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California Legal Forms--Transaction Guide

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DIVISION IV: WILLS AND TRUSTS  
CHAPTER 60 ESTATE PLANNING

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CHAPTER 60 ESTATE PLANNING

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**Scope**

Scope

This chapter covers estate planning. It is designed as an introduction to the subject of estate planning and as a guide to other chapters in this publication that cover particular aspects of estate planning, such as wills, trusts, lifetime gifts, durable powers of attorneys, and contracts that affect wills and trusts.

The Legal Background begins by defining the term "estate planning" and describing the goals that can be met by an estate plan. It includes a description of the roles and duties of estate planners, including estate planning attorneys. It also includes an extended discussion of important tax rules that must be considered whenever an estate is planned. These include estate tax, gift tax, income tax, and generation-skipping transfer tax rules. The Legal Background also containing an extended discussion of the principal tools that are available to the estate planner, including wills, revocable inter vivos ("living") trusts, irrevocable inter vivos trusts, co-ownership of property, life insurance, lifetime gifts, durable powers of attorney, and contracts. Finally, the Legal Background discusses the law of intestate succession in California.

The forms include worksheets and documents designed to facilitate the preparation of an estate plan, including a client interview checklist, a conflict of interest disclosure for dual representation, a cover letter designed to be sent to the client with the completed estate planning documents, follow-up letters designed to be sent to the client after the estate plan has been completed, and worksheets designed to assist the attorney in estimating the estate taxes that will be due on the client's death and the probate fees that will be payable if the client elects not to plan his or her estate so as to avoid probate administration.

Because the chapter is designed to guide the attorney to the use of other estate planning chapters in this publication, it includes frequent cross-references to those others chapters.



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**§ 60.01 California Statutes**

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**Legal Topics:**

For related research and practice materials, see the following legal topics:

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Estates Created by Trusts & Wills  
Estates in Fee  
Family Law  
Marital Duties & Rights  
Property Rights  
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General Overview  
Family Law  
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Repeal of generation-skipping transfer tax, effective for generation-skipping transfers after 2009.  
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## **[2] Regulations**

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Transfers with retained life estate. *Treas. Reg. § 20.2036-1.*

Transfers taking effect at death. *Treas. Reg. § 20.2037-1.*

Revocable transfers. *Treas. Reg. § 20.2038-1.*

Annuities. *Treas. Reg. § 20.2039-1.*

Joint interests. *Treas. Reg. § 20.2040-1.*

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Generation-skipping transfers. *Treas. Reg. §§ 26.2600-1-26.2663-2.*

### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Tax Law Federal Estate & Gift Taxes General Overview Tax Law Federal Estate & Gift Taxes Deductions Marital Deduction (IRC secs. 2056, 2523) General Overview Tax Law Federal Estate & Gift Taxes Powers of Appointment (IRC secs. 2041, 2514) General Overview Tax Law Federal Income Tax Computation Sales & Exchanges Basis (IRC secs. 1011-1017, 1019, 1021, 1023) Property From Decedents Tax Law Federal Taxpayer Groups Income Taxation of Estates, Trusts & Beneficiaries General Overview



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### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law  
 Estates Created by Trusts & Wills  
 General Overview  
 Estate, Gift & Trust Law  
 Nonprobate Transfers  
 General Overview  
 Estate, Gift & Trust Law  
 Trusts  
 General Overview  
 Estate, Gift & Trust Law  
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 Federal Taxpayer Groups  
 Income Taxation of Estates, Trusts & Beneficiaries  
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**§ 60.06 Text References**

**[1] Matthew Bender Sources**

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Ch. 3, *Selecting the Proper Estate Planning Devices*.

Ch. 91, *Planning the Trust*.

Ch. 113, *Generation-Skipping Transfers and Trust Strategies*.

Modern Estate Planning (Matthew Bender).

Ch. 3, *Estate Planning Goals*.

Ch. 6, *Income Taxation of Estates and Trusts*.

Ch. 6A, *Grantor Trusts*.

Ch. 7, *Generation-Skipping Transfer Tax*.

Ch. 8, *Revocable Trusts*.

**[2] Additional Text References**

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**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsGeneral OverviewEstate, Gift & Trust LawWillsGeneral OverviewTax LawFederal  
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**§ 60.10 Estate Planning**

**[1] Definition**

Estate planning is the process by which a client's estate is conserved, invested, managed, and ultimately passed on to others. A good estate plan will preserve as much of the property as the client needs (or wishes to retain) during the client's lifetime, and seek to minimize delay, taxes, and administrative costs when the property is ultimately passed on to the client's relatives, friends, or other designated beneficiaries.

Wills are one of the primary tools of the estate planner. However, a competent estate planner will not attempt to achieve all of a client's estate planning goals with a will, but in appropriate circumstances will employ trusts, co-owned property, life insurance policies, multiple-party accounts, gifts, and durable powers of attorney to accomplish those goals.

**[2] Goals**

The goals of an estate plan should be determined by the client's needs and the legal tools available to meet them. Transferring the client's estate after death to the persons designated by the client is, of course, one of the primary goals of every estate plan. However, many clients will also wish to transfer some property while they are still living. And nearly every client will be interested in arranging his or her affairs in such a way that if the client should ever be incapacitated, his or her property will be properly managed and conserved, both for the client's benefit and for the benefit of the persons to whom the client ultimately wishes to transfer the property.

Saving estate, gift, and other transfer taxes plays an important part in most estate plans. Many clients are aware of the substantial burden that estate [see § 60.13] and gift [see § 60.14] taxes impose on estates of sufficient value. Some may also be aware of the existence of the generation-skipping transfer tax [see § 60.16]. Nearly all clients whose estates are large enough to be subject to one or more of these taxes will wish to arrange their affairs in such a way as to minimize the overall tax burden on their estates and heirs. While tax-saving goals are legitimate, however, it is important to keep them in perspective. Taxes should be saved only when it is possible to do so without sacrificing other more important estate planning goals. Providing adequately for the client's own needs while the client is still alive is always more important than attempting to save taxes, either during the client's lifetime or after the client's death. Similarly, a plan

that transfers the client's property to persons designated by the client with a minimum of delay and expense is almost always preferable to a plan that saves taxes but deprives the designated persons of some or all of the property that they would otherwise receive, or delays their receipt of the property. Reasonable tax-saving goals are usually compatible with a client's dispositive plans. It is the duty of the estate planner to implement the client's plans in such a way as to achieve both when both are achievable. In every case, of course, all of the options available to the client should be explored and explained, and the ultimate decisions should be the client's to make.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawGeneral OverviewEstate, Gift & Trust LawProbateGeneral OverviewEstate, Gift & Trust LawTrustsGeneral OverviewEstate, Gift & Trust LawWillsGeneral OverviewTax LawFederal Taxpayer GroupsIncome Taxation of Estates, Trusts & BeneficiariesGeneral Overview



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DIVISION IV: WILLS AND TRUSTS  
CHAPTER 60 ESTATE PLANNING  
PART II. LEGAL BACKGROUND

*23-60 California Legal Forms--Transaction Guide § 60.11*

**§ 60.11 Estate Planners**

**[1] In General**

Estate planning is often thought to be the exclusive province of estate planning attorneys. While an attorney is key to the implementation of an estate plan, other professionals may also play an important part in devising and carrying out an estate plan.

Investment advisers, for example, may help the client invest his or her savings while still living so that the client's retirement needs can be met and the value of the assets that will be passed on to others after the client's death will be maximized. Accountants and tax advisers will often help to alert clients to tax problems and suggest ways of meeting or minimizing tax obligations. Insurance agents may be indispensable in helping the client to achieve estate planning goals that cannot be financed without insurance proceeds.

**[2] Attorneys**

**[a] Specialists and Nonspecialists**

In appropriate cases, attorneys will work closely with other estate planning professionals to meet the client's overall estate planning needs. In every case, however, the preparation of estate planning documents is the proper function of a duly licensed attorney.

Some estate planning attorneys are certified as specialists under authority of the State Bar's California Board of Legal Specialists. Others qualify as experts on the basis of special knowledge or experience. Attorneys with no particular experience or expertise in the area of estate planning may also prepare wills or draft trusts for clients. However, every attorney who undertakes to render estate planning services should understand the professional responsibilities to which he or she is subject. Modern estate planning is a complex and exacting field of practice, and it is filled with traps for the unwary.

**[b] Attorney's Duty to Act Competently**

An attorney has a duty to use such skill, prudence, and diligence as members of his or her profession commonly possess and exercise [ *Coscia v. McKenna & Cuneo* (2001) 25 Cal. 4th 1194, 1199, 108 Cal. Rptr. 2d 471, 25 P.3d 670 ; *Redante v. Yockelson* (2003) 112 Cal. App. 4th 1351, 1356, 6 Cal. Rptr. 3d 10 ; see *Cal. Rules Prof. Conduct, Rule 3-110*].

All attorneys are expected to possess knowledge of legal principles that are commonly known by well-informed attorneys. They also have a duty to discover additional rules of law that, although not commonly known, may readily be found by standard research techniques [ *Smith v. Lewis* (1975) 13 Cal. 3d 349, 355 n. 3, 358, 118 Cal. Rptr. 621, 530 P.2d 589 , overruled in part, *In re Marriage of Brown*, 15 Cal. 3d 838, 126 Cal. Rptr. 633, 544 P.2d 561, 1976 Cal. LEXIS 192 ]. Whether a legal principle is commonly known, or can readily be discovered by standard research techniques, is often a difficult question. The California courts generally have held attorneys who prepare wills and trusts to a high standard of competence, even requiring them to be familiar with difficult details of federal tax law. In one case, for example, the Court of Appeal found an attorney who had drafted a bypass trust that gave a general power of appointment to the settlor's wife, and thus caused the trust corpus to be included in the wife's estate for estate tax purposes, to be guilty of negligence [ *Bucquet v. Livingston* (1976) 57 Cal. App. 3d 914, 922-923, 129 Cal. Rptr. 514 ]. The court admitted that the provisions of the Internal Revenue Code and Treasury regulations relating to powers of appointment were a "technicality-ridden legal nightmare," but nevertheless found that the tax problems caused by powers of appointment were within the ambit of reasonably competent practitioners and should be known by them [ *Bucquet v. Livingston* (1976) 57 Cal. App. 3d 914, 922, 129 Cal. Rptr. 514 ]. In another case, the Court of Appeal held an attorney liable for drafting a "Clifford" trust and related license agreement that failed to achieve the client's objective of avoiding income taxation on the trust income. The court held that the attorney was chargeable with knowledge of the "Clifford" trust rules, despite their admitted complexity [ *Horne v. Peckham* (1979) 97 Cal. App. 3d 404, 409-414, 158 Cal. Rptr. 714 ; see *Helvering v. Clifford* (1940) 309 U.S. 331, 60 S. Ct. 554, 84 L. Ed. 788 ; see also Pub. L. No. 99-514 (Tax Reform Act of 1986), § 1402(a), abolishing former "Clifford" trust rules of I.R.C. § 673(a)].

An attorney who does not have sufficient skill and knowledge to competently perform the services that a client requests must acquire the necessary skill and knowledge before the services are performed, or associate or consult another attorney who is reasonably believed to be competent [*Cal. Rules Prof. Conduct, Rule 3-110(B)*]. An attorney must refer a client to a specialist, or recommend the assistance of a specialist, if a reasonably skillful and careful practitioner would do so under similar circumstances [ *Horne v. Peckham* (1979) 97 Cal. App. 3d 404, 414-415, 158 Cal. Rptr. 714 ].

### **[c] Inducing or Accepting Gifts from Clients**

Estate planning attorneys have a general duty not to induce their clients to bestow benefits on them unless the applicable standards of fairness and disclosure are satisfied [see *Cal. Rules Prof. Conduct, Rules 3-300* (duty to avoid adverse interests), 4-400 (duty not to induce client to make gift to attorney)]. Although accepting testamentary or inter vivos gifts from a client is not absolutely prohibited, these gifts raise both ethical and legal issues and may subject an attorney to civil liability or professional discipline. In addition, such gifts can be easier to challenge than other gifts, especially when the attorney is not a relative of the client and prepared the will or other instrument containing the gift [see discussion *below*].

*Rule 4-400 of the California Rules of Professional Conduct* prohibits every member of the State Bar from inducing a client to make a substantial gift, including a testamentary gift, to the member or to the member's parent, child, sibling, or spouse, except when the client is "related to the member." The rule does not define the phrase "related to the member." It is likely, however, that the phrase extends to persons who are related to the attorney by marriage as well as by blood [*compare Prob. Code §§ 21350(b), 21351(a)*, noted *below*, which specifically apply to relatives by marriage]. If, for example, the client is a sister or brother of the attorney, the express wording of Rule 4-400 would permit the attorney to induce the sister or brother to make a gift to one of the attorney's children. If the client is married to a sister or brother of the attorney, it is probable that in this case the attorney also could properly induce the client to make a gift to the sister or brother. Rule 4-400 is subject to general standards of fairness and the absence of undue influence [*Cal*

*Rules Prof. Conduct, Rule 4-400, Discussion*]. The official discussion of the rule makes it clear that an attorney who participates in the preparation of an instrument memorializing a gift that is otherwise permissible should not be subject to professional discipline. If impermissible influence has occurred, however, discipline is appropriate [*Cal Rules Prof. Conduct, Rule 4-400, Discussion*].

*Rule 3-300 of the California Rules of Professional Conduct* prohibits every member of the State Bar from knowingly acquiring a pecuniary interest adverse to the client, unless (1) the acquisition and its terms are fair and reasonable to the client and are fully disclosed and transmitted to the client in a manner that should reasonably have been understood by the client, (2) the client is advised in writing that he or she may seek the advice of an independent lawyer of his or her choice and is given a reasonable opportunity to seek that advice, and (3) the client thereafter consents in writing to the terms of the acquisition.

When an attorney participates in the preparation of a will, trust, or other instrument that makes a transfer to the attorney or to certain of the attorney's relatives, employees, or business partners, the transfer may be challenged on several grounds. The transfer may be presumed to be the product of the attorney's undue influence and, in such an event, may be set aside on the ground that it was obtained in violation of the attorney's fiduciary duties [*see Estate of Auen (1994) 30 Cal. App. 4th 300, 310-311, 35 Cal. Rptr. 2d 557*]. When an attorney is acting as an attorney, anything of value that the attorney obtains from the client other than compensation for legal services performed is "undue" and triggers the presumption of undue influence [*Estate of Auen (1994) 30 Cal. App. 4th 300, 310, 312-315, 35 Cal. Rptr. 2d 557*]. An "undue" benefit received by an attorney may consist of a devise under a will, a gift made from a trust, or an inter vivos gift. It may also consist of devises or gifts made to the attorney's relatives [*Estate of Auen (1994) 30 Cal. App. 4th 300, 310, 35 Cal. Rptr. 2d 557*; *Estate of Lind (1989) 209 Cal. App. 3d 1424, 1430, 257 Cal. Rptr. 853*].

In addition, if a transfer is to a person who is a "disqualified person" under *Prob. Code § 21350*, the transfer is invalid unless it falls within one of the statutory exceptions specified in *Prob. Code § 21351* [*Prob. Code § 21350(a)*].

"Disqualified persons" include such persons as the attorney who drafted the instrument, the attorney's relatives and law partners, other fiduciaries such as conservators or trustees, care custodians, and relatives of those individuals [*see Prob. Code § 21350(a)* (detailed definitions)]. For a detailed discussion of "disqualified persons," the exceptions, and the operation of these statutes in general, see *Ch. 60A, Gifts, § 60A.16*. Violation of Probate Code provisions relating to donative transfers [*Prob. Code § 21350 et seq.*] is grounds for professional discipline if the attorney knew or should have known of the facts leading to the violation [*Bus. & Prof. Code § 6103.6*].

#### **[d] Liability to Third Parties**

An attorney who renders estate planning services negligently may be liable for resulting damages, not only to the client who requested and paid for the services but also to third parties whom the attorney has never met. In the landmark case of *Lucas v. Hamm*, the California Supreme Court held that privity of contract is not required to bring an action against an attorney for malpractice in the preparation of a will. Since it is clearly foreseeable that the beneficiaries of a will will be harmed if the attorney fails to prepare the will correctly, the court held that those beneficiaries have standing to recover damages against the attorney in appropriate cases [*Lucas v. Hamm (1961) 56 Cal. 2d 583, 590-591, 15 Cal. Rptr. 821, 364 P.2d 685*; *Garcia v. Borelli (1982) 129 Cal. App. 3d 24, 32, 180 Cal. Rptr. 768* (intended beneficiaries of will who lose their testamentary rights because of failure of attorney who drafted will to properly fulfill his or her obligations under contract with testator may recover damages as third party beneficiaries and also on tort liability for breach of duty owed directly to beneficiaries)]. By logical extension, the same rule applies to the beneficiaries of a trust instrument.

Attorneys who prepare wills and trust instruments are not always liable to the intended beneficiaries of those instruments, however. Whether in a specific case an attorney can be held liable to a third party not the attorney's client depends on various factors, including the extent to which the attorney's services were intended to affect the third party, the foreseeability of harm to the third party, the degree of certainty that the third party in fact suffered injury, the

closeness of the connection between the attorney's negligence and the third party's injury, the moral blame attached to the attorney's conduct, the policy of the law in preventing future harm, the likelihood that imposing liability might interfere with the attorney's ethical duties to the client, and whether imposing liability would impose an undue burden on the legal profession [ *Lucas v. Hamm* (1961) 56 Cal. 2d 583, 588, 15 Cal. Rptr. 821, 364 P.2d 685 ; *Moore v. Anderson Zeigler Disharoon Gallagher & Gray* (2003) 109 Cal. App. 4th 1287, 1295, 135 Cal. Rptr. 2d 888 ; *Bucquet v. Livingston* (1976) 57 Cal. App. 3d 914, 921, 129 Cal. Rptr. 514 ].

An attorney preparing a will for a testator does not owe a duty to the beneficiary of the will or to the beneficiary under a prior will to ascertain and document the client's testamentary capacity. When the testator's testamentary capacity is the basis for a will challenge, the testator's true intent is the central question, and that intent cannot be ascertained from the will or other challenged estate plan document. The attorney who is persuaded of the client's testamentary capacity by the attorney's own observations and experience, and who drafts the will accordingly, fulfills the attorney's duty of loyalty to the testator. In doing so, the attorney should not be required to consider the effect of the new will on beneficiaries under a former will or beneficiaries of the new will. These beneficiaries do not have a cause of action against the attorney for malpractice. Their remedy is to contest the probate and challenge the will on the ground that the testator lacked testamentary capacity at the time of executing the will [ *Moore v. Anderson Zeigler Disharoon Gallagher & Gray* (2003) 109 Cal. App. 4th 1287, 1298-1307, 135 Cal. Rptr. 2d 888 (attorney's duty of loyalty to client might be compromised by imposing duty to beneficiaries in these circumstances)].

In one case, the court was asked to decide whether an attorney who prepared a will for a client but did not take steps to make sure that the client executed the will before the client's death could be held liable to a beneficiary named in the unsigned will for failing to see to it that it was executed [ *Radovich v. Locke-Paddon* (1995) 35 Cal. App. 4th 946, 41 Cal. Rptr. 2d 573 ]. The attorney had prepared a "first draft" of the will and delivered it to the client. The attorney and the client had no contact thereafter, and the client died without executing the will. The Court of Appeal held that the mere fact that the client asked the attorney to prepare a will with specific provisions did not raise a duty on the part of the attorney to see to it that the will was signed [ *Radovich v. Locke-Paddon* (1995) 35 Cal. App. 4th 946, 965, 41 Cal. Rptr. 2d 573 ]. The court stated that it would improperly compromise the attorney's primary duty of undivided loyalty to the client if the attorney were required to exert pressure on the client to execute estate planning documents without delay [ *Radovich v. Locke-Paddon* (1995) 35 Cal. App. 4th 946, 965, 41 Cal. Rptr. 2d 573 ]. The fact that the will was not signed distinguished the case from *Lucas v. Hamm* [ *Radovich v. Locke-Paddon* (1995) 35 Cal. App. 4th 946, 957-959, 41 Cal. Rptr. 2d 573 ]. However, the court suggested that an attorney *might* be held liable if the evidence showed that the client was strongly committed to executing a will that would benefit a particular beneficiary. Under those circumstances, the attorney would have a duty to effectuate the client's commitment [ *Radovich v. Locke-Paddon* (1995) 35 Cal. App. 4th 946, 964, 41 Cal. Rptr. 2d 573 ].

In another case, the court held that when the attorney drafting a will is aware that a beneficiary may be a presumptively disqualified donee under *Prob. Code* § 21350, the attorney has a duty of care to advise the client-testator that, absent steps taken under *Prob. Code* § 21351(b) to obtain a certificate of independent review from another attorney, the devise to the proposed beneficiary, if challenged, will have a significant likelihood of failing because of the presumptive disqualification. The attorney also has a duty to recommend that the client-testator seek independent counsel in an effort to obtain this certificate [ *Osornio v. Weingarten* (2004) 124 Cal. App. 4th 304, 334, 21 Cal. Rptr. 3d 246 ]. This duty of care is owed to both the testator and the prospective beneficiary [ *Osornio v. Weingarten* (2004) 124 Cal. App. 4th 304, 334, 21 Cal. Rptr. 3d 246 ].

For liability to attach, there must be a proximate causal connection between the attorney's breach of duty and the resulting injury, and actual loss or damage resulting from the attorney's negligence [ *Coscia v. McKenna & Cuneo* (2001) 25 Cal. 4th 1194, 1199, 108 Cal. Rptr. 2d 471, 25 P.3d 670 ; *Redante v. Yockelson* (2003) 112 Cal. App. 4th 1351, 1356, 6 Cal. Rptr. 3d 10 ; see *Sisco v. Cosgrove, Michelizzi, Schwabacher, Ward & Bianchi* (1996) 51 Cal. App. 4th 1302, 1307, 59 Cal. Rptr. 2d 647 (attorneys not liable to minor's mother for failing to arrange settlement of minor's claim so that in event of minor's death, settlement proceeds would be paid solely to mother rather than to both of

minor's parents; minor had no power of testamentary disposition and could not have agreed to such a settlement or denied estranged father's rights under intestate succession statutes, so it was not possible for attorneys to have arranged settlement in desired manner)].

A careful estate planning attorney will not test the limits of the rules imposing liability on attorneys for negligently preparing wills, or failing to take steps to ensure that wills are executed promptly. Attorneys who render estate planning services should be well acquainted with the principles and techniques of modern estate planning and render all estate planning services in a competent, knowledgeable, and careful manner. For a more detailed discussion of the professional responsibilities of estate planning attorneys, see California Wills & Trusts, Ch. 4, *Ethical Considerations and Professional Responsibility* (Matthew Bender).

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawGeneral OverviewEstate, Gift & Trust LawTrustsGeneral OverviewEstate, Gift & Trust LawWillsGeneral OverviewTax LawFederal Estate & Gift TaxesGeneral OverviewTax LawFederal Taxpayer GroupsIncome Taxation of Estates, Trusts & BeneficiariesGeneral Overview



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DIVISION IV: WILLS AND TRUSTS  
CHAPTER 60 ESTATE PLANNING  
PART II. LEGAL BACKGROUND

*23-60 California Legal Forms--Transaction Guide § 60.12*

## **§ 60.12 The Client's Estate**

### **[1] In General**

Estate planning should always begin with a careful consideration of the client's estate. For estate planning purposes, a client's "estate" may be regarded as all of the property that the client owns or in which the client has an interest. This definition is broad enough to include all kinds of property, tangible and intangible, real and personal, community, quasi-community, and separate. It includes assets to which the client holds legal title as well as assets in which the client holds only an equitable interest. It includes such obvious items as real estate, automobiles, stocks and bonds, cash on deposit at banks, furniture and furnishings, jewelry, and works of art, as well as less obvious items, such as interests in life insurance policies and the right to receive payments from retirement or pension plans. The client's estate will include items that the client owns outright, as well as items held by trusts in which the client is either an income or a remainder beneficiary.

It is important for a client to understand the all-encompassing nature of the client's "estate." It is equally important, however, for the client to understand the differences between a "probate estate" [*see* [2], *below*] and a "taxable estate" [*see* [3], *below*]. These latter two terms are the subject of much confusion among clients, and even among some attorneys.

### **[2] Probate Estate**

The client's "probate estate" consists of all property that the client owns, or in which the client has an interest, that is subject to probate administration after the client dies. Probate administration is a judicial process under which all of the assets of a decedent that are subject to the jurisdiction of the probate court are collected, valued, conserved, and distributed, either under the terms of the decedent's will or, if the decedent left no valid will, in accordance with the laws of intestate succession.

The probate estate should not be confused with the "taxable estate" [*see* [3], *below*]. Many people die with substantial probate estates that are not subject to any death taxes. Conversely, many people die without probate estates, but with property that is nonetheless subject to substantial estate taxation.

From a practical viewpoint, the probate estate can best be understood as all of a decedent's assets that cannot legally be transferred to the persons entitled to receive them without an order of distribution issued by a probate court. Stated otherwise, if the only way to transfer the assets to the persons entitled to the assets is to subject them to formal probate administration, those assets comprise the "probate estate." If there is some other way of transferring those assets, they are not included in the "probate estate." Assets that can be transferred in other ways include such items as property held in trusts [see § 60.17[2], [3]], joint tenancy assets [see §§ 60.12[5], 60.13[1][f], 60.17[4][b]], accounts in banks or other savings institutions with "pay-on-death" payees, multiple-party accounts [see § 60.17[4][c]], the proceeds of life insurance policies that are not payable to the estate or the personal representative of the estate [see §§ 60.13[1][h], 60.17[5]], and the proceeds of retirement and pension funds with designated "pay-on-death" beneficiaries.

### **[3] Taxable Estate**

The client's "taxable estate" consists of all of the items of property that the client owns, or in which the client has an interest, that are subject to estate taxation upon the client's death. For estate tax purposes, the taxable estate is properly determined by first determining the value of the client's "gross estate" and then deducting the items entitled under the estate tax law to be deducted [see I.R.C. § 2051 (definition of "taxable estate"); *Davis v. Comm'r* (9th Cir. 2005) 394 F.3d 1294, 1297].

The Internal Revenue Code adopts a very broad definition of "gross estate." For estate tax purposes, the value of a decedent's gross estate includes the value at the time of the decedent's death of all property, real or personal, tangible or intangible, to the extent provided for in the Code [I.R.C. § 2031; see § 60.13[1]]. Some items of property are specifically required to be included in the gross estate [see, e.g., I.R.C. §§ 2035 (property transferred within three years of death), 2036 (transfers with retained life estate), 2037 (transfers taking effect at death), 2038 (revocable transfers), 2039 (annuities), 2040 (joint interests), 2041 (powers of appointment), 2042 (proceeds of life insurance), 2043 (transfers for insufficient consideration), 2044 (property for which marital deduction was previously allowed)]. However, an item of property is required to be included in a decedent's gross estate whether or not it is specifically required to be included if the decedent has at the time of death "an interest therein" [I.R.C. § 2033]. Whether a decedent had a sufficient interest in an item of property to require its inclusion in the decedent's gross estate is usually a question of local property law [see, e.g., *Helvering v. Rhodes' Estate* (8th Cir. [B.T.A.] 1941) 117 F.2d 509, 510].

The fact that an item is not subject to probate administration and thus does not comprise part of a decedent's "probate estate" has no bearing on whether the item is includible in the decedent's "gross estate." Many items of property that are not subject to probate administration are includible in the "gross estate." Items of this kind include the proceeds of life insurance policies in which the decedent held "incidents of ownership" [see I.R.C. § 2042(2) (proceeds of life insurance)], property held by the decedent and another person as joint tenants [see I.R.C. § 2040 (joint interests)], and property held by a decedent in an irrevocable inter vivos trust [see I.R.C. § 2038 (revocable transfers)].

For a more detailed discussion of estate taxation, see § 60.13.

### **[4] Community and Quasi-Community Property**

#### **[a] Interests of Deceased and Surviving Spouses**

When a married person dies in California, one half of the community property or the quasi-community property belongs to the deceased spouse and the other half belongs to the surviving spouse [Prob. Code § 100(a), 101(a)]. Each spouse has the right of testamentary disposition over that spouse's half of the community property [ *Estate of Miramontes-Najera* (2004) 118 Cal. App. 4th 750, 756, 13 Cal. Rptr. 3d 240 ].

The half that belongs to the deceased spouse is subject to disposition in the same manner as other property. Thus it may be transferred by will [Prob. Code § 6101(b)] or through the mechanism of an inter vivos trust. If a person who owns an

interest in community or quasi-community property dies without a will, his or her half of the property will pass to the surviving spouse under the laws of intestate succession [*Prob. Code § 6401*].

For estate tax purposes, the value of a decedent's estate includes the decedent's half of the community or quasi-community property. It does not include the surviving spouse's half of that property [*see Prob. Code § 100(a)*].

The equal division of community or quasi-community property does not apply if the spouses have agreed to a non pro rata division of that property (either as to the aggregate value or as to an individual asset) [*see Prob. Code §§ 100(b), 101(b)*].

Although the phrase "one-half of the community property," as used in *Prob. Code § 100(a)* is capable, on its face, of meaning either one-half of the total value of all community property or one-half of each item of community property, the courts have concluded that the statute means a decedent has a right to dispose of only one-half of each community property asset to someone other than a spouse [ *Estate of Wilson (1986) 183 Cal. App. 3d 67, 70, 227 Cal. Rptr. 794* ]. This rule is based on the nature of community property. Each spouse has a vested, undivided one-half interest in the community property. A spouse's death only dissolves the community. It does not affect the character of the property acquired or rights vested before the spouse's death. Because each asset is only half of his or hers to give, a spouse cannot make a testamentary disposition to a third party of any specific item of community property except by a "forced election" requiring the surviving spouse to elect to take under the testamentary scheme or to take his or her community property share [ *Estate of Wilson (1986) 183 Cal. App. 3d 67, 72, 227 Cal. Rptr. 794* ]. For example, a spouse cannot devise the family residence to a third party, even if there are sufficient other community assets to counterbalance the value of the gift, because each spouse only owns an undivided one-half interest in the residence [ *Estate of Wilson (1986) 183 Cal. App. 3d 67, 73, 227 Cal. Rptr. 794* ].

Although this rule makes less practical sense with respect to fungible assets like money, it applies nevertheless [ *Estate of Wilson (1986) 183 Cal. App. 3d 67, 73, 227 Cal. Rptr. 794* ]. Thus, for example, when a spouse has transferred community property into pay-on-death accounts for third persons without the surviving spouse's consent, the surviving spouse may enforce his or her community property interest in each account on an asset-by-asset basis, even if the surviving spouse is already receiving more than one-half of the total community property [ *Estate of Miramontes-Najera (2004) 118 Cal. App. 4th 750, 753, 756-760, 13 Cal. Rptr. 3d 240* ; *see Prob. Code §§ 5020* (provision for nonprobate transfer of community property on death executed by married person without spouse's written consent is not effective as to nonconsenting spouse's interest in property), *5021(a)* (court must set aside nonprobate transfer of community property as to nonconsenting spouse's interest in that property)]. Only one-half of the community property funds in the account belong to the third person. The other one-half, which is the surviving spouse's share of the community property, belongs to that spouse [ *Estate of Wilson (1986) 183 Cal. App. 3d 67, 68-69, 227 Cal. Rptr. 794* ].

#### **[b] When Subject to Probate Administration**

A decedent's interest in community property may or may not be subject to probate administration after the decedent's death. Any property that passes from the deceased spouse to the surviving spouse, regardless of whether the property is separate or community, and regardless of whether it passes by will or under the laws of intestate succession, may be transferred or "set aside" to the surviving spouse without probate administration [*Prob. Code § 13500*]. However, the surviving spouse may elect to subject all or part of the property to administration [*Prob. Code § 13502*]. A surviving spouse will often elect to subject community property to probate administration if the deceased spouse left debts that must be paid out of the community assets and the spouse wishes to obtain a prompt and efficient termination of those debts. A surviving spouse who receives property from a deceased spouse without administration will be personally liable for the debts of the deceased spouse [*Prob. Code § 13550*]. However, this liability is limited to the total amount of property received from the deceased spouse that is not exempt from the enforcement of a money judgment, less the amount of any liens or encumbrances against the property [*Prob. Code § 13551*].

### **[c] "Stepped-Up" Basis for Community Property**

Community property has one estate planning attribute that sharply differentiates it from separate property. Property that is received by inheritance from a decedent receives a new (sometimes called "stepped-up") basis for income tax purposes. For decedents dying before 2010, this basis is the fair market value of the property at the time of the decedent's death [*I.R.C. § 1014(a)(1), (f)*]; a modified carryover basis rule applies generally for decedents dying after 2009 [*I.R.C. § 1022*]. Property that is acquired by purchase, in contrast, has a basis equal to its original cost (as adjusted for subsequent improvements or depreciation) [*I.R.C. § 1012* (cost basis); *see I.R.C. § 1016* (adjustments to basis)].

If a married person dies leaving his or her share of the community property to his or her surviving spouse, the surviving spouse will have acquired one half of the community property by virtue of the original purchase and one half by inheritance from the deceased spouse. In the absence of some special provision, this would result in the acquisition of a new date-of-death basis for one half of the property and the retention of the original cost basis for the other half. Under these circumstances, however, a special provision of the Internal Revenue Code gives a new, date-of-death basis to both halves of the community property, for decedents dying before 2010 [*I.R.C. § 1014(b)(6), (f)*]. If the property has appreciated substantially since it was originally purchased, and if the surviving spouse sells the property after the deceased spouse's death, this new date-of-death value basis will typically produce significant income tax savings. The result is otherwise, however, if the property received from the deceased spouse was separate property, as there is no comparable provision giving both halves of separate property a new, date-of-death value basis when it is acquired by a surviving spouse. For this reason, it may be more desirable for a surviving spouse to receive community rather than separate property from the deceased spouse, particularly if the property has appreciated substantially in value. If one spouse owns substantial separate property, it may thus be desirable to transmute the property to community property before either spouse dies [for estate planning uses of transmutation agreements, *see § 60.17[8][c]*].

For decedents dying after 2009, a modified carryover basis rule generally applies, under which recipients of property transferred at the decedent's death receive a basis equal to the lesser of the adjusted basis of the decedent in the property or the fair market value of the property on the date of the decedent's death [*I.R.C. § 1022(a)*]. Each decedent's estate, however, generally is permitted to increase (i.e., step up) the basis of assets transferred by up to a total of \$1.3 million [*I.R.C. § 1022(b)(1), (2)(B)*]. The \$1.3 million is increased by the amount of unused capital losses, net operating losses, and certain "built-in" losses of the decedent [*I.R.C. § 1022(b)(2)(C)*].

In addition, for decedents dying after 2009, the basis of property transferred to a surviving spouse can be increased by an additional \$3 million. Thus, the basis of property transferred to surviving spouses can be increased by a total of \$4.3 million [*I.R.C. § 1022(c)(1), (2)(B)*]. Nonresidents who are not U.S. citizens will be allowed to increase the basis of property by up to \$60,000, but may not increase that amount by any losses [*I.R.C. § 1022(b)(3)*]. The decedent is treated as having owned the surviving spouse's one-half share of community property (which will be eligible for a basis increase) if at least one-half of the property was owned by, and acquired from, the decedent [*I.R.C. § 1022(d)(1)(B)(iv)*]. Thus, similar to the rule under pre-2010 law, [*see I.R.C. § 1014(b)(6)*], both the decedent's and the surviving spouse's share of community property could be eligible for a basis increase [*I.R.C. § 1022(d)(1)(B)(iv)*].

For a discussion of special considerations in estate planning for community property, see *California Wills & Trusts*, Ch. 3, *Selecting the Proper Estate Planning Devices* (Matthew Bender). For general coverage of agreements between spouses respecting the character of their property, see Ch. 109, *Postnuptial Agreements* .

### **[5] Joint Tenancy Property**

#### **[a] In General**

Joint tenancy is a form of co-ownership of property in which two or more persons hold title to property in equal shares

and as a result of a transfer in which they are named as joint tenants [*see Civ. Code § 683(a)*]. When one joint tenant dies, his or her interest in the joint tenancy passes by operation of law to the surviving joint tenant or tenants [ *Estate of Dow (1947) 82 Cal. App. 2d 675, 680, 186 P.2d 977* ].

A joint tenancy interest does not become part of a deceased joint tenant's probate estate, and it cannot be transferred by the deceased tenant's will [ *Estate of Bibb (2001) 87 Cal. App. 4th 461, 469, 104 Cal. Rptr. 2d 415* ; *Estate of Petersen (1994) 28 Cal. App. 4th 1742, 1746-1747, 34 Cal. Rptr. 2d 449* ; *Goldberg v. Goldberg (1963) 217 Cal. App. 2d 623, 628, 32 Cal. Rptr. 93* ; *see Prob. Code §§ 6600(b)(1), 13050(a)(1)* (joint tenancy property excluded from estate for purposes of small estate set-aside and transfer of small estate without administration)]. However, a joint tenancy may be severed by all of the joint tenants acting together, or by one of the joint tenants acting alone, provided that the required formalities are observed [*see Civ. Code § 683.2(a), (d)*; *see also [b], below*]. Once a joint tenancy has been effectively severed, the interest of the severing joint tenant may be transferred in the same manner as any other property, including by will.

### **[b] Severance of Joint Tenancy**

All of the joint tenants may sever a joint tenancy in real property by executing a written instrument that severs the joint tenancy, or by executing an agreement that the tenancy is or will be severed [*see Civ. Code § 683.2(d)*]. One joint tenant acting alone may sever a joint tenancy in real property by executing and conveying a deed conveying his or her interest in the property to a third party [*Civ. Code § 683.2(a)(1)*], or simply by executing a written declaration or other instrument that evidences his or her intent to sever the joint tenancy [*Civ. Code § 683.2(a)(2)*]. However, a deed, declaration, or other written instrument will not terminate the survivorship rights of the other joint tenants unless it is recorded before the death of the severing joint tenant [*Civ. Code § 683.2(c)(1)*], or acknowledged by the severing joint tenant at least three days before the severing joint tenant's death and recorded not more than seven days after the death [*Civ. Code § 683.2(c)(2)*].

When three persons hold title to real property as joint tenants, a deed from two of the tenants to themselves as joint tenants is effective to sever the joint tenancy, even when the deed is not recorded until after the death of one of the severing joint tenants, since the rule requiring that the deed be recorded or acknowledged before the severing joint tenant's death [*see Civ. Code § 683.2(c)*] does not apply to a deed from one joint tenant to another joint tenant [ *Re v. Re (1995) 39 Cal. App. 4th 91, 98-99, 46 Cal. Rptr. 2d 62* ].

### **[c] Property Characterization Issues in Estate Planning Context**

Joint tenancies are widely used by married persons in California. However, it is not commonly understood that joint tenancy and community property are inconsistent concepts and cannot properly exist in the same property at the same time [*see Tomaier v. Tomaier (1944) 23 Cal. 2d 754, 758, 146 P.2d 905* ; *Siberell v. Siberell (1932) 214 Cal. 767, 770-772, 7 P.2d 1003* ; *see also Fam. Code § 750*]. Moreover, the fact that married persons take title to property as joint tenants does not conclusively prove that they hold the property as joint tenants at the time of death.

If a husband and wife acquire property by a written instrument in which they are described as husband and wife, it is presumed that they take the property as community property [ *Estate of Petersen (1994) 28 Cal. App. 4th 1742, 1747, 34 Cal. Rptr. 2d 449* ]. Under *Fam. Code § 803(c)*, however, if the property was acquired before January 1, 1975, the community property presumption may be overcome merely by showing that a "different intention" was expressed in the instrument. A statement in the instrument that the spouses take the property as joint tenants is sufficient to express such a "different intention" and to establish that the property is joint tenancy property for this purpose [ *Estate of Petersen (1994) 28 Cal. App. 4th 1742, 1747, 34 Cal. Rptr. 2d 449* ]. In other words, in determining the character of real property on the death of a spouse, there was a rebuttable presumption that the property is as described in the deed [ *Estate of England (1991) 233 Cal. App. 3d 1, 5, 284 Cal. Rptr. 361* ]. Parol evidence was admissible, however, to show that the parties intended the property to be community property, regardless of the form of title in the deed [ *Tomaier v.*

*Tomaier* (1944) 23 Cal. 2d 754, 757, 146 P.2d 905 ; *Edwards v. Deitrich* (1953) 118 Cal. App. 2d 254, 260, 257 P.2d 750 ; *Schindler v. Schindler* (1954) 126 Cal. App. 2d 597, 602, 272 P.2d 566 ]. The presumption created by the deed could not be overcome by testimony of the hidden intentions of the parties, but only by evidence tending to prove a common understanding or an agreement that the character of the property was to be other than joint tenancy [ *Machado v. Machado* (1962) 58 Cal. 2d 501, 506, 25 Cal. Rptr. 87, 375 P.2d 55 ; see *Hansford v. Lassar* (1975) 53 Cal. App. 3d 364, 372-374, 125 Cal. Rptr. 804 (discussing what evidence can be used to show the existence of a common understanding or agreement)]. Because this presumption caused problems in connection with marital dissolutions, it was replaced with a contrary presumption, currently codified in *Fam. Code* § 2581, that for purposes of division of property on dissolution of marriage, property acquired by the parties in joint form during marriage, including joint tenancy property, is presumed to be community property. However, since the Family Code presumption applies only to property divisions in connection with marital dissolutions, it has no effect on the characterization of property, or the application of the presumption in favor of the form of title, in other situations [see *Hansford v. Lassar* (1975) 53 Cal. App. 3d 364, 371, 125 Cal. Rptr. 804 ].

The statutory transmutation requirements that became effective on January 1, 1985, can substantially affect the characterization of property that is held in joint tenancy form but that was acquired with community property assets. The state of the law with respect to the character of such assets is probably best described as unsettled, although it is possible to draw some conclusions from the statutes and cases relying on the statutory transmutation provisions.

Any transmutation made on or after January 1, 1985, is invalid unless made in writing by an express declaration that is made, joined in, consented to, or accepted by the spouse whose interest in the property is adversely affected [*Fam. Code* § 852(a)]. Gifts between spouses of clothing, jewelry, and other tangible items of a personal nature and a value that is not substantial under the circumstances of the marriage are not covered by this requirement [*Fam. Code* § 852(c)]. In *Estate of MacDonald*, the California Supreme Court held that, to satisfy the requirement of an "express declaration," a writing must expressly state that the characterization or ownership of the property is being changed [ *Estate of MacDonald* (1990) 51 Cal. 3d 262, 272, 272 Cal. Rptr. 153, 794 P.2d 911 ; *In re Marriage of Starkman* (2005) 129 Cal. App. 4th 659, 663-665, 28 Cal. Rptr. 3d 639 (clause in trust agreement providing that property transferred to trust is community property unless transferor spouse identifies it as separate property was insufficient to transmute husband's separate property, which he failed to identify as separate property, to community property)]. Use of extrinsic evidence to prove that the writing effected a transmutation is precluded [ *Estate of MacDonald* (1990) 51 Cal. 3d 262, 264, 272 Cal. Rptr. 153, 794 P.2d 911 ].

There is no exception from the "express declaration" requirement for partial performance of an agreement to transmute property [ *In re Marriage of Benson* (2005) 36 Cal. 4th 1096, 1100, 32 Cal. Rptr. 3d 471, 116 P.3d 1152 ]. *Fam. Code* § 852(a) is stated in the negative--that is, an agreement to change the character of marital property is *not valid unless* it is in writing, contains an express declaration by which the transmutation is made, and is accepted in some fashion by the adversely affected spouse--as though all intendments weigh against finding compliance with the requirements for transmutation in the usual case. Furthermore, no exception to the requirement of an "express" written declaration appears in *Fam. Code* § 852(a). The California Supreme Court has concluded that these features suggest the legislature envisioned a standard for transmutations from which married couples could not freely depart [ *In re Marriage of Benson* (2005) 36 Cal. 4th 1096, 1104, 32 Cal. Rptr. 3d 471, 116 P.3d 1152 ]. The writing requirement of *Fam. Code* § 852(a) cannot be satisfied when there is no writing at all about the subject property, and when a transmutation would have to be inferred from acts surrounding the parties' purported agreement [ *In re Marriage of Benson* (2005) 36 Cal. 4th 1096, 1107, 32 Cal. Rptr. 3d 471, 116 P.3d 1152 ]. However, these requirements for a valid transmutation do not apply when separate property and community property have been commingled or otherwise combined [*Fam. Code* § 852(d); see *In re Marriage of Weaver* (2005) 127 Cal. App. 4th 858, 870-871, 26 Cal. Rptr. 3d 121 (transmutation of real property parties purchased before marriage to community property occurred as consequence of commingling parties' separate property interest with community property used to pay for mortgage and home improvements during marriage)].

Two consequences of the transmutation statutes are especially important in the context discussed here. First, oral transmutions of property may no longer be made (oral transmutions predating January 1, 1985, however, remain valid if they met the pre-1985 requirements [see *Fam. Code* § 852(e)]). Second, a deed reciting that married persons hold title to real property in joint tenancy does not meet the requirements for a transmutation agreement because it is not "made, joined in, consented to, or accepted by the spouse whose interest in the property is adversely affected" within the requirements of *MacDonald* [see *Fam. Code* § 852(a)].

A distinction has been made between an intent to *transmute* property (which is subject to the statutory and *MacDonald* requirements) and an intent merely to *transfer property without probate* when one of the spouses dies (which the court held was not subject to those requirements). In *Estate of Petersen*, the husband and wife acquired annuity contracts with community funds. The contracts contained no language stating that the character of the property was transmuted from community to separate, but they did provide that on the death of one of the spouses, the annuities would be paid to the surviving spouse. The Court of Appeal stated that it was possible for spouses to agree that, on the death of one of them, the property would be transferred to the other spouse without probate, without also transmuting the property from community to separate property [ *Estate of Petersen* (1994) 28 Cal. App. 4th 1742, 1750, 34 Cal. Rptr. 2d 449 ; see *Prob. Code* § 5022(a) (consent of spouse to nonprobate transfer not a transmutation of spouse's interest in the property)]. When the husband and wife merely provide that the community property will be transferred to the survivor outside of probate, the property may be described as "community property with a right of survivorship" [ *Estate of Petersen* (1994) 28 Cal. App. 4th 1742, 1750, 34 Cal. Rptr. 2d 449 ]. It is community property for all purposes except transfer to the surviving spouse without probate on the death of the first spouse. The result would be different, however, if the joint tenancy was created with some person other than the surviving spouse. In that case, a transmutation would be necessary, and the requirements of *Estate of MacDonald* would have to be satisfied [ *Estate of MacDonald* (1990) 51 Cal. 3d 262, 272, 272 Cal. Rptr. 153, 794 P.2d 911 ].

#### **[d] Joint Tenancy Property Held After Dissolution of Marriage**

When a husband and wife hold title to real property as joint tenants and their marriage is terminated by a judgment of dissolution, the court ordinarily will decide whether the joint tenancy property is community property and thus subject to division by the court, or separate property and not subject to division. In some cases, however, the court may render a "status-only" judgment, which is a judgment that terminates the marriage but does not adjudicate property issues. When the court does this, questions as to the proper characterization of the property may arise at some later time, even after the death of one of the parties.

A status-only judgment of dissolution does not automatically sever a joint tenancy [ *Estate of Layton* (1996) 44 Cal. App. 4th 1337, 1342, 1344, 52 Cal. Rptr. 2d 251 ]. However, if the court reserves jurisdiction to decide property issues, the court may later sever the joint tenancy and divide the property between the parties, even after one of the parties has died. In that case, the property is deemed to be divided "upon the dissolution of the marriage," and the rules applicable to division of property upon dissolution of marriage apply [ *In re Marriage of Hilke* (1992) 4 Cal. 4th 215, 220, 14 Cal. Rptr. 2d 371, 841 P.2d 891 ; see *Fam. Code* § 2581].

For purposes of division of property on dissolution of marriage, property acquired by the parties during marriage in joint form, including property held in tenancy in common, joint tenancy, or in tenancy by the entirety, or as community property, is presumed to be community property [*Fam. Code* § 2581]. This presumption is a presumption affecting the burden of proof and may be rebutted (1) by a clear statement in the deed or other documentary evidence of title by which the property is acquired that the property is separate property and not community property; or (2) proof that the parties have made a written agreement that the property is separate property [*Fam. Code* § 2581; *In re Marriage of Weaver* (2005) 127 Cal. App. 4th 858, 865-866, 26 Cal. Rptr. 3d 121 (under *Fam. Code* § 2581, spouses cannot hold property in joint title while preserving its separate property characterization through oral or implied agreements)]. When the court in a dissolution of marriage proceeding has issued a status-only judgment but reserved jurisdiction to determine property issues, it must apply this rebuttable presumption in any subsequent proceeding to determine the

character of property held in joint tenancy [ *In re Marriage of Hilke* (1992) 4 Cal.4th 215, 221-222, 14 Cal. Rptr. 2d 371, 841 P.2d 891 ; *In re Marriage of Allen* (1992) 8 Cal. App. 4th 1225, 1231-1235, 10 Cal. Rptr. 2d 916 ]. If the court finds that the presumption applies and is not adequately rebutted, the court must sever the joint tenancy and divide the property as community property, even when one of the parties is already dead [ *In re Marriage of Hilke* (1992) 4 Cal. 4th 215, 221-222, 14 Cal. Rptr. 2d 371, 841 P.2d 891 ; *In re Marriage of Allen* (1992) 8 Cal. App. 4th 1225, 1231-1235, 10 Cal. Rptr. 2d 916 ].

Married persons may also terminate a joint tenancy by taking action in the course of a dissolution proceeding that evidences their intention to terminate the joint tenancy. They may, for example, agree to treat the property as community property either by agreeing that the court may divide the property [ *In re Marriage of Allen* (1992) 8 Cal. App. 4th 1225, 1227, 1231, 10 Cal. Rptr. 2d 916 ] or that the property may be sold and the proceeds divided by the court [ *Estate of Seibert* (1990) 226 Cal. App. 3d 338, 341, 276 Cal. Rptr. 508 ]. The agreement to terminate a joint tenancy may be evidenced by an oral stipulation reduced to court order in the dissolution proceedings. When this is done, the joint tenancy is terminated and the property is treated as community property for purposes of division on dissolution [ *In re Marriage of Allen* (1992) 8 Cal. App. 4th 1225, 1227, 1231, 10 Cal. Rptr. 2d 916 ; *Estate of Seibert* (1990) 226 Cal. App. 3d 338, 341, 276 Cal. Rptr. 508 ].

The mere fact that the court renders a status-only judgment and reserves jurisdiction to adjudicate property issues will not overcome the effect of a joint tenancy deed if the parties never seek to litigate the property issues. If both parties die before the court adjudicates the property issues, the rebuttable community property presumption [see *Fam. Code* § 2581] does not apply. In that case, the property will be treated as joint tenancy property and, on the death of the first spouse, the surviving spouse will acquire all of the property by right of survivorship. Upon the subsequent death of the surviving spouse, the property will be subject to disposition in the estate of the surviving spouse [ *Estate of Layton* (1996) 44 Cal. App. 4th 1337, 1339-1344, 52 Cal. Rptr. 2d 251 ].

For discussion of the severance of joint tenancies under *Prob. Code* § 5601, which provides generally that a joint tenancy created between a decedent and the decedent's former spouse is severed as to the decedent's interest if it was created before or during marriage and, at the time of death, the former spouse is not the decedent's surviving spouse, due to annulment or dissolution of marriage, see § 60.17[10][c].

### **[e] Advantages and Disadvantages of Joint Tenancy in Estate Planning Context**

The popularity of joint tenancy is due in large part to the right of survivorship. When one joint tenant dies, his or her interest in the joint tenancy property passes to the survivor and no probate administration is necessary [ *Estate of Dow* (1947) 82 Cal. App. 2d 675, 680, 186 P.2d 977 ; see *Goldberg v. Goldberg* (1963) 217 Cal. App. 2d 623, 628, 32 Cal. Rptr. 93 (probate court has no jurisdiction over joint tenancy property)]. Notwithstanding this advantage, joint tenancies suffer from distinct estate planning disadvantages. Although the surviving joint tenant will receive all of the property when the first tenant dies, some other device will be necessary to transfer the property on the death of the surviving tenant. That device will almost always be a will or a trust. While both joint tenants are living, joint tenancy property cannot be conveyed to a trust, so that joint tenancy property cannot be used to fund a marital deduction trust or a bypass trust [see Ch. 71, *Marital Deduction Trust Provisions* ] on the death of the deceased spouse. Further, when married persons hold property in a joint tenancy, the property will not receive the double "stepped-up" basis that community property receives when the first spouse dies. Only one-half of the joint tenancy property will receive a stepped-up basis when the first spouse dies, while both halves of community property will receive that basis on the death of the first spouse [see *I.R.C.* § 1014(b)(6); [4][c], above; see also *I.R.C.* § 1022 (post-2009 rule)].

### **[6] Tenancy in Common**

Tenancy in common is a form of co-ownership of real property by two or more persons that is neither a joint interest nor a partnership interest [*Civ. Code* §§ 685, 686]. A tenancy in common differs from a joint tenancy in that there is no right

of survivorship when one of the tenants dies, and the interests of the tenants do not have to be equal (although they often are). When a tenant in common dies, his or her interest in the property is subject to disposition by will or trust in the same manner as other property.

## **[7] Partnership Interests**

### **[a] In General**

A partnership is an association formed by two or more persons to carry on a business as co-owners for profit [*see Corp. Code § 16101(9)*; *Civ. Code § 684*]. California law recognizes three basic types of partnerships: general partnerships [*see Corp. Code § 16100 et seq.* (Uniform Partnership Act of 1994, effective Jan. 1, 1997); *see also Ch. 15, Part A, Formation of General Partnerships*], limited partnerships [*see Corp. Code § 15900 et seq.* (Uniform Limited Partnership Act of 2008)]; *see Corp. Code §§ 15912.04, 15912.06* (operative date and limited application of former limited partnership acts prior to January 1, 2010); *see also Chs. 16- 16B*], and limited liability partnerships [*see Corp. Code §§ 16951-16962*; *see also Ch. 16C, Limited Liability Partnerships*].

In general partnerships, the partners have equal rights to control and manage the partnership business [*see Corp. Code § 16301*], and are jointly and severally liable for the partnerships debts [*see Corp. Code § 16306*]. In limited partnerships, the general partners have all of the rights of management and control of the partnership business and are personally liable for the partnership debts [*see Corp. Code §§ 15904.04, 15904.06* (ULPA '08)], whereas the limited partners do not participate in the management and control of the business and generally are not liable for partnership debts beyond the amounts of their capital contributions [*Corp. Code § 15903.03(a)* (ULPA '08); *see Corp. Code §§ 15643, 15632(a)* (CRLPA); *see also Corp. Code §§ 15912.04, 15912.06* (operative date and limited application of former limited partnership acts prior to January 1, 2010)].

A limited liability partnership is a type of general partnership which has complied with certain registration formalities and limited the extent of its liability to creditors [*see Corp. Code §§ 16951-16962* (Uniform Partnership Act of 1994)]. California limited liability partnerships may be formed only for the practice of architecture, law, or accountancy [*Corp. Code § 16101(8)* (UPA '94)].

In California, every general partnership is governed by the Uniform Partnership Act of 1994 (UPA '94) [*Corp. Code § 16100 et seq.*]. The UPA '94, which governed newly formed partnerships effective January 1, 1997, and all partnerships as of January 1, 1999 [*see Corp. Code § 16111*], made a number of important and fundamental changes in California partnership law. As discussed in [c], *below*, some of these changes can have a significant impact on estate planning for partnerships. For a detailed analysis of the UPA '94 and its impact on California partnership law, *see Ch. 15, Part A, Formation of General Partnerships*.

### **[b] No Interest in Specific Partnership Property**

A deceased partner has no interest in specific partnership property, but merely owns an interest in the partnership business, with a right to participate in its profits, losses, and distributions [*Corp. Code §§ 16203, 16401, 16502*].

### **[c] Dissolution or Dissociation**

Under the former version of the UPA [former *Corp. Code § 15001 et seq.* (repealed Jan. 1, 1999)], the death of a partner dissolved a general partnership unless there was a written agreement of the partners providing otherwise, or unless the probate court ordered the personal representative to continue as a partner [former *Corp. Code § 15031(4)*, repealed Jan. 1, 1999; *see Prob. Code § 9762*]. The probate court could make such an order only upon a showing that it would be to the advantage of the estate and in the best interest of the interested persons [*Prob. Code § 9762(a)*; *see Ch. 63, Will Provisions, § 63.461[1][b][ii]*].

Under the UPA '94, the death of a partner does not cause the dissolution of the partnership, but rather merely "dissociates" the deceased partner from it [*Corp. Code § 16601(7)(A)*]. The surviving partners have the right to continue the partnership business, but the partnership has an obligation to buy out the deceased partner's interest [*Corp. Code § 16701(a)*]. The buyout price is the amount that would have been distributable to the deceased partner if, on the date of the deceased partner's death, the assets of the partnership were sold at the greater of their liquidation value or the value of the entire business as a going concern without the deceased partner and the partnership was wound up as of that date [*Corp. Code § 16701(b)*].

The UPA '94 contemplates that the surviving partners and the deceased partner's personal representative will seek to reach an agreement as to a definite price for the deceased partner's interest [*see Corp. Code § 16701(e)*]. If they do not do so within 120 days after a written demand for payment, however, the partnership must make a cash payment of the amount it estimates to be the buyout price, plus accrued interest and reduced by any offsets [*Corp. Code § 16701(e)*]. The payment or tender must be accompanied by a statement of partnership assets and liabilities as of the date of the deceased partner's death, the latest available partnership balance sheet and income statement, an explanation of how the estimated amount of the payment was calculated, and a written notice that the payment is in full satisfaction of the obligation to purchase unless, within 120 days, the deceased partner's personal representative commences an action to determine the buyout price [*Corp. Code § 16701(g)*]. Any such action must be commenced within the 120 days, or within one year after written demand for payment if no payment or offer to pay is tendered [*Corp. Code § 16701(i)*]. In the action, the court may determine the buyout price, any offsets that the partnership is entitled to, and accrued interest that the deceased partner's personal representative is entitled to, and enter judgment for any additional payment or refund [*Corp. Code § 16701(i)*].

However, the UPA '94 makes it clear that the partnership has no obligation to buy out the deceased partner's interest in the partnership if the partnership is dissolved and its business is wound up within 90 days after the deceased partner's death [*Corp. Code § 16701.5*]. In such an event, the partnership's assets and liabilities will be distributed as in the case of any other windup and dissolution of a partnership business [*see Corp. Code § 16801*].

#### **[d] Importance of Partnership Agreement**

Partnerships are often governed by written partnership agreements. If there is a partnership agreement, and if it makes provisions for the death of a partner, those provisions generally will govern the rights and obligations of the surviving partners and the deceased partner's personal representative [*Corp. Code § 16103(a)*]. If the attorney encounters in the estate planning process a partnership that is *not* memorialized by a written partnership agreement, the attorney ordinarily should strongly recommend to the client that a formal partnership agreement be prepared [*see Ch. 15, Part A, Formation of General Partnerships*].

A well-drafted partnership agreement will provide for the disposition of a partnership interest on the death of one of the partners, either by winding up the business and liquidating its assets or by giving the surviving partner or partners the right to purchase the deceased partner's interest. In many cases, the surviving partner(s) will have the obligation to purchase the deceased partner's interest on terms set forth in the agreement. Buy-sell agreements are often funded with life insurance on the life of the partners [for discussion, *see Ch. 8D, Buy-Sell Agreements*].

Before any effort is made to dispose of a partnership interest by will or trust, the governing partnership agreement should be examined to determine the rights and obligations of the partners in the event of a partner's death. If the agreement does not adequately provide for the dissolution of the business or the purchase of the deceased partner's interest by the surviving partner(s), the attorney should propose that the agreement be amended to deal with those important questions. For general discussion of buy-sell agreements, and complete buy-sell forms, see Ch. 8D, *Buy-Sell Agreements*. For more detailed discussion of the dissolution of general partnerships, see Ch. 15, Part B, *Dissolution of General Partnerships*. For detailed discussion of estate planning considerations relating to partnerships and other business interests, see California Wills and Trusts, Ch. 29, *Devises of Businesses and Business Interests* (Matthew

Bender).

## **[8] Community Property With Right of Survivorship**

### **[a] Effect of Manner of Holding Property**

Spouses may hold title to property as "community property with right of survivorship" [*Civ. Code* § 682.1 (effective July 1, 2001)]. This form of title has all the tax benefits of community property, specifically a step-up in basis on both halves of the property, and a right of survivorship that allows the property to avoid probate administration and its attendant costs [*see* [4][c], and [5][e], *above*]. This manner of holding title was previously available for securities and securities accounts under the Uniform TOD Security Registration Act [*see Prob. Code* § 5500 *et seq.*]. Effective July 1, 2001, spouses may take title to real and personal property as community property with a right of survivorship [*Civ. Code* § 682.1; *but see Civ. Code* § 682.1(b)].

When real or personal property is held as community property with a right of survivorship, and one of the spouses dies, the property passes to the surviving spouse without estate administration, pursuant to the terms of the instrument and subject to the same procedures as property held in joint tenancy [*Civ. Code* § 682.1(a); *see* [5], *above*; *see also* § 60.17[4][b]]. In addition, the community property character ensures that both spouse's interests receive an automatic step-up in basis when the first spouse dies [*Civ. Code* § 682.1(a); *see* [4][c], *above*]. Because the property remains community property for purposes of liability for debts, and therefore generally liable for debts of either spouse, "true" joint tenancy may provide better asset protection against the debts of the deceased spouse: the interest of a joint tenant terminates on death and the survivor takes the property free from any claims of the deceased tenant's creditors [ *Grothe v. Cortlandt Corp.* (1992) 11 Cal. App. 4th 1313, 1318, 15 Cal. Rptr. 2d 38 ; *see Anderson v. Southern Pac. Co.* (1968) 264 Cal. App. 2d 230, 232, 70 Cal. Rptr. 389 ].

The statutory authorization for this manner of holding title does not apply to a joint account in a financial institution governed by *Prob. Code* § 5100 *et seq.* [*Civ. Code* § 682.1(b)]. Specifically, this manner of holding property is not authorized for joint, P.O.D., and Totten trust accounts including checking accounts, savings accounts, certificates of deposit, share accounts, and similar arrangements [*see Civ. Code* §§ 682.1(b), 683(b); *see also Prob. Code* §§ 5122(a), 5132]. For further discussion, *see* § 60.17[4][c].

### **PRACTICE TIP:**

When a surviving spouse is the surviving joint tenant, estate administration ordinarily is not an issue. Joint tenancy property held by spouses passes to the surviving spouse without administration; community property may pass to the surviving spouse without administration, provided that the deceased had a will [ *see Prob. Code* § 13650 *et seq.*]. Attorneys' fees for services in connection with a petition to determine or confirm property passing to a surviving spouse is determined by private agreement and ordinarily is not subject to court approval [*Prob. Code* § 13660].

### **[b] Documentation Requirements**

*Civ. Code* § 682.1(a), applicable to transfer instruments created on or after July 1, 2001, provides that the community property of a husband and wife may pass to the surviving spouse on the death of the other spouse without estate administration when the property is expressly declared to be community property with right of survivorship in the transfer document. When accepted in writing on the face of the transfer document by a statement signed or initialed by the grantee spouses, the property passes to the survivor without administration and with a stepped up basis on both halves of the community property [*Civ. Code* § 682.1(a); *see I.R.C.* § 1014(a)(1), (b)(6); *see also* [4][c], *above*]. Although the statutory language "may be accepted in writing" [*see Civ. Code* § 682.1(a)] sounds permissive, the Assembly Committee of the Judiciary has clarified that the parties' signatures or initials are required to demonstrate the requisite clear intent to take the property as community property with a right of survivorship.

*Civ. Code § 682.1(a)* applies to instruments created on or after July 1, 2001 [*Civ. Code § 682.1(c)*]. For property held in joint tenancy before this operative date, spouses do not necessarily need to execute and record new deeds. However, the failure to establish the property as community property ordinarily will cause the surviving spouse's half interest not to receive a stepped-up basis. Nevertheless, the issue does not arise if, depending on the value of the couple's property, estate tax credits cover both spouse's estates. Further, with regard to the spouses' primary residence, the \$250,000 per spouse exemption on capital gains may obviate the need for change. As a caveat, the spouses may otherwise establish their clear intent to hold their joint tenancy property as community property before the death of either spouse [*see Rev. Rul. 87-98, 1987-2 C.B. 206 ; see also Fam. Code §§ 850-853*]. For example, the spouses might execute a transmutation agreement to establish a clear intent to hold the subject property as community property. In general, transmutation agreements must be made in writing, in the form of an express declaration, consented to or accepted by the spouse whose interest in the property is adversely affected, but need not be recorded [*see Fam. Code § 852(a); see also [5][c], above; In re Marriage of Campbell (1999) 74 Cal. App. 4th 1058, 1062-1065, 88 Cal. Rptr. 2d 580 ; In re Marriage of Barneson (1999) 69 Cal. App. 4th 583, 588, 81 Cal. Rptr. 2d 726*].

### **[c] Termination of Right of Survivorship**

The right of survivorship inherent in assets held as community property with right of survivorship may be terminated before the death of either spouse using the same procedures by which a joint tenancy may be severed [*Civ. Code § 682.1(a)*]. For further discussion, see [5][b], *above*.

### **[9] Property Subject to Nonprobate Transfers**

Various types of property interests may be subject to transfer after death without probate administration. If there is a written instrument that provides that money or other benefits due to, controlled by, or owned by one person will be paid after that person's death to another person or persons designated either in the instrument or in a separate writing, the provision is not invalid merely because the instrument does not comply with the requirements for execution of a will [*Prob. Code § 5000(a), (b)(1)*]. Various types of instruments may provide for nonprobate transfers on death, including insurance policies, contracts of employment, bonds, mortgages, promissory notes, certificated or uncertificated securities, account agreements, custodial agreements, deposit agreements, compensation plans, pensions plans, individual retirement plans, employee benefit plans, trusts, conveyances, deeds of gift, marital property agreements, and other written instruments of a similar nature [*Prob. Code § 5000(a)*].

Although a will, in rare cases, may designate the person or persons to whom the transfer is to be made [*Prob. Code § 5000(b)(1)*], it is more typical for that designation to be made in the governing instrument. Thus property subject to nonprobate transfer does not usually form a part of the probate estate [*see § 60.12[2]*] and is not usually subject to transfer by will.

Notwithstanding this, nonprobate transfers may (and usually do) play an important part in an estate plan. For example, the proceeds of a life insurance policy may by terms of the policy be payable directly to members of the insured's family. If they are, the proceeds will not form part of the probate estate and will not be subject to disposition by will. However, the proceeds will form a part of the insured's taxable estate [*see § 60.12[3]*] if, at the time of death, the insured holds any "incidents of ownership" in the policy [*I.R.C. § 2042(2)*]. Similarly, money deposited in a multiple-party account (such as a joint account, a "P.O.D. account," or a Totten trust account) will be paid to the person or persons designated to receive the funds after the death of one of the parties unless there is clear and convincing evidence of a different intent [*Prob. Code § 5302; see Prob. Code §§ 80 ("Totten trust account" defined), 5130 ("joint account" defined), 5132 ("multiple-party account" defined), 5139 ("P.O.D." defined), 5140 ("P.O.D. account" defined)*]. The funds will not form part of the probate estate of the deceased party and will not be subject to disposition under the deceased party's will.

Nonprobate transfers, like joint tenancies [*see [5], above*], have the virtue of avoiding probate. However, they are not

usually subject to disposition under a will or trust, and for this reason special care must be taken to coordinate them with an estate plan. Many estate planners seek to coordinate property subject to nonprobate transfers with other property by transferring it to a revocable living trust, or by making the proceeds payable to the trustee of a revocable living trust. For example, the trustee of a trust (revocable or irrevocable) can be designated as the death payee under a life insurance policy. When that is done, the proceeds of the policy will be paid to the trustee after the insured dies and combined with other assets of the insured's trust estate. Similarly, money that is deposited in financial institutions can be held in the name of the trustee rather than deposited in a multiple-party account. If the trust is revocable, the settlor will have the free use of the trust funds so long as he or she is living. When the settlor dies, however, the funds will be available to the trustee for the purposes set forth in the trust instrument.

### **[10] Out-of-State Property**

Many clients own property that is located outside California. Although the disposition of personal property is generally governed by the laws of the decedent's domicile [*see Restatement (Second) of Conflict of Laws* §§ 260-266], the disposition of real property is generally governed by the law of the state in which the real property is located [*Restatement (Second) of Conflict of Laws* §§ 236-243]. When a person dies owning real property located in more than one state, some sort of probate proceedings may be necessary in every state in which the real property is located.

A revocable living trust may help to avoid the necessity of probating property in more than one state. If the trustee holds title to the property, it will not be necessary to subject the property to probate administration. Rather, it may be held or transferred with other property of the trust estate and paid or distributed to the persons designated in the trust instrument.

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawGeneral OverviewEstate, Gift & Trust LawProbateGeneral OverviewEstate, Gift & Trust LawTrustsGeneral OverviewEstate, Gift & Trust LawWillsGeneral OverviewTax LawFederal Estate & Gift TaxesGeneral Overview



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California Legal Forms--Transaction Guide

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DIVISION IV: WILLS AND TRUSTS  
CHAPTER 60 ESTATE PLANNING  
PART II. LEGAL BACKGROUND

*23-60 California Legal Forms--Transaction Guide § 60.12A*

### § 60.12A Prospective Repeal of Federal Estate Tax

#### NOTE

**REGARDING ESTATE TAX REPEAL:** The federal estate tax has been repealed, effective for decedents dying after 2009 [*I.R.C. § 2210(a)*]. Similarly, the generation-skipping tax has been repealed, effective for generation-skipping transfers after 2009 [*I.R.C. § 2664*]. Until then, both taxes remain in effect, subject to various phased-in changes discussed throughout this chapter.

However, under a sunset provision of the 2001 legislation that enacted the repeals, none of the provisions of that legislation--including the repeal of the estate tax and generation-skipping tax--apply to estates of decedents dying, gifts made, or generation-skipping transfers, after December 31, 2010 [Pub. Law 107-16, § 901]. Thus, unless Congress affirmatively acts before the end of 2010 to extend the provisions repealing the estate tax and generation-skipping tax, the estate tax law that was in effect before enactment of the 2001 legislation (including the 55 percent maximum estate tax rate) will apply again after 2010 [*see* Pub. Law 107-16, § 901; *I.R.C. § 2001*, before amendment by Pub. Law 107-16].

Most commentators believe that significant changes will be made to the estate tax law before its current repeal date of January 1, 2010.

For now, estate tax planning after 2001 involves to some degree guessing how long a client will live. Between now and 2011, estate planning may require year-to-year refinements tailored to each client, as transitional increases in the estate and gift tax unified credit, estate tax rate decreases, and other changes take effect [*see I.R.C. §§ 2001(c), 2010(c), 2505* and discussion throughout this chapter]. For clients who die in 2010, under the law as currently on the books no estate tax will be due [*I.R.C. § 2210(a)*]. For clients who are likely to live past 2010, estate tax planning for larger estates, under the law as currently constituted, would involve many of the same considerations and planning techniques as under the law that was in effect before the 2001 legislation, because post-2010 law will revert to that law in the absence of further Congressional action [*I.R.C. § 2210(a)*]. Again, however, it is important to recognize that there is no guarantee that the much-touted repeal of the estate tax law will ever actually take effect in its

current form, or be re-enacted before the 2010 sunset provision takes effect. Changes in the political climate, the national economy and federal budget, and the political composition of Congress and the executive branch may and probably will result in modifications to the 2001 repeal legislation. The nature of such modifications is speculative at this point. Estate planners need to remain constantly aware of developments in the legislative arena and will need to continually re-evaluate the probable effect of any such developments on individual client estate plans.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Tax Law Federal Estate & Gift Taxes General Overview  
Tax Law Federal Estate & Gift Taxes Definition of Gross Estate  
Tax Law Federal Estate & Gift Taxes Definition of Taxable Estate  
Tax Law Federal Estate & Gift Taxes Estate Tax Returns  
General Overview



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DIVISION IV: WILLS AND TRUSTS  
 CHAPTER 60 ESTATE PLANNING  
 PART II. LEGAL BACKGROUND

*23-60 California Legal Forms--Transaction Guide § 60.13*

**§ 60.13 Estate Tax Considerations**

**[1] The Gross Estate**

**[a] In General**

Before the "taxable estate" can be determined, it is necessary to determine the client's "gross estate." As defined in the Internal Revenue Code, the gross estate includes "the value of all property to the extent therein of the interest of the decedent at the time of his death" [*I.R.C. § 2033*]. This rule is broad enough to include all property that, under familiar rules of property law, a decedent "owns" at the time of death. However, the Internal Revenue Code contains special rules under which property that ordinarily is not considered to be "owned" is also included in the gross estate [*see I.R.C. §§ 2035* (gifts made within three years of death), *2036* (transfers with retained life estate), *2037* (transfers taking effect at death), *2038* (revocable transfers), *2039* (annuities), *2040* (joint interests), *2041* (powers of appointment), *2042* (proceeds of life insurance), *2043* (transfers for insufficient consideration), *2044* (certain property for which marital deduction was previously allowed)]. The most important of these special rules are discussed in [b] through [j], *below*.

Because the gross estate consists of all property held by the decedent to the extent of his or her interest in the property at death, it includes a decedent's one-half interest in all community property [*I.R.C. §§ 2031(a), 2033*].

**[b] Transfers With Retained Life Estate**

Under *I.R.C. § 2036*, the gross estate includes the value of all property as to which the decedent has made a transfer, by trust or otherwise, under which the decedent has retained the possession or enjoyment of the property, or the right to receive the income from the property, for any period not ascertainable without reference to the decedent's death, or that does not in fact end before the decedent's death [*I.R.C. § 2036(a)*]. This rule applies in the case of all transfers, except bona fide sales for adequate and full consideration in money or money's worth [*I.R.C. § 2036(a)*; *see Magnin v. C.I.R. (9th Cir. 1999) 184 F.3d 1074, 1077-1078* (for purposes of determining whether remainder interest is transferred for adequate and full consideration, amount received must equal value of remainder interest only)]. A transferor retains "possession or enjoyment" of property within the meaning of *I.R.C. § 2036(a)* if the transferor retains a substantial present economic benefit from the property rather than a speculative contingent benefit that may or may not be realized [*Strangi v. C.I.R. (5th Cir. 2005) 417 F.3d 468, 476* (benefits transferor retained, including periodic payments made

before his death, continued use of transferred property, and post-death payment of various debts and expenses, were clearly substantial and present benefits, not speculative or contingent benefits) *see Estate of Bigelow (2007) 503 F.3d 955* . 963-965 (full value of real property transferred to family limited partnership, where decedent and her children had implied agreement that decedent would retain income and economic enjoyment of the transferred asset and that the inter vivos transfer was not a bona fide sale for adequate and full consideration and should have been included in decedent's gross estate).]. In addition, there must be an express or implied agreement at the time of the transfer that the transferor will retain possession or enjoyment of the property [*Treas. Reg. § 20.2036-1(a)*].

This provision intended to bring in the gross estate property in which the decedent has retained a life estate, or a lifetime income interest, as illustrated by the following cases:

- The assets a decedent transferred to a family limited partnership were not includable in the decedent's gross estate because the transfer qualified as a bona fide sale for full and adequate consideration; the decedent received a partnership interest that was proportionate to the assets contributed, the decedent's capital account was credited with the assets contributed, and the decedent was entitled to a distribution commensurate with her capital account balance on termination or dissolution of the partnership. The decedent also retained sufficient assets outside of the partnership for her own support and did not commingle partnership and personal assets, partnership formalities were observed, and there were credible business reasons for the partnership formation [ *Kimbell v. United States (5th Cir. 2004) 371 F.3d 257* ].

- Stock in an operating company that the decedent transferred to a holding company organized as a limited liability company was not includable in the decedent's gross estate because the transfer was a bona fide sale for full and adequate consideration. However, membership units in the limited liability company that the decedent transferred to a family limited partnership were includable in his estate when there was an implied agreement under which the decedent retained an interest in the transferred units [ *Estate of Bongard v. Comm'r (2005) 124 T.C. No. 8* ].

- The fair market value of stock a decedent contributed through a revocable trust to a Delaware business trust was not includable in the decedent's gross estate because the stock transfers were bona fide for adequate and full consideration. The decedent was not financially dependent on distributions from the business trust because the decedent retained sufficient assets outside of the trust to amply support his needs [ *Estate of Schutt v. Commissioner, T.C. Memo. 2005-126* ].

- The value of property transferred to family limited partnership by deceased husband and wife was included in their respective gross estates when there was an implied agreement between the spouses and their children that they would retain the right to the income from the transferred property as long as they needed it, and they retained insignificant income-producing assets in their names to meet their needs [ *Estate of Korby v. Comm'r, T.C. Memo 2005-102, 103* ].

- Rental real estate transferred from a decedent's revocable trust to a family limited partnership was includable in the decedent's gross estate when there was an implied agreement that the decedent would retain, for her life, the right to the property's rental income and its economic benefit [ *Estate of Virginia A. Bigelow, T.C. Memo. 2005-65, aff'd, 2007 U.S. App. LEXIS 22030* ].

- The value of real property a decedent transferred to a limited partnership was includable in the decedent's gross estate because the decedent retained the enjoyment of this property for life, as shown by the absence of any change in the decedent's relationship to the property following creation of the partnership, her use of partnership assets for her support, and a lack of formality surrounding the limited partnership and repeated disregard of the partnership agreement [ *Estate of Hillgren v. Commissioner,*

*T.C. Memo 2004-46* ].

- The full date of death value of three family limited partnerships was includable in a decedent's gross estate because the decedent retained the right to all income generated by the partnerships [ *Estate of Ida Abraham v. Commissioner (1st Cir. 2005) 408 F.3d 26* (decedent need not have retained legally enforceable interest in transferred property; inclusion can be triggered under *I.R.C. § 2036* if enjoyment of transferred property is retained under an arrangement or understanding)].

- The full value of property a decedent transferred to a limited partnership was includable in the decedent's gross estate because documents governing the partnership did not prevent the decedent from being designated as a recipient of income from the partnership, and an implied agreement among the parties provided that the decedent would retain the economic benefit of the transferred property. Substantial distributions from the partnership to pay the decedent's funeral expenses, estate administration expenses, specific bequests, and personal debts the decedent had incurred was strong circumstantial evidence of an understanding between the decedent and his children who controlled the partnership that "partnership" assets would be used to meet the decedent's expenses. The decedent's continued occupancy of "partnership" property was also evidence of an implied agreement that the decedent would continue to use his assets as needed. Finally, the decedent's lack of liquid assets after the transfer was evidence that some arrangement to meet his expenses must have been made [ *Strangi v. C.I.R. (5th Cir. 2005) 417 F.3d 468, 477-478* ].

- The date of death value of property a decedent transferred to family limited partnerships for the benefit of the decedent's children and their families was included in the decedent's gross estate when the decedent retained virtually complete control of the assets in both partnerships which he used to pay for his living expenses [ *Estate of T.R. Thompson, T.C. Memo 2002-246* ].

- A gift of 24 percent of real property containing two residences and other buildings was not a transfer with a retained interest, even though the transferor continued to reside on the property, when the transferor did not have exclusive use of the property and her continued use was consistent with her retained interest [ *Estate of Rebecca A. Wineman, T.C. Memo 2000-193* ].

A decedent's retention of direct or indirect voting rights in stock of a controlled corporation is also treated as the retention of the enjoyment of the property that causes the value of the stock to be included in the decedent's gross estate [*I.R.C. § 2036(b)(1)*]. A corporation is *controlled* if the decedent owned or had the right to vote stock possessing at least 20 percent of the total combined voting power of all classes of stock of the corporation within three years of the decedent's death [*I.R.C. § 2036(b)(2)*]. The relinquishment or cessation of these voting rights is deemed a transfer of the property, which begins the three-year time period to determine whether the transfer of property was made within three years of the decedent's death [*I.R.C. § 2036(b)(3)*]. The value of the stock will not be included in the decedent's estate if the decedent dies more than three years after the transfer of the voting rights [*I.R.C. § 2035(a)(2)*].

### **[c] Transfers Taking Effect at Death**

Under *I.R.C. § 2037*, the gross estate includes the value of all property as to which the decedent has made a transfer, by trust or otherwise, if possession or enjoyment of the property can be obtained only by surviving the decedent and if the deceased retained a reversionary interest in the property that, immediately before the decedent's death, was worth more than 5 percent of the total value of the property. This rule is designed to bring into the gross estate property that the decedent transferred to others only for a term of years. When a transfer of this type has been made, the probability that the property will return to the decedent must be determined under actuarial principles; and if the value of the reversion as determined under those principles exceeds 5 percent of the total value of the property, it will be included in the decedent's gross estate.

Under the survivorship condition, inclusion in the gross estate may be avoided by making possession or enjoyment dependent on either survivorship or expiration of a term of years [see *Treas. Reg. § 20.2037-1(b)*]. The term *reversionary interest* under the second condition is not used in a technical sense, but refers to any reserved right that requires that the transferred property must or may be returned to the grantor [*Treas. Reg. § 20.2037-1(c)(2)*]. The 5-percent limitation under the third condition is determined by comparing the value of the reversionary interest to the value of the transferred property, including interests that are not dependent on survivorship [see *Treas. Reg. § 20.2037-1(c)(4)*]. The value of a reversionary interest is determined by multiplying the value of the property by figures contained in Treasury Regulation Tables [see *Treas. Reg. § 20.2031-7(a), (d), 20.2031-7T(d)(5), and 20.2031-7A(f)(4)*].

#### **[d] Revocable Transfers**

Under *I.R.C. § 2038*, the value of the gross estate includes the value of all property as to which the decedent has made a transfer, by trust or otherwise, under which he or she has retained the power to alter, amend, revoke, or terminate the transfer [*I.R.C. § 2038(a)(1)*]. This rule requires that all of the assets of a revocable inter vivos trust be included in the gross estate of the settlor.

The value of the transferred property is not includible if the transfer was for adequate and full consideration, if the decedent's power could only be exercised with the consent of all parties having a vested or contingent interest in the transferred property, if the power is held solely by a person other than the decedent, or if the decedent relinquished the power more than three years before death [*Treas. Reg. § 20.2038-1(a)(1)-(3)*; see *I.R.C. § 2035(a)*].

For purposes of the revocable transfer provision, the power is considered to exist on the date of the decedent's death, even though notice must be given before the power is exercised or a period of time must expire before the change takes effect, and whether or not notice has actually been given or the time period has elapsed on or before the decedent's death [*I.R.C. § 2038(b)*]. In valuing the retained interest in such a case, however, the amount of the interest added to the gross estate must be discounted to take into consideration the period between the decedent's death and the date when the power could have taken effect [*Treas. Reg. § 20.2038-1(b)*; see *Treas. Reg. § 20.2031-7* (valuation provisions)].

Only the value of a property interest that is subject to the retained power is to be included in the decedent's gross estate [*Treas. Reg. § 20.2038-1(a)*].

#### **[e] Annuities**

Under *I.R.C. § 2039*, the value of the gross estate includes the value of any annuity or other payment receivable by any beneficiary pursuant to a contract or agreement under which the decedent was entitled to receive an annuity or other payment for any period not ascertainable without reference to the decedent's death, or that does not in fact end before the decedent's death [*I.R.C. § 2039(a)*]. If the decedent contributed only part of the purchase price for the annuity, then only part of the annuity will be includible in the decedent's gross estate. The part that is includible will be proportional to the part of the purchase price paid by the decedent. However, any part contributed by the decedent's employer will be included to the same extent as if it were contributed by the decedent [*I.R.C. § 2039(b)*].

#### **[f] Joint Interests**

Under *I.R.C. § 2040*, the value of the gross estate includes the value of all property held by the decedent and any other person as joint tenants, or deposited in a financial institution in their joint names and payable to either or the survivor, except the portion that may be shown to have originally belonged to the other person and never to have been received or acquired by the other person from the decedent for less than an adequate and full consideration in money or money's worth [*I.R.C. § 2040(a)*]. The effect of this rule is to include the value of the whole property in the gross estate of the first joint tenant to die unless the surviving tenant can prove that the property originally belonged to the survivor and

was never received from the deceased tenant by gift, inheritance, or other gratuitous transfer.

The above rule does not apply to property held in joint tenancy by married persons when the married persons are the only joint tenants, or to property held by married persons in a tenancy by the entirety. When married persons hold property in this way, only one half of the value of the property is included in the gross estate of the deceased spouse [I.R.C. § 2040(b)].

If joint tenancy property (or property deposited in a financial institution in joint names) was acquired by a deceased spouse and a surviving spouse by gift, bequest, devise, or inheritance, one half of the value of the property is includible in the deceased spouse's estate [I.R.C. § 2040(a)]. If property of that kind was acquired by a decedent and someone other than a spouse, and their interests are not otherwise specified by law, the portion includible in the gross estate of the decedent will be determined by dividing the value of the whole property by the number of joint tenants [I.R.C. § 2040(a)].

### **[g] Property Subject to Powers of Appointment**

Under I.R.C. § 2041, the value of the gross estate generally includes the value of all property over which the decedent held a general power of appointment at the time of death [I.R.C. § 2041(a)(2)]. For this purpose, a power of appointment is a general power if it can be exercised in favor of the decedent, the decedent's estate or creditors, or creditors of the decedent's estate [I.R.C. § 2041(b)(1)].

In determining whether a power of appointment is general, it is necessary to examine the substance of the power and not merely its form. For estate tax purposes, all powers that are general powers of appointment in substance and effect will be treated as general powers, regardless of the nomenclature used in creating them and regardless of whether they would qualify as powers of appointment under local law [Treas. Reg. § 20.2041-1(b)(1)]. Thus a power to consume or appropriate the principal of a trust will be treated as a general power of appointment, regardless of whether it is denominated as such in the governing instrument [Treas. Reg. § 20.2041-1(b)(1)]. Similarly, a beneficiary who has the power to alter, amend, or terminate a trust, or to invade the trust for his or her own benefit, the benefit of his or her estate or creditors, or the benefit of the creditors of his or her estate, will be deemed to have a general power of appointment over the trust assets [Treas. Reg. § 20.2041-1(b)(1)].

Many seemingly innocent powers held by trustees and beneficiaries will have potentially unfavorable tax consequences if, in substance and effect, they give the trustees or beneficiaries broad powers to decide who will receive or have the benefit of the trust assets. For example, if a beneficiary has the power to remove or discharge a trustee and either assume the office of trustee himself or herself or designate another person to serve as trustee, and if the trustee has the power to alter, amend, or terminate the trust for the trustee's own benefit, or the benefit of the trustee's estate or creditors, or creditors of the trustee's estate, the beneficiary may be deemed to hold a general power of appointment over all of the trust assets; and, when the beneficiary dies, all of the assets may be includible in the beneficiary's gross estate [Treas. Reg. § 20.2041-1(b)(1)].

The Internal Revenue Code provides an important exception to the general rule of includability of property that is subject to a general power of appointment. Under this exception, if a person has the power to consume, invade, or appropriate property for himself or herself (or for another person), and if the power is limited by an "ascertainable standard" relating to the health, education, support, or maintenance of the person for whom the power may be exercised, the power is not a general power of appointment for estate or gift tax purposes [I.R.C. §§ 2041(b)(1)(A), 2514(c)(1)]. Ascertainable standards are important and potentially valuable estate-planning tools, and they are often included in trust instruments. However, an ascertainable standard will not achieve its purpose unless it is precisely drafted. The Treasury Regulations state that a power is limited by an "ascertainable standard" if the extent of the holder's duty to exercise the power is reasonably measurable in terms of the beneficiary's needs for health, education, or support (or any combination of those things). Under those regulations, it is acceptable to define the "ascertainable standard" in terms of the

beneficiary's "support," "support in reasonable comfort," "maintenance in health and reasonable comfort," "support in his [or her] accustomed manner of living," "education, including college and professional education," "health," and "medical, dental, hospital and nursing expenses and expenses of invalidism." However, it is not acceptable to define the duty in terms of the beneficiary's "comfort," "welfare," or "happiness," as those words are too indefinite to constitute an "ascertainable standard" [*Treas. Reg. § 20.2041-1(c)(2)*].

Another important rule that affects the taxable consequences of holding a general power of appointment is the so-called "five or five rule" or "five or five power" [*see I.R.C. §§ 2041(b)(2), 2514(e)*]. However, this rule affects the gift and not the estate tax consequences of a general power of appointment. For a discussion of the "five or five rule" and "five or five powers," see *Ch. 64, Testamentary Trusts: Payment and Distribution Provisions, § 64.302[1]*.

### **[h] Proceeds of Life Insurance**

Under *I.R.C. § 2042*, the value of the gross estate includes the proceeds of any life insurance policy on the life of the decedent that are receivable by the decedent's executor [*I.R.C. § 2042(1)*]. Insurance proceeds are receivable by the executor if they are payable to the executor, administrator, or the decedent's estate. The estate does not have to be specifically named as the beneficiary under the terms of the policy to have the proceeds includable in the gross estate. Thus, proceeds are deemed "receivable by the executor" if they are receivable by another beneficiary but are subject to a legally binding obligation to pay taxes, debts, or other charges enforceable against the estate. In such a case, the amount includable in the gross estate is the amount required to pay the taxes, debts, or other charges in full. Proceeds will also be includable if the policy is purchased in favor of another person or corporation as collateral for a loan. The proceeds are considered to be receivable for the benefit of the estate, and the amount of the loan outstanding at the date of the decedent's death with accrued interest will be deductible in determining the taxable estate [*Treas. Reg. § 20.2042-1(b)(1)*].

The value of the gross estate also includes the proceeds of any life insurance policy on the life of the decedent that are not receivable by the executor if, at the time of death, the decedent possessed any of the "incidents of ownership" in the policy, exercisable either alone or in conjunction with any person [*I.R.C. § 2042(2)*]. For estate tax purposes, an "incident of ownership" is a power or right to change the beneficiary of the policy, surrender or cancel the policy, assign the policy, revoke an assignment of the policy, pledge the policy for a loan, or obtain a loan from the insurer against the surrender value of the policy [*Treas. Reg. § 20.2042-1(c)(2)*; *see Priv. Ltr. Rul. 200518005* (taxpayer did not possess incidents of ownership over life insurance policies insuring her life that were purchased by trust, when she renounced her rights as co-trustee in connection with these policies, subsequently resigned as co-trustee, and did not contribute assets to trust or commingle life insurance policies held as trust assets with her personal assets)].

An irrevocable life insurance trust may be created for the purpose of acquiring and holding one or more policies of life insurance. If the trust is properly planned, it may acquire a life insurance policy on the life of the settlor, and the settlor will not have any "incidents of ownership" in the policy. When the settlor dies, assuming that the proceeds of the policy are not paid to the settlor's executor, the proceeds will not be includable in the settlor's gross estate for estate tax purposes. For further discussion of the estate tax treatment of life insurance proceeds and the use of irrevocable trusts to remove insurance proceeds from a settlor's gross estate, see *Ch. 72, Irrevocable Trusts*.

When insurance proceeds are includable in the decedent's gross estate, the amount to be included is generally the full amount receivable under the policy. If the proceeds are payable to a beneficiary as an annuity for life or for a term of years, however, the amount to be included is either an optional lump sum payment if one is provided by the policy or the amount used by the insurer in determining the amount of the annuity if there is no lump sum option in the policy [*Treas. Reg. § 20.2042-1(a)(3)*]. If the proceeds of a policy made payable to the decedent's estate are community property, only one half of the proceeds is includable since only one half is considered receivable by or for the benefit of the decedent's estate [*Treas. Reg. § 20.2042-1(b)(2)*; *Rev. Rul. 2003-40, 2003-17 I.R.B. 813* (if surviving spouse is beneficiary, marital deduction would be available for decedent's half that is included in decedent's estate)].

**[i] Transfers for Insufficient Consideration**

Under *I.R.C. § 2043*, certain property must be included in the gross estate when the decedent has transferred the property to others for value, but not in a bona fide sale for an adequate and full consideration. If the property was transferred in a way that would require the inclusion of the property in the decedent's gross estate under *I.R.C. §§ 2035* through 2038 or under *I.R.C. § 2041*, and if the transfer is made for a consideration in money or money's worth but is not a bona fide sale for an adequate and full consideration in money or money's worth, the excess of the fair market value of the property at the time of the transferor's death over the consideration received by the decedent will be included in the decedent's gross estate [*I.R.C. § 2043(a)*]. For this purpose, a relinquishment or promised relinquishment by a decedent's spouse of marital rights in the decedent's property or estate is not considered to any extent a consideration "in money or money's worth" [*I.R.C. § 2043(b)(1)*].

**[j] Gifts Made Within Three Years of Death**

The value of certain gifts made within three years of a decedent's death must be included in the decedent's gross estate. These gifts include transfers of an interest in property or the relinquishment of a power that would have been included in the decedent's gross estate if retained at death, including [*I.R.C. § 2035(a)(2)*]:

- Transfers with a retained life interest [*I.R.C. § 2036*].
- Transfers taking effect at death [*I.R.C. § 2037*].
- Revocable transfers [*I.R.C. § 2038*].
- Proceeds of life insurance [*I.R.C. § 2035(a)*; see *I.R.C. § 2042*; see also *Priv. Ltr. Rul. 200432015* (entire amount payable on insurance policy on decedent's life was includable in decedent's gross estate and estate was not entitled to estate tax marital deduction when proceeds of policy were payable to limited liability company)].

This inclusion rule, however, does not apply if the decedent made a bona fide sale for full and adequate consideration [*I.R.C. § 2035(d)*]. The value of any gift tax on gifts made within three years of death must also be included in the decedent's estate [*I.R.C. § 2035(b)*].

In addition to the inclusion rules concerning retained interests, the value of gifts made within three years of death must be included in the transferor's gross estate for other special purposes. The value of these gifts must be included for application of the rules with respect to redemption of stock to pay death taxes [*I.R.C. § 2035(c)(1)(A)*; see *I.R.C. § 303*], the special valuation provisions for certain types of farm and real property [*I.R.C. § 2035(c)(1)(B)*; see *I.R.C. § 2032A*], the provisions determining property subject to estate tax liens [*I.R.C. § 2035(c)(1)(A)*; see *I.R.C. Ch. 64, Subchapter C*], and the provisions allowing an extension of time to pay estate taxes when the estate consists largely of an interest in a closely held business [*I.R.C. § 2035(c)(2)*]. The rules requiring inclusion for purposes of stock redemption, special valuation, and tax liens do not apply to gifts (except as to transfers of life insurance policies) if no gift tax return was filed because the value of the gift was less than the annual gift tax exclusion [*I.R.C. § 2035(c)(3)*; see *I.R.C. § 6019(1)*].

**[2] Exclusion for Qualified Conservation Easement**

For decedents dying on or after January 1, 1998, an exclusion is available for a "qualified conservation easement" as defined in *I.R.C. § 2031(c)(8)(B)*. Basically, this exclusion allows a decedent, family member, executor, or trustee to grant to a qualified charitable organization [see *I.R.C. 170(h)(3)*] an easement in qualifying real property [see *I.R.C. 170(h)(2)*] restricting the use of that property to conservation purposes [see *I.R.C. 170(h)(4)(A)*], and exclude a portion of the value of that property from the decedent's gross estate for federal estate tax purposes [*I.R.C. § 2031(c)(1)*], while

retaining ownership and use of the property to the extent not incompatible with the easement.

The portion that may be excluded is 40 percent, reduced, if applicable, by two percent for each percentage point or fraction thereof by which the value of the conservation easement is less than 30 percent of the value of the property without the easement [*I.R.C. § 2031(c)*]. The total value of the property that may be excluded may not exceed \$300,000 for estates of decedents dying in 2000, \$400,000 for decedents dying in 2001, and \$500,000 for decedents dying in 2002 or later [*I.R.C. § 2031(c)*]. The date for determining values is the date the contribution is made [*I.R.C. § 2031(c)(2)*].

The exclusion is complex and subject to numerous qualifications and conditions. Among the more important of these is that the easement include a prohibition on more than a de minimis use for a commercial recreational activity [*I.R.C. § 2031(c)(8)(B)*]. The land must be located within the United States or its possessions [*see I.R.C. § 2031(c)(8)(A)*], effective for decedents dying after 2000; for prior years, the land had to be located within 25 miles of a metropolitan area (as defined by the Office of Management and Budget) or a national park or wilderness area, or within 10 miles of an Urban National Forest (as designated by the Forest Service of the U.S. Department of Agriculture)(*I.R.C. § 2031(c)(8)(A)(I)*, before amendment by Pub Law 107-16) and must have been owned by the decedent or a member of the decedent's family [*see I.R.C. § 2031(c)(8)(D)* (definition)] at all times during the three-year period ending on the date of the decedent's death [*see I.R.C. § 2031(c)(8)(D)*]. The executor must elect the exclusion on the estate tax return, and the exclusion, once made, is irrevocable [*I.R.C. § 2031(c)(1), (6)*].

Postmortem creation of easements and postmortem amendments to easements that require amendment in order to qualify are permitted [*I.R.C. § 2031(c)*].

For more detailed discussion of the exclusion for qualified conservation easements, see Ch. 69, *Charitable Dispositions*; *see also California Wills & Trusts, Ch. 2, Overview of Tax Laws Affecting the Disposition of Estates, § 2.06[6]* (Matthew Bender).

### **[3] Deductions**

#### **[a] In General**

The federal estate law allows certain deductions from the gross estate. It is important to consider all of the available deductions when an estate is planned, as the value of the taxable estate can be determined only after the deductions are subtracted from the value of the gross estate [*I.R.C. § 2051*].

The following deductions are available:

- Funeral expenses, estate administration expenses, claims against the estate, and mortgages or other encumbrances on property included in the gross estate [*I.R.C. § 2053(a)*; *see Estate of Howard Gilman, T.C. Memo. 2004-286* (interest and costs associated with loan used to pay estate taxes may be deductible as administration expenses when loan is necessary to pay estate taxes due to estate's illiquidity); *but see Tech. Adv. Mem. 200513028* (interest on loan that was *not* necessary to administration of estate is not deductible as administration expense; decedent's estate consisted primarily of 99 percent interest in limited partnership which had substantial liquid assets available to pay estate tax); *see also Priv. Ltr. Rul. 200532049* (attorney's fees and litigation expenses incurred by personal representative of estate in malpractice suit connected with estate are deductible as administration expenses)].
- Certain state and foreign death taxes [*I.R.C. § 2053(d)*; *see Letter Rul. 200444021* (estate tax deduction is not allowed for income taxes estate paid on amounts it was forced to withdraw from decedent's IRAs to pay estate tax)].

- Casualty losses incurred during the settlement of the estate [*I.R.C. § 2054*].
- Transfers to charitable beneficiaries [*I.R.C. § 2055*; for general coverage of charitable transfers, *see* Ch. 69, *Charitable Dispositions* ].
- Transfers to the decedent's spouse [*I.R.C. § 2056*; for general coverage of marital deduction, *see* Ch. 71, *Marital Deduction Trust Provisions* ].
- A deduction for state death taxes, effective for the estates of decedents dying after 2004 [*I.R.C. § 2058*; *see* [b], *below*].

For estates of decedents dying before 2004 [*I.R.C. § 2057(j)*], an extremely complex "family-owned business deduction" permitted the value of qualifying family-owned business interests to be deducted from the gross estate. The deduction was designed to give an estate tax break to small family-owned and operated businesses. The maximum available deduction was \$675,000 [*I.R.C. § 2057(a)(2)*], and when the maximum deduction applied, the "applicable exclusion amount" (unified credit) under *I.R.C. § 2010* was fixed at \$625,000, regardless of the year of the decedent's death [*I.R.C. § 2057(a)(3)(A)*]. The deduction was eliminated for decedents dying after 2003 [*I.R.C. § 2057(j)*]. However, the repeal of the deduction and the eventual repeal of the estate tax [*see I.R.C. § 2210(a)*] do not eliminate the compliance requirements imposed as a condition for claiming the deduction for estates of decedents dying before 2004. Thus, in order to avoid recapture of the estate tax, taxpayers claiming the deduction must continue to materially participate in the business interest for which the deduction under *I.R.C. § 2057* is claimed for at least 10 years following the decedent's death [*see I.R.C. § 2057*]. For detailed discussion of the family-owned business deduction, *see California Wills & Trusts, Ch. 2, Overview of Tax Laws Affecting Disposition of Estates, § 2.07[4]* (Matthew Bender).

#### **[b] Deduction for State Death Taxes**

For estates of individuals dying after 2004, the value of the taxable estate is determined by deducting from the gross estate any estate, inheritance, legacy, or succession taxes actually paid to any state or the District of Columbia for any property included in the gross estate, but not including any taxes paid for the estate of a person other than the decedent [*I.R.C. § 2058*]. No dollar limits are imposed on the amount of this deduction.

A deduction for state death taxes is allowed only for taxes actually paid and claimed as a deduction during the time period that ends before the later of [*I.R.C. § 2058(b)*]:

- Four years after the estate tax return is filed;
- 60 days after a decision of the Tax Court becomes final if a timely petition for redetermination of a deficiency has been filed;
- The expiration date of any extension of time that has been granted for payment of the tax; or
- If a timely claim for a refund or credit of an overpayment of tax has been filed, the latest of 60 days after a notice of disallowance is mailed, 60 days after the decision of the court becomes final as to a timely suit started on the claim, or two years after a notice of the waiver of disallowance is filed.

The certificate of the proper taxing authority should be submitted with the estate tax return to support the claimed deduction. This certificate should show the total amount of the tax imposed, the amount of discount allowed, the amount of penalties and interest imposed or charged, the total amount actually paid in cash, and the date of payment.

For estates of individuals dying before 2005, a *credit* (as opposed to a deduction) for state death taxes is allowed [*see*

[4][c], *below*].

#### **[4] Credits**

##### **[a] In General**

The Internal Revenue Code allows various credits in determining the amount of the estate tax. These credits include the "unified credit" [*I.R.C. § 2010*], credits for certain state and foreign death taxes [*I.R.C. §§ 2011, 2014*], credits for certain gift taxes [*I.R.C. § 2012*], and credits for taxes on certain prior transfers [*I.R.C. § 2013*].

##### **[b] Unified Credit**

The most important credit is the unified credit [*see I.R.C. § 2010*]. For decedents dying between 1987 and December 31, 1997, the amount of the credit was \$192,800, enough to effectively exclude \$600,000 of property from estate taxation [*I.R.C. § 2010(a)*]. Beginning January 1, 1998, the amount of the credit is equal to the "applicable credit amount" available in the year of the decedent's death. The "applicable credit amount" is the amount of credit that will exclude the "applicable exclusion amount" according to the following table [*I.R.C. § 2010(c)*]:

In the case of decedents dying during:	The applicable exclusion amount is:
2002 or 2003	\$1 million
2004 or 2005	\$1.5 million
2006-2008	\$2 million
2009	\$3.5 million
After 2010	Not Applicable (estate tax repealed)

After December 31, 2010, the applicable exclusion amount is currently slated to return to \$1,000,000, the amount that was in effect in 2001, unless Congress affirmatively acts to change that amount [*see I.R.C. § 2010(c)*], prior to amendment by Pub. Law 107-16, § 521(a); Pub. Law 107-16 § 901 (repeal date); for more detailed discussion, *see § 60.12A*].

The unified credit against estate taxes works in conjunction with the unified credit against gift taxes. The amount of the gift tax credit was the same as the estate tax credit through 2003, but after 2003, the amount of the gift tax credit remained \$1 million, while the estate tax unified credit continues to increase as noted above [*I.R.C. §§ 2010(c), 2505(a)*]. To the extent that the gift tax credit is depleted by lifetime gifts, however, the amount of the estate tax credit is reduced or even eliminated. If none of the gift tax credit is used during the decedent's lifetime, an estate tax credit equal to the full "applicable exclusion amount" will be available on the decedent's death. If part of the gift tax credit is used during the decedent's lifetime, only part of the estate tax credit will be available on the decedent's death.

Each decedent is entitled to a unified credit. When an attorney plans the estates of a married couple, it is important to remember that both the husband and wife are each entitled to a separate unified credit. The amount each spouse can shelter depends on the year of death, as shown in the table above [*I.R.C. § 2010(c)*].

For estates of decedents dying before 2002, the benefit of the unified credit was progressively "phased out" for estates in excess of \$10,000,000. This was accomplished by increasing the tax that would otherwise be due by an amount equal to 5 percent of the portion of the estate tax exceeding \$10,000,000 [*I.R.C. § 2001(c)(2)*], before amendment by Pub Law 107-16]. The phaseout of the unified credit has been repealed for estates of decedents dying after 2001 [*I.R.C. § 2010(c)(2)*].

##### **[c] Credit for State Death Taxes**

For the estates of decedents dying *before* 2005 [*see I.R.C. § 2011(f)*], the Internal Revenue Code permits a credit to be taken against the gross estate tax for any estate, inheritance, legacy, or succession taxes actually paid to a state or the District of Columbia [*I.R.C. § 2011(b)*]. The credit is limited to specific amounts set forth in *I.R.C. § 2011(b)*. The credit has been replaced with a deduction for state death taxes, effective for decedents dying after 2004 [*I.R.C. § 2058*; *see* discussion of this deduction in [3][b], *above*].

Like many other states, California has enacted a special estate tax designed to take advantage of the federal credit [*Rev. & Tax. Code § 13302*]. This tax is generally known as the California "pick-up" tax.

The California tax is equal to the maximum allowable amount of the federal credit for state death taxes attributable to property located in California [*Rev. & Tax. Code § 13302*]. It specifically provides that the total amount of the federal and California taxes cannot exceed the amount that would be paid in the absence of the California tax [*Rev. & Tax. Code § 13302*]. The effect of the tax is thus to divert to the State of California tax revenues that would otherwise be payable to the federal government. The California tax does not increase the total amount of the estate taxes and is not a critical factor in planning for the disposition of an estate.

#### **[5] Rate of Tax**

#### **NOTE**

**REGARDING ESTATE TAX REPEAL:** The estate tax has been repealed, effective for decedents dying after 2009 [*I.R.C. § 2210(a)*]. For a more detailed explanation of the effect of the repeal, *see* § 60.12A.

The federal estate and gift taxes share a unified rate schedule. These rates begin at 18 percent. The maximum tax rate is 55 percent for decedents dying before 2002, 50 percent for decedents dying in 2002, 49 percent for decedents dying in 2003, 48 percent for decedents dying in 2004, 47 percent for decedents dying in 2005, 46 percent for decedents dying in 2006, and 45 percent for decedents dying in 2007 through 2009 [*I.R.C. § 2001(c)(1), (2)*]. For decedents dying before 2002, the maximum rate applies to estates exceeding \$3 million [*I.R.C. § 2001(c)(1)*, before amendment by Pub. Law 107-16]. For decedents dying after 2001, the maximum rate applies to estates exceeding \$2.5 million [*I.R.C. § 2001(c)(1)*].

Due to the operation of the unified credit [*I.R.C. §§ 2010, 2505*; *see* [3][b], *above*], only amounts in excess of the "applicable exclusion amount" [*see I.R.C. § 2010(c)* (table of graduated amounts) and discussion in [4][b], *above*] are actually subject to estate tax. For example, if a decedent died in 2004 (when the applicable exclusion amount is \$1.5 million), the first \$500,000 actually subject to tax will be taxed at the rate of 45 percent, the rate applicable to transfers in excess of \$1,500,000 but not over \$2,000,000 [*see I.R.C. § 2001(c)*]. Thus, the very first dollar actually exposed to tax will be taxed at a 45 percent rate. The federal estate and gift tax tables are reproduced in § 60.206.

#### **Legal Topics:**

For related research and practice materials, *see* the following legal topics:

Tax Law Federal Estate & Gift Taxes Definition of Gross Estate Tax Law Federal Estate & Gift Taxes Powers of Appointment (IRC secs. 2041, 2514) General Overview Tax Law Federal Estate & Gift Taxes Taxable Property General Overview



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California Legal Forms--Transaction Guide

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DIVISION IV: WILLS AND TRUSTS  
 CHAPTER 60 ESTATE PLANNING  
 PART II. LEGAL BACKGROUND

*23-60 California Legal Forms--Transaction Guide § 60.14*

**§ 60.14 Gift Tax Considerations**

**[1] Tax**

The federal gift tax is imposed on taxable gifts made by a donor during a calendar year [*I.R.C. § 2501*]. The amount of the tax is determined by first computing the value of each gift made during the year [*I.R.C. § 2512*] and then determining the total amount of the taxable gifts made during the year [*I.R.C. § 2503*]. The value of a gift is generally equal to the price, on the date the gift is made, at which the property would change hands between a willing buyer and a willing seller, both having reasonable knowledge of the relevant facts [*Treas. Reg. § 25.2512-1*].

**[2] Annual Exclusion**

In determining the total amount of the taxable gifts for a calendar year, an exclusion (called the "annual exclusion") is available for gifts made to each donee by each donor during a calendar year [*I.R.C. § 2503(b)*]. The amount of the annual gift tax exclusion which is subject to annual adjustment for inflation is \$13,000 for calendar years 2009-2010 [ *Rev. Proc. 2009-50, 2009-45 IRB 624 (2010 Amount), Rev. Proc. 2008-66, 2008-45 IRB 1107 (2009 Amount)*]. For gifts made between 2006-2008, the annual gift tax exclusion was \$12,000 for calendar years 2006 through 2008 [ *Rev. Proc. 2006-53, 2006-48 IRB 996 (2007 amount); Rev. Proc. 2005-70, 2005-47 IRB 979 (2006 amount)*]. For gifts made between 2002 through 2005, the annual gift tax exclusion was \$11,000 for calendar years 2002 through 2005 [*I.R.C. § 2503(b); Rev. Proc. 2004-71, 2004-50 I.R.B. 970 (2005 exclusion amount); Rev. Proc. 2003-85 (2004 exclusion amount); Rev. Proc. 2002-70 (2003 exclusion amount); Rev. Proc. 2001-59 (2002 exclusion amount)*]. For gifts made before 2002, the annual gift tax exclusion was \$10,000 [ *Rev. Proc. 2001-13* ].

The annual exclusion is a valuable estate planning tool and plays an important part in gift planning because a regular program of annual gifts to multiple donees can avoid a substantial amount of transfer tax. The excluded amounts avoid not only the gift tax; they are also excluded in the computation of adjusted taxable gifts under the estate tax and thus do not push the taxable estate into higher brackets. As with all gifts, income and appreciation of the gift property are removed from the donor's estate.

The annual exclusion is available only for gifts of "present interests" in property [*see I.R.C. § 2503(b)(1)*]. A present interest is an unrestricted right to the immediate use, possession, or enjoyment of property or the income from property [

*Treas. Reg. § 25.2503-3(b)*. If the right to the use or possession of property is postponed (as in the case of a future interest), or if the right to the use or possession of property depends on the satisfaction of some condition or the occurrence of some event (as in the case of a contingent interest), the annual exclusion is not available [*see Hackl v. Comm'r (7th Cir. 2003) 335 F.3d 664* (gifts of membership interests in LLC were held to be gifts of future interests due to restrictions against transfer in LLC agreement and expectation that business would not generate income for years to come)].

When gifts are made by a husband and wife, an annual exclusion is available for each donor. If the gift is of community property, for example, only one half of the property will be deemed to have been given by each spouse. Thus, a husband and wife can give each donee up to \$26,000 worth of community property a year in calendar years 2009-2010 [ *Rev. Proc. 2009-50, 2009-45 IRB 624* (2010 Amount), *Rev. Proc. 2008-66, 2008-45 IRB* (2009 Amount)] for exclusion amounts in prior years, *see* [ *Rev. Proc. 2007-45* ( 2008 Amount), *Rev. Proc. 2006-53* ( 2007 Amount), *Rev. Proc. 2005-70* (2006 Amount), *Rev. Proc. 2004-71* (2005 exclusion amount); *Rev. Proc. 2003-85* (2004 exclusion amount); *Rev. Proc. 2002-70* (2003 exclusion amount); *Rev. Proc. 2001-59* (2002 exclusion amount)] without incurring gift tax liability, or more in subsequent years if the annual exclusion amount is adjusted upward for inflation as discussed above [*I.R.C. § 2503(b)*]. Split-gift treatment is also available for gifts of separate property made by a husband and wife [*I.R.C. § 2513*]. However, split-gift treatment is available only if both spouses are citizens of the United States and only if both spouses have consented to the gifts [*I.R.C. § 2513(a)(2), (b)*].

### **[3] Exclusion for Tuition and Medical Expenses**

A gift tax exclusion is also available for transfers made to pay for tuition and medical expenses [*I.R.C. § 2503(e)*]. This exclusion is unlimited in amount, but it requires that the transfer be made in behalf of an individual to a qualified educational organization for the education or training of the individual, or to any person who provides medical care for the individual [*I.R.C. § 2503(e)(2)*; *see I.R.C. § 170(b)(1)(A)(ii)* (qualified educational organization); *see also I.R.C. § 213(d)(1)* (definition of medical care)]. The exclusion is allowed without regard to the relationship between the donor and the donee [*Treas. Reg. § 25.2503-6(a)*]. Amounts the donor pays for medical care are not subject to the exclusion to the extent the donee receives reimbursement from an insurance company. If a donor previously paid qualifying medical care costs for a donee, a taxable gift occurs on the date the donee receives the insurance reimbursement [*Treas. Reg. § 25.2503-6(b)(3)*].

To qualify for the exclusion, the donor must make the payments directly to the educational institution or the medical care provider. Indirect payments, such as payment to the benefited individual, do not qualify [*Treas. Reg. § 25.2503-6(c)* (Example 4)]. A transfer to a trust established to pay tuition or medical costs also does not qualify for the exclusion [*Treas. Reg. § 25.2503-6(c)* (Example 2)].

The exclusion for medical care and tuition generally covers transfers that most donors are unlikely to perceive as "gifts." In many cases, the statutory exclusion will not be strictly necessary because the payment will be in satisfaction of the donor's legal obligation of support, and therefore not a gift within the meaning of the gift tax. However, the exclusion can serve valuable estate planning ends. For example, a grandparent might pay a grandchild's tuition, even though the grandchild's parents are still alive and can afford the tuition themselves. The transfer amounts to a gift from the grandparent to the parents, but avoids transfer tax without consuming any portion of the annual gift tax exclusion [*see I.R.C. § 2503(b)*].

### **[4] Deductions**

The Internal Revenue Code offers various deductions in determining the amount of the gift tax. The most important of these deductions are the charitable deduction [*I.R.C. § 2522*] and the marital deduction [*I.R.C. § 2523(a)*].

The charitable deduction will shelter transfers to a qualified charitable organization, providing the transfers meet certain

qualifications [see *I.R.C. § 2522*]. For a general discussion of the charitable deduction and its requirements, see Ch. 69, *Charitable Dispositions*.

The marital deduction generally will shelter any transfer from one spouse to another [*I.R.C. § 2523*]. However, the marital deduction is not available for the transfer of "terminable interests" [*I.R.C. § 2523(b); Treas. Reg. § 25.2523(b)-1*]. Further, the marital deduction generally is not available for transfers to spouses who are not citizens of the United States [*I.R.C. § 2523(i)(1)*]. There is, however, a larger annual exclusion for gifts to non-citizen spouses. The amount of the annual exclusion for non-citizen spouses is adjusted annually for inflation [*I.R.C. § 2503(b)*]. For gifts made in 2010, the amount of the exclusion is \$134,000 [Rev. Proc. 2009-50, 2009-45 IRB 624 (2010 Amount)]. For gifts made in 2009, the amount of the exclusion is \$133,000 [Rev. Proc. 2008-66, 2008-45 IRB 1107]. For gifts made in 2008, the amount of the exclusion is \$128,000 [ Rev. Proc. 2007-45 m 2007-45 IRB 976 ]. For gifts made in 2007, the amount of the exclusion is \$125,000 [ Rev. Proc. 2006-53, 2006-48 IRB 996 ]. For gifts made in 2006, the amount of the exclusion is \$120,000 [ Rev. Proc. 2005-70, 2005-47 IRB 979 ]. For gifts made in 2005, the amount of the exclusion is \$117,000 [*I.R.C. §§ 2503(b), 2523(i); Rev. Proc. 2004-71, 2004-50 I.R.B. 970*]. For gifts made in 2004, the amount of the exclusion is \$114,000 [ Rev. Proc. 2003-85 ]. For gifts made in 2003, the amount of the exclusion is \$112,000 [ Rev. Proc. 2002-70 ]. For gifts made in 2002, the amount of the exclusion is \$110,000 [ Rev. Proc. 2001-59 ]. For general discussion of the annual exclusion, see § 60.14[2]. For discussion of the marital deduction, see Ch. 71, *Marital Deduction Trust Provisions*.

#### **[5] Unified Credit**

The unified credit against estate taxes [see § 60.13[4][b]] also applies to the gift tax [*I.R.C. § 2505*]. The amount of the unified gift tax credit is the amount that will exclude the "applicable exclusion amount" [*I.R.C. §§ 2010(c), 2505(a)*]. The gift tax unified credit was the same as the estate tax unified credit through 2003, but after 2003, the amount of the gift tax credit remains \$1 million, while the estate tax unified credit increases as discussed in § 60.13[4][b] [*I.R.C. §§ 2010(c), 2505(a)*]. In addition, the gift tax unified credit continues after 2009, because the gift tax continues to be imposed after that time. In contrast, subject to a sunset provision, the estate tax is repealed for decedents dying after 2009, so there is no longer an estate tax unified credit after that time [*I.R.C. §§ 2505(a)(1), 2210(a); see Pub. Law 107-16, § 901; but see § 60.112A regarding uncertainty over whether and in what form the estate tax repeal will actually take effect*].

If, in any calendar year, a donor makes a taxable gift to a donee that exceeds the annual exclusion amount [see *I.R.C. § 2503(b)* (base annual exclusion amount of \$10,000, with upward adjustments for inflation for gifts made in calendar years after 1998) and discussion in [2], *above*], a gift tax return must be filed, and a part of the unified credit applied against the gift tax. Frequent gifts in excess of the annual exclusion amount will thus significantly reduce the amount of the unified credit that is available on the donor's death.

#### **[6] Rate of Tax**

The gift and estate taxes share the same tax rate schedule through 2009 [see *I.R.C. §§ 2001(c), 2502(a); see also § 60.13[5]*]. The parallel rate schedules and unified credits [see [5], *above; see also § 60.13[4][b]*] effectively constitute a single rate schedule applied to the cumulative taxable transfers (both inter vivos and testamentary) of a donor. Although the federal estate tax is repealed for decedents dying after 2009 (subject to a sunset provision) [*I.R.C. §§ 2505(a)(1), 2210(a); see Pub. Law 107-16, § 901; but see § 60.112A regarding uncertainty over whether and in what form the estate tax repeal will actually take effect*], the gift tax continues to be imposed for gifts made after 2009, at rates ranging from 18 percent (for taxable gifts in excess of the annual exclusion of up to \$10,000) to 35 percent (for taxable gifts over \$500,000) [*I.R.C. § 2502(a)(2)*].

The federal estate and gift tax tables are reproduced in § 60.206.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Tax LawFederal Estate & Gift TaxesGifts (IRC secs. 2035, 2501-2524)General OverviewTax LawFederal Estate & Gift TaxesGifts (IRC secs. 2035, 2501-2524)Annual ExclusionsTax LawFederal Estate & Gift TaxesGifts (IRC secs. 2035, 2501-2524)ElementsGeneral OverviewTax LawFederal Estate & Gift TaxesGifts (IRC secs. 2035, 2501-2524)Imposition of TaxesTax LawFederal Estate & Gift TaxesGifts (IRC secs. 2035, 2501-2524)Scope



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DIVISION IV: WILLS AND TRUSTS  
CHAPTER 60 ESTATE PLANNING  
PART II. LEGAL BACKGROUND

*23-60 California Legal Forms--Transaction Guide § 60.15*

**§ 60.15 Income Tax Considerations**

**[1] Income Tax Liability for Property and Income**

Gross income does not include the value of property acquired by gift, bequest, devise, or inheritance [*I.R.C. § 102(a)*]. Thus a donee, beneficiary, or devisee need not report the property received in an inter vivos gift, or by devise or transfer from a trust on the death of the settlor, as income when received. However, if a gift is made specifically of the income from property, the income is taxable to the recipient when received [*I.R.C. § 102(b)(2)*]. This could occur, for example, if a settlor creates a trust and provides that the income from the trust will be received by the settlor's son or daughter for a period of 10 years. During such time as the son or daughter actually receives the income, the income is taxable to the son or daughter.

Any income from property transferred by gift, bequest, devise, or inheritance will be taxable to the recipient after the transfer has been completed. Assume, for example, that Mr. Smith gives his son 50 acres of agricultural property worth \$100,000. Assume further that the property is leased for a net rental of \$8,000 per year. The value of the gift property (\$100,000) is not taxable to the son, but the annual rent of \$8,000 is taxable [*I.R.C. § 102*].

Gifts may be a useful way of transferring income from the donor to the donee. If the donor wishes to avoid income tax liability on the income produced by the gift property, a gift will accomplish that purpose. If, however, the donee would prefer not to have the income, a gift of income-producing property might be unsuitable.

**[2] Gain on Sale of Property**

The potential gain to be realized by the sale of property may be an important factor in determining whether it should be transferred by inter vivos gift or upon death.

The income tax basis of property received by inter vivos gift is generally the same in the hands of the donee as in the hands of the donor [*I.R.C. § 1015(a)*]. However, if the fair market value of the property at the time of the gift is less than its basis, the donee must use the fair market value for purposes of determining loss (but not gain) on a subsequent sale [*I.R.C. § 1015(a)*]. In the case of gifts made after 1976, the donee's basis in gift property is increased by any gift tax paid by the donor on the appreciated element of the property [*I.R.C. § 1015(d)(6)*].

For decedents dying before 2010, income tax basis of property acquired from a decedent is generally its fair market value at the date of the decedent's death (or six months after the date of death, if the alternate valuation date is elected) [I.R.C. § 1014(a), (f); see I.R.C. § 2032 (alternate valuation)]. This can result in valuable income tax savings if the property has appreciated substantially since it was acquired by the decedent.

Retaining property for inclusion in an estate may also be beneficial for decedents dying after 2009. The estate tax is repealed for decedents dying after 2009, but a sunset provision of the repealing legislation re-imposes the estate tax at its pre-2001 rates after 2010 unless the repeal is re-enacted [I.R.C. § 2210(a); Pub. Law 107-16, § 901]. In this regard, however, many commentators believe legislative changes will be made regarding the repeal before 2010 [see § 60.112A regarding uncertainty over whether and in what form repeal will actually take effect]. Therefore, planning to hold onto property to avoid the estate tax is risky. If the estate tax is re-imposed after 2010, it is likely a basis step-up provision similar to current I.R.C. § 1014 would be included, so the same considerations as under current law would apply. For post-2009 periods for which the estate tax is repealed, a modified carryover basis regime generally applies for property received from those decedents, under which recipients of property transferred at the decedent's death receive a basis equal to the lesser of the adjusted basis of the decedent in the property or the fair market value of the property on the date of the decedent's death [I.R.C. § 1022(a)]. Nevertheless, a step up in basis of up to \$1.3 million (\$4.3 million for certain property transferred to a surviving spouse) is allowed for each decedent's estate [I.R.C. § 1022(b)(1), (2)(B), (c)(2)(B)]. This limited step up in basis may also favor holding onto assets, because gain on the sale of the property can be sheltered to that extent [see I.R.C. § 1022].

When planning an estate, it is advisable to consider the basis of the transfer property as well as its fair market value. All other things being equal, it may be preferable to transfer property that has appreciated substantially on the transferor's death rather than by inter vivos gift, so as to obtain the benefits of a new date-of-death value basis [see I.R.C. § 1014(a)]. This is especially true with the scheduled repeal of the estate tax [see I.R.C. § 2210(a)].

### **[3] Income Taxation of Trusts and Estates**

#### **[a] General Principles**

The income taxation of trusts and estates is governed by Subchapter J of the Internal Revenue Code [I.R.C. §§ 641-692]. The taxable income of an estate or trust is basically computed in the same manner as that of an individual. The tax is paid by the personal representative or trustee [I.R.C. § 641(b)]. Subchapter J divides trusts into two broad categories--grantor trusts and nongrantor trusts. These categories are subject to entirely different tax treatment.

#### **[b] Grantor Trusts**

Trusts in which the settlor has retained certain powers or interests [see I.R.C. §§ 672-677] are treated for federal income tax purposes as though no trust had been created at all. These trusts are known as "grantor trusts." The income of grantor trusts is taxed directly to the settlor, the trust is disregarded as a taxable entity, and no separate return is usually required [I.R.C. § 671].

The grantor trust rules treat the settlor as owner of the trust property if he or she does any of the following:

- Retains more than an insignificant reversionary interest [I.R.C. § 673];
- Retains certain powers to control the beneficial enjoyment of the trust property [see I.R.C. § 674];
- Retains certain administrative powers [see I.R.C. § 675];

- Holds a power to revoke [*I.R.C.* § 676]; or
- Retains a power to appoint income to himself or herself, or to his or her spouse [*I.R.C.* § 678].

Under these rules, the typical revocable inter vivos trust is categorized as a grantor trust during the lifetime of the settlor (or, in the case of a two-settlor trust, at least while both settlors are alive), and its income is taxable to the settlor during that time.

In some cases, a person other than the settlor is treated as the direct owner of the property for tax purposes and is taxed directly on the trust income [*see I.R.C.* § 678].

### **[c] Estates and Nongrantor Trusts**

Trusts that do not come within the grantor trust rules are known as nongrantor trusts. These trusts, as well as estates, are treated as independent taxable entities in the first instance [*see I.R.C.* § 641 (imposition of tax)]. However, they are allowed a deduction for certain amounts distributed to beneficiaries [*see I.R.C.* §§ 651, 661], who in turn are taxable on these distributions [*see I.R.C.* §§ 652, 662].

Only irrevocable trusts qualify for non-grantor trust status [*see I.R.C.* § 676]. However, under the criteria discussed in [b], *above*, irrevocability does not mean that a trust will automatically avoid classification as a grantor trust.

### **[d] Importance of Distinction in Trust Planning**

The distinction between grantor and nongrantor trusts is critical in trust planning. If a trust is a grantor trust, the income must be paid by the settlor (or other party treated like the settlor) out of his or her own funds. Treatment as a grantor trust for federal tax purposes does not affect property rights under state law, and therefore the grantor often may have no access to the trust property to pay the taxes. In contrast, the beneficiaries of a grantor trust receive any trust property free of income tax.

Grantor trust status will sometimes be unavoidable, but the estate planner must always be aware of who will bear the income tax burden.

### **[e] Tax Rates**

The tax rates applicable to trusts and estates differ significantly from those that apply to individuals. Like the individual tax rates, the rates applicable to estates and trusts are determined by reference to a series of income brackets, each of which is taxed at a progressively higher rate. The maximum tax rate for trusts and estates, as for individuals, is 35 percent after 2002 [*see I.R.C.* § 1(a)- (d) (individual rates), (e)(rates applicable to trusts and estates), (i)(2)(reduction in rates)]. However, the tax brackets for trusts and estates are substantially compressed, so that the rates take effect at much lower dollar amounts for trusts and estates than for individuals. For example, the maximum tax rate for individuals applies to taxable income in excess of \$250,000 (or \$125,000 in the case of married individuals filing separate returns) [*see I.R.C.* § 1(a)- (d)]. In contrast, the maximum tax rate for trust and estates applies to taxable income in excess of only \$9,550 [*see I.R.C.* § 1(e)]. Thus, trusts and estates pay significantly more tax than individuals on comparable amounts of income.

For this reason, it is usually more advantageous from a tax perspective for a trust to distribute income to a beneficiary, take a deduction for the distribution [*see I.R.C.* §§ 651, 661], and have the beneficiary pay the income tax on the distributed income (unless the beneficiary is already in or near the maximum income tax bracket). In other words, the compressed income tax rates operate to discourage estate planning arrangements that require accumulations of income. Even under plans that provide for discretionary payments of income, the trustee may have to choose between distributing

income to a beneficiary (such as a minor) or accumulating it and having it incur a significant amount of additional income tax.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Tax Law Federal Income Tax Computation Sales & Exchanges Basis (IRC secs. 1011-1017, 1019, 1021, 1023) General Overview  
Tax Law Federal Income Tax Computation Sales & Exchanges Basis (IRC secs. 1011-1017, 1019, 1021, 1023)  
Gifts & Transfers in Trust Tax Law Federal Income Tax Computation Sales & Exchanges Basis (IRC secs. 1011-1017, 1019, 1021, 1023)  
Property From Decedents Tax Law Federal Taxpayer Groups Income Taxation of Estates, Trusts & Beneficiaries General Overview  
Tax Law Federal Taxpayer Groups Individuals Exclusions From Gross Income (IRC secs. 101-112, 115, 117-123, 125-139) Gifts & Inheritances



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DIVISION IV: WILLS AND TRUSTS  
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*23-60 California Legal Forms--Transaction Guide § 60.16*

## **§ 60.16 Generation-Skipping Transfer Tax Considerations**

### **[1] Tax**

#### **NOTE**

REGARDING GENERATION-SKIPPING TRANSFER TAX REPEAL: The generation-skipping transfer tax (GSTT) has been repealed, effective for generation-skipping transfers after 2009 [*I.R.C.* § 2664]. Similarly, the estate tax has been repealed, effective for decedents dying after 2009 [*I.R.C.* § 2210(a)]. Until then, both taxes remain in effect.

However, under a sunset provision of the 2001 legislation that enacted the repeals, all provisions of the legislation--including the repeal of the GSTT and the estate tax--do not apply to generation-skipping transfers, or to estates of decedents dying, after December 31, 2010 [Pub. Law 107-16, § 901]. Thus, unless the provisions repealing the GSTT and estate tax are re-enacted before the end of 2010, the GSTT law in effect before enactment of the 2001 legislation will apply once again after 2010 [*see* Pub. Law 107-16, § 901; *see I.R.C.* §§ 2601-2663, before amendment by Pub. Law 107-16].

Many commentators believe that significant changes will be made to the estate tax law, and probably the GSTT, before 2010. For now, planning around the GSTT after 2001 involves to some degree guessing how long a client will live. For transfers made in 2010, under the law as currently constituted, no GSTT will be due [*I.R.C.* § 2264]. For clients who are likely to live past 2010 and make taxable transfers after that time, the same GSTT considerations apply as under the law that was in effect before the 2001 legislation because, in the absence of further Congressional action, the law will be the same [Pub. Law 107-16, § 901].

For additional discussion of the estate tax repeal, see § 60.112A.

The generation-skipping transfer tax (GSTT) is the third component of the federal government's tripartite transfer tax system. Before 1976, transfers of wealth were subject only to gift and estate taxes. In that year, Congress enacted the first GSTT. However, the 1976 version of the tax proved to be unworkable, and so an entirely new GSTT was enacted

in 1986. The 1976 tax was repealed retroactively, and the 1986 tax became effective on October 26, 1986 [Pub. L. No. 99-514, § 1433(a)].

The GSTT is based on the premise that transfers of wealth should be subject to taxation at every generation, regardless of whether or not the transfers are subject to taxation under familiar principles of gift and estate tax law. Accordingly, the GSTT is designed to subject property to taxation when it is transferred to a person who is two or more generations younger than the transferor. When a transfer of this kind is made, the transferee is described as a "skip person" [I.R.C. § 2613(a)]. Whether a person is deemed a skip person for GSTT purposes depends on the person's generation assignment as specified in the GSTT statutes [see I.R.C. § 2651]. Skip persons are typically grandchildren, although persons who are not related to the transferor may also qualify as skip persons if they are more than 37½ years younger than the transferor [I.R.C. § 2651(d)(2); see Treas. Reg. § 26.2618-1].

The GSTT is imposed at a flat rate, which is the maximum estate or gift tax rate in effect at the time of the transfer [I.R.C. § 2641(a)(1); see Treas. Reg. § 26.2641-1]. Thus, generation skipping transfers are subject to a 55 percent tax rate for transfers before 2002, 50 percent for transfers 2002, 49 percent for transfers in 2003, 48 percent for transfers in 2004, 47 percent for transfers in 2005, 46 percent for transfers in 2006, and 45 percent for transfers in 2007 through 2009 [I.R.C. §§ 2001(c)(1), (2), 2641]. This rate, by itself, would provide a substantial disincentive to all generation-skipping transfers. However, the statute also provides an exemption (called the "GST exemption") [see I.R.C. § 2631(a), (c) and discussion in [3], below]. The actual rate of the tax on a particular transfer varies depending on the "inclusion ratio" applicable to the transfer [I.R.C. § 2641(a)(2)]. The inclusion ratio is determined by dividing the value of the property subject to the transfer into the amount of the GST exemption allocated to the transfer [I.R.C. § 2642(a); see Treas. Reg. § 26.2642-1]. For discussion, see [4], below.

## **[2] Transfers Subject to the Tax**

### **[a] Taxable Distributions**

Three types of transfers are subject to the GSTT. These are defined in the Internal Revenue Code as "taxable distributions," "taxable terminations," and "direct skips."

A "taxable distribution" is a distribution from a trust to a skip person that does not qualify as a "taxable termination" or a "direct skip" [I.R.C. § 2612(b)]. A taxable distribution may be of principal or income. Taxable distributions typically occur when money or property is distributed from a trust to the settlor's grandchildren. When a transfer is subject to GSTT as a taxable distribution, the tax must be paid by the transferee [I.R.C. § 2603(a)(1)].

### **[b] Taxable Terminations**

Generally, a "taxable termination" is the termination of a beneficiary's interest in trust property as a result of death, lapse of time, or some other reason. However, there is no taxable termination if a non-skip person has an interest in the trust immediately after the termination, or if distributions cannot be made to non-skip persons after the termination [I.R.C. § 2612(a)]. Taxable terminations typically occur when the trust interest of a non-skip person terminates and the trust either comes to an end or all of the interests in the trust are held by skip persons. If, for example, a settlor creates a trust for the benefit of his or her children for their lives, with remainder to such of the settlor's grandchildren as are living when the last child dies, a taxable termination will occur when the last child dies. When GSTT is payable on a taxable termination, the tax must be paid by the trustee [I.R.C. § 2603(a)(2)].

### **[c] Direct Skips**

A "direct skip" is a transfer to any skip person that is also subject to gift or estate tax [I.R.C. §§ 2612(c)(1), 2613(a)]. Assume, for example, that a grandparent gives his or her grandchild \$50,000. Assume further that in the year the gift is made the annual gift tax exclusion amount is \$11,000 [see I.R.C. § 2503(b) and discussion in § 60.14[2]]. Since

\$11,000 passes free of gift tax under the annual exclusion, only \$39,000 is subject to tax. Since the grandchild is a skip person, the transfer of \$39,000 is a direct skip and thus subject to the GSTT.

Since a trust may also qualify as a skip person if all of the beneficiaries are skip persons [*see I.R.C. § 2613(a)(2)(A)*], a direct skip may also occur when money is transferred to a trust. Assume, in the example above, that a grandparent gives \$50,000 to a trust created for the benefit of his or her grandchildren. The trust provides that the trust property will be held for the benefit of the grandchildren until the youngest grandchildren reaches the age of 21, at which time all of the trust principal and accumulated trust income will be distributed to the grandchildren. The transfer of \$39,000 qualifies as a direct skip.

#### **[d] Exception for Transfers to Persons with Deceased Parents**

Transfers to any individual who meets both of the following requirements are exempted from the GSTT [*I.R.C. § 2651(e)*] (applicable to terminations, distributions, and transfers occurring after December 31, 1997):

- The individual is a descendant of a parent of the transferor (or the transferors spouse or former spouse; and
- The individual's parent who is a lineal descendant of the parent of the transferor (or the transferor's spouse or former spouse) is dead when the transfer is made.

If the transferee meets both of these requirements, the transferee is treated as if he or she were a member of a generation only one generation lower than that of the transferor [*I.R.C. § 2651(e)*] (applicable to terminations, distributions, and transfers occurring after December 31, 1997), with the result that the transfer is not subject to the GSTT. However, a transfer to any person who is not a lineal descendant of the transferor (or the transferors spouse or former spouse) will still be treated as a generation-skipping transfer if, at the time of the transfer, the transferor has any living lineal descendant [*I.R.C. § 2651(e)(2)*].

This exception will remove a transfer to grandchildren from the operation of the GSTT when the grandchildren's parents are deceased.

#### **EXAMPLE:**

Mindy Green transfers property to a charitable lead unitrust for a 10-year term, with the remainder going to her granddaughter, Jessica White. Jessica's father (Mindy's son) is deceased at the time the trust was created and the transfer to the trust was subject to the gift tax. The termination of the 10-year term is not a taxable termination subject to the GSTT [*see I.R.C. § 2651(e)*].

This exception will also remove transfers to qualifying collateral heirs of the transferor (such as nieces, nephews, grandnieces, and grandnephews) from the operation of the GSTT when their parents are deceased [*see I.R.C. § 2651(e)*].

#### **EXAMPLE:**

Jack Gray, who has no living lineal descendants, transfers property to his grandniece Betty Black. Betty's father (Jack's nephew) is deceased at the time of the transfer. The transfer is not subject to the GSTT [*see I.R.C. § 2651(e)*].

For terminations, distributions, and transfers occurring on or after July 18, 2005, the following rules apply [*Treas. Reg. § 26.2651-3*] (for transfers occurring after December 31, 1997 and before July 18, 2005, taxpayers may rely on any reasonable interpretation of *I.R.C. § 2651(e)*):

- If an individual's parent, who is a lineal descendant of the parent of the transferor (or the transferor's spouse or former spouse), is deceased at the time of the transfer from which the individual's interest is established or derived, the individual is treated as if he or she were a member of the generation that is one generation below the lower of the transferor's generation or the generation assignment of the individual's youngest living lineal ancestor who is also a descendant of the parent of the transferor (or the transferor's spouse or former spouse [*Treas. Reg. § 26.2651-1(a)(1)*]).

- If an individual's generation assignment is so adjusted with respect to a transfer, a corresponding adjustment with respect to that transfer is also made to the generation assignment of each spouse or former spouse of that individual, each descendant of that individual, and each spouse or former spouse of each descendant [*Treas. Reg. § 26.2651-1(a)(2)(i)*].

- An individual's interest is established or derived when the transferor is subject to estate or gift tax. If the transferor is subject to transfer tax on the property on more than one occasion, then the individual's interest is considered established or derived on the earliest of those occasions [*Treas. Reg. § 26.2651-1(a)(3)*].

- The interest of a remainder beneficiary of a trust for which a QTIP election has been made will be deemed to have been established or derived, to the extent of the QTIP election, on the date as of which the value of the trust corpus is first subject to tax under *I.R.C. § 2519* or *I.R.C. § 2044*. This rule does not apply to a trust to the extent that a reverse QTIP election has been made for the trust because, to the extent of the reverse QTIP election, the spouse who established the trust remains the transferor of the trust for GST tax purposes [*Treas. Reg. § 26.2651-1(a)(3)*].

- The above rules do not apply in the case of a transfer to any individual who is not a lineal descendant of the transferor (or the transferor's spouse or former spouse) if the transferor has any living lineal descendant at the time of the transfer [*Treas. Reg. § 26.2651-1(b)*].

- In general, an individual who would be assigned to more than one generation is assigned to the youngest of the generations to which he or she would be assigned [*Treas. Reg. § 26.2651-2(a)*].

- An adopted individual is treated as a member of the generation that is one generation below the adoptive parent. The adopted individual must be legally adopted by the adoptive parent, be a descendant of a parent of the adoptive parent (or the spouse or former spouse of the adoptive parent, be under 18 years of age at the time of the adoption, and not be adopted primarily for the purpose of avoiding the GST tax [*Treas. Reg. § 26.2651-2(b)*].

- If an adopted individual's generation assignment is so adjusted with respect to a transfer, a corresponding adjustment with respect to that transfer is also made to the generation assignment of each spouse or former spouse of that individual, each descendant of that individual, and each spouse or former spouse of each descendant [*Treas. Reg. § 26.2651-2(c)(1)*].

### **[3] GST Exemption**

#### **[a] In General**

Each transferor is entitled to an exemption (referred to as the "GST exemption") for purposes of determining the GSTT inclusion ratio. The basic exemption amount depends on the year of the transfer. The basic exemption amount through 2003 was \$1,000,000 [*I.R.C. § 2631(a)*, before amendment by Pub. Law 107-16], adjusted annually for inflation [*see*

*I.R.C. § 2631(c)(1)* (computation of adjustment)]. For 2002, the adjusted amount was \$1,100,000 [ *Rev. Proc. 2001-59*, § 3.20, *2001-52 I.R.B. 623* ]. The exemption amount for 2003 was \$1,120,000 [ *Rev. Proc. 2002-70*, *2002-46 I.R.B. 845* ]. For generation-skipping transfers after 2003, the exemption amount is determined by the estate tax exclusion amount for the calendar year. [*I.R.C. § 2631(c)*]. For 2004 and 2005, the amount is \$1.5 million; for 2006 through 2008, the amount is \$2 million; for 2009, the amount is \$3.5 million [*I.R.C. §§ 2010(c), 2631(a), (c)*].

The purpose of the GST exemption is to limit the impact of the GSTT to large transfers of wealth. When a husband and wife make generation-skipping transfers, each is entitled to a separate exemption. Thus married persons may transfer up to twice the amount of the GST exemption without subjecting any of the transfer to the GSTT [*see I.R.C. § 2631(a)*].

### **[b] Allocation of GST Exemption**

Special rules apply in allocating the GST exemption [*I.R.C. § 2632*].

An individual (or that individual's executor) may allocate GST exemption to any property transferred by that individual [*I.R.C. § 2631(a)*]. Once made, an allocation is irrevocable [*I.R.C. § 2631(b)*]. All later appreciation attributable to property to which the GST exemption has been allocated is exempt from the GST tax [*see H.R. Rep. No. 99-426*, 99th Cong, 2nd Sess. 826 (1985)]. If an individual makes a direct skip while living, any unused GST exemption is automatically allocated to a direct skip to the extent necessary to make the inclusion ratio for that property equal to zero [*I.R.C. § 2632(b)(1)*]. An individual can elect out of the automatic allocation for lifetime direct skips [*I.R.C. § 2632(b)(3)*].

If any individual makes an indirect skip while living, then any unused portion of that individual's GST exemption is allocated to the property transferred to the extent necessary to produce the lowest possible inclusion ratio [*I.R.C. § 2632(c)(1)*], effective for transfers subject to estate or gift tax made after December 31, 2000, and to estate tax inclusion periods ending after December 31, 2000]. An indirect skip is any transfer of property (that is not a direct skip) subject to the gift tax that is made to a generation-skipping transfer trust. A generation-skipping transfer trust is a trust that could have a generation-skipping transfer with respect to the transferor (e.g., a taxable termination or taxable distribution), unless [*I.R.C. § 2632(c)(3)(B)*]:

- The trust instrument provides that more than 25 percent of the trust corpus must be distributed to or may be withdrawn by one or more individuals who are non-skip persons (1) before the date that the individual attains age 46; (2) on or before one or more dates specified in the trust instrument that will occur before the date that the individual attains age 46; or (3) upon the occurrence of an event that, in accordance with regulations prescribed by the Treasury Secretary, may reasonably be expected to occur before the date that the individual attains age 46;
- The trust instrument provides that more than 25 percent of the trust corpus must be distributed to or may be withdrawn by one or more individuals who are non-skip persons and who are living on the date of death of another person identified in the instrument (by name or by class) who is more than 10 years older than those individuals;
- The trust instrument provides that if one or more individuals who are non-skip persons die on or before a date or event described in one of the above two paragraphs, more than 25 percent of the trust corpus either must be distributed to the estate or estates of one or more of those individuals or is subject to a general power of appointment exercisable by one or more of those individuals;
- The trust is a trust any portion of which would be included in the gross estate of a non-skip person (other than the transferor) if that person died immediately after the transfer;

- The trust is a charitable lead annuity trust or a charitable remainder annuity trust or a charitable unitrust; or
- The trust is a trust with respect to which a deduction was allowed under *I.R.C. § 2522* for the amount of an interest in the form of the right to receive annual payments of a fixed percentage of the net fair market value of the trust property (determined yearly) and which is required to pay principal to a non-skip person if that person is alive when the yearly payments for which the deduction was allowed terminate.

An individual can elect not to have the automatic allocation rules apply to an indirect skip, and any such election will be deemed timely if filed on a timely filed gift tax return for the calendar year in which the transfer was made or deemed to have been made or on such later date or dates as may be prescribed by the Treasury Secretary. An individual can elect not to have the automatic allocation rules apply to any or all transfers made to a particular trust and can elect to treat any trust as a generation-skipping transfer trust with respect to any or all transfers made to the trust. The election can be made on a timely filed gift tax return for the calendar year for which the election is to become effective [*I.R.C. § 2632(c)(5); Treas. Reg. § 26.2632-1(b)(2)(iii)(B),(C), (4)(iv)* (manner and time for making election out, and example of language that may be used in statement required to elect out)].

An election not to have the automatic allocation rules apply may be made with respect to the following [*Treas. Reg. § 26.2632-1(b)(2)(iii)(A)*]:

- One or more prior year transfers made to a specified trust or trusts.
- One or more (or all) current year transfers made to a specified trust or trusts.
- One or more (or all) future transfers made to a specified trust or trusts.
- All future transfers made to all trusts whether or not in existence at the time the election out is made.
- Any combination of the above.

An election out does not affect the automatic allocation of the GST exemption to any transfer that is not covered by the election out statement. An election out with respect to future transfers remains in effect unless and until terminated, and once made, a transferor need not file a Form 709 in future years solely to prevent the automatic allocation of the GST exemption to any future transfer covered by the election out [*Treas. Reg. § 26.2632-1(b)(2)(iii)(D)*].

Requests for an extension of time to allocate a GST exemption are governed by *Treas. Reg. § 301.9100-3 [I.R.C. § 2642(g)(1)(B); see Letter Rul. 200439001* (60-day extension to allocate exemption was granted to donor who intended that sufficient GSTT exemption be allocated to gifts to create an inclusion ratio of zero, but accounting firm donor relied on to prepare and file federal gift tax returns failed to make requisite allocation); *Letter Rul. 200439036* (60-day extension of time was granted to estate to sever marital trust into exempt and nonexempt trusts, and to make reverse QTIP election for exempt marital trust, when estate had retained attorney to prepare federal estate tax return and to take these actions; estate acted reasonably and in good faith in relying on qualified tax professional); *Letter Rul. 200322014* (60-day extension to allocate exemption granted to grantor who reasonably relied on qualified tax professional who failed to make allocation); *Letter Rul. 200324041* (60-day extension to allocate exemption to lifetime transfers made to irrevocable trust granted to grantor and his wife, when accounting firm they retained to prepare tax returns related to trust failed to advise them to allocate their GST exemption to these transfers)]. A simplified alternate method for allocating the GST exemption is provided by *Rev. Proc. 2004-46, 2004-31 I.R.B. 142*.

The GST exemption can be allocated retroactively when there is an unnatural order of death. If a lineal descendant of

the transferor predeceases the transferor, then the transferor can allocate any unused GST exemption to any previous transfer or transfers to the trust on a chronological basis. A transferor may retroactively allocate the GST exemption to a trust if a beneficiary [I.R.C. § 2632(d)(1), effective for deaths of non-skip persons occurring after December 31, 2000]:

- Is a non-skip person;
- Is a lineal descendant of the transferor's grandparent or a grandparent of the transferor's spouse;
- Is a generation younger than the generation of the transferor; and
- Dies before the transferor.

The exemption is allocated under this rule retroactively, and the applicable fraction and inclusion ratio would be determined based on the value of the property on the date that the property was transferred to the trust [I.R.C. § 2632(d)(2)].

Any portion of a GST exemption allocation that is not made before the time for filing an individual's estate tax return (determined with regard to extensions) [see I.R.C. § 2632(a)(1)] is deemed allocated first to property that is the subject of a direct skip at the individual's death, and second to trusts with respect to which the individual is the transferor and from which a taxable distribution or taxable termination occurs at or after the individual's death [I.R.C. § 2632(e)(1)].

Substantial compliance with the statutory and regulatory requirements for allocating the GST exemption will suffice to establish that the exemption was allocated to a particular transfer or a particular trust. If a taxpayer demonstrates substantial compliance, then so much of the transferor's unused GST exemption will be allocated to the extent it produces the lowest possible inclusion ratio. In determining whether there has been substantial compliance, all relevant circumstances will be considered, including evidence of intent contained in the trust instrument or instrument of transfer and such other factors as the Treasury Secretary deems appropriate [I.R.C. § 2642(g)(2), effective for transfers subject to estate or gift tax made after December 31, 2000].

The GST exemption is the principal tool available to estate planners in planning for the GSTT. Proper allocation of the exemption to generation-skipping transfers will minimize the impact of the tax. Improper allocation may result in the loss of all or a portion of the exemption.

#### **[4] Applicable Fraction, Inclusion Ratio, and Applicable Tax Rate**

The "inclusion ratio" of a GSTT is determined by subtracting the "applicable fraction" from the number one [I.R.C. § 2642(a)(1)]. The "applicable fraction" is determined by dividing (1) the amount of the GST exemption [see I.R.C. § 2631(a), (c) and discussion in [3], above] that is being allocated to the trust or transfer property by (2) the value of the property transferred (less the sum of any federal or state estate or death taxes actually collected from the trust attributable to the transferred property and any federal gift or estate tax charitable deduction allowed with respect to the transferred property) [I.R.C. § 2642(a)(2)]. If the transfer is a direct skip, the inclusion ratio is determined for that direct skip [I.R.C. § 2642(a)(1)(B)]. If the transfer is a taxable termination or taxable distribution, the inclusion ratio is determined for the trust from which the transfer is made [I.R.C. § 2642(a)(1)(A)]. Thus, the inclusion ratio is generally a number more than zero but less than one.

A trustee can establish inclusion ratios of zero and one by severing a trust that is subject to the GSTT in a "qualified severance." If a qualified severance is made, the trusts resulting from the severance are treated as separate trusts for purposes of the GSTT [I.R.C. § 2642(a)(3)(A), effective for severances occurring after December 31, 2000]. The severance may be made at any time [I.R.C. § 2642(a)(3)(C)]. A qualified severance is a division of a single trust and the creation of two or more trusts if the following requirements are met [I.R.C. § 2642(a)(3)(B)(I)]:

- The single trust was divided on a fractional basis; and
- The terms of the new trusts, in the aggregate, provide for the same succession of interests of beneficiaries as are provided in the original trust.

If a trust has an inclusion ratio of greater than zero and less than one, a severance is a qualified severance only if the single trust is divided into two trusts, one of which receives a fractional share of the total value of all trust assets equal to the applicable fraction of the single trust immediately before the severance. In that case, the trust receiving the fractional share will have an inclusion ratio of zero and the other trust will have an inclusion ratio of one [*I.R.C. § 2642(a)(3)(B)(ii)*].

The applicable tax rate is then determined by multiplying the inclusion ratio by the maximum estate tax rate in effect at the time of the transfer [*I.R.C. § 2641(a)*].

**EXAMPLE:**

To illustrate how the inclusion ratio and the applicable fraction are computed, assume that a grandmother gives her grandson \$510,000 in cash in 1998. Assume further that the GST exemption applicable to the gift is \$1 million [ *see I.R.C. § 2631(a), (c)* and discussion in [3], *above*] and that the annual gift tax exclusion amount in the year of the gift is \$10,000 [*see I.R.C. § 2503(b)* and discussion in § 60.14[2]]. (Note that the amounts used here do not reflect the increase in the GST exemption in post-2003 years or inflation adjustments that have increased the actual amount of the annual gift tax exclusion; the round numbers are retained here as they make the calculations in this illustration easier to follow.) Finally, assume that the grandmother allocates \$200,000 of her GST exemption to the gift. Since the first \$10,000 of the gift is excluded from taxation under the annual exclusion [*I.R.C. § 2503(b)*], the inclusion ratio for the \$10,000 is zero [*I.R.C. § 2642(c)(1)*]. As to the remaining \$500,000, the applicable fraction is two-fifths (the \$200,000 of exemption allocated to the property divided by the \$500,000 value of the property), and the inclusion ratio is three-fifths (one less the applicable fraction, which is two-fifths). Assume the maximum estate tax rate in the year of the gift is 55 percent. Since generation-skipping transfers are taxed at the maximum estate tax rate [*see I.R.C. §§ 2001(c), 2641* (rate schedule)], the applicable tax rate for GSTT purposes would be 33 percent.

Property with an inclusion ratio of zero will effectively be completely exempt from generation-skipping transfer tax [*see I.R.C. §§ 2641, 2602*]. Property with an inclusion ratio of one will be fully subject to the tax. Transfers involving inclusion ratios of other than zero or one are rather cumbersome to deal with, and estate planners try to avoid them if possible. This is particularly true in the case of trusts, when it is possible that future transfers will necessitate recalculation of the inclusion ratio. The trust severance provisions, discussed above, make the severance of trusts relatively straightforward [*see I.R.C. § 2642(a)(3)*]. Before their enactment, estate planners commonly drafted sometimes complex trust provisions that provided fiduciaries with discretion to split trusts in a manner that will assure the creation of trusts with inclusion ratios of zero or one.

Proposed treasury regulations explain the proper procedure, timing, and required reporting of a qualified severance, and the permitted methods of funding the resulting trusts. Each new trust must receive assets with a value equal to a fraction or percentage of the total value of the trusts assets. For example, the severance of a single trust into one trust funded with 40 percent of the trust assets and another trust funded with the remaining 60 percent of the trust assets satisfies this requirement. Similarly, a severance stated in terms of a fraction of the trust assets in such a manner that one trust is to receive, for example, that fraction of the trust assets the numerator of which is \$1,500,000 and the denominator of which is the fair market value of the trust assets on a specified date, and the second trust is to receive the remaining fraction, satisfies this requirement. However, the severance of a trust based on a pecuniary amount (for example, one

trust is to be funded with \$1,500,000, and the other trust is to be funded with the balance of the trust corpus), does not satisfy this requirement [*see Prop. Treas. Reg. § 26.2642-6(b)(3)*]. Each separate trust need not be funded with a pro rata portion of each asset held by the original trust; they may be funded on a non pro rata basis if funding is based on the total fair market value of the assets on the funding date [*Prop. Treas. Reg. § 26.2642-6(b)(3)*].

The beneficiaries of each separate trust resulting from the severance need not be identical to those of the original trust. For trusts that grant the trustee the discretionary power to make non pro rata distributions to beneficiaries, the separate trusts are considered to have the same succession of interests of beneficiaries if:

- The terms of the separate trusts are the same as the terms of the original trust;
- The severance does not shift a beneficial interest in the trust to any beneficiary in a lower generation than the person or persons who held the beneficial interest in the original trust; and
- The severance does not extend the time for vesting of any beneficial interest in the trust beyond the period provided for in the original trust [*Prop. Treas. Reg. § 26.2642-6(b)(4)*].

A qualified severance must be reported by doing the following:

- Filing a Form 706-GS(T)(Generation-Skipping Transfer Tax Return for Terminations) and writing "Qualified Severance" in red at the top;
- Attaching a "Notice of Qualified Severance" that clearly identifies the trust that is being severed and the new trusts created, and that provides the inclusion ratio of the trust that is being severed and the inclusion ratios of the new trusts; and
- Filing the return and attached notice even if the severance does not result in a taxable termination [*Prop. Treas. Reg. § 26.2642-6(c)*].

For detailed discussion of the generation-skipping transfer tax and estate planning for generation-skipping transfers, see California Wills & Trusts, Ch. 113, *Generation-Skipping Transfers and Trust Strategies*, (Matthew Bender).

## **[5] Reverse QTIP Election**

### **[a] QTIP and Bypass Trusts**

Estate plans for married couples often provide for the division of a trust estate on the death of the first spouse (the "deceased spouse") into two trusts, one denominated a "bypass"(or "credit shelter") trust and the other a qualified terminable interest property (QTIP) trust. QTIP trusts are popular estate planning tools because they permit full use of the marital deduction for federal estate tax purposes [*see I.R.C. § 2056(b)(7)*] while at the same time allowing the deceased spouse to exercise control over the disposition of the trust property on the death of the surviving spouse. By combining a bypass trust with a QTIP trust, it is possible for a husband and wife to leave the combined values of the "applicable exclusion amounts" available in both of their estates [*see I.R.C. § 2010(c)*] (table of graduated amounts) and discussion in § 60.13[4][b] free of federal estate tax. For more detailed discussion, see Ch. 71, *Marital Deduction Trust Provisions*.

### **[b] Allocation of GST Exemptions to Trusts**

When the surviving spouse dies, the assets of the QTIP trust will be included in the surviving spouse's gross estate for estate tax purposes [*I.R.C. § 2044(b)(1)(A)*] and the surviving spouse will be deemed the transferor for GSTT purposes [

*I.R.C. § 2652(a)(1)(A)*. Both the husband and the wife are entitled to GST exemptions [*see I.R.C. § 2631(a), (c)*; *see also I.R.C. § 2010(c)*]. Proper coordination of these exemptions through use of the reverse QTIP election, as discussed in [c], *below*, can avoid or reduce GSTT liability in some cases. The following example illustrates the nature of the problem:

**EXAMPLE:**

Assume that a husband and wife have combined estates of \$5 million, all of which is community property. They wish to create typical QTIP and bypass trusts on the death of the first spouse, and to provide that the surviving spouse will have lifetime interest in the two trusts, with remainders equally to one child and one grandchild. On the death of the first spouse, the value of the first spouse's estate will be \$2.5 million. If the first spouse dies in 2005, for example, the applicable exclusion amount will be \$1.5 million. In that case, under a typical marital deduction formula clause, \$1.5 million of the deceased spouse's \$2.5 million estate would be allocated to the bypass trust, and \$1 million to the QTIP trust [for applicable exclusion amounts, *see I.R.C. § 2010(c)* and discussion in § 60.13[4][b]]. The deceased spouse will be treated for GSTT purposes as the transferor of the one-half of the bypass trust that will pass to the grandchild. The deceased spouse's GST exemption of \$1.5 million [*see I.R.C. § 2631(c)*] (GST exemption for any calendar year after December 31, 2003 is equal to the applicable exclusion amount under *I.R.C. § 2010(c)* for that year) will completely shield the \$750,000 in the bypass trust passing to the grandchild from GSTT taxation, leaving the remaining \$750,000 of the GST exemption unused.

Assuming no change in the value of the trust assets, the surviving spouse will have a \$3.5 million estate consisting of his or her own \$2.5 million, plus the \$1 million in the QTIP trust. If, on the death of the surviving spouse, one half of that amount passes directly to the grandchild under the terms of the trusts (see above), then the surviving spouse will be the deemed transferor of \$1.75 million for GSTT purposes. Assuming that the surviving spouse dies prior to 2006, under current law the surviving spouse's GST exemption (\$1.5 million in 2004 and 2005 [*see I.R.C. §§ 2010(c), 2631(c)*]) would be inadequate to fully shield this \$1.75 million from GSTT. Absent some other arrangement, a substantial GSTT could be due on the unprotected \$250,000, while the unused portion--\$750,000--of the first spouse's GST exemption would have been wasted.

Similar results can occur when underfunding of the bypass trust results in an amount in the QTIP trust that will exceed the surviving spouse's available GST exemption.

**[c] Use of Reverse Election**

The unfavorable result in the preceding example can be avoided in this case by using the so-called "reverse QTIP election." This election is available to treat certain transfers involving qualified terminable interest property as if, for GSTT purposes, a QTIP election had not been made [*I.R.C. § 2652(a)(3)*]. In other words, the surviving spouse, although still treated as the owner of the QTIP property for estate tax purposes, will not be treated as the owner for GSTT purposes [*see I.R.C. § 2652(a)(3)*]. Instead, the deceased spouse would be treated as the transferor for GSTT purposes, thereby allowing the deceased spouse's GST exemption to be applied to that property [*see I.R.C. § 2652(a)(3)*].

**EXAMPLE:**

Under the facts in the example in [b], *above*, when the first spouse dies, the personal representative can elect to have the deceased spouse treated as the transferor of \$250,000 worth of the QTIP trust for GSTT purposes. Since \$750,000 of the deceased spouse's \$1.5 million GST exemption is still available [*see I.R.C. §§ 2010(c), 2631(c)* and discussion in example in [b], *above*], it can be applied to the \$250,000 in

the QTIP trust to completely eliminate any GSTT liability.

However, a special rule provides that the reverse QTIP election must be made as to "all of the property in [the] trust" [I.R.C. § 2652(a)(3)]. If the value of the QTIP trust is greater than the amount of the available GSTT exemption, the QTIP trust should be divided into two portions, with one of the portions fully qualified for the exemption and the other part unqualified. This will result in full utilization of the available GST exemption. Failure to require a division will result in an "inclusion ratio" between one and zero and a loss of part of the GST exemption [see I.R.C. § 2642 and [4], above].

Requests for an extension of time to make a reverse QTIP election are governed by *Treas. Reg. § 301.9100-3*. A simplified, alternate method for obtaining permission to file a later reverse QTIP election is provided by *Rev. Proc. 2004-47, 2004-32 I.R.B. 169*.

A complete discussion of the reverse QTIP election is beyond the scope of this chapter. For a detailed discussion, see California Wills & Trusts, Ch. 113, *Generation-Skipping Transfers and Trust Strategies* (Matthew Bender).

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Tax Law Federal Estate & Gift Taxes Generation-Skipping Transfer Taxes (IRC secs. 2601-2663) Tax Law State & Local Taxes Estate & Gift Tax Generation-Skipping Transfer Taxes



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California Legal Forms--Transaction Guide

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DIVISION IV: WILLS AND TRUSTS  
CHAPTER 60 ESTATE PLANNING  
PART II. LEGAL BACKGROUND

*23-60 California Legal Forms--Transaction Guide § 60.17*

**§ 60.17 Estate Planning Tools**

**[1] Will**

**[a] In General**

The will is the most widely used of all the estate planning tools. A will is commonly understood to be a written instrument by terms of which a person (called a "testator") undertakes to dispose of his or her property after his or her death. Although disposition of property is one of the primary functions of a will, a will may also be used for other purposes. For example, a will may be used to leave instructions respecting the disposition of one's remains, to exercise a testamentary power of appointment, to nominate an executor, or to nominate a guardian for the testator's minor children. If a will is effective for some other valid testamentary purpose, it is valid and enforceable even if it does not dispose of the testator's property [ *In re Hickman (1894) 101 Cal. 609, 613, 36 P. 118* ; *Estate of Fries (1965) 238 Cal. App. 2d 558, 562, 47 Cal. Rptr. 888* ].

**[b] Will With Living Trust**

Every estate plan should include a will. Even when the bulk of the client's estate is to be transferred by means of a living trust [see [2], *below*], the client should execute a will, so that property that has not been transferred to the trust will be properly disposed of after the client's death.

When a living trust is created, the settlor will commonly transfer most of his or her property to the trust. However, some may be left out of the trust, either purposely or inadvertently. A will will direct the transfer of that property after the client's death. Wills are also essential to nominate executors and guardians for minor children. If the client holds a testamentary power of appointment, the will may also be used to exercise the power.

When a client creates a living trust, it is often useful for the client to execute a so-called "pour-over" will.

**[c] Pour-Over Will**

A "pour-over" will is a will that devises property to the trustee of an existing trust. The existing trust may be either

testamentary or inter vivos. However, the trust must be in existence at the time the devise takes effect (that is, the date of the testator's death) [*see Prob. Code § 6300*]. In practice, a pour-over will usually transfers property to an inter vivos trust created by the testator.

Unless the will provides otherwise, property that is poured over to a trust must be held, administered, and distributed under terms of the governing instrument of the trust, and not of the will. This means that the operative trust terms must be set forth in the trust instrument rather than the will. If, for example, Mr. Jones devises property to the trustee of Mr. Jones's living trust, the trustee will take the property and hold, administer, and distribute it under terms of Mr. Jones's trust and not his will.

Pour-over wills are often used in conjunction with living trusts. An estate plan that includes a living trust and a pour-over will assures that the client's property will be disposed of under a comprehensive estate plan.

#### **[d] Will with Testamentary Trust**

A will may be used to create a trust. A trust that is created by a will is described as a "testamentary" trust.

A testamentary trust will come into effect only after the will creating it has been admitted to probate and the court has ordered property to be distributed to the trustee. When the court orders property to be distributed to a trustee under a testamentary trust, it must determine the existence and validity of the trust and the extent of any interest that passes to the trustee under the will [ *Wells Fargo Bk. etc. Co. v. Superior Court (1948) 32 Cal. 2d 1, 8, 193 P.2d 721* ; *Estate of Buckhantz (1958) 159 Cal. App. 2d 635, 642-643, 324 P.2d 317* ]. The order may set forth the terms of the will in full or incorporate them by reference. Once such an order becomes final, it constitutes a final adjudication of the validity of the will and a conclusive construction of its terms as against all interested parties, including the beneficiaries of the trust [ *Estate of Callnon (1969) 70 Cal. 2d 150, 156, 74 Cal. Rptr. 250, 449 P.2d 186* ; *Estate of Van Deusen (1947) 30 Cal.2d 285, 289-290, 182 P.2d 565* ].

A testamentary trust may be created for the benefit of any person. It is common, however, for a testamentary trust to be created for the benefit of minor children. A will may, for example, devise property to a trustee to be held for the benefit of the testator's children who are minors at the time of the testator's death. This may avoid the need to appoint a guardian of the children's estate by assuring that the children's property is managed for them while they are minors.

Testamentary trusts are not as common as inter vivos (or "living") trusts [*see [2], below*] in modern estate planning. This is because a testamentary trust does not avoid probate of the trust assets, and it affords the settlor no protection against incapacity during his or her lifetime. For further discussion of the creation and use of testamentary trusts, see *California Wills & Trusts*, Ch. 110, *Testamentary Trusts* (Matthew Bender).

#### **[2] Revocable Inter Vivos ("Living") Trust**

##### **[a] In General**

A revocable inter vivos trust is a trust that is created during the settlor's lifetime and that the settlor can revoke while still living. Revocable inter vivos trusts are commonly referred to as "living" trusts. Living trusts are very widely used in modern estate planning.

##### **[b] Advantages**

Assets that are transferred to the trustee of a living trust are exempt from probate administration when the settlor dies. In appropriate cases, this can result in substantial savings of both time and expense. A living trust can also avoid the need for the creation of a conservatorship if the settlor should later become incapacitated. In such an event, the trustee (or successor trustee) will have full authority to manage the trust property for the benefit of the settlor, and the expense and

delay of conservatorship proceedings will be avoided.

Living trusts may also be useful to preserve the settlors' privacy. All of the records of the probate court are public documents and available for public inspection. If it is necessary to probate a will, the will must be filed with the court. All of the property subject to transfer under the will must be inventoried and appraised, and the inventory and appraisal will also be available for public inspection. The names and addresses of all persons interested in the will will also be matters of public record. None of this is necessary when property is transferred by means of a living trust.

The privacy afforded by a living trust is not absolute, however. When it becomes necessary to transfer property into or out of the trust, brokers, transfer agents, title insurance companies, and other third parties will frequently ask to see a copy of the trust instrument and other related documents. To the extent that these documents are shown to third parties, the privacy of the trust will be impaired. However, requests from third parties can often be satisfied by producing an abstract of the trust instrument, or the key pages (for example, the first page, the last page, and other relevant pages) without revealing the entire document.

### **[c] Disadvantages**

If used only for the purpose of transferring assets after the settlor's death, a living trust can be somewhat more trouble than a will, at least during the settlor's lifetime. The costs of creating a living trust are typically greater than the costs of planning and drafting a will, and the living trust will be effective only to the extent that it is "funded" during the settlor's lifetime. This means that property that is to be transferred by means of the living trust must be transferred to the trustee during the settlor's lifetime. If the property is real estate, a deed must be prepared by which the property is transferred to the trustee. Bank accounts, mutual funds, brokerage accounts, and other property must similarly be titled in the name of the trustee. If property is not properly transferred to the trustee while the settlor is living, it will not form a part of the trust assets when the settlor dies and cannot be transferred through the mechanism of the trust after the settlor's death. If the settlor dies owning property that does not form a part of the trust estate, it may be necessary to probate that property after the settlor dies.

When property that forms a part of the trust estate is sold or otherwise transferred, the transfer must be made by the trustee. Third parties, such as brokers, transfer agents, and title insurance companies, will require some documentation proving the existence and terms of the trust before they will accept a deed or other transfer from the trustee. Providing this additional documentation can, in some cases, constitute a minor inconvenience.

While a living trust may be expected to save attorneys' fees after the settlor's death, it will typically require that additional attorneys' fees be incurred during the settlor's lifetime. This additional lifetime expense must be balanced against the expected savings after the settlor's death in determining whether the living trust format will suit an individual client's needs.

### **[d] Tax Consequences**

A living trust will not, in itself, save any estate or other transfer taxes. When the settlor of a revocable living trust dies, all of the assets in the trust will be included in the settlor's gross estate for estate tax purposes, to the same extent as property held in the settlor's own name [*I.R.C. § 2038; see § 60.13[1][d]*].

However, a living trust can be used to create marital deduction trusts and bypass trusts, which may effect important estate tax savings in the estates of a married couple. For a discussion of marital deduction and bypass trusts, see Ch. 71, *Marital Deduction Trust Provisions*.

### **[3] Irrevocable Inter Vivos Trust**

#### **[a] In General**

An irrevocable inter vivos trust is a trust that is created during the settlor's lifetime and that the settlor cannot revoke. A trust may be permanently irrevocable, or irrevocable for a specified time, such as a term of years. Since a trust created in California is presumed to be revocable by the settlor unless expressly stated otherwise [*Prob. Code § 15400*], a trust can be made irrevocable only if the trust instrument expressly declares that it is irrevocable.

Although irrevocable trusts have many uses and form a part of many sophisticated estate plans, they are somewhat less frequently used than revocable ("living") trusts [*see [2], above*].

### **[b] As Gift Substitute**

Irrevocable trusts are often used as substitutes for gifts. When a settlor transfers property to an irrevocable trust, the settlor is permanently parting with the trust property in much the same way that he or she would part with the property if it were the subject of an outright gift. If the trust is properly planned and drafted, the trust property will no longer constitute a part of the settlor's gross estate. The settlor will have effectively parted with the ownership and control of the property, and the beneficiary (or beneficiaries) will have the use and enjoyment of the trust property, on the terms and conditions established by the trust instrument.

An irrevocable trust may be preferable to an outright gift for various reasons. When a transfer is made in trust, the use and enjoyment of the trust property may be divided in various ways. For example, the trust instrument may provide that one beneficiary will receive the income from the property for his or her lifetime, or until he or she reaches a specified age, after which time the trust property will be held in trust for the benefit of other beneficiaries, or distributed outright to the original or other beneficiaries. This kind of arrangement is not possible with an outright gift. A trust may also be preferable to an outright gift if the intended beneficiary is unable (or unwilling) to manage the trust property. This may be the case if the beneficiary is a minor, is suffering from some sort of incapacity, or is unable to manage the trust property because of advanced age. A trust may also be used to save taxes in a way that an outright gift cannot [*see [c], below*].

### **[c] Tax Savings**

Irrevocable inter vivos trusts are often used to achieve tax-savings goals. Since a properly planned and drafted irrevocable trust will effectively remove the trust property from the settlor's ownership [*see [b], above*], such a trust can be used to remove property from the settlor's gross estate for federal estate tax purposes [*see I.R.C. § 2031* (definition of gross estate); *see also § 60.13[1]*]. If it is desirable for the settlor to avoid income tax liability on income produced by the trust property, the trust can also be planned so that the settlor possesses none of the interests or powers that would cause the trust to be treated as a "grantor trust" for income tax purposes [*see I.R.C. §§ 671-679* ("grantor trust" rules); *see also § 60.15[3]*].

A transfer of property to an irrevocable inter vivos trust will be treated as a gift for federal gift tax purposes if the transfer is "complete." A transfer is generally "complete" for gift tax purposes if the transferor gives up "dominion and control" over the transferred property [*see Treas. Reg. § 25.2511-1*]. If a gift is "complete," it is potentially subject to gift tax [*see I.R.C. § 2501(a)* (taxable transfers)]. The gift tax burden may be lessened (or entirely avoided) by structuring the trusts and the gifts in such a way that the transfers will qualify for the annual gift tax exclusion [*see I.R.C. § 2503(b)*]; for discussion of the annual exclusion and the applicable exclusion amounts, which are adjusted annually for inflation, *see § 60.14[2]*]. It is important to remember, however, that a gift will qualify for the annual exclusion only if it transfers a "present interest" in the gift property under *I.R.C. § 2503(b)(1)*, or if it qualifies as a "minor's trust" under *I.R.C. § 2503(c)*. A beneficiary may have a "present interest" in a trust if the beneficiary has the right to demand payments (or withdrawals) from the trust on an annual basis. A right of this kind is commonly called a "Crummey" power [*see Crummey v. Commissioner (9th Cir. [Cal.] 1968) 397 F.2d 82*]. For a discussion of "Crummey" powers of withdrawal, *see Ch. 72, Irrevocable Trusts*.

It is common for irrevocable inter vivos trusts to be planned and drafted to achieve specific estate-planning goals. For example, an irrevocable inter vivos trust can be planned to acquire a hold one or more life insurance policies on the life of the settlor. If an irrevocable life insurance trust is properly planned and drafted, the trustee can acquire substantial insurance on the settlor's life and, when the settlor dies, none of the insurance proceeds will be included in the settlor's gross estate for federal estate tax purposes [*see I.R.C. § 2042*]. This can result in a very substantial estate tax savings [for discussion, see Ch. 72, *Irrevocable Trusts* ; *see also* California Wills & Trusts, Ch. 115, *Life Insurance Trusts* (Matthew Bender). Irrevocable trusts may also be structured so that they will qualify for the federal income or estate tax charitable deductions [*see I.R.C. §§ 170* (income tax), *2055* (estate tax)] as split-interest charitable trusts. For discussion of irrevocable trusts that qualify for the charitable deduction, see Ch. 74, *Split-Interest Charitable Trusts* .

For further discussion of the tax savings uses of irrevocable inter vivos trusts, see California Wills & Trusts, Ch. 114, *Irrevocable Inter Vivos Trusts* (Matthew Bender).

#### **[d] Need for Will or Revocable Trust When Client Creates Irrevocable Trust**

An irrevocable inter vivos trust will rarely be the sole (or even the principal) tool used in planning a settlor's estate. Thus, an estate plan for a client who establishes an irrevocable trust will almost always require some other estate planning tools. In many cases, the client will also wish to establish a revocable inter vivos ("living") trust [*see* [2], *above*]. The client will also require a will to direct the transfer of property that does not form a part of the irrevocable (or revocable) trust estate. As noted earlier [*see § 60.17[1][b]*], every estate plan should include a will so that property that has not been transferred to a trust during the client's lifetime (whether the trust is revocable or irrevocable) will be properly disposed of after the client's death.

#### **[4] Co-ownership of Property**

##### **[a] In General**

Many persons own property in various forms of co-ownership, such as joint tenancies, tenancies in common, partnerships, and multiple-party accounts. Some of these forms of co-ownership include mechanisms by which the surviving co-owner acquires the interest of a deceased co-owner when the deceased co-owner dies. Transfers to a surviving co-owner are often described as "transfers by operation of law." Since these transfers are automatic, they will be made even without a direction in a will or trust. Indeed, if a transfer by operation of law is required, the transfer will be carried out even if there is a contrary or inconsistent provision in the deceased co-owner's will or trust.

##### **[b] Joint Tenancy**

Joint tenancy [*see §§ 60.12[5], 60.13[1][f]*] is the most commonly used form of co-ownership. When one joint tenant dies, his or her interest in the jointly owned property passes to the surviving tenant (or tenants) by operation of law and no probate is necessary [ *Estate of Dow (1947) 82 Cal. App. 2d 675, 680, 186 P.2d 977* ]. Joint tenancy property does not constitute a part of the deceased tenant's probate estate and is not subject to disposition under the deceased tenant's will or trust [ *Estate of Dow (1947) 82 Cal. App. 2d 675, 680, 186 P.2d 977* ; *see Goldberg v. Goldberg (1963) 217 Cal. App. 2d 623, 628, 32 Cal. Rptr. 93* (probate court has no jurisdiction over joint tenancy property)].

Joint tenancies can be useful devices. It is generally quite easy to set up a joint tenancy; and, after one of the tenants dies, it is also quite easy to "terminate" the deceased tenant's interest and confirm title in the surviving tenant. Typically, no attorney is necessary either to plan or to "terminate" a joint tenancy.

Notwithstanding their apparent simplicity, however, joint tenancies are not always ideal estate planning tools. A joint tenancy is generally quite inflexible. It does not provide adequately for different orders of death and the different needs of different beneficiaries. If a husband and wife hold title to their residence as joint tenants, for example, the residence

will pass to the survivor without probate when the first spouse dies. However, the joint tenancy makes no provision for disposition of the property on the death of the survivor. If the property is disposed of under the will of the survivor, it will be subject to probate administration at that time. Further, property held in joint tenancy cannot be transferred to a revocable inter vivos ("living") trust and thus cannot be used to fund a marital deduction or bypass trust without first being converted to some other form of title [see Ch. 71, *Marital Deduction Trust Provisions* (general coverage of marital deduction and bypass trusts)]. If the combined estates of the joint tenants exceed the "applicable exclusion amount" available in the year of the surviving spouses death [see *I.R.C. § 2010(c)* (table of graduated amounts) and discussion in § 60.13[4][b]], this may result in a substantially greater estate tax on the death of the surviving spouse than would result if part of the property had been transferred to a bypass trust.

True joint tenancy property does not qualify for the double "stepped-up" basis that community property receives when the first spouse dies [see *I.R.C. § 1014(b)(6)*]. If the surviving spouse sells the property after the death of the first spouse, this may cause greater gain to be realized on the sale and result in a substantially higher income tax burden for the surviving spouse [see § 60.12[4][c], [5]].

However, to overcome these limitations on the usefulness of joint tenancies in estate planning, spouses may hold title to property as "community property with right of survivorship." This form of title has all the tax benefits of community property, specifically a step-up in basis on both halves of the property [see § 60.12[4][c], [8]], and a right of survivorship that allows the property to avoid probate administration and its attendant costs [see § 60.12[5][e], [8]]. Effective July 1, 2001, spouses may take title to real and personal property as community property with a right of survivorship [*Civ. Code § 682.1* (statute inapplicable to joint accounts in financial institutions governed by *Prob. Code § 5100 et seq.*); see [b], below].

The creation of a joint tenancy can result in gift tax liability unless each of the tenants contributes equally to the creation of the tenancy. Assume, for example, that a widowed mother decides to change the title to her home so that it will be held in the name of the mother and her adult daughter. She executes a deed from herself to herself and her daughter as joint tenants. If a true joint tenancy has been created, the daughter will have acquired a one-half interest in the property by gift, and the gift will be potentially subject to gift taxation. In cases of this kind, however, the joint tenancy is rarely created for the purpose of giving the daughter a present one-half interest in the home, but merely to avoid probate when the mother dies. In other words, the joint tenancy is created "for convenience only."

For gift tax purposes, local law must be consulted to determine whether a present interest in the property has been conveyed by a joint tenancy deed [see *Bouchard v. C.I.R. (5th Cir. [T.C.] 1961) 285 F.2d 556, 556* (effect of joint tenancy deed determined by law of Maine)]. In California, when persons who are not married to each other take title to property as joint tenants, there is a rebuttable presumption that the property is held in joint tenancy [see *Machado v. Machado (1962) 58 Cal. 2d 501, 506, 25 Cal. Rptr. 87, 375 P.2d 55*; *Estate of Zeisel (1983) 143 Cal. App. 3d 516, 523, 192 Cal. Rptr. 25*]. However, the presumption can be overcome by evidence of a common understanding that the character of the property is to be other than joint tenancy [see *Machado v. Machado (1962) 58 Cal. 2d 501, 506, 25 Cal. Rptr. 87, 375 P.2d 55*; *Estate of Zeisel (1983) 143 Cal. App. 3d 516, 523, 192 Cal. Rptr. 25*]. If the joint tenants are husband and wife, the presumption is that the property is held as community property, even when the title is taken as joint tenants [*Fam. Code § 2581*]. Although the latter rule applies only for purposes of division of property on dissolution of marriage or legal separation [*Fam. Code § 2581*], proposals have been made to extend the rule so that it will apply on the death of one of the spouses.

### **[c] Multiple-Party Accounts**

Many persons deposit funds into "multiple-party accounts" that are held in banks, savings and loan associations, or other financial institutions. California law recognizes three distinct types of multiple-party accounts. These are (1) joint accounts, (2) pay on death (or "P.O.D.") accounts, and (3) Totten trust accounts [*Prob. Code § 5132*].

Although these types of accounts differ in various particulars, they all share the common characteristic of permitting the transfer of the deposited funds to a designated person or persons when one of the depositors dies. If the account is a joint account [*see Prob. Code § 5130*], the funds will belong to the surviving depositor on the death of the first depositor unless there is clear and convincing evidence of a different intent [*Prob. Code § 5302(a)*]. If the account is a pay on death account [*see Prob. Code § 5140*], the funds belong, on the death of the depositor, to the designated pay on death payee or payees [*Prob. Code § 5302(b)(2)*]. If the account is a Totten trust account [*see Prob. Code § 80*], the funds belong, on the death of the depositor, to the designated beneficiary or beneficiaries unless there is clear and convincing evidence of a different intent [*Prob. Code § 5302(c)(2)*]. Any right of survivorship arising from the terms of the account or by statute, a beneficiary designation in a Totten trust account, or a P.O.D. payee designation cannot be changed by will [*Prob. Code § 5302(e)*].

Multiple-party accounts share the same estate planning virtues as joint tenancies. They are easy to establish and easy to terminate after the death of one of the parties. They may be established and terminated without the services of an attorney, and they completely avoid probate on the first death. However, they are subject to the same disadvantages as joint tenancies. Thus, they are inflexible arrangements; the deposited funds cannot be transferred to an inter vivos trust; and, on the death of the last surviving depositor, some other arrangement (whether by virtue of a will, a trust, or perhaps another multiple-party account) must be made for the transfer of the funds to the designated person or persons.

When one person contributes the funds to an account and title is taken jointly, in the names of that person and another, no gift tax liability is incurred until the funds are withdrawn by the other person without any obligation to account to the original contributor [*Treas. Reg. § 25.2511-1(h)(4)*]. The creation of a pay on death account or a Totten trust account does not result in a gift, since the pay on death payee or beneficiary will not have any interest in the account until the death of the original depositor.

#### **[d] Community Property With Right of Survivorship**

Spouses may hold title to real and personal property as "community property with right of survivorship." This manner of holding title to property is particularly important in the estate planning context. This form of title has all the tax benefits of community property, specifically an automatic step-up in basis on both halves of the community property when the first spouse dies [*Civ. Code § 682.1(a)*; *see § 60.12[4][c]*]. When real or personal property is held as community property with a right of survivorship and one spouse dies, the property passes to the surviving spouse without estate administration, avoiding the cost of probate, pursuant to the terms of the instrument and subject to the same procedures as property held in joint tenancy [*Civ. Code § 682.1(a)*; *see § 60.12[5][e]*].

The statutory authority for holding property in this manner applies to instruments created on or after July 1, 2001 [*Civ. Code § 682.1(c)*]. However, the statute does not apply to certain joint accounts in financial institutions [*Civ. Code § 682.1(b)*; *see § 60.12[8][a]*; *see also [c], above*]. For further discussion of this manner of holding title and documentation requirements, *see § 60.12[8]*.

#### **[5] Life Insurance**

##### **[a] In General**

Life insurance can play an important part in an estate plan. Life insurance can provide liquidity for the payment of debts and expenses of administration after the client's death, and provide the client's dependents with support after the client's death. Life insurance is often a necessity when the client is young and has children (or a spouse and children) who depend on the client's earnings for their support. When the client's earnings cease, life insurance can provide those dependents with capital that can be invested to provide an income stream that will replace the client's lost earnings.

##### **[b] Business Uses**

Life insurance can also play an important role in planning for the orderly disposition of a business after the client's death. If the client is a partner in a business, for example, the life insurance can provide the funds necessary to buy out the client's partnership interest after the client dies. Often, this will permit the continued operation of a business that would otherwise have to be liquidated to pay off the deceased client's heirs and beneficiaries. When life insurance is used for this purpose, it should be coupled with a "buy-sell" agreement by terms of which the surviving partners agree to use the life insurance proceeds to purchase the deceased partner's interest in the partnership. This permits the surviving partners to continue to operate the business without interruption and guarantees that the deceased partner's estate (or inter vivos trust) will receive the proceeds in payment of the deceased partner's interest in the partnership.

### **[c] Irrevocable Life Insurance Trust**

Life insurance may also be used to fund an irrevocable inter vivos trust designed to acquire and hold a life insurance policy whose proceeds will be paid to designated beneficiaries on the client's death without being included in the client's gross estate for federal estate tax purposes. A trust that accomplishes this purpose is commonly described as an "irrevocable life insurance trust," or just a "life insurance trust." For additional coverage of life insurance trusts, see Ch. 72, *Irrevocable Trusts*; see also California Wills & Trusts, Ch. 115, *Life Insurance Trusts* (Matthew Bender).

### **[6] Lifetime Gifts**

#### **[a] In General**

Lifetime gifts can be useful estate planning tools. The annual gift tax exclusion [*see I.R.C. § 2503(b)* and discussion in § 60.14[2]], the exclusion for tuition and medical care payments [*I.R.C. § 2503(e)*; *see § 60.14[3]*], and the unlimited marital deduction [*I.R.C. § 2523*; *see § 60.14[4]*], combine to provide many opportunities for wealth transferral during a client's lifetime.

If the client's financial condition permits, lifetime gifts may be a useful means of transferring wealth without either gift or estate taxation. Assume, for example, that the client is an elderly widow with a taxable estate of \$1 million and that she has three married children. The client can give up to \$11,000 per year to each of the children (the amount of the gift tax exclusion for gifts in calendar years 2002 through 2005; the amount of the exclusion may be adjusted annually for inflation in subsequent years) [*I.R.C. § 2503(b)*; *see § 60.14[2]*], and an additional \$11,000 per year to the three spouses. In this way, the client can give away up to \$66,000 a year without any gift or estate tax liability. If the client is married, the client and the client's spouse can give away up to \$132,000 a year to the same donees. This can be done if the gift property is community property (in which case the client and the client's spouse will each be treated as the donor of one-half of the gift), or if the gift property is separate property but the client and the client's spouse elect to split the gifts under *I.R.C. § 2513*.

#### **[b] Basis of Gift Property**

When gifts are made, it is important to consider the value of the gift property and the total value that may safely be given away without gift tax liability. It is also important to consider the basis of the property, particularly if the property has appreciated since it was acquired by the client and there is any possibility that the donee or donees will sell the property at some time in the future.

If property is acquired by gift, the basis for income tax purposes in the hands of the donee is the same as the basis in the hands of the donor [*I.R.C. § 1015*]. This is generally the cost of the property [*I.R.C. § 1012*]. If property is acquired by inheritance, however, the property acquires a new fair market value computed as of the date of death [*I.R.C. § 1014*]. If the property is later sold, a new date-of-death value may result in substantial income tax savings for the donees [*see I.R.C. § 1001(c)* (determination and recognition of gain or loss)].

#### **[c] Potential for Appreciation**

When a gift is made, it may also be useful to consider the appreciation potential of the gift property. If the property has a good potential for future appreciation, the potential estate tax savings will be greater, as the total value of the property removed from the client's estate as of the date of the client's death will be greater. If, on the other hand, the property has little potential for appreciation, it may make more sense for the client to keep the property until death. Of course, these considerations will vary from client to client and depend in large measure on the client's ability to make gifts and the projected tax savings that will result from the gifts.

## **[7] Durable Powers of Attorney**

### **[a] In General**

A power of attorney is a written instrument by which one person (called the "principal") authorizes another person (called the "attorney in fact" or "agent") to act on his or her behalf [*Prob. Code* § 4022; *see Prob. Code* §§ 4014 ("attorney in fact" defined), 4026 ("principal" defined)]. A durable power of attorney is a power of attorney that contains words showing the intent of the principal that the attorney in fact's authority will be exercisable notwithstanding the principal's later incapacity [*Prob. Code* § 4124]. In this respect, a durable power of attorney differs from a conventional power of attorney, under which the authority of the attorney in fact terminates when the principal becomes incapacitated [*Civ. Code* § 2356(a)(3)]. Under a durable power of attorney, all acts done by the attorney in fact during the principal's incapacity have the same effect as if the principal had capacity [*Prob. Code* § 4125].

Unless a power states a time of termination, the authority of attorney in fact is exercisable notwithstanding any lapse of time since execution of the power [*Prob. Code* § 4127].

For general coverage of durable powers of attorney, including forms for use in drafting durable powers of attorney for property management, durable powers of attorney for health care, and related documents, see Ch. 68, *Durable Powers of Attorney*. See also California Wills & Trusts, Ch. 150, *Durable Powers of Attorney for Health Care*, and Ch. 151, *Durable Powers of Attorney for Property Management* (Matthew Bender).

### **[b] Types**

There are two basic types of durable powers of attorney: durable powers of attorney for health care and durable powers of attorney for property management. A durable power of attorney for health care authorizes the attorney in fact to make health care decisions for the principal [*Prob. Code* §§ 4123(d), 4650 (repealed effective July 1, 2000); *Prob. Code* §§ 4600-4805 (Health Care Decisions Law; effective July 1, 2000)]. A durable power of attorney for property management authorizes the attorney in fact to make other types of decisions for the principal [*see Prob. Code* §§ 4123(a), (b), (c), 4124, 4125].

A durable power of attorney may confer present authority on the attorney in fact, or it may confer authority on the attorney in fact only at a specified future time, or on the occurrence of a specified future event or contingency, such as the subsequent incapacity of the principal [*Prob. Code* § 4030]. When the power of attorney confers present authority on the attorney in fact it must contain the words "This power of attorney shall not be affected by subsequent incapacity of the principal," or similar words [*Prob. Code* § 4124(a), (c)]. When it confers authority only in the event of the principal's subsequent incapacity, it must state "This power of attorney shall become effective upon the incapacity of the principal," or similar words [*Prob. Code* § 4124(b), (c)].

A power of attorney that becomes effective only at a specified future time or on the occurrence of a specified future event or contingency is known as a "springing power of attorney" [*Prob. Code* § 4030]. Although springing powers of attorney may be either durable or nondurable [*see Prob. Code* § 4030], they are typically durable, since they are usually created for the purpose of conferring authority on the attorney in fact only if the principal becomes incapacitated at a

later date.

### **[c] As Creatures of Statute**

Durable powers of attorney are the creatures of statute. The California durable power of attorney statutes were first enacted in 1979 [Stats. 1979, ch. 234] and have been revised several times since then. Effective January 1, 1995, a comprehensive set of Probate Code sections governs the creation, use, effect, and termination of powers of attorney [see *Prob. Code § 4000 et seq.*, as added by Stats. 1994, ch. 307]. Known as the Power of Attorney Law, these statutes replaced statutory provisions formerly included in the Civil Code [see former *Civ. Code §§ 2400-2407, 2430-2445, 2475-2499.5*, repealed by Stats. 1994, ch. 307]. The Power of Attorney Law generally applies to both durable and nondurable powers of attorney [see *Prob. Code § 4050*].

Despite the comprehensive scope of the Power of Attorney Law, it is not completely severed from the general law of agency. Powers of attorney are a type of agency, and the Power of Attorney Law recognizes that fact by explicitly providing that they are subject to the general rules of agency, except to the extent that the Power of Attorney Law provides its own rules [*Prob. Code § 4051*; see *Civ. Code §§ 2295-2400* (agency); see also Comprehensive Power of Attorney Law, 24 Cal. L. Revision Comm'n Reports 111, 121 (1994)].

Durable powers of attorney for health care formerly were regulated by special provisions of the Power of Attorney Law [see *Prob. Code §§ 4600-4779* (repealed effective July 1, 2000)]. However, effective July 1, 2000, durable powers of attorney are no longer subject to the Power of Attorney law [*Prob. Code § 4050(a)(1)*] and are instead treated as a species of "advance health care directive" [see *Prob. Code § 4605*] governed by the Health Care Decisions Law [*Prob. Code §§ 4050(a)(1), 4651(a)*; see *Prob. Code §§ 4600-4805* (effective July 1, 2000)].

For more detailed discussion of durable powers of attorney for property management, see Ch. 68, *Durable Powers of Attorney*. Rules governing powers of attorney generally are discussed in Ch. 98, *Powers of Attorney*.

### **[d] Uses**

Durable powers of attorney are widely used in modern estate planning. In fact, most estate planners regard them as an integral component of the complete estate plan, just as a will or (in many cases) a trust are key components of that plan. It is commonplace for estate planners to prepare a durable power of attorney for property management at the same time as a will, trust, or other estate planning documents. By authorizing an attorney in fact to act for and on behalf of the principal even when the principal is incapacitated, a durable power of attorney for property management can obviate the need for a conservatorship or even a trust. If the client's only concern is to make sure that his or her property will be properly managed in the event the client becomes incapacitated, a durable power of attorney for property management will often satisfy this concern. If the client has properly executed a durable power of attorney for property management, it may be unnecessary for the client also to establish a revocable inter vivos ("living") trust [see § 60.17[2]]. A properly executed durable power of attorney for health care may also obviate the need for a conservatorship of the person.

In appropriate circumstances, a durable power of attorney may be used to give the attorney in fact authority to make personal care decisions for the principal, to contract with respect to the principal's property, to plan and complete sales of the principal's property, and to make tax planning decisions for the principal [see *Prob. Code § 4123(a)-(c)*]. However, some acts are so important that, under the Power of Attorney Law, the attorney in fact will not be deemed to have authority to perform them unless the power of attorney specifically authorizes the attorney in fact to do so. Thus, the attorney in fact may not create, modify, or revoke a trust on behalf of the principal, make gifts of the principal's property, exercise the right to make a disclaimer on behalf of the principal, create or change survivorship interests in the principal's property, make or change the designation of beneficiaries to receive property or other rights on the principal's death, or make a loan to the attorney in fact, unless the power of attorney expressly allows the attorney in fact to do so [*Prob. Code § 4264*].

## [8] Contracts

### [a] In General

Various types of contracts can have an effect on a client's estate plan. The most obvious of these is the contract to make a will, not to revoke a will, or to die intestate [see [b], *below*]. However, other contracts that may also have important estate-planning consequences are transmutation agreements, buy-sell agreements, premarital (or antenuptial) agreements, and marital settlement agreements. The most important estate planning uses of transmutation agreements and buy-sell agreements are discussed in this subsection [see [c], [d], *below*]. For general coverage of premarital agreements, see Ch. 108, *Antenuptial Agreements* . For marital settlement agreements, see Chs. 120, *Complete Marital Settlement Agreements* , and 121, *Provisions for Division of Property* .

### [b] Contract To Make or Not to Revoke a Will or Other Instrument

Contracts to make (or not to revoke) a will or devise are generally valid in California [ *Redke v. Silvertrust* (1971) 6 Cal. 3d 94, 100, 98 Cal. Rptr. 293, 490 P.2d 805 , cert. denied, 405 U.S. 1041 ; *Estate of Watson* (1986) 177 Cal. App. 3d 569, 573, 223 Cal. Rptr. 14 ]. Since the existence and terms of such a contract are generally put in issue only after one of the parties has died, however, special requirements for the proof of the contract are set forth in the Probate Code.

*Prob. Code* § 21700(a) provides that a contract to make a will or devise or other instrument, or not to revoke a will or devise or other instrument, or to die intestate (if made after January 1, 2001), can be established only by one of the following:

- Provisions of a will or other instrument stating material provisions of the contract;
- An express reference in a will or other instrument to a contract and extrinsic evidence proving the terms of the contract;
- A writing signed by the decedent evidencing the contract;
- Clear and convincing evidence of an agreement between the decedent and the claimant or a promise by the decedent to the claimant that is enforceable in equity; or
- Clear and convincing evidence of an agreement between the decedent and another person for the benefit of the claimant or a promise by the decedent to another person for the benefit of the claimant that is enforceable in equity.

Case law makes it clear that a party may recover as third-party beneficiary of a contract to make (or not to revoke) a will only if the party was an intended beneficiary of the contract. It is not sufficient to show merely that the party was incidentally named in the contract, or would have derived some benefit from a will made pursuant to the contract. An intent to benefit the claimant must appear from the contract itself [ *Kalmanovitz v. Bitting* (1996) 43 Cal. App. 4th 311, 314-315, 50 Cal. Rptr. 2d 332 ].

Notwithstanding their validity, contracts to make (or not to revoke) a will or devise are generally avoided by most estate planners, because they are difficult to enforce, can result in the loss of valuable tax benefits, and often lead to costly and time-consuming litigation.

A contract to make a will is often followed by the execution of joint or mutual wills. Joint and mutual wills frequently devise property to one of the surviving parties and provide that, upon the death of that party, the property will pass to

another person or persons. When this is done, the interest of the survivor is a life estate and the interests of the others are remainders [ *Estate of Mulholland (1971) 20 Cal. App. 3d 392, 396, 97 Cal. Rptr. 617* ; *Estate of Cooper (1969) 274 Cal. App. 2d 70, 79, 78 Cal. Rptr. 740* ]. This is because a devise of property that provides that the property must go to another person on the death of the first devisee transfers only a life estate, even when the words "life estate" are not used in the devise [ *Estate of Mulholland (1971) 20 Cal. App. 3d 392, 397, 97 Cal. Rptr. 617* ; *Estate of Cooper (1969) 274 Cal. App. 2d 70, 79, 78 Cal. Rptr. 740* ].

An action to enforce a claim that arises from an oral or written promise or agreement made on or after January 1, 2001, for distribution from an estate or trust or under another instrument, must be brought within one year after the date of death. Any otherwise applicable period of limitations does not apply [Code Civ. Proc. § 355.3].

Even when a contract to make a will can be enforced, it can have very unfavorable results. Assume, for example, that a husband and wife enter into a contract that provides that the first spouse to die will leave all of his or her property to the survivor and that the surviving spouse will leave all of his or her property to the spouses' children. Assume further that each spouse has an estate that is worth more than the "applicable exclusion amount" available in the year of the first spouses death [see *I.R.C. § 2010(c)* (table of graduated amounts) and discussion in § 60.13[4][b]]. When the first spouse dies, all of the property will pass to the surviving spouse. If the contract is enforceable, however, the surviving spouse's interest in the property will be only a life estate. A life estate is a "terminable interest" and thus ineligible for the federal estate tax marital deduction [see *I.R.C. § 2056(b)(1)*; *Treas. Reg. § 20.2056(b)-1(b)*]. A substantial estate tax will thus be payable on the death of the first spouse. Further, none of the property will be in a bypass trust and thus none of it will qualify for the tax-saving advantages that a bypass trust can afford on the death of the surviving spouse, so even more substantial estate taxes will be payable on the death of the surviving spouse. All of these unfavorable results could be avoided by the simple expedient of transferring the property through a revocable inter vivos ("living") trust and avoiding the cumbersome and dangerous mechanism of a contract to make a will. For a general discussion of the marital deduction, see Ch. 71, *Marital Deduction Trust Provisions* .

### **[c] Transmutation Agreement**

Married persons sometimes enter into contracts designed to change the character of their property from separate property to community property or vice versa. Contracts of this kind are generally described as "transmutation agreements" [see *Fam. Code §§ 850-853*]. By statute, California law specifically sanctions agreements that transmute community property to the separate property of either spouse, separate property of either spouse to community property, or separate property of one spouse to the separate property of the other spouse [see *Fam. Code § 850*].

Transmutation agreements are used by estate planners for various purposes. A transmutation agreement may, for example, be designed to protect one or both of the spouses from creditors, to reorder inheritance rights in the spouses' property, or to achieve specified tax advantages.

Although transmutation agreements are generally governed by the same rules as other contracts, they are subject to additional rules applicable to property contracts between a husband and wife [see *Fam. Code § 721(b)*]. Under these rules, transactions between a husband and wife are subject to the general rules governing fiduciary relationships that control the actions of persons occupying confidential relations with each other [*Fam. Code § 721(b)*]. Further, most transmutation agreements made on or after January 1, 1985, must be in writing and signed by the spouse whose interest in the property is adversely affected [*Fam. Code § 852(a)*]; but see *Fam. Code § 852(c)* (exception for gifts between spouses of clothing, wearing apparel, jewelry, and other tangible articles of a personal nature)].

An attorney who is consulted by clients who wish to enter into a transmutation agreement must remember his or her ethical responsibility to avoid conflicts of interest. Transmutation agreements almost always raise actual or potential conflicts between the spouses. An attorney cannot ethically represent two clients who have conflicting or potentially conflicting interests, unless the attorney first explains the facts giving rise to the conflict and obtains written

authorization from the clients to proceed with the dual representation [*Cal. Rules Prof. Conduct, Rule 3-310(B)*]; see § 60.201[1][b]]. For general coverage of the ethical responsibilities of estate planning attorneys, see California Wills & Trusts, Ch. 4, *Ethical Considerations and Professional Responsibility* (Matthew Bender).

#### **[d] Buy-Sell Agreement**

A buy-sell agreement is a contract under which the surviving owners of a business agree to purchase the interest of a withdrawing or deceased owner of the same business [Black's Law Dictionary (5th ed. 1979) at 181]. The business may be organized as a partnership or a corporation, and the parties may be partners or shareholders. Buy-sell agreements are also known as "buyout agreements."

Buy-sell agreements can be very useful estate planning tools. If the client is a partner or shareholder in a closely held corporation, some provision should be made for the continuation of the business after the client's death. This will most typically be accomplished by setting up a buy-sell agreement that establishes terms and conditions under which the surviving partners or shareholders will purchase the deceased partner's or shareholder's interest in the business. The funds for the purchase will often be provided by a life insurance policy on the life of the deceased partner or shareholder that calls for the death benefits to be paid to the surviving partners or shareholders [for estate planning uses of life insurance, see § 60.17[5]].

Another variation of the buy-sell agreement is the so-called "entity agreement," under which the business entity itself (rather than the individual partners or shareholders) agrees to purchase the deceased partner's or shareholder's interest in the business. An entity agreement may also be funded by the proceeds of a life insurance policy on the life of the deceased partner or shareholder with the death benefits payable to the entity.

An estate plan that simply provides for the transfer of a client's interest in a business organized as a partnership or a closely held corporation after the client's death without setting up an appropriate buy-sell mechanism is inadequate and will not adequately address the needs of either the business or the deceased partner's or shareholder's estate in the event of the deceased partner's or shareholder's death.

For further discussion of buy-sell agreements, with illustrative forms, see Ch. 8D, *Buy-Sell Agreements*. For discussion of the devise of business interests, see California Wills & Trusts, Ch. 29, *Devises of Business Interests* (Matthew Bender). For the legal requisites of partnership agreements, and buy-sell agreements for partnerships, see Ch. 15, Part A, *Formation of General Partnerships*; see also Ballantine & Sterling, California Corporation Laws, Ch. 24, *Partnerships* (Matthew Bender).

#### **[9] Uniform TOD Security Registration Act**

##### **[a] Transfer of Securities Without Probate**

Under the Uniform TOD Security Registration Act, effective January 1, 1999 [*Prob. Code § 5512*], securities may be registered in "beneficiary form" to be transferrable on death outside of probate administration [*Prob. Code § 5500 et seq.*]. Designation of a T.O.D. beneficiary on a registration in beneficiary form has no effect on ownership until the owner's death, and registration in beneficiary form may be canceled or changed at any time by the sole owner (or in the case of multiple ownership by all then surviving owners) without the consent of the beneficiary [*Prob. Code § 5506*]. Transfer on death resulting from registration in beneficiary form is not testamentary; it is effective by reason of the contract regarding the registration between the owner and the registering entity pursuant to the Act [*Prob. Code § 5509(a)*]. The Act provides protection for entities registering securities in beneficiary form, including discharge from claims by the estate, creditors, heirs, or devisees of a deceased owner who registered the security [*see Prob. Code § 5508*]. However, the Act does not limit the rights of a surviving spouse or creditors against beneficiaries and transferees under other laws [*Prob. Code § 5509(b)*].

**[b] Registration in Beneficiary Form**

Registration in beneficiary form means registration of the security indicating the present owner and the intention of the owner regarding the person who will become the owner of the security on the death of the present owner [*Prob. Code § 5501(a)* (definition of "beneficiary form")]. A security is registered in beneficiary form when the registration includes a designation of a beneficiary to take ownership at the death of the present owner or the deaths of multiple present owners, whether the security is evidenced by certificate or account [*Prob. Code § 5504*]. In the case of multiple ownership, only individuals whose registration shows multiple ownership with right of survivorship, that is, in joint tenancy, tenancy by the entirety or community property in survivorship form, may obtain registration in beneficiary form. [*Prob. Code § 5502*]. Registration in beneficiary form is shown by the words "transfer on death" or "pay on death" or the abbreviations "T.O.D." or "P.O.D." after the name of the registered owner and before the name of the beneficiary [*Prob. Code § 5505*].

The registering entity may establish terms and conditions for requests for registration in beneficiary form and implementation of registration. [*see Prob. Code § 5512*].

**[c] Death of Owner**

On the death of the sole owner or the last to die of multiple owners, ownership of securities registered in beneficiary form passes to the beneficiary or beneficiaries who survive all owners. On proof of death of all owners and compliance with applicable requirements of the registering entity, the security may be reregistered in the name of the beneficiary. Until division of the security after the death of all owners, multiple beneficiaries hold their interests as tenants in common. If no beneficiary survives the death of the owner or multiple owners, the security belongs to the estate of the deceased sole owner or the estate of the last to die of all multiple owners [*Prob. Code § 5507*].

**[10] Nonprobate Transfers to a Former Spouse****[a] In General**

Nonprobate transfers are a common and efficient way of transferring property to a surviving spouse at death. The Probate Code addresses nonprobate transfers to a former spouse of a divorced individual. The provisions affecting such transfers apply to instruments executed before, on, and after January 1, 2002. However, the provisions do not apply to an instrument if either of the following apply [*Prob. Code § 5604*]:

- The person making the nonprobate transfer or creating the joint tenancy dies before the January 1, 2002; or
- The dissolution of marriage or other event that terminates the status of the nonprobate transfer beneficiary or joint tenant as a surviving spouse occurs before January 1, 2002.

**[b] Nonprobate Transfers by Instrument**

A nonprobate transfer to a decedent's former spouse under an instrument executed before or during the marriage fails if, at the time of death, the transferee is no longer the decedent's surviving spouse, due to annulment or dissolution of the marriage [*Prob. Code § 5600(a)*]. Such a transfer will not fail, however, if the transfer is not subject to revocation at the time of death, there is clear and convincing evidence that the decedent intended to preserve the transfer to the former spouse, or a court order that the transfer be maintained is in effect [*Prob. Code § 5600(b)*]. This provision does not affect the court's authority to order a party for dissolution or annulment of a marriage to maintain the former spouse as a beneficiary on any nonprobate transfer [*Prob. Code § 5603*]. In the case of a nonprobate transfer that fails under this provision, the instrument of transfer is treated as if the former spouse did not survive the transferor [*Prob. Code § 5600(c)*].

Nonprobate transfers do not include life insurance policies, but do include contracts of employment, bonds, mortgages, promissory notes, certificated or uncertificated securities, account agreements, custodial agreements, deposit agreements, compensation plans, pension plans, individual retirement plans, employee benefit plans, trusts, conveyances, deeds of gift, marital property agreements, similar written instruments, or instruments, not including wills, that operate on death and confer a power of appointment or name a trustee [*Prob. Code* § 5600(e); *see Prob. Code* § 5000(a)].

### **[c] Joint Tenancy**

A joint tenancy created between a decedent and the decedent's former spouse is severed as to the decedent's interest if it was created before or during marriage and, at the time of death, the former spouse is not the decedent's surviving spouse, due to annulment or dissolution of marriage [*Prob. Code* § 5601(a)]. A joint tenancy is not severed, however, if it is not subject to severance by the decedent at the time of his or her death or if there is clear and convincing evidence that the decedent intended to preserve the joint tenancy in favor of the former spouse [*Prob. Code* § 5601(b)]. This provision does not affect the rights of a subsequent purchaser or encumbrancer who relies on an apparent severance or lacks knowledge of a severance [*Prob. Code* § 5601(c)]. Joint tenancies include property held as community property with right of survivorship [*Prob. Code* § 5601(d); *see Civ. Code* § 682.1]. This provision does not affect the court's authority to order a party for dissolution or annulment of a marriage to preserve a joint tenancy [*Prob. Code* § 5603].

For additional discussion of the status of joint tenancy property held after a marital dissolution, see § 60.12[5][d].

### **[d] Purchaser or Encumbrancer's Rights**

The Probate Code provision providing for the failure of a nonprobate transfer to a former spouse does not affect the rights of a subsequent purchaser or encumbrancer who in good faith relies on an apparent failure of a transfer or lacks knowledge of a failed transfer [*Prob. Code* § 5600(d)]. Similarly, the provision severing a joint tenancy between a decedent and his or her former spouse does not affect the rights of a subsequent purchaser or encumbrancer who in good faith relies on an apparent severance or lacks knowledge of a severance [*Prob. Code* § 5601(c)]. In either case, the rights of a purchaser or encumbrancer of real property who in good faith relies on an affidavit or declaration under penalties of perjury are protected. The affidavit or declaration may be recorded and must contain the following information [*Prob. Code* § 5602(a), (c)]:

- The decedent's name.
- The date and place of the decedent's death.
- A description of the real property transferred to the affiant or declarant by an instrument making a nonprobate transfer or by operation of joint tenancy survivorship.
- Either that the affiant or declarant is the surviving spouse of the decedent, or that the affiant or declarant is not the surviving spouse of the decedent, but the rights of the affiant or declarant to the described property are not affected by *Probate Code* §§ 5600 or 5601.

A person relying on an affidavit or declaration has no duty to inquire into the truth of the matters stated therein [*Prob. Code* § 5602(b)].

### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawNonprobate TransfersGeneral OverviewEstate, Gift & Trust LawProbateGeneral  
OverviewEstate, Gift & Trust LawTrustsGeneral OverviewEstate, Gift & Trust LawTrustsTestamentary TrustsEstate,  
Gift & Trust LawWillsGeneral Overview



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California Legal Forms--Transaction Guide

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DIVISION IV: WILLS AND TRUSTS  
CHAPTER 60 ESTATE PLANNING  
PART II. LEGAL BACKGROUND

*23-60 California Legal Forms--Transaction Guide § 60.18*

**§ 60.18 Deposit of Estate Planning Documents With Attorney**

**[1] In General**

The Probate Code regulates the transfer of estate planning and other documents held by an attorney for safekeeping [*Prob. Code §§ 700-735*]. Documents covered include original wills, trusts, codicils, and powers of attorney [*see Prob. Code § 704*]. An attorney must use ordinary care for preserving an estate planning document, whether or not consideration is given, must hold a document in a safe, vault, safe-deposit box, or other secure place where it will be reasonably protected against loss or destruction [*Prob. Code § 710*], and must notify the person who deposited the document if it is lost or destroyed [*see Prob. Code § 711; see also Prob. Code §§ 702, 703* ("deposit" and "depositor" defined)]. However, an attorney who fails to satisfy the required standard of care is not liable for loss or destruction if (1) the depositor has actual notice of the loss or destruction and a reasonable opportunity to replace the document and (2) the attorney offers without charge either to assist the depositor in replacing the document, or to prepare a substantially similar document and assist in its execution [*Prob. Code § 712*]. In addition, accepting a document for safekeeping does not require the attorney to inquire into the contents, validity, or correctness of any information in the document or to provide continuing legal services to the depositor or to any beneficiary under the document, unless, of course, the attorney holding the document for safekeeping also drafted the document [*see Prob. Code § 713*].

If provided in a written agreement signed by the person depositing a document for safekeeping, an attorney may charge for compensation and expenses incurred in connection with holding the document [*Prob. Code § 714(a)*]. An attorney may also give written notice to, and obtain written acknowledgment from, a depositor that a document has been accepted for safekeeping and that the depositor must notify the attorney of any address change [*see Prob. Code § 715; see also § 60.208*]. Utilizing the notice and acknowledgment has the effect of changing the standard of care for preserving a document from "ordinary care" to "slight care" [*see Prob. Code §§ 710, 716*].

**[2] Termination of Deposits**

A depositor may terminate a deposit on demand, in which case the attorney must deliver the document to the depositor [*Prob. Code § 720*]. However, an attorney with whom a document has been placed for safekeeping may only terminate the deposit in accordance with one of the methods set forth by statute [*Prob. Code § 730; see Prob. Code §§ 731-735* (methods and procedures for terminating deposit by attorney)]. These methods include [*Prob. Code § 731*]:

- Personal delivery of the document to the depositor;
- Mailing the document to the depositor's last known address, by registered or certified mail with return receipt requested, and receiving a signed receipt; or
- Another method agreed on by the depositor and attorney.

An attorney may also terminate a deposit by transferring the document to another attorney [*Prob. Code § 732(b)*]. However, an attorney may terminate by this method only if he or she has mailed notice to reclaim the document to the depositor's last known address and the depositor has failed to reclaim the document within 90 days of the mailing [*Prob. Code § 732(a)*]. In addition, an attorney transferring a document must file a notice of transfer with the State Bar [*Prob. Code § 733*].

If the document held for safekeeping is a will, and the attorney has actual notice that the depositor died, the attorney may terminate the deposit only by personal delivery of the document to the depositor's personal representative [*Prob. Code §§ 732(f), 734(a)*]. If the attorney has actual notice of the depositor's death but does not have actual notice that a personal representative has been appointed for the depositor, the attorney may terminate the deposit only as provided in *Prob. Code § 8200*, which sets forth the provisions governing a will's delivery to the superior court and the executor named in the will after the testator's death [*Prob. Code § 734(b)*]. If the document is a trust, after the depositor's death the attorney may terminate the deposit by personal delivery of the document to the depositor's personal representative or to the trustee named in the trust [*Prob. Code § 734(c)*].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law  
Probate General Overview  
Estate, Gift & Trust Law  
Trusts General Overview  
Estate, Gift & Trust Law  
Wills General Overview



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DIVISION IV: WILLS AND TRUSTS  
CHAPTER 60 ESTATE PLANNING  
PART II. LEGAL BACKGROUND

*23-60 California Legal Forms--Transaction Guide § 60.19*

**§ 60.19 Intestate Succession**

**[1] Governing Law**

When a decedent dies intestate (that is, without a will), or when any property is not effectively disposed of by the will of a testate decedent, the property not disposed of by will is distributed to the decedent's heirs according to the laws of intestate succession [*see Prob. Code § 6400*]. These laws are set out in *Prob. Code §§ 6400-6455*, and are discussed in this section. They apply to estates of decedents dying on or after January 1, 1985 [*Prob. Code § 6414(a), (b)*]. The intestate succession of a decedent who died before that date is governed by former *Prob. Code §§ 200-258* (repealed by Stats. 1983, ch. 842, operative, January 1, 1985) [*Prob. Code §§ 3, 6414(a), (c)*]. If there is no taker of the intestate estate under the provisions of *Prob. Code §§ 6400-6455*, the property escheats to the state as provided in *Prob. Code §§ 6800-6806* [*Prob. Code § 6404*]. The right to succession is defined by statute [ *Estate of Griswold (2001) 25 Cal. 4th 904, 907, 108 Cal. Rptr. 2d 165, 24 P.3d 1191* ]. Courts have no authority to change the statutory rules governing the law of succession [ *Estate of McCrary (1997) 54 Cal. App. 4th 100, 102, 62 Cal. Rptr. 2d 504* ].

**[2] Definition of Terms**

**[a] Heirs, Child, Parent, and Issue**

"Heirs," as used in the Probate Code, means the persons, including the surviving spouse who are entitled under the statutes of intestate succession to a decedent's property [*Prob. Code § 44; see [10], [11], below*]. "Child" means any individual entitled to take as a child by intestate succession from the parent whose relationship is involved [*Prob. Code § 26*]. "Parent" means any individual entitled to take as a parent by intestate succession from the child whose relationship is involved [*Prob. Code § 54*]. "Issue" of a person means all of his or her lineal descendants of all generations, with the relationship of parent and child at each generation being determined by the definitions of child and parent [*Prob. Code § 50*]. For a discussion of establishing the parent-child relationship for the purpose of intestate succession, see [4], *below*.

**[b] Predeceased Spouse**

For purposes of intestate succession [*see [11], below*], a "predeceased spouse" means a person who died before the

decedent while married to the decedent, but does not include the following [*Prob. Code* § 59]:

- A person who obtains or consents to a final decree or judgment of dissolution of marriage from the decedent or a final decree or judgment of annulment of their marriage, which decree or judgment is not recognized as valid in California, unless they subsequently participate in a marriage ceremony purporting to marry each to the other or subsequently live together as husband and wife.
- A person who, following a decree or judgment of dissolution or annulment of marriage obtained by the decedent, participates in a marriage ceremony to a third person.
- A person who was a party to a valid proceeding concluded by an order purporting to terminate all marital property rights.

### [c] Surviving Spouse

For purposes of intestate succession [*see* [8], *below*], a "surviving spouse" does *not* include any of the following [*Prob. Code* § 78]:

- A person whose marriage to the decedent has been dissolved or annulled, unless, by virtue of a subsequent marriage, the person is married to the decedent at the time of death.
- A person who obtains or consents to a final decree or judgment of dissolution of marriage from the decedent or a final decree or judgment of annulment of their marriage, which decree or judgment is not recognized as valid in California, unless they subsequently participate in a marriage ceremony purporting to marry each to the other or subsequently live together as husband and wife.
- A person who, following a decree or judgment of dissolution or annulment of marriage obtained by the decedent, participates in a marriage ceremony with a third person.
- A person who was a party to a valid proceeding concluded by an order purporting to terminate all marital property rights. Under this provision, a spouse who obtains a judgment of legal separation that resolves the parties' marital property rights does not qualify as a "surviving spouse" on the subsequent death of the other spouse for purposes of intestate succession [ *Estate of McDaniel (2008) 161 Cal. App. 4th 458, 463, 73 Cal. Rptr. 3d 907* ].

In addition, the following individuals do not qualify as a "surviving spouse" for purposes of intestate succession:

- A spouse who has waived his or her rights to take from the decedent's estate by entering into a written property settlement agreement [*see Prob. Code* §§ 140-147; *Estate of Lahey (1999) 76 Cal. App. 4th 1056, 1058 fn. 2, 91 Cal. Rptr. 2d 30* ].
- An undivorced bigamous spouse with respect to the estate of his or her legally recognized first spouse [ *Estate of Anderson (1997) 60 Cal. App. 4th 436, 441-444, 70 Cal. Rptr. 2d 266* (inheritance is precluded by doctrine of judicial estoppel when claimant states in application for marriage license to second spouse that he or she has never been married)].
- An individual who married the decedent in a purported marriage ceremony that did not result in a valid marriage, because the parties had not obtained a marriage license [*see Estate of DePasse (2002) 97 Cal. App. 4th 92, 107, 118 Cal. Rptr. 2d 143* (when day before decedent's death from terminal illness, hospital chaplain performed marriage ceremony for petitioner and decedent, but they had not obtained

marriage license because of imminence of her death, there was no valid marriage and petitioner could not qualify as surviving spouse)].

#### **[d] Domestic Partner**

A "domestic partner" is one of two persons who have filed a declaration of domestic partnership with the Secretary of State under *Fam. Code* § 297 *et seq.*, provided that the domestic partnership has not been terminated under *Fam. Code* § 299 [*Prob. Code* § 37(a)]; for discussion and the declaration of domestic partnership form, *see Ch. 110, Nonmarital Cohabitation Agreements and Related Transactions*, §§ 110.50 *et seq.*, 110.220 *et seq.*]. Notwithstanding *Fam. Code* § 299, if a domestic partnership is terminated by the death of one of the partners and neither partner filed a notice of termination of the domestic partnership before the date of the decedent's death, the domestic partner who survives the deceased is a "surviving domestic partner" and is entitled to the rights of a surviving domestic partner as provided in the Probate Code [*Prob. Code* § 37(b)]. This includes the right to an intestate share of the deceased partner's separate property [*Prob. Code* § 6401(c) (effective July 1, 2003); *see* [9], *below*].

#### **[3] Inheritance by Relatives of the Halfblood, Afterborn Relatives, and Aliens**

Relatives of the halfblood generally inherit the same share they would inherit if they were of the whole blood [*Prob. Code* § 6406]. Relatives of the decedent conceived before the decedent's death and born thereafter inherit as if they had been born in the decedent's lifetime [*Prob. Code* § 6407]. A person is not disqualified to take as an heir because the person, or persons through he or she claims, is or has been an alien [*Prob. Code* § 6411].

#### **[4] Establishing Parent-Child Relationship for Purpose of Intestate Succession**

##### **[a] Natural Parent**

The relationship of parent and child exists, for the purpose of intestate succession, between a person and the person's natural parents, regardless of the parents' marital status [*Prob. Code* § 6450(a)]. In determining whether a parent is a "natural parent," the following rules apply:

- A natural parent and child relationship is established if that relationship is presumed and not rebutted under the Uniform Parentage Act (*Fam. Code* § 7600 *et seq.*) [*Prob. Code* § 6453(a)]. For example:
  - A man is presumed to be the natural father of a child if he receives the child into his home and openly holds the child out as his natural child [*Fam. Code* § 7611(d)].
  - A woman may also be a presumed mother of a child of her lesbian partner if they agree to raise the child together, she receives the child into her home, and she holds the child out as her natural child [*see Elisa B. v. Superior Court* (2005) 37 Cal. 4th 108, 125, 33 Cal. Rptr. 3d 46, 117 P.3d 660 (both of child's parents can be women, and woman with no biological connection to child can be child's presumed mother under *Fam. Code* § 7611(d)); *see also K.M. v. E.G.* (2005) 37 Cal. 4th 130, 143, 33 Cal. Rptr. 3d 61, 117 P.3d 673 (when woman provides ova to her lesbian partner so that partner can bear child who will be raised in their joint home, both women are child's parents); *Kristine H. v. Lisa R.* (2005) 37 Cal. 4th 156, 166, 33 Cal. Rptr. 3d 81, 117 P.3d 690 (lesbian mother of child was estopped from challenging validity of stipulated judgment declaring that she and her lesbian partner were child's parents)].
  - A man who acknowledges a child conceived during marriage is entitled to inherit as a natural parent, regardless of the man's alleged failure to pay child support or the lack of a meaningful parent-child relationship [*see Estate of Shellenbarger*, (2008) Cal. App. 4th

894, 896; *86 Cal. Rptr. 3d 862* (court cannot on principles of equity disinherit a natural parent who abandons a child who later dies intestate where decedent was conceived during parent's marriage and father acknowledged paternity)].

■ A natural parent and child relationship may be established under any provision of the Uniform Parentage Act, except that the relationship may not be established by an action under *Fam. Code § 7630(c)* unless one of the following conditions exists [*Prob. Code § 6453(b)*]:

■ A court order was entered during the father's lifetime declaring paternity [*see Estate of Griswold (2001) 25 Cal. 4th 904, 921-924, 108 Cal. Rptr. 2d 165, 24 P.3d 1191* (judgment in bastardy proceeding, in which decedent's biological father confessed paternity, established father as decedent's natural parent for purposes of intestate succession)]. A finding in a proceeding for dissolution of marriage between the decedent and his or her spouse that the claimant is their child establishes, for the purpose of intestate succession, that the claimant is the decedent's issue [ *Weir v. Ferreira (1997) 59 Cal. App. 4th 1509, 1518-1522, 70 Cal. Rptr. 2d 33* ].

■ Paternity is established by clear and convincing evidence that the father has openly held out the child as his own [*see, e.g., Estate of Burden (2007) 146 Cal. App. 4th 1021, 1030; 53 Cal. Rptr. 3d 390* (decedent's acknowledgements during his lifetime of son born out of wedlock, which included (1) decedent's written acknowledgement that he was a party to conception; (2) that he had asked the child's mother to marry him; and (3) his admissions to his own mother, brother, and sister, as well as to the child himself and his mother, that the child was the decedent's son, were sufficient to meet the evidentiary burden of *Prob. Code § 6453(b)(2)*)].

■ It was impossible for the father to hold out the child as his own and paternity is established by clear and convincing evidence. This alternative does not require proof of any specified conduct by the father, but merely proof that he is (or was) the child's biological father [ *Cheyanna M. v. A.C. Nielsen Co. (1998) 66 Cal. App. 4th 855, 867, 78 Cal. Rptr. 2d 335* (statute does not limit type or source of permissible evidence)]. It governs a situation in which the father dies before the child is born [ *Cheyanna M. v. A.C. Nielsen Co. (1998) 66 Cal. App. 4th 855, 870, 78 Cal. Rptr. 2d 335* ].

■ A natural parent and child relationship may be established for a posthumously conceived child under *Prob. Code § 249.5* [*Prob. Code § 6453(c)*; *see [e], below*].

If a child is born out of wedlock, neither a natural parent nor a relative of that parent inherits from or through the child on the basis of the parent and child relationship between that parent and the child, unless the parent or a relative of the parent acknowledged the child and contributed to the support or care of the child [*Prob. Code § 6452*]. For example, when the natural father of a decedent who was born out of wedlock acknowledged the decedent as his child by confessing to paternity in court and contributed to his support, the decedent's half siblings were entitled to inherit from the decedent's estate through their father who was also deceased [*see Estate of Griswold (2001) 25 Cal. 4th 904, 910-920, 924, 108 Cal. Rptr. 2d 165, 24 P.3d 1191* (no requirement that father receive child into his or her home or have personal contact with child)].

A child is no longer considered the "issue" of his or her natural parent for purposes of intestate succession when the parental rights of the parent have been terminated [ *Jackson v. Fitzgibbons (2005) 127 Cal. App. 4th 329, 335-336, 25 Cal. Rptr. 3d 478* ].

**[b] Adoptive Parent**

The relationship of parent and child exists, for the purpose of intestate succession, between an adopted person and his or her adopting parent or parents [*Prob. Code § 6450(b)*].

An adoption severs the relationship of parent and child between an adopted person and a natural parent of the adopted person, unless the natural parent and the adopted person lived together at any time as parent and child (or the natural parent was married to or cohabiting with the other natural parent at the time the person was conceived and died before the person's birth), and the adoption was by the spouse of either of the natural parents or after the death of either of the natural parents [*Prob. Code § 6451(a)*]. Neither a natural parent nor a relative of a natural parent, except for a wholeblood sibling of the adopted person or the issue of that sibling, inherits from or through the adopted person on the basis of a parent and child relationship between the adopted person and that natural parent, unless the adoption is by the spouse or surviving spouse of that parent [*Prob. Code § 6451(b)*]. A prior adoptive parent and child relationship is treated as a natural parent and child relationship [*Prob. Code § 6451(c)*].

**[c] Foster or Stepparent**

The relationship of parent and child exists, for the purpose of intestate succession, between a person and the person's foster parent or stepparent if (1) the relationship began during the person's minority and continued throughout the joint lifetimes of the person and the person's foster parent or stepparent, and (2) it is established by clear and convincing evidence that the foster parent or stepparent would have adopted the person but for a legal barrier [*Prob. Code § 6454*]. The barrier to adoption must have begun during the child's minority and have continued throughout the joint lifetimes of the child and the decedent [ *Estate of Joseph (1998) 17 Cal. 4th 203, 211-212, 216-217, 70 Cal. Rptr. 2d 619, 949 P.2d 472* (not sufficient that barrier only existed at time when adoption was contemplated or attempted; legal barrier must have continued until decedent's death or at least until such point in time before death as to amount to a factual barrier to adoption in the period remaining)]. The benefits of *Prob. Code § 6454* are not limited to minors, but also apply to adult foster children or stepchildren [ *Estate of Joseph (1998) 17 Cal. 4th 203, 214, 70 Cal. Rptr. 2d 619, 949 P.2d 472* ].

**[d] Equitable Adoption**

These statutes do not affect or limit application of the judicial doctrine of equitable adoption for the benefit of the child or the child's issue [*Prob. Code § 6455*; see *In re Marriage of Lewis & Goetz (1988) 203 Cal. App. 3d 514, 250 Cal. Rptr. 30* (applying doctrine)]. The doctrine allows a person who was accepted and treated as a natural or adopted child, and as to whom adoption was promised or contemplated but never performed, to share in inheriting the property of the equitable "parent" [ *Estate of Ford (2004) 32 Cal. 4th 160, 8 Cal. Rptr. 3d 541, 82 P.3d 747* ]. Under the doctrine, an equitable adoption may be found to exist based on an express contract to adopt [see *Estate of Cleveland (1993) 17 Cal. App. 4th 1700, 1713 fn. 15, 22 Cal. Rptr. 2d 590* ].

Although California decisions have explained equitable adoption as the specific enforcement of a contract to adopt, the doctrine rests less on ordinary rules of contract law than on considerations of fairness and intent [ *Estate of Ford (2004) 32 Cal. 4th 160, 8 Cal. Rptr. 3d 541, 82 P.3d 747* ]. However, the California law of equitable adoption does not recognize an estoppel arising merely from the existence of a family relationship between the decedent and the claimant. While a person with whom the decedent had a close, caring, and enduring relationship may be seen as more deserving of inheritance than the decedent's heirs whose personal relationships with the decedent may have been more attenuated, the doctrine of equitable adoption is not a means of compensating the child for services rendered to the parent or a device for avoiding the unjust enrichment of other more distant relatives who will succeed to the estate under the intestacy statutes. Absent proof of an intent to adopt, a court must follow the statutory law of intestate succession [ *Estate of Ford (2004) 32 Cal. 4th 160, 8 Cal. Rptr. 3d 541, 82 P.3d 747* ].

An equitable adoption claimant need not prove all the elements of an enforceable contract to adopt. The claimant, however, must demonstrate the existence of a direct expression by the decedent of an intent to adopt the claimant. This intent may be shown by proof of an unperformed express agreement or promise to adopt. It may also be shown by proof of other acts or statements directly showing that the decedent intended the claimant to be, or to be treated as, a legally adopted child, such as an invalid or unconsummated attempt to adopt, the decedent's statement of his or her intent to adopt, or the decedent's representation to the claimant or to the community at large that the claimant was the decedent's natural or legally adopted child [ *Estate of Ford (2004) 32 Cal. 4th 160, 8 Cal. Rptr. 3d 541, 82 P.3d 747* ]. In addition to a statement or act by the decedent that unequivocally shows the decedent's intent to adopt, the claimant must show that the decedent acted consistently with that intent by forming with the claimant a close and enduring family relationship that must persist up to, or at least not be repudiated by the decedent before, the decedent's death. These elements of an equitable adoption must be shown by clear and convincing evidence [ *Estate of Ford (2004) 32 Cal. 4th 160, 8 Cal. Rptr. 3d 541, 83 P.3d 747* ].

### **[e] Posthumously Conceived Children**

For purposes of determining rights to property to be distributed on a decedent's death, a child of the decedent who was conceived after the decedent's death is deemed to have been born in the decedent's lifetime, and after the execution of all of the decedent's testamentary instruments, if the child or the child's representative proves by clear and convincing evidence that all of the following conditions are satisfied:

- The decedent specified in writing that his or her genetic material could be used for the posthumous conception of a child of the decedent. This writing must be signed by the decedent and dated [*Prob. Code § 249.5(a)(1)*].
- The person the decedent designated to control the use of the genetic material has given written notice by certified mail, return receipt requested, that the decedent's genetic material was available for posthumous conception. The notice must have been given to a person who has the power to control the distribution of the decedent's property or death benefits payable by reason of the decedent's death, within four months of the date of issuance of a certificate of the decedent's death or entry of a judgment determining the fact of the decedent's death, whichever event occurs first [*Prob. Code § 249.5(b)*].
- The child was in utero using the decedent's genetic material within two years of the date of issuance of a certificate of the decedent's death or entry of a judgment determining the fact of the decedent's death, whichever occurs first. This provision does not apply to a child who shares all of his or her nuclear genes with the person donating the implanted nucleus as a result of the application of somatic nuclear transfer technology commonly known as human cloning [*Prob. Code § 249.5(c)*].

The person with the power to control the distribution of the decedent's property or death benefits payable by reason of the decedent's death may not make a distribution of property or pay death benefits before two years following the date of issuance of a certificate of the decedent's death or entry of a judgment determining the fact of the decedent's death, whichever occurs first, if the person receives timely notice under *Prob. Code § 249.5(b)*, or has actual knowledge, of the availability of the decedent's genetic material for posthumous conception [*Prob. Code § 249.6(a)*]. This provision does not apply to, and the distribution of property or the payment of death benefits may proceed in a timely manner as provided by law with respect to, any property if the birth of the posthumously conceived child or children will not affect the proposed distribution of the decedent's property, the payment of death benefits payable by reason of the decedent's death, the determination of rights to property to be distributed on the decedent's death, or the right of any person to claim a probate homestead or probate family allowance [*Prob. Code § 249.6(b)*]. The provision for delayed distribution also does not apply if the person the decedent designated to control the use of the genetic material sends written notice by certified mail, return receipt requested, that he or she does not intend to use the genetic material for the posthumous conception of a child of the decedent. The notice must be signed by the person and at least one competent witness, and

dated [*Prob. Code § 249.6(c)*].

The person with the power to control the distribution of the decedent's property or death benefits payable by reason of the decedent's death is not liable for making a distribution of property or paying death benefits before receiving notice or acquiring actual knowledge of the existence of genetic material available for posthumous conception purposes [*Prob. Code § 249.6(d)*]. Each person to whom payment, delivery, or transfer of the decedent's property is made is personally liable to a person who, under *Prob. Code § 249.5*, has a superior right to the property. A person's aggregate personal liability cannot exceed the fair market value, valued as of the time of the transfer, of the property paid, delivered, or transferred to the person, less the amount of any liens and encumbrances on the property at that time [*Prob. Code § 249.6(e)*]. In addition, any person who fraudulently secures the payment, delivery, or transfer of the decedent's property is liable to the person having a superior right for three times the fair market value of the property [*Prob. Code § 249.6(f)*]. Any action to impose liability must be filed within three years after the distribution to the holder of the decedent's property, or three years after the discovery of the fraud, whichever is later. This three-year period may not be tolled for any reason [*Prob. Code § 249.6(g)*].

If the notice required by *Prob. Code § 249.5(b)* (*see above*) is not given in a timely manner, the person with the power to control the distribution of the decedent's property or death benefits payable by reason of the decedent's death may make the distribution in the manner provided by law as if any child of the decedent conceived after his or her death had predeceased the decedent without heirs. A posthumously conceived child, or that child's representative, is barred from making a claim for wrongful distribution against either the person making the distribution or the recipient of the distribution, when timely notice was not given [*Prob. Code § 249.7*].

Any interested person may file a petition under *Prob. Code § 248* or *Prob. Code § 17200* requesting distribution of the decedent's property or death benefits payable by reason of the decedent's death that are subject to the delayed distribution provisions of *Prob. Code § 249.6* [*Prob. Code § 249.8*]. At the hearing, if it appears that distribution can be made without any loss to any interested person, including any loss (either actual or contingent) to the decedent's posthumously conceived child, the court may order distribution of all, or a portion, of the property or death benefits. The order is stayed until any bond required by the court is filed [*Prob. Code § 249.8*].

#### **[5] Failure to Survive Decedent**

A person who fails to survive the decedent by 120 hours is deemed to have predeceased the decedent for the purpose of intestate succession, and the heirs are determined accordingly [*Prob. Code § 6403(a)*]. If it cannot be established by clear and convincing evidence that a person who would otherwise be an heir has survived the decedent by 120 hours, then it is deemed that the person failed to survive for the required period [*Prob. Code § 6403(a)*]. If the application of the 120-hour survival requirement would result in the escheat of the decedent's property to the state, then the requirement does not apply [*Prob. Code § 6403(a)*]. In addition, these provisions do not apply if any of the persons on whose time of death the disposition of property depends died before January 1, 1990 [*Prob. Code § 6403(b)*]. These cases continue to be governed by the law applicable before that date, which had no required period of survival (former *Prob. Code § 6403*) [*Prob. Code § 6403(b)*].

#### **[6] Advancements by Decedent**

If a person dies intestate as to all or part of his or her estate, property the decedent gave to an heir before death is treated as an advancement against that heir's share of the intestate estate only if (1) the decedent declares in a contemporaneous writing that the gift is an advancement against the heir's share of the estate or that its value is to be deducted from the value of the heir's share, or (2) the heir acknowledges in writing that the gift is to be so deducted or is an advancement, or that its value is to be deducted from the value of the heir's share of the estate [*Prob. Code § 6409(a)*].

The property advanced is to be valued as of the time the heir came into possession or enjoyment of it or as of the time of

the decedent's death, whichever occurs first [*Prob. Code § 6409(b)*]. If the value of the advanced property is expressed in the decedent's contemporaneous writing or in an acknowledgement the heir made contemporaneously with the advancement, then that value is conclusive in the division and distribution of the intestate estate [*Prob. Code § 6409(c)*].

If the recipient of the advanced property fails to survive the decedent, the property is not taken into account in computing the intestate share to be received by the recipient's issue, unless the declaration or acknowledgment provides otherwise [*Prob. Code § 6409(d)*].

#### **[7] Debts Owed to Decedent**

A debt owed to the decedent is not charged against the intestate share of any person except the debtor [*Prob. Code § 6410(a)*]. If the debtor fails to survive the decedent, the debt is not taken into account in computing the intestate share of the debtor's issue [*Prob. Code § 6410(b)*].

#### **[8] Distribution to Surviving Spouse**

The surviving spouse's intestate share of community property [*see Prob. Code § 28*] and quasi-community property [*see Prob. Code § 66*] is the one-half of the community property and quasi-community property that belongs to the decedent under *Prob. Code §§ 100 and 101* [*Prob. Code § 6401(a), (b)*]. As to the decedent's separate property, the surviving spouse's intestate share is as follows [*Prob. Code § 6401(c)*]:

- The entire estate if the decedent does not have any surviving issue, parent, sibling, or issue of a deceased sibling.
- One-half of the intestate estate if the decedent has only one surviving child or the issue of one deceased child, or has no surviving issue but has a surviving parent or parents or their issue or the issue of either of them.
- One-third of the intestate estate if the decedent has more than one surviving child, one surviving child and the issue or one or more deceased children, or the issue of two or more deceased children.

Except to the extent provided in *Prob. Code § 120*, the estate of dower and curtesy are not recognized [*Prob. Code § 6412*]. Under *Prob. Code § 120*, the surviving spouse of a decedent who died while domiciled outside of California, but who left a valid will disposing of real property in this state that is not the community property of the decedent and the surviving spouse, has the same right to elect to take a portion of or interest in the property against the decedent's will as though the property were situated in the decedent's domicile at death.

#### **[9] Distribution to Surviving Domestic Partner**

A surviving domestic partner [*see [2][d], above*] is entitled to the same intestate share of the decedent's separate property to which a surviving spouse would be entitled [*Prob. Code § 6401(c)* (effective July 1, 2003); *see [8], above*]. A surviving registered domestic partner, following the other partner's death, has the same rights, protections, and benefits, and is subject to the same responsibilities, obligations, and duties under law that are granted to and imposed on a surviving spouse [*Fam. Code § 297.5(c)*; *see Fam. Code § 297.5(j)* (when necessary to implement statutory rights of domestic partners, gender-specific terms referring to spouses must be construed to include domestic partners)]. A transfer of separate real property inherited by a surviving domestic partner by intestate succession on the other partner's death does not constitute a change in ownership requiring a reassessment for property tax purposes [*18 Cal. Code Reg. § 462.240(k)*].

#### **[10] Distribution to Other Heirs**

Except as provided in *Prob. Code § 6402.5* [see [11], below (distribution when decedent has predeceased spouse but no surviving spouse or issue), the part of the intestate estate not passing to the surviving spouse under *Prob. Code § 6401* [see [8], above] or to a surviving domestic partner under *Prob. Code § 6401(c)* [see [9], above], or the entire intestate estate if there is no surviving spouse or surviving domestic partner, passes as follows [*Prob. Code § 6402*]:

- To the decedent's issue. If they are all of the same degree of kinship to the decedent, they take equally. If they are of unequal degree, those of a more remote degree take in the manner provided in *Prob. Code § 240*.
- To the decedent's parent or parents equally if there is no surviving issue.
- To the issue of the parents or either of them if there is no surviving issue or parent. The issue take equally if they are all of the same degree of kinship to the decedent. If they are of unequal degree, those of a more remote degree take in the manner provided in *Prob. Code § 240*.
- To the grandparent or grandparents equally, or if there is no surviving grandparent, to their issue, if there is no surviving issue, parent, or issue of a parent, but the decedent is survived by one or more grandparents or issue of grandparents. The issue take equally if they are all of the same degree of kinship to the decedent. If they are of unequal degree, those of a more remote degree take in the manner provided in *Prob. Code § 240*. The degree of the grandparents' issue is measured by their degree of kinship to the decedent, not their degree of kinship to the grandparents [see *Estate of McCrary (1997) 54 Cal. App. 4th 100, 103-105, 62 Cal. Rptr. 2d 504*]. For example, in distributing the estate of a decedent who died intestate and who was not survived by any children, parents, siblings, grandparents, aunts, or uncles, but who was survived by four maternal first cousins and the issue of 14 predeceased paternal first cousins, the court properly divided the decedent's estate into 18 shares and distributed 4/18 ths of the estate to the first cousins and 14/18 ths of the estate to the decedent's relatives who were the issue of the 14 deceased paternal first cousins. The paternal first cousins were not of a different generation of issue by reason of being descendants of a different grandparent [see *Estate of McCrary (1997) 54 Cal. App. 4th 100, 102-105, 62 Cal. Rptr. 2d 504* (rejecting contention of maternal first cousins that they were entitled to entire estate, and that nothing should have been awarded to more remote relatives, because first cousins were nearest generation of issue then living from any of decedent's grandparents)].
- To the issue of a predeceased spouse if there is no surviving issue, parent or issue of a parent, or grandparent or issue of a grandparent. The issue take equally if they are all of the same degree of kinship to the predeceased spouse. If they are of unequal degree, those of a more remote degree take in the manner provided in *Prob. Code § 240*.
- To the next of kin in equal degree if there is no surviving issue, parent or issue of a parent, grandparent or issue of a grandparent, or issue of a predeceased spouse. If there are two or more collateral kindred in equal degree claiming through different ancestors, those who claim through the nearest ancestor are preferred to those claiming through a more remote ancestor.
- To the parents of a predeceased spouse or the issue of the parents if there is no surviving next of kin of the decedent and no surviving issue of a predeceased spouse of the decedent. The parents take equally. The issue take equally if they are of the same degree of kinship to the predeceased spouse. If they are of unequal degree, those of a more remote degree take in the manner provided in *Prob. Code § 240*.

Under *Prob. Code § 240*, the property must be divided into as many equal shares as there are living members of the nearest generation of issue then living and deceased members of that generation who leave issue then living. Each living member of the nearest generation of issue then living receives one share. The share of each deceased member of that

generation who leaves issue then living is divided in the same manner among his or her then living issue [*see* Estate of Beckle (2009) 174 Cal. App. 4th 34, 38, 93 Cal. Rptr. 3d 890 (Distribution of an intestate decedent's estate could not be limited to surviving first cousins and the children of predeceased first cousins while excluding grandchildren of predeceased first cousins because the governing statutes, *Prob. Code* §§ 50, 240, 6402(d), do not limit the surviving issue of a predeceased heir entitled to inherit to the first generation; rather, surviving issue includes all lineal descendants of all generations)].

A person who is related to the decedent through two lines of relationship is entitled to only a single share based on the relationship that would entitle the person to the larger share [*Prob. Code* § 6413].

### **[11] Distribution of Estate Attributable to Decedent's Predeceased Spouse**

#### **[a] Portion of Estate Attributable to Predeceased Spouse**

When a decedent has no surviving spouse or issue, but had a predeceased spouse, the portion of the decedent's estate attributable to the predeceased spouse must be determined [*see* [2][b], *above* ("predeceased spouse" defined)]. The term "portion of the decedent's estate attributable to the decedent's predeceased spouse" means all of the following property in the decedent's estate [*Prob. Code* § 6402.5(f)]:

- One-half of the community property in existence at the time of the predeceased spouse's death.
- One-half of any community property in existence at the time of the predeceased spouse's death, which the predeceased spouse gave to the decedent by way of gift, descent, or devise.
- The portion of any community property in which the predeceased spouse had any incident of ownership and that vested in the decedent on the predeceased spouse's death by right of survivorship.
- Any separate property of the predeceased spouse that came to the decedent by gift, descent, or devise of the predeceased spouse, or that vested in the decedent on the predeceased spouse's death or by right of survivorship.

Quasi-community property is treated in the same manner as community property [*Prob. Code* § 6402.5(g)].

#### **[b] Distribution of Real Property**

For the purposes of distributing real property when a decedent has no surviving spouse or issue, but had a predeceased spouse who died not more than 15 years before the decedent, the portion of the decedent's estate attributable to the decedent's predeceased spouse passes as follows [*Prob. Code* § 6402.5(a)]:

- To the surviving issue if the decedent is survived by issue of the predeceased spouse. If they are all of the same degree of kinship to the predeceased spouse, they take equally. If they are of unequal degree, those of a more remote degree take in the manner provided in *Prob. Code* § 240 [*see* [10], *above*].
- To the surviving parent or parents equally if there is no surviving issue of the predeceased spouse but the decedent is survived by a parent or parents of the predeceased spouse.
- To the surviving issue of the parents or either of them if there is no surviving issue or parent of the predeceased spouse but the decedent is survived by the issue of a parent of the predeceased spouse. The issue take equally if they are all of the same degree of kinship to the predeceased spouse. If they are of unequal degree, those of a more remote degree take in the manner provided in *Prob. Code* § 240 [*see*

[10], *above*].

- To the decedent's next of kin in the manner provided in *Prob. Code § 6402* [see [10], *above*] if the decedent is not survived by issue, parent, or issue of a parent of the predeceased spouse.
- To the predeceased spouse's next of kin in the manner provided in *Prob. Code § 6402* if the portion of the decedent's estate attributable to the predeceased spouse would otherwise escheat to the state because there is no kin of the decedent to take the estate under that section.

### **[c] Distribution of Personal Property**

For the purposes of distributing personal property when a decedent has no surviving spouse or issue, but had a predeceased spouse who died not more than five years before the decedent, the portion of the decedent's estate attributable to the decedent's predeceased spouse passes as follows [*Prob. Code § 6402.5(b)*]:

- To the surviving issue if the decedent is survived by issue of the predeceased spouse. If they are all of the same degree of kinship to the predeceased spouse, they take equally. If they are of unequal degree, those of a more remote degree take in the manner provided in *Prob. Code § 240* [see [10], *above*].
- To the surviving parent or parents equally if there is no surviving issue of the predeceased spouse but the decedent is survived by a parent or parents of the predeceased spouse.
- To the surviving issue of the parents or either of them if there is no surviving issue or parent of the predeceased spouse but the decedent is survived by the issue of a parent of the predeceased spouse. The issue take equally if they are all of the same degree of kinship to the predeceased spouse. If they are of unequal degree, those of a more remote degree take in the manner provided in *Prob. Code § 240* [see [10], *above*].
- To the decedent's next of kin in the manner provided in *Prob. Code § 6402* [see [10], *above*] if the decedent is not survived by issue, parent, or issue of a parent of the predeceased spouse.
- To the predeceased spouse's next of kin in the manner provided in *Prob. Code § 6402* if the portion of the decedent's estate attributable to the predeceased spouse would otherwise escheat to the state because there is no kin of the decedent to take the estate under that section.

The claimant heir bears the burden of proof to show the exact personal property to be disposed of to the heir [*Prob. Code § 6402.5(c)*]. The term "personal property" means personal property having an aggregate value of at least \$10,000 and to which there is a written record of title or ownership [*Prob. Code § 6402.5(e)*].

### **[d] Inheritance by Afterborn Relatives or Person Related Through Two Lines of Relationship**

Relatives of the predeceased spouse conceived before the decedent's death but born thereafter inherit as if they had been born in the decedent's lifetime [*Prob. Code § 6402.5(h)(1)*]. A person who is related to the predeceased spouse through two lines of relationship is entitled to only a single share based on the relationship that would entitle the person to the larger share [*Prob. Code § 6402.5(h)(2)*].

### **[12] Use of Decedent's Tax Returns to Locate Decedent's Assets**

Individuals who inherit from a decedent who dies intestate may have difficulty in discovering and locating the decedent's assets. They may be assisted in locating these assets by requesting access to the decedent's previously filed

income tax returns. On request, the decedent's returns are open to inspection by, or disclosure to, any heir at law, next of kin, or beneficiary under the will, of the decedent, or a donee of property, if the IRS finds that the individual has a material interest that will be affected by the information contained in the returns [*I.R.C. § 6103(e)(3)(B)*]. The IRS treats an heir at law or next of kin who is a distributee under state law of the estate of a decedent who dies intestate as having a material interest that will be affected by information contained in the decedent's return filed for the year before his or her death [ *Rev. Rul. 2004-68, 2004-31 I.R.B. 118* ].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawIntestacyGeneral OverviewEstate, Gift & Trust LawIntestacyAdopted ChildrenEstate, Gift & Trust LawIntestacyDescent & DistributionEstate, Gift & Trust LawIntestacyEscheatEstate, Gift & Trust LawIntestacyNonmarital Children



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CHAPTER 60 ESTATE PLANNING  
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*23-60 California Legal Forms--Transaction Guide §§ 60.20-60.99*

**[Reserved]**

§§ 60.20[Reserved]



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DIVISION IV: WILLS AND TRUSTS  
CHAPTER 60 ESTATE PLANNING  
PART III. TRANSACTION GUIDE  
A. Client Interview--Facts and Documents

*23-60 California Legal Forms--Transaction Guide § 60.100*

**§ 60.100 Facts**

**NOTE:**

The form in § 60.200[2] is a client interview checklist designed to be used by an estate planning attorney at the initial client interview. This checklist includes questions designed to elicit all of the personal and financial information necessary to begin the preparation of an estate plan.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawGeneral OverviewEstate, Gift & Trust LawTrustsGeneral OverviewEstate, Gift & Trust LawWillsGeneral Overview



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DIVISION IV: WILLS AND TRUSTS  
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A. Client Interview--Facts and Documents

*23-60 California Legal Forms--Transaction Guide § 60.101*

**§ 60.101 Documents**

**NOTE:**

If the originals of any of the documents described below are not available to the client or if, by reason of their special value or other special considerations, they should not be turned over to the attorney, copies may be furnished. For a discussion of the rules governing the deposit of estate planning documents with an attorney for safekeeping, see § 60.18.

1. Any will previously executed by client.
2. Any trust instrument previously executed by client.
3. Any contract affecting client's power to make or revoke a will or trust (for example, contract to make will or devise or contract not to revoke will or devise).
4. Any contact evidencing client's rights in property (for example, joint venture agreement or partnership agreement).
5. Deeds to real property.
6. Deeds of trust or mortgages.
7. Certificates for stocks, bonds, or other securities.
8. Life insurance policies owned by client or on client's life.
9. If client is member of a domestic partnership and has filed declaration of domestic partnership with

Secretary of State, copy of declaration as filed [*Prob. Code* § 37; *Fam. Code* § 297(b); *see* § 61.19[4]].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

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*23-60 California Legal Forms--Transaction Guide §§ 60.102-60.109*

**[Reserved]**

§§ 60.102[Reserved]



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DIVISION IV: WILLS AND TRUSTS  
CHAPTER 60 ESTATE PLANNING  
PART III. TRANSACTION GUIDE  
B. Preliminary Determinations

*23-60 California Legal Forms--Transaction Guide § 60.110*

**§ 60.110 Conflicts of Interest**

1. If clients are husband and wife, determine whether their interests are subject to actual or potential conflict of interest arising from the following:

**NOTE:**

It is impossible to describe all of the circumstances that may give rise to a conflict (or potential conflict) of interest between a husband and wife, and each case must be evaluated on its own circumstances. However, some of the circumstances that may indicate the existence of a conflict of interest are listed below. For discussion, see § 60.201[1].

a. Previous marriages.

**NOTE:**

When there have been previous marriages, there will often be children by those marriages. Further, property will often have been acquired in the previous marriages, and the property will usually be separate rather than community property. For further discussion, see (b), (c), and (d), *below*.

b. Children by previous marriages.

**NOTE:**

If spouses have children by previous marriages, they will often wish to leave some (or all) of their property to those children when they die. But the surviving spouse may expect that the property will be left to the surviving spouse. If both spouses do not have identical ideas concerning the disposition of the property, a conflict may exist.

- c. One spouse with substantially larger estate than other.

**NOTE:**

When one spouse has a substantially larger estate than the other, the spouse with the smaller estate may seek to persuade the spouse with the larger estate to convert some or all of the estate to community property, or to leave the estate to the surviving spouse to the exclusion of other family members. If the spouses have different ideas about the disposition of the larger estate, a conflict of interest will exist.

- d. Interest expressed by either or both spouses in transmuting some or all of their property from community to separate or separate to community.

**NOTE:**

A transmutation of marital property will almost always benefit one spouse at the expense of the other and thus result in a conflict of interest.

- e. Interest expressed by either or both spouses in leaving property to someone other than surviving spouse.

**NOTE:**

A spouse who has children by a previous marriage will often wish to leave some (or all) of the property acquired before the later marriage to those children. If both spouses do not agree on the appropriateness of doing this, a conflict of interest will exist.

- f. Previous attorney-client relationship between attorney and one spouse.

**NOTE:**

If the attorney has previously represented one (but not both) of the spouses, the attorney will often have received information in confidence that cannot be divulged, even to the other spouse. If this information would be important to the other spouse in making estate planning decisions, the attorney cannot ethically represent both.

2. If interests of husband and wife are subject to actual or potential conflict of interest, determine whether they would be willing to do the following:

- a. Waive the conflict; and  
b. Give attorney written authorization to proceed with dual representation.

**NOTE:**

If a husband and wife have conflicting (or potentially conflicting) interests, the attorney cannot ethically represent both without first explaining the facts giving rise to the conflict and obtaining written authorization from both clients to proceed with the dual representation [*Cal. Rules Prof. Conduct, Rule 3-310(B)*]. For a form for a conflict of interest disclosure for dual representation, see § 60.201[2].

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Estate, Gift & Trust Law Wills General Overview Legal Ethics Client Relations Conflicts of Interest



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*23-60 California Legal Forms--Transaction Guide § 60.111*

**§ 60.111 Estimated Estate Tax Liability**

1. Estimate estate taxes that will be due on client's death.

**NOTE:**

*Section 60.205[2]* is a worksheet that may be used to estimate the estate taxes that will be due on the client's death. All of the steps necessary to make the estimate are set forth in the worksheet.

2. Determine whether estate taxes would be reduced (or eliminated) through utilization of marital deduction by transferring some or all of client's estate to surviving spouse by:

- a. Outright devise; or
- b. Qualifying transfer in trust;

**NOTE:**

Property that passes from a decedent to the decedent's surviving spouse will generally qualify for the marital deduction if the spouse is a citizen of the United States and the property does not pass in the form of a nondeductible "terminable interest" [*I.R.C. § 2056(a), (b)*]. For general discussion of the marital deduction see Ch. 71, ***Marital Deduction Trust Provisions*** .

3. Determine whether all or part of client's estate can be sheltered from estate tax under "unified credit."

**NOTE:**

The amount of property that can be sheltered from taxation under the unified credit is called the "applicable exclusion amount" [*see I.R.C. § 2010(c)*] (table of graduated amounts) and discussion in §

60.13[4][b]]. The amount of property that can be sheltered by the estate tax unified credit varies and depends on the year of death. The amount is \$675,000 for decedents dying in 2001, \$1 million for decedents dying in 2002 and 2003, \$1.5 million for decedents dying in 2004 and 2005, \$2 million for decedents dying in 2006, 2007, and 2008, and \$3.5 million for decedents dying in 2009 [*I.R.C. § 2010(c)*]. Planning around the credit to some degree involves guessing when a client will die. The estates of both a husband and a wife are entitled to the benefits of the applicable exclusion amount. In calculating the estate of the surviving spouse, however, the attorney should include both property that originally belonged to the surviving spouse and any property that the surviving spouse will have received from the first spouse to die. Unless it is depleted through gifts or consumption, the surviving spouse's estate will often be substantially larger than the deceased spouse's estate.

4. Determine whether overall estate tax burden on estates of client and client's spouse would be reduced (or eliminated) by creation of "bypass" trust.

**NOTE:**

A "bypass" trust is a trust that is created on the death of the first spouse to die and that is designed to entirely avoid estate taxation in the estate of the surviving spouse. A properly planned and drafted bypass trust will qualify for the full "applicable exclusion amount" available in the year of the first spouse's death [*see I.R.C. § 2010(c)*] (table of graduated amounts) and discussion in § 60.13[4][b]]. Bypass trusts are sometimes called "credit shelter trusts," "exemption trusts," "credit trusts," or "nonmarital trusts." For general coverage of bypass trusts and their use, see Ch. 71, *Marital Deduction Trust Provisions* .

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law  
Probate  
General Overview  
Estate, Gift & Trust Law  
Wills  
General Overview  
Tax Law  
Federal Estate & Gift Taxes  
General Overview



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*23-60 California Legal Forms--Transaction Guide § 60.112*

**§ 60.112 Estimated Probate Costs**

1. Estimate attorney's and executor's compensation if client's estate is subject to probate administration.

**NOTE:**

The form in § 60.207[2] is a worksheet that may be used to estimate the attorney's and executor's fees that would be payable in the event the client's estate is subject to probate administration. All of the steps necessary to estimate those fees are set forth in the worksheet.

2. Factor amount of fee for filing petition for probate [*Gov. Code § 70650(a)*].

**NOTE:**

The uniform filing fee for the first petition for letters of administration or letters testamentary, or the first petition for special letters of administration with the powers of a general personal representative is three hundred fifty-five dollars (\$355) [*Gov. Code § 70650(a)*].

3. Determine whether total cost of transferring client's estate after client's death could be significantly reduced by avoiding probate administration of all or part of estate.

**NOTE:**

To make this determination, the estimated attorney's and executor's fees [*see P 1, above*] payable after the client's death must be compared with the costs of establishing and implementing probate-avoiding mechanisms (such as a revocable inter vivos trust) now and administering the trust after the client's death. To make this comparison, the attorney must estimate the total fees payable to the attorney for planning the estate, drafting any necessary trust instruments, making the necessary transfers to the trust, and providing

necessary administrative services to the trustee (or successor trustee) after the client's death. The costs of creating a living trust are typically greater than the costs of planning and drafting a will, and the living trust will be effective only to the extent that it is "funded" during the settlor's lifetime [*see* § 60.17[2][c]]. This means that property must be transferred to the trustee by means of deeds, assignments, or other instruments. In some cases, the attorney will handle the "funding" of the trust, and will charge fees for that work. In many cases, however, the costs of funding will be excessive, and it will be sufficient if the attorney gives the client detailed instructions as to how these transfers can be accomplished. After the settlor of a revocable trust has died, some legal services will almost always be necessary to carry out the dispositive provisions of the trust and file any necessary tax returns.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law  
Probate  
Personal Representatives  
Compensation  
Estate, Gift & Trust Law  
Probate  
Procedures in  
Probate  
Costs & Expenses  
Legal Ethics  
Client Relations  
Attorney Fees  
General Overview



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*23-60 California Legal Forms--Transaction Guide § 60.113*

**§ 60.113 Will**

1. Determine whether will would be adequate to transfer client's estate after client's death without additional estate planning tools.

**NOTE:**

In many cases, a will is adequate to accomplish the client's estate planning goals without the additional use of other estate planning tools, such as revocable or irrevocable trusts. Even when the estate plan is to include one or more trusts, however, a will is still important, if only to provide for the transfer of property that was not included in the trusts, either intentionally or by inadvertence. In many cases, a "pour-over" will will be indicated. This is a will that devises property to the trustee of a trust established before the will becomes effective. The trust to which property is "poured over" is typically (although not always) a revocable inter vivos ("living") trust established by the testator. For discussion of "pour overs" and "pour-over" wills, see § 60.17[1][c] and Ch. 63, *Will Provisions* . For basic considerations in the use of wills in estate planning, see Ch. 61, *Will Drafting and Complete Will Forms* .

2. Determine whether will should include testamentary trust.

**NOTE:**

A testamentary trust is, by definition, a trust that is created by a will and that does not come into existence until the will becomes effective (that is, until the testator dies). A testamentary trust has no existence during the settlor's lifetime. Testamentary trusts are often used to provide for beneficiaries (such as young children or aged parents) who will need the benefits of professional property management after the settlor has died. For discussion of testamentary trusts, see § 60.17[1][d]. For basic considerations in the use of testamentary trusts, see Ch. 64, *Testamentary Trusts: Payment and Distribution*

**Provisions** , Ch. 64A, *Testamentary Trusts: Trustee Provisions* , and Ch. 64B, *Testamentary Trusts: Administrative Provisions* . For additional discussion of testamentary trusts, see California Wills & Trusts, Ch. 110, **Testamentary Trusts** (Matthew Bender).

3. Determine whether client's interests would be served by both will and inter vivos trust.

**NOTE:**

In many cases, a client's estate planning needs can be served only by the use of a will and one or more inter vivos trusts. When inter vivos trusts are created, a will (even if only a "pour-over" will) is always indicated [*see* NOTE to P 1, *above*]. In some cases, a client may wish to transfer some property by will and other property through the mechanism of a trust or trusts. For the suitability of using a revocable inter vivos ("living") trust to carry out the estate plan, see § 60.114. For the suitability of using an irrevocable inter vivos trust, see § 60.115.

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Estate, Gift & Trust LawWillsGeneral Overview



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*23-60 California Legal Forms--Transaction Guide § 60.114*

**§ 60.114 Revocable Inter Vivos ("Living") Trust**

1. Determine whether client's interests would be served by creation of revocable inter vivos ("living") trust for purposes of:

**NOTE:**

For detailed discussion of the advantages and disadvantages of revocable inter vivos trusts, see *Ch. 70, Complete Revocable Trust Forms, § 70.10*. For discussion of the federal estate tax marital deduction [*I.R.C. § 2056*], and tax planning involving the coordination of that deduction and the unified credit against federal estate and gift taxes [*I.R.C. § 2010*], see *Ch. 71, Marital Deduction Trust Provisions* .

a. Avoiding probate.

**NOTE:**

Assets that form a part of a revocable inter vivos ("living") trust at the time of the settlor's death will not be subject to probate administration. In many cases, this will result in the saving of time and expense. For discussion, see § 60.17[2][b]. For estimated costs of probate, see §§ 60.112 and 60.207.

b. Providing property management in event of client's incapacity.

**NOTE:**

Property that has been transferred to the trustee of a revocable inter vivos ("living") trust can be managed by the trustee in the event of the settlor's incapacity. If the settlor was originally the trustee of the trust, the successor trustee will succeed to the powers of the trustee in the event of the settlor's incapacity. This will obviate the expense and delay of

conservatorship proceedings. However, property management in the event of incapacity can also be provided by an attorney in fact under a durable power of attorney [*see* §§ 60.17[7], 60.119].

c. Providing property management for client's children.

**NOTE:**

Minor children do not have the legal capacity to manage their own property, and some other person will generally have to act in their behalf. This other person may be a guardian [*see Prob. Code* §§ 1500-1601], a custodian under the California Uniform Transfers to Minors Act [*see Prob. Code* §§ 3900-3925], or a trustee acting under a trust instrument. Even children who have attained the age of majority will often lack the maturity to properly manage substantial sums of money or property. If the settlor has children who may need property management after the settlor's death, the trust will provide this management and obviate the need for the appointment of guardians of the minors' estates. For discussion of the California Uniform Transfers to Minors Act, see Ch. 60A, *Gifts* . For discussion of guardianships for minor children, see Ch. 66, *Guardianship and Conservatorship Planning* . For further discussion of problems faced by minors who acquire property by gift or inheritance, see California Wills & Trusts, Ch. 28, *Devises to Minors* , and Ch. 37, *Nomination of Guardians for Minor Children* (Matthew Bender).

d. Protecting client's privacy.

**NOTE:**

A living trust will help to preserve the settlor's privacy. The records of the probate court are public records and, as such, open to public inspection. Trust documents, in contrast, are private documents and need not become public records unless there is some litigation involving the trust. However, third parties such as brokers, transfer agents, and title insurers may ask to inspect the trust instrument before participating in certain trust transactions. To the extent that it is necessary to divulge the contents of the trust documents, the settlor's privacy will be impaired. However, requests of this kind can often be satisfied by furnishing the first and last pages, or merely an abstract, of the trust instrument. For discussion, see § 60.17[2][b].

e. Creating "bypass trust" to reduce or eliminate estate taxes in estates of client and client's spouse.

**NOTE:**

If the combined estates of a married couple exceed the "applicable exclusion amount" that is likely to be available in the year of the first spouses death [*see I.R.C. § 2010(c)* (table of graduated amounts) and discussion in § 60.13[4][b]], estate taxes may be reduced or eliminated by creating a "bypass trust" on the death of the first spouse. The surviving spouse can receive the income from the trust, and distributions of principal according to an "ascertainable standard" [*see I.R.C. §§ 2041(b)(1)(A); see also § 60.13[1][g]*]. When the surviving spouse dies, the assets of the "bypass trust" will not be included in the surviving spouse's gross estate for estate tax purposes, but will pass to other beneficiaries (for example, children) as provided in the trust instrument. For general coverage of bypass trusts and their use, see Ch. 71, *Marital Deduction Trust Provisions* .

2. Determine whether client's interests would be served by planning estate without revocable inter vivos ("living") trust because:

- a. Client's estate can be adequately transferred after client's death by will.
- b. Combined estates of client and client's spouse are small enough to be completely sheltered from estate taxation under unified credit.

**NOTE:**

The full amount of the "applicable exclusion amount" available in the year of the client's death will be sheltered from estate taxation under the unified credit [*see I.R.C. § 2010(c)*] (table of graduated amounts) and discussion in § 60.13[4][b]]. If the combined estates of a married couple will not exceed that amount (even after property owned by the deceased spouse is transferred to the surviving spouse and combined with other property owned by the surviving spouse), estate taxes are not a problem, and there is no need for a bypass trust to reduce or eliminate estate taxes in the estate of the surviving spouse. Under these circumstances, both estates can safely be planned without any consideration for estate taxes. To make sure that the combined estates do not exceed the credit shelter amount, however, the attorney should carefully consider all items of property that could be included in the gross estates of both spouses [*see I.R.C. § 2031* (gross estate); *see also § 60.13[1]*].

- c. Client's potential need for property management in event of incapacity can be adequately met by durable powers of attorney.

**NOTE:**

Durable powers of attorney are useful estate planning tools. For legal rules governing durable powers of attorney, see § 60.17[7]. For preliminary considerations relating to the use of durable powers of attorney, see § 60.119.

- d. Client's estate can be transferred without probate administration because:

(1) Property is in form that calls for nonprobate transfer, or transfer by operation of law, upon client's death;

**NOTE:**

Various forms of property ownership include automatic provisions for the transfer of the property to designated persons on the owner's death. These persons may be co-owners or designated beneficiaries. Forms of property that fall into this category include joint tenancy property [*see § 60.12[5]*], other property that is subject to co-ownership with another person or persons [*see § 60.17[4]*], and various types of property that are subject to nonprobate transfers [*see § 60.12[8]*].

- (2) Property passes to surviving spouse or registered domestic partner; or

**NOTE:**

If property passes to a surviving spouse, the surviving spouse will have full power to deal with the property if no other person claims an interest in the property within 40 days after the death of the deceased spouse [*Prob. Code § 13540*]. Any claim made by another person must be in writing and recorded in the office of the county recorder [*see Prob. Code § 13541*]. However, the surviving spouse may elect to subject some or all of the property to probate [*Prob. Code § 13550*]. For discussion, see the Legal Background to Ch. 65, *Executors*.

Beginning January 1, 2005, these rules apply with respect to the surviving registered domestic partner of a decedent. A surviving registered domestic partner, following the other partner's death, has the same rights, protections, and benefits, and is subject to the same responsibilities, obligations, and duties under law that are granted to and imposed on a surviving spouse [*Fam. Code* § 297.5(c); *see Fam. Code* § 297.5(j) (when necessary to implement statutory rights of domestic partners, gender-specific terms referring to spouses must be construed to include domestic partners)].

(3) Client's probate estate is small enough to qualify for "summary administration."

**NOTE:**

Certain types of property may be transferred to certain beneficiaries without formal probate administration. For example, the court may order a "small estate set-aside" to the surviving spouse and minor children of a decedent if the net value of the decedent's property (over and above all liens and encumbrances, and excluding joint tenancy property and multiple-party accounts) does not exceed \$20,000 [*Prob. Code* §§ 6600-6615 (small estate set-aside)]. "Small estate set-asides" are available for real property located in California and personal property wherever located [*Prob. Code* § 6600(a)].

If the total value of all of the decedent's property in California does not exceed \$100,000 and 40 days have elapsed since the decedent's death, the decedent's successor may collect any money due the decedent, receive any item of tangible personal property belonging to the decedent, and transfer any debt, obligation, right, or chose in action belonging to the decedent without waiting for probate of the will or appointment of a personal representative [*Prob. Code* § 13100]. The following property must be excluded in determining whether the total value of the decedent's property exceeds \$100,000: joint tenancy property; property in which the decedent held only a life estate; property held by the decedent in a revocable trust or multiple-party account; registered vehicles, mobilehomes, truck campers, and vessels; amount due the decedent for service in the United States armed forces; and up to \$5,000 of compensation owing to the decedent from other employment [*Prob. Code* § 13050]. For discussion, see the Legal Background to Ch. 65, *Executors*.

Beginning January 1, 2005, these rules apply with respect to the surviving registered domestic partner of a decedent. A surviving registered domestic partner, following the other partner's death, has the same rights, protections, and benefits, and is subject to the same responsibilities, obligations, and duties under law that are granted to and imposed on a surviving spouse [*Fam. Code* § 297.5(c); *see Fam. Code* § 297.5(j) (when necessary to implement statutory rights of domestic partners, gender-specific terms referring to spouses must be construed to include domestic partners)].

3. Determine whether creation of trust would result in significant savings of attorneys' fees and expenses by avoiding probate of client's property after client's death [*see* § 60.112].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Trusts Revocable Living Trusts



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*23-60 California Legal Forms--Transaction Guide § 60.115*

**§ 60.115 Irrevocable Inter Vivos Trust**

1. Determine whether client's interests would be served by removing property from client's estate by creation of irrevocable inter vivos trust.

**NOTE:**

An irrevocable trust is typically used to remove property from the settlor's ownership and thus to avoid the income and estate tax consequences of continuing to own the property. A properly planned and drafted irrevocable trust will achieve these goals, either permanently or for a specified term (such as a period of years or the life of a designated person). For further discussion, see Ch. 72, *Irrevocable Trusts*, and California Wills & Trusts, Ch. 114, *Irrevocable Inter Vivos Trusts* (Matthew Bender).

2. Determine whether client's interests would be served by transferring property to irrevocable trust in lieu of outright gift.

**NOTE:**

Irrevocable trusts are often used as substitutes for outright gifts. By transferring property to an irrevocable trust, the settlor can transfer the beneficial use and enjoyment of the trust property to other persons without giving those persons outright control over the property. The settlor will have effectively parted with the property, but its use and enjoyment will be subject to terms and conditions set forth in the trust instrument. For further discussion, see Ch. 72, *Irrevocable Trusts*; see also California Wills & Trusts, Ch. 114, *Irrevocable Inter Vivos Trusts* (Matthew Bender).

3. Determine whether client's interests would be served by establishing irrevocable life insurance trust.

**NOTE:**

A life insurance trust is a trust created for the purpose of acquiring and owning one or more policies of life insurance. These policies will typically be on the life of the settlor. However, the trust will be planned and drafted so that the settlor will not hold any "incidents of ownership" in the policy as that term is used in the Internal Revenue Code [*see I.R.C. § 2042(2)*]. If the settlor does not possess any "incidents of ownership" at the time of death, the policy proceeds will not be included in the settlor's death for estate tax purposes [*see I.R.C. § 2042(2)*]. This may result in substantial estate tax savings. For further discussion of life insurance trusts and their use, see Ch. 72, *Irrevocable Trusts* ; *see also* California Wills & Trusts, Ch. 115, *Life Insurance Trusts* (Matthew Bender).

4. Determine whether client's interests would be served by establishing split-interest charitable trust.

**NOTE:**

Charitable lead trusts are designed to confer benefits on charitable beneficiaries while permitting the settlor (or the settlor's designated beneficiaries) to retain the use and enjoyment of the trust property for a period of time. The beneficial use and enjoyment of the property is split between two interests, a present income interest and a remainder interest. If the remainder interest is transferred to the charitable beneficiary, the trust is described as a charitable remainder trust. If the present income interest is transferred to the charitable beneficiary, the trust is described as a charitable lead trust. By conferring benefits on a charitable beneficiary, the settlor (or the settlor's estate) will obtain the benefits of a charitable deduction [*see I.R.C. §§ 170* (income tax deduction), *2055* (estate tax deduction)]. For further discussion, see Ch. 74, *Split-Interest Charitable Trusts* ; *see also* California Wills & Trusts, Ch. 116, *Charitable Remainder Trusts* , and Ch. 117, *Charitable Lead Trusts* (Matthew Bender).

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Estate, Gift & Trust LawTrustsIrrevocable Living Trusts



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*23-60 California Legal Forms--Transaction Guide § 60.116*

**§ 60.116 Co-ownership of Property**

1. Determine whether client's interests in avoiding probate would be served if client owned property as co-owner with another person.

**NOTE:**

Co-owned property may avoid probate administration if the property is subject to automatic transfer to some other person on the death of one of the owners. Property held in joint tenancy or in a multiple-party account will be transferred in this way. Transfers to a surviving co-owner are often described as "transfers by operation of law." However, there are many estate planning disadvantages to co-ownership of property. For discussion, see § 60.17[4].

2. Determine whether client's interests in providing for management of property in event of client's incapacity would be served if client owns property as co-owner with another person.

**NOTE:**

A joint account at a bank or other financial institution may provide some protection from conservatorship proceedings if the depositor later becomes incapacitated. The other joint depositor may have access to the funds in the account and use them to pay the first depositor's bills. This will sometimes be appropriate if the first depositor is elderly (for example, a parent or grandparent) and the joint depositor is younger (for example, an adult child or grandchild). However, there is no assurance that the funds will in fact be used in the way the first depositor would wish them to be used. When the parties agree that the funds will only be used for the benefit of the first depositor (for example, the parent or grandparent), a kind of informal "trust" may have been established; but it may be difficult to enforce the "trust," and the success of the arrangement will depend largely on the trustworthiness of the joint depositor (for example, the adult child or grandchild).

This kind of arrangement is far from ideal, and if substantial sums of money are involved it should not be encouraged by the estate planner. A revocable inter vivos ("living") trust [*see* § 60.114] or one or more durable powers of attorney [*see* § 60.119] will almost always be preferable.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawNonprobate TransfersJointly Held PropertyGeneral OverviewEstate, Gift & Trust LawNonprobate TransfersJointly Held PropertyBank AccountsEstate, Gift & Trust LawNonprobate TransfersJointly Held PropertyReal PropertyReal Property LawEstatesConcurrent OwnershipGeneral OverviewReal Property LawEstatesConcurrent OwnershipJoint Tenancies



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*23-60 California Legal Forms--Transaction Guide § 60.117*

**§ 60.117 Life Insurance**

1. Determine whether life insurance (or additional life insurance) would serve client's interests by enhancing liquidity of client's estate.

**NOTE:**

Life insurance can provide liquidity for the payment of debts and expenses of administration after the client's death. If the client does not have liquid assets sufficient to meet these needs, it may be advisable to obtain insurance for that purpose. For discussion, see § 60.17[5].

2. Determine whether client's interests would be served by acquiring life insurance to replace income that would be lost on client's death.

**NOTE:**

If the client's earnings are the source of support for others (for example, the client's spouse, children, or elderly parents) and if the client does not have other assets that could be used to replace the income stream that would end with the client's death, life insurance may be necessary to supply those assets. Life insurance is generally needed for this purpose when the client is young and has minor children who must be supported. Older clients will rarely have dependent minor children, and they will often have acquired substantial estates that can be invested to produce an income stream sufficient to support dependents. In some cases, however, the need to replace the client's earnings will continue into middle age or later.

3. Determine whether client wishes to reduce estate tax burden on estate through creation of irrevocable life insurance trust.

**NOTE:**

A life insurance trust can be a valuable tax saving device in appropriate cases. If the settlor does not hold any "incidents of ownership" in the policy [*see I.R.C. § 2042(2)*], the death benefits received on the settlor's death will not be included in the settlor's estate for estate tax purposes [*see I.R.C. § 2042(2)*; *see also § 60.17[5]*]. For general discussion of life insurance trusts, see Ch. 72, *Irrevocable Trusts* ; *see also* California Wills & Trusts, Ch. 115, *Life Insurance Trusts* (Matthew Bender).

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawGeneral OverviewInsurance LawLife InsuranceGeneral Overview



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*23-60 California Legal Forms--Transaction Guide § 60.118*

**§ 60.118 Lifetime Gifts**

1. Determine whether client is financially able to make lifetime gifts.

**NOTE:**

A client should consider making substantial lifetime gifts for estate planning purposes only if the client has adequate resources to meet all of the client's future needs. Lifetime gifts should not be made by a client who will need the gift funds or property at some time in the future. While future needs can never be precisely predicted, a reasonable forecast of those needs should be made, taking into consideration the likelihood that the cost of living will continue to increase in the future as it has in the past.

2. Determine whether objects of client's bounty would benefit by receiving lifetime gifts.

**NOTE:**

Lifetime gifts should be made to persons who will benefit from the gifts. The ability of the donee to make use of the property, and to properly manage the property, should be considered. Unless there are countervailing considerations, it is not generally advisable to make gifts to persons who are financially irresponsible, or to persons who already have substantial estates.

3. Determine whether total estate tax burden on client's estate would be reduced by making lifetime gifts.

**NOTE:**

In determining the total amount of the taxable gifts for a calendar year, an exclusion (called the "annual exclusion") each calendar year for gifts made in that year to each donee [*I.R.C. § 2503(b)*]; for discussion of the annual exclusion and the applicable exclusion amounts, which are adjusted annually for inflation, *see § 60.14[2]*. When gifts

are made by a husband and wife, an annual exclusion is available for each donor, thus doubling the amount of the exclusion. Qualified tuition and medical payments are also excluded from gift taxation [*see I.R.C. § 2503(e); see also § 60.14[3]*]. Gifts that do not qualify for a gift tax exclusion will reduce the amount of the "unified credit" otherwise available to the donor (or the donor's estate) [*see I.R.C. §§ 2010* (unified credit against estate tax), 2505 (unified credit against gift tax); *see also § 60.14[5]*].

4. Determine whether client wishes to make lifetime gifts to irrevocable life insurance trust.

**NOTE:**

Gifts to an irrevocable life insurance trust may be used to fund the premiums on the life insurance policy or policies owned by the trust. If beneficiaries of the trust have so-called "Crummey" powers of withdrawal, the gifts will also qualify for the annual gift tax exclusion [*see I.R.C. § 2503(b)*] (base annual exclusion amount of \$10,000, with upward adjustments for inflation for gifts made in calendar years after 1998) and discussion in § 60.14[2]]. For discussion of "Crummey" powers, see Ch. 72, *Irrevocable Trusts*, and California Wills and Trusts, Ch. 114, *Irrevocable Inter Vivos Trusts*, and Ch. 115, *Life Insurance Trusts* (Matthew Bender).

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawPersonal GiftsGeneral OverviewEstate, Gift & Trust LawPersonal GiftsLifetime GiftsTax LawFederal Estate & Gift TaxesGifts (IRC secs. 2035, 2501-2524)Annual Exclusions



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DIVISION IV: WILLS AND TRUSTS  
CHAPTER 60 ESTATE PLANNING  
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B. Preliminary Determinations

*23-60 California Legal Forms--Transaction Guide § 60.119*

**§ 60.119 Durable Powers of Attorney**

1. Determine whether client's interests would be served by executing:

a. Durable power of attorney for property management;

**NOTE:**

A durable power of attorney for property management authorizes the attorney in fact to manage the client's property in the event of the client's incapacity [*see Prob. Code §§ 4123(a), (b), 4124, 4125*]. Durable powers of attorney are useful estate planning tools and can obviate the need for conservatorship proceedings.

Many estate planners regard a durable power of attorney as an essential element of any complete estate plan, and these powers are routinely prepared as part of the planning process, in conjunction with a will, trust, or both. For coverage of durable powers of attorney, including a form for a durable power of attorney for property management, see Ch. 68, *Durable Powers of Attorney*. For additional discussion of durable powers of attorney for property management, see California Wills and Trusts, Ch. 151, *Durable Powers of Attorney for Property Management* (Matthew Bender).

b. Durable power of attorney for health care.

**NOTE:**

A durable power of attorney for health care will give a designated person authority to make health care decisions for the client if the client is unable to make those decisions personally. They complement virtually all estate plans and are generally recommended by estate planners. For coverage of durable powers of attorney, including a form of durable power of attorney for health care, see Ch. 68, *Durable Powers of Attorney*. For additional discussion of durable powers of attorney for health care, see

California Wills and Trusts, Ch. 150, *Durable Powers of Attorney for Health Care* (Matthew Bender).

2. Determine whether client has some other mechanism in place for property management in event of incapacity.

**NOTE:**

A revocable inter vivos ("living") trust will also provide some protection against incapacity. However, this protection only extends to the property that has actually been transferred to the trust, and it does not authorize the trustee to make health care decisions for the client.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Powers of Attorney General Overview  
Estate, Gift & Trust Law Powers of Attorney Durable  
Powers Estate, Gift & Trust Law Powers of Attorney Interpretation  
Estate, Gift & Trust Law Powers of Attorney Limited  
Powers Estate, Gift & Trust Law Powers of Attorney Surrogate Decisions



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*23-60 California Legal Forms--Transaction Guide § 60.120*

**§ 60.120 Contracts**

1. Determine whether client's interests would be served by entering into agreement:

**NOTE:**

Although contracts to make (or not to revoke) a will or devise are generally valid in California [*see Prob. Code § 21700(a)* (requirements for proof of contract)], they are difficult to enforce and often result in costly and time-consuming litigation. They are not ordinarily recommended by estate planners. For discussion, see § 60.17[8][b]. For general coverage of contracts relating to wills, see California Wills and Trusts, Ch. 61, *Contracts and Other Instruments Affecting Wills* (Matthew Bender).

- a. To make will or devise; or
- b. Not to revoke will or devise.

2. Determine whether client's interests would be served by entering into agreement transmuting:

**NOTE:**

Transmutation agreements may be used to protect one or both of the spouses from creditors, to reorder inheritance rights in the spouses' property, or to achieve specified tax advantages. Transmutation agreements are generally subject to the same rules as other contracts. However, they are also subject to rules applicable to property contracts between a husband and wife [*see Fam. Code § 721(b)*; *see also § 60.17[8][c]*]. Further, since transmutation agreements almost always create conflicts of interests between the spouses, one attorney can represent both spouses in the preparation and execution of a transmutation agreement only if the attorney first explains the facts giving rise to the

conflict and obtains written authorization from the clients to proceed with the dual representation [*Cal. Rules Prof. Conduct, Rule 3-310(B)*]; *see* § 60.201[1][b].

- a. Community property to separate property of either spouse;
- b. Separate property of either spouse to community property; or
- c. Separate property of one spouse to separate property of other spouse.

3. Determine whether client's interests would be served by entering into buy-sell agreement because client is:

**NOTE:**

A properly planned buy-sell agreement will facilitate the continuation of a business operated as a partnership or closely held corporation after the death of a partner or shareholder and assure the deceased partner's or shareholder's estate that it will receive fair value for the client's interest. Funds for the purchase will often be provided by a life insurance policy on the life of the deceased partner or shareholder. For estate planning uses of buy-sell agreements, see § 60.17[8][d]. For estate planning uses of life insurance, see § 60.17[5]. For general coverage of buy-sell agreements, with illustrative forms, see Ch. 8D, *Buy-Sell Agreements* .

- a. Partner in unincorporated business; or
- b. Shareholder in small or closely held corporation.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawGeneral OverviewEstate, Gift & Trust LawNonprobate TransfersJointly Held PropertyGeneral OverviewEstate, Gift & Trust LawWillsContracts to Make Wills



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*23-60 California Legal Forms--Transaction Guide §§ 60.121-60.129*

**[Reserved]**

§§ 60.121[Reserved]



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*23-60 California Legal Forms--Transaction Guide § 60.130*

**§ 60.130 Selecting Estate Planning Forms**

**NOTE:**

This section contains directions to estate planning forms in other chapters in this publication. It is designed as a guide to other chapters that deal in specific terms with specific estate planning devices, such as wills, trusts, and durable powers of attorney.

1. To make lifetime gifts, refer to Ch. 60A, *Gifts* .
2. To make gifts to charitable organizations, refer to Ch. 69, *Charitable Dispositions* .
3. To plan and draft wills, refer to Ch. 61, *Will Drafting and Complete Will Forms*, and Ch. 63, *Will Provisions* .
4. To plan and draft codicil to will, refer to Ch. 62, *Codicils* .
5. To plan and draft testamentary trust, refer to Ch. 64, *Testamentary Trusts: Payment and Distribution Provisions* , Ch. 64A, *Testamentary Trusts: Trustee Provisions* , and Ch. 64B, *Testamentary Trusts: Administrative Provisions* .
6. To plan and draft revocable inter vivos trusts, including marital deduction trusts, refer to Ch. 70, *Complete Revocable Trust Forms* ; for additional information on planning and drafting marital deduction trusts, refer to Ch. 71, *Marital Deduction Trust Provisions* .
7. To plan and draft irrevocable inter vivos trusts, refer to Ch. 72, *Irrevocable Trusts* .
8. To plan and draft charitable remainder trusts or charitable lead trusts, refer to Ch. 74, *Split-Interest*

*Charitable Trusts.*

9. To plan and draft durable powers of attorney, refer to Ch. 68, *Durable Powers of Attorney* .

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawNonprobate TransfersGeneral OverviewEstate, Gift & Trust LawPersonal  
GiftsProceduresGeneral OverviewEstate, Gift & Trust LawPowers of AttorneyGeneral OverviewEstate, Gift & Trust  
LawTrustsGeneral OverviewEstate, Gift & Trust LawWillsGeneral Overview



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*23-60 California Legal Forms--Transaction Guide §§ 60.131-60.199*

**[Reserved]**

§§ 60.131[Reserved]



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DIVISION IV: WILLS AND TRUSTS  
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*23-60 California Legal Forms--Transaction Guide § 60.200*

**§ 60.200 Client Interview Checklist**

**[1] Comment**

**[a] Use of Form**

This form is a checklist that an estate planning attorney may use to record estate planning information. It is designed to be filled out by the attorney rather than the client and to suggest important questions that the attorney should ask the client. Properly used, the form will help the attorney elicit all of the information necessary to begin the preparation of an estate plan.

**[b] Advantages and Disadvantages of Questionnaires**

Different attorneys have different opinions about the use of estate planning questionnaires. Some routinely ask clients to complete detailed questionnaires before (or shortly after) the first interview. They believe that the early completion of a questionnaire will provide the attorney with the essential information at the earliest possible stage of the estate planning process and reduce the likelihood that important facts will be overlooked. Other attorneys, however, use questionnaires sparingly, if at all. These attorneys are concerned that questionnaires will annoy or intimidate many clients, and may discourage some potential clients from availing themselves of the attorney's services.

Clients who have had no previous relationship with the attorney are most likely to respond negatively to questionnaires. Attorneys who are reluctant to use questionnaires at or before the first interview will sometimes use a questionnaire after they have personally spoken with a client, explained the purpose of the questionnaire, and satisfied themselves that the client is not reluctant to commit personal information to a printed form.

Since this form is designed to be completed by the attorney rather than the client, it will minimize many of the concerns associated with the use of questionnaires while helping to assure that the attorney obtains the essential estate planning information.

**[c] Need for Further Information**

This form is designed to elicit only the information that is necessary to initiate the estate planning process. As the process continues, the specific needs and wishes of the client will become apparent and further information will be required. The character of that further information will depend on the circumstances of each client.

**[2] FORM**

**Client Interview Checklist**

**CLIENT INTERVIEW CHECKLIST**

Name

Mr. \_\_\_\_\_ Ms. \_\_\_\_\_ Mrs.  
 \_\_\_\_\_ Miss. \_\_\_\_\_ Dr.  
 \_\_\_\_\_ Other \_\_\_\_\_.

Full name \_\_\_\_\_ [*first, middle, last, and any additional designation, e.g., Jr. or III*].

Any assumed or former names, such as maiden name or nickname, that should be included in will or trust \_\_\_\_\_.

Residence

Street number \_\_\_\_\_.

City \_\_\_\_\_.

State \_\_\_\_\_.

Zip \_\_\_\_\_.

County \_\_\_\_\_.

Telephone number \_\_\_\_\_.

Citizenship

Country of citizenship \_\_\_\_\_.

Marital Status

Currently married \_\_\_\_\_ Never married  
 \_\_\_\_\_ Widowed \_\_\_\_\_ Marriage termin-  
 ated by divorce or dissolution \_\_\_\_\_ Marriage termin-  
 ated by annulment \_\_\_\_\_.

Spouse

If client is currently married, entering following information regarding spouse:

Mr. \_\_\_\_\_ Ms. \_\_\_\_\_ Mrs.  
 \_\_\_\_\_ Miss. \_\_\_\_\_ Dr.  
 \_\_\_\_\_ Other \_\_\_\_\_.

Full name of spouse \_\_\_\_\_ [*first, middle, last, and any additional designation, e.g., Jr. or III*].

Any assumed or former names of spouse, such as maiden name or nickname, that should be included in will or trust \_\_\_\_\_.

Date and place of marriage \_\_\_\_\_.

Country of spouse's citizenship \_\_\_\_\_.

Do client and spouse currently reside at same address?

\_\_\_\_\_.

If not, enter following information for spouse's residential address:

Street number \_\_\_\_\_.

City \_\_\_\_\_.

State \_\_\_\_\_.

Zip \_\_\_\_\_.

County \_\_\_\_\_.

Telephone number \_\_\_\_\_.

Former Spouse(s)

Has client been married previously? \_\_\_\_\_.

If so, how many times? \_\_\_\_\_.

Enter following information regarding each former spouse:

First former spouse:

Name \_\_\_\_\_.

Date and place of marriage \_\_\_\_\_.

Length of marriage \_\_\_\_\_.

If marriage dissolved, court and date of dissolution  
\_\_\_\_\_.

If marriage annulled, court and date of annulment  
\_\_\_\_\_.

If spouse deceased, when deceased \_\_\_\_\_.

Second former spouse:

Name \_\_\_\_\_.

Date and place of marriage \_\_\_\_\_.

Length of marriage \_\_\_\_\_.

If marriage dissolved, court and date of dissolution  
\_\_\_\_\_.

If marriage annulled, court and date of annulment  
\_\_\_\_\_.

Third former spouse:

Name \_\_\_\_\_.

Date and place of marriage \_\_\_\_\_.

Length of marriage \_\_\_\_\_.

If marriage dissolved, court and date of dissolution  
\_\_\_\_\_.

If marriage annulled, court and date of annulment  
\_\_\_\_\_.

If spouse deceased, when deceased \_\_\_\_\_.

Current Domestic Partner

If client is unmarried, is client currently cohabiting with another person? \_\_\_\_\_.

Approximately how long? \_\_\_\_\_.

Other person's name. \_\_\_\_\_.

Other person's date of birth. \_\_\_\_\_.

Other person's current age. \_\_\_\_\_.

Have client and other person filed declaration of domestic partnership with California Secretary of State? \_\_\_\_\_.

If so, date declaration was filed: \_\_\_\_\_.

Has client previously filed any declarations of domestic partnership with California Secretary of State? \_\_\_\_\_.

If so, how many times? \_\_\_\_\_.

Name of former domestic partner: \_\_\_\_\_.

Date on which declaration of domestic partnership was filed: \_\_\_\_\_.

Length of domestic partnership: \_\_\_\_\_.

Date when partnership terminated: \_\_\_\_\_.

Manner in which partnership was terminated (e.g., death or marriage of partner; written notice; cessation of common residence): \_\_\_\_\_.

Was formal Notice of Termination filed with California Secretary of State? \_\_\_\_\_.

If so, date notice was filed: \_\_\_\_\_.

Children

Number of living children \_\_\_\_\_.

Number of deceased children \_\_\_\_\_.

Number of adopted children \_\_\_\_\_.

Number of children by previous marriage(s) \_\_\_\_\_.

Living Children

If client has living child(ren), enter following information:

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- Inheritance \_\_\_\_\_.
- Inter vivos gift \_\_\_\_\_.
- Other (specify) \_\_\_\_\_.

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- Joint Tenancy \_\_\_\_\_.
- Community \_\_\_\_\_.
- Community with right of survivorship \_\_\_\_\_.
- Separate \_\_\_\_\_.
- Quasi-community \_\_\_\_\_.

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- Joint Tenancy \_\_\_\_\_.
- Community \_\_\_\_\_.
- Community with right of survivorship \_\_\_\_\_.
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- Purchase \_\_\_\_\_.
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- Inter vivos gift \_\_\_\_\_.
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Character of property:

- Joint Tenancy \_\_\_\_\_.
- Community \_\_\_\_\_.
- Community with right of survivorship \_\_\_\_\_.
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Character of property:

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Community \_\_\_\_\_.

Separate \_\_\_\_\_.

Quasi-community \_\_\_\_\_.

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- Other (specify) \_\_\_\_\_.

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- Joint Tenancy \_\_\_\_\_.
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- Community with right of survivorship \_\_\_\_\_.
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Character of assets used to acquire property (separate or community property of parties):

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Character of property:

- Joint Tenancy \_\_\_\_\_.
- Community \_\_\_\_\_.
- Community with right of survivorship \_\_\_\_\_.
- Separate \_\_\_\_\_.
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**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Estate, Gift & Trust LawGeneral Overview



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California Legal Forms--Transaction Guide

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DIVISION IV: WILLS AND TRUSTS  
CHAPTER 60 ESTATE PLANNING  
PART IV. FORMS

*23-60 California Legal Forms--Transaction Guide § 60.201*

**§ 60.201 Conflict of Interest Disclosure for Dual Representation**

**[1] Comment**

**[a] Use of Form**

This form is a letter disclosing the potential conflicts of interest that may arise if an attorney represents both a husband and a wife in estate planning matters. It is designed to be signed by the attorney and presented to the clients at the same time that the attorney-client agreement is signed. At some later time, the letter is to be signed by the clients and returned to the attorney for retention in the attorney's file.

The letter explains potential problems that can arise with dual representation. However, it does not overstate those problems. Exaggerating the difficulties that can be encountered when one attorney represents both a husband and wife can intimidate some prospective clients and unnecessarily discourage them from availing themselves of the attorney's services.

**[b] Married Clients and Conflicts of Interest**

For reasons of economy and convenience, it is common for married persons to employ a single attorney to plan their estates. In most cases, it is quite proper for one attorney to represent both spouses. However, it is not proper for one attorney to represent clients who have conflicting interests without their informed written consent [*Cal. Rules Prof. Conduct, Rule 3-310(B)*]. If a husband and wife have conflicting (or potentially conflicting) interests, the attorney cannot ethically represent both unless the attorney first explains the facts giving rise to the conflict and obtains written authorization from the clients to proceed with the dual representation [*Cal. Rules Prof. Conduct, Rule 3-310(B)*].

Various circumstances may give rise to conflicts, or potential conflicts, between a husband and wife. If the spouses have substantial separate as well as community property, for example, the interests of the spouses in the characterization of the property may conflict. If there is any suggestion that the character of property should be transmuted (either from community to separate, or separate to community), a conflict will nearly always arise, as a transmutation will inevitably benefit one spouse at the expense of the other. If either spouse wishes to leave property to someone other than the surviving spouse, a conflict may also arise.

It is common for an attorney to meet with both spouses in a joint conference. However, a joint conference may impair the confidentiality of the spouses' communications to the attorney. Although the attorney-client privilege ordinarily prohibits an attorney from disclosing confidential communications made to the attorney in the course of the attorney-client relationship [*see Evid. Code §§ 950-962*], when two clients consult an attorney on a matter of common interest they may not claim the privilege if a communication made in the course of the relationship is later offered in a civil proceeding between the clients or their successors in interest [*Evid. Code § 962*]. Notwithstanding this, either client may compel the attorney to testify regarding any matter arising in the course of the joint consultations [ *In re Estate of Bauer (1889) 79 Cal. 304, 312, 21 P. 759* ]. For this reason, an attorney who is consulted by a husband and wife should advise the spouses of the possibly adverse effects that a joint conference might have on the confidentiality of their communications. If either client objects to that loss of confidentiality, the attorney should advise them of the need for separate counsel.

Separate conferences will sometimes be useful in determining whether a conflict or potential conflict of interest exists. Separate conferences will be particularly appropriate if the attorney has had a previous relationship with one but not both of the spouses.

For further discussion of the ethical duties of estate planning attorneys, see California Wills & Trusts, Chapter 4, *Ethical Considerations and Professional Responsibility* (Matthew Bender).

## [2] FORM

### Conflict of Interest Disclosure for Dual Representation

[Law office letterhead]

\_\_\_\_\_ [Date]  
 \_\_\_\_\_ [Names of clients]  
 \_\_\_\_\_ [Street address]  
 \_\_\_\_\_ [City, state, zip code]

Re: Estate Plan

Dear \_\_\_\_\_ [names]:

This letter will confirm that you have asked \_\_\_\_\_ [me or this firm] to advise and represent you concerning certain estate planning matters. This representation is expected to include the matters covered in the [enclosed] Attorney-Client Employment Agreement.

In the course of our preliminary discussions, \_\_\_\_\_ [I or we] have explained to each of you that it is possible that the two of you may not always agree with each other regarding every detail of your estate plans. For example, you may have different ideas about how you want to dispose of your property during your lifetimes or at your deaths; or you may disagree about which of you owns particular items of your property, or whether particular assets are your separate or community property.

Minor disagreements between you will not ordinarily affect \_\_\_\_\_ [my or our] ability to represent both of you fully and fairly. However, serious disagreements may create a conflict of interest that will render it impossible for \_\_\_\_\_ [me or us] to continue to represent both of you in a manner consistent with \_\_\_\_\_ [my or our] ethical and professional obligations. If a disagreement should arise, \_\_\_\_\_ [I or we] may find it necessary to withdraw from representing one or both of you in connection with this matter. Should that occur, \_\_\_\_\_ [I or we] will bill you jointly for services through the date on which \_\_\_\_\_ [I or we] ceased representing you both.

Of course, should either of you feel for any reason that you need the advice of another attorney regarding any aspect of the services \_\_\_\_\_ [I or we] provide for you, you should feel free to obtain your own attorney to provide advice and counsel and to assure you that \_\_\_\_\_ [my or our] representation of one of you is not adversely influenced by \_\_\_\_\_ [my or our] representation of the other.

Anything that either of you communicates to \_\_\_\_\_ [me or us] will be fully and freely disclosed to the other, and no information will be kept confidential as between the two of you. Should the two of you ever become involved in any lawsuit against one another, neither of you will be able to invoke the lawyer-client privilege as to any communication made by or to \_\_\_\_\_ [me or us] in the course of \_\_\_\_\_ [my or our] joint representation of you, and either of you may compel \_\_\_\_\_ [me or us] to testify in court as to any communication made in the course of that representation.

\_\_\_\_\_ [I or we] have no reason to expect that any of these problems will actually arise in your case. Nevertheless, the ethical rules governing the conduct of lawyers require that \_\_\_\_\_ [I or we] explain to you the problems that could arise if \_\_\_\_\_ [I or we] represent each of you at the same time, and that \_\_\_\_\_ [I or we] obtain your consent to this joint representation.

\_\_\_\_\_ [I or we] have explained these possible problems and the potential advantages of separate counsel to you. \_\_\_\_\_ [I or we] also have explained to you the value and importance of achieving a coordinated estate plan, and the difficulties that can arise in this area when separate counsel are involved. Having been provided with all of this information, you have requested that \_\_\_\_\_ [I or we] represent you in this matter.

To signify that you understand the matters discussed in this letter, please sign and date the enclosed copy of this letter and return it to \_\_\_\_\_ [me or us] in the enclosed envelope. If you have any questions about the matters covered in this letter, please feel free to discuss them with \_\_\_\_\_ [me or us]. Thank you for your cooperation, and \_\_\_\_\_ [I or we] look forward to representing you.

Sincerely yours,

\_\_\_\_\_ [signature of attorney]

\_\_\_\_\_ [typed name of attorney and law firm]

We have read this letter, understand the matters discussed in it, and agree to have \_\_\_\_\_ [you or your firm] represent each of us with respect to the matters described in the letter.

\_\_\_\_\_ Dated:

\_\_\_\_\_ [signature of first client]

[typed name]

\_\_\_\_\_ [signature of second client]

[typed name]

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawGeneral OverviewEstate, Gift & Trust LawWillsGeneral OverviewLegal EthicsClient RelationsAccepting RepresentationLegal EthicsClient RelationsConflicts of Interest



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DIVISION IV: WILLS AND TRUSTS  
CHAPTER 60 ESTATE PLANNING  
PART IV. FORMS

*23-60 California Legal Forms--Transaction Guide § 60.202*

**§ 60.202 Cover Letter Accompanying Estate Planning Documents**

**[1] Comment--Use of Form**

This form is a cover letter designed to accompany the estate planning documents when they are sent to the clients. The letter identifies the documents and requests that the clients review them immediately. It asks the clients (1) to advise the attorney if any changes are necessary, and (2) if there are none, to call the attorney to make arrangements for final execution.

The letter also restates the personal information provided to the attorney by the clients and that is the basis for the estate planning documents. It asks the clients to review that information and to advise the attorney if it contains any errors.

This is a standard form letter and should accompany any estate materials sent to the client for review before final execution.

**[2] FORM**

**Cover Letter Accompanying Estate Planning Documents**

*[Law office letterhead]*

\_\_\_\_\_ *[Date]*  
 \_\_\_\_\_ *[Names of clients]*  
 \_\_\_\_\_ *[Street address]*  
 \_\_\_\_\_ *[City, state, zip code]*

Re: Estate Plan

Dear \_\_\_\_\_ *[names]:*

Enclosed for your review please find drafts of the following documents:

[Include as many of following items as appropriate:]

- 1. Will for Mr. \_\_\_\_\_;
- 2. One-settlor trust for Mr. \_\_\_\_\_;
- 3. Property management durable power of attorney for Mr. \_\_\_\_\_;
- 4. Health care durable power of attorney for Mr. \_\_\_\_\_;
- 5. Declaration under the Natural Death Act for Mr. \_\_\_\_\_;
- 6. Will for Ms. \_\_\_\_\_;
- 7. One-settlor trust for Ms. \_\_\_\_\_;
- 8. Property management durable power of attorney for Ms. \_\_\_\_\_;
- 9. Health care durable power of attorney for Ms. \_\_\_\_\_;
- 10. Declaration under the Natural Death Act for Ms. \_\_\_\_\_; and
- 11. Two-settlor trust for Mr. \_\_\_\_\_ and Ms. \_\_\_\_\_.

[CONTINUE]

Please check the enclosed documents to see that the information is correct and that each document sets out what you wish to do. If you have any questions or comments, please feel free to write them directly on the draft documents to make sure that they will be brought to our attention.

In drafting these documents, \_\_\_\_\_ [I or we] have relied on the following personal information about you:

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PERSONAL INFORMATION FOR \_\_\_\_\_ [*name of second client, e.g., ROBERT J. BLACK*]

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Please review the enclosed documents immediately. If they are satisfactory, please call \_\_\_\_\_ [me or us] to make arrangements to execute them. If changes are required, contact \_\_\_\_\_ [me or us] immediately. As soon as the changes are made, \_\_\_\_\_ [I or we] will call you to set up an appointment for execution.

These documents are based on the personal and financial information you gave \_\_\_\_\_ [me or us] and the current federal and California tax laws governing estate planning matters. Changes in these laws, especially the federal tax laws, may require you to change your estate planning documents. Changes in your financial situation or changes in your family may also require changes in the documents. You should plan to review these documents periodically. \_\_\_\_\_ [I or We] hope you will decide to have our office help you review them.

Thank you for choosing \_\_\_\_\_ [me or us] to prepare your estate planning documents.

Sincerely yours,

\_\_\_\_\_ [signature of attorney]

\_\_\_\_\_ [typed name of attorney and law firm]

### Legal Topics:

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law  
General Overview  
Estate, Gift & Trust Law  
Trusts  
General Overview  
Estate, Gift & Trust Law  
Wills  
General Overview  
Legal Ethics  
Client Relations  
General Overview



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California Legal Forms--Transaction Guide

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DIVISION IV: WILLS AND TRUSTS  
CHAPTER 60 ESTATE PLANNING  
PART IV. FORMS

*23-60 California Legal Forms--Transaction Guide § 60.203*

**§ 60.203 Follow-Up Letter: Estate Plan Not Sensitive to Changes in Tax Laws**

**[1] Comment--Use of Form**

This form is a follow-up letter designed to be mailed to clients whose estate plans are not sensitive to subsequent changes in the tax laws. It advises the client that changes in his or her circumstances may require periodic reviews of the estate plan and recommends that the plan be reviewed on a regular basis. The letter also provides a space in which the client can indicate whether he or she wishes the attorney to review the plan.

A letter of this kind should be sent to all estate planning clients approximately two months after their initial estate planning documents have been signed. The letter should be accompanied by an addressed return envelope so that clients who wish to avail themselves of the advantages of periodic review may easily inform the attorney of that fact.

**[2] FORM**

**Follow-Up Letter: Estate Plan Not Sensitive to Changes in Tax Laws**

[Law office letterhead]

\_\_\_\_\_ [Date]  
 \_\_\_\_\_ [Name(s) of client(s)]  
 \_\_\_\_\_ [Street address]  
 \_\_\_\_\_ [City, state, zip code]

Re: Estate Plan

Dear \_\_\_\_\_ [Name(s)]:

It has been approximately \_\_\_\_\_ [e.g., two] months since you executed your \_\_\_\_\_ [will(s) or trust or will(s) and trust]. Your \_\_\_\_\_ [will(s) or trust or will(s) and trust] \_\_\_\_\_ [was or were] prepared on the basis of the facts, circumstances, and law in existence at the time \_\_\_\_\_ [it was or they were] executed. Those things may change as time passes.

To accommodate any future changes, \_\_\_\_\_ [I or we] suggest that you review your estate plan every \_\_\_\_\_ [e.g., year or two years]. This review should cover changes in your family status and changes in the applicable law.

Your \_\_\_\_\_ [will(s) or trust or will(s) and trust] \_\_\_\_\_ [was or were] prepared on the assumption that certain of your descendants and relatives will survive you. In drafting those documents, care was taken to provide for an alternate disposition if specified descendants or relatives did not survive you. Nevertheless, if there is a change in your family status (such as a birth, a death, an adoption, a divorce, or a marriage) you should review your estate plan documents and determine if any change should be made due to the change in your family status.

During the last few years both the California and federal law relating to wills and trusts has undergone comprehensive changes. These changes were taken into consideration when your current \_\_\_\_\_ [will(s) or trust or will(s) and trust] \_\_\_\_\_ [were or was] drafted. While \_\_\_\_\_ [I or we] do not anticipate similar changes in the near future, it is almost inevitable that legal changes will occur in the future. Since the nature and frequency of the changes cannot be predicted, the prudent approach is to review your \_\_\_\_\_ [will(s) or trust or will(s) and trust] on a periodic basis to determine if changes are necessary.

The first quarter of each calendar year is usually an appropriate time to review estate planning documents. The tax information needed to prepare income tax returns is usually assembled at this time, and that information can be helpful in identifying changes in your financial situation. Further, many changes in the law become effective at the beginning of the year. A review conducted during the first quarter of the year will be sure to include any recent changes in the law.

If asked, \_\_\_\_\_ [I or we] would be pleased to help you conduct the type of review \_\_\_\_\_ [I or we] have recommended in this letter. If \_\_\_\_\_ [I or we] assist in this review, \_\_\_\_\_ [I or we] will charge you for \_\_\_\_\_ [my or our] time at \_\_\_\_\_ [my or our] hourly fee then in effect. Unless unusual circumstances exist, \_\_\_\_\_ [I or we] do not feel that \_\_\_\_\_ [I or we] would charge you for more than two hours of \_\_\_\_\_ [my or our] time.

\_\_\_\_\_ [I or We] would like to know if you would like \_\_\_\_\_ [me or us] to help you conduct the type of review \_\_\_\_\_ [I or we] have recommended. Thus, would you please complete and sign the bottom portion of the copy of this letter and return it to \_\_\_\_\_ [me or us] at your earliest convenience? If you indicate that you wish \_\_\_\_\_ [me or us] to conduct the review, \_\_\_\_\_ [I or we] will schedule \_\_\_\_\_ [my or our] calendar to contact you at the appropriate time. If you indicate that you do not wish \_\_\_\_\_ [me or us] to conduct the review, \_\_\_\_\_ [I or we] will not bother you with further correspondence.

Sincerely yours,

\_\_\_\_\_ [signature of attorney]

\_\_\_\_\_ [typed name of attorney and law firm]

Check One  
Only:

\_\_\_\_\_ Yes. \_\_\_\_\_ [I or We] do wish you to help  
\_\_\_\_\_ [me or us] conduct the review described in your letter.  
\_\_\_\_\_ No. \_\_\_\_\_ [I or We] do not wish you to help

\_\_\_\_\_ [me or us] conduct the review described in your letter.

Dated:

\_\_\_\_\_  
\_\_\_\_\_

\_\_\_\_\_ [*signature of first client*]

[*typed name*]

\_\_\_\_\_ [*signature of second client*]

[*typed name*]

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawGeneral OverviewEstate, Gift & Trust LawTrustsGeneral OverviewEstate, Gift & Trust  
LawWillsGeneral OverviewTax LawFederal Estate & Gift TaxesGeneral Overview



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DIVISION IV: WILLS AND TRUSTS  
CHAPTER 60 ESTATE PLANNING  
PART IV. FORMS

*23-60 California Legal Forms--Transaction Guide § 60.204*

**§ 60.204 Follow-Up Letter: Estate Plan Sensitive to Changes in Tax Laws**

**[1] Comment--Use of Form**

This form is a follow-up letter designed to be mailed to clients whose estate plans are sensitive to subsequent changes in the tax laws. It advises the client that changes in his or her circumstances may require periodic reviews of the estate plan and recommends that the plan be reviewed annually. The letter also provides a space in which the client can indicate whether he or she wishes the attorney to review the plan.

A letter of this kind should be sent to all estate planning clients approximately two months after their initial estate planning documents have been signed. The letter should be accompanied by an addressed return envelope so that clients who wish to avail themselves of the advantages of periodic review may easily inform the attorney of that fact.

**[2] FORM**

**Follow-Up Letter: Estate Plan Sensitive to Changes in Tax Laws**

[Law office letterhead]

\_\_\_\_\_ [Date]  
 \_\_\_\_\_ [Name(s) of client(s)]  
 \_\_\_\_\_ [Street address]  
 \_\_\_\_\_ [City, state, zip code]

Re: Estate Plan

Dear \_\_\_\_\_ [Name(s)]:

It has been approximately \_\_\_\_\_ [e.g., two] months since you executed your \_\_\_\_\_ [will(s) or trust or will(s) and trust]. Your \_\_\_\_\_ [will(s) or trust or will(s) and trust] \_\_\_\_\_ [was or were] prepared on the basis of the facts, circumstances, and law in existence at the time \_\_\_\_\_ [it was or they were] signed. Those things may change as time passes.

To accommodate any future changes, \_\_\_\_\_ [I or we] suggest that you review your estate plan every \_\_\_\_\_ [e.g., year or two years]. This review should cover changes in your family status and changes in the applicable law.

Changes in your financial situation may affect your estate plan. For example, you may wish to alter the disposition of your property should there be a substantial increase or decrease in the size of your estate [s]. Additionally, a change in the size of your estate [s] may require a change in the tax savings devices used in your current estate plan.

Your \_\_\_\_\_ [will(s) or trust or will(s) and trust] \_\_\_\_\_ [was or were] prepared on the assumption that certain of your descendants and relatives will survive you. In drafting those documents, care was taken to provide for an alternate disposition if specified descendants or relatives did not survive you. Nevertheless, if there is a change in your family status (such as a birth, a death, an adoption, a divorce, or a marriage) you should review your estate plan documents and determine if any change should be made due to the change in your family status.

If the past is a valid indicator, the future will bring important changes in the federal income, gift, and estate tax laws. Since the nature and frequency of the changes cannot be predicted, the prudent approach is to review your \_\_\_\_\_ [will(s) or trust or will(s) and trust] on a periodic basis to determine if changes are necessary.

During the last few years California law relating to wills and trusts has undergone comprehensive changes. These changes were taken into consideration when your \_\_\_\_\_ [will(s) or trust or will(s) and trust] \_\_\_\_\_ [was or were] drafted. While \_\_\_\_\_ [I or we] do not anticipate changes in California law on a scale similar to what has been experienced in the past few years, it is almost inevitable that there will be changes. Therefore, you should review the effect of any change in California law on your estate plan as soon as possible.

The first quarter of each calendar year is usually an appropriate time to review estate planning documents. The tax information needed to prepare income tax returns is usually assembled at this time, and that information can be helpful in identifying changes in your financial situation. Further, many changes in federal and California law become effective at the beginning of the year. A review conducted during the first quarter of the year will be sure to include any recent changes in the law.

If asked, \_\_\_\_\_ [I or we] would be pleased to help you conduct the type of review \_\_\_\_\_ [I or we] have recommended in this letter. If \_\_\_\_\_ [I or we] do assist in this review, \_\_\_\_\_ [I or we] will charge you for \_\_\_\_\_ [my or our] time at \_\_\_\_\_ [my or our] hourly fee then in effect. Unless unusual circumstances exist, \_\_\_\_\_ [I or we] do not feel that \_\_\_\_\_ [I or we] would charge you for more than three hours of \_\_\_\_\_ [my or our] time.

\_\_\_\_\_ [I or we] would like to know if you would like \_\_\_\_\_ [me or us] to help you conduct the type of review \_\_\_\_\_ [I or we] have recommended. Thus, \_\_\_\_\_ [I or we] would appreciate it if you would complete and sign the bottom portion of the copy of this letter and return it to \_\_\_\_\_ [me or us] at your earliest convenience. If you indicate that you wish \_\_\_\_\_ [me or us] to conduct the review, \_\_\_\_\_ [I or we] will schedule \_\_\_\_\_ [my or our] calendar to contact you at the appropriate time. If you indicate that you do not wish \_\_\_\_\_ [me or us] to conduct the review, \_\_\_\_\_ [I or we] will not bother you with further correspondence.

Sincerely yours,

\_\_\_\_\_ [signature of attorney]

\_\_\_\_\_ [typed name of attorney and law firm]

Check One  
Only:

\_\_\_\_\_ Yes. \_\_\_\_\_ [I or We] do wish you to help  
\_\_\_\_\_ [me or us] conduct the review described in your letter.

\_\_\_\_\_ No. \_\_\_\_\_ [I or We] do not wish you to help  
\_\_\_\_\_ [me or us] conduct the review described in your letter.

Dated:

\_\_\_\_\_  
\_\_\_\_\_

\_\_\_\_\_ [signature of first client]

[typed name]

\_\_\_\_\_ [signature of second client]

[typed name]

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawGeneral OverviewEstate, Gift & Trust LawTrustsGeneral OverviewEstate, Gift & Trust  
LawWillsGeneral OverviewTax LawFederal Estate & Gift TaxesGeneral Overview



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DIVISION IV: WILLS AND TRUSTS  
CHAPTER 60 ESTATE PLANNING  
PART IV. FORMS

*23-60 California Legal Forms--Transaction Guide § 60.205*

**§ 60.205 Estimate of Estate Tax**

**[1] Comment**

**[a] Use of Form**

This form is a worksheet that may be used to estimate the client's estate tax liability. The worksheet may be used at any point in the estate planning process at which an estimate of the estate tax payable in the client's estate is required. At a minimum, an estimate should be made before the estate plan is drawn up and before any changes or alterations are made to an existing plan that might affect the client's estate tax liability. This worksheet may also be used to test the relative tax saving advantages of alternative estate plans.

**[b] Gross Estate**

The starting point in determining the estate tax is the computation of the decedent's gross estate. The value of the gross estate is determined by including, to the extent provided in *I.R.C. §§ 2033-2045*, the value at the time of the decedent's death, or on the alternative valuation date [*see I.R.C. § 2032*] of all property, real or personal, tangible or intangible, wherever situated [*I.R.C. § 2031; Treas. Reg. § 20.2031-1(a)*].

Property that a decedent owns at death is the most obvious example of property that is included in the decedent's gross estate. This may include a home, investments, and bank accounts; but it may also extend to amounts owed to the decedent, such as the principal of any loans the decedent made to another during life (plus accrued interest), accrued salary, and installment obligations owed to the decedent on property sold during life [*see I.R.C. §§ 2031(a), 2033*].

The decedent need not have owned the property solely or outright for it to be included in his or her gross estate. The value of a decedent's share of community property [*see I.R.C. § 2033; U.S. v. Goodyear (9th Cir. 1938) 99 F.2d 523*], or his or her interest in property owned as a joint tenant with another [*see I.R.C. § 2040*], or the value of a future interest, may need to be included in the gross estate.

The gross estate may also include the value of property interests transferred during the decedent's lifetime when the transfer is, in effect, of a testamentary nature, as well as the value of property that is transmitted on account of the

decedent's death and over which the decedent enjoyed the requisite ownership or control at death. Thus, property transferred in such lifetime transfers as transfers of life insurance [*see I.R.C. § 2042*], revocable transfers [*see I.R.C. § 2038*], and transfers with a retained life estate [*see I.R.C. § 2036*] is included in valuing the gross estate.

For a discussion of the specific items that must be included in a gross estate, see § 60.13[1].

### **[c] Valuation of Assets**

The value of a decedent's gross estate for estate tax purposes must be determined as of the date of the decedent's death or, at the election of the decedent's personal representative, at the alternate valuation date, which is generally six months after the decedent's death [*I.R.C. §§ 2031, 2032*]. The value of every property interest included in the gross estate is its fair market value. All relevant facts and elements of value as of the applicable valuation date must be considered [*Treas. Reg. § 20.2031-1(b)*]. Those factors include income yield, appraisals, sales prices of similar property near the time of death, bids made for the property, and general economic conditions [*see Treas. Reg. §§ 20.2031-2-20.2031-8; Estate of Helen M. Noble, T.C. Memo. 2005-2* (fair market value of decedent's interest in closely held stock was determined using actual sales price of stock in arm's length transaction that occurred approximately one year after decedent's death); *Estate of Josephine T. Thompson, T.C. Memo. 2004-174* (capitalization of income approach used to value decedent's 20-percent interest in closely held company; *see also Estate of Frazier Jelke III, T.C. Memo. 2005-131* (value of holding company stock should be reduced by discounted, not full, built-in capital gain tax)].

The sum of the estate tax and the generation-skipping transfer tax due in respect to the property included in a decedent's gross estate may be reduced by electing an alternate valuation date [*see I.R.C. § 2032*]. Under the alternate valuation date election, all property included in the gross estate is valued as of six months after the decedent's death, except for property sold, distributed, exchanged, or otherwise disposed of during the six months, which is valued as of the date of disposition [*I.R.C. § 2032(a)(1), (2)*]. Adjustments to value due to a mere lapse of time are not allowed [*see I.R.C. § 2032(a)(3); Treas. Reg. § 20.2032-1(f)*].

The alternate valuation date election can only be made if it will reduce both the value of the gross estate and the sum of the estate tax imposed and the tax on generation-skipping transfers [*see I.R.C. §§ 2601-2663*] with respect to property that is includable in the decedent's gross estate [*I.R.C. § 2032(c)*]. The election must be made with respect to all property included in the gross estate on the date of the decedent's death; it cannot be applied only to a portion of the estate property [*see I.R.C. § 2032(a); Treas. Reg. § 20.2032-1(b)(1)*].

Deductions provided by other sections of the tax code must be coordinated with the alternate valuation provision. If the value of the property for estate tax purposes is determined on an alternate valuation date, that same value must be used for all other purposes [*I.R.C. § 2032(b)*]. Thus, if an asset is lost or destroyed during the six-month period following the decedent's death, for example, the loss may be deductible from the value of the gross estate in determining the taxable estate [*see I.R.C. § 2054*]. However, if the alternate valuation date is elected, so that the value of the asset is zero, the deduction under *I.R.C. § 2054* will not be allowed [*see I.R.C. § 2032(b)*].

Special valuation rules apply to charitable and marital deductions [*see I.R.C. §§ 2055, 2056*] when the executor elects to use the alternate valuation date. The value of the charitable or marital deduction is to be determined as of the date of the decedent's death with adjustments made for any difference in value during the six-month period after the date of death. The difference in value must not be due to the mere lapse of time or the occurrence of a contingency, and if the property is disposed of during the six-month period, the adjustment period ends on the date of disposition [*I.R.C. § 2032(b)*]. When, for example, a decedent devises a life estate in specific property to a beneficiary with a remainder to a qualified charity, the value of the charitable deduction is determined at the date of death without adjustment, even if the contingency, that is, the beneficiary's death, occurs within the six-month period. However, if the property actually appreciates in value during the six-month period, the appreciation will be included in determining the value of the charitable deduction [*see Treas. Reg. § 20.2032-1(g)*].

The election to value the gross estate as of the alternate valuation date is exercisable by the decedent's personal representative on a timely filed estate tax return. Once the return is filed, the election cannot be revoked [*I.R.C.* § 2032(d)]. Estates that fail to make an alternate valuation election on the last estate return filed before the due date or the first return filed after the due date may request an extension of time to make the election; however, a request for an extension of time that is submitted more than one year after the due date of the return will not be granted [*Prop. Treas. Reg.* § 20.2032-1(b)(2); *Treas. Reg.* §§ 301.9100-1, 301.9100-3; see *Letter Rul.* 200324048 (decedent's estate granted extension of time under *Treas. Reg.* § 301.9100-1 to make alternate valuation election when accountant who was hired to prepare estate tax return failed to make election); but see *Estate of Eddy v. Commissioner*, (2000) 115 T.C. No. 10 (alternate valuation cannot be elected on return filed more than one year after due date, including extensions; estate should have filed return based on available information and then later filed supplemental return)]. Under proposed treasury regulations, a protective election may be made in cases in which, based on the return as filed, alternate valuation does not result in a decrease in tax liability, but it is later determined that such a decrease would occur. While a protective election generally would be irrevocable, it could be revoked on a subsequent return filed by the due date. If a decrease occurred, absent a revocation, alternate valuation would apply and could not be changed subsequently [*Prop. Treas. Reg.* § 20.2032-1(b)(2)].

If specified conditions are met, the personal representative may elect to value qualified real property included in a decedent's gross estate at its value based on the current use being made of the property rather than on the basis of its highest and best use [*I.R.C.* § 2032A]. Qualified real property must be located in the United States and must be used for farming or for another closely held trade or business [*I.R.C.* § 2032A(b)]. To qualify, the property must pass to a qualified heir (a family member) [*I.R.C.* § 2032A(e)(1), (2)], who must continue the qualified use [*I.R.C.* § 2032A(a)-(c)]. The special valuation method may not be used to decrease the value of the qualified real property in the decedent's gross estate by more than \$750,000, subject to inflation adjustments for decedents dying after 1998 [*I.R.C.* § 2032A(a)(2)]. For decedents dying in 2005, for example, the adjusted figure is \$870,000 [ *Rev. Proc.* 2004-71 ].

Transfers of partial interests in corporations, partnerships, and trusts to other family members are subject to special valuation rules [*I.R.C.* §§ 2701-2704]. These rules are intended to curtail an individual's ability to make lifetime transfers to family members of future appreciation in property. They value any retained interest other than a "qualified interest" at zero, unless the retained interest meets specified exceptions. In general, these provisions accept a present gift and focus on the valuation of that gift. Structuring partnerships and corporations without preferred interests is one of the most common ways of avoiding the application of *I.R.C.* § 2701. However, even partnerships and corporations with only one class of equity ownership are still subject to the valuation rules of *I.R.C.* §§ 2703 and 2704.

#### **[d] Exclusions**

In computing the gross estate [see [b], *above*], the following items may be excluded if the executor so elects:

- For decedents dying before 2004 [see *I.R.C.* § 2057(j)], interests qualifying for the family-owned business deduction [*I.R.C.* § 2057; see § 60.13[3]].
- The applicable percentage of the value of any real property subject to a qualified conservation easement [*I.R.C.* § 2031(c); see discussion in § 60.13[2]].

#### **[e] Deductions**

The deductions allowed by law must be deducted from the gross estate to determine the value of the taxable estate [*I.R.C.* § 2051]. Deductions are allowed for the following items:

- Funeral expenses, estate administration expenses, claims against the estate, and mortgages or other

encumbrances on property included in the gross estate [*I.R.C. § 2053(a)*; see *Estate of Howard Gilman, T.C. Memo. 2004-286* (interest and costs associated with loan used to pay estate taxes may be deductible as administration expenses when loan is necessary to pay estate taxes due to estate's illiquidity); Letter Rul. 200449031 (interest on loan used to pay estate tax is deductible as administration expense if loan was necessary for administration of estate, but amount of loan should reflect any reduction in tax liability resulting from deductibility of interest); but see *Letter Rul. 200444021* (estate may not claim estate tax deduction under *I.R.C. § 2053* for income taxes estate paid on amounts it was compelled to withdraw from decedent's IRAs in order to pay estate tax)].

- Certain state and foreign death taxes [*I.R.C. § 2053(d)*].
- Casualty losses incurred during the settlement of the estate [*I.R.C. § 2054*].
- Transfers to charitable beneficiaries [*I.R.C. § 2055*; for general coverage of charitable transfers, see Ch. 69, *Charitable Dispositions* ].
- Transfers to the decedent's spouse [*I.R.C. § 2056*; for general coverage of the marital deduction, see Ch. 71, *Marital Deduction Trust Provisions* ].
- For decedents dying after 2004, state death taxes [*I.R.C. § 2058*].

#### **[f] Adjusted Taxable Gifts**

The amount of the client's adjusted taxable gifts must be added to the client's taxable estate before the tentative estate tax can be determined [*I.R.C. § 2001(b)(1)(A), (B)*]. They include all taxable gifts made after December 31, 1976 [*I.R.C. § 2001(b)*]. Whether a gift is "taxable" must be determined under the general gift tax rules [*I.R.C. § 2001(b)*; see *I.R.C. § 2503*]. For example, a gift is not a "taxable" gift if it qualifies for the annual exclusion [*I.R.C. § 2503(b)*]. Gifts that are included in the client's gross estate must be excluded from the adjusted taxable gifts [*I.R.C. § 2001(b)*]. Thus there is no double counting for purposes of determining the estate tax rate applicable to a decedent's estate. However, the two types of gifts are valued differently. Gifts that are included in the gross estate are valued as of the client's death, while adjusted taxable gifts are valued as of the date the gifts were made.

#### **[g] Tentative Tax**

The tentative estate tax is determined by adding the amount of the adjusted taxable gifts [see [e], *above*] to the taxable estate and multiplying that amount by the applicable transfer tax rate [*I.R.C. § 2001(b)(1)*]. The transfer tax rates are prescribed by *I.R.C. § 2001(c)*. For a table of those rates, see § 60.206[2].

#### **[h] Gift Tax Payable During Lifetime**

The gross estate tax is determined by subtracting the aggregate amount of the gift taxes that would have been payable on gifts made by the client after December 31, 1976, from the tentative tax. However, the amount of the gift taxes that must be subtracted must be determined by applying the estate tax rates in effect at the time of the client's death [*I.R.C. § 2001(b)(2)*].

#### **[i] Credits**

After the taxable estate has been determined, it is necessary to determine the credits allowed by the Internal Revenue Code. The allowable credits include credits for certain state and foreign death taxes [*I.R.C. §§ 2011* (state death tax credit is replaced by a deduction for state death taxes, for estate of decedents dying after 2003), 2014], credits for certain gift taxes [*I.R.C. § 2012*], and credits for taxes on certain prior transfers [*I.R.C. § 2013*].

The most important credit is the unified credit [*see I.R.C. § 2010*]. The amount of property that can be sheltered by the estate tax unified credit varies and depends on the year of death. The amount is \$675,000 for decedents dying in 2001, \$1 million for decedents dying in 2002 and 2003, \$1.5 million for decedents dying in 2004 and 2005, \$2 million for decedents dying in 2006, 2007, and 2008, and \$3.5 million for decedents dying in 2009 [*see I.R.C. § 2010(c)*] (table of graduated amounts) and discussion/table in § 60.13[4][b]. However, the unified credit against estate taxes works only in conjunction with the unified credit against gift taxes. The amount of the gift tax credit is the same as the estate tax credit through 2003, but after 2003, the amount of the gift tax credit remains \$1 million, while the estate tax unified credit increases as noted above [*I.R.C. §§ 2010(c), 2505(a)*]. To the extent that the gift tax credit is depleted by lifetime transfers (gifts), however, the amount of the estate tax credit is reduced or even eliminated. If none of the gift tax credit is used during the decedent's lifetime, the full "applicable credit amount" and "applicable exclusion amount" will be available on the decedent's death. If part or all of the gift tax unified credit is used during the decedent's life, the otherwise available estate tax unified credit must be reduced by that amount [*see I.R.C. §§ 2010(c), 2505*].

## [2] FORM

### Estimate of Estate Tax

#### ESTIMATE OF ESTATE TAX LIABILITY

##### A. GROSS ESTATE

*(Include only one-half of community assets)*

- |   |          |
|---|----------|
| 1. Real estate (less mortgages and liens for which client's estate would not be liable) | \$ _____ |
| 2. Closely held business interests  | \$ _____ |
| 3. Stocks and bonds   | \$ _____ |
| 4. Notes and mortgages  | \$ _____ |
| 5. Cash   | \$ _____ |
| 6. Personal property  | \$ _____ |
| 9. Transfers taking effect at death [I.R.C. § 2037]                                     | \$ _____ |
| 10. Revocable transfers [I.R.C. § 2038]   | \$ _____ |
| 11. Includible annuities [I.R.C. § 2039]  | \$ _____ |
| 12. Includible interests in jointly owned property [I.R.C. § 2040]                      | \$ _____ |
| 13. General powers of appointment [I.R.C. § 2041]                                       | \$ _____ |
| 14. Includible life insurance [I.R.C. § 2042]   | \$ _____ |
| 15. Total gross estate (lines 1 through 14)   | \$ _____ |

**B. DEDUCTIONS**

16. Funeral expenses [I.R.C. § 2053 (a)(1); Treas. Reg. § 20.2053-2] \$ \_\_\_\_\_  
\_\_\_\_\_
17. Administration expenses [I.R.C. § 2053(a)(2); Treas. Reg. § 20.2053-3] \$ \_\_\_\_\_  
\_\_\_\_\_
18. Claims against estate [I.R.C. § 2053(a)(3); Treas. Reg. § 20.2053-4] \$ \_\_\_\_\_  
\_\_\_\_\_
19. Mortgages on property included in gross estate [I.R.C. § 2053(a)(4);  
Treas. Reg. § 20.2053-7] \$ \_\_\_\_\_  
\_\_\_\_\_
20. Death taxes imposed by state (state death taxes are deductible only for es- \$ \_\_\_\_\_  
tates of decedents dying after 2004); or foreign country [I.R.C. §§  
2053(d), 2058; Treas. Reg. §§ 20.2053-9, 20.2053-10] If the deduction  
for death taxes paid to a foreign country is taken, no credit for foreign  
death taxes [see item 35, below] may be taken with respect to the same  
property [I.R.C. §§ 2014(f), 2053(d)(3)]. \_\_\_\_\_
21. Losses incurred during administration [I.R.C. 2054; Treas. Reg. § \$ \_\_\_\_\_  
20.2054-1] \_\_\_\_\_
22. Total of items 2 through 7 \$ \_\_\_\_\_  
\_\_\_\_\_
23. Deductible transfers to spouse [I.R.C. § 2056] \$ \_\_\_\_\_  
\_\_\_\_\_
24. Charitable deduction [I.R.C. § 2055] \$ \_\_\_\_\_  
\_\_\_\_\_
25. Total deductions (lines 16 through 24) \$ \_\_\_\_\_  
\_\_\_\_\_

**C. TAXABLE ESTATE**

26. Taxable estate (line 15 less line 25) \$ \_\_\_\_\_  
\_\_\_\_\_

**D. ADJUSTED TAXABLE GIFTS**

27. Adjusted taxable gifts made after December 31, 1976 [I.R.C. § 2503] \$ \_\_\_\_\_  
\_\_\_\_\_

**E. TENTATIVE TAX**

28. Tentative tax base (line 26 plus line 27) \$ \_\_\_\_\_  
\_\_\_\_\_
29. Tentative tax [I.R.C. § 2001(c); for rate schedule, see § 60.206[2]] \$ \_\_\_\_\_  
\_\_\_\_\_

**F. GIFT TAX PAYABLE DURING LIFETIME**

30. Gift tax payable during lifetime on gifts made after December 31, 1976 \$ \_\_\_\_\_  
(computed as if rate in I.R.C. § 2001(c) had been applicable at time of  
gifts) [I.R.C. § 2001(b)(2)] \_\_\_\_\_

**G. GROSS ESTATE TAX**

31. Gross estate tax (line 29 less line 30) \$ \_\_\_\_\_  
\_\_\_\_\_

H. CREDITS

- 32. Unified credit [I.R.C. § 2010] \$ \_\_\_\_\_  
\_\_\_\_\_
- 33. Credit for gift tax on pre-1977 transfers [I.R.C. § 2012] \$ \_\_\_\_\_  
\_\_\_\_\_
- 34. Credit for estate tax on prior transfers [I.R.C. § 2013] \$ \_\_\_\_\_  
\_\_\_\_\_
- 35. Credit for state taxes (effective for decedents dying before 2005) [I.R.C. § 2011] and credit for foreign death taxes [I.R.C. § 2014]. If the credit for foreign death taxes is taken, no deduction for foreign death taxes [see item 20, *above*] may be taken with respect to the same property [I.R.C. §§ 2014(f), 2053(d)(3)]. \$ \_\_\_\_\_  
\_\_\_\_\_
- 36. Total credits (add lines 32 through 35) \$ \_\_\_\_\_  
\_\_\_\_\_

I. NET ESTATE TAX

- 37. Net estate tax (line 31 less line 36) \$ \_\_\_\_\_  
\_\_\_\_\_

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
 Estate, Gift & Trust Law [General Overview](#) [Tax Law](#) [Federal Estate & Gift Taxes](#) [General Overview](#)



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DIVISION IV: WILLS AND TRUSTS  
CHAPTER 60 ESTATE PLANNING  
PART IV. FORMS

*23-60 California Legal Forms--Transaction Guide § 60.206*

**§ 60.206 Federal Transfer Tax Tables**

**[1] Comment**

**[a] Use of Form**

This form is a table of federal transfer tax rates. It may be used to estimate the amount of federal gift or estate taxes payable in a client's estate. The table is copied from the table set forth in *I.R.C. § 2001(c)(1)*. Under the unified transfer tax system, transfers by gift and transfers at death made after December 31, 1976, are taxed at the same rates [*I.R.C. §§ 2001, 2501, 2502*]. Thus, the rates shown in this form are applicable to both types of transfers.

Under legislation passed in 2001, the federal estate tax has been repealed for decedents dying after 2009, subject to a sunset provision [*I.R.C. § 2505(a)(1), 2210(a)*; see Pub. Law 107-16, § 901; for more detailed discussion of this repeal, see § 60.112A]. In contrast, the gift tax continues to be imposed for gifts made after 2009, at rates ranging from 18 percent (for taxable gifts in excess of the annual exclusion of up to \$10,000) to 35 percent (for taxable gifts over \$500,000) [*I.R.C. § 2502(a)(2)*].

**[b] Maximum Tax Rate**

The maximum transfer tax rate for decedents dying and gifts made after 1983 and before 2002 is 55 percent [*I.R.C. § 2001(c)(1)*, before amendment by Pub. Law 107-16]. The maximum tax rate is 50 percent for decedents dying in 2002, 49 percent for decedents dying in 2003, 48 percent for decedents dying in 2004, 47 percent for decedents dying in 2005, 46 percent for decedents dying in 2006, and 45 percent for decedents dying in 2007 through 2009 [*I.R.C. § 2001(c)(1), (2)*]. The estate tax is scheduled for repeal for decedents dying after 2009, but many commentators do not believe the repeal will occur as planned [*I.R.C. § 2210(a)*; see § 60.12A].

**[c] Former Phaseout of Graduated Rates and Unified Credit**

The unified credit against gift and estate taxes effectively eliminates any estate or gift tax unless the tax base (taxable estate plus adjusted taxable gifts) exceeds the "applicable exclusion amount" [see *I.R.C. § 2010(c)* (table of graduated amounts) and discussion in § 60.13[4][b]]. However, for estates of decedents dying, and gifts made, before 2002, the

benefit of the unified credit is progressively "phased out" for estates in excess of \$10,000,000. This is accomplished by increasing the tax that would otherwise be due by an amount equal to 5 percent of the portion of the estate that exceeds \$10,000,000 [*I.R.C. § 2001(c)(2)*], before amendment by Pub. Law 107-16].

**[2] FORM**

**Federal Transfer Tax Tables**

*FEDERAL ESTATE TAX TABLES*

For Decedents Dying and Gifts Made After 2001

AMOUNT SUBJECT TO TENTATIVE TAX--      TENTATIVE TAX

Not over \$10,000	18 percent of such amount.
Over \$10,000 but not over \$20,000	\$1,800, plus 20 percent of the excess of such amount over \$10,000.
Over \$20,000 but not over \$40,000	\$3,800, plus 22 percent of the excess of such amount over \$20,000.
Over \$40,000 but not over \$60,000	\$8,200, plus 24 percent of the excess of such amount over \$40,000.
Over \$60,000 but not over \$80,000	\$13,000, plus 26 percent of the excess of such amount over \$60,000.
Over \$80,000 but not over \$100,000	\$18,200, plus 28 percent of the excess of such amount over \$80,000.
Over \$100,000 but not over \$150,000	\$23,800, plus 30 percent of the excess of such amount over \$100,000.
Over \$150,000 but not over \$250,000	\$38,800, plus 32 percent of the excess of such amount over \$150,000.
Over \$250,000 but not over \$500,000	\$70,800, plus 34 percent of the excess of such amount over \$250,000.
Over \$500,000 but not over \$750,000	\$155,800, plus 37 percent of the excess of such amount over \$500,000.
Over \$750,000 but not over \$1,000,000	\$248,300, plus 39 percent of the excess of such amount over \$750,000.
Over \$1,000,000 but not over \$1,250,000	\$345,800, plus 41 percent of the excess of such amount over \$1,000,000.
Over \$1,250,000 but not over \$1,500,00.	\$448,300 plus 43 percent of the excess of such amount over \$1,250,000.
Over \$1,500,000 but not over \$2,000,000	\$555,800, plus 45 percent of the excess of such amount over \$1,500,000.
Over \$2,000,000 but not over \$2,500,000	\$780,800, plus 49 percent of the excess of such amount over \$2,000,000.
Over \$2,500,000	\$1,025,800, plus 50 percent of the excess over \$2,500,000.

**CAUTION:**

The maximum rate of tax as shown by the above table is gradually phased down for estates of decedents dying, and gifts made, after 2002 and before 2010 [*I.R.C. § 2001(c)(2)*]. The maximum rates will be as shown in the table below, and brackets and amounts setting forth the tax will be adjusted accordingly.

In calendar year:	maximum rate is:
2003 .....	49 percent
2004 .....	48 percent
2005 .....	47 percent
2006 .....	46 percent
2007, 2008, and 2009 .....	45 percent

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Tax LawFederal Estate & Gift TaxesGeneral OverviewTax LawFederal Estate & Gift TaxesEstate Tax  
ReturnsImposition of Taxes



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DIVISION IV: WILLS AND TRUSTS  
CHAPTER 60 ESTATE PLANNING  
PART IV. FORMS

*23-60 California Legal Forms--Transaction Guide § 60.207*

**§ 60.207 Estimate of Probate Fees**

**[1] Comment**

**[a] Use of Form**

This form is a worksheet that may be used to estimate the fees that would be payable to the personal representative and the attorney for the personal representative if the client's estate were subject to probate administration. This worksheet may be used at any point in the estate planning process at which it is helpful to contrast the costs of probate administration with the costs of transferring the client's estate without probate. An estimate of this kind will often be useful in the preliminary stages of estate planning, when the client is considering the advantages and disadvantages of probate avoidance.

**[b] Statutory Fees for Ordinary Services**

The fees of the personal representative and the attorney for the representative in probate proceedings are governed by statute. For all "ordinary services," the personal representative and the attorney are entitled to fees determined according to a statutory schedule. The schedule is as follows [*Prob. Code §§ 10800(a), 10810(a)*]:

Four percent of the first \$100,000;

Three percent of the next \$100,000;

Two percent of the next \$800,000;

One percent of the next \$9,000,000;

One half of one percent of the next \$15,000,000; and

A reasonable amount to be determined by the court for all amounts above \$25,000,000.

The statutory fees of the personal representative and the attorney are identical [*Prob. Code §§ 10800(a), 10810(a)*]. For

purposes of determining the statutory fees, "ordinary services" are the common services ordinarily rendered by the personal representative and the attorney in probate proceedings, and must be contrasted with "extraordinary services," for which additional compensation may be ordered by the court [*see* [c], *below*].

The statutory fees are determined by multiplying the statutory percentages by the value of the "estate accounted for" [*Prob. Code* § 10800(a)]. The "estate accounted for" is the total appraisal value of all of the property in the probate estate, plus gains over appraisal value on sales, plus receipts, less losses over appraisal on sales [*Prob. Code* § 10800(b)].

In calculating the value of the estate accounted for, no deduction is allowed for encumbrances or other obligations on estate property [*Prob. Code* § 10800(b)]. Thus, if the client owns a personal residence with an appraised value of \$500,000 that is subject to a deed of trust with an unpaid balance of \$400,000, the statutory fees will be determined on the basis of the \$500,000 value without any deduction for the \$400,000 encumbrance. Fees for ordinary services are calculated on the net income of any businesses that are part of the estate, not on the gross income [ *Estate of Sanchez* (1995) 33 Cal. App. 4th 239, 243, 39 Cal. Rptr. 2d 141 ].

The award of statutory fees is not discretionary. The personal representative and the attorney are entitled to the statutory fees as a matter of right [ *Estate of Getty* (1983) 143 Cal. App. 3d 455, 466, 191 Cal. Rptr. 897 ]. The fact that the estate is a simple one, and the fees are larger than would be adequate compensation for the work involved, does not affect the right to full statutory compensation [ *Estate of Hilton* (1996) 44 Cal. App. 4th 890, 909, 52 Cal. Rptr. 2d 491 ]. This right to statutory fees is absolute unless the personal representative fails to administer the estate in a timely manner or causes the estate to suffer a loss due to his or her default or neglect [*Prob. Code* § 12205; *Estate of Bonaccorsi* (1999) 69 Cal. App. 4th 462, 472, 81 Cal. Rptr. 2d 604 (courts may disallow compensation for services rendered negligently or in breach of trust)]. If the personal representative incurs expenses for work he or she has the duty to perform, those expenses may be charged against the personal representative's statutory commission [ *Estate of Billings* (1991) 228 Cal. App. 3d 426, 430, 278 Cal. Rptr. 439 ].

Any agreement between the personal representative and his or her attorney to grant the attorney compensation exceeding that allowed by statute is void as against public policy [*Prob. Code* § 10813; *Estate of Gilkison* (1998) 65 Cal. App. 4th 1443, 1446 fn. 2, 77 Cal. Rptr. 2d 463 ].

### **[c] Additional Fees for Extraordinary Services**

Personal representatives and their attorneys are entitled to additional compensation for so-called "extraordinary services" [*Prob. Code* §§ 10801(a), 10811(a)]. Extraordinary services are services rendered by the representative or attorney that are beyond or in addition to their common or ordinary services. Examples of extraordinary services include selling real or personal property, handling contested or litigated claims against the estate, defending in good faith against the contest of a will, preparing tax returns, and participating in litigation involving estate property [*see Estate of Hilton* (1996) 44 Cal. App. 4th 890, 895 fn. 5, 52 Cal. Rptr. 2d 491 ; *see also* California Wills & Trusts, Ch. 35, *Nomination of Executors* (Matthew Bender)].

Unlike statutory fees, which are awarded as a matter of right [*see* [b], *above*], the allowance of extraordinary compensation is a matter of discretion with the trial court [*Prob. Code* §§ 10801(a), 10811(a); *Estate of Trynin* (1989) 49 Cal. 3d 868, 874, 264 Cal. Rptr. 93, 782 P.2d 232 (when amount awarded as ordinary compensation is fair and reasonable for all attorney services, court may disallow request for extraordinary compensation even though some extraordinary services have been performed); *Estate of Gilkison* (1998) 65 Cal. App. 4th 1443, 1448, 77 Cal. Rptr. 2d 463 ; *Estate of Hilton* (1996) 44 Cal. App. 4th 890, 914, 52 Cal. Rptr. 2d 491 (court has discretion to deny extraordinary fees when statutory fees are reasonable compensation for services performed)]. The trial court has discretion to determine, first, whether extraordinary compensation is warranted [*see Estate of Billings* (1991) 228 Cal. App. 3d 426, 431, 278 Cal. Rptr. 439 (accounting of complex estate is not always extraordinary)] and, second, when

extraordinary compensation is warranted, how much the compensation should be [ *Estate of Hilton (1996) 44 Cal. App. 4th 890, 907, 52 Cal. Rptr. 2d 491* ].

Since the amount of extraordinary compensation is not fixed, only a rough estimate of the amount of that compensation can be made at the estate planning stage. In determining whether extraordinary compensation is likely to be payable, the likelihood that property will be sold, that tax returns will have to be prepared, and that other similar services will have to be rendered, should be considered.

#### **[d] Will Provisions Governing Compensation**

The Probate Code explicitly authorizes a testator to provide in the will for the compensation of the executor and the attorney for the executor [*Prob. Code §§ 10802(a), 10812(a)*]. When the will specifies what compensation the executor and the attorney will receive, the compensation provided by the will is the full and only compensation for the services of the executor and the attorney [*Prob. Code §§ 10802(a), 10812(a)*]. However, the court may relieve the executor or the attorney from the will provisions if the court determines that it would be to the advantage of the estate and in the best interests of the persons interested in the estate to do so [*Prob. Code §§ 10802(b), (d), 10812(b), (d)*].

Notwithstanding the Probate Code provisions, will provisions setting the compensation of the executor and the attorney are rare.

#### **[e] Contracts Void**

Any contract between a personal representative and an heir or devisee for a higher compensation than that allowed by the will or by statute is void [*Prob. Code § 10803*].

#### **[f] Probate Filing Fees**

The filing fee is an additional factor to be considered in estimating total probate costs. The uniform filing fee for the first petition for letters of administration or letters testamentary, or the first petition for special letters of administration with the power of a general personal representative is three hundred fifty-five dollars (\$355) [*Gov. Code § 70650(a)*]. The uniform filing fee for the first objections to the probate of any will or codicil under *Prob. Code § 8250*, or the first petition for revocation of probate of any will or codicil under *Prob. Code § 8270* is three hundred fifty-five dollars (\$355) [*Gov. Code § 70650 (b)*]. The uniform filing fee for the first petition for special letters of administration without the powers of a general personal representative is provided in *Gov. Code § 70657.5* [*Gov. Code § 70650(b)*]. A fee of three hundred fifty-five dollars (\$355) will also be charged for the filing of each subsequent petition or objection in the same proceeding by a person other than the original petitioner or contestant [*Gov. Code § 70650(c)*]. If a petition for special administration is filed together with a petition for letters of administration or letters testamentary by the same person, the person filing the petitions will be charged the applicable filing fees for both petitions [*Gov. Code § 70650(d)*].

A \$20.00 surcharge is added to the above fees to ensure and maintain adequate funding for court security [*Gov. Code § 69926.5(a)*].

### **[2] FORM**

#### **Estimate of Probate Fees**

#### **ESTIMATE OF PROBATE FEES**

PERCENTAGE OF ESTATE ACCOUNTED FOR	PERSONAL REPRESENTATIVE	ATTORNEY
4% of first \$100,000	\$ _____	\$ _____

Add 3% of next \$100,000	\$ _____	\$ _____
Add 2% of next \$800,000	\$ _____	\$ _____
Add 1% of next \$9,000,000	\$ _____	\$ _____
Add 1/2 of 1% of next \$15,000,000	\$ _____	\$ _____
For all amounts above \$25,000,000, add reasonable amount to be determined by court	\$ _____	\$ _____
Individual Totals	\$ _____	\$ _____
Estimated Filing Fee		\$ _____
Grand Total (add totals in columns for per- sonal representative and attorney, and filing fees)		\$ _____

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law  
 Probate  
 Personal Representatives  
 Compensation  
 Estate, Gift & Trust Law  
 Probate  
 Procedures in  
 Probate  
 Costs & Expenses



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DIVISION IV: WILLS AND TRUSTS  
CHAPTER 60 ESTATE PLANNING  
PART IV. FORMS

*23-60 California Legal Forms--Transaction Guide § 60.208*

**§ 60.208 Notice and Acknowledgment of Acceptance of Estate Planning Document for Safekeeping**

**[1] Comment--Use of Form**

This form is a notice that an attorney has accepted an estate planning document, such as an original will or trust, for "deposit" and an acknowledgment from the "depositor" that he or she will keep the attorney informed of any change in their address [*Prob. Code § 715; see Prob. Code §§ 702, 703* ("deposit" and "depositor" defined); *see also Prob. Code § 704* ("document" defined)]. An attorney may, but is not required to, use the form after accepting a document for safekeeping [*see Prob. Code § 715*]. However, if an attorney (1) gives notice to, and obtains acknowledgment from, the depositor, in substantially the form provided in *Prob. Code § 715*, and (2) satisfies the requirements of *Prob. Code § 732(a)* (regarding notifying a depositor to reclaim a document before it may be transferred to another attorney), the attorney, and a successor attorney that accepts a document's transfer, are required only to use slight care for preserving the document deposited [*see Prob. Code § 716; see also Prob. Code § 733* (attorney transferring document must complete notice of transfer with state bar)]. This is in contrast to the general "ordinary care" standard imposed on attorneys who accept wills and other estate planning documents for safekeeping [*compare Prob. Code § 710 with Prob. Code § 716*].

For a further discussion of the rules governing the deposit of estate planning documents with an attorney for safekeeping, see § 60.18.

**[2] FORM**

**Notice and Acknowledgment of Acceptance of Estate Planning Document for Safekeeping**

To: \_\_\_\_\_ [*name of depositor*]  
 \_\_\_\_\_ [*depositor's address*]  
 \_\_\_\_\_ [*city, state, zip*]

I have accepted your will or other estate planning document for safekeeping. I must use ordinary care for preservation of the document.

You must keep me advised of any change in your address shown above. If you do not and I cannot return this document to you when necessary, I will no longer be required to use ordinary care for preservation of the document, and I may transfer it to another attorney or to the clerk of the superior court of the county of your last known domicile, and give notice of the transfer to the State Bar of California.

\_\_\_\_\_ [*signature of attorney*]

\_\_\_\_\_ [*attorney's address*]

\_\_\_\_\_ [*city, state, zip*]

My address shown above is correct. I understand that I must keep you advised of any change in this address.

Dated: \_\_\_\_\_

\_\_\_\_\_ [*signature of depositor*]

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Probate General Overview Estate, Gift & Trust Law Wills General Overview



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DIVISION IV: WILLS AND TRUSTS  
CHAPTER 60A GIFTS

*23-60A California Legal Forms--Transaction Guide 60A.syn*

**AUTHOR:** Reviewed by Albert G. Handelman

**§ 60A.syn Synopsis to Chapter 60A: GIFTS**

§ 60A.01 California Sources

[1] Statutes

[2] Attorney General Opinions

§ 60A.02 Federal Sources

[1] Statutes

[2] Regulations

§§ 60A.03-60A.04 [Reserved]

§ 60A.05 Law Reviews

§ 60A.06 Annotations

§ 60A.07 Text References

[1] Matthew Bender Sources

[2] Additional Text References

§§ 60A.08-60A.09 [Reserved]

§ 60A.10 Gifts of Personal Property

[1] Definition

[2] Requirements

- [a] Donor's Intent
- [b] Donor's Capacity to Contract
- [c] Delivery to Donee
- [d] Acceptance by Donee
- [e] Divestment of Donor's Control
- [f] Absence of Consideration
- [g] Writing

[3] Revocability

- [a] Revocation Generally Precluded
- [b] Gift in Contemplation of Marriage

[4] Reservation of Rights

§ 60A.11 Gifts of Real Property

[1] Writing Required

[2] Oral Gift of Real Property

[3] Reservations of Rights

§ 60A.12 Gifts of Community Property

[1] In General

[2] Gifts of Quasi-Community Property

[3] Transmutation of Community Property by Gifts Between Spouses

§ 60A.13 Gifts to Minors

§ 60A.14 Charitable Gifts

§ 60A.15 Gifts in View of Impending Death

[1] In General

[2] As Will Substitute

[3] Conditional Nature

[4] Presumption

[5] Revocation

[6] Rights of Creditors

§ 60A.16 Limitations on Gifts to Disqualified Persons

[1] Invalidity of Gifts to Disqualified Persons

[a] Persons Who Are Disqualified

[b] Dependent Adults and Care Custodians

[c] Disposition of Property Subject to Invalid Transfer

[d] Liability for Invalid Transfer

[2] Exceptions

[a] Transfer to Donor's Relative, Cohabitant, or Domestic Partner

[b] Transfer to Public Entity or Public Trust

[c] Independent Attorney's Review

[d] Court Approval

[e] Court-Determined Absence of Fraud, Duress, Menace, or Undue Influence

§§ 60A.17-60A.29 [Reserved]

§ 60A.30 Unified Transfer Tax System

[1] In General

[2] Operation of Unified Rate Schedule and Unified Credit

[3] Distinctions Between Gift Tax and Estate Tax

[a] Tax Treatment of Amounts Used to Pay Tax

[b] Additional Exclusions Available Under Gift Tax

§ 60A.31 Computation of Gift Tax

[1] Initial Computation of Tax

[2] Application of Unified Credit

[3] Federal Gift Tax Rates

§ 60A.32 Taxable Gifts

[1] In General

[2] Transfers by Gift

[a] Basic Rule

[b] What Constitutes "Gift"

[c] Effect of Disclaimers

[d] Effect of Powers of Appointment

[3] Exclusion for Educational and Medical Expenses

[4] Annual Exclusion

[a] In General

[b] Application to Future Interests

[c] Application to Income Interests

[d] Special Problems Involving Transfers to Minors

[5] Marital Deduction

[6] Charitable Deduction

§ 60A.33 Gift of S Corporation Stock to Trust

§ 60A.34 Gift Tax Return

§ 60A.35 Income Tax Consequences of Gifts

§§ 60A.36-60A.39 [Reserved]

§ 60A.40 California UTMA

§ 60A.41 Gifts Under the UTMA

§ 60A.42 Testamentary Transfers and Other Transfers to Take Effect on Occurrence of a Future Event

§ 60A.43 Custodian

[1] Designation of Custodian

[2] Vacancy in Position of Custodian

[3] General Powers and Duties of Custodian

[4] Payments of Custodial Property to or for Benefit of Minor

[5] Liability of Custodian

§ 60A.44 Tax Aspects of UTMA Gifts

[1] Gift Tax Consequences

[2] Income Tax Consequences

[3] Estate Tax Consequences

§§ 60A.45-60A.99 [Reserved]

§ 60A.100 Facts

Scope

§ 60A.101 Documents

Scope

§§ 60A.102-60A.109 [Reserved]

§ 60A.110 In General

Scope

§ 60A.111 Tax Considerations

Scope

§ 60A.112 Determinations Under California UTMA

Scope

§§ 60A.113-60A.119 [Reserved]

§ 60A.120 Preparation and Execution of Written Instrument

Scope

§ 60A.121 Delivery

Scope

§ 60A.122 Acceptance of Gift by Donee

Scope

§ 60A.123 Gifts Under California Uniform Transfers to Minors Act

Scope

§§ 60A.124-60A.129 [Reserved]

§ 60A.130 Federal Gift Tax Liability

Scope

§ 60A.131 Tax Liability Under UTMA

Scope

§§ 60A.132-60A.199 [Reserved]

§ 60A.200 General Form for Gift of Personal Property

[1] Comment

- [a] Use of Form
- [b] Importance of Date of Gift
- [c] Spouse's Consent to Gift of Community Property
- [d] Gift Splitting by Married Donors
- [e] Delivery and Acceptance

[2] Form

General Form for Gift of Personal Property

§ 60A.201 Gift Causa Mortis

[1] Comment

- [a] Use of Form
- [b] Gift in View of Impending Death
- [c] Gift as Conditional
- [d] Revocability
- [e] Rights of Creditors
- [f] Spouse's Consent to Gift of Community Property
- [g] Taxation of Gift Causa Mortis

[2] Form

Gift Causa Mortis

§ 60A.202 Gift of Life Insurance Policy

[1] Comment

[a] Use of Form

[b] Gift of Life Insurance Policy

[c] Premiums Paid With Community Property

[d] Rights of Donee

[e] Policy Requirements and Notice

[f] Gift to Beneficiary

[g] Use of Company Forms

[h] Estate and Income Tax Consequences

[i] Gift Tax Consequences

[j] Drafting Caution

[2] Form

Gift of Life Insurance Policy

§ 60A.203 Gift by Forgiveness of Debt

[1] Comment

[a] Use of Form

[b] Proof of Donative Intent

[2] Form

Gift by Forgiveness of Debt

§ 60A.204 Gift of Securities

[1] Comment

[a] Use of Form

[b] Gift of Securities

[c] Delivery of Endorsed Certificates or Completion of Other Requirements

[d] Importance of Date of Gift

[2] Form

Gift of Securities

§ 60A.205 Gift of Interest in Trust

[1] Comment

[a] Use of Form

[b] Assignability of Trust Interests

[c] Tax Consequences of Gift of Trust Instrument

[2] Form

Gift of Interest in Trust

§ 60A.206 Gift of Tuition or Medical Expenses

[1] Comment

[a] Use of Form

[b] Exclusion of Medical and Educational Payments

[c] Eligible Donee

[d] Qualified Transfers

[e] Income Tax Consequences

[2] Form

Gift of Tuition or Medical Expenses

§ 60A.207 Gift Conditional on Payment of Gift Tax by Donee

[1] Comment

[a] Use of Form

[b] Federal Gift Taxation of Net Gift

[2] Form

Gift Conditional on Payment of Gift Tax by Donee

§§ 60A.208-60A.219 [Reserved]

§ 60A.220 Gift of Personal Property Under California Uniform Transfers to Minors Act

[1] Comment

[a] Use of Form

[b] Transferor Cannot Act as Custodian

[c] Unregistered Securities Not Held by Broker or Financial Institution

[d] Uncertificated Tangible Personal Property

[e] Gifts for Which This Form Should Not Be Used

[f] Gift of Community Property

[g] Age for Termination of Custodianship

[2] Form

Gift of Personal Property Under California Uniform Transfers to Minors Act

§ 60A.221 Agreement for Compensation of Custodian Under California UTMA

[1] Comment

[a] Use of Form

[b] Compensation in Absence of Agreement

[c] Compensation by Agreement

[d] Right to Reimbursement

[2] Form

Agreement for Compensation of Custodian Under California UTMA

§ 60A.222 Declaration That Transferor-Custodian May Pay Custodial Property to or on Behalf of Minor Only by Court Order [Prob. Code § 3914(d)]

[1] Comment

[a] Use of Form

[b] Estate Tax Reasons for Election

[2] Form

Declaration That Transferor-Custodian May Pay Custodial Property to or on Behalf of Minor Only by Court Order  
[Prob. Code § 3914(d)]

§§ 60A.223-60A.229 [Reserved]

§ 60A.230 Disclaimer of Gift or Other Interest

[1] Comment

[a] Use of Form

[b] Use of Disclaimers in Estate Planning

[c] Qualified Disclaimers for Federal Gift Tax Purposes

[d] California Disclaimer Requirements

[e] Who May Disclaim

[f] When Disclaimer Must Be Filed

[g] Filing Requirements

[h] Recording of Disclaimers Affecting Real Property

[i] Irrevocability

[j] Disposition of Disclaimed Interest

[2] Form

Disclaimer of Gift or Other Interest

§ 60A.231 Disclaimer by Beneficiary of Interest in Trust

[1] Comment

[a] Use of Form

[b] When Disclaimer Must Be Filed

[2] Form

Disclaimer by Beneficiary of Interest in Trust

§ 60A.232 Waiver of Right to Disclaim Interest

[1] Comment--Use of Form

[2] Form

Waiver of Right to Disclaim Interest

§§ 60A.233-60A.239 [Reserved]

§ 60A.240 Certificate of Independent Review [Prob. Code § 21351(b)]

[1] Comment

[a] Use of Form

[b] Requirement of Certificate of Independent Review

[c] Status of Attorney Who Prepares Certificate

[2] FORM

Certificate of Independent Review [Prob. Code § 21351(b)]

Reviewed by Albert G. Handelmann\*

**FOOTNOTES:**

(n116)Footnote \*. Mr. Handelman is a member of the State Bar of California and practices in Santa Rosa, California. He is a founding member of California Trust and Estate Counselors, LLP. He received his B.S. degree, cum laude, from the Wharton School, University of Pennsylvania, and his J.D. degree from the University of Southern California. Mr. Handelman is a certified specialist in Probate, Estate Planning and Trust Law (California State Bar Board of Legal Specialization) and a Fellow of the American College of Trust and Estate Counsel. He previously served as a member of the Executive Committee of the Trusts and Estates Section of the California State Bar and as president of the Redwood Empire Estate Planning Council. He is a co-author of and co-consultant on Matthew Bender's California Wills & Trusts . Mr. Handelman has frequently written and spoken throughout California for both professional and industry groups on a variety of subjects in the field of trust and estate law.



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*23-60A California Legal Forms--Transaction Guide Scope*

**AUTHOR:** Reviewed by Albert G. Handelman

**Scope**

Reviewed by Albert G. Handelman\* Scope

This chapter covers gifts of property made during the donor's lifetime, including the general law governing gifts and the procedural requirements for making gifts of different types of property. An overview of the tax treatment of gifts is provided. The chapter also provides information to guide the determination of how to effectuate a particular client's intention to make a gift, along with forms to assist in drafting documents. Gifts to minors under the California Uniform Transfers to Minors Act are covered.

Gifts of property to the natural objects of the donor's affection should be made within the context of the donor's total estate plan, particularly when the gifts are of substantial value. Therefore, it is recommended that the attorney also consult Ch. 60, *Estate Planning*, Ch. 61, *Will Drafting and Complete Will Forms*, Ch. 64, *Testamentary Trusts: Payment and Distribution Provisions*, Ch. 64A, *Testamentary Trusts: Trustee Provisions*, Ch. 64B, *Testamentary Trusts: Administrative Provisions*, Ch. 70, *Complete Revocable Trust Forms*, Ch. 71, *Marital Deduction Trust Provisions*, and Ch. 72, *Irrevocable Trusts*. Gifts to charitable organizations present special tax issues and are discussed in Ch. 69, *Charitable Dispositions*, and Ch. 74, *Split-Interest Charitable Trusts*.

**FOOTNOTES:**

(n117)Footnote \*. Mr. Handelman is a member of the State Bar of California and practices in Santa Rosa, California. He is a founding member of California Trust and Estate Counselors, LLP. He received his B.S. degree, cum laude, from the Wharton School, University of Pennsylvania, and his J.D. degree from the University of Southern California. Mr. Handelman is a certified specialist in Probate, Estate Planning and Trust Law (California State Bar Board of Legal Specialization) and a Fellow of the American College of Trust and Estate Counsel. He previously served as a member of the Executive Committee of the Trusts and Estates Section of the California State Bar and as president of the Redwood Empire Estate Planning Council. He is a co-author of and co-consultant on Matthew Bender's California Wills & Trusts. Mr. Handelman has frequently written and spoken throughout California for both professional and industry groups on a variety of subjects in the field of trust and estate law.



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PART I. RESEARCH GUIDE

A. Primary Sources

*23-60A California Legal Forms--Transaction Guide § 60A.01*

**AUTHOR:** Reviewed by Albert G. Handelman

**§ 60A.01 California Sources**

**[1] Statutes**

Transfer defined. *Civ. Code § 1039.*

Voluntary transfer. *Civ. Code § 1040.*

Gift defined. *Civ. Code § 1146.*

Delivery of gift. *Civ. Code § 1147.*

Revocability of gift. *Civ. Code § 1148.*

Transfer without writing. *Civ. Code § 1052.*

Transfer in writing. *Civ. Code § 1053.*

Title passes on delivery. *Civ. Code § 1054.*

Writing required for certain transfers of real property. *Civ. Code § 1091.*

Written consent of spouse required for gift of community property. *Fam. Code § 1100(b).*

Remedies for improper disposition of community property. *Fam. Code § 1101.*

Both spouses must join in conveyance of community real property. *Fam. Code § 1102.*

California Uniform Transfers to Minors Act. *Prob. Code § 3900 et seq.*

Gifts in view of impending death. *Prob. Code § 5700 et seq.*

Limitations on transfers to drafters and others. *Prob. Code § 21350 et seq.*

## **[2] Attorney General Opinions**

Pursuant to California's Uniform Gifts to Minors Act, *Civ. Code §§ 1154-1165*, control of gift first held on or after March 7, 1973, must be transferred to donee at donee's eighteenth birthday. *57 Ops. Cal. Att'y Gen. 481 (1974)*.

Insured credit unions are eligible depositories under California Uniform Gifts to Minors Act. *55 Ops. Cal. Att'y Gen. 98 (1972)*.

### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawCommunity PropertyGiftsEstate, Gift & Trust LawPersonal GiftsGeneral OverviewEstate, Gift & Trust LawPersonal GiftsElements of Valid GiftsGeneral OverviewEstate, Gift & Trust LawPersonal GiftsGifts to MinorsGeneral OverviewEstate, Gift & Trust LawPersonal GiftsProceduresGeneral Overview



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*23-60A California Legal Forms--Transaction Guide § 60A.02*

**AUTHOR:** Reviewed by Albert G. Handelman

**§ 60A.02 Federal Sources**

**[1] Statutes**

Income of child under 14 taxed as parent's income. *I.R.C. § 1(g).*

Gift tax. *I.R.C. § 2501 et seq.*

Imposition of tax. *I.R.C. § 2501.*

Rate of tax. *I.R.C. § 2502.*

Taxable gifts. *I.R.C. § 2503.*

Unified credit against gift tax. *I.R.C. § 2505.*

Gifts by husband or wife to third person. *I.R.C. § 2513.*

Disclaimers. *I.R.C. § 2518.*

Charitable and similar gifts. *I.R.C. § 2522.*

Gifts to a spouse. *I.R.C. § 2523.*

**[2] Regulations**

Imposition of gift tax. *Treas. Reg. § 25.2501-1.*

Rate of tax. *Treas. Reg. § 25.2502-1.*

General definitions of "taxable gifts" and "total amount of gifts." *Treas. Reg. § 25.2503-1.*

Exclusions from gifts. *Treas. Reg. § 25.2503-2.*

Future interests in property. *Treas. Reg. § 25.2503-3.*

Transfer for benefit of minor. *Treas. Reg. § 25.2503-4.*

Exclusion for tuition and medical expenses. *Treas. Reg. § 25.2503-6.*

Transfers in general. *Treas. Reg. § 25.2511-1.*

Cessation of donor's dominion and control. *Treas. Reg. § 25.2511-2.*

Gift splitting. *Treas. Reg. § 25.2513-1 et seq.*

Qualified disclaimers of property. *Treas. Reg. § 25.2518-1 et seq.*

Gifts to spouse. *Treas. Reg. § 25.2523(a)-1 et seq.*

### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Tax Law Federal Estate & Gift Taxes Gifts (IRC secs. 2035, 2501-2524) General Overview Tax Law Federal Estate & Gift Taxes Gifts (IRC secs. 2035, 2501-2524) Annual Exclusions Tax Law Federal Estate & Gift Taxes Gifts (IRC secs. 2035, 2501-2524) Elements General Overview Tax Law Federal Estate & Gift Taxes Gifts (IRC secs. 2035, 2501-2524) Imposition of Taxes Tax Law Federal Estate & Gift Taxes Gifts (IRC secs. 2035, 2501-2524) Scope



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§§ 60A.03[Reserved]



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B. Secondary Sources

*23-60A California Legal Forms--Transaction Guide § 60A.05*

**AUTHOR:** Reviewed by Albert G. Handelman

**§ 60A.05 Law Reviews**

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Comment, *It Pays to Give It Away--Sometimes: Inter Vivos Charitable Remainder Unitrusts in Estate Planning*, 15 *Pepperdine L. Rev.* 367 (1988).

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Early, Boone, Durand, et al., *What to Give Away*, 18 *Real Prop. Prob. & Tr. J.* 678 (1983).

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*Economic Reality of Net Gifts, 13 Tax Adviser 580 (1982).*

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**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawPersonal GiftsGeneral OverviewEstate, Gift & Trust LawPersonal GiftsElements of Valid GiftsGeneral OverviewEstate, Gift & Trust LawPersonal GiftsGifts to MinorsGeneral OverviewEstate, Gift & Trust LawPersonal GiftsProceduresGeneral OverviewTax LawFederal Estate & Gift TaxesGifts (IRC secs. 2035, 2501-2524)General Overview



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B. Secondary Sources

*23-60A California Legal Forms--Transaction Guide § 60A.06*

**AUTHOR:** Reviewed by Albert G. Handelman

**§ 60A.06 Annotations**

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Annot., Inter Vivos Gift of Remainder in Chattel, 83 A.L.R.4th 966 (1991).

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Annot., Validity of Inter Vivos Gift by Ward to Guardian or Conservator, 70 A.L.R.4th 499 (1989).

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Annot., Transfer on Corporate Books as Sufficient for Gift of Stock, 6 A.L.R.4th 250 (1981).

Annot., Issuance of Stock Certificate to Joint Tenant as Creating Gift Inter Vivos, 5 A.L.R.4th 373 (1981).

Annot., Valuation of Corporate Stock for Purposes of State Gift, Inheritance or Estate Tax, as Affected by Predetermined Price in Buy-Out or First Option Agreement Among Stockholders or With Corporation, 58 A.L.R.3d 1104 (1974).

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*Annot., Valuation for Federal Estate or Gift Tax Purposes of Shares in Open-End or Mutual Fund Investment Company, 11 A.L.R. Fed. 940 (1972) .*

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Personal Gifts General Overview Estate, Gift & Trust Law Personal Gifts Procedures General Overview Estate, Gift & Trust Law Trusts Charitable Trusts Tax Law Federal Estate & Gift Taxes Gifts (IRC secs. 2035, 2501-2524) General Overview Tax Law Federal Estate & Gift Taxes Gifts (IRC secs. 2035, 2501-2524) Imposition of Taxes



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*23-60A California Legal Forms--Transaction Guide § 60A.07*

**AUTHOR:** Reviewed by Albert G. Handelman

**§ 60A.07 Text References**

**[1] Matthew Bender Sources**

California Legal Forms (Matthew Bender).

Ch. 60, *Estate Planning*.

Ch. 67, *Future Interests and Perpetuities*.

Ch. 68, *Durable Powers of Attorney for Property Management*.

Ch. 69, *Charitable Dispositions*.

Ch. 74, *Split-Interest Charitable Trusts*.

Ch. 111, *Premarital Agreements*.

Ch. 112, *Postnuptial Agreements* .

California Forms of Pleading and Practice, Ch. 278, *Gifts* (Matthew Bender).

California Wills and Trusts (Matthew Bender).

Ch. 2, *Overview of Tax Laws Affecting the Disposition of Estates*.

Ch. 3, *Selecting the Proper Estate Planning Devices*.

Ch. 116, *Charitable Remainder Trusts*.

Ch. 117, *Charitable Lead Trusts*.

Fiore, Friedlich, McInerney & Chevat, *Modern Estate Planning* (Matthew Bender).

Ch. 2, *Gift Tax Basics*.

Ch. 3, *Nonresident Alien Estate and Gift Tax Basics*.

Rabkin & Johnson, *Current Legal Forms with Tax Analysis* (Matthew Bender).

Ch. 7B, *Estate Planning for Community Property*.

Ch. 10, *Domestic Relations*.

Ch. 11, *Contributions to Charities*.

Rabkin & Johnson, *Federal Income, Gift and Estate Taxation* (Matthew Bender).

Ch. 51, *Gift Tax Pattern*.

Ch. 52, *Estate Tax Pattern: Gross Estate*.

Ch. 59, *Charities*.

### **[2] Additional Text References**

Witkin, *Summary of California Law*, vol. 13, *Personal Property*, §§ 124-154 (Gifts) (10th ed. 2005).

### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law  
 Personal Gifts  
 General Overview  
 Estate, Gift & Trust Law  
 Personal Gifts  
 Gifts to Minors  
 General Overview  
 Estate, Gift & Trust Law  
 Personal Gifts  
 Procedures  
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 Estate, Gift & Trust Law  
 Trusts  
 Charitable Trusts  
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 Federal Estate & Gift Taxes  
 Gifts (IRC secs. 2035, 2501-2524)  
 General Overview



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**AUTHOR:** Reviewed by Albert G. Handelman

**[Reserved]**

§§ 60A.08[Reserved]



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DIVISION IV: WILLS AND TRUSTS  
CHAPTER 60A GIFTS  
PART II. LEGAL BACKGROUND  
A. Gifts in General

*23-60A California Legal Forms--Transaction Guide § 60A.10*

**AUTHOR:** Reviewed by Albert G. Handelman

**§ 60A.10 Gifts of Personal Property**

**[1] Definition**

A gift of personal property is a transfer of personal property made voluntarily and without consideration [*Civ. Code § 1146; see Civ. Code § 1040* (voluntary transfer)]. A gift is a gratuitous transfer, made with the intention of transferring beneficial ownership of the property from one person (the donor) to another person (the donee). The following six elements are essential to a valid gift of personal property in California [ *Bank of America v. Cottrell* (1962) 201 Cal. App. 2d 361, 363, 20 Cal. Rptr. 126 ; *see Yamaha Corp. of Am. v. State Bd. of Equalization* (1999) 73 Cal. App. 4th 338, 358, 86 Cal. Rptr. 2d 362 ; *Jaffe v. Carroll* (1973) 35 Cal. App. 3d 53, 59, 110 Cal. Rptr. 435 ; *see discussion in [2], below*]:

- The donor's intent to make a gift.
- The donor's capacity to contract.
- Delivery to the donee.
- Acceptance by the donee.
- Divestment of the donor's control.
- The absence of consideration.

A valid gift of personal property takes effect when it is made, and not at some time in the future [*see Civ. Code § 1054* (grant takes effect on delivery); *Robinson v. Mutual Sav. Bank* (1908) 7 Cal. App. 642, 647, 95 P. 533 ]. The donee becomes the owner of the property for all purposes, and the donor retains no rights in or powers over the property.

When a completed gift of personal property has been made, the donor generally has no power to revoke the gift or to regain control of the gift property [see *Civ. Code* § 1148 (revocability of gift); *Taylor v. Taylor* (1944) 66 Cal. App. 2d 390, 399, 152 P.2d 480 ; but see *Prob. Code* § 5704 (revocation of gift in view of impending death)]. For discussion of revocability, see [3], *below*.

The definition of a gift under California law differs significantly from the definition of a gift under federal tax law. For discussion of the essentials of a gift for federal tax purposes, see § 60A.32.

## **[2] Requirements**

### **[a] Donor's Intent**

A gift requires an intent on the part of the donor to make a present gift to the donee [ *Bank of America v. Cottrell* (1962) 201 Cal. App. 2d 361, 363, 20 Cal. Rptr. 126 ; see *Civ. Code* § 1146 (gift is transfer of personal property "made voluntarily")]. If the intention is merely to transfer the property at some time in the future, no gift has been made [ *Estate of Hall* (1908) 154 Cal. 527, 532, 98 P. 269 ; *Hart v. Ketchum* (1898) 121 Cal. 426, 428, 53 P. 931 ]. In some cases, the intent with which property was transferred can be determined only by examining the donor's acts and intentions, both before and after the property was transferred [ *Bank of America v. Cottrell* (1962) 201 Cal. App. 2d 361, 363, 20 Cal. Rptr. 126 ].

Because intent is such an important factor in determining whether a gift was made, it is always prudent to create clear written evidence of any transaction in which property is delivered or divested without an exchange of something of reasonably equivalent value. Without documentary evidence, the ultimate issue of whether a gift was made might have to be resolved on the basis of a "testimony contest" between the purported donor and the purported donee [see, e.g., *Matson v. Jones* (1969) 272 Cal. App. 2d 826, 829, 77 Cal. Rptr. 717 ("The only issue is the credibility or inherent improbability of Matson's testimony. There was a conflict in the evidence as to the intent of each of the parties which was resolved by the trial court ... .")].

### **[b] Donor's Capacity to Contract**

Case law generally holds that a gift requires capacity in the donor to contract with respect to the property that is the subject of the gift [see *Bank of America v. Cottrell* (1962) 201 Cal. App. 2d 361, 363, 20 Cal. Rptr. 126 ]. One case involving a gift deed of real property stated that a donor's capacity to make a gift is judged by the same standards as a testator's capacity to make a will, on the basis that the rules governing capacity to execute a deed are in general the same as those governing testamentary capacity [ *Hughes v. Grandy* (1947) 78 Cal. App. 2d 555, 177 P.2d 939 ; see Ch. 61, *Will Drafting and Complete Will Forms* ; see also *Blevin v. Mayfield* (1961) 189 Cal. App. 2d 649, 652, 11 Cal. Rptr. 882 ; *Brunoni v. Brunoni* (1949) 93 Cal. App. 2d 215, 218, 208 P.2d 1028 (both equating capacity to execute deeds with testamentary capacity)]. However, the capacity to make a gift usually has been equated with capacity to contract regarding the subject property, rather than testamentary capacity [see, e.g., *Bank of America v. Cottrell* (1962) 201 Cal. App. 2d 361, 363, 20 Cal. Rptr. 126 ; see *Yamaha Corp. of Am. v. State Bd. of Equalization* (1999) 73 Cal. App. 4th 338, 358, 86 Cal. Rptr. 2d 362 ; *Jaffe v. Carroll* (1973) 35 Cal. App. 3d 53, 59, 110 Cal. Rptr. 435 ]. In general, all persons except unemancipated minors, persons of unsound mind, and persons deprived of civil rights have the capacity to contract in California [*Civ. Code* § 1556; see *Fam. Code* § 6500 (all persons under 18 years of age are minors)]. For discussion of the capacity to contract, see Ch. 75, *Formation of Contracts and Standard Contractual Provisions* .

An unemancipated minor cannot give a delegation of power, cannot make a contract relating to real property or any interest in real property, and cannot make a contract relating to any personal property not in his or her immediate possession or control [*Fam. Code* § 6701; see *Civ. Code* § 1557(a) (capacity of minor to contract is governed by *Fam. Code* § 6500 *et seq.*)]. An unemancipated minor may make any other type of contract in the same manner as an adult, subject only to the power of disaffirmance [*Fam. Code* § 6700; for more detailed discussion of the power of minors to

contract, *see* Ch. 100B, *Contracts and Employment of Minors* ]. Therefore, an unemancipated minor (who is not of unsound mind) may make a gift of personal property that the minor owns and that is in his or her immediate possession and control, but the gift can be revoked by exercise of the power of disaffirmance.

An emancipated minor is considered to be an adult for the purpose of entering into a binding contract and specifically for the purpose of making a gift, whether outright or in trust [*Fam. Code* § 7050(e)(2), (7)].

An adult who is "entirely without understanding" has no power to make a contract of any kind [*Civ. Code* § 38; *see Civ. Code* § 1557(b) (capacity of person of unsound mind to contract is governed by *Civ. Code* § 38 *et seq.*)]. An adult who is "of unsound mind, but not entirely without understanding," can make a contract "before the incapacity of the person has been judicially determined," but the contract is subject to being rescinded [*Civ. Code* § 39(a)]. A rebuttable presumption affecting the burden of proof that a person is of unsound mind exists for purposes of the foregoing rule if the person is substantially unable to manage his or her own financial resources or resist fraud or undue influence. Substantial inability may not be proved solely by isolated incidents of negligence or improvidence [*Civ. Code* § 39(b)].

After a judicial determination of the incapacity of a person of unsound mind, the person can make no conveyance or other contract, and cannot delegate any power or waive any right, until his or her restoration to capacity [*Civ. Code* § 40(a)], subject only to the right of the person, as a conservatee, to control an allowance [*see Prob. Code* § 2421] or wages or salary [*see Prob. Code* § 2601] and to make a will [*see Prob. Code* § 1871] and to the rights of the person under the Lanterman-Petris Short Act [*see Welf. & Inst. Code* § 5000 *et seq.*]. The establishment of a conservatorship [*see Prob. Code* § 1400 *et seq.*] is a judicial determination of the incapacity of the conservatee for the purposes of the foregoing rule [*Civ. Code* § 40(b)].

The appointment of a conservator of the estate is an adjudication that the conservatee lacks the legal capacity to enter into or make any transaction that binds or obligates the conservatorship estate [*Prob. Code* § 1872(a)]. For this purpose, "transaction" is specifically defined to include making a gift [*Prob. Code* § 1870]. However, the court has the power, either in its order appointing the conservator or on petition, to authorize the conservatee to enter into transactions or types of transactions that may be appropriate under the circumstances, subject to the power of the court to broaden or restrict the conservatee's legal capacity and subject to the supplemental authority of general principles of law and equity relating to transactions [*Prob. Code* §§ 1873, 1874; *see also Prob. Code* § 1876 (provisions relating to legal capacity of conservatee do not displace, but rather are supplemented by, general principles of law and equity relating to transactions)]. Furthermore, in the case of a limited conservatorship [*see Prob. Code* §§ 1827.5, 1828.5 (limited conservatorship for persons with developmental disabilities)], the appointment of a limited conservator does *not* limit the capacity of the limited conservatee to enter into transactions or types of transactions, except as otherwise provided in the court's order [*Prob. Code* § 1872(b)]. Thus, it is possible under some circumstances for a conservatee to make a valid gift.

Whether and to what extent a conservator has power to make a gift of property from the conservatorship estate will depend on the terms of the order of appointment and any subsequent order or instructions. For discussion of conservatorships and the powers and duties of a conservator respecting property of the estate, *see* Ch. 66A, *Conservatorships* , and California Forms of Pleading and Practice, Ch. 290A, *Guardianship and Conservatorship: Asset Management and Investment* (Matthew Bender).

### **[c] Delivery to Donee**

A gift requires actual or symbolic delivery of the gift property to the donee [ *Bank of America v. Cottrell* (1962) 201 Cal. App. 2d 361, 363, 20 Cal. Rptr. 126 ; *see Civ. Code* § 1147]. Delivery generally is accomplished when the property is physically transferred to the donee or to some third person not subject to the donor's direction [*see Beebe v. Coffin* (1908) 153 Cal. 174, 176, 94 P. 766 ; *Bishop's School Upon Scripps Foundation v. Wells* (1937) 19 Cal. App. 2d 141, 146, 65 P.2d 105 ]. If delivery of the property itself is impossible or impractical, the means of obtaining possession of

the property, or a written instrument of gift executed by the donor, may be symbolically delivered in place of the property [Civ. Code § 1147]. Thus, delivery of a key to a safe deposit box may constitute a valid symbolic delivery of the contents of the box [see *Estate of Escolle (1933)* 134 Cal. App. 473, 480, 25 P.2d 860 ].

#### **[d] Acceptance by Donee**

A gift requires acceptance of the gift property by the donee [ *Bank of America v. Cottrell (1962)* 201 Cal. App. 2d 361, 363, 20 Cal. Rptr. 126 ; *Connelly v. Bank of America (1956)* 138 Cal. App. 2d 303, 307, 291 P.2d 501 ]. A donee who does not wish to receive the property cannot be forced to accept it. In most cases, however, acceptance will be presumed unless there are facts showing that the donee refused to accept the property [see, e.g., *Estate of Kalt (1940)* 16 Cal. 2d 807, 813, 108 P.2d 401 ].

#### **[e] Divestment of Donor's Control**

A gift requires complete divestment of all control over the gift property by the donor [ *Bank of America v. Cottrell (1962)* 201 Cal. App. 2d 361, 363, 20 Cal. Rptr. 126 ; *Connelly v. Bank of America (1956)* 138 Cal. App. 2d 303, 307, 291 P.2d 501 ]. If the donor retains dominion over the property after it has been delivered, then no gift has been made.

#### **[f] Absence of Consideration**

A gift requires the absence of consideration for the transfer of the subject property [ *Bank of America v. Cottrell (1962)* 201 Cal. App. 2d 361, 363, 20 Cal. Rptr. 126 ; *Connelly v. Bank of America (1956)* 138 Cal. App. 2d 303, 307, 291 P.2d 501 ]. A gift must be a gratuitous transfer. If property is transferred as part of a bargain in which the transferor receives valuable consideration in return for the transferred property, the transfer is not gratuitous and does not constitute a gift [ *Estate of Breschini (1953)* 120 Cal. App. 2d 154, 156, 260 P.2d 804 ; see *Letter Rul. 200442003* (husband's lump sum payment to wife in exchange for her community property interest in husband's deferred compensation plan as part of marital property settlement was transfer for full and adequate consideration and thus not subject to gift tax)]. However, a valuable consideration need not be money or even property. In appropriate circumstances, it may consist of the cancellation of a debt or the waiver of a right [ *Estate of Bishop (1962)* 209 Cal. App. 2d 48, 55, 25 Cal. Rptr. 763 ].

#### **[g] Writing**

There is no general requirement that a gift be made in writing [Civ. Code § 1052]. In contrast, gifts of real property are required to be made in writing [Civ. Code § 1091; see Civ. Code § 1053 (grant as transfer in writing); see also § 60A.11[1]], but an oral gift of real property can be enforced in some cases [ see § 60A.11[2]].

#### **[3] Revocability**

##### **[a] Revocation Generally Precluded**

A gift generally cannot be revoked by the donor [Civ. Code § 1148]. However, a gift in view of impending death can be revoked in limited circumstances [see *Prob. Code § 5704*; § 60A.15[5]].

In addition, case law recognizes a limited right to rescind a completed gift that was induced by fraud or undue influence [ *McDonald v. Hewlett (1951)* 102 Cal. App. 2d 680, 686-687, 228 P.2d 83 ; *Murdock v. Murdock (1920)* 49 Cal. App. 775, 781-786, 194 P. 762 ]. For further discussion, see California Forms of Pleading and Practice, Ch. 278, *Gifts* (Matthew Bender).

##### **[b] Gift in Contemplation of Marriage**

The Civil Code recognizes a limited right to revoke a gift made in contemplation of marriage. When either party to a contemplated marriage in California makes a gift of money or property to the other on the basis or assumption that the marriage will take place, the donor may recover the gift or its value if the donee refuses to enter into the marriage as contemplated, or if the marriage is given up by mutual consent. In the event of a suit to recover the gift or its value, the court may award the donor a part of the value of the gift if, under all circumstances of the case, partial recovery is found to be just [*Civ. Code § 1590*; but see *Lee v. Yang (2003) 111 Cal. App. 4th 481, 493, 3 Cal. Rptr. 3d 819* (man was not entitled to reimbursement for funds that fiancée withdrew from joint bank account after parties terminated relationship; California Multiple-Party Accounts Law (*Prob. Code § 5100 et seq.*) governed account and under its terms fiancée had an unrestricted right to withdraw the funds in question; failure to establish by a preponderance of the evidence that parties had a legally enforceable oral agreement restricting fiancée's right to withdraw funds)].

#### **[4] Reservation of Rights**

When the payee of a promissory note returned the note to the maker with the "reservation" that the installment payments be continued during the payee's lifetime, a valid gift was made [ *Connelly v. Bank of America (1956) 138 Cal. App. 2d 303, 306-307, 291 P.2d 501* ].

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Personal Gifts Elements of Valid Gifts General Overview Estate, Gift & Trust Law Personal Gifts Elements of Valid Gifts Acceptance Estate, Gift & Trust Law Personal Gifts Elements of Valid Gifts Capacity of Donor Estate, Gift & Trust Law Personal Gifts Elements of Valid Gifts Delivery Estate, Gift & Trust Law Personal Gifts Elements of Valid Gifts Donative Intent



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*23-60A California Legal Forms--Transaction Guide § 60A.11*

**AUTHOR:** Reviewed by Albert G. Handelman

**§ 60A.11 Gifts of Real Property**

**[1] Writing Required**

Real property may be transferred by gift. However, an instrument in writing, signed by the transferor or the transferor's agent duly authorized in writing, is essential to transfer most interests in real property [*Civ. Code § 1091* (exception only for estate at will or for term not exceeding one year)]. A gift of real property typically is made by executing and delivering a deed to the gift property [*see Civ. Code § 1053* (grant as transfer in writing); *see, e.g., City of Palm Springs v. Living Desert Reserve* (1999) 70 Cal. App. 4th 613, 617-618, 82 Cal. Rptr. 2d 859 (gift of real property made by trustee under decedent's will by execution of grant deed)]. For a discussion of the legal rules for execution, acknowledgment, delivery, and recordation of deeds to real property, see Ch. 27, *Deeds and Recording* .

**[2] Oral Gift of Real Property**

An oral gift of real property may be enforced, despite the statutory rule requiring that the gift be made by an instrument in writing [*see Civ. Code § 1091*; [1], *above*], if the person challenging the transfer is estopped to plead the statute [*Andreotti v. Andreotti* (1964) 224 Cal. App. 2d 533, 538, 36 Cal. Rptr. 709 ]. A person generally will be estopped to plead the statute requiring an instrument in writing if the property actually has been transferred pursuant to the oral gift and the donee, relying on the gift, has made valuable and substantial improvements on the property or substantial expenditures in connection with it, or otherwise has acted in relation to the property in such a way as to make it unjust to deprive him or her of its ownership by reason of an imperfection in the mode of transfer [ *Andreotti v. Andreotti* (1964) 224 Cal. App. 2d 533, 538, 36 Cal. Rptr. 709 ].

**[3] Reservations of Rights**

A completed gift may be made despite the fact that the donor reserves the right to income from the property during his or her lifetime [ *Gordon v. Barr* (1939) 13 Cal. 2d 596, 602, 91 P.2d 101 ].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Personal Gifts General Overview Estate, Gift & Trust Law Personal Gifts Procedures General Overview Real Property Law Deeds Types Gift Deeds Real Property Law Deeds Statutes of Frauds Real Property Law Ownership & Transfer General Overview



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*23-60A California Legal Forms--Transaction Guide § 60A.12*

**AUTHOR:** Reviewed by Albert G. Handelman

**§ 60A.12 Gifts of Community Property**

**[1] In General**

A spouse generally may not make a gift of community property unless the other spouse consents to the gift or joins in making it. A spouse may not make a gift of community personal property, or dispose of community personal property for less than fair and reasonable value, without the written consent of the other spouse. However, this rule does not apply to gifts mutually given by both spouses to third parties and to gifts given by one spouse to the other spouse [*Fam. Code § 1100(b)*].

Although there is no general rule prohibiting one spouse from making a gift of community real property, both spouses must join (either personally or by a duly authorized agent) in executing any instrument by which community real property is sold, conveyed, encumbered, or leased for longer than one year [*Fam. Code § 1102(a)*]. However, this rule is subject to exceptions. First, the rule does not apply to any lease, mortgage, conveyance, or transfer of community real property from one spouse to another [*Fam. Code § 1102(b)*]. Second, if one spouse alone holds record title to community real property, a lease, contract, or mortgage executed by that spouse alone to a lessee, purchaser, or encumbrancer in good faith without knowledge of the marriage relation is presumed to be valid, and an action to avoid the instrument must be commenced within one year from the date it was recorded [*Fam. Code § 1102(c), (d)* (presumption applicable to lease, contract, mortgage or deed executed after 1974)].

**[2] Gifts of Quasi-Community Property**

Property that was acquired by a person while domiciled outside California and that would have been community property if the person had been domiciled in California at the time of acquisition is classified in California as "quasi-community property" [*Fam. Code § 125(a); Prob. Code § 66(a)*]. Property that is acquired by a person while domiciled outside California in exchange for property that would have been community property if the person had been domiciled in California at the time of acquisition is also classified as "quasi-community property" [*Fam. Code § 125(b); Prob. Code § 66(b)*].

Quasi-community property differs from community property in a key particular: Although spouses have present and equal interests in their community property while both are living, a spouse will obtain an interest in quasi-community property acquired by the other spouse only on the death of the other spouse, or on dissolution of their marriage. The statutory definitions of quasi-community personal property and quasi-community real property differ slightly for purposes of division on dissolution of marriage and distribution after the death of the acquiring spouse. When the spouses' marriage is being dissolved, all property, real and personal and wherever situated, is eligible to be classified as quasi-community property, providing it meets the other requirements of the definition described above [*Fam. Code § 125*]. After the acquiring spouse has died, however, all personal property, wherever situated, is eligible to be classified as quasi-community property, but only real property situated in California may be so classified [*Prob. Code § 66*].

The spouse who acquires quasi-community property is generally free to dispose of the property in any way he or she sees fit, whether by gift or otherwise, during his or her lifetime. Conversely, the other spouse has no power to dispose of the property while the acquiring spouse is living [*see Paley v. Bank of America (1958) 159 Cal. App. 2d 500, 509, 324 P.2d 35*]. If the acquiring spouse dies owning quasi-community property, however, one-half of the property belongs to the deceased spouse and the other half belongs to the surviving spouse [*Prob. Code § 101(a)*], unless the spouses have agreed to a non-pro rata division of the property [*Prob. Code § 101(b)*]. Until the acquiring spouse dies, the other spouse's interest in the quasi-community property is an expectancy and nothing more.

If the acquiring spouse dies after making a gift of quasi-community property, the surviving spouse may have a right to require the transferee to restore the property to the acquiring spouse's estate or, if the transferee does not retain the property, one half of its proceeds or value [*Prob. Code § 102*]. However, an action to require restoration of quasi-community property to the acquiring spouse's estate will be successful only if all of the following requirements are met [*Prob. Code § 102(a)*]:

- The surviving spouse must have had an expectancy in the property at the time of the acquiring spouse's death.
- The acquiring spouse must have died domiciled in California.
- The acquiring spouse must have transferred the property to a person other than the surviving spouse without receiving in exchange a consideration of substantial value and without the written consent or joinder of the surviving spouse.
- The acquiring spouse must have retained at the time of death the possession or enjoyment of the property or its income, a power to consume, invade, or dispose of the principal the property, or a joint tenancy ownership interest in the property.

The surviving spouse may not require a transferee to restore any life insurance, accident insurance, joint annuity, or pension payable to a person other than the surviving spouse [*Prob. Code § 102(b)*]. If property is restored to the acquiring spouse's estate, it belongs to the surviving spouse as though the transfer had not been made [*Prob. Code § 102(c)*; *see Prob. Code § 101* (surviving spouse's interest in quasi-community property)].

### **[3] Transmutation of Community Property by Gifts Between Spouses**

The process by which the property rights of married persons are changed from separate property to community property, or from community property to separate property, is known as "transmutation" [*see Fam. Code § 850 et seq.*]. The Family Code specifically authorizes married persons to transmute community property to separate property of either spouse, separate property of either spouse to community property, or separate property of one spouse to separate property of the other spouse [*Fam. Code § 850*]. It also provides that a transmutation may be effected by an agreement

or transfer, and with or without consideration [*Fam. Code § 850*].

The spouse whose interest is to be adversely affected by a transmutation generally must make, join in, consent to, or accept an express written declaration making the transmutation [*Fam. Code § 852(a)*]. The written declaration must contain language expressly stating that the characterization or ownership of the property is being changed [ *Estate of MacDonald (1990) 51 Cal. 3d 262, 272, 272 Cal. Rptr. 153, 794 P. 2d 911* ; see *In re Marriage of Starkman (2005) 129 Cal. App. 4th 659, 663-665, 28 Cal. Rptr. 3d 639* (clause in trust agreement providing that property transferred to trust is community property unless transferor spouse identifies it as separate property was insufficient to transmute husband's separate property, which he failed to identify as separate property, to community property); *Estate of Bibb (2001) 87 Cal. App. 4th 461, 465-471, 104 Cal. Rptr. 2d 415* (grant deed signed by husband transferring his separate property interest in real property to himself and his wife as joint tenants satisfied "express declaration" requirement, but unsigned computer printout entitled "DMV Vehicle Registration Information," reflecting that automobile previously registered in husband's name alone was reregistered in names of husband *or* wife did not satisfy requirements for valid transmutation)]. There is no exception from the "express declaration" requirement for partial performance of an agreement to transmute property [ *In re Marriage of Benson (2005) 36 Cal. 4th 1096, 1100, 32 Cal. Rptr. 3d 471, 116 P.3d 1152* ]. Use of extrinsic evidence to prove that a writing effected a transmutation is precluded [ *Estate of MacDonald (1990) 51 Cal. 3d 262, 264, 272 Cal. Rptr. 153, 794 P.2d 911* ].

If the property to be transmuted is real property, the transmutation must also be recorded, or it will not affect the rights of third parties without notice [*Fam. Code § 852(b)*]. However, neither a written declaration nor recordation is required if the gift is merely of clothing, wearing apparel, jewelry, or other tangible articles of a personal nature that are used solely or principally by the spouse to whom the gift is made and that are not substantial in value taking into account the circumstances of the marriage [*Fam. Code § 852(c)*].

Transmutations are subject to rules set forth in the Family Code that limit and regulate contracts between married persons. Although married persons generally may enter into the same property transactions as unmarried persons, contracts between married persons are subject to the general rules governing fiduciary relationships that control the actions of persons occupying confidential relations with each other [*Fam. Code § 721(a), (b)*]. Because of their confidential relationship, married persons must deal with each other on the basis of the highest duty of good faith and fair dealing [*Fam. Code § 721(b)*]. Among other things, each spouse must provide the other spouse with access at all times to any books kept regarding a transaction. Further, each spouse must render on request true and full information of all things affecting any transaction that concerns the community property and account to the other spouse for any benefit or profit derived from any community property transaction made without the other spouse's consent [*Fam. Code § 721(b)*].

An attorney who represents married persons in connection with a transmutation of property should be aware of the special professional duties to which this kind of representation is subject. Under *Rule 3-310(C) of the California Rules of Professional Conduct*, an attorney cannot represent clients whose interests conflict, except with their informed written consent. Since transmutations almost always benefit one spouse and adversely affect the other spouse, the parties to spousal transmutations almost always have conflicting interests. An attorney cannot properly represent both spouses to a transmutation transaction unless the attorney fully informs both parties of all of the circumstances of the proposed transaction and all of the adverse results of the transaction that are reasonably foreseeable. The clients must also be informed of the right to obtain independent counsel [see *Cal. Rules Prof. Conduct, Rule 3.300(B)*]. For a detailed discussion of the ethical duties of attorneys who represent clients with conflicting interests in estate planning transactions, see *California Wills and Trusts, Ch. 4, Ethical Considerations and Professional Responsibility* .

For additional discussion of the conversion of community property to separate property and vice versa, see Ch. 121, *Provisions for Division of Property* .

### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawCommunity PropertyGiftsEstate, Gift & Trust LawPersonal GiftsGeneral OverviewEstate, Gift & Trust LawPersonal GiftsProceduresGeneral OverviewFamily LawMarital Duties & RightsProperty RightsCharacterizationCommunity PropertyReal Property LawEstatesPresent EstatesMarital EstatesCommunity Property



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*23-60A California Legal Forms--Transaction Guide § 60A.13*

**AUTHOR:** Reviewed by Albert G. Handelman

**§ 60A.13 Gifts to Minors**

Gifts to minors can be made in several ways. If the gift is small, it can be made to the minor outright or through a transfer under the California Uniform Transfers to Minors Act [*Prob. Code § 3900 et seq.*] (UTMA). For discussion of the UTMA, see § 60A.40 et seq. If the gift is large, it usually is advisable to create a trust and appoint a trustee to hold the gift property. In the absence of a trust, it is likely that a guardian would have to be appointed to hold the property for the minor [*see Prob. Code § 3413* (appointment of guardian to hold money for minor)]. Property held for a minor by a guardian or a custodian under the UTMA will ordinarily be transferred to the minor when he or she reaches the age of 18, although an instrument of inter vivos transfer under the UTMA may postpone the ultimate transfer to a later time, not to exceed the minor's twenty-first birthday [*Prob. Code § 3920.5(e)*; *see § 60A.40*]. A trust will give the donor greater flexibility to determine when the gift property will be distributed to the minor. For a discussion of inter vivos trusts, see Ch. 72, *Irrevocable Trusts* .

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law  
Personal Gifts  
Gifts to Minors  
General Overview  
Estate, Gift & Trust Law  
Personal Gifts  
Gifts to Minors  
Uniform Acts  
Estate, Gift & Trust Law  
Personal Gifts  
Procedures  
General Overview  
Tax Law  
Federal Estate & Gift Taxes  
Gifts (IRC secs. 2035, 2501-2524)  
Elements  
Transfers Among Family Members



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*23-60A California Legal Forms--Transaction Guide § 60A.14*

**AUTHOR:** Reviewed by Albert G. Handelman

#### **§ 60A.14 Charitable Gifts**

Gifts to charitable, religious, educational, and government institutions involve special issues, primarily related to availability of the federal income, estate, and gift tax deductions that exist for charitable gifts [*see I.R.C. §§ 170, 2055, 2522*]. For a detailed discussion of charitable dispositions, see Ch. 69, *Charitable Dispositions* .

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law  
Personal Gifts  
General Overview  
Estate, Gift & Trust Law  
Trusts  
Charitable Trusts  
Tax Law  
Federal Estate & Gift Taxes  
Deductions  
Charitable Deductions (IRC secs. 2055, 2522, 2524)  
General Overview  
Tax Law  
Federal Estate & Gift Taxes  
Deductions  
Charitable Deductions (IRC secs. 2055, 2522, 2524)  
Transfers for Charitable, Public & Religious Uses  
Tax Law  
Federal Estate & Gift Taxes  
Gifts (IRC secs. 2035, 2501-2524)  
General Overview



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*23-60A California Legal Forms--Transaction Guide § 60A.15*

**AUTHOR:** Reviewed by Albert G. Handelman

**§ 60A.15 Gifts in View of Impending Death**

**[1] In General**

A gift in view of impending death is one that is made in contemplation, fear, or peril of impending death, whether from illness or other cause, and with the intent that it will be revoked if the giver recovers from the illness or escapes from the peril [*Prob. Code § 5702(a)*]. A gift in view of impending death is also known as a gift *causa mortis* [*see, e.g., LaMar v. Bank of America etc. Assn. (1933) 218 Cal. 252, 254, 22 P.2d 689 ; Rosenberg v. Broy (1961) 190 Cal. App. 2d 591, 595, 12 Cal. Rptr. 103*].

Before the adoption of Probate Code rules relating to gifts in view of impending death [*see Prob. Code § 5700 et seq.*], the applicable Civil Code statutes referred to gifts "in view of death" [*see former Civ. Code § 1149 et seq. (repealed Jan. 1, 1992)*]. By referring to gifts "in view of impending death," the current Probate Code rules make it clear that they do not apply to gifts made in contemplation of remote death, but rather apply only to gifts made under circumstances that would naturally impress on the giver an expectation of death in the very near future [*Prob. Code § 5703; see Recommendation Relating to Gifts in View of Impending Death, 20 Cal. L. Revision Comm'n Reports 2869, 2873-2874 (1990)*]. Thus the Probate Code statutes have no application to gifts made solely for the purpose of saving death taxes or avoiding probate at some remote time in the future [*see Recommendation Relating to Gifts in View of Impending Death, 20 Cal. L. Revision Comm'n Reports 2869, 2873-2874, 2880 (1990)*]. A reference in a statute to a "gift in view of death" means a "gift in view of impending death" [*Prob. Code § 5702(b)*].

**[2] As Will Substitute**

A gift in view of impending death differs from other gifts in that it is intended to take effect, not during the giver's lifetime, but on his or her death. It thus functions as a kind of will substitute. It has the effect of transferring property on death without complying with the formalities required for wills and without probate administration [*see Recommendation Relating to Gifts in View of Impending Death, 20 Cal. L. Revision Comm'n Reports 2869, 2873-2874 (1990)*]. Recognizing that gifts in view of impending death avoid the rules governing testamentary dispositions of

property, the courts have traditionally viewed them with caution and sustained them only when they have been established by clear and convincing proof [*see, e.g., Schuler v. Winstanley (1956) 141 Cal. App. 2d 759, 766, 297 P.2d 512 ; Broderick v. Koehler (1949) 92 Cal. App. 2d 813, 817, 207 P.2d 1070*].

The Probate Code recognizes the quasi-testamentary status of gifts in view of impending death by setting forth special rules relating to their revocation [*see* [5], *below*] and to the rights of creditors of the giver [*see* [6], *below*].

### **[3] Conditional Nature**

A gift in view of impending death is a conditional gift [*see Recommendation Relating to Gifts in View of Impending Death*, 20 Cal. L. Revision Comm'n Reports 2869, 2879 (1990); *Prob. Code* §§ 5702(a), 5704]. The Civil Code formerly defined such a gift as one made "with intent that it shall take effect only in case of the death of the giver" [*see former Civ. Code* § 1149, repealed Jan. 1, 1992]. Under a literal application of this language, a gift in view of death would vest in the donee only when the giver died. Vesting of the gift would thus be subject to a condition precedent, i.e., the death of the giver. Because the gift would vest only if the giver died before the gift was revoked, and would not vest if the giver did not die before the gift was revoked, the gift had the same effect as a devise in a will, namely that of transferring the giver's property on the giver's death. Because the gift did not comply with the statutory formalities for wills, it was ineffective for all purposes [*see Yates v. Dundas (1947) 80 Cal. App. 2d 468, 474-475, 182 P.2d 305 ; see also* [2], *above*].

However, the Probate Code statutes make it clear that a gift in view of impending death is not subject to a condition precedent. Rather, the gift is made with the intent that it "shall be revoked" if the giver escapes from the illness or escapes from the peril that induced the gift [*Prob. Code* § 5702(a)]. Under this language, the donee's title vests immediately on delivery of the gift property, subject to later revocation if the giver recovers from the illness or survives the peril. The gift is thus subject to a condition subsequent rather than a condition precedent. It is not an invalid attempt to transfer property on death, and it is not vulnerable to challenge on the ground that it does not comply with the statutory formalities for wills [*see Recommendation Relating to Gifts in View of Impending Death*, 20 Cal. L. Revision Comm'n Reports 2869, 2875 (1990)].

### **[4] Presumption**

If a gift was made during the last illness of the giver, or under circumstances that would naturally impress the giver with an expectation of speedy death, it is presumed to be a gift in view of impending death [*Prob. Code* § 5703].

Notwithstanding this presumption, however, gifts in view of impending death are subject to the general law relating to gifts of personal property [*Prob. Code* § 5701]. Thus, a valid and completed gift in view of impending death must meet other requirements relating to gifts of personal property, such as intent, delivery, and acceptance [*Recommendation Relating to Gifts in View of Impending Death*, 20 Cal. L. Revision Comm'n Reports 2869, 2879 (1990); *Paddock v. Fonner (1927) 84 Cal. App. 652, 655, 258 P. 423 ; see* § 60A.10[2]]. Further, a gift in view of impending death can be made only by a person who has the legal capacity to make a gift [ *LaMar v. Bank of America etc. Assn. (1933) 218 Cal. 252, 255-256, 22 P.2d 689* ]; and, if the gift is of community or quasi-community property, it is subject to the rights of the giver's spouse [*Recommendation Relating to Gifts in View of Impending Death*, 20 Cal. L. Revision Comm'n Reports 2869, 2880 (1990); *see* § 60A.12[1], [2]].

### **[5] Revocation**

The Probate Code includes special rules relating to the revocation of gifts in view of impending death [*see Prob. Code* § 5704]. Under those rules, the giver has the right to revoke the gift at any time [*Prob. Code* § 5704(b)(1)]. The gift may be revoked inter vivos [*Prob. Code* § 5704(b)(1)] or by the giver's will, if the will expresses an intention to revoke the gift [*Prob. Code* § 5704(b)(2)]. However, a gift in view of impending death is not affected by a previous will of the

giver [*Prob. Code* § 5704(c)].

A gift in view of impending death is automatically revoked by the giver's recovery from the illness, or escape from the peril, under the presence of which it was made [*Prob. Code* § 5704(a)(1)]. This means that an enforceable gift in view of impending death can be made only if the giver in fact dies as a result of the illness or other peril that induced the gift [ *Paddock v. Fonner* (1927) 84 Cal. App. 652, 655, 258 P. 423] . However, the mere fact that the death occurred as a result of suicide will not nullify the gift if the other elements of a valid and completed gift in view of impending death have been found [see *Berl v. Rosenberg* (1959) 169 Cal. App. 2d 125, 130, 336 P.2d 975 ; *Recommendation Relating to Gifts in View of Impending Death*, 20 Cal. L. Revision Comm'n Reports 2869, 2873-2874 (1990)].

If the gift has been delivered to the donee, revocation of the gift may be subject to the rights of purchasers or encumbrancers. If a person, acting in good faith, for a valuable consideration, and without knowledge of the conditional nature of the gift, purchases the gift property, or lends money on the security of the property, the person's rights will not be affected by the revocation [*Prob. Code* § 5704(d)].

### **[6] Rights of Creditors**

The Probate Code includes special rules governing the rights of creditors of a person who makes or has made a gift in view of impending death [see *Prob. Code* §§ 5705, 9653]. If a deceased person made a gift of property in view of impending death and if the personal representative has insufficient assets to pay creditors, a creditor of the deceased person or the deceased person's estate may request that the personal representative commence and prosecute an action for the recovery of the property [*Prob. Code* § 9653(a); see *Prob. Code* § 58 ("personal representative" means executor, administrator, administrator with will annexed, etc.)]. However, a creditor who makes such a request must pay a part of the costs and expenses of the suit and attorneys' fees, or give an undertaking to the personal representative for that purpose [*Prob. Code* § 9653(b)]. The amount that the creditor must pay will be determined by mutual agreement of the personal representative and the creditor or, if they cannot agree, by the court [*Prob. Code* § 9653(b)].

Any property recovered in the suit must be sold for the payment of debts in the same manner as if the deceased person has died seized or possessed of the property. The proceeds of the sale first must be applied to payment of the costs and expenses of the suit, including attorneys' fees, and then to payment of the deceased person's debts in the same manner as other property in possession of the personal representative. After all debts of the decedent have been paid, the remainder of the proceeds must be paid to the person from whom the property was recovered. The property may be sold in its entirety or in such portion as is necessary to pay the debts [*Prob. Code* § 9653(c)].

### **Legal Topics:**

For related research and practice materials, see the following legal topics:  
Estate, Gift & Trust Law Personal Gifts Gifts Causa Mortis



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DIVISION IV: WILLS AND TRUSTS  
CHAPTER 60A GIFTS  
PART II. LEGAL BACKGROUND  
A. Gifts in General

*23-60A California Legal Forms--Transaction Guide § 60A.16*

**AUTHOR:** Reviewed by Albert G. Handelman

**§ 60A.16 Limitations on Gifts to Disqualified Persons**

**[1] Invalidity of Gifts to Disqualified Persons**

**[a] Persons Who Are Disqualified**

The Probate Code contains special rules under which donative transfers to certain persons and classes of persons, generally called "disqualified persons," are presumptively invalid [*Prob. Code § 21350 et seq.; see Prob. Code § 21350.5*], unless they come within statutory exceptions [*see [2], below*]. These rules, which apply to instruments that become irrevocable on or after September 1, 1993 [*Prob. Code § 21355*], generally establish a presumption of invalidity as to provisions in wills, trusts, and other instruments that purport to make gifts to any of the following [*Prob. Code § 21350(a)*]:

- The person who drafted the instrument.
- A person who is related by blood or marriage to, is a domestic partner [*see Prob. Code § 21350(d); Fam. Code § 297* (meaning of "domestic partner")] of, or is a cohabitant with, or employee of, the person who drafted the instrument.
- Any partner or shareholder of any law partnership or law corporation in which the person who drafted the instrument has an ownership interest, and any employee of that law partnership or law corporation.
- Any person who has a fiduciary relationship with the transferor, including a conservator or trustee, who transcribes the instrument or causes it to be transcribed. In this regard, a conservator was held not to have caused a will and trust to be "transcribed" for purposes of these rules when he had called an estate planning company to meet with the conservatee, brought the company's agent to the conservatee's house, and wrote a check from the conservatee's funds for the will and trust. The court concluded that to cause a

document to be transcribed would necessarily involve directing the drafted document to be written out in its final form, which the conservator had not done [ *Estate of Swetmann (2000) 85 Cal. App. 4th 807, 819-820, 102 Cal. Rptr. 2d 457* ].

- A person who is related by blood or marriage to, is a domestic partner of, or is a cohabitant with, or employee of, a person described in the immediately preceding category.
- A care custodian of a dependent adult who is the donor [*see (b), below*].
- A person who is related by blood or marriage to, is a domestic partner of, is a cohabitant with, or is an employee of, a person who is a care custodian of a dependent adult who is the donor.

For purposes of this rule, a "person who is related by blood or marriage" to a person means all of the following [*Prob. Code § 21350(b)*]:

- The person's spouse or predeceased spouse.
- Relatives within the third degree of the person and the person's spouse.
- The spouse of any person described in the immediately preceding category.

In determining relationships for purposes of this rule, *Prob. Code § 6406*, which governs the inheritance rights of relatives of the half blood, *Prob. Code § 6407*, which covers the inheritance rights of after-born heirs, and *Prob. Code § 6450 et seq.*, which prescribe rules for determining the relationship of parent and child for purposes of intestate succession, are all applicable [*Prob. Code § 21350(b)*].

**PRACTICE TIP:**

It is important for practitioners to understand the net effect of the disqualification rules, and how the disqualification provisions in *Prob. Code § 21350* interact with the exceptions in *Prob. Code § 21351*, which are discussed in greater detail in [2], *below*. Basically, a gift that is made to a "disqualified person" *other than the person who actually drafted the instrument*, and that does not qualify for any of the specific exceptions in *Prob. Code § 21351*, is subject to a *rebuttable* presumption of invalidity [*Prob. Code § 21351(d),(e)(1)*; *Rice v. Clark (2002) 28 Cal. 4th 89, 98, 120 Cal. Rptr. 2d 522, 47 P.3d 300*]. A rebuttable presumption also applies (regardless of whether or not the gift was made to the person who drafted the instrument) to gifts made in instruments executed on or before July 1, 1993, by a person who was a California resident at the time of execution, and to instruments executed by a California resident who was a nonresident at the time the instruments was executed [*Prob. Code § 21351(e)(2),(3)*]. This presumption is rebuttable only on a showing, by clear and convincing evidence, not based solely on the testimony of disqualified persons, that the transfer was *not* the product of fraud, menace, duress, or undue influence [*Prob. Code § 21351(d)*]. If the attorney can make such a showing, a gift to a disqualified person still may be found valid.

However, if the recipient of the gift was *the person who actually drafted the instrument*, the gift was made in an instrument executed on or after July 1, 1993, by a person who was a California resident at the time the instrument was executed, and none of the other exceptions in *Prob. Code § 21351* apply, the presumption is *conclusive* rather than rebuttable and the gift is automatically invalid [*Prob. Code § 21351(d),(e)(1)*; *Rice v. Clark (2002) 28 Cal. 4th 89, 98, 120 Cal. Rptr. 2d 522, 47 P.3d 300*]. Thus, for example, assuming no other exception in *Prob. Code § 21351* applied, an attorney who drafted an instrument so as to benefit himself or herself would be conclusively disqualified, but if the same attorney drafted the instrument so as to benefit the attorney's relative or law partner, the presumption would be

rebuttable by clear and convincing evidence that the client freely chose that disposition [ *Rice v. Clark* (2002) 28 Cal. 4th 89, 98, 120 Cal. Rptr. 2d 522, 47 P.3d 300] . Commentary by publisher's editorial staff.

### **[b] Dependent Adults and Care Custodians**

The term "dependent adult" as used in [a], above, means any of the following [*Prob. Code § 21350(c)*; see *Welf. & Inst. Code § 15610.23(a)*]:

- Any person residing in California, between the ages of 18 and 64 years, who has physical or mental limitations that restrict his or her ability to carry out normal activities or to protect his or her rights including, but not limited to, persons who have physical or developmental disabilities or whose physical or mental abilities have diminished because of age [*Prob. Code § 21350(c)*].
- Any person between the ages of 18 and 64 who is admitted as an inpatient to a 24-hour health facility as defined in *Health & Safety Code §§ 1250, 1250.2, and 1250.3*.
- Any person older than age 64 who would be a "dependent adult" under the above definitions if he or she were between the ages of 18 and 64.

The term "care custodian" means an administrator or an employee of any of the following public or private facilities or agencies, or persons providing care or services for elders or dependent adults, including members of the support staff and maintenance staff [*Prob. Code § 21350(c)*; *Welf & Inst. Code § 15610.17*]:

- Twenty-four hour health facilities [*see Health & Saf. Code §§ 1250, 1250.2, 1250.3*].
- Clinics.
- Home health agencies.
- Agencies providing publicly funded in-home supportive services, nutrition services, or other home and community-based support services.
- Adult day health care centers and adult day care.
- Secondary schools that serve 18- to 22-year-old dependent adults and postsecondary educational institutions that serve dependent adults or elders.
- Independent living centers.
- Camps.
- Alzheimer's Disease day care resource centers.
- Community care facilities [*see Health & Saf. Code § 1502*] and residential care facilities for the elderly [*see Health & Saf. Code § 1569.2*].
- Respite care facilities.
- Foster homes.

- Vocational rehabilitation facilities and work activity centers.
- Designated area agencies on aging.
- Regional centers for persons with developmental disabilities.
- State Department of Social Services and State Department of Health Services licensing divisions.
- County welfare departments.
- Offices of patients' rights advocates and clients' rights advocates, including attorneys.
- The office of the long-term care ombudsman.
- Offices of public conservators, public guardians, and court investigators.
- Any protection or advocacy agency or entity that is designated by the Governor to fulfill the requirements and assurances of the federal Developmental Disabilities Assistance and *Bill of Rights* Act of 2000 [see 42 U.S.C. § 15001 et seq.] or the Protection and Advocacy for the Mentally Ill Individuals Act of 1986 [see 42 U.S.C. § 10801 et seq.], for the protection and advocacy of the rights of persons with mental illness.
- Humane societies and animal control agencies.
- Fire departments.
- Offices of environmental health and building code enforcement.
- Any other protective, public, sectarian, mental health, or private assistance or advocacy agency or person providing health services or social services to elders or dependent adults.

The last item in the preceding list of care custodians is the most significant in light of its broad interpretation by California courts. In *Bernard v. Foley*, the California Supreme Court held that the statutory definition set out above does not include a professional or occupational limitation and does not provide for a pre-existing personal friendship exception. Thus, the definition includes any person providing care or health services to a dependent adult [ *Bernard v. Foley* (2006) 39 Cal. 4th 794, 803, 47 Cal. Rptr. 3d 248, 139 P.3d 1196 ; see also *Estate of Odian* (2006) 145 Cal. App. 4th 152, 167, 51 Cal. Rptr. 3d 390 (paid live-in caregiver who provides social services within the meaning of Prob. Code § 21350(a) is a care custodian and is subject to the presumption of undue influence)]. In *Bernard v. Foley*, the presumptive disqualification of gifts to care custodians was held applicable although the trustee and other caregivers involved in the case were not health care professionals and had a preexisting personal friendship with the decedent [ *Bernard v. Foley* (2006) 39 Cal. 4th 794, 803, 47 Cal. Rptr. 3d 248, 139 P.3d 1196 ] .

**PRACTICE TIP:**

Estate planners are concerned about the effect of *Bernard v. Foley* because it makes virtually any gift to a family friend who has incidentally provided care to a donor subject to challenge under Prob. Code § 21350. It is not uncommon for elderly donors to want to make gifts to close friends who have helped them during their last years. Since such close friends often provide incidental care for the elderly on an informal basis--driving them to medical appointments, helping with medications, exercise, meals, and so on--it is very likely that an argument can be made that such a person is a "care custodian" within the

meaning of *Bernard v. Foley*, even if no formal relationship exists. Therefore, estate planners faced with such a situation now need to anticipate not only a traditional challenge based on undue influence, but also a statutory challenge based on a claim that the beneficiary is a "care custodian" under *Prob. Code § 21350*. Since the "clear and convincing evidence" standard can be difficult to meet in this type of case, it is strongly recommended that whenever an elderly person wants to make a gift to a close friend, the attorney attempt to qualify the gift in advance by obtaining a certificate of independent review if possible. In addition, or alternatively if a certificate of independent review cannot be obtained, the attorney should anticipate ways of meeting the evidentiary standard, such as videotaping the donor and /or obtaining affidavits or other documentary evidence by disinterested parties at the time the instrument is executed in case the persons with knowledge of the facts are not available after the donor's death.  
*Commentary by publisher's editorial staff.*

It has also been held that a long-term care ombudsman for a health care facility is a "care custodian" for purposes of the statute during the time he or she serves as ombudsman for a particular "dependent adult," and remains a care custodian within the meaning of the statute even after his or her formal ombudsman relationship with a particular resident has ended, due either to a change in the ombudsman's facility assignment or the fact that the resident has left the facility, when the ombudsman, as a result of his or her fiduciary relationship with the resident, develops a personal relationship with the resident and thereby acquires personal and financial information about the resident [ *Estate of Shinkle* (2002) 97 Cal. App. 4th 990, 993, 1007, 119 Cal. Rptr. 2d 42 ; *overruled in part on other grounds in Bernard v. Foley* (2006) 39 Cal. 4th 794, 816, 47 Cal. Rptr. 3d 248, 139 P.3d 1196] .

#### **[c] Disposition of Property Subject to Invalid Transfer**

If a transfer fails under any of the rules discussed in this section, the subject property then must be disposed of as if the disqualified person predeceased the transferor without spouse or issue [*Prob. Code § 21353*].

#### **[d] Liability for Invalid Transfer**

No person will be liable for making any transfer that is invalid under these rules unless the person received actual notice of the possible invalidity of the transfer prior to making the transfer [*Prob. Code § 21352*]. Further, a person who receives actual notice cannot be held liable for failing to make the transfer unless the validity of the transfer has been conclusively determined by a court [*Prob. Code § 21352*].

#### **[2] Exceptions**

##### **[a] Transfer to Donor's Relative, Cohabitant, or Domestic Partner**

A transfer is not invalidated if the transferor is related by blood or marriage to, is a cohabitant with, or is the registered domestic partner of the transferee or the person who drafted the instrument [*Prob. Code § 21351(a)*]. This exception applies to any instrument that becomes irrevocable on or after July 1, 1993 [*Prob. Code § 21351(a)*]. For this purpose, a person is "related by blood or marriage" to another person if the person is related within the fifth degree [*Prob. Code § 21351(g)*].

##### **[b] Transfer to Public Entity or Public Trust**

A transfer is not invalidated if the transferee is a federal, state, or local public entity, an entity that qualifies for a charitable exemption from taxation under *I.R.C. § 501(c)(3)* or *I.R.C. § 501(c)(19)*, or a trust holding an interest for this entity, but only to the extent of the interest of the entity, or the trustee of this trust [*Prob. Code § 21351(f)*].

##### **[c] Independent Attorney's Review**

A transfer is not invalidated if the instrument is reviewed by an independent attorney who counsels the transferor about the nature of the intended transfer; attempts to determine if the intended consequence is the result of fraud, menace, duress, or undue influence; and signs and delivers a Certificate of Independent Review in substantially the form set forth in *Prob. Code § 21351(b)* [ *see § 60A.240* (form for Certificate of Independent Review)].

**PRACTICE TIP:**

As a practical matter, a Certificate of Independent Review can be difficult to obtain, even when there is little or no actual doubt regarding the absence of fraud or undue influence. Many estate planning attorneys are reluctant to issue Certificates of Independent Review out of concern over potential liability and the fear that in the event the gift is subsequently contested by the donor's heirs, they may end up being attacked on the issue of whether or not they performed an adequate investigation prior to issuing the certificate. *Commentary by publisher's editorial staff.*

**[d] Court Approval**

A transfer is not invalidated if, after full disclosure of the relationships of the persons involved, the court approves the instrument by order under *Prob. Code § 2580 et seq.* (substituted judgment) [*Prob. Code § 21351(c)*].

**[e] Court-Determined Absence of Fraud, Duress, Menace, or Undue Influence**

A transfer is not invalidated if the court determines on clear and convincing evidence that the transfer was not the product of fraud, menace, duress, or undue influence [*Prob. Code § 21351(d)*]. However, this exception applies only to the following categories of instruments [*Prob. Code § 21351(e)*; *see Prob. Code § 21351(a)(1)*]:

- Instruments executed by persons who were not residents of California at the time the instruments were executed.
- Instruments that do not make transfers to the persons who actually drafted the instruments.
- Instruments executed on or before July 1, 1993, by persons who were California residents at the time the instruments were executed.

In making a determination that the transfer was not the product of fraud, menace, duress, or undue influence, the court cannot consider any evidence given by the person who drafted the instrument [*Prob. Code § 21351(d)*; *see Prob. Code § 21351(a)(1)*].

**PRACTICE TIP:**

The effect of the preceding provision (*Prob. Code § 21351(d)*) is to establish a rebuttable presumption of invalidity under *Prob. Code § 21350*, except as to a person who actually drafted an instrument that was executed after July 1, 1993, by a California resident then residing in the state. As to the latter, the presumption is conclusive rather than rebuttable [*see Prob. Code § 213151(d),(e)*; *Rice v. Clark (2002) 28 Cal. 4th 89, 98, 120 Cal. Rptr. 2d 522, 47 P.3d 300*]. As to other disqualified persons, the presumption may be rebutted on a showing of clear and convincing evidence [*Prob. Code § 213151(d),(e)*]. *Commentary by publisher's*

*editorial staff.*

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Personal Gifts Elements of Valid Gifts General Overview Estate, Gift & Trust Law Personal

GiftsProceduresPresumptions



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DIVISION IV: WILLS AND TRUSTS

CHAPTER 60A GIFTS

PART II. LEGAL BACKGROUND

A. Gifts in General

*23-60A California Legal Forms--Transaction Guide §§ 60A.17-60A.29*

**AUTHOR:** Reviewed by Albert G. Handelman

**[Reserved]**

§§ 60A.17[Reserved]



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DIVISION IV: WILLS AND TRUSTS

CHAPTER 60A GIFTS

PART II. LEGAL BACKGROUND

B. Tax Aspects of Gifts

*23-60A California Legal Forms--Transaction Guide § 60A.30*

**AUTHOR:** Reviewed by Albert G. Handelman

### **§ 60A.30 Unified Transfer Tax System**

#### **[1] In General**

The federal gift tax is imposed, for each calendar year, on taxable transfers of property by gift by any person (whether resident or nonresident) during that calendar year [*I.R.C. § 2501(a)(1)*; *see §§ 60A.31, 60A.32*]. The federal estate tax is imposed on the taxable estate of every decedent who is a citizen or resident of the United States [*I.R.C. § 2001(a)*]. Both taxes are subject to related exemptions, deductions, exclusions, and credits that together enable tax-free transfers of gifts, up to a certain amount for each gift, every year, as well as the tax-free transfer of additional property during life and after death, up to a certain value.

Estate and gift taxes are effectively merged into a single tax scheme, often called the unified transfer tax, by both the rate schedule and the exemption amount, which is actually a credit. Under a fully unified estate and gift tax, the application of the gift tax credit to lifetime gifts would reduce the estate tax credit on a dollar-for-dollar basis.

The Economic Growth and Tax Relief Reconciliation Act of 2001 [Pub. L. No. 107-16] resulted in a partial undoing of the unification of the gift and estate taxes. Although the same tax rate schedule [*I.R.C. §§ 2001(c), 2502(a)*] remains applicable for both the gift tax and the estate tax, and the term "unified credit" [*I.R.C. §§ 2010(c), 2505(a)*] is retained until 2010, the gift tax exclusion amount is limited to \$1,000,000, while the estate tax exclusion amount increases gradually to \$3,500,000 for estates of decedents dying in 2009. The estate tax is gradually phased out by increasing the applicable exclusion amount and by reducing the maximum tax rate until its complete repeal in 2010 [*I.R.C. § 2010(c)*]. In contrast, the gift tax is not repealed. Because of a sunset provision in the 2001 act, however, the law effective prior to that act is reinstated as of January 1, 2011, unless further legislation is enacted [Pub. L. No. 107-16, § 901(a)]; for more detailed discussion of the repeal legislation and the issues it raises for estate planners, *see Ch. 60, Estate Planning, § 60.12A*]. *See California Wills and Trusts, Ch. 2, Overview of Tax Laws Affecting the Disposition of Estates* (Matthew Bender), for discussion of the modified carryover basis rules that replace the estate tax after its repeal. Because of the temporary nature of the estate tax repeal (and related changes) under the 2001 tax legislation, most commentators

believe that significant changes will be made to the 2001 legislation before the 2011 sunset date takes effect.

**PRACTICE TIP:**

Even if the estate and gift taxes remained fully unified [ *see above* ], a degree of disparity would exist between the transfer tax treatment of wealth transfers by a donor during the donor's lifetime as opposed to those made at the donor's death. This disparity exists because gifts are taxed on a "tax exclusive" basis while transfers at death are taxed on a "tax inclusive" basis; that is, even the dollars used to pay estate tax are themselves taxed, whereas gift tax is imposed only on the assets actually reaching the donee's hands--the dollars used to pay the tax are not taxed themselves. This can result in a greater disparity than it might seem at first glance. For example, if a hypothetical 50 percent tax bracket (which is in excess of the current maximum rates, but useful for purposes of this example) applied equally to the gift and estate tax brackets, the estate tax actually due would be effectively twice as much as the gift tax on the same net amount received by the donee. For this reason, estate planners have long felt that gift taxes are "cheaper" than estate taxes on comparable amounts of transferred assets received by intended beneficiaries. *Commentary by Albert G. Handelman*

**[2] Operation of Unified Rate Schedule and Unified Credit**

The unified rate schedule and unified credit will be in effect as described below until 2010 (in the absence of Congressional action prior to that date relating to the estate tax repeal). The federal estate tax will not be applicable to estates of decedents dying during 2010 [*I.R.C. § 2210* added by Pub. L. No. 107-16, § 501(a)].

The gift and estate taxes share the same tax rate schedule [*see I.R.C. §§ 2001(c), 2502(a)*]. The rates in this table begin at 18 percent of the tax base (taxable gifts or taxable estate) and rise to 50 percent as the tax base exceeds \$2,500,000 [*I.R.C. § 2001(c)(1)*]. The maximum 50 percent tax rate applies to the estates of decedents dying, and gifts made, during 2002. The maximum tax rate thereafter decreases 1 percent each year until it becomes 45 percent in 2007; this maximum rate remains in place until 2009, after which (under current law) the estate tax--but *not* the gift tax--is repealed. After 2009, under current law, the maximum gift tax rate is scheduled to drop to 35 percent [*I.R.C. § 2502(a); see § 60A.31[3]*], subject to the sunset provision noted in [1], *above*.

Both gift and estate taxes also provide for a unified credit against estate or gift tax that would otherwise be due [ *see § 60A.31[4]* ]. The applicable credit amount increases on a graduated basis over a specified span of years and is that amount of credit which will exclude the "applicable exclusion amount." The 2001 act schedules the applicable exclusion amount for estate tax to increase according to the following table [*I.R.C. § 2010(c)*]:

Decedents dying in:	Applicable exclusion amount:
2002 and 2003	\$1,000,000
2004 and 2005	\$1,500,000
2006, 2007, 2008	\$2,000,000
2009	\$3,500,000

Prior to the 2001 act, the applicable exclusion amount was scheduled to increase according to the table below [*I.R.C. § 2010(c)* prior to amendment by Pub. L. No. 107-16, § 521(a)]. If the law effective prior to the 2001 act is reinstated under the sunset provision in that act [*I.R.C. § 2210*], this table will again apply; thus, in 2011 the applicable exclusion amount for both the estate tax and the gift tax would revert to \$1,000,000, the amount scheduled to begin in 2006:

Decedents dying in:	Applicable exclusion amount:
1998	\$625,000
1999	\$650,000

2000 and 2001	\$675,000
2002 and 2003	\$700,000
2004	\$850,000
2005	\$950,000
2006 or later	\$1,000,000

Prior to the 2001 act, the applicable exclusion amount for the estate tax was the same as the applicable exclusion amount for the gift tax [*I.R.C. §§ 2010(c), 2505(a)*]. Under the 2001 act, however, while the applicable exclusion amount for estate tax increases according to the table above, the applicable exclusion amount for the gift tax is limited to \$1,000,000, and is not subject to adjustment for inflation [*I.R.C. § 2505(a)*]. The limitation of the applicable exclusion amount for the gift tax to \$1,000,000 makes lifetime giving in excess of that amount less attractive since higher exclusion amounts are available for transfers at death beginning in 2004.

It is important to remember that for married couples, each spouse is entitled to a separate unified credit. Those credits can fully shelter at least \$2,000,000 of property from transfer tax (see the table above).

### **[3] Distinctions Between Gift Tax and Estate Tax**

#### **[a] Tax Treatment of Amounts Used to Pay Tax**

The estate tax is imposed on the entire taxable estate of the decedent, including the amount that will not be transferred to beneficiaries because it will have to be used to pay the estate tax [*see I.R.C. § 2001(a), (b)*]. In contrast, the gift tax is imposed only on the amount actually transferred to the donee [*see I.R.C. §§ 2501(a), 2502(a)*]. The gift tax is paid by the donor using other funds [*I.R.C. § 2502(c)*], and the amount of tax paid generally is not itself subject to transfer taxes (although it would be paid, in most cases, with money already taxed as income).

#### **[b] Additional Exclusions Available Under Gift Tax**

Two significant exclusions from the gift tax base are not available under the estate tax. First, the annual gift tax exclusion covers aggregate gifts to any donee in a calendar year, up to the applicable annual exclusion amount. The amount of the annual gift tax exclusion, which is subject to annual adjustment for inflation, is \$11,000 for calendar years 2002 through 2005 [*I.R.C. § 2503(b)*; *Rev. Proc. 2004-71, 2004-50 I.R.B. 970* (2005 exclusion amount); *Rev. Proc. 2003-85* (2004 exclusion amount); *Rev. Proc. 2002-70* (2003 exclusion amount); *Rev. Proc. 2001-59* (2002 exclusion amount)]. For gifts made before 2002, the annual gift tax exclusion was \$10,000 [*Rev. Proc. 2001-13*].

This exclusion is a major feature of estate planning because a series of annual gifts before the donor's death, to numerous donees over a number of years, without exceeding the annual exclusion amount, can significantly reduce that portion of a moderate size estate which will be subject to estate tax, without any transfer tax cost.

In addition, qualifying tuition payments and payments to medical care providers for the benefit of another individual are excluded for purposes of the gift tax [*I.R.C. § 2503(e)*; *see § 60A.32[3]*]. Inasmuch as providing for the education and medical care of family members is an important aspect of practical estate planning, the impact of this gift tax exclusion can be significant.

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Tax LawFederal Estate & Gift TaxesGifts (IRC secs. 2035, 2501-2524)General OverviewTax LawFederal Estate & Gift

TaxesGifts (IRC secs. 2035, 2501-2524)Annual ExclusionsTax LawFederal Estate & Gift TaxesGifts (IRC secs. 2035, 2501-2524)ElementsGeneral OverviewTax LawFederal Estate & Gift TaxesGifts (IRC secs. 2035, 2501-2524)Imposition of TaxesTax LawFederal Estate & Gift TaxesGifts (IRC secs. 2035, 2501-2524)Scope



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B. Tax Aspects of Gifts

*23-60A California Legal Forms--Transaction Guide § 60A.31*

**AUTHOR:** Reviewed by Albert G. Handelman

### **§ 60A.31 Computation of Gift Tax**

#### **[1] Initial Computation of Tax**

The gift tax is computed on a calendar year basis with respect to all gifts made during the year [*I.R.C. § 2501(a)*]. The tax base is the aggregate value of gifts for the calendar year, subject to certain exclusions and deductions [*I.R.C. § 2503; see § 60A.32*]. The tax bracket at which gifts are taxed begins in the highest bracket in which gifts were taxed in the last prior gift tax year in which taxable gifts were made (subject, of course, to the current maximum rate). Therefore, in order to determine the bracket and the tax due on taxable gifts made during the current year, it is necessary to determine the sum of taxable gifts made for prior years, giving effect to all deductions or exclusions applicable in the years those gifts were made [*I.R.C. § 2504(a), (b)*]. Gift tax errors in previous years, other than simple valuation errors on which the statute of limitations has run, must be corrected in determining the proper amount of prior gifts for the purpose of computing the current year's tax [*I.R.C. § 2504(c); Treas. Reg. § 25.2504-1(d)*].

Once the amount of taxable gifts for the current year and all prior years is determined, the gift tax is computed as follows:

- (1) A tentative tax is computed by applying the unified estate and gift tax rates [*I.R.C. § 2001(c); see [3], below*] to the aggregate sum of the taxable gifts for the current year and each of the preceding calendar periods [*I.R.C. § 2502(a)(1)*].
- (2) Another tentative tax is computed by applying the same rate structure to only the aggregate sum of the taxable gifts for each of the preceding calendar periods, but not the current year [*I.R.C. § 2502(a)(2)*].
- (3) The gift tax (prior to the application of the unified credit) is the first tentative tax as reduced by the second tentative tax [*I.R.C. § 2502(a)*].

Thus, each successive gift is placed higher on the graduated rate structure. The following example demonstrates this mechanism in the simplest way (and without reference to the actual statutory rates):

**EXAMPLE:**

Assume that a 30-percent rate applies to gifts under \$1,000,000, and a 40-percent rate applies to gifts over \$1,000,000. Further assume that in prior years a donor has made taxable gifts totaling \$1,000,000. If the donor makes a further gift of \$50,000 during the current calendar year, that gift will be effectively subject to a 40-percent tax rate.

**[2] Application of Unified Credit**

Once the gift tax is initially determined, it is offset by the "applicable credit amount" of the unified credit [*see I.R.C. § 2010(c)* (table of graduated amounts); §§ 60A.30[2], 60A.32[4]]. The applicable credit amount is exhausted when the donor's total of post-1976 taxable gifts reaches the "applicable exclusion amount." Only when the cumulative total passes the "applicable exclusion amount" is there gift tax liability.

The "applicable credit amount" and the "applicable exclusion amount" are precisely equivalent only if the donor made no pre-1977 gifts. Because the unified credit became applicable only in 1977 [Pub. L. 94-455, § 2001(b)(2), (d)(2) (*I.R.C. § 2505* effective only for gifts made after 1976)], donors with pre-1977 gifts received what appears to be a clean slate, but there is some loss of the full benefit of the unified credit. There is a narrow exception to this rule, applicable to gifts made after September 8, 1976, and before 1977 [*see I.R.C. § 2505(b)*]. This exception affects persons who took advantage of a specific \$30,000 exemption for gifts made in a calendar quarter (less amounts allowed under this exemption in prior calendar years and calendar quarters) available under former *I.R.C. § 2521*, repealed by Pub. L. No. 94-55, § 2001(b)(3), prior to the effective date of the Tax Reform Act of 1976. On advice of counsel, some persons took advantage of this exemption in the last quarter of 1976 based on the then-prevailing opinion that Congress would never permit the full amount of the unified credit to take effect.

**[3] Federal Gift Tax Rates**

For gifts made before 2010, the federal gift tax rates are the same as the federal estate tax rates [*I.R.C. § 2502(a)*]. The following rates are taken from the rate table set forth in *I.R.C. § 2001(c)*, which sets the rates for the federal estate tax, subject to the phased-in maximum rate limitations discussed below:

AMOUNT OF TAXABLE GIFT	TAX
Not over \$10,000 .....	18 percent of that amount.
Over \$10,000 but not over \$20,000 .....	\$1,800, plus 20 percent of the excess of that amount over \$10,000.
Over \$20,000, but not over \$40,000 .....	\$3,800, plus 22 percent of the excess of that amount over \$20,000.
Over \$40,000, but not over \$60,000 .....	\$8,200, plus 24 percent of the excess of that amount over \$40,000.
Over \$60,000, but not over \$80,000 .....	\$13,000, plus 26 percent of the excess of that amount over \$60,000.
Over \$80,000 but not over \$100,000 .....	\$18,200, plus 28 percent of the excess of that amount over \$80,000.
Over \$100,000 but not over \$150,000 .....	\$23,800, plus 30 percent of the excess of that amount over \$100,000.
Over \$150,000 but not over \$250,000 .....	\$38,800, plus 32 percent of the excess of that

	amount over \$150,000.
Over \$250,000 but not over \$500,000 .....	\$70,800, plus 34 percent of the excess of that amount over \$250,000.
Over \$500,000 but not over \$750,000 .....	\$155,800, plus 37 percent of the excess of that amount over \$500,000.
Over \$750,000 but not over \$1,000,000 .....	\$248,300, plus 39 percent of the excess of such amount over \$750,000.
Over \$1,000,000 but not over \$1,250,000 .....	\$345,800, plus 41 percent of the excess of such amount over \$1,000,000.
Over \$1,250,000 but not over \$1,500,000 .....	\$448,300, plus 43 percent of the excess of such amount over \$1,250,000.
Over \$1,500,000 but not over \$2,000,000 .....	\$555,800, plus 45 percent of the excess of such amount over \$1,500,000.
Over \$2,000,000 but not over \$2,500,000 .....	\$780,800, plus 49 percent of the excess of such amount over \$2,000,000.
Over \$2,500,000 .....	\$1,025,800, plus 50 percent of the excess over \$2,500,000.

The maximum rate of tax as shown by the above table is gradually phased down for gifts made after 2002 and before 2010 [*I.R.C. §§ 2001(c)(2), 2502(a)*]. The maximum rates for those years are as shown below, and the tax brackets and amounts setting forth the tax are adjusted accordingly:

Gifts made before 2002	55 percent
Gifts made in 2002	50 percent
Gifts made in 2003	49 percent
Gifts made in 2004	48 percent
Gifts made in 2005	47 percent
Gifts made in 2006	46 percent
Gifts made in 2007 through 2009	45 percent
Gifts made after 2009	35 percent

### Legal Topics:

For related research and practice materials, see the following legal topics:

Tax Law Federal Estate & Gift Taxes Gifts (IRC secs. 2035, 2501-2524) Imposition of Taxes Tax Law Federal Estate & Gift Taxes Gifts (IRC secs. 2035, 2501-2524) Scope Tax Law Federal Estate & Gift Taxes Gifts (IRC secs. 2035, 2501-2524) Valuation



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California Legal Forms--Transaction Guide

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DIVISION IV: WILLS AND TRUSTS

CHAPTER 60A GIFTS

PART II. LEGAL BACKGROUND

B. Tax Aspects of Gifts

*23-60A California Legal Forms--Transaction Guide § 60A.32*

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## § 60A.32 Taxable Gifts

### [1] In General

The tax base for the gift tax is the total amount of transfers by gift during the taxable year (as valued on the date of the gift), less specified exclusions and deductions [*I.R.C. §§ 2501(a), 2503, 2512(a)*].

The exclusions are for:

- Certain qualifying educational and medical expenses paid on behalf of a donee [*see I.R.C. § 2503(e); [3], below*].
- Lifetime gifts covered by the annual exclusion [*see I.R.C. § 2503(b)*] (annual exclusion amount of \$11,000 for gifts made in calendar years 2002 through 2005, and \$10,000 for gifts made before 2002; amount is subject to annual adjustment for inflation); *see also [4], below*].

The deductions are for:

- Gifts to spouses (the marital deduction) [*see I.R.C. § 2523*].
- Gifts to qualifying charities [*see I.R.C. § 2522*].

The only practical difference between an exclusion and a deduction under the gift tax is that a return still must be filed for a deductible charitable gift (no return is required for marital-deduction gifts) if the value of the gift exceeds the annual exclusion amount, whereas no return is required for an excluded gift [*I.R.C. § 6019(a); see I.R.C. § 2524* (extent of available deductions)].

### [2] Transfers by Gift

**[a] Basic Rule**

The gift tax applies broadly to all transfers by gift, whether in trust or otherwise, and whether the gift is direct or indirect, and whether the property is real or personal, or is tangible or intangible [*I.R.C. § 2511(a)*]. For example, a taxable transfer may be effected by the creation of a trust, the forgiveness of a debt, the assignment of a judgment, the assignment of the benefits of an insurance policy, or the transfer of cash or securities [*Treas. Reg. § 25.2511-1(a)*].

**[b] What Constitutes "Gift"**

There has been confusion about the meaning of the word "gift" for gift tax purposes because the regulations expressly negate donative intent as an essential element of a gift. Rather, the regulations claim to rely only on the "objective facts of the transfer and the circumstances under which it is made, rather than on the subjective motives of the donor" [*Treas. Reg. § 25.2511-1(g)(1)*]; see *Commissioner v. Wemyss (1945) 324 U.S. 303, 306, 65 S. Ct. 652, 89 L. Ed. 958*; but see *Treas. Reg. § 25.2512-8* (donative intent is element to be considered in determining whether transfer was made in ordinary course of business)].

The practical meaning of the definition of "gift" for gift tax purposes is best understood in light of the statutory rule that if property is "transferred for less than an adequate and full consideration in money or money's worth, then the amount by which the value of the property exceed[s] the value of the consideration shall be deemed a gift" [*I.R.C. § 2512(b)*]; see, e.g., *Priv. Ltr. Rul. 200532024* (grandchildren's proposed renunciation of their interests in trust is gift for gift tax purposes of value of renounced interests)]. Thus, if a transfer is supported by full consideration in money or money's worth, there is no gift [*Treas. Reg. § 25.2511-1(g)(1)*]; see *Priv. Ltr. Rul. 200442003* (husband's lump sum payment to wife in exchange for her community property interest in husband's deferred compensation plan as part of marital property settlement was transfer for full and adequate consideration and thus not subject to gift tax)]. The regulations indicate that a bona fide sale or exchange in a business context will not be deemed a gift to any extent, even though the transferor may have made a bad bargain in retrospect [*Treas. Reg. § 25.2512-8*]. However, in order for a transfer to be deemed to have occurred during the ordinary course of business, it must be "bona fide, at arm's length, and free from any donative intent" [*Treas. Reg. § 25.2512-8*]. In short, although the regulations appear to dismiss donative intent as critical, donative intent inherently enters into the determination of whether a transfer was made for valuable consideration in a business context [see, e.g., *Heringer v. Commissioner (9th Cir. 1956) 235 F.2d 149, 151*; *Estate of Lang v. Commissioner (9th Cir. 1980) 613 F.2d 770, 773-774* ].

No gift has been made unless the donor has effectively parted with "dominion and control" over the property [*Treas. Reg. § 25.2511-2(b)*]. A person has effectively parted with dominion and control over property when the person has disposed of property without retaining the right to change the disposition, whether for his or her own benefit or for another person's benefit [*Treas. Reg. § 25.2511-2(b)*]; see, e.g., *Priv. Ltr. Rul. 200534015* (proposed assignment to irrevocable trust of portion of potential proceeds from judgment or settlement in wrongful death action would constitute completed gift at time of assignment)]. A gift is incomplete if the donor reserves the power to revest beneficial title to the property in himself or herself, to name new beneficiaries, or to change the interests of the beneficiaries as between themselves [*Treas. Reg. § 25.2511-2(c)*]. A donor can retain dominion and control over gift property transferred to a trustee, by reserving various powers over the trust property. Dominion and control also can be retained in less formal ways. If, for example, the gift property is cash and the mode of transfer is a check, the donor is deemed to retain dominion and control over the property until the check is presented to the bank and paid, because the donor can stop payment on the check at any time before it has been paid [ *Estate of Dillingham v. Commissioner (10th Cir. 1990) 903 F.2d 760, 762-763* ; *Estate of Gagliardi v. Commissioner (1987) 89 T.C. 1207, 1212* ]. This can be critical when a gift is made by check and the donor wants the gift to be qualified for the annual gift tax exclusion. For example, if a donor gave the donee a check for \$11,000 (the amount of the annual exclusion) on December 24, 2003, and the check was paid on January 5, 2004, when the donee presented it to the bank, then the gift is deemed to have been completed (and qualified for the annual gift tax exclusion) in January 2004, not in December 2003.

A revocable trust is not a gift at the time it is created [ *Burnet v. Guggenheim* (1933) 288 U.S. 280, 288, 53 S. Ct. 369, 77 L. Ed. 748 ]. Only as distributions are made from a revocable trust, and thus pass beyond the donor's power to take back, does a taxable gift occur. Therefore, a transfer may be deemed complete enough to constitute a taxable gift at the time of the transfer, yet be considered incomplete enough (because of powers retained by the donor) to be brought back into the donor's taxable estate.

The gift tax applies only to transfers of a beneficial interest in property, not to transfers of bare legal title. Thus, a transfer in trust is a gift only to the extent that beneficial interests pass to someone other than the settlor. Transfers by the trustee under the terms of the trust (such as a distribution to the remainder beneficiary) are not themselves gifts if the transfer does not pertain to property in which the trustee has a beneficial interest [*Treas. Reg. § 25.2511-1(g)*].

### [c] Effect of Disclaimers

The estate and gift tax laws generally adopt the concept that one who has the power to take possession of property should be treated as the owner [*see, e.g., I.R.C. §§ 2033, 2036, 2037, 2038, 2511, 2514(b)* (decendent's gross estate includes value of all property to extent of decendent's interest in that property at death; transfers in which transferor retains interest are included in transferor's gross estate; transfers taking effect only on or after transferor's death are included in transferor's gross estate; revocable transfers are included in transferor's gross estate; gift tax is applicable whether transfer is direct or indirect, in trust or otherwise; gift tax treatment of general powers of appointment)]. Thus, it is arguable that if A makes a gift to B, and B refuses to accept the gift knowing it will pass by default to C, B should be treated as making a gift of the property to C. However, under the tax law, if B makes a "qualified disclaimer" with respect to property that B is entitled to receive, the property is treated as passing directly from the original donor (A) to the taker in default (C) [*I.R.C. § 2518(a)*]. There is no taxable gift from B to C. This rule applies for purposes of both the gift tax and the estate tax [*I.R.C. § 2518(a)*].

A "qualified disclaimer" is an irrevocable and unqualified refusal to accept an interest in property, made in writing [*I.R.C. § 2518(b)(1)*]. The refusal must be made before the disclaiming party has accepted the interest or any of its benefits [*I.R.C. § 2518(b)(3)*]. Acts indicative of acceptance include using the property or an interest in the property, accepting dividends or rents from the property, and directing others to act with respect to the property or an interest in the property [*Treas. Reg. § 25.2518-2(d)(1)*; *see Estate of Engelman v. Commissioner* (2003) 121 T.C. 54 (attempted disclaimer of property by executor of decendent's estate on decendent's behalf was not qualified disclaimer because decendent's exercise of power of appointment over property, effective on her death, constituted acceptance of property under California law)].

The written refusal must be received by the transferor of the interest, his or her legal representative, or the holder of legal title to the property to which the interest relates not later than the date nine months after the later of (1) the date the transfer creating the interest is made or (2) the day the disclaiming party turns 21 [*I.R.C. § 2518(b)(2)*]. A final requirement is that, as a result of the disclaimer, the interest passes to another person without any direction on the part of the disclaiming party (or to the decendent's surviving spouse if the transfer occurs on the transferor's death) [*I.R.C. § 2518(b)(4)*]. Regulations expand on these rules at length [*see Treas. Reg. §§ 25.2518-1, 25.2518-2, 25.2518-3*].

A donee may disclaim only a portion of an interest in property if he or she chooses [*I.R.C. § 2518(c)(1)*]. However, the disclaimed portion must be an undivided portion [*I.R.C. § 2518(c)(1)*; *Treas. Reg. § 25.2518-3(a)(1)(i)*]. For example, a wife's disclaimer of her survivorship interest in a joint brokerage account with her husband constituted a qualified disclaimer even though, before making the disclaimer, she made cash withdrawals from the account and sold certain securities in the account. Despite the cash withdrawal and sale of securities, the disclaimer was a qualified disclaimer because the cash and securities were separable assets, and the wife did not accept the benefits of the disclaimed interest [*see Treas. Reg. § 25.2518-3(a)(1)(ii)*; *Letter Rul. 200503024*].

Property passing to a tax-exempt charity as a result of a disclaimer qualifies for the estate tax charitable deduction [

*Priv. Ltr. Rul. 200519042* (daughter's disclaimer of interest in residue of mother's estate, which resulted in transfer of residue to charity of which daughter is president, is qualified disclaimer as long as charity's charter and bylaws are amended to require that no person may have wholly discretionary power to direct distribution of funds received by reason of that person's disclaimer, and that disclaimed funds will be held in segregated account)).

For additional discussion and forms for making disclaimers, see §§ 60A.230-60A.232.

### **[d] Effect of Powers of Appointment**

The treatment of disclaimers is somewhat inconsistent with the gift tax treatment of powers of appointment. The exercise or release of a general power of appointment is treated as a gift by the holder of the power to the beneficiary of the appointment or the taker in default [*I.R.C. § 2514(b)*].

If a general power of appointment must be exercised within a specific time, the lapse of the power is treated as a taxable release [*I.R.C. § 2514(e)*] (lapse of power during life of individual possessing power is deemed release of power). This rule is subject, however, to an important exception. A lapse is treated as a taxable gift during a calendar year only to the extent that the value of the property subject to the lapsed power exceeds the greater of \$5,000 or 5 percent of the value of the property out of which the power could be satisfied (a "five and five power") [*I.R.C. § 2514(e)*].

The definition of "general power of appointment" for gift tax purposes is the same as under the estate tax [*see I.R.C. §§ 2041(b)(1), 2514(c)*]. Thus it includes powers to appoint to the holder of the power, his or her estate, his or her creditors, or the creditors of his or her estate. It does not include certain powers subject to an ascertainable standard [*see I.R.C. § 2514(c)(1)*] and certain jointly held powers [*see I.R.C. § 2514(c)(2), (3)*].

### **[3] Exclusion for Educational and Medical Expenses**

Certain "qualified transfers" in the form of payments for tuition or medical care for another individual are excluded from the definition of "gift" for federal gift tax purposes [*see I.R.C. § 2503(e)(1)*]. A "qualified transfer" is defined as any amount paid on behalf of an individual either (1) as tuition to an educational organization for the education and training of that individual or (2) to any person who provides medical care [*see I.R.C. § 213(d)*] (definition) with respect to that individual, as payment for medical care [*I.R.C. § 2503(e)(2)*].

The qualifying educational organizations are those that normally maintain a regular faculty and curriculum and normally have a regularly enrolled body of pupils or students in attendance at the place where educational activities are regularly carried on [*I.R.C. § 170(b)(1)(A)(ii)*]. The exclusion applies to tuition for both full-time and part-time students but applies only to tuition. Amounts paid for books, supplies, dormitory fees, or boarding do not qualify [*Treas. Reg. § 25.2503-6(b)(2)*].

Qualifying "medical care" is any of the following [*I.R.C. § 213(d)(1)*]:

- The diagnosis, cure, mitigation, treatment, or prevention of disease, or for the purpose of affecting any structure or function of the body.
- Transportation for medical care.
- Insurance covering medical care.

Amounts paid by the donor for medical care are not subject to the exclusion to the extent that the donee receives reimbursement from an insurance company. If a donor previously paid qualifying medical care costs for a donee, a taxable gift is deemed to occur on the date the donee receives the insurance reimbursement [*Treas. Reg. §*

25.2503-6(b)(3)].

To qualify for the exclusion, the payments must be made directly to the educational institution or medical care provider. Indirect payments, such as payment to the individual (who has made or will make payment to the school or care provider), do not qualify [*Treas. Reg. § 25.2503-6(c)*]. Moreover, the regulations take the position that a transfer to a trust established to pay tuition or medical costs does not qualify for the exclusion, on the theory that the use of a trust does not constitute a direct transfer to the educational organization or medical care provider [*Treas. Reg. § 25.2503-6(c)*]. On the other hand, the exclusion is allowed without regard to the relationship between the donor and the donee [*Treas. Reg. § 25.2503-6(a)*].

The exclusion for medical care and tuition generally covers transfers that most donors are not likely to perceive as "gifts" in the conventional sense. In many cases, the statutory exclusion will not be strictly necessary because the payment will be in satisfaction of the donor's legal obligation of support, and therefore not a gift for purposes of the gift tax. However, the exclusion can serve some valuable estate planning ends. For example, a grandparent might pay the tuition of a grandchild even though the grandchild's parents are still alive and can afford the tuition themselves. The transfer amounts to a gift from the grandparent to the parents, but avoids transfer tax without consuming any portion of the annual gift tax exclusion. (For an individual retirement account that can be used to pay a beneficiary's postsecondary education expenses, including room and board if applicable, see *I.R.C. § 530*.) Note that transfers which qualify for the gift tax exclusion for educational and medical expenses under *I.R.C. § 2503(e)* are also excluded from treatment as generation-skipping transfers [*I.R.C. § 2611(b)(1)*].

#### **[4] Annual Exclusion**

##### **[a] In General**

In determining the total amount of the taxable gifts for a calendar year, an exclusion (called the "annual exclusion") is available for gifts made to each donee by each donor during the calendar year [*I.R.C. § 2503(b)*]. The amount of the annual gift tax exclusion, which is subject to annual adjustment for inflation, is \$11,000 for calendar years 2002 through 2005 [*I.R.C. § 2503(b)*; *Rev. Proc. 2004-71, 2004-50 I.R.B. 970* (2005 exclusion amount); *Rev. Proc. 2003-85* (2004 exclusion amount); *Rev. Proc. 2002-70* (2003 exclusion amount); *Rev. Proc. 2001-59* (2002 exclusion amount)]. For gifts made before 2002, the annual gift tax exclusion was \$10,000 [*Rev. Proc. 2001-13*]. The exclusion applies separately to each donee, without limitation on the number of donees [*see, e.g., Priv. Ltr. Rul. 200533001* (cash contribution to tax-exempt club will be treated as gift to club as single entity that will qualify for annual gift tax exclusion to extent it does not exceed annual exclusion amount)].

The annual exclusion is available only for a gift of a "present interest" [*I.R.C. § 2503(b)*]. A present interest is an "unrestricted right to the immediate use, possession, or enjoyment of property or the income from property (such as a life estate or term certain)" [*Treas. Reg. § 25.2503-3(b)*]. For instance, gifts of LLC membership interests in a tree-growing business were found to be gifts of future interests due to the restrictions against transfer in the LLC agreement and the expectation that the business would not generate income for years to come, resulting in a federal gift tax deficiency over \$600,000 [*Hackl v. Commissioner (2002) 118 T.C. No. 14* (court rejected argument that when gift takes form of outright transfer of equity interest in property, that alone is sufficient to qualify transfer as one of present interest)].

The annual exclusion plays an important part in gift planning because a regular program of annual gifts to multiple donees can avoid a substantial amount of transfer tax. The excluded amounts not only avoid the gift tax; they are also excluded in the computation of adjusted taxable gifts under the estate tax and thus do not push the taxable estate into higher brackets. As with all gifts, income and appreciation of the transferred property are removed from the donor's estate. Further, the amount of the annual exclusion can be effectively doubled if gifts are made by a husband and wife [*see I.R.C. § 2513(a)* (gift splitting)].

The reciprocal trust doctrine has been applied to deny the availability of the annual exclusion in various cases. For instance, annual exclusions were unavailable for a couple's transfers to their nieces and nephews when the donees' parents made reciprocal gifts to the donors' children. While the reciprocal trust doctrine (under which the substance rather than the form of a transaction is examined) was developed in the trust context, the doctrine is applicable in this non-trust context as well [ *Sather v. Comm'r* (8th Cir. 2001) 251 F.3d 1168 ; see *Estate of Schuler v. Commissioner, T.C. Memo 2000-392* , *aff'd*, 282 F3d 575 (8th Cir. 2002) (transfers to brother's family were indirect gifts to his own family, by application of reciprocal trust doctrine)].

Gifts to the donor's spouse who is a U.S. citizen generally are not subject to gift tax at all [see *I.R.C. § 2523*; [5], *below*]. Gifts to the donor's spouse who is not a citizen of the United States are subject to an exclusion greater than the annual gift tax exclusion [see *I.R.C. § 2523(i)*]. The larger annual exclusion is allowed because the federal gift tax marital deduction is generally unavailable for transfers to spouses who are not citizens [see *I.R.C. § 2523(i)(1)*]. The amount of the annual exclusion is adjusted annually for inflation [*I.R.C. § 2503(b)*]. For gifts made in 2005, the amount of the exclusion is \$117,000 [*I.R.C. §§ 2503(b), 2523(i)*; *Rev. Proc. 2004-71, 2004-50 I.R.B. 970*]. For gifts made in 2004, the amount of the exclusion is \$114,000 [ *Rev. Proc. 2003-85* ]. For gifts made in 2003, the amount of the exclusion is \$112,000 [ *Rev. Proc. 2002-70* ]. For gifts made in 2002, the amount of the exclusion is \$110,000 [ *Rev. Proc. 2001-59* ].

#### **[b] Application to Future Interests**

The annual exclusion does not apply to "gifts of future interests in property" [*I.R.C. § 2503(b)*]. The original rationale for this exception was that the value of a future interest can be difficult to determine, but this rationale is not always consistent with the definition of "future interests" established by the regulations and the courts. The regulations define "future interests" as including reversions, remainders, and other interests or estates (whether vested or contingent, and whether or not supported by a particular interest or estate) that are limited to commence in use, possession, or enjoyment at some future date or time. The term has no reference to such contractual rights as exist in a bond, note (even if bearing no interest until maturity), or a policy of life insurance, the obligations of which are to be discharged by payments in the future. However, a future interest in such a contractual obligation may be created by limitations contained in a trust or other instrument of transfer used in effecting a gift [*Treas. Reg. § 25.2503-3(a)*].

Thus the regulations distinguish between an outright gift of property that naturally results in future cash flow (eligible for exclusion) and a future interest created through the form of the transfer. A zero-coupon bond given outright qualifies for the exclusion, but a regular-coupon bond transferred in trust to accumulate the interest and distribute it along with the principal at the bond's maturity does not qualify for the exclusion, even though these may be economically identical scenarios. Moreover, if the zero-coupon bond were placed in trust, to be distributed only at maturity, the transfer in trust would be disqualified from the exclusion as a future interest. In short, the use of a trust, when a trust is not strictly necessary to accomplish the estate planning ends of the donor, can jeopardize the exclusion. This is highlighted in two examples in the regulations:

#### **EXAMPLE:**

C transfers an insurance policy on C's life in trust for D. On C's death, the proceeds of the policy are to be reinvested and the income is to be paid to D. D's interest is a future interest, not qualifying for the exclusion [ *Treas. Reg. § 25.2503-3(c)*, example 2]. Had C simply transferred the policies outright to D, the exclusion would have been available, despite the fact that the proceeds would be paid only in the future.

#### **EXAMPLE:**

J transfers real property in trust, subject to a mortgage. The trust terms require that the income from the property be used to repay the mortgage, with the beneficiary K to receive income only after the mortgage is repaid. K's interest is a future interest, and therefore the transfer does not qualify for the exclusion [ *Treas. Reg. § 25.2503-3(c)*, example 5]. Had J transferred the property outright to K, the exclusion would have been available even though K would have been obliged to service the mortgage debt or lose the property.

### **[c] Application to Income Interests**

In contrast to a disqualified "future interest," the regulations characterize the "unrestricted right to the immediate use, possession, or enjoyment of property or the income from property (such as a life estate or term certain)" as a present interest in property [ *Treas. Reg. § 25.2503-3(b)*]; *see, e.g., Priv. Ltr. Rul. 200532024* (grandchildren's proposed renunciation of their interests in trust is gift for gift tax purposes of value of renounced interests, and this value qualifies for annual gift tax exclusion as gifts of present interests)]. Thus, an income interest in property transferred in trust qualifies for the exclusion, at least if the income interest takes effect as of the inception of the transfer. Only the income interest qualifies [ *see Treas. Reg. § 25.2503-3(b)*].

For instance, if A transfers property in trust, with income to B and remainder to C, the value of the transfer must be divided into the portion allocable to the income interest and the portion allocable to the remainder. This allocation is made according to standard tables in the regulations [ *see Treas. Reg. § 25.2512-5(d)*]. The annual exclusion applies only against the value of the income interest as so measured. This is true even if the income beneficiary is also the remainder beneficiary.

The regulations indicate that the income interest must be "unrestricted" [ *see Treas. Reg. § 25.2503-3(b)*]. The apparent purpose of this requirement is to ensure that the value of the income interest can be determined. If the income, for instance, were subject to accumulation at the discretion of the trustee, then the income interest would not be a present interest and therefore would not qualify for the exclusion [ *Treas. Reg. § 25.2503-3(c)*, example 1]. If the trustee had complete discretion to sprinkle income between multiple income beneficiaries, none of the beneficiaries would have an interest of ascertainable value, and none of these interests would qualify for the exclusion [ *Treas. Reg. § 25.2503-3(c)*, example 3].

The power of the trustee to distribute corpus inherently diminishes the value of an income interest, and if the power is entirely discretionary, then the income interest is likely to lack any ascertainable value and therefore also likely not to qualify for the exclusion. However, a power to distribute corpus to the income beneficiary is disregarded in measuring the value of that beneficiary's income interest [ *I.R.C. § 2503(b)*; *Treas. Reg. § 25.2503-3(b)*].

### **[d] Special Problems Involving Transfers to Minors**

Transfers to minors have raised numerous issues under the future interest rule. A gift to a minor generally entails control of the property by an adult. Even when control is not provided by a trustee, the legal disability of a minor in dealing with his or her own property may leave control in a parent, legal guardian, or legal custodian. At one time, whether an outright gift of property to a minor could be treated as a present interest was questionable, given the limitation on the child's own control. However, an outright gift to a minor has long been treated as a present interest, whether or not a legal guardian has been appointed. Limitations placed on the child or the guardian by state law are disregarded. Only limitations on present enjoyment created by the form of the gift (as in a transfer in trust) raise the question of the existence of a future interest [ *1954-2 C.B. 319* ]. Even when a trust is created, the transfer may be treated as an outright gift if the powers of the trustee are the same as those of a legal guardian [ *1959-1 C.B. 690* ]. If the powers of the trustee exceed those of a guardian, the income interest may qualify as a present interest even if the remainder interest does not [ *see Treas. Reg. § 25.2503-4(c)*].

Additional protection exists for gifts to minors. A transfer for the benefit of a donee under age 21 on the date of the gift will not be treated as a gift of a future interest (and therefore will qualify for the annual exclusion) if all of the following conditions are met [*I.R.C. § 2503(c)*; *Treas. Reg. § 25.2503-4(a)*]:

- Both the property itself and its income may be expended by or for the benefit of the donee before he or she reaches age 21.
- Any portion of the property and its income not expended by or for the benefit of the donee will pass to the donee when he or she attains age 21.
- If the donee dies before age 21, any portion of the property or its income not disposed of will be payable either to the estate of the donee or as the donee may appoint in a general power of appointment.

Transfers to trusts meeting these requirements will qualify for the annual exclusion. The entire amount of the transfer, not just the portion allocable to the income interest, will qualify. In effect, transfers to qualifying trusts (sometimes referred to as "minors' qualifying trusts") are treated the same as an outright gift to the minor beneficiary if both income and corpus are paid as required. An income interest alone that meets the above requirements will qualify for the exclusion, even if the remainder interest does not [ *Commissioner v. Herr* (3d Cir. 1962) 303 F.2d 780, 782 ; *Rev. Rul. 68-670, 1968-2 C.B. 413* ]. Thus, if an income interest must either be used or accumulated for a minor beneficiary, with any accumulated income distributed to him or her at age 21 or paid as required above if he or she dies before age 21, the value of the income interest qualifies for the exclusion even if corpus (other than accumulated income) is distributed to a different remainder beneficiary.

The trustee may be allowed complete discretion to distribute or accumulate income [*Treas. Reg. § 25.2503-4(b)(1)*]. If the trust provides the donee with a power of appointment (in lieu of requiring distribution to the donee's estate), this power may be exercisable by will or during the donee's life, as long as it is not subject to substantial restrictions. The fact that state law may limit the donee's ability to exercise a power of appointment or to make a will is disregarded, and the trust instrument may name the takers in default of appointment by the donee [*Treas. Reg. § 25.2503-4(b)*].

Gifts made under the California Uniform Transfers to Minors Act would qualify for the exclusion because they meet the conditions of *I.R.C. § 2503(c)* [see *Rev. Rul. 59-357, 1959-2 C.B. 212* ]. This is true even though the statute requires distribution at age 18 rather than age 21 (unless postponed to the latter date) [ *Rev. Rul. 73-287, 1973-2 C.B. 321* ; see 60A.40].

An important technique devised to ensure an exclusion for gifts in trust to minors is the so-called "Crummey" power (or Crummey trust) [see *Crummey v. Commissioner* (9th Cir. 1968) 397 F.2d 82 ], which is often used with minor beneficiaries, although its use is not limited to those situations. In a Crummey trust, the minor beneficiary is given the power to demand distribution of transfers made to the trust during the calendar year, often limited to the amount of the annual gift tax exclusion, the amount covered by a "five or five power," or some other specified part of the entire amount contributed during the year. Transfers subject to this power are present interests and therefore are qualified for the exclusion, even though, as a practical matter, it might be very difficult for a young beneficiary to request and obtain a distribution [ *Crummey v. Commissioner* (9th Cir. 1968) 397 F.2d 82, 88 ; *Rev. Rul. 73-405, 1973-2 C.B. 321* ; but see *Estate of Trotter v. Commissioner, T.C. Memo 2001-250* (Crummey powers may be disregarded in certain situations)]. Thus, a trust with a proper Crummey power can be established with any other terms, such as mandatory accumulation of income, and still serve as a vehicle for continuing excludable transfers. For additional discussion of Crummey trusts and Crummey powers, see Ch. 72, *Irrevocable Trusts* , and California Wills and Trusts, Ch. 114, *Irrevocable Inter Vivos Trusts* (Matthew Bender).

#### [5] Marital Deduction

The gift tax marital deduction [*see I.R.C. § 2523*] is essentially identical to the unlimited estate tax marital deduction. The aggregate value of gifts to the donor's spouse is not included in taxable gifts, unless the spouse's interest is terminable. Similarly, under the estate tax, the terminable interest hurdle is avoided by granting the spouse a life estate coupled with a general power to appoint corpus (thereby bringing the corpus into the gross estate), or by granting the spouse a life estate alone and electing to subject the corpus to estate taxation in the spouse's gross estate at death (a QTIP trust) [*I.R.C. § 2523(e), (f)*; *see I.R.C. § 2044*; *see also Ch. 71, Marital Deduction Trust Provisions* ].

The federal gift tax marital deduction generally is unavailable for transfers to spouses who are not citizens of the United States [*see I.R.C. § 2523(i)(1)*]. Instead, an enhanced annual exclusion is available for gifts to noncitizen spouses [*see I.R.C. § 2523(i)*]. For additional information about this exclusion, see [4][a], *above*.

### **[6] Charitable Deduction**

The gift tax charitable deduction [*see I.R.C. § 2522*], which excludes gifts to qualifying charitable beneficiaries from the gift tax, is also essentially identical to its estate tax counterpart [ *see Ch. 69, Charitable Dispositions* ]. One practical distinction is that a separate gift tax return must be filed if the amount of the gift exceeds the annual exclusion [*I.R.C. § 6019(a)*]. The rules governing split-interest charitable trusts are perhaps more significant in the gift tax context because, in view of the income tax deduction for charitable contributions [*see I.R.C. § 664*], these trusts are more often created before death. For discussion of these rules, see Ch. 74, *Split-Interest Charitable Trusts* , and California Wills and Trusts, Ch. 116, *Charitable Remainder Trusts* (Matthew Bender).

### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Tax LawFederal Estate & Gift TaxesGifts (IRC secs. 2035, 2501-2524)General OverviewTax LawFederal Estate & Gift TaxesGifts (IRC secs. 2035, 2501-2524)Annual ExclusionsTax LawFederal Estate & Gift TaxesGifts (IRC secs. 2035, 2501-2524)Imposition of TaxesTax LawFederal Estate & Gift TaxesGifts (IRC secs. 2035, 2501-2524)ScopeTax LawFederal Estate & Gift TaxesGifts (IRC secs. 2035, 2501-2524)Valuation



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*23-60A California Legal Forms--Transaction Guide § 60A.33*

**AUTHOR:** Reviewed by Albert G. Handelman

**§ 60A.33 Gift of S Corporation Stock to Trust**

A gift to a trust of stock in an S corporation will cause the corporation to lose its S corporation status unless (1) the donee trust meets specified requirements and (2) the gift does not otherwise endanger the corporation's S status [*see generally I.R.C. § 1361 et seq.* (Subchapter S); Ch. 2B, *Electing Subchapter S Status*]. In this regard, an S corporation may have no more than 100 shareholders [*I.R.C. § 1361(b)(1)(A)*], and all of those shareholders must be individuals, estates, qualifying trusts, or tax-exempt organizations [*see I.R.C. § 1361(b)(1)(B)*; *see also I.R.C. § 1361(c)(6)* (eligibility of tax-exempt organizations described in *I.R.C. §§ 401(a)* and *501(c)(3)*)].

A trust may hold stock in an S corporation only if specific requirements are met. If a U.S. citizen or resident is treated as owner of all of the trust under the grantor trust rules [*see I.R.C. § 671 et seq.*], the trust may properly hold the stock during the owner's lifetime and for two years thereafter [*I.R.C. § 1361(c)(2)(A)(i), (ii)*], and the deemed owner or the deemed owner's estate will be treated as the shareholder [*I.R.C. § 1361(c)(2)(B)(i), (ii)*]. If a trust was created primarily to exercise the voting power of S corporation stock, it may properly hold the stock without time limitations [*I.R.C. § 1361(c)(2)(A)(iv)*], and each beneficiary will be treated as a shareholder [*I.R.C. § 1361(c)(2)(B)(iv)*].

A qualified Subchapter S trust (QSST) may hold stock in an S corporation without time limitations [*I.R.C. § 1361(d)*], and an electing small business trust (ESBT) may also hold stock in an S corporation [*I.R.C. § 1361(e)*]. For discussion of these trusts and limitations on their use, see Ch. 70, *Complete Revocable Trust Forms* .

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Business & Corporate Law  
 Closely Held Corporations  
 General Overview  
 Business & Corporate Law  
 Corporations  
 Finance  
 General Overview  
 Tax Law  
 Federal Estate & Gift Taxes  
 Gifts (IRC secs. 2035, 2501-2524)  
 General Overview



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*23-60A California Legal Forms--Transaction Guide § 60A.34*

**AUTHOR:** Reviewed by Albert G. Handelman

#### **§ 60A.34 Gift Tax Return**

A federal gift tax return (IRS Form 709) must be filed on or before April 15th of the year after the year in which a gift is made [*I.R.C. § 6075(b)(1)*]. A short-form gift tax return (IRS Form 709-A) may be used by spouses who elect to split gifts [*see I.R.C. § 2513(a)* (gift made by one spouse may be considered as made half by one spouse and half by other spouse)]. If a donor dies in the year in which taxable gifts were made, the gift tax return for that year must be filed not later than the due date for filing the estate tax return, including extensions [*I.R.C. § 6075(b)(3)*; *see I.R.C. § 6018* (estate tax return is called "return relating to large transfers at death" after 2009)].

A gift tax return need not be filed in any of the following circumstances [*I.R.C. § 6019*]:

- The value of the gift, when added to the value of all other gifts to the same donee during the calendar year, does not exceed the amount of the annual gift tax exclusion [*see I.R.C. §§ 2503(b), 2523(i)(2)*].
- The donor makes medical payments on behalf of the donee or pays tuition to a qualifying educational organization on behalf of the donee [*I.R.C. § 2503(e)*].
- The gift is to a spouse who is a U.S. citizen [*I.R.C. § 2523(a), (i)*].
- The gift qualifies as a deductible charitable contribution [*see I.R.C. § 2522*], and is a gift of the donor's entire interest in the gift property, and the donor has not transferred any other interest in the gift property for less than adequate and full consideration in money or money's worth for a noncharitable use.
- If the gift qualifies for a charitable deduction [*see I.R.C. § 2522(d)*] as a "qualified conservation contribution," which is a contribution of a "qualified real property interest" to a charity exclusively for conservation purposes [*see I.R.C. § 170(h)*].

An extension of time to file a federal gift tax return may be obtained by filing IRS Form 8892 when the donor is not applying for an extension of time to file an income tax return. It may also be used to make a payment of gift tax when a donor is applying for an extension of time to file Form 709.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Tax Law Federal Estate & Gift Taxes Gifts (IRC secs. 2035, 2501-2524) General Overview Tax Law Federal Estate & Gift Taxes Gifts (IRC secs. 2035, 2501-2524) Imposition of Taxes Tax Law Federal Estate & Gift Taxes Gifts (IRC secs. 2035, 2501-2524) Scope Tax Law Federal Estate & Gift Taxes Gifts (IRC secs. 2035, 2501-2524) Valuation



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*23-60A California Legal Forms--Transaction Guide § 60A.35*

**AUTHOR:** Reviewed by Albert G. Handelman

**§ 60A.35 Income Tax Consequences of Gifts**

Gifts during the donor's life are not subject to income tax when received by the donee [*I.R.C. § 102(a)*]. This rule applies only to the transferred property, not to any subsequently received income from the property, and it does not apply to a gift of income from property [*I.R.C. § 102(b)*].

The income tax basis of property received as a gift is generally the same as the basis in the hands of the donor [*I.R.C. § 1015(a)*]. However, if the fair market value of the property at the time of the gift is less than its basis, the donee must use the fair market value to compute a taxable loss (but not gain) on the donee's sale of the property [*I.R.C. § 1015(a)*]. The basis of the donee will be increased by any gift tax paid by the donor on the appreciated value of the property [*I.R.C. § 1015(d)(6)*].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Tax LawFederal Estate & Gift TaxesGifts (IRC secs. 2035, 2501-2524)General OverviewTax LawFederal Income Tax ComputationGross Income (IRC sec. 61)Tax LawFederal Income Tax ComputationSales & ExchangesBasis (IRC secs. 1011-1017, 1019, 1021, 1023)Gifts & Transfers in Trust



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**[Reserved]**

§§ 60A.36[Reserved]



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*23-60A California Legal Forms--Transaction Guide § 60A.40*

**AUTHOR:** Reviewed by Albert G. Handelman

**§ 60A.40 California UTMA**

The California Uniform Transfers to Minors Act [*Prob. Code § 3900 et seq.*] (the UTMA) provides a nonexclusive method for giving property to minors without the creation of a guardianship or trust [*see Prob. Code § 3925*]. Testamentary or inter vivos transfers of any type of property or property interest may be made under the UTMA [*see Prob. Code §§ 3901(f), 3903-3907*].

Under the UTMA, property is transferred to a custodian who holds, manages, and invests the property [*see Prob. Code § 3912*]. The custodial property is indefeasably vested in the minor, subject to the rights, powers, duties, and authority granted to the custodian by the UTMA [*Prob. Code § 3911(b)*]. The property is transferred to the minor when he or she reaches age 18 [*see Prob. Code § 3920.5(g)*], unless the instrument of transfer provides for a longer custodial period, which may be up to age 21 for property transferred by irrevocable gift [*Prob. Code § 3920.5(e)*], or age 25 for property transferred (1) on the occurrence of a future event, (2) by the exercise of a power of appointment, or (3) from a personal representative or trustee when there is no will or trust authorizing a transfer under the UTMA [*Prob. Code § 3920.5(c), (d), (f)*].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law  
 Personal Gifts  
 Gifts to Minors  
 General Overview  
 Estate, Gift & Trust Law  
 Personal Gifts  
 Gifts to Minors  
 Custodial Duties & Rights  
 Estate, Gift & Trust Law  
 Personal Gifts  
 Gifts to Minors  
 Uniform Acts



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*23-60A California Legal Forms--Transaction Guide § 60A.41*

**AUTHOR:** Reviewed by Albert G. Handelman

**§ 60A.41 Gifts Under the UTMA**

The procedural requirements for completing a transfer under the UTMA vary depending on the type of property transferred and, in some cases, on whether the custodian or another party will be the transferor [*see Prob. Code § 3909(a)(1)-(7)*; *see also § 60A.43[1]*]. These requirements are relatively simple, particularly in comparison to the creation of a typical trust. Essentially, the transferor must place the property or a specified instrument of title (depending on the kind of property involved) into the possession or control of the custodian and state that the transfer is made under the UTMA. The precise methods for transferring specific kinds of property are discussed in detail in § 60A.123. Although the UTMA states that the transferor must place the custodian in control of the custodial property as soon as practicable [*Prob. Code § 3909(c)*], it also provides that failure to comply with that requirement will not affect an otherwise valid transfer [*Prob. Code § 3911(a)(1)*].

Each transfer under the UTMA may be made for only one minor [*Prob. Code § 3910*]. A transfer made under the UTMA is irrevocable [*Prob. Code § 3911(b)*].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law  
 Personal Gifts  
 Gifts to Minors  
 General Overview  
 Estate, Gift & Trust Law  
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*23-60A California Legal Forms--Transaction Guide § 60A.42*

**AUTHOR:** Reviewed by Albert G. Handelman

**§ 60A.42 Testamentary Transfers and Other Transfers to Take Effect on Occurrence of a Future Event**

A transferor may make a revocable nomination of a custodian to receive property for a minor beneficiary on occurrence of a future event. The nomination may be made in a will, trust, deed, an instrument exercising a power of appointment, or in a writing designating a beneficiary of contractual rights that is registered with or delivered to the payor, issuer, or other obligor of those rights [*Prob. Code § 3903(a)*; *see Prob. Code § 6341 et seq.* (testamentary dispositions)]. Such a nomination does not create custodial property until the nominating instrument becomes irrevocable or the transfer to the nominated custodian is completed. Unless previously revoked, the custodianship becomes effective on the occurrence of the specified event [*Prob. Code § 3903(c)*]. A personal representative or trustee may make an irrevocable transfer to a custodian as authorized in the governing will or trust [*see Prob. Code § 3905*].

A testamentary gift under the UTMA to a person who, prior to distribution, has attained the age at which the custodianship was to terminate, will be deemed to be a direct devise to that person unless the will clearly requires otherwise [*Prob. Code § 6341(b)*].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law  
Personal Gifts  
Gifts to Minors  
General Overview  
Estate, Gift & Trust Law  
Personal Gifts  
Procedures  
General Overview  
Estate, Gift & Trust Law  
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Bequests & Devises



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*23-60A California Legal Forms--Transaction Guide § 60A.43*

**AUTHOR:** Reviewed by Albert G. Handelman

**§ 60A.43 Custodian**

**[1] Designation of Custodian**

In most cases, the custodian may be the transferor, an adult other than the transferor, or a trust company [*see Prob. Code § 3909(a)(1)-(6)*]. The permissible methods of transferring some types of property are more limited if the transferor rather than some other person or entity is named as custodian [*see Prob. Code § 3909(a)(1), (3), (6)*] (securities; insurance policies and annuities; tangible personal property evidenced by a certificate of title); *see also § 60A.123*]. If the property is personal property of a type not evidenced by a title document or other certificate of ownership, the custodian must be an adult other than the transferor or a trust company [*Prob. Code § 3909(a)(7); see Prob. Code § 3909(b)*] (form of transfer instrument)].

The designation of an ineligible custodian will not affect the validity of the transfer, except when the transferor is designated as custodian and is ineligible to serve in that capacity [*Prob. Code § 3911(a)(2); see Prob. Code § 3909(a)*]. Similarly, the death, incapacity, or disclaimer of the office by the designated custodian will not affect the validity of the transfer [*Prob. Code § 3911(a)(3)*].

A particular transfer may be made for only one minor, and only one person may be the custodian [*Prob. Code § 3910*]. All custodial property held under the UTMA by the same custodian for the benefit of the same minor constitutes a single custodianship [*Prob. Code § 3910*].

**[2] Vacancy in Position of Custodian**

A person nominated as custodian may decline to serve by delivering a valid disclaimer to (1) the person who made the nomination, (2) the transferor, or (3) the transferor's legal representative [*Prob. Code § 3918(a); see Prob. Code § 260 et seq.*] (disclaimer of testamentary and other interests); *see also § 60A.230*]. A custodian may resign at any time by (1) delivering a written notice to the successor custodian (and to the minor, if the minor is at least 14 years old), and (2) delivering the custodial property to the successor custodian [*Prob. Code § 3918(c)*]. A custodian may also be removed

for cause [*Prob. Code § 3918(f), (h)*].

The transferor may designate one or more persons to serve as successor custodians in case the original custodian (or a successor custodian) is unable or ineligible to serve, or declines, resigns, dies, becomes incapacitated, or is removed. A designation by the transferor must be made in the original transfer document, or in a separate writing executed and dated at the same time as the original transfer document [*Prob. Code § 3918(b)*]. The transferor may designate one successor, or two or more successors to serve in a stated order of priority [*Prob. Code § 3918(b)*]. The designation must set forth the name of each successor custodian and, if the transferor is designating two or more successors, the order in which each is designated to serve [*Prob. Code § 3918(b)*].

A similar procedure for designating successor custodians applies to a transfer that is to be made only on the occurrence of a future event [ *see § 60A.42*]. In such a case, the nomination may name one or more substitute custodians to whom the property must be transferred (in the order designated) if the first nominated custodian dies before the transfer takes effect, or is unable, declines, or is ineligible to serve [*Prob. Code § 3903(a)*].

A custodian may designate a successor custodian at any time [*Prob. Code § 3918(b)*]. Unlike a transferor, who may designate two or more successor custodians to serve in a stated order of priority [*Prob. Code § 3918(b)*], a custodian is limited to designating one successor at a time [*see Prob. Code § 3918(b)*]. If the instrument in which the custodian designates a successor does not contain or is not accompanied by the custodian's resignation, the custodian's designation of a successor will not take effect until the custodian resigns, dies, becomes incapacitated, or is removed [*Prob. Code § 3918(b)*]. A successor custodian effectively designated by a transferor, however, has priority over a successor custodian designated by a custodian [*Prob. Code § 3918(b)*].

A minor 14 years of age or over has a limited right to designate a successor custodian. The minor may designate a custodian only if the transferor has not effectively designated a successor and the original custodian is ineligible, dies, or becomes incapacitated without having effectively designated a successor [*Prob. Code § 3918(d)*]. The successor nominated by the minor must be an adult member of the minor's family, a conservator of the minor, or a trust company [*Prob. Code § 3918(d)*]. If the minor has not reached the age of 14 years or fails to act within 60 days after the ineligibility, death, or incapacity, the minor's conservator becomes the successor custodian [*Prob. Code § 3918(b)*]. If the minor has no conservator or if the conservator declines to act, the transferor, the legal representative of the transferor or the custodian, an adult member of the minor's family, or any other interested person may petition the court to designate a successor custodian [*Prob. Code § 3918(d)*].

**PRACTICE TIP:**

Note that the term "conservator" as used above includes a guardian of the minor's estate [ *Prob. Code § 3901(d)*]. *Commentary by Albert G. Handelman.*

A successor custodian may be any adult or trust company. However, the original transferor may not be the successor if the original transfer was by irrevocable gift or irrevocable exercise of a power of appointment [*Prob. Code § 3918(b)*; *see Prob. Code § 3904*].

**[3] General Powers and Duties of Custodian**

The custodian has broad powers with respect to the handling, management, and investment of the custodial property [*Prob. Code §§ 3912(a), 3913*]. The exercise of these powers is limited only by the "prudent person" standard and is not limited by any other statute restricting investments by fiduciaries [*Prob. Code § 3912(b)*]. The custodian also has discretion to retain any custodial property received from the transferor without liability to the minor or the minor's estate [*Prob. Code § 3912(b)(2)*].

The custodian is required to keep records of transactions in custodial property [*see Prob. Code § 3912(e)*] and must

keep the custodial property separate from other property and in a manner that clearly identifies it as custodial property of the minor [*Prob. Code § 3912(d)*].

A custodian is entitled to reimbursement from the custodial property for reasonable expenses incurred in the performance of the custodian's duties. Except when the custodian is also transferor, a custodian has a noncumulative election during each calendar year to charge reasonable compensation for services performed during that year. A custodian is not required to give bond unless an interested party petitions the court to require that a bond be given [*Prob. Code § 3915; see Prob. Code § 3918(f)*].

#### **[4] Payments of Custodial Property to or for Benefit of Minor**

The custodian may deliver or pay to or for the benefit of the minor as much of the custodial property as the custodian considers advisable for the minor's use and benefit, without court order and without regard for any personal duty or ability of the custodian or any other person to support the minor or to any other income or property of the minor that could be available for that purpose [*Prob. Code § 3914(a)*]. On petition by an interested person, or by the minor if he or she is 14 years of age or older, the court may order the custodian to pay or deliver to the minor or expend for the minor's benefit as much of the custodial property as the court considers advisable for the minor's use and benefit [*Prob. Code § 3914(b)*]. These rights and duties do not affect any obligation of any person to support the minor [*Prob. Code § 3914(c)*].

A transferor who names himself or herself as custodian may restrict his or her powers, if desired, by prohibiting payments of custodial property to or for the benefit of the minor except by court order on a showing that the expense is necessary for the support, maintenance, or education of the minor [*Prob. Code § 3914(d); see § 60A.222*]. For discussion of the estate tax advantages of such a restriction, see § 60A.44[3].

#### **[5] Liability of Custodian**

A custodian who serves without compensation is not liable for losses to the custodial property unless the losses result from the custodian's bad faith, intentional wrongdoing, gross negligence, or failure to observe the prudent person rule in making investments [*Prob. Code § 3912(b)*].

The custodian is not liable on contracts entered into in a custodial capacity unless the custodian fails to reveal that capacity and to identify the custodianship in the contract. The custodian is also insulated from personal liability for obligations arising from control of custodial property and from liability for torts committed during the custodianship unless the custodian is personally at fault [*Prob. Code § 3917(b)*]. Third parties are entitled to rely on the authority of the custodian and the validity or propriety of acts performed in a custodial capacity [*see Prob. Code § 3916*].

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law  
Personal Gifts  
Gifts to Minors  
General Overview  
Estate, Gift & Trust Law  
Personal Gifts  
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Custodial Duties & Rights  
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DIVISION IV: WILLS AND TRUSTS  
 CHAPTER 60A GIFTS  
 PART II. LEGAL BACKGROUND  
 C. Gifts Under Uniform Transfer to Minors Act

*23-60A California Legal Forms--Transaction Guide § 60A.44*

**AUTHOR:** Reviewed by Albert G. Handelman

**§ 60A.44 Tax Aspects of UTMA Gifts**

**[1] Gift Tax Consequences**

Gifts under the UTMA qualify for the annual gift tax exclusion [*see I.R.C. § 2503(b); § 60A.32[4]*]. Although the general rule is that gifts of future interests are ineligible for that exclusion [*see I.R.C. § 2503(b)(1); § 60A.32[4][b]*], a gift to an individual who has not attained age 21 is not considered a future interest for purposes of this rule if the property and any income from it may be expended by or for the benefit of the donee before the donee attains 21 and will pass to the donee (or the donee's estate) when the donee reaches 21 [*I.R.C. § 2503(c); see § 60A.32[4][d]*].

No taxable gift occurs for federal gift tax purposes if the custodian subsequently resigns or the custodianship is terminated [*see Rev. Rul. 59-357, 1959-2 C.B. 212*].

**[2] Income Tax Consequences**

Income earned by the custodial property is taxable to the minor except to the extent that the income is distributed to the minor for his or her support [ *Rev. Rul. 56-484, 1956-2 C.B. 23* ]. Regardless of the identity of the custodian, the person charged with responsibility for support of the minor under California law is taxed on income earned by the custodial property that is used for the support of the minor [ *Rev. Rul. 56-484, 1956-2 C.B. 23* ]. Such distributions are taxable to the donor with a legal obligation to support the minor under federal and California law because they discharge the donor's legal duty to support the minor [*see I.R.C. §§ 61, 677(b); Rev. & Tax. Code § 17071*].

Before the Tax Reform Act of 1986, it was possible for parents to shift income tax liability for certain income to their children by transferring income-producing property to the children. Since income taxed in the hands of the parents was almost always taxed at higher rates than income taxed in the hands of the children, a family could achieve potentially significant income tax savings by making transfers of this kind. However, the Tax Reform Act of 1986 included provisions for a "kiddie tax" under which some of the unearned income of children under the age of 14 (increased to age 18 in 2006) will be taxed at the parents' rates [*see I.R.C. § 1(g)*]. For "kiddie tax" purposes, "unearned income" is all

income that is not earned income, which includes wages, salaries, fees, and other compensation for personal services [*I.R.C. § 911(d)(2)*]. Thus, the "kiddie tax" applies broadly to all of the kinds of income that a parent could shift to a child by transferring property to the child, such as interest, dividends, rent, and similar items.

The "kiddie tax" applies to the net unearned income of any child who is under the age of 18 years and has at least one living parent at the close of the taxable year [*I.R.C. § 1(g)(1), (2)*]. Net unearned income is determined by computing the child's unearned income for the year and subtracting from it the sum of (1) the maximum standard deduction available for the child for the year under *I.R.C. § 63(c)(5)(A)* and (2) the greater of the maximum standard deduction available for the child for the year or the amount of the child's itemized deductions, if any, directly relating to the production of the unearned income [*I.R.C. § 1(g)(4)*]. The amount of the maximum standard deduction available for the child under *I.R.C. § 63(c)(5)(A)* is indexed for inflation and changes from year to year [*I.R.C. § 63(c)(4)*].

For "kiddie tax" purposes, the source of the unearned income is immaterial. The tax applies with equal force to unearned income produced by property transferred by gift under the Uniform Transfers to Minors Act, property held in trust, property received by way of gift, and property earned by the minor himself or herself. If, for example, the minor works, saves money, and then deposits the money in an interest-bearing account, the interest will be "unearned income" and potentially subject to the "kiddie tax."

### [3] Estate Tax Consequences

If a UTMA donor is the custodian and dies while acting in that capacity, the custodial property will be included in the donor's gross estate for federal estate tax purposes [ *Rev. Rul. 57-366, 1957-2 C.B. 618* ]. The donor's power as custodian to distribute custodial property at his or her discretion for the minor's benefit is deemed to be the exercise of a power over a revocable transfer [*see I.R.C. § 2038; Stuit v. Commissioner (7th Cir. 1971) 452 F.2d 190* ]. However, if the donor waives the right as custodian to make support payments, so that the support payments are made pursuant to court order and not at the donor-custodian's discretion [*Prob. Code § 3914(d)*], the donor will not be deemed to have retained a power over the custodial property, and the custodial property will not be included in the donor's gross estate.

### Legal Topics:

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law  
 Personal Gifts  
 Gifts to Minors  
 General Overview  
 Estate, Gift & Trust Law  
 Personal Gifts  
 Gifts to Minors  
 Uniform Acts  
 Tax Law  
 Federal Estate & Gift Taxes  
 Gifts (IRC secs. 2035, 2501-2524)  
 General Overview  
 Tax Law  
 Federal Estate & Gift Taxes  
 Gifts (IRC secs. 2035, 2501-2524)  
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*23-60A California Legal Forms--Transaction Guide §§ 60A.45-60A.99*

**AUTHOR:** Reviewed by Albert G. Handelman

**[Reserved]**

§§ 60A.45[Reserved]



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DIVISION IV: WILLS AND TRUSTS  
CHAPTER 60A GIFTS  
PART III. TRANSACTION GUIDE  
A. Client Interview--Facts and Documents

*23-60A California Legal Forms--Transaction Guide § 60A.100*

**AUTHOR:** Reviewed by Albert G. Handelman

**§ 60A.100 Facts**

1. Description of donor.

- a. Name and address.
- b. Age.
- c. Marital status; if married, name of spouse.

2. Description of gift property.

- a. Real property.
  - (1) Legal description.
  - (2) Street address, if any.

b. Bonds.

- (1) Principal amount.
- (2) Name of obligor.
- (3) Maturity date.

(4) Interest rate and dates on which interest is payable.

c. Stock.

(1) Number and class or series of shares.

(2) Whether or not shares are publicly traded and, if not publicly traded, whether they are subject to legal transfer restrictions or terms of any buy-sell agreement.

(3) Par value, if any, and current market value.

(4) Name and address of corporation.

d. Life insurance policy.

(1) Name of insurer.

(2) Type of policy and number.

(3) Face amount of policy.

(4) Current cash value, if any.

(5) Outstanding loans against policy.

e. Interest in property based on duration of a person's life (i.e., a life estate or remainder).

(1) Name and address of that person.

(2) Age of that person.

(3) Gender of that person.

f. Money.

(1) Name and address of bank or money fund.

(2) Type of account and number.

g. Other personal property.

(1) Brand name, if any, and model number.

(2) Serial or identifying number, if any.

(3) Other information to identify property clearly (age, location, color, number of pieces, etc.).

3. Identity of donee.

- a. Name and address.
  - b. Age.
  - c. Marital status; if married, name of spouse.
  - d. Relationship to donor.
  - e. Consideration to be furnished, if any.
4. Identity of custodian, if gift is to be made under the California Uniform Transfers to Minors Act.
- a. Name and address.
  - b. Age, if a person.
  - c. Relationship to donor and donee.
5. Description of trust, if gift made to, or in, trust.
- a. Trustee.
    - (1) Name.
    - (2) Address.
  - b. Beneficiaries.
    - (1) Name.
    - (2) Age.
    - (3) Address.
6. Amounts of previous taxable gifts made by donor, and dates of those gifts.
7. Amounts of other gifts made by donor during current calendar year.
8. Donor's tax basis in gift property [*see I.R.C. § 1011; see also § 60A.35*].
9. If gift causa mortis, nature of donor's illness, injuries or other peril.
10. If gift tax return will be required:
- a. Donor's Social Security number.
  - b. If gift is to be split with spouse:
    - (1) Spouse's Social Security number.

(2) Marital status at the time that gift is made and during current calendar year.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Personal Gifts General Overview Estate, Gift & Trust Law Personal Gifts Procedures General  
Overview Estate, Gift & Trust Law Personal Gifts Procedures Evidence



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PART III. TRANSACTION GUIDE  
A. Client Interview--Facts and Documents

*23-60A California Legal Forms--Transaction Guide § 60A.101*

**AUTHOR:** Reviewed by Albert G. Handelman

**§ 60A.101 Documents**

1. IRS forms:

**NOTE:**

These forms may be obtained from any local IRS office.

a. If gift is taxable, IRS Form 709.

b. If amount of split gift is less than annual exclusion, IRS Form 709-A (gift tax returns).

2. If gift consists of real property, copy of deed conveying title to donor and title policy and survey, if available.

3. If gift consists of bond, bond and assignment.

4. If gift consists of insurance:

a. Insurance policy and assignment.

b. IRS Form 712, Life Insurance Statement.

**NOTE:**

Request a completed Form 712 from the insurance company. In some cases the insurance company is required to file Form 712 directly with the IRS.

5. If gift consists of interest in trust, or gift to trust, copy of trust instrument or will creating trust.

6. If gift consists of forgiveness of debt:

a. Note evidencing indebtedness.

b. Instrument creating security interest, if any.

7. Copies of donor's prior gift tax returns, if any.

8. Copies of donor's will and spouse's will, if any.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawPersonal GiftsProceduresGeneral OverviewTax LawFederal Estate & Gift TaxesGifts (IRC secs. 2035, 2501-2524)General OverviewTax LawFederal Estate & Gift TaxesGifts (IRC secs. 2035, 2501-2524)Imposition of Taxes



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DIVISION IV: WILLS AND TRUSTS  
CHAPTER 60A GIFTS  
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A. Client Interview--Facts and Documents

*23-60A California Legal Forms--Transaction Guide §§ 60A.102-60A.109*

**AUTHOR:** Reviewed by Albert G. Handelman

**[Reserved]**

§§ 60A.102[Reserved]



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DIVISION IV: WILLS AND TRUSTS

CHAPTER 60A GIFTS

PART III. TRANSACTION GUIDE

B. Preliminary Determinations

*23-60A California Legal Forms--Transaction Guide § 60A.110*

**AUTHOR:** Reviewed by Albert G. Handelman

**§ 60A.110 In General**

1. Ascertain whether gift can be made.

a. Determine whether donor has requisite mental capacity [ *see § 60A.10[2][b]*].

b. Determine whether property is community, quasi-community, or separate property [ *see § 60A.12*].

**NOTE:**

The spouse must consent to any gift of community property and has an expectancy in any gift of quasi-community property [ *see Fam. Code §§ 1100, 2550 et seq.; Prob. Code §§ 102, 6101*].

c. Determine if there are any restrictions on conveyance of title, such as:

(1) Restrictive covenants [ *see Ch. 28C, Covenants, Conditions, and Restrictions* ].

(2) Jointly held title.

2. Ascertain whether donee has capacity to take title to gift property:

a. Must not be under any legal disability.

b. Must be age 18 or older.

**NOTE:**

See § 60A.123 for a guide to gifts made under Uniform Gifts to Minors Act.

3. Determine whether consideration will be given [ *see* § 60A.10[2][f]].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawPersonal GiftsGeneral OverviewEstate, Gift & Trust LawPersonal GiftsElements of Valid GiftsGeneral OverviewEstate, Gift & Trust LawPersonal GiftsElements of Valid GiftsCapacity of DonorEstate, Gift & Trust LawPersonal GiftsProceduresGeneral Overview



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DIVISION IV: WILLS AND TRUSTS

CHAPTER 60A GIFTS

PART III. TRANSACTION GUIDE

B. Preliminary Determinations

*23-60A California Legal Forms--Transaction Guide § 60A.111*

**AUTHOR:** Reviewed by Albert G. Handelman

**§ 60A.111 Tax Considerations**

1. Consider advantages and disadvantages of inter vivos transfers over transfers by will:

a. Advantages include:

- (1) Donee's immediate needs are satisfied while donor is still living.
- (2) Income from transferred property is taxable to donee, rather than donor, often at lower rate, and is not includable in donor's gross estate.
- (3) Within applicable limits of annual exclusion, gifts may be made without incurring any federal estate tax or using up any portion of unified credit.

**NOTE:**

In determining the total amount of the taxable gifts for a calendar year, an exclusion (called the "annual exclusion") is available for gifts made to each donee by each donor during a calendar year [*I.R.C. § 2503(b)*; *see § 60A.32[4]*]. The amount of the annual gift tax exclusion, which is subject to annual adjustment for inflation, is \$11,000 for calendar years 2002 through 2005 [*I.R.C. § 2503(b)*; *Rev. Proc. 2004-71, 2004-50 I.R.B. 970 (2005 exclusion amount)*; *Rev. Proc. 2003-85 (2004 exclusion amount)*; *Rev. Proc. 2002-70 (2003 exclusion amount)*; *Rev. Proc. 2001-59 (2002 exclusion amount)*]. For gifts made before 2002, the annual gift tax exclusion was \$10,000 [*Rev. Proc. 2001-13*]. The amount of the annual exclusion can be effectively doubled if gifts are made by a husband and wife [*see I.R.C. § 2513(a)* (gift splitting)].

Although transfers to a spouse generally are tax-free under the marital deduction [*see*

*I.R.C. § 2523(a)* (unlimited marital deduction for gift to spouse), the marital deduction generally is unavailable for gifts to a spouse who is not a U.S. citizen [*see I.R.C. § 2523(i)*]. However, a significantly increased annual exclusion is allowed for gifts to noncitizen spouses [*see I.R.C. § 2523(i)* (annual exclusion amount of \$100,000, with upward adjustments for inflation for gifts made after 1998)]. For gifts made in 2005, the amount of the exclusion is \$117,000 [*I.R.C. §§ 2503(b), 2523(i); Rev. Proc. 2004-71, 2004-50 I.R.B. 970*]. For gifts made in 2004, the amount of the exclusion is \$114,000 [*Rev. Proc. 2003-85*]. For gifts made in 2003, the amount of the exclusion is \$112,000 [*Rev. Proc. 2002-70*]. For gifts made in 2002, the amount of the exclusion is \$110,000 [*Rev. Proc. 2001-59; see § 60A.32[5]*].

(4) Gift property is valued on date of transfer, so subsequent appreciation is not taxable to donor's estate [*I.R.C. § 2512*].

(5) Funds used to pay gift tax on gifts made more than three years prior to donor's death are removed from donor's gross estate for federal estate tax purposes [*I.R.C. § 2035(c)*].

b. Disadvantages include:

(1) Donee takes donor's tax basis in gift property [*see I.R.C. §§ 1015, 1041*], thus increasing potential taxable gain on donee's subsequent disposition of property.

(2) Donor's enjoyment of estate is reduced.

2. Determine value of gift.

a. Generally, value is fair market value on date of transfer reduced by consideration given by donee [*I.R.C. § 2512; Treas. Reg. § 25.2512-1*].

b. Value of insurance policy is replacement cost or interpolated terminal reserve [*Treas. Reg. § 25.2512-6(a)*].

c. Value of forgiven debt is amount of unpaid principal plus accrued interest [*Treas. Reg. § 25.2512-4*].

d. Value of stocks and bonds is fair market value on date of gift.

(1) If sold on exchange, fair market value is mean selling price [*Treas. Reg. § 25.2512-2(b)*].

(2) If stock of closely held corporation, fair market value is based on factors such as financial history, value of assets, goodwill, and business conditions [*see Rev. Rul. 59-60, 1959-1 C.B. 237; Rev. Rul. 80-213, 1980-2 C.B. 101*].

e. Value of annuities, life estate, and future interests based on continuation of person's life is present value, determined with reference to age and sex of that person [*Treas. Reg. § 25.2512-5*].

f. Value of interest in business is amount a willing buyer would pay a willing seller [*Treas. Reg. § 25.2512-3*].

g. Value of real estate, valuable personal property or interest in closely held corporation should be determined by professional appraiser.

3. Consider use of methods to maximize excludable gifts to donee:

a. Election to split gifts with spouse will effectively double amount of annual exclusion [*see I.R.C. § 2513(a)* (gift splitting); *see also I.R.C. § 2503(b)* (annual exclusion); § 60A.32[4][a]].

b. If gift is to donor's spouse and spouse is not a U.S. citizen, amount of annual gift tax exclusion is significantly increased [*see I.R.C. § 2523(i)*; *see also § 60A.32[5]*].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law  
Personal Gifts  
General Overview  
Tax Law  
Federal Estate & Gift Taxes  
Gifts (IRC secs. 2035, 2501-2524)  
General Overview  
Tax Law  
Federal Estate & Gift Taxes  
Gifts (IRC secs. 2035, 2501-2524)  
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Taxes  
Tax Law  
Federal Estate & Gift Taxes  
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DIVISION IV: WILLS AND TRUSTS

CHAPTER 60A GIFTS

PART III. TRANSACTION GUIDE

B. Preliminary Determinations

*23-60A California Legal Forms--Transaction Guide § 60A.112*

**AUTHOR:** Reviewed by Albert G. Handelman

**§ 60A.112 Determinations Under California UTMA**

**NOTE:**

The principal advantage of making a gift under the California Uniform Transfers to Minors Act is administrative simplicity. In addition, such a gift qualifies as a gift of a present interest for purposes of the annual gift tax exclusion [*see I.R.C. § 2503(b); § 60A.32[4][a], [d]*]. In contrast, the creation of a trust is usually more complex, but gives the transferor greater flexibility, including the ability to postpone outright transfer of the gift property to the donee for far longer than would be possible under the UTMA [*see Prob. Code §§ 3920, 3920.5; see also § 60A.123*].

1. Determine whether gift property is special type of property for purposes of Act [*see Prob. Code § 3909*]:

**NOTE:**

The requirements for completing a gift under the California Uniform Transfers to Minors Act vary somewhat according to the category of property involved [*see Prob. Code § 3909(a)*].

a. Registered or unregistered securities.

**NOTE:**

The former Uniform Gifts to Minors Act [former *Civ. Code § 1154 et seq.* (repealed 1984)] defined "security" to include an interest in a partnership or limited partnership [former *Civ. Code § 1155*]. Although *Prob. Code § 3901*, which replaced former *Civ.*

*Code § 1155*, does not define "security" for purposes of the UTMA, the omission was not intended to change the meaning or construction of that term [*see* Senate Legislative Committee Comment to *Prob. Code § 3901*]. Before attempting to make a gift of securities, it is necessary to determine whether the securities are subject to any conditions or restrictions on transfer. There are two types of transfer restrictions: those imposed by the issuer of the securities (such as a buy-sell agreement or right of first refusal) and those imposed by the Commissioner of Corporations. Transfer restrictions imposed by the Commissioner of Corporations generally are inapplicable to transfers by gift or on death [*see 10 Cal. Code Reg. § 260.141.11(b)*].

- b. Money.
- c. Life insurance policy, endowment insurance policy, or annuity contract.
- d. Irrevocable exercise of power of appointment or irrevocable present right to future payment under a contract.
- e. Interest in real property.
- f. Tangible personal property evidenced by certificate of title issued by a government agency.

2. Decide on individual or entity to be named as custodian of gift [*see Prob. Code § 3909(a)(1)-(7)*].

**NOTE:**

Only one person may act as custodian for a gift at any time [*Prob. Code § 3910*]. The designation of an ineligible custodian will not affect the validity of the transfer, except when the transferor is designated as custodian and is ineligible to serve in that capacity [*Prob. Code § 3911(a)(2)*; *see Prob. Code § 3909(a)*].

- a. Transferor.

**NOTE:**

If the gift property consists of securities, insurance policies, annuities, or tangible personal property evidenced by an official certificate of title, the methods available for transferring the property are more limited if the transferor is named as custodian [*see Prob. Code § 3909(a)(3), (6)*; *see § 60A.123* (procedures)]. If the transferred property is of a type not described in paragraph 1, *above*, the transferor may not be named as custodian [*see Prob. Code § 3909(a)(7)*].

- b. Adult other than transferor.
- c. Trust company.

3. If transfer is revocable transfer to take place on occurrence of future event, determine whether transferor wishes to nominate one or more substitute custodians in event that first nominee dies before transfer or is unable, declines, or is ineligible to serve [*see Prob. Code § 3903(a)*].

**NOTE:**

Although the statutory provision permitting nomination of a substitute custodian is relevant principally to testamentary gifts, it is not limited exclusively to that situation [*see Prob. Code § 3903(a)*]. For example,

it would apply to a revocable inter vivos transfer to take effect on the death of a third party. The UTMA does not authorize the transferor to name a successor custodian for property transferred by irrevocable inter vivos gift. Instead, this right is reserved first to the custodian, then to the minor if he or she is 14 or older, and finally to the court on petition of any interested party (including the transferor or the transferor's legal representative) [*see Prob. Code §§ 3904, 3918(b), (d); see also § 60A.43[2]*].

4. Determine whether to delay time for outright transfer of gift property to minor beyond minor's eighteenth birthday.

**NOTE:**

Unless the governing instrument specifies a different period, the custodianship will be terminated when the minor attains age 18 or dies, whichever occurs first [*Prob. Code § 3920*].

a. Transfer may be delayed until minor attains age 21 if property is transferred by irrevocable inter vivos gift [*Prob. Code § 3920.5(e)*].

b. Transfer may be delayed until minor attains age 25 if property is either:

(1) Transferred by irrevocable exercise of power of appointment [*Prob. Code § 3920.5(d)*];

(2) Transferred by revocable transfer to take place on occurrence of a future event [*Prob. Code § 3920.5(c); see Prob. Code § 3903*]; or

(3) Irrevocably transferred to custodian by personal representative or trustee pursuant to terms of governing will or trust [*Prob. Code § 3920.5(c); see Prob. Code § 3905(a)*].

5. If transferor will be named as custodian, determine whether to limit transferor's custodial powers by authorizing payment or expenditure to or for use or benefit of minor only by court order on showing that expenditure is necessary for minor's support, maintenance, or education [*see Prob. Code § 3914(d)*].

**NOTE:**

If the donor names himself or herself as custodian under the UTMA and dies while acting in that capacity, the custodial property will be included in his or her gross estate unless the custodial powers are limited in the manner described above [ *Rev. Rul. 57-366, 1957-2 C.B. 618 ; see I.R.C. § 2038; § 60A.44[3]*]. To determine whether or not such an election should be made, it is necessary to weigh the loss of flexibility that would result from such an election against the anticipated tax savings. The tax advantages of such an election obviously increase according to the size of the transferor's taxable estate and the value of the gift. If such an election will be made, a declaration must be prepared and filed with the superior court [*Prob. Code § 3914(d); see § 60A.123; see also § 60A.222*].

6. Determine whether custodian will be compensated [*see Prob. Code § 3915(b)*].

**NOTE:**

The statute gives a custodian (other than a custodian who is also the transferor) a noncumulative election during each calendar year to charge a reasonable compensation for services performed during that year, and does not specifically authorize the compensation for an inter vivos gift to be fixed prior to the time of transfer [*see Prob. Code § 3915(b)*]. However, the comments to that provision state that compensation can be determined by agreement of the parties [*see Law Revision Commission comment to Prob. Code § 3915(b)*]. Further, in the case of a testamentary gift under the UTMA, the will may specify the standard

of compensation of the custodian [*Prob. Code § 6345*].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Personal Gifts Gifts to Minors General Overview Estate, Gift & Trust Law Personal Gifts Gifts to Minors Custodial Duties & Rights Estate, Gift & Trust Law Personal Gifts Gifts to Minors Uniform Acts



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DIVISION IV: WILLS AND TRUSTS

CHAPTER 60A GIFTS

PART III. TRANSACTION GUIDE

B. Preliminary Determinations

*23-60A California Legal Forms--Transaction Guide §§ 60A.113-60A.119*

**AUTHOR:** Reviewed by Albert G. Handelman

**[Reserved]**

§§ 60A.113[Reserved]



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DIVISION IV: WILLS AND TRUSTS  
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C. Procedural Guide to Gifts

*23-60A California Legal Forms--Transaction Guide § 60A.120*

**AUTHOR:** Reviewed by Albert G. Handelman

**§ 60A.120 Preparation and Execution of Written Instrument**

1. If gift consists of personal property, prepare gift instrument containing [ *see* § 60A.200]:

**NOTE:**

A written instrument is not required for a gift of personal property, but is nevertheless advisable except for outright gifts of cash.

- a. Name of donee.
- b. Clear, complete, and accurate description of gift property.
- c. Statement of donative intent.

**NOTE:**

A statement of donative intent is especially advisable if the transfer is a gift causa mortis or if the donee will pay gift tax or furnish other consideration [ *see* §§ 60A.201 (gift causa mortis), 60A.207 (gift conditional on payment of gift tax by donee)].

d. Date of execution.

**NOTE:**

Since a gift is valued on the date of transfer for tax purposes [ *see* I.R.C. § 2512], it is important to include the date of execution.

e. If property is community property, space for signature of donor's spouse.

**NOTE:**

A spouse generally cannot make a gift of community personal property, or dispose of community personal property for less than fair and reasonable value, without the written consent of the other spouse [*Fam. Code § 1100(b)*]. However, this rule does not apply to gifts mutually given by both spouses to third parties, or to gifts given by one spouse to the other spouse [*Fam. Code § 1100(b)*]. For further discussion, see § 60A.12.

f. Acknowledgment (optional).

g. Statement of acceptance to be executed by donee (optional).

2. If gift consists of real property:

a. Prepare deed [for formal requisites for execution, acknowledgment, delivery, and recordation of deeds, *see* Ch. 27, *Deeds and Recording* ].

b. If property is community property, have deed executed by both spouses.

**NOTE:**

Although there is no general rule prohibiting one spouse from making a gift of community real property, generally both spouses must join (either personally or by duly authorized agent) in executing any instrument by which community real property is conveyed [*Fam. Code § 1102*]. For further discussion, see § 60A.12.

c. Record deed [*see Civ. Code §§ 1169, 1170*].

3. If gift is in or to trust:

a. Prepare and execute trust instrument if trust is not already in existence [ *see* Ch. 72, *Irrevocable Trusts* ].

b. Transfer property to trust if trust is already in existence.

4. If donee is a minor or a person under a legal disability, draft instrument granting title to guardian or custodian in that capacity.

**NOTE:**

A gift to a minor (other than a gift in trust) ordinarily should be made under the California Uniform Transfers to Minors Act [*Prob. Code § 3900 et seq.*]. The procedures for completing a gift under the UTMA are discussed in § 60A.123.

5. If instrument under which gift is made was drafted or transcribed by donee, or if donee is relative (by blood or marriage), employee, partner, domestic partner [*see Fam. Code § 297*], or cohabitant of person who drafted instrument, transcribed instrument, or caused it to be transcribed, take either of following steps to avoid having gift invalidated:

**NOTE:**

The Probate Code contains special rules invalidating donative transfers to "disqualified persons" [*Prob. Code § 21350 et seq.*; *see Prob. Code § 21350.5*]. These rules, however, are subject to important exceptions. For example, a transfer to a disqualified person will not be invalidated when the instrument

under which the transfer is made is reviewed by an independent attorney who must attempt to determine if the intended consequence is the result of fraud, menace, duress, or undue influence, and who signs and delivers a Certificate of Independent Review; or when, after full disclosure of the relationships of the parties to the transfer, the instrument is approved by the court [*Prob. Code § 21351(b), (c)*]. For detailed discussion of these rules and the exceptions, see § 60A.16.

a. Request that independent attorney [*Prob. Code § 21351(b)*]:

- (1) Review instrument;
- (2) Advise transferor on the nature of the transfer; and
- (3) Sign and deliver Certificate of Independent Review [ *see § 60A.240*].

b. Seek court approval of transfer [*Prob. Code § 21351(c)*; *see Prob. Code § 2580 et seq.* (substituted judgment)].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawPersonal GiftsProceduresGeneral OverviewEstate, Gift & Trust LawPersonal GiftsProceduresEvidenceEstate, Gift & Trust LawPersonal GiftsProceduresPresumptionsReal Property LawDeedsTypesGift DeedsTax LawFederal Estate & Gift TaxesGifts (IRC secs. 2035, 2501-2524)Valuation



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*23-60A California Legal Forms--Transaction Guide § 60A.121*

**AUTHOR:** Reviewed by Albert G. Handelman

**§ 60A.121 Delivery**

1. Determine whether delivery requirements for gifts of tangible personal property are met; either:

- a. Deliver property itself; or
- b. Deliver written instrument transferring property if actual delivery is impractical.

**NOTE:**

Delivery of a bank book or safe deposit box key to a donee, and the donee's acceptance of the bank book or key, has been held sufficient to create a completed gift; it is not necessary for the donee to withdraw the funds from the account, or use the safe deposit key to take actual possession of the property [ *Braun v. Brown* (1939) 14 Cal. 2d 346, 354-355, 94 P.2d 348 ].

2. If gift consists of real property, advise donor to execute and deliver gift deed to property [*see Civ. Code § 1091*].

**NOTE:**

Although there are limited circumstances under which an oral gift of real property will be held valid [*see Andreotti v. Andreotti* (1964) 224 Cal. App. 2d 533, 538, 36 Cal. Rptr. 709 ; *see also § 60A.11[2]*], any attempt to make a gift of real property in this manner is highly inadvisable.

3. If gift consists of money, advise donor to do one of the following:

- a. Deliver cash to donor.

b. Deposit cash into donee's bank account.

c. Deliver check or money order.

**NOTE:**

A noncharitable gift of money represented by a check is not complete for federal gift and estate tax purposes until the check is presented to the bank and paid [ *Estate of Dillingham v. Commissioner (10th Cir. 1990) 903 F.2d 760, 762-763* ].

(1) If check is drawn on donor's bank, gift is effective when bank accepts check.

(2) If check is a third-party check, gift is effective on delivery.

d. Deliver savings account passbook together with donor's execution of written assignment of account.

4. If gift consists of contents of safe deposit box, advise donor to:

a. Deliver key to box to donee.

b. Execute written assignment transferring box to donee.

5. If gift consists of insurance policy, advise donor to:

**NOTE:**

A gift of an insurance policy will not remove the policy from the gross estate of the insured if the insured retains any incident of ownership of the policy, such as the right to change beneficiaries [*I.R.C. § 2042*].

a. Deliver policy to donee.

b. Notify insurance company of assignment.

c. Execute written assignment of policy [ *see § 60A.202* ].

6. If gift consists of promissory notes or mortgages, advise donor to:

a. Deliver note to donee.

b. Deliver security if held by donor.

7. If gift consists of securities, advise donor to either:

**NOTE:**

When making a gift of government securities, it is essential to comply with the appropriate federal regulations relating to transfer. In one case, a registered co-owner of several United States Savings Bonds (Series E) delivered the bonds (some to the other co-owner and others to a third party) with the intent of making complete, irrevocable, inter vivos gifts. The bonds were not reissued in the names of the donees, however, as required by the pertinent Treasury regulations [*see 31 C.F.R. §§ 315.15, 315.47*]. After the death of the purported donor, the Supreme Court held, the gifts were incomplete and the bonds

were includable in the estate of the purported donor [ *United States v. Chandler (1973) 410 U.S. 257, 260-261, 93 S. Ct. 880, 35 L. Ed. 2d 247* ].

a. Deliver gift instrument (if one is used) and endorsed share certificate to donee, with instruction to forward certificate to issuer for issuance of new certificate.

b. Deliver gift instrument (if one is used) to donee, and forward endorsed share certificate to issuer for issuance of new certificate in donee's name.

8. If gift consists of cancellation of an existing indebtedness, advise donor to:

a. Either:

(1) Destroy note with intent to cancel; or

(2) Mark note "canceled" and deliver it to donee.

b. Execute written instrument evidencing gift [ *see § 60A.203* ] as evidence of donative intent and deliver instrument to donee.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Personal Gifts Elements of Valid Gifts Delivery Real Property Law Deeds Types Gift Deeds Real Property Law Deeds Delivery



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*23-60A California Legal Forms--Transaction Guide § 60A.122*

**AUTHOR:** Reviewed by Albert G. Handelman

**§ 60A.122 Acceptance of Gift by Donee**

1. Under California law, donee must expressly accept gift except when acceptance may be presumed [ *Brown v. Meredith* (1963) 220 Cal. App. 2d 762, 34 Cal. Rptr. 153 ; see § 60A.10[2][d]].
2. Donee's acceptance of delivery of gift generally establishes presumption of acceptance[ see § 60A.10[2][d]].
3. For gift tax purposes, acceptance by donee is presumed [see *Treas. Reg. § 25.2511-1(c)*].
4. If donee wishes not to accept gift, file written disclaimer with donor within nine months of date of gift. [*I.R.C. § 2518(b); Prob. Code § 279*].

**NOTE:**

For more detailed discussion of the federal and California disclaimer requirements, see § 60A.230[1].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law  
Personal Gifts  
Elements of Valid Gifts  
Acceptance  
Estate, Gift & Trust Law  
Personal Gifts  
Procedures  
General Overview  
Estate, Gift & Trust Law  
Personal Gifts  
Procedures  
Evidence  
Estate, Gift & Trust Law  
Personal Gifts  
Procedures  
Presumptions



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*23-60A California Legal Forms--Transaction Guide § 60A.123*

**AUTHOR:** Reviewed by Albert G. Handelman

**§ 60A.123 Gifts Under California Uniform Transfers to Minors Act**

**NOTE:**

The requirements for making a gift under the UTMA vary according to the type of property being given [*see Prob. Code § 3909(a)(1)-(7)*]. The basic requirements for each specific category of property are listed in paragraphs 1 through 7 below. The remaining paragraphs in this guide section discuss matters relating to more than one category of property.

1. If gift consists of uncertificated security [*see Com. Code § 8102(a)(18)*] or certificated security in registered form [*see Prob. Code § 3909(a)(1)*]:

a. If transferor will be custodian, register security in name of transferor, followed in substance by words "as custodian for \_\_\_\_\_ [*name of minor*] under the California Uniform Transfers to Minors Act."

b. If custodian will be trust company or adult other than transferor, either:

(1) Register security in name of custodian, followed in substance by words "as custodian for \_\_\_\_\_ [*name of minor*] under the California Uniform Transfers to Minors Act"; or

(2) Deliver certificate (if in certificated form) or any document necessary for transfer (if in uncertificated form), together with any necessary endorsement, to custodian, accompanied by written instrument substantially similar to form in § 60A.220[2].

2. If gift consists of money or security held in name of broker, financial institution, or its nominee, pay or deliver it to

broker or financial institution for credit to account in name of transfer, adult other than transferor, or trust company, followed in substance by words "as custodian for \_\_\_\_\_ [name of minor] under the California Uniform Transfers to Minors Act" [Prob. Code § 3909(a)(2)].

3. If gift consists of life or endowment insurance policy or annuity contract [Prob. Code § 3909(a)(3)]:

a. If transferor will be custodian, register policy with issuer in name of transferor, followed in substance by words "as custodian for \_\_\_\_\_ [name of minor] under the California Uniform Transfers to Minors Act."

b. If custodian will be trust company or adult other than transferor, either:

(1) Register policy with issuer in name of custodian, followed in substance by words "as custodian for \_\_\_\_\_ [name of minor] under the California Uniform Transfers to Minors Act"; or

(2) Have transferor execute written instrument assigning policy to custodian whose name in assignment is followed in substance by words "as custodian for \_\_\_\_\_ [name of minor] under the California Uniform Transfers to Minors Act."

4. If gift consists of irrevocable exercise of power of appointment or irrevocable present right to future payment under a contract, deliver written notice to payor, issuer, or other obligor, that right is transferred to transferor, adult other than transferor, or trust company, whose name in notification is followed in substance by words "as custodian for \_\_\_\_\_ [name of minor] under the California Uniform Transfers to Minors Act" [Prob. Code § 3909(a)(4)].

5. If gift consists of interest in real property, record gift deed in name of transferor, adult other than transferor, or trust company, followed in substance by words "as custodian for \_\_\_\_\_ [name of minor] under the California Uniform Transfers to Minors Act" [Prob. Code § 3909(a)(5)].

6. If gift consists of tangible personal property evidenced by certificate issued by a federal or state agency [Prob. Code § 3909(a)(6)]:

a. If transferor will be custodian, have certificate of title issued in name of transferor, followed in substance by words "as custodian for \_\_\_\_\_ [name of minor] under the California Uniform Transfers to Minors Act."

b. If custodian will be trust company or adult other than transferor, either:

(1) Have certificate of title issued in name of custodian, followed in substance by words "as custodian for \_\_\_\_\_ [name of minor] under the California Uniform Transfers to Minors Act"; or

(2) Deliver certificate of title to custodian, endorsed to custodian, followed in substance by words "as custodian for \_\_\_\_\_ [name of minor] under the California Uniform Transfers to Minors Act."

7. If gift consists of any interest in property not described in preceding paragraphs, transfer property to trust company or adult other than transferor by written instrument substantially similar to form in § 60A.220 [Prob. Code § 3909(a)(7)].

**NOTE:**

The above category principally includes tangible property, other than securities or money, which is not evidenced by a certificate of title. In this situation, the UTMA makes no provision for naming the transferor as custodian [*see Prob. Code § 3909(a)(7)*].

8. If transferor wishes to postpone termination of custodial period to a specified time after minor attains age 18, modify language of transfer to read "... as custodian for \_\_\_\_\_ [*name of minor*] until age \_\_\_\_\_ [*age for delivery of property to minor*] under the California Uniform Transfers to Minors Act" [*Prob. Code § 3920.5(b)*].

**NOTE:**

In the case of an irrevocable inter vivos gift, the custodial period cannot be continued beyond the time the minor attains age 21 [*Prob. Code § 3920.5(e)*]. For more coverage of the applicable rules, see § 60A.112.

9. If transferor is custodian and wishes to limit custodial powers by permitting payment of any part of custodial property to or for use or benefit of minor only by court order on showing that expenditure is necessary for minor's support, maintenance, or education [*see Prob. Code § 3914(d)*]:

**NOTE:**

A transferor who names himself or herself as custodian may wish to impose such a limitation to avoid having the custodial property included in the transferor's estate for federal estate tax purposes if he or she should die prior to termination of the custodianship [*see Rev. Rul. 57-366, 1957-2 C.B. 618 ; see also I.R.C. § 2038*]. For additional discussion and guidance, see §§ 60A.44[3] and 60A.112.

- a. Prepare declaration substantially conforming to form § 60A.222[2].
- b. File declaration with clerk of superior court.

**NOTE:**

Since *Prob. Code § 3914(b)* does not specify when the declaration must be filed, there is apparently no bar to filing it after the gift is made.

10. Place custodian in control of custodial property as soon as possible [*Prob. Code § 3909*].

**NOTE:**

Failure to comply with this requirement will not affect the validity of the transfer [*Prob. Code § 3911(a)(1)*].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Personal Gifts Gifts to Minors General Overview Estate, Gift & Trust Law Personal Gifts Gifts to Minors Custodial Duties & Rights Estate, Gift & Trust Law Personal Gifts Gifts to Minors Uniform Acts Estate, Gift & Trust Law Personal Gifts Procedures General Overview



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*23-60A California Legal Forms--Transaction Guide §§ 60A.124-60A.129*

**AUTHOR:** Reviewed by Albert G. Handelman

**[Reserved]**

§§ 60A.124[Reserved]



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*23-60A California Legal Forms--Transaction Guide § 60A.130*

**AUTHOR:** Reviewed by Albert G. Handelman

**§ 60A.130 Federal Gift Tax Liability**

1. Observe filing requirements.

a. File federal gift tax return (IRS Form 709) even if no tax is due, unless gift qualifies for [I.R.C. § 6019]:

(1) Annual exclusion.

**NOTE:**

The amount of the annual gift tax exclusion, which is adjusted annually for inflation, is \$11,000 per donee per year for gifts made in 2002 through 2005, and \$10,000 per donee per year for gifts made before 2002 [I.R.C. § 2503(b); *see* § 60A.32[4]]. The amount can be effectively doubled if gifts are made by a husband and wife [*see* I.R.C. § 2513(a) (gift splitting)] and significantly increased if the donee is a noncitizen spouse [*see* I.R.C. § 2523(i) (base annual exclusion amount is \$100,000, with upward adjustments for inflation for gifts made after 1998); *see also* § 60A.32[5]]. For example, for gifts made in 2005, the amount of the exclusion for gifts to noncitizen spouses is \$117,000 [ *Rev. Proc. 2004-71, 2004-50 I.R.B. 970* ].

(2) Unlimited tuition and medical care exclusion [I.R.C. § 2503(e)].

(3) Unlimited marital deduction [I.R.C. § 2523].

(4) Deduction for charitable gifts [I.R.C. § 2522] if gift is of donor's entire interest in gift property and no other interest in gift property has been transferred for less than adequate and full consideration in money or money's worth from donor to any person for a noncharitable use.

(5) Deduction for charitable gifts when gift is "qualified conservation contribution" as defined in *I.R.C. § 170(h)*].

**NOTE:**

A qualified conservation easement is a contribution of a "qualified real property interest" to a charity exclusively for conservation purposes [*see I.R.C. § 170(h)* (income tax deduction for qualified conservation contribution)]. A gift tax deduction is allowed for such a contribution [*I.R.C. § 2522(d)*].

b. Due date:

(1) Generally, on or before April 15 following year in which gift was made [*I.R.C. § 6075*].

(2) If donor dies during calendar year, on or before due date for filing estate tax return, plus extensions [*I.R.C. §§ 6018, 6075(b)(3)*].

2. Determine total taxable gifts for calendar year.

a. Determine value of each gift [*see I.R.C. § 2512; Treas. Reg. §§ 25.2512-1-25.2512-9; see also § 60A.111*].

b. If gift splitting with spouse is elected [*I.R.C. § 2513(a)*]:

(1) Subtract half of total gifts made by donor during calendar year; and

(2) Add half of total gifts made by donor's spouse during calendar year.

c. Reduce by exclusions.

(1) Annual gift tax exclusion.

**NOTE:**

The annual exclusion applies only to gifts of present interests, except for gifts made under the Uniform Transfers to Minors Act [*see I.R.C. § 2503(b)(1), (c); see also § 60A.131*].

(a) Base rate (which is adjusted annually for inflation) is \$11,000 per donee per year for gifts made in 2002 through 2005, and \$10,000 per donee per year for gifts made before 2002 [*I.R.C. § 2503(b); see § 60A.32[4]*].

(b) If donee is noncitizen spouse of donor, \$100,000, subject to upward adjustment for inflation for gifts made after 1998 [*see I.R.C. § 2523(i); see also § 60A.32[5]*].

**NOTE:**

**For example, for gifts made in 2005, the amount of the exclusion for gifts to noncitizen spouses is \$117,000 [ *Rev. Proc. 2004-71, 2004-50 I.R.B. 970* ].**

(2) Unlimited exclusion for qualified payments of tuition and medical care on behalf of any donee [*I.R.C. § 2503(e)*].

d. Subtract deductions, if applicable.

- (1) Marital deduction [*see I.R.C. § 2523; see also § 60A.32[5]*].
- (2) Charitable deduction [*see I.R.C. § 2522; see also § 60A.32[6]*].

### 3. Compute tax.

- a. Using copies of donor's prior gift tax returns, determine total previous taxable gifts made prior to this calendar year [*see I.R.C. § 2502(a)*].
- b. Add total taxable gifts for this calendar year to total previous taxable gifts [*I.R.C. § 2502(a)*].
- c. Using rate table in instructions to gift tax return IRS Form 709, determine tentative tax on total of previous and present taxable gifts [*I.R.C. § 2502(a)(1)*].
- d. Using rate table, determine tentative tax on total previous taxable gifts [*I.R.C. § 2502(a)(2)*].
- e. Compute tax by subtracting result obtained under (d), *above*, from result obtained under (c), *above*.
- f. Reduce tax by available unified credit [*see I.R.C. § 2505(a)(1)*]:

(1) Determine applicable credit amount for calendar year in which gift is made [*see I.R.C. §§ 2505(a)(1), 2010(c)*].

**NOTE:**

The "applicable credit amount" is equal to an amount sufficient to exclude a specified amount (known as the "applicable exclusion amount") from taxation. The gift tax unified credit can shelter property worth \$1,000,000 from the gift tax for gifts made in 2002 and later years [*I.R.C. §§ 2010(c), 2505(a)*]. Prior to the 2001 tax legislation [Pub. L. 107-16], the applicable exclusion amount for the estate tax was the same as the applicable exclusion amount for the gift tax [*I.R.C. §§ 2010(c), 2505(a)*]. Under the 2001 legislation, however, while the applicable credit amount for the estate tax continues to increase to \$3.5 million until the estate tax ultimately is repealed entirely in 2010, the applicable exclusion amount for the gift tax is limited to \$1,000,000, and is not subject to adjustment for inflation [*I.R.C. § 2505(a); see also § 60A.32[4]* for discussion of the effect of a sunset provision in the 2001 tax legislation]. For additional discussion of the unified credit, see §§ 60A.30[2], 60A.32[4].

(2) Reduce by amounts allowable to donor under unified credit for all preceding calendar periods [*I.R.C. § 2505(a)(2)*].

**NOTE:**

In other words, if the donor made any gifts in excess of the amount protected under the annual exclusion [*see I.R.C. § 2503(b); § 60A.32[4]*] in prior years, the amount of those gifts must be deducted from the applicable credit amount, whether or not the credit was actually claimed in prior years when the gifts were made [*see I.R.C. § 2505(a)(2)* (reduction of available credit for credit allowable, not credit actually allowed)].

(3) Further reduce by 20 percent of aggregate amount allowed as a specific exemption under pre-1977 law [*see former*

*I.R.C. § 2521*] for gifts made between September 8, 1976 and December 31, 1976 [*I.R.C. § 2505(b)*]; *see § 60A.31[2]*].

g. Do not reduce tax below zero [*I.R.C. § 2505(c)*].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Personal Gifts Procedures General Overview Tax Law Federal Estate & Gift Taxes Gifts (IRC secs. 2035, 2501-2524) General Overview Tax Law Federal Estate & Gift Taxes Gifts (IRC secs. 2035, 2501-2524) Imposition of Taxes



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D. Related and Subsequent Procedures

*23-60A California Legal Forms--Transaction Guide § 60A.131*

**AUTHOR:** Reviewed by Albert G. Handelman

**§ 60A.131 Tax Liability Under UTMA**

1. File gift tax return only if value of gift, when added to value of all other gifts to same donee during calendar year, exceeds amount of annual exclusion available for that year [*see I.R.C. § 2503(b)*]; *see also § 60A.43[4]*, or twice that amount in case of split gifts by husband and wife [*see I.R.C. § 2513(a)* (gift splitting)].

**NOTE:**

A gift under the Uniform Transfers to Minors Act will not be considered a gift of a future interest for purposes of the annual gift tax exclusion [*see I.R.C. § 2503(b)(1)*]; § *60A.32[4][d]*.

2. For federal income tax purposes, report income from custodial property as follows:

a. Minor donee must file income tax returns and report income earned by custodial property that is distributed to minor, except to extent that income is distributed for minor's support [ *Rev. Rul. 56-484, 1956-2 C.B. 23* ].

**NOTE:**

If a minor is required to pay tax on unearned income at the parent's rates under *I.R.C. § 1(g)* [ *see § 60A.44[2]*], the parent's taxpayer identification number (TIN) must be provided to the child and included on the child's income tax return [*I.R.C. § 1(g)(6)*].

b. If child is under age 18, parent may elect to report child's interest and dividends on parent's return (thereby avoiding need to file separate return for minor child) by making election on IRS Form 8814 and attaching that form to parent's tax return, but only if all of following conditions are met [*I.R.C. § 1(g)(7)*];

see IRS Publication 929, *Tax Rules for Children and Dependents*]:

**NOTE:**

The IRS cautions that it is possible that making the election and reporting the interest and dividends on the parent's return could result in a higher tax rate than would apply if those items were reported on a separate return for the minor child [see IRS Publication 929, *Tax Rules for Children and Dependents*].

(1) Child was under age 18 at end of year.

(2) Child is required to file a return unless election is made.

(3) Child had income only from interest and dividends (including capital gain distributions and Alaska Permanent Fund dividends).

(4) Dividend and interest income was less than \$7,500.

(5) No estimated tax payments were made for tax year and no overpayment from prior tax year was applied to current year's tax liability under child's name and social security number.

(6) No federal income tax was taken out of child's income under the backup withholding rules.

(7) Parent is the parent whose return must be used when applying the special tax rules for children under age 14.

c. Custodian must report on his or her income tax return income earned by custodial property to extent distribution discharges custodian's legal duty to support minor [see *I.R.C. §§ 61, 677(b)*; *Rev. Rul. 56-484, 1956-2 C.B. 23*].

3. If transferor is custodian and dies while acting in that capacity, include custodial property in custodian's gross estate for federal estate tax purposes unless custodian has made election to limit custodial power to make payment or expenditure to or for use or benefit of minor [ *Rev. Rul. 57-366, 1957-2 C.B. 618* ; *I.R.C. § 2038*; see *Prob. Code § 3914(d)*].

**NOTE:**

**For discussion of this election and further guidance, see §§ 60A.44[3] and 60A.112.**

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law  
 Personal Gifts  
 Gifts to Minors  
 General Overview  
 Estate, Gift & Trust Law  
 Personal Gifts  
 Gifts to Minors  
 Uniform Acts  
 Tax Law  
 Federal Estate & Gift Taxes  
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 Elements  
 Transfers Among Family Members  
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 Federal Estate & Gift Taxes  
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*23-60A California Legal Forms--Transaction Guide §§ 60A.132-60A.199*

**AUTHOR:** Reviewed by Albert G. Handelman

**[Reserved]**

§§ 60A.132[Reserved]



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PART IV. FORMS  
A. Gifts in General

*23-60A California Legal Forms--Transaction Guide § 60A.200*

**AUTHOR:** Reviewed by Albert G. Handelman

**§ 60A.200 General Form for Gift of Personal Property**

**[1] Comment**

**[a] Use of Form**

The form in [2], *below*, is a declaration that may be used to make a gift of personal property. Although a writing is not essential to a valid gift of personal property [*see Civ. Code §§ 1040, 1052* (voluntary transfer may be made without writing)], a written declaration will serve the useful purpose of evidencing that a gift was made, who the parties to the gift were, and when the gift was made. It will also identify the gift property.

**PRACTICE TIP:**

Such a declaration may be particularly useful when a later challenge to the gift can be reasonably anticipated. For example, if a parent gives a piece of jewelry or an item of special sentimental value within the family to one of several children, a declaration setting forth the specifics of the gift can go a long way to heading off disputes as to whether the property was the subject of a valid gift versus having been misappropriated by the donee. *Commentary by Albert G. Handelman*

A gift of real property must be in writing [*see Civ. Code §§ 1053, 1091* (grant as transfer in writing; writing necessary for transfer of estate in real property)]. To make a valid gift of real property, a deed should be used. For general discussion and model forms for deeds, see Ch. 27, *Deeds and Recording* .

**[b] Importance of Date of Gift**

The amount of any federal gift tax liability is determined by the fair market value of the gift property on the date of the transfer [*see I.R.C. § 2512(a)*]. Since particular property may change rapidly in value, the exact date of the gift may become an issue which the taxpayer will have to establish with certainty. The written declaration of gift serves as evidence of this date. The instrument need not be acknowledged when personal property is given. However, an

acknowledgment will corroborate the exact date of the gift.

### **[c] Spouse's Consent to Gift of Community Property**

When a married person makes a gift of community property, the married person's spouse should consent to the gift or join in making it. A spouse may not make a gift of community personal property, or dispose of community personal property for less than fair and reasonable value, without the written consent of the other spouse [*Fam. Code* § 1100(b)]. Although there is no general rule prohibiting one spouse from making a gift of community real property, both spouses must join (either personally or by duly authorized agent) in executing any instrument by which community real property is sold, conveyed, encumbered, or leased for longer than one year [*Fam. Code* § 1102]. For further discussion, see § 60A.12[1].

Although gifts of quasi-community property are not subject to the same restrictions as gifts of community property, if a spouse dies after making a gift of quasi-community property, the surviving spouse may have a right to require the transferee to restore the property to the deceased spouse's estate [*see Prob. Code* § 102]. To avoid this eventuality, it is also advisable to obtain the spouse's written consent to a gift of quasi-community property. For discussion, see § 60A.12[2].

### **[d] Gift Splitting by Married Donors**

For federal gift tax purposes, a gift made by one spouse may be considered as having been made one-half by each spouse [*I.R.C.* § 2513(a)(1)]. This rule is generally referred to as "gift splitting," and effectively doubles the amount of the annual gift tax exclusion [*see I.R.C.* § 2503(b); *see also* § 60A.32[4]] otherwise available. Gift splitting is available for all property, whether community, quasi-community, or separate. However, a gift may be split only if the spouses have signified their consent to the split-gift treatment [*I.R.C.* § 2513(a)(2); *see I.R.C.* § 2513(b)]. Further, gift splitting is not actually necessary when the gift property is community property, since both spouses have present, existing, and equal interests in the community property [*Fam. Code* §§ 760, 1100 (management and control of community property)] and, to the extent that a completed gift of community property is made, it is deemed to have been made one-half by each spouse.

### **[e] Delivery and Acceptance**

Delivery and acceptance are generally essential to a completed gift of personal property in California [*see Civ. Code* § 1147; *Bank of America Nat'l Trust & Sav. Assn. v. Cottrell* (1962) 201 Cal. App. 2d 361, 363, 20 Cal. Rptr. 126; *Connelly v. Bank of America* (1956) 138 Cal. App. 2d 303, 307, 291 P.2d 501; *see also* § 60A.10[2]]. Delivery is generally accomplished when the property is physically transferred to the donee or to some third person not subject to the donor's direction [*see Beebe v. Coffin* (1908) 153 Cal. 174, 176, 94 P. 766; *Bishop's School Upon Scripps Foundation v. Wells* (1937) 19 Cal. App. 2d 141, 146, 65 P.2d 105]. If delivery of the property itself is impossible or impractical, the means of obtaining possession of the property, or a written instrument of gift executed by the donor, may be symbolically delivered in place of the property [*Civ. Code* § 1147]. Thus, delivery of a key to a safe deposit box may constitute a valid symbolic delivery of the contents of the box [*see Estate of Escolle* (1933) 134 Cal. App. 473, 480, 25 P.2d 860].

A donee who does not wish to receive the property cannot be forced to accept it. In most cases, however, acceptance will be presumed unless there are facts showing that the donee refused to accept the property [*see, e.g., Estate of Kalt* (1940) 16 Cal. 2d 807, 813, 108 P.2d 401].

## **[2] Form**

### **General Form for Gift of Personal Property**

**Gift**

I hereby give, assign, and transfer to \_\_\_\_\_ [*name of donee, and relationship to donor, if any*], as a gift and without consideration, all my right, title, and interest in \_\_\_\_\_ [*describe in detail property being given*], effective on this date.

Dated: \_\_\_\_\_

\_\_\_\_\_ [*signature of donor*]

[*typed name*]

[*If community or quasi-community property is being given, add:*]

**Consent**

I hereby consent to the above described gift.

Dated: \_\_\_\_\_

\_\_\_\_\_ [*signature of donor's spouse*]

[*typed name*]

[*Optional*]

**Acknowledgment**

[*Acknowledgments taken in California must be in the following form (Civ. Code § 1189(a)):*]

State of California )  
County of \_\_\_\_\_ )  
 )

On \_\_\_\_\_ [*date*], before me, \_\_\_\_\_ [*name and title of officer taking acknowledgment*], personally appeared \_\_\_\_\_ [*name(s) of person(s) signing instrument*], \_\_\_\_\_ [*who proved to me on the basis of satisfactory evidence*] to be the person[s] whose name[s] \_\_\_\_\_ [*is or are*] subscribed to the within instrument and acknowledged to me that \_\_\_\_\_ [*he or she or they*] executed the same in \_\_\_\_\_ [*his or her or their*] authorized \_\_\_\_\_ [*capacity or capacities*], and that by \_\_\_\_\_ [*his or her or their*] signature[s] on the instrument the person[s], or the entity on behalf of which the person[s] acted, executed the instrument.

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

WITNESS my hand and official seal.

Signature \_\_\_\_\_ [Seal]

[Optional]

**Acceptance**

I hereby accept the above described gift.

Dated: \_\_\_\_\_

\_\_\_\_\_ [signature of donee]

[typed name]

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Personal Gifts Procedures General Overview Estate, Gift & Trust Law Personal Gifts Procedures Evidence



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California Legal Forms--Transaction Guide

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DIVISION IV: WILLS AND TRUSTS  
CHAPTER 60A GIFTS  
PART IV. FORMS  
A. Gifts in General

*23-60A California Legal Forms--Transaction Guide § 60A.201*

**AUTHOR:** Reviewed by Albert G. Handelman

**§ 60A.201 Gift Causa Mortis**

**[1] Comment**

**[a] Use of Form**

This is a declaration for use in making a gift in view of the giver's impending death. Because gifts in view of impending death avoid the rules governing testamentary dispositions of property, the courts have traditionally viewed them with caution and sustained them only when they have been established by clear and convincing proof [*see, e.g., Schuler v. Winstanley (1956) 141 Cal. App. 2d 759, 766, 297 P.2d 512*; *Broderick v. Koehler (1949) 92 Cal. App. 2d 813, 817, 207 P.2d 1070*]. This declaration is designed to supply the proof necessary to make a gift fully enforceable.

For a detailed discussion of gifts in view of impending death, see § 60A.15[1].

**[b] Gift in View of Impending Death**

A gift in view of impending death (also called a gift *causa mortis*) is a gift that is made in contemplation, fear, or peril of impending death, whether from illness or other cause, and with the intent that it will be revoked if the giver recovers from the illness or escapes from the peril [*Prob. Code § 5702(a)*]. In California, gifts in view of impending death are governed by rules set forth in the Probate Code [*see Prob. Code § 5700 et seq.*]. Under those rules, an enforceable gift in view of impending death can only be made during the last illness of the giver, or under circumstances that "would naturally impress the giver with an expectation of speedy death" [*Prob. Code § 5703; see Recommendation Relating to Gifts in View of Impending Death, 20 Cal. L. Revision Comm'n Reports 2869, 2873-2874 (1990)*]. An enforceable gift in view of impending death cannot be made in general contemplation of the distant possibility of death. For example, an enforceable gift in view of impending death cannot be made solely for the purpose of saving death taxes or avoiding probate at some remote time in the future [*see Prob. Code § 5703; Recommendation Relating to Gifts in View of Impending Death, 20 Cal. L. Revision Comm'n Reports 2869, 2873-2874, 2880 (1990)*].

**[c] Gift as Conditional**

A gift in view of impending death is a conditional gift [see *Recommendation Relating to Gifts in View of Impending Death*, 20 Cal. L. Revision Comm'n Reports 2869, 2879 (1990); *Prob. Code* §§ 5702(a), 5704(d)]. When properly made, the gift is subject to a condition subsequent; that is, if the giver does not die of the illness or escapes from the peril under the presence of which the gift was made, the gift will be automatically revoked [see *Prob. Code* § 5704(a)]. A gift in view of impending death cannot properly be made subject to a condition precedent; that is, it cannot be made conditional on the giver's death. If a gift is made subject to the giver's death, it functions in the same way as a devise in a will; and, if the gift does not comply with the formal requirements for execution of a will, it will be unenforceable [see *Yates v. Dundas* (1947) 80 Cal. App. 2d 468, 474-475, 182 P.2d 305 ; see also § 60A.15[2]].

**[d] Revocability**

A gift in view of impending death, unlike most other gifts [see *Civ. Code* § 1148; § 60A.10[3]], is subject to revocation by the giver. The giver has the right to revoke the gift at any time [*Prob. Code* § 5704(b)(1)]. The gift may even be revoked by the giver's will, if the will expresses an intention to revoke the gift [*Prob. Code* § 5704(b)(2)]. However, a gift in view of impending death is not affected by a previously-existing will of the giver [*Prob. Code* § 5704(c)].

A gift in view of impending death is automatically revoked by the giver's recovery from the illness, or escape from the peril, under the presence of which the gift was made [*Prob. Code* § 5704(a)(1)]. This means that an enforceable gift in view of impending death can only be made if the giver in fact dies as a result of the illness or other peril that induced the gift [ *Paddock v. Fonner* (1927) 84 Cal. App. 652, 655, 258 P. 423 ]. However, the mere fact that the death occurred as a result of suicide will not nullify the gift, if the other elements of a valid and completed gift in view of impending death have been found [see *Berl v. Rosenberg* (1959) 169 Cal. App. 2d 125, 130, 336 P.2d 975 ; *Recommendation Relating to Gifts in View of Impending Death*, 20 Cal. L. Revision Comm'n Reports 2869, 2873-2874 (1990)].

If the gift has been delivered to the donee, revocation of the gift may be subject to the rights of purchasers or encumbrancers. If a person, acting in good faith, for a valuable consideration, and without knowledge of the conditional nature of the gift, purchases the gift property, or lends money on the security of the property, the person's rights will not be affected by the revocation [*Prob. Code* § 5704(d)].

**[e] Rights of Creditors**

Property transferred by a gift in view of impending death may be subject to claims of the giver's creditors if, after the giver's death, the giver's personal representative has insufficient assets to pay all creditors [*Prob. Code* §§ 5705, 9653; see *Prob. Code* § 58 ("personal representative" means executor, administrator, administrator with will annexed, etc.)]. In that case, a creditor of the deceased person or the deceased person's estate may request that the personal representative commence and prosecute an action for the recovery of the property [*Prob. Code* § 9653(a)]. However, a creditor who makes such a request must pay a part of the costs and expenses of the suit and attorneys' fees, or give an undertaking to the personal representative for that purpose [*Prob. Code* § 9653(b)]. The amount that the creditor must pay will be determined by mutual agreement of the personal representative and the creditor or, if they cannot agree, by the court [*Prob. Code* § 9653(b)]. For further discussion of the rights of creditors after a gift in view of impending death has been made, see § 60A.15[6].

**[f] Spouse's Consent to Gift of Community Property**

If the gift property is community property, the giver's spouse should consent to the gift or join in making it. A spouse may not make a gift of community personal property, or dispose of community personal property for less than fair and reasonable value, without the written consent of the other spouse [*Fam. Code* § 1100(b)]. Although there is no general

rule prohibiting one spouse from making a gift of community real property, both spouses must join (either personally or by duly authorized agent) in executing any instrument by which community real property is sold, conveyed, encumbered, or leased for longer than one year [*Fam. Code § 1102*]. For further discussion, see § 60A.12[1].

Although gifts of quasi-community property are not subject to the same restrictions as gifts of community property, if a spouse dies after making a gift of quasi-community property, the surviving spouse may have a right to require the transferee to restore the property to the deceased spouse's estate [*see Prob. Code § 102*]. To avoid this eventuality, it is also advisable to obtain the spouse's written consent to a gift of quasi-community property. For discussion, see § 60A.12[2].

### [g] Taxation of Gift Causa Mortis

Because a gift in view of impending death is not legally effective until the death of the donor, it is considered an incomplete gift until the time of death and will not be subject to federal gift tax [*Treas. Reg. § 25.2511-2(c); Rev. Rul. 74-365, 1974-2 C.B. 324*]. It will, however, be subject to federal estate tax [*I.R.C. § 2035; see United States v. Wells (1931) 283 U.S. 102, 115-117, 51 S. Ct. 446, 75 L. Ed. 867*].

### [2] Form

#### Gift Causa Mortis

#### Gift Causa Mortis

In view of my impending death from \_\_\_\_\_ [*set forth terminal illness or injuries from which donor is suffering, e.g., cancer*], I hereby give to \_\_\_\_\_ [*name of donee and relationship, if any*], as a gift and without consideration, all my interest in \_\_\_\_\_ [*description of property*]. In the event that I recover from this illness, however, this gift is revoked.

Dated: \_\_\_\_\_

\_\_\_\_\_ [*signature of donor*]

[*typed name*]

[*If community or quasi-community property is being given, add:*]

#### Consent

I hereby consent to the above described gift.

Dated: \_\_\_\_\_

\_\_\_\_\_ [*signature of donor's spouse*]

[*typed name*]

[*For optional acknowledgment, see § 60A.200[2]* ]

**Acceptance**

I hereby accept the above described gift.

Dated: \_\_\_\_\_

\_\_\_\_\_ [*signature of donee*]

[*typed name*]

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Personal Gifts Gifts Causa Mortis Estate, Gift & Trust Law Personal Gifts Procedures General  
Overview Estate, Gift & Trust Law Personal Gifts Procedures Evidence



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DIVISION IV: WILLS AND TRUSTS  
CHAPTER 60A GIFTS  
PART IV. FORMS  
A. Gifts in General

*23-60A California Legal Forms--Transaction Guide § 60A.202*

**AUTHOR:** Reviewed by Albert G. Handelman

**§ 60A.202 Gift of Life Insurance Policy**

**[1] Comment**

**[a] Use of Form**

The form in [2], *below*, is a written assignment that may be used to make a gift of a life insurance policy. The form includes four alternative provisions and a community property waiver and consent. The first alternative provision may be used to make an assignment from an individual to another individual. The second may be used to make an assignment from a trustee to an individual. The third alternative may be used to make an assignment from an individual to a trustee. The fourth may be used to make an assignment from a trustee to another trustee. The community property waiver and consent should be included in the form if the assignor is a married person because a spouse has community property rights in any life insurance policy if the premiums are paid with community property [*see [c], below*].

This form is based in part on forms developed by Keith V. Abramson, J.D.

For a form that may be used to make a gift of a life insurance policy under the California Uniform Transfers to Minors Act [*Prob. Code § 3900 et seq.*], see § 60A.220.

**PRACTICE TIP:**

The options provided in this form allow a gratuitous transfer of a life insurance policy by a trustee acting in a fiduciary capacity. In advising a client, the lawyer should be extremely careful to point out that in the case of an irrevocable trust (or a revocable trust when the settlor is not serving as trustee or the transfer from the trust is to someone other than the settlor), a trustee making a gift of trust property is almost certainly engaging in a breach of the trust (unless the trust contains a highly unusual provision permitting such a gratuitous transfer by the trustee).

Additionally, if one is considering using this form because the policy is being sold to a third party or the

trustee of a different trust and there is concern that the consideration may not be adequate, attention should be focused on the so-called "transfer for value rule" which will substantially alter the income tax treatment of the policy proceeds (making them taxable instead of tax free) if *any* consideration is given for the transfer of the policy [see *I.R.C. § 101(a)*, including the limited exceptions to the transfer for value rule contained in *I.R.C. § 101(a)(2)*]. *Commentary by Albert G. Handelman*

A transfer of life insurance policies from one trust to another trust for valuable consideration will be disregarded for federal income tax purposes, and the transfer for value rule will not apply, when both trusts are owned by the same individual [see *Priv. Ltr. Rul. 200514001-002* ; *Priv. Ltr. Rul. 200518061* ].

### **[b] Gift of Life Insurance Policy**

A life insurance policy, like any other form of personal property, may be the subject of a gift [ *Mutual Life Ins. Co. v. Franck (1935) 9 Cal. App. 2d 528, 538, 50 P.2d 480* ; see *Morrison v. Mutual Life Ins. Co. (1940) 15 Cal. 2d 579, 583, 103 P.2d 963* ]. The donee of the policy need not have an insurable interest [*Ins. Code § 10130*], but the gift must satisfy all of the general legal requirements for a valid gift [ *Mutual Life Ins. Co. v. Franck (1935) 9 Cal. App. 2d 528, 538, 50 P.2d 480* ; *Lo Presti v. Manning (1932) 125 Cal. App. 442, 445, 13 P.2d 1002* ]. An effective gift of personal property requires: (1) an actual or symbolic delivery of the gift to the donee; and (2) an intention on the part of the donor to completely divest himself or herself of control and dominion over the property [ *Savelli v. Simon (1938) 25 Cal. App. 2d 365, 367, 77 P.2d 486* ]. Direct evidence of delivery need not be shown, however, when delivery may be inferred from proof of possession and independent evidence that the donor intended to make delivery [ *Woodard v. Metropolitan Life Ins. Co. (1937) 8 Cal. 2d 361, 363, 65 P.2d 353* ].

A gift of a life insurance policy may be made orally [ *Woodard v. Metropolitan Life Ins. Co. (1937) 8 Cal. 2d 361, 362-363, 65 P.2d 353* ; see *Asper, Ownership and Transfer of Interests in Life Insurance Policies, 20 Hastings L.J. 1175, 1182 (1969)*] or in writing [see *Savelli v. Simon (1938) 25 Cal. App. 2d 365, 366-367, 77 P.2d 486* ]. An oral gift, however, is not valid unless the means of obtaining possession and control of the property are given, or (if the property is capable of delivery) there is an actual or symbolic delivery [*Civ. Code § 1147*].

In all cases, the donor must intend to make a present transfer of the policy. A promise to make a gift at some time in the future is not a present gift and is not effective to transfer ownership [ *Savelli v. Simon (1938) 25 Cal. App. 2d 365, 368, 77 P.2d 486* ; see *Asper, Ownership and Transfer of Interests in Life Insurance Policies, 20 Hastings L.J. 1175, 1184 (1969)*].

### **[c] Premiums Paid With Community Property**

A life insurance policy purchased during marriage with community funds is a community asset [ *Tyre v. Aetna Life Ins. Co. (1960) 54 Cal. 2d 399, 402, 6 Cal. Rptr. 13, 353 P.2d 725* ]. Similarly, an income protection policy (which for this purpose is analytically indistinguishable from a life insurance policy) is community property if the premiums are paid with community funds [ *Marriage of Donnelly (1983) 142 Cal. App. 3d 135, 137, 190 Cal. Rptr. 756, disapproved on other grounds In re Marriage of Saslow (1985) 40 Cal. 3d 848, 861 n. 5, 221 Cal. Rptr. 546, 710 P.2d 346* ]. No spouse may make a gift of community personal property without the written consent of the other spouse [*Fam. Code § 1100(b)*].

The result may be different if community assets are used to pay the premiums on life insurance policies issued pursuant to federal statutes, such as the National Service Life Insurance Act (NSLIA) [*38 U.S.C. § 1901 et seq.*] or the Servicemembers' Group Life Insurance Act (SGLIA) [*38 U.S.C. § 1965 et seq.*]. Rights acquired under community property laws are preempted by conflicting provisions of the NSLIA [ *Wissner v. Wissner (1950) 338 U.S. 655, 70 S. Ct. 398, 94 L. Ed. 424* ], and a beneficiary designation under a policy issued pursuant to the SGLIA takes precedence over conflicting state law [ *Ridgway v. Ridgway (1981) 454 U.S. 46, 55-60, 102 S. Ct. 49, 70 L. Ed. 2d 39* ].

Although federal law generally has only limited application in the field of domestic relations [*see* *McCarty v. McCarty* (1981) 453 U.S. 210, 220, 101 S. Ct. 2728, 69 L. Ed. 2d 589 ], the *Supremacy Clause* [U.S. Const., art. VI, cl. 2] would invalidate any provision of state law that frustrates or erodes clearly expressed policies of federal law [ *Ridgway v. Ridgway* (1981) 454 U.S. 46, 54, 102 S. Ct. 49, 70 L. Ed. 2d 39 ]. The guiding rule is that if the state law does "major damage" to "clear and substantial" federal interests, the state law must yield [ *Hisquierdo v. Hisquierdo* (1979) 439 U.S. 572, 581, 99 S. Ct. 802, 59 L. Ed. 2d 1 ]. Application of this general rule to particular cases can present problems. For instance, under California law, federal military insurance policies would be community property for which the non-insured spouse might be awarded other community property of equal value [ *Marriage of Milhan* (1980) 27 Cal. 3d 765, 777-778, 166 Cal. Rptr. 533, 613 P.2d 812 , judgment vacated in, *Milhan v. Milhan* (1981) 453 U.S. 918 ]; however, the Supremacy Clause generally precludes the application of state community property laws to military retirement pay [ *McCarty v. McCarty* (1981) 453 U.S. 210, 235-236, 101 S. Ct. 2728, 69 L. Ed. 2d 589 ]. Nevertheless, military pensions for periods beginning after June 25, 1981, are to be treated as separate or community property in accordance with state laws [10 U.S.C. § 1408(c)(1)].

Regardless of whether a provision of state law frustrates or erodes a federal policy, the federal policy must give way to community property rights if application of the community property law is necessary to prevent a fraud against an innocent spouse [ *Yiatchos v. Yiatchos* (1964) 376 U.S. 306, 84 S. Ct. 742, 11 L. Ed. 2d 724 ; *see* *Ridgway v. Ridgway* (1981) 454 U.S. 46, 58, 102 S. Ct. 49, 70 L. Ed. 2d 39 ].

#### **[d] Rights of Donee**

On completion of a valid, present assignment of a life insurance policy, the assignee acquires all of the rights of ownership of the prior owner and may recover whatever the insured might have recovered on the policy [*Ins. Code* § 10130]. Although the ownership rights will vary according to the terms of the policy, they will typically include such things as the right to change the beneficiary, the right to encumber the policy with a policy loan, the right to surrender the policy for cash, and the right to make another assignment of the policy [*see* *Asper, Ownership and Transfer of Interests in Life Insurance Policies*, 20 *Hastings L.J.* 1175, 1184 (1969)].

#### **[e] Policy Requirements and Notice**

Gifts of life insurance policies are generally valid whether or not they are effected in the manner prescribed in the policy [*see* *Asper, Ownership and Transfer of Interests in Life Insurance Policies*, 20 *Hastings L.J.* 1175, 1182 (1969)]. In California, notice to the insurer is not necessary to preserve the validity of the policy unless notice is expressly required by the policy *Ins. Code* § 10131. Notice, however, may be important to perfect or protect the rights of the donee. An insurer who has no notice of a policy assignment is not bound to honor it, but an insurer with notice of an assignment must recognize the rights of the lawful owner [ *Morrison v. Mutual Life Ins. Co.* (1940) 15 Cal. 2d 579, 587, 103 P.2d 963 ]. When a life insurance policy has been assigned in writing, the insurer may deal with the assignee in any manner not inconsistent with the terms of the assignment until the insurer has received at its home office written notice by or on behalf of some other person that the other person claims some interest in the policy [*Ins. Code* § 10173].

#### **[f] Gift to Beneficiary**

A life insurance policy may be given to any person, including the designated beneficiary [ *McEwen v. New York Life Ins. Co.* (1919) 42 Cal. App. 133, 141, 183 P. 373 ]. Although the beneficiary's interest in a policy in which the owner reserves the right to change the beneficiary is a mere expectancy of a gift at the time of the insured's death [ *Grimm v. Grimm* (1945) 26 Cal. 2d 173, 175-176, 157 P.2d 841 ], if the policy has been given to the beneficiary *inter vivos*, the beneficiary's interest as owner becomes absolute, and the donor, in the absence of some act again vesting him or her with title, has no further power or control over the policy [ *McEwen v. New York Life Ins. Co.* (1919) 42 Cal. App. 133, 141, 183 P. 373 ; *see* *Asper, Ownership and Transfer of Interests in Life Insurance Policies*, 20 *Hastings L.J.* 1175,

1183-1184 (1969)].

### **[g] Use of Company Forms**

Insurers typically provide printed forms for assignment of ownership interests in life insurance policies. Although these forms are not legally essential to the completion of valid assignments, by gift or otherwise [*see* [b], *above*], as a practical matter they should be used whenever possible. When an insurance company clerk receives an unfamiliar form, the clerk may be uncertain as to how to proceed, and the form may be returned unfiled. Use of a form provided by the insurer will reduce the likelihood of such an occurrence.

An attorney who is asked to prepare an assignment (by gift or otherwise) of a life insurance policy should first contact the insurer or the insurer's agent to determine if the company will provide a form for assignment. If the insurer will provide such a form, the attorney should request a copy and, whenever possible, use it to accomplish the transaction. Whether or not a printed form is used, the written assignment should be delivered to the donee, together with the policy, and notice of the assignment should be given to the insurer.

### **[h] Estate and Income Tax Consequences**

For federal estate tax purposes, the gross value of an estate will include certain amounts received as insurance under policies on the life of the decedent. Any amount receivable by the executor under a policy on the life of the decedent will be included in the decedent's estate [*I.R.C.* § 2042(1)]; amounts receivable by other beneficiaries will be included if the decedent, at the time of death, retained any of the "incidents of ownership" in the policy [*I.R.C.* § 2042(2); *Treas. Reg.* § 20.2042-1(c)(1)]. The term "incidents of ownership" is not limited to ownership in the technical legal sense, but generally refers to the economic benefits of the policy and includes the power to change the beneficiary, to surrender or cancel the policy, to assign the policy, to revoke an assignment, to pledge the policy for a loan, or to obtain a loan from the insurer against the surrender value of the policy [*Treas. Reg.* § 20.2042-1(c)(2)].

Although gifts made within three years of death generally are not includable in the decedent's gross estate, a gift made within three years of death (even a gift that qualifies for the annual gift tax exclusion) [*see I.R.C.* § 2503(b); *see also* § 60A.32[4]] is includable if the gift property would have been includable in the decedent's estate under *I.R.C.* §§ 2036, 2037, 2038, and 2042 (transfers with retained life estate; transfers taking effect at death; revocable transfers; proceeds of life insurance), if the donor had retained the property at the time of death [*I.R.C.* § 2035(a)].

If the insured, by gift, parts with all of the incidents of ownership in the policy, and if the gift was not made during the three-year period ending with the insured's death, the proceeds will be effectively removed from the insured's estate and the beneficiary will receive the proceeds free of income tax liability [*I.R.C.* § 101(a); *but see I.R.C.* § 101(f) (special rule for proceeds of flexible premium contracts issued before 1985)].

### **[i] Gift Tax Consequences**

A gift of an insurance policy may result in gift tax liability, depending on the value of the policy at the time of the gift, the availability of the annual exclusion, and the availability of any unused portion of the unified credit against gift and estate tax [*see I.R.C.* §§ 2503, 2505; *see also* § 60A.32].

The value of an insurance policy at the date of gift is typically much less than its face value. For gift tax purposes, the value of a life insurance contract is determined by reference to the price at which the company sells comparable policies; but if the price of comparable policies is not readily available (either because the policy has been in force for some time or because it is not issued by a company regularly engaged in selling contracts), other valuation methods may be used [*see Treas. Reg.* § 20.2512-6(a)]. If, after assigning the policy, the prior owner continues to pay the premiums, the payments constitute additional gifts of present interests [*Treas. Reg.* § 25.2503-3(c), example 6].

**[j] Drafting Caution**

Because a gift of an insurance policy is an attractive method of removing the proceeds of the policy from the insured's estate, such a gift will be closely scrutinized. If tax saving is one of the reasons for making a gift of an insurance policy, it is important to clearly establish that the donor intends to make a present and complete inter vivos transfer of the policy and that all of the "incidents of ownership" are presently and completely transferred.

**[2] Form****Gift of Life Insurance Policy**

Assignment of Life Insurance Policy

*[For assignment from individual to individual:]*

I, \_\_\_\_\_ [*name of insured or other assignor*], hereby fully and irrevocably assign and transfer to \_\_\_\_\_ [*name of assignee*], \_\_\_\_\_ [*address*], all my right, title, and interest in and to that certain life insurance policy issued by \_\_\_\_\_ [*name of insurer*] on \_\_\_\_\_ [*my life or the life of* \_\_\_\_\_], policy number \_\_\_\_\_. This assignment is gratuitous and is made with the intention of making a gift of the described life insurance policy to the assignee named above.

[OR]

*[For assignment from trustee to individual:]*

I, \_\_\_\_\_ [*name of trustee*], as trustee of the trust created by \_\_\_\_\_ [*name of trustor*], under terms of that \_\_\_\_\_ [*identify trust instrument, e.g., declaration of trust or trust indenture or Last Will and Testament*] dated \_\_\_\_\_, do hereby fully and irrevocably assign and transfer to \_\_\_\_\_ [*name of assignee*], \_\_\_\_\_ [*address*], all my right, title, and interest, as trustee of the above trust, in and to that certain life insurance policy issued by \_\_\_\_\_ [*name of insurer*], \_\_\_\_\_ [*address*], on \_\_\_\_\_ [*my life or the life of* \_\_\_\_\_], policy number \_\_\_\_\_. This assignment is gratuitous and is made with the intention of making a gift of the described life insurance policy to the assignee named above.

[OR]

*[For assignment from individual to trustee:]*

I, \_\_\_\_\_ [*name of insured or other assignor*], do hereby fully and irrevocably assign and transfer to \_\_\_\_\_ [*name of trustee*], as trustee of that trust created by \_\_\_\_\_ [*name of trustor*], under terms of that \_\_\_\_\_ [*identify trust instrument, e.g., declaration of trust or trust indenture or Last Will and Testament*] dated \_\_\_\_\_, all my right, title, and interest in and to that certain life insurance policy issued by \_\_\_\_\_ [*name of insurer*], \_\_\_\_\_ [*address*], on \_\_\_\_\_ [*my life or the life of* \_\_\_\_\_], policy number \_\_\_\_\_. This assignment is gratuitous and is made with the intention of making a gift of the described life insurance policy in the manner described above.

[OR]

[For assignment from trustee to trustee:]

I, \_\_\_\_\_ [name of trustee], as trustee of that trust created by \_\_\_\_\_ [name of trustor], under terms of that \_\_\_\_\_ [identify trust instrument, e.g., declaration of trust or trust indenture or Last Will and Testament] dated \_\_\_\_\_, do hereby fully and irrevocably assign and transfer to \_\_\_\_\_ [name of trustee], as trustee of that trust created by \_\_\_\_\_ [name of trustor], under terms of that \_\_\_\_\_ [identify trust instrument, e.g., declaration of trust or trust indenture or Last Will and Testament] dated \_\_\_\_\_, all of my right, title, and interest, as trustee, in and to that certain life insurance policy issued by \_\_\_\_\_ [name of insurer], \_\_\_\_\_ [address], on \_\_\_\_\_ [my life or the life of \_\_\_\_\_], and bearing policy number \_\_\_\_\_. This assignment is gratuitous and is made with the intention of making a gift of the described life insurance policy in the manner provided above.

[For each of the four alternatives set forth above, continue with the following:]

Executed at \_\_\_\_\_ [place] on \_\_\_\_\_ [date].

\_\_\_\_\_ [signature of assignor]

[typed name]

Witnessed by:

\_\_\_\_\_ [signature of witness]

[typed name]

\_\_\_\_\_ [signature of witness]

[typed name]

[If assignor is a married person making the assignment in his or her individual capacity, add community property waiver and consent:]

### **Community Property Waiver and Consent**

I, \_\_\_\_\_ [name of spouse of assignor], hereby declare that I am the \_\_\_\_\_ [wife or husband] of \_\_\_\_\_ [name of assignor], the assignor in the foregoing Assignment of Life Insurance Policy, and that I consent to the foregoing assignment. [If donor is to pay premiums after assignment, add: I further consent to payment of future premiums on the policy referred to in the foregoing assignment out of the community property of me and my \_\_\_\_\_ (husband or wife)].

Executed at \_\_\_\_\_ on \_\_\_\_\_ [date].

\_\_\_\_\_ [signature of spouse]

[typed name]

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Personal Gifts Procedures General Overview Insurance Law Life Insurance General Overview



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DIVISION IV: WILLS AND TRUSTS

CHAPTER 60A GIFTS

PART IV. FORMS

A. Gifts in General

*23-60A California Legal Forms--Transaction Guide § 60A.203***AUTHOR:** Reviewed by Albert G. Handelman**§ 60A.203 Gift by Forgiveness of Debt****[1] Comment****[a] Use of Form**

The form in [2], *below*, is a declaration that may be used to make a gift by forgiving a debt. Any written instrument evidencing the debt should be canceled and delivered to the donee-debtor at the same time that the declaration is delivered. If the debt is secured, a release of the security interest should also be executed and delivered. If the original security interest was recorded, the release should also be recorded.

**[b] Proof of Donative Intent**

When a creditor wishes to make a gift by forgiving a debt, donative intent should be clearly established for tax purposes. Without proof of donative intent, the forgiven debt may be considered income in the hands of the donee and thus subject to income tax. Although gross income generally includes income from the discharge of indebtedness [*I.R.C. § 61(a)(12); Rev. & Tax. Code § 17071*], it does not include the value of any property acquired by gift [*I.R.C. § 102(a); see Rev. & Tax. Code § 17071*]. Regardless of whether the creditor is motivated by donative intent, forgiving a debt will constitute a gift for federal gift tax purposes, as donative intent is not one of the elements of a taxable gift [*Treas. Reg. § 25.2511-1(g)(1)*]. The value of the release of a debt is the amount of unpaid principal plus accrued and unpaid interest at the time of the release [*Treas. Reg. § 25.2512-4*]. For a general discussion of taxable gifts, see § 60A.32.

**[2] Form****Gift by Forgiveness of Debt**

Gift by Forgiveness of Debt

I hereby forgive all the remaining outstanding balance of the debt owed to me by \_\_\_\_\_ [*name of*

donee], \_\_\_\_\_ [complete address], [optional: add more detailed description of debt, e.g., under the terms of that promissory note dated \_\_\_\_\_ executed by \_\_\_\_\_ (name of donee),] currently amounting to [approximately] \$ \_\_\_\_\_, together with any accrued interest thereon which remains unpaid. I am forgiving this debt without consideration and with the intention, by forgiving the debt, of making a gift to \_\_\_\_\_ [name of donee] of the amount of the outstanding balance remaining on the debt.

\_\_\_\_\_ Dated:

\_\_\_\_\_ [signature of donor]

[typed name]

[Add if forgiven debt is community property:]

### Consent

I hereby consent to the above gift.

\_\_\_\_\_ Dated:

\_\_\_\_\_ [signature of donor's spouse]

[typed name]

[For optional acknowledgment, see § 60A.200[2] ]

### Acceptance

I hereby accept the above gift.

\_\_\_\_\_ Dated:

\_\_\_\_\_ [signature of donee]

[typed name]

### Legal Topics:

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Personal Gifts Procedures General Overview Tax Law Federal Estate & Gift Taxes Gifts (IRC secs. 2035, 2501-2524) Elements Indirect Gifts



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DIVISION IV: WILLS AND TRUSTS

CHAPTER 60A GIFTS

PART IV. FORMS

A. Gifts in General

*23-60A California Legal Forms--Transaction Guide § 60A.204*

**AUTHOR:** Reviewed by Albert G. Handelman

**§ 60A.204 Gift of Securities**

**[1] Comment**

**[a] Use of Form**

The form in [2], *below*, may be used to make a gift of securities. Execution of the form, together with delivery of the properly endorsed securities, will complete the gift. Although a gift of securities may be completed without a written instrument, a written instrument will establish the date of the transfer, which is important for determining the value of the gift [*see* [d], *below*]. For a form for a gift of securities under the California Uniform Transfers to Minors Act, see § 60A.220.

**[b] Gift of Securities**

If the owner of shares of stock delivers a properly endorsed stock certificate to another person (or to the agent of another person), a gift of the stock is complete, for gift tax purposes, on the date of delivery [*Treas. Reg. § 25.2511-2(h)*]. If the donor delivers the certificate to the donor's bank or broker as agent, or to the issuing corporation or its transfer agent, for transfer into the name of the donee, the gift is complete on the date the stock is transferred on the books of the corporation [*Treas. Reg. § 25.2511-2(h)*; *see Com. Code § 8401* (duty of issuer to register transfer of securities on presentation of properly endorsed certificate)].

Transfer of stock on the books of a corporation, without delivery of the certificates, may not be sufficient to constitute a completed gift. When, for example, shares of stock are transferred on the books of a corporation, but the transferor retains control over the stock and later revokes the transfer, there is no gift [ *Bucholz v. Commissioner (1949) 13 T.C. 201* ]. Further, the execution of an instrument purporting to immediately assign and transfer the stock will not render a gift of the stock complete if the certificates are not endorsed or delivered [ *Broadhead Trust v. Commissioner (1972) T.C. Memo 1972-196* ]. Under appropriate circumstances, however, a gift may be completed without delivery of the stock certificates. In a case in which the donor issued stock in a family corporation in the names of trustees for the

benefit of his children but left the certificates attached to the stock record book (which remained in the donor's custody), the court found a gift since gift tax returns were filed and dividends on the stock were paid into the children's bank accounts [ *Kraft v. Commissioner (1969) T.C. Memo 1969-232* ].

### [c] Delivery of Endorsed Certificates or Completion of Other Requirements

This form should be accompanied by delivery of properly endorsed certificates (or the unendorsed certificates along with the appropriate stock or bond assignment(s) separate from certificate) to the donee, the donee's agent, or the issuer of the security. If the gift is of "uncertificated securities" [see *Com. Code § 8102(a)(18)*], the requirements of the issuer for transfer should be ascertained and complied with [see *Corp. Code § 416(b)* (issuer authorized to adopt system of issuance, recordation, and transfer not involving certificates)].

#### **PRACTICE TIP:**

A gift of less than the full number of shares represented by a certificate probably will require delivery of the certificate to a broker or transfer agent with a request to issue a new certificate in the donee's name for the shares being given and to issue a new certificate in the donor's name for the remaining shares represented by the existing certificate. *Commentary by Albert G. Handelman*

### [d] Importance of Date of Gift

The amount of any federal gift tax liability is determined by the fair market value of the gift property on the date of transfer [see *I.R.C. § 2512(a)*]. Since the market value of securities can vary from day to day [see *Treas. Reg. § 25.2512-2(b)*], it is particularly important to establish the date of such a gift. Moreover, although a gift of securities may be completed by endorsement of the securities and delivery to the donee, or delivery directly to the corporation for issuance of new securities in the donee's name, the date of the gift may still be open to challenge. For example, the donor's mere request to a broker to transfer securities or the donor's endorsement of securities, without proof of the date of delivery, is insufficient to establish the date of transfer for valuation purposes [see *Rev. Rul. 54-135, 1954-1 C.B. 205* ].

## [2] Form

### Gift of Securities

#### Gift of Securities

I hereby give, assign and transfer to \_\_\_\_\_ [full name(s) of donee(s) and relationship, if any, to donor], as a gift and without consideration, \_\_\_\_\_ [number] shares of the \_\_\_\_\_ [describe type of shares, e.g., Type A Common] stock of \_\_\_\_\_ [full name of corporation], \_\_\_\_\_ [for certificated securities: represented by certificate number(s) \_\_\_\_\_, which certificate(s) I hereby deliver to \_\_\_\_\_ (full name(s) of donee(s)), fully and properly endorsed or, for uncertificated securities: which shares are uncertificated and which I have transferred to the name(s) of \_\_\_\_\_ (full name(s) of donee(s)) in accordance with the requirements and procedures established by the corporation for the transfer and recordation of ownership of its shares].

\_\_\_\_\_ Dated:

\_\_\_\_\_ [signature of donor]

[typed name]

[If shares are community property, add:]

**Consent**

I hereby consent to the above described gift.

\_\_\_\_\_ Dated:

\_\_\_\_\_ [*signature of donor's spouse*]

[*typed name*]

[*For optional acknowledgment, see § 60A.200[2] ]*]

[*Optional*]

**Acceptance**

I hereby accept the above described gift.

\_\_\_\_\_ Dated:

\_\_\_\_\_ [*signature of donee*]

[*typed name*]

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Estate, Gift & Trust Law Personal Gifts Procedures General Overview



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DIVISION IV: WILLS AND TRUSTS

CHAPTER 60A GIFTS

PART IV. FORMS

A. Gifts in General

*23-60A California Legal Forms--Transaction Guide § 60A.205*

**AUTHOR:** Reviewed by Albert G. Handelman

**§ 60A.205 Gift of Interest in Trust**

**[1] Comment**

**[a] Use of Form**

The form in [2], *below*, is a declaration of gift to be used when the donor desires to make a gift of an interest in an existing trust, such as the right to receive income from the trust or the remainder interest in the trust. The Statute of Frauds [*Civ. Code § 1624*] applies to the transfer of an interest in a trust containing real property, but as a matter of good practice a writing should be used in all cases to effect the transfer of a trust interest. This form, once executed, should be delivered to the donee as evidence of the gift. The trustee of the trust should be notified of the assignment of the trust interest and, if required by the trust instrument, his or her consent to the assignment should be obtained in writing.

A disclaimer of a trust instrument will in many cases accomplish the same goals as an assignment of the interest, except for a shifting of the potential liability for transfer taxes (a disclaimant can often avoid any transfer tax liability, while a donor of an interest under a trust may well face transfer tax liability). However, if a disclaimer is not made within the applicable time limits, a gift of the trust interest may be the only way of shifting the trust income to persons in a lower tax bracket [*see [c], below*]. For more detailed discussion of disclaimers, § 60A.230.

**[b] Assignability of Trust Interests**

Unless the trust instrument provides otherwise, a beneficiary has the unrestricted right to assign or otherwise alienate his or her interest in the trust [ *Title Ins. & Trust Co. v. Duffill (1923) 191 Cal. 629, 649, 218 P. 14* ]. Such an interest may be transferred regardless of whether it is a present or future interest [*Civ. Code § 699*]. Many trust instruments, however, contain so-called "spendthrift clauses" which specifically prohibit the beneficiary from making any assignment of or otherwise alienating his or her interest in the trust.

**[c] Tax Consequences of Gift of Trust Instrument**

For gift tax valuation purposes, the present value of a life interest is determined by applying an actuarial figure obtained from the tables set forth in the regulations [*see Treas. Reg. § 25.2512-5(d)*] against the value of the property in the trust [*Treas. Reg. § 25.2512-5(c), (d)*]. The value of a remainder interest is equal to the total value of the property in the trust less the value of the life interest [*see Treas. Reg. § 25.2512-5(d)(2)*].

A major purpose of a gift of an interest in the income of a trust is to shift the income tax liability to another, such as a family member, who is in a lower tax bracket. When a trust beneficiary irrevocably assigns all or a portion of trust income, the transfer creates an interest in the trust corpus for the donee, who is therefore taxable on the income produced by the portion of the corpus subject to the interest [ *Blair v. Commissioner (1937) 300 U.S. 5, 12, 57 S. Ct. 330, 81 L. Ed. 465* ]. The donor will remain taxable on trust income which accrues prior to the date of the gift [ *Marx v. Commissioner (1939) 39 B.T.A. 537* ].

The attempt to shift income will be unsuccessful and trust income will remain taxable to the donor if the donor imposes restrictions on the donee's right to alienate trust income or limits the donee's enjoyment of the income [ *Power v. Commissioner (8th Cir. 1932) 61 F.2d 625, 626* ]. If the gift of trust income is unauthorized under the trust instrument, the tax burden will not shift to the donee [ *King v. United States (1st Cir. 1936) 84 F.2d 156, 159* ]. For this reason, the beneficiary of a spendthrift trust will remain taxable on the trust income even if the income is assigned to, and received by, another [ *St. Louis Union Trust Co. v. United States (8th Cir. 1944) 143 F.2d 842, 843* ].

**[2] Form****Gift of Interest in Trust**

## Assignment of Trust Interest

I, \_\_\_\_\_ [*name of donor*], declare that I am a \_\_\_\_\_ [*life income or remainder*] beneficiary under that certain trust created pursuant to the \_\_\_\_\_ [*trust instrument or will*] executed by \_\_\_\_\_ [*name of trustor*] on \_\_\_\_\_ [*date*], with \_\_\_\_\_ [*name*] named as trustee. I hereby assign to \_\_\_\_\_ [*name of donee*], \_\_\_\_\_ [*complete address*], as assignee, as a gift and without consideration, \_\_\_\_\_ [*all or specify portion, e.g., 50 percent*] of my right, title, and interest in the \_\_\_\_\_ [*income or remainder*] of that trust to which I am or hereafter may be entitled pursuant to the terms of the trust. This assignment is irrevocable and shall become effective on \_\_\_\_\_ [*date*].

I further grant to \_\_\_\_\_ [*name of donee*] and \_\_\_\_\_ [*his or her*] heirs, personal representatives, successors, or assigns, \_\_\_\_\_ [*add if income interest is being given: for so long as this assignment shall continue in effect,*] full power to demand, sue for, and recover the interest hereby granted in \_\_\_\_\_ [*his or her*] own name, and to execute receipts therefor.

\_\_\_\_\_ [*name of trustee*], as Trustee under the above described trust, is hereby directed to pay to \_\_\_\_\_ [*name of donee*] \_\_\_\_\_ [*amount, e.g., 50 percent or all*] of the \_\_\_\_\_ [*income or remainder*] interest otherwise payable to me, in the same manner and at the same times as the trust instrument directs those payments to be made to me.

\_\_\_\_\_ Dated:

\_\_\_\_\_ [*signature of donor*]

[*typed name*]

[Add if trust interest is community property:]

**Consent**

I hereby consent to the above described gift of this trust interest.

\_\_\_\_\_ Dated:

\_\_\_\_\_ [signature of donor's spouse]

[typed name]

[For optional acknowledgment, see § 60A.200[2] ]

[Optional]

**Acceptance**

I hereby accept the above described gift.

\_\_\_\_\_ Dated:

\_\_\_\_\_ [signature of donee]

[typed name]

[Add if required by trust instrument:]

**Approval of Trustee**

I hereby approve of the above described assignment by gift and will comply with its terms.

\_\_\_\_\_ Dated:

\_\_\_\_\_ [signature of trustee]

[typed name]

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Personal Gifts Procedures General Overview Estate, Gift & Trust

Law Trusts Beneficiaries General Overview Estate, Gift & Trust Law Trusts Spendthrift Trusts General Overview



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DIVISION IV: WILLS AND TRUSTS  
CHAPTER 60A GIFTS  
PART IV. FORMS  
A. Gifts in General

*23-60A California Legal Forms--Transaction Guide § 60A.206*

**AUTHOR:** Reviewed by Albert G. Handelman

**§ 60A.206 Gift of Tuition or Medical Expenses**

**[1] Comment**

**[a] Use of Form**

The form in [2], *below*, is a declaration to be used for making a gift of tuition or medical expenses that will qualify for the gift tax exclusion under *I.R.C. § 2503(e)*.

**[b] Exclusion of Medical and Educational Payments**

Amounts paid on behalf of any person (1) to a qualified educational organization [*see I.R.C. § 170(b)(1)(A)(ii)* ("educational organization")] as tuition for the education or training of that person or (2) to any person who provides medical care [*see I.R.C. § 213(d)* ("medical care")] for that person are not treated as taxable gifts [*I.R.C. § 2503(e)*; *see § 60A.32[3]*]. A donor may make medical or tuition payments under this rule on behalf of any donee and regardless of the amount of the payments. The medical and educational payments may be in addition to any gifts to the same donee that are excluded from taxation under the annual gift tax exclusion [*see I.R.C. §§ 2503(b), 2523(i)*; *see also § 60A.32[4]*]. The exclusion for medical and education payments, however, does not change the rule that a transfer is not a gift if, under state law, the donor is obligated to provide such payments or otherwise support the donee [House Committee Report, § 1441, Economic Recovery Tax Act of 1981 (Pub. L. No. 97-34); *Rev. Rul. 56-484, 1956-2 C.B. 23*].

**[c] Eligible Donee**

The donee can be any individual; no special relationship to the donor is required [*I.R.C. § 2503(e)(2)*]. However, the donee may not directly receive the payments; rather, qualified transfers must be made in the donee's behalf to certain transferees [*I.R.C. § 2503(e)(2)*; *see [d], below*].

**[d] Qualified Transfers**

Qualified transfers include tuition for the education and training of the donee [*I.R.C. § 2503(e)(2)(A)*] and medical care furnished to the donee [*I.R.C. § 2503(e)(2)(B)*]. Tuition payments must be made directly to an educational organization that is a qualified charitable organization [*I.R.C. §§ 170(b)(1)(A)(ii), 2503(e)(2)(A)*]. Such an educational organization normally must maintain a regular faculty and curriculum and normally have a regularly enrolled student body in attendance at the place where its educational activities are regularly carried on [*I.R.C. § 170(b)(1)(A)(ii)*]. The exclusion is permitted for both full-time and part-time students, but is limited to direct tuition costs; payments for books, supplies, dormitory fees, and the like are not eligible for the exclusion [House Committee Report, § 1441, Economic Recovery Tax Act of 1981 (Pub. L. No. 97-34)].

Payments for medical care must be made directly to the person or organization that provides the care [*I.R.C. § 2503(e)(2)(B)*]. The term "medical care" includes the diagnosis, cure, mitigation, treatment or prevention of disease, treatment affecting any structure or function of the body, transportation primarily for and essential to medical care, and insurance covering medical care [*I.R.C. §§ 213(d)(1), 2503(e)(2)(B)*]. The exclusion is not subject to the percentage limitations on the income tax deduction for medical care [*I.R.C. §§ 213, 2503(e)*; House Committee Report, § 1441, Economic Recovery Tax Act of 1981 (Pub. L. No. 97-34)]. However, the donor's payment does not qualify for the exclusion to the extent the donee is reimbursed by medical insurance, regardless of the taxable year in which the donee receives the reimbursement [House Committee Report, § 1441, Economic Recovery Tax Act of 1981 (Pub. L. No. 97-34)].

**[e] Income Tax Consequences**

The gift tax exclusion of qualified transfers under *I.R.C. § 2503(e)* does not affect the income tax consequences of such transfers. No income tax deduction is generally permitted for tuition payments or for medical payments made on behalf of another. However, a charitable deduction of up to \$50 a month is available for amounts paid to maintain a full-time student as a member of the taxpayer's household while the student is attending a qualified educational organization [*I.R.C. § 170(g)*; *see Rev. & Tax. Code § 17201*].

**[2] Form****Gift of Tuition or Medical Expenses**

Gift of Tuition or Medical Expenses

I hereby give, assign, and transfer on behalf of \_\_\_\_\_ [*name of donee*] to \_\_\_\_\_ [*name of educational organization, or person or organization furnishing medical care to donee*] the sum of \$\_\_\_\_\_ as payment in satisfaction of \_\_\_\_\_ [*tuition or medical care expenses*] incurred by \_\_\_\_\_ [*name of donee*]. Payment for \_\_\_\_\_ [*tuition or medical care expenses*] shall be made only in accordance with, and to the extent qualified under, *Internal Revenue Code Section 2503(e)*.

\_\_\_\_\_ Dated:

\_\_\_\_\_ [*signature of donor*]

[*typed name*]

[*If community property is being given, add:*]

**Consent**

I hereby consent to the gift described above.

\_\_\_\_\_ Dated:

\_\_\_\_\_ [*signature of donor's spouse*]

[*typed name*]

[*For optional acknowledgment, see § 60A.200[2] ]*]

[*Optional*]

**Acceptance**

I hereby accept the gift described above.

\_\_\_\_\_ Dated:

\_\_\_\_\_ [*signature of donee*]

[*typed name*]

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Personal Gifts Procedures General Overview Tax Law Federal Estate & Gift Taxes Gifts (IRC secs. 2035, 2501-2524) Elements Indirect Gifts



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DIVISION IV: WILLS AND TRUSTS  
CHAPTER 60A GIFTS  
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A. Gifts in General

*23-60A California Legal Forms--Transaction Guide § 60A.207*

**AUTHOR:** Reviewed by Albert G. Handelman

**§ 60A.207 Gift Conditional on Payment of Gift Tax by Donee**

**[1] Comment**

**[a] Use of Form**

The form in [2], *below*, is a declaration of gift that makes the gift conditional on the donee (rather than the donor) paying any federal gift tax due. The donor otherwise has primary responsibility for the payment of gift tax [*I.R.C. § 2502*]. The amount of the gift is reduced by the amount of gift tax paid by the donee [ *Harrison v. Commissioner (1952) 17 T.C. 1350* ; *Rev. Rul. 81-223, 1981-2 C.B. 189* ]. The donor's available unified credit must be used to reduce the tax liability that the donee has assumed, to the extent the unified credit is available [ *Rev. Rul. 81-223, 1981-2 C.B. 189* ; *see I.R.C. § 2505* ]. The net gift typically is used when the donor desires to give the donee specific property other than cash, but does not wish the transaction to cost anything more than the value of the gift property. Generally a net gift transaction is not considered the equivalent of a sale or exchange in which gain must be recognized [ *Hirst v. Commissioner (1974) 63 T.C. 307* ]. Therefore the donor may make a gift of appreciated property without being taxed on any gain, providing the gift tax liability is not greater than the donor's adjusted basis [*see Diedrich v. Commissioner (1982) 457 U.S. 191, 102 S. Ct. 2414, 72 L. Ed. 2d 777* ].

**[b] Federal Gift Taxation of Net Gift**

Although the donor is primarily responsible for the payment of gift tax [*I.R.C. § 2502(c)*], payment of the tax by the donee generally will not result in taxable income to the donor, as long as the transaction is in fact a gift and not a disguised sale [ *Estate of Henry v. Commissioner (1978) 69 T.C. 665* ; *McNeice v. Commissioner (1981) T.C. Memo 1981-86* ]. If the gift tax liability assumed by a donee exceeds the donor's adjusted basis in the transferred property, however, the donor realizes taxable income to the extent that the gift tax exceeds the adjusted basis [*see Diedrich v. Commissioner (1982) 457 U.S. 191, 102 S. Ct. 2414, 72 L. Ed. 2d 777* ]. The income is taxable to the donor in the year the tax is paid by the donee, not in the year the gift is made [ *Estate of Weeden v. Commissioner (9th Cir. 1982) 685 F.2d 1160* ].

The value of the taxable gift and the tax due can be computed by the use of an algebraic formula recommended by the Internal Revenue Service [*see Rev. Rul. 75-72, 1975-1 C.B. 310*]. Special computations are required in the event of a bracket change resulting from the computation of the tax [*see Rev. Rul. 75-72, 1975-1 C.B. 310*].

## [2] Form

### Gift Conditional on Payment of Gift Tax by Donee

Gift With Payment of Tax by Donee

I hereby give, assign, and transfer to \_\_\_\_\_ [*name of donee and relationship, if any*], as a gift and without consideration, all my right, title, and interest in and to \_\_\_\_\_ [*describe property to be given*].

It is my intention that all federal gift tax incurred by reason of this gift be paid by \_\_\_\_\_ [*name of donee*], and that I be absolved from all liability therefor. The assumption of the liability by \_\_\_\_\_ [*name of donee*] for any federal gift tax due on this gift is expressly made a condition for this gift and if that liability is not assumed, the above described property shall not be transferred to \_\_\_\_\_ [*name of donee*].

\_\_\_\_\_ Dated:

\_\_\_\_\_ [*signature of donor*]

[*typed name*]

[*Add if property is community property:*]

### Consent

I hereby consent to the above described gift, on the terms and conditions set forth above.

\_\_\_\_\_ Dated:

\_\_\_\_\_ [*signature of donor's spouse*]

[*typed name*]

[*For optional acknowledgment, see § 60A.200[2]*]

### Acceptance

I hereby accept the above described gift and agree that I will pay all federal gift tax incurred or to be incurred by reason of this transaction. I hereby agree to indemnify and hold harmless \_\_\_\_\_ [*name of donor*] from and against any federal gift tax liability arising out of the above gift.

\_\_\_\_\_ Dated:

\_\_\_\_\_ [*signature of donee*]

[*typed name*]

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Personal Gifts Procedures General Overview Tax Law Federal Estate & Gift Taxes Gifts (IRC secs. 2035, 2501-2524) Net Gifts



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DIVISION IV: WILLS AND TRUSTS

CHAPTER 60A GIFTS

PART IV. FORMS

A. Gifts in General

*23-60A California Legal Forms--Transaction Guide §§ 60A.208-60A.219*

**AUTHOR:** Reviewed by Albert G. Handelman

**[Reserved]**

§§ 60A.208[Reserved]



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DIVISION IV: WILLS AND TRUSTS

CHAPTER 60A GIFTS

PART IV. FORMS

B. Gifts Under California Uniform Transfers to Minors Act

*23-60A California Legal Forms--Transaction Guide § 60A.220*

**AUTHOR:** Reviewed by Albert G. Handelman

**§ 60A.220 Gift of Personal Property Under California Uniform Transfers to Minors Act**

**[1] Comment**

**[a] Use of Form**

The form in [2], *below*, may be used to make a gift to a minor under the California Uniform Transfers to Minors Act [*Prob. Code § 3900 et seq.*] when the custodian is to be a trust company or an adult other than the transferor. Only two types of property may be transferred with this form: (1) unregistered securities that are not held by a broker or financial institution, and (2) uncertificated and unregistered tangible personal property. For a detailed discussion of these types of property, see [c] and [d], *below*.

This form is prescribed by *Prob. Code § 3909(b)*. It includes space for the custodian to acknowledge receipt of the property as custodian for the minor. Since acknowledgment of receipt is not necessary when the transferor intends to hold the gift property as custodian for the minor, this form should not be used when the transferor is to be the custodian [*see* [b], *below*]. Nor should it be used when some evidence other than an acknowledgment of receipt will establish that the gift has been made. If, for example, the gift property is to be held by a broker or financial institution in an account in the name of the custodian, acknowledgment of receipt of the property is not required to establish that the gift has been made [*see Prob. Code § 3909(a)(2)*]. Similarly, when the gift property is registered with a corporation or governmental agency, acknowledgment of receipt is not necessary [*see Prob. Code § 3909(a)(1)(A), (2)-(6)*]. If the gift property is real property, the gift should be made by deed, and the deed should be recorded in the office of the county recorder [*see Prob. Code § 3909(a)(5)*].

For a complete list of gifts that should *not* be made using this form, see [e], *below*. When a gift should not be made with this form, the gift property should simply be registered, deposited, assigned, recorded, or otherwise titled in the name of the custodian as custodian for the minor, and a formal transfer form is not required [*see Prob. Code § 3909(a)(1)(A), (2)-(6)*].

**[b] Transferor Cannot Act as Custodian**

The California Uniform Transfers to Minors Act permits the transferor to act as custodian of a wide variety of gifts made under the UTMA [*see Prob. Code § 3909(a)*]. However, there are some gifts of which the transferor cannot be the custodian because transfer of possession and control to a third party is necessary to establish donative intent and consummation of the transfer [*Recommendation Relating to Uniform Transfers to Minors Act*, 17 Cal. L. Revision Comm'n Reports 601, 620 (1984)].

Generally, the transferor can act as custodian if the transfer is reflected in the public records or notice of the transfer is given to an appropriate third person [*Recommendation Relating to Uniform Transfers to Minors Act*, 17 Cal. L. Revision Comm'n Reports 601, 620 (1984)]. Conversely, the transferor generally cannot act as custodian if the transfer is not reflected in the public records and no notice of the transfer is given to a third person. The transferor cannot simply keep the gift property and purport to make an irrevocable transfer by executing and retaining an instrument transferring the property to himself or herself as custodian [*Recommendation Relating to Uniform Transfers to Minors Act*, 17 Cal. L. Revision Comm'n Reports 601, 621 (1984)]. This rule is designed to avoid uncertainty and discourage fraud. Since this form can only be used to make gifts of unregistered securities that are not held by brokers or financial institutions, and unregistered and uncertificated tangible personal property, the transferor cannot be the custodian when this form is used. The custodian must be an adult other than the transferor, or a trust company [*Prob. Code § 3909(a)(1)(B), (7), (b)*].

**[c] Unregistered Securities Not Held by Broker or Financial Institution**

This form may be used to make a gift of securities when the securities are neither registered nor held by a broker or financial institution in an account in the name of the custodian. Acknowledgment of receipt is not required when the securities are registered or are held by a broker or financial institution in an account in the name of the custodian [*Prob. Code § 3909(a)(1)(B), (b)*].

This form may be used to make a gift of either "certificated" or "uncertificated" securities [*see Prob. Code § 3909(a)(1)(B)*]. A "certificated" security is a security that is represented by a certificate [*Com. Code § 8102(a)(4)*]. A "certificated security" is in "registered form" if (1) the certificate specifies a person who is entitled to the security and (2) a transfer of the security may be registered on books maintained for that purpose by or on behalf of the issuer, or the certificate states that the transfer may be registered in that way [*Com. Code § 8102(a)(13)*]. A "certificated security" is in "bearer form" if the security is payable to the bearer of the certificate according to its terms but not by reason of an indorsement [*Com. Code § 8102(a)(2)*]. If securities are registered, acknowledgment of receipt by the custodian is not necessary, and this form should not be used [*see Prob. Code § 3909(a)(1)(A); see also [e], below*].

If unregistered securities are certificated, they should be delivered with this form and with any necessary endorsement to the designated custodian [*Prob. Code § 3909(a)(1)(B)*]. If the securities are uncertificated, any other documents necessary for the transfer of the securities should be delivered to the custodian with any necessary endorsement and this form [*Prob. Code § 3909(a)(1)(B)*].

**[d] Uncertificated Tangible Personal Property**

This form may also be used to transfer personal property when the personal property is not registered, represented by a certificate of title, or held by a broker or financial institution in an account in the name of the custodian [*Prob. Code § 3909(a)(7), (b)*]. Property that meets this description generally consists of tangible personal property that is not certificated or registered with a governmental agency. Acknowledgment of receipt is not required when the property is registered, represented by a certificate of title, or deposited in an account in the name of the custodian. Thus, this form should not be used to transfer automobiles, boats, or other articles of tangible personal property that are certificated by a governmental agency [*Prob. Code § 3909(a)(6), (b)*]. Nor should it be used to transfer real property, since a transfer of

real property must be evidenced by recordation of an appropriate instrument of transfer, such as a deed or lease; and when the instrument has been recorded, acknowledgment of receipt is not necessary [*see Prob. Code § 3909(a)(5)*].

**[e] Gifts for Which This Form Should Not Be Used**

It is generally unnecessary to prepare a formal transfer or title document to make a gift to a minor under the California Uniform Transfers to Minors Act. Most gifts under the UTMA may be made by simply registering, depositing, or titling the gift property in the name of the custodian, followed in substance by the words "as custodian for \_\_\_\_\_ [*name of minor*] under the California Uniform Transfers to Minors Act" [*see Prob. Code § 3909(a)(1)(A), (2)-(6)*]. When the gift is made in this way, the registration, deposit, or title document itself is sufficient evidence that the gift has been made, and an additional instrument is unnecessary. *Prob. Code § 3909(a)* contains a complete list of the types of property that may be given to a minor under the UTMA, with detailed descriptions showing which types require a formal transfer or title instrument such as this form and which types do not require such an instrument. The following gifts may be made without such an instrument [*Prob. Code § 3909(a)*]:

- A gift of registered securities, when the securities are registered in the name of the transferor, an adult other than the transferor, or a trust company, followed in substance by the words "as custodian for \_\_\_\_\_ [*name of minor*] under the California Uniform Transfers to Minors Act" [*Prob. Code § 3909(a)(1)(A)*].
- A gift of money, or of securities held in the name of a broker or financial institution, or its nominee, when the money is paid or delivered or the securities are transferred to a broker or financial institution for credit to an account in the name of the transferor, an adult other than the transferor, or a trust company, followed in substance by the words "as custodian for \_\_\_\_\_ [*name of minor*] under the California Uniform Transfers to Minors Act" [*Prob. Code § 3909(a)(2)*].
- A gift of the ownership of a life or endowment insurance policy or annuity contract when the ownership is registered with the issuer in the name of the transferor, an adult other than the transferor, or a trust company, followed in substance by the words "as custodian for \_\_\_\_\_ [*name of minor*] under the California Uniform Transfers to Minors Act" [*Prob. Code § 3909(a)(3)(A)*].
- A gift of the ownership of a life or endowment insurance policy or annuity contract when the ownership is assigned in a writing delivered to an adult other than the transferor or to a trust company whose name in the assignment is followed in substance by the words "as custodian for \_\_\_\_\_ [*name of minor*] under the California Uniform Transfers to Minors Act" [*Prob. Code § 3909(a)(3)(B)*].
- A gift of an irrevocable present right to future payments under a contract, or a gift made by an irrevocable exercise of a power of appointment, when a written notification is delivered to the payor, issuer, or other obligor that the right is transferred to the transferor, an adult other than the transferor, or a trust company, whose name in the notification is followed in substance by the words "as custodian for \_\_\_\_\_ [*name of minor*] under the California Uniform Transfers to Minors Act" [*Prob. Code § 3909(a)(4)*].
- A gift of an interest in real property when the instrument of transfer is recorded in the name of the transferor, an adult other than the transferor, or a trust company, followed in substance by the words "as custodian for \_\_\_\_\_ [*name of minor*] under the California Uniform Transfers to Minors Act" [*Prob. Code § 3909(a)(5)*].
- A gift of a certificate of title issued by a department or agency of a state or of the United States

which evidences title to tangible personal property when the certificate is issued in the name of the transferor, an adult other than the transferor, or a trust company, followed in substance by the words "as custodian for \_\_\_\_\_ [name of minor] under the California Uniform Transfers to Minors Act" [Prob. Code § 3909(a)(6)(A)].

■ A gift of a certificate of title issued by a department or agency of a state or of the United States which evidences title to tangible personal property when the certificate is delivered to an adult other than the transferor or to a trust company, endorsed to that person followed in substance by the words "as custodian for \_\_\_\_\_ [name of minor] under the California Uniform Transfers to Minors Act" [Prob. Code § 3909(a)(6)(B)].

### [f] Gift of Community Property

A spouse ordinarily cannot make a gift of community property unless the other spouse consents to the gift or joins in making it. A spouse may not make a gift of community personal property, or dispose of community personal property for less than fair and reasonable value, without the written consent of the other spouse [Fam. Code § 1100(b)]. However, this rule does not apply to gifts mutually given by both spouses to third parties, or to gifts given by one spouse to the other spouse [Fam. Code § 1100(b)].

If community property is given to a minor, both spouses should either consent to the gift or join in making it. This form does not include a consent of the transferor's spouse. The form is statutory, and the statutory language does not include spousal consent language [see Prob. Code § 3909(b)]. However, the statute provides only that the gift instrument must be "substantially" in this form [Prob. Code § 3909(a)(1)(B)]. There is no reason to suppose that the addition of spousal consent language would violate the terms of the statute. For an example of such a line for spousal consent to a gift, see § 60A.200[2].

### [g] Age for Termination of Custodianship

This form contains optional language, prescribed by statute [see Prob. Code § 3920.5(b)], that can be used if the transferor wishes to have the custodianship continue beyond the minor's eighteenth birthday. Ordinarily, the custodianship will terminate, and the property will be distributed to the minor outright, when the minor attains age 18 or dies, whichever comes first [Prob. Code § 3920]. However, the UTMA permits the transferor to extend the custodial period beyond the minor's eighteenth birthday by specifying an extended period in the instrument of transfer [see Prob. Code §§ 3920(b), 3920.5]. In the case of a transfer by irrevocable inter vivos gift, the time for transfer of the custodial property to the minor may be delayed until no later than the time the minor attains 21 years of age [Prob. Code § 3920.5(e)].

Any attempt to delay distribution beyond age 21 will be futile, and in that event the property will be distributed when the minor attains 21 [Prob. Code § 3920.5(h)]. If it is essential to the transferor that distribution be postponed beyond that time, then a trust should be created in lieu of a gift under the UTMA.

### [2] Form

#### Gift of Personal Property Under California Uniform Transfers to Minors Act

Transfer Under the California UTMA

I, \_\_\_\_\_ [name of transferor or name and representative capacity if executed by a fiduciary], hereby transfer to \_\_\_\_\_ [name of custodian], as custodian for \_\_\_\_\_ [name of minor] \_\_\_\_\_ [if transferor wishes to delay transfer until a specified time after minor attains age 18, add: until age \_\_\_\_\_ (age for delivery of property to minor; may not exceed age 21 in the case of an irrevocable inter vivos gift)] under the California Uniform Transfers to Minors Act, the following:

\_\_\_\_\_ [insert description of custodial property sufficient to identify it].  
\_\_\_\_\_ Dated:

\_\_\_\_\_ [signature of transferor]  
[typed name]

**Acknowledgment of Receipt by Custodian**

\_\_\_\_\_ [name of custodian] acknowledges receipt of the property described above as custodian for the minor named above under the California Uniform transfers to Minors Act.  
\_\_\_\_\_ Dated:

\_\_\_\_\_ [signature of custodian]  
[typed name]

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Estate, Gift & Trust LawPersonal GiftsGifts to MinorsGeneral OverviewEstate, Gift & Trust LawPersonal GiftsGifts to MinorsCustodial Duties & RightsEstate, Gift & Trust LawPersonal GiftsGifts to MinorsUniform Acts



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DIVISION IV: WILLS AND TRUSTS

CHAPTER 60A GIFTS

PART IV. FORMS

B. Gifts Under California Uniform Transfers to Minors Act

*23-60A California Legal Forms--Transaction Guide § 60A.221*

**AUTHOR:** Reviewed by Albert G. Handelman

**§ 60A.221 Agreement for Compensation of Custodian Under California UTMA**

**[1] Comment**

**[a] Use of Form**

The form in [2], *below*, is an agreement fixing the compensation of a custodian under the California Uniform Transfers to Minors Act. It provides that the custodian will receive a fixed annual fee, or, in the alternative, an annual fee amounting to a specified percentage of the value of the custodial property.

This form is a separate contract between the transferor and the custodian and is designed to be used in addition to the instrument (if any) actually making the transfer. This method is used here because many kinds of property can be transferred under the UTMA without the use of a formal transfer instrument such as the form in § 60A.220[2] (for example, by reregistering securities, depositing money in a custodial account, or transferring the certificate of title to a motor vehicle) [*see Prob. Code § 3909(a)(1), (2), (6); see also § 60A.123*].

A trust company may be named as custodian of property transferred under the UTMA [*see Prob. Code § 3909(a)(1)-(7)*]. If the custodian will be a trust company, it may have its own rate scale for computing compensation and may use its own forms.

**[b] Compensation in Absence of Agreement**

A custodian (except a custodian who is also the transferor) ordinarily has a noncumulative election during each calendar year to charge reasonable compensation for services performed during that year [*Prob. Code § 3915(b)*]. This option must be exercised at least annually or it lapses and may not be exercised later. However, the compensation need not actually be paid in the year in which the option is exercised. The purpose of this requirement is to avoid imputing income to a custodian who waives compensation, and also to avoid a large unanticipated claim for compensation exercisable at termination of the custodianship [*Law Revision Commission comment to Prob. Code § 3915*].

**[c] Compensation by Agreement**

Although the governing statutes say nothing about whether or not the parties can fix the custodian's compensation by mutual agreement, the Law Revision Commission's comments to the relevant provision state that compensation may be determined by agreement, by a will provision, by reference to a statute, or by court order [Law Revision Commission comment to *Prob. Code* § 3915]. In the case of a testamentary gift, the will may specify the measure of compensation of the custodian in the will [*Prob. Code* § 6345].

**[d] Right to Reimbursement**

In addition to the right to reasonable compensation, the custodian is entitled to reimbursement from the custodial property for reasonable expenses incurred in the performance of the custodian's duties [*Prob. Code* § 3915(a)]. This form preserves this right by essentially restating the language of the statute.

**[2] Form****Agreement for Compensation of Custodian Under California UTMA**

Agreement for Compensation of Custodian Under  
California Uniform Transfers to Minors Act

This Agreement is made \_\_\_\_\_ [date], between \_\_\_\_\_ [name of transferor],  
\_\_\_\_\_ [address] ("Transferor") and \_\_\_\_\_ [name of custodian]  
("Custodian").

**Recitals**

In a transfer made [by written instrument dated] \_\_\_\_\_ [date], Custodian has been named by Transferor as custodian of \_\_\_\_\_ [description of property, e.g., 5,000 shares of Acme Corporation Class A common stock] (the "custodial property") for \_\_\_\_\_ [name of minor], a minor, under the California Uniform Transfers to Minors Act.

Custodian has agreed to act as custodian for the custodial property.

Transferor and Custodian desire to fix Custodian's right to compensation for the performance of Custodian's duties in connection with the custodial property.

**Compensation of Custodian**

1. The annual compensation to be paid to Custodian for services as custodian shall be \_\_\_\_\_ [state annual compensation, either a flat fee or a percentage of the value of the custodial property], payable out of the custodial property \_\_\_\_\_ [state time of payment, e.g., at the end of each calendar year]. Compensation for the first payment period shall be proportionally reduced based on the ratio that the number of days during which Custodian serves as custodian bears to the total number of days in that period. Compensation for the payment period in which the custodianship is terminated shall be proportionately reduced by the ratio that the amount of time remaining in the payment period bears to the entire payment period, and shall be payable at the time of termination. The compensation specified in this paragraph shall be in lieu of Custodian's right under *Probate Code Section 3915(b)* or any successor statute to charge reasonable compensation for services performed during the calendar year. As used herein, the phrase "payment period" means a calendar year.

**Reimbursement for Reasonable Expenses**

2. In addition to the compensation specified above, Custodian shall be entitled to reimbursement from the custodial property for reasonable expenses incurred in the performance of custodial duties.

**Controlling Law**

3. Except as specifically provided in this Agreement, all matters relating to the custodial property and the rights, duties, and obligations of the parties shall continue to be governed in all respects by the provisions of the California Uniform Transfers to Minors Act [and the instrument making the transfer of the custodial property].

TRANSFEROR

\_\_\_\_\_ [signature of transferor]

[typed name]

CUSTODIAN

\_\_\_\_\_ [signature of custodian]

[typed name]

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Personal Gifts Gifts to Minors General Overview Estate, Gift & Trust Law Personal Gifts Gifts to Minors Custodial Duties & Rights Estate, Gift & Trust Law Personal Gifts Gifts to Minors Uniform Acts



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DIVISION IV: WILLS AND TRUSTS

CHAPTER 60A GIFTS

PART IV. FORMS

B. Gifts Under California Uniform Transfers to Minors Act

*23-60A California Legal Forms--Transaction Guide § 60A.222*

**AUTHOR:** Reviewed by Albert G. Handelman

**§ 60A.222 Declaration That Transferor-Custodian May Pay Custodial Property to or on Behalf of Minor Only by Court Order [Prob. Code § 3914(d)]**

**[1] Comment**

**[a] Use of Form**

The form in [2], *below*, is a declaration limiting the custodial power of a transferor-custodian under the California Uniform Transfers to Minors Act. It provides that the custodian may not pay over any part of the custodial property to or for the use or benefit of the minor prior to termination of the custodianship except by court order on a showing that the expenditure is necessary for the support, maintenance, or education of the minor. A transferor-custodian who desires to limit his or her custodial powers in this manner must file with the clerk of the superior court a declaration in substantially the form set forth here [*Prob. Code § 3914(d)*]. The language of this form is specified by statute and states that the election is irrevocable [*Prob. Code § 3914(d)*].

**PRACTICE TIP:**

Filing such a declaration with the clerk of the court may be problematic. It appears that such filings are very infrequent and as a result at least some local probate court clerks may be unfamiliar with them. There is also a question whether such a filing requires opening a proceeding and paying a minimum filing fee for a first appearance and, once the filing is made, what the clerk does with the filings. It is recommended that attorneys contemplating such a filing contact the local probate clerk in advance to determine the local answers to these questions. *Commentary by Albert G. Handelman*

The Uniform Transfers to Minors Act does not specify any time limit for making such an election.

**[b] Estate Tax Reasons for Election**

Ordinarily, a custodian under the California Uniform Transfers to Minors Act, including a transferor who has named

himself or herself as custodian, may deliver or pay to the minor, or expend for the minor's benefit, as much of the custodial property as the custodian deems advisable. This right may be exercised without court order and without regard to the duty or ability of the custodian or any other person to support the minor, or to any other income or property of the minor that may be applicable or available for that purpose [*Prob. Code* § 3914(a)].

This unfettered right to pay custodial property to or for the benefit of the minor may have undesirable federal estate tax consequences if the transferor names himself or herself as custodian. If a donor who is named as custodian dies while acting in that capacity, the custodial property is included in his or her gross estate unless the donor waives the right to make support payments so that they are made only pursuant to court order and not at the discretion of the donor [ *Rev. Rul. 57-366, 1957-2 C.B. 618* ; *see I.R.C. § 2038; § 60A.44[3]*].

The advantages that will be derived from such an election obviously will vary depending on the circumstances. If the donor's estate is not large enough to have any potential for federal estate tax liability, there is no point in making such an election. In that situation, it will only deprive the custodian of flexibility by restricting payments to those necessary for the minor's support, maintenance, and education. Further, it could complicate administration of the custodial property by requiring a court proceeding as a condition precedent to any payments to or for the minor. However, if the estate of the transferor-custodian is large enough that imposition of federal estate tax is likely or certain, such an election can result in tax savings for the estate. To determine whether or not an election should be made in such a situation, it is necessary to weigh the loss of flexibility that would result from an election against the anticipated tax savings.

## [2] Form

### **Declaration That Transferor-Custodian May Pay Custodial Property to or on Behalf of Minor Only by Court Order [Prob. Code § 3914(d)]**

Declaration Under California UTMA

I, \_\_\_\_\_ [*name of transferor/custodian*], as custodian for \_\_\_\_\_ [*name of minor*] under the California Uniform Transfers to Minors Act, hereby irrevocably elect to be governed under *Probate Code Section 3914(d)* in my custodial capacity over the following described property: \_\_\_\_\_ [*description of custodial property*].

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

\_\_\_\_\_ Dated:

\_\_\_\_\_ [*signature of transferor/custodian*]

[*typed name*]

### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Personal Gifts Gifts to Minors General Overview Estate, Gift & Trust Law Personal Gifts Gifts to Minors Custodial Duties & Rights Estate, Gift & Trust Law Personal Gifts Gifts to Minors Uniform Acts



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B. Gifts Under California Uniform Transfers to Minors Act

*23-60A California Legal Forms--Transaction Guide §§ 60A.223-60A.229*

**AUTHOR:** Reviewed by Albert G. Handelman

**[Reserved]**

§§ 60A.223[Reserved]



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DIVISION IV: WILLS AND TRUSTS  
CHAPTER 60A GIFTS  
PART IV. FORMS  
C. Disclaimers

*23-60A California Legal Forms--Transaction Guide § 60A.230*

**AUTHOR:** Reviewed by Albert G. Handelman

**§ 60A.230 Disclaimer of Gift or Other Interest**

**[1] Comment**

**[a] Use of Form**

The form in [2], *below*, is an instrument that a donee may use to disclaim an inter vivos gift. The form may be modified to disclaim property or interests transferred or created by will or by the exercise of a power of appointment. For a form that may be used to disclaim an interest in an inter vivos trust, see § 60A.231.

**[b] Use of Disclaimers in Estate Planning**

A person who accepts a gift becomes the owner of the gift property. If, after accepting the property, the donee returns it to the donor, or transfers it to another person, the return to the donor or transfer to another person is a transfer and potentially subject to gift tax. If the donee does not return the property or transfer it to another person, it will be included in the donee's gross estate for federal estate tax purposes and be subject to estate taxation on the donee's death.

To avoid these potentially undesirable results, the donee may elect to disclaim the gift. A disclaimer of a gift will often be appropriate when the donee does not need the gift property and would prefer that it pass to other persons, such as the donee's children or grandchildren. The potentially unfavorable consequences of accepting a gift may be avoided if the disclaimer is a "qualified disclaimer" for gift tax purposes.

Care should be taken to ensure that unintended consequences do not result from a devisee's disclaimer. For example, a decedent's estate was found liable for an estate tax deficiency when a disclaimer executed by the decedent's surviving spouse caused a trust created under the decedent's will to be funded in an amount that exceeded the decedent's applicable exclusion amount. The will provided that the trust was to be funded in an amount equal to the "aggregate federal estate tax exemption equivalent" and that this amount was not to be reduced by any disclaimer executed by the surviving spouse. It also provided that any portion of the decedent's residuary estate that was disclaimed by the

surviving spouse was to be added to the trust. The decedent's will and the surviving spouse's qualified disclaimer had the effect of funding the trust with an amount equal to the "aggregate federal estate tax exemption equivalent" and with the interests of the securities specified in the disclaimer. Assuming that the decedent's intent was to minimize taxes, this intent was defeated by execution of the disclaimer [*see Estate of David Katz, T.C. Memo. 2004-166*].

### [c] Qualified Disclaimers for Federal Gift Tax Purposes

A disclaimer is a "qualified disclaimer" for federal gift tax purposes if it meets the requirements of *I.R.C. § 2518*. A "qualified disclaimer" is an irrevocable and unqualified refusal to accept an interest in property, but only if it meets the following requirements [*I.R.C. § 2518(b)*]:

- The refusal is in writing.
- The writing is received by the transferor of the interest, the transferor's legal representative, or the holder of legal title to the property not later than nine months after (1) the transfer creating the interest is made, or (2) the transferee's 21st birthday, whichever is later.
- The transferee has not accepted the interest or any of its benefits [*Treas. Reg. § 25.2518-2(d)(1)*]; *see, e.g., Estate of Engelman v. Commissioner (2003) 121 T.C. 54* (attempted disclaimer of property by executor of decedent's estate on decedent's behalf was not qualified disclaimer because decedent's exercise of power of appointment over property, effective on her death, constituted acceptance of property under California law)]. Acts indicative of acceptance include using property or interest in property, accepting dividends or rents from property, and directing others to act with respect to property or interest in property [*Treas. Reg. § 25.2518-2(d)(1)*].

If a transferee who disclaims an interest in property is also a fiduciary, actions taken in the exercise of fiduciary powers to preserve or maintain the disclaimed property are not treated as an acceptance of that property [*Treas. Reg. § 25.2518-2(d)(2)*]; *see Letter Rul. 200406038* (individual's disclaimer of interest in limited liability company was qualified disclaimer, even though in her fiduciary capacity, she also executed amendment to LLC agreement)].

#### **PRACTICE TIP:**

A wife's disclaimer of her survivorship interest in a joint brokerage account with her husband constituted a qualified disclaimer even though, before making the disclaimer, she made cash withdrawals from the account and sold certain securities in the account.

Despite the cash withdrawal and sale of securities, the disclaimer was a qualified disclaimer because the cash and securities were separable assets, and the wife did not accept the benefits of the disclaimed interest [*see Treas. Reg. § 25.2518-3(a)(1)(ii)*]; *Letter Rul. 200503024* ].

- As a result of the refusal, the interest passes without any direction on the part of the transferee to some other person [*see, e.g., Letter Rul. 200333023* (example of qualified disclaimer)]. A disclaimer is not qualified if the transferee, either alone or with another, directs the redistribution or transfer of the property or interest in property to another person, or has the power to do so, unless the power is limited by an ascertainable standard [*see Treas. Reg. § 25.2518-2(e)*]; *Letter Rul. 200420007* (disclaimer was qualified even though property would pass to charitable foundation of which transferee was a director, when actions would be taken to prevent transferee from having any say over administration of property by foundation)].

For purposes of determining whether a disclaimer is a qualified disclaimer, the nine-month period begins from the date on which the interest is created, not the date on which the interest becomes vested [ *Jewett v. Commissioner* (1982) 455 U.S. 305, 318-319, 102 S. Ct. 1082, 71 L. Ed. 2d 170 ; *Ordway v. United States* (11th Cir. 1990) 908 F.2d 890, 895-896 ].

**EXAMPLE:**

Assume, for example, that a grandfather created a trust in 1917 and provided that, on the death of the last surviving life beneficiary, the trust corpus would be distributed to his grandchildren. Assume further that a grandson who was born in 1922 learned of his contingent interest in the trust in 1941 and reached his twenty-first birthday in 1943. Assume also that the last surviving life beneficiary died on June 27, 1979, and that the grandson filed a disclaimer of his interest in the trust on August 23, 1979. Although the disclaimer was made within nine months after the remainder interest vested in the grandson, it was not made within nine months after the grandson learned of the remainder interest, or reached his twenty-first birthday; hence the disclaimer was not a "qualified disclaimer" under *I.R.C. § 2518* [see *Ordway v. United States* (11th Cir. 1990) 908 F.2d 890, 895-896 ].

A qualified disclaimer may be partial or whole. For example, a qualified disclaimer may extend only to an undivided portion of an interest in the gift property [*I.R.C. § 2518(c)(1)*]. The disclaimed property may be a power with respect to property (e.g., a power of appointment) [*I.R.C. § 2518(c)(2)*]. A qualified disclaimer also may consist of a written transfer of the transferor's interest in the property. Such a transfer will qualify as a qualified disclaimer if it otherwise meets the requirements for a qualified disclaimer and if the transfer is to a person or persons who would have received the property had the transferor made a qualified disclaimer of the property [*I.R.C. § 2518(c)(3)*].

A beneficiary's disclaimer of a beneficial interest in a decedent's individual retirement account (IRA) is a qualified disclaimer under *I.R.C. § 2518* if all of the requirements of that section are met, even though, before making the disclaimer, the beneficiary receives the required minimum distribution for the year of the decedent's death from the IRA. The beneficiary may make a qualified disclaimer with respect to all or a portion of the balance of the IRA, other than the income attributable to the required minimum distribution that the beneficiary received, as long as at the time the disclaimer is made, the disclaimed amount and the income attributable to that amount are paid to the beneficiary entitled to receive the disclaimed amount, or are segregated in a separate account [ *Rev. Rul. 2005-36, 2005-26 I.R.B. 1368* ].

**[d] California Disclaimer Requirements**

The Probate Code sets forth requirements for the content and execution of disclaimers [see *Prob. Code § 260 et seq.*]. However, any disclaimer that meets the requirements of federal law will be sufficient under California law [*Prob. Code § 295*].

A disclaimer must be in writing and signed by the person disclaiming the interest [*Prob. Code § 278*]. It must identify the creator of the interest, describe the interest to be disclaimed, and state the disclaimer and its extent [*Prob. Code § 278*].

**[e] Who May Disclaim**

The beneficiary of any interest may disclaim the interest, in whole or in part [*Prob. Code § 275*]. A disclaimer on behalf of a conservatee must be made by the conservator of the estate of the conservatee pursuant to a court order [*Prob. Code § 276; see Prob. Code § 2580 et seq.* (court orders authorizing conservators to take proposed action)]. A disclaimer on behalf of a minor must be made by the guardian of the minor's estate if one has been appointed, and by a guardian ad litem of the minor if there is no guardian of the estate [*Prob. Code § 277(a)*]. A disclaimer by a guardian ad litem must

be pursuant to court order [*Prob. Code § 277(a)*]. A disclaimer on behalf of a decedent must be made by the personal representative of the decedent [*Prob. Code § 277(b)*]. Except as provided in the Independent Administration of Estates Act [*see Prob. Code § 10400 et seq.*; *see also Ch. 65, Executors* ], a disclaimer by a guardian or personal representative is not effective unless made pursuant to a court order [*Prob. Code § 277(b)*].

A petition for an order authorizing or requiring a guardian or personal representative to execute and file a disclaimer must be filed in the superior court in the county in which the estate of the minor or decedent is administered or, if there is no administration, in the superior court in any county in which administration would be proper [*Prob. Code § 277(c)*]. The petition may be filed by the guardian, personal representative, or other interested person [*Prob. Code § 277(c)*]. It must identify the creator of the interest, describe the interest to be disclaimed, state the extent of the disclaimer, and identify the person or persons the petitioner believes would take the interest in the event of the disclaimer [*Prob. Code § 277(d)*].

The right to disclaim is not impaired by any limitation on the interest of a beneficiary in the nature of an expressed or implied spendthrift provision or similar restriction [*Prob. Code § 286*; *see Prob. Code § 15300 et seq.* (spendthrift provisions in trusts); *Ch. 64, Testamentary Trusts: Payment and Distribution Provisions* ].

#### **[f] When Disclaimer Must Be Filed**

A disclaimer is effective under California law if it is filed within a "reasonable time" after the person able to disclaim acquires knowledge of the interest [*Prob. Code § 279(a)*]. Disclaimers of interests created under wills, intestate succession, pursuant to the exercise or nonexercise of testamentary powers of appointment, or otherwise arising from death are presumed to have been filed within a reasonable time if they are filed within nine months after the death of the creator of the interest, or within nine months after the interest becomes indefeasibly vested, whichever occurs later [*Prob. Code § 279(b)*].

Disclaimers of interests in inter vivos trusts [ *see § 60A.231* ], interests created by the exercise of a presently exercisable power of appointment, outright inter vivos gifts, powers of appointment, and interests resulting from succession to an interest disclaimed by another person, are conclusively presumed to have been filed within a reasonable time if they are filed within nine months after the latest of the following [*Prob. Code § 279(c)*]:

- The creation of the trust, the exercise of the power of appointment, the making of the gift, the creation of the power of appointment, or the disclaimer of the disclaimed property.
- The time the first knowledge of the interest is acquired by the person able to disclaim.
- The time the interest becomes indefeasibly vested.

A disclaimer of a future estate is conclusively presumed to have been filed within a reasonable time if it is filed within nine months after it becomes an estate in possession or within the time period that would otherwise apply to it, whichever is later [*Prob. Code § 279(e)*]. Disclaimers of other types of interests are conclusively presumed to have been filed within a reasonable time if they are filed within nine months after the time the first knowledge of the interest is acquired by the person able to disclaim, or the time the interest becomes indefeasibly vested, whichever is later [*Prob. Code § 279(d)*].

If the disclaimer is not filed within the time periods specified above, the person filing the disclaimer has the burden of proving that the disclaimer was filed within a reasonable time after he or she acquired knowledge of the interest [*Prob. Code § 279(f)*].

A disclaimer may not be made after the beneficiary has accepted the interest sought to be disclaimed [*Prob. Code §*

285(a)], unless the beneficiary became entitled to the interest because another person disclaimed an interest and the beneficiary (or the person acting on his or her behalf) had no knowledge of the interest to which he or she became entitled [*Prob. Code* § 285(c)]. A beneficiary will be deemed to have accepted an interest if, before filing a disclaimer of the interest, the beneficiary (or someone acting on the beneficiary's behalf) either (1) accepts all or part of the interest; (2) executes a written waiver of the right to disclaim the interest [*see Prob. Code* § 284; § 60A.232]; or (3) voluntarily assigns, conveys, encumbers, pledges, or transfers all or part of the interest, or contracts to do so *Prob. Code* § 285(b)(1)-(3)]. A beneficiary also will be deemed to have accepted an interest if, before the beneficiary files a disclaimer with respect to the interest, all or part of the interest is sold at a judicial sale [*Prob. Code* § 285(b)(4)].

A beneficiary will not be deemed to have accepted an interest, however, merely by making a gratuitous conveyance or transfer of the beneficiary's entire interest in property to the person or persons who would have received the property had the beneficiary made an otherwise qualified disclaimer of the interest [*Prob. Code* § 285(b)(1)]. Further, a beneficiary who is a surviving joint tenant will not be deemed to have accepted the interest of the deceased joint tenant in the joint tenancy property merely because the beneficiary accepted a joint interest in the property when the joint tenancy was originally created [*Prob. Code* § 285(d)].

### **[g] Filing Requirements**

The disclaimer must be filed with any of the following [*Prob. Code* § 280(a)]:

- The superior court in the county in which the decedent's estate is administered, or, if there is no administration of the decedent's estate, the superior court in any county in which administration of the decedent's estate would be proper.
- The trustee, personal representative, fiduciary, or person responsible for distributing the interest to the beneficiary.
- Any other person having custody or possession of or legal title to the interest.
- The creator of the interest.

### **[h] Recording of Disclaimers Affecting Real Property**

If a disclaimer affects real property or an obligation secured by real property, it may be recorded in the same manner as a grant of real property [*Prob. Code* § 280(b); *see Ch. 27, Deeds and Recording* ]. All provisions relating to the recordation or nonrecordation of real property apply to the disclaimer, without regard to the date the disclaimer was filed [*see [g], above*]. Failure to file a disclaimer that has been recorded does not affect the validity of any transaction with respect to the real property or the obligation secured by the real property, and the general laws on recording and its effect govern any such transaction [*Prob. Code* § 280(b)].

### **[i] Irrevocability**

A disclaimer, when effective, is irrevocable. It binds the beneficiary and all persons claiming by, through, or under the beneficiary, including the beneficiary's creditors [*Prob. Code* § 281].

### **[j] Disposition of Disclaimed Interest**

If the disclaimed interest is a present interest, it will be treated as if the person making the disclaimer had predeceased the creator of the interest. If it is a future interest, it will be treated as if the person making the disclaimer had died before the determinative event on which the taker of the interest had become finally ascertained and the taker's interest indefeasably vested. The creator of the interest, however, may provide for a specific alternate disposition of the interest

in the event of a disclaimer [*Prob. Code § 282(a)*]. The beneficiary is not treated as having predeceased the decedent for the purpose of determining the division of the estate under the Probate Code rules relating to distribution among heirs or beneficiaries [*Prob. Code § 282(b)(1)*] (applicable to disclaimers filed on or after Jan. 1, 1985); *see Prob. Code § 240 et seq.* (distribution among heirs or beneficiaries)].

A disclaimer relates back for all purposes to the date of death of the creator of the disclaimed interest or the determinative event, as the case may be [*Prob. Code § 282(a)*].

## [2] Form

### Disclaimer of Gift or Other Interest

#### Disclaimer of Gift

I, \_\_\_\_\_ [*name of donee*], am the person designated as the donee of \_\_\_\_\_ [*describe gift property in detail; if real property, indent for legal description; for a partial disclaimer, include reference to specific fraction or percentage of entire gift*], which was transferred to me by way of gift and without consideration by \_\_\_\_\_ [*name and address of donor*]. \_\_\_\_\_ [This transfer was made *or* I first obtained knowledge of this transfer] on \_\_\_\_\_ [*date*]. I do hereby absolutely disclaim and renounce any right, title, and interest in the property described above, without conditions or reservations of any kind. My disclaimer is irrevocable and unequivocal, and constitutes a complete and unqualified refusal to accept any right, title, and interest in the property described above.

\_\_\_\_\_ Dated:

\_\_\_\_\_ [*donee's signature*]

[*typed name*]

### Acknowledgment of Delivery

I hereby acknowledge delivery to me of the above disclaimer and renunciation by the donee of the property described above on \_\_\_\_\_ [*date*] at \_\_\_\_\_ [*city, state*].

\_\_\_\_\_ [*signature of person accepting disclaimer*]

[*typed name*]

### Legal Topics:

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Personal Gifts General Overview Estate, Gift & Trust Law Personal Gifts Procedures General Overview Estate, Gift & Trust Law Wills Beneficiaries Disclaimers & Renunciations



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DIVISION IV: WILLS AND TRUSTS  
CHAPTER 60A GIFTS  
PART IV. FORMS  
C. Disclaimers

*23-60A California Legal Forms--Transaction Guide § 60A.231*

**AUTHOR:** Reviewed by Albert G. Handelman

**§ 60A.231 Disclaimer by Beneficiary of Interest in Trust**

**[1] Comment**

**[a] Use of Form**

The form in [2], *below*, is an instrument that may be used to disclaim an interest created by an inter vivos trust. It may also be modified to disclaim interests created by will or the exercise of a power of appointment. For a general discussion of the federal and California rules governing disclaimers, see § 60A.230[1].

The use of special "disclaimer trusts" as postmortem estate planning devices is common. The function of disclaimer trusts is basically to allow the trust beneficiary to assess, at the time when he or she would come into actual possession of the interest, whether or not it would be advantageous for tax purposes to divert the trust income or principal to other beneficiaries in a manner predetermined by the settlor or testator and specified in the trust instrument. Most commonly, this involves a disclaimer by a spouse of the settlor or testator into a trust for his or her own benefit or for the benefit of his or her children, or by children of the settlor or testator for the purpose of diverting trust income or principal to grandchildren. If the disclaimer trust is not needed, then it simply never becomes operative. For more detailed discussion of the use of disclaimer trusts in estate planning, see *Ch. 71, Marital Deduction Trust Provisions*, § 71.16. The complete marital deduction trust forms in this publication all contain disclaimer trusts [ *see Ch. 70, Complete Revocable Trust Forms*, §§ 70.201, Sections 5.06, 5.07 (nonformula trust), 70.202, Section 5.11 (formula trust--two settlors), 70.203, Section 5.12 (formula trust--one settlor)].

**[b] When Disclaimer Must Be Filed**

For federal gift tax purposes, a disclaimer must be received by the transferor, the transferor's legal representative, or the holder of legal title to the property to which the interest relates within nine months after (1) the date on which the transfer creating the interest is made, or (2) the beneficiary's 21st birthday, whichever occurs later [*I.R.C. § 2518(b)(2)*]. California law requires only that the disclaimer be filed within a reasonable time after the person able to disclaim

acquired knowledge of the interest [*Prob. Code § 279(a)*; see *Prob. Code § 280* (where disclaimer must be filed)]. California law also provides, however, that the disclaimer of an interest created by an inter vivos trust is conclusively presumed to have been filed within a reasonable time if it is filed within nine months after (1) the trust was created; (2) the beneficiary first acquired knowledge of the interest; or (3) the interest became indefeasibly vested, whichever occurs last [*Prob. Code § 279(c)*]. In any event, a disclaimer valid under federal law is also valid under California law [*Prob. Code § 295*].

## [2] Form

### Disclaimer by Beneficiary of Interest in Trust

Disclaimer of Interest in Trust Property

I, \_\_\_\_\_ [*name of beneficiary*] am the person designated as the beneficiary of an interest in a trust created under \_\_\_\_\_ [the will of \_\_\_\_\_ (*name*) dated \_\_\_\_\_] or a trust instrument entitled " \_\_\_\_\_ " (*name of trust as specified in trust instrument, e.g., The John Q. Smith Family Trust*), executed by \_\_\_\_\_ (*name of settlor*) on \_\_\_\_\_ (*date*) (*add, if applicable: and recorded in \_\_\_\_\_*), more specifically consisting of \_\_\_\_\_ [*describe nature of interest in detail, as specified in trust instrument; for a partial disclaimer, include reference to specific fraction or percentage of entire gift*]. I do hereby absolutely disclaim and renounce that interest without conditions or reservations of any kind. My disclaimer is irrevocable and unequivocal, and constitutes a complete and unqualified refusal to accept any power or rights as a beneficiary in the interest described above.

\_\_\_\_\_ [*signature of beneficiary*]

[*typed name*]

### Acknowledgment of Delivery

I hereby acknowledge delivery to me of the above disclaimer and renunciation of the beneficiary of the trust named above on \_\_\_\_\_ [*date*], at \_\_\_\_\_ [*city, state*].

\_\_\_\_\_ [*signature of trustee*]

[*typed name and title*]

### Legal Topics:

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Personal Gifts Procedures General Overview Estate, Gift & Trust

Law Trusts Beneficiaries General Overview Estate, Gift & Trust Law Wills Beneficiaries Disclaimers & Renunciations



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*23-60A California Legal Forms--Transaction Guide § 60A.232*

**AUTHOR:** Reviewed by Albert G. Handelman

**§ 60A.232 Waiver of Right to Disclaim Interest**

**[1] Comment--Use of Form**

The form in [2], *below*, is a waiver by the recipient of an interest of any right to disclaim the interest. Under California law, any person who could file a disclaimer of an interest may instead file a written waiver of the right to disclaim [*Prob. Code § 284*]. Once this waiver is filed in the same manner as a disclaimer [*see Prob. Code § 280; see also § 60A.230[1][f], [g]*], the waiver is irrevocable and is binding on the beneficiary and all persons claiming by, through, or under the beneficiary [*Prob. Code § 284*].

**PRACTICE TIP:**

A waiver of this sort would most frequently be used when a will or trust incorporated disclaimer planning (in other words, it contemplated and planned for the possible use of disclaimers) and the prospective disclaimant wanted to clearly announce his or her intention to not make a disclaimer, thereby allowing the administration of the will or trust to go forward with a clear understanding on the part of the fiduciary as to how to administer the assets under management. *Commentary by Albert G. Handelman*

**[2] Form**

**Waiver of Right to Disclaim Interest**

Waiver of Right to Disclaim Gift

I, \_\_\_\_\_ [*name of beneficiary*], the person designated as the \_\_\_\_\_ [*donee or beneficiary*] of \_\_\_\_\_ [*describe gift property, trust, or other interest*], hereby waive all my rights to disclaim all or any part of this \_\_\_\_\_ [*property or interest or trust*]. This waiver shall be irrevocable and unequivocal, without any conditions or reservations of any kind.

\_\_\_\_\_ [*signature of beneficiary*]  
[*typed name*]

**Acknowledgment of Delivery**

I hereby acknowledge that the above waiver was delivered to me on \_\_\_\_\_ [*date*], at  
\_\_\_\_\_ [*city and state*].

\_\_\_\_\_ [*signature of person accepting waiver*]  
[*typed name and title*]

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Estate, Gift & Trust LawPersonal GiftsProceduresGeneral OverviewEstate, Gift & Trust  
LawTrustsBeneficiariesGeneral OverviewEstate, Gift & Trust LawWillsBeneficiariesDisclaimers & Renunciations



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*23-60A California Legal Forms--Transaction Guide §§ 60A.233-60A.239*

**AUTHOR:** Reviewed by Albert G. Handelman

**[Reserved]**

§§ 60A.233[Reserved]



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D. Miscellaneous Documents

*23-60A California Legal Forms--Transaction Guide § 60A.240*

**AUTHOR:** Reviewed by Albert G. Handelman

**§ 60A.240 Certificate of Independent Review [Prob. Code § 21351(b)]**

**[1] Comment**

**[a] Use of Form**

The form in [2], *below*, is a Certificate of Independent Review. It may be used when an instrument makes a donative transfer to a "disqualified person" and that transfer otherwise would be invalidated under the rules set forth in *Prob. Code § 21350 et seq.* For a Certificate of Independent Review that may be used when a person who drafts a trust instrument wishes to serve as trustee of the trust [*see Prob. Code § 15642(b)(6)(B)*], see Ch. 64A, *Testamentary Trusts: Trustee Provisions*.

**[b] Requirement of Certificate of Independent Review**

A donative transfer is subject to a statutory presumption of invalidity if the instrument under which it is made was drafted by the donee, or if the donee is a relative (by blood or marriage), domestic partner [*see Fam. Code § 297*], partner, employee, or cohabitant of the person who drafted the instrument, transcribed the instrument, or caused it to be transcribed [Prob. Code § 23150(a)]. Under these circumstances, the donee is classified as a "disqualified person" [Prob. Code § 23150.5] and the transfer is subject to the special rules set forth in *Prob. Code § 21350 et seq.* For a detailed discussion of those rules, and the exceptions to them, see § 60A.16.

One of the exceptions to the general rule creating the presumption of invalidity of donative transfers to "disqualified persons" provides that such a transfer is not invalid if the instrument making the transfer is reviewed by an independent attorney who counsels the transferor about the nature of the intended transfer and signs and delivers a Certificate of Independent Review in substantially the form set forth in *Prob. Code § 21351(b)*. This form illustrates the required certificate and is taken verbatim from the language that appears in *Prob. Code § 21351(b)*.

**[c] Status of Attorney Who Prepares Certificate**

An attorney who prepares a Certificate of Independent Review under an agreement that is limited solely to preparing the certificate and counseling the client about its use is not deemed to represent the client for any other purpose [*Prob. Code* § 21351(b)].

**PRACTICE TIP:**

As a practical matter, a Certificate of Independent Review can be difficult to obtain, even when there is little or no actual doubt regarding the absence of fraud or undue influence. Many estate planning attorneys are reluctant to issue Certificates of Independent Review out of concern over potential liability and the fear that in the event the gift is subsequently contested by the donor's heirs, they may end up being attacked on the issue of whether or not they performed an adequate investigation prior to issuing the certificate. *Commentary by publisher's editorial staff.*

**[2] FORM**

**Certificate of Independent Review [Prob. Code § 21351(b)]**

**Certificate of Independent Review**

I, \_\_\_\_\_ [*name of attorney*], have reviewed \_\_\_\_\_ [*name of instrument*] and counseled my client, \_\_\_\_\_ [*name of client*], on the nature and consequences of the transfer, or transfers, of property to \_\_\_\_\_ [*name of potentially disqualified person*] contained in such instrument. I am so disassociated from the interest of the transferee as to be in a position to advise my client independently, impartially, and confidentially as to the consequences of the transfer. On the basis of this counsel, I conclude that the transfer, or transfers, in the instrument that otherwise might be invalid under *Probate Code Section 21350* are valid because the transfer, or transfers, are not the product of fraud, menace, duress, or undue influence.

\_\_\_\_\_  
\_\_\_\_\_ [*Name of attorney*]  
\_\_\_\_\_ [*Date*]

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law  
Personal Gifts  
Elements of Valid Gifts  
General Overview  
Estate, Gift & Trust Law  
Personal Gifts  
Procedures  
General Overview  
Estate, Gift & Trust Law  
Probate  
General Overview



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DIVISION IV: WILLS AND TRUSTS  
CHAPTER 61 WILL DRAFTING AND COMPLETE WILL FORMS

*23-61 California Legal Forms--Transaction Guide 61.syn*

**AUTHOR:** Reviewed by Albert G. Handelman

**§ 61.syn Synopsis to Chapter 61: WILL DRAFTING AND COMPLETE WILL FORMS**

§ 61.01 California Statutes

§ 61.02 Federal Sources

[1] Statutes

[2] Regulations

§§ 61.03-61.04 [Reserved]

§ 61.05 Law Reviews and Periodicals

§ 61.06 Text References

[1] Matthew Bender Sources

[2] Additional Text References

§§ 61.07-61.09 [Reserved]

§ 61.10 Nature and Characteristics of Will

[1] In General

[2] Types of Wills

[a] In General

[b] Witnessed Wills

[c] Holographic Wills

[d] California Statutory Will

[e] Joint and Mutual Wills

[f] Nuncupative Wills

[3] Will Distinguished from Other Instruments

[a] Will Distinguished from Deed or Contract

[b] Will Distinguished from Trust

[c] Will Distinguished from Joint Tenancy

[4] Ambulatory Character of Will

§ 61.11 Testamentary Capacity

[1] Age

[2] Soundness of Mind

[3] Effect of Establishment of Conservatorship

[4] Effect of Mental or Physical Disorder

[5] Lack of Capacity as Ground for Contest of Will

§ 61.12 Testamentary Intent

[1] In General

[2] Effect of Undue Influence

[a] In General

[b] Factors Tending to Show Undue Influence

[c] Presumption of Undue Influence

[3] Effect of Fraud

[4] Effect of Duress or Menace

[5] Effect of Mistake

§ 61.13 Execution and Witnesses

[1] Witnessed Will

[a] Execution

[b] Witnesses

[c] Interested Witnesses

[2] Holographic Will

[a] Testator's Handwriting

[b] Signature

[c] Date

[d] Witnesses

§ 61.14 Property Subject to Disposition by Will

[1] In General

[2] Property Subject to Nonprobate Transfer on Owner's Death

[3] Joint Tenancy Property

[4] Separate Property

[5] Community Property

[6] Quasi-Community Property

[7] Community Property With Right of Survivorship

[8] Property Held in Tenancy in Common

[9] Property Subject to Power of Appointment

[10] Property Held in Trust

[11] Life Insurance Policy

§ 61.15 Devisees

[1] In General

[2] Subscribing Witnesses

[3] Disqualified Persons

[4] Effect of Homicide

[5] Effect of Simultaneous Death

[a] Potential Problems

[b] Probate Code Rules

[6] Rights of Devisees Under Class Gifts

[a] Nature of Class Gifts

[b] Determining Whether a Class Gift Exists

[c] Determining Members of Class

[d] Distribution Under Prob. Code § 240

[e] Distribution Per Stirpes or By Representation

[f] Distribution Per Capita at Each Generation

[g] Distribution Per Capita

§ 61.16 Protected Persons

[1] In General

[2] Omitted Spouse

[a] Basic Rule

[b] Application to Putative Spouse

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[a] Use of Form

[b] Survivorship

[c] Distribution of Class Gifts

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[a] Use of Form

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[c] Survivorship

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§ 61.211 Will for Married Person; Pour-Over to Inter Vivos Trust

[1] Comment

[a] Use of Form

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[2] FORM

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[1] Comment

[a] Use of Form

[b] Standard Provisions

[c] Marital Deduction Devise

[d] Division Into Marital and Nonmarital Shares

[e] Marital Deduction Formula

[f] Bypass Trust

[g] Disclaimer Trust

[h] Choice of Trustee

[i] Administration of Generation-Skipping Trusts

## [2] FORM

Will for Married Person; Marital Deduction Formula Devise Outright to Surviving Spouse; Residue to Bypass Trust; Disclaimer Trust

§ 61.213 Will for Married Person; Marital Deduction Formula Devise to Power of Appointment Trust; Residue to Bypass Trust; Disclaimer Trust

## [1] Comment

[a] Use of Form

[b] Standard Provisions

[c] Marital Deduction Gift

[d] Power of Appointment Trust

[e] Bypass Trust

[f] Allocation of Assets

[g] Disclaimer Trust

[h] Choice of Trustee

[i] Administration of Generation-Skipping Trusts

## [2] FORM

Will for Married Person; Marital Deduction Formula Devise to Power of Appointment Trust; Residue to Bypass Trust; Disclaimer Trust

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## [1] Comment

[a] Use of Form

[b] Standard Provisions

[c] Marital Deduction Gift

[d] QTIP Trust

[e] Bypass Trust

[f] Allocation of Assets

[g] Disclaimer Trust

[h] Choice of Trustee

[i] Administration of Generation-Skipping Trusts

[2] FORM

Will for Married Person; Marital Deduction Formula Devise to QTIP Trust; Residue to Bypass Trust; Disclaimer Trust

Reviewed by Albert G. Handelmann\*

**FOOTNOTES:**

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*23-61 California Legal Forms--Transaction Guide Scope*

**AUTHOR:** Reviewed by Albert G. Handelmann

**Scope**

Reviewed by Albert G. Handelmann\* Scope

This chapter covers will drafting and complete will forms. The Legal Background surveys the California law governing the planning, drafting, execution, and attestation of wills. The Transaction Guide covers preliminary considerations that are critical to proper planning of a will, and general drafting principles that should be followed whenever an attorney drafts a will. It also includes a drafting guide to the use of the complete will forms in the chapter and a procedural guide to the execution and attestation of wills in California. The forms consist of complete will forms that have been chosen to illustrate basic will arrangements that will commonly be encountered in the attorney's office.

A will is an important estate planning document and should be planned and prepared as part of a comprehensive estate plan. Ch. 60, *Estate Planning*, is a general introduction to the subject of estate planning and a guide to the other estate planning chapters in this publication. It should be consulted before any other estate planning documents are prepared. Lifetime gifts and gift-giving strategies are covered in Ch. 60A, *Gifts*.

Due to space limitations, this chapter does not illustrate the thousands of possible alternative and optional provisions that can be included in a will. For a broad range of alternative provisions, the reader may consult Ch. 63, *Will Provisions*. Additional provisions will be found in Ch. 64, *Testamentary Trusts: Payment and Distribution Provisions*, Ch. 64A, *Testamentary Trusts: Trustee Provisions*, Ch. 64B, *Testamentary Trusts: Administrative Provisions*, Ch. 65, *Executors*, Ch. 66, *Guardianship and Conservatorship Planning*, Ch. 67, *Future Interests and Perpetuities*; and Ch. 69, *Charitable Dispositions*. Some of the wills in this chapter contain extensive trust provisions. Alternatives to many of those trust provisions will be found in Ch. 70, *Complete Revocable Trust Forms*, Ch. 71, *Marital Deduction Trust Provisions*, and Ch. 72, *Irrevocable Trusts*. Attorneys who wish to consider an even wider range of alternative provisions should refer to Matthew Bender's specialty publication, *California Wills & Trusts*. Specific references to that publication are included in appropriate places in this chapter.

**FOOTNOTES:**

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**AUTHOR:** Reviewed by Albert G. Handelman

**§ 61.01 California Statutes**

General definitions applicable to wills. *Prob. Code §§ 20-88.*

"Child." *Prob. Code § 26.*

"Community property." *Prob. Code § 28.*

"Devise." *Prob. Code § 32.*

"Devisee." *Prob. Code § 34.*

"Domestic partner." *Prob. Code § 37.*

"Heir." *Prob. Code § 44.*

"Interested person." *Prob. Code § 48.*

"Issue." *Prob. Code § 50.*

"Parent." *Prob. Code § 54.*

"Predeceased spouse." *Prob. Code § 59.*

"Quasi-community property." *Prob. Code § 66.*

"Subscribing witness." *Prob. Code § 76.*

"Surviving spouse." *Prob. Code § 78.*

"Will." *Prob. Code § 88.*

Effect of death of married person on community and quasi-community property. *Prob. Code §§ 100-105.*

Waiver of rights by surviving spouse. *Prob. Code §§ 140-147.*

Contractual arrangements relating to rights at death. *Prob. Code §§ 140-147.*

Simultaneous death. *Prob. Code §§ 220-234.*

Distribution among heirs or beneficiaries. *Prob. Code §§ 240-249.*

Effect of homicide on inheritance and other rights. *Prob. Code §§ 250-258.*

Disclaimer of testamentary and other interests. *Prob. Code §§ 260-295.*

Trust company as personal representative. *Prob. Code § 300.*

Trust company not required to give bond as personal representative. *Prob. Code § 301.*

Wills. *Prob. Code §§ 6100-6390.*

Persons competent to make a will. *Prob. Code § 6100.*

Persons not mentally competent to make will. *Prob. Code § 6100.5.*

Property subject to disposition by will. *Prob. Code § 6101.*

Persons and entities who may take under a will. *Prob. Code § 6102.*

Effect of duress, menace, fraud, or undue influence. *Prob. Code § 6104.*

Conditional wills. *Prob. Code § 6105.*

Execution of witnessed will. *Prob. Code § 6110.*

Holographic will. *Prob. Code § 6111.*

Witnesses to wills. *Prob. Code § 6112.*

Law governing validity of execution of will. *Prob. Code § 6113.*

Revocation of will by subsequent will or by act. *Prob. Code § 6120.*

Revocation of will executed in duplicate. *Prob. Code § 6121.*

Revocation of will by annulment of dissolution of marriage. *Prob. Code § 6122.*

Revocation of will by termination of domestic partnership. *Prob. Code § 6122.1.*

Revival of revoked will. *Prob. Code § 6123.*

Presumption of revocation. *Prob. Code § 6124.*

Incorporation by reference. *Prob. Code § 6130.*

Events of independent significance. *Prob. Code § 6131.*

California Statutory Will. *Prob. Code §§ 6200-6243.*

Uniform Testamentary Additions to Trusts Act. *Prob. Code § 6300.*

Nonprobate transfer to trustee named in decedent's will. *Prob. Code §§ 6320-6330.*

Devise subject to California Uniform Transfers to Minors Act. *Prob. Code §§ 6341-6349.*

Uniform International Wills Act. *Prob. Code §§ 6380-6390.*

Intestate succession. *Prob. Code §§ 6400-6455.*

Construction of wills, trusts, and other instruments. *Prob. Code §§ 21101-21541.*

Omitted spouses and children. *Prob. Code §§ 21600-21630.*

Contracts regarding testamentary or intestate succession. *Prob. Code § 21700.*

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawWillsGeneral OverviewEstate, Gift & Trust LawWillsCodicilsRequirementsEstate, Gift & Trust LawWillsExecutionEstate, Gift & Trust LawWillsForced Heirs & LegitimeEstate, Gift & Trust LawWillsInterpretationGeneral Overview



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*23-61 California Legal Forms--Transaction Guide § 61.02*

**AUTHOR:** Reviewed by Albert G. Handelman

**§ 61.02 Federal Sources**

**[1] Statutes**

Federal unified transfer tax.

Imposition and rate of tax. *I.R.C. § 2001.*

Liability for payment of tax. *I.R.C. § 2002.*

Unified credit against estate tax. *I.R.C. § 2010.*

Federal estate tax.

Valuation of gross estate. *I.R.C. § 2031.*

Property in which decedent had an interest. *I.R.C. § 2033.*

Transfers with retained life estate. *I.R.C. § 2036.*

Transfers taking effect at death. *I.R.C. § 2037.*

Revocable transfers. *I.R.C. § 2038.*

Joint interests. *I.R.C. § 2040.*

Powers of appointment. *I.R.C. § 2041.*

Proceeds of life insurance. *I.R.C. § 2042.*

Disclaimers. Prob. Code § 2046.

Marital deduction. *I.R.C. § 2056.*

Federal generation-skipping transfer tax.

Tax imposed. *I.R.C. §§ 2601-2604.*

Generation-skipping transfer. *I.R.C. §§ 2611-2613.*

Taxable amount. *I.R.C. § 2621-2624.*

GST exemption. *I.R.C. §§ 2631, 2632.*

Applicable rate. *I.R.C. § 2641.*

Inclusion ratio. *I.R.C. § 2642.*

Definitions and special rules. *I.R.C. §§ 2651-2654.*

Administration. *I.R.C. §§ 2661-2663.*

## **[2] Regulations**

Federal estate tax marital deduction. *Treas. Reg. §§ 20.2056-0-20.2056(d)-3.*

Federal generation-skipping transfer tax. *Treas. Reg. §§ 26.2601-1-26.2663-2.*

## **Legal Topics:**

For related research and practice materials, see the following legal topics:

Tax Law Federal Estate & Gift Taxes General Overview Tax Law Federal Estate & Gift Taxes Deductions Marital Deduction (IRC secs. 2056, 2523) General Overview Tax Law Federal Estate & Gift Taxes Definition of Taxable Estate Tax Law Federal Estate & Gift Taxes Powers of Appointment (IRC secs. 2041, 2514) General Overview Tax Law Federal Taxpayer Groups Income Taxation of Estates, Trusts & Beneficiaries General Overview



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*23-61 California Legal Forms--Transaction Guide §§ 61.03-61.04*

**AUTHOR:** Reviewed by Albert G. Handelman

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*23-61 California Legal Forms--Transaction Guide § 61.05*

**AUTHOR:** Reviewed by Albert G. Handelman

**§ 61.05 Law Reviews and Periodicals**

Bekerman, *Points to Ponder for That "Simple Will,"* 44(2) *Prac. Law.* 43 (1998).

Andres, *When is a Spouse not a Spouse?* 17(3) *Cal. Law.* 64 (1997).

Curtiss & Schultz, *Estate Planning After Dad Dies: Should Mom Gift or Disclaim?* 2(2) *Cal. Tr. & Est. Q.* 30 (1996).

Harris, *Drafting Tips for Simple Wills,* 41(6) *Prac. Law.* 25 (1995).

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Kruse, *Contracts to Devise or Gift Property in Exchange for Lifetime Home Care--Latent and Insidious Abuse of Older Persons,* 12 *Prob. L.J.* 1 (1994).

Domsky, *In Terrorem Clauses: More Bark Than Bite?* 25 *Loy. U. Chi. L.J.* 493 (1994).

Horn, *Two Systems of Drafting for the Generation-Skipping Transfer Tax (With Forms)*, 9 Prac. Tax Law. 39 (1994).

Garvey, *Drafting Wills and Trusts: Anticipating the Birth and Death of Possible Beneficiaries*, 71 Or. L. Rev. 47 (1992).

Smith, *Why Limit a Good Thing? A Proposal to Apply the California Antilapse Statute to Revocable Living Trusts*, 43 Hastings L.J. 1391 (1992).

Jacobs, *The Thrills and Chills of Simple Wills*, 6 Prac. Tax Law. 63 (1992).

Beyer, *Drafting in Contemplation of Will Contests*, 38 Prac. Law. 61 (1992).

Gallo, *I Won't; I Might; I Will: Drafting Strategies for Generation-Skipping Trusts*, 26 Inst. on Est. Plan. 15.1 (1992).

Kaufman, *"Old Wine in New Bottles": The Uniform International Will Revisited*, 11 Prob. L.J. 29 (1992).

Krimmel, *A Criticism of the California Statutory Will*, 19 W. St. U. L. Rev. 77 (1991).

Botts, *I Didn't Ask to Be Born: The American Law of Disinheritance and a Proposal for Change to a System of Protected Inheritance*, 41 Hastings L.J. 1197 (1990).

Hess, *The Federal Transfer Tax Consequences of Joint and Mutual Wills*, 24 Real Prop., Prob. & Tr. 469 (1990).

### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawWillsGeneral OverviewEstate, Gift & Trust LawWillsAfter-Acquired SpousesEstate, Gift & Trust LawWillsBeneficiariesDisclaimers & RenunciationsEstate, Gift & Trust LawWillsContracts to Make WillsEstate, Gift & Trust LawWillsExecution



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*23-61 California Legal Forms--Transaction Guide § 61.06*

**AUTHOR:** Reviewed by Albert G. Handelman

**§ 61.06 Text References**

**PRACTICE TIP:**

When "gathering" forms from different sources in the preparation of a will or any other estate planning document, strict attention must be paid to the intended use of each form. For example, wills and forms for wills and individual will provisions are typically written in the first person (e.g., "my personal residence"). By contrast, non-testamentary trusts and forms for such trusts and their individual provisions are typically written in the third person (e.g., "the settlor's personal residence"), and often assume more than one settlor (e.g., "the settlors' personal residence). Thus, care must be taken to conform each specific form used in a given drafting project to the type of document being produced, in order to insure clarity and consistency. *Commentary by Albert G. Handelman.*

**[1] Matthew Bender Sources**

California Wills and Trusts(Matthew Bender).

Ch. 10, *Introduction to Wills.*

Ch. 11, *Requisites of a Valid Will.*

Ch. 12, *Office Procedures.*

Ch. 20, *Organization of Wills.*

Ch. 21, *Devisees.*

Ch. 22, *Property Devised by Will.*

- Ch. 24, *Devisees--Generation Considerations*.
- Ch. 25, *Devisees of Money and Personal Property*.
- Ch. 26, *Devisees of Real Property Interests*.
- Ch. 27, *Residuary Devisees*.
- Ch. 28, *Devisees to Minors*.
- Ch. 29, *Devisees of Businesses and Business Interests*.
- Ch. 30, *Charitable Devisees*.
- Ch. 31, *Powers of Appointment*.
- Ch. 35, *Nomination of Executors*.
- Ch. 36, *Powers of Executors*.
- Ch. 37, *Nomination of Guardians for Minor Children*.
- Ch. 40, *Disinheritance and No-Contest Clauses*.
- Ch. 41, *Arrangements for Funerals and Disposition of Remains*.
- Ch. 60, *Joint and Mutual Wills*.
- Ch. 62, *Revocation and Revival of Wills*.
- Ch. 110, *Testamentary Trusts*.
- Ch. 112, *The Marital Deduction and Marital Deduction Trusts*.
- Ch. 113, *Generation-Skipping Transfers and Trust Strategies*.

## **[2] Additional Text References**

California Will Drafting (Cal. C.E.B. 1992).

Witkin, Summary of California Law, vol. 4, *Wills and Probate* (10th ed. 2005).

### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawWillsGeneral OverviewEstate, Gift & Trust LawWillsBequests & DeviseesEstate, Gift & Trust LawWillsExecutionEstate, Gift & Trust LawWillsInterpretationGeneral OverviewEstate, Gift & Trust LawWillsResiduary Clauses



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**AUTHOR:** Reviewed by Albert G. Handelman

**[Reserved]**

§§ 61.07[Reserved]



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*23-61 California Legal Forms--Transaction Guide § 61.10*

**AUTHOR:** Reviewed by Albert G. Handelman

**§ 61.10 Nature and Characteristics of Will**

**[1] In General**

A will is a legal declaration of the intentions that a person wills to be performed after his or her death [Black's Law Dictionary (6th ed. 1990) at 1598]. Although leaving directions for the disposition of one's property is one of the primary functions of a will [*see Tennant v. John Tennant Memorial Home (1914) 167 Cal. 570, 577, 140 P. 242 ; Estate of Hall (1906) 149 Cal. 143, 146, 84 P. 839*], a will also may be used to accomplish other purposes, such as leaving burial instructions [*see Health & Safety Code § 7100.1*] or nominating an executor [*see Prob. Code § 8420*] or a guardian for minor children [*see Prob. Code §§ 1500, 1502*]. A will need not dispose of the testator's property if it is effective for some other purpose [ *In re Hickman (1894) 101 Cal. 609, 613, 36 P. 118 ; Estate of Fries (1965) 238 Cal. App. 2d 558, 562, 47 Cal. Rptr. 888*].

The words "testament" and "will" were at one time used to describe distinct instruments, the former referring to an instrument that disposed of personal property and the latter to an instrument that disposed of real property. However, the words are now generally regarded as synonymous [Black's Law Dictionary (6th ed. 1990) at 1474]. Since modern drafting practice favors the elimination of unnecessary or archaic words, this publication uses the word "will" in all discussions of testamentary instruments.

A "testator" is a person who makes or has made a will [Black's Law Dictionary (6th ed. 1990) at 1475]. Although at one time the word "testatrix" was used to refer to a woman who makes a will, the Probate Code refers to both men and women who make wills as "testators" [*see, e.g., Prob. Code §§ 6101, 6110, 6111, 6120*], and this publication follows the same practice.

**[2] Types of Wills**

**[a] In General**

California law recognizes two principal classes of wills. These are formal witnessed wills [*see Prob. Code §§ 6110,*

6112] and holographic wills [see *Prob. Code* § 6111]. Although this chapter includes brief discussions of holographic [see [c], *below*; see also § 61.13[2]] and nuncupative wills [see [f], *below*], it focuses primarily on formal witnessed wills.

The California statutory will is a type of formal witnessed will [see *Prob. Code* §§ 6223(a), 6240 and discussion in § 61.21], although it differs from others of its kind in that it is a printed form and not drafted by an attorney. It is designed to be filled in by persons who do not have the assistance of attorneys, or who need to complete a stopgap will that will be followed by an attorney-drafted will.

Two other types of wills are briefly discussed in this chapter. These are joint wills and mutual wills. For reasons explained in the discussion of those wills [see [e], *below*], joint wills and mutual wills are fraught with dangers and generally avoided by most estate planning attorneys.

### **[b] Witnessed Wills**

A formal witnessed will is a will that is signed by the testator, or by some other person authorized by law to sign for the testator [see *Prob. Code* § 6110(b) and discussion in § 61.13[1][a]], and that is properly witnessed by two qualified witnesses who are either present when the will is signed or when the testator acknowledges his or her signature [see *Prob. Code* § 6110(c)(1) and discussion in § 61.13[1][b]]. The witnesses also must sign the will [*Prob. Code* § 6110(c)(1)]. The subscription of a will must occur during the testator's lifetime, and a will that has not been subscribed by two witnesses at the time of the testator's death neither complies nor substantially complies with *Prob. Code* § 6110 [see *Prob. Code* § 6110(c)(1), see also *Estate of Saueressig* (2006) 38 Cal. 4th 1045, 1057, 44 Cal. Rptr. 3d 672]. Additionally, if a will was not executed in compliance with *Prob. Code* § 6110(c)(1), the will must be treated as if it was executed in compliance with *Prob. Code* § 6110(c)(1) if the proponent of the will can establish by clear and convincing evidence that, at the time the testator signed the will, the testator intended the will to constitute the testator's will [*Prob. Code* § 6110(c)(2)].

Formal witnessed wills are often (although not always) prepared by attorneys. They are the kind of wills that can best be tailored to the specific needs and wishes of individual testators. They can be designed, for example, to create trusts, to create or exercise powers of appointment, to make devises to or for the benefit of charities, to take maximum advantage of tax-saving opportunities, to establish protections for minor children or those with so-called "special needs," and to reduce the possibility of will contests. Since the formal witnessed will is a flexible estate planning tool capable of almost infinite permutations, it is the subject of most of the discussion in this chapter. For execution and witnessing requirements for formal, witnessed wills, see § 61.13[1].

### **[c] Holographic Wills**

A holographic will is a will, usually informally drafted and signed by the testator without witnesses, that is written entirely (or at least partially) in the testator's handwriting [see *Estate of Black* (1982) 30 Cal. 3d 880, 882, 885-886, 181 Cal. Rptr. 222, 641 P.2d 754 (instrument handwritten on three pages of partially preprinted stationer's form was upheld as holographic will, when printed language on stationer's form incorporated in will was not material to its substance or essential to its validity as a testamentary disposition)]. *Prob. Code* § 6111 provides an exception to the formalities for a will specified in *Prob. Code* § 6110, and makes valid a holographic or handwritten will if the signature and the material provisions are in the testator's handwriting [ *Estate of Brenner* (1999) 76 Cal. App. 4th 1298, 1301, 91 Cal. Rptr. 2d 149] . *Prob. Code* § 6111 gives validity to an unwitnessed handwritten will because of the "recognized difficulty of forging an entire handwritten instrument" [ *Estate of Black* (1982) 30 Cal. 3d 880, 888, 181 Cal. Rptr. 222, 641 P.2d 754] . Whether a document should be admitted to probate as a holographic will depends on proof of its authorship and authenticity, and on whether the words used establish that the testator intended it to be his or her last will and testament at the time he or she wrote it [ *Estate of Southworth* (1996) 51 Cal. App. 4th 564, 571, 59 Cal. Rptr. 2d 272] .

Although no particular words are necessary to establish a holographic will, a holographic will must be executed with testamentary intent [ *Estate of Wong (1995) 40 Cal. App. 4th 1198, 1204-1205, 47 Cal. Rptr. 2d 707* ; see *Estate of Black (1982) 30 Cal. 3d 880, 888, 181 Cal. Rptr. 222, 641 P.2d 754* (reference to instrument as testator's will and statement that testator hoped this writing would be given legal effect as testamentary disposition was evidence of testator's intent to authenticate document as will) see also *Estate of Williams (2007) 155 Cal. App. 4th 197, 207* ; *66 Cal. Rptr. 3d 34* , (Evidence supported finding that decedent's handwritten document, where his name was written in block letters at the top, stated the disposition of some of his assets and had included some language of testamentary intent, was a valid holographic will).]. The required statement of testamentary intent may be set forth either in the testator's own handwriting or as part of a commercially printed form will [*Prob. Code § 6111(c)*]. In either case, however, the will must describe, or at least refer to, the property to be disposed of, and it must reveal an intention to dispose of the property [ *Estate of Wong (1995) 40 Cal. App. 4th 1198, 1208, 47 Cal. Rptr. 2d 707* ] . Further, this intention must be shown by words. A symbol without a fixed meaning, such as an arrow, cannot supply the required intention [ *Estate of Wong (1995) 40 Cal. App. 4th 1198, 1208-1209, 47 Cal. Rptr. 2d 707* ] .

The testator's signature need not be located at the end of the holographic will, but may appear in another part of the will, as long as the testator wrote his or her name there with the intention of authenticating or executing the instrument as his or her will [ *Estate of Black (1982) 30 Cal. 3d 880, 888, 181 Cal. Rptr. 222, 641 P.2d 754* (fact that testator wrote her name in each page of holographic will was deemed a sufficient signature) see also *Estate of Williams (2007) 155 Cal. App. 4th 197, 207* ; *66 Cal. Rptr. 3d 34* , (Holographic will need not be signed at the bottom provided the testator wrote his name on the document with the intent of authenticating or executing the instrument as his will).]. For discussion of the execution requirements for holographic wills, see § 61.13[2].

Photocopies of a testator's handwritten property dispositions, included in a holographic will, satisfy the statutory requirement that the material provisions of the will must be in the testator's handwriting, as long as the photocopies are properly authenticated [ *Estate of Brenner (1999) 76 Cal. App. 4th 1298, 1299, 1302, 91 Cal. Rptr. 2d 149* ] .

Both the courts and the legislature have shown a tendency toward liberality in accepting a writing as a holographic will [ *Estate of Black (1982) 30 Cal. 3d 880, 883-884, 181 Cal. Rptr. 222, 641 P.2d 754* ; *Estate of Brenner (1999) 76 Cal. App. 4th 1298, 1301, 91 Cal. Rptr. 2d 149* ] . Substantial compliance with the statutory requirements, not absolute precision, is all that is necessary [ *Estate of Black (1982) 30 Cal. 3d 880, 883-884, 181 Cal. Rptr. 222, 641 P.2d 754* ] . An overly technical application by the courts of the holographic will statute to handwritten testamentary dispositions, which generally are made by people who have no legal training, would seriously limit the effectiveness of the legislative decision to authorize holographic wills [ *Estate of Black (1982) 30 Cal. 3d 880, 884, 181 Cal. Rptr. 222, 641 P.2d 754* ] .

However, an instrument that does not meet the requirements of *Prob. Code § 6111* is not a holographic will. For example, a charitable donor card containing printed language showing an intent to make a future gift to the charity on which the testator writes that his or her entire estate is left to the charity and which is dated and signed by the testator is not a holographic will; the donor card is not a "commercially printed form will" as specified by the statute, and the material printed language together with the handwriting show a future intent, not a present testamentary intent [see *Estate of Southworth (1996) 51 Cal. App. 4th 564, 566, 571-572, 59 Cal. Rptr. 2d 272* ] . Likewise, a written, witnessed will, which the testator alters by crossing out portions and substituting language in the testator's handwriting does not constitute a holographic will; when the handwriting itself lacks testamentary intent and substance, and has meaning only in relationship to the typewritten words, there is no complete testamentary document that can be deemed to be a holographic will [see *Estate of Sola (1990) 225 Cal. App. 3d 241, 245-248, 275 Cal. Rptr. 98* ("even rules of liberal construction do not permit us to ignore clear and explicit statutory requirements")].

**PRACTICE TIP:**

The California cases reveal a judiciary keenly interested in allowing a testator's intent to be carried out,

to the point of allowing questionable documents to be treated as wills and thereby blurring the lines previously thought by estate planners to distinguish valid from invalid holographic instruments. For those seeking the validation of holographic instruments in the context of will contests, this development may be comforting. However, the careful practitioner advising a client on the preparation of a holographic will--and this often happens in "emergency" situations, such as the client call one hour before the start of an extended vacation--will urge that some basics be followed: use of a plain piece of paper; a clear statement that the document is intended to be a will; clear statements regarding the disposition of assets; inclusion of the date of the instrument; all written personally by the testator and, of course, signed by the testator. *Commentary by Albert G. Handelman.*

Extrinsic evidence is admissible to determine whether a writing claimed to be a will is in fact a will, or to determine the meaning of a will or portion of a will if the meaning is unclear [*Prob. Code § 6111.5*]. This statute expands the court's inquiry beyond merely determining if the statutory formalities for a traditional will or a holographic will are satisfied. The court may look at extrinsic evidence to confirm the testator's intent and to determine whether there is any danger of fraud [ *Estate of Brenner (1999) 76 Cal. App. 4th 1298, 1302-1303, 91 Cal. Rptr. 2d 149* ]. For example, a court may consider statements the testator made before and after making a holographic will, as well as the surrounding circumstances [ *Estate of Southworth (1996) 51 Cal. App. 4th 564, 566, 572, 59 Cal. Rptr. 2d 272* ].

When a testator executes a holographic will before marriage naming as a beneficiary a person whom he or she later marries and divorces, *Prob. Code § 6122*, the "revocation by divorce" statute, applies to revoke the holographic will by operation of law [ *Estate of Reeves (1991) 233 Cal. App. 3d 651, 654-655, 284 Cal. Rptr. 650* ]. The holographic will may be revived only by the testator's remarriage to the former spouse [*Prob. Code § 6122(b)*; *Estate of Reeves (1991) 233 Cal. App. 3d 651, 659, 284 Cal. Rptr. 650* (evidence of statements testator made that former spouse should take entire estate and evidence of testator's continuing belief that holographic will was still valid are irrelevant)]. For further discussion, see § 61.19[3].

#### **[d] California Statutory Will**

The California statutory will is a simple will form prescribed by the Probate Code and made available to the public in printed form [*see Prob. Code §§ 6223(a), 6240*]. The will may be completed by the simple process of filling out the printed form, signing at the place indicated, and obtaining the signatures of two witnesses [*Prob. Code § 6221*; *see Prob. Code §§ 6110(c), 6222* (two witnesses)]. If witnesses do not sign, however, the will may still be enforceable if the testator knew and approved of its contents and intended it to have testamentary effect, and the testamentary intent of the testator as reflected in the document is clear [*Prob. Code § 6226(c)*].

Since statutory wills offer few estate planning options, they are rarely used by attorneys. In special circumstances, however, an attorney may properly use a California statutory will. For discussion, see § 61.21[1].

#### **[e] Joint and Mutual Wills**

A joint will is a single instrument containing the wills of two or more persons [ *Stahmer v. Schley (1979) 96 Cal. App. 3d 200, 203-204, 157 Cal. Rptr. 756* ; *Estate of Lane (1975) 47 Cal. App. 3d 52, 57, 120 Cal. Rptr. 499* ]. Mutual wills are separate wills with "reciprocal" provisions [*see Crail v. Blakely (1973) 8 Cal. 3d 744, 747, 106 Cal. Rptr. 187, 505 P.2d 1027* (spouses executed mutual and reciprocal wills on same date under which each spouse left his or her estate to surviving spouse or, in event neither spouse survived, to their children); *Juran v. Epstein (1994) 23 Cal. App. 4th 882, 887, 28 Cal. Rptr. 2d 588* (spouses executed mutual wills devising their respective property to surviving spouse and on surviving spouse's death equally between husband's daughter and wife's daughter from their previous marriages)]. Wills are "reciprocal" if they show on their faces that they are executed in consideration of each other [ *Van Houten v. Whitaker (1959) 169 Cal. App. 2d 510, 514, 337 P.2d 900* ].

Although a joint will is executed by two persons jointly, a joint will is not necessarily either mutual or reciprocal [ *Estate of Lane* (1975) 47 Cal. App. 3d 52, 57, 120 Cal. Rptr. 499 ; *Daniels v. Bridges* (1954) 123 Cal. App. 2d 585, 588, 267 P.2d 343] . It is, in legal effect, the separate will of each of the persons who execute it [ *Estate of Lane* (1975) 47 Cal. App. 3d 52, 57, 120 Cal. Rptr. 499 ; *Estate of Lee* (1964) 225 Cal. App. 2d 578, 580, 37 Cal. Rptr. 572 ; *Daniels v. Bridges* (1954) 123 Cal. App. 2d 585, 588, 267 P.2d 343] . The validity of each will is determined independently of the other [see *Daniels v. Bridges* (1954) 123 Cal. App. 2d 585, 588, 267 P.2d 343 ; *Estate of Lane* (1975) 47 Cal. App. 3d 52, 57, 120 Cal. Rptr. 499] and, on the death of one of the testators, the instrument is offered for probate as the separate will of that testator [ *Estate of Lee* (1964) 225 Cal. App. 2d 578, 580, 37 Cal. Rptr. 572] .

A will may be both joint and mutual, in which case it is described as a "joint and mutual will" [see *Thompson v. Boyd* (1963) 217 Cal. App. 2d 365, 374, 32 Cal. Rptr. 513] .

Although joint wills, mutual wills, and joint and mutual wills may be revoked in the same manner as other wills [see *Crail v. Blakely* (1973) 8 Cal. 3d 744, 747, 106 Cal. Rptr. 187, 505 P.2d 1027 ; *Stahmer v. Schley* (1979) 96 Cal. App. 3d 200, 203, 157 Cal. Rptr. 756] , the revocation of wills executed pursuant to a contract (either a contract to make a will or a contract not to revoke a will) may lead to serious complications. If it can be proven that the wills were executed pursuant to a contract, the persons designated as devisees are recognized as third-party beneficiaries of the contract and entitled to enforce it by judicial action [see *Crail v. Blakely* (1973) 8 Cal. 3d 744, 746-747, 106 Cal. Rptr. 187, 505 P.2d 1027 (suit by children to enforce oral agreement between their parents which provided that first spouse who died would leave his or her estate to other spouse on the condition that survivor would leave their combined estate to their children in equal shares); but see *Kalmanovitz v. Bitting* (1996) 43 Cal. App. 4th 311, 314-316, 50 Cal. Rptr. 2d 332 (claimants may not sue to enforce their interpretation of will agreement, when they were not specified beneficiaries of agreement at time it was made)].

A contract to make a particular testamentary disposition of property is valid and enforceable [ *Redke v. Silvertrust* (1971) 6 Cal. 3d 94, 100, 98 Cal. Rptr. 293, 490 P.2d 805 ; *Estate of Housley* (1997) 56 Cal. App. 4th 342, 351, 65 Cal. Rptr. 2d 628 ; *Juran v. Epstein* (1994) 23 Cal. App. 4th 882, 889, 28 Cal. Rptr. 2d 588] . However, the mere fact that the wills are reciprocal or contain similar or identical provisions, or that the wills were executed at the same time and before the same witnesses, is not sufficient evidence of an oral agreement to make the wills irrevocable. Such an agreement is enforceable only if it is proved by clear and convincing evidence [ *Crail v. Blakely* (1973) 8 Cal. 3d 744, 747-749, 106 Cal. Rptr. 187, 505 P.2d 1027 ; *Estate of Housley* (1997) 56 Cal. App. 4th 342, 358, 65 Cal. Rptr. 2d 628 ; see *Prob. Code* § 150(b) (execution of joint will or mutual wills does not create presumption of contract not to revoke will or wills)]. Nevertheless, when parties contract to make a particular disposition of property by will, their agreement necessarily includes a promise not to breach the contract by revoking the will and failing to dispose of the property as agreed. The parties' rights depend on the contract, and the revocation of the will or other breach of the contract does not prevent the intended devisees from enforcing the contractual obligations [ *Crail v. Blakely* (1973) 8 Cal. 3d 744, 749-750, 106 Cal. Rptr. 187, 505 P.2d 1027 ; *Estate of Housley* (1997) 56 Cal. App. 4th 342, 351-358, 65 Cal. Rptr. 2d 628 (even when contract is oral, it may be enforceable by intended beneficiary under doctrine of estoppel; equitable estoppel principles continue to apply to contracts to make or not to revoke will made after December 31, 1984, effective date of *Prob. Code* § 150 (statute of frauds for such contracts)].

The remedy for breach of an agreement to make a will is not invalidation of the will [ *Estate of Housley* (1997) 56 Cal. App. 4th 342, 351-352, 65 Cal. Rptr. 2d 628] . Instead, the law provides various remedies for the breach of a contract to make a will, or not to revoke a will, including an action at law for damages [ *Wilkison v. Wiederkehr* (2002) 101 Cal. App. 4th 822, 825, 828-833, 124 Cal. Rptr. 2d 631] or equitable relief in the form of quasi-specific performance and imposition of a constructive trust [ *Crail v. Blakely* (1973) 8 Cal. 3d 744, 747, 106 Cal. Rptr. 187, 505 P.2d 1027 ; *Walton v. Walton* (1995) 31 Cal. App. 4th 277, 282 fn. 2, 36 Cal. Rptr. 2d 901 ("quasi-specific performance" is term used for enforcement of contract to make will because court cannot compel making of will but may declare constructive trust on property in hands of those who succeeded to estate, which is in effect equivalent of specific performance); see *Wilkison v. Wiederkehr* (2002) 101 Cal. App. 4th 822, 835-838, 124 Cal. Rptr. 2d 631 (equitable relief in form of

quasi-specific performance of contract to make a will may be obtained when remedy at law is inadequate and promisor has failed to make promised disposition in will; quasi-specific performance is precluded if legal remedy, award of damages, is adequate]. An action for quasi-specific performance accrues on the death of the person who breached the agreement [ *Estate of Brenzikofer (1996) 49 Cal. App. 4th 1461, 1468-1469, 57 Cal. Rptr. 2d 401* (action may be brought within four years when property is impressed with qualities of a resulting trust; 2-year statute for contracts not in writing does not apply)]. There is no right to a jury trial [ *Walton v. Walton (1995) 31 Cal. App. 4th 277, 287-295, 36 Cal. Rptr. 2d 901* ] .

Joint wills, mutual wills, and joint and mutual wills are strongly discouraged by most estate planning attorneys. Enforcement of a mutual will (or a joint and mutual will) after the death of the first testator to die may require costly and time-consuming litigation. If the will is not enforced, its purpose will be frustrated. If it is enforced, it may seriously limit the right of the surviving testator to use the devised property or make unrelated changes to his or her estate plan. If (as is usually the case) the surviving testator is the first testator's spouse, the will may result in the loss of the marital deduction,[*see Bartlett v. C.I.R. (7th Cir. [T.C.] 1991) 937 F.2d 316, 322-324* ] , since the surviving spouse might be viewed as having the equivalent of a life estate in the devised property and a life estate will not qualify for the marital deduction unless the surviving spouse also has a power of appointment over the devised property [ *see I.R.C. § 2056(b)(5)* ]. Further, when a joint will is executed, it is necessary to present the will for probate twice, once on the death of the first testator and a second time on the death of the surviving testator. This can present practical problems, particularly when the wills are probated in different courts, or in different states. Additionally, there can be embarrassment, or even the enhanced likelihood of a will contest, for the surviving joint testator. Once his or her estate plan becomes a matter of public record, later permissible changes might be emotionally difficult to carry out or become fodder for a lawsuit brought by a disappointed person who has been omitted from the revised estate plan.

For additional discussion of the problems presented by joint and mutual wills, see *California Wills & Trusts*, Ch. 60, *Joint and Mutual Wills* (Matthew Bender).

### **[f] Nuncupative Wills**

Before January 1, 1983, California accorded limited recognition to nuncupative (oral) wills. A nuncupative will could be made by a person who was in actual military service in the field or on duty on shipboard at sea and (1) was in actual contemplation, fear, or peril of death or (2) was in expectation of immediate death from an injury received on the day the will was executed [former *Prob. Code § 54*, repealed Jan. 1, 1983 by Stats. 1982, ch. 187, § 4]. Although the nuncupative will statute was repealed as of January 1, 1983, the repeal did not apply to the estates of decedents who died before that date [Stats. 1982, ch. 187, § 8]. Thus, California law still includes a limited recognition of the validity of nuncupative wills made by persons who died before January 1, 1983.

### **[3] Will Distinguished from Other Instruments**

#### **[a] Will Distinguished from Deed or Contract**

A deed is a legal instrument by which property is conveyed from one living person to another [ *Brusseau v. Hill (1927) 201 Cal. 225, 228, 256 P. 419* ] . A will, in contrast, transfers property only on the death of the testator [ *Tennant v. John Tennant Memorial Home (1914) 167 Cal. 570, 577, 140 P. 242* ] .

Various types of contractual arrangements specifically call for the transfer of property upon the death of an individual. For example, life insurance contracts and death benefit provisions of IRAs and other retirement plan arrangements mandate payments to named individuals or members of specified groups upon the death of the insured or account holder or plan participant. Unless the decedent's estate or executor has been named as the death benefit beneficiary, the assets subject to such contractual provisions will not be controlled by the decedent's will and will not be subject to probate administration.

**[b] Will Distinguished from Trust**

A trust is a legal relationship between one person (called the "settlor" or "trustor") and another person or persons (called the "trustee" and the "beneficiary" or "beneficiaries") [*see Prob. Code* §§ 24 ("beneficiary" defined), 84 ("trustee" defined)]. Some trusts (called "testamentary" trusts) are created by wills, while others (called "inter vivos" trusts) are created by instruments executed during their settlors' lifetimes.

Although the terms "will" and "trust" are distinct, they are not mutually exclusive. A valid will may or may not create a trust. If it does, it may be referred to both as a "will" and as a "trust instrument."

**[c] Will Distinguished from Joint Tenancy**

A joint tenancy is a property interest owned by two or more persons in equal shares [*see Civ. Code* § 683(a)]. The "distinguishing incident" of joint tenancy is the right of survivorship [*see Tenhet v. Boswell* (1976) 18 Cal. 3d 150, 155-156, 133 Cal. Rptr. 10, 554 P.2d 330]. When one of the joint tenants dies, the survivor becomes the sole owner of the property and no interest in the property passes to the deceased tenant's heirs or devisees [*see Sterling, Joint Tenancy and Community Property in California*, 14 Pac. L. J. 927, 951-952 (1983)].

Since a deceased joint tenant's interest terminates on death, it cannot be transferred by the joint tenant's will [*see, e.g., Estate of England* (1991) 233 Cal. App. 3d 1, 4, 284 Cal. Rptr. 361]. Further, since a joint tenancy interest is not subject to transfer by will, it is not subject to probate on the joint tenant's death, and the surviving joint tenant acquires ownership of the interest without probate and subject only to the statutory procedures for establishing the fact of death [*Goldberg v. Goldberg* (1963) 217 Cal. App. 2d 623, 628, 32 Cal. Rptr. 93; *see Prob. Code* §§ 200-215 (procedures for establishing and reporting fact of death)].

**[4] Ambulatory Character of Will**

The will is often described as an "ambulatory" instrument, because it can be modified, amended, or even revoked while the testator is still living [*Tennant v. John Tennant Memorial Home* (1914) 167 Cal. 570, 577, 140 P. 242; *Estate of Berger* (1926) 198 Cal. 103, 106, 243 P. 862; *Nichols v. Emery* (1895) 109 Cal. 323, 329, 41 P. 1089]. A will is effective only on the testator's death. While the testator is still living, the interests of the devisees in the property subject to the will are inchoate and legally unenforceable [*Estate of Berger* (1926) 198 Cal. 103, 106, 243 P. 862; *see Tennant v. John Tennant Memorial Home* (1914) 167 Cal. 570, 579, 140 P. 242]. When the testator dies, however, the will--once admitted to probate--becomes firmly established and immediately ceases to be ambulatory. At that time, it acquires a fixed status and operates as a conveyance of property [*Tennant v. John Tennant Memorial Home* (1914) 167 Cal. 570, 577, 140 P. 242].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawWillsGeneral OverviewEstate, Gift & Trust LawWillsExecutionEstate, Gift & Trust LawWillsHandwritten & Oral WillsGeneral OverviewEstate, Gift & Trust LawWillsHandwritten & Oral WillsRequirementsEstate, Gift & Trust LawWillsInterpretationGeneral Overview



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California Legal Forms--Transaction Guide

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DIVISION IV: WILLS AND TRUSTS  
CHAPTER 61 WILL DRAFTING AND COMPLETE WILL FORMS  
PART II. LEGAL BACKGROUND

*23-61 California Legal Forms--Transaction Guide § 61.11*

**AUTHOR:** Reviewed by Albert G. Handelman

**§ 61.11 Testamentary Capacity**

**[1] Age**

To make a will in California, a person generally must be 18 years of age or older [*Prob. Code § 6100(a)*]. However, a will may also be made by an emancipated minor [*Fam. Code § 7050(e)(6)*]. A person under the age of 18 years may qualify as an emancipated minor if he or she meets one or more of the following requirements [*Fam. Code § 7002*]:

- He or she has entered into a valid marriage (whether or not the marriage was terminated by dissolution).
- He or she is on active duty with any of the armed forces of the United States.
- He or she has received a judicial declaration of emancipation under *Fam. Code § 7122*.

A judicial declaration of emancipation must be granted under *Fam. Code § 7122* upon proof of all of the following [*Fam. Code §§ 7120(b), 7122(a)*]:

- That the minor is at least 14 years of age.
- That the minor is willingly living separate and apart from his or her parents or guardian with the consent or acquiescence of the parents or guardian.
- That the minor is managing his or her own financial affairs.
- That the source of the minor's income is not derived from any activity declared to be a crime under the laws of California or the United States.

Because a minor cannot make a will, a minor dies intestate. In the absence of any spouse or issue at death, a minor's estate is distributed to his or her parents equally [*Prob. Code § 6402(b)*; *Sisco v. Cosgrove, Michelizzi, Schwabacher, Ward & Bianchi* (1996) 51 Cal. App. 4th 1302, 1308, 59 Cal. Rptr. 2d 647 (minor lacks legal capacity to designate beneficiary; any purported designation of beneficiary during minority is void as either a testamentary act or an attempted disposition of a future interest)].

## [2] Soundness of Mind

A person must be of sound mind to make a will [*Prob. Code § 6100(a)*]. Conversely, a person may not make a will if the person is not mentally competent [*Prob. Code § 6100.5(a)*].

The requirement of a sound mind must be satisfied at the time the will is executed [*Prob. Code § 6100.5(a)*; *Estate of Fritschi* (1963) 60 Cal. 2d 367, 372, 33 Cal. Rptr. 264, 384 P.2d 656]. Evidence as to a person's mental condition before or after the person executed a will is relevant only insofar as it tends to show the person's mental condition at the time the will was executed [ *In re Estate of Finkler* (1935) 3 Cal. 2d 584, 595, 46 P.2d 149].

A person is not mentally competent to make a will if, at the time the will is made, the person does not have sufficient mental capacity to be able to understand the nature of the testamentary act, to understand and recollect the nature and situation of the person's property, or to remember and understand the person's relations to living descendants, spouse, and parents, and those whose interests are affected by the will; or if the person suffers from a mental disorder with symptoms including delusions or hallucinations, and those delusions or hallucinations result in the person devising property in a way which, except for the delusions or hallucinations, the person would not have done [*Prob. Code § 6100.5(a)*]. It is not sufficient to establish simply that the testator was the victim of some hallucination or delusion. The evidence must establish that the will itself was the product of the hallucination or delusion, and that the hallucination or delusion bore directly on and influenced the creation and terms of the will [ *Goodman v. Zimmerman* (1994) 25 Cal. App. 4th 1667, 1677, 32 Cal. Rptr. 2d 419]. A mistaken belief is not necessarily a delusion [ *Goodman v. Zimmerman* (1994) 25 Cal. App. 4th 1667, 1677, 32 Cal. Rptr. 2d 419]. Even if the person's beliefs are inaccurate, this mistaken belief will not justify overturning the person's will if there is any evidence supporting the belief [ *Goodman v. Zimmerman* (1994) 25 Cal. App. 4th 1667, 1676, 32 Cal. Rptr. 2d 419].

The foregoing rules do not affect the statutory definition of the circumstances under which a person is deemed to lack the capacity to make a valid will as stated in *Prob. Code § 6100.5(a)*. They merely prescribe a minimum level of evidence that must be presented to support a determination that a testator lacked testamentary capacity, and the character of findings made in support of that determination [see *Prob. Code § 812(e)*].

### **PRACTICE TIP:**

If the practitioner anticipates a possible will contest--for example, when a near-do-well child is to be disinherited or given a disproportionately small share of the estate--and when circumstances indicate a potential claim of lack of testamentary capacity, steps should be taken *at the time the will is planned and executed* to establish the testamentary capacity of the testator. This should include a contemporaneous examination of the testator by a qualified physician or psychiatrist, preferably on the same day as the execution of the will. This examination should be documented in a plain-English written report, and should cover not only medical standards such as orientation as to place and time [see *Prob. Code § 811(a)*], but the core questions of the testator's understanding of the testamentary act, extent of his or her estate, and his or her relationships with family and friends.

There are two potential drawbacks to this process. First, it can be difficult to diplomatically convince a client to subject himself or herself to such an examination. Second, the future contestant might later argue that such careful documentation of the testator's capacity is proof that the estate planner personally had doubts about the testator's capacity, and wanted a "second opinion" before proceeding. *Commentary*

by Albert G. Handelman.

### **[3] Effect of Establishment of Conservatorship**

A person who is subject to a conservatorship is not necessarily incompetent to make a will [*Prob. Code § 1871(c)*]. The grounds for appointment of a conservator [*see Prob. Code § 1801*] are not inconsistent with competence to make a will [*see Estate of Mann (1986) 184 Cal. App. 3d 593, 605, 229 Cal. Rptr. 225*]. Although the appointment of a conservator may have some bearing on the conservatee's testamentary capacity, the appointment in itself furnishes only a weak inference of lack of capacity [*Conservatorship of Bookasta (1989) 216 Cal. App. 3d 445, 450 n.5, 265 Cal. Rptr. 1*].

When a conservatee is competent to make a will, he or she may do so [*Prob. Code § 1871(c)*]. A conservator of the estate may also make a will for the conservatee, providing the court first authorizes the action [*Prob. Code §§ 2580(b)(13), 6100(b), 6100.5(c)*]. A conservator might seek to make a will for the conservatee if the conservatee lacks the mental competence to make the will, or if the conservatee is mentally competent to make the will but physically unable to do so.

If a conservator has made a will for the conservatee, the conservatee may later revoke or amend the will, or make a new and inconsistent will, but only if he or she is then mentally competent to do so [*see Prob. Code § 6100(b)*]. The fact that the conservatorship might still be in existence would not prevent the conservatee from doing any of these things, providing the conservatee has the required mental competence [*see Prob. Code § 6100(b)*].

### **[4] Effect of Mental or Physical Disorder**

The mere diagnosis of a mental or physical disorder is not sufficient in itself to support a determination that a person is of unsound mind or lacks the capacity to make a will [*Prob. Code § 811(d)*]. That determination must be supported by evidence of a deficit in at least one of a number of specified mental functions, such as alertness and attention, information processing, thought processes, and ability to modulate mood and affect, and there must be evidence of a correlation between the deficit and the act in question [*Prob. Code § 811(a); Moore v. Anderson Zeigler Disharoon Gallagher & Gray (2003) 109 Cal. App. 4th 1287, 1300, 135 Cal. Rptr. 2d 888* (even hallucinations and delusions do not demonstrate lack of capacity if unrelated to testamentary act)].

A deficit in these mental functions may be considered only if the deficit, by itself or in combination with one or more other mental function deficits, significantly impairs the person's ability to understand and appreciate the consequences of his or her actions with regard to the type of act or decision in question [*Prob. Code § 811(b)*]. In determining whether a person suffers from a deficit in mental function so substantial that the person lacks the capacity to do a certain act, the court may take into consideration the frequency, severity and duration of periods of impairment [*Prob. Code § 811(c)*].

### **[5] Lack of Capacity as Ground for Contest of Will**

Lack of testamentary capacity is one of the grounds for contest of a will [*see Prob. Code § 8252(a)*]. At the trial of a will contest, the contestants have the burden of proving lack of testamentary capacity [*Prob. Code § 8252(a)*].

Before July 1, 1989, a will contest could be tried by a jury [*see former Prob. Code § 371, repealed July 2, 1989*]. The Probate Code now requires the court to try and determine any contested issue of fact that affects the validity of a will [*Prob. Code § 8252(b)*].

An attorney preparing a will for a testator does not owe a duty to the beneficiary of the will or to the beneficiary under a prior will to ascertain and document the client's testamentary capacity [*Moore v. Anderson Zeigler Disharoon Gallagher & Gray (2003) 109 Cal. App. 4th 1287, 1298, 135 Cal. Rptr. 2d 888*]. When the testator's testamentary

capacity is the basis for a will challenge, the testator's true intent is the central question, and that intent cannot be ascertained from the will or other challenged estate plan document. The attorney who is persuaded of the client's testamentary capacity by the attorney's own observations and experience, and who drafts the will accordingly, fulfills the attorney's duty of loyalty to the testator. In doing so, the attorney should not be required to consider the effect of the new will on beneficiaries under a former will or beneficiaries of the new will [ *Moore v. Anderson Zeigler Disharoon Gallagher & Gray* (2003) 109 Cal. App. 4th 1287, 1298-1299, 135 Cal. Rptr. 2d 888] . The attorney is not required to urge the testator to consider an alternative plan to forestall a claim by someone thereby excluded from the will or included in the will but deprived of a specific asset that is devised to someone else. Any other conclusion would place the attorney in an untenable position of divided loyalty [ *Boronian v. Clark* (2004) 123 Cal. App. 4th 1012, 1020, 20 Cal. Rptr. 3d 405] . These beneficiaries do not have a cause of action against the attorney for malpractice. Their remedy is to contest the probate and challenge the will on the ground that the testator lacked testamentary capacity at the time of executing the will [ *Boronian v. Clark* (2004) 123 Cal. App. 4th 1012, 1020-1021, 20 Cal. Rptr. 3d 405 ; *Moore v. Anderson Zeigler Disharoon Gallagher & Gray* (2003) 109 Cal. App. 4th 1287, 1300, 135 Cal. Rptr. 2d 888] .

Likewise, an attorney retained by a grantor to prepare a grant deed transferring the grantor's residence to her daughter as part of the grantor's testamentary plan owed no duty to the grantor's children to ascertain the grantor's intent or capacity to favor one child over another. Imposing an obligation on the attorney to act in the grantee's best interests would necessarily result in a breach of the attorney's duty to the client, a classic example of divided loyalty [ *Featherson v. Farwell* (2004) 123 Cal. App. 4th 1022, 1029, 20 Cal. Rptr. 3d 412 (if attorney had acted in grantee's best interests, he would also have subjected himself to claims from grantor's other children)].

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law  
 Will Contests  
 Testamentary Capacity  
 General Overview  
 Estate, Gift & Trust Law  
 Will Contests  
 Testamentary Capacity  
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 Estate, Gift & Trust Law  
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DIVISION IV: WILLS AND TRUSTS  
CHAPTER 61 WILL DRAFTING AND COMPLETE WILL FORMS  
PART II. LEGAL BACKGROUND

*23-61 California Legal Forms--Transaction Guide § 61.12*

**AUTHOR:** Reviewed by Albert G. Handelman

**§ 61.12 Testamentary Intent**

**[1] In General**

An instrument is not a will unless it was intended to be a will [ *Estate of Smith (1998) 61 Cal. App. 4th 259, 265, 71 Cal. Rptr. 2d 424* ] . When it is claimed that an instrument offered for probate was not intended to be a will, *Prob. Code* § 8252(a) states that the contestants have the burden of proving lack of testamentary intent. However, *Prob. Code* § 8252(a) is meant to apply to documents that are clearly wills. Thus, the party challenging a document that apparently is a will and that exhibits testamentary intent must prove testamentary intent was lacking due, for example, to undue influence. If the question is *whether* a document exhibits testamentary intent, this rule does not apply [ *Estate of Wong (1995) 40 Cal. App. 4th 1198, 1205, 47 Cal. Rptr. 2d 707* ] . When there is doubt as to whether a particular instrument was intended to be a will, the proponent of the instrument and not the contestant of the will has the burden of proving the required intent [ *Estate of Wong (1995) 40 Cal. App. 4th 1198, 1205, 47 Cal. Rptr. 2d 707* ] .

The testator must have intended, by the instrument offered for probate, to make a revocable disposition of his or her property to take effect on his or her death [ *Estate of Smith (1998) 61 Cal. App. 4th 259, 265, 71 Cal. Rptr. 2d 424* ] . No particular words are necessary to show testamentary intent [ *Estate of Wong (1995) 40 Cal. App. 4th 1198, 1205, 47 Cal. Rptr. 2d 707* ; *Estate of Archer (1987) 193 Cal. App. 3d 238, 244, 239 Cal. Rptr. 137* ] , and the word "will" itself need not appear in the instrument [ *Estate of Gutierrez (1961) 189 Cal. App. 2d 165, 169, 11 Cal. Rptr. 51* ] . However, the instrument must contain some words showing an intent to dispose of the author's property on his or her death [ *Estate of Wong (1995) 40 Cal. App. 4th 1198, 1205, 47 Cal. Rptr. 2d 707* ] . If there are no words showing this intent, the instrument will not qualify as a will. Further, the required intent cannot be supplied by a nonverbal symbol (such as an arrow), as such a symbol has no fixed meaning and cannot be used in place of words evidencing an intention to "give," "bequeath," or "will" [ *Estate of Wong (1995) 40 Cal. App. 4th 1198, 1205, 1208-1209, 47 Cal. Rptr. 2d 707* ] .

Regardless of the language used in an alleged testamentary instrument, extrinsic evidence may be introduced to show that the testator did not intend it to be effective as a will [ *Estate of Smith (1998) 61 Cal. App. 4th 259, 266, 71 Cal.*

*Rptr. 2d 424*]. Extrinsic evidence is only relevant and admissible if it is offered for the purpose of ascertaining the intent with which the instrument was executed, and not for the purpose of proving the meaning the testator attributed to specific provisions of the will [ *Estate of Smith (1998) 61 Cal. App. 4th 259, 266, 71 Cal. Rptr. 2d 424* (trial court improperly focused on decedent's intended disposition of her estate, instead of on her intent to execute a testamentary instrument); *Estate of Wong (1995) 40 Cal. App. 4th 1198, 1205, 47 Cal. Rptr. 2d 707* (if it is not completely clear that document evidences testamentary intent, it is possible to resort to extrinsic evidence of surrounding circumstances in order to prove it)]. An instrument will not satisfy the requirement of testamentary intent if it appears that it was intended to effect an immediate transfer of property, or a transfer to become effective before the author's death [ *Cohn v. Klein (1930) 209 Cal. 421, 425, 287 P. 459* ].

## **[2] Effect of Undue Influence**

### **[a] In General**

The execution or revocation of a will or part of a will is ineffective to the extent that the execution or revocation was procured by undue influence [*Prob. Code § 6104*]; *David v. Hermann (2005) 129 Cal. App. 4th 672, 684, 28 Cal. Rptr. 3d 622* (courts have long held that testamentary document may be set aside if it was procured by undue influence)]. Undue influence is pressure brought to bear directly on the testamentary act, sufficient to overcome the testator's free will and amounting to coercion that destroys the testator's free agency [ *Rice v. Clark (2002) 28 Cal. 4th 89, 96, 120 Cal. Rptr. 2d 522, 47 P.3d 300*]. It is defined as an improper or wrongful constraint, machination, or urgency of persuasion whereby the will of a person is overpowered and the person is induced to do an act that he or she would not do, or induced not to do an act that he or she would do if left to act freely [Black's Law Dictionary (6th ed. 1990) at 1528].

Although undue influence often consists of untrue statements made to the testator for the purpose of overpowering the testator's free agency, untrue statements are not essential to a claim of undue influence, and such a claim may be supported in whole or in part by proof of completely true statements [ *Hagen v. Hickenbottom (1995) 41 Cal. App. 4th 168, 48 Cal. Rptr. 2d 197* ]. It is essential to distinguish undue influence from fraud [*see discussion in § 61.12[3]*]. Falsity is an essential element of fraud but not of undue influence. Thus truth is not an absolute defense to a claim of undue influence, as it is to a claim for fraud, although the truth of statements may tend to negate the inference that they had the effect of unduly influencing the testator [*see Hagen v. Hickenbottom (1995) 41 Cal. App. 4th 168, 180-183, 48 Cal. Rptr. 2d 197* ].

### **[b] Factors Tending to Show Undue Influence**

The courts have traditionally considered five factors in determining whether a will is the product of undue influence. They are [ *Estate of Lingenfelter (1952) 38 Cal. 2d 571, 585, 241 P.2d 990* ; *Estate of Yale (1931) 214 Cal. 115, 122, 4 P.2d 153* ]:

- Whether the provisions of the will were unnatural. A will is "unnatural" if it prefers strangers to persons who, because of their close family relationship to the testator, are the natural objects of the testator's bounty [*see Estate of Shay (1925) 196 Cal. 355, 364, 237 P. 1079* ; *Estate of Straisinger (1967) 247 Cal. App. 2d 574, 586, 55 Cal. Rptr. 750* ].
- Whether the dispositions made in the will were at variance with the testator's intentions expressed before and after its execution.
- Whether the relations between the testator and the principal beneficiary or beneficiaries were such as to give the latter an opportunity to control the testamentary act of the former.

- Whether the testator's mental and physical condition was such as to permit a subversion of his or her free will.
- Whether the principal beneficiaries under the will were active in procuring the will.

Undue influence is not proven by the existence of any one or more of these factors. However, the probative force of several of the factors coinciding is often persuasive [ *Estate of Lingenfelter (1952) 38 Cal. 2d 571, 585, 241 P.2d 990* ]. Even when several factors are proven, however, undue influence is not established unless all of the evidence considered together indicates that a particular disposition was brought about by undue pressure, argument, entreaty, or coercive acts that destroyed the testator's freedom of choice [ *Estate of Franco (1975) 50 Cal. App. 3d 374, 382, 122 Cal. Rptr. 661, 123 Cal. Rptr. 458* ].

If it is claimed that the dispositions made in a will conflict with other intentions expressed by the testator, the other intentions may be gleaned from declarations, oral or written, made by the testator either before or after the purported will was executed, or by a will or wills executed by the testator before the challenged instrument [see *Estate of Jamison (1953) 41 Cal. 2d 1, 9, 256 P.2d 984* ]. However, the mere fact the dispositions of a will conflict with other intentions expressed by the testator will not sustain a claim of undue influence if the dispositions are adequately explained [see *Estate of Holloway (1925) 195 Cal. 711, 721, 235 P. 1012* ].

#### **[c] Presumption of Undue Influence**

At the trial of a will contest, the contestants ordinarily have the burden of proving that the will was the result of undue influence [*Prob. Code § 8252(a)*]. Under limited circumstances, a presumption of undue influence may arise, which shifts to the proponent of the will the burden of proving by a preponderance of the evidence that the will was not procured by undue influence [ *Conservatorship of Davidson (2003) 113 Cal. App. 4th 1035, 1059, 6 Cal. Rptr. 3d 702* ].

A presumption of undue influence arises if (1) there was a confidential relationship between the testator and the person allegedly exerting undue influence, (2) the person allegedly exerting undue influence actively participated in the preparation or execution of the will, and (3) the person allegedly exerting undue influence (or a member of that person's family) would receive an undue profit if the will were allowed to stand [ *Rice v. Clark (2002) 28 Cal. 4th 89, 96-97, 120 Cal. Rptr. 2d 522, 47 P.3d 300* ]. For example, a confidential relationship existed between a son and his 81 year old father, when, at the time of executing a new will leaving everything to the son, the father relied almost completely on the son, was critically ill, disoriented, and not eating. The son had a lawyer prepare the will without ever talking to the father alone and had two friends act as witnesses [ *Estate of Gonzalez (2002) 102 Cal. App. 4th 1296, 1306, 126 Cal. Rptr. 2d 332* ].

While evidence of procurement is highly probative of undue influence and figures repeatedly in judicial discussions of the principle, it is essential to proof of undue influence only if the court relies on the presumption of undue influence to shift the burden of proof to the proponent of the will [ *David v. Hermann (2005) 129 Cal. App. 4th 672, 684, 28 Cal. Rptr. 3d 622* ].

#### **OBSERVATION:**

One of the frustrating ironies faced by would-be will contestants seeking to establish a presumption of undue influence is that they must first "prove" a close and trusting relationship between the testator and the alleged undue influencer before they can move on to their claim that the alleged undue influencer abused that relationship. *Commentary by Albert G. Handelman.*

Active participation in the preparation or execution of a will may be proven by circumstantial evidence of facts

occurring both before and after the execution of the will [ *Estate of Baker (1982) 131 Cal. App. 3d 471, 481, 182 Cal. Rptr. 550* ]. Undue profit may be shown by such facts as unequal distribution of the testator's property to the testator's children [ *Estate of Gelonese (1974) 36 Cal. App. 3d 854, 866, 111 Cal. Rptr. 833* ] or an explained failure to provide for living relatives while making a generous devise to a stranger [ *Estate of Clegg (1978) 87 Cal. App. 3d 594, 603, 151 Cal. Rptr. 158* ]. When a testator and an attorney have an ongoing attorney-client relationship, any benefit received by the attorney (or the attorney's relatives) from the testator other than compensation for legal services performed is regarded as undue profit [ *Estate of Auen (1994) 30 Cal. App. 4th 300, 310, 35 Cal. Rptr. 2d 557* ].

A testamentary transfer to the testator's attorney, or to any person who drafted the will or who is related to the person who drafted the will, may be invalid under the statutory rules limiting donative transfers to "disqualified persons" [ *see Prob. Code §§ 21350-21356* ]. A devise to a "disqualified person" [ *see Prob. Code § 21350.5* ] is presumptively invalid unless it comes within one of the statutory exceptions to the presumption [ *see Prob. Code § 21351* ]. For a discussion of the statutory rules limiting donative transfers to "disqualified persons," see § 61.15[3].

### [3] Effect of Fraud

The execution or revocation of a will or part of a will is ineffective to the extent that the execution or revocation was procured by fraud [ *Prob. Code § 6104* ]. Fraud is defined as a false representation or concealment of a matter of fact, whether by words or conduct, that is intended to deceive another and does in fact result in deception [ *Black's Law Dictionary (6th ed. 1990) at 660* ]. As used in the law of wills, fraud generally consists of false statements, false pretenses, or some trick or deceptive device designed to deceive the testator [ *In re Estate of Ricks (1911) 160 Cal. 467, 480, 117 P. 539* ]. Fraud may consist of false representations made to a testator [ *see Estate of Newhall (1923) 190 Cal. 709, 720, 214 P. 231* ] or concealment from the testator of material facts when a confidential relationship gives rise to a duty to disclose the facts [ *see Estate of Garibaldi (1961) 57 Cal. 2d 108, 113-114, 17 Cal. Rptr. 623, 367 P.2d 30* ].

The elements of fraud in the procurement of a testamentary instrument are the same as those required to invalidate a contract [ *David v. Hermann (2005) 129 Cal. App. 4th 672, 685, 28 Cal. Rptr. 3d 622* ]. An intent to deceive the testator or to induce the testator to execute the will is a necessary element [ *David v. Hermann (2005) 129 Cal. App. 4th 672, 685-686, 28 Cal. Rptr. 3d 622* ]. Because proof of intent to deceive is necessarily largely or entirely circumstantial, a contestant is not confined to the bare facts, but is entitled to the benefit of all inferences that can legitimately be drawn from the established facts [ *David v. Hermann (2005) 129 Cal. App. 4th 672, 686, 28 Cal. Rptr. 3d 622* ]. Proof that the testator was induced by misrepresentations into making dispositions that the testator would not have made absent those misrepresentations constitutes fraud [ *David v. Hermann (2005) 129 Cal. App. 4th 672, 686, 28 Cal. Rptr. 3d 622* ].

Although will contests are often based on both fraud and undue influence [ *see discussion in § 61.12[2]* ], these are actually distinct grounds for the contest of a will [ *Estate of Garibaldi (1961) 57 Cal. 2d 108, 114, 17 Cal. Rptr. 623, 367 P.2d 39* ]. The essence of undue influence is a subjugation and control of the testator's will, while fraud is a deception practiced on the testator [ *In re Estate of Ricks (1911) 160 Cal. 467, 480, 117 P. 539* ]. A person who attempts to unduly influence a testator may also attempt to deceive the testator by making fraudulent representations to the testator. In such a case, the fraudulent representations may be considered in determining whether there was undue influence [ *Estate of Garibaldi (1961) 57 Cal. 2d 108, 114, 17 Cal. Rptr. 623, 367 P.2d 39* ; *David v. Hermann (2005) 129 Cal. App. 4th 672, 685, 28 Cal. Rptr. 3d 622* ]. In other cases, however, the undue influence may be entirely separate and distinct from the fraud [ *see Hagen v. Hickenbottom (1995) 41 Cal. App. 4th 168, 48 Cal. Rptr. 2d 197* ]. In such cases, the two grounds for contest must be analyzed separately. Truth is an absolute defense to a claim for fraud, but not to a claim for undue influence [ *see Hagen v. Hickenbottom (1995) 41 Cal. App. 4th 168, 180-183, 48 Cal. Rptr. 2d 197 and discussion in § 61.12[2][a]* ].

At the trial of a will contest, the contestants have the burden of proving that the will was the result of fraud [ *Prob. Code*

§ 8252(a)].

#### [4] Effect of Duress or Menace

The execution or revocation of a will or part of a will is ineffective to the extent that the execution or revocation was procured by duress or menace [*Prob. Code § 6104*]. Neither duress nor menace are defined in the Probate Code. However, the Civil Code contains definitions of those terms, which are primarily applicable to the law of contracts but may be useful by way of analogy in the law of wills. *Civ. Code § 1569* provides that duress consists of any of the following:

- Unlawful confinement of any person, or of the husband, wife, ancestor, descendant, or adopted child of any person.
- Unlawful detention of the property of any person.
- Confinement of any person when the confinement is lawful but fraudulently obtained, or fraudulently made unjustly harassing or oppressive.

*Civ. Code § 1570* provides that menace consists of a threat of any of the following:

- Duress as defined in *Civ. Code § 1569*.
- Unlawful and violent injury to the person or property of any person specified in *Civ. Code § 1569*.
- Injury to the character of any person specified in *Civ. Code § 1569*.

The Probate Code provides that at the trial of a will contest, the contestants have the burden of proving duress [*Prob. Code § 8252(a)*]. Although the Code does not also provide that the contestants have the burden of proving menace [*see Prob. Code § 8252(a)*], the two concepts are so similar that the court would almost certainly assign the burden of proof of menace to the contestants.

#### [5] Effect of Mistake

The Probate Code does not list mistake as one of the grounds for declaring the execution or revocation of a will to be ineffective [*see Prob. Code § 6104*]. However, it provides that at the trial of a will contest, the contestants have the burden of proof of "mistake" [*Prob. Code § 8252(a)*; *see Recommendation Relating to Opening Estate Administration*, 19 Cal. L. Revision Comm'n Reports 787, 823 (1988)].

A mistake by the testator does not preclude admission of a will to probate unless the mistake vitiates the execution of the will or the formation of testamentary intent [ *Estate of Smith (1998) 61 Cal. App. 4th 259, 270, 71 Cal. Rptr. 2d 424* ] . "Testamentary intent" in this context means the testator's general intent to make a revocable disposition of his or her property to be effective on the testator's death; it does not refer to the testator's intentions regarding particular dispositions of property [ *Estate of Smith (1998) 61 Cal. App. 4th 259, 270, 71 Cal. Rptr. 2d 424* ] . The validity of the will, or any part of it, is not affected by a mistake of law or fact inducing the execution of the will, unless fraud or undue influence was perpetrated on the testator or the mistake shows a lack of testamentary intent, for example, when the testator executed the wrong instrument [ *Estate of Smith (1998) 61 Cal. App. 4th 259, 270, 71 Cal. Rptr. 2d 424* ] . However, the will would be subject to attack if the testator executed it in the mistaken belief that it was some instrument other than a will. The grounds of the contest in such a case would be lack of testamentary intent, and the contestants would seek to prove that the testator did not intend the instrument to be effective as a will [*see Estate of Sargavak (1950) 35 Cal. 2d 93, 95, 216 P.2d 850* ; *Estate of Hathaway (1940) 38 Cal. App. 2d 526, 528, 101 P.2d 741*].

(instrument not effective as will unless testator intended it to be will)]. For further discussion of testamentary intent, see § 61.12[1].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Will Contests General Overview Estate, Gift & Trust Law Wills Interpretation General Overview Estate, Gift & Trust Law Wills Interpretation Testator's Intent General Overview



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DIVISION IV: WILLS AND TRUSTS  
CHAPTER 61 WILL DRAFTING AND COMPLETE WILL FORMS  
PART II. LEGAL BACKGROUND

*23-61 California Legal Forms--Transaction Guide § 61.13*

**AUTHOR:** Reviewed by Albert G. Handelman

**§ 61.13 Execution and Witnesses**

**[1] Witnessed Will**

**[a] Execution**

A witnessed will [*see § 61.10[2][b]*] must be in writing and properly signed [*Prob. Code § 6110(a), (b)*]. The will must be signed either [*Prob. Code § 6110(b); see Prob. Code § 2580(b)(13)*]:

- By the testator personally,
- By some other person acting in the testator's presence and by the testator's direction, or
- By a conservator pursuant to a court order to make a will for the testator.

A person acting in the testator's presence and by the testator's direction may sign the testator's name, or merely guide the testator's hand while he or she signs [ *Estate of Holloway (1925) 195 Cal. 711, 719, 235 P. 1012* ; *Estate of Clark (1915) 170 Cal. 418, 424, 149 P. 828* ] . It may be preferable to guide the testator's hand, since this may make it easier to prove that the signature was in the testator's presence and by the testator's direction.

When a conservator makes a will for a conservatee, the conservator does not simply sign (or help the conservatee to sign) the will; he or she plans the will and causes it to be executed, in much the same way that the conservatee would do if able. A conservator may make a will for the conservatee only after a petition for "substituted judgment" has been filed with the court seeking authority to do so, and only after the court has granted the requested authority [*Prob. Code §§ 2580(a), (b)(13), 6110(b)(3)*].

**[b] Witnesses**

A witnessed will must be signed by at least two persons acting as witnesses [*Prob. Code § 6110(c)(1)*]. The witnesses

must be present at the same time and must witness either the signing of the will or the testator's acknowledgment of his or her signature or of the will [*Prob. Code § 6110(c)(1)*]. *Prob. Code § 6110(c)(1)* contains no express temporal limitation on when the witnesses must sign the will in order for the document to be valid, however, the will must be witnessed during the testator's lifetime [*Prob. Code § 6110(c)(1)*, see also [ *Estate of Saueressig (2006) 38 Cal. 4th 1045, 1050, 44 Cal. Rptr. 3d 672, 136 P.3d 201* ] . In other words, although *Prob. Code § 6110(c)(1)* requires that the witnesses must both *be present* at the same time when the testator signs the will or acknowledges the signature, it does not expressly require that the witnesses actually *sign* the will in the presence of the testator, or in each other's presence, or at any particular time--thus, the witnesses apparently can sign at different times without affecting the validity of the will. However, *Prob. Code § 6110(c)(1)* requires that the subscription of a will must occur prior to the testator's death. A will that has not been subscribed by two witnesses at the time of the testator's death neither complies nor substantially complies with *Prob. Code § 6110*, and a post-death signature will not validate a will that fails to meet this requirement [ *Estate of Saueressig (2006) 38 Cal. 4th 1045, 1050, 1057, 44 Cal. Rptr. 3d 672, 136 P.3d 201* ; overruling *Estate of Eugene (2002) 104 Cal. App. 4th 907, 912-914* ]. Additionally, if a will was not executed in compliance with *Prob. Code § 6110(c)(1)*, the will must be treated as if it was executed in compliance with *Prob. Code § 6110(c)(1)* if the proponent of the will can establish by clear and convincing evidence that, at the time the testator signed the will, the testator intended the will to constitute the testator's will [*Prob. Code § 6110(c)(2)*].

There is no requirement of "publication," that is, there is no requirement that the testator make a formal declaration that the instrument is his or her will, or that the testator request that the witnesses sign [see *Prob. Code § 6110*; *Report of Senate Committee on Judiciary on Assembly Bills 25 and 68*, 17 Cal. L. Revision Comm'n Reports 871 872 (1984)]. Nor is there any requirement that the witnesses sign the will in each other's presence, or even in the presence of the testator [see *Report of Senate Committee on Judiciary on Assembly Bills 25 and 68*, 17 Cal. L. Revision Comm'n Reports 871-872 (1984)]. However, the witnesses must understand that the instrument they sign is the testator's will [*Prob. Code § 6110(c)(1)*].

### **[c] Interested Witnesses**

A will or any of its provisions is not invalid merely because the will was signed by an interested witness [*Prob. Code § 6112(b)*]. Unless there are at least two other witnesses who are disinterested, however, the fact that the will makes a devise to a witness creates a presumption that the witness procured the devise by duress, menace, fraud, or undue influence [*Prob. Code § 6112(b)*]. However, this presumption does not apply if the devise is made to the witness in a fiduciary capacity only (e.g., as trustee) [*Prob. Code § 6112(c)*]. This presumption is a presumption affecting the burden of proof [*Prob. Code § 6112(c)*; see *Evid. Code §§ 500-523, 605, 606* (burden of proof)].

If a devise made to an interested witness fails because of this presumption, the interested witness is entitled to take that part of the devise that does not exceed the share of the estate that would be distributed to the witness if the will were not established [*Prob. Code § 6112(d)*].

For purposes of the foregoing rules, an "interested witness" is any of the following [see *Prob. Code § 48(a)* (defining "interested person" for purposes of Probate Code)]:

- An heir, devisee, child, spouse, creditor, beneficiary, and any other person having a property right in or claim against a trust estate or the estate of the decedent that may be affected by the will.
- Any person having priority for appointment as personal representative.
- A fiduciary representing an interested person.

### **[2] Holographic Will**

**[a] Testator's Handwriting**

Before January 1, 1983, the Probate Code required that a holographic will [see § 61.10[1][c]] be entirely written, dated, and signed by the hand of the testator [former *Prob. Code* § 53, repealed Jan. 1, 1985]. The Code now requires only that the signature and material provisions of the will be in the testator's handwriting [*Prob. Code* § 6111(a)].

*Prob. Code* § 6111 gives validity to an unwitnessed handwritten will because of the "recognized difficulty of forging an entire handwritten instrument" [ *Estate of Black* (1982) 30 Cal. 3d 880, 888, 181 Cal. Rptr. 222, 641 P.2d 754] .

Whether a document should be admitted to probate as a holographic will depends on proof of its authorship and authenticity, and on whether the words used establish that the testator intended it to be his or her last will and testament at the time he or she wrote it [ *Estate of Southworth* (1996) 51 Cal. App. 4th 564, 571, 59 Cal. Rptr. 2d 272] .

Although no particular words are necessary to establish a holographic will, a holographic will must be executed with testamentary intent [see *Estate of Black* (1982) 30 Cal. 3d 880, 888, 181 Cal. Rptr. 222, 641 P.2d 754 (testator's reference to instrument as her will and statement that she hoped this writing would be given legal effect as testamentary disposition was evidence of testator's intent to authenticate document as will) see also *Estate of Williams* (2007) 155 Cal. App. 4th 197, 207 ; 66 Cal. Rptr. 3d 34 , (Evidence supported finding that decedent's handwritten document, where his name was written in block letters at the top, stated the disposition of some of his assets and had included some language of testamentary intent, was a valid holographic will).].

If a printed form is used, however, the will must evidence testamentary intent. In one case, the decedent filled out a printed "donor card" prepared by an animal shelter. The card provided the donor with three options: (1) naming the animal shelter as beneficiary of a life insurance policy, (2) changing the donor's will to leave securities or cash to the shelter, or (3) not taking "immediate action" but stating his or her future intentions. The decedent circled option (3) and in the blank space provided after it wrote "My entire estate is to be left to North Shore Animal League." The superior court ruled that the card qualified as a valid holographic will because the signature and the material provisions were in the decedent's handwriting [see *Prob. Code* § 6111(a)]. The Court of Appeal disagreed, concluding that when the decedent selected option (3) she evidenced an intent not to take "immediate action" but to take some action in the future, and that her handwritten words evidenced an intent to make a will in the future. Since there was no present intent to make a will, the requirement of testamentary intent was not satisfied and the card did not qualify as a will [ *Estate of Southworth* (1996) 51 Cal. App. 4th 564, 572, 59 Cal. Rptr. 2d 272] . Moreover, a donor card is not a "commercially printed form will" as specified by the statute [see *Estate of Southworth* (1996) 51 Cal. App. 4th 564, 566, 571-572, 59 Cal. Rptr. 2d 272] .

Photocopies of a testator's handwritten property dispositions, included in a holographic will, satisfy the statutory requirement that the material provisions of the will must be in the testator's handwriting, as long as the photocopies are properly authenticated [ *Estate of Brenner* (1999) 76 Cal. App. 4th 1298, 1299, 1302, 91 Cal. Rptr. 2d 149] .

**[b] Signature**

There is no requirement that the testator's signature be at the end of a holographic will [see *Prob. Code* § 6111(a)]. The signature may appear in another part of the writing, provided the testator writes his or her name there with the intention of authenticating the writing as his or her will [ *Estate of MacLeod* (1988) 206 Cal. App. 3d 1235, 1242-1243, 254 Cal. Rptr. 156] see *Estate of Williams* (2007) 155 Cal. App. 4th 197, 207 ; 66 Cal. Rptr. 3d 34 , (Holographic will need not be signed at the bottom provided the testator wrote his name on the document with the intent of authenticating or executing the instrument as his will).

**[c] Date**

There is no requirement that a holographic will be dated [see *Prob. Code* § 6111(b)]. However, if the will does not contain a statement as to the date of its execution, and if the omission results in doubt as to whether its provisions or the

inconsistent provisions of another will are controlling, the holographic will is invalid to the extent of the inconsistency, unless the time of its execution is established to be after the date of execution of the other will [*Prob. Code* § 6111(b)(1)]. Further, if the will is undated and if it is established that the testator lacked testamentary capacity at any time during which the will might have been executed, the will is invalid unless it is established that it was executed at a time when the testator had testamentary capacity [*Prob. Code* § 6111(b)(2)].

#### **[d] Witnesses**

Although there is no requirement that a holographic will be signed by witnesses, witnesses will not invalidate a will that otherwise meets the requirements of a valid holographic will [*Prob. Code* § 6111(a); *Estate of Clark (1942) 55 Cal. App. 2d 85, 89, 129 P.2d 969*].

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Will Contests Testamentary Formalities General Overview Estate, Gift & Trust Law Will Contests Testamentary Formalities Signature Placements Estate, Gift & Trust Law Will Contests Testamentary Formalities Witnesses General Overview Estate, Gift & Trust Law Will Contests Testamentary Formalities Witnesses Attestation & Subscription Estate, Gift & Trust Law Wills Execution



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DIVISION IV: WILLS AND TRUSTS  
CHAPTER 61 WILL DRAFTING AND COMPLETE WILL FORMS  
PART II. LEGAL BACKGROUND

*23-61 California Legal Forms--Transaction Guide § 61.14*

**AUTHOR:** Reviewed by Albert G. Handelman

**§ 61.14 Property Subject to Disposition by Will**

**[1] In General**

Unless a contrary intention is indicated by the will, a will passes all property the testator owns at death, including property acquired after execution of the will [*Prob. Code § 21105*]. For this purpose, "property" means anything that may be the subject of ownership, and includes both real and personal property and any interest in real or personal property [*Prob. Code § 62*].

**[2] Property Subject to Nonprobate Transfer on Owner's Death**

Property that is subject to nonprobate transfer on the death of its owner is not subject to disposition under the owner's will. The Probate Code provides that a provision for a nonprobate transfer on death in an insurance policy, contract of employment, bond, mortgage, promissory note, certificated or uncertificated security, account agreement, custodial agreement, deposit agreement, compensation plan, pension plan, individual retirement plan, employee benefit plan, trust, conveyance, deed of gift, marital property agreement, or other written instrument of a similar nature is not invalid because the instrument does not comply with the requirements for execution of a will [*Prob. Code § 5000(a)*].

The contract rights transferred pursuant to these instruments, or benefits payable to beneficiaries under their terms, ordinarily are payable under a designation of beneficiary provision, or under terms of the instruments themselves [*see Prob. Code § 5002* (holder of property not required to receive, hold, or transfer property if provision for nonprobate transfer on death does not comply with governing instrument)]. Unless the benefits are payable to the decedent's estate, they ordinarily are not subject to disposition under the will of the contracting party and are not subject to administration in that person's estate [*see Prob. Code § 5002; see also Recommendation Proposing New Probate Code, 20 Cal. L. Revision Comm'n Reports 1001, 1394-1395 (1989); Tentative Recommendation Relating to Wills and Intestate Succession, 16 Cal. L. Revision Comm'n Reports, 2301, 2350-2351, 2381-23822 (1982)*].

**[3] Joint Tenancy Property**

The distinguishing incident of a joint tenancy is the right of survivorship, under which the surviving joint tenant becomes the sole owner of the joint tenancy property on the death of the first tenant [*see Sterling, Joint Tenancy and Community Property in California, 14 Pac. L. J. 927, 951-952 (1983)*]. Because the deceased joint tenant's interest terminates on death, he or she has no property interest that may be subject to disposition by will [*see Estate of England (1991) 233 Cal. App. 3d 1, 4, 284 Cal. Rptr. 361 ; Estate of Moy (1963) 217 Cal. App. 2d 24, 29, 31 Cal. Rptr. 374*].

#### **[4] Separate Property**

A married person's separate property generally consists of all property that was owned before marriage or acquired afterward by gift, bequest, devise, or descent, together with the rents, issues, and profits of that property [*Prob. Code § 28; see Fam. Code § 770(a)*]. A married person has full power of testamentary disposition over his or her own separate property [*Prob. Code § 6101(a)*].

#### **[5] Community Property**

In California, community property consists of all property acquired by a married person while domiciled in California that is not declared by statute to be some other type of property [*Prob. Code § 28; see Fam. Code § 760*].

A married person's community property may include both real and personal property, and property that is situated outside as well as inside California [*Fam. Code § 760*]. Community property also includes personal property wherever situated, and real property situated in California, that a married person acquires during marriage in exchange for real or personal property, wherever situated, that is community property or a substantially equivalent type of marital property under the laws of the place where the acquiring spouse was domiciled at the time the property so exchanged was acquired [*Prob. Code § 28(c)*].

The testamentary power of the spouse who dies first extends to only one half of the community property [*see Prob. Code § 6101(b)*]. Whether the testamentary power of the spouse who dies first extends to one half of the community property as a whole, as compared to one half of each community asset, depends on whether the "aggregate theory" or the "item theory" is applied to the community. Under the "aggregate theory," the community assets are viewed as a whole, and the first spouse to die is deemed to have the power to dispose of any half of the whole, but not more than one-half. Under the "item theory," the first spouse to die can devise only one-half of any particular community asset to a third party, even when the surviving spouse will ultimately receive one half (or more) of all of the community property. The "item theory" has been adopted by court decision in California [*see Estate of Wilson (1986) 183 Cal. App. 3d 67, 73, 227 Cal. Rptr. 794*].

#### **PRACTICE TIP:**

While it is now often conceded that California follows the "item theory," many estate planners continue to rely on the "aggregate theory" when dividing and allocating community property assets after the first spouse dies. There are distinct advantages to employing the "aggregate theory," including the convenience of holding 100 percent of specific assets in marital deduction, bypass or other shares of an estate without the need for exchanging assets between shares, and the potential for allocating assets more likely to appreciate after the first spouse's death to bypass trusts or other shares of the estate which will not be taxed at the surviving spouse's death. To date, the Internal Revenue Service has not aggressively insisted that California estate planners utilize the "item theory" of community property. *Commentary by Albert G. Handelman.*

If a married person attempts to dispose by will of more than his or her one-half interest in the community property, the disposition is not void, but merely voidable at the election of the surviving spouse [ *Harris v. Harris (1962) 57 Cal. 2d 367, 369, 19 Cal. Rptr. 793, 369 P.2d 481* ]. The surviving spouse has the right to avoid the disposition, up to his or her one-half interest in the subject property [ *Harris v. Harris (1962) 57 Cal. 2d 367, 369, 19 Cal. Rptr. 793, 369 P.2d*

481 ; *Estate of Wilson (1986) 183 Cal. App. 3d 67, 72, 227 Cal. Rptr. 794* .

Notwithstanding the rule that a married person can only dispose of one half of the community property by will, a married person's will may purport to dispose of more than one half. However, such an attempt will be successful only if the surviving spouse elects to accept benefits under the will rather than to take "against" the will. For a discussion of the election of a surviving spouse to take under the will or against it (the so-called "widow's election"), see *California Wills and Trusts, Ch. 22, Property Devised by Will, § 22.06[4]* (Matthew Bender).

A married person's right to dispose of his or her community property interest in specified property may be restricted in other ways. For example, anti-alienation provisions in an employee spouse's pension plan may prohibit the non-employee spouse who predeceases the employee spouse from devising his or her community property interest in the plan [*see Regents of University of California v. Benford (2005) 128 Cal. App. 4th 867, 875-877, 27 Cal. Rptr. 3d 441*].

### **[6] Quasi-Community Property**

Quasi-community property generally consists of property acquired by married persons while domiciled outside California that does not qualify as community property in the state of domicile, but that would have been community property if the persons had been domiciled in California at the time of acquisition [*see Fam. Code § 125; Prob. Code § 66*]. It includes the following:

- All personal property wherever situated, and all real property situated in California acquired by a decedent while domiciled elsewhere that would have been the community property of the decedent and the surviving spouse if the decedent had been domiciled in California at the time of its acquisition [*Prob. Code § 66(a)*].
- All personal property wherever situated, and all real property situated in California, acquired in exchange for real or personal property, wherever situated, that would have been the community property of the decedent and the surviving spouse if the decedent had been domiciled in California at the time the property so exchanged was acquired [*Prob. Code § 66(b)*].

Upon the death of a married person domiciled in California, one half of the quasi-community property acquired by the deceased spouse belongs to the surviving spouse, and the other half belongs to the deceased spouse [*Prob. Code § 101(a)*], unless the spouses have agreed to a non-pro-rata division of the property [*see Prob. Code § 101(b)*]. The half that belongs to the deceased spouse is subject to disposition under the deceased spouse's will [*Prob. Code § 6101(c)*].

The power of testamentary disposition over quasi-community property differs from the power of disposition over community property in that a deceased spouse has the power of testamentary disposition over one half of all of the community property, including community property acquired by the surviving spouse, while a deceased spouse has the power of testamentary disposition only over quasi-community property acquired by the deceased spouse [*Prob. Code § 6101(b), (c)*]. A deceased spouse has no power of testamentary disposition over quasi-community property acquired by the surviving spouse [*see Prob. Code § 6101(c)*].

### **[7] Community Property With Right of Survivorship**

Spouses also may hold title to real or personal property as community property with a right of survivorship [*Civ. Code § 682.1* (effective July 1, 2001)]. This form of title has all the tax benefits of community property, specifically a step-up in basis on both halves of the property [*see I.R.C. § 1014(a)(1), (b)(6)*], and a right of survivorship that allows the property to avoid probate administration and its attendant costs. However, although property held in this manner avoids the costs of probate administration when the first spouse dies, the property remains subject to the inflexibility and other

estate planning limitations of property held in joint tenancy [see [3], above; see also §§ 60.12[8], 60.17[4][d]]. For further discussion, see Ch. 60, *Estate Planning*.

### **[8] Property Held in Tenancy in Common**

Property held by the testator and another person or persons in a tenancy in common is subject to disposition under the testator's will in the same manner as other property. A tenancy in common (also called a "common interest" or an "interest in common") [see *Civ. Code* § 685] is an interest owned by two or more persons that is neither a joint interest nor a partnership interest [see *Civ. Code* §§ 685, 686].

When persons own property as tenants in common, each has an interest in the property, and there is no right of survivorship [see *Civ. Code* § 685 (common interest as one owned by several persons, not in joint ownership or partnership); *Estate of Hittell (1903) 141 Cal. 432, 436, 75 P. 53*]. When one tenant in common dies, his or her interest in the property does not automatically pass to the survivor or survivors but is subject to disposition under his or her will or, if there is no will, under the laws of intestate succession [see *Prob. Code* §§ 6400-6455 (intestate succession)].

### **[9] Property Subject to Power of Appointment**

A testator who holds a power of appointment over property may effect the disposition of the property by exercising the power in his or her will. Generally, a power of appointment can be exercised only in the manner prescribed by the creating instrument [*Prob. Code* § 630(a)]. If the power is a "general" power of appointment, it can be exercised in favor of the holder, the holder's estate, creditors of the holder or the holder's estate, or any other persons specified in the creating instrument [*Prob. Code* § 611(a)]. If the power is a "special" power, it can be exercised only in favor of someone (typically named individuals or members of a specified group) other than the holder, the holder's estate, or creditors of the holder or the holder's estate [*Prob. Code* § 611(d)].

If the power is a "testamentary" power, it is exercisable only by will [*Prob. Code* § 612(a)]. However, a power stated to be exercisable by an inter vivos instrument may also be exercised by a will unless the creating instrument expressly prohibits a testamentary exercise [*Prob. Code* § 630(b)].

A general residuary clause in a will, or a will making a general disposition of all of the testator's property, does not exercise a power of appointment held by the testator unless specific reference is made to the power, or there is some other indication of an intention to exercise the power [*Prob. Code* § 641(a); but see *Prob. Code* § 641(b) (rule applicable only when donee dies on or after July 1, 1982)].

For a detailed discussion of powers of appointment and their use in estate planning, see *California Wills & Trusts*, Ch. 31, *Powers of Appointment* (Matthew Bender).

### **[10] Property Held in Trust**

Property held by a trustee usually will not be subject to disposition under the will of a lifetime or income beneficiary of the trust. A testator who has transferred assets to a trust while living (even if he or she is the trustee or a co-trustee) will not generally retain any power of testamentary disposition over the trust assets. The assets will not be included in the testator's probate estate and will not be subject to distribution under terms of the testator's will. Rather, the assets will be held by the trustee (or, if the testator was the original trustee, then by the successor trustee) and administered and distributed according to the terms of the trust instrument.

An exception to this rule exists if the testator has a power of appointment over the trust assets [see discussion in [8], above]. In such a case, the testator may exercise the power of appointment in accordance with the terms of the

instrument creating it. If the trust instrument created a power of appointment in favor of the testator, and if the power of appointment is exercisable by will, then the testator can exercise the power of appointment as part of his or her will and, to that extent, affect the disposition of some or all of the trust assets [*see Prob. Code* § 630 (requirements for exercising power of appointment)]. Often this situation will arise when a marital deduction trust gives the surviving spouse a general power of appointment over the trust assets (a "lifetime income/power of appointment trust") [*see I.R.C.* § 2056(b)(5) and discussion in Ch. 71, *Marital Deduction Trust Provisions* ].

### **[11] Life Insurance Policy**

A life insurance policy is property and can be sold, assigned, or devised by its owner [ *Blethen v. Pacific Mut. Life Ins. Co.* (1926) 198 Cal. 91, 98, 243 P. 431 ; *Estate of Mendenhall* (1960) 182 Cal. App. 2d 441, 444, 6 Cal. Rptr. 45] . Its pecuniary value is the same as if the owner held a promissory note of the insurance company payable on condition [ *Blethen v. Pacific Mut. Life Ins. Co.* (1926) 198 Cal. 91, 98, 243 P. 431 ; *Estate of Mendenhall* (1960) 182 Cal. App. 2d 441, 444, 6 Cal. Rptr. 45] . A testator who is the owner of a life insurance policy has the power to dispose of the policy under his or her will [ *Blethen v. Pacific Mut. Life Ins. Co.* (1926) 198 Cal. 91, 98, 243 P. 431 ; *Estate of Mendenhall* (1960) 182 Cal. App. 2d 441, 444, 6 Cal. Rptr. 45] .

However, the property rights of the owner of a life insurance policy are distinct from the right of the designated beneficiary or beneficiaries to receive death benefits on the death of the insured. Death benefits are not subject to disposition under the will of the policy owner (unless the designated beneficiary is the policy owner's estate), but rather are payable directly to the designated beneficiary or beneficiaries under the terms of the policy [ *Estate of Welfer* (1952) 110 Cal. App. 2d 262, 265, 242 P.2d 655 ; *see Prob. Code* § 5000(a); *Recommendation Proposing New Probate Code*, 20 Cal. L. Revision Comm'n Reports 1001, 1394-1395 (1989); *Tentative Recommendation Relating to Wills and Intestate Succession*, 16 Cal. L. Revision Comm'n Reports, 2301, 2350-2351, 2382 (1982)]. For discussion of benefits and other rights that are payable directly to beneficiaries under contract provisions, see [1], *above*.

### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawNonprobate TransfersGeneral OverviewEstate, Gift & Trust LawUniversal SuccessionEstate, Gift & Trust LawWillsBequests & DevisesEstate, Gift & Trust LawWillsInterpretationRules of ConstructionGeneral OverviewEstate, Gift & Trust LawWillsInterpretationRules of ConstructionStatutory Rules



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DIVISION IV: WILLS AND TRUSTS  
CHAPTER 61 WILL DRAFTING AND COMPLETE WILL FORMS  
PART II. LEGAL BACKGROUND

*23-61 California Legal Forms--Transaction Guide § 61.15*

**AUTHOR:** Reviewed by Albert G. Handelman

**§ 61.15 Devisees**

**[1] In General**

A devisee is a person designated in a will to receive a disposition of real or personal property [*Prob. Code § 34(a)*; see *Prob. Code § 32* ("devise" defined)]. A devisee may be any person, including but not limited to any of the following [*Prob. Code § 6102*]:

- An individual.
- A corporation.
- An unincorporated association, society, lodge, or any branch of an unincorporated association, society, or lodge.
- A county, city, city and county, or any municipal corporation.
- Any state, including the State of California.
- The United States or any instrumentality of the United States.
- A foreign county or a governmental entity in a foreign country.

By special constitutional and statutory provisions, all of the following entities are also authorized to receive devises:

- The Regents of the University of California [*Cal. Const., art. IX, § 9(f)*].
- The Board of Trustees of Stanford University [*Cal. Const., art. XX, § 2*].

- The California Department of Education [*Educ. Code* § 33332].
- The Huntington Library and Art Gallery [*Cal. Const., art. XX, § 2*].
- Any county library in California [*Educ. Code* § 19174].
- Any harbor district in California [*Harb. & Nav. Code* § 6074].
- Any port district in California [*Harb. & Nav. Code* § 6294].
- Any river port district in California [*Harb. & Nav. Code* § 6894].
- Any public cemetery district in California [*Health & Safety Code* §§ 9041, 9074].
- Any hospital district in California [*Health & Safety Code* § 32121(e)].
- The commissioners of any public park in California [*Pub. Res. Code* § 5158].
- The Board of Supervisors of any county in California, for the purpose of erecting a monument in memory of California pioneers [*Pub. Res. Code* § 5101].
- Any corporation for the prevention of cruelty to children or animals incorporated in California [*Corp. Code* § 10403].

### [2] Subscribing Witnesses

A person who signed the will as a witness may properly receive a devise under the will [*Prob. Code* § 6112(b)]. Unless there are at least two other witnesses who are disinterested, however, the fact that the will makes a devise to a witness creates a presumption that the witness procured the devise by duress, menace, fraud, or undue influence, and may invalidate the devise [*Prob. Code* § 6112(b); see *Prob. Code* § 6104]. This presumption is a presumption affecting the burden of proof and may be overcome by appropriate evidence [*Prob. Code* § 6112(c); see *Evid. Code* §§ 500-523, 605, 606 (burden of proof); for discussion, see § 61.13[1][c]].

### [3] Disqualified Persons

The Probate Code contains special rules that invalidate donative transfers to certain persons and classes of persons, generally called "disqualified persons" [*Prob. Code* §§ 21350-21356; see *Prob. Code* § 21350.5]. These rules, which apply to instruments that become irrevocable on or after September 1, 1993 [*Prob. Code* § 21355], generally invalidate provisions in wills, trusts, and other instruments that purport to make gifts to any of the following [*Prob. Code* § 21350(a)]:

- The person who drafted the instrument.
- A person who is related by blood or marriage to, is a domestic partner of, or is a cohabitant with or employee of, the person who drafted the instrument.
- Any partner or shareholder of any law partnership or law corporation in which the person who drafted the instrument has an ownership interest, and any employee of any such law partnership or law corporation.

- Any person who has a fiduciary relationship with the transferor, including a conservator or trustee, who transcribes the instrument or causes it to be transcribed.
- Any person who is related by blood or marriage to, is a domestic partner of, or is a cohabitant with or employee of, a person described in the category immediately above.
- A care custodian of a dependent adult.
- A person who is related by blood or marriage to, is a domestic partner of, or is a cohabitant with or an employee of, a care custodian.

**PRACTICE TIP:**

It is important for practitioners to understand the net effect of the disqualification rules, and how the disqualification provisions in *Prob. Code* § 21350 interact with the exceptions in *Prob. Code* § 21351. The definitions and exceptions under *Prob. Code* §§ 21350 and 21351 are discussed in greater detail *below*. Basically, a gift that is made to a "disqualified person" *other than the person who actually drafted the instrument*, and that does not qualify for any of the specific exceptions in *Prob. Code* § 21351, is subject to a *rebuttable* presumption of invalidity [*Prob. Code* § 21351(d),(e)(1); *Rice v. Clark* (2002) 28 Cal. 4th 89, 98, 120 Cal. Rptr. 2d 522, 47 P.3d 300]. A rebuttable presumption also applies (regardless of whether or not the gift was made to the person who drafted the will) to gifts made in instruments executed on or before July 1, 1993, by a person who was a California resident at the time of execution, and to instruments executed by a California resident who was a nonresident at the time the instrument was executed [*Prob. Code* § 21351(e)(2),(3)]. This presumption is rebuttable only on a showing, by clear and convincing evidence, not based solely on the testimony of disqualified persons, that the transfer was *not* the product of fraud, menace, duress, or undue influence [*Prob. Code* § 21351(d)]. If the attorney can make such a showing, a gift to a disqualified person still may be found valid.

However, if the recipient of the gift was *the person who actually drafted the instrument*, the gift was made in an instrument executed on or after July 1, 1993, by a person who was a California resident at the time the instrument was executed, and none of the other exceptions in *Prob. Code* § 21351 apply, the presumption is *conclusive* rather than rebuttable and the gift is automatically invalid [*Prob. Code* § 21351(d),(e)(1); *Rice v. Clark* (2002) 28 Cal. 4th 89, 98, 120 Cal. Rptr. 2d 522, 47 P.3d 300]. Thus, for example, assuming no other exception in *Prob. Code* § 21351 applied, an attorney who drafted a client's will so as to benefit himself or herself would be conclusively disqualified, but if the same attorney drafted the will so as to benefit the attorney's relative or law partner, the presumption would be rebuttable by clear and convincing evidence that the client freely chose that disposition [*Rice v. Clark* (2002) 28 Cal. 4th 89, 98, 120 Cal. Rptr. 2d 522, 47 P.3d 300]. *Commentary by publisher's editorial staff.*

For purposes of the preceding rules, a "person who is related by blood or marriage" to a person means all of the following [*Prob. Code* § 21350(b)]:

- The person's spouse or predeceased spouse.
- Relatives within the third degree of the person and the person's spouse.
- The spouse of anyone who is a relative within the third degree of the person or the person's spouse.

In determining relationships for purposes of this rule, *Prob. Code § 6406*, which governs the inheritance rights of relatives of the half blood, *Prob. Code § 6407*, which covers the inheritance rights of afterborn heirs, and *Prob. Code §§ 6450-6455*, which prescribe rules for determining the relationship of parent and child for purposes of intestate succession, are all applicable [*Prob. Code § 21350(b)*].

The term "dependent adult" means any of the following [*Prob. Code § 21350(c)*; *see Welf. & Inst. Code § 15610.23(a)*]:

- Any person residing in California, between the ages of 18 and 64 years, who has physical or mental limitations that restrict his or her ability to carry out normal activities or to protect his or her rights including, but not limited to, persons who have physical or developmental disabilities or whose physical or mental abilities have diminished because of age [*Prob. Code § 21350(c)*].
- Any person between the ages of 18 and 64 who is admitted as an inpatient to a 24-hour health facility as defined in *Health & Safety Code §§ 1250, 1250.2, and 1250.3*.
- Any person older than age 64 who would be a "dependent adult" under the above definitions if he or she were between the ages of 18 and 64.

The term "care custodian" means an administrator or an employee of any of the following public or private facilities or agencies, or persons providing care or services for elders or dependent adults, including members of the support staff and maintenance staff [*Prob. Code § 21350(c)*; *Welf & Inst. Code § 15610.17*]:

- Twenty-four hour health facilities [*see Health & Saf. Code §§ 1250, 1250.2, 1250.3*].
- Clinics.
- Home health agencies.
- Agencies providing publicly funded in-home supportive services, nutrition services, or other home and community-based support services.
- Adult day health care centers and adult day care.
- Secondary schools that serve 18- to 22-year-old dependent adults and postsecondary educational institutions that serve dependent adults or elders.
- Independent living centers.
- Camps.
- Alzheimer's Disease day care resource centers.
- Community care facilities [*see Health & Saf. Code § 1502*] and residential care facilities for the elderly [*see Health & Saf. Code § 1569.2*].
- Respite care facilities.
- Foster homes.
- Vocational rehabilitation facilities and work activity centers.

- Designated area agencies on aging.
- Regional centers for persons with developmental disabilities.
- State Department of Social Services and State Department of Health Services licensing divisions.
- County welfare departments.
- Offices of patients' rights advocates and clients' rights advocates, including attorneys.
- The office of the long-term care ombudsman.
- Offices of public conservators, public guardians, and court investigators.
- Any protection or advocacy agency or entity that is designated by the Governor to fulfill the requirements and assurances of the federal Developmental Disabilities Assistance and *Bill of Rights* Act of 2000 [see 42 U.S.C. § 15001 et seq.] or the Protection and Advocacy for the Mentally Ill Individuals Act of 1986 [see 42 U.S.C. § 10801 et seq.], for the protection and advocacy of the rights of persons with mental illness.
- Humane societies and animal control agencies.
- Fire departments.
- Offices of environmental health and building code enforcement.
- Any other protective, public, sectarian, mental health, or private assistance or advocacy agency or person providing health services or social services to elders or dependent adults.

The last item in the preceding list of care custodians is the most significant in light of its broad interpretation by California courts. In *Bernard v. Foley*, the California Supreme Court held that the statutory definition set out above does not include a professional or occupational limitation and does not provide for a pre-existing personal friendship exception. Thus, the definition includes any person providing care or health services to a dependent adult [ *Bernard v. Foley* (2006) 39 Cal. 4th 794, 803, 47 Cal. Rptr. 3d 248, 139 P.3d 1196 ; see also *Estate of Odian* (2006) 145 Cal. App. 4th 152, 167, 51 Cal. Rptr. 3d 390 (paid live-in caregiver who provides social services within the meaning of Prob. Code § 21350(a) is a care custodian and is subject to the presumption of undue influence)]. In *Bernard v. Foley*, the presumptive disqualification of gifts to care custodians was held applicable although the trustee and other caregivers involved in the case were not health care professionals and had a preexisting personal friendship with the decedent [ *Bernard v. Foley* (2006) 39 Cal. 4th 794, 803, 47 Cal. Rptr. 3d 248, 139 P.3d 1196 ] .

**PRACTICE TIP:**

Estate planners are concerned about the effect of *Bernard v. Foley* because it makes virtually any gift to a family friend who has incidentally provided care to a testator subject to challenge under Prob. Code § 21350. It is not uncommon for elderly testators to want to make testamentary gifts to close friends who have helped them during their last years. Since such close friends often provide incidental care for the elderly on an informal basis--driving them to medical appointments, helping with medications, exercise, meals, and so on--it is very likely that an argument can be made that such a person is a "care custodian" within the meaning of *Bernard v. Foley*, even if no formal relationship exists. Therefore, estate planners faced with such a situation now need to anticipate not only a traditional challenge based on undue

influence, but also a statutory challenge based on a claim that the beneficiary is a "care custodian" under *Prob. Code § 21350*. Since the "clear and convincing evidence" standard can be difficult to meet in this type of case, it is strongly recommended that whenever an elderly person wants to make a testamentary gift to a close friend, the attorney attempt to qualify the gift in advance by obtaining a certificate of independent review if possible. In addition, or alternatively if a certificate of independent review cannot be obtained, the attorney should anticipate ways of meeting the evidentiary standard, such as videotaping the testator and/or obtaining affidavits or other documentary evidence by disinterested parties at the time the will is executed in case the persons with knowledge of the facts are not available after the testator's death. *Commentary by publisher's editorial staff.*

It has also been held that a long-term care ombudsman for a health care facility is a "care custodian" for purposes of the statute during the time he or she serves as ombudsman for a particular "dependent adult," and remains a care custodian within the meaning of the statute even after his or her formal ombudsman relationship with a particular resident has ended, due either to a change in the ombudsman's facility assignment or the fact that the resident has left the facility, when the ombudsman, as a result of his or her fiduciary relationship with the resident, develops a personal relationship with the resident and thereby acquires personal and financial information about the resident [ *Estate of Shinkle (2002) 97 Cal. App. 4th 990, 993, 1007, 119 Cal. Rptr. 2d 42* ; *overruled in part on other grounds in Bernard v. Foley (2006) 39 Cal. 4th 794, 816, 47 Cal. Rptr. 3d 248, 139 P.3d 1196* ] .

*Prob. Code § 21350(a)(4)*, which includes in the category of presumptive disqualified persons any fiduciary who transcribes the testamentary instrument or causes it to be transcribed, does not apply to a person who provides information needed in the preparation of the instrument (e.g., a list of the testator's assets) and who encourages the donor to execute it, but does not direct or otherwise participate in the transcription of the instrument to final written form [ *Rice v. Clark (2002) 28 Cal. 4th 89, 101-105, 120 Cal. Rptr. 2d 522, 47 P.3d 300* ] . Similarly, a conservator was held not to have caused a will and trust to be transcribed for purposes of this rule when he had called an estate planning company to meet with the conservatee, brought the company's agent to the conservatee's house, and wrote a check from the conservatee's funds for the will and trust. To cause a document to be transcribed would necessarily involve directing the drafted document to be written out in its final form, which the conservator had not done [ *Estate of Swetmann (2000) 85 Cal. App. 4th 807, 819-820, 102 Cal. Rptr. 2d 457* ] .

When the attorney drafting a will is aware that a beneficiary may be a presumptively disqualified donee, the attorney has a duty of care to advise the client-testator that, absent steps taken under *Prob. Code § 21351(b)* to obtain a certificate of independent review from another attorney, the devise to the proposed beneficiary, if challenged, will have a significant likelihood of failing because of the presumptive disqualification. The attorney also has a duty to recommend that the client-testator seek independent counsel in an effort to obtain this certificate [ *Osornio v. Weingarten (2004) 124 Cal. App. 4th 304, 334, 21 Cal. Rptr. 3d 246* ] . This duty of care is owed to both the testator and to the prospective beneficiary [ *Osornio v. Weingarten (2004) 124 Cal. App. 4th 304, 334, 21 Cal. Rptr. 3d 246* ] .

*Prob. Code § 21350* implicitly requires a person whose interest in a will or trust is threatened by a transfer to a disqualified person to invoke the protection of the statute affirmatively by seeking a court order establishing the invalidity of the transfer [ *Estate of Shinkle (2002) 97 Cal. App. 4th 990, 1004, 119 Cal. Rptr. 2d 42* ] . The burden then shifts to the transferee to justify the transfer under *Prob. Code § 21351*, discussed below [ *Estate of Shinkle (2002) 97 Cal. App. 4th 990, 1004, 119 Cal. Rptr. 2d 42* ] .

The rules that invalidate donative transfers to "disqualified persons" are subject to the following exceptions:

- A transfer is not invalidated if the transferor is related by blood or marriage to, is a cohabitant with, or is the registered domestic partner [for discussion of registered domestic partnerships, see § 61.19[4][a], see also Ch. 110, *Nonmarital Cohabitation Agreements and Related Transactions*, §§ 110.50 et seq., 110.220 et seq.] of, the transferee or the person who drafted the instrument [*Prob. Code §*

21351(a)]. This exception applies to any instrument that becomes irrevocable on or after July 1, 1993 [Prob. Code § 21351(a)]. For this purpose, a person is "related by blood or marriage" to another person if the person is related within the fifth degree or is an heir of the transferor [Prob. Code § 21351(g)]. A "cohabitant" means two unrelated adult persons living together for a substantial period of time, resulting in some permanency of relationship [Prob. Code § 21351(a); see Pen. Code § 13700(b)].

- A transfer is not invalidated if the instrument is reviewed by an independent attorney who counsels the transferor about the nature and consequences of the intended transfer, attempts to determine if the intended consequence is the result of fraud, menace, duress, or undue influence, and signs and delivers a Certificate of Independent Review in substantially the form set forth in Prob. Code § 21351(b) [for form, see California Wills & Trusts Forms, Div. IX, Miscellaneous Documents, Misc. Doc. 18 (Matthew Bender)].

**PRACTICE TIP:**

As a practical matter, a Certificate of Independent Review can be difficult to obtain, even when there is little or no actual doubt regarding the absence of fraud, undue influence, and so on. Many estate planning attorneys are reluctant to issue Certificates of Independent Review out of concern over potential liability and the fear that in the event of a will contest they may end up being dragged into court on the issue of whether or not they performed an adequate investigation prior to issuing the certificate. *Commentary by publisher's editorial staff.*

- A transfer is not invalidated if, after full disclosure of the relationships of the persons involved, the court approves the instrument by order under the substituted judgment provisions of Prob. Code §§ 2580-2586 [Prob. Code § 21351(c)].

- A transfer is not invalidated if the court determines on clear and convincing evidence that the transfer was not the product of fraud, menace, duress, or undue influence [Prob. Code § 21351(d), (e)]. However, this exception applies only to (a) instruments executed by persons who were not residents of California at the time the instruments were executed, (b) instruments that do not make transfers to the persons who actually drafted the instruments, and (c) instruments executed on or before July 1, 1993, by persons who were California residents at the time the instruments were executed [Prob. Code § 21351(e); see Prob. Code § 21351(a)(1)]. In making a determination that the transfer was not the product of fraud, menace, duress, or undue influence, the court cannot consider any evidence given by the person who drafted the instrument [Prob. Code § 21351(d); see Prob. Code § 21351(a)(1)]. If the court finds that the transfer was the product of fraud, menace, duress, or undue influence, the disqualified person must bear all costs of the proceeding, including reasonable attorney's fees [Prob. Code § 21351(d)].

**PRACTICE TIP:**

The effect of the preceding provisions is to establish a rebuttable presumption of invalidity under Prob. Code § 21350, except as to a person who actually drafted an instrument that was executed after July 1, 1993, by a California resident then residing in the state. As to the latter, the presumption is conclusive rather than rebuttable [see Prob. Code § 21351(d),(e); *Rice v. Clark* (2002) 28 Cal. 4th 89, 98, 120 Cal. Rptr. 2d 522, 47 P.3d 300]. As to other disqualified persons, the presumption may be rebutted on a showing of clear and convincing evidence [Prob. Code § 21351(d),(e)]. *Commentary by publisher's editorial staff.*

- A transfer is not invalidated if the transferee is a federal, state, or local public entity, an entity that qualifies for a charitable exemption from taxation under I.R.C. § 501(c)(3) or 501(c)(19), or a trust

holding an interest for this entity, but only to the extent of the interest of the entity, or the trustee of this trust [*Prob. Code § 21351(f)*].

■ A transfer is not invalidated if it is for \$3,000 or less [*Prob. Code § 21351(h)*]. This provision does not apply if the total value of the property in the transferor's estate does not exceed the amount prescribed in *Prob. Code § 13100*, which is \$100,000 [*Prob. Code § 21351(h)*].

■ A transfer is not invalidated if it is made by an instrument executed by a nonresident of California who was not a resident at the time of the execution and that was not signed in California [*Prob. Code § 21351(i)*, see also, *Estate of Clementi (2008) 166 Cal. App. 4th 375, 383, 82 Cal. Rptr. 3d 685 (Prob. Code, § 21351(i) exempted testator's will from the prohibition in Prob. Code, § 21350 against donative transfers to the drafter of the will, since testator was nonresident of California when he signed will, even though the testator was a resident of California at the time of his death)*].

The executor cannot be held liable for making any transfer that is invalid under these rules unless the executor received actual notice of the possible invalidity of the transfer before making the transfer [*Prob. Code § 21352*]. Further, an executor who receives actual notice cannot be held liable for failing to make the transfer unless the validity of the transfer has been conclusively determined by a court [*Prob. Code § 21352*].

#### **[4] Effect of Homicide**

A person who feloniously and intentionally kills another cannot receive any property, interest, or benefit under the will of the person who is killed [*Prob. Code § 250(a)(1)*]. Such a person cannot receive any property from the victim under a trust created by the victim, under a power of appointment created by the victim's will or trust, under the laws of intestate succession [see *Prob. Code §§ 6400-6455*], under the laws of quasi-community property [see *Prob. Code §§ 66, 101*], under the laws governing gifts in view of impending death [see *Prob. Code §§ 5700-5705*], or under the family protection provisions of the Probate Code [*Prob. Code § 250(a)(1)-(5)*; see *Prob. Code §§ 6500-6615* (family protection)].

Any property interest or benefit that would have passed to the killer if he or she had not killed the victim will pass as if the killer had died before the victim [*Prob. Code § 250(b)*]. If the interest or benefit derives from a will executed by the victim, or a trust created by or for the benefit of the victim, the interest or benefit will pass as if the killer had died before the victim without leaving surviving issue [*Prob. Code § 250(b)(1)*; see *Prob. Code § 21110* ("anti-lapse" statute)]. The same rule applies when an interest or benefit derives from a power of appointment [*Prob. Code § 250(b)(2)*]. Similarly, any provision in a will or trust nominating the killer as executor, trustee, guardian, conservator, or custodian that becomes effective on the victim's death must be interpreted as if the killer had died before the victim [*Prob. Code § 250(b)(3)*].

For purposes the foregoing rule, a final judgment of conviction of felonious and intentional killing is conclusive [*Prob. Code § 254(a)*]. In the absence of a final judgment, the court may determine by a preponderance of the evidence whether the killing was felonious and intentional [*Prob. Code § 254(b)*]. However, the party seeking to establish that the killing was felonious and intentional bears the burden of proof [*Prob. Code § 254(b)*].

#### **[5] Effect of Simultaneous Death**

##### **[a] Potential Problems**

When two persons who are beneficiaries under each other's wills die in a common disaster, or under other circumstances that render it difficult or impossible to determine who died first, a problem will arise regarding the disposition of their estates. Since both persons will have died, neither will have survived long enough to have come into

beneficial enjoyment of the other's estate. If one survived the other by only a few days (or even a fraction of a second), the one who survived the longest would inherit property from the other, in the absence of a special provision to the contrary [*see Recommendation Relating to Simultaneous Deaths*, 17 Cal. L. Revision Comm'n Reports 443, 447 (1984)]. Upon the death of the second person, the property that the second person took from the first person would pass through the second person's estate to the second person's heirs or devisees. The property would be subject to double administration and taxation, once in the estate of the first person to die and a second time in the estate of the second to die. Although a federal estate tax credit is available for previously taxed property [*see I.R.C. § 103*], the credit would not necessarily offset the disadvantages that would arise from having the property pass through the second estate.

### **[b] Probate Code Rules**

The Probate Code contains rules designed to avoid the problems presented by simultaneous death. First, it sets forth a special rule governing the rights of a husband and wife in their community and quasi-community property when they die and it cannot be established by clear and convincing evidence which died first. Under this rule, each spouse's share of the community and quasi-community property is treated as if it belonged to that spouse and did not pass to the other [*Prob. Code § 103*]. The effect of this rule is to treat each spouse's half of the community and quasi-community property as that spouse's separate property for purposes of both intestate succession and testamentary disposition. Each spouse has the power to dispose of his or her half of the community and quasi-community property by will, but has no power of testamentary disposition over the other spouse's half [*see Prob. Code § 6101* and discussion of property subject to disposition by will in § 61.14].

Second, the Probate Code provides that if title to or devolution of property depends on the priority of death of two persons and it cannot be established by clear and convincing evidence that one of the persons survived the other, the property of each must be administered, distributed, or otherwise dealt with as if he or she had survived the other [*Prob. Code § 220*]. Under this rule, neither person's property will pass to the other, but will be disposed of as if the other person had died first.

Third, when two persons die leaving property to each other by will, neither person will take under the will of the other unless he or she survives the other, or survives until a future time required by the will of the other [*Prob. Code § 21109(a)*; *see Prob. Code § 21101*]. If it cannot be determined by clear and convincing evidence that one of the persons survived the other, or survived until a future time required by the will of the other, he or she will be deemed not to have survived the other, or not to have survived until a future time required by the will of the other [*Prob. Code § 21109(b)*; *see Prob. Code § 21101*]. However, this rule applies only when the will in question does not contain a contrary provision [*Prob. Code § 21102(b)*; *see Prob. Code § 21101*]. If the will contains specific provisions dealing with simultaneous death and survivorship requirements, those provisions are controlling [*Prob. Code § 21102(a)*; *see Prob. Code § 21101*].

The Probate Code applies similar rules to simultaneous death problems that arise when joint tenants [*see Prob. Code § 223*], or the insured and the beneficiary under a policy of life or accident insurance [*see Prob. Code § 224*], have died and it cannot be established by clear and convincing evidence which died first.

The foregoing rules all apply when two persons die under circumstances that make it difficult or impossible to determine which died first. Another rule applies (for purposes of intestate succession only) when it is established by clear and convincing evidence that one person survived the other, but the period of survival is less than 120 hours. Under *Prob. Code § 6403(a)*, a person who fails to survive a decedent by 120 hours is deemed to have predeceased the decedent for purposes of intestate succession, and the heirs are determined accordingly. Clear and convincing evidence is required to establish that a person survived another for 120 hours; if the evidence is not clear and convincing, the person will be deemed not to have survived the other for the required period [*Prob. Code § 6403(a)*]. However, the 120-hour rule will not apply if it would result in the escheat of property to the state [*Prob. Code § 6403(a)*].

## **[6] Rights of Devisees Under Class Gifts**

### **[a] Nature of Class Gifts**

A class gift is a gift that is made to a group of persons who are uncertain in number at the time the gift is made and who are to be ascertained at some future time [see *In re Estate of Murphy (1909) 157 Cal. 63, 65, 106 P. 230*]. Class gifts typically are made by describing the class members in a general way, through the use of words such as "children," "grandchildren," "issue," "descendants," or "heirs," as opposed to individually naming the recipients of the gift.

The appeal of class gifts lies in the fact that they are able to automatically take into account any increase or decrease in the category of individuals whom the testator or donor wishes to benefit. Thus, for example, if the number of a testator's grandchildren might increase between the time the testator's will is drafted, a class gift to the grandchildren as a class would eliminate any need to modify the will each time a new grandchild is born.

If a devise is made to persons as a class, the right of persons to take the devise will depend on whether they answer the class description at the time of the testator's death (or, in the case of a future interest, at the time the devise is to take effect in enjoyment) [see *Prob. Code § 21101*]. If one member of the class dies before the testator, the share that he or she member would have been entitled to take if he or she has survived the testator will pass to other members of the class who survive the testator [see *Estate of Hittell (1903) 141 Cal. 432, 435, 75 P. 53*].

A devise is not a class gift merely because it is made to several persons. If a devise is made to persons individually, each has an interest in the devised property and there is no right of survivorship [see *Civ. Code § 685; Estate of Hittell (1903) 141 Cal. 432, 436, 75 P. 53*]. In the latter situation, if one of the individuals dies before the testator, his or her interest does not automatically pass to the other devisees or devisees (as it would in the case of a class gift), but rather is subject to distribution according to other terms of the will, if any [see *Estate of Hittell (1903) 141 Cal. 432, 435-437, 75 P. 53*].

### **[b] Determining Whether a Class Gift Exists**

Whether a particular devise is to a class or to individuals must be determined with reference to the testator's intention as reflected in the language of the will [ *Estate of Henderson (1911) 161 Cal. 353, 361, 119 P. 496* ; *Estate of McCallen (1975) 53 Cal. App. 3d 142, 150, 125 Cal. Rptr. 645* ]. If the will identifies the devisees by name, an inference may be drawn that the testator intended only the named persons take [see *Estate of Murphy (1909) 157 Cal. 63, 67, 106 P. 230* ; *Estate of Moore (1955) 135 Cal. App. 2d 122, 137, 286 P. 2d 939* ]. A similar inference may be drawn when the testator refers to devisees by a specific number (e.g., "my two children," or "the four children of my sister, Sally Brown") [see *Estate of Murphy (1909) 157 Cal. 63, 67, 106 P. 230* ]. However, these rules are rules of construction only, and in every case they must give way if the intentions of the testator can otherwise be determined from the words of the will [see *Estate of Murphy (1909) 157 Cal. 63, 67, 106 P. 230* ].

### **[c] Determining Members of Class**

At the time that a class gift vests, only those persons who are alive are regarded as members of the class, and those persons who would have been included if living are considered technically as never having been members of the class [ *Estate of Haney (1959) 174 Cal. App. 2d 1, 13-14, 344 P.2d 16* ].

The class can grow after the testator's death and before the devise takes effect in enjoyment [ *Estate of Grove (1977) 70 Cal. App. 3d 355, 361, 138 Cal. Rptr. 684* ], or shrink when a potential class member dies before the future interest vests [ *Estate of Haney (1959) 174 Cal. App. 2d 1, 14-15, 344 P.2d 16* ].

Unless the will provides otherwise, half-bloods, adopted persons, persons born out of wedlock, stepchildren, foster

children, and the issue of all such persons, when appropriate to the class, are included in the terms of a class gift [*Prob. Code § 21115(a)*]. However, in construing a devise by a testator who is not a natural parent (such as a grandparent, an uncle, or a friend), a person born to the natural parent will not be considered the child of that parent unless the person lived while a minor as a regular member of the household of the natural parent or that parent's parent, brother, sister, spouse, or surviving spouse [*Prob. Code § 21115(b)*]. Similarly, in construing a devise by a parent who is not the adoptive parent, a person adopted by the adoptive parent will not be considered the child of that parent unless the person lived while a minor, either before or after adoption, as a regular member of the household of the adopting parent or of that parent's parent, brother, sister or surviving spouse [*Prob. Code § 21115(b)*; see *Estate of DeLoreto (2004) 118 Cal. App. 4th 1048, 1052-1053, 13 Cal. Rptr. 3d 513* (adopted adult children of beneficiary of father's trust were not members of class of grandchildren who were trust beneficiaries)].

If a statute or a will provides for transfer of a present or future interest to, or creates a present or future interest in, a designated person's heirs, heirs at law, next of kin, relatives, family, or words of similar import, the transfer is to the persons, including the state under *Prob. Code § 6800*, and in the shares that would succeed to the designated person's intestate estate under the intestate succession law of the transferor's domicile, the designated person died when the transfer is to take effect in enjoyment [*Prob. Code § 21114(a)*]. If the designated person's surviving spouse is living but is remarried at the time the transfer is to take effect in enjoyment, the surviving spouse is not an heir of the designated person for this purpose [*Prob. Code § 21114(a)*]. The term "designated person" includes the transferor [*Prob. Code § 21114(b)*].

#### **[d] Distribution Under Prob. Code § 240**

When a will, trust, or other instrument that expresses no contrary intention provides for "issue" or "descendants" to take without specifying the manner in which they are to take, the property must be distributed in the manner provided in *Prob. Code § 240*. This pattern of distribution must be followed in cases of intestacy. It also applies whenever any statute calls for property to be distributed or taken "in the manner provided in *Section 240 of the Probate Code*" [*Prob. Code § 245(a)*; see *Prob. Code §§ 673, 6402, 6402.5, 21110* (statutes calling for distribution in manner provided in *Prob. Code § 240*)].

*Prob. Code § 240* requires that the property be divided into as many equal shares as there are living members of the nearest generation of issue then living, and deceased members of that generation who leave issue then living. Each living member of the nearest generation of issue then living receives one share, and the share of each deceased member of that generation that leaves issue then living is divided in the same manner among his or her then-living issue [see *Estate of Beckle (2009) 174 Cal. App. 4th 34, 38, 93 Cal. Rptr. 3d 890* (Distribution of an intestate decedent's estate could not be limited to surviving first cousins and the children of predeceased first cousins while excluding grandchildren of predeceased first cousins because the governing statutes, *Prob. Code §§ 50, 240, 6402(d)*, do not limit the surviving issue of a predeceased heir entitled to inherit to the first generation; rather, surviving issue includes all lineal descendants of all generations)]. The primary division under *Prob. Code § 240* takes place at the first generation having any living members [ *Estate of Begley (1988) 201 Cal. App. 3d 791, 795, 247 Cal. Rptr. 632* ]. If, for example, a testator had two deceased children, one of whom had two children now living and the other of whom had one child now living, each of the testator's three living grandchildren would be entitled to receive one third of the property.

#### **[e] Distribution Per Stirpes or By Representation**

*Prob. Code § 246* describes the pattern of distribution that must be followed when a will, trust, or other instrument calls for property to be distributed or taken "per stirpes," "by representation," "by right of representation," or "in the manner provided in *Section 246 of the Probate Code*," unless the instrument expressly provides otherwise [*Prob. Code § 246(a), (b)* (applicable to wills and trusts executed on and after Jan. 1, 1986; see *Prob. Code § 246(c)* for rule applicable to will or trust executed before that date)]. Under this pattern, the property must be divided into as many equal shares as there are living children of the designated ancestor, if any, and deceased children who leave issue then living. Each living

child of the designated ancestor is allocated one share, and the share of each deceased child who leaves issue then living is divided in the same manner [*Prob. Code* § 246(a)].

The pattern of distribution under *Prob. Code* § 246 will differ significantly from the pattern of distribution under *Prob. Code* § 240 [see discussion in [c], above] if the designated ancestor has no children living at the time the distribution rights are determined. Under *Prob. Code* § 246, for example, if the testator had two deceased children, one of whom had two children now living and the other of whom had one child now living, the share that each child would have received if living passes to that child's own children in equal shares. The two grandchildren who are the issue of the first deceased child would each take one fourth of the property, and the grandchild who is the issue of the other deceased child would take one half. Under *Prob. Code* § 240, the three grandchildren would take equal shares.

#### **[f] Distribution Per Capita at Each Generation**

*Prob. Code* § 247 describes the pattern of distribution that must be followed when a will, trust, or other instrument calls for property to be distributed or taken "per capita at each generation" or "in the manner provided in *Section 247 of the Probate Code*" [*Prob. Code* § 247(b) (applicable to wills and trusts executed on and after Jan. 1, 1986; see *Prob. Code* § 247(c) for rule applicable to will or trust executed before that date)]. This pattern calls for the property to be divided into as many equal shares as there are living members of the nearest generation of issue then living and deceased members of that generation who leave issue then living. Each living member of the nearest generation of issue then living is allocated one share, and the remaining shares, if any, are combined and then divided and allocated in the same manner among the remaining issue as if the issue already allocated a share and their descendants were then deceased [*Prob. Code* § 247(a)].

#### **[g] Distribution Per Capita**

When descendants or other members of a designated class take as individuals and not "by representation" or "per stirpes," they are said to take "per capita" [ *Estate of Rauschenplat (1931)* 212 Cal. 33, 35, 297 P. 882 ; *Estate of Carroll (1944)* 62 Cal. App. 2d 798, 801-802, 145 P.2d 644 ] . When property is distributed "per capita," the distributees take in equal shares and in their individual rights, without reference to their bloodlines or the right of representation [ *Estate of Edwards (1988)* 203 Cal. App. 3d 1366, 1372, 250 Cal. Rptr. 779 ] . If, for example, the testator had one living child, and also had two deceased children, one of whom was survived by two children and the other of whom was survived by one child, each of the four living descendants of the testator (the child and the three grandchildren) would take one fourth of the estate under a "per capita" pattern of distribution.

A testator who wishes to require that members of a designated class take "per capita" will usually provide they will take "in equal shares." The words "per capita," without more, will not achieve a traditional distribution "per capita" when living members of the designated class are not all of the same generation, but rather will result in distribution in the manner provided by *Prob. Code* § 240 [*Prob. Code* § 245(b)(1)].

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawWillsBeneficiariesGeneral OverviewEstate, Gift & Trust LawWillsBeneficiariesClass GiftsEstate, Gift & Trust LawWillsBeneficiariesDisclaimers & RenunciationsEstate, Gift & Trust LawWillsBeneficiariesElectionsEstate, Gift & Trust LawWillsBequests & Devises



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California Legal Forms--Transaction Guide

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DIVISION IV: WILLS AND TRUSTS  
CHAPTER 61 WILL DRAFTING AND COMPLETE WILL FORMS  
PART II. LEGAL BACKGROUND

*23-61 California Legal Forms--Transaction Guide § 61.16*

**AUTHOR:** Reviewed by Albert G. Handelman

**§ 61.16 Protected Persons**

**[1] In General**

The Probate Code contains rules designed to protect certain persons against unintentional omission from wills and other testamentary instruments [*see Prob. Code § 21601(a)* ("decendent's testamentary instruments" defined)]. These persons are generally described as "omitted" (or sometimes "pretermitted") heirs. Two classes of heirs are protected under the Probate Code rules:

- Omitted spouses [*see Prob. Code §§ 21610-21612* and discussion in [2], *below*].
- Omitted children [*see Prob. Code §§ 21620-21623* and discussion in [3], *below*].

The Probate Code also contains provisions that protect certain persons who are not named as devisees in the will but who are "kindred" of the testator or of a surviving, deceased, or former spouse of the testator against unintentional lapse of devises [*see Prob. Code § 21110(c)* and discussion in [4], *below*].

**[2] Omitted Spouse**

**[a] Basic Rule**

If a decedent fails to provide in a testamentary instrument for a spouse who married the decedent after the execution of all of the decedent's testamentary instruments, the omitted spouse generally will be entitled by statute to receive a prescribed share of the decedent's estate [*Prob. Code § 21610; but see Prob. Code § 21611* (no share if spouse intentionally omitted or otherwise provided for) and discussion, *below*]. The share consists of all of the following [*Prob. Code § 21610*]:

- The one-half of the community property that belongs to the decedent under *Prob. Code § 100(a)*.

- The one-half of the quasi-community property that belongs to the decedent under *Prob. Code* § 101(a).
- A share of the decedent's separate property equal in value to the share the spouse would have received if the decedent had died without having executed a testamentary instrument, but in no event is the share to be more than one-half the value of the separate property in the estate.

The equal division of community or quasi-community property does not apply if the spouses have agreed in writing to a non-pro-rata division of that property (either as to the aggregate value or as to an individual asset). This does not mean, however, that a written agreement is automatically required to permit or recognize a non pro rata division of community property [see *Prob. Code* §§ 100(b), 101(b)].

For purposes of this rule, a "testamentary instrument" is either a will or a trust instrument that was executed by the decedent and that became irrevocable on the decedent's death [*Prob. Code* § 21601(a)] and "estate" is the decedent's probate estate and all property held in any revocable trust executed by the decedent that became irrevocable on the decedent's death [*Prob. Code* § 21601(b)].

Beginning January 1, 2005, the statutory share provided to an omitted spouse must also be provided to an omitted surviving registered domestic partner. A surviving registered domestic partner, following the other partner's death, has the same rights, protections, and benefits, and is subject to the same responsibilities, obligations, and duties under law that are granted to and imposed on a surviving spouse [*Fam. Code* § 297.5(c); see *Fam. Code* § 297.5(j) (when necessary to implement statutory rights of domestic partners, gender-specific terms referring to spouses must be construed to include domestic partners)].

#### **[b] Application to Putative Spouse**

The rules protecting omitted spouses are not limited to legally married spouses. A putative spouse is also entitled to the benefits of the Probate Code rules. In one case, the testator executed a will in 1942 in which he left all of his estate to his wife. In 1957, the testator obtained a divorce and remarried. However, the remarriage was defective because the final judgment of divorce was not signed or filed until one day after the remarriage. Following the testator's death, the second (putative) spouse claimed a share of the testator's estate as an omitted spouse. The court held that the word "spouse" as used in the statute included a putative spouse [ *Estate of Sax (1989) 214 Cal. App. 3d 1300, 1306, 263 Cal. Rptr. 190, 263 Cal. Rptr. 190*] (decided under former *Prob. Code* § 6560, repealed effective January 1, 1998; see *Prob. Code* § 21610, applicable when decedent died on or after January 1, 1998).

#### **[c] Intentional Failure to Provide for Spouse**

The spouse is not entitled to receive a share of the estate if any of the following is established [*Prob. Code* § 21611]:

- The decedent's failure to provide for the spouse in the decedent's testamentary instruments was intentional and that intention appears from the testamentary instruments.
- The decedent provided for the spouse by transfer outside of the estate passing by the decedent's testamentary instruments and the intention that the transfer be in lieu of a provision in those instruments is shown by statements of the decedent or from the amount of the transfer or by other evidence.
- The spouse made a valid agreement waiving the right to share in the decedent's estate [see *Estate of Butler (1988) 205 Cal. App. 3d 311, 315-317, 252 Cal. Rptr. 210* ; see also discussion in [e], below].

#### **[d] Satisfaction of Omitted Spouse's Share**

In satisfying the omitted spouse's share, the share must be taken first from any part of the decedent's estate that is not disposed of by will or trust [*Prob. Code* 21612(a)(1); *but see Prob. Code* § 21612(b) (exception to rule) and discussion, *below*]. If that is not sufficient, so much as may be necessary to satisfy the share must be taken from all beneficiaries of the decedent's testamentary instruments in proportion to the value they may respectively receive [*Prob. Code* § 21612(a)(2); *but see Prob. Code* § 21612(b) (exception to rule) and discussion, *below*]. This value must be determined as of the date of the decedent's death [*Prob. Code* § 21612(a)(2)]. However, if the obvious intention of the decedent in relation to some specific gift or devise or other provision of a testamentary instrument would be defeated by satisfying the omitted spouse's share in this way, the specific devise or gift or provision may be exempted from the apportionment and a different apportionment, consistent with the decedent's intention, may be adopted [*Prob. Code* § 21612(b)].

### [e] Pre-1998 Rules

The rules set forth in *Prob. Code* §§ 21610-26112 governing the inheritance rights of omitted spouses [*see* discussions in [a] through [c], *above*] apply only if the decedent died on or after January 1, 1998 [*Prob. Code* § 21630]. If the decedent died before January 1, 1998, but on or after January 1, 1985, former *Prob. Code* §§ 6560-6562 (repealed effective January 1, 1998 by Stats. 1997, ch. 724, § 34) govern the rights of omitted spouses. While those rules were substantially similar to the rules described above, they applied only when the decedent failed to provide for a spouse married after the execution of a *will* that did not provide for the spouse [*see* former *Prob. Code* § 6560]. The rules applicable on and after January 1, 1998, differ from the former rules in that they apply not just when the decedent failed to provide for the spouse in a *will*, but also when the decedent failed to provide for the spouse in a *trust instrument* that becomes irrevocable on the decedent's death [*see Prob. Code* § 21610]. Conversely, under the rules applicable on and after January 1, 1998, an intention not to provide for the surviving spouse may be shown not just by the decedent's will, but also by a trust instrument executed by the decedent that becomes irrevocable on the decedent's death [*see Prob. Code* § 21610]. If the decedent died before January 1, 1985, former *Prob. Code* § 70 (repealed effective January 1, 1985) governs the rights of omitted spouses [*see* former *Prob. Code* § 6580 (repealed effective January 1, 1998)].

### [f] Effect of Waiver by Spouse

A spouse may agree to waive his or her right to share in the testator's estate [*Prob. Code* § 21611(c); *see* [c], *above*]. However, a waiver will not be enforced unless it meets certain requirements. First, it must be in writing and signed by the surviving spouse [*Prob. Code* § 142]. Second, the waiving spouse must either be represented by an independent attorney at the time the waiver is signed, or receive a fair and reasonable disclosure of the property or financial obligations of the other spouse before signing [*Prob. Code* § 143(a)]. Third, the waiver must clearly show that the waiving spouse intended to give up his or her right to share in the estate of the other spouse.

In one case, the spouses signed an antenuptial agreement prepared for them by an attorney. A statement was attached to the agreement providing, in substance, that the parties considered the possible disposition of their property in the event of their death or the dissolution of their marriage. However, the statement was signed only by the attorney who drafted the agreement. After the wife's death, the court held that the husband had not waived his right to share in the wife's estate as an omitted spouse. The statement attached to the antenuptial agreement did not clearly reveal the parties' intention to waive the right to inherit from each other and thus could not be enforced as a waiver [ *Estate of Butler* (1988) 205 Cal. App. 3d 311, 318, 252 Cal. Rptr. 210 ]. However, where a waiver of the widow's inheritance rights is in writing, signed by the widow, and complies with the requirements of *Prob. Code* § 144, the waiver is enforceable regardless of whether the document containing the waiver is enforceable [ *Estate of Will* (2009) 170 Cal. App. 4th 902, 908 ; 88 Cal. Rptr. 3d 502 (waiver enforceable regardless of whether document containing the waiver was enforceable as a prenuptial agreement under *Fam. Code* § 1615)].

Every spousal waiver is subject to the strict scrutiny of the court, which may enforce it only if the waiver made a fair and reasonable disposition of the rights of the non-waiving spouse, or the waiving spouse had (or reasonably should

have had) an adequate knowledge of the property and financial obligations of the other spouse and the non-waiving spouse did not take any unfair advantage of the waiving spouse [*Prob. Code § 144; see Fam. Code § 721(b)*].

### **[g] Drafting Considerations**

If a client does not wish to provide in a will or a revocable trust for a spouse who, in the absence of such a provision, might qualify as an omitted spouse [*see Prob. Code § 21610*], the client's intentions should be clearly expressed in the client's will or revocable trust instrument [*see Prob. Code § 21611(a)*]. The intention not to provide for a person who would otherwise share in the client's estate is traditionally expressed in a disinheritance clause. For discussion of disinheritance clauses, see § 61.17.

If the client's estate plan includes both a will and a revocable trust, the provisions of the two instruments respecting an omitted spouse should be coordinated. It is not clear whether the intention not to provide for the spouse must be shown in both the will and the trust instrument, or only in one of those instruments. *Prob. Code § 21611(a)* provides that the spouse will not receive a share of the estate if the "decendent's failure to provide for the spouse in the decendent's testamentary *instruments* was intentional and that intention appears from the testamentary *instruments*" [emphasis added]. It may be argued that in determining the decendent's intentions respecting the spouse, the court should look at both instruments and, if either reflects an intention not to provide for the spouse, the requirements of *Prob. Code § 21611(a)* will be satisfied. However, to avoid any possibility of misinterpretation, it is recommended that any intention not to provide for the spouse should be reflected in both instruments.

It is not necessary for the client to provide for the spouse in both the will and the trust instrument solely to avoid application of the omitted spouse rules. A spouse will qualify as an omitted spouse under *Prob. Code § 21610* only if the client fails to provide for the spouse in "a testamentary instrument," and either the will or the trust instrument will qualify as "a testamentary instrument for this purpose [*Prob. Code § 21601(a)* "decendent's testamentary instruments" defined); emphasis added]. Thus, if the client does not wish to provide for the spouse in the will, a provision for the spouse in the trust instrument is adequate to remove the spouse from the definition of an omitted spouse in *Prob. Code § 21610*. Similarly, if the client does not wish to provide for the spouse in the trust, a provision for the spouse in the will is adequate to remove the spouse from the definition of an omitted spouse in *Prob. Code § 21610*.

### **[3] Omitted Children**

#### **[a] Basic Rule**

If a decedent fails to provide in a testamentary instrument for a child born or adopted after the execution of all of the decedent's testamentary instruments, the omitted child will generally be entitled by statute to receive a prescribed share of the decedent's estate [*Prob. Code § 21620; but see Prob. Code § 21621* (no share if child intentionally omitted or otherwise provided for) and discussion in [b], below; see also *Estate of Mowry (2003) 107 Cal. App. 4th 338, 343-344, 131 Cal. Rptr. 2d 855* (daughter adopted before decedent executed holographic will, and who failed to prove mistaken omission, was not omitted heir)]. The share will be equal in value to the share the child would have received if the decedent had died without executing any testamentary instrument [*Prob. Code § 21620*]. For purposes of this rule, a "testamentary instrument" is either a will or a trust instrument that was executed by the decedent and that became irrevocable on the decedent's death [*Prob. Code § 21601(a)*] and "estate" is the decedent's probate estate and all property held in any revocable trust executed by the decedent that became irrevocable on the decedent's death [*Prob. Code § 21601(b)*].

#### **[b] Intentional Failure to Provide for Child**

A child is not entitled to receive a share of the estate if any of the following is established [*Prob. Code § 21611*]:

- The decedent's failure to provide for the child in the decedent's testamentary instruments was

intentional and that intention appears from the testamentary instruments.

- The decedent had one or more children and devised or otherwise directed the disposition of substantially all the estate to the other parent of the omitted child.
- The decedent provided for the child by transfer outside of the estate passing by the decedent's testamentary instruments and the intention that the transfer be in lieu of a provision in those instruments is shown by statements of the decedent or from the amount of the transfer or by other evidence.

#### **[c] Child Believed to Be Dead**

If, at the time of the execution of all of the decedent's testamentary instruments effective at the time of the decedent's death, the decedent failed to provide for a living child solely because the decedent believed the child to be dead or was unaware of the birth of the child, the child must receive a share in the estate equal in value to the share the child would have received if the decedent had died without having executed any testamentary instruments [*Prob. Code § 21622*].

#### **[d] Satisfaction of Omitted Child's Share**

In satisfying an omitted child's share, the share must be taken first from any part of the decedent's estate that is not disposed of by will or trust [*Prob. Code § 21623(a)(1)*; but see *Prob. Code § 21623(b)* (exception to rule) and discussion, *below*]. If that is not sufficient, so much as may be necessary to satisfy the share must be taken from all beneficiaries of the decedent's testamentary instruments in proportion to the value they may respectively receive [*Prob. Code § 21623(a)(2)*; but see *Prob. Code § 21623(b)* (exception to rule) and discussion, *below*]. The proportion of each beneficiary's share that may be taken must be determined based on values as of the date of the decedent's death [*Prob. Code § 21623(a)(2)*]. However, if the obvious intention of the decedent in relation to some specific gift or devise or other provision of a testamentary instrument would be defeated by satisfying the omitted child's share in this way, the specific devise or gift or provision may be exempted from the apportionment and a different apportionment, consistent with the decedent's intention, may be adopted [*Prob. Code § 21623(b)*].

#### **[e] Pre-1998 Rules**

The foregoing rules apply only if the decedent died on or after January 1, 1998 [*Prob. Code § 21630*]. If the decedent died before January 1, 1998, but on or after January 1, 1985, former *Prob. Code §§ 6560-6562* (repealed effective January 1, 1998 by Stats. 1997, ch. 724, § 34) govern the rights of omitted spouses [*Prob. Code § 21630*]. While those rules were substantially similar to the rules described above, they applied only when the decedent failed to provide for a child born or adopted after the execution of a will that did not provide for the child [*see former Prob. Code § 6570*]. The rules applicable on and after January 1, 1998, differ from the former rules in that they apply not just when the decedent failed to provide for the child in a will, but also when the decedent failed to provide for the child in a trust instrument that becomes irrevocable on the decedent's death [*see Prob. Code § 21620*]. Conversely, an intention not to provide for the child may, under the rules applicable on and after January 1, 1998, be shown not just by the decedent's will, but also by a trust instrument executed by the decedent that becomes irrevocable on the decedent's death [*see Prob. Code § 21620*]. If the decedent died before January 1, 1985, former *Prob. Code §§ 71, 90, and 91* (repealed effective January 1, 1985) govern the rights of omitted children [*see former Prob. Code § 6580* (repealed effective January 1, 1998)].

#### **[f] Drafting Considerations**

If a client does not wish to provide in a will or revocable trust for a child who might otherwise qualify as an omitted child [*see Prob. Code § 21620*], the client's intentions should be clearly expressed in the client's will or trust instrument [*see Prob. Code § 21611(a)*]. The intention not to provide for a person who would otherwise share in the client's estate is traditionally expressed in a disinheritance clause. For discussion of disinheritance clauses, see § 61.17.

If the client's estate plan includes both a will and a revocable trust instrument, the provisions of the two instruments respecting an omitted child should be coordinated. It is not clear whether the intention not to provide for the child must be shown in both the will and the trust instrument, or only in one of those instruments. *Prob. Code § 21621(a)* provides that the child will not receive a share of the estate if the "decendent's failure to provide for the child in the decendent's testamentary *instruments* was intentional and that intention appears from the testamentary *instruments*" [emphasis added]. It may be argued that in determining the decendent's intentions respecting the child, the court should look at both instruments and, if either reflects an intention not to provide for the spouse, the requirements of *Prob. Code § 21621(a)* will be satisfied. However, if the client wishes to exclude the child from any share in either the probate estate or the trust estate, it is recommended that this intention be reflected in both instruments.

It is not necessary for the client to provide for the child in both the will and the trust instrument solely to avoid application of the omitted child rules. A child will qualify as an omitted child under *Prob. Code § 21620* only if the client fails to provide for the child in "a testamentary instrument," and either the will or the trust instrument will qualify as "a testamentary instrument" for this purpose [*Prob. Code § 21601(a)* "decendent's testamentary instruments" defined]; emphasis added]. Thus, if the client does not wish to provide for the child in the will, a provision for the child in the trust instrument will adequately remove the child from the definition of an omitted child in *Prob. Code § 21620*. Similarly, if the client does not wish to provide for the child in the trust, a provision for the child in the will is adequate to remove the child from the definition of an omitted child in *Prob. Code § 21620*.

#### [4] Kindred

The survivorship provisions of the Probate Code protect certain persons who are not named as devisees in the will but who are "kindred" of the testator or of a surviving, deceased, or former spouse of the testator [*see Prob. Code § 21110(c)*; *Estate of Sowash (1923) 62 Cal. App. 512, 516, 217 P. 123* ("kindred" refers to persons related by blood)]. Under these provisions, if a gift is made to kindred of the testator (or of a surviving, deceased, or former spouse of the testator), and if the kindred beneficiary is dead when the will is executed (or is treated as if he or she predeceased the testator, or fails or is treated as failing to survive the testator or to survive until a future time required by the will), the issue of the deceased devisee take in his or her place in the manner provided by *Prob. Code § 240* [*Prob. Code § 21110(a)*]; *see Prob. Code §§ 81* ("transferor" includes testator), *81.5* ("transferee" includes devisee under will); *see also Estate of Mooney, (2008) 169 Cal. App. 4th 654, 663*; *87 Cal. Rptr. 3d 115* (anti-lapse statute provides that when a bequest to a protected transferee would otherwise lapse due to the transferee's death, the bequest passes by right of representation to his or her descendants), *see also* discussion in § 61.15[6][c]]. This rule is inapplicable, however, if the will expresses a contrary intention or makes a substitute disposition [*Prob. Code § 21110(b)*].

A requirement that the initial devisee survive the testator or survive for a specified period of time after the death of the testator constitutes such a "contrary intention," as does a requirement that the initial devisee survive until a future time that is related to the probate of the will or administration of the estate of the testator [*Prob. Code § 21110(b)*]; for further discussion, *see Ch. 63, Will Provisions, § 63.411[1][d]*.

#### **PRACTICE TIP:**

No devise under a will, even one which is seemingly trivial, should fail to include a statement indicating the disposition of the devise in the event the devisee predeceases the testator (or dies before the occurrence of some specified event). If there is to be an alternate taker, the will should so indicate. If the gift simply fails, that should also be stated. *Commentary by Albert G. Handelman.*

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawWillsAfter-Acquired SpousesEstate, Gift & Trust LawWillsForced Heirs & LegitimeEstate,  
Gift & Trust LawWillsPretermitted HeirsGeneral OverviewEstate, Gift & Trust LawWillsPretermitted HeirsIntent to

OmitEstate, Gift & Trust LawWillsPretermitted HeirsStatutes



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DIVISION IV: WILLS AND TRUSTS  
CHAPTER 61 WILL DRAFTING AND COMPLETE WILL FORMS  
PART II. LEGAL BACKGROUND

*23-61 California Legal Forms--Transaction Guide § 61.17*

**AUTHOR:** Reviewed by Albert G. Handelman

**§ 61.17 Disinheritance Clauses**

**[1] In General**

A disinheritance clause is a provision in a will or trust instrument expressing the intention of the testator or settlor that a specific person or persons will receive no property under the instrument [*see* Black's Law Dictionary 468 (6th ed. 1990)]. A disinheritance clause is different from a no-contest clause, which is a provision in a will or trust instrument that is designed to discourage devisees or beneficiaries from contesting provisions of the instrument [*see* discussion in § 61.18].

A disinheritance clause in a will is directed against persons who are not provided for in the will and who would otherwise be entitled to claim a share of the testator's estate. A no-contest clause in a will, in contrast, is directed against any person who might contest the will. Although disinheritance and no-contest clauses may be combined in a single provision, the more accepted practice is to state them separately, since each has its own purpose.

The law governing disinheritance clauses is complex and exacting. For a detailed discussion of that law, see California Wills and Trusts, Ch. 40, *Disinheritance and No-Contest Clauses* (Matthew Bender).

**[2] Limited Effectiveness**

Many persons erroneously believe that a disinheritance clause is effective (or even necessary) to ensure that persons not specifically mentioned in a will do not receive any portion of the testator's estate. In fact, under current law a disinheritance clause has a much more limited application and is strictly necessary to cut off inheritance rights in only limited circumstances.

Under present California law, most persons not mentioned in the decedent's "testamentary instruments" [*see Prob. Code § 21601(a)*] ("decedent's testamentary instruments" means the decedent's will or revocable trust)] have no right to any of the decedent's property that is validly disposed of under those instruments. The only exceptions are persons who qualify as "omitted heirs." A spouse who was married and a child who was born or adopted after the execution of all of the

decedent's "testamentary instruments" will qualify as omitted heirs [*Prob. Code* §§ 21610 (spouse), 21620; *see Prob. Code* § 21601(a) ("decedent's testamentary instruments" means the decedent's will or revocable trust)], as will a living child for whom the decedent made no provision solely because the decedent believed the child to be dead or was unaware of the child's birth [*Prob. Code* § 21622]. Thus, a disinheritance clause is essential to cut off the statutory rights of these persons under the "omitted heir" statutes. No other persons will qualify as omitted heirs [*see* discussion in § 61.16[2], [3]].

As to all other persons, therefore, a disinheritance clause is not strictly necessary. Simply making no provision for these persons in the decedent's testamentary instruments, and assuring that those instruments collectively make a full and complete disposition of all the decedent's property so as to avoid any possibility of intestacy [*see* discussion, *below*], is enough to assure that persons not mentioned in the decedent's testamentary instruments will not take any portion of the decedent's property.

Regardless of how broadly a disinheritance clause is worded, it cannot prevent a decedent's heirs from taking under the intestate succession statutes [ *Estate of Barnes* (1965) 63 Cal. 2d 580, 583, 47 Cal. Rptr. 480, 407 P.2d 656] . This is true regardless of whether or not the heirs qualify as "omitted heirs." The only effective way for a testator to cut off the intestate succession rights or his or her heirs is to validly dispose of his or her property to others [ *Estate of Lefranc* (1952) 38 Cal. 2d 289, 295, 239 P.2d 617] . This can be successfully accomplished only if the will includes a residuary clause and provides for a valid alternative disposition of the residue in the event that the primary residuary disposition fails [*see Estate of Munson* (1958) 164 Cal. App. 2d 146, 151-152, 330 P.2d 302] . If the residue is not effectively disposed of, the intestate heirs will inherit under the laws of intestate succession regardless of the terms of any disinheritance clause [*see Estate of Munson* (1958) 164 Cal. App. 2d 146, 151-152, 330 P.2d 302] .

### [3] Specific Language

A testator who wishes to disinherit an omitted spouse or child in a will should state that intention "in strong and convincing language" [ *Estate of Gardner* (1978) 21 Cal. 3d 620, 623, 147 Cal. Rptr. 184, 580 P.2d 684] . A general provision disinheriting "my heirs," "any legal heir of mine," or "my heirs living at the time of my demise," is not sufficient to prevent an omitted heir from taking against the will [ *Estate of Axcelrod* (1944) 23 Cal. 2d 761, 767-768, 147 P.2d 1 ; *Estate of Katleman* (1993) 13 Cal. App. 4th 51, 59-60, 16 Cal. Rptr. 2d 468] . The disinheritance clause may name the heir to be disinherited, or describe the heir with some language that leaves no doubt as to his or her identity. If the testator is contemplating marriage at the time the will is executed, for example, a will provision that names the intended spouse and includes an unequivocal statement that the will "shall not be revoked by the marriage" is sufficient to defeat the intended spouse's rights under the omitted heir statutes [ *Estate of Cooper* (1983) 142 Cal. App. 3d 118, 119, 121, 190 Cal. Rptr. 826] .

#### **PRACTICE TIP:**

Beware of too much specificity in crafting disinheritance clauses. In particular, statements of "factual" bases for disinheritances are better set forth in terms of the testator's "belief." For example, the statement of a testator's "belief" that a child is already "well provided for" is preferable to a direct statement that the child is, in fact, "well provided for." The latter sort of statement can set the stage for a will contest in which the child seeks to establish that he or she was, in fact, destitute; a statement of the testator's belief might open the door to a will contest based on a theory of fraud, but it is much less likely to be successful. *Commentary by Albert G. Handelman.*

In particular cases, a provision disinheriting a child may be essential. Since children born or adopted before the will was executed ordinarily will not qualify as omitted children [*see Prob. Code* § 21620 and discussion in § 61.16[3]], it is not strictly necessary to name those children in the will when the testator does not wish to provide for them. However, if a question might later arise as to whether a testator mistakenly believed a child to be dead at the time the will was executed, or was unaware a child had been born [*see Prob. Code* § 21622 and discussion in § 61.16[3][c]], a provision

specifically referring to the child may be essential to disinherit the child.

Every will should name or identify all persons who have the potential to qualify as the testator's omitted heirs. Every will should also include a general disinheritance clause, even when no omitted heirs can reasonably be anticipated. A general disinheritance clause typically states that, except as otherwise specifically provided in the will, the testator has intentionally and with full knowledge omitted to provide for his or her heirs, regardless of whether the testator is aware of their existence and identities at the time the will is executed.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Will Contests No Contest Clauses Estate, Gift & Trust Law Wills Pretermitted Heirs General Overview Estate, Gift & Trust Law Wills Pretermitted Heirs Intent to Omit Estate, Gift & Trust Law Wills Pretermitted Heirs Nominal Bequests Estate, Gift & Trust Law Wills Pretermitted Heirs Statutes



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DIVISION IV: WILLS AND TRUSTS  
CHAPTER 61 WILL DRAFTING AND COMPLETE WILL FORMS  
PART II. LEGAL BACKGROUND

*23-61 California Legal Forms--Transaction Guide § 61.18*

**AUTHOR:** Reviewed by Albert G. Handelman

**§ 61.18 No-Contest Clauses**

**[1] Nature and Validity**

No contest clauses are valid and enforceable in California [ *Burch v. George (1994) 7 Cal. 4th 246, 254, 27 Cal. Rptr. 2d 165, 866 P.2d 92* ]. The purpose of a no contest clause is to discourage will contests by imposing a penalty of forfeiture against any beneficiary who challenges the will [ *Estate of Gonzalez (2002) 102 Cal. App. 4th 1296, 1302, 126 Cal. Rptr. 2d 332* ]. A no contest clause also is known as an "in terrorem" clause. As discussed in § 61.17[1], a no contest clause is distinct from a disinheritance clause, which seeks to prevent an heir or heirs from receiving any property under the instrument.

A no contest clause in a will or other dispositive instrument creates a condition on the gifts and dispositions provided for in the instrument [ *Burch v. George (1994) 7 Cal. 4th 246, 254, 27 Cal. Rptr. 2d 165, 866 P.2d 92* ; *Estate of Lindstrom (1987) 191 Cal. App. 3d 375, 381, 236 Cal. Rptr. 376* ]. In essence, a no contest clause in a will conditions the rights of the devisees named in the will to take the devises provided for in the will on their acquiescence in its terms. To the extent that a particular devisee acquiesces in those terms, the devisee is entitled to take the devise; to the extent that the devisee does not acquiesce, the devisee cannot take [see *Burch v. George (1994) 7 Cal. 4th 246, 254, 27 Cal. Rptr. 2d 165, 866 P.2d 92* ].

Rules relating to the enforcement of no contest clauses are codified in the Probate Code [see Prob. Code § 2131-21315]. For additional detailed discussion of the enforceability of no contest clauses, and for a will provision containing a no contest clause, see *Ch. 63, Probate: Will Provisions § 63.651*

**[2] Enforcement of No Contest Clause Under Probate Code**

**[a] In General**

Effective January 1, 2010, a revised *Prob. Code §§ 21310-21315* controls the enforcement of no contest clauses as [ *Prob. Code § 21315* ]. The statute provides for the enforcement of no contest clauses in a protected instrument filed on

or after January 1, 2010, wherever executed, provided that the protected instrument became irrevocable on or after January 1, 2001 [*Prob. Code § 21315*]. For the enforcement of all other no contest clauses, common law continues to apply [*Prob. Code § 21315*]. Under the new statute, a no contest clause is only enforceable in three specific circumstances: 1) a direct contest brought without probable cause, 2) a challenge to the transfer of property (provided the no contest clause provides), and 3) the filing of a creditor's claim (provided the no contest clause provides) [*Prob. Code § 21311(a)*]. Furthermore, there is no opt-out of this statute. The provisions of *Prob. Code § 21310-21315* apply notwithstanding any contrary provisions in an instrument [*Prob. Code § 21314*]. See also, Demurrer to Contest and Ground of Opposition to Probate--Contest Violates No contest Clause, § 444.102A.

### **[b] No Contest Clause Defined**

Under the Probate Code, a no contest clause is a provision in a valid instrument, which, if enforced, would penalize a beneficiary for filing a pleading in any court [*Prob. Code § 21310(c)*]. A pleading is a petition, complaint, cross-complaint, objection, answer, response, or claim [*Prob. Code § 21310(d)*].

### **[c] Protected Instrument**

The Probate Code only allows the enforcement of a no contest clause of a protected instrument [see *Prob. Code §§ 21310, 21311*]. A protected instrument is the instrument containing the no contest clause, or an instrument that is in existence on the date the instrument containing the no contest clause is executed and is expressly identified in the no contest clause, either individually or as part of an identifiable class of instruments, as being governed by the no contest clause [*Prob. Code § 21310(e)*]. Since a no contest clause cannot apply to future instruments under the revised code, each amendment of existing instruments should contain its own no contest clause where one is desired. A commonly used statement in amendments that the settler confirms and ratifies the original trust agreement is inadequate to incorporate the no contest clause into the amendment [see *Prob. Code § 21310(e)*, see also *Perrin v. Lee (2008) 164 Cal. App. 4th 1239, 79 Cal. Rptr. 3d 885* (no contest clause does not apply to amendment where amendment stated that grantor and trustee confirm and ratify original trust agreement because (former) *Prob. Code § 21305(a)* requires that no contest clause must explicitly state that challenging validity of amendment is a violation of the no contest clause)]. It is also important to clarify whether a no contest clause is applicable to a testamentary trust that is created under a will that contains a no contest clause. Any no contest clause for the trust should be separately contained in the trust terms as recited in the order for distribution entered in the probate proceeding [ *Meyer v. Meyer (2008) 162 Cal. App. 4th 983, 76 Cal. Rptr. 3d 546* (no contest clause had not been incorporated by reference into the testamentary trust because the decrees of distribution specifying the terms of the testamentary trust did not include the will's no contest clause as one of those terms)].

### **[d] Direct Contest**

A no contest clause is enforceable in a direct contest that is brought without probable cause [*Prob. Code § 21311(a)(1)*]. A direct contest is one that alleges the invalidity of a protected instrument or one or more of its terms based on [*Prob. Code § 21310(b)*]:

- Forgery;
- Lack of due execution;
- Lack of capacity;
- Menace, duress, fraud or undue influence;
- Revocation of a will pursuant to § 6120, revocation of a trust pursuant to § 15401, or revocation of

an instrument other than a will or trust pursuant to the procedure for revocation that is provided by statute or by the instrument; and

- Disqualification of a beneficiary under *Prob. Code* §§ 6112, 21350.

Probable cause exists if, at the time of filing a contest, the facts known to the contestant would cause a reasonable person to believe that there is a reasonable opportunity for further investigation or discovery [*Prob. Code* § 21311(b)].

### **[E] Challenge to Transfer of Property**

A no contest clause is also enforceable against a pleading challenging the transfer of property on the grounds that it was not the transferor's property at the time of the transfer (a "forced election"), so long as the no contest clause expressly provides [*Prob. Code* § 21311(a)(2)]. In this type of contest, probable cause is irrelevant, and the forced election may be applicable to anyone [*see Prob. Code* § 21311(a)(2)].

### **[f] Creditor's Claim**

A no contest clause is also enforceable against the filing of a creditor's claim or prosecution of an action based on it, so long as the no contest clause expressly provides [*Prob. Code* § 21311(a)(3)]. In this type of contest, probable cause is also irrelevant [*see Prob. Code* § 21311(a)(3)].

### **[g] No Availability of Declaratory Relief**

Under the new statutory provisions, declaratory relief (previously granted under the Safe Harbor Provision of former *Prob. Code* § 21320) will no longer be available [*see Prob. Code* §§ 21310-21315].

## **[3] Enforcement of No contest Clauses Under Common Law**

### **[a] In General**

For contests of a will or trust which contain a no contest clause, but are not governed by *Prob. Code* § 21310 *et seq.*, common law continues to apply. Whether there has been a "contest" within the meaning of the language of a no contest clause is to be determined according to the circumstances of each case and the language used [ *Estate of Strader* (2003) 107 Cal. App. 4th 996, 1003, 132 Cal. Rptr. 2d 649 ; *Nairne v. Jessop-Humble* (2002) 101 Cal. App. 4th 1124, 1128, 124 Cal. Rptr. 2d 726] .

Factors relevant to determining whether a claim involving the characterization, inclusion, or distribution of a certain item of property in a testamentary instrument is a contest include [ *Nairne v. Jessop-Humble* (2002) 101 Cal. App. 4th 1124, 1129, 124 Cal. Rptr. 2d 726] :

- The particular language of the no contest clause;
- Whether the instrument specifies the property and its distribution;
- Whether the instrument specifically characterizes the property, *e.g.*, as separate versus community property;
- Whether the challenge, if successful, would thwart the testator's intent.

### **[b] Indirect Attack**

Under the common law, an indirect attack in a separate proceeding that nullifies or thwarts the express wishes of the creator of the instrument may constitute a "contest" for purposes of a no contest clause [see *Burch v. George* (1994) 7 Cal. 4th 246, 27 Cal. Rptr. 2d 165, 866 P.2d 92 (proposed federal complaint by surviving spouse against pension plan administrators to assert community property rights to plan benefits that had been transferred to trust); *Mc Kenzie v. Vanderpoel* (2007) 151 Cal. App. 4th 1442, 1454, 61 Cal. Rptr. 3d 129 (no contest clause in trust instrument that applied to any attempt to "impair" trust extended to trust beneficiary's adjustment petition under California Uniform Principal and Income Act to reallocate principal and income, when reallocation would have resulted in more income to beneficiary than allowed by trust and invasion of trust principal reserved to other beneficiaries); [ *Estate of Pittman* (1997) 63 Cal. App. 4th 290, 298-305, 73 Cal Rptr. 2d 622 (beneficiary's petition to recharacterize property that had been specifically characterized by trustors); *Genger v. Delsol* (1997) 56 Cal. App. 4th 1410, 1428-1429, 66 Cal. Rptr. 2d 527 (proposed challenge by surviving spouse to corporate stock redemption agreement which was "cornerstone" of decedent's integrated estate plan); but see *Jacobs-Zorne v. Superior Court* (1966) 46 Cal. App. 4th 1064, 1075, 54 Cal. Rptr. 2d 385 (thwarting of testator's intent not appropriate test in determining whether no contest clause has been triggered)].

### **[c] Oral Contract**

Although some older cases suggest that actions seeking to enforce an oral contract independent of a testamentary instrument do not constitute "contests" [see *Estate of Watson* (1986) 177 Cal. App. 3d 569, 573-574, 223 Cal. Rptr. 14 ; *Estate of Black* (1984) 160 Cal. App. 3d 582, 591, 206 Cal. Rptr. 663] , the California Supreme Court has clearly indicated that there is no "categorical proposition that any proceeding based upon a claim of right independent of a will or trust instrument is never a contest for purposes of the no contest law" [ *Burch v. George* (1994) 7 Cal. 4th 246, 261, 27 Cal. Rptr. 2d 165, 866 P.2d 92 . As a result, more recent cases have held that a complaint that seeks to establish and enforce an oral contract based on a right independent of a testamentary instrument may constitute a contest within the meaning of a no contest provision in that instrument [ *Nairne v. Jessop-Humble* (2002) 101 Cal. App. 4th 1124, 1129-1131, 124 Cal. Rptr. 2d 726 (complaint alleging that trustors had orally agreed to give specified property to plaintiff and therefore that property should not have been included in trust violated no contest clause in trust because it directly attacked provision of trust that identified and disposed of this property)].

### **[d] Interpretation**

A judicial action seeking an interpretation of a will or other dispositive instrument is not an attack on the instrument and does not constitute a contest of the instrument. It is merely an effort to ascertain the true intentions of the author of the instrument [ *Graham v. Lenzi* (1995) 37 Cal. App. 4th 248, 258, 43 Cal. Rptr. 2d 407] . A petition seeking to interpret a will generally does not violate a no contest clause because, rather than thwarting the testator's dispositive intent, the proceeding serves to ascertain and enforce that intent [ *Estate of Strader* (2003) 107 Cal. App. 4th 996, 1004, 132 Cal. Rptr. 2d 649] .

### **[4] Strict Construction**

The strict statutory rules regarding no contest clauses reflect the general doctrine that no contest clauses are disfavored by the public policy against forfeiture [ *McIndoe v. Olivos* (2005) 132 Cal. App. 4th 483, 487, 33 Cal. Rptr. 3d 689 ; *Estate of Richter* (1993) 12 Cal. App. 4th 1361, 1367, 16 Cal. Rptr. 2d 108 ; *Scharlin v. Superior Court* (1992) 9 Cal. App. 4th 162, 168-169, 11 Cal. Rptr. 2d 448] . Accordingly, under both the Probate Code and common law, no contest clauses must be strictly construed and cannot be extended beyond what the settler or testator (as the case may be) clearly intended by the wording of the governing document [see *Prob. Code* § 21312; see also *Meyer v. Meyer* (2008) 162 Cal. App. 4th 983, 998, 76 Cal. Rptr. 3d 546 ; *Zwirn v. Schweizer* (2005) 134 Cal. App. 4th 1153, 1159, 36 Cal. Rptr. 3d 527 ; *Nairne v. Jessop-Humble* (2002) 101 Cal. App. 4th 1124, 1128, 124 Cal. Rptr. 2d 726 ; see also *Scharlin v. Superior Court* (1992) 9 Cal. App. 4th 162, 168-169, 11 Cal. Rptr. 2d 448 (rule of strict construction applies to no contest clauses in inter vivos trusts as well as in wills)]. Under the common law, a beneficiary will be found to

have violated a no contest clause only if the beneficiary's action clearly falls within the terms of the clause, and the penalty will be imposed only if it is found that the beneficiary's act clearly was intended by the settlor or testator to require the imposition of the penalty [ *Estate of Rossi* (2006) 138 Cal. App. 1325, 1338, 42 Cal. Rptr. 3d 244 ; *McIndoe v. Olivos* (2005) 132 Cal. App. 4th 483, 487, 489, 33 Cal. Rptr. 3d 689 ; *Estate of Richter* (1993) 12 Cal. App. 4th 1361, 1367, 16 Cal. Rptr. 2d 108 ; *Scharlin v. Superior Court* (1992) 9 Cal. App. 4th 162, 168-169, 11 Cal. Rptr. 2d 448 . Although these basic rules were developed in connection with no contest clauses in wills, they have been held applicable to no contest clauses in inter vivos trusts as well [see *Scharlin v. Superior Court* (1992) 9 Cal. App. 4th 162, 168-169, 11 Cal. Rptr. 2d 448] .

Thus, for example, a testator could permissively provide that three of his five children would *all* lose their testamentary gifts under a trust if any one of them contested it [ *Tunstall v. Wells* (2006) 144 Cal. App. 4th 554, 557-558, 50 Cal. Rptr. 3d 468] . The court concluded that the no contest clause did not violate public policy and reasoned that the decedent's intentions to impose conditions on the gifts of the three children were within his rights as a testator [ *Tunstall v. Wells* (2006) 144 Cal. App. 4th 554, 557-558, 50 Cal. Rptr. 3d 468] . Similarly, a no contest clause in a testamentary trust was upheld although it forced the settlor's former wife and their children to choose between enforcing their rights under an existing martial dissolution judgment by filing creditor's claims, or relinquishing those rights and taking the gifts provided for them in the settlor's trust [ *Colburn v. Northern Trust Co.* (2007) 151 Cal. App. 4th 439, 447, 59 Cal. Rptr. 3d 828] . Also upheld was a clause in a trust instrument that applied to any attempt to "impair" the trust, which was held applicable to the trust beneficiary's adjustment petition under the California Uniform Principal and Income Act to reallocate principal and income, when the reallocation would have resulted in more income to the beneficiary than was allowed by the trust and the invasion of trust principal reserved to other beneficiaries [ *McKenzie v. Vanderpoel* (2007) 151 Cal. App. 4th 1442, 1454, 61 Cal. Rptr. 3d 129] .

Extrinsic evidence on the testator's intended meaning of the no contest clause is admissible if it is relevant to show a meaning to which the language is reasonably susceptible [ *Estate of Kaila* (2001) 94 Cal. App. 4th 1122, 1132, 114 Cal. Rptr. 2d 865] . However, consideration of extrinsic evidence does not necessarily require a determination of an action on the merits that would preclude relief [ *Estate of Kaila* (2001) 94 Cal. App. 4th 1122, 1136, 114 Cal. Rptr. 2d 865] .

#### **[5] Review of Determination**

A court order determining whether a particular motion, petition, or other act by the beneficiary would constitute a contest within the terms of the no contest clause is appealable [*Prob. Code* § 1303(j), see *Estate of Hoffman* (2002) 97 Cal. App. 4th 1436, 1438 fn 1, 119 Cal. Rptr. 2d 248] .

Cases have held that, given the short filing times in many probate matters and the need for timely and orderly administration of estates, appeal may constitute an inadequate legal remedy. Under these circumstances, a writ of mandate would be the appropriate remedy for reviewing the court's order [see *Varney v. Superior Court* (1992) 10 Cal. App. 4th 1092, 1098, 12 Cal. Rptr. 2d 865 ; *Scharlin v. Superior Court* (1992) 9 Cal. App. 4th 162, 167, 11 Cal. Rptr. 2d 448] .

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawWill ContestsGeneral OverviewEstate, Gift & Trust LawWill ContestsNo Contest ClausesEstate, Gift & Trust LawWillsPretermitted HeirsGeneral Overview



127 of 195 DOCUMENTS

California Legal Forms--Transaction Guide

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DIVISION IV: WILLS AND TRUSTS  
CHAPTER 61 WILL DRAFTING AND COMPLETE WILL FORMS  
PART II. LEGAL BACKGROUND

*23-61 California Legal Forms--Transaction Guide § 61.19*

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**§ 61.19 Revocation**

**[1] In General**

A will, or any part of a will, may be revoked (1) by a later will that revokes the earlier will or part of a will expressly or by inconsistency, or (2) by being burned, torn, canceled, obliterated, or destroyed with the intent and for the purpose of revoking it, either by the testator or by another person in the testator's presence and at the testator's direction [*Prob. Code § 6120*]. A will or any part of a will executed in duplicate is revoked if one of the duplicates is burned, torn, canceled, obliterated, or destroyed with the intent and for the purpose of revoking it, by either the testator or another person in the testator's presence and by the testator's direction [*Prob. Code § 6121*].

**[2] Presumption of Revocation of Missing Will**

If a testator's will cannot be found after the testator's death, a presumption may arise that the testator destroyed the will with the intent to revoke it [*Prob. Code § 6124*]. This presumption will arise if it is established (1) that the will was last in the testator's possession, (2) that the testator was competent until death, and (3) that neither the will nor a duplicate original of the will can be found [*Prob. Code § 6124*]. This statutory presumption codifies case law [*Communication Concerning Assembly Bill 196*, 18 Cal. L. Revision Comm'n Reports 373 (1986); see *Sparks v. Lauritzen* (1967) 248 Cal. App. 2d 269, 274-275, 56 Cal. Rptr. 370]. In effect, it constitutes a double presumption. First, destruction of the will is presumed from disappearance of the will; second, revocation is presumed from destruction [*Estate of Obermolte* (1979) 91 Cal. App. 3d 124, 129 n.7, 153 Cal. Rptr. 798].

The term "duplicate original," as used in *Prob. Code § 6124*, does not include a photocopy of the will that has not been personally signed by the testator and the witnesses. Therefore, the presumption of revocation applies when such a photocopy is the only copy of the will that can be produced. The fact that the testator preserved a photocopy of the will is not of sufficient significance to permit a court to infer that the testator would not have preserved the photocopy if he or she intended to revoke the will [*Lauermann v. Superior Court* (2005) 127 Cal. App. 4th 1327, 1333, 26 Cal. Rptr. 3d 258].

The presumption may be rebutted by evidence showing that it is equally probable that the will was destroyed by someone other than the testator, or that the act was done by the testator but not with an intention to revoke the instrument [ *Estate of Bristol (1943)* 23 Cal. 2d 221, 224-225, 143 P.2d 689 ; *Estate of Obernolte (1979)* 91 Cal. App. 3d 124, 129, 153 Cal. Rptr. 798] . The presumption is considered to be a weak one and is relatively easily rebutted [see *Lauermann v. Superior Court (2005)* 127 Cal. App. 4th 1327, 1332 n. 8, 26 Cal. Rptr. 3d 258 (presumption only affects burden of producing evidence rather than burden of proof)].

### **[3] Revocation by Dissolution or Annulment of Marriage**

The annulment or dissolution of a marriage may affect a will executed by one of the spouses before the annulment or dissolution, depending on the date of the annulment or dissolution and the subsequent conduct of the parties.

If the dissolution or annulment occurred before January 1, 1985 (the operative date of *Prob. Code* § 6122), it will have no effect on the will [*Prob. Code* § 6122(f); *Tentative Recommendation Relating to Wills and Intestate Succession*, 16 Cal. L. Rev. Comm'n Reports 2398 (1982)], since the case law in effect before that date provided that dissolution or annulment of a marriage had no effect on a will previously executed by one of the parties [ *Estate of Patterson (1923)* 64 Cal. App. 643, 646, 222 P. 374] . An annulment or dissolution that occurs on or after January 1, 1985, generally will revoke any provision of the will that benefits the former spouse [*Prob. Code* § 6122].

Unless the will expressly provides otherwise, if a person executes a will and the person's marriage is later dissolved or annulled by a dissolution or annulment occurring on or after January 1, 1985, the dissolution or annulment will revoke any disposition or appointment of property made by the will to the former spouse, any provision of the will conferring a general or special power of appointment on the former spouse, and any provision of the will nominating the former spouse as executor, trustee, conservator, or guardian [*Prob. Code* § 6122(a)]. This rule applies *whenever* a dissolution or annulment occurs after the will was executed. There is no requirement that the will be executed after the marriage. In one case, the testator executed a holographic will in favor of a woman with whom he was living but to whom he was not then married. Some time after the will was executed, the testator married the woman. Still later, the marriage was terminated by dissolution. The court held that the will was revoked by the dissolution, even though it was executed before the marriage [ *Estate of Reeves (1991)* 233 Cal. App. 3d 651, 658-659, 284 Cal. Rptr. 650] .

Any marriage that has been finally terminated by a valid judgment of dissolution or annulment will be sufficient to revoke the provisions of a previously executed will [*Prob. Code* § 6122(d); see *Prob. Code* § 78(a)]. A judgment that is not recognized as valid (whether obtained in California or outside the state) will still be effective to revoke the provisions of a previously executed will if the person in whose favor the provisions were made subsequently participates in a marriage ceremony with a third person [*Prob. Code* § 6122(d); see *Prob. Code* § 78(d)]. An invalid judgment will also be sufficient to revoke will provisions in favor of a person who did not subsequently marry a third person but who originally obtained or consented to the judgment, unless the person later participated in a marriage ceremony with the testator or lived with the testator as husband and wife [*Prob. Code* § 6122(d); see *Prob. Code* § 78]. A judgment of legal separation will not revoke provisions of a previously executed will [*Prob. Code* § 6122(d)].

When will provisions are revoked because of a dissolution or annulment of a marriage, property that would have passed to the former spouse but for the revocation will pass as if the former spouse failed to survive the testator [*Prob. Code* § 6122(c)(1)]. Other provisions of the will conferring any power or office on the former spouse must be interpreted as if the former spouse failed to survive the testator [*Prob. Code* § 6122(c)(2)]. For example, provisions of a trust incorporated in a decedent's will, appointing the decedent's wife as trustee, granting her a power of appointment, or transferring any property or income from property to her, were revoked by *Prob. Code* § 6122 on the dissolution of their marriage, because that statute provides that the terms of a trust incorporated in a will must be administered and distributed as though the former spouse had predeceased the decedent [ *Estate of Coleman (2005)* 129 Cal. App. 4th 380, 389, 28 Cal. Rptr. 3d 282] .

Although *Prob. Code* § 6122 does not address the effect of dissolution on devises to children of the former spouse, the courts have held that unless a contrary intention is indicated in the will, it is generally presumed that a testator intends to exclude the children of an ex-spouse from taking under the will [ *Estate of Jones (2004) 122 Cal. App. 4th 326, 332, 18 Cal. Rptr. 3d 637* (residuary bequest to adult step-daughter was revoked by her mother's dissolution from testator); *Estate of Hermon (1995) 39 Cal. App. 4th 1525, 1531-1532, 46 Cal. Rptr. 2d 577* (court called on legislature to adopt provision similar to that set forth in Uniform Probate Code, which provides that dissolution revokes not only testamentary bequests to former spouse but also bequests to former spouse's relatives)]. Evidence that the testator continued to have a relationship with the child of a former spouse following dissolution may show an intent by the testator to continue to have the child take under the will [ *Estate of Jones (2004) 122 Cal. App. 4th 326, 332, 342, 18 Cal. Rptr. 3d 637* ].

If any disposition or other provision of a will is revoked solely by reason of the dissolution or annulment of a marriage, it will be revived by the testator's remarriage to the former spouse [*Prob. Code* § 6122(b); see *Prob. Code* § 78(a)].

Dissolution or annulment of a marriage, and termination of a domestic partnership [see § 61.19[4]], are the only circumstances that will revoke a will [*Prob. Code* § 6122(e)]. However, if a testator marries or has a child after executing a will, the spouse or child ordinarily will qualify as "omitted heirs" and have important property rights that can render the will largely ineffective [see *Prob. Code* §§ 21610, 21620; see also § 61.16[2], [3]].

#### **[4] Revocation by Termination of Domestic Partnership**

##### **[a] Meaning of Domestic Partnership**

Under the California Domestic Partner Rights and Responsibilities Act of 2003 (the Act) [*Fam. Code* §§ 297-299.3], a domestic partnership may be formed when two persons who meet specific requirements complete and file a declaration of domestic partnership with the Secretary of State. In order to file a valid declaration, the two parties must meet the following requirements [*Prob. Code* § 37; *Fam. Code* § 297(b)]:

- Both must have a common residence. "Common residence" means both domestic partners must share the same residence, but it is not necessary that the legal right to possess residence be in both of their names. Domestic partners may have a common residence even if one or both have additional residences, and they do not cease to have a common residence if one leaves the residence but intends to return [*Fam. Code* § 297(c)].
- Neither is married or a part of another domestic partnership.
- Neither is related by blood in a way that would prevent them from being married in the state of California.
- Both are over age 18.
- Both are either of the same sex or one or both meet the eligibility criteria under Title II of the Social Security Act for old-age insurance benefits [42 *U.S.C.* § 1381]. Persons of opposite sexes may not form a valid domestic partnership unless at least one is 62 years of age.
- Both are capable of consenting to a domestic partnership.

As of January 1, 2005, each person filing a declaration of domestic partnership must state in the declaration that he or she consents to the jurisdiction of the superior courts of California for the purpose of a proceeding to obtain a judgment of dissolution or nullity of the domestic partnership or for legal separation of the partners in the domestic partnership, or

for any other proceeding related to the partners' rights and obligations, even if one or both partners ceases to be a resident of, or to maintain a domicile in, California [*Fam. Code* § 298(c)(3)].

Effective January 1, 2005, registered domestic partners have the same rights, protections, and benefits, and are subject to the same responsibilities, obligations, and duties under law, whether they derive from statutes, administrative regulations, court rules, government policies, common law, or any other provisions or sources of law, as are granted to and imposed on spouses [*Fam. Code* § 297.5(a); see *Bouley v. Long Beach Memorial Medical Center* (2005) 127 Cal. App. 4th 601, 25 Cal. Rptr. 3d 813 (domestic partner has right under *Code Civ. Proc.* § 377.60 to bring wrongful death action for death of his or her partner); see also *Armijo v. Miles* (2005) 127 Cal. App. 4th 1405, 1422-1424, 26 Cal. Rptr. 3d 623 (giving domestic partner right to bring wrongful death action for death of his or her partner does not violate California Defense of Marriage Act (*Fam. Code* § 308.5), which specifies that only marriage between a man and a woman is valid or recognized in California)]. A surviving registered domestic partner, following the other partner's death, has the same rights, protections, and benefits, and is subject to the same responsibilities, obligations, and duties under law, as are granted to and imposed on a widow or widower [*Fam. Code* § 297.5(c)]. However, the Act is not intended to repeal or adversely affect any other ways in which relationships between adults may be recognized or given effect in California, or the legal consequences of those relationships, including, among other things, civil marriage, enforcement of "palimony" agreements, enforcement of powers of attorney, appointment of conservators or guardians, and petitions for second parent or limited consent adoption [Stats. 2003, ch. 421, § 2].

The legislature has made clear its intention in the domestic partnership law to substantially equalize the status of registered domestic partners and spouses [ *Koebke v. Bernardo Heights Country Club* (2005) 36 Cal. 4th 824, 837, 31 Cal. Rptr. 3d 565, 115 P.3d 1212] . To couples who meet the requirements of establishing a domestic partnership under the domestic partnership law and who have registered under that law, the legislature has granted legal recognition comparable to marriage, both procedurally and in terms of the substantive rights and obligations granted to and imposed on the partners, which are supported by policy considerations similar to those favoring marriage. These rights and responsibilities are not shared by couples who cohabit or who have not registered as domestic partners [ *Koebke v. Bernardo Heights Country Club* (2005) 36 Cal. 4th 824, 845, 31 Cal. Rptr. 3d 565, 115 P.3d 1212 (finding that in light of domestic partnership law, Unruh Act requires businesses to treat registered domestic partners same as spouses; see *Civ. Code* § 51(b) (prohibiting discrimination on basis of marital status or sexual orientation)].

The legislature's enactment of *Fam. Code* § 297.5, giving registered domestic partners the same rights and obligations as spouses, is not an improper legislative amendment of the defense of marriage initiative (Proposition 22), as codified in *Fam. Code* § 308.5, which states that only marriage between a man and a woman is valid or recognized in California. Because Proposition 22 did not address domestic partnerships, changing the domestic partnership law did not amend the initiative [ *Knight v. Superior Court* (2005) 128 Cal. App. 4th 14, 22-31, 26 Cal. Rptr. 3d 687] .

Persons who have filed a declaration of domestic partnership may not file a new declaration or enter a civil marriage with someone other than their registered domestic partner unless the most recent domestic partnership has been terminated or a final judgment of dissolution or nullity of the most recent domestic partnership has been entered. This prohibition does not apply when a previous domestic partnership has ended because of the death of one of the partners [*Fam. Code* § 298.5(c)].

As of January 1, 2005, a legal union of two persons of the same sex, other than a marriage, that was validly formed in another jurisdiction and that is substantially equivalent to a domestic partnership under the Act, must be recognized as a valid domestic partnership in California regardless of whether it bears the name "domestic partnership" [*Fam. Code* § 299.2].

For discussion of declarations of domestic partnership, and the declaration of domestic partnership form, see *Ch. 110, Nonmarital Cohabitation Agreements and Related Transactions*, §§ 110.50 et seq., 110.220 et seq.

**[b] Termination of Domestic Partnership**

Until January 1, 2005, a domestic partnership was terminated when one of the following occurred [*Fam. Code § 299(a)* (prior to amendment by Stats. 2003, ch. 421, operative 1/1/05)]:

- One partner gave or sent by certified mail to the other partner a written notice that he or she is terminating the partnership.
- One of the domestic partners died.
- One of the domestic partners married.
- The domestic partners no longer had a common residence.

On termination of a domestic partnership prior to January 1, 2005, at least one former partner was required to mail a completed notice of termination of domestic partnership to the Secretary of State by certified mail. If the domestic partnership was terminated because of the death or marriage of a domestic partner, the termination date was the date indicated on the notice of termination of domestic partnership form. Otherwise, the date on which the notice of termination of domestic partnership was received by the Secretary of State is deemed the actual termination date of the domestic partnership [*Fam. Code § 299(b)* (prior to amendment by Stats. 2003, ch. 421, operative 1/1/05)].

As of January 1, 2005, a domestic partnership may be terminated by filing a notice of termination of domestic partnership with the Secretary of State, provided all of the following conditions exist at the time of the filing [*Fam. Code § 299(a)*]:

- Both domestic partners have signed the notice of termination.
- There are no children of the parties' relationship born before or after registration of the domestic partnership or adopted by the parties after registration of the domestic partnership, and neither of the domestic partners, to their knowledge, is pregnant.
- The domestic partnership has not lasted for more than five years.
- Neither partner has an interest in real property, wherever situated, with the exception of the lease of a residence occupied by either partner that does not include an option to purchase and that terminates within one year from the date of filing the notice of termination.
- There are no unpaid obligations in excess of the amount specified in *Fam. Code § 2400(a)(6)* (\$4000), as adjusted for inflation under *Fam. Code § 2400(b)*, incurred by either or both of the partners after registration of the domestic partnership, excluding the amount of any unpaid obligation for an automobile.
- The total fair market value of community property assets, excluding all encumbrances and automobiles, including any deferred compensation or retirement plan, is less than the amount specified in *Fam. Code § 2400(a)(7)* (\$25,000), as adjusted for inflation under *Fam. Code § 2400(b)*, and neither partner has separate property assets, excluding all encumbrances and automobiles, in excess of that amount.
- The partners have executed an agreement setting forth the division of assets and assumption of liabilities of the community property, and have executed any documents, title certificates, bills of sale, or

other evidence of transfer necessary to effectuate the agreement.

- The partners have waived any rights to support by the other partner.
- The partners have read and understand a brochure prepared by the Secretary of State describing the requirements, nature, and effect of terminating a domestic partnership.
- Both partners desire that the partnership be terminated.

Beginning January 1, 2005, a domestic partnership that does not meet the conditions specified above may only be terminated by an action for dissolution of the domestic partnership, nullity of the domestic partnership, or legal separation of the partners [*Fam. Code* § 299(c), (d)]. A domestic partnership is terminated six months after the date the notice of termination is filed [*Fam. Code* § 299(b)].

If a domestic partnership is terminated by the death of one of the parties and a notice of termination was not filed by either party before the decedent's death, the domestic partner who survives the decedent is a surviving domestic partner, and is entitled to the rights of a surviving domestic partner as provided in the Probate Code [*Prob. Code* § 37(b); see discussion in [c], *below*]. This includes the right to an intestate share of the deceased partner's separate property [*Prob. Code* § 6401(c)]. A surviving domestic partner is entitled to the same intestate share of the decedent's separate property to which a surviving spouse would be entitled [*Prob. Code* § 6401(c)].

#### **[c] Effect on Domestic Partner's Will**

The termination of a testator's domestic partnership serves to revoke certain provisions of the testator's will, if the will was executed on or after January 1, 2002 [*Prob. Code* § 6122.1(d)]. Unless the will expressly provides otherwise, if a person executes a will and the person's domestic partnership is terminated, the termination will revoke any disposition or appointment of property made by the will to the former domestic partner, any provision of the will conferring a general or special power of appointment on the former domestic partner, and any provision of the will nominating the former domestic partner as executor, trustee, conservator, or guardian [*Prob. Code* § 6122.1(a)].

When will provisions are revoked because of the termination of the testator's domestic partnership, property that would have passed to the former domestic partner if the provisions had not been revoked instead passes as if the former domestic partner failed to survive the testator [*Prob. Code* § 6122.1(c)(1)]. Other provisions of the will conferring some power or office on the former domestic partner will be interpreted as if the former domestic partner failed to survive the testator [*Prob. Code* § 6122.1(c)(2)].

Any disposition or other provision of a will that is revoked solely by reason of the termination of the testator's domestic partnership is revived if the testator re-establishes another domestic partnership with the former domestic partner [*Prob. Code* § 6122.1(b)].

#### **[5] Revival of Revoked Will**

The revocation of a will does not revive an earlier will executed by the same testator unless it is evident from the circumstances of the revocation, or from the testator's contemporary or subsequent declarations, that the testator intended the earlier will to take effect as executed [*Prob. Code* § 6123(a)]. This rule applies only to wills revoked by later wills which expressly or by inconsistency revoke the earlier wills; wills revoked by physical destruction cannot be revived by later revocation of a subsequent will, regardless of the circumstances. If a testator executes a third will revoking a second will which had the effect of revoking a first will, in whole or in part, the first will remains revoked unless it appears from the terms of the third will that the testator intended the first will to take effect [*Prob. Code* § 6123(b)].

If any provision of a will is revoked solely by reason of the dissolution or annulment of the testator's marriage [*see Prob. Code § 6122* and discussion in [3], *above*] the testator's remarriage to the former spouse will revive it [*Prob. Code § 6122(b)*]. Similarly, if any provision of a will is revoked solely by reason of the termination of the testator's domestic partnership [*see Prob. Code § 6122.1* and discussion in [4], *above*], the provision will be revived if the testator establishes another domestic partnership with the former domestic partner [*Prob. Code § 6122.1(b)*].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Will Contests Revocation General Overview Estate, Gift & Trust Law Will  
Contests Revocation Destructive Acts Estate, Gift & Trust Law Will Contests Revocation Later Writings Estate, Gift &  
Trust Law Will Contests Revocation Requirements Estate, Gift & Trust Law Wills General Overview



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DIVISION IV: WILLS AND TRUSTS  
CHAPTER 61 WILL DRAFTING AND COMPLETE WILL FORMS  
PART II. LEGAL BACKGROUND

*23-61 California Legal Forms--Transaction Guide § 61.20*

**AUTHOR:** Reviewed by Albert G. Handelman

**§ 61.20 Interpretation of Wills**

**[1] Governing Law**

The interpretation of a will is governed by the local law of the state selected by the testator in the will, unless the application of that law is contrary to the rights of the surviving spouse in community and quasi-community property, the family protection provisions of the Probate Code [*see Prob. Code §§ 6500-6615*], or any other public policy of California applicable to the disposition [*Prob. Code § 21103; see Prob. Code § 21101*]. If the testator does not specify what law will apply, traditional choice of law rules will control [*see Law Revision Commission Comment to former Prob. Code § 100 (repealed Jan. 1, 1985)*]. Under these rules, personal property is governed by the law of the place of the testator's domicile at the time of death [ *Estate of Moore (1961) 190 Cal. App. 2d 833, 842, 12 Cal. Rptr. 436 ; see Civ. Code § 946*], while real property is governed by the law of the situs [*see Estate of Reynolds (1933) 217 Cal. 557, 561, 20 P.2d 323*].

Real property situated within California is governed by California law [*Civ. Code § 755*]. However, if a married person dies while domiciled outside California and leaves a valid will disposing of California real property that is not the community property of the decedent and the surviving spouse, the surviving spouse has the same right to elect to take an interest in that property against the will as he or she would have if the property were located in the decedent's domicile at death [*Prob. Code § 120*].

**[2] Rules of Construction**

The Probate Code provides general rules for the construction of instruments [*see Prob. Code §§ 21101-21140*]. These rules apply broadly to wills, trusts, deeds, and other instruments [*Prob. Code § 21101*].

The first and most important rule for the interpretation of a will is that the intention of the testator as expressed in the will controls the legal effect of the dispositions made in the will [*Prob. Code § 21102(a)*]. Accordingly, the other rules apply only when the intention of the testator is not otherwise indicated by the will [*Prob. Code § 21102(b)*]. These statutory provisions, however, do not limit the use of extrinsic evidence, to the extent otherwise authorized by law, to

determine the transferor's intent [*Prob. Code § 21102(c)*].

Under the Probate Code rules, all parts of a will are to be construed in relation to each other and so as, if possible, to form a consistent whole. If the meaning of any part of a will is ambiguous or doubtful, it may be explained by any reference to or recital of that part in another part of the instrument [*Prob. Code § 21121*]. The words of a will must be interpreted in such a way as to give some effect to every expression in the instrument, and not so that any of the expressions will become inoperative. Preference must be given to an interpretation that will prevent intestacy or failure of a transfer rather than one that will result in an intestacy or failure of a transfer [*Prob. Code § 21120*].

The words of a will are to be given their ordinary and grammatical meaning, unless the intention to use them in another sense is clear and their intended meaning can be ascertained. Technical words are not necessary to give effect to a disposition in a will. However, technical words are to be considered as having been used in their technical sense unless the context clearly indicates a contrary intention or it appears that the will was drawn solely by the testator and the testator was unacquainted with the technical sense [*Prob. Code § 21122*].

In one case, for example, the statutory rules of construction were applied to determine what the phrase "my money" meant in the dispositive provisions of a holographic will. The court concluded that the testator used the term "my money" in its most flexible sense to include all of his financial assets (including treasury bills, money market accounts, and savings bonds), and not merely his bank accounts, because this construction would avoid intestacy, was in accord with the general scheme of the will to benefit the two beneficiaries named in the will, and also was in accord with the testator's lack of legal sophistication as shown in other parts of the will [ *Estate of Goyette (2004) 123 Cal. App. 4th 67, 19 Cal. Rptr. 3d 760* ] .

Wills containing gifts or trusts intended to qualify for the marital deduction are subject to special rules of construction and interpretation to insure that they will be construed in accordance with applicable federal estate tax requirements [*see Prob. Code §§ 21520-21526; see also Ch. 71, Marital Deduction Trust Provisions, § 71.20*].

Extrinsic evidence is admissible to determine whether a writing constitutes a will, or to determine the meaning of a will or portion of a will if the meaning is unclear [*Prob. Code § 6111.5*].

### **[3] Incorporation by Reference**

A writing in existence when a will is executed may be incorporated into the will by reference if the language of the will manifests an intent to do so and describes the writing sufficiently to permit its identification [*Prob. Code § 6130*].

Nontestamentary documents that have been incorporated in wills include previously executed wills, letters of instruction, and deeds to real property [*see, e.g., Estate of Nielson (1980) 105 Cal. App. 3d 796, 804, 165 Cal. Rptr. 319; Estate of Foxworth (1966) 240 Cal. App. 2d 784, 790, 50 Cal. Rptr. 237; Simon v. Grayson (1940) 15 Cal. 2d 531, 533-534, 102 P.2d 1081* ] .

Many testators want to make small gifts of personal items to relatives and friends as tokens of remembrance, love and affection, and so on. Since the items in question and the identities of the recipients often change over time, it is a frequent practice for testators to make such dispositions in an informal document separate from the will and then to incorporate the terms of that document into the will, to avoid the need for a formal amendment of the will each time the testator wants to add, delete, or change such a gift. To make it easier for testators to create such documents, and to subsequently amend them, without running afoul of the rules governing incorporation of subsequently-executed documents by reference, the legislature has enacted *Prob. Code § 6132*, discussed below.

Under *Prob. Code § 6132*, a testator may refer to a writing that directs disposition of tangible personal property not otherwise disposed of by a will [*Prob. Code § 6132; see Ch. 63, Will Provisions, §§ 64.494 (will provision referencing gifts made in separate writing), 64.495 (separate writing making gifts of testator's tangible personal property)*]. Such a

writing is only effective if an unrevoked will refers to the writing, the writing is dated and is either in the handwriting of or signed by the testator, and the writing describes the items and the recipients of the property with reasonable certainty [*Prob. Code § 6132(a)*]. The total value of property identified and disposed of in the writing must not exceed \$25,000, and the individual value of each item must not exceed \$5,000. Items with a value in excess of \$5,000 described in the writing will be disposed of as provided in the remainder clause of the will [*Prob. Code § 6132(g)*]. For the preceding purposes, "personal property" includes articles of personal or household use or ornament, including, but not limited to, furniture, furnishings, automobiles, boats, and jewelry, as well as precious metals in any tangible form, such as bullion or coins and articles held for investment purposes, but does not include coins or currency kept or acquired for their historical, artistic, collectable, or investment value apart from their normal use as legal tender for payment. Real property, mobilehomes [*see Civ. Code § 798.3* (definition)] intangible property, such as evidences of indebtedness, bank accounts and other monetary deposits, documents of title, or securities, are also excluded [*Prob. Code § 6132(h)*].

The writing may be written or signed before or after the execution of the will, and need not have significance apart from its effect on the dispositions of property made by the will [*Prob. Code § 6132(c)*]. The testator may make subsequent handwritten or signed changes to any writing. If there is an inconsistent disposition of tangible personal property as between writings, the most recent writing controls [*Prob. Code § 6132(d)*].

If a writing directing disposition of tangible personal property omits a statement as to the date of its execution, resulting in doubt over its provisions or the provisions of another writing inconsistent with it are controlling, then the writing omitting the statement is invalid to the extent of its inconsistency unless the time of its execution is established to be after the date of execution of the other writing [*Prob. Code § 6132(e)(1)*]. If the writing omits a statement as to the date of its execution, and it is established that the testator lacked testamentary capacity at any time during which the writing may have been executed, the writing is invalid unless it is established that it was executed at a time when the testator had testamentary capacity [*Prob. Code § 6132(e)(2)*].

A writing that meets the requirements of *Prob. Code § 6132* will be given effect as if it were actually contained in the will itself, except that if any person designated to receive property in the writing dies before the testator, the property will pass as further directed in the writing and, in the absence of any further directions, the disposition will lapse [*Prob. Code § 6132(c)*].

If a writing does not satisfy the conditions specified above, evidence may still be introduced regarding the testator's intent with respect to the disposition of the tangible personal property in question [*Prob. Code § 6132(b)*].

For a will provision referring to gifts of tangible personal property made in a separate writing, see *Ch. 63, Will Provisions, § 63.494*. For a form for a separate writing disposing of items of the testator's tangible personal property in accordance with *Prob. Code § 6132*, see *Ch. 63, Will Provisions, § 63.495*.

#### **[4] Events of Independent Significance**

A will may dispose of property by reference to acts and events that have significance apart from their effect on dispositions made by the will [*Prob. Code § 6131*]. These acts and events may occur before or after the execution of the will, or before or after the testator's death. The execution or revocation of the will of another person is such an event [*Prob. Code § 6131*].

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Wills Interpretation General Overview Estate, Gift & Trust Law Wills Interpretation Rules of Construction General Overview Estate, Gift & Trust Law Wills Interpretation Rules of Construction Conflicts of Laws Estate, Gift & Trust Law Wills Interpretation Rules of Construction Statutory Rules Estate, Gift & Trust

Law Wills Interpretation Testator's Intent General Overview



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DIVISION IV: WILLS AND TRUSTS  
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PART II. LEGAL BACKGROUND

*23-61 California Legal Forms--Transaction Guide § 61.21*

**AUTHOR:** Reviewed by Albert G. Handelman

**§ 61.21 California Statutory Will**

**[1] In General**

The California statutory will is a simple will form prescribed by the Probate Code [*see Prob. Code §§ 6223(a), 6240*]. It is designed to be made available to consumers in printed form and to be completed without the help of attorneys. The State Bar sells printed copies of the form to attorneys and the public.

Statutory wills are inflexible documents and rarely used by attorneys. In special circumstances, however, an attorney may use a California statutory will, or provide advice or assistance to a client who wishes to use one. If a client's estate is relatively simple, the attorney may help the client complete the statutory form, or at least provide the client with the printed form and some directions as to its use. California statutory wills have the advantage of being widely recognized and are almost always preferable to any will that a non-attorney might prepare for himself or herself. A California statutory will may also be an appropriate stopgap measure when a client needs a will at once and intends to prepare a more complex will at some time in the future.

**[2] Capacity to Make**

Any person of sound mind and over the age of 18 years may execute a California statutory will [*Prob. Code § 6220*]. Since the Family Code authorizes an emancipated minor to make or revoke a will [*see Fam. Code § 7050(e)(6)*], it appears that an emancipated minor also has the capacity to make a statutory will [*see Fam. Code § 7002* (when minor is emancipated) and discussion in § 61.11[1]].

California statutory wills are subject to the same rules of testamentary capacity as other wills [*see Prob. Code § 6220*]. For discussion of those rules, see § 61.11.

**[3] Execution and Witnesses**

*Prob. Code § 6221* states that to execute the California statutory will, the testator must complete the appropriate blanks

and sign the will, and each witness must observe the testator's signature and sign his or her name in the presence of the testator. The same section states that the will may be executed "only" in the manner specified.

Notwithstanding *Prob. Code* § 6221, the Court of Appeal has held that the testator need not personally complete the blanks on the form if he or she signs the will and if the will is signed by two witnesses who meet the requirements specified in *Prob. Code* § 6110 for the execution and attestation of a formal, witnessed will. In *Estate of Perry* (1996) [ *Estate of Perry* (1996) 51 Cal. App. 4th 440, 58 Cal. Rptr.2d 797 ], the testator was a patient in a convalescent home. His nephew purchased a California statutory will form in a stationery store and asked a friend to fill out the blanks. The nephew took the completed form to his uncle in the convalescent hospital, and the uncle signed it in the place indicated. Two witnesses also signed the will. After the testator's death, the will was contested on the ground that the testator did not personally complete the blanks. The trial court denied probate, but the Court of Appeal reversed, holding that when a will is signed by the testator and two attesting witnesses the general execution requirements of *Prob. Code* § 6110 are satisfied, even though the specific requirements of *Prob. Code* § 6221 are not. The Court of Appeal noted that *Prob. Code* § 6226(c) provides that, "notwithstanding Section 6110," a document executed on a California statutory will form is valid as a will if the form is signed by the testator, the court is satisfied that the testator knew and approved of the contents of the will and intended it to take testamentary effect, and the testamentary intent of the maker as reflect in the document is clear. The court concluded that this provision showed that *Prob. Code* § 6110 is generally applicable to the California statutory will, as it is to formal, witnessed wills [ *Estate of Perry* (1996) 51 Cal. App. 4th 440, 445, 58 Cal. Rptr. 2d 797 ]. Thus a will that meets the requirements of *Prob. Code* § 6110 cannot be denied probate merely because the blanks were not completed by the testator as specified in *Prob. Code* § 6221. Of course, it is a question of fact whether all of the requirements specified in *Prob. Code* § 6226(c) have been met in a given case; notwithstanding this, it is improper to deny probate to a California statutory will merely because the testator did not personally complete the blanks [ *Estate of Perry* (1996) 51 Cal. App. 4th 440, 445, 58 Cal. Rptr. 2d 797 ; see also *Estate of Smith* (1998) 61 Cal. App. 4th 259, 71 Cal. Rptr. 2d 424 (execution requirements met notwithstanding testator's failure to fill in some blanks on statutory will)].

A California statutory will that is not signed by two witnesses is nevertheless valid as a will if all of the following requirements are shown to be satisfied by clear and convincing evidence [*Prob. Code* § 6226(c)]:

- The form is signed by the testator.
- The court is satisfied that the testator knew and approved of the contents of the will and intended it to have testamentary effect.
- The testamentary intent of the maker as reflected in the document is clear.

#### **[4] Revocation and Amendment**

A California statutory will may be revoked and amended by codicil in the same manner as other wills [*Prob. Code* § 6226(a)]. If, after executing a statutory will, the testator's marriage is dissolved or annulled, the dissolution or annulment revokes any disposition of property made by the will to the former spouse and any nomination of the former spouse as executor, trustee, or guardian [*Prob. Code* § 6227(a)]. If the testator later remarries the former spouse, any disposition or nomination that was revoked solely by reason of such a dissolution or annulment is revived by the remarriage [*Prob. Code* § 6227(a)].

#### **[5] Limited Usefulness**

The California statutory will is not designed to reduce death taxes or other taxes, to transfer business-related assets, to create trusts, to transfer assets located outside California, to disinherit the testator's spouse or descendants, or to dispose of valuable interests in pension or profit-sharing plans [*Prob. Code* § 6240, Question 8].

Words in the printed form should not be crossed out, and there should be no additions to the printed form [*Prob. Code* § 6240, Question 9]. Any additions or deletions on the face of the form not made in accordance with the instructions will be given effect only when clear and convincing evidence shows that they would effectuate the clear intent of the testator [*Prob. Code* § 6226(b)]. In the absence of such a showing, the court may determine that the addition or deletion is ineffective and must be disregarded, or it may determine that all or part of the will is invalid, whichever is more likely to be consistent with the testator's intent [*Prob. Code* § 6226(b)].

The complete text of the California statutory will is set forth in *Prob. Code* § 6240 and reproduced in California Wills & Trusts, Div. III, *Complete Will Forms*, Will 20 (Matthew Bender).

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawWillsGeneral OverviewEstate, Gift & Trust LawWillsExecutionEstate, Gift & Trust

LawWillsStatutory Wills



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*23-61 California Legal Forms--Transaction Guide § 61.22*

**AUTHOR:** Reviewed by Albert G. Handelman

**§ 61.22 Uniform International Wills**

**[1] In General**

An international will is a will that is executed in conformity with *Prob. Code §§ 6381-6384* [*Prob. Code § 6380(a)*], which form a part of the Uniform International Wills Act [*Prob. Code §§ 6380-6390*]. This Act, which was adopted in California in 1979, is designed to increase the uniformity of wills among different states, to minimize the need for determining domiciles and applicable laws, and to reduce the likelihood that wills executed in one state or country will be invalidated because of noncompliance with the purely formal requirements of other states or counties [*Review of Selected 1979 California Legislation, Administration of Estates: International Wills, 11 Pacific L. J. 295 (1980)*]. Under the Act, a will is valid as to form, irrespective of the place where it was made, the location of the assets, and the nationality, domicile, or residence of the testator, if it is made in the form of an international will that complies with the requirements of the Act [*Prob. Code § 6381(a)*].

An international will may fill the special needs of a California resident who plans to move out of the state after executing a will in the state, or of a nonresident who seeks to execute a will in California. Because international wills are widely recognized in the United States and abroad, they may be taken to other jurisdictions with some assurance that they will not be invalidated in those jurisdictions. They may be revoked in the same manner as other wills [*Prob. Code § 6386*].

**[2] Authorized Persons**

An international will must be executed under the supervision or with the assistance of an "authorized person" or a "person authorized to act in connection with international wills" [*Prob. Code § 6380(b)*]. Under the Act, "authorized persons" and "persons authorized to act in connection with international wills" mean individuals who have been admitted to practice law before the courts of California and who are in good standing as active law practitioners of the state and persons, including members of the diplomatic and consular service of the United States designated by Foreign Service regulations, who are empowered by the laws of the United States to supervise the execution of international wills [*Prob. Code §§ 6380(b), 6388*].

### [3] Execution and Witnesses

Although an international will must be in writing [*Prob. Code § 6382(a)*], it may be written in any language, by hand or other means, and by the testator or some other person [*Prob. Code § 6382(a)*].

The testator must declare in the presence of two witnesses and of "a person authorized to act in connection with international wills" [*see Prob. Code §§ 6380(b), 6388* and discussion in [2], *above*] that the document is his or her will and that he or she knows its contents [*Prob. Code § 6382(b)*]. The testator need not inform the witnesses or the "authorized person" of the contents of the will [*Prob. Code § 6382(b)*].

The testator must sign the will or, if he or she has previously signed it, acknowledge his or her signature in the presence of the witnesses and the authorized person [*Prob. Code § 6382(c)*]. If the testator is unable to sign, the absence of a signature will not affect the validity of the will if the testator indicates the reason for his or her inability to sign and the authorized person notes the reason on the will [*Prob. Code § 6382(d)*]. In that case, any other person present (including the authorized person or one of the witnesses) may sign the testator's name at the testator's direction, if the authorized person notes this on the will [*Prob. Code § 6382(d)*]. There is no requirement that any person sign the testator's name for the testator [*Prob. Code § 6382(d)*]. The witnesses and the authorized person must then and there attest the will by signing in the presence of the testator [*Prob. Code § 6382(e)*].

### [4] Certificate of Due Execution

The "authorized person" [*see Prob. Code §§ 6380(b), 6388* and discussion in [2], *above*] must sign and attach a certificate to the will establishing that the requirements of the Act have been fulfilled [*Prob. Code § 6384*]. The certificate must be substantially in the form set forth in *Prob. Code § 6384*. The authorized person is required to keep a copy of the certificate and deliver another to the testator [*Prob. Code § 6384*]. In the absence of evidence to the contrary, the certificate of the authorized person is conclusive as to the formal validity of the instrument as a will under the International Wills Act [*Prob. Code § 6385*]. However, the absence or irregularity of a certificate will not affect the validity of the will [*Prob. Code § 6385*]. The complete text of the international will certificate is set forth in *Prob. Code § 6384* and reproduced in full in California Wills & Trusts, Div. IV, *Individual Will Provisions*, Alt. 100.40-1 (Matthew Bender).

### [5] International Wills Registry System

The California Secretary of State has established an international wills registry under which "authorized persons" [*see Prob. Code §§ 6380(b), 6388* and discussion in [2], *above*] may register information regarding the execution of international wills [*see Prob. Code § 6389*]. The information that may be registered is limited to the testator's name, Social Security number (or other individual identifying number established by law, if any), address, date, and place of birth, and the intended place of deposit or safekeeping of the instrument pending the testator's death [*Prob. Code § 6389*]. The information must be kept in the strictest confidence until the testator's death, and then made available to any person desiring information who presents a death certificate or other satisfactory evidence of death to the registry [*Prob. Code § 6389*]. At the request of the "authorized person," the Secretary of State may cause the information it receives to be transmitted to the registry of another jurisdiction as identified by the testator, if that other system adheres to rules protecting the confidentiality of information similar to those established in California [*Prob. Code § 6389*].

For further discussion of international wills and the Uniform International Wills Act, see California Wills & Trusts, Ch. 11, *Requisites of a Valid Will* (Matthew Bender).

#### Legal Topics:

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Wills General Overview Estate, Gift & Trust Law Wills Interpretation Rules of  
Construction Conflicts of Laws Estate, Gift & Trust Law Wills Statutory Wills



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*23-61 California Legal Forms--Transaction Guide §§ 61.23-61.99*

**AUTHOR:** Reviewed by Albert G. Handelman

**[Reserved]**

§§ 61.23[Reserved]



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A. Client Interview--Facts and Documents

*23-61 California Legal Forms--Transaction Guide*

**AUTHOR:** Reviewed by Albert G. Handelman

**NOTE:**

A will is an important estate planning document and should be planned and prepared as part of a comprehensive estate plan. While planning and preparing a client's will, the attorney should also counsel the client as to the client's needs for or interest in other estate planning strategies or arrangements, such as lifetime gifts, trusts, and durable powers of attorney. Ch. 60, *Estate Planning*, is a general introduction to the subject of estate planning and a guide to other estate planning chapters in this publication. Ch. 60 should be consulted before any other estate planning documents are prepared. Lifetime gifts and gift-giving strategies are covered in Ch. 60A, *Gifts*. Testamentary trusts are covered in Ch. 64, *Testamentary Trusts: Payment and Distribution Provisions*, Ch. 64A, *Testamentary Trusts: Trustee Provisions*, and Ch. 64B, *Testamentary Trusts: Administrative Provisions*. Durable powers of attorney are covered in Ch. 68, *Durable Powers of Attorney*. Revocable inter vivos ("living") trusts are covered in Ch. 70, *Complete Revocable Trust Forms*. Marital deduction trusts and trust strategies are covered in Ch. 71, *Marital Deduction Trust Provisions*. Irrevocable trusts are covered in Ch. 72, *Irrevocable Trusts*.



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A. Client Interview--Facts and Documents

*23-61 California Legal Forms--Transaction Guide § 61.100*

**AUTHOR:** Reviewed by Albert G. Handelman

**§ 61.100 Facts**

**NOTE:**

Ch. 60, *Estate Planning*, § 60.200[2], is a client interview checklist designed to be used by an estate planning attorney at the initial client interview. It includes questions designed to elicit all of the personal and financial information necessary to begin the preparation of an estate plan. It should also be used in preparation for the planning and drafting of a will.

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Estate, Gift & Trust LawWillsGeneral Overview



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*23-61 California Legal Forms--Transaction Guide § 61.101*

**AUTHOR:** Reviewed by Albert G. Handelman

**§ 61.101 Documents**

**NOTE:**

If originals of any of the documents described below are not available, copies may be furnished.

1. Any will previously executed by client.
2. Any trust instrument previously executed by client.
3. Any contract affecting client's power to make or revoke a will or trust (for example, contract to make will or devise or contract not to revoke will or devise, including antenuptial agreements).
4. Any contact evidencing client's rights in property (for example, joint venture agreement or partnership agreement).
5. Deeds to real property.
6. Deeds of trust or mortgages.
7. Certificates for stocks, bonds, or other securities.
8. Life insurance policies owned by client or on client's life.
9. Bank and brokerage account statements.

10. If client is member of a domestic partnership and has filed declaration of domestic partnership with Secretary of State, copy of declaration as filed [*Prob. Code* § 37; *Fam. Code* § 297(b); see § 61.19[4]].

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Estate, Gift & Trust Law Wills General Overview



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CHAPTER 61 WILL DRAFTING AND COMPLETE WILL FORMS  
PART III. TRANSACTION GUIDE  
A. Client Interview--Facts and Documents

*23-61 California Legal Forms--Transaction Guide §§ 61.102-61.109*

**AUTHOR:** Reviewed by Albert G. Handelman

**[Reserved]**

§§ 61.102[Reserved]



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*23-61 California Legal Forms--Transaction Guide § 61.110*

**AUTHOR:** Reviewed by Albert G. Handelman

**§ 61.110 Capacity to Make Will**

1. Determine whether client has testamentary capacity.

**NOTE:**

Generally, any individual who is 18 years of age or older and of sound mind has the capacity to make a will [*Prob. Code § 6100(a)*]. Although the attorney need not subject a client to unnecessary scrutiny, an attorney should not prepare a will for a client who obviously lacks the necessary capacity. If the attorney is to act as one of the witnesses to the will, some inquiry as to the client's capacity is clearly necessary, since a witness to a will must swear that it was executed "in all particulars as prescribed by law" [*see Prob. Code §§ 8220, 8253*]. For discussion of testamentary capacity, see § 61.11. For discussion of the attorney's ethical duty to discover a client's lack of testamentary capacity, see *California Wills & Trusts, Ch. 4, Ethical Considerations and Professional Responsibility, § 4.06[1]* (Matthew Bender).

2. Determine whether client's testamentary intent is free from vitiating influences, such as:

**NOTE:**

The execution of a will is ineffective if it was procured by duress, menace, fraud, or undue influence [*Prob. Code § 6014*; for discussion, *see § 60.12[2]-[4]*].

a. Undue influence.

b. Fraud.

c. Duress.

d. Menace.

e. Mistake.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Will Contests Testamentary Capacity General Overview Estate, Gift & Trust Law Will

Contests Testamentary Capacity Presumption Estate, Gift & Trust Law Wills General Overview



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*23-61 California Legal Forms--Transaction Guide § 61.111*

**AUTHOR:** Reviewed by Albert G. Handelman

**§ 61.111 Property Subject to Disposition by Will**

**NOTE:**

It is important to determine what property the client owns or has an interest in, and what property is subject to disposition under the client's will. The two lists of property will not always be the same. Many items of property will be paid, delivered, or otherwise transferred after the client's death to other persons pursuant to a joint tenancy survivorship, contractual provision, beneficiary designation, pay-on-death direction, or other instruction and will not be subject to disposition pursuant to the client's will. Property that will not be subject to disposition under the client's will generally includes such items as property held in trusts [*see* discussion in *Ch. 60, Estate Planning*, § 60.17[2], [3]], joint tenancy assets [*see* discussion in *Ch. 60, Estate Planning*, §§ 60.12[5], 60.13[1][f], 60.17[4][b]], accounts in banks or other savings institutions with pay-on-death payees, multiple-party accounts [*see* discussion *Ch. 60, Estate Planning*, § 60.17[4][c]], the proceeds of life insurance policies that are not payable to the estate or the executor [*see* discussion in *Ch. 60, Estate Planning*, §§ 60.13[1][h], 60.17[5]], and the proceeds of retirement and pension funds with designated pay-on-death beneficiaries.

1. Determine nature, value, location, and other relevant facts relating to client's property, including:
  - a. Real property.
  - b. Tangible personal property.
  - c. Investments, including securities, mutual funds, stocks, bonds, and similar items.

2. Characterize each item of client's property to determine whether it is:

**NOTE:**

It is essential to properly characterize property as separate, community, or quasi-community, as this will effect the client's power of testamentary disposition over the property. For general discussion of the characterization of property, and of the different types of property that may be disposed of by will, see § 61.14.

- a. Client's separate property.
- b. Community property of client and client's spouse.
- c. Quasi-community property of client and client's spouse.

3. Determine whether client holds property in any of following forms:

**NOTE:**

Property owned in tenancy in common is subject to disposition by will, while property held in joint tenancy is not [*see, e.g., Estate of England (1991) 233 Cal. App. 3d 1, 4, 284 Cal. Rptr. 361*], unless the joint tenancy is first severed [for discussion, *see* § 61.10[3][c]]. For a general discussion of estate planning considerations related to property held in joint tenancy and tenancy in common, see *Ch. 60, Estate Planning*, § 60.12[5], [6].

- a. Tenancy in common.
- b. Joint tenancy.

4. Determine whether there are any contractual limitations on client's power to dispose of property by will, such as:

**NOTE:**

Various types of contracts can affect the client's power to dispose of property by will. The most obvious of these is the contract to make a will, not to revoke a will, or to die intestate [*see* [d], *below; see also* discussion in *Ch. 60, Estate Planning*, § 60.17[8][b]]. However, other contracts that may also have important estate-planning consequences are premarital agreements, postnuptial agreements, and marital settlement agreements [for general coverage, *see* Ch. 111, *Premarital Agreements*, Ch. 112, *Post nuptial Agreements*; Ch. 120, *Complete Marital Settlement Agreements*].

- a. Premarital agreement.
- b. Postnuptial agreement.
- c. Marital settlement agreement.
- d. Contract to make will, not to revoke will, or to die intestate.

e. Partnership agreement.

f. Buy-sell agreement.

5. Determine whether client's testamentary power is subject to statutory limitation because client is resident of Veteran's Home of California.

**NOTE:**

If a veteran became a resident of the Veterans' Home of California before January 1, 1984, the veteran's will cannot leave any part of his or her estate to an officer or employee of the home unless the officer or employee would be eligible to take by intestate succession [*Mil. & Vet. Code § 1035.1(a)*]. If the veteran became a resident of the home after January 1, 1984, and is a resident at the time of death, the veteran's will is invalid insofar as it purports to dispose of money or personal property to anyone other than the veteran's spouse, children, grandchildren, father, or mother [*Mil. & Vet. Code § 1035.1(b)*].

6. Determine whether client has interest in any property held in trust, either under trust established by client or trust established by some other person for client's benefit.

**NOTE:**

A client will quite often establish a revocable inter vivos ("living") trust in connection with the execution of a will. In many cases, a client who consults an attorney for the preparation of a will may already have created such a trust. In either case, the provisions of the will should be closely coordinated with the provisions of the trust so that the client's overall estate plan is consistent. A will may devise property to the trustee of a revocable inter vivos trust [*see Prob. Code § 6300* and discussion in § 60.211[1][b]]. Such a devise is called a "pour-over" and is commonly used in many estate plans [*see* discussion in *Ch. 60, Estate Planning*, § 60.17[1][b], [c]]. For general coverage of revocable inter vivos trusts, see *Ch. 70, Complete Revocable Trust Forms* .

7. Determine whether client owns any life insurance policies, whether on client's own life or life of other person(s).

**NOTE:**

Although the death benefits under a life insurance policy may be payable to the client's estate, it is more common for such benefits to be payable to some other beneficiary, such as the client's spouse, children, or even a life insurance trust created by the client. If the proceeds are not payable to the estate, they will not be subject to disposition under the will. However, they will be subject to estate taxation on the client's death if the client holds any "incidents of ownership" in the policy [*see I.R.C. § 2042(2)* and discussion in *Ch. 72, Irrevocable Trusts*, § 72.12[2][e]].

8. Determine whether client owns any retirement accounts or plans, including qualified plans, individual retirement accounts (IRAs), or similar items.

**NOTE:**

Retirement accounts and plans typically provide for beneficiaries to whom the benefits will be paid after the client's death. When this is the case, they are not subject to disposition under the will.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawNonprobate TransfersGeneral OverviewEstate, Gift & Trust LawNonprobate TransfersJointly  
Held PropertyGeneral OverviewEstate, Gift & Trust LawNonprobate TransfersLife InsuranceEstate, Gift & Trust  
LawNonprobate TransfersLiving TrustsEstate, Gift & Trust LawWillsGeneral Overview



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*23-61 California Legal Forms--Transaction Guide § 61.112*

**AUTHOR:** Reviewed by Albert G. Handelman

**§ 61.112 Potential Devises**

**NOTE:**

This information will help the client and the attorney determine what provisions, if any, the will should make for potential devisees.

1. Determine whether client has spouse and, if so:
  - a. Date of marriage.
  - b. Whether client and spouse are living together or apart.
  - c. Approximate extent, location, value, and character of spouse's property.
  - d. Whether spouse has special financial, physical, or health needs that should be met after client's death.
  - e. Whether spouse is willing and able to act as executor of client's will [*see § 61.116*].
  - f. Whether spouse is willing and able to act as trustee of any trust created by client's will [*see § 61.117*].
2. If client is unmarried, determine whether client has domestic partner and, if so, whether:

**NOTE:**

The Family Code defines "domestic partners" as two adults who have chosen to share one

another's lives in an intimate and committed relationship [*Fam. Code § 297(a)*].

a. Client and domestic partner have filed valid Declaration of Domestic Partnership with California Secretary of State [*see Fam. Code §§ 298, 298.5*].

**NOTE:**

Existence of a domestic partnership will invoke application of the will revocation provisions of *Prob. Code § 6122.1* in the event that the domestic partnership is subsequently terminated [*see discussion in § 61.19[4][c]*].

b. If no declaration has been filed, whether:

(1) Client and domestic partner are eligible to file such a declaration and, if so;

**NOTE:**

The requirements for creating a domestic partnership are very specific, and not all cohabiting individuals qualify [*see Fam. Code § 297(b)*]. For discussion, see § 61.19[4].

(2) Whether or not there are any plans to file such a declaration.

c. Client and domestic partner have any written agreements or oral understandings regarding the ownership or disposition of their property.

3. Determine whether client has children and, if so:

a. Whether children are children of marriage of client and client's current spouse or of previous marriage.

b. Whether any of children are minors and, if so, whether they reside with client or elsewhere.

c. Whether any of children have special physical, emotional, or mental needs that should be met after client's death.

d. If any of children are adults, where they reside and whether they are willing and able to act as executor of client's will [*see § 61.116*].

e. If any of children are adults, whether they are willing and able to act as trustee of any trust created by client's will [*see § 61.117*].

f. Whether any of children have children of their own and, if so, whether client desires to make special provisions for them.

g. Whether any of the children are married and, if so, whether client desires to include provisions specifically including or excluding them from will or other estate planning documents.

4. Determine whether client has living parents and, if so, whether they have special needs that should be met after client's death.

5. Determine whether client has friends or other relatives who client wishes to receive property or other benefits under

will.

**NOTE:**

While most clients will wish to leave property to family members, it is not uncommon for clients to leave property to other persons with whom they have important relationships, such as domestic partners or long-time friends.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Wills General Overview Estate, Gift & Trust Law Wills Beneficiaries General Overview Estate, Gift & Trust Law Wills Bequests & Devises Estate, Gift & Trust Law Wills Pretermitted Heirs General Overview



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*23-61 California Legal Forms--Transaction Guide § 61.113*

**AUTHOR:** Reviewed by Albert G. Handelman

**§ 61.113 Need for Tax-Saving Strategies**

1. Determine whether client's estate plan should include marital deduction devise:

**NOTE:**

The unlimited marital deduction [*see I.R.C. § 2056*] is one of the most useful tax-saving provisions of the federal estate tax law. Most tax-saving planning for married couples who have assets in excess of the amount of the available federal estate and gift tax unified credit involves at least some use or consideration of the marital deduction. For detailed coverage of the marital deduction, see Ch. 71, *Marital Deduction Trust Provisions* .

a. Free of trust.

b. In one of following trust forms:

**NOTE:**

The benefits of the marital deduction can be achieved by devising property to the surviving spouse, free of trust or in the form of one of the trust arrangements that satisfy the requirements of the deduction [*see I.R.C. § 2056(b)(5), (7); Treas. Reg. § 20.2056(b)-2(b)*]; for discussion, *see § 61.212[1][c]*].

(1) Qualified terminable interest property (QTIP) trust.

**NOTE:**

The QTIP trust [*see I.R.C. § 2056(b)(7)*] is the most widely used type of marital deduction trust. It gives the surviving spouse a high degree of enjoyment and use of the trust property, while permitting the testator (or settlor) to determine in advance who will receive the property on the surviving spouse's death. This can be particularly desirable if one or both of the spouses have children by previous marriages and wish to ensure that those children will receive the trust property after the death of the surviving spouse. For discussion, see § 61.214[1][d]. For general description of the QTIP trust and its requirements, see §§ 71.13[4], 71.230[1].

(2) Life estate plus power of appointment trust.

**NOTE:**

A life estate plus power of appointment trust is one in which the income is payable to the surviving spouse annually or at more frequent intervals, the surviving spouse has a general power of appointment over the trust assets, and no person other than the surviving spouse has any power to appoint any part of the assets to any person other than the surviving spouse during the surviving spouse's lifetime [*I.R.C. § 2056(b)(5)*]. For general discussion of the requirements of this type of trust, see *Ch. 71, Marital Deduction Trust Provisions*, §§ 71.13[5], 71.231[1].

(3) Qualified domestic (QDOT) trust.

**NOTE:**

A qualified domestic trust (QDOT) [*see I.R.C. § 2056A*] is a trust that is designed to qualify transfers to a noncitizen spouse for the unlimited marital deduction. The requirements for a QDOT are detailed and specific, and are designed to ensure that the noncitizen spouse cannot take assets out of the country to avoid taxation. When one of the spouses is not a citizen of the United States, a QDOT will often be the only practical alternative to substantial estate tax liability. For discussion, see § Ch. 71, *Marital Deduction Trust Provisions*, § 71.13[7].

2. Determine whether value of client's estate is likely to exceed the "applicable exclusion amount" [*see I.R.C. §§ 2010(c)*] (table of graduated amounts) and discussion in § 60.13[4][b]] available on client's death (or, if client is married, when combined with surviving spouse's estate on death of surviving spouse, if client is married) and, if so, whether preservation of this unified credit must be specifically included in will.

**NOTE:**

Every person has a unified credit against estate and gift taxes. The amount of this credit, called the "applicable credit amount," shelters a specified amount of the person's property, referred to as the "applicable exclusion amount," from gift and estate taxation [*see I.R.C. §§ 2010(c), 2505*]. The applicable exclusion amount depends on the year of death. The amount is \$675,000 for decedents dying in 2001, \$1 million for decedents dying in 2002 and 2003, \$1.5 million for decedents dying in 2004 and 2005, \$2 million for decedents dying in 2006, 2007, and 2008, and \$3.5 million for decedents dying in 2009 [*I.R.C. § 2010(c)*]. Lifetime giving may reduce both the applicable credit amount and the applicable exclusion amount that are available to an estate [*I.R.C. §§ 2010(c), 2505(a)*]; *see* discussion in § 60.14[5]]. In determining whether the value of the client's estate is likely to exceed the applicable exclusion amount available in the year of the client's death, all of the property that will be included in the client's gross estate [*see I.R.C. § 2031*] for federal estate tax purposes must be included, not just property that is likely to form a part of the probate estate. If the client is married, the probability that the second spouse to die will receive property from the first spouse to die and that the property will form part of the

surviving spouse's gross estate must also be considered. For general discussion of the client's estate, see *Ch. 60, Estate Planning, § 60.12*.

3. Determine whether client's estate plan should include bypass trust.

**NOTE:**

A bypass trust (sometimes called a "credit shelter" or "exemption equivalent" trust) is designed to confer substantial lifetime benefits on the lifetime beneficiary while limiting the powers of that beneficiary over the trust property in such a way that it will not be included in the beneficiary's gross estate for federal estate tax purposes upon the beneficiary's death. A bypass trust is often used in conjunction with a marital deduction trust to structure an estate plan that will confer substantial lifetime benefits on a surviving spouse while avoiding all estate tax on the death of the first spouse to die and reducing (if not entirely eliminating) estate tax on the death of the second spouse. However, a bypass trust may also be used to confer benefits on beneficiaries other than a surviving spouse. For discussion, see § 61.212[1][f].

4. Determine whether generation-skipping transfer taxes are likely to be due after client's death and, if so, whether will should include specific provisions to optimize use of tax exemption.

**NOTE:**

The generation-skipping transfer tax (GST) [*see I.R.C. §§ 2600-2663*] is imposed on transfers of property to persons who are two or more generations younger than the transferor. The GST tax has been repealed, effective for generation-skipping transfers after 2009 [*I.R.C. § 2664*]. Until then, it remains in effect. Transfers that trigger GST are typically transfers to grandchildren or more remote descendants. However, transfers to other persons may also trigger the tax if the transferees are more than 37 years younger than the transferor [*I.R.C. § 2651(d)(2)*]. The GST is imposed at a flat rate, which is the maximum estate or gift tax rate in effect at the time of the transfer [*I.R.C. § 2641(a)(1)*]. However, every transferor is entitled to an exemption, the amount of which depends on the year of the transfer. The exemption amount is \$1 million for 1998 [*I.R.C. § 2631(a)*, before amendment by Pub. Law 107-16], \$1,010,000 in 1999, \$1,030,000 for 2000 [ *Rev. Proc. 99-42, 1999-2 C.B. 568* , § 3.18, *1999-46 I.R.B. 568, 1999-2 C.B. 568* ], and \$1,060,000 for 2001 [ *Rev. Proc. 2001-13, 2001-1 C.B. 337* , § 3.18, *2001-3 I.R.B. 337, 2001-1 C.B. 337* ]. Inflation adjustments will also be made for 2002 and 2003 [*I.R.C. § 2631(c)*, before amendment by Pub Law 107-16]. Beginning for generation-skipping transfers after 2003, the exemption amount is determined by the estate tax exclusion amount for the calendar year. [*I.R.C. § 2631(c)*]. For 2004 and 2005, the amount is \$1.5 million; for 2006 through 2008, the amount is \$2 million; for 2009, the amount is \$3.5 million [*I.R.C. §§ 2010(c), 2631(a), (c)*]. Married persons may thus transfer property equal to twice the exemption amount in a form that is subject to the GST without subjecting any of the transfer to the GST [*I.R.C. § 2631*].

5. Determine whether client's estate plan should include disclaimer trust.

**NOTE:**

A disclaimer trust is a trust that is designed to hold, administer, and distribute any property that a devisee may elect to disclaim after the testator's death. If property that the devisee would otherwise be entitled to receive (either outright or in trust) is effectively disclaimed [*see I.R.C. § 2518; Treas. Reg. §§ 25.2518-1-25.2518-3*], the property will pass into the trust and be removed from that devisee's estate for federal estate tax purposes. The trust can be constructed so that a devisee who is the surviving spouse will still receive substantial lifetime benefits from the trust. Disclaimer trusts are often used in estate plans that are designed to reduce the over-all estate tax burden on the combined estates of married persons. They can be used to defer decisions on allocation of trusts or devises until after the death of the first spouse, when the consequences of allocation will generally be seen much more clearly than when

the will is executed. For further discussion of disclaimer trusts, see *Ch. 71, Marital Deduction Trust Provisions, § 71.16*.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Wills General Overview Tax Law Federal Estate & Gift Taxes General Overview



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*23-61 California Legal Forms--Transaction Guide § 61.114*

**AUTHOR:** Reviewed by Albert G. Handelman

**§ 61.114 Need for Trust Planning**

**NOTE:**

Although trusts can be useful tax-saving devices under some circumstances, they can also have important non-tax uses. These uses are usually related to a beneficiary's need for asset management.

1. Determine whether client's estate plan should include one or more trusts to provide care for minor child or children.

**NOTE:**

Since minor children have only limited power to contract with respect to their own property [*see Fam. Code §§ 6700, 6701, 6710*], they almost always need some sort of help in managing their property. Although trust arrangements are not the only means for providing this kind of help, they are among the most popular, flexible, and generally useful. Estate plans of clients who have minor children often include trusts that call for the trust property to be managed and distributed for the benefit of the children during their minorities and distributed to the children when they become adults or at some specified age or ages after they become adults.

2. Determine whether client's estate plan should include a trust or trusts to provide care for an aged family member.
3. Determine whether client's estate plan should include a trust or trusts to provide asset management for an adult family member who is unable or unwilling to accept responsibility for managing assets.

4. Determine whether client's estate plan should include a trust or trusts to provide for special needs of disabled family member.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsGeneral OverviewEstate, Gift & Trust LawTrustsSpendthrift TrustsGeneral  
OverviewEstate, Gift & Trust LawTrustsTestamentary TrustsEstate, Gift & Trust LawWillsGeneral Overview



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*23-61 California Legal Forms--Transaction Guide § 61.115*

**AUTHOR:** Reviewed by Albert G. Handelman

**§ 61.115 Need for Guardianship Planning**

1. Determine whether client could leave minor children who will need guardian of person.
2. Determine whether client could leave minor children who will need guardian of estate.
3. If guardian of person and/or estate might be needed, determine who would make suitable guardian(s).

**NOTE:**

The selection of a potential guardian is an important decision and requires careful consideration. The same person, if qualified, may serve both as guardian of the person and guardian of the estate. A guardian of the person of a minor child will generally be needed if both parents are deceased. However, a guardian of the estate may not be needed if any property left for the benefit of the child is in a trust. For a general discussion of guardians, see Ch. 66, *Guardianships* .

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawConservators & GuardiansGuardians for MinorsEstate, Gift & Trust LawConservators & GuardiansTestamentary GuardiansEstate, Gift & Trust LawWillsGeneral Overview



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*23-61 California Legal Forms--Transaction Guide § 61.116*

**AUTHOR:** Reviewed by Albert G. Handelman

**§ 61.116 Selection of Executor**

1. Determine whether family member or friend is qualified and willing to act as executor of client's will.

**NOTE:**

The selection of an executor is an important decision and deserves careful consideration.  
For general discussion of executors, see Ch. 65, *Executors* .

2. Determine whether professional executor would best suit needs of estate.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawProbatePersonal RepresentativesGeneral OverviewEstate, Gift & Trust LawProbatePersonal  
RepresentativesAppointmentEstate, Gift & Trust LawWillsGeneral Overview



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*23-61 California Legal Forms--Transaction Guide § 61.117*

**AUTHOR:** Reviewed by Albert G. Handelman

**§ 61.117 Selection of Trustee**

**NOTE:**

For general coverage of the selection, qualifications, powers, and responsibilities of trustees, see Ch. 64A, *Testamentary Trusts: Trustee Provisions* .

1. If client's estate plan is to include one or more trusts, determine whether family member or friend is qualified and willing to act as trustee.
2. If client's estate plan is to include one or more trusts, determine whether professional trustee would best suit needs of trust.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsTrusteesGeneral OverviewEstate, Gift & Trust LawTrustsTrusteesAppointmentEstate, Gift & Trust LawTrustsTrusteesMultiple Trustees



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*23-61 California Legal Forms--Transaction Guide §§ 61.118-61.129*

**AUTHOR:** Reviewed by Albert G. Handelman

**[Reserved]**

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*23-61 California Legal Forms--Transaction Guide § 61.130*

**AUTHOR:** Reviewed by Albert G. Handelman

**§ 61.130 General Drafting Rules**

1. To ensure precise identification of devisees, guardians, executors, and trustees named in will, observe following rules with respect to each such person:

- a. Use individual's full and correct legal name.
- b. Spell name correctly.
- c. Include any regularly or frequently used variations on legal names (e.g., "John George Adams, also known as Jack Adams and J. George Adams, Jr.").
- d. When appropriate, state relationship of each individual named in will to testator (e.g., "my uncle, John Edward White").
- e. Include state, town, or city in which individual resides, or full mailing address, when this would help to locate person after testator's death (e.g., "my nephew, John Robert White, of Denver, Colorado" or "my brother, William Henry White, who resides at 112 Maple Street, Springfield, Massachusetts").
- f. When describing corporations and unincorporated associations, use full and proper name of each organization (e.g., "Bank of America, National Trust and Savings Association" or "Los Angeles County chapter of the American Heart Association").

**NOTE:**

Precise description of corporations and unincorporated associations may be particularly

important if they are to be devisees under the will. In one case, an attorney drafted a will leaving one quarter of the residue of the client's \$40 million estate to the "Society for the Prevention of Cruelty to Animals (Local or National)." After the client's death, claims to the devise were made by different SPCA's in different cities, and the probate court had to conduct 13 days of hearings before determining that the client intended the devise to be distributed to local and national humane societies as a group. Several of the contesting societies then sued the attorney, arguing that his failure to describe the residuary devisee with specificity had forced them to retain counsel and participate in lengthy legal proceedings to defend their positions. The court found that the attorney was not liable, but only because none of the societies could show that a duty was owed to them as intended beneficiaries [ *Ventura County Humane Society v. Holloway* (1974) 40 Cal. App. 3d 897, 905-906, 115 Cal. Rptr. 464 ] .

2. Avoid obscure, arcane, or anachronistic legal language, such as:

a. "Last will and testament."

**NOTE:**

Although the words "will" and "testament" at one time had distinct meanings, they are now generally regarded as synonymous. Modern drafting practice favors the elimination of unnecessary or archaic words. For this reason, this publication generally uses the word "will" in all legal discussions and forms.

b. "Bequest" and "legacy."

**NOTE:**

Although "bequest" was traditionally used to describe a testamentary gift of personal property and "devise" to describe a testamentary gift of real property, there is no distinction between these terms in modern legal practice. Some Probate Code provisions relating to wills refer to "devises," while others refer to "transfers" or simply "gifts" [*see Prob. Code §§ 21101-21140* (rules for interpretation of instruments)]. In this publication, a gift made by a will is commonly described as a "devise" in legal discussions. "Gift" is generally used in the forms, because that word is widely understood by nonlawyers and less likely to be misunderstood by clients, executors, and persons named in the will.

3. Minimize extraneous material that has no legal effect, such as:

a. Recitations of testamentary capacity and freedom from vitiating influences such as fraud, duress, menace, undue influence, and mistake.

**NOTE:**

It was common at one time to include a recitation of capacity in the introductory paragraph of a will. Such a recitation commonly stated that the testator was "of sound and disposing mind and memory" and "not actuated by any fraud, duress, menace, or undue influence." However, these recitations have little or no probative force and are now generally avoided. A testator who is acting under fraud will not be aware of the fact, and a testator who has been induced by duress, menace, or undue influence to make a will in all probability will have been similarly induced to declare that the will was free of any such influence. Moreover, every testator is presumed to be of sound mind and to possess testamentary capacity until the contrary is established [ *Estate of Sanderson* (1959) 171

*Cal. App. 2d 651, 660, 341 P.2d 358].*

b. Elaborate statements of motivation or beliefs.

c. Precatory language.

**NOTE:**

Precatory language expresses a testator's desire, hope, or wish, but is not binding on the executor or the beneficiaries. It commonly begins with an introductory phrases such as "it is my wish that" or "it is my desire that." Precatory language can cause problems in judicial construction with respect to whether or not the testator intended it to be binding, and can result in unnecessary litigation by disgruntled beneficiaries if the executor or trustee does not act in accordance with the language. Although circumstances can exist in which the use of precatory language is appropriate, its use should be thought out carefully before it is inserted into a will. Furthermore, it should be carefully drafted to make clear that it is not binding and that the executor or trustee will incur no liability to any potential beneficiary for failing to follow it.

4. Avoid defamatory statements.

**NOTE:**

Although the California courts apparently have never found a testator liable for a defamatory statement in a will, courts in other states have done so, and the tort of testamentary defamation may eventually be recognized in California [*see Hudak, The Sleeping Tort: Testamentary Libel, 12 Cal. West. L. Rev. 491 (1976)*].

5. Avoid provisions that are illegal, immoral, or contrary to public policy.

**NOTE:**

Restraints on alienation are contrary to public policy and unenforceable [*see Civ. Code § 711; Tucker v. Lassen Sav. & Loan Assn. (1974) 12 Cal. 3d 629, 635-636, 116 Cal. Rptr. 633, 526 P.2d 1169; La Sala v. American Sav. & Loan Assn. (1971) 5 Cal. 3d 864, 877-882, 97 Cal. Rptr. 849, 489 P.2d 1113; see also the Legal Background to Ch. 67, Future Interests and Perpetuities*].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawWillsGeneral OverviewEstate, Gift & Trust LawWillsBeneficiariesGeneral OverviewEstate, Gift & Trust LawWillsBequests & Devises



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*23-61 California Legal Forms--Transaction Guide § 61.131*

**AUTHOR:** Reviewed by Albert G. Handelman

**§ 61.131 Organization of Will**

1. Title document "Will of" followed by testator's name.

**NOTE:**

It was common at one time for wills to be titled as the client's "Last Will and Testament." However, since the words "will" and "testament" are now generally regarded as synonymous, and since modern drafting practice favors the elimination of unnecessary or archaic words and phrases, it is preferable to simply title the will as indicated.

2. Organize will in logical way by:

- a. Grouping provisions together by subject matter.

**NOTE:**

This kind of organization will make the will easier to read, facilitate the location of specific provisions, and help the court to ascertain the client's intentions, should judicial review ever become necessary. Grouping related provisions together also makes it easier to spot potential ambiguities and inconsistencies before the will is executed.

- b. Subdividing will into articles and sections.

**NOTE:**

Subdividing the will into numbered articles and sections will ease the task of organizing the will in a logical way, facilitate internal cross-references, and make it possible to precisely identify particular parts of the will. This kind of subdivision will be most helpful

if it is ever necessary to cite portions of the will to a court or to third parties (such as insurance companies, title companies, broker, and transfer agents) who may be called upon to assist in carrying out provisions of the will.

c. Supplying captions for each article and section.

**NOTE:**

Supplying each article and section of the will with descriptive captions will make it easier to scan the will and quickly locate particular provisions. Some attorneys avoid captions, believing that they have a tendency to distort the operative language of the will. It is a general rule of interpretation that the words of an instrument are to receive an interpretation that will give every expression some effect, rather than one that will render any of the expressions inoperative [*Prob. Code § 21120*]. However, any danger posed by this rule may be overcome by including a statement that the captions are for convenience of reference only and are not to be treated as a substantive part of the will provisions themselves.

4. Include articles dealing with the following, to the extent applicable to the client's individual needs:

**NOTE:**

The order of articles shown below is the one followed by the wills in this chapter. If the attorney wishes to adopt another order of articles, he or she may do so; however, some logical arrangement of the essential provisions of the will must be adopted. Not all of the provisions listed below need be included in every will. For example, provisions dealing with the trustee will be appropriate only in wills that create trusts, and provisions dealing with the guardian will be appropriate only if the client has minor children.

**PRACTICE TIP:**

When "gathering" forms from different sources in the preparation of a will or any other estate planning document, strict attention must be paid to the intended use of each form. For example, wills and forms for wills and individual will provisions are typically written in the first person (e.g., "my personal residence"). By contrast, non-testamentary trusts and forms for such trusts and their individual provisions are typically written in the third person (e.g., "the settlor's personal residence"), and often assume more than one settlor (e.g., "the settlors' personal residence"). Thus, care must be taken to conform each specific form used in a given drafting project to the type of document being produced, in order to insure clarity and consistency. *Commentary by Albert G. Handelman.*

a. Introductory provisions, such as:

- (1) Marital status declaration.
- (2) Identification of spouse, children, and other beneficiaries.
- (3) Description of property subject to disposition under the will.
- (4) Existence or nonexistence of a contract to make a will, not to make a will, or to die intestate.

b. Particular gifts.

c. Residuary gifts.

d. Trust distributions.

e. The executor, including:

- (1) Nomination of the executor, any coexecutors, and successor executors.
- (2) The executor's bond.
- (3) The executor's compensation.
- (4) The executor's powers and duties.

f. The trustee, if any, including:

- (1) The nomination of trustees and alternate trustees.
- (2) The trustee's bond.
- (3) The trustee's powers and duties.

g. The guardian, if any, including:

- (1) The nomination of guardians and alternate guardians.
- (2) The guardian's powers and duties.

h. Concluding provisions, including:

- (1) Apportionment of death taxes.
- (2) Payment of debts.
- (3) Simultaneous death provisions, if any.
- (4) Disinheritance clauses.
- (5) No-contest clauses.
- (6) Funeral and burial directions.

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Estate, Gift & Trust LawWillsGeneral Overview



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*23-61 California Legal Forms--Transaction Guide § 61.132*

**AUTHOR:** Reviewed by Albert G. Handelman

**§ 61.132 Basic Will Arrangements**

**NOTE:**

There are seven complete wills in this chapter. They have been chosen to illustrate basic will arrangements that will commonly be encountered in the attorney's office. Before drafting a will for a particular client, the attorney should examine each of the seven wills and determine which most nearly meets the client's needs. Any of the wills may be modified as necessary to address a client's particular needs, wishes, or concerns. For will provisions useful in modifying the complete will forms in this chapter, see Ch. 63, *Will Provisions* ; see also Ch. 65, *Executors* . For trust provisions useful in modifying the complete forms in this chapter, see Ch. 64, *Testamentary Trusts: Payment and Distribution Provisions* , Ch. 64A, *Testamentary Trusts: Trustee Provisions* , Ch. 64B, *Testamentary Trusts: Administrative Provisions* , and Ch. 71, *Marital Deduction Trust Provisions* . If none of the wills in this chapter approximates the client's needs, the attorney must plan and draft an individual will for that purpose.

1. Select will in § 61.200[2] if client:
  - a. Is not married.
  - b. Has no children.
  - c. Has no need for tax-saving strategies.
  - d. Wishes to leave bulk of estate to relatives or friends.

## 2. Select will in § 61.201[2] if client:

- a. Is not married.
- b. Has children who are minors or who otherwise need to be cared for by a trust (such as a disabled child).
- c. Has no need for tax-saving strategies.
- d. Wishes to leave the bulk of estate in separate trusts for the benefit of children.

## 3. Select will in § 61.210[2] if client:

- a. Is married.
- b. Has children.
- c. Has no need for tax-saving strategies.
- d. Wishes to leave entire estate outright to spouse and children.

## 4. Select will in § 61.211[2] if client:

- a. Is married.
- b. Has children.
- c. Has no need for tax-saving strategies.
- d. Wishes to "pour over" bulk of estate to inter vivos ("living") trust.

## 5. Select will in § 61.212[2] if client:

- a. Is married.
- b. Has children.
- c. Needs tax-saving strategies because combined values of estates of client and spouse are likely to exceed "applicable exclusion amount" [*see I.R.C. § 2010(c)* (table of graduated amounts) and discussion in § 60.13[4][b]] available on death of surviving spouse.

**NOTE:**

Every person has a unified credit against estate and gift taxes. The amount of this credit, called the "applicable credit amount," shelters a specified amount of the person's property, referred to as the "applicable exclusion amount," from gift and estate taxation [*see I.R.C. §§ 2010(c), 2505*]. The applicable exclusion amount depends on the year of death. The amount is \$675,000 for decedents dying in 2001, \$1 million for decedents dying in 2002 and 2003, \$1.5 million for decedents dying in 2004 and 2005, \$2 million for decedents dying in 2006, 2007, and 2008, and \$3.5 million for decedents dying in 2009 [*I.R.C. §*

2010(c), *see* discussion in § 60.13[4][b]]. Lifetime giving may reduce both the applicable credit amount and the applicable exclusion amount [*I.R.C.* §§ 2010(c), 2505(a); *see* discussion in § 60.14[5]].

d. Wishes to leave all property to spouse and children in manner that will give spouse optimum lifetime use of property.

e. Wishes to make use of federal estate tax marital deduction [*see I.R.C.* § 2056] and unified credit against estate and gift taxes [*see I.R.C.* §§ 2010 (estate tax), 2505 (gift tax)] to reduce overall death tax liability in estates of both spouses.

**NOTE:**

This will assumes that the value of the combined estates of the testator and the testator's spouse will exceed the "applicable exclusion amount" [*see I.R.C.* § 2010(c) (table of graduated amounts) and discussion in § 60.13[4][b]] available on the death of the surviving spouse. On the death of the surviving spouse, the trust is divided into separate shares for each of the testator's children. Each child will receive a share on the spouse's death or on the date the child reaches a specified age, whichever occurs later. Shares are distributed outright to the issue of any deceased children. A disclaimer trust is included, to hold any assets that the spouse elects to disclaim after the testator's death.

6. Select will in § 61.213[2] if client:

a. Is married.

b. Has children.

c. Needs tax-saving strategies because combined value of estates of client and spouse are likely to exceed "applicable exclusion amount" [*see I.R.C.* § 2010(c) and discussion in § 60.13[4][b]] available on death of surviving spouse.

d. Wishes to leave entire estate in trust so that surviving spouse will have optimum lifetime control over trust assets.

e. Wishes to take advantage of unlimited marital deduction [*see I.R.C.* § 2056] and "applicable exclusion amount" [*see I.R.C.* § 2010(c) and discussion in § 60.13[4][b]] available in each estate to completely avoid estate tax on death of first spouse and to reduce (if not totally eliminate) estate taxes on death of second spouse.

**NOTE:**

This will provides for three trusts. The first, called the "Power of Appointment Trust," is designed to qualify for the unlimited marital deduction as a "lifetime income plus power of appointment" trust [*see I.R.C.* § 2056(b)(5) and discussion in *Ch. 71, Marital Deduction Trust Provisions*, § 71.13[5]]. The second, called the "Bypass Trust," is designed to take advantage of the unified credit available in the testator's estate [*see I.R.C.* §§ 2010 (estate tax), 2505 (gift tax) and discussion in § 60.13[4][b]] and, on the death of the surviving spouse, to "bypass" that estate for estate tax purposes [*see* discussion in § 61.212[1][f]]. The third, called the "Disclaimer Trust," is designed to hold any property that the surviving spouse elects to disclaim. The surviving spouse is given lifetime interests in all three of the trusts.

7. Select will in § 61.214[2] if client:

a. Is married.

b. Has children.

c. Needs tax-saving strategies because combined value of estates of client and spouse are likely to exceed available unified credit "applicable exclusion amount" [*see* "applicable exclusion amount" [*see I.R.C. § 2010(c)* and discussion in § 60.13[4][b]] available on death of surviving spouse.

d. Wishes to leave all property in trust so that surviving spouse will have optimum lifetime control over property.

e. Wishes to take advantage of unlimited marital deduction [*see I.R.C. § 2056*] and unified credit available in each estate [*see I.R.C. §§ 2010* (estate tax), 2505 (gift tax) and discussion in § 60.13[4][b]] to completely avoid estate tax on death of first spouse and to reduce (if not totally eliminate) estate taxes on death of second spouse.

f. Wishes to retain right to dispose of trust assets on surviving spouse's death by making "marital deduction gift" to surviving spouse in form of a qualified terminal interest property (QTIP) trust [*see I.R.C. § 2056(b)(7)* and discussion in § 61.214[1][d]].

**NOTE:**

This will provides for three trusts. The first, called the "QTIP Trust," qualifies for the unlimited marital deduction as a "qualified terminable interest property" trust [*see I.R.C. § 2056(b)(7)* and discussion in *Ch. 71, Marital Deduction Trust Provisions, § 71.13[4]*]. The second, called the "Bypass Trust," is designed to take advantage of the unified credit [*see I.R.C. § 2010(c)* and discussion in § 60.13[4][b]] available in the testator's estate and, on the death of the surviving spouse, to "bypass" that estate for estate tax purposes [*see* discussion in § 61.212[1][f]]. The third, called the "Disclaimer Trust," is designed to hold any property that the surviving spouse elects to disclaim. The surviving spouse is given lifetime interests in all three of the trusts.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawWillsGeneral Overview



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*23-61 California Legal Forms--Transaction Guide §§ 61.133-61.149*

**AUTHOR:** Reviewed by Albert G. Handelman

**[Reserved]**

§§ 61.133[Reserved]



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*23-61 California Legal Forms--Transaction Guide § 61.150*

**AUTHOR:** Reviewed by Albert G. Handelman

**§ 61.150 Preparation for Execution and Attestation of Will Made by Client**

1. Prepare for execution of will, by:

a. Making appointment with client for execution of will.

**NOTE:**

Wills usually are signed in the attorney's office. However, they may be executed in the client's home or in a hospital, convalescent home, or similar location when appropriate to meet the client's individual needs or preference.

b. Arranging for two witnesses who meet following requirements:

**NOTE:**

A witnessed will must be signed by at least two persons acting as witnesses [*Prob. Code § 6110(c)(1)*]. There is no age requirement for witnesses to wills. Although a will is not invalid merely because it is signed by an interested witness [*Prob. Code § 6112(b)*], a devise to an interested witness is presumed to have been procured by duress, menace, fraud, or undue influence unless there are at least two other witnesses who are disinterested [*Prob. Code § 6112(b)*]. However, this presumption does not apply if the devise is made to the witness in a fiduciary capacity only (e.g., as trustee) [*Prob. Code § 6112(c)*]. See discussion in § 61.13[1][c].

(1) Are not devisees under will.

(2) Are likely to be available to offer evidence if and when will is offered for probate.

**PRACTICE TIP:**

It is often most practical for the drafting attorney to act as one of the witnesses. The attorney will almost never be an interested witness, and the State Bar is usually able to locate attorneys even after they have retired. *Commentary by Albert G. Handelman.*

2. Submit complete will to client for review and approval.

**NOTE:**

The client should be given ample opportunity to review the will in a private setting. The attorney should then meet with the client to answer any questions that the client may wish to ask, to explain any parts of the will that the client does not understand, and to make any corrections or changes that may be required. The process of review and approval should not be hurried. When feasible, the advance preparation of a draft may make the most sense.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Will Contests Testamentary Formalities General Overview Estate, Gift & Trust Law Will Contests Testamentary Formalities Signature Placements Estate, Gift & Trust Law Will Contests Testamentary Formalities Witnesses Attestation & Subscription Estate, Gift & Trust Law Will Contests Testamentary Formalities Witnesses Qualifications Estate, Gift & Trust Law Wills Execution



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*23-61 California Legal Forms--Transaction Guide § 61.151*

**AUTHOR:** Reviewed by Albert G. Handelman

**§ 61.151 Execution of Will by Client**

1. After client has reviewed and approved will, summon witnesses and introduce them to client (if they are not already acquainted).
2. In presence of witnesses, ask client: "Is this your will?"

**NOTE:**

The Probate Code does not require a formal declaration that the will is the testator's will. However, the testator and the witnesses must understand that the instrument they sign is the testator's will [*Prob. Code § 6110(c)(1)*]. This requirement is satisfied if it is apparent from the testator's conduct and the surrounding circumstances that the instrument is a will [*Tentative Recommendation Relating to Wills and Intestate Succession*, 16 Calif. L. Rev. Comm'n Reports 2394 (1982)]. The testator's affirmative response to the foregoing question is an appropriate and relatively simple method of establishing the required understanding. It is neither necessary nor appropriate to disclose the contents of the will to witnesses [*Tentative Recommendation Relating to Wills and Intestate Succession*, 16 Calif. L. Rev. Comm'n Reports 2394 (1982)].

3. Request that testator date will [*see § 61.13[2][c]*].
4. Request that testator sign will in presence of witnesses.

**NOTE:**

Although the Probate Code no longer requires that the witnesses be present when the testator signs (or that the testator be present when the witnesses sign) [*see Prob. Code §*

6110(b), (c)(1)], it will be convenient in most cases to complete the execution and attestation at one time and place while all persons concerned are present.

5. If testator is unable to sign will without assistance, use one of following methods:

a. Some other person may help client sign by guiding client's hand [ *Estate of Holloway (1925) 195 Cal. 711, 719, 235 P. 1012* ] .

**NOTE:**

A person acting in the testator's presence and by the client's direction may sign the testator's name, or merely guide the client's hand while he or she signs [ *Estate of Holloway (1925) 195 Cal. 711, 719, 235 P. 1012* ; *Estate of Clark (1915) 170 Cal. 418, 424, 149 P. 828* ] . It may be preferable to guide the client's hand, since this may make it easier to prove that the signature was in the client's presence and by the client's direction.

b. Client may make his or her mark, after which some other person will write his or her name near the mark and then sign as a witness [see *Civ. Code § 14*; *Code Civ. Proc. § 17*].

c. Client may direct another person to sign his or her name in his or her presence [see *Prob. Code § 6110(b)(2)*].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Will Contests Testamentary Formalities Signature Placements Estate, Gift & Trust Law Wills Execution



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*23-61 California Legal Forms--Transaction Guide § 61.152*

**AUTHOR:** Reviewed by Albert G. Handelman

**§ 61.152 Attestation of Will Made by Client**

1. Request that witnesses sign will in client's presence.

**NOTE:**

Although the Probate Code does not require that the witnesses sign in the client's (or in each other's) presence, it is good practice in most cases to have them sign at the time that they witness the client's signature. If a question should later arise as to the genuineness of the witnesses' signatures, or if the attestation itself is challenged, the fact that the witnesses signed in each other's presence may provide evidentiary support.

2. Request that witnesses write their residence addresses in the spaces provided in the attestation clause.

**NOTE:**

Although there is no requirement that the witnesses supply their addresses, this information will make it easier to locate them if and when it is necessary to probate the will.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Will Contests Testamentary Formalities General Overview Estate, Gift & Trust Law Will Contests Testamentary Formalities Witnesses Attestation & Subscription Estate, Gift & Trust Law Wills Execution



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*23-61 California Legal Forms--Transaction Guide §§ 61.153-61.159*

**AUTHOR:** Reviewed by Albert G. Handelman

**[Reserved]**

§§ 61.153[Reserved]



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*23-61 California Legal Forms--Transaction Guide § 61.160*

**AUTHOR:** Reviewed by Albert G. Handelman

**§ 61.160 Preparation for Execution and Attestation of Will Made by Conservator**

**NOTE:**

A conservatee who is competent to make a will may do so [*Prob. Code § 1871(c)*]. However, a conservator of the estate may also make a will for the conservatee if the court first authorizes the action [*Prob. Code §§ 2580(b)(13), 6100(b), 6100.5(c)*]. A conservator of the estate might seek authority to do this if the conservatee lacks the mental competence to make the will or if the conservatee is mentally competent to make the will but physically unable to do so. A will that is made *for* a conservatee differs from a will that is made *by* a conservatee, but which the conservatee is physically unable to sign. For discussion, see § 61.11[3]. The Probate Code offers no specific guidance as to the execution or attestation formalities for wills made by conservators, but the same rules that govern the execution and attestation of wills made personally by the testator should govern.

This guide assumes that the necessary judicial authority for the conservator to make the will has already been obtained.

1. Prepare for execution of will, by:
  - a. Making appointment with conservator for execution of will.
  - b. Arranging for two witnesses who meet following requirements [*see Prob. Code § 6110(c)(1); see also § 61.150, P 1(b) NOTE*].
    - (1) Are not devisees under will.

(2) Are likely to be available to offer evidence if and when will is offered for probate.

2. Submit complete will to conservator for review and approval.

**NOTE:**

The conservator should be given ample opportunity to review the will in a private setting. See § 61.150, P 2 NOTE.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Will Contests Testamentary Formalities General Overview Estate, Gift & Trust Law Will Contests Testamentary Formalities Signature Placements Estate, Gift & Trust Law Will Contests Testamentary Formalities Witnesses General Overview Estate, Gift & Trust Law Wills Execution



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*23-61 California Legal Forms--Transaction Guide § 61.161*

**AUTHOR:** Reviewed by Albert G. Handelman

**§ 61.161 Execution of Will Made by Conservator**

1. After conservator has reviewed and approved will, summon witnesses and introduce them to conservator (if they are not already acquainted).
2. In presence of witnesses, ask conservator: "Is this the will you have made for \_\_\_\_\_ (*name of conservatee*) under the authority of the order issued by the \_\_\_\_\_ (*name of county*) Superior Court?"

**NOTE:**

The Probate Code does not require this kind of formal declaration. However, such a declaration will help to establish that the person making the will and the witnesses all understand that the instrument they sign is the conservatee's will [*see Prob. Code § 6110(c)(1); see also § 61.151, P 2 NOTE*].

3. Request that conservator date will [*see § 61.13[2][c]*].
4. Request that conservator sign will in presence of witnesses [*see § 61.151, P 4 NOTE*].

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
 Estate, Gift & Trust Law Will Contests Testamentary Formalities General Overview Estate, Gift & Trust Law Will Contests Testamentary Formalities Signature Placements Estate, Gift & Trust Law Will Contests Testamentary Formalities Witnesses General Overview Estate, Gift & Trust Law Wills Execution



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PART III. TRANSACTION GUIDE  
E. Procedural Guide for Execution and Attestation of Will Made by Conservator

*23-61 California Legal Forms--Transaction Guide § 61.162*

**AUTHOR:** Reviewed by Albert G. Handelman

**§ 61.162 Attestation of Will Made by Conservator**

1. Request that witnesses sign will in conservator's presence [*see § 61.152, P 1 NOTE*].
2. Request that witnesses write their residence addresses in the spaces provided in the attestation clause [*see § 61.152, P 2 NOTE*].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Will Contests Testamentary Formalities General Overview Estate, Gift & Trust Law Will Contests Testamentary Formalities Witnesses General Overview Estate, Gift & Trust Law Will Contests Testamentary Formalities Witnesses Attestation & Subscription Estate, Gift & Trust Law Wills Execution



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DIVISION IV: WILLS AND TRUSTS  
CHAPTER 61 WILL DRAFTING AND COMPLETE WILL FORMS  
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E. Procedural Guide for Execution and Attestation of Will Made by Conservator

*23-61 California Legal Forms--Transaction Guide §§ 61.163-61.169*

**AUTHOR:** Reviewed by Albert G. Handelman

**[Reserved]**

§§ 61.163[Reserved]



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DIVISION IV: WILLS AND TRUSTS  
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PART III. TRANSACTION GUIDE  
F. Related and Subsequent Procedures

*23-61 California Legal Forms--Transaction Guide § 61.170*

**AUTHOR:** Reviewed by Albert G. Handelman

**§ 61.170 Custody of Original Will**

1. Bind or staple original will in a back or cover on which is printed name and address of attorney or law firm.
2. Ensure that original will is kept in place that is:
  - a. Safe from loss or destruction by fire, water, theft, or other misfortune.
  - b. Not available to any person other than client, except at client's direction or with client's consent.
  - c. Immediately available to executor on client's death.

**NOTE:**

The immediate impulse of most clients is to place the will in a safety deposit box. However, this is not advised because of the delay that may be involved in opening the box after the client's death.

3. If attorney is to retain original will, take following steps:

**NOTE:**

The Probate Code contains rules governing the transfer of estate planning and other documents held by an attorney for safekeeping [*see Prob. Code §§ 700-735*]. These rules specify the standard of care imposed on attorneys holding documents for safekeeping [*see Prob. Code §§ 710, 716*], procedures for notifying a testator that a will has been accepted for safekeeping [*see Prob. Code § 715*], and procedures

for terminating the holding of a will by an attorney [*see Prob. Code §§ 720-735*]. For general discussion of these rules, see *Ch. 60, Estate Planning, § 60.18*.

a. Hold will in safe, vault, safety deposit box, or other secure place where it will be reasonably protected against loss or destruction [*see Prob. Code § 710*].

b. Send client notice that will has been accepted for safekeeping and obtain acknowledgment that client will notify attorney of any change in client's address [*see Prob. Code § 715*].

**NOTE:**

An attorney who accepts a will for safekeeping must use ordinary care for preserving the document [*see Prob. Code § 710*]. However, using a notice and acknowledgment in the form set forth in *Prob. Code § 715* changes the standard of care from "ordinary care" to "slight care" [*see Prob. Code §§ 715, 716*].

c. If will is lost or destroyed, notify client by mailing notice to testator's last known address or by method most likely to give client actual notice [*see Prob. Code § 711*].

d. If client dies while attorney is holding will for safekeeping, and if attorney has actual notice of client's death and appointment of personal representative, deliver will to client's personal representative [*see Prob. Code §§ 732(f), 734(a)*].

**NOTE:**

If the attorney has actual notice that the client has died, but does not have actual notice that a personal representative has been appointed, the attorney must, within 30 days after having knowledge of the client's death, deliver will to the clerk of the superior court of the county in which the estate may be administered and mail a copy of the will to the named executor [*Prob. Code § 734(b); see Prob. Code § 8200*].

4. If will nominates bank or trust company as executor or co-executor, consider requesting that it retain custody of original will.

**NOTE:**

When this is done, the original will should be placed in a sealed envelope with the following typed on the outside: "Original of Will of \_\_\_\_\_ dated \_\_\_\_\_." The forwarding letter to the bank or trust company should include the client's address and business relationship with the bank, if any, and a brief description of the probable assets of the estate.

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Estate, Gift & Trust Law Wills General Overview



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DIVISION IV: WILLS AND TRUSTS  
CHAPTER 61 WILL DRAFTING AND COMPLETE WILL FORMS  
PART III. TRANSACTION GUIDE  
F. Related and Subsequent Procedures

*23-61 California Legal Forms--Transaction Guide §§ 61.171-61.199*

**AUTHOR:** Reviewed by Albert G. Handelman

**[Reserved]**

§§ 61.171[Reserved]



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DIVISION IV: WILLS AND TRUSTS  
CHAPTER 61 WILL DRAFTING AND COMPLETE WILL FORMS  
PART IV. FORMS  
A. Wills for Unmarried Persons

*23-61 California Legal Forms--Transaction Guide § 61.200*

**AUTHOR:** Reviewed by Albert G. Handelman

**§ 61.200 Will for Unmarried Person; No Children**

**[1] Comment**

**[a] Use of Form**

This form is a complete will form designed for use by a testator who is not married, who has no children, and who wishes to leave the bulk of his or her estate to relatives or friends. The will is simple and is not designed to achieve tax savings.

This will permits the testator to make one or more specific devises [*see* Article 2]. The residuary estate is left to one or more named persons or, if those persons do not survive the testator, to the testator's heirs [*see* Article 3].

**PRACTICE TIP:**

Many testators, particularly those with relatively small estates, wish to include lengthy lists of gifts of tangible personal property items in their wills. The estate planner should be careful in drafting such plans, especially when similar gifts might not be adequately described by the client to allow the executor, in administering the will, to determine which beneficiary is entitled to certain items in the estate. Many times, when a person of modest means dies, "friends and relatives" arrive at the residence and simply begin taking what they want just after the death. Fights over items of nominal value are all too common in these situations. The drafter must steer a course between helping the client to carry out his or her wishes and counseling against too many gifts of items with virtually no monetary value. The client should also be advised about the use of lists of items to be incorporated by reference in the will, while being warned about attempts to later modify such a list and thereby unsuccessfully seek to incorporate by reference a list that did not exist at the time the will was executed. *Commentary by Albert G. Handelman.*

This will assumes that the testator has never been married [*see* Article 1]. If the testator is widowed or divorced, the will should be revised to reflect that fact. If the testator marries or has children after this will is executed, a new will should

be made. Spouses married and children born after a will is executed will both qualify as "omitted heirs" [see *Prob. Code* §§ 6560-6580]. For a general discussion of omitted heirs, see § 61.16.

### **[b] Survivorship**

Various provisions in this will give the testator the option of requiring that devisees survive the testator, or survive the testator for a specified time, in order to receive their devises. A devisee who does not survive the testator, or who does not survive until a future time required by the will, does not take under the will [*Prob. Code* § 21109(a); see *Prob. Code* § 21101 (rules applicable to wills, trusts, deeds, and other instruments)].

It is sometimes advisable to condition a devise on survival for a specified period of time, because this may obviate successive administrations and taxation of the same property. If, for example, the testator devises property to a devisee who survives the testator for only one week, all the devised property will be included in the devisee's estate, even though the devisee will not have come into beneficial enjoyment of the property. If, on the other hand, the devise is conditioned on the devisee surviving the testator for a specified period (e.g., 60 days or six months), successive administrations of the same property will be avoided.

Whether survival is to be required should be considered as it bears on each devise. A devise to an elderly friend or relative might well be conditioned on survival for a period of time sufficient to allow the probate estate to proceed to distribution. However, it is not good practice to routinely condition devises to a surviving spouse on survival until a future time, as this may delay or defeat the confirmation proceedings authorized by *Prob. Code* §§ 13650-13660. Further, it may deprive the surviving spouse of the benefits of the marital deduction for estate tax purposes. Under *I.R.C. § 2056(b)(1)*, no estate tax deduction is allowed for a "terminable" interest passing to a surviving spouse. An interest is "terminable" if it may terminate and pass to another person on the lapse of time, on the occurrence of an event or contingency, or on the failure of an event or contingency to occur. A limited exception to this rule is recognized for interests that are subject to termination if the spouse and the testator die in a common disaster or if the spouse fails to survive the testator for a period not exceeding six months [*I.R.C. § 2056(b)(3)(A)*], though, in this case, the termination or failure must not in fact occur [*I.R.C. § 2056(b)(3)(B)*]. For further discussion of the marital deduction, including the terminable interest rule, see Ch. 71, *Marital Deduction Trust Provisions*.

### **[c] Distribution of Class Gifts**

Section 3.01, the primary residuary clause of this will, includes optional language providing that if a residuary beneficiary does not survive the testator, does not survive for a particular time required by the will, or for any other reason fails to take his or her portion of the residue, that portion will be distributed among the beneficiary's issue in the manner provided in *Prob. Code* § 240, *Prob. Code* § 246, or *Prob. Code* § 247, or "in equal shares, regardless of whether or not all such issue are members of the same generation." Choosing the appropriate language from this provision will call for the residue to be distributed according to certain standard patterns for the distribution of class gifts described in the code sections referred to. For an explanation of each of these patterns, and the Probate Code sections that govern them, see § 61.15[6][c]-[f].

### **[d] Bond**

Section 4.05 of this will can be used to require that the executor post a bond, or to waive the requirement of a bond. Personal representatives generally are required to post bonds before letters are issued [see *Prob. Code* § 8480(a)]. The bonds are for the benefit of interested persons and conditioned on the personal representative's faithful execution of the duties of the office according to law [*Prob. Code* § 8480(b)]. However, a bond is not required if the will waives the requirement [*Prob. Code* § 8481(a)(1)], and trust companies are never required to give a bond [*Prob. Code* § 301(a)]. A trust company is a corporate entity (such as a bank) that has qualified to conduct a trust business in California [*Prob. Code* § 83].

Will provisions providing that executors not be required to post bond are common. Waiving bond saves the expense of bond premiums and expresses confidence in the person nominated to serve as executor. A will should waive bond only when the testator has confidence in the honesty, integrity, and competence of the proposed executor, but if the testator does not have confidence in the honesty, integrity, and competence of a prospective executor, it may be best to nominate some other person to serve in that capacity.

#### **[e] Independent Administration**

Section 4.05 of this will gives the executor authority to administer the testator's estate under the California Independent Administration of Estates Act [*Prob. Code §§ 10400-10592*]. This Act allows the executor to administer the estate without having to obtain court approval for many actions taken in connection with the estate. Before an estate may be administered under the Act, however, the personal representative must petition the court for authority to do so [*see Prob. Code § 10450*]. The petition may request full, or merely limited, authority to administer the estate under the Act [*Prob. Code § 10450(b)*]. The court must grant the petition unless an interested person objects and shows good cause why the authority should not be granted [*Prob. Code § 10452*]. An executor may not be granted authority to administer the estate under the Act if the will provides that the estate may not be administered under the Act [*Prob. Code § 10404*].

Independent administration can save time and expense, and safeguards provided in the Act are generally adequate to prevent abuses. If the testator does not wish the estate to be administered under the Act, however, Section 4.05 may be revised accordingly. For general discussion of independent administration, see California Forms of Pleading Practice, Ch. 445, *Probate: Independent Administration of Estates* (Matthew Bender).

#### **[f] Powers of Executor**

Section 4.06 of this will contains an extended list of the executor's powers. The Probate Code grants broad administrative powers to executors and other personal representatives [*see Prob. Code §§ 9600-10382*]. Will provisions stating the testator's powers are not strictly necessary since, when the will is silent on the subject of the executor's powers, the executor will be able to exercise all of the statutory powers. It is the policy of many estate planning attorneys, however, to include a detailed statement of the executor's powers in every will. Such a statement will apprise all persons interested in the estate (including the executor, the devisees, and any creditors) of the exact scope and extent of the executor's powers. In addition, the executor will often find it helpful when dealing with third parties to be able to point to a specific provision in the will that spells out the executor's power to take a particular action.

If the testator prefers not to include a detailed statement of the executor's powers, the will may simply state that the executor will have all of the powers and duties conferred on executors by California law, except as otherwise specifically provided in the will. In particular cases, the attorney may find it necessary or appropriate to create a particular list of powers designed to meet the special needs of the testator or the estate. This may be done by using a general preamble, stating that, except as otherwise provided in the will, the executor will have the particular powers stated in the provision, in addition to other powers conferred on executors by law.

#### **[g] Payments to Incapacitated Persons**

Section 4.07 of this will gives the executor authority to distribute property that is to be distributed to a minor or incapacitated devisee by distributing it to some other person or persons for the benefit of the devisee. This is not a statutory power. Its inclusion in the will may obviate the need to appoint a guardian for a minor or a conservator for an incapacitated adult devisee.

#### **[h] Executor's Liability for Own Acts**

Section 4.08 of this will is a so-called "exculpatory provision," which limits the circumstances under which the executor

may be held liable to the testator's estate or persons interested in the estate for losses resulting from the executor's acts or omissions in the administration of the estate. The provision states that the executor will not be liable for any act or omission unless it is committed intentionally, with gross negligence, in bad faith, or with reckless indifference to the interests of persons interested in the estate, or unless the executor derives a profit from it.

Although exculpatory provisions are not usually found in wills, they may help to persuade persons nominated as executor to accept the considerable responsibilities of the office by easing somewhat the liability rules that would otherwise apply. Section 4.08 does not exculpate the executor from liability for serious acts or omissions for which the executor should be held responsible, and thus is unlikely to harm the estate. Regardless of the terms of this provision, however, the testator and any person nominated to act as executor should always remember that liability insurance is the executor's best protection against personal liability, and the testator's best assurance that the estate will be compensated for losses resulting from the executor's failure to properly discharge the duties of his or her office.

### **[i] Disinheritance Clause**

Section 5.02 is a standard disinheritance clause. It states the testator's intention not to provide for any heirs not specifically provided for in the will, regardless of whether those heirs were born or adopted before or after the will was executed, and regardless of whether the testator was aware of their existence and identities when the will was executed. This provision may not be effective to disinherit a spouse married after the will was executed [*see Prob. Code § 21610* and discussion in § 61.16[2]]. For general discussion of disinheritance clauses and their use in wills, see § 61.17.

### **[j] No-Contest Clause**

Section 5.03 is a standard no-contest clause. It revokes any devise made to any person who contests the will or any of its provisions.

Optional language at the end of the clause may be used to provide that any gift made to a person who contests a will is to be disposed of as if he or she had predeceased the testator without issue. Inclusion of this optional language will insure that the revocation applies not only to the contesting party, but also to the contesting party's issue. The optional language is somewhat draconian in its effect and should be included only when the testator clearly wishes to extend the application of the no-contest clause to the issue of contesting parties. For general discussion of no-contest clauses and their use in wills, see § 61.18.

## **[2] FORM**

### **Will for Unmarried Person; No Children**

WILL OF

\_\_\_\_\_ [*full legal name of testator, e.g., JAMES ROBERT BLACK*]

I, \_\_\_\_\_ [*full legal name of testator, e.g., James Robert Black*], a resident of \_\_\_\_\_ County, California, declare that this is my will. I hereby revoke all my previous wills and codicils.

#### Article 1 : Introductory Provisions

1.01. Marital Status. I have never been married.

1.02. No Children. I have never had any children.

1.03. Property Disposed of by Will. It is my intention by this will to dispose of all property over which I have the power of testamentary disposition at the time of my death.

1.04. No Exercise of Power of Appointment. I intentionally refrain from exercising any power of appointment that I now possess or that hereafter may be conferred on me.

1.05. No Contract Affecting Will. I have not entered into any contract to make a will or a testamentary gift, not to revoke a will or a testamentary gift, or to die intestate.

## Article 2 : Particular Gifts

2.01. Specific Gifts of Personal Property. I give the items of property described below [optional:, together with my interest in any insurance on those items,] to the persons named below:

(a) I give \_\_\_\_\_ [describe property, e.g., my fourteen-karat gold dinner ring] to \_\_\_\_\_ [name of devisee and relationship to testator or other means of identification, e.g., my sister, Mary T. Black] [if desired, add survivorship clause, e.g., if she survives me or, if she survives me for 60 days] [if gift is conditioned on survival, add alternative disposition, e.g.,; but if she does not survive me (for that period), this gift shall \_\_\_\_\_ (e.g., lapse and become part of the residue of my estate or go to \_\_\_\_\_ (name of alternate devisee))];

(b) I give \_\_\_\_\_ [describe property, e.g., my sterling silver flatware service] to \_\_\_\_\_ [name of devisee and relationship to testator or other means of identification, e.g., my niece, Alice Rose Black] [if desired, add survivorship clause, e.g., if she survives me or, if she survives me for 60 days] [if gift is conditioned on survival, add alternative disposition, e.g.,; but if she does not survive me (for that period), this gift shall \_\_\_\_\_ (e.g., lapse and become part of the residue of my estate or go to \_\_\_\_\_ (name of alternate devisee, including additional survivorship condition if appropriate))];

(c) I give \_\_\_\_\_ [describe property, e.g., the promissory note executed in my favor by John D. Smith and Jane B. Smith, on June 1, 1990, in the principal amount of \$100,000, with interest on unpaid principal in the amount of 10 percent per annum, principal and interest payable in monthly payments of \$1,000 per month, together with the deed of trust of the same date on real property located in the City of Monterey, County of Monterey, State of California, and recorded on June 2, 1990, at Reel 10011, Book 10022, Official Records, Monterey County, California, securing the payment of principal and interest under that note,] to \_\_\_\_\_ [name of devisee and relationship to testator or other means of identification, e.g., my brother, Mark Daniel Black], [optional: if he survives me or if he survives me for 60 days] [if gift is conditioned on survival, add alternative disposition, e.g.,; but if he does not survive me (for that period), this gift shall \_\_\_\_\_ (e.g., lapse and become part of the residue of my estate or go to \_\_\_\_\_ (name of alternate devisee))].

[Continue as necessary for each additional item of property to be specifically devised.]

2.02. Gift[s] to Be Selected From Among My Personal Effects. I give \_\_\_\_\_ [name(s) of devisee(s) and relationship(s) to testator, e.g., my brother, Mark Daniel Black or my brother, Mark Daniel Black, and my niece, Alice Rose Black, and each of them], the right to select \_\_\_\_\_ [specify, e.g., one item or one item each or two items or two items each] from among my personal effects so that \_\_\_\_\_ [he or she or they] will have \_\_\_\_\_ [a memento or mementos] to remember me by. I make this gift to \_\_\_\_\_ [him or her or them] as a symbol of my love and affection. If \_\_\_\_\_ [he or she or any person named in this section] does not survive me or does not make a selection within three months after the date of my death or within 30 days after this will is admitted to probate, whichever is later, then the gift made to \_\_\_\_\_ [him or her or that person] in this section shall fail. [If desired, specify any types of property that may not be selected, e.g., For purposes of this gift only, the word "personal effects" shall not include any motor vehicles or any items of property with an appraised value in excess of \$2,500].

2.03. General Pecuniary Gift. I give the sum of \$\_\_\_\_\_ to \_\_\_\_\_ [name of

*devisee and relationship to testator or other means of identification, e.g., my niece, Alice Rose Black* [if desired, add survivorship clause, e.g., if she survives me or, if she survives me for 60 days]. [If gift is conditioned on survival, add appropriate alternative disposition, e.g., If she does not survive me (for that period), this gift shall \_\_\_\_\_ (e.g., lapse and become part of the residue of my estate).]

[Select one of the following alternatives:]

2.04. Interest on Pecuniary Gifts. [Except as otherwise specifically provided in this will,] [n]o interest shall accrue on all [general] pecuniary gifts made in this will.

[or]

2.04. Interest on Pecuniary Gifts. [Except as otherwise specifically provided in this will,] [I]nterest at the rate \_\_\_\_\_ [e.g., of 10 percent per annum or specified in *California Probate Code Section 12001*, or any successor to that section,] shall accrue on all [general] pecuniary gifts made in this will from and after \_\_\_\_\_ [e.g., the date of my death or the first anniversary of my death] and until those gifts are paid in full. All interest shall be paid at the time the gift is distributed.

[Continue with the following:]

2.05. Tangible Personal Property. I give all of my tangible personal property that is not otherwise disposed of as a specific gift in this will, including my interest in any insurance on that property, to those of the following persons who survive me [if desired, add survivorship clause, e.g., for 60 days], to be divided among them by the executor, in equal or unequal shares as the executor believes to be in accordance with my wishes, the decision of the executor as to this division to be final and incontestable by anyone: \_\_\_\_\_ [class description, e.g., my brother, Mark Daniel Black, my sister, Mary T. Black, and their issue]. If none of those beneficiaries survives me [for that period], or if in the executor's opinion any of the property should not be distributed to any of the beneficiaries, the executor may sell the undistributed items, and any proceeds shall be added to the residue of my estate and disposed of accordingly. [Optional: The term "tangible personal property" \_\_\_\_\_ (includes, but is not limited to, or does not include) \_\_\_\_\_ (specify items, e.g., livestock, pets, airplanes, and motor vehicles).]

2.06. Gift of Pet. I give \_\_\_\_\_ [description of pet, name of pet, and description of any related property to be included with pet, e.g., my Golden Retriever, Alex, together with the documents of pedigree and equipment that I maintain for his care and protection,] to \_\_\_\_\_ [name and relationship to testator or other means of identification, e.g., my niece, Alice Rose Black] [if desired, add survivorship clause, e.g., if she survives me or, if she survives me for 60 days]. [If gift is conditioned on survival, add appropriate alternative disposition, e.g., If she does not survive me (for that period), this gift shall \_\_\_\_\_ (e.g., lapse and become part of the residue of my estate or go to my nephew, Robert C. Black).] [Optional precatory request for care of pet, e.g., It is my wish and request that \_\_\_\_\_ (name of devisee) care for \_\_\_\_\_ (name of pet) in the same manner as I have done during my lifetime. It is my further wish that this care include daily walks, monthly grooming at \_\_\_\_\_ (name of pet parlor), and use of Dr. \_\_\_\_\_ (name of veterinarian) as regular veterinarian. This request is precatory only, and not mandatory.]

### Article 3 : Residuary Provisions

3.01. Disposition of Residue. I give the residue of my estate to \_\_\_\_\_ [name(s) and relationship(s) to testator, e.g., my brother, Mark Daniel Black, or my brother, Mark Daniel Black, my sister, Mary T. Black, my niece, Alice Rose Black, and my nephew, Robert C. Black, in equal shares]. If \_\_\_\_\_ [he or she or any of the beneficiaries named in this section] does not survive me [if desired, specify survivorship period, e.g., for 60 days or for six months], or fails for any other reason to take the portion of the residue of my estate to which \_\_\_\_\_ [he or she or he or she] would be entitled under the provisions of this section, the share of the

residue of my estate that \_\_\_\_\_ [he or she] would have taken shall be \_\_\_\_\_

[choose one of following alternatives:]

divided among the surviving beneficiaries named in this section \_\_\_\_\_ [equally or in proportion to their respective shares in the residue of my estate].

[or]

distributed among the issue (if any) of the deceased beneficiary \_\_\_\_\_ [in the manner provided in California Probate Code Section \_\_\_\_\_ (240 or 246 or 247) or in equal shares, regardless of whether or not all such issue are members of the same generation], or, if the deceased person has no issue, \_\_\_\_\_ [specify alternate disposition, e.g., divided among the surviving alternate beneficiaries named in this section \_\_\_\_\_ (equally or in proportion to their respective shares in the residue of my estate)].

[or specify other alternative method of disposition, e.g.] given to \_\_\_\_\_ [e.g., the Marin County chapter of The Anonymous Artists of America or my heirs].

3.02. Alternate Disposition of Residue. If the residue of my estate is not completely disposed of by the preceding provisions, I give the portion that is not disposed of to \_\_\_\_\_ [e.g., the Marin County chapter of The Anonymous Artists of America or my heirs].

#### Article 4 : Executor

4.01. Nomination of Executor. I nominate \_\_\_\_\_ [name and relationship to testator or other means of identification, e.g., my brother, Mark Daniel Black,] as executor of this will.

4.02. Successor Executors. If \_\_\_\_\_ [initial nominee, e.g., my brother, Mark Daniel Black,] is for any reason unable or unwilling to serve, or to continue to serve, as executor, I nominate the following, in the order of priority indicated, as successor executor:

First, \_\_\_\_\_ [name and relationship to testator, e.g., my sister, Mary T. Black];

Second, \_\_\_\_\_ [name and relationship to testator, e.g., my nephew, Robert C. Black];

Third, \_\_\_\_\_ [name of corporate executor, e.g., Double Eagle Bank, Fresno, California office].

4.03. Definition of Executor. The term "executor," as used in this will, refers to each personal representative of my estate who is serving at the pertinent time.

4.04. Bond. \_\_\_\_\_ [No bond or undertaking or bond] shall be required of any executor nominated in this will.

4.05. Independent Administration. The executor shall \_\_\_\_\_ [have full or not have] authority to administer my estate under the California Independent Administration of Estates Act.

4.06. Powers of Executor. Subject to any limitations stated elsewhere in this will, the executor shall have, in addition to all of the powers now or hereafter conferred on executors by law, and any powers enumerated elsewhere in this will, the power to perform any of the acts specified in this section:

(a) Take possession or control of all of my estate subject to disposition by this will, and collect all debts due to me or to my estate.

(b) Receive the rents, issues, and profits from all real and personal property in my estate until the estate is settled or delivered over by order of court to my heirs or beneficiaries.

(c) Pay taxes on, and take all steps reasonably necessary for the management, protection, and preservation of, all property in my estate.

(d) Commence and prosecute, either individually or jointly with my heirs or beneficiaries, any action necessary or proper to quiet title to or recover possession of any real or personal property in my estate.

(e) Vote in person, and give proxies to exercise, any voting rights with respect to any stock, any membership in a nonprofit corporation, or any other property in my estate, and waive notice of a meeting, give consent to the holding of a meeting, and authorize, ratify, approve, or confirm any action that could be taken by shareholders, members, or property owners.

(f) Insure the property of my estate against damage or loss, and insure the executor against liability to third persons.

(g) Deposit money belonging to my estate in an insured account in a financial institution in California.

(h) Invest and reinvest any money of my estate not reasonably required for the immediate administration of my estate in any kind of property, real, personal, or mixed, that persons of prudence, discretion, and intelligence acquire for their own accounts; provided, however, that in investing any property of my estate, the executor shall act with the care, skill, prudence, and diligence under the circumstances then prevailing, including but not limited to the general economic conditions and the anticipated needs of my estate and its beneficiaries, that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of like character and with like aims to accomplish the purposes of my estate as determined from this will.

(i) Retain any assets of my estate for as long as the executor deems to be in the best interest of my estate.

(j) Borrow money on behalf of my estate and pledge, hypothecate, or otherwise encumber property of my estate, real or personal, as security for any sums so borrowed.

(k) In order to satisfy a pecuniary gift or to distribute or divide estate assets into shares or partial shares, the executor may distribute or divide those assets in kind, or divide undivided interests in those assets, or sell all or any part of those assets and distribute or divide the property in cash, in kind, or partly in cash and partly in kind. Property distributed to satisfy a pecuniary gift under this will shall be valued at its fair market value at the time of distribution.

(l) Pay any and all charges reasonably incurred in connection with or incidental to the distribution of any property of my estate, including but not limited to expenses of storage, freight, shipping, delivery, packing, and insurance; and, on any accounting, treat any such expenditures as expenses of the administration of my estate.

(m) To the extent permitted by law, and without regard to the resulting effect on any other provision of this will, on any person interested in my estate, or on the amount of taxes that may be payable, the executor shall have the power to choose a valuation date for tax purposes; choose the methods to pay any death taxes; elect to treat or use any item for state or federal estate or income tax purposes as an income tax deduction or an estate tax deduction; disclaim all or any portion of any interest in property passing to my estate at or after my death; and determine when an item is to be treated as taken into income or used as a tax deduction.

(n) If any asset of my estate consists of an option right, exercise the option after authorization by order of court, upon a showing that the exercise would be to the advantage of my estate, and use any funds or property in my estate to

acquire the property covered by the option.

(o) Hold a security in the name of a nominee or in any other form without disclosure of my estate so that title to the security may pass by delivery.

(p) Exercise any subscription rights owned or received by my estate by reason of owning securities, after authorization by court upon a showing that it is to the advantage of my estate.

(q) Sell, at either public or private sale and with or without notice, and grant options to purchase, any property belonging to my estate [*optional*:, subject only to any confirmation of court required by law].

(r) Lease any real or personal property belonging to my estate on such terms and conditions as the executor determines to be in the best interest of my estate [*optional*:, subject only to any confirmation of court required by law].

(s) Dispose of or abandon tangible personal property, except tangible personal property that is a specific gift, when the cost of collecting, maintaining, and safeguarding the property would exceed its fair market value.

(t) Compromise or settle any claim, action, or proceeding by or for the benefit of, or against, me, my estate, or the executor [*optional*:, subject only to any confirmation of court that may be required by law].

(u) Employ professional investment counsel to make recommendations with respect to, and otherwise assist in, investing the assets of my estate; and, on any accounting, treat any fees paid to investment counsel as expenses of the administration of my estate.

4.07. Payments to Incapacitated Persons. If at any time any beneficiary under this will is a minor, or it appears to the executor that any beneficiary is incapacitated, incompetent, or for any other reason not able to receive payments or make intelligent or responsible use of the payments, then the executor, in lieu of making direct payments to the beneficiary, may make payments to the beneficiary's conservator or guardian; to the beneficiary's custodian under the Uniform Gifts to Minors Act or Uniform Transfers to Minors Act of any state (including a custodian selected by the executor); to one or more suitable persons as the executor deems proper, such as a relative of or a person residing with the beneficiary, to be used for the beneficiary's benefit; to any other person, firm, or agency for services rendered or to be rendered for the beneficiary's assistance or benefit; or to accounts in the beneficiary's name with financial institutions. The receipt of payments by any of the foregoing shall constitute a sufficient acquittance of the executor for all purposes.

4.08. Executor's Liability for Own Acts. The executor shall not be liable to my estate or to any person interested in it for any act or omission of the executor, except an act or omission that is committed intentionally, with gross negligence, in bad faith, or with reckless indifference to the interests of persons interested in my estate, or an act or omission from which the executor derives a profit.

#### Article 5 : Concluding Provisions

5.01. Simultaneous Death. If any beneficiary under this will and I die simultaneously, or if it cannot be established by clear and convincing evidence whether that beneficiary or I died first, I shall be deemed to have survived that beneficiary, and this will shall be construed accordingly.

5.02. Intentional Omission of Heirs Not Specifically Provided For in Will. Except as otherwise specifically provided in this will, I have intentionally and with full knowledge omitted to provide for my heirs, regardless of whether or not I am aware of their existence and identities at the time this will is executed.

5.03. No-Contest Clause. If any person, directly or indirectly, contests the validity of this will in whole or in part, or opposes, objects to, or seeks to invalidate any of its provisions, or seeks to succeed to any part of my estate otherwise

than in the manner specified in this will, any gift or other interest given to that person under this will shall be revoked and shall be disposed of as if he or she had predeceased me [*optional: without issue*].

5.04. Definition of Incapacity. For purposes of this will, a person shall be deemed "incapacitated" if and for so long as a court of competent jurisdiction has made a finding to that effect, or a guardian or conservator of that person's estate or person duly appointed by a court of competent jurisdiction is serving, or upon certification by two physicians licensed to practice under the laws of the state where the person is domiciled at the time of the certification that the person is unable properly to care for himself or herself or for his or her property. The latter certification shall be made by each physician in a written declaration under penalty of perjury.

5.05. Captions. The captions appearing in this will are for convenience of reference only, and shall be disregarded in determining the meaning and effect of the provisions of this will.

5.06. Severability Clause. If any provision of this will is invalid, that provision shall be disregarded, and the remainder of this will shall be construed as if the invalid provision had not been included.

5.07. California Law to Apply. All questions concerning the validity and interpretation of this will, including any trusts created by this will, shall be governed by the laws of the State of California in effect at the time this will is executed.

5.08. Gifts to "Heirs." For any gift to my heirs that is made outright in this instrument, those heirs shall be determined as if I had died intestate at the time for distribution, and the identity and shares of those heirs shall be determined according to the California laws of succession that concern separate property not acquired from a previously deceased spouse and that are in effect at my death. For any assets of any trust estate created by this will to be distributed to my heirs, those heirs shall be determined as if I had died intestate immediately following the termination of the trust of each share, and the identity and shares of those heirs shall be determined according to the California laws of succession that concern separate property not acquired from a previously deceased spouse and that are in effect at my death.

Executed on \_\_\_\_\_ [date], at \_\_\_\_\_ [city or town and state].

\_\_\_\_\_ [signature of testator]

[typed name]

On the date written above, we, the undersigned, each being present at the same time, witnessed the signing of this instrument by \_\_\_\_\_ [name of testator]. At that time, \_\_\_\_\_ [he or she] appeared to us to be of sound mind and memory and, to the best of our knowledge, was not acting under fraud, duress, menace, or undue influence. Understanding this instrument, which consists of \_\_\_\_\_ pages, including the pages on which the signature of \_\_\_\_\_ [name of testator] and our signatures appear, to be the will of \_\_\_\_\_ [name of testator], we subscribe our names as witnesses thereto. We declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on \_\_\_\_\_ [date], at \_\_\_\_\_ [city or town and state].

[signature of first witness]

Residing at \_\_\_\_\_ [street address]

\_\_\_\_\_ [*city and state*]

[*signature of second witness*]

Residing at \_\_\_\_\_ [*street address*]

\_\_\_\_\_ [*city and state*]

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Wills General Overview



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California Legal Forms--Transaction Guide

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DIVISION IV: WILLS AND TRUSTS  
CHAPTER 61 WILL DRAFTING AND COMPLETE WILL FORMS  
PART IV. FORMS  
A. Wills for Unmarried Persons

*23-61 California Legal Forms--Transaction Guide § 61.201*

**AUTHOR:** Reviewed by Albert G. Handelman

**§ 61.201 Will for Unmarried Person; Trust(s) for Child(ren)**

**[1] Comment**

**[a] Use of Form**

This is a complete will form designed for use by a testator who is not married but has children and wishes to leave the bulk of his or her estate in separate trusts for the benefit of the children.

It illustrates the basic framework that may be used whenever a testator wishes to create separate trusts for several beneficiaries and to treat one or more beneficiaries differently from the others. The form may be revised as appropriate to accommodate the different circumstances of particular clients.

The will permits the testator to make one or more specific devises. The residuary estate is left in equal shares for the testator's children. For illustrative purposes, this form assumes that one of the children is disabled, mentally impaired, or, for some other reason, unable to managing his or her own financial affairs.

All of the children (except the child who is unable to manage his or her own financial affairs) will receive their shares outright if they are over a specified age (such as 35 years) when the testator dies. The share of any child who has not reached that age will be held in a separate trust. Principal and income payments will be made to the child for the term of the trust, and the trust principal will be distributed to the child in three stages as the child attains three specified ages (such as 25, 30, and 35). Upon final distribution, the separate trust of that child will terminate.

The share of the remaining child will be held in trust for the child's lifetime. The child will receive as much of the income and principal of his or her separate trust as is necessary for his or her health, education, support, and maintenance. At the testator's option, however, a broader standard may be specified for these distributions. When the child dies, any remaining assets of the trust will be distributed to the child's issue, if any, to the shares or trusts set up for the other children, or to the testator's issue.

The provisions for the latter child are *not* designed to preserve any entitlements that child may have to benefits under available public assistance programs. A trust that *is* designed to protect those entitlements is sometimes referred to as a "special needs trust"; for discussion of these trusts, see California Wills and Trusts, Ch. 118, *Special Needs Trusts* (Matthew Bender). A form for a special needs trust is illustrated in California Wills & Trusts Forms, Div. I, *Complete Inter Vivos Trusts*, Trust No. 43 (Matthew Bender).

#### **[b] Survivorship**

This form gives the testator the option of requiring that devisees survive the testator, or survive the testator for a specified time, in order to receive their devises. It is sometimes advisable to condition a devise on survival for a specified period of time, as this may obviate successive administration and taxation of the same property. In some circumstances, however, routine use of survivorship clauses may be unnecessary, or even harmful. For discussion, see § 61.200[1][b].

#### **[c] Standard Provisions**

This will contains some of the same provisions that are found in the will in § 61.200[2]. These are provisions relating to the executor's bond [*see* Section 5.04 of form], the executor's authority to act under the California Independent Administration of Estates Act [*see* Section 5.05 of form], the executor's powers [*see* Section 5.06 of form], payments to incapacitated persons [*see* Section 5.07 of form], the executor's liability [*see* Section 5.08 of form], disinheritance of the testator's heirs [*see* Section 8.05 of form], and contest of the will [*see* Section 8.06 of form]. For discussion of each of these provisions, see § 61.200[1].

#### **[d] Ascertainable Standard**

Sections 4.01[a] and 4.02[a] of this will offer optional language that may be used to specify a so-called "ascertainable standard" for distributions of trust income and principal to particular beneficiaries. A standard is "ascertainable" if distributions to a beneficiary can be made only for the beneficiary's "health, education, support, and maintenance" [*see Treas. Reg. § 20.2041-1(c)(2)*], but not if distributions can be made to the beneficiary for other less definite purposes, such as for the beneficiary's "comfort, welfare, and happiness" [*see Treas. Reg. § 20.2041-1(c)(2)*].

An ascertainable standard should be used if the same person is to be both the trustee and the beneficiary of a trust and it is desirable to avoid having the trust assets included in the beneficiary's estate for federal estate tax purposes [*see I.R.C. § 2041(b)(1)(A)* (power limited by ascertainable standard not general power of appointment for estate tax purposes)]. In almost all other cases, a broader standard may be safely be used. However, in practice even an ascertainable standard is broad enough to encompass almost any reasonable, non-frivolous expenditure. For general discussion of ascertainable standards, see Ch. 70, *Complete Revocable Trust Forms*, § 70.12[6][c]. For detailed discussion of the tax consequences of conferring discretionary payment and distribution powers on the trustee, see *California Wills & Trusts*, Ch. 96, *Powers of Trustee*, § 96.08[3], and Ch. 95, *Trust Provisions for Payment and Distribution of Income and Principal*, § 95.06[1][c], [3][d] (Matthew Bender).

#### **[e] Administration of Generation-Skipping Trusts**

Section 4.08 of this will governs the administration of any trust created by the will in which there is property that is or may become subject to the federal generation-skipping transfer tax [*see I.R.C. § 2601 et seq.*]. The GST tax has been repealed effective for generation-skipping transfers after 2009 [*I.R.C. § 2664*]. The section is designed to give the executor post-mortem flexibility to eliminate or minimize any generation-skipping transfer tax.

If the executor elects to allocate any portion of the testator's generation-skipping transfer tax exemption [*see I.R.C. § 2631(a)*] to any trust otherwise created by the will, Section 4.08 requires or permits the executor to split the trust in

question into two trusts, one (called the Exempt Trust, and with an "inclusion ratio" of zero) which is exempt from the tax and the other (the Non-Exempt Trust, with an "inclusion ratio" between zero and one) which is not. The trustee is given discretion to make payments and distributions to "non-skip" beneficiaries [*see I.R.C. § 2613(b)* ("non-skip person" defined)], such as children, from the non-exempt trust, and payments and distributions to beneficiaries who are "skip persons" [*see I.R.C. § 2613(a)* ("skip person" defined)], such as grandchildren, from the exempt trust. This will ensure maximum use of the testator's exemption [*see I.R.C. § 2631*].

A trust may be divided if division is required by the trust instrument [*Treas. Reg. § 26.2654-1(b)(1)(i)*] or if either local law or the governing instrument gives the trustee discretion to divide it [*Treas. Reg. § 26.2654-1(b)(1)(ii)*]. When a trust is divided pursuant to the trustee's discretionary authority, however, the terms of each of the new trusts must provide for the same succession of interests and beneficiaries as are provided in the original trust, and the division must occur (or a reformation proceeding, if required, must be commenced) before the date prescribed for filing the federal estate tax return (including any extensions granted) for the estate of the transferor [*Treas. Reg. § 26.2654-1(b)(1)(ii)*]. The new trusts may be funded on either a fractional share or a pecuniary basis, but funding on a fractional basis is required unless the trust instrument specifically requires funding on a pecuniary basis [*Treas. Reg. § 26.2654-1(b)(1)(ii)(C)(1)*]. If a trust is funded on a fractional basis, the separate trusts need not be funded with a pro rata portion of each asset held by the original trust, but the funding must be based on the fair market value of the assets on the date of funding or done in a manner that fairly reflects the net appreciation or depreciation in the value of the assets from the valuation date to the date of funding [*Treas. Reg. § 26.2654-1(b)(1)(ii)(C)(1)*]. If the trust instrument requires pecuniary funding, the trustee must pay interest on the pecuniary amount unless it is set aside within 15 months after the date of death [*Treas. Reg. § 26.2654-1(b)(1)(ii)(C)(2)*; *see Treas. Reg. §§ 26.2642-2(b)(4)(i), (ii), 26.2654-1(a)(1)(ii)*]. Further, if the pecuniary amount is payable in kind on the basis of value other than the date of distribution value of the assets, the assets must be allocated in a manner that fairly reflects net appreciation or depreciation in the assets from the valuation date to the date of payment [*Treas. Reg. § 26.2654-1(a)(1)(ii)(B)*].

Dividing trusts in this way will make it easier to compute generation-skipping transfer taxes on distributions made from the new trusts. Following division of the trust, the executor or trustee will have discretion to allocate the transferor's GST exemption to the separate trusts [*Treas. Reg. § 26.2654-1(b)(3)*]. Discretionary invasions of principal can be made to children first from the non-exempt trust. Because the children will be non-skip persons, no generation-skipping transfer tax will be due as a result of these distributions. Meanwhile, the exempt trust will continue to grow for the benefit of future generations. Further, different investment objectives can be pursued for each trust. For example, growth-oriented investments may be pursued by the exempt trust, while income-oriented investments can be held in the non-exempt trust.

If the testator's estate is so large that generation-skipping transfer taxes are unavoidable, mandatory division may be preferable to discretionary division. If, however, this would create very small exempt trusts, discretionary division may be preferable. This is particularly true if the trusts are designed to terminate in favor of a non-skip person when he or she reaches a specified age. Because the chance of actually incurring a generation-skipping transfer tax will in these circumstances be rather slight, the executor or trustee may prefer to administer a trust with an inclusion ratio between zero and one rather than administering two trusts, one of which is too small to be administratively convenient.

A provision giving an executor discretion to divide a trust for generation-skipping transfer tax purposes will generally give the executor greater flexibility than a provision requiring division for that purpose. When the executor is given discretion, however, there is a risk that the executor may through inadvertence or neglect fail to make a division that would be advantageous to the estate.

The generation-skipping transfer tax is complex and technical, and strategies for minimizing its impact on an estate require careful planning. For an extended discussion of the tax, see *California Wills & Trusts*, Ch. 113, *Generation-Skipping Transfers and Trust Strategies* (Matthew Bender). For further discussion of the comparative advantages and disadvantages of mandatory and discretionary division of trusts for generation-skipping transfer tax

purposes, see *California Wills & Trusts, Ch. 113, Generation-Skipping Transfers and Trust Strategies, § 113.11[3][b]* (Matthew Bender).

### **[f] Perpetuities Savings Clause**

Section 8.07 of this will is a perpetuities savings clause. It requires that every trust created by the will, or by the exercise of a power of appointment created by the will, terminate not later than 21 years after the death of a person or persons living at the time of the testator's death. This is designed to avoid a violation of the Uniform Statutory Rule Against Perpetuities (USRAP), which became operative in California on January 1, 1992 [*see Prob. Code §§ 21200-21231*].

Under the USRAP, a nonvested property interest is invalid unless, when the interest is created, it is certain to vest or terminate no later than 21 years after the death of an individual then alive, or the interest either vests or terminates within 90 years after its creation [*Prob. Code § 21205*]. The USRAP differs from the old common law rule against perpetuities [*see former Civ. Code § 715.2, repealed Jan. 1, 1992*] in that it does not invalidate an interest from its inception, but waits to see if it actually vests or terminates within 90 years after it is created. During the 90-year period, persons with a potential interest in property "wait to see" if the interests in fact vest or terminate.

Although the USRAP has greatly reduced the dangers of violating the rule against perpetuities, it is still good practice to include a perpetuities savings clause in a will or other instrument when future interests are created and there is even a remote possibility of a violation of the rule. Although a will or other instrument that is executed in California may be effectively protected against potential violations of the rule by the USRAP, it is always possible that the testator or settlor will later move to a state that has not adopted the USRAP, and the dangers of a violation could increase dramatically. Even if the testator or settlor does not move to another state, there is a remote possibility that a violation of the USRAP may be discovered at the end of the 90-year wait-and-see period. For this reason, inclusion of Section 8.07 in this will is recommended. For a general discussion of the rule against perpetuities, the USRAP, and the use of perpetuities savings clauses in California, see *California Wills & Trusts, Ch. 24, Devises--General Considerations, § 24.09* (Matthew Bender).

### **[g] Distribution of Class Gifts**

Section 3.01, the primary residuary clause of this will, includes optional language providing that if a residuary beneficiary does not survive the testator, does not survive for a particular time required by the will, or for any other reason fails to take his or her portion of the residue, that portion will be distributed among the beneficiary's issue in the manner provided in *Prob. Code § 240, Prob. Code § 246, or Prob. Code § 247*, or "in equal shares, regardless of whether or not all such issue are members of the same generation." Choosing the appropriate language from this provision will call for the residue to be distributed according to certain standard patterns for the distribution of class gifts described in the code sections referred to. For an explanation of each of these patterns, and the Probate Code sections that govern them, see § 61.15[6][c]-[f].

### **[2] FORM**

#### **Will for Unmarried Person; Trust(s) for Child(ren)**

WILL OF

\_\_\_\_\_ [*full legal name of testator, e.g., THOMAS GEORGE WHITE*]

I, \_\_\_\_\_ [*full legal name of testator, e.g., Thomas George White*], a resident of \_\_\_\_\_ County, California, declare that this is my will. I hereby revoke all my previous wills and codicils.

Article 1 : Introductory Provisions

1.01. Marital Status. I am not currently married. I was previously married to \_\_\_\_\_ [*name of deceased spouse*], who died \_\_\_\_\_ [*specify year or date, e.g., in 1991 or on or about August 1, 1991*].

1.02. Identification of Living Child(ren). I have \_\_\_\_\_ [*number*] living \_\_\_\_\_ [*child or children*], whose name[s] and date[s] of birth \_\_\_\_\_ [*is or are*] as follows:

[*e.g., Thomas George White, Jr., who was born on January 3, 1986*]

[*e.g., Richard Henry White, who was born on June 16, 1988*]

[*e.g., Rose Elizabeth White, who was born on March 26, 1990*]

1.03. No Deceased Children. I have no deceased children.

1.04. Definitions of Child and Children. As used in this will, the terms "child" and "children" refer to all persons referred to in *California Probate Code Section 26*, as in effect at the time of execution of this will.

1.05. Definition of Issue. As used in this will, the term "issue" refers to all lineal descendants of all generations, with the relationship of parent and child in each generation being determined by the definitions of "child" and "children" set forth in this will.

1.06. Number and Gender. As used in this will, references in the masculine gender shall be deemed to include the feminine and neuter genders, and vice versa, and references to the singular shall be deemed to include the plural, and vice versa, wherever the context so permits.

1.07. Property Disposed of by Will. It is my intention by this will to dispose of all property over which I have the power of testamentary disposition at the time of my death.

1.08. No Exercise of Power of Appointment. I intentionally refrain from exercising any power of appointment that I now possess or that hereafter may be conferred on me.

1.09. No Contract Affecting Will. I have not entered into any contract to make a will or a testamentary gift, to not revoke a will or a testamentary gift, or to die intestate.

## Article 2 : Particular Gifts

2.01. Specific Gifts of Personal Property. I give the items of property described below [*optional*], together with my interest in any insurance on those items,] to the persons named below:

(a) I give \_\_\_\_\_ [*describe property, e.g., my fourteen-karat gold dinner ring*] to \_\_\_\_\_ [*name of devisee and relationship to testator or other means of identification, e.g., my sister, Alice R. Turner*] [*if desired, add survivorship clause, e.g., if she survives me or, if she survives me for 60 days*] [*if gift is conditioned on survival, add alternative disposition, e.g.,; but if she does not survive me (for that period), this gift shall \_\_\_\_\_ (e.g., lapse and become part of the residue of my estate or go to my daughter, Rose Elizabeth White)*];

(b) I give \_\_\_\_\_ [*describe property, e.g., my sterling silver flatware service*] to \_\_\_\_\_ [*name of devisee and relationship to testator or other means of identification, e.g., my niece, Mary Margaret White*] [*if desired, add survivorship clause, e.g., if she survives me or, if she survives me for 60 days*] [*if gift is conditioned on survival, add alternative disposition, e.g.,; but if she does not survive me (for that period), this gift shall \_\_\_\_\_ (e.g., lapse and become part of the residue of my estate or go to my daughter, Rose Elizabeth White, if she should survive me)*];

(c) I give \_\_\_\_\_ [*describe property, e.g., the promissory note executed in my favor by John D. Smith and Jane B. Smith, on June 1, 1990, in the principal amount of \$100,000, with interest on unpaid principal in the amount of 10 percent per annum, principal and interest payable in monthly payments of \$1,000 per month, together with the deed of trust of the same date on real property located in the City of Monterey, County of Monterey, State of California, and recorded on June 2, 1990, at Reel 10011, Book 10022, Official Records, Monterey County, California, securing the payment of principal and interest under that note,*] to \_\_\_\_\_ [*name of devisee and relationship to testator or other means of identification, e.g., my brother, Charles Robert White*], [*optional: if he survives me or if he survives me for 60 days*] [*if gift is conditioned on survival, add alternative disposition, e.g.,; but if he does not survive me (for that period), this gift shall* \_\_\_\_\_ (*e.g., lapse and become part of the residue of my estate or go to my son, Thomas George White, Jr.*)].

[*Continue as necessary for each additional item of property to be specifically devised.*]

2.02. Gift[s] to Be Selected From Among My Personal Effects. I give \_\_\_\_\_ [*name(s) of devisee(s) and relationship(s) to testator, e.g., my brother, Charles Robert White, or my niece, Mary Margaret White, or my brother, Charles Robert White, and my niece, Mary Margaret White, and each of them.*] the right to select \_\_\_\_\_ [*specify, e.g., one item or one item each or two items or two items each*] from among my personal effects so that \_\_\_\_\_ [*he or she or they*] will have \_\_\_\_\_ [*a memento or mementos*] to remember me by. I make this gift to \_\_\_\_\_ [*him or her or them*] as a symbol of my love and affection. If \_\_\_\_\_ [*he or she or any person named in this section*] does not survive me or does not make a selection within three months after the date of my death, or within 30 days after this will is admitted to probate, whichever is later, then the gift made to \_\_\_\_\_ [*him or her or that person*] in this section shall fail. [*If desired, specify any types of property that may not be selected, e.g., For purposes of this gift only, the word "personal effects" shall not include any motor vehicles or any items of property with an appraised value in excess of \$2,500.*]

2.03. Tangible Personal Property. I give all of my tangible personal property that is not otherwise disposed of as a specific gift in this will, including my interest in any insurance on that property, to those of the following persons who survive me [*if desired, add survivorship clause, e.g., for 60 days or for 180 days*], to be divided among them as they believe to be in accordance with my wishes: \_\_\_\_\_ [*class description, e.g., my children*]. If none of those beneficiaries survives me [*for that period*], or if any of the property is not chosen by the beneficiaries, the undistributed items shall be added to the residue of my estate and disposed of accordingly. [*Optional: The term "tangible personal property" \_\_\_\_\_ (includes, but is not limited to, or does not include) \_\_\_\_\_ (specify items, e.g., livestock, pets, airplanes, and motor vehicles).*]

2.04. General Pecuniary Gift. I give the sum of \$ \_\_\_\_\_ to \_\_\_\_\_ [*name of devisee and relationship to testator or other means of identification, e.g., my niece, Mary Margaret White*] [*if desired, add survivorship clause, e.g., if she survives me or, if she survives me for 60 days*]. [*If gift is conditioned on survival, add appropriate alternative disposition, e.g., If she does not survive me (for that period), this gift shall* \_\_\_\_\_ (*e.g., lapse and become part of the residue of my estate*).]

2.05. General Pecuniary Gift Under Uniform Transfers to Minors Act. I give the sum of \_\_\_\_\_ [ \$10,000 ] to \_\_\_\_\_ to \_\_\_\_\_ [*name and relationship of custodian, e.g., my brother, Charles Robert White,*] as custodian for \_\_\_\_\_ [*name of minor and relationship to testator, e.g., my niece, Mary Margaret White*], until \_\_\_\_\_ [*he or she*] reaches the age of \_\_\_\_\_ [*majority or specify age not to exceed 25 years, e.g., 24 years*], under the California Uniform Transfers to Minors Act. If, for any reason, \_\_\_\_\_ [*name of proposed custodian, e.g., Charles Robert White,*] is unable, unwilling, or ineligible to serve as custodian, then I nominate \_\_\_\_\_ [*name and relationship of substitute custodian, e.g., my sister, Alice R. Turner,*] as substitute custodian. [*To make devise outright if minor attains stated age before devise is to be distributed, add: If \_\_\_\_\_ (name of minor, e.g., Mary Margaret White) has reached the age of \_\_\_\_\_ before this gift is to be distributed, then this gift shall be distributed to \_\_\_\_\_ (him or her) outright.*]

[Select one of the following alternatives:]

2.06. Interest on Pecuniary Gifts. [Except as otherwise specifically provided in this will,] [n]o interest shall accrue on all [general] pecuniary gifts made in this will.

[or]

2.06. Interest on Pecuniary Gifts. [Except as otherwise specifically provided in this will,] [I]nterest at the rate \_\_\_\_\_ [e.g., of 10 percent per annum or specified in *California Probate Code Section 12001*, or any successor to that section,] shall accrue on all [general] pecuniary gifts made in this will from and after \_\_\_\_\_ [e.g., the date of my death or the first anniversary of my death] and until those gifts are paid in full. All interest shall be paid at the time the gift is distributed.

[Continue with the following:]

### Article 3 : Residuary Provisions

3.01. Disposition of Residue. I give the residue of my estate as follows:

(a) If any of my children survive me, the residue of my estate shall be divided into as many shares of equal market value as are necessary to create one share for each of my children who survive me and one share for the issue who survive me of each of my children who predecease me.

(b) Each share created for a surviving child [to make exception for one or more shares held for specific persons, add: , except the share(s) (if any) created for \_\_\_\_\_ (name(s), e.g., my son, Richard Henry White)], shall be distributed outright to that child if that child has reached the age of \_\_\_\_\_ [e.g., 35] years at the time of my death. If a child has not reached that age at the time of my death, the share created for that child shall be held, administered, and distributed by the trustee in a separate trust according to the terms set forth in Article 4 applicable to the Separate Share Trust. [To make exception for one or more shares held for specific persons, add: The share(s) (if any) created for \_\_\_\_\_ (name(s), e.g., my son, Richard Henry White,) shall be held, administered, and distributed by the trustee in a separate trust according to the terms set forth in Article 4 applicable to the Trust for \_\_\_\_\_ (e.g., my son, Richard Henry White), regardless of \_\_\_\_\_ (his age or her age or their ages) at the time of my death.]

(c) If any of my children do not survive me, each share created for the issue of a deceased child shall be distributed outright to those issue \_\_\_\_\_ [in the manner provided in California Probate Code Section \_\_\_\_\_ (240 or 246 or 247) or in equal shares, regardless of whether or not all such issue are members of the same generation].

(d) If none of my children survive me, but I leave issue surviving, I give the residue of my estate outright to those issue, who are to take that property \_\_\_\_\_ [in the manner provided in California Probate Code Section \_\_\_\_\_ (240 or 246 or 247) or in equal shares, regardless of whether or not all such issue are members of the same generation].

3.02. Alternate Disposition of Residue. If none of my issue survive me, I give the residue of my estate to \_\_\_\_\_ [e.g., the Marin County chapter of the Anonymous Artists of America or my heirs].

### Article 4 : Trust Distributions

4.01. Separate Share Trust. The trustee shall hold, administer, and distribute the assets of each Separate Share Trust as follows:

(a) The trustee shall pay or distribute to or apply for the benefit of the beneficiary, until he or she reaches the age of \_\_\_\_\_ [e.g., 35] years, in monthly or other convenient installments, but not less often than annually, as much of the net income of the trust, and as much of the principal of the trust, as the trustee, in the trustee's discretion, deems necessary for his or her \_\_\_\_\_ [to specify an "ascertainable standard": health, education, support, and maintenance or specify some other standard, e.g., comfort, welfare, and happiness]. All decisions of the trustee regarding payments under this subsection, if any, are within the trustee's discretion and shall be final and incontestable by anyone. The trustee shall accumulate and add to principal any net income not distributed.

(b) When the beneficiary reaches the age of \_\_\_\_\_ [e.g., 25] years, the trustee shall distribute to him or her outright an amount from the trust principal equal to \_\_\_\_\_ [fraction or percentage, e.g., one third or thirty-three and one-third percent] of the fair market value of the principal of the trust, determined as of the first day of the calendar month preceding the month in which the distribution is made.

(c) When the beneficiary reaches the age of \_\_\_\_\_ [e.g., 30] years, the trustee shall distribute to him or her outright an amount from the trust principal equal to \_\_\_\_\_ [fraction or percentage; e.g., one half or fifty percent] of the fair market value of the remaining principal of the trust, determined as of the first day of the calendar month preceding the month in which the distribution is made.

(d) If the beneficiary has already reached the age of \_\_\_\_\_ [e.g., 25] years or \_\_\_\_\_ [e.g., 30] years when property is first allocated to this trust, then upon making the allocation, the trustee shall distribute to him or her outright an amount from the trust principal equal to \_\_\_\_\_ [fraction or percentage; e.g., one third or thirty-three and one-third percent] or \_\_\_\_\_ [fraction or percentage; e.g., two thirds or sixty-six and two-thirds percent], as the case may be, of the fair market value of the principal of the trust, and the balance shall be retained in trust pursuant to the applicable provisions of this section.

(e) When the beneficiary reaches the age of \_\_\_\_\_ [e.g., 35] years, the trustee shall distribute to him or her outright the balance of the trust property.

(f) If the beneficiary dies before the trust property has been fully distributed as provided in this section, the assets of his or her separate share shall be divided among his or her issue \_\_\_\_\_ [in the manner provided in California Probate Code Section \_\_\_\_\_ (240 or 246 or 247) or in equal shares, regardless of whether or not all such issue are members of the same generation]. The share of each issue shall be distributed outright to that issue. If the beneficiary dies without issue before the trust property has been fully distributed as provided in this section, the trustee shall distribute the entire undistributed balance of his or her separate share outright among the other then-living persons for whom separate shares were created under this will, and the issue of any deceased persons for whom separate shares were created under this will, \_\_\_\_\_ [in the manner provided in California Probate Code Section \_\_\_\_\_ (240 or 246 or 247) or in equal shares, regardless of whether or not all such issue are members of the same generation]; provided, however, that if any part of that balance would otherwise be distributed to a person for whose benefit a trust is being administered under this will, that part shall instead be added to that trust and shall thereafter be administered according to its terms. If there are no surviving persons who may take the share of the beneficiary under this section, any remaining trust property shall be distributed outright to \_\_\_\_\_ [alternative disposition, e.g., the Marin County chapter of the Anonymous Artists of America or my heirs].

4.02. Separate Trust for \_\_\_\_\_ [name, e.g., Richard Henry White]. The trustee shall hold, administer, and distribute the assets of the Separate Trust for \_\_\_\_\_ [name, e.g., Richard Henry White] as follows:

(a) The trustee shall pay or distribute to or apply for the benefit of \_\_\_\_\_ [e.g., Richard Henry White], for life, in monthly or other convenient installments, but not less often than annually, as much of the net income of the trust, and as much of the principal of the trust, as the trustee, in the trustee's discretion, deems necessary for

\_\_\_\_\_ [his or her] \_\_\_\_\_ [to specify an "ascertainable standard": health, education, support, and maintenance *or specify some other standard, e.g.,* comfort, welfare, and happiness]. All decisions of the trustee regarding payments under this subsection, if any, are within the trustee's discretion and shall be final and incontestable by anyone. The trustee shall accumulate and add to principal any net income not distributed.

(b) On the death of \_\_\_\_\_ [e.g., Richard Henry White], the trustee may pay the expenses of the last illness and funeral of \_\_\_\_\_ [e.g., Richard Henry White] out of the principal of the trust, unless the trustee determines that other adequate provisions have been made for payment of these expenses.

(c) On the death of \_\_\_\_\_ [e.g., Richard Henry White], and after the payment of any debts, expenses, fees, costs, and taxes that are payable from the trust property, the trustee shall divide the trust property among the issue of \_\_\_\_\_ [e.g., Richard Henry White] \_\_\_\_\_ [in the manner provided in California Probate Code Section \_\_\_\_\_ (240 *or* 246 *or* 247) *or* in equal shares, regardless of whether or not all such issue are members of the same generation]. The share of each issue shall be distributed outright to that issue. If the issue of \_\_\_\_\_ [e.g., Richard Henry White] all predecease \_\_\_\_\_ [e.g., Richard Henry White], or if \_\_\_\_\_ [e.g., Richard Henry White] should die without issue, the trustee shall distribute the entire undistributed balance of the trust property outright among the other then-living persons for whom separate shares were created under this will, and the issue of any deceased persons for whom separate shares were created, \_\_\_\_\_ [in the manner provided in California Probate Code Section \_\_\_\_\_ (240 *or* 246 *or* 247) *or* in equal shares, regardless of whether or not all such issue are members of the same generation]; provided, however, that if any part of that balance would otherwise be distributed to a person for whose benefit a trust is being administered under this will, that part shall instead be added to that trust and shall thereafter be administered according to its terms. If there are no surviving persons who may take the share of the beneficiary under this section, any remaining trust property shall be distributed outright to \_\_\_\_\_ [*alternative disposition, e.g.,* the Marin County chapter of the Anonymous Artists of America *or* my heirs].

4.03. Other Resources Taken Into Account. In making any payments of income and distributions of principal from any trust created by this will for \_\_\_\_\_ [*specify standard of discretion as set forth in provision authorizing the discretionary distribution, e.g.,* the health, education, support, and maintenance *or* care and comfort] of any of my children, the trustee shall take into consideration, to the extent the trustee deems advisable, any other income or resources available to that child that are known to the trustee and that are reasonably available for that purpose.

4.04. Undistributed Payments Pass to Next Successive Beneficiary. On the termination of the right of any beneficiary to receive payments from net income or principal under any of the trusts created by this will, all payments that are accrued but undistributed by the trustee at the date of the termination shall be distributed to the beneficiary next entitled to the successive interest by the terms of this will.

4.05. Trustee's Power to Determine Income and Principal. Unless otherwise specifically provided in this will, the determination of all matters with respect to what is principal and income of any trust under this will and the apportionment and allocation of receipts, expenses and other charges between principal and income shall be governed by the provisions of the California Revised Uniform Principal and Income Act from time to time existing. The trustee in the trustee's discretion shall determine any matter not provided for either in this instrument or in the California Revised Uniform Principal and Income Act.

4.06. Trustee Shall Favor Income Beneficiaries. The primary purpose in establishing \_\_\_\_\_ [e.g., the Separate Trust for Richard Henry White] is to benefit the person who is the income beneficiary. It is my intention that the trustee shall exercise the powers and discretion granted in this will in favor of the person who is the then-current income beneficiary of the trust, except when such an exercise would be inconsistent with other provisions of this will. In each instance, the rights of subsequent beneficiaries and remainder beneficiaries shall be considered subordinate to the rights of the then-current income beneficiary. This declaration of intention is intended to include, but is not limited to, investment policy, the exercise of discretionary powers to determine what constitutes principal and what constitutes

income, and the determination of the amounts to be paid to or applied for the benefit of the income beneficiary.

4.07. Spendthrift Clause. The interests of each trust beneficiary under this will are not transferable by voluntary or involuntary assignment or by operation of law, and shall be free from the claims of creditors and from attachment, execution, bankruptcy, and other legal process, to the maximum extent permitted by law.

4.08. Administration of Generation-Skipping Trusts. The provisions of this section apply to any trust under this will in which there is property that is or may become subject to the federal generation-skipping transfer tax:

(a) If the executor intends to allocate any part of the generation-skipping transfer tax exemption that is available to me to some but not all of the property to be distributed to any trust to which this section of the will applies, the executor \_\_\_\_\_ [shall *or* may, in the executor's discretion,] obtain an order for distribution that divides that trust into two separate trusts, to be designated as the Exempt Trust and the Non-Exempt Trust. [*If executor has discretionary power to divide trusts: If the executor elects to divide a trust in the manner provided in this section, the *or, if division of trusts is mandatory rather than discretionary:* The] Exempt Trust shall contain the share of the property of that trust equal in value to the amount of the generation-skipping transfer tax exemption that the executor intends to allocate to the trust. The Non-Exempt Trust shall contain the balance of the property of that trust. The executor shall then actually allocate the generation-skipping transfer tax exemption to the Exempt Trust and not to the Non-Exempt Trust so that the Exempt Trust shall have an inclusion ratio of zero for federal generation-skipping transfer tax purposes and the Non-Exempt Trust shall have an inclusion ratio of one for federal generation-skipping transfer tax purposes.*

(b) In allocating assets between the Exempt Trust and Non-Exempt Trust for purposes of this section, the executor shall \_\_\_\_\_ [*for a pecuniary allocation: allocate the trust assets between the Exempt Trust and Non-Exempt Trust in cash or in kind, or partly in each, on a pro rata or non pro rata basis, and in undivided interests or not *or, for a fractional allocation: allocate to each trust a fractional share of each and every substantial interest or right held by the trust being divided.* [*If preceding sentence provides for a pecuniary allocation, add: If the allocation is not made within 15 months from the date of my death, the executor shall pay interest, at the legal rate, from the date of my death to the date of distribution. For purposes of allocation under this section, assets shall be valued at their values \_\_\_\_\_ (to use date of distribution values: on the date or dates of distribution *or, to use valuation for estate tax purposes: as finally determined for federal estate tax purposes; provided that any assets allocated in kind shall be allocated between the Exempt Trust and the Non-Exempt Trust in a manner that fairly reflects the net appreciation or depreciation in the value of the assets in the trust being divided, measured from the date of my death to the date of payment.*]**

(c) Regardless of whether or not subsection (a) applies, if the amount of my generation-skipping transfer tax exemption actually allocated by the executor to a trust to which this section applies is equal to the value of the property of that trust so that the entire trust has an inclusion ratio of zero for federal generation-skipping transfer tax purposes, the entire trust shall be referred to as the Exempt Trust. On the other hand, if no part of my generation-skipping transfer tax exemption is actually allocated to the trust by the executor so that the entire trust has an inclusion ratio of one for federal generation-skipping transfer tax purposes (or if I am not the transferor of that trust for generation-skipping transfer tax purposes), the entire trust shall be referred to as the Non-Exempt Trust.

(d) The trustee may, but is not required to, administer the trusts under this will to which this section applies in such a manner that distributions made during the trust terms to "skip persons" (as defined in *Internal Revenue Code Section 2613(a)* or any equivalent successor section) are made from Exempt Trusts, and distributions made during the trust terms to "non-skip persons" (as defined in *Internal Revenue Code Section 2613(b)* or any equivalent successor section) are made from Non-Exempt trusts.

[*Optional:*]

[(e)] If the trustee determines that the burdens of generation-skipping transfer taxes, income taxes, and death taxes on a Non-Exempt Trust, my estate, or the beneficiaries of that trust would be reduced, the trustee may petition the court to amend the trust to grant to one or more trust beneficiaries who are non-skip persons in a generation below me a general testamentary power of appointment over all or a specified portion of that Non-Exempt Trust. Any power to amend the trust is within the discretion of the court, and the preceding sentence shall not be construed to give the trustee any power that the trustee does not already have under California trust law to petition the court under the appropriate circumstances, nor shall it be construed to limit the power of the trustee or any beneficiary under the California trust law to petition the court under the appropriate circumstances.

[(f)] The purpose of this section is to allow the trustee to administer the trusts so as to decrease the amount of generation-skipping transfer taxes owed on generation-skipping transfers from the trusts. The trustee shall balance that consideration against any other tax and non-tax considerations, and may disregard the generation-skipping transfer tax consequences to the extent that the trustee determines that doing so will allow the trustee to carry out my intentions in creating the trusts. All decisions of the trustee under this subsection are within the trustee's discretion and shall be final and incontestable by anyone.

[(g)] If, in the judgment of the executor or the trustee, at any time after the execution of this will, any statute, regulation, court decision, or administrative ruling imposes different or additional requirements on the trust in connection with the generation-skipping transfer tax, the executor or the trustee may petition the court to amend the terms of the trust to meet those requirements and achieve the purpose of this section.

#### Article 5 : Executor

5.01. Nomination of Executor. I nominate \_\_\_\_\_ [*name and relationship to testator or other means of identification, e.g., my brother, Charles Robert White,*] as executor of this will.

5.02. Successor Executors. If \_\_\_\_\_ [*nominee(s) for initial executor, e.g., my brother, Charles Robert White,*] is for any reason unable or unwilling to serve, or to continue to serve, as executor, I nominate the following, in the order of priority indicated, as successor executor:

First, \_\_\_\_\_ [*name and description, e.g. (for coexecutors) my sister, Alice R. Turner*];

Second, \_\_\_\_\_ [*name and description, e.g. (for individual) Arthur J. Taylor, of Santa Rosa, California*];

Third, \_\_\_\_\_ [*name and description, e.g. (for corporate executor) Double Eagle Bank, Fresno, California office*].

5.03. Definition of Executor. The term "executor," as used in this will, refers to each personal representative of my estate who is serving at the pertinent time.

5.04. Bond. \_\_\_\_\_ [No bond or undertaking *or* Bond] shall be required of any executor nominated in this will.

5.05. Independent Administration. The executor shall \_\_\_\_\_ [have full *or* not have] authority to administer my estate under the California Independent Administration of Estates Act.

5.06. Powers of Executor. Subject to any limitations stated elsewhere in this will, the executor shall have, in addition to all of the powers now or hereafter conferred on executors by law, and any powers enumerated elsewhere in this will, the power to perform any of the acts specified in this section:

(a) Take possession or control of all of my estate subject to disposition by this will, and collect all debts due to me or to my estate.

(b) Receive the rents, issues, and profits from all real and personal property in my estate until the estate is settled or delivered over by order of court to my heirs or beneficiaries.

(c) Pay taxes on, and take all steps reasonably necessary for the management, protection, and preservation of, all property in my estate.

(d) Commence and prosecute, either individually or jointly with my heirs or beneficiaries, any action necessary or proper to quiet title to or recover possession of any real or personal property in my estate.

(e) Vote in person, and give proxies to exercise, any voting rights with respect to any stock, any membership in a nonprofit corporation, or any other property in my estate, and waive notice of a meeting, give consent to the holding of a meeting, and authorize, ratify, approve, or confirm any action that could be taken by shareholders, members, or property owners.

(f) Insure the property of my estate against damage or loss, and insure the executor against liability to third persons.

(g) Deposit money belonging to my estate in an insured account in a financial institution in California.

(h) Invest and reinvest any money of my estate not reasonably required for the immediate administration of my estate in any kind of property, real, personal, or mixed, that persons of prudence, discretion, and intelligence acquire for their own accounts; provided, however, that in investing any property of my estate, the executor shall act with the care, skill, prudence, and diligence under the circumstances then prevailing, including but not limited to the general economic conditions and the anticipated needs of my estate and its beneficiaries, that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of like character and with like aims to accomplish the purposes of my estate as determined from this will.

(i) Retain any assets of my estate for as long as the executor deems to be in the best interest of my estate.

(j) Borrow money on behalf of my estate and pledge, hypothecate, or otherwise encumber property of my estate, real or personal, as security for any sums so borrowed.

(k) In order to satisfy a pecuniary gift or to distribute or divide estate assets into shares or partial shares, the executor may distribute or divide those assets in kind, or divide undivided interests in those assets, or sell all or any part of those assets and distribute or divide the property in cash, in kind, or partly in cash and partly in kind. Property distributed to satisfy a pecuniary gift under this will shall be valued at its fair market value at the time of distribution. This section shall apply only to the extent that it does not conflict with the provisions of Article 4 specifying allocation of assets involving generation-skipping trusts.

(l) Pay any and all charges reasonably incurred in connection with or incidental to the distribution of any property of my estate, including but not limited to expenses of storage, freight, shipping, delivery, packing, and insurance; and, on any accounting, treat any such expenditures as expenses of the administration of my estate.

(m) To the extent permitted by law, and without regard to the resulting effect on any other provision of this will, on any person interested in my estate, or on the amount of taxes that may be payable, the executor shall have the power to choose a valuation date for tax purposes; choose the methods to pay any death taxes; elect to treat or use any item for state or federal estate or income tax purposes as an income tax deduction or an estate tax deduction; disclaim all or any portion of any interest in property passing to my estate at or after my death; and determine when an item is to be treated as taken into income or used as a tax deduction.

(n) If any asset of my estate consists of an option right, exercise the option after authorization by order of court, upon a showing that the exercise would be to the advantage of my estate, and use any funds or property in my estate to acquire the property covered by the option.

(o) Hold a security in the name of a nominee or in any other form without disclosure of my estate so that title to the security may pass by delivery.

(p) Exercise any subscription rights owned or received by my estate by reason of owning securities, after authorization by court upon a showing that it is to the advantage of my estate.

(q) Sell, at either public or private sale and with or without notice, and grant options to purchase, any property belonging to my estate [*optional*], subject only to any confirmation of court required by law].

(r) Lease any real or personal property belonging to my estate on such terms and conditions as the executor determines to be in the best interest of my estate [*optional*], subject only to any confirmation of court required by law].

(s) Dispose of or abandon tangible personal property, except tangible personal property that is a specific gift, when the cost of collecting, maintaining, and safeguarding the property would exceed its fair market value.

(t) Compromise or settle any claim, action, or proceeding by or for the benefit of, or against, me, my estate, or the executor [*optional*], subject only to any confirmation of court that may be required by law].

(u) Employ professional investment counsel to make recommendations with respect to, and otherwise assist in, investing the assets of my estate; and, on any accounting, treat any fees paid to investment counsel as expenses of the administration of my estate.

5.07. Payments to Incapacitated Persons. If at any time any beneficiary under this will is a minor, or it appears to the executor that any beneficiary is incapacitated, incompetent, or for any other reason not able to receive payments or make intelligent or responsible use of the payments, then the executor, in lieu of making direct payments to the beneficiary, may make payments to the beneficiary's conservator or guardian; to the beneficiary's custodian under the Uniform Gifts to Minors Act or Uniform Transfers to Minors Act of any state (including a custodian selected by the executor); to one or more suitable persons as the executor deems proper, such as a relative of or a person residing with the beneficiary, to be used for the beneficiary's benefit; to any other person, firm, or agency for services rendered or to be rendered for the beneficiary's assistance or benefit; or to accounts in the beneficiary's name with financial institutions. The receipt of payments by any of the foregoing shall constitute a sufficient acquittance of the executor for all purposes.

5.08. Executor's Liability for Own Acts. The executor shall not be liable to my estate or to any person interested in it for any act or omission of the executor, except an act or omission that is committed intentionally, with gross negligence, in bad faith, or with reckless indifference to the interests of persons interested in my estate, or an act or omission from which the executor derives a profit.

#### Article 6 : Trustee

6.01. Nomination of Trustee. I nominate \_\_\_\_\_ [*name of trustee and relationship to testator or other means of identification, e.g., my brother, Charles Robert White,*] as trustee of any trust created under this will.

6.02. Successor Trustee. If \_\_\_\_\_ [*nominee for initial trustee, e.g., my brother, Charles Robert White,*] is for any reason unable or unwilling to serve, or continue to serve, as trustee, I nominate the following, in the order of priority indicated, as trustee:

First, \_\_\_\_\_ [*name and description, e.g., my sister, Alice R. Turner*];

Second, \_\_\_\_\_ [*name and description, e.g., my niece, Mary Margaret White*];

Third, \_\_\_\_\_ [*name and description, e.g. (for corporate trustee): Double Eagle Bank, Fresno, California office*].

6.03. Definition of Trustee. Reference in this instrument to "the trustee" shall be deemed a reference to whoever is serving as trustee or co-trustees, and shall include alternate or successor trustees, unless the context requires otherwise.

6.04. Bond. \_\_\_\_\_ [No bond or undertaking *or* Bond] shall be required of any trustee nominated in this will.

6.05. Compensation of Trustee. The trustee shall be entitled to reasonable compensation for services rendered, payable without court order. [*Optional: If a trustee serves for only part of a calendar year, the annual compensation shall be prorated according to the number of days during that year that the trustee was acting as trustee.*]

6.06. Compensation of Trustee. The trustee shall be entitled to reasonable compensation for services rendered, payable without court order. [*Optional: If a trustee serves for only part of a calendar year, the annual compensation shall be prorated according to the number of days during that year that the trustee was acting as trustee.*]

6.07. Procedure for Resignation. Any trustee may resign at any time, without giving a reason for the resignation, by giving written notice, at least \_\_\_\_\_ [*specify; e.g., 30 days*] before the time the resignation is to take effect, to any other trustee then acting, to any persons authorized to designate a successor trustee, to all living trust beneficiaries known to the trustee (or, in the case of a minor beneficiary, to the parent or guardian of that beneficiary), and to the successor trustee. A resignation shall be effective upon written acceptance of the trust by the successor trustee.

6.08. General Powers of Trustee. To carry out the purposes of the trusts created under this will, and subject to any limitations stated elsewhere in this will, the trustee shall have all of the following powers, in addition to all of the powers now or hereafter conferred on trustees by law:

(a) Retain property received into the trust at its inception, or later added to the trust, as long as the trustee considers that retention in the best interests of the trust or in furtherance of my goals in creating the trust, as determined from this will, but subject to the standards of the prudent investor rule as set forth in the California Uniform Prudent Investor Act.

(b) Invest and manage the trust assets as a prudent investor would, by considering the purposes, terms, distribution requirements, and other circumstances of the trust. In satisfying this standard, the trustee shall exercise reasonable care, skill, and caution. The trustee's investment and management decisions respecting individual assets and courses of action must be evaluated not in isolation, but in the context of the trust portfolio as a whole and as a part of an overall investment strategy having risk and return objectives reasonably suited to the trust.

(c) Retain or acquire unproductive or underproductive property.

(d) In the trustee's discretion, invest or reinvest in mutual funds, money market funds, investment trusts, regulated investment companies, market funds, and index funds, and in the shares or securities of any such funds or companies, that persons of prudence, discretion, and intelligence acquire for their own account.

(e) Acquire and maintain as a trust asset a life insurance policy on the life of any person, including \_\_\_\_\_ [the trustee or any of the trustees], issued by any company and in any amount that the trustee may deem advisable, and to exercise all rights of ownership granted in that policy.

(f) With or without court authorization, sell (for cash or on deferred payments, and with or without security),

convey, exchange, partition, and divide trust property; grant options for the sale or exchange of trust property for any purpose, whether the contract is to be performed or the option is to be exercised within or beyond the term of the trust; and lease trust property for any purpose, for terms within or extending beyond the expiration of the trust, regardless of whether the leased property is commercial or residential and regardless of the number of units leased.

(g) Lend or advance the trustee's own funds to my estate or to any other trust created by me, for any purpose properly related to that estate or trust, with interest thereon at the then-prevailing rates, and to receive security for any such loans in any commercially reasonable form. The trustee may, from time to time, purchase or lease assets from, sell or lease assets to, and exchange assets with my estate at fair market values. [*Optional:* However, the fair market value of any asset sold, purchased, or leased pursuant to this provision must first be determined by an independent appraisal.]

(h) Engage in any transactions with the personal representative of my estate that are in the best interest of any trusts under this will.

(i) Manage, control, improve, and maintain all real and personal trust property.

(j) Subdivide or develop land; make or obtain the vacation of plats and adjust boundaries, or adjust differences in valuation on exchange or partition by giving or receiving consideration; and dedicate land or easements to public use with or without consideration.

(k) Make ordinary or extraordinary repairs or alterations in buildings or other trust property, demolish any improvements, raze existing party walls or buildings, and erect new party walls or buildings, as the trustee deems advisable.

(l) Enter into oil, gas, and other mineral leases, on terms deemed advisable by the trustee; enter into any pooling, unitization, repressurization, community, or other types of agreements relating to the exploration, development, operation, and conservation of mineral properties; drill, mine, and otherwise operate for the development of oil, gas, and other minerals; contract for the installation and operation of absorption and repressuring plants; and install and maintain pipelines. Any such leases or agreements may be for a term within or extending beyond the term of the trust.

(m) In the trustee's discretion, abandon any [unproductive or wasted] trust asset or interest therein.

(n) Employ and discharge agents and employees, including but not limited to attorneys, accountants, investment and other advisers, custodians of assets, property managers, real estate agents and brokers, and appraisers, to advise and assist the trustees in the management of any trusts created under this will, and compensate them from the trust property. [*Optional:* The agents and employees may be associated or affiliated with the trustee, or may be descendants or other persons related to the trustee or to me, or a company associated with any such persons.] [*Optional:* The trustee is entitled to rely on the advice of any professional advisers employed under this provision. Reasonable compensation paid to any such agents or employees shall not diminish the compensation to which the trustee is otherwise entitled.]

(o) With respect to securities held in trust, exercise all the rights, powers, and privileges of an owner, including, but not limited to, the power to vote, give proxies, and pay assessments and other sums deemed by the trustee necessary for the protection of the trust property; participate in voting trusts, pooling agreements, foreclosures, reorganizations, consolidations, mergers, and liquidations, and, in connection therewith, deposit securities with and transfer title to any protective or other committee under such terms as the trustee deems advisable; exercise or sell stock subscription or conversion rights; and accept and retain as investments of the trust any securities or other property received through the exercise of any of the foregoing powers.

(p) Hold securities or other trust property in the trustee's own name or in the name of a nominee, without disclosure of the trust, or in unregistered form, so that title may pass by delivery.

(q) Deposit securities in a securities depository that is either licensed or exempt from licensing.

(r) Borrow money for any trust purpose from any person or entity on such terms and conditions as the trustee deems advisable, and obligate the trust for repayment; encumber any trust property by mortgage, deed of trust, pledge, or otherwise, whether for terms within or extending beyond the term of the trust, as the trustee deems advisable, to secure repayment of any such loan; replace, renew, and extend any such loan or encumbrance; and pay loans or other obligations of the trust deemed advisable by the trustee.

(s) In the trustee's discretion, make loans to beneficiaries out of funds of the trust and guarantee the repayment of loans made to beneficiaries by third parties by encumbering trust assets.

(t) Procure and carry, at the expense of the trust, insurance in such forms and in such amounts as the trustee deems advisable to protect the trust property against damage or loss, and to protect the trustee against liability with respect to third persons.

(u) Enforce any obligation owing to the trust, including any obligation secured by a deed of trust, mortgage, or pledge held as trust property, and to purchase any property subject to a security instrument held as trust property at any sale under the instrument.

(v) Extend the time for payment of any note or other obligation held as an asset of, and owing to, the trust, including accrued or future interest, and extend the time for repayment beyond the term of the trust.

(w) Pay or contest any claim against the trust; release or prosecute any claim in favor of the trust; or, in lieu of payment, contest, release, or prosecution, adjust, compromise, or settle any such claim, in whole or in part, with or without consideration.

(x) At trust expense, prosecute or defend actions, claims, or proceedings of whatever kind for the protection of the trust property and of the trustee in the performance of the trustee's duties, and employ and compensate attorneys, advisers, and other agents as the trustee deems advisable.

(y) Accept additions to any trusts created by this will, from any source and at any time; all such additions shall become a part of the trust and shall be held, administered, and distributed in accordance with the terms of the trust. Any additions to the trust shall be made by designating in writing the property to be added. However, the titling of any account, deed, or similar asset in the name of the trustee, as trustee of the trust, shall be deemed to be a transfer to the trust. Any designation by a third party, whether by will, deed, account title designation, or similar transfer, shall also be a transfer to the trust estate. No addition shall become part of the trust estate until it is accepted in writing by the trustee.

6.09. Trustee's Discretion to Allow Income Beneficiaries to Occupy Real Property. The trustee may permit any current income beneficiary of any trust created by this will to occupy any real property that forms a part of the trust. The terms of the occupancy shall be determined by the trustee, in the trustee's discretion, and may include, but are not limited to, rent-free occupancy or occupancy in consideration of full or partial payment of mortgage or trust deed payments, taxes, assessments, insurance, maintenance, and ordinary repairs.

6.10. Power to Combine Trust Assets. Each trust created under this will shall constitute a separate trust and be administered and accounted for accordingly; however, the assets of all of the trusts may be combined and held for the trust beneficiaries without physical division into separate trusts until time of distribution.

6.11. Early Termination of Trusts. The trustee shall have the power, in the trustee's discretion, to terminate any trust created under this will whenever the fair market value of the trust falls below \_\_\_\_\_ [amount, e.g., \$25,000], or becomes so small in relation to the costs of administration as to make continuing administration uneconomical. Upon termination, the trustee shall distribute the principal and any accrued or undistributed net income to the income beneficiaries in proportion to their shares of the income. If no fixed amount of income is payable to specific beneficiaries, the trustee shall distribute the principal and any accrued or undistributed net income in equal shares to those beneficiaries who would then be entitled to income payments from the trust.

6.12. Power to Delay Distributions. Following my death, the trustee shall have the power, in the trustee's discretion, to determine the reasonable administrative period necessary or appropriate to pay my debts, expenses, taxes, and other liabilities, before dividing or distributing the trust assets as provided herein, and to delay the division or distribution during that period. During that administrative period, the trustee, in the trustee's discretion, may accumulate the trust income, or distribute the income currently, or partially accumulate and partially distribute the income, as the trustee determines, but any income accumulated shall be distributable to the beneficiary or beneficiaries next entitled to distribution or allocation of the same upon conclusion of the administrative period.

6.13. Division or Distribution in Cash or in Kind. In order to satisfy a pecuniary gift or to distribute or divide trust assets into shares or partial shares, the trustee may distribute or divide those assets in kind, or divide undivided interests in those assets, or sell all or any part of those assets and distribute or divide the property in cash, in kind, or partly in cash and partly in kind. Property distributed to satisfy a pecuniary gift under this will shall be valued at its fair market value at the time of distribution. This section shall apply only to the extent that it does not conflict with the provisions of Article 4 specifying allocation of assets involving generation-skipping trusts.

6.14. Payments to Incapacitated Persons. If at any time any trust beneficiary is a minor, or it appears to the trustee that any trust beneficiary is incapacitated, incompetent, or for any other reason not able to receive payments or make intelligent or responsible use of the payments, then the trustee, in lieu of making direct payments to the trust beneficiary, may make payments to the beneficiary's conservator or guardian; to the beneficiary's custodian under the Uniform Gifts to Minors Act or Uniform Transfers to Minors Act of any state (including a custodian selected by the trustee); to one or more suitable persons as the trustee deems proper, such as a relative of or a person residing with the beneficiary, to be used for the beneficiary's benefit; to any other person, firm, or agency for services rendered or to be rendered for the beneficiary's assistance or benefit; or to accounts in the beneficiary's name with financial institutions. The receipt of payments by any of the foregoing shall constitute a sufficient acquittance of the trustee for all purposes.

6.15. Grant of Specific Powers Not to Limit Exercise of General Powers. The enumeration of specific powers under this will shall not limit the trustee from exercising any other power with respect to any trusts created by this will that may be necessary or appropriate for the trustee to have and exercise in order to carry out the purposes of the trusts or to permit the trustee to fulfill the trustee's responsibilities and duties with respect to the trust.

6.16. Power to Disclaim or Release Powers. Any trustee may disclaim, release, or restrict the scope of any power or discretion that the trustee may hold in connection with any trust created under this will, whether the power or discretion is expressly granted in this will or is implied by law. The trustee shall disclaim a power in the manner required by applicable federal or California law. The trustee shall release or restrict any power or discretion by giving written notice to the beneficiary or beneficiaries then entitled to current distribution of income from the trust, specifying the power or discretion to be released or restricted, the nature of the restriction, and, if appropriate, the person or persons to whom the released or restricted power shall pass and be exercisable. If a power is disclaimed, the power shall be available to and exercisable by the other trustee or trustees.

6.17. Trustee's Liability. No [optional:"family" or individual] trustee [optional: who is serving without compensation under this will] shall be liable to any interested party for acts or omissions of that trustee, except those resulting from that trustee's willful misconduct or gross negligence. [Optional: As used in this provision, a "family" trustee is a trustee who is related to me by blood or marriage.] This standard shall also apply regarding a trustee's liability for the acts or omissions of any co-trustee or agent employed by the trustee.

6.18. Written Notice to Trustee. Until the trustee receives written notice of any death or other event upon which the right to payments from any trust may depend, the trustee shall incur no liability for disbursements made in good faith to persons whose interests may have been affected by that event.

6.19. Duty to Account. The trustee shall render accounts at least annually, at the termination of a trust, and upon a change of trustees, to the persons and in the manner required by law.

## Article 7 : Guardian

7.01. Nomination of Guardian. If a guardian of the person, estate, or person and estate is necessary for any minor child of mine, I nominate \_\_\_\_\_ [*name and relationship to testator or other means of identification, e.g., my sister, Alice R. Turner, or Edward C. Gardner, who resides at \_\_\_\_\_ (address)*], as that guardian. If at any time \_\_\_\_\_ [*name, e.g., my sister, Alice R. Turner, or Edward C. Gardner*] is unable or unwilling to serve or continue as guardian, I nominate \_\_\_\_\_ [*name and relationship to testator or other means of identification, e.g., my brother, Charles Robert White,*] as guardian.

### **PRACTICE TIP**

In some circumstances it may be appropriate to nominate one or more individuals to serve as guardian(s) of the person and a different set of individuals to serve as guardian(s) of the estate. In such cases, the form for Section 7.01 should be repeated, once for each set of nominations. *Commentary by Albert G. Handelman.*

7.02. Bond. \_\_\_\_\_ [No bond or undertaking *or* Bond] shall be required of any guardian of the estate nominated in this will.

## Article 8 : Concluding Provisions

8.01. Definition of Death Taxes. The term "death taxes," as used in this will, shall mean all inheritance, estate, succession, and other similar taxes that are payable by any person on account of that person's interest in my estate or by reason of my death, including penalties and interest, but excluding the following:

(a) Any additional tax that may be assessed under *Internal Revenue Code Section 2032A*.

(b) Any federal or state tax imposed on a generation-skipping transfer, as that term is defined in the federal tax laws unless the applicable tax statutes provide that the generation-skipping transfer tax on that transfer is payable directly out of the assets of my gross estate].

8.02. Payment of Death Taxes. The executor shall pay death taxes as follows:

(a) Death taxes attributable to property inventoried in my probate estate shall be paid out of my residuary estate, and none of those death taxes shall be prorated or apportioned among the persons interested in that property.

(b) Death taxes attributable to property not inventoried in my probate estate shall be prorated and apportioned among the persons interested in that property as provided in the California Probate Code.

(c) The method of apportionment of death taxes specified in this will shall apply equally to any property passing under any codicil to this will, except to the extent that a codicil expressly provides for a different method of apportionment.

### **PRACTICE TIP**

The allocation of taxes shown in this form is but one of many possible allocation schemes. In each case the drafter should carefully consider the nature of the client's assets, including whether those assets will pass under the will or otherwise, and the value of assets passing under the will as specific, rather than residuary, gifts. Only when these factors are considered can the appropriate tax allocation formula be selected. Other possible allocation clauses appear in CALIFORNIA WILLS & TRUSTS FORMS, Div. IV, *Individual Will Provisions*, Pt. 90, *Concluding Provisions*, Form 90.30 (Alts. 90.30-1-90.30-7); for more detailed discussion of tax allocation, see California Wills & Trusts, Ch. 23, *Provisions for Payment of Taxes, Expenses, and Debt* (Matthew Bender).

8.03. Abatement of Gifts. If my estate is insufficient to satisfy in full all of the gifts provided for in this will, I direct that gifts shall abate in the following order:

First, the gift to \_\_\_\_\_ [*name, e.g., Mary Margaret White*] made in Section \_\_\_\_\_ [*e.g., 2.04*] of this will;

Second, the gift to \_\_\_\_\_ [*name, e.g., Charles Robert White*] made in Section \_\_\_\_\_ [*e.g., 2.05*] of this will.

8.04. Simultaneous Death. If any beneficiary under this will and I die simultaneously, or if it cannot be established by clear and convincing evidence whether that beneficiary or I died first, I shall be deemed to have survived that beneficiary, and this will shall be construed accordingly.

8.05. Intentional Omission of Heirs Not Specifically Provided For in Will. Except as otherwise specifically provided in this will, I have intentionally and with full knowledge omitted to provide for my heirs, regardless of whether or not I am aware of their existence and identities at the time this will is executed.

8.06. No-Contest Clause. If any person, directly or indirectly, contests the validity of this will in whole or in part, or opposes, objects to, or seeks to invalidate any of its provisions, or seeks to succeed to any part of my estate otherwise than in the manner specified in this will, any gift or other interest given to that person under this will shall be revoked and shall be disposed of as if he or she had predeceased me [*optional: without issue*].

8.07. Perpetuities Savings Clause. Notwithstanding any other provision of this will, every trust created by this will[, or by the exercise of any power of appointment created by this will,] shall terminate no later than 21 years after the death of \_\_\_\_\_ [*designate measuring life or lives, e.g., the last survivor of my sister, Rose Elizabeth White, and my issue*] who are alive at the time of my death. If a trust is terminated under this section of the will, the trustee shall distribute all of the principal and undistributed income of the trust to the income beneficiaries of the trust in the proportion in which they are entitled (or eligible, in the case of discretionary payments) to receive income immediately before the termination. If that proportion is not fixed by the terms of this will, the trustee shall distribute all of the trust property to the persons then entitled or eligible to receive income from the trust \_\_\_\_\_ [*specify pattern of distribution, e.g., outright in a manner that, in the trustee's opinion, will give effect to my intent in creating the trust, the trustee's decision to be final and incontestable by anyone or as a class, in the manner provided in California Probate Code Section \_\_\_\_\_ (240 or 246 or 247) or in equal shares, regardless of whether all of such persons are members of the same generation*].

8.08. Definition of Incapacity. For purposes of this will, a person shall be deemed "incapacitated" if and for so long as a court of competent jurisdiction has made a finding to that effect, or a guardian or conservator of that person's estate or person duly appointed by a court of competent jurisdiction is serving, or upon certification by two physicians licensed to practice under the laws of the state where the person is domiciled at the time of the certification that the person is unable properly to care for himself or herself or for his or her property. The latter certification shall be made by each physician in a written declaration under penalty of perjury.

8.09. Definition of Education. As used in this will, the term "education" refers to the following:

- (a) Education at public or private elementary, junior high, middle, or high schools, including boarding schools;
- (b) Undergraduate, graduate, and postgraduate study in any field, whether or not of a professional character, in colleges, universities, or other institutions of higher learning;
- (c) Specialized formal or informal training in music, the stage, the handicrafts, or the arts, whether by private instruction or otherwise; and

(d) Formal or informal vocational or technical training, whether through programs or institutions devoted solely to vocational or technical training, or otherwise.

8.10. Captions. The captions appearing in this will are for convenience of reference only, and shall be disregarded in determining the meaning and effect of the provisions of this will.

8.11. Severability Clause. If any provision of this will is invalid, that provision shall be disregarded, and the remainder of this will shall be construed as if the invalid provision had not been included.

8.12. California Law to Apply. All questions concerning the validity and interpretation of this will, including any trusts created by this will, shall be governed by the laws of the State of California in effect at the time this will is executed.

8.13. Gifts to "Heirs." For any gift to my heirs that is made outright in this instrument, those heirs shall be determined as if I had died intestate at the time for distribution, and the identity and shares of those heirs shall be determined according to the California laws of succession that concern separate property not acquired from a previously deceased spouse and that are in effect at my death. For any assets of any trust estate created by this will to be distributed to my heirs, those heirs shall be determined as if I had died intestate immediately following the termination of the trust of each share, and the identity and shares of those heirs shall be determined according to the California laws of succession that concern separate property not acquired from a previously deceased spouse and that are in effect at my death.

Executed on \_\_\_\_\_ [date], at \_\_\_\_\_ [city or town and state].

\_\_\_\_\_ [signature of testator]

[typed name]

On the date written above, we, the undersigned, each being present at the same time, witnessed the signing of this instrument by \_\_\_\_\_ [name of testator]. At that time, \_\_\_\_\_ [he or she] appeared to us to be of sound mind and memory and, to the best of our knowledge, was not acting under fraud, duress, menace, or undue influence. Understanding this instrument, which consists of \_\_\_\_\_ pages, including the pages on which the signature of \_\_\_\_\_ [name of testator] and our signatures appear, to be the will of \_\_\_\_\_ [name of testator], we subscribe our names as witnesses thereto. We declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on \_\_\_\_\_ [date], at \_\_\_\_\_ [city or town and state].

\_\_\_\_\_ [signature of first witness]

Residing at \_\_\_\_\_ [street address]

\_\_\_\_\_ [city and state]

\_\_\_\_\_ [signature of second witness]

Residing at \_\_\_\_\_ [street address]

\_\_\_\_\_ [city and state]

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Estate, Gift & Trust Law Wills General Overview



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California Legal Forms--Transaction Guide

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DIVISION IV: WILLS AND TRUSTS  
CHAPTER 61 WILL DRAFTING AND COMPLETE WILL FORMS  
PART IV. FORMS  
A. Wills for Unmarried Persons

*23-61 California Legal Forms--Transaction Guide §§ 61.202-61.209*

**AUTHOR:** Reviewed by Albert G. Handelman

**[Reserved]**

§§ 61.202[Reserved]



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DIVISION IV: WILLS AND TRUSTS  
CHAPTER 61 WILL DRAFTING AND COMPLETE WILL FORMS  
PART IV. FORMS  
B. Wills for Married Persons

*23-61 California Legal Forms--Transaction Guide § 61.210*

**AUTHOR:** Reviewed by Albert G. Handelman

**§ 61.210 Will for Married Person; All Property Outright to Spouse and Children; Disclaimer Trust**

**[1] Comment**

**[a] Use of Form**

This form is a complete will designed for use by a testator who is married, has children, and wishes to leave his or her entire estate outright to the spouse and children.

The will permits the testator to make one or more specific devises [see Article 2]. The residuary estate is left to the testator's spouse or, if the spouse does not survive the testator, to the testator's children in equal shares [see Article 3].

For illustrative purposes, it is assumed that the number of the testator's children may increase or decrease after the will is executed. To accommodate the possibility that the testator may have additional children, dispositions to the children are made in the form of class gifts.

The devises to the surviving spouse provided for in this will avoid all estate taxation in the testator's estate by reason of the unlimited federal estate tax marital deduction [see *I.R.C. § 2056*; see also discussion of the marital deduction in Ch. 71, *Marital Deduction Trust Provisions*].

However, this will *not* achieve the maximum tax savings if the combined assets of the testator and spouse are likely to exceed the "applicable exclusion amount" (unified credit) [see *I.R.C. § 2010(c)* and discussion in § 60.13[4][b]] available on the death of either the testator or the spouse. To achieve maximum estate tax savings under these circumstances, a marital deduction formula devise coupled with a bypass trust should be considered [see §§ 61.212, 61.213, 61.214].

The will contains provisions nominating an executor [see Article 5] and a guardian for any of the testator's children who are minors at the testator's death [see Article 7].

**[b] Disclaimer Trust**

Section 3.03 of this will provides that if the testator's spouse elects to disclaim any property that he or she would have been entitled to receive under the will, the property will be held in trust under the provisions of Article 4. This has the effect of creating a "disclaimer trust," but only if and to the extent that the surviving spouse disclaims the property.

Disclaimers can be useful estate planning tools. If property that the surviving spouse would otherwise be entitled to receive (either outright or in trust) upon the death of the deceased spouse is effectively disclaimed under rules set forth in the Internal Revenue Code [*see I.R.C. § 2518; Treas. Reg. §§ 25.2518-1-25.2518-3*], the property may be removed from the surviving spouse's estate for estate tax purposes. The property will pass to alternative devisees or heirs outright or, if the will provides for a disclaimer trust, be transferred to a trust which can be structured in such a way that its assets will not be included in the surviving spouse's estate on the surviving spouse's death. Disclaimers can be used to defer decisions on allocation of assets or devises until after a testator's death, when the consequences of allocation will generally be seen much more clearly than when the will is executed. For further discussion of disclaimer trusts, see *Ch. 71, Marital Deduction Trust Provisions, § 71.16*.

Although the disclaimer trust makes the will more complicated than it would otherwise be, it can save substantial estate taxes if the value of the combined estates of the testator and the spouse should increase unexpectedly after the will is executed. The increase may result from an unexpected inheritance, a large personal injury award, or some other cause. The attorney may omit the disclaimer trust if a simpler will is desired, but its inclusion is recommended even if it is thought unlikely that it will be needed.

Since the disclaimer trust will not become operative in many cases, its provisions have been kept relatively simple. They provide for lifetime distributions to the surviving spouse of all of the income and as much of the principal as is needed for the surviving spouse's health, education, support, and maintenance. This provision establishes a so-called "ascertainable standard" and will ensure that, even if the surviving spouse serves as trustee of the disclaimer trust, its assets will not be included in the surviving spouse's estate on his or her death [*see I.R.C. § 2041(b)(1)(A)* and discussion in *Ch. 60, Estate Planning, § 60.13[1][g]*]. On the death of the surviving spouse, the trust assets are distributed to the testator's issue. If more complex disclaimer trust provisions are desired, the attorney may refer to the more complex wills in this chapter for sample patterns of distribution. If those provisions are inadequate, the attorney should refer to the detailed will provisions in *California Wills & Trusts* (Matthew Bender). However, the attorney should modify the provisions of the disclaimer trust only after analyzing the proposed modifications carefully to determine that they will not result in unfavorable tax consequences.

**[c] Survivorship**

This form gives the testator the option of requiring that devisees survive the testator, or survive the testator for a specified time, in order to receive their devises. It is sometimes advisable to condition a devise on survival for a specified period of time, as this may obviate successive administration and taxation of the same property. In some circumstances, however, routine use of survivorship clauses may be unnecessary, or even harmful. For discussion, see § 61.200[1][b].

**[d] Standard Provisions**

This will contains numerous commonly encountered provisions that are also found in other wills in this chapter. These are provisions relating to the executor's bond [*see Section 5.04 of form*], the executor's authority to act under the California Independent Administration of Estates Act [*see Section 5.05 of form*], the executor's powers [*see Section 5.06 of form*], payments to incapacitated persons [*see Section 5.07 of form*], the executor's liability [*see Section 5.08 of form*], disinheritance of the testator's heirs [*see Section 8.04 of form*], and contest of the will [*see Section 8.05 of form*]. For discussion of these provisions, see § 61.200[1].

**[e] Distribution of Class Gifts**

Section 3.02 of this will provides that the residue will be distributed to the testator's children if the testator's spouse does not survive the testator. It also provides that, if any of the children fail to survive the testator, the share of the deceased child will be distributed outright among the child's issue who survive the testator in the manner provided in *Prob. Code* §§ 240, 246, or 247, or in equal shares, regardless of whether or not all such issue are members of the same generation. Choosing the appropriate language from this provision will call for the residue to be distributed according to certain standard patterns for the distribution of class gifts described in the code sections referred to. For an explanation of each of these patterns, and the Probate Code sections that govern them, see § 61.15[6][c]-[f].

**[2] FORM****Will for Married Person; All Property Outright to Spouse and Children; Disclaimer Trust**

WILL OF

\_\_\_\_\_ [full legal name of testator, e.g., RICHARD DANIEL BROWN]

I, \_\_\_\_\_ [full legal name of testator, e.g., Richard Daniel Brown, a resident of \_\_\_\_\_ County, California, declare that this is my will. I hereby revoke all my previous wills and codicils.

## Article 1 : Introductory Provisions

1.01. Marital Status. I am married to \_\_\_\_\_ [name of spouse, e.g. Elizabeth Collier Brown], and all references in this will to "my \_\_\_\_\_ [husband or wife]" are to \_\_\_\_\_ [him or her].

1.02. Identification of Living Child(ren). I have \_\_\_\_\_ [number] living \_\_\_\_\_ [child or children], whose name[s] and date[s] of birth \_\_\_\_\_ [is or are] as follows:

[e.g., Mary Rose Carpenter, who was born on June 10, 1988]

[e.g., John Richard Brown, who was born on November 8, 1994]

[e.g., Edward Daniel Brown, who was born on November 8, 1997]

1.03. No Deceased Children. I have no deceased children.

1.04. Definitions of Child and Children. As used in this will, the terms "child" and "children" refer to all persons referred to in *California Probate Code Section 26*, as in effect at the time of execution of this will.

1.05. Definition of Issue. As used in this will, the term "issue" refers to all lineal descendants of all generations, with the relationship of parent and child in each generation being determined by the definitions of "child" and "children" set forth in this will.

1.06. Number and Gender. As used in this will, references in the masculine gender shall be deemed to include the feminine and neuter genders, and vice versa, and references to the singular shall be deemed to include the plural, and vice versa, wherever the context so permits.

1.07. Property Disposed of by Will. It is my intention by this will to dispose of all of my separate property, [and] my entire one-half interest in the community property of my \_\_\_\_\_ [wife or husband] and myself [if there is likely to be any quasi-community property, add.], and my entire one-half interest in my quasi-community property].

1.08. No Exercise of Power of Appointment. I intentionally refrain from exercising any power of appointment that I now possess or that hereafter may be conferred on me.

1.09. No Contract Affecting Will. I have not entered into any contract to make a will or a testamentary gift, not to revoke a will or a testamentary gift, or to die intestate. [Optional, add language referring to similar will executed by spouse: The similarity of the provisions of this will to the provisions of the will of my \_\_\_\_\_ (husband or wife) (executed on this date) shall not be construed as evidence of any such contract.]

## Article 2 : Particular Gifts

2.01. Specific Gifts of Personal Property. I give the items of property described below [optional:, together with my interest in any insurance on those items,] to the persons named below:

(a) I give \_\_\_\_\_ [describe property, e.g., my fourteen-karat gold dinner ring] to \_\_\_\_\_ [name of devisee and relationship to testator or other means of identification, e.g., my sister, Margaret E. Hunter] [if desired, add survivorship clause, e.g., if she survives me or, if she survives me for 60 days] [if gift is conditioned on survival, add alternative disposition, e.g.,; but if she does not survive me (for that period), this gift shall \_\_\_\_\_ (e.g., lapse and become part of the residue of my estate or go to my daughter, Mary Rose Carpenter)];

(b) I give \_\_\_\_\_ [describe property, e.g., my sterling silver flatware service] to \_\_\_\_\_ [name of devisee and relationship to testator or other means of identification, e.g., my niece, Barbara J. Hunter] [if desired, add survivorship clause, e.g., if she survives me or, if she survives me for 60 days] [if gift is conditioned on survival, add alternative disposition, e.g.,; but if she does not survive me (for that period), this gift shall \_\_\_\_\_ (e.g., lapse and become part of the residue of my estate or go to my daughter, Mary Rose Carpenter, if she should survive me)];

(c) I give \_\_\_\_\_ [describe property, e.g., the promissory note executed in my favor by John D. Smith and Jane B. Smith, on June 1, 1990, in the principal amount of \$100,000, with interest on unpaid principal in the amount of 10 percent per annum, principal and interest payable in monthly payments of \$1,000 per month, together with the deed of trust of the same date on real property located in the City of Monterey, County of Monterey, State of California, and recorded on June 2, 1990, at Reel 10011, Book 10022, Official Records, Monterey County, California, securing the payment of principal and interest under that note,] to \_\_\_\_\_ [name of devisee and relationship to testator or other means of identification, e.g., my brother, Edward R. Brown] [optional:, if he survives me or, if he survives me for 60 days] [if gift is conditioned on survival, add alternative disposition, e.g.,; but if he does not survive me (for that period), this gift shall \_\_\_\_\_ (e.g., lapse and become part of the residue of my estate or go to my son, John Richard Brown)].

[Continue as necessary for each additional item of property to be specifically devised.]

2.02. Gift[s] to Be Selected From Among My Personal Effects. I give \_\_\_\_\_ [name(s) of devisee(s) and relationship(s) to testator, e.g., my brother, Edward R. Brown, or my niece, Barbara J. Hunter, or my sister, Margaret E. Hunter, and my niece, Barbara J. Hunter, and each of them,] the right to select \_\_\_\_\_ [specify, e.g., one item or one item each or two items or two items each] from among my personal effects so that \_\_\_\_\_ [he or she or they] will have \_\_\_\_\_ [a memento or mementos] to remember me by. I make this gift to \_\_\_\_\_ [him or her or them] as a symbol of my love and affection. If \_\_\_\_\_ [he or she or any person named in this section] does not survive me or does not make a selection within three months after the date of my death, or within 30 days after this will is admitted to probate, whichever is later, then the gift made to \_\_\_\_\_ [him or her or that person] in this section shall fail. [If desired, specify any types of property that may not be selected, e.g., For purposes of this gift only, the word "personal effects" shall not include any motor vehicles or any items of property with an appraised value in excess of \$2,500].

2.03. General Pecuniary Gift. I give the sum of \$ \_\_\_\_\_ to \_\_\_\_\_ [*name of devisee and relationship to testator or other means of identification, e.g., my niece, Barbara J. Hunter*] [*if desired, add survivorship clause, e.g., if she survives me or if she survives me for 60 days*]. [*If gift is conditioned on survival, add appropriate alternative disposition, e.g., If she does not survive me (for that period), this gift shall \_\_\_\_\_ (e.g., lapse and become part of the residue of my estate).*]

[*Select one of the following alternatives:*]

2.04. Interest on Pecuniary Gifts. [Except as otherwise specifically provided in this will,] [n]o interest shall accrue on all [general] pecuniary gifts made in this will.

[*or*]

2.04. Interest on Pecuniary Gifts. [Except as otherwise specifically provided in this will,] [I]nterest at the rate \_\_\_\_\_ [*e.g., of 10 percent per annum or specified in California Probate Code Section 12001, or any successor to that section,*] shall accrue on all [general] pecuniary gifts made in this will from and after \_\_\_\_\_ [*e.g., the date of my death or the first anniversary of my death*] and until those gifts are paid in full. All interest shall be paid at the time the gift is distributed.

[*Continue with the following:*]

#### Article 3 : Residuary Provisions

3.01. Disposition of Residue. I give the residue of my estate outright to my \_\_\_\_\_ [husband *or* wife] [*if desired, add survivorship clause, e.g., if he survives me or, if she survives me for 60 days*].

3.02. Alternate Disposition of Residue. If my \_\_\_\_\_ [husband *or* wife] does not survive me [for 60 days], I give the residue of my estate outright to my children, as a class, in equal shares. If any of my children should fail to survive me, the share of the deceased person shall be distributed outright among the issue of the deceased person, if any, who survive me, \_\_\_\_\_ [in the manner provided in California Probate Code Section \_\_\_\_\_ (240 *or* 246 *or* 247) *or* in equal shares, regardless of whether or not all such issue are members of the same generation]. The share of any child who dies without surviving issue shall be divided equally among the other shares created under this section. If the residue of my estate is not completely disposed of by the preceding provisions, I give the portion that is not disposed of to \_\_\_\_\_ [*specify alternative method of disposition, e.g., the Marin County chapter of the Anonymous Artists of America or my heirs*].

3.03. Disclaimer of Property by My Spouse. Any property or portion of property that is disclaimed by my \_\_\_\_\_ [wife *or* husband] shall pass to the trustee named in Article 6, in trust, to be held, administered, and distributed according to the terms set forth in Article 4 applicable to the Disclaimer Trust. [However, if my \_\_\_\_\_ (wife *or* husband) also disclaims an interest in all or any portion of the Disclaimer Trust, that disclaimed interest shall be administered and distributed as if my \_\_\_\_\_ (wife *or* husband) predeceased me.]

#### Article 4 : Trust Distributions

4.01. Disclaimer Trust. The trustee shall hold, administer, and distribute the assets of the Disclaimer Trust as follows:

(a) The trustee shall pay to or apply for the benefit of my \_\_\_\_\_ [husband *or* wife] all of the net income of the trust, in monthly or other convenient installments [agreed upon by \_\_\_\_\_ (*identity of beneficiary, e.g., my wife*) and the trustee], but not less often than annually, for life.

(b) The trustee shall distribute to or apply for the benefit of my \_\_\_\_\_ [husband *or* wife], for life, as much of the principal of the trust as the trustee, in the trustee's discretion, deems necessary [, when added to the income payments from this trust,] for \_\_\_\_\_ [his *or* her] health, education, support, and maintenance. All decisions of the trustee regarding payments under this subsection, if any, are within the trustee's discretion and shall be final and incontestable by anyone.

(c) On the death of my \_\_\_\_\_ [husband *or* wife], [and after the payment of any debts, expenses, fees, costs, and taxes that are payable from the trust property,] the trustee shall divide the trust property among my issue \_\_\_\_\_ [in the manner provided in California Probate Code Section \_\_\_\_\_ (240 *or* 246 *or* 247) *or* in equal shares, regardless of whether or not all such issue are members of the same generation]. The share of each issue shall be distributed outright to that issue. If all my issue predecease my \_\_\_\_\_ [husband *or* wife], the trustee shall distribute any undistributed balance of the trust property outright to \_\_\_\_\_ [*alternative disposition, e.g., my heirs or the Marin County chapter of the Anonymous Artists of America*].

4.02. Other Resources Taken Into Account. In making any distributions of principal from the Disclaimer Trust for the health, education, support, and maintenance of my \_\_\_\_\_ [husband *or* wife], the trustee shall take into consideration, to the extent the trustee deems advisable, any other income or resources available to \_\_\_\_\_ [him *or* her] that are known to the trustee and that are reasonably available for that purpose.

4.03. Trustee's Power to Determine Income and Principal. Unless otherwise specifically provided in this will, the determination of all matters with respect to what is principal and income of any trust under this will and the apportionment and allocation of receipts, expenses, and other charges between principal and income shall be governed by the provisions of the California Revised Uniform Principal and Income Act from time to time existing. The trustee in the trustee's discretion shall determine any matter not provided for either in this instrument or in the California Revised Uniform Principal and Income Act.

#### Article 5 : Executor

5.01. Nomination of Executor. I nominate \_\_\_\_\_ [*name and relationship to testator or other means of identification, e.g., my husband or my wife or my brother, Edward R. Brown,*] as executor of this will.

5.02. Successor Executor. If \_\_\_\_\_ [*nominee(s) for initial executor, e.g., my husband or my wife or my brother, Edward R. Brown,*] is for any reason unable or unwilling to serve, or to continue to serve, as executor, I nominate the following, in the order of priority indicated, as successor executor:

First, \_\_\_\_\_ [*name and description, e.g. (for coexecutors) my sister, Margaret E. Hunter*];

Second, \_\_\_\_\_ [*name and description, e.g. (for individual) Arthur J. Shoemaker, who resides at \_\_\_\_\_ (address)*];

Third, \_\_\_\_\_ [*name and description, e.g. (for corporate executor) Double Eagle Bank, Fresno, California office*].

5.03. Definition of Executor. The term "executor," as used in this will, refers to each personal representative of my estate who is serving at the pertinent time.

5.04. Bond. \_\_\_\_\_ [No bond or undertaking *or* Bond] shall be required of any executor nominated in this will.

5.05. Independent Administration. The executor shall \_\_\_\_\_ [have full *or* not have] authority to administer my estate under the California Independent Administration of Estates Act.

5.06. Powers of Executor. Subject to any limitations stated elsewhere in this will, the executor shall have, in addition to all of the powers now or hereafter conferred on executors by law, and any powers enumerated elsewhere in this will, the power to perform any of the acts specified in this section:

(a) Take possession or control of all of my estate subject to disposition by this will, and collect all debts due to me or to my estate.

(b) Receive the rents, issues, and profits from all real and personal property in my estate until the estate is settled or delivered over by order of court to my heirs or beneficiaries.

(c) Pay taxes on, and take all steps reasonably necessary for the management, protection, and preservation of, all property in my estate.

(d) Commence and prosecute, either individually or jointly with my heirs or beneficiaries, any action necessary or proper to quiet title to or recover possession of any real or personal property in my estate.

(e) Vote in person, and give proxies to exercise, any voting rights with respect to any stock, any membership in a nonprofit corporation, or any other property in my estate, and waive notice of a meeting, give consent to the holding of a meeting, and authorize, ratify, approve, or confirm any action that could be taken by shareholders, members, or property owners.

(f) Insure the property of my estate against damage or loss, and insure the executor against liability to third persons.

(g) Deposit money belonging to my estate in an insured account in a financial institution in California.

(h) Invest and reinvest any money of my estate not reasonably required for the immediate administration of my estate in any kind of property, real, personal, or mixed, that persons of prudence, discretion, and intelligence acquire for their own accounts; provided, however, that in investing any property of my estate, the executor shall act with the care, skill, prudence, and diligence under the circumstances then prevailing, including but not limited to the general economic conditions and the anticipated needs of my estate and its beneficiaries, that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of like character and with like aims to accomplish the purposes of my estate as determined from this will.

(i) Retain any assets of my estate for as long as the executor deems to be in the best interest of my estate.

(j) Borrow money on behalf of my estate and pledge, hypothecate, or otherwise encumber property of my estate, real or personal, as security for any sums so borrowed.

(k) In order to satisfy a pecuniary gift or to distribute or divide estate assets into shares or partial shares, the executor may distribute or divide those assets in kind, or divide undivided interests in those assets, or sell all or any part of those assets and distribute or divide the property in cash, in kind, or partly in cash and partly in kind. Property distributed to satisfy a pecuniary gift under this will shall be valued at its fair market value at the time of distribution.

(l) Pay any and all charges reasonably incurred in connection with or incidental to the distribution of any property of my estate, including but not limited to expenses of storage, freight, shipping, delivery, packing, and insurance; and, on any accounting, treat any such expenditures as expenses of the administration of my estate.

(m) If any asset of my estate consists of an option right, exercise the option after authorization by order of court, upon a showing that the exercise would be to the advantage of my estate, and use any funds or property in my estate to acquire the property covered by the option.

(n) Hold a security in the name of a nominee or in any other form without disclosure of my estate so that title to the security may pass by delivery.

(o) Exercise any subscription rights owned or received by my estate by reason of owning securities, after authorization by court upon a showing that it is to the advantage of my estate.

(p) Sell, at either public or private sale and with or without notice, and grant options to purchase, any property belonging to my estate [*optional*:, subject only to any confirmation of court required by law].

(q) Lease any real or personal property belonging to my estate on such terms and conditions as the executor determines to be in the best interest of my estate [*optional*:, subject only to any confirmation of court required by law].

(r) Dispose of or abandon tangible personal property, except tangible personal property that is a specific gift, when the cost of collecting, maintaining, and safeguarding the property would exceed its fair market value.

(s) Compromise or settle any claim, action, or proceeding by or for the benefit of, or against, me, my estate, or the executor [*optional*:, subject only to any confirmation of court that may be required by law].

(t) Employ professional investment counsel to make recommendations with respect to, and otherwise assist in, investing the assets of my estate; and, on any accounting, treat any fees paid to investment counsel as expenses of the administration of my estate.

5.07. Payments to Incapacitated Persons. If at any time any beneficiary under this will is a minor, or it appears to the executor that any beneficiary is incapacitated, incompetent, or for any other reason not able to receive payments or make intelligent or responsible use of the payments, then the executor, in lieu of making direct payments to the beneficiary, may make payments to the beneficiary's conservator or guardian; to the beneficiary's custodian under the Uniform Gifts to Minors Act or Uniform Transfers to Minors Act of any state (including a custodian selected by the executor); to one or more suitable persons as the executor deems proper, such as a relative of or a person residing with the beneficiary, to be used for the beneficiary's benefit; to any other person, firm, or agency for services rendered or to be rendered for the beneficiary's assistance or benefit; or to accounts in the beneficiary's name with financial institutions. The receipt of payments by any of the foregoing shall constitute a sufficient acquittance of the executor for all purposes.

5.08. Executor's Liability for Own Acts. The executor shall not be liable to my estate or to any person interested in it for any act or omission of the executor, except an act or omission that is committed intentionally, with gross negligence, in bad faith, or with reckless indifference to the interests of persons interested in my estate, or an act or omission from which the executor derives a profit.

#### Article 6 : Trustee

6.01. Nomination of Trustee. I nominate \_\_\_\_\_ [*name of trustee and relationship to testator or other means of identification, e.g., my husband or my wife or my sister, Margaret E. Hunter,*] as trustee of any trust created under this will.

6.02. Successor Trustee. If \_\_\_\_\_ [*nominee(s) for initial trustee, e.g., my husband or my wife or my sister, Margaret E. Hunter,*] is for any reason unable or unwilling to serve, or to continue to serve, as trustee, I nominate the following, in the order of priority indicated, as successor trustee:

First, \_\_\_\_\_ [*name and description, e.g. (for coexecutors) my brother, Edward R. Brown*];

Second, \_\_\_\_\_ [*name and description, e.g. (for individual) Arthur J. Shoemaker, who resides at \_\_\_\_\_ (address)*];

Third, \_\_\_\_\_ [*name and description, e.g. (for corporate executor) Double Eagle Bank, Fresno, California office*].

6.03. Definition of Trustee. Reference in this instrument to "the trustee" shall be deemed a reference to whoever is serving as trustee or co-trustees, and shall include alternate or successor trustees, unless the context requires otherwise.

6.04. Bond. \_\_\_\_\_ [No bond or undertaking *or* Bond] shall be required of any trustee nominated in this will.

6.05. Compensation of Trustee. The trustee shall be entitled to reasonable compensation for services rendered, payable without court order. [*Optional*: If a trustee serves for only part of a calendar year, the annual compensation shall be prorated according to the number of days during that year that the trustee was acting as trustee.]

6.06. Procedure for Resignation. Any trustee may resign at any time, without giving a reason for the resignation, by giving written notice, at least \_\_\_\_\_ [*specify; e.g., 30 days*] before the time the resignation is to take effect, to any other trustee then acting, to any persons authorized to designate a successor trustee, to all living trust beneficiaries known to the trustee (or, in the case of a minor beneficiary, to the parent or guardian of that beneficiary), and to the successor trustee. A resignation shall be effective upon written acceptance of the trust by the successor trustee.

6.07. General Powers of Trustee. To carry out the purposes of the trusts created under this will, and subject to any limitations stated elsewhere in this will, the trustee shall have all of the following powers, in addition to all of the powers now or hereafter conferred on trustees by law:

(a) Retain property received into the trust at its inception, or later added to the trust, as long as the trustee considers that retention in the best interests of the trust or in furtherance of my goals in creating the trust, as determined from this will, but subject to the standards of the prudent investor rule as set forth in the California Uniform Prudent Investor Act.

(b) Invest and manage the trust assets as a prudent investor would, by considering the purposes, terms, distribution requirements, and other circumstances of the trust. In satisfying this standard, the trustee shall exercise reasonable care, skill, and caution. The trustee's investment and management decisions respecting individual assets and courses of action must be evaluated not in isolation, but in the context of the trust portfolio as a whole and as a part of an overall investment strategy having risk and return objectives reasonably suited to the trust.

(c) Retain property only so long as it produces income. If any income-producing property ceases to produce income, the trustee shall, within a reasonable time, replace it with income-producing property.

(d) In the trustee's discretion, invest or reinvest in mutual funds, money market funds, investment trusts, regulated investment companies, market funds, and index funds, and in the shares or securities of any such funds or companies, that persons of prudence, discretion, and intelligence acquire for their own account.

(e) Acquire and maintain as a trust asset a life insurance policy on the life of any person, including \_\_\_\_\_ [the trustee *or* any of the trustees], issued by any company and in any amount that the trustee may deem advisable, and to exercise all rights of ownership granted in that policy.

(f) With or without court authorization, sell (for cash or on deferred payments, and with or without security), convey, exchange, partition, and divide trust property; grant options for the sale or exchange of trust property for any purpose, whether the contract is to be performed or the option is to be exercised within or beyond the term of the trust; and lease trust property for any purpose, for terms within or extending beyond the expiration of the trust, regardless of whether the leased property is commercial or residential and regardless of the number of units leased.

(g) Engage in any transactions with the personal representative of my estate that are in the best interest of any trusts under this will.

(h) Manage, control, improve, and maintain all real and personal trust property.

(i) Subdivide or develop land; make or obtain the vacation of plats and adjust boundaries, or adjust differences in valuation on exchange or partition by giving or receiving consideration; and dedicate land or easements to public use with or without consideration.

(j) Make ordinary or extraordinary repairs or alterations in buildings or other trust property, demolish any improvements, raze existing party walls or buildings, and erect new party walls or buildings, as the trustee deems advisable.

(k) Enter into oil, gas, and other mineral leases, on terms deemed advisable by the trustee; enter into any pooling, unitization, repressurization, community, or other types of agreements relating to the exploration, development, operation, and conservation of mineral properties; drill, mine, and otherwise operate for the development of oil, gas, and other minerals; contract for the installation and operation of absorption and repressuring plants; and install and maintain pipelines. Any such leases or agreements may be for a term within or extending beyond the term of the trust.

(l) In the trustee's discretion, abandon any [unproductive or wasted] trust asset or interest therein.

(m) Employ and discharge agents and employees, including but not limited to attorneys, accountants, investment and other advisers, custodians of assets, property managers, real estate agents and brokers, and appraisers, to advise and assist the trustees in the management of any trusts created under this will, and compensate them from the trust property. [*Optional*: The agents and employees may be associated or affiliated with the trustee, or may be descendants or other persons related to the trustee or to me, or a company associated with any such persons.] [*Optional*: The trustee is entitled to rely on the advice of any professional advisers employed under this provision. Reasonable compensation paid to any such agents or employees shall not diminish the compensation to which the trustee is otherwise entitled.]

(n) With respect to securities held in trust, exercise all the rights, powers, and privileges of an owner, including, but not limited to, the power to vote, give proxies, and pay assessments and other sums deemed by the trustee necessary for the protection of the trust property; participate in voting trusts, pooling agreements, foreclosures, reorganizations, consolidations, mergers, and liquidations, and, in connection therewith, deposit securities with and transfer title to any protective or other committee under such terms as the trustee deems advisable; exercise or sell stock subscription or conversion rights; and accept and retain as investments of the trust any securities or other property received through the exercise of any of the foregoing powers.

(o) Hold securities or other trust property in the trustee's own name or in the name of a nominee, without disclosure of the trust, or in unregistered form, so that title may pass by delivery.

(p) Deposit securities in a securities depository that is either licensed or exempt from licensing.

(q) Borrow money for any trust purpose from any person or entity on such terms and conditions as the trustee deems advisable, and obligate the trust for repayment; encumber any trust property by mortgage, deed of trust, pledge, or otherwise, whether for terms within or extending beyond the term of the trust, as the trustee deems advisable, to secure repayment of any such loan; replace, renew, and extend any such loan or encumbrance; and pay loans or other obligations of the trust deemed advisable by the trustee.

(r) In the trustee's discretion, make loans to beneficiaries out of funds of the trust and guarantee the repayment of loans made to beneficiaries by third parties by encumbering trust assets.

(s) Procure and carry, at the expense of the trust, insurance in such forms and in such amounts as the trustee deems advisable to protect the trust property against damage or loss, and to protect the trustee against liability with respect to third persons.

(t) Enforce any obligation owing to the trust, including any obligation secured by a deed of trust, mortgage, or pledge held as trust property, and to purchase any property subject to a security instrument held as trust property at any

sale under the instrument.

(u) Extend the time for payment of any note or other obligation held as an asset of, and owing to, the trust, including accrued or future interest, and extend the time for repayment beyond the term of the trust.

(v) Pay or contest any claim against the trust; release or prosecute any claim in favor of the trust; or, in lieu of payment, contest, release, or prosecution, adjust, compromise, or settle any such claim, in whole or in part, with or without consideration.

(w) At trust expense, prosecute or defend actions, claims, or proceedings of whatever kind for the protection of the trust property and of the trustee in the performance of the trustee's duties, and employ and compensate attorneys, advisers, and other agents as the trustee deems advisable.

(x) Accept additions to any trusts created by this will, from any source and at any time; all such additions shall become a part of the trust and shall be held, administered, and distributed in accordance with the terms of the trust. Any additions to the trust shall be made by designating in writing the property to be added. However, the titling of any account, deed, or similar asset in the name of the trustee, as trustee of the trust, shall be deemed to be a transfer to the trust. Any designation by a third party, whether by will, deed, account title designation, or similar transfer, shall also be a transfer to the trust estate. No addition shall become part of the trust estate until it is accepted in writing by the trustee.

6.08. Payments to Incapacitated Persons. If at any time any trust beneficiary is a minor, or it appears to the trustee that any trust beneficiary is incapacitated, incompetent, or for any other reason not able to receive payments or make intelligent or responsible use of the payments, then the trustee, in lieu of making direct payments to the trust beneficiary, may make payments to the beneficiary's conservator or guardian; to the beneficiary's custodian under the Uniform Gifts to Minors Act or Uniform Transfers to Minors Act of any state (including a custodian selected by the trustee); to one or more suitable persons as the trustee deems proper, such as a relative of or a person residing with the beneficiary, to be used for the beneficiary's benefit; to any other person, firm, or agency for services rendered or to be rendered for the beneficiary's assistance or benefit; or to accounts in the beneficiary's name with financial institutions. The receipt of payments by any of the foregoing shall constitute a sufficient acquittance of the trustee for all purposes.

6.09. Grant of Specific Powers Not to Limit Exercise of General Powers. The enumeration of specific powers under this will shall not limit the trustee from exercising any other power with respect to any trusts created by this will that may be necessary or appropriate for the trustee to have and exercise in order to carry out the purposes of the trusts or to permit the trustee to fulfill the trustee's responsibilities and duties with respect to the trust.

6.10. Written Notice to Trustee. Until the trustee receives written notice of any death or other event upon which the right to payments from any trust may depend, the trustee shall incur no liability for disbursements made in good faith to persons whose interests may have been affected by that event.

6.11. Duty to Account. The trustee shall render accounts at least annually, at the termination of a trust, and upon a change of trustees, to the persons and in the manner required by law.

#### Article 7 : Guardian

7.01. Nomination of Guardian. If a guardian of the person, estate, or person and estate is necessary for any minor child of mine, I nominate \_\_\_\_\_ [*name and relationship to testator or other means of identification, e.g., my sister, Margaret E. Hunter or Edward C. Gardner, who resides at \_\_\_\_\_ (address)*], as that guardian. If at any time \_\_\_\_\_ [*name, e.g., my sister, Margaret E. Hunter or Edward C. Gardner*] is unable or unwilling to serve or continue as guardian, I nominate \_\_\_\_\_ [*name and relationship to testator or other means of identification, e.g., my brother, Edward R. Brown,*] as guardian.

7.02. Bond. \_\_\_\_\_ [No bond or undertaking *or* Bond] shall be required of any guardian of the

estate nominated in this will.

#### Article 8 : Concluding Provisions

8.01. Abatement of Gifts. If my estate is insufficient to satisfy in full all of the gifts provided for in this will, I direct that gifts shall abate in the following order: first general gifts, then specific gifts, then demonstrative gifts; provided, however, that the gifts to my \_\_\_\_\_ [husband *or* wife] shall not abate until all other gifts have abated [, and the gifts to my children shall not abate until gifts to all persons and entities other than my \_\_\_\_\_ (husband *or* wife) have abated]. All gifts of the same class shall abate proportionally.

8.02. Simultaneous Death. If any beneficiary under this will and I die simultaneously, or if it cannot be established by clear and convincing evidence whether that beneficiary or I died first, I shall be deemed to have survived that beneficiary, and this will shall be construed accordingly.

8.03. Intentional Omission of Heirs Not Specifically Provided For in Will. Except as otherwise specifically provided in this will, I have intentionally and with full knowledge omitted to provide for my heirs, regardless of whether or not I am aware of their existence and identities at the time this will is executed.

8.04. No-Contest Clause. If any person, directly or indirectly, contests the validity of this will in whole or in part, or opposes, objects to, or seeks to invalidate any of its provisions, or seeks to succeed to any part of my estate otherwise than in the manner specified in this will, any gift or other interest given to that person under this will shall be revoked and shall be disposed of as if he or she had predeceased me [*optional*: without issue].

8.05. Perpetuities Savings Clause. Notwithstanding any other provision of this will, every trust created by this will[, or by the exercise of any power of appointment created by this will,] shall terminate no later than 21 years after the death of \_\_\_\_\_ [*designate measuring life or lives, e.g., the last survivor of my spouse and my issue*] who are alive at the time of my death. If a trust is terminated under this section of the will, the trustee shall distribute all of the principal and undistributed income of the trust to the income beneficiaries of the trust in the proportion in which they are entitled (or eligible, in the case of discretionary payments) to receive income immediately before the termination. If that proportion is not fixed by the terms of this will, the trustee shall distribute all of the trust property to the persons then entitled or eligible to receive income from the trust \_\_\_\_\_ [*specify pattern of distribution, e.g., outright in a manner that, in the trustee's opinion, will give effect to my intent in creating the trust, the trustee's decision to be final and incontestable by anyone or as a class, in the manner provided in California Probate Code Section \_\_\_\_\_ (240 *or* 246 *or* 247) *or* in equal shares, regardless of whether all of such persons are members of the same generation*].

8.06. Definition of Incapacity. For purposes of this will, a person shall be deemed "incapacitated" if and for so long as a court of competent jurisdiction has made a finding to that effect, or a guardian or conservator of that person's estate or person duly appointed by a court of competent jurisdiction is serving, or upon certification by two physicians licensed to practice under the laws of the state where the person is domiciled at the time of the certification that the person is unable properly to care for himself or herself or for his or her property. The latter certification shall be made by each physician in a written declaration under penalty of perjury.

8.07. Captions. The captions appearing in this will are for convenience of reference only, and shall be disregarded in determining the meaning and effect of the provisions of this will.

8.08. Severability Clause. If any provision of this will is invalid, that provision shall be disregarded, and the remainder of this will shall be construed as if the invalid provision had not been included.

8.09. California Law to Apply. All questions concerning the validity and interpretation of this will, including any trusts created by this will, shall be governed by the laws of the State of California in effect at the time this will is executed.

8.10. Gifts to "Heirs." For any gift to my heirs that is made outright in this instrument, those heirs shall be determined as if I had died intestate at the time for distribution, and the identity and shares of those heirs shall be determined according to the California laws of succession that concern separate property not acquired from a previously deceased spouse and that are in effect at my death. For any assets of any trust estate created by this will to be distributed to my heirs, those heirs shall be determined as if I had died intestate immediately following the termination of the trust of each share, and the identity and shares of those heirs shall be determined according to the California laws of succession that concern separate property not acquired from a previously deceased spouse and that are in effect at my death.

Executed on \_\_\_\_\_ [date], at \_\_\_\_\_ [city or town and state].

\_\_\_\_\_ [signature of testator]

[typed name]

On the date written above, we, the undersigned, each being present at the same time, witnessed the signing of this instrument by \_\_\_\_\_ [name of testator]. At that time, \_\_\_\_\_ [he or she] appeared to us to be of sound mind and memory and, to the best of our knowledge, was not acting under fraud, duress, menace, or undue influence. Understanding this instrument, which consists of \_\_\_\_\_ pages, including the pages on which the signature of \_\_\_\_\_ [name of testator] and our signatures appear, to be the will of \_\_\_\_\_ [name of testator], we subscribe our names as witnesses thereto. We declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on \_\_\_\_\_ [date], at \_\_\_\_\_ [city or town and state].

\_\_\_\_\_ [signature of first witness]

Residing at \_\_\_\_\_ [street address]

\_\_\_\_\_ [city and state]

\_\_\_\_\_ [signature of second witness]

Residing at \_\_\_\_\_ [street address]

\_\_\_\_\_ [city and state]

### Legal Topics:

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Trusts Marital Deduction Trusts Estate, Gift & Trust Law Wills General Overview



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California Legal Forms--Transaction Guide

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DIVISION IV: WILLS AND TRUSTS  
 CHAPTER 61 WILL DRAFTING AND COMPLETE WILL FORMS  
 PART IV. FORMS  
 B. Wills for Married Persons

*23-61 California Legal Forms--Transaction Guide § 61.211*

**AUTHOR:** Reviewed by Albert G. Handelman

**§ 61.211 Will for Married Person; Pour-Over to Inter Vivos Trust**

**[1] Comment**

**[a] Use of Form**

This form is a complete will that is designed for use by a testator who is married, has children, and wishes to "pour over" the bulk of his or her estate to an inter vivos trust.

The will permits the testator to make one or more specific devises [*see* Article 2]. The tangible personal property is left outright to the surviving spouse [*see* Section 2.03of form], so that the executor and trustee will not have to choose between selling the property or dealing with the practical problems of holding personal property in trust.

It is assumed that the testator's residence has already been transferred to the trust, or will pass to it under the terms of the residuary devise. The residuary estate is left to an inter vivos ("living") trust created by the testator or by the testator and the testator's spouse [*see* Article 3].

**PRACTICE TIP:**

It is considered poor practice to rely on funding an inter vivos trust through the workings of a "pour-over" will. When a client establishes a typical inter vivos trust, the idea of avoiding probate is often one of the paramount concerns. If the trust is fully (or nearly fully) funded during the client's lifetime, the "pour-over" will then serves only a "back stop" role (which is truly its purpose), and the will then will not have to be probated. On the other hand, if substantial portions of the client's assets have intentionally been left out of the trust, a probate proceeding will be necessary. This means there will be a probate proceeding which has the primary purpose of finally funding the inter vivos trust, and there will have to be a "second administration" of the assets inside the trust as the trust's post-mortem provisions are followed. Not only will the surviving spouse or other trust beneficiaries be upset (perhaps to the point of filing suit against the attorney), but difficulties in planning for the post-mortem tax choices designed

into the inter vivos trust are likely to ensue. *Commentary by Albert G. Handelman.*

The will contains provisions nominating an executor [*see* Article 4] and a guardian for any of the testator's children who are minors at the time of the testator's death [*see* Article 5].

### **[b] Pour-Over Devise to Inter Vivos Trust**

A "pour-over" is a devise to the trustee of an existing trust. Although the trust may be either testamentary or inter vivos, it must be in existence at the time the devise takes effect, i.e., the date of the testator's death [*see Prob. Code* § 6300].

#### **PRACTICE TIP:**

While it is unlikely that the "target" inter vivos trust will have been revoked or otherwise will not be in existence at the testator's death without substantial changes also having been made to the testator's will, such an eventuality is possible. To guard against the "pour-over" residuary clause being thoroughly ineffective, it is common practice to incorporate by reference in the will the provisions of the inter vivos trust as they exist at the date of the will and make an alternate residuary gift to a testamentary trust to be held and managed pursuant to those incorporated provisions. This form follows that practice [*see* Section 3.02 of form]. *Commentary by Albert G. Handelman.*

*Prob. Code* § 6130 provides that a writing in existence when the will is executed "may be incorporated by reference if the language of the will manifests this intention and describes the writing sufficiently to permit its identification." If the will makes a pour-over devise to a revocable trust and the trust is later amended, it might be argued that the pour-over is invalid under *Prob. Code* § 6130 because the trust instrument was not in existence when the will was executed [*see* Ferguson & Sinsheimer, *Back to the Basics: Drafting, Part II*, Calif. Tr. and Est. Quarterly (Fall 1996), 50-51]. However, *Prob. Code* § 6300 clearly provides that a devise to a trust "is not invalid because the trust is amendable or revocable, or both, or because the trust was amended after the execution of the will or after the death of the testator." *Prob. Code* § 6300 also provides that unless the will provides otherwise, the property devised to the trust must be "administered and disposed of in accordance with the provisions of the instrument or will setting forth the terms of the trust, including any amendments thereto made before or after the death of the testator (regardless of whether made before or after the execution of the testator's will)." The pour-over devise in this will provides that property that is poured over to the trust must be held in accordance with the provisions of the trust instrument, including any amendments of the instrument that have been made before or after execution of the will [*see* Section 3.01 of form]. This makes it clear that the pour-over devise is subject to all provisions of the trust instrument, including amendments made after the execution of the will, but not amendments made after the testator's death.

Pour-over wills typically are used in conjunction with inter vivos ("living") trusts created by the testator or the testator and his or her spouse. When a married person's will devises property to a living trust, the spouse's will often devises property to the same trust. This helps to assure that the estates of both spouses are disposed of under a comprehensive estate plan. For further discussion of pour-overs, see *Ch. 60, Estate Planning, § 60.17[1][c]*. For general coverage of living trusts, see *Ch. 70, Complete Revocable Trust Forms*.

### **[c] Standard Provisions**

This will contains numerous standard provisions that are also found in other wills in this chapter. These are provisions relating to the executor's bond [*see* Section 4.04 of form], the executor's authority to act under the California Independent Administration of Estates Act [*see* Section 4.05 of form], the executor's powers [*see* Section 4.06 of form], payments to incapacitated persons [*see* Section 4.07 of form], the executor's liability [*see* Section 4.08 of form], disinheritance of the testator's heirs [*see* Section 6.06 of form], and contest of the will [*see* Section 6.07 of form]. For discussion of these provisions, see § 61.200[1].

### **[2] FORM**

**Will for Married Person; Pour-Over to Inter Vivos Trust**

WILL OF

\_\_\_\_\_ [full legal name of testator, e.g., JOSEPH ARTHUR GREEN]

I, \_\_\_\_\_ [full legal name of testator, e.g., Joseph Arthur Green], a resident of \_\_\_\_\_ County, California, declare that this is my will. I hereby revoke all my previous wills and codicils.

## Article 1 : Introductory Provisions

1.01. Marital Status. I am married to \_\_\_\_\_ [name of spouse, e.g., Anne Taylor Green], and all references in this will to "my \_\_\_\_\_ [husband or wife]" are to \_\_\_\_\_ [him or her].

1.02. Identification of Living Child(ren). I have \_\_\_\_\_ [number] living \_\_\_\_\_ [child or children], whose name[s] and date[s] of birth \_\_\_\_\_ [is or are] as follows:

[e.g., Robert Joseph Green, who was born on June 10, 1985]

[e.g., John Arthur Green, who was born on November 8, 1987]

[e.g., Mary Ellen Green, who was born on August 20, 1990]

1.03. No Deceased Children. I have no deceased children.

1.04. Definitions of Child and Children. As used in this will, the terms "child" and "children" refer to all persons referred to in *California Probate Code Section 26*, as in effect at the time of execution of this will.

1.05. Definition of Issue. As used in this will, the term "issue" refers to all lineal descendants of all generations, with the relationship of parent and child in each generation being determined by the definitions of "child" and "children" set forth in this will.

1.06. Number and Gender. As used in this will, references in the masculine gender shall be deemed to include the feminine and neuter genders, and vice versa, and references to the singular shall be deemed to include the plural, and vice versa, wherever the context so permits.

1.07. Property Disposed of by Will. It is my intention by this will to dispose of all of my separate property, [and] my entire one-half interest in the community property of my \_\_\_\_\_ [wife or husband] and myself [if there is likely to be any quasi-community property, add: and my entire one-half interest in my quasi-community property].

1.08. No Exercise of Power of Appointment. I intentionally refrain from exercising any power of appointment that I now possess or that hereafter may be conferred on me.

1.09. No Contract Affecting Will. I have not entered into any contract to make a will or a testamentary gift, not to revoke a will or a testamentary gift, or to die intestate. [Optional, add language referring to similar will executed by spouse: The similarity of the provisions of this will to the provisions of the will of my \_\_\_\_\_ (husband or wife) (executed on this date) shall not be construed as evidence of any such contract.]

## Article 2 : Particular Gifts

2.01. Specific Gifts of Personal Property. I give the items of property described below [optional: together with my interest in any insurance on those items,] to the persons named below:

(a) I give \_\_\_\_\_ [*describe property, e.g., my fourteen-karat gold dinner ring*] to \_\_\_\_\_ [*name of devisee and relationship to testator or other means of identification, e.g., my sister, Ellen Green Fiddler*] [*if desired, add survivorship clause, e.g., if she survives me or, if she survives me for 60 days*] [*if gift is conditioned on survival, add alternative disposition, e.g.,; but if she does not survive me (for that period), this gift shall \_\_\_\_\_ (e.g., lapse and become part of the residue of my estate or go to my daughter, Mary Ellen Green)*];

(b) I give \_\_\_\_\_ [*describe property, e.g., my sterling silver flatware service*] to \_\_\_\_\_ [*name of devisee and relationship to testator or other means of identification, e.g., my niece, Nancy L. Fiddler*] [*if desired, add survivorship clause, e.g., if she survives me or, if she survives me for 60 days*] [*if gift is conditioned on survival, add alternative disposition, e.g.,; but if she does not survive me (for that period), this gift shall \_\_\_\_\_ (e.g., lapse and become part of the residue of my estate or go to my daughter, Mary Ellen Green, is she should survive me)*];

(c) I give \_\_\_\_\_ [*describe property, e.g., the promissory note executed in my favor by John D. Smith and Jane B. Smith, on June 1, 1990, in the principal amount of \$100,000, with interest on unpaid principal in the amount of 10 percent per annum, principal and interest payable in monthly payments of \$1,000 per month, together with the deed of trust of the same date on real property located in the City of Monterey, County of Monterey, State of California, and recorded on June 2, 1990, at Reel 10011, Book 10022, Official Records, Monterey County, California, securing the payment of principal and interest under that note.*] to \_\_\_\_\_ [*name of devisee and relationship to testator or other means of identification, e.g., my brother, Charles D. Green*] [*optional: if he survives me or, if he survives me for 60 days*] [*if gift is conditioned on survival, add alternative disposition, e.g.,; but if he does not survive me (for that period), this gift shall \_\_\_\_\_ (e.g., lapse and become part of the residue of my estate or go to my son, Robert Joseph Green)*].

[*Continue as necessary for each additional item of property to be specifically devised.*]

2.02. Gift[s] to Be Selected From Among My Personal Effects. I give \_\_\_\_\_ [*name(s) of devisee(s) and relationship(s) to testator, e.g., my brother, Charles D. Green, or my niece, Nancy L. Fiddler, or my sister, Ellen Green Fiddler, my brother, Charles D. Green, and my, son John Arthur Green, and each of them,*] the right to select \_\_\_\_\_ [*specify, e.g., one item or one item each or two items or two items each*] from among my personal effects so that \_\_\_\_\_ [*he or she or they*] will have \_\_\_\_\_ [*a memento or mementos*] to remember me by. I make this gift to \_\_\_\_\_ [*him or her or them*] as a symbol of my love and affection. If \_\_\_\_\_ [*he or she or any person named in this section*] does not survive me or does not make a selection within three months after the date of my death, or within 30 days after this will is admitted to probate, whichever is later, then the gift made to \_\_\_\_\_ [*him or her or that person*] in this section shall fail. [*If desired, specify any types of property that may not be selected, e.g., For purposes of this gift only, the word "personal effects" shall not include any motor vehicles or any items of property with an appraised value in excess of \$2,500.*]

2.03. Tangible Personal Property. I give all of my tangible personal property [*if will makes any specific gifts, add: that is not otherwise disposed of as a specific gift in this will*], including my interest in any insurance on that property, to my \_\_\_\_\_ [*husband or wife*], if \_\_\_\_\_ [*he or she*] survives me [*if desired, specify survivorship period, e.g., for 60 days*], and if \_\_\_\_\_ [*he or she*] does not survive me [*for that period*], to my children who survive me [*for that period*], to be divided among them as they believe to be in accordance with my wishes. If my children are not able to agree on a division, the executor shall divide the property among them as the executor believes to be in accordance with my wishes, the decision of the executor as to this division to be final and incontestable by anyone. [*Optional: The term "tangible personal property" \_\_\_\_\_ (includes, but is not limited to, or does not include) \_\_\_\_\_ (specify items, e.g., livestock, pets, airplanes, and motor vehicles).*]

2.04. General Pecuniary Gift. I give the sum of \$ \_\_\_\_\_ to \_\_\_\_\_ [*name of*

*devisee and relationship to testator or other means of identification, e.g., my niece, Nancy L. Fiddler*] [if desired, add survivorship clause, e.g.,, if she survives me or, if she survives me for 60 days]. [If gift is conditioned on survival, add appropriate alternative disposition, e.g., If she does not survive me (for that period), this gift shall \_\_\_\_\_ (e.g., lapse and become part of the residue of my estate).]

[Select one of the following alternatives:]

2.05. Interest on Pecuniary Gifts. [Except as otherwise specifically provided in this will,] [n]o interest shall accrue on all [general] pecuniary gifts made in this will.

[or]

2.05. Interest on Pecuniary Gifts. [Except as otherwise specifically provided in this will,] [I]nterest at the rate \_\_\_\_\_ [e.g., of 10 percent per annum or specified in *California Probate Code Section 12001*, or any successor to that section,] shall accrue on all [general] pecuniary gifts made in this will from and after \_\_\_\_\_ [e.g., the date of my death or the first anniversary of my death] and until those gifts are paid in full. All interest shall be paid at the time the gift is distributed.

[Continue with the following:]

#### Article 3 : Residuary Provisions

3.01. Disposition of Residue. I give the residue of my estate to the trustee(s) of the \_\_\_\_\_ [name of trust, e.g., Green Family Trust], created under the \_\_\_\_\_ [identify trust instrument, e.g., trust agreement or declaration of trust] executed on \_\_\_\_\_ [date] by \_\_\_\_\_ [identify party or parties executing instrument, e.g., Joseph Arthur Green and Anne Taylor Green, as Settlers and Trustees]. The trustee(s) of that trust shall add the residue of my estate to the trust principal and hold, administer, and distribute the property in accordance with the provisions of that \_\_\_\_\_ [e.g., trust agreement or declaration of trust], including any amendments of that \_\_\_\_\_ [e.g., trust agreement or declaration of trust] that have been made before or after execution of this will.

3.02. Alternate Disposition of Residue. If the \_\_\_\_\_ [name of trust, e.g., Green Family Trust] has been revoked, terminated, or declared invalid for any reason, I give the portion of the residue of my estate to \_\_\_\_\_ [name(s) of current trustee(s) or other person(s), e.g., the executor of this will], as trustee, who shall hold, administer, and distribute the property under a testamentary trust, the terms of which shall be identical to the terms of the \_\_\_\_\_ [name of trust, e.g., Green Family Trust] that are in effect on the date of execution of this will.

3.03. Alternate Disposition of Residue. If the residue of my estate is not completely disposed of by the preceding provisions, I give the portion that is not disposed of to my heirs.

#### Article 4 : Executor

4.01. Nomination of Executor. I nominate \_\_\_\_\_ [name and relationship to testator or other means of identification, e.g., my husband or my wife or my sister, Ellen Green Fiddler,] as executor of this will.

4.02. Successor Executors. If \_\_\_\_\_ [nominee(s) for initial executor, e.g., my husband or my wife or my sister, Ellen Green Fiddler,] is for any reason unable or unwilling to serve, or to continue to serve, as executor, I nominate the following, in the order of priority indicated, as successor executor:

First, \_\_\_\_\_ [name and description, e.g. (for coexecutors) my brother, Charles D. Green];

Second, \_\_\_\_\_ [*name and description, e.g. (for individual)* Edward R. Taylor, who resides at \_\_\_\_\_ (*address*)];

Third, \_\_\_\_\_ [*name and description, e.g. (for corporate executor)* Double Eagle Bank, Fresno, California office].

4.03. Definition of Executor. The term "executor," as used in this will, refers to each personal representative of my estate who is serving at the pertinent time.

4.04. Bond. \_\_\_\_\_ [No bond or undertaking *or* Bond] shall be required of any executor nominated in this will.

4.05. Independent Administration. The executor shall \_\_\_\_\_ [have full *or* not have] authority to administer my estate under the California Independent Administration of Estates Act.

4.06. Powers of Executor. Subject to any limitations stated elsewhere in this will, the executor shall have, in addition to all of the powers now or hereafter conferred on executors by law, and any powers enumerated elsewhere in this will, the power to perform any of the acts specified in this section:

(a) Take possession or control of all of my estate subject to disposition by this will, and collect all debts due to me or to my estate.

(b) Receive the rents, issues, and profits from all real and personal property in my estate until the estate is settled or delivered over by order of court to my heirs or beneficiaries.

(c) Pay taxes on, and take all steps reasonably necessary for the management, protection, and preservation of, all property in my estate.

(d) Commence and prosecute, either individually or jointly with my heirs or beneficiaries, any action necessary or proper to quiet title to or recover possession of any real or personal property in my estate.

(e) Vote in person, and give proxies to exercise, any voting rights with respect to any stock, any membership in a nonprofit corporation, or any other property in my estate, and waive notice of a meeting, give consent to the holding of a meeting, and authorize, ratify, approve, or confirm any action that could be taken by shareholders, members, or property owners.

(f) Insure the property of my estate against damage or loss, and insure the executor against liability to third persons.

(g) Deposit money belonging to my estate in an insured account in a financial institution in California.

(h) Invest and reinvest any money of my estate not reasonably required for the immediate administration of my estate in any kind of property, real, personal, or mixed, that persons of prudence, discretion, and intelligence acquire for their own accounts; provided, however, that in investing any property of my estate, the executor shall act with the care, skill, prudence, and diligence under the circumstances then prevailing, including but not limited to the general economic conditions and the anticipated needs of my estate and its beneficiaries, that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of like character and with like aims to accomplish the purposes of my estate as determined from this will.

(i) Retain any assets of my estate for as long as the executor deems to be in the best interest of my estate.

(j) Borrow money on behalf of my estate and pledge, hypothecate, or otherwise encumber property of my estate, real or personal, as security for any sums so borrowed.

(k) In order to satisfy a pecuniary gift or to distribute or divide estate assets into shares or partial shares, the executor may distribute or divide those assets in kind, or divide undivided interests in those assets, or sell all or any part of those assets and distribute or divide the property in cash, in kind, or partly in cash and partly in kind. Property distributed to satisfy a pecuniary gift under this will shall be valued at its fair market value at the time of distribution.

(l) Pay any and all charges reasonably incurred in connection with or incidental to the distribution of any property of my estate, including but not limited to expenses of storage, freight, shipping, delivery, packing, and insurance; and, on any accounting, treat any such expenditures as expenses of the administration of my estate.

(m) If any asset of my estate consists of an option right, exercise the option after authorization by order of court, upon a showing that the exercise would be to the advantage of my estate, and use any funds or property in my estate to acquire the property covered by the option.

(n) Hold a security in the name of a nominee or in any other form without disclosure of my estate so that title to the security may pass by delivery.

(o) Exercise any subscription rights owned or received by my estate by reason of owning securities, after authorization by court upon a showing that it is to the advantage of my estate.

(p) Sell, at either public or private sale and with or without notice, and grant options to purchase, any property belonging to my estate [*optional*], subject only to any confirmation of court required by law].

(q) Lease any real or personal property belonging to my estate on such terms and conditions as the executor determines to be in the best interest of my estate [*optional*], subject only to any confirmation of court required by law].

(r) Dispose of or abandon tangible personal property, except tangible personal property that is a specific gift, when the cost of collecting, maintaining, and safeguarding the property would exceed its fair market value.

(s) Compromise or settle any claim, action, or proceeding by or for the benefit of, or against, me, my estate, or the executor [*optional*], subject only to any confirmation of court that may be required by law].

(t) Employ professional investment counsel to make recommendations with respect to, and otherwise assist in, investing the assets of my estate; and, on any accounting, treat any fees paid to investment counsel as expenses of the administration of my estate.

4.07. Payments to Incapacitated Persons. If at any time any beneficiary under this will is a minor, or it appears to the executor that any beneficiary is incapacitated, incompetent, or for any other reason not able to receive payments or make intelligent or responsible use of the payments, then the executor, in lieu of making direct payments to the beneficiary, may make payments to the beneficiary's conservator or guardian; to the beneficiary's custodian under the Uniform Gifts to Minors Act or Uniform Transfers to Minors Act of any state (including a custodian selected by the executor); to one or more suitable persons as the executor deems proper, such as a relative of or a person residing with the beneficiary, to be used for the beneficiary's benefit; to any other person, firm, or agency for services rendered or to be rendered for the beneficiary's assistance or benefit; or to accounts in the beneficiary's name with financial institutions. The receipt of payments by any of the foregoing shall constitute a sufficient acquittance of the executor for all purposes.

4.08. Executor's Liability for Own Acts. The executor shall not be liable to my estate or to any person interested in it for any act or omission of the executor, except an act or omission that is committed intentionally, with gross negligence, in bad faith, or with reckless indifference to the interests of persons interested in my estate, or an act or omission from which the executor derives a profit.

Article 5 : Guardian

5.01. Nomination of Guardian. If a guardian of the person, estate, or person and estate is necessary for any minor child of mine, I nominate \_\_\_\_\_ [name and relationship to testator or other means of identification, e.g., my sister, Ellen Green Fiddler or Robert J. Farmer, who resides at \_\_\_\_\_ (address)], as that guardian. If at any time \_\_\_\_\_ [name, e.g., my sister, Ellen Green Fiddler or Robert J. Farmer] is unable or unwilling to serve or continue as guardian, I nominate \_\_\_\_\_ [name and relationship to testator or other means of identification, e.g., my brother, Charles D. Green,] as guardian.

5.02. Bond. \_\_\_\_\_ [No bond or undertaking or Bond] shall be required of any guardian of the estate nominated in this will.

#### Article 6 : Concluding Provisions

6.01. Definition of Death Taxes. The term "death taxes," as used in this will, shall mean all inheritance, estate, succession, and other similar taxes that are payable by any person on account of that person's interest in my estate or by reason of my death, including penalties and interest, but excluding the following:

(a) Any additional tax that may be assessed under *Internal Revenue Code Section 2032A*.

(b) Any federal or state tax imposed on a generation-skipping transfer, as that term is defined in the federal tax laws [, unless the applicable tax statutes provide that the generation-skipping transfer tax on that transfer is payable directly out of the assets of my gross estate].

6.02. Payment of Death Taxes. The executor shall pay death taxes, whether or not attributable to property inventoried in my probate estate, by prorating and apportioning them among the persons interested in my estate as provided in the California Probate Code. The method of apportionment of death taxes specified in this will shall apply equally to any property passing under any codicil to this will, except to the extent that a codicil expressly provides for a different method of apportionment.

#### **PRACTICE TIP:**

The allocation of taxes shown in this form is but one of many possible allocation schemes. In each case the drafter should carefully consider the nature of the client's assets, including whether those assets will pass under the will or otherwise, and the value of assets passing under the will as specific, rather than residuary, gifts. Only when these factors are considered can the appropriate tax allocation formula be selected. Other possible allocation clauses appear in California Wills & Trusts Forms, Div. IV, *Individual Will Provisions*, Pt. 90, *Concluding Provisions*, Form 90.30 (Alts. 90.30-1-90.30-7); for more detailed discussion of tax allocation, see California Wills & Trusts, Ch. 23, *Provisions for Payment of Taxes, Expenses, and Debt* (Matthew Bender).

6.03. Abatement of Gifts. If my estate is insufficient to satisfy in full all of the gifts provided for in this will, I direct that gifts shall abate in the following order: first general gifts, then specific gifts, then demonstrative gifts; provided, however, that the gifts to my \_\_\_\_\_ [husband or wife] shall not abate until all other gifts have abated [, and the gifts to my children shall not abate until gifts to all persons and entities other than my \_\_\_\_\_ (husband and children or wife and children) have abated]. All gifts of the same class shall abate proportionally.

6.04. Simultaneous Death. If any beneficiary under this will and I die simultaneously, or if it cannot be established by clear and convincing evidence whether that beneficiary or I died first, I shall be deemed to have survived that beneficiary, and this will shall be construed accordingly.

6.05. Intentional Omission of Heirs Not Specifically Provided For in Will. Except as otherwise specifically provided in this will, I have intentionally and with full knowledge omitted to provide for my heirs, regardless of whether or not I am aware of their existence and identities at the time this will is executed.

6.06. No-Contest Clause. If any person, directly or indirectly, contests the validity of this will in whole or in part, or opposes, objects to, or seeks to invalidate any of its provisions, or seeks to succeed to any part of my estate otherwise than in the manner specified in this will, any gift or other interest given to that person under this will shall be revoked and shall be disposed of as if he or she had predeceased me [*optional: without issue*].

6.07. Perpetuities Savings Clause. Notwithstanding any other provision of this will, every trust created by this will[, or by the exercise of any power of appointment created by this will,] shall terminate no later than 21 years after the death of \_\_\_\_\_ [*designate measuring life or lives, e.g., the last survivor of my spouse and my issue*] who are alive at the time of my death. If a trust is terminated under this section of the will, the trustee shall distribute all of the principal and undistributed income of the trust to the income beneficiaries of the trust in the proportion in which they are entitled (or eligible, in the case of discretionary payments) to receive income immediately before the termination. If that proportion is not fixed by the terms of this will, the trustee shall distribute all of the trust property to the persons then entitled or eligible to receive income from the trust \_\_\_\_\_ [*specify pattern of distribution, e.g., outright in a manner that, in the trustee's opinion, will give effect to my intent in creating the trust, the trustee's decision to be final and incontestable by anyone or as a class, in the manner provided in California Probate Code Section \_\_\_\_\_ (240 or 246 or 247) or in equal shares, regardless of whether all of such persons are members of the same generation*].

6.08. Definition of Incapacity. For purposes of this will, a person shall be deemed "incapacitated" if and for so long as a court of competent jurisdiction has made a finding to that effect, or a guardian or conservator of that person's estate or person duly appointed by a court of competent jurisdiction is serving, or upon certification by two physicians licensed to practice under the laws of the state where the person is domiciled at the time of the certification that the person is unable properly to care for himself or herself or for his or her property. The latter certification shall be made by each physician in a written declaration under penalty of perjury.

6.09. Captions. The captions appearing in this will are for convenience of reference only, and shall be disregarded in determining the meaning and effect of the provisions of this will.

6.10. Severability Clause. If any provision of this will is invalid, that provision shall be disregarded, and the remainder of this will shall be construed as if the invalid provision had not been included.

6.11. California Law to Apply. All questions concerning the validity and interpretation of this will, including any trusts created by this will, shall be governed by the laws of the State of California in effect at the time this will is executed.

6.12. Gifts to "Heirs." For any gift to my heirs that is made outright in this instrument, those heirs shall be determined as if I had died intestate at the time for distribution, and the identity and shares of those heirs shall be determined according to the California laws of succession that concern separate property not acquired from a previously deceased spouse and that are in effect at my death. For any assets of any trust estate created by this will to be distributed to my heirs, those heirs shall be determined as if I had died intestate immediately following the termination of the trust of each share, and the identity and shares of those heirs shall be determined according to the California laws of succession that concern separate property not acquired from a previously deceased spouse and that are in effect at my death.

Executed on \_\_\_\_\_ [*date*], at \_\_\_\_\_ [*city or town and state*].

\_\_\_\_\_ [*signature of testator*]

[*typed name*]

On the date written above, we, the undersigned, each being present at the same time, witnessed the signing of this instrument by \_\_\_\_\_ [name of testator]. At that time, \_\_\_\_\_ [he or she] appeared to us to be of sound mind and memory and, to the best of our knowledge, was not acting under fraud, duress, menace, or undue influence. Understanding this instrument, which consists of \_\_\_\_\_ pages, including the pages on which the signature of \_\_\_\_\_ [name of testator] and our signatures appear, to be the will of \_\_\_\_\_ [name of testator], we subscribe our names as witnesses thereto. We declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on \_\_\_\_\_ [date], at \_\_\_\_\_ [city or town and state].

\_\_\_\_\_ [signature of first witness]

Residing at \_\_\_\_\_ [street address]

\_\_\_\_\_ [city and state]

\_\_\_\_\_ [signature of second witness]

Residing at \_\_\_\_\_ [street address]

\_\_\_\_\_ [city and state]

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsRevocable Living TrustsEstate, Gift & Trust LawTrustsTestamentary TrustsEstate, Gift & Trust LawWillsGeneral Overview



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California Legal Forms--Transaction Guide

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DIVISION IV: WILLS AND TRUSTS  
 CHAPTER 61 WILL DRAFTING AND COMPLETE WILL FORMS  
 PART IV. FORMS  
 B. Wills for Married Persons

*23-61 California Legal Forms--Transaction Guide § 61.212*

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**§ 61.212 Will for Married Person; Marital Deduction Formula Devise Outright to Surviving Spouse; Residue to Bypass Trust; Disclaimer Trust**

**[1] Comment**

**[a] Use of Form**

This form is a complete will designed for use by a testator who is married, has children, and wishes to leave all of his or her property to the spouse and children in a manner that will give the spouse optimum lifetime use of the property while making use of the federal estate tax marital deduction [*see I.R.C. § 2056*] and the unified credit against estate and gift taxes [*see I.R.C. § 2010, 2505* and discussion in § 60.13[4][b]] to reduce the overall death tax liability in the estates of both spouses.

This will assumes that the value of the combined estates of the testator and the testator's spouse will exceed the "applicable exclusion amount" [*see I.R.C. § 2010(c)*] (table of graduated amounts) and discussion in § 60.13[4][b]] available in the year of the surviving spouse's death. If this assumption is not reasonable, taking into consideration all of the property likely to be included in the surviving spouse's estate on his or her death, the kind of tax planning included in this will is probably not warranted and the attorney should select one of the simpler wills included in this chapter.

On the death of the surviving spouse, the trust is divided into separate shares for each of the testator's children. Each child will receive a share on the spouse's death or on the date the child reaches a specified age, whichever occurs later. Shares are distributed outright to the issue of any deceased children.

A disclaimer trust is included to hold any assets that the spouse elects to disclaim after the testator's death.

**[b] Standard Provisions**

This will contains some provisions that are also found in other wills in this chapter. These are provisions relating to the

executor's bond [*see* Section 5.04 of form], the executor's authority to act under the California Independent Administration of Estates Act [*see* Section 5.05 of form]], the executor's powers [*see* Section 5.06 of form]], payments to incapacitated persons [*see* Section 5.07 of form]], the executor's liability [*see* Section 5.08 of form]], disinheritance of the testator's heirs [*see* Section 8.06 of form]], and contest of the will [*see* Section 8.07 of form]]. For discussion of these provisions, see § 61.200[1].

### **[c] Marital Deduction Devise**

Section 2.04 of this will makes a general pecuniary devise to the testator's surviving spouse. This devise, which is referred to as the "marital deduction gift," is a pecuniary formula devise that is stated to be the minimum amount necessary to eliminate (or reduce to the maximum extent possible) any federal estate tax at the testator's death, taking into account the net value of all other property that passes or has passed to the spouse under the will or otherwise and that qualifies for the federal estate tax marital deduction and all allowable federal estate tax credits, exclusions, and deductions (other than the marital deduction). The devise to the spouse is outright and free of trust. The residue is given to a trustee in the form of a bypass trust [*see* discussion in [f], *below*].

A will that includes a marital deduction devise like that in Section 2.04 is designed to take advantage of two key provisions of the federal estate tax law: (1) the unlimited marital deduction [*I.R.C.* § 2056] and (2) the unified credit against estate and gift taxes [*I.R.C.* §§ 2010 (estate tax), 2505 (gift tax)]. The unified credit can be used to shelter property from estate taxation up to the amount of the "applicable exclusion amount" available in the testator's estate. This amount depends on the year of death. The amount is \$675,000 for decedents dying in 2001, \$1 million for decedents dying in 2002 and 2003, \$1.5 million for decedents dying in 2004 and 2005, \$2 million for decedents dying in 2006, 2007, and 2008, and \$3.5 million for decedents dying in 2009 [*see I.R.C.* § 2010(c) (table of graduated amounts) and discussion in § 60.13[4][b]].

The benefits of the marital deduction can be achieved by devising property to the surviving spouse, either outright or in the form of one of the trust arrangements that satisfy the requirements of the deduction [*see I.R.C.* § 2056(b)(5), (7); *Treas. Reg.* § 20.2056(b)-2(b); *see also* discussion in *Ch. 71, Marital Deduction Trust Provisions*, § 71.13]. The benefits of the unified credit can be achieved by devising property equal to the available unified credit (the statutory amount of the credit reduced by any part of the credit that may have been depleted by lifetime gifts) to a person or persons other than the surviving spouse, or by placing an equivalent amount of property in a trust that gives the surviving spouse the right to receive all of the income from the trust property for life [*see* discussion of bypass trust in [f], *below*]. Most estate plans that seek to totally avoid estate taxes on the death of the first spouse and to minimize (if not totally eliminate) estate taxes on the death of the second spouse center on successful coordination of the unlimited marital deduction and the unified credit.

### **[d] Division Into Marital and Nonmarital Shares**

An estate plan that seeks to avoid estate taxes on the death of the first spouse and to minimize estate taxes on the death of the second spouse through coordination of the unlimited marital deduction and the unified credit requires that the estate of the first spouse to die be divided into two or more shares. The first share, which is designed to qualify for the marital deduction, is typically called the "marital share." The other share is often called the "nonmarital share."

A division of this kind could be accomplished by simply transferring to the nonmarital share a specified dollar amount equal to the then-available unified credit, and leaving all of the residue to the surviving spouse. However, this approach cannot account for changes in the values of the respective spouses' estates after the will is executed, for partial or complete depletion of the spouses' unified credits through lifetime giving, for the increased unified credit that is being gradually phased in for years after 1997, or for changes in the needs of the prospective beneficiaries. For this reason, most estate planners prefer the flexibility afforded by so-called "marital deduction formulas" [*see* discussion in [e], *below*].

**[e] Marital Deduction Formula**

Section 2.04 of this will is a marital deduction formula clause. Two basic types of marital deduction formulas are used: "pecuniary formulas" and "fractional formulas."

A pecuniary formula permits the testator to prescribe the dollar value of the property that will constitute one of the resulting shares. The dollar amount will be determined by the formula. The executor or trustee is instructed to transfer property of that value to either the marital or the nonmarital share, depending on the formula selected. Whether the specified dollar value is transferred to the marital or the nonmarital share, the residue of the property will be transferred to the other share. If, for example, the formula clause requires that property of the specified dollar amount be transferred to the marital share, the residue will go to the nonmarital share. Conversely, if the formula requires that property of the specified dollar amount be transferred to the nonmarital share, the residue will go to the marital share. A fractional formula, in contrast, requires that each share have a fractional interest in each asset.

Pecuniary formulas are the most popular form of marital deduction formulas among estate planners. They avoid administrative headaches that result when the marital and nonmarital shares receive fractional interests in the same assets. These headaches can be particularly painful if family members who have interests in the assets (either through a trust or outright) are unfriendly or uncooperative. Pecuniary formulas also offer flexibility in funding, because the executor or trustee can be given discretion to decide which assets to transfer to the marital and nonmarital shares to satisfy the pecuniary and residuary devises [see Section 3.03 of form]. If assets that have a good potential for appreciation are transferred to the nonmarital share, any appreciation in the value of those assets will be removed from the surviving spouse's estate and the estate tax burden on that estate will be reduced. However, the actual allocation of assets to the two shares need not be made until after the first spouse's death, when the executor and the trustee will usually have a better picture of all of the circumstances of the first spouse's estate than would be possible when the will is drafted.

Section 2.04 of this will is a pecuniary formula clause. It funds the marital share to a dollar amount determined by the formula. The residue of the estate constitutes the nonmarital share and is transferred to the bypass trust. Section 3.03 gives the executor discretion to allocate assets in the testator's estate to the marital and nonmarital shares in cash or in kind, or partly in each, on a pro rata or non pro rata basis, and in undivided interests or not. This gives the executor maximum flexibility to allocate assets to the respective shares in the manner that seems most favorable at the time of the allocation.

For an example of a fractional formula clause, see *Ch. 71, Marital Deduction Trust Provisions, § 71.204*. That provision is designed for an inter vivos trust but may be adapted to the testamentary trust format. For a fractional formula clause specifically designed for a testamentary trust, see *California Wills & Trusts Forms, Div. IV, Individual Will Provisions, Alt. 40.20-3* (Matthew Bender).

For detailed discussion of the marital deduction and its use in estate planning, see *Ch. 71, Marital Deduction Trust Provisions*; see also *California Wills & Trusts, Ch. 112, The Marital Deduction and Marital Deduction Trusts* (Matthew Bender).

**[f] Bypass Trust**

Section 3.01 of this will gives the residue of the testator's estate to a trust in which the surviving spouse will receive a lifetime income interest. The distributive terms of the trust are set forth in Section 4.01.

This type of trust is sometimes called a "credit shelter" trust, because it is designed to hold property equal in value to the "applicable exclusion amount" of the unified credit [see *I.R.C. § 2010(c)* (table of graduated amounts) and discussion in *§ 60.13[4][b]*]. It is also frequently called a "bypass" trust, because it is designed to "bypass" the surviving spouse's

estate for estate tax purposes. None of the rights or powers given to the surviving spouse in this trust will cause the trust property to be included in the surviving spouse's estate on his or her death. In this will, this trust is referred to as a "bypass trust," and the devise made to it is referred to as a "bypass gift."

During the surviving spouse's lifetime, the trustee is required to pay the surviving spouse all of the net income of the bypass trust [see Section 4.01(a) of form]. On the surviving spouse's death, the trustee is required to divide the trust property into separate shares for each of the testator's surviving issue [see Section 4.01(b) of form]. Each share created for a surviving child will be distributed outright to that child if the child has reached a particular age, to be specified by the testator [see Section 4.01(c) of form]. If the child has not reached the specified age, the share will be held in a separate trust for the benefit of that child [see Section 4.02 of form]. Each share created for the issue of a deceased child will be divided among those issue in the manner provided in *Prob. Code* §§ 240, 246, or 247, or in equal shares, regardless of whether or not all such issue are members of the same generation [see Section 4.01(d) of form]. Choosing the appropriate language from this provision will call for the residue to be divided according to certain standard patterns for the distribution of class gifts described in the code sections referred to. For an explanation of each of these patterns, and the Probate Code sections that govern them, see § 61.15[6][c]-[f].

### **[g] Disclaimer Trust**

Section 3.05 of this will provides that any property that the testator's surviving spouse elects to disclaim will pass to the trustee and be held in trust under the provisions of Section 4.03. This language creates a disclaimer trust, but only if and to the extent that the surviving spouse disclaims property. If the surviving spouse makes a qualified disclaimer [see *I.R.C.* § 2518(b)], assets subject to the disclaimer will pass to the disclaimer trust and be removed from the surviving spouse's estate for estate tax purposes [see discussion in § 61.210[1][b]].

The distributive provisions of the disclaimer trust provide that the surviving spouse will receive all of the net income of the trust for life [see Section 4.03(a) of form]. The trustee has discretion to invade trust principal for the surviving spouse's health, education, support, and maintenance [see Section 4.03(b) of form]. On the surviving spouse's death, the trustee will divide the assets of the trust into separate shares according to the same directions provided for the division of the assets of the bypass trust on the surviving spouse's death [see Section 4.03(c) of form].

#### **PRACTICE TIP:**

In this form, there are only minor differences between the "Bypass Trust" and the "Disclaimer Trust" in their provisions for the surviving spouse. Specifically, the latter trust allows invasions of principal for the benefit of the surviving spouse, while the former does not. In practice, it would be quite common for the provisions of these two trusts to be identical (typically both allowing such invasions of principal). In cases in which the two trusts will be identical, only one trust is needed, and amounts disclaimed by the surviving spouse can simply be added to the "Bypass Trust." *Commentary by Albert G. Handelman.*

Because the interests of the surviving spouse in the disclaimer trust are appropriately limited, its assets will not be included in the surviving spouse's estate for estate tax purposes when the surviving spouse dies. For a general discussion of disclaimer trusts, see *Ch. 71, Marital Deduction Trust Provisions, § 71.16.*

### **[h] Choice of Trustee**

Section 6.01 of this will nominates the trustee of the trusts created under this will. Any person or entity chosen by the testator may serve as the trustee. The testator's surviving spouse may serve as trustee, if he or she has the requisite temperament, experience, and skill to perform the duties required of a trustee. None of the rights or powers given to the surviving spouse will require that the trust assets be included in the surviving spouse's estate merely because the surviving spouse serves as trustee.

### **[i] Administration of Generation-Skipping Trusts**

Section 4.06 of this will governs the administration of any trust created by the will in which there is property that is or may become subject to the federal generation-skipping transfer tax [see *I.R.C. §§ 2601-2663*]. The section is designed to give the executor post-mortem flexibility to eliminate or minimize any generation-skipping transfer tax. For further discussion of this provision, see § 61.201[1][e]. For general consideration of the generation-skipping transfer tax and generation-skipping transfer tax planning, see *California Wills & Trusts, Ch. 113, Generation-Skipping Transfers and Trust Strategies* (Matthew Bender).

## [2] FORM

### Will for Married Person; Marital Deduction Formula Devise Outright to Surviving Spouse; Residue to Bypass Trust; Disclaimer Trust

WILL OF

\_\_\_\_\_ [full legal name of testator, e.g., WILLIAM DAVID GRAY]

I, \_\_\_\_\_ [full legal name of testator, e.g., William David Gray], a resident of \_\_\_\_\_ County, California, declare that this is my will. I hereby revoke all my previous wills and codicils.

#### Article 1 : Introductory Provisions

1.01. Marital Status. I am married to \_\_\_\_\_ [name of spouse, e.g., Jane Gardner Gray], and all references in this will to "my \_\_\_\_\_ [husband or wife]" are to \_\_\_\_\_ [him or her].

1.02. Identification of Living Child(ren). I have \_\_\_\_\_ [number] living \_\_\_\_\_ [child or children], whose name[s] and date[s] of birth \_\_\_\_\_ [is or are] as follows:

[e.g., Joseph William Gray, who was born on June 10, 1985]

[e.g., John David Gray, who was born on November 8, 1987]

[e.g., Elizabeth Jane, who was born on November 8, 1991]

1.03. No Deceased Children. I have no deceased children.

1.04. Definitions of Child and Children. As used in this will, the terms "child" and "children" refer to all persons referred to in *California Probate Code Section 26*, as in effect at the time of execution of this will.

1.05. Definition of Issue. As used in this will, the term "issue" refers to all lineal descendants of all generations, with the relationship of parent and child in each generation being determined by the definitions of "child" and "children" set forth in this will.

1.06. Number and Gender. As used in this will, references in the masculine gender shall be deemed to include the feminine and neuter genders, and vice versa, and references to the singular shall be deemed to include the plural, and vice versa, wherever the context so permits.

1.07. Property Disposed of by Will. It is my intention by this will to dispose of all of my separate property, [and] my entire one-half interest in the community property of my \_\_\_\_\_ [wife or husband] and myself [if there is likely to be any quasi-community property, add.], and my entire one-half interest in my quasi-community property].

1.08. No Exercise of Power of Appointment. I intentionally refrain from exercising any power of appointment that

I now possess or that hereafter may be conferred on me.

1.09. No Contract Affecting Will. I have not entered into any contract to make a will or a testamentary gift, not to revoke a will or a testamentary gift, or to die intestate. [Optional, add language referring to similar will executed by spouse: The similarity of the provisions of this will to the provisions of the will of my \_\_\_\_\_ (husband or wife) (executed on this date) shall not be construed as evidence of any such contract.]

## Article 2 : Particular Gifts

2.01. Specific Gifts of Personal Property. I give the items of property described below [optional:, together with my interest in any insurance on those items,] to the persons named below:

(a) I give \_\_\_\_\_ [describe property, e.g., my fourteen-karat gold dinner ring] to \_\_\_\_\_ [name of devisee and relationship to testator or other means of identification, e.g., my sister, Catherine Gray Sawyer] [optional:, if she survives me or, if she survives me for 60 days] [if gift is conditioned on survival, add alternative disposition, e.g.,; but if she does not survive me (for that period), this gift shall \_\_\_\_\_ (e.g., lapse and become part of the residue of my estate or go to my daughter, Elizabeth Jane Gray)];

(b) I give \_\_\_\_\_ [describe property, e.g., my sterling silver flatware service] to \_\_\_\_\_ [name of devisee and relationship to testator or other means of identification, e.g., my niece, Mary Jo Porter] [optional:, if she survives me or, if she survives me for 60 days] [if gift is conditioned on survival, add alternative disposition, e.g.,; but if she does not survive me (for that period), this gift shall \_\_\_\_\_ (e.g., lapse and become part of the residue of my estate or go to my daughter, Elizabeth Jane Gray, if she should survive me)];

(c) I give \_\_\_\_\_ [describe property, e.g., the promissory note executed in my favor by John D. Smith and Jane B. Smith, on June 1, 1990, in the principal amount of \$100,000, with interest on unpaid principal in the amount of 10 percent per annum, principal and interest payable in monthly payments of \$1,000 per month, together with the deed of trust of the same date on real property located in the City of Monterey, County of Monterey, State of California, and recorded on June 2, 1990, at Reel 10011, Book 10022, Official Records, Monterey County, California, securing the payment of principal and interest under that note,] to \_\_\_\_\_ [name of devisee and relationship to testator or other means of identification, e.g., my brother, John Joseph Gray] [optional:, if he survives me or, if he survives me for 60 days] [if gift is conditioned on survival, add alternative disposition, e.g.,; but if he does not survive me (for that period), this gift shall \_\_\_\_\_ (e.g., lapse and become part of the residue of my estate or go to my son, John David Gray)].

[Continue as necessary for each additional item of property to be specifically devised.]

2.02. Gift[s] to Be Selected From Among My Personal Effects. I give \_\_\_\_\_ [name(s) of devisee(s) and relationship(s) to testator, e.g., my brother, John Joseph Gray, or my niece, Mary Jo Porter, or my brother, John Joseph Gray, and my niece, Mary Jo Porter, and each of them,] the right to select \_\_\_\_\_ [specify, e.g., one item or one item each or two items or two items each] from among my personal effects so that \_\_\_\_\_ [he or she or they] will have \_\_\_\_\_ [a memento or mementos] to remember me by. I make this gift to \_\_\_\_\_ [him or her or them] as a symbol of my love and affection. If \_\_\_\_\_ [he or she or any person named in this section] does not survive me or does not make a selection within three months after the date of my death, or within 30 days after this will is admitted to probate, whichever is later, then the gift made to \_\_\_\_\_ [him or her or that person] in this section shall fail. [If desired, specify any types of property that may not be selected, e.g., For purposes of this gift only, the word "personal effects" shall not include any motor vehicles or any items of property with an appraised value in excess of \$2,500].

2.03. General Pecuniary Gift. I give the sum of \$\_\_\_\_\_ to \_\_\_\_\_ [name of

*devisee and relationship to testator or other means of identification, e.g., my niece, Mary Jo Porter*] [if desired, add survivorship clause, e.g., if she survives me or, if she survives me for 60 days]. [If gift is conditioned on survival, add appropriate alternative disposition, e.g., If she does not survive me (for that period), this gift shall \_\_\_\_\_ (e.g., lapse and become part of the residue of my estate).]

2.04. Marital Deduction Gift. If my \_\_\_\_\_ [wife or husband] survives me [specify survivorship period if desired, e.g., for six months], I give a pecuniary gift (referred to as the "marital deduction gift"), in the amount determined in this section, outright to \_\_\_\_\_ [him or her]. The marital deduction gift shall consist of assets having a value equal to the minimum amount necessary to eliminate (or reduce to the maximum extent possible) any federal estate tax at my death, taking into account the following:

(a) The net value of all other property that passes or has passed to my \_\_\_\_\_ [wife or husband] under this will or otherwise and that qualifies for the federal estate tax marital deduction. For purposes of this subsection of the will, any qualified disclaimer made by my \_\_\_\_\_ [wife or husband] shall be disregarded, and any property that will qualify as qualified terminable interest property under *Internal Revenue Code Section 2056(b)(7)* if my executor makes the requisite election shall be considered to be qualified terminable interest property, regardless of whether the election is made;

(b) All federal estate tax deductions and exclusions actually allowed, other than the marital deduction;

(c) The applicable exclusion amount, as specified in *Internal Revenue Code Section 2010*, available to my estate;

(d) The credit for state death taxes available to my estate, to the extent that the use of that credit does not result in or increase any death tax payable to any state; and

(e) Any other allowable credits available to my estate (except the credit for tax on prior transfers from a "transferor," as defined in *Internal Revenue Code Section 2013*, who dies within two years after the date of my death), but only to the extent that those credits do not disqualify this gift from receiving the marital deduction.

The marital deduction gift shall be distributed outright to my \_\_\_\_\_ [wife or husband].

If my \_\_\_\_\_ [wife or husband] does not survive me [specify survivorship period if desired, e.g., for six months], this gift shall lapse and become part of the residue of my estate.

[Select one of the following alternatives:]

2.05. Interest on Pecuniary Gifts. [Except as otherwise specifically provided in this will, and] [n]o interest shall accrue on all [general] pecuniary gifts made in this will. This provisions shall not apply to the marital deduction gift made under Section 2.04 of this will. With respect to the marital deduction gift, interest at the rate \_\_\_\_\_ [e.g., of 10 percent per annum or specified in *California Probate Code Section 12001*, or any successor to that section,] shall accrue from and after \_\_\_\_\_ [e.g., the date of my death or the first anniversary of my death] and until that gift is are paid in full. All interest shall be paid at the time the gift is distributed.

[or]

2.05. Interest on Pecuniary Gifts. [Except as otherwise specifically provided in this will,] [I]nterest at the rate \_\_\_\_\_ [e.g., of 10 percent per annum or specified in *California Probate Code Section 12001*, or any successor to that section,] shall accrue on all [general] pecuniary gifts made in this will from and after \_\_\_\_\_ [e.g., the date of my death or the first anniversary of my death] and until those gifts are paid in full. All interest shall be paid at the time the gift is distributed.

[Continue with the following:]

### Article 3 : Residuary Provisions

3.01. Disposition of Residue. If my \_\_\_\_\_ [wife or husband] survives me \_\_\_\_\_ [if desired, add survivorship period not to exceed six months, e.g., for six months], I give the residue of my estate (referred to as the "bypass gift") to the trustee, in trust, to be held, administered, and distributed according to the terms set forth in Article 4 applicable to the Bypass Trust.

3.02. Alternate Disposition of Residue. If my \_\_\_\_\_ [husband or wife] does not survive me [restate any survivorship period imposed in primary residuary devise, but not to exceed six months, e.g., for six months], I give the \_\_\_\_\_ [residue of my estate or portion of the residue of my estate not taken] as follows:

(a) If any of my children survive me, the residue of my estate shall be divided into as many shares of equal market value as are necessary to create one share for each of my children who survive me and one share for the issue who survive me of each of my children who predecease me.

(b) Each share created for a surviving child shall be distributed outright to that child if that child has reached the age of \_\_\_\_\_ [e.g., 25] years at the time of my death. If the child has not reached the age of \_\_\_\_\_ [e.g., 25] years at the time of my death, the share created for the child shall be held, administered, and distributed by the trustee in a separate trust according to the terms set forth in Article 4 applicable to the Separate Share Trust.

(c) If any of my children survive me, each share created for the issue of a deceased child shall be distributed outright to those issue \_\_\_\_\_ [in the manner provided in California Probate Code Section \_\_\_\_\_ (240 or 246 or 247) or in equal shares, regardless of whether or not all such issue are members of the same generation].

(d) If none of my children survive me, but I leave issue surviving, I give the residue of my estate outright to those issue, who are to take that property \_\_\_\_\_ [in the manner provided in California Probate Code Section \_\_\_\_\_ (240 or 246 or 247) or in equal shares, regardless of whether or not all such issue are members of the same generation].

(e) If none of my issue survive me, I give the residue of my estate to \_\_\_\_\_ [e.g., the San Francisco chapter of the American Lung Association or my heirs].

3.03. Allocation and Valuation of Assets. In allocating assets between the marital deduction gift and the bypass gift, the executor shall allocate the assets in my estate that qualify for the marital deduction between the marital deduction gift and the bypass gift in cash or in kind, or partly in each, on a pro rata or non pro rata basis, and in undivided interests or not; subject, however, to the following:

(a) Only assets that qualify for the marital deduction shall be allocated to the marital deduction gift.

(b) Assets allocated in kind shall be \_\_\_\_\_ [to use date of distribution values: valued for purposes of allocation on the date or dates of distribution or, to use valuation for estate tax purposes under "minimum worth" test: deemed to satisfy the marital deduction amount on the basis of their values as finally determined for federal estate tax purposes, but in no event shall the date of distribution values be less than the amount of the marital deduction or, to use valuation for estate tax purposes under "fair representation" test: deemed to satisfy the marital deduction amount on the basis of their values as finally determined for federal estate tax purposes; provided, however, that the executor shall act impartially, consistent with equitable principles requiring impartiality among beneficiaries, in allocating assets in satisfaction of the marital deduction gift, so that any distribution of assets in satisfaction of the marital deduction gift

shall be made of assets, including cash, fairly representative of appreciation or depreciation in the value of all property thus available for distribution].

(c) The executor shall not allocate assets that qualify for the foreign death tax credit to the marital deduction gift unless all other assets or interests available for allocation have been so allocated.

[*Optional:* (d) Any incidents of ownership to a policy of insurance on the life of a person other than me shall be allocated to the bypass gift.]

3.04. Intention That Marital Deduction Gift Qualify for Marital Deduction. I intend that the marital deduction gift qualify for the federal estate tax marital deduction, and this instrument shall be construed accordingly. No fiduciary under this will shall take any action or exercise any power that may impair the federal estate tax marital deduction.

3.05. Disclaimer of Property by My Spouse. Any property or portion of property that is disclaimed by my \_\_\_\_\_ [wife *or* husband] shall pass to the trustee, in trust, to be held, administered, and distributed according to the terms set forth in Article 4 applicable to the Disclaimer Trust. [However, if my \_\_\_\_\_ (wife *or* husband) also disclaims an interest in all or any portion of the Disclaimer Trust, that disclaimed interest shall be administered and distributed as if my \_\_\_\_\_ (wife *or* husband) predeceased me.]

#### Article 4 : Trust Distributions

4.01. Bypass Trust. The trustee shall hold, administer, and distribute the assets of the Bypass Trust as follows:

(a) The trustee shall pay to or apply for the benefit of my \_\_\_\_\_ [husband *or* wife] all of the net income of the trust, in monthly or other convenient installments agreed upon by my \_\_\_\_\_ [husband *or* wife] and the trustee, but not less often than annually, for life.

(b) On the death of my \_\_\_\_\_ [husband *or* wife], the trustee shall divide the trust property into as many shares of equal market value as are necessary to create one share for each of my children who survives my \_\_\_\_\_ [husband *or* wife], and one share for the issue who survive my \_\_\_\_\_ [husband *or* wife] of each of my children who predeceases my \_\_\_\_\_ [husband *or* wife].

(c) Each share created for a surviving child shall be distributed outright to that child if that child has reached the age of \_\_\_\_\_ [e.g., 25] years. If the child has not reached the age of \_\_\_\_\_ years, the share created for the child shall be held, administered, and distributed by the trustee in the Separate Share Trust as *set forth in Section 4.02* of this will.

(d) Each share created for the issue of a deceased child shall be divided among those issue \_\_\_\_\_ [in the manner provided in California Probate Code Section \_\_\_\_\_ (240 *or* 246 *or* 247) *or* in equal shares, regardless of whether or not all such issue are members of the same generation]. The share of each issue shall be distributed outright to that issue.

(e) If all my children predecease my \_\_\_\_\_ [husband *or* wife] without leaving issue who survive my \_\_\_\_\_ [husband *or* wife], the trustee shall distribute any undistributed balance of the trust property outright to \_\_\_\_\_ [*alternative disposition, e.g., my heirs or the San Francisco chapter of the American Lung Association*].

4.02. Separate Share Trust. The trustee shall hold, administer, and distribute the assets of the separate share created for each child as follows:

(a) The trustee shall pay or distribute to or apply for the benefit of that child, until \_\_\_\_\_ [he *or* she *or* he *or* she] reaches the age of \_\_\_\_\_ [e.g., 25] years, in monthly or other convenient

installments, but not less often than annually, as much of the net income of the trust, and as much of the principal of the trust, as the trustee, in the trustee's discretion, deems necessary for \_\_\_\_\_ [his or her or his or her] \_\_\_\_\_ [to specify an "ascertainable standard": health, education, support, and maintenance or specify some other standard, e.g., comfort, welfare, and happiness]. All decisions of the trustee regarding payments under this subsection, if any, are within the trustee's discretion and shall be final and incontestable by anyone. The trustee shall accumulate and add to principal any net income not distributed.

(b) When that child reaches the age of \_\_\_\_\_ [e.g., 25] years, the trustee shall distribute to \_\_\_\_\_ [him or her or him or her] outright the balance of the trust property.

(c) If that child dies before the trust property has been distributed as provided in this section, the assets of \_\_\_\_\_ [his or her or his or her] separate share shall be divided among \_\_\_\_\_ [his or her or his or her] issue \_\_\_\_\_ [in the manner provided in California Probate Code Section \_\_\_\_\_ (240 or 246 or 247) or in equal shares, regardless of whether or not all such issue are members of the same generation]. The share of each issue shall be distributed outright to that issue. If that child dies without issue before the trust property has been distributed as provided in this section, the trustee shall distribute the entire undistributed balance of \_\_\_\_\_ [his or her or his or her] separate share outright among the other then-living persons for whom separate shares were created, and the issue of any deceased persons for whom separate shares were created, \_\_\_\_\_ [in the manner provided in California Probate Code Section \_\_\_\_\_ (240 or 246 or 247) or in equal shares, regardless of whether or not all such issue are members of the same generation]; provided, however, that if any part of that balance would otherwise be distributed to a person for whose benefit a trust is being administered under this section, that part shall instead be added to that trust and shall thereafter be administered according to its terms. If there are no surviving persons who may take the share of that child under this section, any remaining trust property shall be distributed outright to \_\_\_\_\_ [alternative disposition, e.g., my heirs or the San Francisco chapter of the American Lung Association].

4.03. Disclaimer Trust. The trustee shall hold, administer, and distribute the assets of the Disclaimer Trust as follows:

(a) The trustee shall pay to or apply for the benefit of my \_\_\_\_\_ [husband or wife] all of the net income of the trust, in monthly or other convenient installments [agreed upon by \_\_\_\_\_ (identity of beneficiary, e.g., my wife) and the trustee], but not less often than annually, for life.

(b) The trustee shall distribute to or apply for the benefit of my \_\_\_\_\_ [husband or wife], for life, as much of the principal of the trust as the trustee, in the trustee's discretion, deems necessary [, when added to the income payments from this trust,] for \_\_\_\_\_ [his or her] health, education, support, and maintenance. All decisions of the trustee regarding payments under this subsection, if any, are within the trustee's discretion and shall be final and incontestable by anyone.

(c) On the death of my \_\_\_\_\_ [husband or wife], the trustee shall divide the trust property into as many shares of equal market value as are necessary to create one share for each of my children who survives my \_\_\_\_\_ [husband or wife], and one share for the issue who survive my \_\_\_\_\_ [husband or wife] of each of my children who predeceases my \_\_\_\_\_ [husband or wife].

(d) Each share created for a surviving child shall be distributed outright to that child if that child has reached the age of \_\_\_\_\_ [e.g., 25] years. If the child has not reached the age of \_\_\_\_\_ years, the share created for the child shall be held, administered, and distributed by the trustee in the Separate Share Trust as set forth in Section 4.02 of this will.

(e) Each share created for the issue of a deceased child shall be divided among those issue \_\_\_\_\_ [in the manner provided in California Probate Code Section \_\_\_\_\_ (240 or 246 or 247) or in equal

shares, regardless of whether or not all such issue are members of the same generation]. The share of each issue shall be distributed outright to that issue.

(f) If all my children predecease my \_\_\_\_\_ [husband *or* wife] without leaving issue who survive my \_\_\_\_\_ [husband *or* wife], the trustee shall distribute any undistributed balance of the trust property outright to \_\_\_\_\_ [*alternative disposition, e.g., my heirs or the San Francisco chapter of the American Lung Association*].

4.04. Consideration of Beneficiary's Other Resources. In making any payments of income and distributions of principal from any trust created by this will for \_\_\_\_\_ [*specify standard of discretion as set forth in provision authorizing the discretionary distribution, e.g., the health, education, support, and maintenance or care and comfort*] of any beneficiary, the trustee shall take into consideration, to the extent the trustee deems advisable, any other income or resources available to that beneficiary that are known to the trustee and that are reasonably available for that purpose.

4.05. Trustee's Power to Determine Income and Principal. Unless otherwise specifically provided in this will, the determination of all matters with respect to what is principal and income of any trust under this will and the apportionment and allocation of receipts, expenses and other charges between principal and income shall be governed by the provisions of the California Revised Uniform Principal and Income Act from time to time existing. The trustee in the trustee's discretion shall determine any matter not provided for either in this instrument or in the California Revised Uniform Principal and Income Act.

4.06. Administration of Generation-Skipping Trusts. The provisions of this section apply to any trust under this will in which there is property that is or may become subject to the federal generation-skipping transfer tax:

(a) If the executor intends to allocate any part of the generation-skipping transfer tax exemption that is available to me to some but not all of the property to be distributed to any trust to which this section of the will applies, the executor \_\_\_\_\_ [shall *or* may, in the executor's discretion,] obtain an order for distribution that divides that trust into two separate trusts, to be designated as the Exempt Trust and the Non-Exempt Trust. [*If executor has discretionary power to divide trusts: If the executor elects to divide a trust in the manner provided in this section, the or, if division of trusts is mandatory rather than discretionary: The*] Exempt Trust shall contain the share of the property of that trust equal in value to the amount of the generation-skipping transfer tax exemption that the executor intends to allocate to the trust. The Non-Exempt Trust shall contain the balance of the property of that trust. The executor shall then actually allocate the generation-skipping transfer tax exemption to the Exempt Trust and not to the Non-Exempt Trust so that the Exempt Trust shall have an inclusion ratio of zero for federal generation-skipping transfer tax purposes and the Non-Exempt Trust shall have an inclusion ratio of one for federal generation-skipping transfer tax purposes.

(b) In allocating assets between the Exempt Trust and Non-Exempt Trust for purposes of this section, the executor shall \_\_\_\_\_ [*for a pecuniary allocation: allocate the trust assets between the Exempt Trust and Non-Exempt Trust in cash or in kind, or partly in each, on a pro rata or non pro rata basis, and in undivided interests or not or, for a fractional allocation: allocate to each trust a fractional share of each and every substantial interest or right held by the trust being divided*]. [*If preceding sentence provides for a pecuniary allocation, add: If the allocation is not made within 15 months from the date of my death, the executor shall pay interest, at the legal rate, from the date of my death to the date of distribution. For purposes of allocation under this section, assets shall be valued at their values \_\_\_\_\_ (to use date of distribution values: on the date or dates of distribution or, to use valuation for estate tax purposes: as finally determined for federal estate tax purposes; provided that any assets allocated in kind shall be allocated between the Exempt Trust and the Non-Exempt Trust in a manner that fairly reflects the net appreciation or depreciation in the value of the assets in the trust being divided, measured from the date of my death to the date of payment).*]

(c) Regardless of whether or not subsection (a) applies, if the amount of my generation-skipping transfer tax

exemption actually allocated by the executor to a trust to which this section applies is equal to the value of the property of that trust so that the entire trust has an inclusion ratio of zero for federal generation-skipping transfer tax purposes, the entire trust shall be referred to as the Exempt Trust. On the other hand, if no part of my generation-skipping transfer tax exemption is actually allocated to the trust by the executor so that the entire trust has an inclusion ratio of one for federal generation-skipping transfer tax purposes (or if I am not the transferor of that trust for generation-skipping transfer tax purposes), the entire trust shall be referred to as the Non-Exempt Trust.

(d) The trustee may, but is not required to, administer the trusts under this will to which this section applies in such a manner that distributions made during the trust terms to "skip persons" (as defined in *Internal Revenue Code Section 2613(a)* or any equivalent successor section) are made from Exempt Trusts, and distributions made during the trust terms to "non-skip persons" (as defined in *Internal Revenue Code Section 2613(b)* or any equivalent successor section) are made from Non-Exempt trusts.

[*Optional:* (e) If the trustee determines that the burdens of generation-skipping transfer taxes, income taxes, and death taxes on a Non-Exempt Trust, my estate, or the beneficiaries of that trust would be reduced, the trustee may petition the court to amend the trust to grant to one or more trust beneficiaries who are non-skip persons in a generation below me a general testamentary power of appointment over all or a specified portion of that Non-Exempt Trust. Any power to amend the trust is within the discretion of the court, and the preceding sentence shall not be construed to give the trustee any power that the trustee does not already have under California trust law to petition the court under the appropriate circumstances, nor shall it be construed to limit the power of the trustee or any beneficiary under the California trust law to petition the court under the appropriate circumstances.]

[(f)] The purpose of this section is to allow the trustee to administer the trusts so as to decrease the amount of generation-skipping transfer taxes owed on generation-skipping transfers from the trusts. The trustee shall balance that consideration against any other tax and non-tax considerations, and may disregard the generation-skipping transfer tax consequences to the extent that the trustee determines that doing so will allow the trustee to carry out my intentions in creating the trusts. All decisions of the trustee under this subsection are within the trustee's discretion and shall be final and incontestable by anyone.

[(g)] If, in the judgment of the executor or the trustee, at any time after the execution of this will, any statute, regulation, court decision, or administrative ruling imposes different or additional requirements on the trust in connection with the generation-skipping transfer tax, the executor or the trustee may petition the court to amend the terms of the trust to meet those requirements and achieve the purpose of this section.

[(h)] If, upon the death of my \_\_\_\_\_ [husband or wife], (1) my \_\_\_\_\_ [husband or wife] is considered to be the transferor of any Non-Exempt Trust established by this will for generation-skipping transfer tax purposes, and (2) my \_\_\_\_\_ [husband or wife]'s executor allocates any part of the generation-skipping transfer tax exemption that is available to my \_\_\_\_\_ [husband or wife] under *Internal Revenue Code Section 2631(a)* (or any equivalent successor section) to that Non-Exempt Trust so that the entire trust then has an inclusion ratio of zero for federal generation-skipping transfer tax purposes, that trust shall then be considered to be an Exempt Trust for purposes of this section of the will.

#### Article 5 : Executor

5.01. Nomination of Executor. I nominate \_\_\_\_\_ [name and relationship to testator or other means of identification, e.g., my husband or my wife or my sister, Catherine Gray Sawyer,] as executor of this will.

5.02. Successor Executors. If \_\_\_\_\_ [nominee(s) for initial executor, e.g., my husband] is for any reason unable or unwilling to serve, or to continue to serve, as executor, I nominate the following, in the order of priority indicated, as successor executor:

First, \_\_\_\_\_ [*name and description, e.g. (for coexecutors) my brother, John Joseph Gray*];

Second, \_\_\_\_\_ [*name and description, e.g. (for individual) Frank J. Potter, who resides at*  
\_\_\_\_\_ (*address*)];

Third, \_\_\_\_\_ [*name and description, e.g. (for corporate executor) Double Eagle Bank, Fresno, California office*].

5.03. Definition of Executor. The term "executor," as used in this will, refers to each personal representative of my estate who is serving at the pertinent time.

5.04. Bond. \_\_\_\_\_ [No bond or undertaking *or* Bond] shall be required of any executor nominated in this will.

5.05. Independent Administration. The executor shall \_\_\_\_\_ [have full *or* not have] authority to administer my estate under the California Independent Administration of Estates Act.

5.06. Powers of Executor. Subject to any limitations stated elsewhere in this will, the executor shall have, in addition to all of the powers now or hereafter conferred on executors by law, and any powers enumerated elsewhere in this will, the power to perform any of the acts specified in this section:

(a) Take possession or control of all of my estate subject to disposition by this will, and collect all debts due to me or to my estate.

(b) Receive the rents, issues, and profits from all real and personal property in my estate until the estate is settled or delivered over by order of court to my heirs or beneficiaries.

(c) Pay taxes on, and take all steps reasonably necessary for the management, protection, and preservation of, all property in my estate.

(d) Commence and prosecute, either individually or jointly with my heirs or beneficiaries, any action necessary or proper to quiet title to or recover possession of any real or personal property in my estate.

(e) Vote in person, and give proxies to exercise, any voting rights with respect to any stock, any membership in a nonprofit corporation, or any other property in my estate, and waive notice of a meeting, give consent to the holding of a meeting, and authorize, ratify, approve, or confirm any action that could be taken by shareholders, members, or property owners.

(f) Insure the property of my estate against damage or loss, and insure the executor against liability to third persons.

(g) Deposit money belonging to my estate in an insured account in a financial institution in California.

(h) Invest and reinvest any money of my estate not reasonably required for the immediate administration of my estate in any kind of property, real, personal, or mixed, that persons of prudence, discretion, and intelligence acquire for their own accounts; provided, however, that in investing any property of my estate, the executor shall act with the care, skill, prudence, and diligence under the circumstances then prevailing, including but not limited to the general economic conditions and the anticipated needs of my estate and its beneficiaries, that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of like character and with like aims to accomplish the purposes of my estate as determined from this will.

(i) Retain any assets of my estate for as long as the executor deems to be in the best interest of my estate.

(j) Borrow money on behalf of my estate and pledge, hypothecate, or otherwise encumber property of my estate,

real or personal, as security for any sums so borrowed.

(k) In order to satisfy a pecuniary gift or to distribute or divide estate assets into shares or partial shares, the executor may distribute or divide those assets in kind, or divide undivided interests in those assets, or sell all or any part of those assets and distribute or divide the property in cash, in kind, or partly in cash and partly in kind. Property distributed to satisfy a pecuniary gift under this will shall be valued at its fair market value at the time of distribution. This section shall apply only to the extent that it does not conflict with the provisions of Articles 2 and 3 specifying allocation of assets involving the marital deduction gift and of Article 4 specifying allocation of assets involving generation-skipping trusts.

(l) Pay any and all charges reasonably incurred in connection with or incidental to the distribution of any property of my estate, including but not limited to expenses of storage, freight, shipping, delivery, packing, and insurance; and, on any accounting, treat any such expenditures as expenses of the administration of my estate.

(m) To the extent permitted by law, and without regard to the resulting effect on any other provision of this will, on any person interested in my estate, or on the amount of taxes that may be payable, the executor shall have the power to choose a valuation date for tax purposes; choose the methods to pay any death taxes; elect to treat or use any item for state or federal estate or income tax purposes as an income tax deduction or an estate tax deduction; disclaim all or any portion of any interest in property passing to my estate at or after my death; join with my \_\_\_\_\_ [husband *or* wife] or my \_\_\_\_\_ [husband's *or* wife's] estate in filing joint income or gift tax returns for me or my estate; consent to any gifts made by my \_\_\_\_\_ [husband *or* wife] as being made one half by me for gift tax purposes; and determine when an item is to be treated as taken into income or used as a tax deduction.

(n) If any asset of my estate consists of an option right, exercise the option after authorization by order of court, upon a showing that the exercise would be to the advantage of my estate, and use any funds or property in my estate to acquire the property covered by the option.

(o) Hold a security in the name of a nominee or in any other form without disclosure of my estate so that title to the security may pass by delivery.

(p) Exercise any subscription rights owned or received by my estate by reason of owning securities, after authorization by court upon a showing that it is to the advantage of my estate.

(q) Sell, at either public or private sale and with or without notice, and grant options to purchase, any property belonging to my estate [optional:, subject only to any confirmation of court required by law].

(r) Lease any real or personal property belonging to my estate on such terms and conditions as the executor determines to be in the best interest of my estate [optional:, subject only to any confirmation of court required by law].

(s) Dispose of or abandon tangible personal property, except tangible personal property that is a specific gift, when the cost of collecting, maintaining, and safeguarding the property would exceed its fair market value.

(t) Compromise or settle any claim, action, or proceeding by or for the benefit of, or against, me, my estate, or the executor [optional:, subject only to any confirmation of court that may be required by law].

(u) Employ professional investment counsel to make recommendations with respect to, and otherwise assist in, investing the assets of my estate; and, on any accounting, treat any fees paid to investment counsel as expenses of the administration of my estate.

5.07. Payments to Incapacitated Persons. If at any time any beneficiary under this will is a minor, or it appears to the executor that any beneficiary is incapacitated, incompetent, or for any other reason not able to receive payments or make intelligent or responsible use of the payments, then the executor, in lieu of making direct payments to the

beneficiary, may make payments to the beneficiary's conservator or guardian; to the beneficiary's custodian under the Uniform Gifts to Minors Act or Uniform Transfers to Minors Act of any state (including a custodian selected by the executor); to one or more suitable persons as the executor deems proper, such as a relative of or a person residing with the beneficiary, to be used for the beneficiary's benefit; to any other person, firm, or agency for services rendered or to be rendered for the beneficiary's assistance or benefit; or to accounts in the beneficiary's name with financial institutions. The receipt of payments by any of the foregoing shall constitute a sufficient acquittance of the executor for all purposes.

5.08. **Executor's Liability for Own Acts.** The executor shall not be liable to my estate or to any person interested in it for any act or omission of the executor, except an act or omission that is committed intentionally, with gross negligence, in bad faith, or with reckless indifference to the interests of persons interested in my estate, or an act or omission from which the executor derives a profit.

#### Article 6 : Trustee

6.01. **Nomination of Trustee.** I nominate \_\_\_\_\_ [*name of trustee and relationship to testator or other means of identification, e.g., my husband or my wife or my sister, Catherine Gray Sawyer,*] as trustee of any trust created under this will.

6.02. **Successor Trustee.** If \_\_\_\_\_ [*nominee for initial trustee, e.g., my husband or my wife or my sister, Catherine Gray Sawyer,*] is for any reason unable or unwilling to serve, or continue to serve, as trustee, I nominate the following, in the order of priority indicated, as trustee:

First, \_\_\_\_\_ [*name and description, e.g., my brother, John Joseph Gray*];

Second, \_\_\_\_\_ [*name and description, e.g., Frank J. Potter, who resides at \_\_\_\_\_ (address)*];

Third, \_\_\_\_\_ [*name and description, e.g. (for corporate trustee): Double Eagle Bank, Fresno, California office*].

6.03. **Definition of Trustee.** Reference in this instrument to "the trustee" shall be deemed a reference to whoever is serving as trustee or co-trustees, and shall include alternate or successor trustees, unless the context requires otherwise.

6.04. **Bond.** \_\_\_\_\_ [*No bond or undertaking or Bond*] shall be required of any trustee nominated in this will.

6.05. **Compensation of Trustee.** The trustee shall be entitled to reasonable compensation for services rendered, payable without court order. [*Optional: If a trustee serves for only part of a calendar year, the annual compensation shall be prorated according to the number of days during that year that the trustee was acting as trustee.*]

6.06. **Procedure for Resignation.** Any trustee may resign at any time, without giving a reason for the resignation, by giving written notice, at least \_\_\_\_\_ [*specify; e.g., 30 days*] before the time the resignation is to take effect, to any other trustee then acting, to any persons authorized to designate a successor trustee, to all living trust beneficiaries known to the trustee (or, in the case of a minor beneficiary, to the parent or guardian of that beneficiary), and to the successor trustee. A resignation shall be effective upon written acceptance of the trust by the successor trustee.

6.07. **General Powers of Trustee.** To carry out the purposes of the trusts created under this will, and subject to any limitations stated elsewhere in this will, the trustee shall have all of the following powers, in addition to all of the powers now or hereafter conferred on trustees by law:

(a) Retain property received into the trust at its inception, or later added to the trust, as long as the trustee considers that retention in the best interests of the trust or in furtherance of my goals in creating the trust, as determined from this will, but subject to the standards of the prudent investor rule as set forth in the California Uniform Prudent Investor Act.

(b) Invest and manage the trust assets as a prudent investor would, by considering the purposes, terms, distribution requirements, and other circumstances of the trust. In satisfying this standard, the trustee shall exercise reasonable care, skill, and caution. The trustee's investment and management decisions respecting individual assets and courses of action must be evaluated not in isolation, but in the context of the trust portfolio as a whole and as a part of an overall investment strategy having risk and return objectives reasonably suited to the trust.

(c) Retain or acquire unproductive or underproductive property.

(d) In the trustee's discretion, invest or reinvest in mutual funds, money market funds, investment trusts, regulated investment companies, market funds, and index funds, and in the shares or securities of any such funds or companies, that persons of prudence, discretion, and intelligence acquire for their own account.

(e) Acquire and maintain as a trust asset a life insurance policy on the life of any person, including \_\_\_\_\_ [the trustee or any of the trustees], issued by any company and in any amount that the trustee may deem advisable, and to exercise all rights of ownership granted in that policy.

(f) With or without court authorization, sell (for cash or on deferred payments, and with or without security), convey, exchange, partition, and divide trust property; grant options for the sale or exchange of trust property for any purpose, whether the contract is to be performed or the option is to be exercised within or beyond the term of the trust; and lease trust property for any purpose, for terms within or extending beyond the expiration of the trust, regardless of whether the leased property is commercial or residential and regardless of the number of units leased.

(g) Lend or advance the trustee's own funds to my estate or to any other trust created by me, for any purpose properly related to that estate or trust, with interest thereon at the then-prevailing rates, and to receive security for any such loans in any commercially reasonable form. The trustee may, from time to time, purchase or lease assets from, sell or lease assets to, and exchange assets with my estate at fair market values. [*Optional:* However, the fair market value of any asset sold, purchased, or leased pursuant to this provision must first be determined by an independent appraisal.]

(h) Engage in any transactions with the personal representative of my estate that are in the best interest of any trusts under this will.

(i) Manage, control, improve, and maintain all real and personal trust property.

(j) Subdivide or develop land; make or obtain the vacation of plats and adjust boundaries, or adjust differences in valuation on exchange or partition by giving or receiving consideration; and dedicate land or easements to public use with or without consideration.

(k) Make ordinary or extraordinary repairs or alterations in buildings or other trust property, demolish any improvements, raze existing party walls or buildings, and erect new party walls or buildings, as the trustee deems advisable.

(l) Enter into oil, gas, and other mineral leases, on terms deemed advisable by the trustee; enter into any pooling, unitization, repressurization, community, or other types of agreements relating to the exploration, development, operation, and conservation of mineral properties; drill, mine, and otherwise operate for the development of oil, gas, and other minerals; contract for the installation and operation of absorption and repressuring plants; and install and maintain pipelines. Any such leases or agreements may be for a term within or extending beyond the term of the trust.

(m) In the trustee's discretion, abandon any [unproductive or wasted] trust asset or interest therein.

(n) Employ and discharge agents and employees, including but not limited to attorneys, accountants, investment and other advisers, custodians of assets, property managers, real estate agents and brokers, and appraisers, to advise and assist the trustees in the management of any trusts created under this will, and compensate them from the trust property. [*Optional*: The agents and employees may be associated or affiliated with the trustee, or may be descendants or other persons related to the trustee or to me, or a company associated with any such persons.] [*Optional*: The trustee is entitled to rely on the advice of any professional advisers employed under this provision. Reasonable compensation paid to any such agents or employees shall not diminish the compensation to which the trustee is otherwise entitled.]

(o) With respect to securities held in trust, exercise all the rights, powers, and privileges of an owner, including, but not limited to, the power to vote, give proxies, and pay assessments and other sums deemed by the trustee necessary for the protection of the trust property; participate in voting trusts, pooling agreements, foreclosures, reorganizations, consolidations, mergers, and liquidations, and, in connection therewith, deposit securities with and transfer title to any protective or other committee under such terms as the trustee deems advisable; exercise or sell stock subscription or conversion rights; and accept and retain as investments of the trust any securities or other property received through the exercise of any of the foregoing powers.

(p) Hold securities or other trust property in the trustee's own name or in the name of a nominee, without disclosure of the trust, or in unregistered form, so that title may pass by delivery.

(q) Deposit securities in a securities depository that is either licensed or exempt from licensing.

(r) Borrow money for any trust purpose from any person or entity on such terms and conditions as the trustee deems advisable, and obligate the trust for repayment; encumber any trust property by mortgage, deed of trust, pledge, or otherwise, whether for terms within or extending beyond the term of the trust, as the trustee deems advisable, to secure repayment of any such loan; replace, renew, and extend any such loan or encumbrance; and pay loans or other obligations of the trust deemed advisable by the trustee.

(s) In the trustee's discretion, make loans to beneficiaries out of funds of the trust and guarantee the repayment of loans made to beneficiaries by third parties by encumbering trust assets.

(t) Procure and carry, at the expense of the trust, insurance in such forms and in such amounts as the trustee deems advisable to protect the trust property against damage or loss, and to protect the trustee against liability with respect to third persons.

(u) Enforce any obligation owing to the trust, including any obligation secured by a deed of trust, mortgage, or pledge held as trust property, and to purchase any property subject to a security instrument held as trust property at any sale under the instrument.

(v) Extend the time for payment of any note or other obligation held as an asset of, and owing to, the trust, including accrued or future interest, and extend the time for repayment beyond the term of the trust.

(w) Pay or contest any claim against the trust; release or prosecute any claim in favor of the trust; or, in lieu of payment, contest, release, or prosecution, adjust, compromise, or settle any such claim, in whole or in part, with or without consideration.

(x) At trust expense, prosecute or defend actions, claims, or proceedings of whatever kind for the protection of the trust property and of the trustee in the performance of the trustee's duties, and employ and compensate attorneys, advisers, and other agents as the trustee deems advisable.

(y) Accept additions to any trusts created by this will, from any source and at any time; all such additions shall become a part of the trust and shall be held, administered, and distributed in accordance with the terms of the trust. Any additions to the trust shall be made by designating in writing the property to be added. However, the titling of any

account, deed, or similar asset in the name of the trustee, as trustee of the trust, shall be deemed to be a transfer to the trust. Any designation by a third party, whether by will, deed, account title designation, or similar transfer, shall also be a transfer to the trust estate. No addition shall become part of the trust estate until it is accepted in writing by the trustee.

6.08. Retention of Family Residence. The trustee shall retain, in any trust or trusts under this will, any of my interest in real property used by me and my \_\_\_\_\_ [husband *or* wife] as our principal residence at the time of my death ("the family residence"), and shall deal with the family residence in accordance with the following terms and conditions:

(a) During \_\_\_\_\_ [his *or* her] lifetime, my \_\_\_\_\_ [husband *or* wife] shall have the right to occupy the family residence (or any substitute residence or residential property purchased as provided in this section of the will) free of any rent.

(b) The trustee shall pay as much of the mortgage or note payments, property taxes, assessments, insurance, maintenance, and ordinary repairs on the family residence (or on any substitute residence or residential property purchased as provided in this section of the will) as corresponds to the trust's proportionate interest in the same. The trustee shall make those payments out of income or principal of the trust or trusts in accordance with the principles applicable to charging of payments under California law.

(c) My \_\_\_\_\_ [husband *or* wife] shall, at \_\_\_\_\_ [his *or* her] option, have the right to advise the trustee in writing that \_\_\_\_\_ [he *or* she] no longer wishes to occupy the family residence and to direct the trustee to sell it, or any interest therein. In deciding on the terms and conditions relating to any sale, the trustee shall take into account all relevant factors, including, but not limited to, my intent that no sale be made in a "forced sale" situation (other than at my \_\_\_\_\_ [husband's *or* wife's] direction) or at a time when, because of high mortgage rates or otherwise, the residential real estate market is depressed. In selling the family residence, the trustee may dispose of it on such terms as the trustee deems desirable, including an installment sale or any other desirable method of disposing of the family residence, provided that if the sale is for consideration other than cash, the purchaser's obligation shall be secured by a first deed of trust. In the event of a sale, my \_\_\_\_\_ [husband *or* wife] may direct the trustee in writing to apply the proceeds of the sale to the purchase of a substitute residence or residential property, of comparable or lesser value, to be selected by my \_\_\_\_\_ [husband *or* wife]; or to reinvest the proceeds in any manner that \_\_\_\_\_ [he *or* she] may direct, provided that any such investments satisfy normal fiduciary standards of prudence and safety, and to use the income from reinvestment to pay the rental or lease payments on another residence or residential property, to be selected by my \_\_\_\_\_ [husband *or* wife]. Any net trust accounting income from any such investments, in excess of the trust share of the rental costs and any other expenses of trust administration, shall be added to the other trust income and distributed in accordance with the relevant provisions of the trust or trusts as set forth in Article 4 of this will.

[Optional: (d) If my \_\_\_\_\_ [husband *or* wife] does not direct the trustee to sell the family residence, \_\_\_\_\_ [he *or* she] shall have the right to direct the trustee in writing to lease it, or any interest in it. In the event of lease, the trustee shall continue to pay the expenses of maintaining the family residence as specified above, subject to the lease terms, and shall use the entire net income from the lease to pay the rental or lease payments on another residence or residential property, to be selected and occupied by my \_\_\_\_\_ [husband *or* wife]. Any net trust accounting income from any lease of the family residence, in excess of the trust share of the cost of the rental or lease payments on another residence or residential property, shall be added to the other trust income and distributed in accordance with the relevant provisions of the trust or trusts, as set forth in Article 4 of this will.]

(e) Upon the death of my \_\_\_\_\_ [husband *or* wife], the trust interest in either the family residence, any proceeds remaining from the sale of the family residence, or any substitute residence or residential property purchased by the trustee with any proceeds of sale of the family residence, shall be distributed in accordance with the applicable provisions of the trust or trusts in which the interest or interests are held, as set forth in Article 4 of this will.

6.09. Power to Combine Trust Assets. Each trust created under this will shall constitute a separate trust and be administered and accounted for accordingly; however, the assets of all of the trusts may be combined and held for the trust beneficiaries without physical division into separate trusts until time of distribution.

6.10. Early Termination of Trusts. The trustee shall have the power, in the trustee's discretion, to terminate any trust created under this will whenever the fair market value of the trust falls below \_\_\_\_\_ [specify amount, e.g., \$25,000], or becomes so small in relation to the costs of administration as to make continuing administration uneconomical. Upon termination, the trustee shall distribute the principal and any accrued or undistributed net income to the income beneficiaries in proportion to their shares of the income. If no fixed amount of income is payable to specific beneficiaries, the trustee shall distribute the principal and any accrued or undistributed net income in equal shares to those beneficiaries who would then be entitled to income payments from the trust.

6.11. Power to Delay Distributions. Following my death, the trustee shall have the power, in the trustee's discretion, to determine the reasonable administrative period necessary or appropriate to pay my debts, expenses, taxes, and other liabilities, before dividing or distributing the trust assets as provided herein, and to delay the division or distribution during that period. During that administrative period, the trustee, in the trustee's discretion, may accumulate the trust income, or distribute the income currently, or partially accumulate and partially distribute the income, as the trustee determines, but any income accumulated shall be distributable to the beneficiary or beneficiaries next entitled to distribution or allocation of the same upon conclusion of the administrative period.

6.12. Division or Distribution in Cash or in Kind. In order to satisfy a pecuniary gift or to distribute or divide trust assets into shares or partial shares, the trustee may distribute or divide those assets in kind, or divide undivided interests in those assets, or sell all or any part of those assets and distribute or divide the property in cash, in kind, or partly in cash and partly in kind. Property distributed to satisfy a pecuniary gift under this will shall be valued at its fair market value at the time of distribution. This section shall apply only to the extent that it does not conflict with the provisions of Articles 2 and 3 specifying allocation of assets involving the marital deduction gift and of Article 4 specifying allocation of assets involving generation-skipping trusts.

6.13. Payments to Incapacitated Persons. If at any time any trust beneficiary is a minor, or it appears to the trustee that any trust beneficiary is incapacitated, incompetent, or for any other reason not able to receive payments or make intelligent or responsible use of the payments, then the trustee, in lieu of making direct payments to the trust beneficiary, may make payments to the beneficiary's conservator or guardian; to the beneficiary's custodian under the Uniform Gifts to Minors Act or Uniform Transfers to Minors Act of any state (including a custodian selected by the trustee); to one or more suitable persons as the trustee deems proper, such as a relative of or a person residing with the beneficiary, to be used for the beneficiary's benefit; to any other person, firm, or agency for services rendered or to be rendered for the beneficiary's assistance or benefit; or to accounts in the beneficiary's name with financial institutions. The receipt of payments by any of the foregoing shall constitute a sufficient acquittance of the trustee for all purposes.

6.14. Grant of Specific Powers Not to Limit Exercise of General Powers. The enumeration of specific powers under this will shall not limit the trustee from exercising any other power with respect to any trusts created by this will that may be necessary or appropriate for the trustee to have and exercise in order to carry out the purposes of the trusts or to permit the trustee to fulfill the trustee's responsibilities and duties with respect to the trust.

6.15. Surviving Spouse's Power Over Bypass and Disclaimer Trust Not to Constitute General Power of Appointment. Notwithstanding any other provision of this will, at any time that my \_\_\_\_\_ [wife or husband] is serving as [a] trustee of the Bypass Trust and/or the Disclaimer Trust, if any, any power or discretion exercisable by my \_\_\_\_\_ [wife or husband] with respect to that trust, whether granted by this will or conferred by law, insofar as that power or discretion may be exercisable to consume, invade, or appropriate property for the benefit of my \_\_\_\_\_ [wife or husband], \_\_\_\_\_ [his or her] estate, \_\_\_\_\_ [his or her] creditors, or the creditors of \_\_\_\_\_ [his or her] estate, shall be exercisable only for \_\_\_\_\_ [his or her] health, education, support, and maintenance.

6.16. Power to Disclaim or Release Powers. The trustee may disclaim, release, or restrict the scope of any power or discretion that the trustee may hold in connection with any trust created under this will, whether the power or discretion is expressly granted in this will or is implied by law. The trustee shall disclaim a power in the manner required by applicable federal or California law. The trustee shall release or restrict any power or discretion by giving written notice to the beneficiary or beneficiaries then entitled to current distribution of income from the trust, specifying the power or discretion to be released or restricted, the nature of the restriction, and, if appropriate, the person or persons to whom the released or restricted power shall pass and be exercisable. If a power is disclaimed, the power shall be available to and exercisable by \_\_\_\_\_ [if trust nominates co-trustees: the other trustee or trustees or, if trust nominates successor trustee: the successor trustee].

6.17. Written Notice to Trustee. Until the trustee receives written notice of any death or other event upon which the right to payments from any trust may depend, the trustee shall incur no liability for disbursements made in good faith to persons whose interests may have been affected by that event.

6.18. Duty to Account. The trustee shall render accounts at least annually, at the termination of a trust, and upon a change of trustees, to the persons and in the manner required by law.

#### Article 7 : Guardian

7.01. Nomination of Guardian. If a guardian of the person, estate, or person and estate is necessary for any minor child of mine, I nominate \_\_\_\_\_ [name and relationship to testator or other means of identification, e.g., my sister, Catherine Gray Sawyer or my brother, John Joseph Gray,], as that guardian. If at any time \_\_\_\_\_ [name, e.g., my sister, Catherine Gray Sawyer or my brother, John Joseph Gray] is unable or unwilling to serve, or to continue to serve, as guardian, I nominate \_\_\_\_\_ [name and relationship to testator or other means of identification, e.g., Frank J. Potter, who resides at \_\_\_\_\_ (address),] as guardian.

7.02. Bond. \_\_\_\_\_ [No bond or undertaking or Bond] shall be required of any guardian of the estate nominated in this will.

#### Article 8 : Concluding Provisions

8.01. Definition of Death Taxes. The term "death taxes," as used in this will, shall mean all inheritance, estate, succession, and other similar taxes that are payable by any person on account of that person's interest in my estate or by reason of my death, including penalties and interest, but excluding the following:

(a) Any additional tax that may be assessed under *Internal Revenue Code Section 2032A*.

(b) Any federal or state tax imposed on a generation-skipping transfer, as that term is defined in the federal tax laws [, unless the applicable tax statutes provide that the generation-skipping transfer tax on that transfer is payable directly out of the assets of my gross estate].

8.02. Payment of Death Taxes. The executor shall pay death taxes, whether or not attributable to property inventoried in my probate estate, by prorating and apportioning them among the persons interested in my estate as provided in the California Probate Code, except as follows:

(a) Any death taxes attributable to any property passing to my \_\_\_\_\_ [husband or wife] under this will or otherwise that qualifies for the federal estate tax marital deduction shall be paid out of my residuary estate, so that the property shall pass to my \_\_\_\_\_ [husband or wife] free of any death taxes.

(b) Any death taxes attributable to the following specific gift[s] shall be paid out of my residuary estate, and \_\_\_\_\_ [the or each such] gift shall pass free of death taxes: \_\_\_\_\_ [describe each gift

].

(c) The method of apportionment of death taxes specified in this will shall apply equally to any property passing under any codicil to this will, except to the extent that a codicil expressly provides for a different method of apportionment.

**PRACTICE TIP:**

The allocation of taxes shown in this form is but one of many possible allocation schemes. In each case the drafter should carefully consider the nature of the client's assets, including whether those assets will pass under the will or otherwise, and the value of assets passing under the will as specific, rather than residuary, gifts. Only when these factors are considered can the appropriate tax allocation formula be selected. Other possible allocation clauses appear in CALIFORNIA WILLS & TRUSTS FORMS, Div. IV, *Individual Will Provisions*, Pt. 90, *Concluding Provisions*, Form 90.30 (Alts. 90.30-1-90.30-7); for more detailed discussion of tax allocation, see California Wills & Trusts, Ch. 23, *Provisions for Payment of Taxes, Expenses, and Debt* (Matthew Bender). *Commentary by Albert G. Handelman*.

8.03. Abatement of Gifts. If my estate is insufficient to satisfy in full all of the gifts provided for in this will, I direct that gifts shall abate in the following order: first general gifts, then specific gifts, then demonstrative gifts; provided, however, that the gifts to my \_\_\_\_\_ [husband *or* wife] shall not abate until all other gifts have abated [, and the gifts to my children shall not abate until gifts to all persons and entities other than my \_\_\_\_\_ (husband *or* wife) have abated]. All gifts of the same class shall abate proportionally.

8.04. Simultaneous Death. If any beneficiary under this will and I die simultaneously, or if it cannot be established by clear and convincing evidence whether that beneficiary or I died first, I shall be deemed to have survived that beneficiary, and this will shall be construed accordingly.

8.05. Intentional Omission of Heirs Not Specifically Provided For in Will. Except as otherwise specifically provided in this will, I have intentionally and with full knowledge omitted to provide for my heirs, regardless of whether or not I am aware of their existence and identities at the time this will is executed.

8.06. No-Contest Clause. If any person, directly or indirectly, contests the validity of this will in whole or in part, or opposes, objects to, or seeks to invalidate any of its provisions, or seeks to succeed to any part of my estate otherwise than in the manner specified in this will, any gift or other interest given to that person under this will shall be revoked and shall be disposed of as if he or she had predeceased me [*optional*: without issue].

8.07. Perpetuities Savings Clause. Notwithstanding any other provision of this will, every trust created by this will [, or by the exercise of any power of appointment created by this will,] shall terminate no later than 21 years after the death of \_\_\_\_\_ [*designate measuring life or lives, e.g., the last survivor of my spouse and my issue*] who are alive at the time of my death. If a trust is terminated under this section of the will, the trustee shall distribute all of the principal and undistributed income of the trust to the income beneficiaries of the trust in the proportion in which they are entitled (or eligible, in the case of discretionary payments) to receive income immediately before the termination. If that proportion is not fixed by the terms of this will, the trustee shall distribute all of the trust property to the persons then entitled or eligible to receive income from the trust \_\_\_\_\_ [*specify pattern of distribution, e.g., outright in a manner that, in the trustee's opinion, will give effect to my intent in creating the trust, the trustee's decision to be final and incontestable by anyone or as a class, in the manner provided in California Probate Code Section \_\_\_\_\_ (240 or 246 or 247) or in equal shares, regardless of whether all of such persons are members of the same generation*].

8.08. Definition of Incapacity. For purposes of this will, a person shall be deemed "incapacitated" if and for so long as a court of competent jurisdiction has made a finding to that effect, or a guardian or conservator of that person's estate or person duly appointed by a court of competent jurisdiction is serving, or upon certification by two physicians

licensed to practice under the laws of the state where the person is domiciled at the time of the certification that the person is unable properly to care for himself or herself or for his or her property. The latter certification shall be made by each physician in a written declaration under penalty of perjury.

8.09. Definition of Education. As used in this will, the term "education" refers to the following:

- (a) Education at public or private elementary, junior high, middle, or high schools, including boarding schools;
- (b) Undergraduate, graduate, and postgraduate study in any field, whether or not of a professional character, in colleges, universities, or other institutions of higher learning;
- (c) Specialized formal or informal training in music, the stage, the handicrafts, or the arts, whether by private instruction or otherwise; and
- (d) Formal or informal vocational or technical training, whether through programs or institutions devoted solely to vocational or technical training, or otherwise.

8.10. Captions. The captions appearing in this will are for convenience of reference only, and shall be disregarded in determining the meaning and effect of the provisions of this will.

8.11. Severability Clause. If any provision of this will is invalid, that provision shall be disregarded, and the remainder of this will shall be construed as if the invalid provision had not been included.

8.12. California Law to Apply. All questions concerning the validity and interpretation of this will, including any trusts created by this will, shall be governed by the laws of the State of California in effect at the time this will is executed.

8.13. Gifts to "Heirs." For any gift to my heirs that is made outright in this instrument, those heirs shall be determined as if I had died intestate at the time for distribution, and the identity and shares of those heirs shall be determined according to the California laws of succession that concern separate property not acquired from a previously deceased spouse and that are in effect at my death. For any assets of any trust estate created by this will to be distributed to my heirs, those heirs shall be determined as if I had died intestate immediately following the termination of the trust of each share, and the identity and shares of those heirs shall be determined according to the California laws of succession that concern separate property not acquired from a previously deceased spouse and that are in effect at my death.

Executed on \_\_\_\_\_ [date], at \_\_\_\_\_ [city or town and state].

\_\_\_\_\_ [signature of testator]

[typed name]

On the date written above, we, the undersigned, each being present at the same time, witnessed the signing of this instrument by \_\_\_\_\_ [name of testator]. At that time, \_\_\_\_\_ [he or she] appeared to us to be of sound mind and memory and, to the best of our knowledge, was not acting under fraud, duress, menace, or undue influence. Understanding this instrument, which consists of \_\_\_\_\_ pages, including the pages on which the signature of \_\_\_\_\_ [name of testator] and our signatures appear, to be the will of \_\_\_\_\_ [name of testator], we subscribe our names as witnesses thereto. We declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on \_\_\_\_\_ [date], at \_\_\_\_\_ [city or town and state].

\_\_\_\_\_ [signature of first witness]

Residing at \_\_\_\_\_ [street address]

\_\_\_\_\_ [city and state]

\_\_\_\_\_ [signature of second witness]

Residing at \_\_\_\_\_ [street address]

\_\_\_\_\_ [city and state]

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsGeneral OverviewEstate, Gift & Trust LawTrustsMarital Deduction TrustsEstate, Gift & Trust LawTrustsTestamentary TrustsEstate, Gift & Trust LawWillsGeneral Overview



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California Legal Forms--Transaction Guide

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DIVISION IV: WILLS AND TRUSTS  
 CHAPTER 61 WILL DRAFTING AND COMPLETE WILL FORMS  
 PART IV. FORMS  
 B. Wills for Married Persons

*23-61 California Legal Forms--Transaction Guide § 61.213*

**AUTHOR:** Reviewed by Albert G. Handelman

**§ 61.213 Will for Married Person; Marital Deduction Formula Devise to Power of Appointment Trust; Residue to Bypass Trust; Disclaimer Trust**

**[1] Comment**

**[a] Use of Form**

This form is a complete will designed for use by a testator who is married, has children, and wishes to leave his or her entire estate in trust in such a way that the surviving spouse will have maximum control over the trust assets during his or her lifetime. It is further assumed that the testator wishes to take advantage of the unlimited marital deduction [*see I.R.C. § 2056*] and the unified credits available in each estate [*see I.R.C. §§ 2010* (estate tax), 2505 (gift tax)] to completely avoid estate tax on the death of the first spouse and to reduce (or totally eliminate) estate taxes on the death of the second spouse.

This will assumes that the combined estates of the testator and the testator's spouse will be too large at the time of the second spouse's death to be passed free of estate tax to the testator's children under the unified credit available in the second spouse's estate. If it is not reasonably foreseeable that the combined estates will exceed the amount of the available unified credit, the kind of tax planning included in this will is probably not warranted and the attorney should select one of the simpler wills included in this chapter.

This will provides for three trusts. The first, called the "Power of Appointment Trust" [*see Section 4.01 of form*], is designed to qualify for the unlimited marital deduction as a "lifetime income plus power of appointment" trust [*see I.R.C. § 2056(b)(5)* and discussion in *Ch. 71, Marital Deduction Trust Provisions, § 71.13[5]*]. The second, called the "Bypass Trust" [*see Section 4.02 of form*], is designed to take advantage of the unified credit available in the testator's estate [*see I.R.C. §§ 2010* (estate tax), 2505 (gift tax) and discussion in § 60.13[4][b]] and, on the death of the surviving spouse, to "bypass" that estate for estate tax purposes [*see discussion in § 61.212[1][f]*]. The third trust, called the "Disclaimer Trust" [*see Section 4.04 of form*], is designed to hold any property of the Power of Appointment Trust that the surviving spouse elects to disclaim.

The surviving spouse is given lifetime interests in all three of the trusts. On the surviving spouse's death, the Bypass Trust and the Disclaimer Trust will be divided into separate shares for each of the testator's children. Each child will receive a share on the spouse's death or on the date the child reaches a specified age, whichever occurs later. Shares are distributed outright to the issue of any deceased children. On the surviving spouse's death, the assets of the Power of Appointment Trust will be distributed to the person or persons appointed to receive the property in the surviving spouse's will or, in default of such an appointment, pursuant to the terms of the Bypass Trust.

### **[b] Standard Provisions**

This will contains a number of provisions that are also found in other wills in this chapter. These are provisions relating to the executor's bond [*see* Section 5.04 of form], the executor's authority to act under the California Independent Administration of Estates Act [*see* Section 5.05 of form], the executor's powers [*see* Section 5.06 of form], payments to incapacitated persons [*see* Section 5.07 of form], the executor's liability [*see* Section 5.08 of form], disinheritance of the testator's heirs [*see* Section 8.06 of form], and contest of the will [*see* Section 8.07 of form]. For discussion of these provisions, see § 61.200[1].

### **[c] Marital Deduction Gift**

Section 2.05 of this will makes a general pecuniary devise that is to be held in trust for the benefit of the surviving spouse during the surviving spouse's lifetime [*see* Section 4.01 of form]. This devise, referred to as the "marital deduction gift," is a pecuniary formula devise that is stated to be the minimum amount necessary to eliminate (or reduce to the maximum extent possible) any federal estate tax at the testator's death, taking into account the net value of all other property that passes or has passed to the spouse under the will or otherwise and that qualifies for the federal estate tax marital deduction and all allowable federal estate tax credits and deductions (other than the marital deduction).

This formula clause requires that the testator's estate be divided into "marital" and "nonmarital" shares [*see* discussion in § 61.212[1][d]] in a way that will maximize the tax-saving potential of the unlimited marital deduction [*see* I.R.C. § 2056 and discussion in § 61.212[1][c]] and the "applicable credit amount" [*see* I.R.C. § 2010(c) (table of graduated amounts) and discussion in § 60.13[4][b]] available in the testator's estate. The formula prescribes the dollar amount of the property that will constitute the "marital" share of the estate.

Pecuniary formulas are the most popular marital deduction formulas. They avoid the administrative headaches that result when the marital and nonmarital shares receive fractional interests in the same assets and offer flexibility in funding, because the executor or trustee can be given discretion to decide which assets to transfer to the marital and nonmarital shares to satisfy the pecuniary and residuary devises [*see* Section 3.03 of form]. However, the actual allocation of assets to the two shares need not be made until after the first spouse's death. For further discussion of marital deduction devises and formula clauses, see § 61.212[1][c], [d], [e]. For detailed discussion of the marital deduction and its use in estate planning, see Ch. 71, *Marital Deduction Trust Provisions*, and California Wills & Trusts, Ch. 112, *The Marital Deduction and Marital Deduction Trusts* (Matthew Bender).

### **[d] Power of Appointment Trust**

This will requires that the marital deduction gift [*see* Section 2.05 of form] be held in the Power of Appointment Trust [*see* Section 4.01 of form]. This trust will qualify for the unlimited marital deduction as a lifetime income plus power of appointment trust under I.R.C. § 2056(b)(5). For general discussion of the requirements of this type of trust, see Ch. 71, *Marital Deduction Trust Provisions*, §§ 71.13[5], 71.231[1].

### **PRACTICE TIP:**

As noted, there are a several ways to qualify for the marital deduction through the use of trusts, the "lifetime income plus power of appointment trust" being only one of them. The advantage to such a trust

is the surviving spouse's relative sense of control over his or her destiny. However, qualified terminable interest property (QTIP) trusts [ *see* § 61.214] have become by far the most popular type of marital deduction trust, for good reasons. When the spouses have (or one of them has) children from a prior marriage, the order of deaths could greatly affect the ultimate distribution of property subject to a power of appointment--there is a great tendency for a parent to leave property to his or her own children at the expense of the deceased spouse's children. Of course, there is just as much desire on the part of the deceased spouse to benefit his or her own children, but the ability to assure this as to marital deduction assets is eliminated where a general power of appointment is granted to the surviving spouse. The same "problem" can arise for young couples, when a premature death of one spouse could likely lead to a remarriage by the surviving spouse to a person who either has his or her own children or with whom the surviving spouse will have additional children. In each instance, the QTIP trust allows the deceased spouse to exert considerably greater control over the ultimate disposition of his or her property interests. General power of appointment marital deduction trusts such as the one illustrated here are primarily used these days for older couples in their first (and likely only) marriage. *Commentary by Albert G. Handelman.*

### **[e] Bypass Trust**

Section 3.01 of this will gives the residue of the testator's estate to a "bypass trust" [ *see* Section 4.02 of form]. This trust gives the testator's surviving spouse the lifetime right to receive all of the net income from the trust [ *see* Section 4.01(a) of form] and principal distributions pursuant to an "ascertainable standard" [ *see* Section 4.02(b) of form].

Bypass trusts play an important part in most estate plans that seek to give the surviving spouse optimum use of the testator's estate during the surviving spouse's lifetime while at the same time avoiding estate tax on the testator's death and reducing (or eliminating) estate tax on the death of the surviving spouse. For a general discussion of bypass trusts, *see* § 61.212[1][f].

### **[f] Allocation of Assets**

Section 3.03 gives the executor discretion to allocate assets in the testator's estate to the marital and nonmarital shares in cash or in kind, or partly in each, on a pro rata or non pro rata basis, and in undivided interests or not. This gives the executor maximum flexibility to allocate assets to the respective shares in the manner that seems most favorable at the time of the allocation.

### **[g] Disclaimer Trust**

Section 4.04 of this will provides that any property that the testator's surviving spouse elects to disclaim will pass to the trustee and be held in the disclaimer trust. However, the disclaimer trust will actually come into being only if the surviving spouse makes a qualified disclaimer of property [ *see* I.R.C. § 2518(b)]. The distributive provisions of the disclaimer trust provide that the surviving spouse will receive all of the net income of the trust for life [ *see* Section 4.03(a) of form]. The trustee has discretion to invade trust principal for the surviving spouse's benefit pursuant to an "ascertainable standard" [ *see* Section 4.03(b) of form; for "ascertainable standard," *see* I.R.C. § 2041(b)(1)(A) and discussion in *Ch. 60, Estate Planning, § 60.13[1][g]*]. The Disclaimer Trust also gives the surviving spouse the right to request annual principal distributions not to exceed the greater of \$5,000 or 5 percent of the value of the principal of the trust per year [ *see* Section 4.02(c) of form].

### **PRACTICE TIP:**

Note that in this will the "five or five power" is included in the Disclaimer Trust rather than the Bypass Trust. Conceptually, the last thing the testator (or estate planner) wants to do is encourage consumption of the bypass trust. Five or five powers encourage consumption--surviving spouses, especially older ones and/or second spouses with separate sets of children, often get nervous about "their next meal" and take

everything they can legitimately get their hands on, without regard to tax considerations. In the worst case, if the five or five power were included in the bypass trust, there would be no disclaimer (creating maximum later estate tax exposure) and the survivor would fully utilize the five or five power over the bypass trust, perhaps in lieu of invading the marital trust which could, after all, be appointed to that spouse's own children.

If the five or five power is instead put into the disclaimer trust, good things arguably could result. For example, it may be that estate equalization is desired, without an intent to force it on the survivor--hence the option to use the disclaimer. If the five or five power is put into the disclaimer trust, it provides a modest incentive to make the disclaimer and do the estate equalization in the process. *Commentary by Albert G. Handelman.*

On the surviving spouse's death, the trustee will divide the assets of the trust into separate shares according to the same directions provided for the division of the assets of the bypass trust on the surviving spouse's death [*see* Section 4.03(c) of form].

Because the interests of the surviving spouse in the disclaimer trust are appropriately limited, its assets will not be included in the surviving spouse's estate for estate tax purposes when the surviving spouse dies. For a general discussion of disclaimer trusts, see *Ch. 71, Marital Deduction Trust Provisions, § 71.16.*

#### **[h] Choice of Trustee**

Section 6.01 of this will nominates the trustee of the trusts created under the will. Any person or entity chosen by the testator may serve as the trustee. The testator's surviving spouse may serve as trustee, if he or she has the requisite temperament, experience, and skill to perform the duties required of a trustee. None of the rights or powers given to the surviving spouse in this form will require that the trust assets be included in the surviving spouse's estate merely because the surviving spouse serves as trustee.

#### **[i] Administration of Generation-Skipping Trusts**

Section 4.07 of this will governs the administration of any trust created by the will in which there is property that is or may become subject to the federal generation-skipping transfer tax [*see I.R.C. §§ 2601-2664*]. The GST tax has been repealed effective for generation-skipping transfers after 2009 [*I.R.C. § 2664*]. Until then, it remains in effect. The section is designed to give the executor post-mortem flexibility to eliminate or minimize any generation-skipping transfer tax.

For further discussion of this provision, see § 61.201[1][e]. For general discussion of the generation-skipping transfer tax and generation-skipping transfer tax planning, see California Wills & Trusts, Ch. 113, *Generation-Skipping Transfers and Trust Strategies* (Matthew Bender).

#### **[2] FORM**

#### **Will for Married Person; Marital Deduction Formula Devise to Power of Appointment Trust; Residue to Bypass Trust; Disclaimer Trust**

WILL OF

\_\_\_\_\_ [*full legal name of testator, e.g., ROBERT STEPHEN GOLD*]

I, \_\_\_\_\_ [*full legal name of testator, e.g., Robert Stephen Gold*], a resident of \_\_\_\_\_ County, California, declare that this is my will. I hereby revoke all my previous wills and codicils.

## Article 1 : Introductory Provisions

1.01. Marital Status. I am married to \_\_\_\_\_ [*name of spouse, e.g., Barbara Singer Gold*], and all references in this will to "my \_\_\_\_\_ [husband *or* wife]" are to \_\_\_\_\_ [him *or* her].

1.02. Identification of Living Child(ren). I have \_\_\_\_\_ [*number*] living \_\_\_\_\_ [child *or* children], whose name[s] and date[s] of birth \_\_\_\_\_ [is *or* are] as follows:

[*e.g., Charles Robert Gold, who was born on April 1, 1993*]

[*e.g., Edward Stephen Gold, who was born on May 15, 1995*]

[*e.g., Nancy Barbara Gold, who was born on September 30, 1997*]

1.03. No Deceased Children. I have no deceased children.

1.04. Definitions of Child and Children. As used in this will, the terms "child" and "children" refer to all persons referred to in *California Probate Code Section 26*, as in effect at the time of execution of this will.

1.05. Definition of Issue. As used in this will, the term "issue" refers to all lineal descendants of all generations, with the relationship of parent and child in each generation being determined by the definitions of "child" and "children" set forth in this will.

1.06. Number and Gender. As used in this will, references in the masculine gender shall be deemed to include the feminine and neuter genders, and vice versa, and references to the singular shall be deemed to include the plural, and vice versa, wherever the context so permits.

1.07. Property Disposed of by Will. It is my intention by this will to dispose of all of my separate property, [and] my entire one-half interest in the community property of my \_\_\_\_\_ [wife *or* husband] and myself [*if there is likely to be any quasi-community property, add: and my entire one-half interest in my quasi-community property*].

1.08. No Exercise of Power of Appointment. I intentionally refrain from exercising any power of appointment that I now possess or that hereafter may be conferred on me.

1.09. No Contract Affecting Will. I have not entered into any contract to make a will or a testamentary gift, not to revoke a will or a testamentary gift, or to die intestate. [*Optional, add language referring to similar will executed by spouse: The similarity of the provisions of this will to the provisions of the will of my \_\_\_\_\_ (husband or wife) (executed on this date) shall not be construed as evidence of any such contract.*]

## Article 2 : Particular Gifts

2.01. Specific Gifts of Personal Property. I give the items of property described below [*optional: together with my interest in any insurance on those items,*] to the persons named below:

(a) I give \_\_\_\_\_ [*describe property, e.g., my fourteen-karat gold dinner ring*] to \_\_\_\_\_ [*name of devisee and relationship to testator or other means of identification, e.g., my sister, Estelle Gold Taylor*] [*if desired, add survivorship clause, e.g., if she survives me or, if she survives me for 60 days*] [*if gift is conditioned on survival, add alternative disposition, e.g.,; but if she does not survive me (for that period), this gift shall \_\_\_\_\_ (e.g., lapse and become part of the residue of my estate or go to my daughter, Nancy Barbara Gold)*];

(b) I give \_\_\_\_\_ [*describe property, e.g., my sterling silver flatware service*] to \_\_\_\_\_ [*name of devisee and relationship to testator or other means of identification, e.g., my niece, Mary Ann Cooper*] [*if desired, add survivorship clause, e.g., if she survives me or, if she survives me for 60 days*] [*if gift is conditioned on survival, add alternative disposition, e.g.,; but if she does not survive me (for that period), this gift shall \_\_\_\_\_ (e.g., lapse and become part of the residue of my estate or go to my daughter, Nancy Barbara Gold, if she should survive me)*];

(c) I give \_\_\_\_\_ [*describe property, e.g., the promissory note executed in my favor by John D. Smith and Jane B. Smith, on June 1, 1990, in the principal amount of \$100,000, with interest on unpaid principal in the amount of 10 percent per annum, principal and interest payable in monthly payments of \$1,000 per month, together with the deed of trust of the same date on real property located in the City of Monterey, County of Monterey, State of California, and recorded on June 2, 1990, at Reel 10011, Book 10022, Official Records, Monterey County, California, securing the payment of principal and interest under that note,*] to \_\_\_\_\_ [*name of devisee and relationship to testator or other means of identification, e.g., my brother, Benjamin Edward Gold*] [*optional:, if he survives me or, if he survives me for 60 days*] [*if gift is conditioned on survival, add alternative disposition, e.g.,; but if he does not survive me (for that period), this gift shall \_\_\_\_\_ (e.g., lapse and become part of the residue of my estate or go to my son, Charles Robert Gold)*].

[*Continue as necessary for each additional item of property to be specifically devised.*]

2.02. Gift[s] to Be Selected From Among My Personal Effects. I give \_\_\_\_\_ [*name(s) of devisee(s) and relationship(s) to testator, e.g., my brother, Benjamin Edward Gold, or my niece, Mary Ann Cooper, or my brother, Benjamin Edward Gold, and my niece, Mary Ann Cooper, and each of them,*] the right to select \_\_\_\_\_ [*specify, e.g., one item or one item each or two items or two items each*] from among my personal effects so that \_\_\_\_\_ [*he or she or they*] will have \_\_\_\_\_ [*a memento or mementos*] to remember me by. I make this gift to \_\_\_\_\_ [*him or her or them*] as a symbol of my love and affection. If \_\_\_\_\_ [*he or she or any person named in this section*] does not survive me or does not make a selection within three months after the date of my death, or within 30 days after this will is admitted to probate, whichever is later, then the gift made to \_\_\_\_\_ [*him or her or that person*] in this section shall fail. [*If desired, specify any types of property that may not be selected, e.g., For purposes of this gift only, the word "personal effects" shall not include any motor vehicles or any items of property with an appraised value in excess of \$2,500.*]

2.03. Tangible Personal Property. I give all of my tangible personal property that is not otherwise disposed of as a specific gift in this will, including my interest in any insurance on that property, to my \_\_\_\_\_ [*husband or wife*] [*if desired, add survivorship clause, e.g., if she survives me or, if he survives me for 60 days*]. [*If gift is conditioned on survival, add appropriate alternative disposition, e.g.,; and, if \_\_\_\_\_ (he or she) does not, to my children who survive me (for that period), to be divided among them by the executor, in equal or unequal shares as the executor believes to be in accordance with my wishes, the decision of the executor as to this division to be final and incontestable by anyone. [Optional: The term "tangible personal property" \_\_\_\_\_ (includes, but is not limited to, or does not include) \_\_\_\_\_ (specify items, e.g., livestock, pets, airplanes, and motor vehicles).*]

2.04. General Pecuniary Gift. I give the sum of \$ \_\_\_\_\_ to \_\_\_\_\_ [*name of devisee and relationship to testator or other means of identification, e.g., my niece, Mary Ann Cooper*] [*if desired, add survivorship clause, e.g., if she survives me or, if she survives me for 60 days*]. [*If gift is conditioned on survival, add appropriate alternative disposition, e.g., If she does not survive me (for that period), this gift shall \_\_\_\_\_ (e.g., lapse and become part of the residue of my estate or go to my friend, Frank J. Collier).*]

2.05. Marital Deduction Gift. If my \_\_\_\_\_ [*wife or husband*] survives me [*if desired, specify survivorship period not to exceed six months, e.g., for six months*], I give a pecuniary gift (referred to as the "marital deduction gift"), in the amount determined in this section, to the trustee, in trust, to be held, administered, and

distributed according to the terms set forth in Article 4 applicable to the Power of Appointment Trust. The marital deduction gift shall consist of assets having a value equal to the minimum amount necessary to eliminate (or reduce to the maximum extent possible) any federal estate tax at my death, taking into account the following:

(a) The net value of all other property that passes or has passed to my \_\_\_\_\_ [wife or husband] under this will or otherwise and that qualifies for the federal estate tax marital deduction. For purposes of this subsection of the will, any qualified disclaimer made by my \_\_\_\_\_ [wife or husband] shall be disregarded, and any property that will qualify as qualified terminable interest property under *Internal Revenue Code Section 2056(b)(7)* if my executor makes the requisite election shall be considered to be qualified terminable interest property, regardless of whether the election is made;

(b) All federal estate tax deductions and exclusions actually allowed other than the marital deduction;

(c) The applicable exclusion amount, as specified in *Internal Revenue Code Section 2010*, available to my estate;

(d) The credit for state death taxes available to my estate, to the extent that the use of that credit does not result in or increase any death tax payable to any state; and

(e) Any other allowable credits available to my estate (except the credit for tax on prior transfers from a "transferor," as defined in *Internal Revenue Code Section 2013*, who dies within two years after the date of my death), but only to the extent that those credits do not disqualify this gift from receiving the marital deduction.

The marital deduction gift shall be held, administered, and distributed according to the terms of the Power of Appointment Trust as *set forth in Section 4.01*.

If my \_\_\_\_\_ [wife or husband] does not survive me [*if desired, specify survivorship period not to exceed six months, e.g., for six months*], this gift shall lapse and become part of the residue of my estate.

[*Select one of the following alternatives:*]

2.06. Interest on Pecuniary Gifts. [Except as otherwise specifically provided in this will,] [n]o interest shall accrue on all [general] pecuniary gifts made in this will.

[or]

2.06. Interest on Pecuniary Gifts. [Except as otherwise specifically provided in this will,] [I]nterest at the rate \_\_\_\_\_ [e.g., of 10 percent per annum or specified in *California Probate Code Section 12001*, or any successor to that section,] shall accrue on all [general] pecuniary gifts made in this will from and after \_\_\_\_\_ [e.g., the date of my death or the first anniversary of my death] and until those gifts are paid in full. All interest shall be paid at the time the gift is distributed.

[*Continue with the following:*]

### Article 3 : Residuary Provisions

3.01. Disposition of Residue. If my \_\_\_\_\_ [wife or husband] survives me \_\_\_\_\_ [*if desired, add survivorship period not to exceed six months, e.g., for six months*], I give the residue of my estate (referred to as the "bypass gift") to the trustee, in trust, to be held, administered, and distributed according to the terms set forth in Article 4 applicable to the Bypass Trust.

3.02. Alternate Disposition of Residue. If my \_\_\_\_\_ [husband or wife] does not survive me [*restate any survivorship period imposed in primary residuary devise, but not to exceed six months, e.g., for six*

months], I give the \_\_\_\_\_ [residue of my estate *or* portion of the residue of my estate not taken] as follows:

(a) If any of my children survive me, the residue of my estate shall be divided into as many shares of equal market value as are necessary to create one share for each of my children who survive me and one share for the issue who survive me of each of my children who predecease me.

(b) Each share created for a surviving child shall be distributed outright to that child if that child has reached the age of \_\_\_\_\_ [e.g., 25] years at the time of my death. If the child has not reached the age of \_\_\_\_\_ [e.g., 25] years at the time of my death, the share created for the child shall be held, administered, and distributed by the trustee in a separate trust according to the terms set forth in Article 4 applicable to the Separate Share Trust.

(c) If any of my children survive me, each share created for the issue of a deceased child shall be distributed outright to those issue \_\_\_\_\_ [in the manner provided in California Probate Code Section \_\_\_\_\_ (240 *or* 246 *or* 247) *or* in equal shares, regardless of whether or not all such issue are members of the same generation].

(d) If none of my children survive me, but I leave issue surviving, I give the residue of my estate outright to those issue, who are to take that property \_\_\_\_\_ [in the manner provided in California Probate Code Section \_\_\_\_\_ (240 *or* 246 *or* 247) *or* in equal shares, regardless of whether or not all such issue are members of the same generation].

(e) If none of my issue survive me, I give the residue of my estate to \_\_\_\_\_ [e.g., my heirs *or* the Ventura County chapter of the American Red Cross].

3.03. Allocation and Valuation of Assets. In allocating assets between the marital deduction gift and the bypass gift, the executor shall allocate the assets in my estate that qualify for the marital deduction between the marital deduction gift and the bypass gift in cash or in kind, or partly in each, on a pro rata or non pro rata basis, and in undivided interests or not; subject, however, to the following:

(a) Only assets that qualify for the marital deduction shall be allocated to the marital deduction gift.

(b) Assets allocated in kind shall be \_\_\_\_\_ [to use date of distribution values: valued for purposes of allocation on the date or dates of distribution *or*, to use valuation for estate tax purposes under "minimum worth" test: deemed to satisfy the marital deduction amount on the basis of their values as finally determined for federal estate tax purposes, but in no event shall the date of distribution values be less than the amount of the marital deduction *or*, to use valuation for estate tax purposes under "fair representation" test: deemed to satisfy the marital deduction amount on the basis of their values as finally determined for federal estate tax purposes; provided, however, that the executor shall act impartially, consistent with equitable principles requiring impartiality among beneficiaries, in allocating assets in satisfaction of the marital deduction gift, so that any distribution of assets in satisfaction of the marital deduction gift shall be made of assets, including cash, fairly representative of appreciation or depreciation in the value of all property thus available for distribution].

(c) The executor shall not allocate assets that qualify for the foreign death tax credit to the marital deduction gift unless all other assets or interests available for allocation have been so allocated.

[Optional: (d) Any incidents of ownership to a policy of insurance on the life of a person other than me shall be allocated to the bypass gift.]

3.04. Intention That Marital Deduction Gift Qualify for Marital Deduction. I intend that the marital deduction gift qualify for the federal estate tax marital deduction, and this instrument shall be construed accordingly. No fiduciary

under this will shall take any action or exercise any power that may impair the federal estate tax marital deduction.

3.05. Disclaimer of Property by My Spouse. Any property or portion of property that is disclaimed by my \_\_\_\_\_ [wife *or* husband] shall pass to the trustee, in trust, to be held, administered, and distributed according to the terms set forth in Article 4 applicable to the Disclaimer Trust. [However, if my \_\_\_\_\_ (wife *or* husband) also disclaims an interest in all or any portion of the Disclaimer Trust, that disclaimed interest shall be administered and distributed as if my \_\_\_\_\_ (wife *or* husband) predeceased me.]

#### Article 4 : Trust Distributions

4.01. Power of Appointment Trust. The trustee shall hold, administer, and distribute the assets of the Power of Appointment Trust as follows:

(a) The trustee shall pay to or apply for the benefit of my \_\_\_\_\_ [husband *or* wife], so long as my \_\_\_\_\_ [husband *or* wife] lives, the entire net income of the trust, in monthly or other convenient installments agreed upon by my \_\_\_\_\_ [husband *or* wife] and the trustee, but not less often than annually. [*Optional:* In determining the net income of the trust distributable to my \_\_\_\_\_ (husband *or* wife), the trustee shall include all income that must be considered as income in order for the trust to qualify for the marital deduction under the federal estate tax law applicable to my estate, and shall make no deductions from gross income that would prevent the trust from qualifying for that marital deduction, notwithstanding any contrary provisions of this will or any applicable provisions of state law. It is my intention that my \_\_\_\_\_ (husband *or* wife), as the beneficiary of a marital deduction trust, shall have substantially that degree of beneficial enjoyment of the trust during \_\_\_\_\_ (his *or* her) lifetime that the principles of the law of trusts accord to a person who is unqualifiedly designated as the life beneficiary of a trust, and the trustee shall not exercise the trustee's discretion in a manner that is not in accord with this expressed intention. It is also my intention that the trust produce for my \_\_\_\_\_ (husband *or* wife) during \_\_\_\_\_ (his *or* her) lifetime the income, or that my \_\_\_\_\_ (husband *or* wife) shall have the benefit of the trust property, as is consistent with the value of the trust property and with its preservation.]

(b) The trustee shall distribute to my \_\_\_\_\_ [husband *or* wife] such amounts from the principal of the trust, up to the whole of the trust principal, as \_\_\_\_\_ [he *or* she] may request of the trustee in writing from time to time.

(c) On the death of my \_\_\_\_\_ [husband *or* wife], and subject to any power of appointment exercised by \_\_\_\_\_ [him *or* her], the trustee, in the trustee's discretion, may pay the [taxes,] debts[,] and expenses arising on my \_\_\_\_\_ [husband's *or* wife's] death, unless the trustee determines that other adequate provisions have been made for payment of these expenses. Any payments made under this section \_\_\_\_\_ [may be made out of income or principal (or partly from each) of the Power of Appointment Trust *or* shall be made first out of the income or principal of the Power of Appointment Trust, and then out of the income or principal of the Bypass Trust to the extent that the Power of Appointment Trust is insufficient for that purpose].

(d) On the death of my \_\_\_\_\_ [husband *or* wife], the trustee shall distribute the trust property then remaining, including all principal and undistributed income, to the person, persons, or entities, including the estate of my \_\_\_\_\_ [husband *or* wife], on such terms and conditions, either outright or in trust, or by creating further powers of appointment, as my \_\_\_\_\_ [husband *or* wife] shall appoint by \_\_\_\_\_ [his *or* her] valid last will specifically referring to and exercising this power of appointment. The trustee may rely upon any instrument admitted to probate as the last will of my \_\_\_\_\_ [husband *or* wife] in carrying out the terms of the power of appointment and shall not be liable for any good faith act in reliance upon that will, even if for any reason it is later determined to be invalid with respect to its purported exercise of this power of appointment. If the trustee receives no notice of the existence of a will of my \_\_\_\_\_

[husband *or* wife] within six months after my \_\_\_\_\_ [husband's *or* wife's] death, the trustee may distribute the trust assets and income as though this power of appointment had not been exercised and shall in that event be conclusively presumed to have acted in good faith, even if a valid will is thereafter discovered.

(e) If any of the property subject to this power of appointment is not effectively appointed by my \_\_\_\_\_ [husband *or* wife], that property [, after any payment of taxes, debts, and expenses pursuant to the applicable provisions of this will,] shall be distributed in the manner specified in Section 4.02 applicable to the Bypass Trust. However, the property disposed of pursuant to this subsection shall not be considered to be part of the Bypass Trust unless this trust and the Bypass Trust have the same inclusion ratios for federal generation-skipping transfer tax purposes].

(f) Notwithstanding any other provision of this will, any power of appointment created by this will, whether expressly granted in this instrument or implied by law, may be released, disclaimed, or restricted in scope. Any such power may be released to the extent and in the manner set forth in *California Probate Code Section 661* and disclaimed to the extent and in the manner set forth in *California Probate Code Sections 260-295*, provided that these statutes exist at the date of exercise of the release or disclaimer.

4.02. Bypass Trust. The trustee shall hold, administer, and distribute the assets of the Bypass Trust as follows:

(a) The trustee shall pay to or apply for the benefit of my \_\_\_\_\_ [husband *or* wife] all of the net income of the trust, in monthly or other convenient installments agreed upon by my \_\_\_\_\_ [husband *or* wife] and the trustee, but not less often than annually, for life.

(b) The trustee shall distribute to or apply for the benefit of my \_\_\_\_\_ [husband *or* wife], for life, as much of the principal of the trust as the trustee, in the trustee's discretion, deems necessary [, when added to the income payments from this trust,] for \_\_\_\_\_ [his *or* her] health, education, support, and maintenance. All decisions of the trustee regarding payments under this subsection, if any, are within the trustee's discretion and shall be final and incontestable by anyone.

(c) On the death of my \_\_\_\_\_ [husband *or* wife], the trustee shall divide the trust property into as many shares of equal market value as are necessary to create one share for each of my children who survives my \_\_\_\_\_ [husband *or* wife], and one share for the issue who survive my \_\_\_\_\_ [husband *or* wife] of each of my children who predeceases my \_\_\_\_\_ [husband *or* wife].

(d) Each share created for a surviving child shall be distributed outright to that child if that child has reached the age of \_\_\_\_\_ [*e.g.*, 25] years. If the child has not reached the age of \_\_\_\_\_ years, the share created for the child shall be held, administered, and distributed by the trustee in the Separate Share Trust as *set forth in Section 4.03* of this will.

(e) Each share created for the issue of a deceased child shall be divided among those issue \_\_\_\_\_ [in the manner provided in California Probate Code Section \_\_\_\_\_ (240 *or* 246 *or* 247) *or* in equal shares, regardless of whether or not all such issue are members of the same generation]. The share of each issue shall be distributed outright to that issue.

(f) If all my children predecease my \_\_\_\_\_ [husband *or* wife] without leaving issue who survive my \_\_\_\_\_ [husband *or* wife], the trustee shall distribute any undistributed balance of the trust property outright to \_\_\_\_\_ [*alternative disposition, e.g.*, my heirs *or* the Ventura County chapter of the American Red Cross].

4.03. Separate Share Trust. The trustee shall hold, administer, and distribute the assets of the separate share created for each child as follows:

(a) The trustee shall pay or distribute to or apply for the benefit of that child, until \_\_\_\_\_ [he or she or he or she] reaches the age of \_\_\_\_\_ [e.g., 25 years], in monthly or other convenient installments, but not less often than annually, as much of the net income of the trust, and as much of the principal of the trust, as the trustee, in the trustee's discretion, deems necessary for \_\_\_\_\_ [his or her or his or her] \_\_\_\_\_ [to specify an "ascertainable standard": health, education, support, and maintenance or specify some other standard, e.g., comfort, welfare, and happiness]. All decisions of the trustee regarding payments under this subsection, if any, are within the trustee's discretion and shall be final and incontestable by anyone. The trustee shall accumulate and add to principal any net income not distributed.

(b) When that child reaches the age of \_\_\_\_\_ [e.g., 25] years, the trustee shall distribute to \_\_\_\_\_ [him or her or him or her] outright the balance of the trust property.

(c) If that child dies before the trust property has been distributed as provided in this section, the assets of \_\_\_\_\_ [his or her or his or her] separate share shall be divided among \_\_\_\_\_ [his or her or his or her] issue \_\_\_\_\_ [in the manner provided in California Probate Code Section \_\_\_\_\_ (240 or 246 or 247) or in equal shares, regardless of whether or not all such issue are members of the same generation]. The share of each issue shall be distributed outright to that issue. If that child dies without issue before the trust property has been distributed as provided in this section, the trustee shall distribute the entire undistributed balance of \_\_\_\_\_ [his or her or his or her] separate share outright among the other then-living persons for whom separate shares were created, and the issue of any deceased persons for whom separate shares were created, \_\_\_\_\_ [in the manner provided in California Probate Code Section \_\_\_\_\_ (240 or 246 or 247) or in equal shares, regardless of whether or not all such issue are members of the same generation]; provided, however, that if any part of that balance would otherwise be distributed to a person for whose benefit a trust is being administered under this section, that part shall instead be added to that trust and shall thereafter be administered according to its terms. If there are no surviving persons who may take the share of that child under this section, any remaining trust property shall be distributed outright to \_\_\_\_\_ [alternative disposition, e.g., my heirs or the Ventura County chapter of the American Red Cross].

4.04. Disclaimer Trust. The trustee shall hold, administer, and distribute the assets of the Disclaimer Trust as follows:

(a) The trustee shall pay to or apply for the benefit of my \_\_\_\_\_ [husband or wife] all of the net income of the trust, in monthly or other convenient installments [agreed upon by \_\_\_\_\_ (identity of beneficiary, e.g., my wife) and the trustee], but not less often than annually, for life.

(b) The trustee shall distribute to or apply for the benefit of my \_\_\_\_\_ [husband or wife], for life, as much of the principal of the trust as the trustee, in the trustee's discretion, deems necessary [, when added to the income payments from this trust,] for \_\_\_\_\_ [his or her] health, education, support, and maintenance. All decisions of the trustee regarding payments under this subsection, if any, are within the trustee's discretion and shall be final and incontestable by anyone.

(c) In addition to any other payments and distributions that my \_\_\_\_\_ [husband or wife] may receive under this instrument, the trustee shall distribute to \_\_\_\_\_ [him or her], during \_\_\_\_\_ [his or her] lifetime, those amounts from the principal of the trust estate that \_\_\_\_\_ [he or she] may from time to time request of the trustee in writing, not exceeding in any calendar year the greater of \$5,000 or 5 percent of the value of the principal of the trust, determined as of the end of the calendar year. This right of withdrawal is not cumulative, so that if \_\_\_\_\_ [he or she] does not withdraw the full amount that \_\_\_\_\_ [he or she] is entitled to withdraw under this provision in any calendar year, the right to withdraw the amount not withdrawn shall lapse at the end of the calendar year. This power shall exist each year until the death of my \_\_\_\_\_ [husband or wife].

(d) On the death of my \_\_\_\_\_ [husband or wife], the trustee shall divide the trust property into as many shares of equal market value as are necessary to create one share for each of my children who survives my \_\_\_\_\_ [husband or wife], and one share for the issue who survive my \_\_\_\_\_ [husband or wife] of each of my children who predeceases my \_\_\_\_\_ [husband or wife].

(e) Each share created for a surviving child shall be distributed outright to that child if that child has reached the age of \_\_\_\_\_ [e.g., 25] years. If the child has not reached the age of \_\_\_\_\_ years, the share created for the child shall be held, administered, and distributed by the trustee in the Separate Share Trust as *set forth in Section 4.03* of this will.

(f) Each share created for the issue of a deceased child shall be divided among those issue \_\_\_\_\_ [in the manner provided in California Probate Code Section \_\_\_\_\_ (240 or 246 or 247) or in equal shares, regardless of whether or not all such issue are members of the same generation]. The share of each issue shall be distributed outright to that issue.

(g) If all my children predecease my \_\_\_\_\_ [husband or wife] without leaving issue who survive my \_\_\_\_\_ [husband or wife], the trustee shall distribute any undistributed balance of the trust property outright to \_\_\_\_\_ [alternative disposition, e.g., my heirs or the Ventura County chapter of the American Red Cross].

4.05. Consideration of Beneficiary's Other Resources. In making any payments of income and distributions of principal from any trust created by this will for \_\_\_\_\_ [specify standard of discretion as set forth in provision authorizing the discretionary distribution, e.g., the health, education, support, and maintenance or care and comfort] of any beneficiary, the trustee shall take into consideration, to the extent the trustee deems advisable, any other income or resources available to that beneficiary that are known to the trustee and that are reasonably available for that purpose.

4.06. Trustee's Power to Determine Income and Principal. Unless otherwise specifically provided in this will, the determination of all matters with respect to what is principal and income of any trust under this will and the apportionment and allocation of receipts, expenses and other charges between principal and income shall be governed by the provisions of the California Revised Uniform Principal and Income Act from time to time existing. The trustee in the trustee's discretion shall determine any matter not provided for either in this instrument or in the California Revised Uniform Principal and Income Act.

4.07. Administration of Generation-Skipping Trusts. The provisions of this section apply to any trust under this will in which there is property that is or may become subject to the federal generation-skipping transfer tax:

(a) If the executor intends to allocate any part of the generation-skipping transfer tax exemption that is available to me to some but not all of the property to be distributed to any trust to which this section of the will applies, the executor \_\_\_\_\_ [shall or may, in the executor's discretion,] obtain an order for distribution that divides the trust into two separate trusts, to be designated as the Exempt Trust and the Non-Exempt Trust. [If executor has discretionary power to divide trusts: If the executor elects to divide a trust in the manner provided in this section, the or, if division of trusts is mandatory rather than discretionary: The] Exempt Trust shall contain the share of the property of that trust equal in value to the amount of the generation-skipping transfer tax exemption that the executor intends to allocate to the trust. The Non-Exempt Trust shall contain the balance of the property of that trust. The executor shall then actually allocate the generation-skipping transfer tax exemption to the Exempt Trust and not to the Non-Exempt Trust so that the Exempt Trust shall have an inclusion ratio of zero for federal generation-skipping transfer tax purposes and the Non-Exempt Trust shall have an inclusion ratio of one for federal generation-skipping transfer tax purposes.

(b) In allocating assets between the Exempt Trust and Non-Exempt Trust for purposes of this section, the executor shall \_\_\_\_\_ [for a pecuniary allocation: allocate the trust assets between the Exempt Trust and

Non-Exempt Trust in cash or in kind, or partly in each, on a pro rata or non pro rata basis, and in undivided interests or not *or, for a fractional allocation*: allocate to each trust a fractional share of each and every substantial interest or right held by the trust being divided]. [*If preceding sentence provides for a pecuniary allocation, add*: If the allocation is not made within 15 months from the date of my death, the executor shall pay interest, at the legal rate, from the date of my death to the date of distribution. For purposes of allocation under this section, assets shall be valued at their values \_\_\_\_\_ (*to use date of distribution values*: on the date or dates of distribution *or, to use valuation for estate tax purposes*: as finally determined for federal estate tax purposes; provided that any assets allocated in kind shall be allocated between the Exempt Trust and the Non-Exempt Trust in a manner that fairly reflects the net appreciation or depreciation in the value of the assets in the trust being divided, measured from the date of my death to the date of payment).]

(c) Regardless of whether or not subsection (a) applies, if the amount of my generation-skipping transfer tax exemption actually allocated by the executor to a trust to which this section applies is equal to the value of the property of that trust so that the entire trust has an inclusion ratio of zero for federal generation-skipping transfer tax purposes, the entire trust shall be referred to as the Exempt Trust. On the other hand, if no part of my generation-skipping transfer tax exemption is actually allocated to the trust by the executor so that the entire trust has an inclusion ratio of one for federal generation-skipping transfer tax purposes (or if I am not the transferor of that trust for generation-skipping transfer tax purposes), the entire trust shall be referred to as the Non-Exempt Trust.

(d) The trustee may, but is not required to, administer the trusts under this will to which this section applies in such a manner that distributions made during the trust terms to "skip persons" (as defined in *Internal Revenue Code Section 2613(a)* or any equivalent successor section) are made from Exempt Trusts, and distributions made during the trust terms to "non-skip persons" (as defined in *Internal Revenue Code Section 2613(b)* or any equivalent successor section) are made from Non-Exempt trusts.

[*Optional*: (e) If the trustee determines that the burdens of generation-skipping transfer taxes, income taxes, and death taxes on a Non-Exempt Trust, my estate, or the beneficiaries of that trust would be reduced, the trustee may petition the court to amend the trust to grant to one or more trust beneficiaries who are non-skip persons in a generation below me a general testamentary power of appointment over all or a specified portion of that Non-Exempt Trust. Any power to amend the trust is within the discretion of the court, and the preceding sentence shall not be construed to give the trustee any power that the trustee does not already have under California trust law to petition the court under the appropriate circumstances, nor shall it be construed to limit the power of the trustee or any beneficiary under the California trust law to petition the court under the appropriate circumstances.]

[(f)] The purpose of this section is to allow the trustee to administer the trusts so as to decrease the amount of generation-skipping transfer taxes owed on generation-skipping transfers from the trusts. The trustee shall balance that consideration against any other tax and nontax considerations, and may disregard the generation-skipping transfer tax consequences to the extent that the trustee determines that doing so will allow the trustee to carry out my intentions in creating the trusts. All decisions of the trustee under this subsection are within the trustee's discretion and shall be final and incontestable by anyone.

[(g)] If, in the judgment of the executor or the trustee, at any time after the execution of this will, any statute, regulation, court decision, or administrative ruling imposes different or additional requirements on the trust in connection with the generation-skipping transfer tax, the executor or the trustee may petition the court to amend the terms of the trust to meet those requirements and achieve the purpose of this section.

[(h)] If, upon the death of my \_\_\_\_\_ (husband *or* wife), (1) my \_\_\_\_\_ (husband *or* wife) is considered to be the transferor of any Non-Exempt Trust established by this will for generation-skipping transfer tax purposes, and (2) my \_\_\_\_\_ (husband *or* wife)'s executor allocates any part of the generation-skipping transfer tax exemption that is available to my \_\_\_\_\_ (husband *or* wife) under

*Internal Revenue Code Section 2631(a)* (or any equivalent successor section) to that Non-Exempt Trust so that the entire trust then has an inclusion ratio of zero for federal generation-skipping transfer tax purposes, that trust shall then be considered to be an Exempt Trust for purposes of this section of the will.

[(i)] In no event may the trustee exercise any power under this section in a manner that will impair the marital deduction.

#### Article 5 : Executor

5.01. Nomination of Executor. I nominate \_\_\_\_\_ [*name and relationship to testator or other means of identification, e.g., my husband or my wife or my sister, Estelle Gold Taylor,*] as executor of this will.

5.02. Successor Executors. If \_\_\_\_\_ [*nominee(s) for initial executor, e.g., my husband or my wife or my sister, Estelle Gold Taylor,*] is for any reason unable or unwilling to serve, or to continue to serve, as executor, I nominate the following, in the order of priority indicated, as successor executor:

First, \_\_\_\_\_ [*name and description, e.g. (for coexecutors) my brother, Benjamin Edward Gold*];

Second, \_\_\_\_\_ [*name and description, e.g. (for individual) Harry J. Taylor, who resides at \_\_\_\_\_ (address)*];

Third, \_\_\_\_\_ [*name and description, e.g. (for corporate executor) Double Eagle Bank, Fresno, California office*].

5.03. Definition of Executor. The term "executor," as used in this will, refers to each personal representative of my estate who is serving at the pertinent time.

5.04. Bond. \_\_\_\_\_ [No bond or undertaking *or* Bond] shall be required of any executor nominated in this will.

5.05. Independent Administration. The executor shall \_\_\_\_\_ [have full *or* not have] authority to administer my estate under the California Independent Administration of Estates Act.

5.06. Powers of Executor. Subject to any limitations stated elsewhere in this will, the executor shall have, in addition to all of the powers now or hereafter conferred on executors by law, and any powers enumerated elsewhere in this will, the power to perform any of the acts specified in this section:

(a) Take possession or control of all of my estate subject to disposition by this will, and collect all debts due to me or to my estate.

(b) Receive the rents, issues, and profits from all real and personal property in my estate until the estate is settled or delivered over by order of court to my heirs or beneficiaries.

(c) Pay taxes on, and take all steps reasonably necessary for the management, protection, and preservation of, all property in my estate.

(d) Commence and prosecute, either individually or jointly with my heirs or beneficiaries, any action necessary or proper to quiet title to or recover possession of any real or personal property in my estate.

(e) Vote in person, and give proxies to exercise, any voting rights with respect to any stock, any membership in a nonprofit corporation, or any other property in my estate, and waive notice of a meeting, give consent to the holding of a meeting, and authorize, ratify, approve, or confirm any action that could be taken by shareholders, members, or

property owners.

(f) Insure the property of my estate against damage or loss, and insure the executor against liability to third persons.

(g) Deposit money belonging to my estate in an insured account in a financial institution in California.

(h) Invest and reinvest any money of my estate not reasonably required for the immediate administration of my estate in any kind of property, real, personal, or mixed, that persons of prudence, discretion, and intelligence acquire for their own accounts; provided, however, that in investing any property of my estate, the executor shall act with the care, skill, prudence, and diligence under the circumstances then prevailing, including but not limited to the general economic conditions and the anticipated needs of my estate and its beneficiaries, that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of like character and with like aims to accomplish the purposes of my estate as determined from this will.

(i) Retain any assets of my estate for as long as the executor deems to be in the best interest of my estate.

(j) Borrow money on behalf of my estate and pledge, hypothecate, or otherwise encumber property of my estate, real or personal, as security for any sums so borrowed.

(k) In order to satisfy a pecuniary gift or to distribute or divide estate assets into shares or partial shares, the executor may distribute or divide those assets in kind, or divide undivided interests in those assets, or sell all or any part of those assets and distribute or divide the property in cash, in kind, or partly in cash and partly in kind. Property distributed to satisfy a pecuniary gift under this will shall be valued at its fair market value at the time of distribution. This section shall apply only to the extent that it does not conflict with the provisions of Articles 2 and 3 specifying allocation of assets involving the marital deduction gift and of Article 4 specifying allocation of assets involving generation-skipping trusts.

(l) Pay any and all charges reasonably incurred in connection with or incidental to the distribution of any property of my estate, including but not limited to expenses of storage, freight, shipping, delivery, packing, and insurance; and, on any accounting, treat any such expenditures as expenses of the administration of my estate.

(m) To the extent permitted by law, and without regard to the resulting effect on any other provision of this will, on any person interested in my estate, or on the amount of taxes that may be payable, the executor shall have the power to choose a valuation date for tax purposes; choose the methods to pay any death taxes; elect to treat or use any item for state or federal estate or income tax purposes as an income tax deduction or an estate tax deduction; disclaim all or any portion of any interest in property passing to my estate at or after my death; join with my \_\_\_\_\_ [husband *or* wife] or my \_\_\_\_\_ [husband's *or* wife's] estate in filing joint income or gift tax returns for me or my estate; consent to any gifts made by my \_\_\_\_\_ [husband *or* wife] as being made one half by me for gift tax purposes; and determine when an item is to be treated as taken into income or used as a tax deduction.

(n) If any asset of my estate consists of an option right, exercise the option after authorization by order of court, upon a showing that the exercise would be to the advantage of my estate, and use any funds or property in my estate to acquire the property covered by the option.

(o) Hold a security in the name of a nominee or in any other form without disclosure of my estate so that title to the security may pass by delivery.

(p) Exercise any subscription rights owned or received by my estate by reason of owning securities, after authorization by court upon a showing that it is to the advantage of my estate.

(q) Sell, at either public or private sale and with or without notice, and grant options to purchase, any property belonging to my estate [*optional*], subject only to any confirmation of court required by law].

(r) Lease any real or personal property belonging to my estate on such terms and conditions as the executor determines to be in the best interest of my estate [optional:, subject only to any confirmation of court required by law].

(s) Dispose of or abandon tangible personal property, except tangible personal property that is a specific gift, when the cost of collecting, maintaining, and safeguarding the property would exceed its fair market value.

(t) Compromise or settle any claim, action, or proceeding by or for the benefit of, or against, me, my estate, or the executor [optional:, subject only to any confirmation of court that may be required by law].

(u) Employ professional investment counsel to make recommendations with respect to, and otherwise assist in, investing the assets of my estate; and, on any accounting, treat any fees paid to investment counsel as expenses of the administration of my estate.

5.07. Payments to Incapacitated Persons. If at any time any beneficiary under this will is a minor, or it appears to the executor that any beneficiary is incapacitated, incompetent, or for any other reason not able to receive payments or make intelligent or responsible use of the payments, then the executor, in lieu of making direct payments to the beneficiary, may make payments to the beneficiary's conservator or guardian; to the beneficiary's custodian under the Uniform Gifts to Minors Act or Uniform Transfers to Minors Act of any state (including a custodian selected by the executor); to one or more suitable persons as the executor deems proper, such as a relative of or a person residing with the beneficiary, to be used for the beneficiary's benefit; to any other person, firm, or agency for services rendered or to be rendered for the beneficiary's assistance or benefit; or to accounts in the beneficiary's name with financial institutions. The receipt of payments by any of the foregoing shall constitute a sufficient acquittance of the executor for all purposes.

5.08. Executor's Liability for Own Acts. The executor shall not be liable to my estate or to any person interested in it for any act or omission of the executor, except an act or omission that is committed intentionally, with gross negligence, in bad faith, or with reckless indifference to the interests of persons interested in my estate, or an act or omission from which the executor derives a profit.

#### Article 6 : Trustee

6.01. Nomination of Trustee. I nominate \_\_\_\_\_ [name of trustee and relationship to testator or other means of identification, e.g., my husband or my wife or my sister, Estelle Gold Taylor,] as trustee of any trust created under this will.

6.02. Successor Trustee. If \_\_\_\_\_ [nominee for initial trustee, e.g., my husband or my wife or my sister, Estelle Gold Taylor,] is for any reason unable or unwilling to serve, or continue to serve, as trustee, I nominate the following, in the order of priority indicated, as trustee:

First, \_\_\_\_\_ [name and description, e.g., my brother, Benjamin Edward Gold];

Second, \_\_\_\_\_ [name and description, e.g., Ernest W. Carpenter, who resides at \_\_\_\_\_ (address)];

Third, \_\_\_\_\_ [name and description, e.g. (for corporate trustee): Double Eagle Bank, Fresno, California office].

6.03. Definition of Trustee. Reference in this instrument to "the trustee" shall be deemed a reference to whoever is serving as trustee or co-trustees, and shall include alternate or successor trustees, unless the context requires otherwise.

6.04. Removal and Replacement of Trustee. Any trustee serving under this instrument may be removed as trustee at any time by court order upon petition by any beneficiary [or co-trustee], for any of the following grounds:

(a) Breach of trust.

(b) Insolvency or other unfitness to administer the trust.

(c) Hostility or lack of cooperation among the co-trustees that impairs the administration of the trust.

(d) Failure or refusal to act.

(e) Other good cause, as determined by the probate court. If a vacancy occurs in the office of trustee, whether by removal of a trustee or otherwise, the probate court shall appoint a new trustee to fill the vacancy. The court may, in its discretion, appoint the original number, or any lesser number of trustees. In selecting a trustee, the court shall give consideration to the wishes of the beneficiaries who are fourteen years of age or older.

6.05. Bond. \_\_\_\_\_ [No bond or undertaking *or* Bond] shall be required of any trustee nominated in this will.

6.06. Compensation of Trustee. The trustee shall be entitled to reasonable compensation for services rendered, payable without court order. [*Optional*: If a trustee serves for only part of a calendar year, the annual compensation shall be prorated according to the number of days during that year that the trustee was acting as trustee.]

6.07. Procedure for Resignation. Any trustee may resign at any time, without giving a reason for the resignation, by giving written notice, at least \_\_\_\_\_ [*specify; e.g., 30 days*] before the time the resignation is to take effect, to any other trustee then acting, to any persons authorized to designate a successor trustee, to all living trust beneficiaries known to the trustee (or, in the case of a minor beneficiary, to the parent or guardian of that beneficiary), and to the successor trustee. A resignation shall be effective upon written acceptance of the trust by the successor trustee.

6.08. General Powers of Trustee. To carry out the purposes of the trusts created under this will, and subject to any limitations stated elsewhere in this will, the trustee shall have all of the following powers, in addition to all of the powers now or hereafter conferred on trustees by law:

(a) Retain property received into the trust at its inception, or later added to the trust, as long as the trustee considers that retention in the best interests of the trust or in furtherance of my goals in creating the trust, as determined from this will, but subject to the standards of the prudent investor rule as set forth in the California Uniform Prudent Investor Act.

(b) Invest and manage the trust assets as a prudent investor would, by considering the purposes, terms, distribution requirements, and other circumstances of the trust. In satisfying this standard, the trustee shall exercise reasonable care, skill, and caution. The trustee's investment and management decisions respecting individual assets and courses of action must be evaluated not in isolation, but in the context of the trust portfolio as a whole and as a part of an overall investment strategy having risk and return objectives reasonably suited to the trust.

(c) Retain or acquire unproductive or underproductive property; provided, however, that as to any assets of the Power of Appointment Trust, my \_\_\_\_\_ [husband *or* wife] shall have the right, by delivery of a written instrument to the trustee, to require the trustee to make unproductive or underproductive property productive, or to convert it to productive property, within a reasonable time after receipt of the request.

(d) In the trustee's discretion, invest or reinvest in mutual funds, money market funds, investment trusts, regulated investment companies, market funds, and index funds, and in the shares or securities of any such funds or companies, that persons of prudence, discretion, and intelligence acquire for their own account.

(e) Acquire and maintain as a trust asset a life insurance policy on the life of any person, including the trustee, issued by any company and in any amount that the trustee may deem advisable, and to exercise all rights of ownership

granted in that policy; provided, however, that as to any assets of the Power of Appointment Trust, my \_\_\_\_\_ [husband *or* wife] shall have the right, by delivery of a written instrument to the trustee, to require the trustee to convert any such policy into productive property within a reasonable time after receipt of the request.

(f) With or without court authorization, sell (for cash or on deferred payments, and with or without security), convey, exchange, partition, and divide trust property; grant options for the sale or exchange of trust property for any purpose, whether the contract is to be performed or the option is to be exercised within or beyond the term of the trust; and lease trust property for any purpose, for terms within or extending beyond the expiration of the trust, regardless of whether the leased property is commercial or residential and regardless of the number of units leased.

(g) Lend or advance the trustee's own funds to my estate or to any other trust created by me, for any purpose properly related to that estate or trust, with interest thereon at the then-prevailing rates, and to receive security for any such loans in any commercially reasonable form. The trustee may, from time to time, purchase or lease assets from, sell or lease assets to, and exchange assets with my estate at fair market values. [*Optional:* However, the fair market value of any asset sold, purchased, or leased pursuant to this provision must first be determined by an independent appraisal.]

(h) Engage in any transactions with the personal representative of my estate that are in the best interest of any trusts under this will.

(i) Manage, control, improve, and maintain all real and personal trust property.

(j) Subdivide or develop land; make or obtain the vacation of plats and adjust boundaries, or adjust differences in valuation on exchange or partition by giving or receiving consideration; and dedicate land or easements to public use with or without consideration.

(k) Make ordinary or extraordinary repairs or alterations in buildings or other trust property, demolish any improvements, raze existing party walls or buildings, and erect new party walls or buildings, as the trustee deems advisable.

(l) Enter into oil, gas, and other mineral leases, on terms deemed advisable by the trustee; enter into any pooling, unitization, repressurization, community, or other types of agreements relating to the exploration, development, operation, and conservation of mineral properties; drill, mine, and otherwise operate for the development of oil, gas, and other minerals; contract for the installation and operation of absorption and repressuring plants; and install and maintain pipelines. Any such leases or agreements may be for a term within or extending beyond the term of the trust.

(m) In the trustee's discretion, abandon any [unproductive or wasted] trust asset or interest therein.

(n) Employ and discharge agents and employees, including but not limited to attorneys, accountants, investment and other advisers, custodians of assets, property managers, real estate agents and brokers, and appraisers, to advise and assist the trustees in the management of any trusts created under this will, and compensate them from the trust property. [*Optional:* The agents and employees may be associated or affiliated with the trustee, or may be descendants or other persons related to the trustee or to me, or a company associated with any such persons.] [*Optional:* The trustee is entitled to rely on the advice of any professional advisers employed under this provision. Reasonable compensation paid to any such agents or employees shall not diminish the compensation to which the trustee is otherwise entitled.]

(o) With respect to securities held in trust, exercise all the rights, powers, and privileges of an owner, including, but not limited to, the power to vote, give proxies, and pay assessments and other sums deemed by the trustee necessary for the protection of the trust property; participate in voting trusts, pooling agreements, foreclosures, reorganizations, consolidations, mergers, and liquidations, and, in connection therewith, deposit securities with and transfer title to any protective or other committee under such terms as the trustee deems advisable; exercise or sell stock subscription or conversion rights; and accept and retain as investments of the trust any securities or other property received through the

exercise of any of the foregoing powers.

(p) Hold securities or other trust property in the trustee's own name or in the name of a nominee, without disclosure of the trust, or in unregistered form, so that title may pass by delivery.

(q) Deposit securities in a securities depository that is either licensed or exempt from licensing.

(r) Borrow money for any trust purpose from any person or entity on such terms and conditions as the trustee deems advisable, and obligate the trust for repayment; encumber any trust property by mortgage, deed of trust, pledge, or otherwise, whether for terms within or extending beyond the term of the trust, as the trustee deems advisable, to secure repayment of any such loan; replace, renew, and extend any such loan or encumbrance; and pay loans or other obligations of the trust deemed advisable by the trustee.

(s) In the trustee's discretion, make loans to beneficiaries out of funds of the trust and guarantee the repayment of loans made to beneficiaries by third parties by encumbering trust assets.

(t) Procure and carry, at the expense of the trust, insurance in such forms and in such amounts as the trustee deems advisable to protect the trust property against damage or loss, and to protect the trustee against liability with respect to third persons.

(u) Enforce any obligation owing to the trust, including any obligation secured by a deed of trust, mortgage, or pledge held as trust property, and to purchase any property subject to a security instrument held as trust property at any sale under the instrument.

(v) Extend the time for payment of any note or other obligation held as an asset of, and owing to, the trust, including accrued or future interest, and extend the time for repayment beyond the term of the trust.

(w) Pay or contest any claim against the trust; release or prosecute any claim in favor of the trust; or, in lieu of payment, contest, release, or prosecution, adjust, compromise, or settle any such claim, in whole or in part, with or without consideration.

(x) At trust expense, prosecute or defend actions, claims, or proceedings of whatever kind for the protection of the trust property and of the trustee in the performance of the trustee's duties, and employ and compensate attorneys, advisers, and other agents as the trustee deems advisable.

(y) Accept additions to any trusts created by this will, from any source and at any time; all such additions shall become a part of the trust and shall be held, administered, and distributed in accordance with the terms of the trust. Any additions to the trust shall be made by designating in writing the property to be added. However, the titling of any account, deed, or similar asset in the name of the trustee, as trustee of the trust, shall be deemed to be a transfer to the trust. Any designation by a third party, whether by will, deed, account title designation, or similar transfer, shall also be a transfer to the trust estate. No addition shall become part of the trust estate until it is accepted in writing by the trustee.

6.09. Retention of Family Residence. The trustee shall retain, in any trust or trusts under this will, any of my interest in real property used by me and my \_\_\_\_\_ [husband *or* wife] as our principal residence at the time of my death ("the family residence"), and shall deal with the family residence in accordance with the following terms and conditions:

(a) During \_\_\_\_\_ [his *or* her] lifetime, my \_\_\_\_\_ [husband *or* wife] shall have the right to occupy the family residence (or any substitute residence or residential property purchased as provided in this section of the will) free of any rent.

(b) The trustee shall pay as much of the mortgage or note payments, property taxes, assessments, insurance,

maintenance, and ordinary repairs on the family residence (or on any substitute residence or residential property purchased as provided in this section of the will) as corresponds to the trust's proportionate interest in the same. The trustee shall make those payments out of income or principal of the trust or trusts in accordance with the principles applicable to charging of payments under California law, but in no event shall payment be made in a manner that disqualifies any part of any trust, that would otherwise so qualify, for the federal estate tax marital deduction.

(c) My \_\_\_\_\_ [husband *or* wife] shall, at \_\_\_\_\_ [his *or* her] option, have the right to advise the trustee in writing that \_\_\_\_\_ [he *or* she] no longer wishes to occupy the family residence and to direct the trustee to sell it, or any interest therein. In deciding on the terms and conditions relating to any sale, the trustee shall take into account all relevant factors, including, but not limited to, my intent that no sale be made in a "forced sale" situation (other than at my \_\_\_\_\_ [husband's *or* wife's] direction) or at a time when, because of high mortgage rates or otherwise, the residential real estate market is depressed. In selling the family residence, the trustee may dispose of it on such terms as the trustee deems desirable, including an installment sale or any other desirable method of disposing of the family residence, provided that if the sale is for consideration other than cash, the purchaser's obligation shall be secured by a first deed of trust. In the event of a sale, my \_\_\_\_\_ [husband *or* wife] may direct the trustee in writing to apply the proceeds of the sale to the purchase of a substitute residence or residential property, of comparable or lesser value, to be selected by my \_\_\_\_\_ [husband *or* wife]; or to reinvest the proceeds in any manner that \_\_\_\_\_ [he *or* she] may direct, provided that any such investments satisfy normal fiduciary standards of prudence and safety, and to use the income from reinvestment to pay the rental or lease payments on another residence or residential property, to be selected by my \_\_\_\_\_ [husband *or* wife]. Any net trust accounting income from any such investments, in excess of the trust share of the rental costs and any other expenses of trust administration, shall be added to the other trust income and distributed in accordance with the relevant provisions of the trust or trusts as set forth in Article \_\_\_\_\_ of this will.

[Optional: (d) If my \_\_\_\_\_ (husband *or* wife) does not direct the trustee to sell the family residence, \_\_\_\_\_ (he *or* she) shall have the right to direct the trustee in writing to lease it, or any interest in it. In the event of lease, the trustee shall continue to pay the expenses of maintaining the family residence as specified above, subject to the lease terms, and shall use the entire net income from the lease to pay the rental or lease payments on another residence or residential property, to be selected and occupied by my \_\_\_\_\_ (husband *or* wife). Any net trust accounting income from any lease of the family residence, in excess of the trust share of the cost of the rental or lease payments on another residence or residential property, shall be added to the other trust income and distributed in accordance with the relevant provisions of the trust or trusts, as set forth in Article \_\_\_\_\_ of this will.]

(e) Upon the death of my \_\_\_\_\_ [husband *or* wife], the trust interest in either the family residence, any proceeds remaining from the sale of the family residence, or any substitute residence or residential property purchased by the trustee with any proceeds of sale of the family residence, shall be distributed in accordance with the applicable provisions of the trust or trusts in which the interest or interests are held, as set forth in Article 4 of this will.

6.10. Power to Combine Trust Assets. Each trust created under this will shall constitute a separate trust and be administered and accounted for accordingly; however, the assets of all of the trusts may be combined and held for the trust beneficiaries without physical division into separate trusts until time of distribution.

6.11. Early Termination of Trusts. The trustee shall have the power, in the trustee's discretion, to petition the court to terminate any trust created under this will whenever the fair market value of the trust falls below \_\_\_\_\_ [specify amount, e.g., \$25,000] or becomes so small in relation to the costs of administration as to make continuing administration uneconomical or contrary to the primary purposes of the trust. Upon termination, the trustee shall distribute the principal and any accrued or undistributed net income to the income beneficiaries in proportion to their shares of the income. If no fixed amount of income is payable to specific beneficiaries, the trustee shall distribute the principal and any accrued or undistributed net income in equal shares to those beneficiaries who

would then be entitled to income payments from the trust. [Notwithstanding any provision of law to the contrary, and except as otherwise provided in this will, the trustee may not terminate a trust before the trust term expires unless court authorization is first obtained.]

6.12. Power to Delay Distributions. Following my death, the trustee shall have the power, in the trustee's discretion, to determine the reasonable administrative period necessary or appropriate to pay my debts, expenses, taxes, and other liabilities, before dividing or distributing the trust assets as provided herein, and to delay the division or distribution during that period. During that administrative period, the trustee, in the trustee's discretion, may accumulate the trust income, or distribute the income currently, or partially accumulate and partially distribute the income, as the trustee determines, but any income accumulated shall be distributable to the beneficiary or beneficiaries next entitled to distribution or allocation of the same upon conclusion of the administrative period. Nothing contained herein, however, shall delay the right of my spouse to receive income from a trust intended to qualify for the estate tax marital deduction beyond the period reasonably required for payment of or provision for the foregoing liabilities, or any other period that may be permitted under the applicable federal law and regulations relating to the allowance of the marital deduction.

6.13. Division or Distribution in Cash or in Kind. In order to satisfy a pecuniary gift or to distribute or divide trust assets into shares or partial shares, the trustee may distribute or divide those assets in kind, or divide undivided interests in those assets, or sell all or any part of those assets and distribute or divide the property in cash, in kind, or partly in cash and partly in kind. Property distributed to satisfy a pecuniary gift under this will shall be valued at its fair market value at the time of distribution. This section shall apply only to the extent that it does not conflict with the provisions of Articles 2 and 3 specifying allocation of assets involving the marital deduction gift and of Article 4 specifying allocation of assets involving generation-skipping trusts.

6.14. Payments to Incapacitated Persons. If at any time any trust beneficiary is a minor, or it appears to the trustee that any trust beneficiary is incapacitated, incompetent, or for any other reason not able to receive payments or make intelligent or responsible use of the payments, then the trustee, in lieu of making direct payments to the trust beneficiary, may make payments to the beneficiary's conservator or guardian; to the beneficiary's custodian under the Uniform Gifts to Minors Act or Uniform Transfers to Minors Act of any state (including a custodian selected by the trustee); to one or more suitable persons as the trustee deems proper, such as a relative of or a person residing with the beneficiary, to be used for the beneficiary's benefit; to any other person, firm, or agency for services rendered or to be rendered for the beneficiary's assistance or benefit; or to accounts in the beneficiary's name with financial institutions. The receipt of payments by any of the foregoing shall constitute a sufficient acquittance of the trustee for all purposes.

6.15. Grant of Specific Powers Not to Limit Exercise of General Powers. The enumeration of specific powers under this will shall not limit the trustee from exercising any other power with respect to any trusts created by this will that may be necessary or appropriate for the trustee to have and exercise in order to carry out the purposes of the trusts or to permit the trustee to fulfill the trustee's responsibilities and duties with respect to the trust.

6.16. Limitation on Powers That Would Imperil Marital Deduction. Notwithstanding any other provision of this will, the trustee shall exercise power and discretion over any trust or trust share designed to qualify for the federal estate tax marital deduction only in a manner consistent with all statutory and regulatory requirements for the full allowance of the marital deduction for that trust or share.

6.17. Power to Disclaim or Release Powers. Any trustee may disclaim, release, or restrict the scope of any power or discretion that the trustee may hold in connection with any trust created under this will, whether the power or discretion is expressly granted in this will or is implied by law. The trustee shall disclaim a power in the manner required by applicable federal or California law. The trustee shall release or restrict any power or discretion by giving written notice to the beneficiary or beneficiaries then entitled to current distribution of income from the trust, specifying the power or discretion to be released or restricted, the nature of the restriction, and, if appropriate, the person or persons to whom the released or restricted power shall pass and be exercisable. If a power is disclaimed, the power shall be available to and exercisable by the successor trustee.

6.18. Written Notice to Trustee. Until the trustee receives written notice of any death or other event upon which the right to payments from any trust may depend, the trustee shall incur no liability for disbursements made in good faith to persons whose interests may have been affected by that event.

6.19. Duty to Account. The trustee shall render accounts at least annually, at the termination of a trust, and upon a change of trustees, to the persons and in the manner required by law.

#### Article 7 : Guardian

7.01. Nomination of Guardian. If a guardian of the person, estate, or person and estate is necessary for any minor child of mine, I nominate \_\_\_\_\_ [name and relationship to testator or other means of identification, e.g., my sister, Estelle Gold Taylor, or Ernest W. Carpenter, who resides at \_\_\_\_\_ (address)], as that guardian. If at any time \_\_\_\_\_ [name, e.g., my sister, Estelle Gold Taylor, or Ernest W. Carpenter] is unable or unwilling to serve or continue to serve as guardian, I nominate \_\_\_\_\_ [name and relationship to testator or other means of identification, e.g., my brother, Benjamin Edward Gold,] as guardian.

7.02. Bond. \_\_\_\_\_ [No bond or undertaking or Bond] shall be required of any guardian of the estate nominated in this will.

#### Article 8 : Concluding Provisions

8.01. Definition of Death Taxes. The term "death taxes," as used in this will, shall mean all inheritance, estate, succession, and other similar taxes that are payable by any person on account of that person's interest in my estate or by reason of my death, including penalties and interest, but excluding the following:

(a) Any additional tax that may be assessed under *Internal Revenue Code Section 2032A*.

(b) Any federal or state tax imposed on a generation-skipping transfer, as that term is defined in the federal tax laws [, unless the applicable tax statutes provide that the generation-skipping transfer tax on that transfer is payable directly out of the assets of my gross estate].

8.02. Payment of Death Taxes. The executor shall pay all death taxes, whether or not attributable to property inventoried in my probate estate, out of my residuary estate, death taxes, whether or not attributable to property inventoried in my probate estate, out of my residuary estate, and no death taxes shall be prorated or apportioned among the persons interested in that property.

#### **PRACTICE TIP:**

The allocation of taxes shown in this form is but one of many possible allocation schemes. In each case the drafter should carefully consider the nature of the client's assets, including whether those assets will pass under the will or otherwise, and the value of assets passing under the will as specific, rather than residuary, gifts. Only when these factors are considered can the appropriate tax allocation formula be selected. Other possible allocation clauses appear in CALIFORNIA WILLS & TRUSTS FORMS, Div. IV, *Individual Will Provisions*, Pt. 90, *Concluding Provisions*, Form 90.30 (Alts. 90.30-1-90.30-7); for more detailed discussion of tax allocation, see California Wills & Trusts, Ch. 23, *Provisions for Payment of Taxes, Expenses, and Debt* (Matthew Bender). *Commentary by Albert G. Handelman*.

8.03. Abatement of Gifts. If my estate is insufficient to satisfy in full all of the gifts provided for in this will, I direct that gifts shall abate in the following order: first general gifts, then specific gifts, then demonstrative gifts; provided, however, that the gifts to my \_\_\_\_\_ [husband or wife] shall not abate until all other gifts have abated [, and the gifts to my children shall not abate until gifts to all persons and entities other than my \_\_\_\_\_ (husband or wife) have abated]. All gifts of the same class shall abate proportionally.

8.04. Simultaneous Death. If any beneficiary under this will and I die simultaneously, or if it cannot be established by clear and convincing evidence whether that beneficiary or I died first, I shall be deemed to have survived that beneficiary, and this will shall be construed accordingly.

8.05. Intentional Omission of Heirs Not Specifically Provided For in Will. Except as otherwise specifically provided in this will, I have intentionally and with full knowledge omitted to provide for my heirs, regardless of whether or not I am aware of their existence and identities at the time this will is executed.

8.06. No-Contest Clause. If any person, directly or indirectly, contests the validity of this will in whole or in part, or opposes, objects to, or seeks to invalidate any of its provisions, or seeks to succeed to any part of my estate otherwise than in the manner specified in this will, any gift or other interest given to that person under this will shall be revoked and shall be disposed of as if he or she had predeceased me [*optional*: without issue].

8.07. Perpetuities Savings Clause. Notwithstanding any other provision of this will, every trust created by this will[, or by the exercise of any power of appointment created by this will,] shall terminate no later than 21 years after the death of \_\_\_\_\_ [*designate measuring life or lives, e.g., the last survivor of my spouse and my issue*] who are alive at the time of my death. If a trust is terminated under this section of the will, the trustee shall distribute all of the principal and undistributed income of the trust to the income beneficiaries of the trust in the proportion in which they are entitled (or eligible, in the case of discretionary payments) to receive income immediately before the termination. If that proportion is not fixed by the terms of this will, the trustee shall distribute all of the trust property to the persons then entitled or eligible to receive income from the trust \_\_\_\_\_ [*specify pattern of distribution, e.g., outright in a manner that, in the trustee's opinion, will give effect to my intent in creating the trust, the trustee's decision to be final and incontestable by anyone or as a class, in the manner provided in California Probate Code Section \_\_\_\_\_ (240 or 246 or 247) or in equal shares, regardless of whether all of such persons are members of the same generation*].

8.08. Definition of Incapacity. For purposes of this will, a person shall be deemed "incapacitated" if and for so long as a court of competent jurisdiction has made a finding to that effect, or a guardian or conservator of that person's estate or person duly appointed by a court of competent jurisdiction is serving, or upon certification by two physicians licensed to practice under the laws of the state where the person is domiciled at the time of the certification that the person is unable properly to care for himself or herself or for his or her property. The latter certification shall be made by each physician in a written declaration under penalty of perjury.

8.09. Definition of Education. As used in this will, the term "education" refers to the following:

- (a) Education at public or private elementary, junior high, middle, or high schools, including boarding schools;
- (b) Undergraduate, graduate, and postgraduate study in any field, whether or not of a professional character, in colleges, universities, or other institutions of higher learning;
- (c) Specialized formal or informal training in music, the stage, the handicrafts, or the arts, whether by private instruction or otherwise; and
- (d) Formal or informal vocational or technical training, whether through programs or institutions devoted solely to vocational or technical training, or otherwise.

8.10. Captions. The captions appearing in this will are for convenience of reference only, and shall be disregarded in determining the meaning and effect of the provisions of this will.

8.11. Severability Clause. If any provision of this will is invalid, that provision shall be disregarded, and the remainder of this will shall be construed as if the invalid provision had not been included.

8.12. California Law to Apply. All questions concerning the validity and interpretation of this will, including any trusts created by this will, shall be governed by the laws of the State of California in effect at the time this will is executed.

8.13. Gifts to "Heirs." For any gift to my heirs that is made outright in this instrument, those heirs shall be determined as if I had died intestate at the time for distribution, and the identity and shares of those heirs shall be determined according to the California laws of succession that concern separate property not acquired from a previously deceased spouse and that are in effect at my death. For any assets of any trust estate created by this will to be distributed to my heirs, those heirs shall be determined as if I had died intestate immediately following the termination of the trust of each share, and the identity and shares of those heirs shall be determined according to the California laws of succession that concern separate property not acquired from a previously deceased spouse and that are in effect at my death.

Executed on \_\_\_\_\_ [date], at \_\_\_\_\_ [city or town and state].

\_\_\_\_\_ [signature of testator]

[typed name]

On the date written above, we, the undersigned, each being present at the same time, witnessed the signing of this instrument by \_\_\_\_\_ [name of testator]. At that time, \_\_\_\_\_ [he or she] appeared to us to be of sound mind and memory and, to the best of our knowledge, was not acting under fraud, duress, menace, or undue influence. Understanding this instrument, which consists of \_\_\_\_\_ pages, including the pages on which the signature of \_\_\_\_\_ [name of testator] and our signatures appear, to be the will of \_\_\_\_\_ [name of testator], we subscribe our names as witnesses thereto. We declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on \_\_\_\_\_ [date], at \_\_\_\_\_ [city or town and state].

\_\_\_\_\_ [signature of first witness]

Residing at \_\_\_\_\_ [street address]

\_\_\_\_\_ [city and state]

\_\_\_\_\_ [signature of second witness]

Residing at \_\_\_\_\_ [street address]

\_\_\_\_\_ [city and state]

### Legal Topics:

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Powers of Appointment Estate, Gift & Trust Law Trusts Marital Deduction Trusts Estate, Gift & Trust Law Trusts Testamentary Trusts Estate, Gift & Trust Law Wills General Overview



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California Legal Forms--Transaction Guide

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DIVISION IV: WILLS AND TRUSTS  
 CHAPTER 61 WILL DRAFTING AND COMPLETE WILL FORMS  
 PART IV. FORMS  
 B. Wills for Married Persons

*23-61 California Legal Forms--Transaction Guide § 61.214*

**AUTHOR:** Reviewed by Albert G. Handelman

**§ 61.214 Will for Married Person; Marital Deduction Formula Devise to QTIP Trust; Residue to Bypass Trust; Disclaimer Trust**

**[1] Comment**

**[a] Use of Form**

This form is a complete will designed for use by a testator who is married, has children, and wishes to leave his or her entire estate in trust in such a way that the surviving spouse will have optimum control over the trust assets during his or her lifetime. This form further assumes wishes to take advantage of the unlimited marital deduction [*see I.R.C. § 2056*] and the unified credits available in each estate [*see I.R.C. §§ 2010* (estate tax), 2505 (gift tax)] to completely avoid estate tax on the death of the first spouse and to reduce (or totally eliminate) estate taxes on the death of the second spouse. Unlike the *form in § 61.213[2]*, however, this form assumes that the testator wishes to retain control over the disposition of the trust assets on the death of the surviving spouse and, to that end, has chosen to create a qualified terminal interest property (QTIP) trust.

This will assumes that the combined estates of the testator and the testator's spouse will be too large at the time of the second spouse's death to be passed free of estate tax to the testator's children under the unified credit available in the second spouse's estate. If it is not reasonably foreseeable that the combined estates will exceed the amount of the available unified credit, the kind of tax planning included in this will probably is not warranted and the attorney should select one of the simpler wills included in this chapter.

This will creates three trusts. The first, called the "QTIP Trust" [*see Section 4.01 of form*], is designed to qualify for the unlimited marital deduction as a "qualified terminable interest property" trust [*see I.R.C. § 2056(b)(7)* and discussion in *Ch. 71, Marital Deduction Trust Provisions, § 71.13[4]*]. The second, called the "Bypass Trust" [*see Section 4.02 of form*], is designed to take advantage of the unified credit available in the testator's estate [*see I.R.C. §§ 2010* (estate tax), 2505 (gift tax) and discussion in *§ 60.13[5][b]*] and, on the death of the surviving spouse, to "bypass" that estate for estate tax purposes [*see discussion in § 61.212[1][f]*]. The third trust, called the "Disclaimer Trust" [*see Section 4.04 of*

form], is designed to hold any property that the surviving spouse elects to disclaim.

The surviving spouse is given lifetime interests in all three of the trusts. On the surviving spouse's death, the Bypass Trust and the Disclaimer Trust will be divided into separate shares for each of the testator's children. Each child will receive a share on the spouse's death or on the date the child reaches a specified age, whichever occurs later. Shares are distributed outright to the issue of any deceased children. On the surviving spouse's death, the assets of the QTIP Trust will be distributed to the Bypass Trust, to be held, administered, and distributed according to its terms.

### **[b] Standard Provisions**

This will contains numerous provisions that are also found in other wills in this chapter. These are provisions relating to the executor's bond [*see* Section 5.04 of form], the executor's authority to act under the California Independent Administration of Estates Act [*see* Section 5.05 of form], the executor's powers [*see* Section 5.06 of form], payments to incapacitated persons [*see* Section 5.08 of form], the executor's liability [*see* Section 5.09 of form], disinheritance of the testator's heirs [*see* Section 8.06 of form], and contest of the will [*see* Section 8.07 of form]. For discussion of these provisions, see § 61.200[1].

### **[c] Marital Deduction Gift**

Section 2.05 of this will makes a general pecuniary devise that is to be held in trust for the benefit of the surviving spouse during the surviving spouse's lifetime [*see* Section 4.01 of form]. This devise, which is referred to as the "marital deduction gift," is a pecuniary formula devise that is stated to be the minimum amount necessary to eliminate (or reduce to the maximum extent possible) any federal estate tax at the testator's death, taking into account the net value of all other property that passes or has passed to the spouse under the will or otherwise and that qualifies for the federal estate tax marital deduction and all allowable federal estate tax credits and deductions (other than the marital deduction).

This formula clause requires that the testator's estate be divided into "marital" and "nonmarital" shares [*see* discussion in § 61.212[1][d]] in a way that will maximize the tax-saving potential of the unlimited marital deduction [*see* I.R.C. § 2056 and discussion in § 61.212[1][c]] and the "applicable credit amount" [*see* I.R.C. § 2010(c) (table of graduated amounts) and discussion in § 60.13[4][b]] available in the testator's estate. The formula prescribes the dollar amount of the property that will constitute the "marital" share of the estate.

Pecuniary formulas are the most popular marital deduction formulas. They avoid the administrative headaches that result when the marital and nonmarital shares receive fractional interests in the same assets and offer flexibility in funding, because the executor or trustee can be given discretion to decide which assets to transfer to the marital and nonmarital shares to satisfy the pecuniary and residuary devises [*see* Section 3.03 of form]. However, the actual allocation of assets to the two shares need not be made until after the first spouse's death. For further discussion of marital deduction devises and formula clauses, see § 61.212[1][c], [d], [e]. For detailed discussion of the marital deduction and its use in estate planning, see Ch. 71, *Marital Deduction Trust Provisions*; see also California Wills & Trusts, Ch. 112, *The Marital Deduction and Marital Deduction Trusts* (Matthew Bender).

### **[d] QTIP Trust**

This will requires that the marital deduction gift [*see* Section 2.05 of form] be held in the QTIP Trust [*see* Section 4.01 of form]. This trust will qualify for the unlimited marital deduction as a "qualified terminable interest property trust" under I.R.C. § 2056(b)(7). For general discussion of the requirements of this type of trust, see §§ 71.13[4], 71.230[1].

The QTIP trust is probably the most popular type of marital deduction trust among estate planners. It gives the surviving spouse a high degree of enjoyment and use of the trust property, while permitting the testator to determine in advance who will receive the property on the surviving spouse's death. This can be particularly desirable if one or both of the

spouses have children by previous marriages and wish to ensure that those children will receive the trust property after the death of the surviving spouse. In addition, because the executor may elect to qualify all or only part of the QTIP property for the marital deduction [*see* *Treas. Reg. § 20.1056(b)-7(b)(2)* (rules governing partial QTIP elections)], use of a QTIP trust provides a greater degree of flexibility with respect to postmortem planning than does a lifetime income/power of appointment trust. This flexibility is the reason for the popularity of QTIP trusts among estate planners even in situations that do not involve any desire on the part of the testator to limit the surviving spouse's rights to dispose of the trust property after the surviving spouse's death.

A QTIP trust will not qualify for the marital deduction unless the executor makes an election to treat the trust as a QTIP trust [*I.R.C. § 2056(b)(7)(B)(v)*]. An inadvertent failure to make the QTIP election may disqualify the entire trust from the marital deduction. Once the election is made, it is irrevocable [*I.R.C. § 2056(b)(7)(B)(v)*]. As noted in the preceding paragraph, a QTIP election may be made with respect to all or any part of property that meets the requirements for qualified terminable interest property [*Treas. Reg. § 20.2056(b)-7(b)(2)(i)*].

Section 5.07 states that the testator expects the executor to make a full election to qualify all of the property of the QTIP trust for the marital deduction as a qualified terminal interest property trust. However, a full election is not required if there is a compelling reason not to make any election or to make only a partial election. A compelling reason would exist, for example, if the testator's spouse were to die shortly after the testator and making the full election would be likely to increase the sum of the death taxes imposed on the estates of both the testator and the testator's spouse. Section 4.01(a) provides that if a partial QTIP election is made, the QTIP trust will be divided into two separate trusts pursuant to the terms of the election. Section 5.07 also provides that if the executor elects to qualify any property allocated to the QTIP Trust for the federal estate tax marital deduction, the executor may elect, under any applicable provision of the Internal Revenue Code then in effect, to have all or any part of that estate tax election disregarded for purposes of the federal generation-skipping transfer tax [for discussion of the reverse QTIP election, *see* [i], *below*].

#### **[e] Bypass Trust**

Section 3.01 of this will gives the residue of the testator's estate to the bypass trust [*see* Section 4.02 of form] This trust gives the testator's surviving spouse the lifetime right to receive all of the net income from the trust [*see* Section 4.02(a) of form]. On the surviving spouse's death, the bypass trust will be divided into separate shares for each of the testator's children who either survive or leave issue who survive [*see* Section 4.02(b) of form].

Bypass trusts play an important part in most estate plans that seek to give the surviving spouse optimum lifetime use of the testator's estate while at the same time avoiding estate tax on the testator's death and reducing (if not completely eliminating) estate tax on the death of the surviving spouse. For a general discussion of bypass trusts, *see* § 61.212[1][f].

#### **[f] Allocation of Assets**

Section 3.03 gives the executor discretion to allocate assets in the testator's estate to the marital and bypass gifts in cash or in kind, or partly in each, on a pro rata or non pro rata basis, and in undivided interests or not. This gives the executor maximum flexibility to allocate assets to the respective gifts in the manner that seems most favorable at the time of the allocation.

#### **[g] Disclaimer Trust**

Section 4.04 of this will provides that any property that the testator's surviving spouse elects to disclaim will pass to the trustee and be held in the disclaimer trust. However, the disclaimer trust will actually come into being only if the surviving spouse makes a qualified disclaimer of property [*see I.R.C. § 2518(b)*]. The distributive provisions of the disclaimer trust provide that the surviving spouse will receive all of the net income of the trust for life [*see* Section

4.04(a) of form]. The trustee has discretion to invade trust principal for the surviving spouse's benefit pursuant to an "ascertainable standard" [see Section 4.04(a) of form; see also *I.R.C. § 2041(b)(1)(A)* and discussion in *Ch. 60, Estate Planning, § 60.13[1][g]*]. On the surviving spouse's death, the trustee will divide the assets of the trust into separate shares according to the same directions provided for the division of the assets of the bypass trust on the surviving spouse's death [see Section 4.04(b) of form].

Because the interests of the surviving spouse in the disclaimer trust have been appropriately limited in this form, the assets of the disclaimer trust will not be included in the surviving spouse's estate for estate tax purposes when the surviving spouse dies. For a general discussion of disclaimer trusts, see *Ch. 71, Marital Deduction Trust Provisions, § 71.16*.

#### **[h] Choice of Trustee**

Section 6.01 of this will nominates the trustee of the trusts created under the will. Any person or entity chosen by the testator may serve as the trustee. The testator's surviving spouse may serve as trustee if he or she has the requisite temperament, experience, and skill to perform the duties required of a trustee. None of the rights or powers given to the surviving spouse in this form will cause the trust assets to be included in the surviving spouse's estate merely because the surviving spouse serves as trustee.

#### **[i] Administration of Generation-Skipping Trusts**

Section 4.07 of this will governs the administration of any trust created by the will in which there is property that is or may become subject to the federal generation-skipping transfer tax [see *I.R.C. §§ 2601-2664*]. The GST tax is repealed effective for generation-skipping transfers after 2009 [*I.R.C. § 2664*]. Until then, it remains in effect. The section is designed to give the executor postmortem flexibility to eliminate or minimize any generation-skipping transfer tax.

Section 5.07 of this will provides, among other things, that the executor may elect to have any QTIP election [see discussion in [d], *above*] disregarded for purposes of the generation-skipping transfer tax. The power to disregard a QTIP election for purposes of the generation-skipping transfer tax is referred to as a "reverse QTIP election" and can be a useful tool in minimizing the generation-skipping transfer tax.

An election to qualify the assets of a QTIP trust for the unlimited marital deduction as qualified terminable interest property can result in significant estate tax savings at the time of the testator's death. However, the same election could cause the surviving spouse to be treated as the transferor of the assets of the QTIP trust for generation-skipping transfer tax purposes. This is because the generation-skipping transfer tax law defines the term "transferor" to mean the person in whose estate property subject to the transfer is also subject to estate tax [see *I.R.C. § 2652(a)(1)(A)*; *Treas. Reg. § 26.2652-1(a)*]. Since QTIP property is subject to estate tax in the estate of the surviving spouse [*I.R.C. § 2044(b)(1)(A)*], the surviving spouse could be deemed the transferor of the QTIP property for generation-skipping transfer tax purposes. In some cases, this could cause the partial or complete loss of the testator's generation-skipping transfer tax exemption [see *I.R.C. § 2631*].

However, the generation-skipping transfer tax law specifically permits the executor to avoid this result by making a "reverse QTIP" election [see *I.R.C. § 2652(a)(3)*]. Although the estate tax law permits partial QTIP elections, a reverse QTIP election can be made only for all of the property in a given QTIP trust [*I.R.C. § 2652(a)(3)*; *Treas. Reg. § 26.2652-2(a)*]. However, the generation-skipping transfer tax law permits trusts to be divided for generation-skipping transfer tax purposes. A trust may be divided for this purpose if division is required by the trust instrument [*Treas. Reg. § 26.2654-1(b)(1)(i)*] or if either local law or the governing instrument gives the trustee discretion to divide it [*Treas. Reg. § 26.2654-1(b)(1)(ii)*]. When a trust is divided pursuant to the trustee's discretionary authority, the terms of each of the new trusts must provide for the same succession of interests and beneficiaries as are provided in the original trust, and the division must occur (or a reformation proceeding, if required, must be commenced) before the date prescribed

for filing the federal estate tax return (including any extensions granted) for the estate of the transferor [*Treas. Reg. § 26.2654-1(b)(1)(ii)*]. The new trusts must be funded on a fractional basis unless the trust instrument specifically requires funding on a pecuniary basis [*Treas. Reg. § 26.2654-1(b)(1)(ii)(C)*]. After the new trusts are created, the reverse QTIP election can be made for only one of the trusts. Section 4.07 of this will gives the executor broad discretion to divide any trust created by the will in such a way as to minimize the application of the generation-skipping transfer tax.

For further discussion of will provisions governing the administration of the generation-skipping transfer tax, see § 61.201[1][e]. For detailed coverage of the generation-skipping transfer tax and generation-skipping transfer tax planning, see California Wills & Trusts, Ch. 113, *Generation-Skipping Transfers and Trust Strategies* (Matthew Bender).

## [2] FORM

### **Will for Married Person; Marital Deduction Formula Devise to QTIP Trust; Residue to Bypass Trust; Disclaimer Trust**

WILL OF

\_\_\_\_\_ [*full legal name of testator, e.g., JOHN DAVID SILVER*]

I, \_\_\_\_\_ [*full legal name of testator, e.g., John David Silver, a resident of \_\_\_\_\_* County, California, declare that this is my will. I hereby revoke all my previous wills and codicils.

#### Article 1 : Introductory Provisions

1.01. Marital Status. I am married to \_\_\_\_\_ [*name of spouse, e.g., Susan Shoemaker Silver*], and all references in this will to "my \_\_\_\_\_ [*husband or wife*]" are to \_\_\_\_\_ [*him or her*].

1.02. Identification of Living Child(ren). I have \_\_\_\_\_ [*number*] living \_\_\_\_\_ [*child or children*], whose name[s] and date[s] of birth \_\_\_\_\_ [*is or are*] as follows:

[*e.g., Joseph John Silver, who was born on July 1, 1989*]

[*e.g., James David Silver, who was born on December 1, 1994*]

[*e.g., Catherine Taylor Silver, who was born on May 1, 1997*].

1.03. No Deceased Children. I have no deceased children.

1.04. Definitions of Child and Children. As used in this will, the terms "child" and "children" refer to all persons referred to in *California Probate Code Section 26*, as in effect at the time of execution of this will.

1.05. Definition of Issue. As used in this will, the term "issue" refers to all lineal descendants of all generations, with the relationship of parent and child in each generation being determined by the definitions of "child" and "children" set forth in this will.

1.06. Number and Gender. As used in this will, references in the masculine gender shall be deemed to include the feminine and neuter genders, and vice versa, and references to the singular shall be deemed to include the plural, and vice versa, wherever the context so permits.

1.07. Property Disposed of by Will. It is my intention by this will to dispose of all of my separate property, [and] my entire one-half interest in the community property of my \_\_\_\_\_ [*wife or husband*] and myself [*if there is likely to be any quasi-community property, add:*, and my entire one-half interest in my quasi-community

property].

1.08. No Exercise of Power of Appointment. I intentionally refrain from exercising any power of appointment that I now possess or that hereafter may be conferred on me.

1.09. No Contract Affecting Will. I have not entered into any contract to make a will or a testamentary gift, not to revoke a will or a testamentary gift, or to die intestate. [Optional, add language referring to similar will executed by spouse: The similarity of the provisions of this will to the provisions of the will of my \_\_\_\_\_ (husband or wife) (executed on this date) shall not be construed as evidence of any such contract.]

## Article 2 : Particular Gifts

2.01. Specific Gifts of Personal Property. I give the items of property described below [optional:, together with my interest in any insurance on those items,] to the persons named below:

(a) I give \_\_\_\_\_ [describe property, e.g., my fourteen-karat gold dinner ring] to \_\_\_\_\_ [name of devisee and relationship to testator or other means of identification, e.g., my sister, Charlotte Silver Smith] [if desired, add survivorship clause:, if she survives me or, if she survives me for 60 days] [if gift is conditioned on survival, add alternative disposition, e.g.,; but if she does not survive me (for that period), this gift shall \_\_\_\_\_ (e.g., lapse and become part of the residue of my estate or go to my daughter, Catherine Taylor Silver)];

(b) I give \_\_\_\_\_ [describe property, e.g., my sterling silver flatware service] to \_\_\_\_\_ [name of devisee and relationship to testator or other means of identification, e.g., my niece, Elaine Smith Collier] [if desired, add survivorship clause, e.g., if she survives me or, if she survives me for 60 days] [if gift is conditioned on survival, add alternative disposition, e.g.,; but if she does not survive me (for that period), this gift shall \_\_\_\_\_ (e.g., lapse and become part of the residue of my estate or go to my daughter, Catherine Taylor Silver, if she should survive me)];

(c) I give \_\_\_\_\_ [describe property, e.g., the promissory note executed in my favor by John D. Smith and Jane B. Smith, on June 1, 1990, in the principal amount of \$100,000, with interest on unpaid principal in the amount of 10 percent per annum, principal and interest payable in monthly payments of \$1,000 per month, together with the deed of trust of the same date on real property located in the City of Monterey, County of Monterey, State of California, and recorded on June 2, 1990, at Reel 10011, Book 10022, Official Records, Monterey County, California, securing the payment of principal and interest under that note,] to \_\_\_\_\_ [name of devisee and relationship to testator or other means of identification, e.g., my brother, Charles Edward Silver] [if desired, add survivorship clause, e.g., if he survives me or if he survives me for 60 days] [if gift is conditioned on survival, add alternative disposition, e.g.,; but if he does not survive me (for that period), this gift shall \_\_\_\_\_ (e.g., lapse and become part of the residue of my estate or go to my son, James David Silver)].

[Continue as necessary for each additional item of property to be specifically devised.]

2.02. Gift[s] to Be Selected From Among My Personal Effects. I give \_\_\_\_\_ [name(s) of devisee(s) and relationship(s) to testator, e.g., my brother, Charles Edward Silver, or my niece, Elaine Smith Collier, or my brother, Charles Edward Silver, and my niece, Elaine Smith Collier, and each of them,] the right to select \_\_\_\_\_ [specify, e.g., one item or one item each or two items or two items each] from among my personal effects so that \_\_\_\_\_ [he or she or they] will have \_\_\_\_\_ [a memento or mementos] to remember me by. I make this gift to \_\_\_\_\_ [him or her or them] as a symbol of my love and affection. If \_\_\_\_\_ [he or she or any person named in this section] does not survive me or does not make a selection within three months after the date of my death, or within 30 days after this will is admitted to probate, whichever is later, then the gift made to \_\_\_\_\_ [him or her or that person] in this section shall fail. [If

*desired, specify any types of property that may not be selected, e.g.,* For purposes of this gift only, the word "personal effects" shall not include any motor vehicles or any items of property with an appraised value in excess of \$2,500].

2.03. Tangible Personal Property. I give all of my tangible personal property that is not otherwise disposed of as a specific gift in this will, including my interest in any insurance on that property, to my \_\_\_\_\_ [husband or wife] *[if desired, add survivorship clause, e.g., if she survives me or, if he survives me for 60 days]. [If gift is conditioned on survival, add appropriate alternative disposition, e.g.,; and, if \_\_\_\_\_ (he or she) does not, to my children who survive me (for that period), to be divided among them by the executor, in equal or unequal shares as the executor believes to be in accordance with my wishes, the decision of the executor as to this division to be final and incontestable by anyone. [Optional: The term "tangible personal property" \_\_\_\_\_ (includes, but is not limited to, or does not include) \_\_\_\_\_ (specify items, e.g., livestock, pets, airplanes, and motor vehicles).]*

2.04. General Pecuniary Gift. I give the sum of \$ \_\_\_\_\_ to \_\_\_\_\_ *[name of devisee and relationship to testator or other means of identification, e.g., my niece, Elaine S. Collier] [if desired, add survivorship clause, e.g., if she survives me or, if she survives me for 60 days]. [If gift is conditioned on survival, add appropriate alternative disposition, e.g., If she does not survive me (for that period), this gift shall \_\_\_\_\_ (e.g., lapse and become part of the residue of my estate or go to my son, James David Silver).]*

2.05. Marital Deduction Gift. If my \_\_\_\_\_ *[wife or husband] survives me [if desired, specify survivorship period, e.g., for six months], I give a pecuniary gift (referred to as the "marital deduction gift"), in the amount determined in this section, to the trustee, in trust, to be held, administered, and distributed according to the terms set forth in Article 4 applicable to the Qualified Terminable Interest Property (QTIP) Trust. The marital deduction gift shall consist of assets having a value equal to the minimum amount necessary to eliminate (or reduce to the maximum extent possible) any federal estate tax at my death, taking into account the following:*

(a) The net value of all other property that passes or has passed to my \_\_\_\_\_ *[wife or husband] under this will or otherwise and that qualifies for the federal estate tax marital deduction. For purposes of this subsection of the will, any qualified disclaimer made by my \_\_\_\_\_ [wife or husband] shall be disregarded, and any property that will qualify as qualified terminable interest property under Internal Revenue Code Section 2056(b)(7) if my executor makes the requisite election shall be considered to be qualified terminable interest property, regardless of whether the election is made;*

(b) All federal estate tax deductions and exclusions actually allowed other than the marital deduction;

(c) The applicable exclusion amount, as specified in *Internal Revenue Code Section 2010*, available to my estate;

(d) The credit for state death taxes available to my estate, to the extent that the use of that credit does not result in or increase any death tax payable to any state; and

(e) Any other allowable credits available to my estate (except the credit for tax on prior transfers from a "transferor," as defined in *Internal Revenue Code Section 2013*, who dies within two years after the date of my death), but only to the extent that those credits do not disqualify this gift from receiving the marital deduction.

The marital deduction gift shall be held, administered, and distributed according to the terms of the Qualified Terminable Interest Property (QTIP) Trust as set forth in Section 4.01.

If my \_\_\_\_\_ *[wife or husband] does not survive me [if desired, specify survivorship period, e.g., for six months], this gift shall lapse and become part of the residue of my estate.*

*[Select one of the following alternatives:]*

2.06. Interest on Pecuniary Gifts. [Except as otherwise specifically provided in this will,] [n]o interest shall accrue on all [general] pecuniary gifts made in this will.

[or]

2.06. Interest on Pecuniary Gifts. [Except as otherwise specifically provided in this will,] [I]nterest at the rate \_\_\_\_\_ [e.g., of 10 percent per annum or specified in *California Probate Code Section 12001*, or any successor to that section,] shall accrue on all [general] pecuniary gifts made in this will from and after \_\_\_\_\_ [e.g., the date of my death or the first anniversary of my death] and until those gifts are paid in full. All interest shall be paid at the time the gift is distributed.

[Continue with the following:]

### Article 3 : Residuary Provisions

3.01. Disposition of Residue. If my \_\_\_\_\_ [wife or husband] survives me \_\_\_\_\_ [if desired, add survivorship period not to exceed six months, e.g., for six months], I give the residue of my estate (referred to as the "bypass gift") to the trustee, in trust, to be held, administered, and distributed according to the terms set forth in Article 4 applicable to the Bypass Trust.

3.02. Alternate Disposition of Residue. If my \_\_\_\_\_ [husband or wife] does not survive me [restate any survivorship period imposed in primary residuary devise, not to exceed six months, e.g., for six months], I give the \_\_\_\_\_ [residue of my estate or portion of the residue of my estate not taken] as follows:

(a) If any of my children survive me, the residue of my estate shall be divided into as many shares of equal market value as are necessary to create one share for each of my children who survive me and one share for the issue who survive me of each of my children who predecease me.

(b) Each share created for a surviving child shall be distributed outright to that child if that child has reached the age of \_\_\_\_\_ [e.g., 25] years at the time of my death. If the child has not reached the age of \_\_\_\_\_ [e.g., 25] years at the time of my death, the share created for the child shall be held, administered, and distributed by the trustee in a separate trust according to the terms set forth in Article 4 applicable to the Separate Share Trust.

(c) If any of my children survive me, each share created for the issue of a deceased child shall be distributed outright to those issue \_\_\_\_\_ [in the manner provided in California Probate Code Section \_\_\_\_\_ (240 or 246 or 247) or in equal shares, regardless of whether or not all such issue are members of the same generation].

(d) If none of my children survive me, but I leave issue surviving, I give the residue of my estate outright to those issue, who are to take that property \_\_\_\_\_ [in the manner provided in California Probate Code Section \_\_\_\_\_ (240 or 246 or 247) or in equal shares, regardless of whether or not all such issue are members of the same generation].

(e) If none of my issue survive me, I give the residue of my estate to \_\_\_\_\_ [e.g., my heirs or the Regents of the University of California].

3.03. Allocation and Valuation of Assets. In allocating assets between the marital deduction gift and the bypass gift, the executor shall allocate the assets in my estate that qualify for the marital deduction between the marital deduction gift and the bypass gift in cash or in kind, or partly in each, on a pro rata or non pro rata basis, and in undivided interests or not; subject, however, to the following:

(a) Only assets that qualify for the marital deduction shall be allocated to the marital deduction gift.

(b) Assets allocated in kind shall be \_\_\_\_\_ [to use date of distribution values: valued for purposes of allocation on the date or dates of distribution or, to use valuation for estate tax purposes under "minimum worth" test: deemed to satisfy the marital deduction amount on the basis of their values as finally determined for federal estate tax purposes, but in no event shall the date of distribution values be less than the amount of the marital deduction or, to use valuation for estate tax purposes under "fair representation" test: deemed to satisfy the marital deduction amount on the basis of their values as finally determined for federal estate tax purposes; provided, however, that the executor shall act impartially, consistent with equitable principles requiring impartiality among beneficiaries, in allocating assets in satisfaction of the marital deduction gift, so that any distribution of assets in satisfaction of the marital deduction gift shall be made of assets, including cash, fairly representative of appreciation or depreciation in the value of all property thus available for distribution].

(c) The executor shall not allocate assets that qualify for the foreign death tax credit to the marital deduction gift unless all other assets or interests available for allocation have been so allocated.

[Optional: (d) Any incidents of ownership to a policy of insurance on the life of a person other than me shall be allocated to the bypass gift.]

3.04. Intention That Marital Deduction Gift Qualify for Marital Deduction. I intend that the marital deduction gift qualify for the federal estate tax marital deduction, and this instrument shall be construed accordingly. No fiduciary under this will shall take any action or exercise any power that may impair the federal estate tax marital deduction.

3.05. Disclaimer of Property by My Spouse. Any property or portion of property that is disclaimed by my \_\_\_\_\_ [wife or husband] shall pass to the trustee, in trust, to be held, administered, and distributed according to the terms set forth in Article 4 applicable to the Disclaimer Trust. [However, if my \_\_\_\_\_ (wife or husband) also disclaims an interest in all or any portion of the Disclaimer Trust, that disclaimed interest shall be administered and distributed as if my \_\_\_\_\_ (wife or husband) predeceased me.]

#### Article 4 : Trust Distributions

4.01. QTIP Trust. The trustee shall hold, administer, and distribute the assets of the QTIP Trust as follows:

(a) The trustee shall administer the trust in a manner that will not invalidate the election to have the trust qualify for the federal estate tax marital deduction under *Internal Revenue Code § 2056(b)(7)* (or any equivalent successor section), or disqualify the property in which my \_\_\_\_\_ [husband or wife] has a qualifying income interest for life. Any provisions of this trust that could be deemed to invalidate the qualification under *Internal Revenue Code § 2056(b)(7)* shall be disregarded.

(b) If an election is made under *Internal Revenue Code Section 2056(b)(7)* (or any equivalent successor section) to qualify some but not all of the property allocated to the QTIP Trust for the federal estate tax marital deduction, the QTIP Trust shall be divided into two separate trusts pursuant to the terms of the election. The division shall be based on the fair market value of the trust assets at the time of the division. One of the trusts shall contain the share of the trust assets for which the election has been made and shall be designated as the Qualifying QTIP Trust. The other trust shall contain the share of the trust assets for which the election has not been made and shall be designated the Nonqualifying QTIP Trust. The Nonqualifying QTIP Trust shall be subject to all of the rights, interests, powers, and other terms prescribed for the Qualifying QTIP Trust. If a partial election is made and the trust is divided into two separate trusts, the terms "trust," "marital deduction trust," and "QTIP Trust," as used in this section and elsewhere in this will, shall be construed in a manner consistent with the provisions of this subsection of the will.

[Optional: (c) The executor shall notify the trustee in writing if the executor intends to make an election under *Internal*

*Revenue Code Section 2056(b)(7)* (hereafter referred to as "the estate tax election") and also intends to make an election under *Internal Revenue Code Section 2652(a)(3)* (or any equivalent successor section) to have the estate tax election disregarded for federal generation-skipping transfer tax purposes with respect to some but not all of the property in the QTIP Trust. Upon receipt of written notification, the trustee shall divide the QTIP Trust into two separate trusts, to be known as the Exempt QTIP Trust and the Non-Exempt QTIP Trust, in accordance with \_\_\_\_\_ (*section of will concerning administration of generation-skipping trusts, e.g., Section 4.07*) of this will concerning the administration of generation-skipping trusts. Property allocated to the Exempt QTIP Trust must be fairly representative of the appreciation or depreciation of all QTIP Trust property. The executor shall then actually make the election under *Internal Revenue Code Section 2652(a)(3)* with respect to the Exempt QTIP Trust and not the Non-Exempt QTIP Trust. If a partial estate tax election is to be made, then this subsection, if applicable at all, shall apply only with respect to the Qualifying QTIP Trust. The trustee shall not be liable for relying on the written instructions of the executor when acting in accordance with the provisions of this subsection. Nothing in this subsection shall be construed as being inconsistent with \_\_\_\_\_ (*e.g., Section 4.07*) of this will concerning the administration of generation-skipping trusts, which shall apply to the QTIP trust without regard to the application of the remainder of this subsection.]

(d) The trustee shall pay to or apply for the benefit of my \_\_\_\_\_ [husband *or* wife], so long as my \_\_\_\_\_ [husband *or* wife] lives, the entire net income of the trust, in monthly or other convenient installments agreed upon by my \_\_\_\_\_ [husband *or* wife] and the trustee, but not less often than annually. [*Optional: In determining the net income of the trust distributable to my \_\_\_\_\_ (husband or wife), the trustee shall include all income that must be considered as income in order for the trust to qualify for the marital deduction under the federal estate tax law applicable to my estate, and shall make no deductions from gross income that would prevent the trust from qualifying for that marital deduction, notwithstanding any contrary provisions of this will or any applicable provisions of state law. Any grant of rights, powers, discretion, and authority to the trustee in any provision of this will or any statute relating thereto shall not be effective if and to the extent that the provision or statute, if effective, would disqualify, for federal estate tax purposes, the marital deduction trust held under this section of the will. It is my intention that my \_\_\_\_\_ (husband or wife), as the beneficiary of a marital deduction trust, shall have substantially that degree of beneficial enjoyment of the trust during \_\_\_\_\_ (his or her) lifetime that the principles of the law of trusts accord to a person who is unqualifiedly designated as the life beneficiary of a trust, and the trustee shall not exercise the trustee's discretion in a manner that is not in accord with this expressed intention. It is also my intention that the trust produce for my \_\_\_\_\_ (husband or wife) during \_\_\_\_\_ (his or her) lifetime the income, or that my \_\_\_\_\_ (husband or wife) shall have the benefit of the trust property, as is consistent with the value of the trust property and with its preservation.*]

(e) The trustee shall distribute to or apply for the benefit of my \_\_\_\_\_ [husband *or* wife], for life, as much of the principal of the trust as the trustee, in the trustee's discretion, deems necessary, when added to the income payments from this trust, for \_\_\_\_\_ [his *or* her] health, education, support, and maintenance [*or specify broader standard, e.g., comfort, welfare, and happiness*]. All decisions of the trustee regarding payments under this subsection, if any, are within the trustee's discretion and shall be final and incontestable by anyone.

(f) On the death of my \_\_\_\_\_ [husband *or* wife], the trustee, in the trustee's discretion, may pay the [taxes,] debts[,] and expenses arising on my \_\_\_\_\_ [husband's *or* wife's] death, unless the trustee determines that other adequate provisions have been made for payment of these expenses. Any payments made under this section \_\_\_\_\_ [may be made out of income or principal (or partly from each) of the QTIP Trust *or* shall be made first out of the income or principal of the QTIP Trust, and then out of the income or principal of the Bypass Trust to the extent that the QTIP Trust is insufficient for that purpose.

(g) Upon my \_\_\_\_\_ [husband's *or* wife's] death, the net income of the trust then accrued but uncollected and all net income remaining in the hands of the trustee shall be distributed to my \_\_\_\_\_ [husband's *or* wife's] estate. The trust principal shall be dealt with as set forth below in this section.

(h) The trustee shall determine from the personal representative of my \_\_\_\_\_ [husband's *or* wife's]

estate the amount of the federal estate tax allocable to the property of the trust by reason of *Internal Revenue Code Section 2207A* and shall set aside a portion of the trust principal for the purpose of paying that tax upon written demand of the personal representative.

(i) On the death of my \_\_\_\_\_ [husband *or* wife], the trustee shall distribute the balance of the principal of the QTIP Trust (or all of the QTIP Trust principal, if the personal representative of my \_\_\_\_\_ [husband's *or* wife's] estate does not in due course make written demand), in the manner specified in Section 4.02 applicable to the Bypass Trust. However, the property disposed of pursuant to this subsection shall not be considered to be a part of the Bypass Trust unless this trust and the Bypass Trust have the same inclusion ratios for federal generation-skipping transfer tax purposes].

4.02. Bypass Trust. The trustee shall hold, administer, and distribute the assets of the Bypass Trust as follows:

(a) The trustee shall pay or distribute to or apply for the benefit of my \_\_\_\_\_ [husband *or* wife], for life, in monthly or other convenient installments, but not less often than annually, as much of the net income of the trust, and as much of the principal of the trust, as the trustee, in the trustee's discretion, deems necessary for \_\_\_\_\_ [his *or* her] health, education, support, and maintenance. All decisions of the trustee regarding payments under this subsection, if any, are within the trustee's discretion and shall be final and incontestable by anyone. The trustee shall accumulate and add to principal any net income not distributed.

(b) On the death of my \_\_\_\_\_ [husband *or* wife], the trustee shall divide the trust property into as many shares of equal market value as are necessary to create one share for each of my children who survives my \_\_\_\_\_ [husband *or* wife], and one share for the issue who survive my \_\_\_\_\_ [husband *or* wife] of each of my children who predeceases my \_\_\_\_\_ [husband *or* wife].

(c) Each share created for a surviving child shall be distributed outright to that child if that child has reached the age of \_\_\_\_\_ [*e.g.*, 25] years. If the child has not reached the age of \_\_\_\_\_ years, the share created for the child shall be held, administered, and distributed by the trustee in the Separate Share Trust as *set forth in Section 4.03* of this will.

(d) Each share created for the issue of a deceased child shall be divided among those issue \_\_\_\_\_ [in the manner provided in California Probate Code Section \_\_\_\_\_ (240 *or* 246 *or* 247) *or* in equal shares, regardless of whether or not all such issue are members of the same generation]. The share of each issue shall be distributed outright to that issue.

(e) If all my children predecease my \_\_\_\_\_ [husband *or* wife] without leaving issue who survive my \_\_\_\_\_ [husband *or* wife], the trustee shall distribute any undistributed balance of the trust property outright to \_\_\_\_\_ [*alternative disposition, e.g.*, my heirs *or* the Regents of the University of California].

4.03. Separate Share Trust. The trustee shall hold, administer, and distribute the assets of the separate share created for each child as follows:

(a) The trustee shall pay or distribute to or apply for the benefit of that child, until \_\_\_\_\_ [he *or* she *or* he *or* she] reaches the age of \_\_\_\_\_ [*e.g.*, 25 years], in monthly or other convenient installments, but not less often than annually, as much of the net income of the trust, and as much of the principal of the trust, as the trustee, in the trustee's discretion, deems necessary for \_\_\_\_\_ [his *or* her *or* his *or* her] \_\_\_\_\_ [*to specify an "ascertainable standard":* health, education, support, and maintenance *or specify some other standard, e.g.*, comfort, welfare, and happiness]. All decisions of the trustee regarding payments under this subsection, if any, are within the trustee's discretion and shall be final and incontestable by anyone. The trustee shall accumulate and add to principal any net income not distributed.

(b) When that child reaches the age of \_\_\_\_\_ [e.g., 25] years, the trustee shall distribute to \_\_\_\_\_ [him or her or him or her] outright the balance of the trust property.

(c) If that child dies before the trust property has been distributed as provided in this section, the assets of \_\_\_\_\_ [his or her or his or her] separate share shall be divided among \_\_\_\_\_ [his or her or his or her] issue \_\_\_\_\_ [in the manner provided in California Probate Code Section \_\_\_\_\_ (240 or 246 or 247) or in equal shares, regardless of whether or not all such issue are members of the same generation]. The share of each issue shall be distributed outright to that issue. If that child dies without issue before the trust property has been distributed as provided in this section, the trustee shall distribute the entire undistributed balance of \_\_\_\_\_ [his or her or his or her] separate share outright among the other then-living persons for whom separate shares were created, and the issue of any deceased persons for whom separate shares were created, \_\_\_\_\_ [in the manner provided in California Probate Code Section \_\_\_\_\_ (240 or 246 or 247) or in equal shares, regardless of whether or not all such issue are members of the same generation]; provided, however, that if any part of that balance would otherwise be distributed to a person for whose benefit a trust is being administered under this section, that part shall instead be added to that trust and shall thereafter be administered according to its terms. If there are no surviving persons who may take the share of that child under this section, any remaining trust property shall be distributed outright to \_\_\_\_\_ [alternative disposition, e.g., my heirs or the Regents of the University of California].

4.04. Disclaimer Trust. The trustee shall hold, administer, and distribute the assets of the Disclaimer Trust as follows:

(a) The trustee shall pay or distribute to or apply for the benefit of my \_\_\_\_\_ [husband or wife], for life, in monthly or other convenient installments, but not less often than annually, as much of the net income of the trust, and as much of the principal of the trust, as the trustee, in the trustee's discretion, deems necessary for \_\_\_\_\_ [his or her] health, education, support, and maintenance. All decisions of the trustee regarding payments under this subsection, if any, are within the trustee's discretion and shall be final and incontestable by anyone. The trustee shall accumulate and add to principal any net income not distributed.

(b) On the death of my \_\_\_\_\_ [husband or wife], the trustee shall divide the trust property into as many shares of equal market value as are necessary to create one share for each of my children who survives my \_\_\_\_\_ [husband or wife], and one share for the issue who survive my \_\_\_\_\_ [husband or wife] of each of my children who predeceases my \_\_\_\_\_ [husband or wife].

(c) Each share created for a surviving child shall be distributed outright to that child if that child has reached the age of \_\_\_\_\_ [e.g., 25] years. If the child has not reached the age of \_\_\_\_\_ years, the share created for the child shall be held, administered, and distributed by the trustee in the Separate Share Trust as set forth in Section 4.03 of this will.

(d) Each share created for the issue of a deceased child shall be divided among those issue \_\_\_\_\_ [in the manner provided in California Probate Code Section \_\_\_\_\_ (240 or 246 or 247) or in equal shares, regardless of whether or not all such issue are members of the same generation]. The share of each issue shall be distributed outright to that issue.

(e) If all my children predecease my \_\_\_\_\_ [husband or wife] without leaving issue who survive my \_\_\_\_\_ [husband or wife], the trustee shall distribute any undistributed balance of the trust property outright to \_\_\_\_\_ [alternative disposition, e.g., my heirs or the Regents of the University of California].

4.05. Consideration of Beneficiary's Other Resources. In making any payments of income and distributions of principal from any trust created by this will for \_\_\_\_\_ [specify standard of discretion as set forth in

*provision authorizing the discretionary distribution, e.g., the health, education, support, and maintenance or care and comfort*] of any beneficiary, the trustee shall take into consideration, to the extent the trustee deems advisable, any other income or resources available to that beneficiary that are known to the trustee and that are reasonably available for that purpose.

4.06. Trustee's Power to Determine Income and Principal. Unless otherwise specifically provided in this will, the determination of all matters with respect to what is principal and income of any trust under this will and the apportionment and allocation of receipts, expenses and other charges between principal and income shall be governed by the provisions of the California Revised Uniform Principal and Income Act from time to time existing. The trustee in the trustee's discretion shall determine any matter not provided for either in this instrument or in the California Revised Uniform Principal and Income Act.

4.07. Administration of Generation-Skipping Trusts. The provisions of this section apply to any trust under this will in which there is property that is or may become subject to the federal generation-skipping transfer tax:

(a) If the executor intends to allocate any part of the generation-skipping transfer tax exemption that is available to me to some but not all of the property to be distributed to any trust to which this section of the will applies, the executor \_\_\_\_\_ [shall *or* may, in the executor's discretion,] obtain an order for distribution that divides the trust into two separate trusts, to be designated as the Exempt Trust and the Non-Exempt Trust. [*If executor has discretionary power to divide trusts: If the executor elects to divide a trust in the manner provided in this section, the* *or, if division of trusts is mandatory rather than discretionary: The*] Exempt Trust shall contain the share of the property of that trust equal in value to the amount of the generation skipping transfer tax exemption that the executor intends to allocate to the trust. The Non-Exempt Trust shall contain the balance of the property of that trust. The executor shall then actually allocate the generation-skipping transfer tax exemption to the Exempt Trust and not to the Non-Exempt Trust so that the Exempt Trust shall have an inclusion ratio of zero for federal generation-skipping transfer tax purposes and the Non-Exempt Trust shall have an inclusion ratio of one for federal generation-skipping transfer tax purposes.

(b) In allocating assets between the Exempt Trust and Non-Exempt Trust for purposes of this section, the executor shall \_\_\_\_\_ [*for a pecuniary allocation: allocate the trust assets between the Exempt Trust and Non-Exempt Trust in cash or in kind, or partly in each, on a pro rata or non pro rata basis, and in undivided interests or not* *or, for a fractional allocation: allocate to each trust a fractional share of each and every substantial interest or right held by the trust being divided*]. [*If preceding sentence provides for a pecuniary allocation, add: If the allocation is not made within 15 months from the date of my death, the executor shall pay interest, at the legal rate, from the date of my death to the date of distribution. For purposes of allocation under this section, assets shall be valued at their values* \_\_\_\_\_ (*to use date of distribution values: on the date or dates of distribution* *or, to use valuation for estate tax purposes: as finally determined for federal estate tax purposes; provided that any assets allocated in kind shall be allocated between the Exempt Trust and the Non-Exempt Trust in a manner that fairly reflects the net appreciation or depreciation in the value of the assets in the trust being divided, measured from the date of my death to the date of payment*).]

(c) Regardless of whether or not subsection (a) applies, if the amount of my generation-skipping transfer tax exemption actually allocated by the executor to a trust to which this section applies is equal to the value of the property of that trust so that the entire trust has an inclusion ratio of zero for federal generation-skipping transfer tax purposes, the entire trust shall be referred to as the Exempt Trust. On the other hand, if no part of my generation-skipping transfer tax exemption is actually allocated to the trust by the executor so that the entire trust has an inclusion ratio of one for federal generation-skipping transfer tax purposes (or if I am not the transferor of that trust for generation-skipping transfer tax purposes), the entire trust shall be referred to as the Non-Exempt Trust.

(d) The trustee may, but is not required to, administer the trusts under this will to which this section applies in such a manner that distributions made during the trust terms to "skip persons" (as defined in *Internal Revenue Code Section 2613(a)* or any equivalent successor section) are made from Exempt Trusts, and distributions made during the trust

terms to "non-skip persons" (as defined in *Internal Revenue Code Section 2613(b)* or any equivalent successor section) are made from Non-Exempt trusts.

[*Optional:* (e) If the trustee determines that the burdens of generation-skipping transfer taxes, income taxes, and death taxes on a Non-Exempt Trust, my estate, or the beneficiaries of that trust would be reduced, the trustee may petition the court to amend the trust to grant to one or more trust beneficiaries who are non-skip persons in a generation below me a general testamentary power of appointment over all or a specified portion of that Non-Exempt Trust. Any power to amend the trust is within the discretion of the court, and the preceding sentence shall not be construed to give the trustee any power that the trustee does not already have under California trust law to petition the court under the appropriate circumstances, nor shall it be construed to limit the power of the trustee or any beneficiary under the California trust law to petition the court under the appropriate circumstances.]

[(f)] The purpose of this section is to allow the trustee to administer the trusts so as to decrease the amount of generation-skipping transfer taxes owed on generation-skipping transfers from the trusts. The trustee shall balance that consideration against any other tax and non-tax considerations, and may disregard the generation-skipping transfer tax consequences to the extent that the trustee determines that doing so will allow the trustee to carry out my intentions in creating the trusts. All decisions of the trustee under this subsection are within the trustee's discretion and shall be final and incontestable by anyone.

[(g)] If, in the judgment of the executor or the trustee, at any time after the execution of this will, any statute, regulation, court decision, or administrative ruling imposes different or additional requirements on the trust in connection with the generation-skipping transfer tax, the executor or the trustee may petition the court to amend the terms of the trust to meet those requirements and achieve the purpose of this section.

[(h)] If, upon the death of my \_\_\_\_\_ [husband or wife], (1) my \_\_\_\_\_ [husband or wife] is considered to be the transferor of any Non-Exempt Trust established by this will for generation-skipping transfer tax purposes, and (2) my \_\_\_\_\_ [husband or wife]'s executor allocates any part of the generation-skipping transfer tax exemption that is available to my \_\_\_\_\_ [husband or wife] under *Internal Revenue Code Section 2631(a)* (or any equivalent successor section) to that Non-Exempt Trust so that the entire trust then has an inclusion ratio of zero for federal generation-skipping transfer tax purposes, that trust shall then be considered to be an Exempt Trust for purposes of this section of the will.

[(i)] In no event may the trustee exercise any power under this section in a manner that will impair the marital deduction.

#### Article 5 : Executor

5.01. Nomination of Executor. I nominate \_\_\_\_\_ [name and relationship to testator or other means of identification, e.g., my husband or my wife or my sister, Charlotte Silver Smith,] as executor of this will.

5.02. Successor Executors. If \_\_\_\_\_ [nominee(s) for initial executor, e.g., my husband or my wife or my sister, Charlotte Silver Smith,] is for any reason unable or unwilling to serve, or to continue to serve, as executor, I nominate the following, in the order of priority indicated, as successor executor:

First, \_\_\_\_\_ [name and description, e.g. (for coexecutors) my brother, Charles Edward Silver];

Second, \_\_\_\_\_ [name and description, e.g. (for individual) Herbert J. Gardner, who resides at \_\_\_\_\_ (address)];

Third, \_\_\_\_\_ [name and description, e.g. (for corporate executor) Double Eagle Bank, Fresno,

California office].

5.03. Definition of Executor. The term "executor," as used in this will, refers to each personal representative of my estate who is serving at the pertinent time.

5.04. Bond. \_\_\_\_\_ [No bond or undertaking *or* Bond] shall be required of any executor nominated in this will.

5.05. Independent Administration. The executor shall \_\_\_\_\_ [have full *or* not have] authority to administer my estate under the California Independent Administration of Estates Act.

5.06. Powers of Executor. Subject to any limitations stated elsewhere in this will, the executor shall have, in addition to all of the powers now or hereafter conferred on executors by law, and any powers enumerated elsewhere in this will, the power to perform any of the acts specified in this section:

(a) Take possession or control of all of my estate subject to disposition by this will, and collect all debts due to me or to my estate.

(b) Receive the rents, issues, and profits from all real and personal property in my estate until the estate is settled or delivered over by order of court to my heirs or beneficiaries.

(c) Pay taxes on, and take all steps reasonably necessary for the management, protection, and preservation of, all property in my estate.

(d) Commence and prosecute, either individually or jointly with my heirs or beneficiaries, any action necessary or proper to quiet title to or recover possession of any real or personal property in my estate.

(e) Vote in person, and give proxies to exercise, any voting rights with respect to any stock, any membership in a nonprofit corporation, or any other property in my estate, and waive notice of a meeting, give consent to the holding of a meeting, and authorize, ratify, approve, or confirm any action that could be taken by shareholders, members, or property owners.

(f) Insure the property of my estate against damage or loss, and insure the executor against liability to third persons.

(g) Deposit money belonging to my estate in an insured account in a financial institution in California.

(h) Invest and reinvest any money of my estate not reasonably required for the immediate administration of my estate in any kind of property, real, personal, or mixed, that persons of prudence, discretion, and intelligence acquire for their own accounts; provided, however, that in investing any property of my estate, the executor shall act with the care, skill, prudence, and diligence under the circumstances then prevailing, including but not limited to the general economic conditions and the anticipated needs of my estate and its beneficiaries, that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of like character and with like aims to accomplish the purposes of my estate as determined from this will.

(i) Retain any assets of my estate for as long as the executor deems to be in the best interest of my estate.

(j) Borrow money on behalf of my estate and pledge, hypothecate, or otherwise encumber property of my estate, real or personal, as security for any sums so borrowed.

(k) In order to satisfy a pecuniary gift or to distribute or divide estate assets into shares or partial shares, the executor may distribute or divide those assets in kind, or divide undivided interests in those assets, or sell all or any part of those assets and distribute or divide the property in cash, in kind, or partly in cash and partly in kind. Property distributed to satisfy a pecuniary gift under this will shall be valued at its fair market value at the time of distribution.

This section shall apply only to the extent that it does not conflict with the provisions of Articles 2 and 3 specifying allocation of assets involving the marital deduction gift and of Article 4 specifying allocation of assets involving generation-skipping trusts.

(l) Pay any and all charges reasonably incurred in connection with or incidental to the distribution of any property of my estate, including but not limited to expenses of storage, freight, shipping, delivery, packing, and insurance; and, on any accounting, treat any such expenditures as expenses of the administration of my estate.

(m) If any asset of my estate consists of an option right, exercise the option after authorization by order of court, upon a showing that the exercise would be to the advantage of my estate, and use any funds or property in my estate to acquire the property covered by the option.

(n) Hold a security in the name of a nominee or in any other form without disclosure of my estate so that title to the security may pass by delivery.

(o) Exercise any subscription rights owned or received by my estate by reason of owning securities, after authorization by court upon a showing that it is to the advantage of my estate.

(p) Sell, at either public or private sale and with or without notice, and grant options to purchase, any property belonging to my estate [*optional*], subject only to any confirmation of court required by law].

(q) Lease any real or personal property belonging to my estate on such terms and conditions as the executor determines to be in the best interest of my estate [*optional*], subject only to any confirmation of court required by law].

(r) Dispose of or abandon tangible personal property, except tangible personal property that is a specific gift, when the cost of collecting, maintaining, and safeguarding the property would exceed its fair market value.

(s) Compromise or settle any claim, action, or proceeding by or for the benefit of, or against, me, my estate, or the executor [*optional*], subject only to any confirmation of court that may be required by law].

(t) Employ professional investment counsel to make recommendations with respect to, and otherwise assist in, investing the assets of my estate; and, on any accounting, treat any fees paid to investment counsel as expenses of the administration of my estate.

5.07. Power to Make QTIP Election. I expect, but do not require, that the executor will elect to qualify all of the property allocated to the QTIP Trust for the federal estate tax marital deduction under *Internal Revenue Code Section 2056(b)(7)*, unless there is a compelling reason not to make any election or to make only a partial election. In determining whether to make a full or partial election, the executor shall consider the balance between (1) minimizing the estate tax both in my own estate and in the estate of my \_\_\_\_\_ [husband *or* wife]; and (2) assuring that the income to be generated for the benefit of my \_\_\_\_\_ [husband *or* wife] by the assets remaining after payment of death taxes will be adequate to allow my \_\_\_\_\_ [husband *or* wife] to maintain the lifestyle that we enjoyed prior to my death. If the executor elects to qualify any property allocated to the QTIP Trust for the federal estate tax marital deduction, the executor may elect, under any applicable provision of the Internal Revenue Code then in effect, to have all or any part of that estate tax election disregarded for purposes of the federal generation-skipping transfer tax.

5.08. Payments to Incapacitated Persons. If at any time any beneficiary under this will is a minor, or it appears to the executor that any beneficiary is incapacitated, incompetent, or for any other reason not able to receive payments or make intelligent or responsible use of the payments, then the executor, in lieu of making direct payments to the beneficiary, may make payments to the beneficiary's conservator or guardian; to the beneficiary's custodian under the Uniform Gifts to Minors Act or Uniform Transfers to Minors Act of any state (including a custodian selected by the executor); to one or more suitable persons as the executor deems proper, such as a relative of or a person residing with

the beneficiary, to be used for the beneficiary's benefit; to any other person, firm, or agency for services rendered or to be rendered for the beneficiary's assistance or benefit; or to accounts in the beneficiary's name with financial institutions. The receipt of payments by any of the foregoing shall constitute a sufficient acquittance of the executor for all purposes.

5.09. **Executor's Liability for Own Acts.** The executor shall not be liable to my estate or to any person interested in it for any act or omission of the executor, except an act or omission that is committed intentionally, with gross negligence, in bad faith, or with reckless indifference to the interests of persons interested in my estate, or an act or omission from which the executor derives a profit.

#### Article 6 : Trustee

6.01. **Nomination of Trustee.** I nominate \_\_\_\_\_ [*name of trustee and relationship to testator or other means of identification, e.g., my husband or my wife or my sister, Charlotte Silver Smith,*] as trustee of any trust created under this will.

6.02. **Successor Trustee.** If \_\_\_\_\_ [*nominee for initial trustee, e.g., my husband or my wife or my sister, Charlotte Silver Smith,*] is for any reason unable or unwilling to serve, or continue to serve, as trustee, I nominate the following, in the order of priority indicated, as trustee:

First, \_\_\_\_\_ [*name and description, e.g., my brother, Charles Edward Silver*];

Second, \_\_\_\_\_ [*name and description, e.g., Herbert J. Gardner, who resides at \_\_\_\_\_ (address)*];

Third, \_\_\_\_\_ [*name and description, e.g. (for corporate trustee): Double Eagle Bank, Fresno, California office*].

6.03. **Definition of Trustee.** Reference in this instrument to "the trustee" shall be deemed a reference to whoever is serving as trustee or co-trustees, and shall include alternate or successor trustees, unless the context requires otherwise.

6.04. **Removal and Replacement of Trustee.** Any trustee serving under this instrument may be removed as trustee at any time by court order upon petition by any beneficiary [or co-trustee], for any of the following grounds:

(a) Breach of trust.

(b) Insolvency or other unfitness to administer the trust.

(c) Hostility or lack of cooperation among the co-trustees that impairs the administration of the trust.

(d) Failure or refusal to act.

(e) Other good cause, as determined by the probate court. If a vacancy occurs in the office of trustee, whether by removal of a trustee or otherwise, the probate court shall appoint a new trustee to fill the vacancy. The court may, in its discretion, appoint the original number, or any lesser number of trustees. In selecting a trustee, the court shall give consideration to the wishes of the beneficiaries who are fourteen years of age or older.

6.05. **Bond.** \_\_\_\_\_ [No bond or undertaking or Bond] shall be required of any trustee nominated in this will.

6.06. **Compensation of Trustee.** The trustee shall be entitled to reasonable compensation for services rendered, payable without court order. [*Optional: If a trustee serves for only part of a calendar year, the annual compensation*

shall be prorated according to the number of days during that year that the trustee was acting as trustee.]

6.07. Procedure for Resignation. Any trustee may resign at any time, without giving a reason for the resignation, by giving written notice, at least \_\_\_\_\_ [specify; e.g., 30 days] before the time the resignation is to take effect, to any other trustee then acting, to any persons authorized to designate a successor trustee, to all living trust beneficiaries known to the trustee (or, in the case of a minor beneficiary, to the parent or guardian of that beneficiary), and to the successor trustee. A resignation shall be effective upon written acceptance of the trust by the successor trustee.

6.08. General Powers of Trustee. To carry out the purposes of the trusts created under this will, and subject to any limitations stated elsewhere in this will, the trustee shall have all of the following powers, in addition to all of the powers now or hereafter conferred on trustees by law:

(a) Retain property received into the trust at its inception, or later added to the trust, as long as the trustee considers that retention in the best interests of the trust or in furtherance of my goals in creating the trust, as determined from this will, but subject to the standards of the prudent investor rule as set forth in the California Uniform Prudent Investor Act.

(b) Invest and manage the trust assets as a prudent investor would, by considering the purposes, terms, distribution requirements, and other circumstances of the trust. In satisfying this standard, the trustee shall exercise reasonable care, skill, and caution. The trustee's investment and management decisions respecting individual assets and courses of action must be evaluated not in isolation, but in the context of the trust portfolio as a whole and as a part of an overall investment strategy having risk and return objectives reasonably suited to the trust.

(c) Retain or acquire unproductive or underproductive property; provided, however, that as to any assets of the QTIP Trust, my \_\_\_\_\_ [husband or wife] shall have the right, by delivery of a written instrument to the trustee, to require the trustee to make unproductive or underproductive property productive, or to convert it to productive property, within a reasonable time after receipt of the request.

(d) In the trustee's discretion, invest or reinvest in mutual funds, money market funds, investment trusts, regulated investment companies, market funds, and index funds, and in the shares or securities of any such funds or companies, that persons of prudence, discretion, and intelligence acquire for their own account.

(e) Acquire and maintain as a trust asset a life insurance policy on the life of any person, including the trustee, issued by any company and in any amount that the trustee may deem advisable, and to exercise all rights of ownership granted in that policy; provided, however, that as to any assets of the QTIP Trust, my \_\_\_\_\_ [husband or wife] shall have the right, by delivery of a written instrument to the trustee, to require the trustee to convert any such policy into productive property, within a reasonable time after receipt of the request.

(f) With or without court authorization, sell (for cash or on deferred payments, and with or without security), convey, exchange, partition, and divide trust property; grant options for the sale or exchange of trust property for any purpose, whether the contract is to be performed or the option is to be exercised within or beyond the term of the trust; and lease trust property for any purpose, for terms within or extending beyond the expiration of the trust, regardless of whether the leased property is commercial or residential and regardless of the number of units leased.

(g) Lend or advance the trustee's own funds to my estate or to any other trust created by me, for any purpose properly related to that estate or trust, with interest thereon at the then-prevailing rates, and to receive security for any such loans in any commercially reasonable form. The trustee may, from time to time, purchase or lease assets from, sell or lease assets to, and exchange assets with my estate at fair market values. [Optional: However, the fair market value of any asset sold, purchased, or leased pursuant to this provision must first be determined by an independent appraisal.]

(h) Engage in any transactions with the personal representative of my estate that are in the best interest of any trusts under this will.

- (i) Manage, control, improve, and maintain all real and personal trust property.
- (j) Subdivide or develop land; make or obtain the vacation of plats and adjust boundaries, or adjust differences in valuation on exchange or partition by giving or receiving consideration; and dedicate land or easements to public use with or without consideration.
- (k) Make ordinary or extraordinary repairs or alterations in buildings or other trust property, demolish any improvements, raze existing party walls or buildings, and erect new party walls or buildings, as the trustee deems advisable.
- (l) Enter into oil, gas, and other mineral leases, on terms deemed advisable by the trustee; enter into any pooling, unitization, repressurization, community, or other types of agreements relating to the exploration, development, operation, and conservation of mineral properties; drill, mine, and otherwise operate for the development of oil, gas, and other minerals; contract for the installation and operation of absorption and repressuring plants; and install and maintain pipelines. Any such leases or agreements may be for a term within or extending beyond the term of the trust.
- (m) In the trustee's discretion, abandon any [unproductive or wasted] trust asset or interest therein.
- (n) Employ and discharge agents and employees, including but not limited to attorneys, accountants, investment and other advisers, custodians of assets, property managers, real estate agents and brokers, and appraisers, to advise and assist the trustees in the management of any trusts created under this will, and compensate them from the trust property. [*Optional*: The agents and employees may be associated or affiliated with the trustee, or may be descendants or other persons related to the trustee or to me, or a company associated with any such persons.] [*Optional*: The trustee is entitled to rely on the advice of any professional advisers employed under this provision. Reasonable compensation paid to any such agents or employees shall not diminish the compensation to which the trustee is otherwise entitled.]
- (o) With respect to securities held in trust, exercise all the rights, powers, and privileges of an owner, including, but not limited to, the power to vote, give proxies, and pay assessments and other sums deemed by the trustee necessary for the protection of the trust property; participate in voting trusts, pooling agreements, foreclosures, reorganizations, consolidations, mergers, and liquidations, and, in connection therewith, deposit securities with and transfer title to any protective or other committee under such terms as the trustee deems advisable; exercise or sell stock subscription or conversion rights; and accept and retain as investments of the trust any securities or other property received through the exercise of any of the foregoing powers.
- (p) Hold securities or other trust property in the trustee's own name or in the name of a nominee, without disclosure of the trust, or in unregistered form, so that title may pass by delivery.
- (q) Deposit securities in a securities depository that is either licensed or exempt from licensing.
- (r) Borrow money for any trust purpose from any person or entity on such terms and conditions as the trustee deems advisable, and obligate the trust for repayment; encumber any trust property by mortgage, deed of trust, pledge, or otherwise, whether for terms within or extending beyond the term of the trust, as the trustee deems advisable, to secure repayment of any such loan; replace, renew, and extend any such loan or encumbrance; and pay loans or other obligations of the trust deemed advisable by the trustee.
- (s) In the trustee's discretion, make loans to beneficiaries out of funds of the trust and guarantee the repayment of loans made to beneficiaries by third parties by encumbering trust assets.
- (t) Procure and carry, at the expense of the trust, insurance in such forms and in such amounts as the trustee deems advisable to protect the trust property against damage or loss, and to protect the trustee against liability with respect to third persons.

(u) Enforce any obligation owing to the trust, including any obligation secured by a deed of trust, mortgage, or pledge held as trust property, and to purchase any property subject to a security instrument held as trust property at any sale under the instrument.

(v) Extend the time for payment of any note or other obligation held as an asset of, and owing to, the trust, including accrued or future interest, and extend the time for repayment beyond the term of the trust.

(w) Pay or contest any claim against the trust; release or prosecute any claim in favor of the trust; or, in lieu of payment, contest, release, or prosecution, adjust, compromise, or settle any such claim, in whole or in part, with or without consideration.

(x) At trust expense, prosecute or defend actions, claims, or proceedings of whatever kind for the protection of the trust property and of the trustee in the performance of the trustee's duties, and employ and compensate attorneys, advisers, and other agents as the trustee deems advisable.

(y) Accept additions to any trusts created by this will, from any source and at any time; all such additions shall become a part of the trust and shall be held, administered, and distributed in accordance with the terms of the trust. Any additions to the trust shall be made by designating in writing the property to be added. However, the titling of any account, deed, or similar asset in the name of the trustee, as trustee of the trust, shall be deemed to be a transfer to the trust. Any designation by a third party, whether by will, deed, account title designation, or similar transfer, shall also be a transfer to the trust estate. No addition shall become part of the trust estate until it is accepted in writing by the trustee.

6.09. Retention of Family Residence. The trustee shall retain, in any trust or trusts under this will, any of my interest in real property used by me and my \_\_\_\_\_ [husband *or* wife] as our principal residence at the time of my death ("the family residence"), and shall deal with the family residence in accordance with the following terms and conditions:

(a) During \_\_\_\_\_ [his *or* her] lifetime, my \_\_\_\_\_ [husband *or* wife] shall have the right to occupy the family residence (or any substitute residence or residential property purchased as provided in this section of the will) free of any rent.

(b) The trustee shall pay as much of the mortgage or note payments, property taxes, assessments, insurance, maintenance, and ordinary repairs on the family residence (or on any substitute residence or residential property purchased as provided in this section of the will) as corresponds to the trust's proportionate interest in the same. The trustee shall make those payments out of income or principal of the trust or trusts in accordance with the principles applicable to charging of payments under California law, but in no event shall payment be made in a manner that disqualifies any part of any trust, that would otherwise so qualify, for the federal estate tax marital deduction.

(c) My \_\_\_\_\_ [husband *or* wife] shall, at \_\_\_\_\_ [his *or* her] option, have the right to advise the trustee in writing that \_\_\_\_\_ [he *or* she] no longer wishes to occupy the family residence and to direct the trustee to sell it, or any interest therein. In deciding on the terms and conditions relating to any sale, the trustee shall take into account all relevant factors, including, but not limited to, my intent that no sale be made in a "forced sale" situation (other than at my \_\_\_\_\_ [husband's *or* wife's] direction) or at a time when, because of high mortgage rates or otherwise, the residential real estate market is depressed. In selling the family residence, the trustee may dispose of it on such terms as the trustee deems desirable, including an installment sale or any other desirable method of disposing of the family residence, provided that if the sale is for consideration other than cash, the purchaser's obligation shall be secured by a first deed of trust. In the event of a sale, my \_\_\_\_\_ [husband *or* wife] may direct the trustee in writing to apply the proceeds of the sale to the purchase of a substitute residence or residential property, of comparable or lesser value, to be selected by my \_\_\_\_\_ [husband *or* wife]; or to reinvest the proceeds in any manner that \_\_\_\_\_ [he *or* she] may direct, provided that any such investments satisfy normal fiduciary standards of prudence and safety, and to

use the income from reinvestment to pay the rental or lease payments on another residence or residential property, to be selected by my \_\_\_\_\_ [husband *or* wife]. Any net trust accounting income from any such investments, in excess of the trust share of the rental costs and any other expenses of trust administration, shall be added to the other trust income and distributed in accordance with the relevant provisions of the trust or trusts as set forth in Article \_\_\_\_\_ of this will.

[*Optional:* (d) If my \_\_\_\_\_ (husband *or* wife) does not direct the trustee to sell the family residence, \_\_\_\_\_ (he *or* she) shall have the right to direct the trustee in writing to lease it, or any interest in it. In the event of lease, the trustee shall continue to pay the expenses of maintaining the family residence as specified above, subject to the lease terms, and shall use the entire net income from the lease to pay the rental or lease payments on another residence or residential property, to be selected and occupied by my \_\_\_\_\_ (husband *or* wife). Any net trust accounting income from any lease of the family residence, in excess of the trust share of the cost of the rental or lease payments on another residence or residential property, shall be added to the other trust income and distributed in accordance with the relevant provisions of the trust or trusts, as set forth in Article \_\_\_\_\_ of this will.]

(e) Upon the death of my \_\_\_\_\_ [husband *or* wife], the trust interest in either the family residence, any proceeds remaining from the sale of the family residence, or any substitute residence or residential property purchased by the trustee with any proceeds of sale of the family residence, shall be distributed in accordance with the applicable provisions of the trust or trusts in which the interest or interests are held, as set forth in Article 4 of this will.

6.10. Power to Combine Trust Assets. Each trust created under this will shall constitute a separate trust and be administered and accounted for accordingly; however, the assets of all of the trusts may be combined and held for the trust beneficiaries without physical division into separate trusts until time of distribution.

6.11. Early Termination of Trusts. The trustee shall have the power, in the trustee's discretion, to petition the court to terminate any trust created under this will whenever the fair market value of the trust falls below \_\_\_\_\_ [*specify amount, e.g., \$25,000*] or becomes so small in relation to the costs of administration as to make continuing administration uneconomical or contrary to the primary purposes of the trust. Upon termination, the trustee shall distribute the principal and any accrued or undistributed net income to the income beneficiaries in proportion to their shares of the income. If no fixed amount of income is payable to specific beneficiaries, the trustee shall distribute the principal and any accrued or undistributed net income in equal shares to those beneficiaries who would then be entitled to income payments from the trust. [Notwithstanding any provision of law to the contrary, and except as otherwise provided in this will, the trustee may not terminate a trust before the trust term expires unless prior court authorization is obtained.]

6.12. Power to Delay Distributions. Following my death, the trustee shall have the power, in the trustee's discretion, to determine the reasonable administrative period necessary or appropriate to pay my debts, expenses, taxes, and other liabilities, before dividing or distributing the trust assets as provided herein, and to delay the division or distribution during that period. During that administrative period, the trustee, in the trustee's discretion, may accumulate the trust income, or distribute the income currently, or partially accumulate and partially distribute the income, as the trustee determines, but any income accumulated shall be distributable to the beneficiary or beneficiaries next entitled to distribution or allocation of the same upon conclusion of the administrative period. Nothing contained herein, however, shall delay the right of my spouse to receive income from a trust intended to qualify for the estate tax marital deduction beyond the period reasonably required for payment of or provision for the foregoing liabilities, or any other period that may be permitted under the applicable federal law and regulations relating to the allowance of the marital deduction.

6.13. Division or Distribution in Cash or in Kind. In order to satisfy a pecuniary gift or to distribute or divide trust assets into shares or partial shares, the trustee may distribute or divide those assets in kind, or divide undivided interests in those assets, or sell all or any part of those assets and distribute or divide the property in cash, in kind, or partly in cash and partly in kind. Property distributed to satisfy a pecuniary gift under this will shall be valued at its fair market

value at the time of distribution. This section shall apply only to the extent that it does not conflict with the provisions of Articles 2 and 3 specifying allocation of assets involving the marital deduction gift and of Article 4 specifying allocation of assets involving generation-skipping trusts.

6.14. **Payments to Incapacitated Persons.** If at any time any trust beneficiary is a minor, or it appears to the trustee that any trust beneficiary is incapacitated, incompetent, or for any other reason not able to receive payments or make intelligent or responsible use of the payments, then the trustee, in lieu of making direct payments to the trust beneficiary, may make payments to the beneficiary's conservator or guardian; to the beneficiary's custodian under the Uniform Gifts to Minors Act or Uniform Transfers to Minors Act of any state (including a custodian selected by the trustee); to one or more suitable persons as the trustee deems proper, such as a relative of or a person residing with the beneficiary, to be used for the beneficiary's benefit; to any other person, firm, or agency for services rendered or to be rendered for the beneficiary's assistance or benefit; or to accounts in the beneficiary's name with financial institutions. The receipt of payments by any of the foregoing shall constitute a sufficient acquittance of the trustee for all purposes.

6.15. **Grant of Specific Powers Not to Limit Exercise of General Powers.** The enumeration of specific powers under this will shall not limit the trustee from exercising any other power with respect to any trusts created by this will that may be necessary or appropriate for the trustee to have and exercise in order to carry out the purposes of the trusts or to permit the trustee to fulfill the trustee's responsibilities and duties with respect to the trust.

6.16. **Limitation on Powers That Would Imperil Marital Deduction.** Notwithstanding any other provision of this will, the trustee shall exercise power and discretion over any trust or trust share designed to qualify for the federal estate tax marital deduction only in a manner consistent with all statutory and regulatory requirements for the full allowance of the marital deduction for that trust or share.

6.17. **Power to Disclaim or Release Powers.** Any trustee may disclaim, release, or restrict the scope of any power or discretion that the trustee may hold in connection with any trust created under this will, whether the power or discretion is expressly granted in this will or is implied by law. The trustee shall disclaim a power in the manner required by applicable federal or California law. The trustee shall release or restrict any power or discretion by giving written notice to the beneficiary or beneficiaries then entitled to current distribution of income from the trust, specifying the power or discretion to be released or restricted, the nature of the restriction, and, if appropriate, the person or persons to whom the released or restricted power shall pass and be exercisable. If a power is disclaimed, the power shall be available to and exercisable by the successor trustee.

6.18. **Written Notice to Trustee.** Until the trustee receives written notice of any death or other event upon which the right to payments from any trust may depend, the trustee shall incur no liability for disbursements made in good faith to persons whose interests may have been affected by that event.

6.19. **Duty to Account.** The trustee shall render accounts at least annually, at the termination of a trust, and upon a change of trustees, to the persons and in the manner required by law.

#### Article 7 : Guardian

7.01. **Nomination of Guardian.** If a guardian of the person, estate, or person and estate is necessary for any minor child of mine, I nominate \_\_\_\_\_ [*name and relationship to testator or other means of identification, e.g., my sister, Charlotte Silver Smith or Herbert J. Gardner, who resides at \_\_\_\_\_ (address)*], as that guardian. If at any time \_\_\_\_\_ [*name, e.g., my sister, Charlotte Silver Smith or Herbert J. Gardner*] is unable or unwilling to serve, or to continue to serve, as guardian, I nominate \_\_\_\_\_ [*name and relationship to testator or other means of identification, e.g., my brother, Charles Edward Silver,*] as guardian.

7.02. **Bond.** \_\_\_\_\_ [No bond or undertaking *or* Bond] shall be required of any guardian of the estate nominated in this will.

## Article 8 : Concluding Provisions

8.01. Definition of Death Taxes. The term "death taxes," as used in this will, shall mean all inheritance, estate, succession, and other similar taxes that are payable by any person on account of that person's interest in my estate or by reason of my death, including penalties and interest, but excluding the following:

(a) Any additional tax that may be assessed under *Internal Revenue Code Section 2032A*.

(b) Any federal or state tax imposed on a generation-skipping transfer, as that term is defined in the federal tax laws [, unless the applicable tax statutes provide that the generation-skipping transfer tax on that transfer is payable directly out of the assets of my gross estate].

8.02. Payment of Death Taxes. The executor shall pay death taxes, whether or not attributable to property inventoried in my probate estate, by prorating and apportioning them among the persons interested in my estate as provided in the California Probate Code, except as follows:

(a) If my spouse survives me and the executor elects to qualify less than the entire property subject to the marital deduction gift made in Section 2.05 of this will for the federal estate tax marital deduction, any death taxes attributable to any part of that gift that the executor elects not to qualify for the marital deduction, or that is otherwise subject to a state transfer tax, shall be paid by the executor out of the Bypass Trust.

[Use to require that taxes on specific devise(s) be paid out of residue of estate or any bypass trust created in will:]

(b) Any death taxes attributable to the specific gift[s] made under Section[s] \_\_\_\_\_ [e.g., 2.01 and 2.02] of this will shall be paid by the executor out of \_\_\_\_\_ [my residuary estate or the Bypass Trust] without adjustment among the persons interested in my estate.

[Use to direct that taxes attributable to family allowance be paid out of residue:]

(c) Any death taxes attributable to any family allowance payable out of my estate shall be paid by the executor from my residuary estate without adjustment among the persons interested in my estate.

[Use to direct that taxes on excess retirement accumulations be paid out of residue:]

(d) Any taxes attributable to excess retirement accumulations as defined in *Internal Revenue Code Section 4980A* shall be paid by the executor from the residue of my estate without adjustment among the persons interested in my estate.

[Use to require that taxes on testator's community property interest in qualified plan benefits accumulated by testator's spouse be paid out of residue:]

(e) Any death taxes attributable to the inclusion in my estate of my community property interest in any qualified plan benefits accumulated through the employment of my spouse shall be paid by the executor from my residuary estate without adjustment among the persons interested in my estate.

[Use to direct that any generation-skipping transfer tax payable directly from the assets of the estate (direct skips) be paid out of residue:]

(f) Any generation-skipping transfer tax that is payable directly out of the assets of my estate shall be paid by the executor from my residuary estate without adjustment among the persons interested in my estate.

(g) The method of apportionment of death taxes specified in this will shall apply equally to any property passing

under any codicil to this will, except to the extent that a codicil expressly provides for a different method of apportionment.

**PRACTICE TIP:**

The allocation of taxes shown in this form is but one of many possible allocation schemes. In each case the drafter should carefully consider the nature of the client's assets, including whether those assets will pass under the will or otherwise, and the value of assets passing under the will as specific, rather than residuary, gifts. Only when these factors are considered can the appropriate tax allocation formula be selected. Other possible allocation clauses appear in CALIFORNIA WILLS & TRUSTS FORMS, Div. IV, *Individual Will Provisions*, Pt. 90, *Concluding Provisions*, Form 90.30 (Alts. 90.30-1-90.30-7); for more detailed discussion of tax allocation, see California Wills & Trusts, Ch. 23, *Provisions for Payment of Taxes, Expenses, and Debt* (Matthew Bender). *Commentary by Albert G. Handelman.*

8.03. Abatement of Gifts. If my estate is insufficient to satisfy in full all of the gifts provided for in this will, I direct that gifts shall abate in the following order: first general gifts, then specific gifts, then demonstrative gifts; provided, however, that the gifts to my \_\_\_\_\_ [husband *or* wife] shall not abate until all other gifts have abated [, and the gifts to my children shall not abate until gifts to all persons and entities other than my \_\_\_\_\_ (husband *or* wife) have abated]. All gifts of the same class shall abate proportionally.

8.04. Simultaneous Death. If any beneficiary under this will and I die simultaneously, or if it cannot be established by clear and convincing evidence whether that beneficiary or I died first, I shall be deemed to have survived that beneficiary, and this will shall be construed accordingly.

8.05. Intentional Omission of Heirs Not Specifically Provided For in Will. Except as otherwise specifically provided in this will, I have intentionally and with full knowledge omitted to provide for my heirs, regardless of whether or not I am aware of their existence and identities at the time this will is executed.

8.06. No-Contest Clause. If any person, directly or indirectly, contests the validity of this will in whole or in part, or opposes, objects to, or seeks to invalidate any of its provisions, or seeks to succeed to any part of my estate otherwise than in the manner specified in this will, any gift or other interest given to that person under this will shall be revoked and shall be disposed of as if he or she had predeceased me [*optional: without issue*].

8.07. Perpetuities Savings Clause. Notwithstanding any other provision of this will, every trust created by this will [, or by the exercise of any power of appointment created by this will,] shall terminate no later than 21 years after the death of \_\_\_\_\_ [*designate measuring life or lives, e.g., the last survivor of my spouse and my issue*] who are alive at the time of my death. If a trust is terminated under this section of the will, the trustee shall distribute all of the principal and undistributed income of the trust to the income beneficiaries of the trust in the proportion in which they are entitled (or eligible, in the case of discretionary payments) to receive income immediately before the termination. If that proportion is not fixed by the terms of this will, the trustee shall distribute all of the trust property to the persons then entitled or eligible to receive income from the trust \_\_\_\_\_ [*specify pattern of distribution, e.g., outright in a manner that, in the trustee's opinion, will give effect to my intent in creating the trust, the trustee's decision to be final and incontestable by anyone or as a class, in the manner provided in California Probate Code Section \_\_\_\_\_ (240 or 246 or 247) or in equal shares, regardless of whether all of such persons are members of the same generation*].

8.08. Definition of Incapacity. For purposes of this will, a person shall be deemed "incapacitated" if and for so long as a court of competent jurisdiction has made a finding to that effect, or a guardian or conservator of that person's estate or person duly appointed by a court of competent jurisdiction is serving, or upon certification by two physicians licensed to practice under the laws of the state where the person is domiciled at the time of the certification that the person is unable properly to care for himself or herself or for his or her property. The latter certification shall be made by each physician in a written declaration under penalty of perjury.

8.09. Definition of Education. As used in this will, the term "education" refers to the following:

- (a) Education at public or private elementary, junior high, middle, or high schools, including boarding schools;
- (b) Undergraduate, graduate, and postgraduate study in any field, whether or not of a professional character, in colleges, universities, or other institutions of higher learning;
- (c) Specialized formal or informal training in music, the stage, the handicrafts, or the arts, whether by private instruction or otherwise; and
- (d) Formal or informal vocational or technical training, whether through programs or institutions devoted solely to vocational or technical training, or otherwise.

8.10. Captions. The captions appearing in this will are for convenience of reference only, and shall be disregarded in determining the meaning and effect of the provisions of this will.

8.11. Severability Clause. If any provision of this will is invalid, that provision shall be disregarded, and the remainder of this will shall be construed as if the invalid provision had not been included.

8.12. California Law to Apply. All questions concerning the validity and interpretation of this will, including any trusts created by this will, shall be governed by the laws of the State of California in effect at the time this will is executed.

8.13. Gifts to "Heirs." For any gift to my heirs that is made outright in this instrument, those heirs shall be determined as if I had died intestate at the time for distribution, and the identity and shares of those heirs shall be determined according to the California laws of succession that concern separate property not acquired from a previously deceased spouse and that are in effect at my death. For any assets of any trust estate created by this will to be distributed to my heirs, those heirs shall be determined as if I had died intestate immediately following the termination of the trust of each share, and the identity and shares of those heirs shall be determined according to the California laws of succession that concern separate property not acquired from a previously deceased spouse and that are in effect at my death.

Executed on \_\_\_\_\_ [date], at \_\_\_\_\_ [city or town and state].

\_\_\_\_\_ [signature of testator]

[typed name]

On the date written above, we, the undersigned, each being present at the same time, witnessed the signing of this instrument by \_\_\_\_\_ [name of testator]. At that time, \_\_\_\_\_ [he or she] appeared to us to be of sound mind and memory and, to the best of our knowledge, was not acting under fraud, duress, menace, or undue influence. Understanding this instrument, which consists of \_\_\_\_\_ pages, including the pages on which the signature of \_\_\_\_\_ [name of testator] and our signatures appear, to be the will of \_\_\_\_\_ [name of testator], we subscribe our names as witnesses thereto. We declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on \_\_\_\_\_ [date], at \_\_\_\_\_ [city or town and state].

\_\_\_\_\_ [signature of first witness]

Residing at \_\_\_\_\_ [*street address*]

\_\_\_\_\_ [*city and state*]

\_\_\_\_\_ [*signature of second witness*]

Residing at \_\_\_\_\_ [*street address*]

\_\_\_\_\_ [*city and state*]

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsMarital Deduction TrustsEstate, Gift & Trust LawTrustsTestamentary TrustsEstate, Gift & Trust LawWillsGeneral Overview



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*23-62 California Legal Forms--Transaction Guide 62.syn*

**§ 62.syn Synopsis to Chapter 62: CODICILS**

§ 62.01 California Statutes

§§ 62.02- 62.19 [Reserved]

§ 62.20 Law Reviews

§ 62.21 Annotations

§ 62.22 Text References

[1] Related Forms With Tax Analysis

[2] Related California Forms

[3] Additional Text References

§§ 62.23- 62.29 [Reserved]

§ 62.30 Codicil Defined and Distinguished From New Will

§ 62.31 Statutory Authority, Form, and Content

[1] In General

[2] California Statutory Wills

§ 62.32 Rules of Interpretation and Construction

§ 62.33 Revocation of Codicil

[1] In General

[2] Effect of Revocation on Prior Will

§ 62.34 Effect of Revocation of Will on Codicils

§ 62.35 Codicil as Republication of Will

§ 62.36 Problems Involving Omitted Spouse or Child

§§ 62.37- 62.99 [Reserved]

Scope

§ 62.100 Facts

Scope

§ 62.101 Documents

Scope

§§ 62.102- 62.119 [Reserved]

§ 62.120 Preliminary Determinations

Scope

§ 62.121 Drafting Codicil

Scope

§ 62.122 Execution and Attestation of Codicil

Scope

§§ 62.123- 62.199 [Reserved]

§ 62.200 First Codicil Amending and Supplementing Will

[1] Comment

[a] Use of Form

[b] Republication of Will

[c] Proration of Death Taxes

[d] Execution of Codicil

[2] FORM

First Codicil Amending and Supplementing Will

§ 62.201 Second Codicil Supplementing, Partially Revoking, and Amending Will

[1] Comment--Use of Form

[2] FORM

Second Codicil Supplementing, Partially Revoking, and Amending Will

§ 62.202 First Codicil Nominating Substitute Executor

[1] Comment--Use of Form

[2] FORM

First Codicil Nominating Substitute Executor

§ 62.203 Second Codicil Revoking First Codicil

[1] Comment--Use of Form

[2] FORM

Second Codicil Revoking First Codicil

§ 62.204 Codicil Transmuting Property of Married Person

[1] Comment

[a] Use of Form

[b] Transmutation Requirements Under Estate of MacDonald

[c] Addition of New Section to Will

[2] FORM

Codicil Transmuting Property of Married Person



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CHAPTER 62 CODICILS

*23-62 California Legal Forms--Transaction Guide Scope*

**Scope**

Scope

This chapter covers codicils to wills. It includes a brief discussion of relevant law and several forms illustrating various uses of codicils. Ch. 61, *Will Drafting and Complete Will Forms*, and Ch. 63, *Will Provisions*, should be used in conjunction with this chapter.



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PART I. RESEARCH GUIDE

A. Primary Sources

*23-62 California Legal Forms--Transaction Guide § 62.01*

**§ 62.01 California Statutes**

"Will" includes codicil. *Prob. Code § 88.*

Requirements for execution of holographic will or codicil. *Prob. Code § 6111.*

Extrinsic evidence execution of holographic will or codicil. *Prob. Code § 6111.*

Extrinsic evidence admissible to determine whether document constitutes will. *Prob. Code § 6111.5.*

Revocation and revival of will or codicil. *Prob. Code §§ 6120-6124.*

Incorporation of written document by reference. *Prob. Code § 6130.*

California Statutory Will may be amended and revoked by codicil. *Prob. Code § 6226(a).*

Rules for interpretation of wills, trusts, deeds, and other instruments. *Prob. Code §§ 21101-21140.*

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Wills Codicils General Overview Estate, Gift & Trust Law Wills Codicils Effects Estate, Gift & Trust Law Wills Codicils Requirements



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PART I. RESEARCH GUIDE

A. Primary Sources

*23-62 California Legal Forms--Transaction Guide §§ 62.02- 62.19*

**[Reserved]**

§§ 62.02[Reserved]



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PART I. RESEARCH GUIDE

B. Secondary Sources

*23-62 California Legal Forms--Transaction Guide § 62.20*

**§ 62.20 Law Reviews**

Bird, "Revocation of a Revoking Codicil: The Renaissance of Revival in California," *33 Hastings L.J.* 357 (1981).

Lanctot, "Letter as a Will or Codicil: Testamentary Intent in California," *2 U.S.F. L. Rev.* 367 (1968).

Note, "Wills: Revocation by Marriage: Republication by Codicil," *44 Calif. L. Rev.* 171 (1956).

Note, "Wills--Revocation of a Codicil, by a Later Codicil," *23 So. Cal. L. Rev.* 427 (1950).

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawWillsCodicilsGeneral OverviewEstate, Gift & Trust LawWillsCodicilsEffectsEstate, Gift & Trust LawWillsCodicilsRequirements



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PART I. RESEARCH GUIDE

B. Secondary Sources

*23-62 California Legal Forms--Transaction Guide § 62.21*

**§ 62.21 Annotations**

"Wills: Separate gifts to same person in same or substantially same amounts, made in separate wills or codicils, as cumulative or substitutionary," *65 A.L.R.3d 1325 (1975)* .

"Revocation of will as affecting codicil and vice versa," *7 A.L.R.3d 1143 (1966)* .

"Implied revocation of will by later will or codicil," *59 A.L.R.2d 11 (1958)* .

"Letter as a will or codicil," *40 A.L.R.2d 698 (1955)* .

"Codicil as reviving revoked will or codicil," *33 A.L.R.2d 922 (1954)* .

"Codicil as validating will or codicil which was invalid or inoperative at time of its purported execution," *21 A.L.R.2d 821 (1952)* .

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawWillsCodicilsGeneral OverviewEstate, Gift & Trust LawWillsCodicilsEffectsEstate, Gift & Trust LawWillsCodicilsRequirements



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B. Secondary Sources

*23-62 California Legal Forms--Transaction Guide § 62.22*

**§ 62.22 Text References**

**[1] Related Forms With Tax Analysis**

Rabkin & Johnson, *Current Legal Forms*, Ch. 7, *Wills*, 7.49-7.51.

**[2] Related California Forms**

California Wills & Trusts Forms, Div. V, *Complete Codicils*; Div. VI, *Individual Codicil Provisions* (Matthew Bender).

**[3] Additional Text References**

California Wills & Trusts, Ch. 63, *Codicils* (Matthew Bender).

Murphy's Will Clauses, Ch. 1, *Examples of Complete Wills and Codicils*, Part B.

Witkin, *Summary of California Law*, vol. 14, *Wills and Probate*, §§ 159-161 (10th ed. 2005).

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Wills Codicils General Overview Estate, Gift & Trust Law Wills Codicils Effects Estate, Gift & Trust Law Wills Codicils Requirements



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B. Secondary Sources

*23-62 California Legal Forms--Transaction Guide §§ 62.23- 62.29*

**[Reserved]**

§§ 62.23[Reserved]



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*23-62 California Legal Forms--Transaction Guide § 62.30*

**§ 62.30 Codicil Defined and Distinguished From New Will**

A later testamentary writing that is supplementary to an earlier instrument is termed a "codicil" [ *Estate of Loud (1945) 70 Cal. App. 2d 399, 407, 161 P.2d 49* ]. A codicil is distinguished from a new will in that the codicil does not supersede a former will but merely adds to, supplements, qualifies, modifies, or alters a former will in some stated respects, and contemplates that the former will still exists and that reference to it is necessary for a complete disposal of the testator's estate [ *Estate of Benson (1944) 62 Cal. App. 2d 866, 871, 145 P.2d 668* ].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Wills Codicils General Overview Estate, Gift & Trust Law Wills Codicils Effects Estate, Gift & Trust Law Wills Codicils Requirements



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*23-62 California Legal Forms--Transaction Guide § 62.31*

**§ 62.31 Statutory Authority, Form, and Content**

**[1] In General**

The Probate Code does not establish any special requirements governing codicils. Rather, it defines "will" to include codicil and any testamentary instrument that merely appoints an executor or revokes or revises another will [*Prob. Code* § 88]. Thus, codicils are governed by the same requirements and rules of interpretation applicable to wills generally.

The statutory authority for modification of a will by codicil is *Prob. Code* § 6120(a), which provides that a will may be wholly or partially revoked by a subsequent will that revokes the prior will or part expressly or by inconsistency. Therefore, in order to be valid, a codicil must meet the requirements for either a holographic will [*see Prob. Code* § 6111; *Estate of Twohig* (1986) 178 Cal. App. 3d 555, 559-562, 223 Cal. Rptr. 352 (handwritten codicil was not valid holographic codicil because it was not signed by testator); *see also Ch. 61, Will Drafting and Complete Will Forms*, § 61.10[2][c]] or a witnessed will [*see Prob. Code* §§ 6110, 6112; *Crook v. Contreras* (2002) 95 Cal. App. 4th 1194, 1202-1203, 116 Cal. Rptr. 2d 319 (documents titled as trust amendments could potentially qualify as codicils if they satisfied legal requirements for wills and demonstrated testator's intent to dispose of property on death; documents in this case did not qualify as codicils because they had not been subscribed by two witnesses before testator's death as required by *Prob. Code* § 6110)]. The requirements for the witnessing and execution of witnessed wills are discussed in detail in *Ch. 61, Will Drafting and Complete Will Forms*, § 61.13, and are not repeated here.

A codicil need not take any particular form [*see Estate of Darms* (1966) 247 Cal. App. 2d 254, 257-259, 55 Cal. Rptr. 463 (letter as codicil)] as long as it qualifies as either a holographic or witnessed will. There is no requirement that a codicil be executed with the same formalities as the will that it modifies [*see Prob. Code* §§ 6113, 6120(a)]. Thus, a holographic codicil may be used to modify a witnessed will and vice versa. This was true even under the more restrictive provisions in effect prior to 1985 [*see In re Soher* (1889) 78 Cal. 477, 479-481, 21 P. 8]. The term "codicil" need not be used [*Estate of Carr* (1949) 93 Cal. App. 2d 750, 754, 209 P.2d 956] and it is not necessary for the codicil to make specific reference to the will [*see Estate of Cazaurang* (1941) 42 Cal. App. 2d 796, 798-799, 110 P.2d 138].

**[2] California Statutory Wills**

A California statutory will [ *see* § 61.21] may be amended by codicil in the same manner as any other will [*Prob. Code* § 6225(a)]. However, the codicil should not be written on the face of the will itself, inasmuch as any additions or deletions on the face of the statutory will form, other than in accordance with the instructions, are ineffective and will be disregarded [*Prob. Code* § 6225(b)].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Wills Codicils General Overview Estate, Gift & Trust Law Wills Codicils Effects Estate, Gift & Trust Law Wills Codicils Requirements



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*23-62 California Legal Forms--Transaction Guide § 62.32*

**§ 62.32 Rules of Interpretation and Construction**

The Probate Code contains a comprehensive set of rules for the interpretation of wills, trusts, and similar instruments [*see Prob. Code §§ 21101-21140*]. Since the Probate Code definition of "will" also includes codicils to wills [*see Prob. Code § 88*], these rules of interpretation are also applicable to codicils. These rules are discussed in *Ch. 61, Will Drafting and Complete Will Forms, § 61.20*. Some of these provisions have special relevance to codicils, however, and bear repetition here.

The words of a will must receive an interpretation that will give every expression some effect, rather than one that will render any of the expressions inoperative [*Prob. Code § 21120*]. All parts of a will are to be construed in relation to each other and, if possible, so as to form a consistent whole. If the meaning of any part of a will is ambiguous or doubtful, it may be explained by any reference to or recital of that part in another part of the will [*Prob. Code § 21121; see Prob. Code § 21101* (rule applicable to wills, trusts, deeds, and other instruments)]. This means that every attempt will be made, consistent with the intentions of the testator as expressed in a will and codicil, to reconcile the provisions of the two instruments so as to give effect to both and to avoid finding any inconsistencies or contradictions [*see Prob. Code § 21102(a)* (intention of transferor as expressed in instruments controls)].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawWillsCodicilsGeneral OverviewEstate, Gift & Trust LawWillsCodicilsEffectsEstate, Gift & Trust LawWillsCodicilsRequirementsEstate, Gift & Trust LawWillsInterpretationRules of ConstructionGeneral OverviewEstate, Gift & Trust LawWillsInterpretationRules of ConstructionStatutory Rules



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*23-62 California Legal Forms--Transaction Guide § 62.33***§ 62.33 Revocation of Codicil****[1] In General**

A codicil, like a will, may be revoked (wholly or partially) by a subsequent will or codicil that revokes the codicil expressly or by inconsistency [*Prob. Code § 6120(a)*; *see Prob. Code § 88* ("will" includes codicil)]. A codicil may also be revoked by being burned, torn, canceled, obliterated, or destroyed by the testator, or by another person in the testator's presence and at the testator's direction, with the intention and purpose of revoking it [*Prob. Code § 6120(b)*]. Certain provisions in a codicil may also be revoked if the testator's marriage is dissolved or annulled after the will is executed [*see Prob. Code § 6122* (revocation by annulment or dissolution of marriage)]. For a discussion of this type of revocation, see *Ch. 61, Will Drafting and Complete Will Forms, § 61.19[3]*. Similarly, if the testator has formed a domestic partnership and that partnership is later terminated, the termination revokes any codicil provisions devising property to the former domestic partner, creating powers of appointment in favor of the former domestic partner, or nominating the former domestic partner as executor, trustee, conservator, or guardian [*see Prob. Code § 6122.1* (revocation by termination of domestic partnership)]. For a discussion of this type of revocation, see *Ch. 61, Will Drafting and Complete Will Forms, § 61.19[4]*.

A presumption of revocation may arise if, under circumstances specified in the Probate Code, a duly executed will or codicil cannot be found after the testator's death [*see Prob. Code § 6124* (presumption of revocation)]; *see also Prob. Code § 88* ("will" includes codicil)]. For a discussion of this presumption, see *Ch. 61, Will Drafting and Complete Will Forms, § 61.19[2]*.

**[2] Effect of Revocation on Prior Will**

When a codicil is revoked, a question arises as to whether the revocation revives those portions of the will that had been modified or revoked by the codicil. The answer to that question is not entirely clear.

The Probate Code provides that revocation of a will that, had it remained in effect, would have revoked a prior will in whole or in part, does not revive the prior will unless it is evident that the testator intended the prior will to take effect as executed [*Prob. Code § 6123(a)*]. However, a decision under a similar but not identical provision of former law [former *Prob. Code § 75* (repealed Jan. 1, 1985)] refused to extend the application of that statute to codicils and instead

adopted the common law rule that revocation of a codicil leaves the original will in force and effect as written [ *Estate of Hering* (1980) 108 Cal. App. 3d 88, 95, 166 Cal. Rptr. 298 ]. Since the Probate Code now specifically defines "will" to include codicils [Prob. Code § 88]--a definition not found under prior law--and the current revival statute, unlike prior law, specifically refers to partial revocation [compare Prob. Code § 6123 with former Prob. Code § 75 (repealed Jan. 1, 1985)], it appears that this case may no longer be the law. However, further legislative or judicial action will be necessary for a final resolution of this point.

In any case, the question ultimately depends on the intent of the testator. If the codicil is revoked by an act of the testator, intent to revive the affected provisions in the original will may be shown by the circumstances of the revocation or by the testator's contemporary or subsequent declarations that the testator intended the will to take effect as originally written [Prob. Code § 6123(a)]. If the codicil is revoked by another codicil or a new will, intent to revive the affected provisions in the original will must be shown from the terms of the new codicil or will [Prob. Code § 6123(b)]. Thus, an attorney drafting an instrument that revokes a codicil can avoid the uncertainty noted in this section simply by specifying in the instrument whether or not the revocation is intended to revive any or all of the affected provisions in the original will.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawWill ContestsRevocationGeneral OverviewEstate, Gift & Trust LawWill

ContestsRevocationRequirementsEstate, Gift & Trust LawWillsCodicilsGeneral OverviewEstate, Gift & Trust

LawWillsCodicilsEffectsEstate, Gift & Trust LawWillsCodicilsRequirements



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DIVISION IV: WILLS AND TRUSTS  
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*23-62 California Legal Forms--Transaction Guide § 62.34*

**§ 62.34 Effect of Revocation of Will on Codicils**

Before January 1, 1985, former *Prob. Code* § 79 provided that the revocation of a will revoked all of its codicils [former *Prob. Code* § 79, repealed Jan. 1, 1985, by Stats. 1983, ch. 842, § 18]. The courts qualified this rule by providing that if a codicil was sufficiently complete to stand on its own as a will and the underlying will was revoked by the testator with the intent that the comprehensive terms of the codicil be given effect as the testator's final testamentary expression, the codicil became a will and was not revoked by revocation of the underlying will [ *Estate of Cuneo (1963) 60 Cal. 2d 196, 202, 32 Cal. Rptr. 409, 384 P.2d 1* ]. *Prob. Code* § 79 was repealed effective January 1, 1985, and not replaced by a comparable provision. The Law Revision Commission's notes to this repeal state that the failure to enact a comparable provision was intended to leave the question of whether revocation of a will revokes its codicils to case law development [16 Calif. L. Rev. Comm'n Rep. 2502 (1982)].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Will Contests Revocation General Overview Estate, Gift & Trust Law Will  
 Contests Revocation Later Writings Estate, Gift & Trust Law Wills Codicils General Overview Estate, Gift & Trust  
 Law Wills Codicils Effects Estate, Gift & Trust Law Wills Codicils Requirements



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DIVISION IV: WILLS AND TRUSTS  
 CHAPTER 62 CODICILS  
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*23-62 California Legal Forms--Transaction Guide § 62.35*

**§ 62.35 Codicil as Republication of Will**

Before January 1, 1985, the execution of a codicil referring to a previous will had the effect of republishing the will as modified by the codicil [*see former Prob. Code § 25 (repealed Jan. 1, 1985)*]. The Probate Code revision that became effective on January 1, 1985, did not continue this provision. The original purpose of the repealed provision was to extend the effect of a will to cover property acquired after the date the will was executed, and the authors of the 1985 revision felt that its continuation was unnecessary because under current law a will passes all property that the testator owns at death, including property acquired after execution of the will [16 Calif. L. Rev. Comm'n Rep. 2499 (1982)].

The republication rule was also used to incorporate by reference documents referred to in the will but not in the codicil that came into existence after the will was made but before the codicil was executed [*see Simon v. Grayson (1940) 15 Cal. 2d 531, 534, 102 P.2d 1081*]. Since the republication rule has been repealed, and since the general rule, expressed in *Prob. Code § 6130*, is that a writing may be incorporated in a will by reference only if it is in existence when the will is executed, it appears that a codicil may no longer be used to incorporate a post-testamentary document in the will.

Although a codicil no longer automatically acts as a republication of the will, this does not necessarily mean that a codicil cannot still have this effect if it expressly so provides. Since the paramount rule in the construction and interpretation of wills is to give effect to the intent of the testator [*Prob. Code § 21102(a)*], a statement in a codicil that it is intended to republish the will should still be given effect as an expression of testamentary intent. Accordingly, the codicil forms in this chapter contain such a provision. The attorney should bear in mind, however, that the validity and effect of such a provision under post-1985 law have not been judicially determined.

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
 Estate, Gift & Trust Law Will Contests Testamentary Formalities Publication Estate, Gift & Trust Law Will Codicils General Overview Estate, Gift & Trust Law Will Codicils Effects



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*23-62 California Legal Forms--Transaction Guide § 62.36***§ 62.36 Problems Involving Omitted Spouse or Child**

The Probate Code contains provisions that protect the inheritance rights of certain persons, who are referred to as "omitted heirs" [*see Prob. Code §§ 21600-21630*]. A spouse who was married and a child who was born or adopted after the execution of all of the decedent's "testamentary instruments" qualify as omitted heirs [*Prob. Code §§ 21610 (spouse), 21620*], as does a living child for whom the decedent made no provision in any of the decedent's "testamentary instruments" solely because the decedent believed the child to be dead or was unaware of the child's birth [*Prob. Code § 21622*]. For this purpose, the "decedent's testamentary instruments" means the decedent's will or revocable trust [*Prob. Code § 21601(a)*]. No other person who was in being at the time of the execution of the testamentary instruments will qualify as an omitted heir [for discussion, *see § 61.16[2], [3]*].

If a person marries or has a child after executing a will or a revocable trust instrument, and later executes a codicil that does not provide for the spouse or child, a question may arise as to whether the spouse or child qualifies as an omitted heir. The Probate Code provides that a spouse or child will not receive a share of the estate if the failure to provide for the child or spouse "in the decedent's testamentary *instruments* was intentional and that intention appears from the testamentary *instruments*" [*Prob. Code §§ 21611(a) (spouse), 21621(a) (child), emphasis added*]. There is no question that a codicil is a "testamentary instrument" [*see Prob. Code §§ 88 ("will" includes codicil), 21601(a) ("decedent's testamentary instruments" means the decedent's will or revocable trust)*]; but one instrument may not satisfy the requirement that the necessary intention appears from "the testamentary *instruments*." It may be argued that in determining the decedent's intentions respecting the spouse or child, the court should look at all of the instruments and, if any one of them reflects an intention not to provide for the spouse or child, the requirements of *Prob. Code §§ 21611(a)* and *21612(a)* will be satisfied. However, it is recommended that if a client wishes to exclude a spouse or child from any share in either the probate estate or the trust estate, the intention not to provide for the spouse or child should be clearly reflected in all the applicable instruments. When a codicil is drafted, the codicil should evidence that intention with respect to any persons who might qualify as omitted heirs. The intention not to provide for a person who would otherwise share in the client's estate is traditionally expressed in a disinheritance clause. For general discussion of disinheritance clauses, see *Ch. 61, Will Drafting and Complete Will Forms, § 61.17*.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Wills Codicils General Overview Estate, Gift & Trust Law Wills Codicils Effects Estate, Gift & Trust Law Wills Forced Heirs & Legitime Estate, Gift & Trust Law Wills Pretermitted Heirs General Overview Estate, Gift & Trust Law Wills Pretermitted Heirs Adopted Children



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*23-62 California Legal Forms--Transaction Guide §§ 62.37- 62.99*

**[Reserved]**

§§ 62.37[Reserved]



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PART III. TRANSACTION GUIDE

A. Client Interview--Facts and Documents

*23-62 California Legal Forms--Transaction Guide*

**NOTE:**

This portion of the Transaction Guide outlines facts and documents that will be needed in drafting a codicil; see *Ch. 60, Estate Planning*, §§ *60.100, 60.101* for a comprehensive list of facts and documents.



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A. Client Interview--Facts and Documents

*23-62 California Legal Forms--Transaction Guide § 62.100*

**§ 62.100 Facts**

1. Name, address, relationship to testator, and birthdate, if relevant, of:
  - a. New beneficiary.
  - b. Substitute or new executor.
  - c. Current beneficiary whose gift will be altered or corrected.
2. Change of bequest.
  - a. Bequest as it appears in original will, and to whom bequested.
  - b. Nature of change, such as same bequest to new beneficiary, different bequest to same beneficiary, or revocation or addition of bequest.
  - c. If new legacy to same beneficiary is of same nature as in original will, whether bequest is cumulative or substitutionary.
  - d. Alternate disposition in event beneficiary predeceases testator.
3. Other amendments to will.
  - a. Addition of provision to will.
  - b. Revocation of provision in will.

c. Correction of error in will.

d. Other changes in or additions to will, previous codicil, or both.

4. Whether testator has married or whether a child of testator has been born or adopted after execution of original will, and, if so, whether testator wishes to provide for that spouse or child.

NOTE: A spouse married and a child born or adopted after the execution of all of the testator's "testamentary instruments" will qualify as omitted heirs, and may be entitled to inherit part of the testator's estate in the absence of some provision in the testator's will, codicil, or revocable trust instrument, if any [*see Prob. Code §§ 21600-21630* (omitted spouses and children); *see also Prob. Code § 21601(a)* ("decendent's testamentary instruments" means the decedent's will or revocable trust)]. For general discussion of the inheritance rights of omitted heirs, see § 61.16[2], [3].

5. Whether testator's marriage has been dissolved or annulled since execution of original will.

NOTE: If, after executing a will, the testator's marriage is dissolved or annulled, the dissolution or annulment revokes any disposition of property made by the will to the former spouse [*Prob. Code § 6122(a)(1)*]. Similarly, the termination of the testator's domestic partnership revokes any disposition or appointment of property made by the will to the former domestic partner [*Prob. Code § 6122.1(a)(1)*]. For discussion, see *Ch. 61, Will Drafting and Complete Will Forms*, § 61.19[4]. In most cases, this revocation will disrupt the testamentary scheme to such an extent that execution of a new will is preferable to drafting a codicil.

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawWillsGeneral OverviewEstate, Gift & Trust LawWillsCodicilsGeneral OverviewEstate, Gift & Trust LawWillsCodicilsRequirements



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A. Client Interview--Facts and Documents

*23-62 California Legal Forms--Transaction Guide § 62.101*

**§ 62.101 Documents**

1. Original or copy of original will.
2. Prior codicils, if any.

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Estate, Gift & Trust LawWillsGeneral OverviewEstate, Gift & Trust LawWillsCodicilsGeneral OverviewEstate, Gift & Trust LawWillsCodicilsEffectsEstate, Gift & Trust LawWillsCodicilsRequirements



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A. Client Interview--Facts and Documents

*23-62 California Legal Forms--Transaction Guide §§ 62.102- 62.119*

**[Reserved]**

§§ 62.102[Reserved]



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DIVISION IV: WILLS AND TRUSTS  
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*23-62 California Legal Forms--Transaction Guide § 62.120*

### **§ 62.120 Preliminary Determinations**

1. Determine purpose of codicil.

a. Amendment of will (*e.g.*, to increase gift to particular beneficiary) [ *see* § 62.200-62.202].

b. Supplement to will (*e.g.*, to add gift to new beneficiary or new gift to present beneficiary) [ *see* §§ 62.200, 62.201].

c. Revocation of will.

(1) Codicil may be used to revoke will in its entirety [*Prob. Code* § 6120(a); *see Prob. Code* § 88 ("will" includes codicil)], but it is seldom used for this purpose because new will is better for completely revoking will in conjunction with new disposition of estate.

(2) Codicil can be used to partially revoke will, such as to delete a provision for a particular bequest [ *see* § 62.201].

d. Revocation of previous codicil [ *see* § 62.203].

e. Republication of will.

NOTE: The former rule that a codicil automatically had the effect of republishing the will [former *Prob. Code* § 25 (repealed eff. Jan. 1, 1985)] has been repealed. For a discussion of current uncertainties resulting from this repeal, including whether a testator can specifically provide in the codicil that it acts as a republication of the will, *see* § 62.35.

f. Revival of revoked will [ *see Prob. Code* § 6123(b)].

g. Validation of invalid will, such as incorporating by reference a will not properly executed into a properly executed codicil [*see Estate of Plumel (1907) 151 Cal. 77, 79, 90 P. 192 ; see also Prob. Code § 6130*].

2. Determine whether codicil, rather than new will, should be drafted, and consider the following:

a. Effect that codicil will have on will.

NOTE: Codicils ordinarily should only be used to make minor changes in the will. If the changes are extensive, it is considered better practice to have an entirely new will executed.

b. Executing a codicil will require:

(1) Proving the proper execution of two separate documents for admission of will and codicil to probate.

(2) Probating and referring to two separate documents at all times during probate administration.

c. Any discrepancies between will and codicil can cause problems in interpretation.

NOTE: For example, in *Estate of Steele [(1980) 113 Cal. App. 3d 106, 117-120, 169 Cal. Rptr. 635]*, the court concluded that a holographic codicil which left an annuity to a companion of the testator indicated an intention that the annuity recipient was to receive the stated amount without a pro rata deduction for death taxes, despite the absence of any express language to that effect.

An attorney drafting a codicil that adds a specific bequest should consider the effect of the bequest on the apportionment of death taxes in the overall estate, and in appropriate instances should specify whether or not a pro rata deduction is intended [for discussion of apportionment of taxes, *see Ch. 63, Will Provisions, § 63.310[1]*].

d. While any number of codicils can be made, several codicils complicate problems referred to above; therefore, if one or two codicils have already been made, execution of new will is preferable to execution of another codicil.

e. If testator's marriage has been dissolved or annulled, or the testator's domestic partnership has been terminated, since execution of original will, it is likely that testamentary scheme has been disrupted to such an extent that execution of new will is preferable to amendment of existing will by codicil [*see Prob. Code §§ 6122(a), (c), 6122.1(a), (c)*].

### Legal Topics:

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawWillsCodicilsGeneral OverviewEstate, Gift & Trust LawWillsCodicilsEffectsEstate, Gift & Trust LawWillsCodicilsRequirements



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*23-62 California Legal Forms--Transaction Guide § 62.121*

**§ 62.121 Drafting Codicil**

1. Select most appropriate model form for codicil.

- a. First codicil amending and supplementing will [§ 62.200].
- b. Second codicil supplementing, partially revoking, and amending will [§ 62.201].
- c. First codicil nominating substitute executor [§ 62.202].
- d. Second codicil revoking first codicil [§ 62.203].

e. Codicil giving testator's interest in certain property to surviving spouse to meet transmutation requirements of *Estate of MacDonald* [ see § 62.204].

NOTE: In *Estate of MacDonald* [see *Estate of MacDonald (1990) 51 Cal. 3d 262, 272, 272 Cal. Rptr. 153, 794 P.2d 911* ] the California Supreme Court held that words by which one spouse "gives" the other spouse any interest the first spouse may have in a particular account or asset will constitute an "express declaration" for purposes of *Fam. Code § 852(a)* and thus satisfy the requirements for a valid transmutation of the property [see *Fam. Code § 852(a)*]. This kind of transmutation can be important when a revocable inter vivos trust is funded [ see Ch. 73, *Funding a Revocable Trust* ]. For a general discussion of transmutation requirements and *Estate of MacDonald*, see § 73.12[3].

2. Draft codicil, making appropriate modifications to model form selected.

- a. Observe general rules and suggestions applicable to drafting of wills [ see Ch. 61, *Will Drafting and Complete Will Forms* ].

b. If codicil being prepared is not first codicil to will, clearly refer to each previous codicil.

c. If codicil revokes an earlier codicil that amended or revoked portions of will, be sure to specify whether or not revocation of codicil is intended to revive those revoked or amended provisions.

NOTE: There is some uncertainty regarding whether or not revocation of a codicil revives portions of the will that had been modified or revoked by the codicil in the absence of a statement of testamentary intent. For discussion of the problem, *see* § 62.33[2]. However, this uncertainty can easily be avoided simply by clearly specifying the intended effect on any provisions in the will that were modified or revoked by the prior codicil [*see Prob. Code* § 6123(b)].

d. If codicil incorporates any document by reference:

(1) Clearly identify document; and

(2) State date document was executed or otherwise came into existence [*see Prob. Code* § 6130].

NOTE: A codicil, like a will, should not attempt to incorporate by reference a document not in existence at the time the will is executed [*Prob. Code* § 6130], such as a trust that has not yet been drafted or a letter containing testamentary instructions that has not yet been written.

e. If codicil adds one or more specific bequests, specify effect of those bequests on apportionment of death taxes in overall estate, and, if appropriate, whether or not pro rata deduction is intended [for discussion of apportionment of taxes, *see* Ch. 63, *Will Provisions*, § 63.310[1]].

f. If testator has either married or had a child subsequent to date will was originally executed, modify codicil to either:

NOTE: If a person marries or has a child after executing a will or a revocable trust instrument, and later executes a codicil that does not provide for the spouse or child, a question may arise as to whether the spouse or child qualifies as an omitted heir [*see* discussion under § 62.36]. The rights of omitted spouses and children are defined in *Prob. Code* §§ 21600-21630. For general discussion of these rights, see § 61.16[2], [3]. Questions of this kind can be avoided by either providing for the spouse or the child in the codicil, or by including a provision clearly stating the intention not to provide for the spouse or the child. Intention not to provide for a spouse or child is traditionally expressed in a disinheritance clause [for discussion, *see* § 61.17].

(1) Provide for that spouse or child; or

(2) Identify that spouse or child by name and specifically state that testator has intentionally failed to provide for that spouse or child.

### Legal Topics:

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Wills Codicils General Overview Estate, Gift & Trust Law Wills Codicils Effects Estate, Gift & Trust Law Wills Codicils Requirements



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*23-62 California Legal Forms--Transaction Guide § 62.122*

**§ 62.122 Execution and Attestation of Codicil**

1. Before codicil is signed, review codicil, original will, and any prior codicils to make certain that meaning of codicil is clear and unambiguous, and that all references to dates, paragraph numbers, or page numbers are correct.
2. Have codicil executed and attested in same manner as a will.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Will Contests Testamentary Formalities General Overview Estate, Gift & Trust Law Will Contests Testamentary Formalities Witnesses Attestation & Subscription Estate, Gift & Trust Law Wills Codicils General Overview Estate, Gift & Trust Law Wills Codicils Requirements Estate, Gift & Trust Law Wills Execution



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*23-62 California Legal Forms--Transaction Guide §§ 62.123- 62.199*

**[Reserved]**

§§ 62.123[Reserved]



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DIVISION IV: WILLS AND TRUSTS  
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PART IV. FORMS

*23-62 California Legal Forms--Transaction Guide § 62.200*

**§ 62.200 First Codicil Amending and Supplementing Will**

**[1] Comment**

**[a] Use of Form**

This form is a codicil that may be used to make a change in a paragraph of a previously executed will and to add a new paragraph to the same will. It is assumed that this will be the first codicil to the will.

Codicils of this kind are frequently used when testators wish to change the names of devisees or the amounts or descriptions of testamentary gifts. If the changes are relatively minor and the will is lengthy, it may be more expedient to execute a codicil than a new will. However, a codicil should be drafted with caution. If a gift originally made in the will is also made in the codicil, the drafter must clearly indicate whether the gift is intended to be in addition to, or instead of, the original gift, inasmuch as a second gift of quantity to the same legatee is presumed to be cumulative unless there is intrinsic evidence of contrary intent [ *Estate of Lund (1973) 110 Cal. Rptr. 183* ]. For factors that should be considered in determining whether to draft a codicil or a new will, see § 62.120, P 2.

**[b] Republication of Will**

This form (and the other codicil forms in this chapter) contains language purporting to confirm and republish the testator's will. Republication is discussed under "Codicil as Republication of Will" in the Legal Background. As noted in that discussion, repeal of the former rule that a codicil automatically republished the will [see former *Prob. Code* § 25, repealed Jan. 1, 1985] raises some uncertainty as to the validity of a republication provision in a codicil. It seems likely, however, that a republication provision would be held valid, even absent specific statutory authority, as a clear expression of testamentary intent [see *Prob. Code* § 21102(a) (intent of testator); see also *Prob. Code* § 6130 (incorporation of documents by reference)]. In any event, its inclusion is unlikely to have any adverse effects.

**[c] Proration of Death Taxes**

This form also contains an optional provision specifying what property will bear the burden of payment of any estate taxes attributable to property that passes under the codicil. It is the general rule that estate taxes must be equitably

prorated among the persons interested in the estate [*Prob. Code § 20110(a)*]. However, the testator may direct that specific property be applied to the satisfaction of an estate tax or that specific sums or proportions of the estate tax be satisfied from particular gifts [*Prob. Code § 20110(b)(1)*]. The will may provide, for example, that all of the death taxes will be paid out of the residue of the estate [for a will provision requiring payment of all death taxes out of residue, *see Ch. 63, Will Provisions, § 63.310*]. If, however, the will specifies a particular scheme for proration of death taxes and the testator later executes a codicil making additional gifts, doubts may arise as to whether the testator intended the additional gifts to be subject to the proration scheme [*see, e.g., Estate of Steele (1980) 113 Cal. App. 3d 106, 117-120, 169 Cal. Rptr. 635* (annuity not subject to payment of taxes)]. A careful drafter will clearly specify whether the proration scheme set forth in the will (or any other proration scheme) is also intended to apply to the gifts made in the codicil.

The statutory procedure for prorating estate taxes does not include consideration of future income tax consequences. Unless income tax consequences can be ascertained with reasonable certainty for purposes of equitable reallocation at the time of distribution, the beneficiaries of an estate are responsible for paying their own future income taxes [ *Klein v. Hughes (2005) 133 Cal. App. 4th 121, 128-131, 34 Cal. Rptr. 3d 613* ].

For a general discussion of proration of death taxes, *see Ch. 63, Will Provisions, § 63.310[1][d]*.

#### **[d] Execution of Codicil**

The requirements for execution of a witnessed codicil are the same as those for a witnessed will [*see Prob. Code §§ 6110, 6112; see also Prob. Code § 88* ("will" includes codicil) and *Ch. 63, Will Provisions, §§ 63.710[1], 63.720[1]*]. The signature and attestation clauses in this form (like the signature and attestation clauses in the other forms in this chapter) may be used when the testator is able to sign his or her own name. They include two alternative provisions, one of which may be used when the witnesses have witnessed the signing of the will and the other of which may be used when the witnesses have witnessed the acknowledgment of the signature or the acknowledgment of the will [*see Prob. Code § 6110(b), (c)*].

If the codicil is to be signed in the testator's name and at the testator's direction by a person other than the testator [*see Prob. Code § 6110(b)(2)*], the signature clause in § 63.711 and the attestation clause in § 63.731, both in *Ch. 63, Will Provisions*, should be used in place of the signature and attestation clauses in this form. If the codicil is to be signed by witnessed mark, use the forms in *Ch. 63, Will Provisions, § 63.712* (signature clause) and § 63.732 (attestation clause) in place of the clauses in this form. If the testator is sight-impaired or sightless, use the form in *Ch. 63, Will Provisions, § 63.733* in place of the attestation clause in this form.

#### **[2] FORM**

##### **First Codicil Amending and Supplementing Will**

**FIRST CODICIL TO WILL OF** \_\_\_\_\_ [*insert same name of testator as it appears in will*]

I, \_\_\_\_\_ [*insert name of testator as above*], residing in \_\_\_\_\_ County, California, declare this to be the First Codicil to my will dated \_\_\_\_\_ [*date of execution of will*].

##### **FIRST**

Paragraph \_\_\_\_\_ [*e.g., 5(a)*] on page \_\_\_\_\_ [*e.g., 10*] of the above mentioned will is hereby revoked and the following

is substituted in its place: \_\_\_\_\_ [e.g., I give the sum of \$5,000 to my nephew, John Adams, 708 First Street, Fresno, California; if he should predecease me, this legacy shall be disposed of as part of the residue of my estate].

## SECOND

The following new Paragraph \_\_\_\_\_ [e.g., 7(b)] is added to page \_\_\_\_\_ [e.g., 12] of the above mentioned will: \_\_\_\_\_ [e.g., I give my 1968 Ford four-door automobile, license number 337 UCK, to my grandson, Charles Smith, 1479 High Street, San Diego, California; if I do not own the aforesaid automobile at the time of my death or if he should predecease me, this legacy shall lapse].

[Optional Provision:]

## THIRD

I direct that all federal estate taxes and any state taxes payable as the result of my death on the property passing under \_\_\_\_\_ [specify appropriate paragraph(s), e.g., Article Second] of this Codicil shall be paid \_\_\_\_\_ [in the manner specified in Paragraph \_\_\_\_\_ of the above mentioned will or specify manner in which death taxes will be paid, e.g., solely out of that property and not out of any other property in my estate].

[Continue with the following:]

## FOURTH

In every other respect I hereby confirm and republish my will dated \_\_\_\_\_ [date of execution of will].

The foregoing First Codicil to my will dated \_\_\_\_\_ [date of execution of will] is subscribed by me on the \_\_\_\_\_ day of \_\_\_\_\_ at \_\_\_\_\_, California.

\_\_\_\_\_ [signature of testator]

[typed name]

[First alternative: witnesses to testator's signature]

On the date written below, we, the undersigned, each being present at the same time, witnessed the signing of this instrument by \_\_\_\_\_ [full name of testator].

[OR]

[Second alternative: witnesses to acknowledgment of will or of testator's signature]

On the date written below, we, the undersigned, each being present at the same time, witnessed the acknowledgment of \_\_\_\_\_ [the signature of this instrument or this instrument] by \_\_\_\_\_ [full name of

testator].

[Continue with the following:]

[Add the following statement as to capacity, if desired: At that time, \_\_\_\_\_ [full name of testator] appeared to us to be of sound mind and memory and, to the best of our knowledge, was not acting under fraud, duress, menace, or undue influence.]

Understanding this instrument, which consists of \_\_\_\_\_ [number] pages, including this page, to be the First Codicil to the will of \_\_\_\_\_ [full name of testator] dated \_\_\_\_\_, we now subscribe our names as witnesses thereto.

We declare under penalty of perjury that the foregoing is true and correct. Executed at \_\_\_\_\_ [place of execution], California, on \_\_\_\_\_ [date] .

\_\_\_\_\_ [signature of witness]

[typed name]

Residing at \_\_\_\_\_ [street address]

\_\_\_\_\_ [city, state and zip]

\_\_\_\_\_ [signature of witness]

[typed name]

Residing at \_\_\_\_\_ [street address]

\_\_\_\_\_ [city, state and zip]

### Legal Topics:

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawWillsCodicilsGeneral OverviewEstate, Gift & Trust LawWillsCodicilsEffectsEstate, Gift & Trust LawWillsCodicilsRequirements



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DIVISION IV: WILLS AND TRUSTS  
CHAPTER 62 CODICILS  
PART IV. FORMS

*23-62 California Legal Forms--Transaction Guide § 62.201*

**§ 62.201 Second Codicil Supplementing, Partially Revoking, and Amending Will**

**[1] Comment--Use of Form**

This form is a second codicil to a will. It adds a new provision to the will, revokes another provision without substitution, and modifies a third provision. It differs from § 62.200 in that it illustrates the use of a codicil for revoking a provision of the will, and the appropriate provision for a second codicil in the Introductory Paragraph and in Article Fifth.

A second codicil to a will need not refer to the first codicil. However, if the second codicil does not refer to the first, there may be a question of whether the second revokes the first [*see Estate of Dubois (1949) 211 P.2d 895*]. For additional discussion of problems relating to revocation of a codicil, see § 62.33.

For further discussion of the use of codicils, see § 62.200[1].

**[2] FORM**

**Second Codicil Supplementing, Partially Revoking, and Amending Will**

**SECOND CODICIL TO WILL OF** \_\_\_\_\_ [*insert same name of testator as it appears in will*]

I, \_\_\_\_\_ [*insert name of testator as above*], residing in \_\_\_\_\_  
County, California, declare this to be the Second Codicil to my will dated \_\_\_\_\_ [*date of execution of will*], as amended by the First Codicil thereto dated \_\_\_\_\_ [*date of execution of first codicil*].

**FIRST**

The following new Paragraph \_\_\_\_\_ [*e.g., 2(b)*] is added to page \_\_\_\_\_ [*e.g., 12*] of the above mentioned will:  
\_\_\_\_\_ [*e.g., I direct that my funeral be conducted in accordance with that certain agreement dated*

September 7, 1970, between myself and White Mortuary, 1740 Eighth Avenue, San Francisco, California, and that no further or different funeral arrangements be made by my heirs].

## SECOND

Paragraph \_\_\_\_\_ [e.g., 4(c)] on page \_\_\_\_\_ [e.g., 6] of the above mentioned will is revoked and no other provision is substituted in its place.

## THIRD

Paragraph \_\_\_\_\_ [e.g., 5(a)] on page \_\_\_\_\_ [e.g., 7] of the above mentioned will is hereby revoked and the following is substituted in its place: \_\_\_\_\_ [e.g., I give the sum of \$25,000 to my nephew, Robert Black, 1375 Main Street, Sacramento, California; if he should predecease me, this legacy shall go to his wife, Mary Black].

[*Optional Provision:*]

## FOURTH

I direct that all federal estate taxes and any state taxes payable as the result of my death on the property passing under \_\_\_\_\_ [specify appropriate paragraph(s), e.g., Article Third] of this Codicil shall be paid \_\_\_\_\_ [in the manner specified in Paragraph \_\_\_\_\_ of the above mentioned will or specify manner in which death taxes will be paid, e.g., solely out of that property and not out of any other property in my estate].

[*Continue with the following:*]

## FIFTH

In every other respect I hereby confirm and republish my will dated \_\_\_\_\_ [date of execution of will], as amended by the First Codicil thereto dated \_\_\_\_\_ [date of execution of first codicil].

The foregoing Second Codicil to my will dated \_\_\_\_\_ [date of execution of will] is subscribed by me on the \_\_\_\_\_ day of \_\_\_\_\_ at \_\_\_\_\_, California.

\_\_\_\_\_ [signature of testator]

[typed name]

[*First alternative: witnesses to testator's signature*]

On the date written below, we, the undersigned, each being present at the same time, witnessed the signing of this instrument by \_\_\_\_\_ [full name of testator].

[OR]

[*Second alternative: witnesses to acknowledgment of will or of testator's signature*]

On the date written below, we, the undersigned, each being present at the same time, witnessed the acknowledgment of \_\_\_\_\_ [the signature of this instrument *or* this instrument] by \_\_\_\_\_ [full name of testator].

[*Continue with the following:*]

[*Add the following statement as to capacity, if desired:* At that time, \_\_\_\_\_ [full name of testator] appeared to us to be of sound mind and memory and, to the best of our knowledge, was not acting under fraud, duress, menace, or undue influence.]

Understanding this instrument, which consists of \_\_\_\_\_ [number] pages, including this page, to be the Second Codicil to the will of \_\_\_\_\_ [full name of testator] dated \_\_\_\_\_, we now subscribe our names as witnesses thereto.

We declare under penalty of perjury that the foregoing is true and correct. Executed at \_\_\_\_\_ [place of execution], California, on \_\_\_\_\_ [date] .

\_\_\_\_\_ [signature of witness]

[typed name]

Residing at \_\_\_\_\_ [street address]

\_\_\_\_\_ [city, state and zip]

\_\_\_\_\_ [signature of witness]

[typed name]

Residing at \_\_\_\_\_ [street address]

\_\_\_\_\_ [city, state and zip]

### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Will Contests Revocation Later Writings Estate, Gift & Trust Law Will

Contests Revocation Requirements Estate, Gift & Trust Law Wills Codicils General Overview Estate, Gift & Trust

Law Wills Codicils Effects Estate, Gift & Trust Law Wills Codicils Requirements



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DIVISION IV: WILLS AND TRUSTS  
CHAPTER 62 CODICILS  
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*23-62 California Legal Forms--Transaction Guide § 62.202*

**§ 62.202 First Codicil Nominating Substitute Executor**

**[1] Comment--Use of Form**

This form is a first codicil nominating a substitute executor when the executor appointed in the will died and when the will did not appoint an alternate or successor executor. Because of the nature of this change it can generally be done without reference to paragraph or page numbers of the original will.

For further discussion of the use of codicils, see § 62.200[1].

**[2] FORM**

**First Codicil Nominating Substitute Executor**

FIRST CODICIL TO WILL OF \_\_\_\_\_ [*insert same name of testator as appears in will*]

I, \_\_\_\_\_ [*insert name of testator as it is above*], residing in \_\_\_\_\_ County, California, declare this to be the First Codicil to my will dated \_\_\_\_\_ [*date of execution of will*].

Whereas \_\_\_\_\_ [*name of executor nominated in will*], who was nominated as Executor in the above mentioned will, has died, I now nominate \_\_\_\_\_ [*name of substitute executor*] \_\_\_\_\_ [*address*], as the Executor of my will; if \_\_\_\_\_ [*he or she*] should be unable or unwilling to act or to continue to act as Executor, then I hereby nominate \_\_\_\_\_ [*name of alternate substitute executor*], \_\_\_\_\_ [*address*], as the Executor of my will. The \_\_\_\_\_ [*name of substitute executor*] and \_\_\_\_\_ [*name of alternate substitute executor*] may each serve without the posting of bond and with the same powers, rights, discretions, obligations, and immunities conferred on \_\_\_\_\_ [*name of executor nominated in will*] by the terms of my above mentioned will.

In every other respect I hereby confirm and republish my will dated \_\_\_\_\_ [*date of execution of will*].

The foregoing First Codicil to my will dated \_\_\_\_\_ [*date of execution of will*] is subscribed by me on the \_\_\_\_\_ day of \_\_\_\_\_ at \_\_\_\_\_, California.

\_\_\_\_\_ [*signature*]

[*typed name*]

[*First alternative: witnesses to testator's signature*]

On the date written below, we, the undersigned, each being present at the same time, witnessed the signing of this instrument by \_\_\_\_\_ [*full name of testator*].

[*OR*]

[*Second alternative: witnesses to acknowledgment of will or of testator's signature*]

On the date written below, we, the undersigned, each being present at the same time, witnessed the acknowledgment of \_\_\_\_\_ [the signature of this instrument *or* this instrument] by \_\_\_\_\_ [*full name of testator*].

[*Continue with the following:*]

[*Add the following statement as to capacity, if desired:* At that time, \_\_\_\_\_ [*full name of testator*] appeared to us to be of sound mind and memory and, to the best of our knowledge, was not acting under fraud, duress, menace, or undue influence.]

Understanding this instrument, which consists of \_\_\_\_\_ [*number*] pages, including this page, to be the First Codicil to the will of \_\_\_\_\_ [*full name of testator*] dated \_\_\_\_\_, we now subscribe our names as witnesses thereto.

We declare under penalty of perjury that the foregoing is true and correct. Executed at \_\_\_\_\_ [*place of execution*], California, on \_\_\_\_\_ [*date*].

\_\_\_\_\_ [*signature of witness*]

[*typed name*]

Residing at \_\_\_\_\_ [*street address*]

\_\_\_\_\_ [*city, state and zip*]

\_\_\_\_\_ [*signature of witness*]

[*typed name*]

Residing at \_\_\_\_\_ [*street address*]

\_\_\_\_\_ [*city, state and zip*]

### Legal Topics:

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Probate Personal Representatives General Overview Estate, Gift & Trust

LawWillsCodicilsGeneral OverviewEstate, Gift & Trust LawWillsCodicilsEffectsEstate, Gift & Trust  
LawWillsCodicilsRequirements



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*23-62 California Legal Forms--Transaction Guide § 62.203*

**§ 62.203 Second Codicil Revoking First Codicil**

**[1] Comment--Use of Form**

This form is a second codicil revoking the first codicil to a will. The effect of its use is to make the will as originally written fully effective without any modification.

It is extremely important that a codicil revoking all or part of a prior codicil specify whether or not the revocation is intended to revive affected provisions in the will. Failure to do so can result in confusion over the testator's intent, and the law in the absence of an expression of testamentary intent is unsettled [*see Prob. Code § 6123* (no revival absent testamentary intent); *but see Estate of Hering (1980) 108 Cal. App. 3d 88, 95, 166 Cal. Rptr. 298* (refusing to extend former *Prob. Code § 25* [repealed eff. Jan 1, 1985] to codicils and adopting common law rule that revocation of codicil leaves original will in force and effect as written); *see also § 62.33[2]*].

For further discussion of the use of codicils, see § 62.200[1].

**[2] FORM**

**Second Codicil Revoking First Codicil**

**SECOND CODICIL TO WILL OF** \_\_\_\_\_ [*insert same name of testator as it appears in will*]

I, \_\_\_\_\_ [*insert name of testator as above*], residing in \_\_\_\_\_ County, California, declare this to be the Second Codicil to my will dated \_\_\_\_\_ [*date of execution of will*], as amended by the First Codicil thereto dated \_\_\_\_\_ [*date of execution of first codicil*].

The First Codicil dated \_\_\_\_\_ [*date of execution of first codicil*] of the above mentioned will is hereby revoked in full. I hereby confirm and republish my will dated \_\_\_\_\_ [*date of execution of will*] in every respect. All provisions of that will shall continue in full force and effect as though the First Codicil thereto had never been made.

The foregoing Second Codicil to my will dated \_\_\_\_\_ [date of execution of will] is subscribed by me on the \_\_\_\_\_ day of \_\_\_\_\_ at \_\_\_\_\_, California.

\_\_\_\_\_ [signature of testator]  
[typed name]

[First alternative: witnesses to testator's signature]

On the date written below, we, the undersigned, each being present at the same time, witnessed the signing of this instrument by \_\_\_\_\_ [full name of testator].

[OR]

[Second alternative: witnesses to acknowledgment of will or of testator's signature]

On the date written below, we, the undersigned, each being present at the same time, witnessed the acknowledgment of \_\_\_\_\_ [the signature of this instrument or this instrument] by \_\_\_\_\_ [full name of testator].

[Continue with the following:]

[Add the following statement as to capacity, if desired: At that time, \_\_\_\_\_ [full name of testator] appeared to us to be of sound mind and memory and, to the best of our knowledge, was not acting under fraud, duress, menace, or undue influence.]

Understanding this instrument, which consists of \_\_\_\_\_ [number] pages, including this page, to be the Second Codicil to the will of \_\_\_\_\_ [full name of testator] dated \_\_\_\_\_, we now subscribe our names as witnesses thereto.

We declare under penalty of perjury that the foregoing is true and correct. Executed at \_\_\_\_\_ [place of execution], California, on \_\_\_\_\_ [date] .

\_\_\_\_\_ [signature of witness]  
[typed name]  
Residing at \_\_\_\_\_ [street address]  
\_\_\_\_\_ [city, state and zip]

\_\_\_\_\_ [signature of witness]  
[typed name]  
Residing at \_\_\_\_\_ [street address]  
\_\_\_\_\_ [city, state and zip]

### Legal Topics:

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Will Contests Revocation Later Writings Estate, Gift & Trust Law Wills Codicils General

OverviewEstate, Gift & Trust LawWillsCodicilsEffectsEstate, Gift & Trust LawWillsCodicilsRequirements



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*23-62 California Legal Forms--Transaction Guide § 62.204*

**§ 62.204 Codicil Transmuting Property of Married Person**

**[1] Comment**

**[a] Use of Form**

This form is a codicil to a will by terms of which a married person gives any interest he or she may have in a life insurance policy or retirement benefit (such as a pension plan, 401(k) account, IRA, or Keogh plan) to the surviving spouse. The codicil is designed to meet the statutory transmutation requirements set forth in *Estate of MacDonald* [see *Fam. Code § 852(a)*; see also *Estate of MacDonald (1990) 51 Cal. 3d 262, 272, 272 Cal. Rptr. 153, 794 P.2d 911* ].

**[b] Transmutation Requirements Under *Estate of MacDonald***

In *Estate of MacDonald* [ *Estate of MacDonald (1990) 51 Cal. 3d 262, 272, 272 Cal. Rptr. 153, 794 P.2d 911* ], the California Supreme Court held that words by which one spouse "gives" the other spouse any interest the first spouse may have in a particular account or asset will constitute an "express declaration" for purposes of *Fam. Code § 852(a)* and thus satisfy the requirements for a valid transmutation [see *Fam. Code § 852(a)*; *Estate of MacDonald (1990) 51 Cal. 3d 262, 273, 272 Cal. Rptr. 153, 794 P.2d 911* ]. For a general discussion of transmutation requirements and *Estate of MacDonald*, see § 73.12[3]. For a discussion of the various types of retirement benefits that might be affected by this type of codicil, see § 73.27.

**[c] Addition of New Section to Will**

This form adds a new section to the testator's will. If an addition to the terms of the will is all that is required in a specific case, then this form may be used without substantial revision. If, however, it is necessary to delete a provision of that will, or merely to amend one of its provisions, this form should be modified appropriately.

**[2] FORM**

**Codicil Transmuting Property of Married Person**

\_\_\_\_\_ [FIRST or SECOND, etc.] CODICIL TO WILL OF  
 \_\_\_\_\_ [name] DATED \_\_\_\_\_ [date]

\_\_\_\_\_ [Paragraph number] I, \_\_\_\_\_ [full legal name of testator], a resident of  
 \_\_\_\_\_ County, California, declare that this is the \_\_\_\_\_ [first or second, etc.] codicil  
 to my will dated \_\_\_\_\_ [date] [if testator's will has been amended by any previous codicils, add  
 reference to each such codicil and the date each codicil was executed, e.g., as amended by the first codicil thereto dated  
 \_\_\_\_\_, and the second codicil thereto dated \_\_\_\_\_].

Section 1. The following new Section \_\_\_\_\_ [number] is added to page \_\_\_\_\_  
 [number] of the above-mentioned will:

Section \_\_\_\_\_ [number] . *Gift of Insurance Policy and Pension Benefits.* If at the time of my death I  
 have any interest subject to disposition by will in any life, accident, or other similar insurance policy on the life of my  
 spouse, or in a pension plan, 401(k) account, IRA account, or similar plan or account in which my spouse is a  
 participant, I give all incidents of ownership therein to my spouse if \_\_\_\_\_ [he or she] she survives  
 me. If my spouse either fails to survive me or wholly disclaims this gift, I leave those policies and benefits as part of the  
 residue of my estate.

Section 2. In every other respect, I confirm and republish the above-mentioned will [add reference to each codicil not  
 revoked or superseded, and the date each codicil was executed, e.g., as amended by the first codicil thereto dated  
 \_\_\_\_\_, and the second codicil thereto dated \_\_\_\_\_].

The foregoing \_\_\_\_\_ [first or second, etc.] codicil to my will dated \_\_\_\_\_, is  
 executed on \_\_\_\_\_ [date] , at \_\_\_\_\_ [city or town and state in which codicil is  
 signed, e.g., San Francisco, California].

\_\_\_\_\_ [signature of testator]  
 [typed name]

On the date written below, we, the undersigned, each being present at the same time, witnessed the signing of this  
 instrument by \_\_\_\_\_ [full name of testator]. [Add the following statement as to capacity, if desired: At  
 that time, \_\_\_\_\_ (full name of testator) appeared to us to be of sound mind and memory and, to the  
 best of our knowledge, was not acting under fraud, duress, menace, or undue influence.] Understanding this instrument,  
 which consists of \_\_\_\_\_ [number] pages, including this page, to be the will of  
 \_\_\_\_\_ [full name of testator], we now subscribe our names as witnesses thereto. We declare under  
 penalty of perjury that the foregoing is true and correct. Executed at \_\_\_\_\_ [place of execution],  
 California, on \_\_\_\_\_ [date] .

\_\_\_\_\_ [signature of first witness]  
 Residing at \_\_\_\_\_ [street address]  
 \_\_\_\_\_ [city, state and zip]  
 \_\_\_\_\_ [signature of first witness]  
 Residing at \_\_\_\_\_ [street address]  
 \_\_\_\_\_ [city, state and zip]

### Legal Topics:

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Wills Codicils General Overview Estate, Gift & Trust Law Wills Codicils Effects Estate, Gift & Trust Law Wills Codicils Requirements Family Law Marital Termination & Spousal Support Dissolution & Divorce Property Distribution Classification Transmutation



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DIVISION IV: WILLS AND TRUSTS  
CHAPTER 63 WILL PROVISIONS

*23-63 California Legal Forms--Transaction Guide 63.syn*

**§ 63.syn Synopsis to Chapter 63: WILL PROVISIONS**

§ 63.01 California Statutes

§§ 63.02-63.19 [Reserved]

§ 63.20 Law Reviews

§ 63.21 Annotations

§ 63.22 Text References

[1] Related Forms With Tax Analysis

[2] Related Forms

[3] Related California Forms

[4] Additional Text References

§§ 63.23-63.29 [Reserved]

§ 63.30 Organization of Chapter

§ 63.31 Construction of Wills

§§ 63.32-63.99 [Reserved]

§ 63.100 Obtaining Facts

Scope

§ 63.101 Planning the Will

Scope

§§ 63.102-63.119 [Reserved]

§ 63.120 General Drafting Considerations

Scope

§ 63.121 Drafting Wills and Will Provisions

Scope

§§ 63.122-63.199 [Reserved]

§ 63.200 Introductory Declaration--Short Form

[1] Comment

[a] Use of Form

[b] Who May Make a Will

[c] Testamentary Capacity

[d] When Testator Is Subject to Conservatorship

[e] Duress, Menace, Fraud, and Undue Influence

[i] In General

[ii] What Constitutes Fraud

[iii] What Constitutes Undue Influence

[iv] What Constitutes Duress and Menace

[f] Title of Will

[g] Identity of Testator

[h] Recitations of Capacity

[i] Residence

[j] Revocation of Prior Wills and Codicils

[2] FORM

Introductory Declaration--Short Form

§ 63.201 Introductory Declaration--Recitations of Capacity

[1] Comment

[a] Use of Form

[b] Recitation of Capacity to Make a Will

[i] Freedom From Fraud, Duress, Menace, or Undue Influence

[ii] Recitations of Testator's Age

[2] FORM

Introductory Declaration--Recitations of Capacity

§ 63.202 Introductory Declaration--Identity of Testator

[1] Comment

[a] Use of Form

[b] Identity of Testator

[2] FORM

Introductory Declaration--Identity of Testator

§ 63.203 Revocation of Prior Wills

[1] Comment

[a] Use of Form

[b] Revocation of Wills

[i] Generally

[ii] By Subsequent Will

[iii] By Destruction

[iv] By Annulment or Dissolution of Marriage

[v] By Termination of Domestic Partnership

[c] Invalidity of Revocation Procured by Duress, Menace, Fraud, or Undue Influence

[d] Revival of Revoked Will

[e] Dependent Relative Revocation

[2] FORM

Revocation of Prior Wills

§ 63.204 Conditional Revocation

[1] Comment

[a] Use of Form

[b] Conditional Revocation

[2] FORM

Conditional Revocation

§ 63.205 Conditional Will Provision

[1] Comment

[a] Use of Form

[b] Conditional Wills and Gifts--Public Policy Limitations

[2] FORM

Conditional Will Provision

§§ 63.206-63.219 [Reserved]

§ 63.220 Marital Status Declaration--Married Testator

[1] Comment

[a] Use of Form

[b] Testator's Marital Status

[2] FORM

Marital Status Declaration--Married Testator

§ 63.221 Marital Status Declaration--Unmarried Testator

[1] Comment

[a] Use of Form

[b] Will Executed Prior to or in Contemplation of Marriage

[2] FORM

Marital Status Declaration--Unmarried Testator

§ 63.222 Marital Status Declaration--Marriage Dissolved

[1] Comment

[a] Use of Form

[b] Effect of Annulment or Dissolution

[2] FORM

Marital Status Declaration--Marriage Dissolved

§ 63.223 Marital Status Declaration--Widow or Widower

[1] Comment

[a] Use of Form

[b] When Testator Is Widow or Widower

[2] FORM

Marital Status Declaration--Widow or Widower

§ 63.224 Domestic Partnership Declaration--Testator a Domestic Partner

[1] Comment

[a] Use of Form

[b] Requisites for Domestic Partnership

[c] Effect on Domestic Partner's Will

[d] Termination of Domestic Partnership

[e] Will Provision Confirming Testator's Status as Domestic Partner

[2] FORM

Domestic Partnership Declaration--Testator a Domestic Partner

§ 63.225 Domestic Partnership Declaration--Domestic Partnership Terminated

[1] Comment

[a] Use of Form

[b] Effect of Termination

[2] FORM

Domestic Partnership Declaration--Domestic Partnership Terminated

§ 63.226 Children and Issue Declaration--No Children

[1] Comment

[a] Use of Form

[b] Testator's Children

[c] Statutory Definitions of "Child" and "Children"

[i] In General

[ii] Natural Children

[iii] Natural Parents

[iv] Adopted Children

[v] Judicial Doctrine of Equitable Adoption

[vi] Foster Children and Stepchildren

[vii] Posthumously Conceived Children

[viii] Will Provisions

[d] Omitted Children

[2] FORM

Children and Issue Declaration--No Children

§ 63.227 Children and Issue Declaration--Living Child(ren)

[1] Comment--Use of Form

[2] FORM

Children and Issue Declaration--Living Child(ren)

§ 63.228 Children and Issue Declaration--Deceased Child(ren)

[1] Comment--Use of Form

[2] FORM

Children and Issue Declaration--Deceased Child(ren)

§ 63.229 Children and Issue Declaration--Grandchild(ren)

[1] Comment

[a] Use of Form

[b] Testator's Grandchildren

[2] FORM

Children and Issue Declaration--Grandchild(ren)

§ 63.230 Identification of All Beneficiaries

[1] Comment

[a] Use of Form

[b] Identification of Beneficiaries--Individuals

[c] Identification of Beneficiaries--Entities

[2] FORM

Identification of All Beneficiaries

§§ 63.231-63.249 [Reserved]

§ 63.250 General Declaration for Unmarried Testator

[1] Comment

[a] Use of Form

[b] Property That May Be Disposed of by Will

[i] In General

[ii] Separate Property

[iii] Community Property

[iv] Quasi-Community Property

[c] Description of All of Testator's Property

[d] Property Not Subject to Testamentary Disposition

[2] FORM

General Declaration for Unmarried Testator

§§ 63.251-63.269 [Reserved]

§ 63.270 Gift of One-Half of Community Property and All of Separate Property

[1] Comment

[a] Use of Form

[b] "One-Half" of Community Property

[2] FORM

Gift of One-Half of Community Property and All of Separate Property

§ 63.271 Gift of All Community, Quasi-Community, and Separate Property of Both Spouses

[1] Comment--Use of Form

[2] FORM

Gift of All Community, Quasi-Community, and Separate Property of Both Spouses

§ 63.272 Gift of All Community, Quasi-Community, and Separate Property With Alternative Gift If Spouse Takes Against Will

[1] Comment

[a] Use of Form

[b] Widow's Election

[i] In General

[ii] Elements

[iii] Forced Election

[iv] Purposes

[v] Disadvantages

[vi] Alternatives

[2] FORM

Gift of All Community, Quasi-Community, and Separate Property With Alternative Gift If Spouse Takes Against Will

§§ 63.273-63.289 [Reserved]

§ 63.290 Provision Specifying Nonexercise of Powers of Appointment

[1] Comment

[a] Use of Form

[b] Effect of Failure to Exercise Power

[i] Disposition of Appointive Property

[ii] Estate Tax Consequences

[iii] Generation-Skipping Transfer Tax Consequences

[2] FORM

Provision Specifying Nonexercise of Powers of Appointment

§ 63.291 Provision Exercising Power of Appointment Given by Will

[1] Comment

[a] Use of Form

[b] Exercise of Power of Appointment

[i] Compliance With Creating Instrument

[ii] Manifestation of Intent to Exercise

[iii] Exercise by Will

[iv] Types of Appointments

[2] FORM

Provision Exercising Power of Appointment Given by Will

§ 63.292 Provision Exercising Power of Appointment Given by Inter Vivos Trust

[1] Comment--Use of Form

[2] FORM

Provision Exercising Power of Appointment Given by Inter Vivos Trust

§§ 63.293-63.309 [Reserved]

§ 63.310 Proration of Death Taxes--All Taxes to Be Paid Out of Residue

[1] Comment

[a] Use of Form

[b] Marital Deduction

[c] Coordination of Will With Other Components of Estate Plan

[d] Proration of Taxes

[i] Statutory Scheme

[ii] General Rule

[iii] Exceptions to General Rule

[iv] When Will or Inter Vivos Trust Specifies Manner of Proration

[v] When Federal Law Establishes Proration Rule

[vi] Trusts, Estates for Years, and Other Income Interests

[vii] Qualified Real Property

[viii] Extended Taxes

[ix] When Personal Representative Cannot Collect Prorated Amount

[e] California "Pickup" Estate Tax

[f] Effect of Codicils on Apportionment Provision

[2] FORM

Proration of Death Taxes--All Taxes to Be Paid Out of Residue

§ 63.311 Proration of Death Taxes--Taxes on Probate Estate Payable From Residue; Nonprobate Taxes Equitably Prorated

[1] Comment

[a] Use of Form

[b] Marital Deduction

[2] FORM

Proration of Death Taxes--Taxes on Probate Estate Payable From Residue; Nonprobate Taxes Equitably Prorated

§ 63.312 Proration of Death Taxes--All Taxes Prorated Among Probate Assets

[1] Comment

[a] Use of Form

[b] Optional Provision Governing Assets in Inter Vivos Trust

[c] Marital Deduction

[d] Need for Specificity in Drafting Proration Provisions

[2] FORM

Proration of Death Taxes--All Taxes Prorated Among Probate Assets

§ 63.313 Proration of Death Taxes--All Taxes to Be Paid by Inter Vivos Trust

[1] Comment--Use of Form

[2] FORM

Proration of Death Taxes--All Taxes to Be Paid by Inter Vivos Trust

§ 63.314 Proration of Death Taxes--Marital Deduction Provision

[1] Comment

[a] Use of Form

[b] Effect of Death Taxes on Amount of Marital Deduction

[2] FORM

Proration of Death Taxes--Marital Deduction Provision

§ 63.315 Proration of Death Taxes--"Forced Widow's Election" Provision

[1] Comment--Use of Form

[2] FORM

Proration of Death Taxes--"Forced Widower's Election" Provision

§ 63.316 Proration of Death Taxes--Specific Bequest Exempt From Proration

[1] Comment--Use of Form

[2] FORM

Proration of Death Taxes--Specific Bequest Exempt From Proration

§ 63.317 Proration of Death Taxes--Income Beneficiary Under Qualified Terminable Interest (QTIP) Trust

[1] Comment

[a] Use of Form

[b] Tax Considerations in Use of Form

[2] FORM

Proration of Death Taxes--Income Beneficiary Under Qualified Terminable Interest (QTIP) Trust

§§ 63.318-63.329 [Reserved]

§ 63.330 Discharge of Particular Debt From Specific Fund

[1] Comment

[a] Use of Form

[b] Abatement of Devises to Pay Debts

[i] In General

[ii] Statutory Rules

[iii] Will Provisions

[c] Exoneration

[2] FORM

Discharge of Particular Debt From Specific Fund

§§ 63.331-63.349 [Reserved]

§ 63.350 Single Gift of Entire Estate

[1] Comment

[a] Use of Form

[b] Alternative Dispositions

[2] FORM

Single Gift of Entire Estate

§ 63.351 General Pecuniary Devise

[1] Comment

[a] Use of Form

[b] Classification of Devises

[c] Survival and Lapse

[2] FORM

General Pecuniary Devise

§ 63.352 General Pecuniary Devise Specifying Whether Interest Is to Be Paid

[1] Comment

[a] Use of Form

[b] Interest on General Pecuniary Devise

[i] Statutory Rules

[ii] Modification of Statutory Rules by Will

[2] FORM

General Pecuniary Devise Specifying Whether Interest Is to Be Paid

§ 63.353 General Pecuniary Devise to Two or More Beneficiaries

[1] Comment

[a] Use of Form

[b] Form of Ownership

[c] Survival

[2] FORM

General Pecuniary Devise to Two or More Beneficiaries

§§ 63.354-63.369 [Reserved]

§ 63.370 Specific Devise of Personal Property

[1] Comment

[a] Use of Form

[b] Specific Devise--Defined

[c] Rights of Devisee When Property Is Sold, Transformed, Destroyed, or Damaged

[d] Will Provisions

[e] Purpose or Condition

[f] Survival and Lapse

[2] FORM

Specific Devise of Personal Property

§ 63.371 Specific Devise With Substitute Cash Devise

[1] Comment--Use of Form

[2] FORM

Specific Devise With Substitute Cash Devise

§ 63.372 Provision to Insure That Devise Is Specific

[1] Comment--Use of Form

[2] FORM

Provision to Insure That Devise Is Specific

§§ 63.373-63.389 [Reserved]

§ 63.390 Demonstrative Devise

[1] Comment

[a] Use of Form

[b] Demonstrative Devise

[i] In General

[ii] Pecuniary Devise

[iii] Nonpecuniary Devise

[iv] Interest on Devise

[v] Abatement

[c] Survival and Lapse

[2] FORM

Demonstrative Devise

§ 63.391 Provision to Insure That Devise Is Demonstrative

[1] Comment--Use of Form

[2] FORM

Provision to Insure That Devise Is Demonstrative

§ 63.392 Devise From Bank Account With Provision for Ademption If Account Is Insufficient

[1] Comment

[a] Use of Form

[b] Ademption of Demonstrative Devise

[2] FORM

Devise From Bank Account With Provision for Ademption If Account Is Insufficient

§§ 63.393-63.409 [Reserved]

§ 63.410 Conditional Devise

[1] Comment

[a] Use of Form--Public Policy Limitations

[b] Conditional Wills and Conditional Devises--Public Policy Limitations

[c] Survival and Lapse

[2] FORM

Conditional Devise

§ 63.411 Devise Conditioned on Survival Until a Future Time

[1] Comment

[a] Use of Form

[b] Survival Until a Future Time

[i] Advantages

[ii] Disadvantages

[iii] Probate Code Rules of Construction

[c] Alternative Dispositions

[d] Lapse of Legacies

[2] FORM

Devise Conditioned on Survival Until a Future Time

§ 63.412 Conditional Legacy to Son-in-Law or Daughter-in-Law With Precatory Request for Grandchildren

[1] Comment

[a] Use of Form

[b] Precatory or Mandatory Provisions

[2] FORM

Conditional Legacy to Son-in-Law or Daughter-in-Law With Precatory Request for Grandchildren

§ 63.413 Pecuniary Legacy Limited to Percentage of Estate

[1] Comment

[a] Use of Form

[b] Purpose of Limitation

[c] Valuation Formula

[2] FORM

Pecuniary Legacy Limited to Percentage of Estate

§ 63.414 Amount of General Pecuniary Devise Determined by Objective Factor

[1] Comment--Use of Form

[2] FORM

Amount of General Pecuniary Devise Determined by Objective Factor

§ 63.415 Deferred Devise

[1] Comment

[a] Use of Form

[b] Deferred Devises

[i] In General

[ii] Reference to Acts and Events of Independent Significance

[iii] Alternative Methods of Deferral

[2] FORM

Deferred Devise

§ 63.416 Abatement--Order of Payment of Devises

[1] Comment

[a] Use of Form

[b] Abatement of Devises

[i] Statutory Rules

[ii] Will Provisions

[2] FORM

Abatement--Order of Payment of Devises

§ 63.417 Abatement--Nonresiduary Devises Limited to Percentage of Estate

[1] Comment--Use of Form

[2] FORM

Abatement--Nonresiduary Devises Limited to Percentage of Estate

§ 63.418 Abatement--Order of Payment With Preference for Spouse

[1] Comment--Use of Form

[2] FORM

Abatement--Order of Payment With Preference for Spouse

§ 63.419 Discharge of Encumbrances on Specific Devises

[1] Comment

[a] Use of Form

[b] Exoneration of Encumbrances

[c] Abatement of Specific Devise

[d] Testator's Intent

[2] FORM

Discharge of Encumbrances on Specific Devises

§ 63.420 Devise of Insurance on Property

[1] Comment

[a] Use of Form

[b] Insurance on Specific Gifts

[2] FORM

Devise of Insurance on Property

§ 63.421 Devise to Existing Inter Vivos Trust

[1] Comment

[a] Use of Form

[b] Testamentary Gifts to Trusts

[2] FORM

Devise to Existing Inter Vivos Trust

§ 63.422 Devise to Existing Testamentary Trust

[1] Comment

[a] Use of Form

[b] Testamentary Trustee as Devisee

[2] FORM

Devise to Existing Testamentary Trust

§ 63.423 Incorporation by Reference--Extrinsic Writing

[1] Comment

[a] Use of Form

[b] Incorporation by Reference

[c] Advantages and Disadvantages of Incorporation

[2] FORM

Incorporation by Reference--Extrinsic Writing

§ 63.424 Incorporation by Reference--Antenuptial Agreement

[1] Comment

[a] Use of Form

[b] Premarital Agreements

[2] FORM

Incorporation by Reference--Antenuptial Agreement

§ 63.425 Payment for Delivery of Specific Gifts

[1] Comment

[a] Use of Form

[b] Purpose of Provision

[2] FORM

Payment for Delivery of Specific Gifts

§ 63.426 Advancement--Deduction of Lifetime Transfers From Testamentary Gifts

[1] Comment

[a] Use of Form

[b] Advancement

[c] Practical Considerations

[2] FORM

Advancement--Deduction of Lifetime Transfers From Testamentary Gifts

§§ 63.427-63.439 [Reserved]

§ 63.440 Specific Devise of Real Property

[1] Comment

[a] Use of Form

[b] Real Property Subject to Encumbrance

[c] Survival and Lapse

[d] Property Destroyed, Damaged, Altered, or Taken in Eminent Domain

[2] FORM

Specific Devise of Real Property

§ 63.441 Devise of Real Property to More Than One Person

[1] Comment

[a] Use of Form

[b] Form of Ownership

[c] Survival and Lapse of Gifts

[2] FORM

Devise of Real Property to More Than One Person

§ 63.442 Devise of Real Property--Exoneration of Encumbrance

[1] Comment

[a] Use of Form

[b] Exoneration of Encumbrances

[c] Liability for Debts, Expenses, Family Allowance, and Taxes

[d] Testator's Intent

[2] FORM

Devise of Real Property--Exoneration of Encumbrance

§ 63.443 Specific Devise of Farm

[1] Comment--Use of Form

[2] FORM

Specific Devise of Farm

§ 63.444 Devise of Leasehold Interest

[1] Comment

[a] Use of Form

[b] Effect of Clause Prohibiting Assignment

[2] FORM

Devise of Leasehold Interest

§ 63.445 Pecuniary Devise to Be Paid Out of Proceeds of Sale of Real Property

[1] Comment

[a] Use of Form

[b] Pecuniary Devise to Be Paid From Proceeds of Sale

[c] Intention of Testator

[d] Will Provisions

[e] Sale Proceeds Treated as Personal Property

[2] FORM

Pecuniary Devise to Be Paid Out of Proceeds of Sale of Real Property

§ 63.446 Option to Purchase Property

[1] Comment

[a] Use of Form

[b] Options Given by Will

[i] In General

[ii] Exercise of Option Given to Executor

[iii] Court Order Directing Transfer or Conveyance

[iv] Rights of Creditors

[2] FORM

Option to Purchase Property

§§ 63.447-63.459 [Reserved]

§ 63.460 Devise of Sole Proprietorship Business

[1] Comment

[a] Use of Form

[b] Nature and Characteristics of Sole Proprietorship Business

[c] Continuation of Business after Owner's Death

[2] FORM

Devise of Sole Proprietorship Business

§ 63.461 Authorization to Continue or to Sell Unincorporated Business

[1] Comment

[a] Use of Form

[b] Power to Continue Operation of Business

[i] In General

[ii] Partnership Interests

[iii] Effect of Will Provision Authorizing Executor to Continue Business

[2] FORM

Authorization to Continue or to Sell Unincorporated Business

§ 63.462 Provision Requiring That Expenses Attributable to Business Be Paid by Business

[1] Comment

[a] Use of Form

[b] Expenses of Operating a Business

[c] Taxes

[2] FORM

Provision Requiring That Expenses Attributable to Business Be Paid by Business

§ 63.463 Provision Dividing Business and Its Assets Between Two or More Persons

[1] Comment--Use of Form

[2] FORM

Provision Dividing Business and Its Assets Between Two or More Persons

§ 63.464 Gift of Interest in Partnership

[1] Comment

[a] Use of Form

[b] Death of General Partner

[i] Partnership Agreement

[ii] Dissolution and Purchase of Deceased Partner's Interest

[iii] Dissociation and Purchase of Deceased Partner's Interest

[iv] Consent of Surviving Partners

[c] Limited Partnership Interests

[d] Partnership Agreements Controlling

[2] FORM

Gift of Interest in Partnership

§ 63.465 Gift of Shares in Closely Held Corporation

[1] Comment

[a] Use of Form

[b] Close and Closely Held Corporations; Buy-Sell Agreements

[2] FORM

Gift of Shares in Closely Held Corporation

§§ 63.466-63.479 [Reserved]

§ 63.480 Gift of Personal Property to Spouse

[1] Comment

[a] Use of Form

[b] Gifts of Personal Property to Spouse

[c] Survival and Lapse

[2] FORM

Gift of Personal Property to Spouse

§ 63.481 Gift of Tangible Personal Property With Precatory Request for Distribution to Other Beneficiaries

[1] Comment

[a] Use of Form

[b] Gift of Tangible Personal Property for Distribution to Others

[c] Precatory or Mandatory Provisions

[2] FORM

Gift of Tangible Personal Property With Precatory Request for Distribution to Other Beneficiaries

§ 63.482 Gift of Jewelry to One Beneficiary

[1] Comment

[a] Use of Form

[b] Gifts of Jewelry

[2] FORM

Gift of Jewelry to One Beneficiary

§ 63.483 Gift of Jewelry to More Than One Beneficiary

[1] Comment

[a] Use of Form

[b] Gifts of Jewelry

[2] FORM

Gift of Jewelry to More Than One Beneficiary

§ 63.484 Gift of Tangible Personal Property Inherited From an Ancestor

[1] Comment--Use of Form

[2] FORM

Gift of Tangible Personal Property Inherited From an Ancestor

§ 63.485 Specific Gift of Library

[1] Comment--Use of Form

[2] FORM

Specific Gift of Library

§ 63.486 Gift of Pet

[1] Comment--Use of Form

[2] FORM

Gift of Pet

§ 63.487 Pecuniary Legacy Coupled With Precatory Request for Care of Pet

[1] Comment

[a] Use of Form

[b] Devise to Pet

[c] Devise to Individual With Precatory Request for Care of Pet

[d] Trust for Care of Pet--Creation and Enforceability

[e] Practical Considerations

[2] FORM

Pecuniary Legacy Coupled With Precatory Request for Care of Pet

§§ 63.488-63.493 [Reserved]

§ 63.494 Will Provision Referring to Gifts of Tangible Personal Property Made In Separate Writing

[1] Comment

[a] Use of Form

[b] Requirements for Validity of Gift

[c] Changes or Amendments to Writing

[d] Death of Beneficiary

[2] FORM

Will Provision Referring to Gifts of Tangible Personal Property Made In Separate Writing

§ 63.495 Separate Writing Disposing of Tangible Personal Property of Modest Value

[1] Comment

[a] Use of Form

[b] Exception to Rules Governing Incorporation by Reference

[c] Basic Conditions for Application of Prob. Code § 6132

[d] Types of Property Subject to Disposition Under Prob. Code § 6132

[e] Value Limited to \$5,000 Per Item and \$25,000 Total Value

[f] Date of Execution

[g] Subsequent Amendments to Writing

[h] Death of Beneficiary

[2] FORM

Separate Writing Disposing of Tangible Personal Property of Modest Value

§§ 63.496-63.499 [Reserved]

§ 63.500 General Devise of Securities

[1] Comment

[a] Use of Form

[b] Specific Gifts and General Gifts

[i] Distinctions

[ii] Ademption and Abatement

[iii] Rights of Specific Devisee of Securities

[iv] Judicial Construction

[v] Will Provisions

[vi] Changes in Issuing Corporation's Capital Structure

[c] Description of Securities

[d] Survival and Lapse

[2] FORM

General Devise of Securities

§ 63.501 Specific Devise of Securities

[1] Comment--Use of Form

[2] FORM

Specific Devise of Securities

§ 63.502 Pecuniary Devise to Be Paid Out of Proceeds of Sale of Securities

[1] Comment

[a] Use of Form

[b] Ademption and Abatement

[c] Optional Clauses

[2] FORM

Pecuniary Devise to Be Paid Out of Proceeds of Sale of Securities

§ 63.503 Distribution of Securities in Kind

[1] Comment--Use of Form

[2] FORM

Distribution of Securities in Kind

§ 63.504 Adjustment for Capital Changes

[1] Comment

[a] Use of Form

[b] Changes in Capital Structure

[c] Will Provisions

[2] FORM

Adjustment for Capital Changes

§ 63.505 Specific Devise of Promissory Note (and Deed of Trust)

[1] Comment

[a] Use of Form

[b] Devise of Promissory Note

[c] Note Subject to Administration

[d] Change in Form of Note

[2] FORM

Specific Devise of Promissory Note (and Deed of Trust)

§ 63.506 Cancellation of Indebtedness

[1] Comment

[a] Use of Form

[b] Discharge of Debt or Demand

[2] FORM

Cancellation of Indebtedness

§ 63.507 Devise of Patent

[1] Comment--Use of Form

[2] FORM

Devise of Patent

§ 63.508 Annuity With Fixed Periodic Payments

[1] Comment

[a] Use of Form

[b] Annuities

[c] Commercial Annuity Contracts

[d] Considerations in Providing for Commercial Annuity Contracts

[2] FORM

Annuity With Fixed Periodic Payments

§ 63.509 Annuity Based on Fixed Premium Amount

[1] Comment--Use of Form

[2] FORM

Annuity Based on Fixed Premium Amount

§ 63.510 Annuity With Option to Take Cash in Lieu of Periodic Payments

[1] Comment--Use of Form

[2] FORM

Annuity With Option to Take Cash in Lieu of Periodic Payments

§§ 63.511-63.529 [Reserved]

§ 63.530 Residuary Clause--Short and Long Forms

[1] Comment

[a] Use of Form

[b] Residue of the Estate

[c] Function of Residuary Clause

[d] Short or Long Form

[e] Drafting Considerations

[f] Income Distributed to Residuary Beneficiaries

[g] Property That May Be Included in Residue

[h] Survival and Lapse

[2] FORM

Residuary Clause--Short and Long Forms

§ 63.531 Residuary Clause--Gifts by Categories of Property

[1] Comment

[a] Use of Form

[b] Categories of Property

[c] Danger of Overlapping Descriptions

[d] Need for Complete Residuary Scheme

[2] FORM

Residuary Clause--Gifts by Categories of Property

§ 63.532 Alternative Gift of Residue to One or More Named Beneficiaries

[1] Comment

[a] Use of Form

[b] Alternative Gifts

[2] FORM

Alternative Gift of Residue to One or More Named Beneficiaries

§ 63.533 Alternative Gift of Residue to Issue of Primary Beneficiary

[1] Comment

[a] Use of Form

[b] Gifts to Issue or Descendants--In General

[c] Distribution by Representation Based on Nearest Generation With Living Members (Probate Code Sections 240, 245)

[d] Distribution Per Stirpes or by Representation (Probate Code Section 246)

[e] Distribution Per Capita at Each Generation (Probate Code Section 247)

[f] Distribution Per Capita

[2] FORM

Alternative Gift of Residue to Issue of Primary Beneficiary

§§ 63.534-63.549 [Reserved]

§ 63.550 Residuary Clause--Fractional Shares

[1] Comment

[a] Use of Form

[b] Residuary Gift to Multiple Beneficiaries--Statutory Rules

[c] Alternative and Substitute Dispositions

[2] FORM

Residuary Clause--Fractional Shares

§ 63.551 Residuary Clause--Gift to Class

[1] Comment

[a] Use of Form

[b] Gifts to a Class

[i] In General

[ii] Rule Against Perpetuities

[c] Protection for Issue of Kindred Devisees

[d] Defining the Class

[e] Patterns of Distribution for Gifts to Issue and Descendants

[2] FORM

Residuary Clause--Gift to Class

§§ 63.552-63.569 [Reserved]

§ 63.570 Clause Confirming That Particular Provision Is Intended as General Residuary Provision

[1] Comment--Use of Form

[2] FORM

Clause Confirming That Particular Provision Is Intended as General Residuary Provision

§ 63.571 Clause Directing Executor to Convert Residue Into Cash

[1] Comment

[a] Use of Will

[b] Sale of Estate Property

[2] FORM

Clause Directing Executor to Convert Residue Into Cash

§ 63.572 Clause Requiring Abatement of Nonresiduary Devises to Protect Residuary Devisees

[1] Comment

[a] Use of Form

[b] Abatement of Residue

[i] Statutory Rules

[ii] Will Provisions

[2] FORM

Clause Requiring Abatement of Nonresiduary Devises to Protect Residuary Devisees

§§ 63.573-63.589 [Reserved]

§ 63.590 Responsibility of Residue for Debts, Expenses, and Family Allowance

[1] Comment

[a] Use of Form

[b] Apportionment of Debts, Expenses, and Family Allowance

[2] FORM

Responsibility of Residue for Debts, Expenses, and Family Allowance

§ 63.591 Instructions as to Ademption of Residuary Interests

[1] Comment

[a] Use of Form

[b] Advancement and Ademption as Applied to Residue

[c] Practical Considerations

[2] FORM

Instructions as to Ademption of Residuary Interests

§§ 63.592-63.609 [Reserved]

§ 63.610 Directions for Burial of Testator's Remains

[1] Comment

[a] Use of Form

[b] Testator's Instructions for Interment

[i] In General

[ii] Right of Survivors to Control Disposition of Remains

[iii] Authority of Funeral Director or Cemetery Authority

[iv] Practical Considerations Relating to Inclusion of Interment Directions in Will

[c] Dispositions Under Uniform Anatomical Gift Act

[2] FORM

Directions for Burial of Testator's Remains

§ 63.611 Directions for Cremation of Testator's Remains

[1] Comment

[a] Use of Form

[b] Cremation

[2] FORM

Directions for Cremation of Testator's Remains

§ 63.612 Directions for Burial or Cremation Confirming Testator's Lifetime Instructions or Arrangements

[1] Comment

[a] Use of Form

[b] Will Provisions Confirming Lifetime Arrangements

[2] FORM

Directions for Burial or Cremation Confirming Testator's Lifetime Instructions or Arrangements

§ 63.613 Purchase of Burial Plot

[1] Comment--Use of Form

[2] FORM

Purchase of Burial Plot

§ 63.614 Gift of Burial Plot

[1] Comment--Use of Form

[2] FORM

Gift of Burial Plot

§§ 63.615-63.629 [Reserved]

§ 63.630 Provision Reversing Statutory Presumption Regarding Order of Death in Event of Simultaneous Death

[1] Comment

[a] Use of Form

[b] Simultaneous Death

[i] In General

[ii] Probate Code Rules Affecting Testamentary Devises

[iii] Estate Tax Consequences

[iv] Example of Tax Effect of Form

[v] Marital Deduction Considerations

[vi] Other Considerations

[2] FORM

Provision Reversing Statutory Presumption Regarding Order of Death in Event of Simultaneous Death

§§ 63.631-63.649 [Reserved]

§ 63.650 Disinheritance Clause--Short Form

[1] Comment

[a] Use of Form

[b] Disinheritance Clauses

[c] Omitted Children

[d] Omitted Spouse

[e] Language Necessary for Disinheritance

[f] Disinheritance and Lapsed Gifts

[g] Disinheritance Clause Should Be Used With Caution

[2] FORM

Disinheritance Clause--Short Form

§ 63.651 Disinheritance Clause--Long Form

[1] Comment

[a] Use of Form

[b] Nominal Devises to Disinherit or Discourage Will Contests

[c] Use Disinheritance Clause With Caution

[2] FORM

Disinheritance Clause--Long Form--No Contest Provision

§ 63.652 Disinheritance Clause--Spouse Married After Execution of Will

[1] Comment

[a] Use of Form

[b] Omitted Spouse

[c] Use Disinheritance Clause With Caution

[2] FORM

Disinheritance Clause--Spouse Married After Execution of Will

§ 63.653 Disinheritance Clause--Children Born or Adopted After Execution of Will

[1] Comment

[a] Use of Form

[b] Omitted Children

[c] Use Disinheritance Clause With Caution

[2] FORM

Disinheritance Clause--Children Born or Adopted After Execution of Will

§ 63.654 Lapse Provision--Issue of "Kindred" Beneficiaries

[1] Comment

[a] Use of Form

[b] "Kindred" Beneficiaries and the Anti-Lapse Statute

[c] Use Provision With Caution

[2] FORM

Lapse Provision--Issue of "Kindred" Beneficiaries

§ 63.655 No Contest Clause

[1] Comment

[a] Use of Form

[b] Enforcement of No Contest Clauses Under the Probate Code

[c] Direct Contest

[d] Challenge to Transfer of Property

[e] Creditor's Claim

[f] No Availability of Declaratory Relief

[2] FORM

Scope

§ 63.656 Broadly Defined No Contest Clause

[1] Comment

[a] Use of Form

[2] FORM

Scope

§§ 63.657-63.669 [Reserved]

§ 63.670 Definition of "Executor"

[1] Comment--Use of Form

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*23-63 California Legal Forms--Transaction Guide Scope*

**Scope**

Scope

This chapter consists of individual will provisions and comments concerning the use of those provisions. For complete will forms and general information about the drafting and construction of wills see Ch. 61, *Will Drafting and Complete Will Forms* .

Certain categories of will provisions are covered in other chapters. Provisions for testamentary trusts are covered in Ch. 64, *Testamentary Trusts: Payment and Distribution Provisions* , Ch. 64A, *Testamentary Trusts: Trustee Provisions* , and Ch. 64B, *Testamentary Trusts: Administrative Provisions* . Provisions governing executors are covered in Ch. 65, *Executors* . Will provisions relating to guardians are illustrated in Ch. 66, *Guardianships* , and Ch. 66A, *Conservatorships* , respectively. Provisions granting future interests are covered in detail in Ch. 67, *Future Interests and Perpetuities* . Provisions making testamentary gifts to charitable organizations are covered in Ch. 69, *Charitable Dispositions* . Will provisions relating to anatomical gifts are covered in Ch. 106, *Anatomical Gifts* .



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**§ 63.01 California Statutes**

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Beneficiary. *Prob. Code § 24.*

Child. *Prob. Code § 26.*

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Devise. *Prob. Code § 32.*

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Domestic partner. *Prob. Code § 37.*

Fiduciary. *Prob. Code § 39.*

Heirs. *Prob. Code § 44.*

Instrument. *Prob. Code § 45.*

Issue. *Prob. Code § 50.*

Parent. *Prob. Code § 54.*

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Property. *Prob. Code § 62.*

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Real property. *Prob. Code § 68.*

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Trust company. *Prob. Code § 83.*

Trustee. *Prob. Code § 84.*

Will. *Prob. Code § 88.*

Effect of death of married person on community and quasi-community property. *Prob. Code §§ 100-105.*

Rights of surviving spouse in California real property of nondomiciliary decedent. *Prob. Code § 120.*

Contractual arrangements relating to rights at death. *Prob. Code §§ 140-160.*

Surviving spouse's waiver of rights. *Prob. Code §§ 140-147.*

Validity of pay-on-death provisions in contracts, gifts, conveyances, trusts, and other instruments. *Prob. Code § 160.*

Simultaneous death.

Distribution when survivorship cannot be established. *Prob. Code § 220.*

Disposition when right to property is conditional on survivorship. *Prob. Code § 222.*

Disposition of property held in joint tenancy. *Prob. Code § 223.*

Disposition of life or accident insurance. *Prob. Code § 224.*

Proceedings to determine survival. *Prob. Code §§ 230-234.*

Distribution among heirs or beneficiaries. *Prob. Code §§ 240-247.*

Division of property in cases of intestacy. *Prob. Code § 240.*

Division of property when will provides for issue or descendants to take without specifying the manner. *Prob. Code § 245.*

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Distribution to posthumously conceived child. *Prob. Code §§ 249.5-249.8.*

Effect of homicide on inheritance and other rights. *Prob. Code §§ 250-257.*

Disclaimers of testamentary and other interests. *Prob. Code §§ 260-295.*

Trust company as fiduciary. *Prob. Code §§ 300, 301.*

Nonprobate transfers. *Prob. Code §§ 5100-5407.*

Ownership before death of joint, pay-on-death, and trust accounts. *Prob. Code § 5301.*

Ownership after death of joint, pay-on-death, and trust accounts. *Prob. Code § 5302.*

Transfers of joint, pay-on-death, and trust accounts after death not testamentary. *Prob. Code § 5304.*

Protection of financial institutions. *Prob. Code §§ 5401-5407.*

Who may make a will. *Prob. Code § 6100.*

Who is not mentally competent to make a will. *Prob. Code § 6100.5.*

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Who may take a disposition by will. *Prob. Code § 6102.*

Execution and attestation of wills. *Prob. Code §§ 6110-6113.*

Witnessed wills. *Prob. Code § 6110.*

Holographic wills. *Prob. Code § 6111.*

Admissibility of extrinsic evidence to show document constitutes a will, or to determine meaning of will or portion of will. *Prob. Code § 6111.5.*

Witnesses to wills. *Prob. Code § 6112.*

Choice of law as to execution of will. *Prob. Code § 6113.*

Revocation and revival of wills. *Prob. Code §§ 6120-6124.*

Reference to matters outside the will. *Prob. Code §§ 6130, 6131.*

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Uniform International Wills Act. *Prob. Code §§ 6380-6390.*

Intestate succession. *Prob. Code §§ 6400-6455.*

Passage of property not effectively disposed of by will. *Prob. Code § 6400.*

Intestate share of surviving spouse or surviving domestic partner. *Prob. Code § 6401.*

Intestate share of heirs other than surviving spouse or surviving domestic partner. *Prob. Code § 6402.*

Intestate share of predeceased spouse when no surviving spouse or issue. *Prob. Code § 6402.5.*

Requirement that heir survive decedent for 120 hours. *Prob. Code § 6403.*

Escheat if no taker. *Prob. Code § 6404.*

Inheritance by relatives of halfblood. *Prob. Code § 6406.*

Inheritance by afterborn heirs. *Prob. Code § 6407.*

Parent-child relationship. *Prob. Code §§ 6450-6455.*

Advancements. *Prob. Code § 6409.*

Passage of decedent's property to devisees named in will or to intestate heirs. *Prob. Code § 7000.*

Rules governing probate of will. *Prob. Code §§ 8200-8272.*

Compensation of personal representatives and estate attorneys. *Prob. Code §§ 10800-10850.*

Ordinary compensation of personal representative. *Prob. Code § 10800.*

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Compensation of personal representative as provided in will. *Prob. Code § 10802.*

Invalidity of agreement between personal representative and heir or devisee for higher compensation of personal representative. *Prob. Code § 10803.*

Compensation of personal representative who is also attorney. *Prob. Code § 10804.*

Compensation of two or more personal representatives. *Prob. Code § 10805.*

Ordinary compensation of estate attorney. *Prob. Code § 10810.*

Extraordinary compensation of estate attorney. *Prob. Code § 10811.*

Compensation of estate attorney as provided in will. *Prob. Code § 10812.*

Invalidity of agreement between personal representative and estate attorney for higher compensation of attorney. *Prob. Code § 10813.*

Compensation of two or more estate attorneys. *Prob. Code § 10814.*

Allowance of compensation by court. *Prob. Code §§ 10830-10832.*

Collection and transfer of small estate without administration. *Prob. Code §§ 13000-13210.*

Passage of property to surviving spouse without administration. *Prob. Code §§ 13500-13660.*

Construction of wills, trusts, and other instruments. *Prob. Code § 21101 et seq.*

Rules for interpretation of instruments. *Prob. Code §§ 21101-21140.*

Perpetuities. *Prob. Code §§ 21200-21231.*

No Contest clauses. *Prob. Code §§ 21310-21315.*

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Compliance with Internal Revenue Code. *Prob. Code §§ 21500-21541.*

Omitted spouses and children. *Prob. Code §§ 21600-21630.*

Contracts regarding testamentary or intestate succession. *Prob. Code § 21700.*

### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawCommunity PropertyGeneral OverviewEstate, Gift & Trust LawIntestacyGeneral  
OverviewEstate, Gift & Trust LawNonprobate TransfersJointly Held PropertyGeneral OverviewEstate, Gift & Trust  
LawWillsGeneral OverviewEstate, Gift & Trust LawWillsAfter-Acquired Spouses



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B. Secondary Sources

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**§ 63.20 Law Reviews**

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#### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law  
Intestacy  
General Overview  
Estate, Gift & Trust Law  
Wills  
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**§ 63.21 Annotations**

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"Revocation of prior will by revocation clause in lost will or other lost instrument," 31 A.L.R. 4th 306 (1984).

"Word 'child' or 'children' in will as including grandchild or grandchildren," 30 A.L.R. 4th 319 (1984).

"Effectiveness of change of named beneficiary of life or accident insurance policy by will," 25 A.L.R. 4th 1164 (1983).

"Homicide as precluding taking under will or by intestacy," 25 A.L.R. 4th 787 (1983).

"Ademption of bequest of indebtedness on debt," 25 A.L.R. 4th 88 (1983).

"Validity and enforceability of provision of will or trust instrument for forfeiture or reduction of share of contesting beneficiary," 23 A.L.R. 4th 369 (1983).

"What passes under terms 'furniture' or 'furnishings' in will," 21 A.L.R. 4th 383 (1983).

"Determination of price under testamentary option to buy real estate," 13 A.L.R. 4th 947 (1982).

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"Effect of testamentary gift to child conditional upon specified arrangements for parental control," 11 A.L.R. 4th 940 (1982).

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"Liability for administration expenses of spouse electing against will," 89 A.L.R. 3d 315 (1979).

"Base for determining amount of bequest of a specific percent or porportion of estate or property," 87 A.L.R. 3d 605 (1978).

"Validity, construction, and effect of bequest of property owned by corporation in which testator has majority interest," 78 A.L.R. 3d 963 (1977).

"Term 'money' or 'moneys' in will as including real property," 76 A.L.R. 3d 1254 (1977).

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"Word 'grandchild' or 'grandchildren' in will as including great-grandchild or great-grandchildren," 51 A.L.R. 3d 1250 (1973).

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"Validity and construction of testamentary gift to a political party," 41 A.L.R. 3d 7 (1972).

- "Who takes under testamentary gift to 'parent' or 'parents,'" 36 A.L.R. 3d 323 (1971).
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- "What passes under terms 'cash,' 'cash on hand,' or 'cash assets' in will," 27 A.L.R. 3d 1406 (1969).
- "What passes under term 'securities' in will," 27 A.L.R. 3d 1386 (1969).
- "Libel by will," 21 A.L.R. 3d 754 (1968).
- "Wills: Validity and construction of gift to A or B, or to A or B or survivor," 19 A.L.R. 3d 1213 (1968).
- "Wills: undue influence in gift to testator's attorney," 19 A.L.R. 3d 575 (1968).
- "Admissibility of extrinsic evidence to clarify location of real property devised in a will," 16 A.L.R. 3d 386 (1967).
- "Validity, construction, and effect of bequest or devise to a person's estate, or to the person or his estate," 10 A.L.R. 3d 483 (1966).
- "Validity and effect of testamentary direction as to disposition of testator's body," 7 A.L.R. 3d 747 (1966).
- "Determination whether will is absolute or conditional," 1 A.L.R. 3d 1048 (1965).
- "What testamentary language passes United States bonds," 100 A.L.R. 2d 1004 (1965).
- "Sufficiency or provision for or reference to spouse to avoid lapse of will by subsequent marriage," 97 A.L.R. 2d 1026 (1964).
- "Effect of mistake of draftsman (other than testator) in drawing will," 90 A.L.R. 2d 924 (1963).
- " 'Wills:' 'stocks' as including bonds or other securities," 76 A.L.R. 2d 243 (1961).
- "Changing, deleting, or adding punctuation in construing will," 70 A.L.R. 2d 215 (1960).
- "Effect of failure of attesting witness to observe testator's capacity," 69 A.L.R. 2d 662 (1960).

### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawWillsGeneral OverviewEstate, Gift & Trust LawWillsBequests & DevisesEstate, Gift & Trust LawWillsInterpretationRules of ConstructionGeneral OverviewEstate, Gift & Trust LawWillsInterpretationTestator's IntentGeneral Overview



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**§ 63.22 Text References**

**[1] Related Forms With Tax Analysis**

Rabkin & Johnson, *Current Legal Forms with Tax Analysis*, Ch. 7, *Wills* (Matthew Bender).

**[2] Related Forms**

Fiore et al., *Modern Estate Planning*, Ch. 1, *Annotated Wills: A Guide to Drafting* (Matthew Bender).

*Murphy's Will Clauses*, Vols. 1-3 (Matthew Bender).

**[3] Related California Forms**

*California Wills and Trusts Forms*, Div. IV, *Individual Will Provisions* (Matthew Bender).

*California Legal Forms* (Matthew Bender).

Ch. 60, *Estate Planning* .

Ch. 61, *Will Drafting and Complete Will Forms* .

Ch. 62, *Codicils* .

Ch. 64, *Testamentary Trusts: Payment and Distribution Provisions* .

Ch. 64A, *Testamentary Trusts: Trustee Provisions* .

Ch. 64B, *Testamentary Trusts: Administrative Provisions* .

Ch. 65, *Executors* .

Ch. 67, *Future Interests and Perpetuities* .

Ch. 69, *Charitable Dispositions* .

Ch. 71, *Marital Deduction Trust Provisions* .

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#### **[4] Additional Text References**

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Ch. 21, *Devisees* .

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Ch. 26, *Devisees of Real Property Interests* .

Ch. 27, *Residuary Devisees* .

Ch. 28, *Devisees to Minors* .

Ch. 29, *Devisees of Businesses and Business Interests* .

Ch. 30, *Charitable Devisees*.

Ch. 31, *Powers of Appointment* .

Ch. 35, *Nomination of Executors* .

Ch. 36, *Powers of Executors* .

Ch. 37, *Nomination of Guardians for Minor Children* .

Ch. 40, *Disinheritance and No Contest Clauses* .

Ch. 41, *Arrangements for Funerals and Disposition of Remains* .

Ch. 61, *Contracts and Other Instruments Affecting Wills*

Witkin, Summary of California Law, vol. 14, *Wills and Probate* (10th ed. 2005).

**Legal Topics:**

For related research and practice materials, see the following legal topics:

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PART II. LEGAL BACKGROUND

*23-63 California Legal Forms--Transaction Guide § 63.30*

**§ 63.30 Organization of Chapter**

The forms in this chapter are divided into thirteen principal parts, identified as Parts A through M.

Part A contains provisions that may be included in the introductory paragraph of the will, including provisions identifying the testator, establishing the testator's residence, and revoking prior wills executed by the testator. Part A also includes optional provisions reciting the testator's capacity to make the will, conditionally revoking a former will, and making a conditional will.

Part B contains provisions that identify the testator's family and other beneficiaries.

Part C contains provisions that describe and identify the property that is included in the will. It provides forms applicable to both single and married persons. It also includes optional provisions that may be used to exercise a power of appointment or to state that a power of appointment held by the testator is not to be exercised by the will.

Part D contains provisions relating to the apportionment of death taxes and the payment of specific debts. These forms may be used to apportion taxes on probate assets only or taxes on both probate and nonprobate assets.

Part E contains forms for making devises (testamentary gifts), including forms for general devises, specific devises, demonstrative devises, and residuary devises, as well as forms for making devises of particular kinds of property, such as real property, business property, and tangible and intangible personal property. Part E also contains will provisions affecting devises, including provisions imposing conditions on devises, imposing a survivorship requirement, limiting devises to a specified percentage of the estate, determining devises by objective factors, deferring devises, making gifts of insurance on devised property, making devises to existing trusts ("pour-overs"), incorporating extrinsic writings into the will, specifying whether lifetime devises or transfers will be deemed advancements, providing for the abatement of devises, and providing for the discharge of encumbrances on specific devises.

Part F contains provisions that relate to the residue of the estate and the residuary clause of the will, including general residuary clauses, residuary devises to multiple devisees and classes, provisions relating to the interpretation and operation of the residuary clause, and clauses that relate to liabilities of the residue.

Part G contains provisions relating to the testator's funeral and burial (or cremation) and disposing of the testator's burial plot.

Part H contains a simultaneous death provision that reverses the order of death of the testator and his or her spouse as specified in the Probate Code and that may be useful in appropriate circumstances to minimize federal estate taxes.

Part I contains disinheritance and no contest provisions. This part includes a general disinheritance clause, a long form disinheritance clause including a no contest clause, disinheritance clauses that apply particularly to "omitted" heirs, a provision specifying whether testamentary gifts to "kindred" beneficiaries will or will not lapse if the beneficiaries predecease the testator, and a general form for a no contest clause.

Part J contains will provisions defining various terms that are used elsewhere in the will.

Part K contains miscellaneous will provisions, including provisions as to gender and number, severability, the allocation and distribution of income during administration of the testator's estate, and contracts to make wills. Part K also includes a provision for a natural child adopted out of the testator's family.

Part L contains signature and attestation clauses that may be used in any will.

Part M contains a form for election and waiver by the testator's spouse that may be attached to the testator's will.

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Estate, Gift & Trust Law Wills General Overview



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DIVISION IV: WILLS AND TRUSTS  
 CHAPTER 63 WILL PROVISIONS  
 PART II. LEGAL BACKGROUND

*23-63 California Legal Forms--Transaction Guide § 63.31*

**§ 63.31 Construction of Wills**

The Probate Code provides general rules for the construction of instruments [*see Prob. Code §§ 21101-21140*]. These rules apply broadly to wills, trusts, deeds, and other instruments [*Prob. Code § 21101*]. However, these rules are subject to the basic principle that the intention of the testator as expressed in the will controls the legal effect of the dispositions made in the will [*Prob. Code § 21102(a)*]. Accordingly, the Probate Code rules apply only when the intention of the testator is not otherwise indicated by the will [*Prob. Code § 21102(b)*]. In addition, the use of extrinsic evidence is not precluded, to the extent otherwise authorized by law, to determine the testator's intention [*Prob. Code § 21102(c)*]. For general coverage of the statutory rules of construction, see Ch. 61, *Will Drafting and Complete Will Forms*. In this chapter, statutory rules relating to specific will provisions are discussed in the comments to the corresponding forms.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Wills Interpretation Rules of Construction Conflicts of Laws Estate, Gift & Trust  
 Law Wills Interpretation Rules of Construction Construction Favoring Heirs Estate, Gift & Trust  
 Law Wills Interpretation Rules of Construction Construction Favoring Testacy Estate, Gift & Trust  
 Law Wills Interpretation Rules of Construction Construction Favoring Vesting Estate, Gift & Trust  
 Law Wills Interpretation Rules of Construction Statutory Rules



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*23-63 California Legal Forms--Transaction Guide §§ 63.32-63.99*

**[Reserved]**

§§ 63.32[Reserved]



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CHAPTER 63 WILL PROVISIONS  
PART III. TRANSACTION GUIDE  
A. Preliminary Determinations

*23-63 California Legal Forms--Transaction Guide § 63.100*

**§ 63.100 Obtaining Facts**

1. Obtain all necessary facts and documents.

**NOTE:**

The client interview checklist in § 60.200 will enable the attorney to gather the necessary facts and documents and preserve them in an easily accessible form.

2. Determine whether client has testamentary capacity [*see* discussion in § 61.11].
3. Determine what property is subject to disposition under client's will [*see* discussion in § 61.14].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Will Contests Testamentary Capacity General Overview Estate, Gift & Trust Law Wills General Overview



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DIVISION IV: WILLS AND TRUSTS  
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PART III. TRANSACTION GUIDE  
A. Preliminary Determinations

*23-63 California Legal Forms--Transaction Guide § 63.101*

**§ 63.101 Planning the Will**

1. Determine most advantageous estate plan for client.

**NOTE:**

The attorney should review the entire Transaction Guide in Ch. 60, *Estate Planning* .

2. Determine basic form of will to be used [*see § 61.132*].

3. Determine what alternative and additional provisions are necessary to effect testator's intent.

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Estate, Gift & Trust LawWillsGeneral Overview



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DIVISION IV: WILLS AND TRUSTS  
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PART III. TRANSACTION GUIDE  
A. Preliminary Determinations

*23-63 California Legal Forms--Transaction Guide §§ 63.102-63.119*

**[Reserved]**

§§ 63.102[Reserved]



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DIVISION IV: WILLS AND TRUSTS  
CHAPTER 63 WILL PROVISIONS  
PART III. TRANSACTION GUIDE  
B. Drafting Guide for Will Provisions

*23-63 California Legal Forms--Transaction Guide § 63.120*

**§ 63.120 General Drafting Considerations**

1. Review general will drafting rules and suggestions [*see § 61.130*], with particular emphasis on rules for correct identification of beneficiaries.
2. In drafting any individual will provision, consider effect of provision upon remainder of will.

**NOTE:**

When integrating any individual will provision into a standard will form there is always the possibility that some inconsistency may result. A very thorough review of the completed will is vital to spot and eliminate any inconsistencies prior to execution of the will.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Wills General Overview Estate, Gift & Trust Law Wills Interpretation Rules of Construction General Overview Estate, Gift & Trust Law Wills Interpretation Testator's Intent General Overview



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DIVISION IV: WILLS AND TRUSTS  
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PART III. TRANSACTION GUIDE  
B. Drafting Guide for Will Provisions

*23-63 California Legal Forms--Transaction Guide § 63.121*

**§ 63.121 Drafting Wills and Will Provisions**

1. Incorporate alternative and additional will provisions from following list, as necessary, into appropriate complete will form from Ch. 61, *Will Drafting and Complete Will Forms* [see §§ 61.200-61.214]:

- a. Introductory paragraph of will [see §§ 63.200-63.205].
- b. Identity of testator's family and other beneficiaries [see §§ 63.200-63.230].
- c. Identification of property included in will [see §§ 63.250-63.292].
- d. Apportionment of death taxes and payment of specific debts [see §§ 63.310-63.330].
- e. Provisions for general devises, specific devises, demonstrative devises, and provisions affecting gifts [see §§ 63.350-63.427].
- f. Charitable dispositions [see Ch. 69, *Charitable Dispositions* ].
- g. Anatomical dispositions [see Ch. 106, *Anatomical Gifts* ].
- h. Residuary clauses [see §§ 63.530-63.593].
- i. Residuary clause establishing testamentary trust [see Ch. 64, *Testamentary Trusts: Payment and Distribution Provisions* , Ch. 71, *Marital Deduction Trust Provisions* , Ch. 74, *Split-Interest Charitable Trusts* ].

- j. Perpetuities saving clause [*see* Ch. 67, *Future Interests and Perpetuities* ].
  - k. Funeral and burial arrangements [*see* §§ 63.610-63.614].
  - l. Simultaneous death provision [*see* § 63.630].
  - m. Disinheritance and no contest provisions [*see* §§ 63.650-63.655].
  - n. Executor provisions [*see* Ch. 65, *Executors* ].
  - o. Provisions naming guardians for minors [*see* Ch. 66, *Guardianships* ].
  - p. Definitions and miscellaneous clauses [*see* §§ 63.670-63.695].
  - q. Signature, attestation, and certification clauses [*see* §§ 63.710-63.733].
  - r. Provision for election by testator's spouse [*see* § 63.770].
2. After drafting provision, review form, style, and content to make sure that:
- a. Provision is in accord with testator's general plan of disposition.
  - b. Provision does what it is supposed to do.
    - (1) Language clearly and unambiguously expresses what it is supposed to accomplish.
    - (2) Any legal "words of art" have been included.
    - (3) No essential terms, conditions, or other relevant matters have been omitted.
  - c. Provision is not invalid by reason of law or public policy.
  - d. All persons named in provision have been properly identified either in provision itself or elsewhere in will [*see* § 61.130].
  - e. Any property mentioned in provision has been fully and accurately described so that it can be distinguished from all property not affected by provision.
  - f. Inclusion of provision does not create any inconsistencies between provision and remainder of will that might require modification of other will provisions.
  - g. Provision does not generate any undesirable tax consequences not contemplated in estate plan.

### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law  
 Anatomical Gifts  
 Estate, Gift & Trust Law  
 Trusts  
 Testamentary Trusts  
 Estate, Gift & Trust Law  
 Wills  
 General Overview  
 Estate, Gift & Trust Law  
 Wills  
 Bequests & Devises  
 Estate, Gift & Trust Law  
 Wills  
 Residuary Clauses



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DIVISION IV: WILLS AND TRUSTS  
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*23-63 California Legal Forms--Transaction Guide §§ 63.122-63.199*

**[Reserved]**

§§ 63.122[Reserved]



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DIVISION IV: WILLS AND TRUSTS

CHAPTER 63 WILL PROVISIONS

PART IV. FORMS

A. Introductory Paragraph of Will

*23-63 California Legal Forms--Transaction Guide § 63.200*

### **§ 63.200 Introductory Declaration--Short Form**

#### **[1] Comment**

#### **[a] Use of Form**

This form is a short form clause for the introductory paragraph of a will. It identifies the testator, states the testator's county of residence, and declares that the document is the testator's will. It also revokes all the testator's prior wills and codicils. For complete will forms, see Ch. 61, *Will Drafting and Complete Will Forms*.

#### **[b] Who May Make a Will**

Every individual who is 18 or more years of age and of sound mind may make a will [*Prob. Code § 6100(a)*].

An emancipated minor is regarded as an adult for certain purposes, including making or revoking a will [*Fam. Code § 7050(e)(6)*]. An emancipated minor is a person under the age of 18 years who has done any of the following [*Fam. Code § 7002*]:

- Entered into a valid marriage (whether or not the marriage has been dissolved);
- Is on active duty with the armed forces of the United States; or
- Received a declaration of emancipation pursuant to *Fam. Code § 7122*.

For coverage of the judicial procedure whereby a minor may obtain a declaration of emancipation, see California Forms of Pleading and Practice, Ch. 245, *Emancipation of Minors* (Matthew Bender).

#### **[c] Testamentary Capacity**

*Prob. Code § 6100.5* provides that a person is not mentally competent to make a will if, at the time the will is made,

either of the following is true:

- The person does not have sufficient mental capacity to do one or more of the following [*Prob. Code* § 6100.5(a)(1)]:
  - Understand the nature of the testamentary act;
  - Understand and recollect the nature and situation of his or her property; or
  - Remember and understand his or her relations to his or her living descendants, spouse, and parents, and those whose interests are affected by the will.
- The person suffers from a mental disorder with symptoms including delusions or hallucinations that result in the person devising his or her property in a way that he or she would not otherwise have done [*Prob. Code* § 6100.5(a)(2)].

*Prob. Code* § 6100.5 applies to all testators who die on or after January 1, 1985, regardless of when the will in question was executed [see *Prob. Code* § 6103]. However, *Prob. Code* § 6100.5 substantially restates case law in effect prior to that date [see *Estate of Nelson (1964)* 227 Cal. App. 2d 42, 53, 38 Cal. Rptr. 459 ("testamentary capacity" defined); *Estate of Fritschi (1963)* 60 Cal. 2d 367, 372, 33 Cal. Rptr. 264, 384 P.2d 656 ("sound mind" defined)]. Before the adoption of *Prob. Code* § 6100.5, courts were careful to distinguish incompetence to make a will from mental conditions that have legal significance in other contexts. Thus, it was held that an order of involuntary commitment to a hospital does not necessarily indicate that a testator lacks the capacity to make a will [ *Estate of Powers (1947)* 81 Cal. App. 2d 480, 483-484, 184 P.2d 319 ]. Further, an adjudication of insanity, by itself, does not prove that the testator is incompetent to make a will [ *Estate of De Graaf (1939)* 34 Cal. App. 2d 120, 122-123, 93 P.2d 199 ].

Similarly, an order establishing a conservatorship does not constitute an adjudication of testamentary incapacity. A conservator may be appointed for any person who is unable properly to provide for his or her personal needs for physical health, food, clothing, or shelter [*Prob. Code* § 1801(a)]. A person may be unable to provide for personal needs but still understand the nature of the testamentary act, the nature and situation of his or her property, and his or her relations to the natural objects of his or her bounty. Although appointment may have some bearing on the testator's testamentary capacity, appointment in itself furnishes only a weak inference of lack of testamentary capacity [see *Conservatorship of Bookasta (1989)* 216 Cal. App. 3d 445, 450 n.5, 265 Cal. Rptr. 1 ].

Although an adjudication of incompetence may raise an inference that the testator lacked testamentary capacity at the time of the adjudication [ *Estate of Fossa (1962)* 210 Cal. App. 2d 464, 468-469, 26 Cal. Rptr. 687 ], it does not establish that the incapacity continued thereafter. In all cases, the question is whether the testator possessed testamentary capacity at the time the will was made [ *Estate of Bullock (1956)* 140 Cal. App. 2d 944, 949, 295 P.2d 954 ]. *Prob. Code* § 6100.5(b) specifically provides that nothing in it supersedes law in existence on its effective date relating to the admissibility of evidence to prove the existence of mental incompetence or mental disorders.

Although physical or mental infirmity may bear on a testator's capacity to make a will, it is not conclusive on the question. The courts have held that a testator may be of sound mind in spite of lapses of memory [ *Estate of Nolan (1938)* 25 Cal. App. 2d 738, 743, 78 P.2d 456 ], acute alcoholism [ *Estate of Garvey (1940)* 38 Cal. App. 2d 449, 456, 101 P.2d 551 ], rages of anger and cruelty toward family members [ *In re Estate of Peterkin (1937)* 23 Cal. App. 2d 597, 73 P.2d 897 ], and even drug addiction, epilepsy, and suicidal impulses [ *Estate of Ross (1962)* 204 Cal. App. 2d 82, 95-96, 22 Cal. Rptr. 135 ].

The diagnosis of a mental or physical disorder is not sufficient in itself to support a determination that a person is of unsound mind or lacks the capacity to do a certain act, including the capacity to execute a will [*Prob. Code* § 811(d)].

That determination must be supported by evidence of a deficit in at least one of a number of specified mental functions, such as alertness and attention, information processing, thought processes, and ability to modulate mood and affect, and there must be evidence of a correlation between the deficit and the act in question [*Prob. Code* § 811(a)].

#### **[d] When Testator Is Subject to Conservatorship**

An order establishing a conservatorship does not constitute an adjudication of testamentary incompetence. A conservator of the person may be appointed for a person who is unable to provide properly for his or her personal needs for physical health, food, clothing, or shelter [*Prob. Code* § 1801(a)], and a conservator of the estate may be appointed for a person who is substantially unable to manage his or her own financial resources or resist fraud or undue influence [*Prob. Code* § 1801(b)]. A person may be unable to do these things and still be able to understand the nature of the testamentary act, the nature and situation of his or her property, and his or her relations to the natural objects of his or her bounty [see *Conservatorship of Bookasta (1989) 216 Cal. App. 3d 445, 450 n.5, 265 Cal. Rptr. 1*]. Recognizing this, the Probate Code explicitly authorizes a conservatee who is competent to make a will [*Prob. Code* § 1871(c)]. The Probate Code also authorizes a conservator to make a will for the conservatee if the court first approves the action [*Prob. Code* §§ 2580(b)(13), 6100(b), 6110(b)(3), 6100.5(c)]. For further discussion, see *Ch. 61, Will Drafting and Complete Will Forms*, § 61.11[3].

#### **[e] Duress, Menace, Fraud, and Undue Influence**

##### **[i] In General**

The execution or revocation of a will or a part of a will is ineffective to the extent procured by duress, menace, fraud, or undue influence [*Prob. Code* § 6104]. Duress, fraud, mistake, and undue influence are all grounds for the contest of a will [see *Prob. Code* § 8252(a) (burden of proof at trial)]. Although duress, menace, fraud, and undue influence are frequently lumped together by will contestants, the words represent distinct legal concepts and often (although not always) arise from different factual situations.

A finding of the existence of any or all of the grounds for contest of a will does not necessarily invalidate the entire instrument. *Prob. Code* § 6104 provides that "a will or a part of a will" is ineffective to the extent the execution was procured by duress, menace, fraud, or undue influence. If only a part of a will is so procured, then only that part will be ineffective, and the remainder may be admitted to probate [ *In re Estate of Webster (1941) 43 Cal. App. 2d 6, 16, 110 P.2d 81* ]. A distinct and independent residuary clause, for example, may be upheld even if it is determined that other bequests in the same will were procured by undue influence and must be declared void [ *Estate of Stauffer (1956) 142 Cal. App. 2d 35, 43, 297 P.2d 1029* ]. Conversely, if the whole will is the result of fraud, duress, menace, or undue influence, probate of the whole must be refused [ *Estate of Webster (1941) 43 Cal. App. 2d 6, 15, 110 P.2d 81* ].

##### **[ii] What Constitutes Fraud**

The "fraud" that will vitiate a contract is defined in *Civ. Code* § 1572 as any of the following acts, committed by a party with intent to deceive another party or to induce the other party to enter into a contract:

- The suggestion, as a fact, of that which is not true, by one who does not believe it to be true;
- The positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though the person making the assertion believes it to be true;
- The suppression of that which is true by one having knowledge or belief of the fact;
- A promise made without any intention of performing it; or

- Any other act fitted to deceive.

Although *Civ. Code § 1572*, by its terms, is applicable only to contracts, the California Supreme Court has held that fraud that is sufficient to vitiate a contract will also invalidate a will [ *Estate of Newhall (1923) 190 Cal. 709, 719, 214 P. 231* ]. As it applies to wills, fraud consists of false representations made with the intent to deceive the testator and for the purpose of affecting his or her testamentary disposition [ *Estate of Pohlmann (1949) 89 Cal. App. 2d 563, 571, 201 P.2d 446* ]. When fraud is relied on as a ground for contest of a will, the theory is that the testator, though acting of his or her own free will, was deceived by false representations into doing that which he or she would not have done without the fraudulent inducement [ *Estate of Newhall (1923) 190 Cal. 709, 718-719, 214 P. 231* ].

It is not necessary that the fraud be perpetrated at the time the will is made. Fraud perpetrated at some earlier time will invalidate a will if the testator's belief in the fraud persisted at the time of execution and if, but for that belief, the will would have been different from that actually executed [ *Estate of Newhall (1923) 190 Cal. 709, 722, 214 P. 231* ].

### **[iii] What Constitutes Undue Influence**

"Undue influence," as defined in *Civ. Code § 1575*, consists of the following:

- The use, by one in whom a confidence is reposed by another, or who holds a real or apparent authority over the other, of that influence or authority for the purpose of obtaining an unfair advantage over the other;
- Taking an unfair advantage of another's weakness of mind; or
- Taking a grossly oppressive and unfair advantage of another's necessities or distress.

Although this definition is specifically applicable to contracts, the courts have also applied it to wills. Thus, it has been held that conduct that subjugates the will of a testator to the will of another, and causes the testator to make a disposition of property different from that which he or she would otherwise have made, is undue influence that will invalidate a will or part of a will [ *Estate of Baker (1982) 131 Cal. App. 3d 471, 480, 182 Cal. Rptr. 550* ]. The essential elements that raise a presumption of undue influence are a confidential or fiduciary relationship between the testator and the person alleged to have exerted undue influence, active participation by that person in the preparation or execution of the will, and undue benefit to that person (or to another) under the will as procured [ *Rice v. Clark (2002) 28 Cal. 4th 89, 96-97, 120 Cal. Rptr. 2d 522, 47 P.3d 300* ]. A confidential relationship exists whenever one person reposes trust and confidence in the integrity and fidelity of another [ *Estate of Rugani (1952) 108 Cal. App. 2d 624, 630, 239 P.2d 500* ]. Such a relationship exists between husband and wife, attorney and client, physician and patient, and guardian and ward. It may also exist between persons who are closely related by blood or who are intimate friends. "Confidential" and "fiduciary" relations are, in legal contemplation, synonymous, and may be said to exist whenever one person places trust and confidence in another [ *Estate of Cover (1922) 188 Cal. 133, 143, 204 P. 583* ]. If a confidential relationship between the testator and a beneficiary under a will cannot be proved by direct evidence, circumstantial evidence may give rise to an inference that the beneficiary had the opportunity to control the testator's will and was active in procuring it [ *Estate of Franco (1975) 50 Cal. App. 3d 374, 385-386, 123 Cal. Rptr. 458* ].

Although undue influence often consists of false or misleading statements made to the testator for the purpose of influencing the testator's will, the Court of Appeal has held that falsity is not an essential element of undue influence and that statements that are perfectly true may be the basis for a claim of undue influence. In one case, two grandchildren sought to set aside a revocable trust instrument executed by their deceased grandmother on the ground that one of the grandmother's cousins had unduly influenced her decision to leave almost none of her property to the grandchildren. The grandchildren were the sole descendants of the grandmother, who was over 90 years of age at the time she executed the trust. The cousin argued that the only facts alleged to constitute undue influence consisted of true

statements made by the cousin to the grandmother about the grandchildren. In those statements, the cousin reminded the grandmother that one of the grandchildren was an adopted child and informed the grandmother that the other grandchild had become involved with drugs, had sought treatment in a rehabilitation center, had impregnated his girl friend, and then had paid for the girl friend to have an abortion. The grandchildren conceded that all of these statements were true. The cousin moved the court for summary judgment, arguing that truth was a complete defense to a claim of undue influence and that the *First Amendment* guarantee of free speech protected her from any liability for making admittedly true statements. The trial court granted the motion, but the Court of Appeal reversed, concluding that although undue influence often consists of untrue statements made to the testator for the purpose of overpowering the testator's free agency, untrue statements are not essential to undue influence. In fact, a claim of undue influence may be supported in whole or in part by proof of completely true statements. The court stated that it is essential to distinguish undue influence from fraud or misrepresentation. Falsity is an essential element of a claim for fraud or misrepresentation, but not of a claim for undue influence. Thus truth is not an absolute defense to a claim of undue influence, as it is to a claim for fraud or misrepresentation, although the truth of statements may tend to negate the inference that they had the effect of unduly influencing the testator (or, in this case, the settlor) [ *Hagen v. Hickenbottom* (1995) 41 Cal. App. 4th 168, 180-183, 48 Cal. Rptr. 2d 197 ].

#### **[iv] What Constitutes Duress and Menace**

"Duress," as defined in *Civ. Code* § 1569, consists of:

- Unlawful confinement of the person of any party, or of the husband or wife of any party, or of an ancestor, descendant, or adopted child of any such party, husband, or wife;
- Unlawful detention of the property of any such person; or
- Confinement of any such person, lawful in form, but fraudulently obtained, or fraudulently made unjustly harassing or oppressive.

"Menace," as defined in *Civ. Code* § 1570, consists of a threat of:

- "Duress" as specified in the first and third categories immediately above;
- Unlawful and violent injury to the person or property of any person specified above; or
- Injury to the character of any such person.

#### **[f] Title of Will**

It is not necessary to title a will "Last Will and Testament." Although the word "will" at one time referred only to a disposition of real property and "testament" only to a disposition of personal property, the words are now regarded as synonymous [Black's Law Dictionary (5th ed. 1979) p. 1321]. Modern drafting practice favors the elimination of unnecessary or antiquated words and phrases whenever possible. Whether a given will is or is not the testator's "last" will be determined, not by the title assigned to it by the drafter, but by the time of the testator's death and whether or not another will is made before that event.

#### **[g] Identity of Testator**

For detailed comments on the identity of the testator and additional provisions relating to that identity, see § 63.202.

#### **[h] Recitations of Capacity**

It was common at one time for attorneys to include recitations of capacity in wills (e.g., "being of sound and disposing mind and memory" and "not actuated by fraud, duress, menace or undue influence"). Although such recitations do not vitiate a will, they are not generally favored by modern drafting practice and are not included in this form. For a discussion of these recitations and an alternate introductory declaration including them, see § 63.201.

### **[i] Residence**

It is advisable (although not essential) to state the testator's residence, since residence will affect the venue of the administration proceedings and may bear on the law that is applicable to the will. Although the superior court has statewide jurisdiction of all proceedings for administration of decedents' estates [*Prob. Code* § 7050], the proper venue for an administration proceeding is determined first by the decedent's domicile at the time of death, and second by the character and location of the decedent's probate assets [*see Prob. Code* §§ 7051, 7052].

If the decedent was domiciled in California at the time of death, the proper county for proceedings concerning administration of the estate is the county in which the decedent was domiciled, regardless of the place of death [*Prob. Code* § 7051]. If the decedent was domiciled outside California [*see Prob. Code* § 12505 ("nondomiciliary decedent" defined)], the proper county for administration is determined as follows: If the nondomiciliary decedent left property located in the county in which he or she died, that county is the proper county for administration proceedings [*Prob. Code* § 7052(a)]. If no property of the nondomiciliary decedent is located in the county in which the decedent died, or if the decedent did not die in California, any county in which property of the decedent is located is the proper county, regardless of where the decedent died [*Prob. Code* § 7052(b)]. If the nondomiciliary decedent left property located in more than one California county, the proper county is the county in which a petition for ancillary administration is first filed [*Prob. Code* § 7052(b); *see Prob. Code* §§ 12501 ("ancillary administration" defined), 12510-12542 (rules for conduct of ancillary administration proceedings in California); *see also Ch. 65, Executors*, § 65.34 et seq.].

A written will is valid if its execution complies with any of the following [*Prob. Code* § 6113]:

- Provisions of the California Probate Code relating to written wills [*see Prob. Code* §§ 6110, 6111];
- Provisions of the California Probate Code relating to California statutory wills [*see Prob. Code* §§ 6200-6243];
- Provisions of the California Probate Code relating to international wills [*see Prob. Code* §§ 6380-6390];
- The law (at the time of execution) of the place where the will was executed; or
- The law of the place where at the time of execution or at the time of death the testator was domiciled, had a place of abode, or was a national.

### **[j] Revocation of Prior Wills and Codicils**

A will should include a clause or provision expressly revoking prior wills and codicils, either as part of the introductory declaration or as a separate paragraph. For detailed comments on revocation and additional provisions relating to revocation, see § 63.202.

## **[2] FORM**

### **Introductory Declaration--Short Form**

WILL OF \_\_\_\_\_ [*full legal name of testator*]

I, \_\_\_\_\_ [*full legal name of testator*], a resident of the County of \_\_\_\_\_ [*name of county*], State of California, declare that this is my will, and hereby revoke all wills and codicils previously made by me.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Will Contests Testamentary Capacity General Overview Estate, Gift & Trust Law Wills General Overview



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DIVISION IV: WILLS AND TRUSTS

CHAPTER 63 WILL PROVISIONS

PART IV. FORMS

A. Introductory Paragraph of Will

*23-63 California Legal Forms--Transaction Guide § 63.201*

### **§ 63.201 Introductory Declaration--Recitations of Capacity**

#### **[1] Comment**

#### **[a] Use of Form**

This form may be used as an introductory declaration when it is desired to include recitations as to the capacity (soundness of mind, age, and freedom from fraud, duress, menace, and undue influence) of the testator. For an introductory declaration without such recitations, see § 63.200.

For a discussion of the law relating to emancipated minors, what constitutes a sound mind, and grounds for contest of wills, see § 63.200[1].

#### **[b] Recitation of Capacity to Make a Will**

#### **[i] Freedom From Fraud, Duress, Menace, or Undue Influence**

It was common at one time for attorneys to include recitations of capacity in the introductory paragraphs of wills. These recitations commonly stated that the testator was "of sound and disposing mind and memory" and "not actuated by any fraud, duress, menace, or undue influence." Recognizing that these recitations have little or no probative force, many attorneys now eliminate them. A testator's statement that he or she is not actuated by fraud, duress, menace, or undue influence is, at best, of minimal value. A testator who is acting under fraud will not be aware of the fact, and a testator who has been induced by duress, menace, or undue influence to make a will in all probability will have been similarly induced to declare that the will was free of any such influence. Moreover, every testator is presumed to be of sound mind and to possess testamentary capacity until the contrary is established [ *Estate of Sanderson (1959) 171 Cal. App. 2d 651, 660, 341 P.2d 358* ].

Recitations of capacity, however, will not vitiate a will or any of its provisions. At worst, such provisions may be regarded as surplusage. It is the opinion of some attorneys that recitations of capacity serve a valuable purpose in that they remind testators of the importance of the will they are making and of the solemnity of the act of execution. They

argue that such recitations may forestall potential will contests, as persons who are unhappy with the provisions of a will, upon reading a recitation in the document that it was made by a person of "sound and disposing mind and memory" who was "not actuated by fraud, duress, menace, or undue influence," may be discouraged from challenging the will. Although modern drafting practice does not favor such recitations, whether they should be included in a will is a matter that each attorney must decide.

### **[ii] Recitations of Testator's Age**

It is not necessary to recite that the testator is of "legal age," "lawful age," or "over the age of majority." The age of the testator is a fact that is usually quite easy to prove, and is rarely the subject of dispute. If the age of the testator is in issue, testamentary declarations that are contrary to fact will do little to resolve the question. Further, it is always presumed that the testator was competent to make a will [ *Estate of Somers (1948) 82 Cal. App. 2d 757, 187 P.2d 433* ]. It is a relatively simple matter, however, to include a statement that the testator is "eighteen or more years of age" or is an "emancipated minor." If the testator is a very young adult or an emancipated minor, it may be advisable for the attorney to include such a declaration.

### **[2] FORM**

#### **Introductory Declaration--Recitations of Capacity**

WILL OF \_\_\_\_\_ [*full legal name of testator*]

I, \_\_\_\_\_ [*full legal name of testator*], a resident of the County of \_\_\_\_\_ [*name of county*], State of California, \_\_\_\_\_ [*add optional age declaration, e.g., being eighteen years of age, or being over the age of eighteen years, or being an emancipated minor,*] \_\_\_\_\_ [*add optional recitation of capacity: (and) being of sound and disposing mind and memory and not being actuated by fraud, duress, menace, or undue influence,*] declare that this is my will, and hereby revoke all wills and codicils previously made by me.

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Will Contests Testamentary Capacity General Overview Estate, Gift & Trust Law Will Contests Testamentary Capacity Evidence Estate, Gift & Trust Law Will Contests Testamentary Capacity Presumption



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DIVISION IV: WILLS AND TRUSTS

CHAPTER 63 WILL PROVISIONS

PART IV. FORMS

A. Introductory Paragraph of Will

*23-63 California Legal Forms--Transaction Guide § 63.202*

### **§ 63.202 Introductory Declaration--Identity of Testator**

#### **[1] Comment**

#### **[a] Use of Form**

This form contains alternative provisions relating to the identity of the testator. When appropriate, these provisions may be used with or inserted in the introductory paragraph of the will [*see §§ 63.200, 63.201*].

The first alternative provision may be used to state additional names by which the testator has been or is known. The second may be used to state the maiden name of a married woman or the former name of any person whose name has been changed. The third alternative may be used to refer to another document in which the testator is named.

These provisions will help the personal representative identify and locate assets in which the testator had an interest and which might otherwise remain undetected after the testator's death. A statement of identity may be particularly important in the case of a trust that has been created for the benefit of the testator and in which the testator's name is different from the name which appears in the title of the will.

The first name that appears in this provision (and the name that appears in the title of the will) should be the testator's full legal name.

#### **[b] Identity of Testator**

When there is any possibility of confusion in the identity of the testator, the introductory paragraph of the will should contain some facts enabling proper identification. Where the testator has used more than one name or more than one form of a name (e.g., John Smith, John N. Smith, John Norton Smith, J. N. Smith), all of the names and all of the forms of the names should be set out. This may be done by using the phrase "also known as." A married woman who has assumed her husband's name, or any person who has legally changed his or her name, may use the phrase "formerly known as."

When drafting a will, it is particularly important for the attorney to learn what names (or forms of a name) the testator has used in taking title to real property, stocks and bonds, bank accounts or certificates, or other assets, and the name or names, if any, under which the testator may have a beneficial interest in a trust.

**[2] FORM**

**Introductory Declaration--Identity of Testator**

I, \_\_\_\_\_ [full legal name of testator], also known as \_\_\_\_\_ [insert other names and other forms of names by which testator is or has been known],

[OR]

I, \_\_\_\_\_ [full legal name of testator], formerly known as \_\_\_\_\_ [maiden name or former legal name],

[OR]

I declare that I am the same person named as \_\_\_\_\_ [name by which testator is designated] in that certain \_\_\_\_\_ [specify instrument or document, e.g., grant deed or deed of trust or trust declaration] dated \_\_\_\_\_ [date and month], \_\_\_\_\_ [year].

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Estate, Gift & Trust Law Wills General Overview



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DIVISION IV: WILLS AND TRUSTS

CHAPTER 63 WILL PROVISIONS

PART IV. FORMS

A. Introductory Paragraph of Will

*23-63 California Legal Forms--Transaction Guide § 63.203*

### § 63.203 Revocation of Prior Wills

#### [1] Comment

#### [a] Use of Form

This form is a clause that revokes all prior wills and codicils made by the testator. To avoid inconsistencies between the present will and former wills and codicils, a clause revoking prior wills and codicils should be included in the introductory paragraph [*see* § 63.200] or set forth in a separate paragraph of the will.

#### [b] Revocation of Wills

#### [i] Generally

A will or any part of a will may be revoked by a subsequent will that revokes the prior will expressly or by inconsistency, or by being burned, torn, canceled, obliterated, or destroyed, with the intent and for the purpose of revoking it [*Prob. Code* § 6120(a), (b)].

If the testator's marriage is dissolved or annulled, or the testator's domestic partnership has been terminated, after execution of a will, the dissolution, annulment or termination revokes the following unless the will expressly provides otherwise [*Prob. Code* §§ 6122(a), 6122.1(a)]:

- Any disposition or appointment of property made by the will to the former spouse or domestic partner.
- Any provision of the will conferring a general or special power of appointment on the former spouse or domestic partner.
- Any provision of the will nominating the former spouse or domestic partner as executor, trustee, conservator, or guardian.

Former *Prob. Code* § 79 (repealed effective January 1, 1985) provided that the revocation of a will revokes all of its codicils. Even before repeal of this section, the rule had been qualified by a decision holding that, if a codicil is capable of standing on its own as a will, revocation of the underlying will does not revoke the codicil [ *Estate of Cuneo (1963)* 60 Cal. 2d 196, 202, 32 Cal. Rptr. 409 ]. *Prob. Code* § 6120 does not continue the rule that revocation of a will automatically revokes its codicils. As in the case of the will itself, the question of whether a codicil to the will has or has not been revoked must be answered by ascertaining the intent of the testator.

### **[ii] By Subsequent Will**

A will or part of a will may be revoked by a later will executed by the same testator [*Prob. Code* § 6120(a); *Estate of Nielson (1980)* 105 Cal. App. 3d 796, 803, 165 Cal. Rptr. 319 ]. The later will must, of course, have been executed in compliance with the statutory formalities required for wills [ *Estate of Nielson (1980)* 105 Cal. App. 3d 796, 803, 165 Cal. Rptr. 319, citing former *Prob. Code* § 74 (repealed Jan. 1, 1985)]. There is no requirement, however, that a formal witnessed will be revoked by another formal witnessed will. Thus a formal witnessed will may be revoked by a valid holographic will, by a codicil to the earlier will, or even by interlineations in or marginal notations on the earlier will, provided those interlineations or notations are in themselves the equivalent of a valid will or codicil [ *Estate of Nielson (1980)* 105 Cal. App. 3d 796, 803, 165 Cal. Rptr. 319; see *Prob. Code* § 6111 (holographic will); see also *Prob. Code* § 88 (will includes codicil)].

A later will or codicil, however, will not automatically revoke an earlier will, even if executed with the formalities required of wills [ *Estate of Johnson (1979)* 91 Cal. App. 3d 800, 806, 154 Cal. Rptr. 586 ]. Revocation will be accomplished if the later will contains a clause expressly revoking the earlier will (or all earlier wills) [*Prob. Code* § 6120(a)]. If the later will does not include an express revocation clause, revocation will be accomplished only if the later will is inconsistent with the earlier will, or inconsistent with a part of the earlier will [*Prob. Code* § 6120(a)]. In determining the question of inconsistency, the courts must always be guided by the intentions of the testator [*Prob. Code* § 6140(a); *Estate of Danford (1925)* 196 Cal. 339, 342, 238 P. 76 ]. When there is doubt, it is the policy of the law to preserve the earlier will, in whole or in part, rather than declare a total or even partial revocation [ *Estate of Johnson (1979)* 91 Cal. App. 3d 800, 807, 154 Cal. Rptr. 586 ].

Proof that a testator made two wills will not, in itself, establish that the second will was intended to revoke the first. The testator may have intended the second will to complement or supplement the first; or, if the testator intended to revoke the first will, he or she may have intended only a partial revocation [see *Prob. Code* § 6120 (will may be revoked in whole or in part)]. Two testamentary instruments executed by the same person are to be construed as one instrument unless the second instrument is wholly inconsistent with the first [ *Estate of Johnson (1979)* 91 Cal. App. 3d 800, 808, 154 Cal. Rptr. 586 (construing former *Prob. Code* § 101, repealed Jan. 1, 1985); see *Prob. Code* § 6161 (all parts of will must be construed, if possible, to form consistent whole)]. A total revocation of the first will will be found only if the second will is so plainly inconsistent with the first that the two are incapable of standing together [ *Estate of Shute (1942)* 55 Cal. App. 2d 573, 576, 131 P.2d 54 ].

It has been stated that a later will that makes a complete disposition of the testator's property will revoke an earlier will that makes a different disposition [ *Estate of Mallon (1938)* 28 Cal. App. 2d 106, 110, 81 P.2d 992 ]. A later will that completely disposes of the testator's property, however, will not revoke an earlier will if the second disposition is not wholly inconsistent with the first disposition [ *Estate of Shute (1942)* 55 Cal. App. 2d 573, 576, 131 P.2d 54 ]. Whether a subsequent will without an express revocation clause will be found to have revoked a former will depends in every case on an evaluation of the two wills and a determination of whether their terms are consistent or inconsistent [ *Estate of Johnson (1979)* 91 Cal. App. 3d 800, 154 Cal. Rptr. 586 ].

The fact that a later will disposes of all of the testator's property will often indicate that the testator intended to revoke earlier wills [see *Estate of Siemers (1927)* 202 Cal. 424, 435, 261 P. 298; *Estate of Martin (1939)* 31 Cal. App. 2d

501, 506, 88 P.2d 234 ]. When a later will undertakes a complete disposition of all of the testator's property, the court may properly find that the later will is wholly inconsistent with earlier wills and thus revokes them [ *Estate of Benson (1944)* 62 Cal. App. 2d 866, 871, 145 P.2d 668 ; *Estate of Martin (1939)* 31 Cal. App. 2d 501, 506, 88 P.2d 234 ]. However, if the earlier and later wills are consistent despite the fact that the later will disposes of all the property, they must be construed together [ *Estate of Johnson (1979)* 91 Cal. App. 3d 800, 808, 154 Cal. Rptr. 586 ]. In one case, for example, the testator executed a formal witnessed will in which she disinherited particular heirs. She later executed a holographic will in which she disposed of all of her property to persons other than the disinherited heirs, but did not restate the disinheritance clause. The court held that the later will did not revoke the disinheritance clause of the earlier will. Under all of the circumstances, it was apparent that the testator did not intend to revoke the earlier disinheritance clause, and the dispositive provisions of the later will and the disinheritance clause of the earlier will could properly be construed together [ *Estate of Johnson (1979)* 91 Cal. App. 3d 800, 808-809, 154 Cal. Rptr. 586 ].

### **[iii] By Destruction**

A testator may revoke all or part of a will by burning, tearing, canceling, obliterating, or destroying it [ *Prob. Code § 6120(b)* ]. However, an act of destruction or cancellation will not be effective to revoke a will unless it is performed with the intent and for the purpose of revoking it [ *Prob. Code § 6120(b)*; see *Estate of Olmsted (1898)* 122 Cal. 224, 229, 54 P. 745 ; *Estate of Silva (1915)* 169 Cal. 116, 121, 145 P. 1015 ]. Conversely, intent to revoke is ineffective to accomplish revocation if the intent is not actually carried out [ *Estate of Silva (1915)* 169 Cal. 116, 121, 145 P. 1015 ].

A will or part of a will may also be revoked if some person other than the testator burns, tears, cancels, obliterates, or destroys it [ *Prob. Code § 6120(b)* ]. However, an act of destruction or cancellation performed by someone other than the testator will effect a revocation only if it is done (1) with the intent and for the purpose of revoking and (2) in the testator's presence and at the testator's direction [ *Prob. Code § 6120(b)* ].

Former *Prob. Code § 74(2)* (repealed January 1, 1985) provided that if destruction was accomplished by someone other than the testator, the destruction (and the fact that the destruction was carried out at the direction of the testator) had to be proved by two witnesses. *Prob. Code § 6121* (effective January 1, 1985) does not require two witnesses to prove destruction; the standard of proof is the same whether the destruction is by the testator personally or by another person acting at the testator's direction.

A will executed in duplicate is revoked if one of the duplicates is burned, torn, cancelled, obliterated, or destroyed, with the intent and for the purpose of revoking it, by either the testator or another person acting in the testator's presence and at the testator's direction [ *Prob. Code § 6121* ].

Part of a will may be revoked by cancelling, obliterating, tearing, or otherwise destroying a part of the will, or one or more of its provisions, with the intent to revoke it [ *Estate of Finkler (1935)* 3 Cal. 2d 584, 599-602, 46 P.2d 149 ]. If a will is executed in duplicate, the destruction of one of the duplicates (or any part thereof) in the manner and with the intent specified in *Prob. Code § 6120* will effect a revocation (whole or partial) of the will [ *Prob. Code § 6121* ].

If a testator's will cannot be found after the testator's death, a presumption may arise that the testator destroyed the will with the intent to revoke it [ *Prob. Code § 6124* see *Evid. Code §§ 603, 604* (presumptions affecting burden of producing evidence)]. This presumption will arise if it is established (1) that the testator's will was last in the testator's possession, (2) that the testator was competent until death, and (3) that neither the will nor a duplicate original of the will can be found [ *Prob. Code § 6124* ]. This statutory presumption constitutes a double presumption: first, destruction of the will is presumed from disappearance of the will; second, revocation is presumed from destruction [ *Estate of Obernolte (1979)* 91 Cal. App. 3d 124, 129, 153 Cal. Rptr. 798 n.7 ; see *Ch. 61, Will Drafting and Complete Will Forms, § 61.19[2]* ].

### **[iv] By Annulment or Dissolution of Marriage**

Unless the will expressly provides otherwise, the annulment or dissolution of a testator's marriage will revoke any disposition or appointment of property made by the will to the former spouse, any provision of the will conferring a general or special power of appointment on the former spouse, and any provision of the will nominating the former spouse as executor, trustee, conservator, or guardian [*Prob. Code § 6122(a)*].

In case of a revocation by dissolution or annulment, property that would have passed to the former spouse but for the revocation will pass as if the former spouse failed to survive the testator [*Prob. Code § 6122(c)(1)*]. Similarly, other provisions conferring some power or office on the former spouse (such as executor or trustee) must be interpreted as if the former spouse failed to survive the testator [*Prob. Code § 6122(c)(2)*]. For example, provisions of a trust incorporated in a decedent's will, appointing the decedent's wife as trustee, granting her a power of appointment, or transferring any property or income from property to her, were revoked by *Prob. Code § 6122* on the dissolution of their marriage, because that statute provides that the terms of a trust incorporated in a will must be administered and distributed as though the former spouse had predeceased the decedent [ *Estate of Coleman (2005) 129 Cal. App. 4th 380, 389, 28 Cal. Rptr. 3d 282* ].

As used in the Probate Code, the term "predeceased spouse" does not include any person who obtains or consents to a final decree or judgment of dissolution of marriage from the decedent or a final decree or judgment of annulment of their marriage (unless they subsequently remarry or live together as husband and wife); any person who, following a decree or judgment of dissolution or annulment of marriage obtained by the decedent, participates in a marriage ceremony to a third person; or any person who was a party to a valid proceeding concluded by an order purporting to terminate all marital property rights [*Prob. Code § 59*].

If any provision of a will is revoked solely by reason of the dissolution or annulment of the testator's marriage, the testator's remarriage to the former spouse will revive it [*Prob. Code § 6122(b)*].

Although *Prob. Code § 6122* does not address the effect of dissolution on bequests to children of the former spouse, the courts have held that, unless a contrary intention is indicated in the will, it is generally presumed that a testator intends to exclude the children of an ex-spouse from taking under the will [ *Estate of Jones (2004) 122 Cal. App. 4th 326, 332, 18 Cal. Rptr. 3d 637* (residuary bequest to adult step-daughter was revoked by her mother's dissolution from testator); *Estate of Hermon (1995) 39 Cal. App. 4th 1525, 1531-1532, 46 Cal. Rptr. 2d 577* (court called on legislature to adopt provision similar to that set forth in Uniform Probate Code, which provides that dissolution revokes not only testamentary bequests to former spouse but also bequests to former spouse's relatives)]. Evidence showing that the testator continued to have a relationship with the child of a former spouse following dissolution may show an intent by the testator to continue to have the child take under the will [ *Estate of Jones (2004) 122 Cal. App. 4th 326, 332, 18 Cal. Rptr. 3d 637* ].

#### **[v] By Termination of Domestic Partnership**

Under the California Domestic Partner Rights and Responsibilities Act of 2003 (the Act) [*Fam. Code §§ 297-299.3*], a domestic partnership is formed when two persons who meet specific requirements complete and file a declaration of domestic partnership with the Secretary of State. In order to file a valid declaration, the two parties must meet the following requirements [*Prob. Code § 37; Fam. Code § 297(b)*]:

- Both must have a common residence. "Common residence" means that both domestic partners must share the same residence, but it is not necessary that the legal right to possess residence be in both of their names. Domestic partners may have a common residence even if one or both have additional residences, and they do not cease to have common residence if one leaves the residence but intends to return [*Fam. Code § 297(c)*].

- Neither is married or a part of another domestic partnership.
- Neither is related by blood in a way that would prevent them from being married in the state of California.
- Both are over age 18.
- Both are either of the same sex or one or both meet the eligibility criteria under Title II of the Social Security Act for old-age insurance benefits [42 U.S.C. § 1381]. Persons of opposite sexes may not form a valid domestic partnership unless at least one is 62 years of age.
- Both are capable of consenting to a domestic partnership.

As of January 1, 2005, each person filing a declaration of domestic partnership must state in the declaration that he or she consents to the jurisdiction of the California superior courts for the purpose of a proceeding to obtain a judgment of dissolution or nullity of the domestic partnership or for legal separation of the partners in the domestic partnership, or for any other proceeding related to the partners' rights and obligations, even if one or both partners ceases to be a resident of, or to maintain a domicile in, California [*Fam. Code § 298(c)(3)*].

Effective January 1, 2005, registered domestic partners have the same rights, protections, and benefits, and are subject to the same responsibilities, obligations, and duties under law, whether they derive from statutes, administrative regulations, court rules, government policies, common law, or any other provisions or sources of law, as are granted to and imposed on spouses [*Fam. Code § 297.5(a)*]. A surviving registered domestic partner, following the other partner's death, has the same rights, protections, and benefits, and is subject to the same responsibilities, obligations, and duties under law, as are granted to and imposed on a widow or widower [*Fam. Code § 297.5(c)*]. However, the Act is not intended to repeal or adversely affect any other ways in which relationships between adults may be recognized or given effect in California, or the legal consequences of those relationships, including, among other things, civil marriage, enforcement of palimony agreements, enforcement of powers of attorney, appointment of conservators or guardians, and petitions for second parent or limited consent adoption [Stats. 2003, ch. 421, § 2].

The legislature has made clear its intention in the domestic partnership law to substantially equalize the status of registered domestic partners and spouses [ *Koebke v. Bernardo Heights Country Club (2005) 36 Cal. 4th 824, 837, 31 Cal. Rptr. 3d 565, 115 P.3d 1212* ]. To couples who meet the requirements of establishing a domestic partnership under the domestic partnership law and who have registered under that law, the legislature has granted legal recognition comparable to marriage, both procedurally and in terms of the substantive rights and obligations granted to and imposed on the partners, which are supported by policy considerations similar to those favoring marriage. These rights and responsibilities are not shared by couples who cohabit or who have not registered as domestic partners [ *Koebke v. Bernardo Heights Country Club (2005) 36 Cal. 4th 824, 845, 31 Cal. Rptr. 3d 565, 115 P.3d 1212* (finding that in light of domestic partnership law, Unruh Act requires businesses to treat registered domestic partners same as spouses); see *Civ. Code § 51(b)* (prohibiting discrimination on basis of marital status or sexual orientation)].

The legislature's enactment of *Fam. Code § 297.5*, giving registered domestic partners the same rights and obligations as spouses, is not an improper legislative amendment of the defense of marriage initiative (Proposition 22), as codified in *Fam. Code § 308.5*, which states that only marriage between a man and a woman is valid or recognized in California. Because Proposition 22 did not address domestic partnerships, changing the domestic partnership law did not amend the initiative [ *Knight v. Superior Court (2005) 128 Cal. App. 4th 14, 22-31, 26 Cal. Rptr. 3d 687* ].

Persons who have filed a declaration of domestic partnership may not file a new declaration or enter a civil marriage with someone other than their registered domestic partner unless the most recent domestic partnership has been terminated or a final judgment of dissolution or nullity of the most recent domestic partnership has been entered. This

prohibition does not apply when a previous domestic partnership has ended because of the death of one of the partners [*Fam. Code* § 298.5(c)].

As of January 1, 2005, a legal union of two persons of the same sex, other than a marriage, that was validly formed in another jurisdiction and that is substantially equivalent to a domestic partnership under the Act, must be recognized as a valid domestic partnership in California regardless of whether it bears the name "domestic partnership" [*Fam. Code* § 299.2].

The termination of a testator's domestic partnership serves to revoke certain provisions of the testator's will, if the will was executed on or after January 1, 2002 [*Prob. Code* § 6122.1(d)]. Unless the will expressly provides otherwise, if a person executes a will and the person's domestic partnership is terminated, the termination will revoke any disposition or appointment of property made by the will to the former domestic partner, any provision of the will conferring a general or special power of appointment on the former domestic partner, and any provision of the will nominating the former domestic partner as executor, trustee, conservator, or guardian [*Prob. Code* § 6122.1(a)].

When will provisions are revoked because of the termination of the testator's domestic partnership, property that would have passed to the former domestic partner if the provisions had not been revoked instead passes as if the former domestic partner failed to survive the testator [*Prob. Code* § 6122.1(c)(1)]. Other provisions of the will conferring some power or office on the former domestic partner will be interpreted as if the former domestic partner failed to survive the testator [*Prob. Code* § 6122.1(c)(2)].

Any disposition or other provision of a will that is revoked solely by reason of the termination of the testator's domestic partnership is revived if the testator re-establishes another domestic partnership with the former domestic partner [*Prob. Code* § 6122.1(b)].

Until January 1, 2005, domestic partnership was terminated when one of the following occurred [*Fam. Code* § 299(a) (prior to amendment by Stats. 2003, ch. 421, operative 1/1/05)]:

- One partner gave or sent by certified mail to the other partner a written notice that he or she was terminating the partnership.
- One of the domestic partners died.
- One of the domestic partners married.
- The domestic partners no longer had a common residence.

On termination of a domestic partnership prior to January 1, 2005, at least one former partner was required to mail a completed notice of termination of domestic partnership to the Secretary of State by certified mail. If the domestic partnership was terminated because of the death or marriage of a domestic partner, the termination date was the date indicated on the notice of termination of domestic partnership form. Otherwise, the date on which the notice of termination of domestic partnership was received by the Secretary of State is deemed the actual termination date of the domestic partnership [*Fam. Code* § 299(b) (prior to amendment by Stats. 2003, ch. 421, operative 1/1/05)].

As of January 1, 2005, a domestic partnership may be terminated by filing a notice of termination of domestic partnership with the Secretary of State, provided all of the following conditions exist at the time of the filing [*Fam. Code* § 299(a)]:

- Both domestic partners have signed the notice of termination.

- There are no children of the parties' relationship born before or after registration of the domestic partnership or adopted by the parties after registration of the domestic partnership, and neither of the domestic partners, to their knowledge, is pregnant.
- The domestic partnership has not lasted for more than five years.
- Neither partner has an interest in real property, wherever situated, with the exception of the lease of a residence occupied by either partner that does not include an option to purchase and that terminates within one year from the date of filing the Notice of Termination.
- There are no unpaid obligations in excess of the amount specified in *Fam. Code § 2400(a)(6)* (\$4000), as adjusted for inflation under *Fam. Code § 2400(b)*, incurred by either or both of the partners after registration of the domestic partnership, excluding the amount of any unpaid obligation for an automobile.
- The total fair market value of community property assets, excluding all encumbrances and automobiles, including any deferred compensation or retirement plan, is less than the amount specified in *Fam. Code § 2400(a)(7)* (\$25,000), as adjusted for inflation under *Fam. Code § 2400(b)*, and neither partner has separate property assets, excluding all encumbrances and automobiles, in excess of that amount.
- The partners have executed an agreement setting forth the division of assets and assumption of liabilities of the community property, and have executed any documents, title certificates, bills of sale, or other evidence of transfer necessary to effectuate the agreement.
- The partners have waived any rights to support by the other partner.
- The partners have read and understand a brochure prepared by the Secretary of State describing the requirements, nature, and effect of terminating a domestic partnership.
- Both partners desire that the partnership be terminated.

A domestic partnership is terminated six months after the date the notice of termination is filed [*Fam. Code § 299(b)*].

After January 1, 2005, a domestic partnership that does not meet the conditions specified above may only be terminated by an action for dissolution of the domestic partnership, nullity of the domestic partnership, or legal separation of the partners [*Fam. Code § 299(c), (d)*].

If a domestic partnership is terminated by the death of one of the parties and a Notice of Termination was not filed by either party before the decedent's death, the domestic partner who survives the decedent is a surviving domestic partner, and is entitled to the rights of a surviving domestic partner as provided in the Probate Code [*Prob. Code § 37(b)*].

#### **[c] Invalidity of Revocation Procured by Duress, Menace, Fraud, or Undue Influence**

The revocation of a will or a part of a will, like the execution of a will or a part of a will, is ineffective if procured by duress, menace, fraud, or undue influence [*Prob. Code § 6104*]. For discussion, see § 63.200[1][e][i] et seq.

#### **[d] Revival of Revoked Will**

If a testator makes a first will, later makes a second will, and at some subsequent time revokes the second will, there is a

question as to whether the first will is revived. If the second will is revoked by a third will, the issue may be easily resolved by including an explicit statement in the third will expressing the testator's intentions on the question. If the revocation is not effected by a third will, however, but by an act of burning, tearing, cancellation, obliteration or destruction; or if the revocation is effected by a third will but the third will does not clearly address itself to the question of whether the first will is or is not to be revived, resolution of the question will depend on the circumstances of the revocation.

A revocation by any of the means described in *Prob. Code* § 6120 or 6121 (burning, tearing, cancellation, obliteration, or destruction) will not revive the first will (or part of the first will, in case only a part of the second will has been revoked) unless it is evident from the circumstances of the revocation or from the testator's contemporary or subsequent declarations that the testator intended the first will to take effect as executed [*Prob. Code* § 6123(a)]. Revocation of the second will by a third will will not revive the first will unless it appears from the terms of the third will that the testator intended the first will to take effect [*Prob. Code* § 6123(b)].

### **[e] Dependent Relative Revocation**

If a first will is revoked by a second will, and if it appears that the testator intended the revocation to depend on the effectiveness of the second will, the law presumes that the testator intended the revocation to take effect only if the second will is valid, and if the second will should for any reason fail, the revocation will also fail [ *Estate of Cuneo* (1963) 60 Cal. 2d 196, 202, 32 Cal. Rptr. 409, 384 P.2d 1 ; *Estate of Guerrero* (1986) 183 Cal. App. 3d 723, 731, 228 Cal. Rptr. 408 ]. This rule is known as the doctrine of dependent relative revocation. Under it, revocation of a first will is deemed to be relative and not absolute and to depend on the effectiveness of a second will [ *Estate of Kaufman* (1945) 25 Cal. 2d 854, 860, 155 P.2d 831 ]. A prudent attorney, however, will never rely on the doctrine of dependent relative revocation to effectuate the testator's intentions. If there is any doubt about the validity of the second will or any doubt about the correctness of facts assumed by the testator, the attorney may wish to make the revocation of an earlier will explicitly conditional on the validity of the later one. An optional provision establishing such a condition is contained in § 63.204.

### **[2] FORM**

#### **Revocation of Prior Wills**

I hereby revoke all my previous wills and codicils.

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Will Contests Revocation General Overview Estate, Gift & Trust Law Will Contests Revocation Later Writings Estate, Gift & Trust Law Wills General Overview



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DIVISION IV: WILLS AND TRUSTS

CHAPTER 63 WILL PROVISIONS

PART IV. FORMS

A. Introductory Paragraph of Will

*23-63 California Legal Forms--Transaction Guide § 63.204*

### **§ 63.204 Conditional Revocation**

#### **[1] Comment**

#### **[a] Use of Form**

This form is a conditional revocation clause. It may be used to state that any and all wills previously executed by the testator are revoked, but only conditionally. If the stated condition is satisfied, the revocation will be effective. If the condition is not satisfied, the revocation will have no force or effect. For an unconditional revocation of prior wills, see § 63.203. For a will provision making an entire will conditional, see § 63.205.

#### **[b] Conditional Revocation**

A will may be revoked conditionally. *Prob. Code § 6105* provides that a will that is expressly made conditional must be admitted to probate or rejected (or denied effect after admission to probate) in conformity with the condition. Under this rule, if a will is revoked by a subsequent will [*see Prob. Code § 6120(a)* (revocation by subsequent will); *see also § 63.203[1]*], and if the subsequent will by its own terms is conditional, the effectiveness of the revocation is also conditional. The basic rule for the interpretation of wills is that the intention of the testator as expressed in the will controls the legal effect of the dispositions made in the will [*Prob. Code § 21102(a)*; *see Prob. Code § 21101* (rules applicable to wills, trusts, and other instruments)]. Under this rule, if a will disposes of property conditionally, the property must be distributed in accordance with the condition [*see Burch v. George (1994) 7 Cal. 4th 246, 254, 27 Cal. Rptr. 2d 165, 866 P.2d 92*]. However, this rule does not limit the use of extrinsic evidence, to the extent otherwise authorized by law, to determine the testator's intention [*Prob. Code § 21102(c)*].

An express conditional revocation must be distinguished from a revocation that is implied under the doctrine of "dependent relative revocation." The doctrine of dependent relative revocation is a common law rule that is applied by the courts when it can be inferred that a testator who revokes an earlier will and executes a subsequent will has revoked the earlier will conditionally [*see Estate of Cuneo (1963) 60 Cal. 2d 196, 202, 32 Cal. Rptr. 409, 384 P.2d 1*]. It is applied for the purpose of avoiding injustice [*see Tentative Recommendation Relating to Wills and Intestate Succession, 16 Cal. L. Revision Comm'n Reports 2301, 2327 n.46 (1982)*] and to carry out the probable intention of the testator

when there is no reason to suppose that the testator intended to revoke an earlier will if a subsequent will became inoperative [ *Estate of Cuneo (1963) 60 Cal. 2d 196, 202, 32 Cal. Rptr. 409, 384 P.2d 1* ; *Estate of Kaufman (1945) 25 Cal. 2d 854, 859, 155 P.2d 831* ; *Estate of Strickman (1966) 247 Cal. App. 2d 469, 474, 55 Cal. Rptr. 606* ]. For a general discussion of the doctrine of dependent relative revocation, see § 63.203[1].

A conditional revocation may state that it is to be effective only if the revoking will and all of its provisions are valid and effective, or that it is predicated on the correctness of a particular factual assumption--for example, that a child of the testator thought to be deceased is in fact deceased.

## [2] FORM

### Conditional Revocation

I revoke all my prior wills and codicils; provided, however, that this revocation shall be effective only if this will and all of its provisions are valid and effective.

[OR]

I revoke all my prior wills and codicils, including my will dated \_\_\_\_\_[*date*]; provided, however, that this revocation shall be valid and effective only if \_\_\_\_\_[*state factual assumption, e.g.: my son John Smith is now dead*]. If \_\_\_\_\_[*state opposite of factual assumption, e.g.: my son John Smith is not dead*], the provisions of my prior will dated \_\_\_\_\_[*date*], \_\_\_\_\_[*if desired, add description of devise, e.g.: including the devise I have made in that will to my son John Smith of my house and lot at 12 Broad Street, Smalltown, California*], are not revoked and shall be given full effect.

### Legal Topics:

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawWill ContestsRevocationGeneral OverviewEstate, Gift & Trust LawWill ContestsRevocationLater WritingsEstate, Gift & Trust LawWillsGeneral Overview



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DIVISION IV: WILLS AND TRUSTS

CHAPTER 63 WILL PROVISIONS

PART IV. FORMS

A. Introductory Paragraph of Will

*23-63 California Legal Forms--Transaction Guide § 63.205*

### **§ 63.205 Conditional Will Provision**

#### **[1] Comment**

#### **[a] Use of Form**

This form is a will provision that may be used to make a will conditional on the occurrence (or nonoccurrence) of a specified event. If the condition is satisfied, the will becomes fully effective. If it is not, the will is ineffective for any purpose. For a form making a particular gift (as opposed to an entire will) conditional, see § 63.410.

#### **[b] Conditional Wills and Gifts--Public Policy Limitations**

A will, the validity of which is made conditional by its own terms, will be granted or denied probate (or denied effect after probate) in conformity with the condition [*Prob. Code § 6105*].

The words of a will are to receive an interpretation that will give every expression some effect, rather than one that will render any of the expressions inoperative [*Prob. Code § 21120*]. Further, a testator is free to dispose of his or her estate on whatever conditions he or she may establish, as long as the conditions are not prohibited by law and do not violate public policy [*see Estate of Kitchen (1916) 192 Cal. 384, 388, 220 P. 301*]. However, the language of the will must clearly express the testator's intention that the will become operative (or a disposition is to take effect) only if a specified event occurs [ *Estate of Taylor (1953) 119 Cal. App. 2d 574, 580, 259 P.2d 1014* ]. A condition will not be implied from indefinite language [ *Black v. Taylor (In re Estate of Taylor)(1953) 119 Cal. App. 2d 574, 581, 259 P.2d 1014* ], nor will language that merely expresses the testator's reasons for making a will or a particular disposition be interpreted as a condition to the effectiveness of the will or the disposition [ *Estate of Moulton (1959) 176 Cal. App. 2d 87, 90, 1 Cal. Rptr. 407* ].

The test for determining whether a will is conditional is generally stated to be whether the testator intended to make the occurrence (or nonoccurrence) of a specified event a condition to the operation of the will, or merely referred to the event as the motive (or inducement) for making the will [ *Estate of Taylor (1953) 119 Cal. App. 2d 574, 580, 259 P.2d 1014* ]. Although the courts endeavor to interpret a will so as to give every expression some effect [*Prob. Code § 21120*].

], preference must be given to an interpretation that will prevent rather than result in an intestacy [*Prob. Code* § 6160].

Certain conditions in a will may be held invalid or denied enforcement because they violate public policy. Conditions of this kind are those that are intended to limit marriage, encourage divorce, or induce criminal, tortious, or immoral acts.

Conditions imposing restraints on marriage (except the marriage of a minor) are void [*Civ. Code* § 710]. If a gift is intended to restrain marriage and the gift is restricted by the imposition of a condition subsequent, the condition is invalid [ *Estate of Scott (1915)* 170 Cal. 65, 66, 148 P. 221 ]. For example, a devise to a surviving spouse of trust income for her lifetime or until her remarriage or cohabitation was void as a restraint on marriage when testimony showed that the testator was extremely jealous and did not intend to provide for his spouse if she formed another relationship [ *Estate of Guidotti (2001)* 90 Cal. App. 4th 1403, 1407, 109 Cal. Rptr. 2d 674 ]. If, however, the will provides that the beneficiary is to have the use of certain property until the happening of a specified event, the gift violates no policy and is valid [*Civ. Code* § 710]. Thus, a will providing that a surviving husband is to have the use of an apartment "for the period of his natural life or until he shall remarry" does not violate public policy and is enforceable [ *Estate of Horgan (1949)* 91 Cal. App. 2d 618, 620-621, 205 P.2d 706 ].

Gifts made to induce criminal, tortious, or immoral acts are invalid. *Civ. Code* § 1667 condemns as "not lawful" anything that is either contrary to an express provision of law, contrary to the policy of express law, though not expressly prohibited, or otherwise contrary to good morals [*Civ. Code* § 1667].

A condition is not unenforceable, however, simply because the encouragement of criminal or otherwise undesirable conduct might be one of its incidental effects [ *Estate of Robbins (1962)* 57 Cal. 2d 718, 723, 21 Cal. Rptr. 797, 371 P.2d 573 (trust in favor of minor children of parents imprisoned for crime upheld as valid charitable trust against claim it would promote criminal conduct)]. If the beneficial effects of a condition or bequest greatly exceed its possible undesirable effects, the condition will be upheld [ *Estate of Robbins (1962)* 57 Cal. 2d 718, 723, 21 Cal. Rptr. 797, 371 P.2d 573 ].

## [2] FORM

### Conditional Will Provision

This will shall become effective only if \_\_\_\_\_ [*specify condition, e.g., I marry \_\_\_\_\_ (name of intended spouse)*], and if \_\_\_\_\_ [*state negative of condition, e.g., I do not marry \_\_\_\_\_ (name of intended spouse)*] this will shall be ineffective for any purpose.

### Legal Topics:

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawWillsGeneral OverviewEstate, Gift & Trust LawWillsConditional & Contingent Wills



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DIVISION IV: WILLS AND TRUSTS

CHAPTER 63 WILL PROVISIONS

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A. Introductory Paragraph of Will

*23-63 California Legal Forms--Transaction Guide §§ 63.206-63.219*

**[Reserved]**

§§ 63.206[Reserved]



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DIVISION IV: WILLS AND TRUSTS

CHAPTER 63 WILL PROVISIONS

PART IV. FORMS

B. Identity of Testator's Family and Other Beneficiaries

*23-63 California Legal Forms--Transaction Guide § 63.220*

**§ 63.220 Marital Status Declaration--Married Testator**

**[1] Comment**

**[a] Use of Form**

This form may be used to declare that a testator is married and to identify his or her spouse. When used, it should become the first paragraph of the will and should immediately follow the introductory paragraph. If the testator has never been married, § 63.221 should be used in place of this form. If a marriage of the testator has been annulled or dissolved, § 63.222 should be used. If the testator is a widow or widower, § 63.223 should be used.

**[b] Testator's Marital Status**

Although there is no requirement that the testator make a declaration as to marital status, such a declaration will serve several useful purposes. Relating the testator to a spouse (or declaring that the testator has never been married) may, in appropriate cases, help to identify the testator. It may also help the personal representative locate and identify estate assets and trace relatives of the testator and the spouse. In the event of a will contest, the declaration may help to establish the testator's capacity to make the will, as one of the elements of testamentary capacity is the ability to remember and understand the testator's relations to persons who are the natural objects of his or her bounty [ *Estate of Nelson (1964) 227 Cal. App. 2d 42, 53, 38 Cal. Rptr. 459* ]. For a discussion of testamentary capacity, see § 63.220[1].

**[2] FORM**

**Marital Status Declaration--Married Testator**

I am married to \_\_\_\_\_[*name of spouse*], and all references in this will to my  
 \_\_\_\_\_[*husband or wife*] are to \_\_\_\_\_[*him or her*].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Wills General Overview Estate, Gift & Trust Law Wills After-Acquired Spouses



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B. Identity of Testator's Family and Other Beneficiaries

*23-63 California Legal Forms--Transaction Guide § 63.221*

**§ 63.221 Marital Status Declaration--Unmarried Testator**

**[1] Comment**

**[a] Use of Form**

This form may be used to declare that a testator has never been married. When used, it should become the first paragraph of the will and immediately follow the introductory paragraph. If the testator is married, the form in § 63.220[2] should be used in place of this form. If a marriage of the testator has been annulled or dissolved, the form in § 63.222[2] should be used. If the testator is a widow or widower, the form in § 63.223[2] should be used. For a discussion of the testator's marital status and the desirability of including declarations relating to it, see § 63.220[1].

**[b] Will Executed Prior to or in Contemplation of Marriage**

If an unmarried testator is contemplating marriage to a specific individual in the immediate future, various issues may arise in connection with the execution of a will prior to the marriage. First, if the testator marries after the execution of all the testator's "testamentary instruments" [see *Prob. Code § 21601(a)* (for this purpose, "decendent's testamentary instruments" means decedent's will or revocable trust)], and the decedent's testamentary instruments fail to provide for the spouse, the testator's spouse will qualify as an omitted heir [*Prob. Code § 21610*] unless the failure was intentional and that failure appears from the instruments, or the testator made other provision for the spouse outside the estate, or the spouse made a valid waiver of his or her rights to share in the testator's estate [*Prob. Code § 21611*; for general discussion of the inheritance rights of omitted heirs, see § 61.16[2], [3]]. Thus, if the will ignores the prospective spouse, after the marriage that spouse will be entitled to take as an omitted spouse unless some other provision is made. In the majority of cases the omitted heir statutes will generate a result in accordance with the testator's intentions, but if the testator is contemplating marriage to a prospective spouse for whom he or she does *not* wish to provide in the will, the omitted heir issue needs to be addressed by stating that the testator has intentionally failed to provide for the prospective spouse or by satisfying one of the other exceptions to the omitted heir statutes [*Prob. Code § 21611*].

Conversely, if the will *does* provide for a prospective spouse, the testator needs to consider the possibility that the marriage may not occur. In that case, if the will is not clear on this point, an issue can arise as to whether or not the

disposition to the prospective spouse was conditional on occurrence of the marriage [*see Prob. Code § 6105* (conditional wills given affect or rejected in conformity with condition)]. In this situation, the will or the specific provisions for the prospective spouse may be made conditional on the marriage [*see § 63.205*], but conditional wills generally are not favored by estate planners because they may never become valid and because they substantially increase the possibility of an intestacy.

Under ordinary circumstances, a new will should be executed after the testator's marriage. Typically the marriage will change the estate plan significantly enough to require the preparation of new estate planning documents.

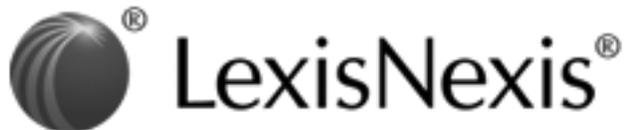
## **[2] FORM**

### **Marital Status Declaration--Unmarried Testator**

I have never been married.

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:  
Estate, Gift & Trust Law Wills General Overview



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## DIVISION IV: WILLS AND TRUSTS

## CHAPTER 63 WILL PROVISIONS

## PART IV. FORMS

## B. Identity of Testator's Family and Other Beneficiaries

*23-63 California Legal Forms--Transaction Guide § 63.222***§ 63.222 Marital Status Declaration--Marriage Dissolved****[1] Comment****[a] Use of Form**

This form is a will provision that may be used to declare that a marriage of the testator was annulled or dissolved. When used, it should become the first paragraph of the will and immediately follow the introductory paragraph. If the testator is married, the form in § 63.220[2] should be used in place of this form. If the testator had a former marriage that ended in annulment or dissolution and has since remarried, this form should be used in conjunction with the form in § 63.220[2]. If the testator has never been married, the form in § 63.221[2] should be used. If the testator is a widow or widower, the form in § 63.223[2] should be used. For a discussion of the testator's marital status and the desirability of including declarations relating to it, see § 63.220[1].

**[b] Effect of Annulment or Dissolution**

If, after executing a will, the testator's marriage is terminated by dissolution or annulment, most provisions of the will favoring the former spouse will be automatically revoked [*Prob. Code § 6122; see discussion in § 63.203[1][b][iv]*]. If the testator later remarries, however, references in the earlier will to "my husband," "my wife," or "my spouse" may be ambiguous and subject to possible misinterpretation. A provision clearly identifying the testator's former spouse will help to avoid any such ambiguities. If, despite the termination of a marriage, a testator wishes to provide for a former spouse, the intention to do so must be expressly stated in the will [*see Prob. Code § 6122(a)*].

**[2] FORM****Marital Status Declaration--Marriage Dissolved**

I was previously married to \_\_\_\_\_ [*name of former spouse and further identification, such as present name and address of former spouse*], but that marriage has been \_\_\_\_\_ [*annulled or dissolved*] by \_\_\_\_\_ [*decree or judgment*] of the \_\_\_\_\_ [*name and location of court, e.g.: Superior*]

Court of the State of California for the County of Santa Clara], file no. \_\_\_\_\_ [*number from decree or judgment*], dated \_\_\_\_\_ [*date*].

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Estate, Gift & Trust Law Wills General Overview



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## DIVISION IV: WILLS AND TRUSTS

## CHAPTER 63 WILL PROVISIONS

## PART IV. FORMS

## B. Identity of Testator's Family and Other Beneficiaries

*23-63 California Legal Forms--Transaction Guide § 63.223***§ 63.223 Marital Status Declaration--Widow or Widower****[1] Comment****[a] Use of Form**

This form may be used to declare that the testator is a widow or a widower. When used, it should become the first paragraph of the will and immediately follow the introductory paragraph. If the testator is married, the form in § 63.220[2] should be used in place of this form. If the testator had a former marriage that ended with the death of a spouse and has since remarried, this form should be used in conjunction with the form in § 63.220[2]. If the testator has never been married, the form in § 63.221[2] should be used. If a marriage of the testator has been annulled or dissolved, the form in § 63.222[2] should be used. For a discussion of the testator's marital status and the desirability of including declarations relating to it, see the form in 63.220[1].

**[b] When Testator Is Widow or Widower**

When a marriage of the testator ended with the death of one spouse, that fact should be recited in the will. The recitation may help to connect beneficiaries with the deceased spouse or simply show the fact of the death and explain the absence of any other mention of the deceased spouse in the will. If the testator has remarried after the death of the former spouse, the recitation of the names of both the deceased spouse and the living spouse will help to make it clear which spouse the testator is referring to in the dispositive provisions of the will.

**[2] FORM****Marital Status Declaration--Widow or Widower**

I was previously married to \_\_\_\_\_ [name of deceased spouse], who died in \_\_\_\_\_ [year of death] \_\_\_\_\_ [add, if appropriate: and in whose memory I have made the devises in Paragraph \_\_\_\_\_ (number of paragraph), below].

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Estate, Gift & Trust Law Wills General Overview



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B. Identity of Testator's Family and Other Beneficiaries

*23-63 California Legal Forms--Transaction Guide § 63.224*

**§ 63.224 Domestic Partnership Declaration--Testator a Domestic Partner**

**[1] Comment**

**[a] Use of Form**

This form may be used to declare that a testator is a member of a domestic partnership, and to identify the testator's domestic partner. When used, it should become the first paragraph of the will and should immediately follow the introductory paragraph. If the testator was previously a member of a domestic partnership, but that partnership has terminated, the form in § 63.225 should be used.

For detailed coverage of California's domestic partnership statutes, see *Ch. 110, Nonmarital Cohabitation Agreements and Related Transactions*, §§ 110.50 *et seq.*, 110.220 *et seq.*

**[b] Requisites for Domestic Partnership**

Under the California Domestic Partner Rights and Responsibilities Act of 2003 (the Act) [*Fam. Code* §§ 297-299.3], a domestic partnership is formed when two persons who meet specific requirements complete and file a Declaration of Domestic Partnership with the Secretary of State. In order to file a valid declaration, the two parties must meet the following requirements [*Prob. Code* § 37; *Fam. Code* § 297(b)]:

- Both must have a common residence. "Common residence" means that both domestic partners must share the same residence, but it is not necessary that the legal right to possess residence be in both of their names. Domestic partners may have a common residence even if one or both have additional residences, and they do not cease to have common residence if one leaves the residence but intends to return [*Fam. Code* § 297(c)].
- Neither is married or a part of another domestic partnership.
- Neither is related by blood in a way that would prevent them from being married in the state of

California.

- Both are over age 18.
- Both are either of the same sex or one or both meet the eligibility criteria under Title II of the Social Security Act for old-age insurance benefits [42 U.S.C. § 1381]. Persons of opposite sexes may not form a valid domestic partnership unless at least one is 62 years of age.
- Both are capable of consenting to a domestic partnership.

As of January 1, 2005, each person filing a Declaration of Domestic Partnership must state in the declaration that he or she consents to the jurisdiction of the superior courts of this state for the purpose of a proceeding to obtain a judgment of dissolution or nullity of the domestic partnership or for legal separation of the partners in the domestic partnership, or for any other proceeding related to the partners' rights and obligations, even if one or both partners ceases to be a resident of, or to maintain a domicile in, this state [*Fam. Code* § 298(c)(3)].

Effective January 1, 2005, registered domestic partners have the same rights, protections, and benefits, and are subject to the same responsibilities, obligations, and duties under law, whether they derive from statutes, administrative regulations, court rules, government policies, common law, or any other provisions or sources of law, as are granted to and imposed on spouses [*Fam. Code* § 297.5(a)]. A surviving registered domestic partner, following the other partner's death, has the same rights, protections, and benefits, and is subject to the same responsibilities, obligations, and duties under law, as are granted to and imposed on a widow or widower [*Fam. Code* § 297.5(c)]. However, the Act is not intended to repeal or adversely affect any other ways in which relationships between adults may be recognized or given effect in California, or the legal consequences of those relationships, including, among other things civil marriage, enforcement of palimony agreements, enforcement of powers of attorney, appointment of conservators or guardians, and petitions for second parent or limited consent adoption [Stats. 2003, ch. 421, § 2].

The legislature has made clear its intention in the domestic partnership law to substantially equalize the status of registered domestic partners and spouses [ *Koebke v. Bernardo Heights Country Club* (2005) 36 Cal. 4th 824, 837, 31 Cal. Rptr. 3d 565, 115 P.3d 1212 ]. To couples who meet the requirements of establishing a domestic partnership under the domestic partnership law and who have registered under that law, the legislature has granted legal recognition comparable to marriage, both procedurally and in terms of the substantive rights and obligations granted to and imposed on the partners, which are supported by policy considerations similar to those favoring marriage. These rights and responsibilities are not shared by couples who cohabit or who have not registered as domestic partners [ *Koebke v. Bernardo Heights Country Club* (2005) 36 Cal. 4th 824, 845, 31 Cal. Rptr. 3d 565, 115 P.3d 1212 (finding that in light of domestic partnership law, Unruh Act requires businesses to treat registered domestic partners same as spouses; see *Civ. Code* § 51(b) (prohibiting discrimination on basis of marital status or sexual orientation))].

The legislature's enactment of *Fam. Code* § 297.5, giving registered domestic partners the same rights and obligations as spouses, is not an improper legislative amendment of the defense of marriage initiative (Proposition 22), as codified in *Fam. Code* § 308.5, which states that only marriage between a man and a woman is valid or recognized in California. Because Proposition 22 did not address domestic partnerships, changing the domestic partnership law did not amend the initiative [ *Knight v. Superior Court* (2005) 128 Cal. App. 4th 14, 22-31, 26 Cal. Rptr. 3d 687 ].

Persons who have filed a declaration of domestic partnership may not file a new declaration or enter a civil marriage with someone other than their registered domestic partner unless the most recent domestic partnership has been terminated or a final judgment of dissolution or nullity of the most recent domestic partnership has been entered. This prohibition does not apply when a previous domestic partnership has ended because of the death of one of the partners [*Fam. Code* § 298.5(c)].

As of January 1, 2005, a legal union of two persons of the same sex, other than a marriage, that was validly formed in another jurisdiction and that is substantially equivalent to a domestic partnership under the Act, must be recognized as a valid domestic partnership in California regardless of whether it bears the name "domestic partnership" [*Fam. Code* § 299.2].

### **[c] Effect on Domestic Partner's Will**

The termination of a testator's domestic partnership serves to revoke certain provisions of the testator's will, if the will was executed on or after January 1, 2002 [*Prob. Code* § 6122.1(d)]. Unless the will expressly provides otherwise, if a person executes a will and the person's domestic partnership is terminated, the termination will revoke any disposition or appointment of property made by the will to the former domestic partner, any provision of the will conferring a general or special power of appointment on the former domestic partner, and any provision of the will nominating the former domestic partner as executor, trustee, conservator, or guardian [*Prob. Code* § 6122.1(a)].

When will provisions are revoked because of the termination of the testator's domestic partnership, property that would have passed to the former domestic partner if the provisions had not been revoked instead passes as if the former domestic partner failed to survive the testator [*Prob. Code* § 6122.1(c)(1)]. Other provisions of the will conferring some power or office on the former domestic partner will be interpreted as if the former domestic partner failed to survive the testator [*Prob. Code* § 6122.1(c)(2)].

Any disposition or other provision of a will that is revoked solely by reason of the termination of the testator's domestic partnership is revived if the testator re-establishes another domestic partnership with the former domestic partner [*Prob. Code* § 6122.1(b)].

### **[d] Termination of Domestic Partnership**

Prior to January 1, 2005, a domestic partnership was terminated when one of the following occurs [*Fam. Code* § 299(a)]:

- One partner gave or sent by certified mail to the other partner a written notice that he or she is terminating the partnership.
- One of the domestic partners died.
- One of the domestic partners married.
- The domestic partners no longer had a common residence.

On termination of a domestic partnership prior to January 1, 2005, at least one former partner was required to mail a completed notice of termination of domestic partnership to the Secretary of State by certified mail [*Fam. Code* § 299; see *Ch. 110, Nonmarital Cohabitation Agreements and Related Transactions*, § 110.221 (form)]. If the domestic partnership was terminated because of the death or marriage of a domestic partner, the termination date is the date indicated on the notice of termination of domestic partnership form. Otherwise, the date on which the notice of termination of domestic partnership was received by the Secretary of State is deemed the actual termination date of the domestic partnership [*Fam. Code* § 299(b)].

Beginning January 1, 2005, a domestic partnership may be terminated by filing a notice of termination of domestic partnership with the Secretary of State, provided all of the following conditions exist at the time of the filing [*Fam. Code* § 299(a)]:

- Both domestic partners have signed the notice of termination.
- There are no children of the parties' relationship born before or after registration of the domestic partnership or adopted by the parties after registration of the domestic partnership, and neither of the domestic partners, to their knowledge, is pregnant.
- The domestic partnership has not lasted for more than five years.
- Neither partner has an interest in real property, wherever situated, with the exception of the lease of a residence occupied by either partner that does not include an option to purchase and that terminates within one year from the date of filing the notice of termination.
- There are no unpaid obligations in excess of the amount specified in *Fam. Code § 2400(a)(6)* (\$4000), as adjusted for inflation under *Fam. Code § 2400(b)*, incurred by either or both of the partners after registration of the domestic partnership, excluding the amount of any unpaid obligation for an automobile.
- The total fair market value of community property assets, excluding all encumbrances and automobiles, including any deferred compensation or retirement plan, is less than the amount specified in *Fam. Code § 2400(a)(7)* (\$25,000), as adjusted for inflation under *Fam. Code § 2400(b)*, and neither partner has separate property assets, excluding all encumbrances and automobiles, in excess of that amount.
- The partners have executed an agreement setting forth the division of assets and assumption of liabilities of the community property, and have executed any documents, title certificates, bills of sale, or other evidence of transfer necessary to effectuate the agreement.
- The partners have waived any rights to support by the other partner.
- The partners have read and understand a brochure prepared by the Secretary of State describing the requirements, nature, and effect of terminating a domestic partnership.
- Both partners desire that the partnership be terminated.

A domestic partnership is terminated six months after the date the notice of termination is filed [*Fam. Code § 299(b)*]. After January 1, 2005, a domestic partnership that does not meet the conditions specified above may only be terminated by an action for dissolution of the domestic partnership, nullity of the domestic partnership, or legal separation of the partners [*Fam. Code § 299(c), (d)*].

If a domestic partnership is terminated by the death of one of the parties and a notice of termination was not filed by either party before the decedent's death, the domestic partner who survives the decedent is a surviving domestic partner, and is entitled to the rights of a surviving domestic partner as provided in the Probate Code [*Prob. Code § 37(b)*]. This includes the right to an intestate share of the deceased partner's separate property [*Prob. Code § 6401(c)* (effective July 1, 2003)]. A surviving domestic partner is entitled to the same intestate share of the decedent's separate property to which a surviving spouse would be entitled [*Prob. Code § 6401(c)*].

#### **[e] Will Provision Confirming Testator's Status as Domestic Partner**

Although there is no requirement that the testator make a declaration as to status as a domestic partner, such a declaration will serve several useful purposes. Naming a domestic partner may help to identify the testator in some

cases. It may also help the personal representative locate and identify estate assets and trace relatives of the testator and the domestic partner. In the event of a will contest, the declaration may help to establish the testator's capacity to make the will, as one of the elements of testamentary capacity is the ability to remember and understand the testator's relations to persons who are the natural objects of his or her bounty [ *Estate of Nelson (1964) 227 Cal. App. 2d 42, 53, 38 Cal. Rptr. 459* ]. For a discussion of testamentary capacity, see § 63.200[1].

## [2] FORM

### Domestic Partnership Declaration--Testator a Domestic Partner

I have established a domestic partnership, as that term is defined in the California Family Code, with \_\_\_\_\_[*name of domestic partner*], and have filed a Declaration of Domestic Partnership with the California Secretary of State as provided by California law. All references in this will to my domestic partner are to \_\_\_\_\_[*name of domestic partner*].

#### Legal Topics:

For related research and practice materials, see the following legal topics:  
Estate, Gift & Trust LawWillsGeneral Overview



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California Legal Forms--Transaction Guide

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DIVISION IV: WILLS AND TRUSTS

CHAPTER 63 WILL PROVISIONS

PART IV. FORMS

B. Identity of Testator's Family and Other Beneficiaries

*23-63 California Legal Forms--Transaction Guide § 63.225*

**§ 63.225 Domestic Partnership Declaration--Domestic Partnership Terminated**

**[1] Comment**

**[a] Use of Form**

This form may be used to declare that a domestic partnership in which the testator was a member was terminated. When used, it should become the first paragraph of the will and should immediately follow the introductory paragraph. If the testator is a member of a domestic partnership, the form in § 63.224 should be used. For a discussion of the California domestic partner statutes [*Fam. Code § 297 et seq.*] and their estate planning implications, the termination of domestic partnerships, and the desirability of including declarations relating to the testator's status as a member of a domestic partnership, see § 63.224[1]. For more detailed discussion of California's domestic partnership statutes, see *Ch. 110, Nonmarital Cohabitation Agreements and Related Transactions*, §§ 110.50 et seq., 110.220 et seq.

**[b] Effect of Termination**

If, after executing a will, the testator's domestic partnership is terminated, most provisions favoring the former domestic partner will be automatically revoked [*Prob. Code § 6122.1*; see discussion in § 63.203[1][b][v]]. If the testator later establishes a domestic partnership with another person, references in the earlier will to "my domestic partner" may be ambiguous and subject to possible misinterpretation. A provision clearly identifying the testator's former domestic partner will help to avoid any such ambiguities. If, despite the termination of a domestic partnership, a testator wishes to provide for a former domestic partner, the intention to do so must be expressly stated in the will [*see Prob. Code § 6122.1(a)*].

If a domestic partnership is terminated by the death of one of the parties and a Notice of Termination [*see Ch. 110, Nonmarital Cohabitation Agreements and Related Transactions*, § 110.221] was not filed by either party before the decedent's death, the domestic partner who survives the decedent is a surviving domestic partner, and is entitled to the rights of a surviving domestic partner as provided in the Probate Code [*Prob. Code § 37(b)*]. This includes the right to an intestate share of the deceased partner's separate property [*Prob. Code § 6401(c)* (effective July 1, 2003)]. A surviving domestic partner is entitled to the same intestate share of the decedent's separate property to which a surviving

spouse would be entitled [*Prob. Code § 6401(c)*].

**[2] FORM**

**Domestic Partnership Declaration--Domestic Partnership Terminated**

I previously established a domestic partnership, as that term is defined in the California Family Code, with \_\_\_\_\_ [*name of former domestic partner and further identification, such as present name and address of former domestic partner*], and filed a Declaration of Domestic Partnership with the California Secretary of State with regard to that partnership as provided by California law. That domestic partnership was subsequently terminated by \_\_\_\_\_ [*specify method of termination, e.g. the \_\_\_\_\_ (marriage or death) of \_\_\_\_\_ (name of former domestic partner) or written notice as provided by law or cessation of common residence*] on \_\_\_\_\_ *date*. [A Notice of Termination of Domestic Partnership with regard to that domestic partnership was filed with the California Secretary of State on \_\_\_\_\_ *(date)*.].

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Estate, Gift & Trust Law Wills General Overview



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DIVISION IV: WILLS AND TRUSTS

CHAPTER 63 WILL PROVISIONS

PART IV. FORMS

B. Identity of Testator's Family and Other Beneficiaries

*23-63 California Legal Forms--Transaction Guide § 63.226*

### **§ 63.226 Children and Issue Declaration--No Children**

#### **[1] Comment**

#### **[a] Use of Form**

This form may be used to declare that the testator has no children, living or deceased. When used, it should become the second paragraph of the will and immediately follow the marital status declaration [see §§ 63.220-63.223]. If the testator has a living child or children, § 63.227 should be used. If the testator has a deceased child or children, § 63.228 should be used. If the testator has both living and deceased children, the provisions of § 63.227 should be combined with the provisions of § 63.228. If the testator wishes to provide for a child who has been adopted out of the testator's family, § 63.695 should be used.

#### **[b] Testator's Children**

Although there is no requirement that the testator name or identify his or her children in the will, a recitation of their names (and optionally of their residences, dates of birth, and, if appropriate, dates of death) may serve several useful purposes.

Relating the testator to children (or declaring that the testator has no children) may, in appropriate cases, help to identify the testator. It may also help the personal representative locate beneficiaries and, in appropriate cases, trace and locate issue and other relatives of the testator and the children. In the event of a will contest, the declaration may help to establish the testator's capacity to make the will, since one of the elements of testamentary capacity is the ability to remember and understand the testator's relations to his or her living descendants, spouse, and parents, and those whose interests are affected by the will [*Prob. Code § 6100.5(a)(1)*; see discussion in *Ch. 61, Will Drafting and Complete Will Forms*, § 61.11 (testamentary capacity); see also discussion in § 63.200[1][c]].

#### **[c] Statutory Definitions of "Child" and "Children"**

#### **[i] In General**

The Probate Code establishes rules for determining the relationship of parent and child. Although these rules are primarily applicable in cases of intestacy [*see Prob. Code §§ 6450-6455*], they also apply when a testator devises property to a class of persons described in a general way by words such as "heirs," "heirs at law," "next of kin," "relatives," or "family," or words of similar import [*Prob. Code §§ 21114, 21115(a); see § 63.226[1][c][viii]*]. The rules vary according to whether the child is a natural child, an adopted child, a foster child, or a stepchild, and whether the person seeking to inherit is a parent or a child, or claims through a parent or a child [*see § 63.226[1][c][ii] et seq.*].

### **[ii] Natural Children**

Natural children generally have the right to succeed to the property of their natural parents under the laws of intestate succession [*Prob. Code § 6450(a)*]. The relationship of parent and child generally exists between a natural child and a natural parent regardless of the parent's marital status [*Prob. Code § 6450(a)*]. However, a natural child will generally lose the right to succeed to the natural parent's property under the laws of intestate succession, and the parent will generally lose the right to succeed to the child's property, if the child was adopted by someone other than the parent's spouse [*Prob. Code § 6451(a); see § 63.226[1][c][iv]*].

The right of a parent to succeed to the property of a child born out of wedlock is also limited. If a child is born out of wedlock, neither a natural parent nor a relative of that parent has the right to succeed to the child's property on the basis of the parent and child relationship between that parent and the child unless both of the following requirements are satisfied [*Prob. Code § 6452*]:

- The parent or a relative of the parent acknowledged the child; and
- The parent or a relative of the parent contributed to the support or the care of the child.

For this purpose, the father of a child born out of wedlock "acknowledged the child" by confessing to paternity in out-of-state court and making no other acts of acknowledgment or disavowal; as a result, the father's heirs shared in the child's intestate estate [ *Estate of Griswold (2001) 25 Cal. 4th 904, 924, 108 Cal. Rptr. 2d 165, 24 P.3d 1191* ].

### **[iii] Natural Parents**

Special rules determine whether a person is a "natural parent" [*see § 63.226[1][c][ii]*]. First, a natural parent and child relationship is established if that relationship is presumed and not rebutted under the Uniform Parentage Act [*Prob. Code § 6453(a); see Fam. Code § 7600 et seq.* (Uniform Parentage Act)]. For example, a man is presumed to be the natural father of a child if he receives the child into his home and openly holds the child out as his natural child [*Fam. Code § 7611(d)*]. A woman may be a presumed mother of a child of her lesbian partner if they agree to raise the child together, she receives the child into her home, and she holds the child out as her natural child [*see Elisa B. v. Superior Court (2005) 37 Cal. 4th 108, 125, 33 Cal. Rptr. 3d 46, 117 P.3d 660* (both of child's parents can be women, and woman with no biological connection to child can be child's presumed mother under *Fam. Code § 7611(d)*); *see also K.M. v. E.G. (2005) 37 Cal. 4th 130, 143, 33 Cal. Rptr. 3d 61, 117 P.3d 673* (when woman provides ova to her lesbian partner so that partner can bear child who will be raised in their joint home, both women are child's parents); *Kristine H. v. Lisa R. (2005) 37 Cal. 4th 156, 166, 33 Cal. Rptr. 3d 81, 117 P.3d 690* (lesbian mother of child was estopped from challenging validity of stipulated judgment declaring that she and her lesbian partner were child's parents)].

Second, a natural parent and child relationship may be established under any other provisions of the Uniform Parentage Act, except *Fam. Code § 7630(c)*, which applies to children who have no presumed fathers or whose presumed fathers are deceased. The relationship may not be established under *Fam. Code § 7630(c)* unless any of the following conditions exist [*Prob. Code § 6453(b)*]:

- A court order was entered during the father's lifetime declaring paternity.
- Paternity is established by clear and convincing evidence that the father openly held out the child as his own.
- It was impossible for the father to hold out the child as his own and paternity is established by clear and convincing evidence.

A natural parent and child relationship may be established for a posthumously conceived child under *Prob. Code* § 249.5 [*Prob. Code* § 6453(c)].

An Ohio judgment in a bastardy case qualified as "a court order entered during the father's lifetime declaring paternity," thus establishing a parent-child relationship. The issue decided in the Ohio case was identical to the issue presented in the related California intestate succession case, and there was no evidence that the paternity confession in the Ohio case was a compromise intended to avoid a jury trial in a quasi-criminal matter [ *Estate of Griswold (2001) 25 Cal. 4th 904, 922-923, 108 Cal. Rptr. 2d 165, 24 P.3d 1191* ].

#### **[iv] Adopted Children**

Adopted children have the same right as natural children to succeed to the estates of their adoptive parents under the laws of intestate succession [*Prob. Code* § 6450(b)]. Similarly, when an adoptive parent devises property to a class of persons described in a general way by words such as "heirs," "heirs at law," "next of kin," "relatives," or "family," or words of similar import, the parent's adopted children are entitled to take in the same way as natural children, unless the will indicates a contrary intention [*Prob. Code* §§ 21114, 21115(a); see *Prob. Code* § 6450(b)].

The right of adopted persons to inherit property from their natural parents is limited. Adopted children generally do not have the right to succeed to the estates of their natural parents under the laws of intestate succession because the adoption severs the relationship of parent and child [see *Prob. Code* § 6451(a)]. However, they do have the right to succeed if both of the following requirements are satisfied [*Prob. Code* § 6451(a)]:

- The natural parent and the adopted person lived together at any time as parent and child, or the natural parent was married to, or cohabiting with the other natural parent at the time the person was conceived and died before the person's birth; and
- The adoption was by the spouse of either of the natural parents or after the death of either of the natural parents.

Further, neither a natural parent nor a relative of a natural parent has any right to succeed by intestate succession to an adopted person's property on the basis of a parent and child relationship between the adopted person and the natural parent that satisfies the requirements of *Prob. Code* § 6451(a)(1) and (2) [see above], unless the adoption is by the spouse or surviving spouse of that parent [*Prob. Code* § 6451(b)]. However, this rule does not apply to a wholeblood brother or sister of the adopted person, or the issue of that brother or sister [*Prob. Code* § 6451(b)]. Moreover, for purposes of the rule that an adoption severs the relationship of parent and child between an adopted person and a natural parent, a prior adoptive parent and child relationship is treated as a natural parent and child relationship [*Prob. Code* § 6451(c)].

When a will makes a class gift, adopted persons are included or excluded as class members in accordance with the rules governing their inheritance rights for purposes of intestate succession [*Prob. Code* § 21115(a); see discussion above; see also § 63.226[1][c][viii]]. Thus, under the statutory rule of construction, an adopted child will *not* be included as a class member for purposes of any class gifts made in the will of his or her natural parent [*Prob. Code* §§ 6451(a)

(adoption severs parent-child relationship for intestate succession purposes), 21115(a) (class gifts construed in accordance with rules governing intestate succession)], unless the child comes within one of the limited exceptions in the intestate succession laws discussed above. This does not mean that a testator is precluded from making a testamentary gift to a person who has been "adopted out" of his or her family. It does mean, however, that the will must contain an expression of testamentary intent sufficient to overcome the statutory rules of construction [see *Prob. Code* § 21102(a) (intention of testator is controlling)]. To overcome the statutory presumption, it is recommended that any gift to a person who has been "adopted out" of the testator's family be made to that person *by name* rather than class description; or, if the testator wants the "adopted out" person to take as a member of a class (such as the testator's "children"), that the class description and/or the will's definition of "children," as appropriate, include a specific statement that the "adopted out" person will be considered a class member (or a "child" of the testator) for purposes of the testamentary gift(s) in question. For discussion of the general rules of construction applicable to will provisions, see § 63.226[1][c][viii];

#### **[v] Judicial Doctrine of Equitable Adoption**

In addition to rights gained by virtue of formal adoption, a child's right to inherit or take under a will may also be upheld under the judicial doctrine of "equitable adoption" [*Prob. Code* § 6455]. The doctrine allows a person who was accepted and treated as a natural or adopted child, and as to whom adoption was promised or contemplated but never performed, to share in inheriting the property of the equitable "parent" [ *Estate of Ford (2004) 32 Cal. 4th 160, 165, 8 Cal. Rptr. 3d 541, 82 P.3d 747* ]. Although California decisions have explained equitable adoption as the specific enforcement of a contract to adopt, the doctrine rests less on ordinary rules of contract law than on considerations of fairness and intent [ *Estate of Ford (2004) 32 Cal. 4th 160, 169, 8 Cal. Rptr. 3d 541, 82 P.3d 747* ]. However, the California law of equitable adoption does not recognize an estoppel arising merely from the existence of a family relationship between the decedent and the claimant. While a person with whom the decedent had a close, caring, and enduring relationship may be seen as more deserving of inheritance than the decedent's heirs whose personal relationships with the decedent may have been more attenuated, the doctrine of equitable adoption is not a means of compensating the child for services rendered to the parent, or a device for avoiding the unjust enrichment of other more distant relatives who will succeed to the estate under the intestacy statutes. Absent proof of an intent to adopt, a court must follow the statutory law of intestate succession [ *Estate of Ford (2004) 32 Cal. 4th 160, 171, 8 Cal. Rptr. 3d 541, 82 P.3d 747* ].

An equitable adoption claimant need not prove all the elements of an enforceable contract to adopt. The claimant must demonstrate, however, the existence of a direct expression by the decedent of an intent to adopt the claimant. This intent may be shown by proof of an unperformed express agreement or promise to adopt. It may also be shown by proof of other acts or statements directly showing that the decedent intended the claimant to be, or to be treated as, a legally adopted child, such as an invalid or unconsummated attempt to adopt, the decedent's statement of his or her intent to adopt, or the decedent's representation to the claimant or to the community at large that the claimant was the decedent's natural or legally adopted child [ *Estate of Ford (2004) 32 Cal. 4th 160, 171, 8 Cal. Rptr. 3d 541, 82 P.3d 747* ]. In addition to a statement or act by the decedent that unequivocally shows the decedent's intent to adopt, the claimant must show that the decedent acted consistently with that intent by forming with the claimant a close and enduring family relationship that must persist up to, or at least not be repudiated by the decedent before, the decedent's death. These elements of an equitable adoption must be shown by clear and convincing evidence [ *Estate of Ford (2004) 32 Cal. 4th 160, 171-172, 8 Cal. Rptr. 3d 541, 83 P.3d 747* ].

#### **[vi] Foster Children and Stepchildren**

For purposes of determining intestate succession, the relationship of parent and child exists between a foster parent and a foster child or a stepparent and a stepchild if (1) the relationship began during the foster child's or stepchild's minority and continued throughout the joint lifetimes of the child and the child's foster parent or stepparent and (2) it is established by clear and convincing evidence that the foster parent or stepparent would have adopted the foster child or stepchild but for a legal barrier [*Prob. Code* § 6454].

### [vii] Posthumously Conceived Children

For purposes of determining rights to property to be distributed on a decedent's death, a child of the decedent who was conceived after the decedent's death is deemed to have been born in the decedent's lifetime, and after the execution of all of the decedent's testamentary instruments, if the child or the child's representative proves, by clear and convincing evidence, that all of the following conditions are satisfied [*Prob. Code* § 249.5]:

- The decedent specified in writing that his or her genetic material could be used for the posthumous conception of a child of the decedent. This writing must be signed by the decedent and dated [*Prob. Code* § 249.5(a)(1)].
- The person the decedent designated to control the use of the genetic material has given written notice by certified mail, return receipt requested, that the decedent's genetic material was available for posthumous conception. The notice must have been given to a person who has the power to control the distribution of the decedent's property or death benefits payable by reason of the decedent's death, within four months of the date of issuance of a certificate of the decedent's death or entry of a judgment determining the fact of the decedent's death, whichever event occurs first [*Prob. Code* § 249.5(b)].
- The child was in utero using the decedent's genetic material within two years of the date of issuance of a certificate of the decedent's death or entry of a judgment determining the fact of the decedent's death, whichever occurs first. This provision does not apply to a child who shares all of his or her nuclear genes with the person donating the implanted nucleus as a result of the application of somatic nuclear transfer technology commonly known as human cloning [*Prob. Code* § 249.5(c)].

The person with the power to control the distribution of the decedent's property or death benefits payable by reason of the decedent's death may not distribute property or pay death benefits before two years following the date of issuance of a certificate of the decedent's death or entry of a judgment determining the fact of the decedent's death, whichever occurs first, if the person receives timely notice as specified above, or has actual knowledge of the availability of the decedent's genetic material for posthumous conception [*Prob. Code* § 249.6(a)]. This provision does not apply to, and the distribution of property or the payment of death benefits may proceed in a timely manner as provided by law with respect to, any property if the birth of the posthumously conceived child or children will not affect the proposed distribution of the decedent's property, the payment of death benefits payable by reason of the decedent's death, the determination of rights to property to be distributed on the decedent's death, or the right of any person to claim a probate homestead or probate family allowance [*Prob. Code* § 249.6(b)]. The provision for delayed distribution also does not apply if the person the decedent designated to control the use of the genetic material sends written notice by certified mail, return receipt requested, that he or she does not intend to use the genetic material for the posthumous conception of a child of the decedent. The notice must be signed by the person and at least one competent witness, and dated [*Prob. Code* § 249.6(c)].

The person with the power to control the distribution of the decedent's property or death benefits payable by reason of the decedent's death is not liable for making a distribution of property or paying death benefits before receiving notice or acquiring actual knowledge of the existence of genetic material available for posthumous conception purposes [*Prob. Code* § 249.6(d); see *Prob. Code* § 249.5(b), discussed *above* (notice requirements)]. Each person to whom payment, delivery, or transfer of the decedent's property is made is personally liable to a person who, under *Prob. Code* § 249.5, has a superior right to the property. A person's aggregate personal liability cannot exceed the fair market value, valued as of the time of the transfer, of the property paid, delivered, or transferred to the person, less the amount of any liens and encumbrances on the property at that time [*Prob. Code* § 249.6(e)]. In addition, any person who fraudulently secures the payment, delivery, or transfer of the decedent's property is liable to the person having a superior right for three times the fair market value of the property [*Prob. Code* § 249.6(f)]. Any action to impose liability must be filed within three years after the distribution to the holder of the decedent's property, or three years after the discovery of the

fraud, whichever is later. This three-year period may not be tolled for any reason [*Prob. Code* § 249.6(g)].

If notice is not given in a timely manner, the person with the power to control the distribution of the decedent's property or death benefits payable by reason of the decedent's death may make the distribution in the manner provided by law as if any child of the decedent conceived after his or her death had predeceased the decedent without heirs. A posthumously conceived child, or that child's representative, is barred from making a claim for wrongful distribution against either the person making the distribution or the recipient of the distribution, when timely notice was not given [*Prob. Code* § 249.7].

Any interested person may file a petition under *Prob. Code* § 248 or 17200 requesting distribution of the decedent's property or death benefits payable by reason of the decedent's death that are subject to the delayed distribution provisions of *Prob. Code* § 249.6, discussed above [*Prob. Code* § 249.8]. At the hearing, if it appears that distribution can be made without any loss to any interested person, including any loss (either actual or contingent) to the decedent's posthumously conceived child, the court may order distribution of all, or a portion, of the property or death benefits. The order is stayed until any bond required by the court is filed [*Prob. Code* § 249.8].

#### **[viii] Will Provisions**

The general rule is that for purposes of construing a gift made in a will, halfbloods, adopted persons, persons born out of wedlock, stepchildren, foster children, and the issue of all such persons, when appropriate to the class, are included in the terms of a class gift or relationship in accordance with the rules for determining intestate succession [*Prob. Code* § 21115; see discussion in § 63.226[1][c][ii] et seq.]. However, this rule is subject to two qualifications.

First, in construing a devise by a testator who is not the natural parent (e.g., a grandfather), a person born to the natural parent (e.g., a son of the grandfather) will not be considered the child of the natural parent unless he or she lived while a minor as a regular member of the household of the natural parent or of that parent's parent, brother, sister, or surviving spouse [*Prob. Code* § 21115(b)]. The effect of this rule is to exclude a child born out of wedlock (if the testator is not the parent) if the child never lived while a minor as a regular member of the parent's household [*Report of Senate Committee on Judiciary on Assembly Bills 25 and 68*, 17 Cal. L. Revision Comm'n Reports 867, 777 (1984)].

Second, in construing a devise by a testator who is not the adoptive parent (e.g., a grandfather), a person adopted by the adoptive parent (e.g., a son of the grandfather) will not be considered the child of the adoptive parent unless he or she lived while a minor (either before or after the adoption) as a regular member of the household of the adopting parent or of that parent's parent, brother, sister, or surviving spouse [*Prob. Code* § 21115(b); *Estate of DeLoreto (2004) 118 Cal. App. 4th 1048, 1052-1053, 13 Cal. Rptr. 3d 513* (adopted adult children of beneficiary of father's trust were not members of class of grandchildren who were trust beneficiaries); see discussion in § 63.226[1][c][iv]]. A person adopted by the adoptive parent in another state is entitled to inherit the adoptive parent's distributive share of a decedent's estate as the "living lawful issue" of the parent only if the out-of-state adoption decree created a parent-and-child relationship between the person adopted and the adoptive parent [ *Ehrenclou v. Macdonald (2004) 117 Cal. App. 4th 364, 376, 12 Cal. Rptr. 3d 411* (adults adopted under Colorado's adult adoption statute did not qualify as "issue" of person adopting them because, under that statute, they did not stand in relation to parent as children but only as parent's heirs at law)].

Finally, the rules for determining intestate succession are those in effect at the time the transfer is to take effect in enjoyment [*Prob. Code* § 21115(d)].

#### **[d] Omitted Children**

A child born or adopted after the execution of all of the testator's "testamentary instruments" may qualify as an omitted heir and be entitled to inherit the same share of the testator's estate that the child would have received if the testator had

died without executing any testamentary instrument [*Prob. Code § 21620*]. For purposes of this rule, a "testamentary instrument" is either a will or a trust instrument that was executed by the decedent and that became irrevocable on the testator's death [*Prob. Code § 21601(a)*], and "estate" means the decedent's probate estate and all property held in any revocable trust executed by the testator that became irrevocable on the testator's death [*Prob. Code § 21601(b)*].

An omitted child is *not* entitled to receive a share of the estate if any of the following is established [*Prob. Code § 21611*]:

- The testator's failure to provide for the child in the testator's testamentary instruments was intentional and that intention appears from the testamentary instruments.
- The testator had one or more children and devised or otherwise directed the disposition of substantially all the estate to the other parent of the omitted child.
- The testator provided for the child by transfer outside of the estate passing by the testator's testamentary instruments and the intention that the transfer be in lieu of a provision in those instruments is shown by statements of the testator or from the amount of the transfer or by other evidence.

For general discussion of the inheritance rights of omitted heirs, see § 61.16[2], [3].

## [2] FORM

### Children and Issue Declaration--No Children

I have no children, living or deceased.

#### Legal Topics:

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawWillsGeneral OverviewEstate, Gift & Trust LawWillsForced Heirs & LegitimeEstate, Gift & Trust LawWillsPretermitted HeirsGeneral Overview



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## DIVISION IV: WILLS AND TRUSTS

## CHAPTER 63 WILL PROVISIONS

## PART IV. FORMS

## B. Identity of Testator's Family and Other Beneficiaries

*23-63 California Legal Forms--Transaction Guide § 63.227***§ 63.227 Children and Issue Declaration--Living Child(ren)****[1] Comment--Use of Form**

This form may be used to declare that the testator has a living child or children. When used, it should become the second paragraph of the will and immediately follow the marital status declaration [*see* §§ 63.220-63.223]. If the testator has no children, living or deceased, § 63.226 should be used. If the testator has a deceased child or children, § 63.228 should be used. If the testator has both living and deceased children, the provisions of § 63.228 should be combined with this form. If the testator wishes to make provision for a child who has been adopted out of the testator's family, § 63.695 should be used. For a discussion of the testator's children and the desirability of identifying them in the will, see § 63.226[1][b], [d].

**[2] FORM****Children and Issue Declaration--Living Child(ren)**

I have \_\_\_\_\_ [number of children] \_\_\_\_\_ [child or children] now living whose \_\_\_\_\_ [name or names] and \_\_\_\_\_ [date or dates] of birth \_\_\_\_\_ [is or are] as follows:

Name	Date of Birth
_____	_____
_____	_____
_____	_____
_____	_____

All references in this will to my "child," "children," or "issue" include the above \_\_\_\_\_ [child or children] and any \_\_\_\_\_ [child or children] hereafter born to or adopted by me.

\_\_\_\_\_ [If appropriate, add: I have no deceased children.]

[Optional provision]

My \_\_\_\_\_ [son or daughter or children], \_\_\_\_\_ [name or names of adopted child or children], \_\_\_\_\_ [has or have] been adopted by \_\_\_\_\_ [my wife or my husband] and me, and it is my intention that \_\_\_\_\_ [he or she or they] be treated in all respects as my natural \_\_\_\_\_ [child or children].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Wills General Overview Estate, Gift & Trust Law Wills Forced Heirs & Legitime Estate, Gift & Trust Law Wills Pretermitted Heirs General Overview



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B. Identity of Testator's Family and Other Beneficiaries

*23-63 California Legal Forms--Transaction Guide § 63.228***§ 63.228 Children and Issue Declaration--Deceased Child(ren)****[1] Comment--Use of Form**

This form may be used to declare that the testator has a deceased child or children. When used, it should become the second paragraph of the will and immediately follow the marital status declaration [*see* §§ 63.220-63.223]. If the testator has no children, living or deceased, the form in § 63.226[2] should be used. If the testator has a living child or children, the form in § 63.227[2] should be used. If the testator has both living and deceased children, the provisions of the form in § 63.227[2] should be combined with this form. If the testator wishes to provide for a child who has been adopted out of the testator's family, the form in § 63.695[2] should be used. For a discussion of the testator's children and the desirability of identifying them in the will, see the discussion in § 63.226[1][b], [d].

**[2] FORM****Children and Issue Declaration--Deceased Child(ren)**

I have \_\_\_\_\_[*number*] deceased \_\_\_\_\_[*child or children*] whose  
 \_\_\_\_\_[*name or names*] \_\_\_\_\_[*was or were*] \_\_\_\_\_[*name or names*  
*of deceased child or children*].

[*Choose one of the following:*]My deceased \_\_\_\_\_[*child or children*] had no issue surviving.[*OR*][*One or Some or All*] of my deceased children had issue surviving, as follows:

Name of Deceased Child	Names of Issue Surviving	Relationship to Deceased Child	Date of Birth
_____	_____	_____	_____
_____	_____	-	_____
_____	_____	_____	_____
_____	_____	-	_____

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Wills General Overview Estate, Gift & Trust Law Wills Forced Heirs & Legitime Estate, Gift & Trust Law Wills Pretermitted Heirs General Overview



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B. Identity of Testator's Family and Other Beneficiaries

*23-63 California Legal Forms--Transaction Guide § 63.229*

**§ 63.229 Children and Issue Declaration--Grandchild(ren)**

**[1] Comment**

**[a] Use of Form**

This form may be used to declare that the testator has one or more grandchildren and to identify them. It makes the identification by specifying the name, birthdate, and parents of each grandchild. It also includes an optional provision establishing the testator's grandchildren as a class and providing that the class will include afterborn children. When used, this form may become part of the second paragraph of the will and immediately follow the declaration as to the testator's children [*see* §§ 63.226-63.228].

**[b] Testator's Grandchildren**

Although a grandchild is not an "omitted" heir [*see Prob. Code* §§ 21600-21630 and discussion in § 61.16] and may not claim an intestate share of the estate if the testator fails to provide for him or her in the will, [*see* § 63.226[1][d]], it may nevertheless be advisable to identify grandchildren in the will. If the testator has a large family, or if one of the testator's children has died and the son-in-law or daughter-in-law has remarried, the testator may wish to mention the grandchildren as a preliminary step to making a disposition in their favor. Whether or not the grandchildren are to share in the testator's bounty, identifying them may help to establish the testator's capacity. Testamentary capacity has been described as sufficient mental capacity to understand the nature of the testamentary act and to remember and understand the testator's relations to those who are the natural objects of his or her bounty [ *Estate of Nelson (1964) 227 Cal. App. 2d 42, 53, 38 Cal. Rptr. 459* ].

If the will includes a class gift to grandchildren, the testator must decide whether the class will be increased by afterborn children. This form provides an optional provision establishing such a class and providing that the class will include afterborn children. If the testator wishes to provide for a child who has been adopted out of the testator's family (whether that child is a natural child, a natural grandchild, or some other blood relation of the testator), § 63.695 should be used.

It is important to remember that a gift to a class that includes grandchildren born after execution of the will has the potential for violating the rule against perpetuities. If the right of a grandchild to membership in the class cannot be determined within 21 years after the death of a person alive when the testator dies, then the class gift might fail to either vest or terminate within the 21-year period of the common-law rule against perpetuities.

In California, perpetuities are subject to the Uniform Statutory Rule Against Perpetuities (USRAP) [*see Prob. Code §§ 21200-21231*], which includes a recodification of Professor John Chipman Gray's classic formulation of the common-law rule against perpetuities [*see Prob. Code §§ 21205(a), 21206(a), 21207(a)*; *see also Ch. 67, Future Interests and Perpetuities, § 67.16[1]*]. Under that recodification, a nonvested property interest is invalid unless, when the interest is created, it is certain to either vest or terminate no later than 21 years after the death of a person alive at the time of creation [*Prob. Code § 21205(a)*]. However, the USRAP also includes a 90-year "wait-and-see" rule, under which a nonvested interest may be valid if it actually vests or terminates within 90 years after its creation [*Prob. Code § 21205(b)*; *see Ch. 67, Future Interests and Perpetuities, § 67.16[1]*].

The 90-year wait-and-see rule shifts the traditional perpetuities focus from what *might conceivably happen* to a nonvested interest during the applicable perpetuities period to *what actually happens* to the interest in the 90 years after it is created. Although this rule substantially liberalizes perpetuities regulation in California, it does not eliminate the need for recognizing potential perpetuities violations and taking reasonable steps to avoid them. First, any disposition that has the potential for violating the common-law rule against perpetuities (as recodified in the USRAP) should be drafted so as to avoid a violation. Second, any will that creates a trust, makes a class gift, or otherwise calls for a complex disposition of property should include a perpetuities savings clause. For perpetuities savings clauses suitable for use in wills, *see Ch. 67, Future Interests and Perpetuities, §§ 67.231, 67.232*. For a detailed discussion of the Uniform Statutory Rule Against Perpetuities and its operation in California, *see Ch. 67, Future Interests and Perpetuities, § 67.16*.

## [2] FORM

### Children and Issue Declaration--Grandchild(ren)

The \_\_\_\_\_ [name or names], \_\_\_\_\_ [birthdate or birthdates], and parents of my \_\_\_\_\_ [grandchild or grandchildren] \_\_\_\_\_ [is or are] as follows:

Name	Birthdate	Parents
_____	_____	_____
—	_____	_____
_____	_____	_____
—	_____	_____
_____	_____	_____
—	_____	_____

[Optional provision]

All references in this will to my \_\_\_\_\_ [grandchild or grandchildren] include the above-named \_\_\_\_\_ [grandchild or grandchildren] and any of my grandchildren born or adopted after the making of this will.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Wills General Overview Estate, Gift & Trust Law Wills Forced Heirs & Legitime Estate, Gift & Trust Law Wills Pretermitted Heirs General Overview



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B. Identity of Testator's Family and Other Beneficiaries

*23-63 California Legal Forms--Transaction Guide § 63.230*

### **§ 63.230 Identification of All Beneficiaries**

#### **[1] Comment**

#### **[a] Use of Form**

This form may be used to identify all of the beneficiaries under the will. It is an optional provision and may be useful when the testator wishes to clearly name and identify in a single place all of the persons named as beneficiaries in the will. When used, it should be added to the provisions declaring the testator's marital status [*see* §§ 63.220-63.223] and children and issue [*see* §§ 63.226-63.229].

#### **[b] Identification of Beneficiaries--Individuals**

It is usually sufficient to identify individual beneficiaries by their names and places of residence. In some situations, however, the names alone may not be sufficient. This will be especially true if the will names different members of a single family who have the same or similar names. In many wills, the beneficiaries may be conveniently identified in the dispositive paragraphs of the will, but if the same beneficiary appears in more than one dispositive paragraph it may be more convenient to identify the beneficiary by a declaration in a separate paragraph and thereby simplify the identification in other provisions of the will.

#### **[c] Identification of Beneficiaries--Entities**

If the intended beneficiary is not an individual, the attorney should take care to make certain that the entity is properly identified and that its capacity to take is verified in advance. If the testator wishes that a specific charity be the beneficiary, it is recommended that the charity be contacted in order to determine the exact name under which it holds property. If the beneficiary is a large organization performing various functions through subordinate entities (such as a religious denomination or a fraternal organization), the specific entity (lodge, chapter, parish, etc.) should be mentioned.

A will may make a disposition of property to any person, including but not limited to an individual; a corporation; an unincorporated association, society, lodge, or any branch of such an organization; a county, city, city and county, or any

municipal corporation; any state, including the State of California; the United States or any of its instrumentalities; and a foreign country or governmental entity [*Prob. Code § 6102*]. Wills also may make gifts to pre-existing trusts.

For a discussion of the rules relating to charities and charitable devises, together with illustrative forms, see Ch. 69, *Charitable Dispositions* .

**[2] FORM**

**Identification of All Beneficiaries**

The following persons [and entities] [, in addition to my \_\_\_\_\_ (wife *or* husband) and child(ren), named above,] are the beneficiaries of this will. Wherever these persons [and entities] are referred to in this will by abbreviations or portions of their names, the references shall be to the following:

Name of Beneficiary	Residence	Age [ <i>or</i> relationship <i>or</i> other identification]
_____	_____	_____
-		
_____	_____	_____
-		
_____	_____	_____
-		
_____	_____	_____
-		

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
 Estate, Gift & Trust LawWillsGeneral OverviewEstate, Gift & Trust LawWillsBeneficiariesGeneral Overview



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B. Identity of Testator's Family and Other Beneficiaries

*23-63 California Legal Forms--Transaction Guide §§ 63.231-63.249*

**[Reserved]**

§§ 63.231[Reserved]



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PART IV. FORMS

C. Property Included In Will

1. Single Person

*23-63 California Legal Forms--Transaction Guide § 63.250*

### **§ 63.250 General Declaration for Unmarried Testator**

#### **[1] Comment**

#### **[a] Use of Form**

This form may be used by an unmarried testator to state that the will disposes of all of the property that he or she is entitled to dispose of by will. Such a statement will clearly manifest the intended scope of the will. If the testator is married, this form should not be used, and an appropriate provision should instead be chosen from among §§ 63.270-63.272. If the testator holds a power of appointment, or if there is any likelihood that such a power may exist at the time of the testator's death, a statement that the testator is or is not exercising the power should be added to the provisions of this form [*see* §§ 63.290-63.292].

#### **[b] Property That May Be Disposed of by Will**

#### **[i] In General**

Unless a contrary intention is indicated by the will, a will passes all property the testator owns at death, including property acquired after execution of the will [*Prob. Code* § 21105]. As used in the Probate Code, the word "property" means anything that may be the subject of ownership, and includes both real and personal property and any interest in real or personal property [*Prob. Code* § 62].

A special rule applies to powers of appointment. Although a power of appointment may be exercised by a will [*see Prob. Code* §§ 612(a), 642], a power of appointment cannot be exercised by a will making a general disposition of all of the testator's property, unless specific reference is made to the power or there is some other indication of intent to exercise the power [*Prob. Code* § 641(a); *see Prob. Code* § 21105 (special exception to general rule that will passes all property testator owned at death)].

A will may dispose of all the testator's separate property, the testator's half of any community property owned by the

testator and the testator's spouse, and the testator's half of any quasi-community property owned by the testator and the testator's spouse [*Prob. Code § 6101*].

### **[ii] Separate Property**

All property owned by a spouse before marriage, and all property acquired by a spouse after marriage by gift, bequest, devise, or descent, together with the rents, issues, and profits of that property, is that spouse's separate property [*Fam. Code § 770*]. In addition, money or property received or to be received by a married person in satisfaction of a judgment for damages for personal injuries, or pursuant to an agreement for the settlement or compromise of such a claim, is the separate property of the injured person if the cause of action for damages arose after the entry of a judgment of dissolution or legal separation, or while the injured spouse was living separate from the other [*Fam. Code § 781(a)*].

All of the testator's separate property is subject to the testator's testamentary disposition [*Prob. Code § 6101(a)*] and, in the absence of a testamentary disposition, passes according to the rules of intestate succession [*see Prob. Code §§ 6400-6455*].

### **[iii] Community Property**

Except as otherwise provided by statute, community property includes all real or personal property, wherever situated, acquired by a married person during the marriage while domiciled in California [*Fam. Code § 760*]. As used in the Probate Code, "community property" means the following:

- Community property acquired during marriage by a married person while domiciled in California [*Prob. Code § 28(a)*];
- All personal property wherever situated, and all real property situated in California, acquired during marriage by a married person while domiciled elsewhere, that is community property, or a substantially equivalent type of marital property, under the laws of the place where the acquiring spouse was domiciled at the time of its acquisition [*Prob. Code § 28(b)*]; and
- All personal property wherever situated, and all real property situated in California, acquired during marriage by a married person in exchange for real or personal property, wherever situated, that is community property, or a substantially equivalent type of marital property, under the laws of the place where the acquiring spouse was domiciled at the time the property so exchanged was acquired [*Prob. Code § 28(c)*].

On the death of a married person, one half of the community property belongs to the surviving spouse and the other half belongs to the decedent [*Prob. Code § 100(a)*]. The one-half that belongs to the decedent is subject to the decedent's testamentary disposition [*Prob. Code § 6101(b)*] and, in the absence of a testamentary disposition, passes to the surviving spouse by intestate succession [*Prob. Code § 6401(a)*]. A putative spouse is a "surviving spouse" within the meaning of *Prob. Code § 6401* and has the same rights in the decedent's intestate estate as a legally married spouse [*Estate of Leslie (1984), 37 Cal. 3d 186, 197, 207 Cal. Rptr. 561, 689 P.2d 133 (decided under former Prob. Code §§ 221, 223, 224)*].

A husband and wife may agree to a non-pro-rata division of their community property (either as to the aggregate value or as to an individual asset) [*see Prob. Code § 100(b)*].

### **[iv] Quasi-Community Property**

Quasi-community property generally consists of property acquired by married persons while domiciled outside

California and which would have been community property if the persons had been domiciled in California at the time of acquisition [*see Fam. Code § 125*]. As used in the Probate Code, the term "quasi-community property" specifically refers to the following property (other than "community property" as defined in *Prob. Code § 28*):

- All personal property (wherever situated) and all real property (situated in California), acquired by a decedent while domiciled outside California, that would have been the community property of the decedent and the surviving spouse if the decedent had been domiciled in California at the time of acquisition [*Prob. Code § 66(a)*]; and
- All personal property (wherever situated) and all real property (situated in California), acquired in exchange for real or personal property, wherever situated, that would have been the community property of the decedent and the surviving spouse if the decedent had been domiciled in California at the time the property so exchanged was acquired [*Prob. Code § 66(b)*].

On the death of a married person domiciled in California, one-half of the decedent's quasi-community property belongs to the surviving spouse and the other half belongs to the decedent [*Prob. Code § 101(a)*]. If the decedent has, before death, transferred all or any part of the decedent's quasi-community property to a third person or persons, without receiving in exchange a consideration of substantial value and without the written consent or joinder of the surviving spouse, the surviving spouse may, under limited circumstances, require the transferee to restore one-half of the property (or an equivalent value) to the decedent's estate [*see Prob. Code § 102; see also Ch. 60A, Gifts, § 60A.12[2]*].

A husband and wife may agree in writing to a non-pro-rata division of their quasi-community property (either as to the aggregate value or as to an individual asset) [*see Prob. Code § 101(b)*].

The one-half of the spouse's quasi-community property that belongs to the decedent is subject to the decedent's testamentary disposition [*Prob. Code § 6101(c)*] and, in the absence of a testamentary disposition, passes to the surviving spouse by intestate succession [*Prob. Code § 6401(b)*].

### **[c] Description of All of Testator's Property**

This form does not include language to the effect that the testator is disposing of "all property, real and personal, community and separate, of every kind and description, and wheresoever located." Such words add nothing to the phrase "all the property over which I have a power of testamentary disposition," which is sufficiently broad to include the entire estate of the testator.

### **[d] Property Not Subject to Testamentary Disposition**

Although this clause is effective to dispose of all property over which the testator has the power of testamentary disposition, it does not affect property over which the testator has no power of testamentary disposition. Such property includes property held in joint tenancy [ *Goldberg v. Goldberg (1963) 217 Cal. App. 2d 623, 628, 32 Cal. Rptr. 93* ] and the proceeds of insurance on the testator's life [ *Cook v. Cook (1941) 17 Cal. 2d 639, 644-648, 111 P.2d 322* ]. Life insurance proceeds are not subject to testamentary disposition unless the policy specifies that the proceeds are to be paid to the estate or to the personal representative of the insured [*see Cook v. Cook (1941) 17 Cal. 2d 639, 645, 111 P.2d 322* ], since the policy is a contract with an insurance company that agrees to pay a certain sum to the named beneficiary on the testator's death [ *Cook v. Cook (1941) 17 Cal. 2d 639, 644-648, 111 P.2d 322* ]. The ownership rights of the insured under a life insurance policy, however, may be disposed of by will, and, when they are, the beneficiary will take whatever interest the insured possessed under the policy [*Ins. Code § 10130; see Cook v. Cook (1941) 17 Cal. 2d 639, 644, 111 P.2d 322* ].

In the absence of a prior contrary agreement, a joint tenant may unilaterally sever his or her interest from the joint

tenancy by conveyance or other acts inconsistent with joint ownership and thereby nullify the right of survivorship of the other joint tenant or tenants, without their consent. Severance of the joint tenancy converts the joint tenancy into a tenancy in common. Thereafter, the severing tenant's interest in the property may be disposed of by will [ *Estate of Propst* (1990) 50 Cal. 3d 448, 461-462, 268 Cal. Rptr. 114, 788 P.2d 628 (personal property); *Riddle v. Harmon* (1980) 102 Cal. App. 3d 524, 526-527, 162 Cal. Rptr. 530 (real property)].

## [2] FORM

### General Declaration for Unmarried Testator

It is my intention by this will to dispose of all property over which I have the power of testamentary disposition at the time of my death.

[Choose one of the following clauses:]

I do not intend, however, to exercise any power of appointment which I now possess or which may hereafter be conferred on me, unless that power is specifically referred to in this will or in any codicil to this will.

[OR]

I hereby exercise the power of appointment granted to me by \_\_\_\_\_ [name and date of instrument creating power] in favor of \_\_\_\_\_ [name and residence of appointee]. If \_\_\_\_\_ [name of appointee] does not survive me, I exercise that power of appointment in favor of \_\_\_\_\_ [name and residence of alternate appointee]. If \_\_\_\_\_ [name of alternate appointee] does not survive me, then I exercise that power of appointment in favor of the beneficiary or beneficiaries of my residuary estate.

### Legal Topics:

For related research and practice materials, see the following legal topics:  
Estate, Gift & Trust Law Wills General Overview



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DIVISION IV: WILLS AND TRUSTS

CHAPTER 63 WILL PROVISIONS

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C. Property Included In Will

1. Single Person

*23-63 California Legal Forms--Transaction Guide §§ 63.251-63.269*

**[Reserved]**

§§ 63.251[Reserved]



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DIVISION IV: WILLS AND TRUSTS

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C. Property Included In Will

2. Married Persons

*23-63 California Legal Forms--Transaction Guide § 63.270*

**§ 63.270 Gift of One-Half of Community Property and All of Separate Property**

**[1] Comment**

**[a] Use of Form**

This form may be used by a married testator to state that the will disposes of the testator's one-half interest in the community and quasi-community property of the spouses and all of the testator's separate property. If the testator is unmarried, § 63.250 should be used in place of this form. If the testator wishes to dispose of the entire interest of both spouses in the community property, § 63.271 or § 63.272 should be used in place of this form.

For definitions of separate property, community property, and quasi-community property, and a discussion of the extent to which these different types of property may be disposed of by will, see § 63.250[1].

**[b] "One-Half" of Community Property**

If the testator intends to dispose his or her entire interest in the community and quasi-community property of the spouses (i.e., one-half of the interest of both spouses), the will should state that the testator is disposing of "all" or "my entire interest." A statement that the testator is disposing of "one-half of my interest," as opposed to "my one-half interest," may be interpreted as disposing of only one-fourth (i.e., one half of one half) of the total community and quasi-community property.

**[2] FORM**

**Gift of One-Half of Community Property and All of Separate Property**

It is my intention by this will to dispose of all of my separate property and my entire one-half interest in the community [and quasi-community] property of my \_\_\_\_\_ [wife or husband] and myself. I do not intend to exercise any power of appointment which I now possess or which may hereafter be conferred on me, unless that power is

specifically referred to in this will or in any codicil to this will.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawCommunity PropertyGeneral OverviewEstate, Gift & Trust LawWillsGeneral OverviewFamily  
LawMarital Duties & RightsProperty RightsGeneral OverviewFamily LawMarital Duties & RightsProperty  
RightsCharacterizationCommunity PropertyFamily LawMarital Duties & RightsProperty  
RightsCharacterizationSeparate Property



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C. Property Included In Will

2. Married Persons

*23-63 California Legal Forms--Transaction Guide § 63.271*

**§ 63.271 Gift of All Community, Quasi-Community, and Separate Property of Both Spouses**

**[1] Comment--Use of Form**

This form may be used by a married testator to state that the will disposes of all of the community and quasi-community property of both spouses in addition to all of the testator's separate property. This form is generally used where the will creates two trusts, one a marital trust and the other a residuary trust. The surviving spouse's one-half interest in the community and quasi-community property is placed in the residuary trust, and the surviving spouse is given the right to withdraw funds from the residuary trust without limitation. Since the surviving spouse has not lost control over the property under such a disposition, a forced election [*see* § 63.272] is unnecessary. However, if the will provides that the testator's spouse will not have the right to withdraw his or her interest, and if the spouse is given no more than a special testamentary power to appoint his or her own interest, then the form in § 63.272[2] should be used instead of this form. For discussion of the "widow's election," see § 63.272[1].

**[2] FORM**

**Gift of All Community, Quasi-Community, and Separate Property of Both Spouses**

It is my intention to dispose of all of the community and quasi-community property of my \_\_\_\_\_ [wife or husband] and myself, and of all of my separate property. I do not intend to exercise any power of appointment which I now possess or which may hereafter be conferred on me, unless that power is specifically referred to in this will or in any codicil to this will.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Trusts Testamentary Trusts Estate, Gift & Trust Law Wills General Overview Family Law Marital Duties & Rights Property Rights Characterization Community Property Family Law Marital Duties & Rights Property Rights Characterization Separate Property



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DIVISION IV: WILLS AND TRUSTS

CHAPTER 63 WILL PROVISIONS

PART IV. FORMS

C. Property Included In Will

2. Married Persons

*23-63 California Legal Forms--Transaction Guide § 63.272*

**§ 63.272 Gift of All Community, Quasi-Community, and Separate Property With Alternative Gift If Spouse Takes Against Will**

**[1] Comment**

**[a] Use of Form**

This form may be used by a married testator to state that the will disposes of all of the community and quasi-community property of the spouses, and to provide an alternative disposition if the surviving spouse elects to take "against" the will. This provision creates a so-called "widow's election," requiring the surviving spouse (who may be either a widow or a widower) to choose whether to accept the benefits conferred by the will, or to reject those benefits and enforce his or her rights in the community and quasi-community property.

The "widow's election" is a sophisticated and potentially dangerous estate planning device. It should be used only after its advantages and disadvantages have been thoroughly evaluated and the attorney is satisfied that it will achieve the client's estate planning goals more satisfactorily than other estate planning arrangements. For further discussion of the "widow's election," see *California Wills and Trusts, Ch. 22, Property Devised by Will, § 22.06* (Matthew Bender); see also *Modern Estate Planning, Ch. 16, Community Property* (Matthew Bender).

**[b] Widow's Election**

**[i] In General**

Although a married person generally has testamentary power over only one half of the community and quasi-community property [*see Prob. Code § 6101*], one spouse may attempt to dispose of more than one half, even up to all, of the property. Such an attempt will be successful, however, only if the will clearly states the spouse's intention to dispose of more than one half of the property, and only if the surviving spouse acquiesces in the attempt. The right of a surviving spouse to acquiesce (or refuse to acquiesce) in an attempt by the spouse who dies first (the "deceased spouse") to dispose of more than one half of the community or quasi-community property is often called the "widow's

election" [*see Estate of Murphy (1976) 15 Cal. 3d 907, 913, 126 Cal. Rptr. 820, 544 P.2d 956*]. A "widow's election," of course, may be made by a widower as well as a widow.

### **[ii] Elements**

The surviving spouse will be put to a "widow's election" if the will of the deceased purports to dispose of property that belongs to the surviving spouse and if it is evident that it would thwart the intentions of the deceased spouse to permit the surviving spouse to enforce his or her own property rights while still taking under the deceased spouse's will [*Estate of Murphy (1976) 15 Cal. 3d 907, 913, 126 Cal. Rptr. 820, 544 P.2d 956*]. In these circumstances, the surviving spouse must choose whether he or she wishes to take under the deceased spouse's will or to enforce his or her own property rights [*Estate of Murphy (1976) 15 Cal. 3d 907, 913, 126 Cal. Rptr. 820, 544 P.2d 956*; *Estate of Wolfe (1957) 48 Cal. 2d 570, 574, 311 P.2d 476*; *Estate of Wilson (1986) 183 Cal. App. 3d 67, 73 n.7, 227 Cal. Rptr. 794*]. Requiring the surviving spouse to make this choice is justified on the ground that a person should not be permitted to accept the benefits conferred by a will while simultaneously repudiating its losses [*Williams v. Williams (1915) 170 Cal. 625, 627-628, 151 P. 10*].

### **[iii] Forced Election**

In estate planning discussions, the phrase "widow's election" often refers to a more or less standardized arrangement by which one spouse attempts to control the disposition of both halves of the community property by creating one or more trusts under which the surviving spouse will receive a lifetime income interest in both halves of the property and, on the death of the surviving spouse, the trust principal will be distributed to other beneficiaries, such as the testator's children or issue. In these circumstances, the will may explicitly provide that, if the surviving spouse "elects" to take his or her interest in the community or quasi-community property "against" the will, the surviving spouse will forfeit all of part of his or her rights under the will. This kind of election is often called a "forced" or "strict" election. In particular cases, this kind of election may be necessary to persuade the surviving spouse to acquiesce in the deceased spouse's attempted disposition of more than one half of the community property.

### **[iv] Purposes**

When a will puts a surviving spouse to a "widow's election," the objective is usually to achieve control over the ultimate disposition of the subject property. The deceased spouse will generally be content to allow the surviving spouse to enjoy the property during his or her lifetime but wish to assure that the property will be distributed after the death of the surviving spouse to persons designated by the deceased spouse. This goal will often be sought when the deceased spouse has children by a previous marriage and wishes to protect those children against disinheritance by the surviving spouse.

Another goal that the deceased spouse may wish to attain through the mechanism of a "widow's election" is professional management of the trust property. In cases of this kind, a professional trustee will often be named to manage the trust property after the deceased spouse's death, and to distribute the property on the surviving spouse's death to the designated remainder beneficiaries.

### **[v] Disadvantages**

While the "widow's election" can be used by sophisticated estate planners to achieve well-defined estate-planning goals in particular circumstances, the arrangement is not suited to the circumstances of most married persons, and it is generally avoided by modern estate planners.

The tax disadvantages of the "widow's election" are significant. For example, a "forced" or "strict" election can actually result in higher estate taxes in the estate of the deceased spouse by impairing the value of the marital deduction that would otherwise be available for property that passes to the surviving spouse [*see I.R.C. § 2056 (marital deduction)*].

This happens if the deceased spouse's will requires the surviving spouse to surrender his or her interest in the community and quasi-community property in return for a devise under the deceased spouse's will. When this happens, the value of the devise to the surviving spouse must be reduced by the value of the community property surrendered [see *I.R.C. § 2056(b)(4)* (value of interest passing to surviving spouse must be reduced by value of obligation imposed on surviving spouse by deceased spouse); see also *Treas. Reg. § 20.2056(b)-(4)(b)*, Ex. 3].

If the surviving spouse accepts a lifetime income interest in a trust or trusts created by the deceased spouse's will, the value of the surviving spouse's half of the community or quasi-community property may be subject to estate taxation when the surviving spouse dies. Under *I.R.C. § 2036(a)*, the gross estate includes the value of all property transferred in which a decedent has retained a life interest. By contributing his or her interest in the community property to a trust in which he or she retained a lifetime income interest, the surviving spouse has made a transfer with a retained lifetime interest [ *Gradow v. U.S. (Fed. Cir. [U.S. Ct. Cl.] 1990) 897 F.2d 516, 518* ]. Although *I.R.C. § 2036(a)* allows an exception for property transferred "in a bona fide sale for an adequate consideration in money or money's worth," this exception is not available when the value of the surviving spouse's half is greater than the value of a lifetime income interest in the deceased spouse's half, determined on an actuarial basis according to the surviving spouse's life expectancy [ *Gradow v. U.S. (Fed. Cir. [U.S. Ct. Cl.] 1990) 897 F.2d 516, 518* ; see *Treas. Reg. § 20.2043-1(a)*].

A taxable gift of a future interest may occur when the surviving spouse surrenders his or her half of the community property in return for a lifetime income interest in both halves. By accepting only a lifetime income interest in his or her half of the community property, the surviving spouse in effect is giving up the remainder interest in that half. If the value of this remainder interest exceeds the value of the lifetime income interest in both halves of the community property, then the surviving spouse will have made a gift to the extent of the difference [see *Commissioner of Internal Revenue v. Siegel (9th Cir. [T.C.] 1957) 250 F.2d 339, 349* ; *Estate of Daisy F. Christ (1970) 54 T.C. 493, 530* , *aff'd on other grounds, (9th Cir. 1973) 480 F.2d 171* ].

In addition to the tax disadvantages, the "widow's election" is subject to other practical disadvantages. In many cases, a "strict" or "forced" election will not be necessary to persuade the surviving spouse to acquiesce in the deceased spouse's plan of disposition. If the spouses share the same overall estate-planning objectives, they will often agree on how the trust property should ultimately be distributed. Further, many surviving spouses will be quite content to receive the income from the trust property during their lifetimes in return for giving up the right to control the disposition of the property after they have died. Even when a "strict" or "forced" election is necessary to persuade the surviving spouse to acquiesce in the deceased spouse's plan of disposition, the election will often engender bitter and divisive feelings among family members, which will practically outweigh any financial advantages achieved by the arrangement.

#### **[vi] Alternatives**

Most of the purposes sought to be accomplished by a "widow's election" can be achieved in other ways. For example, a spouse who wishes to control the disposition of trust property after the death of his or her surviving spouse may create a qualified terminable interest property (QTIP) trust under *I.R.C. § 2056(b)(7)*. A QTIP trust will qualify for the marital deduction on the death of the deceased spouse if the surviving spouse is given the right to receive all of the income from the trust property for life. On the death of the surviving spouse, the trust principal can be distributed to remainder beneficiaries designated by the deceased spouse. For further discussion of QTIP trusts, see Ch. 71, *Marital Deduction Trust Provisions* .

Some of the same purposes may also be accomplished if a husband and wife create a revocable living trust funded with their community or quasi-community property. The surviving spouse will be given the right to receive the income from the trust property after the death of the deceased spouse. On the death of the surviving spouse, the trust property will be distributed to designated remainder beneficiaries. The trust instrument may include a provision stating that the surviving spouse cannot amend the instrument after the death of the deceased spouse. This will give the deceased spouse effective control over the disposition of the trust property after the death of the surviving spouse. For general coverage of

revocable living trusts, see Ch. 70, *Complete Revocable Trust Forms* .

**[2] FORM**

**Gift of All Community, Quasi-Community, and Separate Property With Alternative Gift If Spouse Takes Against Will**

It is my intention by this will to dispose of all of the community and quasi-community of my \_\_\_\_\_ [wife *or* husband] and myself, and of all of my separate property. However, I do not intend to exercise any power of appointment which I now possess or which may hereafter be conferred on me, unless that power is specifically referred to in this will or in any codicil to this will. My \_\_\_\_\_ [husband *or* wife], if \_\_\_\_\_ [he *or* she] survives me, shall elect within \_\_\_\_\_ [specify time, e.g., thirty days after my death *or* within a reasonable time after my death] whether \_\_\_\_\_ [he *or* she] will take under this will or take the rights given \_\_\_\_\_ [him *or* her] by law. If \_\_\_\_\_ [he *or* she] should elect to take the rights given [him *or* her] by law, the provisions of this will \_\_\_\_\_ [insert the following if there is a specific bequest to the spouse:], except for the bequest to my \_\_\_\_\_ (husband *or* wife) provided in Paragraph \_\_\_\_\_ of this will] shall be carried into effect in the same manner as if \_\_\_\_\_ [he *or* she] had predeceased me.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law  
 Community Property  
 Election  
 Estate, Gift & Trust Law  
 Estate Administration  
 Allowances  
 Spouses  
 Estate, Gift & Trust Law  
 Wills  
 General Overview  
 Family Law  
 Marital Duties & Rights  
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DIVISION IV: WILLS AND TRUSTS

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2. Married Persons

*23-63 California Legal Forms--Transaction Guide §§ 63.273-63.289*

**[Reserved]**

§§ 63.273[Reserved]



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*23-63 California Legal Forms--Transaction Guide § 63.290*

**§ 63.290 Provision Specifying Nonexercise of Powers of Appointment**

**[1] Comment**

**[a] Use of Form**

This form is a provision stating that the testator does not wish to exercise any powers of appointment that he or she may possess. Use of this provision is not mandatory, but is nevertheless recommended to eliminate any possibility that any other provision in the will may be misconstrued as an expression of such an intent.

A general residuary clause in a will, or a will making a general disposition of all the testator's property, does not exercise a power of appointment held by the testator unless specific reference is made to the power or there is some indication of an intention on the testator's part to exercise the power [*Prob. Code § 641(a)*]. By indicating an absence of any such intent, this form precludes any likelihood of an inadvertent exercise of a power of appointment.

For general coverage of powers of appointment, see *Ch. 64, Testamentary Trusts: Payment and Distribution Provisions, § 64.43[1] et seq.*

**[b] Effect of Failure to Exercise Power**

**[i] Disposition of Appointive Property**

The failure to exercise a power of appointment will have different effects, depending on whether the power was "imperative" or "discretionary," and whether the creating instrument provided for the consequences of a failure to exercise the power.

A power of appointment is said to be "imperative" if the creating instrument manifests an intent that the particular appointees will benefit even if the donee fails to exercise the power [*Prob. Code § 613*]. A power of appointment is said to be "discretionary" if the donee is privileged to exercise, or not to exercise, the power as the donee chooses [*Prob.*

*Code § 613*].

If the donee of an imperative power declines to exercise the power, then the persons designated as permissible appointees will take equally of the appointive property, unless the creating instrument manifests a contrary intent [*Prob. Code § 671(a)*].

If the power was discretionary and the donee fails to exercise the power, the appointive property will pass to the persons named by the donor as the takers in default [*Prob. Code § 672(a)*]. If no taker in default was designated in the creating instrument, then the property will revert to the donor [*Prob. Code § 672(a)*].

### **[ii] Estate Tax Consequences**

The tax consequences of the failure to exercise a power of appointment will vary, depending on whether the power was a "general" or a "special" power of appointment for estate tax purposes, and whether the effect of the failure to exercise the power will be to transfer property or terminate an interest in property in such a way as to subject the property to the generation-skipping transfer tax.

All powers of appointment are either "general" or "special" [*see California Wills and Trusts, § 31.02[2]* (Matthew Bender)]. A "general" power of appointment is one that can be exercised in favor of the donee, the donee's estate, the donee's creditors, or creditors of the donee's estate, whether or not it is exercisable in favor of others [*Prob. Code § 611(a)*; *I.R.C. § 2041(b)(1)*]. The mere possession at the date of death of a general power of appointment is sufficient to include the appointive property in the gross estate of the holder for estate tax purposes [*I.R.C. § 2041(a)(2)* (power created after October 21, 1942)]. This result is not affected by the holder's decision not to exercise the power. Property subject to the power will be included in the holder's gross estate for estate tax purposes regardless of whether the power is or is not executed in the holder's will.

Any power of appointment that is not "general" is classified as a special power of appointment. The mere possession of a special power of appointment will not cause the appointive property to be included in the holder's gross estate for estate tax purposes. Further, the exercise or nonexercise of a special power of appointment will have no estate tax consequences for the holder's estate.

### **[iii] Generation-Skipping Transfer Tax Consequences**

The failure to exercise a power of appointment may have generation-skipping transfer tax consequences, depending on the value of the property, the identity of the person or persons who will receive the property as a result of the failure to exercise the power, and the generation-assignment of those persons.

The generation-skipping transfer tax applies to three general types of transfers. These are defined as taxable distributions, taxable terminations, and direct skips [*I.R.C. §§ 2611, 2612*].

A taxable distribution is any distribution from a trust to a "skip person" *I.R.C. § 2612(b)*. A "skip person" is defined as (1) any natural person who is assigned to a generation two or more generations below that of the transferor, (2) any trust in which all interests are held by skip persons, and (3) any trust in which no person holds an interest and that does not make any distribution from the trust to any "non-skip person" at any time after the transfer to the trust [*I.R.C. § 2613(a)*].

A taxable termination is generally any termination of an interest in property held in trust, whether the termination occurs as the result of death, lapse of time, release of a power, or otherwise [*I.R.C. § 2612(a)(1)*].

A direct skip is any transfer of a property interest to a skip person if the transfer is also subject to either gift or estate tax

[I.R.C. § 2612(c)(1)].

If, by reason of the testator's failure to exercise a power of appointment, whether general or special, a taxable distribution is made from a trust to a "skip person," the distribution will be potentially subject to the generation-skipping transfer tax. If, by reason of the failure to exercise a power of appointment, a taxable termination is made, the termination will similarly be subject to potential imposition of the generation-skipping transfer tax.

Before a determination can be made of the generation-skipping transfer tax consequences of the failure to exercise a power of appointment, the value of the appointive property must be known, the persons who will receive the property as a result of the failure must be identified, and the relationship between those persons and the transferor of the property must be determined.

A full discussion of the generation-skipping transfer tax is beyond the scope of this chapter. For a general discussion of the tax, see *Ch. 61, Will Drafting and Complete Will Forms, § 61.10 et seq.* For an in-depth discussion of the generation-skipping transfer tax, see *California Wills and Trusts, Ch. 113, Generation-Skipping Transfers and Trust Strategies* (Matthew Bender).

## [2] FORM

### Provision Specifying Nonexercise of Powers of Appointment

I hereby elect not to exercise any powers of appointment which I could validly exercise by this will, including all powers that I now possess or that may be hereafter conferred on me [*if reference to a specific power is desired, add;*, and specifically including, but not limited to, that power given to me by \_\_\_\_\_ (*donor*) under \_\_\_\_\_ (*describe creating instrument; for descriptions, see §§ 63.291 (will), 63.292 (inter vivos trust)*)]. No provision of this will shall be construed as an exercise in whole or in part of any power of appointment.

#### Legal Topics:

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Powers of Appointment Estate, Gift & Trust Law Wills General Overview



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*23-63 California Legal Forms--Transaction Guide § 63.291*

**§ 63.291 Provision Exercising Power of Appointment Given by Will**

**[1] Comment**

**[a] Use of Form**

This form is a will provision exercising a power of appointment. This provision must be included in the will if the testator is the donee of a power of appointment and wishes to exercise it [*see* § 63.291[1][b][iii]].

This form specifically refers to a power of appointment created by the will of another person. For a form exercising a power of appointment created in an inter vivos trust instrument, see § 63.292.

For general coverage of powers of appointment, see *Ch. 64, Testamentary Trusts: Payment and Distribution Provisions*, § 64.43[1] *et seq.* For the tax consequences of powers of appointment, see *Ch. 64, Testamentary Trusts: Payment and Distribution Provisions*, § 64.51[1] *et seq.*

**[b] Exercise of Power of Appointment**

**[i] Compliance With Creating Instrument**

If the creating instrument specifies requirements as to the manner, time, and conditions of the exercise of a power of appointment, the power can generally be exercised only by complying with those requirements [*Prob. Code* § 630(a)]. However, the court may excuse formal compliance with requirements specified in the creating instrument if an actual appointment approximates the manner of appointment prescribed by the donor and the failure to satisfy the formal requirements does not defeat the accomplishment of a significant purpose of the donor [*Prob. Code* § 631(a)].

If the creating instrument expressly directs that a power of appointment be exercised by an instrument that makes a specific reference to the power or to the instrument that created the power, the power can be exercised only by an instrument containing the required reference [*Prob. Code* § 632]. The court cannot excuse compliance with a

requirement of this kind [Prob. Code § 1631(b)].

### **[ii] Manifestation of Intent to Exercise**

The exercise of a power of appointment requires a manifestation of the donee's intent to exercise the power [*Prob. Code § 640(a)*]. The intent to exercise a power may be manifested in various ways [*see Prob. Code § 640(b)*]. For example, the donee may declare, in substance, that the donee exercises a specific power or powers, or all of the powers that the donee has [*Prob. Code § 640(b)(1)*]. Alternatively, the donee may purport to transfer an interest in the appointive property that the donee would have no power to transfer except by virtue of the power [*Prob. Code § 640(b)(2)*]. Or the donee may make a disposition that, when considered with reference to the property owned and the circumstances existing at the time of the disposition, manifests the donee's understanding that the donee was disposing of the appointive property [*Prob. Code § 640(b)(3)*].

### **[iii] Exercise by Will**

A power of appointment may be exercised by a will [*see Prob. Code §§ 612(a), 642*]. A will may even be effective to exercise a power of appointment that was not in existence when the will was executed, provided the will adequately manifests the intent to exercise the power [*Prob. Code § 642*]. However, a will cannot exercise a power not in existence when the will was executed if the creating instrument manifests an intent that the power may not be exercised by a will previously executed, or if the will manifests an intent not to exercise a power subsequently acquired [*Prob. Code § 642*].

A power of appointment cannot be exercised by a general residuary clause in a will, or by a will making a general disposition of all of the testator's property, unless specific reference is made to the power or there is some other indication of intent to exercise the power [*Prob. Code § 641(a); but see Prob. Code § 641(b)* (rule applicable only when donee dies on or after July 1, 1982)].

### **[iv] Types of Appointments**

Various types of appointments may be made under a power of appointment. The appointment may be of present or future interests, or both [*Prob. Code § 650(a)(2)*]. The appointment may be unconditional, or subject to conditions, charges, or otherwise lawful restraints on the alienation of the appointive interest [*Prob. Code § 650(a)(3), (4)*]. The appointment may be in trust, or free of trust [*Prob. Code § 650(a)(5)*], or by creating a new power of appointment [*Prob. Code § 650(a)(6)*].

If the power is, by its terms, a special power of appointment [*see Prob. Code § 611* "general" and "special" powers of appointment; *see also Ch. 64, Testamentary Trusts: Payment and Distribution Provisions, § 64.44[1]*], any of these types of appointments may be made, provided the appointment complies with the terms of the creating instrument [*see § 63.291[1][b][i]*]. The donee of a special power of appointment may appoint the whole or any part of the appointive property to any one or more of the permissible appointees and exclude others, unless the donor specifies either a minimum or maximum share or amount to be appointed to one or more of the permissible appointees, in which case the exercise of the power must conform to the specification [*Prob. Code § 652*].

## **[2] FORM**

### **Provision Exercising Power of Appointment Given by Will**

I am the donee of a power of appointment given to me under Paragraph \_\_\_\_\_ [*number of paragraph*] of the will of \_\_\_\_\_ [*name of decedent*], which was admitted to probate in \_\_\_\_\_ [*year admitted*] in the County of \_\_\_\_\_, State of \_\_\_\_\_. I hereby expressly exercise that power by appointing all of the assets subject to it as follows: \_\_\_\_\_ [

*e.g.*, 60 percent to the living issue per stirpes and not per capita of my late son, Frank Smith; 40 percent to my daughter, Alice Jones (if she should predecease me, this 40 percent is appointed among her living issue per stirpes and not per capita)]. Except as herein provided, I elect not to exercise any power of appointment exercisable by a will which I now have or which may hereafter be conferred on me.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Powers of Appointment Estate, Gift & Trust Law Wills General Overview



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*23-63 California Legal Forms--Transaction Guide § 63.292*

**§ 63.292 Provision Exercising Power of Appointment Given by Inter Vivos Trust**

**[1] Comment--Use of Form**

This form is intended for use in exercising a power of appointment that was created by an inter vivos trust. This form is the same as § 63.291, except that § 63.291 applies if the power was created by will. For a more detailed discussion of the exercise of a power of appointment, see § 63.291[1].

**[2] FORM**

**Provision Exercising Power of Appointment Given by Inter Vivos Trust**

I am the donee of a power of appointment given to me under Paragraph \_\_\_\_\_ [number of paragraph] of that trust agreement dated \_\_\_\_\_, between \_\_\_\_\_ [name of trustor], as settlor, and \_\_\_\_\_ [name of trustee], as trustee. I hereby expressly exercise that power by appointing all of the assets subject to it as follows: \_\_\_\_\_ [e.g., 75 percent to my daughter, Alice Jones (if she should predecease me, this 75 percent is appointed among her living issue per stirpes and not per capita); 25 percent to my son, Frank Smith (if he should predecease me, this 25 percent is appointed among his living issue per stirpes and not per capita)]. Except as herein provided, I elect not to exercise any power of appointment exercisable by a will that I now have or that may hereafter be conferred on me.

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
 Estate, Gift & Trust Law Powers of Appointment Estate, Gift & Trust Law Trusts Irrevocable Living Trusts Estate, Gift & Trust Law Trusts Revocable Living Trusts Estate, Gift & Trust Law Wills General Overview



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DIVISION IV: WILLS AND TRUSTS

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*23-63 California Legal Forms--Transaction Guide §§ 63.293-63.309*

**[Reserved]**

§§ 63.293[Reserved]



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DIVISION IV: WILLS AND TRUSTS

CHAPTER 63 WILL PROVISIONS

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D. Proration of Death Taxes and Payment of Specific Debts

1. Proration of Death Taxes

*23-63 California Legal Forms--Transaction Guide § 63.310*

**§ 63.310 Proration of Death Taxes--All Taxes to Be Paid Out of Residue**

**[1] Comment**

**[a] Use of Form**

This form is a will provision that requires payment of all death taxes out of the residue of the estate. The direction is not limited to death taxes arising out of the probate estate, but includes the payment of all death taxes, including those assessed on property passing outside of probate or on lifetime transfers by the testator [*see I.R.C. §§ 2036-2038* (taxation of lifetime transfers because of a retained interest by the transferor)].

For alternative methods of prorating death taxes, see §§ 63.311-63.317.

**[b] Marital Deduction**

If the will contains a marital deduction trust, § 63.314 should be used in place of this form.

**[c] Coordination of Will With Other Components of Estate Plan**

Any tax apportionment scheme contained in will must be coordinated with the other components of the client's plan. If the client has established or plans to establish an inter vivos trust, any tax apportionment provision contained in the will must be compatible with the existence and terms of the trust. For example, if the bulk of the client's assets will be placed into the trust, it makes no sense to require that all death taxes be paid out of the residue of the client's estate, since the residue may not contain enough assets to pay the taxes generated by the trust. In this situation, it may make more sense to state in the will that all taxes are to be paid out of the trust, since that is where the bulk of the client's assets will be located [*see § 63.313* for form].

Similarly, the attorney must be careful to avoid inconsistency between the tax apportionment schemes of the will and the trust. For example, if the trust provides for statutory proration and the will provides for payment of all taxes out of

the residue, the two schemes would be fundamentally inconsistent. Again, proper coordination is essential. For discussion of tax apportionment provisions in inter vivos trusts, see *Ch. 70, Complete Revocable Trust Forms*, § 70.12[6][e]; for more detailed discussion, see *California Wills and Trusts*, Ch. 23, *Provisions for Payment of Taxes, Expenses, and Debts* (Matthew Bender).

The effects of any codicils to the will also must be considered [*see* § 63.310[1][f]].

#### **[d] Proration of Taxes**

##### **[i] Statutory Scheme**

Rules relating to the proration of estate taxes are set forth in *Prob. Code* §§ 20100-20125. These rules govern the proration of federal and California estate taxes, including interest and penalties on deficiencies assessed pursuant to those taxes [*Prob. Code* § 20100(a); *see I.R.C.* §§ 2001-2210 (federal estate tax); *Rev. & Tax. Code* § 13302 (California "pickup" estate tax); *see also* discussions in § 63.310[1][e]]. Proration rules relating to generation-skipping transfer taxes are set forth in *Prob. Code* §§ 20200-20225. These rules similarly apply both to federal and to state generation-skipping transfer taxes [*Prob. Code* § 20200(a); *see I.R.C.* §§ 2601-2622 (federal generation-skipping transfer tax) and *Rev. & Tax. Code* §§ 16700-16950 (California generation-skipping transfer tax); for general discussion of the generation skipping transfer tax, *see Ch. 60, Estate Planning*, § 60.16].

##### **[ii] General Rule**

The general rule is that estate and generation-skipping transfer taxes must be equitably prorated among the persons interested in the estate [*Prob. Code* § 20110(a) (estate tax); *Prob. Code* § 20210(a) (generation-skipping transfer tax)]. Except as specifically noted in the statutes [*see* discussions in § 63.310[1][d][iii] *et seq.*], equitable proration is achieved when proration is made in the proportion that the value of the property received by each person interested in the estate bears to the total value of all property received by all persons interested in the estate [*Prob. Code* §§ 20111, 20211].

The statutory procedure for prorating estate taxes does not include consideration of future income tax consequences. Unless income tax consequences can be ascertained with reasonable certainty for purposes of equitable reallocation at the time of distribution, the beneficiaries of an estate are responsible for paying their own future income taxes [ *Klein v. Hughes* (2005) 133 Cal. App. 4th 121, 128-131, 34 Cal. Rptr. 3d 613 ].

##### **[iii] Exceptions to General Rule**

The general rule is subject to significant exceptions. First, the rule does not apply if the decedent (in either a written inter vivos instrument or a will) directs that specific property be applied to the satisfaction of a tax or that a tax be prorated in a specific manner [*Prob. Code* §§ 20110(b)(1), 20210(b)(1); *see* § 63.310[1][d][iv]]. Second, the rule does not apply when federal law directs otherwise [*Prob. Code* §§ 20110(b)(2), 20210(b)(2); *see* discussion in § 63.310[1][d][v]]. Finally, the rule yields to specific proration requirements applicable to trusts, estates for years, estates for life, and other income interests [*Prob. Code* §§ 20113, 20213; *see* discussion in § 63.310[1][d][vi]], to "qualified real property" as defined in *I.R.C.* § 2032A [*Prob. Code* § 20114; *see* discussion in § 63.310[1][d][vii]], to extended taxes [*Prob. Code* § 20115; *see* discussion in § 63.310[1][d][viii]], and to situations in which the personal representative cannot collect the amount of a tax apportioned to a person [*Prob. Code* §§ 20116(b), 20214(b); *see* discussion in § 63.310[1][d][ix]].

##### **[iv] When Will or Inter Vivos Trust Specifies Manner of Proration**

As noted earlier [*see* § 63.310[1][d][iii]], the general rule of equitable proration of taxes does not apply if the will or a trust instrument directs that particular property be applied to the satisfaction of a tax or that a tax be prorated in a

specific manner [*Prob. Code § 20110(b)(1)*]. *Prob. Code § 20110(b)(1)* specifically provides that the general rule of equitable proration [*see Prob. Code § 20110(a)* and discussion in § 63.310[1][d][ii]] does not apply "to the extent the decedent in a written inter vivos or testamentary instrument disposing of property specifically directs that the property be applied to the satisfaction of an estate tax or that an estate tax be prorated to the property in the manner provided in the instrument." Before the adoption of this statute, the California Supreme Court held in *Estate of Armstrong* (1961) [*Estate of Armstrong* (1961) 56 Cal. 2d 796, 17 Cal. Rptr. 138, 366 P.2d 490] that, absent a "clear and unambiguous direction" by the decedent of an intention to the contrary, the general rule of equitable proration applies so that the tax burden is equitably allocated among those who are benefitted [*Estate of Armstrong* (1961) 56 Cal. 2d 796, 800, 802, 17 Cal. Rptr. 138, 366 P.2d 490]. In *Estate of Wathen* (1997) [*Estate of Wathen* (1997) 56 Cal. App. 4th 48, 64 Cal. Rptr. 2d 805], the Court of Appeal was asked to apply *Estate of Armstrong* to an ambiguous tax proration clause contained in a will that "poured over" the decedent's property to an inter vivos trust. Although it was clear that the will was intended to give directions with respect to tax proration, it was not clear how that the directions were intended to apply. One of the beneficiaries under the trust argued that since the proration directions were not clear and unambiguous, *Estate of Armstrong* required the court to apply the general rule of equitable proration and prohibited it from considering extrinsic evidence on the question. The trial court disagreed and admitted extrinsic evidence that the testator-settlor had intended by the clause to require that all of the death taxes be paid out of the residue of the trust. The Court of Appeal agreed with the trial court, holding that *Estate of Armstrong* required the application of the general rule of equitable proration only when the dispositive instrument failed altogether to refer to tax proration; when the existence of a tax proration clause is clear but its terms are ambiguous, it is proper to consider extrinsic evidence to determine the decedent's intentions with respect to proration [*Estate of Wathen* (1997) 56 Cal. App. 4th 48, 64 Cal. Rptr. 2d 805].

The objecting beneficiary in *Estate of Wathen* further argued that since the proration clause was in the will and not in the inter vivos trust instrument, the provision had no application to the trust assets. Again the Court of Appeal disagreed, pointing out that the will and the inter vivos trust instrument were executed on the same day and as part of an "integrated testamentary plan" intended to accomplish the same purpose. Accordingly, both documents had to be considered to determine whether the decedent had expressed a clear direction against statutory proration. When there is an "integrated testamentary plan" consisting of a will and a trust, it is sufficient if the tax proration directions are contained in either document; there is no requirement that they be contained in both [*Estate of Wathen* (1997) 56 Cal. App. 4th 48, 64 Cal. Rptr. 2d 805].

Good drafting practice obviously requires that the terms of any tax proration clause be clear and unambiguous, and that if the client's estate plan is to include both a will and a trust instrument no doubt be left as to whether the clause is to apply to the assets that pass under the will, the trust, or both the will and the trust. In no event should inconsistent directions be included in the different instruments.

In many cases, the statutory rule of equitable proration will suit the client's intentions quite well, and it will not be necessary to include any provision varying it. If the client's estate is so small that the likelihood of any estate taxes being due, it will rarely be necessary to address the question of proration. However, both the client and the attorney should remember that circumstances may quickly change. An unanticipated inheritance, for example, could increase the client's estate and suddenly make the proration of estate taxes a real rather than a merely theoretical concern.

#### **[v] When Federal Law Establishes Proration Rule**

In some cases, federal law sets forth rules for proration of taxes. For example, the Internal Revenue Code provides that the tax on qualified terminable interest property (QTIP) will be at the highest incremental bracket [*I.R.C. § 2207A*], with the result that other property in the estate is taxed at lower brackets. In this situation, the California proration rule should give way to the federal rule, and the higher tax attributable to the QTIP property should be collected from that property [*see Recommendation Relating to Proration of Estate Taxes*, 18 Cal. L. Revision Comm'n Reports 1127, 1133 (1986)]. Accordingly, the California statute provides that whenever federal law directs the manner of proration of the federal estate or generation-skipping transfer taxes, the California tax will be prorated in the same manner [*Prob. Code §§*

20110(b)(2), 20210(b)(2)].

#### **[vi] Trusts, Estates for Years, and Other Income Interests**

If a trust is created or other provision is made whereby a person is given an interest in the income of an estate, an estate for years, an estate for life, or any other temporary interest in property, the tax on both the temporary interest and other interests in the property (including remainder interests) must be charged against, and paid out of, the corpus of the property, without apportionment between the temporary and other interests [*Prob. Code* §§ 20113, 20213]. The proration rule under *Prob. Code* § 20113 governing payment of taxes on temporary/remainder interests applies to interest payments on delinquent taxes as well as the tax payment itself [ *Simpson v. White* (1997) 57 Cal. App. 4th 814, 821, 67 Cal. Rptr. 2d 361 ].

An annuity, however, is not a gift of income [ *Estate of Bourn* (1938) 25 Cal. App. 2d 590, 597, 78 P.2d 193 ] and does not come within this rule. An annuity is a general pecuniary gift that is payable periodically [*Prob. Code* § 21117(e); see *Prob. Code* § 21117(d) ("general pecuniary gift" defined)]. A pecuniary gift is one that is either expressly stated as a fixed dollar amount, or is a dollar amount determinable by the provisions of the instrument [*Prob. Code* § 21118(b)]. A general gift is a transfer from the general assets of the transferor [*Prob. Code* § 21117(b)]. The right to an annuity does not depend on the existence of an income, but is unconditional [ *Estate of Steele* (1980) 113 Cal. App. 3d 106, 116, 169 Cal. Rptr. 635 ]. Accordingly, taxes will not be prorated against it [ *Estate of Steele* (1980) 113 Cal. App. 3d 106, 116-117, 169 Cal. Rptr. 635 (decided under former *Prob. Code* § 973)].

#### **[vii] Qualified Real Property**

The Internal Revenue Code permits an executor to elect to specially value certain qualified real property for estate tax purposes [*I.R.C.* § 2032A(a)]. This election may be made with respect to real property used for farming purposes or in a trade or business, provided the property constitutes at least 50 percent of the adjusted gross value of the estate and certain other requirements are met [*I.R.C.* § 2032A(b)(1)]. Since the special value may be as much as \$750,000 less than the fair market value of the qualified property [*I.R.C.* § 2032A(a)(2)], it may result in a substantial reduction in the estate tax. This amount is subject to inflation adjustments for decedents dying after 1998 [*I.R.C.* § 2032A(a)(2)]. For example, for decedents dying in 2005, the figure is \$870,000 [ *Rev. Proc.* 2004-71, 2004-50 *I.R.B.* 970 ]. However, if persons who receive specially valued property do not continue to use it for farming purposes or in a trade or business for at least 10 years, an additional tax may be imposed [*I.R.C.* § 2032A(c)]. The mere passive rental of property to a nonfamily member is not a qualified use under the statute [ *Brockman v. C.I.R.* (7th Cir. 1990) 903 F.2d 518, 521-522 ]. The rules of equitable proration require that when an election has been made, the reduction in taxes be allocated entirely to the persons who receive the qualified property [*Prob. Code* § 20114(b)] and that any additional tax imposed for failure to continue the qualified use for at least 10 years be imposed on the same persons [*Prob. Code* § 20114(c); see *Recommendation Relating to Proration of Estate Taxes*, 18 Cal. Law Rev. Comm'n Reports 1127, 1133 (1986)].

#### **[viii] Extended Taxes**

The Internal Revenue Code authorizes extended payment of estate taxes attributable to certain kinds of property [see *I.R.C.* §§ 6163-6166]. Extensions may be granted with respect to estate taxes attributable to reversionary interests [*I.R.C.* § 6163] and interests in closely held businesses [*I.R.C.* § 6166]. Since the right to extend payment of the tax is granted with respect to particular devisees, the California rules of equitable proration provide that the right to extend the payment also belongs to those devisees. Accordingly, when the payment of any portion of the federal estate tax is extended under the provisions of the federal estate tax law, the amount of extended tax will be a charge against the persons who receive the specific property that gives rise to the extension [*Prob. Code* § 20115].

#### **[ix] When Personal Representative Cannot Collect Prorated Amount**

After a proration has been made, it sometimes happens that the personal representative is unable to collect the full

amount of the prorated taxes. Notwithstanding the rule that a court order requiring persons to pay a prorated amount of an estate tax is a judgment and may be enforced as such [*Prob. Code § 20123(b)*], one or more of the persons required to pay may be beyond the jurisdiction of the court or otherwise unsusceptible to enforcement. In such a case, the amount not recoverable must be equitably prorated among the other persons in the estate who are subject to proration [*Prob. Code § 20116(b)*]. If a person is required to pay a greater estate tax by reason of another's failure to pay his or her prorated share of the tax, the person charged with or required to pay the greater amount has a right of reimbursement against the other person [*Prob. Code § 20117*].

#### **[e] California "Pickup" Estate Tax**

The California inheritance tax was repealed by initiative on June 8, 1982 [*see Rev. & Tax. Code § 13301*]. However, California does impose a "pickup" estate tax equal to the maximum allowable federal estate tax credit for state death taxes [*Rev. & Tax. Code § 13302*]. By providing for apportionment of "any state taxes" payable as a result of the testator's death, this form and the other apportionment provisions in this chapter take into account any California "pickup" estate tax as well as death taxes imposed by any other state in which property owned by the testator is located [*see Rev. & Tax. Code § 13303* (apportionment of "pickup" tax when decedent leaves property in more than one state); *see Ch. 60, Estate Planning, § 60.13[4][c]*].

#### **[f] Effect of Codicils on Apportionment Provision**

When drafting a will provision apportioning death taxes, the attorney should consider the potential effect of subsequent changes in the will. For example, in *Estate of Steele (1980) 113 Cal. App. 3d 106, 117-120, 169 Cal. Rptr. 635*, the court concluded that a holographic codicil creating an annuity for a companion of the testator indicated an intention that the recipient receive the stated amount without any pro rata deduction for estate taxes, although the codicil contained no express language to that effect. If changes in the will can be anticipated, the attorney should consider making the apportionment provision applicable to any future codicils that do not specifically provide for a different method of apportionment. In addition, when drafting any codicils, it may be advisable to specify whether or not they are subject to or exempt from the apportionment scheme set out in the will [*see Ch. 62, Codicils*].

#### **[2] FORM**

##### **Proration of Death Taxes--All Taxes to Be Paid Out of Residue**

I direct that all federal estate tax and any state taxes payable as a result of my death, including taxes on any property passing outside of my probate estate, shall be paid out of the residue of my probate estate only, and shall not be paid out of or collected from the recipients of any other assets passing under or outside of this will.

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Wills General Overview Tax Law Federal Estate & Gift Taxes Gifts (IRC secs. 2035, 2501-2524) Net Gifts Tax Law Federal Taxpayer Groups Income Taxation of Estates, Trusts & Beneficiaries Taxation of Beneficiaries (IRC secs. 661-668, 691-692)



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1. Proration of Death Taxes

*23-63 California Legal Forms--Transaction Guide § 63.311*

**§ 63.311 Proration of Death Taxes--Taxes on Probate Estate Payable From Residue; Nonprobate Taxes Equitably Prorated**

**[1] Comment**

**[a] Use of Form**

This form is a will provision that may be used to require that all death taxes payable on assets of the probate estate be paid out of the residue of the probate estate. Taxes on any property passing outside of the probate estate are to be collected from the transferees of that property. For alternative forms for proration of death taxes, see §§ 63.310 and 63.312-63.317. For a general discussion of the rules relating to proration of taxes, see § 63.310[1].

**[b] Marital Deduction**

If the will contains a marital deduction trust, § 63.314 should be used instead of this form.

**[2] FORM**

**Proration of Death Taxes--Taxes on Probate Estate Payable From Residue; Nonprobate Taxes Equitably Prorated**

I direct that all federal estate tax and any state taxes payable as a result of my death on assets passing under this will shall be paid out of the residue of my probate estate only, and shall not be paid out of or collected from the recipients of any other assets passing under or outside of this will. All federal estate tax and any state taxes payable as a result of my death on assets passing outside of my probate estate shall be prorated among the recipients of the assets passing outside of my probate estate in the proportion that the value of the assets received by each recipient bears to the total value of all such assets received by all recipients.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Wills General Overview Tax Law Federal Taxpayer Groups Income Taxation of Estates, Trusts & Beneficiaries Taxation of Beneficiaries (IRC secs. 661-668, 691-692)



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1. Proration of Death Taxes

*23-63 California Legal Forms--Transaction Guide § 63.312*

**§ 63.312 Proration of Death Taxes--All Taxes Prorated Among Probate Assets**

**[1] Comment**

**[a] Use of Form**

This form is a will provision that may be used to direct that all death taxes, including taxes on assets passing outside the probate estate as well as on those included in the probate estate, be equitably prorated among the assets of the probate estate. The effect of this provision is to permit assets outside the probate estate to pass free of tax and to impose the burden of payment of all taxes on probate assets. At the same time, the executor will be relieved of the duty (which in some circumstances can be burdensome) of attempting to collect prorated shares of the death taxes from the recipients of assets passing outside of probate.

For alternative forms for proration of death taxes, see §§ 63.310-63.311 and 63.313-63.317. For a general discussion of the rules relating to proration of taxes, see § 63.310[1].

**[b] Optional Provision Governing Assets in Inter Vivos Trust**

Since collection of taxes from the trustee of an inter vivos trust will often be less difficult than from the recipients of other nonprobate assets, the reasons for exempting trust assets from proration may not be as compelling as those for exempting other nonprobate assets. Accordingly, this form contains an optional clause that may be used to specify that taxes attributable to assets passing by virtue of an inter vivos transfer in trust will not be prorated among the probate assets, but rather will be prorated among the trust assets in the manner specified in the trust instrument. This clause may be added if the testator has specified a proration scheme in the inter vivos trust.

**[c] Marital Deduction**

If the will contains a marital deduction trust, § 63.314 should be used instead of this form.

**[d] Need for Specificity in Drafting Proration Provisions**

Any will provision setting forth a scheme for proration of taxes should precisely identify the "estate" that will be used as the basis for the proration. The provision should specify whether the "probate estate," the "total estate" (which includes assets passing outside of probate as well as those subject to probate), or the "gross estate" for federal estate tax purposes is to be the proration base. Failure to precisely define the "estate" that is to be the proration base may be fatal to the provision, since only a clear and unambiguous direction of the decedent will relieve a beneficiary from the tax burden imposed on that beneficiary by the proration statutes [ *Estate of Wakefield (1968)* 258 Cal. App. 2d 274, 278-279, 65 Cal. Rptr. 664 (proration statutes govern when will does not precisely identify "estate"); *Estate of Carley (1979)* 90 Cal. App. 3d 582, 588-589, 153 Cal. Rptr. 528 (words "my estate" held not to refer to residuary estate); see *Estate of Armstrong (1961)* 56 Cal. 2d 796, 802, 17 Cal. Rptr. 138, 366 P.2d 490 (decided under former Prob. Code § 970)]. For a general consideration of will provisions sufficient to vary the statutory rules of proration, see discussion in § 63.310[1][d][iv].

**[2] FORM****Proration of Death Taxes--All Taxes Prorated Among Probate Assets**

[(a)] I direct that all federal estate taxes and any state taxes payable as a result of my death, including taxes on any property passing outside of my probate estate, shall be prorated among the assets of my probate estate in the proportion that the value of the property received by each person interested in my probate estate bears to the total value of all property received by all persons interested in my probate estate. No payment shall be made or required out of any assets passing outside of my probate estate.

*[Optional provision specifying different proration scheme for taxes on assets passing by inter vivos transfer in trust:]*

(b) Notwithstanding subparagraph (a), above, any taxes that may be attributable to assets passing by any transfer in trust that I may have made during my lifetime shall not be a charge on any assets of my probate estate, but shall be prorated among the assets passing by that transfer according to directions set forth in the trust instrument governing the transfer.

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Estate, Gift & Trust LawWillsGeneral Overview



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## 1. Proration of Death Taxes

*23-63 California Legal Forms--Transaction Guide § 63.313***§ 63.313 Proration of Death Taxes--All Taxes to Be Paid by Inter Vivos Trust****[1] Comment--Use of Form**

This form is a will provision that may be used to direct that all death taxes be paid out of an inter vivos trust created by the testator. Although the provision does not relieve the executor of the obligation of paying the taxes, it authorizes him or her to compel reimbursement from the trust.

For alternative will provisions directing the proration of death taxes, see §§ 63.310-63.312 and 63.314-63.317. For a general discussion of the rules relating to proration of taxes, see § 63.310[1].

**[2] FORM****Proration of Death Taxes--All Taxes to Be Paid by Inter Vivos Trust**

I direct that all federal estate tax and any state taxes payable as a result of my death, including but not limited to taxes on any property passing under this will and taxes on any property passing outside of my probate estate, shall be paid out of the principal of that inter vivos trust entitled \_\_\_\_\_ [title of trust], executed by \_\_\_\_\_ [identify trustor(s)], as trustor(s), on \_\_\_\_\_ [date], and \_\_\_\_\_ [name of trustee], as trustee, and shall not be paid out of, or collected from the recipients of, any other assets or property.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Probate General Overview Estate, Gift & Trust Law Trusts Irrevocable Living Trusts Estate, Gift & Trust Law Trusts Revocable Living Trusts Estate, Gift & Trust Law Wills General Overview



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1. Proration of Death Taxes

*23-63 California Legal Forms--Transaction Guide § 63.314*

**§ 63.314 Proration of Death Taxes--Marital Deduction Provision**

**[1] Comment**

**[a] Use of Form**

This form is a will provision that may be used to direct that all death taxes be paid out of assets not intended to qualify for the federal estate tax marital deduction. It is suitable for use in any will that makes provision for a marital deduction gift, whether in trust or otherwise.

The form includes two alternative provisions. The first alternative may be used when it is not contemplated that there will be any assets passing outside of the probate estate and the testator wishes all death taxes to be paid out of nonmarital assets passing under the will. The second alternative may be used when there will be assets passing outside the probate estate and the testator wishes the nonprobate assets to bear their proportional share of the taxes. The second alternative directs that taxes on nonprobate assets be equitably prorated among the recipients of those assets.

For a general discussion of the rules relating to proration of taxes, see § 63.310[1].

**[b] Effect of Death Taxes on Amount of Marital Deduction**

The amount of any marital deduction will be reduced by the amount of any death taxes paid out of the marital deduction property [*see I.R.C. § 2056(b)(4)(A); see also Treas. Reg. § 20.2056(b)-4(c)*]. The simplest way of avoiding this reduction is to provide in the will that all death taxes will be paid out of assets that are not intended to qualify for the deduction. Some provision shifting the burden of payment of death taxes from the marital deduction assets to other assets should be included in every will that provides for a marital deduction trust. For deduction of tax apportionment provisions designed to protect the marital deduction, see *California Wills and Trusts, Ch. 23, Provisions for the Payment of Taxes, Expenses, and Debts, § 23.03[2][c]* (Matthew Bender).

**[2] FORM**

**Proration of Death Taxes--Marital Deduction Provision**

*[First alternative provision: taxes to be paid out of residue of probate estate]*

I direct that all federal estate tax and any state taxes payable as a result of my death, including but not limited to taxes on any property passing under this will and taxes on any property passing outside of my probate estate, shall be paid out of \_\_\_\_\_ *[describe nonmarital assets or trust, e.g., the residue of my probate estate or Trust B, referred to in Paragraph \_\_\_\_\_ of this will]* and shall not be paid out of or prorated against any other assets of my estate.

*[Second alternative provision: taxes to be paid out of probate and nonprobate assets]*

I direct that all federal estate tax and any state taxes payable as a result of my death and attributable to or imposed on property passing under this will shall be paid out of \_\_\_\_\_ *[describe nonmarital assets or trust, e.g., the residue of my probate estate or Trust B, referred to in Paragraph \_\_\_\_\_ of this will]* and shall not be paid out of or prorated against any other assets of my probate estate. I further direct that all federal estate tax and any state taxes payable as a result of my death and attributable to or imposed on property passing outside of this will shall be paid out of and prorated among the recipients of the assets passing outside of this will in the proportion that the value of the assets received by each recipient bears to the total value of all such assets received by all recipients.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Probate General Overview Estate, Gift & Trust Law Wills General Overview Tax Law Federal Estate & Gift Taxes Deductions Marital Deduction (IRC secs. 2056, 2523) General Overview



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1. Proration of Death Taxes

*23-63 California Legal Forms--Transaction Guide § 63.315*

**§ 63.315 Proration of Death Taxes--"Forced Widow's Election" Provision**

**[1] Comment--Use of Form**

This form is a will provision prorating death taxes in a widow's election will. In the forced widow's election will, one spouse disposes of all the community property, giving the surviving spouse a life estate and, at most, a special power of appointment. This provision requires that all death taxes payable at the death of the first spouse, including taxes on property passing outside of probate and inter vivos transfers subject to death taxes, are to be paid out of the residue of the estate. It also provides that any taxes payable by the surviving spouse as the result of the forced widow's election will are to be paid out of the residue of the first spouse's estate.

For a general discussion of proration of death taxes, see § 63.310[1].

**[2] FORM**

**Proration of Death Taxes--"Forced Widower's Election" Provision**

I direct that all federal estate tax and any state taxes payable as a result of my death, not limited to taxes payable on property passing under this will, shall be paid out of the residue of my estate, and shall not be deducted or collected from any legatee, devisee, or beneficiary hereunder. To the extent that my \_\_\_\_\_ [wife *or* husband] shall incur any tax liability whatsoever resulting from the disposition hereunder of \_\_\_\_\_ [his *or* her] one-half interest in our community property, that tax liability shall also be paid out of the residue of my estate.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawCommunity PropertyElectionEstate, Gift & Trust LawProbateGeneral OverviewEstate, Gift & Trust LawWillsGeneral OverviewEstate, Gift & Trust LawWillsForced Heirs & Legitime



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## 1. Proration of Death Taxes

*23-63 California Legal Forms--Transaction Guide § 63.316***§ 63.316 Proration of Death Taxes--Specific Bequest Exempt From Proration****[1] Comment--Use of Form**

This form is a will provision that may be used to exempt a specific gift made in the will from any payment of estate taxes. Such a provision is appropriate if the testator wishes a particular beneficiary to receive the full value of a particular gift undiminished by any reduction for death taxes.

The form includes three alternative provisions. The first alternative may be used to direct that all death taxes due in the testator's estate be paid out of the residue of the probate estate and that the specific gift be exempt from those taxes. The second alternative may be used to require proration of death taxes among all assets of the probate estate except the specific gift. The third alternative may be used to require proration among all assets subject to death taxes (including both probate and nonprobate assets) but to preserve the exemption for the specific gift.

For alternative provisions for proration of death taxes, see §§ 63.310-63.315 and 63.317. For a general discussion of the rules relating to proration of taxes, see § 63.310[1].

**[2] FORM****Proration of Death Taxes--Specific Bequest Exempt From Proration**

*[First alternative provision: taxes to be paid out of residue of probate estate]*

I direct that all federal estate taxes and any state taxes payable as a result of my death shall be paid out of the residue of my probate estate only, and that no part of those taxes shall be paid out of, charged, or prorated against \_\_\_\_\_ [*identify or describe exempt gift, e.g., the gift that I have made to* \_\_\_\_\_ (*name of beneficiary*) in Paragraph \_\_\_\_\_ of this will *or* the annuity that I have directed to be paid to \_\_\_\_\_ (*name of beneficiary*) in Paragraph \_\_\_\_\_ of this will].

*[Second alternative provision: taxes to be prorated against all assets of probate estate]*

I direct that \_\_\_\_\_ [*identify or describe exempt gift, e.g., the gift that I have made to* \_\_\_\_\_ (*name of beneficiary*) in Paragraph \_\_\_\_\_ of this will *or* the annuity that I have directed to be paid to \_\_\_\_\_ (*name of beneficiary*) in Paragraph \_\_\_\_\_ of this will] shall be free of any charge for or payment of any federal estate tax and any state taxes payable as a result of my death, and that all such taxes shall be paid out of and prorated against the other assets passing under this will in the proportion that the value of the assets received by each beneficiary bears to the total value of all other assets passing under this will.

*[Third alternative provision: taxes to be prorated against both probate and nonprobate assets]*

I direct that \_\_\_\_\_ [*identify or describe exempt gift, e.g., the gift that I have made to* \_\_\_\_\_ (*name of beneficiary*) in Paragraph \_\_\_\_\_ of this will *or* the annuity that I have directed to be paid to \_\_\_\_\_ (*name of beneficiary*) in Paragraph \_\_\_\_\_ of this will] shall be free of any charge for or payment of any federal estate tax and any state taxes payable as the result of my death, and that all such taxes shall be paid out of and prorated against the other assets of my gross estate (whether passing under this will or outside of it) in the proportion that the value of the assets received by each recipient bears to the total value of all of the other assets of my gross estate (whether passing under this will or outside of it).

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Probate General Overview Estate, Gift & Trust Law Wills General Overview Estate, Gift & Trust Law Wills Bequests & Devises



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DIVISION IV: WILLS AND TRUSTS

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D. Proration of Death Taxes and Payment of Specific Debts

1. Proration of Death Taxes

*23-63 California Legal Forms--Transaction Guide § 63.317*

**§ 63.317 Proration of Death Taxes--Income Beneficiary Under Qualified Terminable Interest (QTIP) Trust**

**[1] Comment**

**[a] Use of Form**

This form is a special provision for allocation of death taxes when the testator is or is likely to become an income beneficiary under a qualified terminable interest property (QTIP) trust, which is a particular type of marital deduction trust. The special tax treatment of such trusts [*see discussion in § 63.317[1][b]*] may make it necessary to include this or a comparable provision in the will of an income beneficiary of such a trust. For a detailed discussion of the use and advantages of marital deduction trusts, including so-called "QTIP" trusts, see Ch. 71, *Marital Deduction Trust Provisions*.

This provision allocates all death taxes, except those that are attributable to the QTIP trust, to the residuary estate in the same manner as § 63.310. This is the most common situation in which special treatment of taxes attributable to QTIP property is likely to be desirable. If taxes attributable to nonprobate assets are to be paid out of probate assets, as in § 63.312, addition of the special language contained in this form may also be desirable. Language requiring special treatment of taxes attributable to QTIP property is unnecessary in any will that provides that taxes attributable to nonprobate assets will be prorated among those assets, because such a provision could not have the effect of waiving the estate's statutory right to recover such taxes from recipients of the QTIP property [*see I.R.C. § 2207A(a)(2); see also discussion in § 63.317[1][c]*].

**[b] Tax Considerations in Use of Form**

A QTIP trust permits a testator to give his or her surviving spouse an income interest in property for life, claim an estate tax marital deduction for the full value of the property (not just the income interest), and concurrently specify the individuals who will take the property upon expiration of the spouse's income interest for life [*see I.R.C. § 2056(b)(7)*]. This differs from the standard marital deduction trust, under which the surviving spouse must be given a general power of appointment over the property, thereby depriving the testator of the ability to control with certainty the ultimate

beneficiaries [*see I.R.C. § 2056(b)(5)*].

This form is useful because of the tax treatment of the estate of the income beneficiary (the surviving spouse) under a QTIP trust. On the death of the surviving spouse, the value of the spouse's gross estate includes the value of any qualified terminable interest (QTIP) property for which the original testator received a marital deduction [*I.R.C. § 2044; see I.R.C. §§ 2056(b)(7), 2523(f)*]. Thus, the corpus of a QTIP trust will be taxable in the estate of the surviving spouse, even though it was the original testator who directed the disposition of that property. However, the Internal Revenue Code contains a special "recapture" provision, *I.R.C. § 2207A*, which permits the estate of the surviving spouse to recover from the recipient of the corpus of the QTIP trust the difference between the estate's tax liability and the amount of tax the estate would have paid if the value of the QTIP property had not been included in the spouse's gross estate [*I.R.C. § 2207A(a)(1)*]. Significantly, there is no such right of recovery if the surviving spouse in a will or revocable trust instrument specifically indicates an intent to waive any right of recapture with respect to the QTIP property [*I.R.C. § 2207A(a)(2)*]. This form precludes the likelihood that a will provision apportioning death taxes will inadvertently waive this right of recovery.

Inclusion of a provision such as this may be important. If the amount of QTIP property is substantial in relation to the total estate, then an otherwise suitable method for allocating death taxes, such as payment of such taxes out of the residuary estate [*see § 63.310*], may work an undue hardship on other beneficiaries. In such a situation, inclusion of this provision may be necessary to preserve the estate's right to recover the estate tax attributable to the QTIP property from the beneficiaries of that property. In addition, QTIP trusts are often used in situations in which there is antagonism between the surviving spouse and the remainder beneficiaries, and in such a case the surviving spouse may want his or her estate to be able to recover as much tax as possible at the expense of the recipients of the QTIP property.

## [2] FORM

### Proration of Death Taxes--Income Beneficiary Under Qualified Terminable Interest (QTIP) Trust

Except as hereinafter provided, I direct that all federal estate taxes and any state taxes payable as a result of my death, not limited to taxes assessed on property passing under this will, shall be paid out of the residue of my estate, and shall not be deducted from nor charged against any other gift or gifts that I have made in this will. The foregoing provision shall not affect the right of my estate under *Internal Revenue Code Section 2207A(a)(1)* to recover from the recipients of any property in which I possess an income interest for life, and which is includable in my gross estate by reason of *Internal Revenue Code Section 2044*, the difference between the total estate tax for which my estate is liable and the estate tax that would have been payable by my estate had that property not been included in my gross estate.

### Legal Topics:

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law  
 Probate  
 General Overview  
 Estate, Gift & Trust Law  
 Trusts  
 Marital Deduction  
 Trusts  
 Estate, Gift & Trust Law  
 Wills  
 General Overview



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D. Proration of Death Taxes and Payment of Specific Debts

1. Proration of Death Taxes

*23-63 California Legal Forms--Transaction Guide §§ 63.318-63.329*

**[Reserved]**

§§ 63.318[Reserved]



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D. Proration of Death Taxes and Payment of Specific Debts

2. Payment of Debts

*23-63 California Legal Forms--Transaction Guide § 63.330*

### **§ 63.330 Discharge of Particular Debt From Specific Fund**

#### **[1] Comment**

##### **[a] Use of Form**

This form is a will provision directing that a specific debt of the testator be paid out of specified estate property. When included in a will, this provision will free all property other than the specified property of the burden of payment of the specified debt and, to that extent, alter the statutory scheme for abatement of the shares of devisees [*see Prob. Code §§ 21400* (shares of beneficiaries abate as necessary to effectuate transferor's plan or terms of instrument), *21401* (application of abatement rules), *21402* (statutory order of abatement)]; *see also § 63.330[1][b][iii]*.

##### **[b] Abatement of Devises to Pay Debts**

##### **[i] In General**

Property subject to testamentary disposition is also subject to the rights of creditors and other persons as provided by law [*Prob. Code § 7001*; *see Prob. Code §§ 11400-11467* (payment of debts)]. Claims that are established in administration proceedings under the Probate Code [*see Prob. Code §§ 9000-9399* (creditor claims in administration proceedings)] must be paid in the course of administration [*Prob. Code § 9003*]. Debts (including expenses of administration, funeral expenses, expenses of the decedent's last illness, a family allowance, if any, and other claims for money) must be paid according to statutory priorities for payment [*see Prob. Code § 11420(a)*]. If necessary to pay debts, expenses, a family allowance, or other devises, the shares of certain devisees may have to be reduced or eliminated, and the executor may have to sell property devised by the will [*see Prob. Code § 10000(a)* (executor may sell property when necessary to pay debts, devises, family allowance, expenses of administration, or taxes)]. The process whereby some devises are reduced or, as necessary, eliminated to pay debts, expenses, or other devises is generally referred to as abatement [*see Prob. Code §§ 21400-21406*].

For a more detailed discussion of the payment of the testator's debts, see Ch. 65, *Executors* .

**[ii] Statutory Rules**

Under abatement rules set forth in the Probate Code, devisees must abate for the purpose of paying debts and other claims in the following order [*Prob. Code § 21402(a)(16)*]:

- First, property not disposed of by the will.
- Second, residuary gifts [*see Prob. Code § 21117(f)* ("residuary gift" defined)].
- Third, general gifts to persons other than the transferor's relatives [*see Prob. Code §§ 21117(b)* ("general gift" defined), *21402(b)* ("relative" is person who would be intestate heir if testator died without will and there were no other persons having priority)].
- Fourth, general gifts to the transferor's relatives.
- Fifth, specific gifts to persons other than the transferor's relatives [*see Prob. Code § 21117(a)* ("specific gift" defined)].
- Sixth, specific gifts to the transferor's relatives.

With exceptions noted in the code [*see Prob. Code §§ 21403(b)* (special rule for certain annuities), *21404* (when will requires specific gift to be exonerated from lien), *21405(b)* (specific devisee may satisfy contribution for abatement out of other property)], shares of devisees abate pro rata within each of the above classes [*Prob. Code § 21403(a)*].

**[iii] Will Provisions**

The Probate Code abatement rules are rules of construction only. They do not apply if the testator's plan (or a particular devise) would be defeated by application of the rules, or if some other scheme of abatement is necessary to effectuate the will or the testator's purpose [*Prob. Code § 21400*]. However, a general statement calling for payment of expenses out of the "trust estate" or "estate" does not override the order of abatement specified by *Prob. Code § 21402* [*see Burkett v. Capovilla (2003) 112 Cal. App. 4th 1444, 5 Cal. Rptr. 3d 817*].

**[c] Exoneration**

For a form directing the executor to pay encumbrances against specifically devised property, see § 63.419. For a form directing the executor to exonerate encumbrances against specifically devised real property, see § 63.442.

**[2] FORM****Discharge of Particular Debt From Specific Fund**

I direct that the funds to pay the indebtedness on the note executed by me on \_\_\_\_\_ [date], payable to [name of creditor], be paid \_\_\_\_\_ [source of funds for payment of debt, e.g., out of the proceeds of the \$\_\_\_\_\_ (face amount of policy) life insurance policy payable to my estate; policy number \_\_\_\_\_, issued by \_\_\_\_\_ (name of insurance company); or from the proceeds of the sale of my ranch located in \_\_\_\_\_ County, California, and more particularly described as follows: \_\_\_\_\_ (description)].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawEstate AdministrationClaims Against EstatesGeneral OverviewEstate, Gift & Trust  
LawWillsGeneral Overview



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*23-63 California Legal Forms--Transaction Guide §§ 63.331-63.349*

**[Reserved]**

§§ 63.331[Reserved]



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E. Devises

1. General and Demonstrative Devises; Gift of Money

*23-63 California Legal Forms--Transaction Guide § 63.350*

### **§ 63.350 Single Gift of Entire Estate**

#### **[1] Comment**

#### **[a] Use of Form**

This form is a will provision that may be used to devise the testator's entire estate to one person. It is the simplest and most complete kind of disposition that can be made in a will.

A single gift of the entire estate typically is made when the estate is modest and the testator wishes all of it to pass to one person, usually the testator's spouse. If the testator wishes to give individual items or specified amounts of property to persons other than the principal beneficiary, this form should not be used. In such a case, appropriate provisions specifying the individual dispositions should be inserted [*see* §§ 63.351-63.510] and the remainder of the estate should be disposed of in the form of a residuary bequest [*see* §§ 63.530-63.591].

#### **[b] Alternative Dispositions**

A devise of the entire estate, like other devises, may be conditioned on survival of the testator, or on survival for a specified period of time after the testator's death. A devisee who does not survive the testator, or who does not survive until a future time required by the will, cannot take under the will [*Prob. Code* § 21109(a); *see Prob. Code* § 21101 (rules applicable to wills, trusts, deeds, and other instruments)]. For devises conditioned on survival until a future time, *see* § 63.411. For a discussion of simultaneous death and provisions setting the order of death in the event of a common disaster, *see* § 63.630. For alternative residuary devises to take effect if the residuary devisees fail to survive, *see* §§ 63.532 and 63.550.

If the will names only one devisee, it is important to consider survival and to provide for alternative dispositions of the estate should the devisee fail to survive the testator, or fail to survive until the time required by the will. If the sole devisee is the testator's spouse, for example, the testator may wish to make alternative dispositions to his or her children, either outright, in trust, or under the California Uniform Transfers to Minors Act [*Prob. Code* §§ 3900-3925; *see* Ch.

60A, *Gifts* ]. If there are no children, alternative dispositions may be made to parents, brothers, sisters, or other individuals.

**[2] FORM**

**Single Gift of Entire Estate**

I give to \_\_\_\_\_ [*name of devisee*] all of my property, of whatever kind or character and wherever located, and with the intent thereby to give all the property I am entitled to dispose of by will.

[*Optional provision: Devise to lapse or not to lapse*]

If \_\_\_\_\_ [*name of devisee*] does not survive me [for \_\_\_\_\_ (*specify period, e.g. six months*)], this gift \_\_\_\_\_ [shall lapse and shall become part of the residue of my estate *or* shall not lapse and shall go to those of \_\_\_\_\_ (*his or her*) issue who survive me (for that period) on the principle of representation].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Wills Bequests & Devises Estate, Gift & Trust Law Wills Residuary Clauses



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E. Devises

1. General and Demonstrative Devises; Gift of Money

*23-63 California Legal Forms--Transaction Guide § 63.351*

### § 63.351 General Pecuniary Devise

#### [1] Comment

#### [a] Use of Form

This form is a will provision that may be used to make a devise of money to be paid out of a specified bank account. It is an example of a general pecuniary devise [*see Prob. Code §§ 21117(d)* ("general pecuniary gift" defined), *21118(b)* ("pecuniary gift" defined); *see also Prob. Code § 21101* (rule applicable to wills, trusts, and other instruments)].

#### [b] Classification of Devises

The Probate Code rules for the interpretation of wills, trusts, and other instruments refer to transfers made under wills as "gifts" [*see Prob. Code §§ 21101-21140*]. However, the Code also defines a disposition of real or personal property made by a will as a "devise." In this publication, transfers made under wills are commonly referred to as "devises." Under the Probate Code rules of interpretation, the following types of devises (or "gifts") are specifically recognized by statute:

- A "specific" devise, which is a transfer of specifically identifiable property [*Prob. Code § 21117(a)*]; *see § 63.370[1]*.
- A "general" devise, which is a transfer from the general assets of the testator's estate that does not give specific property [*Prob. Code § 21117(b)*]. A general devise is to be satisfied out of the testator's estate generally; that is, by delivering to the devisee the portion of the testator's estate that corresponds to the gift in value or in general description [ *Estate of Ehrenfels (1966) 241 Cal. App. 2d 215, 221, 50 Cal. Rptr. 358* ].
- A "demonstrative" devise, which is a general devise that specifies the fund or property from which it is primarily to be made [*Prob. Code § 21117(c)*]; *see § 63.390[1]*.

- A "general pecuniary" devise, which is a devise that is expressed stated as a fixed dollar amount or a dollar amount that can be determined by the provisions of the will [*Prob. Code* §§ 21117(d), 21118(b); *see Prob. Code* § 21118(a) (if will permits personal representative to value property selected for this distribution as of date other than date of distribution, property must, unless will provides otherwise, fairly reflect net appreciation and depreciation occurring between valuation date and date of distribution in all assets from which distribution could have been made)].
- An "annuity," which is a general pecuniary devise that is payable periodically [*Prob. Code* § 21117(e); *see Prob. Code* § 12000].
- A "residuary" devise, which is a devise of all of the property that remains after all of the specific and general devises provided for in the will have been satisfied [*Prob. Code* § 21117(f); *see* § 63.530[1]].

These classifications are rules of interpretation. As such, they are subordinate to the intentions of the testator as expressed in the will, and apply only when the testator's intention is not otherwise indicated by the will [*Prob. Code* § 21102(a), (b)]. However, this provision does not limit the use of extrinsic evidence, to the extent otherwise authorized by law, to determine the testator's intention [*Prob. Code* § 21102(c)]. In determining the classification of a devise, the intention of the testator as revealed in the will is always controlling [ *Estate of Ehrenfels (1966) 241 Cal. App. 2d 215, 221-222, 50 Cal. Rptr. 358* ].

### [c] Survival and Lapse

A general pecuniary devise, like other devises, may be conditioned on survival of the testator, or on survival for a specified time after the testator's death. A devisee who does not survive the testator, or who does not survive until a future time required by the will, cannot take under the will [*Prob. Code* § 21109(a); *see Prob. Code* § 21101 (rules applicable to wills, trusts, deeds, and other instruments)]. For a discussion of devises conditioned on survival, see § 63.411.

When a devise is conditioned on survival, it is good practice to make an alternative disposition of the property and to provide whether the devise will lapse and become part of the residue of the estate or pass to the issue of the primary devisee if the survival condition is not satisfied. For a general discussion of the lapse of legacies and the operation of the "anti-lapse statute" [*Prob. Code* § 21110], see § 63.411[1][d]. For a discussion of alternative dispositions to take effect if the primary devisee fails to take, see § 63.350[1].

## [2] FORM

### General Pecuniary Devise

I give the sum of \_\_\_\_\_ [*specify amount*] to \_\_\_\_\_ [*name of devisee*], payable out of my account at \_\_\_\_\_ [*name of bank*], \_\_\_\_\_ [*name of branch*], \_\_\_\_\_ [*city and state in which bank is located*].

[*Optional provision: Payment from residue*]

If that account shall be insufficient to satisfy this gift, the portion not satisfied shall be paid out of the residue of my estate.

[*Optional provision: Devise to lapse or not to lapse*]

If \_\_\_\_\_ [*name of devisee*] does not survive me [for \_\_\_\_\_ (*specify period, e.g. six months*)], this gift \_\_\_\_\_ [shall lapse and shall become part of the residue of my estate *or* shall not lapse and shall go to those of \_\_\_\_\_ (*his or her*) issue who survive me (for that period) on the principle of representation].

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Estate, Gift & Trust Law Wills Bequests & Devises



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DIVISION IV: WILLS AND TRUSTS

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E. Devises

1. General and Demonstrative Devises; Gift of Money

*23-63 California Legal Forms--Transaction Guide § 63.352*

**§ 63.352 General Pecuniary Devise Specifying Whether Interest Is to Be Paid**

**[1] Comment**

**[a] Use of Form**

This form is a will provision that may be used to make a general pecuniary devise [*Prob. Code §§ 21117(d), 21118(b); see § 63.351[1]*] and to specify whether or not interest will be paid on the devise.

A general pecuniary devise, like other devises, may be conditioned on survival of the testator, or on survival for a specified time after the testator's death. A devisee who does not survive the testator, or who does not survive until a future time required by the will, cannot take under the will [*Prob. Code § 21109(a); see Prob. Code § 21101* (rules applicable to wills, trusts, deeds, and other instruments)]. For a discussion of devises conditioned on survival, see § 63.411.

When a devise is conditioned on survival, it is good practice to make an alternative disposition of the property and to provide whether the devise will lapse and become part of the residue of the estate or pass to the issue of the primary devisee if the survival condition is not satisfied. For a general discussion of the lapse of legacies and the operation of the "anti-lapse statute" [*Prob. Code § 21110*], see § 63.411[1][d]. For a discussion of alternative dispositions to take effect if the primary devisee fails to take, see § 63.350[1].

**[b] Interest on General Pecuniary Devise**

**[i] Statutory Rules**

Unless the will provides otherwise, a general pecuniary devise will bear interest if the devise is not distributed within one year after the testator's death [*Prob. Code § 12003*]. The rate of interest is three percentage points less than the legal rate on judgments in effect one year after the date of the testator's death [*Prob. Code § 12001*]. The California Constitution authorizes the Legislature to set the rate of interest on judgments at not more than 10 percent per annum [

*Cal. Const. art. XV, § 1*). The Legislature has set the current rate at 10 percent per annum, while reserving the right to change the rate at any time to less than 10 percent [*Code Civ. Proc. § 685.010*].

Once the rate of interest has been set, it will not be changed, even if the rate changes before the devise is ultimately distributed [*Prob. Code § 12001*]. When interest is payable on a general pecuniary devise, the devise begins to earn interest one year after the testator's death [*Prob. Code § 12003*].

### **[ii] Modification of Statutory Rules by Will**

The will may alter the general rule about payment of interest [*Prob. Code § 12000*]. It may, for example, provide that interest will not be paid on a devise, or that interest will be paid on a devise from the date of death. It may also alter the applicable rate of interest.

For additional discussion of the payment of interest, and pecuniary legacies in general, see § 63.351[1].

### **[2] FORM**

#### **General Pecuniary Devise Specifying Whether Interest Is to Be Paid**

I give the sum of \_\_\_\_\_ [*specify amount*] to \_\_\_\_\_ [*name of devisee*].

[*Optional provision: No interest to be paid*]

This gift shall be paid without interest.

[*Optional provision: Rate and date from which interest is to be paid*]

Interest shall be paid on this gift from and after \_\_\_\_\_ [*specify date. e.g., the date of my death or one year from the date of my death*] at the rate of \_\_\_\_\_ [*specify rate*] percent per annum.

[*Optional provision: Devise to lapse or not to lapse*]

If \_\_\_\_\_ [*name of devisee*] does not survive me [for \_\_\_\_\_ (*specify period, e.g. six months*)], this devise \_\_\_\_\_ [shall lapse and shall become part of the residue of my estate *or* shall not lapse and shall go to those of \_\_\_\_\_ (his *or* her) issue who survive me (for that period) on the principle of representation].

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:  
Estate, Gift & Trust Law Wills Bequests & Devises



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1. General and Demonstrative Devises; Gift of Money

*23-63 California Legal Forms--Transaction Guide § 63.353*

### **§ 63.353 General Pecuniary Devise to Two or More Beneficiaries**

#### **[1] Comment**

#### **[a] Use of Form**

This form is a will provision that may be used to make a general pecuniary devise [*Prob. Code §§ 21117(d), 21118(b); see § 63.351[1]*] to two or more named devisees. It includes an optional provision stating that if one or more of the devisees fails to survive the testator, the share or shares that would have gone to the nonsurviving devisee will go to the survivor or survivors. The form may be modified to express any other intent of the testator.

#### **[b] Form of Ownership**

Although the will may provide that property devised to more than one devisee will vest in the devisees as joint owners, in many cases it will be preferable to allow the property to vest in the devisees as owners in common. A devisee who takes as an owner in common rather than as a joint owner has a descendible interest and one that may be the subject of the devisee's own testamentary disposition.

#### **[c] Survival**

When a devise is made to two or more persons, it is good practice to specify what disposition will be made of the devise if one of the devisees does not survive the testator. A devisee who does not survive the testator, or who does not survive until a future time required by the will, cannot take under the will [*Prob. Code § 21109(a); see Prob. Code § 21101* (rules applicable to wills, trusts, deeds, and other instruments)]. For a discussion of devises conditioned on survival until a future time, and a provision establishing such a condition, see § 63.411.

The will may provide that if one of the devisees does not survive the testator (or does not survive until a future time required by the will), his or her share of the devise will go to his or her issue or heirs. If the testator does not wish to name alternative devisees, the will may identify the takers as a class. For a class gift, see § 63.551.

**[2] FORM****General Pecuniary Devise to Two or More Beneficiaries**

I give the sum of \_\_\_\_\_ [*specify amount*] to \_\_\_\_\_ [*names of devisees*], in equal shares, share and share alike. In the event that one or more of the above-named devisees does not survive me, then I give the share that would have gone to that devisee had he or she survived me to the other surviving [devisee *or* devisees, in equal shares].

[*Choose one of the following*]

If \_\_\_\_\_ [neither *or* none] of the devisees named in this paragraph survive me, then this gift shall lapse and become part of the residue of my estate.

[*OR*]

If \_\_\_\_\_ [neither *or* none] of the devisees named in this paragraph survive me, then this gift shall be divided into \_\_\_\_\_ [*specify number*] equal shares, one equal share to be set aside for each of the above-named devisees. Each equal share shall be distributed on the principle of representation to the surviving issue of the devisee for whom that share has been set aside. If one or more of the devisees named in this paragraph should have no issue who survive me, then the share that would have gone to that devisee had he or she survived me shall be added equally to the remaining shares of those devisees having issue surviving. If \_\_\_\_\_ [neither *or* none] of the above devisees have issue surviving, this gift shall lapse and become part of the residue of my estate.

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Estate, Gift & Trust Law Wills Bequests & Devises



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DIVISION IV: WILLS AND TRUSTS

CHAPTER 63 WILL PROVISIONS

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1. General and Demonstrative Devises; Gift of Money

*23-63 California Legal Forms--Transaction Guide §§ 63.354-63.369*

**[Reserved]**

§§ 63.354[Reserved]



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E. Devises

2. Specific Devises of Personal Property

*23-63 California Legal Forms--Transaction Guide § 63.370*

### **§ 63.370 Specific Devise of Personal Property**

#### **[1] Comment**

##### **[a] Use of Form**

This form is a will provision that may be used to make a specific devise [*Prob. Code § 21117(a)*; see *Prob. Code § 32* ("devise" as disposition of property by will)] of personal property. For a specific devise of real property, see § 63.440. For a provision insuring that a devise is specific, see § 63.372. For a discussion of insurance on specific devises and rights of devisees when property subject to a specific devise has been destroyed, damaged, altered, or taken in eminent domain, see § 63.420.

##### **[b] Specific Devise--Defined**

A "specific" devise is a transfer of specifically identifiable property made under a will [*Prob. Code § 21117(a)*; see *Prob. Code § 32* ("devise" as disposition of property by will)]. A devise is specific if the testator intends to give a specific thing and that thing alone [ *Estate of Buck (1948) 32 Cal.2d 372, 374, 196 P.2d 769* ; *Estate of Ehrenfels (1966) 241 Cal. App. 2d 215, 221, 50 Cal. Rptr. 358* ]. Specific devises are used to make dispositions of particular items of personal property, or particular parcels or tracts of real property.

##### **[c] Rights of Devisee When Property Is Sold, Transformed, Destroyed, or Damaged**

If property subject to a specific devise is not in the testator's estate at the time of the testator's death, the devise is generally adeemed (extinguished) [see *Prob. Code §§ 21117(a)* (specific gift as gift of specifically identifiable property), *21133* (specific devisee entitled to remaining property specifically given)]. If the testator does not wholly dispose of property subject to a specific devise, but merely alters his or her interest in the property, the specific devisee has the right to the testator's remaining interest in the property [*Prob. Code § 21133*].

A recipient of an at-death transfer of a specific gift has a right to the specifically given property, to the extent the

transferor owned the property at the time the gift takes effect in possession or enjoyment, and all of the following:

- Any balance of the purchase price (together with any security agreement) owing from a purchaser to the transferor at the time the gift takes effect by reason of a sale of the property [*Prob. Code § 21133(a)*].
- Any amount of an eminent domain award for the taking of property unpaid at the time the gift takes effect [*Prob. Code § 21133(b)*].
- Any proceeds unpaid at the time the gift takes effect on fire or casualty insurance on or other recovery for injury to the property [*Prob. Code § 21133(c)*].
- Property owned by the transferor at the time the gift takes effect and acquired as a result of foreclosure, or obtained in place of foreclosure, of the security interest for a specifically given obligation [*Prob. Code § 21133(d)*].

#### **[d] Will Provisions**

The Probate Code rules for the interpretation of transfers made under wills, trusts, and other instruments are rules of interpretation only [*see Prob. Code §§ 21101-21140*]. They are subordinate to the intentions of the testator as expressed in the will, and apply only when the testator's intention is not otherwise indicated by the will [*Prob. Code § 21102(a), (b)*]. However, this provision does not limit the use of extrinsic evidence, to the extent otherwise authorized by law, to determine the testator's intention [*Prob. Code § 21102(c)*]. In determining the classification of a gift made by a will, the fundamental and controlling factor is always the intention of the testator as revealed in the will [ *Estate of Ehrenfels (1966) 241 Cal. App. 2d 215, 221-222, 50 Cal. Rptr. 358* ].

When considering a specific devise, the testator should consider the possibility that the specifically devised property will not be in the estate at the time of the testator's death and decide whether an alternative devise should be made to take effect in such an event. For a specific devise of personal property with a substitute cash devise, see § 63.371.

#### **[e] Purpose or Condition**

A specific devise is often motivated by a particular reason or purpose. That reason or purpose may be expressed in one of several different ways. First, the devise may be conditioned on fulfillment of the purpose. Second, the reason may be offered as an explanation for the devise. Third, the reason or purpose may be stated in precatory language. Before stating a reason or purpose for a devise, the testator should decide whether the devise is or is not to be conditional, and the language used should clearly effectuate that decision. For a provision making an entire will conditional, see § 63.205. For a provision making a devise conditional, see § 63.410. For a provision containing precatory language, see § 63.412.

#### **[f] Survival and Lapse**

A specific devise, like other devises, may be condition on survival of the testator, or on survival for a specified time after the testator's death. A devisee who does not survive the testator, or who does not survive until a future time required by the will, cannot take under the will [*Prob. Code § 21109(a)*; *see Prob. Code § 21101* (rules applicable to wills, trusts, deeds, and other instruments)]. For a discussion of devises conditioned on survival, see § 63.411.

When a devise is conditioned on survival, it is good practice to make an alternative disposition of the property and to provide whether the devise will lapse and become part of the residue of the estate or pass to the issue of the primary devisee if the survival condition is not satisfied. For a general discussion of the lapse of legacies and the operation of the "anti-lapse statute" [*Prob. Code § 21110*], see § 63.411[1][d]. For a discussion of alternative dispositions to take effect

if the primary devisee fails to take, see § 63.350[1].

**[2] FORM**

**Specific Devise of Personal Property**

I give my \_\_\_\_\_ [*describe specific property; if devise is to include insurance on the described property, add: , together with any insurance on it,*] to \_\_\_\_\_ [*name of devisee*] [*if survivorship requirement is to be imposed, add: if \_\_\_\_\_ (he or she) survives me for \_\_\_\_\_ (specify period)*].

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Estate, Gift & Trust Law Wills Bequests & Devises



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2. Specific Devises of Personal Property

*23-63 California Legal Forms--Transaction Guide § 63.371***§ 63.371 Specific Devise With Substitute Cash Devise****[1] Comment--Use of Form**

This form is a will provision that may be used to make a specific devise [*see Prob. Code § 21117(a); see also Prob. Code § 32* ("devise" as disposition of property by will)] and to provide that if the devised property is not in the estate at the time of the testator's death, the devisee will receive a general pecuniary devise [*see Prob. Code §§ 21117(d), 21118(b)*] instead.

For a general discussion of types or classifications of devises, see § 63.351[1][b]. For a general form for a specific devise of personal property, see § 63.370. For a general form for a specific devise of real property, see § 63.440.

**[2] FORM****Specific Devise With Substitute Cash Devise**

I give my \_\_\_\_\_ [*describe specific property; if devise is to include insurance on the described property, add: , together with any insurance on it,*] to \_\_\_\_\_ [*name of devisee*] [*if survivorship requirement is to be imposed, add: if* \_\_\_\_\_ (he or she) survives me for \_\_\_\_\_ (*specify period*)]. In the event that this property is not part of my estate at the time of my death, then I give the sum of \_\_\_\_\_ [*specify amount*] to \_\_\_\_\_ [*name of devisee*] in its place.

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Estate, Gift & Trust Law Wills Bequests & Devises



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2. Specific Devises of Personal Property

*23-63 California Legal Forms--Transaction Guide § 63.372*

### **§ 63.372 Provision to Insure That Devise Is Specific**

#### **[1] Comment--Use of Form**

This form is a will provision that may be added to a devise to insure that it will be construed as a specific devise [*see Prob. Code § 21117(a)*; *see also Prob. Code § 32* ("devise" as disposition of property by will)]. Since the Probate Code rules classifying devises are subject to the general rule that the intention of the testator as expressed in the will controls the legal effect of the dispositions made in the will [*Prob. Code § 21102(a)*], any provision explaining or clarifying the terms of a devise, or the intentions of the testator respecting the rights of the devisee under the devise, will be given effect.

For a general discussion of types or classifications of devises, see § 63.351[1][a]. For a general form for a specific devise of personal property, see § 63.370. For a general form for a specific devise of real property, see § 63.440. For a provision insuring that a devise is a demonstrative devise, see § 63.391.

#### **[2] FORM**

##### **Provision to Insure That Devise Is Specific**

This devise is intended to be a specific devise, and in the event that the property described in this paragraph is, for any reason, not part of my estate at the time of my death, resort shall not be had to any other assets of my estate to satisfy it.

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:  
Estate, Gift & Trust Law Wills Bequests & Devises



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*23-63 California Legal Forms--Transaction Guide §§ 63.373-63.389*

**[Reserved]**

§§ 63.373[Reserved]



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3. Demonstrative Devises

*23-63 California Legal Forms--Transaction Guide § 63.390*

### § 63.390 Demonstrative Devise

#### [1] Comment

##### [a] Use of Form

This form is a will provision that may be used to make a demonstrative devise [*see Prob. Code § 21117(c)* (demonstrative gift defined); *see also Prob. Code § 32* ("devise" as disposition of property by will)]. For a will provision insuring that a devise is demonstrative, see § 63.391. For a devise to be paid from a specified bank account with provisions for ademption if the account is insufficient to satisfy the devise in full, see § 63.392.

##### [b] Demonstrative Devise

##### [i] In General

A demonstrative devise is a devise that specifies the fund or property from which it is "primarily" to be made [*Prob. Code § 21117(c)*; *see Prob. Code § 32* ("devise" as disposition of property by will)]. A gift of "\$10,000, to be paid out of my account at First National Bank of Smalltown, California," is an example of a demonstrative devise.

A demonstrative devise differs from a general devise in that a general devise may be paid out of the general assets of the estate and is not limited to any particular fund or property [*see Prob. Code § 21117(b)*]. A demonstrative devise, in contrast, designates the primary fund or property out of which the devise is to be satisfied [*see Prob. Code § 21117(c)*]. A demonstrative devise differs from a specific devise in that it is not limited to specifically identifiable property, but may be satisfied out of other assets of the general estate if the fund or property out of which it is "primarily" to be satisfied fails in whole or in part [*see Prob. Code § 21403(b)* (demonstrative gift treated as general if satisfied out of property other than specified fund or property)].

For further discussion of the classification of devises, see § 63.351[1]; see also *California Wills and Trusts*, Ch. 24, *Devises* (Matthew Bender).

**[ii] Pecuniary Devise**

A demonstrative devise frequently takes the form of a pecuniary devise that specifies that it is to be satisfied out of a particular account in a bank or other financial institution. Any devise that is stated as a fixed dollar amount, or a dollar amount that can be determined under the provisions of the instrument, is classified as a pecuniary devise [*Prob. Code* §§ 21117(d), 21118(b); *see* § 63.351[1]]. Pecuniary devises are usually made without specifying any particular account or other fund from which they are to be satisfied. A pecuniary devise made in this form is properly classified as a general pecuniary devise [*see Prob. Code* § 21117(d) ("general pecuniary gift" defined); *see also Prob. Code* § 32 ("devise" as disposition of property by will)].

Although demonstrative pecuniary devises are typically to be satisfied out of accounts in banks or other financial institutions, a demonstrative pecuniary devise may, by its terms, specify that it is to be satisfied out of the sale of real or personal property. For example, a devise may be for "\$10,000, to be obtained from the sale of my shares of common stock in Acme Corporation," or "\$100,000 to be paid out of the proceeds of sale of my residence at 100 Shady Lane, Smalltown, California." In both of these cases, the devise would be a demonstrative devise.

For further discussion of pecuniary devises, *see* § 63.351[1]; *see also* California Wills and Trusts, Ch. 25, *Devises of Money and Property* (Matthew Bender).

**[iii] Nonpecuniary Devise**

Demonstrative devises may also take the form of nonpecuniary or non-cash devises. For example, a rancher may devise "two horses from the herd of horses that I maintain at my ranch in Shasta County, California, if sufficient for that purpose; and, if my herd is not sufficient, then my executor shall satisfy this devise from other assets of my estate." This would be an example of a demonstrative devise. By its terms, the devise is "primarily" to be satisfied out of the testator's herd of horses in Shasta County. If that herd is not sufficient, however, the executor will be required to obtain two horses from other sources, purchasing the same if necessary.

**[iv] Interest on Devise**

If a general pecuniary devise is not distributed within one year after the testator's death, the devise bears interest thereafter [*Prob. Code* § 12003]. Since a demonstrative pecuniary devise is a kind of general pecuniary devise, it would seem that interest would be payable on a demonstrative pecuniary devise if it is not paid within one year after the testator's death.

The Probate Code provides that a specific devise carries with it income on the devised property from the date of death, less expenses attributable to the property during administration of the estate [*Prob. Code* § 12002(b)]. However, the Probate Code contains no comparable provision giving the devisee the right to receive income on a nonpecuniary demonstrative devise.

Assume, for example, that the devise is of "two horses from the herd of horses that I maintain at my ranch in Shasta County, California, if sufficient for that purpose; and, if my herd is not sufficient, then my executor shall satisfy this devise from other assets of my estate." Assume further that the herd of horses maintained by the executor at the ranch in Shasta County included four thoroughbred horses at the time of the testator's death. One of these horses is a racehorse that, during the time the testator's estate is subject to administration, has net race winnings of \$1,000,000. Until such time as the devise is satisfied, it cannot be known which of the four horses will be distributed to the devisee. Until that time, it would seem that the earnings of \$1,000,000 would properly belong to the general estate, and not to the devisee of the two horses. It should be understood, however, that the Probate Code rules relating to interest and income on devises are rules of interpretation only [*see Prob. Code* § 12000; *see also Prob. Code* § 21102(a) (intention of transferor controls)]. In a given case, they must give way to a contrary result if the terms of the will demonstrate the testator's

intention to make other provisions for the payment of interest and income.

### **[v] Abatement**

If the assets of a testator's estate are not sufficient to pay all debts and expenses and to satisfy all devises, the shares of devisees must abate (that is, be reduced or eliminated) [*see Prob. Code §§ 21400-21406* (rules for abatement)]. In a given case, the executor may have to sell property disposed of by the will to pay debts, expenses, or even other devises [*see Prob. Code § 10000(a)*].

If abatement is necessary, property not disposed of by the will must first be used to satisfy debts and expenses [*Prob. Code § 21402(a)(1)*]. If that property is not sufficient, resort must then be had to residuary devises [*Prob. Code § 21402(a)*; *see Prob. Code § 6154(f)* ("residuary devise" defined)]. If that property is not sufficient, resort must then be had to general devises [*Prob. Code § 21402(a)(3)*]. Specific devises will abate only after all other types of devises have been exhausted [*Prob. Code § 21402(a)(5), (6)*; *see Prob. Code § 21117(a)* ("specific gift" defined)].

For purposes of abatement, a demonstrative devise is treated as a specific devise to the extent that it is satisfied out of the fund or property specified in the devise and as a general devise to the extent that it is satisfied out of other property [*Prob. Code § 21403(b)*].

Specific and general devises to nonrelatives will abate before specific and general devises to the testator's relatives [*Prob. Code § 21402(a)*; *see Prob. Code § 21402(b)* ("relative" defined)].

General statements in a will that the executor is to pay expenses out of the testator's estate are not sufficiently specific to override the abatement order established by *Prob. Code § 21402* [ *Burkett v. Capovilla* (2003) 112 Cal. App. 4th 1444, 1452, 5 Cal. Rptr. 3d 817 ].

For further discussion of the abatement of devises, see § 63.416[1]; see also California Wills and Trusts, Ch. 24, *Devises* (Matthew Bender).

### **[c] Survival and Lapse**

Demonstrative devises, like other devises, may be conditioned on survival of the testator, or on survival for a specified time after the testator's death. A devisee who does not survive the testator, or who does not survive until a future time required by the will, cannot take under the will [*Prob. Code § 21109(a)*; *see Prob. Code § 21101* (rules applicable to wills, trusts, deeds, and other instruments)]. For a discussion of devises conditioned on survival, see § 63.411.

When a devise is conditioned on survival, it is good practice to make an alternative disposition of the property and to provide whether the devise will lapse and become part of the residue of the estate or pass to the issue of the primary devisee if the survival condition is not satisfied. For a general discussion of the lapse of legacies and the operation of the "anti-lapse statute" [*Prob. Code § 21110*], see § 63.411[1][d]; see also *Ch. 61, Will Drafting and Complete Will Forms*, § 61.16[4]. For a discussion of alternative dispositions to take effect if the primary devisee fails to take, see § 63.350[1].

## **[2] FORM**

### **Demonstrative Devise**

I give \_\_\_\_\_ [*describe devise, e.g., the sum of \$10,000 or 100 shares of the common stock of Acme Corporation or two horses*] to \_\_\_\_\_ [*name of devisee and relationship, if any, to testator, e.g., my son, Robert Smith*] [*if desired, add survivorship clause, e.g., if he survives me or if he survives me for 60 days*]. This gift shall be \_\_\_\_\_ [*paid or satisfied*] first out of \_\_\_\_\_ [*specify fund or property, e.g., my*

account at First National Bank, Smalltown, California *or* the proceeds of the sale of my residence at 100 Shady Lane, Smalltown, California *or* the shares of common stock of Acme Corporation that I shall own at the time of my death *or* the herd of horses that I maintain at the time of my death at my ranch in Shasta County, California]; provided, however, that if \_\_\_\_\_ [*describe source of payment, e.g., that account or the proceeds of that sale or the shares I shall own at the time of my death or that herd*] \_\_\_\_\_ [is *or* are] insufficient to satisfy this gift in full, then my executor may resort to the general assets of my estate to satisfy it. [*If gift is conditioned on survival, add appropriate alternative disposition, e.g., If Robert Smith does not survive me (for that period), this gift shall \_\_\_\_\_ (e.g., lapse and become part of the residue of my estate or go to my granddaughter, Elizabeth Smith).*]

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Estate, Gift & Trust Law Wills Bequests & Devises



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*23-63 California Legal Forms--Transaction Guide § 63.391*

**§ 63.391 Provision to Insure That Devise Is Demonstrative**

**[1] Comment--Use of Form**

This form is a will provision that may be added to a devise to insure that it will be construed as a demonstrative and not a specific devise [*see Prob. Code § 21117(a)* ("specific gift" defined), (c)("demonstrative gift" defined); *see also Prob. Code § 32* ("devise" as disposition of property by will)].

Since the Probate Code rules classifying devises are subject to the general rule that the intention of the testator as expressed in the will controls the legal effect of the dispositions made in the will [*Prob. Code § 21102(a)*], any provision explaining or clarifying the terms of a devise, or the intentions of the testator respecting the rights of the devisee under the devise, will be given effect.

For further discussion of demonstrative devises, see § 63.390[1]. For further discussion of the classification of devises, see § 63.351[1]; see also *California Wills and Trusts, Ch. 24, Devises* (Matthew Bender).

**[2] FORM**

**Provision to Insure That Devise Is Demonstrative**

This gift is demonstrative, and not specific. If \_\_\_\_\_ [*specify fund or property out of which devise is primarily to be satisfied, e.g., my account at First National Bank, Smalltown, California or the proceeds of the sale of my residence at 100 Shady Lane, Smalltown, California or the shares of common stock of Acme Corporation that I shall own at the time of my death or the herd of horses that I maintain at the time of my death at my ranch in Shasta County, California*] \_\_\_\_\_ [*is or are*] insufficient to satisfy this gift in full, then my executor may resort to the general assets of my estate to satisfy it.

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Estate, Gift & Trust Law Wills Bequests & Devises



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## DIVISION IV: WILLS AND TRUSTS

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## 3. Demonstrative Devises

*23-63 California Legal Forms--Transaction Guide § 63.392***§ 63.392 Devise From Bank Account With Provision for Ademption If Account Is Insufficient****[1] Comment****[a] Use of Form**

This form is a will provision that may be used to make a pecuniary devise to be paid from a specified bank account and to provide that, if the account is inadequate to satisfy the devise in full, the devise will be reduced to the amount actually in the account at the time of the testator's death. For a general pecuniary devise, see § 63.351. For discussion of pecuniary devises, see § 63.390[1]; see also *California Wills and Trusts, Ch. 25, Devises of Money and Property* (Matthew Bender).

**[b] Ademption of Demonstrative Devise**

The general rule is that if the fund or property out of which a demonstrative devise is "primarily" to be satisfied fails in whole or in part, the devise may be satisfied out of the general assets of the estate [*see Prob. Code § 21403(b)* (demonstrative gift treated as general if satisfied out of property other than specified fund or property)]. However, this rule is subordinate to the intentions of the testator as expressed in the will [*Prob. Code §§ 21102(a), 21400*]. In determining the classification of a devise, the controlling factor is always the intent of the testator as shown in the will [*Estate of Ehrenfels (1966) 241 Cal. App. 2d 215, 221-222, 50 Cal. Rptr. 358*]. This form specifically provides that, if the designated account is not in existence when the testator dies, or is insufficient to satisfy the devise in full, the amount of the pecuniary devise will be reduced to the balance in the account at the time of the testator's death. This clearly indicates the testator's intention that there will be no resort to other assets of the estate to satisfy the devise.

**[2] FORM****Devise From Bank Account With Provision for Ademption If Account Is Insufficient**

I give \_\_\_\_\_ [*describe devise, e.g., the sum of \$10,000*] to \_\_\_\_\_ [*name of devisee*]

*and relationship, if any, to testator, e.g., my son, Robert Smith* [*if desired, add survivorship clause, e.g., if he survives me or if he survives me for 60 days*], to be paid out of \_\_\_\_\_ [*specify account, e.g., my account number 102-304 at Second Fidelity Bank, Smalltown, California*]. If that account is not in existence at the time of my death, or if in existence it is not sufficient to satisfy this gift in full, the amount of this devise shall be reduced to the amount of the balance in the account at the time of my death. [*If gift is conditioned on survival, add appropriate alternative disposition, e.g., If Robert Smith does not survive me (for that period), this gift shall \_\_\_\_\_ (e.g., lapse and become part of the residue of my estate or go to my granddaughter, Elizabeth Smith)*].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Wills Bequests & Devises Estate, Gift & Trust Law Wills Failure of Bequests Ademptions



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*23-63 California Legal Forms--Transaction Guide §§ 63.393-63.409*

**[Reserved]**

§§ 63.393[Reserved]



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## DIVISION IV: WILLS AND TRUSTS

## CHAPTER 63 WILL PROVISIONS

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## E. Devises

## 4. Provisions Affecting Devises

*23-63 California Legal Forms--Transaction Guide § 63.410***§ 63.410 Conditional Devise****[1] Comment****[a] Use of Form--Public Policy Limitations**

This form is a will provision that may be used to make a devise conditional on the occurrence (or nonoccurrence) of a specified event. If the condition described in this provision is satisfied, the devise becomes fully effective. If it is not satisfied, the devise lapses and becomes part of the residue of the testator's estate. For a form making the entire will (as opposed to a particular devise) conditional, see § 63.205.

**[b] Conditional Wills and Conditional Devises--Public Policy Limitations**

The Probate Code expressly sanctions conditional wills. Under *Prob. Code § 6105*, if a will makes its own validity conditional, the will must be admitted to probate, denied probate, or denied effect after admission to probate, in conformity with the condition. A will may, however, condition a particular devise or devises without conditioning the validity of the entire will. Conditional devises are sanctioned by case law and supported by general rules of construction in the Probate Code [ *In re Kitchen (1916) 192 Cal. 384, 388, 220 P. 301* ; see *Prob. Code §§ 21102(a)* (intention of transferor as expressed in instrument controls legal effect of dispositions made in instrument), 21120 (words of instrument are to receive interpretation that will give every expression some effect); see also *Prob. Code § 21101* (rule applicable to wills, trusts, deed, and other instruments)].

A testator is free to dispose of his or her estate on whatever conditions he or she may establish, as long as the conditions are not prohibited by law and do not violate public policy [see *In re Kitchen (1916) 192 Cal. 384, 388, 220 P. 301* ]. The language of the will must, however, clearly express the testator's intention that the will is to become operative (or a disposition is to take effect) only if a specified event occurs [ *Estate of Taylor (1953) 119 Cal. App. 2d 574, 580, 259 P.2d 1014* ]. A condition will not be implied from indefinite language [ *Estate of Taylor (1953) 119 Cal. App. 2d 574, 581, 259 P.2d 1014* ], nor will language that merely expresses the testator's reasons for making a will or a particular disposition be interpreted as a condition to the effectiveness of the will or the disposition [ *Estate of Moulton (1959)* ].

*176 Cal. App. 2d 87, 90, 1 Cal. Rptr. 407* ].

Whenever a condition is imposed on a devise, it is possible that the condition will not be fulfilled. In contemplation of this possibility, the testator may wish to make an alternative devise, to take effect only if the condition is not fulfilled. When a devise is subject to complex conditions or restrictions, consideration should be given to the use of a trust. For discussion of the use of trusts, together with illustrative forms, see Ch. 64, *Testamentary Trusts: Payment and Distribution Provisions* , Ch. 64A, *Testamentary Trusts: Trustee Provisions* , and Ch. 64B, *Testamentary Trusts: Administrative Provisions* . For discussion of conditional wills and devises, see § 63.205[1]. For detailed discussion of conditional devises involving future interests, see Ch. 67, *Future Interests and Perpetuities* .

Certain conditions in a will may be held invalid or denied enforcement because they violate public policy. For a discussion of public policy limitations on conditions in wills, see § 63.205[1].

### **[c] Survival and Lapse**

A devise conditioned on the occurrence (or nonoccurrence) of a specified event may also be conditioned on survival of the testator, or survival until a future time [*Prob. Code § 21109(a)*]. For a discussion of devises conditioned on survival until a future time, see § 63.411. For a discussion of simultaneous death and provisions stating the order of death in the event of a common disaster, see § 63.630.

### **[2] FORM**

#### **Conditional Devise**

This devise shall become effective only if \_\_\_\_\_ [*specify condition, e.g., I marry \_\_\_\_\_ (name of intended spouse)*], and if \_\_\_\_\_ [*specify negative of condition, e.g., I do not marry \_\_\_\_\_ (name of intended spouse)*] this devise shall lapse and become part of the residue of my estate.

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Wills Bequests & Devises Estate, Gift & Trust Law Wills Failure of Bequests Antilapse  
Statutes Estate, Gift & Trust Law Wills Failure of Bequests Lapses



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*23-63 California Legal Forms--Transaction Guide § 63.411*

### **§ 63.411 Devise Conditioned on Survival Until a Future Time**

#### **[1] Comment**

#### **[a] Use of Form**

This form may be used to make a devise conditional on survival until a future time. It includes optional provisions stating that the devise will lapse if the devisee does not survive for the required time or, in the alternative, that the devise will pass to other named devisees (e.g., the issue of the first devisee).

For a provision making a devise conditional on the occurrence (or nonoccurrence) of a specified event, see § 63.410. For a provision making the entire will conditional on the occurrence (or nonoccurrence) of a specified event, see § 63.205. For a discussion of simultaneous death and provisions stating the order of death in the event of a common disaster, see § 63.630. For detailed discussion of conditional devises involving future interests, see Ch. 67, *Future Interests and Perpetuities* .

#### **[b] Survival Until a Future Time**

#### **[i] Advantages**

A devise may be conditioned on survival of the testator, or on survival for a specified period of time after the testator's death. A devisee who does not survive the testator, or who does not survive until a future time required by the will, does not take under the will [*Prob. Code § 21109(a)*; see *Prob. Code § 21101* (rules applicable to wills, trusts, deeds, and other instruments)].

It is sometimes advisable to condition a devise on survival for a specified period of time, since such a condition may obviate successive administration and taxation of the same property. If, for example, the testator devises property to a devisee who survives the testator for only one week, all the property given will be included in the estate of the devisee, even though the devisee will not have come into beneficial enjoyment of the property. If, in the example given, the

devise was conditioned on the devisee's surviving the testator for a specified period (e.g., 60 days or six months), successive administrations of the same property would have been avoided.

The question of survival should be considered as it bears on each devise. A devise to an elderly friend or relative might well be conditioned on survival for a period of time sufficient to allow the probate estate to proceed to distribution (a petition for preliminary distribution may be filed when two months have elapsed after the first issuance of letters [*Prob. Code § 11620*], but final distribution will not be completed until several months thereafter [*Prob. Code §§ 11640-11642*]).

### **[ii] Disadvantages**

It is not good practice to routinely condition devises to a surviving spouse on survival until a future time, because such a condition may delay or defeat the confirmation proceedings authorized by *Prob. Code §§ 13650-13660*. Further, such a condition may deprive the surviving spouse of the benefits of the marital deduction for estate tax purposes. Under *I.R.C. § 2056(b)(1)*, no estate tax deduction is allowed for a "terminable" interest passing to a surviving spouse. An interest is "terminable" if it may terminate and pass to another person on the lapse of time, on the occurrence of an event or contingency, or on the failure of an event or contingency to occur. A limited exception to this rule is recognized for interests that are subject to termination if the spouse and the testator die in a common disaster or if the spouse fails to survive the testator for a period not exceeding six months [*I.R.C. § 2056(b)(3)(A)*], though, in this case, the termination or failure must not in fact occur [*I.R.C. § 2056(b)(3)(B)*]. For further discussion of the marital deduction, including the terminable interest rule, see Ch. 71, *Marital Deduction Trust Provisions* .

### **[iii] Probate Code Rules of Construction**

The Probate Code contains rules of construction that are designed to reduce the possibility that drafting errors in wills and trusts will result in inadvertent loss of the marital deduction [*see Prob. Code §§ 21520-21526* (marital deduction gifts)]. These rules provide, among other things, that any requirement set forth in a will or trust that the transferor's spouse survive the transferor by a period that exceeds (or may exceed) six months, will be limited to six months as applied to the marital deduction gift [*Prob. Code § 2125(a)*].

Although in most cases the statutory rules will be adequate to guard against loss of the marital deduction, a careful attorney will draft the will so that its terms do not endanger the deduction if it is important to the testator's dispositive plan. In some cases, the value of the marital deduction will outweigh the savings to be gained by avoiding successive administrations. In other cases, the expense, delay, and inconvenience of successive administrations will strongly suggest the adoption of a survivorship period that satisfies *I.R.C. § 2056(b)(3)*. Each case must be considered on its own merits, and appropriate will provisions should be selected to meet the needs of the individual testator. For a discussion of simultaneous death and provisions stating the order of death in the event of a common disaster, see § 63.630.

### **[c] Alternative Dispositions**

When it is decided to condition a devise on survival (or on survival until a future time), the testator should consider the advisability of making an alternative disposition of the property to take effect in the event that the condition is not satisfied. If the sole devisee is the testator's spouse, for example, the testator may wish to make alternative dispositions to his or her children, either outright, in trust, or under the California Uniform Transfers to Minors Act [*Prob. Code §§ 3900-3925; see Ch. 60A, Gifts* ]. If there are no children, alternative dispositions may be made to parents, brothers, sisters, or other persons. The effect of the "anti-lapse statute" [*Prob. Code § 21110*] should also be considered whenever a devise is conditioned on survival until a future time. For a discussion of that statute and the necessity for making alternative or substitute dispositions if it is unclear or uncertain whether the statute will apply to a particular gift, see discussion in § 63.411[1][d].

### **[d] Lapse of Legacies**

Under *Prob. Code* § 21110 (the "anti-lapse statute"), the issue of devisees who are kindred of the testator, or kindred of a surviving, deceased, or former spouse of the testator, are protected against unintended lapse of devises. The term "kindred" refers to persons related by blood [*see Estate of Sowash (1923) 62 Cal. App. 512, 516, 217 P. 123*] and includes halfbloods, adopted persons, persons born out of wedlock, stepchildren, foster children, and the issue of all such persons [*Prob. Code* § 21115; for a general discussion of the statutory definitions of "child" and "children," together with the rights of natural children, adopted children, foster children, and stepchildren to take under wills or by intestate succession, *see* discussion in § 63.226[1][c][i] *et seq.*].

The basic rule of the anti-lapse statute is that if a devise is made to "kindred" of the testator (or to kindred of a surviving, deceased, or former spouse of the testator), and if the kindred devisee is dead when the will is executed, or is treated as if he or she predeceased the testator, or fails to survive the testator, or fails (or is treated as failing) to survive until a future time required by the will, the issue of the deceased devisee take in his or her place in the manner provided in *Prob. Code* § 240 [*Prob. Code* § 21110(a), (c); *see Prob. Code* § 21101 (rules applicable to wills, trusts, deeds, and other instruments; *see also Estate of Mooney, (2008) 169 Cal. App. 4th 654, 663 ; 87 Cal. Rptr. 3d 115* (anti-lapse statute provides that when a bequest to a protected transferee would otherwise lapse due to the transferee's death, the bequest passes by right of representation to his or her descendants), *see also Ch. 61, Will Drafting and Complete Will Forms* § 61.16[4]]. However, the basic rule is inapplicable if the will expresses a "contrary intention" or makes a "substitute disposition" [*Prob. Code* § 21110(b), (c)]. For this purpose, a requirement that the initial devisee survive the testator or survive for a specified period of time after the testator's death, or until a future time that is related to the probate of the will or the administration of the testator's estate, constitutes a "contrary intention" [*Prob. Code* § 21110(b); *Burkett v. Capovilla (2003) 112 Cal. App. 4th 1444, 1451, 5 Cal. Rptr. 3d 817*].

The effect of the anti-lapse statute should be considered whenever a devise is conditioned on survival until a future time. A careful attorney will avoid any question about the lapse of such a devise by making an alternate or substitute devise, to take effect if the beneficiary named in the primary gift fails to take. For provisions making alternate or substitute gifts of the residue of the estate to a named beneficiary or beneficiaries, *see* § 63.532. For provisions making alternate or substitute gifts of the residue to issue of the primary beneficiary, *see* § 63.533.

If the testator does not wish to have the anti-lapse statute apply to a gift, and no alternate disposition of the property is made, then in the event the gift lapses the property will pass under the residuary clause of the will [*Prob. Code* § 21111(a)]. This provision states that if a transfer fails for any reason, the property is transferred as follows: (1) if the transferring instrument provides for an alternative disposition in the event the transfer fails, the property is transferred according to the terms of the instrument; (2) if the transferring instrument does not provide for an alternative disposition but does provide for the transfer of a residue, the property becomes a part of the residue transferred under the instrument; and (3) if the transferring instrument does not provide for an alternative disposition and does not provide for the transfer of a residue, or if the transfer is itself a residuary gift, the property is transferred to the decedent's estate [*Prob. Code* § 21111(a)]. If a residuary gift or a future interest is transferred to two or more persons and the transferee's share fails for any reason, and no alternative disposition is provided, the share passes to the other transferees in proportion to their other interest in the residuary gift or the future interest [*Prob. Code* § 21111(b)]. These provisions are subject to [*Prob. Code* § 21110 [*Prob. Code* § 21111(a), (b)]. A transfer of "all my estate," or words of similar import, is a residuary gift for purposes of these provisions [*Prob. Code* § 21111(c)]. If a failure of a future interest results in an intestacy, the property passes to the testator's heirs determined under [*Prob. Code* § 21114 [*Prob. Code* § 21111(d)]. For a clause specifically providing that the issue of kindred devisees will not take any gift made to those devisees, and providing that the gifts in question will lapse instead, *see* § 63.654[2].

## [2] FORM

### Devise Conditioned on Survival Until a Future Time

I give \_\_\_\_\_ [*describe gift*] to \_\_\_\_\_ [*name of beneficiary*], if \_\_\_\_\_ [*he or she*] survives me for \_\_\_\_\_ [*specify period, e.g.,: two months or six months*].

[*First alternative*]

If \_\_\_\_\_ [*he or she*] does not survive me for that period, then this gift shall lapse and become part of the residue of my estate.

[*Second alternative*]

If \_\_\_\_\_ [*he or she*] does not survive me for that period, then this gift shall go to \_\_\_\_\_ [*name alternative beneficiaries, e.g., \_\_\_\_\_ (his or her) issue by right of representation*].

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Estate, Gift & Trust Law Wills Bequests & Devises



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*23-63 California Legal Forms--Transaction Guide § 63.412*

**§ 63.412 Conditional Legacy to Son-in-Law or Daughter-in-Law With Precatory Request for Grandchildren**

**[1] Comment**

**[a] Use of Form**

This form may be used to make a conditional pecuniary legacy to a son-in-law or daughter-in-law and to couple it with a precatory request that the funds be used for the support or education of the testator's grandchildren. The legacy is conditioned upon the death of the testator's son or daughter and the existence of minor grandchildren who survive the testator. The form includes two optional provisions specifying alternative dispositions of the gift, to take effect if the conditions are not satisfied. One provides that the gift will lapse and the other that it shall go to the minor grandchildren.

The purpose of this form is to make some provision for the education and support of minor grandchildren of the testator in the event that one of the parents of the grandchildren (a child of the testator) does not survive the testator. It may be more desirable, however, to achieve this result by a transfer under the California Uniform Transfers to Minors Act [*Prob. Code §§ 3900-3925*] or by creating a testamentary trust. For a detailed discussion of the California Uniform Transfers to Minors Act, see Ch. 60A, *Gifts* . For a discussion of trusts and illustrative trust provisions, see Ch. 64, *Testamentary Trusts: Payment and Distribution Provisions* , Ch. 64A, *Testamentary Trusts: Trustee Provisions* , and Ch. 64B, *Testamentary Trusts: Administrative Provisions* .

**[b] Precatory or Mandatory Provisions**

"Precatory" words express a hope, wish, desire, recommendation, or suggestion [ *Estate of Sloan (1935) 7 Cal. App. 2d 319, 341, 46 P.2d 1007* ]. When included in a will, they do not have the effect of a command or a charge and are not legally enforceable [ *Estate of Kearns (1950) 36 Cal. 2d 531, 536, 225 P.2d 218* ]. "Mandatory" words import a direction or obligation, and, when included in a will, impose an enforceable legal obligation [ *Estate of Burris (1961) 190 Cal. App. 2d 582, 588-589, 12 Cal. Rptr. 298* ]. While words such as "It is my wish" or "I hereby direct" are ordinarily treated as mandatory rather than precatory, when read in the context in which they are used, they may have quite a different effect [ *Estate of Kearns (1950) 36 Cal. 2d 531, 534, 225 P.2d 218* ]. Whether any words are

precatory or mandatory depends in every case on the intention of the testator [ *Estate of Kearns (1950) 36 Cal. 2d 531, 534, 225 P.2d 218* ; see *Prob. Code § 21102(a)*]. The legal effect of words used in the will may differ according to the person or persons to whom they are directed. While words expressing the testator's wishes or desires may be mandatory when directed to the executor or administrator [ *Estate of Lawrence (1941) 17 Cal. 2d 1, 7, 108 P.2d 893* ], like words directed to a beneficiary or legatee may be merely precatory [ *Estate of Farelly (1931) 214 Cal. 199, 204, 4 P.2d 948* ].

Because the legal effect of words used in the will depends upon ascertaining the intention of the testator [see *Prob. Code § 21102(a)*], any expression that does not clearly and unambiguously express that intention is a potential source of controversy. The danger is that words intended to be precatory may be misinterpreted as mandatory, or that a would-be beneficiary may claim entitlement to the property in question on the basis of such language.

If words intended to be precatory are interpreted as mandatory, a testamentary disposition that was intended as an outright gift may be burdened with unintended conditions or restrictions, or even imposed with the obligations of a trust [see *Estate of Hood (1943) 57 Cal. App. 2d 782, 785, 135 P.2d 383* ]. If the testator intends by the use of a precatory request to benefit a beneficiary other than the named legatee, the intention will be wholly frustrated if the named legatee does not survive the testator (or does not survive until such time as the precatory request is complied with). Further, the use of precatory words may occasion serious and unintended tax consequences. If the testator leaves property to a noncharitable beneficiary with a precatory request that it be devoted to a charitable purpose or distributed to a charitable beneficiary, the estate tax deduction for charitable transfers may be lost even if the noncharitable beneficiary in fact complies with the request [Delaney v. Gardner (5th Cir. [Mass.] 1953) 204 F.2d 855, 860-861] . Compliance with the precatory request by the named legatee may result in a taxable gift [see *Housman v. Commissioner (2nd Cir. [B.T.A.] 1939) 105 F.2d 973 , cert. denied, 309 U.S. 656 (1940)* ].

When confronted with a situation that suggests the use of a precatory request, the attorney should first consider the possibility of making the request mandatory. If it is deemed undesirable to make it mandatory, the attorney should consider eliminating the request altogether. If it is concluded that the request will serve a useful purpose even if it is not made mandatory or if, notwithstanding the attorney's warnings, the client insists on such a request, it should be drafted in such a way as to make it clear that it is precatory and not mandatory. This form will accomplish that purpose.

## [2] FORM

### Conditional Legacy to Son-in-Law or Daughter-in-Law With Precatory Request for Grandchildren

In the event that my \_\_\_\_\_ [son or daughter], \_\_\_\_\_ [name of son or daughter], does not survive me, that, at the time of \_\_\_\_\_ [his or her] death, \_\_\_\_\_ [he or she] is married to \_\_\_\_\_ [name of son-in-law or daughter-in-law], and that \_\_\_\_\_ [he or she] has a minor child or minor children who survive me, then, and in that case only, I give the sum of \_\_\_\_\_ [specify amount] to \_\_\_\_\_ [name of son-in-law or daughter-in-law], which I recommend, but do not direct, be used for the \_\_\_\_\_ [education of those minor children or support and maintenance of those minor children during their minorities]. It is my intention that this recommendation shall be deemed precatory only, and not mandatory.

[First alternative provision]

If \_\_\_\_\_ [name of son-in-law or daughter-in-law] does not survive me, this gift shall lapse and become part of the residue of my estate.

[OR]

If \_\_\_\_\_ [*name of son-in-law or daughter-in-law*] does not survive me, then this gift shall go to those minor children of my \_\_\_\_\_ [*son or daughter*] named above who survive me, in equal shares, share and share alike.

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Estate, Gift & Trust Law Wills Bequests & Devises



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*23-63 California Legal Forms--Transaction Guide § 63.413*

### **§ 63.413 Pecuniary Legacy Limited to Percentage of Estate**

#### **[1] Comment**

#### **[a] Use of Form**

This form may be used to limit a nonresiduary gift to a specified percentage of the estate. The form includes four alternative provisions. The first alternative may be used to make a gift of a specified sum, to be reduced if the total estate is less than a specified value. The second alternative may be used to make a gift of a specified sum, or a percentage of the estate, whichever is less. The third alternative may be used to make a gift of a specified sum not to exceed a specified percentage of the estate. The fourth alternative may be used to make a gift of a specified sum, to be increased if the total estate is more than a specified value.

For a single gift of the testator's entire estate, see § 63.350. For a general pecuniary legacy, see § 63.351. For a clause limiting nonresiduary gifts provided for in the will to a specified percentage of the estate, see § 63.417. For a clause requiring abatement of nonresiduary bequests to protect residuary beneficiaries against unanticipated reduction of the value of the estate, see § 63.572.

#### **[b] Purpose of Limitation**

When the overall plan of the will is to make certain gifts and then to leave the residue of the estate to the testator's spouse and/or children, the testator should consider the possibility that the estate may be substantially reduced before the testator's death. In such a case, specific, general, or demonstrative legacies set forth in the will may no longer accord with the general testamentary plan. When the estate is distributed, such legacies may be paid in full while the residue is drastically reduced. The form set forth below may be used to protect residuary beneficiaries against this contingency.

#### **[c] Valuation Formula**

Any other designation of the amount to which the percentage will be applied may be used in place of this formula. The

testator may, for example, state that if the "net estate" is less than a fixed amount the bequests will be reduced proportionately.

**[2] FORM**

**Pecuniary Legacy Limited to Percentage of Estate**

*[First alternative: specified sum, to be reduced if total estate less than specified value]*

I give the sum of \_\_\_\_\_ *[specify amount]* to \_\_\_\_\_ *[name of beneficiary]*. If the value of all of my property disposed of by this will is less than \_\_\_\_\_ *[specify amount]*, I reduce this gift to an amount equal to \_\_\_\_\_ *[specify number]* percent of that value.

*[Second alternative: specific sum or percentage of estate, whichever is less]*

I give the sum of \_\_\_\_\_ *[specify amount]*, or a sum equal to \_\_\_\_\_ *[specify number]* percent of the value of all of my property disposed of by this will, whichever is less, to \_\_\_\_\_ *[name of beneficiary]*.

*[Third alternative: specified sum not to exceed percentage of estate]*

I give the sum of \_\_\_\_\_ *[specify amount]* to \_\_\_\_\_ *[name of beneficiary]*. If this gift exceeds \_\_\_\_\_ *[specify number]* percent of the value of all of my property disposed of by this will, I reduce the amount of this gift to a sum equal to \_\_\_\_\_ *[specify number]* percent of that value.

*[Fourth alternative: specified sum, to be increased if total estate is more than specified value]*

I give the sum of \_\_\_\_\_ *[specify amount]* to \_\_\_\_\_ *[name of beneficiary]*. If the value of all of my property disposed of by this will is greater than the sum of \_\_\_\_\_ *[specify amount]*, then, and in that case only, I give the sum of \_\_\_\_\_ *[specify alternative amount]*, instead of the sum named above, to \_\_\_\_\_ *[name of beneficiary]*.

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Estate, Gift & Trust Law Wills Bequests & Devises



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*23-63 California Legal Forms--Transaction Guide § 63.414***§ 63.414 Amount of General Pecuniary Devise Determined by Objective Factor****[1] Comment--Use of Form**

This form is a will provision that may be used to make a general pecuniary devise [*see Prob. Code § 21117(d)*] and to measure the amount of the devise by some objective factor in existence at the time of the testator's death. For a general form for a general pecuniary legacy, see § 63.351. For a provision limiting a nonresiduary devise to a specified percentage of the testator's estate, see § 63.413.

A "general pecuniary devise" is defined by statute as a "pecuniary gift" that is made by will [*Prob. Code § 21117(d)*]. A "pecuniary gift," in turn, is defined as a transfer of property made in an instrument that either is expressly stated as a fixed dollar amount or is a dollar amount determinable by the provisions of the instrument [*Prob. Code § 21118(b)*]. A pecuniary devise that limits its amount by some objective factor, such as the amount due on a mortgage or promissory note owed by the devise at the time of the testator's death, or a percentage of the total value of the testator's estate, determined as of the time of the testator's death [*see § 63.413*], will qualify as a pecuniary gift.

**[2] FORM****Amount of General Pecuniary Devise Determined by Objective Factor**

I give to \_\_\_\_\_ [*name of devisee*] a sum equal to \_\_\_\_\_ percent of \_\_\_\_\_ [*describe factor by which amount of devise will be measured, e.g., the amount necessary to discharge any obligation that, at the time of my death, is owed by \_\_\_\_\_ (name of devisee) and secured by the real property that constitutes \_\_\_\_\_ (his or her) principal residence*].

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Estate, Gift & Trust Law Wills Bequests & Devises



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*23-63 California Legal Forms--Transaction Guide § 63.415*

### § 63.415 Deferred Devise

#### [1] Comment

#### [a] Use of Form

This form is a will provision that may be used to postpone or defer the distribution, possession, or enjoyment of a devise until some time after the testator's death. In addition to the principal provision deferring distribution, the form includes an optional alternative disposition of the devised property.

For a will provision making a single devise of the testator's entire estate, see § 63.350. For a conditional devise, see § 63.410.

#### [b] Deferred Devises

#### [i] In General

A testator may wish to postpone the distribution of a particular devise until some time after the testator's death. The testator may wish, for example, to defer distribution of a devise to a minor devisee until the minor attains a specified age. This wish may be stated as a condition precedent to the vesting of the devise, or as a postponement of its enjoyment or possession. If the vesting of the devise is made subject to a condition precedent, the devise will lapse if the condition is not satisfied [ *Estate of Catlett (1953) 117 Cal. App. 2d 315, 317, 255 P.2d 464* ]. If, on the other hand, vesting of the devise is not conditional, but possession or enjoyment of the devised property is deferred, the devise will not lapse if the condition is not satisfied but the devisee will take subject to later defeasance [ *Newlove v. Mercantile Trust Co. (1909) 156 Cal. 657, 661, 105 P. 971* ].

#### [ii] Reference to Acts and Events of Independent Significance

Under *Prob. Code § 6131*, a will may dispose of property by reference to acts and events that have significance apart

from their effect on the dispositions made by the will. The birthday of a devisee is an event that has significance apart from its effect on the dispositions made by the will, and a will may properly dispose of property by reference to such a birthday.

### **[iii] Alternative Methods of Deferral**

Although language postponing or deferring the use or enjoyment of a devise may often accord with the testator's wishes, it may present difficult problems of interpretation and unnecessarily complicate administration of the estate. A provision deferring distribution over a period of years, for example, may require keeping the estate open during all of that period. The death of the devisee before fulfillment of the condition may complicate the question of who is entitled to distribution. In addition, the devisee may demonstrate a genuine need for the devise before the time set forth in the will for distribution but be unable to reach it because of the inflexibility of the will provision. For these reasons, a deferred devise will, in many cases, be less desirable than the creation of a trust, which will provide for otherwise unforeseen contingencies and which will permit the estate to be closed on distribution of the trust assets to the trustee. For a discussion of trusts and trust provisions, see Ch. 64, *Testamentary Trusts: Payment and Distribution Provisions*, Ch. 64A, *Testamentary Trusts: Trustee Provisions*, Ch. 64B, *Testamentary Trusts: Administrative Provisions*.

If the testator wishes to defer a devise until a minor reaches the age of majority, a gift under the California Uniform Transfers to Minors Act [*Prob. Code §§ 3900-3925*] may be the best way of ensuring the desired result, particularly when the amount involved is too small to warrant the expense of creating a trust. For a detailed treatment of the requirements and procedures contained in the California Uniform Transfers to Minors Act, see Ch. 60A, *Gifts*.

## **[2] FORM**

### **Deferred Devise**

I give the sum of \_\_\_\_\_ [*specify amount*] to \_\_\_\_\_ [*name of devisee*], but direct that this sum shall not be distributed to \_\_\_\_\_ [*him or her*] until \_\_\_\_\_ [*specify future time, e.g., two years after my death or* \_\_\_\_\_ (his or her) twenty-fifth birthday].

[*Optional*]

If \_\_\_\_\_ [*name of devisee*] dies before the distribution of this gift, the gift shall \_\_\_\_\_ [lapse and shall become part of the residue of my estate *or* be payable to \_\_\_\_\_ (*name of alternate devisee*)].

### **Legal Topics:**

For related research and practice materials, see the following legal topics:  
Estate, Gift & Trust Law Wills Bequests & Devises



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*23-63 California Legal Forms--Transaction Guide § 63.416*

**§ 63.416 Abatement--Order of Payment of Devises**

**[1] Comment**

**[a] Use of Form**

This form is a will provision that may be used to specify the order in which devises will abate if the testator's estate is insufficient to pay all debts and expenses and to satisfy all devises in full. For a provision limiting nonresiduary devises to a fixed percentage of the estate, see § 63.417. For a provision stating the order of abatement of devises and expressing a preference for the testator's spouse, see § 63.418.

**[b] Abatement of Devises**

**[i] Statutory Rules**

If property disposed of by a will is not sufficient to pay all debts and expenses and to fully satisfy all devises, it may be necessary to reduce or even eliminate some devises [*see Prob. Code § 10000(a)* (executor may sell estate property when necessary to pay debts, devises, family allowance, expenses of administration, or taxes)]. The process whereby devises are reduced or eliminated is referred to as abatement [*see Prob. Code §§ 21400-21406*].

Under rules set forth in the Probate Code, devises abate in the following order [*Prob. Code § 21402(a)*].

First, property not disposed of by the will.

Second, residuary devises [*see Prob. Code § 21117(f)* ("residuary gift" defined)].

Third, general gifts to persons other than the testator's relatives [*see Prob. Code § 21117(b)* ("general gift" defined)].

Fourth, general gifts to the transferor's relatives.

Fifth, specific gifts to persons other than the testator's relatives [*see Prob. Code § 21117(a)* ("specific gift" defined)].

Sixth, specific gifts to the transferor's relatives.

Shares of devisees generally abate pro rata within each of the above classes [*Prob. Code § 21403(a)*]. To the extent that annuities and demonstrative devises are satisfied out of a particular fund or property specified in the will, they are treated as specific devises [*Prob. Code § 21403(b)*; *see Prob. Code § 21117(a)* "specific gift" defined), (c) "demonstrative gift" defined), (e)("annuity" defined)]. To the extent that they are satisfied out of other property, they are treated as general devises [*Prob. Code § 21403(b)*; *see Prob. Code § 21117(b)* ("general gift" defined)].

General statements in a will that the executor is to pay expenses out of the testator's estate are not sufficiently specific to override the abatement order established by *Prob. Code § 21402* [ *Burkett v. Capovilla* (2003) 112 Cal. App. 4th 1444, 1452, 5 Cal. Rptr. 3d 817 ].

### **[ii] Will Provisions**

The Probate Code abatement rules are rules of construction only. They do not apply if the testator's plan (or a particular devise) would be defeated by application of the rules, or if some other scheme of abatement is necessary to effectuate the will or the testator's purpose [*Prob. Code § 21400*]. Since testators frequently provide for surviving spouses or children by residuary devises and for other relatives or friends by general, demonstrative, or specific devises, it will often be in the testator's interest to specify a different order of abatement. If the estate is unexpectedly reduced at the time of death, or if the estate assets are insufficient to pay all debts and expenses and to satisfy all devises in full, most testators would prefer that devises to friends or distant relatives be reduced or eliminated before those to the spouse or children. The provisions contained in this form will effectuate this preference by clearly and explicitly stating the order in which the testator wishes the devises to abate.

## **[2] FORM**

### **Abatement--Order of Payment of Devises**

If my estate is insufficient to pay all debts and expenses and to satisfy all of the devises I have provided for in this will, I direct that the devises I have made shall abate in the following order:

First, the devise to \_\_\_\_\_ [*name of devisee*], provided for in Paragraph \_\_\_\_\_ [*number*] of this will;

Second, the devise to \_\_\_\_\_ [*name of devisee*], provided for in Paragraph \_\_\_\_\_ [*number*] of this will;

Third, the devise to \_\_\_\_\_ [*name of devisee*], provided for in Paragraph \_\_\_\_\_ [*number*] of this will.

[*Continue as necessary*]

### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Wills Bequests & Devises Estate, Gift & Trust Law Wills Failure of Bequests Abatements



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*23-63 California Legal Forms--Transaction Guide § 63.417***§ 63.417 Abatement--Nonresiduary Devises Limited to Percentage of Estate****[1] Comment--Use of Form**

This form is a will provision that may be used to limit nonresiduary devises to a fixed percentage of the estate. The form includes two alternative provisions, one that limits gifts made in a specific paragraph or paragraphs of the will, and another that limits devises to a specific devisee or devisees. In either of its alternative provisions, the form will guard against unexpected abatement of devises and provide protection for residuary devisees by insuring that nonresiduary devises will abate first. For a discussion of abatement of devises and problems arising when estate assets are not sufficient to pay all debts and expenses and to satisfy all devises in full, see § 63.416[1]. For a pecuniary devise limited to a specified percentage of the estate, see § 63.413. For a provision directing the order of abatement of devises, see § 63.416. For a form stating the order of abatement of devises and expressing a preference for the testator's spouse, see § 63.418.

**[2] FORM****Abatement--Nonresiduary Devises Limited to Percentage of Estate***[First alternative: limitation of devise(s) in specified paragraph(s)]*

If the total of all of the devises made in Paragraph[s] \_\_\_\_\_ of this will exceeds \_\_\_\_\_ percent of the value of all of my property disposed of by this will, then all such devises shall be reduced on a pro rata basis, so that the total shall not exceed \_\_\_\_\_ percent of that value.

*[Second alternative: limitation of devise(s) to specified devisee or devisees]*

If the total of all the devises made in this will to \_\_\_\_\_ [name(s) of devisee or devisees] exceeds \_\_\_\_\_ percent of the value of all of my property disposed of by this will, then all such devises shall be

reduced on a pro rata basis, so that the total shall not exceed \_\_\_\_\_ percent of that value.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Wills Bequests & Devises Estate, Gift & Trust Law Wills Failure of Bequests Abatements



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*23-63 California Legal Forms--Transaction Guide § 63.418*

**§ 63.418 Abatement--Order of Payment With Preference for Spouse**

**[1] Comment--Use of Form**

This form is a will provision that may be used to specify the order in which devises will abate if the testator's estate is insufficient to pay all debts and expenses and to satisfy all devises in full, and to express a preference for the testator's spouse. For a discussion of abatement of devises and problems arising when estate assets are not sufficient to pay all debts and expenses and to satisfy all devises, see § 63.416[1]. For a provision stating the order of payment of devises without expressing a preference for the spouse, see § 63.416. For a provision limiting nonresiduary devises to a fixed percentage of the estate, see § 63.417.

**[2] FORM**

**Abatement--Order of Payment With Preference for Spouse**

If my estate is insufficient to pay all debts and expenses and to satisfy all of the devises I have made in this will, I direct that the devises I have made shall abate in the following order: first general devises; then specific devises; then demonstrative devises; provided, however, that the devises to my \_\_\_\_\_ [husband *or* wife] shall not abate until all other devises have abated. All devises of the same class shall abate proportionately.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Wills Bequests & Devises Estate, Gift & Trust Law Wills Failure of Bequests Abatements



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*23-63 California Legal Forms--Transaction Guide § 63.419*

### **§ 63.419 Discharge of Encumbrances on Specific Devises**

#### **[1] Comment**

#### **[a] Use of Form**

This form is a will provision that may be used to provide for the exoneration of encumbrances on specific devises. Two alternative provisions are included. The first exonerates a particular devise from encumbrances, while the second exonerates all specific devises. For a specific devise of real property, see § 63.440. For a specific devise of real property subject to an encumbrance, see § 63.442.

#### **[b] Exoneration of Encumbrances**

If a will makes a specific devise of property that is subject to a mortgage, deed of trust, or other lien at the time of the testator's death, the devisee has a right to the property subject to the lien, without right of exoneration. This is the case even when the will includes a general directive to pay the testator's debts [*Prob. Code § 21131*].

Unless the will provides otherwise [*Prob. Code § 21400*], when a testator devises property that is subject to a mortgage, deed of trust, or other lien, and the will requires that the property be exonerated from the lien, other specifically devised property will not abate for the purpose of exonerating the encumbered property [*Prob. Code § 21404*].

#### **[c] Abatement of Specific Devise**

Property subject to a specific devise will not abate for the purpose of paying expenses of administration, funeral expenses, expenses of the testator's last illness, or a family allowance if there is other property available for that purpose [*see Prob. Code § 21402(a)* (order of abatement of devises); *see also § 63.416[1]*]. If there are expenses of administration attributable to the devised property, however, those expenses must first be paid out of income from the devised property, if any [*Prob. Code § 12002(b)*]. For this purpose, expenses attributable to the property are expenses that result directly from the use or ownership of the property, including property taxes and taxes on income from the

property, but excluding estate and generation-skipping transfer taxes [*Prob. Code § 12002(b)*]. If income from the property is not sufficient to pay expenses attributable to the property, the deficiency must be paid out of the estate until the property is distributed to the devisee or the devisee takes possession of or occupies it, whichever occurs first [*Prob. Code § 12002(c)*].

Commencing one year after the testator's death, any deficiency must be charged against the share of the devisee. If the executor pays any deficiency attributable to the period commencing one year after death, the executor will have an equitable lien on the specifically devised property as against the devisee in the amount paid [*Prob. Code § 12002(c)*]. If a specific devise must be abated, the devisee may satisfy the contribution for abatement out of his or her other property [*Prob. Code § 21405(b)*].

#### **[d] Testator's Intent**

Although a general directive in the will to pay the testator's debts will not suffice to require exoneration of encumbrances on specifically devised property [*Prob. Code § 21131*], the testator may specifically direct that such property be exonerated. The general rules governing exoneration apply only when the intention of the testator is not indicated by the will, and the intention of the testator as evidenced in the will always controls the legal effect of the dispositions made in the will [*Prob. Code § 21102(a)*]. However, this provision does not limit the use of extrinsic evidence, to the extent otherwise authorized by law, to determine the testator's intention [*Prob. Code § 21102(c)*].

Before expressing an intention on the question of exoneration, the testator should decide whether he or she intends to devise his or her equity in the property or a devise of the property free and clear of all encumbrances. In the case of a residence or other real property, the difference in value may be substantial. The testator should also understand that exoneration of encumbrances will require abatement of other estate assets. For a general discussion of the abatement of devises to pay debts and expenses of administration, see § 63.416[1].

#### **[2] FORM**

##### **Discharge of Encumbrances on Specific Devises**

*[First alternative: exoneration of particular specific devise]*

I direct my Executor to pay in full any and all encumbrances, including mortgages, deeds of trust, and other liens, that may at the time of my death be charges or liens against the property described in this paragraph, or any part thereof. It is my intention that \_\_\_\_\_[*name of devisee*] shall take this property free and clear of all encumbrances.

*[Second alternative: exoneration of all specific devises]*

If any \_\_\_\_\_[*real or personal or real or personal*] property specifically devised in this will is subject to any encumbrance, including any mortgage, deed of trust, or other lien, I direct that my Executor exonerate and discharge that encumbrance in full. It is my intention that no liability for any such encumbrance shall attach to the devisee of any such devise.

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:  
Estate, Gift & Trust Law Wills Bequests & Devises



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*23-63 California Legal Forms--Transaction Guide § 63.420*

### **§ 63.420 Devise of Insurance on Property**

#### **[1] Comment**

#### **[a] Use of Form**

This form is a will provision that may be used to provide that the devisee of specifically devised property will receive the proceeds of any insurance on the property. For a single devise of the testator's entire estate, see § 63.350. For a specific devise of personal property, see § 63.370. For a specific devise of real property, see § 63.440.

#### **[b] Insurance on Specific Gifts**

A devisee will not take specifically devised property if it is not in existence or not in the testator's estate at the time of the testator's death [*see Prob. Code § 21133* (specific devisee has right to remaining property specifically given)]. Thus, if specifically devised property is destroyed or damaged after the will is executed but before the testator's death, the devise may fail and the devisee may take nothing.

A recipient of an at-death transfer of a specific gift has a right to the specifically given property, to the extent the transferor owned the property at the time the gift takes effect in possession or enjoyment, and all of the following:

- Any balance of the purchase price (together with any security agreement) owing from a purchaser to the transferor at the time the gift takes effect by reason of a sale of the property [*Prob. Code § 21133(a)*].
- Any amount of an eminent domain award for the taking of property unpaid at the time the gift takes effect [*Prob. Code § 21133(b)*].
- Any proceeds unpaid at the time the gift takes effect on fire or casualty insurance on or other recovery for injury to the property [*Prob. Code § 21133(c)*].

■ Property owned by the transferor at the time the gift takes effect and acquired as a result of foreclosure, or obtained in place of foreclosure, of the security interest for a specifically given obligation [*Prob. Code § 21133(d)*].

To protect a specific devisee against damage or destruction that may occur after death but before distribution, the testator may provide that any insurance on specifically devised property will go to the devisee rather than to the residuary estate. This form will accomplish that objective.

## [2] FORM

### Devise of Insurance on Property

I give \_\_\_\_\_ [*describe specific property*] to \_\_\_\_\_ [*name of devisee*], together with any insurance on that property. If this property is the subject of any claim against any insurance on it, I direct that the proceeds of any such claim be given to \_\_\_\_\_ [*name of devisee*].

### Legal Topics:

For related research and practice materials, see the following legal topics:  
Estate, Gift & Trust Law Wills Bequests & Devises



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*23-63 California Legal Forms--Transaction Guide § 63.421*

### **§ 63.421 Devise to Existing Inter Vivos Trust**

#### **[1] Comment**

#### **[a] Use of Form**

This form is a will provision that may be used to make a devise to the trustee of an existing inter vivos trust. The inter vivos trust may be a trust that was established by the testator or by some other person. This type of devise is frequently referred to as a "pour over" and the will in which it is made as a "pour-over will."

For a will provision making a devise to a testamentary trust, see § 63.422. For a married person's will giving the residue of the estate to an inter vivos trust, see *Ch. 61, Will Drafting and Complete Will Forms, § 61.211*.

#### **[b] Testamentary Gifts to Trusts**

Although the validity of devises to existing trusts was at one time the subject of vigorous debate among lawyers and judges [*see* Scott & Fratcher, *The Law of Trusts*, 4th ed. (Little, Brown & Co. 1987), vol. IA, §§ 54.2, 54.3], their validity is now recognized. California has adopted the Uniform Testamentary Additions to Trusts Act [*Prob. Code* §§ 6300-6303], which explicitly validates devises to the trustee of any trust established or to be established by the testator, by another person, or by the testator and another person together [*Prob. Code* § 6300]. Such a devise requires only that the will identify the trust and that the terms of the trust be set forth in a written instrument. If the trust instrument is not a will, it must be a written instrument that was executed before or concurrently with the testator's will. If the trust instrument is a will, it must be the valid last will of some person who predeceased the testator [*Prob. Code* § 6300].

Under the Act, a devise to an existing trust is not invalid merely because the trust is amendable or revocable, or both, or because the trust was in fact amended after the execution of the testator's will or even after the testator's death. Unless the testator's will provides otherwise, property given to such a trust is not deemed to be held under a testamentary trust of the testator but becomes part of the trust to which it is given, and the property will be administered and disposed of in accordance with the provisions of the original trust instrument [*Prob. Code* § 6300].

The property given by the testator's will will be administered in accordance with any amendments to the original trust instrument made before the testator's death (regardless of whether made before or after execution of the testator's will). If the testator's will so provides, the property may also be administered according to amendments made after the testator's death. A revocation or termination of the trust before the testator's death will cause the devise to lapse [*Prob. Code* § 6300].

**[2] FORM****Devise to Existing Inter Vivos Trust**

I give the sum of \_\_\_\_\_ [*specify amount*] to the Trustee of the \_\_\_\_\_ [*name of trust*] Trust, created by a Declaration of Trust dated \_\_\_\_\_, executed by \_\_\_\_\_ [*name of settlor*] as Settlor and \_\_\_\_\_ [*name of trustee*] as Trustee, [and designating \_\_\_\_\_ (*name[s] of beneficiary or beneficiaries*) as \_\_\_\_\_ (beneficiary *or* beneficiaries),] to be held, divided, administered, and distributed according to the terms of that Trust.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Trusts Revocable Living Trusts Estate, Gift & Trust Law Wills Bequests & Devises



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*23-63 California Legal Forms--Transaction Guide § 63.422*

**§ 63.422 Devise to Existing Testamentary Trust**

**[1] Comment**

**[a] Use of Form**

This form is a will provision that may be used to make a devise to the trustee of a testamentary trust created by someone other than the testator. For a devise to an inter vivos trust, see § 63.421. For a married person's will giving the residue of the estate to an inter vivos trust, see *Ch. 61, Will Drafting and Complete Will Forms, § 61.211*

**[b] Testamentary Trustee as Devisee**

Under the Uniform Testamentary Additions to Trusts Act [*Prob. Code §§ 6300-6303*], a will may make a devise to the trustee of a testamentary trust created by the will of some person other than the testator [*Prob. Code § 6300; see § 63.421[1]*]. Although the Act does not require that the other trust be in existence when the devise is made, it does require that the person who executed the will that created the other trust predecease the testator [*Prob. Code § 6300*]. Since a testamentary trust takes effect only on the death of the testator whose will created the trust [*see Prob. Code § 15200(c)* (trust may be created by testamentary transfer of property)], it is clear that such a trust could not come into existence before its creator's death.

Gifts to testamentary trusts established by other persons may suit the needs and wishes of some testators. If, for example, a member of the testator's family has already provided for a trust in his or her will (whether or not the other trust has already come into existence), and if the terms of the other trust are the same (or substantially the same) as the testator would impose if creating a new trust, the testator may wish simply to add assets to the other trust. Such a devise may be particularly appropriate if the devise that the testator proposes to make is not large enough to justify the creation of a separate trust.

**[2] FORM**

**Devise to Existing Testamentary Trust**

I give the sum of \_\_\_\_\_[*specify amount*] to the Trustee of the \_\_\_\_\_[*name of trust*] Trust, created by a will dated \_\_\_\_\_, and executed by \_\_\_\_\_[*name of settlor*], who died on \_\_\_\_\_[*date*], which will was admitted to probate and administered under the jurisdiction of the \_\_\_\_\_[*name and location of court*], File Number \_\_\_\_\_, and under which Trust \_\_\_\_\_[*name of trustee*] is named as Trustee, to be held, divided, administered, and distributed according to the terms of that Trust.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsTestamentary TrustsEstate, Gift & Trust LawWillsBequests & Devises



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*23-63 California Legal Forms--Transaction Guide § 63.423*

### **§ 63.423 Incorporation by Reference--Extrinsic Writing**

#### **[1] Comment**

##### **[a] Use of Form**

This form may be used to incorporate an extrinsic writing into the will. Extrinsic writings that are commonly incorporated into wills are letters giving instructions for the testator's funeral and burial, deeds to real property, trust agreements, contracts, and other wills. The writing illustrated in this form is a memorandum executed by the testator, but any other extrinsic writing may be incorporated in the same manner. For a provision incorporating an antenuptial agreement between the testator and the testator's spouse, see § 63.424.

##### **[b] Incorporation by Reference**

A writing in existence when a will is executed may be incorporated by reference if the language of the will manifests this intent and describes the writing sufficiently to permit its identification [*Prob. Code § 6130*]. The extrinsic writing may be of any kind or character, formal or informal, and may be written by the testator or by another person [*see Estate of Foxworth (1966) 240 Cal. App. 2d 784, 788-790, 50 Cal. Rptr. 237*].

*Prob. Code § 6130* adopts the traditional requirements for incorporation by reference. The requisites for incorporation by reference, as articulated in the case law, are the following [ *Simon v. Grayson (1940) 15 Cal. 2d 531, 533, 102 P.2d 1081* ; *Estate of Foxworth (1966) 240 Cal. App. 2d 784* ; 788-789, *50 Cal. Rptr. 237* ] :

- The extrinsic paper must be in existence at the time the will makes reference to it;
- The will must identify the paper by a sufficiently certain description (extrinsic evidence is admissible as an aid to such identification); and
- It must appear that the testator intended to incorporate the paper for the purpose of carrying out his

or her testamentary desires.

The extrinsic writing must be in existence when the will is executed, since to allow the incorporation of a writing to be prepared at a later time would permit the testator to dispose of property without complying with the formalities required for the execution of wills [see *Estate of Bauer (1942) 51 Cal. App. 2d 636, 638, 124 P.2d 630*].

Attorneys should note that *Prob. Code § 6132* offers a limited exception to the traditional requirements for incorporation by reference for testators who want to make modest gifts (\$25,000 total maximum value / \$5,000 maximum per item) of tangible personal property in a separate writing. Other statutory requirements also apply, including the requirement that an unrevoked will must specifically refer to the writing [*Prob. Code § 6132(a)*; see § 63.494 (will provision referring to writing)]. A writing that qualifies under *Prob. Code § 6132* may be written or signed either before or after the execution of the will [*Prob. Code § 6132(c)*], and also may be amended from time to time thereafter [*Prob. Code § 6132(d)*]. If the requirements of *Prob. Code § 6132* are met, the writing will be given effect as if it were actually contained in the will itself [*Prob. Code § 6132(c)*].

This form is designed to meet the traditional requirements for incorporation by reference under *Prob. Code § 6130*, not the exception for gifts of tangible personal property under *Prob. Code § 6132* noted above. For a detailed discussion of the requirements of *Prob. Code § 6132*, and a form for a separate writing that meets the requirements of that section, see § 63.495. For a will provision incorporating a separate writing or writings making gifts of tangible personal property, see § 63.494.

### [c] Advantages and Disadvantages of Incorporation

There are various reasons why a testator may wish to incorporate an extrinsic writing into the will. The extrinsic writing may be a lengthy document, and it may be impractical to set forth all of its terms in the will. The extrinsic writing may contain terms or information that the testator wishes to conceal from persons who will have access to the will before the testator's death.

There are, however, inherent dangers in incorporation. An extrinsic writing may be amended, altered, revoked, or destroyed after the incorporation. If the extrinsic writing is not in existence when the will is offered for probate, problems of proof may be difficult or even impossible. If the extrinsic writing has been amended or altered, the date of the amendment or alteration may be critical. Since a writing that is not in existence when the will is executed may not be incorporated into the will, it follows (although there is no express authority on this point) that an amendment or alteration that is not in existence when the will is executed may not be incorporated.

If the testator wishes to incorporate an extrinsic writing into the will, the attorney should carefully evaluate the writing and determine if problems of proof or identification are likely to arise after the testator's death. If the extrinsic document is altered or amended after execution of the will, the attorney should advise the testator to execute a codicil referring to the amended document to comply with the requirement that the extrinsic writing be in existence at the time the will is executed [for discussion, see Ch. 62, *Codicils*].

## [2] FORM

### Incorporation by Reference--Extrinsic Writing

I give \_\_\_\_\_ [specify property, e.g., all my shares of the Class A common stock of Acme Corporation that I own at the time of my death] to the persons named in my memorandum dated \_\_\_\_\_ [date; must be earlier than date of execution of will] and signed by me [, in the amounts, portions, and manner specified in that memorandum], which is hereby incorporated by reference into this will and made a part of this will as if set forth completely herein.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Wills Incorporation by Reference General Overview Estate, Gift & Trust Law Wills Incorporation by Reference Requirements Estate, Gift & Trust Law Wills Incorporation by Reference Trusts



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*23-63 California Legal Forms--Transaction Guide § 63.424*

**§ 63.424 Incorporation by Reference--Antenuptial Agreement**

**[1] Comment**

**[a] Use of Form**

This form is a will provision that may be used to refer to and incorporate into the will the terms of a premarital agreement executed by the testator and the testator's spouse. For a discussion of incorporation by reference and the requisites of an effective incorporation, together with a general provision incorporating an extrinsic writing by reference, see § 63.423.

**[b] Premarital Agreements**

Under the California Uniform Premarital Agreement Act [*Fam. Code §§ 1600-1617*], parties to a premarital agreement may contract with regard to various matters including the rights and obligations of the parties in any of the property of either or both of them [*Fam. Code § 1612(a)(1)*] and the making of a will, trust, or other arrangement to carry out the provisions of the agreement [*Fam. Code § 1612(a)(4)*]. However, premarital agreements are subject to restrictions that do not apply to other agreements. For example, a premarital agreement becomes effective only on the marriage of the parties [*Fam. Code §§ 1610(a), 1613*] and is not enforceable if the party against whom enforcement is sought proves that the agreement was unconscionable when it was executed and that before the agreement's execution all of the following applied to that party [*Fam. Code § 1615(a)(2)*]:

- He or she was not provided a fair and reasonable disclosure of the property or financial obligations of the other party;
- He or she did not voluntarily and expressly waive, in writing, any right to disclosure of the property or financial obligations of the other party beyond the disclosure provided; and
- He or she did not have, or reasonably could not have had, an adequate knowledge of the property or

financial obligations of the other party.

A premarital agreement must be in writing and signed by both parties, although it is enforceable without consideration [*Fam. Code § 1611*].

A premarital agreement may or may not include an agreement to make a will or devise, or other instrument, or not to revoke a will or devise or other instrument, or to die intestate. Any agreement to make a will or devise or other instrument, not to revoke a will or devise or other instrument, or to die intestate must satisfy the requirements of *Prob. Code § 21700*. For a general consideration of contracts to make wills, not to make wills, or to die intestate, see § 63.694[1]. For a will provision stating that such a contract has not been made, see § 63.693. For a will provision confirming that such a contract has been made, see § 63.694. For a general consideration of the legal requirements of premarital agreements, together with forms for complete agreements and optional premarital agreement provisions, see Ch. 108, *Antenuptial Agreements* .

## [2] FORM

### **Incorporation by Reference--Antenuptial Agreement**

Under the terms of a written premarital agreement made between my \_\_\_\_\_ [wife or husband], \_\_\_\_\_ [name], and me, dated \_\_\_\_\_, my \_\_\_\_\_ [wife or husband] relinquished certain rights in my separate property existing at that time and in any separate property that I might thereafter acquire [*add, if applicable*: and waived any interest in my earnings, salaries, commissions, or other income that \_\_\_\_\_ (he or she) would otherwise have owned as our community property]. In consideration of that relinquishment, and as a part of that agreement, I promised that, upon my death, \_\_\_\_\_ [he or she] would receive \_\_\_\_\_ [*state sum of money or other agreed disposition*] from my estate. I hereby direct my executor to carry out the provisions of that agreement.

### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawWillsIncorporation by ReferenceGeneral OverviewEstate, Gift & Trust LawWillsIncorporation by ReferenceRequirements



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*23-63 California Legal Forms--Transaction Guide § 63.425*

**§ 63.425 Payment for Delivery of Specific Gifts**

**[1] Comment**

**[a] Use of Form**

This form may be used to direct the executor to deliver a specifically devised gift to the intended beneficiary and to pay the costs of delivery out of the residuary estate. For a specific legacy, see § 63.370.

**[b] Purpose of Provision**

When the testator makes specific gifts of tangible personal property, delivery to the intended beneficiary may involve shipping expenses. If it is the testator's intention that those expenses be paid out of the estate, the will should state that fact. If the intended beneficiary is unable to take immediate possession of the property, storage may be necessary, and, if insurance on items of personal property in the testator's estate does not cover those items while in transit, additional insurance may be required. This form requires the executor to pay the cost of storage incidental to transportation and to insure the goods. It may be modified to provide for the payment of any other expenses incidental to delivery that can be anticipated.

**[2] FORM**

**Payment for Delivery of Specific Gifts**

If the beneficiary of any gift provided for in this will desires that all or any part of the property so given be delivered to him or her, my executor shall cause delivery to be made, and shall pay out of the residue of my estate all the costs and expenses of packing, shipping, insurance, and storage incidental to delivery that my executor shall deem reasonable, necessary, and appropriate.

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Estate, Gift & Trust Law Wills Bequests & Devises



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*23-63 California Legal Forms--Transaction Guide § 63.426*

**§ 63.426 Advancement--Deduction of Lifetime Transfers From Testamentary Gifts**

**[1] Comment**

**[a] Use of Form**

This form may be used to state whether or not transfers made to beneficiaries under the will during the testator's lifetime are to be deducted from the testamentary dispositions in favor of those beneficiaries. The form includes a general provision stating that no transfer made during the testator's lifetime will be considered as an advancement or ademption. It also contains two alternative provisions, one stating that specific gifts made in the will are not to be reduced by prospective lifetime transfers, and the other stating that specific gifts are to be reduced by any such transfers. For a provision stating whether lifetime gifts or transfers will adeem residuary bequests, see § 63.591.

**[b] Advancement**

Property given by a transferor during his or her lifetime to a person is treated as a satisfaction of an at-death transfer to that person, in whole or in part, only if one of the following conditions is satisfied:

- The instrument provides for deduction of the lifetime gift from the at-death transfer [*Prob. Code § 21135(a)(1)*].
- The transferor declares in a contemporaneous writing that the gift is in satisfaction of the at-death transfer or that its value is to be deducted from the value of that transfer [*Prob. Code § 21135(a)(2)*].
- The transferee acknowledges in writing that the gift is in satisfaction of the at-death transfer or that its value is to be deducted from the value of that transfer [*Prob. Code § 21135(a)(3)*].
- The property given is the same property that is the subject of a specific gift to that person [*Prob. Code § 21135(a)(4)*].

When a lifetime gift is to be treated as a partial satisfaction of a testamentary gift, a value must be assigned to it. If the value is expressed in a contemporaneous writing of the testator, or in an acknowledgment made by the devisee contemporaneously with the gift, that value is conclusive in the division and distribution of the estate [*Prob. Code* § 21135(c)]. If no value has been expressed in a contemporaneous writing of the testator or in an acknowledgment by the devisee, the property must be valued as of the time the devisee came into possession or enjoyment, or as of the time of the testator's death, whichever occurs first [*Prob. Code* § 21135(b)].

If the transferee fails to survive the transferor, the gift is treated as a full or partial satisfaction of the gift in applying *Prob. Code* §§ 21110 and 21111, unless the transferor's contemporaneous writing provides otherwise [*Prob. Code* § 21135(d)].

### **[c] Practical Considerations**

Except in unusual cases, it is better for the will to remain silent on the question of whether lifetime gifts are to be deducted from testamentary dispositions. A will provision dealing with this issue builds in unnecessary inflexibility by making it more difficult for the testator to deal with advancement or ademption on a case-by-case basis. If, for example, the will provides that lifetime gifts are *not* to be deducted from testamentary gifts, and the testator later decides to advance to one of the beneficiaries all or part of that beneficiary's inheritance, it will be necessary to prepare a codicil to the will to eliminate confusion. By the same token, if the will provides that lifetime gifts will be deducted from the beneficiary's share, the testator must go to the trouble of changing the will if he or she decides that a particular gift should not be deducted.

It is much easier, and simpler, if the will simply says nothing about advancement. Then, if the testator does decide that a particular gift should be an advancement on a beneficiary's inheritance, the testator can execute a declaration to that effect at the time the transfer is made, without any need to change the terms of the will.

### **[2] FORM**

#### **Advancement--Deduction of Lifetime Transfers From Testamentary Gifts**

*[If testamentary gifts are not to be reduced by the amount of any lifetime transfers:]*

Any gift or other transfer of any of my property that I have made or shall make during my lifetime to any beneficiary under this will shall not be deemed an ademption of any gift I have made to that person in this will, nor shall any such gift or transfer reduce or satisfy any gift I have made to that person in this will.

*[Or, if only particular testamentary gifts are not to be reduced by the amount of any lifetime transfers:]*

The \_\_\_\_\_ [gift or gifts] that I have made to \_\_\_\_\_ [name or names of beneficiaries] in Paragraph[s] \_\_\_\_\_ [number or numbers] of this will shall not be reduced by any lifetime gift or other transfer which I have made or shall hereafter make to \_\_\_\_\_ [him or her or them], nor shall any such lifetime gift or transfer reduce or satisfy any provision I have made for \_\_\_\_\_ [him or her or them] in this will, [unless the beneficiary acknowledges in writing that a lifetime gift or transfer is in whole or partial satisfaction of a gift that I have made in this will].

*[Or, if testamentary gifts are to be reduced by the amount of prospective inter vivos transfers:]*

The gift[s] that I have made to \_\_\_\_\_ [name(s) of devisee(s)] in Paragraph[s] \_\_\_\_\_

of this will shall be reduced by any lifetime gifts that I may hereafter make to \_\_\_\_\_ [him *or* her *or* them].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Estate Administration Advancements Estate, Gift & Trust Law Wills Bequests & Devises



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*23-63 California Legal Forms--Transaction Guide §§ 63.427-63.439*

**[Reserved]**

§§ 63.427[Reserved]



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*23-63 California Legal Forms--Transaction Guide § 63.440*

### **§ 63.440 Specific Devise of Real Property**

#### **[1] Comment**

##### **[a] Use of Form**

This form is a will provision that may be used to make a devise of real property. Since the subject of the devise is specifically identifiable property, the devise is a specific devise [*see Prob. Code § 21117(a)* ("specific gift" defined)]. For a discussion of specific devises, including rules relating to ademption and lapse of specific devises, see § 63.370[1]. For a general discussion of types or classifications of devises, see § 63.351[1][b].

For a will provision making a specific devise of personal property, see § 63.370. For a devise of real property to more than one person, see § 63.441. For a devise of a farm, see § 63.443. For a devise of a leasehold interest, see § 63.444. For a pecuniary devise to be paid out of the proceeds of the sale of real property, see § 63.445.

##### **[b] Real Property Subject to Encumbrance**

If the real property being devised is subject to a mortgage, deed of trust, or other lien existing at the date of death, the testator should consider whether the property should pass with or without the encumbrance. When a will makes a specific devise of property and, at the time of the testator's death, the property is subject to a mortgage, deed of trust, or other lien, the devisee has a right to the property subject to the lien, without right of exoneration. This is the case even when the will includes a general directive to pay the testator's debts [*Prob. Code § 21131*]. However, the testator may require exoneration by specific language in the will [*see Prob. Code § 21102(a)* (intention of testator controlling)]. For a devise of real property subject to an encumbrance, and more detailed discussion of the statutory rules governing exoneration of encumbrances, see § 63.442.

##### **[c] Survival and Lapse**

A specific devise of real property, like other testamentary gifts, may be conditioned on survival of the testator, or on

survival for a specified time after the testator's death. A devisee who does not survive the testator, or who does not survive until a future time required by the will, does not take under the will [*Prob. Code* § 21109(a); see *Prob. Code* § 21101 (rules applicable to wills, trusts, deeds, and other instruments)].

If the devisee is "kindred" of the testator, or of a surviving, deceased, or former spouse of the testator, the relationship should be stated, since this may determine whether the devise will lapse [see *Prob. Code* § 21110 ("anti-lapse statute")].

The will should also specify whether the devise will lapse if the devisee predeceases the testator or fails to survive the testator for a time specified in the will. For a clause providing that the issue of kindred devisees will not take any devise made to their ancestors, see § 63.654.

### **[d] Property Destroyed, Damaged, Altered, or Taken in Eminent Domain**

If specifically devised property is destroyed or damaged after the will is executed but before the testator's death, the devise is generally deemed (extinguished) [see *Prob. Code* §§ 21117(a) (specific gift as gift of specifically identifiable property), 21133 (specific devisee entitled to remaining property specifically given)]. If the testator does not wholly dispose of the property, however, but merely alters his or her interest in it, the specific devisee has the right to the testator's remaining interest in the property [*Prob. Code* § 21133.].

A recipient of an at-death transfer of a specific gift has a right to the specifically given property, to the extent the transferor owned the property at the time the gift takes effect in possession or enjoyment, and all of the following:

- Any balance of the purchase price (together with any security agreement) owing from a purchaser to the transferor at the time the gift takes effect by reason of a sale of the property [*Prob. Code* § 21133(a)].
- Any amount of an eminent domain award for the taking of property unpaid at the time the gift takes effect [*Prob. Code* § 21133(b)].
- Any proceeds unpaid at the time the gift takes effect on fire or casualty insurance on or other recovery for injury to the property [*Prob. Code* § 21133(c)].
- Property owned by the transferor at the time the gift takes effect and acquired as a result of foreclosure, or obtained in place of foreclosure, of the security interest for a specifically given obligation [*Prob. Code* § 21133(d)].

For a provision giving a specific devisee the proceeds of any insurance on specifically devised property, see § 63.420.

## **[2] FORM**

### **Specific Devise of Real Property**

I give to \_\_\_\_\_ [*name of devisee*] all of my interest in and to that certain real property situated in the [City of \_\_\_\_\_,] County of \_\_\_\_\_, State of \_\_\_\_\_, and commonly known as \_\_\_\_\_ [*description, e.g., 100 Broad Street, Small Town, California 94001*].

### **Legal Topics:**

For related research and practice materials, see the following legal topics:  
Estate, Gift & Trust Law Wills Bequests & Devises



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*23-63 California Legal Forms--Transaction Guide § 63.441*

**§ 63.441 Devise of Real Property to More Than One Person**

**[1] Comment**

**[a] Use of Form**

This form may be used to make a testamentary disposition of real property to two or more named beneficiaries. It includes an optional clause providing that if one or more of the beneficiaries fails to survive the testator, the share or shares that would have gone to the nonsurviving beneficiary will go to the survivor(s). This form may be modified to express any other intent of the testator.

For a specific devise of the testator's entire interest in real property to one person, and general discussion relevant to all testamentary gifts of real property, see § 63.440.

**[b] Form of Ownership**

Although the testator may provide that property devised to more than one devisee will vest in the devisees as joint owners, in many cases it will be preferable to allow the property to vest in the devisees as owners in common. A beneficiary who takes as an owner in common rather than as a joint owner has a descendible interest and one that may be the subject of the beneficiary's own testamentary disposition, while a beneficiary who takes as a joint owner does not.

**[c] Survival and Lapse of Gifts**

When a devise is made to two or more persons, it is good practice to specify what disposition will be made of the devise if one of the devisees does not survive the testator. A devisee who does not survive the testator, or who does not survive until a future time required by the will, cannot take under the will [*Prob. Code § 21109(a)*; see *Prob. Code § 21101* (rules applicable to wills, trusts, deeds, and other instruments)]. For a discussion of gifts conditioned on survival until a future time and a provision establishing such a condition, see § 63.411. The testator may provide that the equal interest

that would have gone to the beneficiary who did not survive the testator (or did not survive until a future time required by the will) will go to the nonsurviving beneficiary's issue or heirs. If the testator does not wish to name alternative beneficiaries, the will may identify the takers as a class [for a class gift, *see* § 63.551].

## [2] FORM

### Devise of Real Property to More Than One Person

I give all of my interest in and to that certain real property situated in the [City of \_\_\_\_\_ (*name of city*),] County of \_\_\_\_\_ [*name of county*], State of \_\_\_\_\_ [*name of state*], and commonly known as \_\_\_\_\_ [*description, e.g., 100 Broad Street, Smalltown, California 94001*] to \_\_\_\_\_ [*names of beneficiaries*], as tenants in common, in equal shares, share and share alike [*or, if interests are to be unequally distributed, specify fractional share that will go to each named individual, e.g., in the following proportions: one-sixth to \_\_\_\_\_ (name), two-sixths to \_\_\_\_\_ (name), and three-sixths to \_\_\_\_\_ (name)*]. If one or more of the above-named beneficiaries does not survive me, then I give the share that would have gone to that beneficiary had he or she survived me to the other surviving \_\_\_\_\_ [beneficiary *or* beneficiaries, in equal shares].

[Choose one of the following:]

If \_\_\_\_\_ [neither *or* none] of the beneficiaries named in this paragraph survives me, then this gift shall lapse and shall become part of the residue of my estate.

[OR]

If \_\_\_\_\_ [neither *or* none] of the beneficiaries named in this paragraph shall survive me, then this gift shall be divided into \_\_\_\_\_ [*specify number*] equal shares, one equal share to be set aside for each of the above-named beneficiaries. Each equal share shall be distributed on the principle of representation to those issue of the beneficiary for whom that share has been set aside who survive me. If one or more of the beneficiaries named in this paragraph should have no issue who survive me, then the share which would have gone to the nonsurviving beneficiary had he or she survived me shall be added equally to the remaining shares of those beneficiaries having issue who survive me. If \_\_\_\_\_ [neither *or* none] of the above beneficiaries have issue who survive me, this gift shall lapse and become part of the residue of my estate.

### Legal Topics:

For related research and practice materials, see the following legal topics:  
Estate, Gift & Trust Law Wills Bequests & Devises



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*23-63 California Legal Forms--Transaction Guide § 63.442*

**§ 63.442 Devise of Real Property--Exoneration of Encumbrance**

**[1] Comment**

**[a] Use of Form**

This form is a will provision that may be used to provide for the exoneration of encumbrances on real property devised in the will. For a specific devise of a testator's entire interest in real property and general discussion of testamentary gifts of real property, see § 63.440. For a provision requiring the discharge of encumbrances on real or personal property specifically devised, see § 63.419.

**[b] Exoneration of Encumbrances**

Unless the will provides otherwise [*see Prob. Code § 21102(a)* (intention of testator controlling)], when a will makes a specific devise of property and, at the time of the testator's death, the property is subject to a mortgage, deed of trust, or other lien, the devisee has a right to the property subject to the lien, without right of exoneration. This is the case even when the will includes a general directive to pay the testator's debts [*Prob. Code § 21131*].

When a testator devises real or personal property that is subject to a mortgage, deed of trust, or other lien, and the will requires that the property be exonerated from the lien, other specifically devised property will not be sold for the purpose of exonerating the encumbered property [*Prob. Code § 21404*] unless the will expressly requires such a sale [*see Prob. Code § 21400* (will may provide for abatement of gifts made by will)].

**[c] Liability for Debts, Expenses, Family Allowance, and Taxes**

Property subject to a specific devise will not abate for the purpose of paying expenses of administration, funeral expenses, expenses of the testator's last illness, or a family allowance if there is other property available for that purpose [*see Prob. Code § 21402(a)* (order of abatement of devises); *see also § 63.416[1]*]. If there are expenses of administration attributable to the devised property, however, those expenses must first be paid out of income on the

devised property, if any [*Prob. Code § 12002(b)*]. If a specific devise must be abated, the devisee may satisfy the contribution for abatement out of his or her other property [*Prob. Code § 21405(b)*]. For further discussion of rules relating to the abatement of specific devises, see § 63.419[1][c].

#### **[d] Testator's Intent**

Although a general directive in the will to pay the testator's debts will not suffice to require exoneration of encumbrances on specifically devised property [*Prob. Code § 21131*], the testator may specifically require that the property be exonerated. The general rules for interpretation of wills apply only when the intention of the testator is not otherwise indicated by the will [*see Prob. Code § 21102(a)* (intention of testator controlling)]. However, this provision does not limit the use of extrinsic evidence, to the extent otherwise authorized by law, to determine the testator's intention [*Prob. Code § 21102(c)*].

Before expressing an intention on the question of exoneration, the testator should determine the extent of the property interest that he or she intends to devise--in other words, whether the property will be free and clear of all encumbrances, or whether it will be a gift of the testator's equity in the devised property only. In the case of a residence or other parcel of real estate, the difference in value between these two interests may be substantial, and exoneration of the encumbrance may substantially deplete the remainder of the testator's estate. For a discussion of the abatement of testamentary gifts to pay debts and expenses of administration, see § 63.416[1].

#### **[2] FORM**

##### **Devise of Real Property--Exoneration of Encumbrance**

I give to \_\_\_\_\_ [*name of devisee*] all of my interest in and to that certain real property situated in the [City of \_\_\_\_\_,] County of \_\_\_\_\_, State of \_\_\_\_\_, and commonly known as \_\_\_\_\_ [*description, e.g., 100 Broad Street, Smalltown, California 94001*]. I direct my Executor to pay in full any and all encumbrances, including mortgages, deeds of trust, and other liens, that may at the time of my death be charges or liens against the property, or any part thereof. It is my intention that \_\_\_\_\_ [*name of devisee*] shall take the property free and clear of any such encumbrances.

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:  
Estate, Gift & Trust Law Wills Bequests & Devises



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*23-63 California Legal Forms--Transaction Guide § 63.443*

### § 63.443 Specific Devise of Farm

#### [1] Comment--Use of Form

This form may be used to devise a farm. For a general form for a specific devise of the testator's entire interest in real property, and general discussion relevant to all devises of real property, see § 63.440.

#### [2] FORM

##### Specific Devise of Farm

I give to \_\_\_\_\_ [*name of devisee*] that certain farm situated in the [City of \_\_\_\_\_,] County of \_\_\_\_\_, State of \_\_\_\_\_, and commonly known as \_\_\_\_\_ [*description, e.g., the Smith Ranch*], together with any other real estate I may own at the time of my death that is used as a part of the farming operation conducted on that farm, whether or not that other real estate is physically connected to or contiguous with the farm. This gift also includes all machinery, trucks, automobiles, farm animals, [bank accounts,] and other property used in connection with the operation of the farm, but does not include any of my personal automobiles or effects.

#### Legal Topics:

For related research and practice materials, see the following legal topics:  
Estate, Gift & Trust Law Wills Bequests & Devises



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*23-63 California Legal Forms--Transaction Guide § 63.444*

### **§ 63.444 Devise of Leasehold Interest**

#### **[1] Comment**

##### **[a] Use of Form**

This form may be used to devise of a leasehold interest in real property.

A leasehold interest in real property may be the subject of a testamentary disposition [ *Burns v. McGraw (1946) 75 Cal. App. 2d 481, 485, 171 P.2d 148* ]. Unless the lease specifically provides that the lessee's interest will terminate on his or her death, the lessee may transfer the leasehold interest by will, despite a clause prohibiting assignment without consent of the lessor [ *Burns v. McGraw (1946) 75 Cal. App. 2d 481, 488, 171 P.2d 148* ]. A lease is a form of contract, and contracts do not terminate on the death of the parties unless they contain specific provisions to that effect [ *Horning v. Ladd (1958) 157 Cal. App. 2d 806, 810, 321 P.2d 795* ]. Contracts will be construed, whenever possible, to avoid forfeiture, and the party claiming a forfeiture has the burden of proving the right to it [ *Horning v. Ladd (1958) 157 Cal. App. 2d 806, 810, 321 P.2d 795* ]. Provisions often found in leases to the effect that the terms and conditions of the lease "are binding on the parties, their heirs, executors, administrators, and assigns" will lend authority to any claim that a leasehold interest survives the death of the lessor and may be disposed of in the lessee's will [ *Burns v. McGraw (1946) 75 Cal. App. 2d 481, 487, 171 P.2d 148* ], though the devisability of a leasehold interest in every case depends on the terms of the lease.

##### **[b] Effect of Clause Prohibiting Assignment**

A clause prohibiting assignment does not automatically make an assignment void, but instead gives the lessor a right to pursue whatever remedies may be available on account of the breach [ *Sexton v. Nelson (1964) 228 Cal. App. 2d 248, 258, 39 Cal. Rptr. 407* ]. A prohibition of assignment is a personal covenant for the benefit of the lessor and, until the lessor asserts the breach and declares a forfeiture of the lease, the assignment is valid and binding on all other parties [ *Weisman v. Clark (1965) 232 Cal. App. 2d 764, 767, 43 Cal. Rptr. 108* ].

The lessor cannot accept inconsistent remedies. If the lessor protests the assignment but accepts rent, the provision against assignment is waived [ *Buchanan v. Banta* (1928) 204 Cal. 73, 76, 266 P. 547 ]. A lessor's refusal to accept the assignment and an assertion that the assignment is void does not terminate the lease or void the assignment unless the lessor also declares a forfeiture of the lease and demands possession of the premises [ *People v. Klopstock* (1944) 24 Cal. 2d 897, 901, 151 P.2d 641 ].

## [2] FORM

### Devise of Leasehold Interest

I give to \_\_\_\_\_[*name of devisee*] all of my right, title, and interest in and to the lease dated \_\_\_\_\_, in which \_\_\_\_\_[*name of lessor*] is named as lessor and I am named as lessee, and covering the premises located at \_\_\_\_\_[*description of leased premises, e.g., 100 Broad Street, Smalltown, California 94001*].

### Legal Topics:

For related research and practice materials, see the following legal topics:  
Estate, Gift & Trust Law Wills Bequests & Devises



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*23-63 California Legal Forms--Transaction Guide § 63.445*

**§ 63.445 Pecuniary Devise to Be Paid Out of Proceeds of Sale of Real Property**

**[1] Comment**

**[a] Use of Form**

This form is a will provision that may be used to make a gift of money (a pecuniary devise) [*see Prob. Code § 21118(b)* ("pecuniary gift" defined)] and to direct that the money be paid out of the proceeds of a sale of specific real property owned by the testator. For a general provision for a pecuniary devise, see § 63.351. For a general provision for a devise of real property, see § 63.440. For a general discussion of devises of real property, see § 63.440[1].

**[b] Pecuniary Devise to Be Paid From Proceeds of Sale**

If the will makes a pecuniary devise and directs that it be satisfied out of proceeds of the sale of specific real property owned by the testator, there is a question whether the testator intended the devise to be specific, and thus subject to ademption, or demonstrative, and not subject to ademption.

Under the Probate Code rules for interpretation of wills, a pecuniary devise is typically a "general" rather than a "specific" devise [*see Prob. Code § 21117* (classification of gifts made under wills, trusts, and other instruments)]. While a specific devise is subject to ademption if the specifically devised property is not in the testator's estate at the time of death [*see Prob. Code §§ 21117(a)* (specific gift as gift of specifically identifiable property), 21133 (specific devisee entitled to remaining property specifically given)], a general devise, which is payable from the general assets of the estate, is not [*see Prob. Code § 21117(b)* ("general gift" defined)]. The Probate Code defines a "demonstrative" gift as a "general" gift that specifies the fund or property from which it is "primarily" to be made [*Prob. Code § 21117(c)*]. If the specified fund or or property fails, in whole or in part, a demonstrative devise may be satisfied as other general devises are satisfied, out of the general assets of the estate [*see Prob. Code § 21403(b)* (demonstrative gift treated as general gift if satisfied out of property other than fund or property specified)].

**[c] Intention of Testator**

The Probate Code classifications, however, are rules of construction only. They apply only when the intention of the testator is not indicated by the will, and are subject to the fundamental rule that the intentions of the testator as expressed in the will control the legal effect of the dispositions made in the will [*Prob. Code § 21102(a), (b)*]. However, this provision does not limit the use of extrinsic evidence, to the extent otherwise authorized by law, to determine the testator's intention [*Prob. Code § 21102(c)*].

In determining the legal effect of any will provision, the courts are always guided by intent of the testator as expressed in the will, if that intent can be ascertained [ *Estate of Russell (1968) 69 Cal. 2d 200, 205, 70 Cal. Rptr. 561, 444 P.2d 353* ]. In one case, for example, the testator gave \$2,000 to each of his daughters and directed that the money be "raised" by the sale of a specific parcel of real property. The residue was left to the testator's wife. The court held that the devises to the daughters were specific and not demonstrative, explaining that when the proceeds of specific property are the subject of a devise, or when specific land is designated as the exclusive source for payment of a devise, the devise is specific [ *Estate of Sullivan (1954) 128 Cal. App. 2d 144, 147, 274 P.2d 946* ]. In another case, the testator gave the residue of the estate to a trust and directed that the trust be divided into two funds. Fund B was to be funded with a specific parcel of real property. The court held that this devise was specific and not residuary, explaining that if the testator's intent is to give a particular sum of money, not generally, but only from a specified and definitely ascertained source, the devise is specific [ *Estate of Loescher (1955) 133 Cal. App. 2d 589, 594, 284 P.2d 902* ]. If the source fails, so does the devise.

#### **[d] Will Provisions**

A careful will drafter will not rely on judicial interpretation to clarify an otherwise uncertain or ambiguous will provision, but will state the testator's intentions in unambiguous terms. This form offers two optional clauses, either of which may be added to the principal provision to specify the testator's intentions with respect to whether the pecuniary devise is to be specific or demonstrative. The first option states that if proceeds from the sale of the specific real property are insufficient to satisfy the pecuniary devise in full, there will be no resort to other assets of the estate to satisfy it. If this clause is used, the devise will be specific. The second option states that if proceeds of the sale of the specific property are insufficient to satisfy the pecuniary devise in full, other assets of the estate will be resorted to in order to satisfy the devise. If the second option is included, the devise will be demonstrative.

#### **[e] Sale Proceeds Treated as Personal Property**

Unless a contrary intention is indicated by the will, if a will directs the conversion of real property into money, the property and its proceeds are deemed personal property from the time of the testator's death [*Prob. Code § 21107*]. Under the principle of "equitable conversion," when the will directs that property be sold and converted into money, the law regards as done that which ought to be done, and the property is considered personal from the date of death, regardless of when the sale takes place [*see Estate of Gracey (1927) 200 Cal. 482, 490, 253 P. 921* ].

#### **[2] FORM**

##### **Pecuniary Devise to Be Paid Out of Proceeds of Sale of Real Property**

I give the sum of \_\_\_\_\_ [*specify amount*] to \_\_\_\_\_ [*name of devisee*], to be paid from the proceeds of the sale of my \_\_\_\_\_ [*describe property, e.g., apartment house or residence*] located at \_\_\_\_\_ [*street address, city, state*].

[*If devise is intended to be specific, add following:*]

This devise is intended to be specific, and in the event that the proceeds of the sale of my \_\_\_\_\_[

*describe property*] are insufficient to fully satisfy this devise, or if my \_\_\_\_\_ [*describe property*] is not in my estate at the time of my death, resort is not to be had to other assets of my estate to satisfy it.

[*Or, if devise is intended to be demonstrative, use following alternative:*]

This devise is intended to be demonstrative, and in the event that the proceeds of the sale of my \_\_\_\_\_ [*describe property*] are insufficient to fully satisfy this devise, or if my \_\_\_\_\_ [*describe property*] is not in my estate at the time of my death, I direct that resort shall be had to the general assets of my estate to satisfy it.

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Estate, Gift & Trust Law Wills Bequests & Devises



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5. Devises of Real Property

*23-63 California Legal Forms--Transaction Guide § 63.446*

### **§ 63.446 Option to Purchase Property**

#### **[1] Comment**

#### **[a] Use of Form**

This form is a will provision that may be used to give a named person an option to purchase property owned by the testator. For a specific devise of real property, see § 63.440. For a specific devise of a farm, see § 63.443. For a devise of a leasehold interest, see § 63.444. For a pecuniary devise to be paid out of the proceeds of the sale of real property, see § 63.445.

#### **[b] Options Given by Will**

#### **[i] In General**

An option to purchase property owned by a testator may be set forth in the testator's will. Options created by will are subject to rules set forth in the Probate Code [*see Prob. Code §§ 9885, 9980-9983*].

When a will gives any person an option to purchase real or personal property, the option may be exercised at any time within the limits provided by the will [*Prob. Code § 9980(a)*]. If a time limitation in the will is measured from the death of the testator, the time must be extended by the period between the testator's death and the issuance of letters, or by six months, whichever is the shorter period [*Prob. Code § 9980(a)*]. If the will does not provide a time limit for exercise of the option, the time limit is one year from the death of the decedent [*Prob. Code § 9980(b)*]. If, before the expiration of an option, property still subject to the option is distributed, it must be distributed subject to the option [*Prob. Code § 9980(c)*].

#### **[ii] Exercise of Option Given to Executor**

Although personal representatives [*see Prob. Code § 58(a)* ("personal representative" includes executor)] are generally

forbidden to purchase estate property for their own account [*see Prob. Code § 9880; see also Ch. 65, Executors, § 65.285[1]*], a personal representative may exercise an option given him or her by the will, providing the other requirements for exercise of options are satisfied [*Prob. Code § 9885*].

### **[iii] Court Order Directing Transfer or Conveyance**

If the rights of creditors are adequately protected [*see Prob. Code § 9982; see also § 63.446[1][b][iii]*] when an option to purchase property is given in a will admitted to probate, the court may direct the personal representative to transfer or convey the property to the person given the option on compliance with the terms and conditions stated in the will [*Prob. Code § 9981(a)*]. A petition for an order directing the transfer or conveyance may be filed by the executor or by the person given the option [*Prob. Code § 9881*].

### **[iv] Rights of Creditors**

Sale of property by exercise of an option is subject to the rights of creditors of the estate [*see Prob. Code §§ 9000 et seq.* (creditor claims), 11400-11467 (payment of debts)]. The court cannot make an order directing the executor to sell property pursuant to an option unless it (1) determines that the sale will not impair the rights of creditors [*Prob. Code § 9882(a)*] or (2) requires a bond [*Prob. Code § 9882(b)*].

## **[2] FORM**

### **Option to Purchase Property**

#### **Option**

I give \_\_\_\_\_ [*name*] of \_\_\_\_\_ [*place*] an option to purchase the following property: \_\_\_\_\_ [*describe property, e.g.: the 100-acre ranch owned by me in Mendocino County, California, and generally known as "Quicksilver Ranch," together with all improvements, fixtures, equipment, and animals located thereon*]. This option may be exercised by giving written notice to my Executor no later than \_\_\_\_\_ [*specify time, e.g.: 180 days after the date of my death*] of the intention to exercise the option. The total purchase price for all property subject to the option shall be \_\_\_\_\_ [*specify price and terms of payment, e.g.: \$200,000 in cash, all payable within 60 days of the date of exercise of the option*]. I authorize and direct my Executor to sell the property described in this paragraph to \_\_\_\_\_ [*name of optionee*] on the terms and conditions, and at the price, specified in this option.

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Wills Bequests & Devises Real Property Law Purchase & Sale Option Contracts General Overview



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*23-63 California Legal Forms--Transaction Guide §§ 63.447-63.459*

**[Reserved]**

§§ 63.447[Reserved]



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6. Devise of Business Property

*23-63 California Legal Forms--Transaction Guide § 63.460*

### **§ 63.460 Devise of Sole Proprietorship Business**

#### **[1] Comment**

#### **[a] Use of Form**

This form is a will provision that may be used to devise the assets of a business owned by the testator as a sole proprietor. The form includes an optional survivorship clause and an alternative disposition, to dispose of the business if the initial devisee does not survive the testator, or does not survive until a time specified in the devise. A devisee who does not survive the testator, or who does not survive until a future time required by the will, does not take under the will [*Prob. Code § 21109(a)*; see *Prob. Code § 21101* (rule applicable to wills, trusts, deeds, and other instruments)].

For a provision authorizing the executor to continue (or to sell) a business, see § 63.461. For a provision stating that expenses attributable to the business are to be paid by the business, see § 63.462. For a provision dividing a business and its assets between two or more persons, see § 63.463. For a devise of an interest in a partnership, see § 63.464. For a devise of stock in a closely held corporation, see § 63.465.

#### **[b] Nature and Characteristics of Sole Proprietorship Business**

A sole proprietorship is a form of business in which one person owns all of the assets and is liable for all of the debts. It differs from other types of business enterprises, such as corporations and partnerships, in that it has no independence of existence apart from that of the owner. A sole proprietorship typically depends in large measure on the personal knowledge, skills, and management of the owner, and when the owner dies what remains are the business assets, such as fixtures, inventory, customers lists, and, to the extent not dependent on the owner personally, the goodwill.

#### **[c] Continuation of Business after Owner's Death**

The owners of sole proprietorship businesses often wish to assure that the businesses will continue in some form after their retirement or death. When the client expresses such a wish, the attorney should ascertain if there is any person,

such as a trusted employee or manager, who would be willing and able to operate the business after the client's departure. If so, the attorney should also determine what incentives, if any, that person would have to continue in the business. The attorney may suggest that the person be given an equity interest in the business, or an opportunity to purchase such an interest. This may require that the business be reorganized into some other legal form, such as a partnership or corporation.

It is almost always better to plan for the continuation of a sole proprietorship business after the owner's death by reorganizing it during the owner's lifetime. If the client is unwilling to do this, however, and if the client insists on attempting to dispose of the business by will, the attorney should prepare a will provision devising the assets of the business to the intended beneficiaries.

A devise of business assets may be outright or in trust, and may be designed to transfer the assets to one or more than one devisee. In any case, the devise should clearly identify all assets that are to be included in the devise. If there are any assets used in or associated with the business that the testator does not wish to include in the devise (e.g., a patent owned by the testator but covering a product manufactured by the business), the devise should clearly state that the asset is not included.

Proper planning for the continuation of businesses owned by clients is complex and demanding. For a general discussion of business planning, see *California Wills and Trusts*, Ch. 29, *Devises of Business Interests* (Matthew Bender).

## [2] FORM

### Devise of Sole Proprietorship Business

I give all of my right, title, and interest in and to all of the assets of \_\_\_\_\_ [*describe business, e.g., the whole machine tool business owned and operated by me under the name and style of Williams Tool Works, with principal place of business at 1400 Ocean Boulevard, San Felipe, California,*] to \_\_\_\_\_ [*name of devisee(s) and relationship to testator or other means of identification, e.g., my son, John J. Williams, Jr.*] [*if desired, add survivorship clause, e.g., if he survives me or if he survives me for 60 days.*] [*If gift is conditioned on survival, add alternative disposition, e.g., If he does not survive me (for that period), this gift shall \_\_\_\_\_ (e.g., lapse and become part of the residue of my estate or go to my grandson John J. Williams, III).*] This gift shall include all of the inventory, stock-in-trade, equipment, machinery, supplies, accounts receivable, cash on hand, bank accounts and similar deposits, leases, good will, and other property (tangible or intangible) used in connection with the business at the time of my death. [*If testator wishes to include or exclude particular property, add appropriate language, e.g., This gift shall include United States Patent No. \_\_\_\_\_, relating to an improved process for the manufacture of die stamping machines, and all of my right, title, and interest in and to the Royalty Agreement executed on April 1, 1998, by and between me and Machine Processors Corporation, a California corporation, providing for the payment to me of royalties or use of that patent or However, this gift shall not include the oil portrait of me that is currently displayed in the office lobby of the business at 1400 Ocean Boulevard, San Felipe, California.*]

### Legal Topics:

For related research and practice materials, see the following legal topics:

Business & Corporate Law Sole Proprietorships Estate, Gift & Trust Law Wills Bequests & Devises



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*23-63 California Legal Forms--Transaction Guide § 63.461*

**§ 63.461 Authorization to Continue or to Sell Unincorporated Business**

**[1] Comment**

**[a] Use of Form**

This form may be used to authorize the executor to continue the operation of an unincorporated business belonging to the estate. It includes an optional provision authorizing the executor to sell or liquidate the business.

For a devise of a sole proprietorship business, see § 63.460. For a provision stating that expenses attributable to an unincorporated business are to be paid by the business, see § 63.462. For a provision dividing a business and its assets between two or more persons, see § 63.463. For a devise of an interest in a partnership, see § 63.464. For a devise of shares in a closely held corporation, see § 63.465.

**[b] Power to Continue Operation of Business**

**[i] In General**

The executor may continue to operate an unincorporated, non-partnership business owned by the estate, with or without court authorization, for a period of up to six months following his or her appointment, if it is to the advantage of the estate and in the best interest of the interested persons [*see Prob. Code § 48* (definition)] to do so [*Prob. Code § 9760(b)*; *see also Prob. Code § 9760(a)* (definition of "decedent's business" excludes partnership in which decedent was a partner)]. The executor may at any time request court authorization to continue operation of the business; however, he or she must do so not more than six months from the date of his or her appointment [*Prob. Code § 9760(b)*]. Any operation of the business by the executor beyond the six-month limitation requires a court order authorizing the continuation [*Prob. Code § 9760(b)*; *see discussion in § 63.461[1][b][iii]*].

Upon a noticed petition by the executor or any interested person, the court may authorize the executor to continue operation of an unincorporated, non-partnership business owned by the decedent or direct the executor to discontinue

operation of the business. The petition must show the advantage to the estate and the benefit to the interested persons of the order requested. The order may then be granted with any restrictions that the court determines to be in the best interests of the estate and those interested in it [*Prob. Code* § 9760(c), (d); *see Prob. Code* § 1220 (notice of hearing)].

### **[ii] Partnership Interests**

A partnership is an association formed by two or more persons to carry on a business as co-owners for profit [*see Corp. Code* § 16101(9); *Civ. Code* § 684]. In a partnership, the partners have no specific interest in partnership property but merely own an interest in the partnership business, with a right to participate in its profits, losses, and distributions [*Corp. Code* §§ 16203, 16401, 16502]. For additional discussion of the law applicable to partnerships, see *Ch. 60, Estate Planning*, § 60.12[7].

Estate planning for partnership interests is most effectively handled by drafting buy-sell agreements with specific terms providing either for the dissolution of the partnership business on the death of a partner or the continuation of the partnership business after a partner's death and the purchase of the deceased partner's interest in the business from the deceased partner's personal representative, devisees, or heirs.

Under the former version of the Uniform Partnership Act [former *Corp. Code* § 15001 *et seq.*, repealed effective January 1, 1999; *see Ch. 60, Estate Planning*, § 60.12[7]], if one of the partners died, the probate court could order the personal representative of the deceased partner to continue as a general partner in the partnership [*see Prob. Code* § 9762]. The probate court had discretion to specify the terms and conditions of that continuation [*Prob. Code* § 9762(a)]. If there was a written partnership agreement giving the personal representative the right to participate as a partner, the personal representative would have all of the rights, powers, duties, and obligations provided in it, except as otherwise ordered by the court [*Prob. Code* § 9762(b)]. If there was no such agreement, the court would specify the personal representative's rights, powers, duties and obligations [*Prob. Code* § 9762(c)].

Under the Uniform Partnership Act of 1994 (UPA '94) [*Corp. Code* § 16100 *et seq.*], which governs all partnerships regardless of when they were formed [*Corp. Code* § 16111(b); *see Ch. 60, Estate Planning*, § 60.12[7]], the court's authority to make such an order is not as clear. The UPA '94 specifically provides that the rights and duties of surviving partners and the legal representatives of deceased partners created by or defined in the Act "shall be given full force and effect notwithstanding any inconsistent provisions of the Probate Code" [*Corp. Code* § 16109]. But the UPA '94 also provides that nothing in it "shall otherwise affect any provision of the Probate Code" [*Corp. Code* § 16109]. The UPA '94 explicitly provides that a person may become a partner only with the consent of all of the partners [*Corp. Code* § 16401(i)]. A court order permitting the personal representative to act as a partner without the consent of all of the surviving partners would clearly seem to violate the rights of the surviving partners. If the surviving partners consent, there would seem to be no obstacle to such an order. If they do not consent, however, the validity of such an order is uncertain.

The death of a general partner does not cause immediate termination of the partnership business. Under the UPA '94, the partnership may continue after the death of a partner, subject to its obligation to purchase the interest of the deceased partner [*see Corp. Code* § 16701 and discussion in § 60.12[7][d]].

For more detailed discussion of the UPA '94, see *Ch. 15, Part A, Formation of General Partnerships*, § 1509 *et seq.*

### **[iii] Effect of Will Provision Authorizing Executor to Continue Business**

The executor may not continue the operation of an unincorporated, nonpartnership business owned by the estate for more than six months after letters are first issued unless a court order has been obtained authorizing the extended operation [*Prob. Code* § 9760(b)]. The prohibition against operation beyond six months without a court order recognizes that operation of a business by an executor may result in the loss of estate assets if the business proves to be

unprofitable [*Recommendations Relating to Probate Law*, 19 Cal. L. Rev. Comm'n Reports 72 (1988)].

Although some earlier cases stated that the executor could operate a business owned by the decedent for an indefinite period without a court order if the will authorized the executor to operate the business [ *Estate of Ward (1932)* 127 Cal. App. 347, 353-354, 15 P.2d 901 ; see *Estate of Burke (1926)* 198 Cal. 163, 166, 244 P. 340 (discussing personal liability of executor)], *Prob. Code* § 9760(b) explicitly requires a court order for any operation beyond six months, and does not authorize the testator to waive the requirement. As a practical matter, it is unlikely that a prudent executor would continue the operation of a testator's business beyond six months without court authorization, whether or not the will authorized the executor to operate the business.

Nevertheless, a will provision authorizing operation may serve a useful purpose. By clearly stating the testator's wishes in the matter, it will help to strengthen any petition the testator may file for authority to operate the business beyond six months.

## [2] FORM

### Authorization to Continue or to Sell Unincorporated Business

I authorize my Executor to continue the operation of \_\_\_\_\_ [any business belonging to my estate *or* the business referred to in Paragraph \_\_\_\_\_ of this will] for such time and in such place and manner as my Executor shall deem to be in the best interests of my estate and the persons interested in it. Any operation pursuant to this paragraph, in good faith, shall be at the risk of my estate and without liability on the part of my Executor for any losses resulting therefrom.

[*Optional provision authorizing sale:*]

I further authorize my Executor to sell or liquidate \_\_\_\_\_ [any business belonging to my estate *or* the business referred to in Paragraph \_\_\_\_\_ of this will] if my Executor shall deem sale or liquidation to be in the best interests of my estate and the persons interested in it. Any sale or liquidation made in good faith pursuant to this paragraph shall be at the risk of my estate and without liability on the part of my Executor for any losses resulting therefrom.

### Legal Topics:

For related research and practice materials, see the following legal topics:

Business & Corporate Law  
Sole Proprietorships  
Business & Corporate Law  
Unincorporated Associations  
Estate, Gift & Trust Law  
Wills  
Bequests & Devises



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*23-63 California Legal Forms--Transaction Guide § 63.462*

**§ 63.462 Provision Requiring That Expenses Attributable to Business Be Paid by Business**

**[1] Comment**

**[a] Use of Form**

This form is a will provision that may be used to require that expenses attributable to the operation of an unincorporated, nonpartnership business owned by the testator be paid out of the income of the business and not out of other assets of the testator's estate. The provision should be included in the will when the testator is authorized to continue to operate a sole proprietorship business owned by the testator [*see § 63.461*] and it is contemplated that the business will collect its own receivables and pay its own debts.

**[b] Expenses of Operating a Business**

The effect of a will provision requiring that the expenses of operating a sole proprietorship business owned by the testator be paid out of the income of the business will depend on how long the business is operated and the terms of the court order, if any, under which the business is operated.

If it is to the advantage of the estate and in the best interest of the interested persons, the executor may, without court authorization, operate an unincorporated, nonpartnership business owned by the decedent for up to six months from the date letters are first issued [*Prob. Code § 9760(b)*; *see Prob. Code § 48* ("interested person" defined); *see also § 63.461[1]*]. Any operation for longer than six months requires a court order [*Prob. Code § 9760(b)*]. If the court orders continued operation, it may do so subject to any restrictions it determines to be for the advantage of the estate and in the best interests of the interested persons [*Prob. Code § 9760(d)(1)*]. If the court determines that paying the expenses of the business only out of the income of the business would be to the advantage of the estate and in the best interests of the interested persons, it may order the executor to operate the business on that basis. If the court determines that the income of the business is inadequate for that purpose, it may order that the business be discontinued [*see Prob. Code § 9760(d)(2)*].

While a will provision requiring that the expenses of operating a business owned by the testator be paid out of the income of the business will not be binding on the court, it will provide a guideline to the executor and the court by clarifying the testator's intentions. Such a provision, considered with other facts relating to the financial condition of the estate and the interests of the devisees, may help the court determine whether the business should be continued and, if so, on what conditions [*see Prob. Code § 21102(a)* (intention of transferor as expressed in instrument controls legal effect of dispositions made in instrument)].

The expenses of a business must be paid even if the income of the business is not adequate to pay them [*see Prob. Code §§ 11401* ("debt" includes claim payable in course of administration), *11420(a)*(order of priority for payment of debts)]. In such a case, other assets of the estate will be subject to abatement (reduction or even elimination) [*see Prob. Code §§ 21400-21406* (rules for abatement)]. For a general discussion of abatement, see Ch. 61, *Will Drafting and Complete Will Forms* ; see also § 63.416[1][b].

### [c] Taxes

Income taxes and property taxes attributable to the operation of a business are ordinarily considered expenses of the operation of the business, while estate and other death taxes are not [*see Prob. Code § 12002(b)* (for purposes of paying income and interest on specific devise, expenses include property tax and tax on income from property but exclude estate and generation-skipping transfer taxes)]. Under rules set forth in the Probate Code [*see Prob. Code §§ 20100-20125*], estate taxes must be equitably prorated among the persons interested in the estate [*Prob. Code § 20110(a)*]. The statutory rules do not apply, however, if the will directs that particular property be applied to the satisfaction of a tax or that a tax be prorated in a different manner [*Prob. Code § 20110(b)(1)*].

This form defines "expenses" to include property and income taxes but to exclude estate and other death taxes. If this definition is included in the will, death and other estate taxes attributable to the assets of the business will be prorated according to other will provisions for proration or, if there are no other provisions, according to the proration rules set forth in the Probate Code. If the testator wishes estate or other death taxes attributable to the assets of a business to be paid out of the business assets only, this definition should be modified accordingly. For a general discussion of the proration of estate taxes, see § 63.310[1].

### [2] FORM

#### **Provision Requiring That Expenses Attributable to Business Be Paid by Business**

All of the expenses attributable to the operation by my Executor of \_\_\_\_\_ [any business belonging to my estate *or* the business referred to in Paragraph \_\_\_\_ of this will] shall be paid first out of the ordinary business operating income of that business, and second out of the proceeds of loans or sales of the assets of that business. None of those expenses shall be paid out of other assets of my estate. It is my intention that the business shall continue without interruption on account of my death and that its operation shall not disrupt the beneficial enjoyment by any devisees of any of the assets of my estate. As used in this paragraph, the word "expenses" includes debts and taxes attributable to \_\_\_\_\_ [any business belonging to my estate *or* the business referred to in Paragraph \_\_\_\_ of this will], and the word "taxes" includes income taxes, property taxes, and any other taxes imposed as a consequence of the conduct of the business, but excludes estate, inheritance, and other death taxes.

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:  
Estate, Gift & Trust Law Wills Bequests & Devises



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*23-63 California Legal Forms--Transaction Guide § 63.463*

**§ 63.463 Provision Dividing Business and Its Assets Between Two or More Persons**

**[1] Comment--Use of Form**

This form may be used to divide a business owned by the testator between two or more persons. In some instances, it may be desirable for family or tax reasons to separate the income operation of a family business from the ownership of certain of its assets in such a way that specified family members will receive rent from tangible business assets and other members will receive income from the operation of the business.

The description of the business contained in this form and the enumeration of the things it comprises are taken largely from *Haldeman v. Haldeman (1962) 202 Cal. App. 2d 498, 21 Cal. Rptr. 75*. Although that case involved a marital dissolution rather than a will, the court's view and definition of the business was largely drawn from will and probate situations.

Wills and trusts that contain detailed instructions and restrictions that have become obsolete, impracticable, or unworkable at the time of probate are frequently interpreted away by strained construction or are ignored and in effect repealed by necessity. It is preferable that the will itself contain provisions for adaptation to necessity and changing circumstances. If the overall intent of the testator is reasonable and clear, the court is more likely to follow that intent than to enforce narrow and detailed instructions and restrictions set forth in the will.

**[2] FORM**

**Provision Dividing Business and Its Assets Between Two or More Persons**

(a) The assets of my \_\_\_\_\_ [*descriptive word or phrase, e.g., retail or manufacturing or restaurant*] business \_\_\_\_\_ [*located at or the principal office of which is located at*] \_\_\_\_\_ [*street address, city, state, zip*], hereinafter referred to as the "family business," shall be allocated among my family members as follows:

(1) To \_\_\_\_\_ [*name of beneficiary*], I give all real property used with or in connection with the family business, including, but not limited to \_\_\_\_\_ [*description of real property being given, e.g., all that certain real property situated in the (City of \_\_\_\_\_ [*name of city*],) County of \_\_\_\_\_ (*name of county*), State of \_\_\_\_\_ (*name of state*), and commonly known as \_\_\_\_\_ (*description, e.g., 100 Broad Street, Small Town, California 94001*)], together with all improvements thereon, \_\_\_\_\_ [excepting *or* including] the fixtures and machinery affixed thereto, together with insurance thereon and the proceeds, if any, from that insurance, if there is a claim against that insurance at the time of my death.*

(2) To \_\_\_\_\_ [*name of beneficiary*], I give all tangible and intangible personal property used with or in connection with the family business including, but not limited to, inventory, stock in trade, cash on hand, bank accounts, accounts receivable, and good will, together with business insurance and loss of business insurance thereon, and the proceeds, if any, from that insurance, if there is a claim against it at the time of my death; but I specifically exclude from this gift all real property used with or in connection with the family business.

(b) I wish, but do not direct, that \_\_\_\_\_ [*name of beneficiary receiving business*] continue to operate the family business and that \_\_\_\_\_ [he or she] pay a fair rental to \_\_\_\_\_ [*name of beneficiary receiving business real property*] for use in connection with the operation of the business of the real property given to \_\_\_\_\_ [*name of beneficiary receiving business real property*].

(c) Notwithstanding any other provision of this will directing the payment or apportionment of debts or costs, and notwithstanding any other direction or expressed wish concerning the conduct of business, the payment of taxes, the property or fund out of which any charge shall be paid, the executor, trustee, donee, or other person charged with that payment, charge, or allocation may and is hereby directed to depart from that payment, allocation, plan, or scheme if it appears on reflection and from the circumstances then existing that such a departure is in the best interests of the beneficiaries of this will.

### **Legal Topics:**

For related research and practice materials, see the following legal topics:  
Estate, Gift & Trust Law Wills Bequests & Devises



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DIVISION IV: WILLS AND TRUSTS

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*23-63 California Legal Forms--Transaction Guide § 63.464*

**§ 63.464 Gift of Interest in Partnership**

**[1] Comment**

**[a] Use of Form**

This form is a will provision that may be used to make a testamentary disposition of an interest in a partnership in which the testator is a partner. It includes an optional provision giving the proceeds of the sale of the testator's partnership interest if it is purchased by the other partners pursuant to the terms of a buy-sell agreement.

For a gift of a sole proprietorship business, see § 63.460. For authorization to continue (or sell) a business, see § 63.461. For a provision requiring that debts, expenses, and taxes attributable to a business be paid by the business, see § 63.462. For a provision dividing a business and its assets between two or more persons, see § 63.463. For a gift of shares in a closely held corporation, see § 63.465.

**[b] Death of General Partner**

**[i] Partnership Agreement**

The effect of the death of a person who was a partner in a general partnership depends first of all on whether there is a partnership agreement that specifies what will happen after the death. Partnership agreements commonly include buy-sell agreements that either call for the dissolution of the partnership business upon the death of one of the partners or provide for the purchase of the deceased partner's interest in the partnership from the deceased partner's personal representative, heirs, or devisees. When there is a buy-sell agreement, its provisions ordinarily will control [*see discussion in § 60.12[7][d]*].

**[ii] Dissolution and Purchase of Deceased Partner's Interest**

Under the former version of the Uniform Partnership Act [*former Corp. Code § 15001 et seq.*, repealed effective

January 1, 1999; *see Ch. 60, Estate Planning, § 60.12[7]*], a general partnership was dissolved by the death of a partner, unless there was a written agreement of the partners providing otherwise, or unless the probate court ordered the personal representative to continue as a partner [former *Corp. Code § 15031(4)*, repealed Jan. 1, 1999; *see Prob. Code § 9762*]. The probate court could make such an order only on a showing that it would be to the advantage of the estate and in the best interest of the interested persons [*Prob. Code § 9762(a)*; *see § 63.461[1][b][ii]*].

### **[iii] Dissociation and Purchase of Deceased Partner's Interest**

Under the Uniform Partnership Act of 1994 (UPA '94) [*Corp. Code § 16100 et seq.*], which now governs all partnerships regardless of when they were formed [*Corp. Code § 16111(b)*; *see Ch. 60, Estate Planning, § 60.12[7]*], the death of a partner does not cause the dissolution of the partnership, but merely "dissociates" the deceased partner from it [*Corp. Code § 16601(7)(A)*]. The surviving partners have the right to continue the partnership business, but the partnership has an obligation to buy out the deceased partner's interest [*Corp. Code § 16701(a)*]. The buyout price is the amount that would have been distributable to the deceased partner if, on the date of the deceased partner's death, the assets of the partnership were sold at the greater of their liquidation value or the value of the entire business as a going concern without the deceased partner and the partnership was wound up as of that date [*Corp. Code § 16701(b)*].

The UPA '94 contemplates that the surviving partners and the deceased partner's personal representative will seek to reach an agreement on a definite price for the deceased partner's interest [*see Corp. Code § 16701(e)*]. If they do not do so within 120 days after a written demand for payment, however, the partnership must make a cash payment of the amount it estimates to be the buyout price, plus accrued interest and reduced by any offsets [*Corp. Code § 16701(e)*]. The payment or tender must be accompanied by a statement of partnership assets and liabilities as of the date of the deceased partner's death, the latest available partnership balance sheet and income statement, an explanation of how the estimated amount of the payment was calculated, and a written notice that the payment is in full satisfaction of the obligation to purchase unless, within 120 days, the deceased partner's personal representative commences an action to determine the buyout price [*Corp. Code § 16701(g)*]. Any such action must be commenced within the 120 days, or within one year after written demand for payment if no payment or offer to pay is tendered [*Corp. Code § 16701(i)*]. In the action, the court may determine the buyout price, any offsets that the partnership is entitled to, and accrued interest that the deceased partner's personal representative is entitled to, and enter judgment for any additional payment or refund [*Corp. Code § 16701(i)*].

However, the UPA '94 makes it clear that the partnership has no obligation to buy out the deceased partner's interest in the partnership if the partnership is dissolved and its business is wound up within 90 days after the deceased partner's death [*Corp. Code § 16701.5*]. In that event, the partnership's assets and liabilities will be distributed as in the case of any other windup and dissolution of a partnership business [*see Corp. Code § 16801*].

### **[iv] Consent of Surviving Partners**

As a practical matter, a testamentary disposition of an interest in a general partnership will be effective only if the surviving partners consent to accept the devisee or devisees into the partnership. The UPA '94 clearly provides that a person may become a partner only with the consent of all of the partners [*Corp. Code § 16401(i)*]. If the surviving partners do not consent, a devisee cannot become a partner, even if the deceased partner's will devisees the partnership interest to a designated person or persons. For this reason, the testator should devise a general partnership interest only if he or she is sure that the surviving partner(s) will consent to accept the devisee as a partner. The testator can be certain that this consent will be forthcoming only if there is an agreement obligating the surviving partner or partners to consent.

A buy-sell agreement obligating the partnership or the surviving partners to purchase the interest of the deceased partner is more typical. Such an agreement typically will specify the price and the terms of sale, and provide for financing the purchase price through insurance on the life of the deceased partner. When there is an agreement of this kind, the

alternative provision of this form devising the proceeds of the sale of the testator's partnership interest will make much more sense. As in all matters relating to estate planning for a general partnership, a well-drafted partnership agreement is essential. For further discussion, see § 60.12[7][e] and Ch. 15, *General Partnerships*. For more detailed discussion of buy-sell agreements in general, see Ch. 8D, *Buy-Sell Agreements*.

### **[c] Limited Partnership Interests**

Under the California Revised Limited Partnership Act [*Corp. Code* §§ 15611-15723 (repealed January 1, 2010)], if a limited partner who is an individual dies, the limited partner's executor or administrator may exercise all the partner's rights for the purpose of settling the partner's estate or administering the partner's property [*Corp. Code* § 15675; see *Prob. Code* § 9763(b)]. If a partner had a power to assign his or her partnership interest, the legal representative may exercise that power [Ballantine & Sterling, California Corporation Laws, Ch. 25, *Limited Partnerships*, § 721.06 (Matthew Bender 4th ed.)].

A limited partnership interest is assignable in whole or in part, except as otherwise provided in the partnership agreement. The assignment entitles the assignee to receive, to the extent assigned, only the distributions and the allocations of income, gain, loss, credit, or similar items to which the assignor would be entitled [*Corp. Code* § 15672]. Unless the assignment states otherwise, the assignee of an interest in a limited partnership interest with more than 100 limited partners will be entitled to the rights of inspection granted in *Corp. Code* § 15634 [*Corp. Code* § 15672].

An assignee of a limited partnership interest may become a limited partner if and to the extent that the partnership agreement provides or all the general partners and a majority in interest of the limited partners consent [*Corp. Code* § 15674(a)]. The assigning limited partner retains his or her status as such until the assignee becomes a limited partner under those conditions [*Corp. Code* § 15672]. On attaining limited partner status, the assignee has, to the extent assigned, the rights and powers and is subject to the restrictions and liabilities under the partnership agreement and the California Revised Limited Partnership Act [*Corp. Code* § 15674(b); see *Corp. Code* §§ 15611-15723]. For discussion of the California Revised Limited Partnership Act and its predecessor, the California Uniform Limited Partnership Act, see Ballantine & Sterling, California Corporation Laws, Ch. 25, *Limited Partnerships*, Part B, (Matthew Bender 4th ed.).

Under the Uniform Limited Partnership Act of 2008 [*Corp. Code* §§ 15900-15912.07; see *Corp. Code* §§ 15912.04, 15912.06 (operative date and limited application of former limited partnership acts prior to January 1, 2010)], if a partner dies, the deceased partner's personal representative or other legal representative may exercise the rights of a transferee as provided in *Corp. Code* § 15907.02. For the purposes of settling the estate, the representative may exercise the rights of a current limited partner under *Corp. Code* § 15903.04 [*Corp. Code* § 15907.04].

The only interest of a partner that is transferable under the ULPA '08 is the partner's transferable interest. That interest is personal property [*Corp. Code* § 15907.01]. "Transferable interest" is defined as a partner's right to receive distributions [*Corp. Code* § 15901.02(a-k)]. A transferee has a right to receive, in accordance with the transfer, distributions to which the transferor would otherwise be entitled [*Corp. Code* § 15907.02(b)]. A transferee of a partnership interest, including a transferee of a general partner, may become a limited partner if and to the extent that (1) the partnership agreement provides, or (2) all general partners and a majority in interest of the limited partners consent [*Corp. Code* § 15907.02(h)].

For further discussion of the Uniform Limited Partnership Act of 2008, see Ballantine & Sterling, California Corporation Laws, Ch. 25, *Limited Partnerships*, Part C, § 747.

### **[d] Partnership Agreements Controlling**

Before drafting any will provision specifically relating to a partnership interest, whether that interest is in a general or a

limited partnership, the attorney should determine what provisions the partnership agreement has made for the death of one of the partners, whether the agreement includes a buy-out provision, and the extent, if any, to which the partnership agreement will permit the partnership interest to be transferred by will.

## [2] FORM

### Gift of Interest in Partnership

I give to \_\_\_\_\_ [name of beneficiary] my partnership interest as \_\_\_\_\_ [general or limited] partner in the \_\_\_\_\_ [general or limited] partnership known as \_\_\_\_\_ [name of partnership], created by the partnership agreement entitled \_\_\_\_\_ [title of partnership agreement], dated \_\_\_\_\_ [month, day, year]. In the event that I am the sole owner of the business carried on by the partnership at the time of my death, this gift shall consist of all of the assets of the business, both real and personal, tangible and intangible.

[Add if partnership is subject to buy-sell agreement:]

This gift is subject to an option by the surviving members in the partnership to purchase my interest in the partnership in the event of my death. In the event that the surviving partners, if any, elect to exercise their option to purchase my interest in the partnership, this gift shall include the proceeds of any such sale.

### Legal Topics:

For related research and practice materials, see the following legal topics:

Business & Corporate Law  
 General Partnerships  
 General Overview  
 Business & Corporate Law  
 Limited Partnerships  
 General Overview  
 Estate, Gift & Trust Law  
 Wills  
 Bequests & Devises



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*23-63 California Legal Forms--Transaction Guide § 63.465*

**§ 63.465 Gift of Shares in Closely Held Corporation**

**[1] Comment**

**[a] Use of Form**

This form may be used to make a testamentary gift of shares held by the testator in a closely held corporation. It includes an optional provision giving the proceeds of the sale of the testator's shares in the corporation if they are purchased by the other shareholders or by the corporation pursuant to the terms of a buy-sell agreement.

For a gift of a sole proprietorship business, see § 63.460. For authorization to continue (or sell) a business, see § 63.461. For a provision requiring that debts, expenses, and taxes attributable to a business be paid by the business, see § 63.462. For a provision dividing a business and its assets between two or more persons, see § 63.463. For a gift of an interest in a partnership, see § 63.464.

**[b] Close and Closely Held Corporations; Buy-Sell Agreements**

A "close corporation" is a corporation whose articles contain, in addition to the general provisions required by *Corp. Code* § 202, a provision that all of the corporation's issued shares of all classes shall be held of record by not more than a specified number of persons, not exceeding 35, and the statement, "This corporation is a close corporation" [*Corp. Code* § 158(a)]. The shareholders of close or closely held corporations frequently enter into buy-sell agreements that prevent shares of the corporations from being freely transferable and that prevent possibly hostile or incompatible "outsiders" from becoming shareholders. For discussion, and forms for buy-sell agreements in close and closely held corporations, see Ch. 8D, *Buy-Sell Agreements*. If the testator's shares are subject to such an agreement, the optional provision contained in this form should be included in the gift.

A gift of shares in a closely held corporation is a specific gift if it appears from the will or from extrinsic evidence that the testator intended to transfer specific shares and no others [ *Estate of Buck (1948)* 32 Cal. 2d 372, 375, 196 P.2d 769 ].

**[2] FORM****Gift of Shares in Closely Held Corporation**

I give to \_\_\_\_\_ [*name of beneficiary*] all of the shares in \_\_\_\_\_ [*name of corporation*], or its successors, held by me at the date of my death.

[*Add, if shares subject to buy-sell agreement*]

This gift is subject to an agreement among the shareholders [and the corporation] set forth in \_\_\_\_\_ [*if by separate agreement, set forth title, date of execution, and names of parties to agreement; if in bylaws, set forth specific reference to provision in bylaws containing agreement*] providing that the remaining shareholders [and the corporation] have the option [*or are required*] to purchase all of the shares of a deceased shareholder of the corporation. In the event that the surviving shareholders [or the corporation] elect to exercise their option to purchase my shares, this gift shall include the proceeds of any such sale.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Business & Corporate Law Closely Held Corporations General Overview Estate, Gift & Trust Law Wills Bequests & Devises



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*23-63 California Legal Forms--Transaction Guide §§ 63.466-63.479*

**[Reserved]**

§§ 63.466[Reserved]



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7. Gifts of Tangible Personal Property

*23-63 California Legal Forms--Transaction Guide § 63.480***§ 63.480 Gift of Personal Property to Spouse****[1] Comment****[a] Use of Form**

This form may be used to give tangible personal property to the testator's spouse. For a gift of tangible personal property with a precatory request for distribution to other beneficiaries, see § 63.481. For a gift of jewelry to one beneficiary, see § 63.482. For a gift of jewelry to more than one beneficiary, see § 63.483. For a gift of inherited personal property, see § 63.484.

**[b] Gifts of Personal Property to Spouse**

When a will includes a testamentary trust for the benefit of the testator's family, it is usual to provide for a direct gift of tangible personal property to the surviving spouse or children so that the personal property is not given to the trustee. Such property is usually cumbersome for the trustee to receive and distribute. If the will does not contain a trust, the property disposed of by this form will be included in the residue.

In the case of a testamentary trust, it is unlikely that a dispute will arise as to the description of the personal property given to the surviving spouse or children since the trustee is not interested in acquiring the property and since the trust is for the benefit of the same persons who are the beneficiaries under this clause. However, when the residuary beneficiary and the beneficiary named in a gift of personal property are different persons, particular attention should be given to the description of the personal property in order to minimize or eliminate the possibility of dispute. In this form, use of the words "other tangible articles of a personal nature" is intended to exclude money, choses in action, securities, banks accounts, and other intangible personal property.

**[c] Survival and Lapse**

A gift of personal property, like any other testamentary gift, may be conditioned on survival for a specified period [

*Prob. Code § 21109(a)*]. For a discussion of gifts conditioned on survival until a future time, see § 63.411[1]. For a discussion of simultaneous death and provisions stating the order of death in the event of a common disaster, see § 63.630.

**[2] FORM**

**Gift of Personal Property to Spouse**

I give all my jewelry, clothing, household furniture and furnishings, personal automobiles, personal effects, mementoes, works of art, and other tangible articles of a personal nature, or my interest in any such property, not otherwise specifically disposed of by this will or in any other manner, together with any insurance thereon, to \_\_\_\_\_[*name of spouse*].

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Estate, Gift & Trust Law Wills Bequests & Devises



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7. Gifts of Tangible Personal Property

*23-63 California Legal Forms--Transaction Guide § 63.481*

**§ 63.481 Gift of Tangible Personal Property With Precatory Request for Distribution to Other Beneficiaries**

**[1] Comment**

**[a] Use of Form**

This form may be used to give tangible items of personal property to a named beneficiary and to couple the gift with a precatory request that the beneficiary distribute those items to other beneficiaries. For a gift of personal property to the testator's spouse, see § 63.480. For a gift of jewelry to one beneficiary, see § 63.482. For a gift of jewelry to more than one beneficiary, see § 63.483. For a gift of inherited personal property, see § 63.484.

**[b] Gift of Tangible Personal Property for Distribution to Others**

When a testator wishes to give various items of tangible personal property to a number of beneficiaries, an alternative to specifically listing all the gifts in the will is to give the property to a trusted friend or relative with a general precatory request that the friend or relative distribute the items to others after the testator's death in accordance with the testator's expressed intentions. The advantage of this approach is that it avoids the necessity of listing all the beneficiaries in the will, thereby making it easier to keep the identity of the recipients of specific items of property confidential. This privacy may be desirable in some situations. Conversely, however, this approach obviously gives a great deal of discretion to the person empowered with distributing the property. The testator has no absolute assurance that the property will actually be given to the testator's intended recipient; thus, it is imperative that this provision be used only when the testator has absolute trust in the individual who is given the power to distribute the property. Moreover, the person empowered to distributed the property may be subjected to pressure from would-be beneficiaries. For these reasons, among others, it is unusual to use this type of provision in a will.

**[c] Precatory or Mandatory Provisions**

"Precatory" words express a hope, wish, desire, recommendation, or suggestion [ *Estate of Sloan (1935) 7 Cal. App. 2d 319, 341, 46 P.2d 1007* ]. When included in a will, they do not have the effect of a command or a charge and are not

legally enforceable [ *Estate of Kearns (1950) 36 Cal. 2d 531, 536, 225 P.2d 218* ]. "Mandatory" words import a direction or obligation and, when included in a will, impose an enforceable legal obligation [ *Estate of Burris (1961) 190 Cal. App. 2d 582, 588-589, 12 Cal. Rptr. 298* ].

Since precatory requests may cause unintended results or bring about significantly unfavorable tax consequences, they should be used with caution and only after a careful assessment of their comparative advantages and disadvantages. For a discussion of precatory requests and the dangers they present, see the discussion in § 63.412[1][b].

## [2] FORM

### **Gift of Tangible Personal Property With Precatory Request for Distribution to Other Beneficiaries**

I give all my tangible personal property, specifically exempting any securities, choses in action, money, bank accounts, promissory notes, debentures, shares of stock, and other intangibles, together with any insurance on any such property, to \_\_\_\_\_[*name of beneficiary*]. This gift is unconditional, but it is my wish that \_\_\_\_\_[*name of beneficiary*] distribute certain items of the property given hereunder to certain persons in the manner in which I may from time to time suggest, or in such a manner as \_\_\_\_\_[*name of beneficiary*] may believe I would wish the property to be distributed. The wish expressed in this paragraph is precatory only, and not mandatory.

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:  
Estate, Gift & Trust Law Wills Bequests & Devises



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7. Gifts of Tangible Personal Property

*23-63 California Legal Forms--Transaction Guide § 63.482*

**§ 63.482 Gift of Jewelry to One Beneficiary**

**[1] Comment**

**[a] Use of Form**

This form may be used to make a gift of jewelry to one beneficiary. For a gift of jewelry to more than one beneficiary, see § 63.483. For a gift of personal property to the testator's spouse, see § 63.480. For a gift of tangible personal property with a precatory request for distribution to other beneficiaries, see § 63.481. For a gift of inherited personal property, see § 63.484.

**[b] Gifts of Jewelry**

Many testators wish to make specific gifts of items of jewelry, either because of the sentimental value attached to the items or because their sale by the executor frequently results in a cash price substantially less than the purchase price or appraised value. This form will accomplish that purpose.

**[2] FORM**

**Gift of Jewelry to One Beneficiary**

I give all of the jewelry I own at the time of my death, together with any insurance on the same, to \_\_\_\_\_[*name of beneficiary*].

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Estate, Gift & Trust Law Wills Bequests & Devises



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*23-63 California Legal Forms--Transaction Guide § 63.483*

**§ 63.483 Gift of Jewelry to More Than One Beneficiary**

**[1] Comment**

**[a] Use of Form**

This form may be used to give various items of jewelry to various beneficiaries. For a gift of jewelry to one beneficiary, see § 63.482. For a gift of personal property to the testator's spouse, see § 63.480. For a gift of tangible personal property with a precatory request for distribution to other beneficiaries, see § 63.481. For a gift of inherited personal property, see § 63.484.

**[b] Gifts of Jewelry**

Many testators wish to make gifts of specific items of jewelry. When describing any item of jewelry, the attorney may find it advisable to consult insurance policies, appraisals, or sales slips for the specific items. Confusion may result if the will refers to "my gold watch" or "my diamond ring" and the testator has more than one such item. Since this form does not refer to "all of the jewelry I own at the time of my death," it will not be effective to dispose of any items that the testator may acquire after execution of the will. If the testator wishes to make provision for items not disposed of by this provision, it may be advisable to use § 63.482, which refers to "all of the jewelry I own at the time of my death," in addition to this form. Alternatively, the testator may execute a codicil to dispose of any after-acquired jewelry.

**[2] FORM**

**Gift of Jewelry to More Than One Beneficiary**

I give the following items of jewelry, together with any insurance thereon, as follows:

To \_\_\_\_\_ [name of first beneficiary] my \_\_\_\_\_ [describe first item of jewelry, e.g., yellow gold dinner ring, containing one diamond approximately 1.5 ct., two diamonds approximately .5 ct. each, and ten

rubies approximately .2 ct. each].

To \_\_\_\_\_ [name of second beneficiary] my \_\_\_\_\_ [describe second item of jewelry].

To \_\_\_\_\_ [name of third beneficiary] my \_\_\_\_\_ [describe third item of jewelry].

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Estate, Gift & Trust Law Wills Bequests & Devises



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7. Gifts of Tangible Personal Property

*23-63 California Legal Forms--Transaction Guide § 63.484*

**§ 63.484 Gift of Tangible Personal Property Inherited From an Ancestor**

**[1] Comment--Use of Form**

This form may be used to make a gift of tangible personal property that the testator inherited from an ancestor. A testator may wish to leave certain property inherited by the testator (or to be inherited at a later time) to a particular person or persons. A gift of this kind often consists of tangible personal property that has been in the testator's family for a period of time, rather than money, securities, or other property that is commonly traded or negotiable. These items may be jewelry, collections of antiques, household furniture, heirlooms, libraries, or works of art.

**[2] FORM**

**Gift of Tangible Personal Property Inherited From an Ancestor**

I give to \_\_\_\_\_ [*name of beneficiary*] all tangible personal property which may be in my estate at the time of my death and which I received from \_\_\_\_\_ [*name person from whom the property was inherited, e.g., my father or my grandmother*] by way of gift, inheritance, bequest, devise, legacy, or other transfer. As used in this paragraph, tangible personal property includes jewelry, clothing, household goods, books, works of art, mementoes, and personal effects, but does not include securities, contracts, rights in action, money, bank accounts, or any real property or interest therein.

*[Add optional provision, if appropriate]*

This gift is intended to be a specific gift, and, in the event that there is no such property in my estate at the time of my death, it is my intention that this gift shall fail.

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Estate, Gift & Trust Law Wills Bequests & Devises



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*23-63 California Legal Forms--Transaction Guide § 63.485*

### § 63.485 Specific Gift of Library

#### [1] Comment--Use of Form

This form may be used to make a specific gift of a library. A testator who has collected a library relating to a specific subject may wish to keep the library intact and to give it to a person who is interested in the same subject. If the library is part of a business or profession, it may be disposed of as one of the business assets [for a gift of a sole proprietorship business, together with the assets of the business, *see* § 63.460]. The description of the library should be as complete as possible to minimize any dispute as to the books included in the gift.

#### [2] FORM

##### Specific Gift of Library

I give to \_\_\_\_\_ [*name of beneficiary*] my library, [together with the cases therefor,] consisting of \_\_\_\_\_ [*describe items contained in library*], [and relating to \_\_\_\_\_ (*subject of library*),] together with any insurance thereon.

#### Legal Topics:

For related research and practice materials, see the following legal topics:  
Estate, Gift & Trust Law Wills Bequests & Devises



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*23-63 California Legal Forms--Transaction Guide § 63.486*

### § 63.486 Gift of Pet

#### [1] Comment--Use of Form

This form may be used to make a testamentary gift of a pet. All domestic animals are subject to ownership [*Civ. Code* § 655]. Dogs are personal property, and their value is to be ascertained in the same manner as the value of other property [*Penal Code* § 491]. Since animals are chattels, they may be disposed of by will in the same manner as other personal property. If animals are pets of the testator, however, different considerations are present, since the testator generally desires that the pet be cared for and protected. For a form for a general pecuniary legacy for the protection and care of animals, see § 63.487.

#### [2] FORM

##### Gift of Pet

I give my \_\_\_\_\_ [*description and name of pet*] [, together with the documents of pedigree and the equipment which I maintain for the care and protection of it,] to \_\_\_\_\_ [*name of beneficiary*]. In the event that \_\_\_\_\_ [*name of beneficiary*] is unable or unwilling to take under this provision, I give the pet [,together with the documents of pedigree and the equipment which I maintain for the care and protection of it,] to \_\_\_\_\_ [*name of alternative beneficiary*].

#### Legal Topics:

For related research and practice materials, see the following legal topics:  
Estate, Gift & Trust Law Wills Bequests & Devises



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*23-63 California Legal Forms--Transaction Guide § 63.487*

**§ 63.487 Pecuniary Legacy Coupled With Precatory Request for Care of Pet**

**[1] Comment**

**[a] Use of Form**

This form may be used to make a pecuniary legacy and to couple it with a precatory request for care of a pet. For a gift of a pet, see § 63.486.

**[b] Devise to Pet**

A pet cannot be a beneficiary under a will [*see Estate of Russell (1968) 69 Cal.2d 200, 215, 70 Cal. Rptr. 561, 444 P.2d 353*]. Thus a testator who wishes to provide by will for the care of a pet cannot make an outright devise to the pet, but must seek some other means of providing for its care [*see § 63.487[1][c], [d]*].

**[c] Devise to Individual With Precatory Request for Care of Pet**

A testator who wishes to provide for the care of a pet can devise property to an individual, and couple that devise with a request that the property be used for the care of the pet. *Prob. Code § 15212* provides for the establishment of an enforceable trust for the care of the pet [*see § 63.487[1][d]*].

**[d] Trust for Care of Pet--Creation and Enforceability**

A trust may be created for the care of a pet.

The Trust Law clearly provides that every trust other than a charitable trust must have a beneficiary [*Prob. Code § 15205(a)*]. The beneficiary is the person who has the primary right to enforce the trust by judicial action [*see Prob. Code § 17200(a)* (right of trustee or beneficiary to petition court to determine existence, or concerning internal affairs, of trust)].

Notwithstanding this, the Probate Code recognizes the existence of trusts for the care of domestic or pet animals. *Prob. Code § 15212* provides that a trust for the care of an animal is a trust for a lawful noncharitable purpose [*Prob. Code § 15212(a)*]. The trust terminates when no animal living on the date of the settlor's death remains alive [*Prob. Code § 15212(a)*]. The instrument governing the animal trust must be liberally construed to bring the trust within *Prob. Code § 15212* and to presume against the precatory or honorary nature of the disposition and to carry out the general intent of the settler [*Prob. Code § 15212 (a)*].

A trust for the care of an animal must use principal and income for the benefit of the animal and must not be converted to the use of the trustee or to any other use [*Prob. Code § 15212 (b)(1)*]. Upon termination of the trust, the trustee must distribute any unexpended trust property in accordance with the statute [*Prob. Code § 15212 (b)(2)*]. The trust may be enforced by a person designated in the trust instrument, a person identified in *Prob. Code § 17200(a)*, or any person or nonprofit charitable organization interested in the welfare of the animal [*Prob. Code § 15212 (c)*]. A court may name a trustee or successor trust if one is not designated, and make all other orders and determinations to carry out the intent of the settler [*Prob. Code § 15212 (d)*]. If the value of assets in the trust exceeds forty thousand dollars (\$40,000), accountings required by *Prob. Code § 16062* must be provided to the beneficiaries who would be entitled to distribution should the animal be deceased [*Prob. Code § 15212 (d)*].

### [e] Practical Considerations

Under ordinary circumstances, it is probably preferable to avoid the formalities of a trust arrangement for pet care if possible. The sums normally required for the care of a pet ordinarily are not great enough to justify the expense of creating a trust. Moreover, as discussed above, the problem of enforcing such a trust may mean that as a practical matter the trust form may not provide any greater assurance that the testator's wishes will be carried out than would a simple outright gift of the pet to a caring individual [*see § 63.486*], or a cash gift coupled with a precatory request such as that illustrated in this form.

In unusual situations, however, a "pet trust" may make sense. For example, if the animal is one that is expensive to care for and that has a long life expectancy, it may reasonably be anticipated that a large sum of money might be necessary to care for the animal over its lifetime. Moreover, some persons may insist on leaving what might appear to be an exorbitant amount of money to make sure that all expenses will be met. If, for example, a client insists on leaving \$50,000 to make sure that a pet receives proper care, it is reasonable to create a trust to provide specific limits on how the money is to be spent, and to assure that the leftover proceeds will pass to appropriate remainder beneficiaries when the animal dies. The existence of remainder beneficiaries with an expectation of receiving some meaningful share of the trust proceeds when the pet dies may be the best assurance that the trustee at least will not misappropriate the trust assets, though such beneficiaries also may have little or no motivation to see that the pet receives proper care.

A trust for the benefit of a pet should be created with all of the formalities required for the creation of any other trust. For a discussion of those requirements, see *Ch. 64, Testamentary Trusts: Payment and Distribution Provisions, § 64.30 et seq.*

### [2] FORM

#### Pecuniary Legacy Coupled With Precatory Request for Care of Pet

I give the sum of \$ \_\_\_\_\_ [*specify amount*] to \_\_\_\_\_ [*name of trustee*] to use for the care and benefit of my \_\_\_\_\_ [*description of name of pet, e.g., dog, Joey,*]. Should \_\_\_\_\_ [*name of trustee*] be unable to care for my \_\_\_\_\_ [*description of name of pet, e.g., dog, Joey,*], I appoint \_\_\_\_\_ [*name of successor trustee*] to use the specified amount for the care and benefit of my \_\_\_\_\_ [*description of name of pet, e.g., dog, Joey,*].

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Estate, Gift & Trust Law Wills Bequests & Devises



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*23-63 California Legal Forms--Transaction Guide §§ 63.488-63.493*

**[Reserved]**

§§ 63.488[Reserved]



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*1-63 California Legal Forms--Transaction Guide § 63.494*

**§ 63.494 Will Provision Referring to Gifts of Tangible Personal Property Made In Separate Writing**

**[1] Comment**

**[a] Use of Form**

This form is a will provision in which the testator directs that items of tangible personal property are to be disposed of in accordance with one or more separate writings describing those items and identifying the recipients. A provision such as this one *must* be included in the will if the testator intends to dispose of tangible personal property items in this manner. Otherwise, the separate writing will be ineffective [*Prob. Code § 6132(a)*], unless it qualifies as a holographic codicil to the decedent's will [*see Prob. Code §§ 88, 6111, 6120(a)*]; *see also Ch. 61, Will Drafting and Complete Will Forms, § 61.10[2][c]; Ch. 62, Codicils, § 62.31*].

Under the traditional rules governing incorporation by reference, a will may incorporate the terms of another document by reference only if that writing is in existence at the time the will is executed [*Prob. Code § 6130; Simon v. Grayson (1940) 15 Cal. 2d 531, 533, 102 P.2d 1081*]. An attempt to incorporate a document executed after the will was executed, or to incorporate amendments to a pre-existing document when the amendments were made after execution of the will, would be invalid under this rule [*see Simon v. Grayson (1940) 15 Cal. 2d 531, 533, 102 P.2d 1081; Estate of Foxworth (1966) 240 Cal. App. 2d 784; 788-789, 50 Cal. Rptr. 237*].

*Prob. Code § 6132*, operative January 1, 2007, creates a special exception to the traditional rules governing incorporation by reference. Under *Prob. Code § 6132*, a testator may refer to a writing that directs the disposition of tangible personal property not otherwise disposed of by a will [*Prob. Code § 6132*]. Such a writing is only effective if an unrevoked will refers to the writing, the writing is dated and is either in the handwriting of or signed by the testator, and the writing describes the items and the recipients of the property with reasonable certainty [*Prob. Code § 6132(a)*]. The writing may be written or signed before or after the execution of the will, and need not have significance apart from its effect on the dispositions of property made by the will [*Prob. Code § 6132(c)*]. A writing that meets the requirements of *Prob. Code § 6132* will be given effect as if it were actually contained in the will itself [*Prob. Code § 6132(c)*].

Many testators want to make small gifts of personal items to relatives and friends as tokens of remembrance, love and affection, and so on. The items in question and the identities of the recipients often change over time. Making a formal change to the will each time the testator wishes to make a minor change respecting these gifts of personal property would be an expensive and time-consuming proposition. If the applicable statutory requirements are observed, the testator may avoid the need for a formal change by creating a separate document making the type of disposition described above, and subsequently may amend that document or make new documents from time to time after the will is executed, subject to specific limitations, without violating the traditional rules governing incorporation by reference [*see Prob. Code §§ 6130, 6132*].

For more detailed discussion of the requirements of *Prob. Code § 6132*, including the types of property that qualify under this section, the requirements that must be met by the separate writing, and pitfalls for the client, see § 63.495[1]. For a sample form for a separate document making gifts of tangible personal property to specified individuals, see § 63.495[2].

If the requirements of *Prob. Code § 6132* cannot be satisfied, the more restrictive traditional requirements of *Prob. Code § 6130* must be met, including the requirement that the writing in question must be in existence at the time the will is executed. For a general form for incorporation by reference of a document in existence at the time the will is executed, see § 63.423.

#### **[b] Requirements for Validity of Gift**

In order for gifts made under *Prob. Code § 6132* to be valid, the total value of all property identified and disposed of in separate writings must not exceed \$25,000, and the individual value of each item must not exceed \$5,000. Items with a value in excess of \$5,000 described in the writing will be disposed of as provided in the remainder clause of the will [*Prob. Code § 6132(g)*]. For additional discussion and cautionary notes regarding the pitfalls of these valuation limitations, see § 63.495[1][e].

"Tangible personal property" includes articles of personal or household use or ornament, including, but not limited to, furniture, furnishings, automobiles, boats, and jewelry, as well as precious metals in any tangible form, such as bullion or coins and articles held for investment purposes [*Prob. Code § 6132(h)(1)*]. Money that is common coin or currency may not be disposed of under *Prob. Code § 6132* [*Prob. Code § 6132(a)*], although coins or currency kept or acquired for their historical, artistic, collectable, or investment value apart from their normal use as legal tender for payment may be disposed of under *Prob. Code § 6132* [*Prob. Code § 6132(h)(2)*]. Real property, mobilehomes [*see Civ. Code § 798.3* (definition)], intangible property, such as evidences of indebtedness, bank accounts and other monetary deposits, documents of title, or securities, are also excluded [*Prob. Code § 6132(h)(1)*]. Property used primarily in a trade or business also may not be disposed under *Prob. Code § 6132* [*Prob. Code § 6132(a)*].

There is no statutory procedure for abatement of gifts to reduce the total so that it will be under the \$25,000 limit. However, subsection (b) of this form provides that if the total value of all tangible personal property disposed of by separate writing exceeds the statutory maximum [*Prob. Code § 6132(g)*] in effect at the time of the testator's death, the personal representative, in his or her discretion, is authorized to reduce or eliminate gifts made in those separate writings as necessary to reduce the maximum value of all gifts below the statutory maximum. Attorneys should be aware that there is no authority on the effect of such a provision and it is not specifically authorized by *Prob. Code § 6132*. Nevertheless, at the very least it will give the probate court a basis on which to abate the dispositions in accordance with the testator's intent.

#### **[c] Changes or Amendments to Writing**

The testator may make subsequent handwritten or signed changes to any writing. If there is an inconsistent disposition of tangible personal property as between writings, the most recent writing controls [*Prob. Code § 6132(d)*]. This

statutory requirement is incorporated into Subparagraph (a) of the form.

**[d] Death of Beneficiary**

If any person designated to receive property in the writing dies before the testator, the property will pass as further directed in the writing. In the absence of any further directions, the disposition will lapse [*Prob. Code § 6132(c)*]. In the usual case, this will mean that the property will pass under the residuary clause of the will, if there is one [*see Prob. Code § 21111(a)(2); see also § 63.411 (d)(lapse rules)*].

Subparagraph (c) of this form provides that in the event a beneficiary predeceases the testator, the gift will be disposed of as otherwise provided in the written instrument or, if the written instrument makes no provision in that case, as otherwise provided in the will.

**[2] FORM**

**Will Provision Referring to Gifts of Tangible Personal Property Made In Separate Writing**

**Gift of Specific Tangible Personal Property by Separate Writing**

(a) I intend to leave at my death one or more separate writings that describe the disposition of specified items of my tangible personal property, and I hereby direct that the items of property specified in those writings be devised as specified therein. If there are inconsistencies between separate writings, the most recent valid writing shall be controlling to the extent of the inconsistency.

(b) If the total value of all items of tangible personal property devised in separate writings exceeds the maximum dollar limitation (if any) for items of tangible personal property that may be validly devised in this manner under the applicable provisions of the California Probate Code in effect on the date of my death, I direct my personal representative to reduce any or all of the devises made in those writings in such proportions as my personal representative, in my personal representative's sole discretion, determines to be in accordance with my probable wishes and desires, or to eliminate one or more of such gifts entirely, as necessary to reduce the total value of the items of tangible personal property disposed of by separate writings so that it does not exceed the maximum that I may validly dispose of in this manner under the law in effect on the date of my death.

(c) If any person designated to receive property in any writing described in this section predeceases me, the property devised to that person in the writing shall pass as further directed in the writing or another valid writing; or, in the absence of further directions in a writing, according to the terms of this will without regard to the writing.

(d) If I do not leave any such separate writing at my death, all of my tangible personal property will be distributed as provided in the other provisions of this will.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Wills Bequests & Devises Estate, Gift & Trust Law Wills Incorporation by Reference General Overview Estate, Gift & Trust Law Wills Incorporation by Reference Requirements



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*1-63 California Legal Forms--Transaction Guide § 63.495*

**§ 63.495 Separate Writing Disposing of Tangible Personal Property of Modest Value**

**[1] Comment**

**[a] Use of Form**

This form is a writing, separate from the will itself, devising specified items of the testator's tangible personal property. The advantage of such a document is that as long as the applicable statutory requirements and limitations are observed, the testator may dispose of items of tangible personal property of modest value, and may add, modify, or eliminate such dispositions, without going through the formal process of creating a codicil or a new will every time the testator wants to change the disposition of an item of personal property.

Frequently, testators wish to leave specific items of tangible personal property to relatives and friends as tokens of remembrance, love, and affection. The testator's wishes regarding the items of property to be given away in this manner, and the identity of the recipients, frequently change with the passage of time. Making a formal change to the will each time the testator wishes to make a minor change respecting these gifts of personal property would be an expensive and time-consuming proposition. If the applicable statutory requirements are observed, the testator may avoid the need for a formal change by creating a separate document (this form) making the type of disposition described above, and subsequently may amend that document or make new documents from time to time after the will is executed, without violating the traditional rules governing incorporation by reference [*see Prob. Code §§ 6130, 6132* and discussion in [b], *below*].

Although in many cases documents of the type described above will be created or amended by testators without attorney involvement, the governing statute, *Prob. Code § 6132*, imposes important requirements and limitations on the use and content of such documents. At a minimum, the attorney should be prepared to explain these requirements to the client. Furthermore, as discussed in this comment, there are potential pitfalls. It is recommended that the attorney assist the client in drafting the initial separate document and counsel the client on making any subsequent changes. This form provides a basic format for such a document, meeting all the statutory requirements.

Note that in order for the dispositions to be effective under *Prob. Code § 6132*, the will must contain a provision referring to the writing. For an appropriate will provision to be used in conjunction with this form, see § 63.494.

### **[b] Exception to Rules Governing Incorporation by Reference**

Under the traditional rules governing incorporation by reference, as codified in *Prob. Code § 6130*, a will could incorporate the contents of a separate document only if that document was already in existence at the time the will was executed. An attempt to incorporate by reference a document not in existence at that time would be ineffective [*see Simon v. Grayson (1940) 15 Cal. 2d 531, 533, 102 P.2d 1081 ; Estate of Foxworth (1966) 240 Cal. App. 2d 784, 788-789, 50 Cal. Rptr. 237*]. Thus, under the traditional rule, a testator could not incorporate by reference a document disposing of items of personal property if that document did not exist at the time the will was executed. Similarly, a testator could not modify such a document after the fact, since the modification would not have existed when the will was executed and therefore could not validly be incorporated by reference.

*Prob. Code § 6132*, operative January 1, 2007, creates a limited exception to these requirements. Under that section, a will may refer to a writing that directs disposition of tangible personal property not otherwise specifically disposed of by the will [*Prob. Code § 6132(a)*]. A separate writing complying with the requirements of *Prob. Code § 6132* will be given effect as if it were actually contained in the will itself, regardless of whether it was written or signed before or after the execution of the will [*Prob. Code § 6132(c)*].

If the requirements of *Prob. Code § 6132* cannot be satisfied, the more restrictive traditional requirements of *Prob. Code § 6130* must be met, including the requirement that the writing in question must be in existence at the time the will is executed. For a general form for incorporation by reference of a document in existence at the time the will is executed, see § 63.423.

#### **PRACTICE TIP:**

If for any reason a writing fails to satisfy the requirements of *Prob. Code § 6132*, the attorney should determine, as an alternative, whether or not it might be able to qualify as a holographic codicil to the testator's will [*see Prob. Code §§ 88, 6111, 6120(a)*; *see also Ch. 61, Will Drafting and Complete Will Forms, § 61.10[2][c]; Ch. 62, Codicils, § 62.31*]. Commentary by publisher's editorial staff.

### **[c] Basic Conditions for Application of Prob. Code § 6132**

A writing directing disposition of a testator's tangible personal property is effective if all of the following conditions are satisfied [*Prob. Code § 6132(a)*]:

- An unrevoked will refers to the writing [*see § 63.494* (will provision referring to writing)].
- The writing is dated and is either in the handwriting of, or signed by, the testator. However, the failure of a writing to conform to this requirements does not preclude the introduction of evidence of the existence of the testator's intent regarding the disposition of tangible personal property as authorized by *Prob. Code § 6132* [*Prob. Code § 6132(b)*].
- The writing describes the items of property and the recipients of the property with reasonable certainty.

As noted in [b], *above*, the writing may be written or signed either before or after the execution of the will. The writing need not have significance apart from its effect on the dispositions of property made by the will [*Prob. Code § 6132(c)*].

### **[d] Types of Property Subject to Disposition Under Prob. Code § 6132**

In order to be subject to disposition under *Prob. Code § 6132*, property must qualify as tangible personal property under that section. "Tangible personal property" means articles of personal or household use or ornament, including, but not limited to, furniture, furnishings, automobiles, boats, and jewelry, as well as precious metals in any tangible form, such as bullion or coins and articles held for investment purposes [*Prob. Code § 6132(h)(1)*]. "Tangible personal property" does not include real property, mobilehomes as defined in *Civ. Code § 798.3* [*see Ch. 40, Mobilehomes, § 40.13*], or intangible property, such as evidences of indebtedness, bank accounts and other monetary deposits, documents of title, or securities [*Prob. Code § 6132(h)(1)*]. The following types of property also are specifically excluded for purposes of *Prob. Code § 6132* [*Prob. Code § 6132(a)*]:

- Money that is common coin or currency. "Common coin or currency" is defined to mean the coins and currency of the United States that are legal tender for the payment of public and private debts, but not coins or currency kept or acquired for their historical, artistic, collectable, or investment value apart from their normal use as legal tender for payment [*Prob. Code § 6132(h)(2)*]. Note also that the definition of tangible personal property set forth above does specially include "precious metals in any form, such as bullion or coins..." [*Prob. Code § 6132(h)(1)*]. In other words, a rare coin could be devised under *Prob. Code § 6132*, as apparently could a bag of silver coins held for investment, even though both technically are legal tender, but a common \$100 bill held for its cash value alone ordinarily could not.
- Property used primarily in a trade or business.

**[e] Value Limited to \$5,000 Per Item and \$25,000 Total Value**

If the value of an item of tangible personal property described in the writing exceeds \$5,000, that item will not be disposed of as provided in the written instrument, but instead will be disposed of pursuant to the remainder clause of the will [*Prob. Code § 6132(g)*]. The statute does not contain any provision authorizing testamentary modification of this rule.

The total value of tangible personal property identified and disposed of in the writing is not permitted to exceed \$25,000. The value of an item of tangible personal property that is disposed of pursuant to the remainder clause of the will (in other words, an item listed in the writing but having a value in excess of \$5,000) is not counted towards the \$25,000 limit [*Prob. Code § 6132(g)*].

Note that the statute contains no procedure for abatement or other direction as to what will happen if the total value of the property given away exceeds \$25,000. The statutory language can be read to invalidate the entire property disposition in such a case, although it is unlikely that such a result would reflect the testator's intent.

**PRACTICE TIP:**

The valuation limitations discussed above create dangerous traps for the unwary testator. First, even if a gift is worth less than \$5,000 at the time the document is executed, subsequent appreciation in value may cause it to exceed the \$5,000 limit by the date of the testator's death--and, if this happens, the gift will no longer pass to the designated beneficiary under the written instrument, but instead will pass under the residuary clause in the estate [*Prob. Code § 6132(g)*].

Second, the \$25,000 total limitation is even more dangerous. A testator who adds gifts to relatives and friends one by one over the passing years easily might inadvertently exceed that limit (especially when appreciation is taken into account) and thereby risk invalidating not just the gift that pushes the total over the limit, but rather *all* the gifts made in the entire instrument [*see above*]. Since there is no statutory procedure in that situation for abatement of gifts to reduce the total so that it will get under the \$25,000 limit, an attorney would be well advised to attempt to address that issue in the document by including a provision for abatement of the gifts. Although there is no authority on the effect of such a provision and

it is not specifically authorized by *Prob. Code § 6132*, at the very least it will give the probate court a basis on which to abate the gifts in accordance with the testator's intent should the court be inclined to do so. This form addresses this issue by giving the testator's personal representative authority to eliminate or abate any of the gifts if necessary to reduce the total below the statutory maximum.

For the above reasons, it is essential that an attorney clearly instruct the client on the existence of the \$5,000 and \$25,000 limitations and the importance of keeping track of any gifts made in this manner to assure that those limits are complied with. An informational letter specifically informing the client of these limits is recommended. *Commentary by Publisher's Editorial Staff.*

#### **[f] Date of Execution**

It is important that a document intended to comply with *Prob. Code § 6132* specify the date on which it was executed. If the document omits a statement as to the date of its execution, and if the omission results in doubt whether its provisions or the provisions of another writing inconsistent with it are controlling, then the writing omitting the statement is invalid to the extent of its inconsistency, unless the time of its execution is established to be after the date of execution of the other writing [*Prob. Code § 6132(e)(1)*]. Furthermore, if the document omits a statement as to the date of its execution, and it is established that the testator lacked testamentary capacity at any time during which the writing may have been executed, the writing is invalid unless it is established that it was executed at a time when the testator had testamentary capacity [*Prob. Code § 6132(e)(2)*].

#### **[g] Subsequent Amendments to Writing**

The testator may make subsequent handwritten or signed changes to any writing. If there is an inconsistent disposition of tangible personal property as between writings, the most recent writing controls [*Prob. Code § 6132(d)*].

#### **[h] Death of Beneficiary**

If any person designated to receive property in the writing dies before the testator, the property will pass as further directed in the writing. In the absence of any further directions, the disposition will lapse [*Prob. Code § 6132(c)*]. In the usual case, this will mean that the property will pass under the residuary clause of the will, if there is one [*see Prob. Code § 21111(a)(2); see also § 63.411 (d)(lapse rules)*].

### **[2] FORM**

#### **Separate Writing Disposing of Tangible Personal Property of Modest Value**

As provided in Section \_\_\_\_\_ of my will dated \_\_\_\_\_, I, \_\_\_\_\_ [*name of testator*], do hereby make the following gifts of items of my tangible personal property to the persons named below, effective on my death:

1. To \_\_\_\_\_ [*designation and name, e.g., my niece, Janice Smith*], I give \_\_\_\_\_ [*describe item(s) of tangible personal property as specifically as possible, e.g., my pair of gold heart shaped earrings, approximately 3/4 inch in diameter and each set with three small red garnet stones, that were once the property of my grandmother*], if I am the owner of that property at the time of my death.
2. To \_\_\_\_\_ [*designation and name, e.g., my friend, James Jones*], I give \_\_\_\_\_ [*describe item(s) of tangible personal property as specifically as possible, e.g., my Super Olympia Model 155 ocean kayak, together with the paddles, ropes, car rack, and related hardware accompanying that kayak*], if I am the owner of that property at the time of my death.

3. To \_\_\_\_\_ [*designation and name, e.g., my sister, Donna Love*], I give  
 \_\_\_\_\_ [*describe item(s) of tangible personal property as specifically as possible, e.g.,*  
 the large golden barrel cactus in the green enamel pot on the front porch of my house at 1237 West  
 Street], if I am the owner of that property at the time of my death.

[*continue as necessary for any other items of testator's tangible personal property*]

If any of the items of property specified above are not among the items of tangible personal property at the time of my death, the gift shall lapse.

If the total value of the items specified above, including any items subsequently added in an amendment to this writing or in a separate writing, exceed in value the maximum amount that may be validly disposed of by a separate writing in this manner under the applicable provisions of the California Probate Code in effect on the date of my death, I direct my personal representative to reduce any or all of the gifts made above, if possible, in such proportions as my personal representative determines to most likely be in accordance with my wishes and desires as understood by my personal representative, or eliminate one or more of such gifts entirely if necessary, in order to ensure that the total value of the items of tangible personal property disposed of under this provision does not exceed the maximum permitted by law.

Date: \_\_\_\_\_  
 \_\_\_\_\_ [*signature of testator; must be handwritten*]

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Wills Bequests & Devises Estate, Gift & Trust Law Wills Incorporation by Reference General Overview Estate, Gift & Trust Law Wills Incorporation by Reference Requirements



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*23-63 California Legal Forms--Transaction Guide §§ 63.496-63.499*

**[Reserved]**

§§ 63.496[Reserved]



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8. Devises of Securities, Notes, and Annuities

*23-63 California Legal Forms--Transaction Guide § 63.500*

### **§ 63.500 General Devise of Securities**

#### **[1] Comment**

##### **[a] Use of Form**

This form is a will provision that may be used to make a general gift of securities. For a specific gift of securities, see § 63.501. For a pecuniary gift to be paid out of the proceeds of the sale of securities, see § 63.502. For a distribution of securities in kind, see § 63.232.

Note that with respect to registration of securities made by decedents dying on or after January 1, 1998, the Uniform TOD Security Registration Act [*Prob. Code §§ 5500-5512*] provides a procedure for a securities title form to designate a TOD beneficiary that is effective, without probate or estate administration, for transferring the securities at death in accordance with the directions of the deceased owner. For additional discussion, see *Ch. 60, Estate Planning, § 60.17[9]*.

##### **[b] Specific Gifts and General Gifts**

###### **[i] Distinctions**

A testamentary gift of securities may be either a "specific" or a "general" gift [*see Prob. Code § 21117(a), (b); see also § 63.351[1][b]*]. A specific gift is a gift of a specific thing and that thing alone [*Prob. Code § 6154(a); Estate of Buck (1948) 32 Cal. 2d 372, 374, 196 P.2d 769; Estate of Ehrenfels (1966) 241 Cal. App. 2d 215, 221, 50 Cal. Rptr. 358*]. A general gift, on the other hand, is a gift from the general estate of a decedent that does not give specific property [*Prob. Code § 21117(b)*]. The distinction between specific and general gifts may become important if, after executing the will, the testator disposes of property referred to in the will, or if there are insufficient assets to pay all debts and expenses and to satisfy all gifts in full.

###### **[ii] Ademption and Abatement**

If property that is subject to a specific gift is not in the testator's estate at the time of death, the specific gift is generally adeemed (extinguished), although the devisee, under circumstances specified in the Probate Code, may have a right to the proceeds of any sale, exchange, mortgage, or other transformation of the property [*see Prob. Code §§ 21132-21134; see also § 63.370[1][c]*]. In contrast, a general devise is not adeemed merely because specific property is not in the estate at the time of death, since a general devise will be satisfied out of the general assets of the estate [*see Prob. Code § 21117(b)*]. General devises, however are subject to abatement (reduction or even elimination) [*see Prob. Code §§ 21400-21406*] before specific devises if necessary to pay debts and expenses of administration [*Prob. Code § 21402(a); see § 63.416[1][b][i]*]. Similarly, general devises may abate before specific devises to pay the share of an omitted spouse or child if abatement of the specific devise would defeat the obvious intention of the testator and adoption of a different method of apportionment is deemed consistent with the testamentary intent [*see Prob. Code §§ 21612(b) (spouse), 21623(b) (child)*].

### **[iii] Rights of Specific Devisee of Securities**

If the testator executes a will that makes an at-death transfer of securities and the testator then owned securities meeting the description in the will, the devise includes additional securities the testator owned at death to the extent the testator acquired them after executing the will as a result of his or her ownership of the described securities [*Prob. Code § 21132(a)*]. The securities must be:

- Securities of the same organization acquired by reason of action initiated by the organization or any successor, related, or acquiring organization, excluding any acquired by exercise of purchase options [*Prob. Code § 21132(a)(1)*].
- Securities of another organization acquired as a result of a merger, consolidation, reorganization, or other distribution by the organization or any successor, related, or acquiring organization [*Prob. Code § 21132(a)(2)*].
- Securities of the same organization acquired as a result of a reinvestment plan [*Prob. Code § 21132(a)(3)*].

Cash distributions before death with respect to a described security are not part of the devise [*Prob. Code § 21132(b)*]. Thus, for example, cash dividends declared and payable as of a record date occurring before the testator's death do not pass as a part of the specific devise even though paid after death [*see Comment to Uniform Probate Code § 2-607; see also Tentative Recommendation Relating to Wills and Intestate Succession, 16 Calif. L. Rev. Comm'n Rep. 2408 (1982)(Prob. Code § 21132(b) is based on Uniform Probate Code § 2-607)*].

### **[iv] Judicial Construction**

If it is unclear whether the testator intended a devise to be specific or general, the courts will indulge in presumptions to resolve the question. It has been held, for example, that a devise of a stated number of bonds of a designated corporation, without descriptive words of ownership showing an intent to make a devise of specific bonds, is presumed to be a general devise [ *Estate of Jones (1943) 60 Cal. App. 2d 795, 801, 141 P.2d 764* ]. A devise of shares in a closely held corporation, in the absence of other evidence of the testator's intent, is presumed to be specific [ *Estate of Buck (1948) 32 Cal. 2d 372, 374-375, 196 P.2d 769* ]. A devise closely associated in the will with other devises to the same devisee that are clearly specific will also be presumed to be specific [ *Estate of Ehrenfels (1966) 241 Cal. App. 2d 215, 225, 50 Cal. Rptr. 358* ].

### **[v] Will Provisions**

A careful will drafter will not rely on judicial interpretation to clarify an otherwise uncertain or ambiguous will provision, but will state the testator's intentions in unambiguous terms. The classification of devises set forth in the Probate Code applies only when the intention of the testator is not indicated by the will, and is subject to the general rule that the intention of the testator as expressed in the will controls the legal effect of the dispositions made in the will [*Prob. Code* §§ 21102, 21117]. However, this provision does not limit the use of extrinsic evidence, to the extent otherwise authorized by law, to determine the testator's intention [*Prob. Code* § 21102(c)]. The Probate Code abatement rules also are simply rules of construction. They do not apply if the testator's plan (or a particular devise) would be defeated by application of the rules, or if some other scheme of abatement is necessary to effectuate the will or the testator's purpose [*Prob. Code* § 21400].

If the testator wishes the devisee to take only if the specific securities are in the estate at the time of the testator's death, the devise should be specific. If, on the other hand, the testator wishes the devisee to take the securities (or their equivalent value) whether or not they are in the estate at the time of death, the devise should be general.

#### **[vi] Changes in Issuing Corporation's Capital Structure**

It is common for corporations to change their capital structures, enter into mergers, reorganizations, or consolidations, split shares of stock, and declare stock dividends. All of these changes may affect the value of securities that are the subjects of devises. When planning any devise of securities, the testator should consider how any such changes may affect the devise and the extent to which they will comport with the testator's intentions. If, for example, the testator wants the named devisee rather than the residuary devisees to receive any increase in value that may result from changes in the capital structure of a corporation, the testator should describe the securities with words that will clearly embrace all such changes (e.g., "all of the shares of stock of ABC Corporation that I own at the time of my death") or should consider a provision making an adjustment for capital changes. For a provision making an adjustment for capital changes in the structure of an issuing corporation, see § 63.504.

#### **[c] Description of Securities**

The attorney should keep in mind that it is quite common for corporations to issue different classes of common and capital stock, different classes of preferred stock, and bonds with different rates of interest and maturities. It is important that the securities intended to be devised are described with sufficient specificity to avoid confusion with other securities issued by the same or other corporations.

#### **[d] Survival and Lapse**

A devise of securities may, like other devises, be conditioned on survival for a specified period [*Prob. Code* § 21109(a)]. For a discussion of devises conditioned on survival until a future time, see § 63.411[1]. For a discussion of simultaneous death and provisions stating the order of death in the event of a common disaster, see § 63.630.

### **[2] FORM**

#### **General Devise of Securities**

I give to \_\_\_\_\_ [*name of devisee*] \_\_\_\_\_ [*specify number*] shares of the \_\_\_\_\_ [*describe shares, e.g., class B common*] stock of \_\_\_\_\_ [*name of corporation*]. This devise is intended to be a general devise, and, in the event that there are insufficient shares of this stock in my estate at the time of my death, I direct my executor to purchase, out of the general assets of my estate, any additional shares that are necessary to satisfy this devise in full.

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:  
Estate, Gift & Trust Law Wills Bequests & Devises



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*23-63 California Legal Forms--Transaction Guide § 63.501***§ 63.501 Specific Devise of Securities****[1] Comment--Use of Form**

This form is a will provision that may be used to make a specific devise of securities. For a general devise of securities, see § 63.500. For a pecuniary devise to be paid out of proceeds of the sale of securities, see § 63.502. For a distribution of securities in kind, see § 63.503. For a provision making an adjustment for capital changes in the structure of an issuing corporation, see § 63.504.

A devise of securities may be specific or general. For a detailed discussion of general and specific devises of securities and the characteristics of each, see § 63.500[1].

Changes in the capital structures of corporations may affect the value of securities that are the subjects of devises. For a discussion of such changes and how they may affect the testator's intentions, see §§ 63.500[1] and 63.504[1]. For a provision making an adjustment for capital changes, see § 63.504.

When drafting any devise of securities, the attorney should describe the securities with sufficient specificity to avoid confusion with other securities issued by the same or other corporations [*see* discussion in § 63.500[1][c]].

**[2] FORM****Specific Devise of Securities**

I give to \_\_\_\_\_ [*name of devisee*] all of the shares of stock of any class, type, or denomination owned by me at the time of my death in \_\_\_\_\_ [*name of corporation*]. This devise is intended to be specific, and in the event that there is no stock of \_\_\_\_\_ [*name of corporation*] in my estate at the time of my death, this devise shall fail.

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
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*23-63 California Legal Forms--Transaction Guide § 63.502*

**§ 63.502 Pecuniary Devise to Be Paid Out of Proceeds of Sale of Securities**

**[1] Comment**

**[a] Use of Form**

This form is a will provision that may be used to make general pecuniary gift of money [*see Prob. Code §§ 21117(d)* ("general pecuniary gift" defined), *21118(b)* ("pecuniary gift") defined; *see also § 63.351[1]*] and to direct that the money be paid out of the proceeds of a sale of securities owned by the testator. For a general provision for a pecuniary devise, see § 63.351. For a general devise of securities, see § 63.500. For a specific devise of securities, see § 63.501. For a pecuniary devise to be paid out of proceeds of the sale of real property owned by the testator, see § 63.445.

**[b] Ademption and Abatement**

If the will makes a devise of money and directs that the money be paid out of proceeds of the sale of specific property owned by the testator, a question may arise of whether the devise is specific [*see Prob. Code § 21117(a)* ("specific devise" defined); *see also § 63.370[1]*] or demonstrative [*see Prob. Code § 21117(c)* ("demonstrative devise" defined); *see also § 63.390[1]*]. Whether a devise is specific or demonstrative is important under the Probate Code rules of ademption and abatement.

Under the ademption rules, if property that is subject to a specific devise is not in the testator's estate at the time of death, the specific devise is generally adeemed (extinguished), although the devisee may, under circumstances specified in the Code, have a right to the proceeds of any sale, exchange, mortgage, or other transformation of the property [*see Prob. Code §§ 21132-21134*; *see also § 63.370[1][c]*]. A demonstrative devise, on the other hand, is not subject to ademption if specific property is not in the estate when the testator dies, since a demonstrative devise may be satisfied from the general assets of the estate if the fund or property out of which it is primarily to be paid fails, in whole or in part [*see Prob. Code §§ 21117(b)* (general devise is devise from general estate), (c)(demonstrative gift is a type of general gift), 21403(b)(demonstrative gift treated as general gift if satisfied out of property other than fund or property specified)].

Under the abatement rules [*see Prob. Code §§ 21400-21406* (abatement of devises)], however, demonstrative devises are subject to abatement (reduction or even elimination) before specific devises if they are satisfied out of the general assets of the estate and if abatement is necessary to pay debts and expenses of administration [*Prob. Code §§ 21401, 21402(a)*; *see Prob. Code §§ 21117(c), 21403(b)* (demonstrative gift treated as general gift to extent satisfied out of property other than fund or property specified); *see also § 63.416[1][b][i]*]. Similarly, a demonstrative devise that is satisfied out of the general assets of the estate will abate before a specific devise to pay the share of an omitted spouse or child if abatement of the specific devise would defeat the obvious intention of the testator and adoption of a different method of apportionment is deemed to be consistent with the testamentary intent [*see Prob. Code §§ 21612(b)* (spouse), *21623(b)* (child)].

### [c] Optional Clauses

Whether a devise is specific or demonstrative depends on the intention of the testator as expressed in the will [*see Prob. Code §§ 21102, 21117*]. For a discussion of judicial interpretation of will provisions making specific and general devises, see § 63.500[1][b][iv]. A careful will drafter will not leave so important a question to judicial interpretation, however, but will clearly specify the testator's intentions in the will.

This form offers two optional clauses that may be used to clearly express the testator's intentions. The first states that if the proceeds from the sale of the specific securities are insufficient to fully satisfy the pecuniary devise, there will be no resort to other assets of the estate to satisfy it. If this optional clause is used, the devise will be specific.

The second optional clause states that, if the proceeds from the sale of the testator's securities are insufficient to fully satisfy the pecuniary devise, resort is to be had to the general assets of the estate to satisfy it. If this optional clause is used, the devise will be demonstrative.

## [2] FORM

### Pecuniary Devise to Be Paid Out of Proceeds of Sale of Securities

I give the sum of \_\_\_\_\_ [*specify amount*] to \_\_\_\_\_ [*name of devisee*], to be paid out of the proceeds of the sale of my shares of \_\_\_\_\_ [*describe shares, e.g., class B common*] stock in \_\_\_\_\_ [*name of corporation*].

[*If devise is intended to be specific, add the following:*]

This devise is intended to be specific, and in the event that the proceeds from the sale of the shares described herein are insufficient to fully satisfy this devise, or if those shares are not in my estate at the time of my death, resort is not to be had to other assets of my estate to satisfy it.

[*Or, if devise is intended to be demonstrative, add the following:*]

This devise is intended to be demonstrative, and in the event that the proceeds from the sale of the shares described herein are insufficient to fully satisfy this devise, or if those shares are not in my estate at the time of my death, I direct that resort shall be had to the general assets of my estate to satisfy it.

### Legal Topics:

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Wills Bequests & Devises



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*23-63 California Legal Forms--Transaction Guide § 63.503*

**§ 63.503 Distribution of Securities in Kind**

**[1] Comment--Use of Form**

This form is a will provision that may be used to authorize the executor to satisfy any general, demonstrative, or residuary devise provided for in the will by distributing securities owned by the estate to any devisee. For a discussion of the powers and duties of an executor, see Ch. 65, *Executors*, § 65.10 et seq.

**[2] FORM**

**Distribution of Securities in Kind**

I direct that my Executor, in my Executor's sole discretion, may pay any general, demonstrative, or residuary devises provided for in this will or in any codicil to this will by transferring to the devisees of those gifts any securities owned by me at the time of my death. It is my desire, but I do not direct, that my Executor shall use every opportunity to make any such distribution in the form of the securities themselves.

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
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*23-63 California Legal Forms--Transaction Guide § 63.504*

#### **§ 63.504 Adjustment for Capital Changes**

##### **[1] Comment**

##### **[a] Use of Form**

This form is a will provision that may be used to provide for future changes in the capital structures of corporations whose securities are the subjects of devises. The form is optional only and, if used, should be added to and made a part of any paragraph making a devise of corporate securities.

##### **[b] Changes in Capital Structure**

It is common for corporations to change their capital structures; enter into mergers, reorganizations, or consolidations; split shares of stock; and declare stock dividends. Since these changes may affect the value of devised securities, they are potential sources of controversy and litigation.

If the testator executes a will that makes an at-death transfer of securities and the testator then owned securities meeting the description in the will, the devise includes additional securities the testator owned at death to the extent the testator acquired them after executing the will as a result of his or her ownership of the described securities [*Prob. Code § 21132(a)*]. The securities must be:

- Securities of the same organization acquired by reason of action initiated by the organization or any successor, related, or acquiring organization, excluding any acquired by exercise of purchase options [*Prob. Code § 21132(a)(1)*].
- Securities of another organization acquired as a result of a merger, consolidation, reorganization, or other distribution by the organization or any successor, related, or acquiring organization [*Prob. Code § 21132(a)(2)*].

- Securities of the same organization acquired as a result of a reinvestment plan [*Prob. Code* § 21132(a)(3)].

Cash distributions before death with respect to a described security are not part of the devise [*Prob. Code* § 21132(b)].

For further discussion of the right of specific devisees of securities, see § 63.500[1][b][iii].

If the will makes a specific devise of only a portion of the stock the testator owns in a particular company and there is later a stock split or stock dividend, the specific devisee is entitled, under the Probate Code rules, only to a proportionate share of the additional stock received [*Tentative Recommendation Relating to Wills and Intestate Succession*, 16 Calif. L. Rev. Comm'n Rep. 2408 (1982)]. Assume, for example, that when the will is executed the testator owns 500 shares of stock in XYZ Corporation and that he or she devises 100 of those shares to a son or daughter. If the stock later splits two for one, the son or daughter will be entitled to 200 shares, not 600 [*Tentative Recommendation Relating to Wills and Intestate Succession*, 16 Calif. L. Rev. Comm'n Rep. 2408 (1982)].

### [c] Will Provisions

The Probate Code rules for the interpretation of wills, trusts, and other instruments are rules of construction only. They apply only when the intention of the testator is not otherwise indicated by the will and are subject to the fundamental rule that the intentions of the testator as expressed in the will controls the legal effect of the dispositions made in the will [*Prob. Code* § 21102; see *Prob. Code* § 21101 (rules applicable to wills, trusts, and other instruments)]. However, this provision does not limit the use of extrinsic evidence, to the extent otherwise authorized by law, to determine the testator's intention [*Prob. Code* § 21102(c)]. Whenever a testator makes a devise of securities, the will should clearly state the testator's intentions with respect to stock dividends, splits, mergers, consolidations, and related changes in the structure of the corporation or its stock. If the testator intends that the named devisee and not the residuary devisees will receive any increase in value that may result from any such changes, the will should describe the securities with words that will clearly encompass them (e.g., "all of the shares of stock of ABC Corporation that I own at the time of my death") or include a provision such as this form.

### [2] FORM

#### Adjustment for Capital Changes

If, after execution of this will, any change or adjustment, whether resulting from stock dividends, stock splits, mergers, consolidations, reorganizations, or any other event or events, is made in the capital structure of any corporation whose stock I own, any devise of the stock of that corporation made in this will shall be adjusted so as to consist of the number of shares of the stock of that corporation, or of its successor, that, as the result of the change or adjustment, would be derived from or attributable to the number of shares of stock given by this will, as those shares exist on the date this will is executed. If the total number of shares of a class of stock devised by this will, as adjusted by any such changes or adjustments, exceeds the total number of shares owned by me or by my estate, all devises of that stock shall be ratably reduced, so that the total number of shares of that stock devised shall be the number of shares owned by me or by my estate.

#### Legal Topics:

For related research and practice materials, see the following legal topics:  
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*23-63 California Legal Forms--Transaction Guide § 63.505*

**§ 63.505 Specific Devise of Promissory Note (and Deed of Trust)**

**[1] Comment**

**[a] Use of Form**

This form is a will provision that may be used to make a devise of a promissory note owned by the testator. If the note is secured by a deed of trust, the form may also be used to give the deed of trust. For a will provision discharging a debt owed to the testator, see § 63.506.

**[b] Devise of Promissory Note**

A testamentary gift of a promissory note is a specific devise [*see Prob. Code §§ 21117(a)* ("specific devise" defined), 8851 (devise of debt or demand of testator against any person is specific devise); *see also § 63.370[1]*]. If property subject to a specific devise is not in the testator's estate at the time of death, the specific devise is generally adeemed (extinguished), although under circumstances specified in the Probate Code the devisee may have a right to the proceeds of any sale, exchange, mortgage, or other transformation of the property [*see Prob. Code §§ 21132-21134*]. Specific devises, however, will abate (be reduced or even eliminated) to pay debts and expenses of administration [*Prob. Code § 21402(a)*]; *see Prob. Code § 10000(a)* (executor may sell property to pay debts, devises, family allowance, expenses of administration, or taxes)], or to satisfy the statutory shares of an omitted spouse [*Prob. Code § 21612*] or child [*Prob. Code § 21623*], only after all other devises have abated. For a general discussion of ademption, see § 63.370[1][c]. For a general discussion of abatement, see § 63.416[1][b][i].

**[c] Note Subject to Administration**

A devise of a promissory note, like a devise of any other debt or demand of the testator against any person, will not remove the note from the probate estate or relieve the executor of the duty of including it in the inventory and, if necessary, applying it to the payment of the testator's debts [*Prob. Code § 8851*; *see § 63.506[1]*]. If the note is not necessary for the payment of the testator's debts, it will be distributed in the same manner and proportion as other

specific devises [*Prob. Code § 8851*].

**[d] Change in Form of Note**

Promissory notes are sometimes assigned, renewed, paid, cancelled, or otherwise transformed or extinguished. A testator who makes a devise of a promissory note should be advised that if there is any change in the form or legal status of the note, the will should be modified to reflect the change.

**[2] FORM**

**Specific Devise of Promissory Note (and Deed of Trust)**

I give to \_\_\_\_\_ [*name of devisee*] that certain promissory note executed on \_\_\_\_\_, at \_\_\_\_\_ [*place of execution*], in the principal amount of \_\_\_\_\_, in which \_\_\_\_\_ [*name of promisor*] is named as promisor and \_\_\_\_\_ [*name of promisee*] is named as promisee [*add, if appropriate:*, together with the deed of trust that secures that note, in which \_\_\_\_\_ (*name of trustor*) is named as trustor and \_\_\_\_\_ (*name of trustee*) is named as trustee]. This devise includes all documents relating to payment of the note [and deed of trust], including payment books. This devise is intended to be specific, and, in the event that this note is paid in full, discharged, or transferred by me, this devise shall fail, and resort shall not be made to any other assets of my estate to satisfy it.

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
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*23-63 California Legal Forms--Transaction Guide § 63.506***§ 63.506 Cancellation of Indebtedness****[1] Comment****[a] Use of Form**

This form is a will provision that may be used to discharge a debt owed to the testator. It is drafted in the form of a direction to the executor to discharge the indebtedness and to cancel a promissory note evidencing the indebtedness. It may be modified, however, to apply to any other form of indebtedness. For a will provision making a devise of a promissory note owned by the testator, see § 63.505.

**[b] Discharge of Debt or Demand**

The executor has a duty to collect all debts due to the decedent or the estate [*Prob. Code § 9650(a)(1)*]. The decedent's property is subject to administration [*see Prob. Code §§ 7000-12591*] and, under rules set forth in the Probate Code, to the payment of debts [*see Prob. Code §§ 9000-9399* (creditor claims), 11400-11467 (payment of debts)], expenses of administration [*see Prob. Code §§ 11401(b)* ("debt" includes an expense of administration), 11420(a)(1)(priority for payment of expenses of administration)], and any family allowance that may be payable out of the assets of the estate [*Prob. Code § 7001; see Prob. Code §§ 6540-6545* (family allowance)].

The will may discharge a debt or demand of the testator against any person (including the executor) [*Prob. Code § 8851*]. Such a discharge is deemed to be a specific devise of the debt or demand, but it is not valid against creditors of the testator [*Prob. Code § 8851; see Prob. Code § 21117(a)* ("specific devise" defined)]. Like other devised property, the discharged debt or demand must be included in the inventory [*see Ch. 65, Executors, § 65.41[3]*] and will be subject to the payment of debts, expenses, and any family allowance payable out of the estate [*Prob. Code § 8851*]. If not necessary for the payment of debts, expenses, or a family allowance, the debt or demand will be distributed in the same manner and proportion as other specific devises [*Prob. Code § 8851; see Ch. 65, Executors, § 65.41[9]*].

**[2] FORM**

**Cancellation of Indebtedness**

I direct that the entire balance of the outstanding indebtedness on the promissory note payable to me in the face amount of \_\_\_\_\_, which was executed on \_\_\_\_\_ [date], by \_\_\_\_\_ [name of promisor- devisee] be discharged, and that the note (and any security therefor) be cancelled by my executor and delivered to \_\_\_\_\_ [name of promisor- devisee]. If this indebtedness has been paid in full, discharged, or transferred by me, this devise shall fail, and resort shall not be had to any other assets of my estate for its satisfaction.

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Estate, Gift & Trust Law Wills Bequests & Devises



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*23-63 California Legal Forms--Transaction Guide § 63.507***§ 63.507 Devise of Patent****[1] Comment--Use of Form**

This form is a will provision that may be used to devise a patent. If a patent is being used by a business owned by the testator, it may be devised as part of the business assets. For a devise of a sole proprietorship, see § 63.460.

The contractor licensing agreement relating to the patent should be examined to determine whether it makes any provision for the death of the testator. If it does, and if it does not preclude the possibility of testamentary disposition, the provision should be respected and referred to in the will.

Courtroom procedure relating to patents and their protection is discussed in California Forms of Pleading and Practice, Ch. 411, *Patents and Inventions* (Matthew Bender)

**[2] FORM****Devise of Patent**

I give to \_\_\_\_\_ [name of devisee] all of my right, title and interest in and to United States Patent No. \_\_\_\_\_, relating to \_\_\_\_\_ [describe subject matter of patent], and all of my interest in and to that certain \_\_\_\_\_ [describe agreement, e.g., contract] executed on \_\_\_\_\_, at \_\_\_\_\_ [place], by and between \_\_\_\_\_ [names of contracting parties], relating to the use of this patent and to \_\_\_\_\_ [specify essential provisions of agreement, e.g., the payment of royalties thereunder].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Wills Bequests & Devises Patent Law Ownership Patents as Property



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DIVISION IV: WILLS AND TRUSTS

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8. Devises of Securities, Notes, and Annuities

*23-63 California Legal Forms--Transaction Guide § 63.508*

### **§ 63.508 Annuity With Fixed Periodic Payments**

#### **[1] Comment**

#### **[a] Use of Form**

This form is a will provision that may be used to direct the executor to purchase a commercial annuity contract providing for periodic payments in a fixed amount to a named annuitant. The premium required to purchase the contract will vary according to the age of the intended annuitant. For a provision directing the executor to purchase an annuity contract for a fixed premium (and with periodic payments varying according to the age of the intended annuitant), see § 63.509. For a provision providing for an annuity with an option to take cash in lieu of periodic payments, see § 63.510.

#### **[b] Annuities**

A testamentary annuity is a devise of periodic payments to be made from the general assets of the estate. The payments may be made at any interval selected by the testator, such as monthly, quarterly, or annually. The amount of the payments must be expressly stated as a fixed dollar amount or a dollar amount determinable by the provisions of the will [*Prob. Code §§ 21117(b), (e), 21118(b); see Prob. Code § 21101* (rule applicable to wills, trusts, and other instruments)].

An annuity must be distinguished from a gift of income. An annuity is a periodic payment of a specified or ascertainable sum that is payable unconditionally [ *Estate of Markham (1946) 28 Cal. 2d 69, 73-74, 168 P.2d 669* ]. A periodic payment that is dependent on the existence of an income that may fluctuate is not an annuity, but a gift of income [ *Estate of Luckel (1957) 151 Cal. App. 2d 481, 488, 312 P.2d 24* ]. When an annuity is created, the annuitant is entitled to the stipulated payments, irrespective of the earnings derived from a particular corpus or fund, and, if the earnings are insufficient to meet the payments, other assets of the corpus or fund or may be resorted to to satisfy them [ *Estate of Luckel (1957) 151 Cal. App. 2d 481, 488, 312 P.2d 24* ]. A devise of a specified monthly sum to be paid out of the net income of the estate is not an annuity, since the devisee is entitled to the monthly payments only insofar as there is income to meet them [ *Estate of Roberts (1945) 27 Cal. 2d 70, 77, 162 P.2d 461* ]. In determining whether a devise

is an annuity or merely income from a specified corpus or fund, the testator's intentions must be given effect [ *Estate of Luckel (1957) 151 Cal. App. 2d 481, 487, 312 P.2d 24* ].

### **[c] Commercial Annuity Contracts**

A gift of an annuity to be paid directly out of the assets of the estate, while legally possible, may be inadvisable. Since an annuity is potentially payable from the general assets of the estate [*Prob. Code §§ 21117(b), (e), 21118(b)*; see *Prob. Code § 21101* (rule applicable to wills, trusts, and other instruments)], it is a charge against the whole estate, and, if the payments are to continue over a long period (e.g., the lifetime of the annuitant), administration of the estate will be prolonged indefinitely. To avoid this problem, the testator may provide that a commercial annuity contract be purchased. Even without such a direction in the will, the executor or any other person interested in the estate may petition the court for authority to purchase an annuity from an insurer admitted to do business in California [*Prob. Code § 9733*]. On such a petition, the court may prescribe the conditions under which the annuity will be purchased [ *Estate of Luckel (1957) 151 Cal. App. 2d 481, 492, 312 P.2d 24* (decided under former *Prob. Code § 584*, repealed July 1, 1988); see now *Prob. Code § 9733*].

### **[d] Considerations in Providing for Commercial Annuity Contracts**

Whenever a testator contemplates making provision in the will for an annuity, several factors must be considered. The first is whether the annuity is to run for the lifetime of the intended annuitant or merely for a period of years. The age of the annuitant is also of critical importance, as is the amount of money that will be available to purchase an annuity contract. Before deciding to authorize the purchase of a commercial annuity contract, the testator or the attorney should confer with an insurance agent who is familiar with annuities to determine the cost of a single premium annuity contract for a person of the age of the intended annuitant. The testator should also decide if the intended annuitant will have the right to obtain a lump sum payment in lieu of periodic payments. The will may provide that the annuitant shall have the option of receiving a cash settlement in lieu of the annuity [for such a provision, see § 63.510].

The testator may require that the annuity contract be nonassignable, noncancelable, and nonrefundable. By providing that the contract be nonguaranteed, nonrefundable, noncancelable, and nonassignable, this form will prevent the annuitant from obtaining a lump sum payment in lieu of the periodic payments. The testator should, of course, be aware that any devisee may purchase an annuity contract for his or her own benefit. Unless the intended devisee requires investment guidance, a provision allowing the devisee to decide whether he or she would prefer to take the annuity contract or a cash devise [see § 63.510] may be advisable.

## **[2] FORM**

### **Annuity With Fixed Periodic Payments**

I direct my executor to purchase a commercial annuity contract to provide for payments to \_\_\_\_\_ [name of intended annuitant] of \_\_\_\_\_ [specify amount] per month, beginning \_\_\_\_\_ [specify period, e.g., one year after my death] and continuing thereafter until the death of \_\_\_\_\_ [name of intended annuitant], and I give that annuity contract to \_\_\_\_\_ [name of intended annuitant]. As used in this will, the term "commercial annuity contract" means an annuity contract sold by an insurance company authorized to do business in the \_\_\_\_\_ [State of California or state in which I am domiciled at the time of my death] and insured on a nonguaranteed, nonrefundable, noncancelable, and nonassignable basis.

### **Legal Topics:**

For related research and practice materials, see the following legal topics:  
Estate, Gift & Trust Law Wills Bequests & Devises



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*23-63 California Legal Forms--Transaction Guide § 63.509***§ 63.509 Annuity Based on Fixed Premium Amount****[1] Comment--Use of Form**

This form may be used to direct the executor to purchase a single premium annuity contract to provide for periodic payments to an intended annuitant. The amount of the premium is fixed, while the amount of the periodic payments will vary according to the age of the intended annuitant. For a provision directing the executor to purchase an annuity contract providing for periodic payments in a fixed amount to a named beneficiary (with the amount of the premium varying according to the age of the intended annuitant), see § 63.508. For a provision providing for an annuity with an option to take cash in lieu of periodic payments, see § 63.510.

For discussion of annuities, commercial annuity contracts, and considerations in providing for commercial annuity contracts, see § 63.508[1].

**[2] FORM****Annuity Based on Fixed Premium Amount**

I direct my executor to purchase a commercial annuity contract for a single premium in the amount of \_\_\_\_\_[specify amount] to provide for regular monthly payments to \_\_\_\_\_[name of intended annuitant], beginning \_\_\_\_\_[specify period, e.g., one year after my death] and continuing thereafter until the death of \_\_\_\_\_[name of intended annuitant], and I give that annuity contract to \_\_\_\_\_[name of intended annuitant]. As used in this will, the term "commercial annuity contract" means an annuity contract sold by an insurance company authorized to do business in the \_\_\_\_\_[State of California or state in which I am domiciled at the time of my death] and insured on a nonguaranteed, nonrefundable, noncancelable, and nonassignable basis.

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Estate, Gift & Trust Law Wills Bequests & Devises



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8. Devises of Securities, Notes, and Annuities

*23-63 California Legal Forms--Transaction Guide § 63.510***§ 63.510 Annuity With Option to Take Cash in Lieu of Periodic Payments****[1] Comment--Use of Form**

This form may be used to direct the executor to purchase a commercial annuity contract but allow the intended annuitant the option of taking a cash bequest in lieu of the periodic payments. The form includes two alternative provisions. The first gives the intended annuitant the option of taking a specified sum of cash in lieu of the annuity contract. The second gives the intended annuitant the option of taking cash equal to the cost of the annuity contract. For a provision directing the executor to purchase an annuity contract calling for fixed periodic payments, see § 63.508. For a provision directing the executor to purchase an annuity contract with a fixed premium, see § 63.509.

For discussion of annuities, commercial annuity contracts, and considerations in providing for commercial annuity contracts, see § 63.508[1].

**[2] FORM****Annuity With Option to Take Cash in Lieu of Periodic Payments**

*[First alternative: gift of annuity contract or specified sum of cash]*

I direct my executor to purchase a commercial annuity contract to provide for payments to \_\_\_\_\_[*name of intended annuitant*] of \_\_\_\_\_[*specify amount*] per month, beginning \_\_\_\_\_[*specify period, e.g., one year after my death*] and continuing thereafter until the death of \_\_\_\_\_[*name of intended annuitant*], and I give that annuity contract to \_\_\_\_\_[*name of intended annuitant*]. As used in this will, the term "commercial annuity contract" means an annuity contract sold by an insurance company authorized to do business in the \_\_\_\_\_[*State of California or state in which I am domiciled at the time of my death*] and insured on a nonguaranteed, nonrefundable, noncancelable, and nonassignable basis. Provided, however, that at the sole and exclusive option of \_\_\_\_\_[*name of intended annuitant*], communicated to my executor in writing within \_\_\_\_\_[*specify period, e.g., four*

months] after my death, the foregoing provision providing for the purchase of a commercial annuity contract shall be ineffective, and \_\_\_\_\_[*name of intended annuitant*] shall receive cash in the amount of \_\_\_\_\_[*specify amount*], in lieu of the commercial annuity contract and the payments that would have been received thereunder.

[*Second alternative: gift of annuity contract or cash equal to annuity premium*]

I direct my executor to determine the cost of a single-premium commercial annuity contract providing for payments to \_\_\_\_\_[*name of intended annuitant*] in the amount of \_\_\_\_\_[*specify amount*] \_\_\_\_\_[*per month or quarterly or annually*], beginning \_\_\_\_\_[*specify period, e.g., one year after my death*], and continuing thereafter until the death of \_\_\_\_\_[*name of intended annuitant*]. I further direct my executor to advise \_\_\_\_\_[*name of intended annuitant*] of that cost, in writing, no later than \_\_\_\_\_[*specify period, e.g., two months after my death*]. I give \_\_\_\_\_[*name of intended annuitant*] the option to receive such an annuity, which shall be purchased for \_\_\_\_\_[*him or her*] by my executor, or to receive instead of such an annuity an amount of cash equal to the cost of purchasing such an annuity, determined as provided above. \_\_\_\_\_[*name of intended annuitant*] must advise my executor, in writing, no later than \_\_\_\_\_[*specify period, e.g., four months*] after my death, whether \_\_\_\_\_[*he or she*] elects to receive a commercial annuity or to receive cash as provided above. If \_\_\_\_\_[*name of intended annuitant*] fails to make such an election, then upon expiration of the time for making the election my Executor shall purchase a commercial annuity for \_\_\_\_\_[*name of intended annuitant*] as provided above. As used in this will, the term "commercial annuity contract" means an annuity contract sold by an insurance company authorized to do business in \_\_\_\_\_[*California or the state in which I am domiciled at the time of my death*] and insured on a nonguaranteed, nonrefundable, noncancelable, and nonassignable basis.

### **Legal Topics:**

For related research and practice materials, see the following legal topics:  
Estate, Gift & Trust Law Wills Bequests & Devises



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*23-63 California Legal Forms--Transaction Guide §§ 63.511-63.529*

**[Reserved]**

§§ 63.511[Reserved]



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## DIVISION IV: WILLS AND TRUSTS

## CHAPTER 63 WILL PROVISIONS

## PART IV. FORMS

## F. Residuary Clause

## 1. General Residuary Clauses

*23-63 California Legal Forms--Transaction Guide § 63.530***§ 63.530 Residuary Clause--Short and Long Forms****[1] Comment****[a] Use of Form**

This form is a will provision that may be used to give the residue of the testator's estate to a single devisee. A residuary clause should be included in any will that makes specific, general, or demonstrative devises, or that provides for any annuities, to ensure that the will disposes of the entire estate. The only situation in which a residuary clause is not required is when the will makes a general devise of all of the testator's property to a single devisee [*see* § 63.350]. Even in that case, however, an alternative residuary devise is recommended to take effect in the event that the primary disposition fails.

This form should be used in conjunction with § 63.532, which provides for alternative dispositions in the event the primary residuary devisee does not take. If the residue is to be divided into classes of property, § 63.531 should be used in place of this form. If there will be more than one residuary devisee, § 63.550 (residuary devise to two or more devisees in fractional shares) or § 63.551 (residuary devise to class) should be used instead of this form. For a "pour-over" residuary clause distributing the residue into a preexisting inter vivos trust, see *Ch. 61, Will Drafting and Complete Will Forms*, § 61.211[2], Section 3.01. For residuary clauses establishing testamentary trusts, see *Ch. 64, Testamentary Trusts: Payment and Distribution Provisions* .

**[b] Residue of the Estate**

A "residuary devise" is a devise of property that remains after all specific and general devises have been satisfied [*Prob. Code* § 21117(f); for discussion of the terminology used in the Probate Code, *see* § 63.351[1][b]]. A general residuary clause (or a will making a general disposition of all of the testator's property), however, does not, exercise a power of appointment held by the testator unless specific reference is made to the power or there is some other indication of an intention to exercise it [*Prob. Code* § 641(a)]. For a detailed list of all property that might potentially be included in the residue of an estate, see § 63.530[1][g].

### **[c] Function of Residuary Clause**

The purpose of the residuary clause is to dispose of any portion of the testator's estate not otherwise disposed of by the will. The amount and value of the property included in the residue will vary widely from estate to estate. If the will has disposed of the bulk of the estate assets in the form of specific, general, or demonstrative devises, the residue will be small. If the will has made no such devises, or if the specific, general, or demonstrative devises are inconsequential, the residue may consist of all or nearly all of the estate.

Since general and demonstrative devises are satisfied out of the general assets of the estate and the residuary devisee receives only what remains [*Prob. Code* § 21117(f)], the residuary devisee will be the first to suffer if the estate assets are inadequate to pay all debts and expenses and to satisfy all devises. [*see Prob. Code* §§ 21401, 21402(a); *see also* § 63.416[1][b][i]]. If, after satisfaction of specific, demonstrative, and general devises, the remaining assets are small or insignificant, problems of administration may also arise.

Notwithstanding these negative features of residuary devises, if the testator wants the bulk of the estate to pass to a specific person or persons, or to a class, it will be easier to carry out the testator's intent by allowing the property to pass under a residuary devise than by attempting to itemize all of the property into specific, general, and demonstrative devises. The use of a residuary clause to dispose of the bulk of the estate has the added advantage of automatically passing to the primary devisee any property that the testator may inadvertently have failed to itemize, or that may be acquired after execution of the will. For this reason, it is recommended that the bulk of the estate be devised by way of the residuary clause. In addition, the use of one or more abatement provisions may be helpful. For a provision specifying the order in which devises will abate if the estate is inadequate to pay all debts and expenses and to satisfy all devises in full, see § 63.416. For a provision limiting nonresiduary devises to a fixed percentage of the estate, see § 63.417. For a provision specifying the order in which devises will abate if the estate is inadequate, and expressing a preference for the testator's spouse, see § 63.418. For a provision specifying the responsibility of the residue for the debts, expenses, and any family allowance, see § 63.591.

Devises designed to qualify for the federal estate tax marital deduction [*I.R.C.* § 2056] by means of a "marital deduction formula" present special considerations. One component of such a formula typically involves a residuary devise that is designed either to qualify for the marital deduction or to take advantage of the surviving spouse's unified credit [*I.R.C.* § 2010] to minimize estate taxation. The role of residuary devises in connection with marital deduction planning is discussed in Ch. 71, *Marital Deduction Trust Provisions*, which also contains formula clauses [*see* §§ 71.210-71.212 (formula clauses for testamentary trusts)].

### **[d] Short or Long Form**

This form sets forth two alternative clauses, a short form and a long form. The long form contains a detailed itemization of the classes of property that are included in the residue. Whether the short or the long form will be used is largely a matter of individual preference. A specification of the property that is included in the residue is not necessary to transfer that property and adds little to an otherwise carefully drafted will. Some attorneys, however, feel that such a specification helps to clarify the scope of the residuary clause and makes it clear that property included in the residue is not included in any other devise.

### **[e] Drafting Considerations**

The residuary clause should never include phrases that refer to specific items of property, such as "including my house and books," or "consisting of my tools and my furniture." Phrases such as these may be interpreted as specific devises and may raise questions about whether the clause is intended as a true residuary disposition. The testator may exempt certain items of property from the residue, if those items have been mentioned and disposed of in other parts of the will. Whenever any property is exempted from the residuary clause, the will should make an alternative disposition of the

property to take effect if the devisee named to take the property does not in fact take it. Failure to make an alternative disposition will, under those circumstances, result in a partial intestacy. Although it is possible to exempt certain items of property from the residue, it is never necessary to do so, since the residue consists, by definition, of property that remains after all other devises have been satisfied [*Prob. Code* § 21117(f)]. In most cases, it is also inadvisable to do so.

The residuary clause should be placed at the end of the portion of the will that makes property dispositions. It should follow all specific, general, and demonstrative devises. If such a placement is impossible or impractical, the will should include a provision confirming that the clause is intended as a general residuary disposition. For such a provision, see § 63.570.

#### **[f] Income Distributed to Residuary Beneficiaries**

Unless the will provides otherwise [*Prob. Code* § 12000], net income received during administration and not paid to other devisees [*see Prob. Code* §§ 12002 (income payable to specific devisees), 12003 (interest payable on general pecuniary devise in trust), 12004(b) (interest payable on annuity), 12005 (interest payable to devisee of devise for maintenance)] must be distributed to the residuary devisee or devisees [*Prob. Code* § 12006].

#### **[g] Property That May Be Included in Residue**

Since the definition of residue is so inclusive [*see* discussion in § 63.530[1][b]], the kinds, categories, and forms of property that may pass under the residue clause are almost limitless. Some that the testator may not be aware of are the following:

- Property the testator owns but has forgotten.
- Property the testator acquired after execution of the will [*Prob. Code* § 21105].
- Property owned by the testator but wrongfully withheld by others.
- A remainder interest in real property to which the testator becomes entitled upon expiration of the prior estate.
- Devises conditioned on circumstances that have failed by the time of distribution (e.g., survival).
- Devises renounced or disclaimed by their devisees.
- Devises forfeited through unsuccessful will contests.
- Devises invalid for illegality or because they violate public policy.
- Devises invalid because of undue influence, fraud, menace, or duress [*see Prob. Code* § 6104].
- Earnings of the testator received after execution of the will.
- Income received during administration [*Prob. Code* §§ 12006, 16345].

#### **[h] Survival and Lapse**

A residuary devise, like any other devise, may be conditioned on survival for a specified period [*Prob. Code* § 21109(a)]. A devisee who fails to survive the testator, or who fails to survive until a future time required by the will,

does not take under the will [*Prob. Code § 21109(a)*]. For a discussion of devises conditioned on survival until a future time, see § 63.411[1]. For a discussion of simultaneous death and provisions stating the order of death in the event of a common disaster, see § 63.630. For an alternative disposition of the residue to take effect if the primary devisee does not survive the testator or for some other reason fails to take, see § 63.532. For alternative dispositions of the residue if there are multiple devisees, see § 63.550.

**[2] FORM**

**Residuary Clause--Short and Long Forms**

[*Short form*]

I give all the rest and residue of my estate to \_\_\_\_\_ [*name of devisee*].

[*OR*]

[*Long form*]

I give to \_\_\_\_\_ [*name of devisee*] all the residue of all the real and personal property that I am entitled to give at the time of my death, not otherwise effectively disposed of in this will, including, but not limited to [*omit any categories not to be included*] any property of which I am possessed but which I have not mentioned in this will; any property over which I have a power of appointment, which I hereby exercise; any property willed to me after my death (including property willed through testamentary exercise of a power of appointment); any property hereafter recovered on my behalf for any reason; any property coming to me hereafter as a beneficiary of the disposition of any future interest; any property mentioned or given in this will as part of a gift that fails for any reason, including, but not limited to property renounced, abandoned, disclaimed, or forfeited for any reason, or from any trust that fails for any reason; and any other property that might otherwise devolve by the laws of succession rather than pass by this will.

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Estate, Gift & Trust Law Wills Residuary Clauses



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F. Residuary Clause

1. General Residuary Clauses

*23-63 California Legal Forms--Transaction Guide § 63.531*

**§ 63.531 Residuary Clause--Gifts by Categories of Property**

**[1] Comment**

**[a] Use of Form**

This form may be used to make residuary dispositions of different classes or categories of property to different beneficiaries. It includes provisions making residuary dispositions of real property, personal property, and particularly described items of property. Also included is a "catch-all" provision that may be used to dispose of all of the residue of the estate not otherwise disposed of by the will. For general residuary clauses, see § 63.531.

**[b] Categories of Property**

This form will permit the testator to divide the residue of the estate into specified classes or categories of property and to make a separate disposition of each. This method of disposition may be useful if the testator owns large quantities of particular types of property and wishes to ensure that all property of a certain type (e.g., all of the testator's commercial real property, or all of the testator's personal property) will pass to a named beneficiary. It eliminates the need for an itemized description of all property in a particular category and may be useful if the testator expects to acquire property after execution of the will or is concerned that any items in a specific category may have been inadvertently omitted.

Although this provision may be useful in rare cases, it should be employed with caution. If more than three or four separate residuary dispositions are contemplated, specific gifts of the property subject to those dispositions will usually be preferable. Splitting the residue into categories invites problems of classification, may lead to conflict among the residuary beneficiaries, and may unnecessarily prolong and complicate administration and distribution of the estate.

**[c] Danger of Overlapping Descriptions**

Great care must be taken to avoid overlapping descriptions of the property that is subject to the separate residuary dispositions. If a particular item of property could fall within two different categories of the residue as established by

the will, conflict and litigation will almost invariably result. If there is the slightest danger of overlapping descriptions, a single residuary disposition will almost always be preferable. For general residuary clauses disposing of a single residue, see § 63.530. If the testator wishes different beneficiaries to receive different proportions of the single residue, the form in § 63.550 may be used.

#### **[d] Need for Complete Residuary Scheme**

The attorney must carefully construct a complete residuary scheme for any will that has more than one residue. Other residuary dispositions should be effective to dispose of any part of the residue that is not covered by the residuary categories. The "catch-all" provision included in this form should be employed to eliminate any possibility that property not described in another residuary disposition will escape the effect of the will and result in a partial intestacy.

#### **[2] FORM**

##### **Residuary Clause--Gifts by Categories of Property**

###### *[Real property]*

I give the residue of my real property only, including all of the real property that I am entitled to dispose of by will and that is not otherwise effectively disposed of in this will, to \_\_\_\_\_ *[name of beneficiary]*.

###### *[Personal property]*

I give the residue of my personal property only, including all of the personal property that I am entitled to dispose of by will and that is not otherwise effectively disposed of in this will, to \_\_\_\_\_ *[name of beneficiary]*.

###### *[Particularly described property]*

I give the residue of all \_\_\_\_\_ *[describe particular category of property, e.g., my personal effects or all the tangible personal property located in my household at \_\_\_\_\_ (location) or all of my real property situated in the County of \_\_\_\_\_, State of California or all of my commercial real property]*, including all such property that I am entitled to dispose of by will and that is not otherwise effectively disposed of in this will, to \_\_\_\_\_ *[name of beneficiary]*.

###### *[Catch-all provision]*

I give the residue of all of my \_\_\_\_\_ *[real or personal]* property which is not the \_\_\_\_\_ *[proper or expressly designated]* subject matter of any other residuary disposition in this will, that I am entitled to dispose of by will and that is not otherwise effectively disposed of in this will, to \_\_\_\_\_ *[name of beneficiary]*.

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:  
Estate, Gift & Trust Law Wills Residuary Clauses



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## DIVISION IV: WILLS AND TRUSTS

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## F. Residuary Clause

## 1. General Residuary Clauses

*23-63 California Legal Forms--Transaction Guide § 63.532***§ 63.532 Alternative Gift of Residue to One or More Named Beneficiaries****[1] Comment****[a] Use of Form**

This form is a will provision that may be used to make an alternative gift of the residue. The form provides that a named beneficiary or beneficiaries will take the residue if the primary residuary beneficiary for any reason fails to take. When used, it should immediately follow the residuary clause of the will. For an alternative gift of the residue which provides that issue of a deceased beneficiary will take the share of the deceased beneficiary, see § 63.533.

**[b] Alternative Gifts**

If the residuary beneficiaries do not survive the testator or fail to take the residue for any other reason, the will should provide for an alternative disposition. In the absence of such a disposition, the gift will either lapse or pass under provisions of the anti-lapse statute, *Prob. Code § 21110*. For a general consideration of the content and application the anti-lapse statute (together with drafting considerations), see discussion in § 63.411[1][d]. For a general consideration of distribution in the manner provided in *Prob. Code § 240*, see *Ch. 61, Will Drafting and Complete Will Forms*, § 61.15[6][d] and § 63.533[1][c].

**[2] FORM****Alternative Gift of Residue to One or More Named Beneficiaries****Alternate Disposition of Residue**

In the event that \_\_\_\_\_ [the *or* any] residuary beneficiary named in [Paragraph \_\_\_\_\_ of] this will fails for any reason to take all or any part of the residuary gift to that beneficiary, then I give any portion of the residuary gift to that beneficiary which is not taken by that beneficiary to \_\_\_\_\_ [alternate

*beneficiary or beneficiaries*].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawWillsBeneficiariesGeneral OverviewEstate, Gift & Trust LawWillsResiduary Clauses



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DIVISION IV: WILLS AND TRUSTS  
 CHAPTER 63 WILL PROVISIONS  
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 F. Residuary Clause  
 1. General Residuary Clauses

*23-63 California Legal Forms--Transaction Guide § 63.533*

**§ 63.533 Alternative Gift of Residue to Issue of Primary Beneficiary**

**[1] Comment**

**[a] Use of Form**

This form is a will provision that may be used to give the residue of the estate to the issue of the primary beneficiary if the primary beneficiary should for any reason fail to take. The form may provide that distribution will be made to the issue of the primary beneficiary according to any one of four basic patterns of distribution. For discussion of these basic patterns and the legal rules that govern them, see § 63.533[1][b] *et seq.*

For a will provision making an alternative gift of the residue to a named beneficiary or beneficiaries, see § 63.532.

**[b] Gifts to Issue or Descendants--In General**

There are four basic patterns under which the property of a testator may be distributed to the testator's "issue" or "descendants." Three of these patterns are set forth in the Probate Code, while the fourth is recognized in case law. The patterns are:

- Distribution by representation based on the nearest generation with living members (also referred to as distribution in the manner provided in *Prob. Code § 240*;) [*Prob. Code §§ 240, 245*; see discussion in § 63.533[1][c]];
- Distribution "per stirpes," "by representation," or "by right of representation" (also referred to as distribution in the manner provided in *Prob. Code § 246*) [*Prob. Code § 246*; see discussion in § 63.533[1][d]];
- Distribution per capita at each generation (also referred to as distribution in the manner provided in *Prob. Code § 247*) [*Prob. Code § 247*; see discussion in § 63.533[1][e]]; and

■ Distribution per capita [ *In re Estate of Rauschenplat (1931) 212 Cal. 33, 35, 297 P. 882* ; *Estate of Carroll (1944) 62 Cal. App. 2d 798, 801-802, 145 P.2d 644* ; see also discussion in § 63.533[1][f]].

Which of these patterns will apply to a particular gift depends on the intention of the testator as expressed in the will [see *Prob. Code* §§ 245, 246, 247].

**[c] Distribution by Representation Based on Nearest Generation With Living Members (Probate Code Sections 240, 245)**

If the will calls for issue or descendants to take without specifying the manner, or requires distribution "in the manner provided in *Section 240 of the Probate Code*" and expresses no contrary intention, it will be distributed by representation based on the nearest generation with living members [*Prob. Code* §§ 240, 245]. This is the same pattern applicable to intestate distributions. Under this pattern, the property is divided into as many equal shares as there are living members of the nearest generation of issue then living and deceased members of that generation who leave issue then living. Each living member of the nearest generation of issue then living receives one share, and the share of each deceased member of that generation who leaves issue then living is divided in the same manner among his or her then living issue [*Prob. Code* § 240, see *Estate of Beckle (2009) 174 Cal. App. 4th 34, 38, 93 Cal. Rptr. 3d 890* (Distribution of an intestate decedent's estate could not be limited to surviving first cousins and the children of predeceased first cousins while excluding grandchildren of predeceased first cousins because the governing statutes, *Prob. Code* §§ 50, 240, 6402(d), do not limit the surviving issue of a predeceased heir entitled to inherit to the first generation; rather, surviving issue includes all lineal descendants of all generations)].

A contrary intention is not shown by the use, without more, of the words "per capita," when living members of the designated class are not all of the same generation [*Prob. Code* § 245(b)(1)], nor is a contrary intention expressed, without more, by use of contradictory wording, such as "per capita and per stirpes," or "equally and by right of representation" [*Prob. Code* § 245(b)(2)].

For further consideration of distribution by representation based on the nearest generation with living members, see discussion in *Ch. 61, Will Drafting and Complete Will Forms*, § 61.15[6][d].

**[d] Distribution Per Stirpes or by Representation (Probate Code Section 246)**

If the will calls for property to be distributed "per stirpes," "by representation," "by right of representation," or "in the manner provided in *Section 246 of the Probate Code*," it will be distributed as provided in the latter section [*Prob. Code* § 246(c); for special rule applicable to will or trust executed before January 1, 1986, see *Prob. Code* § 246(b)]. The property will be divided into as many equal shares as there are living children of the designated ancestor, if any, and deceased children who leave issue then living. Each living child of the designated ancestor is allocated one share, and the share of each deceased child who leaves issue then living is divided in the same manner [*Prob. Code* § 246(a)].

This pattern of distribution is based upon "roots" or "stocks" ("stirpes" in Latin) [Black's Law Dictionary (5th ed., 1979) 1030]. Under it, heirs are entitled to take the shares of their own immediate ancestors, who in turn are entitled to take the shares of their immediate ancestors, and so on until a common ancestor is reached [ *In re Estate of Rauschenplat (1931) 212 Cal. 33, 35, 297 P. 882* ; *Estate of Carroll (1944) 62 Cal. App. 2d 798, 801-802, 145 P.2d 644* ].

For further discussion of distribution "per stirpes" or "by representation," see discussion in *Ch. 61, Will Drafting and Complete Will Forms*, § 61.15[6][e].

**[e] Distribution Per Capita at Each Generation (Probate Code Section 247)**

If the will calls for property to be distributed "per capita at each generation," or "in the manner provided in *Section 247 of the Probate Code*," [*Prob. Code § 247(b)*]; for special rule applicable to will or trust executed before January 1, 1986, see *Prob. Code § 247(c)*], the property will be divided into as many equal shares as there are living members of the nearest generation of issue then living and deceased members of that generation who leave issue then living. Each living member of the nearest generation of issue then living is allocated one share, and the remaining shares, if any, are combined and then divided and allocated in the same manner among the remaining issue as if the issue already allocated a share and their descendants were then deceased [*Prob. Code § 247(a)*].

For further discussion of distribution per capita at each generation, see discussion in *Ch. 61, Will Drafting and Complete Will Forms*, § 61.15[6][f].

### [f] Distribution Per Capita

Distribution "per capita" is the traditional pattern under which property is distributed to the issue, descendants, or other heirs of a decedent as individuals and not according to the shares of their ancestors [ *In re Estate of Rauschenplat* (1931) 212 Cal. 33, 35, 297 P. 882 ; *Estate of Carroll* (1944) 62 Cal. App. 2d 798, 801-802, 145 P.2d 644 ]. In Latin, the words "per capita" mean "by the heads or polls"; i.e., "according to the number of individuals" [Black's Law Dictionary (5th ed., 1979) 1022]. When property is distributed "per capita," the distributees take in equal shares [Black's Law Dictionary (5th ed., 1979) 1022]. Distribution "per capita" is traditionally contrasted with distribution "per stirpes" [see *Lombardi v. Blois* (1964) 230 Cal. App. 2d 191, 198, 40 Cal. Rptr. 899 ; see discussion in § 63.533[1][d]].

Care must be used in drafting any will provision which calls for distribution "per capita." Use of the words "per capita," without more, when living members of the designated class are not all of the same generation, will not achieve a traditional distribution "per capita," but will result in a distribution in the manner provided by *Prob. Code § 240* [*Prob. Code § 245(b)(1)*]; see discussion in § 63.533[1][c].

For further discussion of distribution "per capita," see *Ch. 61, Will Drafting and Complete Will Forms*, § 61.15[6][g].

## [2] FORM

### Alternative Gift of Residue to Issue of Primary Beneficiary

#### Alternate Disposition of Residue

In the event that \_\_\_\_\_ [the *or* any] residuary beneficiary named in [Paragraph \_\_\_\_\_ of] this will fails for any reason to take all or any part of the residuary gift to that beneficiary, then I give any portion of the residuary gift to that beneficiary which is not taken by that beneficiary to \_\_\_\_\_ [his *or* her] issue \_\_\_\_\_ [in the manner provided in Section \_\_\_\_\_ (240, 246, *or* 247) of the California Probate Code *or* in equal shares, share and share alike, irrespective of whether all such issue are *or* are not members of the same generation] .

#### Legal Topics:

For related research and practice materials, see the following legal topics:  
Estate, Gift & Trust Law Wills Residuary Clauses



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1. General Residuary Clauses

*23-63 California Legal Forms--Transaction Guide §§ 63.534-63.549*

**[Reserved]**

§§ 63.534[Reserved]



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DIVISION IV: WILLS AND TRUSTS

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F. Residuary Clause

2. Dispositions to Multiple Beneficiaries and Classes

*23-63 California Legal Forms--Transaction Guide § 63.550*

### **§ 63.550 Residuary Clause--Fractional Shares**

#### **[1] Comment**

##### **[a] Use of Form**

This form may be used to give the residue of the estate to two or more named individuals in fractional shares. For general residuary gifts, see § 63.530. For residuary gifts by categories of property, see § 63.531.

The fractional shares provided for in this form may be equal or unequal. The use of fractional shares instead of alternative methods such as percentage interests is recommended as the easiest and most practical method of disposing of the residue among several named beneficiaries. If the residue is to be apportioned among a large number of beneficiaries, the attorney should use a common denominator to describe all shares (e.g., eight-sixteenths instead of one-half) and make sure that the total of all fractional interests equals 100 percent of the residuary estate.

If the residue will be given to a group, such as children or grandchildren of the testator, and if the membership of the group may expand before the testator's death, the testator should consider making a class gift. For a residuary disposition to a class, see § 63.551.

##### **[b] Residuary Gift to Multiple Beneficiaries--Statutory Rules**

If a residuary gift is made to two or more persons, and the gift to one of those persons fails for any reason and no alternative disposition is provided, the share passes to the other persons in proportion to their other interest in the residuary gift [*Prob. Code § 2111(b)*]. This rule, however, is subject to two major exceptions that in practice are likely to apply more often than the rule itself.

First, the rule yields to the "anti-lapse" statute [*Prob. Code § 2110*], which provides in substance that a devise to "kindred" of the testator or the testator's spouse will pass to the issue of the devisee in the manner provided in *Prob. Code § 240* [for discussion of *Prob. Code § 240*, see *Ch. 61, Will Drafting and Complete Will Forms § 61.115[6]*] if the

transferee predeceases the testator or fails (or is treated as failing) to survive until the required time [*Prob. Code* § 21110(a); for discussion of the anti-lapse statute, see § 63.411[1][d]]. Since residuary beneficiaries are usually persons closely related to the testator, the anti-lapse statute usually will apply to residuary dispositions. It assures that the issue of deceased devisee will take the devisee's share of the residuary estate, rather than having that share divided among the other devisees named in the will.

Second, both the basic rule and the anti-lapse statute will yield to the intent of the testator [*Prob. Code* §§ 21102(b), 21110(b)]. If the will makes a substitute disposition, that disposition will control. As noted below, the preferred drafting practice is to include a substitute disposition].

In addition, the use of extrinsic evidence is not precluded, to the extent otherwise authorized by law, to determine the testator's intention [*Prob. Code* § 21101(c)].

### **[c] Alternative and Substitute Dispositions**

Although application of the statutory rules discussed above will usually give the result desired by the testator, the best drafting practice is to specify what the testator wants done if one or more devisees are deceased or unable to take their respective shares. This reduces the possibility of uncertainty over the testator's intent and results in a clearer, more complete estate plan. alternate or substitute gifts of the residue of the estate to a named beneficiary or beneficiaries, see § 63.533. For provisions making alternate or substitute gifts of the residue to issue of the primary beneficiary, see § 63.533.

### **[2] FORM**

#### **Residuary Clause--Fractional Shares**

##### **Residuary Clause**

*[First alternative: beneficiaries to take in equal shares:]*

I give all the rest and residue of my estate to \_\_\_\_\_ [*names and descriptions of beneficiaries, e.g.: my niece, Jane White, of Smalltown, California, and my friend, Ruth Black, of Bigtown, California,*] in equal shares, share and share alike.

[OR]

*[Second alternative: beneficiaries to take in unequal shares:]*

I give all the rest and residue of my estate to the following persons and in the proportions hereinafter set forth:

To \_\_\_\_\_ [*name and description of beneficiary, e.g.: my niece, Jane White, of Smalltown, California,*],  
a \_\_\_\_\_ [*specify fraction, e.g.: two-thirds*] interest in the residue of my estate; and

To \_\_\_\_\_ [*name and description of beneficiary, e.g.: my friend, Ruth Black, of Bigtown, California,*] a  
\_\_\_\_\_ [*specify fraction, e.g.: one-third*] interest in the residue of my estate.

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Wills Beneficiaries Class Gifts Estate, Gift & Trust Law Wills Residuary Clauses



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2. Dispositions to Multiple Beneficiaries and Classes

*23-63 California Legal Forms--Transaction Guide § 63.551*

**§ 63.551 Residuary Clause--Gift to Class**

**[1] Comment**

**[a] Use of Form**

This form may be used to give the residue of the estate to members of a class. The form includes two alternative provisions. The first may be used to make a class gift to specified relatives, such as the testator's "children" or "grandchildren," or children of a specified relative. The second may be used to make a class gift to "issue" of the testator or of some other named person. Either of these provisions may be used to direct that distribution to members of the class will be made in the manner provided in *Prob. Code § 240*, in the manner provided in *Prob. Code § 246*, in the manner provided in *Prob. Code § 247*, or "per capita." For a discussion of distributions under *Prob. Code §§ 240, 246, and 247*, and distribution "per capita," see § 63.551[1][e].

For will provisions making general residuary gifts, see § 63.530. For will provisions making residuary gifts by classes or categories of property, see § 63.531. For will provisions making alternative disposition of the residue if all or part of a primary residuary gift fails, see §§ 63.532 and 63.533. For a gift of the residue in fractional shares, see § 63.550.

**[b] Gifts to a Class**

**[i] In General**

Halfbloods, adopted persons, persons born out of wedlock, stepchildren, foster children, and the issue of all such persons when appropriate to the class, are included in the terms of a class gift or relationship in accordance with the rules for determining relationship and inheritance rights for purposes of intestate succession [*Prob. Code § 21115(a)*; see *Prob. Code §§ 6400-6455* (intestate succession rules)]. However, two exceptions are recognized to this rule. First, in construing a devise by a testator who is not the natural parent, a person born to the natural parent will not be considered the child of that parent unless the person lived while a minor as a regular member of the household of the natural parent or of that parent's parent, brother, sister, spouse, or surviving spouse [*Prob. Code § 21115(b)*]. Second, in construing a

devise by a testator who is not the adoptive parent, a person adopted by the adoptive parent will not be considered the child of that parent unless the person lived while a minor (either before or after the adoption) as a regular member of the household of the adopting parent or of that parent's parent, brother, sister, or surviving spouse [*Prob. Code* § 21115(b); *Estate of DeLoreto* (2004) 118 Cal. App. 4th 1048, 1052-1053, 13 Cal. Rptr. 3d 513 (adopted adult children of beneficiary of father's trust were not members of class of grandchildren who were trust beneficiaries)]. This rule (and the two exceptions noted) also apply to:

- Persons who would be kindred of the testator or kindred of a surviving, deceased, or former spouse of the testator under *Prob. Code* § 21110 [*Prob. Code* § 21115(c)(1)];
- Persons to be included as issue of a deceased devisee under *Prob. Code* § 21110 (the anti-lapse statute) [*Prob. Code* § 21115(c)(2); see § 63.411[1][d)];
- Persons who would be the testator's or other person's heirs under *Prob. Code* § 21114 [*Prob. Code* § 21115(c)(3)].

These rules for determining intestate succession are those in effect at the time the transfer is to take effect in enjoyment [*Prob. Code* § 21115(d)].

For more detailed discussion of the statutory definitions of "child" and "children," together with rules governing the rights of natural children, adopted children, foster children, and stepchildren to take under a will or by intestate succession, see § 63.226[1][c][i] et seq.

### **[ii] Rule Against Perpetuities**

A gift to a class has the potential for violating the rule against perpetuities. In California, perpetuities are subject to the Uniform Statutory Rule Against Perpetuities (USRAP), which includes a recodification of Professor John Chipman Gray's classic formulation of the common-law rule against perpetuities [*see Prob. Code* §§ 21205(a), 21206(a), 21207(a); see also *Ch. 67, Future Interests and Perpetuities*, § 67.16]. Under that recodification, a nonvested property interest is invalid unless, when the interest is created, it is certain either to vest or terminate no later than 21 years after the death of a person alive at the time of creation [*Prob. Code* § 21205(a)]. If the right of any person to membership in a particular class cannot be determined within the specified 21 years, then the class will fail to vest or terminate within that period and the common-law rule against perpetuities is violated.

However, the USRAP as adopted in California also includes a 90-year "wait-and-see" rule, under which a nonvested interest may be valid if it actually vests or terminates within 90 years after its creation [*see Prob. Code* § 21205(b)]. The 90-year "wait-and-see" rule shifts the traditional perpetuities focus from *what might conceivably happen* to a nonvested interest during the applicable perpetuities period to *what actually happens* to the interest in the 90 years after it is created. For further discussion of this rule and its effect, see *Ch. 67, Future Interests and Perpetuities*, § 67.16[6]

Although the 90-year "wait-and-see" rule substantially liberalizes perpetuities regulation in California, it does not eliminate the need to recognize potential perpetuities violations and take reasonable steps to avoid them. Any will provision that makes a class gift should be drafted to avoid the potential for a perpetuities violation. Further, any will that makes a class gift (or otherwise calls for a complex disposition of property) should include a perpetuities savings clause. For perpetuities savings clauses suitable for use in wills, see *Ch. 67, Future Interests and Perpetuities*, §§ 67.231, 67.232. For a detailed discussion of the Uniform Statutory Rule Against Perpetuities and its operation in California, see *Ch. 67, Future Interests and Perpetuities*, § 67.16.

### **[c] Protection for Issue of Kindred Devisees**

Under *Prob. Code § 21110* (the anti-lapse statute), the issue of devisees who are kindred of the testator, or kindred of a surviving, deceased, or former spouse of the testator, are protected against unintended lapse of gifts. For a general discussion of the antilapse statute, see § 63.411[1][d].

#### [d] Defining the Class

Since the statutes go to some lengths to specify the persons who will and will not be included in a class gift [see § 63.551[1][b][i]], the will should clearly state whether halfbloods, adopted persons, and persons born out of wedlock, or the issue of those persons, will be included in the class. For a will provision defining the words "child" and "children," see § 63.672. For a will provision defining the word "issue," see § 63.673. For a general consideration of the statutory definitions of "child" and "children," together with rules governing the rights of natural children, adopted children, foster children, and stepchildren to take under a will or by intestate succession, see § 63.226[1][c][i] et seq.

#### [e] Patterns of Distribution for Gifts to Issue and Descendants

There are four basic patterns under which the property of a testator may be distributed to the testator's "issue" or "descendants":

- Distribution by representation based on the nearest generation with living members (also referred to as "distribution in the manner provided in *Section 240 of the Probate Code*") [*Prob. Code* §§ 240, 245; see § 63.533[1][c)];
- Distribution "per stirpes," "by representation," or "by right of representation" (also referred to as "distribution in the manner provided in *Section 246 of the Probate Code*") [*Prob. Code* § 246; see discussion in § 63.533[1][d)];
- Distribution per capita at each generation (also referred to as "distribution in the manner provided in *Section 247 of the Probate Code*") [*Prob. Code* § 247; see § 63.533[1][e)]; and
- Distribution per capita [see *In re Estate of Rauschenplat (1931) 212 Cal. 33, 35, 297 P. 882*; *Estate of Carroll (1944) 62 Cal. App. 2d 798, 801-802, 145 P.2d 644*; see also § 63.533[1][f)].

Which of these patterns will apply to a particular gift depends on the intention of the testator as expressed in the will [see *Prob. Code* §§ 245, 246, 247]. If the class consists of "issue" or "descendants" of the testator (or of another person, e.g., a child of the testator), the will should adopt one of these patterns of distribution.

#### [2] FORM

##### Residuary Clause--Gift to Class

##### Class Gift of Residue

[First alternative provision: Class consisting of specified relatives:]

I give all the rest and residue of my estate to \_\_\_\_\_ [identify class, e.g., my children or my grandchildren or the children of my sister, Sally Ann Smith], as a class. The class so designated \_\_\_\_\_ [includes, but is not limited to, or does not include] halfbloods, adopted persons, persons born out of wedlock, and the issue of those persons. In the event that any class member does not survive me and leaves issue who survive me, then the share which that class member would have received if he or she had survived me shall be distributed to his or her issue [in the manner provided in Section \_\_\_\_\_ (specify either 240, 246, or

247) of the California Probate Code *or* per capita, and not per stirpes, the issue to take in equal shares, whether or not of the same generation].

[OR]

[*Second alternative provision: Class consisting of issue of testator or another specified person:*]

I give all the rest and residue of my estate to my issue [*or* the issue of \_\_\_\_\_ (*name and relationship*)], as a class. In the event that any class member does not survive me and leaves issue who survive me, then the share which that class member would have received if he or she had survived me shall be distributed to his or her issue \_\_\_\_\_ [in the manner provided in Section \_\_\_\_\_ (*specify either 240, 246, or 247*) of the California Probate Code *or* per capita, and not per stirpes, said issue to take in equal shares, whether or not living members of the class are all of the same generation].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Wills Beneficiaries Class Gifts Estate, Gift & Trust Law Wills Residuary Clauses



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*23-63 California Legal Forms--Transaction Guide §§ 63.552-63.569*

**[Reserved]**

§§ 63.552[Reserved]



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DIVISION IV: WILLS AND TRUSTS

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3. Interpretation and Operation of Residuary Clause

*23-63 California Legal Forms--Transaction Guide § 63.570*

**§ 63.570 Clause Confirming That Particular Provision Is Intended as General Residuary Provision**

**[1] Comment--Use of Form**

This form may be used to confirm that a specific clause is intended to operate as a general residuary provision. It is usually unnecessary to confirm that a specific provision of the will is intended as a residuary disposition. If, however, the residuary clause cannot be placed as the last dispositive provision in the will, or if there is any possibility of uncertainty about whether a particular clause is really intended to operate as a general residuary disposition, this clause will clarify the testator's intent.

**[2] FORM**

**Clause Confirming That Particular Provision Is Intended as General Residuary Provision**

Notwithstanding any other provision of this will or any order among the provisions of this will, it is my intention that this clause operate as the general residuary disposition of this will and shall pass all the property that I am entitled to dispose of by will and that is not otherwise effectively disposed of in this will.

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Estate, Gift & Trust Law Wills Residuary Clauses



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F. Residuary Clause

3. Interpretation and Operation of Residuary Clause

*23-63 California Legal Forms--Transaction Guide § 63.571*

**§ 63.571 Clause Directing Executor to Convert Residue Into Cash**

**[1] Comment**

**[a] Use of Will**

This form may be used to direct the executor to sell the residue of the estate and distribute the proceeds in accordance with other directions in the will. For general residuary gifts, see § 63.530. For residuary gifts by categories of property, see § 63.531. For alternative dispositions if all or part of the primary residuary gift fails, see § 63.532. For a gift of the residue in fractional shares with alternative dispositions, see § 63.550. For a residuary gift to a class, see § 63.551. For a clause requiring abatement of nonresiduary gifts to protect the residuary beneficiaries against unanticipated reduction of the estate, see § 63.572.

**[b] Sale of Estate Property**

When the will directs that property be sold, or gives the executor authority to sell property [*see Prob. Code § 10000*], the executor must sell the property in accordance with the directions stated in the will [*Prob. Code § 10002(a)*]. The executor, or any interested person [*see Prob. Code § 48* (definition)], may, after a noticed hearing, receive an order relieving the executor of the duty to comply with the will if noncompliance would be to the advantage of the estate and in the best interest of the interested persons [*Prob. Code § 10002(b)*; *see Prob. Code § 1220* (notice requirements)]. Similarly, if the executor neglects or refuses to sell estate property when the will directs the executor to do so, any interested person may petition the court for an order compelling the executor to perform the sale [*Prob. Code § 10001*].

Absent directions in the will [*see Prob. Code § 10002(a)*], the executor has discretion to determine the order in which estate property will be sold, whether to sell the estate's entire interest or some lesser interest, and whether the sale will be at public auction or by private sale [*Prob. Code § 10003*]. The executor has the authority to enter into contracts with agents, brokers [*see Prob. Code § 10150*], or auctioneers [*see Prob. Code § 10151*] for the purpose of securing the sale of estate property [*see also Prob. Code §§ 10160-10167* (compensation of agents, brokers, or auctioneers)]; *Sullivan v. Dorsa* (2005) 128 Cal. App. 4th 947, 956, 963, 27 Cal. Rptr. 3d 547 (broker's commission cannot be awarded on

unconsummated sale of real property)].

In the absence of any contrary directions in the will [*see Prob. Code § 10002(a)*], if the executor determines that any assets of the estate constitute a unit for purposes of sale, he or she may have them appraised as a unit [*Prob. Code § 10004(a)*]. With court approval, the property may be sold under one bid without prior appraisal, but if the property is sold at a private sale, the purchase price may not be below 90 percent of its appraised value [*Prob. Code § 10004(b)*, (c)]. If the estate assets to be sold as a unit include any real property, the sale must be made pursuant to the statutes governing those sales [*see Prob. Code §§ 10300-10316*], and if the assets constituting a unit are all personal property, the personal property sales provisions [*see Prob. Code §§ 10250-10264*] apply [*Prob. Code § 10004(d)*].

At the executor's discretion, estate property may be sold either with or without notice if the will directs or authorizes the sale [*Prob. Code §§ 10252* (personal property), *10303* (real property)].

## [2] FORM

### Clause Directing Executor to Convert Residue Into Cash

I direct my Executor, as soon after commencement of the administration of my estate as is consistent with proper administration, to sell all of the residue of my estate, at either public auction or private sale, and with or without notice (as my Executor shall in my Executor's discretion determine) \_\_\_\_\_ [*or state other specific directions for the method of selling the property*], and to distribute the proceeds of that sale [as I have otherwise directed in this will or in accordance with the provisions of Paragraph \_\_\_\_\_ (*number of paragraph*) of this will].

### Legal Topics:

For related research and practice materials, see the following legal topics:  
Estate, Gift & Trust Law Wills Residuary Clauses



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DIVISION IV: WILLS AND TRUSTS

CHAPTER 63 WILL PROVISIONS

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F. Residuary Clause

3. Interpretation and Operation of Residuary Clause

*23-63 California Legal Forms--Transaction Guide § 63.572***§ 63.572 Clause Requiring Abatement of Nonresiduary Devises to Protect Residuary Devises****[1] Comment****[a] Use of Form**

This form is a will provision that may be used to provide for the abatement of nonresiduary devises and thus to protect the residuary devisees against an unanticipated reduction in the size of the estate. The form provides that if the residue of the estate is less than a specified sum (or, in the alternative, less than a specified percentage of all of the property disposed of by the will), the nonresiduary devises are to abate proportionally, so that the residue will be no less than a specified sum (or, in the alternative, no less than a specified percentage of all the property disposed of by the will). For a pecuniary devise limited to a specified percentage of the estate, see § 63.413. For a provision specifying the order in which devises will abate if the testator's estate is insufficient to pay all debts and expenses and satisfy all devises in full, see § 63.416. For a clause limiting nonresiduary devises to a specified percentage of the estate, see § 63.417.

**[b] Abatement of Residue****[i] Statutory Rules**

A typical testamentary plan may envision a few devises of relatively small or nominal value to friends or relatives, followed by a residuary disposition of the bulk of the estate to the testator's spouse or children. A testator who wishes to pass the bulk of his or her assets by way of a residuary devise should consider the possibility that the value of the estate may decline after the will is executed but before he or she dies. If property disposed of by a will is not sufficient to pay all debts and expenses and to satisfy all devises in full, it may be necessary to reduce or eliminate some devises. In some circumstances, it may even be necessary to sell assets disposed of by the will to pay debts or expenses of administration or to satisfy other devises [*see Prob. Code § 10000(a)*]. The process whereby testamentary devises are reduced or eliminated is referred to as "abatement" and is subject to rules set forth in the Probate Code [*see Prob. Code §§ 21400-21406*].

Under the Probate Code rules, residuary devisees [*see Prob. Code § 21117(f)* ("residuary devise" defined)] abate before all other devisees [*Prob. Code § 21402(a)*]. If abatement is necessary, a residuary devise, even if to the testator's spouse or children, will abate before a specific or general devise [*see Prob. Code § 21117(a), (b)*], even if the specific or general devisees are unrelated to the testator.

The Probate Code rules do not apply, however, if the will provides otherwise. If the will provides for abatement, or if the testator's plan or purpose would be defeated by abatement under the statutory rules, the shares of devisees will abate as necessary to effectuate the will, plan, or purpose [*Prob. Code § 21400; see Prob. Code § 21100(b)* ("instrument" includes will)].

### **[ii] Will Provisions**

If the testator wishes to protect the residuary devisees from application of the statutory abatement rules, the will may provide that a particular devise will not exceed a specified percentage of the estate [*see § 63.413*]. Alternatively, the will may provide that nonresiduary devisees, considered collectively, will not exceed a specified percentage of the estate [*see § 63.417*]. Finally, the will may provide that, if the residue is less than a specified sum or a specified percentage of the estate, nonresiduary devisees will abate. This form adopts the latter approach. For a general consideration of abatement and problems that arise when estate assets are not sufficient to pay all debts and expenses and to satisfy all devisees, see § 63.416[1].

### **[2] FORM**

#### **Clause Requiring Abatement of Nonresiduary Devisees to Protect Residuary Devisees**

I give all the rest and residue of my estate to \_\_\_\_\_ [*name of residuary devisee*]. If the value of the residue of my estate is less than \_\_\_\_\_ [the sum of \_\_\_\_\_ (*specify amount*) or \_\_\_\_\_ (*specify percent*) percent of the value of all of my property disposed of by this will], then I direct that all of the nonresiduary devisees provided for in this will shall abate proportionally, so that the residue of my estate shall in no event be less than \_\_\_\_\_ [the sum of \_\_\_\_\_ (*specify amount*) or \_\_\_\_\_ (*specify percent*) percent of the value of all of my property disposed of by this will]. As used in this paragraph, "residue of my estate" means the value of all of my property disposed of by this will, less the total of all of my debts, all expenses of administration of my estate, all death taxes due and payable as a result of my death, and all nonresiduary devisees provided for in this will.

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Wills Failure of Bequests Abatements Estate, Gift & Trust Law Wills Residuary Clauses



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*23-63 California Legal Forms--Transaction Guide §§ 63.573-63.589*

**[Reserved]**

§§ 63.573[Reserved]



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F. Residuary Clause

4. Liabilities of the Residue

*23-63 California Legal Forms--Transaction Guide § 63.590*

**§ 63.590 Responsibility of Residue for Debts, Expenses, and Family Allowance**

**[1] Comment**

**[a] Use of Form**

This form is a will provision that may be used to specify whether debts, expenses of administration, and any family allowance payable out of the estate will or will not be paid out of the residue of the estate. The form includes two optional provisions, one providing that the residue will be free of responsibility for payment, and the other providing that the residue will bear the burden of payment but that any part of the residue that qualifies for the estate tax marital deduction will be free of it. For forms apportioning the payment of death taxes, see §§ 63.310-63.317.

**[b] Apportionment of Debts, Expenses, and Family Allowance**

The estate of every testator is subject to administration [*see Prob. Code §§ 7000-12591*] and, under rules set forth in the Probate Code, to the payment of debts [*see Prob. Code §§ 9000-9399* (creditor claims), *11400-11467* (payment of debts)], expenses of administration [*see Prob. Code §§ 11401(b)* ("debt" includes an expense of administration), *11420(a)(1)* (priority for payment of expenses of administration)], and any family allowance that may be payable out of the assets of the estate [*Prob. Code § 7001*; *see Prob. Code §§ 6540-6545* (family allowance)]. If necessary, the executor may sell property disposed of by the will to pay debts, taxes, expenses of administration, a family allowance, or even other devises [*Prob. Code § 10000(a)*]. Unless the will provides otherwise [*Prob. Code § 21400*], the shares of devisees will abate (be reduced or eliminated if necessary) for the purpose of paying debts, expenses of administration, and a family allowance in the order specified in *Prob. Code § 21402* [*Prob. Code § 21401*]. Under *Prob. Code § 21402*, property not disposed of by the will (if any) will abate first, followed by property subject to a residuary devise [*Prob. Code § 21402(a)(1), (2)*]. Property subject to general and specific devises will abate only after all of the residue has been abated [*Prob. Code § 21402(a)(36)*]. If there are two or more residuary devisees, the shares of those devisees will abate pro rata [*Prob. Code § 21403(a)*].

The order of abatement set forth in *Prob. Code § 21402* will be appropriate for many estates. If the will names only one

devisee, for example, payments of the debts and expenses out of the residue will adequately serve the needs of that devisee and other arrangements will be unnecessary. If most of the estate consists of specific devises, however, and if the residue is too small to pay all of the debts and expenses, the executor may be forced to require a pro rata contribution from the specific devisees [*see Prob. Code § 21402(a)(5), (6)* (order of abatement of specific devisees); *see also Prob. Code § 21403(a)* (shares of beneficiaries abate pro rata within each class)]. If the testator wishes a particular devisee to be free of responsibility for payment of debts or expenses, the will should provide that the devisee take free of those charges.

If a substantial part of the testator's estate has been transferred to an inter vivos trust, leaving only a small probate estate, the probate estate may be inadequate for payment of the debts and expenses. In such a case, the testator may provide that the trust will pay all or part of the debts and expenses. If the testator wishes to preserve the maximum estate tax marital deduction, without reduction for debts or expenses [*see I.R.C. § 2056(a); Treas. Reg. § 20.2056(a)-2(b)(2)*], the will should provide that no debts or administration expenses are to be paid from property subject to the marital deduction gift.

## [2] FORM

### Responsibility of Residue for Debts, Expenses, and Family Allowance

*[If residue will not be responsible for debts of estate:]*

The residue of my estate shall not be charged with or responsible for the payment of any of my debts, any of the expenses of administration of my estate, or any family allowance that may be payable out of my estate. It is my wish and intention that the residuary \_\_\_\_\_ [devisee *or* devisees] named in this will shall take without deduction, reduction, charge, or offset for any such payment. I direct that my executor shall not resort to the residue for any such payment, unless all other property of my estate shall have been exhausted, but shall pay all of my debts, expenses of administration, and any family allowance as follows: \_\_\_\_\_ [*set forth directions for payment*].

*[Or, if only that portion of residue that does not qualify for the federal estate tax marital deduction will be responsible for debts of estate:]*

I direct my executor to pay all of my debts, all expenses of administration of my estate, and any family allowance that may be payable out of my estate, from the residue of my estate that is disposed of by this will. Provided, however, that if any portion of the residue qualifies for the marital deduction allowed by *Internal Revenue Code Section 2056(a)* (or its successor), my executor shall pay any debts, expenses, and family allowance only from the part of the residue that does not qualify for the marital deduction. It is my intention that the marital deduction shall not be reduced, diminished, or impaired, in whole or in part, by reason of any such payment.

### Legal Topics:

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law  
Estate Administration  
Allowances  
Families  
Estate, Gift & Trust Law  
Estate Administration  
Claims Against Estates  
General Overview  
Estate, Gift & Trust Law  
Wills  
Residuary Clauses



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F. Residuary Clause

4. Liabilities of the Residue

*23-63 California Legal Forms--Transaction Guide § 63.591*

### **§ 63.591 Instructions as to Ademption of Residuary Interests**

#### **[1] Comment**

#### **[a] Use of Form**

This form may be used to state whether the interests of any of the residuary beneficiaries will be adeemed (i.e., satisfied or reduced) by inter vivos transfers from the testator to those beneficiaries. The form includes two optional provisions, one stating that inter vivos transfers to residuary beneficiaries will not satisfy, reduce, or otherwise adeem any gifts made to those beneficiaries under the will, and the other providing that inter vivos transfers to some, but not all, of the residuary beneficiaries will have that effect. For a general provision stating whether transfers made during the testator's lifetime will or will not adeem testamentary dispositions in favor of those beneficiaries, see § 63.426.

#### **[b] Advancement and Ademption as Applied to Residue**

Property given by a transferor during his or her lifetime to a person is treated as a satisfaction of an at-death transfer to that person, in whole or in part, only if one of the following conditions is satisfied:

- The instrument provides for deduction of the lifetime gift from the at-death transfer [*Prob. Code § 21135(a)(1)*].
- The transferor declares in a contemporaneous writing that the gift is in satisfaction of the at-death transfer or that its value is to be deducted from the value of that transfer [*Prob. Code § 21135(a)(2)*].
- The transferee acknowledges in writing that the gift is in satisfaction of the at-death transfer or that its value is to be deducted from the value of that transfer [*Prob. Code § 21135(a)(3)*].
- The property given is the same property that is the subject of a specific gift to that person [*Prob. Code § 21135(a)(4)*].

Thus, a will provision dealing with ademption is only one of the permissible ways for dealing with this issue. As discussed below, it is probably not the preferable method in the majority of cases.

### **[c] Practical Considerations**

In the majority of estates, the residuary beneficiaries will receive the largest portion of the estate. Under these circumstances, the testator may or may not want a particular lifetime gift to affect the amount of a residuary beneficiary's inheritance. The testator should consider each gift made to such a beneficiary during the testator's lifetime on its own merits, and decide whether or not that gift should be deducted from the share left to that beneficiary under the testator's will. In other words, the testator needs flexibility to determine whether or not ademption should apply in a given case.

The testator's will should not limit the flexibility necessary to make this case-by-case determination. As discussed in § 63.426[1][c], any will provision dealing with ademption will operate as a constraint on the testator's flexibility. For this reason, it is recommended that except in unusual cases, it is better for the will to remain silent on the question of whether lifetime gifts are to be deducted from testamentary dispositions. If the testator decides that a particular gift to a residuary beneficiary should count against that beneficiary's share under the will, the testator can simply execute a declaration to that effect at the time the gift is made.

### **[2] FORM**

#### **Instructions as to Ademption of Residuary Interests**

*[If there is to be no ademption of residuary gifts:]*

No payment, gift, or transfer of property of any kind made by me during my lifetime to any residuary beneficiary under this will shall operate to reduce, satisfy, or adeem, in whole or in part, any residuary gift I have made under this will.

*[Or, if some but not all residuary gifts are to be adeemed:]*

No payment, gift, or transfer of property of any kind made by me during my lifetime to any residuary beneficiary under this will shall operate to reduce, satisfy, or adeem, in whole or in part, any residuary gift that I have made to that beneficiary under this will, except with respect to a transfer to the beneficiary named in Paragraph \_\_\_\_\_[number] of this will. Should I make any gift, payment, or transfer during my lifetime to the beneficiary named in Paragraph \_\_\_\_\_[number] of this will, then I direct that the full value of that gift, payment, or transfer, determined as of the date of the gift, payment, or transfer, shall be deducted from the value of the residuary gift made to that beneficiary under this will, and if the value of all such gifts, payments, or transfers made to that beneficiary, determined in the manner stated above, equals or exceeds the value of the residuary gift made to that beneficiary under this will, then, and to that extent, the residuary gift shall be satisfied in full.

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Wills Failure of Bequests Ademptions Estate, Gift & Trust Law Wills Residuary Clauses



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4. Liabilities of the Residue

*23-63 California Legal Forms--Transaction Guide §§ 63.592-63.609*

**[Reserved]**

§§ 63.592[Reserved]



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DIVISION IV: WILLS AND TRUSTS

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G. Arrangements for Funeral, Burial, Cremation, and Burial Plot

*23-63 California Legal Forms--Transaction Guide § 63.610*

**§ 63.610 Directions for Burial of Testator's Remains**

**[1] Comment**

**[a] Use of Form**

This form is a will provision that may be used to give directions for the burial of the testator's remains. For directions for cremating the testator's remains, see § 63.611. For provisions directing the executor to comply with written instructions left by the testator or with the terms of a contract providing for funeral and burial or cremation, see § 63.612.

**[b] Testator's Instructions for Interment**

**[i] In General**

Any person may leave written directions regarding the disposition of his or her remains and specifying funeral goods and services to be provided after his or her death [*Health & Safety Code § 7100.1(a)*]. If there is no contrary statement signed and dated by the person, the directions may not be altered, changed, or otherwise amended in any material way, except as may be required by law, and they must be faithfully carried out upon the person's death, provided both of the following requirements are met [*Health & Safety Code § 7100.1(a)*]:

- The directions clearly and completely set forth the person's wishes in sufficient detail to preclude any material ambiguity with regard to the instructions.
- The arrangements for payment through trusts, insurance, commitments by others, or any other effective and binding means have been made [*see Bus. & Prof. Code § 7735 (preneed funeral arrangements)*].

If funds are set aside only for the cost of disposition of the person's remains, or only for the funeral goods and services, the wishes of the person must be carried out only to the extent that the person has sufficient assets to do so, unless the

person or persons that otherwise have the right to control the disposition and arrange for the funeral goods and services agree to assume the cost [*Health & Safety Code § 7100.1(b)*].

If directions for the disposition of a person's remains are contained in a will, they must be carried out immediately, regardless of the validity of the will in other respects or the fact that the will may not be offered for or admitted to probate until a later date [*Prob. Code § 7100.1(c)*].

### **[ii] Right of Survivors to Control Disposition of Remains**

Unless a person has left written directions regarding the disposition of his or her remains and specifying the funeral goods and services to be provided after his or her death, the right to control the disposition of the remains and to arrange for the funeral goods and services vests in the following persons in the order named [*Health & Safety Code § 7100(a)*]:

- An agent under a power of attorney for health care governed by the Health Care Decisions Law [*Prob. Code § 4600 et seq.*].
- The competent surviving spouse.
- The sole surviving competent adult child of the deceased person or, if there is more than one competent adult child, the majority of the surviving competent adult children. However, less than the majority may exercise this right if they have used reasonable efforts to notify all other surviving competent adult children of their instructions and are not aware of any opposition to those instructions on the part of one-half or more of all the surviving competent adult children.
- The surviving competent parent or parents of the decedent. If one of the surviving competent parents is absent, the remaining competent parent will be vested with this right after reasonable efforts have been unsuccessful in locating the absent surviving competent parent.
- The sole surviving competent adult sibling of the decedent or, if there is more than one surviving competent adult sibling of the decedent, the majority of the surviving competent adult siblings. Less than the majority of the surviving competent adult siblings may exercise this right if they have used reasonable efforts to notify all other surviving competent adult siblings of their instructions and are not aware of any opposition to those instructions by the majority of all surviving competent adult siblings.
- The surviving competent adult person or persons respectively in the next degrees of kindred or, if there is more than one surviving person of the same degree of kindred, the majority of those persons. Less than the majority of surviving competent persons of the same degree of kindred may exercise this right if they have used reasonable efforts to notify all other surviving competent persons of the same degree of kindred of their instructions and are not aware of any opposition to those instructions on the part of one-half or more of all surviving competent persons of the same degree of kindred.
- The public administrator when the deceased person has sufficient assets.

As used above, "adult" means an individual who has attained 18 years of age, "child" means a natural or adopted child of the decedent, and "competent" means an individual who has not been declared incompetent by a court of law or who has been declared competent by a court of law following a declaration of incompetence [*Prob. Code § 7100(g)*].

If any person to whom the right of control has vested has been charged with murder or voluntary manslaughter in connection with the decedent's death, and those charges are known to the funeral director or cemetery authority, the right of control is relinquished and passed on to the next of kin in accordance with *Prob. Code § 7100(a)* [*Prob. Code §*

7100(b)(1)].

Liability for the reasonable cost of interment devolves upon the same persons in whom the right to control disposition of the remains and arrange for funeral goods and services is vested, and in the same order of priority as shown in the foregoing list [*Health & Safety Code § 7100(a)*]. This liability devolves jointly and severally upon all kin of the deceased person in the same degree of kindred, and upon the estate of the deceased person [*Health & Safety Code § 7100(c)*]. However, if a person accepts the gift of an entire body, that person will, subject to the terms of the gift, be liable for the reasonable cost of final disposition of the deceased person [*Health & Safety Code § 7100(c)*]; *see also Health & Safety Code §§ 7150-7151.40* (anatomical gifts); *see also Ch. 106, Anatomical Gifts § 106.11 et seq.*].

### **[iii] Authority of Funeral Director or Cemetery Authority**

A funeral director or cemetery authority will have complete authority to control the disposition of a deceased person's remains, and to recover the usual and customary charges for the disposition, when both of the following apply [*Health & Safety Code § 7100(b)*]:

- The funeral director or cemetery authority has knowledge that there are no persons who have the legal right to control the disposition of the remains and arrange for the funeral services and goods, or none of those persons can be found after reasonable inquiry or contacted by reasonable means [*see Health & Safety Code § 7100(a)* and discussion in § 63.610[1][b][ii]].
- The public administrator fails to assume responsibility for disposition of the remains within seven days after having been given written notice of the facts. For this purpose, written notice may be delivered by hand, U.S. mail, facsimile transmission, or telegraph.

A funeral director or cemetery authority will not be liable to any person or persons for carrying out the instructions of the deceased person or the person entitled to control the disposition [*Health & Safety Code § 7100(e)*].

### **[iv] Practical Considerations Relating to Inclusion of Interment Directions in Will**

Most attorneys believe that interment instructions should not be left solely in a will. This is because funerals and interments ordinarily must be carried out within a short time after the testator's death and, in many cases, the will is not consulted or read until after the remains have been interred. If the testator's wishes respecting interment are not known before the remains are interred, it is likely that those wishes will be completely frustrated. For this reason, it is preferable to set forth interment instructions in a separate inter vivos instrument, such as a letter addressed to the executor or to a close relative. To guard against the possibility that such a letter may be lost or misplaced, the original should be delivered to the executor and a copy (or duplicate original) should be attached to and stored with the will. As further protection against misplacement of the instructions, the will may repeat and confirm the nontestamentary instructions.

Whether the instructions are embodied in the will or elsewhere, they should be in writing [*see, e.g., Maffei v. Woodlawn Memorial Park (2005) 130 Cal. App. 4th 119, 123-130, 29 Cal. Rptr. 3d 679* (dispute between decedent's surviving husband and decedent's brother concerning decedent's wishes regarding disposition of her remains in absence of written instructions)], and relatives should be advised where they may be found. A statement by the testator indicating what amount he or she considers reasonable for funeral and burial expenses may be helpful to those who must make the arrangements.

### **[c] Dispositions Under Uniform Anatomical Gift Act**

As an alternative to burial, a testator may dispose of all or part of his or her remains under the Uniform Anatomical Gift

Act [*Health & Safety Code §§ 7150-7151.40*]. The Uniform Anatomical Gift Act permits any person who is at least 18 years of age to make an anatomical gift for transplantation, therapy, research, or the education [*Health & Safety Code § 7150.15*]. The donor may make an anatomical gift by:

- (1) Indicating such on their driver's license [*Health & Safety Code § 7150.20 (a)(1)*];
- (2) Directly through the Donate Life California Organ and Tissue Donor Registry Internet Web site [*Health & Safety Code § 7150.20 (a)(2)*];
- (3) In a will [*Health & Safety Code § 7150.20 (a)(3)*];
- (4) During a terminal illness or injury, by any form of communication that clearly expresses the donor's wish, addressed to at least two adults, at least one of whom is a disinterested witness [*Health & Safety Code § 7150.20 (a)(4)*];
- (5) By a donor card or other record signed by the donor [*Health & Safety Code § 7150.20 (b)*].

For discussion of gifts under the Uniform Anatomical Gift Act, see Ch. 106, *Anatomical Gifts* .

## [2] FORM

### Directions for Burial of Testator's Remains

I direct that my remains be buried \_\_\_\_\_ [*state place of burial, e.g., in the family burial plot at Broadlawn Cemetery, Smalltown, California*].

[*Optional provision for funeral arrangements:*]

I further direct that arrangements for my funeral be made and that the funeral and interment be carried out according to the ritual of \_\_\_\_\_ [*state religious denomination, fraternal order, or give other description of ritual*].

### Legal Topics:

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Anatomical Gifts Estate, Gift & Trust Law Wills General Overview Healthcare Law Treatment Human Remains General Overview Healthcare Law Treatment Human Remains Property Rights



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## DIVISION IV: WILLS AND TRUSTS

## CHAPTER 63 WILL PROVISIONS

## PART IV. FORMS

## G. Arrangements for Funeral, Burial, Cremation, and Burial Plot

*23-63 California Legal Forms--Transaction Guide § 63.611***§ 63.611 Directions for Cremation of Testator's Remains****[1] Comment****[a] Use of Form**

This form may be used to give directions for the cremation of the testator's remains. For a general will provision giving funeral and burial directions, see § 63.610. For provisions directing the executor to comply with written instructions left by the testator or with the terms of a contract providing for funeral and burial or cremation, see § 63.612.

**[b] Cremation**

Cremation means the combination of (1) the reduction of the body of a deceased person to its essential elements by incineration, (2) the repositioning or movement of the body or remains during incineration to facilitate the process, and (3) the processing of the remains after removal from the cremation chamber [*Health & Safety Code § 7010; see Health & Safety Code § 7010.3* ("processing" means removal of foreign objects, and reduction of the particle size of cremated remains by mechanical means, such as grinding, crushing, and pulverizing to a consistency appropriate for disposition)]. Any person may leave written directions for the disposition of his or her remains, including cremated remains [*Health & Safety Code § 7100.1(a); see Health & Safety Code §§ 7001* ("human remains" includes cremated remains), *7002* ("cremated remains" means human remains after cremation)]. For rules governing interment instructions made before death and whether they should be embodied in the will or in some other writing, see discussion in § 63.610[1][b].

Cremated remains may be inurned, placed or buried in a cemetery, or buried at sea [*Health & Safety Code § 7009; see Health & Safety Code §§ 7003* (cemetery), *7011* (inurnment), *7011.2* (placement), *7013* (burial)]. They may also be kept in private dwellings or in churches or religious shrines if certain requirements are met [*Health & Safety Code § 7054.6*]. Before cremated remains may be removed to a private dwelling, church, or religious shrine, a death certificate must be filed with the local registrar of vital statistics and the registrar must issue a permit [*Health & Safety Code §§ 103050, 103065*]. The remains must be in a durable container when they are removed from the place of cremation [*Health & Safety Code § 7054.6*]. The dwelling in which the remains are kept must be owned or occupied by the person having the right to control disposition of the remains [*Health & Safety Code § 7054.6; see Health & Safety Code §*

7100(a), (b) (right to control disposition of remains)]. If the remains are to be kept in a church or religious shrine, written permission must be obtained from the church or shrine, and there must be no conflict with local use permit requirements or zoning laws [*Health & Safety Code* § 7054.6]. When cremated remains are to be buried at sea, they may be taken by air or by boat from any harbor in California [*Health & Safety Code* § 7117]. Before disposition of cremated remains, the licensee or registrant, and its agents and employees, must remove the cremated remains from the place of cremation in a durable container and responsibly maintain the cremated remains, including keeping the remains in a durable container and storing the cremated remains in a place free from exposure to the elements [*Health & Safety Code* § 7054.6(b)].

No crematory may make or enforce any rules requiring that human remains be placed in a casket before cremation or that the remains be cremated in a casket, nor may a crematory refuse to accept remains for cremation because they are not in a casket [*Health & Safety Code* § 8342]. The remains must be removed from their container before they are buried at sea, and any person who carries out such a burial must file with the local registrar of births and deaths in the county nearest the point where the remains were buried a verified statement containing the name of the deceased person, the time and place of death, the place at which the cremated remains were buried, and any other information that the local registrar of births and deaths may require [*Health & Safety Code* § 7117]. All remains not disposed of in accordance with the rules governing the operation and management of private cemeteries [*Health & Safety Code* §§ 8275-8362], within one year, must be interred [*Health & Safety Code* § 8341]. For additional rules and regulations governing the operation of crematories, in particular, see *Health & Safety Code* §§ 8343-8347.

## [2] FORM

### Directions for Cremation of Testator's Remains

I direct that my remains be cremated and that the ashes \_\_\_\_\_ [*state disposition of ashes, e.g., be buried at sea or be buried in the columbarium at Broadlawn Cemetery, Smalltown, California*].

### Legal Topics:

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Wills General Overview Healthcare Law Treatment Human Remains General Overview Healthcare Law Treatment Human Remains Property Rights



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DIVISION IV: WILLS AND TRUSTS

CHAPTER 63 WILL PROVISIONS

PART IV. FORMS

G. Arrangements for Funeral, Burial, Cremation, and Burial Plot

*23-63 California Legal Forms--Transaction Guide § 63.612*

**§ 63.612 Directions for Burial or Cremation Confirming Testator's Lifetime Instructions or Arrangements**

**[1] Comment**

**[a] Use of Form**

This form may be used to direct the executor to carry out funeral and burial or cremation instructions or arrangements made by the testator during his or her lifetime. The form includes two alternative provisions, one directing the executor to comply with written instructions left by the testator and the other directing the executor to comply with a contract entered into by the testator. For funeral and burial directions, see § 63.610. For cremation directions, see § 63.611.

**[b] Will Provisions Confirming Lifetime Arrangements**

Any person may leave written directions regarding the disposition of his or her remains and specifying funeral goods and services to be provided after his or her death [*Health & Safety Code § 7100.1(a)*]. If there is no contrary statement signed and dated by the person, the directions may not be altered, changed, or otherwise amended in any material way, except as may be required by law, and they must be faithfully carried out upon the person's death, provided both of the following requirements are met [*Health & Safety Code § 7100.1(a)*]:

- The directions clearly and completely set forth the person's wishes in sufficient detail to preclude any material ambiguity with regard to the instructions.
- The cost of the disposition and the funeral goods and services is (1) funded through insurance, (2) set aside in a fund or funds designated for that purpose, or (3) held in trust pursuant to a "preneed funeral arrangement" so as to preclude the payment of any funds by the survivor or survivors who might otherwise retain the right to control the disposition and arrange for the funeral goods and services to be provided [*see Bus. & Prof. Code § 7735 (preneed funeral arrangements)*].

For further discussion of directions for the disposition of remains, see § 63.610[1][b][i] *et seq.*

**[2] FORM****Directions for Burial or Cremation Confirming Testator's Lifetime Instructions or Arrangements**

*[If testator has left written instructions for disposition of his or her remains:]*

I direct that my funeral services and \_\_\_\_\_[burial *or* cremation] of my remains be carried out in accordance with my written instructions dated \_\_\_\_\_, which are located \_\_\_\_\_  
*[location of instructions]*.

*[Or, if testator has previously entered into a contract for funeral and burial:]*

On \_\_\_\_\_[*date*], I entered into a contract with \_\_\_\_\_[*name of cemetery or funeral director*], whose address is \_\_\_\_\_[*street address, city, state, zip*], providing for my funeral and the \_\_\_\_\_[burial *or* cremation] of my remains. I direct my executor to comply fully with the terms of that contract and to do everything necessary and appropriate to assure that my funeral and \_\_\_\_\_[burial *or* cremation] shall be in accordance with its terms.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Wills General Overview Healthcare Law Treatment Human Remains General  
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G. Arrangements for Funeral, Burial, Cremation, and Burial Plot

*23-63 California Legal Forms--Transaction Guide § 63.613*

### **§ 63.613 Purchase of Burial Plot**

#### **[1] Comment--Use of Form**

This form may be used to direct the executor to purchase a burial plot and appropriate monument. If the will contains a provision directing that the testator be buried [*see* § 63.610] and if a burial plot has not been acquired, the will may direct the executor to purchase the plot and to erect a headstone or other monument. The provision may also include a limitation on the cost of the plot and monument.

#### **[2] FORM**

##### **Purchase of Burial Plot**

I direct my executor to purchase a burial plot and an appropriate headstone and monument to mark the place of my burial. [The total cost of the plot and headstone or monument shall not exceed \$\_\_\_\_\_.]

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Wills General Overview Healthcare Law Treatment Human Remains General Overview Healthcare Law Treatment Human Remains Property Rights



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*23-63 California Legal Forms--Transaction Guide § 63.614*

**§ 63.614 Gift of Burial Plot**

**[1] Comment--Use of Form**

This form may be used to make a testamentary gift of a family burial plot. If the testator has acquired such a plot during his or her lifetime, it will become part of the estate and may be disposed of by the will.

**[2] FORM**

**Gift of Burial Plot**

I give to \_\_\_\_\_ [*name of beneficiary*] my burial plot located in \_\_\_\_\_ [*location*].

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Estate, Gift & Trust Law Wills General Overview



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G. Arrangements for Funeral, Burial, Cremation, and Burial Plot

*23-63 California Legal Forms--Transaction Guide §§ 63.615-63.629*

**[Reserved]**

§§ 63.615[Reserved]



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DIVISION IV: WILLS AND TRUSTS  
CHAPTER 63 WILL PROVISIONS  
PART IV. FORMS  
H. Simultaneous Death Provision

*23-63 California Legal Forms--Transaction Guide § 63.630***§ 63.630 Provision Reversing Statutory Presumption Regarding Order of Death in Event of Simultaneous Death****[1] Comment****[a] Use of Form**

This form may be used to state that if the testator and the testator's spouse die simultaneously or under circumstances that render it difficult or impossible to determine who died first, the spouse will be conclusively presumed to have survived the testator. This provision reverses the order of death specified in the Probate Code [*see Prob. Code §§ 103, 220, 21109(b)*]. It may be useful to do this for federal estate tax purposes if the testator's estate is significantly larger than that of his or her spouse [*see discussion in § 63.630[1][b][iii] et seq.*]. If both spouses have small estates, this form will not be necessary to save estate taxes and may increase expenses of probate administration. If both estates are large, the provision could significantly increase estate taxes by pushing the estate of the spouse into a higher bracket.

**CAUTION:**

This form should never be used if the estate of the testator's spouse is larger than the testator's own estate. This provision, if used in such a situation, is likely to increase rather than reduce the combined federal estate tax liability of the testator and his or her spouse. The attorney should carefully calculate the potential tax effect of any survivorship provision before including it in the will.

For a discussion of gifts conditioned on survival until a future time, and a provision establishing such a condition, see § 63.411.

**[b] Simultaneous Death****[i] In General**

If two people are spouses, beneficiaries under each other's wills, or heirs under the laws of intestate succession, and die simultaneously in a common disaster or under other circumstances that render it difficult or impossible to determine who died first, a problem will arise regarding the disposition of their estates. Since both spouses will have died, neither

will have survived long enough to have come into beneficial enjoyment of the other's estate. If one survived the other by only a few days (or even a fraction of a second) [*see Recommendation Relating to Simultaneous Deaths*, 17 Cal. L. Revision Comm'n Reports 443, 447 (1984)], the survivor would inherit property from the other. The property that the surviving spouse inherits from the first spouse to die would pass, on the death of the surviving spouse, to the heirs or devisees of the surviving spouse, and the heirs or devisees of the first spouse would not share in it. Further, the property that the surviving spouse inherits from the first spouse would be subject to double administration and taxation--once in the estate of the first spouse and a second time in the estate of the surviving spouse.

### **[ii] Probate Code Rules Affecting Testamentary Devises**

The Probate Code offers solutions to the problems presented by simultaneous death. First, the Code sets forth a special rule relating to community and quasi-community property [*see Prob. Code § 103*]. Under this rule, when a husband and wife die and it cannot be established by clear and convincing evidence that one spouse survived the other, each spouse's share of the community and quasi-community property is treated as if it belonged to that spouse and did not pass to the other [*Prob. Code § 103*]. The effect of this rule is to treat each spouse's half of the community and quasi-community property as that spouse's separate property for purposes of intestate succession and testamentary disposition. Each spouse has the power to dispose of his or her half of the community and quasi-community property by will, but has no power of testamentary disposition over the other spouse's half [*see Prob. Code § 6101* (general rule relating to disposition of property by will)].

The Probate Code also addresses the problem of simultaneous death when two persons (who may or may not be husband and wife) die leaving property to each other by will [*see Prob. Code § 21109*]. Under this rule, a devisee who does not survive the testator, or does not survive until a future time required by the will, does not take under the will. If it cannot be determined by clear and convincing evidence that the devisee survived the testator, or survived until a future time required by the will, it is deemed that the devisee did not survive for the required time [*Prob. Code § 21109*]. However, this rule applies only when the will does not contain a contrary provision [*Prob. Code § 21102(b)*]. If the will contains a specific provision dealing with simultaneous death and survivorship requirements, the will provisions are controlling and will be given effect under the rules for interpretation of wills. The first and most important of these rules is that the intention of the testator as expressed in the will controls the legal effect of the dispositions made in the will [*Prob. Code § 21102(a)*; *see Prob. Code § 21101* (rules applicable to wills, trusts, and other instruments)]. However, this general rule does not preclude the use of extrinsic evidence, to the extent otherwise authorized by law, to determine the testator's intention [*Prob. Code § 21102(c)*]. For a general discussion of the rules of construction of wills, see *Ch. 61, Will Drafting and Complete Will Forms*, § 61.20.

### **[iii] Estate Tax Consequences**

Although the Probate Code rules discussed above will prevent successive administration and taxation of the same property in the estates of two persons, they may have undesirable estate tax consequences if the individuals involved are spouses (as is usually the case) and there is a significant disparity in the relative sizes of their estates. The most extreme situation would be one in which one spouse has a large separate property estate, the other spouse has little or no separate property, and the spouses together have little or no community property [*see § 63.630[1][b][iv]*].

Two features of the federal estate tax are important in such situations. The first is the graduated tax rate. When there is a disparity in the sizes of the estates of the parties, the estates will be taxed at different rates, and the larger estate will pay a disproportionately higher tax [*see I.R.C. § 2001(c)*]. The second important feature is the unified credit against estate and gift tax, under which property equal in value to the "applicable credit amount" can pass by gift or through an estate without liability for federal estate or gift tax [*see I.R.C. §§ 2010(c), 2505(a)* (table of graduated amounts) and discussion in § 60.13[4][b]]. If the value of the smaller estate is less than the "applicable credit amount," the unused portion of that amount will be wasted.

In order to achieve the most favorable estate tax treatment, it is desirable to equalize the estates of the parties as much as possible by shifting property from the larger estate into the smaller one where it will be taxed at a lower rate. This will also ensure that the unified credits available to each estate will be fully utilized. This shifting of property cannot be accomplished under the survivorship rule established by the Probate Code. However, if the spouse with the larger estate is presumed to have predeceased the spouse with the smaller estate, the will of the spouse with the larger estate can transfer property to the spouse with the smaller estate, thereby equalizing the estates of the parties to achieve the most favorable tax treatment possible.

There is no potential for double taxation in such a situation. This is because the amounts transferred from one spouse to the other spouse are fully protected by the federal estate tax marital deduction [*see I.R.C. § 2056; see also § 63.630[1][b][v]*].

#### **[iv] Example of Tax Effect of Form**

The advantages and disadvantages of a provision establishing a conclusive presumption may be illustrated by a relatively simple example. Assume a husband with a taxable estate of \$1.5 million and a wife with a taxable estate of \$500,000 died simultaneously in 2003, when the applicable exclusion amount for the estate tax unified credit was \$1 million [*see I.R.C. § 2010(c)*], and discussion in § 60.13[4][b]. Assume that the husband included a provision in his will stating that in the event of a simultaneous death, the wife will be presumed to have survived him. With this presumption in effect, if the husband left the wife \$500,000 in his will, the entire amount will be fully sheltered from estate tax in the husband's estate under the unlimited marital deduction [*see I.R.C. § 2056*], and the remaining \$1 million in his estate is sheltered from estate tax by the unified credit available to his estate. In the wife's estate, her original \$500,000 plus the \$500,000 received from the husband is sheltered from the estate tax by her unified credit [*I.R.C. § 2010(c)*]. A total of \$2 million therefore passed to other heirs or beneficiaries without estate tax liability. If the husband's will did not establish a conclusive presumption that the wife survived him, then (assuming he had no other available deductions or credits) federal estate tax would be imposed on \$500,000 of his estate (\$1.5 million less the \$1 million applicable exclusion amount) [*see I.R.C. §§ 2001, 2010(c)*].

#### **[v] Marital Deduction Considerations**

The federal estate tax marital deduction allows an unlimited amount of property to pass from a decedent to his or her surviving spouse without liability for federal estate tax [*I.R.C. § 2056(a)*]. The marital deduction is not available, however, for any interest in the property of the decedent which is "terminable" [*I.R.C. § 2056(b)(1)*]. An interest is "terminable" if it may terminate or fail on the lapse of time, the occurrence of an event or contingency, or the failure of occurrence of some contingency or event [*I.R.C. § 2056(b)(1)*]. However, a limited exception to the terminable interest rule provides that the interest of a surviving spouse will not be disqualified if it is terminable if the spouse dies within six months of the decedent or as the result of a common disaster. If the contingency does not in fact occur, the interest of the surviving spouse is not a "terminable interest" [*I.R.C. § 2056(b)(3)*].

A will provision establishing a presumption that the spouse survived the testator will preserve the marital deduction if the property passing from the testator to the surviving spouse is included in the gross estate of the spouse [*Treas. Reg. § 20.2056(e)-2(e)*]. This form will establish such a presumption.

#### **[vi] Other Considerations**

The client should be reminded that property that passes to the spouse under a conclusive presumption of survival will be disposed of in accordance with the spouse's will rather than that of the testator, and that the testator will accordingly lose control over the estate. The ultimate recipients of the portion of the estate passing to the spouse will be designated by the spouse rather than the testator. For this reason, a provision establishing a conclusive presumption that the spouse survived the testator should be used only when the testator and the spouse substantially agree as to the ultimate

disposition of the estate. Finally, since this provision will never become operative in the vast majority of cases, it should be included only if otherwise consistent with the client's dispositive scheme.

**[2] FORM**

**Provision Reversing Statutory Presumption Regarding Order of Death in Event of Simultaneous Death**

If my \_\_\_\_\_ [wife *or* husband] and I should die simultaneously, or if it cannot be established by clear and convincing evidence which of us died first, my \_\_\_\_\_ [wife *or* husband] shall be conclusively presumed to have survived me, and the will shall be construed on the basis of that presumption.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Wills General Overview Insurance Law Life Insurance Beneficiaries Simultaneous Deaths



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H. Simultaneous Death Provision

*23-63 California Legal Forms--Transaction Guide §§ 63.631-63.649*

**[Reserved]**

§§ 63.631[Reserved]



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DIVISION IV: WILLS AND TRUSTS  
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I. Disinheritance and No Contest Provisions

*23-63 California Legal Forms--Transaction Guide § 63.650*

**§ 63.650 Disinheritance Clause--Short Form**

**[1] Comment**

**[a] Use of Form**

This form may be used to disinherit persons who are not beneficiaries under the will. Two alternative provisions are included. The first is a general disinheritance clause that does not name specific persons, while the second is a disinheritance clause that may be used to name a specific person or persons, and, if desired, to state the reason for the disinheritance. The first alternative will be used in most wills as a general clause to disinherit all of the testator's heirs except those provided for in the will. The second may be used in more limited circumstances, that is, if the testator wishes specifically to disinherit a person or persons who might otherwise claim that the testator mistakenly believed them to be dead, or was unaware of their birth (for the rights of persons whom the testator mistakenly believed to be dead or whose birth the testator is unaware of, *see* discussion in § 63.650[1][c]).

For a long form disinheritance clause, *see* § 63.651. For a clause disinheriting a spouse married after execution of the will, *see* § 63.652. For a clause disinheriting children born or adopted after execution of the will, *see* § 63.653. For a clause providing that issue of kindred beneficiaries will not take any gifts made to those beneficiaries, *see* § 63.654. For a no contest clause, *see* § 63.655.

**[b] Disinheritance Clauses**

The purpose of a disinheritance clause is to clearly state the testator's intention not to provide for persons who would otherwise be entitled to inherit all or part of the estate. A disinheritance clause applies only to persons who would inherit the estate if the testator did not intentionally disinherit them (that is, omitted or "pretermitted" heirs) and is to be distinguished from a no contest (in *terrorem* clause), which is designed to discourage beneficiaries under the will from contesting its provisions [ *Estate of Torregano (1960) 54 Cal. 2d 234, 251, 5 Cal. Rptr. 137, 352 P.2d 505* ; for a discussion of will contests and will provisions that may discourage them, *see* § 63.651[1][b]]. Because contesting beneficiaries may take all or part of the estate under the laws of intestate succession or under a former will, their interests depend on defeating the will. Omitted heirs, in contrast, do not "contest" or "challenge" the will, but take in

spite of it [ *Estate of Smith (1973) 9 Cal. 3d 74, 80, 106 Cal. Rptr. 774, 507 P.2d 78* ].

A spouse or child of the testator may, under specified circumstances, assert rights as omitted heirs.

### **[c] Omitted Children**

If a decedent fails to provide in a testamentary instrument for a child born or adopted after the execution of all of the decedent's testamentary instruments, the omitted child generally will be entitled by statute to receive a prescribed share of the decedent's estate [*Prob. Code § 21620; but see Prob. Code § 21621* (no share if child intentionally omitted or otherwise provided for) and discussion *below*]. The share will be equal in value to the share the child would have received if the decedent had died without executing any testamentary instrument [*Prob. Code § 21620*]. For purposes of this rule, a "testamentary instrument" is either a will or a trust instrument that was executed by the decedent and that became irrevocable on the decedent's death [*Prob. Code § 21601(a)*] and "estate" is the decedent's probate estate and all property held in any revocable trust executed by the decedent that became irrevocable on the decedent's death [*Prob. Code § 21601(b)*].

A child is *not* entitled to receive a share of the estate if any of the following is established [*Prob. Code § 21611*]:

- The decedent's failure to provide for the child in the decedent's testamentary instruments was intentional and that intention appears from the testamentary instruments.
- The decedent had one or more children and devised or otherwise directed the disposition of substantially all the estate to the other parent of the omitted child.
- The decedent provided for the child by transfer outside of the estate passing by the decedent's testamentary instruments and the intention that the transfer be in lieu of a provision in those instruments is shown by statements of the decedent or from the amount of the transfer or by other evidence.

If, at the time of the execution of all of the decedent's testamentary instruments effective at the time of the decedent's death, the decedent failed to provide for a living child solely because the decedent believed the child to be dead or was unaware of the birth of the child, the child must receive a share in the estate equal in value to the share the child would have received if the decedent had died without having executed any testamentary instruments [*Prob. Code § 21622*].

For further discussion of the inheritance rights of omitted children, see § 61.16[3].

### **[d] Omitted Spouse**

If a decedent fails to provide in a testamentary instrument for a spouse who married the decedent after the execution of all of the decedent's testamentary instruments, the omitted spouse generally will be entitled by statute to receive a prescribed share of the decedent's estate [*Prob. Code § 21610; but see Prob. Code § 21611* (no share if spouse intentionally omitted or otherwise provided for) and discussion, *below*]. The share consists of all of the following [*Prob. Code § 21610*]:

- The one-half of the community property that belongs to the decedent under *Prob. Code § 100(a)*.
- The one-half of the quasi-community property that belongs to the decedent under *Prob. Code § 101(a)*.
- A share of the decedent's separate property equal in value to the share the spouse would have received if the decedent had died without having executed a testamentary instrument, but in no event is

the share to be more than one-half the value of the separate property in the estate.

The equal division of community or quasi-community property does not apply if the spouses have agreed in writing to a non pro rata division of that property (either as to the aggregate value or as to an individual asset). This does not mean, however, that a written agreement is automatically required to permit or recognize a non pro rata division of community property [see *Prob. Code* §§ 100(b), 101(b)].

For purposes of this rule, a "testamentary instrument" is either a will or a trust instrument that was executed by the decedent and that became irrevocable on the decedent's death [*Prob. Code* § 21601(a)] and "estate" is the decedent's probate estate and all property held in any revocable trust executed by the decedent that became irrevocable on the decedent's death [*Prob. Code* § 21601(b)].

The spouse is not entitled to receive a share of the estate if any of the following is established [*Prob. Code* § 21611]:

- The decedent's failure to provide for the spouse in the decedent's testamentary instruments was intentional and that intention appears from the testamentary instruments.
- The decedent provided for the spouse by transfer outside of the estate passing by the decedent's testamentary instruments and the intention that the transfer be in lieu of a provision in those instruments is shown by statements of the decedent or from the amount of the transfer or by other evidence.
- The spouse made a valid agreement waiving the right to share in the decedent's estate.

For further discussion of the inheritance rights of omitted spouses, see § 61.16[2].

#### **[e] Language Necessary for Disinheritance**

The testator may disinherit an omitted child [*Prob. Code* § 21610] or an omitted spouse [*Prob. Code* § 21620] by stating an intention to do so in the will. Since the law presumes that the failure to name an omitted heir in a will was unintentional [ *Estate of Smith* (1973) 9 Cal. 3d 74, 78-79, 106 Cal. Rptr. 774, 507 P.2d 78 ], the language used in the disinheritance clause must be "strong and convincing" [ *Estate of Smith* (1973) 9 Cal. 3d 74, 78-79, 106 Cal. Rptr. 774 ].

In *Estate of Gardner*, the California Supreme Court held that a will clause purporting to disinherit "any person not mentioned" in the will was insufficient to terminate the rights of omitted heirs. The court pointed out that the intention to disinherit must "clearly appear on the face of the will" and concluded that a clause referring to "any person not mentioned" did not satisfy the requirement [ *Estate of Gardner* (1978) 21 Cal. 3d 620, 623, 147 Cal. Rptr. 184, 580 P.2d 684 ]. In *Estate of Szekely* (1980) 104 Cal. App. 3d 236, 243, 163 Cal. Rptr. 506 (also decided under former Prob. Code § 90), however, the Court of Appeal upheld a disinheritance clause stating, among other things, that the testator had omitted to provide for "my heirs." The court concluded that the word "heir" was more precise and definite than the words "any person" and adequately expressed the testator's intention to disinherit an omitted heir [ *Estate of Szekely* (1980) 104 Cal. App. 3d 236, 241, 163 Cal. Rptr. 506 ].

In *Estate of Shannon*, a widower made a will in favor of his daughter. Twelve years later, he married again. He died two years later, without having made a new will or having revoked his fourteen-year-old will. The will included a disinheritance clause, stating: "I have intentionally omitted all other living persons and relatives. If any devisee, legatee, beneficiary under this will, or any legal heir of mine, person or persons claiming under any of them, or other person or persons shall contest this will or seek to impair or invalidate any of its provisions or conspire with or voluntarily assist anyone attempting to do any of those things mentioned, in that event, I specifically disinherit such person or persons. If any Court finds that such person or persons are lawful heirs and entitled to participate in my estate, then in that event I

bequeath each of them the sum of one dollar (\$1.00) and no more." The court held that the spouse married 12 years after the execution of the will was an omitted spouse under former *Prob. Code* § 6560 and that the disinheritance clause did not adequately evidence the testator's intention to fail to provide for the spouse under former *Prob. Code* § 6561. A general disinheritance clause does not effectively state an intention not to provide for a future spouse. Since there was no mention of the future spouse in the disinheritance clause, or any indication of a future marriage, the spouse was entitled to claim the rights of an omitted spouse [ *Estate of Shannon (1990) 224 Cal. App. 3d 1148, 1153-1154, 274 Cal. Rptr. 338* ].

Although a clause referring to the testator's "heirs" will probably be sufficient to disinherit omitted heirs, more specific language should be used whenever possible. The will should always include declarations as to the testator's marital status and children and issue [for will provisions containing such declarations, *see* §§ 63.220-63.229]. If complete and accurate, these declarations will name all persons (except a spouse married after execution of the will) who would be entitled to protection as omitted heirs. A disinheritance clause referring to "heirs, whether named in this will or not named herein," should then satisfy the statutory requirement that the intention to disinherit appear "from the will" [*see Prob. Code* §§ 6561(a), 6571(a)].

#### **[f] Disinheritance and Lapsed Gifts**

The statutes protecting omitted heirs from unintentional omission [*Prob. Code* §§ 21600-21630] must be distinguished from the statutes that protect the issue of kindred beneficiaries from the lapse of testamentary gifts [*Prob. Code* §§ 21110, 21115]. An omitted heir asserts a claim to all or part of the estate because he or she was not provided for in the testator's will or in a revocable trust instrument executed by the testator [*Prob. Code* §§ 21610 (spouse), 21620 (child); *see Prob. Code* § 21601(a) ("decendent's testamentary instruments" defined)]. The issue of a kindred devisee asserts a claim because the will made a gift to his or her ancestor and the ancestor died before the gift took effect. In either case, the will may express an intention that the claimant receive nothing. In the case of omitted heirs, the failure to provide may appear "from the testamentary instruments" [*Prob. Code* §§ 21611(a) (spouse), 21621(a) (child)]. In the case of the issue of kindred beneficiaries, the intention may be shown "if the will expresses a contrary intention or a substitute disposition" [*Prob. Code* § 21110(b)]. For discussion of statutory protection for the issue of kindred beneficiaries, *see* § 63.551[1][c]. For a clause providing that issue of kindred beneficiaries will not take any gift made to their ancestors, *see* § 63.654.

#### **[g] Disinheritance Clause Should Be Used With Caution**

A disinheritance clause should be used with caution and only after a full consideration of its consequences. While it is only natural that a testator should wish to preserve the testamentary plan embodied in the will and to protect it against contest or challenge, the testator should understand that the omitted heir statutes are designed to protect persons who are typically objects of a testator's bounty and that if those persons are not provided for in a will it is often because the testator did not consider them. The will should not attempt to disinherit those persons unless the testator has in fact considered them and determined that they will not benefit from the will.

#### **[2] FORM**

##### **Disinheritance Clause--Short Form**

*[If testator wants to disinherit all "heirs" specifically named as beneficiaries in will:]*

Except as otherwise provided in this will, I have intentionally failed to provide for any of my heirs.

*[OR, if testator wishes to disinherit named persons:]*

Except as otherwise provided in this will, I have intentionally failed to provide for \_\_\_\_\_ [*name of person or persons disinherited*] [*if desired, add: for the reason that \_\_\_\_\_ (state reasons, e.g., I have made provision for him in that certain trust created on the same date as this will and in which he is the principal beneficiary)*].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Wills Pretermitted Heirs General Overview Estate, Gift & Trust Law Wills Pretermitted Heirs Intent to Omit



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DIVISION IV: WILLS AND TRUSTS  
CHAPTER 63 WILL PROVISIONS  
PART IV. FORMS  
I. Disinheritance and No Contest Provisions

*23-63 California Legal Forms--Transaction Guide § 63.651*

**§ 63.651 Disinheritance Clause--Long Form**

**[1] Comment**

**[a] Use of Form**

This form is a broad form disinheritance clause. It may be used to disinherit persons who are not defined under the will or alternatively, provide a nominal devise to specific persons under the will.

For a short-form disinheritance clause, and general discussion relevant to the use of disinheritance clauses, see § 63.650. For a basic no contest clause, see § 63.655. For a broadly defined no contest clause, see § 63.656. For additional discussion of the use and construction of no contest clauses, see *Ch. 61, Will Drafting and Complete Will Forms*, § 61.18.

**[b] Nominal Devises to Disinherit or Discourage Will Contests**

A provision making a nominal devise (\$1) to an heir may be sufficient to disinherit the heir [ *Van Strien v. Jones (1956) 46 Cal. 2d 705, 707, 299 P.2d 1* ], though such a devise will add nothing to the effectiveness of an otherwise properly drafted disinheritance provision or no contest clause and, if it is improperly drafted, it may be ineffective for either purpose. In *Estate of Carroll (1956) 138 Cal. App. 2d 363, 366, 291 P.2d 976*, the testator left \$1 to each of her nephews and the residue of the estate to her sister, the mother of one of the nephews. The sister died before the testator. The court held that the nominal devise was not a sufficient indication of the testator's intent to deny the son of the deceased sister the benefits of the anti-lapse statute [former Prob. Code § 92 (repealed Jan. 1, 1985); now Prob. Code § 21110] and that the nephew was entitled to the share left to the deceased mother [ *Estate of Carroll (1956) 138 Cal. App. 2d 363, 366-367, 291 P.2d 976* ].

A nominal devise may, however, be part of a valid disinheritance clause. In *Estate of Hirschi*, the will gave \$1 "to any person who, if I died intestate, would be entitled to any part of my Estate," if that person contested the will. The court held that the testamentary language showed an intent to exclude intestate heirs and was sufficient to defeat a claim by an omitted heir [ *Estate of Hirschi (1980) 113 Cal. App. 3d 681, 684, 170 Cal. Rptr. 186* ].

**[c] Use Disinheritance Clause With Caution**

Any disinheritance clause should be used with caution and only after a full consideration of its consequences. For matters to be considered before using a disinheritance clause, see § 63.650[1][g].

**[2] FORM****Disinheritance Clause--Long Form--No Contest Provision**

Except as otherwise provided in this will, I have intentionally failed to provide herein for any of my heirs, and I specifically disinherit any person claiming to be my heir who is not provided for in this will.

[AND, to make a nominal devise to a specific devisee:]

I give \_\_\_\_\_ [name of person or person disinherited] the sum of one dollar, and no more, in lieu of any other share or interest in my estate or under this will.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Will Contests No Contest Clauses Estate, Gift & Trust Law Wills Pretermitted Heirs General Overview Estate, Gift & Trust Law Wills Pretermitted Heirs Intent to Omit



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*23-63 California Legal Forms--Transaction Guide § 63.652*

**§ 63.652 Disinheritance Clause--Spouse Married After Execution of Will**

**[1] Comment**

**[a] Use of Form**

This form may be used to disinherit a spouse married after execution of the will. It includes two alternative provisions. The first states that the testator is contemplating marriage, identifies the prospective spouse by name, and states that the testator has intentionally failed to provide for the spouse in the will. The second states that the testator has considered the possibility of marriage and does not wish to provide for any person who may become an heir by reason of marriage, but does not name such a person.

For a short form disinheritance clause, and general discussion relevant to the use of disinheritance clauses, see § 63.650. For a no contest clause, see § 63.655. For a broadly defined no contest clause, see § 63.656.

**[b] Omitted Spouse**

A spouse who married the testator after the execution of all of the testator's "testamentary instruments" is an "omitted spouse" and may be entitled to a share in the testator's estate [*see Prob. Code § 21610*]. For this purpose, the testator's "testamentary instruments" include the testator's will and any revocable trust that the testator may have executed [*Prob. Code § 21601(a)*]. However, a surviving spouse is not entitled to a share in the estate if the testator's failure to provide for the spouse in the "testamentary instruments" was intentional and that intention appears from the "testamentary instruments" [*Prob. Code § 21611(a)*]. For further discussion of the inheritance rights of omitted spouses, see § 61.16[2].

**[c] Use Disinheritance Clause With Caution**

A disinheritance clause should be used with caution and only after a full consideration of its consequences. For matters to be considered before using a disinheritance clause, see discussion in § 63.650[1][g].

**[2] FORM****Disinheritance Clause--Spouse Married After Execution of Will**

*[If prospective spouse is to be named:]*

I am presently contemplating marriage to \_\_\_\_\_ [*name of prospective spouse*]. Should that marriage take place, it is my intention not to make any testamentary provision for \_\_\_\_\_ [*name of prospective spouse*] [, for the reason that \_\_\_\_\_ (*state reason, e.g., she already has ample resources to accommodate her needs*)]. My failure to provide for \_\_\_\_\_ [*name of prospective spouse*] in this will is intentional.

*[OR, if prospective spouse is not to be named:]*

In the event that I marry after the execution of this will, I do not intend to make any testamentary disposition in favor of my spouse, and it is my specific intention not to make any provision in this will for any person who may, after the date of this will, become my heir by reason of marriage.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Wills After-Acquired Spouses Estate, Gift & Trust Law Wills Pretermitted Heirs General  
Overview Estate, Gift & Trust Law Wills Pretermitted Heirs Intent to Omit



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*23-63 California Legal Forms--Transaction Guide § 63.653*

**§ 63.653 Disinheritance Clause--Children Born or Adopted After Execution of Will**

**[1] Comment**

**[a] Use of Form**

This form may be used to disinherit children born or adopted after execution of the will. For a short form disinheritance clause, and general discussion relevant to the use of disinheritance clauses, see § 63.650. For a no contest clause, see § 63.655.

**[b] Omitted Children**

If a decedent fails to provide in a testamentary instrument for a child born or adopted after the execution of all of the decedent's testamentary instruments, the omitted child generally will generally be entitled by statute to receive a prescribed share of the decedent's estate [*Prob. Code § 21620; see Prob. Code § 21601(a)* ("decedent's testamentary instruments" means the decedent's will or revocable trust)]. However, a child is not entitled to receive a share of the estate if any of the following is established [*Prob. Code § 21611*]:

- The decedent's failure to provide for the child in the decedent's testamentary instruments was intentional and that intention appears from the testamentary instruments.
- The decedent had one or more children and devised or otherwise directed the disposition of substantially all the estate to the other parent of the omitted child.
- The decedent provided for the child by transfer outside of the estate passing by the decedent's testamentary instruments and the intention that the transfer be in lieu of a provision in those instruments is shown by statements of the decedent or from the amount of the transfer or by other evidence.

If, at the time of the execution of all of the decedent's testamentary instruments effective at the time of the decedent's death, the decedent failed to provide for a living child solely because the decedent believed the child to be dead or was

unaware of the birth of the child, the child must receive a share in the estate equal in value to the share the child would have received if the decedent had died without having executed any testamentary instruments [*Prob. Code* § 21622].

For further discussion of the inheritance rights of omitted children, see § 61.16[3].

### **[c] Use Disinheritance Clause With Caution**

Any disinheritance clause should be used with caution and only after a full consideration of its consequences. For matters to be considered before using a disinheritance clause, see § 63.650[1][g].

### **[2] FORM**

#### **Disinheritance Clause--Children Born or Adopted After Execution of Will**

Except as otherwise provided in this will, I have made no provision for any of my children or for the issue of any of my children, whether born or adopted before or after the execution of this will. It is my specific intention not to provide in this will for any such child or for the issue of any such child.

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawWillsPretermitted HeirsGeneral OverviewEstate, Gift & Trust LawWillsPretermitted HeirsAdopted ChildrenEstate, Gift & Trust LawWillsPretermitted HeirsIntent to Omit



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*23-63 California Legal Forms--Transaction Guide § 63.654*

**§ 63.654 Lapse Provision--Issue of "Kindred" Beneficiaries**

**[1] Comment**

**[a] Use of Form**

This form may be used to state that the issue of specified "kindred" beneficiaries will not take any gifts made to those beneficiaries and to provide that the gifts will lapse. Its effect is to render the "anti-lapse" statute [*Prob. Code § 21110*; *see § 63.654[1][b]*] inapplicable to specified provisions of the will. Although in the technical sense it is not a disinheritance or no contest clause, its practical effect is to preclude the issue of one or more specified relatives from taking directly under the will. Obviously, it will not preclude those issue from taking indirectly if the primary beneficiary does survive to take the gift, since once the primary beneficiary takes the property he or she can dispose of it as he or she desires. A form such as this would be used only in unusual circumstances [*see § 63.654[1][c]*].

**[b] "Kindred" Beneficiaries and the Anti-Lapse Statute**

Under the "anti-lapse" statute [*Prob. Code § 21110*], transfers to a person who is "kindred" of the transferor or of the transferor's spouse ordinarily will not lapse if the transferor dies before the transfer takes effect or fails (or is treated as failing) to meet any applicable survivorship requirement [*Prob. Code § 21110(a), (c)*]. Instead, the issue of the deceased transferee take in his or her place in the manner specified in *Prob. Code § 240* [*Prob. Code § 21110(a)*]; for discussion of *Prob. Code § 240*, *see Ch. 61, Will Drafting and Complete Will Forms, § 61.15[6][d]*; for discussion of the anti-lapse statute, *see § 63.411[1][d]*. For this purpose, a requirement that the initial devisee survive the testator or survive for a specified period of time after the testator's death, constitutes a "contrary intention" [*Prob. Code § 21110(b)*; *Burkett v. Capovilla (2003) 112 Cal. App. 4th 1444, 1451, 5 Cal. Rptr. 3d 817*].

The will may vary the foregoing rule if the testator decides for any reason that the transferee's issue should not take the property if the transferee fails to do so [*Prob. Code § 21110(b)*]. To render the rule inapplicable, the will may either express a contrary intention, or simply make a substitute disposition [*Prob. Code § 21110(b)*]. This form combines these two methods by providing that the gift will lapse if the named beneficiary does not survive to take it, and specifies that the lapsed gift will become part of the residue of the settlor's estate.

**[c] Use Provision With Caution**

A clause providing that the issue of kindred beneficiaries will not take any gift made to their ancestors should be used with caution, and only after a full consideration of its consequences. The statutory protection for the issue of kindred beneficiaries is, like the omitted heir statutes, designed to protect persons who are the natural objects of a testator's bounty. A testator who decides that such persons will not participate in the estate or will not benefit from the will should do so only after a careful consideration of the consequences of that decision.

**[2] FORM****Lapse Provision--Issue of "Kindred" Beneficiaries**

If any beneficiary named in Paragraph[s] \_\_\_\_\_[*number(s)*] of this will should fail to survive me, fail to survive until any time required by this will, or be treated under any provision of this will as if that beneficiary had predeceased me, the issue of that beneficiary, if any, shall not take any gift or gifts made to that beneficiary under this will, but that gift or gifts instead shall lapse and become part of the residue of my estate.

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Estate, Gift & Trust Law Wills Failure of Bequests Lapses



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*23-63 California Legal Forms--Transaction Guide § 63.655*

**§ 63.655 No Contest Clause**

**[1] Comment**

**[a] Use of Form**

This form is a will provision that provides a short form no contest clause that complies with the statutory requirements of *Prob. Code § 21310-21315* [see *Prob. Code § 21310-21315*]. For a short form disinheritance clause, and general discussion relevant to the use of disinheritance clauses, see § 63.650. For a long form disinheritance clause, including nominal devise, see § 63.651. For a broad form no contest clause see § 63.656. For additional discussion on the use and enforcement of no contest clauses, see *Ch. 61, Will Drafting and Complete Will Forms*, § 61.18 .

**NOTE:**

Although no contest provisions are commonly included in wills, such a provision may be ineffective as to property that the testator-settlor has already transferred to a trust. For this reason, it is recommended that consideration be given to including a no contest clause in any trusts created by the settlor as well. The settlor may revoke the trust as to the contesting beneficiary, or as to both the contesting beneficiary and the issue of that beneficiary. Careful consideration should be given before penalizing the issue of the beneficiary.

**[b] Enforcement of No Contest Clauses Under the Probate Code**

Effective January 1, 2010, but effective for documents that become irrevocable on or after January 1, 2001, revised *Prob. Code §§ 21310-21315* controls the enforcement of no contest clauses [*Prob. Code § 21315*]. The revised statute affects all contests of a protected instrument filed on or after January 1, 2010, wherever executed, if that protected instrument became irrevocable on or after January 1, 2001 [*Prob. Code § 21315*]. Under the new statute, a no contest clause is effective only against (1) direct contests brought without probable cause, (2) actions involving creditor's claims, and (3) actions involving certain types of property claims (e.g., *Prob. Code § 850* actions) [*Prob. Code § 21311(a)*]. The two latter types of proceedings must be expressly identified in the no contest clause as violations for the clause to apply to them [*Prob. Code § 21311(a)*]. For all other contests, common law continues to apply [*Prob. Code §*

21315].

**[c] Direct Contest**

A no contest clause is enforceable in a direct contest that is brought without probable cause [*Prob. Code § 21311(a)(1)*]. A direct contest is one that alleges the invalidity of a protected instrument or one or more of its terms based on [*Prob. Code § 21310(b)*]:

- Forgery;
- Lack of due execution;
- Lack of capacity;
- Menace, duress, fraud or undue influence;
- Revocation of a will pursuant to § 6120, revocation of a trust pursuant to § 15401, or revocation of an instrument other than a will or trust pursuant to the procedure for revocation that is provided by statute or by the instrument; and
- Disqualification of a beneficiary under *Prob. Code §§ 6112, 21350*.

Probable cause exists if, at the time of filing a contest, the facts known to the contestant would cause a reasonable person to believe that there is a reasonable opportunity for further investigation or discovery [*Prob. Code § 21311(b)*].

**[d] Challenge to Transfer of Property**

A no contest clause is also enforceable against a pleading challenging the transfer of property on the grounds that it was not the transferor's property at the time of the transfer (a "forced election"), so long as the no contest clause expressly provides [*Prob. Code § 21311(a)(2)*]. In this type of contest, probable cause is irrelevant, and the forced election may be applicable to anyone [*see Prob. Code § 21311(a)(2)*].

**[e] Creditor's Claim**

A no contest clause is also enforceable against the filing of a creditor's claim or prosecution of an action based on it, so long as the no contest clause expressly provides [*Prob. Code § 21311(a)(3)*]. In this type of contest, probable cause is also irrelevant [*see Prob. Code § 21311(a)(3)*].

**[f] No Availability of Declaratory Relief**

Under the new statutory provisions, Declaratory relief (previously granted under the Safe Harbor Provision of former *Prob. Code § 21320*) will no longer be available [*see Prob. Code §§ 21310-21315*].

**[2] FORM**

If any beneficiary under this will, singularly or in combination with any other person or persons, directly or indirectly does any of the following acts, then the right of that person to take any interest given to him or her by this will shall be void, and any gift or other interest in my estate to which the beneficiary would otherwise have been entitled shall pass as if he or she had predeceased me [*optional: without issue*].

Without probable cause challenges the validity of this will [*optional*], or the validity of any contract, agreement (including any trust agreement), declaration of trust, beneficiary designation, or other document executed by me or executed by another for the benefit of me that is in existence on the date that this will is executed and further described as \_\_\_\_\_ (*provide express identification of such items, either individually or as a class*),] on any of the following grounds:

- (a) Forgery;
- (b) Lack of due execution;
- (c) Lack of capacity;
- (d) Menace, duress, fraud, or undue influence;
- (e) Revocation pursuant to the terms of [*optional*: applicable instrument, document, contract, or] applicable law;
- (f) Disqualification of a beneficiary under *California Probate Code §§ 6122 or 21350* or applicable successor statutes.

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Estate, Gift & Trust Law Will Contests No Contest Clauses



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*23-63 California Legal Forms--Transaction Guide § 63.656*

**§ 63.656 Broadly Defined No Contest Clause**

**[1] Comment**

**[a] Use of Form**

This form is a will provision that provides a broad form no contest clause which complies with the statutory requirements of *Prob. Code §§ 21310-21315* [see *Prob. Code §§ 21310-21315*].

For a short form no contest clause, and general discussion relevant to the use of no contest clauses see § 63.655. For additional discussion on the use and enforcement of no contest clauses, see *Ch. 61, Will Drafting and Complete Will Forms, § 61.18*.

**NOTES:**

Although no contest provisions are commonly included in wills, such a provision may be ineffective as to property that the testator-settlor has already transferred to a trust. For this reason, it is recommended that consideration be given to including a no contest clause in any trusts created by the settlor as well. The settlor may revoke the trust as to the contesting beneficiary, or as to both the contesting beneficiary and the issue of that beneficiary. Careful consideration should be given before penalizing the issue of the beneficiary.

**[2] FORM**

If any beneficiary under this will, singularly or in combination with any other person or persons, directly or indirectly does any of the following acts, then the right of that person to take any interest given to him or her by this will shall be void, and any gift or other interest in my estate to which the beneficiary would otherwise have been entitled shall pass as if he or she had predeceased me [*optional*: without issue].

(a) Without probable cause challenges the validity of this will [*optional*: or the validity of any contract, agreement (including any trust agreement), declaration of trust, beneficiary designation, or other document executed by me or executed by another for the benefit of me that is in existence on the date that this will is executed and further described as \_\_\_\_\_ (*provide express identification of such items, either individually or as a class*),] on any of the following grounds:

(1) Forgery;

(2) Lack of due execution;

(3) Lack of capacity;

(4) Menace, duress, fraud, or undue influence;

(5) Revocation pursuant to the terms of [*optional*: applicable instrument, document, contract, or] applicable law;

(6) Disqualification of a beneficiary under *California Probate Code* §§ 6122 or 21350 or applicable successor statutes.

(b) [Without probable cause files *or* Files] a pleading to challenge the transfer of property [*optional*: under this will or \_\_\_\_\_ (*express identification of any other instrument, either individually or as a class, if this no contest clause is expressly covering those other documents*)] on the grounds that it was not the transferor's property at the time of the transfer;

(c) [Without probable cause files *or* Files] a creditor's claim or prosecutes any action against the estate for any debt alleged to be owed [*optional*: by me or from my estate] to the beneficiary-claimant.

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Estate, Gift & Trust Law Will Contests No Contest Clauses



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*23-63 California Legal Forms--Transaction Guide §§ 63.657-63.669*

**[Reserved]**

§§ 63.657[Reserved]



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*23-63 California Legal Forms--Transaction Guide § 63.670*

**§ 63.670 Definition of "Executor"**

**[1] Comment--Use of Form**

This form is a will provision that may be used to define the word "executor" as it is used in the will.

As used in the Probate Code, "personal representative" means an executor [*see Prob. Code §§ 8420-8425*], administrator [*see Prob. Code §§ 8460-8468*], administrator with the will annexed [*see Prob. Code §§ 8440-8442*], special administrator [*see Prob. Code §§ 8540-8547*], successor personal representative, or any other person who performs substantially the same function under the law of another jurisdiction governing the person's status [*Prob. Code § 58(a)*]. To avoid confusion, the form set forth below defines "executor" to include any personal representative of the estate. Since an executor may be masculine or feminine, natural or corporate, and singular or plural, it is not necessary to refer to an "executrix" or to "executors."

For coverage of the selection, nomination, appointment, qualification, and duties of executors and other personal representatives, see Ch. 65, *Executors* .

**[2] FORM**

**Definition of "Executor"**

*[Short form]*

As used in this will, the words "my Executor" include any personal representative or representatives of my estate.

*[Long form]*

As used in this will, the words "my Executor" refer to any personal representative or representatives of my estate and include the person named in Paragraph \_\_\_\_\_ [*number of paragraph in which Executor is nominated*]

and any other person, persons, entity, or entities, regardless of number or gender, who may for any reason become the Executor or of this will and to the successor or successors of that person, persons, entity, or entities.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law  
Probate  
Personal Representatives  
General Overview  
Estate, Gift & Trust Law  
Wills  
General Overview



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*23-63 California Legal Forms--Transaction Guide § 63.671*

**§ 63.671 Definition of "Trustee"**

**[1] Comment--Use of Form**

This form is a will provision that may be used to define the term "trustee." The will may nominate one or more trustees. A trustee or trustees nominated in the will may be unable or unwilling to serve or to continue to serve in that capacity, with the result that it may be necessary to appoint an alternate, additional, or successor trustee or trustees. As used in the Probate Code, the word "trustee" includes an original, additional, or successor trustee, whether or not appointed or confirmed by a court [*Prob. Code § 84*]. The will should define the term "trustee" in such a way that it will apply to any such contingency.

**[2] FORM**

**Definition of "Trustee"**

As used in this will, the word "trustee" refers to the person named in Paragraph \_\_\_\_\_ [*number of paragraph in which trustee is nominated*] and includes any other person, persons, entity, or entities, regardless of number or gender, who may for any reason become the trustee or trustees of the trust created by this will and to the successor or successors of that person, persons, entity, or entities.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsTrusteesGeneral OverviewEstate, Gift & Trust LawWillsGeneral Overview



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*23-63 California Legal Forms--Transaction Guide § 63.672*

**§ 63.672 Definitions of "Child" and "Children"**

**[1] Comment**

**[a] Use of Form**

This form is a will provision that may be used to define the words "child" and "children." It includes two alternative provisions, one that includes all natural children and all legally adopted children, and the other that adopts the broader definition of "child" used in the Probate Code to determine intestate succession rights.

The Probate Code contains many provisions affecting the rights of children to take under wills or by intestate succession. These provisions include definitions of the words "child" [*Prob. Code § 26*], "issue" [*Prob. Code § 50*], "parent" [*Prob. Code § 54*], and "descendants" [*Prob. Code § 6205*]; rules for intestate succession that determine when natural children, children born out of wedlock, adopted children, foster children, and stepchildren are entitled to share in the estate of a parent [*see Prob. Code § 6400-6455*]; and rules to be followed in the construction of wills that make gifts to "heirs," "heirs at law," "next of kin," "relatives," or "family" [*Prob. Code § 21114*] or to members of a class [*Prob. Code § 21115*]. For a general discussion of the statutory definitions of "child" and "children," together with the rights of natural children, adopted children, foster children, and stepchildren to take under wills or by intestate succession, see discussions in § 63.226[1] *et seq.*

**[b] Testator's Definition of "Child" and "Children"**

The will is not limited by the definition of "child" contained in the Probate Code provisions relating to intestate succession, and the testator is free to adopt an identical, similar, or different definition. The first alternative provision stated below is a more limited definition than that set forth in *Prob. Code §§ 26 and 6400-6455*. It includes natural children and children who have been legally adopted by a parent through whom their right to inherit or to take as a beneficiary (or as issue of a beneficiary) is determined or derived. The second alternative provision includes all persons included within the definition of "child" in *Prob. Code § 26* or any successor provision.

**[2] FORM**

**Definitions of "Child" and "Children"****Definitions of "Child" and "Children"**

*[First alternative provision: "Child" and "children" include natural and adopted children]*

As used in this will, the words "child" and "children" refer to natural children [*add, if testator wishes to exclude children adopted out of testator's family: (except natural children who have been adopted out of the family of their natural parents)*] and to children who have been legally adopted by the parent or parents from or through whom their right to inherit or to take as a beneficiary or as issue of a beneficiary is determined or derived.

[OR]

*[Second alternative provision: "Child" and "children" include persons referred to in Prob. Code § 26:]*

As used in this will, the words "child" and "children" refer to natural children and to adopted children and include all persons referred to in *California Probate Code Section 26*, or any successor section.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Wills General Overview Estate, Gift & Trust Law Wills Interpretation Testator's Intent General Overview



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*23-63 California Legal Forms--Transaction Guide § 63.673*

**§ 63.673 Definition of "Issue"**

**[1] Comment--Use of Form**

This form may be used to define the word "issue" as it is used in the will. The form includes two alternative provisions, one that may be used if the will has adopted its own definition of the words "child" and "children" [*see* § 63.672] and the other that may be used if the will has adopted the definition of "child" set forth in *Prob. Code* § 26.

As used in the Probate Code, "issue" of a person means all his or her lineal descendants of all generations, with the relationship of parent and child at each generation being determined by the definitions of child and parent set forth in the Probate Code [*Prob. Code* § 50; *see Prob. Code* §§ 26 ("child"), 54 ("parent")].

**[2] FORM**

**Definition of "Issue"**

*[Use this alternative if will does not adopt statutory definition of "child" or "children":]*

As used in this will, the word "issue" refers to all lineal descendants of all generations, with the relationship of parent and child at each generation being determined by the definitions of "child" and "children" as defined in this will.

*[Or, use this alternative if the will adopts the definition of "child" or "children" contained in Prob. Code § 26:]*

As used in this will, the word "issue" refers to all lineal descendants of all generations, with the relationship of parent and child at each generation being determined by the definitions of "child" and "parent" set forth in *California Probate Code Sections 26* and *54*, or any successor sections.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Wills General Overview Estate, Gift & Trust Law Wills Interpretation Testator's Intent General Overview



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DIVISION IV: WILLS AND TRUSTS

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J. Definitions

*23-63 California Legal Forms--Transaction Guide §§ 63.674-63.689*

**[Reserved]**

§§ 63.674[Reserved]



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DIVISION IV: WILLS AND TRUSTS  
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K. Miscellaneous Will Provisions

*23-63 California Legal Forms--Transaction Guide § 63.690*

**§ 63.690 Number and Gender**

**[1] Comment--Use of Form**

This form is a will provision that may be used to provide that any use of the masculine, feminine, or neuter gender, and the singular or plural, is deemed to include the others whenever the context so indicates. Use of this provision may help reduce the possibility of misinterpretation of any will provision that uses terms such as "he," "she," "they," "it," "his," "her," "their," or similar terms denoting number or gender. It may be helpful if the will drafter has inadvertently failed to use the appropriate pronoun or adjective in any will provision.

**[2] FORM**

**Number and Gender**

As used in this will, the masculine, feminine, or neuter gender, and the singular or plural number shall each be deemed to include the others whenever the context so indicates.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawWillsGeneral OverviewEstate, Gift & Trust LawWillsInterpretationGeneral Overview



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*23-63 California Legal Forms--Transaction Guide § 63.691*

**§ 63.691 Severability Provision**

**[1] Comment**

**[a] Use of Form**

This form is a will provision that may be used as a general severability clause providing that if any provision of the will is unenforceable, the remaining provisions will be carried into effect.

**[b] Interpretation of Wills**

The intention of the testator as expressed in the will controls the legal effect of the dispositions made in the will [*Prob. Code § 21102(a)*]. However, this provision does not limit the use of extrinsic evidence, to the extent otherwise authorized by law, to determine the testator's intention [*Prob. Code § 21102(c)*]. The words of a will must be interpreted in such a way as to give some effect to every expression in the instrument, and not so that any of the expressions will become inoperative. Preference must be given to an interpretation that will prevent rather than result in an intestacy or failure of a transfer [*Prob. Code § 21120; see Prob. Code § 21101* (rule applicable to wills, trusts, and other instruments)].

**[2] FORM**

**Severability Provision**

If any provision of this will is unenforceable, the remaining provisions shall be carried into effect.

[OR]

If any part, clause, provision, or condition of this will is held to be void, inoperative, ineffective, or otherwise invalid, its invalidity shall not affect any other part, clause, provision, or condition of this will, and the remainder of this will

shall be carried into effect as if the invalid part, clause, provision, or condition had not been included.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawWillsGeneral OverviewEstate, Gift & Trust LawWillsInterpretationGeneral OverviewEstate,  
Gift & Trust LawWillsInterpretationRules of ConstructionGeneral OverviewEstate, Gift & Trust  
LawWillsInterpretationRules of ConstructionStatutory Rules



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*23-63 California Legal Forms--Transaction Guide § 63.692*

**§ 63.692 Allocation and Distribution of Income Received During Administration**

**[1] Comment**

**[a] Use of Form**

This form is a will provision that may be used to provide for the distribution of income from estate property. It includes two alternative provisions, one that allocates net income to particular devisees made under the will and provides that the income will be distributed to the devisees of those devisees, and another that provides generally that all net income of the estate will be distributed to a named devisee.

**[b] Right to Income From or Interest on Devised Property**

**[i] In General**

The right of devisees to income earned by devised property while the property is in administration and before it is distributed is governed by rules set forth in the Probate Code [*see Prob. Code §§ 12000-12007*]. These rules determine when devisees are entitled to receive interest on devisees (or on the value of devised property). The rules distinguish devisees according to their classifications (i.e., whether they are specific, general, or residuary) [*see Prob. Code § 21117; see also § 63.351[1][b]*] and, in specified circumstances, according to the purpose for which they were made.

**[ii] Specifically Devised Property**

If property subject to a specific devise [*see Prob. Code § 21117(a); see also § 63.370[1]*] is income-producing property, the devisee of that property is entitled to receive the income on the property from the date of death to the date of distribution, less expenses attributable to the property during administration [*Prob. Code § 12002(b)*]. If the income is not sufficient to pay expenses attributable to the property, the deficiency must be paid out of the estate until the property is distributed to the devisee, or until the devisee takes possession of or occupies the property, whichever occurs first [*Prob. Code § 12002(c)*]. to receive the income on the property from the date of death to the date of distribution, less expenses attributable to the property during administration [*Prob. Code § 12002(b)*]. If the income is not sufficient to

pay expenses attributable *Prob. Code § 12002(c)*. For purposes of this rule, expenses attributable to property are expenses that result directly from the use or ownership of the property, including property taxes and taxes on income from the property, but excluding estate and generation-skipping transfer taxes [*Prob. Code § 12002(b)*].

If property subject to a specific devise is sold during administration, the devisee is entitled to the net income from the property until the date of sale and to interest on the net sale proceeds thereafter, but no interest accrues during the first year after the testator's death [*Prob. Code § 12002(d)*; *see Prob. Code § 12001(a)* (rate of interest); *see also § 63.692[1][b][vii]*]. Specific devisees are not entitled to any other interest [*Prob. Code § 12002(a)*].

### **[iii] Cash Devises**

If a general pecuniary devise [*see Prob. Code §§ 21117(d), 21118(b)*; *see also § 63.351[1]*], including a general pecuniary devise in trust, is not distributed within one year after the testator's death, the devise bears interest thereafter [*Prob. Code § 12003*; *see Prob. Code § 12001(a)* (rate of interest); *see also § 63.692[1][b][vii]*].

### **[iv] Annuities**

If an annuity [*see Prob. Code § 21117(e)*] ("annuity" defined); *see also § 63.508[1]* is not paid at the end of the annual, monthly, or other period specified in the will [*see Prob. Code § 12004(a)*], the annuitant is entitled to receive interest, except that no interest is payable during the first year after the testator's death [*Prob. Code § 12004(b)*; *see Prob. Code § 12001(a)* (rate of interest); *see also § 63.692[1][b][vii]*].

### **[v] Devise for Maintenance**

The devisee of a devise for maintenance is entitled to interest on the amount of any unpaid accumulations of the payments held by the executor on each anniversary of the testator's death, computed from the date of the anniversary [*Prob. Code § 12005*; *see Prob. Code § 12001(a)* (rate of interest); *see also § 63.692[1][b][vii]*]. For this purpose, a devise for maintenance includes a devise for support [California Law Revision Commission, Official Comments to Assembly Bill 2841 (1988), p. 114].

### **[vi] Residue**

Net income received during administration and not paid to any other devisee under the Probate Code rules must be distributed pro rata as income among all distributees who receive either residuary or intestate property [*Prob. Code § 12006*; *see Prob. Code § 21117(f)*] ("residuary devise" defined); *see also § 63.530[1]*. If a distributee takes for life or for a term of years, the pro rata share of income belongs to the tenant for life or for the term of years [*Prob. Code § 12006*].

### **[vii] Rate of Interest**

When interest is payable to a devisee, the rate is three percentage points less than the legal rate on judgments in effect one year after the date of the testator's death [*Prob. Code § 12001*]. The California Constitution authorizes the Legislature to set the rate of interest on judgments at not more than 10 percent per annum [*Cal. Const. art. XV, § 1*]. The Legislature has set the current annual rate at 10 percent, while reserving the right to change the rate at any time to less than 10 percent [*Code Civ. Proc. § 685.010*].

Once the rate of interest has been set, it will not be changed, even if the rate changes before the devise is finally distributed [*Prob. Code § 12001*]. When interest is payable on a general pecuniary devise, the devise begins to earn interest one year after the testator's death [*Prob. Code § 12003*].

### **[viii] Will Provisions**

The will may alter the Probate Code rules governing the payment of income and interest to devisees [*Prob. Code § 12000*]. Any will provision allocating income received during administration and before distribution will in any case be subject to the general rule that the intention of the testator as expressed in the will controls the legal effect of the dispositions made in the will [*Prob. Code § 21102(a)*; see *Prob. Code § 21101* (rule applicable to wills, trusts, and other instruments)].

**[2] FORM**

**Allocation and Distribution of Income Received During Administration**

*[Use this provision if income is to be apportioned among more than one devisee:]*

I direct that all net income received during administration of my estate shall be allocated and distributed as follows:

(1) All net income received from or attributable to the property described in Paragraph \_\_\_\_\_ [*number of paragraph*] of this will shall be distributed to \_\_\_\_\_ [*name of first devisee*].

(2) All net income received from or attributable to the property described in Paragraph \_\_\_\_\_ [*number of paragraph*] of this will shall be distributed to \_\_\_\_\_ [*name of second devisee*].

(3) All net income received from or attributable to all the rest and residue of my estate shall be distributed to \_\_\_\_\_ [*name of residuary or other designated devisee*].

*[OR, if all income will be paid to a single devisee:]*

I direct that all net income received during administration of my estate shall be distributed to \_\_\_\_\_ [*name of devisee*].

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Estate, Gift & Trust LawWillsGeneral Overview



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*23-63 California Legal Forms--Transaction Guide § 63.693*

**§ 63.693 Contracts to Make Wills--Statement That Testator Has Made No Contract**

**[1] Comment**

**[a] Use of Form**

This form is a will provision that may be used to state that the testator has not entered into any contract to make a will or devise or other instrument, not to revoke a will or devise or other instrument, or to die intestate. The provision may be included in the will of every testator who has not entered into such a contract and, when used, may negate any inference that such a contract exists. For a clause confirming that the testator has made such a contract, see § 63.694. If the testator's estate or will is affected by the terms of an antenuptial agreement, the will drafter should review § 63.424[1].

For a detailed discussion of contracts affecting wills, see California Wills and Trusts, Ch. 61, *Contracts and Other Instruments Affecting Wills* (Matthew Bender). For a detailed discussion of wills made pursuant to contracts, see California Wills and Trusts, Ch. 60, *Joint and Mutual Wills* (Matthew Bender).

**[b] Contracts Affecting Wills**

**[i] Uses and Validity**

Contracts affecting wills are generally valid in California. A contract affecting a will may take one of three different forms: (1) a contract to dispose of property by will or other instrument in a specified manner; (2) a contract not to revoke an existing will or other instrument; or (3) a contract not to make a will (that is, to die intestate) [*see Prob. Code § 21700* (proof of contract to make will or devise or other instrument)].

Contracts of this kind are sometimes made by married persons who have been married previously and who have children by their previous marriages. These persons will often wish to make sure that their children receive an inheritance, or a specified share of an inheritance, after both of the spouses have died. Conversely, they often wish to prevent the surviving spouse from making a will that disinherits the deceased spouse's children. Contracts affecting

wills are sometimes incorporated into premarital agreements executed by prospective spouses [*see Fam. Code § 1612(a)(4)* and § 63.693[1][b][ii]].

Four elements are essential to the existence of any contract in California. These are (1) parties capable of contracting, (2) the consent of those parties, (3) a lawful object, and (4) consideration [*Civ. Code § 1550; see Civ. Code §§ 1556-1559* (parties), *1565-1590* (consent), *1595-1599* (object of contract), *1605-1615* (consideration); *but see Fam. Code § 1611* (consideration not required for enforceable premarital agreement)]. A contract affecting a will, like any other contract, will not be enforced unless the four elements are present.

### **[ii] Premarital Agreements**

Under the California Uniform Premarital Agreement Act [*see Fam. Code §§ 1600-1617*], parties to a premarital agreement may contract, among other things, with regard to the making of a will or other arrangement to carry out the terms of the agreement [*Fam. Code § 1612(a)(4)*]. However, premarital agreements are subject to restrictions that do not apply to other agreements. For example, a premarital agreement becomes effectively only on the marriage of the parties [*Fam. Code §§ 1610(a), 1613*]. Such an agreement is subject to rigorous disclosure requirements and is totally unenforceable if its provisions are "unconscionable" [*see Fam. Code § 1615(a)(2)*]. All premarital agreements must be in writing and signed by both parties, although they are enforceable without consideration [*Fam. Code § 1611*]. For detailed discussion of the Premarital Agreement Act and contracts subject to it, see Ch. 108, *Antenuptial Agreements*.

### **[iii] Contract Distinguished From Will**

The law recognizes three types of wills that are sometimes associated with contracts. These are joint wills, mutual wills, and joint and mutual wills.

A "joint will" is a single instrument that contains the wills of two or more persons [ *Estate of Lane (1975) 47 Cal. App. 3d 52, 56, 120 Cal. Rptr. 499* ; *Daniels v. Bridges (1954) 123 Cal. App. 2d 585, 588, 267 P.2d 343* ]. "Mutual wills," in contrast, are separate wills with "reciprocal" provisions. For this purpose, provisions are "reciprocal" if they show on their faces that they are executed in consideration of each other [ *Van Houten v. Whitaker (1959) 169 Cal. App. 2d 510, 514, 337 P.2d 900* ; *Daniels v. Bridges (1954) 123 Cal. App. 2d 585, 588, 267 P.2d 343* ]. A "joint and mutual will" is a single will that has characteristics of both a "joint will" and "mutual wills"; that is, it is executed by two or more persons and contains "reciprocal" provisions [ *Thompson v. Boyd (1963) 217 Cal. App. 2d 365, 374-375, 32 Cal. Rptr. 513* ].

It is important to distinguish a contract affecting a will from a will that may be affected by a contract. A contract affecting a will is not in itself a will, even though it may call for the execution of a will. The validity of such a contract will always be determined under the law of contracts, and not the law of wills. A will that is affected by a contract, in contrast, is not in itself a contract, and will be enforced only if it complies with the law of wills. Further, joint wills, mutual wills, and joint and mutual wills may all be executed in the absence of any contract. Wills of this type do not depend on underlying contracts for their validity.

### **[iv] Proof of Contract**

The Probate Code contains special rules relating to the proof of a contract to make a will or devise, or other instrument, or not to revoke a will or devise or other instrument, or to die intestate [*Prob. Code § 21700(a)* (applicable only to contract made on or after January 1, 2001)]. These rules may become critically important if the heirs of a deceased spouse claim that the deceased spouse and the surviving spouse were parties to a contract that affected their wills. At least one spouse will be deceased when such a claim is made; and many times both will be deceased, thus exacerbating the problems of proof.

Of course, if the contract itself has been reduced to writing and signed by the deceased spouse, the writing will be adequate to prove the terms of the contract [*Prob. Code § 21700(a)(3)*]. In the absence of a signed writing, however, the contract may be proved by provisions of a will or other instrument stating material provisions of the contract [*Prob. Code § 21700(a)(1)*] or an express reference in a will or other instrument to a contract and extrinsic evidence proving the terms of the contract [*Prob. Code § 21700(a)(2)*]. Alternatively, a contract may be proved by clear and convincing evidence of an agreement between the decedent and the claimant or a promise by the decedent to the claimant that is enforceable in equity [*Prob. Code § 21700(a)(4)*], or by clear and convincing evidence of an agreement between the decedent and another person for the benefit of the claimant or a promise by the decedent to another person for the benefit of the claimant that is enforceable in equity [*Prob. Code § 21700(a)(5)*].

### **[c] Equitable Estoppel**

A contract to make (or not to revoke) a will or devise or other instrument may be enforced under the doctrine of equitable estoppel even when the contract is not in writing and the Probate Code requirements for proof of the contract cannot be met [*see Prob. Code § 21700(a)* and discussion in § 63.693[1][b][iv]]. Under the doctrine of equitable estoppel, the courts will enforce an oral contract when one party has detrimentally relied on the oral promise of another and the other party has been unjustly enriched [ *Crail v. Blakely* (1973) 8 Cal. 3d 744, 751, 106 Cal. Rptr. 187, 505 P.2d 1027 ].

The doctrine of equitable estoppel is designed to prevent an unconscionable injury that would result from refusing to enforce an oral contract when one party has been induced to make a serious change of position in reliance on the contract, or when unjust enrichment would result if a party who has received the benefits of the other's performance under the contract were allowed to deny the contract [ *Juran v. Epstein* (1994) 23 Cal. App. 4th 882, 892, 28 Cal. Rptr. 2d 588 ]. If, for example, married persons execute reciprocal wills pursuant to an oral agreement to leave their property after their deaths to all of their children, and one of the spouses dies before either will has been revoked, equity will not permit the surviving spouse to accept the benefits of the deceased spouse's will and thereafter make a different disposition of the property. To permit a surviving spouse to do this would, in effect, be to permit the surviving spouse to benefit from a fraud perpetrated against the deceased spouse and to unjustly enrich the beneficiaries under the later will at the expense of the beneficiaries under the original will [ *Notten v. Mensing* (1935) 3 Cal. 2d 469, 474, 45 P.2d 198 ]. Under these circumstances, the courts will enforce the oral agreement under the doctrine of equitable estoppel, even when the statutory requirements for proof of the agreement cannot be met [ *Juran v. Epstein* (1994) 23 Cal. App. 4th 882, 894, 28 Cal. Rptr. 2d 588 ].

### **[d] Enforcement**

It may be difficult to enforce the terms of a contract affecting a will, even when the terms are susceptible of proof. The courts will not enforce such a contract by specific performance, since a contract affecting a will is a personal act and thus not subject to specific performance [ *Ludwicki v. Guerin* (1961) 57 Cal. 2d 127, 130, 17 Cal. Rptr. 823, 367 P.2d 415 ; *Bank of California v. Superior Court* (1940) 16 Cal. 2d 516, 524, 106 P.2d 879 ]. Similarly, the court will not compel the execution of a will, or revive a revoked will, merely because there is a contract requiring such a will [*see Estate of Watson* (1986) 177 Cal. App. 3d 569, 573, 223 Cal. Rptr. 14 ].

An action for money damages is usually the only remedy available when a contract affecting a will has been breached. If, as is often the case, the breaching party is deceased, the aggrieved parties must proceed on the theory that they have claims for money against the deceased person's estate, and file claims in that estate [ *Morrison v. Land* (1915) 169 Cal. 580, 584, 147 P. 259 ]. In some cases, the aggrieved party may proceed in *quantum meruit* [ *Johns v. Coleman* (1959) 176 Cal. App. 2d 778, 782, 1 Cal. Rptr. 784 ]. For example, if one person performed services for another in return for the other's promise to make a will in his or her favor, the person who performed the services may be entitled to recover on the contract that the law implies on failure to perform the express contract. However, such an action may be maintained only after a claim has been filed against the deceased person's estate [*see Mattes v. Pinkney* (1968) 260

*Cal. App. 2d 491, 493, 67 Cal. Rptr. 255* ].

If legal remedies would not adequately compensate an aggrieved party for the breach of a contract affecting a will, the court may impose a constructive trust on the property affected by the will [*see Ludwicki v. Guerin (1961) 57 Cal. 2d 127, 130, 17 Cal. Rptr. 823, 367 P.2d 415* ; *Estate of Stewart (1968) 69 Cal. 2d 296, 298, 70 Cal. Rptr. 545, 444 P.2d 337* ]. Such an action must be addressed, not to the probate court, but to the superior court acting in the exercise of its general equity jurisdiction [*see Ludwicki v. Guerin (1961) 57 Cal. 2d 127, 132, 17 Cal. Rptr. 823, 367 P.2d 415* ; *Estate of Mullins (1988) 206 Cal. App. 3d 924, 929, 255 Cal. Rptr. 430* ].

#### **[e] Effect of No Contest Clause**

A claim based on an alleged contract to make a will may violate a valid no contest clause. Although there may be instances in which a beneficiary who is also a creditor of the estate may file a creditor's claim without violating a no contest clause, if the claim is a disguised attack on the will it will violate the no contest clause and result in forfeiture of the claimant's right to take under the will [ *Estate of Larsen (1984) 162 Cal. App. 3d 134, 139, 207 Cal. Rptr. 526* ]. Any legal proceeding that is plainly intended to frustrate the testator's unequivocally expressed intent will violate a valid no contest clause. For a general discussion of no contest clauses, see § 63.651[1]. See also *California Wills and Trusts*, Ch. 40, *Disinheritance and No Contest Clauses* (Matthew Bender).

#### **[f] Disadvantages**

Contracts to make a will, or not to revoke a will, are fraught with disadvantages and avoided by prudent estate planners. A contract of this kind deprives a person of testamentary flexibility, making it difficult or impossible to revise a will as and when conditions dictate. Any variation between the terms of a will and the underlying contract has the potential for inviting litigation and adding greatly to the expense and delay of administering the testator's estate.

The difficulties of enforcing a contract affecting a will [*see § 63.693[1][d]*] make it an inadequate safeguard for the rights of the persons it is designed to protect. It is often impossible to determine whether a person who has contracted to make a particular will has in fact made such a will until the person has died, and after death the problems of enforcing the contract against the person's estate will be substantial. The right to sue for the breach of such a contract will not ordinarily accrue until after the death of both parties, when problems of proof will be onerous [*see § 63.693[1][b][iv]*].

In the rare circumstances in which it is possible to impose a constructive trust on property affected by a contract to make a will, or not to revoke a will, the rights of the surviving spouse in and to the property will be seriously impaired. In such a case, the rights of the surviving spouse in the affected property will amount to a life estate. Since a life estate is not eligible for the estate tax marital deduction [*I.R.C. § 2056(b)(1)* (terminable interest rule); *Treas. Reg. § 20.2056(b)-1(b)*], any such arrangement will have potentially disastrous consequences if the marital deduction is needed to reduce or avoid estate taxes on the death of the deceased spouse. For a more detailed discussion of the marital deduction, see Ch. 71, *Marital Deduction Trust Provisions* .

The goals that are usually sought to be achieved by a contract to make a will, or not to make a will, can almost always be achieved by the creation of one or more trusts. A trust is much simpler to enforce than a contract affecting a will. It is more flexible, and can be revised and modified while both spouses are living to adjust to changing conditions. A properly drafted trust will qualify for the marital deduction while at the same time safeguarding the legitimate interests of remainder beneficiaries, such as children and grandchildren [*see I.R.C. § 2056(b)(7)* (qualified terminable interest property trusts)]. See the discussion of qualified terminable interest property (QTIP) trusts in Ch. 71, *Marital Deduction Trust Provisions* .

#### **[2] FORM**

##### **Contracts to Make Wills--Statement That Testator Has Made No Contract**

I have not entered into any contract to make a will or devise, not to revoke a will or devise, or to die intestate.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Wills Contracts to Make Wills



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DIVISION IV: WILLS AND TRUSTS

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K. Miscellaneous Will Provisions

*23-63 California Legal Forms--Transaction Guide § 63.694***§ 63.694 Contracts to Make Wills--Statement That Testator Has Made Contract****[1] Comment****[a] Use of Form**

This form is a will provision that may be used to confirm that the testator has entered into a contract to make a will or devise or other instrument, not to revoke a will or devise or other instrument, or to die intestate. The provision may be used to disclose the existence of such a contract and to affirm the testator's intention to comply with its terms. For a clause stating that the testator has not made such an agreement, see § 63.693. If the testator's estate or will is affected by the terms of an premarital agreement, the will drafter should review § 63.424[1].

For general discussion of contracts to make a will, or not to revoke a will, see § 63.693[1]. For a detailed discussion of contracts affecting wills, see *California Wills and Trusts*, Ch. 61, *Contracts and Other Instruments Affecting Wills* (Matthew Bender). For a detailed discussion of wills made pursuant to contracts, see *California Wills and Trusts*, Ch. 60, *Joint and Mutual Wills* (Matthew Bender).

**[b] Caution Against the Use of Contracts Affecting Wills**

Contracts to make a will or other instrument, not to revoke a will or other instrument, or to die intestate are fraught with dangers and almost always avoided by experienced estate planners. Contracts of this type are generally designed to protect children of previous marriages from disinheritance by a stepparent. When persons who have children by a previous marriage enter into a subsequent marriage, they will often wish to plan their estates in such a way that the surviving spouse will have the full use and enjoyment of the property during the surviving spouse's lifetime, but the children will receive the property (or a specified share of the property) after both spouses have died. In circumstances of this kind, the spouses will sometimes ask their attorney to draft a contract obligating both spouses to make wills that protect the inheritance rights of the children. A contract of this kind may be incorporated in a premarital agreement subject to the Uniform Premarital Agreement Act [*Fam. Code § 1612(a)(4)*]; see *Fam. Code §§ 1600-1617* (Uniform Premarital Agreement Act); see also Ch. 108, *Antenuptial Agreements* ].

However, contracts to make a will or other instrument, not to revoke a will or other instrument, or to die intestate are clumsy devices and ill-suited to accomplish their stated goals. They are difficult to prove and equally difficult to enforce. If such a contract is successfully enforced, it will seriously limit the surviving spouse's use of the affected property and result in the loss of the estate tax marital deduction, with potentially disastrous consequences both for the clients and the attorney [*see I.R.C. § 2056(b)(1)* (terminable interest rule); *see also Treas. Reg. § 20.2056(b)-1(b)* and discussion of the marital deduction in Ch. 71, *Marital Deduction Trust Provisions* ].

The goals that are usually sought to be achieved by a contract to make a will, or not to make a will, can almost always be achieved by the creation of one or more trusts. A trust is a much more flexible arrangement than a contract. The terms of a trust are almost always easy to prove. Enforcing a trust is almost always easier than enforcing a contract affecting a will. Further, a properly drafted trust will qualify for the marital deduction while at the same time providing for remainder beneficiaries, such as children and grandchildren [*see I.R.C. § 2056(b)(7)* (qualified terminable interest property trusts)]. For a general discussion of qualified terminable interest property (QTIP) trusts, see Ch. 71, *Marital Deduction Trust Provisions* . For further discussion of the disadvantages of contracts affecting wills, see § 63.693[1].

## [2] FORM

### Contracts to Make Wills--Statement That Testator Has Made Contract

On \_\_\_\_\_[*date*], \_\_\_\_\_[*name of other party to contract*] and I entered into a written contract that affects the dispositions to be made by me in this will. [That contract is hereby incorporated into this will and made a part hereof.] In that contract, I agreed, among other things, \_\_\_\_\_[*set forth operative terms of contract, e.g., that I would leave all of my estate to \_\_\_\_\_ (name of other party to contract)*]. I declare that the terms of Paragraph \_\_\_\_\_[*number*] of this will are for the express purpose of performing and discharging my obligations under that contract. [If there is any inconsistency between the terms of that contract and any provision of this will, then, and to the extent of that inconsistency, I direct that the terms of that contract shall control and govern the interpretation of this will].

[*Add, if the contract has not yet been fully performed:*]

The disposition of property made in Paragraph \_\_\_\_\_[*number*] of this will is expressly conditioned upon the performance by \_\_\_\_\_[*name of other party to contract*] of all of the terms and conditions of that contract to be performed by \_\_\_\_\_[*him or her*]. If \_\_\_\_\_[*name of other party to contract*] shall not as of the date of my death have performed all such terms and conditions [*add, if appropriate, a statement of the performance required of the other party, e.g., by residing with me and caring for me at all times from the date of that contract until the date of my death*], then the disposition of property made in Paragraph \_\_\_\_\_[*number*] shall not take effect and the gift of the property described in that paragraph shall lapse and become part of the residue of my estate.

[*Continue with the following:*]

Except as otherwise specified in this paragraph, I have not entered into any contract to make a will or devise, not to revoke a will or devise, or to die intestate.

### Legal Topics:

For related research and practice materials, see the following legal topics:  
Estate, Gift & Trust Law Wills Contracts to Make Wills



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DIVISION IV: WILLS AND TRUSTS  
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K. Miscellaneous Will Provisions

*23-63 California Legal Forms--Transaction Guide § 63.695*

**§ 63.695 Provision for Natural Child Adopted Out of Testator's Family**

**[1] Comment**

**[a] Use of Form**

This form is a will provision that may be used to include a child adopted out of the testator's family in the testator's will. The form includes three alternative provisions. The first alternative names the adopted child and includes the child within the definition of the terms "children," "grandchildren," and "issue," but makes no special provision for the child. The second alternative names the adopted child, includes the child within the definition of the terms "children," "grandchildren," and "issue," and makes an individual gift to the child. The third alternative does not name the adopted child but states generally that all references in the will to "children," "grandchildren," and "issue" include any person who would be included by those references but for the fact of his or her adoption.

A fourth alternative, not illustrated in this form, is simply to make an outright gift to the child without stating the facts of the adoption or the names of the natural parents. This may be preferable to the other alternatives if confidentiality is a concern. Failure to identify the child as an adopted child may, however, deny the issue of that child the protection of the anti-lapse statute [*Prob. Code § 21110*], which applies to adopted persons [*Prob. Code § 21115(a), (b), (c)(1), (2)*].

**[b] Right of Adopted Child to Inherit From or Through Natural Parent**

Although a child who has been adopted may under certain circumstances inherit from or through his or her natural parent [*see Prob. Code § 6451(a)*]; *see also § 63.226[1][c][iv]*, the right is not available to all children who have been adopted. If the testator wishes to provide for such a child, the will should clearly state an intention to do so, either by naming the child or by including the child within the definitions of "children," "grandchildren," and "issue," as used in the will.

**[2] FORM**

**Provision for Natural Child Adopted Out of Testator's Family**

*[First alternative: child named, included in definition of "children," "grandchildren," and "issue," but no individual gift]*

I declare that \_\_\_\_\_ [name of child adopted out of testator's family], who was born [on \_\_\_\_\_ (date)] to \_\_\_\_\_ [name(s) of natural parent(s)] and was thereafter adopted by \_\_\_\_\_ [name(s) of adoptive parent(s)], is considered by me for all purposes and particularly with reference to this will as my \_\_\_\_\_ [state relationship, e.g., grandson or granddaughter]. Whenever this will refers to children, grandchildren, issue, or similar words, I thereby refer to and include \_\_\_\_\_ [name of child adopted out of testator's family].

*[Second alternative: child named, included in definition of "children," "grandchildren," and "issue," with individual gift]*

I give \_\_\_\_\_ [specify gift, e.g., the sum of \$10,000] to \_\_\_\_\_ [name of child adopted out of testator's family], who was born to my \_\_\_\_\_ [relationship of child's parent to testator, e.g., daughter], \_\_\_\_\_ [name of child's parent], [on \_\_\_\_\_, 20 \_\_\_\_], and adopted by \_\_\_\_\_ [names of adoptive parents] [on \_\_\_\_\_, 20 \_\_\_\_] [add any additional identifying information, such as address of adoptive parents, name of court in which adoption was adjudged, and file number of adoption proceeding].

*[Third alternative: child not named, but included in definition of "children," "grandchildren," and "issue"]*

All references in this will to children, issue, or other similar words, shall include any person who would be included by such a reference but for the fact of his or her adoption either before or after the date of this will or before or after my death.

### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Wills General Overview Estate, Gift & Trust Law Wills Bequests & Devises



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*23-63 California Legal Forms--Transaction Guide §§ 63.696-63.709*

**[Reserved]**

§§ 63.696[Reserved]



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DIVISION IV: WILLS AND TRUSTS

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PART IV. FORMS

L. Signature and Attestation

1. Signature of Testator

*23-63 California Legal Forms--Transaction Guide § 63.710*

### § 63.710 Standard Signature Clause

#### [1] Comment

#### [a] Use of Form

This form is a standard signature clause and may be included in the will of any testator who is competent to sign his or her name. Four alternative provisions, each of which differs slightly in its wording and in the placement of its component parts, are included. All are proper and adequate signature clauses that fully comply with the statutory requirements for will signatures.

For a will signature by a person other than the testator in the testator's name and at the testator's direction, see § 63.711. For a will signature by witnessed mark, see § 63.712.

#### [b] Will Signatures

A formal, witnessed will must be in writing [*Prob. Code § 6110(a)*] and must be signed by the testator or by someone other than the testator in the testator's name and presence and at the testator's direction [*Prob. Code § 6110(b)*]. The requirement of former *Prob. Code § 50(1)* (repealed eff. January 1, 1985) that the will be subscribed "at the end thereof" no longer applies. All former questions relating to the placement of the signature on or in the will are now immaterial.

The will need not be signed in the presence of the subscribing witnesses. The testator may either sign the will or acknowledge the signature of the will (or the will itself) in the presence of at least two witnesses, each of whom must be present at the same time [*Prob. Code § 6110(c)(1)*]. The witnesses must understand that the will is the testator's will, and they must sign it. It is not necessary, however, that the witnesses sign the will in each other's presence or even in the presence of the testator, but the will must be witnessed during the testator's lifetime [*Prob. Code § 6110(c)(1)*], see Senate Legislative Committee Comment to *Prob. Code § 6110*. Additionally, if a will was not executed in compliance with *Prob. Code § 6110(c)(1)*, the will must be treated as if it was executed in compliance with *Prob. Code § 6110(c)(1)* if the proponent of the will can establish by clear and convincing evidence that, at the time the testator signed the will,

the testator intended the will to constitute the testator's will [*Prob. Code § 6110(c)(2)*]. For rules relating to the competency of witnesses, interested witnesses, and the formalities of attestation, see discussion in § 63.730[1][b], [c], and [d].

### **[c] Place and Date of Execution**

Although the statute does not require that the place (or even the date) of execution appear on the will, it is advisable to include that information. A will is valid if it complies with the law at the time of execution of the place where it is executed [*Prob. Code § 6113(b)*]. The date of a will may be important for many reasons. It may help witnesses to remember the will and when it was executed. It may help to establish the validity of the will if the legal requirements for execution or attestation have been changed after the will was signed. If the testator has executed other wills, codicils, or contracts that relate to property that is disposed of by the will, the date will help to relate the will to those other documents.

### **[d] Form of Signature**

To avoid any confusion as to the identity of the testator, the testator's name should be signed in the same form as it appears in the title and in the introductory clause of the will. The same form of the name should be typed under the testator's signature.

### **[e] Numbering and Initialing Each Page of Will**

It is the practice of many attorneys to provide a space for the testator's signature or initials on each page of the will. This procedure provides some protection against the substitution of will pages, indicates that the testator has read (or at least has looked at) each page, and adds a degree of solemnity to the execution and attestation. While the Probate Code does not require such precautions, it neither prohibits nor discourages them.

## **[2] FORM**

### **Standard Signature Clause**

*[First alternative provision]*

\_\_\_\_\_ [*city or town and state in which will is signed, e.g., Smalltown, California*],  
 \_\_\_\_\_ [*date*].

\_\_\_\_\_ [*signature of testator*]  
 \_\_\_\_\_ [*typed name*]

[OR]

Executed at \_\_\_\_\_ [*city or town and state, e.g., Smalltown, California*] on  
 \_\_\_\_\_ [*date*].

\_\_\_\_\_ [*signature of testator*]  
 \_\_\_\_\_ [*typed name*]

[OR]

The foregoing will is subscribed by me on this \_\_\_\_\_ [date] day of \_\_\_\_\_ [month], 20\_\_\_\_, at \_\_\_\_\_ [city or town and state in which will is signed, e.g., Smalltown, California].

\_\_\_\_\_ [signature of testator]  
[typed name]

[OR]

I, \_\_\_\_\_ [name of testator], residing in \_\_\_\_\_ [city or town, county, and state of residence, e.g., Smalltown, Timber County, California], subscribe my name to this will on the \_\_\_\_\_ [date] day of \_\_\_\_\_ [month], 20\_\_\_\_, at \_\_\_\_\_ [city or town and state in which will is signed, e.g., Smalltown, California].

\_\_\_\_\_ [signature of testator]  
[typed name]

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Will Contests Testamentary Formalities Signature Placements Estate, Gift & Trust Law Will Contests Testamentary Formalities Witnesses Attestation & Subscription Estate, Gift & Trust Law Wills Execution



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L. Signature and Attestation

1. Signature of Testator

*23-63 California Legal Forms--Transaction Guide § 63.711*

### **§ 63.711 Testator's Signature Written by Another**

#### **[1] Comment**

##### **[a] Use of Form**

This form may be used as the signature clause when the will is signed by some person other than the testator at the testator's direction and in the testator's presence. For a standard signature clause, see § 63.710. For a will signature by witnessed mark, see § 63.712.

##### **[b] When Testator Is Unable to Sign**

A formal, witnessed will must be in writing [*Prob. Code § 6110(a)*] and signed by the testator or by someone other than the testator in the testator's name and presence and at the testator's direction [*Prob. Code § 6110(b)*]. If the testator is too ill or infirm to sign the will, at least three alternative courses of action are available.

First, some person other than the testator may help the testator sign by guiding the testator's hand. In one case, the testator was too weak to hold a pen or pencil and, at his request, another person put a pencil in his hand and helped him write his name. The Supreme Court held that the signature was valid and fully complied with the statutory requirements for will signatures [ *Estate of Holloway (1925) 195 Cal. 711, 719, 235 P. 1012* ].

Second, the testator may make his or her mark [see § 63.712], with the testator's name being written near to the mark by a person who signs as a witness [*Civ. Code § 14; Code Civ. Proc. § 17*]. Although signatures by mark were formerly made by persons who had never learned to write, marks may also be used by persons who know how to write but cannot do so because of illness or physical disability [ *In re Guilfoyle (1892) 96 Cal. 598, 601, 31 P. 553* ].

Third, the testator may direct another person to sign the testator's name in the testator's presence [*Prob. Code § 6110(b)*]. If the testator is too ill or infirm to sign, the will drafter may prepare for the problem by adding the clause set forth below to the will.

**[c] When Testator Is Subject to Conservatorship**

If the testator is subject to a conservatorship, the conservator has no more authority than any other person to help the testator sign. Thus, if a conservator assists the conservatee in signing the will, one of the three methods described above must be used; the conservator has no general authority to sign the will on the testator's behalf. A conservator may be granted the authority to make a will for the conservatee, but only by obtaining prior court authorization to do so [*Prob. Code* §§ 2580(b)(13), 6100(b), 6100.5(c)]. For discussion, see *Ch. 61, Will Drafting and Complete Will Forms*, § 61.11[3].

**[d] Form of Signature**

To avoid any confusion as to the identity of the testator, the testator's name should be signed in the same form as it appears in the title and in the introductory clause of the will. The same form of the name should be typed under the testator's signature.

**[2] FORM****Testator's Signature Written by Another**

This will was executed on \_\_\_\_\_ [date], at \_\_\_\_\_ [city or town and state in which will is signed, e.g., Smalltown, California].

\_\_\_\_\_ [full name of testator as signed by other person]  
[typed name of testator]

The signature appearing above as the signature of \_\_\_\_\_ [full name of testator] was, on the date and at the place indicated hereinabove, signed by me, at the direction of \_\_\_\_\_ [full name of testator] and in \_\_\_\_\_ [his or her] presence.

\_\_\_\_\_ [signature of person signing testator's name]  
\_\_\_\_\_ [typed name of person signing testator's name]

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Will Contests Testamentary Formalities Signature Placements Estate, Gift & Trust Law Wills Execution



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L. Signature and Attestation

1. Signature of Testator

*23-63 California Legal Forms--Transaction Guide § 63.712*

**§ 63.712 Signature by Witnessed Mark**

**[1] Comment**

**[a] Use of Form**

This form may be used as the signature clause when the will is signed by the testator's mark. For a standard signature clause, see § 63.710. For a will signature by a person other than the testator in the testator's name and at the testator's direction, see § 63.711.

**[b] Signature by Mark**

*Prob. Code § 6110(a)* requires that the will be signed either (1) by the testator or (2) in the testator's name by some other person in the testator's presence and at the testator's direction. *Civ. Code § 14* and *Code Civ. Proc. § 17* both provide that "signature or subscription includes mark, when the person cannot write, his name being written near it, by a person who writes his own name as a witness." *Civ. Code § 14* and *Code Civ. Proc. § 17* have been construed to permit subscription of a will by mark when the testator cannot write [ *Estate of McCabe (1990) 224 Cal. App. 3d 330, 332, 274 Cal. Rptr. 43* ; *Estate of Mangeri (1976) 55 Cal. App. 3d 76, 81, 127 Cal. Rptr. 438* ].

*Civ. Code § 14* and *Code Civ. Proc. § 17* require (1) that the testator be unable to write, (2) that the testator make his or her mark on the will, (3) that another person write the testator's name "near" the mark, and (4) that the other person write his or her own name as a witness. However, it has been held that substantial compliance with the requirements of *Civ. Code § 14* and *Code Civ. Proc. § 17* may validate a will even when the literal requirements of the statutes are not satisfied [ *Estate of McCabe (1990) 224 Cal. App. 3d 330, 332, 274 Cal. Rptr. 43* ].

In one case, the testator made his mark at the end of the will, on a line below which his name had been typewritten. A witness signed her name immediately below the typewritten name of the testator. Two additional witnesses attested to the due execution of the will. Although no witness had written the testator's name near his mark, as required by *Civ. Code § 14* and *Code Civ. Proc. § 17*, the court held that the fact that the testator's name was typewritten and that the

witness signed her name immediately below the typewritten name constituted substantial compliance with the statutory requirement that the testator's name be "written near" to the mark [ *Estate of McCabe (1990) 224 Cal. App. 3d 330, 334, 274 Cal. Rptr. 43* ]. In another case, the testator's name appeared in the body of a one-page will but was not written next to her mark. Noting that the "only conceivable object of requiring the name to be written 'near' the mark is to show what name the mark is intended to represent," the court held that there had been substantial compliance with the statutory requirement [ *In re Guilfoyle (1892) 96 Cal. 598, 600, 31 P. 553* ].

It is difficult to draw a general rule as to when a failure to fully comply with the statutory requirements for execution of a will, will be deemed substantial compliance. There are two competing policies in determining whether a will has been validly executed. Strict compliance with statutory requirements is generally required to protect testators from fraud [ *Estate of Howell (1958) 50 Cal. 2d 211, 215, 324 P.2d 578* ]. On the other hand, the policy of the law is generally to favor the validity of a will when there is some doubt as to whether the statutory requirements have been satisfied [ *Estate of Baker (1963) 59 Cal. 2d 680, 683, 31 Cal. Rptr. 33, 381 P.2d 913* ]. Wills are most often sustained on grounds of substantial compliance when the wills are holographic. However, the doctrine of substantial compliance is not limited to holographic wills; and, in appropriate circumstances, a formal, witnessed will may be validated when there is some failure to comply with the statutory requirements, provided the validation does not open the door to fraud or potential fraud [see *Estate of McCabe (1990) 224 Cal. App. 3d 330, 334, 274 Cal. Rptr. 43* ]. Of course, a prudent attorney will never rely on the doctrine of substantial compliance to validate a will when strict compliance with the statutory requirements is possible.

For a general discussion of the courses of action available when a testator is unable to sign his or her name to the will, see § 63.711[1].

## [2] FORM

### Signature by Witnessed Mark

This will was executed on \_\_\_\_\_ [date], at \_\_\_\_\_ [city or town and state in which will is signed, e.g., Smalltown, California].

\_\_\_\_\_ ["X" or other mark] \_\_\_\_\_ [name of testator written by witness]

The mark appearing to the left of the written name of \_\_\_\_\_ [name of testator] was made by \_\_\_\_\_ [name of testator] as \_\_\_\_\_ [his or her] signature in my presence, \_\_\_\_\_ [he or she] stating at that time that \_\_\_\_\_ [he or she] made that mark as and intended it to be \_\_\_\_\_ [his or her] signature. At \_\_\_\_\_ [his or her] request, I wrote \_\_\_\_\_ [his or her] name to the right of that mark and then wrote my name immediately below.

\_\_\_\_\_ [signature of witness]

[typed name]

### Legal Topics:

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Will Contests Testamentary Formalities Signature Placements Estate, Gift & Trust Law Wills Execution



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1. Signature of Testator

*23-63 California Legal Forms--Transaction Guide §§ 63.713-63.729*

**[Reserved]**

§§ 63.713[Reserved]



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DIVISION IV: WILLS AND TRUSTS

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PART IV. FORMS

L. Signature and Attestation

2. Attestation

*23-63 California Legal Forms--Transaction Guide § 63.730*

**§ 63.730 Attestation Clause--Standard Signature by Testator**

**[1] Comment**

**[a] Use of Form**

This form may be used as the attestation clause (or declaration of subscribing witnesses) when the will has been personally signed by the testator. The form contains appropriate alternatives that may be used when the witnesses have witnessed the signing of the will or when the witnesses have witnessed the acknowledgment of the signature (or the acknowledgment of the will).

For an attestation clause to be used when the testator's signature has been written by another person in the testator's presence and at the testator's direction, see § 63.731. For an attestation clause to be used when the testator's signature is by witnessed mark, see § 63.732. For an attestation clause to be used when the testator is sight-impaired or sightless, see § 63.733.

**[b] Witnesses to the Will**

Every formal witnessed will must be signed by at least two witnesses [*Prob. Code § 6110(c)(1)*]. Any person generally competent to be a witness may act as a witness to a will [*Prob. Code § 6112(a)*]. Except as otherwise provided by statute, every person, irrespective of age, is qualified to be a witness, and no person is disqualified to testify to any matter [*Evid. Code § 700*]. A person is disqualified to be a witness if he or she is incapable of expressing himself or herself concerning the matter so as to be understood, either directly or through interpretation by one who can understand the witness [*Evid. Code § 701(a)*], or incapable of understanding the duty of a witness to tell the truth [*Evid. Code § 701(b)*].

**[c] Interested Witnesses**

A will or will provision is not invalid merely because the will is signed by an interested witness [*Prob. Code § 6112(b)*].

However, if the will makes a devise to a witness, and if there are not at least two other disinterested witnesses, a presumption will arise that the witness procured the devise by duress, menace, fraud, or undue influence [*Prob. Code* § 6112(c); for definitions of "duress," "menace," "fraud," and "undue influence," see § 63.200[1][e][i] et seq.]. If a devise to an interested witness fails because of this presumption, the interested witness will take so much of the devise as does not exceed the intestate share to which the witness would otherwise be entitled [*Prob. Code* § 6112(d)]. The witness can still testify to the due execution of the will, however [see *Uniform Prob. Code* § 2-505, Comment; *Tentative Recommendation Relating to Wills and Intestate Succession*, 16 Cal. L. Revision Comm'n Reports 2301, 2396 (1982)(*Prob. Code* § 6112 same as *Uniform Prob. Code* § 2-505)]. Furthermore, if there are at least two other disinterested witnesses, the devise to the "interested" witness is as effective as any other [*Prob. Code* § 6112; *Recommendation Relating to Revision of Wills and Intestate Succession Law*, 17 Cal. L. Revision Comm'n Reports 537, 541, 552].

No presumption that a devise to an interested witness was procured by duress, menace, fraud, or undue influence will arise if the devisee is made to the witness solely in a fiduciary capacity, such as that of trustee [*Prob. Code* § 6112(c)].

#### **[d] Formalities of Attestation**

The witnesses must witness either the testator's signing of the will or the testator's acknowledgment of the signature (or acknowledgment of the will). The signing or the acknowledgment must take place in the presence of the witnesses, who must be present at the same time, but the witnesses need not sign in the presence of each other [*Prob. Code* § 6110(c)(1); see Law Revision Commission Comment to *Prob. Code* § 6110; see also *Estate of Armstrong (1937)* 8 Cal. 2d 204, 209-210, 64 P.2d 1093 ]. The subscription of the will by two witnesses must occur before the testator's death [*Prob. Code* § 6110(c)(2), see *Estate of Saueressig (2006)* 38 Cal. 4th 1045, 1050, 44 Cal. Rptr. 3d 672 , see also *Crook v. Contreras (2002)* 95 Cal. App. 4th 1194, 1205, 116 Cal. Rptr. 2d 319 ].

The requirement of former *Prob. Code* § 50(3) (repealed January 1, 1985) that the testator "declare" that the will is his or her will has been eliminated, as has the requirement of former *Prob. Code* § 50(4) that the testator "request" that the witnesses sign. It is sufficient if the witnesses "understand" that the instrument they sign is the testator's will, although this understanding will in most cases be supplied by a declaration of the testator or the testator's attorney.

Although the witnesses are not required to give their residences, that information may help in locating the witnesses at the time it is necessary to prove the will [for proof of wills when there is no contest, see *Prob. Code* § 8220; for contests of wills, see *Prob. Code* §§ 8250-8254].

#### **[e] Law Office Procedure**

##### **[i] Arranging for Witnesses**

The attorney may find it helpful to develop a standard procedure for the execution and attestation of wills. In the usual case, when the will has been drafted and is ready for the client's signature, the attorney will arrange for two witnesses. Neither of these witnesses should be an "interested witness" (i.e., a person to whom the will "makes a devise") [*Prob. Code* § 6112(b)]. One of the witnesses may be the attorney for the testator. While some attorneys prefer not to act as witnesses unless no other witness is available, many others do so routinely.

##### **[ii] Attorney as Witness**

The attorney is legally competent to act as one of the witnesses to the will [see *Prob. Code* § 6112(a); *Evid. Code* § 700]. Opinions differ about whether an attorney should customarily act in that capacity.

If there is a will contest, the testimony of an attorney-witness may be necessary to prove the will. Before July 1, 1989, an attorney who knew or should have known that he or she would be called on to testify in a contested proceeding

relating to the subject matter of his or her employment was required to withdraw from the employment unless the client, after having been fully advised in the matter and having had a reasonable opportunity to seek the advice of independent counsel, consented in writing to the continued employment [former *Cal. Rules Prof. Conduct, Rule 2-111(A)(4)*, superseded May 27, 1989, by Rule 5-210]. Under former *Prob. Code § 371* (repealed July 1, 1989), key issues of fact in will contests could be tried before a jury. Operative May 27, 1989, *Rules of Professional Conduct, Rule 5-210* disqualifies an attorney from acting as an advocate in a matter in which the attorney will give testimony, but only if the matter is tried before a jury. Operative July 1, 1989, *Prob. Code § 8252(b)* eliminates jury trials in will contests. Since a will contest must now be tried before the court sitting without a jury, an attorney who acts as a witness to a will is not automatically disqualified from also acting as advocate in the trial of the contest.

If the attorney is not a witness to the will, he or she may be unable to state an opinion about the sanity of the testator. Under *Evid. Code § 870(b)*, a witness may state an opinion about the sanity of a person if the witness was a subscribing witness to a writing the validity of which is in dispute and which was signed by the person whose sanity is in question. The second witness may be a secretary or other employee in the attorney's office.

### **[iii] Execution and Attestation**

The testator and the witnesses should assemble in one place, typically the attorney's office. After the testator has read the will and approved its contents, the attorney may ask the testator if the indicated instrument is the testator's will. If the answer is affirmative, the testator may proceed to sign and date the will, after which the witnesses may sign and indicate their places of residence. Although the statute no longer requires that the testator be present when the witnesses sign their names, it will be convenient in most cases to complete the execution and attestation at one time and place and while all persons concerned are present. It is not necessary to disclose the contents of the will to the witnesses. The statute requires only that the witnesses "understand" that the indicated document is the testator's will [*Prob. Code § 6110(c)(1)*], and that understanding may be imparted without a disclosure of the contents of the document.

### **[f] "Self-Proving Wills"**

*Prob. Code § 8220(b)* permits the proof of an uncontested will by "an affidavit in the original will that includes or incorporates the attestation clause." Under *Code Civ. Proc. § 2015.5*, an unsworn declaration under penalty of perjury has the same force and effect as an affidavit. If no one appears to contest the will, the court may admit it to probate on the evidence of only one of the subscribing witnesses, if the evidence shows that it was executed in all particulars as required by law [*Prob. Code § 8220(a)*]. Evidence of execution of the will may be received in the form of an affidavit of a subscribing witness, to which a photographic copy of the will is attached, or by an affidavit (or declaration under penalty of perjury) in the original will that includes or incorporates the attestation clause [*Prob. Code § 8220(b)*; see *Code Civ. Proc. § 2015.5* (declaration under penalty of perjury in lieu of affidavit)].

### **[g] Statements as to Testamentary Capacity**

The Probate Code does not require that the witnesses attest to the testator's capacity or anticipate grounds for contest of the will by denying such influences as fraud, duress, menace, or undue influence. Nothing in the code, however, forbids the inclusion in the attestation clause of a statement that the testator "appears" (or words of like effect) to have the requisite testamentary capacity, or "appears" to be free of fraud, menace, or the like. Many attorneys routinely include such statements in attestation clauses. Others, recognizing that such statements have little or no probative value and are not matters to which the witnesses are competent to testify [see *Evid. Code § 702(a)* (a witness who is not an expert witness must have personal knowledge of the matter testified to)], routinely reject them.

If the will is not contested, it may be admitted to probate on the affidavit of one of the witnesses, or on an affidavit (or declaration under penalty of perjury) in the will itself [*Prob. Code § 8220(b)*]. Neither the affidavit nor the declaration under penalty of perjury need establish that the testator was of "sound mind" or "not under the influence of fraud" when

the will was executed, but only that the will was "executed" properly [*see Prob. Code § 8220*].

If the will is contested, each subscribing witness must be produced and examined [*Prob. Code § 8253*]. If only one subscribing witness is available in a will contest, his or her evidence alone may be sufficient to prove due execution and the unavailable witness is not necessary [ *Estate of Burdette (2000) 81 Cal. App. 4th 938, 945, 97 Cal. Rptr. 2d 263* ]. If no subscribing witness is available as a witness [*see Evid. Code § 240* (when witness is "unavailable as a witness")], the court may admit the evidence of other witnesses to prove the due execution of the will [*Prob. Code § 8253*]. At the trial of an action, a witness can be heard only in the presence and subject to the examination of all parties to the action, if they choose to attend and examine [*Evid. Code § 711*].

Affidavits and verified petitions may be received as evidence in uncontested probate proceedings [*Prob. Code § 1022*] but not in contested proceedings [ *Estate of Duncan (1969) 1 Cal. App. 3d 212, 215, 81 Cal. Rptr. 568* ]. Neither a verified petition nor the affidavit of an attesting witness is competent to prove a will in the face of a contest [ *Estate of Duncan (1969) 1 Cal. App. 3d 212, 214-215, 81 Cal. Rptr. 568* ].

A statement in the will that the testator "appeared" to a witness (who may never have seen the testator before or after) to be of "sound mind," even if supported by an affidavit or declaration under penalty of perjury, will have little or no probative value. At worst, such a statement may be regarded as surplusage. At best, it may serve to inform the witnesses that they may one day be called on (in open court) to testify to the testator's capacity. This form offers a statement about the testator's competency as an optional provision, which the will drafter may or may not see fit to include in the attestation clause.

## [2] FORM

### Attestation Clause--Standard Signature by Testator

[*EITHER, if witnesses to testator's signature:*]

On the date written below, we, the undersigned, each being present at the same time, witnessed the signing of this instrument by \_\_\_\_\_ [*full name of testator*].

[*OR, if witnesses to acknowledgment of will or of testator's signature:*]

On the date written below, we, the undersigned, each being present at the same time, witnessed the acknowledgment of \_\_\_\_\_ [the signature of this instrument *or* this instrument] by \_\_\_\_\_ [*full name of testator*].

[*Continue with the following:*]

[*Add the following statement as to capacity, if desired:* At that time, \_\_\_\_\_ (*full name of testator*) appeared to us to be of sound mind and memory and, to the best of our knowledge, was not acting under fraud, duress, menace, or undue influence.]

Understanding this instrument, which consists of \_\_\_\_\_ [*number*] pages, including this page, to be the will of \_\_\_\_\_ [*full name of testator*], we now subscribe our names as witnesses thereto.

We declare under penalty of perjury that the foregoing is true and correct. Executed at \_\_\_\_\_ [*place of execution*], California, on \_\_\_\_\_ [*date*].

\_\_\_\_\_ [signature of first witness]  
Residing at \_\_\_\_\_ [street address]  
\_\_\_\_\_ [city, state and zip]

\_\_\_\_\_ [signature of second witness]  
Residing at \_\_\_\_\_ [street address]  
\_\_\_\_\_ [city, state and zip]

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Will Contests Testamentary Formalities Signature Placements Estate, Gift & Trust Law Will  
Contests Testamentary Formalities Witnesses Attestation & Subscription Estate, Gift & Trust Law Wills Execution



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DIVISION IV: WILLS AND TRUSTS

CHAPTER 63 WILL PROVISIONS

PART IV. FORMS

L. Signature and Attestation

2. Attestation

*23-63 California Legal Forms--Transaction Guide § 63.731*

**§ 63.731 Attestation Clause--Testator's Signature Written by Another**

**[1] Comment**

**[a] Use of Form**

This form may be used as the attestation clause (or declaration of subscribing witnesses) when the testator's signature has been written by another person in the testator's presence and at the testator's direction. The form contains appropriate alternatives that may be used when the witnesses have witnessed the signing of the will or when the witnesses have witnessed the acknowledgment of the signature (or the acknowledgment of the will).

For an attestation clause to be used when the will has been signed personally by the testator, see § 63.730. For an attestation clause to be used when the testator's signature is by witnessed mark, see § 63.732. For an attestation clause to be used when the testator is sight-impaired or sightless, see § 63.733.

For discussion of the rules relating to witnesses to wills, formalities of will attestation, "self-proving" wills, and statements as to testamentary capacity, see § 63.730[1].

**[b] Testator's Hand Guided by Another**

When the testator is too ill or infirm to sign his or her own name to the will, at least three alternative courses of action are available. First, another person may help the testator sign by guiding the testator's hand. Second, the testator may make his or her mark, with the testator's name being written near to the mark by a person who signs as a witness. Third, the testator may direct another person to sign the testator's name in the testator's presence. For a detailed discussion of these alternatives and considerations to be followed in choosing among them, see discussion in § 63.711[1][b].

**[2] FORM**

**Attestation Clause--Testator's Signature Written by Another**

[First alternative: witnesses to signature]

On the date written below, we, the undersigned, each being present at the same time, witnessed the signing of this instrument by \_\_\_\_\_ [name of person signing testator's name], who signed the name of \_\_\_\_\_ [full name of testator] thereto, at the request of \_\_\_\_\_ [full name of testator] and in \_\_\_\_\_ [his or her] presence.

[OR]

[Second alternative: witnesses to acknowledgment of will or of signature]

On the date written below, we, the undersigned, each being present at the same time, witnessed the acknowledgment of \_\_\_\_\_ [the signature of this instrument or this instrument] by \_\_\_\_\_ [full name of testator].

[Continue with the following:]

[Add the following statement as to capacity, if desired: At that time, \_\_\_\_\_ (full name of testator) appeared to us to be of sound mind and memory and, to the best of our knowledge, was not acting under fraud, duress, menace, or undue influence.]

Understanding this instrument, which consists of \_\_\_\_\_ [number] pages, including this page, to be the will of \_\_\_\_\_ [full name of testator], we now subscribe our names as witnesses thereto.

We declare under penalty of perjury that the foregoing is true and correct. Executed at \_\_\_\_\_ [place of execution], California, on \_\_\_\_\_ [month and date], 20 \_\_\_\_.

\_\_\_\_\_ [signature of first witness]  
Residing at \_\_\_\_\_ [street address]  
\_\_\_\_\_ [city, state and zip]

\_\_\_\_\_ [signature of second witness]  
Residing at \_\_\_\_\_ [street address]  
\_\_\_\_\_ [city, state and zip]

### Legal Topics:

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Will Contests Testamentary Formalities Witnesses Attestation & Subscription Estate, Gift & Trust Law Wills Execution



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CHAPTER 63 WILL PROVISIONS

PART IV. FORMS

L. Signature and Attestation

2. Attestation

*23-63 California Legal Forms--Transaction Guide § 63.732*

**§ 63.732 Attestation Clause--Signature by Witnessed Mark**

**[1] Comment**

**[a] Use of Form**

This form may be used as the attestation clause (or declaration of subscribing witnesses) when the will is signed by witnessed mark. The form contains appropriate alternatives that may be used when the witnesses have witnessed the signing of the will or when the witnesses have witnessed the acknowledgment of the signature (or the acknowledgment of the will).

For an attestation clause to be used when the will has been signed personally by the testator, see § 63.731. For an attestation clause to be used when the testator's signature has been written by another person in the testator's presence and at the testator's direction, see § 63.732. For an attestation clause to be used when the testator is sight-impaired or sightless, see § 63.733.

**[b] Witnesses to Signature by Mark**

A signature or subscription includes a mark when the person whose signature is required cannot write [*Civ. Code § 14; Code Civ. Proc. § 17*]. In addition to the requirement that a will signed by mark, like other formal wills, must be witnessed by at least two persons [*Prob. Code § 6110(c)(1)*], if a signature by mark is to be acknowledged, the signature itself must be witnessed by two persons who must subscribe their own names thereto [*Civ. Code § 14; Code Civ. Proc. § 17*]. The same witnesses who subscribe their names as witnesses to the will may sign their names as witnesses to the mark.

For discussion of the rules relating to signatures by witnessed mark, see § 63.712[1]. For discussion of the rules relating to witnesses to wills, formalities of will attestation, "self-proving" wills, and statements as to testamentary capacity, see § 63.730[1].

**[2] FORM****Attestation Clause--Signature by Witnessed Mark**

*[First alternative: witnesses to signature]*

On the date written below, we, the undersigned, each being present at the same time, witnessed the signing of this instrument by \_\_\_\_\_ *[full name of testator]*, who, being unable to write \_\_\_\_\_ *[his or her]* name, made \_\_\_\_\_ *[his or her]* mark thereupon, after which \_\_\_\_\_ *[name of witness to mark]* signed the name of \_\_\_\_\_ *[full name of testator]* near to the mark and wrote \_\_\_\_\_ *[his or her]* own name as witness to the mark.

*[OR]*

*[Second alternative: witnesses to acknowledgment of will or of signature]*

On the date written below, we, the undersigned, each being present at the same time, witnessed the acknowledgment of \_\_\_\_\_ *[the signature of this instrument or this instrument]* by \_\_\_\_\_ *[full name of testator]*.

*[Continue with the following:]*

*[Add the following statement as to capacity, if desired: At that time, \_\_\_\_\_ (full name of testator) appeared to us to be of sound mind and memory and, to the best of our knowledge, was not acting under fraud, duress, menace, or undue influence.]*

Understanding this instrument, which consists of \_\_\_\_\_ *[number]* pages, including this page, to be the will of \_\_\_\_\_ *[full name of testator]*, we now subscribe our names as witnesses thereto.

We declare under penalty of perjury that the foregoing is true and correct. Executed at \_\_\_\_\_ *[place of execution]*, California, on \_\_\_\_\_ *[month and date]*, 20 \_\_\_\_.

\_\_\_\_\_ *[signature of first witness]*  
Residing at \_\_\_\_\_ *[street address]*  
\_\_\_\_\_ *[city, state and zip]*

\_\_\_\_\_ *[signature of second witness]*  
Residing at \_\_\_\_\_ *[street address]*  
\_\_\_\_\_ *[city, state and zip]*

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Will Contests Testamentary Formalities Witnesses Attestation & Subscription Estate, Gift & Trust Law Wills Execution



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L. Signature and Attestation

2. Attestation

*23-63 California Legal Forms--Transaction Guide § 63.733*

**§ 63.733 Attestation Clause--Signature by Sight-Impaired or Sightless Person**

**[1] Comment**

**[a] Use of Form**

This form may be used as the attestation clause (or declaration of subscribing witnesses) when the will is signed by a sight-impaired or sightless person. It has been adapted from a form developed by Sacramento attorney Sharon Quinn, and is reproduced by permission. It assumes that the witnesses were present at the signing of the will (rather than at a subsequent acknowledgment of the signature or will by the testator) [*see Prob. Code § 6110(c)(1)*] and that the optional procedure discussed in § 63.733[1][b], has been used.

For discussion of the rules relating to witnesses to wills, formalities of will attestation, "self-proving" wills, and statements as to testamentary capacity, see § 63.730[1].

**[b] Wills Signed by Sight-Impaired or Sightless Persons**

The statutes governing the execution and attestation of wills do not make any special provision for the problems of sight-impaired or sightless testators. The form set forth below addresses these problems by including a recitation that (1) the will has been read aloud to the sight-impaired or sightless testator, (2) the will has been read silently by the subscribing witnesses, and (3) the instrument signed by the witnesses is the identical instrument that was read aloud to the testator. This procedure is an optional one, but its use may make it easier to prove that the sightless or sight-impaired person was aware of and approved of the contents of the will that he or she signed. In the alternative, a standard attestation clause [*see § 63.730*] may be used in lieu of this form.

**[2] FORM**

**Attestation Clause--Signature by Sight-Impaired or Sightless Person**

On the date written below, we, the undersigned, each being present at the same time, witnessed the signing of this instrument by \_\_\_\_\_ [full name of testator]. At that time, and in our presence, this instrument, consisting of \_\_\_\_\_ [number] pages, including this page, was read aloud to \_\_\_\_\_ [full name of testator] while, at the same time, the undersigned read it silently and to ourselves. This instrument is the same instrument that was read aloud to \_\_\_\_\_ [full name of testator] at that time, and no clause or clauses that appear herein was or were omitted from the instrument as it was read aloud to \_\_\_\_\_ [full name of testator]. Upon completion of the reading, \_\_\_\_\_ [full name of testator] stated to us that this instrument was \_\_\_\_\_ [his or her] will and, then and there, and in our presence, \_\_\_\_\_ [full name of testator] signed it in the place indicated above.

[Add the following statement as to capacity, if desired: At that time, \_\_\_\_\_ (full name of testator) appeared to us to be of sound mind and memory and, to the best of our knowledge, was not acting under fraud, duress, menace, or undue influence.]

Understanding this instrument, which consists of \_\_\_\_\_ [number] pages, including this page, to be the will of \_\_\_\_\_ [full name of testator], we now subscribe our names as witnesses thereto.

We declare under penalty of perjury that the foregoing is true and correct. Executed at \_\_\_\_\_ [place of execution], California, on \_\_\_\_\_ [month and date], 20 \_\_\_\_.

\_\_\_\_\_ [signature of first witness]  
Residing at \_\_\_\_\_ [street address]  
\_\_\_\_\_ [city, state and zip]

\_\_\_\_\_ [signature of second witness]  
Residing at \_\_\_\_\_ [street address]  
\_\_\_\_\_ [city, state and zip]

### Legal Topics:

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Will Contests Testamentary Formalities Witnesses Attestation & Subscription Estate, Gift & Trust Law Wills Execution



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*23-63 California Legal Forms--Transaction Guide §§ 63.734-63.749*

**[Reserved]**

§§ 63.734[Reserved]



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DIVISION IV: WILLS AND TRUSTS  
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L. Signature and Attestation  
3. Certification of International Will

*23-63 California Legal Forms--Transaction Guide § 63.750*

**§ 63.750 Certification of International Will**

**[1] Comment**

**[a] Use of Form**

This form may be used by an authorized person to certify that the requirements of the Uniform International Wills Act [*Prob. Code §§ 6380-6389*] have been fulfilled.

**[b] International Wills**

**[i] In General**

An international will is a will that is executed in conformity with the Uniform International Wills Act [*Prob. Code § 6380; see Prob. Code §§ 6381-6384*]. Under the Act, a will is valid as regards form (irrespective of the place where it is made, the location of the assets which it covers, or the nationality, domicile, or residence of the testator) if it is made in the form of an international will complying with the provisions of the Act [*Prob. Code § 6381(a)*].

**[ii] Form**

Under the Act, an international will must be in writing, though it need not be written by the testator himself or herself [*Prob. Code § 6382(a)*]. It may be written in any language, by hand or by other means [*Prob. Code § 6382(a)*].

The signatures must be placed at the end of the will [*Prob. Code § 6383(a)*]. If the will consists of several sheets, each sheet will be signed by the testator or, if he or she is unable to sign, by the person signing on his or her behalf or, if there is no such person, by an "authorized person" [*Prob. Code § 6383(a); see discussion in § 63.750[1][c]*]. In addition, each sheet must be numbered [*Prob. Code § 6383(a)*].

The date of the will is the date of its signature by the authorized person [*Prob. Code § 6383(b)*]. That date must be

noted at the end of the will by the authorized person [*Prob. Code* § 6383(b)].

### **[iii] Requirements for Execution**

The testator must declare in the presence of two witnesses and of a person authorized to act in connection with international wills [*see Prob. Code* §§ 6380(b), 6388; *see also* discussion in § 63.750[1][c]] that the document is his or her will and that he or she knows its contents [*Prob. Code* § 6382(b)]. The testator need not inform the witnesses or the authorized person of the contents of the will [*Prob. Code* § 6382(b)]. The testator must sign the will in the presence of the witnesses and the authorized person, or (if he or she has previously signed it) acknowledge his or her signature [*Prob. Code* § 6382(c)].

If the testator is unable to sign, the absence of a signature does not affect the validity of the international will provided the testator includes the reason for his or her inability to sign and the authorized person makes note of that reason on the will [*Prob. Code* § 6382(d)]. In that case, it is permissible for any other person present, including the authorized person or one of the witnesses, to sign the testator's name at the direction of the testator, if the authorized person makes note of this also on the will. However, it is not required that any person sign the testator's name for the testator [*Prob. Code* § 6382(d)]. The witnesses and the authorized person must then and there attest the will by signing in the presence of the testator [*Prob. Code* § 6382(e)].

The authorized person must ask the testator whether he or she wishes to make a declaration concerning the safekeeping of the will. If so, and at the express request of the testator, the place where he or she intends to have his or her will kept must be mentioned in the certificate that is attached to the will by the authorized person [*Prob. Code* § 6383(c); *see Prob. Code* § 6384].

### **[c] Persons Authorized to Act in Connection With International Wills**

As used in the Act, the terms "authorized person" and "person authorized to act in connection with international wills" mean persons who are empowered by the laws of the United States or by *Prob. Code* § 6388 to supervise the execution of international wills [*Prob. Code* § 6380(b)]. Persons authorized by the laws of the United States to supervise the execution of international wills include members of the diplomatic and consular service of the United States designated by Foreign Service Regulations [*Prob. Code* § 6380(b)]. Persons authorized by *Prob. Code* § 6388 are individuals who have been admitted to practice law before the courts of California and who are in good standing as active law practitioners in the state.

### **[d] Certificate of Authorized Person**

The authorized person must attach to the will a certificate to be signed by him or her establishing that the requirements of the Act for the valid execution of an international will have been fulfilled [*Prob. Code* § 6384]. The authorized person must keep a copy of the certificate and deliver another to the testator [*Prob. Code* § 6384]. The certificate must be substantially in the form prescribed by *Prob. Code* § 6384.

Although the absence or irregularity of a certificate does not affect the formal validity of an international will [*Prob. Code* § 6385], the certificate is, in the absence of evidence to the contrary, conclusive of the formal validity of the instrument [*Prob. Code* § 6385].

### **[e] International Wills Registry System**

*Prob. Code* § 6389 requires the Secretary of State to establish a registry system by which authorized persons may register in a central information center information regarding the execution of international wills. Information registered in the system must be kept in strictest confidence until the testator's death and then made available to any person who presents a death certificate or other satisfactory evidence of the testator's death [*Prob. Code* § 6389]. Information that

may be received, preserved, and reported is limited to the name, social security (or any other individual identifying number established by law), address, date and place of birth of the testator, and the intended place of deposit or safekeeping of the instrument. The Secretary of State, at the request of the authorized person, may cause the information it receives about execution of any international will to be transmitted to the registry system of another jurisdiction as identified by the testator, if that other system adhered to rules protecting the confidentiality of the information similar to those established in California [*Prob. Code § 6389*].

## [2] FORM

### Certification of International Will

#### CERTIFICATE

(Convention of October 26, 1973)

1. I, \_\_\_\_\_ [*name, address, and capacity*], a person authorized to act in connection with international wills,

2. certify that on \_\_\_\_\_ [*date*] at \_\_\_\_\_ [*place*]

3. \_\_\_\_\_ [*name of testator, address, date, and place of birth*] in my presence and that of the witnesses

4. (a) \_\_\_\_\_ [*name, address, date, and place of birth*]

(b) \_\_\_\_\_ [*name, address, date, and place of birth*] has declared that the attached document is \_\_\_\_\_ [*his or her*] will and that \_\_\_\_\_ [*he or she*] knows the contents thereof.

5. I furthermore certify that:

6. (a) in my presence and in that of the witnesses

[*Choose appropriate clause:*]

(1) the testator has signed the will or has acknowledged \_\_\_\_\_ [*his or her*] signature previously affixed.  
[*or*]

(2) following a declaration of the testator stating that \_\_\_\_\_ [*he or she*] was unable to sign \_\_\_\_\_ [*his or her*] will because \_\_\_\_\_, [*state reason, e.g., he was too ill to do so*], I have mentioned this declaration on the will and the signature has been affixed by \_\_\_\_\_ [*name and address*]

7. (b) the witnesses and I have signed the will;

8. (c) each page of the will has been signed by \_\_\_\_\_ [*the testator or name of other person signing*] and numbered;

9. (d) I have satisfied myself as to the identity of the testator and of the witnesses as designated above;

10. (e) the witnesses met the conditions requisite to act as such according to the law under which I am acting;

11. (f) the testator has requested me to include the following statement concerning the safekeeping of his will: \_\_\_\_\_ [*set forth requested statement*]

\_\_\_\_\_ [*place of execution*]  
\_\_\_\_\_ [*date of execution*]  
\_\_\_\_\_ [*signature of authorized person*]

[*SEAL, if any*]

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Estate, Gift & Trust Law Will Contests Testamentary Formalities Witnesses General Overview Estate, Gift & Trust Law Wills Execution



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3. Certification of International Will

*23-63 California Legal Forms--Transaction Guide §§ 63.751-63.769*

**[Reserved]**

§§ 63.751[Reserved]



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DIVISION IV: WILLS AND TRUSTS  
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PART IV. FORMS  
M. Election and Waiver of Marital Rights

*23-63 California Legal Forms--Transaction Guide § 63.770*

**§ 63.770 Election and Waiver of Marital Rights**

**[1] Comment**

**[a] Use of Form**

This form may be used when the testator's spouse elects to waive his or her rights in the community and quasi-community property of the parties in return for provisions in the testator's will. When executed by the spouse, this form amounts to an "election" by the spouse to ratify or acquiesce in the testator's disposition of both halves of the community and quasi-community property. For a will provision disposing of all the community and quasi-community property of both spouses and putting the testator's spouse to an election, see § 63.272.

When used, this form should be set forth at the end of the will and immediately follow the signatures of the attesting witnesses.

**[b] Waiver of Marital Rights**

A spouse may waive his or her marital or property rights in the estate of the other spouse, including the right to elect to take community or quasi-community property against the will [*Prob. Code § 141(a)(7)*]. Because relations between spouses are typically based on trust and confidence, however, and because waivers of marital or property rights may be requested or granted under unfair or inequitable circumstances, such waivers have long been subject to special scrutiny. Before the enactment of *Prob. Code §§ 140-147* (operative January 1, 1985), marital waivers were subject to the general rules that control the actions of persons occupying confidential relations with each other [*Fam. Code § 721*; see *Estate of Mader (1970) 11 Cal. App. 3d 409, 89 Cal. Rptr. 787*; see also *Estate of Wiedemann (1966) 239 Cal. App. 2d 269, 48 Cal. Rptr. 558*].

Under *Prob. Code §§ 140-147*, waivers of marital and property rights are governed by specific statutory rules that apply to a broad spectrum of marital rights and that comprehensively specify the circumstances under which waivers of those rights may be enforced.

The statutory rules apply to complete or partial waivers of the rights of a "surviving spouse" [*see Prob. Code § 78*] in or to any property that would pass from one spouse to another upon death, including, but not limited to [*Prob. Code § 141(a), (b)*]:

- Property that would pass from the decedent spouse by intestate succession;
- Property that would pass from the decedent by testamentary disposition in a will executed before the waiver;
- A probate homestead;
- The right to have exempt property set aside;
- The right to a family allowance;
- The right to have a small estate set aside without probate administration [*see Prob. Code §§ 6600-6615*];
- The right to elect to take community or quasi-community property against the decedent's will;
- The right to take the statutory share of an omitted spouse [*see Prob. Code §§ 21610-26112*];
- The right to be appointed as the personal representative of the decedent's estate; and
- An interest in property that is the subject of a nonprobate transfer on death [*see Prob. Code §§ 5000-5705*].

### **[c] Enforceability of Marital Waivers**

The waiver must be in writing and signed by the surviving spouse [*Prob. Code § 142(a)*]. Enforcement of the waiver is subject to the same defenses as enforcement of a contract, except that lack of consideration is not a defense [*Prob. Code § 142(c)(1)*]. A minor intending to marry may make a waiver as if married, but the waiver becomes effective only upon the marriage [*Prob. Code § 142(c)(2)*].

After it has been determined that the waiver is in writing and signed by the surviving spouse, the waiver is subject to scrutiny on at least three levels. At any one of these levels, the court may determine that the waiver does or does not meet the statutory requirements and is or is not enforceable.

First, *Prob. Code § 143* provides that the waiver is enforceable unless the surviving spouse proves either (1) that a fair and reasonable disclosure of the property or financial obligations of the decedent was not provided to the surviving spouse before the waiver was signed (unless such a disclosure was waived after advice by independent legal counsel) [*Prob. Code § 143(a)(1)*]; or (2) that the surviving spouse was not represented by independent legal counsel when the waiver was signed [*Prob. Code § 143(a)(2)*]. If the foregoing requirements are not established, the court may proceed to a second level of determination.

Under *Prob. Code § 144(a)*, the waiver is enforceable if the court determines either: (1) that the waiver at the time of signing made a fair and reasonable disposition of the rights of the surviving spouse [*Prob. Code § 144(a)(1)*]; or (2) that the surviving spouse had (or reasonably should have had) an adequate knowledge of the property and financial obligations of the decedent, and the decedent did not violate any of the fiduciary duties imposed by *Fam. Code 721(b)*.

If the court determines that the waiver is enforceable under *Prob. Code § 144(a)*, the court may proceed to a third level of determination. Even if the waiver is enforceable under *Prob. Code § 144(a)* (because it made a fair and reasonable disposition of the rights of the surviving spouse or because the surviving spouse had, or reasonably should have had, an adequate knowledge of the property and financial obligations of the decedent), the court may deny enforcement if, after considering all relevant facts and circumstances, it finds that enforcement would be "unconscionable" under the circumstances existing at the time enforcement is sought [*Prob. Code § 144(b)*]. If the court finds that enforcement would be unconscionable in whole or in part, it may refuse to enforce the waiver entirely, refuse to enforce the part that is unconscionable and enforce the rest, or limit the application of the unconscionable provisions to avoid an unconscionable result [*Prob. Code § 144(b)*].

#### **[d] Tax Consequences of Waivers and Elections**

The use of marital waivers, especially waivers that include the widow(er)'s election, may have significant tax consequences. For discussion, see *California Wills and Trusts, Ch. 22, Property Devised by Will, § 22.06[4]* (Matthew Bender).

#### **[2] FORM**

##### **Election and Waiver of Marital Rights**

##### ELECTION AND WAIVER BY SPOUSE

I, \_\_\_\_\_ [*full name of testator's spouse*], the \_\_\_\_\_ [*husband or wife*] of \_\_\_\_\_ [*full name of testator*], have read the foregoing will of my \_\_\_\_\_ [*husband or wife*] and fully understand that it disposes, not only of all of \_\_\_\_\_ [*his or her*] separate property, but also of all of our community property and quasi-community property.

[EITHER]

Before signing this Election and Waiver, I was provided a fair and reasonable disclosure of all of the property and financial obligations of my \_\_\_\_\_ [*husband or wife*] and, at the time of signing, was represented by independent legal counsel, \_\_\_\_\_ [*name of independent legal counsel*], attorney-at-law, who has fully advised me as to my legal rights and as to the consequences of this Election and Waiver.

[OR]

At the time of signing this Election and Waiver, I was represented by independent legal counsel, \_\_\_\_\_ [*name of independent legal counsel*], attorney-at-law, whose address is \_\_\_\_\_ [*street address, city, state, zip*] and who has fully advised me as to my legal rights and as to the consequences of this Election and Waiver and, upon whose advice, I do now waive the provisions of the *California Probate Code § 143(a)*, under which I am entitled to a fair and reasonable disclosure of the property or financial obligations of my \_\_\_\_\_ [*husband or wife*]. I do hereby waive such a disclosure.

[Continue with the following:]

I am fully satisfied with the foregoing will and therefore elect to accept and acquiesce in its provisions. I hereby waive any and all claims to my share of the community property and quasi-community property, if any, and all other rights, claims or interests that I may have in or to any of the property disposed of by the foregoing will [, but not my right to

request and receive a family allowance out of the estate of my \_\_\_\_\_ (husband *or* wife) during the administration of \_\_\_\_\_ (his *or* her) estate]. This Election and Waiver is not intended and shall not operate as a present transfer or release of any of my rights in any property.

[*Optional; add if spouse will retain right to revoke election and waiver:*]

This Election and Waiver may be revoked by me by a written instrument signed by me and delivered to my \_\_\_\_\_ [husband *or* wife] at any time during \_\_\_\_\_ [his *or* her] lifetime.

[*Continue with the following:*]

This Election and Waiver shall be effective only on the death of my \_\_\_\_\_ [husband *or* wife] and only if all of the following conditions are satisfied:

- (1) I survive my \_\_\_\_\_ [husband *or* wife];
- (2) The foregoing will is duly admitted to probate by a court of competent jurisdiction;
- (3) The foregoing will, or any part thereof, is not successfully contested;
- (4) The probate of the foregoing will is not revoked; and
- (5) The estate of my \_\_\_\_\_ [husband *or* wife] is distributed in accordance with the terms and provisions of the foregoing will.

This Election and Waiver is executed on \_\_\_\_\_ [date], at \_\_\_\_\_ [place, e.g., Smalltown, California].

\_\_\_\_\_ [signature of spouse]  
[typed name]

[*Add signature of independent counsel, if appropriate:*]

The foregoing Election and Waiver is approved as to form and content on \_\_\_\_\_ [date].

\_\_\_\_\_ [signature of counsel]  
[typed name]  
Attorney at Law

\_\_\_\_\_ [signature of counsel]  
[typed name]  
Attorney at Law

### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Wills Beneficiaries Elections



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California Legal Forms--Transaction Guide

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DIVISION IV: WILLS AND TRUSTS  
CHAPTER 64 TESTAMENTARY TRUSTS: PAYMENT AND DISTRIBUTION PROVISIONS

*24-64 California Legal Forms--Transaction Guide 64.syn*

**§ 64.syn Synopsis to Chapter 64: TESTAMENTARY TRUSTS: PAYMENT AND DISTRIBUTION PROVISIONS**

§ 64.01 California Statutes

§ 64.02 Federal Statutes

§ 64.03 Federal Regulations

§§ 64.04-64.19 [Reserved]

§ 64.20 Law Reviews

§ 64.21 Annotations

§ 64.22 Text References

[1] Related Forms With Tax Analysis

[2] Related California Forms

[3] Additional Text References

§§ 64.23-64.29 [Reserved]

§ 64.30 The Trust Law

[1] Scope and Purpose

[2] Effective Date

[3] Application to Charitable Trusts

[4] Involuntary Trusts

§ 64.31 Elements of a Trust

[1] In General

[2] Intent

[3] Property

[4] Beneficiary or Beneficiaries

[5] Honorary Trusts

[6] Purpose

§ 64.32 Consideration Not Required

§ 64.33 Creation of Trust

[1] Methods

[2] When Writing Is Required

[3] Validity of Oral Trusts

[4] Testamentary Trusts

§ 64.34 Settlor's Capacity

§ 64.35 Testamentary Trusts and Survivorship

§ 64.36 Pour-Overs

§ 64.37 "Income" and "Principal"

§ 64.38 "Payments" and "Distributions"

§ 64.39 Testamentary Trusts and the Income Tax

[1] In General

[2] "Simple" and "Complex" Trusts

[3] Distributable Net Income

[4] Trusts and Income Shifting

§ 64.40 Testamentary Trusts and the Generation-Skipping Transfer Tax

[1] In General

[2] Application

[3] Drafting Dangers

[4] California Pickup Tax on Generation-Skipping Transfers

§ 64.41 Spendthrift Trusts

[1] In General

[2] Protection Against Creditors

[3] Protection for Discretionary Payments

[4] Exceptions

[5] Use in Marital Deduction Trusts

§ 64.42 Accumulation of Income

[1] In General

[2] Time Limitations

[3] Direction Required

[4] Acceleration by Court

[5] Tax Consequences

§ 64.43 Powers of Appointment

[1] Nature and Uses

[2] Applicable Law

§ 64.44 Classification of Powers of Appointment

[1] "General" and "Special"

[2] "Testamentary" and "Nontestamentary"

[3] "Presently Exercisable" and "Postponed"

[4] "Imperative" and "Discretionary"

§ 64.45 Creation of Power of Appointment

[1] Capacity to Create

[2] By Written Instrument

§ 64.46 Revocability of Power of Appointment

§ 64.47 Exercise of Power of Appointment

[1] Capacity to Exercise

[2] Compliance With Creating Instrument

[3] Consent of Donor or Other Person

[4] Exercise by Two or More Donees

[5] Manifestation of Intent to Exercise

[6] Exercise by Will

[7] Types of Appointments

[8] Contract to Make an Appointment

[9] Revocability of Exercise

§ 64.48 Release of Power of Appointment

§ 64.49 Failure to Exercise Power of Appointment

[1] Imperative Power

[2] Discretionary Power

[3] Death of Appointee Before Effective Date of Appointment

§ 64.50 Powers of Appointment Subject to Rule Against Perpetuities

§ 64.51 Tax Consequences of Powers of Appointment

[1] In General

[2] Income Tax Consequences

[3] Estate Tax Consequences

[4] Power Limited by Ascertainable Standard

[5] Estate Tax Consequences of Exercise or Release

[6] Gift Tax Consequences of Exercise, Release, or Lapse of Power

[7] Generation-Skipping Transfer Tax Consequences

[8] Disclaimer of Power

§§ 64.52-64.99 [Reserved]

Scope

§ 64.100 Facts

Scope

§ 64.101 Documents

Scope

§§ 64.102-64.119 [Reserved]

§ 64.120 Number of Trusts

Scope

§ 64.121 Payments or Accumulations of Income

Scope

§ 64.122 Distributions of Principal

Scope

§ 64.123 Powers of Appointment

Scope

§§ 64.124-64.139 [Reserved]

Scope

§ 64.140 Introductory Provisions

Scope

§ 64.141 Payments or Accumulations of Income

Scope

§ 64.142 Distributions of Principal

Scope

§ 64.143 Payments out of Income or Principal

Scope

§ 64.144 Powers of Appointment

Scope

§ 64.145 Termination of Trust and Distribution to Remainder Beneficiaries

Scope

§ 64.146 Provisions Affecting Payments, Distributions, and Terminations

Scope

§§ 64.147-64.199 [Reserved]

§ 64.200 Separate Trusts for Testator's Children

[1] Comment

[a] Use of Form

[b] Separate Trusts Compared to "Family Pot" Trust

[c] Advantages and Disadvantages of Separate Trusts

[i] Separation of Beneficiaries' Shares

[ii] Size of Total Trust Estate

[iii] Administrative Difficulties of Small Trusts

[d] Advantages and Disadvantages of Family Pot Trusts

[e] Tax Consequences

[i] Income Tax

[ii] Generation-Skipping Transfer Tax

[f] Beneficiary's Outside Resources

[g] Application of Income for Benefit of Beneficiary

[h] Spendthrift Provision

[i] Accumulation of Income

[j] Survivorship Clauses

[k] Distributions to "Issue" or "Descendants"

[2] FORM

Separate Trusts for Testator's Children

§ 64.201 Family Pot Trust for Children With "Sprinkling" Provisions

[1] Comment

- [a] Use of Form
- [b] Separate Trusts Compared With Family Pot Trust
- [c] Discretionary Payments of Income and Principal
- [d] Tax Considerations
  - [i] Income Tax
  - [ii] Generation-Skipping Transfer Tax

[2] FORM

Family Pot Trust for Children With "Sprinkling" Provisions

§ 64.202 Separate Trusts for Children With Different Payment Provisions for Each Child

[1] Comment

- [a] Use of Form
- [b] Separate Shares With Different Payment Provisions
  - [i] In General
  - [ii] Advantages and Disadvantages
  - [iii] Particular Provisions
- [c] Invasion of Principal: "Five or Five Power"
- [d] Revision of Will Necessary to Accommodate After-Born Children

[2] FORM

Separate Trusts for Children With Different Payment Provisions for Each Child

§ 64.203 Family Pot Trust for Spouse and Children With Remainder to Children

[1] Comment

- [a] Use of Form
- [b] Marital Deduction Considerations
- [c] "Family Pot" Trust for Benefit of Spouse and Children--Advantages and Disadvantages

[d] Particular Provisions

[2] FORM

Family Pot Trust for Spouse and Children With Remainder to Children

§ 64.204 Trust for Adult Son or Daughter With Power to Invade Corpus and Special Power of Appointment

[1] Comment

[a] Use of Form

[b] Particular Provisions

[c] Five or Five Power

[d] Independent Trustee

[2] FORM

Trust for Adult Son or Daughter With Power to Invade Corpus and Special Power of Appointment

§ 64.205 Trust for Impaired Son or Daughter With Maximum Protection Against Creditors and Remainder to Grandchildren

[1] Comment

[a] Use of Form

[b] Spendthrift Provisions

[c] Discretion of Trustee to Determine Amount of Distributions

[d] Provisions

[e] Generation-Skipping Transfer Tax

[2] FORM

Trust for Impaired Son or Daughter With Maximum Protection Against Creditors and Remainder to Grandchildren

§ 64.206 Non-Marital Deduction Trust for Spouse and Parent With Remainder in Family Pot Trust for Testator's Children

[1] Comment

[a] Use of Form

[b] Marital Deduction Considerations

[c] Provisions

[2] FORM

Non-Marital Deduction Trust for Spouse and Parent With Remainder in Family Pot Trust for Testator's Children

§ 64.207 Trust for Testator's Parents With Payments Equivalent to Specified Percentage of Principal

[1] Comment

[a] Use of Form

[b] Drafting Considerations

[2] FORM

Trust for Testator's Parents With Payments Equivalent to Specified Percentage of Principal

§§ 64.208-64.219 [Reserved]

§ 64.220 Payment of All Net Income for Limited Period

[1] Comment

[a] Use of Form

[b] Income and Principal

[c] Drafting Alternatives

[d] Reserves and Frequency of Payments

[2] FORM

Payment of All Net Income for Limited Period

§ 64.221 Payment of All Net Income for Life

[1] Comment

[a] Use of Form

[b] Trustee's Duty to Determine and Pay Net Income

[2] FORM

Payment of All Net Income for Life

§ 64.222 Payment of Part of Net Income

[1] Comment

[a] Use of Form

[b] Tax Caution

[2] FORM

Payment of Part of Net Income

§ 64.223 Payment of All Net Income to Class of Beneficiaries

[1] Comment

[a] Use of Form

[b] Class Gifts

[i] In General

[ii] Statutory Rules

[iii] Drafting Considerations

[c] Alternatives to Class Gifts

[d] Class Gifts and the Rule Against Perpetuities

[2] FORM

Payment of All Net Income to Class of Beneficiaries

§ 64.224 Discretionary Payment of Income to One Beneficiary

[1] Comment

[a] Use of Form

[b] Tax Caution

[c] Discretion of Trustee

[d] Guidelines for Exercise of Discretion

[2] FORM

Discretionary Payment of Income to One Beneficiary

§ 64.225 Power to "Sprinkle" Trust Income

[1] Comment

[a] Use of Form

[b] Discretion of Trustee

[c] "Sprinkling" Trusts

[i] In General

[ii] Generation-Skipping Transfer Tax Considerations

[2] FORM

Power to "Sprinkle" Trust Income

§§ 64.226-64.239 [Reserved]

§ 64.240 Payment of Fixed Amount for Life

[1] Comment

[a] Use of Form

[b] Payments out of Principal

[i] In General

[ii] Contrasted With Annuities Payable out of Estate

[c] Drafting Alternatives

[d] Cost-of-Living Adjustments

[2] FORM

Payment of Fixed Amount for Life

§ 64.241 Payment of Fixed Amount to Spouse Until Child Reaches Certain Age

[1] Comment--Use of Form

[2] FORM

Payment of Fixed Amount to Spouse Until Child Reaches Certain Age

§ 64.242 Payment of Percentage of Corpus

[1] Comment

[a] Use of Form

[b] Advantages of Percentage Payments

[2] FORM

Payment of Percentage of Corpus

§ 64.243 Payment of All of Net Income for Life With Discretionary Payments of Principal

[1] Comment

[a] Use of Form

[b] Defining Trustee's Discretion

[i] In General

[ii] Considering Outside Income or Resources

[iii] Whether Income Beneficiary or Remainder Beneficiary Is to Be Favored

[iv] Purposes of Discretion

[v] Simple or Absolute

[2] FORM

Payment of All of Net Income for Life With Discretionary Payments of Principal

§ 64.244 Power to "Sprinkle" Trust Principal

[1] Comment

[a] Use of Form

[b] "Sprinkling" Trusts

[i] In General

[ii] Possible Income Tax Advantages

[iii] Generation-Skipping Transfer Tax Advantages and Disadvantages

[c] Defining Trustee's Discretion

[2] FORM

Power to "Sprinkle" Trust Principal

§ 64.245 Payments From "Sprinkling" Trust to Be Deducted (or Not to Be Deducted) From Recipient's Share on

Distribution

[1] Comment

[a] Use of Form

[b] Deduction From Distributive Shares

[2] FORM

Payments From "Sprinkling" Trust to Be Deducted (or Not to Be Deducted) From Recipient's Share on Distribution

§§ 64.246-64.259 [Reserved]

§ 64.260 Fixed Periodic Payments out of Income or Principal

[1] Comment

[a] Use of Form

[b] Payments out of Principal--In General

[c] Drafting Alternatives

[d] Cost-of-Living Adjustments

[2] FORM

Fixed Periodic Payments out of Income or Principal

§ 64.261 Payment of All Net Income, Plus Payments out of Principal Sufficient to Guarantee Beneficiary Fixed Periodic Payment

[1] Comment--Use of Form

[2] FORM

Payment of All Net Income, Plus Payments out of Principal Sufficient to Guarantee Beneficiary Fixed Periodic Payment

§ 64.262 Fixed Periodic Payments to Two Beneficiaries or Survivor

[1] Comment

[a] Use of Form

[b] Drafting Alternatives

[c] Cost-of-Living Adjustments

[2] FORM

Fixed Periodic Payments to Two Beneficiaries or Survivor

§§ 64.263-64.279 [Reserved]

§ 64.280 Accumulation of All of Net Income

[1] Comment

[a] Use of Form

[b] Accumulations of Income

[i] Time Limit

[ii] Direction Required

[iii] Purposes

[iv] Income Tax Consequences

[v] Estate Tax Consequences

[vi] Generation-Skipping Transfer Tax Consequences

[2] FORM

Accumulation of All of Net Income

§§ 64.281-64.299 [Reserved]

§ 64.300 Unlimited Right of Invasion

[1] Comment

[a] Use of Form

[b] Power of Invasion

[i] In General

[ii] Estate Tax Considerations

[iii] Gift Tax Consequences

[iv] Income Tax Considerations

[v] Generation-Skipping Transfer Tax Considerations

[2] FORM

Unlimited Right of Invasion

§ 64.301 Right of Invasion Limited by Ascertainable Standard

[1] Comment

[a] Use of Form

[b] Power Limited by Ascertainable Standard

[2] FORM

Right of Invasion Limited by Ascertainable Standard

§ 64.302 \$5,000 or Five Percent Invasion Power

[1] Comment

[a] Use of Form

[b] Five or Five Powers

[2] FORM

\$5,000 or Five Percent Invasion Power

§§ 64.303-64.319 [Reserved]

§ 64.320 Payment of Undistributed Income to Succeeding Beneficiaries

[1] Comment

[a] Use of Form

[b] Income Rights of Successive Beneficiaries

[i] In General

[ii] Tax Considerations

[2] FORM

Payment of Undistributed Income to Succeeding Beneficiaries

§ 64.321 Payments to Grandchildren

[1] Comment

[a] Use of Form

[b] Definition of Grandchildren

[2] FORM

Payments to Grandchildren

§ 64.322 Payments to Income Beneficiaries and Remainder Beneficiaries in Foreign Countries

[1] Comment

[a] Use of Form

[b] Rule Against Perpetuities

[c] Drafting Considerations

[d] Avoid Use in Marital Deduction Trust

[2] FORM

Payments to Income Beneficiaries and Remainder Beneficiaries in Foreign Countries

§§ 64.323-64.339 [Reserved]

§ 64.340 General Testamentary Power of Appointment

[1] Comment

[a] Use of Form

[b] General Powers of Appointment

[i] Purposes and Functions

[ii] Estate and Gift Tax Consequences

[iii] Exercise by Will

[c] Takers in Default

[2] FORM

General Testamentary Power of Appointment

§ 64.341 General Nontestamentary Power of Appointment: Exercise to Be Effective on Death of Donee

[1] Comment

[a] Use of Form

[b] Filing Instrument With Trustee

[c] Right to Revoke Exercise

[d] Drafting Caution

[2] FORM

General Nontestamentary Power of Appointment: Exercise to Be Effective on Death of Donee

§ 64.342 General Nontestamentary Power of Appointment: Exercise to Be Effective During Lifetime of Donee

[1] Comment

[a] Use of Form

[b] Drafting Considerations

[c] Revocation of Exercise

[2] FORM

General Nontestamentary Power of Appointment: Exercise to Be Effective During Lifetime of Donee

§ 64.343 Special Testamentary Power of Appointment

[1] Comment

[a] Use of Form

[b] Special Powers of Appointment

[i] In General

[ii] Tax Considerations

[iii] Use With Marital Deduction Trust

[2] FORM

Special Testamentary Power of Appointment

§ 64.344 Special Nontestamentary Power of Appointment: Exercise to Be Effective on Death of Donee

[1] Comment--Use of Form

[2] FORM

Special Nontestamentary Power of Appointment: Exercise to Be Effective on Death of Donee

§ 64.345 Special Nontestamentary Power of Appointment: Exercise to Be Effective During Lifetime of Donee

[1] Comment--Use of Form

[2] FORM

Special Nontestamentary Power of Appointment: Exercise to Be Effective During Lifetime of Donee

§ 64.346 Limited Right to Release Power of Appointment

[1] Comment

[a] Use of Form

[b] Releases of Powers of Appointment

[i] In General

[ii] Power Not Presently Exercisable

[iii] Delivery

[iv] Recordation

[c] Tax Caution

[d] Drafting Considerations

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Limited Right to Release Power of Appointment



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DIVISION IV: WILLS AND TRUSTS  
CHAPTER 64 TESTAMENTARY TRUSTS: PAYMENT AND DISTRIBUTION PROVISIONS

*24-64 California Legal Forms--Transaction Guide Scope*

**Scope**

Scope

This chapter covers payments and distributions of income and principal from testamentary trusts. It discusses the general legal rules that govern the formation of testamentary trusts in California, including the comprehensive statutory scheme embodied in the Trust Law [*Prob. Code §§ 15000-19403*; see discussion in § 64.30[1] *et seq.*]. It includes a detailed analysis of testamentary trust provisions that empower trustees to make payments or distributions from trusts, that determine whether payments or distributions are mandatory or discretionary, and that specify whether the payments are to be made from income, from principal, or from both.

This chapter does not discuss the selection or appointment of trustees [*see Ch. 64A, Testamentary Trusts: Trustee Provisions* ], the administrative powers of trustees [*see Ch. 64A, Testamentary Trusts: Trustee Provisions* ], operational provisions of the trust [*see Ch. 64B, Testamentary Trusts: Administrative Provisions* ], or the Uniform Principal and Income Act [*Prob. Code § 16320-16375*], which prescribes rules for the allocation of the receipts and expenditures of trusts to income or principal [*see Ch. 64B, Testamentary Trusts: Administrative Provisions* ]. Complete will forms, including wills with testamentary trusts, are illustrated in Ch. 61, *Will Drafting and Complete Will Forms*.

This chapter does not contain marital deduction formula provisions, payment and distribution provisions for marital deduction trusts, or ancillary provisions that are usually included in marital deduction trusts. These forms are illustrated and discussed in Ch. 71, *Marital Deduction Trust Provisions* .

Although the forms in this chapter are drafted for testamentary trusts, many of them can be adapted for use in inter vivos ("living") trusts. For complete inter vivos trust forms, and discussion of the use and drafting of inter vivos trusts, see Ch. 70, *Complete Revocable Trust Forms* .



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DIVISION IV: WILLS AND TRUSTS  
CHAPTER 64 TESTAMENTARY TRUSTS: PAYMENT AND DISTRIBUTION PROVISIONS  
PART I. RESEARCH GUIDE  
A. Primary Sources

*24-64 California Legal Forms--Transaction Guide § 64.01*

**§ 64.01 California Statutes**

Accumulations of income.

Restraints upon alienation. *Civ. Code §§ 715-719.*

Lease to commence in future invalid if term does not commence in possession within 30 years after execution. *Civ. Code § 715.*

Agricultural lease limited to 51 years. *Civ. Code § 717.*

Oil and gas lease limited to 99 years. *Civ. Code § 718f.*

Accumulations and income. *Civ. Code §§ 722-726.*

Income to be received after execution of instrument as future interest. *Civ. Code § 722.*

Accumulations of income subject to rule against perpetuities. *Civ. Code § 724.*

Requirement for accumulation of income in violation of rule against perpetuities void. *Civ. Code § 725.*

Power of court to order acceleration of income. *Civ. Code § 726.*

Disclaimers of testamentary and other interests. *Prob. Code §§ 260-295.*

Powers of appointment. *Prob. Code §§ 600-695.*

Common law applies unless modified by statute. *Prob. Code § 600.*

Law applicable to powers created before July 1, 1970. *Prob. Code § 601.*

"Appointee" defined. *Prob. Code § 610(a).*

"Appointive property" defined. *Prob. Code § 610(b).*

"Creating instrument" defined. *Prob. Code § 610(c).*

"Donee" defined. *Prob. Code § 610(d).*

"Donor" defined. *Prob. Code § 610(e).*

"Permissible appointee" defined. *Prob. Code § 610(f).*

"General" and "special" powers of appointment. *Prob. Code § 611.*

"Testamentary" and "presently exercisable" powers of appointment. *Prob. Code § 612.*

"Imperative" and "discretionary" powers of appointment. *Prob. Code § 613.*

Capacity to create. *Prob. Code § 620.*

Capacity to exercise. *Prob. Code § 625.*

Scope of donee's authority. *Prob. Code §§ 630-635.*

Donee's required intent. *Prob. Code §§ 640-642.*

Types of appointments. *Prob. Code §§ 650-652.*

Contracts to appoint. *Prob. Code § 660.*

Release of discretionary power. *Prob. Code § 661.*

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Rights of creditors. *Prob. Code §§ 680-684.*

Applicability of Uniform Statutory Rule Against Perpetuities. *Prob. Code § 690.*

Authority to revoke or release power of appointment. *Prob. Code § 695.*

Testamentary gifts to trusts ("pour-overs"). *Prob. Code § 6300.*

The Trust Law. *Prob. Code §§ 15000-19403.*

General application. *Prob. Code § 15001.*

Effect on common law. *Prob. Code § 15002.*

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Applicable to charitable trusts. *Prob. Code § 15004.*

Creation and validity of trusts. *Prob. Code §§ 15200-15210.*

Restrictions on transfer ("spendthrift trusts"). *Prob. Code §§ 15300-15309.*

Modification and termination of trusts. *Prob. Code §§ 15400-15414.*

Acceptance of trust by trustee. *Prob. Code § 15600.*

Rejection of trust by trustee. *Prob. Code § 15601.*

Trustee's bond. *Prob. Code § 15602.*

Cotrustees. *Prob. Code §§ 15620-15622.*

Resignation and removal of trustees. *Prob. Code §§ 15640-15645.*

Appointment of trustee to fill vacancy. *Prob. Code § 15660.*

Compensation of trustees. *Prob. Code §§ 15680-15683.*

Repayment for expenditures. *Prob. Code § 15684.*

Trustee's equitable lien. *Prob. Code § 15685.*

Compensation of trustee who performs legal services for trust. *Prob. Code § 15687.*

Limits on rights of beneficiary of revocable trust. *Prob. Code § 15800.*

Consent by beneficiary of revocable trust. *Prob. Code § 15801.*

Duties of trustees. *Prob. Code §§ 16000-16015.*

Trustee's standard of care. *Prob. Code §§ 16040-16042.*

Trustee's duty to account and report. *Prob. Code §§ 16060, 16064.*

Trustee's duties with regard to discretionary powers. *Prob. Code §§ 16080, 16081.*

Duties of trustees of private foundations, charitable trusts, and split-interest trusts. *Prob. Code §§ 16100-16105.*

Powers of trustees. *Prob. Code §§ 16200-16249.*

Uniform Principal and Income Act. *Prob. Code §§ 16320-16375.*

Liability of trustees for breach of trust. *Prob. Code §§ 16400-16403.*

Remedies for breach of trust. *Prob. Code §§ 16420, 16421.*

Measure of liability for breach of trust. *Prob. Code §§ 16440-16442.*

Limitations on proceedings against trustees. *Prob. Code § 16460.*

Releasing trustee from liability. *Prob. Code § 16461.*

Consent of beneficiary to relieve trustee of liability for breach of trust. *Prob. Code § 16463.*

Judicial proceedings concerning trusts. *Prob. Code §§ 17000-17457.*

Liability of trustee to third persons. *Prob. Code §§ 18000-18005.*

Protection of third persons dealing with trustees. *Prob. Code §§ 18100-18104.*

Rights of settlor's creditors. *Prob. Code § 18200.*

Uniform Statutory Rule Against Perpetuities. *Prob. Code §§ 21200-21231.*

Taxation of trusts.

Income tax.

Applicability of federal law. *Rev. & Tax. Code § 17731.*

Income taxable to trust. *Rev. & Tax. Code § 17742.*

Income taxable to beneficiaries. *Rev. & Tax. Code § 17745.*

"Pick-up" tax on estates.

Imposition of tax. *Rev. & Tax. Code § 13302.*

Computation of tax. *Rev. & Tax. Code § 13303.*

Determination of state death tax credit allowable against federal tax. *Rev. & Tax. Code § 13304.*

"Pick-up" tax on generation-skipping transfers.

"Generation-skipping" transfer defined. *Rev. & Tax. Code § 16702.*

Amount of tax. *Rev. & Tax. Code § 16710(a).*

Filing requirements. *Rev. & Tax. Code § 16720.*

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsGeneral OverviewEstate, Gift & Trust LawTrustsAdministrationEstate, Gift & Trust  
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*24-64 California Legal Forms--Transaction Guide § 64.02*

**§ 64.02 Federal Statutes**

Income taxation of trusts.

Imposition of tax. *I.R.C. § 641.*

Credits and deductions for trusts. *I.R.C. § 642.*

"Distributable net income." *I.R.C. § 643(a).*

"Income" defined. *I.R.C. § 643(b).*

"Beneficiary" defined. *I.R.C. § 643(c).*

"Simple" trusts. *I.R.C. §§ 651-652.*

"Complex" trusts. *I.R.C. §§ 661-663.*

"Throwback" rules. *I.R.C. §§ 665-668.*

Grantors and others treated as substantial owners of trust. *I.R.C. §§ 671-679.*

Estate tax.

Unified credit. *I.R.C. § 2010.*

Credit for state death taxes. *I.R.C. § 2011.*

"Gross estate" defined. *I.R.C. § 2031.*

Gifts within three years of death. *I.R.C. § 2035.*

Transfers with retained life estate. *I.R.C. § 2036.*

Transfers taking effect at death. *I.R.C. § 2037.*

Revocable transfers. *I.R.C. § 2038.*

Powers of appointment. *I.R.C. § 2041.*

"Taxable estate" defined. *I.R.C. § 2051.*

Charitable deduction. *I.R.C. § 2055.*

Marital deduction. *I.R.C. § 2056.*

Gift tax. *I.R.C. §§ 2501-2524.*

Taxable gifts. *I.R.C. § 2503.*

Unified credit. *I.R.C. § 2505.*

Powers of appointment. *I.R.C. § 2514.*

Disclaimers. *I.R.C. § 2518.*

Generation-skipping transfer tax. *I.R.C. §§ 2601-2663.*

Tax imposed. *I.R.C. § 2601.*

Amount of tax. *I.R.C. § 2602.*

Liability for tax. *I.R.C. § 2603.*

Credit for state tax. *I.R.C. § 2604.*

"Generation-skipping transfer" defined. *I.R.C. § 2611.*

"Taxable termination" defined. *I.R.C. § 2612(a).*

"Taxable distribution" defined. *I.R.C. § 2612(b).*

"Direct skip" defined. *I.R.C. § 2612(c).*

"Skip person" defined. *I.R.C. § 2613(a).*

Generation-skipping transfer tax exemption. *I.R.C. § 2631.*

Generation assignment. *I.R.C. § 2651.*

**Legal Topics:**

For related research and practice materials, see the following legal topics:

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*24-64 California Legal Forms--Transaction Guide § 64.03*

**§ 64.03 Federal Regulations**

Income tax.

Income tax treatment of trusts. *Treas. Reg. §§ 1.641-1.692.1.*

"Distributable net income." *Treas. Reg. § 1.643(a)-0.*

Deduction for distributions. *Treas. Reg. § 1.643(a)-1.*

"Income" defined. *Treas. Reg. § 1.643(b)-1.*

"Beneficiary" defined. *Treas. Reg. § 1.643(c)-1.*

"Simple" trusts. *Treas. Reg. §§ 1.651(a)-1-1.652(c)-4.*

"Complex" trusts. *Treas. Reg. §§ 1.661(a)-1-1.669(b)-2.*

"Throwback" rules. *Treas. Reg. §§ 1.665(a)-0A-1.668(b)-2.*

Grantors and others treated as substantial owners of trusts. *Treas. Reg. §§ 1.671-1-1.681(a)-1.*

Estate tax.

Credit for state death taxes. *Treas. Reg. § 20.2011-1.*

Gross estate. *Treas. Reg. §§ 20.2031-1-20.2044-1.*

Transfers with retained life estate. *Treas. Reg. § 20.2036-1.*

Transfers taking effect at death. *Treas. Reg. § 20.2037-1.*

Revocable transfers. *Treas. Reg. § 20.2038-1.*

Powers of appointment. *Treas. Reg. §§ 20.2041-1-20.2041-3.*

Taxable estate. *Treas. Reg. §§ 20.2051-1-20.2056(e)-3.*

Marital deduction. *Treas. Reg. §§ 20.2056(a)-20.2056(e).*

Gift tax.

"Taxable gifts." *Treas. Reg. § 25.2503-1.*

Powers of appointment. *Treas. Reg. §§ 25.2514-1-25.2514-3.*

### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Tax Law Federal Taxpayer Groups Income Taxation of Estates, Trusts & Beneficiaries General Overview Tax  
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 641-668, 671, 681, 685) Credits Tax Law Federal Taxpayer Groups Income Taxation of Estates, Trusts &  
 Beneficiaries Credits & Deductions (IRC secs. 641-668, 671, 681, 685) Deductions Tax Law Federal Taxpayer  
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*24-64 California Legal Forms--Transaction Guide §§ 64.04-64.19*

**[Reserved]**

§§ 64.04[Reserved]



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*24-64 California Legal Forms--Transaction Guide § 64.20*

**§ 64.20 Law Reviews**

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**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Trusts Testamentary Trusts Tax Law Federal Taxpayer Groups Income Taxation of Estates, Trusts & Beneficiaries General Overview Tax Law Federal Taxpayer Groups Income Taxation of Estates, Trusts & Beneficiaries Credits & Deductions (IRC secs. 641-668, 671, 681, 685) Credits Tax Law Federal Taxpayer Groups Income Taxation of Estates, Trusts & Beneficiaries Credits & Deductions (IRC secs. 641-668, 671, 681, 685) Deductions Tax

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*24-64 California Legal Forms--Transaction Guide § 64.21*

**§ 64.21 Annotations**

Annot., Sufficiency of Exercise of Power Specifying That it Can Be Exercised Only by Specific or Direct Reference Thereto, 15 A.L.R. 4th 810 (1982).

Annot., Validity, Construction, and Effect of Provisions of Charitable Trust Providing for Accumulation of Income, 6 A.L.R. 4th 903 (1981).

Annot., Validity and Construction of Beneficiary's Arrangement for Payment to Another, as They Become Due, Under Spendthrift Trust, 83 A.L.R. 3d 1142 (1978).

Annot., Right of Life Tenant With Power to Anticipate or Consume Principal to Dispose of it by Inter Vivos Gift, 83 A.L.R.3d 135 (1978).

Annot., Exercise by Will of Trustor's Reserved Power to Revoke or Modify Inter Vivos Trust, 81 A.L.R.3d 959 (1977).

Annot., Powers of Appointment: Revocation or Amendment of Exercise of Power to Appoint Future Interest, After Exercise by Inter Vivos Instrument, 60 A.L.R.3d 143 (1974).

Annot., Propriety of Considering Beneficiary's Other Means Under Trust Provision Authorizing Invasion of Principal for Beneficiary's Support, 41 A.L.R.3d 255 (1972).

Annot., Language of will or other trust instruments as implying right to invade principal on behalf of life beneficiary, 31 A.L.R.3d 309 (1970).

Annot., Distribution if Income Released by Declaration of Invalidity of Express Direction for Accumulation, 17 A.L.R.3d 231 (1968).

Annot., Beneficiary's Right to Disclaim or Renounce Spendthrift Trust Prior to Acceptance, 14 A.L.R.3d 1437 (1967).

Annot., "Pour-over" Provisions From Will to Inter Vivos Trust, 12 A.L.R.3d 56 (1967).

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsGeneral OverviewEstate, Gift & Trust LawTrustsAdministrationEstate, Gift & Trust LawTrustsTestamentary TrustsTax LawFederal Taxpayer GroupsIncome Taxation of Estates, Trusts & BeneficiariesGeneral Overview



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*24-64 California Legal Forms--Transaction Guide § 64.22*

**§ 64.22 Text References**

**[1] Related Forms With Tax Analysis**

Rabkin & Johnson, *Current Legal Forms with Tax Analysis* (Matthew Bender).

Ch. 7, *Wills*.

Ch. 8, *Revocable Trusts*.

Ch. 9, *Irrevocable Trusts*.

**[2] Related California Forms**

California Legal Forms (Matthew Bender).

Ch. 61, *Will Drafting and Complete Will Forms*.

Ch. 63, *Will Provisions*.

Ch. 69, *Charitable Dispositions*.

Ch. 71, *Marital Deduction Trust Provisions*.

Ch. 72, *Irrevocable Trusts*.

California Wills & Trusts Forms (Matthew Bender).

Div. III, *Complete Will Forms*.

Div. IV, *Individual Will Provisions*.

**[3] Additional Text References**

California Wills & Trusts (Matthew Bender).

Ch. 2, *Overview of Tax Laws Affecting the Disposition of Estates*.

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Ch. 82, *Basic Tax Considerations in Trust Planning*.

Ch. 90, *Requisites of a Valid Trust*.

Ch. 91, *Organization of the Trust Instrument*.

Ch. 92, *Settlors and Beneficiaries*.

Ch. 93, *Appointment of Trustees*.

Ch. 95, *Trust Provisions for Payment and Distribution of Income and Principal*.

Ch. 96, *Powers and Duties of Trustees*.

Ch. 110, *Testamentary Trusts*.

Ch. 112, *The Marital Deduction and Marital Deduction Trusts*.

Ch. 113, *Generation-Skipping Transfers and Trust Strategies*.

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Ch. 6, *Validity--Perpetuities, Restraints on Alienation and Other Time Limits*.

Ch. 7, *Accumulations and Income Undisposed of*.

Ch. 15, *Successive Beneficiaries' Rights Inter Se*.

Ch. 24, *Rights of Creditors of Settlor and Beneficiary*.

Ch. 36, *Powers of Appointment*.

Part IX, "Testamentary Trusts--In General."

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Ch. 3, *Estate Planning Goals*.

Ch. 6, *Income Taxation of Trusts and Estates*.

Ch. 7, *Generation-Skipping Transfer Tax*.

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Scott, *The Law of Trusts* (3d ed., Little, Brown & Co., 1967), vol. I, ch. 2, *The Creation of a Trust*; vol. II, ch. 6, *Transfer of the Interest of the Beneficiary*.

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*Recommendation Proposing the Trust Law*, 18 Cal. L. Revision Comm'n Reports 501 (1986).

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsCharitable TrustsEstate, Gift & Trust LawTrustsMarital Deduction TrustsEstate, Gift & Trust LawTrustsTestamentary TrustsEstate, Gift & Trust LawWillsGeneral OverviewTax LawFederal Taxpayer GroupsIncome Taxation of Estates, Trusts & BeneficiariesGeneral Overview



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**[Reserved]**

§§ 64.23[Reserved]



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*24-64 California Legal Forms--Transaction Guide § 64.30*

**§ 64.30 The Trust Law**

**[1] Scope and Purpose**

In 1987, a comprehensive Trust Law [*Prob. Code § 15000 et seq.*] took effect in California. Recognizing that preexisting law relating to the creation, administration, and termination of trusts (much of which dated back to the Field Codes of 1872) had become a patchwork of confusing, overlapping, and sometimes conflicting provisions, the legislature sought to replace the patchwork with a comprehensive statutory scheme reorganizing, recodifying, and recasting relevant provisions of trust law [*see Recommendation Proposing the Trust Law*, 18 Cal. L. Revision Comm'n Rep. 501, 520 (1986)]. Some new rules were introduced as part of the Trust Law. The substance of much of the old law, however, was reenacted, although sometimes in different language [*see Recommendation Proposing the Trust Law*, 18 Cal. L. Revision Comm'n Rep. 501, 520 (1986)]. Although the Trust Law largely reorganizes and streamlines rules relating to the creation and administration of trusts, it does not purport to codify all relevant rules relating to trusts that may apply under the common law [*see Recommendation Proposing the Trust Law*, 18 Cal. L. Revision Comm'n Rep. 501, 520 (1986)]. On the contrary, it specifically provides that, except as they are modified by statute, common law rules governing trusts remain the law of California [*Prob. Code § 15002; see Civ. Code § 22.2* (common law as rule of decision in California)].

**[2] Effective Date**

The Trust Law became effective on July 1, 1987 [*Prob. Code § 15001*]. It applies broadly to trusts created both before and after that date. Many of the provisions of the Trust Law continue similar or identical provisions of previous law. Although some provisions of the Trust Law differ from corresponding provisions of the former law, the changes were, for the most part, dictated by public policy considerations that indicate the desirability of applying them both prospectively and retroactively. Further, most of the provisions of the Trust Law are rules of construction that apply only when the trust instrument does not prescribe a different rule [*see Recommendation Proposing the Trust Law*, 18 Cal. L. Revision Comm'n Rep. 501, 521 (1986)]. For these reasons, it was decided to apply the new law to existing trusts to the fullest extent possible [*see Recommendation Proposing the Trust Law*, 18 Cal. L. Revision Comm'n Rep. 501, 605 (1986)].

Except as otherwise provided by statute, the Trust Law generally applies to all trusts, regardless of whether they were

created before, on, or after July 1, 1987 [*Prob. Code § 15001(a)*]. It also applies to all proceedings concerning trusts commenced before July 1, 1987, unless in the opinion of the court application of a particular provision of the law would substantially interfere with the effective conduct of the proceedings or the rights of the parties and other interested persons. In that case, prior law applies [*Prob. Code § 15001(c)*]. The Trust Law also applies to all proceedings concerning trust commenced on or after July 1, 1987 [*Prob. Code § 15001(b)*].

### **[3] Application to Charitable Trusts**

The Trust Law applies generally to charitable trusts as well as to so-called "private trusts" [*see Prob. Code § 15004*]. Recognizing, however, that charitable trusts have been given special treatment under the common law [*see Recommendation Proposing the Trust Law*, 18 Cal. L. Revision Comm'n Rep. 501, 604 (1986)], the law subordinates the general statutory rules to the supervisory authority of the Attorney General and to other more specific statutory provisions. Thus the Trust law applies to charitable trusts that are subject to the jurisdiction of the Attorney General to the extent that application of the law is not in conflict with the Uniform Supervision of Trustees for Charitable Purposes Act [*Prob. Code § 15004; see Gov. Code §§ 12580-12597*]. For further consideration of special rules relating to charitable dispositions, see Ch. 69, *Charitable Dispositions* .

### **[4] Involuntary Trusts**

By its own terms, the Trust Law is inapplicable to "involuntary" trusts (also called "constructive" or "resulting" trusts) [*Prob. Code § 15003(a)*]. Unlike a "voluntary" or "express" trust, an involuntary trust arises, not when the settlor manifests an intention to create it, but when circumstances raise an inference that the settlor does not intend that the person taking or holding title to property should have its beneficial enjoyment. Stated otherwise, a constructive trust is not imposed to effectuate intention, but to redress a wrong or prevent unjust enrichment [Restatement (Second) of Trusts § 1 cmt. e]. Constructive and resulting trusts are subject to *Civ. Code §§ 2223-2225*, which apply to persons who wrongfully detain property belonging to others [*see Civ. Code § 2223*]; persons who gain property by fraud, accident, mistake, undue influence, violation of a trust, or some other wrongful act [*see Civ. Code § 2224*]; and felons or profiteers who receive money for selling materials or rights that are enhanced by the notoriety gained from the felons' convictions [*see Civ. Code § 2225*]. Note, however, that the Supreme Court of California has held that *Civ. Code § 2225*, which imposes a constructive trust on the proceeds or profits of a convicted felon from expressive materials that include a story of the crime, is facially invalid under both free speech clause of *First Amendment* to federal Constitution as applied to states through *Fourteenth Amendment*, and liberty of speech clause of *California Constitution (art. I, § 2, subd. (a))* [ *Keenan v. Superior Court (2002) 27 Cal. 4th 413, 431-435, 117 Cal. Rptr. 2d 1, 40 P.3d 718* ] .

### **Legal Topics:**

For related research and practice materials, see the following legal topics:

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*24-64 California Legal Forms--Transaction Guide § 64.31*

**§ 64.31 Elements of a Trust**

**[1] In General**

Four elements are required for the creation of a valid "express" trust [*see § 64.30[4]*]. These are (1) intent [*Prob. Code § 15201; see § 64.31[2]*]; (2) property [*Prob. Code § 15202; see § 64.31[3]*]; (3) a beneficiary or beneficiaries [*Prob. Code § 15205; see § 64.31[4]*]; and (4) a trust purpose [*see Prob. Code §§ 15203, 15204; see also § 64.31[6]*].

**[2] Intent**

A valid express trust is created only if the settlor properly manifests an intention to create a trust [*Prob. Code § 15201*]. It is immaterial whether the settlor knows that the intended relationship is called a "trust," or even whether the settlor knows the precise characteristics of a "trust" [Restatement (Second) of Trusts § 23 cmt. a]. It is essential, however, that the intention to create the trust be expressed in some way--by words (oral or written) [*see Prob. Code § 15207(a)*] (when writing is required); *see also § 64.33[2]*] or even by conduct [Restatement (Second) of Trusts § 23 cmt. a]. In any event, the intention must be evidenced by an external expression as distinguished from an undisclosed intention [Restatement (Second) of Trusts § 23 cmt. a].

**[3] Property**

Since a trust is, by its nature, a method of making a disposition of property and subjecting a person (the trustee) to equitable duties to deal with the property for the benefit of another person (the beneficiary), it follows that there can be no trust without trust property [*Prob. Code § 15203; see Restatement (Second) of Trusts § 74 cmt. a*]. In this connection, it is important to distinguish a trust from a contract to create a trust. Although the former requires property for its subject, the latter may be created without any property, providing the requisites of a valid contract are satisfied [Restatement (Second) of Trusts § 74 cmt. a; *see § 64.32*].

Whether the subject of a trust meets the "property" requirement will, in many cases, depend on the character of the property sought to be transferred in trust. Generally, any property that can be voluntarily transferred by the owner can be held in trust [Restatement (Second) of Trusts § 78]. Examples of interests that may be transferred in trust include partnership interests in businesses [ *Walberg v. Smyth (N.D. Cal. 1956) 142 F. Supp. 293, 297* ], debts or contract rights

[ *Placerville Fruit Growers' Assn. v. Irving* (1955) 135 Cal. App. 2d 731, 737, 287 P.2d 793 ], transferable rights in intangibles (e.g., patents, copyrights, trademarks, trade secrets, or unpatented inventions [Restatement (Second) of Trusts § 82], and the proceeds of life insurance policies that are made payable to the trustee [ *Shaw v. Johnson* (1936) 15 Cal. App. 2d 599, 605-606, 59 P.2d 876 ]).

Certain property interests, however, cannot be held in trust. For example, as a general rule, an interest that has not come into existence or that has ceased to exist cannot be held in trust [Restatement (Second) of Trusts § 75]. Similarly, neither an interest that is not definite or definitely ascertainable [Restatement (Second) of Trusts § 76] nor an interest that the owner cannot transfer [Restatement (Second) of Trusts § 79] may be held in trust. Other examples of interests that cannot be held in trust include pensions and salaries received from public office [Scott, *The Law of Trusts* (3d ed., Little, Brown & Co., 1967), vol. I, § 79], a right of action for a tort [Scott, *The Law of Trusts* (3d ed., Little, Brown & Co., 1967), vol. I, § 79], joint tenancy property [see *Goldberg v. Goldberg* (1963) 217 Cal. App. 2d 623, 628, 32 Cal. Rptr. 93 ], and a lease subject to a covenant not to assign [ *Weintraub v. Weingart* (1929) 98 Cal. App. 690, 695-697, 277 P. 752 ].

Life insurance proceeds are not subject to testamentary disposition and hence may not be transferred by a testamentary trust unless the policy specifies that the proceeds are to be paid to the estate or to the personal representatives of the insured, since the policy is a contract under which the insurer agrees to pay a certain sum to a named beneficiary [ *Cook v. Cook* (1941) 17 Cal. 2d 639, 644-648, 111 P.2d 322 ]. However, the ownership rights to a life insurance policy may be disposed of by will, and the beneficiary then will take whatever interest the insured possessed under the policy [Ins. Code § 10130; see *Cook v. Cook* (1941) 17 Cal. 2d 639, 644, 111 P.2d 322 ].

#### **[4] Beneficiary or Beneficiaries**

A valid trust (other than a charitable trust) is created only if there is a beneficiary or beneficiaries [*Prob. Code* § 15205(a)]. Problems sometimes arise when a trust instrument designates beneficiaries by describing a class (e.g., "my family," "my relatives," or "my descendants") or attempts to delegate the power to determine the beneficiaries to the trustee [see "Recommendation Proposing the Trust Law," 18 Cal. L. Revision Comm'n Reports 501, 526 (1986)]. The Trust Law provides that the requirement of a beneficiary is satisfied if the trust instrument provides for either of the following:

- A beneficiary or class of beneficiaries that is ascertainable with reasonable certainty or that is sufficiently described so that it can be determined that some person meets the description or is within the class [*Prob. Code* § 15205(b)(1)]; or
- A grant of power to the trustee or some other person to select the beneficiaries based on a standard or in the discretion of the trustee or other person [*Prob. Code* § 15205(b)(2)]. (A trustee who refuses to act under a grant of power to select beneficiaries may be compelled to exercise his or her discretion in a reasonable manner [see *Recommendation Proposing the Trust Law*, 18 Cal. L. Revision Comm'n Reports 501, 528 (1986)]).

A will may make a disposition of property to any person, including but not limited to (1) an individual; (2) a corporation; (3) an unincorporated association, society, lodge, or any branch of such an organization; (4) a county, city, city and county, or any municipal corporation; (5) any state, including the State of California; (6) the United States or any instrumentality of the United States; and (7) a foreign country or a governmental entity in a foreign country [*Prob. Code* § 6102]. Within the limits of this section, a person who has capacity to take and hold legal title to property has capacity to be the beneficiary of a trust of that property [Restatement (Second) of Trusts § 116]. Conversely, a person who does not have capacity to take legal title to property has no capacity to become the beneficiary of a trust of that property; and a person who has become a beneficiary may continue in that capacity only to the extent that he or she has capacity to hold legal title to the trust property [Restatement (Second) of Trusts § 117]. However, a disability that would

prevent a person from making a contract will not prevent that person from being a beneficiary of a trust. Thus, a child or an insane person may be the beneficiary of a trust [Restatement (Second) of Trusts § 116].

### [5] Honorary Trusts

Some trusts lack a specific beneficiary but are nonetheless enforceable as so-called "honorary trusts." An "honorary trust" is a trust that has no ascertainable beneficiary but is created for a specific, non-charitable purpose [Black's Law Dictionary (5th ed., 1979), at 1354]. Trusts to maintain a tombstone or a grave, or to care for a pet, are examples of honorary trusts [*see* Restatement (Second) of Trusts § 124].

The courts have sometimes enforced and sometimes declined to enforce honorary trusts. In one case, the testator left the sum of \$1,000 in trust to a fraternal lodge for the purpose of erecting and caring for a headstone for the testator and the testator's wife. The court held that the trust violated the rule against perpetuities, since it was a trust for a non-charitable purpose that was intended to continue for an unlimited time [ *Estate of Pfund (1949) 93 Cal. App. 2d 444, 445, 209 P.2d 52* ]. In another case, the testator left the residue of his estate to a bishop for the purpose of saying masses for the repose of his soul. The Supreme Court held that this was a valid charitable trust and, as such, enforceable under the charitable exception to the rule against perpetuities [ *Estate of Hamilton (1919) 181 Cal. 758, 771-772, 186 P. 587* ]. For discussion of the rule against perpetuities and exceptions to the rule, see *Ch. 67, Future Interests and Perpetuities, § 67.10 et seq.*

In an effort to bring some certainty to this area of the law, the legislature enacted two statutes that became operative in 1991. The first was *Prob. Code § 15211*, which provides that a trust for a lawful non-charitable purpose may be performed by the trustee, whether or not there is a beneficiary who can seek enforcement or termination of the trust. Under *Prob. Code § 15211*, however, such a trust may be performed for only 21 years, even when the terms of the trust contemplate a longer duration.

The second statute was *Prob. Code § 15212*, which provides that a trust for the care of a designated domestic or pet animal may be created by the trustee for the life of the animal, whether or not there is a beneficiary who can seek enforcement or termination of the trust, and whether or not the terms of the trust contemplate a longer duration. On the death of the designated animal, the trust terminates and the trust property is distributed according to the terms of the trust instrument or, if there are no such terms, as directed by the court [*Prob. Code § 15212; see Recommendation Relating to Uniform Statutory Rule Against Perpetuities, 20 Cal. L. Revision Comm'n Reports 2501, 2540 (1990); for distribution of trust on termination, see Prob. Code § 15410*].

The time limits set for the duration of trusts by *Prob. Code §§ 15211 and 15212* are exceptions to the general rule of the Uniform Statutory Rule Against Perpetuities, which prescribes a 90-year "wait-and-see" rule for determining the validity of most trusts. The Uniform Statutory Rule Against Perpetuities is set forth in *Prob. Code §§ 21200-21225* and discussed in *Ch. 67, Future Interests and Perpetuities, § 67.10 et seq.*

### [6] Purpose

Every trust must have an ascertainable purpose. However, a trust created for an indefinite or general purpose is not invalid for that reason if it can be determined with reasonable certainty that a particular use of the trust property comes within that purpose [*Prob. Code § 15204*].

A trust may be created for any purpose that is not illegal or against public policy [*Prob. Code § 15203*]. Although most trusts result from the settlors' desires to separate the management and control of property from its beneficial enjoyment and to create successive interests in the same property, the reasons that particular settlors may have for creating trusts are varied and incapable of exact classification [Restatement (Second) of Trusts § 59 cmt. b].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

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*24-64 California Legal Forms--Transaction Guide § 64.32*

**§ 64.32 Consideration Not Required**

Consideration is not required to create a valid trust [*Prob. Code § 15208*]. If property is transferred in trust, it is immaterial whether the settlor gives (or promises to give) the trustee any compensation; nor must the settlor receive any compensation (or promised compensation) from the beneficiary.

The rule is different, however, with respect to a promise to create a trust. A promise to create a trust in the future is a contract, and like other contracts, is subject to the general requirement of consideration [*Prob. Code § 15208*].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

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*24-64 California Legal Forms--Transaction Guide § 64.33*

**§ 64.33 Creation of Trust**

**[1] Methods**

Subject to other provisions of the Trust Law, a trust may be created in any of the following methods [*Prob. Code § 15200*]:

- By a declaration by the owner of property that the owner holds the property as trustee;
- By a transfer of property by the owner to another person as trustee;
- By a testamentary transfer of property by the owner to another person as trustee;
- By an exercise of a power of appointment to another person as trustee; or
- By an enforceable promise to create a trust.

**[2] When Writing Is Required**

Although the law recognizes and will enforce certain oral trusts in relation to personal property [*see § 64.33[3]*], trusts relating to real property must be in writing. Specifically, the Trust Law provides that a trust in relation to real property is not valid unless evidenced by one of the following [*Prob. Code § 15206*]:

- A written instrument signed by the trustee or by the trustee's agent if authorized in writing to do so;
- A written instrument conveying the trust property signed by the settlor, or by the settlor's agent if authorized in writing to do so; or
- Operation of law.

A trust instrument that relates to real property may be recorded in the office of the county recorder in the county in

which all or a portion of the real property is located [*Prob. Code § 15210*]. Recordation is not essential to the validity of a trust instrument, however, even an instrument that relates to real property, since an unrecorded instrument is valid as between the parties and those who have actual notice of it [*Civ. Code § 1217*].

### **[3] Validity of Oral Trusts**

California law recognizes the validity of oral trusts in personal property [*see Recommendation Proposing the Trust Law*, 18 Cal. L. Revision Comm'n Reports 501, 525 (1986)] but subjects them to special requirements designed to facilitate proof of their terms. It is unlikely that an oral trust will meet all of the requirements of a formal express trust [*see § 64.31[1]*]. Further, efforts to prove trusts by parol are fraught with the danger of perjury [*see Recommendation Proposing the Trust Law*, 18 Cal. L. Revision Comm'n Reports 501, 525 (1986)]. Thus, the Trust Law provides that the existence and terms of an oral trust of personal property may be established only by "clear and convincing" evidence [*Prob. Code § 15207(a)*]. It further provides that the oral declaration of the settlor, standing alone, is not sufficient evidence of the creation of the trust [*Prob. Code § 15207(b)*].

### **[4] Testamentary Trusts**

A testamentary trust is a trust that is created by a will and takes effect on the death of the settlor (or testator) [*Black's Law Dictionary* (5th ed. 1979), at 1356; *see Prob. Code § 15200(c)* (trust may be created by testamentary transfer of property)]. Since a testamentary trust is an inseparable part of a will [*see Restatement (Second) of Trusts § 33*], it must be created with all of the formalities of a will [*Restatement (Second) of Trusts § 53*].

No writing may be a part of a will unless it is incorporated into the will by reference [*Estate of Doane (1923) 190 Cal. 412, 414, 213 P. 53*; *see Prob. Code § 6130* (requirements of incorporation by reference)], although a will may dispose of property by reference to acts and events that have significance apart from their effect upon the dispositions made by the will [*Prob. Code § 6131*]. For discussion of the formalities for creation of a will, and the general rules applicable to the construction and interpretation of wills, see *Ch. 61, Will Drafting and Complete Will Forms*, § 61.10 et seq.

### **Legal Topics:**

For related research and practice materials, see the following legal topics:

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*24-64 California Legal Forms--Transaction Guide § 64.34*

**§ 64.34 Settlor's Capacity**

If the owner of property has the capacity to devise property to another person, the owner has the capacity to transfer it by will to be held by the transferee in trust [Restatement (Second) of Trusts § 20 cmt. a]. The rules governing capacity to create a valid testamentary trust are the same as the rules regarding capacity to create a valid will. In California, any person who is 18 years of age or older and of sound mind may make a will [*Prob. Code § 6100(a)*; see *Prob. Code § 6100.5* (when person is not mentally competent to make will)]. For a general discussion of testamentary capacity, see *Ch. 61, Will Drafting and Complete Will Forms, § 61.10 et seq.*

**Legal Topics:**

For related research and practice materials, see the following legal topics:

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*24-64 California Legal Forms--Transaction Guide § 64.35*

**§ 64.35 Testamentary Trusts and Survivorship**

Frequently, a testator will wish to have a testamentary trust take effect only if the principal beneficiary named in the will (often the testator's spouse) does not survive the testator or does not survive until some time after the testator's death. A testator is free to dispose of his or her estate on whatever conditions he or she may see fit, as long as the conditions are not prohibited by law and do not violate public policy [*see In re Kitchen (1923) 192 Cal. 384, 388, 220 P. 301* ; *see Ch. 63, Will Provisions, § 63.410[1]*].

The general rule is that a devisee who does not survive the testator, or does not survive until a future time required by the will, will not take under the will [*Prob. Code § 21109(a)*]. However, when the devisee is "kindred" of the testator, the "anti-lapse" statute [*Prob. Code § 21110*] will apply and the devise instead will pass to the heirs of the devisee [*Prob. Code § 21110(a)*], unless the will expresses a contrary intent or makes a substitute disposition [*Prob. Code § 21110(b)*; *see Prob. Code § 21102(a)* (intent of testator is controlling)]. For a general discussion of the lapse of legacies and the operation of the "anti-lapse statute," *see Ch. 63, Will Provisions, § 63.411[1][d]*.

Whether a gift should be conditioned on survival should be considered as it bears on each gift in a will. While it is often advisable to condition a testamentary gift on survival for a specified period of time, since such a condition may obviate successive administration and taxation of the same property, it is unwise to routinely condition gifts to a surviving spouse on survival until a future time, because such a condition may delay or defeat the community property confirmation proceedings authorized by *Prob. Code §§ 13650-13660* [*see discussions in Ch. 61, Will Drafting and Complete Will Forms, § 61.200[1][b] et seq.*].

Under the Internal Revenue Code, a will provision that requires a surviving spouse to survive a testator for more than six months will deprive the spouse of the federal estate tax marital deduction [*see I.R.C. § 2056(b)(1), (3)*]. This six-month requirement has been very strictly construed by the IRS and presents a trap for the unwary. For example, a survivorship requirement conditioned on the conclusion of probate or the time of distribution disqualifies the gift from the marital deduction, because the specified period of time involved *might* exceed six months after the death of the testator [ *Rev. Rul. 88-90, 1988-2 C.B. 335* ; *Estate of Heim v. Commissioner (9th Cir. [T.C.] 1990) 914 F.2d 1322, 1327-1328* ; *Estate of Robertson v. United States (5th Cir. [Tex.] 1990) 903 F.3d 1034, 1037* ]. Under California law, however, if a will that makes a marital deduction gift includes a condition that the transferor's spouse survive the

transferor by a period that exceeds (or may exceed) six months, the condition will be limited to six months as applied to the marital deduction gift [*Prob. Code* § 21525(a); see *Prob. Code* §§ 45 ("instrument" defined), 21522 (rules applicable to "instrument"); see also *Prob. Code* § 21520(a) ("marital deduction" defined), (b) ("marital deduction gift" defined)]. This statute is intended to protect against inadvertent loss of the marital deduction [see *Prob. Code* § 21522(a)]. Nevertheless, attorneys should not attempt to specify survivorship periods that might exceed the six-month limit, since the California statute also provides, somewhat inconsistently with the provision limiting survivorship periods, that these rules are inapplicable to any instrument "the terms of which expressly or by necessary implication" make them inapplicable [*Prob. Code* § 21502(a)].

A different limitation applies if the will includes a condition that the testator's spouse survive a common disaster that results in the death of the spouse and the testator. If the will includes the latter type of condition and the testator and spouse die in a common disaster, California law limits the condition to the time of the final audit of the federal estate tax return for the testator's estate, if any, as applied to the marital deduction gift [*Prob. Code* § 21525(b)].

For further discussion of survivorship clauses and testamentary trusts, see § 64.200[1][j]. For a will provision conditioning a gift on survival until a future time, see *Ch. 63, Will Provisions*, § 63.411.

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:

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**§ 64.36 Pour-Overs**

As an alternative to a testamentary trust, a testator may make a testamentary gift to an existing trust, or to a trust to be created independently of the testator's will. Although testamentary gifts to existing trusts were at one time the subject of heated controversy [*see McClanahan, Bequests to an Existing Trust--Problems and Suggested Remedies, 47 Cal. L. Rev. 267 (1959)*], they have been explicitly sanctioned by statute in California since 1965, when the Uniform Testamentary Additions to Trusts Act was added to the Probate Code [*Stats. 1965, ch. 1640; see Prob. Code §§ 6300-6303 (Uniform Testamentary Additions to Trusts Act)*]. These gifts are commonly referred to as "pour-over gifts," and the trusts to which they are made are known as "pour-over trusts" [*see Black's Law Dictionary 1517 (7th ed. 1999)*].

A pour-over gift may be made to a trust created by the testator, to a trust created by some person other than the testator, or to a trust created by the testator and another person together [*Prob. Code § 6300*]. Although the pour-over trust need not actually be in existence before the pour-over gift is made, the trust must be identified in the testator's will [*Prob. Code § 6300*]. To be identified in the testator's will, the trust must be evidenced either (1) by an inter vivos instrument executed before or at the same time as the testator's will or (2) by the will of a person who died before the testator [*Prob. Code § 6300*]. A pour-over gift may be made to a funded or an unfunded trust, i.e., to a trust with or without corpus [*Prob. Code § 6300*]. Such a gift is not invalid because the pour-over trust is amendable or revocable, or both, or even because the trust is in fact amended after the pour-over gift is made (i.e., after the testator's will was executed). If, however, the trust is revoked or terminated before the testator's death, the pour-over gift will lapse [*Prob. Code § 6300*] and become part of the residue of the testator's estate [*Prob. Code § 21111(a)*]. If the gift is a residuary gift, there are no other residuary beneficiaries, and the will does not contain an alternate residuary disposition, the pour-over gift will pass to the testator's heirs under the law of intestate succession [*Prob. Code § 6400 (any part of decedent's estate not effectively disposed of by will passes under intestate succession statutes); see Prob. Code §§ 6400-6414 (intestate succession rules)*].

Unless the testator's will provides otherwise, property subject to a pour-over gift is not deemed to be held under a testamentary trust of the testator but becomes part of the trust to which it is given and must be administered and disposed of under the terms of the instrument (inter vivos or testamentary) by which that trust was created, including any amendments to that instrument [*Prob. Code § 6300*].

For will provisions making gifts to existing inter vivos trusts, see *Ch. 61, Will Drafting and Complete Will Forms, § 61.211* and *Ch. 63, Will Provisions, § 63.421*. For a will provision making a gift to an existing testamentary trust, see *Ch. 63, Will Provisions, § 63.422*.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

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*24-64 California Legal Forms--Transaction Guide § 64.37*

**§ 64.37 "Income" and "Principal"**

A typical testamentary trust requires the trustee to pay the trust income to one or more income beneficiaries (such as the testator's surviving spouse or children) during their lifetimes. It often grants the trustee discretion to make payments out of principal if the trustee determines that the income is not sufficient to meet the needs of the beneficiaries. Finally, it provides that on the deaths of the income beneficiaries, the trust principal will be distributed to remainder beneficiaries, who may be children or grandchildren of the testator.

The Uniform Principal and Income Act [*Prob. Code §§ 16320-16375*] prescribes detailed rules under which the receipts and disbursements of a trust must be allocated to or charged against trust income or principal [for discussion of the Act, *see Ch. 64B, Testamentary Trusts: Administrative Provisions, § 64B.30 et seq.*]. However, the will may prescribe its own rules for the determination of income and principal [*Prob. Code § 16335(a)(1)*], and these rules, like the other provisions of the trust, are binding on the trustee [*see Prob. Code § 16000*] and enforceable by the courts [*see Prob. Code §§ 16400-16442*].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

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*24-64 California Legal Forms--Transaction Guide § 64.38*

**§ 64.38 "Payments" and "Distributions"**

As used in this chapter, the word "payment" generally refers to a payment to a current income beneficiary, whether that payment is out of trust income or principal. "Distribution" refers generally to a distribution of principal to a remainder beneficiary. The distinction between payments and distributions, however, is not always precise. "Payments" out of income are sometimes made to remainder beneficiaries; and "distributions" of principal, or of both income and principal, are sometimes made to current income beneficiaries. For this reason, the words "payment" and "distribution" are often used interchangeably. Whether a transaction is labeled a "payment" or a "distribution" is less important than the times and circumstances under which the payment will be made, whether the trustee has discretion to determine the amount of the payment, and whether the payment is to be made from income, from principal, or from both income and principal. A "final distribution" is generally the last payment made by the trustee upon termination of the trust.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

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*24-64 California Legal Forms--Transaction Guide § 64.39*

**§ 64.39 Testamentary Trusts and the Income Tax**

**[1] In General**

Testamentary trusts are treated as separate entities for the purpose of reporting and paying income taxes. The income tax [see *I.R.C. § 1(e)*] applies to the taxable income of any kind of property held in trust, including income accumulated for future distribution under the terms of a will or trust, income that is to be distributed currently to income beneficiaries, and income that, in the trustee's discretion, may be either distributed to income beneficiaries or accumulated [*I.R.C. § 641(a)*; *Treas. Reg. § 1.641(a)-2*]. The trustee is required to make and file the tax return and pay the tax for which the trust is liable [*I.R.C. § 641(b)*; *Treas. Reg. § 1.641(b)-2(b)*]. Unlike individuals, however, trusts frequently function as conduits for the purpose of passing on income and income tax liability to the income beneficiaries, rather than as separate taxable entities. This function arises out of the rule permitting trusts to deduct income distributed to beneficiaries [see *I.R.C. §§ 651, 661*] and the corresponding rule requiring income beneficiaries to include that income in their gross incomes [see *I.R.C. §§ 652, 662*].

Although the income tax rules pertaining to testamentary trusts are simple in theory, they are more complicated in application. For a basic discussion of the income taxation of trusts in general, see *California Wills and Trusts*, Ch. 82, *Basic Tax Considerations in Trust Planning* (Matthew Bender). More detailed discussion of the same subject may be found in Nossaman & Wyatt, *Trust Administration and Taxation*, Ch. 42, *Income Taxation of Trusts and Estates* (Matthew Bender), and in Rabkin & Johnson, *Federal Income, Gift and Estate Taxation*, Chs. 54- 58 (Matthew Bender).

**[2] "Simple" and "Complex" Trusts**

The income tax liability of a trust depends in part on determining whether the trust is "simple" or "complex." A "simple" trust is one that requires all of its income to be distributed currently and does not provide for any amounts to be paid, permanently set aside, or used for charitable purposes [*I.R.C. § 651(a)*, *Treas. Reg. § 1.651(a)-1*; see *I.R.C. § 642(c)* (charitable deduction)]. Whether all of the income must be distributed currently depends on the terms of the trust instrument and the applicable local law [*Treas. Reg. § 1.651(a)-2(a)*]. It is immaterial whether the amount of income to be allocated to each beneficiary is specified in the instrument or is left to the discretion of the trustee, provided that the trustee is required to distribute all of the income [*Treas. Reg. § 1.651(a)-2(b)*]. All trusts that are not "simple" are

"complex" [*I.R.C. 661(a); Treas. Reg. § 1.661(a)-1*].

In determining "income" for the purpose of distinguishing between simple and complex trusts, an allocation of amounts between income and principal under applicable local law will be respected if that law provides for a reasonable apportionment between the income and remainder beneficiaries of the total return of the trust for the year, including ordinary and tax-exempt income, capital gains, and appreciation. A state statute that permits the trustee to make adjustments between income and principal to fulfill the trustee's duty of impartiality between the income and remainder beneficiaries generally is a reasonable apportionment of the total return of the trust [*Treas. Reg. § 1.643(b)-1; see Prob. Code § 16336(a)*].

Likewise, a state statute which provides that income is a unitrust amount of no less than three percent and no more than five percent of the fair market value of the trust assets, whether determined annually or averaged on a multiple year basis, is a reasonable apportionment of the total return of the trust [*Treas. Reg. § 1.643(b)-1; see Prob. Code § 16328*]. *Prob. Code §§ 16336.4, 16336.5, and 16336.6*, effective January 1, 2006, allow a trustee, under the circumstances described in those sections, to convert a net income trust to a unitrust to take advantage of this regulation, without running afoul of the "prudent investor" rule while meeting the terms of an instrument requiring income to a beneficiary such as a surviving spouse. These sections restrict the annual distribution or unitrust amount to four percent of the net fair market value of the trust's assets [*Prob. Code § 16336.4(e)(2)*]. The unitrust conversion power and the adjustment power afforded by *Prob. Code § 16336* enable trustees to achieve impartiality between income beneficiaries and remainder beneficiaries.

A trust may be simple in one year and complex in another [*Treas. Reg. 1.651(a)-1(b)*]. Every trust is complex in any year in which corpus is actually distributed, and in the year of termination [*see I.R.C. § 651(a); Treas. Reg. § 1.651(a)-3(a), (b)*].

While a simple trust is allowed an annual deduction of \$300 for its personal exemption, a complex trust is allowed a deduction of only \$100 [*I.R.C. § 642(b)*]. In computing its taxable income for the year, a simple trust may deduct the amount of trust income required to be distributed currently [*I.R.C. § 651(a)*] and, if that amount exceeds the trust's distributable net income [*see I.R.C. § 643(a); see also § 64.39[3]*], the deduction is limited to the amount of the distributable net income [*I.R.C. § 651(b)*]. A complex trust may deduct the sum of (1) any amount of income required to be currently distributed; and (2) any other amounts properly paid, credited, or required to be distributed for the taxable year [*I.R.C. § 661(a)*].

### **[3] Distributable Net Income**

The "distributable net income" of a trust [*see I.R.C. § 643(a)*] is important for two reasons. First, distributable net income is a measure of the trust's income. Second, it acts as a cap on amounts that will be taxable to the beneficiaries and deductible by the trust on distribution [*see I.R.C. §§ 651, 652, 661, 662*].

Since it would be inequitable to tax the beneficiaries on income that is taxable to the trust but cannot be distributed to the beneficiaries, distributable net income generally includes items that can be distributed to the beneficiaries and excludes items that cannot be distributed. Thus, distributable net income is defined as the taxable income of the trust (that is, gross income less deductible items such as business and investment expenses) modified as follows [*I.R.C. § 643(a)*]:

- No deduction is made for the deduction for distributions to beneficiaries [*see I.R.C. §§ 651, 661*].
- No deduction is made for the \$100 or \$300 personal exemption of the trust [*see I.R.C. § 642(b)*].
- Capital gains are not included unless they are paid, credited, or required to be distributed to

beneficiaries, or are paid or permanently set aside for a charitable purpose [*see I.R.C. § 642(c)*].

- Capital losses are not included unless they are taken into account in determining the amount of capital gains that are paid, credited, or required to be distributed to beneficiaries during the taxable year.
- The partial exclusion available for gain from the sale of certain qualified small business stock [*see I.R.C. § 1202*] is not taken into account.
- Tax exempt interest, with certain adjustments, is included.
- With respect to simple trusts only [*see I.R.C. §§ 651, 652*], extraordinary dividends or taxable stock dividends that the trustee determines in good faith to allocate to trust principal are excluded.

With respect to foreign trusts, gross income received from sources outside the United States is included in distributable net income, reduced by any disbursements that would be deductible from that income but for *I.R.C. § 265(a)(1)* [*I.R.C. § 643(a)(6)(A)*]. Gross income from sources within the United States is determined without regard to exemptions based on treaty provisions [*I.R.C. § 643(a)(6)(B)*; *see I.R.C. § 894* (income exempt under treaty)]. Capital gains are included in determining the distributable net income of a foreign trust, but the amount of any capital losses may be deducted from the amount of the gains [*I.R.C. § 643(a)(6)(C)*].

#### **[4] Trusts and Income Shifting**

It may sometimes be possible to reduce the overall income tax liability of a trust's beneficiaries by using the trust as an income-shifting device. If the beneficiaries are in a lower marginal tax bracket than the trust, or if one beneficiary is in a lower bracket than another beneficiary, a trustee with appropriate powers may withhold income, or may distribute income to the beneficiary in whose hands it would be taxed at the lowest marginal rate. Withholding (i.e., accumulating) income, or distributing income unequally among two or more beneficiaries (i.e., "sprinkling" income) may be advantageous, depending on an analysis of the trust's total taxable income and the total taxable income of each of the beneficiaries.

However, the differences between the tax rate brackets applicable to trusts and the rates applicable to individuals will often make accumulation of income undesirable from an income tax standpoint. Both individuals and trusts are subject to the same maximum tax rate [*see I.R.C. § 1(a)-(d), (i)(2)* (tax brackets for individuals), (e) (tax bracket for trusts and estates)]. Because the income tax brackets for trusts and estates are compressed, they apply at much lower dollar amounts than the corresponding rates applicable to individuals. For example, for individuals, the maximum tax rate applies to any income in excess of \$250,000, or \$125,000 in the case of married individuals filing separate returns. [*I.R.C. § 1(a)-(d), (i)(2)*]. In contrast, for trusts and estates, all income in excess of \$9,550 is taxed at the maximum rate [*I.R.C. § 1(e)*]. Thus, unless the beneficiary is already in or near the maximum tax bracket, income ordinarily is subject to higher tax in the hands of the trust than in the hands of the beneficiary. The effect of this rule is to discourage accumulations of income.

Whether any benefits can be achieved by income shifting will also be affected by the so-called "kiddie tax" rule of *I.R.C. § 1(g)*, which subjects the unearned income of minor children under the age of 18 to income taxation at the parents' marginal rates. If young children are the income beneficiaries of a trust, it is unlikely that any substantial tax savings will be achieved by shifting family income to the trust, for the children will be taxed on the income distributed to them at their parents' rates [*I.R.C. § 1(g)*]. For discussion of the rule taxing unearned income of minors under the age of 18 at the parents' marginal rates, see *Ch. 60A, Gifts, § 60A.44[2]*.

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsGeneral OverviewEstate, Gift & Trust LawTrustsAdministrationEstate, Gift & Trust  
LawTrustsTestamentary TrustsTax LawFederal Taxpayer GroupsIncome Taxation of Estates, Trusts &  
BeneficiariesGeneral OverviewTax LawFederal Taxpayer GroupsIncome Taxation of Estates, Trusts &  
BeneficiariesImposition of Tax



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DIVISION IV: WILLS AND TRUSTS  
CHAPTER 64 TESTAMENTARY TRUSTS: PAYMENT AND DISTRIBUTION PROVISIONS  
PART II. LEGAL BACKGROUND

*24-64 California Legal Forms--Transaction Guide § 64.40*

**§ 64.40 Testamentary Trusts and the Generation-Skipping Transfer Tax****[1] In General**

The federal estate and gift taxes ordinarily operate to expose property to taxation at least once in each generation [*see I.R.C. §§ 2001(a), 2031(a), 2033*], assuming that the estates involved are of sufficient size. However, it is possible to avoid federal estate and gift tax for one or more generations by using what has come to be known as a "generation-skipping transfer" [*see I.R.C. § 2611; see also § 64.40[2]*]. Probably the most common arrangements involving generation-skipping transfers are (1) a succession of life estates in favor of persons in different generations (e.g., to the testator's children for life, then grandchildren for life, with remainder to the great-grandchildren); and (2) trusts with income beneficiaries in one or more generations and remainder beneficiaries who are in a later generation than any of the income beneficiaries (e.g., a trust providing income to the testator's children and grandchildren for life, with remainder to the great-grandchildren). In these examples, the property is taxed in the estate of the testator, but not in the estates of the life or income beneficiaries [*see I.R.C. §§ 2001(a), 2031(a), 2033*]. Before 1976, arrangements such as these could be and were used to avoid federal estate or gift tax for one or more generations, subject only to the limitations on duration of the interests imposed by the applicable rule against perpetuities.

Beginning in 1976, Congress sought to limit the use of this tax-avoidance device by imposing a special "generation-skipping transfer tax." The first generation-skipping transfer tax [*see former I.R.C. §§ 2601-2622*] purported to tax successive transfers of property to successive generations of beneficiaries in much the same way that gift or estate taxes would have taxed the transfers if they had been made by gift or inheritance. This tax was the subject of widespread confusion and dissatisfaction. It was repealed by the Tax Reform Act of 1986 and replaced by a new generation-skipping transfer tax which applies generally to all generation-skipping transfers made after October 22, 1986 [Pub. L. No. 99-514, § 1433].

**[2] Application****NOTE ABOUT GENERATION-SKIPPING TRANSFER TAX REPEAL:**

The generation-skipping transfer tax has been repealed, effective for generation-skipping transfers after 2009 [I.R.C. § 2264]. Similarly, the estate tax has also been repealed, effective for decedents dying after 2009 [I.R.C. § 2210(a)]. Until then, both taxes remain in effect.

Under a sunset provision of the 2001 legislation that enacted the repeals, none of the provisions of the legislation--including the repeal of the GSTT and the estate tax--apply to generation-skipping transfers, or to estates of decedents dying, after December 31, 2010 [Pub. Law 107-16, § 901]. Thus, unless the provisions repealing the GST tax and estate tax are re-enacted before 2010, the GST tax law in effect before enactment of the 2001 legislation will apply after 2010 [*see* Pub. Law 107-16, § 901; *see also* *I.R.C.* §§ 2601-2663, before amendment by Pub. Law 107-16]. Many commentators feel that significant changes will be made to the estate tax law, and probably the GST tax, before 2010.

For now, post-2001 GST tax planning involves to some degree guessing how long a client will live. For transfers made in 2010, there will be no GST tax due [*I.R.C.* § 2264]. For the time being, with respect to clients who are likely to live past 2010 and make taxable transfers after that time, the same GST tax considerations apply as under the law before the 2001 legislation because, under the current scheme, the law after 2010 will be the same as it was prior to enactment of that legislation [Pub. Law 107-16, § 901].

Under the generation-skipping transfer tax, a tax is imposed on every generation-skipping transfer [*I.R.C.* § 2601]. A "generation-skipping transfer" is (1) a "taxable distribution," (2) a "taxable termination," or (3) a "direct skip" [*I.R.C.* § 2611(a)]. A "taxable distribution" is generally any distribution from a trust to a "skip person" (a beneficiary assigned to a generation more than one generation below that of the transferor) or to a trust of which all the beneficiaries are "skip persons" [*I.R.C.* § 2612(b) ("taxable distribution" defined); *see* *I.R.C.* § 2613(a) ("skip person" defined)]. A "taxable termination" is generally the termination (by reason of death, lapse of time, release of a power, or otherwise) of a beneficial interest in a trust if thereafter all of the beneficiaries of the trust are skip persons [*I.R.C.* § 2612(a); *I.R.C.* § 2613(a) ("skip person" defined)]. A "direct skip" is generally a transfer directly to a skip person that is subject to gift or estate tax [*I.R.C.* § 2612(c)]. The tax imposed on a generation-skipping transfer is equal to the "taxable amount" multiplied by the "applicable rate" [*I.R.C.* § 2602; *see* *I.R.C.* §§ 2621-2624 (taxable amount); *see also* *I.R.C.* §§ 2641-2642 (applicable rate)].

Unlike the federal income, estate, and gift taxes, the generation-skipping transfer tax does not have a series of progressive tax rates. Rather, it is simply imposed at a flat rate equal to the maximum federal estate tax rate in effect at the time of the transfer [*I.R.C.* § 2641]. Because of this high tax rate, generation-skipping transfer tax liability can be extremely undesirable, and estate planners generally plan to minimize that liability.

Every individual is allowed an exemption (called the "GST exemption") [*see* *I.R.C.* § 2631(a), (c) and discussion in § 60.16[3]], which may be allocated by the individual (or the individual's executor) to any property with respect to which the individual is the transferor [*I.R.C.* § 2631]. The amount of the exemption depends on the year of the transfer, and ranges from \$1 million in 1998 [*I.R.C.* § 2631(a), before amendment by Pub. Law 107-16] to \$3.5 million in 2009 [*I.R.C.* §§ 2010(c), 2631(a), (c); *see* § 60.16[3] for a detailed discussion]. In addition, there is an exemption of \$2,000,000 for any "direct skip" made before January 1, 1990, from a transferor to a grandchild of the transferor [Pub. L. No. 99-514, § 1433(b)(3)].

Liability for payment of the generation-skipping transfer tax depends on the nature of the transfer. If the transfer is a taxable distribution, the tax must be paid by the transferee [*I.R.C.* § 2603(a)(1)]. If the transfer is a taxable termination, the tax must be paid by the trustee [*I.R.C.* § 2603(a)(2)]. If the transfer is a direct skip (other than a direct skip from a trust), the tax must be paid by the transferor [*I.R.C.* § 2603(a)(3)]. Unless otherwise directed in the trust instrument by specific reference to the generation-skipping transfer tax, the tax must be charged against the property constituting the transfer [*I.R.C.* § 2603(b)].

### [3] Drafting Dangers

The attorney must be aware of the existence and possible application of the generation-skipping transfer tax. While it

will be difficult, if not impossible, to avoid imposition of the tax in some cases, a careful drafter should make every reasonable effort to anticipate situations in which the tax might be imposed and advise testators of the potential dangers.

Although a complete discussion of the generation-skipping transfer tax is beyond the scope of this chapter, special aspects of the tax and its application are considered at numerous points in the chapter. For a general discussion of the generation-skipping transfer tax, see § 60.16. For a detailed consideration of the tax and its potential pitfalls, see California Wills and Trusts, Ch. 113, *Generation-Skipping Transfers and Trust Strategies* (Matthew Bender).

#### **[4] California Pickup Tax on Generation-Skipping Transfers**

Every generation-skipping transfer that is subject to taxation under federal law [*see I.R.C. §§ 2601-2664; see also § 64.40[1]*] is also subject to taxation in California if the original transferor is a resident of California at the date of the original transfer or if the property transferred is real or personal property in California [*see Rev. & Tax. Code § 16702*].

Like the California estate tax [*see Rev. & Tax. Code § 13302*], the California generation-skipping transfer tax is a "pickup" tax. It is equal to the amount allowable as a credit for state generation-skipping transfer taxes under *I.R.C. § 2604* [*see Rev. & Tax. Code § 16710(a)*]. Note that the federal GST credit for state taxes is repealed for generation-skipping transfers after 2004 [*I.R.C. § 2604(c)*]. If any of the property transferred is real property in another state or personal property having a business situs in another state, and the other state requires the payment of a tax for which credit is received against the federal generation-skipping transfer tax, the California tax will be reduced proportionally [*Rev. & Tax. Code § 16710(b)*]. The reduction will be by an amount that bears the same ratio to the total state tax credit allowable for federal generation-skipping transfer tax purposes as the value of the property taxable in the other state bears to the value of the gross generation-skipping transfer for federal generation-skipping transfer tax purposes [*Rev. & Tax. Code § 16710(b)*].

Every person required by law to file a return reporting a generation-skipping transfer under federal law must also file a return with the California State Controller on or before the last day prescribed for filing the federal return [*Rev. & Tax. Code § 16720*].

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Trusts Testamentary Trusts Tax Law Federal Estate & Gift Taxes Generation-Skipping Transfer Taxes (IRC secs. 2601-2663)



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*24-64 California Legal Forms--Transaction Guide § 64.41*

### § 64.41 Spendthrift Trusts

#### [1] In General

A beneficiary who has the capacity to transfer property ordinarily will have the capacity to transfer his or her interest in the trust or the trust income [ *Title Ins. & Trust Co. v. Duffill* (1923) 191 Cal. 629, 649, 218 P. 14 ; Restatement (Second) of Trusts §§ 132, 133]. Since the beneficiary's interest in the trust may be assigned, it follows that the beneficiary's interest may be subject to claims by the beneficiary's creditors, whether by way of garnishment, execution, or otherwise [ *Lynch v. Cunningham* (1933) 131 Cal. App. 164, 175, 21 P.2d 154 ; Restatement (Second) of Trusts § 147]. The trust instrument may, however, restrict the right of the beneficiary to transfer or assign his or her interest and limit the right of the beneficiary's creditors to reach the beneficiary's interest by legal process [see *Prob. Code* §§ 15300-15309]. A trust with such restrictions is commonly known as a "spendthrift trust" [see *Black's Law Dictionary* 1400 (6th ed. 1990)].

#### [2] Protection Against Creditors

Although the right of the settlor to restrict the assignment of the beneficiary's interest has been held void in some states, California courts have traditionally upheld the right on the theory that the settlor is free to make any disposition of the trust property that does not violate public policy [see *Canfield v. Security-First Nat. Bank* (1939) 13 Cal. 2d 1, 12, 87 P.2d 830 ; *Seymour v. McAvoy* (1898) 121 Cal. 438, 442, 53 P. 946] . Further, the right of the settlor to impose restrictions on the transfer of the beneficiary's interest is clearly recognized (and regulated) by statute in California.

The Trust Law [*Prob. Code* §§ 15000-19403] broadly protects beneficiaries of spendthrift trusts from the claims of creditors [see *Prob. Code* §§ 15300-15309]. It provides, with specified exceptions [see *Prob. Code* §§ 15301(b), 15304-15307; see also § 64.41[4]], that if the trust instrument provides that a beneficiary's interest in income or principal is not subject to voluntary or involuntary transfer, the beneficiary's interest in that income or principal may not be transferred and is not subject to enforcement of a money judgment until paid to the beneficiary [*Prob. Code* §§ 15300, 15301(a)]. Further, the Trust Law provides, with specified exceptions [see *Prob. Code* §§ 15305-15307; see also § 64.41[4]], that if the trust instrument provides that the trustee "shall pay" income or principal, or both, for the education or support of a beneficiary, then the beneficiary's interest in income or principal, or both, under the trust, to the extent the income or principal, or both, is necessary for the education or support of the beneficiary, may not be

transferred and is not subject to the enforcement of a money judgment until paid to the beneficiary [*Prob. Code* § 15302].

### **[3] Protection for Discretionary Payments**

The Trust Law also protects discretionary payments from creditors. If the trust instrument requires the trustee to pay the beneficiary as much of the income or principal, or both, as the trustee "in the trustee's discretion" sees fit to pay, a transferee or creditor of the beneficiary may not compel the trustee to make a discretionary payment [*Prob. Code* § 15303(a); *but see Prob. Code* § 15303(d) (beneficiary's right to compel payment not impaired)].

If the trustee has knowledge of the transfer of the beneficiary's interest, however, or if the trustee has been served with process in a proceeding under *Code Civ. Proc.* § 709.010 by a judgment creditor seeking to reach the beneficiary's interest, and if the trustee thereafter makes discretionary payments to or for the benefit of the beneficiary, the trustee will be liable to the transferee or creditor to the extent that the payments impair the transferee's or creditor's rights [*Prob. Code* § 15303(b)]. This rule applies whether or not the trust instrument provides a standard for the exercise of the trustee's discretion [*Prob. Code* § 15303(c)].

The trustee will not be liable to the transferee or creditor, however, if the beneficiary's interest in the trust is subject to a restraint on transfer that is valid under *Prob. Code* § 15300 or 15301 [*Prob. Code* § 15303(b); *see* § 64.41[2]].

### **[4] Exceptions**

The protection provided by the Trust Law is subject to significant exceptions.

First, the protection afforded a beneficiary's interest in trust principal is subject to the general qualification that, after an amount of principal has become due and payable to the beneficiary, a judgment creditor may petition the court for an order under *Code Civ. Proc.* § 709.010 directing the trustee to satisfy the judgment out of that principal amount, and the court, in its discretion, may issue an order directing the trustee to satisfy all or part of the judgment out of that principal amount [*Prob. Code* § 15301(b)].

Second, the settlor may not escape the settlor's own creditors by placing his or her assets in a trust with spendthrift provisions. If the settlor is also the beneficiary, a trust provision restraining the voluntary or involuntary transfer of the beneficiary's interest is invalid against transferees or creditors of the beneficiary (although the trust is not itself invalid) [*Prob. Code* § 15304(a)]. If the settlor is also the beneficiary, and the trust instrument requires the trustee to pay income or principal, or both, for the education or support of the beneficiary, or gives the trustee discretion to determine the amount of income or principal, or both, to be paid to or for the benefit of the settlor, a transferee or creditor of the settlor may reach the maximum amount that the trustee could pay to or for the benefit of the settlor under the trust instrument, not exceeding the amount of the settlor's proportionate contribution to the trust [*Prob. Code* § 15304(b)].

Third, a beneficiary's interest in trust income or principal may be reached to satisfy all or part of a money judgment for support of the beneficiary's spouse, former spouse, or minor child [*Prob. Code* § 15305(a)]. If the beneficiary has the right under the trust to compel the trustee to pay income or principal to or for the beneficiary's benefit, the court may order the trustee to satisfy all or part of the support judgment out of all or part of those payments as they become due and payable, presently or in the future [*Prob. Code* § 15303(b)]. Whether or not the beneficiary has the right to compel the trustee to make payments, the court may order the trustee to satisfy all or part of the support judgment out of all or part of future payments that the trustee determines to make to or for the benefit of the beneficiary [*Prob. Code* § 15305(c)]. The court's power to make an order requiring the trustee to satisfy a support judgment out of principal or income payable to the beneficiary may not be restricted by any provision in the trust instrument [*Prob. Code* § 15305(d)].

Fourth, a beneficiary's interest in the trust income or principal may be reached to satisfy a judgment for restitution or damages incurred as a result of conduct for which the defendant was convicted of a felony [*Prob. Code* § 15305.5(a)]. If the beneficiary has the right to compel the trustee to pay income or principal to or for the beneficiary's benefit, the court may order the trustee to satisfy all or part of the restitution judgment out of all or part of those payments as they become due and payable, presently or in the future [*Prob. Code* § 15305.5(b)]. Whether or not the beneficiary has the right to compel payments, the court may order the trustee to satisfy all or part of the restitution judgment out of all or part of the future payments that the trustee determines to make to or for the benefit of the beneficiary [*Prob. Code* § 15305.5(c)]. The court's power to make an order requiring the trustee to satisfy a restitution judgment out of principal or income payable to the beneficiary may not be restricted by any provision in the trust instrument [*Prob. Code* § 15305.5(d)].

Fifth, no provision in the trust will be sufficient to insulate a beneficiary from any statutory liability to reimburse the state or a local public entity in the state for public support furnished to the beneficiary, the beneficiary's spouse, or the beneficiary's minor child [*Prob. Code* § 15306(a)]. If a California statute imposes this kind of liability on the beneficiary, the court, upon petition under *Code Civ. Proc.* § 709.010 by the appropriate public entity or public official, may make any of the orders specified in *Prob. Code* § 15306, to the extent it determines to be equitable and reasonable under the circumstances of the particular case.

Sixth, the court may, upon a judgment creditor's petition under *Code Civ. Proc.* § 709.010, order the trustee to satisfy all or part of the judgment out of payments to which the beneficiary is entitled under the trust instrument or that the trustee, in the exercise of the trustee's discretion, has determined (or determines in the future) to pay to the beneficiary [*Prob. Code* § 15306.5]. However, the court may not require the trustee to pay more than 25 percent of the payment that otherwise would be made to or for the beneficiary's benefit [*Prob. Code* § 15306.5(b)]; nor may it require the trustee to pay any amount that the court determines is necessary for the support of the beneficiary and all the persons the beneficiary is required to support [*Prob. Code* § 15306.5(c)]. Further, an order for satisfaction of a judgment for support of the beneficiary's spouse, former spouse, or minor child [*see Prob. Code* § 15305(a) ("support judgment" defined)] has priority over an order to satisfy any other judgment; and any amount ordered to be applied for any other judgment must be reduced by the amount of an order for satisfaction of a judgment for support, regardless of whether the order for satisfaction of the support judgment was made before or after the order for satisfaction of the other judgment [*Prob. Code* § 15306.5(d)]. In addition, subject to the rule authorizing orders for the satisfaction of support judgments [*see Prob. Code* §§ 15305, 15306.5(d)], the aggregate of all orders for satisfaction of money judgments may not exceed 25 percent of the payment that otherwise would be made to or for the beneficiary's support [*Prob. Code* § 15306.5(f)].

Finally, any amount to which the beneficiary is entitled under the trust instrument or that the trustee, in the exercise of the trustee's discretion, has determined to pay the beneficiary in excess of the amount that is or will be necessary for the beneficiary's education and support, may be applied to the satisfaction of a money judgment against the beneficiary [*Prob. Code* § 15307].

#### **[5] Use in Marital Deduction Trusts**

Although a carefully drafted spendthrift clause may safely be used in a marital deduction trust [*see Treas. Reg.* § 20.2056(b)-5(f)(7); *see also Treas. Reg.* § 20.2056(b)-7(d)(2) (regulations applicable to QTIP trusts)], a poorly drafted clause may endanger or even defeat the deduction. The marital deduction rules require that all of the income from lifetime income plus power of appointment trusts and qualifying terminable interest property (QTIP) trusts must be paid to the surviving spouse annually or at more frequent intervals [*I.R.C.* § 2056(b)(5), (7)]. The regulations pertaining to lifetime income plus power of appointment trusts provide that an income interest is not disqualified merely because it is not subject to assignment, alienation, pledge, attachment, or claims of creditors [*Treas. Reg.* § 20.2056(b)-5(f)(7)], and the same rules are applicable to QTIP trusts [*Treas. Reg.* § 20.2056(b)-7(d)(2)]. Thus, a clause that provides that the beneficiary's interest will cease and terminate if any attempt is made to violate the spendthrift provision will defeat the deduction [*see Virginia National Bank v. United States* (4th Cir. [Va.] 1971) 443 F.2d 1030, 1032 (spendthrift clause interfered with power of appointment under *I.R.C.* § 2056(b)(5))]. In California, however, a will making a marital

deduction gift (including any power, duty, or discretionary authority given to the fiduciary in such a will) must be construed so as to comply with the marital deduction provisions of the Internal Revenue Code [*Prob. Code* § 21522(a); *see Virginia National Bank v. United States* (4th Cir. [Va.] 1971) 443 F.2d 1030, 1034-1035 (parole evidence admissible to save deduction when will is ambiguous)]. Under this rule, a gift might still qualify for the deduction despite a poorly drafted spendthrift clause. A careful attorney, however, will not rely on rules of construction to save an otherwise questionable marital deduction when careful drafting will assure it.

For further discussion of the potential dangers of using spendthrift clauses with marital deduction trusts, see Halbach, "Drafting and Over-Drafting: A Voyeur's View of Recurrent Problems," 19 *University of Miami Institute on Estate Planning* (1985), P 1307.5.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsSpendthrift TrustsGeneral OverviewEstate, Gift & Trust LawTrustsSpendthrift TrustsExceptions to EnforceabilityEstate, Gift & Trust LawTrustsSpendthrift TrustsExclusion From Bankruptcy EstateEstate, Gift & Trust LawTrustsSpendthrift TrustsRequirementsEstate, Gift & Trust LawTrustsTestamentary Trusts



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*24-64 California Legal Forms--Transaction Guide § 64.42*

**§ 64.42 Accumulation of Income**

**[1] In General**

"Accumulation" is the process by which, pursuant to a valid direction in a will or other trust instrument, income is added to trust principal and not currently paid out to the income beneficiaries [*Black's Law Dictionary* (5th ed. 1979), p. 20; *see* Scott, *The Law of Trusts* (3d ed., Little, Brown & Co., 1967), vol. I, § 62.11]. When the income is treated by the trustee as capital and the trustee invests it, the new capital and the income accrued on it constitute accumulations [ *Estate of Steele* (1899) 124 Cal. 533, 541, 57 P. 564 ]. There is no accumulation if the entire net income is distributed annually [ *Estate of Steele* (1899) 124 Cal. 533, 541, 57 P. 564 ].

**[2] Time Limitations**

Although a will or trust instrument may require that income be accumulated for the benefit of one or more persons, objects, or purposes, an accumulation of income generally cannot extend beyond the time permitted for the vesting of future interests under the rule against perpetuities [*Civ. Code* § 724(a); *but see* *Civ. Code* § 724(b) (exception for trusts forming part of employee profit-sharing or retirement plans)]. If a will or trust instrument requires that income be accumulated for a longer time, the requirement is void insofar as it applies to the longer period [*Civ. Code* § 725]. However, such a requirement will not affect the validity of any other provision of the will or trust [*Civ. Code* § 725].

In California, perpetuities are subject to the Uniform Statutory Rule Against Perpetuities (USRAP) [*see Prob. Code* § 21200 *et seq.*], which includes a recodification of the common law rule against perpetuities [*see Prob. Code* §§ 21205(a), 21206(a), 21207(a)]. Under that recodification, a nonvested property interest is invalid unless (1) when the interest is created, it is certain to either vest or terminate no later than 21 years after the death of a person alive at the time of creation or (2) the interest actually vests or terminates within 90 years after its creation [*Prob. Code* § 21205(a)].

The perpetuities period is marked off from the time the interest is created [*Prob. Code* §§ 21205-21207]. Since a will does not take effect until the testator dies, an interest created by a will (such as an interest in a testamentary trust) is not created until the testator dies. Thus, the perpetuities period for an interest created by a will is marked off from the testator's death [ *Estate of Gorchakoff* (1951) 108 Cal. App. 2d 44, 46, 238 P.2d 121 ].

For a detailed discussion of the Uniform Statutory Rule Against Perpetuities and its operation in California, see *Ch. 67, Future Interests and Perpetuities*, § 67.10 et seq.

### **[3] Direction Required**

A valid direction in a will or other trust instrument is essential to accumulation. In the absence of such a direction, undistributed income belongs to the person presumptively entitled to the next eventual interest [Civ. Code § 73] and must be distributed currently to that person [ *Estate of Robinson* (1968) 262 Cal. App. 2d 32, 40-42, 68 Cal. Rptr. 420 ; *Estate of Lefranc* (1952) 38 Cal. 2d 289, 299-301, 239 P.2d 617 ]. The person presumptively entitled to the next eventual interest must be ascertained from the terms of the will and is ordinarily the remainder beneficiary [see *Estate of Charters* (1956) 46 Cal. 2d 227, 240, 293 P.2d 778 ; see also *Estate of Lefranc* (1952) 38 Cal. 2d 289, 299-301, 239 P.2d 617] ].

### **[4] Acceleration by Court**

A valid direction for accumulation may be ignored if the person for whom the income is accumulated is destitute of other sufficient means of support or education [Civ. Code § 726]. Such a person may petition the court at any time for an order requiring a suitable sum to be paid out of the fund directed to be accumulated [Civ. Code § 726].

### **[5] Tax Consequences**

Accumulations of income generally result in unfavorable income tax consequences. This is because trust income is taxed at lower rates when it is distributed to beneficiaries than when it is accumulated by the trust, as a result of the compressed tax rate brackets for trusts [see *I.R.C. § 1(a)-(e), (i)(2)*]. Before August 5, 1997, accumulated income was subject to complex income tax rules known as the "throwback rules." The throwback rules required that when income that has been accumulated in a trust is finally distributed to a beneficiary, it must be included in the beneficiary's income if the beneficiary's top average marginal tax rate in the preceding five years was higher than that of the trust [*I.R.C. §§ 665, 666, 667*]. Effective August 5, 1997, the "throwback" rules are inapplicable to most domestic trusts created on or after March 1, 1984 [*I.R.C. § 665(c)*].

Although distributions of accumulated income are no longer subject to the "throwback rules," accumulation of income is still discouraged by the compressed tax rates applicable to trusts [see *I.R.C. § 1(e)* and discussion in § 64.39[4]].

### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsGeneral OverviewEstate, Gift & Trust LawTrustsTestamentary Trusts



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*24-64 California Legal Forms--Transaction Guide § 64.43*

**§ 64.43 Powers of Appointment**

**[1] Nature and Uses**

A power of appointment is a power that an owner of property gives to another person to designate the person or persons who will receive the property at some time in the future [*Recommendation Relating to Revision of the Powers of Appointment Statute*, 15 Cal. L. Revision Comm'n Reports 1667, 1673 (1980)]. The person who creates a power of appointment is called the "donor" [*Prob. Code § 610(e)*]. The person to whom a power of appointment is given is called the "donee" [*Prob. Code § 610(d)*]. The person in whose favor the power is exercised is called the "appointee" [*Prob. Code § 610(a)*].

A power of appointment may be created to give the donee the power to designate the person or persons who will receive a legal interest in property at some time in the future (for example, a remainder or some other future interest). More often, however, powers of appointment are created in connection with trusts to give the donee the power to designate the persons who will receive the trust property, income from the trust property, or some other interest in the trust, at a future time. The typical power of appointment is created in connection with a trust under which the income is to be paid to a designated beneficiary for life. In such a situation, the power may give the lifetime income beneficiary or some other person the power to designate the person or persons who will receive the trust property after the death of the income beneficiary. Powers of appointment are versatile devices, however, and capable of adaptation to a variety of circumstances.

Powers of appointment may, according to their terms, be exercised by will, or during the lifetimes of the donees. In either case, they have be used to accomplish important objectives that cannot conveniently be accomplished in other ways. A power of appointment will, for example, authorize the donee to act as a kind of posthumous agent and to designate the ultimate taker of the property after the death of the donor. This may be particularly useful if trust property is to be distributed to beneficiaries who are much younger than the donor, and the donor wishes to postpone the decision as to which of the younger beneficiaries will actually receive the property. The donee can make the decision years after the power is created, at a time when the identities, characters, and special needs of the potential beneficiaries are known.

A power of appointment may also help foster deference to the wishes of older family members. For example, a

grandparent may wish to create a trust and to designate one of his or her children as the lifetime income beneficiary. The grandparent may be unsure about which of the grandchildren should receive the trust property on the death of the child. In these circumstances, the grandparent could give the child the power to designate the grandchildren who will ultimately receive the property, and the shares that each grandchild will receive. Giving a child a power of this kind will give the child authority over the ultimate distribution of the trust property, and tend to encourage the grandchildren to treat the child with deference. In turn, this may help to promote family unity and discourage disputes. Whether it is desirable to permit a child to determine how and in what shares the grandparent's property will be distributed to grandchildren is, of course, a question that each grandparent should consider and resolve. In one family, such an arrangement may seem appropriate, while in others it may not.

A power of appointment may also help a child accomplish his or her own long-term objectives. Assume, for example, that a child is in comfortable financial circumstances and does not need the parent's property for support. If the child has the power to decide who will ultimately receive the property, the child can help other persons who are in greater need, coordinating the ultimate distribution of the grandparent's property with the distribution of the child's own estate to confer maximum benefits on the ultimate beneficiaries.

### **[2] Applicable Law**

In California, powers of appointment are governed by provisions of the Probate Code [*Prob. Code §§ 600-695*]. However, these provisions do not supplant the common law. Except to the extent that the common-law rules governing powers of appointment are modified by statutes, the common law as to powers of appointment is the law of California [*Prob. Code § 600*].

Powers of appointment also have important income, estate, gift, and generation-skipping tax consequences. The income tax consequences of powers of appointment are covered in *I.R.C. § 678(a)* and discussed in § 64.5[2]. The estate tax consequences of powers of appointment are covered in *I.R.C. § 2041* and discussed in § 64.51[3]. The gift tax consequences of powers of appointment are covered in *I.R.C. § 2514* and discussed in § 64.51[6]. The generation-skipping transfer tax consequences of powers of appointment are generally dealt with in the generation-skipping transfer tax statutes, *I.R.C. §§ 2601-2663*, and discussed in 64.51[7]. To properly create or exercise a power of appointment, both the Probate Code and Internal Revenue Code provisions relating to powers of appointment must be carefully considered.

### **Legal Topics:**

For related research and practice materials, see the following legal topics:

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*24-64 California Legal Forms--Transaction Guide § 64.44*

**§ 64.44 Classification of Powers of Appointment**

**[1] "General" and "Special"**

All powers of appointment are either "general" or "special" [*see California Wills & Trusts, Ch. 31, Powers of Appointment, § 31.02[2]* (Matthew Bender)].

A "general" power of appointment is one that can be exercised so as to confer benefits on the donee, either directly or indirectly. Thus, the Probate Code provides that a power of appointment is "general" if it can be exercised in favor of the donee, the donee's estate, the donee's creditors, or creditors of the donee's estate, whether or not it is exercisable in favor of others [*Prob. Code § 611(a)*]. The power does not have to give the donee a choice among all of these groups. It will be classified as general if it enables the donee to appoint to any one or more of them [*Relocation of Powers of Appointment Statute, 21 Cal. L. Revision Comm'n Reports 91, 103 (1991)*]. The Internal Revenue Code definition is substantially identical to the Probate Code definition [*see I.R.C. § 2041(b)(1)*].

A general power of appointment may take various forms. Perhaps the most common is the power to invade the principal of a trust. If a beneficiary or trustee has the power to invade the principal for his or her own benefit, the power is a general power of appointment for purposes of both the Probate Code and the Internal Revenue Code.

The Probate Code specifically excludes certain types of powers from the definition of a "general" power. Thus, a power to consume, invade, or appropriate property for the benefit of a person in discharge of the donee's obligation of support that is limited by an ascertainable standard relating to the person's health, education, support, or maintenance is not a general power of appointment [*Prob. Code § 611(b)*]. Similarly, the Probate Code provides that a power exercisable by the donee only in conjunction with a person who has a substantial interest in the appointive property that is adverse to the exercise of the power in favor of the donee, the donee's estate, the donee's creditors, or creditors of the donee's estate is not a general power of appointment [*Prob. Code § 611(c)*]. The Probate Code exclusions have parallels in the Internal Revenue Code provisions relating to powers of appointment [*see I.R.C. § 2041(b)(1)(A), (C)(ii)*].

Any power of appointment that is not "general" is "special" [*Prob. Code § 611(d)*].

**[2] "Testamentary" and "Nontestamentary"**

Powers of appointment may be exercised by will or by inter vivos instrument. If a power can be exercised only by will it is classified as a "testamentary" power [*Prob. Code § 612(a)*]. If a power cannot be exercised by will, it is classified as "nontestamentary." Unless expressly prohibited by the creating instrument, a power stated to be exercisable by an inter vivos instrument can also be exercised by a written will [*Prob. Code § 630(b)*].

### **[3] "Presently Exercisable" and "Postponed"**

Powers of appointment may be classified as "presently exercisable" or "postponed" [*Prob. Code § 612*]. A power is "presently exercisable" if at any given time an irrevocable appointment can be made under the power [*Prob. Code § 612(b)*]. A power is "postponed" if the creating instrument provides that the power may be exercised only after a specified act or event occurs or a specified condition is met, and the act or event has not occurred or the condition has not been met [*Prob. Code § 612(c)(1)*]; or if the creating instrument provides that an exercise of the power will be revocable until a specified act or event occurs, or a specified condition is met, and the act or event has not occurred, or the condition has not been met [*Prob. Code § 612(c)(2)*].

### **[4] "Imperative" and "Discretionary"**

Powers of appointment may be classified as "imperative" or "discretionary" [*Prob. Code § 613*]. A power is "imperative" if the creating instrument manifests an intent that the permissible appointees be benefited even if the donee fails to exercise the power. A power may be "imperative" even though the donee has the privilege of selecting some permissible appointees and excluding others [*Prob. Code § 613*].

If a power is imperative, the donee must exercise the power or the court will divide the appointive property among the permissible appointees [*Prob. Code § 671(a)*; see § 64.49[1]]. If an imperative power is exercised but the exercise is defective, the court has the power to remedy the defective appointment [*Prob. Code § 635*].

All powers that are not imperative are classified as "discretionary" [*Prob. Code § 613*]. When a power is discretionary, the donee is privileged to exercise or not to exercise the power, as the donee chooses [*Prob. Code § 613*].

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:

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*24-64 California Legal Forms--Transaction Guide § 64.45*

**§ 64.45 Creation of Power of Appointment**

**[1] Capacity to Create**

A power of appointment may be created only by a donor who has the capacity to transfer the interest in property to which the power relates [*Prob. Code § 620*]. A person generally has the capacity to convey property if he or she can comprehend the nature of the act of conveyance, the character of the subject property, and his or her relationship to the natural objects of his or her bounty (that is, family members or other heirs) [ *Marback v. Marback (1965) 235 Cal. App. 2d 354, 356, 45 Cal. Rptr. 341* ]. A person does not have the capacity to transfer property if he or she is a minor or mentally incapacitated [*Civ. Code § 38; Fam. Code § 6701*].

**[2] By Written Instrument**

A power of appointment may be created by a deed, a will, a trust instrument, or some other writing or document [*Prob. Code § 610(c)*]. A power created by will is generally deemed to have been created on the date of the testator's death [*see Treas. Reg. § 20.2041-1(e)*]. This accords with the general view that a will becomes effective only on the death of the testator [*see Tennant v. John Tennant Memorial Home (1914) 167 Cal. 570, 577, 140 P. 242* ]. A power created by inter vivos instrument is deemed to have been created on the date the instrument takes effect [*Treas. Reg. § 20.2041-1(e)*].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

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*24-64 California Legal Forms--Transaction Guide § 64.46*

**§ 64.46 Revocability of Power of Appointment**

The creation of a power of appointment is irrevocable unless the power to revoke is in the creating instrument, or unless the power is created by a trust instrument that itself is revocable [*Prob. Code § 695(a)*]. A trust instrument is revocable by the settlor unless it is expressly made irrevocable by the trust instrument [*Prob. Code § 15400*]. However, the latter rule applies only when the trust instrument is executed in California, the settlor is domiciled in California when the trust is created, or the trust instrument provides that the law of California governs the trust [*Prob. Code § 15400*].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

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*24-64 California Legal Forms--Transaction Guide § 64.47*

**§ 64.47 Exercise of Power of Appointment**

**[1] Capacity to Exercise**

A power of appointment can be exercised only by a donee who has the capacity to transfer the interest in property to which the power relates [*Prob. Code § 625(a)*; see § 64.45[1]]. Unless the creating instrument provides otherwise, a donee may not exercise a power of appointment while he or she is a minor [*Prob. Code § 625(b)*].

**[2] Compliance With Creating Instrument**

If the creating instrument specifies requirements as to the manner, time, and conditions of the exercise of a power of appointment, the power can generally be exercised only by complying with those requirements [*Prob. Code § 630(a)*]. However, the court may excuse formal compliance with requirements specified in the creating instrument if an actual appointment approximates the manner of appointment prescribed by the donor and the failure to satisfy the formal requirements does not defeat the accomplishment of a significant purpose of the donor [*Prob. Code § 631(a)*].

If the creating instrument expressly directs that a power of appointment be exercised by an instrument that makes a specific reference to the power or to the instrument that created the power, the power can be exercised only by an instrument containing the required reference [*Prob. Code § 632*]. The court cannot excuse compliance with a requirement of this kind [*Prob. Code § 1631(b)*].

**[3] Consent of Donor or Other Person**

If the creating instrument requires the consent of the donor or some other person to exercise a power of appointment, the power can only be exercised when the required consent is contained in the instrument of exercise or in a separate written instrument, signed in each case by the person whose consent is required [*Prob. Code § 633(a)*]. A required consent can be given before or after the power is exercised [*Prob. Code § 633(b)(3)*].

Unless the creating instrument expressly provides otherwise, if a person whose consent is required dies, the power may be exercised by the donee without the consent of that person [*Prob. Code § 633(b)(1)*]. Similarly, if a person whose consent is required becomes legally incapable of consenting, the person's guardian or conservator may consent to an

exercise of the power [*Prob. Code § 633(b)(2)*].

#### **[4] Exercise by Two or More Donees**

A power of appointment created in favor of two or more donees can only be exercised when all of the donees unite in its exercise. If one or more of the donees dies, becomes legally incapable of exercising the power, or releases the power, the power may be exercised by the others, unless expressly prohibited by the creating instrument [*Prob. Code § 634*].

#### **[5] Manifestation of Intent to Exercise**

The exercise of a power of appointment requires a manifestation of the donee's intent to exercise the power [*Prob. Code § 640(a)*]. The intent to exercise a power may be manifested in various ways [*see Prob. Code § 640(b)*]. For example, the donee may declare, in substance, that the donee exercises a specific power or powers, or all of the powers that the donee has [*Prob. Code § 640(b)(1)*]. Alternatively, the donee may purport to transfer an interest in the appointive property that the donee would have no power to transfer except by virtue of the power [*Prob. Code § 640(b)(2)*]. Or the donee may make a disposition that, when considered with reference to the property owned and the circumstances existing at the time of the disposition, manifests the donee's understanding that the donee was disposing of the appointive property [*Prob. Code § 640(b)(3)*].

#### **[6] Exercise by Will**

A power of appointment may be exercised by a will [*see Prob. Code §§ 612(a), 642*]. A will may even be effective to exercise a power of appointment that was not in existence when the will was executed, provided the will adequately manifests the intent to exercise the power [*Prob. Code § 642*]. However, a will cannot exercise a power not in existence when the will was executed if the creating instrument manifests an intent that the power may not be exercised by a will previously executed, or if the will manifests an intent not to exercise a power subsequently acquired [*Prob. Code § 642*].

A power of appointment cannot be exercised by a general residuary clause in a will, or by a will making a general disposition of all of the testator's property, unless specific reference is made to the power or there is some other indication of intent to exercise the power [*Prob. Code § 641(a); but see Prob. Code § 641(b)* (rule applicable only when donee dies on or after July 1, 1982)].

#### **[7] Types of Appointments**

Various types of appointments may be made under a power of appointment. When the power is exercisable inter vivos, for example, the donee may appoint all of the appointive property at one time, or make several partial appointments at different times [*Prob. Code § 650(a)(1)*]. The appointment may be of present or future interests, or both [*Prob. Code § 650(a)(2)*]. The appointment may be unconditional, or subject to conditions, charges, or otherwise lawful restraints on the alienation of the appointive interest [*Prob. Code § 650(a)(3), (4)*]. The appointment may be in trust, or free of trust [*Prob. Code § 650(a)(5)*], or by creating a new power of appointment [*Prob. Code § 650(a)(6)*].

If the power is, by its terms, a special power [*see § 64.44[1]*], any of these types of appointments may be made, provided the appointment complies with the terms of the creating instrument [*see § 64.47[2]*]. The donee of a special power of appointment may appoint the whole or any part of the appointive property to any one or more of the permissible appointees and exclude others, unless the donor specifies either a minimum or maximum share or amount to be appointed to one or more of the permissible appointees, in which case the exercise of the power must conform to the specification [*Prob. Code § 652*].

#### **[8] Contract to Make an Appointment**

The donee of a power of appointment can contract to make an appointment under the power to the same extent that the donee could make an effective appointment under the power [*Prob. Code* § 660(a)]. However, a contract to make an appointment can be made only while the power itself is presently exercisable [*Prob. Code* § 660(a), (b); see § 64.44[3]]. If the donee and the donor are the same person, a contract to make an appointment can be made while the power is postponed, providing the creating instrument does not expressly forbid such a contract [*Prob. Code* § 660(c)].

#### **[9] Revocability of Exercise**

The exercise of a power of appointment is generally revocable if the exercise is contained in a revocable trust instrument [*see Prob. Code* § 15400 (presumption of revocability of trust instrument)] or so long as the interest in the appointive property, whether present or future, has not been transferred or become distributable pursuant to the appointment [*Prob. Code* § 695(b)]. The exercise of a power of appointment is irrevocable, however, if the creating instrument or the instrument of exercise expressly makes it irrevocable [*Prob. Code* § 695(b)].

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:  
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*24-64 California Legal Forms--Transaction Guide § 64.48*

**§ 64.48 Release of Power of Appointment**

Unless the creating instrument provides otherwise, a discretionary power of appointment [*see § 64.44[4]*], whether general or special, testamentary or inter vivos, may be released by a written instrument signed by the donee and delivered to the person entitled to delivery [*Prob. Code § 661(a)*]; for delivery requirements, *see Prob. Code § 661(c)*].

A releasable power may be released with respect to the whole or any part of the appointive property [*Prob. Code § 661(b)*]. It may also be released in such a manner as to reduce or limit the permissible appointees [*Prob. Code § 661(b)*]. If the creating instrument designated a person or persons to take in default of the donee's exercise of the power, however, no release is possible unless the power is presently exercisable [*see § 64.44[3]*], or unless the release serves to benefit all persons designated as provided by the donor [*Prob. Code § 661(b)*].

If the release of a power of appointment affects real property, or obligations secured by real property, it must be acknowledged and proved in the same manner as grants of real property [*Prob. Code § 661(d)*]; for acknowledgment and proof of execution of instruments, *see Civ. Code §§ 1181-1207*. A release that affects real property may be also be certified and recorded [*Prob. Code § 661(d)*]. A release made on behalf of a minor donee must be made by the guardian of the minor's estate pursuant to a court order [*Prob. Code § 662*].

A release of a power of appointment is irrevocable unless the power to revoke is reserved in the instrument release the power [*Prob. Code § 695(c)*].

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
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*24-64 California Legal Forms--Transaction Guide § 64.49*

**§ 64.49 Failure to Exercise Power of Appointment**

**[1] Imperative Power**

If the donee dies without having made an effective appointment under a power of appointment, the rights of the parties to the appointive property will vary, depending on whether the power was imperative or discretionary [*see § 64.44[4]*] and whether the creating instrument specifically provided for the consequences of a failure to exercise the power.

If the power was imperative and the donee dies without having exercised the power in whole or in part, the persons designated as permissible appointees will take equally of the appointive property not already appointed, unless the creating instrument or the donee, in writing, manifests a contrary intent [*Prob. Code § 671(a)*]. If the creating instrument establishes a minimum distribution requirement that is not satisfied by an equal division of the property not already appointed, the appointees who have received a partial appointment are required to return a pro rata portion of the property they would otherwise be entitled to receive in an amount sufficient to meet the minimum distribution requirement [*Prob. Code § 671(a)*].

If an imperative power of appointment has been exercised defectively, either in whole or in part, the court may order its proper execution in favor of the person intended to be benefited by the defective exercise [*Prob. Code § 671(b)*].

If an imperative power of appointment has been created so that it confers on a person a right to have the power exercised in the person's favor, the court may compel the exercise of the power in favor of the person, or the person's assigns, creditors, guardian, or conservator [*Prob. Code § 671(c)*].

**[2] Discretionary Power**

If the power was discretionary [*see § 64.44[4]*] and the donee dies without having exercised the power, in whole or in part, the general rule is that the appointive property not effectively appointed will pass to the person named by the donor as the taker in default or, if there is none, it will revert to the donor [*Prob. Code § 672(a)*]. The same result will apply if the power was discretionary and the donee released the entire power, or made an appointment that was ineffective [*Prob. Code § 672(a)*].

If the power was a discretionary general power of appointment, however, and the donee made an ineffective appointment, an implied alternative appointment to the donee's estate may be found if the donee has manifested an intent that the appointive property be disposed of as property of the donee rather than as in default of appointment [*Prob. Code* § 672(b)].

### **[3] Death of Appointee Before Effective Date of Appointment**

Unless the creating instrument expressly provides otherwise, if an appointment by will or by some other instrument effective only at the death of the donee is ineffective because of the death of an appointee before the appointment becomes effective and the appointee leaves issue surviving the donee, the surviving issue of the appointee will take the appointed property in the same manner as the appointee would have taken had the appointee survived the donee [*Prob. Code* § 673(a),(b)]. In these circumstances, however, the property will pass only to persons who are permissible appointees or the issue of permissible appointees [*Prob. Code* § 673(a); *see Prob. Code* § 674]. If the surviving issue are all of the same degree of kinship to the deceased appointee, they will take equally; if they are of unequal degree, however, those of more remote degree will take in the manner provided in *Prob. Code* § 240 [*Prob. Code* § 673(a); *see Ch. 61, Will Drafting and Complete Will Forms*, § 61.15[6][d]].

If the power is a special power of appointment [*see* § 64.44[1]], and a permissible appointee dies before the power is exercised, the donee has the power to appoint to the issue of the deceased permissible appointee, whether or not the issue was included within the description of the permissible appointees, but only if the deceased permissible appointee was alive at the time of the execution of the creating instrument or was born thereafter [*Prob. Code* § 674(a)]. This rule applies whether the special power of appointment is exercisable by inter vivos instrument, by will, or otherwise [*Prob. Code* § 674(b)]. It does not apply, however, if the creating instrument expressly provides otherwise [*Prob. Code* § 674(a)].

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:  
Estate, Gift & Trust Law Powers of Appointment



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DIVISION IV: WILLS AND TRUSTS  
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PART II. LEGAL BACKGROUND

*24-64 California Legal Forms--Transaction Guide § 64.50*

**§ 64.50 Powers of Appointment Subject to Rule Against Perpetuities**

In California, powers of appointment are subject to the Uniform Statutory Rule Against Perpetuities [*see Prob. Code §§ 21200-21231*]. For a discussion of that rule, see *Ch. 67, Future Interests and Perpetuities*, § 67.10 et seq.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law  
Estates Created by Trusts & Wills  
Invalid Restraints & Rule Against Perpetuities  
Estate, Gift & Trust Law  
Powers of Appointment  
Real Property Law  
Estates  
Future Interests  
Invalid Restraints & Rule Against Perpetuities



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*24-64 California Legal Forms--Transaction Guide § 64.51*

**§ 64.51 Tax Consequences of Powers of Appointment**

**[1] In General**

Since powers of appointment affect the control, ownership, and enjoyment of property, they are subject to special tax rules. A power of appointment may have income, gift, or estate tax consequences for the donee, depending on whether the power is classified as a general or special power [*see § 64.44[1]*], and whether it is held by the donee at the time of the donee's death. The exercise or release of a power of appointment may also have important tax consequences.

**[2] Income Tax Consequences**

Any person who has a power exercisable solely by himself or herself to vest any portion of the income or principal of a trust in himself or herself is taxable on the income of the portion of the trust that is subject to the power [*I.R.C. § 678(a)(1); see Rev. & Tax. Code § 17731*]. Since the donee of a presently exercisable [*see § 64.44[3]*] general [*see § 64.44[1]*] power of appointment will have such a right, the donee will be liable for income taxes on the income of the property.

The same result will obtain after the power has been partially released or modified if, after the release or modification, the donee retains control over the appointive property that, if retained by the grantor, would subject the grantor to treatment as the owner [*I.R.C. § 678(a)(2); see I.R.C. §§ 671-677* (grantor tax rules); *see also Rev. & Tax. Code § 17731*].

**[3] Estate Tax Consequences**

Property that is subject to a general power of appointment [*see § 64.44[1]*] is includable in the gross estate of the donee for estate tax purposes if the donee holds the power at the time of death [*I.R.C. § 2041(a)(2)*]. A power will be classified as a general power of appointment for estate tax purposes if it amounts to a general power of appointment in substance and effect, regardless of whether the power is formally designated as a power of appointment [*Treas. Reg. § 20.2041-1(b)*]. A wide variety of powers over trust property may be deemed to constitute a general power of appointment for estate tax purposes.

For example, if a trust instrument provides that a beneficiary may appropriate or consume the principal of the trust, the power to consume or appropriate is a power of appointment [*Treas. Reg. § 20.2041-1(b)*]. Similarly, a power to affect the beneficial enjoyment of trust property or its income by altering, amending, or revoking the trust instrument, or terminating the trust, will be deemed a power of appointment [*Treas. Reg. § 20.2041-1(b)*]. However, the power to amend the administrative provisions of a trust instrument, when the administrative provisions cannot substantially affect the beneficial enjoyment of the trust property or income, is not a power of appointment for this purpose [*Treas. Reg. § 20.2041-1(b)*].

The power to discharge a trustee and appoint a successor trustee may constitute a power of appointment if, under terms of the trust instrument, the person who holds the power can name himself or herself as the successor trustee and, in that capacity, appropriate or consume the principal of the trust [*Treas. Reg. § 20.2041-1(b)*]. However, the mere power to manage, invest, or take custody of property, or to allocate receipts and disbursements as between income and principal, is not a power of appointment if the power can only be exercised in a fiduciary capacity and if the holder of the power has no power to enlarge or shift any of the beneficial interests in the property except as an incidental consequence of the discharge of his or her fiduciary duties [*Treas. Reg. § 20.2041-1(b)*].

If a power is a special power of appointment, it will have no estate tax consequences for the donee [*see Treas. Reg. § 20.2041-1(c)* (definition of "general power of appointment")].

#### **[4] Power Limited by Ascertainable Standard**

A power to consume, invade, or appropriate property for the benefit of the holder will not be deemed a general power of appointment for estate tax purposes if the power is limited by an ascertainable standard relating to the health, education, support, or maintenance of the holder [*I.R.C. § 2041(b)(1)(A)*; *Treas. Reg. § 20.2041-1(c)(2)*]. A power is limited by an ascertainable standard if the extent of the holder's duty to exercise (or not exercise) the power is reasonably measurable in terms of the beneficiary's needs for health, education, or support, or any combination of them. A power is not limited by an ascertainable standard if the holder can exercise the power for the beneficiary's "comfort," "welfare," or "happiness" [*Treas. Reg. § 20.2041-1(c)(2)*].

#### **[5] Estate Tax Consequences of Exercise or Release**

Property subject to a general power of appointment is includable in the gross estate of the holder for estate tax purposes even if the holder does not have the power at the date of death if, during the holder's lifetime, he or she exercised or released the power under circumstances such that, if the property subject to the power had been owned and transferred by the holder, the property would have been included in the decedent's gross estate under *I.R.C. § 2035, 2036, 2037, or 2038* relating to certain lifetime transfers [*I.R.C. § 2041(a)(2)* (applicable to powers created after October 21, 1942)]. If, for example, the holder of a general power of appointment exercises or releases the power in such a way that the holder retains the beneficial use of the property for life, or retains a right to revoke the exercise or release and regain the beneficial use of the property, then the property will be included in the gross estate of the holder for estate tax purposes [*I.R.C. § 2036* (estate taxation of transfers with retained life estate), *2038* (estate taxation of revocable transfers)]. For more detailed discussion, see *California Wills and Trusts, Ch. 2, Overview of Tax Laws Affecting the Disposition of Estates, § 2.06* (gross estate).

#### **[6] Gift Tax Consequences of Exercise, Release, or Lapse of Power**

The exercise, release, or lapse of a general power of appointment constitutes a transfer of the property subject to the power for gift tax purposes [*I.R.C. § 2514(b)* (powers created after October 21, 1942); *see I.R.C. § 2514(e)* (lapse of power treated as release of power)].

Whether a power has been exercised for gift tax purposes will generally be determined under the applicable state law [

*see § 64.47[1]* et seq.]. A power is released when the holder gives up the right to make an appointment under it.

A power lapses when the right to exercise the power expires. Assume, for example, that the income beneficiary of a trust has a right to demand the withdrawal of \$10,000 a year from the trust principal. If the right is not exercised by the end of a year, it will expire. If the beneficiary fails to exercise the right in any year, the right lapses, and under the gift tax law the beneficiary will be deemed to have made a transfer to the remainder beneficiaries of the trust.

Although the lapse of a general power of appointment constitutes a transfer for gift tax purposes, the transfer is taxed only to the extent that the property subject to the power in any calendar year exceeds the greater of \$5,000 or 5 percent of the aggregate value of the assets out of which the exercise of the lapsed power could have been exercised [*I.R.C. § 2514(e); Treas. Reg. § 25.2514-3(c)(4)*]. Under this rule (generally called the "Five or Five" rule), it is possible to give the beneficiary of a trust the power to withdraw (or demand the withdrawal of) property from a trust without subjecting the beneficiary to possible gift taxation if the power is not exercised, provided the power is limited to the greater of \$5,000 or 5 percent per year, and further provided that the power is not cumulative from year to year [*I.R.C. § 2514(e); Treas. Reg. § 25.2514-3(c)(4)*]. For further discussion of the "Five or Five" rule, see § 64.302[1].

### **[7] Generation-Skipping Transfer Tax Consequences**

The exercise, release, or lapse of a general power of appointment may also have generation-skipping transfer tax consequences, depending on whether the exercise, release, or lapse results in a distribution from a trust, the termination of an interest in a trust, or a direct transfer to a person who qualifies as a "skip person" under the generation-skipping transfer tax law [*see I.R.C. §§ 2601-2663*].

For generation-skipping transfer tax purposes, a "skip person" is defined as (1) any natural person who is assigned to a generation two or more generations below that of the transferor, (2) any trust in which all interests are held by skip persons, and (3) any trust in which no person holds an interest in the trust and at no time after the transfer to the trust may any distribution be made from the trust to any "non-skip person" [*I.R.C. § 2613(a)*].

Three types of taxable events are subject to the generation-skipping transfer tax. These are taxable distributions, taxable terminations, and direct skips [*I.R.C. §§ 2611, 2612*]. A taxable distribution is any distribution from a trust to a skip person [*I.R.C. § 2612(b)*]. A taxable termination is generally any termination of an interest in property held in trust, whether the termination occurs as the result of death, lapse of time, release of a power, or otherwise [*I.R.C. § 2612(a)(1)*]. A direct skip is any transfer of a property interest to a skip person if the transfer is also subject to either gift or estate tax [*I.R.C. § 2612(c)(1)*].

A full discussion of the generation-skipping transfer tax is beyond the scope of this chapter. For a general discussion of the tax, see § 60.16. For an in-depth discussion of the generation-skipping transfer tax, see *California Wills & Trusts*, Ch. 113, *Generation-Skipping Transfers and Trust Strategies* (Matthew Bender).

### **[8] Disclaimer of Power**

A person who holds a general power of appointment may have considerable flexibility in exercising or declining to exercise the power. If it is advantageous to exercise the power, the holder may do so by complying with the rules for exercise [*see § 64.47[1]*]. If unfavorable tax or other consequences would follow the exercise of the power, the holder may disclaim (that is, refuse to accept) the power and be treated for all practical purposes as if the power had never been transferred to the holder. A donee who complies with the statutory requirements for disclaimer may avoid any tax liability that would otherwise result from the power of appointment [*see I.R.C. §§ 678(d), 2518(a)*].

A disclaimer will be effective for estate or gift tax purposes only if it is a "qualified disclaimer" [*I.R.C. § 2046, 2518*]. A "qualified disclaimer" is an irrevocable and unqualified refusal to accept an interest in property that meets all of the

following requirements [*I.R.C.* § 2518(b)]:

- The refusal is in writing.
- The writing is received by the transferor of the interest, the transferor's legal representative, or the holder of the legal title to the property to which the interest relates not later than nine months after the date on which the transfer creating the interest is made or the date on which the person attains the age of 21.
- The person to whom the interest was given has not accepted the interest or any of its benefits.
- As a result of the refusal, the interest passes without any direction on the part of the person making the disclaimer to some other person.

A disclaimer that is effective under the Internal Revenue Code is also effective under the California Probate Code [*Prob. Code* § 295]. For further discussion of disclaimer, see Ch. 60A, *Gifts* .

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Powers of Appointment Tax Law Federal Estate & Gift Taxes Powers of Appointment (IRC secs. 2041, 2514) General Overview Tax Law Federal Estate & Gift Taxes Powers of Appointment (IRC secs. 2041, 2514) General Powers Tax Law Federal Estate & Gift Taxes Powers of Appointment (IRC secs. 2041, 2514) Special Powers



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*24-64 California Legal Forms--Transaction Guide §§ 64.52-64.99*

**[Reserved]**

§§ 64.52[Reserved]



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*24-64 California Legal Forms--Transaction Guide*

**NOTE:**

The following facts and documents relate specifically to the creation of testamentary trusts. Ch. 60, *Estate Planning*, contains detailed questionnaires that are designed to be filled out by the client or the client's financial advisors [*see Ch. 60, Estate Planning, § 60.200[2]* (client information form)]. It may be desirable to have the client complete these forms prior to the initial interview so that the attorney will be in a better position to evaluate the client's needs (including potential tax liability) at that time.

For preliminary determinations and a master drafting guide for complete wills, see *Ch. 61, Will Drafting and Complete Will Forms, § 61.100* et seq.



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*24-64 California Legal Forms--Transaction Guide § 64.100*

**§ 64.100 Facts**

1. Purpose(s) of trust.

a. To provide for particular beneficiaries:

- (1) Testator's spouse;
- (2) Testator's children;
- (3) Testator's grandchildren;
- (4) Combination of testator's spouse, children, and grandchildren; or
- (5) Other beneficiaries.

b. To avoid or reduce taxes:

- (1) Death taxes:

**NOTE:**

If the attorney has reviewed personal and financial questionnaires prepared by the client [*see* Note, *above*], it should be possible to determine rather quickly whether there is any realistic possibility of estate tax liability. If this possibility does exist, the attorney should begin to consider tax planning devices, including the use of a marital deduction trust. For a more complete treatment of this subject, see Ch. 60, *Estate Planning* .

- (a) Due on death of testator;

(b) Due on death of beneficiaries.

(2) Income taxes.

2. Assets of trust.

a. Value of assets:

- (1) Total current market value of all of assets to be included in trust;
- (2) Individual market value of particular assets to be included in trust;
- (3) Amount of encumbrances against any trust property;
- (4) Whether assets are likely to appreciate before testator's death.

b. Character of assets:

- (1) Marketable or unmarketable.
- (2) Real or personal.
- (3) Community or separate.
- (4) Business assets held as:
  - (a) Partnership;
  - (b) Corporation; or
  - (c) Sole proprietorship.

(5) Other.

c. Any assets that testator is likely to acquire by will or inheritance.

d. Form of title:

- (1) In testator's sole name;
- (2) In cotenancy;
- (3) Joint tenancy;
- (4) Tenancy in common;
- (5) Other.

e. Income:

(1) Nonproductive assets.

(2) Productive assets:

(a) Estimated annual income;

(b) Intervals at which income is received (e.g., monthly, quarterly, annually).

### 3. Income Beneficiaries.

a. Identities (or description of class, if a class gift is contemplated):

(1) Full name of each income beneficiary;

(2) Relationship to testator;

(3) Birth date;

(4) Marital status;

(5) Address;

(6) Names, birth dates, and addresses of children;

(7) Other identifying information (e.g., name of employer).

b. Needs:

(1) Income:

(a) Approximate income of each income beneficiary, independent of trust;

(b) Source of income;

(c) Whether income can be expected to remain constant;

(d) Approximate income each income beneficiary should have, including payments from trust;

(e) If expected income of trust will exceed needs of income beneficiary or beneficiaries, whether excess income will be accumulated.

(2) Principal:

(a) If needs of income beneficiary or beneficiaries will exceed expected income of trust, whether principal will be invaded;

(b) If principal will be invaded, whether amount of invasions will be fixed, or committed to discretion of income beneficiary, trustee, or cotrustees.

4. Remainder beneficiaries.

a. Identities (or description of class, if a class gift is contemplated):

- (1) Full name of each remainder beneficiary;
- (2) Relationship to testator;
- (3) Birth date;
- (4) Marital status;
- (5) Address;
- (6) Names, birth dates, and addresses of children;
- (7) Other identifying information (e.g., name of employer).

b. When principal will be distributed to remainder beneficiaries:

- (1) On fixed date;
- (2) At specified age; or
- (3) On death of income beneficiaries.

5. Management problems or needs.

- a. Any restrictions on powers of trustee or cotrustees;
- b. Any restrictions on investment of trust assets;
- c. Any other special needs of trust assets, beneficiaries, or proposed trustee or cotrustees.

6. Dispositive plan.

a. Income.

- (1) Amount of payments to income beneficiaries:
  - (a) All income to be paid out currently;
  - (b) Amount of payments to be in discretion of trustee or cotrustees; or
  - (c) All or part of income to be accumulated.
- (2) Frequency of payments to income beneficiaries:
  - (a) Monthly;

- (b) Quarterly;
- (c) Annually;
- (d) Other.

b. Principal.

(1) To be distributed currently:

- (a) Fixed sums; or
- (b) Power of invasion in trustee or beneficiary.

(2) To be distributed at some time in future:

- (a) On specified date or dates;
- (b) When remainder beneficiary attains specified age;
- (c) When income beneficiary dies; or
- (d) At other specified time.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsGeneral OverviewEstate, Gift & Trust LawTrustsAdministrationEstate, Gift & Trust LawTrustsBeneficiariesGeneral OverviewEstate, Gift & Trust LawTrustsCreationEstate, Gift & Trust LawTrustsTestamentary Trusts



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*24-64 California Legal Forms--Transaction Guide § 64.101*

**§ 64.101 Documents**

1. Any previous will executed by client.
2. Any inter vivos trust instrument:
  - a. Executed by client; and
  - b. In which client is:
    - (1) Trustee or cotrustee;
    - (2) Income beneficiary;
    - (3) Remainder beneficiary; or
    - (4) Donee of a power of appointment.
3. Any decree of distribution relating to testamentary trust in which client is:
  - a. Trustee or cotrustee;
  - b. Income beneficiary;
  - c. Remainder beneficiary; or
  - d. Donee of a power of appointment.

4. Any documents relating to business assets to be included in trust:

- a. Partnership agreement.
- b. Articles of incorporation.
- c. Buy-sell agreements.
- d. Other.

5. Documents relating to real estate to be included in trust:

- a. Deeds.
- b. Trust deeds.
- c. Leases.
- d. Other.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsGeneral OverviewEstate, Gift & Trust LawTrustsAdministrationEstate, Gift & Trust  
LawTrustsBeneficiariesGeneral OverviewEstate, Gift & Trust LawTrustsCreationEstate, Gift & Trust  
LawTrustsTestamentary Trusts



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*24-64 California Legal Forms--Transaction Guide §§ 64.102-64.119*

**[Reserved]**

§§ 64.102[Reserved]



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B. Preliminary Determinations for Payments and Distributions of Income and Principal

*24-64 California Legal Forms--Transaction Guide § 64.120*

**§ 64.120 Number of Trusts**

1. Will trust have more than one beneficiary?

**NOTE:**

If the trust will have only one beneficiary (such as a spouse or a minor child of the testator), it is clear that only one trust is appropriate. If, however, the trust will have two or more beneficiaries (such as a spouse and a child, or any combination of children or grandchildren), the testator may elect either to place the trust assets in a single ("family pot") trust or to divide them into separate trusts, with one trust being set aside for each of the beneficiaries. For an introduction to the advantages and disadvantages of family pot trusts and separate trusts, see discussions in § 64.200[1][b] *et seq.*

2. If trust will have more than one beneficiary, should will create single ("family pot") trust or separate trusts?

a. Are trust assets substantial enough to justify division into separate trusts?

(1) Corporate trustees are generally more willing to accept administration of large trusts than small trusts.

**NOTE:**

Since the compensation of most corporate trustees is based on a percentage of the trust assets, larger trusts are generally more acceptable to corporate trustees than small trusts. While the total fees derived from several small trusts may equal (or even exceed) the fees derived from a single, large trust, the administrative duties and costs of several small trusts will ordinarily exceed those of a single, large trust.

(2) Unanticipated needs of beneficiaries are more likely to exhaust principal of small trusts than large

trusts.

**NOTE:**

If, as is often the case, the trustee has power to invade the trust corpus to meet the beneficiaries needs (such as college education or medical expenses) [*see* § 64.122, PP 1, 2], the principal of a small trust may be more easily exhausted than that of a large trust. This will deprive the trustee of a large measure of flexibility in meeting the beneficiaries' needs and, if any beneficiary's separate trust is exhausted before termination of the trust, that beneficiary may suffer real hardships. Invasions of principal to meet the needs of one or two of several beneficiaries will be less likely to exhaust the principal of a large family pot trust.

b. Does testator wish trustee to have power to "sprinkle" income among two or more beneficiaries?

**NOTE:**

Discretion to distribute ("sprinkle") income among various beneficiaries according to their respective needs may be useful when the needs of several beneficiaries are not identical or when it is anticipated that the beneficiaries' needs will vary from time to time. When separate trusts are created, the trustee may look only to the separate trust created for a particular beneficiary to meet that beneficiary's needs.

c. Does testator wish to avoid inequities in distributions of principal among beneficiaries?

**NOTE:**

Because the ages of beneficiaries will differ, almost any scheme for distribution of principal from a family pot trust will result in disparities. If all of the principal is distributed at one time, the younger beneficiaries will have the benefit of the income for a shorter period. If the principal is distributed at different times, the value of the corpus will be diminished when later distributions are made. For a discussion of the inequities of principal distributions from family pot trusts, see discussion in § 64.200[1][c].

d. Is testator concerned about providing adequately for younger beneficiaries?

**NOTE:**

Younger children will generally be provided for more adequately with family pot trusts than with separate trusts. In general, the younger the beneficiary, the longer he or she may be expected to depend upon the trust for support. A very young beneficiary, such as a minor child or grandchild of the testator, will have a larger trust estate to look to for support when a family pot trust is created than when a separate trust is established for each beneficiary.

e. Does testator wish trustee to have wide latitude in responding to emergencies?

**NOTE:**

Generally, medical or other emergencies may be met more adequately by family pot trusts than by separate trusts. If, for example, one child suffers a major illness that requires the unexpected expenditure of a large sum of money, the trustee may respond to that emergency out of the resources of a family pot trust without severely impairing or exhausting the separate share of the affected child.

f. Does testator wish to discourage family arguments about trust payments and distributions?

**NOTE:**

Creation of a separate trust for each beneficiary may help to avoid family arguments about income

payments and principal distributions from a family pot trust. The assets set aside for each beneficiary will be clearly identified from the inception of the trust, and the trustee will have no discretion to draw upon any trust other than the trust set aside for a particular beneficiary in satisfying that beneficiary's needs.

g. Does testator wish older beneficiaries to receive principal distributions without waiting for younger beneficiaries to reach a specified age?

**NOTE:**

Family pot trusts typically provide for termination and distribution of principal to the remainder beneficiaries when the youngest beneficiary (e.g., a child or grandchild of the testator) reaches a certain age. If there is a substantial difference in the ages of the oldest and youngest beneficiaries, the oldest beneficiary may be required to wait for many years before receiving his or her share of the trust principal. For the inequities of distributions from family pot trusts and possible drafting solutions to those inequities, see discussions in § 64.200[1][c] et seq.

h. Will trust make distributions to beneficiaries who are two or more generations below generation assignment of testator?

**NOTE:**

It can be extremely difficult to evaluate the potential effect of the generation-skipping transfer tax [*see I.R.C. §§ 2601-2664*] on a decision to establish separate trusts or a single family pot trust. (Note that the GST tax has been repealed for generation-skipping transfers after 2009, but remains in effect until then [*I.R.C. § 2664*].) Substantially separate and independent shares of different beneficiaries in a single trust will be treated as separate trusts for purposes of the generation-skipping transfer tax [*I.R.C. § 2654(b)*].

In general, any transfer of principal or income to a beneficiary who is assigned to a generation that is two or more below the testator's generation is a generation-skipping transfer [*I.R.C. §§ 2601, 2611(a)*]. However, separate trusts have a more immediate potential for triggering the imposition of the generation-skipping transfer tax with regard to the corpus of each separate trust. For example, if the testator creates a separate trust for each child and one of the children dies leaving surviving issue, ordinarily the trust terminates and the corpus is distributed to the surviving grandchildren. The entire corpus of that separate trust is subject to the generation-skipping transfer tax on distribution [*see I.R.C. §§ 2601, 2611(a), 2612(a)*; *see also I.R.C. §§ 2611(c), 2613(a)(2)*]. In contrast, in a "family pot" trust, final distribution is often postponed until the death of the last child, or until some other event such as the date the youngest grandchild reaches a specified age. In this situation, if one of the children dies leaving surviving issue, the trust continues to operate. The corpus is not subject to the tax until the trust finally terminates and all the corpus is distributed to the grandchildren (or other beneficiaries who are two or more generations below that of the testator) [*I.R.C. §§ 2611(a), 2612(a)*; *see I.R.C. § 2612(a)(2)*]. Of course, if any distributions are made to grandchildren before the trust terminates, those distributions are subject to the generation-skipping transfer tax at the time of distribution, unless exempt [*I.R.C. §§ 2601, 2612, 2613(a)*; *see I.R.C. § 2631*].

i. Is trust (or any portion of trust) designed to qualify for federal estate tax marital deduction as lifetime income/power of appointment or qualified terminable interest property (QTIP) trust?

**NOTE:**

The use of one trust with two or more income beneficiaries for marital deduction purposes is risky at best. At worst, such a plan will wholly disqualify the interest passing to the surviving spouse for the marital deduction.

An interest in a lifetime income/power of appointment trust will qualify for the marital deduction only if the surviving spouse is entitled to all of the income from the entire interest or all or the income from a "specific portion" of the interest [*I.R.C. § 2056(b)(5)*]. "Specific portion" means a portion determined on a fractional or percentage basis [*I.R.C. § 2056(b)(10)*; *see Treas. Reg. § 20.2056(b)-5(c)* (meaning of "specific portion")]. A substantially similar rule applies to QTIP trusts [*see Treas. Reg. § 20.2056(b)-7(b)(1)(ii)*].

The will drafter should attempt to qualify a partial interest in a trust only after carefully studying the statutes and regulations applicable to lifetime income/power of appointment trusts and QTIP trusts. If the attorney is not confident that the proposed partial interest will satisfy all the statutory and regulatory requirements, a distinct and separate trust should be used as a vehicle for the marital deduction gift. The safest and most commonly used method is simply to divide the trust estate into two trusts--a marital deduction trust and a residuary trust. For wills illustrating basic two-trust arrangements commonly used in testamentary trusts, see §§ 61.213 and 61.214. For additional discussion of the federal estate tax marital deduction and marital deduction trusts, see Ch. 71, *Marital Deduction Trust Provisions* .

### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsGeneral OverviewEstate, Gift & Trust LawTrustsBeneficiariesGeneral OverviewEstate, Gift & Trust LawTrustsCreationEstate, Gift & Trust LawTrustsTestamentary Trusts



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California Legal Forms--Transaction Guide

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DIVISION IV: WILLS AND TRUSTS  
CHAPTER 64 TESTAMENTARY TRUSTS: PAYMENT AND DISTRIBUTION PROVISIONS  
PART III. TRANSACTION GUIDE

B. Preliminary Determinations for Payments and Distributions of Income and Principal

*24-64 California Legal Forms--Transaction Guide § 64.121*

**§ 64.121 Payments or Accumulations of Income**

1. Should will require trustee to pay all of net income to income beneficiary or beneficiaries?

**NOTE:**

For a general discussion of trust "income" and "principal," see discussions in §§ 64.37 and 64.220[1][b].

a. Does testator wish to favor income beneficiaries at expense of remainder beneficiaries?

**NOTE:**

Payment of all trust income favors the income beneficiary at the expense of the remainder beneficiaries because it ensures that the income beneficiary will receive all the trust income regardless of whether or not it is actually necessary for his or her support or maintenance.

b. Are income beneficiaries likely to need all of trust income for their support?

c. Is any income beneficiary a minor?

**NOTE:**

If an income beneficiary is a minor and it is likely that he or she can be supported without recourse to the trust income, it may be desirable to provide that income that might otherwise be paid to that beneficiary be accumulated until he or she reaches age 21 or some other specified age.

d. Is trust designed to qualify for federal estate tax marital deduction as lifetime income/power of

appointment or QTIP trust?

**NOTE:**

If the trust is designed to qualify for the federal estate tax marital deduction as a lifetime income plus power of appointment or QTIP trust, the surviving spouse must be entitled to receive all of the income, payable annually or at more frequent intervals [*I.R.C.* § 2056(b)(5), (7); *see Treas. Reg.* § 20.2056(b)-5(f) (lifetime income/power of appointment trusts); 20.2057(b)-7(d)(2)-(6) (income requirements applicable to QTIP trusts)].

e. Do tax advantages of "simple trust" justify requiring current distribution of all income?

**NOTE:**

A trust is "simple" if it requires all of its income to be distributed currently, does not distribute any amounts other than income, and makes no charitable distributions [*I.R.C.* § 651(a)]. All other trusts are "complex" [*I.R.C.* § 661(a)].

(1) "Simple" trust is entitled to annual deduction of \$300 (instead of \$100), in lieu of personal exemption [*I.R.C.* § 642(b)]; and

(2) Distribution of all current income under "simple" trust will be taxed at beneficiaries' rates, which are likely to be lower than trust rate [*see I.R.C.* §§ 642, 651, 661(a); *see also* discussions in § 64.39[2] et seq.].

2. Should will require trustee to pay income beneficiaries fixed amount out of trust income?

a. Does testator wish to supplement income beneficiary's income rather than provide full support for income beneficiary?

**NOTE:**

It will be difficult, if not impossible, to anticipate a given beneficiary's total income needs years before those needs arise. Although the educational requirements of a young beneficiary may reasonably be predicted, the medical needs of an older beneficiary can rarely be anticipated. Changing economic conditions (including widely varying rates of inflation) add to this difficulty. Fixed periodic payments (whatever their amount) are likely to be more or less than what is required to fully satisfy an income beneficiary's needs. If the purpose of the trust is merely to supplement a beneficiary's income rather than provide full support, the testator need not be as concerned about the income beneficiary's fluctuating needs. In that case, the trust may safely require that a small, fixed sum be paid.

b. Is there a danger that fixed periodic payments might deplete or exhaust trust principal?

**NOTE:**

If the net income of the trust is not large (or if the amount of the net income is susceptible to variation), there is a danger that fixed periodic payments will exceed the net income and thus impair the principal of the trust. If preservation of principal is one of the goals of the trust, fixed periodic payments will be undesirable unless the trust income is clearly adequate to meet the payments. If the will calls unconditionally for the payment of a fixed periodic sum, the sum is deemed an annuity and must be paid whether or not the income is or is not sufficient for the purpose [*Prob. Code* § 663(c); *Estate of Luckel (1957) 151*].

*Cal. App. 2d 481, 488-490, 312 P.2d 24* ]. For general discussion of annuities, see *Ch. 63, Will Provisions, § 63.508[1]*.

c. Does testator have doubts about prospective trustee's ability to determine income beneficiaries' needs and make appropriate income payments?

**NOTE:**

If the prospective trustee lacks business experience or the kind of judgment necessary to fairly and accurately determine the needs of the income beneficiaries, requiring fixed periodic payments will avoid the necessity of granting the trustee the discretion to determine the amount of the income payments.

d. Does testator wish to eliminate disputes among beneficiaries?

**NOTE:**

When the trustee has discretion to determine the amount of income that will be paid to two or more beneficiaries, the possibility of disputes among those beneficiaries (and litigation to resolve those disputes) exists. Requiring fixed periodic payments is one way of avoiding such disputes.

e. Is trust designed to qualify for federal estate tax marital deduction as lifetime income/power of appointment trust or QTIP trust?

**NOTE:**

The beneficiary of a lifetime income plus power of appointment trust or QTIP trust must have the right to receive all of the income from the trust property, payable annually or at more frequently intervals [*I.R.C. § 2056(b)(5), (7); see Treas. Reg. § 20.2056(b)-5(f)* (lifetime income/power of appointment trusts); *20.2057(b)-7(d)(2)-(6)* (income requirements applicable to QTIP trusts)].

3. Should will give trustee discretion to determine amount of income to be paid to income beneficiaries?

a. Are there two or more income beneficiaries with different needs?

**NOTE:**

Whenever there are two or more income beneficiaries, it is possible (or even likely) that their needs will differ, or that the needs of different income beneficiaries will vary from time to time. For example, one income beneficiary may require larger payments while he or she is pursuing an education and smaller payments thereafter. Another may need greater payments during times of illness or unemployment. A trustee with discretion to determine the amount of income to be paid to two or more income beneficiaries may make payments to income beneficiaries who are in actual need and withhold payments from income beneficiaries who have no needs, or adjust payments among the income beneficiaries, making larger payments to income beneficiaries with greater needs. A trustee with discretion to determine the amount of income that will be paid to two or more income beneficiaries is said to have a "sprinkling" power.

b. Is any beneficiary likely to need protection from creditors?

**NOTE:**

If the trustee has discretion to determine when and in what amounts an income beneficiary

will receive income from the trust, provisions specifically limiting the right of the beneficiary's creditors to reach the beneficiary's interest in the trust ("spendthrift" provisions) may be unnecessary. If and when the beneficiary's income interest is threatened by a creditor, the trustee may withhold payments; or, if there are several income beneficiaries and the trustee has the power to "sprinkle" income among them, the trustee may shift payments to the other income beneficiaries. For preliminary determinations relating to "spendthrift" provisions, see § 64.121, P 6. For legal rules relating to "spendthrift" protection, see discussions in § 64.41[1] et seq.

c. Does testator wish trustee to have power to reduce (or equalize) income tax liabilities of beneficiaries?

**NOTE:**

A trustee with power to "sprinkle" income among two or more income beneficiaries may make larger payments to beneficiaries in lower income tax brackets and lower payments to beneficiaries in higher income tax brackets, thus effecting an overall income tax savings for the income beneficiaries.

d. Is trust designed to qualify for federal estate tax marital deduction as lifetime income/power of appointment trust or QTIP trust?

**NOTE:**

The right of the surviving spouse to receive all of the income, payable at least annually, must be assured if the trust is designed to qualify for the federal estate tax marital deduction as a lifetime income plus power of appointment trust or QTIP trust [*I.R.C.* § 2056(b)(5), (7); *see Treas. Reg.* § 20.2056(b)-5(f) (lifetime income/power of appointment trusts); 20.2057(b)-7(d)(2)-(6) (income requirements applicable to QTIP trusts)].

e. Will trust make distributions to beneficiaries who are assigned to generations two or more generations below that of testator?

**NOTE:**

Distributions of income or principal to trust beneficiaries who are assigned to generations two or more generations below that of the testator will trigger imposition of the generation-skipping transfer tax [*I.R.C.* §§ 2601, 2611(a)]. For a general consideration of testamentary trusts and the generation-skipping transfer tax, see the discussions in § 64.40[1] et seq.

4. If will gives trustee discretion to determine amount of income to be paid to income beneficiary or beneficiaries, should trustee be required (or forbidden) to consider income beneficiaries' outside means?

**NOTE:**

The will may or may not require the trustee, when making discretionary payments to an income beneficiary (out of either trust income or principal), to consider the beneficiary's income outside the trust. If the trust instrument does not require the trustee to make payments to the beneficiary regardless of the beneficiary's outside means, the trustee will ordinarily be required to consider outside means in making payments [ *Estate of Ferrall (1953) 41 Cal. 2d 166, 176, 258 P.2d 1009* ; *see* discussion in § 64.200[1][f]].

a. Does testator wish to encourage income beneficiaries to provide for themselves?

**NOTE:**

An income beneficiary whose payments from the trust will be the same whether or not that beneficiary is gainfully employed may be encouraged to lead an idle life. Requiring the trustee to consider the beneficiary's employment capabilities, in contrast, may encourage the beneficiary to employ himself or herself gainfully.

b. Does testator wish trustee to conserve trust principal?

**NOTE:**

Requiring the trustee to consider outside means may be a significant means of saving income and, to the extent that undistributed income is accumulated [*see § 64.141, P 5*], conserving or even enhancing principal. If the will calls for payments to several income beneficiaries, and if the trust income will be stretched to meet all of the income beneficiaries' needs, considering outside means may help to conserve assets and cover more of the beneficiaries' legitimate needs.

c. Does testator wish to reduce time required for, and difficulty of, trust administration?

**NOTE:**

Requiring the trustee to determine outside means may add significantly to the trustee's responsibilities and thus increase the time required for (and the resulting costs of) trust administration. Forbidding consideration of outside means may, conversely, help to reduce those responsibilities and lower administration costs.

d. Does testator wish to reduce likelihood of disputes among beneficiaries?

**NOTE:**

Prescribing a means test for trust payments may result in disputes among beneficiaries and encourage litigation to determine the beneficiaries' entitlements. Dispensing with determination of outside means may help to reduce such disputes.

e. Does testator wish beneficiaries to exhaust other resources before receiving income payments from trust?

**NOTE:**

Requiring consideration of outside means may be interpreted as requiring that a beneficiary exhaust other resources before receiving payments from the trust. Such a requirement could work a significant hardship on an otherwise deserving income beneficiary. Further, if the beneficiary's living expenses are increased by loss of the other assets (such as a residence), such a provision could prove costly to the trust by ultimately increasing the income beneficiary's needs.

5. Should will require trustee to accumulate undistributed income?

**NOTE:**

Any will or trust instrument may direct the trustee to accumulate income [*Civ. Code § 724(a)*]. However, an accumulation of income generally cannot extend beyond the time permitted for the vesting of future interests under the rule against perpetuities [*Civ. Code § 724(a)*, **but see** *Civ. Code § 724(b)* (exception for trusts forming part of employee profit-sharing or retirement plan)]. If a trust instrument requires that income be accumulated for a longer time, the requirement is void to the extent that it exceeds the permissible perpetuities period [*Civ. Code § 725*]. In California, perpetuities are subject to the Uniform

Statutory Rule Against Perpetuities (USRAP) [*see Prob. Code §§ 21200-21231*], which includes a recodification of the common law rule against perpetuities [*see Prob. Code §§ 21205(a), 21206(a), 21207(a)*]. For a detailed discussion of the USRAP and its operation in California, see *Ch. 67, Future Interests and Perpetuities, § 67.16*

a. Does testator wish undistributed income to be preserved for possible future benefit of income beneficiaries?

**NOTE:**

If the will does not require accumulation, any income not currently distributed to the income beneficiaries belongs to and must be currently distributed to the person or persons presumptively entitled to the next eventual interest (ordinarily the remainder beneficiary) [*Civ. Code § 733; Estate of Robinson (1968) 262 Cal. App. 2d 32, 40-42, 68 Cal. Rptr. 420; see discussions in §§ 64.42[1] et seq. and 64.200[1][i]*].

If undistributed income is currently distributed to a remainder beneficiary, it will not be added to principal, and income from the undistributed income will not be available for future payment to the income beneficiaries. Accumulation, on the other hand, will enhance the corpus and thus increase the income available for payment to the income beneficiaries at a future time when they may need it most.

b. Does testator wish to protect income beneficiaries from improvidence in handling trust income?

**NOTE:**

If the income beneficiaries are minors or inexperienced adults, a direction for accumulation will authorize the trustee to withhold funds until such time as they have attained sufficient maturity or experience to handle the funds themselves.

c. Does testator wish to contribute to income beneficiaries' incomes without making them totally dependent on trust?

**NOTE:**

If a minor is an income beneficiary and also a remainder beneficiary, a valid direction for accumulation will empower the trustee to pay part of the income to the beneficiary on a current basis and accumulate the rest for later distribution as part of the trust principal. If, for example, a minor grandchild of the testator is both an income beneficiary and a remainder beneficiary, the testator may wish the minor's parents to provide for his or her ordinary support until the grandchild reaches college age (or majority), at which time the trust can provide funds for education or other special needs (such as the purchase of a home or a business). A valid direction for accumulation will empower the trustee to pay part of the income to the income beneficiary currently and to accumulate the rest for later distribution to the beneficiary as remainder beneficiary.

d. Does will give trustee "sprinkling" power?

**NOTE:**

A valid direction for accumulation is, in most cases, a necessary complement of a "sprinkling" power. Without the power to accumulate undistributed income, the trustee's discretion to determine when and in what amounts income payments should be made to the income beneficiaries will (if the income beneficiaries, as is often the case, are also

remainder beneficiaries) be largely ineffective. If, for example, the trustee determines that only part of the net income should currently be distributed to the income beneficiaries, and if the income beneficiaries are also remainder beneficiaries, the income beneficiaries will, in the absence of a valid direction for accumulation, be entitled to current distribution of the undistributed balance of the income. This will largely undermine the purposes of the "sprinkling" power.

e. Does testator wish trustee to have power to reduce (or equalize) income tax liabilities of beneficiaries?

**NOTE:**

A trustee who has power both to "sprinkle" and to accumulate may, in appropriate cases, help the beneficiaries reduce (or equalize) their income tax liabilities. For example, a trustee with power both to "sprinkle" income and principal and to accumulate undistributed principle may make payments of accumulated income to beneficiaries in low income tax brackets and of principal to beneficiaries in high brackets, thus producing a net tax savings for the beneficiaries. Alternatively, the trustee may be authorized to distribute accumulated income after a beneficiary's higher earning years are past (e.g., upon retirement or after a serious illness) and while the beneficiary's income is taxed at lower rates. However, accumulations of income will often result in a higher overall income tax burden. This is because trust income that accumulates in the trust is subject to higher tax because of compressed tax brackets than when it is distributed to beneficiaries than when it is accumulated by the trust [*see I.R.C. § 1(a)-(e), (i)(2)* and discussion in § 64.39[4]].

6. Should beneficiary's right to receive income be subject to "spendthrift" provisions?

**NOTE:**

There are significant legal limitations on the protections afforded by spendthrift trusts. For a general consideration of spendthrift provisions and their use in California, see discussions in § 64.41[1] et seq.

a. Does testator have doubts about income beneficiary's ability to handle money or manage his or her own affairs?

**NOTE:**

If the income beneficiary is inexperienced in business matters, has little ability to handle money, or is the kind of person who is likely to be imposed upon, a "spendthrift" provision may help protect him or her from improvidence. Protection from improvidence may be particularly appropriate if the trust is intended to support the income beneficiary over an extended period. In general, the greater the beneficiary's dependence on trust income, the greater the inherent danger from improvident handling of trust payments. Conversely, if the beneficiary's payments from the trust will continue for only a short time, spendthrift protection ordinarily will be less useful.

b. Would "spendthrift" clause unnecessarily restrict beneficiary's freedom to use trust income?

**NOTE:**

If the income beneficiary is not the kind of person who is likely to need spendthrift protection [*see § 64.120, P 6(a)*], a spendthrift clause will serve little purpose and will, in fact, constitute a formidable obstacle to the reasonable and provident management of the beneficiary's affairs.

c. Does will give trustee discretion to determine amounts of income (or principal) that will be paid to income beneficiary?

**NOTE:**

If the trustee has discretion to determine amounts of income and principal that will be paid to or distributed among two or more income beneficiaries (a "sprinkling" power), spendthrift provisions may be unnecessary to protect the income beneficiaries from creditors. If any income beneficiary's income interest is threatened by a creditor, the trustee may shift payments to the other income beneficiaries.

d. Is trust designed to qualify for federal estate tax marital deduction as lifetime income/power of appointment trust or QTIP trust?

**NOTE:**

The Treasury Regulations provide that a clause under which payments to the surviving spouse will be cut off if there is an attempt to violate a spendthrift clause will defeat the marital deduction if the trust is a lifetime income/power of appointment trust or a QTIP trust [*Treas. Reg. §§ 20.2056(b)-5(f)(7)* (lifetime income/power of appointment trusts), *20.2056(b)-7(d)(2)* (applicability to QTIP trusts)]. Although California law provides that a marital gift will be construed so as to comply with the marital deduction provisions of the Internal Revenue Code if the intention to make a qualifying gift appears from the will [*Prob. Code § 1032(a)*], careful attorneys will not rely on rules of construction to save otherwise questionable marital deduction trusts. If a marital deduction gift is intended, the will should not provide for cutting off or terminating the surviving spouse's right to receive trust income.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsGeneral OverviewEstate, Gift & Trust LawTrustsCreationEstate, Gift & Trust LawTrustsTestamentary Trusts



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PART III. TRANSACTION GUIDE

B. Preliminary Determinations for Payments and Distributions of Income and Principal

*24-64 California Legal Forms--Transaction Guide § 64.122*

**§ 64.122 Distributions of Principal**

1. Should will authorize trustee to invade principal for benefit of income beneficiaries?

**NOTE:**

The will may give the trustee discretion to make distributions of principal to a beneficiary or beneficiaries, or may confer on a beneficiary a right to compel the trustee to make such a distribution to the beneficiary. The power to make distributions of principal to a beneficiary is termed a "power of invasion."

a. Will net income of trust be sufficient to meet all reasonably anticipated needs of income beneficiaries without invasion?

**NOTE:**

If the net income of the trust is small or modest, and if the testator wishes the trust to provide all of the support of a designated income beneficiary or beneficiaries, the power to invade principal will ordinarily be desirable. When the needs of the designated income beneficiary or beneficiaries exceed the net income, the trustee (or the beneficiaries) may apply (or compel the application of) trust principal. Every trust should be carefully designed to fit the needs of the individual beneficiaries. If a minor beneficiary has educational needs, for example, those needs may require application of trust principal. If an adult beneficiary has special medical or other health needs that cannot be met out of the net income of the trust, invasion of principal may also be necessary.

b. Does testator wish to preserve trust principal from impairment?

**NOTE:**

If the trust assets are small or modest in size, and if the testator does not wish to impair trust principal, a power of invasion will usually be inappropriate. Invading principal to meet current support needs will not impair the remainder beneficiary's interest if the sole income beneficiary is also the sole remainder beneficiary (such as a minor child of the testator). If, however, the remainder beneficiary is not an income beneficiary, every invasion of principal will, to the extent of the invasion, impair the principal and diminish the remainder beneficiary's interest.

c. Is trust designed to supplement income beneficiary's income rather than provide full support?

**NOTE:**

If the trust is designed merely to supplement an income beneficiary's income, there will be less reason to authorize invasions of principal than if the trust is intended to provide the beneficiary's full support. An income beneficiary who looks to a trust for his or her full support may be expected from time to time to have needs that cannot be fully met out of income. On the other hand, an income beneficiary who has comfortable means outside the trust (e.g., an adult child of the testator) may reasonably be expected to look to his or her own resources to satisfy unusual or unanticipated needs.

d. Are income beneficiaries and remainder beneficiaries likely to argue over invasions?

**NOTE:**

If the income beneficiaries and the remainder beneficiaries are not the same persons, invasions of principal may be the subject of disputes, since every invasion of principal will inure to the benefit of an income beneficiary and to the detriment of a remainder beneficiary. Even when the right to invade is undisputed, the amount of the invasions may be questioned. One way of avoiding such disputes is simply to forbid invasions.

2. If will authorizes invasions of principal, should right to invade be limited?

**NOTE:**

An unlimited right to invade the corpus of a trust will be construed as a general power of appointment and cause assets subject to the power to be included in the holder's estate for federal estate tax purposes [*I.R.C. § 2041*; *Treas. Reg. § 20.2041-1(b)*]. For the same purposes, the value of the gross estate of any decedent includes the value of any property with respect to which the decedent had, at the time of his or her death, a general power of appointment created after October 21, 1941, or with respect to which the decedent has at any time exercised or released a general power of appointment [*I.R.C. § 2041(a)(2)*]. If one of the purposes of a trust is to effect estate tax savings by removing assets from a beneficiary's estate, the will drafter must take precautions to avoid giving the beneficiary a power of invasion that amounts to a general power of appointment.

a. Should power of invasion be limited by "ascertainable standard"?

**NOTE:**

A right to invade the corpus of a trust will not be deemed a general power of appointment if it is limited by an "ascertainable standard" relating to the health, education, support, or maintenance of the donee [*I.R.C. § 2041(b)(1)(A)*; *see Treas. Reg. § 20.2041-1(c)(2)*]. For a general discussion of "ascertainable standards," see discussion in § 64.51[4].

b. Should power of invasion be limited to annual withdrawal of \$5,000 or five percent of trust principal,

whichever is greater?

**NOTE:**

Under the "five or five" rule [*see I.R.C. § 2041(b)*], the taxable estate of a beneficiary who fails to exercise a general power of appointment will not include assets subject to the power if the beneficiary did not have the power to appoint more than \$5,000 or 5 percent of the trust estate, whichever is greater [*I.R.C. § 2041(b)(2)*]. If the beneficiary has the power to withdraw more than the statutory maximum, and if the beneficiary does not exercise the power, the beneficiary's estate will include the excess over the statutory maximum. That is, the beneficiary's estate will include assets subject to the power to the extent that the power exceeds the greater of \$5,000 or 5 percent [*Treas. Reg. § 20.2041-3(d)(3)-(5)*]. For a general discussion of powers of invasion and the "five or five" rule, see discussion in § 64.302.

3. What provision should will make for determining date of distribution of principal to remainder beneficiaries?

a. Should will call for distribution of principal on death of income beneficiaries?

**NOTE:**

If a principal purpose of the trust is to provide income support for one or more beneficiaries for life, and if none of the beneficiaries is also a remainder beneficiary, the will should provide for distribution of the principal on the death of the income beneficiaries. Any earlier distribution will interfere with the beneficiaries' support and defeat the purpose of the trust. The situation is otherwise, however, if one of the income beneficiaries is also a remainder beneficiary. In such a case, the will may provide for distribution of the principal to the remainderman upon the death of the beneficiaries who are not remainder beneficiaries.

b. Should will call for distribution of principal to remaindermen when designated beneficiary attains specified age?

**NOTE:**

If a principal purpose of the trust is to support a designated beneficiary during his or her minority (or until such time as the income beneficiary will have, in the normal course of development, become self-supporting), the will may call for distribution of the principal when the income beneficiary (or the youngest of two or more income beneficiaries) attains a certain age, such as 25 or 30. Such a provision will further the purpose of the trust by assuring that the beneficiary will have regular income payments and the benefit of competent asset management during his or her minority and, if desired, during the period required for his or her education, after which the remainder beneficiaries may enjoy the full use of the principal.

c. Should will call for distribution of principal on specified date?

**NOTE:**

A provision calling for distribution on a specified date will generally be advisable only if the date corresponds to some other event which has significance in the overall trust plan (e.g., a particular birthday of a beneficiary). Such a provision will be inappropriate if the principal purpose of the trust is to provide lifetime support for the income beneficiaries, since the date of termination of the lifetime interests cannot be determined in advance.

d. Would proposed scheme of distribution violate rule against perpetuities?

**NOTE:**

The distributive scheme of the trust should be scrutinized for potential perpetuities problems. In California, perpetuities are subject to the Uniform Statutory Rule Against Perpetuities (USRAP) [*see Prob. Code § 21200 et seq.*], which includes a recodification of the common law rule against perpetuities [*see Prob. Code §§ 21205(a), 21206(a), 21207(a)*]. Under that recodification, a "nonvested" property interest is invalid unless (1) when the interest is created, it is certain to either vest or terminate no later than 21 years after the death of a person alive at the time of creation or (2) the interest actually vests or terminates within 90 years after its creation [*Prob. Code § 21205(a)*]. Certain powers of appointment are also invalid unless they meet the requirements of the rule [*see Prob. Code §§ 21206(a), 21207(a)*]. Although the rule against perpetuities does not require the termination of a trust that continues beyond the permissible perpetuities period if all interests in the trust are vested, powers of appointment, accumulations of income, spendthrift clauses, and other provisions of the trust may violate the rule against perpetuities or some related rule if termination is not required. To guard against this possibility, it is generally good practice to require the termination of the trust at the end of the applicable perpetuities period and to guard against inadvertent violation of the rule by including a perpetuities savings clause in the will. For general coverage of the Uniform Statutory Rule Against Perpetuities, together with forms for perpetuities savings clauses, see Ch. 67, *Future Interests and Perpetuities* .

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsGeneral OverviewEstate, Gift & Trust LawTrustsCreationEstate, Gift & Trust LawTrustsTestamentary Trusts



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PART III. TRANSACTION GUIDE

B. Preliminary Determinations for Payments and Distributions of Income and Principal

*24-64 California Legal Forms--Transaction Guide § 64.123*

**§ 64.123 Powers of Appointment**

**NOTE:**

For a general discussion of the legal rules relating to powers of appointment and their uses, see § 64.43[1] et seq.

1. Should will create power of appointment?

a. Does testator wish to postpone or delegate decision as to who will receive trust principal upon termination of lifetime income interest?

**NOTE:**

Powers of appointment are usually used in conjunction with lifetime income interests in trust property, although they may also be used in connection with income interests for a period of years (e.g., income to testator's children for 25 years). By terms of a typical power of appointment, the holder (usually an income beneficiary) is empowered to act for or on behalf of the creator (the testator) and to designate the person or persons who will take the trust property upon termination of the income interest. If trust property is to be distributed to beneficiaries who are much younger than the testator, postponing the decision as to which persons will take may serve a useful purpose. The holder of the power can select the ultimate takers years after the power is created, at a time when the identities, characters, and special needs of the potential recipients are known.

b. Does testator wish to foster deference to wishes of older family members?

**NOTE:**

If one of the testator's children has the power to decide which of the testator's grandchildren will receive

the principal of the trust upon termination of the child's lifetime income interest, the grandchildren may show greater deference to the wishes of their parent than if their rights to the trust property had been fixed from the time of the testator's death. Empowering a parent to decide which children will receive the grandparent's property may, however, create or exacerbate family arguments and rivalries.

c. Does testator wish to facilitate implementation of donee's estate plan?

**NOTE:**

A power of appointment may, in appropriate circumstances, help the donee accomplish his or her own estate planning objectives. For example, an adult child of the testator who has substantial assets that he or she plans to leave to his or her children (the testator's grandchildren) may coordinate distribution of the appointive property with distribution of his or her own estate.

d. Is trust designed to qualify for federal estate tax marital deduction as lifetime income plus power of appointment trust [*I.R.C. § 2056(b)(5)*; *see § 64.123*, P 2(a)].

**NOTE:**

Although lifetime income plus power of appointment trusts are generally less flexible than qualified terminable interest property (QTIP) trusts [*see I.R.C. § 2056(b)(7)*], they are one means of securing the benefits of the marital deduction.

2. If will creates power of appointment, should power be "general" or "special"?

**NOTE:**

A power of appointment is "general" if it is exercisable in favor of the donee, the donee's estate or creditors, or creditors of the donee's estate, whether or not it is also exercisable in favor of others [*I.R.C. §§ 2041(b)(1)*, *2514(c)*; *Prob. Code § 611(a)*]. All other powers are "special" [*Prob. Code § 611(d)*; *see § 64.44[1]*].

a. Is trust designed to qualify for federal estate tax marital deduction as lifetime income plus power of appointment trust?

**NOTE:**

To qualify a marital deduction gift as a lifetime income plus power of appointment trust, the power of appointment must be a general power [*I.R.C. § 2056(b)(5)*].

b. Does testator wish to remove appointive property from donee's estate for federal estate tax purposes?

**NOTE:**

If the testator wishes to create a power of appointment but does not wish the appointive assets to be included in the donee's estate for federal estate tax purposes, the power should be special. Any action or inaction by the holder of a general power of appointment (such as exercise or release of the power--or even allowing the power to lapse) that results in another person or persons receiving the appointive property will cause federal gift or estate tax consequences [*see I.R.C. §§ 2041(a)*, *2514(b)*; *Treas. Reg. § 25.2514-3*; for a general discussion of the federal estate and gift tax consequences of general powers of appointment, *see § 64.51[3]-[6]*].

(1) If power is limited by "ascertainable standard" relating to holder's health, education,

support, or maintenance, appointive property will not be subject to federal estate or gift tax in hands of the holder [*I.R.C. §§ 2041(b)(1)(A), 2514(c)(1)*].

**NOTE:**

For discussion, see § 64.51[4].

(2) If power is exercisable only in conjunction with person who has substantial interest in appointive property that is adverse to exercise of power in favor of donee, appointive property will not be subject to federal estate or gift tax in hands of the holder [*I.R.C. §§ 2041(b)(1)(C)(ii), 2514(c)(3)(b)*].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Powers of Appointment Estate, Gift & Trust Law Trusts General Overview Estate, Gift & Trust Law Trusts Creation Estate, Gift & Trust Law Trusts Testamentary Trusts



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B. Preliminary Determinations for Payments and Distributions of Income and Principal

*24-64 California Legal Forms--Transaction Guide §§ 64.124-64.139*

**[Reserved]**

§§ 64.124[Reserved]



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C. Drafting Guide for Testamentary Trust Provisions Governing Payment and Distribution of Income and Principal

*24-64 California Legal Forms--Transaction Guide*

**NOTE:**

This guide provides a general overview of the categories of provisions that should be included in testamentary trusts, together with indications of the more commonly used alternatives within these categories and references to illustrative provisions in the forms in this chapter. Because each testamentary trust must be tailored to the unique circumstances of the individual testator, it is obviously impossible to anticipate all possible combinations and drafting possibilities.

For drafting guides to marital deduction trusts, including survivor's trusts, see §§ 71.120-71.121. Marital deduction formula clauses and payment and distributive provisions for marital deduction trusts are illustrated and discussed in Ch. 71, *Marital Deduction Trust Provisions* .



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C. Drafting Guide for Testamentary Trust Provisions Governing Payment and Distribution of Income and Principal

*24-64 California Legal Forms--Transaction Guide § 64.140*

**§ 64.140 Introductory Provisions**

1. Include language creating trust, as follows:

a. Testamentary gift to trustee, consisting of:

(1) Residue of estate;

**NOTE:**

The forms in this chapter are drafted as residuary trusts, because testamentary trusts are most commonly funded with the residue of the testator's estate. For a general consideration of the uses and purposes of residuary clauses, see *Ch. 63, Will Provisions, § 63.530[1]*. For residuary clauses suitable for use in nontrust wills, see *Ch. 63, Will Provisions, §§ 63.530-63.591*. For residuary clauses suitable for use in trust wills, see the introductory paragraphs to §§ 64.200-64.207.

(2) Specific sum of money; or

(3) Other fund or property.

**NOTE:**

The trust may be created by language making a testamentary gift of a specific sum of money, an identifiable fund, or any other property. For the uses and purposes of general legacies (e.g., gifts of money), see *Ch. 63, Will Provisions, § 63.351[1]*; for the uses of and purposes of specific legacies (i.e., gifts of specifically identified property), see *Ch. 63, Will Provisions, § 63.370[1]*; for the uses and purposes of demonstrative legacies (i.e., gifts to be satisfied out of particular funds or properties), see *Ch. 63, Will Provisions, § 63.390[1]*. To make any nonresiduary gift to a trustee, the introductory paragraphs of §§ 64.200-64.207 may be modified appropriately.

b. Language identifying trustee, either in:

(1) Same paragraph as gift; or

**NOTE:**

The trustee may be appointed in the same paragraph in which the gift to the trustee is made. For examples of provisions both making gifts and appointing trustees, see the introductory paragraphs to § 64.200-64.207.

(2) Separate paragraph or paragraphs.

**NOTE:**

The trustee, cotrustees, and successor trustees, if any, may be appointed in separate paragraphs of the will. For provisions appointing trustees in separate paragraphs, see *Ch. 64A, Testamentary Trusts: Trustee Provisions*, §§ 64A.200-64A.202. For forms providing for the appointment of alternate and successor trustees, see *Ch. 64B, Testamentary Trusts: Administrative Provisions*, §§ 64B.270-64B.272. If the trustee is appointed in a separate paragraph of the will, the gift to the trustee should cross-refer to the paragraph in which the appointment is made. For examples of provisions that refer to the paragraph in which the trustee is appointed, see the introductory paragraphs to §§ 64.200-64.207.

c. Language showing testator's intention to make gift in trust.

**NOTE:**

The gift to the trustee should clearly reflect the testator's intention to make the gift in trust, and not outright. For examples of will provisions making gifts in trust, see the introductory paragraphs to §§ 64.200-64.207.

2. Include language specifying whether trust estate is to be held and administered as single trust or divided into separate trusts:

**NOTE:**

If the trust estate is to be divided, it may be divided at the outset of the trust or at some future time. The trust may, for example, provide for its administration as a single trust during the lifetime of the lifetime income beneficiary or beneficiaries (who may be the testator's spouse or children), with division occurring upon the death of the lifetime income beneficiary.

a. If single trust, language directing trustee to hold all of trust estate as single trust [*see, e.g.*, § 64.201[2], P 1; § 64.203[2], P 1].

b. If separate trusts, language:

(1) Directing trustee to divide trust estate into separate trusts [*see, e.g.*, § 64.200, P 1; § 64.201[2], P 2; § 64.202[2], P 1]; and

(2) Specifying and identifying separate shares [*see, e.g.*, § 64.200, P 1; § 64.201, P 2; § 64.202; P 1].

**NOTE:**

For an example of a provision requiring the trustee to divide the estate into equal shares for each of the testator's children, see P 1 of § 64.200[2]. For an example of a provision requiring the trustee to divide the trust estate into two equal shares, see P 1 of § 64.202[2]. For an example of a provision requiring the trustee to set apart a fractional share of the trust estate and hold it for the benefit of a lifetime income beneficiary, see P 4 of § 64.206[2]. These provisions may be appropriately modified to make other divisions or specify other shares.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsGeneral OverviewEstate, Gift & Trust LawTrustsCreationEstate, Gift & Trust LawTrustsTestamentary Trusts



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*24-64 California Legal Forms--Transaction Guide § 64.141*

**§ 64.141 Payments or Accumulations of Income**

1. Identify income beneficiaries, as follows:

- a. If they are individual beneficiaries, by name and relationship to testator [*see, e.g., § 64.205[2], P 1; § 64.224[2]*]; or
- b. If they are members of class, by appropriate class description [*see, e.g., § 64.223[2], § 64.225[2]*].

**NOTE:**

Class gifts may be made to the testator's "children," "grandchildren," "issue," "descendants," or any other group. Testamentary classes are sometimes defined in very limited terms, e.g., "the children of my friend, John Smith, who are under the age of 30 years at the time of my death," or "the lawful issue of my deceased sister, Jane Brown." For an example of a trust provision requiring a trustee to pay income to the testator's living children, see P 1(a) of § 64.201[2]. For an example of a trust provision requiring the trustee to pay income to each of the testator's children who meet specified age requirements, see P 1(b) of § 64.203[2].

2. Specify time period during which trustee will make payments to income beneficiaries, as follows:

- a. During lifetime of beneficiary [*see, e.g., § 64.204[2], P 1; § 64.205[2], P 1; § 64.221[2]*];
- b. During joint lifetimes of two income beneficiaries [*see, e.g., § 64.206, P 1*];
- c. Until income beneficiary reaches specified age [*see, e.g., § 64.200[2], P 4(a); § 64.202[2], P 2(b); § 64.202[2], P 3(b); § 64.206, P 5(a); §§ 64.220[2] and 64.222[2]*];

d. For term of years [*see, e.g.*, §§ 64.220 and 64.222]; or

e. Until occurrence of some other event.

3. Specify amount or share of payments that trustee will make, as follows:

a. If payments are to be fixed, periodic payments, specify one or more of following:

(1) All of net income [*see, e.g.*, § 64.200[2], P 4(b); § 64.201[2], P 3(a); § 64.202[2], P 3(b); § 64.204[2], P 1; §§ 64.220[2], 64.221[2], and 64.223];

(2) Part of net income [*see, e.g.*, § 64.202[2], P 2(b); § 64.222];

(3) Proportions or shares of net income [*see, e.g.*, § 64.223];

(4) Fixed dollar amounts.

b. If trustee will have discretion to determine amount of payments, specify one or more of following:

(1) Any amounts trustee deems appropriate [*see, e.g.*, § 64.224];

(2) Amounts trustee deems advisable for income beneficiary's proper care, support, maintenance, and education [*see, e.g.*, § 64.200[2], P 4(a); § 64.201[2], P 2(a); § 64.206[2], P 1];

(3) Amounts paid according to "sprinkling" power.

**NOTE:**

Discretion to determine the amounts of income (or principal) that will be paid to two or more beneficiaries, and the proportions in which payments will be made, is known as a "sprinkling" power. Under a typical sprinkling power, the trustee may pay more income to some beneficiaries than others, and may omit some beneficiaries altogether. For examples of "sprinkling" powers, see P 1 of § 64.201[2], P 1 of § 64.203[2], and § 64.225.

4. Specify intervals at which payments will be made, as follows:

a. Monthly [*see, e.g.*, § 64.200[2], P 4(a), (b); § 64.201[2], PP 1(a), 3(a); § 64.202[2], P 2(a); §§ 64.220 and 64.221];

b. Annually [*see, e.g.*, § 64.242];

c. At other specified intervals.

5. If trustee is not required to pay out all of net income on current basis, include one of following provisions:

a. Provision requiring trustee to accumulate income [*see, e.g.*, § 64.201[2], P 1(d); § 64.203[2], P 1(d); § 64.205[2], P 1; § 64.206[2], P 4(a); § 64.206[2], P 5(c); and §§ 64.222, 64.224, and 64.50]; or

b. Provision specifying how, when, and to whom unpaid income will be distributed [*see, e.g.*, § 64.320].

6. If any or all trust income will be accumulated, specify:

a. Time limit on duration of accumulation [*see, e.g.*, § 64.260]; or

b. Event on which accumulation will cease [*see, e.g.*, § 64.202[2], P 2(b)].

**NOTE:**

Accumulations of income are subject to the rule against perpetuities. If the will directs the trustee to accumulate income, it should limit the duration of the accumulation. For an example of a provision limiting the duration of an accumulation, see § 64.280. If the accumulation is not specifically limited, then the trust should provide in some other paragraph for a limitation on its duration, as by a perpetuities savings clause. For an example of a perpetuities savings clause, see P 8 of § 64.200[2].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsGeneral OverviewEstate, Gift & Trust LawTrustsCreationEstate, Gift & Trust LawTrustsTestamentary Trusts



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*24-64 California Legal Forms--Transaction Guide § 64.142*

**§ 64.142 Distributions of Principal**

1. If trustee will be required or authorized to distribute principal before termination of trust, specify following:

a. Names and relationships to testator of persons to whom distributions will be made;

**NOTE:**

If, as is usually the case, principal is distributed and income is paid to the same person or persons, the principal distributees will also be the income beneficiaries and may be identified in the same paragraph [*see* § 64.121, P 1(a), (b)].

b. Time period during which distributions may or must be made, as follows:

(1) During lifetime of distributee (or beneficiary) [*see, e.g.,* § 64.206[2], P 3; § 64.240];

(2) Until designated child reaches specified age [*see, e.g.,* § 64.241];

(3) Until distributee (or beneficiary) reaches specified age [*see, e.g.,* § 64.202[2], P 2(b)]; or

(4) Until occurrence of some other event [*see, e.g.,* § 64.241].

c. Amount of distributions, as follows:

(1) Dollar amount of fixed, periodic payments [*see, e.g.,* §§ 64.240 and 64.241];

(2) Fractions or percentages of trust principal [*see, e.g.,* § 64.207[2], P 1; § 64.242];

(3) Amounts to be determined in discretion of trustee [*see, e.g.*, § 64.200[2], P 4(c); § 64.202[2], P 2(b); § 64.204[2], P 2; and §§ 64.243 and 64.244];

(4) Amounts to be determined according to trustee's "sprinkling" power [*see, e.g.*, § 64.244]; or

(5) Lump-sum distributions [*see, e.g.*, § 64.321].

d. Intervals at which distributions will be made, as follows:

(1) Monthly [*see, e.g.*, § 64.202[2], P 2(b); § 64.207[2], P 1];

(2) Annually [*see, e.g.*, § 64.242];

(3) At other specified intervals, such as "from time to time" [*see, e.g.*, § 64.204[2], P 2].

e. Whether distributions are to be deducted from any distributive share of trust estate that distributee will receive on termination of trust [*see, e.g.*, § 64.201[2], P 1(e); § 64.203[2], P 1(e); § 64.206[2], P 5(d); § 64.245].

2. If any income or remainder beneficiary will have power to invade principal for his or her own benefit, specify following:

a. Names and relationships to testator of persons who will have power of invasion;

**NOTE:**

If one or more of the income beneficiaries will have the power of invasion, they may be identified in the same paragraph as the income beneficiaries [*see* § 64.121, P 1(a), (b)].

b. Time period during which principal may be invaded, as follows:

(1) During lifetime of holder of power;

(2) Until holder of power reaches specified age [*see, e.g.*, § 64.202[2], P 2(c)]; or

(3) Until occurrence of some other event.

c. Permissible amount of invasions, as follows:

(1) Unlimited power of invasion [*see, e.g.*, § 64.300]; or

(2) Power limited by;

(a) Percentage of corpus [*see, e.g.*, § 64.302];

(b) Maximum dollar amount [*see, e.g.*, § 64.202[2], P 2(c)];

(c) "Five or Five" rule [*see, e.g.*, § 64.202[2], P 3(c); § 64.204[2], P 3; § 64.302];

(d) Recipient's reasonable needs;

(e) "Ascertainable standard" relating to the holder's health, education, support, or maintenance [*see, e.g.*, § 64.301].

d. Whether power is cumulative [*see, e.g.*, § 64.204[2], P 3; § 64.302];

e. Whether amounts withdrawn are to be deducted from distributive share that beneficiary would otherwise receive on termination of trust [*see, e.g.*, § 64.245].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsGeneral OverviewEstate, Gift & Trust LawTrustsCreationEstate, Gift & Trust

LawTrustsTestamentary Trusts



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*24-64 California Legal Forms--Transaction Guide § 64.143*

**§ 64.143 Payments out of Income or Principal**

1. If trustee is required or authorized to make payments or distributions out of income or principal (or both income and principal), specify following:

a. Names and relationships to testator of persons to whom distributions will be made;

**NOTE:**

If the payments will be made to one or more of the income beneficiaries, the recipients may be identified in the same paragraph as the income beneficiaries [*see* § 64.121, P 1(a), (b)].

b. Time period during which distributions may or must be made, as follows:

(1) During lifetime of recipient (or beneficiary) [*see, e.g.*, § 64.205[2], P 1; § 64.206[2], P 4(a)];

(2) During joint lifetime of two or more recipients (or beneficiaries) [*see, e.g.*, § 64.206[2], P 1; § 64.262];

(3) Until recipient (or beneficiary) reaches specified age [*see, e.g.*, § 64.202[2], P 2(a); § 64.203[2], P 1(b)];

(4) Until specified date;

(5) Until occurrence of some other event.

c. Amount of payments, as follows:

- (1) Dollar amount of fixed, periodic payments [*see, e.g.*, § 64.260];
  - (2) All of net income, plus additional amounts of principal sufficient to guarantee recipient fixed, periodic payment [*see, e.g.*, § 64.261];
  - (3) Percentage of trust corpus [*see, e.g.*, § 64.207[2], P 1];
  - (4) Amounts to be determined in discretion of trustee [*see, e.g.*, § 64.201, P 1(a), (b)];
  - (5) Amounts to be determined according to trustee's "sprinkling" power [*see, e.g.*, § 64.201[2], P 1; § 64.203[2], P 1; § 64.206[2], P 5(a), (b)].
- d. Intervals at which payments will be made, as follows:
- (1) Monthly [*see, e.g.*, § 64.201[2], P 1(a)];
  - (2) Annually;
  - (3) At other specified intervals.
- e. Whether payments are to be deducted from distributive share of trust estate that recipient (or beneficiary) will receive on termination of trust.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsGeneral OverviewEstate, Gift & Trust LawTrustsCreationEstate, Gift & Trust LawTrustsTestamentary Trusts



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*24-64 California Legal Forms--Transaction Guide § 64.144*

**§ 64.144 Powers of Appointment**

1. If will is to include general power of appointment, specify following:

a. Name and relationship to testator of holder of power;

**NOTE:**

If the holder of the power is also an income beneficiary of the trust, the holder may be identified in the same paragraph as the beneficiaries [*see* § 64.141, P 1]. If the holder is also the trustee, the holder may be identified in the same paragraph as the trustee [*see* § 64.140, P 1(b)].

b. Whether power will be:

(1) Testamentary power [*see, e.g.,* § 64.340];

(2) Nontestamentary power [*see, e.g.,* §§ 64.341, 64.342].

c. Whether holder will have right to release power [*see, e.g.,* § 64.346].

2. If will is to include special power of appointment, specify following:

a. Name and relationship to testator of holder of power;

**NOTE:**

If the holder of the power is also an income beneficiary of the trust, the holder may be identified in the same paragraph as the beneficiaries [*see* § 64.141, P 1]. If the holder is also the trustee, the holder may be identified in the same paragraph as the trustee [*see* §

64.140, P 1(b)].

b. Whether power will be:

(1) Testamentary power [*see, e.g.*, § 64.204[2], P 4(a); § 64.343];

(2) Nontestamentary power [*see, e.g.*, §§ 64.344, 64.345];

c. Whether holder will have right to release power [*see, e.g.*, § 64.346].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Powers of Appointment Estate, Gift & Trust Law Trusts General Overview Estate, Gift & Trust Law Trusts Creation Estate, Gift & Trust Law Trusts Testamentary Trusts



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C. Drafting Guide for Testamentary Trust Provisions Governing Payment and Distribution of Income and Principal

*24-64 California Legal Forms--Transaction Guide § 64.145*

**§ 64.145 Termination of Trust and Distribution to Remainder Beneficiaries**

1. Identify remainder beneficiaries, as follows:

a. If individual remainder beneficiaries, by name and relationship to testator [*see, e.g.*, § 64.202[2], P 2(d)]; or

b. If members of class, by appropriate class description [*see, e.g.*, § 64.200, P 4(g); § 64.201[2], P 5].

2. Specify time when trust will terminate, as follows:

a. On death of lifetime income beneficiary [*see, e.g.*, § 64.202[2], P 3(d); § 64.203[2], P 2; § 64.205[2], P 4];

b. When designated remainder beneficiary reaches specified age [*see, e.g.*, § 64.200[2], P 4(d)-(f); § 64.202[2], P 2(d); § 64.203[2], P 2; § 64.206[2], P 5(f)];

c. On specified date;

d. On occurrence of some other event.

3. Specify pattern of distribution, as follows:

a. To individual beneficiary or beneficiaries;

b. To members of class in equal shares;

c. In stages [*see, e.g.*, § 64.200[2], P 4(d)-(f); § 64.201[2], P 3(b)-(f)].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsGeneral OverviewEstate, Gift & Trust LawTrustsCreationEstate, Gift & Trust  
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*24-64 California Legal Forms--Transaction Guide § 64.146*

**§ 64.146 Provisions Affecting Payments, Distributions, and Terminations**

1. If interest of income beneficiary is to be protected from beneficiary's creditors, include spendthrift clause [*see, e.g., § 64.200[2], P 14; § 64.203, P 10*].
2. If maximum duration of trust is to be limited (so as to avoid inadvertent violation of rule against perpetuities), include perpetuities saving clause [*see, e.g., § 64.200[2], P 8*].
3. If income beneficiary is to occupy real property belonging to trust (e.g., family residence), include provision:
  - a. Authorizing trustee to permit beneficiary to occupy real property, if occupation is to be discretionary with trustee [*see, e.g., § 64.200[2], P 9; § 64.203, P 5*];
  - b. Directing trustee to permit beneficiary to occupy real property, if beneficiary is to have enforceable right of occupation [*see, e.g., § 64.206[2], P 9*].
4. If trustee is to be authorized to make payments on behalf of minor or incompetent beneficiary, include clause authorizing trustee to make payments directly to beneficiary, to guardian or conservator of beneficiary, or to any provider of support, maintenance, care, health care, or education [*see, e.g., § 64.200[2], P 10; § 64.203[2], P 6; § 64.204[2], P 8*].
5. If trustee is to be authorized to withhold payments when there are conflicting claims as to proper recipient of any payment, include provision authorizing trustee to withhold payment until claims have been finally adjudicated [*see, e.g., § 64.200[2], P 13; § 64.204[2], P 11; § 64.206[2], P 13*].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

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*24-64 California Legal Forms--Transaction Guide §§ 64.147-64.199*

**[Reserved]**

§§ 64.147[Reserved]



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DIVISION IV: WILLS AND TRUSTS  
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PART IV. FORMS

A. Complete Provisions for Payment and Distribution of Income and Principal

*24-64 California Legal Forms--Transaction Guide § 64.200*

**§ 64.200 Separate Trusts for Testator's Children**

**[1] Comment**

**[a] Use of Form**

This form is a will provision that may be used to create a separate trust for each of the testator's children. It is cast in the form of a residuary clause. The clause may be conditioned to take effect only if the testator's spouse fails to survive the testator for a specified period (e.g., six months); or, if appropriate, it may be made unconditional [*see* discussion in § 64.200[1][j]]. It gives the residue of the estate to the trustee, to be divided into as many equal shares as there are children of the testator living at the time of the testator's death and children deceased but leaving surviving issue. Until the age of 21, each child will receive as much of the income and principal from his or her share of the trust estate as the trustee deems advisable for the child's support and education. From the age of 21 until 35, each child will receive all of the net income from his or her separate trust and any principal payments that the trustee deems advisable for his or her support and education. The corpus of each trust will be distributed to the child in three stages, at the ages of 25, 30, and 35. If any child predeceases the testator, the child's share will be retained in the trust for his or her issue until the youngest issue reaches 21. For discussion of the important generation-skipping tax consequences of these provisions, see § 64.51[7].

For will provisions creating single (or family pot) trusts, see §§ 64.201 and 64.203. For complete will forms, including complete will forms establishing testamentary trusts, see Ch. 61, *Will Drafting and Complete Will Forms*.

**[b] Separate Trusts Compared to "Family Pot" Trust**

When drafting a testamentary trust that is designed to benefit the testator's children, the attorney and client should first decide whether to establish a single unified family trust (sometimes called a "family pot" trust) or separate trusts for each of the children. When a family pot trust is established, the trustee will typically have the discretionary power to distribute (i.e., "sprinkle") income and principal among the income beneficiaries according to their needs. When separate trusts are established, the needs of each income beneficiary will be met only out of that income beneficiary's separate trust. Both family pot trusts and separate beneficiary trusts have advantages and disadvantages that the attorney

and the testator should carefully consider before deciding on any trust plan.

### **[c] Advantages and Disadvantages of Separate Trusts**

#### **[i] Separation of Beneficiaries' Shares**

When separate trusts are established, a separate share of the trust estate will be set aside for each income beneficiary. The needs of each income beneficiary will be met out of the income and, eventually, out of the corpus of that beneficiary's separate trust, without encroaching on the interests of other income beneficiaries. Because the needs of each income beneficiary may be met only out of that beneficiary's assigned share, family quarrels as to comparative needs are more likely to be avoided. If, for example, one child receives a complete college and graduate school education at an expensive institution, the share of trust corpus ultimately distributed to that beneficiary may be significantly reduced. Another child who does not receive such an education may expect to receive a proportionately larger share of corpus at the time of final distribution.

When separate trusts are established, each income beneficiary's share of the corpus may be distributed at the same age, and older beneficiaries need not wait until younger beneficiaries reach a specified age. When a family pot trust is established, distribution inequities are likely to result, whether the trust provides for distribution of all of the corpus at one time (e.g., when the youngest beneficiary reaches majority) or at different times (as and when each income beneficiary reaches majority or some other specified age). For a discussion of the inequities of distributions from family pot trusts and possible drafting solutions to them, see discussion in § 64.200[1][d].

#### **[ii] Size of Total Trust Estate**

If the total trust estate is large, separate trusts for each of the income beneficiaries may be particularly advantageous. In such a case, the danger that one of the trusts will be depleted by a medical or other emergency is small. Separate trusts may also be appropriate when the income beneficiaries will have substantial assets or means of support outside the trust. If the income beneficiaries will have no other assets or means of support, and if the total trust estate is small or modest, there may be insufficient assets to adequately fund separate trusts. If any trust is not funded adequately, the trustee may find it difficult or impossible to respond to the beneficiary's ongoing needs. A medical or other emergency affecting one beneficiary, for example, may exhaust the separate trust of the affected beneficiary while leaving the shares of the other beneficiaries untouched. Many testators choose to prevent inequities of this kind by establishing family pot trusts.

#### **[iii] Administrative Difficulties of Small Trusts**

If the separate trusts are small, significant administrative difficulties may be encountered. Many corporate trustees will not accept appointment as trustee of any trust with assets below a specified minimum level. Before appointing any corporation (such as a bank or trust company) as trustee, the attorney should check with the corporation to determine if it has a minimum asset level for trusts and, if so, what that level is. For a provision appointing a trust company or other corporate trustee, see *Ch. 64A, Testamentary Trusts: Trustee Provisions*, § 64A.201.

#### **[d] Advantages and Disadvantages of Family Pot Trusts**

A "family pot" trust will be larger than separate trusts and, for that reason, more acceptable to most corporate trustees. Since younger children may be expected to depend upon the trust for longer periods than older children, younger children are usually provided for more adequately with family pot trusts than with separate trusts. Since, under terms of the trust created by this form, the final principal distribution will not be made to each child until that child reaches the age of 35, a child who is only 6 years old when the trust comes into effect may look forward to receiving support from the trust for 29 years, while a child who is 19 years old when the trust comes into effect may look forward to receiving support for only 6 years.

In addition, unexpected medical or other emergencies may be met more adequately by a family pot trust than by separate trusts. If, for example, one child suffers a major illness that requires the unexpected expenditure of a large sum of money, the family pot trust may respond to that need without severely impairing or exhausting the separate share of the affected child.

It may be more difficult in the case of a family pot trust to decide when the trust corpus should be distributed to the beneficiaries. If the trust corpus is distributed to each beneficiary at the same age, then the older children will enjoy the support of the full family pot until they attain the designated distribution age, while the younger children will have only what is left after principal distributions to the older children. To avoid this inequity, the trust may postpone distributions of corpus until the youngest child has reached the age of 21, but this will require the older children to wait longer for their distributive shares of corpus. Alternatively, the trust may provide for a partial distribution of corpus to each child when the child has reached a specified age, such as 25, or the trustee may be empowered to make distributions of corpus to older children if, and only if, there is a valid reason for those distributions.

### **[e] Tax Consequences**

#### **[i] Income Tax**

The income tax liabilities of the beneficiaries may be affected by the testator's decision to establish a family pot trust or separate trusts for each of the testator's children. If there are separate trusts, the children ordinarily will be taxed only on current and accumulated income from their separate trusts. Under *I.R.C. § 663(c)*, substantially separate and independent shares of different beneficiaries in a single trust must be treated as separate trusts for the purpose of determining the amount of distributable net income that may be deducted by the trust [*see I.R.C. § 663(a)*] and that must be included in the gross income of the beneficiaries [*see I.R.C. § 662(a)*].

If the trustee has discretion to "sprinkle" income among the beneficiaries, the trustee may distribute income to beneficiaries in lower income tax brackets and withhold income from beneficiaries in higher brackets. Similarly, the trustee may distribute income to beneficiaries in years in which those beneficiaries are in lower brackets than in other years. Although the compressed income tax brackets for trusts and estates [*see I.R.C. § 1(a)-(e), (i)(2)*]; *see also § 64.39[4]*] tend to discourage accumulations of income, differences among the income tax brackets of the individual beneficiaries may still permit some income tax savings to be achieved from family pot trusts. Separate trusts, in contrast, afford the trustee less flexibility in distributing income.

Whether income tax savings will result from shifting income tax liability from one beneficiary to another (or from one year to another year when there is only one beneficiary) will depend on the relative income levels of the beneficiaries and a careful calculation of the marginal rates applicable to individuals and trusts. For a general discussion of income tax rules relating to trusts, see § 64.39[1] et seq.

#### **[ii] Generation-Skipping Transfer Tax**

The separate trusts established by this form will trigger the imposition of the generation-skipping transfer tax if any of the children who survive the testator die before attaining the age of 35 and leave surviving issue. The termination of the child's interests in the trust constitute a generation-skipping transfer [*I.R.C. § 2612(a)*].

If any child predeceases the testator, the establishment of the trust in favor of the child's surviving issue is not a generation-skipping transfer because of the application of a special rule for determining whether a transfer is a generation-skipping transfer. Under this rule, a transfer to any individual who is a descendant of a parent of the transferor (or the transferor's spouse or former spouse) is deemed to be a transfer to a person only one generation below the transferor's generation if the transferee's parent who is a lineal descendant of the parent of the transferor (or the transferor's spouse or former spouse) is dead when the transfer is made [*I.R.C. § 2651(e)*] (applicable to terminations,

distributions, and transfers occurring after December 31, 1997)]. This rule has the effect excepting transfers to grandchildren and collateral heirs of the transferor (such as nieces, nephews, grandnieces, and grandnephews) from the operation of the generation-skipping transfer tax when the transferees' parents (who are lineal descendants of the transferor's parent) are dead at the time of the transfer [*I.R.C. § 2651(e)*].

In general, all distributions of principal or income to a beneficiary who is assigned to a generation that is two or more generations below that of the testator are generation-skipping transfers [*I.R.C. §§ 2601, 2611(a)*]. However, the establishment of separate trusts may trigger the imposition of the generation-skipping transfer tax [*I.R.C. §§ 2601-2663*] with regard to the entire corpus of the separate trust, before the corpus of a family trust would be subject to the tax. For example, if the testator creates a separate trust for each child and any child dies before final distribution leaving surviving issue, ordinarily that child's separate trust terminates and the corpus is distributed to the surviving grandchildren. In such a case, the entire corpus of the separate trust would be subject to the generation-skipping transfer tax on distribution at the child's death [*see I.R.C. §§ 2601, 2611(a), 2612(a)*; *see also I.R.C. §§ 2611(c), 2613(a)(2)*].

In contrast, the terms of a family pot trust often postpone final distribution until the death of the last child, or until some other event such as the date the youngest grandchild reaches a specified age. In this situation, if one of the children dies leaving surviving issue, the trust continues to operate. The corpus is not subject to the tax until the trust finally terminates and all the corpus is distributed to the grandchildren (or other beneficiaries who are two or more generations below that of the testator) [*I.R.C. §§ 2611(a), 2612(a)*; *see I.R.C. § 2612(a)(2)*; *see also I.R.C. §§ 663(c), 2654* (application of separate-share rules)]. Of course, if any distributions are made to grandchildren before the trust terminates, those distributions are subject to the generation-skipping transfer tax at the time of distribution unless exempt [*I.R.C. §§ 2601, 2612(b), 2613(a)*; *see I.R.C. § 2631*].

Every testator is allowed an exemption (called the "GST exemption") and discussion in § 60.16[3], which may be allocated by testator or the executor to any property that he or she, or his or her executor, transfers [*I.R.C. § 2631*]. The amount of the exemption depends on the year of the transfer. The exemption amount was \$1 million for 1998 [*I.R.C. § 2631(a)*, before amendment by Pub. Law 107-16], \$1,010,000 in 1999, \$1,030,000 for 2000 [ *Rev. Proc. 99-42* , § 3.18, *1999-46 I.R.B. 568* ], and \$1,060,000 for 2001 [ *Rev. Proc. 2001-13* , § 3.18, *2001-3 I.R.B. 337* ], \$1,100,000 for 2002 [ *Rev. Proc. 2001-59* , § 3.20, *2001-52 I.R.B. 623* ], and \$1,120,000 for 2003 [ *Rev. Proc. 2002-70*, *2002-46 I.R.B. 845* ]. Beginning for generation-skipping transfers after 2003, the exemption amount is determined by the estate tax exclusion amount for the calendar year [*I.R.C. § 2631(c)*]. For 2004 and 2005, the amount was \$1.5 million; for 2006 through 2008, the amount is \$2 million; for 2009, the amount is \$3.5 million [*I.R.C. §§ 2010(c), 2631(a), (c)*]. Absent any specific allocations before the testator's estate tax return is filed, any unused portion of the exemption is allocated by statute [*see I.R.C. § 2632*]. Any unused GST exemption for a lifetime direct skip is automatically allocated to the property transferred to the extent necessary to make the inclusion ratio for that property equal to zero [*I.R.C. § 2632(b)(1)*]. An individual can elect out of the automatic allocation for lifetime direct skips [*I.R.C. § 2632(b)(3)*]. For a lifetime indirect skip, any unused portion of the individual's GST exemption is allocated to the property transferred to the extent necessary to produce the lowest possible inclusion ratio [*I.R.C. § 2632(c)(1)*].

An indirect skip is any transfer of property (that is not a direct skip) subject to the gift tax that is made to a generation-skipping transfer trust [*I.R.C. § 2632(c)(3)(A), (B)*]. An individual can elect [*I.R.C. § 2632(c)(5), (g)(1)*; *Treas. Reg. § 26.2632-1(b)(2)(iii)(B), (C), (4)(iv)* (manner and time for making election out, and example of language that may be used in statement required to elect out)]:

- Not to have the automatic allocation rules apply to an indirect skip;
- Not to have the automatic allocation rules apply to any or all transfers made to a particular trust; and
- To treat any trust as a generation-skipping transfer trust with respect to any or all transfers made to the trust.

An election not to have the automatic allocation rules apply may be made with respect to the following [*Treas. Reg. § 26.2632-1(b)(2)(iii)(A)*]:

- One or more prior year transfers made to a specified trust or trusts.
- One or more (or all) current year transfers made to a specified trust or trusts.
- One or more (or all) future transfers made to a specified trust or trusts.
- All future transfers made to all trusts whether or not in existence at the time the election out is made.
- Any combination of the above.

An election out does not affect the automatic allocation of the GST exemption to any transfer that is not covered by the election out statement. An election out with respect to future transfers remains in effect unless and until terminated, and once made, a transferor need not file a Form 709 in future years solely to prevent the automatic allocation of the GST exemption to any future transfer covered by the election out [*Treas. Reg. § 26.2632-1(b)(2)(iii)(D)*].

The GST exemption can be allocated retroactively when there is an unnatural order of death. If a lineal descendant of the transferor predeceases the transferor, then the transferor can allocate any unused GST exemption to any previous transfer or transfers to the trust on a chronological basis. A transferor may retroactively allocate the GST exemption to a trust when a beneficiary [*I.R.C. § 2632(d)(1)*, effective for deaths of non-skip persons occurring after 12/31/00]:

- Is a non-skip person;
- Is a lineal descendant of the transferor's grandparent or a grandparent of the transferor's spouse;
- Is a generation younger than the generation of the transferor; and
- Dies before the transferor.

Any portion of an individual's GST exemption that has not been allocated under one of the above rules is allocated ratably (1) among nonexempt portions of direct skips occurring at death, and (2) among trusts from which a taxable distribution or taxable termination might occur [*see I.R.C. § 2632(e)(1)*].

If the testator has sufficient assets and wishes to ensure that significant assets pass to the grandchildren, and if the children are self-supporting, the testator might consider creating one trust for the children and a separate trust for the grandchildren. Assuming that all the testator's children who have surviving issue are alive when the testator dies, the transfer of assets to the trust in favor of the grandchildren is subject to the generation-skipping transfer tax; this transfer is taxed as a "direct skip" because all the interests in the trusts are held by persons assigned to generations that are two or more below that of the testator [*I.R.C. §§ 2612(c), 2613(a)(2)*]. If the remaining unused portion of the testator's GST exemption [*see I.R.C. §§ 2631(a), (c), 2010(c)* and discussion in § 60.16[3]] may be used to offset the tax, all distributions from the grandchildren's trust (including appreciation and interest) to the grandchildren are exempt from the tax. Absent specific instructions to the contrary, the deemed allocation rules would automatically allocate any unused portion of the testator's exemption to any nonexempt portion of direct skips occurring at death, such as a trust in favor of grandchildren [*see I.R.C. § 2632(e)(1)*]. It is important to note that if any of the testator's children predecease the testator and leave surviving issue, a trust in favor of the grandchildren would no longer be taxed as a direct skip [*see I.R.C. § 2651(e)*], and a retroactive allocation of the testator's GST exemption can be made, as described above [*I.R.C. § 2632(d)*, effective for deaths of non-skip persons occurring after 12/31/00]. Therefore, as a drafting technique, the trust

might provide that any grandchildren-beneficiaries whose parent (who is a lineal descendant of the testator) predeceases the testator be reassigned as beneficiaries of the trust in favor of the children. If a trust in favor of the grandchildren is not a direct skip because one of the children predeceases the testator, and no such reassignment provision is included in the trust instrument to prevent this result, subsequent distributions of income or corpus to a grandchild whose parent (who is a lineal descendant of the testator) is still living constitute taxable distributions [*see I.R.C. § 2651(e)*]. However, subsequent distributions of income or corpus to a grandchild whose parent (who is a lineal descendant of the testator) has predeceased the testator are not subject to the generation-skipping tax [*see I.R.C. § 2651(e)*].

For terminations, distributions, and transfers occurring on or after July 18, 2005, the following rules apply [*Treas. Reg. § 26.2651-3* (for transfers occurring after December 31, 1997 and before July 18, 2005, taxpayers may rely on any reasonable interpretation of *I.R.C. § 2651(e)*):

- If an individual's parent, who is a lineal descendant of the parent of the transferor (or the transferor's spouse or former spouse), is deceased at the time of the transfer from which the individual's interest is established or derived, the individual is treated as if he or she were a member of the generation that is one generation below the lower of the transferor's generation or the generation assignment of the individual's youngest living lineal ancestor who is also a descendant of the parent of the transferor (or the transferor's spouse or former spouse) [*Treas. Reg. § 26.2651-1(a)(1)*].
- If an individual's generation assignment is so adjusted with respect to a transfer, a corresponding adjustment with respect to that transfer is also made to the generation assignment of each spouse or former spouse of that individual, each descendant of that individual, and each spouse or former spouse of each descendant [*Treas. Reg. § 26.2651-1(a)(2)(i)*].
- An individual's interest is established or derived when the transferor is subject to estate or gift tax. If the transferor is subject to transfer tax on the property on more than one occasion, then the individual's interest is considered established or derived on the earliest of those occasions [*Treas. Reg. § 26.2651-1(a)(3)*].
- The interest of a remainder beneficiary of a trust for which an election under *I.R.C. § 2523(f)* or *I.R.C. § 2056(b)(7)* (QTIP election) has been made will be deemed to have been established or derived, to the extent of the QTIP election, on the date as of which the value of the trust corpus is first subject to tax under *I.R.C. § 2519* or *I.R.C. § 2044*. This rule does not apply to a trust to the extent that an election under *I.R.C. § 2652(a)(3)* (reverse QTIP election) has been made for the trust because, to the extent of the reverse QTIP election, the spouse who established the trust remains the transferor of the trust for GST tax purposes [*Treas. Reg. § 26.2651-1(a)(3)*].
- The above rules do not apply in the case of a transfer to any individual who is not a lineal descendant of the transferor (or the transferor's spouse or former spouse) if the transferor has any living lineal descendant at the time of the transfer [*Treas. Reg. § 26.2651-1(b)*].
- In general, an individual who would be assigned to more than one generation is assigned to the youngest of the generations to which he or she would be assigned [*Treas. Reg. § 26.2651-2(a)*].
- An adopted individual is treated as a member of the generation that is one generation below the adoptive parent. The adopted individual must be legally adopted by the adoptive parent, be a descendant of a parent of the adoptive parent (or the spouse or former spouse of the adoptive parent), be under 18 years of age at the time of the adoption, and not be adopted primarily for the purpose of avoiding the GST tax [*Treas. Reg. § 26.2651-2(b)*].

- If an adopted individual's generation assignment is so adjusted with respect to a transfer, a corresponding adjustment with respect to that transfer is also made to the generation assignment of each spouse or former spouse of that individual, each descendant of that individual, and each spouse or former spouse of each descendant [*Treas. Reg. § 26.2651-2(c)(1)*].

#### **[f] Beneficiary's Outside Resources**

The will may require the trustee, when making discretionary payments to a beneficiary out of trust income or principal, to consider the beneficiary's income outside the trust. If the trust instrument does not require the trustee to make payments to the beneficiary regardless of the beneficiary's outside means, the trustee ordinarily will be required to consider outside means in making payments [ *Estate of Ferrall (1953) 41 Cal. 2d 166, 176, 258 P.2d 1009* ]. The trust may provide, however, that payments should be made only if the beneficiary is in actual need, in which case the beneficiary is not entitled to payments if he or she has other sufficient resources [Scott, *The Law of Trusts* (Little Brown & Co. 3d ed. 1967), § 128.4]. Whether the trustee is required to consider outside resources must be determined by the intent of the settlor as manifested in the trust instrument [Scott, *The Law of Trusts* (Little, Brown & Co. 3d ed. 1967), § 128.4]. Whether the testator should require the trustee to consider outside means depends on the circumstances of the trust, the needs of the income beneficiaries, and the interests of the remainder beneficiaries. If the will forbids the trustee to consider outside means, the beneficiary might be induced to lead a life of idleness or to dissipate other resources, since trust income would be forthcoming in any case. Conversely, a provision requiring the trustee to consider outside means might cause undue hardship if it is interpreted to require that the beneficiary must exhaust all other resources (including a home) before receiving discretionary payments from the trust.

If there are several beneficiaries, and if the testator believes that the resources of the trust will be stretched to meet their needs, a provision requiring the trustee to consider outside resources may serve a useful purpose. If there is only one beneficiary, however, or if the trust resources are clearly adequate to meet the needs of all of the beneficiaries, a provision forbidding the trustee to consider outside resources may be advisable. Before adopting any provision relating to outside means, the will drafter should consult with the testator, evaluate the circumstances of the trust and the needs of the beneficiaries, and effectuate the testator's wishes.

#### **[g] Application of Income for Benefit of Beneficiary**

This form authorizes the trustee to make payments to a beneficiary directly or, under appropriate circumstances, to apply the payments for the beneficiary's benefit. If the beneficiary is under an incapacity (e.g., suffering from mental impairment, incompetency, or otherwise unable to handle funds properly or wisely), this power will permit the trustee to reimburse third-party providers for goods or services supplied to the beneficiary without the necessity of first establishing a conservatorship or other protective proceeding for the beneficiary [Restatement (Second) of Trusts § 182 cmt. d]. Protective proceedings may also be avoided by granting the trustee power to apply payments for the benefit of a minor beneficiary [*see* Restatement (Second) of Trusts § 182 cmt. d]. These powers are useful because a trust, particularly one with a corporate trustee, may be significantly less expensive to maintain and establish than a protective proceeding such as a conservatorship or guardianship. For beneficiaries who are minors, however, a custodianship under the California Uniform Transfers to Minors Act [*Prob. Code* §§ 3900-3925] may adequately serve the testator's needs and effect a considerable savings over the cost of establishing and maintaining a trust or guardianship. For a discussion of gifts to minors, see *Ch. 60A, Gifts*, §§ 60A.13, 60A.40 et seq.

#### **[h] Spendthrift Provision**

A trust instrument may or may not include a "spendthrift" provision intended to protect a beneficiary's interest in the trust from creditors. Although California law recognizes the trustor's power to limit creditor's claims against beneficiaries, the power is subject to significant limitations [*see Prob. Code* §§ 15300-15309 (restrictions on voluntary and involuntary transfers)]. Spendthrift clauses have distinct advantages and disadvantages and should not automatically

be included in every trust. For rules relating to spendthrift clauses and a consideration of the advantages and disadvantages of including "spendthrift" provisions in trusts, see discussions in § 64.41[1] et seq.

### **[i] Accumulation of Income**

If the will does not direct the trustee to distribute all of the income of the trust on a current basis, it is good practice to direct the trustee to accumulate undistributed income and add it to principal. If the will does not require accumulation of undistributed income, the income belongs to the person presumptively entitled to the next eventual interest, who will ordinarily be the remainder beneficiary [*Civ. Code* § 733; see *Estate of Charters (1956)* 46 Cal. 2d 227, 240, 293 P.2d 778 ; *Estate of Lefranc (1952)* 38 Cal. 2d 289, 299-301, 239 P.2d 617 ]. If the remainder beneficiary is entitled to the next eventual interest, undistributed income will be distributed to the remainder beneficiary on a current basis [ *Estate of Robinson (1968)* 262 Cal. App. 2d 32, 40-42, 68 Cal. Rptr. 420 ].

An accumulation of income generally cannot extend beyond the time permitted for the vesting of future interests under the rule against perpetuities [*Civ. Code* § 724(a); but see *Civ. Code* § 724(b) (exception for trusts forming part of employee profit-sharing or retirement plans)]. In California, perpetuities are subject to the Uniform Statutory Rule Against Perpetuities (USRAP) [*see Prob. Code* § 21200 et seq.], which includes a recodification of the common law rule against perpetuities [*see Prob. Code* §§ 21205(a), 21206(a), 21207(a)]. Under that recodification, a nonvested property interest is invalid unless (1) when the interest is created, it is certain to either vest or terminate no later than 21 years after the death of a person alive at the time of creation or (2) it actually vests or terminates within 90 years after its creation [*Prob. Code* § 21205]. For a detailed discussion of the Uniform Statutory Rule Against Perpetuities and its operation in California, see *Ch. 67, Future Interests and Perpetuities*, § 67.16.

Accumulations of income generally have unfavorable income tax consequences. The compressed income tax rate brackets applicable to trusts [*see I.R.C.* § 1(e) and discussion in § 64.39[4]] operate to effectively discourage accumulations of income. This is because trust income is taxed at lower rates when it is distributed to beneficiaries than when it is accumulated by the trust [*see I.R.C.* § 1(a)-(e), (i)(2)].

Before August 5, 1997, accumulated income was also subject to complex income tax rules known as the "throwback rules." The throwback rules required that when income that has been accumulated in a trust is finally distributed to a beneficiary, it must be included in the beneficiary's income if the beneficiary's top average marginal tax rate in the preceding five years was higher than that of the trust [*I.R.C.* §§ 665, 666, 667]. Since August 5, 1997, however, the "throwback" rules have been inapplicable to most domestic trusts created on or after March 1, 1984 [*I.R.C.* § 665(c)].

For a trust provision requiring that all of the net income of the trust be accumulated and added to principal, see § 64.280.

### **[j] Survivorship Clauses**

A testamentary gift, including a testamentary gift in trust, may be conditioned on survival until a future time [*see Prob. Code* § 21109(a)]. The will may condition a gift in trust on the survivorship of a beneficiary of the trust (e.g., the testator's spouse). It is often advisable to condition a testamentary gift on survival for a specified period of time, since such a condition may obviate successive administration and taxation of the same property. It is unwise, however, to routinely condition gifts to a surviving spouse on survival until a future time, because such a condition may prevent or delay the statutory procedures for passage of the property to the surviving spouse without administration [*see Prob. Code* §§ 13500-13660], or deprive the surviving spouse of the benefits of the federal estate tax marital deduction. A gift to a surviving spouse may, however, be conditioned upon survival of that spouse for up to six months without depriving the spouse of the benefits of the marital deduction [*I.R.C.* § 2056(b)(3)].

The gift to the trustee set forth in this form may be conditioned to take effect only if the testator's spouse does not

survive the testator for six months. If the testator chooses not to condition the gift upon the spouse's failure to survive, or chooses to condition the gift on the spouse's failure to survive for some period other than six months, the opening clause of the form may be modified or entirely omitted.

For a general discussion of survivorship clauses and factors to be considered before conditioning a gift on survival, see *Ch. 63, Will Provisions, § 63.411[1][b]*.

### **[k] Distributions to "Issue" or "Descendants"**

This trust provides for distribution of the shares of the testator's deceased children to the "issue" of those children. When a will or trust provides for "issue" or "descendants" to take property, the manner of distribution and the shares that each distributee is entitled to take will vary according to the language of the instrument.

The Probate Code provides for the following three basic patterns of distribution:

- Distribution in the manner provided in cases of intestacy (also called "distribution in the manner provided in *Section 240 of the Probate Code*") [*Prob. Code §§ 240, 245*];
- Distribution "per stirpes" or "by representation" (also called "distribution in the manner provided in *Section 246 of the Probate Code*") [*Prob. Code § 246*]; and
- Distribution "per capita at each generation" (also called "distribution in the manner provided in *Section 247 of the Probate Code*") [*Prob. Code § 247*].

Case law provides for a fourth pattern of distribution, which is distribution "per capita" [*see Lombardi v. Blois (1964) 230 Cal. App. 2d 191, 198, 40 Cal. Rptr. 899*].

The shares that issue will receive may be affected by which pattern of distribution is adopted. For a more detailed discussion of these patterns, see *Ch. 61, Will Drafting and Complete Will Forms, § 61.15[6]*.

## **[2] FORM**

### **Separate Trusts for Testator's Children**

#### **Trust**

[If my \_\_\_\_\_ (husband *or* wife) fails to survive me for \_\_\_\_\_ (*specify period, e.g.: six months*),] I give the residue of my estate to \_\_\_\_\_ [*name of trustee or, if trustee appointed in separate paragraph, state: the trustee named in Section \_\_\_\_\_ of this will*], or to the successor trustee or trustees named below, in trust, to be held, administered, and distributed in accordance with the following provisions:

#### **A. PAYMENT AND DISTRIBUTION OF INCOME AND PRINCIPAL**

##### **Division of Trust Estate Into Separate Trusts**

1. The Trustee shall divide the trust estate into as many equal shares as there are children of mine living at the time of my death and children of mine then deceased but leaving issue then surviving. Each share shall constitute and be held, administered, and distributed by the Trustee as a separate trust.

**Separate Trust for Each Child**

2. One equal share shall be set aside for the benefit of each of my children living at the time of my death, and shall constitute the separate trust estate of each child's trust.

**Separate Trust for Issue of Each Deceased Child**

3. One equal share shall be set aside for the benefit of the issue of each child of mine who is deceased at the time of my death but who leaves issue then living, and shall constitute the separate trust estate of the issue of each such child.

**Payments and Distributions From Trusts for Children**

4. The Trustee shall apply and distribute the net income and principal of each of the trusts set aside for the benefit of my children who are living at the time of my death as follows:

(a) Until each child reaches the age of 21 years, the Trustee shall pay to or apply for the benefit of that child, in monthly or other convenient installments, but not less often than annually, so much of the net income from the separate trust set aside for that child (up to the whole thereof) as the Trustee, in the Trustee's discretion, deems advisable for the child's proper care, support, maintenance, and education. The Trustee shall accumulate and add to the principal of the separate trust set aside for that child the balance, if any, of the net income not paid or applied in accordance with the foregoing provision.

(b) After each child reaches the age of 21 years, and until that child attains the age of 35 years, the Trustee shall pay to or apply for the benefit of that child, in monthly or other convenient installments, but not less often than annually, all of the net income from the separate trust set aside for that child.

(c) If, at any time, the Trustee shall, in the Trustee's discretion, determine that any child is in need of additional funds for that child's proper care, support, maintenance, and education, the Trustee shall pay to or apply for the benefit of that child such additional amounts from the principal of the separate trust set aside for that child (up to the whole thereof) as the Trustee, in the Trustee's discretion, may deem advisable.

(d) When each child reaches the age of 25 years, the Trustee shall distribute to that child one-third of the remaining balance of the principal of the separate trust set aside for that child.

(e) When each child reaches the age of 30 years, the Trustee shall distribute to that child one-half of the remaining balance of the principal of the separate trust set aside for that child.

(f) When each child reaches the age of 35 years, the Trustee shall distribute to that child the whole of the remaining balance of the separate trust set aside for that child.

(g) If any child should die before attaining the age of 35 years, then, on the death of that child, the Trustee shall distribute the whole of the remaining balance of the separate trust set aside for that child to that child's surviving issue \_\_\_\_\_ [in the manner provided in Section \_\_\_\_\_ (240 or 246 or 247) of the California Probate Code *or* in equal shares, share and share alike, irrespective of whether or not all such issue are members of the same generation]. If there should be no surviving issue, then the whole of the balance of the separate trust set aside for the deceased child shall be added to the shares set aside for the benefit of my other living children and the issue of any deceased children \_\_\_\_\_ [in the manner provided in Section \_\_\_\_\_

(240 or 246 or 247) of the California Probate Code *or* in equal shares, share and share alike, irrespective of whether or not all such issue are members of the same generation], including proportionately both the distributed and undistributed portions of each share.

(h) If my children and their issue should all die before final distribution of the trust estate, all of the estate not disposed of as hereinabove provided shall be distributed to \_\_\_\_\_ [*specify alternative disposition, e.g.: my heirs, their identities and respective shares to be determined in accordance with the laws of the State of California in effect at the time of distribution. If there are no heirs of mine, the trust estate shall be distributed to \_\_\_\_\_ (name and address of charitable beneficiary).*]

### **Payments and Distributions From Trusts for Issue of Deceased Children**

5. The Trustee shall distribute the separate trust estate set aside for the benefit of each child of mine who is deceased at the time of my death but who leaves issue then living to the issue of that child \_\_\_\_\_ [in the manner provided in Section \_\_\_\_\_ (240 or 246 or 247) of the California Probate Code *or* in equal shares, share and share alike, irrespective of whether or not all such issue are members of the same generation]; provided, however, that each share set aside for any issue who has not yet reached the age of \_\_\_\_\_ [*e.g.: 25 years*] shall be retained in the trust. The Trustee shall pay to or apply for the benefit of that issue as much of the income and principal of that issue's share of the trust as the Trustee, in the Trustee's discretion, considers appropriate for that issue's support, health, and education. When that issue reaches the age of \_\_\_\_\_ [*e.g.: 25 years*], the Trustee shall distribute the remaining balance of principal and undistributed income of that issue's share of the trust to that issue free of trust.

### **Exercise of Discretion**

6. In exercising the discretion conferred on the Trustee to make payments and distributions of income and principal to any beneficiary or beneficiaries as provided in this will, the Trustee shall take into consideration, to the extent that the Trustee deems advisable, the value of the trust assets, the needs, both present and future, of the beneficiaries, and the tax consequences to the trust and to the beneficiaries of any payment or distribution. The Trustee may accept as final and conclusive the written statement of any beneficiary receiving a payment or distribution as to the amount and availability of any other income or resources of that beneficiary. The determination of the Trustee with respect to the advisability of making payments out of income or principal to any beneficiary shall be conclusive on all persons interested in the trust. In exercising the discretion conferred on the Trustee to make payments and distributions of income and principal to any beneficiary, the Trustee shall \_\_\_\_\_ [*consider any income or resources outside the trust made known to the Trustee and reasonably available to the needs of that beneficiary *or* not consider any income or resources available to that beneficiary outside the trust*].

### **Definitions**

7. As used in this will:

(a) The terms "child" and "children" and "grandchild" and "grandchildren" include adopted children and any children who may hereafter be born.

(b) The term "issue" means lawful issue and includes legally adopted children.

(c) Unless the context requires otherwise, the term "trust" refers to one of the separate trusts provided for herein, and the

term "trust estate" refers to the estate of one of those separate trusts.

(d) The term "education" includes \_\_\_\_\_ [college, but not postgraduate, *or* both college and postgraduate] study at any accredited institution of the beneficiary's choice and for any period of time that the Trustee, in the Trustee's discretion, shall deem advantageous to the beneficiary concerned. The Trustee shall, within reasonable limits, provide adequate amounts for all living and travel expenses of the beneficiary in connection with all such education.

### **Maximum Duration of Trusts**

8. Any trust created by this will, or by the exercise of any power of appointment conferred by this will, shall, if not terminated sooner, terminate 21 years after the death of the last survivor of those of my issue who are living at the time of my death. The principal and undistributed income of any trust terminated under this clause shall be distributed to the income beneficiaries of that trust in the same proportion that they are entitled to income immediately before termination. If that proportion is not fixed by the terms of this will, distribution shall be to the income beneficiaries of that trust who are then living and to the then-living issue of income beneficiaries of that trust who are deceased but who leave issue then living, \_\_\_\_\_ [in the manner provided in Section \_\_\_\_\_ (240 *or* 246 *or* 247) of the California Probate Code *or* in equal shares, share and share alike, irrespective of whether or not all such issue are members of the same generation].

### **Occupation of Real Property**

9. The Trustee may, in the Trustee's discretion, permit any person who has a current right to receive income from the trust estate to occupy any real property that forms a part of \_\_\_\_\_ [the trust estate *or* any separate part of the trust estate from which that beneficiary's right to income is derived]. The terms of occupation may include, but are not limited to, rent-free occupation of any such real property, or occupation in consideration of full or partial payment of taxes, insurance, maintenance, and ordinary repairs. The terms of any such occupation shall be determined by the Trustee in the Trustee's discretion.

*[If testator wishes to assure a particular beneficiary the right to occupy a residence that has been occupied by that beneficiary before the testator's death, then a clause directing the trustee to allow the beneficiary to occupy the residence should be used. For such a clause, see P 9 of § 64.206]*

### **Payments on Behalf of Beneficiary**

10. If, at any time, any beneficiary entitled to receive income or principal from the trust estate is a minor, is an incompetent person, is a person for whose person or estate a guardian or conservator has been appointed, or is, in the judgment of the Trustee, unable to handle funds properly or wisely, the Trustee may, in the Trustee's discretion, make or apply payments or distributions from any trust provided for in this will in one or more of the following ways:

- (a) Directly to the beneficiary;
- (b) To the natural guardian or legally appointed guardian or conservator of the person or estate of the beneficiary; or
- (c) To any provider of support, maintenance, care, health care, or education of or for the beneficiary.

In making any payments or distributions under this clause, the Trustee shall not be required to see to the application of any funds paid or applied in any of the aforementioned ways, and receipt by the payee shall fully discharge the Trustee. Any good faith decision by the Trustee as to which of the aforementioned methods should be used in making payments shall be conclusive and binding on all parties concerned.

#### **Accrued or Undistributed Payments**

11. On the termination of the right of any beneficiary to receive payments from net income or principal under any of the separate trusts provided for in this will, all such payments accrued or undistributed by the Trustee at the date of the termination shall be distributed to the beneficiary next entitled to the successive interest by the terms of this will.

#### **Notice to Trustee**

12. Until the Trustee receives written notice of any birth, death, marriage, or other event on which a right to receive payments or distributions from the trust estate may depend, the Trustee shall incur no liability to any person whose interests may have been affected by that event for disbursements or distributions previously made in good faith.

#### **Discretion to Withhold Disputed Payments**

13. If, at any time, there are conflicting claims as to the person or persons entitled to any payment or distribution from the trust estate, or from any of the separate trusts provided for in this will, the Trustee may, in the Trustee's discretion, withhold all or part of any disputed payment or distribution until entitlement to the payment or distribution has been finally adjudicated by a court of competent jurisdiction, and, in doing so, the Trustee shall incur no obligation to pay interest on any disputed payment or distribution withheld in good faith.

*[If appropriate, add spendthrift clause, as follows:]*

#### **Spendthrift Clause**

14. No income or remainder beneficiary shall have any right, power, or authority to sell, transfer, assign, pledge, mortgage, alienate, hypothecate, encumber, or otherwise impair all or any part of his or her interest in the trust estate or in the principal or income of any of the separate trusts provided for in this will, directly or indirectly, or in any manner whatsoever. To the fullest extent allowed by the law, the interest of each and every income and remainder beneficiary shall be free from claims, control, or any other interference on the part of his or her creditors, and shall be free from attachment, execution, bankruptcy proceedings, or any other legal process. The Trustee shall pay, disburse, and distribute principal and income only in the manner provided for in this will, and not on any attempted transfer or assignment by any income beneficiary or remainder beneficiary, or by operation of law.

#### **B. GENERAL ADMINISTRATIVE POWERS OF TRUSTEE**

*[Select and add appropriate provisions for administrative powers of the trustee or cotrustees from Ch. 64A, Testamentary Trusts: Trustee Provisions]*

### **C. OPERATIONAL PROVISIONS**

*[Select and add appropriate operational provisions for the trust from Ch. 64B, Testamentary Trusts: Administrative Provisions]*

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsGeneral OverviewEstate, Gift & Trust LawTrustsCreationEstate, Gift & Trust LawTrustsTestamentary Trusts



53 of 170 DOCUMENTS

California Legal Forms--Transaction Guide

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DIVISION IV: WILLS AND TRUSTS  
CHAPTER 64 TESTAMENTARY TRUSTS: PAYMENT AND DISTRIBUTION PROVISIONS  
PART IV. FORMS

A. Complete Provisions for Payment and Distribution of Income and Principal

*24-64 California Legal Forms--Transaction Guide § 64.201*

**§ 64.201 Family Pot Trust for Children With "Sprinkling" Provisions**

**[1] Comment**

**[a] Use of Form**

This form is a will provision that may be used to create a single (or "family pot") trust and to authorize the trustee to distribute ("sprinkle") income and principal among the testator's children. It is drafted in the form of a residuary clause. The clause may be conditioned to take effect only if the testator's spouse fails to survive the testator for a specified period (e.g., six months); or, if appropriate, it may be made unconditional [*see* discussion in § 64.200[1][j]]. It gives the residue of the estate to the trustee, to be held and administered as one trust until the youngest living child of the testator reaches 21, at which time the trust will be divided into separate trusts, one for each child. Thereafter, each child will receive the entire net income and any principal payments from that child's separate trust that the trustee deems advisable for that child's support and education. Distribution of each separate trust will be made in stages, at the ages of 25 and 30. The share of any child who dies before the age of 30 will continue to be held in trust for the issue of that child (if any) until the issue reach a stated age (such as 25), or 21 years after the death of the last surviving issue of the testator who is living at the time of the testator's death, whichever is earlier. The 21-year outside limitation is included to make certain that providing for final distribution to issue (i.e., grandchildren) when they are older than 21 years will not result in violation of the rule against perpetuities [*see Prob. Code § 21200 et seq.* (Uniform Statutory Rule Against Perpetuities)]; *but see Prob. Code § 21220* (reformation of disposition to comply with rule).

If the testator wishes to vary the distribution pattern prescribed by this form, the trust may provide that the share of any child who dies before the age of 30 will be distributed to the surviving spouse, if any, of that child.

Before distribution, the trustee is empowered to make payments from income or principal for the proper care, support, maintenance, and education of the children.

For a will provision creating separate trusts for each of the testator's children, see § 64.200. For complete will forms, including complete wills establishing testamentary trusts, see Ch. 61, *Will Drafting and Complete Will Forms*. For rules relating to spendthrift trusts and the advantages and disadvantages of including spendthrift provisions in the will, see

discussions in § 64.41[1] et seq.

### **[b] Separate Trusts Compared With Family Pot Trust**

A trust that is intended to benefit the testator's children may be cast in the form of a single (or "family pot") trust or divided into separate trusts, with each trust assigned to one of the testator's children (whether living or deceased). Before deciding on any testamentary trust plan, the attorney and the client should consider the respective advantages and disadvantages of these different trust structures and choose the one that best suits the intentions of the testator and the anticipated needs of the beneficiaries.

When separate trusts are established, the needs of each beneficiary will be met only out of that beneficiary's separate trust. The trustee may not draw funds from one separate trust to meet the needs of the beneficiary of another separate trust, however great the needs of the other beneficiary may be. When the will establishes a single trust, however, the trustee may be given the discretionary power to distribute ("sprinkle") income and principal among the beneficiaries according to their needs. For a general discussion of the advantages and disadvantages of separate beneficiary trusts and family pot trusts, see § 64.200[1][c][i] et seq.

### **[c] Discretionary Payments of Income and Principal**

Trustees frequently are given discretion to make payments of income or principal, or both. The general rule is that a discretionary power conferred on a trustee is not left to the trustee's arbitrary discretion but must be exercised reasonably [*Prob. Code* § 16080]. Even if a trust instrument confers "absolute," "sole," or "uncontrolled" discretion on a trustee, the trustee has a duty to act in accordance with fiduciary principles and not to act in bad faith or in disregard of the purposes of the trust [*Prob. Code* § 16081]. For further discussion of trustee discretion, see *Ch. 64A, Testamentary Trusts: Trustee Provisions*, §§ 64A.39[8] and 64A.340[1].

Provisions authorizing a trustee to make discretionary payments of income and principal permit the trustee to respond to the needs of the beneficiaries. A trustee with discretion to make payments may benefit beneficiaries who are in need and withhold payments from beneficiaries who are not in need. The trustee may distribute income to a beneficiary who has little or no outside income and withhold it from a beneficiary who has a large outside income. This may serve the needs of the beneficiaries more adequately than a provision that requires the trustee to make payments to beneficiaries regardless of need. Further, it may result in income tax savings, since beneficiaries with outside income may be in higher income tax brackets than those without such income. A trustee who sprinkles income among beneficiaries in this manner may effect substantial tax savings for the beneficiaries. Exercise of such a power may, however, have adverse tax effects [see discussions in § 64.201[1][d][i], [ii]].

### **[d] Tax Considerations**

#### **[i] Income Tax**

The testator's decision to establish a family pot trust or a separate trust for each of the testator's children may result in substantially different income tax liabilities for the beneficiaries. For a consideration of these liabilities, see discussion in § 64.200[1][e].

#### **[ii] Generation-Skipping Transfer Tax**

A testamentary trust that has the potential to benefit the testator's grandchildren also has the potential to trigger the generation-skipping transfer tax [see *I.R.C. § 2601 et seq.*]. For general discussion of the generation-skipping transfer tax, see § 60.16.

### **[2] FORM**

## Family Pot Trust for Children With "Sprinkling" Provisions

### Trust

[If my \_\_\_\_\_ (husband *or* wife) fails to survive me for \_\_\_\_\_ (*specify period, e.g., six months*),] I give the residue of my estate to \_\_\_\_\_ [*name of trustee or, if trustee is appointed in separate paragraph, state: the trustee named in Paragraph \_\_\_\_\_ of this will*], or to the successor trustee or trustees named below, in trust, to be held, administered, and distributed in accordance with the following provisions:

#### A. PAYMENT AND DISTRIBUTION OF INCOME AND PRINCIPAL

##### Administration as Single Trust

1. The entire trust estate shall be administered as one trust until my youngest child then living reaches the age of 21 years. Until that time, the Trustee shall apply the net income and principal of the trust estate as follows:
  - (a) The Trustee shall pay to or apply for the benefit of each of my children then living, including those who have attained the age of 21 years, in monthly or other convenient installments, but not less often than annually, so much of the net income and so much of the principal of the trust estate (up to the whole thereof) as the Trustee, in the Trustee's discretion, deems advisable for the proper care, support, maintenance, and education of each of them.
  - (b) The Trustee shall, from time to time, pay to or apply for the benefit of the surviving spouse and each of the issue of any deceased child of mine so much of the net income and so much of the principal of the trust estate as the Trustee, in the Trustee's discretion, deems advisable for their proper care, support, maintenance, and education.
  - (c) The Trustee may pay more to or apply more for some beneficiaries than others, and may omit some beneficiaries entirely.
  - (d) The Trustee shall accumulate and add to the principal of the trust any net income of the trust not paid out in accordance with the discretion herein conferred on the Trustee.
  - (e) Payments or distributions made by the Trustee from trust principal as authorized by the terms of this will shall not subsequently be deducted from or otherwise reduce or impair the value of the property to which the recipients of the payments shall be entitled on any distribution or termination of the trust.

##### Division Into Separate Trusts

2. When my youngest child then living reaches the age of 21 years, the Trustee shall immediately divide the trust estate into as many equal shares as there are children of mine then living and children of mine then deceased but with issue then living. One equal share shall be set aside for the benefit of each of my children then living, and one equal share shall be set aside for the benefit of the issue of each child of mine who is then deceased but leaves issue then living. Each share set aside under the terms of this paragraph shall constitute, and be held, administered, and distributed by the Trustee as, a separate trust.

##### Payments and Distributions From Trusts for Children

3. On division of the trust estate as provided in Paragraph 2, above, the Trustee shall pay and distribute the income and principal of each of the separate trusts set aside for the benefit of my living children as follows:

(a) If any child of mine shall have reached the age of 30 years at the time of division, the Trustee shall then distribute the whole of the separate trust set aside for that child to that child, free of trust.

(b) If any child of mine shall have reached the age of 25 years (but shall not have reached the age of 30 years) at the time of division, the Trustee shall then distribute one half of the principal of the separate trust set aside for that child to that child, free of trust, and shall hold the remaining one half of the principal in trust for that child until that child attains the age of 30 years, whereupon all amounts remaining in the separate trust for that child shall be distributed to that child and the separate trust for that child shall terminate.

(c) If any child of mine shall not have attained the age of 25 years at the time of division, the Trustee shall continue to hold the entire principal of the separate trust for that child in trust. The Trustee shall distribute one half of the principal of the separate trust set aside for that child to that child at the time the child attains the age of 25 years, and shall hold the remaining one half of the principal in trust for that child until that child attains the age of 30 years, whereupon all amounts remaining in the separate trust for that child shall be distributed to that child and the separate trust for that child shall terminate.

(d) Until such time as all the principal in the separate trust for each child has been distributed in accordance with Paragraph 3(a), (b), or (c) above, the Trustee shall pay to or apply for the benefit of each child, in monthly or other convenient installments (but not less often than annually), all of the net income of the separate trust held by the Trustee for that child. If, at any time, the Trustee shall, in the Trustee's discretion, determine that any child is in need of additional funds for that child's proper care, support, maintenance, and education, the Trustee shall pay to or apply for the benefit of that child such additional amounts from the principal of the separate trust set aside for that child (up to the whole thereof) as the Trustee, in the Trustee's discretion, deems advisable.

(e) If any child of mine for whom a separate trust has been set aside as provided in Paragraph 2, above, should die before attaining the age of 30 years, leaving issue surviving, the trustee shall apportion the whole of the remaining balance of the separate trust set aside for that child among that child's surviving issue \_\_\_\_\_ [in the manner provided in Section \_\_\_\_\_ (240 or 246 or 247) of the California Probate Code *or* in equal shares, share and share alike], and shall continue to hold the share of each issue in trust. The Trustee shall pay to or apply for the benefit of each issue as much of the income and principal of the share of that issue as the Trustee, in the Trustee's discretion, considers appropriate for the health, education, support, and maintenance of that issue, and shall distribute any remaining balance of that issue's share to that issue when that issue attains the age of \_\_\_\_\_ [e.g., 25] years, or 21 years after the death of the last survivor of those of my issue who are living at the time of my death, whichever occurs first. If any issue for whom a share has been apportioned under this Paragraph 3(e) should die before attaining the age of \_\_\_\_\_ [restate age of final distribution, e.g., 25] years, the share of that issue shall be apportioned among the issue of that issue, if any, \_\_\_\_\_ [in the manner provided in Section \_\_\_\_\_ (240 or 246 or 247) of the California Probate Code *or* in equal shares, share and share alike]; or, if that issue leaves no issue surviving, shall be apportioned among the other issue of my deceased child \_\_\_\_\_ [in the manner provided in Section \_\_\_\_\_ (240 or 246 or 247) of the California Probate Code *or* in equal shares, share and share alike]; provided that no final distribution to any issue under the provisions of this Paragraph 3(e) shall occur until the date when that issue reaches the age of \_\_\_\_\_ [restate age of final distribution, e.g., 25] years, or 21 years after the death of the last survivor of those of my issue who are living at the time of my death, whichever occurs first.

(f) If any child of mine for whom a separate trust has been set aside as provided in Paragraph 2, above, should die without issue before attaining the age of 30 years, then the remaining balance, if any, of the separate trust set aside for that child shall be apportioned among the shares and partial shares set aside for the benefit of my other living children

and the issue of any deceased children \_\_\_\_\_ [in the manner provided in Section \_\_\_\_\_ (240 or 246 or 247) of the California Probate Code or in equal shares, share and share alike] and held, administered, and distributed in accordance with the provisions of this will.

#### **Payments and Distributions From Trusts for Issue of Deceased Children**

4. Each share of the trust estate set aside for the benefit of the living issue of a deceased child of mine, as provided in Paragraph 2, above, shall, on division of the trust into separate shares as provided in Paragraph 2, be apportioned among the issue of that deceased child \_\_\_\_\_ [in the manner provided in Section \_\_\_\_\_ (240 or 246 or 247) of the California Probate Code or in equal shares, share and share alike]. The share of any issue who has attained the age of \_\_\_\_\_ [e.g., 25] years shall be distributed to that issue, free of trust. The Trustee shall continue to hold in trust the share of any issue who has not yet attained the age of \_\_\_\_\_ [restate age of distribution, e.g., 25] years. The Trustee shall pay to or apply for the benefit of each issue for whom a share is held in trust as much of the income and principal of the share of that issue as the Trustee, in the Trustee's discretion, considers appropriate for the health, education, support, and maintenance of that issue, and shall distribute any remaining balance of that issue's share to that issue when that issue attains the age of \_\_\_\_\_ [e.g., 25] years, or 21 years after the death of the last survivor of those of my issue who are living at the time of my death, whichever occurs first. If any issue for whom a share has been apportioned under this Paragraph 4 should die before attaining the age of \_\_\_\_\_ [restate age of final distribution, e.g., 25] years, the share of that issue shall be apportioned among the issue of that issue, if any, \_\_\_\_\_ [in the manner provided in Section \_\_\_\_\_ (240 or 246 or 247) of the California Probate Code or in equal shares, share and share alike]; or, if that issue leaves no issue surviving, shall be apportioned among the other issue of my deceased child \_\_\_\_\_ [in the manner provided in Section \_\_\_\_\_ (240 or 246 or 247) of the California Probate Code or in equal shares, share and share alike]; provided that no final distribution to any issue who receives any share of the trust estate set aside for the issue of a deceased child of mine under the provisions of this Paragraph 4 shall occur until the date when that issue reaches the age of \_\_\_\_\_ [restate age of final distribution, e.g., 25] years, or 21 years after the death of the last survivor of those of my issue who are living at the time of my death, whichever occurs first.

#### **Distribution if No Issue**

5. If my children and their issue should all die before final distribution of the trust estate, then the whole of the trust estate not otherwise disposed of shall be distributed to \_\_\_\_\_ [specify alternative disposition, e.g., my heirs, their identities and respective shares to be determined in accordance with the laws of the State of California in effect at the time of distribution. If there are no heirs of mine, the trust estate shall be distributed to \_\_\_\_\_ (name and address of charitable beneficiary)].

#### **Exercise of Discretion**

6. In exercising the discretion conferred on the Trustee to make payments and distributions of income and principal to any beneficiary or beneficiaries as provided in this will, the Trustee shall take into consideration, to the extent that the Trustee deems advisable, the value of the trust assets, the needs, both present and future, of the beneficiaries, and the tax consequences to the trust and to the beneficiaries of any payment or distribution. The Trustee may accept as final and conclusive the written statement of any beneficiary receiving a payment or distribution as to the amount and availability of any other income or resources of that beneficiary. The determination of the Trustee with respect to the advisability of making payments out of income or principal to any beneficiary shall be conclusive on all persons interested in the trust. In exercising the discretion conferred on the Trustee to make payments and distributions of income and principal to any

beneficiary, the Trustee shall \_\_\_\_\_ [consider any income or resources outside the trust made known to the Trustee and reasonably available to the needs of that beneficiary *or* not consider any income or resources available to that beneficiary outside the trust].

### **Definitions**

7. As used in this will:

- (a) The terms "child" and "children" include adopted children and any children who may hereafter be born.
- (b) The term "issue" means lawful issue and includes legally adopted children.
- (c) Unless the context requires otherwise, the term "trust" refers to one of the separate trusts provided for herein, and the term "trust estate" refers to the estate of one of those separate trusts.
- (d) The term "education" includes \_\_\_\_\_ [college, but not postgraduate, *or* both college and postgraduate] study at any accredited institution of the beneficiary's choice and for any period of time that the Trustee, in the Trustee's discretion, shall deem advantageous to the beneficiary concerned. The Trustee shall, within reasonable limits, provide adequate amounts for all living and travel expenses of the beneficiary in connection with any such education.

### **Maximum Duration of Trusts**

8. Any trust created by this will, or by the exercise of any power of appointment conferred by this will, shall, if not terminated sooner, terminate 21 years after the death of the last survivor of those of my issue who are living at the time of my death. The principal and undistributed income of any trust terminated under this clause shall be distributed to the income beneficiaries of that trust in the same proportion that they are entitled to income immediately before termination. If that proportion is not fixed by the terms of this will, distribution shall be to the income beneficiaries of that trust who are then living and to the then-living issue of income beneficiaries of that trust who are deceased but who leave issue then living, \_\_\_\_\_ [in the manner provided in Section \_\_\_\_\_ (240 *or* 246 *or* 247) of the California Probate Code *or* in equal shares, share and share alike, irrespective of whether or not all such issue are members of the same generation].

### **Occupation of Real Property**

9. The Trustee may, in the Trustee's discretion, permit any person who has a current right to receive income from the trust estate to occupy any real property that forms a part of \_\_\_\_\_ [the trust estate *or* any separate part of the trust estate from which that beneficiary's right to income is derived]. The terms of occupation may include, but are not limited to, rent-free occupation of the real property, or occupation in consideration of full or partial payment of taxes, insurance, maintenance, and ordinary repairs. The terms of any such occupation shall be determined by the Trustee in the Trustee's discretion.

*[If the testator wishes to assure a particular beneficiary the right to occupy a residence that has been occupied by that beneficiary before the testator's death, then a clause directing the trustee to allow the beneficiary to occupy the residence should be used. For such a clause, see P 9 of § 64.206.]*

**Payments on Behalf of Beneficiary**

10. If, at any time, any beneficiary entitled to receive income or principal from the trust estate is a minor, is an incompetent person, is a person for whose person or estate a guardian or conservator has been appointed, or is, in the judgment of the Trustee, unable to handle funds properly or wisely, the Trustee may, in the Trustee's discretion, make or apply payments or distributions from any trust provided for in this will in one or more of the following ways:

- (a) Directly to the beneficiary;
- (b) To the natural guardian or legally appointed guardian or conservator of the person or estate of the beneficiary; or
- (c) To any provider of support, maintenance, care, health care, or education of or for the beneficiary.

In making any payments or distributions under this clause, the Trustee shall not be required to see to the application of any funds paid or applied in any of the aforementioned ways, and receipt by the payee shall fully discharge the Trustee. Any decision, in good faith, by the Trustee as to which of the aforementioned methods should be used in making payments shall be conclusive and binding on all parties concerned.

**Accrued or Undistributed Payments**

11. On the termination of the right of any beneficiary to receive payments from net income or principal under this will, all such payments accrued or undistributed by the Trustee at the date of termination shall be distributed to the beneficiary next entitled to the successive interest by the terms of this will.

**Notice to Trustee**

12. Until the Trustee receives written notice of any birth, death, marriage, or other event on which a right to receive payments or distributions from the trust estate may depend, the Trustee shall incur no liability to persons whose interests may have been affected by that event for disbursements or distributions previously made in good faith.

**Discretion to Withhold Disputed Payments**

13. If, at any time, there are conflicting claims as to the person or persons entitled to any payment or distribution from the trust estate, or from any of the separate trusts provided for in this will, the Trustee may, in the Trustee's discretion, withhold all or part of any disputed payment or distribution until entitlement to the payment or distribution has been finally adjudicated by a court of competent jurisdiction, and, in doing so, the Trustee shall incur no obligation to pay interest on any disputed payment or distribution withheld in good faith.

*[If appropriate, add spendthrift clause, as follows:]*

**Spendthrift Clause**

14. No income beneficiary or remainder beneficiary shall have any right, power, or authority to sell, transfer, assign, pledge, mortgage, alienate, hypothecate, encumber, or otherwise impair all or any part of his or her interest in the trust

estate or in the principal or income of any of the separate trusts provided for in this will, directly or indirectly, or in any manner whatsoever. To the fullest extent allowed by the law, the interest of each and every income beneficiary and remainder beneficiary shall be free from claims, control, or any other interference on the part of his or her creditors, and shall be free from attachment, execution, bankruptcy proceedings, or any other legal process. The Trustee shall pay, disburse, and distribute principal and income only in the manner provided for in this will, and not on any attempted transfer or assignment by any income beneficiary or remainder beneficiary, or by operation of law.

#### **B. GENERAL ADMINISTRATIVE POWERS OF TRUSTEE**

*[Select and add appropriate provisions for administrative powers of the trustee or cotrustees from Ch. 64A, Testamentary Trusts: Trustee Provisions]*

#### **C. OPERATIONAL PROVISIONS**

*[Select and add appropriate operational provisions for the trust from Ch. 64B, Testamentary Trusts: Administrative Provisions]*

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsGeneral OverviewEstate, Gift & Trust LawTrustsBeneficiariesMultiple BeneficiariesEstate, Gift & Trust LawTrustsCreationEstate, Gift & Trust LawTrustsTestamentary Trusts



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California Legal Forms--Transaction Guide

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DIVISION IV: WILLS AND TRUSTS  
CHAPTER 64 TESTAMENTARY TRUSTS: PAYMENT AND DISTRIBUTION PROVISIONS  
PART IV. FORMS

A. Complete Provisions for Payment and Distribution of Income and Principal

*24-64 California Legal Forms--Transaction Guide § 64.202*

**§ 64.202 Separate Trusts for Children With Different Payment Provisions for Each Child**

**[1] Comment**

**[a] Use of Form**

This form is a will provision that may be used to divide the trust estate into equal shares for each of the testator's children and to make different payment and distribution provisions for each child.

For a will provision creating separate trusts for the testator's children and making identical provisions for payment of income and principal to each child, see § 64.200. For will provisions creating single (or family pot) trusts, see §§ 64.201 and 64.203. For rules relating to spendthrift trusts and the advantages and disadvantages of including spendthrift provisions in the will, see discussions in § 64.41[1] et seq. and in § 64.200[1][h]. For complete will forms, including complete will forms establishing testamentary trusts, see Ch. 61, *Will Drafting and Complete Will Forms*.

For a comparison of trust plans that create separate trusts for the testator's children with trust plans that create single or family pot trusts, see discussion in § 64.200[1][b]. For a discussion of the advantages and disadvantages of separate trusts and family pot trusts, see discussion in § 64.200[1][c][i] et seq.

**[b] Separate Shares With Different Payment Provisions**

**[i] In General**

A testator who creates separate trusts for his or her children may also make different provisions for the payment and distribution of the income and principal of those trusts. This form illustrates how different provisions may be specified. It is cast in the form of a residuary clause. The clause may be conditioned to take effect only if the testator's spouse fails to survive the testator for a specified period (e.g., six months); or, if appropriate, may be made unconditional (*see* discussion in § 64.200[1][j]). It requires the trustee to divide the trust estate into equal shares and to set aside one share for each of the testator's children. Different provisions for payment and distribution of income and principal are made for each trust. Although this form assumes that the testator has two sons, it may be modified to fit the needs of any

number of sons or daughters of a particular testator.

### **[ii] Advantages and Disadvantages**

Before the testator decides to make different payment and distribution provisions for his or her children, the advantages and disadvantages of different provisions should be carefully considered.

A testator's children will sometimes have significantly different needs. For example, one child may have a special medical condition that requires the expenditure of large sums of money for health or custodial care. One of the testator's children may have an independent source of income, while the other may depend solely on the trust for the necessities of life. One child may enjoy the testator's full confidence, while the other may not. One child may have a large family that is dependent upon him or her for financial support, while the other may have no family to support. In these or other similar circumstances, the testator may find it necessary or desirable to make different provisions for payment of income and principal to suit the needs of different children.

Different provisions for the payment of income and principal may, however, be the source of unhappiness and dissatisfaction among children. While different children sometimes have different needs, they frequently expect their parents to treat them alike in matters of inheritance. If the testator decides to make different provisions for the children, it may be desirable for the attorney to meet with the children, outline the payment and distribution provisions of the will, and explain the testator's reasons for making different provisions. This explanation may serve to ease problems that the attorney might otherwise encounter during the administration of the estate or the operation of the trust.

### **[iii] Particular Provisions**

This form grants the trustee discretion to pay sufficient sums out of income and, if necessary, out of principal, for the benefit of the testator's older son until the older son reaches the age of 22. Between the ages of 22 and 30, the older son will receive only one-half of the net income because the testator believes the older son should be at least partially self-supporting. However, the testator wishes the son to complete his education and provides additional payments for that purpose. Additionally, the testator authorizes the older son to withdraw a total of \$30,000 from the trust between the ages of 25 and 30. The testator believes this money may be necessary to assist the older son in starting a business, opening a professional office, or purchasing a residence. All of the older son's share of the trust estate is distributed to him when he reaches the age of 30.

The testator gives the younger son the same benefits for support and education that were given to the older son, except that the younger son's benefits continue until he reaches 25, rather than 22. Thereafter, the younger son will receive all of the net income from his share of the trust and an annual payment equivalent to 2 percent of the total value of his share, or \$5,000, whichever is greater. When the younger son dies, the trust terminates and is distributed to his issue.

### **[c] Invasion of Principal: "Five or Five Power"**

This trust gives the testator's younger son an annual payment equivalent to 2 percent of the value of his share of the trust, or \$5,000, whichever is greater. This is an example of a "five or five" power of appointment [*see I.R.C. § 2041(b)(2)*]. The taxable estate of a beneficiary who fails to exercise a qualifying five or five power will not include the assets subject to the power. If the beneficiary's power of invasion exceeds the greater of \$5,000 or 5 percent, however, the excess over that amount (if not withdrawn) will be deemed to have been released and will be included in the beneficiary's estate for federal estate tax purposes [*Treas. Reg. § 20.2041-3(d)(3)*]. For a more detailed consideration of five or five powers, their uses and limitations, see the discussion in § 64.302.

### **[d] Revision of Will Necessary to Accommodate After-Born Children**

It is nearly impossible to draft a coherent will with varying clauses for different children that will adequately provide for

children born after execution of the will. For this reason, whenever a will with different provisions for different children is executed, the testator should be advised to contact the attorney promptly if another child is born so that a new will with adequate provisions for the after-born child can be executed. The trust set forth in this form makes no provision for after-born children.

## [2] FORM

### Separate Trusts for Children With Different Payment Provisions for Each Child

#### Trust

[If my \_\_\_\_\_ (husband *or* wife) fails to survive me for \_\_\_\_\_ (*specify period, e.g.:* six months),] I give the residue of my estate to \_\_\_\_\_ [*name of trustee or, if trustee appointed in separate paragraph, state: the trustee named in Paragraph \_\_\_\_\_ of this will*], or to the successor trustee or trustees named below, in trust, to be held, administered, and distributed in accordance with the following provisions:

#### A. PAYMENT AND DISTRIBUTION OF INCOME AND PRINCIPAL

##### Division of Trust Estate Into Separate Trusts

1. The Trustee shall divide the trust estate into two equal shares. One equal share shall be set aside for the benefit of my older son, \_\_\_\_\_ [*name*], and shall constitute and be held and administered as a separate trust for his benefit. The other equal share shall be set aside for the benefit of my younger son, \_\_\_\_\_ [*name*], and shall constitute and be held and administered as a separate trust for his benefit.

##### Trust for Older Son

2. The Trustee shall apply and distribute the net income and principal of the share set aside for the benefit of my older son, \_\_\_\_\_ [*name*], as follows:

(a) Until my older son reaches the age of 22 years, the Trustee shall pay to or apply for his benefit, in monthly or other convenient installments, but not less often than annually, so much of the net income and so much of the principal of his share of the trust estate (up to the whole thereof) as the Trustee, in the Trustee's discretion, deems advisable for his proper care, support, maintenance, and education. The Trustee shall accumulate and add to principal any net income not distributed.

(b) When my older son reaches the age of 22 years, and until he reaches the age of 30 years, the Trustee shall pay to or apply for the benefit of my older son, in monthly or other convenient installments, but not less often than annually, one-half of the net income from his share of the trust estate. While my older son is between the ages of 22 and 30 years, the Trustee shall pay to or apply for his benefit such additional payments out of the net income of his share of the trust estate and, if the net income is insufficient, out of the principal of his share of the trust estate, as the Trustee, in the Trustee's discretion, deems necessary to enable my older son to complete his education. The Trustee shall accumulate and add to the principal of his share of the trust estate any net income not distributed.

(c) In addition to the above payments, during the period that my older son is between the ages of 25 and 30 years, the Trustee shall pay to or apply for the benefit of my older son such additional amounts out of the net income and, if the net income is insufficient, out of the principal of his share of the trust estate, as my older son shall, from time to time,

request in writing of the Trustee; provided, however, that the total amount of the requests to be honored by the Trustee during that five-year period shall not exceed \$30,000. My older son need not give any reasons to the Trustee for making any requests pursuant to this paragraph.

(d) When my older son reaches the age of 30 years, the Trustee shall immediately distribute to him all of the remaining balance of his share of the trust estate.

(e) If my older son should die before he reaches the age of 30 years, then on his death the Trustee shall distribute all of the balance of my older son's share of the trust estate to his surviving issue on the principle of representation. If my older son should die before attaining the age of 30 years leaving no issue, then on his death the balance of my older son's share of the trust estate shall be added to the share of the trust estate set aside for my younger son. If my older son should die before attaining the age of 30 years leaving no issue, and if at that time the share of the trust estate set aside for my younger son has been distributed in full, then on the death of my older son the Trustee shall distribute all of the balance of my older son's share of the trust estate to the surviving issue of my younger son on the principle of representation. If my older son should die before reaching the age of 30 years and is not survived by any of his issue or by my younger son or by any issue of my younger son, the then-balance of my older son's share of the trust estate shall be distributed to \_\_\_\_\_ [*specify alternative disposition, e.g.: my heirs, their identities and respective shares to be determined in accordance with the laws of the State of California in effect at the time of distribution. If there are no heirs of mine, the trust estate shall be distributed to \_\_\_\_\_ (name and address of charitable beneficiary)*].

### **Trust for Younger Son**

3. The Trustee shall apply and distribute the net income and principal of the share of the trust estate set aside for the benefit of my younger son, \_\_\_\_\_ [*name*], as follows:

(a) Until my younger son reaches the age of 25 years, the Trustee shall pay to or apply for his benefit, in monthly or other convenient installments, but not less often than annually, so much of the net income and so much of the principal of his share of the trust estate (up to the whole thereof) as the Trustee, in the Trustee's discretion, deems advisable for his proper care, support, maintenance, and education. The Trustee shall accumulate and add to principal any net income not distributed.

(b) When my younger son reaches the age of 25 years, the Trustee shall thereafter pay to or apply for the benefit of my younger son, in monthly or other convenient installments, but not less often than annually, all of the net income from his share of the trust estate.

(c) On the first day of the calendar year immediately following my younger son's 25th birthday, and annually thereafter during his lifetime on the first day of the calendar month immediately following his birthday, the Trustee shall determine the market value of the principal of his share of the trust estate. This determination shall be conclusive on all persons interested in his share of the trust estate. Annually, on the first day of the first month immediately following the month in which the Trustee makes this determination, the Trustee shall pay to or apply for the benefit of my younger son out of the principal of his share of the trust estate a sum equal to 2 percent of that value, as last determined by the Trustee, or \$5,000, whichever is greater.

(d) On the death of my younger son, the Trustee shall distribute all of the balance of my younger son's share of the trust estate to his issue \_\_\_\_\_ [in the manner provided in Section \_\_\_\_\_ (240 or 246 or 247) of the California Probate Code *or* in equal shares, share and share alike, irrespective of whether or not all such issue are members of the same generation]. If my younger son should die leaving no issue, then on his death the balance of my younger son's share of the trust estate shall be added to the share of the trust estate set aside for my older son. If

my younger son should die without issue, and if at the time of my younger son's death the share of the trust estate set aside for my older son has been distributed in full, then the Trustee shall distribute the balance of my younger son's share of the trust estate to my older son, or if my older son is not living at that time, to the surviving issue of my older son on the principle of representation. If my younger son should die without surviving issue, and if he is not survived by my older son or by any issue of my older son, the balance of all of the principal and undistributed income then remaining in my younger son's share of the trust estate shall be distributed to \_\_\_\_\_ [*specify alternative disposition, e.g.: my heirs, their identities and respective shares to be determined in accordance with the laws of the State of California in effect at the time of distribution. If there are no heirs of mine, the trust estate shall be distributed to \_\_\_\_\_ (name and address of charitable beneficiary)*].

### **Exercise of Discretion**

4. In exercising the discretion conferred on the Trustee to make payments and distributions of income and principal to any beneficiary or beneficiaries as provided in this will, the Trustee shall take into consideration, to the extent that the Trustee deems advisable, the value of the trust assets, the needs, both present and future, of the beneficiaries, and the tax consequences to the trust and to the beneficiaries of any payment or distribution. The Trustee may accept as final and conclusive the written statement of any beneficiary receiving a payment or distribution as to the amount and availability of any other income or resources of that beneficiary. The determination of the Trustee with respect to the advisability of making payments out of income or principal to any beneficiary shall be conclusive on all persons interested in the trust. In exercising the discretion conferred on the Trustee to make payments and distributions of income and principal to any beneficiary, the Trustee shall \_\_\_\_\_ [consider any income or resources outside the trust made known to the Trustee and reasonably available to the needs of that beneficiary *or* not consider any income or resources available to that beneficiary outside the trust].

### **Definitions**

5. As used in this will:

- (a) The terms "child" and "children" and "grandchild" and "grandchildren" include adopted children and any children who may hereafter be born.
- (b) The term "issue" means lawful issue and includes legally adopted children.
- (c) Unless the context requires otherwise, the term "trust" refers to one of the separate trusts provided for herein, and the term "trust estate" refers to the estate of one of those separate trusts.
- (d) The term "education" includes \_\_\_\_\_ [college, but not postgraduate, *or* both college and postgraduate] study at any accredited institution of the beneficiary's choice and for any period of time that the Trustee, in the Trustee's discretion, shall deem advantageous to the beneficiary concerned. The Trustee shall, within reasonable limits, provide adequate amounts for all living and travel expenses of the beneficiary in connection with any such education.

### **Maximum Duration of Trusts**

6. Any trust created by this will, or by the exercise of any power of appointment conferred by this will, shall, if not terminated sooner, terminate 21 years after the death of the last survivor of those of my issue who are living at the time of my death. The principal and undistributed income of any trust terminated under this clause shall be distributed to the

income beneficiaries of that trust in the same proportion that they are entitled to income immediately before termination. If that proportion is not fixed by the terms of this will, distribution shall be to the income beneficiaries of that trust who are then living and to the then-living issue of income beneficiaries of that trust who are deceased but who leave issue then living, \_\_\_\_\_ [in the manner provided in Section \_\_\_\_\_ (240 or 246 or 247) of the California Probate Code or in equal shares, share and share alike, irrespective of whether or not all such issue are members of the same generation].

### **Occupation of Real Property**

7. The Trustee may, in the Trustee's discretion, permit any person who has a current right to receive income from the trust estate to occupy any real property which forms a part of \_\_\_\_\_ [the trust estate or any separate part of the trust estate from which that beneficiary's right to income is derived]. The terms of occupation may include, but are not limited to, rent-free occupation of the real property, or occupation in consideration of full or partial payment of taxes, insurance, maintenance, and ordinary repairs. The terms of any such occupation shall be determined by the Trustee in the Trustee's discretion.

*[If the testator wishes to assure a particular beneficiary the right to occupy a residence that has been occupied by that beneficiary before the testator's death, then a clause directing the trustee to allow the beneficiary to occupy the residence should be used. For such a clause, see P 9 of § 64.206.]*

### **Payments on Behalf of Beneficiary**

8. If, at any time, any beneficiary entitled to receive income or principal from the trust estate is a minor, is an incompetent person, is a person for whose person or estate a guardian or conservator has been appointed, or is, in the judgment of the Trustee, unable to handle funds properly or wisely, the Trustee may, in the Trustee's discretion, make or apply payments or distributions from any trust provided for in this will in one or more of the following ways:

- (a) Directly to the beneficiary;
- (b) To the natural guardian or legally appointed guardian or conservator of the person or estate of the beneficiary; or
- (c) To any provider of support, maintenance, care, healthcare, or education of or for the beneficiary.

In making any payments or distributions under this clause, the Trustee shall not be required to see to the application of any funds paid or applied in any of the aforementioned ways, and receipt by the payee shall fully discharge the Trustee. Any decision, in good faith, by the Trustee as to which of the aforementioned methods should be used in making payments, shall be conclusive and binding on all parties concerned.

### **Accrued or Undistributed Payments**

9. On the termination of the right of any beneficiary to receive payments from net income or principal under this will, all such payments accrued or undistributed by the Trustee at the date of termination shall be distributed to the beneficiary next entitled to the successive interest by the terms of this will.

### **Notice to Trustee**

10. Until the Trustee receives written notice of any birth, death, marriage, or other event on which a right to receive payments or distributions from the trust estate may depend, the Trustee shall incur no liability to persons whose interests may have been affected by that event for disbursements or distributions previously made in good faith.

#### **Discretion to Withhold Disputed Payments**

11. If, at any time, there are conflicting claims as to the person or persons entitled to any payment or distribution from the trust estate, or from any of the separate trusts provided for in this will, the Trustee may, in the Trustee's discretion, withhold all or part of any disputed payment or distribution until entitlement to the payment or distribution has been finally adjudicated by a court of competent jurisdiction, and, in doing so, the Trustee shall incur no obligation to pay interest on any disputed payment or distribution withheld in good faith.

*[If appropriate, add spendthrift clause, as follows:]*

#### **Spendthrift Clause**

12. No income beneficiary or remainder beneficiary shall have any right, power, or authority to sell, transfer, assign, pledge, mortgage, alienate, hypothecate, encumber, or otherwise impair all or any part of his or her interest in the trust estate or in the principal or income of any of the separate trusts provided for in this will, directly or indirectly, or in any manner whatsoever. To the fullest extent allowed by the law, the interest of each and every income beneficiary and remainder beneficiary shall be free from claims, control, or any other interference on the part of his or her creditors, and shall be free from attachment, execution, bankruptcy proceedings, or any other legal process. The Trustee shall pay, disburse, and distribute principal and income only in the manner provided for in this will, and not on any attempted transfer or assignment by any income beneficiary or remainder beneficiary, or by operation of law.

### **B. GENERAL ADMINISTRATIVE POWERS OF TRUSTEE**

*[Select and add appropriate provisions for administrative powers of the trustee or cotrustees from Ch. 64A, Testamentary Trusts: Trustee Provisions]*

### **C. OPERATIONAL PROVISIONS**

*[Select and add appropriate operational provisions for the trust from Ch. 64B, Testamentary Trusts: Administrative Provisions]*

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsGeneral OverviewEstate, Gift & Trust LawTrustsBeneficiariesMultiple BeneficiariesEstate, Gift & Trust LawTrustsCreationEstate, Gift & Trust LawTrustsTestamentary Trusts



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DIVISION IV: WILLS AND TRUSTS  
CHAPTER 64 TESTAMENTARY TRUSTS: PAYMENT AND DISTRIBUTION PROVISIONS  
PART IV. FORMS

A. Complete Provisions for Payment and Distribution of Income and Principal

*24-64 California Legal Forms--Transaction Guide § 64.203*

**§ 64.203 Family Pot Trust for Spouse and Children With Remainder to Children**

**[1] Comment**

**[a] Use of Form**

This form is a will provision that may be used to create a single (or "family pot") trust for the benefit of the surviving spouse and the children of the testator and to provide that the remainder will go to the children when the surviving spouse dies or the testator's youngest child reaches the age of 25, whichever occurs last. It authorizes the trustee to pay the income to the surviving spouse and to the testator's children who are under the age of 22. Between the ages of 22 and 25, the children will receive discretionary payments for their educations. When the surviving spouse dies, or when the youngest child reaches the age of 25, whichever occurs last, the trust will terminate and the principal will be distributed to the surviving children.

For a form creating a family pot trust for the testator's children with sprinkling provisions, see § 64.201. For forms creating a separate trust for each of the testator's children, see §§ 64.200 and 64.202. For rules relating to spendthrift trusts and the advantages and disadvantages of including spendthrift provisions in the will, see discussions in § 64.41[1] et seq., and in § 64.200[1][h]. For complete will forms, including complete wills establishing testamentary trusts, see Ch., *Will Drafting and Complete Will Forms*.

**[b] Marital Deduction Considerations**

Because this form allows the trustee to pay income to the testator's children during the lifetime of the surviving spouse, it will not qualify for the federal estate tax marital deduction [see I.R.C. § 2056(b)(1), (5), (7)(B)(ii)(I)]. Thus, it should be used only if the amount of the trust is small enough that recourse to the marital deduction is unnecessary, or if for some other reason the marital deduction is to be inapplicable. The use of such a trust for larger estates ordinarily is inappropriate and in a great many cases could constitute legal malpractice. For discussion of the marital deduction, marital deduction planning, and the circumstances under which a marital deduction trust should be used in lieu of a trust such as this one, see Ch. 71, *Marital Deduction Trust Provisions*, § 71.11.

### **[c] "Family Pot" Trust for Benefit of Spouse and Children--Advantages and Disadvantages**

The establishment of a family pot trust that will benefit both the testator's surviving spouse and children presents both advantages and disadvantages. Before deciding upon any testamentary plan, the testator and the attorney should carefully consider these advantages and disadvantages, weighing them against the needs of the prospective beneficiaries and the wishes of the testator.

A trustee who has discretion to shift the benefits of a trust among the beneficiaries may spread the trust income among the beneficiaries in such a way as to minimize their total income tax liability. If, for example, one of the beneficiaries is in a lower income tax bracket than another, distributing income to the lower-bracket beneficiary will result in a net income tax savings for the beneficiaries. Further, a trust that benefits both the surviving spouse and the children will ensure that the children will receive some benefit from the estate as soon as the trust becomes effective. If the trust is created for the benefit of the surviving spouse alone, the children may or may not receive some benefit from it during the spouse's lifetime or upon his or her death. Many testamentary trusts provide that all payments are to be made to the surviving spouse while he or she is living. In such a case, any benefit that the children will receive during the surviving spouse's lifetime will depend solely upon the largesse of the surviving spouse.

A trust that benefits both the surviving spouse and the children must, of necessity, divide its benefits among the beneficiaries. If the trust estate is small or modest in size, the income that would otherwise be available for the support of the spouse will necessarily be diminished by any payments made to the surviving children. If the principal object of the testator's bounty is the surviving spouse, then the testator and attorney should determine the adequacy of the trust estate to provide for the spouse's needs as well as those of the children. If the trust estate is inadequate to make provisions for both, the testator may choose to benefit the spouse at the expense of the children, who may be better able to provide for themselves.

For a comparison of trust plans that create separate trusts for beneficiaries with plans that create single or family pot trusts, see discussion in § 64.200[1][b]. For a general consideration of the advantages and disadvantages of separate trusts and family pot trusts, see discussion in § 64.200[1][c][i] et seq.

### **[d] Particular Provisions**

This trust provides that each of the testator's children will be supported by the trust until he or she reaches the age of 22. This is the age at which many children complete their college educations and, presumably, are ready to become self-supporting. Any other age that suits the wishes of the testator or the anticipated needs of the children may be substituted. If, for example, the testator expects that the children will pursue postgraduate studies, then the age at which their right to support will terminate may be raised. No child will receive a distribute share of the trust principal until that child is 25 or until the surviving spouse dies, whichever occurs later. The distribute share of each child is charged with the amount of educational payments made between the ages of 22 and 25 in an effort to equalize the total of the benefits received by each beneficiary. If the testator wishes to encourage each child to obtain as much education as possible, and does not wish to penalize those children who pursue their educations and benefit those who do not, this provision may be omitted.

### **[2] FORM**

#### **Family Pot Trust for Spouse and Children With Remainder to Children**

#### **Trust**

I give the residue of my estate to \_\_\_\_\_ [name of trustee or, if trustee appointed in separate paragraph, state: the trustee named in Paragraph \_\_\_\_\_ of this will], or to the successor trustee or trustees named below, in trust, to be held, administered, and distributed in accordance with the following provisions:

**A. PAYMENT AND DISTRIBUTION OF INCOME AND PRINCIPAL****Administration as Single Trust**

1. The entire trust estate shall be administered as one trust until my youngest child then living reaches the age of 25 years, or until my spouse dies, whichever event occurs last. Until that time, the Trustee shall apply the net income and principal of the trust estate as follows:

(a) The Trustee shall pay to or apply for the benefit of my spouse during \_\_\_\_\_ [his *or* her] lifetime, and for the benefit of each of my living children who are under the age of 22 years, in monthly or other convenient installments, but not less often than annually, so much of the net income and so much of the principal of the trust estate (up to the whole thereof) as the Trustee, in the Trustee's discretion, deems advisable for the proper care, support, maintenance, and education of each of them.

(b) The Trustee shall pay to or apply for the benefit of each of my living children who are over the age of 22 years but under the age of 25 years, in monthly or other convenient installments, but not less often than annually, so much of the net income and so much of the principal of the trust estate (up to the whole thereof) as the Trustee, in the Trustee's discretion, deems advisable for the education of each of them.

(c) The Trustee may pay more to or apply more for some beneficiaries than others, and may omit some beneficiaries entirely.

(d) The Trustee shall accumulate and add to the principal of the trust any net income of the trust not paid out in accordance with the discretion hereinabove conferred on the Trustee.

(e) Payments or distributions made by the Trustee from trust principal as authorized by the terms of this will \_\_\_\_\_ [shall *or* shall not] subsequently be deducted from the value of the trust principal to which the recipient of those payments shall be entitled on distribution or termination of the trust.

(f) In exercising the discretion conferred on the Trustee to make payments and distributions of income and principal to any beneficiary or beneficiaries as provided in this will, the Trustee shall take into consideration, to the extent that the Trustee deems advisable, the value of the trust assets, the needs of the beneficiaries, both present and future, and the tax consequences to the trust and to the beneficiaries of any payment or distribution. The Trustee may accept as final and conclusive the written statement of any beneficiary receiving a payment or distribution as to the amount and availability of any other income or resources of that beneficiary. The determination of the Trustee with respect to the advisability of making payments out of income or principal to any beneficiary shall be conclusive on all persons interested in the trust. In exercising the discretion conferred on the Trustee to make payments and distributions of income and principal to any beneficiary, the Trustee shall \_\_\_\_\_ [consider any income or resources outside the trust made known to the Trustee and reasonably available to the needs of that beneficiary *or* not consider any income or resources available to that beneficiary outside the trust].

**Division Into Separate Trusts**

2. When my youngest child then living reaches the age of 25 years, or when my spouse dies, whichever event occurs last, the trust shall terminate and the Trustee shall immediately divide the trust estate into as many equal shares as there are children of mine then living and children of mine then deceased but leaving issue then surviving. One equal share

shall be then be distributed to each of my children then living, and one equal share shall then be distributed to the issue of each deceased child of mine on the principle of representation.

### **Definitions**

3. As used in this will:

(a) The terms "child" and "children" and "grandchild" and "grandchildren" include adopted children and any children who may hereafter be born.

(b) The term "issue" means lawful issue and includes legally adopted children.

(c) Unless the context requires otherwise, the term "trust" refers to the trust provided for in this will, and the term "trust estate" refers to the estate of that trust.

(d) The term "education" includes \_\_\_\_\_ [college, but not postgraduate, *or* both college and postgraduate] study at any accredited institution of the beneficiary's choice and for any period of time that the Trustee, in the Trustee's discretion, shall deem advantageous to the beneficiary concerned. The Trustee shall, within reasonable limits, provide adequate amounts for all living and travel expenses of the beneficiary in connection with all such education.

### **Maximum Duration of Trusts**

4. Any trust created by this will, or by the exercise of any power of appointment conferred by this will, shall, if not terminated sooner, terminate 21 years after the death of the last survivor of those of my issue who are living at the time of my death. The principal and undistributed income of any trust terminated under this clause shall be distributed to the income beneficiaries of that trust in the same proportion that they are entitled to income immediately before termination. If that proportion is not fixed by the terms of this will, distribution shall be to the income beneficiaries of that trust who are then living and to the then-living issue of income beneficiaries of that trust who are deceased but who leave issue then living, \_\_\_\_\_ [in the manner provided in Section \_\_\_\_\_ (240 *or* 246 *or* 247) of the California Probate Code *or* in equal shares, share and share alike, irrespective of whether or not all such issue are members of the same generation].

### **Occupation of Real Property**

5. The Trustee may, in the Trustee's discretion, permit any person who has a current right to receive income from the trust estate to occupy any real property that forms a part of \_\_\_\_\_ [the trust estate *or* any separate part of the trust estate from which that beneficiary's right to income is derived]. The terms of occupation may include, but are not limited to, rent-free occupation of any such real property, or occupation in consideration of full or partial payment of taxes, insurance, maintenance, and ordinary repairs. The terms of any such occupation shall be determined by the Trustee in the Trustee's discretion.

*[If the testator wishes to assure a particular beneficiary the right to occupy a residence that has been occupied by that beneficiary before the testator's death, then a clause directing the trustee to allow the beneficiary to occupy the residence should be used. For such a clause, see P 9 of § 64.206.]*

**Payments on Behalf of Beneficiary**

6. If, at any time, any beneficiary entitled to receive income or principal from the trust estate is a minor, is an incompetent person, is a person for whose person or estate a guardian or conservator has been appointed, or is, in the judgment of the Trustee, unable to handle funds properly or wisely, the Trustee may, in the Trustee's discretion, make or apply payments or distributions from any trust provided for in this will in one or more of the following ways:

- (a) Directly to the beneficiary;
- (b) To the natural guardian or legally appointed guardian or conservator of the person or estate of the beneficiary; or
- (c) To any provider of support, maintenance, care, health care, or education of or for the beneficiary.

In making any payments or distributions under this clause, the Trustee shall not be required to see to the application of any funds paid or applied in any of the aforementioned ways, and receipt by the payee shall fully discharge the Trustee. Any decision, in good faith, by the Trustee as to which of the aforementioned methods should be used in making payments shall be conclusive and binding on all parties concerned.

**Accrued or Undistributed Payments**

7. On the termination of the right of any beneficiary to receive payments from net income or principal under any of the separate trusts provided for in this will, all such payments accrued or undistributed by the Trustee at the date of the termination shall be distributed to the beneficiary next entitled to the successive interest by the terms of this will.

**Notice to Trustee**

8. Until the Trustee receives written notice of any birth, death, marriage, or other event on which a right to receive payments or distributions from the trust estate may depend, the Trustee shall incur no liability to any person whose interests may have been affected by that event for disbursements or distributions previously made in good faith.

**Discretion to Withhold Disputed Payments**

9. If, at any time, there are conflicting claims as to the person or persons entitled to any payment or distribution from the trust estate, or from any of the separate trusts provided for in this will, the Trustee may, in the Trustee's discretion, withhold all or part of any disputed payment or distribution until entitlement to the payment or distribution has been finally adjudicated by a court of competent jurisdiction, and, in doing so, the Trustee shall incur no obligation to pay interest on any disputed payment or distribution withheld in good faith.

*[If appropriate, add spendthrift clause, as follows:]*

**Spendthrift Clause**

10. No income beneficiary or remainder beneficiary shall have any right, power, or authority to sell, transfer, assign, pledge, mortgage, alienate, hypothecate, encumber, or otherwise impair all or any part of his or her interest in the trust

estate or in the principal or income of any of the separate trusts provided for in this will, directly or indirectly, or in any manner whatsoever. To the fullest extent allowed by the law, the interest of each and every income beneficiary and remainder beneficiary shall be free from claims, control, or any other interference on the part of his or her creditors, and shall be free from attachment, execution, bankruptcy proceedings, or any other legal process. The Trustee shall pay, disburse, and distribute principal and income only in the manner provided for in this will, and not on any attempted transfer or assignment by any income beneficiary or remainder beneficiary, or by operation of law.

#### **B. GENERAL ADMINISTRATIVE POWERS OF TRUSTEE**

*[Select and add appropriate provisions for administrative powers of the trustee or cotrustees from Ch. 64A, Testamentary Trusts: Trustee Provisions]*

#### **C. OPERATIONAL PROVISIONS**

*[Select and add appropriate operational provisions for the trust from Ch. 64B, Testamentary Trusts: Administrative Provisions]*

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsGeneral OverviewEstate, Gift & Trust LawTrustsBeneficiariesMultiple BeneficiariesEstate, Gift & Trust LawTrustsBeneficiariesSuccessive BeneficiariesEstate, Gift & Trust LawTrustsCreationEstate, Gift & Trust LawTrustsTestamentary Trusts



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California Legal Forms--Transaction Guide

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DIVISION IV: WILLS AND TRUSTS  
CHAPTER 64 TESTAMENTARY TRUSTS: PAYMENT AND DISTRIBUTION PROVISIONS  
PART IV. FORMS

A. Complete Provisions for Payment and Distribution of Income and Principal

*24-64 California Legal Forms--Transaction Guide § 64.204*

**§ 64.204 Trust for Adult Son or Daughter With Power to Invade Corpus and Special Power of Appointment**

**[1] Comment**

**[a] Use of Form**

This form is a will provision that may be used to create a trust for the benefit of an adult son or daughter of the testator and to provide the son or daughter with funds beyond those a trustee might consider adequate for the son's or daughter's support. In addition, the beneficiary is given a special power of appointment exercisable by will.

For a form creating separate trusts for two or more of the testator's children, see §§ 64.200 and 64.202. For rules relating to spendthrift trusts and the advantages and disadvantages of including spendthrift provisions in the will, see discussions § 64.41[1] et seq. and in § 64.200[1][h]. For complete will forms, including complete wills establishing testamentary trusts, see Ch. 61, *Will Drafting and Complete Will Forms* .

**[b] Particular Provisions**

This form is suitable for use by a testator who is a widow, widower, or divorced person and who wishes to establish a trust for the benefit of an adult child. The form contemplates that there are presently no grandchildren but reflects the testator's wish that, if grandchildren are born, the adult child will have the power to determine what amounts the grandchildren will receive from the trust. To implement this wish, the beneficiary is given a power to appoint trust assets in favor of the testator's grandchildren. This power is a special power of appointment [*see Prob. Code § 611(d); see also § 64.44[1]*] and, as such, will not cause the property subject to the power to be included in the beneficiary's estate for federal estate tax purposes [*see I.R.C. § 2041(a)(2); see also § 64.51[3]*].

**[c] Five or Five Power**

This form includes a so-called "Five or Five" power. Under this power, the beneficiary has the right to demand the withdrawal of the greater of \$5,000 or 5 percent of the market value of the trust principal in each calendar year. If the power is not exercised in any given year, it will lapse and cannot be exercised in succeeding years.

The power is limited to \$5,000 or 5 percent of the market value of the trust principal so that the lapse of the power will not be deemed a taxable gift to the remainder beneficiaries. Under *I.R.C. § 2514(e)*, the lapse of a power of appointment will be deemed a taxable gift only to the extent that the property subject to the power exceeds the greater of \$5,000 or 5 percent of the property out of which the power could be exercised. For further discussion of "five or five" powers and the "five or five" rule, see § 64.302[1].

#### **[d] Independent Trustee**

Because this form gives the sole income beneficiary extensive rights in the trust, it is suggested that the testator appoint an independent trustee [for provisions appointing trustees, see *Ch. 64A, Testamentary Trusts: Trustee Provisions, §§ 64A.200-64A.202*; for tax considerations in the selection of trustees, see discussion in *Ch. 64A, Testamentary Trusts: Trustee Provisions, § 64A.32[1]* et seq.].

#### **[2] FORM**

#### **Trust for Adult Son or Daughter With Power to Inva d e Corpus and Special Power of Appointment**

##### **Trust**

I give the residue of my estate to \_\_\_\_\_ [*name of trustee, or, if trustee is appointed elsewhere in will: the Trustee named in Paragraph \_\_\_\_\_ of this will*], or to the successor trustee or trustees named below, in trust, to be held, administered, and distributed in accordance with the following provisions:

#### **A. PAYMENT AND DISTRIBUTION OF INCOME AND PRINCIPAL**

##### **Payment of Income**

1. The Trustee shall pay to or apply for the benefit of my \_\_\_\_\_ [son or daughter], \_\_\_\_\_ [*name*], during \_\_\_\_\_ [his or her] lifetime, in monthly or other convenient installments, but not less often than annually, all of the net income from the trust estate.

##### **Discretionary Payments out of Principal**

2. The Trustee shall, from time to time, pay to or apply for the benefit of my \_\_\_\_\_ [son or daughter] such additional sums from the principal of the trust estate (up to the whole thereof) as the Trustee, in the Trustee's discretion, deems advisable for \_\_\_\_\_ [his or her] proper care, support, and maintenance. In exercising the discretion conferred on the Trustee to make payments and distributions of principal pursuant to this paragraph, the Trustee, to the extent that the Trustee deems advisable, shall take into consideration any income or resources known to the Trustee that are available to my \_\_\_\_\_ [son or daughter] from sources outside of this trust.

##### **"Five or Five" Power**

3. In addition to any other payments provided for in this will, the Trustee shall, during the lifetime of my \_\_\_\_\_ [son or daughter], pay to or apply for \_\_\_\_\_ [his or her] benefit such additional sums from the principal of the trust estate as \_\_\_\_\_ [he or she] may, from time to time, request in writing, not exceeding in any calendar year the greater of \$5,000 or 5 percent of the market value of the principal of the

trust estate, determined as of the last day of the calendar year in which the request was made. This limited right to make withdrawals from the principal of the trust estate is noncumulative, so that an amount which might have been, but was not, withdrawn during any year may not be withdrawn in any later year.

### Special Power of Appointment

4.(a) On the death of my \_\_\_\_\_[son *or* daughter], the Trustee shall distribute the balance of the trust estate then remaining, if any, together with accrued income and undistributed income, to those persons appointed by my \_\_\_\_\_[son *or* daughter] from among \_\_\_\_\_[his *or* her] own issue; provided, however, that this power of appointment may not be exercised in favor of my \_\_\_\_\_[son *or* daughter], \_\_\_\_\_[his *or* her] estate, \_\_\_\_\_[his *or* her] creditors, or the creditors of \_\_\_\_\_[his *or* her] estate. The appointment shall be in the amounts or proportions and on the terms and conditions, either outright or in trust, that my \_\_\_\_\_[son *or* daughter] shall appoint in a valid will, whether executed before or after my death, specifically referring to and exercising this power of appointment.

(b) Before distributing the balance of the trust estate, the Trustee shall pay any federal estate tax, any federal generation-skipping transfer tax, and any other federal or state tax or taxes that may be due by reason of the death of my \_\_\_\_\_[son *or* daughter].

(c) If any of the property subject to this power of appointment is not effectively appointed by my \_\_\_\_\_[son *or* daughter] for any reason, the property shall be distributed to \_\_\_\_\_[specify alternative disposition, e.g.: my heirs, their identities and respective shares to be determined in accordance with the laws of the State of California in effect at the time of distribution. If there are no heirs of mine, the trust estate shall be distributed to \_\_\_\_\_ (*name and address of charitable beneficiary*)].

### Definitions

5. As used in this will:

(a) The terms "child" and "children" and "grandchild" and "grandchildren" include adopted children and any children who may hereafter be born.

(b) The term "issue" means lawful issue and includes legally adopted children.

(c) Unless the context requires otherwise, the term "trust" refers to the trust provided for herein, and the term "trust estate" refers to the estate of that trust.

(d) The term "education" includes \_\_\_\_\_[college, but not postgraduate, *or* both college and postgraduate] study at any accredited institution of the beneficiary's choice for any period of time that the Trustee, in the Trustee's discretion, shall deem advantageous to the beneficiary concerned. The Trustee shall, within reasonable limits, provide adequate amounts for all living and travel expenses of the beneficiary in connection with all such education.

### Maximum Duration of Trust

6. Any trust created by this will, or by the exercise of any power of appointment conferred by this will, shall, if not terminated sooner, terminate 21 years after the death of the last survivor of those of my issue who are living at the time

of my death. The principal and undistributed income of any trust terminated under this clause shall be distributed to the income beneficiaries of that trust in the same proportion that they are entitled to income immediately before termination. If that proportion is not fixed by the terms of this will, distribution shall be to the income beneficiaries of that trust who are then living and to the then-living issue of income beneficiaries of that trust who are deceased but who leave issue then living, \_\_\_\_\_ [in the manner provided in Section \_\_\_\_\_ (240 or 246 or 247) of the California Probate Code or in equal shares, share and share alike, irrespective of whether or not all such issue are members of the same generation].

### **Occupation of Real Property**

7. The Trustee may, in the Trustee's discretion, permit any person who has a current right to receive income from the trust estate to occupy any real property that forms a part of \_\_\_\_\_ [the trust estate or any separate part of the trust estate from which that beneficiary's right to income is derived]. The terms of occupation may include, but are not limited to, rent-free occupation of any such real property, or occupation in consideration of full or partial payment of taxes, insurance, maintenance, and ordinary repairs. The terms of any such occupation shall be determined by the Trustee in the Trustee's discretion.

*[If the testator wishes to assure a particular beneficiary the right to occupy a residence that has been occupied by that beneficiary before the testator's death, then a clause directing the trustee to allow the beneficiary to occupy the residence should be used. For such a clause, see P 9 of § 64.206.]*

### **Payments on Behalf of Beneficiary**

8. If, at any time, any beneficiary entitled to receive income or principal from the trust estate is a minor, an incompetent person, a person for whose person or estate a guardian or conservator has been appointed, or is, in the judgment of the Trustee, unable to handle funds properly or wisely, the Trustee, in the Trustee's discretion, may make or apply payments or distributions from any trust provided for in this will in one or more of the following ways:

- (a) Directly to the beneficiary;
- (b) To the natural guardian or legally appointed guardian or conservator of the person or estate of the beneficiary; or
- (c) To any provider of support, maintenance, care, healthcare, or education of or for the beneficiary.

In making any payments or distributions under this clause, the Trustee shall not be required to see to the application of any funds paid or applied in any of the aforementioned ways, and receipt by the payee shall fully discharge the Trustee. Any decision, in good faith, by the Trustee as to which of the aforementioned methods should be used in making payments shall be conclusive and binding on all parties concerned.

### **Accrued or Undistributed Payments**

9. On the termination of the right of any beneficiary to receive payments from net income or principal under any of the separate trusts provided for in this will, all such payments accrued or undistributed by the Trustee at the date of termination shall be distributed to the beneficiary next entitled to the successive interest by the terms of this will.

### **Trustee Not Liable Absent Notice**

10. Until the Trustee receives written notice of any birth, death, marriage, or other event on which a right to receive payments or distributions from the trust estate may depend, the Trustee shall incur no liability to any person whose interests may have been affected by that event for disbursements or distributions previously made in good faith.

#### **Discretion to Withhold Disputed Payments**

11. If, at any time, there are conflicting claims as to the person or persons entitled to any payment or distribution from the trust estate, the Trustee may, in the Trustee's discretion, withhold all or part of any disputed payment or distribution until entitlement to the payment or distribution has been finally adjudicated by a court of competent jurisdiction, and, in doing so, the Trustee shall incur no obligation to pay interest on any disputed payment or distribution withheld in good faith.

*[If appropriate, add spendthrift clause, as follows:]*

#### **Spendthrift Clause**

12. No income beneficiary or remainder beneficiary shall have any right, power, or authority to sell, transfer, assign, pledge, mortgage, alienate, hypothecate, encumber, or otherwise impair all or any part of his or her interest in the trust estate or in the principal or income thereof, directly or indirectly, or in any manner whatsoever. To the fullest extent allowed by the law, the interest of each and every income beneficiary and remainder beneficiary shall be free from claims, control, or any other interference on the part of his or her creditors, and shall be free from attachment, execution, bankruptcy proceedings, or any other legal process. The Trustee shall pay, disburse, and distribute principal and income only in the manner provided for in this will, and not on any attempted transfer or assignment by any income beneficiary or remainder beneficiary, or by operation of law.

### **B. GENERAL ADMINISTRATIVE POWERS OF TRUSTEE**

*[Select and add appropriate provisions for the trustee's administrative powers from Ch. 64A, Testamentary Trusts: Trustee Provisions]*

### **C. OPERATIONAL PROVISIONS**

*[Select and add appropriate operational provisions for the trust from Ch. 64B, Testamentary Trusts: Administrative Provisions]*

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsGeneral OverviewEstate, Gift & Trust LawTrustsBeneficiariesGeneral OverviewEstate, Gift & Trust LawTrustsCreationEstate, Gift & Trust LawTrustsTestamentary Trusts



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DIVISION IV: WILLS AND TRUSTS  
CHAPTER 64 TESTAMENTARY TRUSTS: PAYMENT AND DISTRIBUTION PROVISIONS  
PART IV. FORMS

A. Complete Provisions for Payment and Distribution of Income and Principal

*24-64 California Legal Forms--Transaction Guide § 64.205*

**§ 64.205 Trust for Impaired Son or Daughter With Maximum Protection Against Creditors and Remainder to Grandchildren**

**[1] Comment**

**[a] Use of Form**

This form is a will provision that may be used to create a trust for the benefit of a physically or mentally impaired son or daughter of the testator. The form will be appropriate when the testator has only one child and that child needs special or institutional care or treatment, or when all of the testator's children (with the exception of the impaired child) are self-supporting adults. In establishing this trust, the testator is primarily concerned for the welfare of the impaired child and only secondarily concerned about his or her other children or their issue.

The trust is cast in the form of a residuary clause. The clause may be conditioned to take effect only if the testator's spouse fails to survive the testator for a specified period (e.g., six months); or, if appropriate, may be made unconditional [*see* discussion in § 64.200[1][j]].

**[b] Spendthrift Provisions**

To protect the interest of the impaired child from creditors, this trust includes a spendthrift provision. Although spendthrift provisions should not automatically be included in every testamentary trust, they will be useful when the primary purpose of the trust is to provide for the continuing support of a principal beneficiary who has little or no income outside the trust and who lacks experience in handling money or is the kind of person who may easily be imposed upon by others. For the rules relating to spendthrift trusts and the advantages and disadvantages of including spendthrift provisions in the will, see discussions in § 64.41[1] et seq. and in § 64.200[1][h].

**[c] Discretion of Trustee to Determine Amount of Distributions**

This trust also gives the trustee the sole and absolute discretion to determine the amount of all payments of income and principal to the beneficiary. If a trust instrument confers "absolute," "sole," or "uncontrolled" discretion on a trustee, the

trustee must act in accordance with fiduciary principles and must not act in bad faith or in disregard of the purposes of the trust [*Prob. Code § 16081(a)*]. When the trustee is given absolute discretion to determine the amounts of income and principal that will be paid to a beneficiary, the court will not substitute its judgment for the trustee's [ *Estate of Canfield (1947) 80 Cal. App. 2d 443, 450, 181 P.2d 732* ]. The absolute discretion of the trustee, exercised in good faith, is not subject to control by the court as to its reasonableness in the allocation of income [ *Estate of Canfield (1947) 80 Cal. App. 2d 443, 450, 181 P.2d 732* ]. When the trust provides that the trustee will pay or apply only so much of the income as is necessary for the education or support of an income beneficiary, the beneficiary cannot assign the income interest and the beneficiary's creditors cannot reach it [ *Seymour v. McAvoy (1898) 121 Cal. 438, 443-444, 53 P. 946* ; Scott, *The Law of Trusts* (2d ed., Little, Brown & Co., 1967), vol. II, § 154]. A provision that an income beneficiary is to receive only such income as is necessary for the beneficiary's support limits the beneficiary's interest in such a way that no one other than the beneficiary may enjoy it [Scott, *The Law of Trusts* (2d ed., 1967), vol. II, § 154]. Such a provision will afford an extra measure of protection to an income beneficiary in need of spendthrift protection (although it will also restrict the beneficiary's ability to use trust income in ways that may be beneficial).

#### **[d] Provisions**

To carry out the purposes of the trust, the trustee is authorized to make payments or distributions directly to the beneficiary or to make payments to any person or entity furnishing care or support for the beneficiary. The trust also provides for payment of the expenses of the beneficiary's last illness and funeral and burial expenses.

The trust may provide for any appropriate distribution of trust principal on the death of the principal beneficiary. Since it is contemplated that the testator's other children are self-supporting adults, the testator may choose to distribute the principal to his or her grandchildren in any suitable proportions or shares. The Probate Code describes three basic patterns for the distribution of class gifts. They are: (1) distribution in the manner provided in cases of intestacy (also called "distribution in the manner provided in *Section 240 of the Probate Code*") [*Prob. Code §§ 240, 245*]; (2) distribution "per stirpes" or "by representation" (also called "distribution in the manner provided in *Section 246 of the Probate Code*") [*Prob. Code § 246*]; and (3) distribution "per capita at each generation" (also called "distribution in the manner provided in *Section 247 of the Probate Code*") [*Prob. Code § 247*]. Case law provides for a fourth pattern of distribution, which is distribution "per capita" [*see Lombardi v. Blois (1964) 230 Cal. App. 2d 191, 198, 40 Cal. Rptr. 899*]. For a general discussion of these patterns, see *Ch. 61, Will Drafting and Complete Will Forms, § 61.15[6]*.

#### **[e] Generation-Skipping Transfer Tax**

When distributions are made to grandchildren, the generation-skipping transfer tax may be triggered. For rules relating to the imposition of the generation-skipping transfer tax, see discussion in § 64.200[1][e][ii].

#### **[2] FORM**

#### **Trust for Impaired Son or Daughter With Maximum Protection Against Creditors and Remainder to Grandchildren**

##### **Trust**

[If my \_\_\_\_\_ (husband or wife) fails to survive me for \_\_\_\_\_ (specify period, e.g.: six months),] I give the residue of my estate to \_\_\_\_\_ [name of trustee, or, if trustee is appointed elsewhere in will: the Trustee named in Paragraph \_\_\_\_ of this will], or to the successor trustee or trustees named below, in trust, to be held, administered, and distributed in accordance with the following provisions:

#### **A. PAYMENT AND DISTRIBUTION OF INCOME AND PRINCIPAL**

### **During Lifetime of Beneficiary**

1. The Trustee shall pay to or apply for the benefit of my \_\_\_\_\_ [son *or* daughter], \_\_\_\_\_ [name] (hereinafter sometimes referred to as the Beneficiary), during \_\_\_\_\_ [his *or* her] lifetime, in monthly or other convenient installments, but not less often than annually, so much of the net income and so much of the principal of the trust estate (up to the whole thereof) as the Trustee, in the Trustee's sole and absolute discretion, deems necessary for the Beneficiary's proper care, support, and maintenance. The Trustee shall accumulate and add to principal the balance, if any, of the net income not paid or applied in accordance with the foregoing provision.

### **Exercise of Discretion**

2. In exercising the discretion conferred on the Trustee to make payments and distributions of income and principal to the Beneficiary, the Trustee shall take into consideration, to the extent that the Trustee deems advisable, the value of the trust assets, the needs, both present and future, of the Beneficiary, and the tax consequences to the trust and the Beneficiary of any payment or distribution. The Trustee may accept as final and conclusive the written statement of the Beneficiary as to the amount and availability of any other income or resources of the Beneficiary. The determination of the Trustee with respect to the advisability of making payments out of income or principal to the Beneficiary shall be conclusive on all persons and the creditors of all persons interested in the trust. In exercising the discretion conferred on the Trustee to make payments and distributions of income and principal to the Beneficiary, the Trustee shall consider any income or resources outside the trust made known to the Trustee and reasonably available to the needs of the Beneficiary.

### **Payment of Funeral and Burial Expenses**

3. On the death of the Beneficiary, the Trustee shall pay out of the income, if available, and, if not, out of the principal of the trust estate the expenses of the Beneficiary's last illness, funeral, and burial, unless the Trustee shall, in the Trustee's discretion, determine that other provisions have been made for the payment of those expenses.

### **Termination on Death of Beneficiary**

4. The trust shall terminate on the death of the Beneficiary, and the Trustee shall immediately distribute the balance of the trust estate \_\_\_\_\_ [add provisions for distribution of principal, e.g.: to my grandchildren then living, in equal shares. However, if any grandchild of mine is deceased at the time of the Beneficiary's death but leaves issue then surviving, the share of the trust estate that would otherwise have been distributed to the deceased grandchild shall instead be distributed to those issue \_\_\_\_\_ (e.g.: in the manner provided in *Section 246 of the California Probate Code*)].

### **Definitions**

5. As used in this will:

(a) The terms "child" and "children" and "grandchild" and "grandchildren" include adopted children and any children who may hereafter be born.

- (b) The term "issue" means lawful issue and includes legally adopted children.
- (c) Unless the context requires otherwise, the term "trust" refers to the trust provided for herein, and the term "trust estate" refers to the estate of that trust.
- (d) The term "education" includes \_\_\_\_\_ [college, but not postgraduate, *or* both college and postgraduate] study at any accredited institution of the Beneficiary's choice and for any period of time that the Trustee, in the Trustee's discretion, shall deem advantageous to the Beneficiary. The Trustee shall, within reasonable limits, provide adequate amounts for all living and travel expenses of the Beneficiary in connection with all such education.

### **Occupation of Real Property**

6. The Trustee may, in the Trustee's discretion, permit the Beneficiary to occupy any real property that forms a part of \_\_\_\_\_ [the trust estate *or* any separate part of the trust estate from which the Beneficiary's right to income is derived]. The terms of occupation may include, but are not limited to, rent-free occupation of that real property, or occupation in consideration of full or partial payment of taxes, insurance, maintenance, and ordinary repairs. The terms of any such occupation shall be determined by the Trustee in the Trustee's discretion.

*[If the testator wishes to assure the beneficiary of the right to occupy a residence occupied by the beneficiary before the testator's death, a clause directing the trustee to allow the beneficiary to occupy the residence should be used. For a clause that may be adapted for that purpose, see P 4 of § 64.206[2].]*

### **Payments on Behalf of Beneficiary**

7. The Trustee may, in the Trustee's discretion, make or apply payments or distributions from the trust in one or more of the following ways:

- (a) Directly to the Beneficiary;
- (b) To the natural guardian or legally appointed guardian or conservator of the person or estate of the Beneficiary; or
- (c) To any provider of support, maintenance, care, healthcare, or education of or for the Beneficiary.

In making any payments or distributions under this clause, the Trustee shall not be required to see to the application of any funds paid or applied in any of the aforementioned ways, and receipt by the payee shall fully discharge the Trustee. Any good faith decision by the Trustee as to which of the aforementioned methods should be used in making payments shall be conclusive and binding on all parties concerned.

### **Notice to Trustee**

8. Until the Trustee receives written notice of any birth, death, marriage, or other event on which a right to receive payments or distributions from the trust estate may depend, the Trustee shall incur no liability to any person whose interests may have been affected by that event for disbursements or distributions previously made in good faith.

### **Discretion to Withhold Disputed Payments**

9. If, at any time, there are conflicting claims as to the person or persons entitled to any payment or distribution from the trust estate, the Trustee may, in the Trustee's discretion, withhold all or part of any disputed payment or distribution until entitlement to the payment or distribution has been finally adjudicated by a court of competent jurisdiction, and, in doing so, the Trustee shall incur no obligation to pay interest on any disputed payment or distribution withheld in good faith.

### **Spendthrift Clause**

10. Neither the Beneficiary nor any of the remainder beneficiaries shall have any right, power, or authority to sell, transfer, assign, pledge, mortgage, alienate, hypothecate, encumber, or otherwise impair all or any part of his or her interest in the principal or income of the trust estate, directly or indirectly, or in any manner whatsoever. To the fullest extent allowed by the law, the interest of the Beneficiary and of each and every remainder beneficiary shall be free from claims, control, or any other interference on the part of the Beneficiary's or any remainder beneficiary's creditors and shall be free from attachment, execution, bankruptcy proceedings, or any other legal process. The Trustee shall pay, disburse, and distribute principal and income only in the manner provided for in this will, and not on any attempted transfer or assignment by the Beneficiary or any remainder beneficiary, or by operation of law.

### **B. GENERAL ADMINISTRATIVE POWERS OF TRUSTEE**

*[Select and add appropriate provisions for the trustee's administrative powers from Ch. 64A, Testamentary Trusts: Trustee Provisions]*

### **C. OPERATIONAL PROVISIONS**

*[Select and add appropriate operational provisions for the trust from Ch. 64B, Testamentary Trusts: Administrative Provisions]*

### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsGeneral OverviewEstate, Gift & Trust LawTrustsBeneficiariesGeneral OverviewEstate, Gift & Trust LawTrustsCreationEstate, Gift & Trust LawTrustsTestamentary Trusts



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California Legal Forms--Transaction Guide

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DIVISION IV: WILLS AND TRUSTS  
CHAPTER 64 TESTAMENTARY TRUSTS: PAYMENT AND DISTRIBUTION PROVISIONS  
PART IV. FORMS

A. Complete Provisions for Payment and Distribution of Income and Principal

*24-64 California Legal Forms--Transaction Guide § 64.206*

**§ 64.206 Non-Marital Deduction Trust for Spouse and Parent With Remainder in Family Pot Trust for Testator's Children**

**[1] Comment**

**[a] Use of Form**

This form is a will provision that may be used to create a non-marital deduction trust that will provide for the support of both the testator's spouse and a parent of the testator. It gives the trustee discretion to pay whatever amounts of income are necessary for the support of the parent during the joint lifetimes of the parent and the spouse, with the balance of the income being paid to the spouse. If the parent survives the spouse, a fractional share of the trust estate will be set aside for the benefit of the parent, who will receive discretionary payments of income and principal from that share. On the parent's death, the parent's share of the trust will, depending on the age of the testator's youngest living child, either be held in trust for the benefit of the testator's children or distributed to them outright. If the spouse survives the parent, all of the trust estate will be held for the benefit of the spouse, and the remainder either held in trust for the children or distributed to them outright.

For a discussion of the relative merits of creating a single family pot trust for the benefit of the testator's children or separate trusts for each of the children, see discussion in § 64.200[1][b] et seq.

**[b] Marital Deduction Considerations**

Because this form allows the trustee to pay income to the testator's parent as well as the testator's surviving spouse, it will not qualify for the federal estate tax marital deduction [*see I.R.C. § 2056(b)(1), (5), (7)(B)(ii)(I)*]. Thus, it should be used only if the amount of the trust is small enough that recourse to the marital deduction is unnecessary, or if for some other reason the marital deduction is to be inapplicable. In larger estates, this form should be used with caution and only after a full consideration of the tax consequences. Often, when a person with a larger estate wants to create a trust for the care of a parent, it may be preferable to create a separate trust for the care of the parent, with remainder to the testator's spouse or children on the parent's death [*see, e.g., § 64.207*]. Assets earmarked for the surviving spouse then can be placed in a standard marital deduction trust.

For discussion of the marital deduction, marital deduction planning, and the circumstances under which a marital deduction trust should be used, see *Ch. 71, Marital Deduction Trust Provisions, § 71.11.*

### [c] Provisions

Payments to the testator's parent are limited to net income, regardless of any emergencies that might occur, so that the ability of the trust to provide for the testator's spouse (and, after the death of the spouse, the testator's children) will not be impaired. During the parent's lifetime, the spouse will receive the balance of any income that is not paid to the parent. If the spouse dies while the parent is still living, a fractional part of the trust estate will be set aside for the parent, out of which he or she will thereafter receive whatever income and principal payments are appropriate. On the parent's death, the balance of his or her share will be added to the remainder of the trust estate.

On the death of the spouse, a family pot trust will be established for all of the children of the testator who are under a specified age (e.g., 24 years). When the testator's youngest living child reaches the specified age, the trust will be distributed in equal shares to all of the children.

Alternatively, the support needs of a parent of the testator may be served by establishing a separate trust for the benefit of the parent. For a form establishing such a trust, see § 64.207.

### [2] FORM

#### **Non-Marital Deduction Trust for Spouse and Parent With Remainder in Family Pot Trust for Testator's Children**

##### **Trust**

I give \_\_\_\_\_ [*describe property to be placed in trust e.g.: the residue of my estate*] to \_\_\_\_\_ [*name of trustee, or, if trustee is appointed elsewhere in will: the Trustee named in Paragraph \_\_\_\_\_ of this will*], or to the successor trustee or trustees named below, in trust, to be held, administered, and distributed in accordance with the following provisions:

#### **A. PAYMENT AND DISTRIBUTION OF INCOME AND PRINCIPAL**

##### **Income Payments for Support of Parent**

1. During the joint lifetimes of my \_\_\_\_\_ [*husband or wife*] and my \_\_\_\_\_ [*mother or father*], the Trustee shall pay to or apply for the benefit of my \_\_\_\_\_ [*mother or father*], \_\_\_\_\_ [*name*], in monthly or other convenient installments, but not less often than annually, so much of the net income of the trust estate as the Trustee, in the Trustee's discretion, deems appropriate for the proper support and care of my \_\_\_\_\_ [*mother or father*], after considering, to the extent known to the Trustee, any other income or resources available to \_\_\_\_\_ [*him or her*].

##### **Remaining Income to Spouse**

2. During the lifetime of my \_\_\_\_\_ [*husband or wife*], the Trustee shall pay to or apply for \_\_\_\_\_ [*his or her*] benefit, in monthly or other convenient installments, but not less often than annually, any and all of the net income not paid to or applied for the benefit of my \_\_\_\_\_ [*mother or*

father] in accordance with the terms of Paragraph 1 of this trust.

### **Payments of Principal for Support of Spouse**

3. The Trustee shall, from time to time during the lifetime of my \_\_\_\_\_ [husband *or* wife], pay to or apply for \_\_\_\_\_ [his *or* her] benefit such additional sums from the principal of the trust estate as the Trustee, in the Trustee's discretion, deems appropriate for \_\_\_\_\_ [his *or* her] support in \_\_\_\_\_ [his *or* her] accustomed manner of living. In exercising the Trustee's discretion to make payments of principal to my \_\_\_\_\_ [husband *or* wife] under this paragraph, the Trustee shall, to the extent deemed advisable by the Trustee, take into consideration any income or other resources available to \_\_\_\_\_ [him *or* her] from sources outside the trust that may be known to the Trustee.

### **Payments and Distributions if Parent Survives Spouse**

4. If my \_\_\_\_\_ [mother *or* father] survives my \_\_\_\_\_ [husband *or* wife], then upon the death of my \_\_\_\_\_ [husband *or* wife] the Trustee shall set aside \_\_\_\_\_ [specify fractional share of trust estate, e.g.: one-quarter] of the trust estate for the benefit of my \_\_\_\_\_ [mother *or* father], and shall hold, administer, and distribute that share as follows:

(a) The Trustee shall, during the lifetime of my \_\_\_\_\_ [mother *or* father], pay to or apply for \_\_\_\_\_ [his *or* her] benefit, in monthly or other convenient installments, but not less often than annually, so much of the net income and so much of the principal of that share of the trust estate as the Trustee, in the Trustee's discretion, deems appropriate for the support of my \_\_\_\_\_ [mother *or* father] in \_\_\_\_\_ [his *or* her] accustomed manner of living, after considering, to the extent known to the Trustee, any other income or resources available to \_\_\_\_\_ [him *or* her]. The Trustee shall accumulate and add to principal any net income of the trust not paid out to my \_\_\_\_\_ [mother *or* father] pursuant to this paragraph.

(b) On the death of my \_\_\_\_\_ [mother *or* father], if my youngest living child has not then reached the age of \_\_\_\_\_ [specify age, e.g.: 24 years], the Trustee shall add the balance of \_\_\_\_\_ [his *or* her] share of the trust estate to the rest of the trust estate and shall hold, administer, and distribute it in accordance with the provisions of Paragraph 5 of this trust.

(c) If my \_\_\_\_\_ [mother *or* father] dies after my youngest living child reaches the age of \_\_\_\_\_ [same age set forth above, e.g.: 24 years], the balance of \_\_\_\_\_ [his *or* her] share of the trust estate shall, upon \_\_\_\_\_ [his *or* her] death, \_\_\_\_\_ [specify distribution plan, e.g.: be distributed in equal shares to my children living at the time of distribution]. If any child of mine not living at the time of distribution leaves issue then surviving, an equal share shall be distributed to the then-living issue of that child \_\_\_\_\_ [in the manner provided in Section \_\_\_\_\_ (240 *or* 246 *or* 247) of the California Probate Code *or* in equal shares, share and share alike, irrespective of whether or not all such issue are members of the same generation].

### **Payments and Distributions if Spouse Dies Before Youngest Living Child Reaches Specified Age**

5. On the death of my \_\_\_\_\_ [husband *or* wife], if my youngest living child has not then reached the age of \_\_\_\_\_ [same age set forth above, e.g.: 24 years], the Trustee shall hold, administer, and distribute all the rest and residue of the trust estate (excepting any part of the trust estate then being held for the benefit

of my \_\_\_\_\_ [mother *or* father] under the terms of Paragraph 4 of this trust) as follows:

(a) The Trustee shall pay to or apply for the benefit of each of my children then living who are under the age of \_\_\_\_\_ [same age set forth above, *e.g.*: 24 years], in monthly or other convenient installments, but not less often than annually, so much of the net income and so much of the principal of the trust estate, up to the whole thereof, as the Trustee, in the Trustee's discretion, deems advisable for the proper care, support, maintenance, and education of each such child. No child who has attained the age of \_\_\_\_\_ [same age set forth above, *e.g.*: 24 years] shall receive any of the aforesaid payments from the trust estate.

(b) The Trustee may pay more to or apply more for some children than others and may omit some beneficiaries entirely.

(c) The Trustee shall accumulate and add to the principal of the trust any net income of the trust not paid out in accordance with the discretion conferred on the Trustee.

(d) Payments or distributions made by the Trustee from trust principal as authorized by the terms of this will shall not subsequently be deducted from or otherwise reduce or impair the value of the property to which the recipient of the payments shall be entitled on any distribution or termination of the trust.

(e) In exercising the Trustee's discretion to make payments of income of principal to any child of mine, the Trustee shall take into consideration any income or resources available to the child from sources outside of the trust that may be known to the Trustee. The Trustee may accept as final and conclusive the written statement of the child receiving payment as to other available income or resources. The determination of the Trustee with respect to the advisability of making payments out of income or principal to any of my children shall be conclusive on all persons interested in the trust.

(f) When my youngest child then living reaches the age of \_\_\_\_\_ [same age set forth previously, *e.g.*: 24 years], the Trustee shall immediately distribute all of the trust estate then remaining in equal shares to my children living at the time of distribution. If any child of mine not living at the time of distribution leaves issue then surviving, an equal share of the trust estate shall be distributed to the then-living issue of that child \_\_\_\_\_ [in the manner provided in Section \_\_\_\_\_ (240 *or* 246 *or* 247) of the California Probate Code *or* in equal shares, share and share alike, irrespective of whether or not all such issue are members of the same generation].

#### **Distribution if Spouse Dies After Youngest Living Child Reaches Specified Age**

6. If my \_\_\_\_\_ [husband *or* wife] dies after my youngest living child reaches the age of \_\_\_\_\_ [same age set forth above, *e.g.*: 24 years], all the rest and remainder of the trust estate (excepting any share of the trust estate then being held for the benefit of my \_\_\_\_\_ [mother *or* father] under the terms of Paragraph 4 of this trust) shall, upon my \_\_\_\_\_ [husband's *or* wife's] death, \_\_\_\_\_ [specify distribution plan, *e.g.*: be distributed in equal shares to my children living at the time of distribution]. If any child of mine not living at the time of distribution leaves issue then surviving, an equal share shall be distributed to the then-living issue of that child \_\_\_\_\_ [in the manner provided in Section \_\_\_\_\_ (240 *or* 246 *or* 247) of the California Probate Code *or* in equal shares, share and share alike, irrespective of whether or not all such issue are members of the same generation].

#### **Definitions**

7. As used in this will:

(a) The terms "child" and "children" and "grandchild" and "grandchildren" include adopted children and any children who may hereafter be born.

(b) The term "issue" means lawful issue and includes legally adopted children.

(c) Unless the context requires otherwise, the term "trust" refers to the trust provided for herein, and the term "trust estate" refers to the estate of that trust.

(d) The term "education" includes \_\_\_\_\_ [college, but not postgraduate, *or* both college and postgraduate] study at any accredited institution of the beneficiary's choice and for any period of time that the Trustee, in the Trustee's discretion, shall deem advantageous to the beneficiary concerned. The Trustee shall, within reasonable limits, provide adequate amounts for all living and travel expenses of the beneficiary in connection with all such education.

### Maximum Duration of Trust

8. Any trust created by this will shall, if not terminated sooner, terminate 21 years after the death of the last survivor of those of my issue who are living at the time of my death. The principal and undistributed income of any trust terminated under this clause shall be distributed to the income beneficiaries of that trust in the same proportion that they are entitled to income immediately before termination. If that proportion is not fixed by the terms of this will, distribution shall be to the income beneficiaries of that trust who are then living and to the then-living issue of income beneficiaries of that trust who are deceased but who leave issue then living, \_\_\_\_\_ [in the manner provided in Section \_\_\_\_\_ (240 *or* 246 *or* 247) of the California Probate Code *or* in equal shares, share and share alike, irrespective of whether or not all such issue are members of the same generation].

### Occupation of Real Property

9. If any real property that \_\_\_\_\_ [name of beneficiary] occupies as \_\_\_\_\_ [his or her] home at the time of my death is, after my death, distributed to the Trustee and forms a part of the trust estate, the Trustee is authorized and directed to allow \_\_\_\_\_ [name of beneficiary] to continue to use and occupy the same as \_\_\_\_\_ [his or her] home, without the payment of any rent or other cost, expense, or charge, and for as long as \_\_\_\_\_ [he or she] wishes to reside there. During such time as the home is occupied by \_\_\_\_\_ [name of beneficiary], the Trustee shall pay all taxes, assessments, insurance, and maintenance costs, and all costs of ordinary and reasonable repairs, replacements, and improvements for the home, with payments for these costs to be made out of the principal or income of the trust, as the Trustee shall, in the Trustee's discretion, determine. With the written consent of \_\_\_\_\_ [name of beneficiary], or at such time as \_\_\_\_\_ [name of beneficiary] shall cease permanently to occupy that real property as \_\_\_\_\_ [his or her] home, the Trustee may sell the home, and, on the written request of \_\_\_\_\_ [name of beneficiary], the sale proceeds shall be used by the Trustee to purchase, acquire, or build a substantially similar home, or if \_\_\_\_\_ [name of beneficiary] wishes, a home of lesser value, taking title in the name of the Trustee and allowing \_\_\_\_\_ [name of beneficiary] to occupy and use it on the same terms and conditions set forth above with respect to the home that \_\_\_\_\_ [name of beneficiary] may occupy as \_\_\_\_\_ [his or her] home at the time of my death. If \_\_\_\_\_ [name of beneficiary] does not request the acquisition or construction of another home, the Trustee shall invest the proceeds of any such sale and shall hold, administer, and distribute the income and principal of those proceeds under the terms of this will, exclusive of this paragraph.

### Payments on Behalf of Beneficiary

10. If, at any time, any beneficiary entitled to receive income or principal from the trust estate is a minor, an incompetent person, a person for whose person or estate a guardian or conservator has been appointed, or is, in the judgment of the Trustee, unable to handle funds properly or wisely, the Trustee may, in the Trustee's discretion, make or apply payments or distributions from any trust provided for in this will in one or more of the following ways:

- (a) Directly to the beneficiary;
- (b) To the natural guardian or legally appointed guardian or conservator of the person or estate of the beneficiary; or
- (c) To any provider of support, maintenance, care, healthcare, or education of or for the beneficiary.

In making any payments or distributions under this clause, the Trustee shall not be required to see to the application of any funds paid or applied in any of the aforementioned ways, and receipt by the payee shall fully discharge the Trustee. Any good faith decision by the Trustee as to which of the aforementioned methods should be used in making payments shall be conclusive and binding on all parties concerned.

#### **Accrued or Undistributed Payments**

11. On the termination of the right of any beneficiary to receive payments from net income or principal under any trust provided for in this will, all such payments accrued or undistributed by the Trustee at the date of termination shall be distributed to the beneficiary next entitled to the successive interest by the terms of this will.

#### **Notice to Trustee**

12. Until the Trustee receives written notice of any birth, death, marriage, or other event on which a right to receive payments or distributions from the trust estate may depend, the Trustee shall incur no liability to any person whose interests may have been affected by that event for disbursements or distributions previously made in good faith.

#### **Discretion to Withhold Disputed Payments**

13. If, at any time, there are conflicting claims as to the person or persons entitled to any payment or distribution from the trust estate, or from any of the separate trusts provided for in this will, the Trustee may, in the Trustee's discretion, withhold all or part of any disputed payment or distribution until entitlement to the payment or distribution has been finally adjudicated by a court of competent jurisdiction, and, in doing so, the Trustee shall incur no obligation to pay interest on any disputed payment or distribution withheld in good faith.

*[If appropriate, add spendthrift clause, as follows:]*

#### **Spendthrift Clause**

14. No income beneficiary or remainder beneficiary shall have any right, power, or authority to sell, transfer, assign, pledge, mortgage, alienate, hypothecate, encumber, or otherwise impair all or any part of his or her interest in the trust estate or in the principal or income thereof, directly or indirectly, or in any manner whatsoever. To the fullest extent

allowed by the law, the interest of each and every income beneficiary and remainder beneficiary shall be free from claims, control, or any other interference on the part of his or her creditors and shall be free from attachment, execution, bankruptcy proceedings, or any other legal process. The Trustee shall pay, disburse, and distribute principal and income only in the manner provided for in this will, and not on any attempted transfer or assignment by any income beneficiary or remainder beneficiary, or by operation of law.

#### **B. GENERAL ADMINISTRATIVE POWERS OF TRUSTEE**

*[Select and add appropriate provisions for the trustee's administrative powers from Ch. 64A, Testamentary Trusts: Trustee Provisions]*

#### **C. OPERATIONAL PROVISIONS**

*[Select and add appropriate operational provisions for the trust from Ch. 64B, Testamentary Trusts: Administrative Provisions]*

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsGeneral OverviewEstate, Gift & Trust LawTrustsBeneficiariesGeneral OverviewEstate, Gift & Trust LawTrustsCreationEstate, Gift & Trust LawTrustsMarital Deduction TrustsEstate, Gift & Trust LawTrustsTestamentary Trusts



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DIVISION IV: WILLS AND TRUSTS  
CHAPTER 64 TESTAMENTARY TRUSTS: PAYMENT AND DISTRIBUTION PROVISIONS  
PART IV. FORMS

A. Complete Provisions for Payment and Distribution of Income and Principal

*24-64 California Legal Forms--Transaction Guide § 64.207*

**§ 64.207 Trust for Testator's Parents With Payments Equivalent to Specified Percentage of Principal**

**[1] Comment**

**[a] Use of Form**

This form is a will provision that may be used to create a trust that will provide for the support of the testator's mother or father. For a form creating a trust that will provide for the support of the testator's spouse and a parent of the testator, see § 64.206.

**[b] Drafting Considerations**

The payments that will be made to the testator's parent from the trust may be measured in various ways. For example, they may be specified as a percentage of the trust estate. Such a provision may be appropriate if the testator has reason to believe that the value of the trust estate will increase in the future and wishes the payments to his or her parent to increase correspondingly. This plan may be suitable if payments the testator has been making to the parent have increased in the past and the testator expects that the parent's needs will increase in the future. A provision stating the payments as a percentage of the estate probably will not be appropriate, however, if the estate is small or if its value is expected to decline in the future. Under those circumstances, payments expressed as a percentage of the principal will decline as the principal declines, and may eventually become inadequate to meet the parent's needs.

If preferred, the payments may be stated as a fixed dollar amount, or as all of the net income of the trust. Alternatively, the trustee may be given discretion to fix the amount of the payments and to draw upon income or principal to satisfy them. For a form setting the amount of payments in a fixed dollar amount, see § 64.260. For a form directing the trustee to pay the net income of the trust to the parent, see § 64.207. For a form directing the trustee to make fixed, periodic payments out of income or principal, see § 64.260.

For rules and drafting considerations relating to survivorship clauses, see discussion in § 64.200[1][j]. For a consideration of spendthrift clauses and circumstances under which such clauses may be appropriate or inappropriate, see discussion in § 64.41[1] et seq.

**[2] FORM****Trust for Testator's Parents With Payments Equivalent to Specified Percentage of Principal****Trust**

If my \_\_\_\_\_ [mother or father], \_\_\_\_\_ [name] survives me [add, if desired, appropriate survivorship period, e.g.: for six months], I give \_\_\_\_\_ [describe property to be placed in trust] to \_\_\_\_\_ [name of trustee, or, if trustee is appointed elsewhere in will: the Trustee named in Paragraph \_\_\_\_\_ of this will], or to the successor trustee or trustees named below, in trust, to be held, administered, and distributed in accordance with the following provisions:

**A. PAYMENT AND DISTRIBUTION OF INCOME AND PRINCIPAL****During Lifetime of Parent**

1. The Trustee shall pay to or apply for the benefit of my \_\_\_\_\_ [mother or father], during \_\_\_\_\_ [his or her] lifetime, \_\_\_\_\_ [specify amount of payment, e.g.: an annual sum equal to \_\_\_\_\_ (e.g.: 5) percent of the value of the principal of the trust estate determined as of the first day of the calendar year]. This sum shall be paid in monthly or other convenient installments, but not less often than annually, and from the net income of the trust estate, or, if the net income should be insufficient, from the net income and principal of the trust estate. The Trustee shall accumulate and add to principal any net income not distributed.

**On Death of Parent**

2. On the death of my \_\_\_\_\_ [mother or father], the Trustee shall distribute the trust estate \_\_\_\_\_ [specify disposition, e.g.: in equal shares to my children then living; however, if any child of mine not then living leaves issue then living, an equal share shall be distributed to the then-living issue of that child \_\_\_\_\_ (in the manner provided in Section \_\_\_\_\_ (240 or 246 or 247) of the California Probate Code or in equal shares, share and share alike, irrespective of whether or not all such issue are members of the same generation)].

**Definitions**

3. As used in this will:

- (a) The terms "child" and "children" and "grandchild" and "grandchildren" include adopted children and any children who may hereafter be born.
- (b) The term "issue" means lawful issue and includes legally adopted children.
- (c) Unless the context requires otherwise, the term "trust" refers to the trust provided for herein, and the term "trust estate" refers to the estate of that trust.

**Maximum Duration of Trust**

4. Any trust created by this will, or by the exercise of any power of appointment conferred by this will, shall, if not terminated sooner, terminate 21 years after the death of the last survivor of those of my issue who are living at the time of my death. The principal and undistributed income of any trust terminated under this clause shall be distributed to the income beneficiaries of that trust in the same proportion that they are entitled to income immediately before termination. If that proportion is not fixed by the terms of this will, distribution shall be to the income beneficiaries of that trust who are then living and to the then-living issue of income beneficiaries of that trust who are deceased but who leave issue then living, \_\_\_\_\_ [in the manner provided in Section \_\_\_\_\_ (240 or 246 or 247) of the California Probate Code or in equal shares, share and share alike, irrespective of whether or not all such issue are members of the same generation].

#### **Payments on Behalf of Beneficiary**

5. If, at any time, any beneficiary entitled to receive income or principal from the trust estate is a minor, an incompetent person, a person for whose person or estate a guardian or conservator has been appointed, or is, in the judgment of the Trustee, unable to handle funds properly or wisely, the Trustee may, in the Trustee's discretion, make or apply payments or distributions from any trust provided for in this will in one or more of the following ways:

- (a) Directly to the beneficiary;
- (b) To the natural guardian or legally appointed guardian or conservator of the person or estate of the beneficiary; or
- (c) To any provider of support, maintenance, care, health care, or education of or for the beneficiary.

In making any payments or distributions under this clause, the Trustee shall not be required to see to the application of any funds paid or applied in any of the aforementioned ways, and receipt by the payee shall fully discharge the Trustee. Any good faith decision by the Trustee as to which of the aforementioned methods should be used in making payments shall be conclusive and binding on all parties concerned.

#### **Trustee Not Liable Absent Notice**

6. Until the Trustee receives written notice of any birth, death, marriage, or other event on which a right to receive payments or distributions from the trust estate may depend, the Trustee shall incur no liability to any person whose interests may have been affected by that event for disbursements or distributions previously made in good faith.

#### **Discretion to Withhold Disputed Payments**

7. If, at any time, there are conflicting claims as to the person or persons entitled to any payment or distribution from the trust estate or from any part of the trust estate, the Trustee may, in the Trustee's discretion, withhold all or part of any disputed payment or distribution until entitlement to the payment or distribution has been finally adjudicated by a court of competent jurisdiction; and, in doing so, the Trustee shall incur no obligation to pay interest on any disputed payment or distribution withheld in good faith.

*[If appropriate, add spendthrift clause, as follows:]*

**Spendthrift Clause**

8. No income beneficiary or remainder beneficiary shall have any right, power, or authority to sell, transfer, assign, pledge, mortgage, alienate, hypothecate, encumber, or otherwise impair all or any part of his or her interest in the trust estate or in the principal or income thereof, directly or indirectly, or in any manner whatsoever. To the fullest extent allowed by the law, the interest of each and every income beneficiary and remainder beneficiary shall be free from claims, control, or any other interference on the part of his or her creditors, and shall be free from attachment, execution, bankruptcy proceedings, or any other legal process. The Trustee shall pay, disburse, and distribute principal and income only in the manner provided for in this will, and not on any attempted transfer or assignment by any income beneficiary or remainder beneficiary, or by operation of law.

**B. GENERAL ADMINISTRATIVE POWERS OF TRUSTEE**

*[Select and add appropriate provisions for the trustee's administrative powers from Ch. 64A, Testamentary Trusts: Trustee Provisions]*

**C. OPERATIONAL PROVISIONS**

*[Select and add appropriate operational provisions for the trust from Ch. 64B, Testamentary Trusts: Administrative Provisions]*

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsGeneral OverviewEstate, Gift & Trust LawTrustsBeneficiariesGeneral OverviewEstate, Gift & Trust LawTrustsCreationEstate, Gift & Trust LawTrustsTestamentary Trusts



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DIVISION IV: WILLS AND TRUSTS  
CHAPTER 64 TESTAMENTARY TRUSTS: PAYMENT AND DISTRIBUTION PROVISIONS  
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A. Complete Provisions for Payment and Distribution of Income and Principal

*24-64 California Legal Forms--Transaction Guide §§ 64.208-64.219*

**[Reserved]**

§§ 64.208[Reserved]



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DIVISION IV: WILLS AND TRUSTS  
 CHAPTER 64 TESTAMENTARY TRUSTS: PAYMENT AND DISTRIBUTION PROVISIONS  
 PART IV. FORMS  
 B. Payments out of Income

*24-64 California Legal Forms--Transaction Guide § 64.220*

**§ 64.220 Payment of All Net Income for Limited Period**

**[1] Comment**

**[a] Use of Form**

This form is a will provision that may be used to direct the trustee to pay all of the net income of the trust estate to a designated beneficiary for a specified period of time. The period of time may be stated in various ways: as a term of years, until a specified date, or, more usually, until the beneficiary reaches a specified age. The trust may provide that all or a part of the principal of the trust estate will be distributed to the beneficiary when the income payments terminate.

For a will provision directing the trustee to pay all of the net income of the trust to a designated beneficiary for life, see § 64.221. For a discussion of alternative trust provisions requiring a trustee to pay income to one or more beneficiaries for a specified period of time, see § 64.220[1][c].

**[b] Income and Principal**

The Uniform Principal and Income Act [*Prob. Code §§ 16320-16375*] prescribes rules for allocating receipts to principal or income. Under the Act, "income" means money or property received by a fiduciary as a current return from a principal asset. It also includes a portion of receipts from a sale, exchange, or liquidation of certain principal assets [*Prob. Code § 16324*]. "Net income" means the total receipts allocated to income during an accounting period minus the disbursements made from income during the accounting period, plus or minus transfers under this chapter to or from income during the accounting period [*Prob. Code § 16328*]. The current version of the Uniform Principal and Income Act does not expressly define the term "principal."

A trustee must administer a trust in accordance with the terms of the trust, even if the terms of the trust contradict provisions of the Uniform Principal and Income Act [*Prob. Code § 16335(a)(1)*]. A trustee may administer a trust in accordance with a discretionary power given by the trust, even if this produces a result contrary to a result required or permitted by the Act [*Prob. Code § 16335(a)(2)*]. A trustee must administer the trust in accordance with the terms of the

Act if the trust does not include a different provision or does not grant the trustee a discretionary power of administration [*Prob. Code § 16335(a)(3)*]. In exercising a discretionary power of administration, whether granted by a trust or the Act, the trustee must administer the trust impartially, except when the trust expresses an intention that the fiduciary favor one or more of the beneficiaries. The exercise of discretion in accordance with the Act is presumed to be fair and reasonable to all beneficiaries [*Prob. Code § 16335(b)*].

For detailed discussion of the Uniform Principal and Income Act, see Ch. 64B, *Testamentary Trusts: Administrative Provisions*.

### **[c] Drafting Alternatives**

A direction to pay the entire net income of the trust to a designated beneficiary is a common trust provision, particularly when the trust will have only one income beneficiary, such as the testator's spouse or child. If there is more than one income beneficiary, it is more common to divide the estate into separate trusts or trust shares or to grant the trustee discretion to distribute ("sprinkle") income and principal among the beneficiaries. For a will provision creating a separate trust for each of the testator's children, see § 64.200. For a provision authorizing the trustee to pay a part of the net income to a designated beneficiary, see § 64.222. For a provision authorizing the trustee to pay all of the net income to a class of beneficiaries, see § 64.223. For a provision granting the trustee discretion to determine the amount of income that will be paid to a single beneficiary, see § 64.224. For a provision creating a single (or family pot) trust and authorizing the trustee to "sprinkle" income and principal among the testator's children, see § 64.201. For a "sprinkling" trust that authorizes discretionary payments of income among several beneficiaries, see § 64.225.

### **[d] Reserves and Frequency of Payments**

It is the usual practice to pay the income beneficiary in monthly installments. Since the net income of the trust cannot be finally determined until all of the year's expenses have been computed, some provision must be made for withholding income to meet expenses. Most banks that act as trustees set up a reserve for regularly recurring charges against income (e.g., attorneys' fees and trustee's compensation), which are customarily paid once a year and, in some cases, every two or three years.

Monthly payments may be impractical if the trust consists of assets that produce income on an irregular basis. Further, beneficiaries who do not depend upon payments from the trust for their entire support may prefer to receive payments at other intervals, e.g., quarterly or semi-annually. For this reason, it is good practice to authorize, but not to require, the trustee to make monthly payments.

## **[2] FORM**

### **Payment of All Net Income for Limited Period**

#### **Payment of Income**

The Trustee shall pay to or apply for the benefit of \_\_\_\_\_ [*name of beneficiary*] all of the net income of the trust, in monthly or other convenient installments, but not less often than annually, continuing \_\_\_\_\_ [*specify period during which payments will continue, e.g.: until \_\_\_\_\_ (he or she) reaches the age of 25 years or for a period of 10 years*].

### **Legal Topics:**

For related research and practice materials, see the following legal topics:  
 Estate, Gift & Trust LawTrustsGeneral OverviewEstate, Gift & Trust LawTrustsCreationEstate, Gift & Trust LawTrustsTestamentary TrustsEstate, Gift & Trust LawTrustsTrusteesDuties & PowersLimitations



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DIVISION IV: WILLS AND TRUSTS  
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*24-64 California Legal Forms--Transaction Guide § 64.221*

**§ 64.221 Payment of All Net Income for Life**

**[1] Comment**

**[a] Use of Form**

This form is a will provision that may be used to direct the trustee to pay all of the net income of the trust estate to a designated beneficiary for the beneficiary's lifetime. For a provision directing the trustee to pay all of the net income to a designated beneficiary for a specified period of time, see § 64.220. For a provision directing the trustee to pay part of the net income to a designated beneficiary, see § 64.222. For a provision directing the trustee to pay all of the net income to members of a class, see § 64.223. For a provision granting the trustee discretion to determine the amount of income that will be paid to a single beneficiary, see § 64.224.

**[b] Trustee's Duty to Determine and Pay Net Income**

Under this provision, the trustee's duty is to determine and pay all the net income except the amount necessary to meet reasonably anticipated expenses chargeable against income [Restatement (Second) of Trusts § 182 cmt. b]. The trustee's determination of what is income and what is principal will be determined by other provisions of the trust or, in default of other provisions, by the terms of the Revised Uniform Principal and Income Act [*see Prob. Code §§ 16300-16375; see also Ch. 64B, Testamentary Trusts: Administrative Provisions* ].

Since the net income of a trust cannot be finally determined until all of the year's expenses have been computed, some provision must be made for withholding income to meet expenses. For a consideration of reserves for expenses and the frequency with which payments of net income should be made to the beneficiary, see discussion in § 64.220[1][d].

For a detailed discussion of the Revised Uniform Principal and Income Act, see *Ch. 64B, Testamentary Trusts: Administrative Provisions, § 64B.31[1]* et seq. For will provisions governing the determination by the trustee of principal and income, see *Ch. 64B, Testamentary Trusts: Administrative Provisions § 64B.200* et seq.

**[2] FORM**

**Payment of All Net Income for Life**

**Payment of Income**

The Trustee shall pay to or apply for the benefit of \_\_\_\_\_ [*name of beneficiary*], in monthly or other convenient installments, but not less often than annually, all of the net income of the trust for \_\_\_\_\_ [his or her] lifetime.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsGeneral OverviewEstate, Gift & Trust LawTrustsCreationEstate, Gift & Trust LawTrustsTestamentary TrustsEstate, Gift & Trust LawTrustsTrusteesDuties & PowersGeneral Overview



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*24-64 California Legal Forms--Transaction Guide § 64.222*

**§ 64.222 Payment of Part of Net Income**

**[1] Comment**

**[a] Use of Form**

This form is a will provision that may be used to direct the trustee to pay a part of the net income to a designated beneficiary. The part may be expressed as a fraction or as a percentage of the net income. The form further authorizes the trustee to accumulate the net income not paid to the beneficiary and add it to the trust principal. For a general discussion of accumulations and the tax consequences of directions to accumulate, see § 64.42[1] et seq.

For a provision directing the trustee to pay all of the net income to a designated beneficiary, see § 64.220. For a provision authorizing the trustee to pay all of the net income to a class of beneficiaries, see § 64.223. For a provision granting the trustee discretion to determine the amount of income that will be paid to a single beneficiary, see § 64.224. For a "sprinkling" trust that authorizes discretionary payments of income among a class of beneficiaries, see § 64.225.

**[b] Tax Caution**

This provision should not be used if the trust is designed to qualify for the federal estate tax marital deduction as a life estate with power of appointment trust [*see I.R.C. § 2056(b)(5)*] or a qualified terminable interest property (QTIP) trust [*see I.R.C. § 1056(b)(7)*]. An interest in a lifetime income/power of appointment trust will qualify for the marital deduction only if the surviving spouse is entitled to all of the income from the entire interest or all or the income from a "specific portion" of the interest [*I.R.C. § 2056(b)(5)*]. "Specific portion" means a portion determined on a fractional or percentage basis [*I.R.C. § 2056(b)(10)*; *see Treas. Reg. § 20.2056(b)-5(c)* (meaning of "specific portion")]. A substantially similar rule applies to QTIP trusts [*see Treas. Reg. § 20.2056(b)-7(b)(1)(ii)*]. For a more detailed discussion of the income requirements applicable to these trusts, see Ch. 71, *Marital Deduction Trust Provisions* .

**[2] FORM**

**Payment of Part of Net Income**

**Payment of Income**

The Trustee shall pay to or apply for the benefit of \_\_\_\_\_ [*name of beneficiary*]  
\_\_\_\_\_ [*specify part, e.g., one-half or three-fourths*] of the net income of the trust, in monthly or other  
convenient installments, but not less often than annually, continuing \_\_\_\_\_ [*specify period during*  
*which payments will continue, e.g.: until \_\_\_\_\_ (he or she) reaches the age of 25 years or for a period*  
*of 10 years*]. The Trustee shall accumulate and add to principal any net income not distributed.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsGeneral OverviewEstate, Gift & Trust LawTrustsCreationEstate, Gift & Trust  
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*24-64 California Legal Forms--Transaction Guide § 64.223*

**§ 64.223 Payment of All Net Income to Class of Beneficiaries**

**[1] Comment**

**[a] Use of Form**

This form is a will provision that may be used to direct the trustee to pay all of the income of the trust in equal shares to members of a designated class. For a will provision making an outright gift to members of a class, see *Ch. 63, Will Provisions, § 63.551*.

**[b] Class Gifts**

**[i] In General**

A class gift is a gift to a group of persons who are uncertain in number at the time the gift is made but who will be determined at some future time and who are to take in equal or other definite proportions [ *Estate of Moore (1955) 135 Cal. App. 2d 122, 135, 286 P.2d 939* ]. A class gift (outright or in trust) may be useful if the testator wishes the group of persons who will enjoy the gift to increase or decrease in number by reason of the birth or death of additional members. Class gifts are frequently characterized by the use of terms such as "my children," "my grandchildren," or "my brothers and sisters."

For further consideration of class gifts, see *Ch. 63, Will Provisions, § 63.551[1][b][i]* et seq.

**[ii] Statutory Rules**

The general rule is that halfbloods, adopted persons, persons born out of wedlock, stepchildren, foster children, and the issue of all such persons, when appropriate to the class, are included within the terms of a class gift [*Prob. Code § 21115(a)*]. However, the general rule is subject to important qualifications relating to certain natural and adopted children [*see Prob. Code § 21115(b)*]. For a discussion of these qualifications, see *Ch. 63, Will Provisions, § 63.226[1]*.

### **[iii] Drafting Considerations**

A testator who intends to make a class gift should not identify members of the class by name. Such an identification will raise an inference that the identified individuals (and only those individuals) are intended to take [ *Estate of Murphy (1909)* 157 Cal. 63, 67, 106 P. 230 ; *Estate of Moore (1955)* 135 Cal. App. 2d 122, 134-137, 286 P.2d 939 ]. If words that, standing alone, would be effective to create a class are followed by equally operative words of devise to devisees by name and in definite proportions, the law infers from the designation by name and shares that the devisees are to take individually and that the descriptive portion of the class is intended merely as a means of identifying the individual devisees [ *Estate of Moore (1955)* 135 Cal. App. 2d 122, 136-137, 286 P.2d 939] . Similarly, when the will numbers the persons who will take (e.g., "my three children" or "the four children of my late sister, Jane Smith"), an inference arises that the children were intended to take individually rather than as members of a class [ *Estate of Murphy (1909)* 157 Cal. 63, 64, 67, 106 P. 230] .

When drafting a class gift, the attorney should clearly define and specify all of the following:

- The members of the class.
- The time when membership in the class will be ascertained.
- The proportions or shares that will be taken by members of the class.

If such words as "children," "grandchildren," "issue," or "heirs" are used to define the class, the drafter should precisely determine and clearly explain to the testator the persons who will be included within the definition. The time when membership in the class will be determined may be the date of execution of the will, the date of the testator's death, or any other readily ascertainable event or date. When a will or trust provides for issue or descendants to take property, the manner of distribution and the shares that each distributee are entitled to take will vary according to the language used. The Probate Code provides for three basic patterns of distribution:

- Distribution in the manner provided for in cases of intestacy [*Prob. Code* §§ 240, 245].
- Distribution "per stirpes" or by representation [*Prob. Code* § 246].
- Distribution "per capita at each generation" [*Prob. Code* § 247].

Case law provides for a fourth pattern of distribution, which is distribution "per capita" [*see Lombardi v. Blois (1964)* 230 Cal. App. 2d 191, 198, 40 Cal. Rptr. 899 ]. For a discussion of these patterns of distribution, see *Ch. 61, Will Drafting and Complete Will Forms*, § 61.15[6].

### **[c] Alternatives to Class Gifts**

A result similar or nearly identical to that of a class gift may, in appropriate circumstances, be achieved by other means. For example, the testator may create separate trusts for each named member of a particular class. Alternatively, the will may create a "family pot" trust for the benefit of named members of the testator's family, such as children or grandchildren, and authorize the trustee to distribute ("sprinkle") income and principal among the beneficiaries. For a will provision creating a separate trust for each of the testator's children, see § 64.200. For a will provision creating a single (or family pot) trust and authorizing the trustee to "sprinkle" income and principal among the testator's children, see § 64.201. For a will provision creating a family pot trust for the benefit of the surviving spouse and children of the testator, see § 64.203.

### **[d] Class Gifts and the Rule Against Perpetuities**

A gift to a class, whether outright or in trust, has the potential for violating the rule against perpetuities. The California rules governing perpetuities are contained in the Uniform Statutory Rule Against Perpetuities (USRAP) [*see Prob. Code §§ 21200-21231*], which includes a recodification of the old common law rule against perpetuities [*see Prob. Code §§ 21205(a), 21206(a), 21207(a)*]. Under that recodification, a nonvested property interest is invalid unless, when the interest is created, it is certain to either vest or terminate no later than 21 years after the death of the person alive at the time of creation [*Prob. Code § 21205(a)*]. If the right of any person to membership in a particular class cannot be determined within 21 years after the death of a person alive when the testator dies, then the class gift might fail to either vest or terminate within the 21-year period of the common law rule against perpetuities.

However, the USRAP also includes a 90-year "wait and see" rule, under which a nonvested interest that violates the common law rule against perpetuities may nevertheless be valid if it *actually vests or terminates* within 90 years after its creation [*Prob. Code § 21205(b)*; *see Ch. 67, Future Interests and Perpetuities, § 67.16[6]*]. The 90-year wait-and-see rule shifts the perpetuities focus from the traditional consideration of what *might conceivably happen* to *what actually happens* to the interest in the 90 years after it is created.

The 90-year wait-and-see rule substantially liberalizes perpetuities regulation in California, and allows will drafters a measure of latitude in drafting dispositions that might possibly exceed the period of the rule. However, the liberalized rule still does not entirely eliminate the need for recognizing potential perpetuities violations and taking reasonable steps to avoid them. First, any disposition that has the potential of violating the common law rule against perpetuities (as recodified in the USRAP) should be drafted so as to avoid any obvious violation. In the case of a class gift, this can be done by carefully defining membership in the class and avoiding the possibility that any person could claim membership in the class more than 21 years after the death of some person alive when the gift is made (when a gift is made by will, whether outright or in trust, the gift is made at the time of the testator's death). Second, any will that creates a trust, makes a class gift, or otherwise calls for a complex disposition of property should include a perpetuities savings clause. For perpetuities savings clauses suitable for wills, *see Ch. 67, Future Interests and Perpetuities, §§ 67.231, 67.232*. For a detailed discussion of the Uniform Statutory Rule Against Perpetuities and its operation in California, *see Ch. 67, Future Interests and Perpetuities, § 67.16*

## [2] FORM

### Payment of All Net Income to Class of Beneficiaries

#### Payment of Income

The trustee shall pay to or apply for the benefit of any one or more of \_\_\_\_\_ [*describe class, e.g., my children or the children of my brother, Miles G. Pliskit*], [*add following if necessary to avoid potential violation of rule against perpetuities: their names and identities to be determined as of the date of my death,*] in equal shares, all of the net income of the trust, in monthly or other convenient installments, but not less often than annually, \_\_\_\_\_ [*specify period during which payments may be made, e.g., for life or until (specify condition on which payment of all income will cease, e.g., the youngest child reaches the age of 25 years)*].

#### Legal Topics:

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsGeneral OverviewEstate, Gift & Trust LawTrustsBeneficiariesMultiple BeneficiariesEstate, Gift & Trust LawTrustsCreationEstate, Gift & Trust LawTrustsTestamentary TrustsEstate, Gift & Trust LawTrustsTrusteesDuties & PowersGeneral Overview



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*24-64 California Legal Forms--Transaction Guide § 64.224*

**§ 64.224 Discretionary Payment of Income to One Beneficiary**

**[1] Comment**

**[a] Use of Form**

This form is a will provision that may be used to grant the trustee discretion to determine the amount of income that will be paid to a single beneficiary.

For a will provision creating a single (or family pot) trust and authorizing the trustee to "sprinkle" income and principal among the testator's children, see § 64.201.

**[b] Tax Caution**

This form should not be used in a trust intended to qualify for the federal estate tax marital deduction as a life estate plus power of appointment or a qualified terminable interest property (QTIP) trust, as the right of the surviving spouse to the income of such a trust must be unqualified [*see I.R.C. § 2056(b)(5), (7)*]. If the trustee has power to grant or withhold income from the surviving spouse, then the right to income is not unqualified and the trust will not qualify for the marital deduction. For discussion of the "terminable interest" rule and the limitations it places on income payments from marital deduction trusts, see *Ch. 71, Marital Deduction Trust Provisions, § 71.10[4]*.

**[c] Discretion of Trustee**

This form grants the trustee simple discretion to determine the amount of the income of the trust that will be paid to the beneficiary. Unless the trust instrument provides that the trustee's discretion is to be "absolute," "sole," or "uncontrolled" [*see Prob. Code § 16081*], a discretionary power conferred on a trustee is not left to the trustee's arbitrary discretion, but must be exercised reasonably [*Prob. Code § 16080*]. Even if a trust instrument confers "absolute," "sole," or "uncontrolled" discretion on a trustee, the trustee has a duty to act in accordance with fiduciary principles and not to act in bad faith or in disregard of the purposes of the trust [*Prob. Code § 16081*]. A grant of "absolute" discretion to a trustee means simply that the judgment of the trustee, if exercised in good faith, will control, but it will not excuse bad

faith or failure to exercise any judgment at all [ *Copley v. Copley (1981) 126 Cal. App. 3d 248, 284, 178 Cal. Rptr. 842* ]. In every case, whether the discretionary power conferred on the trustee is narrow or broad, it is subject to judicial review [*Prob. Code § 17200(b)(5)*]. For further discussion of trustee discretion, see discussion in *Ch. 64A, Testamentary Trusts: Trustee Provisions, § 64A.39[8]*.

#### **[d] Guidelines for Exercise of Discretion**

The will may direct the trustee, in exercising its discretion to determine the amount of income to pay to a beneficiary, to consider other income or resources available to the beneficiary. This is one of many possible guidelines that the trust instrument may lay down for exercise of the trustee's discretion. Alternatively, the trust instrument may direct the trustee to consider such factors as the relative tax consequences to the beneficiary and the trust of a distribution of income, the beneficiary's accustomed standard of living, or the amount necessary for the comfortable support of the beneficiary. The instrument may further direct the trustee to consider specific needs of the beneficiary, such as medical care, custodial care, or education expenses. If the testator prefers, the trustee's discretion may be made unlimited, with the trustee free to consider any factors the trustee considers relevant. Any standard or directions that will guide the trustee in exercising its discretion granted may be employed. The attorney should determine the testator's precise intentions in this regard and draft the provision accordingly.

For a general consideration of the advantages and disadvantages of requiring the trustee to consider a beneficiary's income or resources outside the trust, see discussion in § 64.200[1][f].

#### **[2] FORM**

##### **Discretionary Payment of Income to One Beneficiary**

##### **Payment of Income**

The Trustee shall, from time to time during the lifetime of \_\_\_\_\_ [*name of beneficiary*], pay to or apply for the benefit of \_\_\_\_\_ [*name of beneficiary*] so much of the net income of the trust estate as the Trustee, in the Trustee's discretion, deems appropriate. [*If desired, add guideline for exercise of trustee's discretion, e.g.: In exercising the discretion conferred by this paragraph, the Trustee \_\_\_\_\_ (shall or shall not) consider any other income or resources reasonably available to \_\_\_\_\_ (him or her) and known to the Trustee.*] The Trustee shall accumulate and add to principal any net income not distributed.

##### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsGeneral OverviewEstate, Gift & Trust LawTrustsBeneficiariesSingle BeneficiariesEstate, Gift & Trust LawTrustsCreationEstate, Gift & Trust LawTrustsTestamentary TrustsEstate, Gift & Trust LawTrustsTrusteesDuties & PowersGeneral Overview



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*24-64 California Legal Forms--Transaction Guide § 64.225*

**§ 64.225 Power to "Sprinkle" Trust Income**

**[1] Comment**

**[a] Use of Form**

This form is a will provision that may be used to grant the trustee discretion to distribute ("sprinkle") trust income among several beneficiaries.

For a will provision creating a "family pot" trust and authorizing the trustee to sprinkle income and principal among the testator's children, see § 64.201. For a will provision granting the trustee discretion to determine the amount of income that will be paid to a single beneficiary, see § 64.224. For a will provision granting the trustee discretion to "sprinkle" trust principal among several beneficiaries, see § 64.244.

**[b] Discretion of Trustee**

This form grants the trustee simple discretion to determine the amount of the trust income that will be paid to the beneficiaries, and what proportions each beneficiary will receive. Unless the trust instrument confers "absolute," "sole," or "uncontrolled" discretion on the trustee [*see Prob. Code § 16081*], the trustee's discretion must be exercised reasonably [*Prob. Code § 16080*]. For additional discussion, see § 64.224[1][c]; see also *Ch. 64A, Testamentary Trusts: Trustee Provisions*, §§ 64A.39[8] and 64A.340[1].

**[c] "Sprinkling" Trusts**

**[i] In General**

Granting the trustee discretion to determine the amount of income that will be paid to two or more beneficiaries, and the proportions in which those beneficiaries will receive the income, may permit the trustee to respond to the particular needs of the beneficiaries. The needs may be purely economic (i.e., for larger payments), or they may be based partly on economic and partly on tax considerations. Beneficiaries with income from sources outside the trust will presumably be

in higher marginal tax brackets than those without such income and will pay a correspondingly higher percentage of the income in taxes. A trustee who sprinkles income among beneficiaries, making higher payments to beneficiaries with no other income and lower payments to those with outside income, may thus effect substantial tax savings.

### **[ii] Generation-Skipping Transfer Tax Considerations**

The power to sprinkle income, principal, or both principal and income may have generation-skipping transfer tax implications [*see I.R.C. §§ 2601-2663*]. Distributions of principal or income to a beneficiary assigned to a generation two or more generations below that of the transferor is subject to the tax [*see I.R.C. §§ 2601, 2611-2613; but see I.R.C. § 2651(e)*]. For a general discussion of the generation-skipping transfer tax, see § 64.40 et seq. For a general discussion of sprinkling powers and their tax consequences, see § 64.201[1][c], [d][ii].

## **[2] FORM**

### **Power to "Sprinkle" Trust Income**

#### **Payment of Income**

As long as any of \_\_\_\_\_ [the group consisting of \_\_\_\_\_ (*names of income beneficiaries*); or *describe class, e.g.: my children*] are living, the Trustee shall, from time to time, pay to or apply for the benefit of any one or more of them so much of the net income of the trust estate as the Trustee, in the Trustee's discretion, deems necessary for their \_\_\_\_\_ [*specify purpose or purposes of income payments, e.g.: support, health, and education*]. In making these payments, the Trustee may pay more to or apply more for some beneficiaries than for others, and may make payments to or applications of benefits for one or more beneficiaries to the exclusion of others. [*If desired, add guideline for exercise of trustee's discretion, e.g.: In exercising the discretion conferred by this paragraph, the Trustee \_\_\_\_\_ (shall or shall not) consider any other income or resources reasonably available to \_\_\_\_\_ (him or her) and known to the Trustee.*] The Trustee shall accumulate and add to principal any net income not distributed.

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsGeneral OverviewEstate, Gift & Trust LawTrustsCreationEstate, Gift & Trust LawTrustsTestamentary TrustsEstate, Gift & Trust LawTrustsTrusteesDuties & PowersGeneral Overview



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*24-64 California Legal Forms--Transaction Guide §§ 64.226-64.239*

**[Reserved]**

§§ 64.226[Reserved]



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*24-64 California Legal Forms--Transaction Guide § 64.240*

**§ 64.240 Payment of Fixed Amount for Life**

**[1] Comment**

**[a] Use of Form**

This form is a will provision that may be used to direct the trustee to make fixed periodic payments to a designated beneficiary out of trust principal for the beneficiary's life. This provision will typically be used when the will also requires the trustee to pay all of the net income to the same beneficiary. It is designed to assure the beneficiary of a fixed minimum income and may be useful if the testator fears that the income alone will not be sufficient to meet the beneficiary's needs.

**[b] Payments out of Principal**

**[i] In General**

Distributions from the principal of the trust estate may be appropriate if the net income is not sufficient to meet all the needs of the income beneficiaries. However, clear authority for such distributions must be included in the will. A trust provision authorizing the trustee to pay the net income to an income beneficiary does not authorize the trustee to make any payments to that beneficiary out of principal [ *Estate of Van Deusen (1947) 30 Cal. 2d 285, 294, 182 P.2d 565* ].

The testator should clearly understand that payments out of principal will ordinarily reduce the value of the trust corpus and, by so doing, diminish the value of the interests of the remainder beneficiaries. For this reason, the power to make payments out of principal may be a source of conflict between the remainder beneficiaries and the trustee or income beneficiaries. Generally, the larger the estate, the larger the principal payments that may safely be made out of it; and the smaller the trust estate, the more rapidly it will be exhausted by invasions. The testator should authorize invasions of principal only when he or she clearly intends to favor the income beneficiaries at the expense of the remainder beneficiaries. Any provision authorizing invasions of principal should be carefully drafted so as to minimize conflicts over the extent of the power or the circumstances under which it may be exercised.

In appropriate circumstances, an express statement of the testator's intention to favor the income beneficiaries over the remainder beneficiaries, or to favor one income beneficiary over another income beneficiary, may help to guide the trustee and the courts in interpreting a power of invasion. For a provision stating the testator's intention to favor the income beneficiaries over the remainder beneficiaries, see *Ch. 64B, Testamentary Trusts: Administrative Provisions, § 64B.230*. For a provision stating the testator's intention to favor the remainder beneficiaries over the income beneficiaries, see *Ch. 64B, Testamentary Trusts: Administrative Provisions, § 64B.231*.

### **[ii] Contrasted With Annuities Payable out of Estate**

The payments provided for by this form are to be contrasted with annuities that are payable out of the general assets of the testator's estate. An annuity is defined in the Probate Code as a specific sum to be paid periodically [*Prob. Code § 662(c)*]. If the fund out of which an annuity is payable fails, in whole or in part, resort may be had to the general assets of the estate to pay it [*Prob. Code § 662(c)*]. An annuity may be made payable out of a specific fund, such as a trust or the income from a trust. In such a case, the payments will continue only as long as the fund is adequate; if the fund fails, so will the payments [ *Estate of Markham (1946) 28 Cal. 2d 69, 73-74, 168 P.2d 669* .

Annuities that are made payable out of the general assets of the decedent's estate will prolong the administration of the estate. It is almost always preferable to provide that a fixed periodic payment be made from a trust, or to direct the executor or the trustee to purchase a commercial annuity that will guarantee payments to the recipient. For a general discussion of annuities, see *Ch. 63, Will Provisions, § 63.508[1][b]*. For will provisions creating annuities, see *Ch. 63, Will Provisions, § 63.508-63.510*.

### **[c] Drafting Alternatives**

There are other ways in which beneficiaries may be given the right to receive fixed periodic payments. If the testator's primary concern is to guarantee that a beneficiary will receive a certain minimum income regardless of fluctuations in the trust income, the will may direct the trustee to make principal payments only to the extent that the trust does not produce a certain level of income. Another method is to direct the trustee to pay the beneficiary a certain percentage of the trust corpus. For a form directing the trustee to pay the beneficiary a percentage of the corpus, see § 64.242. For a form requiring the trustee to make fixed periodic payments to a designated beneficiary out of income, to the extent that the income is adequate for the purpose, and out of principal to the extent that the income is not adequate, see § 64.260. For a form requiring the trustee to pay all of the net income to the beneficiary, and such additional amounts out of principal as will guarantee the beneficiary a fixed periodic income when added to the income payments, see § 64.261.

Alternatively, the beneficiary may be granted the right to demand payments out of trust principal. However, a beneficiary who is given an unlimited right to invade principal may consume the principal more rapidly than the testator would wish. Directing the trustee to make fixed payments of principal to the beneficiary will limit the amounts of principal that the beneficiary may withdraw in a given period. Further, the grant of an unlimited power of invasion may result in adverse federal estate tax consequences. If not limited by an "ascertainable standard," a power of invasion will be deemed a general power of appointment and the assets subject to the power will be included in the beneficiary's estate for federal estate tax purposes [*I.R.C. § 2041(a)(2); Treas. Reg. § 20.2041-1(b)(1); see Prob. Code § 611(a)* (general power of appointment defined)]. For a consideration of powers of invasion and their estate tax consequences, see discussion in § 64.300[1][b]. For a will provision granting a beneficiary an unlimited power of invasion, see § 64.300. For a will provision granting a beneficiary a power of invasion limited by an "ascertainable standard," see § 64.301.

### **[d] Cost-of-Living Adjustments**

If the purpose of a provision directing the trustee to make fixed periodic payments to a beneficiary is to guarantee the beneficiary a certain level of income, that purpose may be defeated by the eroding effects of inflation. For this reason, it

may be advisable to include language requiring the trustee to adjust the amount payable to reflect changes in one or more of the consumer price indexes published at regular intervals by the United States Department of Labor, Bureau of Labor Statistics.

The Bureau of Labor Statistics publishes two consumer price indexes that reflect national trends in price changes. The Consumer Price Index for All Urban Consumers (CPI-U) reflects the buying habits of about 80 percent of the noninstitutional, civilian population of the United States. The revised Consumer Price Index for Urban Wage Earners and Clerical Workers (revised CPI-W) covers about half the population covered by the CPI-U. In addition, regional indexes are published to show price changes in 85 urban areas in the United States. In California, Class A regional indexes are published for the Los Angeles-Long Beach-Anaheim, San Francisco-Oakland, and San Diego areas. Class B and Class C indexes are published for San Jose, San Bernardino, Fresno, Salinas, and Bakersfield.

The testator should understand, however, that cost-of-living adjustments in times of inflation will cause the trust principal to be depleted, and the value of the remainder to decline more rapidly, than would otherwise be the case. Before including any cost-of-living adjustment in the will, the testator should decide if the additional protection a provision requiring adjustments will give the beneficiary will outweigh the additional loss that the provision may be expected to cause to the remainder beneficiaries.

## [2] FORM

### Payment of Fixed Amount for Life

#### Payment of Principal

During the lifetime of \_\_\_\_\_ [name of beneficiary], the Trustee shall pay to or apply for \_\_\_\_\_ [his or her] benefit, out of the principal of the trust estate, the sum of \$\_\_\_\_\_ per \_\_\_\_\_ [e.g.: month].

[If testator wishes payments to be adjusted for inflation, add the following:]

The dollar amount of this \_\_\_\_\_ [interval of payment, e.g.: monthly] payment is based upon monetary values as of \_\_\_\_\_, 20 \_\_\_\_\_ [date of execution of will] and shall be adjusted in the manner and at the times specified herein to reflect changes in the \_\_\_\_\_ [specify index, e.g.: Consumer Price Index for All Urban Consumers or San Francisco-Oakland All Urban Consumers Index] published by the United States Department of Labor, Bureau of Labor Statistics, using as the base figure the latest published index figure available on the date of my death. An adjustment in the dollar amount of the \_\_\_\_\_ [interval of payment, e.g.: monthly] payments shall be made on January 1 of each year, beginning with the year immediately following the year of my death, and shall be based on the most current published figures for the Consumer Price Index specified above. The amount of the \_\_\_\_\_ [interval of payment, e.g.: monthly] payments for the twelve-month period following each adjustment date shall be increased [add, if desired: or decreased] from the amount specified above in the same proportion that the specified Consumer Price Index figure available on the adjustment date is higher [or lower] than the base index figure, provided that the index figure available on the adjustment date is at least \_\_\_\_\_ [e.g.: 5] percent higher [or lower] than the base index figure.

### Legal Topics:

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsGeneral OverviewEstate, Gift & Trust LawTrustsBeneficiariesGeneral OverviewEstate, Gift & Trust LawTrustsCreationEstate, Gift & Trust LawTrustsTestamentary TrustsEstate, Gift & Trust LawTrustsTrusteesDuties & PowersGeneral Overview



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*24-64 California Legal Forms--Transaction Guide § 64.241*

**§ 64.241 Payment of Fixed Amount to Spouse Until Child Reaches Certain Age**

**[1] Comment--Use of Form**

This form is a will provision that may be used to direct the trustee to make fixed payments to the surviving spouse until a designated child of the testator reaches a certain age, at which time the payments to the spouse will be reduced. The decrease in the amount of the payments is predicated on the assumption that the spouse's needs will be reduced when the child's education is finished or the child is otherwise ready to assume responsibility for his or her own support.

This form may be modified to provide that nothing will be paid out of principal after the child reaches a certain age. If desired, an inflation adjustment provision may be added. For a discussion of circumstances under which inflation adjustment provisions may be desirable, see discussion in § 64.240[1][d].

**[2] FORM**

**Payment of Fixed Amount to Spouse Until Child Reaches Certain Age**

**Payment of Principal**

The Trustee shall pay to or apply for the benefit of my \_\_\_\_\_ [husband or wife],  
 \_\_\_\_\_ [name], out of the principal of the trust estate, the sum of \$ \_\_\_\_\_ per  
 \_\_\_\_\_ [e.g.: month], until \_\_\_\_\_ [designate child whose age will determine date when  
 payments are reduced, e.g.: my youngest child then living or my son \_\_\_\_\_ (name)] reaches the age of  
 \_\_\_\_\_ years, and thereafter the sum of \$ \_\_\_\_\_ per \_\_\_\_\_ [e.g., month].

*[If testator wishes payments to be adjusted for inflation, add following:]*

These \_\_\_\_\_ [interval of payment, e.g.: monthly] payments are based upon monetary values as of  
 \_\_\_\_\_, 20 \_\_\_\_\_ [date of execution of will] and shall be adjusted in the manner and

at the times specified herein to reflect changes in the Consumer Price Index--U.S. All Urban Consumers \_\_\_\_\_ [or specify *Consumer Price Index for particular city, region, or state*] published by the United States Department of Labor, Bureau of Labor Statistics, using as the base figure the latest published index figure available on the date of my death. Adjustments in the amount of the \_\_\_\_\_ [interval of payment, e. g.: monthly] payments shall be made on January 1 of each year, beginning with the year immediately following the year of my death, and shall be based on the most current published figures for the Consumer Price Index specified above. The amount of the \_\_\_\_\_ [interval of payment, e.g.: monthly] payments for the twelve-month period following each adjustment date shall be increased [add, if desired: or decreased] from the amounts specified above in the same proportion that the specified Consumer Price Index figure available on the adjustment date is higher [or lower] than the base index figure, provided that the index figure available on the adjustment date is at least \_\_\_\_\_ [e.g.: 5] percent higher [or lower] than the base index figure.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

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*24-64 California Legal Forms--Transaction Guide § 64.242*

**§ 64.242 Payment of Percentage of Corpus**

**[1] Comment**

**[a] Use of Form**

This form is a will provision that may be used to direct the trustee to pay a fixed percentage of the trust corpus at specified intervals to a designated beneficiary. Such a provision is normally included in the will only if the trustee is also directed to pay all of the net income to the beneficiary. For a form directing the trustee to pay all of the net income from the trust to a designated beneficiary, see § 64.221.

**[b] Advantages of Percentage Payments**

A provision requiring the trustee to pay a percentage of the trust corpus to a beneficiary may be desirable for the same reasons as a provision requiring the trustee to make fixed payments out of corpus. Such a provision will help to insure that the beneficiary will receive an income adequate to his or her needs regardless of fluctuations in the trust income and whether or not the trust income is sufficient to meet those needs. Other provisions that may be used to guarantee a beneficiary a certain level of income are provisions directing the trustee to pay the beneficiary a fixed periodic amount, with or without adjustments for inflation. For a form directing the trustee to make fixed periodic payments to a beneficiary out of trust principal for the beneficiary's life, see § 64.240. For a provision directing the trustee to pay the beneficiary a fixed amount until a designated child reaches a certain age, see § 64.241.

A provision requiring the trustee to pay the beneficiary a percentage of the trust estate may help to insure that the beneficiary's income will be adequate to meet all of the beneficiary's needs. Such a provision will be particularly suitable if the trust assets are expected to appreciate on a regular basis, so that payments to the beneficiary will not deplete or exhaust the corpus. If the trust assets appreciate, the provision will have the further virtue of automatically increasing the amount of the payments. Such increases will, in many cases, parallel increases in the Consumer Price Index or in some other appropriate index of price fluctuations.

It should be remembered, however, that the amount of the payments will decrease if the value of the trust corpus

decreases. For this reason, a payment formula based on a percentage of the corpus should not be adopted if the beneficiary's needs for a fixed income is definite and the testator is not reasonably certain that the corpus will appreciate.

For a consideration of fixed payments and adjustments for inflation, see discussion in § 64.240[1][d].

## [2] FORM

### Payment of Percentage of Corpus

#### Payment of Principal

On the first day of the calendar month immediately following the making of the first court order distributing the trust estate, or any portion of the trust estate, to the Trustee, and annually thereafter during the lifetime of \_\_\_\_\_[*name of beneficiary*], the Trustee shall determine the market value of the principal of the trust estate. This determination shall be conclusive on all persons interested in the trust. On the first day of the month following that determination, and annually thereafter during the lifetime of \_\_\_\_\_[*name of beneficiary*], the Trustee shall pay to or apply for the benefit of \_\_\_\_\_[*name of beneficiary*], out of the principal of the trust estate, a sum equal to \_\_\_\_\_ percent of that value as last determined by the Trustee.

#### Legal Topics:

For related research and practice materials, see the following legal topics:

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*24-64 California Legal Forms--Transaction Guide § 64.243*

**§ 64.243 Payment of All of Net Income for Life With Discretionary Payments of Principal**

**[1] Comment**

**[a] Use of Form**

This form is a will provision that may be used to require the trustee to pay all of the net income to a designated beneficiary for life, and to grant the trustee discretion to make additional payments of principal to the same beneficiary. A provision of this type should be included in the will if the testator is concerned that the income of the trust may be insufficient to provide adequately for the beneficiary and wishes the beneficiary to receive payments out of principal only when there is a real need for them. Since principal payments will ordinarily be made to a beneficiary only when all of the net income is also paid to that beneficiary, the provision includes a direction requiring the trustee to pay all of the net income to the beneficiary. If the testator wishes the income to be paid to another beneficiary, however, the form may be appropriately modified.

Although this trust provides that the trustee will receive payments of income and principal for life, it may be modified to require payments only for a designated period of time, which may be measured by a number of years or by a specified birthday, either of the beneficiary or another person (e.g., a child of the testator or beneficiary). For a provision directing the trustee to pay all of the net income to a designated beneficiary for a specified period of time, see § 64.220.

**[b] Defining Trustee's Discretion**

**[i] In General**

A provision granting the trustee discretion to make principal payments to an income beneficiary will ordinarily have the effect of diminishing the principal and reducing the value of the remainder. For this reason, such a provision may open the door to controversy between the remainder beneficiaries and the trustee, or between the beneficiary and the trustee. Except in unusual cases (such as when the corpus is expected to appreciate in an amount equal to or greater than the expected invasions of principal), the testator should authorize invasions of principal only when he or she clearly intends

to favor the income beneficiaries at the expense of the remainder beneficiaries. Furthermore, the extent of the trustee's discretion should be carefully defined in order to minimize controversies among the beneficiaries and remaindermen and clearly guide the trustee in exercising the discretion. Any power to invade principal must be interpreted in accordance with the testator's intent as revealed in the trust instrument [ *Estate of Stober (1980) 108 Cal. App. 3d 591, 596-597, 166 Cal. Rptr. 628*; *Estate of Patten (1963) 217 Cal. App. 2d 167, 171, 31 Cal. Rptr. 767* ].

#### **[ii] Considering Outside Income or Resources**

Among other things, the testator may direct the trustee to consider (or not to consider) any income or other resources that the beneficiary may have outside the trust. Unless the will provides otherwise, the trustee will ordinarily be required to consider outside means when making discretionary payments [ *Estate of Ferrall (1953) 41 Cal. 2d 166, 176, 258 P.2d 1009* ]. For a consideration of means outside the trust and whether the trustee should be required to consider those means when making discretionary payments out of income or principal, see discussion in § 64.200[1][f]§ 64.200.

#### **[iii] Whether Income Beneficiary or Remainder Beneficiary Is to Be Favored**

A statement of the testator's intentions to favor the income beneficiary over the remainder beneficiaries (or vice versa) may help the trustee and the courts to interpret a provision of the will that is not otherwise clear and unambiguous. The intention of the testator as expressed in the will must control the legal effect of the dispositions made in the will [*Prob. Code § 6140(a)*]. In analyzing the terms of a trust created by a will, the court's function is to ascertain the general scheme of the testator as expressed in the will and to give effect to its scope and purpose as manifested in the will's language [ *County National Bank etc. Co. v. Sheppard (1955) 136 Cal. App. 2d 205, 215, 288 P.2d 880*; see *Getty v. Getty (1972) 28 Cal. app. 3d 996, 1004, 105 Cal. Rptr. 295* (intent of trustor of inter vivos trust will control allocations to principal or income)].

For a general consideration of declarations of the testator's intentions to favor income beneficiaries or remainder beneficiaries, see discussion in *Ch. 64B, Testamentary Trusts: Administrative Provisions, § 64B.32*. For a provision stating the testator's intention to favor income beneficiaries over remainder beneficiaries, see *Ch. 64B, Testamentary Trusts: Administrative Provisions, § 64B.230*. For a provision stating the testator's intention to favor remainder beneficiaries over income beneficiaries, see *Ch. 64B, Testamentary Trusts: Administrative Provisions, § 64B.231*.

#### **[iv] Purposes of Discretion**

The will should clearly state the purpose or purposes for which the discretion is to be exercised. A clause that clearly reflects the intent of the testator and realistically takes into account circumstances in which the beneficiaries may find themselves will do much to obviate controversies over the limits of the trustee's discretion. For a consideration of trustee discretion to invade principal and guidelines that may help the trustee to exercise the discretion in accordance with the testator's intentions, see § 64.240[1].

#### **[v] Simple or Absolute**

Unless the trust instrument provides that the trustee's discretion is to be "absolute," "sole," or "uncontrolled," a discretionary power conferred on a trustee is presumed not to be left to the arbitrary discretion of the trustee, but must be exercised reasonably [*Prob. Code § 16080*; see *Prob. Code § 16081*]. For further consideration of trustee discretion, see § 64.224[1][c]; see also *Ch. 64A, Testamentary Trusts: Trustee Provisions, §§ 64A.39[8] and 64A.340[1]*.

### **[2] FORM**

#### **Payment of All of Net Income for Life With Discretionary Payments of Principal**

##### **Payment of Income and Principal**

The Trustee shall pay to or apply for the benefit of \_\_\_\_\_ [name of beneficiary], in monthly or other convenient installments, but not less often than annually, all of the net income of the trust for \_\_\_\_\_ [his or her] lifetime. If the Trustee considers such payments insufficient for the \_\_\_\_\_ [specify purpose, e.g.: support, health, and education] of \_\_\_\_\_ [name of beneficiary], the Trustee shall, from time to time, pay to or apply for the benefit of \_\_\_\_\_ [name of beneficiary], out of the principal of the trust estate, such sums as the Trustee, in the Trustee's discretion, deems necessary for the \_\_\_\_\_ [specify purpose, e.g.: support, health, and education] of \_\_\_\_\_ [name of beneficiary].

[If appropriate, add statement relating to outside means:]

In exercising the discretion conferred on the Trustee to make payments to \_\_\_\_\_ [name of beneficiary] out of the principal of the trust estate, the Trustee \_\_\_\_\_ [shall consider any income or resources outside the trust made known to the Trustee and reasonably available to the needs of \_\_\_\_\_ (name of beneficiary) or shall not consider any income or resources available to \_\_\_\_\_ (name of beneficiary) outside the trust].

[If desired, add statement of testator's intention to favor income beneficiary:]

In exercising the discretion conferred on the Trustee to make payments to \_\_\_\_\_ [name of beneficiary] out of the principal of the trust estate, the Trustee shall be mindful of the fact that my primary concern in establishing this trust is the welfare of \_\_\_\_\_ [name of beneficiary], and that it is my intention that the interests of others in the trust are to be subordinate to \_\_\_\_\_ [his or her] interest.

### **Legal Topics:**

For related research and practice materials, see the following legal topics:

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*24-64 California Legal Forms--Transaction Guide § 64.244*

**§ 64.244 Power to "Sprinkle" Trust Principal**

**[1] Comment**

**[a] Use of Form**

This form is a will provision that may be used to grant the trustee discretion to distribute ("sprinkle") trust principal among several beneficiaries.

For a will provision creating a "family pot" trust and authorizing the trustee to sprinkle income and principal among the testator's children, see § 64.201. For a will provision granting the trustee discretion to determine the amount of income that will be paid to a single beneficiary, see § 64.224. For a will provision granting the trustee discretion to sprinkle trust income among several beneficiaries, see § 64.225.

**[b] "Sprinkling" Trusts**

**[i] In General**

The power to "sprinkle" income or principal among the beneficiaries of a trust may enable a trustee to respond in a more satisfactory manner to the particular needs of the beneficiaries. Those needs may be purely economic (i.e., one beneficiary may have greater needs than another, or the needs of one beneficiary may be greater at some times than at other times), or may be based partly on economic and partly on tax considerations.

First, a sprinkling power will enable the trustee to make higher payments to beneficiaries with greater needs and lower payments to beneficiaries with lesser needs. This will be important if the trust is designed to provide all (or a large part) of the beneficiaries' support and not merely to supplement their incomes. Second, an appropriately drafted sprinkling power may enable the trustee to distribute payments to the beneficiaries in a way that will minimize their respective tax liabilities. For a discussion of the income and generation-skipping transfer tax uses of sprinkling powers, see § 64.244[1][b][ii], [iii]. For a general discussion of sprinkling powers and their tax consequences, see § 64.201[1][c]-64.201[1][d][ii]; and § 64.40[1] et seq.

**[ii] Possible Income Tax Advantages**

In appropriate cases, the power to sprinkle income may be used to reduce the beneficiaries' income tax liabilities by making larger income payments to beneficiaries in lower income tax brackets and smaller payments to beneficiaries in higher tax brackets [for a provision granting the trustee discretion to sprinkle income among several beneficiaries, *see* § 64.225]. The power to sprinkle both income and principal may similarly be used to reduce the beneficiaries' potential income tax liabilities by making income payments to beneficiaries in lower income tax brackets and principal distributions to beneficiaries in higher brackets [for a provision granting the trustee discretion to sprinkle both income and principal, *see* P 1 of § 64.201].

The power to sprinkle principal only may be used to reduce the overall income tax liabilities of the beneficiaries by making principal payments to beneficiaries in higher income tax brackets. Principal payments ordinarily do not ordinarily subject either the trust or the beneficiaries to income tax liability. A trustee with the power to sprinkle principal may thus make principal distributions to a beneficiary in a high income tax bracket without subjecting that beneficiary to any additional income tax liability.

**[iii] Generation-Skipping Transfer Tax Advantages and Disadvantages**

The power to sprinkle income, principal, or both may have generation-skipping transfer tax implications [*see I.R.C. §§ 2601-2664*]. (The generation-skipping transfer tax has been repealed, effective for generation-skipping transfers after 2009 [I.R.C. § 2264]. Until then, however, it remains in effect.). Distributions of principal or income to a beneficiary assigned to a generation that is two or more below the generation assignment of the transferor is subject to the tax [*see I.R.C. §§ 2601, 2611-2613; but see I.R.C. § 2651(e)*]. However, the testator's GST exemption [*see I.R.C. §§ 2631(a), (c), 2010(c)*] and discussion in § 60.16[3] may be used to offset the tax. For a general discussion of the generation-skipping transfer tax, see discussions in § 64.40[1] et seq. For a general discussion of sprinkling powers and their tax consequences, see §§ 64.201[1][c], [d][ii].

**[c] Defining Trustee's Discretion**

Any provision empowering a trustee to make discretionary payments out of income or principal should be drafted carefully so as to accurately reflect the testator's intentions and, to the extent possible, minimize potential conflicts among the income beneficiaries and remainder beneficiaries. Since any provision authorizing payments out of principal to an income beneficiary will ordinarily have the effect of reducing the value of the corpus and diminishing the interests of the remainder beneficiaries, it will be helpful to state the purposes of the payments so that potential challenges by remainder beneficiaries will be discouraged. Further provisions may help to clarify the testator's intentions with respect to the exercise of the discretion. The will may, for example, require (or forbid) the trustee to consider any income or resources the beneficiaries may have outside the trust. Additionally, it may include a statement of the testator's intentions to favor the income beneficiaries or the remainder beneficiaries. For a general review of provisions that may be included in any grant of discretion, see discussions in § 64.243[1].

**[2] FORM****Power to "Sprinkle" Trust Principal****Payment of Principal**

As long as any of \_\_\_\_\_ [the group consisting of \_\_\_\_\_ (*names of income beneficiaries*); or *describe class, e.g.: my children*] are living, the Trustee shall, from time to time, pay to or apply for the benefit of any one or more of them so much of the principal of the trust estate as the Trustee, in the Trustee's discretion, deems necessary for their \_\_\_\_\_ [*specify purpose or purposes of income payments, e.g.: support, health, and education*]. In making these payments, the Trustee may pay more to or apply more for some

beneficiaries than for others and may make payments to or applications of benefits for one or more beneficiaries to the exclusion of others.

*[If appropriate, add provision relating to outside means:]*

In exercising the discretion conferred on the Trustee to make payments and distributions of income and principal to the Beneficiary, the Trustee shall \_\_\_\_\_[consider any income or resources outside the trust made known to the Trustee and reasonably available to the needs of the Beneficiary *or* not consider any income or resources available to the Beneficiary outside the trust].

*[If desired, add statement of testator's intention to favor income beneficiary:]*

In making these payments, the Trustee shall be mindful of the fact that my primary concern in establishing this trust is the welfare of \_\_\_\_\_[*names of income beneficiaries*] and that it is my intention that the interests of others in the trust are to be subordinate to their interests.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

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*24-64 California Legal Forms--Transaction Guide § 64.245*

**§ 64.245 Payments From "Sprinkling" Trust to Be Deducted (or Not to Be Deducted) From Recipient's Share on Distribution**

**[1] Comment**

**[a] Use of Form**

This form is a will provision that may be used to provide that principal payments made to a beneficiary pursuant to a "sprinkling" power will (or will not) be deducted from that beneficiary's distributive share of the trust estate, if any, on termination of the trust. It is intended to be used in conjunction with another provision granting the trustee discretion to distribute ("sprinkle") income, principal, or both income and principal, among two or more beneficiaries. For a provision granting the trustee power to "sprinkle" income among several beneficiaries, see § 64.225. For a provision granting the trustee discretion to "sprinkle" principal among several beneficiaries, see § 64.244. For a provision authorizing the trustee to "sprinkle" both income and principal from a family pot trust, and further providing that payments from trust principal will not be deducted from the recipients' distributive shares of principal, see § 64.201.

**[b] Deduction From Distributive Shares**

When the trustee is empowered to "sprinkle" principal among several beneficiaries, the will should state whether or not principal payments made under the "sprinkling" power will be deducted from the beneficiary's distributive share of principal on termination of the trust. Whether such deductions should be made will depend in most cases on what the testator considers fair under the circumstances.

If the primary purpose of the "sprinkling" power is to retain all of the assets in one pot until the testator's younger children have completed their educations, and if the older children received similar educations before the trust was established, most testators would choose not to charge the younger children's distributive shares with payments made out of the trust for their educations. If, on the other hand, the "sprinkling" is to occur when all of the beneficiaries are adults, the testator may choose to require deductions. If, for example, one beneficiary makes great efforts to provide for his or her own support and does not receive principal payments from the trust, while another less industrious beneficiary draws heavily from trust principal, equity might well require that some equalization of the beneficiaries' shares be made

at the time of distribution.

**[2] FORM**

**Payments From "Sprinkling" Trust to Be Deducted (or Not to Be Deducted) From Recipient's Share on Distribution**

*[First alternative: deduction required]*

**Payments of Principal to Be Deducted From Recipient's Share Upon Distribution**

All payments made by the Trustee from trust principal as authorized by the terms of this will shall be charged to and deducted from the share, if any, of trust principal or corpus, to which the recipient of those payments shall be entitled on distribution or termination of the trust. The amount to be charged against the interest of any recipient will be the amount paid or, if property is transferred, the market value of the property transferred, determined as of the date of transfer and without adjustment for subsequent increases or decreases in the value of that property.

*[OR]*

*[Second alternative: deduction prohibited]*

**Payments of Principal Not to Be Deducted From Recipient's Share Upon Distribution**

Payments or distributions made by the Trustee from trust principal as authorized by the terms of this will shall not subsequently be deducted from or otherwise reduce or impair the value of the property to which the recipients of the payments shall be entitled on any distribution or termination of the trust.

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Estate, Gift & Trust LawTrustsGeneral OverviewEstate, Gift & Trust LawTrustsBeneficiariesGeneral OverviewEstate,  
Gift & Trust LawTrustsCreationEstate, Gift & Trust LawTrustsTestamentary TrustsEstate, Gift & Trust  
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DIVISION IV: WILLS AND TRUSTS  
CHAPTER 64 TESTAMENTARY TRUSTS: PAYMENT AND DISTRIBUTION PROVISIONS  
PART IV. FORMS  
C. Payments out of Principal

*24-64 California Legal Forms--Transaction Guide §§ 64.246-64.259*

**[Reserved]**

§§ 64.246[Reserved]



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D. Payments out of Income or Principal

*24-64 California Legal Forms--Transaction Guide § 64.260*

**§ 64.260 Fixed Periodic Payments out of Income or Principal**

**[1] Comment**

**[a] Use of Form**

This form is a will provision that may be used to require the trustee to make a fixed periodic payment to a beneficiary. It provides that the payment will be made out of the income of the trust, to the extent that the income is sufficient for that purpose, and out of principal to the extent that the income is not sufficient. For a fixed periodic payment to be paid only out of the trust principal, see § 64.240.

**[b] Payments out of Principal--In General**

If the testator wishes to guarantee a beneficiary a certain fixed payment and believes that the income of the trust may be insufficient to meet those payments, the fixed payment may be made payable from both income and principal. To the extent that such a payment is made out of trust principal, it will tend to reduce the value of the trust corpus and, by so doing, diminish the value of the interest of the remainder beneficiaries interest. For this reason, the power to make payments out of principal may be a source of conflict between the remainder beneficiaries and the trustee or income beneficiaries. The testator should authorize invasions of principal only when he or she clearly intends to favor the income beneficiaries at the expense of the remainder beneficiaries, and any provision authorizing invasions of principal should be carefully drafted so as to minimize conflicts over the extent of the power or the circumstances under which it may be exercised. For a general discussion of fixed periodic payments, see discussion in § 64.240[1].

**[c] Drafting Alternatives**

There are other ways in which beneficiaries may be given the right to receive fixed periodic payments. The will may, for example, direct the trustee to make fixed payments out of the principal of the trust. It may direct the trustee to make principal payments only to the extent that the trust does not produce a certain level of income, or the trustee may be directed to pay the beneficiary a certain percentage of the trust corpus. For a form requiring the trustee to make fixed periodic payments to a designated beneficiary out of trust principal, see § 64.240. For a form directing the trustee to pay

the beneficiary a percentage of the corpus, see § 64.242. For a form directing the trustee to pay all of the net income to the beneficiary, together with additional amounts of principal which, when added to the income payments, will be sufficient to guarantee the beneficiary a fixed periodic income, see § 64.261. For a general consideration of these and other alternative provisions, see discussion in § 64.240[1][c].

#### **[d] Cost-of-Living Adjustments**

If the purpose of a provision directing the trustee to make fixed periodic payments to a beneficiary is to guarantee the beneficiary a certain level of income, the testator should consider adding a cost-of-living adjustment to the provision. For a general discussion of cost-of-living adjustments and the advantages and disadvantages of such provisions, see discussion in § 64.240[1][d].

### **[2] FORM**

#### **Fixed Periodic Payments out of Income or Principal**

##### **Payments out of Income or Principal**

During the lifetime of \_\_\_\_\_ [name of beneficiary], the Trustee shall pay to or apply for \_\_\_\_\_ [his or her] benefit, the sum of \$\_\_\_\_\_ per \_\_\_\_\_ [e.g.: month]. This payment shall be paid out of the net income of the trust, to the extent that the net income is adequate for this purpose, and out of the principal of the trust estate, to the extent that the net income is not adequate. The Trustee shall accumulate and add to principal any net income not distributed.

*[If testator wishes payments to be adjusted for inflation, add following:]*

The dollar amount of this \_\_\_\_\_ [interval of payment, e.g.: monthly] payment is based upon monetary values as of \_\_\_\_\_, 20 \_\_\_\_\_ [date of execution of will], and shall be adjusted in the manner and at the times specified herein to reflect changes in the \_\_\_\_\_ [specify index, e.g.: Consumer Price Index for All Urban Consumers or San Francisco-Oakland All Urban Consumers Index] published by the United States Department of Labor, Bureau of Labor Statistics, using as the base figure the latest published index figure available on the date of my death. An adjustment in the dollar amount of the \_\_\_\_\_ [interval of payment, e.g.: monthly] payments shall be made on January 1 of each year, beginning with the year immediately following the year of my death, and shall be based on the most current published figures for the Consumer Price Index specified above. The amount of the \_\_\_\_\_ [interval of payment, e.g.: monthly] payments for the twelve-month period following each adjustment date shall be increased [add, if desired: or decreased] from the amount specified above in the same proportion that the specified Consumer Price Index figure available on the adjustment date is higher [or lower] than the base index figure, provided that the index figure available on the adjustment date is at least \_\_\_\_\_ [e.g.: 5] percent higher [or lower] than the base index figure.

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsGeneral OverviewEstate, Gift & Trust LawTrustsBeneficiariesGeneral OverviewEstate, Gift & Trust LawTrustsConstructive TrustsEstate, Gift & Trust LawTrustsTestamentary TrustsEstate, Gift & Trust LawTrustsTrusteesDuties & PowersGeneral Overview



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*24-64 California Legal Forms--Transaction Guide § 64.261*

**§ 64.261 Payment of All Net Income, Plus Payments out of Principal Sufficient to Guarantee Beneficiary Fixed Periodic Payment**

**[1] Comment--Use of Form**

This form is a will provision that may be used to require the trustee to pay a trust beneficiary all the net income of the trust and amounts out of the trust principal that, when added to the income payments, will be sufficient to guarantee the beneficiary a minimum periodic payment. The amount of the minimum periodic payment will ordinarily be the amount that the testator considers necessary for the beneficiary's support, although any suitable sum may be designated. If desired, a cost-of-living adjustment clause may be added to provide protection against inflation.

For a form directing the trustee to pay the beneficiary a fixed amount out of the trust principal, see § 64.240. For a form directing the trustee to pay the surviving spouse a fixed amount until the testator's child reaches a certain age, see § 64.241. For a form requiring the trustee to make fixed periodic payments out of income, to the extent that the income is sufficient for that purpose, and out of principal, to the extent that the income is not sufficient, see § 64.260.

For a general discussion of fixed periodic payments and payments out of trust principal, together with a discussion of the tax consequences of such payments, see discussions in §§ 64.240[1][b][i] et seq. For a consideration of alternative provisions for guaranteeing a beneficiary a minimum periodic income, see discussion in § 64.240[1][c]. For discussion of cost-of-living adjustments and the advantages and disadvantages of such provisions, see § 64.240[1][d].

**[2] FORM**

**Payment of All Net Income, Plus Payments out of Principal Sufficient to Guarantee Beneficiary Fixed Periodic Payment**

**Payments out of Income or Principal**

During the lifetime of \_\_\_\_\_ [name of beneficiary], the Trustee shall pay to or apply for \_\_\_\_\_ [his or her] benefit, in equal \_\_\_\_\_ [specify interval, e.g.: monthly or quarterly]

installments, all of the net income of the trust estate, and such additional amounts from the principal of the trust estate as, when added to the income payments, may be necessary to make each \_\_\_\_\_ [*specify interval, e.g.: monthly or quarterly*] payment equal the minimum sum of \$\_\_\_\_\_.

[*If testator wishes principal to be reimbursed out of excess income, add the following:*]

If, during any year, the net income of the trust exceeds the minimum sum of \$\_\_\_\_\_ [*same amount set forth above*] per \_\_\_\_\_ [*specify same interval as above, e.g.: month or quarter*], the Trustee shall use that excess net income to restore to the trust principal any amounts previously paid to \_\_\_\_\_ [*name of beneficiary*] from the principal before paying any of the excess net income to or for the benefit of \_\_\_\_\_ [*name of beneficiary*] in any subsequent month or months, or at the end of that year.

[*If testator wishes payments to be adjusted for inflation, add following:*]

As used in this paragraph, the minimum sum of \$\_\_\_\_\_ [*same amount set forth above*] is based upon monetary values as of \_\_\_\_\_, 20 \_\_\_\_\_ [*date of execution of will*] and shall be adjusted in the manner and at the times specified herein to reflect changes in the \_\_\_\_\_ [*specify index, e.g.: Consumer Price Index for All Urban Consumers or San Francisco-Oakland All Urban Consumers Index*] published by the United States Department of Labor, Bureau of Labor Statistics, using as the base figure the latest published index figure available on the date of my death. An adjustment in the amount of the minimum sum specified in this paragraph shall be made on January 1 of each year, beginning with the year immediately following the year of my death, and shall be based on the most current published figures for the Consumer Price Index specified above. The amount of the minimum payments to \_\_\_\_\_ [*name of beneficiary*] shall be increased [*add, if desired:* or decreased] from the minimum sum specified above in the same proportion that the specified Consumer Price Index figure available on the adjustment date is higher [or lower] than the base index figure, provided that the index figure available on the adjustment date is at least \_\_\_\_\_ [*e.g.: 5*] percent higher [or lower] than the base index figure.

### **Legal Topics:**

For related research and practice materials, see the following legal topics:

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*24-64 California Legal Forms--Transaction Guide § 64.262*

**§ 64.262 Fixed Periodic Payments to Two Beneficiaries or Survivor**

**[1] Comment**

**[a] Use of Form**

This form is a will provision that may be used to require the trustee to pay a fixed periodic sum to two beneficiaries during their joint lifetimes and, on the death of one, to pay the same sum to the survivor. This provision may be used when the testator wishes to benefit a married couple and wants payments to continue without interruption after the death of one of the beneficiaries. The payments will be made out of the net income of the trust estate, to the extent that the net income is sufficient for that purpose, and out of the trust principal, to the extent that the net income is not sufficient.

For a general discussion of fixed periodic payments and payments out of trust principal, together with a discussion of the tax consequences of such payments, see discussions in §§ 64.240[1][b][i] et seq.

**[b] Drafting Alternatives**

For a form creating a family pot trust and authorizing the trustee to distribute ("sprinkle") income and principal among the beneficiaries, see § 64.201. For a form creating a family pot trust for the benefit of the surviving spouse and children of the testator, see § 64.203. For a form creating a trust for the benefit of an adult son or daughter of the testator, see § 64.204. For a form creating a trust for the surviving spouse and a parent of the testator, see § 64.206. For a form creating a trust for the benefit of the testator's mother or father, see § 64.207. For a form requiring the trustee to make fixed periodic payments to a single beneficiary, with payments to be made out of income, to the extent that the income is sufficient for that purpose, and out of principal, to the extent that the income is not sufficient, see § 64.260. For a form requiring the trustee to pay all of the net income to a single beneficiary and such additional amounts out of principal as, when added to the income payments, will guarantee the beneficiary a fixed periodic income, see § 64.261.

For discussion of alternative provisions for guaranteeing a beneficiary a minimum periodic income, see § 64.240[1][c].

**[c] Cost-of-Living Adjustments**

If the payments from this trust are designed to provide the beneficiaries' principal support, the testator may choose to add a cost-of-living adjustment to the provision. If the payments are designed only to supplement the beneficiaries' incomes, a cost-of-living adjustment may be inappropriate. The testator should remember that cost-of-living adjustments will, in inflationary periods, tend to deplete trust principal more quickly than principal payments that are not periodically adjusted for inflation. For a consideration of cost-of-living adjustments, and the advantages and disadvantages of such provisions, see discussion in § 64.240[1][d].

## [2] FORM

### Fixed Periodic Payments to Two Beneficiaries or Survivor

#### Payments out of Income or Principal

The Trustee shall, during the joint lifetimes of \_\_\_\_\_ [name of first beneficiary] and \_\_\_\_\_ [name of second beneficiary], pay to or apply for the benefit of each of them the sum of \$ \_\_\_\_\_ [e.g.: \$ 2,500] per \_\_\_\_\_ [specify interval, e.g.: month or quarter]. On the death of either of them, the Trustee shall, during the lifetime of the survivor, pay to or apply for the benefit of the survivor the sum of \$ \_\_\_\_\_ [twice the sum set forth above, e.g.: \$5,000] per \_\_\_\_\_ [specify interval, e.g.: month or quarter]. These payments shall be made out of the net income of the trust estate, to the extent that the net income is sufficient for that purpose, and out of the principal of the trust estate, to the extent that the net income is not sufficient. The Trustee shall accumulate and add to principal any net income not distributed.

[If testator wishes payments to be adjusted for inflation, add following:]

The dollar amount of this \_\_\_\_\_ [interval of payment, e.g.: monthly] payment is based upon monetary values as of \_\_\_\_\_ [date of execution of will], and shall be adjusted in the manner and at the times specified herein to reflect changes in the \_\_\_\_\_ [specify index, e.g.: Consumer Price Index for All Urban Consumers or San Francisco-Oakland All Urban Consumers Index] published by the United States Department of Labor, Bureau of Labor Statistics, using as the base figure the latest published index figure available on the date of my death. An adjustment in the dollar amount of the \_\_\_\_\_ [interval of payment, e.g.: monthly] payments shall be made on January 1 of each year, beginning with the year immediately following the year of my death, and shall be based on the most current published figures for the Consumer Price Index specified above. The amount of the \_\_\_\_\_ [interval of payment, e.g.: monthly] payments for the twelve-month period following each adjustment date shall be increased [add, if desired: or decreased] from the amount specified above in the same proportion that the specified Consumer Price Index figure available on the adjustment date is higher [or lower] than the base index figure, provided that the index figure available on the adjustment date is at least \_\_\_\_\_ [e.g.: 5] percent higher [or lower] than the base index figure.

#### Legal Topics:

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsGeneral OverviewEstate, Gift & Trust LawTrustsBeneficiariesMultiple BeneficiariesEstate, Gift & Trust LawTrustsCreationEstate, Gift & Trust LawTrustsTestamentary TrustsEstate, Gift & Trust LawTrustsTrusteesDuties & PowersGeneral Overview



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*24-64 California Legal Forms--Transaction Guide §§ 64.263-64.279*

**[Reserved]**

§§ 64.263[Reserved]



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PART IV. FORMS  
E. Accumulation of Income

*24-64 California Legal Forms--Transaction Guide § 64.280*

**§ 64.280 Accumulation of All of Net Income**

**[1] Comment**

**[a] Use of Form**

This form is a will provision that may be used to require that all of the net income of the trust be accumulated and added to principal. It may be combined with any suitable provision for payment of income or principal, such as periodic payments of income, or a lump sum distribution of principal when the beneficiary reaches a designated age.

**[b] Accumulations of Income**

**[i] Time Limit**

An accumulation of income generally cannot extend beyond the time permitted for the vesting of future interests under the rule against perpetuities [*Civ. Code § 724(a)*]; *but see Civ. Code § 724(b)* (exception for trusts forming part of employee profit-sharing or retirement plans)]. In California, perpetuities are subject to the Uniform Statutory Rule Against Perpetuities (USRAP) [*see Prob. Code §§ 21200 et seq.*], which includes a recodification of the common law rule against perpetuities [*see Prob. Code §§ 21205(a), 21206(a), 21207(a)*]. Under that recodification, a nonvested property interest is invalid unless (1) when the interest is created, it is certain to either vest or terminate no later than 21 years after the death of a person alive at the time of creation or (2) it actually vests or terminates within 90 years after its creation [*Prob. Code § 21205*]. For a detailed discussion of the Uniform Statutory Rule Against Perpetuities and its operation in California, see *Ch. 67, Future Interests and Perpetuities*, § 67.16.

**[ii] Direction Required**

A valid direction is essential to accumulation. In the absence of such a direction, undistributed income belongs to the person presumptively entitled to the next eventual interest [*Civ. Code § 733*]. That person will ordinarily be the remainder beneficiary [*see Estate of Charters (1956) 46 Cal. 2d 227, 240, 293 P.2d 778*; *see also Estate of Lefranc (1952) 38 Cal. 2d 289, 299-301, 239 P.2d 617*]. If the remainder income is entitled to the next eventual interest, then

the undistributed income will be distributed to the remainder beneficiary on a current basis [ *Estate of Robinson (1968)* 262 Cal. App. 2d 32, 40-42, 68 Cal. Rptr. 420] .

For a general discussion of income accumulations and rules relating to accumulations, see § 64.42[1] et seq.

### **[iii] Purposes**

Accumulations may be desirable for various reasons. These reasons typically include personal considerations, such as a wish to preserve trust income and assets for distribution at times when the beneficiary most needs it; lack of faith in the beneficiary's ability to handle the income; or simply a desire to exercise control over the beneficiary. A testator may, for example, wish to provide benefits for a particular beneficiary but feel that the beneficiary should not depend on the trust for ordinary living expenses. If the prospective beneficiary is a minor grandchild of the testator, the testator may expect the minor's parents to provide for his or her ordinary support until the grandchild reaches college age (or adulthood), at which time the trust can provide funds for education or other special needs (such as the purchase of a home). In other instances, a testator may wish to withhold funds from minor beneficiaries until such time as the beneficiaries have attained sufficient maturity to handle the funds themselves. If the prospective beneficiaries are adults, the testator may entertain doubts about their ability to handle the income properly and wish to postpone their enjoyment of the income by requiring accumulation for a period of years.

### **[iv] Income Tax Consequences**

Accumulations of income generally have unfavorable income tax consequences because trust income is taxed at lower rates when it is distributed to beneficiaries than when it is accumulated by the trust [*see I.R.C. § 1(a)-(e)* and discussion in § 64.39[4]].

Before August 5, 1997, accumulated income also was subject to complex income tax rules called the "throwback rules." The throwback rules require that when income that had been accumulated in a trust was finally distributed to a beneficiary, it had to be included in the beneficiary's income if the beneficiary's top average marginal tax rate in the preceding five years was higher than that of the trust [*I.R.C. §§ 665, 666, 667*]. Since August 5, 1997, the "throwback" rules have been inapplicable to most domestic trusts created on or after March 1, 1984 [*I.R.C. § 665(c)*].

### **[v] Estate Tax Consequences**

A direction for accumulation of income should not be included in any trust that is designed to qualify for the federal estate tax marital deduction as a lifetime income/power of appointment trust or a qualified terminable interest property (QTIP) trust, since the surviving spouse must have the right to receive all of the income from such a trust, payable at least annually [*I.R.C. § 2056(b)(5), (7)*]. Neither a trust that provides expressly for accumulation nor a trust that indirectly accomplishes a similar purpose will satisfy the requirement that the surviving spouse be entitled to all of the income [Treas. Reg. §§ 20.2056(b)-(5)(f)(5) (lifetime income/power of appointment trusts), 20.2056(b)-7(d)(2) (application to QTIP trusts)].

### **[vi] Generation-Skipping Transfer Tax Consequences**

The effect of the generation-skipping transfer tax on accumulation distributions should be carefully considered. A distribution from a trust to a beneficiary assigned to a generation that is two or more generations below that of the transferor will be subject to the generation-skipping transfer tax, regardless of whether the distribution is from principal, income, or accumulated income [*see I.R.C. §§ 2601, 2611-2613; but see I.R.C. § 2651(e)*] (The generation-skipping transfer tax has been repealed, effective for generation-skipping transfers after 2009 [I.R.C. § 2264]. Until then, however, it remains in effect.). However, the testator's GST exemption [*see I.R.C. §§ 2631(a), (c), 2010(c)* *see also § 60.16[3]*] may be used to offset the tax. For a general discussion of the generation-skipping transfer tax, see § 64.40[1] et seq.

**[2] FORM****Accumulation of All of Net Income****Accumulation of Income**

The Trustee shall accumulate all of the net income of the trust and add it to the principal of the trust estate until \_\_\_\_\_ [*name of beneficiary*] reaches the age of \_\_\_\_\_ [*e.g., 21*] years or until \_\_\_\_\_ [*his or her*] death, whichever occurs first.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

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*24-64 California Legal Forms--Transaction Guide §§ 64.281-64.299*

**[Reserved]**

§§ 64.281[Reserved]



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PART IV. FORMS  
F. Invasion of Principal by Beneficiary

*24-64 California Legal Forms--Transaction Guide § 64.300*

**§ 64.300 Unlimited Right of Invasion**

**[1] Comment**

**[a] Use of Form**

This form is a will provision that may be used to give a designated beneficiary the unlimited right to withdraw principal from the trust estate. Because the amount, time, and frequency of invasions is unlimited, the beneficiary will have the power, in effect, to terminate the trust by withdrawing all of the principal. A provision of this type will be suitable only if the testator wishes to provide generously for the needs of a particular income beneficiary and the interests of the remainder beneficiaries and the tax consequences of large withdrawals of trust principal are of minor concern.

For a provision granting a power of invasion limited by an ascertainable standard, see § 64.301. For a provision establishing a "five or five" power, see § 64.302. For other forms conferring limited invasion rights on beneficiaries, see §§ 64.204 and 64.206.

**[b] Power of Invasion**

**[i] In General**

As used in the law of trusts, the word "invasion" refers to payments made from the trust corpus or principal and not from income [Black's Law Dictionary (5th ed. 1979), at p. 739]. The right to receive payments out of the corpus of a trust may be conferred by explicit words in the trust instrument or inferred from other words granting powers to a trustee or beneficiary [see Scott, *The Law of Trusts* (3d ed., Little, Brown & Co., 1967), vol. II, § 128.7]. The power to invade principal may be conferred on the trustee or on a beneficiary. When the power is conferred on a beneficiary, the trust instrument usually provides that the beneficiary will have the right to require the trustee to pay the beneficiary a part or all of the principal [see Scott, *The Law of Trusts* (3d ed., Little, Brown & Co., 1967), vol. II, § 128.7]. The extent of the beneficiary's powers under such a provision depends upon the intention of the trustor as revealed in the words of the trust instrument.

For general discussion of powers of appointment, their creation and exercise, see § 64.43[1] et seq.

### **[ii] Estate Tax Considerations**

An unlimited power to withdraw principal from a trust is a general power of appointment and will cause the trust assets to be included in the holder's gross estate for federal estate tax purposes [*I.R.C. § 2041(a)(2)*; see *I.R.C. § 2041(b)(1)* ("general" power of appointment defined); see also *Prob. Code § 611(a)*]. Assets subject to a general power of appointment will be subject to estate taxation in the holder's estate if the power is held at the time of death, regardless of whether the power is or is not exercised [*I.R.C. § 2041(a)(2)*]. If the entire trust estate is subject to an unlimited power of invasion exercisable by a beneficiary, and if the beneficiary holds the power of invasion at the time of death, the entire trust estate will be subject to estate tax in the beneficiary's estate. If only a part of the estate is subject to the power, only a part will be subject to estate taxation.

However, a power to consume, invade, or appropriate property for the benefit of the holder will not be deemed a general power of appointment for estate tax purposes if the power is limited by an "ascertainable standard" relating to the health, education, support, or maintenance of the holder [*I.R.C. § 2041(b)(1)(A)*; *Treas. Reg. § 20.2041-1(c)(2)*]. A power is limited by an ascertainable standard if the extent of the holder's duty to exercise (or not exercise) the power is reasonably measurable in terms of the beneficiary's needs for health, education, or support, or any combination of them. A power is not limited by an ascertainable standard, however, if the holder can exercise the power for the beneficiary's "comfort," "welfare," or "happiness" [*Treas. Reg. § 20.2041-1(c)(2)*]. For further discussion of the "ascertainable standard" rule, see § 64.301[1].

### **[iii] Gift Tax Consequences**

Under *I.R.C. § 2514(e)*, the lapse of a power of appointment is deemed to be a release of the power and to constitute a transfer of the property subject to the power to the persons who would be entitled to the property if the power were not exercised by the holder. When a general power of appointment is held by the income beneficiary of a trust, and the power lapses, the beneficiary is deemed to have made a transfer of the property to the remainder beneficiaries for gift tax purposes.

A transfer for gift tax purposes will sometimes occur when an income beneficiary is given the right to withdraw a specified sum of money from a trust during a calendar year, and the trust instrument provides that if the right is not exercised in a given year it will expire. The expiration of the right would ordinarily constitute a transfer for gift tax purposes from the income beneficiary to the remainder beneficiaries. If, however, the right to withdraw money is limited to the greater of \$5,000 or 5 percent of the value of the trust assets, the lapse of the power in a given year will not constitute a transfer for gift tax purposes [*I.R.C. § 2514(e)*]. Invasion rights conferred on income beneficiaries are often limited to the greater of \$5,000 or 5 percent of the trust assets so as to avoid this undesirable potential for gift tax liability. For further discussion of the "five or five" rule, see § 64.302[1].

### **[iv] Income Tax Considerations**

Any person who has a power exercisable solely by himself or herself to vest any portion of the income or principal of a trust in himself or herself is deemed the owner of that portion of the trust for income tax purposes [*I.R.C. § 678(a)(1)*; see *Rev. & Tax. Code § 17731*]. A beneficiary who has an unlimited right to withdraw principal from the whole of a trust estate will thus be liable for taxes on the income from the entire trust estate. For further discussion, see § 64.51[2].

### **[v] Generation-Skipping Transfer Tax Considerations**

An unlimited power of invasion may have generation-skipping transfer tax implications [see *I.R.C. §§ 2601-2663*]. Distributions of principal or income to a beneficiary assigned to a generation that is two or more generations below that of the transferor is subject to the tax [see *I.R.C. §§ 2601, 2611-2613*; but see *I.R.C. § 2651(e)* (special rule for

determining whether a transfer to a trust is a generation-skipping transfer)]. Thus, if the testator establishes a trust and gives his or her grandchildren an unlimited power of invasion (assuming that the transfer to the trust does not itself constitute a direct skip [*see I.R.C. §§ 2612(c), 2613(a)*]), any amounts that they withdraw will be subject to the tax [*see I.R.C. §§ 2601, 2612(b)*]. If the testator gives a child an unlimited power of invasion, the power is a general power of appointment and causes the assets subject to the power to be included in the child's estate [*I.R.C. § 2041; see § 64.300[1][b][ii]*]. If, by reason of the child's death, those assets pass to a beneficiary who is two or more generations below that of the transferor, the transfer is subject to estate tax, but it is not subject to the generation-skipping transfer tax [*I.R.C. §§ 2041(a)(2), 2612(a), (c), 2613(a)*]. However, if by reason of the child's death, the assets pass to a beneficiary who is two or more generations below that of the child, the transfer is subject to estate tax and the generation-skipping transfer tax [*I.R.C. §§ 2041(a)(2), 2612(a), (c), 2613(a)*].

For further discussion of the generation-skipping transfer tax, see § 64.51[7]. See also *California Wills & Trusts*, Ch. 113, *Generation-Skipping Transfers and Trust Strategies* (Matthew Bender).

## [2] FORM

### Unlimited Right of Invasion

#### Invasion of Principal

The Trustee shall pay to \_\_\_\_\_ [*name of beneficiary*] any amounts from the principal of the trust estate that \_\_\_\_\_ [*he or she*] may, from time to time, request of the trustee in writing. It is my intention that no limitation shall be placed on \_\_\_\_\_ [*name of beneficiary*] as to the amount of or the reasons for any invasion of principal.

#### Legal Topics:

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsGeneral OverviewEstate, Gift & Trust LawTrustsBeneficiariesGeneral OverviewEstate, Gift & Trust LawTrustsCreationEstate, Gift & Trust LawTrustsTestamentary TrustsEstate, Gift & Trust LawTrustsTrusteesDuties & PowersGeneral Overview



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*24-64 California Legal Forms--Transaction Guide § 64.301*

**§ 64.301 Right of Invasion Limited by Ascertainable Standard**

**[1] Comment**

**[a] Use of Form**

This form is a will provision that may be used to give a beneficiary a limited power to withdraw principal from the trust estate. The power is limited by an "ascertainable standard" so that it will not be considered a general power of appointment for federal estate and income tax purposes.

For a provision granting a beneficiary an unlimited right to invade the principal of the trust, see § 64.300. For a provision establishing a "five or five" power, see § 64.302. For other forms conferring limited invasion rights on beneficiaries, see §§ 64.204 and 64.206.

**[b] Power Limited by Ascertainable Standard**

If a beneficiary has an unlimited right to invade the principal of a trust, and if the beneficiary holds the right at the time of death, the trust property will be included in the beneficiary's gross estate for federal estate tax purposes [*I.R.C. § 2041(a)(2)* (power created after October 21, 1942)]. The property will not be included in the beneficiary's gross estate, however, if the trustee's power to invade the trust principal for the benefit of the beneficiary is limited by an "ascertainable standard" relating to the beneficiary's health, education, support, or maintenance [*I.R.C. § 2041(b)(1)(A)*; *Treas. Reg. § 20.2041-1(c)(2)*].

A power is limited by an "ascertainable standard" if the extent of the trustee's duty to exercise (or not exercise) the power is reasonably measurable in terms of the beneficiary's needs for health, education, or support, or any combination of them. A power is not limited by an ascertainable standard if the trustee can exercise the power for the beneficiary's "comfort," "welfare," or "happiness" [*Treas. Reg. § 20.2041-1(c)(2)*].

The regulations lay down certain terms that are insufficient to establish a valid ascertainable standard and contrast them with other terms that meet the statutory requirements. For example, a power to use property for the "comfort,"

"welfare," or "happiness" of the holder is, according to the regulations, insufficient to establish the requisite standard [*Treas. Reg. § 20.2041-1(c)(2)*]; but a power exercisable for the holder's "support," "support in reasonable comfort," "maintenance in health and reasonable comfort," "support in his [or her] accustomed manner of living," "education, including college and professional education," or "health," and "medical, dental, hospital and nursing expenses and expenses of invalidism," is properly limited [*Treas. Reg. § 20.2041-1(c)(2)*].

Inadvertent use of the wrong word or words may defeat an attempt to lay down an "ascertainable standard" [*see Cory v. Ward (1980) 106 Cal. App. 3d 631, 642, 165 Cal. Rptr. 330; Estate of Allgeyer (1976) 60 Cal. App. 3d 169, 174, 129 Cal. Rptr. 820 (both decided under former Rev. & Tax. Code § 13692)*]. When drafting a trust instrument, prudence indicates the wisdom of adopting the precise language approved by the regulations.

## [2] FORM

### Right of Invasion Limited by Ascertainable Standard

#### Invasion of Principal

In addition to any other payments that \_\_\_\_\_ [*name of beneficiary*] may receive under this will, the Trustee shall pay \_\_\_\_\_ [*him or her*] such additional sums out of the principal of the trust estate as the Trustee determines to be reasonably required for \_\_\_\_\_ [*his or her*] \_\_\_\_\_ [*select one of following: support or support in reasonable comfort or maintenance in health and reasonable comfort or support in* \_\_\_\_\_ (*his or her*) *accustomed manner of living or education, including college and professional education or health or medical, dental, hospital and nursing expenses, and expenses of invalidism*]. \_\_\_\_\_ [*Name of beneficiary*] shall not be required to exhaust \_\_\_\_\_ [*his or her*] other income in order to be entitled to receive any such payments.

#### Legal Topics:

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsGeneral OverviewEstate, Gift & Trust LawTrustsBeneficiariesGeneral OverviewEstate, Gift & Trust LawTrustsCreationEstate, Gift & Trust LawTrustsTestamentary TrustsEstate, Gift & Trust LawTrustsTrusteesDuties & PowersGeneral Overview



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*24-64 California Legal Forms--Transaction Guide § 64.302*

**§ 64.302 \$5,000 or Five Percent Invasion Power**

**[1] Comment**

**[a] Use of Form**

This form is a will provision that may be used to give a beneficiary a limited power to withdraw principal from the trust estate. The power to withdraw principal in any calendar year is limited to \$5,000 or 5 percent of the trust assets, whichever is greater. For general discussion of powers of appointment, their creation and exercise, see § 64.43[1] et seq. For the income, gift, estate, and generation-skipping tax consequences of powers of appointment, see § 64.51[1] et seq.

For a provision conferring an unlimited power of invasion, see § 64.300. For a provision granting a beneficiary an unlimited right to invade trust principal, see § 64.301. For a provision establishing a "five or five" power, see § 64.302. For other forms conferring limited invasion rights on beneficiaries, see §§ 64.204 and 64.206.

**[b] Five or Five Powers**

The lapse of a general power of appointment constitutes a transfer of the property subject to the power for gift tax purposes [*I.R.C. § 2514(b)* (powers created after October 21, 1942); see *I.R.C. § 2514(e)* (lapse of power treated as release of power)].

A power lapses when the right to exercise the power expires. For example, a power to demand the withdrawal of money from a trust during any calendar year is subject to lapse if the trust instrument provides that the power is noncumulative and that any amount that might have been withdrawn during one year but was not in fact withdrawn in that year may not be withdrawn in any later year.

When a power to demand a withdrawal from a trust lapses, the person who holds the power will be deemed to have made a transfer of the property subject to the power to the person or persons who thereupon become entitled to the property. If the power is held by the income beneficiary of a trust, for example, the income beneficiary will be deemed

to have made a transfer of the property to the remainder beneficiaries.

However, the lapse of a general power of appointment is taxable only to the extent that the property subject to the power in any calendar year exceeds the greater of \$5,000 or 5 percent of the aggregate value of the assets out of which the exercise of the lapsed power could have been exercised [*I.R.C. § 2514(e); Treas. Reg. § 25.2514-3(c)(4)*]. Under this rule (generally called the "five or five" rule), it is possible to give the beneficiary of a trust the power to demand the withdrawal of property from a trust without subjecting the beneficiary to possible gift taxation if the power is not exercised, provided the power is limited to the greater of \$5,000 or 5 percent per year, and further provided that the power is not cumulative from year to year [*I.R.C. § 2514(e); Treas. Reg. § 25.2514-3(c)(4)*].

Assume that the value of the trust principal is \$200,000 and that the income beneficiary has the right to withdraw \$10,000 a year from that principal. The withdrawals can be made at any time before the end of the calendar year. If a withdrawal is not made in one calendar year, however, the right to make a withdrawal in that year will expire and cannot be exercised in any succeeding year. If the beneficiary does not exercise the withdrawal right in a given year, so that the right expires, the beneficiary will be deemed to have made a transfer to the remainder beneficiaries of the trust. Since \$10,000 does not exceed 5 percent of \$200,000, however, no gift tax will be due on the transfer. If the beneficiary dies while retaining an unexpired right to withdraw, \$10,000 will be included in the beneficiary's gross estate for estate tax purposes as property subject to a general power of appointment [*I.R.C. § 2041(a)(2); see I.R.C. § 2041(b)(1)*]. However, no gift tax will be due on any of the withdrawal rights that lapsed in previous years [*I.R.C. § 2514(e)*].

In appropriate cases, a five or five power will add a desirable measure of flexibility to a trust plan. The beneficiary may exercise the right (in which case the amount withdrawn will either be consumed or held in the beneficiary's estate) or let the right lapse (in which case the assets that might have been withdrawn pursuant to the lapsed right will not be included in the beneficiary's estate). A five or five power may also be helpful to the trustee in that it will decrease pressure on the trustee to exercise a discretionary power to pay principal to the beneficiary.

In some cases, the testator may wish to limit the invasion power to something less than the statutory maximum. The power may, for example, be limited to \$5,000, or to something less than 5 percent of the value of the trust assets. Such limitations may be particularly appropriate if the estate is small and larger invasions would quickly deplete it.

Five or five powers should not be routinely included in every will or trust. In some cases (particularly when the trust estate is small), the power will result in rapid depletion of trust principal and may seriously damage the interests of the remainder beneficiaries. Such a power may also have adverse income tax consequences for the beneficiary who is granted the power. For a discussion of those consequences, see § 64.51[2].

## [2] FORM

### **\$5,000 or Five Percent Invasion Power**

#### **Invasion of Principal**

In addition to any other payments that \_\_\_\_\_ [*name of beneficiary*] may receive under this will, the Trustee shall pay to \_\_\_\_\_ [*him or her*] such additional sums out of the principal of the trust estate as \_\_\_\_\_ [*he or she*] may, from time to time, request of the Trustee in writing; provided, however, that the amount withdrawn in any calendar year shall not exceed the greater of \$5,000 or 5 percent of the value of the principal of the trust, determined as of the end of the calendar year. This right of withdrawal is noncumulative, so that if \_\_\_\_\_ [*name of beneficiary*] does not withdraw the full amount that \_\_\_\_\_ [*he or she*] is entitled to withdraw in any calendar year, the right to withdraw the amount not withdrawn shall lapse at the end of that calendar year.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

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*24-64 California Legal Forms--Transaction Guide §§ 64.303-64.319*

**[Reserved]**

§§ 64.303[Reserved]



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G. Payments to Particular Beneficiaries

*24-64 California Legal Forms--Transaction Guide § 64.320*

**§ 64.320 Payment of Undistributed Income to Succeeding Beneficiaries**

**[1] Comment**

**[a] Use of Form**

This form is a will provision that may be used to require the trustee, on termination of the income interest of any income beneficiary, to pay any undistributed income held by the trustee for that beneficiary to the person or persons next entitled to receive income from the trust. The provision will be helpful if, at the time that the income beneficiary's income interest terminates (e.g., by reason of death), the trustee is holding undistributed income that the trustee is required, under terms of the will, to distribute to the beneficiary. If the will does not require the trustee to pay any income to the beneficiary, the provision will not be necessary.

**[b] Income Rights of Successive Beneficiaries**

**[i] In General**

The Probate Code prescribes certain rules for the distribution of income received by a trust after a particular income beneficiary's right to receive income from the trust is terminated. When a mandatory income interest ends, the beneficiary of that interest, or that person's estate, is entitled to "undistributed income," meaning net income received before the end of the income interest. There is no entitlement to income which is due or has accrued, but is not yet received, net income that has been added or is required to be added to principal by the trust [*Prob. Code § 16347(a)*], or receipts that may be adjusted from principal to income pursuant to other provisions of the Uniform Principal and Income Act [*see Prob. Code § 16347* (requirement for payment of undistributed income limited to "mandatory" income beneficiaries)]. These rules may be modified, however, by a contrary provision in the trust [*Prob. Code § 16335(a)(1)*].

**[ii] Tax Considerations**

Unless modified by the will, the statutory rule may unnecessarily subject undistributed income to estate taxation. Assume, for example, that the current income beneficiary dies leaving two children who, by terms of the will, succeed

to the income interest. Assume also that the trustee is holding undistributed income received before the death of the income beneficiary but, under terms of the will, payable to that beneficiary. Under *Prob. Code § 16347(b)*, the undistributed income belongs to the income beneficiary's personal representative and, under *I.R.C. § 2033*, it will be included in the beneficiary's gross estate for federal estate tax purposes. If, however, the will provides that the current beneficiary will have no interest in income undistributed at the time his or her interest terminates, the undistributed income will not be included in the income beneficiary's gross estate and may be distributed to the succeeding income beneficiaries free of estate tax. The savings effected by this provision will usually be significant only if the estate is large and the amount of undistributed income held by the trustee when the first income interest terminates is also large, since the amount of the tax saved will depend on the amount of undistributed income.

## [2] FORM

### **Payment of Undistributed Income to Succeeding Beneficiaries**

#### **Payment of Undistributed Income**

On the termination of any interest in this trust, all undistributed income in the hands of the Trustee shall be paid to the person or persons next entitled to receive income under the terms of this will.

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsGeneral OverviewEstate, Gift & Trust LawTrustsBeneficiariesSuccessive BeneficiariesEstate, Gift & Trust LawTrustsCreationEstate, Gift & Trust LawTrustsTestamentary TrustsEstate, Gift & Trust LawTrustsTrusteesDuties & PowersGeneral Overview



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G. Payments to Particular Beneficiaries

*24-64 California Legal Forms--Transaction Guide § 64.321*

**§ 64.321 Payments to Grandchildren**

**[1] Comment**

**[a] Use of Form**

This form is a will provision that may be used to require the trustee to make gifts to the testator's grandchildren. The provision is intended primarily to illustrate the use of a trust as a vehicle for making gifts to particular persons. As drafted, the form requires the trustee to pay a specified sum of money to any grandchild who obtains a degree from an accredited college or university. The actual terms of the provision may, however, be modified to provide for any kind of gift under any condition or conditions (except, of course, a condition that is prohibited by law or violates public policy).

The final sentence of this form (which states that the provision will not prolong the existence of the trust), is intended to avoid inadvertent violation of the rule against perpetuities. For a general discussion of the rule against perpetuities, see *Ch. 67, Future Interests and Perpetuities, § 67.10* et seq.

**[b] Definition of Grandchildren**

Before including this provision in the will, the attorney should examine the will's definition of "grandchildren" to make sure that it clearly reflects the testator's wishes. If the testator intends adopted as well as natural grandchildren to benefit from this provision, the term "grandchildren" should be defined accordingly.

As used in the Probate Code, the word "child" means any individual entitled to take as a child by intestate succession from the parent whose relationship is involved [*Prob. Code § 26*]. The rules of intestate succession are set forth in *Prob. Code §§ 6400-6414*.

For a general will provision defining the words "child" and "children," see *Ch. 63, Will Provisions, § 63.672*. For trust forms that include definitions of the words "child," "children," "grandchild," and "grandchildren," see §§ *64.200-64.207*.

**[2] FORM**

**Payments to Grandchildren****Payments to Grandchildren**

The Trustee shall pay to or apply for the benefit of any grandchild of mine who obtains a bachelor's degree from an accredited college or university the sum of \$\_\_\_\_\_, out of the principal of the trust estate. Each grandchild shall be eligible to receive only one payment pursuant to this provision. This provision shall not prolong the existence of the trust, and the Trustee shall not make any payment to any grandchild pursuant to this provision after the trust has terminated.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

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*24-64 California Legal Forms--Transaction Guide § 64.322*

**§ 64.322 Payments to Income Beneficiaries and Remainder Beneficiaries in Foreign Countries**

**[1] Comment**

**[a] Use of Form**

This form is a will provision designed to facilitate the distribution of trust funds to beneficiaries who reside in certain foreign countries. The provision states that if transmission of private funds to any beneficiary in a foreign country would, by reason of political or other conditions in that country, be withheld or otherwise interfered with, the trustee will have the authority to retain the funds in the trust for a specified period. If the funds cannot be transmitted to the beneficiary at the end of the specified period, they will be added to the principal of the trust estate and paid out in accordance with other provisions of the trust.

**[b] Rule Against Perpetuities**

This form specifies that the ability of a beneficiary to personally use or enjoy a distribution or payment of property or funds from the trust is a condition precedent to the vesting of the property or funds in the beneficiary. A provision that postpones the vesting of an interest in a trust has the potential for violation of the rule against perpetuities.

Under the Uniform Statutory Rule Against Perpetuities (USRAP) as adopted in California [*see Prob. Code §§ 21200-21231; see also Ch. 67, Future Interests and Perpetuities, § 67.16[3]*], a nonvested property interest is invalid unless it meets the requirements of the common law rule against perpetuities or the alternative requirements of the 90-year "wait-and-see" rule. Similarly, under provisions of the Civil Code, income cannot be accumulated for a longer time than is permitted for the vesting of a property interest under the rule against perpetuities [*Civ. Code §§ 724, 725; see Ch. 67, Future Interests and Perpetuities, § 67.16[5][c]*].

Under the USRAP recodification of the common law rule against perpetuities, a nonvested property interest is valid if, when the interest is created, it is certain to vest or terminate no later than 21 years after the death of an individual who is alive at the time of the creation [*Prob. Code § 21205(a)*]. Under the 90-year wait-and-see rule of the USRAP, a nonvested interest that does not meet the requirements of the common law rule is valid if it actually vests or terminates

within 90 years after its creation [*Prob. Code § 21205(b)*]. Although the 90-year wait-and-see rule has greatly ameliorated the draconian effects of the common law rule, it has not eliminated the need for considering perpetuities questions when drafting a will or trust. A prudent attorney will still scrutinize a will or trust for potential perpetuities violations and take reasonable steps to avoid them. This form avoids the possibility of a perpetuities violation arising from a withheld payment or distribution by providing that payments or distributions cannot be withheld for longer than 21 years after the death of a designated person who must be alive at the time of the testator's death. This person will become the "measuring life" for perpetuities purposes [*see Ch. 67, Future Interests and Perpetuities, § 67.16[8]*].

### **[c] Drafting Considerations**

Of necessity, the terms of this provision are general. A testator who knows, or who has reason to believe, that a prospective income beneficiary or remainder beneficiary resides in a foreign country that, by reason of political instability, is likely to interfere with the personal enjoyment of any payment or distribution from the trust, should make specific provisions for that situation.

### **[d] Avoid Use in Marital Deduction Trust**

This provision is not suitable for use in a trust that is designed to qualify for the federal estate tax marital deduction as a life estate plus power of appointment trust or a qualified terminable interest property (QTIP) trust [*see I.R.C. § 2056(b)(5)* (life estate plus power of appointment trust); *see also I.R.C. § 2056(b)(7)*]. The surviving spouse must have the right to receive all of the income from a life estate plus power of appointment or QTIP trust at least annually [*see I.R.C. § 2056(b)(5)* (life estate plus power of appointment trust); *see also I.R.C. § 2056(b)(7)(B)(i)(II), (ii)* (QTIP trust)]. If the will includes a marital deduction trust, the optional clause set forth at the conclusion of this form should be added to the principal provision to make clear that the provision will not apply to the marital deduction trust. For a general discussion of the marital deduction, see Ch. 71, *Marital Deduction Trust Provisions*.

## **[2] FORM**

### **Payments to Income Beneficiaries and Remainder Beneficiaries in Foreign Countries**

#### **Payments to Beneficiaries in Foreign Countries**

(a) All payments and distributions out of the trust(s) established by this will are intended to be for the personal use and benefit of the income beneficiaries and remainder beneficiaries, whether or not they (or any of them) shall at any time reside in a foreign country. The ability of any income beneficiary or remainder beneficiary to personally use or enjoy any distribution or payment is a condition precedent to the vesting of any such property or funds. If, at any time, it shall appear to the satisfaction of the Trustee [*add, if trust is to be subject to continuing judicial supervision: and the probate court*] that political or other conditions existing in any foreign country would make it impossible or reasonably impractical for any income beneficiary or remainder beneficiary in that country to personally use and enjoy any payment or distribution, or if the transmission of private funds to that income beneficiary or remainder beneficiary in any foreign country would, under any provision of the laws, regulations, or executive orders of that country, of the United States, or of any state of the United States, be withheld, prevented, or otherwise interfered with, in whole or in part, the Trustee shall, notwithstanding any other provision of this will, withhold and retain in the trust all such payments and distributions.

(b) If, at any time within \_\_\_\_\_ years after the commencement of any withholding of funds in accordance with (a), above, it is possible for any income beneficiary or remainder beneficiary for whom payments or distributions have been withheld pursuant to the terms of this paragraph to have the personal use and enjoyment of the withheld property or funds, all sums that shall have become payable to that income beneficiary or remainder beneficiary under the terms of this will shall immediately be paid or distributed to that beneficiary or remainder beneficiary. No payment or distribution shall be withheld for a period of longer than \_\_\_\_\_ [*e.g., five*] years.

(c) When any payment or distribution has been withheld for \_\_\_\_\_ [e.g., five] years, or upon the death of the income beneficiary or remainder beneficiary for whom any payment or distribution has been withheld, whichever first occurs, the Trustee shall accumulate and add that payment or distribution to the principal of the trust estate, to be paid or distributed in the manner otherwise provided in this will for disposition of the trust principal; provided, however, that all such withheld payments or distributions must, in any event, be paid or distributed by the Trustee to the person or persons entitled to the same not later than 21 years after the death of \_\_\_\_\_ [specify person whose life will be "measuring life," e.g., the last survivor of my wife and my issue living at the date of my death].

(d) The Trustee's determination of the facts that authorize or require the Trustee to withhold or to make any payment or distribution to any income beneficiary or remainder beneficiary pursuant to the terms of this paragraph shall be conclusive upon all persons interested in the trust established by this will. In determining these facts, the Trustee may, but shall not be required to, conduct an investigation, personally or through agents, as the Trustee may deem advisable.

[If the will includes a marital deduction trust, add the following: ]

(e) This paragraph shall not apply to any payments of income to my \_\_\_\_\_ [wife or husband] out of \_\_\_\_\_ [describe marital deduction trust, e.g.: the marital deduction trust established under Section \_\_\_\_\_] of this will, all of which payments must be made at least annually.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

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*24-64 California Legal Forms--Transaction Guide §§ 64.323-64.339*

**[Reserved]**

§§ 64.323[Reserved]



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 H. Powers of Appointment

*24-64 California Legal Forms--Transaction Guide § 64.340*

**§ 64.340 General Testamentary Power of Appointment**

**[1] Comment**

**[a] Use of Form**

This form is a will provision that may be used to create a general testamentary power of appointment; that is, a power of appointment that may be exercised only by the will of the donee. For general nontestamentary powers of appointment (i.e., powers that may be exercised by inter vivos instrument), see §§ 64.341 and 64.342. For special powers of appointment (both testamentary and nontestamentary), see §§ 64.343-64.345. For will provisions either exercising or refusing to exercise testamentary powers of appointment, see *Ch. 63, Will Provisions*, §§ 63.290-63.292.

For a consideration of the uses, purposes, and characteristics of powers of appointment, see discussions in § 64.43[1] et seq. For a consideration of the types of powers of appointment and legal rules governing their creation, disclaimer, release, and exercise, see discussions in § 64.43[1] et seq.

**[b] General Powers of Appointment**

**[i] Purposes and Functions**

A "general" power of appointment is one that can be exercised so as to confer benefits on the donee, either directly or indirectly. Thus, the Probate Code provides that a power of appointment is "general" if it can be exercised in favor of the donee, the donee's estate, the donee's creditors, or creditors of the donee's estate, whether or not it is exercisable in favor of others [*Prob. Code § 611(a)*].

Two types of powers of appointment are excluded from the definition of a general power. The first is a power to consume, invade, or appropriate property for the benefit of a person that is limited by an ascertainable standard relating to the person's health, education, support, or maintenance [*I.R.C. § 2041(b)(1)(A)*; *Prob. Code § 611(b)*]. The second is a power that is exercisable by the donee only in conjunction with a person having a substantial interest in the appointive property that is adverse to the exercise of the power in favor of the donee, the donee's estate, the donee's creditors, or

creditors of the donee's estate [*I.R.C. § 2041(b)(1)(C)*; *Prob. Code § 611(c)*]. Any power that is not "general" is "special" [*Prob. Code § 611(d)*].

Powers are further classified according to the time and manner in which they may be exercised. Thus a power is "testamentary" if it may be exercised only by a will [*Prob. Code § 612(a)*] and "presently exercisable" at a particular time to the extent that an irrevocable appointment can be made under the power [*Prob. Code § 612(b)*]. A power that is not "presently exercisable" is said to be "postponed" [*Prob. Code § 612(c)*].

### **[ii] Estate and Gift Tax Consequences**

Because the donee of a general power of appointment has the right to appoint the subject property in his or her own favor (either personally or through his or her estate or creditors, or the creditors of his or her estate) [*I.R.C. §§ 2041(b), 2514(c)*; *Prob. Code § 611(a)*; see discussion in § 64.340[1][b][i]], any action (or inaction) by the donee that results in another person or persons receiving the subject property will have transfer tax consequences. Thus, the exercise, release, or lapse during the donee's lifetime of a general power of appointment (created after October 21, 1942) is deemed a transfer subject to the federal gift tax [*I.R.C. § 2514(b)*; *Treas. Reg. § 25.2514-3*]. Similarly, property subject to a general power of appointment (created after October 21, 1942) that the donee either retains or exercises at the time of the donee's death will be included in his or her estate for federal estate tax purposes [*I.R.C. § 2041(a)*]. A lifetime exercise or release of a general power, under circumstances that, if it were property, would have caused the property to be included in the donee's estate, will similarly cause the appointive property to be included in the donee's estate for federal estate tax purposes [*I.R.C. § 2041(a)(2)*].

Although the lapse of a general power of appointment constitutes a transfer for gift tax purposes, the transfer is taxed only to the extent that the property subject to the power in any calendar year exceeds the greater of \$5,000 or 5 percent of the aggregate value of the assets out of which the exercise of the lapsed power could have been exercised [*I.R.C. § 2514(e)*; *Treas. Reg. § 25.2514-3(c)(4)*]. Under this rule (generally called the "five or five" rule), it is possible to give the beneficiary of a trust the power to withdraw (or demand the withdrawal of) property from a trust without subjecting the beneficiary to possible gift taxation if the power is not exercised, provided the power is limited to the greater of \$5,000 or 5 percent per year, and further provided that the power is not cumulative from year to year [*I.R.C. § 2514(e)*; *Treas. Reg. § 25.2514-3(c)(4)*].

For a general consideration of the income, estate, gift, and generation-skipping transfer tax consequences of powers of appointment, see § 64.51[1] et seq.

### **[iii] Exercise by Will**

A power of appointment may be exercised by a will [see *Prob. Code §§ 612(a), 642*; see also § 64.44[2]]. A will may even be effective to exercise a power of appointment that was not in existence when the will was executed, provided the will adequately manifests the intent to exercise the power [*Prob. Code § 642*]. However, a will cannot exercise a power not in existence when the will was executed if the creating instrument manifests an intent that the power may not be exercised by a will previously executed, or if the will manifests an intent not to exercise a power subsequently acquired [*Prob. Code § 642*].

A power of appointment cannot be exercised by a general residuary clause in a will, or by a will making a general disposition of all of the testator's property, unless specific reference is made to the power or there is some other indication of intent to exercise the power [*Prob. Code § 641(a)*; but see *Prob. Code § 641(b)* (rule applicable only when donee dies on or after July 1, 1982)]. The purpose of this rule is to guard against the inadvertent exercise of a power of appointment by a testator who is not aware of the existence of the power and has no intention of exercising it.

### **[c] Takers in Default**

When the donee of a discretionary power of appointment [*see Prob. Code § 613; see also § 64.44[4]*] fails to exercise the power, or makes an appointment that is wholly or partially ineffective, the appointive property not effectively appointed will pass to the person named by the donor as the taker in default [*Prob. Code § 672(a)*]. If no taker in default is named, the property will revert to the donor [*Prob. Code § 672(a)*].

If the donee makes an ineffective appointment, however, an implied alternative appointment to the donee's estate may be found if the donee has manifested an intent that the appointive property be disposed of as property of the donee rather than as in default of appointment [*Prob. Code § 672(b)*].

Good drafting practice demands that the creating instrument designate a taker or takers in default. This will avoid disputes that might otherwise result if the power of appointment is not exercised, or if it is not effectively exercised. If there are to be two or more takers in default, the creating instrument should also specify the shares in which they will take.

## [2] FORM

### General Testamentary Power of Appointment

#### Power of Appointment

On the death of \_\_\_\_\_ [*name of donee*], the Trustee shall distribute the then-remaining balance of the trust estate, if any, including all principal and undistributed income, to the person, persons, or entities, including the estate of \_\_\_\_\_ [*name of donee*], whom \_\_\_\_\_ [*name of donee*] shall appoint by \_\_\_\_\_ [*his or her*] valid last will [*add, if desired: executed after my death and*] specifically referring to and exercising this power of appointment, on the terms and conditions that \_\_\_\_\_ [*name of donee*] shall specify therein. If, for any reason, any of the property subject to this power of appointment is not effectively appointed by \_\_\_\_\_ [*name of donee*], that property shall be distributed to \_\_\_\_\_ [*specify names, identities, and shares of takers in default*].

#### Legal Topics:

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Powers of Appointment Estate, Gift & Trust Law Trusts General Overview Estate, Gift & Trust Law Trusts Creation Estate, Gift & Trust Law Wills General Overview



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*24-64 California Legal Forms--Transaction Guide § 64.341*

**§ 64.341 General Nontestamentary Power of Appointment: Exercise to Be Effective on Death of Donee**

**[1] Comment**

**[a] Use of Form**

This form is a will provision that may be used to create a general nontestamentary power of appointment, that is, a power of appointment that can be exercised by inter vivos instrument. The form requires the donee to file the exercising instrument, and any instrument or instruments revoking the exercise, with the trustee. Although the appointment must be made during the donee's life, the terms of the power provide that the appointment will be effective only upon the death of the donee.

For a general testamentary power of appointment, see § 64.340. For a general nontestamentary power of appointment, the exercise of which may be effective only during the lifetime of the donee, see § 64.342. For special powers of appointment, see §§ 64.343-64.345.

For the uses, purposes, and characteristics of powers of appointment, see discussion in § 64.43[1]. For definitions of "general," "special," "testamentary," and "nontestamentary" powers, and rules relating to the creation, exercise, and release of powers of appointment, see § 64.44[1] et seq. For the income, estate, gift, and generation-skipping transfer tax consequences of powers of appointment, see § 64.51[1] et seq.

**[b] Filing Instrument With Trustee**

The creating instrument should require the donee to file the instrument exercising the power of appointment with the trustee. If the creating instrument specifies the manner, time, and conditions of exercise, the power of appointment can be exercised only by complying with those requirements [*Prob. Code* § 630(a)]. Requiring the donee to file the exercising instrument with the trustee will enable the trustee to supervise and keep track of the power of appointment. It will also help to prevent an inadvertent exercise of the power [*see* discussion in § 64.340[1]].

**[c] Right to Revoke Exercise**

This form authorizes the donee to revoke or modify any exercise of the power by another instrument filed with the trustee. Unless made expressly irrevocable by the creating instrument or the instrument of exercise, an exercise of a power of appointment will remain revocable so long as the interest in the appointive property has not been transferred or become distributable pursuant to the appointment [*Prob. Code § 695(b)*; see *Prob. Code § 15400* (presumption of revocability of trust)].

If the testator wishes to make the exercise of the power of appointment irrevocable, this form may be modified accordingly.

**[d] Drafting Caution**

A power stated to be exercisable by an inter vivos instrument is also exercisable by a written will unless the creating instrument prohibits such an exercise [*Prob. Code § 630(b)*]. Thus, if the testator does not wish the donee to exercise the power by will, the provision creating the power should clearly prohibit such an exercise.

**[2] FORM**

**General Nontestamentary Power of Appointment: Exercise to Be Effective on Death of Donee**

**Power of Appointment**

On the death of \_\_\_\_\_ [*name of donee*], the Trustee shall distribute the then-remaining balance of the trust estate, if any, including all principal and undistributed income, to the person, persons, or entities, including the estate of \_\_\_\_\_ [*name of donee*], whom \_\_\_\_\_ [*name of donee*] shall appoint, and on the terms and conditions that \_\_\_\_\_ [*name of donee*] shall specify, in the last unrevoked written instrument, other than a will, executed and acknowledged by \_\_\_\_\_ [*name of donee*], on file with the Trustee at the time of the death of \_\_\_\_\_ [*name of donee*], and specifically referring to and exercising this power of appointment. Any exercise of this power of appointment may be revoked by a later written instrument, other than a will, executed and acknowledged by \_\_\_\_\_ [*name of donee*], filed with the Trustee, specifically referring to this power and to the exercise to be revoked, and making an alternative exercise of the power. If, for any reason, any of the property subject to this power of appointment is not effectively appointed by \_\_\_\_\_ [*name of donee*], that property shall be distributed to \_\_\_\_\_ [*specify names, identities, and shares of takers in default*].

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Estate, Gift & Trust Law Powers of Appointment



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*24-64 California Legal Forms--Transaction Guide § 64.342*

**§ 64.342 General Nontestamentary Power of Appointment: Exercise to Be Effective During Lifetime of Donee**

**[1] Comment**

**[a] Use of Form**

This form is a will provision that may be used to create a general nontestamentary power of appointment (that is, a power that can be exercised by inter vivos instrument) that may be exercised only during the lifetime of the donee. For a general nontestamentary power that may be made exercisable only after the donee's death, see § 64.341. For a general testamentary power of appointment, see § 64.340. For special powers of appointment, see §§ 64.343-64.345.

For a general discussion of the uses, purposes, and characteristics of powers of appointment, see § 64.43 et seq.

**[b] Drafting Considerations**

A power of appointment that is exercisable only by will is a "testamentary" power [*Prob. Code § 612(b)*]. To the extent that a power is not exercisable by will, it is a "nontestamentary" power [*see discussion in § 64.44[2]*].

Although every nontestamentary power may be exercised during the lifetime of the donee, the exercise may (depending on the terms of the creating and exercising instruments) take effect during or after the lifetime of the donee. The creating instrument may, for example, provide that an exercise of the power will take effect at any time during the donee's lifetime that the donee may specify. In such a case, the donee may make an appointment effective immediately, or may specify that it will take effect at any other time during his or her lifetime.

Alternatively, the creating instrument may provide that the exercise can take effect only after the donee's death. In such a case, an exercise of the power may not be made effective at any earlier time [*see Prob. Code § 630(a)* (exercise must comply with terms of power)].

A power stated to be exercisable by an inter vivos instrument is also exercisable by a written will unless the creating instrument prohibits such an exercise [*Prob. Code § 630(b)*]. Thus, if the testator does not wish the donee to exercise

the power by will, the provision should clearly prohibit such an exercise.

### **[c] Revocation of Exercise**

This form authorizes the donee to revoke or modify any exercise of the power by another instrument filed with the trustee. Unless made expressly irrevocable by the creating instrument or the instrument of exercise, an exercise of a power of appointment will remain revocable so long as the interest in the appointive property has not been transferred or become distributable pursuant to the appointment [*Prob. Code § 695(b)*; see *Prob. Code § 15400* (presumption of revocability of trust)]. If the testator wishes to make an exercise irrevocable only, this form may be modified accordingly.

### **[2] FORM**

#### **General Nontestamentary Power of Appointment: Exercise to Be Effective During Lifetime of Donee**

##### **Power of Appointment**

From time to time during the lifetime of \_\_\_\_\_ [*name of donee*], the Trustee shall distribute all or any part of the trust estate, including accrued income and undistributed income, to the person, persons, or entities, including \_\_\_\_\_ [*name of donee*] or the estate of \_\_\_\_\_ [*name of donee*], whom \_\_\_\_\_ [*name of donee*] shall appoint, and on the terms and conditions that \_\_\_\_\_ [*name of donee*] shall specify, in the last unrevoked written instrument other than a will executed and acknowledged by \_\_\_\_\_ [*name of donee*] and filed with the Trustee, specifically referring to and exercising this power of appointment. Except to the extent that property or an interest in property shall previously have been transferred or become distributable pursuant to an exercise of this power, any such exercise may be revoked by an instrument other than a will executed and acknowledged by \_\_\_\_\_ [*name of donee*], filed with the Trustee, specifically referring to this power of appointment and the exercise to be revoked, and making an alternative exercise of the power. If, for any reason, any of the property subject to this power of appointment is not effectively appointed by \_\_\_\_\_ [*name of donee*], that property shall be distributed to \_\_\_\_\_ [*specify names, identities, and shares of takers in default*].

##### **Legal Topics:**

For related research and practice materials, see the following legal topics:  
Estate, Gift & Trust Law Powers of Appointment



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*24-64 California Legal Forms--Transaction Guide § 64.343*

**§ 64.343 Special Testamentary Power of Appointment**

**[1] Comment**

**[a] Use of Form**

This form is a will provision that may be used to create a special testamentary power of appointment. The power is "special" because it is not exercisable in favor of the donee, the donee's estate or creditors, or creditors of the donee's estate; "testamentary" because it may be exercised only by a will of the donee. For definitions of "general," "special," "testamentary," and "nontestamentary" powers of appointment, see discussion in § 64.44[1] et seq.

**[b] Special Powers of Appointment**

**[i] In General**

Unlike a general power of appointment, a special power limits the class of persons in whose favor it may be exercised. The persons in whose favor a special power may be exercised are referred to as "permissible appointees" [*Prob. Code* § 610(f)]. The class of permissible appointees may be as broad or narrow as the donor wishes, providing it does not include the donee, the donee's estate or creditors, or creditors of the donee's estate. Although the class of permissible appointees under a special power may be nearly unlimited, most donors prefer to limit the class to members of their family--spouses, issue, descendants, or the spouses of issue or descendants.

A very broad special power (one that may be exercised in favor of anyone other than the donee, the donee's estate or creditors, or creditors of the donee's estate) may be appropriate if the donor wishes the donee to have broad latitude in selecting the appointees. More narrowly drafted powers will be appropriate when the donor wishes to keep the appointive property in the family. A special power should reflect the wishes of the individual testator and be drafted accordingly.

**[ii] Tax Considerations**

The exercise, release, or lapse of a special power of appointment will not usually have federal estate or gift tax consequences [see discussion in § 64.51[1] et seq.]. However, special powers of appointment may trigger imposition of the generation-skipping transfer tax [see I.R.C. §§ 2601-2663]. If, for example, the holder of a special power of appointment over trust assets exercises the power in favor of a beneficiary who is two or more generations below the generation assignment of the transferor of the power, the transfer constitutes a taxable distribution and is subject to the generation-skipping tax [I.R.C. § 2611(a) (generation-skipping transfer defined); see I.R.C. § 2612(b) (taxable distribution defined)]. Similarly, if the release or lapse of a special power of appointment results in a transfer to a beneficiary who is two or more generations below the generation assignment of the transferor of the power, the transfer a taxable termination or a direct skip [see I.R.C. § 2612(a), (c)]. For a detailed consideration of the generation-skipping transfer tax, see California Wills & Trusts, Ch. 113, *Generation-Skipping Transfers and Trust Strategies* (Matthew Bender).

### **[iii] Use With Marital Deduction Trust**

Caution must be exercised when including a special power of appointment in a marital deduction trust. Such a power should not be included in any trust that is designed to qualify for the federal estate tax marital deduction as a lifetime income plus power of appointment trust, since such a trust must grant the surviving spouse a general power of appointment over the deductible property or interest in property [I.R.C. § 2056(b)(5)]. If the trust is designed to qualify for the marital deduction as a qualified terminable interest property (QTIP) trust, the trustee (or any other person) may be given the power to appoint the trust property to persons other than the surviving spouse, providing the power is exercisable only at or after the surviving spouse's death [I.R.C. § 2056(b)(7)(B)(ii)]. No person may have a power under a QTIP trust to appoint any part of the property to any person other than the surviving spouse during the surviving spouse's lifetime, and the surviving spouse must be entitled to all of the income from the property, payable annually or at more frequent intervals [I.R.C. § 2056(b)(7)(B)(ii)(I)]. For a general consideration of marital deduction trusts, see Ch., *Marital Deduction Trust Provisions*; see also California Wills & Trusts, Ch. 112, *The Marital Deduction and Marital Deduction Trusts* (Matthew Bender).

## **[2] FORM**

### **Special Testamentary Power of Appointment**

#### **Power of Appointment**

On the death of \_\_\_\_\_ [name of donee], the Trustee shall distribute the then-remaining balance of the trust estate, if any, including all principal and undistributed income, to the person or persons appointed by \_\_\_\_\_ [name of donee] from among \_\_\_\_\_ [identify class of permissible appointees, e.g.: my issue and the spouses (at the time of my death) of my issue or the children of \_\_\_\_\_ (name of donee) then living and the then-living issue of any predeceased child of \_\_\_\_\_ (name of donee)]. This power of appointment is exercisable by \_\_\_\_\_ [name of donee] alone and in all events, and shall be in the amounts or proportions, and on such terms and conditions, as \_\_\_\_\_ [name of donee] shall appoint by \_\_\_\_\_ [his or her] valid last will specifically referring to and exercising this power of appointment. If, for any reason, any of the property subject to this power of appointment is not effectively appointed by \_\_\_\_\_ [name of donee], that property shall be distributed to \_\_\_\_\_ [specify names, identities, and shares of takers in default].

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Powers of Appointment Estate, Gift & Trust Law Wills General Overview Tax Law Federal Estate & Gift Taxes Powers of Appointment (IRC secs. 2041, 2514) Special Powers



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*24-64 California Legal Forms--Transaction Guide § 64.344*

**§ 64.344 Special Nontestamentary Power of Appointment: Exercise to Be Effective on Death of Donee**

**[1] Comment--Use of Form**

This form is a will provision that may be used to create a special nontestamentary power of appointment. The power is "special" because it is not exercisable in favor of the donee, the donee's estate or creditors, or creditors of the donee's estate [*see Prob. Code § 611(a), (d)*]; it is "nontestamentary" because it may be exercised during the lifetime of the donee but not by the donee's will [*see Prob. Code § 612(a); see also § 64.44[2]*]. Although the appointment must be made by inter vivos instrument, the appointment will, by terms of the power, be effective only upon the death of the donee. For a special nontestamentary power authorizing an appointment to be effective during the lifetime of the donee, see § 64.345.

For a general consideration of the uses, purposes, and characteristics of powers of appointment, see § 64.43[1]. For types of powers and legal rules governing their creation, exercise, and release, see § 64.44[1] et seq. For the income, estate, gift, and generation-skipping transfer tax consequences of powers of appointment, see § 64.51[1] et seq. For a discussion of special powers, their creation and exercise, see § 64.343[1].

**[2] FORM**

**Special Nontestamentary Power of Appointment: Exercise to Be Effective on Death of Donee**

**Power of Appointment**

On the death of \_\_\_\_\_ [*name of donee*], the Trustee shall distribute the then-remaining balance of the trust estate, if any, including all principal and undistributed income, to the person or persons appointed by \_\_\_\_\_ [*name of donee*] from among \_\_\_\_\_ [*identify class of permissible appointees, e.g.: my issue or the children of \_\_\_\_\_ (name of donee) then living and the then-living issue of any predeceased child of \_\_\_\_\_ (name of donee)*]. This power of appointment is exercisable by \_\_\_\_\_ [*name of donee*] alone and in all events and shall be in the amounts or proportions, and on such terms and conditions, as \_\_\_\_\_ [*name of donee*] shall appoint in the last unrevoked written instrument

other than a will executed and acknowledged by \_\_\_\_\_[*name of donee*], on file with the Trustee at the time of the death of \_\_\_\_\_[*name of donee*], and specifically referring to and exercising this power of appointment. Any exercise of this power of appointment may be revoked by a later written instrument other than a will executed and acknowledged by \_\_\_\_\_[*name of donee*], filed with the Trustee, specifically referring to this power and to the exercise to be revoked, and making an alternative exercise of the power. If, for any reason, any of the property subject to this power of appointment is not effectively appointed by \_\_\_\_\_[*name of donee*], that property shall be distributed to \_\_\_\_\_[*specify names, identities, and shares of takers in default*].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Powers of Appointment Tax Law Federal Estate & Gift Taxes Powers of Appointment (IRC secs. 2041, 2514) Special Powers



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*24-64 California Legal Forms--Transaction Guide § 64.345*

**§ 64.345 Special Nontestamentary Power of Appointment: Exercise to Be Effective During Lifetime of Donee**

**[1] Comment--Use of Form**

This form is a will provision that may be used to create a special nontestamentary power of appointment. The appointment will, by terms of the power, be effective at any time during the lifetime of the donee. For a special nontestamentary power authorizing an appointment to be effective only upon the death of the donee, see § 64.344.

For a general discussion of the uses, purposes, and characteristics of powers of appointment, see § 64.43[1]. For types of powers and legal rules governing their creation, exercise, and release, see § 64.44[1] et seq. For the income, estate, gift, and generation-skipping transfer tax consequences of powers of appointment, see § 64.51[1] et seq. For a discussion of special powers, their creation and exercise, see § 64.343[1].

**[2] FORM**

**Special Nontestamentary Power of Appointment: Exercise to Be Effective During Lifetime of Donee**

**Power of Appointment**

From time to time during the lifetime of \_\_\_\_\_[*name of donee*], the Trustee shall distribute all or any part of the trust estate, including accrued income and undistributed income, to the person or persons appointed by \_\_\_\_\_[*name of donee*] from among \_\_\_\_\_[*identify class of permissible appointees, e.g.: my issue or the children of \_\_\_\_\_ (name of donee) and the issue of any predeceased child of \_\_\_\_\_ (name of donee)*]. This power of appointment is exercisable by \_\_\_\_\_[*name of donee*] alone and in all events, and shall be in the amounts or proportions, and on such terms and conditions, as \_\_\_\_\_[*name of donee*] shall appoint in the last unrevoked written instrument other than a will executed and acknowledged by \_\_\_\_\_[*name of donee*] and filed with the Trustee, specifically referring to and exercising this power of appointment. Except to the extent that property or an interest in property shall previously have been transferred or become distributable pursuant to an exercise of this power, any such exercise may be revoked by an instrument other than a will executed and acknowledged by \_\_\_\_\_[*name of donee*], filed with the

Trustee, specifically referring to this power of appointment and the exercise to be revoked, and making an alternative exercise of the power. If, for any reason, any of the property subject to this power of appointment is not effectively appointed by \_\_\_\_\_ [*name of donee*], that property shall be distributed to \_\_\_\_\_ [*specify names, identities, and shares of takers in default*].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Powers of Appointment Tax Law Federal Estate & Gift Taxes Powers of Appointment (IRC secs. 2041, 2514) Special Powers



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*24-64 California Legal Forms--Transaction Guide § 64.346*

**§ 64.346 Limited Right to Release Power of Appointment**

**[1] Comment**

**[a] Use of Form**

This form is a will provision that may be used to grant the donee of a power of appointment a limited right to release the power. The form permits the entire power over all of the property to be released without consideration; it prohibits a partial release and any release for consideration.

**[b] Releases of Powers of Appointment**

**[i] In General**

A power of appointment is "released" when the donee relinquishes, concedes, or gives up the right to exercise the power [*see Black's Law Dictionary* (5th ed. 1979) at 1159]. After it is released, the power passes to the person or persons designated by the donor as takers in default; or, if there are none, it reverts to the donor [*Prob. Code* § 672(a)].

Under California law, a "discretionary" power of appointment may be released [*Prob. Code* § 661(a)], but an "imperative" power may not. For the distinctions between "discretionary" and "imperative" powers, see § 64.44[4].

Any discretionary power of appointment may be released, regardless of whether it is "general" or "special," "testamentary" or "nontestamentary," unless the creating instrument provides otherwise [*Prob. Code* § 661(a)]. The release may apply to the whole or any part of the appointive property, and it may reduce or limit the number of permissible appointees [*Prob. Code* § 661(b)].

**[ii] Power Not Presently Exercisable**

A special rule limits the circumstances under which a power that is not "presently exercisable" [*see Prob. Code* § 612(b); *see also* § 64.44[3]] may be released. If the power is not presently exercisable and if the donor designated

persons or a class of persons to take in default of the donee's exercise of the power, the power cannot be released, unless the release serves to benefit all persons designated as provided by the donor [*Prob. Code* § 661(b)]. The purpose of this rule is to prevent the donee, under the guise of a release, from benefiting certain of the takers in default at the expense of others [*see Recommendation Relating to Revision of the Powers of Appointment Statute*, 15 Cal. L. Revision Comm'n Reports 1667, 1679 (1980)]. If, for example, the power is exercisable only after all of the testator's children reach the age of 21, the donee cannot at any earlier time release the power as to all of the children except one, because such a release would amount to a premature exercise of the power.

### **[iii] Delivery**

Delivery is required for the effective release of a power of appointment [*Prob. Code* § 661(a)]. If the creating instrument specifies a person to whom a release is to be delivered, the release must be delivered to that person, unless the person cannot with due diligence be found [*Prob. Code* § 661(c)(1)]. If the property to which the power relates is held by a trustee, the release must be delivered to the trustee [*Prob. Code* § 661(c)(2)].

In all other cases, the release may be delivered to any person (other than the donee) who could be adversely affected by the exercise of the power [*Prob. Code* § 661(c)(3)(A)] or to the county recorder of the county in which the donee resides or in which the deed, will, or other instrument creating the power is filed [*Prob. Code* § 661(c)(3)(B)].

### **[iv] Recordation**

If the release of a power of appointment affects real property, or obligations secured by real property, it must be acknowledged and proved in the same manner as grants of real property [*Prob. Code* § 661(d)]; for acknowledgment and proof of execution of instruments, *see Civ. Code* §§ 1181-1207]. A release that affects real property may be also be certified and recorded [*Prob. Code* § 661(d)].

### **[c] Tax Caution**

The release of a power of appointment may have gift or estate tax consequences for the donee (or the donee's estate), depending on whether the power is "general" or "special," whether the donee retains any interest in the appointive property after the release, and whether the value of the property released exceeds the greater of \$5,000 or 5 percent of the property out of which the power could have been exercised [*see I.R.C. § 2514(e)* ("five or five" rule)]. For the tax consequences of releases of powers of appointment, *see § 64.51[5], [6]*.

### **[d] Drafting Considerations**

This form permits the power of appointment to be released to the extent permitted by *Prob. Code* § 661. This will avoid conflict of laws problems if the testator dies while domiciled in some state other than California or if, for any other reason, the law of another jurisdiction is applicable to the will. By expressly making the California law relating to releases applicable, this provision deals with the possibility that some other law might be applied to preclude release.

## **[2] FORM**

### **Limited Right to Release Power of Appointment**

### **Limited Right to Release Power of Appointment**

Any provision of this will to the contrary notwithstanding, any power created by this will, whether expressly granted in this will or implied by law, may be released to the extent and in the manner authorized in *California Probate Code Section 661*, providing that section exists at the date of the release. Any released power shall pass to and may be exercised by \_\_\_\_\_ [*name and identity of person to whom power will pass*].

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Estate, Gift & Trust Law Powers of Appointment



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DIVISION IV: WILLS AND TRUSTS  
CHAPTER 64A TESTAMENTARY TRUSTS: TRUSTEE PROVISIONS

*24-64A California Legal Forms--Transaction Guide 64A.syn*

**§ 64A.syn Synopsis to Chapter 64A: TESTAMENTARY TRUSTS: TRUSTEE PROVISIONS**

§ 64A.01 California Statutes

§ 64A.02 Federal Statutes

§§ 64A.03-64A.19 [Reserved]

§ 64A.20 Law Reviews

§ 64A.21 Annotations

§ 64A.22 Text References

[1] Related Forms With Tax Analysis

[2] Related California Forms

[3] Additional Text References

§§ 64A.23-64A.29 [Reserved]

§ 64A.30 Who May Act as Trustee

[1] In General

[2] Aliens and Nonresidents

[3] Trust Company

[4] Other Corporate Trustees

[5] Beneficiary

[6] Attorney Who Drafts Trust

§ 64A.31 Cotrustees

[1] In General

[2] Compensation

[3] Liability

[4] Tax Consequences of Appointment

§ 64A.32 Tax Considerations in Selection of Trustee

[1] In General

[2] Management Powers

[3] Generation-Skipping Trusts

[4] Income Tax Liability

§ 64A.33 Appointment of Trustee

[1] By Testator

[2] By Court

§ 64A.34 Acceptance by Trustee

§ 64A.35 Rejection by Trustee

§ 64A.36 Resignation of Trustee

§ 64A.37 Removal of Trustee

[1] In General

[2] Special Rules Governing Removal of Trustee Who Drafted Trust Instrument or Is Relative or Associate of Drafter

§ 64A.38 Professional Fiduciaries

[1] Professional Fiduciary

[2] Professional Fiduciaries Bureau

[3] Licensing Requirements

[4] Qualifications for Licensure

[5] License Renewal

[6] Initial and Annual Statement

[7] Suspension, Revocation, Denial and Disciplinary Action

§ 64A.39 Duties of Trustees

[1] Administration of Trust

[2] Avoiding Conflicts of Interest

[3] Dealing With Trust Property

[4] Enforcing Claims and Defending Actions

[5] Delegation of Duties

[6] Cotrustees

[7] Skill and Care

[8] Exercise of Discretionary Powers

[9] Reporting

[10] Accounting

§ 64A.40 Powers of Trustee

[1] In General

[2] Receiving, Holding, Managing, and Disposing of Property

[3] Investments

[4] Miscellaneous Powers

§ 64A.41 Release of Liability

§§ 64A.42-64A.99 [Reserved]

§ 64A.100 Number of Trustees

Scope

§ 64A.101 Identity of Trustee or Cotrustees

Scope

§§ 64A.102-64A.119 [Reserved]

§ 64A.120 General Administrative Powers

Scope

§ 64A.121 Optional and Alternative Powers and Restrictions on Powers

Scope

§§ 64A.122-64A.139 [Reserved]

§ 64A.140 Appointment of Trustee or Cotrustees

Scope

§ 64A.141 General Administrative Powers

Scope

§ 64A.142 Optional and Alternative Administrative Powers

Scope

§ 64A.143 Division or Apportionment of Powers Among Cotrustees

Scope

§§ 64A.144-64A.199 [Reserved]

§ 64A.200 Appointment of Individual as Trustee

[1] Comment

[a] Use of Form

[b] Alternate and Successor Trustees

[2] FORM

Appointment of Individual as Trustee

§ 64A.201 Appointment of Trust Company or Other Corporate Trustee

[1] Comment

[a] Use of Form

[b] Trust Company

[c] Other Corporate Trustee

[2] FORM

Appointment of Trust Company or Other Corporate Trustee

§ 64A.202 Appointment of Cotrustees

[1] Comment

[a] Use of Form

[b] Cotrustees

[i] In General

[ii] Selection

[iii] Settlor's Objectives

[c] Dividing or Allocating Powers as Alternative to Cotrustees

[2] FORM

Appointment of Cotrustees

§ 64A.203 Certificate of Independent Review (Prob. Code § 15642(b)(6)(B))

[1] Comment

[a] Use of Form

[b] Attorney Who Drafted Trust Instrument--Appointment as Trustee

[c] Removal When Serving As Sole Trustee

[d] Exceptions to Removal Rule

[e] Independent Review and Certification

[2] FORM

Certificate of Independent Review (Prob. Code § 15642(b)(6)(B))

§§ 64A.204-64A.219 [Reserved]

§ 64A.220 General Administrative Powers of Trustee--Short Form

[1] Comment

[a] Use of Form

[b] Powers of Trustee

[i] In General

[ii] Drafting Considerations

[iii] Retention of Assets

[iv] Investment and Management

[v] Sales, Exchanges, Leases, Encumbrances, and Options

[vi] Claims and Litigation

[vii] Borrowing and Lending

[viii] Division and Distribution

[c] Judicial Relief From Restrictions on Powers

[2] FORM

General Administrative Powers of Trustee--Short Form

§ 64A.221 General Administrative Powers of Trustee--Long Form

[1] Comment

[a] Use of Form

[b] Discretion of Trustee

[c] Management of Securities

[d] Investment and Management of Trust Assets; Retention of Unproductive Property

[e] Trustee's Dealings With Trust

[f] Insurance

[g] Employment of Advisers, Attorneys, and Agents

[2] FORM

General Administrative Powers of Trustee--Long Form

§ 64A.222 Provision Conferring All Statutory Powers

[1] Comment

[a] Use of Form

[b] Statutory Powers

[c] Drafting Considerations

[d] Derivation of Provisions

[e] Tax Considerations

[2] FORM

Provision Conferring All Statutory Powers

§§ 64A.223-64A.239 [Reserved]

§ 64A.240 Provision Waiving Requirement of Diversification

[1] Comment

[a] Use of Form

[b] Diversification of Investments

[i] General Rule

[ii] Effect of Trust Provisions

[iii] Drafting Considerations

[iv] Limitations on Effect of Provision

[2] FORM

Provision Waiving Requirement of Diversification

§ 64A.241 Provision Permitting Trustee to Hold Unproductive Property

[1] Comment

[a] Use of Form

[b] Unproductive Investments

[c] Tax Considerations

[2] FORM

Provision Permitting Trustee to Hold Unproductive Property

§ 64A.242 Provision Requiring Trustee to Hold Specific Asset or Assets

[1] Comment

[a] Use of Form

[b] Direction to Retain Particular Asset or Assets

[c] Use Provision With Caution

[2] FORM

Provision Requiring Trustee to Hold Specific Asset or Assets

§§ 64A.243-64A.259 [Reserved]

§ 64A.260 Prudent Person Rule--Long Form

[1] Comment

[a] Use of Form

[b] Prudent Investor Rule

[c] Trustee's Investigation and Review

[d] Investment Costs

[e] Circumstances to Be Considered

[f] Delegation of Investment Responsibilities

[g] Standard Drafting Terms

[2] FORM

Prudent Person Rule--Long Form

§ 64A.261 Prudent Person Rule--Short Form

[1] Comment--Use of Form

[2] FORM

Prudent Person Rule--Short Form

§ 64A.262 Provision Conferring Broad Investment Powers on Trustee

[1] Comment

[a] Use of Form

[b] Settlor's Power to Expand or Restrict Prudent Person Rule

[c] Use Provision With Caution

[2] FORM

Provision Conferring Broad Investment Powers on Trustee

§ 64A.263 Provision Conferring Broad Investment Powers on Trustee and Waiving Diversification Requirement

[1] Comment--Use of Form

[2] FORM

Provision Conferring Broad Investment Powers on Trustee and Waiving Diversification Requirement

§ 64A.264 Provision Permitting Trustee to Invest in Unproductive Property

[1] Comment

[a] Use of Form

[b] Investment in Unproductive Property

[c] Tax Caution

[2] FORM

Provision Permitting Trustee to Invest in Unproductive Property

§ 64A.265 Provision Permitting Trustee to Invest in Investment Funds

[1] Comment

[a] Use of Form

[b] Investment Funds

[2] FORM

Provision Permitting Trustee to Invest in Investment Funds

§ 64A.266 Provisions Permitting Trustee to Invest in Life Insurance

[1] Comment

[a] Use of Form

[b] Life Insurance as Trust Investment

[i] In General

[ii] Tax Considerations

[2] FORM

Provisions Permitting Trustee to Invest in Life Insurance

§ 64A.267 Provision Restricting Trustee's Investment Powers

[1] Comment

[a] Use of Form

[b] Restricted Investment Powers

[i] Statutory Authority

[ii] Use Provision With Caution

[2] FORM

Provision Restricting Trustee's Investment Powers

§ 64A.268 Provisions Permitting Trustee's Own Dealings With Trust

[1] Comment

[a] Use of Form

[b] Prohibition Against Personal Dealings With Trust

[c] Deposits in Accounts of Financial Institution Serving As Trustee

[d] Trust Instrument May Authorize Personal Dealings

[e] Obligation of Good Faith

[f] Drafting Considerations

[2] FORM

Provisions Permitting Trustee's Own Dealings With Trust

§§ 64A.269-64A.279 [Reserved]

§ 64A.280 Provision Permitting Trustee to Conduct Business

[1] Comment

[a] Use of Form

[b] Operation of Business by Trustee

[i] In General

[ii] Businesses Received as Part of Trust Estate

[iii] New Businesses

[iv] Drafting Considerations

[2] FORM

Provision Permitting Trustee to Conduct Business

§ 64A.281 Provision Permitting Trustee to Operate Farm or Ranch

[1] Comment

[a] Use of Form

[b] Operation of Farm or Ranch by Trustee

[2] FORM

Provision Permitting Trustee to Operate Farm or Ranch

§ 64A.282 Provision Permitting Trustee to Hold Corporate Stock

[1] Comment

[a] Use of Form

[b] Holding Stock in Closely Held Corporation

[c] Will Provisions Authorizing Operation of Business

[d] Restrictions on Transfer of Stock

[2] FORM

Provision Permitting Trustee to Hold Corporate Stock

§§ 64A.283-64A.299 [Reserved]

§ 64A.300 Provision Permitting Trustee to Sell, Lease, or Exchange Trust Property

[1] Comment

[a] Use of Form

[b] Sales and Exchanges of Trust Property

[i] In General

[ii] Self-Dealing

[c] Employment of Agents and Advisers

[2] FORM

Provision Permitting Trustee to Sell, Lease, or Exchange Trust Property

§§ 64A.301-64A.319 [Reserved]

§ 64A.320 Provision Authorizing Trustee to Employ Agents, Advisors, and Attorneys

[1] Comment

[a] Use of Form

[b] Employment of Advisors, Attorneys, and Agents

[2] FORM

Provision Authorizing Trustee to Employ Agents, Advisors, and Attorneys

§§ 64A.321-64A.339 [Reserved]

§ 64A.340 Provision Conferring "Sole," "Absolute," or "Uncontrolled" Discretion on Trustee

[1] Comment

[a] Use of Form

[b] Discretion of Trustee

[i] Effect of Provision Granting "Absolute," "Sole," or "Uncontrolled" Discretion

[ii] Effect of Provision on Trustee Who Is Also Beneficiary of Trust

[c] Drafting Considerations

[2] FORM

Provision Conferring "Sole," "Absolute," or "Uncontrolled" Discretion on Trustee

§§ 64A.341-64A.359 [Reserved]

§ 64A.360 Provisions Authorizing Majority of Cotrustees to Make Investment Decisions for Trust

[1] Comment

[a] Use of Form

[b] Dividing or Allocating the Powers of Cotrustees

[2] FORM

Provisions Authorizing Majority of Cotrustees to Make Investment Decisions for Trust

§ 64A.361 Provisions Assigning Investment Powers to Named Cotrustee

[1] Comment

[a] Use of Form

[b] Dividing Powers Among Cotrustees

[c] Drafting Considerations

[2] FORM

Provisions Assigning Investment Powers to Named Cotrustee

§ 64A.362 Provisions Empowering Special Trustee to Make Investment Decisions

[1] Comment

[a] Use of Form

[b] Conferring Trust Powers on Third Parties

[c] Beneficial and Fiduciary Powers

[d] Tax Considerations

[2] FORM

Provisions Empowering Special Trustee to Make Investment Decisions

§ 64A.363 Provision Conferring Veto Power on Special Trustee

[1] Comment

[a] Use of Form

[b] Veto Powers in Special Trustees

[2] FORM

Provision Conferring Veto Power on Special Trustee

§ 64A.364 Provisions Authorizing Majority of Cotrustees to Bind Trust

[1] Comment

[a] Use of Form

[b] Dividing or Allocating the Powers of Cotrustees

[i] In General

[ii] Statutory Rules

[iii] Drafting Considerations

[2] FORM

Provisions Authorizing Majority of Cotrustees to Bind Trust

§ 64A.365 Corporate Cotrustee to Have Custody of Personal Property and Maintain Records and Accounts

[1] Comment

[a] Use of Form

[b] Custody of Personal Property and Corporate Records

[2] FORM

Corporate Cotrustee to Have Custody of Personal Property and Maintain Records and Accounts

§ 64A.366 Delegation of Powers and Duties of Individual Cotrustee to Corporate Cotrustee

[1] Comment

[a] Use of Form

[b] Delegation of Powers and Duties of Cotrustees

[i] In General

[ii] Alternatives to Delegation

[iii] Drafting Considerations

[2] FORM

Delegation of Powers and Duties of Individual Cotrustee to Corporate Cotrustee

§ 64A.367 Provision Disqualifying Cotrustee From Decisions Affecting Cotrustee's Own Interest

[1] Comment

[a] Use of Form

[b] Duty of Loyalty

[i] Statutory Rules

[ii] Will Provisions

[2] FORM

Provision Disqualifying Cotrustee From Decisions Affecting Cotrustee's Own Interest

§ 64A.368 Provision Requiring Unanimous Action Among Cotrustees When Voting Shares

[1] Comment--Use of Form

[a] In General

[b] Statutory Rule of Majority Action in Voting Shares

[c] Will Provision Overcoming Majority-Action Rule

[2] FORM

Provision Requiring Unanimous Action Among Cotrustees When Voting Shares



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DIVISION IV: WILLS AND TRUSTS  
CHAPTER 64A TESTAMENTARY TRUSTS: TRUSTEE PROVISIONS

*24-64A California Legal Forms--Transaction Guide Scope*

**Scope**

Scope

This chapter covers the selection, appointment, and general administrative powers of testamentary trustees. The Legal Background discusses the legal qualifications of trustees, special rules relating to cotrustees, tax considerations in the selection of trustees, appointment of testamentary trustees (both by the trustor-testator and by the court), duties and obligations of testamentary trustees, and the rights and powers of testamentary trustees. The forms include provisions for the appointment of testamentary trustees, complete provisions for the general administrative powers of testamentary trustees, an optional provision conferring "absolute," "unlimited," or "sole" discretion on the trustee, and alternate provisions for retention of trust assets, investment powers, business interests, sale and exchange of assets, and employment of attorneys and agents. Also included are forms relating to the allocation of trust duties and responsibilities between cotrustees.

This chapter does not cover the rules governing compensation of trustees or continuing judicial supervision of testamentary trusts. Both of these topics are dealt with in Ch. 64B, *Testamentary Trusts: Administrative Provisions*. This chapter also does not contain trust provisions governing the appointment of successor trustees and related matters. These provisions, together with discussion, are also contained in Ch. 64B, *Testamentary Trusts: Administrative Provisions*. In addition, Ch. 64B, *Testamentary Trusts: Administrative Provisions*, covers other miscellaneous matters affecting the operation of the trust, some of which have an impact on the duties and obligations of the trustee.

Trust provisions governing the payment and distribution of income and principal are covered in Ch. 64, *Testamentary Trusts: Payment and Distribution Provisions*.



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PART I. RESEARCH GUIDE  
A. Primary Sources

*24-64A California Legal Forms--Transaction Guide § 64A.01*

**§ 64A.01 California Statutes**

Accumulations and income. *Civ. Code §§ 722-726.*

Qualification of trust company to act as trustee. *Prob. Code § 300.*

Creation and validity of trusts.

Methods of creating trust. *Prob. Code § 15200.*

Intention to create trust. *Prob. Code § 15201.*

Trust property. *Prob. Code § 15202.*

Trust purpose. *Prob. Code § 15203.*

Trust for indefinite or general purposes. *Prob. Code § 15204.*

Designation of beneficiary. *Prob. Code § 15205.*

Requirement of writing. *Prob. Code § 15206.*

Validity of oral trusts. *Prob. Code § 15207.*

When consideration is required. *Prob. Code § 15208.*

Exceptions to doctrine of merger. *Prob. Code § 15209.*

Recordation of trust relating to real property. *Prob. Code § 15210.*

Trust company not required to file bond. *Prob. Code § 15602(e)*.

Duties of trustees.

General duty to administer trust. *Prob. Code § 16000*.

Duties with respect to revocable trusts. *Prob. Code § 16001*.

Loyalty. *Prob. Code § 16002*.

Impartiality. *Prob. Code § 16003*.

Duty to avoid conflicts of interests. *Prob. Code § 16004*.

Duty not to undertake adverse trust. *Prob. Code § 16005*.

Duty to take control of and preserve trust property. *Prob. Code § 16006*.

Duty to make trust property productive. *Prob. Code § 16007*.

Duty to keep trust property separate and identified. *Prob. Code § 16009*.

Duty to enforce claims. *Prob. Code § 16010*.

Duty to defend actions. *Prob. Code § 16011*.

Duty not to delegate. *Prob. Code § 16012*.

Duties with respect to cotrustees. *Prob. Code § 16013*.

Duty to use special skills. *Prob. Code § 16014*.

Prudent person rule. *Prob. Code § 16040*].

Uniform Prudent Investor Act. *Prob. Code §§ 16045-16054*.

Reporting and accounting. *Prob. Code §§ 16060-16064*.

Duties with regard to discretionary powers. *Prob. Code §§ 16080, 16081*.

Duties of private foundations, charitable trusts, and split-interests trusts. *Prob. Code §§ 16100-16105*.

Powers of trustees. *Prob. Code §§ 16200-16249*.

Uniform Principal and Income Act. *Prob. Code §§ 16320-16375*.

Unitrust conversions. *Prob. Code §§ 16336.4-16336.7*.

Protection of third persons. *Prob. Code §§ 18100-18104.*

Rights of creditors of settlor. *Prob. Code § 18200.*

Professional Fiduciaries Act. *Bus. & Prof. Code § 6500 et seq.*

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsTrusteesGeneral OverviewEstate, Gift & Trust LawTrustsTrusteesAppointmentEstate,  
Gift & Trust LawTrustsTrusteesDuties & PowersGeneral OverviewEstate, Gift & Trust LawTrustsTrusteesDuties &  
PowersClaims By & AgainstEstate, Gift & Trust LawTrustsTrusteesDuties & PowersStandards of Care



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A. Primary Sources

*24-64A California Legal Forms--Transaction Guide § 64A.02*

**§ 64A.02 Federal Statutes**

Income tax.

Imposition of income tax on trusts. *I.R.C. § 641.*

Deduction for distributions to beneficiaries. *I.R.C. §§ 651, 652.*

Beneficiaries taxable on distributions from trusts. *I.R.C. §§ 661, 662.*

Person other than grantor treated as owner of trust. *I.R.C. § 678.*

Estate tax.

Powers of appointment. *I.R.C. § 2041.*

Generation-skipping transfer tax. *I.R.C. §§ 2601-2663.*

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsTrusteesDuties & PowersGeneral OverviewTax LawFederal Estate & Gift TaxesPowers of Appointment (IRC secs. 2041, 2514)General OverviewTax LawFederal Taxpayer GroupsIncome Taxation of Estates, Trusts & BeneficiariesCredits & Deductions (IRC secs. 641-668, 671, 681, 685)General OverviewTax LawFederal Taxpayer GroupsIncome Taxation of Estates, Trusts & BeneficiariesImposition of TaxTax LawFederal Taxpayer GroupsIncome Taxation of Estates, Trusts & BeneficiariesTaxation of Beneficiaries (IRC secs. 661-668, 691-692)



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**[Reserved]**

§§ 64A.03[Reserved]



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*24-64A California Legal Forms--Transaction Guide § 64A.20*

**§ 64A.20 Law Reviews**

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Nichols, Roche & Young, "Estate Planning and Trust Administration Considerations in the Retention of Closely Held Stock in a Family Trust," 16 *Real Prop., Prob. & Tr. J.* 342 (1981).

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"Problems of Fiduciaries Under the Securities Laws," 9 *Real Prop., Prob. & Tr. J.* 292 (1974).

Cohan, "Splitting Powers Between Fiduciaries," 8 *Real Prop., Prob. & Tr. J.* 588 (1973).

Dessent, "Trustee's Powers: The Power to Sell Includes the Power to Option," 7 *San Diego L. Rev.* 22 (1970).

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Note, "Trust Participation in Partnership Ventures," *3 Stan. L. Rev.* 467 (1951).

Comment, "Trusts--Powers of Trustee--Validity of a Lease of Trust Property for a Term Which Extends Beyond the Term of the Trust--*California Civil Code Section 2272*," *21 So. Cal. L. Rev.* 260 (1948).

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsTrusteesGeneral OverviewEstate, Gift & Trust LawTrustsTrusteesAppointmentEstate, Gift & Trust LawTrustsTrusteesDuties & PowersGeneral OverviewEstate, Gift & Trust LawTrustsTrusteesDuties & PowersLimitationsEstate, Gift & Trust LawTrustsTrusteesDuties & PowersSales



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*24-64A California Legal Forms--Transaction Guide § 64A.21*

**§ 64A.21 Annotations**

"Liability of testamentary trustee for failure to assert claim against executor of testator's estate for mistake resulting in overpayment of taxes," 68 A.L.R. 3d 1265 (1976) .

"Liability of executor, administrator, trustee, or his counsel, for interest, penalty, or extra taxes assessed against estate because of tax law violations," 47 A.L.R. 3d 507 (1973) .

"Validity and construction of trust provision authorizing trustee to purchase trust property," 39 A.L.R. 3d 836 (1971) .

"Liability of executor or administrator, or his bond, for loss caused to estate by act or default of his agent or attorney," 28 A.L.R. 3d 1191 (1969) .

"Duty of trustee to diversify investments and liability for failure to do so," 24 A.L.R.3d 730 (1969) .

"Power of executor or trustee to sell or to lease real property, or to do both, to give an option to purchase," 83 A.L.R. 2d 1310 (1962) .

"Authorization by trust instrument of investment of trust funds in nonlegal investments," 78 A.L.R. 2d 7 (1961) .

"Power of trustee and court as regards term of lease of trust property," 67 A.L.R. 2d 978 (1959) .

"Coexecutor's, coadministrator's, or cotrustee's liability for defaults or wrongful acts of fiduciary in handling estate," 65 A.L.R. 2d 1019 (1959) .

"Trustee's power to employ broker or agent to sell or lease estate property," 47 A.L.R. 2d 1379 (1956) .

"Trustee's power to compromise and settle claims and actions by or against trust estate," 35 A.L.R. 2d 1377 (1954) .

"Implied power of executor or testamentary trustee to sell real estate," 23 A.L.R. 2d 1000 (1952) .

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsTrusteesGeneral OverviewEstate, Gift & Trust LawTrustsTrusteesDuties & PowersGeneral OverviewEstate, Gift & Trust LawTrustsTrusteesDuties & PowersClaims By & AgainstEstate, Gift & Trust LawTrustsTrusteesDuties & PowersSalesEstate, Gift & Trust LawTrustsTrusteesDuties & PowersStandards of Care



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*24-64A California Legal Forms--Transaction Guide § 64A.22*

**§ 64A.22 Text References**

**[1] Related Forms With Tax Analysis**

*Rabkin & Johnson, Current Legal Forms with Tax Analysis, Ch. 8, Will Clauses, 8.36-8.41* (Matthew Bender).

**[2] Related California Forms**

California Wills and Trusts--Forms (Matthew Bender)

Div. II, *Individual Inter Vivos Trust Provisions*, pt. 5, "Trustee."

Div. IV, *Individual Will Provisions*, pt. 70, "Trustee."

**[3] Additional Text References**

California Wills & Trusts, Ch. 93, *Appointment of Trustees*, Ch. 96, *Powers and Duties of Trustees* (Matthew Bender).

1A, Nossaman & Wyatt, *Trust Administration and Taxation*, Part V, "Rights, Powers, Duties, and Liabilities of the Trustee," (Matthew Bender).

*Restatement (Second) of Trusts* (American Law Institute Publishers, 1959), Ch. 4, *The Trustee*, Ch. 5, *The Beneficiary*, Ch. 7, *The Administration of the Trust*.

Scott, *The Law of Trusts* (3d ed., Little Brown & Co., 1967), Ch. 4, *The Trustee*, Ch. 5, *The Beneficiary*, Ch. 7, *The Administration of the Trust*, Ch. 7, *The Administration of the Trust (Continued)*, Ch. 8, *Liabilities to Third Persons*.

Fiore, Friedlich, McNerney & Chevat, *Modern Estate Planning* (Matthew Bender), Ch. 3, *Estate Planning Goals*; Ch. 6, *Income Taxation of Trusts and Estates*; Ch. 7, *Generation-Skipping Tax*; Ch. 27, *State Taxation of Estates, Trusts and Beneficiaries* (Matthew Bender).

*Selected 1986 Trust and Probate Legislation, with Official Comments* (California Law Revision Commission, Sept. 1986).

"Recommendation Proposing the Trust Law," 18 Cal. L. Revision Comm'n Reports 501 (1986).

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsTrusteesGeneral OverviewEstate, Gift & Trust LawTrustsTrusteesAppointmentEstate,  
Gift & Trust LawTrustsTrusteesDuties & PowersGeneral Overview



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*24-64A California Legal Forms--Transaction Guide §§ 64A.23-64A.29*

**[Reserved]**

§§ 64A.23[Reserved]



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*24-64A California Legal Forms--Transaction Guide § 64A.30*

**§ 64A.30 Who May Act as Trustee**

**[1] In General**

In general, any person who is capable of taking legal title to property (or a beneficial interest in that property) may take it as trustee for another [ *Wallace v. Riley (1937) 23 Cal. App. 2d 654, 666, 74 P.2d 807* ]. A person who is "unfit" to execute the trust, or who has acquired an interest or become charged with a duty adverse to the interests of any beneficiary of the trust, may be appointed as trustee, but such a person is subject to removal by the court after appointment [*Prob. Code § 15642(b)(2)*].

**[2] Aliens and Nonresidents**

In some states, an alien may not serve as a trustee [*see Scott, The Law of Trusts, vol. II, § 93 (Little, Brown & Co. 3d ed. 1967)*]. However, the rule appears to be otherwise in California, where any person, citizen, or alien, may take, hold, and dispose of property, both real and personal [*Civ. Code § 671*].

There is no requirement that a trustee appointed under a California trust be a resident of the state [*see Scott, The Law of Trusts, vol. II, § 94 (Little, Brown & Co. 3d ed. 1967)*]. Similarly, there is no requirement that an out-of-state trustee post bond, and no appellate cases impose such a requirement. However, a court could conceivably conclude in a given case that the potential difficulty of obtaining jurisdiction over an out-of-state trustee justified imposition of a bond in order to protect the interests of the beneficiaries [*see Prob. Code § 15602(a)*].

**[3] Trust Company**

A trust company is a corporation, industrial bank, or commercial bank that is authorized to engage in the trust business in California [*Fin. Code § 107; Prob. Code § 83*]. The trust business is the business of acting as executor, administrator, trustee, guardian, or conservator of estates, assignee, receiver, depository, or trustee under the appointment of any court or by authority of any state or federal law [*Fin. Code § 106*]. Certain large commercial banks maintain trust departments that qualify as trust companies [*see Fin. Code § 1500.1 (commercial or industrial bank engaging in trust business)*]. Corporations are generally prohibited from engaging in the trust business in California unless they meet the requirements of *Fin. Code § 1500* (specifying contents or articles of incorporation, certificate or authority, and required

deposits). Foreign corporations are prohibited from acting as trust companies in California unless they are national banking associations or sister-state banks that have been authorized to conduct a trust business in California [*Fin. Code § 1503*].

One of the advantages of appointing a trust company as trustee of a private trust is that the trusts of such a company will not be disrupted by any reorganizations or mergers affecting the company. When a trust company sells its trust business, the buyer automatically acquires all of its trusts and assumes all of its fiduciary responsibilities under trust instruments, executorships, administrations, guardianships, agencies, and other similar arrangements [*Fin. Code §§ 4859(f), 4879.14(e); see Fin. Code § 4877.05*].

Another advantage of appointing a trust company is that it will not be required to post a bond as a condition to its qualification as trustee. The Trust Law specifically provides that a trust company cannot be required to give a bond, even if a bond is required by the trust instrument [*Prob. Code § 15602(e); see Ch. 64B, Testamentary Trusts Administrative Provisions, § 64B.36*]. This may result in a saving to the trust, since the cost of a bond will be charged against the trust unless the trust instrument provides or the court orders otherwise [*Prob. Code § 15602(d)*].

Many trust companies will decline to serve as trustee unless the trust estate meets minimum value requirements. Before drafting any instrument naming a trust company as trustee, the attorney should consult with the trust company and ascertain its minimum estate requirements.

#### **[4] Other Corporate Trustees**

Various statutes permit corporations other than trust companies to accept appointments as trustees. *Fin. Code § 6515(a)*, for example, authorizes savings and loan associations to act as trustee, executor, administrator, guardian, or in any other fiduciary capacity in which banks, trust companies, or other corporations are permitted to act [*Fin. Code § 6515(a)*]. Savings and loan associations may advertise and solicit trust business in California [*Fin. Code § 6515(b)*] and may accept fiduciary savings accounts in the name of any administrator, executor, custodian, conservator, guardian, trustee, or other fiduciary for a named beneficiary or beneficiaries [*Fin. Code § 6850*].

*Corp. Code § 5140(k)* authorizes any nonprofit public benefit corporation [*see Corp. Code §§ 5110-6910*] to act (subject to any limitations contained in its articles or bylaws and to any other applicable laws) as trustee under any trust incidental to the principal objects of the corporation, and further authorizes such a corporation to receive, hold, administer, exchange, and expend funds and property subject to the trust. *Prob. Code § 15604* authorizes a nonprofit charitable corporation to be appointed as trustee upon petition to the court provided a valid, unexpired, unsuspended license as a professional fiduciary, under the Professional Fiduciaries Act has been obtained [*Prob. Code § 2340, see Professional Fiduciaries Act, Bus. & Prof. Code § 6500 et seq.*].

#### **[5] Beneficiary**

A beneficiary of a trust may be its trustee [ *Crocker-Citizens National Bank v. Younger (1971) 4 Cal. 3d 202, 212, 93 Cal. Rptr. 214, 481 P.2d 222* ], provided that beneficiary is not the sole beneficiary [*see Prob. Code § 15209* (inter vivos trust not invalid, merged, or terminated if it provides for successor beneficiaries after settlor's death)]. Since separation of the legal and equitable interests in property is essential to the concept of a trust, it follows that the trust will terminate if the legal title to the trust property and the entire beneficial interest become united in one person who is not under an incapacity [ *Estate of Washburn (1909) 11 Cal. App. 735, 746, 106 P. 415* ; Restatement (Second) of Trusts, § 341(2)].

Although there is no legal bar to the appointment of a beneficiary as trustee, a beneficiary may be subject to restrictions that do not apply to other trustees. If there is only one beneficiary under the trust, for example, that beneficiary may not serve as trustee without effecting a cessation of the trust, as there can be no trust when the legal and the equitable

interests in property are united in one person.

Even if there is more than one beneficiary, or more than one trustee [*see* § 64A.31[1]], a person who is both a beneficiary (or co-beneficiary) and a trustee (or co-trustee) may have significantly limited powers. *Prob. Code* § 16081 sets forth special rules that are applicable to persons who have discretion to make distributions from a trust of principal or income for their own benefits. For a discussion of those rules, see § 64A.39[8].

The appointment of a trustee who is also a beneficiary may result in the loss of significant tax advantages. For a discussion of those advantages, and other important tax consequences of the selection of a trustee, see § 64A.32[1].

#### **[6] Attorney Who Drafts Trust**

The attorney who drafts the trust instrument may serve as trustee. If the attorney is the sole trustee, however, the attorney may be subject to removal under *Prob. Code* § 15642(b)(6). That section authorizes (but does not require) the removal of a trustee if (1) there is only one trustee; (2) the trust instrument became irrevocable after January 1, 1994; and (3) the trustee is a person described in *Prob. Code* § 21350(a) [*Prob. Code* § 15642(b)(6)]. Persons described in *Prob. Code* § 21350(a) include the person who drafted the instrument and certain other persons who are relatives, partners, employees, or cohabitants of the person who drafted the instrument [*see Prob. Code* § 21350(a)].

However, a trustee may avoid removal under *Prob. Code* § 15642(b)(6) if certain precautions are taken. One of these precautions is to request an independent attorney to review the trust instrument and to sign and deliver a Certificate of Independent Review [*Prob. Code* § 15642(b)(6)(B); *see* § 64A.203]. For further discussion of the circumstances under which a trustee may be removed under *Prob. Code* § 15642(b)(6), see § 64A.37[1], [2].

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsTrusteesGeneral OverviewEstate, Gift & Trust LawTrustsTrusteesAppointment



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*24-64A California Legal Forms--Transaction Guide § 64A.31*

**§ 64A.31 Cotrustees**

**[1] In General**

The settlor may designate one or several trustees to execute the trust. Unless the will provides otherwise, a power vested in two or more cotrustees may only be exercised by their unanimous action [*Prob. Code § 15620*]. If a vacancy occurs in the office of a cotrustee, the remaining cotrustee or cotrustees may act for the trust as if they were the only trustees [*Prob. Code § 15621*].

A testator who elects to appoint more than one trustee should, if at all possible, select cotrustees who will work together smoothly. If the testator has reason to suspect that the cotrustees will not work together smoothly, other cotrustees should be selected; or, failing that, some provision should be made in the trust instrument for the exercise of trust powers by less than all of the cotrustees. Such a provision might, for example, authorize action by a majority of the cotrustees, or might divide or apportion the powers of the trust among named cotrustees [*see §§ 64A.360-64A.367* (will provisions dividing or allocating powers of cotrustees)]. In the absence of such a provision, judicial action would be necessary to resolve differences among cotrustees who were unable to reach unanimous agreement about trust action [*see Prob. Code § 17200* (petitions concerning internal affairs of trust)]. If continuing hostility or lack of cooperation among the cotrustees impairs the administration of the trust, the court, on its own motion or on the petition of any cotrustee or beneficiary, may remove one (or all) of the cotrustees and appoint successors [*Prob. Code § 15642(a), (b)(3)*].

Unless the trust instrument provides otherwise, if a cotrustee is unavailable to perform the duties of cotrustee by reason of absence, illness, or other temporary incapacity, the remaining cotrustee or cotrustees may act for the trust as if they were the only trustees, when necessary to accomplish the purposes of the trust or to avoid irreparable injury to the trust property [*Prob. Code § 15622*].

**[2] Compensation**

Unless the trust instrument provides or the cotrustees agree otherwise, the compensation of cotrustees must be apportioned among them according to the services rendered by each [*Prob. Code § 15683*]. Although the appointment of more than one trustee need not, in itself, increase the total amount of the compensation, the number of the trustees

may indirectly affect the total.

When the trust instrument does not specify the amount of the compensation, the trustee is entitled to "reasonable compensation under the circumstances" [*Prob. Code § 15681*]. Factors that should be considered when determining the reasonableness of compensation include the amount of the trust income, the success or failure of the cotrustees' administration, any unusual skill or experience that the cotrustees have brought to the trust, the loyalty or disloyalty displayed by the cotrustees, the amount of risk and responsibility assumed, the time spent in carrying out the trust, the custom in the community as to allowances to trustees and charges by trust companies and banks, whether the work done is routine or involves skill and judgment, and any estimates that the cotrustees themselves have made of the value of their services [ *Estate of McLaughlin (1954) 43 Cal. 2d 462, 467-468, 274 P.2d 868* ]. Thus, if cotrustees shoulder greater responsibility than would a sole trustee, or spend more time and do more work in the execution of the trust, they may be entitled to greater compensation.

For a general discussion of trustee compensation, see discussions in *Ch. 64B, Testamentary Trusts: Administrative Provisions, § 64B.35[1]* et seq.

### **[3] Liability**

If there are two or more cotrustees, responsibility for wrongdoing may be shared. The general rule is that except as provided in *Prob. Code § 16402(b)*, a trustee is not liable to a beneficiary for a breach of trust committed by a cotrustee [*Prob. Code § 16402(a)*]. However, *Prob. Code § 16402(b)* provides that a trustee is liable to the beneficiary for a breach committed by a cotrustee under any of the following circumstances:

- If the trustee participates in a breach of trust committed by the cotrustee;
- If the trustee improperly delegates the administration of the trust to the cotrustee;
- If the trustee approves, knowingly acquiesces in, or conceals a breach of trust committed by a cotrustee;
- If the trustee negligently enables the cotrustee to commit a breach of trust; or
- If the trustee neglects to take reasonable steps to compel the cotrustee to redress a breach of trust in a case in which the trustee knows or has information from which the trustee reasonably should have known of the breach.

The liability imposed by *Probate Code § 16402(b)*, unlike other provisions of the Trust Law [*see discussion in Ch. 64, Testamentary Trusts: Payment and Distribution Provisions, § 64.30[2]*], applies only to acts or omissions of a cotrustee that occurred on or after July 1, 1987, the effective date of the law. Liability for acts or omissions that occurred before that date is governed by prior law [*Prob. Code § 16402(c)*].

### **[4] Tax Consequences of Appointment**

The appointment of more than one trustee may, in certain circumstances, avoid unfavorable tax consequences. Under *Internal Revenue Code Section 678(a)*, a person (other than the grantor) who has a power exercisable solely by himself or herself to vest the corpus or the income of a trust in himself or herself will be treated as the owner of the trust for income tax purposes. If the power may be exercised only with another person, however, the rule does not apply [*Treas. Reg. § 1.678(a)-1(b)*].

Requiring that such a power be exercised in conjunction with a cotrustee will not, however, be sufficient to avoid

unfavorable estate tax consequences. If a trustee has a power to invade the principal of the trust for his or her own benefit, and if the power is not limited by an "ascertainable standard" relating to health, education, support, or maintenance, that portion of the trust assets subject to the power may be includible in the estate of the holder and subject to estate tax upon his or her death [*see I.R.C. § 2041(b)(1)(A)* and discussion in § 64A.32[1] et seq.]. This unfavorable estate tax result may be avoided only by establishing an "ascertainable standard" [*see Treas. Reg. § 20.2041-1(c)(2)*] or by appointing a cotrustee who has a substantial interest in the property adverse to the holder [*I.R.C. § 2041(b)(1)(C)(ii)*]. An "adverse interest" is not established by the mere fact that the co-holder has joint possession of the power, but does exist if the co-holder may possess the power after the death of the other holder and exercise it in favor of himself or herself, his or her estate or creditors, or the creditors of his or her estate [*Treas. Reg. § 20.2041-3(c)(2)*].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

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*24-64A California Legal Forms--Transaction Guide § 64A.32*

**§ 64A.32 Tax Considerations in Selection of Trustee****[1] In General**

The selection of a trustee or cotrustee may have significant tax consequences. Some of these consequences apply especially to trusts in which beneficiaries are also trustees. Others are more generally applicable to trusts in which the trustees have wide powers to determine or allocate payments or benefits. In any trust arrangement in which tax savings are or may be an important factor, the attorney should carefully consider any provisions that may limit or imperil those savings.

**[2] Management Powers**

If the will gives the trustee the power to invade the principal of the trust for his or her own benefit, and if the power is not limited by an "ascertainable standard," the trustee may be deemed to hold a general power of appointment over the trust assets [*see I.R.C. § 2041(b)(1)(A)*], with the result that they will be included in the trustee's estate for estate tax purposes [*I.R.C. § 2041(a)*]. A general power of appointment, as defined in *Section 2041(b)(1) of the Internal Revenue Code*, is any power of appointment that is exercisable in favor of the decedent, the decedent's estate, the decedent's creditors, or creditors of the decedent's estate, except certain joint powers [*Treas. Reg. §§ 20.2041-2, 20.2041-3*] and certain powers limited by an "ascertainable standard" [*Treas. Reg. § 20.2041-1(c)*]. The term "power of appointment" includes all powers that are in substance and effect powers of appointment, regardless of the nomenclature used in creating them [*Treas. Reg. § 20.2041-1(b)*].

Administrative powers typically granted to a testamentary trustee will not, however, constitute a power of appointment. The mere power of management, investment, and custody of assets, or the power to allocate receipts and disbursements as between income and principal, exercisable in a fiduciary capacity, whereby the holder has no power to enlarge or shift any of the beneficial interests except as an incidental consequence of the discharge of fiduciary duties, is not a power of appointment [*Treas. Reg. § 20.2041-1(b)*].

**[3] Generation-Skipping Trusts**

The selection of the trustee will not in itself have any generation-skipping transfer tax consequences [*see I.R.C. §§*

2601-2663]. However, some provisions of the trust may trigger the imposition of the tax if the trust has the potential for benefitting the testator's grandchildren. For discussion, see *Ch. 64, Testamentary Trusts: Payment and Distribution Provisions, § 64.40[1]* et seq. For a general discussion of the generation-skipping transfer tax, see *Ch. 60, Estate Planning, § 60.16*.

#### **[4] Income Tax Liability**

Appointment of a beneficiary as trustee may also result in the loss of the income tax advantages of a trust. A trust is ordinarily considered a separate entity for income tax purposes [*see I.R.C. § 641* (imposition of income tax on trusts); *I.R.C. §§ 651, 661* (trusts may deduct income distributed to beneficiaries); *I.R.C. §§ 652, 662* (beneficiaries taxable on distributions from trusts)]; *see also* discussion in *Ch. 64, Testamentary Trusts: Payment and Distribution Provisions, § 64.39[1]*. The income of a trust may, however, be taxed to the trustee if the trustee has a power exercisable solely by himself or herself to vest the corpus or the income of any portion of the trust in himself or herself [*I.R.C. § 678*]. The income will not be taxed to the trustee, however, if the power enables the trustee to apply the income of the trust to the support or maintenance of a person he or she is obligated to support (except to the extent the income is actually so applied) [*Treas. Reg. § 1.678(c)-1*].

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsTrusteesAppointmentEstate, Gift & Trust LawTrustsTrusteesDuties & PowersGeneral OverviewTax LawFederal Estate & Gift TaxesPowers of Appointment (IRC secs. 2041, 2514)General OverviewTax LawFederal Taxpayer GroupsIncome Taxation of Estates, Trusts & BeneficiariesImposition of Tax



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**§ 64A.33 Appointment of Trustee**

**[1] By Testator**

One of the methods recognized in the Trust Law for the creation of a trust is a testamentary transfer of property by the owner to another person as trustee [*Prob. Code § 15200(c)*; see discussion in *Ch. 64, Testamentary Trusts: Payment and Distribution Provisions, § 64.33[1]*]. Thus, a will in which the testator gives all or part of the property subject to the will to a named trustee, in trust, will suffice to appoint the named person as trustee.

**[2] By Court**

Failure to appoint a trustee will not be fatal to the trust, providing the other requisites of a valid testamentary trust are present [*Restatement (Second) of Trusts, § 33*; see discussions in *Ch. 64, Testamentary Trusts: Payment and Distribution Provisions, §§ 64.31[1] et seq., 64.33[1] et seq.*]. If a trust has no trustee, the vacancy may be filled, either in the manner provided in the trust instrument or by court order [*Prob. Code § 15660*].

The Trust Law describes eight circumstances under which the office of trustee will be deemed to be vacant [*see Prob. Code § 15643*]. For a general discussion of those circumstances, see discussion in *Ch. 64B, Testamentary Trusts: Administrative Provisions, § 64B.34[1]*. The Probate Code prescribes three ways in which a vacancy in the office of trustee may be filled:

- If the will names a successor or alternate trustee or specifies some other practical way for filling the vacancy, the vacancy must be filled in that way [*Prob. Code § 15660(b)*].
- If the will does not name a successor or alternate trustee or specify some other practical way for filling the vacancy, a trust company may become the trustee, providing all of the adult beneficiaries agree [*Prob. Code § 15660(c)*; see *Prob. Code § 83* ("trust company" defined)].
- If the will does not name a successor or alternate trustee or specify a practical way for filling the vacancy, and if the vacancy is not filled by a trust company, the court may appoint a trustee to fill the vacancy [*Prob. Code § 15660(d)*].

For a general discussion of the court's power to fill vacancies, see discussion in *Ch. 64B, Testamentary Trusts: Administrative Provisions, § 64B.34[2]*.

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Estate, Gift & Trust Law Trusts Trustees Appointment



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*24-64A California Legal Forms--Transaction Guide § 64A.34*

**§ 64A.34 Acceptance by Trustee**

Just as a valid trust may be created without the appointment of a trustee [*see* discussion in § 64A.33[2]], so a valid trust may be created even if the trustee refuses or fails to accept the trust [*Restatement (2d) of Trusts*, § 35; *see Pacific S. & L. Co. v. American etc. Co. (1940) 37 Cal. App. 2d 307, 309, 99 P.2d 355* (acceptance of trustee not essential to trust deed)]. Acceptance, however, usually will be a prerequisite to the imposition of liability on a trustee, and rejection will usually be essential to any claim that the trustee is absolved of liability to the trust or the beneficiaries.

The Trust Law provides that the person named as trustee may accept the trust (or a modification of the trust) by either of the following methods:

- (1) Signing the trust instrument (or the trust instrument as modified) or a separate written acceptance [*Prob. Code* § 15600(a)(1)]; or
- (2) Knowingly exercising powers or performing duties under the trust instrument (or the trust instrument as modified), except when there is an immediate risk of damage to the trust property [*Prob. Code* § 15600(a)(2); *see Prob. Code* § 15600(b)]. For the effect of acting when there is an immediate risk of danger to the trust property, *see* discussion in § 64A.35.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

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**§ 64A.35 Rejection by Trustee**

A person named as trustee may reject the trust (or a modification of the trust) in writing [*Prob. Code § 15601(a)*]. If the person named as trustee does not accept in writing within a reasonable time after learning of being named as trustee, the person is deemed to have rejected the trust (or the modification) [*Prob. Code § 15601(b)*].

In cases in which there is an immediate risk of damage to the trust property, the person named as trustee may act to preserve the trust property without accepting the trust (or a modification of the trust) if, within a reasonable time after acting, the person delivers a written rejection of the trust or modification to the settlor or, if the settlor is dead or incompetent, to a beneficiary [*Prob. Code § 15600(b)*]. The fact that there is an immediate risk of damage to the trust property does not, in itself, impose any duty on the person named as trustee to act in the capacity [*Prob. Code § 15600(b)*].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

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**§ 64A.36 Resignation of Trustee**

A trustee who has accepted the trust may resign the office. However, resignation may be effected only in the manner specified in *Prob. Code § 15640*. That section permits resignation:

- As provided in the trust instrument;
- With the consent of the person holding the power to revoke the trust (if the trust is revocable);
- With the consent of all adult beneficiaries who are receiving or are entitled to receive income under the trust or who would, if the trust were terminated at the time consent is sought, be entitled to receive a distribution of principal (if the trust is irrevocable); or
- Pursuant to a court order.

On petition by the trustee, the court is required to accept the trustee's resignation. However, the court may, at the time the resignation is accepted, make any orders necessary for the preservation of the trust property, including the appointment of a receiver or a temporary trustee [*Prob. Code § 15640(d)*].

A trustee's resignation does not affect the trustee's liability for acts or omissions, if any, nor does it relieve the sureties on the trustee's bond of their liability for acts or omissions of the trustee [*Prob. Code § 15641*]. A trustee who resigns is required to deliver the trust property to the successor trustee, or to a person appointed by the court to receive it, and remains responsible for the property until it is delivered [*Prob. Code § 15644*]. A resigning trustee has the powers reasonably necessary under the circumstances to preserve the trust property until it is delivered to the successor trustee and to perform actions necessary to complete the resignation or wind up his or her administration of the trust [*Prob. Code § 15644*].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Trusts Trustees Removal & Resignation



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DIVISION IV: WILLS AND TRUSTS  
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*24-64A California Legal Forms--Transaction Guide § 64A.37*

### § 64A.37 Removal of Trustee

#### [1] In General

A trustee may be removed in accordance with the trust instrument or by the court, on its own motion or on petition of a cotrustee or beneficiary [*Prob. Code § 15642(a)*]. Grounds for removal include breach of trust [*Prob. Code § 15642(b)(1)*], insolvency or other unfitness to administer the trust [*Prob. Code § 15642(b)(2)*], or failure or refusal to act [*Prob. Code § 15642(b)(4)*]. A trustee may also be removed if hostility or lack of cooperation among cotrustees impairs the administration of the trust [*Prob. Code § 15642(b)(3)*], if the trustee's compensation is excessive under the circumstances [*Prob. Code § 15642(b)(5)*], if there is a conflict between the trustee's interests and those of the trust [ *Getty v. Getty (1988) 205 Cal. App. 3d 134, 139-140, 252 Cal. Rptr. 342* ]. A trustee also may be removed if the trustee is substantially unable to manage the trust's financial resources [*Prob. Code § 15642(b)(7)*], the trustee is substantially unable to resist fraud or undue influence [*Prob. Code § 15642(b)(8)*], or if there is other "good cause" for removal [*Prob. Code § 15642(b)(9)*]. When a conflict between the trustee's interest and those of the trust pertains only to particular litigation involving the trust, the court may order a partial removal of the trustee with respect to that litigation. The court then will appoint a trustee ad litem to act as trustee for that litigation only [ *Getty v. Getty (1988) 205 Cal. App. 3d 134, 141-142, 252 Cal. Rptr. 342* ].

If it appears to the court that trust property or the interests of a beneficiary may suffer loss or injury pending decision on a petition for removal of a trustee, the court, on its own motion or on petition of a cotrustee or beneficiary, may compel the trustee whose removal is sought to surrender trust property to a cotrustee or to a receiver or temporary trustee. The court may also suspend the powers of the trustee to the extent the court deems necessary.

Like a trustee who has resigned [*see § 64A.36*], a trustee who has been removed is obligated to deliver the trust property to his or her successor and has the powers reasonably necessary to preserve the trust property pending termination of his or her administration [*Prob. Code § 15644*].

#### [2] Special Rules Governing Removal of Trustee Who Drafted Trust Instrument or Is Relative or Associate of Drafter

In addition to the general grounds for removal of a trustee, a trustee may also be removed if there is only one trustee, if

the trust instrument became irrevocable after January 1, 1994, and if the trustee is a person described in *Prob. Code* § 21350(a) [*Prob. Code* § 15642(b)(6)]. The persons described in *Prob. Code* § 21350(a) are:

- The person who drafted the instrument.
- A person who is related by blood or marriage to, is a domestic partner of, or is a cohabitant with or employee of the person who drafted the instrument.
- Any partner or shareholder of any law partnership or law corporation in which the person who drafted the instrument has an ownership interest, and any employee of any such law partnership or law corporation.
- Any person who has a fiduciary relationship with the transferor, including a conservator or trustee, who transcribes the instrument or causes it to be transcribed.
- A person who is related by blood or marriage to, is a domestic partner of, or is a cohabitant with or employee of, a person described in the fourth category, above.
- A care custodian of a dependent adult.
- A person who is related by blood or marriage to, is a domestic partner of, or is a cohabitant with or an employee of a care custodian.

For purposes of this rule, a "person who is related by blood or marriage" to a person means all of the following [*Prob. Code* § 21350(b)]:

- The person's spouse or predeceased spouse.
- Relatives within the third degree of the person and the person's spouse.
- The spouse of any person who is described in the second category immediately above.

In determining relationships for purposes of this rule, *Prob. Code* § 6406, which governs the inheritance rights of relatives of the half blood, *Prob. Code* § 6407, which covers the inheritance rights of afterborn heirs, and *Prob. Code* §§ 6450-6455, which prescribe rules for determining the relationship of parent and child for purposes of intestate succession, are all applicable [*Prob. Code* § 21350(b)].

The term "dependent adult" means any of the following [*Prob. Code* § 21350(c); *see Welf. & Inst. Code* § 15610.23(a)]:

- Any person residing in California, between the ages of 18 and 64 years, who has physical or mental limitations that restrict his or her ability to carry out normal activities or to protect his or her rights including, but not limited to, persons who have physical or developmental disabilities or whose physical or mental abilities have diminished because of age [*Prob. Code* § 21350(c)].
- Any person between the ages of 18 and 64 who is admitted as an inpatient to a 24-hour health facility as defined in *Health & Safety Code* §§ 1250, 1250.2, and 1250.3.
- Any person older than age 64 who would be a "dependent adult" under the above definitions if he or she were between the ages of 18 and 64.

The term "care custodian" means an administrator or an employee of any of the following public or private facilities or agencies, or persons providing care or services for elders or dependent adults, including members of the support staff and maintenance staff [*Prob. Code § 21350(c); Welf & Inst. Code § 15610.17*]:

- Twenty-four hour health facilities [*see Health & Saf. Code §§ 1250, 1250.2, 1250.3*].
- Clinics.
- Home health agencies.
- Agencies providing publicly funded in-home supportive services, nutrition services, or other home and community-based support services.
- Adult day health care centers and adult day care.
- Secondary schools that serve 18- to 22-year-old dependent adults and postsecondary educational institutions that serve dependent adults or elders.
- Independent living centers.
- Camps.
- Alzheimer's Disease day care resource centers.
- Community care facilities [*see Health & Saf. Code § 1502*] and residential care facilities for the elderly [*see Health & Saf. Code § 1569.2*].
- Respite care facilities.
- Foster homes.
- Vocational rehabilitation facilities and work activity centers.
- Designated area agencies on aging.
- Regional centers for persons with developmental disabilities.
- State Department of Social Services and State Department of Health Services licensing divisions.
- County welfare departments.
- Offices of patients' rights advocates and clients' rights advocates, including attorneys.
- The office of the long-term care ombudsman.
- Offices of public conservators, public guardians, and court investigators.
- Any protection or advocacy agency or entity that is designated by the Governor to fulfill the requirements and assurances of the federal Developmental Disabilities Assistance and *Bill of Rights Act* of 2000 [*see 42 U.S.C. § 15001 et seq.*] or the Protection and Advocacy for the Mentally Ill Individuals

Act of 1986 [see 42 U.S.C. § 10801 et seq.], for the protection and advocacy of the rights of persons with mental illness.

- Humane societies and animal control agencies.
- Fire departments.
- Offices of environmental health and building code enforcement.
- Any other protective, public, sectarian, mental health, or private assistance or advocacy agency or person providing health services or social services to elders or dependent adults.

The last item in the preceding list of care custodians is the most significant in light of its broad interpretation by California courts. In *Bernard v. Foley*, the California Supreme Court held that the statutory definition set out above does not include a professional or occupational limitation and does not provide for a pre-existing personal friendship exception. Thus, the definition includes any person providing care or health services to a dependent adult [ *Bernard v. Foley* (2006) 39 Cal. 4th 794, 803, 47 Cal. Rptr. 3d 248, 139 P.3d 1196 ; see also *Estate of Odian* (2006) 145 Cal. App. 4th 152, 167, 51 Cal. Rptr. 3d 390 (paid live-in caregiver who provides social services within the meaning of *Prob. Code* § 21350(a) is a care custodian and is subject to the presumption of undue influence)]. It has also been held that a long-term care ombudsman for a health care facility is a "care custodian" for purposes of the statute during the time he or she serves as ombudsman for a particular "dependent adult," and remains a care custodian within the meaning of the statute even after his or her formal ombudsman relationship with a particular resident has ended, due either to a change in the ombudsman's facility assignment or the fact that the resident has left the facility, when the ombudsman, as a result of his or her fiduciary relationship with the resident, develops a personal relationship with the resident and thereby acquires personal and financial information about the resident [ *Estate of Shinkle* (2002) 97 Cal. App. 4th 990, 993, 1007, 119 Cal. Rptr. 2d 42 ; overruled in part on other grounds in *Bernard v. Foley* (2006) 39 Cal. 4th 794, 816, 47 Cal. Rptr. 3d 248, 139 P.3d 1196 ] .

If a trustee is one of the persons described in *Prob. Code* § 21350(a), the trustee is subject to removal, whether or not the trustee is also the transferee of a donative transfer made by the settlor, unless, based upon any evidence of the intent of the settlor and all other facts and circumstances, which must be made known to the court, the court finds that it is consistent with the settlor's intent that the trustee continue to serve and that this intent was not the product of fraud, menace, duress, or undue influence [*Prob. Code* § 15642(b)(6)]. The trustee is not subject to removal based on this rule if the settlor is related by blood or marriage to, or is a cohabitant, with any the trustee, the person who drafted or transcribed the instrument, or the person who caused the instrument to be transcribed [*Prob. Code* § 15642(b)(6)(A)], or if, after full disclosure of the relationships of the persons involved, the instrument is approved by the court [*Prob. Code* § 15642(b)(6)(C)]. Further, the trustee will not be subject to removal under this rule if the trust instrument is reviewed by an independent attorney who counsels the settlor about the nature of the intended trustee designation and signs and delivers to the settlor and the designated trustee a certificate in substantially the form required by *Prob. Code* § 15642(b)(6)(B) [see § 64A.203].

### Legal Topics:

For related research and practice materials, see the following legal topics:  
Estate, Gift & Trust LawTrustsTrusteesRemoval & Resignation



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*24-64A California Legal Forms--Transaction Guide § 64A.38*

**§ 64A.38 Professional Fiduciaries**

**[1] Professional Fiduciary**

A professional fiduciary is a person who acts as a conservator or guardian for two or more persons at the same time who are not related to the professional fiduciary or to each other by blood, adoption, marriage, or registered domestic partnership [*Bus. & Prof. Code 6501 (f)*]. A professional fiduciary is also a person who acts as a trustee, agent under a durable power of attorney for health care, or agent under a durable power of attorney for finances, for more than three people or more than three families or a combination of people and families that totals more than three, at the same time, who are not related to the professional fiduciary by blood, adoption, marriage or registered domestic partnership [*Bus. & Prof. Code § 6501(f)*, see Qualifications for Licensure, § 64A.38[4]].

However, the following are exempted from the definition of professional fiduciary, and are not required to obtain a professional fiduciary license [*Bus. & Prof. Code § 6501(f)(5)*]:

- (1) A trust company, as defined by *Prob. Code § 83*;
- (2) An FDIC-insured institution, or its holding companies, subsidiaries or affiliates;
- (3) Any public agency, including the public guardian, public conservator, or other agency of the State of California or of a county of California or any regional center for persons with developmental disability as defined in *Welf. & Inst. Code § 4620*;
- (4) A person who is employed by a trust company, an FDIC-insured institution or its holding companies, subsidiaries or affiliates, or a public agency who is acting in the course and scope of that employment, and in the instance of a public officer of a public agency, acting in the course and scope of official duties;
- (5) Any person whose sole activity as a professional fiduciary is as a broker-dealer, broker-dealer agent, investment adviser representative registered and regulated under the Corporate Securities Law of 1968 [*Corp. Code § 25000 et seq.*], the Investment Advisers Act of 1940 [*15 U.S.C. 80b-1 et seq.*], or the

Securities Exchange Act of 1934 [15 U.S.C. 78a et seq.], or involves serving as a trustee to a company regulated by the Securities and Exchange Commission under the Investment Company Act of 1940 [15 U.S.C. 80a-1 et seq.].

## **[2] Professional Fiduciaries Bureau**

The Professional Fiduciaries Bureau ("Bureau") is created under the Professional Fiduciaries Act and has the duty of enforcing and administering the Act [Bus. & Prof. Code § 6510]. Even though the Bureau is set to become inoperative as of July 1, 2011 and repealed as of January 1, 2012 (unless later statues deletes or extends the dates on inoperability and repeal), upon repeal, the responsibilities and jurisdiction of the Bureau will be transferred and vested in the existing Professional Fiduciaries Advisory Committee [Bus. & Prof. Code § 6511]. The Bureau is responsible for administering the licensing and regulatory program established under the Act, approving classes for prelicense and continuing education, and preparing and administering licensing exams [Bus. & Prof. Code § 6518]. The Bureau has adopted a Professional Fiduciaries Code of Ethics ("Code of Ethics") which is provided on the Bureau's internet website and to any person requesting an application for license [see www.fiduciary.ca.gov].

## **[3] Licensing Requirements**

No person may act or hold themselves out to the public as a professional fiduciary unless he or she is licensed as a professional fiduciary under the Professional Fiduciaries Act [Prob. Code § 60.1(b), see Professional Fiduciaries Act Bus. & Prof. Code § 6500 et seq.]. A superior court may not appoint a person to carry out the duties of a professional fiduciary unless he or she holds a valid, unexpired, unsuspended license as a professional fiduciary under Bus. & Prof. Code § 6500 et seq. [Prob. Code § 2340]. A court may appoint a person to be a professional fiduciary without a professional fiduciary license if they are exempt from the definition of "professional fiduciary" under Bus. & Prof. Code § 6501, or are exempt from the licensing requirements of Bus. & Prof. Code § 6530 [Prob. Code § 2340]. Furthermore, every person previously required to register with the statewide registry under Prob. Code § 2850 et seq. prior to January 1, 2007, and every person required to file information with the clerk of the court under Prob. Code § 2340 et seq. is required to obtain a license as a professional fiduciary under Bus. & Prof. Code § 6500 et seq.

Licensing requirements to do not apply to [Bus. & Prof. Code § 6530(b)-(d)]:

- 1) A licensed attorney;
- 2) A licensed certified public accountant;
- 3) An Internal Revenue Service agent acting within the scope of practice.

All applications for a professional fiduciary license can be obtained online, through the California Department of Consumer Affairs, at <http://www.fiduciary.ca.gov/>[see Qualifications for Licensure, § 64A.38[4]].

## **[4] Qualifications for Licensure**

The Bureau reviews all applications and they will approve those applications that meet the required qualifications [Bus. & Prof. Code § 6536]. The Bureau may also investigate an applicant's qualifications [Bus. & Prof. Code § 6536]. To receive a license as a professional fiduciary, an applicant must meet the following [Bus. & Prof. Code § 6533(a)-(k)]:

- (a) Be at least 21 years old;
- (b) Be a United States citizen or be legally admitted to the United States;

(c) Have not committed any acts that are grounds for denial of a license under *Bus. & Prof. Code §§ 480, 6536* [see below];

(d) Submit fingerprints as required by *Bus. & Prof. Code § 6533.5* in order to obtain criminal offender record information;

(e) Have completed 30 hours of prelicensing education as required by *Bus. & Prof. Code § 6538*;

(f) Have passed the licensing exam under *Bus. & Prof. Code § 6539*;

(g) Have a least one of the following:

a. A BA or BS degree from a college or university;

b. An AA/AS degree from a college or university and at least five (5) years experience with substantive fiduciary responsibilities working as a professional fiduciary, public agency, or financial institution acting as a conservator, guardian, trustee, personal representative, or agent under a power of attorney; or

c. Experience of not less than three (3) years, prior to July 1, 2008, with substantive fiduciary institution acting as a conservator, guardian, trustee, personal representative, or agent under a power of attorney.

(h) Agree to adhere to the Professional Fiduciaries Code of Ethics [see *Bus. & Prof. Code § 6520*] and to all statutes and regulations;

(i) Consent to the bureau conducting a credit check;

(j) File a completed application;

(k) Submit a nonrefundable application fee.

The Bureau will not issue a license to any applicant who [see *Bus. & Prof. Code § 6536(a)-(e)*];

(a) Does not meet the qualifications for licensure [see *Bus. & Prof. Code § 6533(a)-(k)*];

(b) Has been convicted of a crime substantially related to the qualifications, functions, or duties of a fiduciary;

(c) Has engaged in fraud or deceit in applying for a license;

(d) Has engaged in dishonesty, fraud, or gross negligence in performing the functions or duties of a fiduciary;

(e) Has been removed as a fiduciary by a court for breach of trust committed intentionally, with gross negligence, in bad faith, or with reckless indifference, or has demonstrated a pattern of negligent conduct, including a removal prior to January 1, 2009, and all appeals have been taken, or the time to file an appeal has expired.

#### **[5] License Renewal**

A license is valid for one year and will expire one year after it was issued on the last day of the month in which it was issued [*Bus. & Prof. Code § 6541(a)*]. A license may be renewed by filing a renewal application, submitting the annual statement, as required by *Bus. & Prof. Code § 6561* [*see § 64A.38[6]*], submitting proof of compliance with continuing education requirements [*see Bus. & Prof. Code § 6538(b)*] (15 hours of approved courses each year), and payment of the renewal fee [*Bus. & Prof. Code § 6541(b)*]. Conduct that would result in a refusal of a license renewal includes [*Bus. & Prof. Code § 6541(b)*]:

- (1) Conviction of a crime substantially related to the qualifications, functions, or duties of a fiduciary;
- (2) Fraud or deceit in obtaining a license;
- (3) Dishonesty, fraud, or gross negligence in performing the functions or duties of a professional fiduciary;
- (4) Removal by a court as a fiduciary for breach of a fiduciary duty.

#### **[6] Initial and Annual Statement**

A licensee is required to keep complete and accurate records of client accounts and must make them available for audit by the bureau [*Bus. & Prof. Code § 6560*]. A licensee must file initially and annually thereafter, a statement which contains the following [*Bus. & Prof. Code § 6561(a)*]:

- (1) His or her business address, phone and fax number;
- (2) Whether or not he or she has been removed as conservator, guardian, trustee or personal representative for cause;
- (3) The case names, court locations and case numbers for all matters where the licensee has been appointed by the court;
- (4) Whether he or she has been found by a court to have breached a fiduciary duty;
- (5) Whether he or she has reassigned or settled a matter in which a complaint has been filed, along with the case number and a statement of the issues and facts pertaining to the allegations;
- (6) Any licenses or professional certificates held;
- (7) Any ownership or beneficial interests in any businesses or other enterprises held by the licensee or by a family member that receives or has received payment from a client of the licensee;
- (8) Whether the licensee has ever filed for bankruptcy or held a controlling financial interest in a business that filed for bankruptcy;
- (9) The name of any persons or entities that have an interest in the licensee's professional fiduciary business;
- (10) Whether the licensee has been convicted of a crime.

The annual statement must be filed with the Bureau 60 days prior to the expiration of the license [*Bus. & Prof. Code §*

6562].

**[7] Suspension, Revocation, Denial and Disciplinary Action**

The Bureau has authority to investigate the actions of any professional fiduciary [*Bus. & Prof. Code § 6580(a)*]. Sanctions may include administrative citations and fines, license suspension, probations or revocation [*Bus. & Prof. Code § 6580(b)*]. A license may be suspended, revoked, denied or other disciplinary action may be imposed for one or more of the following [*Bus. & Prof. Code § 6584*]:

- (a) Conviction of any felony or misdemeanor, if the misdemeanor is substantially related to the functions and duties of a professional fiduciary;
- (b) Failure to notify the bureau of a conviction pursuant to *Bus. & Prof. Code § 6561(a)(10)*;
- (c) Fraud or misrepresentation in obtaining a license;
- (d) Fraud, dishonesty, corruption, willful violation of duty, gross negligence or incompetence in practice, or unprofessional conduct in, or related to, the practice of a professional fiduciary;
- (e) Failure to comply with, or to pay a monetary sanction imposed by a court for failure to provide timely reports;
- (f) Failure to pay a civil penalty relating to the licensee's professional fiduciary duties;
- (g) The revocation of, suspension of, or other disciplinary action against, any other professional license by the State of California or by another state;
- (h) Violation of this *Bus. Prof. Code § 6500 et seq.*, *Probate Code § 4000 et seq.*, *Probate Code § 4600 et seq.*, *Probate Code § 5000 et seq.*, or any of the statutes, rules, or regulations pertaining to the duties or functions of a professional fiduciary.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsTrusteesGeneral OverviewEstate, Gift & Trust LawTrustsTrusteesAppointmentEstate, Gift & Trust LawTrustsTrusteesDuties & PowersGeneral OverviewEstate, Gift & Trust LawTrustsTrusteesDuties & PowersClaims By & AgainstEstate, Gift & Trust LawTrustsTrusteesDuties & PowersStandards of Care



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*24-64A California Legal Forms--Transaction Guide § 64A.39*

**§ 64A.39 Duties of Trustees****[1] Administration of Trust**

On acceptance of the trust, the trustee has a duty to administer it according to the trust instrument and, except to the extent that the trust instrument provides otherwise, according to the Trust Law [*Prob. Code § 16000*; see discussions in *Ch. 64, Testamentary Trusts: Payment and Distribution Provisions, § 64.30[1]* et seq.].

The trustee has a duty to administer the trust solely in the interest of the beneficiaries [*Prob. Code § 16002(a)*]. If the trust has two or more beneficiaries, the trustee has a duty to deal with them impartially and to act impartially in investing and managing the trust property, taking into account any differing interests of the beneficiaries [*Prob. Code § 16003*]. Although a trustee has a general duty not to knowingly become the trustee of a trust that is adverse in its nature to the first trust [*Prob. Code § 16005*; see § 64A.39[2]], a trustee who administers two trusts that are not adverse may sell, exchange, or participate in the sale or exchange of trust property between the two trusts if the sale or exchange is fair and reasonable with respect to the beneficiaries of both trusts [*Prob. Code § 16002(b)(1)*] and if the trustee gives the beneficiaries of both trusts notice of all material facts related to the sale or exchange that the trustee knows or should know [*Prob. Code § 16002(b)(2)*]. Further, the provision of services for compensation by a regulated financial institution or its affiliates in the ordinary course of business either to a trust of which it also acts as trustee or to a person dealing with the trust does not violate the trustee's duty of loyalty [*Prob. Code § 16015*].

**[2] Avoiding Conflicts of Interest**

The trustee has a duty not to use or deal with trust property for the trustee's own profit or for any purpose unconnected with the trust [*Prob. Code § 16004(a)*; but see *Prob. Code § 16220* (trustee may keep property received from settlor or other person even if trustee is personally interested in property) and discussion in § 64A.40[2]]. The trustee may not take part in any transaction in which the trustee has an interest adverse to the beneficiary [*Prob. Code § 16004(a)*].

The trustee may not enforce any claim against the trust property that the trustee purchased after or in contemplation of appointment as trustee, although the court may allow the trustee to be reimbursed from trust property the amount that the trustee paid in good faith for the claim [*Prob. Code § 16004(b)*].

A transaction between the trustee and a beneficiary (except an agreement relating to the hiring or compensation of the trustee) that occurs during the existence of the trust, or while the trustee's influence with the beneficiary remains, and by which the trustee obtains an advantage from the beneficiary, is presumed to be a violation of the trustee's fiduciary duties [*Prob. Code* § 16004(c)]. This presumption is a presumption affecting the burden of proof [*Prob. Code* § 16004(c); *see Evid. Code* §§ 605, 606 (presumptions affecting burden of proof)].

The trustee of one trust has a duty not to knowingly become a trustee of another trust that is adverse in its nature to the interest of the beneficiary of the first trust, and a duty to eliminate the conflict or resign as trustee when the conflict is discovered [*Prob. Code* § 16005].

### **[3] Dealing With Trust Property**

The trustee has a duty to take reasonable steps to take charge of trust property and keep and preserve it [*Prob. Code* § 16006; *see Prob. Code* § 16220 (power to collect, hold, and retain trust property); *see also Prob. Code* § 16220 (trustee may keep property received from settlor or other person even if trustee has personal interest in property)]. The trustee also has a duty to make the trust property productive under the circumstances and in furtherance of the purposes of the trust [*Prob. Code* § 16007].

The trustee must also keep the trust property separate from other property not subject to the trust [*Prob. Code* § 16009(a)] and see to it that the trust property is designated as property of the trust [*Prob. Code* § 16009(b)].

The trustee's duties with respect to the management and investment of trust property are subject to the prudent investor rule, which is set forth in the Uniform Prudent Investor Act [*see Prob. Code* §§ 16045-16054]. This rule is discussed in §§ 64A.40[3] and 64A.260[1].

### **[4] Enforcing Claims and Defending Actions**

The trustee has a duty to take reasonable steps to enforce claims that are part of the trust property [*Prob. Code* § 16010] and to defend actions that may result in a loss to the trust [*Prob. Code* § 16011; *see Prob. Code* § 16242 (trustee's power to pay, settle, contest, or release claims)].

### **[5] Delegation of Duties**

The trustee has a duty not to delegate to others the performance of acts that the trustee can reasonably be required to perform personally [*Prob. Code* § 16012(a)]. The trustee may not transfer the office of trustee to another person or delegate the entire administration of the trust to a cotrustee or other person [*Prob. Code* § 16012(a); *see* § 64A.39[6]]. If the trustee has properly delegated any matter to an agent, cotrustee, or other person, the trustee has a duty to exercise general supervision over the person performing the delegated matter [*Prob. Code* § 16012(b)]. In exercising investment and management functions, however, the trustee is not subject to these rules, but must act in accordance with the Uniform Prudent Investor Act [*Prob. Code* § 16012(c); *see Prob. Code* §§ 16045-16054 and § 64A.260[1]].

### **[6] Cotrustees**

Special rules relate to the duties of cotrustees. If a trust has more than one trustee, each trustee has a duty to participate in the administration of the trust [*Prob. Code* § 16013(a)] and to take reasonable steps to prevent a cotrustee from committing a breach of trust [*Prob. Code* § 16013(b)]. If a cotrustee has committed a breach of trust, each trustee has a further duty to compel that cotrustee to redress the breach [*Prob. Code* § 16013(b)].

### **[7] Skill and Care**

The trustee must administer the trust with reasonable care, skill, and caution [*Prob. Code* § 16040(a)]. When taking any

action, the trustee must consider the circumstances then prevailing and use the same care, skill, and caution that a prudent person acting in a like capacity would use in the conduct of an enterprise of like character and with like aims to accomplish the purposes of the trust as determined from the trust instrument [*Prob. Code § 16040(a)*].

This rule is known as the prudent person rule. Unless it is expanded or restricted by express provisions in the trust instrument [*see Prob. Code § 16040(b)*], it governs all aspects of trust administration except investments, which are subject to the Uniform Prudent Investor Act and the prudent investor rule [*Prob. Code § 16040(c)*; *see Prob. Code §§ 16045-16054* (Uniform Prudent Investor Act)]. For discussion of the prudent investor rule, see § 64A.40[3].

If the trust instrument includes express provisions expanding or restricting the trustee's duties under the prudent person rule, the trustee is entitled to rely on the provisions and may not be held liable to any beneficiary for doing so in good faith [*Prob. Code § 16040(b)*].

### **[8] Exercise of Discretionary Powers**

The general rule is that a discretionary power conferred on a trustee is not left to the trustee's arbitrary discretion but must be exercised "reasonably" [*Prob. Code § 16080*]. If the trust instrument confers "absolute," "sole," or "uncontrolled" discretion on a trustee, the trustee is relieved of the duty of acting "reasonably," but still must act in accordance with fiduciary principles and not in bad faith or in disregard of the purposes of the trust [*Prob. Code § 16081(a)*].

If the trustee is also a beneficiary of the trust, and if the trust permits the trustee, either individually or as co-trustee, to make discretionary distributions of income or principal for his or her own benefit pursuant to a standard, the trustee must exercise the power reasonably and in accordance with the standard, even when the trust instrument uses terms like "absolute," "sole," or "uncontrolled" [*Prob. Code § 16081(b)*].

Similarly, if the trust permits the trustee to make discretionary distributions of income or principal for his or her own benefit, but does not specify a standard by which the distributions are to be made, the trustee may make distributions only for his or her health, education, support or maintenance within the meaning of *I.R.C. §§ 2041 and 2514*, even when the trust instrument uses terms like "absolute," "sole," or "uncontrolled" [*Prob. Code § 16081(c)*]. A power to distribute principal or income for a person's health, education, support, or maintenance within the meaning of *I.R.C. §§ 2041 and 2514* is generally known as an "ascertainable standard." The rule permitting distributions only pursuant to an "ascertainable standard" applies to (1) all trusts executed on or after January 1, 1997, (2) all testamentary trusts created under wills executed on or after January 1, 1997, and (3) any irrevocable trust created under a document executed before January 1, 1997, or any revocable trust executed before that date if the settlor was incapacitated as of that date, unless all parties in interest elect affirmatively not to be subject to the rule [*Prob. Code § 16081(e)*; *see Prob. Code § 16081(g)* ("party in interest" defined)]. The rule does not apply to any power held by the settlor of a revocable or amendable trust or any power held by a settlor's or testator's spouse who is the trustee of a trust for which a marital deduction has been allowed [*see Prob. Code § 21520* ("marital deduction" and "marital deduction gift" defined)]. Further, the rule does not apply if the settlor or testator expressly refers to *Prob. Code § 16081(c)* and provides in the trust or will that a broader power is conferred on the trustee [*Prob. Code § 16081(c)*].

### **[9] Reporting**

The trustee has a general duty to keep the beneficiaries reasonably informed about the trust and its administration [*Prob. Code § 16060*; *see Strauss v. Superior Court (1950) 36 Cal. 2d 396, 401, 224 P.2d 726*]. This duty includes the duty to communicate to the beneficiary information that is reasonably necessary to enable the beneficiary to prevent or redress a breach of the trust [*Restatement (Second) of Trusts § 173, comment c*]. However, the duty does not require disclosure of communications protected by the attorney-client privilege [*Wells Fargo Bank v. Superior Court (2000) 22 Cal. 4th 201, 207, 91 Cal. Rptr. 2d 716, 990 P.2d 591*].

On reasonable request, the trustee must provide a beneficiary with a report of the assets, liabilities, receipts, and disbursements of the trust [*Prob. Code § 16061*]. The report must include information about the trustee's acts and particulars of the trust administration relevant to the beneficiary's interest, including the terms of the trust [*Prob. Code § 16061*]. The report need not be given if the trust instrument waives the requirement [*Prob. Code §§ 16061, 16064(a)*]. However, a waiver in a trust instrument will be ineffectual if there is only one trustee and the trustee is a "disqualified person" [*Prob. Code §§ 16062(e), 16064(a)*; for information on "disqualified persons," see *Prob. Code §§ 21350(a), 21350.5, and 21351* and discussion in *Ch. 60A, Gifts, § 60A.16 et seq.*]. A waiver will also be ineffectual if it is likely that a material breach of the trust has occurred [*Prob. Code § 16064(a)*]. In this case, the court may compel the trustee to report information about the trust despite the waiver [*Prob. Code § 16064(a)*].

There is no duty to report to beneficiaries if the trust is revocable and the person holding the power to revoke the trust is still living and capable of revoking it [*Prob. Code § 16064(b)*]. Similarly, there is no duty to report to a beneficiary who has waived in writing the right to a report [*Prob. Code § 16064(c)*]. However, a waiver of the right to receive a report may be withdrawn in writing at any time, and a waiver will have no effect on the beneficiary's right to petition the court for a report [*Prob. Code § 16064(c)*; see *Prob. Code § 17200(b)(7)*].

Finally, there is no duty to report when the beneficiary to whom the report would be given is the same person as the trustee [*Prob. Code § 16064(d)*].

### **[10] Accounting**

The trustee's duty to account to the beneficiaries is closely related to the trustee's duty to keep the beneficiaries reasonably informed about the trust and its administration [*see § 64A.39[9]*] and is subject to similar rules. The trustee has a general duty to account to each beneficiary to whom income or principal is required or authorized in the trustee's discretion to be currently distributed [*Prob. Code § 16062(a)*; see *Prob. Code § 16063* (contents of accounting)]. However, this duty is subject to exceptions. First, the trustee has no duty to account to the extent that the trust instrument waives accounts [*Prob. Code § 16064(a)*]. However, a waiver in a trust instrument will be ineffectual if there is only one trustee and the trustee is a "disqualified person" [*Prob. Code §§ 16062(e), 16064(d)*; see *§ 64A.39[9]*; for definition of "disqualified person," see *Ch. 60A, Gifts, § 60A.16 et seq.*], or if it is reasonably likely that the trustee has committed a material breach of the trust [*Prob. Code § 16064(a)*]. Second, there is no duty to account if the trust is a living trust created by an instrument executed before July 1, 1987 [*Prob. Code § 16062(b)*]. Third, if the trust is a testamentary trust created by a will executed before July 1, 1987, there is no duty to account unless the trust is removed from continuing court jurisdiction under either *Prob. Code §§ 17350-17354* (removal of trusts executed before July 1, 1977, from continuing court jurisdiction) [*see discussion in Ch. 64B, Testamentary Trusts: Administrative Provisions, § 64B.39*] or former *Prob. Code § 1120.1a* [repealed *Stats. 1986, ch. 820*]. On removal of such a trust from continuing court supervision, the trustee is subject to accounting duties under either *Prob. Code § 16062(a)* [*Prob. Code § 16062(c)*] or former *Prob. Code § 1120.1a* [*Prob. Code § 16062(d)*], depending on when the trust was removed from continuing court supervision. The duty to account under former *Prob. Code § 1120.1a* may be satisfied by furnishing an account that satisfies the requirements of *Prob. Code § 16063* [*Prob. Code § 16062(d)*]. Finally, if the trust is revocable and the person holding the power to revoke is competent, the trustee's duty to account, if any, is owed to the person holding the power to revoke and not to the beneficiaries [*Prob. Code § 16064(b)*; see *Prob. Code § 15800* (rights of person holding power to revoke)]. When the settlor of a revocable trust was under the care and custody of a court-appointed conservator, the beneficiaries had no right to an accounting because the trust remained revocable despite the conservatorship [ *Johnson v. Kotyck* (1999) 76 Cal. App. 4th 83, 88, 90 Cal. Rptr. 2d 99].

When the trustee has a duty to account, the accountings must be provided [*Prob. Code § 16062(a)*]:

- At least annually;

- At the termination of the trust; and
- On a change of trustees.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsTrusteesDuties & PowersGeneral OverviewEstate, Gift & Trust  
LawTrustsTrusteesDuties & PowersCompensationEstate, Gift & Trust LawTrustsTrusteesDuties &  
PowersLimitationsEstate, Gift & Trust LawTrustsTrusteesDuties & PowersSalesEstate, Gift & Trust  
LawTrustsTrusteesDuties & PowersStandards of Care



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*24-64A California Legal Forms--Transaction Guide § 64A.40*

**§ 64A.40 Powers of Trustee**

**[1] In General**

Under the Trust Law, the trustee has a broad range of powers that may be exercised without court authorization. These powers include the following [*Prob. Code § 16200*]:

- The powers conferred by the trust instrument;
- Except as limited in the trust instrument, the powers conferred by statute; and
- Except as limited in the trust instrument, the power to perform any act that a trustee would perform for the purposes of the trust under the prudent person and prudent investor rules [*Prob. Code § 16200(c)*]; *see Prob. Code §§ 16040(a)* (prudent person rule), 16047 (prudent investor rule); *see also* discussions in §§ 64A.39[7] and 64A.40[3].

The grant of a power to a trustee, whether by the trust instrument, by statute, or by the court, does not in itself require or permit the exercise of the power [*Prob. Code § 16202*]. In all cases, the exercise of a power by a trustee is, notwithstanding any grant of power, broadly subject to the trustee's fiduciary duties [*Prob. Code § 16202*; *see* discussions in § 64A.39[7], [8]]; and the court retains discretion in appropriate cases to relieve a trustee from restrictions on the exercise of the trustee's powers set forth in the trust instrument [*Prob. Code § 16201*]. Thus, the court retains power to permit deviation from trust restrictions if and to the extent that deviations are made necessary by unforeseen circumstances [*see Restatement (Second) of Trusts*, § 167; *see also Estate of Loring (1946) 29 Cal. 2d 423, 436-437, 175 P.2d 524*; *Estate of Mabury (1976) 54 Cal. App. 3d 969, 984-985, 127 Cal. Rptr. 233*].

**[2] Receiving, Holding, Managing, and Disposing of Property**

The trustee has the power to collect, hold, and retain trust property received from a settlor or any other person until the trustee determines, in the trustee's judgment, that the property should be disposed of [*Prob. Code § 16220*; *see Prob. Code § 16006* (duty to take and control trust property) and § 64A.39[3]]. The property may be retained even if it includes property in which the trustee is personally interested [*Prob. Code § 16220*; *but see Prob. Code § 16004(a)*].

(trustee may not use or deal with trust property for own profit) and discussion in § 64A.39[2]. Further, the trustee has power to accept additions to the property of the trust from a settlor or any other person [*Prob. Code § 16221*].

The trustee has limited power to operate a business or other enterprise that forms part of the trust estate. The basic rule is that a business may be operated on a permanent basis only if the trust instrument authorizes (or the court orders) permanent operation [*Prob. Code § 16222(b)*]. However, this rule does not apply to the leasing of four or fewer residential units, because such leasing is not considered to be "the operation of a business or other enterprise" for this purpose [*Prob. Code § 16222(b)*]. If the trust instrument does not authorize permanent operation, however, and if the "business" is not the leasing of four or fewer residential units, the trustee has authority to operate the business only for a "reasonable time," pending a sale of the business or a court hearing on an application for authority to operate it permanently [*Prob. Code § 16222(c)*]. If the trustee has power to operate a business, the trustee also has power to effect incorporation, dissolution, or other changes in the form of the business [*Prob. Code § 16222(a)*].

With respect to trust property, the trustee also has the following powers, among others:

- To acquire or dispose of property, for cash or on credit, at public or private sale, or by exchange [*Prob. Code § 16226*].
- To manage, control, divide, develop, improve, exchange, partition, change the character of, or abandon trust property or any interest in trust property [*Prob. Code § 16227*].
- To encumber, mortgage, or pledge trust property for a term within or extending beyond the term of the trust in connection with the exercise of any power vested in the trustee [*Prob. Code § 16228*].
- To make repairs, alterations, or improvements in buildings or other trust property [*Prob. Code § 16229(a)*].
- To demolish any improvements [*Prob. Code § 16229(b)*].
- To raze existing or erect new party walls or buildings [*Prob. Code § 16229(c)*].
- To subdivide or develop land [*Prob. Code § 16230(a)*].
- To dedicate land to public use [*Prob. Code § 16230(b)*].
- To enter into leases (as lessor or lessee) for terms within or extending beyond the term of the trust [*Prob. Code §§ 16231, 16232*].
- To grant or take options for the acquisition or disposition of any property, whether the options are exercisable within or beyond the term of the trust [*Prob. Code § 16233*].
- To vote stock and exercise other rights of stock ownership [*Prob. Code §§ 16234-16239*].
- To insure trust property against damage or loss and to insure the trustee against liability with respect to third persons [*Prob. Code § 16240*].

### [3] Investments

Unless the trust instrument provides otherwise, a trustee who invests and manages trust assets must comply with the prudent investor rule [*Prob. Code § 16046(a)*]. A settlor who wishes to expand or restrict the prudent investor rule may

do so by express provisions in the trust instrument [*Prob. Code § 16046(b)*]. The trustee is entitled to rely in good faith on any express provisions expanding or restricting the rule and may not be held liable to any beneficiary for doing so [*Prob. Code § 16046(b)*].

The Uniform Prudent Investor Act, which is a part of the Trust Law, sets forth the terms of the prudent investor rule [*see Prob. Code §§ 16045-16054*]. The rule requires the trustee to invest and manage trust assets as a prudent investor would, by considering the purposes, terms, distribution requirements, and other circumstances of the trust [*Prob. Code § 16047(a)*]. In satisfying this standard, the trustee must exercise reasonable care, skill, and caution [*Prob. Code § 16047(a)*].

The prudent investor rule permits the trustee to invest in any kind of property or type of investment, or to engage in any course of action or investment strategy, consistent with the Uniform Prudent Investor Act [*Prob. Code § 16047(e)*]. In this respect the rule is consistent with *Prob. Code § 16223*, which gives the trustee power to invest in any kind of property, whether real, personal, or mixed. Thus the rule permits investment in investment company shares, mutual funds, index funds, and other modern vehicles for collective investments [*Uniform Prudent Investor Act*, 25 Cal. L. Revision Comm'n Reports 543, 580 (1995)]. However, the rule requires the trustee to diversify the trust's investments unless, under the circumstances, it is prudent not to do so [*Prob. Code § 16048; see § 64A.240[1]*].

The Uniform Prudent Investor Act applies to all trusts existing on and created after its effective date, which was January 1, 1996 [*Prob. Code § 16054*]. When applied to trusts existing on the effective date of the Act, it applies only to decisions or actions occurring after that date [*Prob. Code § 16054*].

For further discussion of the Uniform Prudent Investor Act and the prudent investor rule, see § 64A.260[1].

#### **[4] Miscellaneous Powers**

The Trust Law also empowers the trustee to do the following:

- Borrow money for any trust purpose to be repaid from trust property [*Prob. Code § 16241*].
- Pay or contest any claim [*Prob. Code § 16242(a)*].
- Settle, compromise, arbitrate, or release any claim belonging to the trust [*Prob. Code § 16242(b), (c)*].
- Pay taxes, assessments, reasonable compensation of the trustee and employees and agents of the trust, and other expenses incurred in the collection, care, administration, and protection of the trust [*Prob. Code § 16243*].
- Make loans to beneficiaries [*Prob. Code § 16244(a)*].
- Guarantee loans to the beneficiary by encumbrances on trust property [*Prob. Code § 16244(b)*].
- Pay any sum distributable to a beneficiary to another person for the use or benefit of the beneficiary [*Prob. Code § 16245*].
- Distribute property and money in divided or undivided interests and adjust resulting differences in valuation [*Prob. Code § 16246*].
- Hire persons, including accountants, attorneys, auditors, investment advisers, or other agents, even if

they are associated or affiliated with the trustee, to advise or assist the trustee in the performance of administrative duties [*Prob. Code § 16247*].

- Execute and deliver all instruments that are needed to accomplish or facilitate exercise of the powers vested in the trustee [*Prob. Code § 16248*].

- Prosecute or defend actions, claims, or proceedings for the protection of trust property and of the trustee in the performance of the trustee's duties [*Prob. Code § 16249*].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsTrusteesDuties & PowersGeneral OverviewEstate, Gift & Trust

LawTrustsTrusteesDuties & PowersLimitationsEstate, Gift & Trust LawTrustsTrusteesDuties & PowersSalesEstate,

Gift & Trust LawTrustsTrusteesDuties & PowersStandards of Care



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*24-64A California Legal Forms--Transaction Guide § 64A.41*

**§ 64A.41 Release of Liability**

A trustee may not require a beneficiary to relieve the trustee of liability as a condition for making a distribution or payment to, or for the benefit of, the beneficiary, if the trust instrument requires the distribution or payment [*Prob. Code § 16004.5(a)*]. This provision does not, however, affect the trustee's right to maintain a reserve for reasonably anticipated expenses, to seek a voluntary release or discharge of the trustee's liability from the beneficiary, to require indemnification against a claim by a person or entity (other than a beneficiary) that may reasonably arise as a result of the distribution, to withhold any portion of an otherwise required distribution that is reasonably in dispute, or to seek court or beneficiary approval of an accounting of trust activities [*Prob. Code § 16004.5(b)*].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsTrusteesGeneral OverviewEstate, Gift & Trust LawTrustsTrusteesDuties & PowersGeneral OverviewEstate, Gift & Trust LawTrustsTrusteesDuties & PowersClaims By & Against



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*24-64A California Legal Forms--Transaction Guide §§ 64A.42-64A.99*

**[Reserved]**

§§ 64A.42[Reserved]



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 PART III. TRANSACTION GUIDE  
 A. Preliminary Determinations for Selection and Appointment of Trustees

*24-64A California Legal Forms--Transaction Guide § 64A.100*

**§ 64A.100 Number of Trustees**

1. Will needs of trust be adequately served by a single fiduciary?

a. Single trustee will adequately meet needs of most testamentary trusts.

(1) If individual selected to serve as sole trustee is experienced in business or investment matters, trustor may find it unnecessary to seek such experience through appointment of cotrustees.

(2) Vesting duties and responsibilities in single individual or corporation eliminates such problems as:

(a) Need for unanimity of action;

(b) Disagreements among cotrustees; and

(c) Petitions for court instructions [*see* discussion in § 64A.31[1] et seq.].

(3) Appointment of corporate trustee may indirectly achieve management diversity without necessity for appointment of cotrustees.

**NOTE:**

Corporate trustees are customarily managed by many persons whose combined experience, expertise, and judgment are at the service of trusts they administer. The trustor should be aware, however, that appointment of a trust company or other corporate trustee does not guarantee that all decisions pertaining to his or her trust will be made by several persons. If the trust is relatively small or uncomplicated, a single trust officer may, in practice, make all (or nearly all) of the decisions relating to it.

b. Appointment of cotrustees may be desirable if:

(1) Combined judgment, knowledge, and reflection of several persons are deemed important; or

**NOTE:**

Cotrustees may bring greater wisdom and experience to trust than single trustee, even if single trustee is a trust company or other corporate trustee.

(2) Trustor wants benefits of corporate trustee's administration and record-keeping facilities, but desires that specified decisions (such as investment decisions or decisions regarding distributions) be made by a particular individual.

**NOTE:**

Unless the will provides otherwise, a power vested in two or more trustees may only be exercised by their unanimous action [*Prob. Code* § 15620]. The duties of cotrustees may, however, be divided or apportioned among them [*see* discussion in § 64A.360[1][b]; *see also* § 64A.121, P 15].

If a corporation and an individual are the cotrustees, the corporation will usually insist that it have custody of all moneys, securities, and personal property, keep all records and accounts, and make all payments and distributions.

2. Will appointment of more than one trustee increase costs of trust administration?

**NOTE:**

Unless the will provides (or the cotrustees agree) otherwise, if the trust has two or more trustees, the compensation must be apportioned among them according to the services rendered by them [*Prob. Code* § 15683]. While the designation of more than one trustee need not, in itself, increase the total amount of the compensation, the number of the trustees may indirectly affect the total [*see* discussion in § 64A.31[2]].

3. Will appointment of more than one trustee result in any tax advantages for trust?

a. Trustee-beneficiary who has power to vest trust corpus or income in himself or herself will be taxed on income unless power is exercisable only with another person [*I.R.C.* § 678(a)(1)].

b. Assets over which trustee has general power of appointment will be included in trustee's taxable estate [*I.R.C.* § 2041(a)] unless power can be exercised only in conjunction with another person having a substantial interest in property that is adverse to exercise of power in favor of trustee [*I.R.C.* § 2041(b)(1)(C)(ii)].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsTrusteesAppointmentEstate, Gift & Trust LawTrustsTrusteesMultiple Trustees



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A. Preliminary Determinations for Selection and Appointment of Trustees

*24-64A California Legal Forms--Transaction Guide § 64A.101*

**§ 64A.101 Identity of Trustee or Cotrustees**

1. Will corporation or natural person best serve needs of trust?

**NOTE:**

Trust companies (and banks and savings and loan associations authorized to act as trustees) typically assign six principal reasons why corporate, rather than individual, trustees should be appointed. These are: (1) permanency, (2) experience, (3) impartiality, (4) financial responsibility, (5) necessary facilities, and (6) investment experience and expertise. Each of these factors should be carefully weighed and compared with the personal attention and skills that an individual trustee may be expected to bring to the trust. While some settlors will prefer to have a trust company manage the trust investments and determine the needs of the beneficiaries, others will prefer to have a trusted friend or business associate rather than a nameless corporate officer or employee (or even a committee). An individual trustee may be particularly important if the beneficiaries are likely to require personal attention.

It should be remembered that a fiduciary has the right to select his or her own attorney, regardless of any directive in the will [ *Highfield v. Bozio (1922) 188 Cal. 727, 728, 207 P. 242* ]. While individual trustees frequently select attorneys who did not draft the trust instrument, it is the policy of trust companies to select the will drafter. By naming a trust company as trustee, the settlor may thus be certain that his or her own attorney will also be the attorney for the trustee.

2. In deciding whether to appoint a particular natural person or persons as trustee or cotrustees, consider following:

- a. Is prospective trustee or cotrustee willing to serve?

**NOTE:**

A person named as trustee may reject the appointment [*Prob. Code § 15601*]; and a person who has accepted the trust may resign [*Prob. Code § 15640*]. Before drafting any appointment, the testator should determine the prospective trustee's willingness to accept the trust.

b. Is prospective trustee or cotrustee able to perform duties of trustee, which include:

- (1) Holding all assets of trust estate;
- (2) Collecting all income and other payments due trust estate;
- (3) Paying all expenses of trust;
- (4) Making investments;

**NOTE:**

Unless the trust instrument provides otherwise, the trustee's investment decisions will be governed by the prudent investor rule set forth in the Uniform Prudent Investor Act [*see Prob. Code §§ 16045-16054*]. To fulfill the standards of this rule, a trustee should have some business or investment knowledge or experience. A business associate of the trustor is often a good choice to fill this position. For discussion of the prudent investor rule, see §§ 64A.40[3], 64A.260[1].

- (5) Protecting and managing trust property;
- (6) Obtaining insurance necessary for protection of trust estate;
- (7) Paying income to beneficiaries entitled to income;
- (8) Preparing and filing required tax returns for trust;
- (9) Preparing and filing required accounts and reports;

**NOTE:**

The trustee has a general duty to keep the beneficiaries reasonably informed about the trust and its administration [*Prob. Code § 16060; see § 64A.39[9]*] and to account to each beneficiary to whom income or principal is required or authorized in the trustee's discretion to be currently distributed [*Prob. Code § 16062; see § 64A.39[10]*].

- (10) Carrying out any special provisions of trust.

c. Is prospective trustee or cotrustee likely to be in good health at expected time of appointment (which may be years after execution of will)?

d. Is prospective trustee or cotrustee under any legal disabilities?

**NOTE:**

A person who is "unfit" to execute the trust, or who has acquired an interest or become charged with a duty adverse to the interests of a beneficiary, may be appointed as trustee, but such a person is subject to

removal by the court after appointment [*Prob. Code* § 15642(b)(2); *see* § 64A.30[1]].

e. Where does prospective trustee or cotrustee reside?

**NOTE:**

Although there is no legal requirement that a trustee appointed under a California trust be a resident of the state [*see* Scott, *The Law of Trusts*, vol. II, § 94 (3d ed., Little, Brown & Co., 1967)], a nonresident is generally unable to perform the trustee's duties as efficiently as one who resides near the location of the trust assets and the residences of the beneficiaries. Communicating with distant trustees necessarily entails delay, inconvenience, and expense. If the prospective trustee is a nonresident, or may become a nonresident in the future, that fact should be considered.

f. Are persons interested in trust likely to feel any resentment toward prospective trustee or cotrustee?

**NOTE:**

Since the trustee must often deal actively with the beneficiaries (particularly when the will gives the trustee the power to determine the amount of principal and income that the beneficiaries will receive), personal feelings that may interfere with the administration of the trust should be taken into consideration.

g. Is prospective trustee or cotrustee willing to waive all or part of compensation provided by law?

**NOTE:**

A trustee is entitled to compensation for services rendered to the trust and to reimbursement for expenses incurred in the administration of the trust. If the trust instrument does not specify the amount of the compensation, it must be "reasonable compensation under the circumstances" [*Prob. Code* § 15681]. Waiver of all or part of the trustee's compensation may result in substantial savings for the trust estate. A prospective trustee who is willing to serve for little or no compensation, however, may be unfit in other respects (e.g., such a person may have little or no investment knowledge or experience), and the appointment of such a trustee may result in, at best, a false saving. For detailed discussion of the rules relating to the compensation of trustees, see *Ch. 64B, Testamentary Trusts: Administrative Provisions, § 64B.290[1]*.

h. Will appointment of particular trustee or cotrustee result in any adverse tax consequences?

(1) If trustee has sole power to vest corpus or income in himself or herself, trustee will be treated as owner for income tax purposes.

**NOTE:**

A person (other than the settlor) who has a power exercisable solely by himself or herself to vest the corpus or the income of a trust in himself or herself will be treated as the owner of the trust for income tax purposes [*I.R.C.* § 678(a)]. If the power may be exercised only with another person (e.g., a cotrustee), however, the rule does not apply [*Treas. Reg.* § 1.678(a)-1(b); *see* § 64A.31[4]].

(2) If trustee has equivalent of general power of appointment over trust assets, those assets may be subject to estate tax in estate of trustee.

**NOTE:**

If the will gives the trustee the power to invade the principal of the trust for his or her own benefit, and if the power is not limited by an "ascertainable standard," the trustee

may be deemed to hold a general power of appointment over the trust assets [*see I.R.C. § 2041(b)(1)(A)*] with the result that they will be included in the trustee's estate for estate tax purposes [*I.R.C. § 2041(a)*]. This result may be avoided only by establishing an "ascertainable standard" [*see Treas. Reg. § 20.2041-1(c)(2)*] or by appointing a cotrustee who has a substantial interest in the property adverse to the holder [*I.R.C. § 2041(b)(1)(C)(ii)*]. For further tax rules and considerations relating to the selection and appointment of trustees and cotrustees, see §§ 64A.31[4], 64A.32[1] et seq.

3. In deciding whether to appoint trust company or other corporate trustee as trustee or cotrustee, consider following:

a. Is prospective trustee or cotrustee legally qualified to serve?

**NOTE:**

A trust company is a corporation, industrial bank, or commercial bank that is authorized to engage in the trust business [*Fin. Code § 107; see Fin. Code § 106* ("trust business" defined)]. Various statutes permit corporations other than trust companies to accept appointments as trustee [*e.g., Fin. Code § 6515(a)* (savings and loan associations), *Corp. Code § 5140(k)* (nonprofit public benefit corporations)]. For rules and drafting considerations relating to selection of corporate trustees, see § 64A.30[3], [4].

b. Is prospective trustee or cotrustee willing to serve?

**NOTE:**

A corporate trustee, like an individual trustee, may reject the appointment [*Prob. Code § 15601*] or resign the office [*Prob. Code § 15640*]. Since the trustee's compensation is often based on a percentage of the trust assets, many trust companies (and other corporate trustees) require certain minimum total assets before they will accept a trust. Before naming a corporate trustee, the testator and the attorney should determine if the trust assets will meet the particular corporate trustee's minimum requirements.

c. Will any tax advantages result from appointment of corporate trustee [*see § 64A.121, P 2(h)*]?

4. Should alternate or successor trustee or cotrustees be appointed and, if so, who?

**NOTE:**

Although the court has power to appoint a trustee or cotrustee when there is a vacancy [*Prob. Code § 15660(d)*], the vacancy must be filled in the manner provided in the will if it is a practical method, or if the will names the person to fill the vacancy [*Prob. Code § 15660(b)*]. It is generally good practice to name successors or alternates in the will. A court-appointed trustee may not be as sympathetic to the testator's intentions and the beneficiaries' needs as a trustee personally selected by the testator. Further, a court-appointed trustee is required to post a bond [*Prob. Code § 15602(a)(3)*], while no bond is required of a trustee appointed in the will [*Prob. Code § 15602(a)*].

When a trust company sells its business, the seller succeeds to the trusts of the seller under all trusts, executorships, administrations, guardianships, agencies, and other fiduciary or representative capacities to the same extent as if the purchaser had originally assumed the fiduciary or representative capacities [*Fin. Code §§ 4859(f), 4879.14(e); see Fin. Code § 4877.05*]. For this reason, it is not strictly necessary to appoint a successor to a trust company. It is still good practice to do so, however. If the trust company declines to accept the trust or resigns the office, a trustee of the testator's choosing, rather than a trustee appointed by the court, will then become trustee.

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Estate, Gift & Trust Law Trusts Trustees General Overview



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DIVISION IV: WILLS AND TRUSTS  
CHAPTER 64A TESTAMENTARY TRUSTS: TRUSTEE PROVISIONS  
PART III. TRANSACTION GUIDE  
A. Preliminary Determinations for Selection and Appointment of Trustees

*24-64A California Legal Forms--Transaction Guide §§ 64A.102-64A.119*

**[Reserved]**

§§ 64A.102[Reserved]



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DIVISION IV: WILLS AND TRUSTS  
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PART III. TRANSACTION GUIDE

B. Preliminary Determinations for Trustee Powers

*24-64A California Legal Forms--Transaction Guide § 64A.120*

**§ 64A.120 General Administrative Powers**

1. Does aggregate value of trust assets indicate that broad or narrow grant of general administrative powers should be made?

**NOTE:**

Generally, the problems of trust administration are proportional to the size of the trust estate. While this is not invariably true (particular provisions of the trust instrument or special needs of the beneficiaries may complicate the administration of even small trusts), the aggregate value of the trust assets is one factor to consider in determining the extent of the powers to be conferred on the trustee or cotrustees.

a. If value of trust assets is substantial, broad grant of powers may be required.

b. If value of trust assets is modest, narrow grant of powers may be sufficient.

2. Do trust assets have special characteristics that indicate broad or narrow grant of general administrative powers should be made?

a. If, by reason of their nature or special characteristics, trust assets have unusual needs, broad administrative powers may be required, e.g.:

(1) If trust assets include business that trustee will be called on to operate, broad grant of administrative powers will be necessary.

(2) If trust assets include farm or ranch property which trustee will be called on to operate as business, broad grant of administrative powers will be necessary.

(3) If trust assets include interested in closely held corporation, broad grant of administrative powers will be necessary.

**NOTE:**

If the trust will include a business, a farm, a ranch, or an interest in a closely held corporation, special powers should be conferred on the trustee to sell or otherwise liquidate, or to continue to operate, those assets. For rules and considerations relating to trusts that hold businesses, farms, or interests in closely held corporations, see §§ 64A.280[1], 64A.281[1], and 64A.282[1].

b. If trust assets have no special needs, narrow powers may be sufficient.

3. Does expected duration of trust indicate broad or narrow grant of general administrative powers should be made?

a. If it is contemplated that trust will have relatively long life, or if duration of trust cannot be reasonably anticipated, broad grant of powers may be desirable.

b. If it is contemplated that trust will have a relatively short life (e.g., not more than 10 or 15 years), narrow grant of powers may be sufficient.

**NOTE:**

A trust that will continue a relatively short time (e.g., 15 or 20 years, or only during the minorities of the settlor's children) may be expected to present fewer administrative problems than a trust that will continue for a more extended period, or a trust whose duration cannot be reasonably anticipated.

4. Does trust have any special purposes or objects that indicate broad or narrow grant of general administrative powers should be made?

a. If trust is designed to achieve special purpose or object, provisions interfering with that special purpose or object should be avoided, e.g.:

(1) Provision interfering with right of surviving spouse to receive trust income will endanger trust designed to take advantage of marital deduction for federal estate taxes.

**NOTE:**

Because a provision empowering the trustee to acquire or hold unproductive property may give the trustee power to deny income to an income beneficiary, such a provision would, unless modified by the settlor or by statutory rule, disqualify the trust for treatment as a qualified terminable interest marital deduction trust under *Internal Revenue Code Section 2056(b)(7)(B)(ii)* [see discussion in § 64A.241[1][c]; see also Ch. 71, *Marital Deduction Trust Provisions*, § 71.10[4] (discussion of terminable interest rule)].

(2) Provision giving trustee-beneficiary power to invade principal for own benefit, if not limited by "ascertainable standard," may create general power of appointment over trust assets and cause assets to be included in trustee's estate for estate tax purposes.

**NOTE:**

If the will gives the trustee the power to invade the principal of the trust for his or her own benefit, and if the power is not limited by an "ascertainable standard," the trustee may be deemed to hold a general power of appointment over the trust assets [see *I.R.C. § 2041(b)(1)(A)*] with the result that they will be

included in the trustee's estate for estate tax purposes [*I.R.C. § 2041(a)*].

For tax considerations generally, see discussion in § 64A.32[1] et seq.; for tax considerations relating to particular administrative powers, see the comments to the appropriate forms.

b. If trust has no special purposes or object, broad powers may safely be granted.

5. Does level of investment skill or experience of prospective trustee or cotrustees indicate broad or narrow grant of administrative powers should be made?

a. If prospective trustee or cotrustees have extensive business or investment skill or experience, testator may safely grant broad administrative powers.

b. If prospective trustee or cotrustees have limited business or investment skill or experience, narrow grant of powers may be required.

**NOTE:**

Just as the trust should fit the needs of the beneficiaries, it should also fit the capacities of the prospective trustee or cotrustees. If the trustee will be a trust company or other corporate trustee, or an individual who has extensive business and investment experience, the testator may properly give the trustee broad administrative latitude. If, on the other hand, the prospective trustee has little or no business or investment knowledge or experience, or if he or she does not enjoy the unqualified confidence of the testator, restricted powers may be more appropriate.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsAdministrationEstate, Gift & Trust LawTrustsTrusteesGeneral OverviewEstate, Gift & Trust LawTrustsTrusteesDuties & PowersGeneral Overview



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DIVISION IV: WILLS AND TRUSTS  
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 PART III. TRANSACTION GUIDE  
 B. Preliminary Determinations for Trustee Powers

*24-64A California Legal Forms--Transaction Guide § 64A.121*

**§ 64A.121 Optional and Alternative Powers and Restrictions on Powers**

1. Should trustee be empowered to hold trust assets without regard to usual rule of diversification of investments?

a. Optional provision dispensing with general rule of diversification may be appropriate if:

(1) Trust estate consists principally of one asset (e.g., family business or farm) that testator wishes trustee or cotrustees to continue to operate; or

(2) Trust estate is too small for effective diversification.

b. Provision dispensing with rule will be inappropriate if testator is satisfied with general requirement that trust investments be diversified.

**NOTE:**

The Uniform Prudent Investor Act generally requires trustees to diversify their investments [*see Prob. Code § 16048* and § 64A.260[1]]. However, the Act permits the settlor to expand or restrict the trustee's investment duties by express provisions in the trust instrument and provides that, if the settlor does this, the trustee is entitled to rely on those express provisions and cannot be held liable to a beneficiary for doing so in good faith [*Prob. Code § 16046(b)*].

2. Should trustee be empowered to hold or invest trust funds in unproductive property?

**NOTE:**

The trustee has a duty to make the trust property productive under the circumstances and in furtherance of the purposes of the trust [*Prob. Code § 16007*]. This duty, however, may be varied or even dispensed with by the trust instrument [*Prob. Code § 16000*]. Some assets produce little or no income but have

excellent prospects for capital appreciation. If the income beneficiaries' needs for current income are modest, investment in assets that hold promise of capital appreciation may be indicated. If, however, the income beneficiaries' needs are such that all (or nearly all) of the trust income must be paid to them on a current basis, trust investments that do not produce current income will clearly be unsuitable, and the testator should do nothing to change the usual rule requiring the trustee to make productive investments. For rules and drafting considerations relating to unproductive investments, see §§ 64.241[1] and 63.264[1].

a. Optional provision permitting trustee or cotrustees to hold or to invest trust funds in unproductive assets may be appropriate if needs of income beneficiaries are modest and testator wishes trustee or cotrustees to increase capital value of trust estate.

b. Provision permitting trustee or cotrustees to hold or acquire unproductive investments should not be included in will if income beneficiaries will need all or nearly all of income of trust on current basis.

3. Should trustee be required to retain specific asset or assets?

a. Optional provision requiring trustee to retain specific asset or assets held by trust estate should be included in will if testator wishes particular asset or assets (e.g., a family business or a farm) to be retained in trust.

b. Provision requiring trustee to retain specific asset or assets will be undesirable unless testator wishes specific asset to be retained in trust estate.

**NOTE:**

Although the Uniform Prudent Investor Act generally requires trustees to diversify their investments [*see Prob. Code § 16048* and § 64A.260[1]], it permits the settlor to expand or restrict the trustee's investment duties by express provisions in the trust instrument [*Prob. Code § 16046(b)*]. It is clearly within the settlor's power to require the trustee to retain a particular asset or assets in the trust estate; however, a provision imposing such a requirement will deprive the trustee of a large measure of investment flexibility and could lead to serious problems should retention of the specified asset or assets become inconsistent with the purposes, terms, distribution requirements, and other circumstances of the trust [*see Prob. Code § 16047(a)*]. For discussion, see § 64A.242[1].

4. Should will include provision requiring that trustee conform to prudent investor rule?

a. Optional provision requiring trustee to conform to prudent investor rule should be included in will if trustee wishes to make it clear that standards of rule must be followed.

b. Specific reference to prudent investor rule is not necessary, since rule is statutory and applies to all trusts unless will provides different rule.

**NOTE:**

Since the prudent investor rule applies to all trusts unless the trust instrument includes express provisions expanding or restricting it [*Prob. Code § 16046(b)*], it is not necessary to include a provision making it applicable. However, it may be useful to do so, to make it clear to the trustee and other persons interested in the trust that the rule applies.

5. Should trustee be granted broader investment powers than are permitted under prudent person rule?

- a. If testator wishes to expand range of investments permitted under prudent investor rule, will should include optional provision granting trustee broader investment powers.
- b. If expanded range of investments is unnecessary and testator wishes trustee or cotrustee to conform to established standards of prudent person rule, broader investment powers should not be granted.

**NOTE:**

The prudent investor rule is set forth in the Uniform Prudent Investor Act [*see Prob. Code §§ 16045-16054* and § 64A.260[1]]. It is widely understood and accepted by courts and financial institutions throughout the United States. Most professional fiduciaries believe that they are not sufficiently protected by investment powers that deviate from the well-accepted provisions of the prudent investor rule, or its substantially similar predecessors, the "prudent man" and "prudent person" rules. The settlor should authorize deviations from the rule only after carefully considering the reasons for doing so.

6. Should will include provision restricting investment powers of trustee or cotrustee?

- a. Investment powers may be restricted by either forbidding or mandating certain investments or types of investments.

**NOTE:**

The will may either expand or restrict the investment powers of the trustee under the prudent investor rule. It may, for example, require that the trustee or cotrustees invest trust funds only in bonds of "grade AA or better," or it may prohibit investment in common stocks. Although most testators will probably find it advisable to increase rather than restrict the investment powers of the fiduciary, some investors may choose to do the opposite. For discussion, see § 64A.267[1].

- b. Provision restricting investment powers may be appropriate if testator has definite views as to proper investment program to be followed by fiduciaries.

**NOTE:**

Although some testators have strong investment views and are inclined to instruct the trustee to follow them strictly, it is a rare investor who can see into the future with clarity and anticipate changing economic conditions. A testator who is inclined to tie the fiduciary's investment hands should seriously consider the adverse implications of overly restrictive investment rules [*see § 64A.267[1]*].

- c. In absence of strong wishes of testator, restrictive investment provision will usually be inadvisable.

**NOTE:**

Restriction of the trustee's investment powers is generally inadvisable for the same reason that expansion of those powers is often advisable: restriction deprives the trustee of flexibility, while expansion increases flexibility.

7. Should will include provision authorizing self-dealing on part of trustee or cotrustees?

- a. Unless will provides otherwise, trustee is generally prohibited from any personal dealings with trust.

**NOTE:**

The Trust Law includes numerous prohibitions against self-dealing by trustees. For example, it prohibits trustees from using or dealing with trust property for their own profit [*Prob. Code § 16004(a)*]; **but see** *Prob. Code § 16220* (trustee may keep property received from settlor or other person even if trustee is personally interested in property)] and from taking part in any transaction in which the trustee has an interest adverse to that of the beneficiary [*Prob. Code § 16004(a)*]. However, it authorizes trustees who are also financial institutions to charge for services provided to the trusts they administer if the services are provided in the ordinary course of business [*Prob. Code § 16015*], and it also authorizes trustees who are banks, savings and loan associations, credit unions, and other financial institutions to deposit trust funds in insured or collateralized accounts in those institutions [*see Prob. Code § 16225*]. Further, it authorizes the settlor to relieve the trustee of any or all of the rules limiting personal dealings with the trust [*see Prob. Code § 16000* (statutory duties binding except to extent trust instrument provides otherwise)]. For a general discussion of statutory rules and drafting considerations relating to self-dealing, see § 64A.268[1].

- b. Will may by clear direction authorize trustee to engage in self-dealing.

**NOTE:**

The statutory rules against self-dealing [*see Prob. Code § 16004*] apply only when the trust instrument does not provide otherwise [*see Prob. Code § 16000*].

- c. Provision authorizing self-dealing may be desirable if fiduciary is likely purchaser of any of trust assets.

**NOTE:**

If the trust will include an interest in a business held as a partnership or closely held corporation, a surviving partner or shareholder who is also trustee may wish to purchase the trust's interest in the business. If such a purchase would be in the interests of the trust, a provision authorizing self-dealing should be included in the will.

8. Should will include provision authorizing trustee or cotrustee to operate business or farm?

- a. Unless trust instrument provides otherwise, investments in businesses (including farms and ranches operated as businesses) are usually prohibited.

**NOTE:**

Unless the trust instrument or a court authorizes the trustee to operate a business belonging to the trust estate on a permanent basis, the trustee has power to operate the business only for a reasonable time pending sale of the business or a court hearing on a request for authority to operate the business permanently [*Prob. Code § 16222(a), (b), (c)*]. In any event, however, the trustee may lease four or fewer residential units belonging to the trust estate on a permanent basis because such a lease is not considered the operation of a business for this purpose [*Prob. Code § 16222(b)*]. Further, if the trustee has the power to operate a business under a trust created by an instrument executed before July 1, 1987, the business may be operated on a permanent basis [*Prob. Code § 16222(d)*]. For further consideration of the operation of businesses belonging to the trust, see § 64A.280[1].

b. Provision empowering trustee or cotrustee to operate business, farm, or ranch on permanent basis may be desirable if:

(1) Business or interest in a business constitutes substantial part of trust estate and testator wishes it to be operated after his or her death; or

(2) Farm or ranch constitutes substantial part of trust estate and testator wishes it to be operated after his or her death.

9. Should will include provision permitting trustee to hold stock in closely held corporation?

a. Specific provision is generally necessary to empower trustee to hold stock in small or closely held corporation.

**NOTE:**

In the absence of express authority in the trust instrument, shares of stock in a closely held corporation probably do not qualify as an investment under the prudent investor rule, and a trustee who receives such shares into a trust is under a duty to dispose of them [*see* § 64A.282[1]].

b. Provision permitting trustee to hold stock in closely held corporation should be included in will if:

(1) Trust assets will include stock in closely held corporation whose smooth operation (or continued existence) might be imperiled by sudden or substantial changes in stock ownership; and

(2) There are no corporate restrictions on sale or transfer of shares that would prevent their transfer to or ownership by trustee.

**NOTE:**

The power of a trustee to hold corporate stock may be affected by the articles of incorporation or bylaws of the corporation, by the corporation's right to redeem shares of stock, or by inter vivos buy-and-sell agreements entered into by or among the incorporators or shareholders [*see* § 64A.281[1]].

12. Should will include provision authorizing trustee to sell, lease, or exchange trust property?

a. Will provision is not strictly necessary since Trust Law grants trustees broad powers of sale, lease, and exchange.

**NOTE:**

Although the Trust Law gives trustees broad powers to acquire and dispose of property [*Prob. Code* § 16226], it also requires them to comply with the prudent investor rule, unless the trust instrument contains express provisions expanding or restricting that rule [*Prob. Code* § 16046 for prudent investor rule, *see Prob. Code* §§ 16045-16054 and discussion in § 64A.260[1]].

b. Will provision may serve useful purpose in advising trustee and other persons interested in trust that trustee has power to sell, lease, and exchange property.

- c. Will provision may also authorize trustee to purchase trust property for his or her own account.

**NOTE:**

Even if a sale of trust property would be proper under the prudent investor rule, it is improper for a trustee to purchase trust property for the trustee's own account unless the trust instrument specifically authorizes such a purchase [*see Prob. Code § 16004(a)*] (trustee may not deal with property for own profit); *see also § 64A.300[1]*.

13. Should trustee or cotrustee be empowered to employ custodians, agents, advisors, and attorneys to assist and advise trustee or cotrustees?

- a. Although will provision authorizing employment of agents is not strictly necessary, it may serve valuable purpose of clarifying trustee's authority to do so.

**NOTE:**

Although trustees have broad authority to hire accountants, attorneys, auditors, investment advisers, appraisers, and others agents to advise or assist them in the performance of their duties [*Prob. Code § 16247*], they have a duty not to delegate to others the performance of acts they can reasonably be required to perform personally [*Prob. Code § 16012(a)*]. Further, they have a duty to supervise their agents and employees [*Prob. Code § 16012(b)*] and to apply the full extent of their skills to the administration of the trust, whether or not there are advisers [*Prob. Code § 16014(a)*].

- b. Employment of attorneys, agents, and advisors is usually necessary and almost always beneficial.

**NOTE:**

Nearly every trustee will require legal advice in the administration of the trust and assistance in the preparation of tax returns. In addition, most trustees will benefit from investment counseling or advice. A trustee who is not an attorney may have a duty to seek the advice of an attorney on legal questions encountered in the course of trust administration.

14. Should "sole," "absolute," or "uncontrolled" discretion be conferred on trustee or cotrustee?

- a. Grant of "sole," "absolute," or "uncontrolled" discretion relieves trustee or cotrustee of duty to act "reasonably," but good faith and independent judgment are still required.

**NOTE:**

"Absolute" discretion means simply that the judgment of the trustee, if exercised in good faith, will control. It will not excuse action in bad faith or in disregard of the purposes of the trust [*Prob. Code § 16081(a)*]. Whether a discretionary power conferred on a trustee is broad or narrow, its exercise is subject to judicial review [*Prob. Code § 17200(b)(5)*]. For a general discussion of trust provisions conferring "sole," "absolute," and "uncontrolled" discretion on trustees, see § 64A.340[1].

- b. If prospective trustee or cotrustee is corporation, individual with extensive business or investment experience, or other person who enjoys testator's full confidence, "sole," "absolute," or "uncontrolled" discretion may be appropriate.

- c. If prospective trustee or cotrustee is friend or relative with little or no investment experience, or person whose loyalties to trust may be subject to compromise, "absolute," "sole," or "uncontrolled"

discretion will be inappropriate and possibly dangerous.

**NOTE:**

In determining whether discretion should be "absolute," "sole," or "uncontrolled," the testator should be guided principally by the confidence (or lack of confidence) he or she reposes in the integrity and skill of the prospective trustee or cotrustee, and his or her willingness to relieve that trustee or cotrustee of the statutory obligations of the prudent person rule [*see* discussion in § 64A.340[1]].

d. If prospective trustee or cotrustee will also be beneficiary of trust and will have power to invade principal for own benefit, grant of "absolute" discretion may have unfavorable estate tax consequences.

**NOTE:**

If a will gives the trustee power to invade the principal of the trust for the trustee's own benefit, and if the power is not limited by an "ascertainable standard," the trustee may be deemed to hold a general power of appointment over the trust assets [*see I.R.C. § 2041(b)(1)(A)*], with the result that they will be included in the trustee's estate for estate tax purposes [*I.R.C. § 2041(a)*]. Under *Prob. Code § 16081(c)*, a trustee who has discretion to distribute principal or income for the trustee's own benefit may exercise the discretion only to make distributions for his or her health, education, support, or maintenance within the meaning of *I.R.C. §§ 2041 and 2514*, unless the will or trust specifically refers to the statute and specifies a broader standard [*see Prob. Code § 16081(e)* (applicable dates of *Prob. Code § 16081(c)*)]. A power to distribute principal or income for a person's health, education, support, or maintenance within the meaning of *I.R.C. §§ 2041 and 2514* is generally known as an "ascertainable standard." For further discussion of the special rules of *Prob. Code § 16081(c)*, see § 64A.39[8].

15. If there are cotrustees, should powers of trust be divided or allocated?

a. If testator suspects that cotrustees will not work together smoothly and efficiently, or that cotrustees will not be able to reach unanimous decisions as to trust action, trust provision authorizing majority to act may be desirable.

**NOTE:**

Unless the will provides otherwise, a power vested in two or more trustees may only be exercised by their unanimous action [*Prob. Code § 15620*]. If cotrustees cannot agree, petitions for instructions [*see Prob. Code § 17200(b)(6)*] may be necessary.

(1) Provision authorizing majority of cotrustees to bind trust may save time, expense, and inconvenience of petitions for instructions.

**NOTE:**

If cotrustees cannot agree, and if the trust instrument does not authorize action in the absence of unanimous agreement, the court must be petitioned for instructions [*see Prob. Code § 17200(b)(6)*].

(2) Majority of cotrustees may be authorized to:

(a) Make only investment decisions for trust; or

(b) Make any decisions for trust, regardless of whether or not related to investment.

(3) Majority of cotrustees may be authorized to:

(a) Take action in any transaction, without regard to amount of obligation incurred; or

(b) Take action only when amount of obligation does not exceed specified dollar limit.

**NOTE:**

If the will so provides, a majority of the cotrustees may act for the trust only as to transactions that are within a specified dollar limit. If a given transaction exceeds the specified limit, the general requirement of unanimity will still apply.

(4) Provision authorizing majority of cotrustees to bind trust should be included in will only if there will be more than two cotrustees.

**NOTE:**

When there are only two cotrustees, they will be either unanimous or split equally on any decision, and no majority decision will be possible.

b. If one of prospective cotrustees has special qualifications or experience, that cotrustee may be:

**NOTE:**

If one of the prospective cotrustees is a trust company or other qualifying corporation, or an individual who has greater investment or business experience, knowledge, or skill than the other prospective cotrustees, the settlor may choose to give that cotrustee the power to make investment decisions for the trust (or to veto investment decisions made by another trustee or cotrustee), while another cotrustee may be given the power to determine payments of principal and income to the beneficiaries. Any division of powers and responsibilities that suits the particular abilities of the proposed cotrustees may be appropriate.

(1) Empowered to perform specific duties relating to those qualifications or experience; or

(2) Given veto power over decisions of other cotrustees.

c. If trust is to include interest in business owned as partnership or closely held corporation, surviving partner or shareholders may be empowered (as cotrustee or "special trustee") to continue operation of business, while remaining powers of trust are assigned to other cotrustee [*see* § 64A.362[1]].

**NOTE:**

Placing a testator's share of a business owned as a partnership or a closely held corporation in the trust may jeopardize the successful operation of the business by creating management tensions between the trustee and the surviving owners. If, however, one of the surviving owners is named as a special trustee with power to make investment decisions that affect the business, these tensions may be avoided [*see* § 64A.361[1]].

d. If one of prospective cotrustees is trust company or other corporate trustee, that cotrustee may be empowered to keep records and accounts, have custody of money, securities, and personal property, and make payments for trust, while individual cotrustee may be given powers of investment.

**NOTE:**

When a trust company or other qualifying corporation and an individual are cotrustees, the corporation will usually insist that it have custody of all money, securities, and personal property, keep all records and accounts, and make all payments and distributions. This arrangement may comport well with a division of duties among the cotrustees, as another cotrustee may then be given the power to make investment decisions for the trust [*see* § 64A.361[1]].

(1) Provision may be essential if corporate cotrustee is to accept trust.

**NOTE:**

If a named trustee or cotrustee is dissatisfied with any provision of the trust instrument, that trustee or cotrustee may decline to act as trustee [*see Prob. Code* § 15601 (rejection of trust)] or, after accepting the trust, may resign the office [*Prob. Code* § 15640].

(2) Provision may comport well with provision requiring or authorizing division of duties among cotrustees [*see* § 64A.121, P 15 (b), (c)].

e. If testator has reason to believe that individual cotrustee may be unable to perform all of required duties, will may authorize that cotrustee to delegate all or part of his or her duties to corporate cotrustee.

(1) Although generally prohibited, delegation of trustee's or cotrustee's duties may be authorized by will.

**NOTE:**

Trustees have a duty not to delegate to others the performance of acts they can be required to perform personally [*Prob. Code* § 16012(a)]. The trust instrument may, however, permit a greater delegation of powers and duties [*Prob. Code* § 16000; *see* § 64A.320[1]]. The delegation of the trustee's investment responsibilities is subject to special rules set forth in the Uniform Prudent Investor Act [*see Prob. Code* § 16052 and discussion in § 64A.260[1]]. Even when the trustee has properly delegated a matter to an agent, cotrustee, or other person, the trustee has a duty to exercise general supervision over the person performing the delegated matter [*Prob. Code* §§ 16012(b), 16052(a)(3)].

(2) Delegation may be advisable if testator suspects that individual cotrustee will be unable or unwilling to carry out duties for temporary period or periods.

(3) Since delegation for anything other than short period may amount to virtual resignation, delegation is not usually in best interests of trust.

(4) Practical alternatives to delegation include provisions:

(a) Authorizing cotrustee to employ agents, advisers, and attorneys to assist and advise cotrustee in administration of trust [*see* § 64A.320];

(b) Dividing or allocating powers of cotrustees [*see* §§ 64A.360-64A.363]; and

(c) Designating successor cotrustee to take office if and when designated cotrustee is unable or unwilling to act [*see Ch. 64B, Testamentary Trusts: Administrative Provisions*, §§ 64B.290-64B.292].

f. If cotrustees lack business experience, knowledge, or skill, will may authorize third party (not trustee or cotrustee) to exercise veto power over investment decisions of cotrustees.

**NOTE:**

The will may provide that the trustee or cotrustees will be subject to the control of another person in specified respects [Scott, *The Law of Trusts* (3d ed., Little, Brown & Co., 1967), vol. 2, § 185]. For a general discussion of will provisions empowering third parties to act for the trust and subjecting trustees and cotrustees to the control of third parties, see discussions in §§ 64A.362[1][b] and 64A.363[1][b].

(1) Person on whom power of control is conferred may be person otherwise unconnected with trust.

(2) Power of control may be power:

(a) To compel action by cotrustees; or

(b) To prevent any action taken or proposed to be taken without consent of third party.

g. If a cotrustee is also a trust beneficiary, will may disqualify that person from participating in discretionary decisions relating to his or her beneficial interest.

**NOTE:**

A trustee may not use or deal with trust property for the trustee's own profit or for any purpose unconnected with the trust [*Prob. Code* § 16004(a); **but see** *Prob. Code* § 16220 (trustee may keep property received from settlor or other person even if trustee is personally interested in property)]; nor may the trustee take part in any transaction in which the trustee has an interest adverse to the beneficiary [*Prob. Code* § 16004(a); **see** discussion in § 64A.39[2]; **but see** *Prob. Code* §§ 16015 (provision of financial services by financial institution-trustee), 16225 (deposit of trust funds in financial institution-trustee)]. Despite these statutory safeguards, a will provision disqualifying a cotrustee who is also a beneficiary from participating in discretionary decisions relating to his or her own interest may serve a useful purpose. Such a provision will clearly apprise all persons interested in the trust that the cotrustee is forbidden to participate in decisions that affect his or her own interest. It will also obviate the necessity of proving that the cotrustee's interest is actually adverse to that of the trust or its beneficiaries.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsTrusteesGeneral OverviewEstate, Gift & Trust LawTrustsTrusteesDuties & PowersGeneral OverviewEstate, Gift & Trust LawTrustsTrusteesDuties & PowersLimitations



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*24-64A California Legal Forms--Transaction Guide §§ 64A.122-64A.139*

**[Reserved]**

§§ 64A.122[Reserved]



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C. Drafting Guide for Appointment of Trustee or Cotrustees and Provisions Conferring Administrative Powers

*24-64A California Legal Forms--Transaction Guide § 64A.140*

**§ 64A.140 Appointment of Trustee or Cotrustees**

1. To appoint individual as trustee, use either of two alternative provisions of § 64A.200.
2. To appoint trust company or other corporate trustee as cotrustee, use either of two alternative provisions of § 64A.201.
3. To appoint cotrustees, use either of two alternative provisions of § 64A.202.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsTrusteesAppointmentEstate, Gift & Trust LawTrustsTrusteesMultiple Trustees



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*24-64A California Legal Forms--Transaction Guide § 64A.141*

**§ 64A.141 General Administrative Powers**

1. To grant narrow administrative powers to trustee or cotrustee, use:

a. *Form in § 64A.220*, which includes provisions relating to:

- (1) Retention of assets;
- (2) Investments;
- (3) Management;
- (4) Sales;
- (5) Leases and mineral rights;
- (6) Claims and litigation;
- (7) Borrowing;
- (8) Division and distribution; and

b. One or more of following provisions, if appropriate to trust purposes, trustee, and beneficiaries:

- (1) *Form in § 64A.242*, which requires trustee to retain specific asset or assets held by trust estate;
- (2) *Form in § 64A.267*, which restricts trustee's investment powers;

(3) *Form in § 64A.363*, which gives third party veto power over decisions of trustee.

2. To grant broad administrative powers to trustee or cotrustee, use either of following:

a. *Form in § 64A.221*, which includes provisions relating to;

- (1) Retention of assets;
- (2) Investments;
- (3) Management of securities;
- (4) Form of ownership of trust property;
- (5) Business interests;
- (6) Sales and exchanges of property;
- (7) Division of trust estate;
- (8) Abandonment of trust assets;
- (9) Options;
- (10) Leases of trust property;
- (11) Property management;
- (12) Development of property;
- (13) Repair, alteration, construction, and demolition;
- (14) Borrowing and encumbering;
- (15) Loans by trustee(s);
- (16) Mineral rights;
- (17) Insurance;
- (18) Enforcement of hypothecations;
- (19) Extending time for payment of obligations;
- (20) Adjustment of claims;
- (21) Litigation;
- (22) Administration expenses;

(23) Employment of attorneys, advisers, and other agents;

(24) Termination of small trust;

(25) Distribution; and

(26) General.

b. *Form in § 64A.222*, which gives trustee all of the powers conferred on trustees by *Prob. Code §§ 16220-16249* and the general grant of authority to act in accordance with the prudent person and prudent investor rules [*Prob. Code § 16200(c)*; *see Prob. Code §§ 16040(a)* (prudent person rule), 16047 (prudent investor rule)].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsTrusteesDuties & PowersGeneral OverviewEstate, Gift & Trust  
LawTrustsTrusteesDuties & PowersAccountingEstate, Gift & Trust LawTrustsTrusteesDuties & PowersClaims By &  
AgainstEstate, Gift & Trust LawTrustsTrusteesDuties & PowersLimitationsEstate, Gift & Trust  
LawTrustsTrusteesDuties & PowersSales



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*24-64A California Legal Forms--Transaction Guide § 64A.142*

**§ 64A.142 Optional and Alternative Administrative Powers**

1. To permit (but not require) trustee to hold trust assets without regard to usual requirement of diversification of investments, use § 64A.240.

**NOTE:**

For considerations in the use of provisions permitting the trustee or cotrustee to hold trust assets without regard to the usual requirement of diversification of investments, see § 64A.121, P 1.

2. To permit (but not require) trustee to hold unproductive property, use principal or optional provision of § 64A.241.

**NOTE:**

For considerations in the use of provisions permitting the trustee or cotrustee to hold unproductive property, see § 64A.121, P 2.

3. To require trustee to retain specific asset or assets held by trust estate, use § 64A.242.

**NOTE:**

For considerations in the use of provisions requiring the trustee or cotrustee to retain specific assets held by trust estate, see § 64A.121, P 3.

4. To require that trustee, when investing trust funds, conform to prudent person rule, use either:

**NOTE:**

For considerations in the use of provisions specifically adopting the prudent person rule of investments, see § 64A.121, P 4.

a. *Form in § 64A.260* (long form); or

b. *Form in § 64A.261* (short form).

5. To grant trustee broader investment powers than are permitted under prudent person rule, use § 64A.262.

6. To confer very broad investment powers on trustee and dispense with usual requirement of investment diversification, use § 64A.263.

**NOTE:**

For considerations in the use of provisions conferring broad or very broad investment powers, see § 64A.121, P 5.

7. To permit (but not require) trustee to purchase, acquire, or otherwise invest trust funds in unproductive property, use § 64A.264.

**NOTE:**

For considerations in the use of provisions authorizing investment in unproductive property, see § 64A.121, P 2.

8. To permit (but not require) trustee to invest in investment funds, use § 64A.265.

**NOTE:**

For considerations in the use of provisions authorizing investment in investment funds, see § 64A.121, P 6.

9. To permit (but not require) trustee to invest in life insurance contracts on life of trustee or beneficiaries, use § 64A.266.

**NOTE:**

For considerations in the use of provisions authorizing investment in unproductive property, see § 64A.121, P 2.

10. To restrict trustee's investment powers, use § 64A.267.

**NOTE:**

For considerations in the use of provisions restricting the trustee's or cotrustees' investment powers, see § 64A.121, P 8.

11. To empower trustee to lend or advance trustee's own funds to trust and to purchase from and sell property to trust, use § 64A.268.

**NOTE:**

For considerations in the use of provisions authorizing self-dealing by the trustee or cotrustees, see § 64A.121, P 9.

12. To permit (but not require) trustee to conduct any business received into trust at inception or later acquired as trust investment, use § 64A.280.

**NOTE:**

For considerations in the use of provisions permitting the trustee or cotrustee to operate a business, see § 64A.121, P 10.

13. To permit (but not require) trustee to operate any farm or ranch received into trust at inception or later acquired as trust investment, use § 64A.281.

**NOTE:**

For considerations in the use of provisions permitting the trustee or cotrustee to operate a farm or ranch, see § 64A.121, P 10.

14. To permit (but not require) trustee to hold stock in a closely held corporation, use § 64A.282.

**NOTE:**

For considerations in the use of provisions permitting the trustee or cotrustee to hold stock in a closely held corporation, see § 64A.121, P 11.

15. To permit (but not require) trustee to sell, lease, or exchange trust property, and, for that purpose, to employ agents, consultants, advisors, and brokers, use § 64A.300.

**NOTE:**

For considerations in the use of provisions permitting the sale, exchange, or lease of trust property, see § 64A.121, P 12.

16. To permit (but not require) trustee to employ custodians, agents, advisors, and attorneys to assist and advise trustee in execution of trust, use § 64A.320.

**NOTE:**

For considerations in the use of provisions permitting the trustee or cotrustees to employ attorneys, advisors, and other agents, see § 64A.121, P 13.

17. To confer "sole," "absolute," or "uncontrolled" discretion on trustee, use § 64A.340.

**NOTE:**

For considerations in the use of provisions granting the trustee or cotrustees "sole," "absolute," or "uncontrolled" discretion, see § 64A.121, P 14.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsTrusteesDuties & PowersGeneral OverviewEstate, Gift & Trust

LawTrustsTrusteesDuties & PowersLimitationsEstate, Gift & Trust LawTrustsTrusteesDuties & PowersStandards of Care



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*24-64A California Legal Forms--Transaction Guide § 64A.143*

**§ 64A.143 Division or Apportionment of Powers Among Cotrustees**

1. To divide or allocate powers of cotrustees by providing that, whenever two or more cotrustees are in office, a majority of cotrustees may bind trust, use one or more of following provisions, as appropriate:

a. If testator wishes to authorize majority of cotrustees to make investment decisions (but not other decisions) for trust, use either of following provisions:

(1) First alternative provision of § 64A.360, to authorize majority of cotrustees to make investment decisions without setting any dollar limit on amount of obligation that may be incurred by majority decision; or

(2) Second alternative provision of § 64A.360, to authorize majority of cotrustees to make investment decisions only when amount of obligation incurred does not exceed specified dollar limit.

b. If testator wishes to authorize majority of cotrustees to make any decisions for trust (whether or not related to investment), use either of following provisions:

(1) First alternative provision of § 64A.364, to authorize majority of cotrustees to bind trust estate in any transaction without specifying limit on amount of obligations that may be incurred; or

(2) Second alternative provision of § 64A.364, to authorize majority of cotrustees to bind trust estate only when amount of obligation incurred does not exceed specified dollar limit.

**NOTE:**

For considerations in the use of provisions authorizing a majority of the cotrustees to

make decisions for the trust, see § 64A.121, P 15(a); see also §§ 64A.360[1] and 64A.364[1].

2. To divide or allocate powers of cotrustees by assigning investment powers to named cotrustee or cotrustees, use § 64A.361.

**NOTE:**

For considerations in the use of provisions assigning particular powers to named cotrustee or cotrustees, see § 64A.121, P 15(b), (d); see also § 64A.361[1].

3. To empower third party (not trustee or one of cotrustees) to make investment decisions for trust, use either of the following provisions:

a. First alternative provision of § 64A.362, to authorize third party to make all investment decisions for trust; or

b. Second alternative provision of § 64A.362, to authorize third party to make investment decisions with respect to specific asset or assets only.

**NOTE:**

For considerations in the use of provisions empowering third parties to act for or control the action of trustees and cotrustees, see § 64A.121, P 15(f); see also §§ 64A.362[1] and 64A.363[1].

4. To grant third party (not trustee or one of cotrustees) veto power over investment decisions of trustee, use § 64A.363.

**NOTE:**

For considerations in the use of provisions granting veto powers to third parties, see § 64A.121, P 15(f); see also § 64A.363[1].

5. To authorize corporate cotrustee to have custody of personal property and maintain records and accounts of trust, use § 64A.365.

**NOTE:**

For considerations in the use of provisions empowering corporate cotrustees to keep records and accounts, have custody of moneys, securities, and personal property, and make payments for trust, see § 64A.121, P 15(d); see also § 64A.365[1].

6. To authorize individual cotrustee to delegate his or her powers and duties to corporate cotrustee, use § 64A.366.

**NOTE:**

For considerations in the use of provisions dividing or allocating the powers of cotrustees, see § 64A.121, P 15(e); see also § 64A.366[1].

7. To disqualify a cotrustee from decisions affecting that cotrustee's own interest, use § 64A.367.

**NOTE:**

For considerations in the use of provisions disqualifying a cotrustee from participating in discretionary decisions relating to the cotrustee's interest, see § 64A.121, P 15(g); see also § 64A.367[1].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsTrusteesDuties & PowersGeneral OverviewEstate, Gift & Trust  
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*24-64A California Legal Forms--Transaction Guide §§ 64A.144-64A.199*

**[Reserved]**

§§ 64A.144[Reserved]



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PART IV. FORMS  
A. Appointment of Trustee

*24-64A California Legal Forms--Transaction Guide § 64A.200*

**§ 64A.200 Appointment of Individual as Trustee**

**[1] Comment**

**[a] Use of Form**

This provision may be used to appoint an individual as trustee. When used, it will be the introductory sentence of that part of the will that establishes the testamentary trust. Two alternative provisions are set forth, one that includes a description of the property to be transferred in trust and another that does not. If the property transferred in trust is not described in this provision, it must be described elsewhere in the will.

For a will provision appointing a trust company or other corporation as trustee, see § 64A.201. For a will provision appointing cotrustees, see § 64A.202. For rules relating to bond requirements for testamentary trustees, see discussion in § 64A.30[1].

**[b] Alternate and Successor Trustees**

Any trust instrument that names an individual as trustee should also name an alternate or successor trustee. If the will names an alternate or successor trustee, any vacancy in the office of trustee will be filled by the nominated alternate or successor [*see Prob. Code § 15660(b)*]. If the will does not name an alternate or successor trustee, or if it does not prescribe some practical method for filling a vacancy in the office of trustee, all of the adult beneficiaries may agree that the vacancy be filled by a trust company [*Prob. Code § 15660(c); see Prob. Code § 83* ("trust company" defined)]. If the will makes no provision for an alternate or successor trustee and the adult beneficiaries do not agree that the vacancy be filled by a trust company, the court may appoint a trustee to fill the vacancy [*Prob. Code § 15660(d)*]. However, a court-appointed trustee must post a bond, while a trustee (or successor trustee) named in the will need not do so [*Prob. Code § 15602(a)*]. A trust company is never required to post a bond [*Prob. Code § 15602(e)*]. A bond may be an unnecessary expense for the trust estate. Unless the will or the court prescribe otherwise, the cost of the bond must be charged against the trust estate [*Prob. Code § 15602(d)*].

For a will provision appointing alternate and successor trustees and cotrustees, see *Ch. 64B, Testamentary Trusts*:

*Administrative Provisions, § 64B.270.* For a will provision authorizing a trustee or cotrustee to designate a successor, see *Ch. 64B, Testamentary Trusts: Administrative Provisions, § 64B.271.* For a will provision providing that the powers of a cotrustee who dies or resigns may be exercised by the remaining cotrustees, see *Ch. 64B, Testamentary Trusts: Administrative Provisions, § 64B.272.*

## [2] FORM

### Appointment of Individual as Trustee

*[First alternative: trust property described]*

I give \_\_\_\_\_ [*describe property transferred in trust, e.g.: all the rest and residue of my estate*] to \_\_\_\_\_ [*name of trustee*] [, of \_\_\_\_\_ (*residence of designated trustee*)], or to the successor trustee or trustees named below, in trust, to be held, administered, and distributed in accordance with the following provisions:

*[Second alternative: trust property not described]*

I appoint \_\_\_\_\_ [*name of trustee*] [, of \_\_\_\_\_ (*residence of designated trustee*)], as the Trustee of \_\_\_\_\_ [*the trust or all of the trusts*] provided for under this will.

### Legal Topics:

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsTrusteesGeneral OverviewEstate, Gift & Trust LawTrustsTrusteesAppointment



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A. Appointment of Trustee

*24-64A California Legal Forms--Transaction Guide § 64A.201*

**§ 64A.201 Appointment of Trust Company or Other Corporate Trustee**

**[1] Comment**

**[a] Use of Form**

This provision may be used to appoint a trust company or other corporation as trustee. Two alternative provisions are set forth, one that includes a description of the property to be transferred in trust and another that does not. If the property transferred in trust is not described in this provision, it must be described elsewhere in the will.

For a will provision appointing an individual as trustee, see § 64A.200. For a will provision appointing cotrustees, see § 64A.202. For rules relating to bond requirements for testamentary trustees, see discussion in § 64A.30[1].

**[b] Trust Company**

Although "banks" are often referred to as trustees, only a bank that is also a "trust company" may serve as a trustee. A trust company is an entity that has qualified to engage in and conduct a trust business in California [*Prob. Code* § 83; *see Fin. Code* § 107 ("trust company" defined)]. As used in the Financial Code, the words "trust business" include the business of acting as executor, administrator, guardian, conservator, or trustee under the appointment of any court or the authority of any state or federal law [*Fin. Code* § 106].

When a trust company sells its business, the seller succeeds to the trusts of the seller under all trusts, executorships, administrations, guardianships, agencies, and other fiduciary or representative capacities to the same extent as if the purchaser had originally assumed the fiduciary or representative capacities [*Fin. Code* §§ 4859(f), 4879.14(e); *see Fin. Code* § 4877.05]. For this reason, it is not strictly necessary to appoint a successor to a trust company. It is advisable to do so, however, to provide for the contingency that the trust company may decline to serve as trustee. Any trustee named in a will may reject the trust, either in writing or simply by failing to accept the trust within a reasonable time after learning of the appointment [*Prob. Code* § 15601]. Many trust companies will decline to serve as trustee unless the trust estate meets the companies' minimum value requirements. Accordingly, before drafting any instrument naming a trust company as trustee, the attorney should consult with the trust company and ascertain its minimum estate value

requirements.

**[c] Other Corporate Trustee**

Various statutes permit corporations other than trust companies to accept appointments as trustee. Included among these are savings and loan associations [*Fin. Code § 6515(a)*] and nonprofit public benefit corporations [*Corp. Code § 5140(k)*]. For further rules relating to the appointment of corporate trustees, see discussions in § 64A.30[3], [4].

**[2] FORM**

**Appointment of Trust Company or Other Corporate Trustee**

*[First alternative: trust property described]*

I give \_\_\_\_\_ [*describe property transferred in trust, e.g.: all the rest and residue of my estate*] to \_\_\_\_\_ [*full and correct name of trust company*] \_\_\_\_\_ [, whose address is \_\_\_\_\_ (*address of principal office of trust company or of local office with which attorney and beneficiaries will have contact*)], or to the successor trustee or trustees named below, in trust, to be held, administered, and distributed in accordance with the following provisions:

*[Or second alternative: trust property not described]*

I appoint \_\_\_\_\_ [*full and correct name of trust company*] [, whose address is \_\_\_\_\_ (*address of principal office of trust company or of local office with which attorney and beneficiaries will have contact*)], as the trustee of \_\_\_\_\_ [*the trust or all of the trusts*] provided for under this will.

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Estate, Gift & Trust Law Trusts Trustees Appointment



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A. Appointment of Trustee

*24-64A California Legal Forms--Transaction Guide § 64A.202*

**§ 64A.202 Appointment of Cotrustees**

**[1] Comment**

**[a] Use of Form**

This provision may be used to appoint cotrustees. Two alternative provisions are set forth, one that includes a description of the property to be transferred in trust and another that does not. If the property transferred in trust is not described in this provision, it must be described elsewhere in the will.

For a will provision appointing an individual as trustee, see § 64A.200. For a will provision appointing a trust company as trustee, see § 64A.201. For provisions allocating the powers of the trustee among and between cotrustees, see §§ 64A.360-64A.367. For rules relating to bond requirements for testamentary trustees, see discussion in § 64A.30[1].

**[b] Cotrustees**

**[i] In General**

The will may appoint one trustee or two or more cotrustees. The Probate Code sets forth certain rules governing cotrustees. First, when there are cotrustees, they may exercise their powers only by unanimous action [*Prob. Code § 15620*]. Second, if a vacancy occurs in the office of a cotrustee, the remaining cotrustee or cotrustees may act for the trust as if they were the only trustees [*Prob. Code § 15621*]. Third, if a cotrustee is unavailable to perform the duties of the cotrustee because of absence, illness, or other temporary incapacity, the remaining cotrustee or cotrustees may act for the trust when necessary to accomplish the purposes of the trust or to avoid irreparable injury to the trust property as if they were the only trustees [*Prob. Code § 15622*]. However, these rules may be varied by provisions in the trust instrument and, by their terms, apply only when the trust instrument does not provide otherwise [*Prob. Code §§ 15620-15622*].

**[ii] Selection**

If cotrustees are appointed, the testator should select trustees who will work together smoothly and efficiently, since the court may remove one or all of the cotrustees whenever it determines that hostility or lack of cooperation among the cotrustees impairs the administration of the trust [*Prob. Code § 15642(b)(3)*].

A trust company or other qualifying corporation may be one of the cotrustees. When a corporation and an individual are cotrustees, however, the corporation will usually insist that it have custody of all money, securities, and personal property, keep all records and accounts, and make all payments and distributions.

### **[iii] Settlor's Objectives**

Although the settlor's power to appoint cotrustees is unquestioned, the appointment of cotrustees may not be the most practical means of achieving the typical settlor's objectives. Although a settlor may hope that cotrustees will bring greater wisdom to the trust administration than would a single trustee, and may reasonably expect that one cotrustee will serve as a moderating influence on the excesses or failures of another, in practice it is often difficult for cotrustees to work together. Moreover, the appointment of cotrustees will not automatically bring about a division of their duties or responsibilities. For example, if the settlor determines that a trust company should be appointed as trustee because of its stability, safety, office facilities, and experience in the routine duties of trust management, but that a trusted financial advisor should be appointed as cotrustee because of that advisor's investment knowledge and experience, the legal duties of the cotrustees will not be divided according to their respective abilities. The trust company will have as much power to make investment decisions as the financial advisor, and the financial advisor will be equally responsible for the day-to-day administration of the trust. The agreement of both cotrustees will be required for any trust action [*Prob. Code § 15620*] and both will be responsible to a greater or lesser degree for the actions of the other. A cotrustee may be held liable for negligent inattention to duties, even in the absence of any active participation in the misapplication of trust funds or property by a cotrustee [ *Estate of Whitney (1932) 124 Cal. App. 109, 118, 11 P.2d 1107* ; see *Blackmon v. Hale (1970) 1 Cal. 3d 548, 560, 83 Cal. Rptr. 194, 463 P.2d 418* ; see also discussion in § 64A.31[1]].

### **[c] Dividing or Allocating Powers as Alternative to Cotrustees**

Because of the practical difficulties that frequently plague the administration of trusts by cotrustees, a better solution may be to divide or allocate the duties of the trustee by appointing a principal fiduciary (who may be designated the "Principal Trustee") and conferring one or more of the powers of that fiduciary on a third party (who may be designated an "advisor" or a "Special Trustee"). For provisions splitting the duties of cotrustees, see §§ 64A.360-64A.367. For further rules relating to administration of the trust by more than one trustee, see discussion in § 64A.31[1].

## **[2] FORM**

### **Appointment of Cotrustees**

[*First alternative: trust property described*]

I give \_\_\_\_\_ [*describe property transferred in trust, e.g.: the residue of my estate*] to \_\_\_\_\_ [*names of cotrustees*] [, of \_\_\_\_\_ (*residences of designated cotrustees*)], or to the successor trustees named below, in trust, to be held, administered, and distributed in accordance with the following provisions:

[*Or second alternative: trust property not described*]

I appoint \_\_\_\_\_ [*names of cotrustees*] [, of \_\_\_\_\_ (*residences of designated cotrustees*)], as cotrustees of \_\_\_\_\_ [*the trust or all of the trusts*] provided for under this will.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsTrusteesAppointmentEstate, Gift & Trust LawTrustsTrusteesMultiple Trustees



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*24-64A California Legal Forms--Transaction Guide § 64A.203*

**§ 64A.203 Certificate of Independent Review (Prob. Code § 15642(b)(6)(B))**

**[1] Comment**

**[a] Use of Form**

This form is a Certificate of Independent Review. It may be used when the settlor wishes to designate the attorney who drafted the instrument (or any of certain relatives, partners, employees, or cohabitants of that attorney) as the sole trustee of the trust. For a Certificate of Independent Review that may be used when a settlor (or other transferor) wishes to make a donative transfer to a "disqualified person" [*Prob. Code § 21351(b)*], see *Ch. 60A, Gifts, § 60A.240*. For additional discussion of the "disqualified person" rules of *Prob. Code § 21350*, see *Ch. 61, Will Drafting and Complete Will Forms, § 61.15[3]* and *Ch. 60A, Gifts, § 60A.16*.

**[b] Attorney Who Drafted Trust Instrument--Appointment as Trustee**

The settlor may wish to designate the attorney who prepares the trust instrument as trustee of the trust. If the settlor is related to the attorney by blood or marriage, or if the settlor is a cohabitant of the attorney, there is no reason why the attorney cannot properly act as trustee [*Prob. Code § 15642(b)(6)(A)*]. Similarly, it is perfectly proper for the attorney to act as trustee if there are to be two or more cotrustees, and the attorney is merely to serve as one of the cotrustees [*see Prob. Code § 15642(b)(6)*]. In other cases, however, the attorney could be subject to removal as trustee if the attorney is the sole trustee and if one of the beneficiaries requests removal [*Prob. Code § 15642(b)(6)*].

**[c] Removal When Serving As Sole Trustee**

A sole trustee is subject to removal as trustee if the trust instrument became irrevocable after January 1, 1994, and if the sole trustee is any of the following [*Prob. Code §§ 15642(b)(6), 21350(a)*]:

- The person who drafted the instrument.
- A person who is related by blood or marriage to, is a domestic partner of, or is a cohabitant with or

employee of the person who drafted the instrument.

- Any partner or shareholder of any law partnership or law corporation in which the person who drafted the instrument has an ownership interest, and any employee of any such law partnership or law corporation.
- Any person who has a fiduciary relationship with the transferor, including a conservator or trustee, who transcribes the instrument or causes it to be transcribed.
- A person who is related by blood or marriage to, is a domestic partner of, or is a cohabitant with or employee of a person described in the fourth category immediately above.
- A care custodian of a dependent adult. For discussion of the definitions of the terms "care custodian" and "dependent adult," see § 64A.37[2].
- A person who is related by blood or marriage to, is a domestic partner of, or is a cohabitant with or an employee of a care custodian.

For purposes of this rule, a "person who is related by blood or marriage" to a person means all of the following [*Prob. Code § 21350(b)*]:

- The person's spouse or predeceased spouse.
- Relatives within the third degree of the person and the person's spouse.
- The spouse of any person who is described in the second category immediately above.

In determining relationships for purposes of this rule, *Prob. Code § 6406*, which governs the inheritance rights of relatives of the half blood, *Prob. Code § 6407*, which covers the inheritance rights of afterborn heirs, and *Prob. Code §§ 6450-6455*, which prescribe rules for determining the relationship of parent and child for purposes of intestate succession, are all applicable [*Prob. Code § 21350(b)*].

#### **[d] Exceptions to Removal Rule**

The Probate Code sets forth explicit exceptions to this general rule of removal. For example, the trustee will not be subject to removal if, after full disclosures of the relationships of the persons involved, the court approves the instrument [*Prob. Code § 15642(b)(6)(C)*], or if, after the trustee begins to serve, the court finds that it is consistent with the settlor's intent that the trustee continue to serve and that this intent was not the product of fraud, menace, duress, or undue influence [*Prob. Code § 15642(b)(6), (c)*]. For further discussion of these exceptions, see § 64A.37[2].

The trustee will also be shielded from removal if the trust instrument is reviewed by an independent attorney who counsels the settlor about the nature of the intended trustee designation and signs and delivers to the settlor and the designated trustee a certificate in substantially the form required by *Prob. Code § 15642(b)(6)(B)*. This form is the required certificate and is taken verbatim from the form that appears in *Prob. Code § 15642(b)(6)*.

#### **[e] Independent Review and Certification**

The attorney who counsels the client and signs the certificate must be independent of the attorney who drafts the trust instrument and whom the client wishes to designate as trustee [*Prob. Code § 15642(b)(6)(B)*]. The independent attorney must be able to advise the settlor impartially and confidentially as to the consequences of designating the first attorney

as trustee [*Prob. Code § 15642(b)(6)(B)*].

The independent review and certification may occur before or after the trust instrument has been executed [*Prob. Code § 15642(b)(6)(B)*]. If the written agreement between the independent attorney and the client expressly limits the independent attorney's services to the preparation of a certificate under *Prob. Code § 15642(b)(6)*, including counseling the client before the certificate is prepared, the independent attorney will not be deemed to represent the client for any other purpose [*Prob. Code § 15642(b)(6)(B)*].

**[2] FORM**

**Certificate of Independent Review (Prob. Code § 15642(b)(6)(B))**

CERTIFICATE OF INDEPENDENT REVIEW

I, \_\_\_\_\_ [*name of attorney*], have reviewed \_\_\_\_\_ [*name of instrument*] and counseled my client, \_\_\_\_\_ [*name of client*], fully and privately on the nature and legal effect of the designation as trustee of \_\_\_\_\_ [*name of trustee*] contained in such instrument. I am so disassociated from the interest of the person named as trustee as to be in a position to advise my client impartially and confidentially as to the consequences of the designation. On the basis of this counsel, I conclude that the designation of a person who would otherwise be subject to removal under *Probate Code Section 15642(b)(6)* is clearly the settlor's intent and such intent is not the product of fraud, menace, duress, or undue influence.

\_\_\_\_\_  
(Name of Attorney).....(Date)

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Estate, Gift & Trust LawTrustsTrusteesGeneral OverviewEstate, Gift & Trust LawTrustsTrusteesAppointment



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DIVISION IV: WILLS AND TRUSTS  
CHAPTER 64A TESTAMENTARY TRUSTS: TRUSTEE PROVISIONS  
PART IV. FORMS  
A. Appointment of Trustee

*24-64A California Legal Forms--Transaction Guide §§ 64A.204-64A.219*

**[Reserved]**

§§ 64A.204[Reserved]



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DIVISION IV: WILLS AND TRUSTS  
CHAPTER 64A TESTAMENTARY TRUSTS: TRUSTEE PROVISIONS  
PART IV. FORMS  
B. General Administrative Powers of Trustee

*24-64A California Legal Forms--Transaction Guide § 64A.220*

**§ 64A.220 General Administrative Powers of Trustee--Short Form**

**[1] Comment**

**[a] Use of Form**

This provision may be used to grant general administrative powers to the trustee. It is intended for use in simple trusts in which more lengthy statements of the trustee's administrative powers are not necessary. It is not intended for trusts that hold substantial assets, trusts that are expected to continue for extended periods (i.e., more than 15 or 20 years), trusts that include businesses or farms, trusts that have trust companies as trustees or cotrustees, or marital deduction trusts.

If the trust estate is large, or if it is expected that the trust will continue over an extended period of time, the drafter should adopt the more comprehensive statements of administrative powers contained in either § 64A.221 (granting the trustee broad and extensive powers suitable for large or complex trusts) or § 64A.222 (granting the trustee all of the statutory powers). If the trust is a marital deduction trust, the provisions of the *form in Ch. 61, Will Drafting and Complete Will Forms*, § 61.212, P 7 (married person's will with marital deduction trust) should be used.

For a provision conferring "sole," "absolute," or "uncontrolled" discretion on the trustee, see § 64A.340. For alternate and optional powers for retention of assets, see §§ 64A.240-64A.242. For alternate and optional investment powers, see §§ 64A.260-64A.268. For alternate and optional business powers, see §§ 64A.280-64A.282. For alternate and optional powers of sale, lease, and exchange, see § 64A.300. For alternate and optional powers for the employment of agents, advisors, and attorneys, see § 64A.320.

**[b] Powers of Trustee**

**[i] In General**

The Trust Law confers a broad range of powers on trustees. These powers are automatic in the sense that they may be exercised without court authorization unless they are limited by the trust instrument [*Prob. Code § 16200(b)*]. In addition to the explicit powers conferred by statute [*see Prob. Code § 16200(b)*; *see also Prob. Code §§ 16220-16249*]

(statutory powers of trustees)], every trustee has the power to perform any act that a trustee would perform for the purposes of the trust under the prudent person and prudent investor rules [*Prob. Code* § 16200(c); see *Prob. Code* §§ 16040(a) (prudent person rule), 16047 (prudent investor rule)]. For discussion of these rules, see §§ 64A.39[7], 64A.40[3]. For a detailed discussion of the prudent investor rule, see § 64A.260[1].

The grant of a power to a trustee, whether by the trust instrument, by statute, or by the court, does not in itself require or permit the exercise of the power [*Prob. Code* § 16202]. In all cases, the exercise of a power by a trustee, notwithstanding any grant of power, is broadly subject to the trustee's fiduciary duties [*Prob. Code* § 16202; see discussions § 64A.39[7], [8]], and the court retains discretion in appropriate cases to relieve a trustee from restrictions on the exercise of the trustee's powers set forth in the trust instrument [*Prob. Code* § 16201; see discussion in § 64A.220[1][c]].

### **[ii] Drafting Considerations**

Strictly speaking, it is not necessary to include all of the powers set forth in this form, since they are also conferred by statute [see § 64A.40[1]]. It is generally good practice, however, to spell out the trustee's powers in full. If the trustee's powers are specified in the will, the trustee will understand them clearly and the beneficiaries will know what to expect from the trustee. In addition, third parties dealing with the trustee will be more readily satisfied as to the trustee's authority, and the expense, inconvenience, and delay occasioned by court proceedings may be reduced or eliminated. The authority of the settlor to vary the powers of the trustee by provisions in the trust instrument is clearly recognized in the Trust Law [see *Prob. Code* §§ 16000, 16040(b), 16046(b), 16200(b)].

### **[iii] Retention of Assets**

Except as limited in the trust instrument [*Prob. Code* § 16200(b)], the trustee has power to collect, hold, and retain trust property received from a settlor or any other person until, in the judgment of the trustee, disposition of the property should be made [*Prob. Code* § 16220]. The property may be retained even though it includes property in which the trustee is personally interested [*Prob. Code* § 16220].

### **[iv] Investment and Management**

The investment and management powers of the trustee are governed by the prudent investor rule, which is set forth in the Uniform Prudent Investor Act [*Prob. Code* §§ 16045-16054]. Unless the settlor expands or restricts the rule by express provisions in the trust instrument, every trustee who invests and manages trusts assets owes a duty to the beneficiaries to comply with the prudent investor rule [*Prob. Code* § 16046(a), (b)]. If the trust instrument includes express provisions expanding or restricting the rule, the trustee is entitled to rely on those provisions cannot be held liable to any beneficiary for doing so in good faith [*Prob. Code* § 16046(b)].

The prudent investor rule requires the trustee to invest and manage the trust assets as a prudent investor would, by considering the purposes, terms, distributions requirements, and other circumstances of the trust [*Prob. Code* § 16047(a)]. In satisfying this standard, the trustee is required to exercise reasonable care, skill, and caution [*Prob. Code* § 16047(a)]. For general discussion of the prudent investor rule and the Uniform Prudent Investor Act, see § 64A.40[3]; see also § 64A.260[1].

Paragraph 2 of this form contains a "short form" statement of the prudent investor rule that is very similar to that appearing in § 64A.261. For a longer form of the prudent investor rule, setting forth the key provisions of the rule as specified by statute, see § 64A.260. Provisions modifying the rule are contained in §§ 64A.262 through 64A.268.

### **[v] Sales, Exchanges, Leases, Encumbrances, and Options**

Under the Trust Law, the trustee has broad powers to sell, exchange, and lease trust property.

First, the trustee's power to hold trust property [*see Prob. Code § 16220; see also* discussion § 64A.220[1][b][iii]] is subject to the broad qualification that the property may be disposed of when, in the trustee's judgment, disposition would be proper [*Prob. Code § 16220*]. Second, the trustee has explicit statutory authority to dispose of trust property in a variety of ways. The trustee may acquire or dispose of property, for cash or on credit, at public or private sale, or by exchange [*Prob. Code § 16226*]; manage, control, divide, develop, improve, exchange, partition, change the character of, or abandon trust property or any interest in trust property [*Prob. Code § 16227*]; encumber, mortgage, or pledge trust property for a term within or extending beyond the term of the trust [*Prob. Code § 16228*]; demolish any improvements [*Prob. Code § 16229(b)*] and raze existing party walls or buildings [*Prob. Code § 16229(c)*] on trust property; subdivide or develop land belonging to the trust estate [*Prob. Code § 16230(a)*]; enter into leases for any purpose as lessor or lessee with or without the option to purchase or renew and for a term within or extending beyond the term of the trust [*Prob. Code § 16231*]; and grant options involving disposition of trust property, or take options for the acquisition of any property [*Prob. Code § 16233*].

#### **[vi] Claims and Litigation**

Unless the trust instrument provides otherwise [*Prob. Code § 16200(b)*], the trustee has the statutory power to prosecute or defend actions, claims, or proceedings for the protection of trust property and for the protection of the trustee in the performance of the trustee's duties [*Prob. Code § 16249*] and to pay, contest, settle, or release any claim by or against the trust, in whole or in part [*Prob. Code § 16242*]. Conversely, the trustee has a duty to take reasonable steps to enforce claims that are part of the trust property [*Prob. Code § 16010*] and to defend actions that may result in a loss to the trust [*Prob. Code § 16011*].

Although the trustee is not required to expend money in pursuit of uncollectible claims [*see* Nossaman & Wyatt, *Trust Administration and Taxation*, § 28.16 (Matthew Bender)], if a claim in favor of the trust is settled for less than the amount due, the trustee may be required to show that more could not have been obtained [ *Purdy v. Johnson (1917) 174 Cal. 521, 528, 163 P. 893* ]. The trustee may properly submit claims against the estate to arbitration [*Restatement (2d) of Trusts*, §§ 178, 192] but must, in appropriate circumstances, take necessary action to collect moneys that are due the trust estate [ *Purdy v. Johnson (1917) 174 Cal. 521, 528, 163 P. 893* ]. If litigation is necessary to protect the trust or preserve trust property, it is both the right and the duty of the trustee to employ counsel to prosecute or defend the litigation, and the trustee is entitled to reimbursement out of trust funds for expenses incurred [ *Metzenbaum v. Metzenbaum (1953) 115 Cal. App. 2d 395, 399, 252 P.2d 31* ].

In adjusting claims or commencing or defending litigation, the trustee is subject to the prudent person rule [*Prob. Code § 16040; see Prob. Code § 16202* (exercise of trustee's power subject to fiduciary duties); *see also* discussion § 64A.39[7]].

#### **[vii] Borrowing and Lending**

Unless the trust instrument provides otherwise, the trustee has the power to borrow money for any trust purpose to be repaid from trust property [*Prob. Code § 16241*]. As a complement of the power to borrow, the trustee also has the power to encumber, mortgage, or pledge trust property for a term within or extending beyond the term of the trust in connection with the exercise of any power vested in the trustee [*Prob. Code § 16228*].

The trustee has the additional power to make loans of trust property to the beneficiary on terms and conditions that the trustee determines are fair and reasonable under the circumstances and to guarantee loans to the beneficiary by encumbrances on trust property [*Prob. Code § 16244*]. Like other statutory powers, the power to lend money to the beneficiary may be limited (or forbidden) by explicit terms of the trust instrument [*Prob. Code § 16200(b)*].

#### **[viii] Division and Distribution**

Wills often provide for the establishment of multiple trusts (for example, when an equal share of the trust estate is to be held for each of several children). A will may also provide for a partial distribution (e.g., one fourth of the trust estate) when a beneficiary reaches a specified age, or it may call for distribution in fractional shares to multiple beneficiaries. In these cases, the trustee must divide the trust estate. If the estate consists entirely of cash, the division will present no problem. If it consists of real property, stocks, bonds, business interests, or intangibles, the division will present greater difficulty unless the trustee has power to make distributions in divided interests and to adjust resulting differences in valuation.

The Trust Law addresses this problem by empowering the trustee to effect distribution of property and money in divided or undivided interests and to adjust resulting differences in valuation [*Prob. Code § 16246*]. In making any distribution pursuant to this power, the trustee has the power to make a distribution in kind pro rata or non-pro rata [*Prob. Code § 16246*]. Like other statutory powers set forth in the Trust Law, the power to make distributions in divided or undivided instruments may be modified (or denied) by the trust instrument [*Prob. Code § 16200(b)*].

### **[c] Judicial Relief From Restrictions on Powers**

The court has power to permit (or even direct) the trustee to deviate from terms of the trust instrument in appropriate circumstances [*see Prob. Code § 16201* (power of court to relieve trustee from restrictions unaffected); see also "Recommendation Proposing the Trust Law," 18 Cal. L. Revision Comm'n Reports 501, 680 (1986)]. Deviation generally will be permitted if circumstances not known to or anticipated by the settlor would defeat or substantially impair the accomplishment of the purposes of the trust [*Restatement (2d) of Trusts, § 167(1)*]. In such a case, the court may direct or permit the trustee to do acts not authorized (or even forbidden) by the trust instrument if necessary to carry out the purposes of the trust [*Restatement (2d) of Trusts, § 167(1)*].

The deviation doctrine is analogous to the cy pres doctrine applicable to charitable trusts [ *Stanton v. Wells Fargo Bank etc. Co. (1957) 150 Cal. App. 2d 763, 770, 310 P.2d 1010* ; see discussion in *Ch. 69, Charitable Dispositions, § 69.12*], though independent of it [ *Estate of Loring (1946) 29 Cal. 2d 423, 436-437, 175 P.2d 524* ]. In permitting a deviation, the court authorizes the trustee to do what the testator would have done had the testator anticipated the changed conditions [*see Adams v. Cook (1940) 15 Cal. 2d 352, 358-361, 101 P.2d 484* ]. Thus the testator's specific intent is disregarded in order to enforce the testator's general intent [ *Estate of Mabury (1976) 54 Cal. App. 3d 969, 984-985, 127 Cal. Rptr. 233* ].

## **[2] FORM**

### **General Administrative Powers of Trustee--Short Form**

To carry out the purposes of any trust or trusts provided for in this will, and subject to any limitations stated elsewhere in this will, the Trustee(s) shall have, in addition to all the powers now or hereafter conferred on trustees by law, the following powers:

#### **Retention of Assets**

1. To continue to hold any property and to operate at the risk of the trust estate any business that the Trustee receives or acquires under this trust for as long as the Trustee in the Trustee's judgment deems advisable.

#### **Investment and Management of Trust Property**

2. To invest, reinvest, purchase, acquire, exchange, sell, and manage trust property in accordance with the prudent investor rule and the Uniform Prudent Investor Act, as set forth in *California Probate Code Sections 16045-16054* or any successor sections.

### **Sales**

3. To sell (for cash or on deferred payments, with or without security), convey, exchange, partition, divide and grant options on trust property.

### **Leases and Mineral Rights**

4. To lease trust property for terms within or beyond the term of the trust and for any purpose, including, but not limited to, the exploration and removal of oil, gas, and other minerals, and to enter into community leases and pooling and unitization agreements.

### **Claims and Litigation**

5. To adjust, settle, compromise, submit to arbitration, or abandon any claims in favor of or against the trust and, at the expense of the trust, to institute, compromise, and defend actions and proceedings.

### **Borrowing**

6. To borrow money, and to hypothecate or encumber trust property by mortgage, deed of trust, or otherwise, to secure the indebtedness of the trust or the joint indebtedness of the trust and any co-owner of trust property.

### **Division and Distribution**

7. On any division or distribution of the trust estate, to make the division or distribution in identical interests, in kind, or partly in kind and partly in money, pro rata, or non-pro rata, or in undivided interests, and for this purpose to sell trust property on the terms and conditions that the Trustee in the Trustee's discretion shall determine.

### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsTrusteesDuties & PowersGeneral OverviewEstate, Gift & Trust LawTrustsTrusteesDuties & PowersCompensationEstate, Gift & Trust LawTrustsTrusteesDuties & PowersLimitationsEstate, Gift & Trust LawTrustsTrusteesDuties & PowersSalesEstate, Gift & Trust LawTrustsTrusteesDuties & PowersStandards of Care



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DIVISION IV: WILLS AND TRUSTS  
CHAPTER 64A TESTAMENTARY TRUSTS: TRUSTEE PROVISIONS  
PART IV. FORMS  
B. General Administrative Powers of Trustee

*24-64A California Legal Forms--Transaction Guide § 64A.221*

**§ 64A.221 General Administrative Powers of Trustee--Long Form**

**[1] Comment**

**[a] Use of Form**

This provision may be used to confer broad administrative powers on the trustees of large or complex trusts. When used, the form will afford a wide measure of protection for the beneficiaries and allow the trustee discretion to deal with most situations that may be expected to arise in the course of trust administration. The form is designed for use in connection with: (1) trusts that have large total assets, (2) trusts that are expected to continue for more than 15 or 20 years, (3) trusts that have substantial real estate holdings (e.g., an apartment house or similar rental property), (4) trusts that include a business or farm, or (5) trusts that have a corporate trustee or cotrustees.

The provisions of this form are not appropriate for use in every large testamentary trust. They should not be used in a marital deduction trust, for example [for provisions establishing a marital deduction trust, *see Ch. 61, Will Drafting and Complete Will Forms, § 61.212*]. They should not be used if the trustee is a beneficiary of the trust [*see discussion in § 64A.32[1]*]. In other trusts, the appropriateness of each provision of the form should be considered by the attorney before that provision is included in the will.

For drafting considerations relating to provisions of this form not specifically discussed in this comment, see the comments to the following related forms:

- See § 64A.220[1] for discussion of the power to borrow and lend, to deal with claims against and in favor of the trust estate, and to sell, lease, exchange, manage, and encumber trust assets.
- See § 64A.240[1] for discussion of the power to retain trust assets.
- See § 64A.260[1] for discussion of investment powers.
- See § 64A.280[1] for discussion of powers relating to business interests.

- See § 64A.300[1] for discussion of the power to sell, lease, and exchange trust assets.

### **[b] Discretion of Trustee**

The discretion conferred on the trustee in this form is "simple" or "ordinary," not "absolute," "sole," or "uncontrolled." When administering the trust, a trustee with "simple" or "ordinary" discretion must act in accordance with the prudent-person rule of *Prob. Code § 16040* [*Prob. Code § 16040(b)*; see in § 64A.39[7]] in all matters other than investment and management functions (which are governed by the "prudent investor rule") [*Prob. Code § 16040(c)*; see in § 64A.221[1][d]], whereas a trustee with "absolute," "sole," or "uncontrolled" discretion need not [ *American Center for Education, Inc., v. Cavnar* (1978) 80 Cal. App. 3d 476, 497, 145 Cal. Rptr. 736, superseded by statute as stated in *Patton v. Sherwood*, 152 Cal. App. 4th 339, 152 Cal. App. 4th 339, 61 Cal. Rptr. 3d 289]. However, a trustee with "absolute," "sole," or "uncontrolled" discretion must conform to fiduciary principles and may not act in bad faith or in disregard of the purposes of the trust [*Prob. Code § 16081(a)*]. For a provision conferring "sole," "absolute," or "uncontrolled" discretion on the trustee, see § 64A.340.

### **[c] Management of Securities**

Unless the trust instrument provides otherwise [*Prob. Code § 16200(a)*], a trustee has power to exercise any voting rights with respect to shares of stock or memberships in any corporation, to waive notices of meetings or give consents to the holding of meetings, and to authorize, ratify, approve, or confirm any action that could be taken by shareholders, members, or property owners [*Prob. Code § 16234*]. Shares standing in the name of a trustee may be voted by the trustee, either in person or by proxy, but not unless the shares are transferred into the trustee's name [*Corp. Code § 702(a)*]. In exercising rights relating to shares of stock held in trust, the trustee is subject, as in other investments, to the prudent investor rule of *Prob. Code §§ 16045-16054* [see *Prob. Code § 16202* (exercise of trustee's powers subject to fiduciary duties)].

When there are cotrustees with power to exercise voting rights with respect to shares of stock, the question arises as to what constitutes a binding vote among them. *Prob. Code § 15620* states the general rule that, unless otherwise provided in the trust instrument, cotrustees may exercise their powers by unanimous actions only. However, *Corp. Code § 704*, governing the voting of shares when two or more persons have the same fiduciary relationship respecting the same shares, provides that the act of the majority of the cotrustees is binding. The more specific majority-vote statute, *Corp. Code § 704*, controls over the general unanimity rule stated in *Prob. Code § 15620* [ *Edwards v. Edwards* (1998) 61 Cal. App. 4th 599 ]. The majority voting rule can be overcome if the secretary of the corporation is given written notice to the contrary and is furnished with a copy of the trust instrument appointing the fiduciaries and providing for unanimous vote [see *Corp. Code § 704*]. However, to constitute notice to the contrary, the requirement of unanimity in the voting of shares must be expressly stated in the trust instrument [see *Edwards v. Edwards* (1998) 61 Cal. App. 4th 599, 603-604 ].

For optional provisions for dividing or allocating powers of cotrustees, see §§ 64A.360-64A.367.

Unless the trust instrument provides otherwise, if a trust company is trustee or cotrustee, it may (with the consents of its cotrustees, if any) hold stock or other securities in the name of a nominee or nominees [*Fin. Code § 1563*]. If a trust company is acting as depositary or custodian for another trustee, it may, with the consent of the other trustee, hold the stock in the name of a nominee or nominees, but the trust company will in any event be liable for any loss occasioned by the acts of the nominee with respect to the stock or other securities so registered [*Fin. Code § 1563*].

### **[d] Investment and Management of Trust Assets; Retention of Unproductive Property**

The investment and management powers of the trustee ordinarily are governed by the prudent investor rule, which is set

forth in the Uniform Prudent Investor Act [*Prob. Code §§ 16045-16054*]. Unless the settlor expands or restricts the rule by express provisions in the trust instrument, every trustee who invests and manages trusts assets owes a duty to the beneficiaries to comply with the prudent investor rule [*Prob. Code § 16046(a), (b)*]. If the trust instrument includes express provisions expanding or restricting the rule, the trustee is entitled to rely on those provisions cannot be held liable to any beneficiary for doing so in good faith [*Prob. Code § 16046(b)*].

The prudent investor rule requires the trustee to invest and manage the trust assets as a prudent investor would, by considering the purposes, terms, distributions requirements, and other circumstances of the trust [*Prob. Code § 16047(a)*]. In satisfying this standard, the trustee is required to exercise reasonable care, skill, and caution [*Prob. Code § 16047(a)*]. For general discussion of the prudent investor rule and the Uniform Prudent Investor Act, see § 64A.40[3]; see also § 64A.260[1].

Paragraph 2 of this form confers very broad investment powers on the trustee. These powers are broader than those conferred by the Uniform Prudent Investor Act and other provisions of the Trust Law. Among other things, the statement of powers in this form waives the requirement of diversification [*see Prob. Code § 16048*] and permits the trustee to retain unproductive property [*see Prob. Code § 16007*]. Although such powers can be helpful by providing added flexibility to the trustee, they can also be more dangerous because they increase the potential financial risks to the trust. Accordingly, these provisions should be included only after careful consideration. If the trust drafter would prefer that the standard of the Uniform Prudent Investor Act be substituted, § 64A.260 (prudent investor rule--long form) or § 64A.261 (prudent investor rule--short form) may be substituted for Paragraph 2 if desired.

The Trust Law provides that the trustee has a duty to make the trust property productive "under the circumstances and in furtherance of the purpose of the trust" [*Prob. Code § 16007; see Restatement (Second) of Trusts, § 181*]. Under some circumstances, however, the retention and/or purchase of unproductive assets may benefit the trust estate and the beneficiaries [*see discussion in § 64A.241[1][b]*]. By authorizing (but not requiring) the trustee to acquire or to retain unproductive property, this form affords the trustee an added measure of investment flexibility. If used in a marital deduction trust, however, the provision will be qualified by the statutory rule that the income beneficiary may require the trustee to make any unproductive property productive or to convert it into productive property within a reasonable time [*Prob. Code § 1035(d); see Treas. Reg. § 20.2056(b)-5(f)(4)*]. A provision authorizing retention of unproductive property should not be used if a beneficiary of the trust will also be a trustee or cotrustee [*see discussion in § 64A.32[1] et seq.*].

#### **[e] Trustee's Dealings With Trust**

The trustee has a duty not to use or deal with trust property for the trustee's own profit or for any other purpose unconnected with the trust [*Prob. Code § 16004(a)*]. Similarly, the trustee is prohibited from taking part in any transaction in which the trustee has an interest adverse to the beneficiary [*Prob. Code § 16004(a)*]. The trustee may not enforce any claim against the trust property that the trustee purchased after or in contemplation of appointment as trustee, but the court may allow the trustee to be reimbursed from trust property the amount that the trustee paid in good faith for the claim [*Prob. Code § 16004(b)*]. A transaction between the trustee and a beneficiary that occurs during the existence of the trust or while the trustee's influence with the beneficiary remains and by which the trustee obtains an advantage from the beneficiary is presumed to be a violation of the trustee's fiduciary duties [*Prob. Code § 16004(c)*]. This presumption is a presumption affecting the burden of proof [*Prob. Code § 16004(c); see Evid. Code §§ 605, 606* (presumptions affecting burden of proof)]. However, a trustee may properly retain trust property received from a settlor or any other person, even though it includes property in which the trustee is personally interested [*Prob. Code § 16220*]. Further, the provision of services for compensation by a regulated financial institution or its affiliates in the ordinary course of business either to a trust of which it also acts as trustee or to a person dealing with the trust does not violate the trustee's duties to the beneficiaries [*Prob. Code § 16015*].

The statutory rules against self-dealing and conflicts of interest, like other statutory rules dealing with the trust and

trustees, may be varied by provisions of the trust instrument [*Prob. Code* §§ 16000, 16200(b)]. It has been suggested that a provision in the trust instrument empowering the trustee to lend money to the trust and to buy or sell trust assets may negate the broad statutory prohibitions [*see* Nossaman & Wyatt, *Trust Administration and Taxation* (Rev. 2d ed., § 27.16, (Matthew Bender)); *see also* *Restatement (2d) of Trusts*, § 170, Comment t], although there appears to be no direct California authority to that effect.

### **[f] Insurance**

It is the duty of the trustee to take reasonable steps under the circumstances to keep control of and preserve the trust property [*Prob. Code* § 16006; *see Restatement (2d) of Trusts*, §§ 175, 176]. This general duty includes the more particular duty to take reasonable steps to obtain such insurance as is customarily taken by prudent persons [*Restatement (2d) of Trusts*, § 176, Comment b(2)]. This insurance will typically include fire insurance, but in appropriate circumstances it also includes liability insurance and insurance against loss of income [*see* Nossaman & Wyatt, *Trust Administration and Taxation* (Rev. 2d ed.), § 27.01(3) (Matthew Bender)].

### **[g] Employment of Advisers, Attorneys, and Agents**

The Trust Law gives the trustee the general power to hire persons to advise or assist the trustee in the performance of the trustee's administrative duties. These persons specifically may include, but are not limited to, accountants, attorneys, auditors, investment advisers, appraisers (including probate referees appointed under *Probate Code Section 400*) [*Prob. Code* § 16247]. The trustee may employ agents and advisers who are associated or affiliated with the trustee [*Prob. Code* § 16247].

However, the law imposes limitations on the extent to which the trustee may delegate the trustee's duties and responsibilities to others. In matters other than investment and management functions (which are covered by special rules discussed below) [*see Prob. Code* § 16012(c)], the trustee has a general duty not to delegate to others the performance of acts that the trustee can reasonably be required to perform personally [*Prob. Code* § 16012(a); *see Restatement (2d) of Trusts*, § 171]. Similarly, the trustee may not transfer the office of trustee to another person, nor delegate the entire administration of the trust to a cotrustee or other person [*Prob. Code* § 16012(a)]. One California court has interpreted this rule to require the trustee to perform those duties that an average business person, dealing with his or her own property, but with motives similar to those of the settlor, would consider important enough to perform personally [ *Powers v. Ashton* (1975) 45 Cal. App. 3d 783, 789, 119 Cal. Rptr. 729]. The trustee also has a duty to apply the full extent of the trustee's skills [*Prob. Code* § 16014(a)] and, if the settlor in selecting the trustee has relied on the trustee's representation that it has special skills, the trustee is held to the standard of the skills represented [*Prob. Code* § 16014(b)]. When a trustee has properly delegated a matter to an agent, cotrustee, or other person, the trustee has a duty to exercise general supervision over the person performing the delegated matter [*Prob. Code* § 16012(b)].

Special rules apply to the delegation of investment and management functions of the trust [*see Prob. Code* § 16012(c) (general rule inapplicable)]. Under the Uniform Prudent Investor Act [*see Prob. Code* §§ 16045-16054 and discussion in § 64A.260[1]], a trustee may delegate investment and management functions as prudent under the circumstances [*Prob. Code* § 16052(a)]. However, the trustee must exercise prudence in selecting an agent, establishing the scope and terms of the delegation, and periodically reviewing the agent's overall performance [*Prob. Code* § 16052(a)(1)-(3)].

For further discussion of rules relating to agents, advisers, and attorneys, see § 64A.320[1]. For a broad provision empowering the trustee to employ agents, attorneys, and advisers, see § 64A.320.

## **[2] FORM**

### **General Administrative Powers of Trustee--Long Form**

To carry out the purposes of any trust or trusts provided for in this will, and subject to any limitations stated elsewhere

in this will, the Trustee shall have, in addition to all the powers now or hereafter conferred on trustees by law, the following powers:

### **Retention of Assets**

*[For alternative and optional provisions, see §§ 64A.240-64A.242.]*

1. To continue to hold any property received into the trust at its inception or subsequently added to it or acquired pursuant to proper authority, if and as long as the trustee, in the exercise of good faith and of reasonable prudence, discretion and intelligence, may consider that retention is in the best interests of the trust or in furtherance of the goals of the trust as determined from this will; such property may include stock in the Trustee, if a corporation, and stock in any corporation controlling, controlled by, or under common control with the Trustee.

### **Investments**

*[For alternative investment powers, see §§ 64A.260-64A.268.]*

2. To invest and reinvest in every kind of property, real, personal, or mixed, and every kind of investment, specifically including (but not by way of limitation) corporate obligations of every kind, common and preferred stocks (including stock in the trustee, if a corporation), shares of investment trusts and investment companies, bonds, debentures, options, financial futures contracts, commodities futures contracts, forward and leverage contracts, mortgages, deeds of trust, and notes; to retain (in the form in which received or in the form to which it may be changed by reorganization, split-up, stock dividend, or otherwise) any securities or other property the trustee may at any time acquire under this trust; and to purchase or otherwise acquire and to retain, for as long as the Trustee in the Trustee's discretion deems advisable, unproductive property; it being my intention that the trustee shall have full power to invest and reinvest all or any part of the trust estate or funds, without restriction as to the kind or form of investment otherwise permitted or required by law, and without any requirement as to diversification.

### **Management of Securities**

3. To exercise, respecting securities held in the trust estate, all the rights, powers, and privileges of an owner, including, but not limited to, the power to vote, give proxies, and to pay assessments and other sums deemed by the trustee necessary for the protection of the trust estate; to participate in voting trusts, pooling agreements, foreclosures, reorganizations, consolidations, mergers, and liquidations, and in connection therewith to deposit securities with and transfer title to any protective or other committee under such terms as the trustee may deem advisable; to exercise or sell stock subscription or conversion rights; to accept and retain as an investment any securities or other property received through the exercise of any of the forgoing powers, regardless of any limitations elsewhere in this instrument relative to investments by the trustee.

### **Form of Ownership of Trust Property**

4. To hold securities or other trust property in the name of the trustee as trustee under this trust, in the trustee's [or trustees'] own name, in the name of a nominee, or unregistered in a condition under which ownership will pass by delivery.

**Business Interests**

*[For alternate business powers, see §§ 64A.280-64A.282. For alternate powers for retention of assets, see §§ 64A.240-64A.242.]*

5. To continue to operate, to sell, or to liquidate, as the trustee shall deem advisable, and at the risk of the trust estate, any business or partnership interest received by the trust estate.

**Sales and Exchanges of Property**

*[For alternate powers of sale, lease, and exchange, see § 64A.300.]*

6. To sell, for cash or on deferred payments, at either public or private sale, to exchange, and to convey any property of the trust estate without approval of any court.

**Division of Trust Estate**

7. On any division of the trust estate into separate shares or trusts, to apportion and allocate the assets of the trust estate in cash or in kind, or partly in cash and partly in kind, or in undivided interests, in the manner deemed advisable by the Trustee(s); after any division of the trust estate, to make joint investments with funds from some or all of the several shares or trusts, but to keep separate accounts for each share or trust.

**Abandonment of Trust Assets**

8. To abandon any trust asset or interest therein, in the discretion of the trustee.

**Options**

9. To grant an option involving disposition of a trust asset and to take an option for the acquisition of any asset by the trust estate.

**Leases of Trust Property**

10. To lease any real or personal property of the trust estate, for any purpose, for terms within or extending beyond the duration of the trust.

**Property Management**

11. To manage, control, improve, and repair real and personal property belonging to the trust estate.

**Development of Property**

12. To partition, divide, subdivide, assign, develop, and improve any trust property; to make or obtain the vacation of plats and adjust boundaries, or to adjust differences in valuation on exchange or partition by giving or receiving consideration; and to dedicate land or easements to public use with or without consideration.

**Repair, Alteration, Construction, and Demolition**

13. To make ordinary and extraordinary repairs and alterations in buildings or other trust property; to demolish any improvements, to raze party walls or buildings; and to erect new party walls or buildings, as the trustee deem advisable.

**Borrowing and Encumbering**

14. To borrow money for any trust purpose from any person, firm, or corporation, including one acting as trustee hereunder, on the terms and conditions deemed proper by the trustee, and to obligate the trust estate for repayment; to encumber the trust estate or any of its property by mortgage, deed of trust, pledge, or otherwise, using procedures to consummate the transaction deemed advisable by the trustee; to replace, renew, and extend any encumbrance and to pay loans or other obligations of the trust estate deemed advisable by the trustee.

**Loans by Trustee**

15. To lend or advance the Trustee's own funds for any trust purposes to this trust; the loans or advances to bear interest at the then current rate of interest from the date of loan or advancement until repayment, and the principal and interest to constitute a first lien on the entire trust estate until repayment.

**Mineral Rights**

16. To enter into oil, gas, and other mineral leases, on terms deemed advisable by the trustee; to enter into any pooling, unitization, repressurization, community, or other types of agreements relating to the exploration, development, operation, and conservation of mineral properties; to drill, mine, and otherwise operate for the development of oil, gas, and other minerals; to contract for the installation and operation of absorption and repressuring plants; and to install and maintain pipelines.

**Insurance**

17. To procure and carry, at the expense of the trust estate, insurance of the kinds, forms, and amounts deemed advisable by the trustee to protect the trust estate and the trustee against any hazard.

**Enforcement of Hypothecations**

18. To enforce any deed of trust, mortgage, or pledge held by the trust estate, and to purchase at any sale thereunder any property subject to any such hypothecation.

**Extending Time for Payment of Obligations**

19. To extend the time of payment of any note or other obligation held in the trust estate, including accrued or future interest, in the discretion of the trustee.

**Adjustment of Claims**

20. To compromise, submit to arbitration, release (with or without consideration), or otherwise adjust claims in favor of or against the trust estate.

**Litigation**

21. To commence or defend, at the expense of the trust estate, any litigation affecting the trust or any property of the trust estate, as deemed advisable by the trustee.

**Administration Expenses**

22. To pay all taxes, assessments, and compensation of the trustee, and any other expenses incurred in the collection, care, administration, and protection of the trust estate.

**Employment of Attorneys, Advisers, and Other Agents**

*[For alternate provisions for employment of attorneys and agents, see § 64A.320 ]*

23. To employ any attorney, investment adviser, accountant, broker, tax specialist, or any other agent deemed necessary in the discretion of the trustee; and to pay from the trust estate reasonable compensation for all services performed by any of them.

**Termination of Small Trust**

24. To terminate, in the discretion of the trustee, any separate trust held for an income beneficiary, whenever the fair market value of the separate trust at any time becomes less than \_\_\_\_\_ [*amount, e.g.: \$5,000 or \$10,000*]; and, regardless of the age of the income beneficiary, to distribute the principal and any accrued or undistributed net income to the income beneficiary, or to the income beneficiary's guardian, conservator, or other fiduciary.

**Distribution**

25. On any partial or final distribution of the trust estate, to apportion and allocate the assets of the trust estate in cash or in kind, or partly in cash and partly in kind, or in undivided interests, in the manner deemed advisable by the trustee; and to sell any property deemed necessary by the trustee to make the distribution.

**General**

26. With respect to the trust property, funds, and assets, to do all the acts, take all the proceedings, and exercise all the rights, powers, and privileges which an absolute owner of the same property, funds, and assets would have, subject always to the discharge of the fiduciary obligations of the trust; the enumeration of certain powers in this will shall not limit the general or implied powers of the trustee; the trustee shall have all additional powers that may now or hereafter be conferred by law or that may be necessary to enable the trustee to administer the trust in accordance with the provisions of, and subject to any limitations specified in this will.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsTrusteesDuties & PowersGeneral OverviewEstate, Gift & Trust  
LawTrustsTrusteesDuties & PowersCompensationEstate, Gift & Trust LawTrustsTrusteesDuties &  
PowersLimitationsEstate, Gift & Trust LawTrustsTrusteesDuties & PowersSalesEstate, Gift & Trust  
LawTrustsTrusteesDuties & PowersStandards of Care



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DIVISION IV: WILLS AND TRUSTS  
 CHAPTER 64A TESTAMENTARY TRUSTS: TRUSTEE PROVISIONS  
 PART IV. FORMS  
 B. General Administrative Powers of Trustee

*24-64A California Legal Forms--Transaction Guide § 64A.222*

**§ 64A.222 Provision Conferring All Statutory Powers**

**[1] Comment**

**[a] Use of Form**

This form is a will provision that may be used to give the trustee the specific powers conferred on trustees by *Prob. Code §§ 16220-16249*, plus the general power to perform any act that a trustee would perform for the purposes of the trust under the prudent person and prudent investor rules [*Prob. Code § 16200(c)*; see *Prob. Code §§ 16040(a)* (prudent person rule), 16047 (prudent investor rule)]. Two alternative provisions are set forth. One that sets out the statutory provisions in full and another that specifically refers to the provisions but does not set them out in full.

**[b] Statutory Powers**

The Trust Law includes numerous provisions that confer specific powers on trustees. These powers are subject in all respects to provisions of the trust instrument, which may limit or even prohibit their exercise [*Prob. Code § 16200(b)*].

The Trust Law also gives trustees the power to perform any act that a trustee would perform for the purposes of the trust under the standards of care provided in *Prob. Code § 16040* or *Prob. Code § 16047* [*Prob. Code § 16200(c)*]. *Prob. Code § 16040(a)* states the prudent person rule, under which the trustee is required to administer the trust with the care, skill, and caution under the circumstances then prevailing that a prudent person acting in a like capacity would use in the conduct of an enterprise of like character and with like aims to accomplish the purposes of the trust as determined from the trust instrument. *Prob. Code § 16047* states the prudent investor rule, under which the trustee is required to invest and manage trust assets as a prudent investor would, by considering the purposes, terms, distribution requirements, and other circumstances of the trust. In satisfying the prudent investor rule, the trustee must exercise reasonable care, skill, and caution [*Prob. Code § 16047(a)*].

Unless the trust instrument provides otherwise, the trustee is subject to the prudent person rule in all aspects of trust administration except the management and investment of trust assets [*Prob. Code § 16040(b), (c)*]. The trustee's investment and management duties are subject to the prudent investor rule [*Prob. Code § 16047*].

For discussion of the prudent person rule, see § 64A39[7]. For discussion of the prudent investor rule, see §§ 64A.40[3] and 64A.260[1].

### **[c] Drafting Considerations**

Since the statutory powers are conferred on every trustee unless the trust instrument provides otherwise [*Prob. Code § 16200(b)*], the trust instrument need not repeat or refer to those powers. In spite of this, it will be advantageous in many cases to restate the statutory powers. If the trustee's powers are broad enough to meet and deal with any problems that may arise in the administration of the trust, the trustee will be able to act quickly, efficiently, and flexibly. A specific restatement of the statutory powers (or an incorporation of those powers by reference) will make it clear to the settlor, the trustee, and the beneficiaries that the trustee's powers include all of the powers set forth in the statutes. Third parties dealing with the trust will be more readily satisfied with the trustee's authority to act in its behalf. Further, a specific statement of (or reference to) the statutory powers will avoid any inference that some other provision of the will was intended to modify or limit one or more of the statutory powers. If the testator resides outside California at the time of his or her death, the statement of or reference to the statutory powers may be particularly useful, inasmuch as the law of the state of death (which may otherwise control the administration of the trust estate) may not authorize powers as broad as those contained in the Trust Law.

Broad powers should not, however, be conferred on all trustees. They should be reserved for trustees with sufficient experience, ability, and integrity to exercise them intelligently and responsibly. If the trustee is an individual with little or no business or investment experience, if the loyalties of the trustee may for any reason be subject to compromise, or if conflicts between the trustee and the beneficiaries are anticipated, the drafter should limit the trustee's powers.

### **[d] Derivation of Provisions**

Each of the paragraphs set forth in the first alternative provision of this form derives from a specific statute or statutes. The following table will assist the attorney in identifying the source of each of the paragraphs:

<b>Paragraph</b>	<b>Statute</b>
1.	<b>Prob. Code § 16220</b>
2.	<b>Prob. Code § 16221</b>
3.	<b>Prob. Code § 16222</b>
4.	<b>Prob. Code § 16224</b>
5.	<b>Prob. Code § 16225</b>
6.	<b>Prob. Code § 16226</b>
7.	<b>Prob. Code § 16227</b>
8.	<b>Prob. Code § 16228</b>
9.	<b>Prob. Code § 16229</b>
10.	<b>Prob. Code § 16230</b>
11.	<b>Prob. Code § 16231</b>
12.	<b>Prob. Code § 16232</b>
13.	<b>Prob. Code § 16233</b>
14.	<b>Prob. Code § 16234</b>
15.	<b>Prob. Code § 16235</b>
16.	<b>Prob. Code § 16236</b>

17. **Prob. Code § 16237**
18. **Prob. Code § 16238**
19. **Prob. Code § 16239**
20. **Prob. Code § 16240**
21. **Prob. Code § 16241**
22. **Prob. Code § 16242**
23. **Prob. Code § 16243**
24. **Prob. Code § 16244**
25. **Prob. Code § 16245**
26. **Prob. Code § 16246**
27. **Prob. Code § 16247**
28. **Prob. Code § 16248**
29. **Prob. Code § 16249**
30. **Prob. Code §§ 16040, 16047, 16200(c)**

#### **[e] Tax Considerations**

Tax considerations may, in some cases, require a substantial limitation of the trustee's administrative powers. Excessively broad powers may, under certain circumstances, result in the loss of significant tax benefits. If, for example, the trust is designed to qualify for the federal estate tax marital deduction [*see I.R.C. § 2056*], powers that would permit the trustee to interfere with the surviving spouse's right to trust income by allocating receipts and disbursements between principal and income or by holding overly broad investment powers are potentially dangerous. Under *I.R.C. § 2056(b)(5), (7)(B)(ii)*, the surviving spouse must have the right to all income for life, payable at least annually. If the trustee can interfere with the spouse's right to the income of the trust, then the marital deduction may be lost [*but see Prob. Code § 21522(a)* (if instrument contains marital deduction gift, trustee's powers must be construed to comply with marital deduction provisions of Internal Revenue Code); *see also Ch. 71, Marital Deduction Trust Provisions, § 71.20* (California statutes designed to insure that marital deduction gift will comply with Internal Revenue Code requirements)].

Further, if the trustee is a beneficiary, and if the trustee-beneficiary's powers of administration are so broad as to constitute a general power of appointment over the trust principal, the principal may be included in the estate of the trustee upon the trustee's death. If the will gives the trustee the power to invade the principal of the trust for his or her own benefit, and if the power is not limited by an "ascertainable standard," the trustee may be deemed to hold a general power of appointment over the trust assets [*see I.R.C. § 2041(b)(1)(A)*], with the result that they will be included in the trustee's estate for estate tax purposes [*I.R.C. § 2041(a)*]. However, the mere power of management, investment, custody of assets, or the power to allocate receipts and disbursements as between income and principal, exercisable in a fiduciary capacity, whereby the holder has no power to enlarge or shift any of the beneficial interests except as an incidental consequence of the discharge of fiduciary duties, is not a power of appointment [*Treas. Reg. § 20.2041-1(b)*].

#### **[2] FORM**

##### **Provision Conferring All Statutory Powers**

[*First alternative: powers set forth at length:*]

To carry out the purposes of the trust(s) provided for in this will, and subject to any limitations stated elsewhere in this will, the trustee shall have, in addition to all other powers now or hereafter conferred on trustees by law, the following powers:

### **Collecting and Holding Property**

1. To collect, hold, and retain trust property received at the inception of the trust or thereafter from any other source until, in the judgment of the trustee, disposition of the property should be made. The property may be retained even though it includes property in which the trustee is personally interested.

### **Receiving Additions to Trust**

2. To accept additions to the property of the trust from any source.

### **Participating in Business**

3. To continue or participate in the operation of any business or other enterprise that is part of the trust property for a reasonable time pending a court hearing on the matter and, for that purpose, to effect incorporation, dissolution, or other changes in the form of the organization of the business or enterprise; and, if authorized by the court, to continue the operation of any such business or enterprise thereafter.

### **Investments in Obligations of United States Government**

4. To invest in obligations of the United States government, directly or in the form of an interest in a money market mutual fund registered under the Investment Company Act of 1940 (*15 U.S.C. §§ 80a-1-80a-64*) or an investment vehicle authorized for the collective investment of trust funds pursuant to Title 12, Section 9.18 of the Code of Federal Regulations, the portfolios of which are limited to United States government obligations maturing not later than five years from the date of investment or reinvestment and to repurchase agreements fully collateralized by United States government obligations.

### **Deposits**

5. To deposit trust funds at reasonable interest in any of the following accounts (including accounts in institutions operated by or that are affiliated with the trustee and accounts that are subject to notice or other conditions respecting withdrawal prescribed by law or governmental regulation) to the extent that the account is insured by a government agency or collateralized:

- (a) An account in a bank;
- (b) An account in an insured savings and loan association;
- (c) An account consisting of shares of an insured credit union.

If authorized by the court, the trustee may deposit trust funds in an account described above in an amount greater than the maximum insured or collateralized amount. Nothing in this paragraph shall prevent the trustee from holding an

amount of trust property reasonably necessary for the orderly administration of the trust in the form of cash or in a checking account without interest.

### **Acquisition and Disposition of Property**

6. To acquire or dispose of property, for cash or on credit, at public or private sale, or by exchange.

### **Management of Property**

7. To manage, control, divide, develop, improve, exchange, partition, change the character of, or abandon trust property or any interest therein.

### **Encumbrances**

8. To encumber, mortgage, or pledge trust property for a term within or extending beyond the term of the trust in connection with the exercise of any power vested in the trustee.

### **Repairs and Alterations of Property**

9. To make ordinary or extraordinary repairs, alterations, or improvements in buildings or other trust property; to demolish any improvements; and to raze existing or erect new party walls or buildings.

### **Development of Land**

10. To subdivide or develop land; dedicate land to public use; make or obtain the vacation of plats and adjust boundaries; adjust differences in valuation on exchange or partition by giving or receiving consideration; and dedicate easements to public use without consideration.

### **Leases**

11. To enter into a lease for any purpose as lessor or lessee with or without the option to purchase or renew and for a term within or extending beyond the term of the trust.

### **Mineral Leases**

12. To enter into a lease or arrangement for exploration and removal of gas, oil, or other minerals, and to enter into a community oil lease or a pooling or unitization agreement, and for a term within or extending beyond the term of the trust.

### **Options**

13. To grant an option involving disposition of trust property or take an option for the acquisition of any property, either

of which may be exercisable beyond the term of the trust.

### **Voting Rights**

14. With respect to any shares of stock of a domestic or foreign corporation, any membership in a nonprofit corporation, or any other property, to vote in person and give proxies to exercise any voting rights with respect to the shares, memberships, or property; to waive notice of a meeting or give consent to the holding of a meeting; and to authorize, ratify, approve, or confirm any action that could be taken by shareholders, members, or property owners.

### **Payment of Calls and Assessments**

15. To pay calls, assessments, and any other sums chargeable or accruing against or on account of securities.

### **Stock Subscriptions and Conversions**

16. To sell or exercise stock subscription or conversion rights.

### **Consent to Changes in Form of Business and Voting Trusts**

17. To consent, directly or through a committee or other agent, to the reorganization, consolidation, merger, dissolution, or liquidation of a corporation or other business enterprise, and to participate in voting trusts, pooling arrangements, and foreclosures, and in connection therewith, to deposit securities with and transfer title and delegate discretions to any protective or other committee as the trustee may deem advisable.

### **Holding Securities in Name of Nominee**

18. To hold a security in the name of a nominee or in other form without disclosure of the trust so that title to the security may pass by delivery, but the trustee shall be liable for any act of the nominee in connection with the security so held.

### **Deposit of Securities in Securities Depository**

19. To deposit securities in a securities depository, as defined in *California Financial Code Section 30004*, which is licensed under *Financial Code Section 30200* or is exempt from licensing by *Financial Code Section 30005* or *30006*. The securities may be held by the securities depository in the manner authorized by *Financial Code Section 775*.

### **Insurance**

20. To insure the property of the trust against damage or loss and to insure the trustee against liability with respect to third persons.

### **Borrowing Money**

21. To borrow money for any trust purpose to be repaid from trust property. The lender may include, but is not limited to, a bank holding company, affiliate, or subsidiary of the trustee.

#### **Payment and Settlement of Claims**

22. To pay or contest any claim; to settle a claim by or against the trust by compromise, arbitration, or otherwise; and to release, in whole or in part, any claim belonging to the trust.

#### **Payment of Taxes, Compensation, and Other Expenses**

23. To pay taxes, assessments, reasonable compensation of the trustee and of employees and agents of the trust, and other expenses incurred in the collection, care, administration, and protection of the trust.

#### **Loans to Beneficiary**

24. To make loans out of trust property to \_\_\_\_\_[the *or* any] beneficiary on terms and conditions that the trustee determines are fair and reasonable under the circumstances; and to guarantee loans to \_\_\_\_\_[the *or* any] beneficiary by encumbrances on trust property.

#### **Distribution to Beneficiary Under Legal Disability**

25. To pay any sum of principal or interest distributable to \_\_\_\_\_[the *or* any] beneficiary, without regard to whether the beneficiary is under a legal disability, by paying the sum to the beneficiary or by paying the sum to another person for the use or benefit of the beneficiary.

#### **Nature and Value of Distributions**

26. To effect distribution of property and money in divided or undivided interests and to adjust resulting differences in valuation; and to make any distribution in kind pro rata or non pro rata.

#### **Hiring Persons**

27. To hire persons, including accounts, attorneys, auditors, investment advisers, appraisers, or other agents, even if they are associated or affiliated with the trustee, to advise or assist the trustee in the performance of administrative duties.

#### **Execution and Delivery of Instruments**

28. To execute and deliver all instruments needed to accomplish or facilitate the exercise of the powers vested in the trustee.

#### **Actions and Proceedings**

29. To prosecute or defend actions, claims, or proceedings for the protection of trust property and of the trustee in the performance of the trustee's duties.

**Prudent Person and Prudent Investor Rules**

30. To perform any act that a trustee would perform for the purposes of the trust under the standard of care provided in the prudent person or prudent investor rules, as stated in *Probate Code Sections 16040* and *16047* or any successors to those sections.

[OR]

[*Second alternative provision: statutory powers referred to but not set forth at length:*]

To carry out the purposes of the trust(s) provided for in this will, and subject to any limitations stated elsewhere in this will, the trustee shall have, in addition to all the powers now or hereafter conferred on trustees by law, all of the powers now or hereafter conferred on trustees by *Sections 16220-16249 of the Probate Code* of the State of California (or any successors to those sections) and the power to perform any act that a trustee would perform for the purposes of the trust under the standard of care provided in the prudent person or prudent investor rules, as stated in *Probate Code Sections 16040* and *16047* or any successors to those sections.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsTrusteesDuties & PowersGeneral OverviewEstate, Gift & Trust  
LawTrustsTrusteesDuties & PowersClaims By & AgainstEstate, Gift & Trust LawTrustsTrusteesDuties &  
PowersLimitationsEstate, Gift & Trust LawTrustsTrusteesDuties & PowersSalesEstate, Gift & Trust  
LawTrustsTrusteesDuties & PowersStandards of Care



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DIVISION IV: WILLS AND TRUSTS  
CHAPTER 64A TESTAMENTARY TRUSTS: TRUSTEE PROVISIONS  
PART IV. FORMS

B. General Administrative Powers of Trustee

*24-64A California Legal Forms--Transaction Guide §§ 64A.223-64A.239*

**[Reserved]**

§§ 64A.223[Reserved]



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DIVISION IV: WILLS AND TRUSTS  
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PART IV. FORMS

C. Alternate and Optional Powers for Retention of Assets

*24-64A California Legal Forms--Transaction Guide § 64A.240*

**§ 64A.240 Provision Waiving Requirement of Diversification**

**[1] Comment**

**[a] Use of Form**

This provision may be used to permit (but not require) the trustee to hold trust assets without regard to the usual rule of diversification of investments. It should be used whenever the trust estate is small or consists in large part of a single asset and the testator wishes the principal trust asset to be retained and not converted into diversified investments.

For a provision granting the trustee "sole," "absolute," or "uncontrolled" discretion, see § 64A.340. For provisions permitting the trustee to hold unproductive assets, see § 64A.241. For a provision requiring the trustee to retain a specific asset or assets held by the trust estate, see § 64A.242.

**[b] Diversification of Investments**

**[i] General Rule**

The trustee's investment powers are governed by the Uniform Prudent Investor Act [*see Prob. Code §§ 16045-16054*], which is a part of the Trust Law. The Uniform Prudent Investor Act applies to all trusts existing on and created after its effective date, which was January 1, 1996 [*Prob. Code § 16054*]. As applied to those trusts, however, it only governs decisions or actions occurring after the effective date [*Prob. Code § 16054*]. For a general discussion of the Uniform Prudent Investor Act, and the trustee's powers and duties under the act, see § 64A.40[3].

The Uniform Prudent Investor Act provides that in making and implementing investment decisions, the trustee has a duty to diversify the investments of the trust unless, under the circumstances, it is prudent not to do so [*Prob. Code § 16048*]. Even before the adoption of the Uniform Prudent Investor Act, case law in California required trustees to diversify trust investments [*see Estate of Collins (1977) 72 Cal. App. 3d 663, 669, 139 Cal. Rptr. 644*].

The rule requiring the trustee to diversify investments prevents the trustee from investing a disproportionately large part

of the trust estate in a particular security or type of security [*Restatement 2d of Trusts*, § 228, Comment a]. Diversification of investments is generally desirable because it minimizes the risk of large losses.

### **[ii] Effect of Trust Provisions**

Although the Uniform Prudent Investor Act generally requires trustees to diversify their investments [*see Prob. Code* § 16048 and discussion in § 64A.240[1][b][i]], the Act permits the settlor to expand or restrict the trustee's investment duties by express provisions in the trust instrument [*Prob. Code* § 16046(b)]. If the settlor does include express provisions modifying the diversification requirement, the trustee is entitled to rely on those provisions and cannot be held liable to a beneficiary for doing so in good faith [*Prob. Code* § 16046(b)]. The settlor may modify or dispense with the diversification requirement either by expressly modifying the requirement, as in this form, or by authorizing (or requiring) the trustee to make or retain specified investments that do not comply with the diversification rule.

### **[iii] Drafting Considerations**

The rule requiring diversification of investments is generally beneficial and should be dispensed with only in special circumstances and only after fully considering the effect of doing so. Diversification is one of the cornerstones of prudent investment policy and will help to ameliorate the effect of other investment mistakes. If the trust's investment portfolio is diversified, a loss sustained in one investment may be balanced by gains in other investments. The benefits of diversification generally increase as the size of the trust estate and the term of the trust increase. While it may be prudent to invest a small trust estate in one or two investments only, it will rarely be prudent to invest a very large trust estate in this way. Similarly, it may be prudent to invest a trust estate in one or two investments for a very short time; but it will rarely be prudent to invest in one or two investments for a very long term.

### **[iv] Limitations on Effect of Provision**

A court may authorize the sale of a trust asset even when the trust instrument dispenses with the requirement of diversification, if circumstances change after the creation of the trust in a manner that would cause its purpose to be defeated if the asset were retained [*see Scott, The Law of Trusts* (3d ed., Little, Brown & Co., 1967), vol. 3, § 190.4; *see also Restatement 2d of Trusts*, § 167]. Further, a trust provision dispensing with the requirement of diversification will not relieve the trustee of the duty of investing and managing the trust assets as a prudent investor would, by considering the purposes, terms, distribution requirements, and other circumstances of the trust [*see Prob. Code* § 16047(a)]. Such a provision also will not relieve the trustee of the duty of exercising reasonable care, skill, and caution in making and retaining investments [*see Prob. Code* § 16047(a)]. While it might be prudent at the inception of a trust to hold all or substantially all of the trust's assets in a single large investment, it may later prove to be inappropriate to continue to retain the single investment, and diversification would then become necessary. The Trust Law generally empowers the court to relieve the trustee from restrictions on the exercise of powers under the trust instrument [*Prob. Code* § 16201].

## **[2] FORM**

### **Provision Waiving Requirement of Diversification**

The trustee is authorized to continue to hold any property, or any interest or interests in any property, without regard to whether the trust investments are diversified.

### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsTrusteesDuties & PowersGeneral OverviewEstate, Gift & Trust

LawTrustsTrusteesDuties & PowersLimitationsEstate, Gift & Trust LawTrustsTrusteesDuties & PowersStandards of Care



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*24-64A California Legal Forms--Transaction Guide § 64A.241*

**§ 64A.241 Provision Permitting Trustee to Hold Unproductive Property**

**[1] Comment**

**[a] Use of Form**

This form is a will provision that may be used to permit (but not require) the trustee to hold unproductive property. The form includes a principal provision and an optional provision. The optional provision may be added to the principal provision if any trust subject to the provision is a marital deduction trust [*see § 64A.241[1][c]*].

For a provision permitting the trustee to purchase, acquire, or otherwise invest in unproductive property, see § 64A.264. For a provision permitting (but not requiring) the trustee to hold assets without regard to the usual rule of investment diversification, see § 64A.240. For a provision requiring the trustee to retain a specific asset or assets held by the trust, see § 64A.242. For a provision granting the trustee "sole," "absolute," or "uncontrolled" discretion, see § 64A.340.

**[b] Unproductive Investments**

The trustee has a duty to make the trust property productive under the circumstances and in furtherance of the purposes of the trust [*Prob. Code § 16007*; see Restatement (Second) of Trusts § 181; Scott, *The Law of Trusts* (Little, Brown & Co. 3d ed. 1967), vol. 3, § 240]. This rule codifies the substance of Section 181 of the Restatement (Second) of Trusts [*Recommendation Proposing the Trust Law*, 18 Cal. L. Revision Comm'n Reports 501, 665 (1986)]. The duty to make trust property productive, like other duties imposed by statute, may be varied or even dispensed with by provisions of the trust instrument [*Prob. Code § 16000*]. For example, the trust instrument may require the trustee to hold certain unproductive property in the trust estate and/or give possession of the property to a beneficiary at a later date. Such a provision would override the trustee's general duty to make the trust property productive [18 Cal. L. Revision Comm'n Reports 501, 665 (1986)]. The trust instrument may also give a beneficiary a right to occupy a home that forms part of the trust estate. Such a provision would relieve the trustee of the duty to make the home productive, or to convert it into other productive assets [18 Cal. L. Revision Comm'n Reports 501, 665 (1986)].

Depending on the goals of the trust, the circumstances of the beneficiaries, and the trustee's investment skills and

experience, the retention of assets that do not currently produce income may benefit the trust under some circumstances. In other circumstances, an investment program geared toward acquisition of such investments may be indicated [*see* § 64A.264[1][b]]. If the principal goal of the trust is to provide current support for income beneficiaries, it would make little sense to leave any substantial part of the trust estate in unproductive assets. If, however, the current needs of the income beneficiaries are modest and the principal goal of the trust is to increase the size of the corpus for the eventual benefit of the remainder beneficiaries, the retention of at least some unproductive assets may be indicated.

Market conditions and tax considerations may also influence the decision to retain unproductive assets or convert them into income-producing property. If, for example, the market price of an asset received into the trust estate at its inception is depressed but prospects for a rise in price are good or reasonable, it may well be to the advantage of the trust estate to continue to hold the asset. Since any appreciation in the value of a capital asset will ordinarily be recognized only on sale of the asset [*see I.R.C. § 1222*], retention of the asset and postponement of the recognition for a period of time may (depending on other circumstances of the trust) be advantageous. By authorizing (but not requiring) the trustee to retain unproductive assets, this form gives the trustee sufficient flexibility to take advantage of whatever circumstances, in the trustee's judgment, will result in the greatest benefit to the trust estate.

### **[c] Tax Considerations**

A trust provision empowering the trustee to acquire or hold unproductive property effectively gives the trustee the power to deny income to the income beneficiary. For this reason, such a power will disqualify a trust from eligibility for the federal estate tax marital deduction either as a lifetime income/power of appointment trust [*Treas. Reg. § 20.2056(b)-5*; *see I.R.C. § 2056(b)(5)*] or a qualified terminable interest property (QTIP) trust [*Treas. Reg. § 20.2056(b)-7*; *see I.R.C. § 2056(b)(7)*], *unless* the trust requires, or permits the surviving spouse to require, that the trustee either make the property productive or convert it within a reasonable time [*Treas. Reg. §§ 20.2056(b)-5(f)(4)* (power of appointment trusts), 20.2056(b)-7(d)(2) (power of appointment rules for determining lifetime income interest also apply to QTIP trusts)]. To protect against inadvertent loss of the marital deduction by virtue of the preceding rule, California has enacted *Prob. Code § 21524(c)*, which provides that, if a marital deduction gift is made in trust, the surviving spouse has the right, among other things, to require that the trustee make unproductive marital deduction property productive or convert it into productive property within a reasonable time. However, *Prob. Code § 21524(c)* does not apply if the terms of the trust expressly or by implication make it inapplicable [*Prob. Code § 21502(a)*]. For this reason, it is strongly recommended that the optional language in this provision be included whenever a marital deduction trust is involved, despite the fact that it simply restates the statutory rule. Besides clarifying the testator's intent, inclusion of this language in the trust itself will help assure that the trustee and the trust beneficiaries will understand the nature of their powers with respect to unproductive property without recourse to the statute.

For additional discussion of the marital deduction and marital deduction trusts, see Ch. 71, *Marital Deduction Trust Provisions*.

### **[2] FORM**

#### **Provision Permitting Trustee to Hold Unproductive Property**

The trustee shall have the power to retain or acquire unproductive or underproductive property [*optional language for marital deduction trusts*]; provided, however, that as to any assets of the \_\_\_\_\_ (Power of Appointment or QTIP) Trust, my \_\_\_\_\_ (husband or wife) shall have the right, by delivery of a written instrument to the trustee, to require the trustee to make unproductive or underproductive property productive, or to convert it to productive property, within a reasonable time following receipt of the request].

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsMarital Deduction TrustsEstate, Gift & Trust LawTrustsTrusteesDuties & PowersGeneral OverviewEstate, Gift & Trust LawTrustsTrusteesDuties & PowersStandards of Care



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*24-64A California Legal Forms--Transaction Guide § 64A.242*

**§ 64A.242 Provision Requiring Trustee to Hold Specific Asset or Assets**

**[1] Comment**

**[a] Use of Form**

This form is a will provision that may be used to require the trustee to retain a specific asset or assets held by the trust estate. It should be used only when the testator wishes a particular asset or assets, such as a family business, farm, or other specified property, to be retained in the trust.

For a provision permitting the trustee to hold assets without regard to the usual rule of investment diversification, see § 64A.240. For a provision permitting the trustee to hold unproductive assets, see § 64A.241. For a provision permitting the trustee to purchase, acquire, or otherwise invest in unproductive property, see § 64A.264. For a provision granting the trustee "sole," "absolute," or "uncontrolled" discretion, see § 64A.340.

**[b] Direction to Retain Particular Asset or Assets**

The prudent investor rule [*see Prob. Code §§ 16045-16054* and discussion in § 64A.40[3]] generally requires the trustee to diversify the investments of the trust unless, under the circumstances, it is prudent not to do so [*Prob. Code § 16048*]. However, the settlor may expand or restrict the prudent investor rule by express provisions in the trust instrument [*Prob. Code § 16046(a)*; *see § 64A.240[1]*]. The settlor may, for example, direct the trustee to hold a particular asset or assets, and forbid the trustee to sell those assets for the purpose of achieving investment diversification. When the trust instrument includes a provision such as this, the trustee is entitled to rely on it and cannot be held liable to any beneficiary for doing so in good faith [*Prob. Code § 16046(b)*].

**[c] Use Provision With Caution**

This provision dispenses with the usual rule of investment diversification by requiring the trustee to hold a specified asset or assets as part of the trust estate. Since diversification is one of the cornerstones of prudent investment policy, this provision should be used only in rare cases and only when the settlor is firmly convinced that its advantages to the

trust and the beneficiaries will clearly outweigh its disadvantages.

This provision will deprive the trustee of much of the flexibility necessary to make prudent investment decisions. However, it will not relieve the trustee of the duty of investing and managing the trust assets as a prudent investor would, by considering the purposes, terms, distribution requirements, and other circumstances of the trust [*see Prob. Code § 16047(a)*]. It also will not relieve the trustee of the duty to exercise reasonable care, skill, and caution in making and retaining investments [*see Prob. Code § 16047(a)*]. If, at some time after the trust becomes effective, holding the stated asset or assets in the trust estate proves to be incompatible with the stated purposes or distribution requirements of the trust, diversification could become necessary despite the terms of this provision.

## [2] FORM

### Provision Requiring Trustee to Hold Specific Asset or Assets

The Trustee is directed to continue to hold, and not to sell for the purpose of achieving investment diversification, or for any other reason, the following trust asset(s), to wit: \_\_\_\_\_ [*here describe asset or assets to be retained, e.g.: my ranch known as "Haven's Rest," located in the County of Mendocino, State of California, and more particularly described as follows: \_\_\_\_\_ (full legal description)*].

### Legal Topics:

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsTrusteesDuties & PowersGeneral OverviewEstate, Gift & Trust  
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*24-64A California Legal Forms--Transaction Guide §§ 64A.243-64A.259*

**[Reserved]**

§§ 64A.243[Reserved]



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*24-64A California Legal Forms--Transaction Guide § 64A.260*

**§ 64A.260 Prudent Person Rule--Long Form**

**[1] Comment**

**[a] Use of Form**

This provision may be used to state that, in investing trust assets, the trustee must comply with the terms of the prudent investor rule. Since the prudent investor rule applies to all trusts unless the trust instrument includes express provisions expanding or restricting it [*Prob. Code § 16046(b)*], it is not necessary to include this provision in the will. However, it may be useful to do so to make it clear to the trustee and other persons interested in the trust that the rule applies.

For a short form of the prudent investor rule, see *Ch. 63, Will Provisions, § 63.411[2]*.

**[b] Prudent Investor Rule**

The Uniform Prudent Investor Act, which forms a part of the Trust Law, sets forth the terms of the prudent investor rule in California [*see Prob. Code §§ 16045-16054*]. The basic terms of the prudent investor rule are stated in *Prob. Code § 16047(a)*, which requires the trustee to invest and manage trust assets as a prudent investor would, by considering the purposes, terms, distribution requirements, and other circumstances of the trust. *Prob. Code § 16047(a)* also provides that in satisfying this standard, the trustee must exercise reasonable care, skill, and caution.

For a general discussion of the Uniform Prudent Investor Act and the prudent investor rule, see *§ 64A.40[3]*.

**[c] Trustee's Investigation and Review**

The prudent investor rule requires the trustee to make a reasonable effort to ascertain facts relevant to the investment and management of trust assets [*Prob. Code § 16047(d)*]. Within a reasonable time after accepting a trusteeship or receiving trust assets, the trustee has a duty to review the trust assets and make and implement decisions concerning the retention and disposition of assets, in order to bring the trust portfolio into compliance with the purposes, terms, distribution requirements, and other circumstances of the trust, and with the requirements of the Uniform Prudent

Investor Act [*Prob. Code § 16049*]. Compliance with the prudent investor rule is determined in light of the facts and circumstances existing at the time of a trustee's decision or action and not by hindsight [*Prob. Code § 16051*].

#### **[d] Investment Costs**

In investing and managing trust assets, the trustee may only incur costs that are appropriate and reasonable in relation to the assets, overall investment strategy, purposes, and other circumstances of the trust [*Prob. Code § 16050*].

#### **[e] Circumstances to Be Considered**

The Uniform Prudent Investor Act provides that the trustee's investment and management decisions respecting individual assets and courses of action must be evaluated not in isolation, but in the context of the trust portfolio as a whole and as a part of an overall investment strategy having risk and return objectives reasonably suited to the trust [*Prob. Code § 16047(b)*]. To the extent that they are relevant to the trust or its beneficiaries, the following circumstances are appropriate to consider in investing and managing trust assets under the prudent investor rule [*Prob. Code § 16047(c)*]:

- General economic conditions.
- The possible effect of inflation or deflation.
- The expected tax consequences of investment decisions or strategies.
- The role that each investment or course of action plays within the overall trust portfolio.
- The expected total return from income and the appreciation of capital.
- Other resources of the beneficiaries known to the trustee as determined from information provided by them;
- Needs for liquidity, regularity of income, and preservation or appreciation of capital.
- An asset's special relationship or special value, if any, to the purposes of the trust or to one or more of the beneficiaries.

#### **[f] Delegation of Investment Responsibilities**

The trustee may delegate investment and management functions as prudent under the circumstances [*Prob. Code § 16052(a)*]. However, the trustee must exercise prudence in selecting an agent, establishing the scope and terms of the delegation, and periodically reviewing the agent's overall performance and compliance with the terms of the delegation [*Prob. Code § 16052(a)*].

A trustee who delegates investment functions in accordance with the rules stated above generally will not generally be liable to the beneficiaries or to the trust for the decisions or actions of the agent to whom the function was delegated [*Prob. Code § 16052(c)*]. However, the trustee may be held liable for the agent's acts in any of the following circumstances [*Prob. Code §§ 16041(b), 16052(c)*]:

- If the trustee directs the acts of the agent.
- If the trustee delegates to the agent authority to perform an act that the trustee is under a duty not to

delegate.

- If the trustee does not use reasonable prudence in the selection or retention of the agent.
- If the trustee does not periodically review the agent's overall performance and compliance with the terms of the delegation.
- If the trustee conceals the act of the agent.
- If the trustee neglects to take reasonable steps to compel the agent to redress a wrong when the trustee knows of the agent's wrongful acts or omissions.

When an agent performs a delegated function, the agent has a duty to exercise reasonable care to comply with the terms of the delegation [*Prob. Code § 16052(b)*]. By accepting the delegation of a trust function from the trustee of a trust that is subject to the law of California, an agent submits to the jurisdiction of the California courts [*Prob. Code § 16052(d)*].

### **[g] Standard Drafting Terms**

Some standard terms are commonly used in trust instruments to describe or limit the trustee's investment authority. For example, a trust instrument may authorize the trustee to make "investments permissible by law for investment of trust funds," "legal investments," or "authorized investments." Trust instruments often provide that the trustee may invest trust funds under the "prudent man rule," the "prudent trustee rule," the "prudent person rule," or the "prudent investor rule" [*see Prob. Code § 16053*]. Alternatively, trust instruments may authorize the trustee to make investment decisions "using the judgment and care under the circumstances then prevailing that persons of prudence, discretion, and intelligence exercise in the management of their own affairs, not in regard to speculation but in regard to the permanent disposition of their funds, considering the probable income as well as the probable safety of their capital" [*see Prob. Code § 16053*]. Unless the trust instrument provides otherwise, when these or comparable terms are used in the instrument, the trustee will have the power to make any investment or follow any investment strategy permitted under the Uniform Prudent Investor Act [*Prob. Code § 16053*].

## **[2] FORM**

### **Prudent Person Rule--Long Form**

The Trustee shall invest and manage trust assets as a prudent investor would, by considering the purposes, terms, distribution requirements, and other circumstances of the trust. In satisfying this standard, the Trustee shall exercise reasonable care, skill, and caution. The Trustee's investment and management decisions respecting individual assets and courses of action must be evaluated not in isolation, but in the context of the trust portfolio as a whole, and as a part of an overall investment strategy having risk and return objectives reasonably suited to the trust. Among the circumstances that are appropriate to consider in investing and managing trust assets are the following, to the extent relevant to the trust or its beneficiaries:

- (1) General economic conditions.
- (2) The possible effect of inflation or deflation.
- (3) The expected tax consequences of investment decisions or strategies.
- (4) The role that each investment or course of action plans within the overall trust portfolio.

- (5) The expected total return from income and the appreciation of capital.
- (6) Other resources of the beneficiaries known to the trustee as determined from information provided by them.
- (7) Needs for liquidity, regularity of income, and preservation or appreciation of capital.
- (8) An asset's special relationship or special value, if any, to the purposes of the trust or to one or more of the beneficiaries.

The trustee may invest in any kind of property of type of investment or engage in any course of action or investment strategy consistent with the standards set forth in this provision or the Uniform Prudent Investor Act, as set forth in *California Probate Code Sections 16045-16054* or any successor sections.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsTrusteesDuties & PowersGeneral OverviewEstate, Gift & Trust LawTrustsTrusteesDuties & PowersStandards of Care



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*24-64A California Legal Forms--Transaction Guide § 64A.261*

**§ 64A.261 Prudent Person Rule--Short Form**

**[1] Comment--Use of Form**

This provision may be used to require the trustee to make and implement investment decisions in accordance with the prudent investor rule. For a longer provision making the same requirement, see § 64A.260. For a general discussion of the Uniform Prudent Investor Act [*Prob. Code §§ 16045-16054*], see § 64A.260[1].

**[2] FORM**

**Prudent Person Rule--Short Form**

When investing, reinvesting, purchasing, acquiring, exchanging, selling, and managing trust property, the Trustee shall comply with the terms of the prudent investor rule and the terms of the Uniform Prudent Investor Act, as set forth in *California Probate Code Sections 16045-16054* or any successor sections.

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
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*24-64A California Legal Forms--Transaction Guide § 64A.262*

**§ 64A.262 Provision Conferring Broad Investment Powers on Trustee**

**[1] Comment**

**[a] Use of Form**

This provision may be used to give the trustee broader investment powers than are permitted under the prudent investor rule [*see Prob. Code §§ 16045-16054*]. For a long form of the prudent investor rule, see § 64A.260. For a short form of the prudent investor rule, see § 64A.261. For a provision granting the trustee "sole," "absolute," or "uncontrolled" discretion, see § 64A.340.

**[b] Settlor's Power to Expand or Restrict Prudent Person Rule**

The Uniform Prudent Investor Act [*see Prob. Code §§ 16045-16054*] authorizes the settlor to expand or restrict the prudent investor rule by express provisions in the trust instrument [*Prob. Code § 16046(b)*]. If the settlor does modify the prudent investor rule, the trustee is entitled to rely on the express provisions of the trust instrument and cannot be held liable to any beneficiary for doing so in good faith [*Prob. Code § 16046(b)*].

When a trust instrument confers broad investment discretion on the trustee, the extent to which the settlor intended to expand the scope of the trustee's powers is subject to interpretation. A trust instrument that grants the trustee the power to make investments "in his discretion" or "in her discretion" does not ordinarily permit the trustee to make investments that would not be permitted under the prudent investor rule [*Restatement (2d) of Trusts, § 227, Comment u*]. Although a settlor may, by a clear statement in the trust instrument, authorize the trustee to invest in speculative securities or in other assets that would, under the prudent investor rule, be "improper," any provision purporting to grant the trustee such authority will be strictly construed against an enlargement of the permissible scope of investments [*Restatement (2d) of Trusts, § 227, Comment u*].

While a provision conferring broad investment powers on the trustee may be sufficient to expand the scope of the prudent investor rule, it will not relieve the trustee of the general duty to exercise reasonable care, skill, and caution in making investments, or to consider the purposes, terms, distribution requirements, and other circumstances of the trust [

*see Prob. Code § 16047(a)*. Many trust companies and other corporate trustees feel that they are not sufficiently protected by investment powers that significantly exceed the terms and scope of the prudent investor rule and will adhere to the well-established rule despite a provision in the trust instrument granting broader powers.

### **[c] Use Provision With Caution**

The prudent investor rule is designed to protect trust estates from improvident trust administration and to assure the beneficiaries that their interests will be protected by a reasonable investment program. The testator should authorize a deviation from the rule only after carefully considering the reasons for doing so and concluding that the advantages of the proposed deviation clearly outweigh its disadvantages.

### **[2] FORM**

#### **Provision Conferring Broad Investment Powers on Trustee**

When investing, reinvesting, purchasing, acquiring, exchanging, selling, and managing property of the trust(s) provided for in this will, the Trustee may make any investments that the trustee deem advisable, including any common trust fund administered by the trustee, whether or not of the type or character permitted by law for the investment of trust funds.

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsTrusteesDuties & PowersGeneral OverviewEstate, Gift & Trust

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*24-64A California Legal Forms--Transaction Guide § 64A.263*

**§ 64A.263 Provision Conferring Broad Investment Powers on Trustee and Waiving Diversification Requirement**

**[1] Comment--Use of Form**

This provision may be used to confer very broad investment powers on the trustee and to dispense with the usual requirement of investment diversification. For a discussion of the settlor's power to authorize deviations from the prudent investor rule and the caution that must be exercised whenever the trustee's investment powers are expanded, see § 64A.262[1]. For rules relating to investment diversification and the settlor's power to authorize deviations from those rules, see § 64A.240[1].

**[2] FORM**

**Provision Conferring Broad Investment Powers on Trustee and Waiving Diversification Requirement**

When investing, reinvesting, purchasing, acquiring, exchanging, selling, and managing property of the trust(s) provided for in this will, the Trustee may make any investments that the trustees deem advisable, including any common trust fund administered by the trustee, whether or not of the type or character permitted by law for the investment of trust funds and without regard to diversification.

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
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D. Alternate and Optional Investment Powers

*24-64A California Legal Forms--Transaction Guide § 64A.264*

**§ 64A.264 Provision Permitting Trustee to Invest in Unproductive Property**

**[1] Comment**

**[a] Use of Form**

This provision may be used to permit (but not require) the trustee to purchase, acquire, or otherwise invest in unproductive property. For a provision permitting (but not requiring) the trustee to hold unproductive property, see § 64A.241.

**[b] Investment in Unproductive Property**

Although the trustee generally has a duty to make the trust property productive [*Prob. Code § 16007*; see § 64A.241[1]], the trust instrument may relieve the trustee of that duty, in whole or in part [*Prob. Code § 16000*]. Some assets produce little or no income but have excellent prospects for capital appreciation. Depending on the goals of the trust, the circumstances of the trust beneficiaries, and the trustee's investment skills and experience, the acquisition and retention of assets that do not currently produce income may, in appropriate circumstances, benefit the trust and the trust beneficiaries. If the principal purpose of the trust is to provide current support for income beneficiaries, then it will make little sense to invest all or a substantial part of the trust estate in unproductive assets. If, on the other hand, the principal goal of the trust is to increase the size of the corpus for the eventual benefit of the remainder beneficiaries, an investment program that includes the purchase of at least some unproductive assets may be indicated.

**[c] Tax Caution**

Since a provision empowering the trustee to acquire or hold unproductive property may give the trustee power to deny income to an income beneficiary, such a provision would, unless modified by the trust instrument or statutory rule, disqualify the trust for treatment as a qualified terminable interest property (QTIP) trust [*see I.R.C. § 2056(b)(7)(B)(ii)*]. For further consideration of the tax consequences of investments in unproductive property, see the discussion in § 64A.241[1][c].

**[2] FORM**

**Provision Permitting Trustee to Invest in Unproductive Property**

When investing, reinvesting, purchasing, acquiring, exchanging, selling, and managing property of the trust(s) provided for in this will, the Trustee may, in the trustee's discretion, acquire (by exchange, purchase, or otherwise) and may retain and hold unproductive property.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsTrusteesDuties & PowersGeneral OverviewEstate, Gift & Trust  
LawTrustsTrusteesDuties & PowersStandards of Care



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*24-64A California Legal Forms--Transaction Guide § 64A.265*

**§ 64A.265 Provision Permitting Trustee to Invest in Investment Funds**

**[1] Comment**

**[a] Use of Form**

This provision may be used to permit (but not require) the trustee to invest in mutual funds, money market funds, investment trusts, mortgage participations, regulated investment companies, and other investment funds.

**[b] Investment Funds**

The widespread use of mutual funds, money market funds, investment trusts, investment companies, mortgage participations, and other similar investment vehicles has, in recent years, raised the question as to whether such investments are permissible under the prudent investor rule. Investments of this kind were at one time condemned as improper delegations of the trustee's discretionary power to select investments for the trust [Scott, *The Law of Trusts* (3d ed., Little, Brown & Co., 1967), vol. 3, § 227.9A]. By statute, a majority of the states have authorized fiduciaries to invest in stocks or other securities of investment management companies [Scott, *The Law of Trusts* (3d ed., Little, Brown & Co., 1967), vol. 3, § 227.9A].

In California, unless the trust instrument provides otherwise, every trustee has the statutory power to invest "in any kind of property," consistent with the standards of the Uniform Prudent Investor Act and the other provisions of the Trust Law governing the duties of trustees [*Prob. Code* § 16047(e)]. The Probate Code broadly defines "property" to include "anything that may be the subject of ownership" [*Prob. Code* § 62; see 18 Cal. L. Revision Comm'n Reports 501, 798 (1986) (definition of "property" in *Prob. Code* § 62 supersedes definition of "property" in former *Civ. Code* § 2261(f), repealed eff. July 1, 1987)]. In light of this definition and the broad standards applied in the Uniform Prudent Investor Act, it is clear that investment funds are now a permitted investment provided they meet the other standards and requirements stated in the Act [see *Uniform Prudent Investor Act*, 25 Cal. L. Revision Comm'n Reports 543, 580 (1995)]. Nevertheless, the inclusion of this provision may still serve a useful purpose by making clear that the testator specifically intends that these types of investments be permitted [see *Prob. Code* § 16046(c) (testator's power to expand or restrict trustee's statutory investment powers)], in order to preclude any argument by a beneficiary that such an

investment would not be "reasonably suited to the trust" within the meaning of *Prob. Code § 16047(b)* or would be inappropriate in light of any of the specific factors listed in *Prob. Code § 16047(c)* [*see* discussion in § 64A.260[1][e]].

**[2] FORM**

**Provision Permitting Trustee to Invest in Investment Funds**

The Trustee is authorized, in the Trustee's discretion, to invest or reinvest in mutual funds, money market funds, investment trusts, regulated investment companies, market funds or index funds, and in any shares or securities of any such funds or companies, which persons of prudence, discretion, and intelligence acquire for their own account.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsTrusteesDuties & PowersGeneral OverviewEstate, Gift & Trust  
LawTrustsTrusteesDuties & PowersStandards of Care



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*24-64A California Legal Forms--Transaction Guide § 64A.266*

**§ 64A.266 Provisions Permitting Trustee to Invest in Life Insurance**

**[1] Comment**

**[a] Use of Form**

This provision may be used to permit (but not require) the trustee to invest in life insurance contracts on the life of the trustee or the beneficiaries. The form consists of a principal provision and an optional provision. The optional provision may be added to the principal provision if the will is to include a marital deduction trust. Although these provisions are not strictly necessary, since investments in life insurance contracts are permitted by statute [*see* discussion in § 64A.266[1][b][i]], they may serve a useful function by clearly apprising the trustee and other persons interested in the trust that such investments may be made.

**[b] Life Insurance as Trust Investment**

**[i] In General**

Investment of trust funds in life insurance contracts was condemned at one time on the ground that life insurance contracts do not produce current income for the trust [*see* discussion in § 64A.241[1][b]]. In the absence of specific authorization in the trust instrument, or in a statute, trustees traditionally have been prohibited from investing in insurance contracts [Nossaman & Wyatt, *Trust Administration and Taxation* (Rev. 2d ed.), Ch. 29, *Powers and Duties of Trustees (Cont.) Investments*, § 29.02 [5]] (Matthew Bender). In 1968, the California legislature removed any impediment to such investments by including life insurance, endowment, and annuity contracts issued by legal reserve companies authorized to do business in California within the definition of "property" as that word was used in the prudent person rule [*see* former *Civ. Code* § 2261(f), repealed eff. July 1, 1987]. This definition of "property" was not included in the version of the prudent investor rule adopted as part of the Trust Law [*see Prob. Code* § 16040], or the prudent investor rule subsequently adopted as part of the Uniform Prudent Investor Act [*see Prob. Code* §§ 16045-16054]. However, the Uniform Prudent Investor Act gives trustees broad latitude with respect to investments by authorizing them to invest trust assets in "any kind of property or type of investment or engage in any course of action or investment strategy consistent with" the Probate Code standards governing the duties of trustees [*Prob. Code* §

16047(e)]. These standards require, among other things, that the trustee's investment and management decisions must be evaluated not in isolation, but "in the context of the trust portfolio as a whole and as part of an overall investment strategy having risk and return objectives reasonably suited to the trust" [*Prob. Code* § 16047(b)]. Currently, the Probate Code broadly defines "property" to include "anything that may be the subject of ownership" [*Prob. Code* § 62]. The California Law Revision Commission recommendation proposing the Trust Law reveals that the Probate Code definition of property was deemed broad enough to include the prudent person rule definition [*see* "Recommendation Proposing the Trust Law," 18 Cal. L. Revision Comm'n Reports 501, 798 (1986)]. Thus, life insurance, endowment, and annuity contracts are permissible investments under the Trust Law, as long as they meet the general standard stated above and the other specific circumstances stated in the prudent investor rule [*see Prob. Code* § 16047(c) and discussion in § 64A.260[1][e]]. Nevertheless, the inclusion of this form may still serve a useful purpose by making clear that the testator specifically intends that investments in life insurance be permitted [*see Prob. Code* § 16046(c) (testator's power to expand or restrict trustee's statutory investment powers)], in order to preclude any possible argument by a beneficiary that such an investment would not be "reasonably suited to the trust" within the meaning of *Prob. Code* § 16047(b).

### **[ii] Tax Considerations**

Unfavorable tax consequences may result if the trustee purchases life insurance on the life of the trustee or a beneficiary. Under *I.R.C.* § 2042(2), the proceeds of a policy of life insurance will, for estate tax purposes, be included in the estate of any person who has any "incidents of ownership" over the policy, whether exercisable alone or in conjunction with any other person. Thus, if the trustee has "incidents of ownership" over a life insurance policy owned by the trust, the policy may be subject to estate tax in the estate of the trustee [In *Re Estate of Lumpkin* (5th Cir. [T.C.] 1973) 474 F.2d 1092, 1097-1098 ].

The courts have taken different views as to what "incidents of ownership" are sufficient to require federal estate taxation of the policy in the estate of the person who holds the "incidents." The Fifth Circuit has required federal estate taxation of a policy of life insurance even when the trustee had no beneficial interest in the trust [ *In Re Estate of Lumpkin* (5th Cir. [T.C.] 1973) 474 F.2d 1092, 1097-1098 ], although the Second Circuit [ *Estate of Skifter v. C.I.R.* (2d Cir. [T.C.] 1972) 468 F.2d 699, 702 ] and the Sixth Circuit [ *Estate of Fruehauf v. Commissioner* (1970) (6th Cir. [T.C.] 1970) 427 F.2d 80, 86 ] have held that the trustee does not have "incidents of ownership" unless the trustee can exercise them for the trustee's own benefit.

### **[2] FORM**

#### **Provisions Permitting Trustee to Invest in Life Insurance**

The Trustee shall have the power to acquire and to maintain as a trust asset a life insurance policy on the life of any person, issued by any company and in any amount that the Trustee(s) shall deem advisable, and to exercise all rights of ownership granted in such policies.

[Add optional provision if trust is a marital deduction trust:]

In no event, however, shall any policy be purchased with funds of or held in the marital deduction trust without the prior consent of my \_\_\_\_\_[husband or wife].

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law  
Trusts  
Trustees  
Duties & Powers  
General Overview  
Estate, Gift & Trust Law  
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*24-64A California Legal Forms--Transaction Guide § 64A.267*

**§ 64A.267 Provision Restricting Trustee's Investment Powers**

**[1] Comment**

**[a] Use of Form**

This provision may be used to restrict the trustee's investment powers. For a provision expanding the trustee's investment powers, see § 64A.262. For provisions adopting the prudent investor rule as the standard of investment, see §§ 64A.260 and 64A.261.

**[b] Restricted Investment Powers**

**[i] Statutory Authority**

The prudent investor rule [*see Prob. Code §§ 16045-16054 and discussion in § 64A.260[1]*] authorizes the settlor to expand or restrict the prudent investor rule by express provisions in the trust instrument [*Prob. Code § 16046(b)*]. If the settlor does this, the trustee is entitled to rely on the express provisions and cannot be held liable to beneficiaries for doing so in good faith [*Prob. Code § 16046(b)*]. Although settlors will most often find it advisable to increase the trustee's investment flexibility by expanding the powers granted to the trustee, some settlors may choose to do the opposite.

**[ii] Use Provision With Caution**

Restriction of the trustee's investment powers is generally inadvisable for the same reason that expansion of those powers is often advisable: restriction deprives the trustee of flexibility, while expansion increases flexibility. Although some settlors have definite investment views and are inclined to instruct the trustee to follow them strictly, it is a rare investor who can see into the future with clarity and anticipate changing economic conditions. High quality government and corporate bonds were at one time considered safe, prudent, and provident investments, but changing economic conditions proved that even fixed-income, "blue-chip" securities are subject to market fluctuations and consequent capital erosion [*see Stanton v. Wells Fargo Bank etc. Co. (1957) 150 Cal. App. 2d 763, 310 P.2d 1010* (settlor

provided that trustee could invest only in AA bonds)].

Although the courts may relieve a trustee from restrictions on the exercise of powers under the trust instrument [*Prob. Code § 16201*], they will do so only in extraordinary cases. The court will not authorize a deviation merely because the original directions were misguided or because changing economic conditions reduced their effectiveness [ *Stanton v. Wells Fargo Bank etc. Co. (1957) 150 Cal. App. 2d 763, 771-776, 310 P.2d 1010* ]. The court may modify the trust in an emergency to permit that which the court believes the settlor would have permitted had the settlor anticipated the emergency, but only in the clearest of cases [ *Leonardini v. Wells Fargo Bank (1955) 131 Cal. App. 2d 9, 12-13, 280 P.2d 81* ]. A modification will be granted only if there has been a change in circumstances that would justify a deviation from the original terms of the trust, a showing that the change was unforeseen by the settlor, and a further showing that compliance with the original terms would defeat the principal purpose of the trust [ *Crocker-Citizens National Bank v. Younger (1971) 4 Cal. 3d 202, 212, 93 Cal. Rptr. 214, 481 P.2d 222* ]. Whether or not judicial modification is finally forthcoming, the time, expense, and inconvenience required by the litigation necessary to obtain it must, in any case, be considered a strong deterrent to any trustor who is inclined to severely restrict the trustee's investment powers.

## [2] FORM

### Provision Restricting Trustee's Investment Powers

The Trustee shall have the power to invest and reinvest in the following kinds of property, and in none other:  
 \_\_\_\_\_[describe kinds of property, e.g.: insured savings accounts in banks or savings and loan associations within California or direct obligations of any municipality located within California].

### Legal Topics:

For related research and practice materials, see the following legal topics:  
 Estate, Gift & Trust LawTrustsTrusteesDuties & PowersGeneral OverviewEstate, Gift & Trust  
 LawTrustsTrusteesDuties & PowersLimitations



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*24-64A California Legal Forms--Transaction Guide § 64A.268*

**§ 64A.268 Provisions Permitting Trustee's Own Dealings With Trust**

**[1] Comment**

**[a] Use of Form**

This provision may be used to empower the trustee to lend or advance the trustee's own funds to the trust and to purchase from and sell property to the trust. The form includes a principal provision and two optional provisions that may be added if desired. The first requires that the market value of any assets sold, purchased, or leased by or to the trustee be determined by independent appraisal. The second authorizes the trustee to make loans to beneficiaries, provided the rates of interest are fair and reasonable.

**[b] Prohibition Against Personal Dealings With Trust**

The Trust Law includes broad rules prohibiting trustees from dealing personally with the trust or the trust assets. For example, the trustee is prohibited from using or dealing with trust property for the trustee's own profit [*Prob. Code § 16004(a)*; *but see Prob. Code § 16220* (trustee may keep property received from settlor or other person even if trustee is personally interested in property)] and from taking part in any transaction in which the trustee has an interest adverse to that of the beneficiary [*Prob. Code § 16004(a)*]. The trustee may not enforce any claim against the trust property that the trustee purchased after or in contemplation of appointment as trustee (although the court may allow the trustee to be reimbursed from trust property for the amount that the trustee paid in good faith for the claim) [*Prob. Code § 16004(b)*]. Any transaction between the trustee and a beneficiary (except an agreement relating to the hiring or compensation of the trustee) that occurs during the existence of the trust, or while the trustee's influence with the beneficiary remains, and by which the trustee obtains an advantage from the beneficiary, is presumed to be a violation of the trustee's fiduciary duties [*Prob. Code § 16004(c)*]. An exception is recognized, however, when a regulated financial institution (or one of its affiliates) provides services for compensation in the ordinary course of business either to a trust of which it also acts as trustee or to a person dealing with the trust. In such a case, there is no violation of the rules against self-dealing [*Prob. Code § 16015*].

**[c] Deposits in Accounts of Financial Institution Serving As Trustee**

Notwithstanding the broad rules prohibiting trustees from dealing personally with the trust assets [*see* § 64A.268[1][b]], the Trust Law authorizes trustees to deposit trust funds in certain accounts in financial institutions operated by or affiliated with the trustees [*Prob. Code* § 16225]. The accounts may be in banks, savings and loan associations, credit unions, or like organizations [*Prob. Code* § 16225; *see Prob. Code* § 40 ("financial institution" defined)]. The accounts must be either insured or collateralized [*Prob. Code* § 16225(a)]. If they meet this requirement, however, the court may authorize the trustee to deposit trust funds in an amount greater than the maximum insured or collateralized amount [*Prob. Code* § 16225(d)].

#### **[d] Trust Instrument May Authorize Personal Dealings**

The trust instrument may relieve the trustee of any or all of the rules prohibiting personal dealings with the trust [*see Prob. Code* § 16000 (statutory duties binding except to extent trust instrument provides otherwise); *see also* Nossaman & Wyatt, *Trust Administration and Taxation* (Rev. 2d ed.), Ch. 26, *Who May Be a Trustee --Capacity--Tenure--Succession* (Matthew Bender)]. Thus, the trust instrument may empower the trustee to sell trust property to himself or herself personally, to purchase property from the trust estate, to borrow from the trust, or otherwise to deal personally with the trust property [*Restatement (2d) of Trusts*, § 170, Comment t]. Although trust provisions empowering self-dealing by the trustee have been widely criticized [Nossaman & Wyatt, *Trust Administration and Taxation* (Rev. 2d ed.), Ch. 27, *Duties of Trustees*, § 27.16 (Matthew Bender)], they have been sanctioned by court decisions in many jurisdictions [*see* "Validity and construction of trust provision authorizing trustee to purchase trust property," 39 A.L.R. 3d 836 (1971)]. No reported California decision has approved or disapproved such provisions, although the fact that they have been sustained in other jurisdictions would indicate that they are likely to be upheld in California.

#### **[e] Obligation of Good Faith**

Even when the trust instrument authorizes self-dealing, however, the trustee must act in good faith [*see* "Validity and construction of trust provision authorizing trustee to purchase trust property," 39 A.L.R. 3d 836, 842 (1971)] and must not take unfair advantage of the trust or the beneficiaries [*see* Scott, *The Law of Trusts* (3d ed., Little, Brown & Co., 1967), vol. 2, § 170.9].

#### **[f] Drafting Considerations**

The testator may find a provision like the one set forth below to be desirable if the trustee is a likely purchaser of any of the assets of the trust. If the trust includes an interest in a business, a surviving partner or shareholder may wish to purchase the trust's interest in the business. The provision set forth below will authorize such a purchase.

#### **[2] FORM**

##### **Provisions Permitting Trustee's Own Dealings With Trust**

The Trustee is authorized from time to time to lend or to advance the Trustee's own funds to the trust for any trust purpose, with interest at rates then prevailing, and to receive security for any such loans in the form of pledges, hypothecations, mortgages, deeds of trust, encumbrances, or otherwise. The Trustee is further authorized from time to time to purchase assets of the trust at a price not less than their fair market value, to sell assets to the trust at a price not more than their fair market value, and to exchange assets with the trust at a price equal to their fair market value. The Trustee is further authorized from time to time to lease assets to or from the trust for their fair rental value.

*[Optional provision: independent appraisal of assets]*

The fair market value of any assets sold, purchased, or leased by or to the Trustee pursuant to this paragraph shall be determined by independent appraisal.

*[Optional provision: loans to beneficiaries at reasonable rates]*

The Trustee is further authorized to make secured or unsecured loans to any beneficiary, or to the estate of any beneficiary, provided the rates of interest thereon are fair and reasonable.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsTrusteesDuties & PowersGeneral OverviewEstate, Gift & Trust

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*24-64A California Legal Forms--Transaction Guide §§ 64A.269-64A.279*

**[Reserved]**

§§ 64A.269[Reserved]



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E. Alternate and Optional Business Powers

*24-64A California Legal Forms--Transaction Guide § 64A.280*

**§ 64A.280 Provision Permitting Trustee to Conduct Business****[1] Comment****[a] Use of Form**

This provision may be used to permit (but not require) the trustee to conduct any business that is received into the trust at its inception or acquired later as a trust investment. It confers broad powers on the trustee and is a longer form of the shorter business interests provision *set forth in § 64A.221*. For a provision permitting the trustee to operate any farm or ranch received into the trust at its inception or acquired later as a trust investment, see § 64A.281. For a provision permitting the trustee to hold stock in a closely held corporation, see § 64A.282.

**[b] Operation of Business by Trustee****[i] In General**

The risks of operating a business are generally greater than the risks of other more conventional investments. For this reason, special rules restrict the power of trustees to operate (or participate in the operation of) trust-owned businesses.

**[ii] Businesses Received as Part of Trust Estate**

The Trust Law grants trustees limited power to operate businesses received as part of the trust estate. The basic rule is that a business may be operated on a permanent basis only if the trust instrument authorizes (or the court orders) permanent operation [*Prob. Code § 16222(b)*]. However, this rule does not apply to the leasing of four or fewer residential units, because such leasing is not considered to be "the operation of a business or other enterprise" for this purpose [*Prob. Code § 16222(b)*]. If the trust instrument does not authorize permanent operation, and if the "business" is not the leasing of four or fewer residential units, the trustee has authority to operate the business only for a "reasonable time" pending sale or a court hearing on an application for authority to operate it permanently [*Prob. Code § 16222(c); but see Prob. Code § 16222(d)* (rule inapplicable if trustee has power to operate business under trust created by instrument executed before July 1, 1987)]. If the trustee has power to operate a business, the trustee also has power

to effect incorporation, dissolution, or other changes in the form of the business [*Prob. Code § 16222(a)*; see Scott, *The Law of Trusts* (3d ed., Little, Brown & Co., 1967), vol. 3, § 230.4].

### **[iii] New Businesses**

The authority of the trustee to invest in a new business (as opposed to a business received as part of the trust estate) is even more limited. The court has no power to authorize such an investment independent of authority in the trust instrument [*see Prob. Code § 16222*; see also *Restatement (2d) of Trusts*, § 230, Comment m; "Recommendation Proposing the Trust Law," 18 Cal. L. Revision Comm'n Reports 501, 682 (1986) (under *Prob. Code § 16222*, trustee may continue business but not enter into new business)]. Even without court authorization, however, the trustee may invest in a new business if power to do so is conferred in the trust instrument [*Prob. Code § 16200(a)*; see *Restatement (2d) of Trusts*, § 230, Comment m].

### **[iv] Drafting Considerations**

A trust provision specifically empowering the trustee to continue the operation of a business may be desirable whenever a business or an interest in a business constitutes a substantial part of the trust estate and the settlor wishes it to be operated after his or her death. Authority to incorporate a business will not be implied from a general power to continue the operation of a business, but the trust instrument may properly confer that power on the trustee [Nossaman & Wyatt, *Trust Administration and Taxation* (Rev. 2d ed.), Ch. 28, *Powers and Duties of Trustees--(Cont.) Various Powers*, § 28.09 (Matthew Bender)]. Although the power to borrow is necessarily incidental to the power to operate a business and is therefore implied from an express testamentary power to continue a business [ *Purdy v. Bank of America Nat'l Trust & Sav. Assn.* (1935) 2 Cal. 2d 298, 302303, 40 P.2d 481 ], it will be advantageous to include express authority for borrowing in any provision authorizing the operation of a business.

## **[2] FORM**

### **Provision Permitting Trustee to Conduct Business**

(a) The Trustee is authorized to continue to hold, operate, sell, [*add, if desired*: purchase, acquire, invest or reinvest in,] or liquidate any business or any interest in any business, whether organized as a sole proprietorship, general partnership, limited partnership, corporation, or otherwise, on the terms, for the time, and in the manner that the Trustee shall, in the Trustee's discretion, deem advisable. Any such operation, sale, [*add, if desired*: purchase, acquisition, investment, reinvestment,] or liquidation, in good faith, shall be at the risk of the trust estate and without liability on the part of the Trustee for any resulting losses. The Trustee is further authorized to incorporate any business or any interest in any business which may at the inception of the trust or at any time thereafter become an asset of the trust estate and hold the stock as an asset of the trust estate, or sell, or grant options on any such stock. The Trustee is further authorized to borrow money for any purpose related to the holding, operating, sale, [*add, if desired*: purchase, acquisition, investment or reinvestment in,] or liquidation of any business or any interest in any business pursuant to this paragraph, and to employ officers, managers, directors, employees, or agents in its management or operation, including elected directors or officers.

(b) In addition to the powers expressly conferred on the Trustee in this paragraph, the Trustee shall have any additional powers that may be reasonable and necessary to enable the Trustee to carry out the provisions of this paragraph, subject to any limitations that may be provided for in this will.

(c) [*Add, if desired*: The Trustee shall receive reasonable compensation for any services performed pursuant to the terms of this paragraph, in the amounts and at the times that the Trustee in the Trustee's discretion shall determine.]

### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsTrusteesDuties & PowersGeneral OverviewEstate, Gift & Trust

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*24-64A California Legal Forms--Transaction Guide § 64A.281*

**§ 64A.281 Provision Permitting Trustee to Operate Farm or Ranch**

**[1] Comment**

**[a] Use of Form**

This form may be used to permit (but not to require) the trustee to operate any farm or ranch received into the trust at its inception or later acquired as a trust investment. For a provision permitting (but not requiring) the trustee to conduct any business received into the trust at its inception or later acquired as a trust investment, see § 64A.280. For a provision permitting (but not requiring) the trustee to hold stock in a closely held corporation, see § 64A.282.

**[b] Operation of Farm or Ranch by Trustee**

Since the operation of a farm or ranch is analogous to the operation of a business, the trustee's authority to operate a farm or ranch is generally subject to the same limitations as the trustee's authority to hold or deal with other business assets [*see Estate of King (1942) 19 Cal. 2d 354, 121 P.2d 716*; *see also Logan, "Estate Planning: The Special Problems of the Farmer in Dispositions by Will," 32 Rocky Mt. L. Rev. 329 (1960)*]. The operation of a farm or ranch, like the operation of other businesses, generally entails greater risk for the trust estate than more conventional investments. For this reason, the power of trustees to operate these entities has traditionally been restricted. For a general discussion of the power of trustees to operate businesses received as part of the trust estate (and statutory limitation on that power), see § 64A.280[1].

The trustee's authority to invest in a new business (as opposed to a business received as part of the trust estate) is even more limited. The court has no power to authorize such an investment independent of authority in the trust instrument [*see Prob. Code § 16222*; *see also discussion in § 64A.280[1][b][ii]*]. Even without court authorization, however, the trustee may invest in a new business if power to do so is conferred in the trust instrument [*Prob. Code § 16200(a)*].

**[2] FORM**

**Provision Permitting Trustee to Operate Farm or Ranch**

(a) The Trustee is authorized to continue to hold, operate, sell, [*add, if desired:* purchase, acquire, invest or reinvest in,] or liquidate any farming or ranching property, or any interest in any farming or ranching property, whether organized as a sole proprietorship, general partnership, limited partnership, corporation, or otherwise, on the terms, for the time, and in the manner that the Trustee shall, in the Trustee's discretion, deem advisable. Any such operation, sale, [*add, if desired:* purchase, acquisition, investment, reinvestment,] or liquidation, in good faith, shall be at the risk of the trust estate and without liability on the part of the Trustee for any resulting losses.

(b) In addition to the powers expressly conferred on the trustee in this paragraph, the Trustee shall have such further and additional powers as may be reasonable and necessary to enable the Trustee to carry out the provisions of this paragraph, including the power to rent or lease land, equipment, or livestock, for cash or on shares; to purchase, sell, exchange, or acquire tools, machinery, equipment, supplies, services, farm products, livestock, and timber; to repair, improve, construct, and demolish buildings and structures of all types; to clear, drain, terrace, and fertilize the land; to install irrigation systems; to employ soil conservation and other practices to conserve, improve, and maintain the fertility and productivity of the soil; to protect, manage, and improve any timber and forest on the property; to engage in livestock and crop production, including (but not limited to) the raising, purchase, and sale of any and all types of livestock and farm or ranch products; to perform all acts necessary or appropriate to participate in and cooperate with any governmental agricultural program; to receive all payments, proceeds, and benefits under any governmental program; and to employ the methods of carrying on the farming or ranching operations that are in common use by other landowners in the area where the farming or ranching property or interest is located.

(c) [*Add if desired:* The Trustee is further authorized to incorporate any farming or ranching property or any interest in any farming or ranching property that may at the inception of the trust or at any time thereafter become an asset of the trust estate and hold the stock as an asset of the trust estate, or sell, or grant options on such stock. The Trustee is authorized to borrow money for any purpose related to the holding, operating, sale, [purchase, acquisition, investment or reinvestment in,] or liquidation of any farming or ranching property or any interest in any farming or ranching property pursuant to this Paragraph, and to employ officers, managers, directors, employees, or agents in its management or operation, including elected directors or officers.]

(d) [*Add if desired:* In addition to any other compensation to which the Trustee shall be entitled for services rendered to the trust, the Trustee shall receive reasonable compensation for any services performed pursuant to the terms of this paragraph, in the amounts and at the times that the Trustee in the Trustee's discretion shall determine.]

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Estate, Gift & Trust LawTrustsTrusteesDuties & PowersGeneral Overview



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*24-64A California Legal Forms--Transaction Guide § 64A.282*

**§ 64A.282 Provision Permitting Trustee to Hold Corporate Stock**

**[1] Comment**

**[a] Use of Form**

This provision may be used to permit (but not require) the trustee to hold stock in a closely held corporation. It will be particularly useful if the stock is in a small corporation whose smooth operation (or continued existence) might be imperiled by sudden or substantial changes in stock ownership. For a provision permitting the trustee to conduct any business received into the trust at its inception or later acquired as a trust investment, see § 64A.280.

**[b] Holding Stock in Closely Held Corporation**

The trustee's duties with respect to the management and investment of trust property are subject to the prudent investor rule, which is set forth in the Uniform Prudent Investor Act [*see Prob. Code §§ 16045-16054*]. The prudent investor rule requires the trustee to invest and manage trust assets as a prudent investor would, by considering the purposes, terms, distribution requirements, and other circumstances of the trust [*Prob. Code § 16047(a)*]. In satisfying this standard, the trustee must exercise reasonable care, skill, and caution [*Prob. Code § 16047(a)*].

The prudent investor rule permits the trustee to invest in any kind of property or type of investment or engage in any course of action or investment strategy consistent with the Uniform Prudent Investor Act [*Prob. Code § 16047(e)*]. However, it also requires the trustee to diversify the investments of the trust unless, under the circumstances, it is prudent not to do so [*Prob. Code § 16048*].

The trustee would have the power to hold stock in a closely held corporation even without a special trust provision if a prudent investor would hold that stock, considering the purposes, terms, distribution requirements, and other circumstances of the trust, and if holding the stock would not violate the trustee's duty to diversify trust investments [*Prob. Code §§ 16047(a), 16048*]. However, the Uniform Prudent Investor Act specifically authorizes the settlor to expand the prudent investor rule by express provisions in the trust instrument [*Prob. Code § 16046*]. This form is such a provision. If the trustee relies on the provision in good faith, the trustee cannot be held liable to any beneficiary for

doing so [*Prob. Code § 16046(b)*].

This provision empowers the trustee to hold stock in a closely held corporation, but it does not require the trustee to do so. The Trust Law makes it clear that the grant of a power to a trustee, whether by the trust instrument, by statute, or by the court, does not in itself require or permit the exercise of the power [*Prob. Code § 16202*]. In all cases, the exercise of a power by a trustee is subject to the trustee's fiduciary duties [*Prob. Code § 16202*]. This means, at the least, that the exercise of the power is subject to the prudent investor rule, which requires the trustee to administer the trust with reasonable care, skill and caution under the circumstances then prevailing, and to use the same care, skill, and caution that a prudent person acting in a like capacity would use in the conduct of an enterprise of like character and with like aims to accomplish the purposes of the trust as determined from the trust instrument [*Prob. Code § 16040(a)*].

For further discussion of the prudent investor rule, see §§ 64A.40[3] and 64A.260[1]. For further discussion of the prudent investor rule, see § 64A.39[7].

### **[c] Will Provisions Authorizing Operation of Business**

If the testator wishes the trustee to operate a business or participate in the operation of a closely held corporation, the will should clearly instruct the executor not to sell the business or shares of stock. For directions to the executor with respect to holding, operating, selling, or liquidating a business or an interest in a business owned by the testator, see *Ch. 65, Executors*, § 65.241. For will provisions making gifts of business property, see *Ch. 63, Will Provisions*, §§ 63.460-63.465.

### **[d] Restrictions on Transfer of Stock**

The power of a trustee to hold corporate stock may be affected by the articles of incorporation or bylaws of the corporation, by the corporation's right to redeem shares of stock, or by inter vivos buy and sell agreements entered into by or among the incorporators or shareholders. The articles of incorporation may set reasonable restrictions on the right to transfer or hypothecate shares of any class or classes or series of corporate stock, but no restriction will be binding with respect to shares issued before the adoption of the restriction unless the holders of the shares voted for the restriction [*Corp. Code § 204(b)*]. The bylaws may contain any provision not in conflict with the law or with the articles of incorporation, including any provision setting reasonable restrictions on the transfer of shares [*Corp. Code § 212(b)(1)*]. In addition, the corporation may reserve the right to redeem shares of its stock [*see Corp. Code §§ 166, 509*]. For further discussion of restrictions on the transfers of shares of stock, see *Ch. 3, Articles of Incorporation*, § 3.264[1] and *Ch. 4, Bylaws*, §§ 4.244[1], 4.245[1]. For a discussion of buy and sell agreements, see *Ch. 8D, Buy-Sell Agreements*, § 8D.10 et seq.

## **[2] FORM**

### **Provision Permitting Trustee to Hold Corporate Stock**

It is my wish that the Trustee continue to hold any stock of \_\_\_\_\_ [*name of corporation,*] hereinafter sometimes referred to as "the corporation," received by the Trustee or later added to the trust estate. This provision will not prohibit the Trustee from selling any or all of that stock if the Trustee, in the Trustee's discretion, deems sale to be in the best interests of the trust estate; but inasmuch as I believe that retention of the stock will be beneficial to the trust estate, I specifically authorize its retention.

In the event that the shares of stock in the corporation held by the trustee constitute a majority of the total outstanding shares of the voting stock of the corporation, I authorize the Trustee to use the Trustee's control to continue the business of the corporation in such a manner and for such a time as the Trustee may deem advisable and in the best interests of the trust estate. In the discretion of the trustee, the kind of business in which the corporation is engaged may from time to time be changed and the scope and nature of its activities may be enlarged or diminished, or it may be dissolved and

its assets liquidated. The Trustee shall have with respect to the business of the corporation and the stock of the corporation owned by the Trustee all of the powers that I would have if personally present and acting.

The Trustee is authorized (but not required) to vote the stock of the corporation in such a way as to elect the Trustee or one or more employees of the Trustee as a member or members of the board of directors of the corporation. The management of the corporation and the actual conduct of the business operations of the corporation may be delegated to such persons as the board of directors shall direct. I recommend (but do not direct) that the active conduct of the business of the corporation be committed to those persons who are in charge of its operations at the time of my death.

The Trustee shall incur no liability for misconduct, mismanagement, or negligence on the part of any employee of a business, any employee or partner of a partnership, or any director, officer, or employee of the corporation who is not also an officer or employee of the Trustee. In the absence of actual notice to the contrary, the Trustee may accept as correct and rely on financial and other statements as to the condition and operation of the corporation rendered from time to time by any accountant for or in behalf of the corporation. The corporation shall be regarded as an entity separate from the trust and the trust estate, and no accounting as to the operations of the business of the corporation shall be required to be made.

[*Add if desired:* The services rendered by the trustee under the provisions of this paragraph, or otherwise in connection with the management of the corporation or the continuation of its business, shall be deemed extraordinary services, for which the Trustee shall be entitled to extra compensation out of the trust estate.]

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsTrusteesDuties & PowersGeneral OverviewEstate, Gift & Trust  
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*24-64A California Legal Forms--Transaction Guide §§ 64A.283-64A.299*

**[Reserved]**

§§ 64A.283[Reserved]



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F. Alternate and Optional Powers of Sale, Lease, and Exchange

*24-64A California Legal Forms--Transaction Guide § 64A.300*

**§ 64A.300 Provision Permitting Trustee to Sell, Lease, or Exchange Trust Property**

**[1] Comment**

**[a] Use of Form**

This provision may be used to permit (but not require) the trustee to sell, exchange, or lease trust property, and, for that purpose, to employ agents, consultants, advisers, and brokers. For a provision requiring the trustee to retain a specific trust asset or assets, see § 64A.242. For a provision authorizing the trustee to employ agents, advisers, and attorneys, see § 64A.320.

**[b] Sales and Exchanges of Trust Property**

**[i] In General**

Under the Trust Law, trustees are broadly invested with power to acquire or dispose of property, for cash or on credit, at public or private sale, or by exchange [*Prob. Code § 16226*]. When selling property, however, trustees must act in accordance with the prudent investor rule [*Prob. Code § 16040(b)*; *Prob. Code § 16202* (exercise of trustee's powers subject to fiduciary duties)]. In general, the prudent person rule permits the trustee to sell trust property whenever sale is necessary or proper to enable the trustee to carry out the purposes of the trust and when the power is not expressly or impliedly forbidden by the trust instrument [*see Church v. Church (1940) 40 Cal. App. 2d 696, 700, 105 P.2d 640*]. In every case, however, the trustee must exercise independent judgment as to the propriety of a sale, and it is improper to delegate the decision to another [*Prob. Code § 16012* (duty not to delegate); *see Estate of Talbot (1956) 141 Cal. App. 2d 309, 317, 320, 296 P.2d 848*].

**[ii] Self-Dealing**

Even if a sale of trust property would be proper under the prudent investor rule [*see Prob. Code § 16040*; *see also* discussion in § 64A.300[1][b]], it is improper for a trustee to purchase trust property for the trustee's own account unless the trust instrument specifically authorizes such a purchase [*Prob. Code § 16004(a)* (trustee may not deal with

property for own profit); see *Estate of Howard* (1955) 133 Cal. App. 2d 535, 536, 284 P.2d 966 ; see also § 64A.268[1]. When a sale to the trustee is challenged, the court will refuse to consider whether the transaction benefited the beneficiaries, since the rule prohibiting a trustee from dealing personally with trust property is absolute [see *Toedter v. Bradshaw* (1958) 164 Cal. App. 2d 200, 208, 330 P.2d 688] .

### **[c] Employment of Agents and Advisers**

The Trust Law broadly empowers trustees to hire persons, including accountants, attorneys, auditors, investment advisers, appraisers (including probate referees appointed under *Prob. Code* § 400), and other agents, to advise or assist the trustee in the performance of the trustee's administrative duties [*Prob. Code* § 16247]. These persons may be hired even if they are associated or affiliated with the trustee [*Prob. Code* § 16247]. However, the trustee may not blindly rely on the advice of any of these persons, inasmuch as the trustee has a duty not to delegate to others the performance of acts that the trustee can reasonably be required to perform personally [*Prob. Code* § 16012(a)] and, whenever the trustee has properly delegated a matter to an agent or other person, the trustee has a duty to exercise general supervision over the person performing the delegated matter [*Prob. Code* § 16012(b)]. In any event, the trustee must apply the full extent of the trustee's skills to the administration of the trust, whether or not there are advisers [*Prob. Code* § 16014(a)].

For further considerations relating to the employment of agents, advisers, and attorneys, see § 64A.320[1].

## **[2] FORM**

### **Provision Permitting Trustee to Sell, Lease, or Exchange Trust Property**

The Trustee shall have the power to grant, convey, liquidate, grant options on, sell (for cash or on deferred payments, with or without security), exchange, partition, divide, and improve trust property, and to lease trust property for terms within or beyond the term of the trust and for any purpose, including, but not limited to, the exploration and removal of oil, gas, and other minerals, and to enter into community leases and pooling and unitization agreements. To carry out the purposes of the powers conferred on the Trustee in this paragraph, the Trustee shall have the further power to employ agents, consultants, advisers, and brokers, and to pay them from the trust estate reasonable compensation for all services performed on behalf of the trust. [*Add, if desired:* Any compensation paid to any agents, consultants, advisers, or brokers pursuant to the terms of this paragraph shall not decrease the compensation to which the Trustee is entitled.]

### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsTrusteesDuties & PowersGeneral OverviewEstate, Gift & Trust

LawTrustsTrusteesDuties & PowersSalesEstate, Gift & Trust LawTrustsTrusteesDuties & PowersStandards of Care



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F. Alternate and Optional Powers of Sale, Lease, and Exchange

*24-64A California Legal Forms--Transaction Guide §§ 64A.301-64A.319*

**[Reserved]**

§§ 64A.301[Reserved]



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 G. Alternate and Optional Powers for Employment of Attorneys and Agents

*24-64A California Legal Forms--Transaction Guide § 64A.320*

**§ 64A.320 Provision Authorizing Trustee to Employ Agents, Advisors, and Attorneys**

**[1] Comment**

**[a] Use of Form**

This provision may be used to permit the trustee to employ custodians, agents, advisors, and attorneys to assist and advise the trustee in the execution of the trust. For a provision permitting the trustee to sell, exchange, or lease trust property, and, for that purpose, to employ agents, consultants, advisors, and brokers, see § 64A.300.

**[b] Employment of Advisors, Attorneys, and Agents**

Trustees have broad statutory authority to employ accountants, attorneys, auditors, investment advisors, appraisers (including probate referees appointed under *Prob. Code § 400*), and other agents, to advise or assist them in the performance of their duties [*Prob. Code § 16247*]. However, a trustee may not rely blindly on the advice of any agent, and must exercise independent judgment with respect to important decisions. Under the Trust Law, the trustee has a duty not to delegate to others the performance of administrative acts that the trustee can reasonably be required to perform personally [*Prob. Code § 16012(a)*; see *Prob. Code § 16012(c)* (rule not applicable to investment and management functions)], and, if a power has been delegated, the trustee has a duty to exercise general supervision over the person to whom the power has been delegated [*Prob. Code § 16012(b)*]. Under the Uniform Prudent Investor Act [see *Prob. Code §§ 16045-16054* and discussion in § 64A.260[1]], a trustee may delegate investment and management functions as prudent under the circumstances [*Prob. Code § 16052(a)*]. However, the trustee must exercise prudence in selecting an agent, establishing the scope and terms of the delegation, and periodically reviewing the agent's overall performance [*Prob. Code § 16052(a)(1)-(3)*].

**[2] FORM**

**Provision Authorizing Trustee to Employ Agents, Advisors, and Attorneys**

The Trustee is authorized to employ custodians, investment advisors, accountants, attorneys, appraisers, and any other

agents or advisors to assist the trustee in the proper management and administration of the trust. All such agents and advisors shall receive reasonable compensation for their services on behalf of the trust.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsTrusteesDuties & PowersGeneral Overview



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*24-64A California Legal Forms--Transaction Guide §§ 64A.321-64A.339*

**[Reserved]**

§§ 64A.321[Reserved]



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H. Alternate and Optional Provisions for Discretion

*24-64A California Legal Forms--Transaction Guide § 64A.340*

**§ 64A.340 Provision Conferring "Sole," "Absolute," or "Uncontrolled" Discretion on Trustee**

**[1] Comment**

**[a] Use of Form**

This provision may be used to confer "sole," "absolute," or "uncontrolled" discretion on the trustee. It should be used only after careful consideration of the legal rules relating to trustee discretion and the permissible scope of broad or permissive grants of discretionary powers. The form consists of a principal provision and an optional provision. The optional provision may be added to the principal provision if it is intended to give a trustee who is also a beneficiary a power to take or distribute income or principal for the trustee's own benefit without regard to whether that income or principal is for the trustee-beneficiary's health, education, support, or maintenance.

For trust provisions conferring simple or ordinary discretion on the trustee, see §§ 64A.220 and 64A.221.

**[b] Discretion of Trustee**

**[i] Effect of Provision Granting "Absolute," "Sole," or "Uncontrolled" Discretion**

Unless the trust instrument provides that the trustee's discretion is to be "absolute," "sole," or "uncontrolled," a discretionary power conferred on a trustee is presumed not to be left to the arbitrary discretion of the trustee, but must be exercised reasonably [*Prob. Code § 16080*]. In making investments, a trustee with "absolute" discretion is relieved of the obligation to act in accordance with the prudent investor rule [ *American Center for Education, Inc., v. Cavnar* (1978), 80 Cal. App. 3d 476, 497, 145 Cal. Rptr. 736, superseded by statute as stated in *Patton v. Sherwood*, 152 Cal. App. 4th 339, 61 Cal. Rptr. 3d 289, 2007 Cal. App. LEXIS 1011] and is not required to conform to the standard of "reasonableness" [ *Estate of Friedman* (1979), 94 Cal. App. 3d 667, 670, 156 Cal. Rptr. 597]. Such a trustee must, however, conform to fiduciary principles and is forbidden to act in bad faith or to disregard the purposes of the trust [*Prob. Code § 16081(a)*].

A grant of "absolute discretion" to a trustee means simply that the judgment of the trustee, if exercised in good faith,

will control [ *Estate of Gross (1963) 216 Cal. App. 2d 563, 567, 31 Cal. Rptr. 281* ], but it will not excuse bad faith or failure to exercise any judgment at all [ *Copley v. Copley (1981) 126 Cal. App. 3d 248, 284, 178 Cal. Rptr. 842* ]. In all cases, whether the discretionary power conferred on the trustee is broad or narrow, it is subject to review by a court of competent jurisdiction [*Prob. Code § 17200(b)(5)*].

### **[ii] Effect of Provision on Trustee Who Is Also Beneficiary of Trust**

Under *Prob. Code § 16081(c)*, a trustee who has discretion to distribute principal or income for the trustee's own benefit may exercise the discretion only to make distributions for his or her health, education, support, or maintenance within the meaning of *I.R.C. §§ 2041 and 2514*, unless the will or trust specifically refers to the statute and specifies a broader standard [*see Prob. Code § 16081(e)* (applicable dates of *Prob. Code § 16081(c)*)]. A power to distribute principal or income for a person's health, education, support, or maintenance within the meaning of *I.R.C. §§ 2041 and 2514* is generally referred to as an "ascertainable standard." For further discussion of the special rules of *Prob. Code § 16081(c)*, see § 64A.39[8]. For the adverse tax consequences of giving a trustee-beneficiary a power that is not subject to an "ascertainable standard," see § 64A.340[1][c].

This provision contains optional language removing the statutory limitations imposed by *Prob. Code § 16081(c)*. That language should not be included without careful evaluation of the potential adverse tax consequences.

### **[c] Drafting Considerations**

In determining whether the trustee's discretion should be made "absolute," "sole," or "uncontrolled", the testator should be guided in large measure by the testator's level of confidence in the integrity and skill of the proposed trustee. If the trustee is to be a corporate trustee, a close and trusted family friend, an experienced financial advisor, or some other person who enjoys the unqualified confidence of the testator, there will ordinarily be little reason to restrict the trustee's investment powers to the prudent investor rule, and the testator may wish the trustee to have the broader investment latitude that flows from a grant of "absolute," "sole," or "uncontrolled" discretion. If, however, the trustee is to be a family member who has little or no investment experience, or a person whose loyalties to the trust or concern for the welfare of the beneficiaries may, for any reason, be subject to compromise, the testator may wish to retain the prudent investor rule and withhold a grant of "absolute," "sole," or "uncontrolled" discretion.

In any event, whether or not the will includes broad discretionary powers, the trustee will be required to act in accordance with fiduciary principles and forbidden to act in bad faith or in disregard of the purposes of the trust [*Prob. Code § 16081(a)*].

Before adopting the optional provision of this form, which grants a trustee-beneficiary absolute discretion to take trust income or principal for himself or herself whether or not it is for his or her health, education, support, or maintenance, the testator and the drafter should consider the adverse tax consequences of such a provision. If a will gives the trustee power to invade the principal of the trust for the trustee's own benefit, and if the power is not limited by an "ascertainable standard," the trustee may be deemed to hold a general power of appointment over the trust assets [*see I.R.C. § 2041(b)(1)(A)*], with the result that they will be included in the trustee's estate for estate tax purposes [*I.R.C. § 2041(a)*]. For further discussion of the tax consequences of such a power, see discussion in § 64A.32[2].

## **[2] FORM**

### **Provision Conferring "Sole," "Absolute," or "Uncontrolled" Discretion on Trustee**

Any provision of this will that grants to or confers on the Trustee(s) any discretion with respect to any power or duty is intended and shall be deemed to confer sole, absolute, and uncontrolled discretion on the Trustee(s).

[Optional provision permitting beneficiary-trustee to take income for own benefit; do not include without careful

*consideration of potential adverse tax consequences: ]*

The discretion conferred by this will shall extend to the power to take or distribute trust income or principal to or for the Trustee's own benefit, up to the maximum extent permitted by this will; and, in exercising such discretion for the Trustee's own benefit, the trustee shall not be limited to distributions for the health, education, support, or maintenance of the trustee. Any limitations contained in *California Probate Code Section 16081(c)* (or any successor statute) on the power of a Trustee or Co-Trustee to make distributions to or for the Trustee's own benefit shall not apply to any such power conferred by this will.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsTrusteesGeneral OverviewEstate, Gift & Trust LawTrustsTrusteesDuties & PowersGeneral OverviewEstate, Gift & Trust LawTrustsTrusteesDuties & PowersStandards of Care



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H. Alternate and Optional Provisions for Discretion

*24-64A California Legal Forms--Transaction Guide §§ 64A.341-64A.359*

**[Reserved]**

§§ 64A.341[Reserved]



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I. Optional Provisions Dividing or Allocating Powers of Cotrustees

*24-64A California Legal Forms--Transaction Guide § 64A.360*

**§ 64A.360 Provisions Authorizing Majority of Cotrustees to Make Investment Decisions for Trust**

**[1] Comment**

**[a] Use of Form**

This form is a will provision that may be used to divide or allocate the powers of cotrustees by providing that, whenever two or more cotrustees are in office, investment decisions for the trust may be made by a majority of the cotrustees. Two alternative provisions are illustrated. The first provides that a majority of the cotrustees may make investment decisions in any transaction, without specifying a limit on the amount of the obligation that may thereby be incurred. The second provides that a majority of the cotrustees may make such decisions only when the amount of the obligation incurred thereby does not exceed a specified limit.

For a provision dividing or allocating the powers of cotrustees by assigning investment powers to a named cotrustee or cotrustees, see § 64A.361. For a provision empowering a third party to make investment decisions for the trust, see § 64A.362. For a provision conferring a veto power on a third party (or "Special Trustee"), see § 64A.363.

**[b] Dividing or Allocating the Powers of Cotrustees**

Because of practical difficulties that inhibit the efforts of many cotrustees to administer trusts effectively [*see* discussion in § 64A.202[1][b][i] et seq.], the testator may wish to consider one of several alternate provisions that divide the duties of the cotrustees.

Generally, when there are cotrustees, all must unite in any action to bind the trust property, but unanimity is not required if the trust instrument provides otherwise [*Prob. Code § 15620*]. The trust instrument may dispense with the requirement by providing, among other things, that the powers of the trust may be exercised by a majority of the trustees [Scott, *The Law of Trusts* (3d ed., Little, Brown & Co., 1967), § 194]. In this provision, the testator dispenses with the requirement of unanimity by providing that, in making investment decisions, a majority of the cotrustees may bind the trust estate.

This provision will be most useful if there are more than two cotrustees. When there are only two cotrustees, they will be either unanimous or split equally on any decision, and no majority decision will be possible. If the trustees cannot agree, and if the trust instrument does not authorize action by a majority of the cotrustees, the only practical solution is to petition the court for instructions [*Prob. Code § 17200(b)(6)*].

The trust instrument may set a dollar limit on transactions in which a majority of the cotrustees may bind the estate. If the transaction is within the specified limit, a majority of the cotrustees is competent to act. If the transaction exceeds the specified limit, the general requirement of unanimity applies.

## **[2] FORM**

### **Provisions Authorizing Majority of Cotrustees to Make Investment Decisions for Trust**

*[First alternative: no dollar limit on decisions:]*

At any time that more than two Cotrustees are in office, any decision to retain, sell, purchase, acquire, exchange, hypothecate, mortgage, encumber, or grant or acquire an option or options on any trust assets, or to make any other investment decision or decisions for the trust, may be made by a majority of the Cotrustees then in office. Any such decision shall be binding upon the trust and may be relied upon by third parties in dealing with it.

*[Second alternative: dollar limit on decisions:]*

At any time that more than two Cotrustees are in office, any decision to retain, sell, purchase, acquire, exchange, hypothecate, mortgage, encumber, or grant or acquire an option or options on any trust assets, or to make any other investment decision for the trust, may be taken by a majority of the Cotrustees then in office, if the decision does not obligate the Cotrustees or the trust to expend more than \_\_\_\_\_ [*specify amount, e.g.: \$1,000.00*] for each such decision. Any investment decision taken by a majority of the Cotrustees in accordance with the provisions of this Paragraph which does not obligate the Cotrustees or the trust to expend more than \_\_\_\_\_ [*specify amount, e.g.: \$1,000.00*] shall be binding upon the trust and may be relied upon by third parties in dealing with it.

### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsTrusteesDuties & PowersGeneral OverviewEstate, Gift & Trust LawTrustsTrusteesMultiple Trustees



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DIVISION IV: WILLS AND TRUSTS  
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I. Optional Provisions Dividing or Allocating Powers of Cotrustees

*24-64A California Legal Forms--Transaction Guide § 64A.361*

**§ 64A.361 Provisions Assigning Investment Powers to Named Cotrustee**

**[1] Comment**

**[a] Use of Form**

This form is a will provision that may be used to divide or allocate the powers of cotrustees by assigning investment powers to a named cotrustee or cotrustees. For provisions authorizing investment action by a majority of the cotrustees, see § 64A.360. For a provision empowering a third party to make investment decisions for the trust, see § 64A.362. For a provision conferring a veto power on a third party, see § 64A.363.

**[b] Dividing Powers Among Cotrustees**

The general rule requiring that all cotrustees must unite in any action to bind the trust estate is discussed in § 64A.360[1]. The trust instrument may dispense with the requirement of unanimity by, among other things, authorizing any one of several trustees to exercise a specified power [Scott, *The Law of Trusts* (3d ed., Little, Brown & Co., 1967), § 194] or by providing that specified powers will be exercised by one trustee and other powers by another [ *Crocker-Citizens National Bank v. Younger* (1971) 4 Cal. 3d 202, 211, 93 Cal. Rptr. 214, 481 P.2d 222 ; see Scott, *The Law of Trusts* (Third edition, Little, Brown & Co., 1967), vol. 2, § 185; see also Cohan, "Splitting Powers Between Fiduciaries," 8 *Real Prop., Prob. & Tr. J.* 588, 590 (1973)]. A testator may wish to name a trust company or other corporate trustee as cotrustee with a trusted friend or family member, but wish the friend or family member to make investment decisions. The provision set forth below may be used to vest such power in a named individual.

**[c] Drafting Considerations**

This provision (or one of the provisions set forth in the *forms* in § 64A.362 or 64A.363) may be useful in a variety of business situations. If, for example, an interest in a business owned as a partnership (or as a closely held corporation) is to be placed in the trust, the testator may wish the surviving partner or shareholders to continue the operation of the business [for rules relating to the operation of businesses or interests in businesses held by trusts, see § 64A.280[1]]. Placing the testator's share in trust may jeopardize the successful operation of the business by creating management

tensions between the trustee and the surviving owners. If, however, one of the surviving owners is named as a special trustee with power to make any and all investment decisions that affect the business, these tensions may be avoided. If a sole proprietorship business, a farm, or oil, gas or mineral interests are to be placed in the trust, the trustor may well wish to designate an experienced and knowledgeable person, perhaps a business associate, to make decisions regarding those assets, while designating another individual, or a corporate trustee, to carry on the usual business of trust administration and recordkeeping.

## [2] FORM

### Provisions Assigning Investment Powers to Named Cotrustee

I give to \_\_\_\_\_ [*name of cotrustee who will make investment decisions*], for so long as \_\_\_\_\_ [*he or she or it*] shall serve as a Cotrustee of \_\_\_\_\_ [*any of the trusts established in or the trust established under Paragraph \_\_\_\_\_ of*] this will, the sole and exclusive power to direct \_\_\_\_\_ [*name of corporate or other trustee to whom directions will be directed*] in writing, from time to time, to retain, sell, lease, exchange, hypothecate, mortgage, encumber, or grant options on any property of the trust estate, and to invest and reinvest funds of the trust estate in such property as \_\_\_\_\_ [*name of cotrustee who will make investment decisions*] shall from time to time determine. \_\_\_\_\_ [*name of corporate or other trustee to whom directions will be directed*] shall promptly comply with all such written directions and shall incur no liability to any interested party for following [or for failing to act in the absence of] the same.

### Legal Topics:

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsTrusteesDuties & PowersGeneral OverviewEstate, Gift & Trust LawTrustsTrusteesMultiple Trustees



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*24-64A California Legal Forms--Transaction Guide § 64A.362*

**§ 64A.362 Provisions Empowering Special Trustee to Make Investment Decisions**

**[1] Comment**

**[a] Use of Form**

This form is a will provision that may be used to empower a third party (referred to in this form and comment as a "Special Trustee") to make investment decisions for the trust. Two alternative forms are set forth, one that empowers the third party to make all investment decisions for the trust, and another that empowers the third party to make decisions only with respect to specific assets.

For provisions authorizing investment decisions to be made by a majority of the cotrustees, see § 64A.360. For a provision assigning investment powers to a named cotrustee or cotrustees, see § 64A.361. For a provision conferring a veto power on a third party (or "special trustee"), see § 64A.363.

**[b] Conferring Trust Powers on Third Parties**

The practical difficulties that cotrustees frequently encounter in the administration of trust estates may be overcome by the simple expedient of empowering a third party to make certain decisions for the trust. Although such a third party will not be designated as a trustee in the same sense that the principal trustee or cotrustees are designated, he or she will exercise duties similar to those of a trustee and, unless the power conferred is a "beneficial power" [*see* discussion in § 64A.362[1][c]], will be subject to all of the rules that govern trustees.

The power of a settlor to confer powers on persons other than the named trustee follows from the settlor's power to define and limit the powers of all of the trustees. If the settlor may name two or four or a score of cotrustees and define the powers of each [*see* discussions in §§ 64A.360[1][b] and 64A.361[1][b]], the trustor may name one trustee (the "principal trustee") to exercise all of the usual trustee powers (except those granted to a third party) and may designate a third party (the "special trustee") to execute specially designated powers. If, under the terms of the trust, a third party has the power to control the action of the trustee in certain respects, the trustee must act in accordance with the exercise of that power [*see* *Vale v. Union Bank* (1979) 88 Cal. App. 3d 330, 336, 151 Cal. Rptr. 784 (power to direct

investments conferred on committee)], unless the exercise violates the terms of the trust or a fiduciary duty owed by the third party [Restatement (Second) of Trusts, § 185]. If the settlor, for example, empowers a third party to decide when trust property will be sold, the principal trustee may sell property only when the third party directs the sale, and any other sale will subject the principal trustee to damages for breach of trust [ *Corbett v. Benioff* (1932) 126 Cal. App. 772, 776-776, 14 P.2d 1028 ].

### **[c] Beneficial and Fiduciary Powers**

A power that is granted to a third party may be a "beneficial power" or a "fiduciary power". A power is "beneficial" if its exercise will benefit the holder or a specifically designated beneficiary or beneficiaries only [Restatement (Second) of Trusts, § 185, Comment c; see Scott, *The Law of Trusts* (3d ed., Little, Brown & Co., 1967), vol. 2, § 185]. For example, the power of a beneficiary to direct the sale or retention of a residence in which the beneficiary resides is a "beneficial" power. If the power is "beneficial," the holder is not subject to the ordinary obligations of fiduciaries, and the only rule regulating exercise of the power is that it must be exercised in compliance with the terms of the trust [Cohan, "Splitting Powers Between Fiduciaries," 8 *Real Prop., Prob. & Tr. J.* 588, 591 (1973)].

A power is "fiduciary" if its exercise will benefit the beneficiaries of the trust generally [Restatement (Second) of Trusts, § 185, Comment c]. If the power is "fiduciary," then the holder must act as a trustee would under similar circumstances [Cohan, "Splitting Powers Between Fiduciaries," 8 *Real Prop., Prob. & Tr. J.* 588, 592 (1973)].

Whether a power is "beneficial" or "fiduciary" is to be determined from the intention of the settlor as manifested in the trust instrument. Since this intention is subject to interpretation, it is recommended that the will drafter clearly state the testator's intentions in the matter.

### **[d] Tax Considerations**

Just as the selection of a trustee or cotrustees may have significant tax implications, the appointment of a special trustee may have tax consequences for the trust and the beneficiaries. If a power vested in a special trustee who is also a beneficiary is deemed a power of appointment, the assets subject to the power may be included in the special trustee's estate for federal tax purposes [see *I.R.C. § 2041(a)*]. Administrative powers typically granted to a testamentary trustee will not, however, constitute a power of appointment. The mere power of management, investment, custody of assets, or the power to allocate receipts and disbursements between income and principal, exercisable in a fiduciary capacity, whereby the holder has no power to enlarge or shift any of the beneficial interests except as an incidental consequence of the discharge of fiduciary duties, is not a power of appointment [*Treas. Reg. § 20.2041-1(b)*].

Appointment of a trustee who is a beneficiary may also result in the loss of the income tax advantages of a trust. Although a trust is ordinarily deemed a separate entity for income tax purposes [*I.R.C. § 641*], the income may be taxed to the trustee if the trustee has a power exercisable solely by himself or herself to vest the corpus or the income of any portion of the trust in himself or herself [*I.R.C. § 678*].

For a more detailed discussion of the tax consequences of the selection of trustees, cotrustees, and special trustees, see discussion in § 64A.32[1] et seq.

## **[2] FORM**

### **Provisions Empowering Special Trustee to Make Investment Decisions**

[First alternative: special trustee to make all investment decisions]

I appoint \_\_\_\_\_ [name of special trustee] as the Special Trustee of this trust and give

\_\_\_\_\_ [him or her or it] the sole and exclusive power to direct \_\_\_\_\_ [name of principal trustee] in writing, from time to time, to retain, sell, lease, exchange, hypothecate, mortgage, encumber, or grant options on any property of the trust estate, and to invest and reinvest funds of the trust estate in such property as \_\_\_\_\_ [name of special trustee] shall determine. \_\_\_\_\_ [Name of principal trustee] shall promptly comply with all such written directions and shall incur no liability to any interested party for following [or for failing to act in the absence of] the same. \_\_\_\_\_ [Name of special trustee] shall hold this power in a fiduciary capacity and shall be subject to the same duties, obligations, and liabilities that apply to the exercise of power by a trustee.

[Second alternative: special trustee to make decisions with respect to specific asset]

I appoint \_\_\_\_\_ [name of special trustee] as the Special Trustee of this trust and give \_\_\_\_\_ [him or her or it] the sole and exclusive power to direct the operation, management, and control of \_\_\_\_\_ [describe asset over which special trustee will have investment control] only. For the purpose of successfully carrying out that operation, management, and control, I further give \_\_\_\_\_ [name of special trustee] the sole and exclusive power to direct \_\_\_\_\_ [name of principal trustee] in writing, from time to time, to retain, sell, lease, exchange, hypothecate, mortgage, encumber, or grant options on \_\_\_\_\_ [describe asset as to which special trustee will have investment control], or any part thereof. \_\_\_\_\_ [Name of principal trustee] shall promptly comply with all such written directions and shall incur no liability to any interested party for following [or for failing to act in the absence of] the same. \_\_\_\_\_ [Name of special trustee] shall hold the power granted in this Paragraph in a fiduciary capacity and shall be subject to the same duties, obligations, and liabilities that apply to the exercise of power by a trustee.

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsTrusteesDuties & PowersGeneral OverviewEstate, Gift & Trust LawTrustsTrusteesDuties & PowersStandards of Care



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*24-64A California Legal Forms--Transaction Guide § 64A.363*

**§ 64A.363 Provision Conferring Veto Power on Special Trustee**

**[1] Comment**

**[a] Use of Form**

This form is a will provision that may be used to give a third party veto power over investment decisions of the trustee. For provisions authorizing a majority of the cotrustees to make investment decisions for the trust, see § 64A.360. For a provision assigning investment powers to a named cotrustee or cotrustees, see § 64A.361. For provisions empowering a third party to make investment decisions for the trust, see § 64A.362.

**[b] Veto Powers in Special Trustees**

One solution to the practical difficulties that cotrustees frequently encounter in the administration of trust estates is to give a third party power to veto decisions of the trustee or cotrustees. Although the third party will not be designated as a trustee in the same sense as the principal trustee or cotrustees, he or she will exercise duties similar to those of a trustee and, unless the power conferred is a "beneficial power" [*see* discussion in § 64A.362[1][c]], will be subject to all of the rules that govern trustees.

The settlor has the power to provide that the trustee or cotrustees will be subject to the control of another in specified respects [Scott, *The Law of Trusts* (3d ed., Little, Brown & Co., 1967), vol. 2, § 185]. The person on whom the power of control is conferred may be a beneficiary, one of the cotrustees, or a third person who is otherwise unconnected with the trust [for rules relating to the exercise of "beneficial" and "fiduciary" powers, *see* discussion in § 64A.362[1][c]].

The extent of the power conferred depends entirely on the trust instrument. It may be a power to compel action by the trustee or to veto certain acts, as in the case of a provision that the trustee may make no investment or sell no property without the consent of the designated person [Scott, *The Law of Trusts* (3d ed., Little, Brown & Co., 1967), vol. 2, § 185; *see Estate of Gilmaker* (1962) 57 Cal. 2d 627, 629, 21 Cal. Rptr. 585, 371 P.2d 321].

**[2] FORM**

### Provision Conferring Veto Power on Special Trustee

The Trustee shall make no investment, reinvestment, sale, lease, or exchange, nor shall the Trustee grant or take any option on any trust property, unless the Trustee first gives written notice to \_\_\_\_\_ [name of special trustee], Special Trustee, of each proposed investment, reinvestment, sale, lease, exchange, or option [add, if desired:, except that the Trustee may invest any trust funds awaiting investment in a savings account or accounts or in a money market fund]. On receipt of written notice of any proposed investment, reinvestment, sale, lease, exchange, or option, the Special Trustee shall promptly notify the Trustee in writing of the Special Trustee's approval or disapproval of the same. If the written notice has been given by certified mail addressed to the Special Trustee at the Special Trustee's last known address, and if the Trustee has not received notice of the Special Trustee's approval or disapproval of the proposed action within \_\_\_\_\_ [specify number, e.g.: 10] days from the date of mailing of the written notice by certified mail, then the Special Trustee shall be deemed to have approved the proposed investment, reinvestment, sale, lease, exchange, or option.

If \_\_\_\_\_ [name of special trustee] shall at any time be unable or unwilling to act or to continue to act as Special Trustee, \_\_\_\_\_ [name of alternate special trustee] shall become Special Trustee and shall exercise all of the rights and powers herein conferred on the Special Trustee. If both \_\_\_\_\_ [name of special trustee] and \_\_\_\_\_ [name of alternate special trustee] are, at any time, unable or unwilling to act or to continue to act as Special Trustee, then the Trustee shall exercise the investment powers conferred on the Trustee by this instrument and by any applicable provisions of law without the necessity of first obtaining the approval of the Special Trustee. The Trustee shall not be liable to any interested party for failure to take action disapproved by the Special Trustee. The Special Trustee shall hold the powers conferred by this Paragraph in a fiduciary capacity and shall be subject to all of the duties, obligations, and liabilities that apply to the exercise of power by a Trustee.

#### Legal Topics:

For related research and practice materials, see the following legal topics:  
Estate, Gift & Trust LawTrustsTrusteesDuties & PowersGeneral Overview



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*24-64A California Legal Forms--Transaction Guide § 64A.364*

**§ 64A.364 Provisions Authorizing Majority of Cotrustees to Bind Trust**

**[1] Comment**

**[a] Use of Form**

This form is a will provision that may be used to provide that, whenever two or more cotrustees are in office, action taken by a majority of the cotrustees will bind the trust. Two alternative provisions are illustrated. The first provides that a majority of the cotrustees may bind the trust estate in any transaction, without specifying a limit on the amount of the obligation that may be incurred. The second provides that a majority of the cotrustees may bind the trust only when the amount of the obligation incurred does not exceed a specified limit.

For provisions authorizing a majority of the cotrustees to make investment decisions for the trust, see § 64A.360.

**[b] Dividing or Allocating the Powers of Cotrustees**

**[i] In General**

Because of practical difficulties that inhibit the efforts of many cotrustees to administer trusts effectively [*see* discussions in § 64A.202[1][b][i] et seq.], the testator may wish to consider one of several alternative provisions that divide, allocate, or apportion the powers and duties of the cotrustees.

**[ii] Statutory Rules**

Generally, when there are cotrustees, all must unite in any action to bind the trust property, but unanimity is not required if the trust instrument provides otherwise [*Prob. Code § 15620*]. The testator may dispense with the requirement of unanimity by providing, among other things, that the powers of the trust may be exercised by a majority of the cotrustees [Scott, *The Law of Trusts* (3d ed., Little, Brown & Co., 1967), vol. III, § 194].

**[iii] Drafting Considerations**

In this form, the testator dispenses with the requirement of unanimity by providing that a majority of the cotrustees may bind the trust estate. The form will be most useful if there are more than two cotrustees. When there are only two cotrustees, they will be either unanimous or split equally on any question, and a majority decision will not be possible. If the trustees do not agree, and if the trust instrument does not authorize action by a majority of the cotrustees, the only practical solution is to petition the court for instructions [*see Prob. Code § 17200(b)(6)*].

The testator may set a dollar limit on transactions in which a majority of the cotrustees may bind the estate. If the transaction is within the specified limit, a majority of the cotrustees will be competent to act. If the transaction exceeds the specified limit, the general requirement of unanimity will apply.

## [2] FORM

### Provisions Authorizing Majority of Cotrustees to Bind Trust

#### Majority of Cotrustees to Bind Trust

[*First alternative: no dollar limit on transactions*]

At any time that more than two Cotrustees are in office, any action taken by a majority of the Cotrustees shall be binding upon the trust and may be relied upon by third parties in dealing with it.

[OR]

[*Second alternative: dollar limit on transactions*]

At any time that more than two Cotrustees are in office, a majority of those Cotrustees shall have the power to bind the trust in any transaction obligating the Trustees to expend \_\_\_\_\_ [*specify amount, e.g.: \$1,000*] or less. Any transaction obligating the Trustees to expend more than \_\_\_\_\_ [*restate amount, e.g.: \$1,000*] shall be approved by all of the Trustees.

#### Legal Topics:

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsTrusteesDuties & PowersGeneral OverviewEstate, Gift & Trust

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*24-64A California Legal Forms--Transaction Guide § 64A.365*

**§ 64A.365 Corporate Cotrustee to Have Custody of Personal Property and Maintain Records and Accounts**

**[1] Comment**

**[a] Use of Form**

This form is a will provision that may be used to provide that any corporate trustee who is acting as a cotrustee will have custody of all money, securities, and other personal property belonging to the trust estate, maintain all records and accounts for the trust, receive all receipts, and make all necessary payments, disbursements, and distributions.

For provisions authorizing a majority of the cotrustees to bind the trust, see § 64A.364.

**[b] Custody of Personal Property and Corporate Records**

Because of the obligations imposed on them by federal and state regulatory statutes, most banks, trust companies, and other corporate trustees, when acting as cotrustees, insist that they alone have custody of personal property belonging to the trust and keep all records of the trust. The form set forth below may be incorporated in the will to clearly apprise any individual acting as a cotrustee of the corporate trustee's rights and duties in this respect.

**[2] FORM**

**Corporate Cotrustee to Have Custody of Personal Property and Maintain Records and Accounts**

**Corporate Cotrustee to Have Custody of Personal Property and Maintain Records and Accounts**

While \_\_\_\_\_ [*name of corporate cotrustee*] is acting as Cotrustee, it alone shall have custody of all money, securities, and other personal property belonging to the trust estate, shall maintain all records and accounts for the trust, shall receive all receipts, and shall make all necessary payments, disbursements, and distributions.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

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*24-64A California Legal Forms--Transaction Guide § 64A.366*

**§ 64A.366 Delegation of Powers and Duties of Individual Cotrustee to Corporate Cotrustee**

**[1] Comment**

**[a] Use of Form**

This form is a will provision that may be used to authorize an individual cotrustee to delegate his or her powers and duties to a corporate cotrustee.

**[b] Delegation of Powers and Duties of Cotrustees**

**[i] In General**

The Trust Law forbids a trustee or cotrustee from delegating the entire administration of the trust to a cotrustee or any other person [*Prob. Code § 16012(a)*; *see Prob. Code § 16012(c)* (rule not applicable to investment and management functions)]. The Trust Law also provides that if a trustee or cotrustee has delegated a matter to a cotrustee or other person, the trustee or cotrustee has a duty to exercise general supervision over the person performing the delegated matter [*Prob. Code § 16012(b)*]. However, these rules are not applicable if the trust instrument "provides otherwise" [*Prob. Code § 16000*]. By authorizing an individual cotrustee to delegate all or any of the cotrustee's powers to a corporate trustee, this provision "provides otherwise."

**[ii] Alternatives to Delegation**

A cotrustee's delegation of all the cotrustee's powers and duties may not be in the best interests of the trust. In fact, a delegation of substantially all of the trustee's duties may amount to a virtual resignation from office. Various alternatives are available to permit a division or allocation of the duties of the cotrustees without authorizing a delegation.

If, for example, the testator wishes to permit a cotrustee to seek and rely on advice or counsel, the cotrustee may be authorized to employ agents, advisors, and attorneys to assist and advise him or her in the administration of the trust. If

the testator wishes one of the cotrustees to make investment decisions for the trust while another cotrustee attends to the ministerial functions of trust administration, the powers of the cotrustees may be divided or allocated among them in various ways. For a provision authorizing a trustee to employ agents, advisors, and attorneys, see § 64A.320[2]. For provisions assigning investment powers to a named cotrustee, see § 64A.361[2]. For provisions empowering a special trustee to make investment decisions for the trust, see § 64A.362[2]. For provisions conferring a veto power on a special trustee, see § 64A.363[2]. For provisions authorizing a majority of the cotrustees to bind the trust, see § 64A.364[2]. For provisions empowering a corporate cotrustee to have custody of personal property and maintain records and accounts for the trust, see § 64A.365[2].

### **[iii] Drafting Considerations**

This form permits an entire delegation of the cotrustee's powers and duties. It may be useful if the testator contemplates that an individual trustee may, for a temporary period or periods, be unable or unwilling to carry out the duties of the trust. In such an event, the cotrustee could temporarily delegate his or her powers or responsibilities. If it is contemplated that an individual trustee will be permanently unable to carry out the duties of the trust, a provision for appointment of a successor cotrustee, to take office if and when the earlier cotrustee is unable or unwilling to act as cotrustee, will be more appropriate. For provisions appointing trustees and cotrustees, and providing for appointing of successors, see §§ 64A.200-64A.202. For provisions authorizing the appointment of alternate and successor trustees, see Ch. 64B, *Testamentary Trusts: Administrative Provisions*, § 64B.270-64B.272.

### **[2] FORM**

#### **Delegation of Powers and Duties of Individual Cotrustee to Corporate Cotrustee**

#### **Delegation of Powers and Duties of Individual Cotrustee to Corporate Cotrustee**

Any individual cotrustee may at any time delegate all or any of his or her powers and duties as cotrustee, whether ministerial or discretionary, to the corporate cotrustee, and may revoke or renew any such delegation at any time.

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:

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*24-64A California Legal Forms--Transaction Guide § 64A.367*

**§ 64A.367 Provision Disqualifying Cotrustee From Decisions Affecting Cotrustee's Own Interest**

**[1] Comment**

**[a] Use of Form**

This provision may be used to disqualify a cotrustee who is also a beneficiary of the trust from participating in discretionary decisions relating to the cotrustee's interest in the trust.

**[b] Duty of Loyalty**

**[i] Statutory Rules**

Although there is no legal bar to the appointment of a beneficiary as trustee, a trustee-beneficiary is subject to certain restrictions that do not apply to other trustees. For example, a trustee may not use or deal with the trust property for his or her own profit, or for any other purpose unconnected with the trust [*Prob. Code § 16004(a)*]. Further, a trustee (or any agent for a trustee) may not take part in any transaction concerning the trust in which the trustee (or any person for whom the trustee acts as agent) has an interest, present or contingent, adverse to that of the beneficiaries, except when consent is obtained from the beneficiaries [*Prob. Code §§ 16004(a), 16463*]. If a trustee acquires any interest, or becomes charged with any duty, adverse to the interest of the beneficiary of the trust, the trustee must immediately inform the beneficiary of that interest or duty, and may at once be removed from office [*Prob. Code § 15642(b)* (grounds for removal of trustee); *Prob. Code § 16002* (duty of loyalty); *Prob. Code § 16004* (duty to avoid conflict of interest)]. For a general discussion of the trustee's duty of loyalty to the trust and to the beneficiaries, see discussions in § 64A.39[1] et seq.

**[ii] Will Provisions**

Although statutory safeguards are available to prevent a trustee from acting adversely to the interests of the trust or its beneficiaries, a will provision disqualifying a cotrustee who is also a beneficiary from participating in discretionary decisions relating to the cotrustee's own interest in the trust may serve a useful purpose. First, it will clearly apprise

persons interested in the trust that a cotrustee may not participate in any decision that will affect the trustee's own interest. Second, it will obviate the necessity of proving that the cotrustee's interest is actually adverse to that of the trust or the beneficiaries of the trust.

**[2] FORM**

**Provision Disqualifying Cotrustee From Decisions Affecting Cotrustee's Own Interest**

**Cotrustee Prohibited From Participating in Decisions Affecting Own Interest**

Any other provision of this will to the contrary notwithstanding, no cotrustee who is a beneficiary of any trust established under this will shall participate in any discretionary decision relating to his or her distributive share of the income or principal of the trust. The decision of the other cotrustees shall control in all such cases.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

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DIVISION IV: WILLS AND TRUSTS  
CHAPTER 64A TESTAMENTARY TRUSTS: TRUSTEE PROVISIONS  
PART IV. FORMS

I. Optional Provisions Dividing or Allocating Powers of Cotrustees

*24-64A California Legal Forms--Transaction Guide § 64A.368*

**§ 64A.368 Provision Requiring Unanimous Action Among Cotrustees When Voting Shares**

**[1] Comment--Use of Form**

**[a] In General**

This provision may be used to require unanimous action to vote shares when there are two or more cotrustees in office.

**[b] Statutory Rule of Majority Action in Voting Shares**

The power to exercise voting rights with respect to shares of stock is one of the administrative powers usually granted to a trustee [*see § 64A.221*]. When there are two or more cotrustees with these powers, the question arises as to what constitutes a binding vote among them. *Prob. Code § 15620* states the general rule that, unless otherwise provided in the trust instrument, cotrustees may exercise their powers by unanimous actions only. However, *Corp. Code § 704*, governing the voting of shares when two or more persons have the same fiduciary relationship respecting the same shares, provides that the act of the majority of the cotrustees is binding. As the more specific statute governing the voting of shares, *Corp. Code § 704* controls over the general unanimity rule for cotrustees stated in *Prob. Code § 15620* [ *Edwards v. Edwards (1998) 61 Cal. App. 4th 599, 602-603, 71 Cal. Rptr. 2d 653* ].

**[c] Will Provision Overcoming Majority-Action Rule**

The majority voting rule can be overcome if the secretary of the corporation is given written notice to the contrary and is furnished with a copy of the instrument appointing the fiduciaries and providing for unanimous vote [*see Corp. Code § 704*]. To constitute notice to the contrary, the requirement of unanimity in the voting of shares must be expressly stated in the instrument; an instrument that is silent on the issue will not trigger the default unanimity rule under *Prob. Code § 15620* for purposes of voting shares [*see Edwards v. Edwards (1998) 61 Cal. App. 4th 599, 603-604, 71 Cal. Rptr. 2d 653* ].

**[2] FORM**

**Provision Requiring Unanimous Action Among Cotrustees When Voting Shares**

**Unanimity Required in Voting Shares**

At any time that two or more Cotrustees are in office, they may exercise the power to vote shares of stock by unanimous action only.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsTrusteesDuties & PowersGeneral OverviewEstate, Gift & Trust

LawTrustsTrusteesDuties & PowersLimitationsEstate, Gift & Trust LawTrustsTrusteesMultiple Trustees



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DIVISION IV: WILLS AND TRUSTS  
CHAPTER 64B TESTAMENTARY TRUSTS: ADMINISTRATIVE PROVISIONS

*24-64B California Legal Forms--Transaction Guide 64B.syn*

**§ 64B.syn Synopsis to Chapter 64B: TESTAMENTARY TRUSTS: ADMINISTRATIVE PROVISIONS**

§ 64B.01 California Statutes

§§ 64B.02-64B.19 [Reserved]

§ 64B.20 Law Reviews

§ 64B.21 Annotations

§ 64B.22 Text References

[1] Related Forms

[2] Additional Text References

§§ 64B.23-64B.29 [Reserved]

§ 64B.30 Determination of Principal and Income

§ 64B.31 Uniform Principal and Income Act

[1] Scope and Application

[2] Definitions

[3] Basic Rules for Determination of Principal and Income

[4] Items Included in Income

[5] Items Included in Principal

[6] Items Apportioned Between Principal and Income

- [7] Apportionment at Beginning and End of Income Interest
- [8] Accounting and Adjustments by Trustee
- [9] Trustee's General Power of Adjustment
- [10] Limitations on General Power of Adjustment
- [11] Release of General Power of Adjustment
- [12] Limitations on General Power of Adjustment in Trust Instrument
- [13] Factors Considered in Exercising General Power of Adjustment
- [14] Spouse's Right to Require Productive Property
- [15] Notice of Proposed Action
  - [a] In General
  - [b] Content of Proposed Notice
  - [c] Objection to Proposed Action
  - [d] Decision Not To Implement Proposed Action
- § 64B.32 Declaration of Testator's Intention
- § 64B.33 Additions to Trust by Third Parties
- § 64B.34 Vacancy in Trusteeship
  - [1] Circumstances Causing Vacancy
  - [2] How Vacancy Is Filled
    - § 64B.35 Compensation of Trustees
- [1] When Specified in Trust Instrument
- [2] When Not Specified in Trust Instrument
- [3] When Trustee Is Attorney
- [4] Apportionment Among Cotrustees
- [5] Effect of Breach of Trust
- [6] Court's Power to Order Periodic Payments

[7] Reimbursement of Expenditures

[8] Equitable Lien

§ 64B.36 Bonds

§ 64B.37 Exculpatory Clauses

[1] In General

[2] Provision Releasing Trustee from Liability for Account or Other Written Report if Beneficiary Fails to Object Within Specified Period

§ 64B.38 Choice of Law

[1] Conflict of Laws

[2] Testator's Direction

[3] California Statutes

§ 64B.39 Judicial Supervision

§§ 64B.40-64B.99 [Reserved]

§ 64B.100 Determination of Principal and Income

Scope

§ 64B.101 Declaration of Testator's Intention

Scope

§ 64B.102 Additions to Trust by Third Parties

Scope

§ 64B.103 Vacancies in Trusteeship

Scope

§ 64B.104 Compensation of Trustees

Scope

§ 64B.105 Bonds and Exculpatory Clauses

Scope

§ 64B.106 Administration

Scope

§§ 64B.107-64B.119 [Reserved]

§ 64B.120 Determination of Principal and Income

Scope

§ 64B.121 Declaration of Testator's Intention

Scope

§ 64B.122 Additions to Trust by Third Parties

Scope

§ 64B.123 Vacancies in Trusteeship

Scope

§ 64B.124 Compensation of Trustees

Scope

§ 64B.125 Bonds and Exculpatory Clauses

Scope

§ 64B.126 Administration

Scope

§§ 64B.127-64B.199 [Reserved]

§ 64B.200 Principal and Income to Be Determined in Accordance With Uniform Principal and Income Act

[1] Comment

[a] Use of Form

[b] Uniform Principal and Income Act

[i] In General

[ii] Advantages

[c] Tax Considerations

[i] In General

[ii] Trustee Who Is Also Beneficiary

[iii] Marital Deduction Trusts

[2] FORM

Principal and Income to Be Determined in Accordance With Uniform Principal and Income Act

§ 64B.201 Broad Power to Determine What Is Principal and What Is Income

[1] Comment

[a] Use of Form

[b] Testator's Authority to Grant Broad Power

[c] Advantages of Broad Power

[d] Tax Considerations

[2] FORM

Broad Power to Determine What Is Principal and What Is Income

§ 64B.202 No Power to Make Adjustments Between Income and Principal

[1] Comment

[a] Use of Form

[b] Trustee's General Power to Make Adjustments Between Principal and Income

[c] Drafting Issues

[2] FORM

No Power to Make Adjustments Between Income and Principal

§ 64B.203 Reserve for Depreciation

[1] Comment

[a] Use of Form

[b] Reserve for Depreciation

[i] Statutory Rules

[ii] Advantages of Requiring Reserve

[2] FORM

Reserve for Depreciation

§ 64B.204 Allocation of Receipts From Natural Resources, Timber, or Liquidating Assets

[1] Comment

[a] Use of Form

[b] Statutory Rules Governing Receipts From Natural Resources, Timber, or Liquidating Assets

[i] In General

[ii] Minerals and Other Natural Resources

[iii] Timber and Related Products

[iv] Liquidating Assets

[c] Trust Provisions

[2] FORM

Allocation of Receipts From Natural Resources, Timber, or Liquidating Assets

§ 64B.205 Power to Purchase Bonds at Premium

[1] Comment

[a] Use of Form

[b] Purchase of Bonds at Premium

[i] Statutory Provisions

[ii] Will Provisions

[iii] Tax Considerations

[2] FORM

Power to Purchase Bonds at Premium

§ 64B.206 Power to Purchase Bonds at Discount

[1] Comment

[a] Use of Form

[b] Purchase of Bonds at Discount

[i] Statutory Provisions

[ii] Will Provisions

[2] FORM

Power to Purchase Bonds at Discount

§ 64B.207 Income Earned During Administration of Testator's Estate to Be Treated as Principal

[1] Comment

[a] Use of Form

[b] Income on Trust Property During Probate Administration

[i] In General

[ii] Probate Code Rules

[iii] Will Provision

[2] FORM

Income Earned During Administration of Testator's Estate to Be Treated as Principal

§ 64B.208 Discretion to Apportion Stock Dividends and Liquidating Dividends or Distributions Between Principal and Income

[1] Comment

[a] Use of Form

[b] Corporate Distributions

[i] Statutory Rules

[ii] Will Provisions

[2] FORM

Discretion to Apportion Stock Dividends and Liquidating Dividends or Distributions Between Principal and Income

§ 64B.209 Capital Gains Distributions From Mutual Funds, Regulated Investment Companies, and Real Estate Investment Trusts to Be Allocated to Income

[1] Comment

[a] Use of Form

[b] Capital Gains Distributions

[i] Statutory Rules

[ii] Will Provisions

[iii] Tax Considerations

[2] FORM

Capital Gains Distributions From Mutual Funds, Regulated Investment Companies, and Real Estate Investment Trusts to Be Allocated to Income

§ 64B.210 Depreciation and Accounting Rules for Business or Other Activity Operated by Trustee

[1] Comment

[a] Use of Form

[b] Depreciation and Accounting for Business

[i] Statutory Provisions

[ii] Will Provisions

[2] FORM

Depreciation and Accounting Rules for Business or Other Activity Operated by Trustee

§ 64B.211 Allocation of Trustee's Compensation, Attorneys' Fees, and Court Costs

[1] Comment

[a] Use of Form

[b] Trustee's Compensation, Attorneys' Fees, and Court Costs

[i] Statutory Rules

[ii] Will Provisions

[iii] Tax Considerations

[2] FORM

Allocation of Trustee's Compensation, Attorneys' Fees, and Court Costs

§§ 64B.212-64B.229 [Reserved]

§ 64B.230 Testator's Intention to Favor Income Beneficiaries Over Remainder Beneficiaries

[1] Comment

[a] Use of Form

[b] Intention of Testator

[i] Words of the Will

[ii] Drafting Considerations

[iii] Tax Considerations

[2] FORM

Testator's Intention to Favor Income Beneficiaries Over Remainder Beneficiaries

§ 64B.231 Testator's Intention to Favor Remainder Beneficiaries Over Income Beneficiaries

[1] Comment

[a] Use of Form

[b] Drafting Caution

[2] FORM

Testator's Intention to Favor Remainder Beneficiaries Over Income Beneficiaries

§§ 64B.232-64B.249 [Reserved]

§ 64B.250 Additions by Third Parties Permitted

[1] Comment

[a] Use of Form

[b] Drafting Considerations

[c] Statutory Rules Governing Additions to Trusts

[d] Estate Tax Considerations

[e] Generation-Skipping Transfer Tax Considerations

[2] FORM

Additions by Third Parties Permitted

§ 64B.251 Additions by Third Parties Prohibited

[1] Comment

[a] Use of Form

[b] Prohibiting Additions to Trust

[2] FORM

Additions by Third Parties Prohibited

§§ 64B.252-64B.269 [Reserved]

§ 64B.270 Appointment of Alternate and Successor Trustees and Cotrustees by Testator

[1] Comment

[a] Use of Form

[b] Appointment of Alternate and Successor Trustees

[i] Statutory Rules

[ii] Will Provisions

[2] FORM

Appointment of Alternate and Successor Trustees and Cotrustees by Testator

§ 64B.271 Trustee or Cotrustee Authorized to Designate Successor

[1] Comment

[a] Use of Form

[b] Power of Trustee to Appoint Successor

[2] FORM

Trustee or Cotrustee Authorized to Designate Successor

§ 64B.272 Powers of Cotrustee Who Dies or Resigns May Be Exercised by Remaining Cotrustees

[1] Comment

[a] Use of Form

[b] Surviving Cotrustees

[2] FORM

Powers of Cotrustee Who Dies or Resigns May Be Exercised by Remaining Cotrustees

§§ 64B.273-64B.289 [Reserved]

§ 64B.290 Fixed Amount as Compensation

[1] Comment

[a] Use of Form

[b] Compensation of Trustees

[i] In General

[ii] Amount

[iii] Local Guidelines

[iv] Corporate Trustees

[v] Extraordinary Services

[vi] Apportionment Among Cotrustees

[c] Reimbursement of Expenses

[2] FORM

Fixed Amount as Compensation

§ 64B.291 Percentage of Principal as Compensation

[1] Comment

[a] Use of Form

[b] Compensation As a Percentage

[i] Court Guidelines

[ii] Variable Percentages

[iii] Annual Revaluations of Principal

[2] FORM

Percentage of Principal as Compensation

§ 64B.292 Reasonable Compensation

[1] Comment

[a] Use of Form

[b] Reasonable Compensation

[i] In General

[ii] Advantages

[iii] Disadvantages

[iv] Compensation in Accordance With Trustee's Standard Fee Schedule

[2] FORM

Reasonable Compensation

§ 64B.293 Corporate Cotrustee to Be Compensated as if It Were Sole Trustee; Individual Cotrustee to Receive No Compensation or Nominal Fee

[1] Comment

[a] Use of Form

[b] Apportionment of Compensation Between Cotrustees

[2] FORM

Corporate Cotrustee to Be Compensated as if It Were Sole Trustee; Individual Cotrustee to Receive No Compensation or Nominal Fee

§ 64B.294 Fractional Division of Compensation Between Corporate and Individual Cotrustees

[1] Comment--Use of Form

[2] FORM

Fractional Division of Compensation Between Corporate and Individual Cotrustees

§ 64B.295 Bequest in Lieu of Compensation

[1] Comment

[a] Use of Form

[b] Bequest in Lieu of Compensation

[c] Tax Considerations

[2] FORM

Bequest in Lieu of Compensation

§ 64B.296 Termination Fee

[1] Comment

[a] Use of Form

[b] Termination Fee

[2] FORM

Termination Fee

§§ 64B.297-64B.309 [Reserved]

§ 64B.310 Waiver of Bond

[1] Comment

[a] Use of Form

[b] Trustee Bonds

[2] FORM

Waiver of Bond

§ 64B.311 Provision Relieving Trustee of Liability For Acts and Omissions of Agents and Attorneys

[1] Comment

[a] Use of Form

[b] Liability of Trustee for Acts of Agents and Employees

[i] Liability to Beneficiaries

[ii] Liability to Third Parties

[c] Exculpatory Provisions

[2] FORM

Provision Relieving Trustee of Liability For Acts and Omissions of Agents and Attorneys

§ 64B.312 Provision Relieving Trustee of Liability for Trustee's Own Acts and Omissions

[1] Comment

[a] Use of Form

[b] Related Provision

[c] Importance of Provision

[2] FORM

Provision Relieving Trustee of Liability for Trustee's Own Acts and Omissions

§§ 64B.313-64B.329 [Reserved]

§ 64B.330 Provision Empowering Beneficiary to Move Place of Trust Administration by Changing Trustee

[1] Comment

[a] Use of Form

[b] Moving Trust Administration

[i] Practical Difficulties

[ii] Without Court Order

[iii] With Court Order

[iv] To Another Jurisdiction Outside California

[v] Will Provisions

[c] Corporate Trustee

[2] FORM

Provision Empowering Beneficiary to Move Place of Trust Administration by Changing Trustee

§ 64B.331 Choice of Law Provision

[1] Comment

[a] Use of Form

[b] Testamentary Trusts and Conflict of Laws

[i] In General

[ii] Testator's Intention

[iii] California Statutes

[c] Drafting Considerations

[i] Designating Law of Another Jurisdiction

[ii] Designating California Law

[2] FORM

Choice of Law Provision

§ 64B.332 Provision Requiring Continuing Judicial Supervision of Trust

[1] Comment

[a] Use of Form

[b] Continuing Judicial Supervision of Testamentary Trusts

[i] In General

[ii] Will Provisions

[iii] Advantages and Disadvantages

[2] FORM

Provision Requiring Continuing Judicial Supervision of Trust



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DIVISION IV: WILLS AND TRUSTS  
CHAPTER 64B TESTAMENTARY TRUSTS: ADMINISTRATIVE PROVISIONS

*24-64B California Legal Forms--Transaction Guide Scope*

**Scope**

Scope

This chapter covers miscellaneous operational provisions for testamentary trusts. These include provisions relating to the determination of principal and income, declaring the testator's intentions to favor the income beneficiaries or remainder beneficiaries, defining the trustee's power to accept additions to the trust from third parties, providing for vacancies in the trusteeship, establishing rules for the determination of the trustee's or cotrustees' compensation, empowering the income beneficiary to move the place of trust administration by changing trustees, and specifying the law that will govern questions relating to the validity, construction, interpretation, and administration of the trust.

Provisions relating to the payment and distribution of income and principal are covered in Ch. 64, *Testamentary Trusts: Payment and Distribution Provisions* . Provisions relating to the selection, appointment, and general administrative powers of trustees are covered in Ch. 64A, *Testamentary Trusts: Trustee Provisions* .



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DIVISION IV: WILLS AND TRUSTS  
CHAPTER 64B TESTAMENTARY TRUSTS: ADMINISTRATIVE PROVISIONS  
PART I. RESEARCH GUIDE  
A. Primary Sources

*24-64B California Legal Forms--Transaction Guide § 64B.01*

**§ 64B.01 California Statutes**

"Trust" defined. *Prob. Code § 82(a)(1)*.

Will valid if executed in compliance with law of California or certain other jurisdictions. *Prob. Code § 6113*.

Uniform Testamentary Additions to Trusts Act. *Prob. Code §§ 6300-6303*.

Trustees' bonds.

When trustee is required to give bond. *Prob. Code § 15602(a)*.

Power of court to excuse, or reduce or increase amount of, bond. *Prob. Code § 15602(b)*.

Filing or service. *Prob. Code § 15602(c)*.

Costs of bond charged against trust. *Prob. Code § 15602(d)*.

Trust company not required to give bond. *Prob. Code § 15602(e)*.

Resignation and removal of trustees. *Prob. Code §§ 15640-15644*.

Appointment of trustee to fill vacancy. *Prob. Code § 15660*.

Compensation and indemnification of trustees.

When provided in trust instrument. *Prob. Code § 15680*.

If trust instrument is silent. *Prob. Code § 15681.*

Court determination of prospective compensation. *Prob. Code § 15682.*

Compensation of cotrustees. *Prob. Code § 15683.*

Repayment of trustee for expenditures. *Prob. Code § 15684.*

Trustee's equitable lien. *Prob. Code § 15685.*

Compensation of trustee who performs legal services for trust. *Prob. Code § 15687.*

Reduction or denial of compensation of trustee who commits breach. *Prob. Code § 16420(a)(7).*

Revised Uniform Principal and Income Act. *Prob. Code §§ 16320-16375.*

"Accounting period" defined. *Prob. Code § 16322.*

"Fiduciary" defined. *Prob. Code § 16324.*

"Income" defined. *Prob. Code § 16324.*

"Income beneficiary" means a person to whom net income of a trust is or may be payable. *Prob. Code § 16325.*

"Income interest." defined *Prob. Code § 16326.*

"Mandatory income interest." defined *Prob. Code § 16327.*

"Net income" defined. *Prob. Code § 16328.*

Effect of contrary will provisions. *Prob. Code § 16335.*

Trustee's discretion to adjust between principal and income. *Prob. Code § 16336.*

Notice of proposed action. *Prob. Code §§ 16337, 16500-16504.*

Income during administration of decedent's estates. *Prob. Code §§ 16340, 16341.*

Apportionment at beginning and end of income interest. *Prob. Code §§ 16345-16347.*

Receipts from "entities." *Prob. Code § 16350.*

Allocation of receipts from estate or trust. *Prob. Code § 16351.*

Business accountings. *Prob. Code § 16352.*

Assets granted to trust. *Prob. Code § 16355(a).*

Sale of assets. *Prob. Code § 16355(b).*

Eminent domain. *Prob. Code § 16355(d).*

Leased property. *Prob. Code § 16356.*

Obligations for payment of money. *Prob. Code § 16357.*

Insurance proceeds. *Prob. Code § 16358.*

"Insubstantial" allocations between principal and income. *Prob. Code § 16360.*

Payments during fixed term or lifetime interval. *Prob. Code § 16361.*

"Liquidating assets." *Prob. Code § 16362.*

Natural resources. *Prob. Code § 16363.*

Timber products. *Prob. Code § 16364.*

Underproductive property for marital deduction trust. *Prob. Code § 16365.*

"Derivatives." *Prob. Code § 16366.*

"Asset-backed securities." *Prob. Code § 16367.*

Allocation of disbursements. *Prob. Code §§ 16370, 16371.*

Depreciation. *Prob. Code § 16372.*

Adjustments for principal disbursements. *Prob. Code § 16373.*

Taxes. *Prob. Code § 16374.*

Adjustments for trustee's elections. *Prob. Code § 16375.*

Releasing trustee from liability. *Prob. Code § 16461.*

Judicial supervision of trusts.

Jurisdiction. *Prob. Code §§ 17000-17006.*

Notice. *Prob. Code §§ 17100-17105.*

Proceedings concerning trusts. *Prob. Code §§ 17200-17210.*

Testamentary trusts subject to continuing court jurisdiction. *Prob. Code §§ 17300-17354.*

Transfer of trusts to other jurisdictions. *Prob. Code §§ 17400-17405.*

Transfer of trusts from other jurisdictions. *Prob. Code §§ 17450-17457.*

Rules for interpretation of wills, trusts, and other instruments. *Prob. Code §§ 21101-21140.*

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsGeneral OverviewEstate, Gift & Trust LawTrustsAdministrationEstate, Gift & Trust LawTrustsTestamentary TrustsEstate, Gift & Trust LawTrustsTrusteesGeneral Overview



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PART I. RESEARCH GUIDE  
A. Primary Sources

*24-64B California Legal Forms--Transaction Guide §§ 64B.02-64B.19*

**[Reserved]**

§§ 64B.02[Reserved]



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PART I. RESEARCH GUIDE  
B. Secondary Sources

*24-64B California Legal Forms--Transaction Guide § 64B.20*

**§ 64B.20 Law Reviews**

Henderickson, *Choice-of-Law Directions for Disposing of Assets Situated Elsewhere Than the Domicile of Their Owner--The Refractions of Renard*, 18 *Real Prop., Prob. & Tr. J.* 407 (1983).

American Bar Association Committee Report, *Legal Problems in Controlling Devolution of Property Under Multi-State Trusts and Relevant Varying Situs Rules of Multiple Jurisdictions*, 18 *Real Prop., Prob. & Tr. J.* 331 (1983).

Frimmer, *Beneficiaries' Rights to Distributions When Business Interests Are Held in Trust*, 16 *Real Prop., Prob. & Tr. J.* 359 (1981).

American Bar Association Committee Report, *Duties and Responsibilities of a Successor Trustee*, 10 *Real Prop., Prob. & Tr. J.* 310 (1975).

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsGeneral OverviewEstate, Gift & Trust LawTrustsAdministrationEstate, Gift & Trust LawTrustsTestamentary TrustsEstate, Gift & Trust LawTrustsTrusteesGeneral Overview



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*24-64B California Legal Forms--Transaction Guide § 64B.21*

**§ 64B.21 Annotations**

Annot., Extent of Rights of Surviving Spouse Who Elects to Take Against Will in Profits of or Increase in Value of Estate Accruing After Testator's Death, 7 A.L.R.4th 989 (1981) .

Annot., Modern Status of Rules Governing Allocation of Stock Dividends or Splits Between Principal and Income, 81 A.L.R.3d 876 (1977) .

Annot., Liability of Executor or Administrator, or His Bond, for Loss Caused to Estate by Act or Default of His Agent or Attorney, 28 A.L.R.3d 1191 (1969) .

Annot., Limiting Effect of Provision in Contract, Will, or Trust Instrument Fixing Trustee's or Executor's Fees, 19 A.L.R.3d 520 (1968) .

Annot., Allocation, as Between Income and Principal, of Income on Property Used in Paying Legacies, Debts, and Expenses, 2 A.L.R.3d 1061 (1965) .

Annot., Dividends: Allocation Between Income and Principal of Capital Gains Dividends of Mutual Fund or Investment Trust or Corporation, 98 A.L.R.2d 511 (1964) .

Annot., Coexecutors', Coadministrators', or Cotrustees' Liability for Defaults or Wrongful Acts of Fiduciary in Handling Estate, 65 A.L.R.2d 1019 (1959) .

Annot., Trustee's Appointment of Associate or Successor Trustee Under Powers of Trust Instrument, 57 A.L.R.2d 887, 889 (1958) .

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsGeneral OverviewEstate, Gift & Trust LawTrustsAdministrationEstate, Gift & Trust LawTrustsTestamentary TrustsEstate, Gift & Trust LawTrustsTrusteesGeneral Overview



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B. Secondary Sources

*24-64B California Legal Forms--Transaction Guide § 64B.22*

**§ 64B.22 Text References**

**[1] Related Forms**

California Wills and Trusts--Forms (Matthew Bender).

Div. II, *Individual Trust Provisions*.

Pt. 4, "Payments and Distributions," 4.550-4.640.

Pt. 5, "Trustee," 5.01-5.20 (appointment and replacement of trustee), 5.110 (trustee's bond), 5.120-5.150 (compensation of trustee), 5.640-5.680 (exculpatory provisions).

Div. IV, *Individual Will Provisions*.

Pt. 50, "Trust Distributions," 50.300-50.400.

Pt. 70, "Trustee," 70.10-70.90 (appointment and replacement of trustee), 70.100 (trustee's bond), 70.110-70.140 (compensation of trustee), 70.610-70.640 (exculpatory provisions).

California Legal Forms (Matthew Bender).

Ch. 61, *Will Drafting and Complete Will Forms*.

Ch. 70, *Complete Revocable Trust Forms*.

Ch. 71, *Marital Deduction Trust Provisions*.

Ch. 72, *Irrevocable Trusts*.

Ch. 73, *Funding a Revocable Trust*.

Ch. 74, *Split-Interest Charitable Trusts*.

*California Forms of Pleading and Practice, Ch. 560, Trusts: Express, Public, Charitable, and Totten Trusts, §§ 560.670, 560.671 (Testamentary Trust Administration) (Matthew Bender).*

## [2] Additional Text References

California Wills and Trusts (Matthew Bender).

Ch. 93, *Appointment of Trustees*.

Ch. 95, *Trust Provisions for Payment and Distribution of Income and Principal*, § 95.03 (trust provisions modifying Uniform Principal and Income Act).

Ch. 96, *Powers and Duties of Trustees*.

Hartog & Dirkes, California Trust Practice (Matthew Bender).

Ch. 7, *Trustee's Investment Powers and Duties*.

Ch. 8, *Fiduciary Accounts*.

Scott, The Law of Trusts (Little, Brown & Co. 3d ed. 1967)

Vols. II, III, Ch. 7, *The Administration of the Trust*.

Vol. V, Ch. 14, *Trusts and the Conflict of Laws*.

Restatement (Second) of Trusts

Ch. 7, *The Administration of the Trust*.

Ch. 8, *Liabilities to Third Persons*.

Restatement (Second) of Conflict of Laws, Ch. 10, *Trusts*.

*Recommendation Proposing the Trust Law*, 18 Cal. L. Revision Comm'n Rep. 501 (1986).

## Legal Topics:

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsGeneral OverviewEstate, Gift & Trust LawTrustsAdministrationEstate, Gift & Trust LawTrustsTestamentary TrustsEstate, Gift & Trust LawTrustsTrusteesGeneral Overview



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DIVISION IV: WILLS AND TRUSTS  
CHAPTER 64B TESTAMENTARY TRUSTS: ADMINISTRATIVE PROVISIONS  
PART I. RESEARCH GUIDE  
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*24-64B California Legal Forms--Transaction Guide §§ 64B.23-64B.29*

**[Reserved]**

§§ 64B.23[Reserved]



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DIVISION IV: WILLS AND TRUSTS  
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PART II. LEGAL BACKGROUND

*24-64B California Legal Forms--Transaction Guide § 64B.30*

**§ 64B.30 Determination of Principal and Income**

Testamentary trusts frequently require the trustee to pay the income of the trust to one or more persons (the income beneficiaries) for a period of time and thereafter to distribute the trust principal or corpus to another person or persons (the remainder beneficiaries). The income beneficiaries are entitled to the net income during the period specified in the trust. Net income is determined by subtracting expenditures properly chargeable to income from receipts properly allocable to income [Scott, *The Law of Trusts*, vol. III, § 233 (3d ed. 1967)]. Whether a particular receipt is treated as income or principal, or a particular expenditure charged against income or corpus, may significantly affect the respective interests of the income and remainder beneficiaries. For this reason, it is important for the trustee to have clear and easily applied rules for the allocation of receipts and disbursements to principal and income.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsGeneral OverviewEstate, Gift & Trust LawTrustsAdministrationEstate, Gift & Trust LawTrustsTestamentary Trusts



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*24-64B California Legal Forms--Transaction Guide § 64B.31*

**§ 64B.31 Uniform Principal and Income Act**

**[1] Scope and Application**

In California, the allocation of trust receipts and expenditures to income and principal is governed by the Uniform Principal and Income Act [*Prob. Code § 16320-16375*], which is part of the Trust Law [*Prob. Code § 15000 et seq.*]. The Act generally applies to all trusts existing on or after January 1, 2000, except as otherwise expressly provided in the Act or in the trust or will [*Prob. Code § 16339*].

**[2] Definitions**

To apply the rules of the Uniform Principal and Income Act, a number of commonly used terms are defined as follows:

- "Accounting period" means a calendar year, unless another 12-month period is selected by a fiduciary. It also includes a portion of a calendar year or 12-month period that begins when an income interest begins, or ends when an income interest ends [*Prob. Code § 16322*].
- "Fiduciary" means a personal representative or trustee [*Prob. Code § 16324*].
- "Income" means money or property received by a fiduciary as a current return from a principal asset. It also includes a portion of receipts from a sale, exchange, or liquidation of a principal asset as provided under *Prob. Code §§ 16350-16367* [*Prob. Code § 16324*].
- "Income beneficiary" means a person to whom net income of a trust is or may be payable [*Prob. Code § 16325*].
- "Income interest" means the right of an income beneficiary to receive all or part of net income, whether the distribution is required or within the trustee's discretion [*Prob. Code § 16326*].
- "Mandatory income interest" means the right of an income beneficiary to receive net income which the trust requires the fiduciary to distribute [*Prob. Code § 16327*].

- "Net income" means the total receipts allocated to income during an accounting period minus the disbursements made from income during the accounting period, plus or minus transfers under this chapter to or from income during the accounting period. During any period in which the trust is administered as a unitrust [*see Prob. Code §§ 16336.4-16336.6*], "net income" means the unitrust amount, if this amount is no less than 3 percent and no more than 5 percent of the fair market value of the trust assets, whether determined annually or averaged on a multiple year basis [*Prob. Code § 16328*].

Note that the current version of the Uniform Principal and Income Act, unlike its predecessor [*see former Prob. Code § 16303 (b)* (repealed effective January 1, 2000)], does not contain a specific definition of "principal." However, as discussed in § 64B.31[5], *Prob. Code § 16355* and various other sections of the Act delineate in detail those assets that are to be allocated to principal under the Act.

### [3] Basic Rules for Determination of Principal and Income

In allocating receipts and disbursements to principal and income, and with respect to any other matter within the Uniform Principal and Income Act, a fiduciary is to be guided by certain fundamental principles specified in the Act [*Prob. Code § 16335*]:

- A fiduciary *must* administer a trust in accordance with the terms of the trust, even if the trust's terms contradict provisions of the Act [*Prob. Code § 16335(a)(1)*].
- A fiduciary *may* administer a trust in accordance with a discretionary power given by the trust, even if this produces a result contrary to a result required or permitted by the Act. The fact that a contrary result occurs creates no inference that a fiduciary has improperly exercised its discretion [*Prob. Code § 16335(a)(2)*].
- A fiduciary *must* administer the trust in accordance with the terms of the Act if the trust does not include a different provision or does not grant the fiduciary a discretionary power of administration [*Prob. Code § 16335(a)(3)*].
- In exercising a discretionary power of administration, whether granted by a trust or the Act, the fiduciary must administer the trust impartially, except when the trust expresses an intention that the fiduciary favor one or more of the beneficiaries. The exercise of discretion in accordance with the Act is presumed to be fair and reasonable to all beneficiaries [*Prob. Code § 16335(b)*].

The Act sets forth numerous specific rules to allocate particular categories of receipts and disbursements. Some items are allocated directly to income [*see § 64B.31[4]*], whereas others are allocated directly to principal [*see § 64B.31[5]*]. Other items are subject to more complex apportionment or allocation rules under which certain portions or elements are allocated to income, and others to principal [*see § 64B.31[6]*].

### [4] Items Included in Income

The Uniform Principal and Income Act provides for the following items to be allocated to income:

- Amounts received as rent of real or personal property, including payments for cancellation or renewal of a lease. Note that an exception exists in the case of security deposits and deposits of future rent, which are to be added to principal, held subject to the terms of the lease, and are unavailable for distribution to a beneficiary until the lessee's contractual obligations have been satisfied with respect to that amount [*Prob. Code § 16356*].

- Subject to any contrary rules in *Prob. Code §§ 16361-16367*, interest on a monetary obligation to the trust [*Prob. Code § 16357(a)*].
- Proceeds from an insurance contract covering against loss of occupancy or other use by an income beneficiary, loss of income, or lost income from a business [*Prob. Code § 16358(b)*].
- All ordinary expenses incurred in administering, managing, and preserving the trust property, and in distributing income, specifically including interest, ordinary repairs, regularly recurring taxes assessed against principal, and expenses of a proceeding or other matter that primarily concerns the income interest [*Prob. Code § 16370(c)*].
- All recurring insurance premiums covering the loss of a principal asset or loss of income from use of the asset [*Prob. Code § 16370(d)*].
- In an eminent domain proceeding, an award made for the loss of income with respect to an accounting period during which a current income beneficiary had a mandatory income interest [*Prob. Code § 16355(d)*].

#### **[5] Items Included in Principal**

The Uniform Principal and Income Act provides for the following items to be allocated to principal:

- Except when allocated to income under other provisions of the Act, assets received from a transferor during the transferor's lifetime, a decedent's estate, a trust with a terminating income interest, or a payee under a contract naming the trust or its trustee as beneficiary [*Prob. Code § 16355(a)*].
- Subject to any contrary rules in *Prob. Code §§ 16350-16367*, money or other property received from the sale, exchange, liquidation, or change in form of a principal asset, including realized profit [*Prob. Code § 16355(b)*].
- Amounts recovered from third parties to reimburse the trust for disbursements from principal, or for other reasons not based on the loss of income [*Prob. Code § 16355(c)*].
- Proceeds from property taken by eminent domain, except an award made for the loss of income with respect to an accounting period during which a current income beneficiary had a mandatory income interest [*Prob. Code § 16355(d)*].
- Net income received in an accounting period during which there is no beneficiary to whom a trustee may or must distribute income [*Prob. Code § 16355(e)*].
- A refundable deposit for leased real or personal property [*Prob. Code § 16356; see § 64B.31[4]*].
- Proceeds from a life insurance policy or other contract in which the trust is named as beneficiary, including a contract that insures trust property against damage, destruction, or loss of title [*Prob. Code § 16358(a)*].
- "Derivatives"; that is, contracts and/or financial instruments that give a trust the right or obligation to participate in some of all changes in the price of a tangible or intangible asset or group of assets, or changes in a rate, an index of prices or rates, or other market indicator for an asset or a group of assets.

To the extent that these items are not accounted for as receipts from a business entity [*see Prob. Code § 16352*], receipts from and disbursements with respect to these items will generally be allocated to principal [*Prob. Code § 16366(a), (b)*].

- Amounts received for granting options to buy trust property (whether or not the trust owns the property when the option is granted) or permitting another person to sell property to the trust, amounts expended in acquiring an option to buy property for the trust or to sell an asset owned by the trust, and any gain or loss realized upon the exercise of an option, including an option granted to a settlor of the trust for services rendered. Note that the trustee or other owner of the asset must be required to deliver the asset if the option is exercised [*Prob. Code § 16366(c)*].
- Trustee's compensation for that is calculated based on principal as a fee for acceptance, distribution, or termination of the trust, and disbursements made to prepare property for sale [*Prob. Code § 16371(a)(2)*].
- Payments on the principal of a trust debt [*Prob. Code § 16371(a)(3)*].
- Expenses of proceedings primarily concerning principal [*Prob. Code § 16371(a)(4)*].
- Premiums paid on insurance policies of which the trust is the owner and beneficiary, other than recurring premiums on insurance covering the loss of a principal asset or the loss of income from or use of the asset [*Prob. Code § 16371(a)(5)*; *see Prob. Code § 16370(d)*].
- Estate, inheritance, and other transfer taxes [*Prob. Code § 16371(a)(6)*].
- Disbursements relating to environmental matters [*see Prob. Code § 16371(a)(7)*].

#### **[6] Items Apportioned Between Principal and Income**

Various trust assets and expenses are subject to more complicated allocation rules under which certain elements or portions are allocated to income, and others to principal. A list of assets falling into these categories is included below. For more detailed discussion of the apportionment or allocation rules applicable to these classes of assets or expenses, see the appropriate form comments cited below.

- Receipts from a corporation, partnership, limited liability company, or other business entity [*see Prob. Code § 16350*; *see also § 64B.208[1]*].
- Amounts received as a distribution from a trust or decedent's estate (other than an interest in an investment entity) in which the trust has an interest other than a purchased interest. These receipts generally take the character they had in the distributing trust or estate; distributions of principal will be allocated to principal and distributions of income will be allocated to income [*Prob. Code § 16351*].
- Amounts connected with operating a business or other activity, if the trustee determines it is in the trust's best interest to account separately for the business instead of accounting for it as part of the trust's general accounting records. If the trustee maintains separate accounts for the business, the trustee has specific discretionary powers with respect to the allocation of expenses and receipts to income or principal [*see Prob. Code § 16352*; *see also § 64B.210[1]*].
- Amounts received from the sale or redemption of an obligation to pay money. Subject to any contrary rules in *Prob. Code §§ 16361-16367*, if the amounts are due within one year of its purchase or

acquisition, any amount received in excess of the purchase price is allocated to income. Otherwise, the entire amount is allocated to principal [*Prob. Code § 16357(b)*].

- Dividends from an insurance policy. These receipts are allocated to income if premiums are paid from income, and principal if premiums are paid from principal [*Prob. Code § 16358(a)*].
- Pensions, annuities, individual retirement accounts, stock bonus or ownership plans, and similar items [*see Prob. Code § 16361; see also § 64B.204[1]*].
- "Liquidating assets"; that is, assets whose value will diminish or terminate because the asset will only produce receipts for a limited duration [*see Prob. Code § 16362; see also § 64B.204[1]*].
- Natural resources [*see Prob. Code § 16363; see also § 64B.204[1]*].
- Merchantable timber and related products [*Prob. Code § 16364; see § 64B.204[1]*].
- "Asset-backed securities"; that is, assets whose value is based on the right it gives the owner to receive distributions from the proceeds of the financial assets that provide collateral for the security (other than business entity income [*see Prob. Code § 16350*] or payments from pension, profit sharing, and related plans [*see Prob. Code § 16361*]) [*Prob. Code § 16367(a)*]. If a trust receives a payment from interest or other current return and from other proceeds of the collateral financial assets, the trustee must allocate to income the portion of the payment that the payer identifies as being from interest or other current return, and allocate the balance of the payment to principal. If a trust receives one or more payments in exchange for the trust's entire interest in an asset-backed security in one accounting period, the trustee must allocate the payments to principal. If a payment is one of a series of payments that will result in the liquidation of the trust's interest in the security over more than one accounting period, the trustee must allocate 10 percent of the payment to income and the balance to principal [*Prob. Code § 16367*].
- Regular compensation for a trustee, investment advisor, or custodian, and expenses for accountings, judicial proceedings or other matters involving both income and remainder interests. These disbursements are divided evenly between principal and income, unless the court orders a different allocation [*Prob. Code §§ 16370(a), (b), 16371(a)(1)*].
- Income taxes. These are allocated based on the nature of the receipts as principal or income, notwithstanding the characterization as "income" taxes [*see Prob. Code § 16374*].

#### **[7] Apportionment at Beginning and End of Income Interest**

An income beneficiary is entitled to net income from the date when the income interest begins, which is the date specified in the trust or, if no date is specified, the date an asset becomes subject to a trust or successive income interest [*Prob. Code § 16345(a)*]. An asset becomes subject to a trust on the date the asset is transferred, if during the transferor's life, on the date of a testator's death, even if there is an intervening period of administration for the testator's estate, or on the date of an individual's death, if the asset is transferred because of that individual's death [*Prob. Code § 16345(b)*]. An asset becomes subject to a successive income interest the day after the preceding income interest ends, even if there is an intervening period of administration to wind up the preceding income interest [*Prob. Code § 16345(c)*].

Income receipts or disbursements not subject to *Prob. Code § 16340(a)* (special rules applicable to decedent's estate following decedent's death, or after income interest in trust ends) are applied to principal if the due date is prior to the

date an income interest begins, and income if the due date occurs on or after the date the income interest begins [*Prob. Code § 16346(a), (b)*]. A receipt or disbursement is due on the date that payment is required. If no such date is stated, there is no due date [*Prob. Code § 16346(c)*]. If the due date is not periodic or there is no due date, the income receipt or disbursement is treated as accruing day to day, and allocated accordingly between principal and income [*Prob. Code § 16346(b)*].

When a mandatory income interest ends, the beneficiary of that interest, or that person's estate, is entitled to "undistributed income", meaning net income received before the end of the income interest. There is no entitlement to income that is due or has accrued, but that has not been received, or net income that has been added or is required to be added to principal by the trust [*Prob. Code § 16347*].

### **[8] Accounting and Adjustments by Trustee**

The Uniform Principal and Income Act provides other rules relating to accounting or adjusting between principal and income. If a trustee determines that the best interests of all beneficiaries would be served, it may account separately for a business or other activity rather than including it in the trust's general accounting [*Prob. Code § 16352; see § 64B.210[1]*].

A trustee may transfer a reasonable amount from income to principal to cover depreciation. However, no depreciation adjustment may occur if the depreciating property is held or available for the personal use of a beneficiary [*Prob. Code § 16372; see § 64B.203[1]*].

In consideration of various principal disbursements, a trustee may transfer an appropriate amount from income to principal to reimburse principal or provide a reserve for future principal disbursements [*Prob. Code § 16373(a)*]. The principal disbursements justifying this adjustment include the following [*Prob. Code § 16373(b)*]:

- An amount chargeable to income but paid by principal because it is unusually large.
- A capital improvement to a principal asset.
- Disbursements made to prepare property for rental.
- Periodic payments on an obligation secured by a principal asset, to the extent that any adjustment for depreciation is less than the periodic payment.
- Disbursements related to environmental matters.

These adjustments may be made over the course of multiple accounting periods, and may continue through successive income interests [*Prob. Code § 16373*].

A fiduciary also may make adjustments between principal and income to offset consequences from elections on tax matters, transactions or distributions involving the trust, or ownership of an entity by the trust [*Prob. Code § 16375(a)*].

A fiduciary's election to deduct a principal expenditure for income tax purposes rather than estate tax purposes can cause an increase in estate tax liability to principal, because of a reduction in the marital or charitable contribution deduction. Under these circumstances, the trusts, estates, or beneficiaries who gained the income tax benefit must reimburse principal for the increase in estate taxes, in proportional shares equal to the income tax benefit gained. [*Prob. Code § 16375(b)*].

### **[9] Trustee's General Power of Adjustment**

The Uniform Principal and Income Act provides a trustee with a general power to make adjustments between principal and income, to the extent the trustee considers necessary, under specified circumstances [*Prob. Code* § 16336]. This general power of adjustment is available only when each of the following conditions has been satisfied [*Prob. Code* § 16336(a)]:

- The trustee invests and manages trust assets under the prudent investor rule [*Prob. Code* §§ 16045-16054; see *Ch. 64A, Testamentary Trusts: Trustee Provisions*, §§ 64A.40[3], 64A.260[1]].
- The trust describes the amount that shall or may be distributed to a beneficiary by referring to the trust's income.
- The trustee determines that complying with other conditions set forth in the trust or the Act will preclude the trustee from administering the trust impartially.

The power of adjustment is discretionary, and the trustee cannot be held liable for failing to adjust or even consider an adjustment [*Prob. Code* § 16336(h)]. In a proceeding with respect to a trustee's exercise or nonexercise of the power of adjustment, the sole remedy is to direct, deny, or revise an adjustment between principal and income [*Prob. Code* § 16338].

#### **[10] Limitations on General Power of Adjustment**

The trustee may not make any adjustment [*Prob. Code* § 16336(b)]

- That would jeopardize an estate or gift tax marital deduction.
- That would reduce the actuarial value of an income interest granted by a person seeking a gift tax exclusion (thereby causing an increased value for the remainder interest).
- That would change the amount payable to a beneficiary under a unitrust or annuity trust.
- If it would adjust an amount permanently set aside for charitable purposes, unless both principal and income are so set aside.
- If possessing or exercising the power could cause someone to be treated as owner of all or part of the trust for income tax purposes.
- If possessing or exercising the power could cause all or part of the trust to be included in the taxable estate of someone with the power to remove and/or appoint a trustee.
- If the trustee is a beneficiary of the trust.

If one of these last three conditions applies to a co-trustee, another co-trustee to whom the prohibition does not apply may exercise the power to adjust, unless otherwise prohibited by the trust or Act [*Prob. Code* § 16336(c)].

The trustee also may not make any adjustment during any period in which the trust is administered as a unitrust [*Prob. Code* § 16336(b)(8); see *Prob. Code* §§ 16336.4-16336.6].

#### **[11] Release of General Power of Adjustment**

A trustee may release the power to adjust if the trustee believes that possessing or exercising the power could deprive the trust of a tax benefit or impose a tax burden, including but not limited to the benefits or burdens described in *Prob. Code § 16336(b)* [*Prob. Code § 16336(d)*]. The release may be permanent or for a specified period, including the life of an individual [*Prob. Code § 16336(e)*].

#### **[12] Limitations on General Power of Adjustment in Trust Instrument**

A trust that limits the power of a trustee to make an adjustment between principal and income does not affect the application of *Prob. Code § 16336* unless it is clear from the trust that it is intended to deny the trustee the power of adjustment [*Prob. Code § 16336(e)*]. For a trust provision limiting the trustee's power of adjustment under *Prob. Code § 16336*, see § 64B.201A.

#### **[13] Factors Considered in Exercising General Power of Adjustment**

In deciding whether and to what extent to exercise the power of adjustment, the trustee may consider, among other factors, any of the following [*Prob. Code § 16336(g)*]:

- The nature, purpose, and expected duration of the trust.
- The intent of the settlor.
- The identity and circumstances of the beneficiaries.
- The needs for liquidity, regularity of income, and preservation and appreciation of capital.
- The assets held in trust; the extent to which they consist of financial assets, interests in closely held properties, tangible and intangible personal property, or real property; the extent to which an asset is used by a beneficiary; and whether an asset was purchased by the trustee or received from the settlor.
- The net amount allocated to income under other statutes and the change in value of the principal assets, which the trustee may estimate when market values are not readily attainable.
- Whether and to what extent the trustee may invade principal or accumulate income, and the extent to which such powers have been exercised.
- The effects of inflation or deflation, and the actual and anticipated effects of economic conditions on principal and income.
- The anticipated tax consequences of an adjustment.

#### **[14] Spouse's Right to Require Productive Property**

If a marital deduction is allowed for all or part of a trust whose assets fail to provide the spouse with sufficient income, and the trustee fails to adjust for the lack of income pursuant to *Prob. Code § 16336*, then the spouse may require the trustee to either make the property productive, convert it into productive property, or make adjustments under *Prob. Code § 16336* [*Prob. Code § 16365*].

#### **[15] Notice of Proposed Action**

##### **[a] In General**

When making allocations to principal or income, a trustee may further insulate himself or herself from liability by using an optional notice of proposed action procedure [*Prob. Code § 16337*], similar to that used under the Independent Administration of Estates Act [*see Prob. Code § 10580 et seq.*]. A trustee may give notice of proposed action regarding a matter governed by the Probate Code provisions relating to trustee powers [*Prob. Code § 16200 et seq.*] or by the Uniform Principal and Income Act [*Prob. Code § 16320 et seq.*]. For purpose of the notice provisions, a "proposed action" includes a course of action or a decision not to take action [*Prob. Code § 16500*]. A trustee is not required, however, to use this notice procedure before taking any action [*Prob. Code § 16504*]. Moreover, these notice provisions do not preclude the application or assertion of any other rights or remedies available to an interested party regarding an action to be taken or not taken by the trustee [*Prob. Code § 16500*].

A trustee who elects to provide notice of a proposed action must mail notice to each of the following [*Prob. Code § 16501(a)*]:

- A beneficiary who is receiving, or is entitled to receive, income under the trust, including a beneficiary who is entitled to receive income at the trustee's discretion.
- A beneficiary who would receive a distribution of principal if the trust were terminated at the time the notice is given.

If the beneficiary is a minor or an incompetent adult, the notice must be served on the guardian or conservator of the beneficiary's estate [*see Prob. Code § 16503(b)*].

A trustee who elects to use the notice procedure is not required to give notice to the following persons:

- A person who consents in writing to the proposed action. The consent may be executed at any time before or after the proposed action is taken [*Prob. Code § 16501(b)*].
- A beneficiary who is known to the trustee, but who cannot be located after reasonable diligence, or who is unknown to the trustee [*Prob. Code § 16501(c)*].

The trustee may not use a notice of proposed action with respect to any of the following actions [*Prob. Code § 16501(d)*]:

- Allowance of the trustee's compensation.
- Allowance of compensation for the trustee's attorney.
- Settlement of accounts.
- Preliminary and final distributions and discharge.
- Sale of trust property to the trustee or the trustee's attorney.
- Exchange of trust property for property of the trustee or the trustee's attorney.
- Grant to the trustee or the trustee's attorney of an option to purchase trust property.
- Allowance, payment, or compromise of a claim of the trustee or the trustee's attorney against the trust.

- Compromise or settlement of a claim, action, or proceeding by the trust against the trustee or the attorney for the trust.
- Extension, renewal, or modification of the terms of a debt or other obligation of the trustee or the trustee's attorney, owing to or in favor of the trust.

#### **[b] Content of Proposed Notice**

The notice of proposed action must state that it is given under *Prob. Code § 16502*, and must include all of the following [*Prob. Code § 16502*]:

- The trustee's name and mailing address.
- The name and telephone number of a person who may be contacted for additional information.
- A description of the proposed action and an explanation of the reasons for the action.
- The time within which objections to the proposed action can be made, which must be at least 45 days from the date the notice is mailed.
- The date on or after which the proposed action may be taken or is effective.

#### **[c] Objection to Proposed Action**

A beneficiary may object to a proposed action by mailing a written objection to the trustee at the address, and within the time, specified in the notice [*Prob. Code § 16503(a)*]. A trustee is not liable to a beneficiary for a proposed action if the trustee does not receive a timely, written objection from the beneficiary. If no beneficiary entitled to notice objects, the trustee is not liable to any current or future beneficiary with respect to the proposed action [*Prob. Code § 16503(b)*]. If the trustee receives a timely written objection, the trustee or a beneficiary may petition the court to have the proposed action taken as proposed, taken with modifications, or denied. In the proceeding, a beneficiary who objects to the proposed action has the burden of proving that the action should not be taken. A beneficiary who has not objected to the proposed action is not estopped from opposing the action in the proceeding [*Prob. Code § 16503(c)*].

#### **[d] Decision Not To Implement Proposed Action**

If the trustee decides not to implement the proposed action, the trustee must give the beneficiaries notice of this decision and the reasons for it. The trustee's decision not to implement a proposed action does not itself give rise to liability to any current or future beneficiary. A beneficiary may petition the court to have the action taken, and has the burden of proving that the trustee should take the action [*Prob. Code § 16503(d)*].

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsGeneral OverviewEstate, Gift & Trust LawTrustsAdministrationEstate, Gift & Trust LawTrustsTestamentary Trusts



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*24-64B California Legal Forms--Transaction Guide § 64B.32*

**§ 64B.32 Declaration of Testator's Intention**

The Probate Code provides general rules for the interpretation of wills, trusts, and other instruments [*see Prob. Code §§ 21101-21140*]. The first and most important of these rules is that the intention of the transferor as expressed in the instrument controls the legal effect of the dispositions made in the instrument [*Prob. Code § 21102(a)*]. Accordingly, the other rules apply only when the intention of the transferor is not otherwise indicated by the instrument [*Prob. Code § 21102(b)*]. However, these provisions do not limit the use of extrinsic evidence, to the extent otherwise authorized by law, to determine the testator's intention [*Prob. Code § 21102(c)*]. In analyzing the terms of a trust created by a will, the court's function is to ascertain the testator's intention as expressed in the will and, to the extent possible, give it effect [*Estate of Karkeet (1961) 56 Cal. 2d 277, 281, 14 Cal. Rptr. 664, 363 P.2d 896*; *Estate of Stokley (1980) 108 Cal. App. 3d 461, 467, 166 Cal. Rptr. 587* (intent of settlor of inter vivos trust will control allocations to principal or income)].

Since the typical testamentary trust gives the trustee wide discretion with respect to investments, income payments, and determination of questions of income and principal, the manner in which particular determinations are made may depend in large part on an interpretation of the testator's intentions with respect to the income beneficiaries and the remainder beneficiaries. If the will evidences the testator's intention to favor the income beneficiaries over the remainder beneficiaries, the trustee's power with respect to investments, allocation of income, invasion of principal, and other administrative duties will properly be exercised in favor of the income beneficiaries. If the will evidences the testator's intention to favor the remainder beneficiaries, the trustee and the court will be guided accordingly in carrying out and enforcing the other provisions of the trust instrument [*see Getty v. Getty (1972) 28 Cal. App. 3d 996, 105 Cal. Rptr. 259* (inter vivos trust instrument showed settlor's intention to favor remainder beneficiaries)].

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Estate, Gift & Trust LawTrustsGeneral OverviewEstate, Gift & Trust LawTrustsAdministrationEstate, Gift & Trust LawTrustsInterpretationEstate, Gift & Trust LawTrustsTestamentary Trusts



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**§ 64B.33 Additions to Trust by Third Parties**

After a testamentary trust has been established by one member of a family, other family members sometimes choose to make additions to it. By doing so, they avoid the necessity of establishing a new trust, selecting a new trustee, and determining all the terms and provisions that must govern the operation and administration of the new trust. The Probate Code authorizes additions to previously established trusts, prescribes rules for determining their validity, and lays down certain principles under which the assets comprising such additions must be administered. For a general discussion of those rules and principles, see discussion § 64B.250[1][c].

Unless the will provides otherwise, property devised to a previously created trust becomes part of the trust to which it is given and must be administered and disposed of in accordance with the first trust instrument, including any amendments made before or after the death of the testator (regardless of whether the amendments were made before or after execution of the testator's will) [*Prob. Code § 6300*].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsGeneral OverviewEstate, Gift & Trust LawTrustsAdministrationEstate, Gift & Trust LawTrustsTestamentary Trusts



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*24-64B California Legal Forms--Transaction Guide § 64B.34*

**§ 64B.34 Vacancy in Trusteeship**

**[1] Circumstances Causing Vacancy**

The Trust Law describes eight circumstances under which the office of trustee will be deemed to be vacant. These are:

- If the person named as trustee rejects the trust [*Prob. Code § 15643(a)*; see *Prob. Code § 15601(a)* and discussion in *Ch. 64A, Testamentary Trusts: Trustee Provisions, § 64A.35*].
- If the person named as trustee cannot be identified or does not exist [*Prob. Code § 15643(b)*].
- If the trustee resigns or is removed [*Prob. Code § 15643(c)*; see *Probate Code Section 15640* and discussion in *Ch. 64A, Testamentary Trusts: Trustee Provisions, § 64A.36*; see also *Prob. Code § 15642* and discussion in *Ch. 64A, Testamentary Trusts: Trustee Provisions, § 64A.37*].
- If the trustee dies [*Prob. Code § 15643(d)*].
- If a conservator or guardian of the person or estate of an individual trustee is appointed [*Prob. Code § 15643(e)*].
- The trustee is the subject of an order for relief in bankruptcy.
- If a trust company's charter is revoked or its powers are suspended (providing the revocation or suspension is to be in effect for a period of 30 days or more) [*Prob. Code § 15643(g)*].
- If a receiver is appointed for a trust company (if the appointment is not vacated within a period of 30 days) [*Prob. Code § 15643(h)*].

**[2] How Vacancy Is Filled**

If the will specifies a practical method for filling the vacancy (or if it names a person to fill the vacancy), the vacancy

must be filled as provided in the will [*Prob. Code § 15660(b)*]. If the will makes no provision for filling the vacancy, all of the adult beneficiaries may agree that the vacancy be filled by a trust company [*Prob. Code § 15660(c)*; see *Prob. Code § 83* ("trust company" defined)]. If the adult beneficiaries do not agree that the vacancy be filled by a trust company, the court may appoint a trustee to fill the vacancy [*Prob. Code § 15660(d)*]. Although the selection of a trustee is entrusted to the discretion of the court, the court must give consideration to the wishes of any beneficiary who is 14 years of age or older [*Prob. Code § 15660(d)*].

If the trust provides for more than one trustee, the court, in its discretion, may appoint the original number or any lesser number of cotrustees [*Prob. Code § 15660(d)*].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsGeneral OverviewEstate, Gift & Trust LawTrustsAdministrationEstate, Gift & Trust LawTrustsTestamentary TrustsEstate, Gift & Trust LawTrustsTrusteesAppointmentEstate, Gift & Trust LawTrustsTrusteesRemoval & Resignation



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**§ 64B.35 Compensation of Trustees**

**[1] When Specified in Trust Instrument**

If the trust instrument provides for the trustee's compensation, the trustee is entitled to be compensated in accordance with the trust instrument [*Prob. Code § 15680(a)*]. Notwithstanding the provisions of the trust instrument and except as provided in *Prob. Code § 15688* (Public Guardian Compensation), the court, upon proper showing, may fix or allow greater or lesser compensation if the trustee's duties are substantially different from those contemplated when the trust was created [*Prob. Code § 15680(b)(1)*], if compensation in accordance with the trust would be inequitable or unreasonably low or high [*Prob. Code § 15680(b)(2)*], or if other extraordinary circumstances call for equitable relief [*Prob. Code § 15680(b)(3)*]. However, an order fixing or allowing greater or lesser compensation can apply only prospectively to actions taken in administration of the trust after the order is made [*Prob. Code § 15680(c)*].

**[2] When Not Specified in Trust Instrument**

If the trust instrument does not specify the trustee's compensation, the trustee is entitled to reasonable compensation under the circumstances [*Prob. Code § 15681*]. There is no inflexible rule for determining the reasonableness of compensation, and when a trustee is entitled to reasonable compensation the actual amount depends largely on the individual circumstances of the case [*see Estate of McLaughlin (1954) 43 Cal. 2d 462, 467-468, 274 P.2d 868 ; see also § 64B.292[1]*]. Although the trustee's determination of its fee is subject to its fiduciary duties [*see discussions in Ch. 64A, Testamentary Trusts: Trustee Provisions, § 64A.39[1] et seq.*], the court usually will not upset the trustee's determination unless it was not made in good faith or is outside the bounds of reasonable judgment [*see Horowitz, Uniform Trustee's Powers Act, 41 Wash. L. Rev. 1, 7, 22 (1966); see also Recommendation Proposing the Trust Law, 18 Cal. L. Revision Comm'n Reports 501, 532 n.78 (1986)*].

**[3] When Trustee Is Attorney**

A trustee who is also the attorney for the trustee generally may not receive dual compensation. The Trust Law provides that a trustee who is also an attorney may receive only the trustee's compensation provided in the trust instrument (or otherwise provided for in the Trust Law) or compensation for legal services performed for the trustee, but not both [*Prob. Code § 15687(a)*]. Similarly, no parent, child, sibling, or a spouse of a person who is a trustee, and no law

partnership or corporation whose partner, shareholder, or employee is serving as a trustee is permitted to receive any compensation for legal services performed for the trustee unless the trustee waives compensation or unless the trustee obtains approval for the right to dual compensation as specified below [*Prob. Code § 15687(a)*]. However, the rules prohibiting dual compensation do not apply if the trustee is related by blood or marriage to, or is a cohabitant with, the settlor [*Prob. Code § 15786(c)*]. These rules apply only to services rendered on or after January 1, 1994 [*Prob. Code § 15687(f)*].

Any waiver of these provisions is contrary to public policy and void [*Prob. Code § 15687(e)*]. Thus, dual compensation may not be assured simply by providing in the trust instrument that the attorney-trustee will be entitled to dual compensation [*Prob. Code § 15687(a)*] or by waiving the rule against dual compensation [*Prob. Code § 15687(e)*]. However, dual compensation may be received if, after full disclosure of the nature of the compensation and the relationship of the trustee to all persons receiving compensation, the court approves the compensation [*Prob. Code § 15687(a), (d)(1)*; see *Prob. Code § 17200(b)(21)*]. It may also be received if the trustee gives 30 days advance notice to the beneficiaries and any other persons entitled to notice [see *Prob. Code § 17203*]. During that period, the persons receiving the notice may object to the dual compensation by giving the trustee written notice or by filing a petition asking the court to disapprove the dual compensation [*Prob. Code § 15687(d)(2)*]. If the trustee receives an objection during the 30-day period and still wishes to receive dual compensation, the trustee must file a petition for court approval of the compensation [*Prob. Code § 15687(d)(2)*; see *Prob. Code § 17200(b)(21)*].

#### **[4] Apportionment Among Cotrustees**

Unless the trust instrument provides or cotrustees agree otherwise, if the trust has two or more trustees, the compensation must be apportioned among them according to the services rendered by them [*Prob. Code § 15683*; for further discussion of the compensation of cotrustees, see *Ch. 64A, Testamentary Trusts: Trustee Provisions, § 64A.31[2]*].

#### **[5] Effect of Breach of Trust**

If a trustee commits (or threatens to commit) a breach of trust, the trustee's compensation, on application of a beneficiary or cotrustee, may be reduced or denied entirely [*Prob. Code § 16420(a)(7)*]. It is generally within the court's discretion to determine whether a trustee who has committed a breach of trust is entitled to receive compensation and, if so, how much [*Restatement (Second) of Trusts, § 243, comment c*]. In exercising its discretion, the court will consider the following [*Restatement (Second) of Trusts, § 243, comment c*]:

- Whether or not the trustee acted in good faith.
- Whether the breach was intentional, negligent, or without fault.
- Whether the breach related to the management of the whole trust or only a part.
- Whether the breach occasioned any loss and whether the loss has been made good.
- Whether the trustee's services, notwithstanding the breach, were of value to the trust.

For a general discussion of the duties and obligations of trustees, see discussions in *Ch. 64A, Testamentary Trusts: Trustee Provisions, § 64A.39[1]* et seq.

#### **[6] Court's Power to Order Periodic Payments**

The court may fix an amount of periodic compensation under *Prob. Code §§ 15680* and *15681* [see *§ 64B.35[1], [2]*] to

continue for as long as the court determines is proper [*Prob. Code § 15682*]. Additionally, a court has the authority to order the beneficiaries of a trust to pay attorney fees incurred by the trustee in completing and defending an accounting prior to completion of a trust accounting [ *Kasperbauer v. Fairfield*, (2009) 170 Cal. App. 4th 785, 795 ; 88 Cal. Rptr. 3d 494] .

### **[7] Reimbursement of Expenditures**

In addition to compensation, a trustee is entitled to repayment out of the trust property for expenditures that were properly incurred in the administration of the trust [*Prob. Code § 15684(a)*]. Even if the expenditures were not properly incurred in the administration of the trust, the trustee is entitled to repayment out of the trust property if and to the extent that the expenditures actually benefited the trust [*Prob. Code § 15684(b)*].

If litigation is necessary to preserve the trust, the trustee is entitled to reimbursement for his or her expenditures from the trust. However, if the litigation is specifically for the trustee's benefit, the trustee must bear his or her own costs, and is not entitled to reimbursement [ *Terry v. Conlan* (2005) 131 Cal. App. 4th 1445, 1461, 1464, 33 Cal. Rptr. 3d 603 (trustee who did not participate in litigation as neutral trustee to defend trust and protect its assets, but rather to pursue her own interests and those of her siblings to detriment of other beneficiary, was required to bear her own costs)]. If the litigation does not involve a challenge to the existence of the trust, but is a dispute over who will control and benefit from it, the trustee is not entitled to reimbursement because no matter who prevails in the litigation, the trust will remain intact, and the trustee's only participation in the litigation should be that of a neutral party [ *Terry v. Conlan* (2005) 131 Cal. App. 4th 1445, 1461, 33 Cal. Rptr. 3d 603] .

### **[8] Equitable Lien**

A trustee who has made advances for the protection of the trust has an equitable lien on the trust property to secure repayment of those advances, plus interest [*Prob. Code § 15685*, see *Kasperbauer v. Fairfield*, (2009) 170 Cal. App. 4th 785, 795 ; 88 Cal. Rptr. 3d 494 (trustee had right to indemnification for expenses reasonably incurred in defending accounting)]. An "equitable lien" is a right to have specific property applied in whole or in part to payment of a particular debt or class of debts [*Black's Law Dictionary* (5th ed., 1979), 483]. It differs from a "legal lien" in that it is not good as against a transferee of trust property who gives fair consideration for the property without knowledge of the lien [*Restatement (Second) of Trusts*, § 244, comment c; see "Recommendation Proposing the Trust Law", 18 Cal. L. Revision Comm'n Reports 501, 535, 656 (1986)]. The effect of the lien is to give the trustee a security interest in the trust property and to relieve the trustee of any obligation to transfer the trust property to the beneficiary (or to a transferee of the beneficiary) until the trustee is paid, or until the trustee's right to payment is otherwise secured [*Restatement (Second) of Trusts*, § 244, comment c]. In addition to the lien for repayment of advances, the trustee has an equitable lien for payment of expenses, losses, and liabilities sustained in the administration of the trust or because of ownership or control of any trust property [*Prob. Code § 15685*].

### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsAdministrationEstate, Gift & Trust LawTrustsTrusteesGeneral OverviewEstate, Gift & Trust LawTrustsTrusteesDuties & PowersCompensation



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**§ 64B.36 Bonds**

There is no general requirement that the trustee of a California trust post a bond. The Trust Law [*Prob. Code §§ 15000-18201*] provides that a trustee is not required to give a bond to secure performance of the trustee's duties unless any of the circumstances specified in *Prob. Code § 15602(a)* occur. Thus, a bond will be required only if:

- The trust instrument requires a bond [*Prob. Code § 15602(a)(1)*];
- The court finds a bond to be necessary to protect the interests of the beneficiaries or other persons having an interest in the trust (notwithstanding the trust instrument waives the bond) [*Prob. Code § 15602(a)(2)*]; or
- An individual who is not named as a trustee in the trust instrument is appointed as a trustee by the court [*Prob. Code § 15602(a)(3)*].

The court may excuse the requirement of a bond, reduce or increase the amount of the bond, release a surety, or permit the substitution of another bond with the same or different sureties [*Prob. Code § 15602(b)*]. However, the court may not excuse the requirement of a bond for an individual who is not named as a trustee in the trust instrument that the court appoints as trustee, except under compelling circumstances. A request by all of the adult beneficiaries of a trust that the bond be waived for this individual constitutes a compelling circumstance [*Prob. Code § 15602(b)*].

Whether or not the trust instrument requires a bond, a trust company [*see Fin. Code § 107; Prob. Code § 83* ("trust company" defined); *see also* discussion in *Ch. 64A, Testamentary Trusts: Trustee Provisions, § 64A.30[3]*] may not be required to give a bond [*Prob. Code § 15602(e)*].

There is no special requirement that an out-of-state trustee post bond, and no appellate cases impose such a requirement. Thus, the criteria specified in *Prob. Code § 15602* will govern the court's determination of whether or not to require a bond from an out-of-state trustee.

If a bond is required, it must be in the amount and with the sureties and liabilities ordered by the court [*Prob. Code §*

15602(c)]. Except as otherwise provided in the trust instrument or ordered by the court, the cost of the bond is a charge against the trust [*Prob. Code* § 15602(d)].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsAdministrationEstate, Gift & Trust LawTrustsTrusteesGeneral OverviewEstate, Gift & Trust LawTrustsTrusteesAppointmentEstate, Gift & Trust LawTrustsTrusteesDuties & PowersGeneral Overview



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*24-64B California Legal Forms--Transaction Guide § 64B.37*

**§ 64B.37 Exculpatory Clauses**

**[1] In General**

Under specified circumstances, a trustee may be liable to the beneficiaries for the acts or omissions of agents [*see Prob. Code § 16401*], for breaches committed by cotrustees [*see Prob. Code § 16402*], or for the acts or omissions of predecessor trustees [*see Prob. Code § 16403*]. Trust instruments sometimes include provisions intended to limit trustees' liability for breach of trust or to excuse trustees from some liability that the law imposes on them. These provisions are commonly referred to as "exculpatory clauses."

Under the Trust Law, a trust provision relieving the trustee of liability for breach of trust will be effective for that purpose unless the breach was committed intentionally, with gross negligence, in bad faith, or with reckless indifference to the interests of the beneficiaries [*Prob. Code § 16461(b)(1)*]; or unless the breach resulted in a profit to the trustee [*Prob. Code § 16461(b)(2)*]. The rule rendering exculpatory clauses ineffective to relieve a trustee of liability for any profit that the trustee may have derived from a breach is founded in the public policy rule that a trustee should never profit from a breach of trust [*see Restatement (Second) of Trusts, § 222, comments b and c; see also "Recommendation Proposing the Trust Law," 18 Cal. L. Revision Comm'n Reports 501, 715 (1986)*].

**[2] Provision Releasing Trustee from Liability for Account or Other Written Report if Beneficiary Fails to Object Within Specified Period**

A provision in a trust instrument that releases the trustee from liability if a beneficiary fails to object to an item in an interim or final account or other written report within a specified time period is effective only if all of the following conditions are met [*Prob. Code § 16461(c)*]:

- The account or report sets forth the item.
- The period specified in the trust instrument for the beneficiary to object is not less than 180 days.
- Written notice in 12-point boldface type is provided to the beneficiary with the account or report in the following form:

**NOTICE TO BENEFICIARIES**

**YOU HAVE \_\_\_\_\_ [180 days or the period specified in the trust instrument, whichever is longer] FROM THE RECEIPT OF THIS ACCOUNT OR REPORT TO MAKE AN OBJECTION TO ANY ITEM SET FORTH IN THIS ACCOUNT OR REPORT. ANY OBJECTION YOU MAKE MUST BE IN WRITING; IT MUST BE DELIVERED TO THE TRUSTEE WITHIN THE PERIOD STATED ABOVE; AND IT MUST STATE YOUR OBJECTION. YOUR FAILURE TO DELIVER A WRITTEN OBJECTION TO THE TRUSTEE WITHIN THE PERIOD STATED ABOVE WILL PERMANENTLY PREVENT YOU FROM LATER ASSERTING THIS OBJECTION AGAINST THE TRUSTEE. IF YOU DO MAKE AN OBJECTION TO THE TRUSTEE, THE THREE-YEAR PERIOD PROVIDED IN SECTION 16460 OF THE PROBATE CODE FOR COMMENCEMENT OF LITIGATION WILL APPLY TO CLAIMS BASED ON YOUR OBJECTION AND WILL BEGIN TO RUN ON THE DATE THAT YOU RECEIVE THIS ACCOUNT OR REPORT.**

A provision in a trust instrument that provides for a period of less than 180 days to object to an item in an account or report is ineffective to release the trustee from liability. However, a trustee of a trust created by an instrument with an ineffective period may elect to be governed by *Prob. Code § 16461(c)*, except that "180 days" must be substituted in the notice form above for the ineffective period [*Prob. Code § 16461(d)*].

A beneficiary who fails to object in writing to an account or report that complies with the above requirements within the specified valid period is barred from asserting any claim against the trustee regarding an item that is adequately disclosed in the account or report. An item is "adequately disclosed" if it provides sufficient information so that the beneficiary knows of the claim or reasonably should have inquired into the existence of the claim [*Prob. Code § 16461(e)*; see *Prob. Code § 16460(a)(1)*].

The trustee is not released from liability as to any claim based on a written objection made by a beneficiary, if the objection is delivered to the trustee within the specified effective period. If a beneficiary files a written objection to an account or report that complies with the requirements of *Prob. Code § 16461(c)* within the specified, valid period that concerns an item that affects any other beneficiary of the trust, any affected beneficiary may join in the objection anytime within the specified, valid period or while resolution of the objection is pending, whichever is later [*Prob. Code § 16461(f)*]. This provision is not intended to establish a class of beneficiaries for actions on an account and report, or to provide that the action of one beneficiary is for the benefit of all beneficiaries. It does not create a duty for any trustee to notify beneficiaries of objections or resolution of objections [*Prob. Code § 16461(f)*].

When a beneficiary has filed a written objection to an account or report that complies with the requirements of *Prob. Code § 16461(c)* within the specified, valid period, a supplemental written objection may be delivered in the same manner as the objection not later than 180 days after receipt of the account or report, or no later than the period specified in the trust instrument, whichever is longer [*Prob. Code § 16461(g)*]. If proper notice has been given and a beneficiary has not made a timely objection, the trustee is not liable for any other claims adequately disclosed by any item in the account or report [*Prob. Code § 16461(i)*].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsTrusteesGeneral OverviewEstate, Gift & Trust LawTrustsTrusteesDuties & PowersGeneral OverviewEstate, Gift & Trust LawTrustsTrusteesDuties & PowersClaims By & AgainstEstate, Gift & Trust LawTrustsTrusteesDuties & PowersStandards of Care



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*24-64B California Legal Forms--Transaction Guide § 64B.38*

**§ 64B.38 Choice of Law**

**[1] Conflict of Laws**

If a trust has significant contacts with two or more states, it may be difficult to determine which state's law will govern questions relating to the validity of the trust, how the trust instrument should be interpreted or construed, and which state's courts will exercise administrative supervision over it. If a will is executed in California, for example, by a testator who dies while a resident of Arizona, and if the trust includes real property located in Illinois and personal property located in Arizona, the question arises whether the law of California, Arizona, or Illinois, or some combination of the laws of those states, will properly be applied to the trust. All questions of this kind must be determined in accordance with conflict of laws rules and statutes that relate to testamentary and inter vivos trusts.

Insofar as a trust consists of real property, the law of the situs of the property has traditionally been applied to determine all questions of validity [ *Campbell--Kawannanakoia v. Campbell* (1907) 152 Cal. 201, 206-207, 92 P. 184 ; see *Hutchinson v. Hutchinson* (1941) 48 Cal. App. 2d 12, 18-19, 119 P.2d 214] . Insofar as the trust consists of personal property, the law of the state having the most significant relationship to the trust is generally applied [*Restatement (Second) of Conflict of Laws* (1971), § 270(b)]. Whether the law of a particular state will or will not be applied to a question of validity is, however, a difficult question to answer, even under recognized conflict of law principles, for the courts have frequently been influenced by practical rather than theoretical considerations. One factor that may affect the resolution of such a question, for example, is whether the application of a particular law would or would not uphold the validity of the trust. Since the testator is presumed not to have intended that the trust be invalid, if the law of one state would validate the trust while that of another would invalidate it, the courts frequently choose to apply the law of the state that would uphold it [*Restatement (Second) of Conflict of Laws* (1971), § 270, Comment d].

**[2] Testator's Direction**

The intention of a testator as expressed in the will usually (although not always) governs the resolution of conflict of law questions relating to testamentary trusts. The general conflict of laws rule is that if a will contains a clear choice of law direction and if the direction can be effectuated without violating public policy, it will control the determination of all conflict of law questions, except those relating to the validity of the will or the trust [Scott, *The Law of Trusts* (3d ed., Little, Brown & Co., 1967), vol. V, § 555; see *Restatement (Second) of Conflict of Laws* (1971), §§ 268(1),

269(b)(i), 271(a), 273(a), 275, 277(1)]. With respect to the validity of the trust, the intention of the testator is a significant although not always controlling factor, since various and sometimes contradictory conflict of law principles must be applied to any question of the validity of a will or of a trust.

### [3] California Statutes

In California, two statutes govern the resolution of conflict of laws questions relating to wills, including wills that establish trusts. *Prob. Code* § 6113 specifies a choice of law rule relating to the validity of wills, and *Prob. Code* § 21103 specifies a choice of law rule relating to the interpretation of wills.

*Prob. Code* § 6113 provides that a written will is valid if its execution complies with any of the following [*Prob. Code* § 6113]:

- *Prob. Code* § 6110 (relating to the execution of witnessed wills [*see Ch. 63, Will Provisions, §§ 63.710[1]-63.712[1] and 63.730[1]-63.732[1]*]);
- *Prob. Code* § 6111 (relating to holographic wills);
- *Prob. Code* §§ 6380-6390 (relating to the execution of international wills [*see Ch. 63, Will Provisions, § 63.750[1]*]);
- The law at the time of execution of the place in which the will is executed; or
- The law of the place in which at the time of execution or at the time of death the testator is domiciled, has a place of abode, or is a national.

*Prob. Code* § 6113 applies whether or not the will was executed in California ["Tentative Recommendation Relating to Wills and Intestate Succession," 16 Cal. L. Revision Comm'n Reports 2302, 2397 (1982)]. The statute is based on Uniform *Probate Code* § 2-506 ["Tentative Recommendation Relating to Wills and Intestate Succession," 16 Cal. L. Revision Comm'n Reports 2302, 2397 (1982)]. Following the example of the Uniform Probate Code, *Prob. Code* § 6113 permits the probate in California of certain wills executed outside the state. Such wills must be in writing, but otherwise are valid if they meet the requirements for execution of the law of the place in which the will is executed (when it is executed in another state or country) or the law of the testator's domicile, abode, or nationality at either the time of execution or at the time of death [Comment to Uniform *Probate Code* § 2-506, Uniform Probate Code, Official 1982 Text with Comments, pp. 57-58 (6th ed., West Publishing Co., 1982)].

*Prob. Code* § 21103 provides that the meaning and legal effect (i.e., the interpretation or construction) of a disposition in a will must be determined by the local law of a particular state selected by the testator in the will, unless the application of that law would be contrary to any of the following:

- The rights of the surviving spouse in community and quasi-community property;
- Any other public policy of California otherwise applicable to the disposition; or
- The family protection provisions of the Probate Code [*see Prob. Code* § 6500 *et seq.*].

This statute is based on Uniform *Probate Code* Section 2-602 [*see* "Tentative Recommendation Relating to Wills and Intestate Succession," 16 Cal. L. Revision Comm'n Reports 2302, 2400 (1982) (discussing former *Prob. Code* § 6141, the predecessor to *Prob. Code* § 21103)]. Following the example of the Uniform Probate Code, *Prob. Code* § 21103 permits a testator to select the law of a particular state for purposes of interpreting the will, without regard to the

location of the property covered by the will, and requires the courts to accept the designation unless it is contrary to public policy [Comment to Uniform *Probate Code* § 2-602, Uniform Probate Code, Official 1982 Text with Comments, p. 64 (6th ed., West Publishing Co., 1982)].

For further discussion of choice-of-law designations in wills, see § 64B.331[1].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil Procedure Federal & State Interrelationships Choice of Law General Overview Estate, Gift & Trust

Law Trusts General Overview Estate, Gift & Trust Law Trusts Administration Estate, Gift & Trust

Law Trusts Interpretation Estate, Gift & Trust Law Trusts Testamentary Trusts



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**§ 64B.39 Judicial Supervision**

Under the Trust Law, most California trusts are not subject to the continuing supervision of the superior court. Only trusts created by wills executed before July 1, 1977 (and not incorporated by reference in a will on or after July 1, 1977) [*Prob. Code § 17300(a)*], and trusts created by wills which expressly provide that they will be subject to the continuing jurisdiction of the superior court [*Prob. Code § 17300(b)*] are subject to the continuing supervision of the court in which the decedent's estate was administered [*Prob. Code § 16301*; but see *Prob. Code §§ 17350-17354* (procedure for removing trust from continuing supervision)].

To require continuing jurisdiction, a will must clearly express the testator's intent that the trust be supervised by the court [ *Estate of Goddard (1984) 157 Cal. App. 3d 340, 344, 203 Cal. Rptr. 623* (decided under former Prob. Code § 1120(a), repealed eff. July 1, 1987)]. A standard clause to the effect that the trustee "shall receive reasonable compensation to be fixed by the Court for its services" is not, in itself, sufficient to require continuing jurisdiction [ *Estate of Goddard (1984) 157 Cal. App. 3d 340, 343-344, 203 Cal. Rptr. 623* ].

Trusts that are subject to continuing supervision are governed by the provisions of *Prob. Code §§ 17300-17354*. If the trust is an inter vivos trust, or if the trust is a testamentary trust created after July 1, 1977, and the will creating it does not provide that it will be subject to the continuing jurisdiction of the superior court, then the trust is subject to the "intermittent intervention" (or "disputed-related") provisions of *Prob. Code §§ 17200-17210* [see "Recommendation Proposing the Trust Law," 18 Cal. L. Revision Comm'n Reports 501, 577 ("intermittent intervention scheme" discussed)].

The principal difference between the continuing jurisdiction provided for in *Prob. Code §§ 17300-17304* and the "intermittent intervention" (or "dispute-related") provisions of *Prob. Code §§ 17200-17210* is that the latter are invoked only when one of the persons interested in the trust petitions the court for an order. In the absence of such a petition, the court exercises no supervision over the trust.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsGeneral OverviewEstate, Gift & Trust LawTrustsAdministrationEstate, Gift & Trust LawTrustsTestamentary Trusts



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DIVISION IV: WILLS AND TRUSTS  
CHAPTER 64B TESTAMENTARY TRUSTS: ADMINISTRATIVE PROVISIONS  
PART II. LEGAL BACKGROUND

*24-64B California Legal Forms--Transaction Guide §§ 64B.40-64B.99*

**[Reserved]**

§§ 64B.40[Reserved]



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DIVISION IV: WILLS AND TRUSTS  
CHAPTER 64B TESTAMENTARY TRUSTS: ADMINISTRATIVE PROVISIONS  
PART III. TRANSACTION GUIDE

A. Preliminary Determinations for Operational Provisions of Testamentary Trust

*24-64B California Legal Forms--Transaction Guide § 64B.100*

**§ 64B.100 Determination of Principal and Income**

1. Should will adopt all provisions of Revised Uniform Principal and Income Act [*Prob. Code §§ 16320-16375*]?

**NOTE:**

The Act is a comprehensive statute that includes rules for the determination of most questions of principal and income, including rules governing the allocation to principal or income of specific receipts and expenses. For a general introduction to the Act, see § *64B.31[1]* et seq. For discussions of specific rules embodied in the Act, see §§ *64B.203[1]-64B.211[1]*.

a. Provisions of Act will adequately serve needs of most trusts.

b. Requiring trustee to conform to ascertainable standards of Act may help to avoid uncertainties and disputes among persons interested in trust.

**NOTE:**

If the will adopts the Act, the trustee and other persons interested in the trust may rely on the legislative history and judicial interpretation of the Act to determine its application to specific receipts or expenses.

c. Requiring trustee to conform to rules of Act may avoid unfavorable tax consequences of broad grant of discretion.

**NOTE:**

Unfavorable income or estate tax consequences may result if (1) the trustee has broad

power to allocate receipts or disbursements to principal or income and the power is not subject to reasonable limitations, or (2) a trustee who is also a beneficiary possesses a broad power to allocate principal or income. This is because property subject to a general power of appointment is subject to estate tax in the estate of the person who holds the power [*I.R.C. § 2041(a)(2)*], and a broad power to shift the beneficial enjoyment of the trust may be deemed a general power of appointment for this purpose [*Treas. Reg. § 20.2041-1(b)(1)*]. Further, a trust interest intended to qualify for the marital deduction as a life estate plus power of appointment or qualified terminable interest property (QTIP) trust may fail to qualify for the deduction if the surviving spouse does not have the right to receive all of the income from the trust (or a portion of the trust) payable at least annually [*see I.R.C. § 2056(b)(5)* (life estate plus power of appointment trust); *see also I.R.C. § 2056(b)(7)(B)(i)(II), (ii)* (QTIP trust)]. For a general discussion of the tax implications of broad trustee discretion to determine questions of principal and income, see § 64B.200[1][c][i] et seq.

d. Will provision adopting Act is not necessary to its application.

**NOTE:**

The provisions of the Act will apply to the trust in absence of any contrary terms of the trust instrument [*Prob. Code § 16335(a)(3)*].

2. Should will contain any provisions expanding or restricting Act's rules governing allocation of receipts or expenditures to principal or income?

**NOTE:**

The trust may vary the rules of the Act in whole or in part [*see Prob. Code § 16335(a)(1)*]. The testator may prescribe a comprehensive set of rules for the determination of principal and income questions or, depending on the needs of the trust and the beneficiaries, establish rules for specific principal and income problems only.

a. Should will grant trustee broad discretion to allocate receipts and expenditures to principal or income?

(1) Broad discretion will give trustee flexibility to meet unanticipated needs of income and remainder beneficiaries as and when needs arise.

(2) Since broad discretion will enable trustee to shift benefits of trust, it should not be granted if trustee is also beneficiary.

**NOTE:**

If a trustee who is also a beneficiary possesses a broad power to allocate receipts or disbursements to principal or income, the power may cause the trust corpus to be included in the trustee-beneficiary's estate [*see I.R.C. § 2041(a)*; *see also §§ 64B.200[1][c][ii], 64B.201[1][d]*].

(3) Since broad discretion may interfere with right of surviving spouse to receive all income of trust, it should not be granted if trust is designed to qualify for federal estate tax marital deduction as lifetime income plus power of appointment trust or qualified terminable interest property (QTIP) trust.

**NOTE:**

A broad power to allocate receipts or disbursements to principal or income may disqualify the trust for

the estate tax marital deduction. The trust instrument must give the surviving spouse substantially the degree of beneficial enjoyment of trust property during his or her life that the principles of the law of trusts accord to a person who is unqualifiedly designated as the life beneficiary of a trust [*Treas. Reg. § 20.2056(b)-5(f)(1)*]. The rules to be applied by the trustee in allocating receipts and expenses between income and corpus must be considered in relation to the nature and expected productivity of the trust assets, the nature and frequency of occurrence of the expected receipts, and any provisions as to change in the form of investments [*Treas. Reg. § 20.2056(b)-5(f)(3)*]. For general discussion of the marital deduction, see Ch. 71, *Marital Deduction Trust Provisions* .

b. Should will permit, require, or forbid trustee to establish reserve for depreciation?

**NOTE:**

A reserve for depreciation is an account used to recover the cost of an asset by writing off a portion of the cost over the life of the asset, or by some other acceptable method [Black's Law Dictionary 1308 (6th ed. 1990)].

(1) Provision either requiring or forbidding trustee to establish reserve for depreciation will limit trustee's discretion and may avoid unfavorable tax consequences of broad discretion.

**NOTE:**

If the trustee has unlimited discretion to establish or not to establish a reserve for depreciation, the trustee's power may be deemed a general power of appointment and subject the appointive assets to federal estate tax in the estate of the trustee [*see §§ 64B.200[1][c][i], [ii], and 64B.203[1][b][ii]*].

(2) Trustee is not required to set aside reserve for depreciation unless required by will [*Prob. Code § 16372*].

(3) Unless will provides otherwise, trustee has discretion to establish reserve for depreciation.

**NOTE:**

The Act does not prohibit a trustee from establishing (or from maintaining a previously established) reserve for depreciation [*Prob. Code § 16372*].

(4) Requiring reserve for depreciation will serve interests of remainder beneficiaries by requiring trustee to preserve trust principal [*see § 64B.203[1][b][i]*].

(5) Failure or refusal to establish reserve will favor interests of income beneficiaries by giving them benefits of income from depreciable property without requiring that portion of income be withheld and allocated to depreciation reserve.

c. Should will require trustee to allocate receipts from natural resources, including timber and other depreciating or "liquidating" assets, according to a formula?

(1) Act sets forth rules for allocation to principal and income of receipts from natural resources [*see § 64B.204[1][b]*].

(2) Will may limit trustee's discretion by prescribing specific rules favoring either income or remainder beneficiaries.

d. Should will authorize trustee to purchase bonds at premiums and either require that premiums be amortized or provide that amortization is not required?

**NOTE:**

The Act permits the trustee to purchase bonds at premiums but prohibits the trustee from amortizing the premiums [*Prob. Code § 16357(a)*]. The will may either require amortization or provide that amortization is not required [*see* discussion § 64B.205[1][b][i]].

(1) If trustee purchases bonds at premiums and does not amortize, principal will be impaired.

**NOTE:**

When a bond is purchased at a premium, the face value is less than the principal used to acquire it. If no provision is made to amortize the premium (i.e., set aside a portion of the interest earned by the bond and allocate it to a principal account), the income beneficiaries will benefit at the expense of the remainder beneficiaries.

(2) Provision requiring amortization will serve interests of remainder beneficiaries by insuring preservation of principal.

(3) Provision requiring amortization will protect trustee against any charge that, by purchasing bonds at premium, trustee is improperly impairing principal of trust.

(4) Provision absolving trustee who is also beneficiary of duty to amortize bond premiums will give trustee power to shift benefits of trust with possible adverse tax consequences.

**NOTE:**

If the trustee is also a beneficiary of the trust, any property over which the beneficiary has a general power of appointment (or the equivalent of a general power of appointment) will be included in the beneficiary's estate for federal estate tax purposes [*I.R.C. § 2041(a)*; *see* §§ 64B.200[1][c][ii] and 64B.205[1][b][iii]].

e. Should will authorize trustee to purchase bonds at discount and either require trustee to accumulate discounts to interest or provide that accumulation is not required?

**NOTE:**

The Act permits the trustee to purchase bonds at discounts, and requires a total accumulation occurs when the bonds are redeemed within one year of purchase, and no accumulation occurs when the bonds are held for a longer period [*Prob. Code § 16357*].

(1) Will may provide that, if bonds are purchased at discount, discounts either must or may not be accumulated and distributed as income to beneficiaries.

**NOTE:**

When bonds are purchased at a discount, remainder beneficiaries benefit and income beneficiaries suffer unless some provision is made for accumulation to income.

(2) If testator wishes to favor remainder beneficiaries, will may provide that trustee need not accumulate bond discounts.

(3) If trust is designed to qualify for marital deduction as lifetime income plus power of appointment or qualified terminable interest property (QTIP) trust, will should require accumulation, as right of surviving spouse to receive all income should not be disturbed [*Treas. Reg. §§ 20.2056(b)-5(f), 20.2056(b)-7(d)(2); see § 64.211*].

f. Should will provide that income earned during administration of testator's estate will be treated as principal?

**NOTE:**

Unless the will provides otherwise, income earned during administration of a testator's estate by property subject to a testamentary trust may have to be distributed to the testamentary trustee and not made available for use by the executor [*see Prob. Code §§ 16340, 16341; see also Prob. Code §§ 12000-12007* (rules governing entitlement to interest and income during administration); for detailed consideration of right to income from devised property during administration of testator's estate, *see Ch. 63, Will Provisions, § 63.532[1]*]. If the assets of the trust are the principal assets of the estate, depriving the executor of the use of the income earned by assets during administration may unnecessarily impede the administration of the estate. The will may, however, avoid this potential problem by providing that income earned by the testator's estate during administration will be treated as principal and thus be available for the executor's use [*see Prob. Code §§ 12000* (rules governing right to interest and income accruing during administration apply only when intention of testator not otherwise indicated by will), 16335(a) (rules applicable unless will provides otherwise); *see also § 64B.207[1]*].

g. Should will grant trustee discretion to apportion stock dividends and liquidating dividends or distributions between principal and income?

**NOTE:**

The Act requires the trustee to allocate distributions of shares of stock, including distributions in the form of stock splits and stock dividends, as well as liquidating dividends, to principal [*Prob. Code § 16350*; for a general discussion of the statutory rules relating to corporate distributions, *see § 64B.208[1][b][i]*]. Some corporations, however, issue stock or liquidating dividends over extended periods, while at the same time paying no ordinary dividends. Requiring the trustee to allocate such dividends to principal would adversely affect the interests of many beneficiaries. If it appears that the trust will include substantial holdings of securities that are likely to pay stock dividends or liquidating distributions without distributing ordinary cash dividends, the testator may choose to give the trustee discretion to allocate such dividends or distributions between principal and income.

h. Should will require trustee to allocate distributions from capital gains made by mutual funds or real estate investment trusts to income?

**NOTE:**

The Act requires the trustee to allocate distributions from ordinary income made by regulated investment companies (mutual funds) and qualified real estate investment trusts (REITs) to income. All other distributions from such companies or trusts, including distributions from capital gains, depreciation, or depletion, must be allocated to principal [*Prob. Code § 16350; see § 64B.209[1][b][i]*]. This rule may, however, be varied or negated by the will [*Prob. Code § 16335(a)(1)*].

(1) If trust assets will include mutual funds whose principal investment objectives are capital growth, statutory rule will favor remainder beneficiaries at expense of income beneficiaries.

**NOTE:**

Mutual funds whose principal investment objectives are capital growth commonly distribute capital gains that are many times larger than their ordinary income distributions. If the trust will include substantial holdings of the shares of such a fund, or if the trustee is authorized to invest in or retain the shares of such a fund, the testator may require the trustee to allocate all or part of the capital gains distributions to income.

(2) If trust is designed to qualify for marital deduction as lifetime income plus power of appointment or QTIP trust, provision requiring trustee to allocate all or part of capital gains distributions to income may save deduction.

**NOTE:**

An interest passing in trust will not satisfy the requirement that the surviving spouse be entitled for life to all of the income from the trust payable annually [*see I.R.C. § 2056(b)(5)* (life estate plus power of appointment trust); *see also I.R.C. § 2056(b)(7)(B)(i)(II), (ii)* (QTIP trust)] if the primary purpose of the trust is to safeguard the trust property without providing the spouse with the required beneficial enjoyment [*Treas. Reg. § 20.2056(b)-5(f)(5)*]. However, the interest will qualify even if the trustee has the power to allocate or apportion receipts and disbursements between income and corpus, if the power to do so is subject to reasonable limitations [*Treas. Reg. § 20.2056(b)-5(f)(4)*]. Requiring the trustee to allocate capital gains distributions to income may provide the surviving spouse with the requisite degree of enjoyment.

(3) If trust will not include substantial holdings of growth-oriented mutual funds, provision varying statutory rule will not be necessary.

i. Should will specify depreciation and accounting rules for any business or other activity that will be operated by the trustee for the trust?

**NOTE:**

A trustee who operates a business or other activity may account for that business or activity separate and apart from the trust's general accounting records [*Prob. Code § 16352(a)*]. Whether or not a trustee accounts for a business or other activity separately, there is discretion but no requirement for a depreciation reserve or particular accounting method [*see Prob. Code §§ 16352(b), 16372*]. The testator may wish to either require or forbid depreciation, and may prescribe the methods used for depreciation and accounting.

j. Should will establish rules for charging trustee's compensation, attorneys' fees, and court costs to principal or income?

(1) Will may provide that all trustee compensation, attorneys' fees, and court costs must be charged entirely to principal or entirely to income.

(2) Will may provide that all regular trustee compensation and all ordinary attorneys' fees and courts costs must be charged to income and all other compensation, fees, and costs to principal.

(3) Will may provide that attorneys' fees and courts costs will be charged to income for matters primarily concerning income and to principal for matters primarily concerning principal, with all other compensation, fees, and costs charged entirely to principal or entirely to income.

k. Should will include provision restricting or eliminating trustee's general power to make adjustments to income and

principal under *Prob. Code § 16336* [see § 64B.202].

**NOTE:**

The Uniform Principal and Income Act grants trustees the general discretionary power to make adjustments between principal and income, to the extent the trustee considers necessary, under specified circumstances [*Prob. Code § 16336*; for detailed discussion of this power, see § 64B.31[9] et seq.]. The statutory prerequisites for exercise of this power, coupled with the limitations on its exercise, appear to minimize the likelihood that trustees can apply it in a manner that would be inequitable to any of the trust beneficiaries. Nevertheless, circumstances may arise in which the attorney may deem it appropriate to restrict this power still further, or even eliminate it. When this is the case, any provision limiting this power should be carefully drafted and include a specific reference to *Prob. Code § 16336(a)*, because the statute requires that any trust limiting the trustee's power to make adjustments between principal and income does not affect the trustee's power to make adjustments under *Prob. Code § 16336* unless it is clear from the trust that it is intended to deny this power to the trustee [*Prob. Code § 16336(f)*].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsGeneral OverviewEstate, Gift & Trust LawTrustsAdministrationEstate, Gift & Trust LawTrustsTestamentary Trusts



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CHAPTER 64B TESTAMENTARY TRUSTS: ADMINISTRATIVE PROVISIONS  
PART III. TRANSACTION GUIDE

A. Preliminary Determinations for Operational Provisions of Testamentary Trust

*24-64B California Legal Forms--Transaction Guide § 64B.101*

**§ 64B.101 Declaration of Testator's Intention**

1. Should will include statement of testator's intention to favor income beneficiaries or remainder beneficiaries?

**NOTE:**

Since the intention of the testator as expressed in the will controls the legal effect of all dispositions in the will [*Prob. Code § 21102(a)*], a statement of the testator's intentions to favor either the income beneficiaries or the remainder beneficiaries will be of help in interpreting and construing provisions of the will. If the words of the will are clear, the testator's intention will be derived solely from them [ *Estate of Hill (1963) 214 Cal. App. 2d 812, 816, 29 Cal. Rptr. 814 ; see § 64B.230[1][b][iii]*].

a. If trust gives trustee discretion with respect to investments, payments of income to income beneficiaries, determination of income and principal, or other matters, statement of testator's intentions to favor income beneficiaries or remainder beneficiaries may help trustee and court determine how discretion should be exercised.

b. If will gives trustee no discretion, statement of testator's intention to favor income beneficiaries or remainder beneficiaries is not necessary.

2. Will special tax needs of trust or of income or remainder beneficiaries be served by declaration of testator's intentions?

a. If trust is designed to qualify for federal estate tax marital deduction as lifetime income plus power of appointment or QTIP trust [*I.R.C. § 2056(b)(5), (7)*], statement favoring income beneficiary may help to protect deduction [*see discussion in § 64B.230[1][b][iii]*]

].

b. If trust is charitable remainder annuity trust or charitable remainder unitrust, statement favoring income beneficiaries should not be included in will.

**NOTE:**

A remainder interest passing to a qualified charity is deductible for federal estate tax purposes only if it is a qualified charitable remainder annuity trust or a charitable remainder unitrust [*I.R.C. § 2055(e)(2)(A)*]. Payments to a noncharitable income beneficiary (e.g., a surviving spouse), under a charitable remainder annuity trust must be a sum certain [*I.R.C. § 664(d)(1)(A)*], and payments to such a beneficiary under a charitable remainder unitrust must be a fixed percentage of the net fair market value of the assets [*I.R.C. § 664(d)(2)(A)*]; *see* § 64B.230[1][b][ii].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsInterpretationEstate, Gift & Trust LawTrustsTestamentary TrustsEstate, Gift & Trust LawWillsInterpretationTestator's IntentGeneral Overview



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*24-64B California Legal Forms--Transaction Guide § 64B.102*

**§ 64B.102 Additions to Trust by Third Parties**

1. Should will include provision either authorizing or prohibiting additions to trust from sources other than testator?

**NOTE:**

Unless the will provides otherwise, property devised to a previously created trust is not deemed to be held under a testamentary trust of the second testator but becomes part of the trust to which it is given and must be administered and disposed of in accordance with the provisions of the first trust instrument or will, including any amendments to the first instrument or will made before or after the death of the second testator (regardless of whether the amendments were made before or after the execution of the second testator's will) [*Prob. Code § 6300*].

a. If it is likely that other members of testator's family will make additions to trust, will may include provision authorizing additions.

b. Additions to previously created trust will save time, inconvenience, and expense by obviating need for new trustee and new trust instrument.

c. Additions to previously created trust may effect long-term savings by making it possible to administer all of family's assets as single trust.

2. Will special tax needs of trust, income beneficiaries, or remainder beneficiaries be served by provision authorizing or prohibiting additions to trust?

**NOTE:**

Additions to a trust may have estate or generation-skipping transfer tax consequences. If the person making the addition retains the right to designate those who will possess or enjoy the property or its income (or if the person making the addition has such a right under terms of the first trust instrument), the property will be included in that person's estate for federal estate tax purposes [*I.R.C. § 2036(a)(2)*; *see* discussion in § 64B.250[1][d]]. If the trust to which the assets are added distributes the assets (or income earned from those assets) to a beneficiary who is assigned to a generation that is two or more generations below that of the transferor, the transfer may trigger imposition of the generation-skipping transfer tax [*see I.R.C. §§ 2601, 2611, 2612*; *see also* discussion in § 64B.250[1][e]].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

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*24-64B California Legal Forms--Transaction Guide § 64B.103*

**§ 64B.103 Vacancies in Trusteeship**

1. Should will provide for filling vacancy in office of trustee or cotrustee?

**NOTE:**

Since an alternate or successor trustee will, upon taking office, exercise all of the powers and be subject to all of the duties and obligations of the original trustee, similar considerations should govern the selection of an alternate or successor trustee. For a general discussion of the legal qualifications of trustees, see *Ch. 64A, Testamentary Trusts: Trustee Provisions*, § 64A.30 et seq. For a general examination of tax considerations in the selection of cotrustees, see *Ch. 64A, Testamentary Trusts: Trustee Provisions*, § 64A.32[1] et seq.

a. Will provision designating alternate or successor trustee or cotrustees will:

- (1) Avoid time, inconvenience, and expense of judicial proceedings for appointment of successor;
- (2) Save expense of bond premiums for successor; and

**NOTE:**

A court-appointed trustee is required to post a bond [*Prob. Code § 15602(a)(3)*], while there is no similar statutory requirement for a successor trustee appointed in the will. The court may not excuse the requirement of a bond for an individual who is not named as a trustee in the trust instrument that the court appoints as trustee, except under compelling circumstances. A request by all of the adult beneficiaries of a trust that the bond be waived for this individual constitutes a compelling circumstance [*Prob. Code § 15602(b)*].

(3) Insure that person or corporation acceptable to testator will serve as alternate or successor trustee or cotrustee.

b. If will makes no provision for filling vacancy, court may appoint trustee.

**NOTE:**

If the will specifies a practical method for filling a vacancy (or if it names a person to fill the vacancy), the vacancy must be filled as provided in the will [*Prob. Code § 15660(b)*]. If the will makes no provision for filling the vacancy, all of the adult beneficiaries may agree that the vacancy be filled by a trust company [*Prob. Code § 15660(c)*; *see Prob. Code § 83* ("trust company" defined)]. If the adult beneficiaries do not agree that the vacancy be filled by a trust company, the court may appoint a trustee to fill the vacancy [*Prob. Code § 15660(d)*].

2. Should will provide for alternate or successor trustees or cotrustees?

a. Will may provide for vacancy by:

(1) Appointing successor trustee by name;

(2) Authorizing designated trustee or cotrustee to name successor; or

(3) Providing that powers of cotrustee who dies or resigns may be exercised by remaining cotrustees.

**NOTE:**

Unless otherwise provided in the trust instrument, if a vacancy occurs in the office of a cotrustee, the remaining cotrustee or cotrustees may act for the trust as if they were the only trustees [*Prob. Code § 15621*; *see § 64B.272[1]*].

b. Since trust may continue for many years, testator should designate alternate and successor trustees who will be able and willing to serve over full life of trust.

c. Corporate trustee may be suitable successor, since it will normally continue in existence well beyond lifetimes of natural persons interested in trust.

d. Even when corporate trustee is original trustee, will should designate successor, as corporate trustee may decline to serve or resign office [*see discussions in Ch. 64A, Testamentary Trusts: Trustee Provisions, § 64A.30[3] et seq.*].

e. Original trustee named in will should be empowered to name successor if:

(1) Testator reposes confidence in judgment and integrity of original trustee; or

(2) Testator believes it is preferable to postpone selection of successor until later time and believes original trustee will make wise selection.

**NOTE:**

A power in a trustee to designate a successor does not constitute an impermissible delegation of the powers of the trust [ *Estate of Kessler (1953) 120 Cal. App. 2d 383, 388, 261 P.2d 27* ; *see discussion in § 64B.271[1][b]*].

f. Will may provide that power of cotrustee who is unable or unwilling to act will survive to remaining cotrustees, if testator either:

**NOTE:**

Since the powers of a cotrustee who dies or resigns will pass to the surviving cotrustees in the absence of will provision [*Prob. Code § 15621*], such a provision is not necessary. Nevertheless, it may still be useful to apprise those concerned with trust that the cotrustee's powers will survive.

- (1) Is unwilling to appoint successor in will or to empower trustee or cotrustee to name successor; or
- (2) Believes duties of trust can be successfully exercised by survivors.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsGeneral OverviewEstate, Gift & Trust LawTrustsAdministrationEstate, Gift & Trust LawTrustsTrusteesGeneral OverviewEstate, Gift & Trust LawTrustsTrusteesAppointmentEstate, Gift & Trust LawTrustsTrusteesRemoval & Resignation



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*24-64B California Legal Forms--Transaction Guide § 64B.104*

**§ 64B.104 Compensation of Trustees**

1. Should will provide for compensation of trustee?

a. Will provision will control determination of all ordinary, but not extraordinary, compensation.

**NOTE:**

If the trust instrument provides for the trustee's compensation, the trustee is entitled to be compensated in accordance with the trust instrument [*Prob. Code § 15680(a)*]. However, the court may fix or allow greater or lesser compensation if the duties of the trustee are substantially different than those contemplated when the trust was created, if compensation in accordance with the terms of the trust would be inequitable or unreasonably low or high, or if other extraordinary circumstances call for equitable relief [*Prob. Code § 15680(b)*]. Any order fixing or allowing greater or lesser compensation will apply only prospectively to actions taken in administration of the trust after the order is made [*Prob. Code § 15680(c)*]. Further, a trustee who is an attorney is not entitled to dual compensation as trustee and as attorney for the trustee unless prior court approval is obtained for the arrangement [*see Prob. Code § 15687*]. For further discussion of trustee compensation, see § 64B.290[1].

b. If will makes no provision for compensation, trustee and cotrustees are entitled to reasonable compensation to be determined by court.

2. If will provides for compensation of trustees or cotrustees, what provision should be made?

a. Will may provide that trustee or cotrustees will receive:

- (1) Fixed amount as compensation;
- (2) Percentage of corpus as compensation; or
- (3) Reasonable compensation.

b. If there are cotrustees, will may provide that:

- (1) Corporate cotrustee (if any) will be compensated as if it were sole trustee and individual cotrustee will receive no compensation, or merely nominal compensation; or
- (2) Compensation will be divided between corporation and individual cotrustees according to formula.

**NOTE:**

Unless the trust instrument provides (or the cotrustees agree) otherwise, when there are two or more cotrustees, the compensation must be apportioned among them according to the services they have rendered [*Prob. Code § 15683*].

c. As alternative to compensation, will may provide bequest in lieu of compensation.

**NOTE:**

If the will makes a bequest to a person who is also appointed as trustee, it is a question of interpretation whether the bequest is intended to be in addition to or in lieu of the trustee's regular compensation [*see* discussion in § 64B.295[1][b]].

Tax considerations may affect a testator's decision to provide compensation for a trustee or to make a bequest to the trustee in lieu of compensation. A sum received as a bequest will be free of federal income taxation [*I.R.C. § 102(a)*] but subject to estate taxation [*see I.R.C. § 2031*], while trustee compensation is subject to income tax [*see I.R.C. § 61(a)(1)* (gross income defined)]. For discussion, see § 64B.295[1][c].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsAdministrationEstate, Gift & Trust LawTrustsTrusteesGeneral OverviewEstate, Gift & Trust LawTrustsTrusteesDuties & PowersCompensation



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*24-64B California Legal Forms--Transaction Guide § 64B.105*

**§ 64B.105 Bonds and Exculpatory Clauses**

1. Should will include provision waiving bond of trustee or cotrustees?

a. If trustee is appointed in will, waiver may not be necessary.

**NOTE:**

Bonds usually are not required if the trustee is named in the will. A bond will be required of a trustee named in the will only if the will requires a bond, the court finds a bond is necessary to protect the interests of the beneficiaries or other persons having an interest in the trust (even though it is waived in the will), or an individual who is named as a trustee in the will is appointed as a trustee by the court [*Prob. Code § 15602(a)*].

The court may excuse the requirement of a bond, reduce or increase the amount of the bond, release a surety, or permit the substitution of another bond with the same or different sureties [*Prob. Code § 15602(b)*]. However, the court may not excuse the requirement of a bond for an individual who is not named as a trustee in the trust instrument that the court appoints as trustee, except under compelling circumstances. A request by all of the adult beneficiaries of a trust that the bond be waived for this individual constitutes a compelling circumstance [*Prob. Code § 15602(b)*]. For further discussion of trustee bonds, see § 64B.310[1].

b. Bond will not be required of trust company.

**NOTE:**

A trust company is never required to give a bond [*Prob. Code § 15602(e)*; *see § 64B.310[1]*].

c. Will should waive bond only when testator has confidence in honesty, integrity, and competence of proposed trustee

or cotrustees.

d. Will provision waiving bond will save expense of annual bond premiums.

**NOTE:**

Except as otherwise provided in the trust instrument or ordered by the court, the cost of a bond will be charged against the trust [*Prob. Code § 15602(d)*].

2. Should will include exculpatory provisions?

a. Ordinarily, trustee will be liable for:

(1) Violation of any duty that trustee owes to beneficiary [*Prob. Code § 16400*];

(2) Act or omission of agent employed by trustee in administration of trust, if act or omission would be breach of trust if committed by trustee personally and if [*Prob. Code § 16401(b)*]:

(a) Trustee directs act of agent;

(b) Trustee delegates to agent authority to perform act that trustee is under duty not to delegate;

**NOTE:**

A trustee has a duty not to delegate to others the performance of acts that the trustee can reasonably be required to perform personally [*Prob. Code § 16012(a)*].

(c) Trustee does not use reasonable prudence in selection or retention of agent;

(d) Trustee does not periodically review agent's overall performance and compliance with terms of delegation;

(e) Trustee conceals act of agent; or

(f) Trustee neglects to take reasonable steps to compel agent to redress wrong when trustee knows of agent's acts or omissions.

b. Exculpatory provision in will may relieve trustee of liability:

(1) To trust or trust beneficiaries but not to third parties;

**NOTE:**

Since exculpatory provisions are effective to relieve trustees of liability for breach of trust only [*see Prob. Code § 16461(a)*], and since a breach of trust consists of a violation of a duty that the trustee owes to a beneficiary and not to a third party [*Prob. Code § 16400*], an exculpatory provision will be ineffective to relieve the trustee of any liability the trustee may have to a third party [*see discussion in § 64B.311[1][c]*].

(2) If act or omission was not intentional, in bad faith, grossly negligent, or recklessly indifferent to interests of beneficiaries [*Prob. Code § 16461(b)(1)*]; and

(3) If trustee did not profit from act or omission [*Prob. Code § 16461(b)(2)*].

c. Exculpation of corporate trustee is usually unnecessary.

**NOTE:**

Since corporate trustees (banks and trust companies) hold themselves out as professional trustees, they should be prepared to accept the risks of liability for breach of fiduciary duties. Accordingly, there is little reason to relieve them of liability.

d. Relieving trustee of liability for good faith reliance on advice of attorneys and other advisers is usually advisable.

**NOTE:**

A fiduciary who is not an attorney would normally be derelict if he or she did not employ the services of an attorney, and a fiduciary who exercises reasonable care in selecting an attorney will not be absolutely bound by the attorney's dereliction, but is only required to act with the degree of prudence and diligence with which a person of ordinary judgment would be expected to act when conducting his or her own affairs of a like nature [ *Estate of Barbikas (1959) 171 Cal. App. 2d 452, 459, 341 P.2d 32* ; *see § 64B.311[1]*].

e. Prospective trustee or cotrustee may require reasonable protection from liability before accepting trust.

**NOTE:**

Since any person named as trustee may reject the trust [*Prob. Code § 15601*] or resign the office [*Prob. Code § 15640*], capable potential trustees may refuse to serve unless they are protected against claims arising out of their acts or omissions.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsAdministrationEstate, Gift & Trust LawTrustsTrusteesGeneral OverviewEstate, Gift & Trust LawTrustsTrusteesAppointmentEstate, Gift & Trust LawTrustsTrusteesDuties & PowersClaims By & AgainstEstate, Gift & Trust LawTrustsTrusteesDuties & PowersStandards of Care



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*24-64B California Legal Forms--Transaction Guide § 64B.106*

**§ 64B.106 Administration**

1. Should will include provision empowering beneficiary to move place of trust administration by changing trustee?

a. Provision authorizing beneficiary to move place of administration will be desirable if:  
(1) Principal beneficiary may at future time move to some place distant from residence or office of trustee; and

(2) Frequent contact between principal beneficiary and trustee is necessary because:  
(a) Trustee has discretionary powers that affect distribution of principal or income and that require personal knowledge of beneficiary's needs;

(b) Principal beneficiary is cotrustee of trust;

(c) Will requires trustee to consult with principal beneficiary; or

(d) Other requirements of trust necessitate frequent consultations between principal beneficiary and trustee.

b. Provision authorizing beneficiary to move place of trust administration will be undesirable if:

(1) There are multiple beneficiaries whose interests are approximately equivalent and no chief beneficiary whose interests predominate; or

(2) Testator wishes particular attorney or firm of attorneys to act as attorney for trustee, regardless of beneficiary's place of residence.

**NOTE:**

If the principal beneficiary's new residence is distant from the office of the attorney for the trustee, it may be impossible or difficult for the attorney to continue to represent the trustee after a change of the place of administration. Further, a new trustee in a new place of administration will have the right to select a new attorney, since every fiduciary has the right to select his or her own attorney [ *Highfield v. Bozio* (1922) 188 Cal. 727, 728, 207 P. 242 ; *Estate of Ogier* (1894) 101 Cal. 381, 385-386, 35 P. 900] .

c. Moving place of administration within California will be unnecessary if sole trustee will be corporate trustee having other offices near principal beneficiary's new residence.

**NOTE:**

Many trust companies and other qualified corporate trustees have offices throughout California. If the principal beneficiary's new residence is within the state, the office in charge of the trust may be changed without changing the trustee.

2. Should will include choice of law provision?

a. If trust has no significant contacts with states other than California, choice of law provision will probably be unnecessary.

b. If will has significant contacts with other states or countries, testator should decide whether choice of law provision will be useful.

(1) Selection of law that will govern meaning and legal effect of dispositions made by will will be given effect by courts.

**NOTE:**

The meaning and legal effect of a disposition in a will must be determined by the local law of a particular state selected by the testator in the will, unless the application of that law would be contrary to: (1) the rights of the surviving spouse to community and quasi-community property; (2) any other public policy of California; or (3) the family protection provisions of the Probate Code [*Prob. Code* § 21103; *see Prob. Code* §§ 6500-6615 (family protection provisions); *see also* discussion in § 64B.331[1][b][iii]].

(2) Selection of law that will govern validity of will or trust will probably not be given effect by courts.

**NOTE:**

California law prescribes the conditions under which a written will is valid, and does not authorize the testator to select the law that will determine validity. A written will is valid if its execution complies with: (1) California law relating to witnessed wills; (2) California law relating to holographic wills; (3) California law relating to international wills; or (4) the law of the place where, at the time of execution or at the time of death, the testator is domiciled, has a place of abode, or is a national [*Prob. Code* § 6113; *see* discussion in § 64B.331[1][b][iii]].

c. Choice of law provision may be advisable if:

(1) Testator and will drafter know provision of law of particular jurisdiction that will vitally affect trust or its administration;

(2) Testator and will drafter believe that choice of law provision will head off difficult, time-consuming, and costly conflict of laws disputes among persons interested in trust; or

(3) Testator and will drafter believe that choice of law provision will promote smooth and efficient administration of trust by clearly apprising persons interested in trust of law that will be applicable to questions of construction and administration.

d. If choice of law provision is included in will, testator may limit choice to law:

(1) As of time of execution of will;

(2) As of time of death; or

(3) Otherwise.

**NOTE:**

The law of the designated state may change after the will is executed. To prepare for this possibility, the choice of law provision may be limited to the law at the time of execution of the will, at the time of the testator's death, or otherwise. But this may make it difficult to accurately determine the applicable law when, at some time in the future, a conflict of law question arises.

e. Choice of law provision will generally be inadvisable if neither testator nor will drafter knows any particular provision of law that will affect meaning or legal effect of dispositions of will or provisions of trust.

f. Choice of law provision may deprive courts of flexibility to fashion appropriate solutions to choice of law problems that neither testator nor will drafter can foresee at time will is executed.

3. Should will require that trust be subject to continuing judicial supervision?

**NOTE:**

Trusts created by wills executed after July 1, 1977, are not subject to continuing court jurisdiction unless the will expressly provides otherwise [*see Prob. Code § 17300; see also § 64B.39*].

a. Not requiring continuing judicial supervision will generally save time, money, and expense for all concerned [*see Estate of Parrette (1985) 165 Cal. App. 3d 157, 162, 211 Cal. Rptr. 313 ; see also § 64B.332[1]*].

b. Will provision expressly requiring that trust be subject to continuing jurisdiction of superior court may be used if:

(1) Testator feels that persons interested in trust are likely to be litigious or may disagree as to administration of trust; or

(2) Testator lacks full confidence in experience, skill, or integrity of prospective trustee.

**NOTE:**

Although continuing judicial supervision may mitigate some of the excesses of a trustee who lacks business experience, investment skill, or integrity, it should not be regarded as

a crutch for such a trustee. If the testator believes that the prospective trustee is, for any continuing reason, unable to properly carry out the duties of the trust, another trustee should be selected.

- c. Will provision requiring continuing jurisdiction will not provide measurably greater judicial protection for trust.

**NOTE:**

Continuing jurisdiction of the superior court is not essential to restrain wayward or recalcitrant trustees or settle disputes among or between trustees, cotrustees, income beneficiaries, and remainder beneficiaries. The "intermittent intervention" (or "dispute-related") provisions of *Prob. Code* §§ 17200-17210 also provide for court supervision of trustees and cotrustees, although that supervision is exercised only upon petition by a trustee or beneficiary [*Prob. Code* § 17200(a)].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsGeneral OverviewEstate, Gift & Trust LawTrustsAdministrationEstate, Gift & Trust LawTrustsTestamentary Trusts



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*24-64B California Legal Forms--Transaction Guide §§ 64B.107-64B.119*

**[Reserved]**

§§ 64B.107[Reserved]



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B. Drafting Guide for Operational Provisions of Testamentary Trust

*24-64B California Legal Forms--Transaction Guide § 64B.120*

**§ 64B.120 Determination of Principal and Income**

1. To provide that principal and income will be determined in accordance with Revised Uniform Principal and Income Act, use § 64B.200.
2. To grant trustee broad power to determine what is principal and what is income, use § 64B.201.
3. To eliminate trustee's general power to make adjustments to principal and income under *Prob. Code § 16336*, use § 64B.201A.

**NOTE:**

This provision should be used sparingly. For discussion, see §§ *64B.202[1]* and *64B.31[9]* et seq.

4. To provide for a depreciation reserve, use appropriate alternative provision of § 64B.203:
  - a. To require that trustee establish a reasonable reserve for depreciation, use first alternative provision;
  - b. To authorize, but not require, trustee to establish reserve, use second alternative provision; or
  - c. To forbid trustee from establishing reserve, use third alternative provision.
5. To require trustee to allocate receipts from natural resources held by trust, or from trust property subject to depletion, to principal or income, use appropriate alternative provision of § 64B.204:
  - a. To require trustee to allocate all receipts according to single, fixed formula, use first

alternative provision; or

b. To require trustee to allocate receipts according to formulas that vary with type of resource, use second alternative provision.

6. To authorize trustee to purchase bonds at premiums and either to require or not require trustee to amortize premiums, use basic provision of § 64B.205 and appropriate additional clause of same form:

a. To require that all premiums on bonds be amortized, use first additional clause;

b. To provide that premiums need not be amortized, use second additional clause; or

c. To require amortization only when bonds are purchased at more than certain percentage of par value, use third additional clause.

7. To authorize trustee to purchase bonds at discounts and either to require or not require trustee to periodically accumulate discounts to income, use basic provision of § 64B.206 and appropriate additional clauses of the same form:

a. To require that all discounts on bonds be accumulated to income, use first additional clause;

b. To provide that discounts will not be accumulated to income, use second additional clause; or

c. To require accumulation only when bonds are purchased at less than certain percentage of par value, use third additional clause.

8. To require trustee to treat income earned during administration of testator's estate as principal, use appropriate alternative provision of § 64B.207:

a. To require trustee to treat income earned from all probate assets as principal, use first alternative provision; or

b. To require trustee to treat income on all assets except specific bequests or devises as principal, use second alternative provision.

9. To grant trustee discretion to apportion stock dividends and liquidating dividends or distributions between principal and income, use § 64B.208.

10. To require trustee to allocate all distributions from capital gains made by mutual fund or real estate investment trust (REIT) to income, use § 64B.209.

11. To establish depreciation and accounting rules for business or farm that will be operated by trustee for trust, use § 64B.210.

12. To establish rules for charging trustee's compensation, attorneys' fees, and court costs to principal or income, use appropriate alternative provision of § 64B.211:

a. To provide that all trustee compensation, attorneys' fees, and court costs must be

charged entirely to principal or entirely to income, use first alternative provision;

b. To provide that all regular trustee compensation and all ordinary attorneys' fees and courts costs must be charged to income and all other compensation, fees, and costs to principal, use second alternative provision; or

c. To provide that attorneys' fees and court costs will be charged to income for matters primarily concerning income and to principal for matters primarily concerning principal, with all other compensation, fees, and costs charged entirely to principal or entirely to income, use third alternative provision.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

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*24-64B California Legal Forms--Transaction Guide § 64B.121*

**§ 64B.121 Declaration of Testator's Intention**

1. To declare testator's intention to favor current income beneficiaries designated in will over subsequent income and remainder beneficiaries, use § 64B.230.
2. To declare testator's intention to favor remainder beneficiaries over income beneficiaries, use § 64B.231.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

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*24-64B California Legal Forms--Transaction Guide § 64B.122*

**§ 64B.122 Additions to Trust by Third Parties**

1. To authorize trustee to accept additions to trust from sources other than testator's estate, use § 64B.250.
2. To prohibit trustee from accepting additions to trust from sources other than testator's estate, use § 64B.251.

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
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*24-64B California Legal Forms--Transaction Guide § 64B.123*

**§ 64B.123 Vacancies in Trusteeship**

1. To appoint alternate or successor trustees or cotrustees to serve in event that trustees or cotrustees appointed in will are unable or unwilling to serve, use § 64B.270.
2. To empower trustee or cotrustee named in will to appoint successor, use § 64B.271.
3. To provide that, if any cotrustee named in will is unable or unwilling to act, powers of trust may be exercised by remaining cotrustee or cotrustees, use § 64B.272.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsAdministrationEstate, Gift & Trust LawTrustsTestamentary TrustsEstate, Gift & Trust LawTrustsTrusteesGeneral OverviewEstate, Gift & Trust LawTrustsTrusteesAppointmentEstate, Gift & Trust LawTrustsTrusteesRemoval & Resignation



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*24-64B California Legal Forms--Transaction Guide § 64B.124*

**§ 64B.124 Compensation of Trustees**

1. To provide that trustee or cotrustees will be compensated in fixed annual amount, use § 64B.290.
2. To fix trustee's or cotrustees' compensation at percentage of trust corpus, use § 64B.291.
3. To provide that trustee or cotrustees will receive reasonable compensation for services, use § 64B.292.
4. To provide that corporate cotrustee will be compensated as if it were sole trustee, and that individual cotrustee will receive no or merely nominal compensation, use § 64B.293.
5. To provide for fractional division of compensation between corporate and individual cotrustees, use § 64B.294.
6. To make bequest in lieu of compensation, use § 64B.295.
7. To provide for termination or "wind-up" fee, use § 64B.296.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

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*24-64B California Legal Forms--Transaction Guide § 64B.125*

**§ 64B.125 Bonds and Exculpatory Clauses**

1. To waive requirement that trustee file bond, use appropriate alternative provision of § 64B.310:
  - a. To waive bond of any trustee or cotrustee, whether named in will, appointed by court, or appointed in manner provided for in will, use first alternative provision; or
  - b. To waive bond unless timely demand for bond is made by income or remainder beneficiary, use second alternative provision.
2. To relieve trustee of liability for acts of attorneys, agents, or advisers employed by trustee, if reasonable care was used in their selection, use § 64B.311.
3. To relieve trustee of liability for trustee's own acts and omissions, use one or both alternative provisions of § 64B.312:
  - a. To relieve trustee of liability for any act or omission not committed intentionally, with gross negligence, in bad faith, or with reckless indifference to the interests of the beneficiaries, and from which trustee did not derive profit, use first alternative provision; and/or
  - b. To relieve trustee of liability for any act or omission that results from good faith reliance on opinions of attorneys employed by trustee, use second alternative provision.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsAdministrationEstate, Gift & Trust LawTrustsTestamentary TrustsEstate, Gift & Trust

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*24-64B California Legal Forms--Transaction Guide § 64B.126*

**§ 64B.126 Administration**

1. To empower beneficiary to move place of trust administration by changing trustee, use § 64B.330.
2. To provide that validity, construction, interpretation, and administration of trust will be governed by law of designated jurisdiction, use § 64B.331.
3. To require that trust be subject to continuing jurisdiction of superior court, use § 64B.332.

**NOTE:**

A will provision requiring continuing jurisdiction must clearly express the testator's intention that the trust be subject to that jurisdiction [*Prob. Code § 17300(b)*]; *see Estate of Goddard (1984) 157 Cal. App. 3d 340, 344, 203 Cal. Rptr. 623* ; *see also § 64B.332[1]*].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

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*24-64B California Legal Forms--Transaction Guide §§ 64B.127-64B.199*

**[Reserved]**

§§ 64B.127[Reserved]



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 PART IV. FORMS  
 A. Determination of Principal and Income

*24-64B California Legal Forms--Transaction Guide § 64B.200*

**§ 64B.200 Principal and Income to Be Determined in Accordance With Uniform Principal and Income Act**

**[1] Comment**

**[a] Use of Form**

This form is a will provision that may be used to require that all questions regarding what is principal and income of a trust be determined in accordance with the Uniform Principal and Income Act.

**[b] Uniform Principal and Income Act**

**[i] In General**

The Uniform Principal and Income Act [*Prob. Code §§ 16320-16375*] is a comprehensive statute that provides for the allocation of the receipts and expenditures of trust estates to principal or income. Although the Act became effective January 1, 2000, it generally applies to trusts created before as well as after its enactment [*Prob. Code § 16339*]. For a general discussion of the provisions of the Act, see § 64B.31[1] et seq. A parallel law, the California Legal Estates Principal and Income Law [*Civ. Code §§ 731-731.15*] provides for the allocation to principal and income of the receipts and expenditures of legal estates.

**[ii] Advantages**

The Uniform Principal and Income Act provides for most problems that may be expected to arise in the determination of principal and income in trust estates. It establishes general principles for the allocation of trust receipts and expenditures to income or principal, but permits the will to establish different rules. For a general discussion of the principles of the Act, see § 64B.31[1] et seq.

Requiring the trustee to conform to the ascertainable standard of the Act may help to avoid uncertainties and disputes among the persons who are interested in the trust. In addition, it may help to avoid unfavorable tax consequences that might result from the grant of broad discretion to the trustee [*see § 64B.200[1][c][i] et seq.*]. In certain areas, however,

the Act confers wide discretion on the trustee. Because broad discretion may result in adverse tax consequences for some trusts, it may sometimes be advisable, even when the will adopts the Act, to further limit the trustee's authority to determine principal and income.

### **[c] Tax Considerations**

#### **[i] In General**

Tax consequences must be carefully considered whenever the attorney drafts a clause authorizing or requiring the trustee to determine what is principal and what is income. In general, it will be advisable to limit the trustee's discretion to determine principal and income if the trust is sensitive to adverse tax consequences. A trust is sensitive to adverse tax consequences if the trustee (or one of the cotrustees) is also a beneficiary of the trust or if the trust is designed to qualify for the federal estate tax marital deduction.

If the trustee is also a beneficiary of the trust, care should be taken to avoid granting the trustee powers that amount to a general power of appointment, since this will cause property subject to the power to be included in the trustee's estate for federal estate tax purposes [*see I.R.C. § 2041(a)*; *see also § 64B.200[1][c][ii]*]. If the trust is designed to qualify for the federal estate tax marital deduction as a lifetime income plus power of appointment trust or a qualified terminable interest property (QTIP) trust, the trustee should not have power to interfere with the surviving spouse's right to receive all of the income from the trust payable annually [*see I.R.C. § 2056(b)(5)* (life estate plus power of appointment trust); *see also I.R.C. § 2056(b)(7)(B)(i)(II), (ii)* (QTIP trust)]. A broad power to allocate receipts or disbursements to principal or income may disqualify the trust for the estate tax marital deduction if the power is not subject to reasonable limitations [*see I.R.C. § 2056(b)(5)*; *Treas. Reg. § 20.2056(b)-5(f)(4)*; *see also Treas. Reg. § 20.2056(b)-7(d)(2)* (application of rules to QTIP trusts); § 64B.200[1][c][iii]].

Provisions limiting the trustee's discretion to allocate receipts and expenditures to principal or income are *set forth in §§ 64B.204-64B.211*.

#### **[ii] Trustee Who Is Also Beneficiary**

For federal estate tax purposes, the estate of any person will include the value of property over which that person had a general power of appointment at the time of his or her death or as to which that person at any time exercised or released a general power of appointment [*I.R.C. § 2041(a)(2)* (applies to powers created after October 21, 1942)]. The term "general power of appointment" includes a power that is exercisable in favor of the holder, the holder's estate, the holder's creditors, or the creditors of the holder's estate [*I.R.C. § 2041(b)(1)*]. It does not include the following:

- A power to consume, invade, or appropriate property for the benefit of any person that is limited by an "ascertainable standard" relating to that person's health, education, support, or maintenance [*I.R.C. § 2041(b)(1)(A)*]; or
- A power exercisable by the holder only in conjunction with another person who is either the creator of the power or a person having a substantial adverse interest in the power [*I.R.C. § 2041(b)(1)(C)*]; for a discussion of the advantages of appointing cotrustees, *see Ch. 64A, Testamentary Trusts: Trustee Provisions, § 64A.202[1]*].

The risk that a power to allocate receipts and expenditures to principal and income will be deemed a general power of appointment is not great, since the regulations provide that such a power will not be deemed a general power of appointment if it is exercisable in a fiduciary capacity and does not include a power to enlarge or shift beneficial interests except as an incident to the discharge of fiduciary duties [*Treas. Reg. § 20.2041-1(b)(1)*]. If, however, the power to allocate exceeds the customary fiduciary duties of a trustee, or if it includes a power to enlarge or shift

beneficial interests, there is a danger that the power will be deemed a general power of appointment [*see Treas. Reg. § 20.2041-1(b)(1)*]. Recognizing this danger, the prudent drafter will seek to limit the discretion of a trustee who is also a beneficiary. One way in which the discretion of such a trustee may be limited is by requiring the trustee to allocate receipts and disbursements in accordance with the Revised Uniform Principal and Income Act. This form will accomplish that purpose.

The trustee's discretion may be further limited in the following ways:

- The trustee may be required (or forbidden) to establish a reserve for depreciation [*see § 64B.203*];
- The trustee may be required to allocate proceeds from natural resources or property subject to depletion to income according to a formula [*see § 64B.204*]; or
- The trustee may be forbidden to buy premium bonds unless the premiums are amortized [*see § 64B.205*].

If the distinction between principal and income is irrelevant to the dispositive scheme of the trust, then it is immaterial whether or not the trustee has discretion to allocate receipts between income and principal. The distinction between principal and income is immaterial, for example, if all trust income is required to be accumulated and paid out together with and in the same manner as the principal, or if the trustee is required to pay the beneficiary either a fixed annual sum (with or without a cost-of-living adjustment) or a fixed percentage of the total assets of the trust.

### **[iii] Marital Deduction Trusts**

If the trust is designed to qualify for the federal estate tax marital deduction as a lifetime income/power of appointment trust or a qualified terminable interest property (QTIP) trust, the surviving spouse must be entitled to receive all of the trust income, payable annually or at more frequent intervals [*I.R.C. § 2056(b)(5), (7)*; *see Treas. Reg. § 20.2056(b)-5(f)* (life estate plus power of appointment trust)]. The Treasury Regulations provide that a trustee's power to determine the allocation or apportionment of receipts and disbursements between income and corpus will not disqualify the interest passing to the spouse if the power is subject to reasonable limitations [*Treas. Reg. §§ 20.2056(b)-5(f)(4)* (lifetime income/power of appointment trusts), *20.2056(b)-7(d)(2)* (application of rule to QTIP trusts)], nor will the interest be disqualified if the entire terms of the instrument are such that the local courts will impose reasonable limitations upon the exercise of the powers [*Treas. Reg. §§ 20.2056(b)-5(f)(4)* (lifetime income/power of appointment trusts), *20.2056(b)-7(d)(2)* (application of rule to QTIP trusts)].

A prudent drafter will take precautions to assure that the marital deduction will not be impaired by any power given to the trustee. Limitations on the authority of the trustee to allocate receipts and disbursements to principal and income will help to preserve the estate tax marital deduction. Among others, the following limitations may be appropriate for this purpose:

- A provision requiring (or forbidding) the trustee to establish a reserve for depreciation [*see § 64B.203*].
- A provision requiring the trustee to allocate proceeds from natural resources or property subject to depletion to income according to a formula [*see § 64B.204*].
- A provision forbidding the trustee to buy premium bonds unless the premiums are amortized [*see § 64B.205*].

## **[2] FORM**

**Principal and Income to Be Determined in Accordance With Uniform Principal and Income Act**

**Determination of Principal and Income**

In the determination of all matters with respect to what is principal and what is income of the trust estate, and in the apportionment and allocation of receipts and expenditures between principal and income accounts, the Trustee shall follow and be guided by the provisions of the California Uniform Principal and Income Act from time to time existing, except as otherwise specifically provided in this will.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsGeneral OverviewEstate, Gift & Trust LawTrustsAdministrationEstate, Gift & Trust LawTrustsTestamentary Trusts



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*24-64B California Legal Forms--Transaction Guide § 64B.201*

**§ 64B.201 Broad Power to Determine What Is Principal and What Is Income**

**[1] Comment**

**[a] Use of Form**

This form is a will provision that may be used to grant the trustee broad power to determine principal and income. For a provision requiring that all questions of principal and income be determined in accordance with the Uniform Principal and Income Act [*Prob. Code §§ 16320-16373*], see § 64B.200.

**[b] Testator's Authority to Grant Broad Power**

When the will provides for the determination of a question of principal and income, that provision governs, despite any contrary provision of the Uniform Principal and Income Act [*see Prob. Code § 16335(a)(1)*].

**[c] Advantages of Broad Power**

Although the Uniform Principal and Income Act is comprehensive, it does not provide for every situation that may arise in the determination of principal and income. The Act does not adequately provide for certain contingencies, and in other respects its provisions may be inappropriate for particular trust purposes.

Under the Act, an amount received as income on an obligation to pay money, such as a bond, is allocated to income without any amortization [*Prob. Code § 16357(a)*]. An amount received from the sale or redemption of an obligation is allocated entirely to principal, except when the sale or redemption occurs within one year of acquisition, in which case the excess is allocated to income [*Prob. Code § 16357(a)*]. The power to vary from these provisions in allocating receipts from bonds or other obligations can sometimes best protect the interests of competing beneficiaries. For a discussion of amortization of bond premiums, see § 64B.205[1]. For a discussion of accumulation for bond discounts, see § 64B.206[1].

The Act does not provide for the allocation of a "personal profit" made by a former trustee and recovered by a

subsequent trustee. In appropriate cases, such a profit should be allocated to principal or to income [*see Harris, Allocation and Apportionment in a Private Trust Between Principal and Income, 9 Okla. L. Rev. 269 (1956)*].

If the trust assets include a closely held business, problems of the determination of principal and income may be difficult. Granting the trustee broad power to determine what is principal and what is income may help avoid disputes in such cases. For a discussion of the problems of holding closely held businesses in a trust, see Frimmer, *Beneficiaries' Rights to Distributions When Business Interests Are Held in Trust, 16 Real Prop., Prob. & Tr. J. 359 (1981)*.

#### **[d] Tax Considerations**

Before any provision granting the trustee broad discretion to determine principal and income is included in the will, the drafter should carefully consider the tax consequences. It is usually advisable to limit the trustee's discretion to determine principal and income if the trust is sensitive to adverse tax consequences [*see § 64B.200[1][c][ii]*].

The broad power conferred by this form will be inappropriate in most marital deduction trusts and in most trusts in which the trustee (or one of the cotrustees) is also a beneficiary. A broad power to determine principal and income may give the trustee power to shift the benefits of the trust among and between income beneficiaries and remainder beneficiaries and, if the trustee (or one of the cotrustees) is also a beneficiary, cause the assets subject to the power to be included in the trustee's estate for federal estate tax purposes [*see I.R.C. § 2041; see also § 64B.200[1][c][ii]*]. Further, a broad power to determine principal and income, unless subject to reasonable limitations, may interfere with the right of a surviving spouse to receive all of the income from the trust [*see I.R.C. § 2056(b)(5)*] (life estate plus power of appointment trust); *see also I.R.C. § 2056(b)(7)(B)(i)(II), (ii)* (QTIP trust)] and thus disqualify it for the federal estate tax marital deduction [*Treas. Reg. § 20.2056(b)-5(f)(4)*]. *See § 64B.200[1]*.

## **[2] FORM**

### **Broad Power to Determine What Is Principal and What Is Income**

#### **Determination of Principal and Income**

(a) In the determination of all matters with respect to what is principal and what is income of the trust estate, and in the apportionment and allocation of receipts and expenditures between principal and income accounts, the Trustee, except as otherwise specifically provided in this will, shall have the power, exercisable in the Trustee's discretion, to determine what is principal and what is income of the trust estate, to apportion and allocate receipts, expenditures, and other charges between principal and income, and to amortize out of or to charge to income premiums paid on the purchase of bonds or other obligations.

(b) The Trustee shall have the power to establish a reserve for depreciation or to make any charge for depreciation against income, but shall not be required to do so. If the Trustee, in the Trustee's discretion, establishes a reserve for depreciation, the Trustee shall have the power to fund the reserve by appropriate charges against income. Any reserve for depreciation shall be established on such assumptions as the Trustee, in the Trustee's discretion, shall determine. No inference of imprudence or partiality shall arise from the fact that the Trustee, in the exercise of the discretion and power conferred on the Trustee in this paragraph, has allocated a receipt or expenditure in a manner contrary to any provision of the California Uniform Principal and Income Act.

(c) If the trust is a member of a partnership, the Trustee may (but shall not be required to) accept, with respect to the partnership interest of the trust, any accounting method or methods used by the partnership, regardless of whether or not those accounting methods include depreciation reserves, regardless of the assumptions on which any such reserves may be based, and regardless of whether or not those accounting methods are consistent with the accounting methods used by the Trustee with respect to other property of the trust.

(d) Except insofar as the Trustee exercises the power conferred on the Trustee under this paragraph, and except insofar as otherwise provided in this will, all matters relating to the determination of principal and income shall be governed by provisions of the California Uniform Principal and Income Act from time to time existing.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsGeneral OverviewEstate, Gift & Trust LawTrustsAdministrationEstate, Gift & Trust LawTrustsTestamentary TrustsEstate, Gift & Trust LawTrustsTrusteesDuties & PowersGeneral Overview



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*24-64B California Legal Forms--Transaction Guide § 64B.202*

**§ 64B.202 No Power to Make Adjustments Between Income and Principal**

**[1] Comment**

**[a] Use of Form**

This form is a provision eliminating the authority of a trustee to make adjustments to income and principal under the general adjustment powers granted by *Prob. Code § 16336*, which is part of the Uniform Principal and Income Act.

**[b] Trustee's General Power to Make Adjustments Between Principal and Income**

The Uniform Principal and Income Act grants trustees the general discretionary power to make adjustments between principal and income, to the extent the trustee considers necessary, under specified circumstances [*Prob. Code § 16336*]. For a detailed discussion of this power, see *§ 64B.31[9]* et seq. The statutory prerequisites for exercise of this power, coupled with the limitations on its exercise, appear to minimize the likelihood that trustees can apply it in a manner that would be inequitable to any of the trust beneficiaries.

Nevertheless, circumstances may arise in which the settlor may want to restrict this power still further, or even eliminate it. For example, a beneficiary may be entitled to the greater of a unitrust amount or income, with no power in the trust to invade principal for the beneficiary's benefit. The settlor in such a case may view the unitrust amount as a floor and the income as a ceiling, and want to assure that the beneficiary will get no less or more than the amount determined by that range. In a case such as that, this form may be used. Practitioners should note that such circumstances are likely to occur infrequently.

**[c] Drafting Issues**

When the power granted by *Prob. Code § 15336* is to be limited or eliminated, any provision limiting this power should be carefully drafted and include a specific reference to *Prob. Code § 15336*, because the statute requires that any trust limiting the trustee's power to make adjustments between principal and income does not affect the trustee's power to make adjustments under *Prob. Code § 15336* unless it is clear from the trust that it is intended to deny this power to the

trustee [Prob. Code § 15336(f)].

**[2] FORM**

**No Power to Make Adjustments Between Income and Principal**

**No Power to Make Adjustments to Income and Principal**

Under no circumstances shall the trustee exercise any of the powers provided under *Probate Code Section 16336* regarding making adjustments between income and principal.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsAdministrationEstate, Gift & Trust LawTrustsTestamentary TrustsEstate, Gift & Trust LawTrustsTrusteesDuties & PowersGeneral Overview



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*24-64B California Legal Forms--Transaction Guide § 64B.203*

**§ 64B.203 Reserve for Depreciation**

**[1] Comment**

**[a] Use of Form**

This form is a will provision that may be used to provide for a depreciation reserve. Three alternative provisions are illustrated. The first requires that the trustee establish a reasonable reserve for depreciation. The second authorizes the trustee, in the trustee's discretion, to establish such a reserve, but does not require that the trustee do so. The third forbids the trustee from establishing such a reserve.

For a provision requiring the trustee to set aside a reserve for depreciation of trust property used in the operation of a business or other activity, see § 64B.210.

**[b] Reserve for Depreciation**

**[i] Statutory Rules**

A reserve for depreciation is an account used to recover the cost of an asset by writing off a portion of the cost over the life of the asset, or by some other acceptable method [Black's Law Dictionary 1308 (6th ed. 1990)]. Under the Uniform Principal and Income Act, a trustee may, but is not required to, transfer a reasonable amount from income to principal to cover depreciation [*Prob. Code § 16372(b)*]. However, no depreciation adjustment may occur under the Act when the depreciating property is held or available for the personal use of a beneficiary, or during the administration of a decedent's estate [*Prob. Code § 16372(b)*]. The trustee must use "generally accepted accounting principles" to compute depreciation [*Prob. Code § 16372(b)*].

**[ii] Advantages of Requiring Reserve**

The will may vary the statutory rules relating to reserves for depreciation [*see Prob. Code § 16335(a)(1)*]. In general, the establishment of a reserve for depreciation will serve the interests of the remainder beneficiaries by preserving trust

principal [*see* § 64B.203[1][b][i]]. Failure to establish such a reserve ordinarily will favor the interests of the income beneficiaries, since it will give the beneficiaries the benefits of current income from depreciable property without requiring that a portion of the income be withheld and allocated to a depreciation reserve for the benefit of the remainder beneficiaries.

The creation of a reserve for depreciation will not render the depreciable property ineligible for the federal estate tax marital deduction. The regulations provide that property in a lifetime income plus power of appointment trust will qualify for the marital deduction despite a reserve for depreciation [*Treas. Reg. §§ 20.2056(b)-5(f)(3)* (lifetime income/power of appointment trusts), 20.2056(b)-7(d)(2) (application of rule to QTIP trusts)].

The marital deduction will be preserved if the effect of the trust is to give the surviving spouse substantially the same degree of beneficial enjoyment of the trust property during his or her life that the principles of the law of trusts accord to a person who is unqualifiedly designated as the life beneficiary of a trust [*Treas. Reg. §§ 20.2056(b)-5(f)(1)* (lifetime income/power of appointment trusts), 20.2056(b)-7(d)(2) (application of rule to QTIP trusts)]. To ensure that this provision will not be interpreted as interfering with the surviving spouse's right to receive all of the income at least annually [*I.R.C. § 2056(b)(5), (7)*], this form includes language drawn from the regulation which may be added to the principal provision if the trust is a marital deduction trust. While this language is not essential to preservation of the marital deduction, it will be useful as an expression of the testator's intention that the principal provision is not to jeopardize the deduction.

## [2] FORM

### Reserve for Depreciation

### Reserve for Depreciation

*[First alternative provision: trustee required to establish reserve]*

Any other provision of this will to the contrary notwithstanding, the Trustee shall be required to establish reasonable reserves for depreciation of all income-producing real and personal property and of all capital improvements and extraordinary repairs. Further, the Trustee shall from time to time charge to income a reasonable reserve for depletion of all depletable natural resources, including, but not limited to, oil, gas, and mineral and timber property [*add, if trust is designed to qualify for marital deduction as lifetime income /power of appointment or qualified terminable interest (QTIP) trust:*, provided, however, that with respect to the marital deduction trust established under Paragraph \_\_\_\_\_ of this will, the Trustee shall at all times provide the income beneficiary with substantially the same degree of beneficial enjoyment of the trust property as the principles of the law of trusts accord to a person who is unqualifiedly designated as the life beneficiary of a trust].

[OR]

*[Second alternative provision: trustee authorized but not required to establish reserve]*

Any other provision of this will to the contrary notwithstanding, the Trustee shall have the power, exercisable in the Trustee's discretion, to determine whether or not to establish a reserve or reserves for depreciation or to make any charge or charges for depreciation against all or any portion of the income of the trust estate, including any income realized through use of any portion of the trust estate employed in the conduct of a business by the Trustee. The Trustee shall not be required to establish any such reserve or reserves, but if the Trustee decides to establish such a reserve or reserves, they shall be established in the amounts the Trustee shall, in the Trustee's discretion, determine. [*Add, if*

*trustor wishes trustee to favor either income beneficiaries or remainder beneficiaries:* Provided, however, that it is my express intention and wish, and I hereby direct, that the Trustee shall, in the exercise of the discretion conferred on the Trustee by this Paragraph, primarily benefit \_\_\_\_\_ (the income beneficiaries *or* the remainder beneficiaries *or name specific person or persons to be primarily benefited*).

[OR]

[*Third alternative provision: trustee forbidden to establish reserve*]

The Trustee shall not under any circumstances charge any income account or accounts of the trust for depreciation of any property held in the trust estate.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsAdministrationEstate, Gift & Trust LawTrustsTestamentary TrustsEstate, Gift & Trust LawTrustsTrusteesDuties & PowersGeneral Overview



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*24-64B California Legal Forms--Transaction Guide § 64B.204*

**§ 64B.204 Allocation of Receipts From Natural Resources, Timber, or Liquidating Assets**

**[1] Comment**

**[a] Use of Form**

This form is a will provision that may be used to require the trustee to allocate receipts from natural resources held by the trust or from trust property that is subject to depletion according to principal and income in accordance with a prescribed formula. Two alternative provisions are illustrated. The first may be used to require that the trustee allocate all receipts according to a single, fixed formula. The second may be used to require the trustee to allocate receipts according to formulas that vary with the type of resource.

For a provision requiring that all questions of principal and income be determined in accordance with the Revised Uniform Principal and Income Act [*Prob. Code §§ 16300-16315*], see § 64B.200. For a provision granting the trustee broad power to determine principal and income, see § 64B.201. For provisions respecting reserves for depreciation, see § 64B.203.

**[b] Statutory Rules Governing Receipts From Natural Resources, Timber, or Liquidating Assets**

**[i] In General**

The Uniform Principal and Income Act sets forth rules for allocations of receipts from minerals or other natural resources [*Prob. Code § 16363*], timber and related products [*Prob. Code § 16364*], and other "liquidating assets" [*Prob. Code § 16362*]. These rules accord different treatment to those respective assets, and are discussed separately below.

**[ii] Minerals and Other Natural Resources**

Receipts from minerals and other natural resources are allocated as follows [*Prob. Code § 16363*]:

- A nominal bonus, nominal delay rental, or nominal annual rent is allocated to income.
- Production payments are allocated to income to the extent provided in the agreement creating the production payments, with the balance allocated to principal.
- Amounts received from water are allocated to income if the water is renewable, and principal if the water is not renewable.
- If royalties, shut-in-well payments, take-or-pay payments, bonuses, or delay rentals are more than nominal, 90 percent is allocated to principal, and the balance to income.
- For receipts from a working interest or any other interest not described above, 90 percent is allocated to principal, and the balance to income.

These rules apply regardless of when extraction began [*Prob. Code § 16363(c)*].

If a trust owned an interest in minerals, water or other natural resources on January 1, 2000, the trustee may allocate receipts from the interest as provided above, or in the manner reasonably used by the trustee prior to that date [*Prob. Code § 16363 (d)*]. Receipts acquired after January 1, 2000, must be allocated only as provided above [*Prob. Code § 16363 (d)*].

### **[iii] Timber and Related Products**

Receipts from timber and related products are generally allocated to income to the extent that the amount of timber removed from the land does not exceed the growth of timber, and to principal to the extent that the amount of timber removed exceeds the growth of timber, or are from the sale of standing timber [*Prob. Code § 16364(a)*]. The allocations also apply when the receipts are from a lease of timberland, or a contract to cut timber from trust land [*Prob. Code § 16364(a)(3)*]. To the extent that advance payments, bonuses, and other payments are not allocated pursuant to these rules, they are allocated to principal [*Prob. Code § 16364(a)*].

In determining the allocation of net income, the trustee must transfer a reasonable amount from income to principal for depletion [*Prob. Code § 16364(b)*]. These rules apply regardless of when the harvesting of timber began [*Prob. Code § 16364(c)*].

If a trust owned an interest in timberland on January 1, 2000, the trustee may allocate net receipts from the sale of timber as provided above, or in the manner reasonably used by the trustee prior to that date [*Prob. Code § 16364 (d)*]. Net receipts acquired after January 1, 2000, must be allocated only as provided above [*Prob. Code § 16364 (d)*].

### **[iv] Liquidating Assets**

"Liquidating asset" means an asset whose value will diminish or terminate because the asset is expected to produce receipts for a period of limited duration [*Prob. Code § 16362(a)*]. It includes a leasehold, patent, copyright, royalty right, and right to receive payments under an arrangement that does not provide for interest payments on the unpaid balance [*Prob. Code § 16362(a)*]. It does not include a fixed term payment [*Prob. Code § 16361*], minerals or other natural resources [*Prob. Code § 16363*], timber and related products [*Prob. Code § 16364*], derivatives [*Prob. Code § 16366*], asset-backed securities [*Prob. Code § 16367*], or any asset for which the trustee establishes a reserve for depreciation under *Prob. Code § 16372* [*Prob. Code § 16362(a)*].

A trustee must allocate 10 percent of receipts from liquidating assets to income, and the balance to principal [*Prob. Code § 16362(b)*].

**[c] Trust Provisions**

The trust instrument may vary the statutory rules for allocation of receipts to principal and income [*Prob. Code* § 16335(a)(1)]. Although the statutory rules do set forth fairly comprehensive rules for allocation of receipts from natural resources, timber, or other liquidating, the testator may wish to vary these rules to favor either income beneficiaries or remainder beneficiaries.

The form set forth below may be tailored to fit the testator's specific needs and intentions by specifically providing what percentage of receipts from particular property will be allocated to income and what percentage will be allocated to principal.

A similar result may be accomplished by providing in the will for accumulation of some of the trust income, by directing the trustee to dispose of wasting assets held by the trust, or by requiring or forbidding the trustee to establish a reserve for depreciation [*see* § 64B.203].

**[2] FORM****Allocation of Receipts From Natural Resources, Timber, or Liquidating Assets****Allocation of Receipts From Natural Resources, Timber, or Liquidating Assets**

[*First alternative provision: single formula for allocation*]

The Trustee shall allocate to income all receipts from interests in minerals or other natural resources, timber and related products, and other liquidating assets (as defined in *Probate Code Section 16362*), to the extent that those receipts do not exceed \_\_\_\_\_ [*specify percentage, e.g., 5 percent*] per annum of the fair market value of the property, determined as of the "valuation date." As used in this paragraph, the "valuation date" is the date on which the last of the following events occurs:

- (a) The principal is established;
- (b) The property is acquired; or
- (c) If the resource is discovered after the events described in (a) and (b), the property is put into commercial use.

[*OR*]

[*Second alternative provision: allocation according to type of resources*]

For purposes of this provision, "depleting property" shall include interests in minerals or other natural resources, timber and related products, and other liquidating assets. The Trustee shall allocate receipts from depleting property to principal and income as follows:

- (a) Receipts received under a lease of land having or believed to have depleting property shall be allocated \_\_\_\_\_ [*specify allocation formula, e.g., 95 percent to income and 5 percent to principal*];
- (b) Receipts from all production payments shall be apportioned \_\_\_\_\_ [*specify allocation formula, e.g., 80 percent to income and 20 percent to principal*]; and

(c) Receipts from royalties, bonuses, and working or net profit arrangements shall be allocated \_\_\_\_\_ [*specify allocation formula, e.g., 95 percent to income and 5 percent to principal*].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsAdministrationEstate, Gift & Trust LawTrustsTestamentary TrustsEstate, Gift & Trust LawTrustsTrusteesDuties & PowersGeneral Overview



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*24-64B California Legal Forms--Transaction Guide § 64B.205*

**§ 64B.205 Power to Purchase Bonds at Premium**

**[1] Comment**

**[a] Use of Form**

This form is a will provision that may be used to authorize the trustee to purchase bonds at premiums and, further, to either require the trustee to amortize the premiums out of interest or to provide that amortization is not required. The form consists of a basic provision and three additional clauses, one of which should be added to the basic provision. The first additional clause may be added to the basic provision if the testator wishes to require that all premiums on bonds be amortized. The second additional clause may be added if the testator does not wish to require amortization. The third may be added if the testator wishes to require amortization only when bonds are purchased at more than a specified percentage of par value. For discussion of the use of these three alternatives, see § 64B.205[1][b][ii], [iii].

For a provision authorizing the trustee to purchase bonds at a discount, see § 64B.206.

**[b] Purchase of Bonds at Premium**

**[i] Statutory Provisions**

Although the Uniform Principal and Income Act [*Prob. Code §§ 16320-16375*] permits the trustee to purchase bonds at a premium, it prohibits the trustee from making any provision for amortization of bond premiums [*Prob. Code § 16357(a)*]. If the trustee purchases a bond at a premium, trust principal will be impaired, since the amount that the trustee will receive upon maturity of the bond will be less than the principal used to acquire it. If no provision is made to amortize the premium; that is, to set aside a portion of the interest earned by the bond and allocate it to a principal account, the income beneficiaries will benefit at the expense of the remainder beneficiaries.

**[ii] Will Provisions**

The will may vary the statutory rules as to amortization of bond premiums [*see Prob. Code § 16335(a)(1)*]. A will

provision clearly setting forth the trustee's authority and duties with respect to bond premiums may be useful. A provision empowering the trustee to purchase bonds at a premium will be desirable if the testator is not concerned about preserving trust principal for the remainder beneficiaries and wishes to give the trustee authority to maximize trust income. Such a provision will preclude objections from the remainder beneficiaries that a trustee who purchases bonds at a premium is not properly preserving trust principal.

If, on the other hand, the testator wishes the trust principal to be preserved for the remainder beneficiaries, the will may require the trustee to amortize any premiums paid for bonds. There are two general ways in which the will may require that bonds may be amortized. It may require that all bond premiums be amortized, or it may require only that premiums over a certain percentage of par value be amortized. The latter provision will give the trustee somewhat more flexibility than the former by permitting some premium purchases that do not trigger the amortization requirement.

### **[iii] Tax Considerations**

A provision absolving the trustee in whole or in part of the duty to amortize bond premiums [*see* the second and third additional clauses of this form] may be suitable in some trusts. However, it should not be used if the trustee is also a beneficiary of the trust, since the power to buy bonds at premiums without any duty to amortize the premiums will give the trustee significant power to shift or alter the benefits of the trust. A trustee-beneficiary who has the power to shift or alter the benefits of the trust will be deemed to have a general power of appointment over the trust assets, with the result that the assets will be included in the beneficiary's gross estate for federal estate tax purposes [*see I.R.C. § 2041(a)(2)* (general powers of appointment created after October 21, 1942)]. For purposes of this rule, the term "power of appointment" includes all powers that are in substance and effect powers of appointment, regardless of the nomenclature used in creating them [*Treas. Reg. § 20.2041-1(b)*]. Although powers that cannot substantially affect the beneficial enjoyment of the trust property or income are not powers of appointment for this purpose [*Treas. Reg. § 20.2041-1(b)*], the right to purchase bonds at premium without any duty to amortize the premiums can substantially favor the income beneficiaries over the remainder beneficiaries and, if the power is exercisable in favor of the holder (i.e., a trustee-beneficiary), constitute a general power of appointment.

## **[2] FORM**

### **Power to Purchase Bonds at Premium**

### **Power to Purchase Bonds at Premium**

The Trustee shall have the power to purchase bonds at such premiums as the Trustee shall, in the Trustee's discretion, deem advisable.

*[If all premiums are to be amortized:]*

Any premium paid by the Trustee for any bond shall, however, be periodically repaid to principal out of the interest received on the bond, in a reasonable manner, as the Trustee shall determine or, to the extent necessary, out of the proceeds of the sale or other disposition of the bond.

*[Or, if trustee is to be permitted but not required to amortize premiums:]*

The Trustee shall not be required to repay to the principal of the trust any portion of the premium on any bond, regardless of the fact that on the maturity of the bond, or on its sale or other disposition before maturity, any loss or gain on the bond may fall on or inure to the principal of the trust.

*[Or, if trustee is to be required to amortize premiums only when bonds are purchased at more than a stated percentage of par value:]*

Any premium paid by the Trustee for any bond purchased at more than \_\_\_\_\_ [*specify percentage, e.g., 103 percent*] of its par value shall, however, be periodically repaid to principal out of the interest received on the bond, in a reasonable manner, as the Trustee shall determine or, to the extent necessary, out of the proceeds of the sale or other disposition of the bond. The Trustee shall not be required to repay any portion of the premium on any other bond.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsAdministrationEstate, Gift & Trust LawTrustsTestamentary TrustsEstate, Gift & Trust LawTrustsTrusteesDuties & PowersGeneral Overview



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*24-64B California Legal Forms--Transaction Guide § 64B.206*

**§ 64B.206 Power to Purchase Bonds at Discount**

**[1] Comment**

**[a] Use of Form**

This form is a will provision that may be used to authorize the trustee to purchase bonds at discounts and, in addition, to require the trustee to periodically accumulate the discounts to income, or to provide that accumulation is not required. The form consists of a basic provision and three additional clauses. The first additional clause may be added to the basic provision if the testator wishes to require that all discounts on bonds be accumulated to income. The second may be added if the testator does not wish to require accumulation, and the third may be added if the testator wishes to require accumulation only when bonds are purchased at less than a specified percentage of par value.

For a provision authorizing the trustee to purchase bonds at a premium, see § 64B.205.

**[b] Purchase of Bonds at Discount**

**[i] Statutory Provisions**

A bond is "discounted" when the price at which it is purchased (or sold) is less than the price at which it was issued (variously referred to as "face" value, "par" value, "maturity" value, or "redemption" value). When a bond is acquired at a discount, the increment represented by the difference between the purchase price and the redemption value will benefit the remainder beneficiaries at the expense of the income beneficiaries. When a trustee adjusts for this disparity, the discount is said to be "accumulated to income." A discount is "accumulated to income" when a part of the discount is set aside to be distributed to the income beneficiary as income.

Under the Uniform Principal and Income Act [*Prob. Code §§ 16320-16375*], an amount received from the redemption of a bond is allocated entirely to principal, except when the redemption occurs within one year of acquisition, in which case the excess is allocated to income [*Prob. Code § 16357(a)*]. Thus, a total accumulation occurs when a bond is redeemed within one year of purchase, and no accumulation occurs when the bond is held for a longer period.

**[ii] Will Provisions**

The will may vary the statutory rules as to accumulation of bond discounts [*see Prob. Code § 16335(a)(1)*]. If the testator wishes the income beneficiaries to receive all or substantially all of the income of the trust, a provision requiring accumulation of bond discounts to income should be included in the will. Further, if the trust is designed to qualify for the marital deduction as a lifetime income/power of appointment or qualified terminable interest property (QTIP) trust, accumulation to income should be required, since the right of the surviving spouse to all of the income of such a trust must be assured [*see I.R.C. § 2056(b)(5), (7); Treas. Reg. §§ 20.2056(b)-5(f)* (lifetime income/power of appointment trusts), 20.2056(b)-7(d)(2)(application of rule to QTIP trusts); *see also § 64B.200[1][c][iii]*]. For the same reason, any provision relieving the trustee of the duty, in whole or in part, of accumulating bond discounts to income, should not be included in a marital deduction trust. Accordingly, neither the second nor the third additional clause set forth below should be used if the trust is a lifetime income plus power of appointment trust or a QTIP trust. For a general discussion of statutory rules and drafting considerations relating to marital deduction trusts, see Ch. 71, *Marital Deduction Trust Provisions*.

**[2] FORM****Power to Purchase Bonds at Discount****Power to Purchase Bonds at Discount**

The Trustee shall have the power to purchase bonds at such discounts as the Trustee, in the Trustee's discretion, shall deem advisable.

*[Add, if all discounts are to be accumulated to income:]*

Any discount on any bond purchased by the Trustee shall, however, \_\_\_\_\_ [*periodically or, if trust is a marital deduction trust, annually, or at more frequent intervals,*] be accumulated to income as interest in such a reasonable manner as the Trustee shall determine and, to the extent necessary, paid out of the proceeds of the sale, redemption, or other disposition of the bond, or out of principal.

*[Or, if no accumulation is to be required:]*

The Trustee shall not be required to accumulate to income any discount on any bond purchased by the Trustee, regardless of the fact that, on the sale, redemption, or other disposition of the bond, a gain or increase may inure to the benefit of the principal of the trust.

*[Or, if accumulation is to be required only when bonds are purchased at less than a certain percentage of par value:]*

Any discount on any bond purchased by the Trustee at less than \_\_\_\_\_ [*specify percentage, e.g., 97 percent*] of its par value shall, however, be accumulated periodically as interest in such a reasonable manner as the Trustee shall determine and, to the extent necessary, paid out of the proceeds of the sale, redemption, or other disposition of the bond, or out of principal.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsAdministrationEstate, Gift & Trust LawTrustsTestamentary TrustsEstate, Gift & Trust

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*24-64B California Legal Forms--Transaction Guide § 64B.207*

**§ 64B.207 Income Earned During Administration of Testator's Estate to Be Treated as Principal**

**[1] Comment**

**[a] Use of Form**

This form is a will provision that may be used to require the trustee to treat income earned by trust property while the testator's estate is in probate and before it is distributed to the trustee as principal of the trust estate. The form includes two alternative provisions. The first may be used to require the trustee to treat income earned during probate by all trust assets as principal. The second may be used to require the trustee to treat income earned by all assets except specific devises as principal.

**[b] Income on Trust Property During Probate Administration**

**[i] In General**

Property devised to a trustee will frequently earn income during the period of probate administration, i.e., while it is in the hands of the executor and before it has been distributed to the trustee. Depending on the circumstances of the estate, probate administration may continue (and distribution of trust assets to the trustee may be delayed) for many months after the testator's death [*see Prob. Code §§ 11640(a)* (final distribution may be ordered when estate is in condition to be closed), 12200 (time limits on petition for final distribution); *see also Ch. 65, Executors § 65.41[9]*]. Proper allocation (and ultimate distribution) of income earned by trust property during probate administration will be determined by rules set forth in the Probate Code or, if the testator chooses to vary those rules, by a will provision addressing the question.

**[ii] Probate Code Rules**

The Uniform Principal and Income Act [*Prob. Code §§ 16320-16375*] provides rules for allocating income from property subject to a testamentary trust. The right to collect this income depends on the nature of the gift [*see Prob. Code § 21117* (rules governing classifications of devises); *see also Ch. 63, Will Provisions, § 63.351[1][b]*]. For a

detailed discussion of the Probate Code rules governing the right to income accruing during a decedent's estate, see *Ch. 63, Will Provisions, § 63.532[1]* et seq.

Recipients of specifically given property receive all net income from the specifically given property, which is determined by including all receipts or disbursements with respect to the property, regardless of whether they occurred before or after the decedent's death [*Prob. Code § 16340(a)(1)*]. The personal representative must make a reasonable provision for amounts that he or she believes the estate may become obligated to pay after distribution of the property, but may not reduce receipts on account of expenditures actually paid or required to be paid by a third party [*Prob. Code § 16340(a)*].

Recipients of a pecuniary amount will only receive interest if the principal amount is not distributed within one year [*Prob. Code §§ 12003, 16340(b)*]. However, interest on a general pecuniary gift distributable under a trust was not payable when the trust was created before the effective date of a prior version of *Prob. Code § 16340(b)* [*Remsen v. Lavacot (2001) 87 Cal. App. 4th 421, 429, 104 Cal. Rptr. 2d 612*]. After deducting for expenses of administration and other estate obligations, the remaining net income is distributed to all other beneficiaries in proportional shares equal to their fractional interests in undistributed principal assets [*Prob. Code §§ 16340, 16341*].

If, as is often the case, the trust is funded with a specific or a residuary devise, the trustee and not the executor will be entitled to income earned by the property during administration. This may impede efficient administration of the estate by denying the executor income needed for administration. If, for example, the estate consists almost entirely of a parcel of income-producing real property that is devised in trust, the trustee (and ultimately the beneficiaries) will be entitled to all of the income and the executor will be entitled to none. Payment of the testator's debts and expenses of administration may present difficulties in such a case.

### **[iii] Will Provision**

The will may vary the statutory rules discussed above [*see Prob. Code § 16335(a)(1)*]. The form set forth below is designed to obviate the difficulties described above by providing that income during administration will be treated as principal and not income. If treated as principal, the income will be subject to administration in the hands of the executor and not distributable under the statutory rules to the trustee.

This form will not deprive an otherwise qualified interest of the benefits of the estate tax marital deduction. Although the marital deduction rules require that all of the income from the entire interest be paid to the surviving spouse annually, or at more frequent intervals [*I.R.C. § 2056(b)(5), (7)(B)(ii)(I)*], an interest passing to the surviving spouse is not disqualified merely because the spouse is not entitled to the income from estate assets for the period before distribution of those assets by the executor, unless the executor is, by the decedent's will, authorized or directed to delay distribution beyond the period reasonably required for administration of the decedent's estate [*Treas. Reg. §§ 20.2056(b)-5(f)(9)* (lifetime income/power of appointment trusts), *20.2056(b)-7(d)(2)* (application of rule to QTIP trusts)].

### **[2] FORM**

#### **Income Earned During Administration of Testator's Estate to Be Treated as Principal**

#### **Income Earned During Estate Administration to Be Treated as Principal**

*[First alternative provision: income on all probate assets to be treated as principal]*

All income from all of the assets of my probate estate earned after the date of my death and before distribution of my estate to the Trustee shall be treated as principal of the trust estate.

[OR]

*[Second alternative provision: income on all assets except specific devises to be treated as principal]*

All income from all of the assets of my probate estate, except any assets subject to specific devise, earned after the date of my death and before distribution of my estate to the Trustee shall be treated as principal of the trust estate.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsAdministrationEstate, Gift & Trust LawTrustsTestamentary TrustsEstate, Gift & Trust LawTrustsTrusteesDuties & PowersGeneral Overview



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*24-64B California Legal Forms--Transaction Guide § 64B.208*

**§ 64B.208 Discretion to Apportion Stock Dividends and Liquidating Dividends or Distributions Between Principal and Income**

**[1] Comment**

**[a] Use of Form**

This form is a will provision that may be used to grant the trustee discretion to apportion stock dividends and liquidating dividends or distributions between principal and income. For a form requiring the trustee to allocate to income all distributions from capital gains made by a mutual fund or a real estate investment trust (REIT), see § 64B.209.

**[b] Corporate Distributions**

**[i] Statutory Rules**

The Uniform Principal and Income Act [*Prob. Code §§ 16320-16375*] provides rules for allocating receipts from an "entity," which includes a corporation, partnership, limited liability company, regulated investment company, real estate investment trust, and common trust fund [*Prob. Code § 16350(a)*]. Except as otherwise provided, money received from an entity is allocated to income [*Prob. Code § 16350(b)*]. However, the following items are specifically allocated to principal [*Prob. Code § 16350(c)*]:

- Property other than money.
- Money received in exchange for some or all of a trust's interest in the entity.
- Money received in partial or total liquidation of the entity.
- Money received from a regulated investment company or real estate investment trust if considered a capital gain dividend for federal income tax purposes.

Money is received in partial liquidation to the extent indicated by the entity, or if the total amount of money and property received by all owners, collectively, in a distribution or series of related distributions, is greater than 20 percent of the entity's gross assets, as shown by its year-end financial statements immediately preceding the initial receipt. If that receipt was allocated between December 2, 2004 and July 18, 2005, the trustee is not liable for allocating the receipt to income, as long as the amount received by the trustee, when considered together with the amount received by all owners, collectively exceeds 20 percent of the entity's gross assets, but the amount received by the trustee does not exceed 20 percent of the entity's gross assets [*Prob. Code § 16350(d)(1)*]. Money is not received in partial liquidation to the extent that it does not exceed the income tax liability the trustee or beneficiary must pay for taxable income from the distributing entity [*Prob. Code § 16350(d)(2)*].

A trustee may rely on a statement made by an entity about the source or character of a distribution if the statement is made at or near the time of distribution [*Prob. Code § 16350(e)*].

### **[ii] Will Provisions**

The will may vary the statutory rules relating to corporate distributions [*see Prob. Code § 16335(a)(1)*]. Allocating stock dividends and most liquidating dividends or distributions to principal may, in particular situations, adversely affect the income beneficiaries. Some corporations issue stock dividends over extended periods while at the same time paying no ordinary dividends. The income beneficiaries of a trust with large holdings of the stock of such corporations would receive little income and the remainder beneficiaries would receive all of the benefits of the dividends unless the will contains some provision to the contrary. If it appears that the trust will include substantial holdings of securities that are likely to pay stock dividends or liquidating distributions without distributing ordinary cash dividends, the testator may choose to give the trustee discretion to allocate such dividends or distributions between principal and income.

An alternative means of providing for such a contingency would be to empower the trustee, in the trustee's discretion, to make principal payments to the income beneficiaries. For forms authorizing or directing the trustee to make payments out of principal, see *Ch. 64, Testamentary Trusts: Payment and Distribution Provisions*, §§ 64.240-64.245.

### **[2] FORM**

#### **Discretion to Apportion Stock Dividends and Liquidating Dividends or Distributions Between Principal and Income**

##### **Apportionment of Stock and Liquidating Dividends Between Principal and Income**

The Trustee is authorized, in the Trustee's discretion, to apportion stock dividends and liquidating dividends or distributions between principal and income. It is my wish, without limiting the Trustee's discretion, that the Trustee allocate the above items to income, except to the extent that the Trustee determines that to do so would substantially impair the principal of the trust.

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsAdministrationEstate, Gift & Trust LawTrustsTestamentary TrustsEstate, Gift & Trust LawTrustsTrusteesDuties & PowersGeneral Overview



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*24-64B California Legal Forms--Transaction Guide § 64B.209*

**§ 64B.209 Capital Gains Distributions From Mutual Funds, Regulated Investment Companies, and Real Estate Investment Trusts to Be Allocated to Income**

**[1] Comment**

**[a] Use of Form**

This form is a will provision that may be used to require the trustee to allocate to income all distributions from capital gains made by a mutual fund or a real estate investment trust (REIT).

**[b] Capital Gains Distributions**

**[i] Statutory Rules**

The Uniform Principal and Income Act provides rules for allocating receipts from an "entity," which includes a regulated investment company, real estate investment trust, and common trust fund [*Prob. Code § 16350(a)*]. Except as otherwise provided, money received from an entity is allocated to income [*Prob. Code § 16350(b)*]. For discussion of these rules, see § 64B.208[1][b][i].

**[ii] Will Provisions**

The will may vary the statutory rules as to allocation between principal and income of capital gains dividends [*see Prob. Code § 16335(a)(1)*]. In some cases, a contrary will provision may be desirable to protect the interests of the income beneficiaries.

The investment objectives of a particular fund may be growth of principal, production of income, stability, or any combination of growth, income, and stability. Investments by a mutual fund may be primarily in common stocks, bonds, convertible bonds, preferred stocks, specialized investments, or any combination of stocks, bonds, or specialized investments. It is not uncommon for a mutual fund whose principal objective is growth to distribute capital gains that are many times larger than its ordinary income distributions. If the trust will include shares in such a fund, or if the

trustee is authorized to invest in or retain the shares of such a fund, the testator may deem it appropriate to require the trustee to allocate all capital gains distributions to income. This form will achieve that objective.

### **[iii] Tax Considerations**

An interest passing in trust to a surviving spouse will not qualify for the estate tax marital deduction as a lifetime income/power of appointment trust [*see I.R.C. § 2056(b)(5)*] if the trustee has the power, directly or indirectly, to accumulate income, or if the corpus consists substantially of property that is not likely to be income-producing during the surviving spouse's lifetime and the spouse cannot compel the trustee to convert it to income-producing property [*Treas. Reg. §§ 20.2056(b)-5(f)(6)* (lifetime income/power of appointment trusts), 20.2056(b)-7(d)(2) (application of rule to QTIP trusts)]. Property that is not likely to produce income should not be held in a lifetime income plus power of appointment or QTIP trust unless other provisions of the trust give the surviving spouse the substantial enjoyment of the property or unless the surviving spouse has the power to compel the trustee to convert it to income-producing property. Requiring the trustee to allocate capital gains distributions to income may provide the surviving spouse with the requisite degree of enjoyment [*see Treas. Reg. § 20.2056(b)-5(f)*].

### **[2] FORM**

#### **Capital Gains Distributions From Mutual Funds, Regulated Investment Companies, and Real Estate Investment Trusts to Be Allocated to Income**

#### **Capital Gains Distributions From Mutual Funds and Real Estate Investment Trusts to Be Allocated to Income**

The Trustee shall allocate to income all distributions from capital gains made by any mutual fund and all distributions from capital gains made by any regulated investment company or real estate investment trust as defined in the Internal Revenue Code.

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsAdministrationEstate, Gift & Trust LawTrustsTestamentary TrustsEstate, Gift & Trust LawTrustsTrusteesDuties & PowersGeneral Overview



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*24-64B California Legal Forms--Transaction Guide § 64B.210*

**§ 64B.210 Depreciation and Accounting Rules for Business or Other Activity Operated by Trustee**

**[1] Comment**

**[a] Use of Form**

This form is a will provision that may be used to establish depreciation and accounting rules for a business or other activity (including a farm) that will be operated by the trustee for the trust. Specifically, the form may be used to require the trustee to set aside a reserve from trust income for the depreciation of property used in the operation of the business or other activity and, further, to follow specified accounting rules to determine the income of the business or other activity.

For a provision authorizing the trustee to conduct a business, see *Ch. 64A, Testamentary Trusts: Trustee Provisions, § 64.280*. For a provision authorizing the trustee to operate a farm or a ranch, see *Ch. 64A, Testamentary Trusts: Trustee Provisions, § 64.281*. For a provision authorizing the trustee to hold corporate stock, see *Ch. 64A, Testamentary Trusts: Trustee Provisions, § 64A.282*. For general provisions relating to reserves for depreciation of trust property, see § *64B.203*.

**[b] Depreciation and Accounting for Business**

**[i] Statutory Provisions**

A trustee who operates a business or other activity may account for that business or activity separate and apart from the trust's general accounting records [*Prob. Code § 16352(a)*]. The activities for which a trustee may account separately include the following [*Prob. Code § 16352(c)*]:

- Retail, manufacturing, service, and other traditional business activities.
- Farming.

- Raising and selling livestock or other animals.
- Managing rental properties.
- Extracting minerals or other natural resources.
- Timber operations.
- Investments in derivatives (that is, contracts and/or financial instruments that give a trust the right or obligation to participate in some of all changes in the price of a tangible or intangible asset or group of assets, or changes in a rate, an index of prices or rates, or other market indicator for an asset or a group of assets) [*see Prob. Code § 16366*].

Whether or not a trustee accounts for a business or other activity separately, there is discretion, but no requirement, for a depreciation reserve or the use of a particular accounting method [*see Prob. Code §§ 16352(b), 16372*].

### **[ii] Will Provisions**

The will may vary the statutory rules relating to depreciation of business or farm property and prescribing accounting rules for the operation of businesses or farms [*Prob. Code § 16335(a)(1)*]. For a general discussion of statutory rules and drafting considerations relating to depreciation of trust property, see § 64B.203[1][b][i] et seq. Whenever it is contemplated that the trustee will continue the operation of a business or other activity, the testator and the will drafter should carefully analyze the accounting methods presently being used in the business or farm and determine whether the will should contain directions that differ from those of the Uniform Principal and Income Act.

## **[2] FORM**

### **Depreciation and Accounting Rules for Business or Other Activity Operated by Trustee**

#### **Depreciation and Accounting Rules for Business**

(a) The Trustee shall set aside a reserve from trust income for depreciation, using the method indicated below, with regard to property used in the operation of any business and shall determine the net profits or income of any business by the trust in accordance with the following methods:

- (1) Depreciation: \_\_\_\_\_ [*e.g.*, straight-line];
- (2) Inventories: \_\_\_\_\_ [*e.g.*, first in and first out];
- (3) Investment credit: \_\_\_\_\_ [*e.g.*, full immediate credit];
- (4) Property taxes: \_\_\_\_\_ [*e.g.*, proration over county's fiscal year];
- (5) Overall accounting method: \_\_\_\_\_ [*e.g.*, percentage of completion method].

(b) For purposes of this provision, "business" shall mean any or all of the following activities:

- (1) Retail, manufacturing, service, and other traditional business activities;
- (2) Farming;

- (3) Raising and selling livestock or other animals;
- (4) Managing rental properties;
- (5) Extracting minerals or other natural resources;
- (6) Timber operations; and
- (7) Investments in derivatives, as defined in *Probate Code Section 16366*.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsAdministrationEstate, Gift & Trust LawTrustsTestamentary TrustsEstate, Gift & Trust LawTrustsTrusteesDuties & PowersGeneral OverviewEstate, Gift & Trust LawTrustsTrusteesDuties & PowersAccounting



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*24-64B California Legal Forms--Transaction Guide § 64B.211*

**§ 64B.211 Allocation of Trustee's Compensation, Attorneys' Fees, and Court Costs**

**[1] Comment**

**[a] Use of Form**

This form is a will provision that may be used to establish rules for charging trustee's compensation, attorneys' fees, and court costs to principal or to income. The form includes three alternative provisions. The first alternative provision may be used to provide that all trustee compensation, attorneys' fees, and court costs must be charged entirely to principal or entirely to income. The second alternative provision may be used to provide that all regular trustee compensation and all ordinary attorneys' fees and court costs must be charged to income and all other compensation, fees, and costs to principal. The third alternative provision may be used to provide that attorneys' fees and courts costs will be charged to income for matters primarily concerning income and to principal for matters primarily concerning principal, with all other compensation, fees, and costs charged entirely to principal or entirely to income.

For a provision authorizing the trustee to employ agents, advisers, and attorneys, see *Ch. 64A, Testamentary Trusts: Trustee Provisions*, § 64A.320.

**[b] Trustee's Compensation, Attorneys' Fees, and Court Costs**

**[i] Statutory Rules**

The Uniform Principal and Income Act [*Prob. Code* §§ 16320-16375] establishes rules for allocating various disbursements between principal and income. The trustee's compensation, fees for investment advisors or custodial services, and expenses for accountings, judicial proceedings, or other matters involving both income and remainder interests are divided evenly between principal and income, unless otherwise ordered by the court [*Prob. Code* §§ 16370, 16371]. Expenses for proceedings or other matters concerning primarily an income interest are allocated to income, while expenses for proceedings primarily concerning principal are allocated to principal [*Prob. Code* §§ 16370, 16371].

**[ii] Will Provisions**

The will may vary the statutory rules for charging the trustee's compensation, attorneys' fees, and court costs to principal or income [*Prob. Code* §§ 16335(a)(1), 16312]. The trustee's regular compensation and the attorneys' fees and court costs incurred on periodic accountings to the court are among the largest items of expense incurred on a regular basis by typical testamentary trusts. If no special provision is made in the will, these items will be charged equally to principal and income. Such an allocation may or may not fit the plan of a particular testator. A testator who is concerned with the maximization of income may wish, for example, that such items be charged entirely to principal. On the other hand, a testator who is more concerned with the preservation of principal may wish that they be charged to income, so that they will not erode the trust principal. This form permits the testator to direct the source out of which these expenses are to be paid.

### **[iii] Tax Considerations**

If the trust is designed to qualify for the marital deduction as a lifetime income plus power of appointment or qualified terminable interest property (QTIP) trust [*see I.R.C. § 2056(b)(5)* (life estate plus power of appointment trust); *see also I.R.C. § 2056(b)(7)*], any provision that shifts a burden from trust principal to income should be viewed with caution, since it may interfere with the right of the surviving spouse to receive all of the income from the trust payable annually [*see I.R.C. § 2056(b)(5)* (life estate plus power of appointment trust); *see also I.R.C. § 2056(b)(7)(B)(i)(II), (ii)* (QTIP trust)] and thereby disqualify the interest passing to the surviving spouse from the marital deduction. A trust provision that impairs the interests of the income beneficiary and favors the remainder beneficiaries may potentially disqualify the interest passing to the surviving spouse.

A grant of administrative powers to the trustee will not disqualify an interest passing in trust unless the grant of powers evidences the intention to deprive the surviving spouse of the required beneficial enjoyment [*Treas. Reg. § 20.2056(b)-5(f)(4)*]. An interest is not disqualified if the entire terms of the instrument are such that the local courts will impose reasonable limitations on the exercise of the powers. Among the powers which, if subject to reasonable limitations, will not disqualify the interest passing in trust is the power to allocate or apportion receipts and disbursements between income and corpus [*Treas. Reg. § 20.2056(b)-5(f)(4)*]. However, an interest is disqualified if the primary purpose of the trust is to safeguard the trust property without providing the spouse with the required beneficial enjoyment [*Treas. Reg. § 20.2056(b)-5(f)(5)*]. A trust will be disqualified under this rule if it provides for the accumulation of trust income, either directly or indirectly [*Treas. Reg. § 20.2056(b)-5(f)(5)*]. For general discussion of the marital deduction, see Ch. 71, *Marital Deduction Trust Provisions*.

### **[2] FORM**

#### **Allocation of Trustee's Compensation, Attorneys' Fees, and Court Costs**

#### **Charging Trustee's Compensation, Attorneys' Fees, and Courts Costs to Principal or Income**

[*First alternative: all trustee compensation, attorneys' fees, and court costs to be charged entirely to principal or entirely to income:*]

The Trustee shall charge all of the compensation of the Trustee, whether regular or special, all attorneys' fees incurred by the Trustee for or in behalf of the trust and its administration, and all court costs incurred in judicial proceedings relating to the trust or its administration, entirely to \_\_\_\_\_ [principal or income].

[OR]

[*Second alternative: all regular trustee compensation and all ordinary attorneys' fees and court costs to be charged to*

*income; all other compensation, fees, and costs to be charged to principal:]*

The Trustee shall charge all of the regular compensation of the Trustee, all ordinary attorneys' fees incurred in the ordinary course of the administration of the trust and on periodic judicial accountings, and all court costs incurred on periodic judicial accountings, entirely to income. All other items of trustee compensation, attorneys' fees, and court costs shall be charged entirely to principal.

[OR]

*[Third alternative: attorneys' fees and court costs to be charged to income for matters primarily concerning income and to principal for matters primarily concerning principal; all other compensation, fees, and costs to be charged entirely to principal or income:]*

The Trustee shall charge entirely to principal all trustee compensation, all attorneys' fees, and all court costs incurred in judicial proceedings, if the matters for which that compensation, fees, or costs were incurred primarily concern the principal interest. The Trustee shall charge entirely to income all trustee compensation, all attorneys' fees, and all court costs incurred in judicial proceedings, if the matters for which the compensation, fees, or costs were incurred primarily concern the income interest. All other compensation of the trustee, and all other attorneys' fees and court costs, shall be charged entirely to \_\_\_\_\_[principal or income].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsAdministrationEstate, Gift & Trust LawTrustsTestamentary TrustsEstate, Gift & Trust LawTrustsTrusteesDuties & PowersCompensation



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*24-64B California Legal Forms--Transaction Guide §§ 64B.212-64B.229*

**[Reserved]**

§§ 64B.212[Reserved]



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B. Declaration of Testator's Intention

*24-64B California Legal Forms--Transaction Guide § 64B.230*

**§ 64B.230 Testator's Intention to Favor Income Beneficiaries Over Remainder Beneficiaries**

**[1] Comment**

**[a] Use of Form**

This form is a will provision that may be used to declare the testator's intention to favor the current income beneficiaries designated in the will over subsequent income or remainder beneficiaries. For a provision declaring the testator's intention to favor the remainder beneficiaries over the income beneficiaries, see § 64B.231.

**[b] Intention of Testator**

**[i] Words of the Will**

The Probate Code provides general rules for the interpretation of wills, trusts, and other instruments [*see Prob. Code §§ 21101-21140*]. The first and most important of these rules is that the intention of the transferor as expressed in the instrument controls the legal effect of the dispositions made in the instrument [*Prob. Code § 21102(a)*]. Accordingly, the other rules apply only when the intention of the transferor is not otherwise indicated by the instrument [*Prob. Code § 21102(b)*]. However, these provisions do not limit the use of extrinsic evidence, to the extent otherwise authorized by law, to determine the testator's intention [*Prob. Code § 21102(c)*].

**[ii] Drafting Considerations**

The typical testamentary trust gives the trustee wide discretionary latitude with respect to investments of trust property, payments of income to income beneficiaries, determination of income and principal, and other matters. How this discretion is exercised by the trustee and supervised by the court may depend in large part on an interpretation of the intentions of the testator. If the will clearly evidences the testator's intention to favor the income beneficiaries over the remainder beneficiaries, the trustee's discretionary power with respect to investments, allocation of income, invasion of principal, and other administrative duties will properly be exercised in favor of those beneficiaries. If, on the other hand, the will evidences the testator's intention to favor the remainder beneficiaries over the income beneficiaries, the trustee

and the court will be guided accordingly in carrying out and enforcing the other provisions of the trust instrument.

Although an expression of the testator's intentions in this regard will be useful in many situations, such an expression will be most helpful only in trusts in which the trustee is given discretion. In the rare case in which the trustee has no discretionary authority, such an expression will have little effect, since the trustee's powers and duties will have been narrowly prescribed by other provisions of the will.

### **[iii] Tax Considerations**

This provision should not be used with a charitable remainder annuity trust [*see I.R.C. § 664(d)(1)*] or a charitable remainder unitrust [*see I.R.C. § 664(d)(2)*]. A remainder interest passing to a qualified charity is deductible for federal estate tax purposes only if it is a charitable remainder annuity trust or a charitable remainder unitrust [*I.R.C. § 2055(e)(2)(A)*]. Payments to a noncharitable income beneficiary, e.g., a surviving spouse, under a charitable remainder annuity trust must be a sum certain [*I.R.C. § 664(d)(1)(A)*], and payments to such a beneficiary under a charitable remainder unitrust must be a fixed percentage of the net fair market value of the assets [*I.R.C. § 664(d)(2)(A)*]. For a general discussion of split-interest trusts, charitable annuity remainder trusts, and charitable remainder unitrusts, see Ch. 74, *Split-Interest Charitable Trusts* .

If the trust is designed to qualify for the federal estate tax marital deduction as a lifetime income/power of appointment [*see I.R.C. § 2056(b)(5)*] or qualified terminable interest property (QTIP) [*see I.R.C. § 2056(b)(7)*] trust, a statement of the testator's intention to favor the income beneficiary (the surviving spouse) may help to protect the deduction. A trust will qualify for the deduction as a lifetime income plus power of appointment or a QTIP trust if the surviving spouse is entitled for life to all of the income, payable annually or at more frequent intervals [*I.R.C. § 2056(b)(5), (7); see Treas. Reg. §§ 20.2056(b)-5(f)* (lifetime income/power of appointment trusts), 20.2056(b)-7(d)(2) (application of rule to QTIP trusts)]. The intentions of the testator as expressed in the will may be of critical importance in determining whether the surviving spouse is entitled to receive all of the income payable at least annually [*see Prob. Code §§ 21502(a), 21524(b), (d)*]. The regulations provide that a lifetime income plus power of appointment trust will satisfy the income requirements of the statute if its effect is to give the surviving spouse substantially that degree of beneficial enjoyment of the trust property during the surviving spouse's lifetime that the law of trusts accords to a person who is unqualifiedly designated as the life beneficiary of a trust [*Treas. Reg. §§ 20.2056(b)-5(f)* (lifetime income/power of appointment trusts), 20.2056(b)-7(d)(2) (application of rule to QTIP trusts)]. The requisite degree of enjoyment is given only if it is the testator's intention, as manifested by the terms of the trust instrument and the surrounding circumstances, that the trust should produce for the surviving spouse the income rights accorded by the law of trusts, or that the spouse should have such use of the trust property as is consistent with the value of the trust corpus and its preservation [*Treas. Reg. § 20.2056(b)-5(f)* (lifetime income/power of appointment trusts), 20.2056(b)-7(d)(2) (application of rule to QTIP trusts)].

## **[2] FORM**

### **Testator's Intention to Favor Income Beneficiaries Over Remainder Beneficiaries**

#### **Intention to Favor Current Income**

#### **Beneficiary [or Beneficiaries]**

My primary purpose in establishing this trust is to benefit the person[s] designated herein as the income \_\_\_\_\_ [beneficiary or beneficiaries]. It is my intention that the Trustee shall, to the extent deemed prudent by the Trustee, and except when inconsistent with other provisions of this will, freely exercise the powers and discretion granted herein in favor of the person[s] who \_\_\_\_\_ [is or are] the then-current income \_\_\_\_\_ [beneficiary or beneficiaries] of the trust. In each instance, the rights of subsequent beneficiaries and remainder beneficiaries shall be considered subordinate to the rights of the then-current income

\_\_\_\_\_ [beneficiary *or* beneficiaries]. This declaration of intention is intended to include, but is not limited to, investment policy, the exercise of discretionary powers to determine what constitutes income and what constitutes principal, and the determination of the amounts to be paid to or applied for the benefit of the then-current income \_\_\_\_\_ [beneficiary *or* beneficiaries].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Trusts Administration Estate, Gift & Trust Law Trusts Interpretation Estate, Gift & Trust Law Trusts Testamentary Trusts



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DIVISION IV: WILLS AND TRUSTS  
 CHAPTER 64B TESTAMENTARY TRUSTS: ADMINISTRATIVE PROVISIONS  
 PART IV. FORMS  
 B. Declaration of Testator's Intention

*24-64B California Legal Forms--Transaction Guide § 64B.231*

**§ 64B.231 Testator's Intention to Favor Remainder Beneficiaries Over Income Beneficiaries**

**[1] Comment**

**[a] Use of Form**

This form is a will provision that may be used to declare the testator's intention to favor the remainder beneficiaries over the income beneficiaries designated in the will. For a provision declaring the testator's intention to favor the current income beneficiaries over subsequent beneficiaries and remainder beneficiaries, see § 64B.230[1].

**[b] Drafting Caution**

A declaration of the testator's intention to favor the interests of the remainder beneficiaries over the interests of the income beneficiaries could drastically affect the rights of income beneficiaries if the trustee has wide discretionary authority to determine their needs and to apply amounts of income for their benefit. Therefore, this form should not be used if the trustee has such discretion.

**[2] FORM**

**Testator's Intention to Favor Remainder Beneficiaries Over Income Beneficiaries**

**Intention to Favor Remainder Beneficiaries Over Income Beneficiaries**

My primary purpose in establishing this trust is to benefit the person[s] designated herein as the remainder \_\_\_\_\_[beneficiary *or* beneficiaries]. It is my intention that the Trustee shall, to the extent deemed prudent by the Trustee, and except when inconsistent with other provisions of this will, freely exercise the powers and discretion granted herein so as to conserve, protect, and build up the principal of the trust estate. In each instance, the rights of income beneficiaries shall be considered subordinate to the rights of the remainder \_\_\_\_\_[beneficiary *or* beneficiaries], although the income beneficiaries shall receive all of the income provided for them by the terms of this will. This declaration of intention is intended to include, but is not limited to,

investment policy, the exercise of discretionary powers to determine what constitutes income and what constitutes principal, and the determination of the amounts to be paid to or applied for the benefit of the income \_\_\_\_\_[beneficiary *or* beneficiaries].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsAdministrationEstate, Gift & Trust LawTrustsInterpretationEstate, Gift & Trust LawTrustsTestamentary Trusts



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*24-64B California Legal Forms--Transaction Guide §§ 64B.232-64B.249*

**[Reserved]**

§§ 64B.232[Reserved]



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 C. Additions to Trust by Third Parties

*24-64B California Legal Forms--Transaction Guide § 64B.250*

**§ 64B.250 Additions by Third Parties Permitted**

**[1] Comment**

**[a] Use of Form**

This form is a will provision that may be used to authorize the trustee to accept additions to the trust from sources other than the estate of the testator. For a provision prohibiting the trustee from accepting any such additions, see § 64B.251.

**[b] Drafting Considerations**

Although a will provision empowering the trustee to accept additions to the trust is not strictly necessary [*see* § 64B.250[1][c]], such a provision may nevertheless serve a useful purpose by making it clear to the trustee and beneficiaries that additions are permitted.

**[c] Statutory Rules Governing Additions to Trusts**

The Trust Law empowers trustees to accept additions to the property of their trusts from the original settlors or from any other persons [*Prob. Code* § 16221], and the Uniform Testamentary Additions to Trusts Act [*Prob. Code* §§ 6300-6303] sanctions testamentary additions to trusts previously established by the testator or some other person [*Prob. Code* § 6300]. An addition may be made to either an inter vivos or a testamentary trust, but in the case of a testamentary trust the trust must have been created by the valid last will of a person who predeceased the testator [*Prob. Code* § 6300]. A devise to a previously created trust is not invalid because the trust is amendable or revocable, or both, or because the trust was amended after the execution of the will or the death of the testator making the addition [*Prob. Code* § 6300].

Unless the will provides otherwise, property devised to a previously created trust becomes part of the trust to which it is given and must be administered and disposed of in accordance with the first trust instrument, including any amendments made before or after the death of the testator (regardless of whether the amendments were made before or after execution of the testator's will) [*Prob. Code* § 6300; *see Prob. Code* § 82(a)(1) ("trust" includes addition to trust); *see also* discussion in § 64B.33].

**[d] Estate Tax Considerations**

If the person making the addition is also a trustee or cotrustee of the trust, or holds a power of appointment over the trust assets, the added assets may be included in the person's estate for federal estate tax purposes. Under *I.R.C. § 2036(a)(2)*, if a person transfers property but retains the right (either alone or in conjunction with another person) to designate those who will possess or enjoy the transferred property or its income, the property will be included in the person's gross estate. A right to designate those who will possess or enjoy the property will be deemed to have been retained if the property is transferred to a trust under which such a right exists, even if the right was not reserved in the instrument of transfer [*see State Street Trust Company v. United States (1st Cir. [Mass.] 1959) 263 F.2d 635, 637* (father transferred property to trusts created by children)]. A right to designate those who will possess or enjoy the property exists whenever there is a power to shift substantially the economic benefits of a trust between the income beneficiaries and remaindermen [*State Street Trust Company v. United States (1st Cir. 1959) 263 F.2d 635, 639* (broad investment discretion in cotrustees); *see Treas. Reg. § 20.2036-1(b)(3)*].

**[e] Generation-Skipping Transfer Tax Considerations**

An addition to a trust may also have generation-skipping transfer tax consequences. If the trust to which the assets are added distributes the assets (or income earned from those assets) to a beneficiary who is assigned to a generation that is two or more generations below that of the transferor, the transfer may trigger imposition of the generation-skipping transfer tax [*see I.R.C. §§ 2601, 2611, 2612*]. It is important to note that portions of a trust that are attributable to transfers from different transferors will be treated as separate trusts for purposes of determining the application of the generation-skipping transfer tax [*I.R.C. § 2654(b)(1)*]. Further, substantially separate and independent shares of different beneficiaries in a trust will be similarly treated as separate trusts [*I.R.C. § 2654(b)(2)*]. For a general consideration of the generation-skipping transfer tax, see discussions in *Ch. 64, Testamentary Trusts: Payment and Distribution Provisions, § 64.40[1]*.

**[2] FORM****Additions by Third Parties Permitted****Additions to Trust**

With the consent of the Trustee, additions to the trust established by this will may be made at any time from any source or sources.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsGeneral OverviewEstate, Gift & Trust LawTrustsAdministrationEstate, Gift & Trust LawTrustsModification & TerminationEstate, Gift & Trust LawTrustsTestamentary Trusts



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*24-64B California Legal Forms--Transaction Guide § 64B.251*

**§ 64B.251 Additions by Third Parties Prohibited**

**[1] Comment**

**[a] Use of Form**

This form is a will provision that may be used to prohibit the trustee from accepting additions to the trust from sources other than the estate of the testator. For a provision permitting the trustee to accept such additions, see § 64B.250.

**[b] Prohibiting Additions to Trust**

Although additions to a trust may be advantageous under certain circumstances [*see* § 64B.250[1]; *see also* discussion in § 64B.33], they may generate adverse tax consequences under other circumstances [*see* discussions § 64B.250[1][d] et seq.].

A will provision specifically empowering the trustee to accept additions to the trust is not essential, since every trustee has this power unless the will provides otherwise [*Prob. Code* § 16221; *see Prob. Code* § 16200(b)]. Conversely, however, a will provision forbidding the trustee to accept additions is necessary if the testator wishes to prohibit additions. This form will accomplish the latter purpose.

**[2] FORM**

**Additions by Third Parties Prohibited**

**Additions to Trust Prohibited**

The Trustee is directed not to receive additions to the trust established by this will from any source or sources other than my estate.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsGeneral OverviewEstate, Gift & Trust LawTrustsAdministrationEstate, Gift & Trust LawTrustsModification & TerminationEstate, Gift & Trust LawTrustsTestamentary Trusts



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*24-64B California Legal Forms--Transaction Guide §§ 64B.252-64B.269*

**[Reserved]**

§§ 64B.252[Reserved]



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 D. Vacancies in Trusteeship

*24-64B California Legal Forms--Transaction Guide § 64B.270*

**§ 64B.270 Appointment of Alternate and Successor Trustees and Cotrustees by Testator**

**[1] Comment**

**[a] Use of Form**

This form is a will provision that may be used to appoint alternate or successor trustees or cotrustees to serve in the event that the trustees or cotrustees appointed in the will are unable or unwilling to serve or to continue to serve. For provisions appointing trustees and cotrustees, see *Ch. 64A, Testamentary Trusts: Trustee Provisions*, §§ 64A.200-64A.202. For a provision authorizing the trustee or cotrustee designated in the will to appoint a successor trustee or cotrustee, see § 64B.271. For a clause providing that, if any cotrustee named in the will is unable or unwilling to act or to continue to act as cotrustee, the powers of the trust may be exercised by the remaining cotrustee or cotrustees, see § 64B.272.

**[b] Appointment of Alternate and Successor Trustees**

**[i] Statutory Rules**

Vacancies in the trusteeship may occur from a variety of causes. If the person named as trustee rejects the trust [*Prob. Code § 15643(a)*], cannot be identified [*Prob. Code § 15643(b)*], or does not exist [*Prob. Code § 15643(b)*], there will be a vacancy. If a trustee who has accepted the trust resigns [*Prob. Code § 15643(c)*], is removed from office [*Prob. Code § 15643(c)*], or dies [*Prob. Code § 15643(d)*], a vacancy will also occur. Other less obvious causes of vacancy are the appointment of a conservator or guardian of the person or estate of an individual trustee [*Prob. Code § 15643(e)*], or the trustee is the subject of an order for relief in bankruptcy [*Prob. Code § 15643(f)*], and the revocation of the charter of (or appointment of a receiver for) any trust company that is serving as trustee [*Prob. Code § 15643(g), (h)*].

Under the Trust Law, if the will specifies a practical method for filling a vacancy, or if it names a person to fill the vacancy, the vacancy must be filled as provided in the will [*Prob. Code § 15660(b)*]. If the will makes no provision for filling the vacancy, all of the adult beneficiaries may agree that the vacancy be filled by a trust company [*Prob. Code § 15660(c)*]; see *Prob. Code § 83* ("trust company" defined). If the adult beneficiaries do not agree that the vacancy be

filled by a trust company, the court may appoint a trustee to fill the vacancy [*Prob. Code § 15660(d)*]. If the trust provides for more than one trustee, the court may, in its discretion, appoint the original number or any lesser number of cotrustees [*Prob. Code § 15660(d)*]. Although the selection of a trustee is entrusted to the discretion of the court, the court must give consideration to the wishes of any beneficiary who is 14 years of age or older [*Prob. Code § 15660(d)*].

### **[ii] Will Provisions**

Whenever a will appoints an individual as trustee or cotrustee, it is advisable to name an alternate or successor trustee or trustees to act in the event the first trustee is unable or unwilling to serve or to continue to serve. Such an appointment will serve three valuable purposes. First, it will obviate the necessity for judicial proceedings for the appointment of a successor trustee or cotrustee. Second, it will avoid the expense of premiums for the bonds that must be posted by court-appointed trustees and cotrustees [*see Prob. Code § 15602(a)(3)* (individual trustee not named in will must post bond except under compelling circumstances), *Prob. Code § 15602(a)(1), (2)* (no bond unless required by will or court order); *Prob. Code § 15602(e)* (no bond required of trust company)]. Third, it will insure that a trustee acceptable to the testator will serve in that capacity.

The form set forth below designates two alternate or successor trustees, but may be modified to provide for any number deemed desirable by the attorney and the testator.

The typical testamentary trust will continue for many years. For this reason, alternate and successor trustees able and willing to serve over the full life of the trust should be designated. An aged person, or a person whose health is poor, ordinarily should not be named as an alternate or successor trustee. Many testators and will drafters name corporate trustees as alternate and successor trustees because the corporate trustees may be expected to continue in existence well beyond the lifetimes of the natural persons who are interested in the trust. Even when a corporate trustee is designated, however, it may be advisable to name an alternate or successor, since the corporate trustee may decline to serve or resign the office.

Unless the trust instrument provides otherwise, the powers conferred on the original trustee can properly be exercised by successors to the original trustee [Restatement (Second) of Trusts (1959), § 196] since, in the absence of a contrary direction in the instrument, the powers of the trust attach to the office rather than to the trustee [ *Estate of Canfield* (1947) 80 Cal. App. 2d 443, 447, 181 P.2d 732]. This form makes it clear that the successor trustee has the same powers, rights, discretions, obligations, and immunities as the original trustee. If, for any reason, the testator wishes to restrict the rights or powers of a successor in any, the form should be modified accordingly.

## **[2] FORM**

### **Appointment of Alternate and Successor Trustees and Cotrustees by Testator**

#### **Alternate and Successor Trustees**

If \_\_\_\_\_ [*name of original trustee or cotrustee*] is, for any reason, unable or unwilling to act or to continue to act as \_\_\_\_\_ [Trustee or Cotrustee], then I appoint \_\_\_\_\_ [*name of alternate or successor trustee or cotrustee*], \_\_\_\_\_ [*address*], as \_\_\_\_\_ [Trustee or Cotrustee] of \_\_\_\_\_ [the trust or all of the trusts] provided for under this will, with the same powers, rights, discretions, obligations, and immunities.

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsAdministrationEstate, Gift & Trust LawTrustsTestamentary TrustsEstate, Gift & Trust LawTrustsTrusteesGeneral OverviewEstate, Gift & Trust LawTrustsTrusteesAppointmentEstate, Gift & Trust

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 D. Vacancies in Trusteeship

*24-64B California Legal Forms--Transaction Guide § 64B.271*

**§ 64B.271 Trustee or Cotrustee Authorized to Designate Successor**

**[1] Comment**

**[a] Use of Form**

This form is a will provision that may be used to empower a trustee or cotrustee named in the will to appoint a successor or alternate trustee or cotrustee to serve in the event the first trustee or cotrustee is unable or unwilling to serve. For provisions appointing trustees and cotrustees, see *Ch. 64A, Testamentary Trusts: Trustee Provisions*, §§ 64A.200-64A.202. For a provision appointing alternate or successor trustees or cotrustees by name, see § 64B.270. For a clause providing that, if any cotrustee named in the will is unable or unwilling to act or to continue to act as cotrustee, the powers of the trust may be exercised by the remaining cotrustee or cotrustees, see § 64B.272.

**[b] Power of Trustee to Appoint Successor**

The will may empower the trustee to designate an alternate or successor trustee [*Prob. Code § 15660(b)*]. Such a power does not constitute a delegation of the powers or discretion of the trustee, but rather provides a method, in addition to appointment by the testator or by the court, whereby a trustee may be appointed if the original trustee fails to qualify or becomes unable to serve [ *Estate of Kessler (1953) 120 Cal. App. 2d 383, 388, 261 P.2d 27* ].

The general rule is that the authority of a trustee to name a successor will be strictly construed ["Trustee's appointment of associate or successor trustee under powers of trust instrument," 57 A.L.R. 2d 887, 889 (1958)] . When a provision in a will empowers the trustee to name a successor, however, and the provision is duly followed, the successor takes under the will and derives the power to act from the act of the testator, precisely as though the successor had been originally named therein ["Trustee's appointment of associate or successor trustee under powers of trust instrument," 57 A.L.R. 2d 887, 889 (1958)] .

**[2] FORM**

**Trustee or Cotrustee Authorized to Designate Successor**

### Alternate and Successor Trustees

If \_\_\_\_\_ [the Trustee *or* any Cotrustee] named in this will is, for any reason, unable or unwilling to act or to continue to act as \_\_\_\_\_ [Trustee *or* Cotrustee], \_\_\_\_\_ [he *or* she *or* it] may decline to accept or resign the office and appoint an alternate or successor \_\_\_\_\_ [Trustee *or* Cotrustee] to carry out the terms and provisions of \_\_\_\_\_ [the trust *or* all of the trusts] provided for in this will, with the same powers, rights, discretions, obligations, and immunities as the original \_\_\_\_\_ [Trustee *or* Cotrustee]. Any such appointment may be made only by an instrument in writing signed by the original \_\_\_\_\_ [Trustee *or* Cotrustee] and delivered to each adult income beneficiary, the parent or guardian of each minor income beneficiary, and the \_\_\_\_\_ [Trustee *or* Cotrustee] being appointed.

### Legal Topics:

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsAdministrationEstate, Gift & Trust LawTrustsTestamentary TrustsEstate, Gift & Trust LawTrustsTrusteesGeneral OverviewEstate, Gift & Trust LawTrustsTrusteesAppointmentEstate, Gift & Trust LawTrustsTrusteesRemoval & Resignation



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*24-64B California Legal Forms--Transaction Guide § 64B.272*

**§ 64B.272 Powers of Cotrustee Who Dies or Resigns May Be Exercised by Remaining Cotrustees**

**[1] Comment**

**[a] Use of Form**

This form is a will provision that may be used to provide that if any cotrustee named in the will is unable or unwilling to act or to continue to act as cotrustee, the powers of the trust may be exercised by the remaining cotrustee or cotrustees.

For provisions appointing trustees and cotrustees, see *Ch. 64A, Testamentary Trusts: Trustee Provisions*, §§ 64A.200-64A.202. For a provision appointing alternate or successor trustees or cotrustees by name, see § 64B.270. For a provision authorizing a trustee or cotrustee designated in the will to appoint a successor trustee or cotrustee, see § 64B.271. For provisions dividing or allocating the powers of cotrustees, see *Ch. 64A, Testamentary Trusts: Trustee Provisions*, §§ 64A.360-64A.363.

**[b] Surviving Cotrustees**

Unless the will provides otherwise, if a vacancy occurs in the office of a cotrustee, the remaining cotrustee or cotrustees may act for the trust as if they were the only trustees [*Prob. Code § 15621*; see *Drinkhouse v. Birch Ranch & Oil Co. (1950) 97 Cal. App. 2d 923, 927-928, 219 P.2d 45*; Restatement (Second) of Trusts (1959), § 195]. Whether or not the trust will survive to the remaining trustees depends upon the terms of the trust instrument, which are controlling [*Estate of Tourny (1957) 154 Cal. App. 2d 501, 505, 316 P.2d 763*].

While a will provision authorizing surviving cotrustees to exercise the powers of a cotrustee who withdraws from the trust is not strictly necessary, it may serve the useful purpose of apprising those concerned with the trust that the powers will survive.

**[2] FORM**

**Powers of Cotrustee Who Dies or Resigns May Be Exercised by Remaining Cotrustees**

**Powers of Cotrustee Who Dies or Resigns May Be Exercised by Remaining Cotrustees**

If any Cotrustee named in this will shall, for any reason, fail to qualify or cease to act as Cotrustee, then the powers of that Cotrustee shall survive to the remaining Cotrustee or Cotrustees and shall be exercised by the remaining Cotrustee or Cotrustees in the same manner and to the same extent as if exercised by the withdrawing Cotrustee.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsTestamentary TrustsEstate, Gift & Trust LawTrustsTrusteesGeneral OverviewEstate, Gift & Trust LawTrustsTrusteesDuties & PowersGeneral OverviewEstate, Gift & Trust LawTrustsTrusteesMultiple Trustees



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*24-64B California Legal Forms--Transaction Guide §§ 64B.273-64B.289*

**[Reserved]**

§§ 64B.273[Reserved]



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DIVISION IV: WILLS AND TRUSTS  
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 PART IV. FORMS  
 E. Compensation of Trustees

*24-64B California Legal Forms--Transaction Guide § 64B.290*

**§ 64B.290 Fixed Amount as Compensation**

**[1] Comment**

**[a] Use of Form**

This provision may be used to provide that the trustee or cotrustees will receive a fixed annual amount as compensation for their services. For a provision establishing the trustee's compensation as a percentage of the trust corpus, see § 64B.291. For a provision entitling the trustee to reasonable compensation, see § 64B.292. For a clause providing that a corporate cotrustee will be compensated as if it were sole trustee and that an individual cotrustee will receive no compensation, or nominal compensation, see § 64B.293. For a clause providing for a fractional division of compensation between a corporate cotrustee and an individual cotrustee, see § 64B.294. For a bequest in lieu of compensation, see § 64B.295. For a termination or "wind-up" fee, see § 64B.296.

**[b] Compensation of Trustees**

**[i] In General**

The general rule is that the trustee's compensation is to be determined in accordance with the provisions, if any, of the trust instrument [*Prob. Code § 15680(a)*]. However, this general rule is subject to important qualifications. First, the trustee's compensation may be reduced or denied entirely if a trustee commits (or threatens to commit) a breach of trust [*Prob. Code § 16420(a)(7)*]. Second, the court may allow greater or lesser compensation if the trustee's duties are substantially different from those contemplated when the trust was created [*Prob. Code § 15680(b)(1)*], if compensation in accordance with the trust would be inequitable or unreasonably low or high [*Prob. Code § 15680(b)(2)*], or if other extraordinary circumstances call for equitable relief [*Prob. Code § 15680(b)(3)*]. However, an order fixing or allowing greater or lesser compensation can apply only prospectively to actions taken in administration of the trust after the order is made [*Prob. Code § 15680(c)*].

If the trust instrument does not specify the trustee's compensation, the trustee is entitled to reasonable compensation under the circumstances [*Prob. Code § 15681*]. Although the trustee may fix and pay its compensation without first

obtaining a court order [*Prob. Code § 16243*; see "Recommendation Proposing the Trust Law," 18 Cal. L. Revision Comm'n Reports 501, 655 (1986)], the court, on petition of the trustee or any beneficiary, may review and fix the amount [*Prob. Code § 17200(b)(9)*]. Further, the court may in appropriate cases fix an amount of periodic compensation to continue for as long as the court determines proper [*Prob. Code § 15682*].

A trustee who is also the attorney for the trustee generally may not receive dual compensation for serving as trustee and for acting as attorney for the trustee [*Prob. Code § 15687(a)*], even when the trust instrument authorizes dual compensation [*Prob. Code § 15687(a)*] or waives the rule against dual compensation [*Prob. Code § 15687(e)*]. However, dual compensation is permissible if the trustee is related by blood or marriage to, or is a cohabitant with, the settlor [*Prob. Code § 15687(c)*], or if the court approves the compensation [*Prob. Code § 15687(a),(d)(1)*]; see *Prob. Code § 17200(b)(21)*. Dual compensation may also be received if the trustee gives 30 days advance notice to the beneficiaries and any other persons entitled to notice and, within that period, no objection is received to the dual compensation [*Prob. Code § 15687(d)(2)*]. For further discussion of the rules limiting dual compensation of trustees and attorneys, see § 64B.35[3].

### **[ii] Amount**

There is no inflexible rule for determining the reasonableness of compensation, and when a trustee is entitled to reasonable compensation the actual amount depends largely on the individual circumstances of the case [see *Estate of McLaughlin (1954) 43 Cal. 2d 462, 467-468, 274 P.2d 868*; see discussion in § 64B.35[2]]. Factors that may be considered in determining reasonableness include the income of the trust; the success or failure of the trustee's administration; any unusual skill or experience the trustee may have brought to his or her work; the fidelity or disloyalty displayed; the amount of risk and responsibility assumed; the time consumed in carrying out the trust; the custom in the community as to allowances to trustees by settlors or courts and as to charges exacted by trust companies and banks; whether the work done is routine or involves skill and judgment; and any estimate the trustee has given of the value of the trustee's own services [ *Estate of McLaughlin (1954) 43 Cal. 2d 462, 467-468, 274 P.2d 868* ].

### **[iii] Local Guidelines**

In some counties, the courts have established percentage guidelines for the determination of reasonable trustees' fees [for further discussion of percentages and percentage guidelines, see § 64B.291[1][b][i] et seq.]. In Marin County, for example, one-half of one percent of the principal value plus 10 to 15 percent of the income usually will be considered a reasonable fee if the trustee is actively managing an income-producing trust [Marin County Rules of Probate Practice, § 1407(d)]. If the income-producing property is actively managed real estate, the Marin County rules indicate that a reasonable fee will normally be about three-quarters of one percent of the corpus. If the corpus is a mixture of different types of income-producing properties, a reasonable fee in Marin will normally be a combination of the above percentages [Marin County Rules of Probate Practice, § 1407(d)]. In San Francisco, ordinary fees for trustees must not exceed 1 percent of the value of real estate actually managed by the trustee, eight-tenths of one percent of the first \$400,000 of market value of the remaining assets, and three-quarters of 1 percent of the balance [San Francisco County Probate Policy Manual, § 13.02(b)]. Alternatively, a fee of six percent of income may be allowed in the court's discretion in San Francisco [San Francisco County Probate Policy Manual, § 13.02(b)].

Not every locality has local guidelines. For example, percentage guidelines formerly in effect in the Los Angeles County Superior Court have been abandoned. In Los Angeles County, the test is simply whether the fee is reasonable in view of the work done, the size of the estate, and all the circumstances of the case [Marshall, California Probate Procedure (4th ed., Parker & Son Publications, Inc., 1985), vol. I, § 1728].

### **[iv] Corporate Trustees**

It is customary for corporate trustees to establish fee schedules [see Miller, "Survey of California Corporate Fiduciary

Fees and Practices," Estate Planning, Trust & Prob. News, vol. 6. No. 5 (Summer/Fall 1985), 18-22]. In addition to percentages, some corporate fee schedules include minimum sizes of trusts that will be accepted, minimum annual fees, one-time "start-up" or "acceptance" fees, and one-time termination or "wind-up" fees [for a general discussion of termination or "wind-up" fees, *see* § 64B.296[1][b]; for a will provision providing for a termination fee to be paid to the trustee upon termination of its duties as trustee, *see* § 64B.296]. Before appointing any corporate trustee, the testator and the will drafter should contact the prospective trustee's trust department to determine its policy with respect to fee percentages, minimum trust sizes, minimum annual fees, "wind-up" fees, and any other fees or charges that may be incurred by the trust.

Deregulation of the bank and savings and loan industries has introduced a large measure of competition to the trust business, with the result that the trust policies of banks and savings and loan associations now differ widely and change frequently. While some statewide banks impose high minimum-size requirements (ranging from as little as \$50,000 to as much as \$500,000), other smaller institutions impose none. Some institutions that do not impose minimum-size requirements, however, impose minimum annual fees (ranging from as little as \$500 to as much as \$2,500) which make it economically prohibitive for very small trusts to be committed to their care. While some institutions impose miscellaneous fees and charges (such as "acceptance" or "wind-up" fees), others do not.

The investment duties required of the trustee may also affect the fees charged by a corporate trustee. Many corporate trustees will charge less for assets which are invested only in common trust funds. If the testator is concerned about minimizing the fees charged by a corporate trustee, the will drafter should inquire of the prospective corporate trustee if reduced fees are available for trusts that require limited investment activity on the part of the trustee [*see* Miller, "Survey of California Corporate Fiduciary Fees and Practices," Estate Planning, Trust & Prob. News, vol. 6. No. 5 (Summer/Fall 1985), 18-22].

In *Estate of Taylor* [(1970) 6 Cal. App. 3d 16, 21-22, 85 Cal. Rptr. 474], a corporate trustee sought and was granted a higher fee than that provided for in the will upon a showing that trustee fee schedules customarily used in the community provided for higher compensation. The will fixed the trustee's compensation as one-quarter of 1 percent of the value of the corpus. A corporate trustee sought and was granted three-quarters of 1 percent upon testimony that its currently disseminated fee schedule called for compensation of three-quarters of 1 percent, that this rate was competitive and in line with those of other corporate trustees in the community, and that no competent trustee would undertake the trust for less than the larger fee [ *Estate of Taylor* (1970) 6 Cal. App. 3d 16, 21-22, 85 Cal. Rptr. 474].

#### **[v] Extraordinary Services**

The compensation provided for in the trust instrument will usually cover only "ordinary" services. If and when the trustee renders "extraordinary" services, the trustee may be entitled to additional compensation [*see Prob. Code* § 15680(b); *see also* discussion in § 64B.290[1][b][i]]. "Ordinary" services are those which trustees usually and customarily render on a continuing basis; "extraordinary" services are those which are not usually rendered by trustees, or are rendered only in unusual circumstances [*see* Scott, *The Law of Trusts* (3d ed., Little, Brown & Co., 1967), vol. III, § 242.2]. Neither the cases nor the statutes comprehensively define "ordinary" or "extraordinary" services; however, the Probate Code offers examples of services which, when performed by executors and administrators, will be deemed "extraordinary" and for which extra compensation may be awarded. Although not directly applicable to services rendered by trustees, these examples are illustrative of the kind of services that are deemed extraordinary. They include sales or mortgages of real or personal property; contested or litigated claims against the estate; preparation of estate, income, sales or other tax returns; adjustment, litigation, or payment of taxes; litigation in regard to the estate or estate property; and carrying on a business [Prob. Code § 902].

#### **[vi] Apportionment Among Cotrustees**

Unless the trust instrument provides (or the cotrustees agree) otherwise, when there are two or more cotrustees, the

compensation must be apportioned among them according to the services they have rendered [*Prob. Code § 15683*].

### **[c] Reimbursement of Expenses**

In addition to compensation, a trustee is entitled to repayment out of the trust property for expenditures that were properly incurred in the administration of the trust [*Prob. Code § 15684(a)*]. Even if the expenditures were not properly incurred in the administration of the trust, the trustee is entitled to repayment out of the trust property if and to the extent that the expenditures actually benefited the trust [*Prob. Code § 15684(b)*].

If litigation is necessary to preserve the trust, the trustee is entitled to reimbursement for his or her expenditures from the trust. However, if the litigation is specifically for the trustee's benefit, the trustee must bear his or her own costs, and is not entitled to reimbursement [ *Terry v. Conlan (2005) 131 Cal. App. 4th 1445, 1461, 1464, 33 Cal. Rptr. 3d 603* (trustee who did not participate in litigation as neutral trustee to defend trust and protect its assets, but rather to pursue her own interests and those of her siblings to detriment of other beneficiary, was required to bear her own costs)]. If the litigation does not involve a challenge to the existence of the trust, but is a dispute over who will control and benefit from it, the trustee is not entitled to reimbursement because no matter who prevails in the litigation, the trust will remain intact, and the trustee's only participation in the litigation should be that of a neutral party [ *Terry v. Conlan (2005) 131 Cal. App. 4th 1445, 1461, 33 Cal. Rptr. 3d 603* ] .

Further, a trustee who has made advances for the protection of the trust has an equitable lien on the trust property to secure repayment of those advances, plus interest [*Prob. Code § 15685*]. The effect of this lien is to relieve the trustee of any obligation to transfer the trust property to the beneficiary until the trustee is paid or his or her right to payment is otherwise secured [*see* Restatement (Second) of Trusts, § 244, Comment c and discussion in § 64B.35[8]].

## **[2] FORM**

### **Fixed Amount as Compensation**

#### **Compensation of Trustee(s)**

\_\_\_\_\_ [The Trustee *or* Each of the Trustees] shall be entitled to receive \_\_\_\_\_ [specify amount] per year for all ordinary services rendered as \_\_\_\_\_ [Trustee *or* Cotrustee] in behalf of the trust provided for in this will, and to reasonable additional compensation for any extraordinary services rendered, all without court order. If a Trustee serves for only part of a calendar year, the annual compensation shall be prorated.

### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsTestamentary TrustsEstate, Gift & Trust LawTrustsTrusteesGeneral OverviewEstate, Gift & Trust LawTrustsTrusteesDuties & PowersCompensation



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*24-64B California Legal Forms--Transaction Guide § 64B.291*

**§ 64B.291 Percentage of Principal as Compensation**

**[1] Comment**

**[a] Use of Form**

This form is a will provision that may be used to fix the trustee's compensation at a percentage of the trust corpus. For a clause providing that the trustee or cotrustees will receive a fixed amount as compensation, see § 64B.290. For a provision entitling the trustee to reasonable compensation, see § 64B.292. For a clause providing that a corporate cotrustee will be compensated as if it were sole trustee and that an individual cotrustee will receive no compensation, or compensation in a nominal amount, see § 64B.293. For a clause providing for a fractional division of compensation between a corporate cotrustee and an individual cotrustee, see § 64B.294. For a bequest in lieu of compensation, see § 64B.295. For a termination or "wind-up" fee, see § 64B.296.

**[b] Compensation As a Percentage**

**[i] Court Guidelines**

Percentage guidelines for the determination of trustees' fees have been established by some courts in California [*see* discussion in § 64B.290[1][b][iii]] and are often employed by corporate trustees in determining their compensation [*see* discussion in § 64B.290[1][b][iv]]. When percentage guidelines are used, they vary considerably, depending on the type of property held by the trust and the expected difficulty of administration.

**[ii] Variable Percentages**

The percentages may vary from as little as one-half of one percent to as much as a full percent, and the base may be either the value of the trust principal or the annual income of the trust. Alternatively, compensation may be equal to a percentage of the value of the principal plus a percentage of the annual income. In one California county, for example, the percentage guidelines established by the probate court call for trustee compensation of one-half of 1 percent of the value of the trust principal plus 10 to 15 percent of the annual income, if the trust is an income-producing trust. If the

income-producing property is actively managed real estate, the same court's guidelines call for compensation equal to three-quarters of 1 percent of the value of the trust principal. In another county, the probate court's percentage guidelines limit the maximum fees to 1 percent of the value of real estate actually managed by the trustee, plus eight-tenths of 1 percent of the first \$400,000 of market value of the remaining assets and three-quarters of 1 percent of the balance. In the alternative, the same court's guidelines provide that compensation may be equal to 6 percent of the annual income of the trust. The fees charged by corporate trustees are often equal to three-quarters of 1 percent of the value of the trust principal [ *Estate of Taylor (1970) 6 Cal. App. 3d 16, 21-22, 85 Cal. Rptr. 474* ; for a general consideration of percentage guidelines for the determination of trustees' fees, see discussion in § 64B.290[1][b][iii]].

### **[iii] Annual Revaluations of Principal**

It is customary for corporate trustees to revalue the trust principal on a yearly basis for the purpose of determining their compensation; and it is proper for the court, in determining the amounts of that compensation, to consider the custom [ *Estate of Guasti (1953) 117 Cal. App. 2d 612, 616-617, 256 P.2d 629* ].

## **[2] FORM**

### **Percentage of Principal as Compensation**

#### **Compensation of Trustee(s)**

\_\_\_\_\_ [The Trustee *or* Each of the Trustees] shall be entitled to receive \_\_\_\_\_ percent of the fair market value of the principal of the trust estate, as determined on an annual basis, during each calendar year for all ordinary services rendered as \_\_\_\_\_ [Trustee *or* Cotrustee] in behalf of the trust provided for in this will, and to reasonable additional compensation for any extraordinary services rendered, all without court order. If a Trustee serves for only part of a calendar year, the annual compensation shall be prorated.

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:

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*24-64B California Legal Forms--Transaction Guide § 64B.292*

**§ 64B.292 Reasonable Compensation**

**[1] Comment**

**[a] Use of Form**

This form is a will provision that may be used to provide that the trustee or cotrustees will receive reasonable compensation for their services as trustees. If the prospective trustee or cotrustee is a corporate trustee (such as a bank or trust company), the form may be used to provide that the trustee or cotrustee will receive reasonable fees to be determined in accordance with its standard fee schedule as that schedule exists from time to time. For a general discussion of the compensation of corporate trustees, see § 64B.290[1][b][iv].

For a clause providing that the trustee or cotrustees will receive a fixed amount as compensation, see § 64B.290. For a provision establishing the trustee's compensation as a percentage of the trust corpus, see § 64B.291. For a clause providing that a corporate cotrustee will be compensated as if it were sole trustee and that an individual cotrustee will receive no compensation, or nominal compensation, see § 64B.293. For a clause providing for a fractional division of compensation between a corporate cotrustee and an individual cotrustee, see § 64B.294. For a bequest in lieu of compensation, see § 64B.295. For a termination or "wind-up" fee, see § 64B.296.

For a general discussion of trustee compensation, see § 64B.290[1].

**[b] Reasonable Compensation**

**[i] In General**

What constitutes reasonable compensation will vary according to the circumstances of each case, and the court has wide discretion to determine the amount [ *Estate of McLaughlin (1954) 43 Cal. 2d 462, 468, 274 P.2d 868* ; for a consideration of factors properly considered in determining reasonable compensation, see discussion in § 64B.290[1][b][ii].

**[ii] Advantages**

A will provision allowing the trustee reasonable compensation will, in appropriate circumstances, serve the interests of both the trustee and the trust estate. Such a provision will avoid the rigidity of a fee schedule, which may be unfair to the trustee (or to the trust) if investment conditions change significantly. A trustee may have a greater incentive to serve the best interests of the trust if the trustee knows that, in any event, the compensation received will be adequate. Reasonable compensation may, in some cases, be less than either a fixed fee or a fee determined by the percentage method, thus resulting in savings for the trust.

**[iii] Disadvantages**

If the will provides simply that the trustee will receive reasonable compensation, and if the trustee and the beneficiaries do not agree as to what is reasonable under the circumstances, it may be necessary to seek a court determination of the amount. Although a trustee may fix and pay its compensation without first obtaining a court order [*Prob. Code* § 16243; see "Recommendation Proposing the Trust Law," 18 Cal. L. Revision Comm'n Reports 501, 655 (1986)], the court, on petition of the trustee or any beneficiary, may fix the amount [*Prob. Code* § 17200(b)(9)]. Further, the court may in appropriate cases fix an amount of periodic compensation to continue for as long as the court determines proper [*Prob. Code* § 15682]. Providing for a fixed fee may help to avoid the necessity for seeking a court determination and save the trust estate the time, expense, and inconvenience attendant upon judicial proceedings.

**[iv] Compensation in Accordance With Trustee's Standard Fee Schedule**

The necessity of seeking a judicial determination of the amount of the trustee's fee may also be avoided by providing that the trustee will receive a reasonable fee to be determined in accordance with the trustee's standard schedule of trustee fees.

Nearly every corporate trustee maintains and disseminates a standard schedule of trust fees [for a general discussion of the compensation of corporate trustees, see discussion in § 64B.290[1][b][iv]]. A will provision basing the trustee's compensation on its own fee schedule will have several distinct advantages. First, it will provide a convenient method for precisely determining the amount of the trustee's fees. Second, it will assure the trustee and the other persons interested in the trust that the fee will be reasonable. Third, it will automatically be acceptable to the trustee, since it will be based on the trustee's own schedule.

It should be remembered that a person named as trustee in the trust instrument may reject the trust [*Prob. Code* §§ 15601, 15643(a)] and that a trustee who has accepted the trust may resign [*Prob. Code* §§ 15640, 15643(c)]. Compensation that is acceptable to the trustee may help to assure that a competent trustee will continue to serve.

**[2] FORM****Reasonable Compensation****Compensation of Trustee(s)**

\_\_\_\_\_ [The Trustee or Each of the Trustees] shall be entitled to receive reasonable compensation for all ordinary services rendered as \_\_\_\_\_ [Trustee or Cotrustee] in behalf of the trust provided for in this will [*add, if trustee will be corporate trustee: to be determined in accordance with the Trustee's standard schedule of trust fees from time to time existing*], and to reasonable additional compensation for any extraordinary services rendered, all without court order.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

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*24-64B California Legal Forms--Transaction Guide § 64B.293*

**§ 64B.293 Corporate Cotrustee to Be Compensated as if It Were Sole Trustee; Individual Cotrustee to Receive No Compensation or Nominal Fee**

**[1] Comment**

**[a] Use of Form**

This form is a will provision that may be used to provide that a corporate cotrustee will be compensated as if it were the sole trustee of the trust, and that an individual cotrustee will receive no compensation or nominal compensation. For a clause providing that the trustee or cotrustees will receive a fixed amount as compensation, see § 64B.290. For a provision establishing the trustee's compensation as a percentage of the trust corpus, see § 64B.291. For a provision entitling the trustee to reasonable compensation, see § 64B.292. For a clause providing for a fractional division of compensation between a corporate cotrustee and an individual cotrustee, see § 64B.294. For a bequest in lieu of compensation, see § 64B.295. For a termination or "wind-up" fee, see § 64B.296.

**[b] Apportionment of Compensation Between Cotrustees**

Unless the trust instrument provides (or the cotrustees agree) otherwise, when there are two or more cotrustees, the compensation must be apportioned among them according to the services they have rendered [*Prob. Code § 15683*]. Problems of apportionment frequently arise when one of the cotrustees is a corporate trustee, e.g., a bank or trust company. Since corporate trustees almost invariably have custody of all money, securities, and other personal property of the trust estate, maintain all records and accounts for the trust, receive all receipts, and make all necessary payments, disbursements, and distributions [*see Ch. 64A, Testamentary Trusts: Trustee Provisions, § 64A.365*], they usually expect the same compensation that a sole trustee would receive. Some corporate trustees strongly suggest that the will include a provision entitling them to such compensation. This form provides that the corporate cotrustee will receive the same compensation as a sole trustee. In addition, it provides that the individual trustee named in the trust will receive no compensation or, in the alternative, nominal compensation. An individual trustee may be willing to serve without compensation, or with merely nominal compensation, if he or she is a family member or an income or remainder beneficiary under the trust.

A trustee who does not receive compensation will be held to the same standards as a trustee who does receive compensation, since the standard of care required of trustees is not affected by whether or not they receive any compensation [*Prob. Code § 16041*].

**[2] FORM**

**Corporate Cotrustee to Be Compensated as if It Were Sole Trustee; Individual Cotrustee to Receive No Compensation or Nominal Fee**

**Corporate Cotrustee to Receive Same Compensation as if It Were Sole Trustee**

For its services as cotrustee in behalf of the trust provided for in this will, \_\_\_\_\_ [*name of corporate cotrustee*] shall receive the same compensation that it would receive if it were acting as the sole Trustee.

\_\_\_\_\_ [*name of individual cotrustee*] shall receive \_\_\_\_\_ [no compensation or specify nominal amount, e.g., the sum of \$150 annually] for \_\_\_\_\_ [his or her] services as cotrustee.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

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*24-64B California Legal Forms--Transaction Guide § 64B.294*

**§ 64B.294 Fractional Division of Compensation Between Corporate and Individual Cotrustees**

**[1] Comment--Use of Form**

This form is a will provision that may be used to provide for a fractional division of compensation between a corporate cotrustee and an individual cotrustee. For a clause providing that the trustee or cotrustees will receive a fixed amount as compensation, see § 64B.290. For a provision establishing the trustee's compensation as a percentage of the trust corpus, see § 64B.291. For a provision entitling the trustee to reasonable compensation, see § 64B.292. For a clause providing that a corporate cotrustee will be compensated as if it were sole trustee and that an individual cotrustee will receive no compensation, or nominal compensation, see § 64B.293. For a bequest in lieu of compensation, see § 64B.295. For a termination or "wind-up" fee, see § 64B.296.

For a general discussion of trustee compensation, see § 64B.290[1]. For problems that arise in the apportionment of compensation among cotrustees and possible drafting solutions to those problems, see § 64B.293[1].

**[2] FORM**

**Fractional Division of Compensation Between Corporate and Individual Cotrustees**

**Division of Compensation Between Corporate and Individual Cotrustees**

For \_\_\_\_\_ [his or her] services as trustee on behalf of the trust provided for in this will, \_\_\_\_\_ [name of individual cotrustee] shall receive a sum equal to \_\_\_\_\_ [specify fractional amount, e.g., one tenth or one half] of the total trustee's compensation, and, for its services as trustee, \_\_\_\_\_ [name of corporate cotrustee] shall receive the balance.

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
 Estate, Gift & Trust LawTrustsTrusteesGeneral OverviewEstate, Gift & Trust LawTrustsTrusteesDuties &

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*24-64B California Legal Forms--Transaction Guide § 64B.295*

**§ 64B.295 Bequest in Lieu of Compensation**

**[1] Comment**

**[a] Use of Form**

This form is a will provision that may be used to make a bequest in lieu of compensation. The form includes two alternative provisions. The first alternative provision describes the bequest to be made. The second refers to a bequest made in another paragraph of the will. For a clause providing that the trustee or cotrustees will receive a fixed amount as compensation, see § 64B.290. For a provision establishing the trustee's compensation as a percentage of the trust corpus, see § 64B.291. For a provision entitling the trustee to reasonable compensation, see § 64B.292. For a clause providing that a corporate cotrustee will be compensated as if it were sole trustee and that an individual cotrustee will receive no compensation, or nominal compensation, see § 64B.293. For a clause providing for a fractional division of compensation between a corporate cotrustee and an individual cotrustee, see § 64B.294. For a termination or "wind-up" fee, see § 64B.296.

For a general discussion of trustee compensation, see § 64B.290[1].

**[b] Bequest in Lieu of Compensation**

If the will makes a bequest to a person who is also appointed as trustee, it is a question of interpretation whether the bequest is intended to be in addition to or in lieu of the trustee's regular compensation [Restatement (Second) of Trusts, § 242, comment f]. It is also a question of interpretation whether the bequest is intended to be unconditional or conditioned upon the trustee either qualifying as trustee or completely performing the duties of the office. In the absence of evidence of a different intention, the inference is that a bequest to a trustee is not conditional [Restatement (Second) of Trusts, § 242, comment f].

**[c] Tax Considerations**

Tax considerations may affect a testator's decision to provide compensation for a trustee or to make a bequest to the

trustee in lieu of compensation; and, if a bequest is made, similar considerations may affect the decision to make the bequest conditional or unconditional.

A gift, bequest, devise, or inheritance is not subject to income tax [*I.R.C. § 102(a)*], while compensation received for services as trustee is, like other compensation for personal services, subject to tax [*I.R.C. § 61(a)(1)* (gross income defined)]. Similarly, an unconditional bequest is not subject to income tax, while a bequest that is conditional upon the performance of services will be subject [*see cases discussed below*].

In *United States v. Merriam* [(1923) 263 U.S. 179, 44 S. Ct. 69, 68 L. Ed. 240], the will made large bequests to each of five named individuals. In another part of the same will, the testator appointed the same individuals as co-executors of his estate and cotrustees of the trusts provided for in the will, stating that the bequests were in lieu of all compensation or commissions to which the named individuals would otherwise be entitled as executors or trustees. The United States Supreme Court held that the bequests were not subject to income tax, since qualification as co-executors and cotrustees, and not actual service in that capacity, was the only condition of the bequests. The test was not whether the testator gave the legacies for services, but whether the legatees had to perform the services in order to earn the bequests [United States v. Merriam (1923) 263 U.S., 179, 68 L. Ed. 3d 240, 44 S. Ct. 69; *see Bank of New York v. Helvering* (2d Cir. [N.Y.] 1943) 132 F.2d 773, 774].

In *Ream v. Bowers* (2d Cir. [N.Y.] 1927) 22 F.2d 465, the will provided that "my executors shall each be paid and shall each receive in full payment for all commissions, percentages, and allowances by statute or otherwise, for acting as executors ... the sum of \$50,000." The court held that the \$50,000 was directed to be paid for personal services, was not a bequest, and was subject to income tax [ *Ream v. Bowers* (2d Cir. [N.Y.] 1927) 22 F.2d 465, 468 ]. In *Bank of New York v. Helvering* [(2d Cir. [N.Y.] 1943) 132 F.2d 773], the will named two individuals of advanced age as trustees of the testator's estate and gave to each five percent of the principal of the estate and five percent each year upon the income "in lieu of statutory commissions." The court held that the payments received were bequests and not taxable compensation, since the trustees did not have to serve, but only to qualify, in order to receive the original five percent [ *Bank of New York v. Helvering* (2d Cir. [N.Y.] 1943) 132 F.2d 773, 775 ]. The circumstances of each case will dictate the correct interpretation to be given to the will provision [ *Bank of New York v. Helvering* (2d Cir. [N.Y.] 1927) 132 F.2d 773, 775 ].

When deciding whether to make a bequest in lieu of compensation and, if a bequest is made, whether to make the bequest conditional or unconditional, the tax needs and liabilities of the trust and the trustees should be considered. If a bequest in lieu of compensation is conditioned upon actual service as trustee, the bequest will be taxable to the trustee and deductible to the trust. If the bequest is unconditional, it will not be taxable to the trustee. It will, however, be included in the gross estate for federal estate tax purposes and will not be deductible to the trust [*see cases discussed above*]. The parties should therefore consider income tax brackets of the estate and all trustees.

## [2] FORM

### Bequest in Lieu of Compensation

### Bequest in Lieu of Compensation

[First alternative: bequest described]

I give \_\_\_\_\_ [describe bequest, e.g., the sum of \$10,000,000] to \_\_\_\_\_ [name of trustee or cotrustee or the Trustee named in Paragraph \_\_\_\_\_ of this will]. This bequest is in lieu of all compensation to which \_\_\_\_\_ [he or she] would otherwise be entitled as a \_\_\_\_\_ [Trustee or Cotrustee], and shall be payable to \_\_\_\_\_ [him or her] whether or not \_\_\_\_\_ [he or she] agrees or qualifies to act as \_\_\_\_\_ [Trustee or Cotrustee].

[OR]

[*Second alternative: reference to bequest described elsewhere in will.*]

The bequest to \_\_\_\_\_ [*name of trustee or cotrustee*] made in Paragraph \_\_\_\_\_ of this will is in lieu of all compensation to which \_\_\_\_\_ [*he or she*] would otherwise be entitled as \_\_\_\_\_ [*Trustee or Cotrustee*], and shall be payable to \_\_\_\_\_ [*him or her*] whether or not \_\_\_\_\_ [*he or she*] agrees or qualifies to act as \_\_\_\_\_ [*Trustee or Cotrustee*].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsAdministrationEstate, Gift & Trust LawTrustsTrusteesGeneral OverviewEstate, Gift & Trust LawTrustsTrusteesDuties & PowersCompensation



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 E. Compensation of Trustees

*24-64B California Legal Forms--Transaction Guide § 64B.296*

**§ 64B.296 Termination Fee**

**[1] Comment**

**[a] Use of Form**

This form is a will provision that may be used to provide for a "termination fee," to be paid to the trustee upon termination of its duties as trustee. The amount of the fee is a percentage of the value of the trust principal. For will provisions providing for the trustee's compensation for services as trustee, see §§ 64B.290-64B.295. For a general discussion of trustee compensation, see § 64B.290[1].

**[b] Termination Fee**

When a trustee's duties are terminated for some reason other than failure to perform his or her duties properly, the trustee is ordinarily entitled to special compensation, often referred to as a "wind-up," "termination," or "distribution" fee [*see* Estate of Baird (1955) 135 Cal. App. 2d 343, 348-349, 287 P.2d 372 ]. Some corporate trustees charge such fees as a matter of policy [*see* discussion in § 64B.290[1][b]]. The purpose of this fee is to compensate the trustee for "winding up" the trust affairs and transferring the assets to the new trustee, or to the other person or persons entitled to the assets under terms of the trust.

Although it may be difficult for the testator to anticipate the proper amount of a "wind-up" or "termination" fee, failure to make any provision for the trustee's compensation upon termination could force the withdrawing trustee to petition the court for compensation. To avoid the time, expense, and inconvenience of such a petition, it is recommended that the will include a provision for a termination fee, to be expressed as a percentage of the trust corpus at the time of termination.

**[2] FORM**

**Termination Fee**

**Termination Fee**

If, at any time, the duties of the Trustee shall be terminated for any reason other than the failure of the Trustee properly to perform those duties, the Trustee shall be entitled to receive, out of the principal of the trust estate, a fee to compensate the Trustee for the termination of its services, for winding up the affairs of the trust, and for delivering the trust assets and records to a successor Trustee or Cotrustees, or to any other person or persons who may be entitled to receive them under the terms of this will. This fee shall be equal to \_\_\_\_\_ [*specify percentage, e.g.: three-quarters of one*] percent of the fair market value of all of the trust principal at the time of termination, and shall be in addition to any other compensation which the Trustee shall be entitled to receive for its services as Trustee.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsTrusteesGeneral OverviewEstate, Gift & Trust LawTrustsTrusteesDuties & PowersCompensationEstate, Gift & Trust LawTrustsTrusteesRemoval & Resignation



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*24-64B California Legal Forms--Transaction Guide §§ 64B.297-64B.309*

**[Reserved]**

§§ 64B.297[Reserved]



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 PART IV. FORMS  
 F. Bonds and Exculpatory Clauses

*24-64B California Legal Forms--Transaction Guide § 64B.310*

**§ 64B.310 Waiver of Bond**

**[1] Comment**

**[a] Use of Form**

This form is a will provision that may be used to waive the requirement that the trustee file a bond. The form includes two alternative provisions. The first alternative may be used to waive a bond of any trustee or cotrustee, whether named in the will, appointed by the court, or appointed in the manner provided for in the will. The second may be used to waive a bond unless a timely demand for a bond is made by a beneficiary.

**[b] Trustee Bonds**

Under the Trust Law [*Prob. Code §§ 15000-18201*], there is no general requirement that the trustee of a California trust post a bond to secure the performance of his or her duties. A bond will be required, however, if the trust instrument requires one [*Prob. Code § 15602(a)(1)*], if the court finds a bond necessary to protect the interests of the beneficiaries or other persons having an interest in the trust [*Prob. Code § 15602(a)(2)*], or if an individual who is not named as trustee in the trust instrument is appointed as trustee by the court [*Prob. Code § 15602(a)(3)*; see discussion in § 64B.36]. The court may excuse the requirement of a bond, reduce or increase the amount of the bond, release a surety, or permit the substitution of another bond with the same or different sureties [*Prob. Code § 15602(b)*]. However, the court may not excuse the requirement of a bond for an individual who is not named as a trustee in the trust instrument that the court appoints as trustee, except under compelling circumstances. A request by all of the adult beneficiaries of a trust that the bond be waived for this individual constitutes a compelling circumstance [*Prob. Code § 15602(b)*]. Under no circumstances will a trust company [see *Fin. Code § 107*; *Prob. Code § 83* ("trust company" defined); see also discussion in *Ch. 64A, Testamentary Trusts: Trustee Provisions, § 64A.30[3]*] be required to give a bond [*Prob. Code § 15602(e)*]. Even when the law requires a bond, the requirement may be waived if all the beneficiaries and creditors consent and there are no minor or unascertained beneficiaries [ *Estate of Shapiro (1947) 79 Cal. App. 2d 731, 733-734, 181 P.2d 117* ].

Since a bond generally is an unnecessary expense, a provision waiving bond will be desirable in most circumstances. If

the testator does not have sufficient confidence in the integrity of the prospective trustee to waive a bond for that trustee, a trustee in whom the testator reposes greater confidence probably should be appointed. However, a bond will insure that the beneficiaries will have added protection in the event of a breach of the trust, which may result from negligent acts or omissions as well as from intentional wrongdoing or dishonesty. If a bond is required, the premium is a proper charge against the trust estate and need not be borne by the trustee personally [*Prob. Code § 15602(d)*]. Whether or not a bond should be waived is a matter that should be determined under the circumstances of each case.

If the testator does not choose to provide that a bond will never be required, the will may provide that a bond will not be required unless demanded by a beneficiary. If this provision is adopted, the option to require a bond of a particular trustee or cotrustee may be exercised by one or more of the persons who are most interested in the trust. The second alternative provision set forth below will accomplish this object.

**[2] FORM**

**Waiver of Bond**

**Waiver of Bond**

*[First alternative: no bond required.]*

No bond shall be required of any trustee of the trust provided for in this will, whether named in this will, appointed by the court, or appointed in the manner provided for in this will.

*[OR]*

*[Second alternative: No bond required unless demanded by beneficiary.]*

No bond shall be required of any trustee of the trust(s) provided for in this will, whether named in this will, appointed by the court, or appointed in the manner provided for in this will, unless demanded by one or more of the income or remainder beneficiaries in the manner set forth in this paragraph. If written demand for a bond is delivered by any beneficiary to any trustee within \_\_\_\_\_ [*specify time, e.g., 10 days*] after petition for appointment of that trustee is filed with the court, or all or any part of the trust estate is distributed to that trustee, whichever shall first occur, that trustee shall be required to give a bond in the form and amount required of an administrator of a decedent's estate.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsAdministrationEstate, Gift & Trust LawTrustsTestamentary TrustsEstate, Gift & Trust LawTrustsTrusteesGeneral OverviewEstate, Gift & Trust LawTrustsTrusteesDuties & PowersClaims By & AgainstEstate, Gift & Trust LawTrustsTrusteesDuties & PowersStandards of Care



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*24-64B California Legal Forms--Transaction Guide § 64B.311*

**§ 64B.311 Provision Relieving Trustee of Liability For Acts and Omissions of Agents and Attorneys**

**[1] Comment**

**[a] Use of Form**

This provision may be used to relieve the trustee of liability for the acts of attorneys, agents, or advisers employed by the trustee if reasonable care was used in their selection. For provisions relieving the trustee of liability for the trustee's own acts or omissions, see § 64B.312. For a provision authorizing the trustee to employ agents, attorneys, and advisers, see *Ch. 64A, Testamentary Trusts: Trustee Provisions, § 64A.320*.

**[b] Liability of Trustee for Acts of Agents and Employees**

**[i] Liability to Beneficiaries**

The circumstances under which trustees may be held liable to beneficiaries for acts or omissions of agents employed by the trustees in the administration of their trusts are spelled out in the Trust Law. First, the act or omission of which the beneficiary complains must be one that would constitute a breach of the trust if committed by the trustee personally [*Prob. Code § 16401(b)*; see *Prob. Code § 16400* (breach of trust is violation of any duty trustee owes to beneficiary)]. Second, the trustee may be held liable for an act or omission of an agent only in one or more of the following situations [*Prob. Code § 16401(b)*]:

- If the trustee directs the act of the agent.
- The trustee delegates to the agent the authority to perform an act that the trustee is under a duty not to delegate.
- The trustee does not use reasonable prudence in the selection or retention of the agent.
- The trustee does not periodically review the agent's overall performance and compliance with the

terms of the delegation.

- The trustee conceals the act of the agent.
- The trustee neglects to take reasonable steps to compel the agent to redress the wrong in a case in which the trustee knows of the agent's acts or omissions.

Whether a trustee has acted reasonably in selecting, retaining, supervising, or otherwise exercising the trustee's responsibilities with respect to an agent depends upon application of the prudent person rule [*Prob. Code § 16040(a)*]; see "Recommendation Proposing the Trust Law," 18 Cal. L. Revision Comm'n Reports 501, 707 (1986); see also discussion in *Ch. 64A, Testamentary Trusts: Trustee Provisions, § 64A.39[7]*].

### **[ii] Liability to Third Parties**

The trustee's liability to third persons is governed by different rules. In general, trustees are not personally liable to third persons on contracts entered into in their fiduciary capacities unless they fail to reveal their representative capacities or identify their trusts in the contract [*Prob. Code § 18000(a)*]; but see *Prob. Code § 18000(b)* (rule applies only to contracts entered into on or after July 1, 1987)]. A trustee is personally liable to third persons for obligations arising from ownership or control of trust property or for torts committed in the course of administration of the trust only if the trustee is personally at fault [*Prob. Code §§ 18001, 18002*]. To meet this burden, the party seeking to impose personal liability on the trustee must demonstrate that the trustee intentionally or negligently acted or failed to act in a manner that establishes personal fault [ *Haskett v. The Villas at Desert Falls (2001) 90 Cal. App. 4th 864, 877-878, 108 Cal. Rptr. 2d 888* ].

Special rules exempt cotrustees from liability to third persons if they do not join in exercising powers held by three or more cotrustees [*Prob. Code § 18003*] or if they dissent from certain actions taken by their cotrustees [*Prob. Code § 18003(b)*].

Regardless of whether or not the trustees are personally liable, third persons may assert contract, property, or tort claims against the trustees in their representative capacities [*Prob. Code § 18004*]. Third parties may proceed against the trustee's personal assets only if the trustee is personally liable on the claim [ *Haskett v. The Villas at Desert Falls (2001) 90 Cal. App. 4th 864, 880, 108 Cal. Rptr. 2d 888* ]. Any question of liability as between the trust estate and the trustee personally may be determined by the court on petition of any trustee or beneficiary [*Prob. Code § 18005*; see *Prob. Code § 17200(b)*].

### **[c] Exculpatory Provisions**

An exculpatory provision in a trust instrument will be effective to relieve a trustee of liability for breach of trust [*Prob. Code § 16461(a)*]. Since exculpatory provisions are effective to relieve trustees of liability for breach of trust only [see *Prob. Code § 16461(a)*], and since a breach of trust consists of a violation of a duty that the trustee owes to a beneficiary and not to a third party [*Prob. Code § 16400*], it follows that an exculpatory provision will be ineffective to relieve the trustee of any liability the trustee may have to a third party. Further, an exculpatory provision will not relieve a trustee of liability for a breach of trust committed intentionally, with gross negligence, in bad faith, or with reckless indifference to the interests of the beneficiaries [*Prob. Code § 16461(b)(1)*]; nor will such a provision relieve a trustee of liability for any profit that the trustee derives from a breach of trust [*Prob. Code § 16461(b)(2)*].

Although exculpatory clauses are widely recognized and enforced [see Restatement (Second) of Trusts, vol. 3, Appendix, § 222, Reporter's Notes], they are strictly construed [Restatement (Second) of Trusts, § 222, comment a]. An exculpatory clause will be effective to relieve a trustee of liability only to the extent to which it is clearly provided that the trustee will be excused [ *Corbett v. Benioff (1932) 126 Cal. App. 772, 776, 14 P.2d 1028* ].

**[2] FORM****Provision Relieving Trustee of Liability For Acts and Omissions of Agents and Attorneys****Limitation on Liability of Trustee**

The Trustee may rely on information or advice given by any custodian, investment adviser, accountant, attorney, or other agent or adviser employed by the Trustee for the purpose of assisting the Trustee in the proper management and administration of the trust. The Trustee shall not be personally liable for any neglect, omission, or wrongdoing of any custodian, investment adviser, accountant, attorney, or any other agent or adviser so employed, provided that reasonable care was exercised in his or her selection.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsAdministrationEstate, Gift & Trust LawTrustsTestamentary TrustsEstate, Gift & Trust LawTrustsTrusteesGeneral OverviewEstate, Gift & Trust LawTrustsTrusteesDuties & PowersClaims By & AgainstEstate, Gift & Trust LawTrustsTrusteesDuties & PowersStandards of Care



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*24-64B California Legal Forms--Transaction Guide § 64B.312*

**§ 64B.312 Provision Relieving Trustee of Liability for Trustee's Own Acts and Omissions**

**[1] Comment**

**[a] Use of Form**

This form is a will provision that may be used to relieve the trustee of liability for the trustee's own acts and omissions. Two alternative provisions are included. The first may be used to relieve the trustee of liability for any act or omission that was not committed intentionally, with gross negligence, in bad faith, or with reckless indifference to the interests of the beneficiaries, and from which the trustee did not derive a profit. The second may be used to relieve the trustee of liability for any act or omission that results from good faith reliance on the opinions of attorneys employed by the trustee.

For a provision permitting the trustee to employ custodians, agents, advisers, and attorneys to assist and advise the trustee in the execution of the trust, see *Ch. 64A, Testamentary Trusts: Trustee Provisions, § 64A.320*.

**[b] Related Provision**

This form is to be distinguished from the form in § 64B.311, which also refers to attorneys and agents, although for a different purpose. The form in § 64B.311 is designed to relieve the trustee of liability for the acts and omissions of agents and attorneys. This form is designed to relieve the trustee of liability for the trustee's own acts and omissions. The second alternative provision of this form mentions attorneys, but only for the purpose of excusing the trustee from liability for the trustee's own acts or omissions.

For liability of the trustee for losses occasioned by the acts or omissions of agents, attorneys, or advisers, see discussion in § 64B.311[1][b]. For the effect of exculpatory provisions on the trustee's liability, see discussion in § 64B.311[1][c].

**[c] Importance of Provision**

Since any person appointed as a trustee may decline to accept the appointment [*Prob. Code §§ 15601(a), 15643(a)*] or

resign the office after accepting it [*Prob. Code §§ 15640, 15643(c)*], a capable person may refuse to serve as trustee unless he or she is protected against claims of personal liability arising out of his or her acts or omissions as trustee. The law relating to trusts is complex, and a prospective trustee may well demand and expect reasonable freedom from personal liability while serving on behalf of the trust. It is reasonable to expect freedom from liability while acting in good faith or in reliance on the opinions of attorneys employed to assist the trustee in the property execution of the trust. This form confers that freedom.

## **[2] FORM**

### **Provision Relieving Trustee of Liability for Trustee's Own Acts and Omissions**

#### **Limitation on Liability of Trustee**

*[First alternative: trustee not liable for act or omission that is not committed intentionally, with gross negligence, in bad faith, or with reckless indifference to interests of beneficiaries, and from which trustee does not derive profit.]*

The Trustee shall not be liable to any beneficiary, to any heir of mine, to any heir of any beneficiary, or to the trust estate for any act or omission of the Trustee, except an act or omission that is committed intentionally, with gross negligence, in bad faith, or with reckless indifference to the interests of any beneficiary of the trust, or an act or omission from which the trustee derives a profit.

[OR]

*[Second alternative: trustee not liable for act or omission that results from good faith reliance on opinions of attorneys.]*

The Trustee may consult with any attorney or attorneys employed by the Trustee in connection with the trust or any matter or matters related to its execution, management, or administration; and, provided reasonable care was used in their selection, the opinion or opinions of those attorneys shall be full and complete authorization and protection to the Trustee for any act or acts taken or not taken. The Trustee shall not be liable to any beneficiary, to any heir of mine, to any heir of any beneficiary, or to the trust estate, for any act or omission of the Trustee that results from good faith reliance on, and is in accord with, any such opinion or opinions.

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsAdministrationEstate, Gift & Trust LawTrustsTestamentary TrustsEstate, Gift & Trust LawTrustsTrusteesGeneral OverviewEstate, Gift & Trust LawTrustsTrusteesDuties & PowersClaims By & AgainstEstate, Gift & Trust LawTrustsTrusteesDuties & PowersStandards of Care



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*24-64B California Legal Forms--Transaction Guide §§ 64B.313-64B.329*

**[Reserved]**

§§ 64B.313[Reserved]



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 PART IV. FORMS  
 G. Administration

*24-64B California Legal Forms--Transaction Guide § 64B.330*

**§ 64B.330 Provision Empowering Beneficiary to Move Place of Trust Administration by Changing Trustee**

**[1] Comment**

**[a] Use of Form**

This form is a will provision that may be used to empower a beneficiary to move the place of trust administration by changing the trustee.

**[b] Moving Trust Administration**

**[i] Practical Difficulties**

If the sole or principal beneficiary of a testamentary trust moves from the community in which the trust is administered to a new location, it may be convenient also to move the trust administration to the new location. Such a move may be particularly desirable if the trustee has discretionary powers with regard to the amount of income to be paid to the income beneficiary or the will requires the trustee to consult the beneficiary with regard to investments or other matters. Such a move may also be desirable if the beneficiary is a cotrustee, if the principal asset of the trust is stock in a closely held corporation, other shares of which are held by the beneficiary, or if there are other complications which require that the beneficiary and the trustee consult frequently.

However, moving the place of administration will not facilitate continuing contact between the income beneficiary and the trustee if the trustee is still located in the old place of administration. In addition, changing the place of administration will not automatically effect a change of attorneys for the trust, since the trustee has the sole right to choose the attorney who represents the trust [*see In re Ogier (1894) 101 Cal. 381, 385, 35 P. 900* (attorney for executor)].

**[ii] Without Court Order**

If the trustee is a corporate trustee such as a bank or trust company that has offices in different locations in the state, and

if the beneficiary's new place of residence is within the State of California, administration of the trust may be transferred from one office of the corporate trustee to another without court order. Changes of this kind are frequently made at the request of trust beneficiaries. Whether a corporate trustee will grant the beneficiary's request to move the trust administration from one office to another will depend in part on whether there are other beneficiaries, whether the trust requires the trustee to consult frequently with the beneficiary who seeks to move the place of administration, and whether it would be practicable for the attorney for the trustee to continue serving in that capacity after a transfer.

If the trust is not subject to continuing court jurisdiction [*see Prob. Code § 17300; see also* discussion in § 64B.330[1][b][iii]], a court order is not required to move the place of administration.

### **[iii] With Court Order**

Trusts created by wills executed before July 1, 1977 (and not incorporated by reference in wills executed after that date), and trusts created by wills that expressly provide that they are subject to the continuing jurisdiction of the superior court, may be transferred from one county to another only pursuant to court order [*see Prob. Code § 17304* (contents of petition for order, formalities required for order, and effects of transfer)]. For a general discussion of the statutory rules governing wills subject to continuing jurisdiction of the superior court [*Prob. Code §§ 17300-17354*], see § 64B.39.

### **[iv] To Another Jurisdiction Outside California**

The Trust Law contains special rules relating to the transfer of trusts from California to another jurisdiction [*Prob. Code §§ 17400-17405*] and from another jurisdiction to California [*Prob. Code §§ 17450-17457*]. Unlike the rules pertaining to the transfer of trusts from one county to another within California [*see Prob. Code § 17304; see* discussion in § 64B.330[1][b][iii]], these rules apply to all trusts, whenever executed and whether or not they are subject to continuing court jurisdiction [*Prob. Code § 17400*]. Court orders are required to transfer these trusts from one state to another [*Prob. Code §§ 17401, 17451; see Prob. Code §§ 17400-17457* (contents of petitions for orders, rules relating to notice, hearings, and orders, and effects of transfer); *see also* California Forms of Pleading and Practice, Ch. 560, *Trusts: Express, Public, Charitable, and Totten Trusts* .].

### **[v] Will Provisions**

Notwithstanding the statutory rules relating to transfer, the will may prescribe another method for transfer [*see Prob. Code §§ 17400(b), 17450(b)*]. Since in many situations it is not clear where a trust is located, it would be unnecessarily time-consuming and expensive to require judicial proceedings for transfer whenever a transfer is sought [*see* 18 Cal. L. Revision Comm'n Reports 501, 585 (1986)]. Accordingly, it will generally be desirable to prescribe a nonjudicial method of transfer.

### **[c] Corporate Trustee**

This form provides for the selection of a corporate trustee as the new trustee. While the will may properly empower the beneficiary to select an individual trustee, it is recommended that the new trustee be a corporate trustee. Selection of a corporate trustee will serve four purposes. First, it will relieve the new trustee of the necessity and expense of posting a bond [*see Prob. Code § 15602(e)* (no bond required of trust company); *see also Prob. Code § 15602(a)(3), (b)* (individual trustee not named in will must post bond except under compelling circumstances)]. Second, it will assure that the new trustee will be competent and financially responsible. Third, it will insulate the beneficiaries from pressure from friends and relatives to appoint one of them as trustee. Fourth, it will avoid possible income and estate tax problems that might arise if a person interested in the trust was appointed as trustee [*see I.R.C. § 678(a)* (income taxed to trustee with power to vest corpus or income in himself or herself), *I.R.C. § 2041(a)* (property subject to general power of appointment included in estate of holder); *see also* discussions in Ch. 64A, *Testamentary Trusts: Trustee Provisions*, § 64A.32[2], [4]].

This form can be modified to provide for the appointment of an individual trustee if the testator and the attorney, after consideration, believe that such an appointment would be in the best interests of the trust and the beneficiaries or if the trust is too small to be accepted by a corporate trustee. Some corporate trustees customarily refuse to accept the administration of trusts that do not meet their minimum assets requirements [*see* discussion in § 64B.290[1][b][iv]].

## [2] FORM

### Provision Empowering Beneficiary to Move Place of Trust Administration by Changing Trustee

#### Power to Change Trustee

\_\_\_\_\_ [*Name of beneficiary*] shall have the right at any time during \_\_\_\_\_ [his or her] lifetime to change \_\_\_\_\_ [the Trustee *or* any of the Trustees] of the trust provided for in this will to \_\_\_\_\_ [a *or* another] corporate Trustee located anywhere within \_\_\_\_\_ [the State of California *or* the United States], by giving \_\_\_\_\_ [*specify time, e.g.: 30 days*] written notice to the then-acting Trustee. The then-acting Trustee, on receiving that notice and a written acceptance of the trust from the successor Trustee, shall then transfer all of the assets to the successor Trustee.

#### Legal Topics:

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsAdministrationEstate, Gift & Trust LawTrustsTestamentary TrustsEstate, Gift & Trust LawTrustsTrusteesRemoval & Resignation



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California Legal Forms--Transaction Guide

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DIVISION IV: WILLS AND TRUSTS  
CHAPTER 64B TESTAMENTARY TRUSTS: ADMINISTRATIVE PROVISIONS  
PART IV. FORMS  
G. Administration

*24-64B California Legal Forms--Transaction Guide § 64B.331*

**§ 64B.331 Choice of Law Provision**

**[1] Comment**

**[a] Use of Form**

This form is a will provision that may be used to provide that the validity, construction, interpretation, and administration of all trusts provided for in the will will be governed by the law of a designated jurisdiction.

**[b] Testamentary Trusts and Conflict of Laws**

**[i] In General**

In most cases, it is a simple matter to determine the state whose law will determine questions relating to the validity, interpretation, and administration of a testamentary trust. If, for example, the will is executed in California, the testator dies domiciled in California, all of the trust property is located in California, and the trustee is a resident of California, the law of California will clearly determine all questions relating to the trust in the absence of a will provision to the contrary.

The result may be less clear if the trust has significant contacts with other jurisdictions, if the testator dies a resident of some state other than California, or if some of the trust assets are located in other states or even other countries. In such a case, it may be more difficult to determine which law will apply.

**[ii] Testator's Intention**

The testator's intention will usually (but not always) govern the resolution of conflict of law questions relating to the trust. The general rule is that if the testator's intention can be determined from the will and if effectuation of that intention would not violate public policy, it will control all questions except those relating to the validity of the will or the trust [Scott, *The Law of Trusts* (3d ed., 1967), vol. V, § 555; *see* Restatement (Second) of Conflict of Laws (1971), §§ 268(1), 269(b)(i), 271(a), 273(a), 275, 277(1)]. As to the validity of the trust, the intention of the testator is a

significant although not always controlling factor.

The validity of a trust interest in personal property will generally be determined by the law of the testator's domicile at the time of death [Restatement (Second) of Conflict of Laws (1971), § 269], while the validity of a trust interest in real property will be determined by the law of the situs [Restatement (Second) of Conflict of Laws (1971), § 278]. The validity of a trust interest in personal property will, under the general rule, be determined by the law designated by the testator, if the designation is not invalid under the strong public policy of the state of the testator's domicile at death, and if the designated state has a substantial relation to the trust [Restatement (Second) of Conflict of Laws (1971), § 269(b)]; for an extended consideration of the conflict of laws rules relating to testamentary trusts, see Scott, *The Law of Trusts* (3d ed., 1967), Volume V, Chapter 14, and Restatement (Second) of Conflict of Laws (1971), Volume 2, Chapter 10.

### **[iii] California Statutes**

Two California statutes specifically pertain to conflict of laws questions involving wills executed after January 1, 1985. *Prob. Code § 6113* establishes rules for determining the validity of wills, including wills that establish trusts. *Prob. Code § 21103* specifies circumstances under which a testator may designate the law that will govern questions relating to the meaning and legal effect of testamentary dispositions.

*Prob. Code § 6113* provides that a will is valid if its execution complies with (1) California law relating to the execution of witnessed wills [see *Prob. Code § 6110*; see also *Ch. 63, Will Provisions, § 63.750[1]*]; (2) California law relating to the execution of holographic wills [see *Prob. Code § 6111*]; (3) California law relating to the execution of international wills [see *Prob. Code §§ 6380-6390*; see also *Ch. 63, Will Provisions, § 63.750[1]*]; or (4), under certain circumstances, the law of another jurisdiction. A will is valid under the law of another jurisdiction if:

- The execution of the will complies with the law at the time of execution of the place where the will is executed [*Prob. Code § 6113(b)*]; or
- The execution of the will complies with the law of the place where, at the time of execution or at the time of death, the testator is domiciled, has a place of abode, or is a national [*Prob. Code § 6113(c)*].

*Prob. Code § 21103* provides that the meaning and legal effect of a disposition in a will must be determined by the local law of a particular state selected by the testator in the will, unless the application of that law would be contrary to any of the following:

- The rights of the surviving spouse to community and quasi-community property;
- Any other public policy of California; or
- The family protection provisions of the Probate Code [see *Prob. Code §§ 6500-6615* (family protection provisions)].

For a general discussion of choice of law questions relating to wills, including a discussion of the legislative background of *Prob. Code §§ 6113* and *21103*, see § 64B.38[1] et seq.

### **[c] Drafting Considerations**

#### **[i] Designating Law of Another Jurisdiction**

Opinions differ as to whether the will should or should not include a choice of law provision.

A choice of law provision will sometimes be advisable if the testator is aware of a provision of the law of a particular jurisdiction that will vitally affect the legal meaning or effect of a provision of the trust (e.g., a different limit on perpetuities than the law of California allows, different rules as to omitted heirs, different definitions of the words "representation" or "per stirpes," or different rules as to disinheritance or ademption of bequests). In such a case, a choice of law provision may serve the valuable purpose of heading off difficult, time-consuming, and costly conflict of laws disputes among the persons interested in the trust. Further, it may promote the smooth and efficient administration of the trust by clearly apprising the trustee and other persons interested in the trust of the law that will apply to questions of construction and administration.

As a practical matter, however, the testator or attorney will rarely, if ever, be familiar with the law of a designated jurisdiction other than California, much less whether it would be advantageous or disadvantageous to the trust. Moreover, a direction to apply the law of a particular jurisdiction may deprive the courts of the flexibility necessary to fashion appropriate and equitable solutions to unanticipated problems. An inflexible choice of law rule may force unanticipated and undesirable results by depriving the courts of the considerable latitude afforded by modern conflicts of law rules.

There is also a risk that the law of the designated jurisdiction will change after the will is executed. To avoid this risk, the choice of law provision may be limited to the law of the designated jurisdiction at the time of execution of the will, or at the time of the testator's death. This may make it difficult, however, to accurately determine the applicable law if and when a conflict of law question arises.

### **[ii] Designating California Law**

If the will is drafted and executed in California, it ordinarily will make sense to designate the law of California as governing law. The attorney who drafts a will executed in California by a California domiciliary presumably will be familiar with the applicable provisions of California law and will draft the will with those provisions in mind. If, for example, the word "representation" (or the equivalent phrase, "per stirpes") is used in the will, the attorney will be familiar with the California definition of representation [*see Prob. Code § 246*] and will have used the word in the sense indicated by the California statute (which may or may not be the same as the word is used in the law of another jurisdiction). Similarly, if the will includes a disinheritance clause, the California attorney will have drafted the clause to comply with the California rules governing disinheritance [for a general discussion of the California law of disinheritance, *see Ch. 63, Will Provisions, § 63.650[1]*], which may or may not correspond to the disinheritance law of another jurisdiction. Therefore, when the will has been drafted in California, is executed in California by a California domiciliary, and its material provisions correspond to the California law of wills, it is advisable (if any choice of law provision is to be included in the will) to choose the law of California, rather than that of any other jurisdiction.

## **[2] FORM**

### **Choice of Law Provision**

#### **Governing Law**

The validity, construction, interpretation, and administration of the trust provided for in this will shall be governed by the law of \_\_\_\_\_ [*jurisdiction; e.g., the State of California*] in force \_\_\_\_\_ [from time to time *or* at the time of execution of this will *or* at the date of my death].

### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil Procedure Federal & State Interrelationships Choice of Law General Overview Contracts Law Contract Conditions & Provisions Forum Selection Clauses Estate, Gift & Trust Law Trusts Administration Estate, Gift & Trust

LawTrustsTestamentary Trusts



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DIVISION IV: WILLS AND TRUSTS  
 CHAPTER 64B TESTAMENTARY TRUSTS: ADMINISTRATIVE PROVISIONS  
 PART IV. FORMS  
 G. Administration

*24-64B California Legal Forms--Transaction Guide § 64B.332*

**§ 64B.332 Provision Requiring Continuing Judicial Supervision of Trust**

**[1] Comment**

**[a] Use of Form**

This form is a will provision that may be used to require that the trust be subject to the continuing jurisdiction of the superior court. It should be included in the will only if the trustee feels that the prospective trustee lacks the skill, experience, or integrity necessary to properly administer the trust without continuing judicial supervision.

**[b] Continuing Judicial Supervision of Testamentary Trusts**

**[i] In General**

In California, most trusts are not subject to the continuing jurisdiction of the superior court. Under the Trust Law, only trusts created by wills executed before July 1, 1977 (and not incorporated by reference in a will on or after July 1, 1977) [*Prob. Code § 17300(a)*], and trusts created by wills that expressly provide that they will be subject to the continuing jurisdiction of the superior court [*Prob. Code § 17300(b)*] are subject to continuing supervision by the court in which the decedent's estate was administered [*but see Prob. Code §§ 17350-17354* (procedure for removing trust from continuing supervision)]. All other trusts (that is, all inter vivos trusts and all testamentary trusts created after July 1, 1977, by wills that do not provide that they will be subject to the continuing jurisdiction of the superior court) are free of continuing supervision.

The principal difference between continuing jurisdiction and the "intermittent intervention" provisions is that the latter are invoked only when a person interested in the trust petitions the court for an order. In the absence of a petition, the court exercises no supervision over the internal affairs of a trust that is subject only to the "intermittent intervention" provisions. Conversely, when a trust is subject to continuing jurisdiction, the trustee must petition the court before taking any action relating to the internal affairs of the trust [*Prob. Code § 17301; see Prob. Code § 17200(b)* (petitions concerning internal affairs of trust)]. For further discussion of continuing judicial supervision of trusts, see § 64B.39.

**[ii] Will Provisions**

To require continuing judicial supervision, a will must clearly express the testator's intent that the trust be subject to the continuing jurisdiction of the superior court [*Prob. Code* § 17300(b); *Estate of Goddard* (1984) 157 Cal. App. 3d 340, 344, 203 Cal. Rptr. 623]. A standard clause to the effect that the trustee "shall receive reasonable compensation to be fixed by the Court for its services" is not, in itself, sufficient to require continuing jurisdiction [*Estate of Goddard* (1984) 157 Cal. App. 3d 340, 343-344, 203 Cal. Rptr. 623].

An even clearer expression of the testator's intention will be required to show that the testator intended the trust to be free of the "intermittent intervention" provisions of *Prob. Code* §§ 17200-17210. Although a will clause providing that "neither the original trustee nor any successor trustee shall be subject to the jurisdiction of the court administering the estate" will be sufficient to remove the trust from the continuing jurisdiction provisions of *Prob. Code* §§ 17300-17354, it will not be sufficient to remove the trust from the "intermittent intervention" (or "disputed-related") provisions of *Prob. Code* §§ 17200-17210 [*Estate of Parrette* (1985) 165 Cal. App. 3d 157, 165, 211 Cal. Rptr. 313 (decided under former *Prob. Code* §§ 1120-1133; *repealed effective July 1, 1987*)]. The words "jurisdiction of the court administering the estate" reveal an intention only to dispense with the continuing jurisdiction of the court in which the estate was administered, and not to limit all judicial power over the trust so that persons who wish to enforce any of its provisions must resort to the time-consuming and burdensome procedure of commencing civil actions [*Estate of Parrette* (1985) 165 Cal. App. 3d 157, 165, 211 Cal. Rptr. 313].

**[iii] Advantages and Disadvantages**

Continuing judicial supervision of a testamentary trust will usually be costly, burdensome, and unnecessary [*Estate of Parrette* (1985) 165 Cal. App. 3d 157, 162, 211 Cal. Rptr. 313], inasmuch as the "intermittent intervention" provisions [*Prob. Code* §§ 17200-17210] ordinarily will adequately protect those interested in the trust. However, some testators may insist that the trustee will be subject to continuing jurisdiction. For example, if the trustee lacks significant experience in business or investment, is the kind of person who might easily be imposed upon by others, or has interests that may conflict with those of the income or remainder beneficiaries, or if there are any other potential causes for dispute among or between the trustee and the beneficiaries, the testator may decide that continuing judicial supervision will serve the best interests of the trust.

**[2] FORM****Provision Requiring Continuing Judicial Supervision of Trust****Trust Subject to Continuing Court Jurisdiction**

Any other provision of this will to the contrary notwithstanding, the trust(s) provided for in this will shall be subject to the continuing jurisdiction of the superior court as provided in *California Probate Code Sections 17300-17354*.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsAdministrationEstate, Gift & Trust LawTrustsTestamentary Trusts



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DIVISION IV: WILLS AND TRUSTS  
CHAPTER 65 EXECUTORS

*24-65 California Legal Forms--Transaction Guide 65.syn*

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Scope

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[1] Comment

[a] Use of Form

[b] Executors

[c] Attorney as Executor

[2] FORM

Nomination of Individual Executor

§ 65.201 Nomination of Trust Company as Executor

[1] Comment

[a] Use of Form

[b] Trust Company as Executor

[2] FORM

Nomination of Trust Company as Executor

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[1] Comment

[a] Use of Form

[b] Coexecutors

[2] FORM

Nomination of Coexecutors

§ 65.203 Nomination of Alternate and Successor Executors

[1] Comment

[a] Use of Form

[b] Alternate and Successor Executors

[2] FORM

Nomination of Alternate and Successor Executors

§ 65.204 Nomination of Ancillary Executor

[1] Comment

[a] Use of Form

[b] Ancillary Executors

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[ii] Nominations

[2] FORM

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[1] Comment

[a] Use of Form

[b] Delegation of Authority to Nominate Executor

[2] FORM

Provision Delegating Authority to Nominate Executor

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[1] Comment

[a] Use of Form

[b] Delegation of Authority to Nominate Alternate and Successor Executor

[2] FORM

Provision Delegating Authority to Nominate Alternate and Successor Executor

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[1] Comment

[a] Use of Form

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[1] Comment

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[1] Comment

[a] Use of Form

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[1] Comment

[a] Use of Form

[2] FORM

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[1] Comment

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[2] FORM

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[1] Comment

[a] Use of Form

[2] FORM

Power to Invest--Specified Investment

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[1] Comment

[a] Use of Form

[2] FORM

Power to Invest--Grant of Power Does Not Require Exercise of Power

§ 65.263 Power to Retain Investment Counsel

[1] Comment

[a] Use of Form

[b] Investment Counsel

[2] FORM

Power to Retain Investment Counsel

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[1] Comment

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[b] Power to Sell Estate Property

[i] In General

[ii] Will Provisions

[c] Directing Sale of Specific Asset or Assets

[2] FORM

Power of Sale--General Form

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[1] Comment

[a] Use of Form

[b] Power to Sell Assets in Foreign Jurisdiction

[2] FORM

Power of Sale--Assets in Foreign Jurisdiction

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[1] Comment

[a] Use of Form

[b] Leases

[i] In General

[ii] Effect of Will Provision Granting Authority

[2] FORM

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[1] Comment

[a] Use of Form

[b] Retaining Estate Assets

[2] FORM

Power to Retain Assets

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[1] Comment

[a] Use of Form

[b] Power to Continue Operation of Business

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[ii] Partnership Interests

[iii] Will Provisions

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[iii] Permitted When Will Authorizes Purchase

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[2] FORM

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[1] Comment

[a] Use of Form

[b] Collection of Foreign Assets

[i] Executor's Duty

[ii] Assets Outside California

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[b] Effect of Tax Elections on Distributive Shares

[2] FORM

Power to Take Actions Without Regard to Tax Consequences

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[1] Comment

[a] Use of Form

[2] FORM

Power to Allocate Expense Deductions Between Income Tax and Estate Tax

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[1] Comment

[a] Use of Form

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[2] FORM

Provision Investing Ancillary Executor With Power to Sell, Lease, and Borrow

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[1] Comment

[a] Use of Form

[b] Powers of Ancillary Executors

[2] FORM

Provision Investing Ancillary Executor With Same Powers as Domiciliary Executor

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[1] Comment

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[i] In General

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[2] FORM

Provision Investing Administrator With Will Annexed With Same Powers as Executor

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[a] Use of Form

[b] Distribution

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Power to Allocate and Distribute Property in Kind

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[1] Comment

[a] Use of Form

[b] Distribution to Minors

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[2] FORM

Power to Pay Devises for Benefit of Minor or Incompetent Devisees

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[1] Comment

[a] Use of Form

[b] Costs of Distribution

[2] FORM

Power to Pay Costs of Distribution

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[1] Comment

[a] Use of Form

[b] Payment of Debts

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[2] FORM

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[a] Use of Form

[b] Liquidation of Business

[2] FORM

Provision Directing Executor to Liquidate Business

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[1] Comment

[a] Use of Form

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[1] Comment

[a] Use of Form

[b] Custody of Personal Property and Records

[2] FORM

Provision Directing That Trust Company Serving as Coexecutor Take Custody of Personal Property and Maintain Records

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[1] Comment

[a] Use of Form

[b] Delivery of Ancillary Estate to Domiciliary Executor

[2] FORM

Provision Directing Ancillary Executor to Deliver Ancillary Residue to Domiciliary Executor

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[1] Comment

[a] Use of Form

[b] Independent Administration of Estates Act

[c] Effect of Will Provision

[i] In General

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[2] FORM

Independent Administration of Estates Act Applicable

§ 65.421 Independent Administration of Estates Act Not Applicable

[1] Comment

[a] Use of Form

[2] FORM

Independent Administration of Estates Act Not Applicable

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Fixed Amount as Compensation

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Reasonable Compensation

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[1] Comment

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[b] Apportionment of Compensation Between Coexecutors

[i] In General

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[2] FORM

Trust Company Serving as Coexecutor to Be Compensated as if It Were Sole Executor

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[1] Comment

[a] Use of Form

[2] FORM

Fractional Division of Compensation Between Trust Company and Individual Coexecutor

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[1] Comment

[a] Use of Form

[b] Attorneys as Executors

[i] In General

[ii] Effect of Will Provision

[iii] Ethical Considerations

[2] FORM

Attorney to Receive Compensation Both as Executor and as Attorney for Executor

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§ 65.460 Provision Relieving Executor of Liability for Acts and Omissions of Agents and Attorneys

[1] Comment

[a] Use of Form

[b] Liability of Executors

[c] Exculpatory Provisions

[i] In General

[ii] Trustees

[iii] Strictly Construed

[2] FORM

Provision Relieving Executor of Liability for Acts and Omissions of Agents and Attorneys

§ 65.461 Provision Relieving Executor of Liability for Own Acts and Omissions

[1] Comment

[a] Use of Form

[2] FORM

Provision Relieving Executor of Liability for Own Acts and Omissions



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CHAPTER 65 EXECUTORS

*24-65 California Legal Forms--Transaction Guide Scope*

**Scope**

Scope

This chapter covers executors of wills. The Legal Background discusses general concepts related to administration of decedents' estates and personal representatives of decedents. It also discusses qualifications of executors and legal rules relating to the nomination and compensation of executors, their powers, duties, and liabilities, and when bonds are required of persons named in wills as executors. Finally, it outlines the differences between supervised and independent administration of decedent's estates. The forms include will provisions for the nomination of executors and coexecutors and for the delegation of authority to nominate executors, as well as provisions relating to executors' bonds, powers to act, compensation, and liability.

For detailed coverage of the appointment of executors and the administration of decedents' estates, see California Probate Practice (Matthew Bender).



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A. Primary Sources

*24-65 California Legal Forms--Transaction Guide § 65.01*

**§ 65.01 California Statutes**

Uniform Fraudulent Transfer Act. *Civ. Code §§ 3439-3439.12.*

Bond and Undertaking Law. *Code Civ. Proc. § 995.010 et seq.*

Limited authority of foreign executor or administrator in *California*. *Code Civ. Proc. § 1913(b).*

Probate Code definitions.

"Account." *Prob. Code § 21.*

"Account in insured credit union." *Prob. Code § 22.*

"Account in insured savings and loan association." *Prob. Code § 23.*

"Devise." *Prob. Code § 32.*

"Devisee." *Prob. Code § 34.*

"Dissolution of marriage." *Prob. Code § 36.*

"Domestic partner." *Prob. Code § 37.*

"Family allowance." *Prob. Code § 38.*

"Fiduciary." *Prob. Code § 39.*

"Financial institution." *Prob. Code § 40.*

"Heirs." *Prob. Code § 44.*

"Insured account in financial institution." *Prob. Code § 46.*

"Interested person." *Prob. Code § 48.*

"Issue." *Prob. Code § 50.*

"Letters." *Prob. Code § 52.*

"Personal representative." *Prob. Code § 58.*

"Property." *Prob. Code § 62.*

"Trust company." *Prob. Code § 83.*

"Will." *Prob. Code § 88.*

Appointment of trust company as personal representative. *Prob. Code § 300.*

Trust company not required to give bond. *Prob. Code § 301(a).*

Probate referees. *Prob. Code §§ 400-453.*

Dissolution or annulment of marriage revokes will provision nominating former spouse as executor. *Prob. Code § 6122(a)(3).*

Termination of domestic partnership revokes will provision nominating former domestic partner as executor. *Prob. Code § 6122.1(a)(3).*

Jurisdiction of superior court in proceedings for administration of decedents' estates. *Prob. Code § 7050.*

Venue in proceedings for administration of decedents' estates. *Prob. Code §§ 7051, 7052.*

Public administrators. *Prob. Code §§ 7600-7666.*

Opening estate administration.

Petition. *Prob. Code § 8000.*

Waiver of right to appointment as executor by failure to petition within 30 days after learning of testator's death. *Prob. Code § 8001.*

Duty of custodian to deliver will. *Prob. Code § 8200.*

Proof of will. *Prob. Code §§ 8220-8226.*

Contest of will. *Prob. Code §§ 8250-8254.*

Appointment of personal representatives. *Prob. Code §§ 8400 et seq.*

Executors. *Prob. Code §§ 8420-8425.*

Administrators with the will annexed. *Prob. Code §§ 8440-8442.*

Administrators. *Prob. Code §§ 8460-8469.*

Bonds. *Prob. Code §§ 8480-8488.*

Removal from office. *Prob. Code §§ 8500-8505.*

Changes in administration. *Prob. Code §§ 8520-8525.*

Special administrators. *Prob. Code §§ 8540-8547.*

Nonresident personal representatives. *Prob. Code §§ 8570-8577.*

Inventory and appraisal.

Filing required. *Prob. Code § 8800.*

Supplemental inventory and appraisal. *Prob. Code § 8801.*

Form. *Prob. Code § 8802.*

Effect of failure to file. *Prob. Code § 8804.*

Contents of inventory. *Prob. Code § 8850.*

Appraisal. *Prob. Code §§ 8900-8980.*

Creditor claims. *Prob. Code §§ 9000-9399.*

Estate management.

Duties of personal representative. *Prob. Code § 9600.*

Liability for breach of fiduciary duty. *Prob. Code § 9601.*

Authority and liability of joint personal representatives. *Prob. Code §§ 9630-9631.*

Possession and management of estate by personal representative. *Prob. Code § 9650.*

Duty of personal representative to keep cash invested. *Prob. Code § 9652.*

Deposit of money and personal property with financial institutions. *Prob. Code §§ 9700-9705.*

Investments and purchase of property. *Prob. Code §§ 9730-9737.*

Operation of decedent's business. *Prob. Code §§ 9760-9763.*

Abandonment of tangible personal property. *Prob. Code §§ 9780-9788.*

Borrowing, refinancing, and encumbering property. *Prob. Code §§ 9800-9807.*

Actions and proceedings by or against personal representative. *Prob. Code §§ 9820-9823.*

Purchase of estate property by personal representative or personal representative's attorney. *Prob. Code §§ 9880-9885.*

Independent Administration of Estates Act. *Prob. Code § 10400.*

Effect of will provision prohibiting independent administration. *Prob. Code § 10404.*

Granting or revoking independent administration authority. *Prob. Code §§ 10450-10454.*

Administration under Act. *Prob. Code §§ 10500-10564.*

Compensation of personal representatives and estate attorneys. *Prob. Code §§ 10800-10850.*

Accounts. *Prob. Code §§ 10900-11052.*

Contents of account. *Prob. Code § 10900.*

When accounts required. *Prob. Code §§ 10950-10954.*

Payment of debts. *Prob. Code §§ 11400-11446.*

Priority for payment. *Prob. Code § 11420.*

Funeral and last illness. *Prob. Code § 11446.*

Distribution of estate. *Prob. Code § 11600.*

Preliminary distribution. *Prob. Code §§ 11620-11624.*

Final distribution. *Prob. Code §§ 11640-11642.*

Duty of personal representative to distribute. *Prob. Code § 11750.*

Interest and income accruing during administration. *Prob. Code §§ 12000-12007.*

Closing estate administration. *Prob. Code §§ 12200-12252.*

When estate must be closed. *Prob. Code § 12200.*

Report of status of administration in lieu of timely closing. *Prob. Code § 12201.*

Continuation of administration to pay family allowance. *Prob. Code § 12203.*

Discharge of personal representative. *Prob. Code §§ 12250-12252.*

Nondomiciliary decedents. *Prob. Code §§ 12500-12591.*

Disposition of estates without administration. *Prob. Code § 13000.*

Collection or transfer of small estates without administration. *Prob. Code §§ 13000-13208.*

Passage of property to surviving spouse without administration. *Prob. Code §§ 13500-13660.*

Application of federal estate tax law to California estate tax. *Rev. & Tax. Code § 17731.*

Duty of executor to file California income tax return for estate. *Rev. & Tax. Code § 18505(a)(4).*

Duty of executor to file California income tax return for decedent. *Rev. & Tax. Code § 18505(a)(7).*

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Probate Personal Representatives General Overview Estate, Gift & Trust Law Probate Personal Representatives Appointment Estate, Gift & Trust Law Probate Personal Representatives Duties & Powers General Overview Estate, Gift & Trust Law Probate Personal Representatives Removal & Termination General Overview



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A. Primary Sources

*24-65 California Legal Forms--Transaction Guide § 65.02*

**§ 65.02 Federal Statutes**

Duty of executor to pay federal income tax. *I.R.C. § 641(b)*.

Duty of executor to pay federal estate tax. *I.R.C. § 2002*.

Duty of executor to file federal income tax return for decedent. *I.R.C. § 6012(b)(1)*.

Duty of executor to file federal income tax return for estate. *I.R.C. § 6012(b)(4)*.

Duty of executor to file federal estate tax return. *I.R.C. § 6018(a)*, before amendment by Pub. Law 107-16 (eff. for decedents dying before 2010).

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law  
Probate  
Personal Representatives  
Duties & Powers  
General Overview  
Estate, Gift & Trust Law  
Probate  
Personal Representatives  
Duties & Powers  
Fiduciary Responsibilities  
Tax Law  
Federal Taxpayer Groups  
Income Taxation of Estates, Trusts & Beneficiaries  
General Overview  
Tax Law  
Federal Taxpayer Groups  
Income Taxation of Estates, Trusts & Beneficiaries  
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B. Secondary Sources

*24-65 California Legal Forms--Transaction Guide § 65.20*

### § 65.20 Law Reviews

Kitada & Rokaw, *Shedding the Cloak of Ancillary Administration: Application of Summary Probate Procedures to Estates of Decedents Formerly Domiciled in Foreign Countries*, 17 U.S.F. L. Rev. 655 (1983).

Kollaja, *Terminating Estates With Contingent Liabilities: A Review of the Options*, 119 Tr. & Est. 65 (1980).

Kindregan, *The California Crawl: Reforming Probate Administration in California*, 19 Santa Clara L. Rev. 1 (1979).

Note, *Probate Reform: California's Declaration of Independent Administration*, 50 S. Cal. L. Rev. 155 (1976).

Comment, *Administration of Estates; Designation of Executor*, 4 Pac. L.J. 231 (1973).

Sumner, *The Independent Executor*, 43 Cal. St. B.J. 333 (1968).

*Report of the A.B.A. Subcommittee on Hidden Dangers in Standard Testamentary Clauses*, 100 Tr. & Est. 915 (1961).

Note, *Executors and Administrators: Exceptions to the Rule Against Self-Dealing*, 11 Hastings L.J. 64 (1959).

### Legal Topics:

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawProbatePersonal RepresentativesGeneral OverviewEstate, Gift & Trust LawProbatePersonal RepresentativesAppointmentEstate, Gift & Trust LawProbatePersonal RepresentativesClaims By & AgainstEstate, Gift & Trust LawProbatePersonal RepresentativesDuties & PowersGeneral Overview



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*24-65 California Legal Forms--Transaction Guide § 65.21*

**§ 65.21 Annotations**

Annot., Liability of Executor or Administrator, or His Bond, For Loss Caused to Estate By Act or Default of His Agent or Attorney, 28 A.L.R.3d 1191 (1969).

Annot., Limiting Effect of Provision in Contract, Will, or Trust Instrument Fixing Trustee's or Executor's Fees, 19 A.L.R.3d 520 (1968).

Annot., Capacity of Infant to Act as Executor or Administrator, and Effect of Improper Appointment, 8 A.L.R.3d 590 (1966).

Annot., Power of Executor or Trustee With Power to Sell or to Lease Real Property, or to Do Both, to Give an Option to Purchase, 83 A.L.R.2d 1310 (1962).

Annot., Constructions and Effect of Statutory Provision That No Person Is Competent to Act as Executor or Administrator Whom Court Finds Incompetent by Reason of Want of Integrity, 73 A.L.R.2d 458 (1960).

Annot., Coexecutors', Coadministrators', or Cotrustees' Liability for Defaults or Wrongful Acts of Fiduciary in Handling Estate, 65 A.L.R.2d 1019 (1959).

Annot., Power of Personal Representative to Repair Personal Property of Estate, 64 A.L.R.2d 857 (1959).

Annot., Construction and Effect of Will Authorizing or Directing Executor to Retain Investments, Received Under Will, 47 A.L.R.2d 187 (1956).

Annot., What Constitutes "Estate" of Nonresident Decedent Within Statute Providing for Local Ancillary Administration Where Decedent Died Leaving an Estate in Jurisdiction, 34 A.L.R.2d 1270 (1954).

Annot., Implied Power of Executor or Testamentary Trustee to Sell Real Estate, 23 A.L.R.2d 1000 (1952).

Annot., Adverse Interest or Position as Disqualification for Appointment as Personal Representative, 18 A.L.R.2d 633 (1951).

Annot., Power of Sale Conferred on Executor by Testator as Authorizing Private Sale, 11 A.L.R.2d 955 (1950).

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law  
Probate  
Personal Representatives  
General Overview  
Estate, Gift & Trust Law  
Probate  
Personal Representatives  
Appointment  
Estate, Gift & Trust Law  
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B. Secondary Sources

*24-65 California Legal Forms--Transaction Guide § 65.22*

**§ 65.22 Text References**

**[1] Related Forms With Tax Analysis**

Rabkin & Johnson, *Current Legal Forms*, Ch. 7, *Wills*, pt. I, "Alternative Provisions for Fiduciaries" (Matthew Bender).

**[2] Related California Forms**

*California Legal Forms*, Ch. 61, *Will Drafting and Complete Will Forms*; Ch. 63, *Will Provisions*.

*California Forms of Pleading and Practice*, Ch. 440, *Probate: Is Probate Necessary ?*.

*California Wills & Trusts Forms*, Div. IV, *Individual Will Provisions*, pt. 60, "Executor" (Matthew Bender).

**[3] Additional Text References**

*California Wills and Trusts* (Matthew Bender).

Ch. 35, *Nomination of Executors*.

Ch. 36, *Powers of Executors*.

Witkin, *Summary of California Law*, vol. 14, *Wills and Probate* (10th ed. 2005).

*Recommendations Relating to Probate Law*, 19 Cal. L. Revision Comm'n Rep. 1 (1988).

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Probate Personal Representatives General Overview Estate, Gift & Trust Law Probate Personal Representatives Appointment Estate, Gift & Trust Law Probate Personal Representatives Claims By & Against Estate, Gift & Trust Law Probate Personal Representatives Compensation Estate, Gift & Trust Law Probate Personal Representatives Duties & Powers General Overview



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*24-65 California Legal Forms--Transaction Guide §§ 65.23-65.29*

**[Reserved]**

§§ 65.23[Reserved]



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*24-65 California Legal Forms--Transaction Guide § 65.30*

**§ 65.30 Administration of Decedents' Estates**

**[1] In General**

When a person dies, title to the person's property passes to the person or persons to whom it is devised in the person's last will or, in the absence of such a devise, to the person's heirs as prescribed in the laws governing intestate succession [*Prob. Code § 7000; see Prob. Code §§ 6400-6455* (intestate succession)]. Whether the person died with a will (i.e., testate) or without a will (i.e., intestate), the person's property is subject to administration [*see Prob. Code § 7000 et seq.* (administration of decedents' estates)] and, under rules set forth in the Probate Code, to the payment of debts [*see Prob. Code § 9000 et seq.* (creditor claims), *11400-11467* (payment of debts)], expenses of administration [*see Prob. Code §§ 11401(b)* ("debt" includes an expense of administration), *11420(a)(1)* (priority for payment of expenses of administration)], and any family allowance that may be payable out of the assets of the estate [*Prob. Code § 7001; see Prob. Code §§ 6540-6545* (family allowance)]. For the purpose of effectuating administration, the personal representative [*see Prob. Code § 58(a)* ("personal representative" defined); *see also § 65.35[1]*] and succeeding headings] has the right (and the duty) to take possession or control of all of the property, real and personal, tangible and intangible, to be administered in the decedent's estate [*Prob. Code § 9650(a)(1)*].

The process of collecting and preserving the decedent's assets, paying the decedent's debts, and distributing the decedent's assets to the persons legally entitled to distribution is called "administration" [*see Black's Law Dictionary* (5th ed., 1979), at 41]. Administration of decedents' estates is sometimes referred to as "probate administration" or, less formally, as "probate." In its most technical sense, however, "probate" refers to the process whereby the last will of a decedent is proved valid or invalid [*see Prob. Code §§ 8200-8272* (probate of wills); *Swift v. Superior Court* (1952) 39 Cal. 2d 358, 360-361, 247 P.2d 6 (petition for probate of will)]. In less formal usage, "probate" refers to any of a number of distinct proceedings authorized and regulated by the Probate Code, such as probate of wills [*see Prob. Code §§ 8200-8272*], supervision of guardians [*see Probate Code § 1500*] and conservators [*see Prob. Code § 1800 et seq.*], administration of decedents' estates [*see Prob. Code § 7000 et seq.*], and judicial supervision of trusts [*see Prob. Code § 17000 et seq.*], both testamentary and inter vivos.

**[2] Jurisdiction of Superior Court**

The superior court has jurisdiction of all proceedings under the Probate Code concerning the administration of

decedents' estates [*Prob. Code* § 7050]. The court in proceedings under the Probate Code is a court of general jurisdiction. The court, or a judge of the court, has the same power and authority with respect to the proceedings as otherwise provided by law for a superior court, or a judge of the superior court [*Prob. Code* § 800; *see Code Civ. Proc.* § 128 (statutory powers of court)]. It is the practice in virtually all superior courts in California to refer to the superior court when sitting in probate as "the probate court" [*see Copley v. Copley* (1978) 80 Cal. App. 3d 97, 107, 145 Cal. Rptr. 437 (superior court is "probate court" when sitting in exercise of its probate jurisdiction)].

Before the enactment of *Prob. Code* § 7050 (operative July 1, 1989), the appellate courts held that proceedings for administration of a decedent's estate were proceedings *in rem* [ *Copley v. Copley* (1978) 80 Cal. App. 3d 97, 106-107, 145 Cal. Rptr. 437 ] and that, in the exercise of its *in rem* jurisdiction, the superior court could conclusively determine claims against estate assets [ *Estate of Bissinger* (1964) 60 Cal. 2d 756, 764, 36 Cal. Rptr. 450, 388 P.2d 682 ] but it could not resolve personal claims between the estate and third persons [ *Schlyen v. Schlyen* (1954) 43 Cal. 2d 361, 372-373, 273 P.2d 897 ; *Estate of Lagios* (1981) 118 Cal. App. 3d 459, 462, 173 Cal. Rptr. 506 ]. In its notes to *Prob. Code* § 7050, the California Law Revision Commission states that the section was intended to preserve the division of business among different departments of the superior court but to reject the limitation on the powers of the probate court cited in the earlier appellate decisions [*Recommendation Relating to Rules of Procedure in Probate*, 19 Cal. L. Revision Comm'n Reports 941 (1988)].

### **[3] When Administration Is Not Necessary**

Many (perhaps even most) decedents' estates are not subject to administration. This is because many classes of property are not subject to administration. First, the right to ownership of (or succession to) certain types of assets are determined by the contracts or other instruments under which the assets were created, and not by the wills of their owners. Included in this class of property are joint tenancy assets, multiple-party accounts [*see Prob. Code* § 5100 *et seq.*], assets held in trust with a designated beneficiary, life insurance on the decedent's life when the decedent's estate is not the beneficiary, retirement plans with beneficiaries other than the decedents' estates, United States Savings Bonds, and assets held in trust. Second, property passing to a surviving spouse is subject to administration only at the election of the surviving spouse [*see Prob. Code* § 13500 *et seq.*]. Third, by special statutory provisions, certain small estates may be distributed without the necessity of either administration or probate of the will of the decedent [*see Prob. Code* § 13000 *et seq.* (collection or transfer of small estate without administration); *see also* § 65.33[1]]. Thus administration of a decedent's estate ordinarily is necessary only when the decedent's estate includes assets that (1) do not pass by terms of a contract or other instrument to designated survivors, (2) do not pass to a surviving spouse, and (3) exceed statutory limits for summary administration procedures.

### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawEstate AdministrationGeneral OverviewEstate, Gift & Trust

LawIntestacyAdministratorsEstate, Gift & Trust LawProbatePersonal RepresentativesGeneral OverviewEstate, Gift &

Trust LawProbatePersonal RepresentativesDuties & PowersGeneral Overview



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*24-65 California Legal Forms--Transaction Guide § 65.31*

**§ 65.31 Supervised Administration**

Administration of a decedent's estate is said to be "supervised" if it is subject to continuing supervision by the probate court [*see Prob. Code § 10401* ("court supervision" defined)]. Supervised administration, which is governed by *Prob. Code § 9600 et seq.*, is distinguished from "independent" administration, which is governed by *Prob. Code §§ 10400-10592* [*see § 65.32*]. If the estate is subject to supervised administration, the personal representative must petition the court for authority or instructions before certain actions may be taken in the course of administration, management, investment, disposition, care, protection, operation, or preservation of the estate [*Prob. Code § 9611(a)*]. Unless the Probate Code specifically provides or requires a proceeding to obtain court authorization, the powers of the personal representative may be exercised without court authorization, instruction, approval, or confirmation [*Prob. Code § 9610*]. Even when court authorization is not required, however, the personal representative may seek court authorization, instruction, approval, or confirmation before or after taking any act [*Prob. Code § 9610*].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law  
 Estate Administration  
 General Overview  
 Estate, Gift & Trust Law  
 Probate  
 Personal Representatives  
 General Overview  
 Estate, Gift & Trust Law  
 Probate  
 Personal Representatives  
 Duties & Powers  
 General Overview



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*24-65 California Legal Forms--Transaction Guide § 65.32*

**§ 65.32 Independent Administration**

The Probate Code permits certain estates to be administered with a minimum of court supervision under the Independent Administration of Estates Act [*Prob. Code § 10400 et seq.*]. A personal representative who has authority to administer an estate under the Independent Administration of Estates Act is free to take many actions without court supervision that otherwise could be taken only under court supervision. The personal representative must give notice to affected persons before taking certain kinds of actions, and if an interested person objects, the action may be taken only under court supervision. For a general discussion of independent administration, see § 65.45.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law  
 Estate Administration  
 General Overview  
 Estate, Gift & Trust Law  
 Probate  
 Personal Representatives  
 General Overview  
 Estate, Gift & Trust Law  
 Probate  
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*24-65 California Legal Forms--Transaction Guide § 65.33*

**§ 65.33 Summary Administration**

**[1] In General**

Statutory provisions permit some estates (generally small estates) to be transferred without formal administration [*see Prob. Code §§ 13000-13210*]. Transfer of an estate without formal administration is generally referred to as "summary administration." Summary administration may be accomplished by filing affidavits (or declarations under penalty of perjury), or by obtaining court orders, under the following circumstances:

- An affidavit (or declaration under penalty of perjury) furnished to the holder of property will be sufficient to effect transfer of personal property without administration if the total value of all of the decedent's property (real and personal) in California does not exceed \$100,000 and if at least 40 days have elapsed since the decedent's death [*Prob. Code §§ 13100, 13101; see Prob. Code §§ 13100-13116*].
- A court order may be obtained to transfer real property to the persons entitled to the property if the total estate in California is not over \$100,000 and at least 40 days have elapsed since the decedent's death [*Prob. Code §§ 13151, 13152; see Prob. Code §§ 13150-13158*].
- An affidavit in the form prescribed by the Judicial Council filed in the superior court [*Prob. Code § 13200*] and a certified copy of the affidavit recorded with the county recorder [*Prob. Code § 13202*] will be sufficient to effect the transfer of real property in California not exceeding \$10,000 in value if at least six months have elapsed since the decedent's death [*Prob. Code §§ 13200, 13203; see Prob. Code §§ 13000-13210*].

Certain kinds of property must be excluded in determining whether the total value of the decedent's property exceeds \$100,000 for this purpose. The excluded property includes joint tenancy property, property in which the decedent held only a life estate, property held by the decedent in a revocable trust or multiple-party account, registered vehicles, mobile homes, truck campers, and vessels, amounts due the decedent for service in the United States armed forces, and up to \$5,000 of compensation owing to the decedent from other employment [*Prob. Code § 13050*]. The person or persons to whom the property will be transferred will be determined by the decedent's will, if any, [*Prob. Code §*

13006(a)] or by the laws of intestate succession if there is no will [*Prob. Code § 13006(b)*; see *Prob. Code §§ 6401, 6402* (intestate shares of surviving spouse and other heirs)].

For more detailed discussion of the rules under which summary administration is available, reasons why summary administration may or may not be desirable, and forms for affidavits, declarations under penalty of perjury, and court petitions, see California Forms of Pleading and Practice, Ch. 440, *Probate: Is Probate Necessary?* (Matthew Bender); see also California Probate Practice (Matthew Bender).

### **[2] Property Passing to Decedent's Surviving Spouse or Registered Domestic Partner**

Property that passes to a surviving spouse, either by will or by the laws of intestate succession, may be transferred or "set aside" to the decedent's surviving spouse with or without administration [*Prob. Code § 13500* (no administration necessary); *Prob. Code § 13502* (surviving spouse may elect to administer all or part of property)]. The surviving spouse has a right to deal with real property passing to him or her if at least 40 days have elapsed since the death of the decedent spouse [*Prob. Code § 13540*] and if, within that time, no other person has recorded a notice claiming an interest in the property under the decedent's will [*Prob. Code § 13541*]. In addition, the statutes prescribe an affidavit procedure for the collection of salary or other compensation owed to the deceased spouse [see *Prob. Code §§ 13600-13606*] and a simplified judicial procedure for the transfer of other property [see *Prob. Code §§ 13650-13660*].

A surviving spouse may elect to administer all or a part of the property transferred from the decedent spouse to avoid personal liability for the decedent's debts. If a surviving spouse receives property from a decedent spouse and the property is not administered, the surviving spouse will be personally liable for debts of the decedent [*Prob. Code § 13550*]. However, the liability will be limited to the total amount of the property received from the decedent spouse and not exempt from enforcement of a money judgment, less the amount of any liens or encumbrances against that property [*Prob. Code § 13551*].

Beginning January 1, 2005, these provisions also apply with respect to the surviving registered domestic partner of a decedent. A surviving registered domestic partner, following the other partner's death, has the same rights, protections, and benefits, and is subject to the same responsibilities, obligations, and duties under law that are granted to and imposed on a surviving spouse [*Fam. Code § 297.5(c)*; see *Fam. Code § 297.5(j)* (when necessary to implement statutory rights of domestic partners, gender-specific terms referring to spouses must be construed to include domestic partners)].

### **[3] Small Estate Set-Aside**

A court order may be obtained assigning personal property (wherever located) and real property (located in California) to the decedent's surviving spouse and minor children (even if there is a conflicting will) if the net value of the decedent's estate does not exceed \$20,000 [*Prob. Code § 6602*; see *Prob. Code §§ 6600-6615*]. In determining whether to assign personal property to a surviving spouse or minor children under this provision, the court must consider the needs of the spouse and children, liens and encumbrances on the decedent's property, creditors' claims, the needs of heirs or devisees, and the intent of the decedent with respect to the property in the estate [*Prob. Code § 6609(b)*]. The court may refuse to assign property if it determines that it would be inequitable to do so under the circumstances of the particular case [*Prob. Code § 6609(a)*].

Beginning January 1, 2005, these provisions also apply with respect to the surviving registered domestic partner of a decedent. A surviving registered domestic partner, following the other partner's death, has the same rights, protections, and benefits, and is subject to the same responsibilities, obligations, and duties under law that are granted to and imposed on a surviving spouse [*Fam. Code § 297.5(c)*; see *Fam. Code § 297.5(j)* (when necessary to implement statutory rights of domestic partners, gender-specific terms referring to spouses must be construed to include domestic partners)].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawEstate AdministrationGeneral OverviewEstate, Gift & Trust LawProbateGeneral  
OverviewEstate, Gift & Trust LawProbateSmall Estates



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DIVISION IV: WILLS AND TRUSTS  
CHAPTER 65 EXECUTORS  
PART II. LEGAL BACKGROUND

*24-65 California Legal Forms--Transaction Guide § 65.34*

### § 65.34 Ancillary Administration

#### [1] In General

Ancillary administration is administration of a decedent's estate in a state in which the decedent left property but in which he or she was not domiciled at the time of death [*Black's Law Dictionary* (5th ed., 1979), p. 78; *see Prob. Code § 12501* ("ancillary administration" defined)]. It is a probate proceeding in a nondomiciliary state made necessary by the existence of property belonging to the decedent in the nondomiciliary state. The power of a state to require that property within its borders be subject to local administration flows from the state's plenary power to regulate the ownership of property subject to its jurisdiction [*see Estate of Clark (1905) 148 Cal. 108, 112, 82 P. 760*; *Estate of Glassford (1952) 114 Cal. App. 2d 181, 188, 249 P.2d 908*; *see also Civ. Code § 755* (property in California governed by California law)].

The Probate Code contains rules governing ancillary administration in California of the estates of decedents who die domiciled in other states or countries [*see Prob. Code §§ 12510-12542*]. Under those rules, the will of a nondomiciliary decedent [*see Prob. Code § 12505* ("nondomiciliary decedent" defined)] that is admitted to probate in California has the same force and effect as the will of a person who dies while domiciled in the state [*Prob. Code § 12524*].

Administration of property owned by a nondomiciliary decedent is called "ancillary" only to distinguish it from the administration of property owned by a domiciliary decedent. Ancillary administration is wholly independent of any administration in the domiciliary state and proceeds according to the same rules as the administration of other estates [*Richards v. Blaisdell (1909) 12 Cal. App. 101, 110, 106 P. 732*; *see Prob. Code §§ 12524* (will admitted to probate under ancillary administration provisions of Probate Code has same force and effect as will of domiciliary), 12530 (ancillary administration of nondomiciliary's estate in California subject to all estate administration provisions of Probate Code)].

#### [2] In California

The mere presence in California of property owned by a nondomiciliary decedent is sufficient to justify ancillary administration in California [*Richards v. Blaisdell (1909) 12 Cal. App. 101, 110, 106 P. 732*; *see Prob. Code § 7001* (decedent's property subject to administration under Probate Code except as otherwise provided by law); *see also Prob.*

*Code* §§ 7051 (venue in case of domiciliary), 7052 (venue in case of nondomiciliary)]. It is not necessary to show that there are local creditors, or even that the local property requires care or preservation [ *Richards v. Blaisdell* (1909) 12 Cal. App. 101, 110, 106 P. 732 ].

If the nondomiciliary decedent left a will that has been admitted to probate in another state or country, the will is entitled to automatic recognition in California [see *Prob. Code* § 12521; see also discussion] if the requirements of *Prob. Code* §§ 12520-12524 are satisfied. A will admitted to probate in another state or country will satisfy the requirements of *Prob. Code* §§ 12520-12524 if all of the following conditions are satisfied:

- It was admitted in accordance with the laws of the other state or country [*Prob. Code* §§ 12522, 12523(a)];
- The determination of the other state or country was based on a finding that at the time of death the decedent was domiciled in that state or country [*Prob. Code* §§ 12522(a), 12523(a)(1)];
- All interested parties were given notice and an opportunity for contest in the proceedings in the other state or country [*Prob. Code* §§ 12522(b), 12523(a)(2)]; and
- The determination in the other state or country is final [*Prob. Code* §§ 12522(c), 12523(a)(3)].

Automatic recognition of a nondomiciliary will may be obtained by filing a petition for probate of the will under *Prob. Code* § 12521. The petition must include the will (or an authenticated copy of the will) [*Prob. Code* § 12521(a)(1)] and an authenticated copy of the order admitting the will to probate in the other state or foreign nation [*Prob. Code* § 12521(a)(2); see *Prob. Code* § 12521(b) ("authenticated copy" must satisfy requirements of *Evid. Code* §§ 1530-1532); see also *Evid. Code* §§ 1530-1532 (proof of official writings and recorded writings)]. If an authenticated copy of the order admitting the will to probate is not produced, other evidence of the establishment or proof of the will in accordance with the law of the other state or nation may be offered [*Prob. Code* § 12521(a)(2)].

If all of the requirements of *Prob. Code* §§ 12520-12524 are satisfied, the court must admit the will to probate in California (and it may not permit a contest or revocation of the probate), unless the will was admitted to probate in a foreign nation under a judicial system that does not provide impartial tribunals or procedures compatible with the requirements of due process of law [*Prob. Code* § 12523(b)]. In the latter case, the court may refuse to admit the will even if it satisfies the other requirements of *Prob. Code* §§ 12520-12524 [*Prob. Code* § 12523(b)]. The will of a nondomiciliary admitted to probate in California under the simplified procedure outlined above has the same force and effect as the will of a domiciliary that is admitted to probate [*Prob. Code* § 12524].

If the requirements of *Prob. Code* §§ 12520-12524 are not met, the nondomiciliary's will is not entitled to automatic recognition in California, but it may be offered for probate under the ordinary procedures established for probate of the wills of domiciliary decedents [*Prob. Code* § 12520(b); see *Prob. Code* §§ 8000-8577 (opening estate administration)].

### [3] Alternative Procedures

Alternative procedures for the collection and distribution of property left in California by a nondomiciliary decedent are available under California law. These includes various procedures that are individually and collectively referred to as "summary" administration [see *Prob. Code* §§ 6600-6615 (small estate set-asides), 13100-13116 (collection or transfer of personal property by affidavit if gross value of property in California not over \$100,000), 13150-13158 (court order determining succession to real property if gross value of property in California not over \$100,000), 13200-13210 (collection by affidavit of real property not over \$10,000 in value)]. The sister state personal representative of a nondomiciliary decedent may collect personal property belonging to the decedent and located in California by using the affidavit procedure available for the use of successors of domiciliary decedents if the gross value of the decedent's real

and personal property in California does not exceed \$100,000 [*Prob. Code § 12570*; see *Prob. Code §§ 13100-13116*]. Under this procedure, the sister state representative must wait at least 40 days after the decedent's death [*Prob. Code § 13100*]. The representative may then proceed, without initiating ancillary administration proceedings [see *Prob. Code § 13108(a)* (procedure available only if no administration proceedings conducted or pending)], to collect money due the decedent, receive tangible personal property of the decedent, or have debts, obligations, rights, or other choses in action belonging to the decedent transferred to the decedent's successor [*Prob. Code §§ 12570, 13100*]. This may be done by furnishing the holder of the money, property, or chose in action an affidavit setting forth specified information [see *Prob. Code § 13101(a)* (contents of affidavit)]. The affidavit must, among other things, disclose the name of the decedent's successor [*Prob. Code § 13101(a)(7)*; see *Prob. Code § 13006* ("successor" defined)] and state that no other person has a right to the interest of the decedent in the described property [*Prob. Code § 13101(a)(9)*].

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Estate, Gift & Trust Law  
Probate  
Ancillary Proceedings



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 PART II. LEGAL BACKGROUND

*24-65 California Legal Forms--Transaction Guide § 65.35*

**§ 65.35 Personal Representatives**

**[1] In General**

For the purpose of carrying out the administration of a decedent's estate, the decedent's personal representative has the right (and the duty) to take possession or control of all of the property, real and personal, tangible and intangible, to be administered in the decedent's estate [*Prob. Code § 9650(a)(1)*]. As used in the Probate Code, the term "personal representative" includes an executor [*see § 65.35[2]*], an administrator [*see § 65.35[3]*], an administrator with the will annexed [*see § 65.35[5]*], a special administrator [*see § 65.35[4]*], a successor personal representative, and any person who performs substantially the same function under the laws of another jurisdiction governing the person's status [*Prob. Code § 58(a)*]. No person has any power to administer a decedent's estate until the person is appointed personal representative and the appointment becomes effective. Appointment of a personal representative becomes effective when the person appointed is issued letters [*Prob. Code § 8400(a)*; *see Prob. Code § 52* ("letters" defined)].

**[2] Executors**

An executor is a personal representative [*see Prob. Code § 58(a)* ("personal representative" defined); *see also § 65.35[1]*] who is nominated by the will of a decedent and appointed by the court to carry out the provisions of the decedent's will and dispose of the decedent's property according to law [*see Prob. Code §§ 8400(a)* (no power to administer estate until appointed), 8420 (appointment of person named as executor in will); Black's Law Dictionary 511 (5th ed. 1979)]. On appointment and qualification, an executor is entitled to the issuance of letters testamentary [*see Prob. Code § 52* ("letters" defined)].

The person named as executor in the decedent's will has the right to appointment as personal representative [*Prob. Code § 8420*]. The executor need not be named in the will, however. If it appears by the terms of the will that the testator intended to commit the execution of the will and the administration of the estate to a particular person, that person is entitled to appointment in the same manner as if named as executor [*Prob. Code § 8421*]. Although it is generally true that a personal representative (including an executor) has no power to administer the estate until appointed by the court [*Prob. Code § 8400(a)*], a person named as executor in the will may, before appointment, pay funeral expenses and take necessary measures for the maintenance and preservation of the estate [*Prob. Code § 8400(b)*]. An executor is properly referred to as "executor of the will of " or "executor under the will of " the named decedent, rather than as "executor of

the estate."

### [3] Administrators

An administrator is a personal representative [*see Prob. Code § 58(a)* ("personal representative" defined); *see also § 65.35[1]*] who is appointed by the court to administer and settle the estate of an intestate decedent [*Black's Law Dictionary* (5th ed., 1979), p. 43; *see Prob. Code § 8460* (if decedent dies intestate, court must appoint administrator)]. An administrator differs from an executor in that the latter is nominated by the will of the decedent while the former acquires his or her right to appointment by statutory provision. In the usual case, the court appoints a relative of the decedent as administrator [*see Prob. Code §§ 8461* (order of priority for appointment), 8462 (limitations on priority of surviving spouse or domestic partner [*see Prob. Code § 37*], relative of decedent, or relative of predeceased spouse)]. In appropriate circumstances, however, the court may appoint the nominee of a person entitled to appointment [*Prob. Code §§ 8465, 8466*; *see Estate of Garrett (2008) 159 Cal. App. 4th 831, 839, 71 Cal. Rptr. 3d 864* (surviving spouse's nominated son, had priority over decedent's daughter in obtaining letters of administration under *Prob. Code § 8461* when the past filing of a dissolution action by surviving spouse was dismissed for lack of prosecution, resulting in surviving spouse having priority under *Prob. Code § 8463*, as well as her son, as nominee, under *Prob. Code § 8465*)]. If several persons have equal priority for appointment as administrator, the court may appoint one or more of them, or if the persons who have priority are unable to agree, the court may appoint the public administrator [*see Prob. Code §§ 7600-7666* (public administrators); *see also § 65.35[6]*] or a disinterested person having a statutory claim to appointment [*Prob. Code § 8467*]. If no person having priority claims appointment as administrator, the court may appoint any person who claims appointment [*Prob. Code § 8468*].

### [4] Special Administrators

A special administrator is a personal representative [*see Prob. Code § 58(a)* ("personal representative" defined); *see also § 65.35[1]*] who is appointed to take possession and control of an estate until some other person is appointed to administer it [*O'Bryan v. Superior Court (1941) 18 Cal. 2d 490, 494, 116 P.2d 49*; *see Prob. Code §§ 8540-8547* (special administrators)]. A special administrator's powers and duties are typically limited, in contrast to those of a general administrator [*see Prob. Code §§ 58(b)* ("general personal representative" excludes special administrator), 8546(a)(powers of special administrator cease on issuance of letters to general personal representative), (b)(duty of special administrator to deliver property to general personal representative); *but see Prob. Code § 8545(a)* (when proper, court may grant special administrator same powers as general personal representative)], which are typically plenary, or unlimited. If the circumstances of an estate require the immediate appointment of a personal representative, the court may appoint a special administrator to exercise the powers that may be appropriate under the circumstances for the preservation of the estate [*Prob. Code § 8540(a)*].

The function of the special administrator is essentially stopgap; that is, the special administrator acts only when there is no other person to take charge of the estate, or when appointment of the person or persons entitled to take charge of the estate has been delayed for some reason [*O'Bryan v. Superior Court (1941) 18 Cal. 2d 490, 494, 116 P.2d 49*; *In re Estate of Heaton (1904) 142 Cal. 116, 117-118*]. Special administrators are most commonly appointed when there is a will contest and the right of the person named in the will to act as executor is unresolved, although they may also be appointed under other special circumstances.

In appointing a special administrator, the court must ordinarily give preference to the person entitled to appointment as personal representative, whether that person is named in the will of a testate decedent as executor [*see Prob. Code §§ 8420-8425* (executors); *see also § 65.200[1][b]*] or is a person entitled to appointment as administrator of the estate of an intestate decedent [*see Prob. Code §§ 8460-8468* (administrators); *see also § 65.35[3]*]. A special administrator may be appointed at any time, with or without notice [*Prob. Code § 8541(a)*] and on any terms the court may direct [*Prob. Code § 8540(b)*].

A special administrator may be appointed for a specified term or merely to perform a particular act or acts [*Prob. Code § 8540(b)*]. When the appointment is to perform a particular act, the letters of the special administrator [*see Prob. Code § 52* ("letters" defined)] must include a notation of the particular act the special administrator was appointed to perform [*Prob. Code § 8542(c)*]. Unless the court limits the authority of the special administrator, he or she will have power to take possession of the decedent's property and preserve it from damage, waste, and injury, to collect claims, to commence and maintain or defend suits, and to sell perishable property [*Prob. Code § 8544(a)*]. Power to perform other acts may be conferred on the special administrator by the court [*Prob. Code §§ 8544(b), 8545*]. The special administrator's powers cease on issuance of letters to a general personal representative [*Prob. Code § 8546(a)*].

#### **[5] Administrators With the Will Annexed**

An administrator with the will annexed is an administrator [*see Prob. Code §§ 8460-8468* (administrators); *see also § 65.35[3]*] who is appointed to take charge of the estate of a testate, rather than intestate, decedent. An administrator with the will annexed must be appointed if a person dies with a will that does not name an executor, or if the sole executor or all of the executors named in the will waive the right to appointment or for any reason are unwilling or unable to act [*Prob. Code § 8440*; *see Prob. Code § 8522(a)* (duty of court to appoint successor personal representative when vacancy occurs and there are no other personal representatives)]. An administrator with the will annexed is typically appointed when the executor named in the will dies or becomes disabled before the testator's death. An administrator with the will annexed may also be appointed if the person named as executor in the will does not petition for appointment [*see Prob. Code § 8001* (waiver of appointment by unexcused failure to petition within 30 days after learning of testator's death)].

Persons entitled to appointment as administrator have the same right to appointment as administrator with the will annexed [*Prob. Code § 8441(a)*; *see Prob. Code §§ 8461-8464* (order of priorities for appointment of administrators); *see also § 65.35[3]*]. Similarly, persons entitled to appointment as administrator have the right to nominate administrators with the will annexed [*Prob. Code § 8441(a)*; *see Prob. Code § 8465* (nomination of administrator by persons entitled to appointment)]. A person who takes under the will has priority over a person who does not, but the court in its discretion may give priority to a person who does not take under the will if the person is entitled to a statutory interest that is a substantially greater portion of the estate than the devise to the person who takes under the will and the priority appears appropriate under the circumstances [*Prob. Code § 8441(b)*]. A person who takes more than 50 percent of the value of the estate under the will, or the nominee of a person or several persons who together take more than 50 percent of the value of the estate under the will, has priority over other persons who take under the will [*Prob. Code § 8441(b)*].

An administrator with the will annexed ordinarily has the same authority over the decedent's estate that an executor named in the will would have [*Prob. Code § 8442(a)*]. If, however, the will confers a discretionary power or authority on an executor that is not conferred by law and the will does not extend the power or authority to other personal representatives, the power or authority will not be deemed to be conferred on an administrator with the will annexed unless the court in its discretion authorizes the exercise of the power or authority [*Prob. Code § 8442(b)*]. On appointment and qualification, an administrator with the will annexed is entitled to the issuance of letters of administration with the will annexed [*see Prob. Code § 8405* (form of letters)].

#### **[6] Public Administrators**

The public administrator is a county officer [*see Gov. Code § 24000(l)*] who performs a governmental function [*Estate of Miller (1936) 5 Cal. 2d 588, 593-594, 55 P.2d 491*] and discharges duties and exercises powers prescribed by statute [*see Gov. Code §§ 27440-27443.5*; *Prob. Code §§ 7600-7666*]. Under the Probate Code, the public administrator has a duty to take preliminary steps to protect the property of certain decedents who die without next of kin and to petition for appointment as personal representative of the decedents' estates [*see Prob. Code § 58(a)* ("personal representative" defined); *see also § 65.35[1]*] if no person having higher priority petitions [*see Prob. Code §§*

7600-7604 (taking temporary possession or control of property), 7620-7624 (appointment of public administrator as personal representative)].

When a person dies in a hospital, convalescent hospital, or board and care facility without known next of kin, the public administrator has a duty to take possession or control of any property of the decedent that is subject to loss, injury, waste, or misappropriation until a personal representative is appointed [*Prob. Code* §§ 7600.5, 7601(a); *but see Prob. Code* § 7601(b) (public administrator not liable for failing to take possession of control of property beyond his or her ability)]. In such a case, the public administrator must make a prompt search for any other property of the decedent and for a will or instructions for disposition of the decedent's remains [*Prob. Code* § 7602(a)]. If a will is found, the public administrator must deliver it to the clerk of the superior court within 30 days and mail a copy to the person named as executor, if the executor's whereabouts are known, and, if not, to a beneficiary named in the will [*Prob. Code* §§ 7602(b), 8200(a)]. If instructions for dispositions of the decedent's remains are found, the public administrator must promptly deliver the instructions to the person who has the right to control disposition of the remains as provided in the Health and Safety Code [*Prob. Code* § 7602(c); *see Health & Safety Code* § 7100 (right to control disposition of remains)].

The public administrator is required to petition for appointment as personal representative if no person having higher priority has petitioned and the total value of the property in the decedent's estate exceeds \$100,000, or if, for any other reason, the public administrator determines that a petition would be proper [*Prob. Code* § 7620(a), (b)]. The public administrator must accept appointment as personal representative whenever ordered to do so by the court, whether or not the appointment results from the public administrator's petition [*Prob. Code* § 7620(c); *see Prob. Code* § 7621(b) (appointment on court's own motion)].

When appointed as personal representative, the public administrator generally has the same powers and is subject to the same duties as other personal representatives [*Prob. Code* §§ 7621(a) (appointment and letters), 7622(a) (duty to administer estate in same manner as personal representative generally)]. The public administrator is entitled to the same compensation as other personal representatives [*Prob. Code* § 7622(b)] and may receive additional compensation [*see Prob. Code* § 7623(a) ("additional compensation" defined)] if another person having priority for appointment has, after notice, refused to petition, or if he or she has appointed after the resignation or removal of another personal representative [*Prob. Code* § 7623(b)]. Letters may be issued to "the public administrator" of the county without naming the public administrator [*Prob. Code* § 7621(c)].

### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law  
 Intestacy Administrators  
 Estate, Gift & Trust Law  
 Probate Personal Representatives  
 General Overview  
 Estate, Gift & Trust Law  
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DIVISION IV: WILLS AND TRUSTS  
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*24-65 California Legal Forms--Transaction Guide § 65.36*

### § 65.36 Qualifications of Executor

#### [1] In General

Subject to statutory restrictions, a testator has the right to select any person to be executor of his or her will [*Prob. Code § 8420; Estate of Shimum (1977) 67 Cal. App. 3d 436, ; Estate of Fiddymont (1946) 74 Cal. App. 2d 72, ; see Prob. Code § 58(a)* ("personal representative" defined)]. The fact that a person has been nominated as executor is evidence of the confidence reposed in that person by the testator [ *Estate of Buchman (1954), 123 Cal. App. 2d 546* ]. Statutory grounds for disqualification of a properly nominated executor are few, and the courts have no power to add additional grounds not set forth in the statutes [ *Estate of Berry (1943) 56 Cal. App. 2d 621, 624* ].

#### [2] Age

A person is not competent to act as executor (or as any other personal representative) if the person is under the age of majority [*Prob. Code § 8402(a)(1); see Prob. Code § 58(a)* ("personal representative" defined); *see also § 65.35[1]*]. In California, the age of majority is 18 years [*see Fam. Code § 6500*]. If a person named as executor is under 18 when the testator dies, the court may appoint another personal representative to administer the estate until the minor reaches 18 [*Prob. Code § 8242*]. If the will names another executor, the other person may be appointed and may administer the estate until the minor reaches 18, at which time the minor may be appointed as coexecutor [*Prob. Code § 8424(a)*]. If the will does not name another executor, another person may be appointed as administrator with the will annexed [*see Prob. Code §§ 8440-8442; see also § 65.35[5]*] or as special administrator [*see Prob. Code §§ 8540-8547* (special administrators); *see also § 65.35[4]*], but the court may revoke the appointment when the minor reaches 18 and appoint the minor as executor [*Prob. Code § 8424(b)*].

#### [3] Ability and Fitness

A person is not competent to act as executor (or as any other personal representative) if the person is subject to a conservatorship of the estate or is otherwise incapable of executing or unfit to execute the duties of the office [*Prob. Code § 8402(a)(2); see Prob. Code § 58(a)* ("personal representative" defined); *see also § 65.35[1]*]. A conservator of the estate may be appointed for any adult who is substantially unable to manage his or her own financial resources or to resist fraud or undue influence [*Prob. Code §§ 1800, 1801*; for discussion, *see Ch. 66, Conservatorships* ].

#### [4] Grounds for Removal

A person is not competent to act as executor (or as any other personal representative) if the person would be subject to removal from the office under *Prob. Code* § 8502 [*Prob. Code* § 8402(a)(3); see *Prob. Code* § 58(a) ("personal representative" defined); see also § 65.35[1]]. An executor (or other personal representative) is subject to removal from office under *Prob. Code* § 8502 for any of the following causes:

- The executor has wasted, embezzled, mismanaged, or committed a fraud on the estate, or is about to do so [*Prob. Code* § 8502(a)];
- The executor is incapable of properly executing the duties of the office, or is otherwise not qualified for appointment as personal representative [*Prob. Code* § 8502(b)];
- The executor has wrongfully neglected the estate, or has long neglected to perform any act as personal representative [*Prob. Code* § 8502(c)];
- Removal is otherwise necessary for protection of the estate or interested persons [*Prob. Code* § 8502(d)]; or
- Any other cause provided by statute [*Prob. Code* § 8502(d)].

The former rule that the grounds for disqualification of an executor before appointment are distinct from the grounds for removal of an executor after appointment [see *Estate of Backer* (1985) 164 Cal. app. 3d 1159, 1162-1163, 211 Cal. Rptr. 163] was abrogated in 1989 by the repeal of former *Prob. Code* §§ 401 and 521 and the enactment of current *Prob. Code* Section § 8402(a)(3). Under the new section (operative July 1, 1989), the grounds for denying an appointment are identical to the grounds for removing an incumbent [*Recommendation Relating to Opening Estate Administration*, 19 Cal. L. Revision Comm'n Reports (1988) p. 829]. This change in the law was intended to save needless court proceedings and avoid unnecessary complications in the administration of the estate that sometimes resulted from application of the old rule [*Recommendation Relating to Opening Estate Administration*, 19 Cal. L. Revision Comm'n Reports (1988) p. 795].

#### [5] Residence

Although a person who is not a resident of the United States is generally disqualified from appointment as personal representative [*Prob. Code* § 8402(a)(4); see *Prob. Code* § 58(a) ("personal representative" defined); see also § 65.35[1]], this rule does not apply to a person named as executor or successor executor in the decedent's will [*Prob. Code* § 8402(b)]. There is no requirement that any personal representative be a resident of California [ *Estate of Kelley* (1920) 182 Cal. 81, 82, 186 P. 1041 ], or even that the executor's oath of office be executed in the state [ *Adams v. Sharp* (1964) 61 Cal. 2d 775, 778 ]. Executors who do not reside in California are, however, subject to rules that do not apply to residents.

First, a nonresident who accepts appointment as executor is deemed to have irrevocably appointed the Secretary of State as his or her attorney for the purpose of accepting service of process and other notices in any action or proceeding against the nonresident with respect to the estate or arising out of acts or omissions of the nonresident in that capacity [*Prob. Code* § 8572 (rule applicable to personal representatives generally); see *Prob. Code* §§ 8574 (manner of service on Secretary of State), 8575 (proof of service), 8576 (legal effect of service)]. Second, a nonresident executor must sign and file with the court a statement of his or her permanent address and update the statement whenever the address changes [*Prob. Code* § 8573; see *Prob. Code* § 8577(a) (failure to file and update statement are grounds for removal from office)]. Finally, the court in its discretion may require a nonresident executor to post a bond, even if the will waives the requirement of a bond [*Prob. Code* § 8571; see *Prob. Code* §§ 8480-8488 (bond requirements); see also §

65.40].

A resident executor who, after appointment, moves his or her residence outside California is subject to the same rules and requirements as a person who is a nonresident when appointed [*Prob. Code* § 8570 (rule applicable to personal representatives generally)].

### **[6] Trust Company**

A trust company may be appointed to act as an executor in the same manner as an individual [*Prob. Code* § 300; *see Prob. Code* § 58(a) ("personal representative" defined); *see also* *Fin. Code* § 107, *Prob. Code* § 83 ("trust company" defined)]. A trust company is an entity that has qualified to act as executor, administrator, trustee, guardian, conservator, trustee, or other fiduciary in California [*Prob. Code* § 83 ("trust company" defined); *see Fin. Code* §§ 106 ("trust business" defined), 107 ("trust company" defined)].

If the will nominates a trust company as executor and the trust company later sells its business and assets to another trust company, the court may (and to the extent required by Division 1 of the Banking Law [*Fin. Code* § 99 *et seq.*] it must) appoint the successor trust company as executor [*Prob. Code* § 8423]. The same rule applies when the trust company nominated in the will merges with or is succeeded by another trust company [*Prob. Code* § 8423].

A trust company that is appointed as executor may not be required to give a bond, even if a bond is required by the will [*Prob. Code* § 301(a); *see Prob. Code* §§ 8480-8488 (bond requirements); *see also* § 65.40]. Trust companies are, however, subject to special requirements for liability, oaths, and affidavits set forth in the Financial Code [*Prob. Code* § 301(b); *see Fin. Code* §§ 1540-1547, 1587].

Some (although not all) large commercial banks and industrial banks and industrial banks in California maintain trust departments and are legally qualified to act as trust companies, as are certain title insurance companies [*see Fin. Code* § 107; *see also* Ch. 64A, *Testamentary Trusts: Payment and Distribution Provisions* ].

### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law  
 Probate  
 Personal Representatives  
 General Overview  
 Estate, Gift & Trust Law  
 Probate  
 Personal Representatives  
 Appointment



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DIVISION IV: WILLS AND TRUSTS  
 CHAPTER 65 EXECUTORS  
 PART II. LEGAL BACKGROUND

*24-65 California Legal Forms--Transaction Guide § 65.37*

**§ 65.37 Nomination of Executor**

Although the process whereby a testator names a person to act as executor is commonly referred to as "appointment," a will provision naming an executor is properly a "nomination" rather than an "appointment." The testator "nominates" the executor, and the court (if the nomination is approved) "appoints" the executor [*see Prob. Code § 8400 et seq.* (appointment of personal representative)].

The nomination of a testator is a testamentary act and, as such, must be part of a valid will [for the requisites of valid wills, *see Prob. Code § 6100 et seq.*; *see also* Ch. 61, *Will Drafting and Complete Will Forms*]. The Probate Code generally uses the words "named" or "named in the will" to refer to the nomination of an executor [*see, e.g., Prob. Code §§ 8420* (right to appointment as executor), 8423 (appointment of successor trust company)]. It is settled, however, that no particular language is required to nominate an executor [ *Estate of Parker (1927) 202 Cal. 138, 142, 259 P. 431* ]. The code itself provides that, if a person is not named as executor in a will but it appears by terms of the will that the testator intended to commit the execution of the will and the administration of the estate to the person, the person is entitled to appointment in the same manner as if named in the will [*Prob. Code § 8421*].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law  
 Probate  
 Personal Representatives  
 General Overview  
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 Personal Representatives  
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*24-65 California Legal Forms--Transaction Guide § 65.38*

**§ 65.38 Direction or Recommendation in Will That Executor Employ Particular Attorney**

A will provision naming a specific attorney as attorney for the executor, or directing the executor to consult and employ a particular attorney in all matters relating to the probate of the will and the administration of the estate, is advisory only and not binding on the executor [ *In re Ogier (1894) 101 Cal. 381, 386, 35 P. 900* ; *Highfield v. Bozio (1922) 188 Cal. 727, 728, 207 P. 242* ]. The attorney for the executor represents the executor, not the estate [see *Goldberg v. Frye (1990) 217 Cal. App. 3d 1258, 1267, 266 Cal. Rptr. 483* (attorney for administrator)]; and the office or position of "attorney of an estate" is not recognized by the law [ *In re Ogier (1894) 101 Cal. 381, 385, 35 P. 900* ]. An executor, like any other person, has the right to select his or her own attorney [ *Highfield v. Bozio (1922) 188 Cal. 727, 729, 207 P. 242* ]. However, an executor may respect a will provision requesting that the executor employ a particular attorney. Under appropriate circumstances, such a provision may safely be added to the will, provided the testator understands that the direction is not binding.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawProbatePersonal RepresentativesGeneral OverviewEstate, Gift & Trust LawProbatePersonal RepresentativesDuties & PowersGeneral Overview



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*24-65 California Legal Forms--Transaction Guide § 65.39*

**§ 65.39 Compensation of Executors**

**[1] Statutory Fees**

Executors, like other personal representatives, are entitled to compensation for their services. If the will does not specify the amount of the compensation [*see § 65.39[3]*], it will be determined according to a statutory schedule [*see Prob. Code § 10800*]. The statutory schedule determines the compensation according to the total value of the estate accounted for, as follows [*Prob. Code § 10800(a)*; *see Cal. Rules of Ct., Rule 7.707* (for proceedings commenced after June 30, 1991, law in effect on date of court's order awarding statutory compensation determines amount of that compensation)]:

- Four percent on the first \$100,000;
- Three percent on the next \$100,000;
- Two percent on the next \$800,000;
- One percent on the next \$9,000,000;
- One half of 1 percent on the next \$15,000,000;
- A reasonable amount to be determined by the court for all amounts above \$25,000,000.

For purposes of computing the statutory compensation, the total amount of the estate accounted for is deemed to be the total appraisal value of the inventory, plus gains over appraisal value on sales, plus receipts, less losses over appraisal on sales [*Prob. Code § 10800(b)*]. No deduction is allowed for encumbrances or other obligations on estate property [*Prob. Code § 10800(b)*].

A petition for statutory commissions or attorney's fees must state the amount of statutory compensation that is payable, and set forth the estate accounted for and the calculation of statutory compensation [*Cal. Rules of Ct., Rule 7.705(a)*]. If an account has been waived, the final report of administration must list the information required by law, including

information as to creditors' claims, sales, purchases or exchanges of assets, changes in the form of assets, assets on hand, whether the estate is solvent, detailed schedules of receipts and gains or losses on sale (if an amount other than the amount of the inventory and appraisal is used as a basis for calculating fees or commissions), costs of administration (if reimbursement of these costs is requested), the amount of any fees or commissions paid or to be paid, and the calculation of these fees or commissions [*Cal. Rules of Ct., Rules 7.705(b), 7.550*]. If the report is accompanied by a request for statutory commissions or fees, the basis for their computation must be included in the petition [*Cal. Rules of Ct., Rule 7.705(b)*].

The court may authorize an allowance of statutory fees or commissions on account before approval of the final account and decree of final distribution [*Cal. Rules of Ct., Rule 7.701*]. Any allowance before settlement of the final account must be low enough to avoid the possibility of overpayment and must be (1) based on the estimated amount of statutory compensation payable on the estate determined as of the date of the petition for allowance, (2) in proportion to the work actually performed, and (3) based on a detailed description of the ordinary services performed and remaining to be performed [*Cal. Rules of Ct., Rule 7.701*].

The award of statutory fees is not discretionary. The representative is entitled to those fees as a matter of right, and the fact that the estate is large and its administration relatively simple does not diminish the right [ *Estate of Getty (1983) 143 Cal. App. 3d 455, 466, 191 Cal. Rptr. 897* ]. The court has discretion, however, on hearing a petition for final distribution of the estate, to reduce the executor's compensation in an appropriate amount if the time taken for administration of the estate exceeds the time required by the Probate Code or prescribed by the court and if the court determines that the time taken was within the control of the executor and not in the best interest of the estate or interested persons [*Prob. Code § 12205; see Prob. Code § 48* ("interested person" defined)].

The statutory compensation is intended to cover all of the services that the executor has a duty to perform [ *Estate of Billings (1991) 228 Cal. App. 3d 426, 430, 278 Cal. Rptr. 439* ]. The executor may not hire other persons to perform those services and expect that the compensation of the other persons will be paid out of the estate. Rather, compensation for those services must be deducted from the executor's statutory compensation. Whether the executor had a duty to perform services actually performed by others, and whether the executor's statutory compensation should be reduced by the amount of the compensation paid to the others, are ordinarily questions to be determined in the discretion of the trial court [ *Estate of Billings (1991) 228 Cal. App. 3d 426, 430-432, 278 Cal. Rptr. 439* ].

The personal representative may not pay or receive, and the attorney for the personal representative may not receive, statutory commissions or fees, or fees for extraordinary services, in advance of a court order authorizing their payment [*Cal. Rules of Ct., Rule 7.700(a)*]. In addition to removing the personal representative and imposing any other sanctions authorized by law against the personal representative or the attorney, the court may surcharge the personal representative for payment or receipt of statutory commissions or fees, or fees for extraordinary services, in advance of a court order authorizing their payment [*Cal. Rules of Ct., Rule 7.700(b)*].

## **[2] For Extraordinary Services**

In addition to statutory compensation based on the value of the estate accounted for, executors are entitled to additional compensation for "extraordinary services" [*Prob. Code § 10801(a); see Prob. Code § 58(a)* ("personal representative" defined); *see also §§ 65.41, 65.42*]. Extraordinary services are generally those beyond or in addition to the common or ordinary services rendered by the representative.

A petition for extraordinary compensation must include, or be accompanied by, a statement of the facts on which the petition is based, which must [*Cal. Rules of Ct., Rule 7.702*]:

- Show the nature and difficulty of the tasks performed.

- Show the results achieved.
- Show the benefit of the services to the estate.
- Specify the amount requested for each category of service performed.
- State the hourly rate of each person who performed services and the hours spent by each of them.
- Describe the services rendered in sufficient detail to demonstrate the productivity of the time spent.
- State the estimated amount of statutory compensation to be paid by the estate, if the petition is not part of a final account or report.

Extraordinary compensation ordinarily will not be awarded unless the services benefit the estate. Thus the representative is not entitled to extraordinary compensation for services that were not properly part of the administration of the estate [ *Estate of Tubbs (1947) 82 Cal. App. 2d 305, 308, 186 P.2d 7* ] or that were made necessary by the representative's own mistake [ *Estate of Coberly (1949) 90 Cal. App. 2d 46, 51, 202 P.2d 306* ].

The following is a nonexclusive list of activities for which the personal representative may be awarded extraordinary compensation [ *Cal. Rules of Ct., Rule 7.703(b)* ]:

- Selling, leasing, exchanging, financing, or foreclosing real or personal property.
- Carrying on the decedent's business if necessary to preserve the estate or under court order.
- Preparing tax returns.
- Handling audits or litigation connected with tax liabilities of the decedent or the estate.

The following is a nonexclusive list of activities for which the personal representative's attorney may be awarded extraordinary compensation [ *Cal. Rules of Ct., Rule 7.703(c)* ]:

- Legal services in connection with the sale of property held in the estate.
- Services to secure a loan to pay estate debts.
- Litigation undertaken to benefit the estate or protect its interests.
- Defense of the personal representative's account or defense of a will that is contested after its admission to probate.
- Successful defense of a will that is contested before its admission to probate or successful defense of a personal representative in a removal proceeding.
- Extraordinary efforts to locate estate assets.
- Litigation in support of the attorney's request for extraordinary compensation when prior compensation awards are not adequate compensation under all of the circumstances.
- Coordination of ancillary administration.

■ Accounting for a deceased, incapacitated, or absconded personal representative under *Prob. Code* § 10953.

Extraordinary legal services may include the services of a paralegal acting under an attorney's direction and supervision [*Cal. Rules of Ct., Rule 7.703(e)*]. A request for extraordinary legal fees for a paralegal's services must: (1) describe the paralegal's qualifications (including education, certification, continuing education, and experience); (2) state the hours the paralegal spent and the hourly rate requested for the paralegal's services; (3) describe the services the paralegal performed; (4) state why it was appropriate to use the paralegal's services in the particular case; and (5) demonstrate that the total amount requested for the attorney's and paralegal's extraordinary services does not exceed the amount appropriate if the attorney had performed the services without the paralegal's assistance [*Cal. Rules of Ct., Rule 7.703(e)*].

The allowance of extraordinary compensation is a matter of discretion with the trial court [ *Estate of Fulcher (1965) 234 Cal. App. 2d 710, 718, 44 Cal. Rptr. 861* ], and in the absence of abuse, the trial court's discretion will not be interfered with on appeal [ *Estate of Downing (1982) 134 Cal. App. 3d 256, 266, 184 Cal. Rptr. 511* ]. The trial court's discretion includes discretion to determine whether the character of the services is such that it warrants extra compensation and, if it is, how much that extra compensation should be [ *Estate of Downing (1982) 134 Cal. App. 3d 256, 266, 184 Cal. Rptr. 511* ; *Estate of Scherer (1943) 58 Cal. App. 2d 133, 142, 136 P.2d 103* ].

### [3] Will Provisions

Wills do not usually provide for the compensation of the executor, although the Probate Code explicitly authorizes them to do so [*see Prob. Code § 10802*; *see also Prob. Code § 58(a)* ("personal representative" defined) and § 65.35]. If the will makes provision for the executor's compensation, the specified sum must be the full compensation for the executor's services [*Prob. Code § 10802(a)*]. The executor is not also entitled to claim extraordinary compensation [ *Estate of Runyon (1899) 125 Cal. 195, 197, 57 P. 783* ; *see Estate of Van Every (1944) 67 Cal. App. 2d 164, 165, 153 P.2d 614* (attorneys' fees); *see also § 65.39[2]*].

However, the executor may petition the court to be relieved from a will provision setting his or her compensation [*Prob. Code § 10802(b)*]; and, if the court determines that it is to the advantage of the estate and in the best interest of the persons interested in the estate, the court may make an order authorizing greater compensation than the will allows [*Prob. Code § 10802(d)*].

Any contract between an executor or administrator and an heir or devisee for a higher compensation than that allowed by the will or by statute is void [*Prob. Code § 10803*].

### [4] When There Are Coexecutors

When there are two or more executors (whether the executors serve simultaneously or consecutively), the executor's compensation must be apportioned among them. If they cannot agree among themselves how the compensation should be apportioned, the court will apportion it for them [*Prob. Code § 10805*; *Cal. Rules of Ct., Rule 7.704(a)*]. Apportionment is required for extraordinary compensation as well as statutory compensation [*Prob. Code § 10805*; *Cal. Rules of Ct., Rule 7.704(a)*]; *see Dobbins v. Title Guar. & Trust Co. (1943) 22 Cal. 2d 64, 67, 136 P.2d 572* ].

### [5] When Attorney Is Executor

Attorneys for executors are also entitled to compensation for their services. The statutory provisions regulating the compensation of attorneys are substantially the same as those regulating the compensation of executors. A statutory fee schedule determines the ordinary compensation of the attorney for the executor, and the schedule is identical to the

statutory schedule for the compensation of personal representatives [see *Prob. Code* §§ 10800(a) (personal representatives), 10810(a)(attorneys); see also § 65.39]. If the attorney renders extraordinary services, the court may allow the attorney additional compensation for those services in an amount the court determines to be just and reasonable [*Prob. Code* § 10811(a); for extraordinary compensation of executor, see *Prob. Code* § 10801(a); § 65.39[2]]. An attorney may also claim extraordinary compensation for services performed by a paralegal under the attorney's direction and supervision [*Prob. Code* § 10811(b)]. Moreover, an attorney may agree to perform extraordinary service on a contingent fee basis if the agreement to do so is in writing, complies with *Bus. & Prof. Code* § 6147, is approved by the court, and the court determines that the agreement is just and reasonable, to the estate's advantage, and in the best interests of the persons who are interested in the estate [*Prob. Code* § 10811(c)].

A will may make provision for the compensation of the attorney for the executor. If it does so, the compensation provided by the will will ordinarily be the full and only compensation to which the attorney is entitled [*Prob. Code* § 10812(a)]. However, the attorney may petition the court to be relieved from the will provision [*Prob. Code* § 10812(a), (b)]; and, if the court determines that it is to the advantage of the estate and in the best interest of the persons interested in the estate, it may make an order authorizing greater compensation for the attorney [*Prob. Code* § 10812(c)(5)]. Any agreement by the executor to pay the attorney higher compensation than that allowed by the statutes is void [*Prob. Code* § 10813]. If there are two or more attorneys, the compensation must be apportioned among them according to the services actually rendered by each, or as they may agree among themselves [*Prob. Code* § 10814].

An attorney who serves as an executor cannot generally claim compensation both as executor and as attorney for the executor [see *Prob. Code* § 10804; *In re Estate of Parker* (1926) 200 Cal. 132, 137, 251 P. 907]. The reason for this rule is that an executor is a fiduciary, and a fiduciary should not be permitted to make a profit by employing himself or herself in a matter related to his or her trust [ *Estate of Thompson* (1958) 50 Cal. 2d 613, 614-615, 328 P.2d 1; *Estate of Hart* (1962) 204 Cal. App. 2d 634, 639, 22 Cal. Rptr. 495 ]. However, compensation as an executor as well as for services rendered as attorney for the executor may be obtained if the court specifically approves the compensation in advance and finds that the arrangement is to the advantage, benefit, and best interests of the decedent's estate [*Prob. Code* § 10804]. An executor who is an attorney may properly employ another attorney to render legal services for the estate. If the executor elects to act as his or her own attorney, however, the general rule is that he or she is not entitled to attorneys' fees for doing so unless prior court approval is obtained [*Prob. Code* § 10804; *Estate of Thompson* (1958) 50 Cal. 2d 613, 614-615, 328 P.2d 1; *Estate of Parker* (1926) 200 Cal. 132, 135-136, 251 P. 907]. An attorney cannot waive his or her fees as executor and thereafter claim attorneys' fees, since the rule against awarding attorneys' fees to an executor is based on public policy [ *Estate of Hart* (1962) 204 Cal. App. 2d 634, 639, 22 Cal. Rptr. 495 ].

The rule that an executor who is an attorney may not receive compensation as executor and as attorney for the executor (unless prior court approval is obtained) applies notwithstanding any provision in the decedent's will [*Prob. Code* § 10804; see *Estate of Thompson* (1958) 50 Cal. 2d 613, 615-617, 328 P.2d 1 (in absence of statutory provision or compelling policy reason to the contrary, when testamentary document expressly provides for both executor's and attorney's fees to same person, full force and effect should be given to testamentary direction); for will provision authorizing an attorney to receive compensation both as executor and as attorney, see § 65.445]. However, an attorney may receive compensation for services as executor and the attorney's law firm may receive compensation for legal services for the executor on proof that they have agreed that the executor will not share in any part of the attorneys' fees [ *Estate of Parker* (1926) 200 Cal. 132, 137, 251 P. 907 ]. If the record is silent about whether the executor will share in the attorneys' fees, sharing is presumed [ *Estate of Parker* (1926) 200 Cal. 132, 138, 251 P. 907 ]. Although these rules are somewhat negated by the statutory provision authorizing dual compensation for an executor who is also the attorney for the executor (by obtaining prior court approval for such an arrangement) [see *Prob. Code* § 10804], to establish that the attorney will not share in the law firm's compensation, a written agreement to that effect should be filed with the court.

### **Legal Topics:**

For related research and practice materials, see the following legal topics:  
Estate, Gift & Trust Law Probate Personal Representatives Compensation



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DIVISION IV: WILLS AND TRUSTS  
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*24-65 California Legal Forms--Transaction Guide § 65.40***§ 65.40 Bonds****[1] When Required**

The general rule is that every personal representative is required to give a bond approved by the court [*Prob. Code § 8480(a)*; *see Prob. Code § 58(a)* ("personal representative" defined); *see also Code Civ. Proc. § 995.210(a)* (undertaking may be given in place of bond)]. The bond must be for the benefit of interested persons and conditioned on the personal representative's faithful execution of the duties of his or her office according to law [*Prob. Code § 8480(b)*; *see Prob. Code § 48* ("interested person" defined)]. If the person appointed as personal representative fails to give the required bond, letters may not be issued [*Prob. Code § 8480(c)*; *see Prob. Code § 52* ("letters" defined)].

A bond is not required, however, if the will waives the requirement of a bond [*Prob. Code § 8481(a)(1)*]. Similarly, a bond is not required if all of the beneficiaries waive the requirement of a bond and their written waivers are attached to the petition for the appointment of the personal representative [*Prob. Code § 8481(a)(2)*; *see Prob. Code § 24* ("beneficiary" defined)]. Even if the beneficiaries waive the bond however, a bond will be required if the will requires one [*Prob. Code § 8481(a)(2)*].

Notwithstanding the waiver of a bond by the will or by all of the beneficiaries, the court may require that a bond be given, either before or after issuance of letters, if it finds good cause to require one [*Prob. Code § 8481(b)*].

When there are two or more personal representatives, the court may require a separate bond from each or a joint and several bond from both. If a joint bond is furnished, the liability on the bond is joint and several [*Prob. Code § 8480(a)*].

**[2] Amount**

The court has discretion to fix the amount of the bond [*Prob. Code § 8482(a)*]. In the usual case, the amount of the bond may not be more than the sum of the estimated value of the personal property plus the probable annual gross income of the estate [*Prob. Code § 8482(a)(1), (2)*]. If, however, the executor is granted authority to administer real property in the estate under the Independent Administration of Estates Act [*Prob. Code §§ 10400-10592*; *see §§ 65.32, 65.45*], the estimated net value of the real property must be added to the estimated value of the personal property and the probable annual gross income of the estate to determine the amount [*Prob. Code § 8482(a)*]. If the bond is given by personal

sureties rather than an admitted surety insurer [*see Code Civ. Proc. §§ 995.120* ("admitted surety insurer" defined), 995.610-995.660 (bond and undertaking requirements for admitted surety insurers); *Ins. Code § 105* (surety insurance)], the amount of the bond must be twice the amount fixed by the court under the foregoing rules [*Prob. Code § 8482(c)*].

A different rule applies when the personal representative has deposited property of the estate in an insured account in a financial institution on condition that the property, including any earnings on the property, not be withdrawn except on authorization of the court [*Prob. Code § 8483(a)*; *see Prob. Code § 8401* (deposit of money, securities, or other personal property); *see also Prob. Code §§ 9700-9705* (deposit of money and personal property with financial institutions)]. If the personal representative produces a receipt showing that property has been so deposited, the court may (either at the time the personal representative is appointed or thereafter) exclude the property in determining the amount of the required bond, or reduce the amount of the bond to an amount the court determines is reasonable [*Prob. Code § 8483(b)*].

### **[3] Increases and Decreases**

The court may reduce the amount of the bond if the personal representative produces a receipt showing that property of the estate has been deposited in an insured account in a financial institution [*see Prob. Code §§ 8401* (deposit of money, securities, or other personal property), 8483 (reduction of bond when property deposited)]. It must increase the amount of the bond whenever it confirms a sale of real property, treating the expected proceeds of the sale as personal property [*Prob. Code § 8482(d)*]. When the court orders preliminary distribution of all or a portion of a devisee's share of the estate [*see Prob. Code §§ 11620-11624* (preliminary distribution); *see also § 65.41[9]*], an additional bond may be required. If preliminary distribution is ordered before four months have elapsed after letters were first issued to the executor, the court must require an additional bond in the amount of the distribution [*Prob. Code § 11622(a)*]. If preliminary distribution is ordered after four months have elapsed, the court may require a bond in any amount it deems proper [*Prob. Code § 11622(b)*].

If the circumstances of the estate are such that the full amount of the existing bond is not required, the representative may request that the amount be reduced. A petition for a reduction of the bond must include an affidavit setting forth the condition of the estate [*Prob. Code § 8484*; *see Prob. Code § 1220* (notice of hearing)].

### **[4] Bond and Undertaking Law**

The Bond and Undertaking Law [*Code Civ. Proc. §§ 995.010-996.560*] sets forth detailed rules relating to the execution, filing, approval, form, sufficiency, cancellation, and enforcement of bonds. This law applies broadly to any bond or undertaking executed, filed, posted, furnished, or otherwise given as security pursuant to any California statute, except to the extent that another statute prescribes a different rule [*Code Civ. Proc. § 995.020(a)*]. It applies to all proceedings for administration of decedents' estates, except to the extent that the Probate Code provisions governing administration are inconsistent [*Prob. Code § 8487*]. For coverage of the Bond and Undertaking Law, see *Ch. 79, Suretyship, Guaranty, and Indemnity, § 79.50 et seq.*

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law  
 Probate  
 Personal Representatives  
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DIVISION IV: WILLS AND TRUSTS  
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*24-65 California Legal Forms--Transaction Guide § 65.41***§ 65.41 Duties of Executors****[1] In General**

Executors, like administrators, trustees, guardians, conservators, and other legal representatives, are fiduciaries [*Prob. Code § 39* ("fiduciary" defined); *see Prob. Code § 9601(a)* (measure of liability for breach of fiduciary duty)]. Every executor has fiduciary duties to the estate and the persons interested in it [*see Prob. Code § 48* ("interested person" defined)] and is bound to the utmost good faith in his or her transactions with the devisees and heirs [ *Larrabee v. Tracy (1943) 21 Cal. 2d 645, 651, 134 P.2d 265* ].

Executors, like other personal representatives [*see Prob. Code § 58(a)* ("personal representative" defined)], are legally charged with the duty of managing and controlling the estate [*Prob. Code § 9600(a)*]. This duty includes the duty of preserving and protecting the assets of the estate [*see 65.41[2]*], satisfying and discharging debts and claims against the decedent or the estate [*see § 65.41[6]*], and distributing the assets to the persons entitled to receive them [*see § 65.41[9]*]. In the discharge of that duty, the executor is required to use ordinary care and diligence [*Prob. Code § 9600(a)*]. What constitutes ordinary care and diligence will be determined by all of the circumstances of the particular estate [*Prob. Code § 9600(a)*; *see Prob. Code § 9600(b)* (duty to exercise or not to exercise power)].

**[2] Collecting and Preserving Estate Assets**

The executor has a general duty to take possession or control of all estate property, including debts due the decedent or the estate [*Prob. Code § 9650(a)(1)*; *Estate of King (1942) 19 Cal. 2d 354, 358, 121 P.2d 716* ]. However, this duty is subject to other statutory provisions governing possession of the estate [*see Prob. Code § 9650(a)*; *see also Recommendations Relating to Probate Law*, 19 Cal. L. Revision Comm'n Reports 49 (1988)]. Thus the executor need not take possession of the family dwelling or household furniture of the decedent if they are occupied and used by the decedent's surviving spouse and minor children [*see Prob. Code §§ 6500, 6501*]. The executor is not required to take possession of personal property if the cost of collecting, maintaining, and safeguarding the property would exceed its fair market value, unless the property has been specifically devised [*Prob. Code § 9780*; *see Prob. Code § 9782* (notice of proposed disposition or abandonment of property)]. Further, the executor may properly leave real or tangible personal property with the person presumptively entitled to it until its possession is necessary for administration purposes [*Prob. Code § 9650(c)*]. When the executor determines that possession of the property is necessary, the person

holding it is required to surrender it to the executor [*Prob. Code § 9650(c)*].

The executor also has a duty to preserve estate property [ *Estate of King (1942) 19 Cal. 2d 354, 358, 121 P.2d 716* ]. To that end, he or she must pay all taxes on the property and take all steps reasonably necessary for the protection and preservation of property in his or her possession [*Prob. Code § 9650(b)*]. Although an executor does not ordinarily have any power before he or she is appointed by the court [*Prob. Code § 8400(a)*], a person named as executor in the will may, before appointment, pay funeral expenses and take necessary measures for the maintenance and preservation of the estate [*Prob. Code § 8400(b)*].

### **[3] Filing Inventory and Appraisal**

Unless the court allows further time, the executor must file an inventory and appraisal of all property to be administered in the estate within four months after letters are first issued [*Prob. Code §§ 8800(a), (b), 8850(a)*]. The inventory must particularly specify certain kinds of property [*see Prob. Code § 8850(b)* (property that must be particularly specified)] and show, to the extent ascertainable by the executor, the portions that are community, quasi-community, and separate property [*Prob. Code § 8850(c)*]. The executor is generally required to appraise items consisting of cash or cash equivalents [*see Prob. Code § 8901* (money and other cash items, checks issued after death, accounts in financial institutions, cash deposits and money market funds, insurance proceeds, and certain retirement plans and annuities)], while the probate referee designated by the court is required to appraise other items [*Prob. Code § 8902(b); see Prob. Code §§ 400-453* (probate referees)] unless the court, for good cause, waives appraisal by the probate referee [*Prob. Code § 8903*]. Unique, artistic, unusual, or special items of tangible personal property that would otherwise be appraised by the probate referee may, at the election of the executor, be appraised by an independent expert [*Prob. Code § 8904(a)*].

Whether property is appraised by the executor, the probate referee, or an independent expert, the executor is responsible for filing the appraisal with the court within the permitted time. An executor who refuses or negligently fails to file may be removed from office [*Prob. Code § 8804(b)*] or ordered to reimburse the estate or interested persons for resulting injury and attorney fees [*Prob. Code § 8804(c); see Prob. Code § 48* ("interested person" defined)].

### **[4] Investing**

The executor has a duty to keep all cash in his or her possession (except such cash as is reasonably necessary for orderly administration of the estate) invested in interest-bearing accounts or other investments authorized by law [*Prob. Code § 9652(a)*]. However, the will may relieve the testator of this duty [*Prob. Code § 9652(c); see Prob. Code § 9732* (investment of money as provided in will)].

### **[5] Recovering Property**

If there are insufficient estate assets to pay all creditors, any creditor of the decedent or the estate may request that the executor sue to recover any property of which the decedent made a gift in contemplation of death [*Prob. Code § 9653(a)(2)*], or that was the subject of a fraudulent transfer [*Prob. Code § 9653(a)(1); see Civ. Code §§ 3439-3439.12* (Uniform Fraudulent Transfer Act)]. On receiving such a request, the executor has a duty to commence and prosecute an action for recovery of the property [*Prob. Code § 9653(a)*]. However, a creditor requesting such a suit may be required to pay a part of the costs and attorneys' fees incurred in the suit [*Prob. Code § 9653(b)*]. If the property is recovered, it must be sold and the proceeds (after payment of attorneys' fees and costs) applied to payment of the decedent's debts [*Prob. Code § 9653(c)*].

### **[6] Paying Debts**

The executor is required to pay certain debts [*see Prob. Code § 11401* ("debt" defined)] without the necessity of first obtaining a court order [*Prob. Code § 11421*]. As soon as he or she has sufficient funds (after retaining sufficient funds

to pay expenses of administration and debts owed to the state or federal governments that are legally entitled to preference), the executor must pay the following debts [*Prob. Code* § 11421]:

- Funeral expenses;
- Expenses of the decedent's last illness;
- Any family allowance [*see Prob. Code* §§ 6540-6545]; and
- Wage claims [*see Prob. Code* § 11402 ("wage claim" defined)].

The executor is obligated to pay other debts only if their payment has been ordered by the court [*Prob. Code* § 11422(a); *see Prob. Code* §§ 9000-9399 (creditor claims)].

For circumstances under which executors may be personally liable to creditors of the estate for payment of debts, see § 65.43[6].

### **[7] Filing Tax Returns and Paying Taxes**

The executor must file federal and state income and estate tax returns for both the decedent and the estate [*I.R.C.* §§ 6012(b)(1) (federal income tax return for decedent), (4)(federal income tax return for estate), 6018(a), before amendment by Pub. Law 107-16 (federal estate tax return); *Rev. & Tax. Code* § 18505(a)(4) (state income tax return for estate), (7)(state income tax return for decedent)]. In addition, the executor has the duty of paying any taxes due [*I.R.C.* §§ 641(b) (payment of federal income tax), 2002 (payment of federal estate tax); *Rev. & Tax. Code* § 17731 (federal law relating to taxation of estates applicable to state income tax)] when there are sufficient estate assets for that purpose [*County of Los Angeles v. Morrison* (1940) 15 Cal. 2d 368, 372-373, 101 P.2d 470 ; *Estate of Gerber* (1977) 73 Cal. App. 3d 96, 114, 140 Cal. Rptr. 577 ; *Estate of Harvey* (1964) 224 Cal. App. 2d 555, 557, 36 Cal. Rptr. 788 ].

For estates of decedents dying after 2009, a return related to certain large transfers at death must be filed [*I.R.C.* § 6018; *see I.R.C.* § 6716 (penalty if return is not filed)].

For the personal liability of executors for unpaid taxes, see § 65.43[5].

### **[8] Accounting**

Executors, like other personal representatives [*see Prob. Code* § 58(a) ("personal representative" defined)] are required to render accounts. The duty to account is inherent in the nature of the representative's fiduciary capacity and expressed in various statutes [*see Prob. Code* §§ 10900-11052 (accounts of personal representatives)]. An executor's account may be a final account or an interim account, as explained below.

Every executor is required to file at least one account, generally denominated a "final account" [*see Prob. Code* § 10951 (duty to file final account on final distribution)]. The final account must be filed (with the executor's petition for an order for final distribution) when the estate is in a condition to be closed [*Prob. Code* § 10951] or earlier, if the executor's authority is terminated before final distribution [*Prob. Code* § 10952]. If the executor resigns or is removed from office, or if the executor's authority is otherwise terminated, the account must be filed not later than 60 days after termination of the authority, unless the court extends the time [*Prob. Code* § 10952]. If the executor dies or becomes incapacitated, the executor's legal representative, if any, must file the account in his or her behalf [*Prob. Code* § 10953(b)]. If no legal representative has been appointed for the executor, or if the executor absconds, the court may compel the executor's attorney to file the account [*Prob. Code* § 10953(c); *see Prob. Code* § 10953(d) (accounting duty of attorney or legal representative of executor)].

Interim accounts are accounts that are filed before final distribution. Interim accounts are required, not as a matter of course, but when demanded by the court or an interested person [*Prob. Code § 10950; Recommendation Relating to Accounts*, 19 Cal. L. Revision Comm'n Reports (1988) p. 882; *see Prob. Code § 48(a)* ("interested person" defined)]. The court, on its own motion or on petition of an interested person, may require an interim account at any time [*Prob. Code § 10950(a)*]. It must order an account to be filed if an interested person petitions for an account and if more than one year has passed since the last account was filed or, if no previous account has been filed, if more than one year has passed since letters were issued [*Prob. Code § 10950(b)*].

No account (final or interim) is required if each person entitled to distribution from the estate has executed and filed a written waiver of account, or a written acknowledgment that the person's interest has been satisfied [*Prob. Code § 10954(a)(1)*; *see Prob. Code § 10954(b)* (formal requirements of waiver or acknowledgment)]. Similarly, no account is required if adequate provision has been made to fully satisfy each person's interest [*Prob. Code § 10954(a)(2)*]. A creditor whose claim has not been satisfied may, however, petition for an account even if all the devisees under the will have waived the account [*Prob. Code § 10954(c)(2)*; *Recommendation Relating to Accounts*, 19 Cal. L. Revision Comm'n Reports (1988) p. 882].

If a final account is not required because it has been waived or because all of the distributees have acknowledged that their interests have been satisfied, the executor is nevertheless required to file a final report of administration at the time the final account would otherwise have been required [*Prob. Code § 10954(c)(1)*]. The final report must include the amount of the fees and commissions paid or payable to the executor and the executor's attorney and set forth the basis for determining the amount [*Prob. Code § 10954(c)(1)*].

Related to the duty to account is the duty to keep and, when necessary, produce supporting documents (sometimes called vouchers). On court order, or on request of an interested person filed with the clerk and served on the executor, the executor must produce for inspection and audit by the court or interested persons any documents specified in the order or request that support an account [*Prob. Code § 10901*].

### **[9] Distributing Assets**

The executor is responsible for distributing the property in the estate in compliance with the terms of the court order for distribution [*Prob. Code § 11750(a)*]. Distribution may be preliminary [*see Prob. Code §§ 11620-11624* (preliminary distribution)] or final [*see Prob. Code §§ 11640-11642* (final distribution)]. In either case, distribution is proper only after a petition has been filed, notice has been given, and the court has entered an order of distribution [*Prob. Code §§ 11600* (petition for distribution), 11601 (notice of hearing), 11603 (hearing and order)].

An order for preliminary distribution of all or a portion of a particular devisee's share in the estate may be made if at least two months have passed since letters were first issued [*Prob. Code § 11620* (petition must be filed after elapse of two months)] and the court finds that distribution may be made without loss to creditors or injury to the estate or any interested person [*Prob. Code § 11621(a)*; *see Prob. Code § 48* ("interested person" defined)]. If the court orders preliminary distribution before four months, it must require a bond in the amount of the distribution [*Prob. Code § 11622(a)*]. If it orders preliminary distribution after four months have elapsed, it may require a bond in any amount it deems proper [*Prob. Code § 11622(b)*].

In the ordinary case, the executor must petition for an order for final distribution of the estate within one year after letters were issued (if a federal estate tax return is not required) or within 18 months (if a federal estate tax return is required) [*Prob. Code § 12200*]. Final distribution may be ordered when all debts have been paid or adequately provided for and the estate is in a condition to be closed [*Prob. Code § 11640(a)*]. If the estate is insolvent, final distribution may be ordered whenever the estate is in a condition to be closed [*Prob. Code § 11640(a)*]. If the executor determines that final distribution may not be made within the required one year or 18 months, as the case may be, the

executor must file a report of status of administration showing the condition of the estate, the reasons why the estate cannot be distributed and closed, and an estimate of the time needed to close administration [*Prob. Code* §§ 12200, 12201].

When an order settling a final account and ordering distribution is entered, the executor may immediately distribute the property in the estate to the persons entitled to distribution without further notice or proceedings [*Prob. Code* § 11641; *but see Prob. Code* §§ 7240 (appealable orders), 7241 (appeal stays operation and effect of order)]. When the executor has complied with the terms of the order for final distribution and has filed the appropriate receipts (or the court has excused the filing of a receipt), the court must, on ex parte petition, make an order discharging the personal representative from all liability incurred thereafter [*Prob. Code* § 12250].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

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 Probate  
 Personal Representatives  
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California Legal Forms--Transaction Guide

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DIVISION IV: WILLS AND TRUSTS  
 CHAPTER 65 EXECUTORS  
 PART II. LEGAL BACKGROUND

*24-65 California Legal Forms--Transaction Guide § 65.42*

**§ 65.42 Powers of Executors**

**[1] Investment**

The executor has the power to make certain investments without prior court approval [*see Prob. Code § 9730*] and others only on court order [*see Prob. Code §§ 9731-9737*].

Court orders are not required to invest estate assets in any of the following:

- Direct obligations of the United States or the State of California maturing in one year or less [*Prob. Code § 9730(a)*];
- Money market mutual funds or any of certain collective investments, such as common trust funds maintained by banks, and retirement, pension, profit-sharing, stock bonus, or other trust funds [*Prob. Code § 9730(b)*]; *see 12 C.F.R. § 9.18*; and
- Units of certain common trust funds [*Prob. Code § 9730(c)*]; *see Fin. Code § 1564*.

Investments in other government securities (state or federal) are permitted only after court order permitting the investment and only on a showing that the investment is to the advantage of the estate [*Prob. Code § 9731*].

If the will authorizes specific investments not authorized by statute, the court may order that estate money be invested as authorized by the will, but only if the following conditions are satisfied [*Prob. Code § 9732(a)*]:

- The time for filing claims has expired;
- The court is satisfied that all debts [*see Prob. Code § 11401* ("debt" defined)] have been or will be paid; and
- The estate is not in a condition to be finally distributed.

If the will directs the executor to purchase an annuity [*see Prob. Code § 6154(e)* ("annuity" defined)] or makes other provisions for periodic payments to a devisee, the executor may purchase an annuity from an insurer authorized to do business in California, but only after the court has found good cause for the purchase [*Prob. Code § 9733*; for will provisions for annuities, *see Ch. 63, Will Provisions, §§ 63.508-53.510*]. The executor may exercise options [*Prob. Code § 9734*] and subscription rights [*Prob. Code § 9737*] belonging to the estate, and may purchase any securities or commodities required to perform an incomplete contract made by the decedent [*Prob. Code § 9735*], but only after court authorization.

## **[2] Operation of Businesses**

The executor has limited power to continue the operation of any unincorporated business or venture in which the decedent was engaged or which was wholly or partly owned by the decedent at the time of his or her death [*Prob. Code § 9760(b)*]. If it is to the advantage of the estate and in the best interest of those interested in it, the executor may operate the business, with or without court order, for six months after letters are first issued [*Prob. Code § 9760(b)*]. Operation beyond six months requires a showing of advantage to the estate and benefit to the interested persons [*Prob. Code § 9760(c)*] and a court order authorizing the operation [*Prob. Code § 9760(d)(1)*].

The executor has power to continue to participate in a partnership in which the decedent was a general partner at the time of his or her death only if the court authorizes continued participation [*Prob. Code § 9762(a)*]. Such an order may be granted only on a showing of advantage to the estate and the persons interested in it [*Prob. Code § 9762(a)*]. If there is a written partnership agreement permitting the decedent's personal representative to participate as a partner, the personal representative has all of the rights, powers, duties, and obligations provided in the agreement [*Prob. Code § 9762(b)*]. If there is no written agreement, the executor's rights, powers, duties, and obligations must be specified by the court [*Prob. Code § 9762(c)*]. Whether or not there is a written agreement, the court may specify any terms and conditions of the personal representative's participation as a partner that the court determines are to the advantage of the estate and in the best interest of the interested persons [*Prob. Code § 9762(a), (b)*]. However, any court-imposed terms and conditions that are inconsistent with the partnership agreement are subject to the written consent of all of the surviving partners [*Prob. Code § 9762(a), (b)*; *see also Ch. 15, Part A, Formation of General Partnerships, § 15.255* (provision allowing deceased partner's personal representative to continue as partner during administration of estate)].

The executor has full power to exercise all of the decedent's rights in managing any limited partnership interests owned by the decedent at the time of his or her death [*Prob. Code § 9763(b)*; *see Corp. Code § 15675* (CRLPA, repealed January 1, 2010); *now see Corp. Code § 15907.04* (ULPA '08)].

## **[3] Commencing and Defending Legal Actions**

The executor has power to commence and maintain actions and proceedings for the benefit of the estate [*Prob. Code § 9820(a)*] and to defend actions and proceedings against the decedent, the executor, or the estate [*Prob. Code § 9820(b)*].

If the decedent leaves an undivided interest in any property, the executor may bring an action against the other cotenants for partition of the property [*Prob. Code § 9823(b)*]. Similarly, an action for partition of the property may be brought against the executor as defendant [*Prob. Code § 9823(a)*]. If the decedent was a general partner in a business, the executor has power to commence and maintain any action against the surviving partner that the decedent could have commenced and maintained [*Prob. Code § 9763(a)*].

In any legal actions or proceedings, the executor may assert the decedent's attorney-client privilege [*Evid. Code § 953(c)*; *HLC Properties, Ltd. v. Superior Court* (2005) 35 Cal. 4th 54, 61, 24 Cal. Rptr. 3d 199, 105 P.3d 560 (only personal representative may claim attorney-client privilege in case of deceased client)].

#### [4] Borrowing Money and Encumbering Estate Property

The executor has power to borrow money or encumber estate property (real or personal) only if authorized by the court [*Prob. Code* § 9800]. The court may authorize borrowing or encumbering only if it would be to the advantage of the estate to do so [*Prob. Code* § 9800(a); see *Prob. Code* § 9802 (petition for order)]. The proceeds of any loan so obtained must be used for one or more of the following purposes:

- Paying debts of the decedent or the estate [*Prob. Code* § 9800(a)(1)].
- Paying devises, expenses of administration, or charges against the estate [*Prob. Code* § 9800(a)(1)].
- Paying, reducing, extending, or renewing a security interest, lien, mortgage, or deed of trust already existing on estate property [*Prob. Code* § 9800(a)(2)].
- Improving, using, operating, or preserving property in the estate [*Prob. Code* § 9800(a)(3)].

When the decedent's surviving spouse has elected to have his or her share of the community real property administered in the decedent's estate, the executor may encumber real property in the estate only with the written consent of the spouse [*Prob. Code* § 9800(c)].

#### [5] Settling Claims

The executor has broad power to compromise and settle claims, actions, or proceedings in favor of or against the decedent, the executor, or the estate [*see Prob. Code* §§ 9830-9839]. Subject to exceptions noted below, the power may be exercised whenever it is to the advantage of the estate to do so [*Prob. Code* § 9830(a)] and with or without court order [*Prob. Code* § 9830(a), (b)]. For this purpose, the power to compromise and settle includes the power to extend, renew, or modify the terms of obligations [*Prob. Code* § 9830(a)(2)] and the power to release, in whole or in part, any uncollectible claim that belongs to the estate [*Prob. Code* § 9830(a)(3)].

The executor does not have the power to compromise or settle claims if the court has limited his or her authority to do so [*Prob. Code* § 9830(c)]. In any event, the power can be exercised only on court order in any of the following circumstances:

- Before the time for filing creditor's claims has expired [*Prob. Code* § 9831].
- When the compromise affects title to real estate or an interest in, lien or encumbrance on, or option to purchase real estate [*Prob. Code* § 9832(a)].
- When the compromise or settlement requires the transfer or encumbrance of property of the estate, or the creation of an unsecured liability, in an amount or value in excess of \$25,000 [*Prob. Code* § 9833].
- When the claim being settled is against the executor or the executor's attorney (whether or not the claim arises out of administration of the estate) [*Prob. Code* § 9834(a)].
- When the compromise requires an extension, renewal, or modification of the terms of a debt or similar obligation of the executor or the executor's attorney that is owed to or in favor of the estate [*Prob. Code* § 9834(b)].
- When the claim is for the wrongful death of or injury to the decedent [*Prob. Code* § 9835].

The executor has power to accept a deed to property that is subject to mortgage or deed of trust in lieu of foreclosure of the mortgage or sale under the deed of trust, on a showing of advantage to the estate and a court order authorizing the acceptance [*Prob. Code* § 9850].

### [6] Contracts

The executor has broad power to make contracts for the estate. This power is related to and supportive of other more specific powers vested in personal representatives, such as the power to make investments [*see* § 65.42[1]], the power to continue the operation of the decedent's business [*see* § 65.42[2]], the power to sell [*see* § 65.42[8]], lease [*see* § 65.42[9]], and exchange [*see* § 65.42[10]] estate property, the power to grant and exercise options [*see* § 65.42[11]], the power to procure insurance for the estate and the executor [*see* § 65.42[7]], and the power to employ attorneys, accountants, and other persons to assist the executor in the administration of the estate. Whether the executor should make a contract is generally determined by the rule of ordinary care and diligence [*see Prob. Code* § 9600(a); *see also* § 65.43[1]]. That is, the executor should make a contract if ordinary care and diligence require that the contract be made [*Prob. Code* § 9600(b)(1)] and should not make a contract if ordinary care and diligence require that it not be made [*Prob. Code* § 9600(b)(2)].

An executor cannot generally bind the estate by contract unless the contract is authorized by statute or by the decedent's will [ *Nason v. Granz* (1963) 223 Cal. App. 2d 761, 763-764, 35 Cal. Rptr. 876 ; *Byrne v. Harvey* (1962) 211 Cal. App. 2d 92, 105, 27 Cal. Rptr. 110 ]. If, however, the executor acts pursuant to statute or under direction of the probate court, the estate is bound, and the executor is relieved of personal liability under the contract [ *Estate of Lucas* (1943) 23 Cal. 2d 454, 464-465, 144 P.2d 340 (compromise of claim pursuant to court order); *Byrne v. Harvey* (1962) 211 Cal. App. 2d 92, 106, 27 Cal. Rptr. 110 ].

The executor's power to perform executory contracts under which the decedent was obligated derives from at least two sources. If the contract obligated the decedent to pay money to a third party (or if the third party's claim is otherwise reducible to a claim for money), that party is a creditor of the estate and entitled to claim payment of his or her debt [*see Prob. Code* §§ 9000-9399 (creditor claims); *see also* § 65.41[6], *see, e.g., Estate of Roberson* (2002) 102 Cal. App. 4th 1201, 1206-1207, 126 Cal. Rptr. 2d 238 (support and property agreement between cohabitants is enforceable against estate when one party dies; estate breaches agreement by rejecting surviving cohabitant's claim)]. If the contract obligated the decedent to convey property to a third party, the executor has power to convey the property to the third party only if the contract was specifically performable and only if the court authorizes the conveyance [*see Prob. Code* § 9860(a)(1), (2)].

The executor or any interested person may file a petition requesting that the court order the executor to convey or transfer property to a third person in any of the following cases:

- If decedent made a contract to convey or transfer property but died before performing it, and the decedent, if living, could have been compelled to make the conveyance or transfer [*Prob. Code* § 850(a)(2)(A)].
- If decedent made a contract to convey or transfer property on or after his or her death, and the contract is one that can be specifically enforced [*Prob. Code* § 850(a)(2)(B)].
- If decedent died in possession of, or holding title to, property, and the property or an interest therein is claimed to belong to another [*Prob. Code* § 850(a)(2)(C)].

The executor may not be compelled to transfer or convey property to a third party pursuant to a contract unless the third party has a clear right to specific performance of the contract [ *Estate of Roche* (1962) 202 Cal. App. 2d 295, 298, 20 Cal. Rptr. 775 ; *see Civ. Code* §§ 3384-3395 (specific performance of obligations)]. If the right to specific performance

is not clear, the third party has the right to bring an independent action on the contract for specific performance [ *Estate of Roche* (1962) 202 Cal. App. 2d 295, 297-298, 20 Cal. Rptr. 775 ] or any other relief to which he or she may be entitled.

### **[7] Insurance**

The executor has the power to insure the property of the estate against damage or loss and to insure himself or herself against liability to third persons [*Prob. Code* § 9656]. This power, like other powers conferred on the executor, must be exercised to the extent that ordinary care and diligence require its exercise and must not be exercised to the extent that ordinary care and diligence require that it not be exercised [*see Prob. Code* § 9600(b); *see also* § 65.43[1]]. For example, when the estate includes improved real property, the executor will ordinarily be required to maintain a reasonable amount of insurance on the improvements and may also insure himself or herself against personal liability arising out of the ownership or management of the property [*Recommendation Relating to Supervised Administration of Decedent's Estate*, 19 Cal. L. Revision Comm'n Reports (1988) p. 57].

### **[8] Sales**

Personal representatives have broad powers to sell estate property [*see Prob. Code* §§ 10000-10382]. Thus the executor may sell property belonging to the estate in any of the following circumstances [*Prob. Code* § 10000]:

- When sale is necessary to pay debts, devisees, family allowances, expenses of administration, or taxes.
- When sale is to the advantage of the estate and in the best interest of the interested persons.
- When the will directs or grants authority for sale of the property.

If the will provides how the property is to be sold, or specifies particular property that must be sold, the executor has a duty to comply with the will provisions [*Prob. Code* § 10002(a)], unless the court determines that it would be to the advantage of the estate and in the best interest of the interested persons to relieve the executor of the duty to comply with the will provisions [*Prob. Code* § 10002(b)]. If the court relieves the executor of that duty, it must specify the mode, terms, and conditions of the sale, or the particular property to be sold, or both [*Prob. Code* § 10002(b)].

Subject to statutory rules on abatement of devises [*see Prob. Code* §§ 21400-21406 (abatement)] and any directions in the will respecting the mode of sale or the particular property to be sold [*see Prob. Code* § 10002], the executor may use discretion as to which property to sell first [*Prob. Code* § 10003(a)]. Subject to the same rules and directions, the executor may also use discretion in deciding whether the entire interest of the estate in a piece of property, or only a partial interest in that property, should be sold [*Prob. Code* § 10003(b)], and whether the property should be sold privately or at public auction [*Prob. Code* § 10003(c)].

If property is sold for more than its appraised value, the executor must account for the full amount of the proceeds, including the excess over the appraised value [*Prob. Code* § 10005(a)]. If property is sold for less than its appraised value, the executor is not responsible for the loss, providing the sale was made in accordance with law [*Prob. Code* § 10005(b)].

The executor generally must give notice of sale before any property may be sold [*see Prob. Code* §§ 10250 (personal property), 10300 (real property)]. However, notice of sale of real or personal property need not be given if the will directs that particular property be sold [*Prob. Code* §§ 10252(a) (personal property), 10303(a)(real property)] or if it gives the executor authority to sell property [*Prob. Code* §§ 10252(b) (personal property), 10303(b)(real property)]. However, notice of sale of personal property need not be given under any of the following circumstances:

- If the property is perishable, will depreciate in value if not disposed of promptly, or will incur loss or expense by being kept [*Prob. Code § 10252(c)*]; or

- If sale of the property is necessary to provide for payment of a family allowance [*see Prob. Code §§ 6540-6545*] pending receipt of other sufficient funds [*Prob. Code § 10252(d)*].

### **[9] Leases**

If it is to the advantage of the estate, the executor has power to lease real property belonging to the estate without authorization if the term does not exceed one year and the rental does not exceed \$5,000 a month [*Prob. Code § 9941(a)*], or if the lease is from month to month only, regardless of the amount of the rental [*Prob. Code § 9941(b)*]. In other cases, property may be leased only on a showing of advantage to the estate [*Prob. Code § 9943(a)(3)*] and order of the court [*Prob. Code § 9942(a)*]. The court has discretion to fix the term of the lease [*Prob. Code § 9947(a)*]. However, if any heir or devisee who has an interest in the property to be leased objects, the lease cannot be for longer than 10 years [*Prob. Code § 9947(b)*].

### **[10] Exchanges**

The executor has power to exchange property of the estate for other property if it is to the advantage of the estate to do so and if the court authorizes the exchange [*Prob. Code § 9920*]. When making an order authorizing an exchange, the court has power to set terms and conditions under which the exchange will be executed, including the payment or receipt of part of the amount in cash by the executor [*Prob. Code § 9920*].

### **[11] Options**

The executor has power to grant options to purchase real property of the estate for periods within or beyond the period of administration, but only if the court authorizes the grant [*Prob. Code § 9960*]. The court will authorize the grant of an option only if there is good reason to grant the option and granting the option would be to the advantage of the estate [*Prob. Code § 9964(a)(1)*]. Further, the purchase price specified in the option must be at least 90 percent of the appraised value of the real property (as shown in an appraisal made not more than one year before the hearing on the petition for authority to grant the option) [*Prob. Code § 9962*], and it must not appear that a higher price [*Prob. Code § 9964(a)(2)*; *see Prob. Code § 10311* (overbid)] or a better offer [*Prob. Code § 9964(a)(3)*] could be obtained. Options granted by an executor under provisions of the Probate Code are subject to rules relating to unexercised options set forth in the Civil Code [*Prob. Code § 9965*; *see Civ. Code §§ 884.010-884.030*].

If an asset of the estate consists of an option right, the executor may exercise the option after authorization by the court on a showing that the exercise would be to the advantage of the estate and in the best interest of the interested persons [*Prob. Code § 9734(a)*]. Any estate funds or property may be used to acquire the property covered by the option [*Prob. Code § 9734(a)*].

### **[12] Coexecutors**

The powers of joint personal representatives are subject to special rules set forth in the Probate Code. These rules [*see Prob. Code §§ 9630, 9631*] are applicable when there are coexecutors. However, they are also applicable in other cases when there are two or more representatives (e.g., a domiciliary executor and an ancillary executor, or an executor and an administrator with the will annexed).

Under the Probate Code rules, when there are two personal representatives, both must concur to exercise a power [*Prob. Code § 9630(a)(1)*], and when there are more than two, a majority must concur [*Prob. Code § 9630(a)(2)*]. If one of the joint personal representatives dies, is removed, or resigns, his or her powers and duties continue in the remaining

representatives as if they were the only representatives, until further appointment is made by the court [*Prob. Code § 9630(b)*]. When joint personal representatives have been appointed and one or more are (1) absent from the state and unable to act, (2) otherwise unable to act, or (3) legally disqualified from serving, the court may authorize the remaining representatives to act as to any matters it specifies [*Prob. Code § 9630(c)*].

Joint personal representatives have the power, acting alone or jointly, to oppose petitions made by other representatives [*Prob. Code § 9630(d)(1)*] and to petition the court for orders requiring the others to take (or not to take) specific actions for the benefit of the estate [*Prob. Code § 9630(d)(2)*].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Probate Personal Representatives Duties & Powers General Overview Estate, Gift & Trust

Law Probate Personal Representatives Duties & Powers Fiduciary Responsibilities Estate, Gift & Trust

Law Probate Personal Representatives Duties & Powers Sales of Assets



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DIVISION IV: WILLS AND TRUSTS  
 CHAPTER 65 EXECUTORS  
 PART II. LEGAL BACKGROUND

*24-65 California Legal Forms--Transaction Guide § 65.43*

**§ 65.43 Liability of Executors**

**[1] Standard of Care**

The Probate Code requires all personal representatives [*see Prob. Code § 58(a)*] ("personal representative" defined); *see also § 65.35[1]*] to use ordinary care and diligence in the management and control of their estates [*Prob. Code § 9600(a)*]. What constitutes ordinary care and diligence is determined by all of the circumstances of the particular estate [*Prob. Code § 9600(a)*].

This statutory formulation is consistent with court decisions imposing liability on executors and administrators for failure to act with prudence and diligence. The Supreme Court has stated that the standard of care generally applicable to executors is "that degree of prudence and diligence which a man of ordinary judgment would be expected to bestow upon his own affairs of a like nature" [ *Estate of Moore (1892)* 96 Cal. 522, 525, 31 P. 584 ; *Estate of Beach (1975)* 15 Cal. 3d 623, 631, 125 Cal. Rptr. 570, 542 P.2d 994 , cert. denied, 434 U.S. 1046 ] ; and the Court of Appeal has stated that administrators are required to "exercise the degree of care and prudence that an ordinary person would employ in handling his or her own affairs" [ *Lobro v. Watson (1974)* 42 Cal. App. 3d 180, 189, 116 Cal. Rptr. 533 ] . A professional representative may, however, be held to a higher standard of care than a lay representative [*Recommendation Relating to Supervised Administration of Decedent's Estate*, 19 Cal. L. Revision Comm'n Rep. 1, 35 (1988)]. If, for example, the representative is a trust company [*see § 65.36[6]*] and thus in the business of acting as a fiduciary for trusts and estates, it can be required to exercise the skill and knowledge ordinarily possessed by professional fiduciaries [ *Estate of Beach (1975)* 125 Cal. Rptr. 570, 542 P.2d 994 ; *Gagne v. Bertran (1954)* 43 Cal. 2d 481, 489, 275 P.2d 15 ] .

**[2] Breach of Fiduciary Duty**

Executors, like other personal representatives, may be held liable for breach of their fiduciary duties [*Prob. Code § 9601(a)*; *see Prob. Code §§ 58(a)*] ("personal representative" defined), 16440 (liability of trustee); *see also Recommendation Relating to Supervised Administration of Decedent's Estate*, 19 Cal. L. Revision Comm'n Rep. 1, 37 (1988)(liability of personal representative consistent with liability of trustee)]. Since a breach of duty generally consists of any failure to discharge a duty imposed by law, it may be shown by a variety of facts.

Clearly, an executor who misappropriates estate funds [ *Estate of Elizalde* (1920) 182 Cal. 427, 435, 188 P. 560 ; *Estate of McSweeney* (1954) 123 Cal. App. 2d 787, 792-793, 268 P.2d 107] is guilty of a breach of fiduciary duty. However, breach may also consist in failure to exercise care to protect estate assets [ *Estate of Guiol* (1972) 28 Cal. App. 3d 818, 825, 105 Cal. Rptr. 35 (administratrix turned over estate funds to attorney, who embezzled them); *Estate of Barreiro* (1932) 125 Cal. App. 752, 773, 14 P.2d 786 (executor acquiesced in attorney's retention of estate funds)], failure to rent property belonging to the estate [ *Estate of Pardue* (1943) 57 Cal. App. 2d 918, 920-921, 135 P.2d 394] , failure to collect debts owing to the estate [ *Sanchez v. Forster* (1901) 133 Cal. 614, 615, 65 P. 1077] , or failure to file timely tax returns and elections [ *Estate of Gerber* (1977) 73 Cal. App. 3d 96, 112, 140 Cal. Rptr. 577] .

The measure of liability for a breach of fiduciary duty is set forth in *Prob. Code* § 9601. Under that section, the personal representative is chargeable with any of the following that may be appropriate under the circumstances:

- Any loss or depreciation in value of the decedent's estate resulting from the breach of duty, with interest [*Prob. Code* § 9601(a)(1)];
- Any profit made by the personal representative through the breach of duty, with interest [*Prob. Code* § 9601(a)(2)]; or
- Any profit that would have accrued to the decedent's estate if the loss of profit is the result of the breach of duty [*Prob. Code* § 9601(a)(3)].

### **[3] Tort Liability**

The executor is personally liable for any torts that he or she commits in the administration of the estate [ *Johnston v. Long* (1947) 30 Cal. 2d 54, 59, 181 P.2d 645 ; *Rapaport v. Forer* (1937) 20 Cal. App. 2d 271, 278, 66 P.2d 1242] . In addition, the executor is personally liable (under the doctrine of *respondeat superior*) for torts committed by persons employed by the executor in the administration of the estate [ *Johnston v. Long* (1947) 30 Cal. 2d 54, 61-62, 181 P.2d 645] . However, the executor has a right of reimbursement from the assets of the estate when he or she is personally without fault [ *Johnston v. Long* (1947) 30 Cal. 2d 54, 62, 181 P.2d 645] .

The estate is not generally liable for a tort committed by the personal representative [ *Rapaport v. Forer* (1937) 20 Cal. App. 2d 271, 278, 66 P.2d 1242 ; see *Nickals v. Stanley* (1905) 146 Cal. 724, 727, 81 P. 117] .

### **[4] Contract Liability**

The executor is personally liable on all contracts made in the course of estate administration unless, by special agreement, the creditors agree to look to the estate only for payment [ *Byrne v. Harvey* (1962) 211 Cal. App. 2d 92, 105, 27 Cal. Rptr. 110] . However, the executor may be entitled to reimbursement out of estate assets if the contract is found to be necessary [ *Byrne v. Harvey* (1962) 211 Cal. App. 2d 92, 105, 27 Cal. Rptr. 110 ; *Moss v. Boyle* (1941) 44 Cal. App. 2d 410, 413, 112 P.2d 657] .

### **[5] Tax Liability**

The executor may become personally liable for the payment of taxes under limited circumstances. By federal statute, a representative of an estate who pays any debt of the estate before paying a claim of the federal government is liable to the extent of the payment for claims of the government [31 U.S.C. § 3713(b)]. Income taxes are claims of the government within the meaning of this statute [ *Viles v. Commissioner of Internal Revenue* (6th Cir. [T.C.] 1956) 233 F.2d 376, 379] . However, an executor will be personally liable for unpaid taxes only if the executor knew or should have known that the taxes were due and unpaid [ *United States v. Vibradamp Corporation* (S.D. Cal. 1966) 257 F. Supp. 931, 935-936 ; *Livingston v. Becker* (E.D. Mo. 1929) 40 F.2d 673, 675] .

An executor who fails to file timely tax returns, to make timely tax elections, or to pay taxes due when sufficient funds are on hand for payment [see § 65.41[7]], may also be liable to the estate for interest and penalties incurred as a result of the failure [see *Estate of Gerber (1977) 73 Cal. App. 3d 96, 113-115, 140 Cal. Rptr. 577* (failure to make elections and to claim refunds)].

#### **[6] To Creditors of Estate**

Executors may be personally liable to creditors of the estate under certain circumstances. If the court has ordered payment of a creditor's claim, and if the executor has sufficient funds on hand (after payment of priority claims) to pay the claim, his or her failure to pay the claim will result in personal liability to the creditor [*Prob. Code § 11424(a)*]. In addition, the executor will be liable on his or her bond, if any [*Prob. Code § 11424(a)*].

#### **[7] To Devisees and Heirs**

The executor is responsible for distributing property in accordance with the terms of the court order for distribution [*Prob. Code § 11750(a)*; see § 65.41[9]]. When the court makes an order of distribution, it must determine the persons entitled to distribution and specify their shares [*Prob. Code § 11705(a)*]. A distributee may demand, sue for, and recover from the executor (or any other person in possession) any property to which the distributee is entitled [*Prob. Code § 11750(b)*]. A suit against an executor to recover a distributive share is a suit against the executor individually and not against the estate [ *Rafferty v. Mitchell (1935) 4 Cal. App. 2d 491, 494, 41 P.2d 563* ; *St. Mary's Hospital v. Perry (1907) 152 Cal. 338, 340, 92 P. 864* ], since the distributee's rights against the estate are conclusively determined by the decree of distribution [*Prob. Code § 11705(b)*].

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law  
Probate  
Personal Representatives  
Claims By & Against  
Estate, Gift & Trust Law  
Probate  
Personal Representatives  
Duties & Powers  
Fiduciary Responsibilities



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*24-65 California Legal Forms--Transaction Guide § 65.44*

**§ 65.44 Liability of Coexecutors**

Special rules determine when personal representative [*see Prob. Code § 58(a)* ("personal representative" defined); *see also § 65.35[1]*] may be held liable for a breach of fiduciary duty committed by another personal representative. These rules are usually applied to coexecutors, though they may also be applied in other cases where there are two or more personal representatives.

The general rule is that one personal representative is not liable for a breach of fiduciary duty by another [*Prob. Code § 9631(a)*]. However, liability may be imposed on a representative under any of the following circumstances [*Prob. Code § 9631(b)*; *but see Prob. Code § 9631(c)* (liability for breach before July 1, 1988, governed by prior law)]:

- (1) If the representative participates in a breach of fiduciary duty committed by another representative;
- (2) If the representative improperly delegates the administration of the estate to another representative;
- (3) If the representative approves, knowingly acquiesces in, or conceals a breach of fiduciary duty committed by another representative;
- (4) If the representative's negligence enables another representative to commit a breach of fiduciary duty; or
- (5) If the representative knows or has reason to know of a breach by another representative and fails to take reasonable steps to compel the other representative to redress the breach.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law  
 Probate  
 Personal Representatives  
 Claims By & Against Estate, Gift & Trust Law  
 Probate  
 Personal Representatives  
 Duties & Powers  
 Fiduciary Responsibilities



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*24-65 California Legal Forms--Transaction Guide § 65.45*

**§ 65.45 Independent Administration of Estates Act**

**[1] In General**

As an alternative to supervised administration, the Probate Court authorizes certain personal representatives to administer estates with a minimum of court supervision under the Independent Administration of Estates Act [*Prob. Code §§ 10400-10592; see § 65.32*]. The Act provides that some actions may be taken only after giving notice to heirs, devisees, and persons who have requested special notice [*see Prob. Code §§ 10510-10519* (powers exercisable only after giving notice), 10530-10538 (powers that require notice under some circumstances), 10580-10592 (notice of proposed action procedure)] and other action may be taken without notice or any court authorization [*see Prob. Code §§ 10550-10564* (powers that do not require notice)]. Authority to administer an estate under the Act affords the personal representative greater flexibility and freedom than is available under the more restrictive procedures of supervised administration [*see § 65.31*].

Any personal representative may petition the court for authority to administer an estate under the Act [*Prob. Code § 10450(a)*]. However, the petition will not be granted if the decedent's will provides that the estate is not to be administered under the Act [*Prob. Code § 10404*; for a testamentary direction against independent administration, *see § 65.421*]. Further, a special administrator may be granted authority under the Act only if he or she has been granted the powers of a general administrator [*Prob. Code § 10405; see Prob. Code § 58(b)* ("general personal representative" excludes special administrator unless granted general parties)].

Taking action under the Independent Administration of Estates Act is optional. A personal representative who has authority to take action without court supervision is not required to do so. The personal representative may elect to act under court supervision even when independent administration authority has been granted [*Prob. Code § 10500(b)*].

The court may limit the representative's authority by providing that he or she has all of the powers authorized by the Act except the power to [*Prob. Code §§ 10403, 10452, 10501(b)*]:

(1) Sell real property;

- (2) Exchange real property;
- (3) Grant an option to purchase real property; or
- (4) Borrow money with the loan secured by an encumbrance on real property.

If the petition to administer the estate under the Independent Administration of Estates Act is granted, the letters must include a notation that the executor has authority under the Act and indicate whether the authority includes or excludes the authority to sell, exchange, grant options to purchase real property belonging to the estate, or borrow money with the loan secured by an encumbrance upon real property [*Prob. Code § 8405(c)*].

Any interested person may petition the court for an order revoking or limiting the representative's authority under the Act [*Prob. Code § 10454(a)*]. If good cause is shown, the court must revoke or limit the representative's authority under the Act, and new letters must be issued, either without a notation of authority under the Act or with a notation showing how the authority has been limited [*Prob. Code § 10454(d), (e)*; see *Prob. Code § 8405(c)*].

## **[2] Bonds**

When a personal representative is granted authority to act under the Independent Administration of Estates Act, the representative must post a bond, unless he or she is exempt from the requirement [*Prob. Code § 10453*; for bond requirements and exemptions, see § 65.40]. If the representative has full authority under the Act, the court must fix the amount of the bond at not more than the estimated value of the personal property, the estimated net proceeds of real property authorized to be sold under the Act, and the estimated value of the probable annual gross income of all of the property belonging to the estate; or, if the bond is to be given by personal sureties, at not less than twice that amount [*Prob. Code § 10453(a)*]. If the personal representative's authority is limited, the court has discretion to fix the amount of the bond at not more than the estimated value of the personal property and the estimated value of the probable annual gross income of all the property belonging to the estate, or, if the bond is to be given by personal sureties, at not less than twice that amount [*Prob. Code § 10453(b)*].

## **[3] Supervision Required When Representative Has Conflict of Interest**

The Act requires the representative to obtain court authorization for certain actions with respect to which the representative is deemed to have a conflict of interest [see *Recommendation Relating to Independent Administration of Estates Act*, 19 Cal. L. Revision Comm'n Reports (1988) pp. 213-214]. The representative is required to obtain court supervision for any of the following actions [*Prob. Code § 10501(a)*];

- Allowance of the personal representative's compensation;
- Allowance of compensation of the attorney for the personal representative;
- Settlement of accounts;
- Preliminary and final distributions and discharge;
- Any sale of estate property to the personal representative or the personal representative's attorney;
- Any exchange of estate property for property of the personal representative or the personal representative's attorney;
- Grant of an option to purchase property of the estate to the personal representative or the personal

representative's attorney;

- Allowance, payment, or compromise of any claim of the personal representative or the personal representative's attorney against the estate;
- Compromise or settlement of any claim, action, or proceeding by the estate against the personal representative or the personal representative's attorney; or
- Any extension, renewal, or modification of the terms of a debt or other obligation owed to the estate by the personal representative or the personal representative's attorney.

The personal representative is not prohibited from taking any of the last five actions mentioned above if all of the following requirements are satisfied [*Prob. Code § 10501(c)*]:

- The personal representative is the sole beneficiary of the estate, or all of the known heirs or devisees have consented to the transaction;
- The time for filing creditors' claims has expired;
- No request for special notice is on file, or all persons who have requested special notice have consented to the transaction; and
- The claim of each creditor who filed a claim has been paid, settled, or withdrawn, or the creditor has consented to the transaction.

#### **[4] Notice of Proposed Action**

The Act authorizes the personal representative to take certain actions only after all interested persons have been given notice of the proposed action [*see Prob. Code §§ 10510-10519* (powers exercisable only after notice of proposed action is given), 10530-10538 (actions for which notice of proposed action required under some circumstances), 10580-10592 (notice of proposed action procedure)]. For purposes of giving notice of proposed action, interested persons are heirs and devisees whose interest in the estate is affected by the proposed action, persons who have filed requests for special notice, and the State of California if any portion of the estate is to escheat to the state and its interest is affected by the proposed action [*Prob. Code § 10581*]. Failure to give notice when required will subject the personal representative to removal from office [*Prob. Code § 10592*]. However, notice need not be given to any person who consents to the action [*Prob. Code § 10582*] or waives notice of it [*Prob. Code § 10583*]. Consents and waivers may be revoked in writing [*Prob. Code § 10584*].

#### **[5] Objections**

Any person entitled to notice may object to the proposed action [*Prob. Code § 10587(a)*] or apply to the court for an order restraining the representative from proceeding with it without court supervision [*Prob. Code § 10588(a)*]. If the proposed action is one that would require court supervision absent the special authority granted under the Independent Administration of Estates Act, the representative may then proceed only under court supervision [*Prob. Code § 10589(a)*]. If the proposed action would not require court supervision absent the special authority, the representative must then request instructions from the court [*Prob. Code § 10589(b)*].

A person who receives notice of a proposed action and fails to object within the permitted time [*see Prob. Code § 10587(c)* (time for making objection)] ordinarily cannot object to the action after it has been taken [*Prob. Code § 10590(a)*]; *but see Prob. Code § 10590(c)* (limited exception for review on motion of heir or devisee)].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawEstate AdministrationGeneral OverviewEstate, Gift & Trust LawProbateGeneral Overview



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*24-65 California Legal Forms--Transaction Guide §§ 65.46-65.99*

**[Reserved]**

§§ 65.46[Reserved]



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DIVISION IV: WILLS AND TRUSTS

CHAPTER 65 EXECUTORS

PART III. TRANSACTION GUIDE

A. Preliminary Determinations for Selection and Nomination of Executors

*24-65 California Legal Forms--Transaction Guide*

**NOTE:**

**The attorney will need detailed personal and financial information about his or her client to draft a will that adequately disposes of the client's estate in accordance with the client's testamentary plan. For a work sheet that may be used as a guide to the personal and financial information that will be needed to formulate an estate plan and prepare the appropriate documents, see *Ch. 60, Estate Planning*, § 60.200.**



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DIVISION IV: WILLS AND TRUSTS

CHAPTER 65 EXECUTORS

PART III. TRANSACTION GUIDE

A. Preliminary Determinations for Selection and Nomination of Executors

*24-65 California Legal Forms--Transaction Guide § 65.100*

### § 65.100 Individual Executors

1. Determine whether prospective executor is willing to serve.

NOTE: A person nominated as executor may decline to serve or, after accepting appointment, resign the office [*see Prob. Code §§ 8001* (waiver of right to appointment by failure to petition for appointment), 8520 (vacancy occurs when personal representative resigns), 10952 (duty to account after resignation)].

2. Determine whether prospective executor is legally capable of serving.

a. Will prospective executor be at least 18 years of age when testator dies?

NOTE: A person under the age of 18 is not competent to act as executor [*Prob. Code § 8402(a)(1)*; *see Fam. Code § 6502* (age of majority); *Prob. Code § 58(a)* ("personal representative" defined)]. A person under 18 when the will is executed (or even when the testator dies) may, however, qualify for appointment upon later attaining the age of majority [*Prob. Code § 8424* (minor named as executor); *see § 65.36[2]*].

b. Is prospective executor subject to a conservatorship or otherwise incapable or unfit?

NOTE: A person who is subject to a conservatorship of the estate or is otherwise incapable of executing or unfit to execute the duties of the office is not competent to act as executor [*Prob. Code § 8402(a)(2)*; *see Prob. Code § 58(a)* ("personal representative" defined); *see also § 65.36[3]*]. A conservator of the estate may be appointed for any adult who is substantially unable to manage his or her own financial resources or to resist fraud or undue influence [*Prob. Code §§ 1800, 1801*].

c. Would prospective executor be subject to removal from office if appointed?

NOTE: A person is not competent to act as executor if the person would be subject to

removal from the office under *Prob. Code* § 8502 [*Prob. Code* § 8402(a)(3); *see Prob. Code* § 58(a) ("personal representative" defined)]. Grounds for removal under *Prob. Code* § 8502 generally consist of conduct that would be injurious to the estate or the persons interested in it, such as committing a fraud on the estate or wrongfully neglecting the estate or its affairs. For a discussion of these grounds, see § 65.36[4]. Although grounds for removal may not exist before the executor is appointed, a person who is likely to commit a fraud on the estate or wrongfully neglect the estate or its affairs clearly should not be nominated.

d. Is prospective executor a resident of California?

NOTE: Although a person who is not a resident of the United States is generally disqualified from appointment as personal representative [*Prob. Code* § 8402(a)(4); *see Prob. Code* § 58(a) ("personal representative" defined)], this rule does not apply to a person named as executor or successor executor in the decedent's will [*Prob. Code* § 8402(b)]. There is no requirement that any personal representative be a resident of California [ *Estate of Kelley (1920) 182 Cal. 81, 82, 186 P. 1041* ], or even that the executor's oath of office be executed in the state [ *Adams v. Sharp (1964) 61 Cal. 2d 775, 778, 40 Cal. Rptr. 255, 394 P.2d 943* ]. Executors who do not reside in California are, however, subject to rules that do not apply to residents [*see Prob. Code* §§ 8571 (discretion of court to require bond of nonresident executor), 8572 (Secretary of State as attorney for service of process on nonresident executor), 8573 (duty of nonresident to file statement of permanent address)]. For a discussion of these rules, see § 65.36[5]. A resident executor who, after appointment, moves his or her residence outside California is subject to the same rules and requirements as a person who is a nonresident when appointed [*Prob. Code* § 8570 (rule applicable to personal representatives generally)].

3. Determine whether prospective executor is actually capable of serving.

NOTE: The duties of an executor are diverse. They include, among other things, collecting and preserving the assets of the estate, filing the inventory and appraisal, making investments, paying debts, filing tax returns and paying taxes, accounting, and distributing assets [*see* § 65.41]. At the minimum, an executor should be an intelligent person in good physical health who has sufficient time and energy to devote to the affairs of the estate. Business knowledge or experience may be helpful, although an executor without business knowledge or experience can properly look to his or her attorney (and other advisers, if necessary) to make up for his or her own deficiencies in this regard.

4. Determine whether there is likely to be a conflict of interest between prospective executor and persons interested in estate.

NOTE: Although the existence of an actual or potential conflict of interest between a prospective executor and the persons interested in the estate will not, in itself, disqualify a prospective executor [*see Prob. Code* § 8402 (qualifications of executor)], facts showing grounds for removal under *Prob. Code* § 8502 may also show a conflict of interest and, if they do, the prospective executor is not qualified [*Prob. Code* § 8402(a)(3)]. For a general discussion of *Prob. Code* § 8502, see P 2(c), *above*, and the discussion in § 65.36[4]. Whether or not a conflict of interest can be shown, antagonism or hostility toward the estate or the persons interested in it may severely hamper the effectiveness of the prospective executor and lead to costly and time-consuming disputes.

5. Determine whether attorney should be nominated as executor.

a. Has testator requested attorney to serve as executor?

NOTE: Although attorneys are competent to serve as executors [*see Estate of Thompson*

(1958) 50 Cal. 2d 613, 616-617, 328 P.2d 1 ; Estate of Crouch (1966) 240 Cal. app. 2d 801, 802, 49 Cal. Rptr. 926] , special ethical problems arise whenever an attorney draws a will naming himself or herself as executor. Such a will raises questions of both conflict of interest and undue influence [see §§ 65.200[1][c]; see also 65.39[5]]. To avoid charges of unethical conduct, an attorney should, at the least, refrain from soliciting a nomination as executor. If the attorney is to be nominated, the intention to nominate should clearly be that of the testator and not the attorney.

- b. Does testator repose special confidence in ability, judgment, and integrity of attorney?
- c. Are there other more natural candidates for nomination, such as relatives, friends, or business associates?
- d. Are heirs or devisees likely to object to attorney's nomination?
- e. Is attorney personally convinced his or her nomination would, under all circumstances, be fair and equitable both to testator and to devisees under testator's will?

- f. Are both testator and attorney willing to submit will to independent counsel for review?

NOTE: Before executing the will, the client must be given a reasonable opportunity to seek the advice of independent counsel of the client's choice [see Cal. Rules Prof. Conduct, Rule 3-300 (avoiding adverse interests)]. In addition, a prudent attorney will insist (even when the client is reluctant to seek independent counsel) that independent counsel review the will and the propriety of the nomination [see Magee v. State Bar (1962) 58 Cal. 2d 423, 433, 24 Cal. Rptr. 839, 374 P.2d 807 (attorney has duty to send testator to independent counsel before drafting will in which attorney is residuary devisee); see also § 65.200[1][c]].

- g. Is attorney willing to serve in two capacities while receiving compensation for only one?

NOTE: An attorney cannot claim compensation both as executor and as attorney for the executor [ Estate of Parker (1926) 200 Cal. 132, 137, 251 P. 907 ; see § 65.39[5]] unless the will expressly authorizes dual compensation [ Estate of Thompson (1958) 50 Cal. 2d 613, 616-617, 328 P.2d 1 ; Estate of Crouch (1966) 240 Cal. App. 2d 801, 802, 49 Cal. Rptr. 926 ; for will provision authorizing an attorney to receive compensation both as executor and as attorney, see § 65.445]. A will authorizing an attorney to receive dual compensation should be submitted to independent counsel for review [see (f), above]. However, an attorney may receive compensation for services as executor and the attorney's law firm may receive compensation for legal services for the executor on proof that they have agreed that the executor will not share in any part of the attorney fees [ Estate of Parker (1926) 200 Cal. 132, 137, 251 P. 907] .

6. Determine whether will should waive executor's bond [see Prob. Code §§ 8480(a) (general requirement that bond be given), 8481(a)(1)(bond not required of executor if waived in will); see also § 65.40[1]].

- a. Does testator repose complete confidence in prospective executor's ability, judgment, and integrity?

NOTE: A bond will protect the devisees and creditors against the executor's misconduct. Accordingly, a bond should be waived only when the testator is confident that the executor will discharge the duties of his or her office competently and honestly.

- b. Is prospective executor sole devisee under will?

NOTE: If a bond is given, it will be for the benefit of "interested persons," e.g., heirs, devisees, and creditors [*Prob. Code § 8480(b)*]; *see Prob. Code § 48* ("interested person" defined)]. If the prospective executor is the sole devisee, there is little reason to require a bond, since the bond will inure primarily to the executor's own benefit.

c. Does testator wish to save cost of bond premium?

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law  
Probate  
Personal Representatives  
General Overview  
Estate, Gift & Trust Law  
Probate  
Personal Representatives  
Appointment



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DIVISION IV: WILLS AND TRUSTS

CHAPTER 65 EXECUTORS

PART III. TRANSACTION GUIDE

A. Preliminary Determinations for Selection and Nomination of Executors

*24-65 California Legal Forms--Transaction Guide § 65.101*

### § 65.101 Trust Companies

1. Determine whether prospective executor is qualified trust company.

NOTE: A trust company is an entity that has qualified to act as executor, administrator, trustee, guardian, conservator, trustee, or other fiduciary in California [*Prob. Code* § 83 ("trust company" defined); *see Fin. Code* §§ 106 ("trust business" defined), 107 ("trust company" defined)]. A trust company may be appointed to act as an executor in the same manner as an individual [*Prob. Code* § 300; *see Prob. Code* § 58(a) ("personal representative" defined)]. Certain large commercial banks, industrial banks, and title insurance companies in California are qualified trust companies [*see* discussion in § 65.36[6]].

2. Determine whether trust company is willing to serve.

- a. Does estate meet trust company's minimum asset requirements, if any?

NOTE: A trust company will generally decline to serve as executor of a very small estate [*see* § 65.36[6]]. Before nominating a corporate executor, the attorney should ascertain whether the trust company has a minimum asset requirement and, if so, what the minimum is.

- b. Will estate require close personal management or supervision?

NOTE: Trust companies often refuse to serve as executors of estates that require close personal supervision or management. An estate that includes a sole proprietorship business that the executor will be required to operate may thus be unacceptable to a trust company.

3. Determine whether estate would benefit from trust company's professional skill and experience.

## a. Does estate need professional management?

NOTE: Trust companies usually have professional staffs who are experienced in estate administration and trained in such matters as investment and accounting. Because they are "professional fiduciaries," they are held to a higher standard of care and diligence than lay fiduciaries [ *Estate of Beach (1975)* 15 Cal. 3d 623, 631, 125 Cal. Rptr. 570, 542 P.2d 994 ; *see Recommendation Relating to Supervised Administration of Decedent's Estate*, 19 Cal. L. Revision Comm'n Reports (1988) p. 35].

## b. Does testator have history of business relations with that is also a qualified trust company?

NOTE: A bank or trust company may effectively serve as executor for a testator who has a history of business with it. In such a case, the bank may be expected to be familiar with the assets of the estate, encumbrances on real property, and other matters of importance to an executor.

## c. Does trust company have offices near estate assets?

NOTE: A trust company cannot effectively administer assets that are far distant from its offices. If the assets are not close enough to the trust company's offices, it may decline to act as executor.

## d. Would estate benefit from savings of bond premium?

NOTE: A trust company that is appointed as executor may not be required to give a bond, even if a bond is required by the will [*Prob. Code* § 301(a); *see Prob. Code* § 58(a) ("personal representative" defined); *see also* § 65.36[6]].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law  
 Probate  
 Personal Representatives  
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A. Preliminary Determinations for Selection and Nomination of Executors

*24-65 California Legal Forms--Transaction Guide § 65.102*

### § 65.102 Coexecutors

1. Determine whether estate would benefit from appointment of coexecutors.

a. Does testator wish to name more than one executor to avoid appearance of favoring one devisee over another?

NOTE: Many testators wish to treat their devisees with complete equality. Nominating one child to serve as executor to the exclusion of other children may give the appearance of favoritism. In such a case, the testator may wish to nominate all of his or her children to serve as coexecutors.

b. Would estate benefit from knowledge, judgment, and experience of more than one executor?

NOTE: The skill and experience of one coexecutor may complement that of another. For example, one coexecutor may be experienced in investment matters, another in the management of real estate, and yet another in business accounting. If the estate includes assets that would benefit from diverse skills and experience, coexecutors may be indicated.

c. Would coexecutors work together harmoniously?

NOTE: Coexecutors should be able to work together effectively and without conflict. When there are two executors, both must concur to exercise a power [*Prob. Code § 9630(a)(1)*]; and when there are more than two a majority must concur [*Prob. Code § 9630(a)(2)*]; *see §§ 65.42[12], 65.44.*

d. Should powers of executor be shared by individual executor and trust company?

NOTE: The will may name both an individual and a trust company as executor. In such a case, the trust company will usually insist on having possession of all money and other

personal property of the estate and keeping all records and accounts [*see* §§ 65.403[1][b]].

e. Would appointment of coexecutors delay administration of estate?

NOTE: Appointment of coexecutors may unnecessarily delay or hinder the efficient administration of the estate. If the coexecutors do not live in close proximity, it may take time to bring them together to make decisions. Further, multiple signatures may be needed on estate documents, such as petitions, notices, and accounts. It will almost inevitably require additional time to secure the additional signatures. Finally, family rivalries and other personal or financial conflicts may make it difficult for the coexecutors to work together. Disagreement among coexecutors may necessitate frequent and repeated petitions for instructions, thus adding to the expense of administration and delaying the eventual settlement of the estate.

2. Determine whether will should waive bond for coexecutors.

NOTE: If coexecutors are appointed, the court may require either a separate bond from each or a joint and several bond. If a joint bond is furnished, the liability on the bond is joint and several [*Prob. Code* § 8480(a)], unless one of the coexecutors is a trust company [*Prob. Code* § 301(a)] or the will waives the requirement of a bond [*Prob. Code* § 8481(a)(1)]. For considerations respecting the waiver of bonds, see § 65.100, P 6.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

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Probate  
Personal Representatives  
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*24-65 California Legal Forms--Transaction Guide § 65.103*

### § 65.103 Alternate and Successor Executors

#### NOTE:

The will should nominate one or more alternate and successor executors to serve in the event the person named as executor fails to qualify or ceases to serve as executor. If the will does not name a successor or alternate, the court must appoint an administrator with the will annexed [*Prob. Code §§ 8440* (appointment of administrator with will annexed), 8522(a)(duty of court to appoint successor); see § 65.35[5]]. Although it is not strictly necessary to name alternate and successor executors when a trust company has been nominated to act as executor [*see § 65.201[1]*], such a nomination is nevertheless prudent, since a trust company may decline to serve as executor or may resign [*see Prob. Code §§ 8001* (waiver of right to appointment by failure to petition for appointment), 8520 (vacancy occurs when personal representative resigns), 10952 (duty to account after resignation)].

1. Determine who should be nominated as alternate and successor executor(s).

NOTE: The selection of alternate and successor executors should be governed by the same considerations as the selection of executors. For discussion, see generally § 65.100.

2. Determine whether will should waive bond for alternate and successor executor(s).

NOTE: An alternate or successor executor, like a primary executor, will be required to post a bond [*Prob. Code § 8480(a)*] unless the alternate or successor executor is a trust company [*Prob. Code § 301(a)*] or the will waives the requirement of a bond [*Prob. Code § 8481(a)*]. For considerations respecting the waiver of bond, see § 65.100, P 6.

#### Legal Topics:

For related research and practice materials, see the following legal topics:

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*24-65 California Legal Forms--Transaction Guide § 65.104*

### § 65.104 Ancillary Executors

1. Determine whether executor has assets outside California.

NOTE: Ancillary administration is generally necessary when a testator leaves property in a state in which he or she is not domiciled [*see Prob. Code §§ 12501* ("ancillary administration" defined), 12505 ("nondomiciliary decedent" defined), 12510-12542 (ancillary administration in California of estates of nondomiciliary decedents); *see also § 65.34*]. Since the authority of personal representatives does not ordinarily extend beyond the jurisdiction of the government from which they derive their authority [*see Code Civ. Proc. § 1913(b)*], domiciliary executors ordinarily have no authority over assets located outside the domiciliary jurisdiction.

2. Determine whether will should nominate separate ancillary executor.

a. Will it be difficult or impossible for domiciliary executor to take charge of and manage ancillary estate?

NOTE: A domiciliary executor may also petition for and receive appointment as ancillary executor. However, the expense and time necessary for travel to another jurisdiction will make it nearly impossible for many domiciliary executors to act effectively as ancillary executors. In addition, a trust company [*see Prob. Code § 83, Fin. Code § 107* ("trust company" defined); *see also § 65.36[6]*]; for considerations in the selection of a trust company as executor, see *§ 65.101*] usually cannot transact any business beyond the borders of the jurisdiction in which it is authorized to do business.

b. Does testator know some qualified and competent person where ancillary estate is located who could serve as ancillary executor?

3. Determine whether will should waive bond for ancillary executor [for considerations respecting the waiver of bond, *see* § 65.100, P 6].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawProbateAncillary ProceedingsEstate, Gift & Trust LawProbatePersonal RepresentativesGeneral  
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A. Preliminary Determinations for Selection and Nomination of Executors

*24-65 California Legal Forms--Transaction Guide § 65.105*

**§ 65.105 Delegating Authority to Nominate Executors**

1. Determine whether will should authorize third party to nominate executor.

NOTE: The will may confer on one or more persons the power to designate an executor, coexecutor, or successor executor or coexecutor [*Prob. Code § 8422(a)*; *see § 65.220*].

a. Is it difficult for testator to make selection of executor at present?

NOTE: It may be difficult for some testators to select an executor, particularly when the executor is not expected to act until many years after he or she is nominated. A single parent with minor children and no other close relatives may, for example, be unwilling to commit the administration of the estate to a relative stranger to the family, and trust company may be unwilling to accept appointment because the estate is small. In such a situation, the testator could authorize the attorney to nominate an executor after the testator's death.

b. Does testator repose confidence and trust in third party who could select executor after testator's death?

c. Does testator wish occupant of particular office or position (regardless of identity) to serve as executor?

NOTE: A testator who wishes his or her estate to be administered by a particular officer whose name cannot be known at the time the will is executed may properly delegate the authority to nominate the executor to another person. For example, a testator who wishes his or her estate to be administered by the president of a college and cannot predict who the president will be when the will is offered for probate, may choose to authorize a third person to nominate the president by name [*see Comment, "Administration of Estates*;

designation of executor," 4 *Pacific L.J.* 231 (1973)].

2. Determine whether will should authorize third party to nominate alternate and successor executor.

NOTE: Alternate and successor executors should be named to serve in the event that the principal executor fails to qualify or ceases to serve as executor [*see* § 65.103]. Since the failure of the principal executor to serve may be more or less unforeseeable at the time the will is executed, it may be difficult for the testator to prepare for the failure by naming alternate and successor executors. A third party may be authorized to select the alternate and successor executors if and when the eventuality occurs.

3. Determine whether will should authorize third party to nominate executor from class of persons.

NOTE: A delegation of authority to nominate an executor may limit the authority to nominate to a designated class of persons, such as persons related to the testator by blood [*see* § 65.222].

4. Determine whether will should authorize executor to nominate ancillary executor.

NOTE: Ancillary administration may be necessary if the testator owns assets located in a nondomiciliary state [*see* § 65.104]. It may be difficult at the time the will is executed to predict whether the testator will own such assets at the time of death. In appropriate circumstances, it may make sense to authorize the domiciliary executor to nominate an ancillary executor.

5. Determine whether executor nominated by third party should be relieved of obligation to post bond [*see Prob. Code* § 8422(a) (will may provide that person designated as executor or coexecutor by third person may serve without bond); for considerations respecting the waiver of bond, see § 65.100, P 6].

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:

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*24-65 California Legal Forms--Transaction Guide §§ 65.106-65.119*

**[Reserved]**

§§ 65.106[Reserved]



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B. Preliminary Determinations for Powers, Duties, and Compensation of Executors

*24-65 California Legal Forms--Transaction Guide § 65.120*

### § 65.120 Investment

1. Determine whether will should include special provisions for executor's investment powers.

a. Is estate likely to require that executor make investment decisions?

(1) Small estates will not ordinarily require any investment decisions.

NOTE: Unless the will provides otherwise [*Prob. Code § 9652(c)*], executors are required to keep all cash (except cash that is reasonably necessary for the orderly administration of the estate) invested in interest-bearing accounts or other investments authorized by law [*Prob. Code § 9652(a), (b)*]. This kind of investment will ordinarily be all that is required during a short period of administration.

(2) If estate will have large amounts of cash on hand, and if administration is expected to be prolonged, investment decisions may be necessary.

NOTE: Final distribution is not required sooner than one year in estates not required to file a federal estate tax return, and 18 months in estates for which a federal estate tax return is required [*see Prob. Code § 12200* (executor must file petition for distribution or verified report of status of administration)].

(3) If estate will have unique assets (e.g., sole proprietorship business that must be sold after testator's death or real property subject to option) that are expected to be converted into cash, investment decisions may be called for.

b. Does testator repose confidence in executor's investment ability and judgment?

NOTE: Special investment powers should not be conferred on a testator who is unable to exercise the powers properly or to the benefit of the estate. If the executor lacks business knowledge and experience, it will ordinarily be more prudent to limit the investor to the investment powers conferred on executors

by statute.

c. Is executor likely to require assistance of investment adviser in making investment decisions?

(1) If executor has limited investment knowledge or experience, adviser may be necessary to help executor make investment decisions.

(2) If estate is large and administration expected to be prolonged, investment adviser may be called.

2. If will should include special provisions for executor's investment powers, determine what those provisions should be.

a. Should executor be given broad power to invest?

NOTE: A broad grant of power will allow the executor maximum flexibility in making investment decisions.

b. Should executor be given power to make specified investment?

NOTE: Power to make a specified investment (e.g., to purchase shares of the stock of a particular corporation) may be included if the testator particularly favors the investment. However, the testator should be reminded that no investment is right for all times and all circumstances. Since the executor's investment decisions will not be made until some time in the future, an investment that seems particularly attractive or safe when the will is executed may seem unattractive or unsafe when the estate is being administered.

c. Should will provide that grant of investment power does not require that power to be exercised?

NOTE: So that the executor will have the flexibility necessary to make decisions based on current conditions, an investment power should not be equated with an investment duty. The will should make it clear that the grant of a power to invest does not require exercise of the power [*see* § 65.262].

d. Should executor be given power to retain investment counsel [*see* § 65.120, P 1(c)]?

### Legal Topics:

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law  
Probate  
Personal Representatives  
Duties & Powers  
General Overview  
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B. Preliminary Determinations for Powers, Duties, and Compensation of Executors

*24-65 California Legal Forms--Transaction Guide § 65.121*

### § 65.121 Asset Management

1. Determine whether executor should be given power to sell estate assets.

a. Will estate have sufficient cash to pay all claims, expenses, and taxes?

NOTE: If there is insufficient cash on hand to pay all claims, expenses, and taxes, estate assets may have to be sold. Sale of assets for the purpose of paying claims, expenses, and taxes may be ordered by the court, even in the absence of a will provision authorizing sale [*Prob. Code § 10001(a)(1)*].

b. Will sale of assets be necessary to satisfy devisees?

NOTE: Sale of estate assets may be ordered by the court when necessary to satisfy devisees [*Prob. Code § 10001(a)(1)*]. Sale may be particularly appropriate if the devisees are in fractional or undivided shares, as division or allocation may then be difficult [for a power to allocate and distribute property in kind, *see § 65.380*].

2. Determine whether executor should be given power to lease assets.

a. Does estate include property that is typically leased?

NOTE: Some property is typically leased (e.g., agricultural acreage or oil-producing property). If the estate includes any such property, a power to lease may be beneficial.

b. Will estate require income from leased property to pay claims, expenses, taxes, or devisees?

NOTE: Lease payments may produce cash to pay claims, expenses, taxes, or devisees. In some circumstances, leasing may obviate the necessity for selling assets to raise necessary cash.

3. Determine whether executor should be given power to retain assets.

a. Will estate include assets that should not be retained under "ordinary care and diligence" rule?

NOTE: Because they have the potential to lose value quickly, some assets (e.g., shares of stock of a small corporation, or shares of a corporation that is currently operating at a loss) may not be suitable for holding under the "ordinary care and diligence rule" [*see Prob. Code § 9600(a)*]; *see also* discussion in § 65.43[1].

b. Does testator wish executor to retain those assets?

NOTE: A will provision authorizing the executor to retain assets that could not otherwise be held under the "ordinary care and diligence" rule will be one of the "circumstances" that may be considered in determining whether the trustee has acted with ordinary care and diligence [*see Prob. Code § 9600(a)*] (what constitutes "care and diligence" is determined by all circumstances of particular estate); *see also* § 65.283[1].

4. Determine whether executor should be given power to continue operation of business after testator's death [for considerations in determining whether business should be liquidated after testator's death, *see* § 65.125, P 2].

a. Will estate include business operated by testator as sole proprietor or general partner?

b. Does testator wish business to be continued after his or her death?

NOTE: If it is to the advantage of the estate and in the best interest of the interested persons [*see Prob. Code § 48*] ("interested person" defined), the executor may continue the operation of a business owned by the decedent as a sole proprietor for a period of six months from the date letters are first issued *Prob. Code § 9760(b)*. Operation of a business beyond six months is permissible only if a court order has been obtained authorizing continued operation [*Prob. Code § 9760(b)*]; *see Ch. 63, Will Provisions, § 63.461[1][b]*. Although a will provision will probably be ineffective to authorize operation beyond six months without a court order [*see § 65.284[1][b][iii]*], it will clearly state the testator's intentions with respect to operation, thereby helping to resolve disputes as to the propriety of the executor's decision and strengthening a petition for court authority.

5. Determine whether executor should be given power to purchase assets of estate for executor's own account.

NOTE: Executors and their attorneys are generally forbidden to purchase, directly or indirectly, any property of or claim against the estate [*Prob. Code § 9880*]; *see Prob. Code § 58(a)* ("personal representative" defined); *see also* § 65.285].

a. Is estate likely to need cash to pay claims, expenses, taxes, or devises [*see §§ 65.120-65.124*?

b. Is executor business associate of testator?

NOTE: Business associates of the testator are sometimes chosen to serve as executors. Because they know the testator's business and are familiar with the testator's assets, they are sometimes in a better position than other persons to take over those assets. In appropriate circumstances, an executor who is also a business associate of the testator may wish to purchase business assets held by the estate.

c. Will estate include assets that cannot readily be sold on open market?

NOTE: Some assets cannot readily be sold on the open market (e.g., stock in small

corporations, limited partnership interests, and sole proprietorship businesses that depend for their success on the close personal supervision of an experienced manager). If the estate is likely to be illiquid, purchase of those assets by a friend or business associate of the testator who is familiar with them and willing to purchase them for his or her own account may be to the advantage of the estate.

- d. Does testator wish to give executor power to purchase assets for executor's own account?

NOTE: If the will authorizes the executor (or the executor's attorney) to purchase property of the estate, the court may make an order authorizing the purchase [*Prob. Code* § 9882; *see Prob. Code* § 58(a) ("personal representative" defined); *see also* § 65.285].

6. Determine whether executor should be given power to make expenditures to collect foreign assets.

- a. Will estate include out-of-state property?

b. Can out-of-state property be collected without ancillary administration in other state [*see* § 65.104; *see also* § 65.286]?

7. Determine whether administrator with will annexed [*see Prob. Code* §§ 8440-8442; *see also* § 65.35[5]] should be given same powers as executor.

- a. Does will confer discretionary power on executor?

NOTE: An administrator with the will annexed will generally have the same authority over the estate as an executor named in the will [*Prob. Code* § 8442(a)]. If, however, the will confers a discretionary power or authority on an executor that is not conferred by law and does not extend the power or authority to other personal representatives [*see Prob. Code* § 58(a) ("personal representative" defined)], the power or authority is not deemed to be conferred on an administrator with the will annexed [*Prob. Code* § 8442(b)] although the court, in its discretion, may authorize an administrator with the will annexed to exercise it [*Prob. Code* § 8442(b)].

- b. If executor fails to qualify or ceases to act, does testator wish administrator with will annexed to have same powers as executor?

NOTE: The will may provide that an administrator with the will annexed will have all of the powers of the executor [*see Prob. Code* § 8442(b) (will may provide that discretionary powers exercisable by executor also exercisable by administrator with will annexed); *see also* § 65.360].

- c. Does will nominate alternate and successor executors?

NOTE: If the will names sufficient alternate and successor executors, appointment of an administrator with the will annexed will not be necessary and there will be no need for will to confer any powers on administrator with will annexed [*see* § 65.203; for preliminary determinations in the selection and nomination of alternate and successor executors, *see* § 65.103].

### Legal Topics:

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law  
 Probate  
 Personal Representatives  
 Claims By & Against Estate, Gift & Trust Law  
 Probate  
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*24-65 California Legal Forms--Transaction Guide § 65.122*

### § 65.122 Borrowing

1. Determine whether executor should be given power to borrow money on behalf of estate.
  - a. Is estate likely to need cash to pay claims, expenses, or taxes?
  - b. Does testator wish executor to avoid selling estate property to raise cash?  
NOTE: The court may order estate assets sold if there is insufficient cash on hand to pay claims, expenses, and taxes [*Prob. Code § 10001(a)(1)*]. Borrowing may enable the executor to avoid sale.
  - c. Will estate include business that executor will operate [*see § 65.121, P 4*] and that is likely to need cash during administration?
2. Determine whether executor should be given power to encumber estate assets.
  - a. Does will empower executor to borrow money on behalf of estate [*see (1), above*]?
  - b. Is power to encumber estate assets necessary to facilitate exercise of power to borrow money?  
NOTE: Many (if not most) large loans are secured. A power to borrow money without a power to encumber estate assets is likely to be ineffectual.

#### Legal Topics:

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Probate Personal Representatives Duties & Powers General Overview



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*24-65 California Legal Forms--Transaction Guide § 65.123*

### § 65.123 Taxes

1. Determine whether executor should be given power to take particular actions without regard to tax consequences.
2. Determine whether executor should be given power to allocate expense deductions between income tax and estate tax.

NOTE: In discharge of his or her duty to file tax returns for the estate and for the decedent [*see § 65.41[7]*], the executor has the power to make various tax elections. If these elections affect the distributive shares of different devisees in different ways, the court may compel adjustments on distribution [*Estate of Bixby (1956) 140 Cal. app. 2d 326, 339-340, 295 P.2d 68*]. A will provision may relieve the executor of the obligation to make such adjustments [*see § 65.320[1][b]*].

- a. Is estate likely to require executor to make tax elections?
- b. Will estate have several devisees whose distributive shares may be affected in different ways by executor's tax elections?
- c. Does testator wish executor to have maximum freedom to make tax elections without regard to effect on devisees' distributive shares?
- d. Does testator wish executor to ensure that devisees' distributive shares will be neither augmented nor diminished by any tax decisions?

### Legal Topics:

For related research and practice materials, see the following legal topics:

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*24-65 California Legal Forms--Transaction Guide § 65.124*

### § 65.124 Distribution

1. Determine whether executor should be given power to divided property on distribution and to allocate and distribute property in kind.

a. Does will make gifts to two or more devisees in fractional shares?

b. Will allocation of particular assets to particular devisees be difficult?

NOTE: If an estate does not consist entirely of cash, problems may arise as to how the estate should be distributed, particularly if the residue includes assets (e.g., furniture, jewelry, or works of art) that cannot readily be divided into separate interests.

c. Would testator prefer that executor rather than court allocate and divide property?

NOTE: If the will does not give the executor power to divide property on distribution, the court must determine what property will be distributed to each devisee and whether property should be partitioned [*Prob. Code § 11603(b)(1)*]; *see Prob. Code §§ 11950-11956* (procedure for division by court)]. The court may order property sold when sale would be more equitable than partition and the property cannot conveniently be allotted to any one party [*Prob. Code § 11953*]. Costs of the partition proceedings must be paid by the parties entitled to distribution, but each must pay his or her own attorney fees [*Prob. Code § 11955*].

The testator will often prefer that the executor divide the property, since the executor will frequently have a better understanding of the testator's wishes and the needs of the devisees. Further, court petitions can be costly, delay the ultimate closing of the estate, and produce discord among the interested persons.

2. Determine whether executor should be given power to pay devises to third parties for benefit of minor or incompetent devisees.

a. Does will make gifts to devisees who may be minors at time of distribution?

NOTE: Although minors are capable of owning property, they are not capable of contracting with respect to the property [*Fam. Code* § 6701(b); *see* § 65.381[1][b]]. For this reason, it is generally necessary for a minor's property to be held for the minor by some other person legally empowered to do so [*see* (c) and (d), *below*; *see also* § 65.381].

b. Does will make gifts to adults subject to disabilities?

c. Does minor or disabled adult devisee have guardian of estate, conservator, or trustee who could hold property for that devisee?

NOTE: Property may be held for minors by (1) guardians of the estate [*see Prob. Code* § 2401(a)], (2) trustees [*see Prob. Code* §§ 15000-18201 (the Trust Law)], (3) custodians under the California Uniform Transfers to Minors Act [*Prob. Code* §§ 3900-3925], or (4) parents, if the minor's "total estate" does not exceed \$5,000 [*Prob. Code* §§ 3400, 3401; *see* § 65.381[1][b]]. Property may be held for disabled adults by (1) trustees or (2) conservators [*Prob. Code* §§ 1800, 1801, 2401(a); *see* § 65.381[1][c]].

d. Should will designate custodian for minor under California Uniform Transfers to Minors Act?

NOTE: A will may nominate a custodian under the Act [*Prob. Code* § 3903(a)].

3. Determine whether executor should be given power to pay costs of distribution of estate assets.

a. Are costs of distributing property to devisees likely to be more than nominal?

NOTE: Costs of distributing estate assets can include such items as recording fees (for real property), transfer and registration fees (for securities), and storage and freight charges (for tangible personal property). If the assets of the estate are substantial, or if the devisees reside some distance from the executor, these costs can be substantial.

b. Will provision authorizing executor to pay costs of distribution will help establish that costs are expenses of administration and thus deductible for federal estate tax purposes?

NOTE: Expenses of administering the estate are deductible for federal estate tax purposes, but only to the extent that they are actually and necessarily incurred in collecting assets, paying debts, and distributing property to the persons entitled to it [*Treas. Reg.* § 20.2053-3]. A will provision authorizing the executor to pay distribution costs may help to establish that the costs are properly deductible expenses [*see* § 65.382].

### Legal Topics:

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law  
 Probate  
 Personal Representatives  
 Duties & Powers  
 General Overview  
 Estate, Gift & Trust Law  
 Probate  
 Personal Representatives  
 Duties & Powers  
 Distribution



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DIVISION IV: WILLS AND TRUSTS

CHAPTER 65 EXECUTORS

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B. Preliminary Determinations for Powers, Duties, and Compensation of Executors

*24-65 California Legal Forms--Transaction Guide § 65.125*

### § 65.125 Directions

1. Determine whether executor should be directed to pay a specific debt or debts.

a. Does testator feel moral obligation to pay legally uncollectible debt?

b. Does testator have reason to believe creditor may be unable or unwilling to file claim for payment of legally collectible debt?

c. Does testator wish particular debt to be paid out of specific fund or property?

NOTE: If necessary to pay debts and expenses of administration, estate assets must abate (i.e., be reduced, eliminated, or even sold) according to a statutory schedule of priorities [*see Prob. Code § 21402(a)*] (order of abatement); *see also Prob. Code § 10000(a)* (executor may sell assets when necessary to pay debts, devisees, family allowance, expenses of administration, or taxes). The will may, however, provide a different order of abatement [*Prob. Code § 21400; see Ch. 61, Will Provisions, § 61.416*].

d. Could provision have effect of reviving a barred debt?

NOTE: Although the executor cannot properly pay a debt that is barred by the statute of limitations [*Prob. Code § 9253*], an otherwise barred debt may be revived by a writing signed by the party to be charged [*Code Civ. Proc. § 360*]. A will provision requiring the executor to pay a specified debt may be deemed such a writing [*see § 65.400*].

2. Determine whether executor should be directed to liquidate business [for considerations in determining whether business should be continued after testator's death, *see § 65.121, P 4*].

a. Will estate include business operated by testator as sole proprietorship or general partnership?

- b. Does success of business depend largely on testator's personal management?

NOTE: Many businesses (particularly small businesses operated as sole proprietorships or general partnerships) depend greatly on the knowledge, experience, skill, and energy of a single manager. If that manager is the testator, the business may suffer greatly as a result of the testator's death.

- c. Does testator wish business to be liquidated after his or her death?

3. Determine whether will should direct executor as to sequence of sales of estate property.

- a. Is it likely executor will have to liquidate estate assets to pay claims, expenses, or taxes?

- b. Does testator wish property of estate to be resorted to for payment of claims, expenses, and taxes only in certain order?

NOTE: The will may direct that particular property of the estate be sold [*Prob. Code* §§ 10000(c), (d), 10002(a)] or give directions about the "mode of selling" estate property [*Prob. Code* § 10002(a); *see* § 65.402[1]].

4. Determine whether will should provide that trust company nominated as coexecutor will have custody of personal property of estate and maintain all estate records and accounts.

- a. Does will nominate individual and trust company as coexecutors [*see* § 65.102, P 1]?

- b. Will individual coexecutor acquiesce in trust company's demand [*see* § 65.102, P 1 *see also* § 65.403[1]] to have possession of all moneys and other personal property of estate and keep all records and accounts?

5. Determine whether will should direct ancillary executor to deliver residue of ancillary estate to domiciliary executor.

- a. Does will nominate ancillary executor [*see* § 65.104]?

- b. Does testator wish all assets (of both ancillary and domiciliary estates) to be distributed by domiciliary executor under terms of will?

NOTE: The assets of an ancillary estate are usually delivered to the domiciliary executor to be distributed with other assets of the estate according to the law of the domiciliary state. However, the laws of some states (including California) permit the court, in its discretion, to order distribution directly to the devisees under the will [*see Estate of Lathrop (1913) 165 Cal. 243, 249, 131 P. 752 ; see also Prob. Code* §§ 12540(a) (court may order distribution to domiciliary representative if in best interest of estate or interested persons), 12542 (court may order distribution to domiciliary representative if domiciliary estate insolvent)]. A will provision directing the ancillary executor to distribute the residue of the ancillary estate to the domiciliary executor will help to prevent direct distribution [*see* § 65.404[1][b]].

### Legal Topics:

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawEstate AdministrationClaims Against EstatesGeneral OverviewEstate, Gift & Trust LawProbatePersonal RepresentativesGeneral OverviewEstate, Gift & Trust LawProbatePersonal RepresentativesDuties

& PowersGeneral Overview



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B. Preliminary Determinations for Powers, Duties, and Compensation of Executors

*24-65 California Legal Forms--Transaction Guide § 65.126*

**§ 65.126 Independent Administration**

1. Determine whether independent administration [*see § 65.45[1]*] would be to advantage of estate.

NOTE: The Independent Administration of Estates Act [*Prob. Code §§ 10400-10592*] generally affords the personal representative greater flexibility and freedom than is available under the more restrictive procedures of supervised administration [*see § 65.31*]. Under the Act, certain action may be taken only after notice of proposed action is given to heirs, devisees, and persons who have requested special notice, while other action may be taken without notice or any court authorization [*see § 65.45[4]*].

a. Is testator's confidence in ability, judgment, and integrity of executor and alternate and successor executor(s) such that he or she would be willing to permit administration without close judicial supervision?

b. Is testator content to dispense with many formal aspects of supervised administration?

c. Would supervised administration be preferable to independent administration because persons interested in estate are likely to quarrel over provisions of will or disagree about steps to be taken in administration of estate?

2. Determine whether will should include direction permitting or prohibiting independent administration.

NOTE: If the will is silent on the question of independent administration, the executor may petition for authority to administer the estate under the Act [*Prob. Code § 10450*], but persons interested in the estate may object [*Prob. Code § 10452*]. The court must grant the petition unless good cause has been shown why independent administration should not be permitted [*Prob. Code § 10452*]. It may, however, order limited

independent administration in appropriate circumstances [*Prob. Code § 10452*].

a. Does testator feel strongly that estate should not be administered under Independent Administration of Estates Act?

NOTE: The court cannot permit independent administration if the decedent's will provides that the estate is not to be administered under the Act [*Prob. Code § 10404*; *see § 65.420[1]*].

b. Does testator wish to permit independent administration subject to stated exceptions [*see § 65.420[1][c][ii]*]?

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawEstate AdministrationGeneral OverviewEstate, Gift & Trust LawProbateGeneral OverviewEstate, Gift & Trust LawProbatePersonal RepresentativesGeneral Overview



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*24-65 California Legal Forms--Transaction Guide § 65.127*

### **§ 65.127 Compensation**

1. Determine whether will should make special provision for compensation of executor.

a. Is testator satisfied with statutory compensation?

NOTE: Unless the will provides otherwise, the compensation of an executor will be determined by statute [*see Prob. Code §§ 10800, 10802*]. Because the statutory compensation is easy to compute and understand, it usually gives persons interested in the estate little cause for argument or dispute.

b. Does testator wish to allow executor greater or lesser compensation than that permitted by statute?

2. If will should make special provision for compensation of executor, determine what provision it should make.

a. Should executor's compensation be fixed amount [*see § 65.440[1]*]?

(1) Fixed amount will avoid disputes among persons interested in estate and avoid court proceedings to fix compensation.

(2) Fixed amount may overcompensate or undercompensate executor for actual services rendered, since time and effort required for administration may not be anticipated at time will is executed.

b. Should executor's compensation be "reasonable"?

(1) Provision for reasonable compensation will avoid rigidity of statutory fee schedules.

(2) Provision for reasonable compensation will assure that compensation received bears reasonable relation to actual services rendered.

(3) Provision for reasonable compensation will require court order to fix amount of compensation [see § 65.441[1][b]].

c. Should executor receive devise in lieu of compensation?

(1) Does testator wish executor's compensation to be deductible for federal estate tax purposes?

(2) Would executor prefer to avoid income tax on compensation?

NOTE: Compensation paid to the executor for services rendered in the administration of the estate will be deductible for federal estate tax purposes [I.R.C. § 2053(a)(2) (administration expenses); *Treas. Reg. § 20.2053-3(b)(1)* (commissions of executor or administrator)] and taxable as income to the executor [I.R.C. § 61(a)(1) (gross income defined)]. In contrast, a devise is neither deductible for federal estate tax purposes nor subject to income tax in the hands of the recipient [I.R.C. § 102(a)]. However, a devise to an executor that is conditioned on the rendition of services will, for both estate and income tax purposes, be treated as compensation for services and not a devise [ *Ream v. Bowers* (2d Cir. [N.Y.] 1927) 22 F.2d 465, 468 ; for discussion, see §§ 65.442[1][c][i], 65.442[1][c][ii]].

d. Should trust company be compensated as if it were sole executor and individual executor receive no (or merely nominal) compensation?

NOTE: When one of the coexecutors is an individual and another is a trust company, the trust company almost invariably has custody of all personal property and maintains all records and accounts for the estate [see § 65.403[1]]. Since, under those circumstances, trust companies can be expected to perform the bulk of the work of administration, they frequently expect the same compensation that a sole executor would receive [see § 65.443[1][c]].

e. Should compensation of trust company and individual coexecutors be divided according to fractional formula?

(1) Fractional formula will avoid necessity for court to divide fees among or between coexecutors.

(2) Fractional formula will assure that each coexecutor will receive part of compensation.

(3) Fractional formula may or may not match compensation to actual services rendered, since it will be difficult when will is executed to anticipate actual services rendered by each coexecutor.

f. Should attorney receive compensation both as executor and as attorney?

NOTE: Notwithstanding any provision in the decedent's will, an executor who is the attorney may receive the executor's compensation, but is not entitled to compensation for services as the attorney for the executor unless the court grants prior approval and finds that the arrangement is to the advantage, benefit, and best interests of the decedent's estate [ *Prob. Code § 10804*; see also [ *In re Estate of Parker* (1926) 200 Cal. 132, 137, 251 P. 907 ; *Estate of Thompson* (1958) 50 Cal. 2d 613, 616-617, 328 P.2d 1 ; *Estate of Crouch* (1966) 240 Cal. App. 2d 801, 802, 49 Cal. Rptr. 926 ; see also § 65.39[5]].

(1) Does testator repose special confidence in ability, judgment, and integrity of attorney?

(2) Are heirs or devisees likely to object to dual compensation for attorney?

(3) Are both attorney and testator willing to submit will to independent counsel for review?

NOTE: Ethical problems that arise whenever an attorney draws a will naming himself or herself as executor [*see* § 65.100, P 5] will also be encountered when the attorney draws a will authorizing himself or herself to receive dual compensation. Thus, independent review of such a will before its execution may be appropriate in light of the requirement that the court must give prior approval of a dual compensation arrangement [*see Prob. Code* § 10804; *see also* §§ 65.200[1][c], 65.445[1][b][iii]].

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Estate, Gift & Trust Law  
Probate  
Personal Representatives  
Compensation



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*24-65 California Legal Forms--Transaction Guide § 65.128*

### § 65.128 Exculpatory Provisions

1. Determine whether will should include provision relieving executor of liability.

NOTE: The effectiveness of will provisions relieving executors of liability is unsettled. It is likely, however, that such a provision will be effective to relieve an executor of liability to the estate and the devisees under the estate but not to third parties [*see* § 65.460[1][c][ii]]. In any event, a provision relieving a fiduciary of liability must be strictly construed [*Corbett v. Benioff* (1932) 126 Cal. app. 772, 776, 14 P.2d 1028].

a. Does testator repose trust and confidence in ability, judgment, and integrity of prospective executor and alternate executor?

b. Is it likely executor or alternate executor would decline to serve without some relief from liability?

NOTE: Unless the estate is small, its administration is likely to be complex and demanding. The grounds on which executors may be held liable for acts or omissions of agents and employees (and for their own acts and omissions) are numerous [*see* § 65.43]. Many persons are reluctant to serve in any fiduciary capacity without some protection against personal liability.

(1) Are devisees likely to quarrel about will provisions or steps to be taken in administration of estate?

(2) Are prospective executor and alternate executor also principal devisees under will?

c. Will prospective executor and alternate executor be adequately protected against personal liability by liability insurance?

NOTE: The executor's best protection against personal liability is liability insurance. In California, every executor has the power to insure the property of the estate against damage or loss and to insure himself or herself against liability to third persons [*Prob. Code* § 9656; *see* § 65.42[7]]. Some executors, however, may wish to have additional protection against personal liability.

2. If will should include provision relieving executor of liability, determine what provision it should include.

a. Should will relieve executor of liability for acts and omissions of agents and attorneys?

(1) Will executor require assistance of agents and employees?

(2) Does testator feel executor should not be personally liable for acts or omissions of agents, employees, and attorneys?

NOTE: A will may relieve the executor of liability for acts or omissions of agents, employees, and attorneys, provided reasonable care was used in their selection [*see* § 65.460].

b. Should will relieve executor of liability for own acts and omissions [*see* § 65.461 and comment]?

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Probate Personal Representatives General Overview Estate, Gift & Trust Law Probate Personal Representatives Claims By & Against Estate, Gift & Trust Law Probate Personal Representatives Duties & Powers Fiduciary Responsibilities



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*24-65 California Legal Forms--Transaction Guide §§ 65.129-65.139*

**[Reserved]**

§§ 65.129[Reserved]



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C. Drafting Guide to Will Provisions for Executors

*24-65 California Legal Forms--Transaction Guide*

**NOTE:**

All of the forms in this chapter are designed to be used as part of complete wills. They should be used only in conjunction with other will provisions set forth in Ch. 61, *Will Drafting and Complete Will Forms*, Ch. 62, *Codicils*, Ch. 63, *Will Provisions*, Ch. 64, *Testamentary Trusts: Payment and Distribution Provisions*, Ch. 64A, *Testamentary Trusts: Trustee Provisions*, and Ch. 64B, *Testamentary Trusts: Administrative Provisions*.



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C. Drafting Guide to Will Provisions for Executors

*24-65 California Legal Forms--Transaction Guide § 65.140*

#### **§ 65.140 Nominations**

1. To nominate one executor only, use one of following forms:
  - a. § 65.200 to nominate individual executor [*see § 65.100*].
  - b. § 65.201 to nominate trust company [*see § 65.101*].
2. To nominate coexecutors [*see § 65.102*], use § 65.202.
3. To nominate alternate and successor executors [*see § 65.103*], use § 65.203.
4. To nominate ancillary executor [*see § 65.104*], use § 65.204.

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawProbatePersonal RepresentativesGeneral OverviewEstate, Gift & Trust LawProbatePersonal RepresentativesAppointmentEstate, Gift & Trust LawWillsGeneral Overview



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PART III. TRANSACTION GUIDE

C. Drafting Guide to Will Provisions for Executors

*24-65 California Legal Forms--Transaction Guide § 65.141*

**§ 65.141 Delegations of Authority to Nominate**

1. To delegate authority to nominate executor [*see* § 65.105, P 1], use § 65.220.
2. To delegate authority to nominate alternate and successor executor [*see* § 65.105, P 2], use § 65.221.
3. To delegate authority to nominate executor from a class of persons [*see* § 65.105, P 3], use § 65.222.
4. To authorize executor to nominate ancillary executor [*see* § 65.105, P 4], use § 65.223.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Probate Personal Representatives General Overview Estate, Gift & Trust Law Probate Personal Representatives Appointment Estate, Gift & Trust Law Wills General Overview



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C. Drafting Guide to Will Provisions for Executors

*24-65 California Legal Forms--Transaction Guide § 65.142*

**§ 65.142 Bonds**

1. To waive bond for individual executor [*see* § 65.100, P 6], use § 65.240.

2. To waive bond for coexecutors [*see* §§ 65.100, P 6, 65.102, P 2], use § 65.241.

NOTE: No waiver is necessary if a trust company is nominated as the executor [*see* § 65.101], since trust companies are exempt from bond requirements [*Prob. Code* § 301(a); *see* § 65.101, P 3(d)].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Probate Personal Representatives General Overview Estate, Gift & Trust Law Probate Personal Representatives Appointment Estate, Gift & Trust Law Wills General Overview



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*24-65 California Legal Forms--Transaction Guide § 65.143*

**§ 65.143 Powers**

1. To grant executor investment powers [*see § 65.120*], use:
  - a. § 65.260 for broad grant of investment powers [*see § 65.120*, P 2(a)].
  - b. § 65.261 for power to make specified investments [*see § 65.120*, P 2(b)].
2. To provide that grant of investment power does not require exercise of power [*see § 65.120*, P 2(c)], use § 65.262.
3. To grant executor power to retain investment counsel [*see § 65.120*, P 2(d)], see § 65.263.
4. To grant executor power to sell estate property [*see § 65.121*, P 1], use:
  - a. § 65.280 for general power of sale.
  - b. § 65.281 for power to sell assets in foreign jurisdiction.
  - c. § 65.340 to grant ancillary executor power to sell, lease, and borrow.
5. To grant executor power to lease estate property [*see § 65.121*, P 2], use:
  - a. § 65.282 to grant executor power to lease.
  - b. § 65.340 to grant ancillary executor power to sell, lease, and borrow.

6. To grant executor power to retain particular asset or assets [*see* § 65.121, P 3], use § 65.283.
7. To grant executor power to continue operation of business or partnership interest [*see* § 65.121, P 4], use § 65.284.
8. To grant executor power to purchase estate assets for executor's own account [*see* § 65.121, P 5], use § 65.285.
9. To grant executor power to make expenditures to collect foreign assets [*see* § 65.121, P 6], use § 65.286.
10. To grant executor power to borrow money and encumber property [*see* § 65.122], use:
  - a. § 65.300 to grant executor power to borrow money and encumber property.
  - b. § 65.340 to grant ancillary executor power to sell, lease, and borrow.
11. To grant executor special tax powers [*see* § 65.123], use:
  - a. § 65.320 for power to take particular actions without regard to their tax consequences.
  - b. § 65.321 for power to allocate expense deductions between income tax and estate tax.
12. To grant administrator with will annexed same powers as executor [*see* § 65.121, P 7], use § 65.360.
13. To grant executor special distribution powers [*see* § 65.124], use:
  - a. § 65.380 to grant executor power to allocate and distribute property in kind [*see* § 65.124, P 1].
  - b. § 65.381 to grant executor power to pay devise for benefit of minor or incompetent devisees [*see* § 65.124, P 2].
  - c. § 65.382 to grant executor power to pay for costs of distributing estate assets [*see* § 65.124, P 3].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Probate Personal Representatives Duties & Powers General Overview Estate, Gift & Trust Law Probate Personal Representatives Duties & Powers Distribution Estate, Gift & Trust Law Probate Personal Representatives Duties & Powers Sales of Assets



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C. Drafting Guide to Will Provisions for Executors

*24-65 California Legal Forms--Transaction Guide § 65.144*

**§ 65.144 Directions**

1. To direct executor to pay debt [*see* § 65.125, P 1], use § 65.400.
2. To direct executor to liquidate business [*see* § 65.125, P 2], use § 65.401.
3. To direct executor as to the sequence of sales of estate property [*see* § 65.125, P 3], use § 65.402.
4. To provide that trust company is to have custody of all money and personal property of estate and maintain all records and accounts for estate [*see* § 65.125, P 4], use § 65.403.
5. To direct ancillary executor to deliver residue of ancillary estate to domiciliary executor [*see* § 65.125, P 5], use § 65.404.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law  
Estate Administration  
Claims Against Estates  
General Overview  
Estate, Gift & Trust Law  
Probate  
Personal Representatives  
General Overview  
Estate, Gift & Trust Law  
Probate  
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C. Drafting Guide to Will Provisions for Executors

*24-65 California Legal Forms--Transaction Guide § 65.145*

**§ 65.145 Independent Administration**

1. To direct that estate may be administered under Independent Administration of Estates Act [*Prob. Code §§ 10400-10592; see § 65.126*], use § 65.421.

2. To direct that the estate may not be administered under Independent Administration of Estates Act, use § 65.420.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawEstate AdministrationGeneral OverviewEstate, Gift & Trust LawProbateGeneral Overview



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C. Drafting Guide to Will Provisions for Executors

*24-65 California Legal Forms--Transaction Guide § 65.146*

### **§ 65.146 Compensation**

1. To make special provision for executor's compensation [*see* § 65.127], use:
  - a. § 65.440 to establish executor's compensation at fixed amount [*see* § 65.127, P 2(a)].
  - b. § 65.441 to provide that executor is to receive reasonable compensation [*see* § 65.127, P 2(b)].
  - c. § 65.442 to make devise to executor in lieu of compensation [*see* § 65.127, P 2(c)].
2. To make special provision for coexecutors' compensation, use:
  - a. § 65.443 to provide that trust company is to be compensated as if it were sole executor and individual executor is to receive no (or merely nominal) compensation [*see* § 65.127, P 2(d)].
  - b. § 65.444 to require a fractional division of commissions between trust company and individual coexecutor [*see* § 65.127, P 2(e)].
3. To authorize attorney to receive compensation both as executor and as attorney for executor [*see* § 65.127, P 2(f)], use § 65.445.

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:  
Estate, Gift & Trust Law  
Probate  
Personal Representatives  
Compensation



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DIVISION IV: WILLS AND TRUSTS

CHAPTER 65 EXECUTORS

PART III. TRANSACTION GUIDE

C. Drafting Guide to Will Provisions for Executors

*24-65 California Legal Forms--Transaction Guide § 65.147*

**§ 65.147 Exculpatory Provisions**

1. To relieve executor of liability for acts and omissions of agents and attorneys [*see* § 65.128, P 2(a)], use § 65.460.
2. To relieve executor of liability for own acts and omissions [*see* § 65.128, P 2(b)], use § 65.461.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Probate Personal Representatives General Overview Estate, Gift & Trust Law Probate Personal Representatives Claims By & Against Estate, Gift & Trust Law Probate Personal Representatives Duties & Powers General Overview Estate, Gift & Trust Law Probate Personal Representatives Duties & Powers Fiduciary Responsibilities Estate, Gift & Trust Law Wills General Overview



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DIVISION IV: WILLS AND TRUSTS

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C. Drafting Guide to Will Provisions for Executors

*24-65 California Legal Forms--Transaction Guide §§ 65.148-65.199*

**[Reserved]**

§§ 65.148[Reserved]



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DIVISION IV: WILLS AND TRUSTS

CHAPTER 65 EXECUTORS

PART IV. FORMS

A. Nominations

*24-65 California Legal Forms--Transaction Guide § 65.200*

### **§ 65.200 Nomination of Individual Executor**

#### **[1] Comment**

#### **[a] Use of Form**

This form is a will provision that may be used to nominate an individual as executor. For a nomination of a trust company as executor, see § 65.201. For a nomination of coexecutors, see § 65.202. For nomination of alternate and successor executors, see § 65.203. For nomination of an ancillary executor, see § 65.204.

#### **[b] Executors**

An executor is a personal representative [*see Prob. Code § 58(a)* ("personal representative" defined); *see also § 65.35[1]*] who is nominated by the will of a decedent and appointed by the court to carry out the provisions of the decedent's will and dispose of the decedent's property according to law [*see Prob. Code §§ 8400(a)* (no power to administer estate until appointed), 8420 (appointment of person named as executor in will); Black's Law Dictionary 511 (5th ed. 1979)]. On appointment and qualification, an executor is entitled to the issuance of letters testamentary [*see Prob. Code § 52* ("letters" defined)].

For functions and characteristics of the office of executor, see § 65.35[2]. For requisites of a valid nomination, see § 65.37. For qualifications of executors, see § 65.36.

#### **[c] Attorney as Executor**

An attorney is competent to serve as executor of a client's will [*see Estate of Thompson (1958) 50 Cal. 2d 613, 616-617, 328 P.2d 1*; *Estate of Crouch (1966) 240 Cal. App. 2d 801, 802, 49 Cal. Rptr. 926*]. Testators who repose special trust and confidence in their attorneys sometimes ask those attorneys to act as their executors. These requests raise special ethical problems. Any dealing between an attorney and a client whereby the attorney benefits will be strictly scrutinized for unfairness [*Ritter v. State Bar (1985) 40 Cal. 3d 595, 221 Cal. Rptr. 134, 709 P.2d 1303*; *Clancy v. State Bar (1969) 71 Cal. 2d 140, 146, 77 Cal. Rptr. 657, 454 P.2d 329*]. An attorney who acts as executor of

a decedent's estate is held to the high standards of the legal profession, even when not acting in the capacity of attorney. While acting as executor, the attorney must maintain proper books and records and must not commingle funds. Failure to provide proper accounting for entrusted funds is cause for professional discipline, whether or not financial loss results [ *Ridge v. State Bar (1989)* 47 Cal. 3d 952, 961, 254 Cal. Rptr. 803, 766 P.2d 569 ]. In addition, the Rules of Professional Conduct prohibit every attorney from knowingly acquiring a pecuniary interest adverse to a client unless each of the following requirements has been satisfied [ *Cal. Rules of Prof. Conduct, Rule 3-300* ]:

- (1) The acquisition and its terms are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner which should reasonably have been understood by the client;
- (2) The client is advised in writing that the client may seek the advice of an independent lawyer of the client's choice and is given a reasonable opportunity to seek that advice; and
- (3) The client thereafter consents in writing to the terms of the acquisition.

An inference of undue influence may be drawn when an attorney drafts a will from which he or she will profit personally [ *see Magee v. State Bar (1962)* 58 Cal. 2d 423, 429, 24 Cal. Rptr. 839, 374 P.2d 807 (inference of undue influence when attorney receives gift from client under circumstances that reasonably suggest such influence); *Estate of Lind (1989)* 209 Cal. App. 3d 1424, 1430, 257 Cal. Rptr. 853 (when elderly testator executed will naming attorney as executor and giving him one-half of entire estate, presumption of undue influence arose, shifting burden to attorney to show no undue influence)]. An attorney should accept nomination as executor only if the attorney is personally convinced that his or her acceptance of the nomination would be fair and reasonable to the client under all the circumstances and only if, before executing the will, the client has been given a reasonable opportunity to seek the advice of independent counsel of the client's choice [ *see Magee v. State Bar (1962)* 58 Cal. 2d 423, 433, 24 Cal. Rptr. 839, 374 P.2d 807 (residuary gift to attorney)]. Review of the will by independent counsel is particularly important if the will makes a devise to the attorney. In addition, when the will authorizes the attorney to receive compensation both as executor and as attorney for the executor, obtaining independent counsel may be appropriate because, notwithstanding any provision in the decedent's will, the court must approve a dual compensation arrangement and find that the arrangement is to the advantage, benefit, and best interests of the decedent's estate [ *see Prob. Code § 10804*; *see also* 65.445[1]].

## [2] FORM

### Nomination of Individual Executor

Executor

I nominate \_\_\_\_\_ [state relationship, if any, e.g., my husband], \_\_\_\_\_ [name] , of \_\_\_\_\_ [place] , as Executor of this will.

### Legal Topics:

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law  
 Probate  
 Personal Representatives  
 General Overview  
 Estate, Gift & Trust Law  
 Probate  
 Personal Representatives  
 Appointment  
 Estate, Gift & Trust Law  
 Wills  
 General Overview



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DIVISION IV: WILLS AND TRUSTS  
CHAPTER 65 EXECUTORS  
PART IV. FORMS  
A. Nominations

*24-65 California Legal Forms--Transaction Guide § 65.201*

**§ 65.201 Nomination of Trust Company as Executor**

**[1] Comment**

**[a] Use of Form**

This form is a will provision that may be used to nominate a trust company as executor. For a nomination of an individual executor, see § 65.200. For a nomination of coexecutors, see § 65.202. For nomination of alternate and successor executors, see § 65.203. For nomination of an ancillary executor, see § 65.204.

For functions and characteristics of the office of executor, see § 65.35[2]. For requisites of a valid nomination, see § 65.37. For qualifications of executors, see § 65.36.

**[b] Trust Company as Executor**

A trust company may be appointed to act as an executor in the same manner as an individual [*Prob. Code § 300; see Prob. Code § 58(a)* ("personal representative" defined); *see also* *Fin. Code § 107, Prob. Code § 83* ("trust company" defined)]. In addition to their exemption from bond requirements [*see Prob. Code § 301(a)* (trust company appointed to act as personal representative may not be required to give a bond)], trust companies present other advantages. They are professional fiduciaries and have professional staffs who are experienced in estate administration and such matters as investment and accounting. Moreover, trust companies have a measure of permanence and stability that individuals executors do not have. If the will nominates a trust company as executor and the trust company later sells its business and assets to another trust company, the court may (and to the extent required by Division 1 of the Banking Law [*Fin. Code §§ 99-3904*] it must) appoint the successor trust company as executor [*Prob. Code § 8423*]. The same rule applies when the trust company nominated in the will consolidates or merges with another trust company or is in any other manner provided by law succeeded by another trust company [*Prob. Code § 8423*]. If the trust company or its assets are sold, consolidated, or merged after it has been appointed as executor, the successor trust company succeeds by operation of law and without further transfer to the executorship and all rights and duties under it [*Fin. Code § 2073*]. Although it is not strictly necessary to nominate a successor to a trust company [for nomination of successor and alternative executors, *see § 65.203*], it is advisable to do so, since any executor may decline to serve [*see Prob. Code § 8001*].

(waiver of right to appointment by failure to petition for appointment)] or, after accepting appointment, resign the office [see *Prob. Code* §§ 8520 (vacancy occurs when personal representative resigns), 10952 (duty to account after resignation)].

**[2] FORM**

**Nomination of Trust Company as Executor**

Executor

I nominate \_\_\_\_\_ [full name of qualified trust company], of \_\_\_\_\_ [place] , or its successors or assigns, as Executor of this will.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Probate Personal Representatives General Overview Estate, Gift & Trust Law Probate Personal Representatives Appointment Estate, Gift & Trust Law Wills General Overview



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DIVISION IV: WILLS AND TRUSTS

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PART IV. FORMS

A. Nominations

*24-65 California Legal Forms--Transaction Guide § 65.202*

## § 65.202 Nomination of Coexecutors

### [1] Comment

#### [a] Use of Form

This form is a will provision that may be used to nominate coexecutors. For nomination of an individual executor, see § 65.200. For nomination of a trust company as executor, see § 65.201. For nomination of alternate and successor executors, see § 65.203. For a direction that a trust company serving as coexecutor have custody of all personal property and maintain all records for the estate, see § 65.403. For provisions apportioning compensation among coexecutors, see § 65.443 and 65.444.

For the functions and characteristics of executors, see § 65.35[2]. For requisites of a valid nomination, see § 65.37. For qualifications of executors, see § 65.36.

#### [b] Coexecutors

When there are two executors, both must concur to exercise a power [*Prob. Code § 9630(a)(1)*]; and when there are more than two, a majority must concur [*Prob. Code § 9630(a)(2)*]. The powers and duties of coexecutors are subject to special rules set forth in the Probate Code [*see Prob. Code §§ 9630* (authority of joint personal representatives to act), 9631 (liability of joint personal representative for breach of duty by another personal representative)]. For a general consideration of these rules, see §§ 65.42[12], 65.44.

### [2] FORM

#### Nomination of Coexecutors

Coexecutors

I nominate \_\_\_\_\_ [*state relationship, if any, e.g., my brother*], \_\_\_\_\_ [*name*] , of \_\_\_\_\_ [*place*] , and \_\_\_\_\_ [*state relationship, if any, e.g., my sister*], \_\_\_\_\_ [*name*] , of \_\_\_\_\_ [*place*] , as coexecutors of this will. As used in this will, the term "Executor" includes coexecutors and any other personal representative or representatives of my estate.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Probate Personal Representatives General Overview Estate, Gift & Trust Law Wills General Overview



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A. Nominations

*24-65 California Legal Forms--Transaction Guide § 65.203*

### **§ 65.203 Nomination of Alternate and Successor Executors**

#### **[1] Comment**

#### **[a] Use of Form**

This form is a will provision that may be used to nominate alternate and successor executors. For a nomination of an individual executor, see § 65.200. For a nomination of a trust company as executor, see § 65.201. For nomination of coexecutors, see § 65.202. For nomination of an ancillary executor, see § 65.204. For a provision authorizing the executor named in the will to nominate an alternate and successor executor, see the second alternative provision to § 65.400.

For the functions and characteristics of executors, see § 65.35[2]. For requisites of a valid nomination, see § 65.37. For qualifications of executors, see § 65.36.

#### **[b] Alternate and Successor Executors**

The will should nominate one or more alternate and successor executors to serve in the event the person named as executor fails to qualify or ceases to serve as executor. If the will does not name a successor or alternate, the court must appoint an administrator with the will annexed [*see Prob. Code §§ 8440* (appointment of administrator with will annexed if all executors named in will are unwilling or unable to act), 8522(a)(duty of court to appoint successor when office of personal representative is vacant); *see also Prob. Code § 58(a)* ("personal representative" defined)]. Persons are generally entitled to appointment as administrator with the will annexed in the same order of priority as in the appointment of administrators [*Prob. Code § 8441(a)*]. A person who takes under the will has priority over a person who does not, although the court in its discretion may give priority to a person who does not take under the will if the person is entitled to a statutory interest that is a substantially greater portion of the estate than the devise to the person who takes under the will and the priority appears appropriate under the circumstances [*Prob. Code § 8441(b)*]; *see § 65.35[5]*].

Like other personal representatives [*see Prob. Code § 58(a)* ("personal representative" defined)], alternate and successor

representatives are required to post bonds [*Prob. Code § 8480*] unless a bond is waived in the will or by all of the beneficiaries [*Prob. Code § 8481(a); see § 65.40[1]*].

Although it is not strictly necessary to nominate alternate or successor executors when a trust company has been nominated as the principal executor [for nomination of trust company as executor, *see § 65.201*], it is advisable to do so, since any executor may decline to serve [*see Prob. Code § 8001* (waiver of right to appointment by failure to petition for appointment)] or, after accepting appointment, resign the office [*see Prob. Code §§ 8520* (vacancy occurs when personal representative resigns), 10952 (duty to account after resignation)].

## [2] FORM

### Nomination of Alternate and Successor Executors

Alternate and Successor Executor(s)

[*First alternative: use if only one executor is named in nomination clause:*]

If, for any reason, \_\_\_\_\_ [*name of person nominated as executor*] fails to qualify or ceases to act as Executor, I nominate \_\_\_\_\_ [*state relationship, if any, e.g., my brother*], \_\_\_\_\_ [*name*], of \_\_\_\_\_ [*place*], as Executor of this will.

[*Second alternative: use if coexecutors are named in nomination clause:*]

If, for any reason, either of the coexecutors \_\_\_\_\_ [named in this will *or* named in Paragraph \_\_\_\_\_ of this will] fails to qualify or ceases to act as coexecutor, I nominate the other coexecutor as sole Executor of this will. If both of the coexecutors fail to qualify or cease to act as coexecutor or executor, I nominate \_\_\_\_\_ [*state relationship, if any, e.g., my nephew*], \_\_\_\_\_ [*name*], as Executor of this will.

### Legal Topics:

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Probate Personal Representatives General Overview Estate, Gift & Trust Law Probate Personal Representatives Appointment Estate, Gift & Trust Law Wills General Overview



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A. Nominations

*24-65 California Legal Forms--Transaction Guide § 65.204*

**§ 65.204 Nomination of Ancillary Executor**

**[1] Comment**

**[a] Use of Form**

This form is a will provision that may be used to nominate an ancillary executor. For nomination of an individual executor, see § 65.200. For nomination of a trust company as executor, see § 65.201. For nomination of coexecutors, see § 65.202. For nomination of alternate and successor executors, see § 65.203. For a provision authorizing the executor to nominate an ancillary executor, see § 65.223. For a provision directing the ancillary executor to deliver the residue of the ancillary estate to the domiciliary executor, see § 65.404.

For the functions and characteristics of executors, see § 65.35[2]. For requisites of a valid nomination, see § 65.37. For qualifications of executors, see § 65.36.

**[b] Ancillary Executors**

**[i] In General**

Ancillary administration is administration of a decedent's estate in a state in which the decedent left property but in which he or she was not domiciled at the time of death [*Black's Law Dictionary* (5th ed., 1979), p. 78; see *Prob. Code* § 12501 ("ancillary administration" defined)]. Ancillary administration is made necessary by the existence of property belonging to a decedent in a nondomiciliary state, and it is ordinarily governed by the law of the nondomiciliary state [see § 65.34[1]]. An executor appointed to administer assets located in a nondomiciliary state is referred as an ancillary executor.

Administration of property owned by a nondomiciliary decedent [see *Prob. Code* § 12505 ("nondomiciliary decedent" defined)] is called "ancillary" only to distinguish it from the administration of property owned by a domiciliary decedent. Ancillary administration is wholly independent of any administration in the domiciliary state and proceeds according to the same rules as the administration of other estates [Richards v. Blaisdell (1909) 12 Cal. app. 101, 110,

106 P. 732 ; *see Prob. Code §§ 12524* (will admitted to probate under ancillary administration provisions of Probate Code has same force and effect as will of domiciliary), 12530 (ancillary administration of nondomiciliary's estate in California subject to all estate administration provisions of Probate Code)].

Ancillary administration proceedings in California are governed by rules set forth in the Probate Code [*see Prob. Code §§ 12510-12542*]. Under those rules, the will of a nondomiciliary decedent that is admitted to probate in California has the same force and effect as the will of a person who dies while domiciled in the state [*Prob. Code § 12524*]. If the nondomiciliary decedent left a will that has been admitted to probate in another state or country, the will is entitled to automatic recognition in California [*see Prob. Code § 12521; see also discussion, below*] if the requirements of *Probate Code Sections 12520-12524* are satisfied [*see § 65.34[2]*]. California does not, however, recognize the authority of executors appointed in other states or countries unless they have also been appointed in California [*Code Civ. Proc. § 1913(b)* (authority of personal representative does not extend beyond jurisdiction of government under which representative was invested with authority); *see Prob. Code § 58(a)* ("personal representative" defined)].

### **[ii] Nominations**

The executor nominated in a California will may be appointed as ancillary executor in another state. Thus it is not necessary to name a different ancillary executor. However, a California executor may experience difficulty in administering the ancillary estate. If the value of the estate is not large, travel to and from the other state may be prohibitively expensive. Further, a California executor may be unfamiliar with the business practices and laws of the other state. In almost all cases, local counsel will have to be retained to assist the executor in the ancillary administration. Some California testators may have friends, relatives, or business associates in other states who would be competent to undertake the responsibilities of ancillary administration. Under all of the circumstances, the testator may find it prudent to nominate a different person as ancillary executor.

## **[2] FORM**

### **Nomination of Ancillary Executor**

#### Ancillary Executor

If, at the time of my death, I have an ancillary estate, I nominate \_\_\_\_\_ [*state relationship, if any, e.g., my cousin*], \_\_\_\_\_ [*name*] , of \_\_\_\_\_ [*place*] , as Ancillary Executor of this will, to take charge of and administer my ancillary estate according to the terms of this will. I give my Executor, in my Executor's sole and absolute discretion, the power, right, and authority to cause ancillary administration to be commenced, carried on, and completed; to determine what assets, if any, are to be sold by the Ancillary Executor; to advance funds from my domiciliary estate for the payment of (or to pay directly) any and all claims, taxes, costs, and expenses of administration (including compensation of the Ancillary Executor and attorneys' fees) incurred in or by reason of the administration of my ancillary estate. As used in this will, "ancillary estate" means any property owned by me at the time of my death and requiring administration outside the State of California, and "domiciliary estate" means any property owned by me at the time of my death and requiring administration in California.

### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawProbateAncillary ProceedingsEstate, Gift & Trust LawProbatePersonal RepresentativesGeneral OverviewEstate, Gift & Trust LawProbatePersonal RepresentativesAppointmentEstate, Gift & Trust LawWillsGeneral Overview



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DIVISION IV: WILLS AND TRUSTS

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PART IV. FORMS

A. Nominations

*24-65 California Legal Forms--Transaction Guide §§ 65.205-65.219*

**[Reserved]**

§§ 65.205[Reserved]



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DIVISION IV: WILLS AND TRUSTS  
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PART IV. FORMS  
B. Delegations of Authority to Nominate

*24-65 California Legal Forms--Transaction Guide § 65.220*

**§ 65.220 Provision Delegating Authority to Nominate Executor**

**[1] Comment**

**[a] Use of Form**

This form is a will provision that may be used to delegate authority to nominate an executor. For a provision delegating authority to nominate an alternate and successor executor, see § 65.221. For a provision delegating authority to nominate an executor from a designated class of persons, see § 65.222. For basic will provisions nominating executors, see § 65.200-65.202.

For the functions and characteristics of executors, see § 65.35[2]. For requisites of a valid nomination, see § 65.37. For qualifications of executors, see § 65.36.

**[b] Delegation of Authority to Nominate Executor**

The will may confer on one or more persons the power to designate an executor, coexecutor, or successor executor [*Prob. Code § 8422(a)*]. The will may also provide that the person designated may serve without bond [*Prob. Code § 8422(a)*].

Unless the will provides otherwise, two or more holders of the power to designate an executor must make a unanimous selection [*Prob. Code § 8422(b)*]. If, however, one of the designators is unable or unwilling to act, the remaining designator or designators may act in his or her absence [*Prob. Code § 8422(b)*]. Unless the will confers the power of designation on the executor, an executor has no power to designate a coexecutor or successor executor [*Prob. Code § 8422(c)*].

A testator who wishes his or her estate to be administered by a particular officer whose name cannot be known at the time the will is executed may properly designate the authority to nominate the executor to another person. If, for example, the testator wishes his or her estate to be administered by the president of a college and cannot predict who the president will be after his or her death may choose to authorize a third person to nominate the president by name [*see*

Comment, "Administration of Estates; Designation of Executor," *4 Pacific L.J. 231 (1973)*].

When the will has authorized some person or persons to designate an executor, the designation must be in writing and filed with the court [*Prob. Code § 8422(b)*].

**[2] FORM**

**Provision Delegating Authority to Nominate Executor**

Nomination of Executor

I hereby confer on \_\_\_\_\_ [*state relationship, if any, e.g., my cousin*], \_\_\_\_\_  
[*name*] , of \_\_\_\_\_ [*place*] , the power to nominate the Executor of this will.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law  
Probate  
Personal Representatives  
General Overview  
Estate, Gift & Trust Law  
Probate  
Personal Representatives  
Appointment  
Estate, Gift & Trust Law  
Wills  
General Overview



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DIVISION IV: WILLS AND TRUSTS  
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B. Delegations of Authority to Nominate

*24-65 California Legal Forms--Transaction Guide § 65.221*

**§ 65.221 Provision Delegating Authority to Nominate Alternate and Successor Executor**

**[1] Comment**

**[a] Use of Form**

This form is a will provision that may be used to delegate authority to nominate an alternate and successor executor. The form includes two alternative provisions. The first may be used to authorize a named person to nominate an alternate and successor executor. The second may be used to nominate an executor and to authorize that executor to nominate an alternate and successor executor.

For a basic will provision nominating alternate and successor executors, see § 65.203. For the functions and characteristics of executors, see § 65.35[2]. For requisites of a valid nomination, see § 65.37. For qualifications of executors, see § 65.36.

**[b] Delegation of Authority to Nominate Alternate and Successor Executor**

The will may authorize one or more persons to designate a successor executor or coexecutor [*Prob. Code § 8422(a)*]. For a general discussion of delegations of authority to nominate executors, coexecutors, and successors executors, see the comment to § 65.220.

**[2] FORM**

**Provision Delegating Authority to Nominate Alternate and Successor Executor**

*[First alternative: named person to nominate alternate and successor executor:]*

Alternate and Successor Executor

I hereby confer on \_\_\_\_\_ [state relationship, if any, e.g., my cousin], \_\_\_\_\_ [name], of \_\_\_\_\_ [place], the power to nominate an alternate or successor Executor to serve in the event that \_\_\_\_\_ [person nominated as primary executor] shall, for any reason, fail to qualify or cease to act as Executor. As used in this will, "Executor" includes any alternate and successor Executor nominated by \_\_\_\_\_ [name] pursuant to the authority conferred by this paragraph.

[Second alternative: executor to nominate alternate and successor executor:]

Executor

I nominate \_\_\_\_\_ [state relationship, if any, e.g., my husband], \_\_\_\_\_ [name], of \_\_\_\_\_ [place], as Executor of this will. If, for any reason, \_\_\_\_\_ [he or she] fails to qualify or ceases to act as Executor, I authorize \_\_\_\_\_ [him or her] to nominate a successor and alternative Executor. If, for any reason, \_\_\_\_\_ [he or she] shall fail to nominate an alternate or successor executor, then I nominate \_\_\_\_\_ [name] as Executor of this will. As used in this will, "Executor" includes any successor or alternative executor, whether nominated by \_\_\_\_\_ [name of executor named first above] pursuant to the authority conferred by this paragraph, or by me.

#### Legal Topics:

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Probate Personal Representatives General Overview Estate, Gift & Trust Law Probate Personal Representatives Appointment Estate, Gift & Trust Law Wills General Overview



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DIVISION IV: WILLS AND TRUSTS

CHAPTER 65 EXECUTORS

PART IV. FORMS

B. Delegations of Authority to Nominate

*24-65 California Legal Forms--Transaction Guide § 65.222***§ 65.222 Provision Delegating Authority to Nominate Executor From Class of Persons****[1] Comment****[a] Use of Form**

This form is a will provision that may be used to delegate authority to nominate an executor from a designated class of persons. For a provision delegating authority to nominate an executor without designating the class of persons from which the nomination is to be made, see § 65.220. For a provision delegating authority to nominate an alternate and successor executor, see § 65.221.

For the functions and characteristics of executors, see § 65.35[2]. For requisites of a valid nomination, see § 65.37. For qualifications of executors, see § 65.36. For a general discussion of delegations of authority to nominate executors, coexecutors, and successors executors, see § 65.220[1].

**[2] FORM****Provision Delegating Authority to Nominate Executor From Class of Persons**

Nomination of Executor

I hereby confer on \_\_\_\_\_ [*state relationship, if any, e.g., my cousin*], \_\_\_\_\_  
 [name], of \_\_\_\_\_ [*place*], the power to nominate the Executor of this will from among  
 \_\_\_\_\_ [*designate class, e.g., persons related to me by blood or my issue*] who are legally qualified to  
 act as an executor. \_\_\_\_\_ [name] shall not have the power to nominate an Executor who is not  
 \_\_\_\_\_ [*e.g., related to me by blood or my issue*].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Probate Personal Representatives General Overview Estate, Gift & Trust Law Probate Personal  
Representatives Appointment Estate, Gift & Trust Law Wills General Overview



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B. Delegations of Authority to Nominate

*24-65 California Legal Forms--Transaction Guide § 65.223*

**§ 65.223 Provision Authorizing Executor to Nominate Ancillary Executor**

**[1] Comment**

**[a] Use of Form**

This form is a will provision that may be used to authorize the executor to nominate an ancillary executor. For a will provision nominating an ancillary executor, see § 65.204. For provisions delegating authority to nominate an executor, see § 65.220 and 65.222. For a provision delegating authority to nominate an alternate and successor executor, see § 65.221. For will provisions relating to the powers of ancillary executors, see § 65.340 and 65.341. For a provision directing the ancillary executor to deliver the residue of the ancillary estate to the domiciliary executor, see § 65.404.

For the functions and characteristics of executors, see § 65.35[2]. For requisites of a valid nomination, see § 65.37. For qualifications of executors, see § 65.36. For a general discussion of delegations of authority to nominate executors, coexecutors, and successors executors, see the comment to § 65.220. For a general consideration of ancillary administration, see § 65.34.

**[2] FORM**

**Provision Authorizing Executor to Nominate Ancillary Executor**

Nomination of Ancillary Executor

If, at the time of my death, I have an ancillary estate, I confer on my Executor the power to designate an Ancillary Executor to take charge of and administer my ancillary estate according to the terms of this will. I give my Executor, in my Executor's sole and absolute discretion, the power, right, and authority to cause ancillary administration to be commenced, carried on, and completed; to determine what assets, if any, are to be sold by the Ancillary Executor; to advance funds from my domiciliary estate for the payment of (or to pay directly) any and all claims, taxes, costs, and expenses of administration (including compensation of the Ancillary Executor and attorneys' fees) incurred in or by

reason of the administration of my ancillary estate. As used in this will, "ancillary estate" means any property owned by me at the time of my death and requiring administration outside the State of California, and "domiciliary estate" means any property owned by me at the time of my death and requiring administration in California.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Probate Ancillary Proceedings Estate, Gift & Trust Law Probate Personal Representatives General Overview Estate, Gift & Trust Law Probate Personal Representatives Appointment Estate, Gift & Trust Law Wills General Overview



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DIVISION IV: WILLS AND TRUSTS

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B. Delegations of Authority to Nominate

*24-65 California Legal Forms--Transaction Guide §§ 65.224-65.239*

**[Reserved]**

§§ 65.224[Reserved]



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DIVISION IV: WILLS AND TRUSTS

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PART IV. FORMS

C. Bonds

*24-65 California Legal Forms--Transaction Guide § 65.240*

**§ 65.240 Waiver of Bond--Individual Executor**

**[1] Comment**

**[a] Use of Form**

This form is a will provision that may be used to relieve an individual executor of the obligation to post a bond. For a will provision relieving coexecutors of the obligation to post bonds, see § 65.241.

**[b] Executors' Bonds**

Executors, like other personal representatives [*see Prob. Code § 58(a)* ("personal representative" defined)], are required to give bonds (or undertakings) [*see Code Civ. Proc. § 995.210(a)*] (undertaking may be given in place of bond) conditioned on the faithful execution of the duties of their office according to law [*Prob. Code § 8480(a), (b)*]. If the executor fails to give the required bond, letters may not be issued [*Prob. Code § 8480(c); see Prob. Code § 52* ("letters" defined)].

A bond is not required in any of the following circumstances:

- (1) If the executor is a trust company [*Prob. Code § 301(a); see Prob. Code § 83, Fin. Code § 107* ("trust company" defined)];
- (2) If all beneficiaries waive in writing the requirement of a bond and the written waivers are attached to the petition for the appointment of a personal representative [*Prob. Code § 8481(a)(2); see Prob. Code § 24* ("beneficiary" defined)];
- (3) If the will waives the requirement of a bond [*Prob. Code § 8481(a)(1)*].

Notwithstanding the waiver of a bond by the will or by all of the beneficiaries, the court may require that a bond be given, either before or after issuance of letters, if it finds good cause to require one [*Prob. Code § 8481(b)*].

Since a provision waiving bond will save the expense of bond premiums, it is common to include such a provision in the will. If the executor is the sole devisee under the will or if the executor is a person in whom the testator reposes confidence and trust, waiving bond is ordinarily advisable. In other circumstances, however, careful consideration should be given to waiving bond. If the executor is young and inexperienced in business matters, or if the executor is not a member of the testator's family while the principal devisees are relatives, a bond may serve the useful function of insulating the devisees against any risk of loss in the course of administration.

For further consideration of executors' bonds, see § 65.40.

### **[3] FORM**

#### **Waiver of Bond--Individual Executor**

##### Waiver of Bond

*[First alternative: no bond required of executor nominated in will:]*

No bond shall be required of any Executor named in this will.

*[Second alternative: no bond required of executor, whether nominated in will or pursuant to delegation of authority to nominate:]*

No bond shall be required of my Executor, whether nominated in this will or nominated pursuant to any authority conferred by this will.

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Probate Personal Representatives General Overview Estate, Gift & Trust Law Probate Personal Representatives Appointment Estate, Gift & Trust Law Wills General Overview



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C. Bonds

*24-65 California Legal Forms--Transaction Guide § 65.241*

**§ 65.241 Waiver of Bond--Coexecutors**

**[1] Comment**

**[a] Use of Form**

This form is a will provision that may be used to relieve coexecutors of the obligation to post bonds. For a provision relieving an individual executor of the obligation to post a bond, see § 65.240. For a will provision nominating coexecutors, see § 65.203.

For a general consideration of executors' bonds and will provisions waving the requirement of a bond, see *discussions under §§ 65.40 and 65.240[1][b]*.

**[2] FORM**

**Waiver of Bond--Coexecutors**

Waiver of Bond

No bond shall be required of any Executor named in this will, whether acting jointly or severally in the administration of my estate. As used in this will, the word "Executor" includes coexecutors, whether nominated in this will or nominated pursuant to authority conferred by this will.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Probate Personal Representatives General Overview Estate, Gift & Trust Law Probate Personal Representatives Appointment Estate, Gift & Trust Law Wills General Overview



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C. Bonds

*24-65 California Legal Forms--Transaction Guide §§ 65.242-65.259*

**[Reserved]**

§§ 65.242[Reserved]



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D. Powers

1. Investment

*24-65 California Legal Forms--Transaction Guide § 65.260*

**§ 65.260 Power to Invest--General Form**

**[1] Comment**

**[a] Use of Form**

This form is a will provision that may be used to confer investment powers on the executor. For a provision authorizing the executor to invest in a specified investment, see § 65.261. For a provision stating that the grant to the executor of a power of investment does not require the executor to exercise the power, see § 65.262. For a power to retain investment counsel, see § 65.263.

**[b] Investments by Executors**

**[i] Statutory Powers**

Every executor has the duty to keep all cash in his or her possession invested in interest-bearing accounts or other investments authorized by law [*Prob. Code § 9652(a)*]. However, this requirement does not apply to the amount of cash that is reasonably necessary for the orderly administration of the estate [*Prob. Code § 9652(b)*]; nor does it apply if the will provides otherwise [*Prob. Code § 9652(c)*].

The executor has the power to make certain investments without prior court approval [*see Prob. Code § 9730*] and others only on court order [*see Prob. Code §§ 9731-9737*]. Court orders are not required to invest estate assets in any of the following:

- Direct obligations of the United States or the State of California maturing not later than one year from the date of making the investment [*Prob. Code § 9730(a)*];
- Money market funds or any of certain collective investments, such as common trust funds maintained by banks, and retirement, pension, profit-sharing, stock bonus, and other trust funds [*Prob.*

*Code § 9730(b); see 12 C.F.R. § 9.18*]; and

- Units of certain common trust funds [*Prob. Code § 9730(c); see Fin. Code § 1564*].

Investments in other government securities (state or federal) are permitted only with a court order and only on a showing that the investment is to the advantage of the estate [*Prob. Code § 9731*].

### **[ii] Will Provisions**

If the will authorizes specific investments not authorized by statute, the court may order that estate money be invested as authorized by the will, but only if the following conditions are satisfied [*Prob. Code § 9732(a)*]:

- The time for filing claims has expired;
- The court is satisfied that all uncontested claims have been or will be paid, either because there is sufficient cash in the estate (other than the cash proposed to be invested) to pay them, or because the claims are secured, or otherwise; and
- The estate is not in a condition to be finally distributed.

### **[iii] Purchase of Annuity**

If the will directs the executor to purchase an annuity [*see Prob. Code § 6154(e)* ("annuity" defined)] or makes other provisions for periodic payments to a devisee, the executor may purchase an annuity from an insurer authorized to do business in California, but only after the court has found good cause for the purchase [*Prob. Code § 9733*; for will provisions for annuities, *see Ch. 63, Will Provisions, §§ 63.508-63.510*]. The executor may exercise options [*Prob. Code § 9734*] and subscription rights [*Prob. Code § 9737*] belonging to the estate, and may purchase any securities or commodities required to perform an incomplete contract made by the decedent [*Prob. Code § 9735*], but only after court authorization.

## **[2] FORM**

### **Power to Invest--General Form**

#### Investments

I authorize my Executor to invest and reinvest any property forming part of my estate in any kind of property, real, personal, or mixed, and in any kind of investment, specifically including (but not by way of limitation) obligations of every kind, stocks (common or preferred), and bonds. When investing, reinvesting, purchasing, acquiring, exchanging, selling, and managing property of my estate, my Executor shall act with the care, skill, prudence, and diligence under the circumstances then prevailing (including but not limited to the general economic conditions and the anticipated needs of the estate and its beneficiaries) that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of like character and with like aims to accomplish the purposes set forth in this will. In the course of investing and reinvesting pursuant to this power, my Executor shall consider individual investments as part of an overall investment strategy.

### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Probate Personal Representatives General Overview Estate, Gift & Trust Law Probate Personal

Representatives Duties & Powers General Overview Estate, Gift & Trust Law Wills General Overview



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D. Powers

1. Investment

*24-65 California Legal Forms--Transaction Guide § 65.261*

**§ 65.261 Power to Invest--Specified Investment**

**[1] Comment**

**[a] Use of Form**

This form is a will provision that may be used to authorize the executor to make a specified investment. For rules relating to the investment powers of executors, see §§ 65.260[1][b][i], 65.260[1][b][ii].

For a general provision conferring investment powers on the executor, see § 65.260. For a provision stating that the grant to the executor of a power of investment does not require the executor to exercise the power, see § 65.262. For a power to retain investment counsel, see § 65.263.

**[2] FORM**

**Power to Invest--Specified Investment**

Investments

I authorize my Executor to invest and reinvest any property belonging to my estate in \_\_\_\_\_ [*specify investment, e.g., shares of the common stock of American Telephone and Telegraph Company*].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Probate Personal Representatives General Overview Estate, Gift & Trust Law Probate Personal Representatives Duties & Powers General Overview Estate, Gift & Trust Law Wills General Overview



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D. Powers

1. Investment

*24-65 California Legal Forms--Transaction Guide § 65.262*

**§ 65.262 Power to Invest--Grant of Power Does Not Require Exercise of Power**

**[1] Comment**

**[a] Use of Form**

This form is a will provision that may be used to state that the grant to the executor of a power of investment does not require the executor to exercise the power. The form includes two alternative provisions. The first is designed to constitute a separate paragraph of the will. The second is designed to be incorporated into and form a part of the investment paragraph of the will. The form makes it clear that the grant to the executor of a power to invest does not require the executor to exercise the power. So that the executor will have the flexibility necessary to make decisions based on current conditions, an investment power should not be equated with an investment duty.

For rules relating to the investment powers of executors, see §§ 65.42[1], 65.260[b][i] and succeeding headings in § 65.260[1]. For a general provision conferring investment powers on the executor, see § 65.260. For a provision authorizing the executor to invest in a specified investment, see § 65.261. For a power to retain investment counsel, see § 65.263.

**[2] FORM**

**Power to Invest--Grant of Power Does Not Require Exercise of Power**

*[First alternative provision: separate paragraph:]*

Grant of Power Does Not Require Exercise of Power

Notwithstanding the investment power conferred on my Executor in [Paragraph \_\_\_\_\_ of] this will, the grant of that power shall not be deemed to require my Executor to exercise the power.

*[Second alternative provision: part of investment paragraph:]*

However, the grant of this power [to invest] shall not be deemed to require my Executor to exercise the power.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Probate Personal Representatives General Overview Estate, Gift & Trust Law Probate Personal Representatives Duties & Powers General Overview Estate, Gift & Trust Law Wills General Overview



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D. Powers

1. Investment

*24-65 California Legal Forms--Transaction Guide § 65.263*

**§ 65.263 Power to Retain Investment Counsel**

**[1] Comment**

**[a] Use of Form**

This form is a will provision that may be used to authorize the executor to retain professional investment counsel and to pay his or her fees as expenses of administration. For rules relating to the investment powers of executors, see §§ 65.42[1], 65.260[b][i] and succeeding headings in § 65.260[1]. For will provisions conferring investment powers on the executor, see §§ 65.260 and 65.31. For a provision stating that the grant to the executor of an investment power does not require exercise of the power, see § 65.262.

**[b] Investment Counsel**

Unless the will provides otherwise [*see Prob. Code § 9652(c)*], the executor's only investment duties are to keep all cash (except such cash as is necessary for the orderly administration of the estate) invested in interest-bearing accounts or other investments authorized by law [*Prob. Code § 9652(a), (b)*]. If the will directs the executor to make other investments, a provision authorizing the executor to employ investment counsel may serve a useful purpose.

Investment counsel will not generally be necessary unless it is expected that the estate will include a large amount of cash (or cash equivalents) that will have to be invested during the period of administration and the person chosen to serve as executor does not have sufficient investment knowledge or experience to make large investments without professional advice. For this purpose, a "cash equivalent" is an asset that is likely to be converted into cash before the estate is closed. Assets that can be considered cash equivalents are thus short-term money market instruments, such as United States Treasury bills, United States Treasury notes or bonds that are expected to mature while the estate is in administration, and other similar security instruments.

**[2] FORM**

**Power to Retain Investment Counsel**

I authorize my Executor, with or without court approval, to employ professional investment counsel to assist \_\_\_\_\_ [him *or* her] in the investment of assets of my estate. The fees of any investment counsel employed by my Executor shall be expenses of the administration of my estate. However, the grant of this power to my Executor shall not be deemed to require \_\_\_\_\_ [him *or* her] to exercise it.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Probate Personal Representatives General Overview Estate, Gift & Trust Law Probate Personal Representatives Duties & Powers General Overview Estate, Gift & Trust Law Wills General Overview



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1. Investment

*24-65 California Legal Forms--Transaction Guide §§ 65.264-65.279*

**[Reserved]**

§§ 65.264[Reserved]



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D. Powers

2. Asset Management

*24-65 California Legal Forms--Transaction Guide § 65.280*

## **§ 65.280 Power of Sale--General Form**

### **[1] Comment**

#### **[a] Use of Form**

This form is a will provision that may be used to authorize the executor to sell estate property. The form includes two alternative provisions. The first may be used to authorize the executor to sell all or any property belonging to the estate. The second alternative may be used to authorize the executor to sell a specified asset or assets only.

For a power to sell estate assets located in a foreign jurisdiction, see § 65.281. For a power to lease estate property, see § 65.282. For a provision directing the testator to sell assets in a specified order, see § 65.402. For a general consideration of the powers of executors to sell estate property, see § 65.42[8].

#### **[b] Power to Sell Estate Property**

##### **[i] In General**

Executors have broad authority to sell estate property, even in the absence of will provisions conferring that authority. Thus an executor may sell property whenever sale is necessary to pay debts, devisees, family allowances, expenses of administration, or taxes [*Prob. Code § 10000(a)*] or when sale is to the advantage of the estate and in the best interest of the interested persons [*Prob. Code § 10000(b)*]. In addition, property may be sold whenever the will directs [*Prob. Code § 10000(c)*] or authorizes [*Prob. Code § 10000(d)*] its sale.

##### **[ii] Will Provisions**

While not strictly necessary, a will provision empowering an executor to sell property may serve a useful purpose. First, such a provision will make the intentions of the testator respecting sales clear and help to avoid disputes about the propriety of any proposed sale. Second, it will relieve the executor of the obligation to show necessity or advantage as a

prerequisite to a sale [*Prob. Code § 10000(c), (d); see Prob. Code § 10000(a), (b)*]. Finally, it will excuse the executor from the obligation of giving notice of sale [*see Prob. Code §§ 10250 (personal property), 10300, 10301 (real property)*]. When the will directs or authorizes sale, the executor may sell property with or without notice, as the executor sees fit [*Prob. Code § 10252(a), (b) (personal property); Prob. Code § 10303(a), (b) (real property)*].

### **[c] Directing Sale of Specific Asset or Assets**

A will provision empowering the executor to sell a specified asset or assets may be desirable in certain circumstances. If a single asset (e.g., the testator's residence) constitutes a major part of the estate and if the testator has reason to believe that there will be insufficient cash on hand to pay claims, expenses, and taxes without selling that asset, the testator may empower the executor to sell that asset only, and may direct that other assets not be sold.

### **[2] FORM**

#### **Power of Sale--General Form**

Power of Sale

*[First alternative: power to sell any property of estate:]*

I authorize my Executor to sell, at either public or private sale and with or without notice, [*add if desired, and to grant options to purchase,*] any property belonging to my estate, subject only to any confirmation of court required by law.

*[Second alternative: power to sell specific asset(s) of estate:]*

I authorize my Executor to sell, at either public or private sale and with or without notice, [*add if desired, and to grant options to purchase,*] the following asset(s) of my estate: \_\_\_\_\_ [*describe asset(s) to be sold, e.g., my residence, consisting of the house and lot generally known as 101 Shadylawn Avenue, Smalltown, California 00001, and my 1988 Chrysler Eagle automobile*]. [*To direct executor not to sell other assets, add, I direct my Executor not to sell any other assets of my estate.*]

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Probate Personal Representatives General Overview Estate, Gift & Trust Law Probate Personal Representatives Duties & Powers General Overview Estate, Gift & Trust Law Probate Personal Representatives Duties & Powers Sales of Assets Estate, Gift & Trust Law Wills General Overview



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2. Asset Management

*24-65 California Legal Forms--Transaction Guide § 65.281*

**§ 65.281 Power of Sale-- Assets in Foreign Jurisdiction**

**[1] Comment**

**[a] Use of Form**

This form is a will provision that may be used to authorize the executor to sell estate assets located in a foreign jurisdiction. For a general power of sale, see § 65.280. For a power to lease estate property, see § 65.282. For a will provision directing the testator to sell assets in a specified order, see § 65.402.

**[b] Power to Sell Assets in Foreign Jurisdiction**

A will provision empowering the executor to sell assets in a foreign jurisdiction may be effective to avoid ancillary administration of property located in that jurisdiction [*see* § 65.34; *see also* § 65.204[1]]. Whether property in a foreign jurisdiction can be sold by an executor in California without the necessity of ancillary administration depends on the law of the foreign jurisdiction.

California law does not permit an executor appointed in a foreign jurisdiction to sell property located in California [*Code Civ. Proc. § 1913(b)* (authority of foreign executor or administrator does not extend beyond jurisdiction of government under which he or she was invested with authority)]. However, some states permit sales of property by foreign executors under various circumstances.

**[2] FORM**

**Power of Sale--Assets in Foreign Jurisdiction**

I authorize my Executor to sell, at either public or private sale and with or without notice, [*add if desired*, and to grant options to purchase,] any property belonging to my estate situated outside the State of California, to the extent that the law of the jurisdiction of situs does not prevent such sale [or option]. The proceeds of any sale [or option] of assets

situated outside the State of California shall be distributed by my Executor in accordance with the provisions of this will.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Probate Personal Representatives Duties & Powers General Overview Estate, Gift & Trust Law Probate Personal Representatives Duties & Powers Sales of Assets Estate, Gift & Trust Law Wills General Overview



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2. Asset Management

*24-65 California Legal Forms--Transaction Guide § 65.282*

## **§ 65.282 Power to Lease**

### **[1] Comment**

#### **[a] Use of Form**

This form is a will provision that may be used to authorize the executor to lease real property belonging to the estate. For a power to sell estate assets, see § 65.280. For a power to sell estate assets located in a foreign jurisdiction, see § 65.281. For a will provision directing the testator to sell assets in a specified order, see § 65.402.

#### **[b] Leases**

##### **[i] In General**

If it is to the advantage of the estate, the executor has power to lease real property belonging to the estate without authorization when [*Prob. Code § 9941*]:

- (1) The term does not exceed one year and the rental does not exceed \$5,000 a month; or
- (2) The lease is from month to month, regardless of the amount of the rental.

In all other cases, the executor may lease estate property only on a showing of advantage to the estate [*Prob. Code § 9943(a)(3)*] and order of the court [*Prob. Code § 9942(a)*; see § 65.42[9]].

##### **[ii] Effect of Will Provision Granting Authority**

A will provision authorizing the executor to lease property will probably add little to the authority granted to executors by statute. The statutes do not authorize leases for terms longer than one year and with rentals exceeding \$5,000 a month without court approval, even when the will grants the executor power to lease [*see Prob. Code § 9941*; see also §

65.42[9]]. However, a will provision empowering the executor to lease property may help to show advantage to the estate and thus strengthen any petition for a court order.

**[2] FORM**

**Power to Lease**

I authorize my Executor to lease all or any part of the real or personal property belonging to my estate on such terms as my Executor deems proper, subject only to any confirmation of court required by law.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Probate Personal Representatives Duties & Powers General Overview Estate, Gift & Trust Law Wills General Overview



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D. Powers

2. Asset Management

*24-65 California Legal Forms--Transaction Guide § 65.283*

### § 65.283 Power to Retain Assets

#### [1] Comment

##### [a] Use of Form

This form is a will provision that may be used to authorize the executor to retain estate assets. For power to continue the operation of businesses (or interests in businesses) owned by the testator, see § 65.284.

##### [b] Retaining Estate Assets

Executors may incur liability for losses resulting from improper retention of estate assets. Every executor has the duty to take reasonable steps to preserve the assets of the estate and, if necessary, to take affirmative steps to prevent deterioration in value [ *Estate of Beach (1975) 15 Cal. 3d 623, 639, 125 Cal. Rptr. 570, 542 P.2d 994, cert. denied, 434 U.S. 1046*; *Estate of King (1942) 19 Cal. 2d 354, 358, 121 P.2d 716* ]. In discharging this duty, as in discharging other duties, the executor is required to act with ordinary care and diligence [*Prob. Code § 9600(a)*; see § 65.41[1]]. What constitutes ordinary care and diligence must be determined by all the circumstances of the particular estate [*Prob. Code § 9600(a)*].

If the testator wishes the executor to retain a particular asset (e.g., shares of stock of a particular corporation) that might decline in value during administration, a will provision authorizing the executor to retain the assets will protect the executor from liability if the assets do in fact decline. Such a will provision is one of the "circumstances" that may be considered in determining when the trustee has acted with ordinary care and diligence [see *Prob. Code § 9600(a)*].

#### [2] FORM

##### Power to Retain Assets

I authorize my Executor to retain any property of my estate for as long as my Executor considers proper. My Executor

shall not be liable for any loss resulting from any property so retained.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Probate Personal Representatives Duties & Powers General Overview Estate, Gift & Trust Law Wills General Overview



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D. Powers

2. Asset Management

*24-65 California Legal Forms--Transaction Guide § 65.284*

**§ 65.284 Power to Continue Business or Partnership Interest**

**[1] Comment**

**[a] Use of Form**

This form is a will provision that may be used to authorize the executor to continue the operation of a business owned by the testator. It includes two alternatives. The first may be used if the executor is to operate a sole proprietorship business only. The second may be used if the executor is to have authority both to operate a sole proprietorship business and to continue as partner in a business held in partnership form. For a contract provision permitting a deceased partner's personal representative to become a new general partner and continue the decedent's interest in the partnership during administration of the estate, see Ch. 15, Part A, *Formation of General Partnerships*, § 15.255.

For a general consideration of the power of executors to operate businesses and continue partnerships interests owned by estates, see § 65.42[2]. For a will provision directing the executor to liquidate a business, see § 65.401.

**[b] Power to Continue Operation of Business**

**[i] Sole Proprietorships**

If it is to the advantage of the estate and in the best interest of the interested persons [*see Prob. Code § 48* ("interested person" defined)], the executor may continue the operation of a business owned by the testator as a sole proprietor for a period of six months from the date letters are first issued [*Prob. Code § 9760(b)*]. Operation of a business beyond six months is permissible only if a court order has been obtained authorizing continued operation [*Prob. Code § 9760(b)*; *see Ch. 63, Will Provisions*, § 63.461].

**[ii] Partnership Interests**

The Probate Code empowers the executor to continue as a general or limited partner in any partnership in which the

testator was a general partner at the time of death, but only after court order on a showing that it would be to the advantage of the estate and in the best interest of the interested persons [*Prob. Code* § 9762(a)]. If there is a written partnership agreement permitting the executor to participate as a partner, the executor will have the rights, powers, duties, and obligations provided in the agreement, except as otherwise ordered by the court [*Prob. Code* § 9762(b); *see Prob. Code* § 9762(a) (power of court to specify terms and conditions of executor's participation); *see also* Ch. 15, Part A, *Formation of General Partnerships*, § 15.255[1][b]]. If there is no written partnership agreement, the court must specify what rights, powers, duties, and obligations the executor will have [*Prob. Code* § 9762(c)].

### **[iii] Will Provisions**

A will provision is probably ineffective to authorize operation of a business beyond six months (or to authorize continuation of a partnership interest for any period) without court order. Under former *Prob. Code* § 572 (repealed effective July 1, 1988), an executor could, with or without court order, continue the operation of a business owned by the estate without risking personal liability if the will authorized him or her to do so [*Estate of Ward* (1932) 127 Cal. app. 347, 353-354, 15 P.2d 901 ; *see California Emp. etc. Com. v. Hansen* (1945) 69 Cal. App. 2d 767, 770 ; *Estate of Burke* (1926) 198 Cal. 163, 166, 244 P. 340 (discussing personal liability of executor)]. However, *Prob. Code* § 9760 now expressly requires a court order for any operation of a sole proprietorship business beyond six months. Similarly, *Prob. Code* § 9762 requires a court order for any continuation of a partnership interest, whether within or beyond six months. Neither section authorizes the testator to relieve the executor of the necessity of obtaining a court order.

As a practical matter, it is doubtful that any executor would be willing to operate a business or to continue as partner in a partnership business without express statutory or court authority to do so. A will provision authorizing the executor to operate a business may nevertheless serve a useful purpose by clearly stating the testator's intentions in the matter. A clear statement of the testator's intentions may help to resolve any disputes as to propriety of a particular decision by the executor and strengthen any petition for court authority.

## **[2] FORM**

### **Power to Continue Business or Partnership Interest**

*[First alternative: sole proprietorship business only:]*

I authorize my Executor to continue the operation of any business owned by my estate for the time and in the manner that my Executor considers advisable and in the best interests of my estate, or to sell or to liquidate the business at the time and on the terms and conditions that my Executor considers advisable and in the best interests of my estate. Any operation, sale, or liquidation by my Executor, in good faith, shall be at the risk of my estate and without liability on the part of my Executor for any resulting losses.

*[Second alternative: sole proprietorship and interest in partnership:]*

I authorize my Executor to continue the operation of any business owned by my estate, and to continue as a general partner in any business in which I may be a general partner at the time of my death, for the time and in the manner that my Executor considers advisable and in the best interests of my estate; or, in my Executor's discretion, to sell or to liquidate the business or partnership interest at the time and on the terms and conditions that my Executor considers advisable and in the best interests of my estate. Any operation, continuation, sale, or liquidation by my Executor, in good faith, shall be at the risk of my estate and without liability on the part of my Executor for any resulting losses.

### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Probate Personal Representatives Duties & Powers General Overview Estate, Gift & Trust

LawWillsGeneral Overview



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D. Powers

2. Asset Management

*24-65 California Legal Forms--Transaction Guide § 65.285*

**§ 65.285 Power to Purchase Estate Assets**

**[1] Comment**

**[a] Use of Form**

This form is a will provision that may be used to authorize the executor to purchase assets of the estate.

**[b] Purchase of Estate Assets by Executor**

**[i] General Prohibition**

Since executors are fiduciaries, they are generally prohibited from engaging in any self-dealing with the estates they represent [ *Estate of Boggs (1942) 19 Cal. 2d 324, 333, 121 P.2d 678* (executrix); see *Wickersham v. Crittenden (1892) 93 Cal. 17, 29, 28 P. 788* (director of corporation); see also *Prob. Code § 39* ("fiduciary" defined)]. Accordingly, the Probate Code prohibits personal representatives (and attorneys for personal representatives) from directly or indirectly purchasing any property of or claim against the estate [*Prob. Code § 9880*; see *Prob. Code § 58(a)* ("personal representative" defined)]. When a personal representative is forbidden by law to engage in self-dealing, the courts will not permit any investigation into the fairness or unfairness of the transaction, or allow the representative to show that the dealing was for the best interest of the devisees [ *Estate of Boggs (1942) 19 Cal. 2d 324, 333, 121 P.2d 678* ; *Wickersham v. Crittenden (1892) 93 Cal. 17, 29, 28 P. 788* ].

**[ii] Permitted When All Heirs and Devisees Consent**

The Probate Code authorizes the executor to purchase property of the estate if all of the following requirements are satisfied:

(1) A written consent to the purchase signed by each known heir and each known devisee whose interest in the estate is affected by the proposed purchase is filed with the court [*Prob. Code § 9881(a), (b)*];

- (2) The purchase is shown to be to the advantage of the estate [*Prob. Code § 9881(c)*]; and
- (3) The court makes an order authorizing the purchase [*Prob. Code § 9881*; see *Prob. Code § 9883* (petition for order)].

**[iii] Permitted When Will Authorizes Purchase**

If the will authorizes the executor (or the executor's attorney) to purchase property of the estate, the court may make an order authorizing the purchase [*Prob. Code § 9882*]. Notice of hearing on a petition for an order authorizing such a sale must be given to all heirs and devisees whose interests are affected by the proposed purchase [*Prob. Code § 9883(c)*]. If the court is satisfied that the purchase should be authorized, it must make an order authorizing the purchase on the terms and conditions specified in the order [*Prob. Code § 9883(d)*]. Unless the will or the order provides otherwise, the sale must be in the same manner as other estate property of the same nature.

**[iv] Permitted When Pursuant to Specifically Enforceable Contract**

The executor (or executor's attorney) may purchase property of the estate when the purchase is pursuant to a written contract made during the decedent's lifetime, but only if the contract is specifically enforceable [*Prob. Code § 9884*; see *Prob. Code §§ 850-859* (transfer of property claimed to belong to decedent or others)]. For a general consideration of specific performance of contracts, see California Real Estate Law & Practice, Ch. 74, *Buyer's Remedies in Actions Involving Agreements of Sale*, and California Forms of Pleading & Practice, Ch. 528, *Specific Performance*.

**[v] Permitted When Pursuant to Exercise of Option Given in Will**

The executor (or the executor's attorney) may purchase property of the estate by exercising an option to purchase given in the will [*Prob. Code §§ 9885, 9980*]. For a provision granting a named person (who may be the executor) an option to purchase estate property, see Ch. 63, *Will Provisions*, § 63.446[1][b].

**[2] FORM**

**Power to Purchase Estate Assets**

Power to Purchase Assets

I authorize my Executor to purchase for my Executor's own account any asset, or any interest in an asset, belonging to my estate.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law  
 Probate  
 Personal Representatives  
 Duties & Powers  
 General Overview  
 Estate, Gift & Trust Law  
 Wills  
 General Overview



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2. Asset Management

*24-65 California Legal Forms--Transaction Guide § 65.286*

### **§ 65.286 Power to Make Expenditures to Collect Foreign Assets**

#### **[1] Comment**

#### **[a] Use of Form**

This form is a will provision that may be used to authorize the executor to make expenditures to collect property of the testator situated outside of California. For a will provision nominating an ancillary executor, see § 65.204. For will provisions relating to the powers and duties of ancillary executors, see §§ 65.340, 65.341, and 65.114.

#### **[b] Collection of Foreign Assets**

#### **[i] Executor's Duty**

Every executor has the duty to take possession or control of all of the testator's property to be administered in the testator's estate [*Prob. Code § 9650(a)(1)*]. This duty may even include the duty to collect assets in a foreign jurisdiction, if the law of the foreign jurisdiction permits such collection [ *In re Ortiz (1890) 86 Cal. 306, 313, 24 P. 1034* ]. The Probate Code invests executors with authority to take various steps that will facilitate collection of the estate, such as maintaining actions and proceedings for the benefit of the estate [*Prob. Code § 9820(a)*], suing former personal representatives on their bonds [*Prob. Code § 9822*; see *Prob. Code § 58(a)* ("personal representative" defined)], and suing cotenants for partition of any property in which the testator left an undivided interest [*Prob. Code § 9823(b)*].

In discharging the duty to collect estate assets, as in discharging other duties, the executor is required to act with ordinary care and diligence [*Prob. Code § 9600(a)*; see § 65.41[1]]. What constitutes ordinary care and diligence must be determined by all the circumstances of the particular estate [*Prob. Code § 9600(a)*].

#### **[ii] Assets Outside California**

California executors do not ordinarily have any authority over real property located outside California. They may, however, have authority over personal property belonging to the estate of a California domiciliary. In any event, when a California executor has in fact taken possession of assets in a foreign jurisdiction, the probate court in California may hold the executor accountable for the assets [ *Estate of Barreiro (1932) 125 Cal. App. 752, 767, 14 P.2d 786* ] .

### **[iii] Deductibility of Expenses**

Expenses of administering the estate are deductible for federal estate tax purposes [*I.R.C. § 2053(a)(2); Treas. Reg. § 20.2053-1*], but only to the extent that the expenses are actually and necessarily incurred in collecting assets, paying debts, and distributing property to the persons entitled to it [*Treas. Reg. § 20.2053-3*]. By authorizing the executor to make any expenditures to collect, preserve, or protect out-of-state property, this form will help to establish that any expenditures made for that purpose are properly deductible.

## **[2] FORM**

### **Power to Make Expenditures to Collect Foreign Assets**

#### Expenditures for Property Outside California

I authorize my Executor to make any expenditures out of my estate that my Executor may deem proper and in the interest of my estate as a whole in order to collect, preserve, or protect any property belonging to my estate situated outside the State of California. Any such expenditures shall be expenses of the administration of my estate.

### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law  
Probate  
Personal Representatives  
Duties & Powers  
General Overview  
Estate, Gift & Trust Law  
Wills  
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2. Asset Management

*24-65 California Legal Forms--Transaction Guide §§ 65.287-65.299*

**[Reserved]**

§§ 65.287[Reserved]



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3. Borrowing

*24-65 California Legal Forms--Transaction Guide § 65.300*

**§ 65.300 Power to Borrow Money and Encumber Property**

**[1] Comment**

**[a] Use of Form**

This form is a will provision that authorizes the executor to borrow money and encumber estate property.

**[b] Executor's Borrowing Power**

**[i] Statutory Rules**

Under the Probate Code, the power of the executor to borrow money and encumber estate property is subject to control of the court. Borrowing and encumbering always requires specific court authorization [*Prob. Code § 9800(a)*]. The court may authorize these acts only on a showing of advantage to the estate [*Prob. Code § 9800(a)*], and only for one or more of the following purposes:

- (1) To pay debts of the decedent or the estate, devises made in the decedent's will, expenses of administration or charges against the estate [*Prob. Code § 9800(a)(1)*];
- (2) To pay, reduce, extend, or renew a security interest, lien, mortgage, or deed of trust already existing on property of the estate [*Prob. Code § 9800(a)(2)*]; or
- (3) To improve, use, operate, or preserve property in the estate [*Prob. Code § 9800(a)(3)*].

When money has been borrowed under the foregoing rules, the proceeds must be applied to the purposes stated above, in the order in which they are stated [*Prob. Code § 9800(b)*].

**[ii] Debt and Security Instruments**

When the court has authorized the executor to borrow money, the loan may, as specified by the court, be on an unsecured note, on a note secured by a security interest in personal property of the estate, or on a note secured by a mortgage or deed of trust on real property of the estate [*Prob. Code* § 9800(a)].

### **[iii] When Surviving Spouse Has Elected to Have Community Property Administered**

If the surviving spouse has elected to have his or her share of the community real property administered in the decedent's estate [*see Prob. Code* § 13502 (surviving spouse's election to have community property administered in estate of deceased spouse); *see also* Ch. 60, *Estate Planning* ], the executor may borrow money to be secured by a mortgage or deed of trust on real property of the estate only with the written consent of the surviving spouse [*Prob. Code* § 9800(c)].

### **[iv] Will Provisions**

The Probate Code does not authorize borrowing without court order, even when it is authorized by the testator's will. Thus court authorization is required whether or not the will authorizes borrowing [*see* § 65.300[1][b][i]]. Accordingly, will provisions authorizing borrowing or encumbering are usually neither necessary nor advisable. If, however, the testator anticipates that the estate will not be liquid and that borrowing will be necessary to pay debts, expenses, or devises, and if the testator wishes the executor to borrow money to pay those debts, expenses, or devises, a will provision may serve a useful purpose by making the testator's intentions in the matter clear. This, in turn, may help resolve disputes about the propriety of a particular decision by the executor and strengthen a petition for court authorization.

## **[2] FORM**

### **Power to Borrow Money and Encumber Property**

I authorize my Executor, in my Executor's discretion, to borrow money on behalf of my estate, and to pledge, hypothecate, or otherwise encumber property of my estate, real or personal, as security for any sums so borrowed.

### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law  
Probate  
Personal Representatives  
Duties & Powers  
General Overview  
Estate, Gift & Trust Law  
Wills  
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3. Borrowing

*24-65 California Legal Forms--Transaction Guide §§ 65.301-65.319*

**[Reserved]**

§§ 65.301[Reserved]



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## DIVISION IV: WILLS AND TRUSTS

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## D. Powers

## 4. Taxes

*24-65 California Legal Forms--Transaction Guide § 65.320***§ 65.320 Power to Take Actions Without Regard to Tax Consequences****[1] Comment****[a] Use of Form**

This form is a will provision that may be used to authorize the executor to take certain actions without regard to their tax consequences. For a will provision empowering the executor to allocate expense deductions between income tax and estate tax, see § 65.321.

**[b] Effect of Tax Elections on Distributive Shares**

In the discharge of his or her duty to file tax returns and pay taxes both for the estate and for the decedent [*see* § 65.41[7]], the executor has discretion to make various tax elections. For example, expenses of administration [*I.R.C.* § 2053(a)(2), (b)] and losses [*I.R.C.* § 2054] may be deducted for federal estate tax purposes or, at the executor's election, be taken as deductions in computing the taxable income of the estate [*I.R.C.* § 642(g); *Treas. Reg.* § 1.642(g)-1]. The executor's decision to take a deduction for one purpose and not another may, however, require adjustment among the distributive shares of different devisees. If an election favors one devisee at the expense of another, the court may compel the distributive shares of the devisees to be adjusted [ *Estate of Bixby (1956) 140 Cal. App. 2d 326, 339-340, 295 P.2d 68* ]. The provision set forth below is designed to provide the executor maximum freedom to make tax elections without considering the effect of those elections on distributive shares and without exposing the estate to time-consuming and expensive court proceedings to compel adjustments.

**[2] FORM****Power to Take Actions Without Regard to Tax Consequences**

I authorize my Executor, in my Executor's sole discretion, regardless of the resulting effect on any other provision of this will or on any person interested in my estate, to make the following choices or elections, to the extent that the law

permits:

- (a) To choose a valuation date for estate tax purposes;
- (b) To choose the methods to pay estate taxes;
- (c) To elect to treat or use any item for state or federal estate or income tax purposes as an income tax deduction or an estate tax deduction;
- (d) To disclaim all or any portion of any interest in property passing to my estate at or after my death;
- (e) To join with my spouse or my spouse's estate in filing joint income or gift tax returns for me or my estate;
- (f) To consent to any gifts made by my spouse as being made one-half by me for gift tax purposes; and
- (g) To determine when an item is to be treated as taken into income or used as a tax deduction.

No person interested in my estate shall have the right to any reimbursement, recoupment, or adjustment for any choice or election made by my Executor under the authority granted in this provision, nor shall my Executor be required to make any adjustment between income and principal or in the amount of any property passing under this will as a result of any such choice or election.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law  
Probate  
Personal Representatives  
Duties & Powers  
General Overview  
Estate, Gift & Trust Law  
Probate  
Personal Representatives  
Duties & Powers  
Fiduciary Responsibilities  
Estate, Gift & Trust Law  
Wills  
General Overview



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4. Taxes

*24-65 California Legal Forms--Transaction Guide § 65.321***§ 65.321 Power to Allocate Expense Deductions Between Income Tax and Estate Tax****[1] Comment****[a] Use of Form**

This form is a will provision that may be used to authorize the executor to allocate expense deductions between income tax and estate tax. For a will provision empowering the executor to take particular actions without regard to their tax consequences, see § 65.320.

For the effect of tax elections on the distributive shares of devisees, see § 65.320[1][b].

**[2] FORM****Power to Allocate Expense Deductions Between Income Tax and Estate Tax**

I authorize my Executor, in my Executor's sole discretion, regardless of the resulting effect on any other provision of this will or on any person interested in my estate, to determine whether any or all of the expenses of administration of my estate shall be used as deductions for federal estate tax or federal income tax purposes. No person interested in my estate shall have the right to any reimbursement, recoupment, or adjustment for any such choice or election made by my Executor; nor shall my Executor be required to make any adjustment between income and principal or in the amount of any property passing under this will as a result of any such choice or election.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Probate Personal Representatives Duties & Powers General Overview Estate, Gift & Trust Law Probate Personal Representatives Duties & Powers Accounting Estate, Gift & Trust Law Probate Personal Representatives Duties & Powers Fiduciary Responsibilities Estate, Gift & Trust Law Wills General Overview



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4. Taxes

*24-65 California Legal Forms--Transaction Guide §§ 65.322-65.339*

**[Reserved]**

§§ 65.322[Reserved]



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D. Powers

5. Ancillary Executors

*24-65 California Legal Forms--Transaction Guide § 65.340*

**§ 65.340 Provision Investing Ancillary Executor With Power to Sell, Lease, and Borrow**

**[1] Comment**

**[a] Use of Form**

This form is a will provision that may be used to give an ancillary executor the power to sell, lease, and borrow. For a general consideration of ancillary administration and ancillary executors, see § 65.34; see also § 65.204[1].

For nomination of an ancillary executor, see § 65.204. For a provision authorizing the domiciliary executor to nominate an ancillary executor, see § 65.223. For a provision investing an ancillary executor with the same powers as a domiciliary executor, see § 65.341. For a provision directing the ancillary executor to deliver the residue of the ancillary estate to the domiciliary executor, see § 65.404.

**[b] Powers of Ancillary Executors**

Ancillary administration is administration of a decedent's estate in a state in which the decedent left property but in which he or she was not domiciled at the time of death [*Black's Law Dictionary* (5th ed., 1979), p. 78; see *Prob. Code* § 12501 ("ancillary administration" defined)]. In California, the powers of an ancillary executor are identical to the powers of domiciliary executors [see *Prob. Code* §§ 12524 (will admitted to probate under ancillary administration provisions of Probate Code has same force and effect as will of domiciliary), 12530 (ancillary administration in California subject to other estate administration provisions of Probate Code, including provisions relating to estate management)]. Thus, ancillary executors in California may sell, lease, and borrow in the same circumstances as domiciliary executors. For powers of domiciliary executors to sell estate property, see §§ 65.42[8], 65.280[1]. For powers of domiciliary executors to lease estate property, see §§ 65.42[9], 65.282[1]. For powers to borrow and to encumber estate property, see §§ 65.42[4], 65.300[1].

Since ancillary administration is made necessary by the existence of property belonging to a decedent in a nondomiciliary state, it is ordinarily governed by the law of the nondomiciliary state [see § 65.34[1]]. Whether an

ancillary executor in another state administering property belonging to the estate of a California domiciliary can effectively exercise testamentary powers to sell, lease, borrow, or encumber estate property will ultimately be determined by the law of the other state.

**[2] FORM**

**Provision Investing Ancillary Executor With Power to Sell, Lease, and Borrow**

Powers of Ancillary Executor

I authorize my Ancillary Executor to do any of the following things, on such terms and for such consideration as my Ancillary Executor shall, in my Ancillary Executor's discretion, deem proper and to the advantage of my estate:

- (a) Sell any property, and any interest in any property, belonging to my ancillary estate;
- (b) Lease any property belonging to my ancillary estate;
- (c) Borrow money by unsecured note or by note secured by mortgage, deed of trust, or other security instrument, on any property of my ancillary estate.

As used in this will, "ancillary estate" means any property owned by me at the time of my death and requiring administration outside the State of California.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawProbateAncillary ProceedingsEstate, Gift & Trust LawProbatePersonal RepresentativesDuties & PowersGeneral OverviewEstate, Gift & Trust LawProbatePersonal RepresentativesForeign RepresentativesEstate, Gift & Trust LawWillsGeneral Overview



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5. Ancillary Executors

*24-65 California Legal Forms--Transaction Guide § 65.341*

**§ 65.341 Provision Investing Ancillary Executor With Same Powers as Domiciliary Executor**

**[1] Comment**

**[a] Use of Form**

This form is a will provision that may be used to invest an ancillary executor with the same powers as the domiciliary executor. For a general consideration of ancillary administration and ancillary executors, see § 65.34; see also § 65.204[1].

For nomination of an ancillary executor, see § 65.204. For a provision authorizing the domiciliary executor to nominate an ancillary executor, see § 65.223. For a provision authorizing the ancillary executor to sell, lease, and borrow, see § 65.340. For a provision directing the ancillary executor to deliver the residue of the ancillary estate to the domiciliary executor, see § 65.404.

**[b] Powers of Ancillary Executors**

In California, the powers of ancillary executors are identical to the powers of domiciliary executors [*see Prob. Code §§ 12524 (will admitted to probate under ancillary administration provisions of Probate Code has same force and effect as will of domiciliary), 12530 (ancillary administration in California subject to other estate administration provisions of Probate Code, including provisions relating to estate management); see also § 65.34[1]*]. The powers of an ancillary executor in a state other than California will, however, be determined by the law of the other state. This form will therefore be effective only to the extent that it is sanctioned by the law of the state in which the ancillary administration will be carried out.

**[2] FORM**

**Provision Investing Ancillary Executor With Same Powers as Domiciliary Executor**

### Powers of Ancillary Executor

With respect to the administration of my ancillary estate, the Ancillary Executor shall, in addition to the rights, powers, privileges, and discretions conferred on ancillary executors by law, have all the rights, powers, privileges, and discretions conferred on my Executor by terms of this will. As used in this will, "ancillary estate" means any property owned by me at the time of my death and requiring administration outside the State of California.

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Probate Ancillary Proceedings Estate, Gift & Trust Law Probate Personal Representatives Duties & Powers General Overview Estate, Gift & Trust Law Wills General Overview



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5. Ancillary Executors

*24-65 California Legal Forms--Transaction Guide §§ 65.342-65.359*

**[Reserved]**

§§ 65.342[Reserved]



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6. Administrators With Will Annexed

*24-65 California Legal Forms--Transaction Guide § 65.360*

**§ 65.360 Provision Investing Administrator With Will Annexed With Same Powers as Executor**

**[1] Comment**

**[a] Use of Form**

This form is a will provision that may be used to invest an administrator with the will annexed with the same powers as the executor.

**[b] Administrators With the Will Annexed**

**[i] In General**

An administrator with the will annexed is an administrator [*see Prob. Code §§ 8460-8468 (administrators); see also § 65.35[3]*] who is appointed to take charge of the estate of a testate, rather than intestate, decedent. An administrator with the will annexed must be appointed if a person dies with a will that does not name an executor, or if the sole executor or all of the executors named in the will waive the right to appointment or for any reason are unwilling or unable to act [*Prob. Code § 8440; see Prob. Code § 8522(a)*] (duty of court to appoint successor personal representative when vacancy occurs and there are no other personal representatives); *see also § 65.35[5]*. On appointment and qualification, an administrator with the will annexed is entitled to the issuance of letters of administration with the will annexed [*see Prob. Code § 8405 (form of letters)*].

**[ii] Powers**

An administrator with the will annexed ordinarily has the same administrative and management powers as an executor named in the will [*Prob. Code § 8442(a)*]. If, however, the will confers a discretionary power or authority on an executor that is not conferred by law and the will does not extend the power or authority to other personal representatives, the power or authority will not be deemed to be conferred on an administrator with the will annexed unless the court in its discretion authorizes the exercise of the power or authority [*Prob. Code § 8442(b)*].

**[iii] Will Provision**

A will provision stating that an administrator with the will annexed will have all of the powers of the executor will assure that the administrator with the will annexed is able to exercise all of the executor's powers, whether conferred by will or statute [*see Prob. Code § 8442(b)* (will may provide that discretionary powers exercisable by executor are also exercisable by administrator with will annexed)]. An even better means of ensuring that the personal representative will be able to exercise all of the executor's powers is to nominate alternative and successor executors to serve in the event the executor fails to qualify or ceases to act as executor. If sufficient alternate and successor executors are nominated, it will not be necessary to appoint an administrator with the will annexed. For nomination of alternate and successor executors, see § 65.203.

**[2] FORM****Provision Investing Administrator With Will Annexed With Same Powers as Executor****Powers of Administrator With Will Annexed**

If, at any time, it becomes necessary to appoint an administrator with the will annexed to administer or to continue administration of my estate, I direct that the administrator with the will annexed shall have, in addition to all the rights, powers, privileges, and discretions conferred on administrators with the will annexed by law, all of the rights, powers, privileges, and discretions conferred on my Executor by terms of this will.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Probate Personal Representatives Duties & Powers General Overview Estate, Gift & Trust Law Wills General Overview



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6. Administrators With Will Annexed

*24-65 California Legal Forms--Transaction Guide §§ 65.361-65.379*

**[Reserved]**

§§ 65.361[Reserved]



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*24-65 California Legal Forms--Transaction Guide § 65.380*

### **§ 65.380 Power to Allocate and Distribute Property in Kind**

#### **[1] Comment**

##### **[a] Use of Form**

This form is a will provision authorizing the executor to distribute property in kind, or partly in kind and partly in cash, or entirely in cash. When included in the will, this provision will give the executor flexibility in determining which assets should be allocated to satisfy the shares of different distributees. The form includes a basic provision and an optional provision that may be included if the testator wishes the executor to have the power to consider the tax consequences of distributions.

##### **[b] Distribution**

###### **[i] Executor's Duties**

The executor has the duty to distribute estate assets to the person or persons legally entitled to distribution under the decedent's will [*Prob. Code § 11750(a)*]. However, distribution must follow a court order determining that distribution is proper and specifying the persons to whom assets will be distributed [*Prob. Code § 11750(a)*; see *Prob. Code §§ 11600-11642* (order for distribution), *11700-11705* (determination of persons entitled to distribution); see § 64.41[9]].

###### **[ii] Power to Allocate and Distribute in Kind**

Wills frequently provide that the residue of the estate is to be distributed in fractional shares to two or more devisees. If an estate does not consist entirely of cash, problems may arise over how the estate should be distributed, particularly if the residue includes assets (e.g., furniture, jewelry, or works of art) that cannot readily be divided into separate interests. In such cases, devisees are frequently unable to agree among themselves about an appropriate division.

If the will does not give the executor power to divide property on distribution, the court must determine what property

will be distributed to each devisee and whether property should be partitioned [*Prob. Code § 11603(b)(1)*; see *Prob. Code §§ 11950-11956* (procedure for division by court)]. The court may order property sold when sale would be more equitable than partition and the property cannot conveniently be allotted to any one party [*Prob. Code § 11953(b)*]. Costs of the partition proceedings must be paid by the parties entitled to distribution, but each must pay his or her own attorney fees [*Prob. Code § 11955*].

The testator will often prefer that the executor divide the property, since the executor will frequently have a better understanding of the testator's wishes, of the needs of the devisees, and of the composition of the estate. This form is intended to give the executor broad discretion to allocate and divide property on distribution. If appropriate, the form may be modified to confer a more narrow discretion in this regard.

## [2] FORM

### Power to Allocate and Distribute Property in Kind

#### Powers of Distribution

On any partial or final distribution of my estate, my Executor shall have the power, in my Executor's sole and absolute discretion, to divide, allocate, and distribute property of my estate (including undivided interests in property) in kind, partly in kind and partly in cash, or entirely in cash, and to determine what property shall be allocated to the shares or devises to be distributed. Any division, allocation, or distribution by my Executor pursuant to the terms of this paragraph, made in good faith, shall be binding on all of the distributees.

*[Optional provision; add if executor is to have power to consider tax consequences of distribution:]*

My Executor, in my Executor's discretion, shall have the further power to make adjustments to shares, or devises to compensate for the tax consequences of any distribution that my Executor believes may have the effect, directly or indirectly, of favoring one distributee or group of distributees over another.

*[Continue with the following:]*

Notwithstanding the powers conferred on my Executor in this paragraph, my Executor shall in no event be required to exercise any or all of these powers.

#### Legal Topics:

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law  
 Probate  
 Personal Representatives  
 Duties & Powers  
 General Overview  
 Estate, Gift & Trust Law  
 Probate  
 Personal Representatives  
 Duties & Powers  
 Distribution  
 Estate, Gift & Trust Law  
 Wills  
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*24-65 California Legal Forms--Transaction Guide § 65.381*

**§ 65.381 Power to Pay Devises for Benefit of Minor or Incompetent Devises**

**[1] Comment**

**[a] Use of Form**

This form is a will provision that may be used to authorize the executor to distribute property for the benefit of minors, incompetents, and other persons who the executor believes are unable to manage the property properly.

**[b] Distribution to Minors**

In California, minors are capable of acquiring and holding property, both real and personal [ *In re Scott K. (1979) 24 Cal. 3d 395, 405, 155 Cal. Rptr. 671, 595 P.2d 105*, cert. denied, 444 U. S. 973 (1979) (parent may not consent to warrantless search of toolbox owned by minor child); *In re Guardianship of Yano (1922) 188 Cal. 645, 649, 206 P. 995*]. However, the right of minors to deal with and manage their own property is subject to severe restrictions. Minors may not contract with respect to their real property under any circumstances, and they may not contract with respect to their personal property unless the property is in their immediate possession or control [*Fam. Code § 6701(b)*]. For this reason, it is usually necessary to entrust control of a minor's property to some person other than the minor. Further, because the parents of a minor, in their capacity as parents, have "no control" over the property of a minor [see *Civ. Code § 202*], the person entrusted with control of the minor's property may not generally be a parent unless the parent is acting in some other legally recognized capacity.

Property may be held for a minor:

- By a trustee [see *Prob. Code §§ 15000-18201* (the Trust Law); see also Ch. 64, *Testamentary Trusts: Payment and Distribution Provisions*, and Ch. 70, *Complete Revocable Trust Forms*, and Ch. 72, *Irrevocable Trusts*];
- By a guardian of the minor's estate [see *Prob. Code § 2401(a)*; see also Ch. 66, *Guardianship and*

*Conservatorship Planning, § 66.15[2]*];

- By a custodian designated to hold property for the minor under the California Uniform Transfers to Minors Act [*Prob. Code §§ 3900-3925; see Ch. 60A, Gifts, § 60A.40*]; or
- By a parent, if the minor's "total estate" [*see Prob. Code § 3400*] does not exceed \$5,000 [*Prob. Code § 3401; see Ch. 100A, Personal Affairs of Minors, § 100A.21[2]*].

By authorizing the executor to distribute property to the legally appointed guardian of a minor, to a custodian under the California Uniform Transfers to Minors Act, to the parent of a minor, if the parent is legally capable of holding the distributed property for the minor, or to the trustee of any trust established for the benefit of any beneficiary, the form set forth below will give the executor wide latitude in determining the proper person to receive a distribution for a minor.

### **[c] Distribution to Incompetents and Other Disabled Persons**

Like minors, certain adults may be legally (or actually) incapable of dealing with their own property. Adults for whom conservators have been appointed will generally fall into this category. A conservator of the estate may be appointed for an adult who is substantially unable to manage his or her own financial resources or to resist fraud or undue influence [*Prob. Code §§ 1800, 1801*]. A conservator has the power of management and control of the conservatee's estate [*Prob. Code § 2401(a)*]. Other adults, although not represented by conservators, may be beneficiaries of trusts. By authorizing the executor to distribute property to both conservators and trustees, the form set forth below will give the executor wide latitude in determining the proper person to hold distributed assets for a disabled adult.

### **[2] FORM**

#### **Power to Pay Devises for Benefit of Minor or Incompetent Devisees**

#### **Distributions for Benefit of Minors and Others**

If, on any partial or final distribution of my estate, any beneficiary under this will is a minor, under any other legal disability, or, in my Executor's judgment, unable by reason of physical or mental disability or illness properly to hold and manage the property to be distributed, my Executor may distribute the property to some other person or persons for the benefit of that beneficiary. Distributions pursuant to this paragraph may be made to a legally appointed guardian of a minor, to a legally appointed conservator of a conservatee, to a custodian under the California Uniform Transfers to Minors Act for the benefit of a minor, to a trustee of any trust established for the benefit of any beneficiary, or to the parent of a minor, if the parent is legally entitled to hold the property distributed for the benefit of the minor. If a distribution should, by terms of this will, be made to a minor beneficiary, my Executor may designate a custodian under the California Uniform Transfers to Minors Act to accept and hold the distribution for the minor. My Executor is authorized to accept the receipt of any distributee to whom property is distributed pursuant to this paragraph in full satisfaction and discharge of the distribution. Any distribution by my Executor pursuant to the terms of this paragraph, made in good faith, shall be binding on all of the distributees.

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law  
 Conservators & Guardians  
 Guardians for Minors  
 Estate, Gift & Trust Law  
 Conservators & Guardians  
 Testamentary Guardians  
 Estate, Gift & Trust Law  
 Probate  
 Personal Representatives  
 Duties & Powers  
 General Overview  
 Estate, Gift & Trust Law  
 Probate  
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 Duties & Powers  
 Distribution  
 Estate, Gift & Trust Law  
 Wills  
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*24-65 California Legal Forms--Transaction Guide § 65.382*

### **§ 65.382 Power to Pay Costs of Distribution**

#### **[1] Comment**

##### **[a] Use of Form**

This form is a will provision that may be used to authorize the executor to pay out of estate assets any costs relating to the distribution of estate property.

##### **[b] Costs of Distribution**

Expenses of administering the estate are deductible for federal estate tax purposes [*I.R.C. § 2053(a)(2); Treas. Reg. § 20.2053-1*], but only to the extent that the expenses are actually and necessarily incurred in collecting assets, paying debts, and distributing property to the persons entitled to it [*Treas. Reg. § 20.2053-3*]. Expenditures not essential to the proper settlement of the estate, but incurred for the individual benefit of devisees, may not be deducted [*Treas. Reg. § 20.2053-3(a), (d)*]. By authorizing the executor to pay storage, freight, shipping, delivery, packing, insurance, and other costs related to the distribution of estate property, this form will establish that expenses of distribution are properly deductible.

#### **[2] FORM**

##### **Power to Pay Costs of Distribution**

Costs of Distribution

I authorize my Executor, in my Executor's discretion, to pay from my estate any and all storage, freight, shipping, delivery, packing, insurance, and other costs related to the distribution of any property of my estate. Any expenses paid by my Executor pursuant to this paragraph shall be expenses of my estate.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law  
Probate  
Personal Representatives  
Duties & Powers  
Distribution  
Estate, Gift & Trust Law  
Probate  
Procedures in Probate  
Costs & Expenses  
Estate, Gift & Trust Law  
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*24-65 California Legal Forms--Transaction Guide §§ 65.383-65.399*

**[Reserved]**

§§ 65.383[Reserved]



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*24-65 California Legal Forms--Transaction Guide § 65.400*

### **§ 65.400 Provision Directing Executor to Pay Debt**

#### **[1] Comment**

#### **[a] Use of Form**

This form is a will provision that may be used to direct the executor to pay a debt of the decedent. The form includes two alternative provisions. The first alternative provision may be used to direct payment of the debt without specifying the property or fund from which payment is to be made. The second may be used to direct payment of the debt only out of a specified fund or property.

#### **[b] Payment of Debts**

#### **[i] In General**

Executors have a duty to pay debts of the decedent and of the estate [*see § 65.41[6]; see also Prob. Code § 11401* ("debt" defined)]. The executor must pay certain debts without obtaining a court order for payment [*Prob. Code § 11421*], while others must be paid only if their payment has been ordered by the court [*Prob. Code § 11422(a)*]. The duty to pay debts never depends on will provisions authorizing or directing their payment.

#### **[ii] Will Provisions**

A will provision directing the executor to pay a particular debt may be desirable in certain circumstances. If the debt is barred by the statute of limitations, or if the testator believes that the creditor may be unwilling or unable to file a claim for payment [*see Prob. Code §§ 9000-9399* (creditor claims)], and if the testator feels a moral obligation to pay the debt, a will provision directing the executor to pay may be appropriate. Will provisions directing the payment of debts should be used with caution, however, and blanket directions [e.g., "I direct my Executor to pay all of my debts" or "My Executor shall pay all of my just debts"] should not be used.

If a debt is barred by the statute of limitations, the executor is forbidden to allow the debt, and the court cannot approve

it [*Prob. Code* § 9253]. However, an otherwise barred debt may be revived by a writing signed by the party to be charged [*Code Civ. Proc.* § 360]. Although no reported California cases have been found in which a will provision directing the executor to pay a debt has been held to satisfy the requirement of such a writing, cases decided outside California have so held [ *Perkins v. Seigfried's Adm'r* (1899) 97 Va. 444, 34 S.E. 64 (will provision directing payment of particular debt revives debt); *but see McNeal v. Pierce* (1905) 73 Ohio St. 7, 75 N.E. 938 (will provision directing executor to pay a devise to creditor does not revive barred debt)].

### [iii] Specifying Source of Payment

Estate debts must be paid out of estate assets. If necessary to pay debts, assets must abate (i.e., be reduced, eliminated, or even sold) according to a statutory schedule of priorities [*see Prob. Code* § 21402(a) (order of abatement); *see also Prob. Code* § 10000(a) (executor may sell assets when necessary to pay debts, devises, family allowance, expenses of administration, or taxes)]. The will may, however, provide a different order of abatement [*Prob. Code* § 21400; *see Ch. 63, Will Provisions*, § 63.416]. A will provision specifying the property or fund out of which a debt is to be paid will have the effect of exempting other assets from any obligation to contribute to the payment and, to that extent, alter the statutory order of abatement.

## [2] FORM

### Provision Directing Executor to Pay Debt

#### Payment of Debt

[*First alternative: source of payment not specified:*]

I direct my Executor to pay my debt to \_\_\_\_\_ [*relationship, if any, e.g., my brother*],  
 \_\_\_\_\_ [*name*], of \_\_\_\_\_ [*place*], in the principal amount of  
 \$\_\_\_\_\_, incurred on or about \_\_\_\_\_ [*date*], \_\_\_\_\_ [*plus or  
 without*] interest on that principal.

[*Second alternative: payment out of specified source:*]

I direct my Executor to pay my debt to \_\_\_\_\_ [*relationship, if any, e.g., my sister*],  
 \_\_\_\_\_ [*name*], of \_\_\_\_\_ [*place*], in the principal amount of  
 \$\_\_\_\_\_, incurred on or about \_\_\_\_\_ [*date*], \_\_\_\_\_ [*plus or  
 without*] interest on that principal. The payment is to be made out of \_\_\_\_\_ [*description of property or  
 fund, e.g., the sale of my residence located at 100 Broad Street, Smalltown, California or money held by me in the  
 Smalltown branch of the Bank of America, National Trust & Savings Association, Smalltown, California, at the date of  
 my death*], to the extent that the same is sufficient for that purpose. If that \_\_\_\_\_ [*money or property  
 or fund*] is not sufficient for that purpose, my Executor shall not resort to any other property or assets of my estate for  
 payment.

### Legal Topics:

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law  
 Estate Administration  
 Claims Against Estates  
 General Overview  
 Estate, Gift & Trust  
 Law  
 Probate  
 Personal Representatives  
 Duties & Powers  
 General Overview  
 Estate, Gift & Trust Law  
 Wills  
 General  
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*24-65 California Legal Forms--Transaction Guide § 65.401*

### **§ 65.401 Provision Directing Executor to Liquidate Business**

#### **[1] Comment**

##### **[a] Use of Form**

This form is a will provision that may be used to direct the executor to liquidate a business owned by the testator. For will provisions empowering the executor to continue the operation of businesses (or interests in businesses) owned by the testator, see § 65.284.

##### **[b] Liquidation of Business**

Executors have broad statutory power (with the approval of the superior court) to continue the operation of businesses owned by testators and to continue as partners in partnerships in which the testator was interested [*see* § 65.284[1]]. Wills may reinforce that authority by specifically empowering the executor to operate a business or continue as a partner [*see* § 65.284].

The operation of a business, however, will sometimes subject an estate to unwarranted risks. This may be particularly true if the business depended in large measure on personal direction from the testator. A business that is profitable in one person's hands may quickly become unprofitable in the hands of another. If the testator believes that operation of a particular business would subject other assets of the estate to risk, a will provision directing liquidation of the business may be appropriate.

#### **[2] FORM**

##### **Provision Directing Executor to Liquidate Business**

Liquidation of Business

I direct my Executor to liquidate my business known as \_\_\_\_\_ [name] , located at \_\_\_\_\_ [place or address], as soon as my Executor, in my Executor's discretion, deems liquidation practicable and advisable. The time of liquidation, as well as the terms and price under which the business is liquidated, shall be determined by my Executor in my Executor's discretion. Until liquidation is complete, my Executor is authorized (but not required) to continue the operation of the business at the sole risk of my estate and without any liability on the part of my Executor for any resulting losses.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law  
Probate  
Personal Representatives  
Duties & Powers  
General Overview  
Estate, Gift & Trust Law  
Wills  
General Overview



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*24-65 California Legal Forms--Transaction Guide § 65.402***§ 65.402 Provision Directing Executor as to Sequences of Sales****[1] Comment****[a] Use of Form**

This form is a will provision that may be used to direct the executor to sell assets in a specified order if sale is necessary to pay debts, expenses, or devises. The form includes a principal provision and an optional provision. The optional provision may be included if the testator wishes to forbid the executor to sell specified assets.

**[b] Will Provisions Directing Mode of Sale of Estate Property**

The will may direct that particular assets of the estate be sold [*Prob. Code §§ 10000(c), (d), 10002(a)*] or give directions as to the mode of selling estate property [*Prob. Code § 10002(a)*]. The executor has a duty to comply with those directions [*Prob. Code § 10002(a); see Prob. Code § 10001(a)(3)* (court order compelling sale when sale directed by will)] unless the court determines that it would be to the advantage of the interested persons to relieve the executor of that duty [*Prob. Code § 10002(b)*].

**[2] FORM****Provision Directing Executor as to Sequences of Sales**

Sale of Assets

If, for any reason, it should become necessary to sell assets of my estate to pay debts or expenses of administration or satisfy devises, or for any other purpose or purposes, I direct my Executor to sell the following assets in the order listed:

(1) \_\_\_\_\_ [*description*]

(2) \_\_\_\_\_ [*description*]

(3) \_\_\_\_\_ [*description*]

[*Optional provision: add if executor is not to sell specified properties:*]

I direct my Executor not to sell any of the following assets under any circumstances:

(1) \_\_\_\_\_ [*description*]

(2) \_\_\_\_\_ [*description*]

(3) \_\_\_\_\_ [*description*]

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Probate Personal Representatives Duties & Powers General Overview Estate, Gift & Trust Law Probate Personal Representatives Duties & Powers Sales of Assets Estate, Gift & Trust Law Wills General Overview



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*24-65 California Legal Forms--Transaction Guide § 65.403*

**§ 65.403 Provision Directing That Trust Company Serving as Coexecutor Take Custody of Personal Property and Maintain Records**

**[1] Comment**

**[a] Use of Form**

This form is a will provision directing that a trust company serving as coexecutor take custody of all personal property and maintain all records and accounts for the estate. For a will provision nominating a trust company as executor, see § 65.201. For a provision nominating coexecutors, see § 65.202.

**[b] Custody of Personal Property and Records**

Because of the obligations imposed on them under state and federal statutes and regulations, trust companies [*see* Prob. Code § 83, Fin. Code § 107 ("trust company" defined)] that serve as coexecutors usually insist that they alone have custody of personal property belonging to the estate and keep all records and accounts. The form set forth below will clearly apprise all persons interested in the estate of the corporate coexecutor's powers in this regard.

**[2] FORM**

**Provision Directing That Trust Company Serving as Coexecutor Take Custody of Personal Property and Maintain Records**

Personal Property and Records

During any time that \_\_\_\_\_ [*full name of corporate coexecutor*] is acting as executor or coexecutor, it alone shall have custody of all money, securities, and other personal property belonging to my estate; and it alone shall maintain all records and accounts, receive all receipts, and make all necessary payments, disbursements, and distributions for the estate.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Probate Personal Representatives Duties & Powers General Overview Estate, Gift & Trust Law Wills General Overview



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*24-65 California Legal Forms--Transaction Guide § 65.404*

**§ 65.404 Provision Directing Ancillary Executor to Deliver Ancillary Residue to Domiciliary Executor**

**[1] Comment**

**[a] Use of Form**

This form is a will provision that may be used to direct an ancillary executor to deliver the residue of the ancillary estate to the domiciliary executor. For nomination of an ancillary executor, see § 65.204. For a provision authorizing the domiciliary executor to nominate an ancillary executor, see § 65.223. For a provision authorizing an ancillary executor to sell, lease, and borrow, see § 65.340. For a provision investing an ancillary executor with the same powers as the domiciliary executor, see § 65.341.

**[b] Delivery of Ancillary Estate to Domiciliary Executor**

On completion of ancillary administration [*see Prob. Code §§ 12510-12542* (ancillary administration in California); *see also § 65.34*], the residue of the ancillary estate is usually distributed to the domiciliary personal representative for final settlement and distribution under the laws of the domiciliary state [ *McCully v. Cooper* (1896) 114 Cal. 258, 261 ; *Estate of Patmore* (1956) 141 Cal. App. 2d 416, 423, 296 P.2d 863] . The probate codes of some jurisdictions require ancillary executors to transmit the ancillary residue to the domiciliary representative to be distributed in accordance with the will (if there is one) or the laws of intestate succession of the domiciliary estate [*see Estate of Patmore* (1956) 141 Cal. App. 2d 416, 424, 296 P.2d 863 (probate code of Kansas)]. In California, the Probate Code authorizes the court to order distribution to the domiciliary representative, but only if such distribution is in the best interest of the estate or interested persons [*Prob. Code § 12540(a)*] or if the domiciliary estate is insolvent [*Prob. Code § 12542*]. This rule has been interpreted as giving the court discretion to determine whether distribution should be to the domiciliary representative or directly to the devisees under the will [ *Estate of Lathrop* (1913) 165 Cal. 243, 249, 131 P. 752 (decided under former Code Civ. Proc. § 1667)]. Although distribution will ordinarily be made to the domiciliary representative, the court may deny distribution if it would violate some policy of California law [ *Estate of Lathrop* (1913) 165 Cal. 243, 249, 131 P. 752 (distribution of more than one-third of estate to charity then contrary to California law)].

A domiciliary representative who comes into possession of foreign assets must account for them in the domiciliary administration [In re Ortiz (1890) 86 Cal. 306, 313-314, 24 P. 1034; Estate of Patmore (1956) 141 Cal. App. 2d 416, 423, 296 P.2d 863].

By clearly stating the testator's intention that the ancillary residue should be distributed to the domiciliary executor, this form will help to assure that some other distribution is not made. It should be remembered, however, that the validity and construction of this provision will depend on the law of the jurisdiction in which the ancillary administration is conducted.

## [2] FORM

### Provision Directing Ancillary Executor to Deliver Ancillary Residue to Domiciliary Executor

#### Residue of Ancillary Estate

I direct the Ancillary Executor, immediately on completion of the administration of my ancillary estate, [if any,] to distribute, transfer, and deliver the residue of that estate to my Executor, to be distributed by my Executor under the terms of this will. It is my intention that my ancillary and domiciliary estates be administered as a unit and that my domiciliary Executor supervise and control administration of my ancillary estate to the fullest extent permissible under applicable law. If, however, my ancillary estate includes real property, or any interest in real property, administration of my ancillary estate may be continued until such time as the property can conveniently be sold or liquidated. As used in this will, "ancillary estate" means any property owned by me at the time of my death and requiring administration outside the State of California, and "domiciliary estate" means any property owned by me at the time of my death and requiring administration in California. "Domiciliary executor" means my Executor as nominated in Paragraph \_\_\_\_\_ of this will.

#### Legal Topics:

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawProbateAncillary ProceedingsEstate, Gift & Trust LawProbatePersonal RepresentativesDuties & PowersGeneral OverviewEstate, Gift & Trust LawProbatePersonal RepresentativesForeign RepresentativesEstate, Gift & Trust LawWillsGeneral Overview



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E. Directions

*24-65 California Legal Forms--Transaction Guide §§ 65.405-65.419*

**[Reserved]**

§§ 65.405[Reserved]



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DIVISION IV: WILLS AND TRUSTS

CHAPTER 65 EXECUTORS

PART IV. FORMS

F. Independent Administration

*24-65 California Legal Forms--Transaction Guide § 65.420*

### **§ 65.420 Independent Administration of Estates Act Applicable**

#### **[1] Comment**

#### **[a] Use of Form**

This form is a will provision that may be used to provide that the testator's estate is to be administered under the Independent Administration of Estates Act [*Prob. Code §§ 10400-10592*]. The form includes two alternative provisions. The first alternative may be used to permit independent administration without exceptions. The second may be used to permit independent administration but to state exceptions to the executor's independent administration authority. For a provision that the estate is not to be administered under the Act, see § 65.421.

#### **[b] Independent Administration of Estates Act**

As an alternative to supervised administration [*see Prob. Code § 10401* ("court supervision" defined); *see also § 65.31*], the Probate Court permits executors to administer estates with a minimum of court supervision under the Independent Administration of Estates Act [*Prob. Code §§ 10400-10592*]. Under the Act, certain actions may be taken only after giving notice of the proposed action to heirs, devisees, and persons who have requested special notice [*see Prob. Code §§ 10510-10519* (powers exercisable only after notice is given), 10530-10538 (powers that require notice under some circumstances), 10580-10592 (notice of proposed action procedure)]. Other actions may be taken without notice or any court authorization [*see Prob. Code §§ 10550-10564* (powers that do not require notice)]. Authority to administer an estate under the Act affords the personal representative greater flexibility and freedom than is available under the more restrictive procedures of supervised administration.

For a general consideration of independent administration, see *discussions under § 65.420[1][b][1]*.

#### **[c] Effect of Will Provision**

#### **[i] In General**

Any personal representative [*see Prob. Code § 58(a)* ("personal representative" defined); *see also § 65.35[1]*] may petition the court for authority to administer an estate under the Independent Administration of Estates Act [*Prob. Code § 10450(a)*]. The petition will not be granted, however, if the decedent's will provides that the estate is not to be administered under the Act [*Prob. Code § 10404*].

Whether or not the will should include a provision precluding independent administration should be decided by the testator and the testator's attorney after consideration of the advantages and disadvantages of independent administration. A testator who fears that persons interested in the estate will quarrel over provisions of the will or disagree about steps to be taken in the administration of the estate may prefer that the estate be administered under close judicial supervision. Similarly, a testator who does not repose full and complete confidence in the business ability or prudence of the executor may wish to ensure that the executor will work under judicial supervision. A will provision precluding independent administration will achieve that purpose.

### **[ii] Specifying Exceptions to Independent Administration**

The testator may wish to allow independent administration but to require the executor to seek judicial approval for certain actions. A will provision listing exceptions to actions that the executor may take under the Independent Administration of Estates Act will achieve that goal. For example, the testator may list as exceptions any actions that the Act permits the executor to take without giving notice of proposed action [*see Prob. Code §§ 10550-10564*], such as actions on claims against the estate [*Prob. Code § 10552*] or the payment of taxes, assessments, and expenses [*Prob. Code § 10556*]. Exceptions might also be created for any of the actions for which the Act requires notice of proposed action only under certain circumstances [*Prob. Code §§ 10530-10538*], such as investing estate money [*Prob. Code § 10533*] or continuing the operation of a business owned by the testator [*Prob. Code § 10534*].

## **[2] FORM**

### **Independent Administration of Estates Act Applicable**

Independent Administration

*[First alternative: independent administration with no exceptions]*

My estate may be administered under the California Independent Administration of Estates Act.

*[Second alternative: independent administration with exceptions]*

My estate may be administered under the California Independent Administration of Estates Act, except that my Executor shall not exercise any of the following powers without court approval or authorization:

(a) \_\_\_\_\_

(b) \_\_\_\_\_

(c) \_\_\_\_\_

### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law  
Estate Administration  
General Overview  
Estate, Gift & Trust Law  
Probate  
Personal Representatives  
Duties & Powers  
General Overview  
Estate, Gift & Trust Law  
Probate  
Procedures in Probate  
General

OverviewEstate, Gift & Trust LawProbateSmall Estates



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F. Independent Administration

*24-65 California Legal Forms--Transaction Guide § 65.421*

**§ 65.421 Independent Administration of Estates Act Not Applicable**

**[1] Comment**

**[a] Use of Form**

This form is a will provision that may be used to provide that the estate is not to be administered under the Independent Administration of Estates Act [*Prob. Code §§ 10400-10592*]. The court may not grant the executor authority to administer the estate under the Act if the will provides that the estate is not to be administered under the Act [*Prob. Code § 10404*]. For a will provision permitting administration under the Act, see § 65.420.

For a general consideration of administration under the Independent Administration of Estates Act, see § 65.45. For a discussion of will provisions granting (or precluding) authority to administer the estate under the Act, see § 65.420[1].

**[2] FORM**

**Independent Administration of Estates Act Not Applicable**

No Independent Administration

My estate shall not be administered under the California Independent Administration of Estates Act, or any successor of that Act.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Estate Administration General Overview Estate, Gift & Trust Law Probate Personal Representatives Duties & Powers General Overview Estate, Gift & Trust Law Probate Procedures in Probate General Overview Estate, Gift & Trust Law Probate Small Estates



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F. Independent Administration

*24-65 California Legal Forms--Transaction Guide §§ 65.422-65.439*

**[Reserved]**

§§ 65.422[Reserved]



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PART IV. FORMS

G. Compensation

*24-65 California Legal Forms--Transaction Guide § 65.440*

### **§ 65.440 Fixed Amount as Compensation**

#### **[1] Comment**

##### **[a] Use of Form**

This form is a will provision stating that the executor will receive a fixed amount as compensation for his or her services. The form includes two alternative provisions. The first may be used if the will nominates only a single executor, and the second if the will nominates coexecutors.

For a provision that the executor will receive reasonable compensation, see § 65.441. For a devise to the executor in lieu of compensation, see § 65.442. For will provisions relating to the compensation of coexecutors, see §§ 65.443-65.444. For a provision stating that an attorney who is nominated as executor will receive compensation both as executor and as attorney, see § 65.445.

##### **[b] Compensation of Executors**

###### **[i] In General**

Executors typically receive statutory compensation for their services [*see Prob. Code § 10800 and § 65.39[1]*]. Except in the case of very large estates [*see Prob. Code § 10800(a)(6)*], the statutory compensation is based on a fixed percentage of the estate accounted for [*Prob. Code § 10800(a); but see Prob. Code § 10801 and § 65.440[1][b][iii]*].

###### **[ii] Will Provisions**

Because statutory compensation is determined by an objective standard, will provisions specifying the executor's compensation are rare. However, the Probate Code explicitly authorizes the testator to provide for the compensation of the executor [*see Prob. Code § 10802(a)*].

When the will provides for the executor's compensation, the compensation provided for in the will will ordinarily be the

executor's full and only compensation [*Prob. Code § 10802(a)*]. However, the executor may petition the court to be relieved from a will provision setting his or her compensation [*Prob. Code § 10802(b)*]; and, if the court determines that it is to the advantage of the estate and in the best interest of the persons interested in the estate, the court may make an order authorizing greater compensation than the will allows [*Prob. Code § 10802(d)*].

### **[iii] Extraordinary Compensation**

If the will specifies the executor's compensation, and if the executor performs extraordinary services in the course of administration, the executor must ordinarily choose between the compensation provided in the will and extraordinary compensation as provided by statute [ *Estate of Runyon (1899) 125 Cal. 195, 196-197, 57 P. 783* ]. This is because it will be presumed, in the absence of evidence of a contrary intention, that the testator intended the amount provided for in the will to be ample compensation for all services to be rendered in the administration of the estate [*see Prob. Code § 10802(a); Estate of Runyon (1899) 125 Cal. 195, 196-197, 57 P. 783* ].

However, the will may authorize the executor to claim extraordinary compensation for extraordinary services. In such a case, the amount specified in the will covers ordinary services only, and the executor may apply to the court for additional compensation for any extraordinary services rendered. If the testator wishes to permit the executor to claim extraordinary compensation, the bracketed word "ordinary" in the first sentence of the form should be included and the bracketed reference to "extraordinary compensation for any extraordinary services" should be included. If, however, the testator wishes to limit the executor to a specified compensation for both ordinary and extraordinary services, the bracketed word and reference should be excluded.

## **[2] FORM**

### **Fixed Amount as Compensation**

***[If will nominates a single executor:]***

Compensation of Executor

For all [ordinary] services rendered as executor of this will, my Executor shall be entitled to receive the sum of \$\_\_\_\_\_, and no more, in lieu of any statutory commissions or compensation to which my Executor might otherwise be entitled. [*Add, if testator wishes executor to receive additional compensation for extraordinary services, However, my Executor shall be entitled to extraordinary compensation for any extraordinary services rendered in the administration of my estate, in an amount to be determined by the court.*]

***[Or, if will nominates coexecutors:]***

Compensation of Coexecutors

For all [ordinary] services rendered as coexecutors of this will, my Coexecutors shall be entitled to receive the sum of \$\_\_\_\_\_, and no more, in lieu of any statutory commissions or compensation to which they might otherwise be entitled. [*Add, if testator wishes coexecutors to receive additional compensation for extraordinary services, However, they shall be entitled to extraordinary compensation for any extraordinary services rendered in the administration of my estate, in an amount to be determined by the court.*] All compensation, whether for ordinary or extraordinary services, shall be apportioned \_\_\_\_\_ [among *or* between] the coexecutors according to the services rendered by each.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law  
Probate  
Personal Representatives  
Compensation  
Estate, Gift & Trust Law  
Wills  
General  
Overview



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G. Compensation

*24-65 California Legal Forms--Transaction Guide § 65.441*

### **§ 65.441 Reasonable Compensation**

#### **[1] Comment**

#### **[a] Use of Form**

This form is a will provision that may be used to provide that the executor will receive reasonable compensation for administering the estate. The form includes two alternative provisions. The first may be used if the will nominates only a single executor, and the second if the will nominates coexecutors.

For a general consideration of the compensation of executors, see § 65.39. For discussion of will provisions relating to executors' compensation, see §§ 65.39[3], 65.440[1].

For a provision that the executor will receive a fixed amount as compensation, see § 65.440. For a devise to the executor in lieu of compensation, see § 65.442. For will provisions relating to the compensation of coexecutors, see §§ 65.443 and 65.444. For a provision that an attorney who is nominated as executor will receive compensation both as executor and as attorney, see § 65.445.

#### **[b] Reasonable Compensation**

A will provision limiting the executor to reasonable compensation will avoid the rigidity of the statutory fee schedules [*see Prob. Code § 10800(a); see also § 65.39[1]*]. An executor who knows that he or she will be adequately compensated regardless of the amount of the estate accounted for may have greater incentive to serve the best interests of the estate. Further, when the statutory compensation is clearly excessive compared to the time and effort that must be devoted to administration, reasonable compensation may result in a savings to the estate.

However, provisions calling for reasonable compensation may be a source of uncertainty and even dispute. If the executor and the other persons interested in the estate cannot agree as to what is reasonable, a contested hearing may result. In any event, a will provision limiting the executor to reasonable compensation will require that the court determine reasonableness. What constitutes reasonable compensation varies according to the circumstances of each

case, and the court has wide discretion to determine the amount [ *Estate of McLaughlin (1954) 43 Cal. 2d 462, 467-468, 274 P.2d 868* (trustees)].

**[2] FORM**

**Reasonable Compensation**

***[If will nominates a single executor:]***

Compensation of Executor

For all [ordinary] services rendered as executor of this will, my Executor shall be entitled to receive reasonable compensation, in an amount to be determined by the court. This compensation shall be in lieu of any statutory commissions or compensation to which my Executor might otherwise be entitled. *[Add, if testator wishes executor to receive additional compensation for extraordinary services,* However, my Executor shall be entitled to extraordinary compensation for any extraordinary services rendered in the administration of my estate, in an amount to be determined by the court.]

***[Or, if will nominates coexecutors:]***

Compensation of Coexecutors

For all [ordinary] services rendered as coexecutors of this will, my Coexecutors shall be entitled to receive reasonable compensation, in an amount to be determined by the court, in lieu of any statutory commissions or compensation to which they might otherwise be entitled. *[Add, if testator wishes coexecutors to receive additional compensation for extraordinary services,* However, they shall be entitled to extraordinary compensation for any extraordinary services rendered in the administration of my estate, in an amount to be determined by the court.] All compensation, whether for ordinary or extraordinary services, shall be apportioned \_\_\_\_\_ [among *or* between] the coexecutors according to the services rendered by each.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law  
 Probate  
 Personal Representatives  
 Compensation  
 Estate, Gift & Trust Law  
 Wills  
 General Overview



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## DIVISION IV: WILLS AND TRUSTS

## CHAPTER 65 EXECUTORS

## PART IV. FORMS

## G. Compensation

*24-65 California Legal Forms--Transaction Guide § 65.442***§ 65.442 Devise in Lieu of Compensation****[1] Comment****[a] Use of Form**

This form is a will provision that may be used to make a devise to the executor in lieu of compensation. The form includes two alternative provisions. The first should be used if the devise is to be conditioned on services rendered in the administration of the estate. If this provision is used, the devise will be subject to income tax in the hands of the executor and deductible to the estate for federal estate tax purposes [see §§ 65.442[1][c][i], [ii]]. The second alternative may be used if the devise is not to be conditioned on services rendered in the administration of the estate. If the second alternative is used, the devise will not be subject to income tax in the hands of the executor, nor will it be deductible to the estate for federal estate tax purposes [see §§ 65.442[1][c][i], [ii]].

For a provision that the executor will receive a fixed amount as compensation, see § 65.440. For a provision that the executor will receive reasonable compensation, see § 65.441. For will provisions relating to the compensation of coexecutors, see §§ 65.443 and 65.444. For a provision that an attorney who is nominated as executor will receive compensation both as executor and as attorney, see § 65.445.

For a general consideration of the compensation of executors, see § 65.39. For discussion of will provisions relating to executors' compensation, see § 65.440[1].

**[b] Devise to Executor**

The will may make a devise to a person nominated as executor. In the absence of evidence of a different intention, it is presumed that a devise to an executor is not conditioned on service as executor [ *United States v. Merriam* (1923) 263 U.S. 179, 187, 44 S. Ct. 69, 68 L. Ed. 240 ; see Restatement (Second) of Trusts, § 242, comment f (devise to trustee); see also Ch. 64B, *Testamentary Trusts: Administrative Provisions*, § 64B.365[1]]. The will may, however, condition the devise on actual rendition of services, or on satisfactory completion of the administration of the estate [see *United States v. Merriam* (1923) 263 U.S. 179, 187, 44 S. Ct. 69, 68 L. Ed. 240 ; *Ream v. Bowers* (2d Cir. [N.Y.] 1927) 22

*F.2d 465, 468* ].

### **[c] Tax Considerations**

#### **[i] Federal Income Tax**

Tax considerations may affect a testator's decision to make a devise to an executor and whether to make the devise conditional on service as executor. A gift, devise, or inheritance is not subject to income tax [*I.R.C. § 102(a)*], whereas compensation received for personal services is taxable [*I.R.C. § 61(a)(1)* (gross income defined)]. If the will conditions a devise on performance of services, the devise will be deemed compensation for personal services and thus subject to income tax [ *Ream v. Bowers* (2d Cir. [N.Y.] 1927) 22 *F.2d 465, 468* ]. If, however, the devise is conditioned merely on qualifying to serve as executor and not on actual rendition of services, the devise is not compensation for personal services and not subject to income tax [ *United States v. Merriam* (1923) 263 *U.S. 179, 187, 44 S. Ct. 69, 68 L. Ed. 240* ]. The test is whether the devisee has to perform the services in order to earn the devisees [Bank of New York v. Helvering (2d Cir. [N.Y.] 1943 132) *F.2d 773, 774*].

#### **[ii] Estate Tax**

Compensation paid to a personal representative is a deduction for federal estate tax purposes [*I.R.C. § 2053(a)(2)* (administration expenses); *Treas. Reg. § 20.2053-3(b)(1)* (commissions of executor or administrator)], while devisees are not [*Treas. Reg. § 20.2053-3(b)(2)*]. If the will fixes the executor's compensation for services to be rendered in the administration of the estate, a federal estate tax deduction may be taken to the extent that the amount fixed does not exceed the compensation allowable by local law or practice [*Treas. Reg. § 20.2053-3(a)(2)*]. A devise to an executor that is conditioned on actual rendition of services therefore will reduce the size of the taxable estate, while an unconditional devise will not. For further discussion of the taxable consequences of devisees to fiduciaries (whether executors or trustees), see Ch. 64B, *Testamentary Trusts: Administrative Provisions* , § 64B.295[1][c].

## **[2] FORM**

### **Devise in Lieu of Compensation**

*[First alternative: use if devise is to be conditioned on services rendered in administration of estate:]*

Devise in Lieu of Compensation

I give \_\_\_\_\_ [*describe gift, e.g., the sum of \$10,000*] to \_\_\_\_\_ [*name of executor as set forth in nomination paragraph*]. This devise is conditioned upon \_\_\_\_\_ [*his or her*] satisfactory completion of the administration of my estate and is in lieu of any compensation to which my Executor would otherwise be entitled as executor of this will.

*[Second alternative: use if devise is to be unconditional:]*

Devise to Executor

I give \_\_\_\_\_ [*describe gift, e.g., the sum of \$10,000*] to \_\_\_\_\_ [*name of executor as set forth in nomination paragraph*]. This devise is unconditional.

### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law  
Probate  
Personal Representatives  
Compensation  
Estate, Gift & Trust Law  
Wills  
General  
Overview  
Estate, Gift & Trust Law  
Wills  
Bequests & Devises



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G. Compensation

*24-65 California Legal Forms--Transaction Guide § 65.443*

**§ 65.443 Trust Company Serving as Coexecutor to Be Compensated as if It Were Sole Executor**

**[1] Comment**

**[a] Use of Form**

This form is a will provision that may be used to provide that a trust company serving as coexecutor will be compensated as if it were the sole executor and that an individual coexecutor will receive no (or merely a nominal) compensation. For a provision dividing compensation between a trust company serving as coexecutor and an individual coexecutor on a fractional basis, see § 65.444. For nomination of coexecutors, see § 65.202. For a direction that a trust company serving as coexecutor have custody of all personal property and maintain all records and accounts for the estate, see § 65.403.

For a general consideration of the compensation of executors, see § 65.39. For discussion of will provisions relating to executors' compensation, see §§ 65.39[3], 65.440[1].

**[b] Apportionment of Compensation Between Coexecutors**

**[i] In General**

When there are coexecutors, the executor's compensation must be apportioned among them [*Prob. Code § 10805; Cal. Rules of Ct., Rule 7.704(a)*]. If the coexecutors cannot agree among themselves how the compensation should be apportioned, the court will apportion it for them [*Prob. Code § 10805; Cal. Rules of Ct., Rule 7.704(a)*]. Apportionment is required for extraordinary compensation as well as statutory compensation [*Prob. Code § 10805; Cal. Rules of Ct., Rule 7.704(a)*]; see *Dobbins v. Title Guar. & Trust Co. (1943) 22 Cal. 2d 64, 67, 136 P.2d 572*].

However, the will may make provisions for the executor's compensation; when it does, the compensation set by the will shall be the "full and only compensation" allowed [*Prob. Code § 10802(a)*]. Although no reported California case has been found sustaining a will clause apportioning compensation among coexecutors, it seems likely that such a provision would be upheld as a will provision setting the "full and only compensation." It should be noted, however, that any will

provision setting compensation may be set aside if an executor petitions the court to be relieved from the provision and if the court determines that it would be to the advantage of the estate and in the best interest of the persons interested in the estate to allow greater compensation [*Prob. Code § 10802(b), (d)*].

### **[c] When One Coexecutor Is Individual and One Is Trust Company**

Problems of apportionment frequently arise when one of the coexecutors is an individual and another is a trust company [*see § 65.36[6]*]. In such a case, the trust company almost invariably has custody of all personal property and maintains all records and accounts for the estate [*see § 65.403[1]*]. Since under those circumstances the trust company can be expected to perform the bulk of the work of administration, it will frequently expect the same compensation that a sole executor would receive. Some trust companies strongly suggest that wills include provisions entitling them to such compensation.

### **[2] FORM**

#### **Trust Company Serving as Coexecutor to Be Compensated as if It Were Sole Executor**

##### **Compensation of Coexecutors**

For its services as coexecutor of this will, \_\_\_\_\_ [*full name of trust company as set forth in nomination paragraph*] shall receive the same compensation that it would receive if acting as sole executor of this will.  
 \_\_\_\_\_ [*Name of individual coexecutor as set forth in nomination paragraph*] shall receive  
 \_\_\_\_\_ [*no compensation or set forth nominal sum, e.g., the sum of \$100*] for \_\_\_\_\_  
 [his or her] services as coexecutor.

##### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law  
 Probate  
 Personal Representatives  
 Compensation  
 Estate, Gift & Trust Law  
 Wills  
 General Overview



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G. Compensation

*24-65 California Legal Forms--Transaction Guide § 65.444*

**§ 65.444 Fractional Division of Compensation Between Trust Company and Individual Coexecutor**

**[1] Comment**

**[a] Use of Form**

This provision that may be used to provide for a fractional division of compensation between a trust company serving as coexecutor and an individual coexecutor. For a provision providing that a trust company serving as coexecutor will be compensated as if it were the sole executor and that an individual coexecutor will receive no compensation, see § 65.443. For a nomination of coexecutors, see § 65.202.

For a general discussion of the compensation of executors, see § 65.39. For discussion of will provisions relating to executors' compensation, see §§ 65.39[3], 65.440[1]. For apportionment of compensation among or between coexecutors, see § 65.443[1].

**[2] FORM**

**Fractional Division of Compensation Between Trust Company and Individual Coexecutor**

**Compensation of Coexecutors**

For its services as coexecutor, \_\_\_\_\_ [*full name of trust company as set forth in nomination paragraph*] shall receive a sum equal to \_\_\_\_\_ [*specify fractional amount, e.g., one half or two thirds*] of the total executor's commission and, for its services as coexecutor, \_\_\_\_\_ [*full name of individual coexecutor as set forth in nomination paragraph*] shall receive the balance.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law  
Overview

Probate  
Personal Representatives  
Compensation

Estate, Gift & Trust Law  
Wills  
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G. Compensation

*24-65 California Legal Forms--Transaction Guide § 65.445*

**§ 65.445 Attorney to Receive Compensation Both as Executor and as Attorney for Executor**

**[1] Comment**

**[a] Use of Form**

This form is a will provision stating that an attorney who serves as executor will receive compensation both as executor and as attorney for the executor. For a nomination of an individual as executor, see § 65.200.

**[b] Attorneys as Executors**

**[i] In General**

An attorney who serves as executor of a will cannot generally claim compensation both as executor and as attorney for the executor [*see Prob. Code § 10804; In re Estate of Parker (1926) 200 Cal. 132, 137, 251 P. 907; see also § 65.39[5]*]. However, a personal representative who is an attorney may receive the personal representative's compensation as well as compensation for services as the attorney for the personal representative if the court specifically approves the right to compensation in advance and finds that the arrangement is to the advantage, benefit, and best interests of the decedent's estate [*Prob. Code § 10804*]. In addition, an executor who is an attorney may properly employ another attorney to act as his or her attorney in matters relating to administration of the estate, but if the representative elects to act as his or her own attorney, the general rule is that he or she is not entitled to double compensation and must forfeit attorneys' fees in the matter unless prior court approval is obtained [*see Prob. Code § 10804; Estate of Thompson (1958) 50 Cal. 2d 613, 614-615, 328 P.2d 1; Estate of Parker (1926) 200 Cal. 132, 135-136, 251 P. 907*]. An attorney may receive compensation for services as personal representative and the attorney's law firm may receive compensation for legal services for the representative on proof that they have agreed that the personal representative will not share in any part of the attorneys' fees [ *Estate of Parker (1926) 200 Cal. 132, 137, 251 P. 907; see § 65.39[5]*].

**[ii] Effect of Will Provision**

The will may expressly authorize an attorney to act in the dual capacities of executor and attorney and to receive compensation in both capacities [ *Estate of Thompson (1958) 50 Cal. 2d 613, 616-617, 328 P.2d 1* ; *Estate of Crouch (1966) 240 Cal. App. 2d 801, 802, 49 Cal. Rptr. 926* ]. However, notwithstanding any provision in the decedent's will, the court must grant prior approval of a dual compensation arrangement and must find that the arrangement is to the advantage, benefit, and best interests of the decedent's estate [*Prob. Code § 10804*]. This statutory requirement appears consistent with earlier case law holding that a dual compensation provision will be upheld on the theory that the testator has expressed special confidence in the attorney and that, in the absence of a statutory provision or compelling policy reason to the contrary, the testator's clear intentions should be given effect [ *Estate of Thompson (1958) 50 Cal. 2d 613, 615-617, 328 P.2d 1* (construing law before enactment of statutory requirement that court must approve dual compensation arrangement)].

### **[iii] Ethical Considerations**

Special ethical problems arise whenever an attorney drafts a will from which he or she will personally profit. If the attorney is to receive compensation that would otherwise go to members of the testator's family, a conflict of interest may arise and an inference of undue influence may be drawn. For a discussion of steps that an attorney must take before drafting any will in which he or she is named as executor, see § 65.200[1][c].

## **[2] FORM**

### **Attorney to Receive Compensation Both as Executor and as Attorney for Executor**

#### **Compensation of Executor and Attorney**

If \_\_\_\_\_ [*full name of attorney as set forth in nomination paragraph*] elects to act both as my Executor and \_\_\_\_\_ [*his or her*] own attorney in the course of administration of my estate, \_\_\_\_\_ [*he or she*] shall be entitled to receive both \_\_\_\_\_ [*his or her*] statutory commissions as executor and \_\_\_\_\_ [*his or her*] commissions as attorney, plus any extraordinary compensation to which \_\_\_\_\_ [*he or she*] may be entitled by law.

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Probate Personal Representatives Compensation Estate, Gift & Trust Law Wills General Overview



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G. Compensation

*24-65 California Legal Forms--Transaction Guide §§ 65.446-65.459*

**[Reserved]**

§§ 65.446[Reserved]



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DIVISION IV: WILLS AND TRUSTS

CHAPTER 65 EXECUTORS

PART IV. FORMS

H. Exculpatory Provisions

*24-65 California Legal Forms--Transaction Guide § 65.460*

**§ 65.460 Provision Relieving Executor of Liability for Acts and Omissions of Agents and Attorneys**

**[1] Comment**

**[a] Use of Form**

This form is a will provision that may be used to relieve an executor of liability for acts or omissions of agents and attorneys employed by the executor in the administration of the estate. For a provision relieving the executor of liability for the executor's own acts or omissions, see § 65.461.

**[b] Liability of Executors**

An executor may incur personal liability in the course of administration of the estate. An executor's personal liability may be based on the executor's own acts or omissions or on the acts or omissions of agents and employees employed by the executor as executor. When an executor is personally liable, the executor may be liable to persons interested in the estate (e.g., to devisees under the will) or to third persons. For a general consideration of the liability of executors, see § 65.43.

**[c] Exculpatory Provisions**

**[i] In General**

The executor's best protection against personal liability is liability insurance. In California, every executor has the power to insure the property of the estate against damage or loss, and to insure himself or herself against liability to third persons [*Prob. Code § 9656; see § 65.42[7]*].

Some executors, however, may wish to have additional protection against personal liability. In most estates, the executor must employ various persons to assist him or her in the administration of the estate. Attorneys, accountants, and financial advisers are frequently employed to perform tasks and to give the executor advice. A prospective executor may reasonably expect to be protected from personal liability for any act or omission of an agent or employee as well as

from any act or omission of the executor that results from good faith reliance on the advice of an attorney, accountant, or financial adviser.

### **[ii] Trustees**

The Trust Law [*Prob. Code §§ 15000-18201*] explicitly sanctions exculpatory provisions in trust instruments. Under the Trust Law, an exculpatory provision in a trust instrument is effective to relieve a trustee of liability for breach of trust [*Prob. Code § 16461(a)*], provided the breach is not committed intentionally, with gross negligence, in bad faith, or with reckless indifference to the interests of the beneficiaries [*Prob. Code § 16461(b)(1)*], and provided further that the trustee does not derive any profit from the breach [*Prob. Code § 16461(b)(2)*]. Since a breach of trust consists of a violation of a duty that the trustee owes to a beneficiary and not to a third party [*Prob. Code § 16400*], it follows that an exculpatory provision in a trust instrument will not be effective to relieve the trustee of any liability the trustee may have to a third party.

No similar statute authorizes exculpatory clauses for the purpose of relieving executors of liability. However, the powers and duties of executors are analogous to those of trustees. For this reason, it may be assumed that the courts will look to the Trust Law for guidance in determining the validity of exculpatory clauses relating to executors. Thus it may be assumed that an exculpatory provision will be effective to relieve an executor of liability to the estate and the devisees under the will, but not to third parties, and that the executor will not be relieved of liability resulting from intentional misconduct, gross negligence, bad faith, or reckless indifference to the interests of the devisees, or from any misconduct from which the executor has derived a profit.

### **[iii] Strictly Construed**

Before enactment of the Trust Law, the courts established the general principal that exculpatory clauses must be construed strictly [ *Estate of Collins (1977) 139 Cal. Rptr. 644* ] and that an exculpatory provision, even if valid, will not be effective to relieve a fiduciary of liability unless the act or omission giving rise to the liability comes squarely within the terms of the exculpatory provision [, *14 P.2d 1028* ].

## **[2] FORM**

### **Provision Relieving Executor of Liability for Acts and Omissions of Agents and Attorneys**

#### Liability of Executor

In the course of administration of my estate, my Executor shall be entitled to rely on information or advice given by any custodian, investment adviser, accountant, attorney, or other agent or adviser employed by my Executor for the purpose of assisting my Executor in the proper management and administration of my estate. My Executor shall not be personally liable for any neglect, omission, or wrongdoing of any agent or adviser so employed, provided that reasonable care was exercised in his or her selection.

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law  
 Probate  
 Personal Representatives  
 General Overview  
 Estate, Gift & Trust Law  
 Probate  
 Personal Representatives  
 Claims By & Against  
 Estate, Gift & Trust Law  
 Probate  
 Personal Representatives  
 Duties & Powers  
 Fiduciary Responsibilities  
 Estate, Gift & Trust Law  
 Wills  
 General Overview



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H. Exculpatory Provisions

*24-65 California Legal Forms--Transaction Guide § 65.461*

**§ 65.461 Provision Relieving Executor of Liability for Own Acts and Omissions**

**[1] Comment**

**[a] Use of Form**

This form is a will provision that may be used to relieve an executor of liability for the executor's own acts and omissions. The form includes two alternative provisions. The first may be used to relieve the executor of liability for any act or omission that is not committed intentionally, with gross negligence, in bad faith, or with reckless indifference to the interests of persons interested in the estate, and from which the executor does not derive a profit. The second alternative may be used to relieve the executor of liability for any act or omission that results from good faith reliance on the opinions of attorneys consulted by the executor. Whereas § 65.460 relieves the executor of imputed or vicarious liability for the acts and omission of agents or advisers (providing reasonable care was used in their selection), the second alternative of this form relieves the executor of liability for his or her own acts or omissions resulting from good faith reliance on advice of attorneys.

For a general discussion of the liability of executors, see §§ 65.43 and 65.460[1]. For a will provision relieving the executor of liability for acts or omissions of agents, see § 65.460.

**[2] FORM**

**Provision Relieving Executor of Liability for Own Acts and Omissions**

Limitation on Liability of Executor

*[First alternative: executor not liable unless act or omission is committed intentionally, with gross negligence, in bad faith, or unless executor derives profit:]*

My Executor shall not be liable to my estate or to any person interested in it for any act or omission of my Executor,

except an act or omission that is committed intentionally, with gross negligence, in bad faith, or with reckless indifference to the interests of persons interested in my estate, or an act or omission from which my Executor derives a profit.

*[Second alternative: executor not liable for act or omission resulting from good faith reliance on advice of attorneys:]*

In the course of the administration of my estate, my Executor shall be entitled to rely on information or advice given by any attorney or attorneys employed by my Executor in connection with the administration.

If reasonable care was used in the selection of those attorneys, their opinions shall be full and complete authorization and protection to my Executor for any acts or acts taken or not taken in reliance on them. My Executor shall not be liable to my estate or to any person interested in it for any act or omission of my Executor that results from good faith reliance on and is in accord with any such opinion(s).

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Probate Personal Representatives General Overview Estate, Gift & Trust Law Probate Personal Representatives Claims By & Against Estate, Gift & Trust Law Probate Personal Representatives Duties & Powers Fiduciary Responsibilities Estate, Gift & Trust Law Wills General Overview



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DIVISION IV: WILLS AND TRUSTS  
CHAPTER 66 GUARDIANSHIPS

*25-66 California Legal Forms--Transaction Guide 66.syn*

**§ 66.syn Synopsis to Chapter 66: GUARDIANSHIPS**

§ 66.01 California Sources

[1] Statutes

[2] California Rules of Court

§§ 66.02-66.04 [Reserved]

§ 66.05 Law Reviews and Periodicals

§ 66.06 Annotations

§ 66.07 Text References

[1] Matthew Bender Sources

[2] Additional Text References

§§ 66.08-66.09 [Reserved]

§ 66.10 Governing Law

§ 66.11 Fiduciary Relationship of Guardian to Ward

§ 66.12 Types of Guardianships

[1] In General

[2] Authorized by Statute

[3] Guardian De Facto

[4] Guardian De Son Tort

[5] Natural Guardian

[6] Guardian Ad Litem

§ 66.13 Nomination of Guardian

[1] For Person or Estate or Both of Minor

[2] For Property of Minor

[3] Time and Effect

§ 66.14 Appointment of Guardian

[1] Requirement of Necessity or Convenience

[2] Applicability of Child Custody Standards to Guardian of Person

[3] Considerations for Guardian of Estate or Property

[4] Unrelated, Nonprofit Charitable Corporation, and Temporary Guardians

[5] Private Professional Guardians

§ 66.15 Powers and Duties

[1] Guardian of Person

[2] Guardian of Estate

[3] Guardian of Property

[4] Annual Status Report

§ 66.16 Compensation

[1] Of Guardian and Attorney

[2] Restrictions on Right to Receive Attorney Fees and Compensation

§ 66.17 Removal or Resignation of Guardian

§ 66.18 Appointment of Successor Guardian

§ 66.19 Termination of Guardianship

[1] Events Terminating Guardianship

[2] Judicial Declaration of Emancipation

[3] Court-Ordered Termination

[4] Final Account

[5] Termination by Juvenile Court in Dependency Proceeding

[6] Visitation Rights of Guardian

§ 66.20 Use of Guardianships

[1] Protective Nature

[2] In Estate Planning

§ 66.21 Vexatious Litigant Determination in Guardianship Proceeding

§ 66.22 Professional Fiduciaries

[1] Professional Fiduciary

[2] Professional Fiduciaries Bureau

[3] Licensing Requirements

[4] Qualifications for Licensure

[5] License Renewal

[6] Initial and Annual Statement

[7] Suspension, Revocation, Denial and Disciplinary Action

§ 66.23 Guardian's Subsequent Adoption of Minor

§§ 66.24-66.99 [Reserved]

§ 66.100 Facts

Scope

§ 66.101 Documents

Scope

§§ 66.103-66.109 [Reserved]

§ 66.110 Determining Type of Guardian to Nominate

Scope

§ 66.111 Selecting Guardian Nominees

Scope

§§ 66.113-66.119 [Reserved]

§ 66.120 Guardianship of Person or Estate or Both of Minor

Scope

§ 66.121 Guardianship for Property of Minor

Scope

§§ 66.122-66.199 [Reserved]

§ 66.200 Nomination of Guardian of Person or Estate or Both of Minor--By Will of Parent

[1] Comment

- [a] Use of Form
- [b] Authorization for Nomination
- [c] Effective Date of Nomination
- [d] Appointment of Guardian In General
- [e] Guardianship of Person
- [f] Role of Child's Preference
- [g] Multiple Guardians or Wards
- [h] Nonprofit Charitable Corporation
- [i] Trust Company as Guardian of Estate
- [j] Powers and Duties of Guardian of Person
- [k] Powers and Duties of Guardian of Estate
- [l] Bond Requirements
- [m] Nomination of Alternative Guardians

[2] Form

Nomination of Guardian of Person or Estate or Both of Minor--By Will of Parent

§ 66.201 Nomination of Guardian of Person or Estate or Both of Minor--By Deed of Parent

[1] Comment

[a] Use of Form

[b] Legal Effect of Deed to Nominate Guardian

[c] Common-Law Requirement of Delivery

[2] Form

Nomination of Guardian of Person or Estate or Both of Minor--By Deed of Parent

§ 66.202 Nomination of Guardian of Person or Estate or Both of Minor--By Signed Writing of Parent

[1] Comment--Use of Form

[2] Form

Nomination of Guardian of Person or Estate or Both of Minor--By Signed Writing of Parent

§ 66.203 Consent of One Parent to Other Parent's Nomination of Guardian for Minor [Prob. Code § 1500]

[1] Comment--Use of Form

[2] Form

Consent of One Parent to Other Parent's Nomination of Guardian for Minor

§§ 66.204-66.209 [Reserved]

§ 66.210 Nomination of Guardian for Particular Property of Minor--By Will of Parent

[1] Comment

[a] Use of Form

[b] Effective Time of Nomination

[c] Appointment of Guardian for Particular Property

[d] Powers and Duties of Guardian

[e] Bond Requirements

[f] Nomination of Successor Guardian

[2] Form

Nomination of Guardian for Particular Property of Minor--By Will of Parent

§ 66.211 Nomination of Guardian for Particular Property of Minor--By Will of Nonparent

[1] Comment

[2] Form

Nomination of Guardian for Particular Property of Minor--By Will of Nonparent

§ 66.212 Nomination of Guardian for Particular Property of Minor--By Signed Writing of Parent or Nonparent

[1] Comment

[2] Form

Nomination of Guardian for Particular Property of Minor--By Signed Writing of Parent or Nonparent

§§ 66.213-66.219 [Reserved]

§ 66.220 Provision Waiving Bond Requirement

[1] Comment

[a] Use of Form

[b] General Bond Requirement

[c] Bond and Undertaking Law

[d] Exemption for Trust Company

[e] Amount of Bond

[f] Bonds For Joint Guardians

[g] Cautionary Note

[2] FORM

Provision Waiving Bond Requirement

§ 66.221 Provision Nominating Alternate or Successor Guardian

[1] Comment--Use of Form

[2] FORM

Provision Nominating Alternate or Successor Guardian

§ 66.222 Provision for Temporary Guardian of Person or Estate

[1] Comment

[a] Use of Form

[b] Temporary Guardianship Statutes

[2] FORM

Provision for Temporary Guardian of Person or Estate

§ 66.223 Provisions for Compensation of Guardian and Payments on Behalf of Ward

[1] Comment

[a] Use of Form

[b] Procedure for Obtaining Compensation

[c] Order for Periodic Payment of Services

[d] Payments for Maintenance, Support, and Education of Ward

[2] FORM

Provisions for Compensation of Guardian and Payments on Behalf of Ward

§ 66.224 Provision Conditioning Nomination on Continued Personal or Business Position

[1] Comment--Use of Form

[2] Form

Provision Conditioning Nomination on Continued Personal or Business Position

§ 66.225 Provision That Particular Individual Has Not Been Nominated as Guardian

[1] Comment--Use of Form

[2] Form

Provision That Particular Individual Has Not Been Nominated as Guardian

§§ 66.226-66.229 [Reserved]

§ 66.230 Provision Explaining Parent's Selection of Nominee

[1] Comment--Use of Form

[2] Form

Provision Explaining Parent's Selection of Nominee

§ 66.231 Provision for Joint Guardians of the Person

[1] Comment

- [a] Use of Form
- [b] Appointment of Joint Guardians
- [c] Authority to Act
- [d] Modification or Limitation of Guardian's Statutory Responsibilities

[2] Form

Provision for Joint Guardians of the Person

§§ 66.232-66.239 [Reserved]

§ 66.240 Will Provision Granting Guardian Specific Powers [Prob. Code § 2108(b)]

[1] Comment

- [a] Use of Form
- [b] Authorization for Provision Granting Right to Exercise Powers
- [c] Enumerated Powers
- [d] Grant of Right to Exercise Powers When Form Is Not Used
- [e] Statement of Terms or Powers in Letters of Guardianship

[2] Form

Will Provision Granting Guardian Specific Powers

§ 66.241 Provision for Joint Guardians of the Estate

[1] Comment

- [a] Use of Form
- [b] Appointment and Authority
- [c] Statutory Basis for Division of Authority
- [d] Liability

[2] Form

Provision for Joint Guardians of the Estate

§ 66.242 Provision for Burial Arrangements for Ward

[1] Comment

[a] Use of Form

[b] Last Illness and Disposition of Remains

[c] Liquidation When Value of Estate Not More Than \$100,000

[2] Form

Provision for Burial Arrangements for Ward



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DIVISION IV: WILLS AND TRUSTS  
CHAPTER 66 GUARDIANSHIPS

*25-66 California Legal Forms--Transaction Guide Scope*

**Scope**

Scope

This chapter covers guardianship planning, with a focus on the nomination of a guardian for a minor. The Legal Background discusses the following:

- Types of guardianships.
- Powers and duties of guardians.
- Removal or resignation of guardians.
- Termination of a guardianship.

The Transaction Guide lists the facts, documents, determinations, and procedures for nominating a guardian. The forms include forms for the nomination of a guardian, consent by a non-nominating parent to a nomination by the other parent, and various alternative provisions that may be included in a nominating instrument.

This chapter does not discuss court appointment or supervision of a guardian except to the extent that those matters affect the nomination of the guardian. For discussion of those matters, see *California Forms of Pleading and Practice*, Ch. 280 et seq. (Matthew Bender).



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PART I. RESEARCH GUIDE

A. Primary Sources

*25-66 California Legal Forms--Transaction Guide § 66.01*

**§ 66.01 California Sources**

**[1] Statutes**

Professional Fiduciaries Act *Bus. & Prof. Code § 6530 et. seq.*

When guardian, conservator, or guardian ad litem must appear in court for minor, incompetent, or conservatee. *Code Civ. Proc. § 372.*

Bond and Undertaking Law. *Code Civ. Proc. § 995.010 et seq.*

Parental entitlement to custody and services of minor. *Fam. Code §§ 3010, 7500.*

Determination of best interests of a child. *Fam. Code § 3011.*

Child custody award order of preference. *Fam. Code § 3040.*

Minor defined. *Fam. Code § 6500.*

Parental lack of control over child's property. *Fam. Code § 7502.*

Trust company as guardian of estate. *Fin. Code §§ 106, 107, 1500 et seq.; Prob. Code §§ 300, 301.*

Procedure for obtaining court order permitting guardian of estate to release power of appointment held by minor donee. *Prob. Code § 662.*

Appointment of guardian ad litem. *Prob. Code § 1003.*

Appeals in proceedings under Probate Code. *Prob. Code § 1300 et seq.*

Appeals with respect to orders in guardianships, conservatorships, and other protective proceedings. *Prob. Code § 1301.*

Effect of appeal. *Prob. Code § 1310.*

Reversal of order appointing fiduciary. *Prob. Code § 1311.*

Guardianship, conservatorship, and other protective proceedings. *Prob. Code § 1400 et seq.*

Authority of person who petitions for appointment as guardian or conservator to seek any power or authority that guardian or conservator could seek. *Prob. Code § 1455.*

General notice requirements. *Prob. Code § 1460 et seq.*

Appointment of legal counsel. *Prob. Code § 1470 et seq.*

Transitional provisions. *Prob. Code § 1488 et seq.*

Nomination of guardian. *Prob. Code § 1500 et seq.*

Appointment of guardian generally. *Prob. Code § 1510 et seq.*

Nonrelative guardianship requirements. *Prob. Code § 1540 et seq.*

Termination of guardianship. *Prob. Code §§ 1600, 1601.*

General provisions regarding appointment of guardians and conservators. *Prob. Code § 2100 et seq.*

Nonprofit charitable corporation as guardian. *Prob. Code § 2104.*

Jurisdiction and venue provisions. *Prob. Code § 2200 et seq.*

Temporary guardians and conservators. *Prob. Code § 2250 et seq.*

Bond, letters of guardianship, and oath of guardian. *Prob. Code § 2300 et seq.*

Powers and duties of guardian of person. *Prob. Code § 2350 et seq.*

Powers and duties of guardian of estate. *Prob. Code § 2400 et seq.*

Inventory and account requirements. *Prob. Code § 2600 et seq.*

Compensation of guardians and attorneys. *Prob. Code § 2640 et seq.*

Removal or resignation of guardians. *Prob. Code § 2650 et seq.*

Appointment of successor guardian. *Prob. Code § 2670.*

Requests for special notice. *Prob. Code § 2700 et seq.*

Transfer of assets out of state. *Prob. Code § 2800 et seq.*

Guardianship estates with less than \$5,000 value. *Prob. Code §§ 3400 et seq., 3412(d).*

Procedures when sole asset of guardianship estate is money. *Prob. Code §§ 3410-3412.*

Procedures when minor has no guardian of estate and there is money belonging to minor. *Prob. Code § 3413.*

Removal of nonresidents' property in state to place of residence of nonresident guardian. *Prob. Code § 3800 et seq.*

California Uniform Transfers to Minors Act. *Prob. Code § 3900 et seq.*

Dissolution or annulment of marriage revokes will provision nominating former spouse as guardian. *Prob. Code § 6122(a)(3).*

Termination of domestic partnership revokes will provision nominating former domestic partner as guardian. *Prob. Code § 6122.1(a)(3).*

## **[2] California Rules of Court**

General probate rules. *Cal. Rules Ct., Rules 7.1 et seq.*

Judicial Council forms required. *Cal. Rules Ct., Rule 7.101.*

Title of account, petition, or other pleading and of proposed order must clearly and completely identify nature of all of relief sought or granted. *Cal. Rules Ct., Rule 7.102.*

Bonding of personal representatives, guardians, conservators, trustees. *Cal. Rules Ct., Rules 7.201 et seq.*

Requirement that inventory and appraisal show sufficiency of bond. *Cal. Rules Ct., Rule 7.501.*

Petitions for order allowing compensation for guardians and their attorneys. *Cal. Rules of Ct., Rule 7.751.*

Order for accounting before or at time petition is filed or heard. *Cal. Rules of Ct., Rule 7.752.*

Contingency fee agreements in guardianships. *Cal. Rules of Ct., Rule 7.753.*

Use of paralegals in performance of legal services for guardian. *Cal. Rules of Ct., Rule 7.754.*

Advance payments prohibited. *Cal. Rules of Ct., Rule 7.755(a).*

Periodic payments on showing of ongoing need for legal services. *Cal. Rules of Ct., Rule 7.755(b).*

Requirement that screening form be submitted with petition for guardianship. *Cal. Rules Ct., Rule 7.1001.*

Requirement that before court issues letters, guardian execute and file acknowledgment of receipt of Duties of Guardian (Judicial Council Form GC-248) *Cal. Rules Ct., Rule 7.1002.*

Confidential guardianship status report form. *Cal Rules of Ct., Rule 7.1003.*

Termination of guardianship. *Cal. Rules of Ct., Rule 7.1004.*

Service of final account or report after guardian's resignation or removal. *Cal. Rules of Ct., Rule 7.1005.*

Service of final account on termination of guardianship. *Cal. Rules of Ct., Rule 7.1006.*

Settlement of accounts and release by former minor. *Cal. Rules of Ct., Rule 7.1007.*

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil Procedure Parties Capacity of Parties Guardians Estate, Gift & Trust Law Conservators & Guardians General Overview Estate, Gift & Trust Law Conservators & Guardians Conservators General Overview Estate, Gift & Trust Law Conservators & Guardians Guardians for Minors Estate, Gift & Trust Law Conservators & Guardians Testamentary Guardians



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PART I. RESEARCH GUIDE

A. Primary Sources

*25-66 California Legal Forms--Transaction Guide §§ 66.02-66.04*

**[Reserved]**

§§ 66.02[Reserved]



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PART I. RESEARCH GUIDE

B. Secondary Sources

*25-66 California Legal Forms--Transaction Guide § 66.05*

**§ 66.05 Law Reviews and Periodicals**

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Haines & Campbell, *Defects, Due Process and Protective Proceedings: Are Our Probate Codes Unconstitutional?* 33 *Real Prop. Prob. & Tr. J.* 215 (1998).

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Schlesinger, *A Guardianship Questionnaire for Clients*, 41 *Prac. Law.* 75 (1995).

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Note, *Stability in Child-Parent Relations: Modifying Guardianship Law*, 33 *Stan. L. Rev.* 905 (1981).

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil Procedure Parties Capacity of Parties Guardians Estate, Gift & Trust Law Conservators & Guardians General  
Overview Estate, Gift & Trust Law Conservators & Guardians Conservators General Overview Estate, Gift & Trust  
Law Conservators & Guardians Guardians for Minors Family Law Guardians General Overview



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**§ 66.06 Annotations**

Annot., Ademption or Revocation of Specific Devise or Bequest by Guardian, Committee, Conservator, or Trustee of Mentally or Physically Incompetent Testator, 84 A.L.R.4th 462 (1991) .

Annot., Necessity or Propriety of Appointment of Independent Guardian for Child Who Is Subject of Paternity Proceedings, 70 A.L.R.4th 1033 (1989) .

Annot., Validity of Inter Vivos Gift by Ward to Guardian or Conservator, 70 A.L.R.4th 499 (1989) .

Annot., Guardian's Authority, Without Seeking Court Approval, to Exercise Ward's Right to Revoke Trust, 53 A.L.R.4th 1297 (1987) .

Annot., Tolling of Statute of Limitations on Account of Minority of Injured Child as Applicable to Parent's or Guardian's Right of Action Arising Out of Same Injury, 49 A.L.R.4th 216 (1986) .

Annot., Validity of Guardianship Proceeding Based on Brainwashing of Subject by Religious, Political, or Social Organization, 44 A.L.R.4th 1207 (1986) .

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Annot., Resignations or Removal of Executor, Administrator, Guardian, or Trustee, Before Final Administration or Before Termination of Trust, as Affecting His Compensation, 96 A.L.R.3d 1102 (1979) .

Annot., Guardian's Position as Joint Tenant of or Successor to Property in Ward's Estate as Raising Conflict of Interest, 69 A.L.R.3d 1171 (1976) .

Annot., Who Is Minor's Next of Kin for Guardianship Purposes, 63 A.L.R.3d 813 (1975) .

Annot., Amount of Attorneys' Compensation in Matters Involving Guardianship and Trusts, 57 A.L.R.3d 550 (1974) .

Annot., Termination of Continuing Guaranty by Appointment of Guardian or Conservator for Guarantor, 55 A.L.R.3d 344 (1974) .

Citizenship of Ward or of Guardian, Conservator, Curator, or Next Friend, as Test of Diversity of Citizenship for Purpose of Jurisdiction of Federal District Court under 28 U.S.C. § 1332, 8 A.L.R. Fed. 550 (1971).

Annot., Guardian's Power to Make Lease for Infant Ward Beyond Minority or Term of Guardianship, 6 A.L.R.3d 570 (1966) .

Annot., Capacity of Guardian to Sue or to Be Sued Outside State Where Appointed, 94 A.L.R.2d 162 (1964) .

Annot., Construction and Effect of Provision for Service of Process Against Minor on a Parent, Guardian or Other Designated Person, 92 A.L.R.2d 1336 (1963) .

Annot., Sufficiency of Delivery of Deed Where Grantor Retains, or Recovers, Physical Possession, 87 A.L.R.2d 787 (1963) .

Annot., Propriety of Service of Process in an In Personam Action on Resident Minor Defendant Whose Only Guardian Is a Nonresident and Cannot Be Served Validly Either Within or Without State, 86 A.L.R.2d 1183 (1962) .

Annot., Appointment of Guardian for Incompetent or for Infant as Affecting Running of Statute of Limitations, 86 A.L.R.2d 965 (1962) .

Annot., Right of Infant to Select His Own Guardian, 85 A.L.R.2d 921 (1962) .

Annot., Guardian's Liability for Interest on Ward's Funds, 72 A.L.R.2d 757 (1960) .

Annot., Function, Power and Discretion of Court Where There is Testamentary Appointment of Guardian of Minor, 67 A.L.R.2d 803 (1959) .

Annot., Power of Court to Confirm Sale of Ward's Property Over Objection of Guardian, 43 A.L.R.2d 1445 (1955) .

Annot., Guardian's Authority to Make Agreement to Drop or Compromise Will Contest or Withdraw Objections to *Probate*, 42 A.L.R.2d 1361 (1955).

Annot., Right of Foreign Personal Representative or Guardian to Vote Stock Owned by Estate or Ward, 41 A.L.R.2d 1082 (1955) .

Annot., What Constitutes Change of Position by Payee-Guardian so as to Preclude Recovery of Payment Made Under Mistake, 40 A.L.R.2d 1011 (1955) .

Annot., Doctrine of Natural Guardianship, 32 A.L.R.2d 863 (1953) .

Annot., Guardian De Facto or De Son Tort of Minor, 25 A.L.R.2d 752 (1952) .

Annot., Consideration and Weight of Religious Affiliations in Appointment or Removal of Guardian for Minor Child,

22 A.L.R.2d 696 (1952) .

Annot., Estoppel of or waiver by parties or participants regarding irregularities or defects in execution or judicial sale, 2 A.L.R.2d 6 (1948) .

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil ProcedurePartiesCapacity of PartiesGuardiansEstate, Gift & Trust LawConservators & GuardiansGeneral  
OverviewEstate, Gift & Trust LawConservators & GuardiansConservatorsGeneral OverviewEstate, Gift & Trust  
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*25-66 California Legal Forms--Transaction Guide § 66.07*

**§ 66.07 Text References**

**[1] Matthew Bender Sources**

California Forms of Pleading and Practice (Matthew Bender).

Ch. 280, *Guardianship and Conservatorship: Appointment of Guardians.*

Ch. 282, *Guardianship and Conservatorship: Temporary Guardians and Conservators.*

Ch. 283, *Guardianship and Conservatorship: Bonds.*

Ch. 284, *Guardianship and Conservatorship: Notice.*

Ch. 285, *Guardianship and Conservatorship: Care of Ward or Conservatee.*

Ch. 286, *Guardianship and Conservatorship: Inventory and Appraisal.*

Ch. 287, *Guardianship and Conservatorship: General Management Powers.*

Ch. 288, *Guardianship and Conservatorship: Independent Exercise of Powers.*

Ch. 290, *Guardianship and Conservatorship: Maintenance of Ward or Conservatee.*

Ch. 290A, *Guardianship and Conservatorship: Asset Management and Investment.*

Ch. 290C, *Guardianship and Conservatorship: Actions and Disputed Claims.*

Ch. 290D, *Guardianship and Conservatorship: Actions Against Guardians, Conservators, and Sureties.*

Ch. 290E, *Guardianship and Conservatorship: Accounts.*

Ch. 290F, *Guardianship and Conservatorship: Compensation of Guardian or Conservator.*

Ch. 290G, *Guardianship and Conservatorship: Removal or Resignation of Guardians and Conservators.*

Ch. 290H, *Guardianship and Conservatorship: Termination of Guardianships and Conservatorships.*

Ch. 291, *Guardianship and Conservatorship: Guardians Ad Litem.*

California Legal Forms (Matthew Bender).

Ch. 61, *Will Drafting and Complete Will Forms*, §§ 61.201, 61.210-61.214.

Ch. 100, *Control, Custody, and Support of Minors*, § 100.202 (notice of change of minor's residence).

Ch. 100A, *Minors' Personal Affairs*, §§ 100A.230 (receipt for funds if guardianship estate is less than \$5,000), 100A.240 (release of minor's tort claim against third person).

Ch. 100B, *Minors' Contracts & Employment*, §§ 100B.230 (release of minor's disputed contract claim against third

person), 100B.250 (notice of guardian's claim on wages of minor).

California Wills & Trusts, Ch. 37, *Nomination of Guardians for Minor Children* (Matthew Bender).

California Wills & Trusts Forms, § 80 et seq., *Guardian* (Matthew Bender).

California Probate Practice (Matthew Bender).

Ch. 1, *Client Interview and Preliminary Assistance*, § 1.15 (custody of minor children).

Ch. 3, *General Procedure in Probate Proceedings*, §§ 3.10, 3.11 (appointment of guardian ad litem).

Ch. 4, *Transfer of Property Without Administrations*, §§ 4.30 et seq. (collection of small estate without administration); 4.40 et seq. (passing property to spouse without administration).

Ch. 25, *Distribution and Discharge*, § 25.11 (distribution of estate to minor).

### [2] Additional Text References

Witkin, Summary of California Law, vol. 10, *Parent and Child*, §§ 510-518, 729-973; vol. 14, *Wills and Probate*, §§ 903-930, 960-1053 (10th ed. 2005).

### Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Parties Capacity of Parties Guardians Estate, Gift & Trust Law Conservators & Guardians General Overview Estate, Gift & Trust Law Conservators & Guardians Conservators General Overview Estate, Gift & Trust Law Conservators & Guardians Guardians for Minors Family Law Guardians General Overview



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*25-66 California Legal Forms--Transaction Guide §§ 66.08-66.09*

**[Reserved]**

§§ 66.08[Reserved]



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**§ 66.10 Governing Law**

Except as otherwise expressly provided by statute, guardianships in California are covered by Divisions 3 and 4 of the *Probate Code* [*Prob. Code § 2100*; see *Prob. Code § 1000 et seq.* (Division 3, covering general provisions of procedural nature); see also *Prob. Code § 1400 et seq.* (Division 4, covering guardianship, conservatorship, and other protective proceedings)]. If no specific provision of Division 4 is applicable, provisions of the *Probate Code* applicable to the administration of decedents' estates govern insofar as they apply to like situations [*Prob. Code § 2100*]. Most of the provisions of Divisions 3 and 4 apply both to guardianships and conservatorships, although a few apply only to one or the other type of proceeding.

The statutes governing guardianships were substantially revised effective January 1, 1981 [see *Stats. 1979, ch. 726*]. Generally, guardianships and nominations of guardians in existence before January 1, 1981, continue in existence and are governed by the provisions of Division 4 [see *Prob. Code § 1488 et seq.* (transitional provisions)].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil Procedure Parties Capacity of Parties Guardians Estate, Gift & Trust Law Conservators & Guardians General Overview Estate, Gift & Trust Law Conservators & Guardians Conservators General Overview Estate, Gift & Trust Law Conservators & Guardians Guardians for Minors Family Law Guardians General Overview



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**§ 66.11 Fiduciary Relationship of Guardian to Ward**

The relationship between a guardian and a ward is a fiduciary relationship that is governed by the law of trusts, except as provided in *Probate Code Sections 1400 et seq.* [*Prob. Code § 2101*; see *Prob. Code § 15000 et seq.* (Trust Law)]; see also Ch. 64, *Testamentary Trusts: Payment and Distribution Provisions*, § 64.30[1]. A guardian is subject to the regulation and control of the court in the performance of his or her duties [*Prob. Code § 2102*]. Guardians exercise a trust demanding the highest degree of good faith and confidence, and the law is scrupulously careful in protecting the interests of wards [ *Clark v. State Bar (1952) 39 Cal. 2d 161, 166, 246 P.2d 1*; *Guardianship of Carlton (1941) 43 Cal. App. 2d 204, 208, 110 P.2d 488*].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Conservators & Guardians General Overview Family Law Guardians General Overview



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*25-66 California Legal Forms--Transaction Guide § 66.12*

**§ 66.12 Types of Guardianships**

**[1] In General**

The guardianship statutes provide for three types of guardians of minors, which are covered in detail in this chapter [*see Prob. Code §§ 1500, 1501* (nomination of guardian), 1510 et seq. (appointment of guardian), 2350 et seq. (powers of guardian of the person), 2400 et seq. (powers of guardian of the estate); *see also discussion under §§ 66.13- 66.15, below* ]:

- Guardians of the person.
- Guardians of the estate.
- Guardians of the person and estate.

Three types of guardians are not authorized by statute, but are recognized as existing outside of the appointment procedure:

- Guardians de facto [*see discussion under [3], below*].
- Guardians de son tort [*see discussion under [4], below*].
- Natural guardians [*see discussion under [5], below*].

These types of guardianships are briefly described below but are not otherwise covered in this chapter.

**[2] Authorized by Statute**

The guardianship statutes authorize three types of guardianships for minors. Minors are all persons under the age of 18 [*Fam. Code § 6500*]:

- A guardian may be appointed for the person of a minor [*Prob. Code § 1514*].
- A guardian may be appointed for the estate of a minor [*Prob. Code § 1514*]. A combined guardian of the person and estate of a minor is also possible [*Prob. Code § 1514*].
- A guardian may be appointed for property that a minor has or will receive, or is receiving, from or by designation of a nominator [*Prob. Code § 1501*].

The guardianship statutes specifically do not apply to minors who are married or whose marriage has been dissolved [*Prob. Code § 1515*]. They do apply, however, to a minor whose marriage has been adjudged a nullity [*Prob. Code § 1515*].

### **[3] Guardian De Facto**

A guardian de facto is one who acts with bona fides as a guardian of the person or estate, often before actual appointment as guardian, in taking care of the ward or the ward's estate. If the court recognizes the person as a guardian de facto, he or she is subject to all the duties and liabilities of a guardian [ *Guardianship of Giambastiani (1934) 1 Cal. App. 2d 639, 645, 37 P.2d 142* ], and is entitled to an allowance for proper disbursements for the benefit of the ward or the ward's estate [ *Guardianship of Jacobson (1947) 30 Cal. 2d 312, 320, 182 P.2d 537* (benefit of estate); *Guardianship of Giambastiani (1934) 1 Cal. App. 2d 639, 645, 37 P.2d 142* (benefit of ward)].

### **[4] Guardian De Son Tort**

A guardian de son tort is one who wrongfully meddles with or assumes authority over the property of a minor. The guardian de son tort acquires none of the rights of a guardian, but must render an account as if he or she were an appointed guardian [ *Aldrich v. Willis (1880) 55 Cal. 81, 85* ], and may be required to give specific relief with respect to the particular fund or property over which authority was assumed [ *Stull v. Benedict (1909) 10 Cal. App. 619, 622, 102 P. 961* ].

### **[5] Natural Guardian**

The term "natural guardian" refers to the parents of a minor. Parents are entitled to the custody, services, and earnings of an unemancipated minor child, and if either parent is dead, unable or refuses to take custody, or abandons the child, the other parent is entitled to the custody, services, and earnings of the minor [*Fam. Code §§ 3010, 7500*]. However, the parent, as such, has no control over the child's property [*Fam. Code § 7502*]. The distinction between a parent's control over the person of a minor as against the property of the minor has led to the proposition that natural guardianships, also known as guardianship by nature, extend only to the custody of the person and not to the estate of the ward [see *Kendall v. Miller (1858) 9 Cal. 591, 592* ; see also *Fam. Code § 7502* (parent as such has no control over property of child)].

### **[6] Guardian Ad Litem**

A guardian ad litem is a guardian appointed for the special purpose of representing a minor or incompetent person in a judicial proceeding [see *Code Civ. Proc. § 372(a)*]. The guardian or conservator of the estate or the guardian ad litem appearing for a minor, incompetent person, or person for whom a conservator has been appointed has power, with the approval of the court in which the action or proceeding is pending, to do any of the following [*Code Civ. Proc. § 372(a)*; *County of Los Angeles v. Superior Court (2001) 91 Cal. App. 4th 1303, 1311, 111 Cal. Rptr. 2d 471* (guardian ad litem is officer and agent of appointing court, whose duty it is to protect minor's rights)]:

- Compromise the action.

- Agree to the order or judgment to be entered for or against the ward or conservatee.
- Satisfy any judgment or order in favor of the ward or conservatee or release or discharge any claim of the ward or conservatee pursuant to a compromise.

If a guardian ad litem is needed in any proceeding, the judge in that proceeding has power to appoint the guardian ad litem [*Code Civ. Proc.* § 372(a)]. When a person who has need of a guardian ad litem has previously nominated a guardian or conservator (as in the case of a nomination by an adult prior to the time the adult became incompetent), the person so nominated is presumptively entitled to appointment as guardian ad litem if and when the appointment becomes necessary [ *In re Marriage of Caballero (1994) 27 Cal. App. 4th 1139, 1151-1152, 33 Cal. Rptr. 2d 46* ; see *Prob. Code* §§ 1810 (nomination of conservator by proposed conservatee), 4126(b) (effect of nomination of guardian or conservator)].

In an action prosecuted by a guardian ad litem, the minor is the real party; judgment may not be rendered for or against the guardian, but only for or against the minor [ *First Security Bank of Cal. v. Paquet (2002) 98 Cal. App. 4th 468, 475, 119 Cal. Rptr. 2d 787* ] .

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawConservators & GuardiansGeneral OverviewEstate, Gift & Trust LawConservators & GuardiansConservatorsGeneral OverviewEstate, Gift & Trust LawConservators & GuardiansGuardians for MinorsFamily LawGuardiansGeneral Overview



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*25-66 California Legal Forms--Transaction Guide § 66.13*

**§ 66.13 Nomination of Guardian**

**[1] For Person or Estate or Both of Minor**

A parent may nominate a guardian of the person or estate or both of a minor child in either of the following cases [*Prob. Code § 1500*]:

- The other parent nominates or consents in writing to the nomination of the same guardian for the same child.
- At the time the petition for appointment of the guardian is filed, either the other parent is dead or lacks legal capacity to consent to the nomination, or the consent of the other parent would not be required for an adoption of the child.

A guardian of the person cannot be appointed for a minor who is married or whose marriage has been dissolved, unless the marriage is adjudged a nullity [*Prob. Code § 1515*; *Guardianship of Melissa W.* (2002) 96 Cal. App. 4th 1293, 1300, 118 Cal. Rptr. 2d 42]. However, a conservator of the person may be appointed for a minor who is married or whose marriage has been dissolved, if the need for a conservator is established to the court's satisfaction [*Prob. Code § 1800.3(a)(2)*; *see § 66A.12[1]*].

**[2] For Property of Minor**

A parent or any other person may nominate a guardian for property that a minor receives from or by designation of the nominator including, but not limited to, property received by the minor by gift, deed, trust, will, succession, insurance, or benefits of any kind [*Prob. Code § 1501*]. The property may have been received before, at the time of, or after the nomination [*Prob. Code § 1501*].

**[3] Time and Effect**

A nomination may be made in the petition for appointment of the guardian or at the hearing on the petition [*Prob. Code § 1502(a)*]. The nomination may also be made in a writing signed before or after the petition for appointment is filed [

*Prob. Code § 1502(a)*].

The nomination is effective when made, except that a writing nominating a guardian may provide that the nomination will become effective only on the occurrence of conditions specified in the writing, including such conditions as the subsequent legal incapacity or death of the person making the nomination [*Prob. Code § 1502(b)*].

Unless the nomination expressly provides otherwise, it remains effective notwithstanding the subsequent legal incapacity or death of the person making the nomination [*Prob. Code § 1502(c)*].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawConservators & GuardiansGeneral OverviewEstate, Gift & Trust LawConservators & GuardiansConservatorsAppointmentEstate, Gift & Trust LawConservators & GuardiansGuardians for MinorsEstate, Gift & Trust LawConservators & GuardiansTestamentary GuardiansFamily LawGuardiansAppointment



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*25-66 California Legal Forms--Transaction Guide § 66.14*

**§ 66.14 Appointment of Guardian**

**[1] Requirement of Necessity or Convenience**

If it appears necessary or convenient, the court may appoint a guardian of the person, a guardian of the estate, or a guardian of both the person and estate [*Prob. Code § 1514(a)*]. However, the requirement of necessity or convenience is applied differently in a proceeding for appointment of a guardian of the estate than in a proceeding for appointment of a guardian of the person. Since a parent, as such, has no control over the child's property [*Fam. Code § 7502*], the fact that a minor owns property ordinarily is sufficient to support a finding that appointment of a guardian of the estate is necessary or convenient [ *Guardianship of Kentera (1953) 41 Cal. 2d 639, 643, 262 P.2d 317* ]. Appointment of a guardian of the person of a minor, on the other hand, occurs most frequently when both parents of the child are dead [*see Guardianship of Hall (1962) 200 Cal. App. 2d 508, 19 Cal. Rptr. 426* ]. In other situations, the courts generally will defer to alternative proceedings, such as an adoption or a grant of custody in a dissolution proceeding. For discussion of adoption see Kirkland, Lurvey, Richmond and Wagner, *California Family Law*, 2nd Ed., Ch. 170 et seq. (Matthew Bender); for discussion of child custody, see Kirkland, Lurvey, Richmond and Wagner, *California Family Law*, 2nd Ed., Ch. 33, *Custody and Visitation Orders* (Matthew Bender).

**[2] Applicability of Child Custody Standards to Guardian of Person**

When the court appoints a guardian of the person of a minor, it must be guided by the Family Code provisions relating to custody of a minor [*Prob. Code § 1514(b)*; *see Fam. Code § 3020 et seq.*]. Under those provisions, the court must determine custody according to the best interests of the child [*Fam. Code § 3040(a)*]. In considering the best interests of the child, the court must consider, among any other factors it finds relevant, all of the following [*Fam. Code § 3011*; *see Fam. Code § 6203* ("abuse" defined), *Pen. Code § 11165.6* ("child abuse" defined)]:

- The health, safety, and welfare of the child.
- Any history of abuse by one parent or any other person seeking custody against any of the following [*Fam. Code § 3011(b)*]. "Abuse against a child" means "child abuse" as defined in *Pen. Code § 11165.6* and abuse against any of the other persons described below means "abuse" as defined in *Fam. Code § 6203*:

- Any child to whom the person is related by blood or affinity or with whom he or she has had a caretaking relationship, no matter how temporary.
- The other parent.
- A parent, current spouse, or cohabitant, of the parent or person seeking custody, or a person with whom the parent or person seeking custody has a dating or engagement relationship.

As a prerequisite to considering allegations of abuse, the court may require substantial independent corroboration, including, but not limited to, written reports by any of the following:

- Law enforcement agencies.
  - Child protective services or other social welfare agencies.
  - Courts.
  - Medical facilities.
  - Other public agencies or private nonprofit organizations providing services to victims of sexual assault or domestic violence.
- The nature and amount of contact with both parents.
  - The habitual or continual illegal use of controlled substances or habitual or continual abuse of alcohol by either parent. "Controlled substances" has the same meaning as defined in the California Uniform Controlled Substances Act [*see Health & Safety Code § 11000 et seq.*]. Before considering these allegations, the court may first require independent corroboration, including, but not limited to, written reports by any of the following:
    - Law enforcement agencies.
    - Courts.
    - Probation departments.
    - Social welfare agencies.
    - Medical facilities.
    - Rehabilitation facilities.
    - Other public agencies or nonprofit organizations providing drug and alcohol abuse services.

If the child is of sufficient age and capacity to form an intelligent preference as to custody, the court must consider and give due weight to the child's wishes [*Fam. Code § 3042(a)*].

*Fam. Code § 3040* sets forth an order of preference that should be followed in awarding custody. Subject to the general rule that the best interests of the child are controlling, preference should first be given to both parents jointly, or to either parent [*Fam. Code § 3040(a)(1)*; see *Fam. Code §§ 3040(b)* (no preference for or against joint custody or sole custody), 3080 et seq. (joint custody of minor child)]. In ordering custody to either parent, the court must consider, among other factors and subject to the best interest of the child, which parent is more likely to allow the child frequent and continuing contact with the noncustodial parent. The court must not prefer a parent as custodian because of that parent's sex [*Fam. Code § 3040(a)(1)*; see *Fam. Code §§ 3011, 3020*]. If neither parent is awarded custody, the court should award custody to any person or persons in whose home the child has been living in a wholesome and stable environment [*Fam. Code § 3040(a)(2)*]. If there is no such person, then custody may be awarded to any other person or persons deemed by the court to be suitable and able to provide adequate and proper care and guidance for the child [*Fam. Code § 3040(a)(3)*]. Before a court may make any order awarding custody to someone other than a parent over a parent's objection, it must make a finding that an award to a parent would be detrimental to the child and that award to a nonparent is required to serve the best interests of the child [*Fam. Code § 3041(a)*]. If a court finds that granting custody to a parent would be detrimental and granting custody to a nonparent would be in the child's best interests, the court may grant custody to the nonparent without further balancing the parent's constitutionally protected interest in an opportunity to form a relationship with the child [ *Adoption of Daniele G. (2001) 87 Cal. App. 4th 1392, 1408, 105 Cal. Rptr. 2d 341* ].

"Detriment to the child" includes the harm of removal from a stable placement of a child with a person who has assumed, on a day-to-day basis, the role of the child's parent, fulfilling both the child's physical needs and the child's psychological needs for care and affection, and who has assumed that role for a substantial period of time [*Fam. Code § 3041(c)*]. A finding that parental custody would be detrimental to the child must ordinarily be supported by clear and convincing evidence [*Fam. Code § 3041(b)*]. However, if the court finds by a preponderance of the evidence that the person to whom custody may be given is a person described in *Fam. Code § 3041(c)*, this finding is deemed a finding that the custody is in the child's best interest and that parental custody would be detrimental to the child absent a showing by a preponderance of the evidence to the contrary [*Fam. Code § 3041(d)*].

When the child is an Indian child, before making an order granting custody to a person or persons other than a parent over the objection of a parent, the court is required to apply special evidentiary standards, and placement preferences and standards, specified in the federal Indian Child Welfare Act [see 25 U.S.C. §§ 1912 (d), (e), (f) (evidentiary standards), 1922 (placement)] and California law [*Fam. Code § 3041(e)*; see *Welf. & Inst. Code §§ 224.6, 361.7* (evidentiary standards), 361.31 (placement)].

### **[3] Considerations for Guardian of Estate or Property**

The court must appoint a person nominated as guardian of the estate by a parent [see *Prob. Code § 1500*; see also *Prob. Code § 1502*], or by the owner of property governed by the nomination [see *Prob. Code § 1501*], unless the court determines that the nominee is unsuitable [*Prob. Code § 1514(c), (d)*; see *Prob. Code §§ 1500, 1501* (nomination of guardians)]. In determining the suitability of a nominee, the court must be guided by what appears to be in the best interest of the proposed ward [*Prob. Code § 1514(e)(1)*]. The proposed guardian's ability to manage and preserve the estate and his or her concern for and interest in the welfare of the proposed ward are to be taken into account [*Prob. Code § 1514(e)(1)*].

If the proposed ward is of sufficient age to form an intelligent preference as to the person to be appointed guardian, the court must give consideration to that preference in making the appointment [*Prob. Code § 1514(e)(2)*].

### **[4] Unrelated, Nonprofit Charitable Corporation, and Temporary Guardians**

Special requirements apply when a proposed guardian of the person (or of the person and estate) is unrelated to the proposed ward [*Prob. Code § 1540(a), (b)*; see *Prob. Code § 1540 et seq.*]. Public guardians and certain officials of

public welfare agencies are exempt from these requirements [*see Prob. Code § 1540(c)-(f)*; *see also Health & Safety Code § 416 et seq.*]. The special requirements include submission of additional material in the petition for appointment of a guardian [*see Prob. Code § 1541*] and the filing of an investigative report with respect to the suitability of the proposed guardian [*see Prob. Code § 1543*].

Appointment of a nonprofit charitable corporation as guardian of the person or estate or both is governed by *Prob. Code § 2104*. *Prob. Code § 2104* also governs the compensation allowed the corporation as guardian.

Special provisions govern the appointment and performance of a temporary guardian [*see Prob. Code § 2250 et seq.*]. The petition for a temporary guardian may be filed on or after filing for appointment of a guardian [*Prob. Code § 2250(a)(1)*].

### **[5] Private Professional Guardians**

If a guardian acts as a guardian for two or more persons at the same time who are not related to the guardian or to each other by blood, adoption, marriage, or registered domestic partner, and if the guardian is not a bank, trust company, broker-dealer, or public officer or agency, the guardian is a "professional fiduciary" and is subject to licensure under the Professional Fiduciaries Act [*Bus. & Prof. Code 6501 (f)*, *Prob. Code § 60.1(b)*, *see Bus. & Prof. Code § 6500 et seq* ("Professional Fiduciaries Act")]. To be licensed as a professional fiduciary, an applicant must meet the qualifications, including, but not limited to, being at least 21 years of age and meeting specified education requirements, as provided in *Bus. & Prof. Code § 6533* [*Bus. & Prof. Code § 6533(a)-(k)*]. For a detailed discussion on the Professional Fiduciaries Act, and the licensing requirements of professional fiduciaries, *see § 66.22*.

### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law  
 Conservators & Guardians  
 General Overview  
 Estate, Gift & Trust Law  
 Conservators & Guardians  
 Conservators Appointment  
 Estate, Gift & Trust Law  
 Conservators & Guardians  
 Guardians for Minors  
 Family Law  
 Guardians Appointment



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*25-66 California Legal Forms--Transaction Guide § 66.15*

**§ 66.15 Powers and Duties**

**[1] Guardian of Person**

The general powers and duties of guardians of the person are set forth in *Prob. Code § 2350 et seq.* A guardian of the person is responsible for the care, custody, control, and education of the ward [*Prob. Code § 2351(a)*]. In exercising his or her duties, however, a guardian may not hire or refer business to an entity in which he or she has a financial interest, as defined, except with court authorization after written disclosure of the interest to the court [*Prob. Code § 2351(d)*].

The guardian may fix the ward's residence, although court permission is required if the place is not inside California [*Prob. Code § 2352(a)*]. Guardians generally have the same right as parents to consent to medical treatment for their wards and to require the wards to receive treatment [*Prob. Code § 2353(a)*; see *Prob. Code § 2357* (medical treatment for existing or continuing condition); see also *Prob. Code § 2353(b)* (limitations on surgery when ward is 14 or older)]. They also have authority to institute proceedings for placing their wards in mental health facilities [*Prob. Code § 2356(a)*; see *Welf. & Inst. Code § 6000(b)* (requirements for minor's admission to state mental hospital)].

A guardian nominated by will and appointed by the court must be granted the same authority as a parent having legal custody, except as limited by the will or by the court for good cause [*Prob. Code § 2108(a)*]. The guardian may exercise the authority without notice, hearing, court authorization, instructions, approval, or confirmation, in the same manner as if the authority were exercised by a parent having legal custody of a child [*Prob. Code § 2108(a)*].

Except as otherwise limited by court order, a guardian of the person of a nonresident ward has the same powers and duties as a guardian of a resident ward while the nonresident is in California [*Prob. Code § 2107(a)*].

**[2] Guardian of Estate**

The general powers and duties of guardians of the estate are set forth in *Prob. Code § 2400 et seq.* A guardian of the estate has the management and control of the ward's estate and, in managing that estate, is required to use ordinary care and diligence [*Prob. Code § 2401(a)*]. What constitutes ordinary care and diligence is determined by all the circumstances of the particular estate [*Prob. Code § 2401(a)*]. A guardian of the estate is required to exercise a power to the extent that ordinary care and diligence require that the power be exercised [*Prob. Code § 2401(b)(1)*] and is

forbidden to exercise it to the extent that ordinary care and diligence require that it not be exercised [*Prob. Code* § 2401(b)(2)]. In exercising his or her duties, however, a guardian may not hire or refer business to an entity in which he or she has a financial interest, as defined, except with court authorization after written disclosure of the interest to the court [*Prob. Code* § 2401(c)].

The Probate Code contains detailed rules prescribing the powers and duties of guardians of the estate with respect to such matters as the following:

- The ward's support and maintenance [*see Prob. Code* § 2420 *et seq.*].
- Payment of debts and expenses [*see Prob. Code* §§ 2430, 2431].
- Estate management [*see Prob. Code* § 2450 *et seq.*].
- Compromise of claims and actions [*see Prob. Code* § 2500 *et seq.*].
- Transfers of property [*see Prob. Code* §§ 850-859].
- Sales [*see Prob. Code* § 2540 *et seq.*].
- Notes, mortgages, leases, conveyances, and exchanges [*see Prob. Code* § 2550 *et seq.*].
- Investments and purchase of property [*see Prob. Code* § 2570 *et seq.*].

The Probate Code also sets forth rules under which the court, in its discretion, may grant the guardian certain "powers" [*see Prob. Code* § 2590 *et seq.*]. The court may, in its discretion, make an order granting the guardian any one or more or all of the powers specified in *Prob. Code* § 2591 if the court determines that, under the circumstances, it would be to the advantage, benefit, and best interest of the estate to do so [*Prob. Code* § 2590(a)]. The guardian may exercise the powers granted without notice, hearing or court authorization, subject only to the limitations as expressly provided in the order granting the powers [*Prob. Code* § 2590(a)]. A guardian does not have any powers as provided by *Prob. Code* § 2591 without authorization by a court [*Prob. Code* § 2590(b)]. If a guardian of the estate is nominated under *Prob. Code* § 1500 or *Prob. Code* § 1501 and appointed by the court, he or she must, to the extent provided in the nomination, be granted the right to exercise any one or more powers, provided in *Prob. Code* § 2591 except that for a guardian nominated under *Prob. Code* § 1501, the additional authority is limited to the property covered by the nomination [*Prob. Code* § 2108(b)].

Within 90 days after appointment (or later, if the court allows further time), a guardian of the estate must file an inventory and appraisal of the estate with the clerk of the court [*Prob. Code* § 2610(a)]. The inventory and appraisal must be made as of the date of the guardian's appointment [*Prob. Code* § 2610(a)]. The guardian must file an account one year after appointment and, unless otherwise ordered by the court, further accounts every two years thereafter [*Prob. Code* § 2620(a); *see Prob. Code* § 2620(c)-(e) (accounting requirements)].

A guardian may be appointed for the estate of a nonresident ward. In that case, the guardian has the same powers and duties as a guardian of the estate of a resident ward, except that the guardian's powers extend only to the ward's property within California [*Prob. Code* § 2107(b)]. The responsibility of a guardian of the estate of a nonresident ward with regard to inventory, accounting, and disposal of the estate is limited to property that comes into the guardian's hands in California [*Prob. Code* § 2107(b)].

### **[3] Guardian of Property**

A guardian may be appointed for particular property [*see Prob. Code § 1514(d)*] (appointment of guardian nominated under *Prob. Code § 1501*); *see also Prob. Code § 1501* (nomination of guardian for property minor received from or by designation of nominator)]. A guardian appointed for particular property has the same powers and duties as a guardian of the estate, except that the powers and duties extend only to the particular property [*Prob. Code § 2109(a)*]. The responsibility of a guardian of particular property with regard to inventory, accounting, and disposal of the estate is limited to the property covered by the appointment [*Prob. Code § 2109(a)*].

If both a guardian of the estate and a guardian of particular property have been appointed, the guardian appointed for particular property manages and controls that property, and the guardian of the estate manages and controls the balance of the ward's estate [*Prob. Code § 2109(b)(1)*]. In that case, either guardian may petition the court for instructions concerning how their duties are to be allocated [*Prob. Code § 2109(b)(2)*]; *see Prob. Code § 2403* (petition for instruction or confirmation of acts)].

#### **[4] Annual Status Report**

To the extent resources are available, courts must implement procedures to ensure that every guardian completes and returns to the court an annual status report [*Prob. Code § 1513.2(a)*]; *see* Judicial Council Form GC-251, Confidential Guardianship Status Report]. The report must include information about the status of the guardianship, including the guardian's present address, the name and birth date of the child under guardianship, the name of the school in which the child is enrolled, and information about the person with whom the child is residing if the child is not in the guardian's home and why the child was moved [*Prob. Code § 1513.2(b)*]. It is a misdemeanor for a guardian to submit willfully any material information required by the form that the guardian knows to be false [*Prob. Code § 1513.2(a)*].

A guardian must file the completed and signed report no later than one month after the anniversary date of the order appointing him or her as guardian. Co-guardians may sign and file reports jointly [*Cal. Rules of Ct., Rule 7.1003(a)*].

At least one month before the date the guardian is required to return the status report, the clerk of the court must mail to the guardian a notice informing the guardian that he or she is required to complete and return the report to the court [*Prob. Code § 1513.2(a)*]. The clerk must enclose a blank status report form for the guardian to complete and return by mail for each child under guardianship in the same case [*Prob. Code § 1513.2(a)*]; *Cal. Rules of Ct., Rule 7.1003(b)* (clerk must fill in due date for report)]. If the guardian does not complete and return the status report, or if the court finds after the guardian has returned the report that further information is needed, the court must attempt to obtain this information from the guardian or other sources [*Prob. Code § 1513.2(a)*]. If the court is unable to obtain this information within 30 days after the date the status report is due, the court must either order the guardian to make himself or herself available to the court's investigator for purposes of investigation of the guardianship or to show cause why the guardian should not be removed [*Prob. Code § 1513.2(a)*].

The status report is confidential and may only be made available to persons who have been served in the proceedings or their attorneys [*Prob. Code § 1513.2(c)*].

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law  
 Conservators & Guardians  
 General Overview  
 Estate, Gift & Trust Law  
 Conservators & Guardians  
 Conservators  
 Duties & Rights  
 Estate, Gift & Trust Law  
 Conservators & Guardians  
 Guardians for Minors  
 Family Law  
 Guardians  
 Duties & Rights



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*25-66 California Legal Forms--Transaction Guide § 66.16*

**§ 66.16 Compensation**

**[1] Of Guardian and Attorney**

At any time after the filing of the inventory and appraisal, but not earlier than 90 days after letters are issued, or after any other period of time that the court for good cause orders, a guardian may petition the court for an order fixing and allowing compensation to the guardian and the attorney for the guardian [*Prob. Code §§ 2640(a), 2641(a); Cal. Rules of Ct., Rule 7.751*]. After holding a hearing, the court must allow just and reasonable compensation, which will become a charge against the estate [*Prob. Code §§ 2640(c), 2641(b)*].

**[2] Restrictions on Right to Receive Attorney Fees and Compensation**

Special rules restrict the right of an attorney to receive attorneys' fees from the estate if the attorney is also the guardian [*see Prob. Code § 2645*]. An attorney who is also the guardian may not receive any compensation from the estate for services performed for the guardian unless the court specifically approves the right to the compensation and finds that it is to the advantage, benefit, and best interests of the ward [*Prob. Code § 2645(a)*]. Similar rules restrict the right of relatives, partners, shareholders, or employees of the guardian to receive compensation from the estate. No parent, child, siblings, or spouse of a person who is guardian, and no law partnership or corporation whose partner, shareholder, or employee is serving as guardian, may receive any compensation for legal services performed for the guardian unless the court specifically approves the right to compensation and finds that it is to the advantage, benefit, and best interests of the ward [*Prob. Code § 2645(b)*].

An attorney who seeks compensation under these rules must show that his or her representation, as opposed to legal representation otherwise available, benefitted the conservatorship estate [ *Brown v. Brown (1996) 45 Cal. App. 4th 117, 122-123, 52 Cal. Rptr. 2d 755* (conservatorship; same rules applicable to guardianship)]. It is not sufficient merely to show that the ward or the estate derived some benefit from the representation [ *Brown v. Brown (1996) 45 Cal. App. 4th 117, 119-120, 52 Cal. Rptr. 2d 755* (conservatorship; same rules applicable to guardianship)].

Neither the rules restricting the right of an attorney who is also a guardian, or the specified relatives, partners, or employees of a guardian, to receive legal fees from the guardianship estate apply if the guardian or conservator is related by blood or marriage to, or is a cohabitant with, the ward [*Prob. Code § 2645(c)*].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law  
Conservators & Guardians  
General Overview  
Estate, Gift & Trust Law  
Conservators & Guardians  
Guardians for  
Minors  
Family Law  
Guardians  
General Overview



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*25-66 California Legal Forms--Transaction Guide § 66.17*

**§ 66.17 Removal or Resignation of Guardian**

A guardian may be removed for cause or may resign [*see Prob. Code § 2650 et seq.*]. A guardian may be removed for any of the following reasons [*Prob. Code § 2650(a)-(c)*]:

- Failure to use ordinary care and diligence in the management of the estate.
- Failure to file an inventory or render an account on time.
- Continued failure to perform duties or incapacity to perform duties suitably.

Other causes for removal of a guardian include [*Prob. Code § 2650(d)-(f)*]:

- Conviction of a felony, whether before or after appointment as a guardian.
- Gross immorality.
- Having an interest adverse to the faithful performance of duties which creates an unreasonable risk that the guardian will not faithfully perform his or her duties.

A guardian of the person may be removed if he or she violates the law governing placement of a ward in a mental health treatment facility and consenting to the administration of prohibited drugs and treatment [*see Prob. Code § 2650(g); see also Prob. Code § 2356*]. A guardian of the estate may be removed for insolvency or bankruptcy of the guardian [*Prob. Code § 2650(h)*]. A guardian may also be removed if the court determines that removal is in the best interests of the ward, taking into account the fact that the guardian was appointed under *Prob. Code §§ 1500 or 1501* [*Prob. Code § 2650(i)*].

A guardian may file a petition at any time tendering his or her resignation [*Prob. Code § 2660*]. *Prob. Code § 2660* sets forth the procedure and conditions under which the court may allow the resignation.

When the court grants a petition removing the guardian of a minor ward (or tendering the guardian's resignation), and does not immediately appoint a successor guardian, the court must at the same time appoint a responsible adult to make educational decisions for the minor until it appoints a successor [*Prob. Code* § 2662]. Likewise, if the court suspends or limits the guardian's powers to make educational decisions for the minor, it must at the same time appoint a responsible adult to make these decisions until the guardian is again authorized to do so [*Prob. Code* § 2662]. An individual who has a conflict of interest in representing the minor may not be appointed to make educational decisions [*Prob. Code* § 2662]. This means a person that has any interests which might restrict his or her ability to make educational decisions, including, but not limited to, the conflicts of interest prohibited by *Gov. Code* § 1126, and the receipt of compensation or attorneys' fees for providing services under this section [*Prob. Code* § 2662]. A foster parent is not considered to have a conflict of interest solely because he or she receives compensation for providing services under this section [*Prob. Code* § 2662].

A guardian of the estate who resigns or is removed must serve a copy of the final account or report and petition for its settlement with the notice of hearing that must be served on the successor guardian of the estate under *Prob. Code* § 1460(b)(1), unless the court dispenses with service [*Cal. Rules of Ct., Rule* 7.1005].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law  
Conservators & Guardians  
Conservators  
Removal & Termination  
Family Law  
Guardians  
Removal & Termination



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*25-66 California Legal Forms--Transaction Guide § 66.18*

**§ 66.18 Appointment of Successor Guardian**

If a vacancy in the office of guardian occurs for any reason, the court may appoint a successor guardian after notice and hearing in the same manner as for the original appointment of a guardian [*Prob. Code § 2670*].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawConservators & GuardiansConservatorsAppointmentEstate, Gift & Trust LawConservators & GuardiansConservatorsRemoval & TerminationFamily LawGuardiansAppointmentFamily LawGuardiansRemoval & Termination



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*25-66 California Legal Forms--Transaction Guide § 66.19*

**§ 66.19 Termination of Guardianship**

**[1] Events Terminating Guardianship**

A guardianship of the person or estate or both terminates when the ward attains majority or dies [*Prob. Code § 1600(a)*]. A guardianship of the person terminates on the adoption of the ward or on the emancipation of the ward under *Fam. Code § 7002* [*Prob. Code § 1600(b)*]. The guardianship in these cases terminates by operation of law, and the guardian need not file a petition for termination [*Cal. Rules of Ct., Rule 7.1004(a)*].

A person under the age of 18 years will be emancipated under *Fam. Code § 7002* in any of the following circumstances [*Fam. Code § 7002*]:

- If the person enters into a valid marriage, even if the marriage is later dissolved.
- If the person is on active duty with the armed forces of the United States.
- If the person obtains a judicial declaration of emancipation under *Fam. Code § 7122*.

**[2] Judicial Declaration of Emancipation**

A minor who meets all of the following requirements may obtain a judicial declaration of emancipation under *Fam. Code § 7122* upon petition [*Fam. Code §§ 7120(b), 7122*]:

- The minor is at least 14 years of age.
- The minor is willingly living separate and apart from his or her parents or guardian with the consent or acquiescence of the parents or guardian.
- The minor is managing his or her own financial affairs. As evidence of this, the minor must complete and attach to the petition a declaration of income as expenses as provided in Cal. Judicial Council Form FL-150.

- The source of the minor's income is not derived from any activity declared to be a crime by the laws of California or the United States.

### **[3] Court-Ordered Termination**

A guardian, a parent, or the ward may petition the court for an order terminating the guardianship [*Prob. Code § 1601*]. If the court determines that it is in the ward's best interest to terminate the guardianship, the court may make an order terminating the guardianship [*Prob. Code § 1601; Cal. Rules of Ct., Rule 7.1004(a)*]. The best interest of the child is the sole criterion for terminating a guardianship [*see Guardianship of L.V. (2006) 136 Cal. App. 4th 481, 490, 38 Cal. Rptr. 3d 894 (because parents were not participating in day-to-day parenting of minor, they were not entitled to constitutional protection afforded to parents acting in that role)*].

### **[4] Final Account**

A guardian of the estate whose administration is terminated by operation of law or court order must file and obtain the court's approval of a final account or report of administration [*Cal. Rules of Ct., Rule 7.1004(c)*]. The guardian must serve a copy of the final account and petition for its settlement on the minor, unless the court dispenses with service [*Cal. Rules of Ct., Rule 7.1006(a)*]. If the minor is deceased, the guardian must serve a notice of hearing and a copy of the final account and petition for its settlement on the personal representative of the deceased minor's estate, unless the court dispenses with service [*Cal. Rules of Ct., Rule 7.1006(b)*]. If there is no personal representative, service must be made on the persons entitled to succeed to the estate, unless the court dispenses with service [*Cal. Rules of Ct., Rule 7.1006(c)*].

A ward who has reached majority may settle accounts with the guardian of his or her estate and may give the guardian a valid release if the court determines, at the time of the hearing on the final account, or on the final report and petition for termination on waiver of account, that the release has been obtained fairly and without undue influence. The release is not effective to discharge the guardian until one year after the ward has reached majority [*Cal. Rules of Ct., Rule 7.1007(a)*]. The court may require the ward's personal appearance at the hearing on the final account or report [*Cal. Rules of Ct., Rule 7.1007(b)*].

### **[5] Termination by Juvenile Court in Dependency Proceeding**

The juvenile court may terminate a guardianship of the person of a minor previously established under the Probate Code if the minor is the subject of dependency proceedings under *Welf. & Inst. Code §§ 300, 601, or 602* [*Welf. & Inst. Code § 728(a)*]. The juvenile court must inform the probate court of the pending termination of the guardianship [*Welf. & Inst. Code § 728(b)*]. The court has the authority to terminate the guardianship at any stage of the dependency proceedings, including at the detention hearing or the jurisdictional hearing [ *In re Merrick V. (2004) 122 Cal. App. 4th 235, 248, 19 Cal. Rptr. 3d 490* ]. Reunification services need not be offered to the guardian in the juvenile court proceedings before that court may terminate the guardianship [ *In re Merrick V. (2004) 122 Cal. App. 4th 235, 243, 249, 19 Cal. Rptr. 3d 490* ].

### **[6] Visitation Rights of Guardian**

A court may grant reasonable visitation rights to a person who previously served as the legal guardian of a child if the court determines that such visitation is in the child's best interest [*Fam. Code § 3105(b)*]. A guardian may request the court to order visitation at the time of termination of the guardianship, either in the guardian's petition for termination, or in the guardian's objections or other pleading filed in response to the petition of another party for termination [*Cal. Rules of Ct., Rule 7.1008(a)*].

In the absence of a court order granting or denying visitation between a former legal guardian and his or her former

minor ward, and if a dependency proceeding is not pending, the former guardian may maintain an independent action under the Family Code for visitation with the former ward [*Fam. Code § 3105(c)*; *Cal. Rules of Ct., Rule 7.1008(b)(1)*]. If the child does not have a least one living parent, visitation may not be determined in a proceeding under the Family Code, but must instead be determined in a guardianship proceeding under the Probate Code that may be initiated for that purpose [*Fam. Code § 3105(c)*; *Cal. Rules of Ct., Rule 7.1008(b)(2)*].

A guardian or former guardian who is requesting visitation must file Judicial Council Form FL-105/GC-120, Declaration Under Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), with his or her request for visitation [*Cal. Rules of Ct., Rule 7.1008(c)*].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law  
Conservators & Guardians  
Conservators Removal & Termination  
Family Law  
Guardians Removal & Termination



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*25-66 California Legal Forms--Transaction Guide § 66.20*

**§ 66.20 Use of Guardianships**

**[1] Protective Nature**

A guardian stands in the position of a protector [ *Fox v. Minor (1867) 32 Cal. 111, 117* ]. The protective nature of a guardianship is one of its distinguishing features. In accordance with this protective nature, court supervision of guardians surpasses the supervision extended over other fiduciaries, such as trustees or executors. With regard to the estate of a minor, the close supervision by the court is either a clear advantage or disadvantage from the position of estate planners and would-be nominators of guardians.

**[2] In Estate Planning**

In the estate planning situation, the alternatives for handling the estate of a minor are to establish either a guardianship of the estate or a trust for the estate. When tax consequences are a consideration, a trust is used in an overwhelming majority of situations. When tax consequences are not significant, or if the use of a trust is not desired or feasible, guardianship may be preferred.

It is no longer necessary for the nomination of a guardian to be made only by will or deed [see former *Prob. Code §§ 1402, 1403*]. Since a nomination need only be made by a signed writing [see *Prob. Code § 1502*], the possibility now exists for nomination outside the confines of a will but still within the scope of a planned estate. For example, if provision for guardian of the person or estate of a minor is overlooked at the time of making a will, the nomination may be made by a separate document that does not have the stilted features of a deed. In other instances, the testator may want to separate the will and the nomination of a guardian; this may now be accomplished in a separate document which is not a deed.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law  
 Conservators & Guardians  
 General Overview  
 Estate, Gift & Trust Law  
 Conservators & Guardians  
 Guardians for  
 Minors  
 Estate, Gift & Trust Law  
 Conservators & Guardians  
 Guardians for Missing & Undetermined Heirs  
 Family

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*25-66 California Legal Forms--Transaction Guide § 66.21*

**§ 66.21 Vexatious Litigant Determination in Guardianship Proceeding**

A person who files a petition for visitation, termination of the guardianship, or instruction to the guardian that is unmeritorious, or intended to harass or annoy the guardian, and who has previously filed pleadings in the guardianship proceedings that were unmeritorious or intended to harass or annoy the guardian, may be determined to be a vexatious litigant for the purposes of the vexatious litigant statutes (*Code Civ. Proc. § 391 et seq.*) [*Prob. Code § 1611*].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil ProcedureSanctionsBaseless FilingsVexatious LitigantsEstate, Gift & Trust LawConservators & GuardiansGeneral OverviewFamily LawGuardiansGeneral Overview



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*25-66 California Legal Forms--Transaction Guide § 66.22*

**§ 66.22 Professional Fiduciaries**

**[1] Professional Fiduciary**

A professional fiduciary is a person who acts as a conservator or guardian for two or more persons at the same time who are not related to the professional fiduciary or to each other by blood, adoption, marriage, or registered domestic partnership [*Bus. & Prof. Code 6501 (f)*]. A professional fiduciary is also a person who acts as a trustee, agent under a durable power of attorney for health care, or agent under a durable power of attorney for finances, for more than three people or more than three families or a combination of people and families that totals more than three, at the same time, who are not related to the professional fiduciary by blood, adoption, marriage or registered domestic partnership [*Bus. & Prof. Code § 6501(f)*, see Qualifications for Licensure, § 66.22[4]].

However, the following are exempted from the definition of professional fiduciary, and are not required to obtain a professional fiduciary license [*Bus. & Prof. Code § 6501(f)(4)*]:

- (1) A trust company, as defined by *Prob. Code § 83*;
- (2) An FDIC-insured institution, or its holding companies, subsidiaries or affiliates;
- (3) Any public agency, including the public guardian, public conservator, or other agency of the State of California or of a county of California or any regional center for persons with developmental disability as defined in *Welf. & Inst. Code § 4620*;
- 4) A person who is employed by a trust company, an FDIC-insured institution or its holding companies, subsidiaries or affiliates, or a public agency who is acting in the course and scope of that employment, and in the instance of a public officer of a public agency, acting in the course and scope of official duties;
- (5) Any person whose sole activity as a professional fiduciary is as a broker-dealer, broker-dealer agent, investment adviser representative registered and regulated under the Corporate Securities Law of 1968 [*Corp. Code § 25000 et seq.*], the Investment Advisers Act of 1940 [*15 U.S.C. 80b-1 et seq.*], or the

Securities Exchange Act of 1934 [15 U.S.C. 78a et seq.], or involves serving as a trustee to a company regulated by the Securities and Exchange Commission under the Investment Company Act of 1940 [15 U.S.C. 80a-1 et seq.].

## **[2] Professional Fiduciaries Bureau**

The Professional Fiduciaries Bureau ("Bureau") is created under the Professional Fiduciaries Act and has the duty of enforcing and administering the Act [Bus. & Prof. Code § 6510]. Even though the Bureau is set to become inoperative as of July 1, 2011 and repealed as of January 1, 2012 (unless later statutes deletes or extends the dates on inoperability and repeal), upon repeal, the responsibilities and jurisdiction of the Bureau will be transferred and vested in the existing Professional Fiduciaries Advisory Committee [Bus. & Prof. Code § 6511]. The Bureau is responsible for administering the licensing and regulatory program established under the Act, approving classes for prelicense and continuing education, and preparing and administering licensing exams [Bus. & Prof. Code § 6518]. The Bureau has adopted a Professional Fiduciaries Code of Ethics ("Code of Ethics") which is provided on the Bureau's internet website and to any person requesting an application for license [see www.fiduciary.ca.gov].

## **[3] Licensing Requirements**

No person may act or hold themselves out to the public as a professional fiduciary unless he or she is licensed as a professional fiduciary under the Professional Fiduciaries Act [Prob. Code § 60.1(b), see Professional Fiduciaries Act Bus. & Prof. Code § 6500 et seq.]. A superior court may not appoint a person to carry out the duties of a professional fiduciary unless he or she holds a valid, unexpired, unsuspended license as a professional fiduciary under Bus. & Prof. Code § 6500 et seq. [Prob. Code § 2340]. A court may appoint a person to be a professional fiduciary without a professional fiduciary license if they are exempt from the definition of "professional fiduciary" under Bus. & Prof. Code § 6501, or are exempt from the licensing requirements of Bus. & Prof. Code § 6530 [Prob. Code § 2340]. Furthermore, every person previously required to register with the statewide registry under Prob. Code § 2850 et seq. prior to January 1, 2007, and every person required to file information with the clerk of the court under Prob. Code § 2340 et seq. is required to obtain a license as a professional fiduciary under Bus. & Prof. Code § 6500 et seq.

Licensing requirements do not apply to [Bus. & Prof. Code § 6530(b)-(d)]:

- 1) A licensed attorney;
- 2) A licensed certified public accountant;
- 3) An Internal Revenue Service agent acting within the scope of practice.

All applications for a professional fiduciary license can be obtained online, through the California Department of Consumer Affairs, at <http://www.fiduciary.ca.gov/> [see Qualifications for Licensure, § 66.22[4]].

## **[4] Qualifications for Licensure**

The Bureau reviews all applications and they will approve those applications that meet the required qualifications [Bus. & Prof. Code § 6536]. The Bureau may also investigate an applicant's qualifications [Bus. & Prof. Code § 6536]. To receive a license as a professional fiduciary, an applicant must meet the following [Bus. & Prof. Code § 6533(a)-(k)]:

- (a) Be at least 21 years old;
- (b) Be a United States citizen or be legally admitted to the United States;

- (c) Have not committed any acts that are grounds for denial of a license under *Bus. & Prof. Code §§ 480, 6536* [see below];
- (d) Submit fingerprints as required by *Bus. & Prof. Code § 6533.5* in order to obtain criminal offender record information;
- (e) Have completed 30 hours of prelicensing education as required by *Bus. & Prof. Code § 6538*;
- (f) Have passed the licensing exam under *Bus. & Prof. Code § 6539*;
- (g) Have a least one of the following:
  - a. A BA or BS degree from a college or university;
  - b. An AA/AS degree from a college or university and at least five (5) years experience with substantive fiduciary responsibilities working as a professional fiduciary, public agency, or financial institution acting as a conservator, guardian, trustee, personal representative, or agent under a power of attorney; or
  - c. Experience of not less than three (3) years, prior to July 1, 2008, with substantive fiduciary institution acting as a conservator, guardian, trustee, personal representative, or agent under a power of attorney.
- (h) Agree to adhere to the Professional Fiduciaries Code of Ethics [see *Bus. & Prof. Code § 6520*] and to all statutes and regulations;
- (i) Consent to the bureau conducting a credit check;
- (j) File a completed application;
- (k) Submit a nonrefundable application fee.

The Bureau will not issue a license to any applicant who [see *Bus. & Prof. Code § 6536(a)-(e)*];

- (a) Does not meet the qualifications for licensure [see *Bus. & Prof. Code § 6533(a)-(k)*];
- (b) Has been convicted of a crime substantially related to the qualifications, functions, or duties of a fiduciary;
- (c) Has engaged in fraud or deceit in applying for a license;
- (d) Has engaged in dishonesty, fraud, or gross negligence in performing the functions or duties of a fiduciary;
- (e) Has been removed as a fiduciary by a court for breach of trust committed intentionally, with gross negligence, in bad faith, or with reckless indifference, or has demonstrated a pattern of negligent conduct, including a removal prior to January 1, 2009, and all appeals have been taken, or the time to file an appeal has expired.

#### **[5] License Renewal**

A license is valid for one year and will expire one year after it was issued on the last day of the month in which it was issued [*Bus. & Prof. Code § 6541(a)*]. A license may be renewed by filing a renewal application, submitting the annual statement, as required by *Bus. & Prof. Code § 6561* [*see § 66.22[6]*], submitting proof of compliance with continuing education requirements [*see Bus. & Prof. Code § 6538(b)*] (15 hours of approved courses each year), and payment of the renewal fee [*Bus. & Prof. Code § 6541(b)*]. Conduct that would result in a refusal of a license renewal includes [*Bus. & Prof. Code § 6541(b)*]:

- (1) Conviction of a crime substantially related to the qualifications, functions, or duties of a fiduciary;
- (2) Fraud or deceit in obtaining a license;
- (3) Dishonesty, fraud, or gross negligence in performing the functions or duties of a professional fiduciary;
- (4) Removal by a court as a fiduciary for breach of a fiduciary duty.

#### **[6] Initial and Annual Statement**

A licensee is required to keep complete and accurate records of client accounts and must make them available for audit by the bureau [*Bus. & Prof. Code § 6560*]. A licensee must file, initially and annually thereafter, a statement which contains the following [*Bus. & Prof. Code § 6561(a)*]:

- (1) His or her business address, phone and fax number;
- (2) Whether or not he or she has been removed as conservator, guardian, trustee or personal representative for cause;
- (3) The case names, court locations and case numbers for all matters where the licensee has been appointed by the court;
- (4) Whether he or she has been found by a court to have breached a fiduciary duty;
- (5) Whether he or she has reassigned or settled a matter in which a complaint has been filed, along with the case number and a statement of the issues and facts pertaining to the allegations;
- (6) Any licenses or professional certificates held;
- (7) Any ownership or beneficial interests in any businesses or other enterprises held by the licensee or by a family member that receives or has received payment from a client of the licensee;
- (8) Whether the licensee has ever filed for bankruptcy or held a controlling financial interest in a business that filed for bankruptcy;
- (9) The name of any persons or entities that have an interest in the licensee's professional fiduciary business;
- (10) Whether the licensee has been convicted of a crime.

The annual statement must be filed with the Bureau 60 days prior to the expiration of the license [*Bus. & Prof. Code §*

6562].

#### **[7] Suspension, Revocation, Denial and Disciplinary Action**

The Bureau has authority to investigate the actions of any professional fiduciary [*Bus. & Prof. Code § 6580(a)*]. Sanctions may include administrative citations and fines, license suspension, probations or revocation [*Bus. & Prof. Code § 6580(b)*]. A license may be suspended, revoked, denied or other disciplinary action may be imposed for one or more of the following [*Bus. & Prof. Code § 6584*]:

- (a) Conviction of any felony or misdemeanor, if the misdemeanor is substantially related to the functions and duties of a professional fiduciary;
- (b) Failure to notify the bureau of a conviction pursuant to *Bus. & Prof. Code § 6561(a)(10)*;
- (c) Fraud or misrepresentation in obtaining a license;
- (d) Fraud, dishonesty, corruption, willful violation of duty, gross negligence or incompetence in practice, or unprofessional conduct in, or related to, the practice of a professional fiduciary;
- (e) Failure to comply with, or to pay a monetary sanction imposed by a court for failure to provide timely reports;
- (f) Failure to pay a civil penalty relating to the licensee's professional fiduciary duties;
- (g) The revocation of, suspension of, or other disciplinary action against, any other professional license by the State of California or by another state;
- (h) Violation of this *Bus. Prof. Code § 6500 et seq.*, *Probate Code § 4000 et seq.*, *Probate Code § 4600 et seq.*, *Probate Code § 5000 et seq.*, or any of the statutes, rules, or regulations pertaining to the duties or functions of a professional fiduciary.

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law  
Conservators & Guardians  
General Overview  
Family Law  
Guardians  
General Overview



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DIVISION IV: WILLS AND TRUSTS  
 CHAPTER 66 GUARDIANSHIPS  
 PART II. LEGAL BACKGROUND

*25-66 California Legal Forms--Transaction Guide § 66.23*

**§ 66.23 Guardian's Subsequent Adoption of Minor**

A proceeding to have a child declared free from the custody and control of one or both parents may be brought in the guardianship proceeding under *Fam. Code § 7800 et seq.*, if all of the following requirements are satisfied [*Prob. Code § 1516.5(a)*]:

- Neither parent has legal custody of the child.
- The child has been in the guardian's physical custody for at least two years.
- The court finds that the child would benefit from being adopted by the guardian. In making this determination, the court must consider all factors relating to the child's best interest, including, but not limited to, the nature and extent of the relationship between the child and the birth parent, the child and the guardian (and the guardian's family members), and the child and any siblings or half-siblings.

The court must appoint a court investigator or other qualified professional to investigate each of these factors, and the investigator's or professional's findings on these issues must be included in the written report required by *Fam. Code § 7851* [*Prob. Code § 1516.5(b)*].

The rights afforded a parent, including the rights to notice and counsel, provided by *Fam. Code § 7800 et seq.*, apply in the proceeding [*Prob. Code § 1516.5(c)*].

These provisions do not apply if the child is a dependent of the juvenile court [*Prob. Code § 1516.5(d)*].

Despite challenges to the constitutionality of *Prob. Code § 1516.5*, the California Supreme Court has upheld the statute as facially constitutional and consistent with due process [ *Guardianship of Ann S.*, (2009) 45 Cal. 4th 1110, 1118, 90 Cal. Rptr. 3d 701, 202 P.3d 1089 , and *In re Charlotte D.*, (2009) 45 Cal. 4th 1140, 1142-1143, 90 Cal. Rptr. 3d 724, 202 P.3d 1109] . A showing of current unfitness is not necessary when a court terminates parental rights under *Prob. Code § 1516.5* based on the child's best interest, but parents may challenge the constitutionality of the statute as applied to them individually [ *In re Charlotte D.*, (2009) 45 Cal. 4th 1140, 1147, 90 Cal. Rptr. 3d 724, 202 P.3d 1109] .

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law  
Conservators & Guardians  
Guardians for Minors  
Family Law  
Adoption  
Procedures  
General  
Overview  
Family Law  
Guardians  
General Overview



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*25-66 California Legal Forms--Transaction Guide §§ 66.24-66.99*

**[Reserved]**

§§ 66.24[Reserved]



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DIVISION IV: WILLS AND TRUSTS  
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PART III. TRANSACTION GUIDE  
A. Client Interview--Facts and Documents

*25-66 California Legal Forms--Transaction Guide § 66.100*

**§ 66.100 Facts**

1. Client and spouse:

- a. Name.
- b. Address.
- c. Telephone number.
- d. Relationship to proposed ward.

2. Each proposed ward:

- a. Name.
- b. Address.
- c. Telephone number.
- d. Birthdate.
- e. Whether married or had marriage dissolved or nullified.
- f. Sex.

3. Parents of proposed ward, if not same as client and his or her spouse:

- a. Name.
- b. Address.
- c. Telephone number.

4. Possible nominees and alternates:

- a. Name.
- b. Address.
- c. Telephone number.
- d. Relationship to proposed ward, if any.
- e. Conditions or factors making person desirable candidate, if appropriate.
- f. Whether candidate knows proposed ward and has formed enduring relationship with ward.
- g. Whether ward would express or presently express preference for candidate to be guardian.
- h. Indication, if any, of willingness to act.
- i. General financial level and stability.
- j. If candidate is nonprofit charitable corporation:
  - (1) Whether corporation is incorporated in California.
  - (2) Whether corporate articles of incorporation specifically authorize corporation to accept appointment as guardian.
  - (3) Whether corporation is, has been, or will provide care, counseling, or financial assistance to ward under supervision of California certified registered social worker.

5. Type of guardianship client thinks is desired:

- a. For person of minor.
- b. For estate of minor.
- c. For person and estate of minor.
- d. For particular property that minor has or will receive from client.

6. If property is involved:

a. If guardianship for particular property is involved:

- (1) Description and location of property.
- (2) Manner by which proposed ward will or has received, or is receiving, property, if appropriate.
- (3) Approximate value of personal property.
- (4) Probable value of annual rents, issues, and profits of all property.

b. If general estate of minor is involved:

- (1) Location and type of assets, such as:
  - (a) Residence.
  - (b) Bank and savings account deposits.
  - (c) Securities.
  - (d) Business interests.
  - (e) Insurance policy benefits.
  - (f) Other personal property.
  - (g) Other real property.
- (2) Approximate value of personal property.
- (3) Probable value of annual rent, issues, and profits of all property to be in estate.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawConservators & GuardiansGeneral OverviewEstate, Gift & Trust LawConservators & GuardiansConservatorsGeneral OverviewEstate, Gift & Trust LawConservators & GuardiansGuardians for MinorsFamily LawGuardiansGeneral OverviewFamily LawGuardiansAppointment



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*25-66 California Legal Forms--Transaction Guide § 66.101*

**§ 66.101 Documents**

1. Prior nomination documents, if any.
2. Nomination documents by other persons for a guardianship for particular property for proposed ward, if any.
3. If nonprofit charitable corporation is candidate for nomination, articles of incorporation.
4. Will(s) of nominating parent(s), if appropriate.
5. Trust documents affecting proposed ward.
6. If minor has been married but is no longer married, decree dissolving or nullifying minor's marriage.

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Estate, Gift & Trust LawConservators & GuardiansGeneral OverviewEstate, Gift & Trust LawConservators & GuardiansConservatorsGeneral OverviewEstate, Gift & Trust LawConservators & GuardiansGuardians for MinorsFamily LawGuardiansGeneral OverviewFamily LawGuardiansAppointment



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*25-66 California Legal Forms--Transaction Guide §§ 66.103-66.109*

**[Reserved]**

§§ 66.103[Reserved]



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DIVISION IV: WILLS AND TRUSTS  
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B. Preliminary Determinations

*25-66 California Legal Forms--Transaction Guide § 66.110*

**§ 66.110 Determining Type of Guardian to Nominate**

1. Nominate guardian of person of minor child when it is desired to have person to assume following statutory powers, duties, and authority:

a. Care, custody, and control of ward [*Prob. Code § 2351(a)*].

b. Charge of education of ward [*Prob. Code § 2351(a)*].

c. Authority to fix residence of ward at [*Prob. Code § 2352*]:

(1) Any place within California without permission of court.

(2) Any place outside of California if permission of court is first obtained.

d. Right, same as parent having legal custody of child, to give consent to medical treatment performed on ward and to require ward to receive medical treatment [*Prob. Code § 2353*], subject to following limitations:

(1) Ward of 14 years of age or older must also consent to surgery performed on himself or herself, or court order authorizing surgery must be obtained.

(2) In emergency case in which ward faces loss of life or serious bodily injury if surgery is not performed, guardian alone may consent to surgery and require ward to receive surgery.

(3) Consent of guardian for medical or surgical treatment for ward is not required if ward alone may consent to that treatment.

2. Nominate guardian of estate of minor child when it is desired to have person or entity to assume following statutory powers, duties, and authority:

a. Management and control of estate [*Prob. Code § 2401(a)*], subject to following rules:

(1) Guardian must use ordinary care and diligence in managing and controlling estate.

**NOTE:**

What constitutes use of ordinary care and diligence is determined by circumstances of each estate [*Prob. Code § 2401(a)*].

(2) Guardian must exercise or not exercise a power to extent that ordinary care and diligence requires that power should or should not be exercised.

(3) Guardian must not hire or refer business to entity in which he or she has a financial interest, as defined, except with court authorization after written disclosure of interest to court.

b. Responsibility for applying estate income and assets to support and maintenance of ward [*see Prob. Code § 2420 et seq.*].

c. Duty to pay from principal and income of estate [*Prob. Code § 2430*]:

(1) Debts incurred by ward before creation of guardianship.

(2) Reasonable debts incurred by ward during guardianship to provide necessaries of life to ward and his or her dependents.

(3) Debts reasonably incurred by conservatee during conservatorship to provide basic living expenses [*see Fam. Code § 297*] to conservatee's domestic partner [*see Prob. Code § 37* ("domestic partner" defined)].

(4) Reasonable expenses incurred in the collection, care, and administration of estate.

**NOTE:**

Court authorization is required for payment of compensation to the guardian, to the attorney for the guardian, or to the attorney for the ward or the estate [*Prob. Code § 2430(a)(4)*].

d. Power to perform general estate management functions, such as the following, without court authorization, instruction, approval, or confirmation [*see Prob. Code § 2450*]:

(1) Collection of debts due to ward [*Prob. Code § 2451*].

(2) Contract, perform outstanding contracts, and bind the estate [*Prob. Code § 2451.5(a)*].

(3) Purchase tangible personal property [*Prob. Code § 2451.5(b)*].

(4) Employ an attorney to advise and represent the guardian, subject to *Prob. Code § 2640 et seq.* [*Prob. Code § 2451.5(c)*].

- (5) Employ and pay the expense of accountants, investment advisers, agents, depositories, and employees [*Prob. Code § 2451.5(d)*].
  - (6) Operate for a period of 45 days after issuance of letters, at the risk of the estate, a business, farm, or enterprise [*Prob. Code § 2451.5(e)*].
  - (7) Cashing checks payable to ward [*Prob. Code § 2452*].
  - (8) Deposit of checks, funds, personal property, or securities in authorized companies [*see Prob. Code § 2452 et seq.*].
  - (9) Maintenance of dwelling of ward [*Prob. Code § 2457*].
  - (10) Preparation of tax returns and payment of taxes [*Prob. Code § 2461*].
  - (11) Commencing and maintaining actions and proceedings for benefit of ward, unless guardian ad litem is appointed [*Prob. Code § 2462(a)*].
  - (12) Defending actions and proceedings against ward, guardian, or estate [*Prob. Code § 2462(b)*].
  - (13) Disposal or abandonment of valueless property [*Prob. Code § 2465*].
  - (14) Continued duty of custody and conservation of estate after death of ward, until delivery to personal representative of ward's estate [*Prob. Code § 2467*].
- e. Authority to compromise claims and actions, and to extend, renew, or modify obligations [*see Prob. Code § 2500 et seq.*].
- f. Authority to petition court for authority to convey or transfer property claimed to belong to ward [*see Prob. Code §§ 850-859*].
- g. Power, generally, to sell, without court authorization, confirmation, or direction:
- (1) Securities sold on established stock or bond exchange, securities sold through registered broker-dealer on NASDAQ, and securities to be directly redeemed by issuer [*Prob. Code § 2544(a)*].
  - (2) Tangible personal property of estate, if aggregate sales or exchanges do not exceed \$5,000 per year; and for personal effects, furniture, or furnishings used for personal purposes, when ward, if 14 years of age or over, consents to sale or exchange [*Prob. Code § 2545*].
- h. Power to sell real or personal property of estate, subject to court supervision [*see Prob. Code § 2540*].

**NOTE:**

The sale of real or personal property of the estate is specifically authorized if the income of the estate is insufficient for the comfortable and suitable support, maintenance, and education of the ward; the personal property of the estate and income from real property of the estate are insufficient to pay certain debts; or the sale is for the advantage, benefit, and best interest of the ward, the estate, or the ward and those who are legally dependent on the ward [*Prob. Code § 2541*].

i. Power, after authorization by the court, to encumber, lease, convey, or exchange estate property [*see Prob. Code § 2550 et seq.*].

**NOTE:**

The guardian may lease real property without court authorization, however, when the rental is \$5,000 or less a month and the term does not exceed two years, or, regardless of the amount of the rental, when the lease is from month to month [*Prob. Code § 2555*].

j. Power, with court authorization, to make investments and purchase property [*see Prob. Code § 2570 et seq.*], except that the following generally may be invested in without such authorization [*see Prob. Code § 2574(a)(1)-(6)*]:

**NOTE:**

*Prob. Code § 2574(b)* requires the guardian, in making and retaining investments, to consider the circumstances of the estate, indicated cash needs, and, if reasonably ascertainable, the date of the prospective termination of the guardianship [*Prob. Code § 2574(b)*].

(1) Direct obligations of the United States or of California, having a maturity date of not more than five years from time of making investment.

(2) United States Treasury bonds redeemable at par value on death of holder for payment of federal estate taxes, regardless of maturity date.

(3) Securities listed on established stock or bond exchange, if purchased on the exchange.

(4) Eligible securities for investment of surplus state funds [*see Gov. Code § 16430*].

**NOTE:**

These securities include, among others, federal government bonds and obligations, bonds and interest-bearing notes guaranteed by a federal agency, California state government bonds, qualifying commercial paper of "prime" quality, and negotiable certificates of deposit issued by a federal or state-chartered bank [*see Gov. Code § 16430*].

(5) Federally registered money market mutual funds [*see 15 U.S.C. §§ 80a-1-80a-64*], or mutual funds having portfolios limited to United States government obligations maturing not later than five years from date of investment, and repurchase agreements fully collateralized by United States government obligations.

(6) Units of common trust fund described in *Fin. Code § 1564* when common trust fund has as its objective investment primarily in short-term fixed income obligations and permitted to value investments at cost pursuant to regulations of appropriate regulatory authority.

l. Guardian may be granted powers to do any one or more of the following, if court determines that it would be to advantage, benefit, and best interest of estate [*Prob. Code §§ 2590, 2591*]:

**NOTE:**

Subject to limitation by court order, the guardian may exercise these powers without notice, hearing, court authorization, instructions, approval, or confirmation [*see Prob. Code § 2590*].

(1) Operate for a period of longer than 45 days at estate risk business, farm, or enterprise that is estate

asset.

- (2) Grant and take options.
- (3) Sell at public or private sale real or personal property of estate.
- (4) Create easements or servitudes.
- (5) Borrow money and give security for repayment of loans.
- (6) Purchase real or personal property.
- (7) Alter, improve, and repair or raze, replace, and rebuild estate property.
- (8) Let or lease estate property, or extend, renew or modify a lease of real property, for which the monthly rental or lease term exceeds the maximum specified in *Prob. Code § 2501* and *Prob. Code § 2555* for any purpose and any period, including term to begin at future time.
- (9) Lend money on adequate security.
- (10) Exchange estate property.
- (11) Sell estate property on credit if unpaid portion of selling price is adequately secured.
- (12) Commence and maintain action for partition.
- (13) Exercise stock rights and stock options.
- (14) Participate in and become subject to and consent to provisions of voting trust and of reorganization, consolidation, merger, dissolution, liquidation, or other adjustment affecting estate property.
- (15) Pay, collect, compromise, arbitrate, or otherwise adjust claims, debts, or demands on guardianship.

m. Responsibility for inventory and appraisal of estate and for presenting account of guardian to court for settlement and allowance.

- (1) Guardian must file inventory and appraisal of estate within 90 days after appointment, or such further time as court for reasonable cause may allow on ex parte petition. [*Prob. Code § 2610*].

**NOTE:**

Any property of the ward not included in the original inventory that is subsequently discovered or received must be reported by the guardian in a supplemental inventory and appraisal, with the appraisal made as of the date the property was discovered or received [*Prob. Code § 2613*].

- (2) Guardian must present account to court, unless court otherwise orders [*Prob. Code § 2620(a)*]:
  - (a) At end of one year from time of appointment; and

(b) Thereafter, at least biennially.

3. Nominate guardian for particular property of minor child when it is desired to have person or entity to assume following statutory powers, duties, and authority:

a. Powers and duties of nominee appointed guardian for particular property minor receives from nominator, with respect to that property, are same as guardian for estate [*see Prob. Code § 2109; see also P (b)(1), above*].

b. Nominee appointed guardian for property has responsibilities for inventory and appraisal of the particular property, and presenting account of guardian to court for settlement and allowance [*Prob. Code § 2109; see P (b)(2), above*].

c. Guardian for property nominated by person from whom minor receives property has same right, with respect to the particular property, to exercise enumerated powers and under same conditions as guardian of estate [*Prob. Code § 2108(b); see Prob. Code § 1501* (nomination by person from whom minor receives property); *see also P (b)(3), above*].

4. Determine type of guardian desired, taking into consideration family situation revealed in client interview.

a. Guardian of person.

b. Guardian of estate.

c. Guardian of person and estate.

d. Guardian of person and guardian of estate.

e. Guardian for property.

5. Determine whether client may make nomination for types of guardian desired:

a. Parent of minor child may nominate:

**NOTE:**

If nominated by a parent pursuant to *Prob. Code § 1500*, and to the extent provided in the nomination (except if the court for good cause determines otherwise), a guardian of the person must be granted the same authority with respect to the person of the ward as a parent having legal custody of a child [*see Paragraph 1, above*], and may exercise that authority without notice, hearing, or court authorization, instructions, approval, or confirmation, in the same manner as if the authority were being exercised by a custodial parent [*Prob. Code § 2108(a)*]:

Similarly, a guardian estate, if nominated by a parent, and to the extent provided in the nomination (except if the court for good cause determines otherwise), must be granted the right to exercise any one or more of the powers enumerated in Paragraph 2, *above*, and may exercise the rights granted without notice, hearing, or court authorization, instructions, approval, or confirmation, and in the same manner as the ward could do if the ward had legal capacity [*Prob. Code § 2108(b); see Prob. Code § 1500* (nomination

by parent)].

(1) Guardian of person.

(2) Guardian of estate.

(3) Guardian for property.

b. Nonparent may only nominate guardian for property.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawConservators & GuardiansGeneral OverviewEstate, Gift & Trust LawConservators & GuardiansConservatorsGeneral OverviewEstate, Gift & Trust LawConservators & GuardiansConservatorsAppointmentFamily LawGuardiansGeneral OverviewFamily LawGuardiansAppointment



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B. Preliminary Determinations

*25-66 California Legal Forms--Transaction Guide § 66.111*

**§ 66.111 Selecting Guardian Nominees**

**NOTE:**

Although a guardian may be nominated, actual appointment is by the court, which is required to appoint the person nominated as guardian of the estate or for property, if the person is suitable, but is not required to appoint the person nominated as guardian of the person [*see Prob. Code § 1514*]. Thus, careful consideration should be given to the statutory rules and preferences to avoid a situation in which the nomination will be disregarded by a court.

1. Review prospective ward's personal and/or financial needs.
  - a. For guardian of the person, consider ward's personal, medical, and educational needs, including any special care requirements that might impose particular difficulties or hardships on guardian.
  - b. For guardian of the estate, consider:
    - (1) Overall size of guardian's estate.
    - (2) Nature of assets in guardian's estate and any special expertise that might be necessary to properly manage those assets.
2. Compile list of potential guardians, including:
  - a. Close relatives.
  - b. Trusted friends.

- c. Nonprofit charitable corporations [*Prob. Code § 2104(a)*].
- d. Trust companies (for guardian of estate but not of person) [*Prob. Code § 300*].

3. Determine which potential guardians are best suited to manage ward's personal and/or financial needs, considering the following:

- a. Age and health during period when person might be called upon to act as guardian.

**NOTE:**

The statutes do not state any age limitations for the nominee. However, common sense dictates that the nominee should be of an age appropriate to the task, and in sufficient mental and physical health to be able to handle the duties and responsibilities that would be imposed. For example, if grandparents of the prospective ward are being considered as nominees, consideration should be given to the fact that a guardianship may take effect or continue many years after the date when the nomination is made, depending on the age of the prospective ward. The court, of course, has the right to reject any nominee if it determines that doing so would serve the best interests of the prospective ward [*Prob. Code § 1514(b),(e); Fam. Code §§ 3020 et seq., 3040 et seq.*].

- b. Location of residence.

**NOTE:**

Relocating to a distant location where a guardian of the person resides may have a traumatic personal effect on a ward. In some cases, depending on the nature of the assets in the ward's estate (such as real property or business interests), financial management also may be more difficult if the guardian of the estate resides in a distant location.

- c. Honesty and reliability.
- d. For guardian of person, ability to provide good home for ward, including:
  - (1) Experience in caring for and raising minor children.
  - (2) Compatibility of personal lifestyle with duties and responsibilities of guardianship.
  - (3) General environment in which ward would be living.

- e. For guardian of estate, ability to manage and conserve ward's estate, including:

- (1) General financial and business experience.
- (2) Whether prospective nominee has any special skills that may be required to properly manage ward's assets.

4. Determine whether ward would have objection to appointment of any of the potential guardians.

**NOTE:**

If the proposed ward is of sufficient age to form intelligent preference as to person to be appointed guardian, the court must give consideration to that preference in determining the person to be appointed [

*Fam. Code § 3042(a)* (guardian of person); *Prob. Code § 1514(e)(2)* (guardian of estate)]. Even aside from the statutory requirement, nominating a person whom the prospective ward strongly dislikes obviously could be a source of problems later.

5. Determine whether consent of other parent to nomination of guardian by nominating parent is required or desired.

a. Consent may be required or desired for nomination of guardian of person or estate or both of minor.

b. Effective nomination by parent of guardian of person or estate or both of minor requires that either [*Prob. Code § 1500*]:

(1) Other parent also nominates, or consents in writing to nomination of, same guardian for same child; or

(2) At time petition for appointment of guardian is filed:

(a) Other parent is dead or lacks legal capacity to consent to nomination; or

(b) Consent of other parent would not be required for adoption of child.

c. Consent of other parent is not required for nomination of guardian for property [*see Prob. Code § 1501*].

6. Contact probable nominees to ascertain whether nomination would be accepted.

7. Determine who will be primary nominee or nominees.

**NOTE:**

One guardian may be appointed for several wards [*Prob. Code § 2106*].

a. Consider statutory preferences for appointment of guardians:

(1) For guardian of person, court is governed by Family Code provisions and preferences relating to custody of child [*Prob. Code § 1514(b)*; *see Fam. Code § 3040*].

(a) Court must consider and give due weight to nomination of guardian by parent [*Fam. Code § 3043*].

(b) If child is of sufficient age and capacity to reason so as to form intelligent preference, court must consider and give due weight to wishes of child [*Fam. Code § 3042(a)*; *see Paragraph 4, above*].

(c) Order of preference for award of custody according to best interests of child is to [*Fam. Code § 3040(a)*]:

**NOTE:**

*Fam. Code § 3040(a)* requires that custody be determined according to the best interests of the child as provided in *Fam. Code § 3040(a)*. Factors the court must consider in determining custody are specified in *Fam. Code §§ 3011, 3020* and *discussed under § 66.14[2], above*.

In addition, *Fam. Code § 3040(b)* provides that *Fam. Code § 3040(a)* establishes neither a

preference nor a presumption for or against joint legal custody, joint physical custody, or sole custody, but allows the court and the family the widest discretion to choose a parenting plan that is in the best interests of the child or children.

(i) Both parents jointly or to either parent without regard to the parent's gender.

(ii) Person in whose home child has been living in a wholesome and stable environment.

(iii) Any other person deemed by court to be suitable and able to provide adequate and proper care and guidance for child.

(d) When custody award will be to a nonparent over a parent's objection, court must find that award of custody to a parent would be detrimental to child and award of custody to nonparent is in child's best interests [*Fam. Code § 3041*].

(2) For guardian of estate or for property:

(a) Court must appoint person nominated pursuant to statutes governing nomination of guardian of estate or for property [*Prob. Code §§ 1500, 1501*], unless court determines nominee is unsuitable [*Prob. Code § 1514(c), (d)*].

(b) When court does not appoint nominee as guardian, court must do what appears to be in best interests of proposed ward, taking into account [*Prob. Code § 1514(e)(1)*]:

(i) Proposed guardian's ability to manage and preserve estate; and

(ii) Proposed guardian's concern for interest in welfare of proposed ward.

(c) When court does not appoint nominee as guardian, court must consider preference of proposed ward, if proposed ward is of sufficient age to form intelligent preference as to person to be appointed guardian [*Prob. Code § 1514(e)(2)*].

b. If nonprofit charitable corporation is under consideration as potential guardian of person or estate, determine whether it complies with following requirements [*Prob. Code § 2104(a)*]:

**NOTE:**

If appointed, such a corporation may be allowed compensation only for services actually rendered [*Prob. Code § 2104(c)*].

(1) Corporation is incorporated in California.

(2) Articles of incorporation specifically authorize corporation to accept appointments as guardian.

(3) At time of appointment, corporation has been providing care, counseling, or financial assistance to proposed ward under supervision of registered social worker certified by state Board of Behavioral Science Examiners.

c. If trust company is under consideration as guardian of estate, verify that it complies with applicable requirements.

**NOTE:**

A trust company may be appointed to act as guardian of the estate but not of the person [*Prob. Code* § 300].

A trust company is an entity that has qualified to engage in and conduct a trust business in California [*Fin. Code* § 107; *Prob. Code* § 83]. The trust business is the business of acting as executor, administrator, trustee, guardian, or conservator of estates, assignee, receiver, depository, or trustee under the appointment of any court or by authority of any state or federal law [*Fin. Code* § 106]. Certain large commercial and industrial banks maintain trust departments that qualify as trust companies [*see Fin. Code* § 1500.1 (commercial or industrial bank engaging in trust business)].

d. If appointment of joint guardians is being contemplated [*Prob. Code* § 2105(a)].

(1) Verify that each will be able to qualify as guardian [*Prob. Code* § 2105(b)].

(2) Inform nominator that act of a majority of joint guardians is valid [*see Prob. Code* § 2105(c)].

(3) Determine nominator's preference in case one of persons nominated as joint guardians is unwilling or unable to assume that task at time guardianship takes effect.

e. Determine whether or not to waive bond [for discussion, *see* § 66.220[1]].

**NOTE:**

A trust company that is appointed guardian of an estate may not be required to give a bond [*Prob. Code* § 301(a)]. Trust companies are subject, however, to special requirements as to liability, oaths, and affidavits set forth in the Financial Code [*Prob. Code* § 301(b); *see Fin. Code* §§ 1540 et seq., 1587].

8. Determine who will be alternate nominees.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawConservators & GuardiansGeneral OverviewEstate, Gift & Trust LawConservators & GuardiansConservatorsAppointmentEstate, Gift & Trust LawConservators & GuardiansGuardians for MinorsFamily LawGuardiansGeneral OverviewFamily LawGuardiansAppointment



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DIVISION IV: WILLS AND TRUSTS  
CHAPTER 66 GUARDIANSHIPS  
PART III. TRANSACTION GUIDE  
B. Preliminary Determinations

*25-66 California Legal Forms--Transaction Guide §§ 66.113-66.119*

**[Reserved]**

§§ 66.113[Reserved]



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DIVISION IV: WILLS AND TRUSTS  
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PART III. TRANSACTION GUIDE  
C. Procedural Guide to Nomination of Guardian

*25-66 California Legal Forms--Transaction Guide § 66.120*

**§ 66.120 Guardianship of Person or Estate or Both of Minor**

1. Select most appropriate form of nomination.

- a. Nomination by will of parent [*see* § 66.200].
- b. Nomination by deed of parent [*see* § 66.201].
- c. Nomination by signed writing of parent [*see* § 66.202].

2. Consider including following provisions, as appropriate.

- a. General purpose provisions.
  - (1) Waiver of bond [*see* §§ 66.112, 66.220].
  - (2) Nomination of successor guardian [*see* § 66.221].
  - (3) Request for nominee to seek temporary guardianship appointment [*see* § 66.222].
  - (4) Compensation of guardian [*see* § 66.223].
  - (5) Conditions on which nominee is nominated [*see* § 66.224].
  - (6) Statement that particular individual is intentionally not nominated [*see* § 66.225].

b. Provisions for guardian of person:

(1) Will provision granting nominee authority of a custodial parent as to person of minor [see § 66.200].

(2) Explanation of selection of nominee [see § 66.230].

(3) Joint guardians with divided responsibilities [see § 66.231].

c. Provisions for guardian of estate:

(1) Will provision granting right to exercise enumerated powers without court supervision [see § 66.240].

(2) Arrangement for contingency of ward's burial [see § 66.242].

(3) Joint guardians with divided responsibilities [see § 66.241].

3. Draft document nominating guardian.

4. If necessary, secure consent of non-nominating parent to nomination [see § 66.111, Paragraph 5, above] and draft consent to nomination [see § 66.203] for execution by non-nominating parent.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law  
Conservators & Guardians  
General Overview  
Family Law  
Guardians  
General Overview  
Family Law  
Guardians  
Appointment



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C. Procedural Guide to Nomination of Guardian

*25-66 California Legal Forms--Transaction Guide § 66.121*

**§ 66.121 Guardianship for Property of Minor**

1. Select most appropriate form of nomination.
  - a. Nomination by will of parent [*see* form at § 66.210].
  - b. Nomination by will of nonparent [*see* form at § 66.211].
  - c. Nomination by signed writing of parent or nonparent [*see* § 66.212].
2. Consider including following provisions, as appropriate:
  - a. Bond waiver [*see* § 66.220].
  - b. Will provision granting right to exercise enumerated powers without court supervision [*see* form at § 66.240].
  - c. Conditions on which nominee is nominated [*see* § 66.224].
3. Draft document nominating guardian.

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Estate, Gift & Trust LawConservators & GuardiansGuardians for MinorsEstate, Gift & Trust LawConservators & GuardiansTestamentary GuardiansFamily LawGuardiansAppointmentFamily LawGuardiansDuties & Rights



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C. Procedural Guide to Nomination of Guardian

*25-66 California Legal Forms--Transaction Guide §§ 66.122-66.199*

**[Reserved]**

§§ 66.122[Reserved]



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DIVISION IV: WILLS AND TRUSTS

CHAPTER 66 GUARDIANSHIPS

PART IV. FORMS

A. Guardian of Person or Estate or Both of Minor

*25-66 California Legal Forms--Transaction Guide § 66.200*

**§ 66.200 Nomination of Guardian of Person or Estate or Both of Minor--By Will of Parent**

**[1] Comment**

**[a] Use of Form**

This form is a provision for use in the will of a parent to nominate a guardian of the person or estate or both of his or her minor child. It includes optional provisions for nomination of a successor guardian and for waiver of a bond.

A guardian may be nominated by a writing signed either before or after the petition for appointment of the guardian is filed [*Prob. Code § 1502(a)*].

Alternative provisions for the nomination of a guardian by a parent are set forth in the *forms in § 66.201* (nomination by deed) and 66.202 (nomination by signed writing). For nomination by a parent of a guardian for particular property, see the *forms in § 66.210 et seq.*

**[b] Authorization for Nomination**

A parent may nominate a guardian of the person or estate or both of a minor child if the other parent nominates, or consents in writing to the nomination of, the same guardian for the same child [*Prob. Code § 1500(a)*]. Alternatively, a parent may nominate a guardian of the person or estate or both of a minor child if, at the time the petition for appointment of the guardian is filed, either (1) the other parent is dead or lacks legal capacity to consent to the nomination, or (2) the consent of the other parent would not be required for an adoption of the child [*Prob. Code § 1500(b)*; see *Fam. Code §§ 8604-8606*].

The person or persons nominated by a parent will not automatically be appointed as guardians. The court must take into account various considerations to determine the suitability of the proposed guardian [*see Prob. Code § 1514*; see also *Fam. Code §§ 3040-3043* and discussion under [d], *below*]. The criteria for appointment of a guardian [*see Prob. Code § 1514(e)*; *Fam. Code §§ 3040-3043*] should be reviewed and discussed with the client before the final choice of nominees is made.

**[c] Effective Date of Nomination**

A nomination of a guardian under *Prob. Code* §§ 1500 or 1501 becomes effective when made [*Prob. Code* § 1502(b)]. However, the effective date may be made contingent on the occurrence of a specified condition or conditions by express direction in the writing [*Prob. Code* § 1502(b)]. The express conditions may include, but are not limited to, the subsequent legal incapacity or death of the nominator [*Prob. Code* § 1502(b)]. Unless the writing provides otherwise, a nomination remains effective notwithstanding the subsequent legal incapacity or death of the nominator [*Prob. Code* § 1502(c)].

**[d] Appointment of Guardian In General**

On hearing of a duly filed and noticed petition, the court may appoint a guardian of the person or estate or both if it appears necessary or convenient [*Prob. Code* § 1514(a)]. The court must appoint the nominee of a parent as guardian insofar as the nomination relates to guardianship of the estate, unless the court determines that the nominee is unsuitable [*Prob. Code* § 1514(c)]. For guardian of the person, however, the choice of the court is governed by the considerations and preferences prescribed in *Fam. Code* § 3020 *et seq.* [*Prob. Code* § 1514(b)].

**[e] Guardianship of Person**

Under *Fam. Code* § 3040, the court is required to award guardianship according to the best interests of the child. If custody will be awarded to a nonparent, which is the case in a guardianship, the court must consider and give due weight to the nominee under *Prob. Code* § 1500 [*see Fam. Code* § 3043]. If the child is old enough, and has sufficient reasoning capacity to form an intelligent preference as to custody, the court must consider and give due weight to the wishes of the child [*Fam. Code* § 3042(a)]. The order of preference for custody prescribed by *Fam. Code* § 3040 is as follows [*Fam. Code* § 3040(a)]:

- (1) To both parents or to either parent.
- (2) To the person in whose home the child has been living in a wholesome and stable environment.
- (3) To any other person or persons deemed by the court to be suitable and able to provide adequate and proper care and guidance for the child.

For further discussion of the application of *Fam. Code* § 3040 to guardianship proceedings, see § 66.14[2], *above*.

If a minor is married or had a marriage that has been dissolved, no guardian may be appointed for the person of the minor [*Prob. Code* § 1515]. However, a guardian of the person is not prohibited from being appointed for a minor whose marriage has been adjudged a nullity [*Prob. Code* § 1515].

**[f] Role of Child's Preference**

When appointing a guardian of the person of a minor, the court must consider and give due weight to the wishes of the minor regarding custody if the minor is old enough and has sufficient reasoning capacity to form an intelligent preference [*Prob. Code* § 1514(b); *Fam. Code* § 3042(a)]. However, the court will not consider the child's preference for guardian of the estate if the parent has nominated a guardian of the estate, unless the court determines the parent's nominee is unsuitable [*Prob. Code* § 1514(c)]. Nevertheless, the preference of the child for guardian of the estate may be explored and considered at the time of nomination [*Prob. Code* § 1514(e)].

**[g] Multiple Guardians or Wards**

The court has the discretion to appoint two or more guardians for the person or the estate or both [*Prob. Code* § 2105(a)]

]. The court also has the discretion to appoint one guardian for several wards [*Prob. Code § 2106*].

#### **[h] Nonprofit Charitable Corporation**

A nonprofit charitable corporation may be appointed as guardian of the person or estate or both if three requirements are met [*Prob. Code § 2104(a)*]:

- The corporation must be incorporated in California.
- The articles of incorporation must specifically authorize the corporation to accept appointments as guardian.
- The corporation must have been providing, at the time of appointment, care, counseling, or financial assistance to the proposed ward under the supervision of a registered social worker certified by the state Board of Behavioral Science Examiners.

If the corporation is appointed as guardian, its compensation as guardian will be allowed only for services rendered [*Prob. Code § 2104(c)(1)*].

#### **[i] Trust Company as Guardian of Estate**

A trust company may be appointed to act as guardian of an estate but not of a person [*Prob. Code § 300*]. A trust company is an entity that has qualified to engage in and conduct a trust business in California [*Fin. Code § 107; Prob. Code § 83*]. The trust business is the business of acting as executor, administrator, trustee, guardian, or conservator of estates, assignee, receiver, depository, or trustee under the appointment of any court or by authority of any state or federal law [*Fin. Code § 106*]. Certain large commercial banks maintain trust departments that qualify as trust companies [*see Fin. Code § 1500.1* (commercial bank engaging in trust business)].

Before nominating a commercial bank as guardian, the attorney should contact the bank and determine whether it maintains a trust department and, if so, whether the trust department accepts guardianship appointments. Most banks will refuse to accept fiduciary responsibilities for an estate that does not meet their minimum value requirements. Minimum value requirements are typically set high enough to ensure that the bank will be adequately compensated for its services.

A trust company that is appointed as guardian of an estate may not be required to give a bond [*Prob. Code § 301(a)*]. Trust companies are, however, subject to special requirements as to liability, oaths, and affidavits set forth in the Financial Code [*Prob. Code § 301(b)*; *see Fin. Code §§ 1540 et seq., 1587*].

#### **[j] Powers and Duties of Guardian of Person**

A guardian of the person is responsible for the care, custody, control, and education of the ward [*Prob. Code § 2351(a)*], except as limited by court order [*Prob. Code § 2351(b)*]. In exercising his or her duties, however, a guardian of the person may not hire or refer business to an entity in which he or she has a financial interest, as defined, except with court authorization after written disclosure of the interest to the court [*Prob. Code § 2351(d)*].

The guardian has the power to fix the residence of the ward and to consent to certain types of medical treatment for the ward [*see Prob. Code §§ 2352-2357*]. Additionally, if it is provided in a nomination by will of the parent and to the extent provided in the will, a nominee appointed as guardian of the person usually will be granted the same authority over a ward as a custodial parent and may exercise the authority without notice, hearing, or court authorization, instructions, approval, or confirmation in the same manner as if the authority were exercised by a parent having legal

custody of the child [*Prob. Code § 2108(a)*]. The nomination in this form includes an optional provision for a grant of this type of authority over the proposed ward.

### **[k] Powers and Duties of Guardian of Estate**

A guardian of the estate has management and control of the estate and must use ordinary care and diligence in managing and controlling it [*Prob. Code § 2401(a)*]. All the circumstances of the particular estate determine what constitutes use of ordinary care and diligence [*Prob. Code § 2401(a)*]. Ordinary care and diligence also determine the extent to which a power is to be exercised or not exercised [*Prob. Code § 2401(b)*]. In exercising his or her duties, a guardian of the estate may not hire or refer business to an entity in which he or she has a financial interest, as defined, except with court authorization after written disclosure of the interest to the court [*Prob. Code § 2401(c)*].

A guardian of the estate is subject to close judicial supervision. The guardian should expect to be required to petition the court for authorization or other orders for matters including the following:

- Investments [*see Prob. Code § 2570 et seq.*].
- Encumbrances on or conveyances of property [*see Prob. Code § 2550 et seq.*].
- Sales of real or personal property [*see Prob. Code § 2540 et seq.*].

Usually only a few routine matters, such as cashing or depositing checks for the ward, may be exercised without court authorization, instruction, approval, or confirmation [*see Prob. Code § 2450 et seq.*]. However, if provided for in a nomination by a parent, and to the extent provided in the nomination, a nominee appointed guardian of the estate usually will be granted the right to exercise any one or more of certain powers [*see Prob. Code §§ 2590, 2591*] without notice, hearing, or court authorization, instruction, approval, or confirmation in the same manner as the ward could do if possessed of legal capacity [*Prob. Code §§ 2108(b), 2590*]. For a provision covering the powers enumerated in *Prob. Code § 2591*, see the form in § 66.240.

For further discussion of the powers and duties of guardians, see § 66.15.

### **[l] Bond Requirements**

An appointed guardian may be required to file a bond. The general requirement is that every guardian must furnish a bond in the amount fixed by the court [*Prob. Code § 2320(a)(2)*]. However, one appointed only as guardian of the person need not file a bond unless required by the court [*Prob. Code § 2322*]. Additionally, if the nominator waives the filing of the bond, a guardian nominated under the law governing nominations [*Prob. Code §§ 1500, 1501*] need not file a bond unless required by the court [*Prob. Code § 2324*]. For a clause waiving bond, and discussion, see § 66.220[1][g]. The law governing the bond requirements for guardians is further discussed in § 66.220.

### **[m] Nomination of Alternative Guardians**

Nomination of alternative guardians is a wise practice. The initial choice for guardian may become unavailable or decline to act or, even if appointed, be unable to continue to act.

### **[2] Form**

#### **Nomination of Guardian of Person or Estate or Both of Minor--By Will of Parent** NOMINATION OF GUARDIAN

In the event that a guardian of the person [*or estate or person and estate*] should be necessary for any minor child of

mine, I nominate \_\_\_\_\_ [name], \_\_\_\_\_ [street address, city, state, zip], as guardian [or if more than one identified, joint guardians] of the person [or estate or person and estate] of my child [or son(s) or daughter(s) or children], \_\_\_\_\_ [name(s)] [or I nominate \_\_\_\_\_ (name), \_\_\_\_\_ (street, address, city, state, zip) as guardian of the person of my child (or son(s) or daughter(s) or children) and \_\_\_\_\_ (name), \_\_\_\_\_ (street address, city, state, zip or, for bank: \_\_\_\_\_ [full and exact name of bank]), as guardian of the estate of my child (or son(s) or daughter(s) or children) \_\_\_\_\_ (names)], so long as [, with respect to any such child,] that child remains a minor [if parent is alive and not consenting, add:, and only in the event that the mother (or father) of that child, \_\_\_\_\_ (name of other parent), fails to survive me or lacks the legal capacity to consent to this nomination or that the consent of the mother (or father) is not required for an adoption of that child].

[Optional will provision for guardian of person]

### Authority of Guardian of Person

The nominee for guardian of the person [or person and estate] shall have the same authority with respect to my child [or son(s) or daughter(s) or children] as I have [or the following authority with respect to my child (or son(s) or daughter(s) or children): \_\_\_\_\_ describe extent of authority to be given to nominee].

[Add appropriate optional provisions:]

### Successor Guardian

In the event that \_\_\_\_\_ [the or any] nominee is unable or unwilling to act or to continue to act as guardian of the person [or estate or person and estate], then I nominate \_\_\_\_\_ [name], \_\_\_\_\_ [street address, city, state, zip], as guardian.

[OR]

In the event that \_\_\_\_\_ [name of nominee for guardian of person] is unable or unwilling to act or to continue to act as guardian of the person, then I nominate \_\_\_\_\_ [name], \_\_\_\_\_ [street address, city, state, zip], as guardian of the person.

In the event that \_\_\_\_\_ [name of nominee for guardian of estate] is unable or unwilling to act or to continue to act as guardian of the estate, then I nominate \_\_\_\_\_ [name], \_\_\_\_\_ [street address, city, state, zip], as guardian of the estate.

### Legal Topics:

For related research and practice materials, see the following legal topics:  
 Estate, Gift & Trust LawConservators & GuardiansGeneral OverviewEstate, Gift & Trust LawConservators & GuardiansConservatorsGeneral OverviewEstate, Gift & Trust LawConservators & GuardiansGuardians for MinorsFamily LawGuardiansGeneral OverviewFamily LawGuardiansAppointment



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DIVISION IV: WILLS AND TRUSTS

CHAPTER 66 GUARDIANSHIPS

PART IV. FORMS

A. Guardian of Person or Estate or Both of Minor

*25-66 California Legal Forms--Transaction Guide § 66.201*

**§ 66.201 Nomination of Guardian of Person or Estate or Both of Minor--By Deed of Parent**

**[1] Comment**

**[a] Use of Form**

This form is a deed for use by a parent to nominate a guardian for the person or estate or both of a minor child. Parental nomination of a guardian by the deed of a parent is a traditional device of English statutory law and was specifically authorized under the former guardianship statutes [*see former Prob. Code § 1403*]. The present guardianship statutes require only that a parental nomination of a guardian for the person or estate or both of a minor be by signed writing [*see Prob. Code §§ 1500, 1502*]. A nomination by deed is seldom used today; however, it may be used when a client refuses to make a will or prefers a separate nomination of a guardian from other matters covered in a will.

A form for the nomination of a guardian by the will of a parent is *set forth in § 66.200[2]*. See § 66.200[1] for a discussion of the law governing nomination by a parent of a guardian of the person or estate of a minor. For a nomination by a signed writing of the parent, see § 66.202[2].

**[b] Legal Effect of Deed to Nominate Guardian**

Although the use of a deed to nominate a guardian was previously specifically authorized by statute [*see former Prob. Code § 1403*] and is still permissible [*see Prob. Code § 1502*], the substantive effect of this type of nominating instrument does not fall within the usual meaning of a deed, which is a written instrument transferring title to real property [*see Brusseau v. Hill (1927) 201 Cal. 225, 228, 256 P. 419*]. The deed in this form merely nominates a person to act in the capacity of a guardian. No substantive transfer of title to real property affected by this instrument occurs on a valid execution and effective delivery of the instrument as a deed.

**[c] Common-Law Requirement of Delivery**

The deed in this form comes within the common-law tradition of a deed, as simply "an instrument in writing, sealed, and delivered" [ *Barr v. Schroeder (1867) 32 Cal. 609, 616* ]. Because the use of a seal is no longer necessary [*see*

Code Civ. Proc. §§ 1932, 1933], only the writing and delivery of the deed to the grantee are required. Therefore, the deed should be delivered to the nominee prior to or at the time of the desired effective date of the nomination.

[2] Form

**Nomination of Guardian of Person or Estate or Both of Minor--By Deed of Parent**

DEED NOMINATING GUARDIAN OF THE PERSON [or ESTATE or PERSON AND ESTATE]

I, \_\_\_\_\_ [name of nominating parent], by this deed nominate \_\_\_\_\_ [name of guardian], \_\_\_\_\_ [street address, city, state, zip] [or, where bank is nominated as guardian of estate: \_\_\_\_\_ (full and exact name of bank)], guardian [or if more than one identified, joint guardians] of the person [or estate or person and estate] of \_\_\_\_\_ [name(s)], my child [or son(s) or daughter(s) or children], so long as [, with respect to any such child,] that child remains a minor [if other parent alive and not consenting, add: and only in the event that the mother (or father) of that child, \_\_\_\_\_ (name of other parent) fails to survive me or lacks the legal capacity to consent to this nomination or that the consent of the mother (or father) is not required for an adoption of that child].

[For optional clauses to be added, see § 66.220 et seq.]

Executed on \_\_\_\_\_ [date], at \_\_\_\_\_ [city and state].

\_\_\_\_\_ [signature]

[typed name]

[If other parent is consenting, the consent may be placed here; see § 66.203.]

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Estate, Gift & Trust LawConservators & GuardiansConservatorsGeneral OverviewEstate, Gift & Trust LawConservators & GuardiansConservatorsAppointmentEstate, Gift & Trust LawConservators & GuardiansGuardians for MinorsFamily LawGuardiansGeneral OverviewFamily LawGuardiansAppointment



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DIVISION IV: WILLS AND TRUSTS

CHAPTER 66 GUARDIANSHIPS

PART IV. FORMS

A. Guardian of Person or Estate or Both of Minor

*25-66 California Legal Forms--Transaction Guide § 66.202***§ 66.202 Nomination of Guardian of Person or Estate or Both of Minor--By Signed Writing of Parent****[1] Comment--Use of Form**

This form is an instrument nominating a guardian of the person, estate, or both of a minor child by his or her parent. It is an alternative to a nomination by will [*see § 66.200*] or by deed [*see § 66.201*]. Former guardianship statutes required a parent to appoint (nominate) a guardian by will or by deed [*see former Prob. Code § 1403*]. That requirement had the effect of usually making the appointment (nomination) testamentary in nature. In contrast with the former law, the present guardianship statutes only require that a written nomination of guardian by a parent be made in a writing signed before or after the petition for guardianship is filed, or in the petition itself [*Prob. Code §§ 1500, 1502*]. Thus, while a nomination by will or by deed still is appropriate for testamentary nominations, a nomination by signed writing may be more appropriate when the nominating parent desires the nomination to be effective when made, or desires to separate the nominating document from the provisions of the will in order to avoid using a document having the stilted features of a deed.

For the law governing nomination of a guardian of the person or estate or both of a minor, see § 66.200[1]. For a consent by a non-nominating parent, see § 66.203.

**[2] Form****Nomination of Guardian of Person or Estate or Both of Minor--By Signed Writing of Parent**

## NOMINATION OF GUARDIAN

I, \_\_\_\_\_ [name], the undersigned parent [or father or mother] of \_\_\_\_\_ [name(s) of proposed ward(s)], who \_\_\_\_\_ [is a minor or are minors], hereby nominate a guardian of the \_\_\_\_\_ [person or estate or person and estate or person and a guardian of the estate] of \_\_\_\_\_ [that or those minor(s)], as follows:

[EITHER:]

1. In the event that a guardian of the \_\_\_\_\_ [person *or* estate *or* person and estate] should be necessary for any minor child of mine, I nominate \_\_\_\_\_ [name], \_\_\_\_\_ [street, address, city, state, zip], as guardian [or if more than one identified, as joint guardians] of the \_\_\_\_\_ [person *or* estate *or* person and estate] of my child [or son(s) *or* daughter(s) *or* children], \_\_\_\_\_ [name(s)]

[OR:]

1. I nominate \_\_\_\_\_ [name], \_\_\_\_\_ [street address, city, state, zip], as guardian of the person of my child [or son(s) *or* daughter(s) *or* children] and \_\_\_\_\_ [name], \_\_\_\_\_ [street address, city, state, zip *or* for a bank, full and exact name of bank], as guardian of the estate of my child [or son(s) *or* daughter(s) *or* children], \_\_\_\_\_ [name(s) of minor(s)], so long as [, with respect to any such child,] that child remains a minor [if other parent is alive and not consenting, add: and only in the event that the mother (or father) of that child, \_\_\_\_\_ (name of other parent), fails to survive me or lacks legal capacity to consent to this nomination or that the consent of the mother (or father) is not required for an adoption of that child].

[Continue with the following:]

[Add optional provisions, as appropriate:]

### Successor Guardian

2. In the event that \_\_\_\_\_ [the *or* any] nominee is unable or unwilling to act or to continue to act as guardian of the person [or estate *or* person and estate], then I nominate \_\_\_\_\_ [name], \_\_\_\_\_ [street address, city, state, zip], as guardian.

[OR]

2. (a) In the event that \_\_\_\_\_ [name of nominee for guardian of person] is unable or unwilling to act or to continue to act as guardian of the person, then I nominate \_\_\_\_\_ [name], \_\_\_\_\_ [street address, city, state, zip], as guardian.

(b) In the event that \_\_\_\_\_ [name of nominee for guardian of estate] is unable or unwilling to act or to continue to act as guardian of the estate, then I nominate \_\_\_\_\_ [name], \_\_\_\_\_ [street address, city, state, zip], as guardian.

Dated: \_\_\_\_\_

\_\_\_\_\_ [signature of parent]

[typed name]

### Legal Topics:

For related research and practice materials, see the following legal topics:  
 Estate, Gift & Trust LawConservators & GuardiansGeneral OverviewEstate, Gift & Trust LawConservators & GuardiansConservatorsAppointmentEstate, Gift & Trust LawConservators & GuardiansGuardians for MinorsFamily LawGuardiansAppointment



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## DIVISION IV: WILLS AND TRUSTS

## CHAPTER 66 GUARDIANSHIPS

## PART IV. FORMS

## A. Guardian of Person or Estate or Both of Minor

*25-66 California Legal Forms--Transaction Guide § 66.203***§ 66.203 Consent of One Parent to Other Parent's Nomination of Guardian for Minor [Prob. Code § 1500]****[1] Comment--Use of Form**

This form is a consent by one parent of a minor child to the nomination of a guardian for the minor by the other parent. The form may be used to secure consent to a nomination by will [*see § 66.200*], by deed [*see § 66.201*], or by signed writing [*see § 66.202*]. When a parent of a minor child nominates a guardian of the person or estate or both of a minor child, a surviving parent must consent to the nomination, unless incapable of consenting or unless the parent's consent would not be required for the adoption of the child [*see Fam. Code § 8604 et seq.*] in order for the nomination to be effective [*Prob. Code § 1500*]. The consent appears to be required even if the surviving parent is no longer married to the decedent [*see In re Arkle (1928) 93 Cal. App. 404, 409-410, 269 P. 689*].

The consent should be appended to the nominating instrument. If the consent is not obtained at the time of execution of the nominating instrument, it apparently may be given at any time up to the appointment of a guardian [*see Prob. Code § 1500; see also In re Guardianship of Baker (1908) 153 Cal. 537, 540-541, 96 P. 12* (interpreting former *Civ. Code § 241* as permitting consent of surviving parents after death of nominating parent)]. However, the better practice is to obtain the consent at the time of execution of the nominating instrument, or as soon thereafter as is possible.

**[2] Form****Consent of One Parent to Other Parent's Nomination of Guardian for Minor**

## CONSENT TO NOMINATION OF GUARDIAN

I, \_\_\_\_\_ [name], the \_\_\_\_\_ [mother or father] of \_\_\_\_\_ [name(s) of proposed ward(s)], consent to the nomination by \_\_\_\_\_ [name], the \_\_\_\_\_ [father or mother] of the child [or children],

[Select the appropriate alternative; either:]

of \_\_\_\_\_ [name(s)], \_\_\_\_\_ [street address, city, state, zip], as guardian [or joint guardians] of the \_\_\_\_\_ [person or estate or person and estate] of that child [or son(s) or daughter(s) or children]

[Or, if different persons are being nominated as guardians of person and estate:]

of \_\_\_\_\_ [name], \_\_\_\_\_ [street address, city, state, zip], as guardian of the person of that child [or son(s) or daughter(s) or children], and \_\_\_\_\_ [name], \_\_\_\_\_ [street address, city, state, zip or, for bank, give full and exact name of bank]), as guardian of the estate of that child [or son(s) or daughter(s) or children]

[Continue with the following:]

, as long as [, with respect to any such child,] that child remains a minor. [If appropriate, add: I also consent to the similar nomination of \_\_\_\_\_ (name(s)) as successor guardians(s).]

Executed on \_\_\_\_\_ [date], at \_\_\_\_\_ [city and state].

\_\_\_\_\_ [signature]

[typed name]

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Estate, Gift & Trust LawConservators & GuardiansGeneral OverviewEstate, Gift & Trust LawConservators & GuardiansConservatorsAppointmentEstate, Gift & Trust LawConservators & GuardiansGuardians for MinorsFamily LawGuardiansAppointment



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DIVISION IV: WILLS AND TRUSTS

CHAPTER 66 GUARDIANSHIPS

PART IV. FORMS

A. Guardian of Person or Estate or Both of Minor

*25-66 California Legal Forms--Transaction Guide §§ 66.204-66.209*

**[Reserved]**

§§ 66.204[Reserved]



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DIVISION IV: WILLS AND TRUSTS  
CHAPTER 66 GUARDIANSHIPS  
PART IV. FORMS  
B. Guardian for Particular Property of Minor

*25-66 California Legal Forms--Transaction Guide § 66.210*

**§ 66.210 Nomination of Guardian for Particular Property of Minor--By Will of Parent**

**[1] Comment**

**[a] Use of Form**

This form is a will provision for nomination of a guardian for particular property to be received by a minor child of the nominator. A parent may nominate a guardian for property that a minor receives from or by designation of the parent (whether before, at the time of, or after the nomination) including, but not limited to, property received by the minor by virtue of a gift, deed, trust, will, succession, insurance, or benefits of any kind [*Prob. Code § 1501*]. A written nomination must be by a writing signed before or after the petition for the appointment of the guardian is filed, or in the petition itself [*Prob. Code § 1502*]. Although the governing statutes authorize nomination of a guardian for particular property to occur at any time, including after the property is received by the minor, the type of nomination in this form; that is, by will provision, is most appropriate for use when the given property is to be received by the minor at the time of the death of the nominating parent.

This form is also appropriate for use when the parent desires to grant the nominee certain powers which, if the court appoints the nominee as guardian, the nominee may exercise without notice, hearing, or other court supervision [*see* discussion under [d], *below*]. If a more general form of nomination of a guardian for particular property of a minor is desired, the *form in § 66.212* may be used.

For a nomination by a nonparent of a guardian for particular property, see § 66.211. For nomination of a guardian of the estate of a minor, rather than of particular property of the minor, see §§ 66.200-66.202.

**[b] Effective Time of Nomination**

A nomination of a guardian is effective when made, except that a writing nominating a guardian may provide that the nomination becomes effective only on the occurrence of stated specified condition or conditions, including the subsequent legal incapacity or death of the person making the nomination [*Prob. Code § 1502(b)*]. The nomination remains effective, unless the writing making the nomination expressly provides otherwise, notwithstanding the

subsequent legal incapacity or death of the nominator [*Prob. Code § 1502(c)*].

In contrast with a nomination by a parent of a guardian of the person or estate or both of a minor [*see Prob. Code § 1500*], the other parent need not consent to the nomination of a guardian for particular property [*see Prob. Code § 1501*].

### **[c] Appointment of Guardian for Particular Property**

The court must appoint the nominee for guardianship for particular property as guardian of the property covered by the nomination unless the court determines that the nominee is unsuitable [*Prob. Code § 1514(d)*]. The letters of guardianship must indicate if the appointment is only as guardian of the property covered by the nomination [*Prob. Code § 1514(d)*].

### **[d] Powers and Duties of Guardian**

The powers and duties of a guardian of the estate [*see Prob. Code § 2400 et seq.*] also apply to a nominee appointed guardian for particular property, with respect to that property [*Prob. Code § 2109(a)*]. Responsibility with regard to inventory, accounting, and disposal of the estate is confined to the property covered by the nomination [*Prob. Code § 2109(a)*].

If both a guardian of the estate and a guardian for particular property are appointed, the guardian for particular property manages and controls only the particular property [*Prob. Code § 2109(b)(1)*]. Either guardian may petition the court for instructions concerning how the duties imposed by law on the guardian of the estate are to be allocated [*Prob. Code § 2109(b)(2)*].

Except to the extent the court for good cause determines otherwise, if provided in a nomination by a parent and to the extent provided in the nomination, a nominee appointed as guardian for particular property must be granted the right to exercise any one or more of certain powers [*see Prob. Code §§ 2590, 2591*] without notice, hearing, or court authorization, instruction, approval, or confirmation, in the same manner as the ward could exercise over the property if possessed of legal capacity [*Prob. Code §§ 2108(b), 2590*]. A provision covering the powers enumerated in *Prob. Code § 2591* is set forth in § 66.240.

### **[e] Bond Requirements**

The general requirement is that every guardian must furnish a bond in the amount fixed by the court [*Prob. Code § 2320(a), (b)*]. However, if the nominator waives the filing of the bond, a guardian nominated as guardian for particular property need not file a bond unless required by the court [*Prob. Code § 2324*]. For discussion, see § 66.220[1][g]. For further discussion of the bond requirements for a guardian, and a provision waiving bond, see § 66.220.

### **[f] Nomination of Successor Guardian**

Nomination of a successor guardian is a wise practice. The initial choice for guardian may become unavailable or decline to act or, even if appointed, be unable to continue to act.

## **[2] Form**

### **Nomination of Guardian for Particular Property of Minor--By Will of Parent**

#### **NOMINATION OF GUARDIAN FOR PARTICULAR PROPERTY**

I nominate \_\_\_\_\_ [name], \_\_\_\_\_ [street address, city, state, zip], as guardian [or, if more than one is nominated, joint guardians] for any and all property [or that certain property, as hereinafter described,]

of my child [or children], \_\_\_\_\_ [name(s) of proposed ward(s)], which that child [or those children] shall receive from me either by will or succession [if appropriate, add: or gift or deed or trust or insurance or benefits of any kind], so long as [, with respect to any such child,] that child remains a minor [if particular property is to be described, add: \_\_\_\_\_ (describe property to be received)].

[Add any optional provisions, such as:]

### **Successor Guardian**

I nominate \_\_\_\_\_ [name], \_\_\_\_\_ [street address, city, state, zip], as guardian in the event that \_\_\_\_\_ [the or any] nominee is unable or unwilling to act or to continue to act as guardian.

### **Special Qualification**

This nomination is made and subsequent court appointment as guardian is to be retained only on the condition that \_\_\_\_\_ [condition, e.g., \_\_\_\_\_ (name) continue in the employ of \_\_\_\_\_ (e.g., bank) and process all guardianship investments and management through its facilities].

### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law  
 Conservators & Guardians  
 Guardians for Minors  
 Estate, Gift & Trust Law  
 Conservators & Guardians  
 Testamentary Guardians  
 Family Law  
 Guardians  
 General Overview



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DIVISION IV: WILLS AND TRUSTS  
 CHAPTER 66 GUARDIANSHIPS  
 PART IV. FORMS  
 B. Guardian for Particular Property of Minor

*25-66 California Legal Forms--Transaction Guide § 66.211*

**§ 66.211 Nomination of Guardian for Particular Property of Minor--By Will of Nonparent**

**[1] Comment**

This form is a will provision for a person, other than a parent, who desires to nominate a guardian for particular property which the person leaves to or designates for a minor child. Under *Prob. Code § 1501*, a parent or any other person may nominate a guardian for property that a minor receives from or by designation of the nominator (whether before, at the time of, or after nomination) including, but not limited to, property received by the minor by virtue of a deed, trust, will, succession, insurance, or benefits of any kind. The nomination may be made in a writing signed before or after the petition for appointment of the guardian is filed, or in the petition itself [*Prob. Code § 1502*]. The breadth of these provisions of the guardianship laws contrasts sharply with prior law, which authorized a nonparent to "appoint," rather than "nominate," the guardian by will alone and only for property that the minor receives by the will [*see former Prob. Code § 1402*].

The nomination provision in this form is most appropriate for use when the given property is to be received by the minor at the time of the death of the nominator. The form also is appropriate for use when the nominator desires to grant the nominee certain powers which, if the court appoints the nominee as guardian, the nominee may exercise without notice, hearing, or other court supervision [*see discussion under § 66.210*]. For a more general form of nomination by a nonparent of a guardian for property, see § 66.212.

A will provision for nomination by a parent of a guardian for property is included in § 66.210. The law governing nomination of a guardian for particular property is discussed in § 66.210[1]. Forms for nomination of a guardian of the person or estate or both of a minor are *set forth in §§ 66.200-66.202*.

**[2] Form**

**Nomination of Guardian for Particular Property of Minor--By Will of Nonparent**

I nominate \_\_\_\_\_ [name], \_\_\_\_\_ [street address, city, state, zip], the  
 \_\_\_\_\_ [relationship to minor, if any, e.g., father or aunt] of \_\_\_\_\_ [name of minor]

*beneficiary*], as guardian [*or joint guardians*] for any and all property [*or describe property with reference to other provisions of will*] of \_\_\_\_\_ [*name of minor beneficiary*], minor child of \_\_\_\_\_ [*name(s) of parent(s)*], which that child may take from me by this will [*if appropriate, add: gift, deed, trust, succession, insurance, or benefits of any kind*], as long as that child remains a minor.

[*Add any desired optional provisions, such as:*]

### **Successor Guardian**

I nominate \_\_\_\_\_ [*name*], \_\_\_\_\_ [*street address, city, state, zip*], as guardian in the event that \_\_\_\_\_ [*the or any*] nominee is unable or unwilling to act or to continue to act as guardian.

### **Special Qualification**

This nomination is made and subsequent court appointment as guardian is to be retained only on the condition that \_\_\_\_\_ [*condition, e.g., \_\_\_\_\_ (name) continues to reside and primarily to be engaged in business within a one hundred mile radius of the city of \_\_\_\_\_*].

### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law  
 Conservators & Guardians  
 Conservators Appointment  
 Estate, Gift & Trust Law  
 Conservators & Guardians  
 Guardians for Minors  
 Estate, Gift & Trust Law  
 Conservators & Guardians  
 Testamentary Guardians  
 Family Law  
 Guardians  
 General Overview



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PART IV. FORMS  
B. Guardian for Particular Property of Minor

*25-66 California Legal Forms--Transaction Guide § 66.212*

**§ 66.212 Nomination of Guardian for Particular Property of Minor--By Signed Writing of Parent or Nonparent**

**[1] Comment**

This form is an written instrument nominating a guardian. It is for use when a parent or nonparent desires to nominate a guardian for property by an instrument other than a will. A parent or any other person may nominate a guardian for property that a minor receives from or by designation of the nominator (whether before, at the time of, or after the nomination) including, but not limited to, property received by the minor by virtue of a gift, deed, trust, will, succession, insurance, or benefits of any kind [*Prob. Code § 1501*]. The nomination may be made in a writing signed before or after the petition itself, or at the hearing on the petition [*Prob. Code § 1502(a)*].

While a nomination of a guardian for property still may be made by the will of a parent or nonparent, a nomination by a signed writing may be more appropriate for use when the nominator desires the nomination to take effect immediately [*see Prob. Code § 1502(b)*] or desires to make a nomination that is separate from the will.

For nomination of a guardian for property by the will of a parent or nonparent, see §§ 66.210, 66.211. The law governing nomination and appointment of a guardian for property is discussed in § 66.210[1].

**[2] Form**

**Nomination of Guardian for Particular Property of Minor--By Signed Writing of Parent or Nonparent**  
NOMINATION OF GUARDIAN FOR PROPERTY

I, \_\_\_\_\_ [name], the undersigned parent [or father or mother or state other relationship] of \_\_\_\_\_ [name(s) of minor(s)], hereby nominate \_\_\_\_\_ [name], \_\_\_\_\_ [street address, city, state, zip], as guardian [or joint guardians] for any and all property [or that certain property, as hereinafter described,] of

[Either:]

my child [or children], \_\_\_\_\_ [names of minor(s)]

[Or:]

\_\_\_\_\_ [name(s) of minor(s)], minor child [or children] of \_\_\_\_\_ [name(s) of parent(s)],

[Continue:]

which that child [or those children] may take [or \_\_\_\_\_ (has or have) taken] from me by \_\_\_\_\_ [specify, e.g., gift, deed, trust, will, succession, insurance, or benefits of any kind], so long as [, with respect to any such child,] that child remains a minor [if property is to be described, add: \_\_\_\_\_ (name each minor and describe property given to such child)].

[Add any desired optional provisions, such as:]

### Successor Guardian

I nominate \_\_\_\_\_ [name], \_\_\_\_\_ [street address, city, state, zip], as guardian in the event that the [or any] nominee is unable or unwilling to act or to continue to act as guardian.

Dated: \_\_\_\_\_

\_\_\_\_\_ [signature of nominator]

[typed name]

### Legal Topics:

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law  
 Conservators & Guardians  
 General Overview  
 Estate, Gift & Trust Law  
 Conservators & Guardians  
 Conservators Appointment  
 Estate, Gift & Trust Law  
 Conservators & Guardians  
 Guardians for Minors  
 Family Law  
 Guardians Appointment



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PART IV. FORMS

B. Guardian for Particular Property of Minor

*25-66 California Legal Forms--Transaction Guide §§ 66.213-66.219*

**[Reserved]**

§§ 66.213[Reserved]



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DIVISION IV: WILLS AND TRUSTS

CHAPTER 66 GUARDIANSHIPS

PART IV. FORMS

C. Optional Provisions

1. General Provisions

*25-66 California Legal Forms--Transaction Guide § 66.220*

## **§ 66.220 Provision Waiving Bond Requirement**

### **[1] Comment**

#### **[a] Use of Form**

This form is a waiver of bond. It is designed to relieve a guardian nominated by a parent or by a person from whom a minor receives property of the statutory obligation to post a bond for the benefit of the ward and other persons interested in the guardianship estate. When used, it should be added to the instrument (whether a will, a deed, or some other writing) by which the guardian is nominated. For nominating instruments for guardians, see §§ 66.200 and 66.210 (nomination by will of parent), 66.201 (nomination by deed of parent), 66.211 (nomination for particular property by will of nonparent), and 66.202 and 66.212 (nomination by signed writing of parent).

#### **[b] General Bond Requirement**

Except as otherwise provided by statute, every guardian must give a bond, conditioned on the faithful execution of the duties of the office according to law, to protect the ward and all persons interested in the guardianship estate [*Prob. Code* §§ 2320(a), (b)]. If, however, a parent or other person from whom a minor receives property nominates the guardian and if, in the nominating instrument, the parent or other person waives the filing of a bond, the guardian need not file a bond unless required by the court [*Prob. Code* § 2324; see *Prob. Code* §§ 1500 (nomination by parent), 1501 (nomination from person from whom minor receives property)]. In any case, a person appointed as guardian of the person (and not also as guardian of the estate) need not file a bond unless required by the court [*Prob. Code* § 2322].

#### **[c] Bond and Undertaking Law**

Rules relating to the execution, filing, approval, form, sufficiency, cancellation, and enforcement of bonds (and other rules relating to bonds and undertakings) are set forth in the Bond and Undertaking Law [*Code Civ. Proc.* § 995.010 *et seq.*]. For discussion of the Bond and Undertaking Law, see Ch. 79, *Suretyship, Guaranty, and Indemnity*.

**[d] Exemption for Trust Company**

A trust company [*see Fin. Code § 107; Prob. Code § 83* ("trust company" defined); *see also § 66.200[1]*] nominated as guardian of the estate will be unaffected by the use or lack of use of this form, since trust companies are never required to post bonds [*Prob. Code § 301(a)*]. If, however, a trust company nominated as guardian is unwilling to act in that capacity, this provision may become important, since it will then apply to the successor nominee.

**[e] Amount of Bond**

A guardian's bond may be given by an admitted surety insurer [*see Code Civ. Proc. §§ 995.120(a)* ("admitted surety insurer" defined), 995.610 et seq. (bond and undertaking requirements for admitted surety insurers); *Ins. Code § 105* (surety insurance)] or by a personal surety. When the guardian's bond is given by an admitted personal surety insurer, the amount must be equal to the sum of the following [*Prob. Code § 2320(c)*]:

- The value of the personal property of the estate.
- The probable annual gross income of all of the property of the estate.
- The probable annual gross payments from public entitlement programs such as Social Security, California public aid, and California medical assistance.
- On and after January 1, 2008, the reasonable amount for the cost of recovery to collect on the bond, including attorney's fees and costs. However, any attorney's fees and costs incurred in a successful action for surcharge against a conservator or guardian for breach of his or her duty will be a surcharge against the conservator or guardian, and, if unpaid, will be recovered against surety on the bond [*Prob. Code § 2320(c)(4)*].

If the bond is given by a personal surety, it must be twice the amount required of an admitted surety insurer [*Prob. Code § 2320(d)*].

Whether the bond is given by an admitted surety insurer or a personal surety, the court must fix the amount of the bond in accordance with the statutory requirements [*Prob. Code §§ 2320(c), (d)*].

If a guardian has knowledge of facts from which he or she knows or should know that the bond posted is less than the amount required by statute, the guardian, and the attorney, if any, are required to make an ex parte application for an order increasing the bond to the required amount [*Prob. Code § 2320.1*].

If the court requires additional bond upon hearing the account, the additional bond must be filed before the order approving the account and related matters, including fees, is filed by the court and becomes effective [*Prob. Code § 2320.2*].

**[f] Bonds For Joint Guardians**

If joint guardians are appointed, the court may require the guardians to furnish separate bonds, a joint bond, or a combination of joint and separate bonds [*Prob. Code § 2326(a)*]. If a joint bond is furnished, the liability on the bond will be joint and several [*Prob. Code § 2326(b)*].

**[g] Cautionary Note**

Careful consideration to the effects of this provision should be given before including a waiver of bond. A waiver of

bond may result in a savings to the guardianship estate, since the bond premiums will be charged against it [*see Prob. Code § 2623(a)*] (when filing account, guardian is entitled to allowance out of estate for cost of any surety bond furnished)]. Although the idea of saving the expense of a bond may appeal to many clients, however, it is important for them to bear in mind that waiving bond also dispenses with the important protection that a bond provides to the minor. If bond is waived and a loss subsequently occurs, the minor may find himself or herself without recourse to obtain needed funds for his or her maintenance or education. For this reason, it is suggested that in most cases the security provided by a bond may be well worth the expense.

Clients often believe that the individuals whom they nominate as guardians (or other fiduciaries) are eminently trustworthy and can be absolutely relied on to exercise their powers and duties in the best interests of those with whom they stand in a fiduciary relationship. However, the case law is replete with examples of instances in which fiduciaries, including close relatives, did not measure up to this standard of conduct. Moreover, losses suffered by guardianship estates can also result from honest mistakes committed by inexperienced individuals as well as from intentional malfeasance. Recognizing this, probate courts are generally reluctant to excuse individual guardians from the obligation of posting a bond. The testator may require a bond simply by not waiving one. In most cases (even when the testator has confidence in the honesty and integrity of the proposed guardian), requiring a bond will serve the best interests of the minor and the guardianship estate.

## **[2] FORM**

### **Provision Waiving Bond Requirement Waiver of Bond**

The guardian(s) of the person [*or estate or person and estate or for the property*] is [*or are*] not to be required to give bond of any kind.

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawConservators & GuardiansGeneral OverviewEstate, Gift & Trust LawConservators & GuardiansConservatorsGeneral OverviewEstate, Gift & Trust LawConservators & GuardiansGuardians for MinorsEstate, Gift & Trust LawConservators & GuardiansTestamentary GuardiansFamily LawGuardiansGeneral Overview



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## DIVISION IV: WILLS AND TRUSTS

## CHAPTER 66 GUARDIANSHIPS

## PART IV. FORMS

## C. Optional Provisions

## 1. General Provisions

*25-66 California Legal Forms--Transaction Guide § 66.221***§ 66.221 Provision Nominating Alternate or Successor Guardian****[1] Comment--Use of Form**

This form may be used to nominate an alternate or successor guardian to serve in the event the person nominated as guardian is unwilling or unable to serve (or continue to serve) in that capacity. It is advisable to nominate an alternate or successor guardian, since any person nominated to serve as guardian may decline to serve in that capacity or, after accepting appointment, resign the office [*Prob. Code § 2660*]. In addition, the court may refuse to appoint a person nominated as guardian [*see Prob. Code § 1514* (appointment of guardian)] or may remove a guardian from office after appointment [*Prob. Code § 2650*].

The same considerations that govern the selection of a guardian should govern the selection of an alternate or successor guardian. For discussion of the considerations governing the selection of a guardian, see § 66.110 et seq.

**[2] FORM**

**Provision Nominating Alternate or Successor Guardian**  
**Alternate or Successor Guardian**

*[If a single successor is being nominated:]*

If \_\_\_\_\_ [*name of nominee, e.g., Jane R. Smith*] is unable or unwilling to serve or continue as guardian of the \_\_\_\_\_ [*person, estate, or person and estate or person or estate*], I nominate \_\_\_\_\_ [*name of nominee and relationship, if any, to testator, e.g., my friend, Thomas W. Jones,*] to serve as guardian of the \_\_\_\_\_ [*person, estate, or person and estate or person or estate*].

I nominate \_\_\_\_\_ [*name*], \_\_\_\_\_ [*street address, city, state, zip*], as successor guardian of the person [*or estate or person and estate or for the property of the minor*] as described above, to serve only

in the event that the original nominee is not [or that none of the prior original or substitute nominees is] appointed or remains qualified to serve.

[Or, if several successors are to be named in order of priority:]

If \_\_\_\_\_ [name of nominee, e.g., Jane R. Smith] is unable or unwilling to serve or continue as guardian of the \_\_\_\_\_ [person, estate, or person and estate or person or estate], I nominate the following individuals, in the order of priority listed below, to serve as guardian of the \_\_\_\_\_ [person, estate, or person and estate or person or estate]:

First, \_\_\_\_\_ [name and relationship; e.g. my sister, Bertha Jones];

Second, \_\_\_\_\_ [name and relationship; e.g. my niece, Anne Smith];

Third, \_\_\_\_\_ [name and relationship; e.g. my uncle, John Jones].

[Continue as necessary for each additional person whom the nominator believes will make a suitable successor guardian.]

[Continue with the following:]

Any successor guardian is to act under all of the powers and duties described above for that position, except as follows \_\_\_\_\_ [state any additional or different powers, duties and restrictions, which will apply to successor guardians].

### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law  
 Conservators & Guardians  
 General Overview  
 Estate, Gift & Trust Law  
 Conservators & Guardians  
 Conservators Appointment  
 Estate, Gift & Trust Law  
 Conservators & Guardians  
 Guardians for Minors  
 Family Law  
 Guardians Appointment



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DIVISION IV: WILLS AND TRUSTS

CHAPTER 66 GUARDIANSHIPS

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C. Optional Provisions

1. General Provisions

*25-66 California Legal Forms--Transaction Guide § 66.222***§ 66.222 Provision for Temporary Guardian of Person or Estate****[1] Comment****[a] Use of Form**

This form is a provision directing the nominee for guardian of the person or estate to petition the court for appointment as temporary guardian, if required for the immediate care, maintenance, and support of the proposed ward, or for the immediate conservation and protection of the estate of the proposed ward from loss and injury. Any person entitled to petition for appointment of a guardian may file a petition for the appointment of a temporary guardian of the person or estate or both, on or after the filing of a petition for appointment of a guardian [*Prob. Code § 2250(a)(1)*]. On a showing of good cause, the court is authorized to appoint a temporary guardian of the person or estate or both, to serve pending the final determination of the petition for appointment of the guardian [*Prob. Code § 2250(b)*]. The requirements and procedure for appointment, and other provisions concerning the powers and duties of the temporary conservator and the duration of his or her powers, are set forth in *Prob. Code § 2250 et seq.*

The provisions in this form may be used when the nominating parent foresees that the person or estate of the proposed ward will require special immediate care before the final determination on the petition for guardianship, and when the nominating parent desires the nominee for guardian to seek the powers and duties of temporary guardian until that final determination. For example, a temporary guardian of the person may be desirable if the nominating parent foresees that the minor child may require medical treatment for which the consent of a guardian is required. Former law cited several specific situations in which a temporary guardian of the person is desirable and authorized an order for temporary custody. Included are those situations in which the proposed ward would be imperiled if he or she was allowed to remain in the custody of those having his or her care, or in which there was reason to believe the proposed ward would be taken out of the state [*see former Prob. Code § 1442*]. Although the present guardianship statutes do not recite these situations, there are instances in which a temporary guardianship of the person may be desirable.

**[b] Temporary Guardianship Statutes**

The appointed temporary guardian has only the powers and duties of a guardian necessary to provide for the temporary care, maintenance, and support of the ward and those necessary to conserve and protect the property of the ward from loss or injury [*Prob. Code § 2252(a)*]. The temporary guardian also may have any additional powers and duties that may be ordered by the court in the order of appointment or by subsequent order [*Prob. Code § 2252(c)*].

Unless the court otherwise orders, the temporary guardian of the person has the same powers and duties to consent to medical treatment of the ward as the guardian [*Prob. Code § 2252(b)(1)*; *see Prob. Code § 2353*]. Unless the court orders otherwise, a temporary guardian of the estate also may marshal assets and establish accounts at financial institutions [*Prob. Code § 2252(b)(3)*].

The letters of temporary guardian must indicate the termination date of the appointment [*Prob. Code § 2251*]. However, the powers of the temporary guardian may terminate prior to this date [*see Prob. Code § 2257*].

A temporary guardian is subject to the same requirements for taking oaths and filing a bond [*Prob. Code § 2300 et seq.*] as a guardian [*Prob. Code § 2251*]. Therefore, if the nominating party will impose special bond requirements on the nominee or will waive bond [*see § 66.220*], the nominating document should include a consistent bond provision for both the nomination of the guardian and the provision in this form.

## **[2] FORM**

### **Provision for Temporary Guardian of Person or Estate Temporary Guardian of the Person**

If at the time of filing a petition for appointment as guardian of the person, or any time thereafter before a guardian is appointed, the care, maintenance, and support of the ward(s) so requires, the nominee for guardian of the person is to petition the Superior Court which is to hear proceedings on this guardianship to provide for the temporary custody of the ward with that nominee as temporary guardian immediately, pending the final determination of the Court on the petition for appointment of a guardian of the person.

[OR]

### **Temporary Guardian of the Estate**

If at the time of filing a petition for appointment as guardian of the estate or any time thereafter before a guardian is appointed, the conservation and protection of the estate of the ward from loss or injury so requires, the nominee for guardian of the estate is to petition the Superior Court which is to hear proceedings on this guardianship to provide for the temporary guardianship of the estate of the ward with that nominee as temporary guardian immediately, pending the final determination of the Court on the petition for appointment of a guardian of the estate.

### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law  
Conservators & Guardians  
General Overview  
Estate, Gift & Trust Law  
Conservators & Guardians  
Conservators  
General Overview  
Estate, Gift & Trust Law  
Conservators & Guardians  
Guardians for  
Minors  
Family Law  
Guardians  
Appointment



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DIVISION IV: WILLS AND TRUSTS

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C. Optional Provisions

1. General Provisions

*25-66 California Legal Forms--Transaction Guide § 66.223*

**§ 66.223 Provisions for Compensation of Guardian and Payments on Behalf of Ward**

**[1] Comment**

**[a] Use of Form**

This form contains provisions for compensation of the guardian of the person and the guardian of the estate of a minor child, and for payments to be made from the estate for the maintenance, support, and education of the minor. It may be used by a person who is nominating a guardian and wishes to establish a "just and reasonable" amount for the guardian's compensation, especially for services to be rendered on an ongoing basis. The court will not be bound by the amount set forth in this form, but it may consider it along with other factors it deems material in determining the guardian's compensation.

**[b] Procedure for Obtaining Compensation**

A guardian's compensation will be established by the court after the guardian has filed a petition for an order fixing and allowing compensation. A petition may be filed by a guardian of the estate [*Prob. Code § 2640(a)*] or a guardian of the person [*Prob. Code § 2641(a)*].

When a petition is filed by a guardian of the estate, the court may be asked to fix and allow compensation for the guardian of the estate, the guardian of the person, or the attorney for either (or both) [*Prob. Code § 2640(a)*]. When a petition is filed by a guardian of the person, the court may be asked to fix and allow compensation only for the guardian of the person [*Prob. Code § 2641(a)*].

On hearing the petition, the court will determine a "just and reasonable" amount for the compensation of the guardian (or guardians) and a "reasonable" amount for the compensation of the attorney (or attorneys) [*Prob. Code §§ 2640(c), 2641(b); Cal. Rules of Ct., Rule 7.751(b)*]. The compensation ordinarily will be for services rendered to the guardian or the guardianship estate up to that time [*Prob. Code §§ 2640(a), 2641(a)*]. However, the court has discretion to include compensation for services rendered before the date of the order appointing the guardian [*Prob. Code §§ 2640(c)*].

2641(b); *Cal. Rules of Ct., Rule 7.751(a)*]. Furthermore, the guardian or conservator will not be compensated from the estate for any costs or fees that the guardian or conservator incurred in unsuccessfully opposing a petition or other action by or on behalf of the ward or conservatee, unless the court determines that the opposition was made in good faith based on the best interests of the ward or conservatee [*Prob. Code §§ 2640(d), 2641(c)*].

Legal services for which the attorney may be compensated include any services rendered by a paralegal under the direction and supervision of the attorney [*Prob. Code § 2640(c); Cal. Rules of Ct., Rule 7.754*].

The compensation allowed by the court (whether for the guardian of the estate, the guardian of the person, or the attorney for either) will be charged against the estate [*Prob. Code §§ 2640(c), 2641(b)*].

Special procedures apply in dual compensation circumstances when, for example, legal services are performed by an attorney who is also serving as guardian [*see Prob. Code § 2645*].

### **[c] Order for Periodic Payment of Services**

On petition of a guardian of the estate, a guardian of the person, or both, the court may authorize periodic payments on account to any guardian or attorney for a guardian. A petition for periodic payments must describe the services to be rendered on a periodic basis and the reason why authority to make period payments is requested [*Prob. Code § 2643(a); Cal. Rules of Ct., Rule 7.755(b)*].

In fixing the amount of periodic payments, the court must take into account the services to be rendered on a periodic basis and their reasonable value [*Prob. Code § 2643(c)*]. The guardian may make the periodic payments authorized by the court only if the services described in the petition are actually rendered, and the payments are subject to review by the court on the guardian's next succeeding account to determine that the services were rendered and that the amount paid on account was not unreasonable. If the court determines that the amount paid on account was either excessive or inadequate in view of the services actually rendered, it must make an appropriate order [*Prob. Code § 2643(c)*].

### **[d] Payments for Maintenance, Support, and Education of Ward**

The income from the estate of the minor must be applied to the comfort and suitable support, maintenance, and education of the ward and of those legally entitled to support, maintenance, or education from the ward [*Prob. Code § 2420(a)*]. The guardian of the estate must take into account the value of the estate and the condition of life of the persons required to be furnished support, maintenance, or education [*Prob. Code § 2420(a)*]. If the income is insufficient, the guardian of the estate may sell or give a security interest in or other lien on any personal property of the estate, or sell or mortgage or give a deed of trust on any real property of the estate, in accordance with the guardianship laws [*Prob. Code § 2420(b)*].

## **[2] FORM**

### **Provisions for Compensation of Guardian and Payments on Behalf of Ward Guardian of Person**

The guardian of the estate is to pay the guardian of the person [*or* The guardian is to receive] each month the amount of \$\_\_\_\_\_ [for the first year of the guardianship, with a \_\_\_\_\_ percent increase in each succeeding year] for the ordinary maintenance, support, and education of the ward. The guardian [of the person] is to set aside up to \_\_\_\_\_ percent of this amount each month as \_\_\_\_\_ [his *or* her] own just and reasonable compensation for serving the ward in this capacity. \_\_\_\_\_ [He *or* She] may turn over to the ward from time to time, as befits the age of the ward at any certain time, such sums of money from these amounts as \_\_\_\_\_ [he *or* she] deems appropriate toward complementing and completing the guardianship arrangement.

### Guardian of Estate

The guardian of the estate is to receive \$ \_\_\_\_\_ per month [*or* year] for the first year of the guardianship [with an increase of \_\_\_\_\_ percent of the income produced by the estate in each succeeding year of the guardianship] as just and reasonable compensation for managing the ward's property, including rendering all required inventories and accounting to the superior court. \_\_\_\_\_ [He *or* She] is to favorably entertain, whenever possible, the requests of the guardian of the person for payments for special or unusual purchases on behalf of the ward, which payments are to be made directly by the guardian of the estate to the selling sources, whenever convenient. Such extraordinary requests may consist of, but are not limited to, the following \_\_\_\_\_ [*list representative requests, e.g., complete seasonal wardrobe, part-week or multiweek vacation away from residence, special sports or hobby equipment, any type of vehicle of transportation or longer journey travel arrangements, any audio-visual, communications, musical, professional, artistic, or heavy-duty mechanical equipment, medical or dental expenses of specific treatments, etc.*]. Any request of the guardian of the person for a single purchase for the ward likely to cost \$ \_\_\_\_\_ or over, or any series of items to be purchased at one time and related by nature or purpose collectively totaling in likelihood \$ \_\_\_\_\_ or over is automatically to be considered in the category of requests for special or unusual purchases.

### Legal Topics:

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawConservators & GuardiansGeneral OverviewEstate, Gift & Trust LawConservators & GuardiansConservatorsGeneral OverviewEstate, Gift & Trust LawConservators & GuardiansGuardians for MinorsFamily LawGuardiansGeneral Overview



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C. Optional Provisions

1. General Provisions

*25-66 California Legal Forms--Transaction Guide § 66.224***§ 66.224 Provision Conditioning Nomination on Continued Personal or Business Position****[1] Comment--Use of Form**

The provision in this form conditions the nomination of a guardian on the continued existence of the nominee's personal or business status. Although the parent usually selects a guardian, particularly one of the person of a minor, on the basis of the person or business status of the nominee at the time of and until the nomination, the nominee's personal business situation must be expected to change with time. However, if certain features of the nominee's life are the fundamental criteria by which the nominating parent selected him to be the guardian, the parent may desire to make one or more of these features express conditions of the continued nomination of the nominee.

If this form is used, the nominating parent should also nominate successor guardians in the event that the situation of the original nominee changes and he or she no longer meets the conditions stated in this provision.

**[2] Form****Provision Conditioning Nomination on Continued Personal or Business Position**

Condition(s) of Nomination

The above named guardian of the person is nominated to serve as guardian only so long as the following conditions exist:

\_\_\_\_\_ [He *or* She] remains [married to and] living in a household relationship with \_\_\_\_\_ [*name or* a woman (*or* man) of adequate maturity, education, and understanding of and compassion for children, who will be close to the home situation and be an accessible and dependable \_\_\_\_\_ (mother-figure *or* father-figure) for my child];

\_\_\_\_\_ [He *or* She] remains employed in \_\_\_\_\_ [his *or* her] present field [*or* occupational place *or* position *or* other];

\_\_\_\_\_ [He or She] continues to reside in California [or the city or the county of \_\_\_\_\_]; and

\_\_\_\_\_ [He or She] continues to be a member of the \_\_\_\_\_ [name] Church.

[Add any other desired conditions]

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawConservators & GuardiansGeneral OverviewEstate, Gift & Trust LawConservators & GuardiansConservatorsAppointmentEstate, Gift & Trust LawConservators & GuardiansGuardians for MinorsFamily LawGuardiansGeneral Overview



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## DIVISION IV: WILLS AND TRUSTS

## CHAPTER 66 GUARDIANSHIPS

## PART IV. FORMS

## C. Optional Provisions

## 1. General Provisions

*25-66 California Legal Forms--Transaction Guide § 66.225***§ 66.225 Provision That Particular Individual Has Not Been Nominated as Guardian****[1] Comment--Use of Form**

This form is a provision by which the nominating parent may state that he or she has intentionally not nominated a particular individual as guardian of the minor child. Although it may be used in connection with the nomination of a guardian of the person or a guardian of the estate, the form probably will be used most frequently in connection with the guardian of the person since the court has considerably more discretion in the appointment of this type of guardian [*see Prob. Code § 1514(b)-(d)*].

The statement in this form may include the reasons why the particular individual is not desired as a guardian. This statement can influence the court's determination of what is in the best interests of the child [*see Fam. Code § 3040(a)*]. If used, the statement of reasons should be drafted with care so that no libel is committed and so that it is logical and clear. The bare statement of intentional omission of nomination, without supporting reasons, is a clear indication of the nominator's thinking. As an alternative, the nominating party may state his or her reasons for not nominating the individual as guardian in a separate letter delivered to the nominee or proposed executor, with instructions not to open or publish the contents unless a challenge by the particular individual arises.

**[2] Form****Provision That Particular Individual Has Not Been Nominated as Guardian**

Negation of Nomination of Individual

I intentionally do not nominate [my \_\_\_\_\_ (*relationship, if any*)], \_\_\_\_\_ [*name*], \_\_\_\_\_ [*street address, city, state, zip*], to act as guardian of the person [*or estate or person and estate*] of my child [*or children*], and desire that \_\_\_\_\_ [*name*] not be appointed guardian in the event that the above-named nominees are unable or unwilling to act or to continue to act as guardian. [*Optional: My reasons for desiring that \_\_\_\_\_ (*name*) not be appointed under any circumstances to act as guardian of the person (*or estate or person and estate*) are \_\_\_\_\_ (*state reasons*).*]

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawConservators & GuardiansGeneral OverviewEstate, Gift & Trust LawConservators & GuardiansConservatorsAppointmentEstate, Gift & Trust LawConservators & GuardiansGuardians for MinorsFamily LawGuardiansGeneral OverviewFamily LawGuardiansAppointment



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1. General Provisions

*25-66 California Legal Forms--Transaction Guide §§ 66.226-66.229*

**[Reserved]**

§§ 66.226[Reserved]



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 2. Provisions for Guardian of the Person

*25-66 California Legal Forms--Transaction Guide § 66.230*

**§ 66.230 Provision Explaining Parent's Selection of Nominee**

**[1] Comment--Use of Form**

The provision in this form permits the nominating parent to express his or her reasons for selecting the candidate nominated as guardian of the person. This type of provision is not needed in a nomination of a guardian of the estate or for property because the court must appoint the person nominated for these positions, unless the nominee is unsuitable [*see Prob. Code § 1514(c), (d)*]. For a guardian of the person, however, the court is required to follow the child custody provisions of the Family Code and appoint a guardian according to the best interests of the child [*Prob. Code § 1514(b); see Fam. Code § 3020 et seq.*]. Under *Fam. Code § 3043*, the court must consider and give due weight to the nomination of a guardian of the person of the child by his or her nominating parent. The provision in this form will aid the court in giving due weight to the nominee, and may be determinative in selecting the guardian if a challenge for the position of guardian is raised by a relative or friend.

**[2] Form**

**Provision Explaining Parent's Selection of Nominee**

Explanation of Nomination

My nomination of \_\_\_\_\_ [*name*] as guardian [of the person] is based on what I believe would be for the best interest of my child. Some of the factors I considered in the selection are as follows: \_\_\_\_\_  
 [*reasons, e.g.,* \_\_\_\_\_ (he *or* she) has children of similar age to my child and could comfortably accommodate another into \_\_\_\_\_ (his *or* her) household; \_\_\_\_\_ (he *or* she) has always been solicitous of the welfare of my child, has formed a good working relationship with \_\_\_\_\_ (him *or* her) based on affection and understanding, and has the trust and interest of my child; \_\_\_\_\_ (his *or* her) lifestyle and that of \_\_\_\_\_ (his *or* her) household would pose no psychological problems or pressures for my child beyond the minimum unavoidable in any family relationship; \_\_\_\_\_ (his *or* her) own interests are in the area of those of my child, and \_\_\_\_\_ (he *or* she) would be of continuing inestimable value in guiding my child to develop and to gauge \_\_\_\_\_ (his *or* her) own talents and

abilities; *etc.*].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law  
Conservators & Guardians  
General Overview  
Estate, Gift & Trust Law  
Conservators & Guardians  
Guardians for  
Minors  
Estate, Gift & Trust Law  
Conservators & Guardians  
Testamentary Guardians  
Family Law  
Guardians  
General  
Overview



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DIVISION IV: WILLS AND TRUSTS  
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*25-66 California Legal Forms--Transaction Guide § 66.231*

**§ 66.231 Provision for Joint Guardians of the Person**

**[1] Comment**

**[a] Use of Form**

This form provides for the appointment of joint guardians of the person, and illustrates one possible method of dividing the guardianship responsibilities among joint guardians. For a provision nominating joint guardians of a minor's estate, see § 66.241.

**[b] Appointment of Joint Guardians**

The court, in its discretion, may appoint joint guardians of the person, joint guardians of the estate, or joint guardians of the person and estate [*Prob. Code § 2105(a)*]. When joint guardians are appointed, each must qualify in the same manner as a sole guardian [*Prob. Code § 2105(b)*].

If a custodial parent has been diagnosed with a terminal condition, the court may appoint the custodial parent and a person nominated by the custodial parent as joint guardians of the minor's person [*Prob. Code § 2105(f)*; see *Fam. Code § 3041*, *Prob. Code § 1419.5*]. However, this appointment cannot be made over the objection of a noncustodial parent without a finding that the noncustodial parent's custody would be detrimental to the minor [*Prob. Code § 2105(f)*; see *Fam. Code § 3041*]. A "terminal condition" is an incurable and irreversible condition that, without the administration of life-sustaining treatment, will, within reasonable medical judgment, result in death [*Prob. Code § 2105(f)*]. It must be evidenced by a declaration executed by a licensed physician [*Prob. Code § 2105(f)*].

**[c] Authority to Act**

Ordinarily, if there are two guardians, they must concur to exercise a power [*Prob. Code § 2105(c)(1)*]. If there are more than two guardians, a majority must concur to exercise a power [*Prob. Code § 2105(c)(2)*]. It is not entirely clear whether and to what extent an individual who nominates a guardian can modify these statutory requirements for

exercise of authority [*see* [d], *below*].

If one joint guardian dies, is removed, or resigns, the powers and duties continue in the remaining joint guardians until the court appoints a new joint guardian [*Prob. Code* § 2105(d)]. If one or more joint guardians is absent from California and unable to act, legally disqualified from serving, or unable to act for any other reason, the court may authorize the remaining joint guardians to act as to all matters within its order. The court may make the order with or without notice [*Prob. Code* § 2105(e)].

#### **[d] Modification or Limitation of Guardian's Statutory Responsibilities**

This form specifies a division of responsibilities between two joint guardians. It provides that the ward will reside alternately with each joint guardian during specified months of the year, and that the joint guardian with whom the ward resides is to have sole responsibility for the ward while the ward resides with that guardian. This constitutes, in effect, a modification of the statutory requirement that the guardians must concur to exercise a power [*see Prob. Code* § 2105(c); *see also* [c], *above*]. The extent to which a nominating instrument may modify or limit the statutory powers and duties of a guardian of the person is not entirely clear, although there is a distinction between nominations made in wills and nominations made in other instruments.

If the nomination for a guardian of the person is made by the parent of the proposed ward, and the nominee is appointed by the court, the guardian will be granted, "to the extent provided in the will," the same authority over the ward as a parent having legal custody of a child [*Prob. Code* § 2108(a)]. The words of limitation imply that the parent may limit or restrict the powers of the guardian [*see Norris v. Harris (1860) 15 Cal. 226, 255-256* (existence of testamentary power to modify statutory powers of guardians confirmed by early case involving guardianship of estate; testamentary authorization to sell property of ward without direction of probate court, as required under law then in effect)]. The court has authority, however, to depart from the statutory guidelines for good cause [*Prob. Code* § 2108(a)]. Given the court's general duty to consider the best interests of the ward in appointing a guardian of the person [*see Prob. Code* § 1514(b); *Fam. Code* §§ 3011, 3040(a)], it is unlikely that any attempted modification of the guardian's powers and responsibilities would be recognized if the court concluded that it was inconsistent with the ward's best interests.

It is unclear whether the court has the unilateral power to modify the statutory powers of a guardian of the person. While *Prob. Code* § 2351(b) specifically permits the court to limit the powers and duties of a conservator of the person, it extends no similar authority to modify the statutory powers of guardians of the person. However, in appointing a guardian of the person, the court is governed by *Fam. Code* § 3040 *et seq.* [*Prob. Code* § 1514(b)], which provides, among other things, that custody is to be awarded according to the best interests of the child [*see Fam. Code* § 3040(a); *see also Fam. Code* § 3011 (factors considered in determining "best interest" of child)]. It is arguable that the court could modify or limit the powers of a guardian of the person on a finding that such a modification would be in the ward's best interest.

In any case, the court does have the power, with the consent of the guardian, to include in its order conditions that would not otherwise be obligatory. These conditions may provide for the care, treatment, education, and welfare of the ward or conservatee. The performance of these conditions becomes a part of the guardian's duties for which the guardian may be held responsible [*Prob. Code* § 2358]. Thus, although a provision such as this one, when included in a nominating instrument, is not binding on the court, it nevertheless may serve to inform all interested parties regarding the parent's wishes. If these wishes are agreeable to the court and the proposed guardians, they may be embodied in the court's order and the letters of guardianship [*see Prob. Code* § 2358].

## **[2] Form**

### **Provision for Joint Guardians of the Person**

Joint Guardians of the Person

\_\_\_\_\_ [name], the first joint guardian of the person, is to be solely responsible as guardian of the ward's person when the ward resides at \_\_\_\_\_ [name of first town or county]; and \_\_\_\_\_ [name], the second joint guardian of the person, is to be solely responsible as guardian of the ward's person when the ward resides at \_\_\_\_\_ [name of second town or county; continue on for other locations]. The ward is to reside with the first joint guardian approximately from \_\_\_\_\_ [date] to \_\_\_\_\_ [date] of each year [or, e.g., during the school months], and to reside with the second joint guardian \_\_\_\_\_ [e.g., approximately from \_\_\_\_\_ (date) to \_\_\_\_\_ (date) or, e.g., during the remainder of the year or during school vacations and holidays of approximately a week or more]. The joint guardians are to confer as often as they desire, in person or by letter or telephone, but at least on the occasions of the transfer of the ward's residence, on the general program of the ward's upbringing, and on any details of his transference between residences.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law  
 Conservators & Guardians  
 General Overview  
 Estate, Gift & Trust Law  
 Conservators & Guardians  
 Conservators  
 General Overview  
 Estate, Gift & Trust Law  
 Conservators & Guardians  
 Conservators  
 Appointment  
 Estate, Gift & Trust Law  
 Conservators & Guardians  
 Guardians for Minors  
 Family Law  
 Guardians  
 Appointment



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DIVISION IV: WILLS AND TRUSTS

CHAPTER 66 GUARDIANSHIPS

PART IV. FORMS

C. Optional Provisions

2. Provisions for Guardian of the Person

*25-66 California Legal Forms--Transaction Guide §§ 66.232-66.239*

**[Reserved]**

§§ 66.232[Reserved]



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DIVISION IV: WILLS AND TRUSTS  
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C. Optional Provisions  
3. Provisions for Guardian of the Estate

*25-66 California Legal Forms--Transaction Guide § 66.240*

**§ 66.240 Will Provision Granting Guardian Specific Powers [Prob. Code § 2108(b)]**

**[1] Comment**

**[a] Use of Form**

This form is a will provision granting the nominee the right to exercise certain enumerated powers without notice, hearing, or court authorization, instructions, approval, or confirmation. The provision is authorized by *Prob. Code § 2108(b)* and specifically applies for both guardians of the estate and guardians for property.

**[b] Authorization for Provision Granting Right to Exercise Powers**

If a person nominated pursuant to the statutes governing nomination of a guardian of the estate or for property [*Prob. Code §§ 1500, 1501*] is appointed guardian, the guardian must be granted the right to independently exercise any one or more of certain powers [*Prob. Code §§ 2590, 2591*], except to the extent the court for good cause determines otherwise [*Prob. Code § 2108(b)*]. A grant of the right permits the guardian to exercise the powers without notice, hearing, or court authorization, instructions, approval, or confirmation, in the same manner as the ward could do if possessed of legal capacity [*Prob. Code §§ 2108(b), 2590*]. For a guardianship of particular property [*see Prob. Code § 1501*], the right granted applies only with respect to the property covered by the nomination [*Prob. Code § 2108(b)*].

**[c] Enumerated Powers**

The enumerated powers referred to in *Prob. Code § 2108(b)* and listed in *Prob. Code § 2591* are the following:

- To operate for a period longer than 45 days at the risk of the estate a business, farm, or enterprise constituting an asset of the estate.
- To grant and take options.

- To sell at public or private sale real or personal property of the estate.
- To create by grant or otherwise easements and servitudes.
- To borrow money and give security for its repayment.
- To purchase real or personal property.
- To alter, improve, and repair, or raze, replace, and rebuild the property of the estate.
- To let or lease property of the estate, or extend, renew or modify a lease of real property, for which the monthly rental or lease term exceeds the maximum specified in *Prob. Code § 2501* and *Prob. Code § 2555* for any purpose (including exploration for and removal of gas, oil, and other minerals and natural resources) and for any period, including a term commencing at a future time.
- To lend money on adequate security.
- To exchange property of the estate.
- To sell property of the estate on credit if any unpaid portion of the selling price is adequately secured.
- To commence and maintain an action for partition.
- To exercise stock rights and stock options.
- To participate in and become subject to and consent to the provisions of a voting trust and of a reorganization, consolidation, merger, dissolution, liquidation, or other modification or adjustment affecting estate property.
- To pay, collect, compromise, arbitrate, or otherwise adjust claims, debts, or demands upon the guardianship.

#### **[d] Grant of Right to Exercise Powers When Form Is Not Used**

A guardian of the estate or for property may be granted the right to independently exercise one or more of the powers, separate and apart from the use of this form. *Prob. Code § 2590* authorizes a court, in its discretion, to make an order granting any one or more of the powers if the court determines that, under the circumstances of the particular guardianship, it would be to the advantage, benefit, and best interest of the estate to do so. However, since the grant is to be made on a case-by-case basis, is only for powers as determined by the court, and must be petitioned for by the guardian [*see Prob. Code § 2592*], a guardian would probably prefer to be granted a power or powers pursuant to *Prob. Code § 2108(b)* rather than *Prob. Code § 2590*.

#### **[e] Statement of Terms or Powers in Letters of Guardianship**

The right to exercise the powers provided in the nomination must be granted in the order of appointment, and the terms of these granted powers must be included in the letters of guardianship [*Prob. Code § 2108(b), (c)*]. If any of the powers are granted pursuant to *Prob. Code § 2590* rather than *Prob. Code § 2108*, the letters of guardianship must state the powers granted and the restrictions, conditions, or limitations, if any, prescribed in the order, and must refer to the laws governing the grant [*Prob. Code § 2594(a)*]. When any powers are granted by a subsequent order, new letters must be

issued in this described form [*Prob. Code § 2594(b)*].

**[2] Form**

**Will Provision Granting Guardian Specific Powers**

Additional Powers of Guardian

The guardian of the estate [*or for property*] nominated by this will shall be granted the right to exercise the powers described hereinafter, without notice, hearing, or court authorization, instruction, approval, or confirmation, in the same manner as my minor child could do if possessed of legal capacity: \_\_\_\_\_ [*list power(s) from Prob. Code § 2591 and any requirements, conditions, or limitations on right to exercise such power(s) to be granted to guardian*].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law  
Conservators & Guardians  
Conservators  
Duties & Rights  
Estate, Gift & Trust Law  
Conservators & Guardians  
Guardians for Minors  
Estate, Gift & Trust Law  
Conservators & Guardians  
Testamentary Guardians  
Family Law  
Guardians  
Duties & Rights



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CHAPTER 66 GUARDIANSHIPS

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C. Optional Provisions

3. Provisions for Guardian of the Estate

*25-66 California Legal Forms--Transaction Guide § 66.241*

#### **§ 66.241 Provision for Joint Guardians of the Estate**

##### **[1] Comment**

##### **[a] Use of Form**

This form is a provision for a division of responsibilities between joint guardians of the estate of a minor. Joint guardians of the estate of the ward may be desirable if different kinds of assets of the ward require specific expertise from different managers, or if separate managers already have been handling these particular investments. The device is also useful if the properties are located at remote locations, or if they require supervision at far ends of the state or in different states. In other instances, as illustrated in this form, division of responsibility along lines of real property management and personal property administration may be practical. When this provision is used, the nominating parent should specify which guardian will handle the ordinary financial needs of the ward.

##### **[b] Appointment and Authority**

The court, in its discretion, may appoint joint guardians of the estate, or joint guardians of the person and estate [*Prob. Code § 2105(a)*]. When joint guardians are appointed, each must qualify in the same manner as a sole guardian [*Prob. Code § 2105(b)*].

Ordinarily, if there are two guardians, they must concur to exercise a power [*Prob. Code § 2105(c)(1)*]. If there are more than two guardians, a majority must concur [*Prob. Code § 2105(c)(2)*]. For additional discussion of the authority of joint guardians, see § 66.231[1][c], [d].

##### **[c] Statutory Basis for Division of Authority**

No statutory authority specifically permits a division of the guardianship function precisely in the manner provided in this form. However, *Prob. Code § 2108(b)* does provide that a guardian of the estate who is nominated by a parent may be granted the right to exercise any or all of the statutory powers specified in *Prob. Code § 2591* without further court

authorization [*see* § 66.240[1][c]] "to the extent provided in the nomination," unless the court for good cause determines otherwise [*Prob. Code* § 2108(b)]. Since the nominator may limit a guardian's ability to exercise some or all statutory powers without court authorization, it seems to follow that the right to apportion or allocate authority among joint guardians should also exist.

A substantially similar result can be achieved simply by dividing the minor's estate into specific parts in the manner illustrated in this form, and then appointing a separate guardian of property (rather than joint guardians) for each part [*see Prob. Code* §§ 1501, 1514(d), 2109; *see also* § 66.15[3], *above*].

#### **[d] Liability**

When there is more than one guardian of the estate, one guardian is not liable for a breach of fiduciary duty committed by another guardian [*Prob. Code* § 2105.5(a)], except when the former guardian does any of the following [*see Prob. Code* § 2105.5(b)(1)-(5)]:

- Participates in the breach.
- Improperly delegates the administration of the estate to the other guardian.
- Approves, acquiesces in, or conceals a breach committed by the other guardian.
- Negligently enables the other guardian to commit a breach.
- Knows or has information from which he or she reasonably should have known of the breach by the other guardian and fails to take reasonable steps to compel the other guardian to redress the breach.

The liability of a guardian or conservator for a breach of fiduciary duty committed by another guardian or conservator before July 1, 1988, is governed by prior law and not by *Prob. Code* § 2105.5 [*Prob. Code* § 2105.5(c)].

#### **[2] Form**

##### **Provision for Joint Guardians of the Estate**

Joint Guardians of the Estate

\_\_\_\_\_ [name], the first joint guardian of the estate, is to have sole responsibility for the property of the ward in the form of real estate, including all unimproved lots or acreage and all parcels containing homes, apartment buildings, commercial buildings, industries, or the like, including all relationships with the occupants of those properties, including leasing, selling, trading, and the like [*or* responsibility for \_\_\_\_\_ (all *or* the) property of the ward located in \_\_\_\_\_ (*e.g.*, California *or* specify other location)]. [The first joint guardian will keep on hand and manage the amount of \$ \_\_\_\_\_ (*or* a reasonable amount) from proceeds for expenses of management, and forward the remainder periodically to the second joint guardian.]

\_\_\_\_\_ [name], the second joint guardian of the estate, is to have sole responsibility for \_\_\_\_\_ [*specify extent of responsibility; e.g.*, the property of the ward in the form of personal property, including all cash, deposits in financial institutions, valuable objects and possessions, stock and bonds, and the like, including all relationships with persons coming into dealing with that property *or* \_\_\_\_\_ (all *or* the) property of the ward located in \_\_\_\_\_ (*location*)].

Each joint guardian will be separately responsible for inventorying and accounting for property under his or her sole management, to be presented as a joint account [under the auspices of the second joint guardian]. The joint guardians

will confer periodically and as often as necessary on reconciliation of accounts and problems of joint management as well as allocation of responsibility for determining and meeting the needs of the ward in special instances. However, the needs of the ward will be addressed to and accommodated by the individual joint guardians in the first and normal instances as follows [*or* solely by the second joint guardian]:

The second joint guardian will be responsible for \_\_\_\_\_ [*e.g.*, the ward's daily needs of maintenance, food, clothing, and short personal expenses, *etc.*]. The first joint guardian will be responsible for \_\_\_\_\_ [*e.g.*, the ward's school tuition, vacation and holiday traveling expenses, and purchases of special single objects of a value of \$\_\_\_\_\_ or more].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law  
 Conservators & Guardians  
 Conservators Appointment  
 Estate, Gift & Trust Law  
 Conservators & Guardians  
 Guardians for Minors  
 Estate, Gift & Trust Law  
 Conservators & Guardians  
 Testamentary Guardians  
 Family Law  
 Guardians Appointment



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*25-66 California Legal Forms--Transaction Guide § 66.242*

**§ 66.242 Provision for Burial Arrangements for Ward**

**[1] Comment**

**[a] Use of Form**

This form is a provision directing the guardian to contract and pay for the ward's last illness and the disposition of the ward's remains. When used, it should be added to the instrument (whether a will, a deed, or some other writing) by which the guardian is nominated. For nominating instruments for guardians, see §§ 66.200 and 66.210 (nomination by will of parent), 66.201 (nomination by deed of parent), and 66.202 and 66.212 (nomination by signed writing of parent).

The form includes two alternative provisions. The first may be used to specify that payment for the last illness and disposition of the ward's remains will be made only from a specified fund or property. The second may be used to specify that payment may be made from any property of the ward under the guardian's control, except real property or an interest in real property. The form also includes an optional provision which may be added to the principal provision to specify details of, and set a limit on the total cost of, the ward's funeral and burial.

**[b] Last Illness and Disposition of Remains**

On the death of the ward, the guardian may contract for and pay a reasonable sum for the expenses of the ward's last illness and the disposition of his or her remains [*Prob. Code § 2631(a)*]. The guardian may also contract for and pay any unpaid and court-approved attorneys' fees or guardianship expenses [*Prob. Code § 2631(a)*]. These payments may be made in full or in part from any personal property of the deceased ward which is under the guardian's control [*Prob. Code § 2631(a)*].

**[c] Liquidation When Value of Estate Not More Than \$100,000**

If, after payment of the expenses for the ward's last illness and disposition of the remains described under [b], *above*, the value of the remaining estate of the ward does not exceed \$100,000, the guardian may petition the court for an order

permitting the guardian to liquidate the estate [*Prob. Code § 2631(b)*]. The guardian may petition for an order even if there is a will, providing the will does not appoint an executor or, if it does so, the named executor refuses to act [*Prob. Code § 2631(b)*]. If the order is granted, the guardian may sell personal property of the ward, withdraw money of the ward in an account in a financial institution, and collect debts, claims, or insurance proceeds owed to the ward or the ward's estate [*Prob. Code § 2631(b)*].

If, after payment of all expenses, the value of the remaining property of the ward or conservatee in California does not exceed \$100,000 [*see Prob. Code § 13100*], it may be transferred to the persons who would be entitled to it under the Probate Code provisions for the transfer of small estates without administration [*Prob. Code § 2631(c); see Prob. Code § 13000 et seq.* (collection or transfer of small estate without administration)]. To determine whether the value of the remaining property qualifies for transfer under these provisions, it is necessary to exclude all of the property described in *Prob. Code § 13050*.

## [2] Form

### Provision for Burial Arrangements for Ward

#### Last Illness and Disposition of Remains

[*First alternative: use if payment is to be made out of specified fund or property only:*]

Should the ward die during the guardianship, the \_\_\_\_\_ [guardian *or* guardian of the estate] shall contract and pay for the last illness of the Ward and for the disposition of \_\_\_\_\_ [his *or* her] remains. Payment shall be made from the following \_\_\_\_\_ [fund *or* property] only: \_\_\_\_\_ [*describe fund or property from which payment is to be made, e.g.: money held for the ward in a bank, savings and loan association, or other financial institution*]. No payment shall be made from any real property (or any interest in real property) belonging to the ward or the guardianship estate.

[*OR*]

[*Second alternative: use if no restriction is to be made as to which property or funds may be used for payment:*]

Should the ward die during the guardianship, the \_\_\_\_\_ [guardian *or* guardian of the estate] shall contract and pay for the last illness of the Ward and for the disposition of \_\_\_\_\_ [his *or* her] remains. Payment shall be made from any property of the ward or the guardianship estate then under the control of the \_\_\_\_\_ [guardian *or* guardian of the estate], other than real property or an interest in real property.

[*If desired, add specifications with respect to funeral and burial, such as the following:*]

The funeral services are to be nondenominational. The casket is to be made of wood, or a comparable material, and the plot is to be of standard dimensions, marked by a stone, and located in the City Cemetery in Smalltown, California. The total cost of the funeral, casket, cemetery, burial, and related expenses is not to exceed \$\_\_\_\_\_.

### Legal Topics:

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law  
 Conservators & Guardians  
 Conservators  
 General Overview  
 Estate, Gift & Trust Law  
 Conservators & Guardians  
 Conservators  
 Duties & Rights  
 Estate, Gift & Trust Law  
 Conservators &

Guardians Guardians for Minors Estate, Gift & Trust Law Conservators & Guardians Testamentary Guardians Family  
Law Guardians General Overview



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DIVISION IV: WILLS AND TRUSTS  
CHAPTER 66A CONSERVATORSHIPS

*25-66A California Legal Forms--Transaction Guide 66A.syn*

**§ 66A.syn Synopsis to Chapter 66A: CONSERVATORSHIPS**

§ 66A.01 California Sources

[1] Statutes

[2] California Rules of Court

§§ 66A.02-66A.04 [Reserved]

§ 66A.05 Law Reviews and Periodicals

§ 66A.06 Annotations

§ 66A.07 Text References

[1] Matthew Bender Sources

[2] Additional Text References

§§ 66A.08-66A.09 [Reserved]

§ 66A.10 Governing Law

§ 66A.11 Nomination of Conservator

[1] Who May Nominate

[2] Who May Be Nominated

[3] Time and Form of Nomination

[4] Effective Duration of Nomination

[5] Legal Effect of Nomination

§ 66A.12 Persons for Whom Conservator May Be Appointed

[1] In General

[2] Inability to Provide Properly for Personal Needs

[3] Inability to Manage Finances or to Resist Fraud or Undue Influence

[4] Developmentally Disabled Adult

[5] Person Who Voluntarily Requests Conservator

§ 66A.13 Fiduciary Relationship of Conservatorship

§ 66A.14 Requirements and Procedure for Establishing Conservatorship

§ 66A.15 Order of Preference for Appointing Conservator

§ 66A.16 Nonprofit Charitable Corporation as Conservator

§ 66A.17 Private Professional Conservators

§ 66A.18 Temporary Conservator

§ 66A.19 Information Package for Conservators

§ 66A.20 Legal Capacity of Conservatee

[1] In General

[2] To Bind or Obligate the Conservatorship Estate

[3] To Give Informed Consent to Medical Treatment

[4] To Marry or Register as Domestic Partner

[5] To Vote

§ 66A.21 Powers and Duties

[1] Conservator of the Person

[2] Conservator of the Estate

§ 66A.22 Periodic Review of Conservatorship

§ 66A.23 Compensation

[1] Conservator and Attorney

[2] Restrictions on Compensation When Conservator Is Attorney or Family Member

§ 66A.24 Removal or Resignation of Conservator

§ 66A.25 Appointment of Successor Conservator

§ 66A.26 Termination of the Conservatorship

§ 66A.27 Professional Fiduciaries

[1] Professional Fiduciary

[2] Professional Fiduciaries Bureau

[3] Licensing Requirements

[4] Qualifications for Licensure

[5] License Renewal

[6] Initial and Annual Statement

[7] Suspension, Revocation, Denial and Disciplinary Action

§§ 66A.28-66A.29 [Reserved]

§ 66A.30 In General

§ 66A.31 Persons Subject to LPS Conservatorship

§ 66A.32 Recommendation by Treatment or Evaluation Professional

§ 66A.33 Appointment of Conservator

§ 66A.34 Procedure

§ 66A.35 Investigation

§ 66A.36 Powers of Conservator

§ 66A.37 Termination of Conservatorship

§§ 66A.38-66A.39 [Reserved]

§ 66A.40 In General

§ 66A.41 Procedures for Determination and Enforcement of Support

§§ 66A.42-66A.99 [Reserved]

§ 66A.100 Facts

Scope

§ 66A.101 Documents

Scope

§§ 66A.102-66A.109 [Reserved]

§ 66A.110 Determining Whether Conservator Is Needed

Scope

§ 66A.111 Determining Whether Nomination Should Be Made

Scope

§ 66A.112 Determining Whom To Nominate

Scope

§ 66A.113 Determining Whether Client Has Legal Capacity to Make Nomination

Scope

§ 66A.114 Determining When Nomination Should Be Made

Scope

Scope

§§ 66A.115-66A.119 [Reserved]

§ 66A.120 Preparation of Nominating Instrument

Scope

§ 66A.121 Execution and Storage of Nominating Instrument

Scope

§§ 66A.122-66A.199 [Reserved]

§ 66A.200 Nomination of Conservator of Person

[1] Comment

[a] Use of Form

[b] Optional Provisions

[c] Formal Requisites

[2] FORM

Nomination of Conservator of Person

§ 66A.201 Nomination of Conservator of Estate [Prob. Code §§ 1810, 1811]

[1] Comment--Use of Form

[2] FORM

Nomination of Conservator of Estate

§ 66A.202 Nomination of Conservator of Person and Estate

[1] Comment--Use of Form

[2] FORM

Nomination of Conservator of Person and Estate

§ 66A.203 Nomination of Separate Conservators of Person and Estate

[1] Comment--Use of Form

[2] FORM

Nomination of Separate Conservators of Person and Estate

§ 66A.204 Nomination of Individual as Conservator of Person and Trust Company as Conservator of Estate

[1] Comment--Use of Form

[2] FORM

Nomination of Individual as Conservator of Person and Trust Company as Conservator of Estate

§ 66A.205 Nomination of Joint Conservators [Prob. Code § 2105]

[1] Comment

[a] Use of Form

[b] Powers of Joint Conservators

[c] Formal Requisites

[2] FORM

Nomination of Joint Conservators

§§ 66A.206-66A.209 [Reserved]

§ 66A.210 Provision Stating Reasons for Nomination

[1] Comment--Use of Form

[2] FORM

Provision Stating Reasons for Nomination

§ 66A.211 Provision Stating That Specific Person Is Not Nominated

[1] Comment--Use of Form

[2] FORM

Provision Stating That Specific Person Is Not Nominated

§ 66A.212 Waiver of Bond

[1] Comment

[a] Use of Form

[b] General Requirements for Conservator's Bond

[c] Exemption for Trust Company

[d] Amount of Bond

[e] Bond For Joint Conservators

[f] Reduction, Addition, or Substitution

[g] Cautionary Note

[2] FORM

Waiver of Bond



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DIVISION IV: WILLS AND TRUSTS  
CHAPTER 66A CONSERVATORSHIPS

*25-66A California Legal Forms--Transaction Guide Scope*

**Scope**

Scope

This chapter covers conservatorship planning and focuses on the nomination of conservators. The Legal Background, covers conservatorships governed by the Probate Code conservatorship statutes effective January 1, 1981, and only briefly discusses conservatorship statutes in effect before that date. Also covered are conservatorships for gravely disabled persons (known generally as Lanterman-Petris-Short Act conservatorships). The Transaction Guide, lists the facts, documents, determinations, and procedures for nominating a conservator. The forms include nomination forms and optional provisions for nominating instruments.

Nomination of a conservator may precede, accompany, or follow the filing of a petition for judicial appointment of a conservator. Coverage of the judicially-regulated proceedings of a conservatorship is beyond the scope of this chapter. However, effective conservatorship planning requires that both the attorney and the client have a clear understanding of the proceedings and how they may affect the proposed conservatee's legal rights and obligations. A client's planning will be affected, for example, by the knowledge that certain constitutional rights will be altered by a conservatorship and that the court will not only supervise the conservatee but, to an extent, determine and review the legal rights and capacity of a conservatee as well.

It is also important for the attorney and the client to know how and under what circumstances a conservator may be nominated. Although a nomination is never a condition precedent to the appointment of a conservator (and, indeed, many conservatorship proceedings are commenced and successfully terminated without a nomination ever having been made), a nomination may be made in various circumstances, at various times, and by various persons. An understanding of those circumstances, times, and persons will help the attorney and the client to plan effectively for the eventuality of judicial proceedings.

For comprehensive coverage of the judicial proceedings relating to conservatorships, including illustrative forms, see California Forms of Pleading and Practice, Chs. 281 et seq. (Matthew Bender).



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DIVISION IV: WILLS AND TRUSTS  
CHAPTER 66A CONSERVATORSHIPS  
PART I. RESEARCH GUIDE  
A. Primary Sources

*25-66A California Legal Forms--Transaction Guide § 66A.01*

**§ 66A.01 California Sources**

**[1] Statutes**

Professional Fiduciaries Act. *Bus. & Prof. Code § 6530 et. seq.*

Effect of judicial determination that person of unsound mind lacks capacity. *Civ. Code § 40.*

Bond and Undertaking Law. *Code Civ. Proc. § 995.010 et seq.*

Affidavit of voter registration. *Elec. Code § 2150.*

Disqualification of mentally incompetent conservatees from voting. *Elec. Code §§ 2201, 2208-2211.*

Review of conservatee's capability to complete voter registration affidavit. *Elec. Code § 2209.*

Trust company as conservator of estate. *Fin. Code §§ 106, 107, 107.5, 1500 et seq.; Prob. Code §§ 300, 301.*

"Domestic partner" defined. *Prob. Code § 37.*

Appeals in proceedings under Probate Code. *Prob. Code § 1300 et seq.*

Appealable orders in guardianships, conservatorships, and other protective proceedings. *Prob. Code § 1301.*

Effect of appeal. *Prob. Code §§ 1310, 1311.*

Guardianship, conservatorship, and other protective proceedings. *Prob. Code § 1400 et seq.*

"Developmental disability" defined. *Prob. Code § 1420.*

Appointment of legal counsel. *Prob. Code § 1470 et seq.*

Guardianships. *Prob. Code § 1500 et seq.*

Conservatorships. *Prob. Code § 1800 et seq.*

General provisions of law common to guardianships and conservatorships. *Prob. Code § 2100 et seq.*

Nonprofit charitable corporation as conservator. *Prob. Code § 2104.*

Jurisdiction and venue. *Prob. Code § 2200 et seq.*

Temporary guardians and conservators. *Prob. Code § 2250 et seq.*

Oaths, letters, and bonds. *Prob. Code § 2300 et seq.*

Powers and duties of guardian or conservator of person. *Prob. Code § 2350 et seq.*

Powers and duties of guardian or conservator of estate. *Prob. Code § 2400 et seq.*

Inventory and accounts. *Prob. Code § 2600 et seq.*

Compensation of guardians, conservators, and attorneys. *Prob. Code § 2640 et seq.*

Removal or resignation of guardians and conservators. *Prob. Code § 2650 et seq.*

Appointment of successor conservators. *Prob. Code § 2680 et seq.*

Requests for special notice. *Prob. Code § 2700 et seq.*

Transfer of assets out of state. *Prob. Code § 2800 et seq.*

Public guardians as guardians and conservators. *Prob. Code § 2900 et seq.*

Management or disposition of community property when spouse lacks legal capacity. *Prob. Code § 3000 et seq.*

Capacity determinations and health care decisions for adult without conservator. *Prob. Code § 3200 et seq.*

Money or property belonging to minors. *Prob. Code § 3400 et seq.*

Compromise by parent of minor's disputed claim. *Prob. Code § 3500.*

Money or property paid or delivered pursuant to compromise or judgment for minor or incompetent person. *Prob. Code § 3600 et seq.*

Procedure to set aside personal property of absent federal personnel. *Prob. Code § 3700 et seq.*

Dissolution or annulment of marriage revokes will provision nominating former spouse as conservator. *Prob. Code § 6122(a)(3).*

Termination of domestic partnership revokes will provision nominating former domestic partner as conservator. *Prob. Code § 6122(a)(3)*.

"Gravely disabled" defined. *Welf. & Inst. Code § 5008(h)*.

Conservatorships under Lanterman-Petris-Short Act. *Welf. & Inst. Code § 5350 et seq.*

Procedure for appointment of conservator. *Welf. & Inst. Code § 5350*.

Temporary conservators. *Welf. & Inst. Code §§ 5352.1, 5353*.

Designation of conservator. *Welf. & Inst. Code § 5355*.

Capabilities of conservatee. *Welf. & Inst. Code § 5357*.

Powers of conservator. *Welf. & Inst. Code § 5357*.

Placement of conservatee in facility for treatment. *Welf. & Inst. Code § 5358*.

Filing fee may not be charged in appellate proceedings under Lanterman-Petris-Short Act. *Gov. Code § 68926*.

## **[2] California Rules of Court**

General probate rules. *Cal. Rules Ct., Rules 7.1 et seq.*

Judicial Council forms required. *Cal. Rules Ct., Rule 7.101*.

Title of account, petition, or other pleading and of proposed order must clearly and completely identify nature of all of relief sought or granted. *Cal. Rules Ct., Rule 7.102*.

Bonding of personal representatives, guardians, conservators, trustees. *Cal. Rules Ct., Rules 7.201 et seq.*

Requirement that inventory and appraisal show sufficiency of bond. *Cal. Rules Ct., Rule 7.501*.

Petitions for order allowing compensation for conservators and their attorneys. *Cal. Rules of Ct., Rule 7.751*.

Order for accounting before or at time petition is filed or heard. *Cal. Rules of Ct., Rule 7.752*.

Contingency fee agreements in conservatorships. *Cal. Rules of Ct., Rule 7.753*.

Use of paralegals in performance of legal services for conservator. *Cal. Rules of Ct., Rule 7.754*.

Advance payments prohibited. *Cal. Rules of Ct., Rule 7.755(a)*.

Periodic payments on showing of ongoing need for legal services. *Cal. Rules of Ct., Rule 7.755(b)*.

Termination of conservatorship. *Cal. Rules of Ct., Rule 7.1052*.

Service of final account of removed or resigned conservator. *Cal. Rules of Ct., Rule 7.1053.*

Service of final account after termination of conservatorship. *Cal. Rules of Ct., Rule 7.1054.*

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawConservators & GuardiansConservatorsGeneral OverviewEstate, Gift & Trust

LawConservators & GuardiansConservatorsAppointmentEstate, Gift & Trust LawConservators &

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**[Reserved]**

§§ 66A.02[Reserved]



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*25-66A California Legal Forms--Transaction Guide § 66A.05*

**§ 66A.05 Law Reviews and Periodicals**

Bernstein, *Eroding Roulette [ In re Conservatorship of Roulette, 590 P.2d 1 (Cal. 1979)] : How the Courts Ignore a Landmark in California Civil Commitment Hearings*, 33(1) U.S.F. L. Rev. 59 (1998).

Wade, *Recent Developments in Representing Disabled Clients*, 136 Tr. & Est. 35 (1997).

Dembicki, *What You Should Know About Adult Guardianships*, 42 Prac. Law. 73 (1996).

Friedman & Starr, *Losing It in California: Conservatorship and the Social Organization of Aging*, 73 Wash. U. L.Q. 1501 (1995).

Friedman & Savage, *Taking Care: The Law of Conservatorship in California*, 61 S. Cal. L. Rev. 273 (1988).

Alexander, *Premature Probate: A Different Perspective on Guardianship for the Elderly*, 31 Stan. L. Rev. 1003 (1979).

Comment, *To Keep Them Out of Harm's Way? Temporary Conservatorships and Religious Sects*, 66 Cal. L. Rev. 845 (1978).

Morris, *Conservatorship for the "Gravely Disabled": California's Nondeclaration of Nonindependence*, 15 San Diego L. Rev. 201 (1978).

Zillgitt, *Planning for Incompetency & Possibilities and Practices Under the Conservatorship Law*, 37 So. Cal. L. Rev. 181.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawConservators & GuardiansConservatorsGeneral OverviewEstate, Gift & Trust  
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*25-66A California Legal Forms--Transaction Guide § 66A.06*

**§ 66A.06 Annotations**

Annot., Ademption or Revocation of Specific Devise or Bequest by Guardian, Committee, Conservator, or Trustee of Mentally or Physically Incompetent Testator, 84 A.L.R.4th 462 (1991) .

Annot., Validity of Inter Vivos Gift by Ward to Guardian or Conservator, 70 A.L.R.4th 499 (1989) .

Annot., Validity of Guardianship Proceeding Based on Brainwashing of Subject by Religious, Political, or Social Organization, 44 A.L.R.4th 1207 (1986) .

Annot., Priority and Preference in Appointment of Conservator or Guardian for an Incompetent, 65 A.L.R.3d 991 (1975) .

Annot., Right of Guardian or Committee of Incompetent to Incur Obligations So As to Bind Incompetent or His Estate, or to Make Expenditures, Without Prior Approval by Court, 63 A.L.R.3d 780 (1975) .

Annot., Termination of Continuing Guaranty by Appointment of Guardian or Conservator for Guarantor, 55 A.L.R.3d 344 (1974) .

Annot., Citizenship of Ward or of Guardian, Conservator, Curator, or Next Friend, as Test of Diversity of Citizenship for Purpose of Jurisdiction of Federal District Court under 28 U.S.C. § 1332, 8 A.L.R. Fed. 550 (1971).

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law  
Conservators & Guardians  
Conservators  
General Overview  
Estate, Gift & Trust  
Law  
Conservators & Guardians  
Conservators  
Appointment  
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*25-66A California Legal Forms--Transaction Guide § 66A.07*

**§ 66A.07 Text References**

**[1] Matthew Bender Sources**

*California Legal Forms, Ch. 104, Health Care Transactions, Consents, and Directives, § 104.220 et seq.* (authorizations, consents, and refusals to give informed consent to medical treatment)(Matthew Bender).

California Forms of Pleading and Practice (Matthew Bender).

Ch. 281, *Guardianship and Conservatorship: Appointment of Conservators.*

Ch. 282, *Guardianship and Conservatorship: Temporary Guardians and Conservators.*

Ch. 283, *Guardianship and Conservatorship: Bonds.*

Ch. 284, *Guardianship and Conservatorship: Notice.*

Ch. 285, *Guardianship and Conservatorship: Care of Ward or Conservatee.*

Ch. 286, *Guardianship and Conservatorship: Inventory and Appraisal.*

Ch. 287, *Guardianship and Conservatorship: General Management Powers.*

Ch. 288, *Guardianship and Conservatorship: Independent Exercise of Powers.*

Ch. 289, *Guardianship and Conservatorship: Management of Community Property.*

Ch. 290, *Guardianship and Conservatorship: Maintenance of Ward or Conservatee.*

Ch. 290A, *Guardianship and Conservatorship: Asset Management and Investment.*

Ch. 290B, *Guardianship and Conservatorship: Substituted Judgment.*

Ch. 290C, *Guardianship and Conservatorship: Actions and Disputed Claims.*

Ch. 290D, *Guardianship and Conservatorship: Actions Against Guardian or Conservator.*

Ch. 290E, *Guardianship and Conservatorship: Accounts.*

Ch. 290F, *Guardianship and Conservatorship: Compensation of Guardian or Conservator.*

**[2] Additional Text References**

Witkin, Summary of California Law, vol. 14, *Wills and Probate*, §§ 932-1061 (10th ed. 2005).

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawConservators & GuardiansConservatorsGeneral OverviewEstate, Gift & Trust  
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*25-66A California Legal Forms--Transaction Guide §§ 66A.08-66A.09*

**[Reserved]**

§§ 66A.08[Reserved]



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*25-66A California Legal Forms--Transaction Guide § 66A.10*

**§ 66A.10 Governing Law**

By its adoption of the Conservatorship Law in 1957, the California Legislature created the legal framework for a new and (in this state) previously unfamiliar legal relationship. While similar in many respects to the old law governing guardians and wards, the new law of conservators and conservatees was free of the stigmatizing label of "incompetency," which had previously caused many persons to shun guardianships. Effective January 1, 1981, California's guardianship and conservatorship statutes were brought into a new and comprehensive statutory scheme, under which guardianship was reserved for minors and conservatorship (with minor exceptions) reserved for adults. While the substance of the old law of guardianship and conservatorship was in large part continued under the current scheme, procedural rules common to both guardianships and conservatorships were consolidated, and minor and technical changes and improvements were incorporated into the new law.

Under the current statutory scheme, many rules and concepts are common to both guardianships and conservatorships. Thus, guardianships and conservatorships are governed by common rules relating to the following:

- Appeals [*Prob. Code §§ 1301, 1310 et seq.*].
- Jurisdiction and venue [*Prob. Code § 2200 et seq.*].
- Temporary guardians and conservators [*Prob. Code § 2250 et seq.*].
- Oaths, letters and bonds [*Prob. Code § 2300 et seq.*].
- Powers and duties of guardians and conservators of the person [*Prob. Code § 2350 et seq.*].
- Powers and duties of guardians and conservators of the estate [*Prob. Code § 2400 et seq.*].
- Inventories and accounts [*Prob. Code § 2600 et seq.*].

- Compensation of guardians, conservators, and attorneys [*Prob. Code § 2640 et seq.*].
- Removal and resignation of guardians and conservators [*Prob. Code § 2650 et seq.*].
- Appointment of successor guardians and conservators [*Prob. Code § 2670 et seq.*].
- Requests for special notice [*Prob. Code § 2700 et seq.*].
- Transfer of assets outside the state [*Prob. Code § 2800 et seq.*].

Other provisions apply only to conservatorships. These include rules relating to the following:

- Persons for whom a conservator may be appointed [*Prob. Code § 1800 et seq.*].
- Nomination and order of preference for appointment of conservators [*Prob. Code § 1810 et seq.*].
- Conservatees who are "absentees" [*Prob. Code § 1840 et seq.*] or "missing persons" [*Prob. Code § 1845 et seq.*].
- Periodic review of conservatorships [*Prob. Code § 1850 et seq.*].
- Termination of conservatorships [*Prob. Code § 1860 et seq.*].
- Legal capacity of conservatees [*Prob. Code § 1870 et seq.*].
- Disqualification of conservatees from voting [*Prob. Code § 1910*].

Apart from the statutes listed above, special provisions relate to the management or disposition of community property when either spouse is substantially unable to manage or control the community property, lacks the legal capacity to join in or consent to a transaction involving the community property, or has a conservator [*Prob. Code § 3000 et seq.*]. For a discussion of these provisions, see §§ 66A.40, 66A.41, below .

To deal with the affairs of persons who are gravely disabled as a result of mental disorder or impairment by chronic alcoholism, the Legislature in 1967 enacted the Lanterman-Petris-Short Act [*Welf. & Inst. Code § 5000 et seq.*]. This Act provides special rules governing conservatorships for gravely disabled persons (including gravely disabled minors) [*Welf. & Inst. Code § 5350 et seq.*]. For a more detailed discussion of these rules and their practice implications, see § 66A.30 et seq., below.

### **Legal Topics:**

For related research and practice materials, see the following legal topics:

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 Conservators & Guardians  
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*25-66A California Legal Forms--Transaction Guide § 66A.11*

**§ 66A.11 Nomination of Conservator**

**[1] Who May Nominate**

The proposed conservatee may nominate a conservator if he or she has sufficient capacity at the time to form an intelligent preference, as may a spouse, domestic partner [*see Prob. Code § 37; Fam. Code § 297* ("domestic partnership" defined)], parent, adult child, or brother or sister of the proposed conservatee [*Prob. Code §§ 1810, 1811*].

The spouse of a proposed conservatee may not petition for the appointment of a conservator of his or her spouse, nor be appointed as conservator of the person or estate of his or her spouse, unless the petitioner alleges, and the court finds, that the spouse is not a party to any action or proceeding for legal separation of the parties, dissolution of marriage, or adjudication of nullity of the marriage [*Prob. Code § 1813(a)*]. However, if the court finds by clear and convincing evidence that the spouse of a proposed conservatee is a party to such an action or proceeding, or has obtained a judgment in any of these proceedings, and that appointment of the spouse is in the best interests of the proposed conservatee, the court may appoint the spouse. Before the appointment, the court must appoint counsel to consult with and advise the conservatee, and to report to the court his or her findings regarding the suitability of appointing the spouse as conservator [*Prob. Code § 1813(a)*]. Further, the spouse of a conservatee must disclose to the conservator or, if the spouse is the conservator, to the court, the filing of any action or proceeding against the conservatee for legal separation of the parties, dissolution of marriage, or adjudication of nullity of marriage, within 10 days of the filing of the action or proceeding. Disclosure is made by filing a notice with the court and serving the notice according to statutory notice procedures. If the spouse is the conservator, the court may set the matter for hearing on an order to show cause why the appointment of the spouse as conservator should not be terminated and a new conservator appointed by the court [*Prob. Code § 1813(b)*].

Similar rules limit the petition by and appointment of a domestic partner [*see Prob. Code § 37; Fam. Code § 297* ("domestic partnership" defined)] as conservator unless the court finds that the domestic partner has not terminated and is not intending to terminate the domestic partnership [*Prob. Code § 1813.1; see Fam. Code § 299* (termination of domestic partnerships)].

**[2] Who May Be Nominated**

Any natural person is eligible to be nominated and appointed as a conservator [*see Prob. Code § 1812* (selection of conservator)]. In addition, special statutory provisions permit the nomination and appointment of qualifying nonprofit charitable corporations [*Prob. Code § 2104*], trust companies [*Prob. Code § 300*], and public guardians [*Prob. Code §§ 2920, 2922*].

A nonprofit charitable corporation may be appointed as a conservator of the person or estate, or both, if it meets all of the following requirements [*Prob. Code § 2104*]:

- The corporation must be incorporated in the State of California.
- The articles of incorporation must specifically authorize the corporation to accept appointments as conservator.
- At the time of the appointment, the corporation must have been providing care, counseling, or financial assistance to the proposed conservatee under supervision of a registered social worker certified by the Board of Behavioral Science Examiners of the State of California.

In counties with a public guardian [*see Prob. Code § 2900 et seq.* (public guardian)], the public guardian may act as the conservator of the person or estate (or of the person and estate) of any person domiciled in the county who requires a guardian and for whom no other person is qualified and willing to act [*see Prob. Code §§ 2920* (application for appointment), 2922 (letters, oath, and bond)]. Before appointment, the public guardian may take possession or control of the property of any person domiciled in the county that is subject to loss, injury, waste, or misappropriation if the public guardian determines that the requirements for appointment of a guardian or conservator of the estate are satisfied and the public guardian intends to apply for appointment [*Prob. Code § 2900*].

A trust company may be appointed to act as conservator of an estate but not of a person [*Prob. Code § 300; see Fin. Code § 107; Prob. Code § 83* ("trust company" defined); *see also § 66A.17*]. Although a trust company appointed as conservator of an estate may not be required to give a bond [*Prob. Code § 301(a)*], trust companies are subject to special requirements as to liability, oaths, and affidavits set forth in the Financial Code [*Prob. Code § 301(b); see Fin. Code §§ 1540 et seq., 1587*].

The statutes specifically authorize the court to appoint two or more joint conservators of the person or estate, or both [*Prob. Code § 2105(a)*], and to appoint one conservator for several conservatees [*Prob. Code § 2106*].

There is no requirement that a conservator be a California resident [ *Guardianship of Mosier* (1966) 246 Cal. App. 2d 164, 176, 54 Cal. Rptr. 447 ; *Guardianship of Boutz* (1938) 24 Cal. App. 2d 644, 647, 76 P.2d 154] . However, the courts have indicated that a California resident is to be preferred over a nonresident [ *Guardianship of Mosier* (1966) 246 Cal. App. 2d 164, 177, 54 Cal. Rptr. 447] . The residence of the proposed conservator will be considered insofar as it bears on the best interests of the proposed conservatee [ *Guardianship of Brown* (1976) 16 Cal. 3d 326, 336, 128 Cal. Rptr. 10, 546 P.2d 298] .

### **[3] Time and Form of Nomination**

The proposed conservatee may nominate a conservator in the petition for appointment of a conservator or in a writing signed before or after the petition is filed [*Prob. Code § 1810*]. An adult child or a brother or sister of the proposed conservatee may nominate a conservator in the petition for appointment or at the hearing on the petition [*Prob. Code § 1811(a)*]. A spouse, domestic partner [*see Prob. Code § 37; Fam. Code § 297* ("domestic partnership" defined)], or parent of the proposed conservatee may nominate a conservator in the petition for appointment [*Prob. Code § 1811(a)*], at the hearing on the petition [*Prob. Code § 1811(a)*], or in a writing signed before or after the petition is filed [*Prob.*

*Code § 1811(b)*].

If desired, the proposed conservatee may make the nomination in the form of a durable power of attorney [*Prob. Code § 4126(a)*]. A durable power of attorney is a power of attorney designed to survive the principal's incapacity. For a detailed discussion of durable powers of attorney, see Ch. 68, *Durable Powers of Attorney for Property Management* .

#### **[4] Effective Duration of Nomination**

In general, the statutes do not specify how long a nomination will be effective, the consequences of revocation of a nomination, or the effect of a subsequent nomination on an earlier nomination. With respect to nominations made by the proposed conservatee, *Prob. Code § 1810* provides only that the court "shall appoint the nominee as conservator unless the court finds that the appointment of the nominee is not in the best interests of the proposed conservatee." A nomination made by the spouse, domestic partner [*see Prob. Code § 37; Fam. Code § 297* ("domestic partnership" defined)], or a parent of the proposed conservatee in a writing signed either before or after the petition is filed remains effective notwithstanding the subsequent legal incapacity or death of the spouse or parent [*Prob. Code § 1811(b)*]. With respect to a nomination made by a power of attorney, unless the power of attorney states a time of termination, the authority of the attorney-in-fact is exercisable notwithstanding any lapse of time since execution of the power [*Prob. Code § 4127*].

Although *Prob. Code §§ 4124* and *4125* provide that a nomination made in the form of a durable power of attorney will not be affected by the subsequent incapacity of the nominator (or "principal"), the same result necessarily applies to a nomination made in any other form. If the proposed conservatee becomes incapacitated after the nomination is made (a typical occurrence in any conservatorship context), the court must still give effect to the nomination under *Prob. Code § 1810*. A nomination made in the form of a durable power of attorney may be superseded by a subsequent nomination, whether or not made in the form of a durable power of attorney [*Prob. Code § 4126(b)*].

If the spouse of a conservatee files an action or proceeding against the conservatee for legal separation of the parties, dissolution of marriage, or adjudication of nullity of marriage, the court may set the matter for hearing on an order to show cause why the appointment of the spouse as conservator should not be terminated and a new conservator appointed by the court [*Prob. Code § 1813(b)*].

#### **[5] Legal Effect of Nomination**

Subject to special rules applying to nominations by the proposed conservatee [*Prob. Code § 1810; see [1], above*] and to nominations of the spouse of the proposed conservatee [*Prob. Code § 1813; see [1], above*], the selection of a conservator rests in the sound discretion of the court. The court's exercise of its discretion must in all cases be based on what appears to be in the best interests of the conservatee [*Prob. Code § 1812(a)*]. A finding that a particular individual should be appointed as conservator necessarily includes a finding that the appointment is in the conservatee's best interests; no separate finding is required [ *Conservatorship of Ramirez (2001) 90 Cal. App. 4th 390, 400-401, 108 Cal. Rptr. 2d 581* ] . All other things being equal, preference for appointment must be given in the order prescribed by *Prob. Code § 1812(b)* [*see discussion in § 66A.15*].

The court must appoint the nominee of the proposed conservatee unless it finds that the appointment would not be in the best interests of the proposed conservatee [*Prob. Code § 1810*].

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawConservators & GuardiansConservatorsGeneral OverviewEstate, Gift & Trust LawConservators & GuardiansConservatorsAppointmentEstate, Gift & Trust LawConservators &

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*25-66A California Legal Forms--Transaction Guide § 66A.12*

**§ 66A.12 Persons for Whom Conservator May Be Appointed**

**[1] In General**

In appropriate circumstances, the court may appoint a conservator of the person, a conservator of the estate, or a conservator of both the person and estate of an adult [*Prob. Code § 1800.3(a)(1)*]. The court may also appoint a conservator of the person of a minor who is married or whose marriage has been dissolved [*Prob. Code § 1800.3(a)(2)*].

It should be noted that no conservatorship of the person or of the estate will be granted unless the court makes an express finding that the granting of the conservatorship is the least restrictive alternative needed for the protection of the conservatee [*Prob. Code § 1800.3(b)*].

A conservatorship of the person may be established for a person who is not a resident of California [*see Prob. Code § 1800.3(a)*]. Prior to January 1, 2001, special rules applied to the establishment of a conservatorship of the person of a nonresident for whom a conservatorship has been established in another state [*see Prob. Code § 1800.3(b)*]. However, those rules became inoperative on January 1, 2001.

A guardian, rather than a conservator, may be appointed for the estate of a married minor [*see Prob. Code §§ 1514, 1515; see also Prob. Code § 1800.3(a)(2)* (conservator of person may be appointed for minor who is married or whose marriage has been dissolved; no authorization for appointment of conservatorship of estate, unlike adults for whom *Prob. Code § 1800.3(a)(1)* specifically authorizes such an appointment)]. Guardianship, not conservatorship, is also the proper proceeding for a minor whose marriage has been judged a nullity [*see Prob. Code § 1515*]. For discussion of guardianships, see Ch. 66, *Guardianships* .

**[2] Inability to Provide Properly for Personal Needs**

A conservator of the person may be appointed for a person who is unable to provide properly for his or her personal needs for physical health, food, clothing, or shelter [*Prob. Code § 1801(a); see Prob. Code § 1828.5(c),(d)* (limited conservatorship for developmentally disabled adult)]. The need for a conservator is clear when an individual is completely unable to care for his or her needs, independent of help from others [*see Conservatorship of Harvey*

(1970) 3 Cal. 3d 646, 91 Cal. Rptr. 510, 477 P.2d 742 (conservator appointed for unconscious and comatose person); *Guardianship of Brown* (1976) 16 Cal. 3d 326, 337, 128 Cal. Rptr. 10, 546 P.2d 298 (conservatee required intensive care and assistance in regard to physical needs and could perform only simple tasks without assistance)]. In other cases, when the issue is whether the proposed conservatee is properly caring for his or her needs, the court may require a showing that the proposed conservatee is physically unhealthy, or actually deprived of or unable to secure food, clothing, or shelter, to support a determination that a conservator is needed [see *Katz v. Superior Court* (1977) 73 Cal. App. 3d 952, 981, 141 Cal. Rptr. 234 (court vacated order granting temporary conservatorship to parents for purpose of deprogramming adult children from ideas inculcated by religious cult)].

### **[3] Inability to Manage Finances or to Resist Fraud or Undue Influence**

A conservator of the estate may be appointed for a person who is substantially unable to manage his or her own financial resources or resist fraud or undue influence [*Prob. Code § 1801(b)*; see *Prob. Code § 1828.5* (limited conservatorship for developmentally disabled adult)]. Substantial inability may not be proved solely by isolated incidents of negligence or improvidence [*Prob. Code § 1801(b)*].

### **[4] Developmentally Disabled Adult**

A limited conservator of the person or of the estate, or both, may be appointed for a developmentally disabled adult [*Prob. Code § 1801(d)*]. A developmental disability is a disability that originates before an individual is 18 years old, can be expected to continue indefinitely, and constitutes a substantial handicap for the individual [*Prob. Code § 1420*]. Examples of developmental disabilities include mental retardation, cerebral palsy, epilepsy, and autism [*Prob. Code § 1420*].

A limited conservator may be appointed only when necessary to promote and protect the conservatee's well-being and only to the extent necessitated by the conservatee's proven mental and adaptive limitations [*Prob. Code § 1801(d)*]. Limited conservatorships must be designed to encourage the conservatee's self-reliance and independence [*Prob. Code § 1801(d)*]. When a limited conservatorship is established, the conservatee is not presumed incompetent; he or she retains all legal and civil rights, except those that the court has designated as legal disabilities and specifically granted to the limited conservator [*Prob. Code § 1801(d)*].

### **[5] Person Who Voluntarily Requests Conservator**

A conservator of the person, a conservator of the estate, or a conservator of both the person and estate may be appointed for a person who requests the appointment and who, to the satisfaction of the court, establishes good cause for the appointment [*Prob. Code § 1802*; see *Prob. Code § 1800.3*]. In discussing "good cause" in the context of a petition for appointment of a temporary conservator, one court stated that good cause is relative, that what constitutes good cause depends largely on the circumstances of a case, and that the concept calls for a factual exposition of a reasonable ground for the order [ *Conservatorship of Gray* (1970) 12 Cal. App. 3d 513, 521, 90 Cal. Rptr. 776, *superseded by statute on other grounds*, *Brown v. Brown* (1996) 45 Cal. App. 4th 117, 122, 52 Cal. Rptr. 2d 755].

It should be noted that no conservatorship of the person or of the estate will be granted unless the court makes an express finding that the granting of the conservatorship is the least restrictive alternative needed for the protection of the conservatee [*Prob. Code § 1800.3(b)*].

### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law  
 Conservators & Guardians  
 Conservators  
 General Overview  
 Estate, Gift & Trust  
 Law  
 Conservators & Guardians  
 Conservators  
 Appointment



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*25-66A California Legal Forms--Transaction Guide § 66A.13*

**§ 66A.13 Fiduciary Relationship of Conservatorship**

A conservator is subject to the regulation and control of the superior court in the performance of the duties of office [*Prob. Code §§ 2102, 2200*]. The relationship between a conservator and a conservatee is a fiduciary relationship that is governed by the law of trusts [*Prob. Code § 2101*].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law  
Conservators & Guardians  
Conservators  
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*25-66A California Legal Forms--Transaction Guide § 66A.14*

**§ 66A.14 Requirements and Procedure for Establishing Conservatorship**

A petition for appointment of a conservator may be filed by a wide range of persons, including the proposed conservatee, his or her spouse, registered domestic partner [*see Prob. Code § 37; Fam. Code § 297* ("domestic partnership" defined)], or other relative, any interested person or friend, or an interested state or local entity [*see Prob. Code § 1820*]. If the proposed conservatee does not file the petition, the clerk must issue the proposed conservatee a citation that sets forth the time and place of the hearing, states the legal standards by which the need for a conservator is determined [*see Prob. Code § 1801*], and states the substance of a prescribed list of information [*Prob. Code § 1823*]. The information that must be included in the citation includes a list of the proposed conservatee's rights that may be affected by the adjudication and statements that the proposed conservatee has the right to appear at the hearing, to oppose the petition, to be represented by legal counsel, and to have a jury trial [*Prob. Code § 1823(b)*]. Notice of the hearing must also be sent to certain other persons, including the spouse or domestic partner of the proposed conservatee [*see Prob. Code § 1822*].

The proposed conservatee generally must appear at the hearing [*Prob. Code § 1825*] and must be informed by the court of the nature and effect of the proceedings [*see Prob. Code §§ 1828, 1828.5*]. However, in some circumstances, the proposed conservatee may not be required to attend the hearing [*see Prob. Code § 1825(a)*, *see Conservatorship of John L. (2007) 154 Cal. App. 4th 1090, 1102*; *65 Cal. Rptr. 3d 393* (holding that conditions of *Prob. Code § 1825 (a)* were satisfied when the trial court permitted counsel to communicate the conservatee's waiver of his presence in a LPS proceeding)]. Regardless of whether the proposed conservatee attends the hearing, a court investigator must interview the proposed conservatee personally, inform the proposed conservatee of the contents of the citation, make a series of determinations, and report to the court [*Prob. Code § 1826*; *see Conservatorship of Christopher A. (2006) 139 Cal. App. 4th 604, 610, 613*; *43 Cal. Rptr. 3d 427* (before accepting stipulation for appointment, court was required to consult with the conservatee on the record to instruct conservatee on consequences of stipulation and obtain conservatee's express consent to it.)]. In addition to the proposed conservatee, the spouse, registered domestic partner [*see Prob. Code § 37; Fam. Code § 297* ("domestic partnership" defined)], or any friend or relative of the proposed conservatee, or any other interested person, may appear at the hearing to support or oppose the petition [*Prob. Code § 1829*].

A conservator may be appointed in a proceeding under the Probate Code only if there is "clear and convincing" proof of

the statutory grounds for appointment [*Prob. Code § 1801(e); Conservatorship of Sanderson (1980) 106 Cal. App. 3d 611, 620, 165 Cal. Rptr. 217*; see *Prob. Code § 1800 et seq.*; for discussion of persons for whom a conservator may be appointed, see § 66A.12]. This standard of proof, which requires greater proof than the "preponderance of the evidence" standard applicable in most civil actions, is applicable because the appointment of a conservator stigmatizes the conservatee and results in a substantial deprivation of liberty [ *Conservatorship of Sanderson (1980) 106 Cal. App. 3d 611, 618-620, 165 Cal. Rptr. 217*]. However, the "clear and convincing proof" standard is less rigorous than the "evidence beyond a reasonable doubt" standard that is applicable in conservatorship proceedings under the Lanterman-Petris-Short (LPS) Act [ *Conservatorship of Sanderson (1980) 106 Cal. App. 3d 611, 618-620, 165 Cal. Rptr. 217*; see *Welf. & Inst. Code § 5000 et seq.* ( LPS Act); *Conservatorship of Roulet (1979) 23 Cal. 3d 219, 235, 152 Cal. Rptr. 425, 590 P.2d 1* (proof beyond reasonable doubt required before conservator can be appointed under LPS Act); for discussion of Lanterman-Petris-Short Act conservatorships, see § 66A.30 et seq.].

Additional requirements must be met if the proposed conservatee is an absentee [*see Prob. Code § 1840 et seq.*] or a missing person [*see Prob. Code § 1845 et seq.*].

Further, if appointed counsel in a conservatorship appeal fails to discover an arguable issue, the Court of Appeal must independently review the record under *People v. Wende (1979) 25 Cal. 3d 436, 158 Cal. Rptr. 839, 600 P.2d 1071* [ *Conservatorship of Margaret L. (2001) 89 Cal. App. 4th 675, 682, 107 Cal. Rptr. 2d 542*].

If a conservator other than a bank, trust company, or public officer such as the public guardian or public conservator acts as a conservator for two or more conservatees at the same time, and if the conservator is not related to the conservatees by blood or marriage, the conservator is deemed a "professional fiduciary" and is subject to licensing requirements [*Bus. & Prof. Code 6501 (f), Prob. Code § 60.1(b), see Bus. & Prof. Code § 6500 et seq.* ("Professional Fiduciaries Act")]. For discussion, see § 66A.27.

### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law  
 Conservators & Guardians  
 Conservators  
 General Overview  
 Estate, Gift & Trust  
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*25-66A California Legal Forms--Transaction Guide § 66A.15*

**§ 66A.15 Order of Preference for Appointing Conservator**

If the proposed conservatee has nominated a conservator in the petition or in a signed writing, the court must appoint the nominee unless it finds that the appointment is not in the best interests of the proposed conservatee [*Prob. Code § 1810*]. Otherwise, the selection of a conservator is solely in the discretion of the court and, in making the selection, the court must be guided by the best interests of the proposed conservatee [*Prob. Code § 1812(a)*]. In choosing among equally qualified persons, the court is generally required to give preference to the following persons, in the following order [*Prob. Code § 1812(b)*; see *Prob. Code § 1811* (nomination by relatives)]:

- (1) The spouse or domestic partner of the proposed conservatee, or a nominee of the spouse or domestic partner. Note that for these purposes, "domestic partner" does not simply mean any person who is cohabiting with the proposed conservatee. Rather, the term is specifically defined to mean one of two persons who have filed a Declaration of Domestic Partnership with the Secretary of State pursuant to *Fam. Code § 297 et seq.*, provided that the domestic partnership has not been terminated pursuant to *Fam. Code § 299* [*Prob. Code § 37(a)*; for discussion, see *Ch. 110, Nonmarital Cohabitation Agreements and Related Transactions, §§ 110.50 et seq., 110.220 et seq.*].
- (2) An adult child of the proposed conservatee, or a nominee of an adult child.
- (3) A parent of the proposed conservatee, or a nominee of a parent.
- (4) A brother or sister of the proposed conservatee, or a nominee of a brother or sister.
- (5) Any other person eligible for appointment as a conservator under the Probate Code or the Welfare and Institutions Code.

The preference for any nominee of an adult child, parent, brother, or sister is subordinate to the preference for any other parent, child, brother, or sister in the same class [*Prob. Code § 1812(c)*].

The court may not appoint the spouse of a proposed conservatee as conservator of the person or estate, unless the petitioner alleges, and the court finds, that the spouse is not a party to any action or proceeding for legal separation of the parties, dissolution of marriage, or adjudication of nullity of the marriage [*Prob. Code § 1813(a)*]. However, if the court finds by clear and convincing evidence that the spouse of a proposed conservatee is a party to such an action or proceeding, or has obtained a judgment in any of these proceedings, and that appointment of the spouse is in the best interests of the proposed conservatee, the court may appoint the spouse. Before the appointment, the court must appoint counsel to consult with and advise the conservatee, and to report to the court his or her findings regarding the suitability of appointing the spouse as conservator [*Prob. Code § 1813(a)*].

There is no statutory bar to appointment of a nonresident conservator. A resident, however, is usually preferred to a nonresident unless very strong reason for the appointment of a nonresident is presented. That evidence must clearly demonstrate that it would be in the proposed conservatee's best interest to move to another state [*see Guardianship of Brown (1976) 16 Cal. 3d 326, 339, 128 Cal. Rptr. 10, 546 P.2d 298*].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

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*25-66A California Legal Forms--Transaction Guide § 66A.16*

**§ 66A.16 Nonprofit Charitable Corporation as Conservator**

A nonprofit charitable corporation may be appointed as conservator of the person or estate, or both, if all of the following requirements are met [*Prob. Code § 2104(a)*]:

- The corporation is incorporated in California.
- The articles of incorporation specifically authorize the corporation to accept appointments as guardian or conservator, as the case may be.
- At the time of appointment, the corporation has been providing care, counseling, or financial assistance to the proposed conservatee under the supervision of a registered social worker certified by the California Board of Behavioral Science Examiners.

A responsible officer of the corporation must be designated to act for the corporation with respect to the conservatorship. The officer must be named in the petition for appointment. If, at some subsequent time, the officer ceases to act with respect to the conservatorship, the corporation must file the name of the successor officer with the court [*Prob. Code § 2104(b)*]. The corporation's compensation as conservator, and any fees allowed an attorney for the corporation, must be for services actually rendered [*Prob. Code § 2104(c)*].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

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*25-66A California Legal Forms--Transaction Guide § 66A.17*

**§ 66A.17 Private Professional Conservators**

If a conservator acts as a conservator for two or more persons at the same time who are not related to the conservator or to each other by blood, adoption, marriage, or registered domestic partner, and if the conservator is not a bank, trust company, broker-dealer, or public officer or agency, the conservator is a "professional fiduciary" and is subject to licensure under the Professional Fiduciaries Act [*Bus. & Prof. Code 6501 (f), Prob. Code § 60.1(b), see Bus. & Prof. Code § 6500 et seq* ("Professional Fiduciaries Act")]. To be licensed as a professional fiduciary, an applicant must meet the qualifications, including, but not limited to, being at least 21 years of age and meeting specified education requirements, as provided in *Bus. & Prof. Code § 6533 [Bus. & Prof. Code § 6533(a)n-(k)]*. For a detailed discussion on the Professional Fiduciaries Act, and the licensing requirements of professional fiduciaries, *see § 66A.27*.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

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 Conservators & Guardians  
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*25-66A California Legal Forms--Transaction Guide § 66A.18*

**§ 66A.18 Temporary Conservator**

On or after the filing of a petition for appointment of a conservator, any person entitled to petition for appointment as the conservator may petition for appointment as temporary conservator of the person or estate or both [*Prob. Code § 2250(a)*]. The requirements and procedure for appointment, and other provisions concerning the powers and duties of the temporary conservator and the duration of his or her powers, are set forth in *Prob. Code § 2250 et seq.*

A proposed conservatee is entitled to notice of any application for a temporary conservatorship in accordance with *Prob. Code § 2250(e)* [ *Edward W. v. Lamkins (2002) 99 Cal. App. 4th 516, 521-525, 122 Cal. Rptr. 2d 1* (notice may be dispensed with only on showing of good cause, *i.e.*, individualized showing of exigent circumstances)].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

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Conservators  
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*25-66A California Legal Forms--Transaction Guide § 66A.19*

**§ 66A.19 Information Package for Conservators**

Every superior court is required to provide all private conservators with written information concerning a conservator's rights, duties, limitations, and responsibilities under the conservatorship statutes [*Prob. Code § 1835(a)*]. To help courts meet this requirement, the Judicial Council is required to develop and periodically update an information package [*Prob. Code § 1835(c), (e)*]. Courts may charge each private conservator up to \$20 to cover the costs of providing the written information [*Prob. Code § 1835(f)*], which must include all of the following [*Prob. Code § 1835(b)*]:

- The rights, duties, limitations, and responsibilities of a conservator.
- The rights of a conservatee.
- How to assess the needs of the conservatee.
- How to use community-based services to meet the needs of the conservatee.
- How to ensure that the conservatee is provided with the least restrictive environment possible.
- The court procedures and processes relevant to conservatorships.
- The procedures for inventory and appraisal, and the filing of accounts.

Before letters are issued, every conservator other than a trust company or a public conservator must file an acknowledgment of receipt of both the required information package and a statement of the duties and liabilities of the office of conservator. The acknowledgment and statement must be in the form prescribed by the Judicial Council [*Prob. Code § 1834(a)*]. However, a court's failure to provide a conservator with the required package will not relieve the conservator of his or her statutory duties, nor will it make the court or any agent or employee of the court, personally or officially liable for damages suffered by a conservatee, conservator, or any other person or entity [*Prob. Code § 1835(d)*].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

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*25-66A California Legal Forms--Transaction Guide § 66A.20*

**§ 66A.20 Legal Capacity of Conservatee**

**[1] In General**

The conservatorship statutes set forth the capacity of a conservatee to exercise certain rights, or to bind or obligate the estate during the conservatorship:

- *Prob. Code § 1870 et seq.* cover the capacity of the conservatee to bind the conservatorship estate [see [2], below].
- *Prob. Code §§ 1880 et seq.* and *2354 et seq.* cover the conservatee's capacity to give an informed consent to medical treatment [see [3], below].
- *Prob. Code §§ 1900* and *1901* govern the conservatee's capacity to marry or to enter into a registered domestic partnership.

The conservatee's capacity to vote is also governed by *Prob. Code §§ 1865* and *1910*.

**[2] To Bind or Obligate the Conservatorship Estate**

In general, the appointment of a conservator of the estate is an adjudication that the conservatee lacks the legal capacity to enter into or make any transaction that binds or obligates the conservatorship estate [*Prob. Code § 1872(a)*]. The appointment of a limited conservator does not limit the legal capacity of the limited conservatee, except as provided in the court order appointing the limited conservator [*Prob. Code § 1872(b)*].

The term "transaction" includes, but is not limited to, any of the following [*Prob. Code § 1870*]:

- Making a contract, sale, transfer, or conveyance.
- Incurring a debt or encumbering property.

- Making a gift.
- Delegating a power.
- Waiving a right.

After his or her incapacity has been judicially determined, a person of unsound mind can make no conveyance or other contract, or delegate any power or waive any right, until his or her restoration to capacity. Establishment of a conservatorship under the Probate Code is a judicial determination of the incapacity of the conservatee for these purposes [*Civ. Code* § 40]. These two rules, however, are subject to the exceptions discussed below.

The capacity of a conservatee with regard to several specific rights or transactions is clearly described by statutes. A conservatee retains the right to control allowances received from the conservator of the estate for the personal use of the conservatee, to make a will, and, unless otherwise ordered by the court, to control his or her wages and salary [*Prob. Code* § 1871(a)-(c)]. The conservatee retains the right to enter into reasonable transactions to provide the necessities of life to the conservatee and his or her spouse and minor children and to provide the basic living expenses [*see Fam. Code* § 297] to the conservatee's domestic partner [*Prob. Code* § 1871(d); *see Prob. Code* § 37; *Fam. Code* § 297 ("domestic partnership" defined)]. Further, any person who enters into a transaction affecting the conservatee's real property will be unaffected by the conservatorship or any order made in the conservatorship proceedings if he or she entered into the transaction in good faith, for a valuable consideration, and without knowledge of the establishment of the conservatorship, unless a notice of the establishment of the conservatorship is recorded prior to the transaction in the county in which the property is located [*Prob. Code* § 1875].

Apart from the rights and transactions described above, the court may by order authorize the conservatee, subject to general principles of law and equity relating to transactions, to enter into transactions or types of transactions that may be appropriate for the particular conservatee and conservatorship estate, and may set conditions or limitations on this authorization [*see Prob. Code* § 1873]. This permits the court to give the conservatee the right to enter into transactions affecting the conservatorship estate which, but for the order, the conservatee would not have. For example, the court might permit the conservatee to enter into specified types of transactions or into transactions not exceeding specified amounts.

### **[3] To Give Informed Consent to Medical Treatment**

Statutory provisions relating to a conservatee's capacity to give an informed consent to medical treatment [*Prob. Code* §§ 1880 *et seq.*, 2354 *et seq.*] were enacted in response to judicial development of the right of an adult to give an informed consent to medical treatment [*see Cobbs v. Grant* (1972) 8 Cal. 3d 229]. These provisions clarify uncertainties over when a conservator of the person may give an informed consent on behalf of a conservatee, which were not addressed by former statutory law [*see 60 Ops. Cal. Atty. Gen.* 375 (1977)].

On petition and after a hearing at which, with prescribed exceptions, the presence of the conservatee is required [*see Prob. Code* § 1891 *et seq.*], the court determines whether there is any form of medical treatment for which the conservatee has the capacity to give an informed consent. If the court determines that the conservatee lacks this capacity, the court must by order give the conservator of the person the exclusive authority make health care decisions for the conservatee that the conservator, in good faith based on medical advice, determines to be necessary. In making health care decisions for the conservatee, the conservator must act in accordance with the conservatee's individual health care instructions, if any, and other wishes to the extent known to the conservator. Otherwise, the conservator must make the decision in accordance with the conservator's determination of the conservatee's best interest, considering the conservatee's personal values to the extent known to the conservator. The conservator may require the conservatee to receive the health care, whether or not the conservatee objects. In such a case, the health care decision of

the conservator alone is sufficient and no person is liable because the health care is administered to the conservatee without the conservatee's consent [*Prob. Code* §§ 1880, 2355(a)]. For this purpose, health care decisions include the selection and discharge of health care providers and institutions, approval or disapproval of diagnostic tests, and directions to provide, withhold, or withdraw artificial nutrition and hydration and all other forms of health care, including cardiopulmonary resuscitation [*Prob. Code* § 4617(c)]. The conservator's exclusive authority to make health care decisions for the conservatee is restricted, however, if the conservatee, before the conservatorship, adhered to a religion whose tenets and practices call for reliance on prayer alone for healing [*see Prob. Code* § 2355(b)], if the conservatee opposes being placed in a mental health treatment facility, or if the conservatee is to be given experimental drugs or convulsive treatment, is to be sterilized, or has issued a directive pursuant to the Health Care Decisions Law [*Prob. Code* § 2356; *see Prob. Code* § 4600 *et seq.*]. The effective period of the order terminates at the time, if any, specified in the order, or the time the order is modified or revoked, or the time the conservatorship is terminated [*Prob. Code* § 1897; *see Prob. Code* § 1898 (modification or revocation of order on petition)].

If the conservatee is not judged to be lacking the capacity to give informed consent to medical treatment, the consent of the conservatee, with or without the additional consent of the conservator, is generally sufficient for treatment, and the consent of the conservator alone is insufficient if the conservatee objects to the treatment [*Prob. Code* § 2354(a)]. However, in cases of emergency, or if the conservator obtains a court order specifically authorizing treatment for an existing or continuing medical condition, the conservator may require the conservatee to receive medical treatment [*see Prob. Code* §§ 2354(b), (c), 2357]. As an alternative to this procedure, there is a separate procedure for obtaining judicial authorization to make health care decisions for a person with an existing or continuing medical condition who is unable to give an informed consent to the treatment [*see Prob. Code* § 3200 *et seq.*].

A conservator claiming statutory authority for withholding life-sustaining treatment in accordance with a conscious conservatee's wishes must present clear and convincing evidence of the conservatee's wishes [ *Conservatorship of Wendland* (2001) 26 Cal. 4th 519, 110 Cal. Rptr. 2d 412, 28 P.3d 151] .

#### **[4] To Marry or Register as Domestic Partner**

The capacity of the conservatee to marry or to enter into a registered domestic partnership is not affected by the appointment of a conservator of the person or estate or both [*Prob. Code* § 1900]. However, a judicial determination whether the conservatee has this capacity may be obtained [*see Prob. Code* § 1901].

#### **[5] To Vote**

The conservatee may be ordered disqualified from voting if the court determines the conservatee is not capable of completing an affidavit of voter registration [*Prob. Code* § 1910; *see Elec. Code* § 2150]. The capacity or incapacity of a conservatee to complete a voter registration affidavit is reviewed by the court investigator during each periodic review of the conservatorship [*Prob. Code* § 1851(a); *see discussion in* § 66A.22]. The investigator must determine whether the conservatee is capable of completing the affidavit and must inform the court of his or her determination [*Elec. Code* § 2209].

If the investigator determines that the status of the capability of the conservatee changes, that is, if he or she finds that the conservatee has become capable after having been determined to be incapable or has become incapable after not having been found to be incapable of completing the affidavit, the court must hold a hearing to determine the capability or incapability of the conservatee to complete the affidavit [*Elec. Code* § 2209(b), (c)]. If the capability of the conservatee is found to have changed, the court must give an appropriate notification to the county clerk of the county where the conservatee resides [*Elec. Code* § 2209(b), (c); *see Elec. Code* § 2208(c)].

If the right is not restored sooner, on termination of the conservatorship the court must notify the clerk of the court in the county in which the former conservatee resides that the former conservatee's right to register to vote is restored [

*Prob. Code § 1865*].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

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*25-66A California Legal Forms--Transaction Guide § 66A.21*

**§ 66A.21 Powers and Duties**

**[1] Conservator of the Person**

In general, a conservator, except a limited conservator, of the person has the care, custody, and control of, and has charge of the education of, the conservatee [*Prob. Code § 2351(a)*].

The limited conservator has the care, custody, and control of the limited conservatee, except that the limited conservator does not have control over the conservatee's residence, education, social relationships, and certain other areas unless the court specifies otherwise [*Prob. Code § 2351.5(b)*]. The limited conservator must secure such habilitation, treatment, training, education, medical and psychological services, and social and vocational opportunities as are appropriate for and will assist the limited conservatee in the development of maximum self-reliance and independence [*Prob. Code § 2351.5(a)(2)*].

If the court determines that it is appropriate under the circumstances of a particular estate, the court has the discretion to limit these powers and duties [*Prob. Code § 2351(b)*]. If the powers and duties are to be limited, the court will issue an order either stating the specific powers that the conservator does not have with respect to the person of the conservatee and reserving the specified powers to the conservatee, or stating the specific powers and duties the conservator has with respect to the person of the conservatee and reserving to the conservatee all other rights with respect to his or her person that the conservator otherwise would have [*Prob. Code § 2351(b)*]. The order may be included in the order appointing the conservator of the person, or may be made, modified, or revoked on a petition subsequently filed when notice of the hearing on the petition has been given as required [*Prob. Code § 2351(c)*].

In exercising his or her duties, a conservator may not hire or refer business to an entity in which he or she has a financial interest, as defined, except with court authorization after written disclosure of the interest to the court [*Prob. Code § 2351(d)*].

If the court does not order that the conservatee retain the power to fix his or her own residence, the conservator of the person has the power to fix the residence of the conservatee at any place within California [*Prob. Code § 2352(a), (b)*].

The guardian or conservator must select the least restrictive appropriate residence that is available and necessary to meet the needs of the ward or conservatee, and that is in the best interests of the ward or conservatee [*Prob. Code* §§ 2352 (a), (b)]. If permission of the court is first obtained, the conservator may also fix the residence of the conservatee at a place outside California [*Prob. Code* § 2352(c)]. It will be presumed that the personal residence of the conservatee is the least restrictive appropriate residence for the conservatee [*Prob. Code* § 2352.5]. Furthermore, a conservator seeking an order authorizing a sale of the conservatee's personal residence must demonstrate that the terms of the sale are in the best interests of the conservatee [*Prob. Code* § 2591.5].

The conservator of the person also may obtain the authority to give informed consent to medical treatment for the conservatee as the court may order [*see discussion in* § 66A.20[3]].

For nonresident conservatees, the conservator has the same powers and duties as a conservator of a resident conservatee while the conservatee is in California, unless the court otherwise limits the conservator [*Prob. Code* § 2107(a)].

## **[2] Conservator of the Estate**

The conservator of the estate, and limited conservator to the extent specifically and expressly provided in the appointing court's order, has the management and control of the estate and, in managing and controlling the estate, must use ordinary care and diligence. What constitutes use of ordinary care and diligence is determined by all the circumstances of the particular estate [*Prob. Code* § 2401(a)]. The conservator is to exercise or not exercise a power to the extent required by ordinary care and diligence [*Prob. Code* § 2401(b)]. In exercising his or her duties, however, a conservator may not hire or refer business to an entity in which he or she has a financial interest, as defined, except with court authorization after written disclosure of the interest to the court [*Prob. Code* § 2401(c)].

The powers and duties of a conservator of the estate are detailed by statutes [*Prob. Code* § 2400 *et seq.*], which are divided into 11 articles, including separate articles for each of the following:

- The conservator's powers and duties to support and maintain the conservatee and the persons legally entitled to support and maintenance from the conservatee [*Prob. Code* § 2420 *et seq.*].
- The conservator's powers and duties to pay debts and expenses incurred by the conservatee [*Prob. Code* §§ 2430, 2431].
- General estate management powers [*Prob. Code* § 2450 *et seq.*].
- The conservator's powers and duties to compromise claims and actions for the benefit of, or against, the conservatee, and to extend, renew, or modify obligations owing to or running in favor of the conservatee [*Prob. Code* § 2500 *et seq.*].
- The conservator's powers and duties to convey or transfer property claimed to belong to the conservatee [*Prob. Code* § 850 *et seq.*].
- The conservator's powers and duties related to sales of the conservatee's real or personal property [*Prob. Code* § 2540 *et seq.*].
- The conservator's powers and duties with regard to borrowing or lending money, notes, mortgages, leases, conveyances and exchanges of the estate property [*Prob. Code* § 2550 *et seq.*].
- The conservator's powers and duties to invest the property of the estate [*Prob. Code* § 2570 *et seq.*].

- Additional powers the conservator may be authorized to exercise independent of court supervision [*Prob. Code § 2590 et seq.*].

The conservator may also petition the court for authority to take certain actions the conservatee would have taken if competent to act [*Prob. Code § 2580*]. In this proceeding, the court has discretion to authorize or require a conservator to take a variety of different actions affecting the conservatee's estate. The court, in essence, is permitted to substitute its judgment for that of the conservatee. The question in a substituted-judgment proceeding is not what the conservatee would do but what a reasonably prudent person in the conservatee's position would do [ *Conservatorship of McDowell (2004) 125 Cal. App. 4th 659, 665, 23 Cal. Rptr. 3d 10* ].

The powers and duties of a conservator of the estate apply to property owned by a husband and wife as community property, but only to the extent authorized by a separate set of statutory provisions [*see Prob. Code § 3000 et seq.* (management or disposition of community property when spouse lacks legal capacity); *see also §§ 66A.40, 66A.41*].

Within 90 days after appointment (or later, if the court allows further time), a conservator of the estate must file an inventory and appraisal of the estate with the clerk of the court [*Prob. Code § 2610(a)*]. The inventory and appraisal must be made as of the date of the conservator's appointment [*Prob. Code § 2610(a)*]. The conservator must file an account one year after appointment and, unless otherwise ordered by the court, further accounts every two years thereafter [*Prob. Code § 2620(a)*]. As part of these accountings, a conservator must submit original account statements from any institution [*see Prob. Code § 2890* ("institution" defined)], or any financial institution [*see Prob. Code § 2892* ("financial institution" defined)], in which estate money or other assets are held or deposited, as of the close of the period of the court accounting [*Prob. Code § 2620(c)(2)*]. If the court accounting is the first one of the conservatorship, the conservator must also provide the account statement for the account balance immediately before the date the conservator was appointed and the account statement or statements for the account through the closing date of the first court accounting [*Prob. Code § 2620(c); see Prob. Code §§ 2890-2893* (statements required to be submitted by institutions and financial institutions)]. If any document filed with the court contains the conservatee's social security number or any other personal information that would not ordinarily be disclosed in a court accounting, inventory and appraisal, or other nonconfidential pleadings, the account statement must be attached to a separate affidavit describing the character of the document, captioned "CONFIDENTIAL FINANCIAL STATEMENT". Except as otherwise ordered by the court, the clerk of the court must keep the document confidential and may disclose the document only upon court order [*Prob. Code § 2620(c)(7)*]. Additionally, courts may provide by local rule that the court shall retain all documents lodged with it until the court's determination of the guardian's or conservator's account has become final, at which time the supporting documents will be returned to the depositing guardian or conservator or delivered to any successor appointed by the court [*Prob. Code § 2620(c)(8)*].

The powers and duties of a conservator of the estate of a nonresident conservatee are the same as the powers and duties of a conservator of the estate of a resident, but only with respect to the property of the nonresident within California [*Prob. Code § 2107(b)*]. The responsibility of a conservator of the estate of a nonresident with regard to inventory, accounting, and disposal of the estate is confined to property that comes into his or her hands as conservator in California [*Prob. Code § 2107(b)*].

### **Legal Topics:**

For related research and practice materials, see the following legal topics:  
Estate, Gift & Trust Law  
Conservators & Guardians  
Conservators Duties & Rights



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*25-66A California Legal Forms--Transaction Guide § 66A.22*

**§ 66A.22 Periodic Review of Conservatorship**

The court must review every conservatorship at the expiration of six months after the initial appointment of the conservator [*Prob. Code 1850(a)(1)*], again one year after the appointment of the conservator, and annually thereafter [*Prob. Code 1850(a)(2)*]. At the review conducted one year after the appointment of the conservator, the court may set the next review in two years if the court determines that the conservator is acting in the best interests of the conservatee [*Prob. Code § 1850(a)(2)*]. In addition, the court, on its own motion or on request by any interested person, may take appropriate action, including ordering a review of the conservatorship and ordering the conservator to present an accounting of the assets of the estate [*Prob. Code § 1850(b)*]. These requirements do not apply to conservatorships for absentees or conservatorships of the estate for nonresidents when the conservatee is not present in California [*Prob. Code § 1850*]. Conservatorships of an absentee conservator [*see Prob. Code § 1403* ("absentee" defined)] or of a conservatee who is not a resident of California and who is not present in the state are not subject to this requirement, however [*Prob. Code § 1850(d)*].

The court must review each limited conservatorship for a developmentally disabled adult [*see Prob. Code § 1801(d)*] one year after the appointment of the conservator, and biennially thereafter [*Prob. Code § 1850.5(a)*]. In addition, the court, on its own motion or on request by any interested person, may take appropriate action, including ordering a review of the limited conservatorship [*Prob. Code § 1850.5(b)*].

When court review is required, a court investigator must visit the conservatee [*Prob. Code § 1851(a)*]. This visit must be without prior notice to the conservatee, except as ordered by the court for necessity or to prevent harm to the conservatee [*Prob. Code § 1851(a)*]; for a form for an order appointing court investigator, *see* § 281.104]. The investigator must inform the conservatee personally that the conservatee is under a conservatorship, and must give the conservatee the name of the conservator. The investigator must determine whether the conservatee wishes to petition the court for termination of the conservatorship, whether the conservator is acting in the best interests of the conservatee, and whether the conservatee is capable of completing an affidavit of voter registration. In determining whether the conservator is acting in the best interests of the conservatee, the court investigator's evaluation must include an examination of the conservatee's placement, the quality of care, and the conservatee's finances [*Prob. Code § 1851(a)*]. If the court has made an order regarding the legal capacity of the conservatee under *Prob. Code § 1870 et seq.*, the court

investigator must determine whether the condition of the conservatee is such that the terms of the order should be modified or the order revoked [*Prob. Code § 1851(a)*]. On request of the court investigator, the conservator must make available to the court investigator during the investigation, for inspection and copying all books and records, including receipts and any expenditures, of the conservatorship [*Prob. Code § 1850(a)*].

At the time of periodic review, the court investigator also may visit the conservator and other persons if necessary to determine whether the conservator is acting in the best interests of the conservatee [*Prob. Code § 1851(d)*]. The investigator's report must be confidential and can be made available only to the parties, the persons to whom a copy of the report is required to be mailed [*see Prob. Code § 1851(b)*, referenced *below*], persons given notice of the petition who have requested the report or who have appeared in the proceeding, their attorneys, and the court. However, the court has discretion to release the report at any other time if it would serve the interest of the conservatee [*Prob. Code § 1851(e)*].

At least 15 days before the date of review, the investigator must certify his or her findings to the court [*Prob. Code § 1851(b)*]. In the case of a limited conservatee, the investigator also must recommend whether the conservatorship should be continued or terminated [*Prob. Code § 1851(c)*]. Confidential medical information and confidential information from the California Law Enforcement Telecommunications System shall be in a separate attachment to the report and shall not be provided in copies sent to the conservatee's spouse or registered domestic partner, the conservatee's relatives in the first degree, and, if there are no such relatives, to the next closest relative.

A copy of the report must be mailed to the conservatee's spouse or registered domestic partner, the conservatee's relatives in the first degree, and if there are no such relatives, to the next closest relative, unless the court determines that the mailing will result in harm to the conservatee [*Prob. Code § 1851(b)*].

Each court shall coordinate investigations with the filing of accountings so that investigators may review accountings before visiting the conservatee, if feasible [*Prob. Code § 1851.2*].

If the investigator cannot locate the conservatee, the court will order the conservator to show cause why the conservatorship should not be terminated [*Prob. Code § 1853(a)*]. If the conservatee is not made available within the time prescribed and if good cause for continuing the conservatorship is not shown, the court must terminate the conservatorship and order the conservator to file an accounting and to surrender the estate to the person legally entitled to it [*Prob. Code § 1853(b)*].

At the close of each fiscal year the State Controller determines the statewide average cost for investigations by court investigators. Each county must annually assess the estate of each conservatee in the county for any investigation or review conducted by a court investigator at county expense [*Prob. Code § 1851.5(a)*]. The court may order reimbursement to the county for the costs of the investigations required by statute unless the court finds that the assessment would pose a hardship to the estate [*Prob. Code § 1851.5(a)*]. There is a rebuttable presumption that the assessment would impose a hardship if the conservatee is receiving Medi-Cal benefits [*see Prob. Code § 1851.5(a)* (reference to "ward" rather than "conservatee" probably inadvertent)].

### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law  
Conservators & Guardians  
Conservators  
General Overview  
Estate, Gift & Trust  
Law  
Conservators & Guardians  
Conservators  
Removal & Termination



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*25-66A California Legal Forms--Transaction Guide § 66A.23*

**§ 66A.23 Compensation**

**[1] Conservator and Attorney**

At any time after the filing of the inventory and appraisal, but not earlier than 90 days after letters are issued, or after any other period of time that the court for good cause orders, a conservator may petition the court for an order fixing and allowing compensation to the conservator and the attorney for the conservator [*Prob. Code §§ 2640(a), 2641(a); Cal. Rules of Ct., Rule 7.751*]. At the hearing, the court must allow just and reasonable compensation, which will become a charge against the estate [*Prob. Code §§ 2640(c), 2641(b)*].

**[2] Restrictions on Compensation When Conservator Is Attorney or Family Member**

An attorney who is also the conservator may not receive any compensation from the estate for services performed for the conservator unless the court specifically approves the right to the compensation and finds that it is to the advantage, benefit, and best interests of the conservatee [*Prob. Code § 2645(a)*]. Similarly, a parent, child, sibling, or spouse of a person who is conservator, or a law partnership or corporation whose partner, shareholder, or employee is serving as conservator, may not receive any compensation for legal services performed for the conservator unless the court specifically approves the right to compensation and finds that it is to the advantage, benefit, and best interests of the conservatee [*Prob. Code § 2645(b)*].

An attorney who seeks compensation under these rules must show that his or her representation, as opposed to representation otherwise available, benefitted the conservatorship estate [ *Brown v. Brown (1996) 45 Cal. App. 4th 117, 122-123, 52 Cal. Rptr. 2d 755* ] . It is not sufficient merely to show that the conservatee or the estate derived some benefit from the representation [ *Brown v. Brown (1996) 45 Cal. App. 4th 117, 120, 52 Cal. Rptr. 2d 755* ] .

Neither the rules restricting the right of an attorney who is also a conservator, or the specified relatives, partners, or employees of a conservator, to receive legal fees from the conservatorship estate apply if the conservator or conservator is related by blood or marriage to, or is a cohabitant with, the conservatee [*Prob. Code § 2645(c)*].

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Estate, Gift & Trust LawConservators & GuardiansConservatorsGeneral Overview



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*25-66A California Legal Forms--Transaction Guide § 66A.24*

**§ 66A.24 Removal or Resignation of Conservator**

A conservator may be removed for cause or may resign [*see Prob. Code § 2650 et seq.*]. The specific causes for which a conservator may be removed include the following:

- Failure to use ordinary care and diligence in the management of the estate [*Prob. Code § 2650(a)*].
- Failure to file a timely inventory or account [*Prob. Code § 2650(b)*].
- Continued failure or incapacity to perform duties suitably [*Prob. Code § 2650(c)*].
- Conviction of a felony before or after appointment as conservator [*Prob. Code § 2650(d)*].
- Gross immorality [*Prob. Code § 2650(e)*].
- An adverse interest that creates an unreasonable risk that the guardian will not faithfully perform his or her duties [*Prob. Code § 2650(f)*].
- For a conservator of the person, violating the law governing placement of a conservatee in a mental health treatment facility or the prohibitions against administration to the conservatee of certain drugs and treatment [*Prob. Code § 2650(g); see Prob. Code § 2356*].
- For a conservator of the estate, insolvency or bankruptcy [*Prob. Code § 2650(h)*].
- If the court, in its discretion, determines that removal is in the conservatee's best interests [*Prob. Code § 2650(i)*].

A conservator may resign at any time by filing a petition with the court [*Prob. Code § 2660*]. The court must allow the resignation when it appears proper, to take effect at the time the court fixes [*Prob. Code § 2660*]. The court may make

any order necessary to deal with the conservatorship before a new conservator is appointed and the resigning conservator's accounts are settled [*Prob. Code § 2660*].

When the court grants a petition removing the conservator of a minor conservatee (or tendering the conservator's resignation), and does not immediately appoint a successor conservator, the court must at the same time appoint a responsible adult to make educational decisions for the minor until it appoints a successor [*Prob. Code § 2662*]. Likewise, if the court suspends or limits the conservator's powers to make educational decisions for the minor, it must at the same time appoint a responsible adult to make these decisions until the conservator is again authorized to do so [*Prob. Code § 2662*]. An individual who has a conflict of interest in representing the minor may not be appointed to make educational decisions [*Prob. Code § 2662*]. This means a person that has any interests which might restrict his or her ability to make educational decisions, including, but not limited to, the conflicts of interest prohibited by *Gov. Code § 1126*, and the receipt of compensation or attorneys' fees for providing services under this section [*Prob. Code § 2662*]. A foster parent is not considered to have a conflict of interest solely because he or she receives compensation for providing services under this section [*Prob. Code § 2662*].

A conservator of the estate who resigns or is removed must serve a copy of the final account and petition for its settlement with the notice of hearing that must be served on the successor conservator of the estate under *Prob. Code § 1460(b)(1)*, unless the court dispenses with notice [*Cal. Rules of Ct., Rule 7.1053*].

In a conservatorship proceeding in which the court denied a petition by the conservatee's wife for the removal of the conservator, the court violated the wife's right to due process by reading and considering a report prepared by the conservatee's appointed counsel, but refusing to allow the wife or her attorney to review the report [ *Conservatorship of Schaeffer (2002) 98 Cal. App. 4th 159, 165, 119 Cal. Rptr. 2d 547* ] .

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law  
Conservators & Guardians  
Conservators  
Removal & Termination



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*25-66A California Legal Forms--Transaction Guide § 66A.25*

**§ 66A.25 Appointment of Successor Conservator**

The court may appoint a successor conservator if a vacancy in the conservatorship occurs for any reason [*Prob. Code § 2680*]. A petition for appointment of a successor conservator may be filed by any of the following persons [*Prob. Code § 2681*]:

- The conservatee.
- The conservatee's spouse or domestic partner [*see Prob. Code § 37; Fam. Code § 297* ("domestic partnership" defined)].
- A relative of the conservatee.
- Any state or local entity or officer.
- Any other interested person or friend of the conservatee.

The petition must contain specified information [*see Prob. Code § 2682*], and applicable notice requirements must be observed [*see Prob. Code § 2683*]. Unless the petition states that the conservatee will be personally present at the hearing, the court investigator must do all of the following [*Prob. Code § 2684(a)-(e)*]:

- Personally interview the conservatee in advance of the hearing.
- Inform the conservatee of the nature of the proceeding.
- Determine whether the conservatee has any objections to the proposed successor.
- Determine whether the conservatee is, wishes to be, or should be represented by legal counsel.

The investigator must report the findings to the court, with copies to the attorneys and any other parties the court orders, at least five days before the hearing [*Prob. Code § 2684(f), (g)*]. The court will determine who is to be appointed as successor conservator in accordance with the criteria for order of preference for appointing a conservator, discussed in § 66A.15 [*Prob. Code § 2688*].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law  
Conservators & Guardians  
Conservators Appointment  
Estate, Gift & Trust Law  
Conservators & Guardians  
Conservators Removal & Termination



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*25-66A California Legal Forms--Transaction Guide § 66A.26*

**§ 66A.26 Termination of the Conservatorship**

A conservatorship continues until terminated by the death of the conservatee or by order of the court [*Prob. Code § 1860(a)*]. A conservatorship may be terminated by court order when the court determines that it is no longer required [*Cal. Rules of Ct., Rule 7.1052(a)*]. A conservatorship of the person terminates by operation of law when the conservatee dies, and the conservator need not file a petition for termination [*Cal. Rules of Ct., Rule 7.1052(b)*]. A conservatorship for a married minor does not terminate if the marriage is dissolved or adjudged a nullity [*Prob. Code § 1860(b)*]. Procedural requirements for termination of a conservatorship are set forth in *Prob. Code § 1861 et seq.*

A limited conservatorship is terminated by any of the following:

- The death of the limited conservatee or conservator [*Prob. Code § 1860.5(a)(1), (2)*].
- A court order appointing a conservator of the former limited conservatee [*Prob. Code § 1860.5(a)(3)*].
- A court order terminating the limited conservatorship on the ground that it is no longer necessary for the limited conservatee [*Prob. Code § 1860.5(a)(4)*].

A conservator of the estate whose administration is terminated by operation of law or by court order must file and obtain the court's approval of a final account of administration [*Cal. Rules of Ct., Rule 7.1052(c)*]. After termination of the conservatorship, the conservator must serve copies of the final account and petition for its settlement with the notices of hearing that must be served on the former conservatee and on the spouse or domestic partner of the former conservatee under *Prob. Code § 1460(b)(2)* and (3), unless the court dispenses with service [*Cal. Rules of Ct., Rule 7.1054*].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Conservators & Guardians Conservators Removal & Termination



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*25-66A California Legal Forms--Transaction Guide § 66A.27*

**§ 66A.27 Professional Fiduciaries**

**[1] Professional Fiduciary**

A professional fiduciary is a person who acts as a conservator or guardian for two or more persons at the same time who are not related to the professional fiduciary or to each other by blood, adoption, marriage, or registered domestic partnership [*Bus. & Prof. Code 6501 (f)*]. A professional fiduciary is also a person who acts as a trustee, agent under a durable power of attorney for health care, or agent under a durable power of attorney for finances, for more than three people or more than three families or a combination of people and families that totals more than three, at the same time, who are not related to the professional fiduciary by blood, adoption, marriage or registered domestic partnership [*Bus. & Prof. Code § 6501(f)*, see Qualifications for Licensure, § 66A.27[4]].

However, the following are exempted from the definition of professional fiduciary, and are not required to obtain a professional fiduciary license [*Bus. & Prof. Code § 6501(f)(4)*]:

- (1) A trust company, as defined by *Prob. Code § 83*;
- (2) An FDIC-insured institution, or its holding companies, subsidiaries or affiliates;
- (3) Any public agency, including the public guardian, public conservator, or other agency of the State of California or of a county of California or any regional center for persons with developmental disability as defined in *Welf. & Inst. Code § 4620*;
- (4) A person who is employed by a trust company, an FDIC-insured institution or its holding companies, subsidiaries or affiliates, or a public agency who is acting in the course and scope of that employment, and in the instance of a public officer of a public agency, acting in the course and scope of official duties;
- (5) Any person whose sole activity as a professional fiduciary is as a broker-dealer, broker-dealer agent, investment adviser representative registered and regulated under the Corporate Securities Law of 1968 [

*Corp. Code § 25000 et seq.*], the Investment Advisers Act of 1940 [*15 U.S.C. 80b-1 et seq.*], or the Securities Exchange Act of 1934 [*15 U.S.C. 78a et seq.*], or involves serving as a trustee to a company regulated by the Securities and Exchange Commission under the Investment Company Act of 1940 [*15 U.S.C. 80a-1 et seq.*].

## **[2] Professional Fiduciaries Bureau**

The Professional Fiduciaries Bureau ("Bureau") is created under the Professional Fiduciaries Act and has the duty of enforcing and administering the Act [*Bus. & Prof. Code § 6510*]. Even though the Bureau is set to become inoperative as of July 1, 2011 and repealed as of January 1, 2012 (unless later statutes deletes or extends the dates on inoperability and repeal), upon repeal, the responsibilities and jurisdiction of the Bureau will be transferred and vested in the existing Professional Fiduciaries Advisory Committee [*Bus. & Prof. Code § 6511*]. The Bureau is responsible for administering the licensing and regulatory program established under the Act, approving classes for prelicense and continuing education, and preparing and administering licensing exams [*Bus. & Prof. Code § 6518*]. The Bureau has adopted a Professional Fiduciaries Code of Ethics ("Code of Ethics") which is provided on the bureau's Internet Web site and to any person requesting an application for license [*see www.fiduciary.ca.gov*].

## **[3] Licensing Requirements**

No person may act or hold themselves out to the public as a professional fiduciary unless he or she is licensed as a professional fiduciary under the Professional Fiduciaries Act [*Prob. Code § 60.1(b)*], *see* Professional Fiduciaries Act [*Bus. & Prof. Code § 6500 et seq.*]. A superior court may not appoint a person to carry out the duties of a professional fiduciary unless he or she holds a valid, unexpired, unsuspended license as a professional fiduciary under *Bus. & Prof. Code § 6500 et seq.* [*Prob. Code § 2340*]. A court may appoint a person to be a professional fiduciary without a professional fiduciary license if they are exempt from the definition of "professional fiduciary" under *Bus. & Prof. Code § 6501*, or are exempt from the licensing requirements of *Bus. & Prof. Code § 6530* [*Prob. Code § 2340*]. Furthermore, every person previously required to register with the statewide registry under *Prob. Code § 2850 et seq.* prior to January 1, 2007, and every person required to file information with the clerk of the court under *Prob. Code § 2340 et seq.* is required to obtain a license as a professional fiduciary under *Bus. & Prof. Code § 6500 et seq.*

Licensing requirements do not apply to [*Bus. & Prof. Code § 6530(b)-(d)*]:

- 1) A licensed attorney;
- 2) A licensed certified public accountant;
- 3) An Internal Revenue Service agent acting within the scope of practice.

All applications for a professional fiduciary license can be obtained online, through the California Department of Consumer Affairs, at <http://www.fiduciary.ca.gov/> [*see* Qualifications for Licensure, § 66A.27[4]].

## **[4] Qualifications for Licensure**

The Bureau reviews all applications and they will approve those applications that meet the required qualifications [*Bus. & Prof. Code § 6536*]. The Bureau may also investigate an applicant's qualifications [*Bus. & Prof. Code § 6536*]. To receive a license as a professional fiduciary, an applicant must meet the following [*Bus. & Prof. Code § 6533(a)-(k)*]:

- (a) Be at least 21 years old;
- (b) Be a United States citizen or be legally admitted to the United States;

- (c) Have not committed any acts that are grounds for denial of a license under *Bus. & Prof. Code* §§ 480, 6536 [*see below*];
- (d) Submit fingerprints as required by *Bus. & Prof. Code* § 6533.5 in order to obtain criminal offender record information;
- (e) Have completed 30 hours of prelicensing education as required by *Bus. & Prof. Code* § 6538;
- (f) Have passed the licensing exam under *Bus. & Prof. Code* § 6539;
- (g) Have at least one of the following:
  - a. A BA or BS degree from a college or university;
  - b. An AA/AS degree from a college or university and at least five (5) years experience with substantive fiduciary responsibilities working as a professional fiduciary, public agency, or financial institution acting as a conservator, guardian, trustee, personal representative, or agent under a power of attorney; or
  - c. Experience of not less than three (3) years, prior to January 1, 2009, with substantive fiduciary institution acting as a conservator, guardian, trustee, personal representative, or agent under a power of attorney.
- (h) Agree to adhere to the Professional Fiduciaries Code of Ethics [*see Bus. & Prof. Code* § 6520] and to all statutes and regulations;
- (i) Consent to the bureau conducting a credit check;
- (j) File a completed application;
- (k) Submit a nonrefundable application fee.

The Bureau will not issue a license to any applicant who [*see Bus. & Prof. Code* § 6536(a)-(e)];

- (a) Does not meet the qualifications for licensure [*see Bus. & Prof. Code* § 6533(a)-(k)];
- (b) Has been convicted of a crime substantially related to the qualifications, functions, or duties of a fiduciary;
- (c) Has engaged in fraud or deceit in applying for a license;
- (d) Has engaged in dishonesty, fraud, or gross negligence in performing the functions or duties of a fiduciary;
- (e) Has been removed as a fiduciary by a court for breach of trust committed intentionally, with gross negligence, in bad faith, or with reckless indifference, or has demonstrated a pattern of negligent conduct, including a removal prior to July 1, 2008, and all appeals have been taken, or the time to file an appeal has expired.

**[5] License Renewal**

A license is valid for one year and will expire one year after it was issued on the last day of the month in which it was issued [*Bus. & Prof. Code § 6541(a)*]. A license may be renewed by filing a renewal application, submitting the annual statement, as required by *Bus. & Prof. Code § 6561* [*see § 66A.27[6]*], submitting proof of compliance with continuing education requirements [*see Bus. & Prof. Code § 6538(b)* (15 hours of approved courses each year)], and payment of the renewal fee [*Bus. & Prof. Code § 6541(b)*]. Conduct that would result in a refusal of a license renewal includes [*Bus. & Prof. Code § 6541(b)*]:

- (1) Conviction of a crime substantially related to the qualifications, functions, or duties of a fiduciary;
- (2) Fraud or deceit in obtaining a license;
- (3) Dishonesty, fraud, or gross negligence in performing the functions or duties of a professional fiduciary;
- (4) Removal by a court as a fiduciary for breach of a fiduciary duty.

**[6] Initial and Annual Statement**

A licensee is required to keep complete and accurate records of client accounts and must make them available for audit by the bureau [*Bus. & Prof. Code § 6560*]. A licensee must file initially and annually thereafter, a statement which contains the following [*Bus. & Prof. Code § 6561(a)*]:

- (1) His or her business address, phone and fax number;
- (2) Whether or not he or she has been removed as conservator, guardian, trustee or personal representative for cause;
- (3) The case names, court locations and case numbers for all matters where the licensee has been appointed by the court;
- (4) Whether he or she has been found by a court to have breached a fiduciary duty;
- (5) Whether he or she has reassigned or settled a matter in which a complaint has been filed, along with the case number and a statement of the issues and facts pertaining to the allegations;
- (6) Any licenses or professional certificates held;
- (7) Any ownership or beneficial interests in any businesses or other enterprises held by the licensee or by a family member that receives or has received payment from a client of the licensee;
- (8) Whether the licensee has ever filed for bankruptcy or held a controlling financial interest in a business that filed for bankruptcy;
- (9) The name of any persons or entities that have an interest in the licensee's professional fiduciary business;
- (10) Whether the licensee has been convicted of a crime.

The annual statement must be filed with the Bureau 60 days prior to the expiration of the license [*Bus. & Prof. Code § 6562*].

### **[7] Suspension, Revocation, Denial and Disciplinary Action**

The Bureau has authority to investigate the actions of any professional fiduciary [*Bus. & Prof. Code § 6580(a)*]. Sanctions may include administrative citations and fines, license suspension, probations or revocation [*Bus. & Prof. Code § 6580(b)*]. A license may be suspended, revoked, denied or other disciplinary action may be imposed for one or more of the following [*Bus. & Prof. Code § 6584*]:

- (a) Conviction of any felony or misdemeanor, if the misdemeanor is substantially related to the functions and duties of a professional fiduciary;
- (b) Failure to notify the bureau of a conviction pursuant to *Bus. & Prof. Code § 6561(a)(10)*;
- (c) Fraud or misrepresentation in obtaining a license;
- (d) Fraud, dishonesty, corruption, willful violation of duty, gross negligence or incompetence in practice, or unprofessional conduct in, or related to, the practice of a professional fiduciary;
- (e) Failure to comply with, or to pay a monetary sanction imposed by a court for failure to provide timely reports;
- (f) Failure to pay a civil penalty relating to the licensee's professional fiduciary duties;
- (g) The revocation of, suspension of, or other disciplinary action against, any other professional license by the State of California or by another state;
- (h) Violation of this *Bus. Prof. Code § 6500 et seq.*, *Probate Code § 4000 et seq.*, *Probate Code § 4600 et seq.*, *Probate Code § 5000 et seq.*, or any of the statutes, rules, or regulations pertaining to the duties or functions of a professional fiduciary.

### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law  
 Conservators & Guardians  
 Conservators  
 General Overview  
 Estate, Gift & Trust  
 Law  
 Conservators & Guardians  
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 Estate, Gift & Trust Law  
 Conservators & Guardians  
 Conservators  
 Duties & Rights



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DIVISION IV: WILLS AND TRUSTS  
CHAPTER 66A CONSERVATORSHIPS  
PART II. LEGAL BACKGROUND  
A. Conservatorships in General

*25-66A California Legal Forms--Transaction Guide §§ 66A.28-66A.29*

**[Reserved]**

§§ 66A.28[Reserved]



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 B. Lanterman-Petris-Short Act (LPS) Conservatorships

*25-66A California Legal Forms--Transaction Guide § 66A.30*

**§ 66A.30 In General**

The Lanterman-Petris-Short Act (LPS) authorizes the establishment of conservatorships for persons who are "gravely disabled" as a result of mental disorder or chronic alcoholism [*Welf. & Inst. Code § 5350; see § 66A.31* for discussion of "gravely disabled"]. LPS was designed to provide short-term, intensive treatment at community based treatment facilities for gravely disabled persons [*see Welf. & Inst. Code §§ 5150 (72-hour treatment and evaluation), 5250 (14-day intensive treatment)*]. Conservatorships established under LPS are usually, although not always, preceded by short periods of detention at community-based mental health treatment facilities.

Although conservators are generally appointed for adults and guardians are generally appointed for minors [*see § 66A.10*], LPS makes no distinction between minors and adults. Thus an LPS conservatorship may be established for a gravely disabled minor as well as a gravely disabled adult [*Welf. & Inst. Code § 5350(a)*].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law  
 Conservators & Guardians  
 Conservators  
 General Overview  
 Estate, Gift & Trust Law  
 Conservators & Guardians  
 Conservators  
 Appointment



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*25-66A California Legal Forms--Transaction Guide § 66A.31*

**§ 66A.31 Persons Subject to LPS Conservatorship**

A person may become subject to an LPS conservatorship by reason of a "mental disorder" or "impairment by chronic alcoholism" [*see Welf. & Inst. Code § 5350*]. In either case, however, the person's condition must be such that the person is "gravely disabled." A person may be found to be "gravely disabled" by a mental disorder or chronic alcoholism if, as a result of that condition, the person is unable to provide for his or her basic personal needs for food, clothing, or shelter [*Welf. & Inst. Code § 5008(h)(1)(A), (2)*]. Grave disability as a result of a mental disorder may also be shown if the person has been charged with a crime and has been declared mentally incompetent to stand trial [*Welf. & Inst. Code § 5008(h)(1)(B); see Pen. Code § 1370*]. A person is not "gravely disabled" for LPS purposes merely because the person is mentally retarded [*Welf. & Inst. Code § 5008(h)(3)*]. Grave disability must be established by proof beyond a reasonable doubt and, if a jury trial on the issue has been requested, by a unanimous verdict [*Conservatorship of Margaret L. (2001) 89 Cal. App. 4th 675, 679, 107 Cal. Rptr. 2d 542* (verdict of only nine out of twelve jurors is sufficient to find person is *not* gravely disabled)].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law  
 Conservators & Guardians  
 Conservators General Overview  
 Estate, Gift & Trust Law  
 Conservators & Guardians  
 Conservators Appointment



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DIVISION IV: WILLS AND TRUSTS  
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*25-66A California Legal Forms--Transaction Guide § 66A.32*

**§ 66A.32 Recommendation by Treatment or Evaluation Professional**

An LPS conservatorship can be initiated only when the professional in charge of treating or evaluating the proposed conservatee determines that the proposed conservatee is "gravely disabled" as a result of mental disorder or impairment by chronic alcoholism and cannot or will not accept voluntary treatment [*Welf. & Inst. Code § 5352*; see § 66A.31 for discussion of "gravely disabled"]. When this determination is made, the professional in charge may recommend an LPS conservatorship to the county officer in charge of conservatorship investigations in the county in which the disabled person resided before entering the treatment facility [*Welf. & Inst. Code § 5352*]. The determination of whether a proposed conservatee is gravely disabled as a result of mental disorder and amendable to treatment under the LPS Act is solely in the conservator's discretion, and a court can order the investigation for a conservatorship but cannot require that a petition for an LPS conservatorship be filed [ *People v. Karriker (2007) 149 Cal. App. 4th 763, 782 57 Cal. Rptr. 3d 412* ].

Although LPS conservatorships are usually reserved for inpatients in treatment facilities, an LPS conservatorship may be established for a person who is not an inpatient if the professional in charge (or another person designated by the professional) has examined the prospective conservatee and determined that he or she is "gravely disabled" and that future examination on an inpatient basis is not necessary to make that determination [*Welf. & Inst. Code § 5352*]. If the county officer in charge of conservatorship investigations concurs with the recommendation, he or she will petition the superior court to establish the LPS conservatorship [*Welf. & Inst. Code § 5352*].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law  
 Conservators & Guardians  
 Conservators  
 General Overview  
 Estate, Gift & Trust  
 Law  
 Conservators & Guardians  
 Conservators  
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*25-66A California Legal Forms--Transaction Guide § 66A.33*

**§ 66A.33 Appointment of Conservator**

The court has a measure of discretion in selecting and appointing a conservator under LPS [*Prob. Code § 1812(a)*; *Welf. & Inst. Code § 5350*]. Unless the conservatorship investigator recommends another person, however, if the persons entitled to appointment appear to the court to be equally qualified, preference should be given to the same persons who would be entitled to preference in the appointment of a conservator under the Probate Code [*Prob. Code § 1812(b)*; *Welf. & Inst. Code § 5350(b)(1)*; *see § 66A.15*]. In most cases, the court should be guided by the best interests of the proposed conservatee [*Prob. Code § 1812(a)*; *Welf. & Inst. Code § 5350*]. However, if the proposed conservatee has been charged with a crime and has been declared mentally incompetent to stand trial, the court must consider the purposes of protection of the public and treatment of the proposed conservatee [*Welf. & Inst. Code § 5350(b)(2)*; *see Pen. Code § 1370*; *Welf. & Inst. Code § 5008(h)(1)(B)*].

A conservator of the estate cannot be established under LPS if a conservatorship or guardianship of the estate already exists under the Probate Code [*Welf. & Inst. Code § 5350(c)*]. However, if a conservator of the person has been appointed under the Probate Code, a conservator of the person may also be appointed under LPS. The LPS conservatorship will not terminate the Probate Code proceedings but will be "superior" to those proceedings [*Welf. & Inst. Code § 5350(c)*]. The court may appoint the existing guardian or conservator of the person or some other person as the LPS conservator [*Welf. & Inst. Code § 5350(c)*].

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Estate, Gift & Trust Law  
Conservators & Guardians  
Conservators Appointment



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*25-66A California Legal Forms--Transaction Guide § 66A.34*

**§ 66A.34 Procedure**

LPS conservatorships are subject to many of the same procedural rules as Probate Code conservatorships and guardianships [*Welf. & Inst. Code § 5350*; see *Prob. Code § 1400 et seq.* (guardianship, conservatorship, and other protective proceedings)]. For example, a proposed conservatee is entitled to notice of any application for a temporary conservatorship, in accordance with *Prob. Code § 2250(e)* [ *Edward W. v. Lamkins (2002) 99 Cal. App. 4th 516, 541-545, 122 Cal. Rptr. 2d 1* (notice may be dispensed with only on showing of good cause, *i.e.*, individualized showing of exigent circumstances)]. However, the general statutory provisions governing the petition [see *Prob. Code § 2250*], attendance of the conservatee at the hearing [see *Prob. Code § 2250.4*], and the duties of the court investigator [see *Prob. Code § 2250.6*], do not apply to LPS temporary conservatorship proceedings [*Prob. Code § 2250.8*].

A proposed LPS conservatee has the right to demand a court or jury trial on the issue of whether he or she is gravely disabled [*Welf. & Inst. Code § 5350(d)*; see *Prob. Code § 1827* (right to demand jury trial in Probate Code conservatorship)]. Alternatively, the proposed conservatee's attorney may meet in person with the proposed conservatee and sign an affidavit attesting to the conservatee's agreement to the establishment of the conservatorship without a hearing [see *Conservatorship of Tian L. (2007) 149 Cal. App. 4th 1022, 1031-1032* (proposed conservatee had received all required statutory notices, including copy of petition which included physicians' declaration, notice of intended placement in locked facility, and precise nature of proposed disabilities, as well as two written notices of her right to a hearing and a jury trial, and attorney had met with her in person and discussed these matters); compare *Conservatorship of Christopher A. (2006) 139 Cal. App. 4th 604, 610-613, 43 Cal. Rptr. 3d 427* (court violated conservatee's due process rights by accepting stipulated judgment submitted by attorneys *without* first consulting conservatee on consequences of agreement; stipulated judgment approved by conservatee's attorney and adopted by court after no formal hearing on issues of placement, disabilities, and powers of conservator is not a constitutionally sound safeguard against error)].

A demand for a court or jury trial must be made within five days after the hearing on the conservatorship petition. The trial must begin within 10 days of the date of the demand unless counsel for the proposed conservatee requests a continuance, in which case the court may order that the trial be continued for up to 15 days [*Welf. & Inst. Code § 5350(d)*].

The court must appoint the public defender or other attorney for the proposed conservatee within five days after the date of the petition [*Welf. & Inst. Code* § 5365]. A proposed conservatee does not have a constitutional right under the *Sixth Amendment* or a statutory right under *Welf. & Inst. Code* § 5350 to represent himself or herself in the civil commitment proceedings, but the court has the discretion to permit self-representation [ *Conservatorship of Joel E. (2005) 132 Cal. App. 4th 429, 438-442, 33 Cal. Rptr. 3d 704* ] . Additionally, a proposed conservatee who requests substitute appointed counsel must be given a full opportunity to state the reasons for his or her requests [ *Conservatorship of David L. (2008) 164 Cal. App. 4th 701, 712, 79 Cal. Rptr. 3d 530* ] . A court's failure to afford a proposed conservatee a full opportunity to state his or her reasons for requesting substitute counsel violates his or her right to due process of law [ *Conservatorship of David L. (2008) 164 Cal. App. 4th 701, 712, 79 Cal. Rptr. 3d 530* ] .

However, there are notable differences between Probate Code conservatorships and LPS conservatorships. The most notable difference is that an LPS conservatorship can be established only on recommendation of the professional in charge of the treatment or evaluation agency and only on petition of the county officer in charge of conservatorship investigations [*Welf. & Inst. Code* § 5352; *see* § 66A.32].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawConservators & GuardiansConservatorsGeneral OverviewEstate, Gift & Trust

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*25-66A California Legal Forms--Transaction Guide § 66A.35*

**§ 66A.35 Investigation**

Before an LPS conservator is appointed, the officer charged with the duty of making conservatorship investigations must investigate the proposed conservatorship and file a written report with the court. The report must include all relevant aspects of the proposed conservatee's medical, psychological, financial, family, vocational, and social conditions, as well as information obtained from family members, friends, social workers, and therapists. It must also include information concerning the proposed's conservatee's property. The court may receive the report in evidence and read and consider it when making its judgment [*Welf. & Inst. Code § 5354; see Welf. & Inst. Code § 5008(g)* ("conservatorship investigation" defined)].

The investigating officer can recommend the conservatorship to the court only if no suitable alternatives are available. If the officer recommends against conservatorship, he or she must set forth all of the available alternatives [*Welf. & Inst. Code § 5354*].

The exclusionary rule, under which evidence seized in violation of the *Fourth Amendment to the United States Constitution* must be suppressed, does not apply to a conservatorship action under LPS. The exclusionary rule is enforced in criminal proceedings to deter unreasonable searches and seizures. Adoption of the rule in proceedings under LPS would not have a deterrent effect, since the first concern of a mental health worker is likely to be securing treatment for a gravely disabled person and not ensuring the admissibility of evidence in a subsequent hearing [*Conservatorship of Susan T. (1994) 8 Cal. 4th 1005, 1019-1020, 36 Cal. Rptr. 2d 40, 884 P.2d 988*].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law  
 Conservators & Guardians  
 Conservators  
 General Overview  
 Estate, Gift & Trust  
 Law  
 Conservators & Guardians  
 Conservators  
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*25-66A California Legal Forms--Transaction Guide § 66A.36*

**§ 66A.36 Powers of Conservator**

LPS conservators have extensive powers. All conservators of the estate will have the powers specified in the general power provisions of the Probate Code [*Welf. & Inst. Code § 5357; see Prob. Code § 2400 et seq.* (powers and duties of guardian or conservator of estate)]. These powers generally may be exercised only after the court has authorized their exercise. However, the court may give the conservator authority to exercise certain powers without notice or court authorization [*Welf. & Inst. Code § 5357; see Prob. Code § 2590 et seq.* (independent exercise of powers)]. The court may also authorize the conservator to place the conservatee in a medical, psychiatric, or nursing facility, in a hospital operated by the University of California or the United States government, or, in cases of chronic alcoholism, in a county alcoholic treatment center [*Welf. & Inst. Code § 5358(a)(2)*].

When a conservatee is incapable of making routine medical decisions, the court must designate the least restrictive alternative placement for a conservatee upon the establishment of a conservatorship [*Welf. & Inst. Code § 5358(c)(1); Conservatorship of Amanda B. (2007) 149 Cal. App. 4th 342, 351-352 ; 56 Cal. Rptr. 3d 901* (trial court's designation of least restrictive placement may not be an "either/or" designation of multiple levels of care; court must set a single level of placement as least restrictive placement)].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law  
 Conservators & Guardians  
 Conservators  
 General Overview  
 Estate, Gift & Trust Law  
 Conservators & Guardians  
 Conservators  
 Duties & Rights



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*25-66A California Legal Forms--Transaction Guide § 66A.37*

**§ 66A.37 Termination of Conservatorship**

An LPS conservatorship will automatically terminate one year after the court has appointed the conservator. On request of the conservatee, any facility in which a conservatee has been placed must release the conservatee when the conservatorship terminates [*Welf. & Inst. Code § 5361*].

The authority of a conservator of the estate may continue after the conservatorship is terminated, but only for a reasonable time, only if continued action by the conservator is necessary to wind up certain affairs of the conservatorship, and only if the court authorizes the continued authority [*Welf. & Inst. Code § 5361*]. Thus the court may authorize the conservator to collect assets or income that accrued during the conservatorship but were uncollected on the date of termination, to pay expenses which accrued before the termination, or to complete real property sales when the only act remaining at the date of termination is the actual transfer of title [*Welf. & Inst. Code § 5361*].

If, upon termination of the conservatorship, the conservator determines that it is still required, he or she may petition the court for reappointment for another one-year period. A petition for reappointment must include the opinions of two physicians or licensed psychologists with doctoral degrees in psychology and at least five years of postgraduate experience that the conservatee is still gravely disabled as a result of mental disorder or impairment by chronic alcoholism. If the conservatee is unable to obtain the opinions of two qualified physicians or psychologists, he or she may request that the court appoint them [*Welf. & Inst. Code § 5361*].

The conservator has discretion under *Code Civ. Proc. § 581(b)(1)* to voluntarily dismiss the petition to reestablish the conservatorship for a further one-year period at any time before the commencement of trial [ *Conservatorship of Martha P. (2004) 117 Cal. App. 4th 857, 865-869, 12 Cal. Rptr. 3d 142* (request for dismissal granted on finding that conservatee was no longer gravely disabled)].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law  
 Conservators & Guardians  
 Conservators  
 Removal & Termination



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*25-66A California Legal Forms--Transaction Guide §§ 66A.38-66A.39*

**[Reserved]**

§§ 66A.38[Reserved]



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DIVISION IV: WILLS AND TRUSTS  
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C. Management of Community Property When Spouse Lacks Legal Capacity

*25-66A California Legal Forms--Transaction Guide § 66A.40*

**§ 66A.40 In General**

The legislature has enacted specific provisions concerning the management, control, and disposition of community property when one or both spouses lack legal capacity [*see Prob. Code § 3000 et seq.*]. For this purpose, community property is defined to mean community real property and community personal property, including, but not limited to, a community property business that is or was under the primary management and control of one of the spouses [*Prob. Code § 3002; see Fam. Code § 761*].

The right of a spouse to manage, control, and dispose of community property is not affected by the lack of legal capacity of the other spouse [*Prob. Code § 3051(a)*]. When one spouse has legal capacity and the other has a conservator, the spouse with legal capacity has the exclusive management, control, and power to dispose of the community property, subject to situations in which joinder or consent would be required for a transaction if both spouses had legal capacity [*see Prob. Code § 3071*], and the community property is not part of the conservatorship estate [*Prob. Code § 3051(b)*]. The spouse with legal capacity may consent, however, by a writing filed in the proceeding, to have all or part of the community property managed, controlled, and disposed of as part of the conservatorship estate [*Prob. Code § 3051(c)*]. The standard for determining whether a spouse lacks legal capacity is prescribed in *Prob. Code § 3012(b)*.

If both spouses have conservators, the community property interest of each spouse is to be managed, controlled, and disposed of as part of the conservatorship estate of that spouse [*Prob. Code § 3051(d)*]. When authorized by the court in which any of the proceedings is pending, the conservators may agree in writing that all or specific parts of the community property be included in the conservatorship estate on one of the spouses and, subject to consent of joinder requirements [*see Prob. Code § 3071*] will be managed, controlled, and disposed of as part of the conservatorship estate of that spouse [*Prob. Code § 3051(e)*].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

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## C. Management of Community Property When Spouse Lacks Legal Capacity

*25-66A California Legal Forms--Transaction Guide § 66A.41***§ 66A.41 Procedures for Determination and Enforcement of Support**

*Prob Code § 3080 et seq.* establish rules for the determination and enforcement of support when one spouse has a conservator and the other spouse has the management and control of the community property. In this situation, the conservator, the conservatee, a relative or friend of the conservatee, or any other interested person may petition the court in which the conservatorship proceeding is pending for an order requiring the spouse who has the management and control of the community property to apply the principal and/or income from the community property to the support and maintenance of the conservatee spouse [*Prob. Code § 3080*]. The court will hold a hearing on the petition, and may examine the spouse who has the management and control of the community property on matters relevant to the petition [*Prob. Code § 3082; see Prob. Code § 3081* (notice)]. The spouse having management and control must also file and serve a current income and expense declaration and a current property declaration [*Prob. Code § 3084*].

The court may determine whether property is separate or community property if that issue is raised [*Prob. Code § 3087*], and may prescribe the amounts, times, and manner of support payments, taking into account the same factors used in determining spousal support in a dissolution action [*Prob. Code § 3088*]. The paying spouse may be ordered to make assignments from earnings to cover support payments, and the court's order will operate as an assignment and be binding on any employer on whom a copy of the order is served [*see Prob. Code § 3088(e)*]. The court also has the power to order temporary support payments during the pendency of the proceeding [*Prob. Code § 3083*]. It may issue ex parte orders with respect to the use and distribution of community property funds while the action remains pending, and may require prior court approval for all extraordinary expenditures [*Prob. Code § 3085*]. The court retains jurisdiction to modify or vacate any order made with respect to support [*Prob. Code § 3088(f)*].

If the spouse who has management and control of the community property refuses to comply with any order relating to the support of the conservatee spouse, the court, on petition, may divide the community and quasi-community property, as it exists at the time of division, in the same manner as in a dissolution of marriage, and order that portion awarded to the conservatee spouse to be managed, controlled, and disposed of as part of the conservatorship estate [*Prob. Code § 3089*]. However, such a division has no effect on after-acquired property [*Prob. Code § 3089*].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law  
Conservators & Guardians  
Conservators  
General Overview  
Estate, Gift & Trust Law  
Conservators & Guardians  
Conservators  
Duties & Rights  
Family Law  
Family Protection & Welfare  
Cohabitants & Spouses  
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C. Management of Community Property When Spouse Lacks Legal Capacity

*25-66A California Legal Forms--Transaction Guide §§ 66A.42-66A.99*

**[Reserved]**

§§ 66A.42[Reserved]



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PART III. TRANSACTION GUIDE  
A. Client Interview--Facts and Documents

*25-66A California Legal Forms--Transaction Guide § 66A.100*

**§ 66A.100 Facts**

1. Name, address, and telephone number of each of the following:
  - a. Proposed conservatee.
  - b. Client, if different from proposed conservatee.
  - c. Spouse of proposed conservatee.
  - d. Possible nominees for conservator and alternates.
2. If client is not proposed conservatee:
  - a. Relationship of client to proposed conservatee.
  - b. Whether proposed conservatee or any of his relatives are known to have nomination of conservator for proposed conservatee.
3. Date of birth of proposed conservatee.
4. If proposed conservatee is minor:
  - a. Whether minor is or has been married.
  - b. If minor has been married, whether marriage was dissolved or nullified.

5. For proposed conservatee:
  - a. General physical condition.
  - b. If under any existing or continuing conditions of infirmity, description of these conditions.
  - c. If under care of physician, physician's:
    - (1) Name.
    - (2) Address.
    - (3) Telephone number.
6. For possible conservator nominees and alternates:
  - a. Relationship to proposed conservatee, if any.
  - b. Conditions or factors making the person a desirable candidate.
  - c. Indication, if any, of willingness to act, if appointed.
  - d. If candidate is nonprofit charitable corporation:
    - (1) Whether corporation is incorporated in California.
    - (2) Whether corporate articles of incorporation specifically authorize corporation to accept appointment of conservator.
    - (3) Whether proposed conservatee is, has been, or will receive care or counseling or financial assistance from corporation under supervision of California certified, registered social worker.
7. For proposed conservatee's property:
  - a. General description of conservatee's estate.
    - (1) Location and types of assets, such as:
      - (a) Residence.
      - (b) Bank and savings account deposits.
      - (c) Securities.
      - (d) Business interests.
      - (e) Insurance policy benefits.
      - (f) Other personal property.

(g) Other real property.

(2) Value of personal property.

(3) Probable value of annual rents, issues, and profits of all estate property.

b. If proposed conservatee is married:

(1) Extent to which described property is owned as community property.

(2) For property held as community property, whether spouse or proposed conservatee desires to manage and control property or has considered consenting to having conservator manage, control, and dispose of property as part of conservatorship estate.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawConservators & GuardiansGeneral OverviewEstate, Gift & Trust LawConservators & GuardiansConservatorsGeneral Overview



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DIVISION IV: WILLS AND TRUSTS  
CHAPTER 66A CONSERVATORSHIPS  
PART III. TRANSACTION GUIDE  
A. Client Interview--Facts and Documents

*25-66A California Legal Forms--Transaction Guide § 66A.101*

**§ 66A.101 Documents**

1. Prior nominations of conservator for proposed conservatee, if any.
2. If nonprofit charitable corporation is candidate for nomination as conservator, corporate articles of incorporation.
3. If proposed conservatee is previously married minor, order dissolving or nullifying marriage.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawConservators & GuardiansGeneral OverviewEstate, Gift & Trust LawConservators & GuardiansConservatorsGeneral Overview



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DIVISION IV: WILLS AND TRUSTS  
CHAPTER 66A CONSERVATORSHIPS  
PART III. TRANSACTION GUIDE  
A. Client Interview--Facts and Documents

*25-66A California Legal Forms--Transaction Guide §§ 66A.102-66A.109*

**[Reserved]**

§§ 66A.102[Reserved]



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DIVISION IV: WILLS AND TRUSTS  
CHAPTER 66A CONSERVATORSHIPS  
PART III. TRANSACTION GUIDE  
B. Preliminary Determinations

*25-66A California Legal Forms--Transaction Guide § 66A.110*

**§ 66A.110 Determining Whether Conservator Is Needed**

1. Is there present need for conservator of person, or is it likely such a need will arise in future?
  - a. Is proposed (or potential) conservatee presently unable to provide properly for his or her personal needs for physical health, food, clothing, or shelter [*Prob. Code § 1801(a)*]?
  - b. If not presently unable, is it likely proposed (or potential) conservatee will become unable in future [*Prob. Code § 1801(a)*]?
2. Is there present need for conservator of estate, or is it likely such a need will arise in future?
  - a. Does proposed (or potential) conservatee have substantial financial resources?

**NOTE:**

In determining whether the proposed (or potential) conservatee has substantial financial resources, his or her wages or salary should not ordinarily be taken into account. Unless otherwise ordered by the court, any wages or salary earned by the conservatee during the conservatorship will be paid directly to the conservatee and will be subject to the conservatee's control to the same extent as if the conservatorship did not exist [*Prob. Code §§ 1871(b), 2601*].

- b. If proposed (or potential) conservatee has substantial financial resources, is he or she substantially unable to manage those resources, or to resist fraud or undue influence [*Prob. Code § 1801(b)*]?
- c. If not presently unable, is it likely proposed (or potential) conservatee will become unable in future [*Prob. Code § 1801(b)*]?

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law  
Conservators & Guardians  
General Overview  
Estate, Gift & Trust Law  
Conservators & Guardians  
Conservators  
General Overview



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PART III. TRANSACTION GUIDE  
B. Preliminary Determinations

*25-66A California Legal Forms--Transaction Guide § 66A.111*

**§ 66A.111 Determining Whether Nomination Should Be Made**

**NOTE:**

The nomination of a conservator (except in a petition for appointment) is always optional and never mandatory. Whether a conservator should be nominated will depend on the circumstances of the case and the attorney's and the client's resolution of the preliminary determinations outlined herein.

1. Is petition for appointment of conservator pending or anticipated?
2. If there is a petition, is person named as conservator in petition acceptable to client?
3. Is there a specific person whom client wishes to have act as conservator?
4. Are there any close relatives whom client specifically does not wish to have act as conservator?

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law  
Conservators & Guardians  
General Overview  
Estate, Gift & Trust Law  
Conservators & Guardians  
Conservators  
General Overview



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PART III. TRANSACTION GUIDE  
B. Preliminary Determinations

*25-66A California Legal Forms--Transaction Guide § 66A.112*

**§ 66A.112 Determining Whom To Nominate**

1. Is there a person or entity acceptable to client who is now or will in future be capable of acting as conservator?

a. Is person legally qualified for appointment?

**NOTE:**

As a general rule, any natural person is eligible to be nominated and appointed as a conservator [*see § 66A.11[2], above*].

b. Is person qualified by ability and experience to act as conservator?

**NOTE:**

While it is essential to select a person who is legally qualified to accept appointment, it is equally important to select a person who is actually capable of shouldering the responsibilities of the conservatorship. In the case of a conservatorship of the person, those duties will necessarily require making personal decisions for the conservatee, exercising a degree of control over the conservatee, and providing for his or her care. In the case of a conservatorship of the estate, the conservator's duties will include making financial decisions, collecting, preserving, and accounting for assets of the conservatorship estate, and, when appropriate, making investment decisions.

2. Is preferred nominee willing to assume responsibilities and duties of a conservator?

**NOTE:**

The proposed conservator's willingness to shoulder these responsibilities is no less important than his or her legal qualifications and ability. The conservator's tasks are often thankless, and, unless the conservatorship assets are considerable, compensation may be meager. Although trust companies and

certain nonprofit charitable corporations may be legally qualified to accept appointment as conservators [*see* discussion in § 66A.11[2], *above*], they are often unwilling to do so unless the conservatee's assets are sufficient to assure they will be adequately compensated. There is no legal requirement that a conservator be a California resident [*see* discussion in § 66A.11[2], *above*]. If the proposed conservatee lives in California, however, selection of a nonresident as conservator may present practical problems.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law  
Conservators & Guardians  
Conservators  
General Overview  
Estate, Gift & Trust Law  
Conservators & Guardians  
Conservators  
Appointment



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DIVISION IV: WILLS AND TRUSTS  
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PART III. TRANSACTION GUIDE  
B. Preliminary Determinations

*25-66A California Legal Forms--Transaction Guide § 66A.113*

**§ 66A.113 Determining Whether Client Has Legal Capacity to Make Nomination**

1. If client is proposed (or potential) conservatee, does he or she have sufficient capacity to form an intelligent preference [*Prob. Code § 1810*]?

**NOTE:**

If the client presently has such capacity but fears that at some time in the future he or she may lack it, a nomination may be made now, to take effect only in the event of incapacity.

2. If client is not proposed (or potential) conservatee, is he or she among those persons legally entitled to make nomination [*Prob. Code § 1811*]?

- a. Spouse.
- b. Domestic partner [*see Prob. Code § 37; Fam. Code § 297* ("domestic partnership" defined)].
- c. Adult child.
- d. Parent.
- e. Brother or sister.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law  
Conservators & Guardians  
Conservators  
General Overview  
Estate, Gift & Trust  
Law  
Conservators & Guardians  
Conservators  
Appointment



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DIVISION IV: WILLS AND TRUSTS  
CHAPTER 66A CONSERVATORSHIPS  
PART III. TRANSACTION GUIDE  
B. Preliminary Determinations

*25-66A California Legal Forms--Transaction Guide § 66A.114*

**§ 66A.114 Determining When Nomination Should Be Made**

1. Is petition for appointment of conservator pending?

**NOTE:**

The nomination of a conservator may precede, accompany, or follow the filing of a petition for appointment of a conservator [*Prob. Code §§ 1810, 1811*]. If the client has filed a petition for appointment of a conservator, or if a petition has been filed by some other person and the conservator named in the petition is acceptable to the client, it will not be necessary to prepare a separate nominating instrument. If, however, the person named in the petition is objectionable, or if there is a specific person whom the client wishes to serve as conservator, a nomination may be made in a writing signed after the petition is filed [*Prob. Code §§ 1810, 1811*]. If the client is a spouse, domestic partner [*see Prob. Code § 37; Fam. Code § 297* ("domestic partnership" defined)], or parent of the proposed conservatee, the nomination also may be made at the hearing [*Prob. Code § 1811(a)*].

2. If no petition is pending, should one be filed?

**NOTE:**

A conservator may be nominated in the petition for appointment [*Prob. Code §§ 1810, 1811(a)*]. In that case, no separate nominating instrument is required.

3. If no petition is pending or anticipated, should a separate nominating instrument be prepared?

**NOTE:**

A conservator may be nominated in a writing signed before or after the petition is filed [*Prob. Code §§ 1810, 1811*]. In cases in which there is no petition pending (and there is no immediate necessity for filing

one), the client may nevertheless wish to prepare for the possibility that the potential conservatee may at some time in the future need conservatorship protection. In that case, the client may wish to prepare a written nomination to take effect if and when the need for a conservatorship arises.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law  
Conservators & Guardians  
Conservators  
General Overview  
Estate, Gift & Trust Law  
Conservators & Guardians  
Conservators  
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DIVISION IV: WILLS AND TRUSTS  
CHAPTER 66A CONSERVATORSHIPS  
PART III. TRANSACTION GUIDE  
C. Procedural Guide for Nominating Conservator

*25-66A California Legal Forms--Transaction Guide*

**NOTE:**

The following guide deals only with the procedures for nominating conservators. It does not deal with the procedures by which conservators are actually appointed. Those procedures are beyond the scope of this chapter. For detailed discussion of the procedures for appointment of conservators, see California Forms of Pleading and Practice, Ch. 281, *Guardianship and Conservatorship: Appointment of Conservators* (Matthew Bender).



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DIVISION IV: WILLS AND TRUSTS  
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*25-66A California Legal Forms--Transaction Guide §§ 66A.115-66A.119*

**[Reserved]**

§§ 66A.115[Reserved]



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*25-66A California Legal Forms--Transaction Guide § 66A.120*

**§ 66A.120 Preparation of Nominating Instrument**

1. Select most appropriate type of nominating instrument.

a. Separate nominating instrument:

(1) Nomination of conservator of person [*see § 66A.200*].

(2) Nomination of conservator of estate [*see § 66A.201*].

(3) Nomination of conservator of person and estate [*see § 66A.202*].

(4) Nomination of separate conservators of person and estate [*see § 66A.203*].

(5) Nomination of individual as conservator of person and trust company as conservator of estate [*see § 66A.204*].

(6) Nomination of joint conservators [*see § 66A.205*].

b. Nomination as part of durable power of attorney.

**NOTE:**

A nomination by a proposed (or potential) conservatee may be made as part of a durable power of attorney [*Prob. Code § 4126(a)*]. A durable power of attorney is a power of attorney designed to survive the principal's incapacity. If conservatorship proceedings are subsequently commenced in California, and if the proposed conservatee has sufficient capacity at the time to form an intelligent preference, the court must appoint the nominee as conservator unless the court finds that the appointment of the nominee is not in the best interests of the proposed conservatee [*Prob. Code §§ 1810, 4126(b)*]. The court must give effect to the most recent writing executed in accordance with *Prob. Code § 1810* (discussed in the

preceding sentence), whether or not the writing is a durable power of attorney [*Prob. Code § 4126(b)*].

For a detailed discussion of durable powers of attorney for property management, see Ch. 68, ***Durable Powers of Attorney for Property Management*** for detailed coverage of durable powers of attorney for health care, also known as advance health care directives, see Ch. 104, ***Health Care Transactions, Consents, and Directives*** .

c. Nomination as part of petition for appointment of conservator [*see discussion under § 66A.200[1]*]; *see also* California Forms of Pleading and Practice, Ch. 281, *Guardianship and Conservatorship: Appointment of Conservators* (Matthew Bender)].

2. If desired, include optional provisions:

a. Provision stating reasons for nomination [*see § 66A.210*].

b. Provision stating that specific person is not nominated [*see § 66A.211*].

c. Waiver of bond [*see § 66A.212*].

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawConservators & GuardiansConservatorsGeneral OverviewEstate, Gift & Trust LawConservators & GuardiansConservatorsAppointmentEstate, Gift & Trust LawConservators & GuardiansTestamentary Guardians



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*25-66A California Legal Forms--Transaction Guide § 66A.121*

### **§ 66A.121 Execution and Storage of Nominating Instrument**

1. Have instrument executed by person making nomination.

**NOTE:**

There is no requirement that the nomination of a conservator be either witnessed or acknowledged. A nomination made in a writing other than a petition for appointment of a conservator need only be signed by the person making the nomination [*Prob. Code §§ 1810, 1811*]. If a nomination is in the form of a durable power of attorney, however, and if it is contemplated that the attorney-in-fact named in the power will enter into transactions affecting the title to real property standing in the name of the proposed (or potential) conservatee or execute any documents that must be recorded, it may be advisable to have the signature acknowledged. Generally, before an instrument can be recorded, its execution must be acknowledged [*Gov. Code § 27287*; for general acknowledgement, *see Civ. Code § 1189*].

Even if it is not contemplated that the attorney-in-fact (conservator) will enter into transactions affecting title to real property, and even if the nomination is not in the form of a durable power of attorney, an acknowledgement will enhance the evidentiary value of the nomination. If executed in the proper form [*see Civ. Code § 1180 et seq.*], a certificate of the acknowledgment of a writing other than a will, or a certificate of the proof of such a writing, is prima facie evidence of the facts recited in the certificate and of the genuineness of the signature of each person by whom the writing purports to have been signed [*Evid. Code § 1451*].

In the case of a nomination by the proposed (or potential) conservatee, if it is contemplated that the capacity of the proposed (or potential) conservatee to form an intelligent preference may be challenged, it may be advisable to arrange for a witness or

witnesses to the nomination who will be able to testify in the event of such a challenge.

2. Make arrangements for storage of original instrument (if nomination is made other than in connection with a pending petition for conservatorship) and production of copies.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law  
Conservators & Guardians  
Conservators  
General Overview  
Estate, Gift & Trust Law  
Conservators & Guardians  
Conservators  
Appointment  
Estate, Gift & Trust Law  
Conservators & Guardians  
Testamentary Guardians  
Estate, Gift & Trust Law  
Powers of Attorney  
General Overview  
Estate, Gift & Trust Law  
Powers of Attorney  
Surrogate Decisions



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*25-66A California Legal Forms--Transaction Guide §§ 66A.122-66A.199*

**[Reserved]**

§§ 66A.122[Reserved]



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DIVISION IV: WILLS AND TRUSTS  
CHAPTER 66A CONSERVATORSHIPS  
PART IV. FORMS  
A. NOMINATING INSTRUMENTS

*25-66A California Legal Forms--Transaction Guide § 66A.200*

**§ 66A.200 Nomination of Conservator of Person**

**[1] Comment**

**[a] Use of Form**

This form may be used when a potential or proposed conservatee, or an eligible relative of a proposed conservatee, wishes to nominate an individual to act as conservator of the person. For the nomination of a conservator of the estate, see § 66A.201. For the nomination of a conservator of the person and estate, see § 66A.202. For the nomination of separate conservators of the person and estate, see § 66A.203. For the nomination of an individual as conservator of the person and a trust company as conservator of the estate, see § 66A.204. For the nomination of joint conservators, see § 66A.205. For the legal rules governing the nomination and appointment of conservators, see *discussion under § 66A.11*.

**[b] Optional Provisions**

The following optional provisions may be added to or substituted for the provisions in this form:

- Provision Stating Reasons for Nomination [§ 66A.210].
- Provision Stating That Specific Person Is Not Nominated [§ 66A.211].
- Waiver of Bond [§ 66A.212].

**[c] Formal Requisites**

The nomination of a conservator may be made in any of the following ways:

- In the petition for appointment of a conservator [*Prob. Code §§ 1810, 1811*].
- In a writing signed before or after the petition is filed [*Prob. Code §§ 1810, 1811*].

- In the form of a durable power of attorney [*Prob. Code § 4126; see Prob. Code § 4659*].

With the exception of a nomination made in the form of a durable power of attorney [*see Prob. Code § 4126; see also Ch. 68, Durable Powers of Attorney for Property Management* ], the nomination need not be witnessed or executed with the formalities required of a will. If the nomination is made in the petition, it may be attached as Attachment 3c to Judicial Council Form No. GC-310(81), "Petition for Appointment of a Conservator." If the nomination is made after the petition is filed, it should be captioned like the pleading filed in the proceeding.

In Los Angeles County, when a document relates to a matter already set for hearing, local rules require that the department number and date of hearing be placed immediately below the case number on the first page [Los Angeles Prob. Pol. Mem. § 2.03].

For a detailed discussion of the procedure for appointment and qualification of conservators (with illustrative forms), see California Forms of Pleading and Practice, Ch. 281 et seq. (Matthew Bender).

## [2] FORM

### Nomination of Conservator of Person

#### NOMINATION OF CONSERVATOR OF PERSON

#### Introductory Paragraph

1. I, \_\_\_\_\_ [name], residing at \_\_\_\_\_ [street address, city, state, zip], [*if nomination is by a relative, add: the \_\_\_\_\_ (state relationship, e.g., brother) of \_\_\_\_\_ (name of proposed conservatee)*], wish to nominate a conservator of \_\_\_\_\_ [my person or the person of \_\_\_\_\_ (name of proposed conservatee)] [*if nomination is to take place at some time in the future, add: to act in the event that \_\_\_\_\_ (I am or he is or she is) unable to provide for \_\_\_\_\_ (my or his or her) personal needs for physical health, food, clothing, or shelter, or in the event that a court of competent jurisdiction shall, for any other reason, determine that such a conservator should be appointed*].

#### Revocation of Former Nominations

2. I hereby revoke all former instruments nominating conservators [*if nomination by relative, add: for \_\_\_\_\_ (name of proposed conservatee)*] executed by me.

#### Nomination of Conservator

3. I nominate \_\_\_\_\_ [name], \_\_\_\_\_ [street address, city, state, zip] as conservator of \_\_\_\_\_ [my person or the person of \_\_\_\_\_ (name of proposed conservatee)].

#### Nomination of Alternate Conservator

4. If the nominee named in Paragraph 3 shall for any reason be unable or unwilling to act or to continue to act as conservator, then I nominate \_\_\_\_\_ [name], \_\_\_\_\_ [street address, city, state, zip] as

conservator of \_\_\_\_\_ [my person *or* the person of \_\_\_\_\_ (*name of proposed conservatee*)].

Executed at \_\_\_\_\_, California, on \_\_\_\_\_ [*date*].

\_\_\_\_\_ [*signature*]  
[*typed name*]

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law  
Conservators & Guardians  
Conservators  
General Overview  
Estate, Gift & Trust Law  
Conservators & Guardians  
Conservators  
Appointment



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DIVISION IV: WILLS AND TRUSTS  
CHAPTER 66A CONSERVATORSHIPS  
PART IV. FORMS  
A. NOMINATING INSTRUMENTS

*25-66A California Legal Forms--Transaction Guide § 66A.201*

**§ 66A.201 Nomination of Conservator of Estate [Prob. Code §§ 1810, 1811]**

**[1] Comment--Use of Form**

This form may be used when a potential or proposed conservatee, or an eligible relative of a proposed conservatee, wishes to nominate an individual to act as conservator of the estate [*see Prob. Code §§ 1810, 1811*]. For the nomination of a conservator of the person, see § 66A.200. For the nomination of a conservator of the person and estate, see § 66A.202. For the nomination of separate conservators of the person and estate, see § 66A.203. For the nomination of an individual as conservator of the person and a trust company as conservator of the estate, see § 66A.204. For the nomination of joint conservators, see § 66A.205.

For the legal rules governing the nomination and appointment of conservators, see *discussion under § 66A.11 et seq.*

For discussion of optional provisions that may be added to this form if desired, and discussion of the formal requisites of an instrument nominating a conservator, see § 66A.200[1].

**[2] FORM**

**Nomination of Conservator of Estate**

NOMINATION OF CONSERVATOR OF ESTATE

**Introductory Paragraph**

1. I, \_\_\_\_\_ [name], residing at \_\_\_\_\_ [street address, city, state, zip], [if nomination is by a relative, add: the \_\_\_\_\_ (state relationship, e.g., brother) of \_\_\_\_\_ (name of proposed conservatee)], wish to nominate a conservator of \_\_\_\_\_ [my estate or the estate of \_\_\_\_\_ (name of proposed conservatee)] [if nomination is to take place at some time in the future, add: to act in the event that \_\_\_\_\_ (I am or he is or she is) unable to provide for \_\_\_\_\_

(my *or* his *or* her) personal needs for physical health, food, clothing, or shelter, or, in the event that a court of competent jurisdiction shall, for any other reason, determine that such a conservator should be appointed].

### Revocation of Former Nominations

2. I hereby revoke all former instruments nominating conservators [*if nomination is by a relative, add:* for \_\_\_\_\_ (*name of proposed conservatee*)] executed by me.

### Nomination of Conservator

3. I nominate \_\_\_\_\_ [*name*], \_\_\_\_\_ [*street address, city, state, zip*] as conservator of \_\_\_\_\_ [*my estate or the estate of* \_\_\_\_\_ (*name of proposed conservatee*)].

### Nomination of Alternate Conservator

4. If the nominee named in Paragraph 3 shall for any reason be unable or unwilling to act or to continue to act as conservator, then I nominate \_\_\_\_\_ [*name*], \_\_\_\_\_ [*street address, city, state, zip*] as conservator of \_\_\_\_\_ [*my estate or the estate of* \_\_\_\_\_ (*name of proposed conservatee*)].

Executed at \_\_\_\_\_, California, on \_\_\_\_\_ [*date*].

\_\_\_\_\_ [*signature*]  
[*typed name*]

### Legal Topics:

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law  
Conservators & Guardians  
Conservators General Overview  
Estate, Gift & Trust Law  
Conservators & Guardians  
Conservators Appointment



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DIVISION IV: WILLS AND TRUSTS  
CHAPTER 66A CONSERVATORSHIPS  
PART IV. FORMS  
A. NOMINATING INSTRUMENTS

*25-66A California Legal Forms--Transaction Guide § 66A.202*

**§ 66A.202 Nomination of Conservator of Person and Estate**

**[1] Comment--Use of Form**

This form may be used when a potential or proposed conservatee, or an eligible relative of a proposed conservatee, wishes to nominate a conservator of the person and estate. For the nomination of a conservator of the person, see § 66A.200. For the nomination of a conservator of the estate, see § 66A.201. For the nomination of separate conservators of the person and estate, see § 66A.203. For the nomination of an individual as conservator of the person and a trust company as conservator of the estate, see § 66A.204. For the nomination of joint conservators, see § 66A.205.

For the legal rules governing the nomination and appointment of conservators, see *discussion under § 66A.11* et seq.

For discussion of optional provisions that may be added to this form if desired, and discussion of the formal requisites of an instrument nominating a conservator, see § 66A.200[1].

**[2] FORM**

**Nomination of Conservator of Person and Estate**

NOMINATION OF CONSERVATOR OF PERSON AND ESTATE

**Introductory Paragraph**

1. I, \_\_\_\_\_ [name], residing at \_\_\_\_\_ [street address, city, state, zip], [if nomination is by a relative, add: the \_\_\_\_\_ (state relationship, e.g., brother) of \_\_\_\_\_ (name of proposed conservatee)], wish to nominate a conservator of \_\_\_\_\_ [my person and estate or the person and estate of \_\_\_\_\_ (name of proposed conservatee)] [if nomination is to take place at some time in the future, add: to act in the event that \_\_\_\_\_ (I am or he is or she is) unable properly to provide for \_\_\_\_\_ (my or his or her) personal needs for physical health, food, clothing, or shelter,

and \_\_\_\_\_ (am *or* is) substantially unable to manage \_\_\_\_\_ (my *or* his *or* her) own financial resources or resist fraud or undue influence, or in the event that a court of competent jurisdiction shall, for any other reason, determine that such a conservator should be appointed].

### Revocation of Former Nominations

2. I hereby revoke all former instruments nominating conservators [*if nomination by relative, add:* for \_\_\_\_\_ (*name of proposed conservatee*)] executed by me.

### Nomination of Conservator

3. I nominate \_\_\_\_\_ [*name*], \_\_\_\_\_ [*street address, city, state, zip*] as conservator of \_\_\_\_\_ [my person and estate *or* the person and estate of \_\_\_\_\_ (*name of proposed conservatee*)].

### Nomination of Alternate Conservator

4. If the nominee named in Paragraph 3 shall for any reason be unable or unwilling to act or to continue to act as conservator, then I nominate \_\_\_\_\_ [*name*], \_\_\_\_\_ [*street address, city, state, zip*] as conservator of \_\_\_\_\_ [my person and estate *or* the person and estate of \_\_\_\_\_ (*name of proposed conservatee*)].

Executed at \_\_\_\_\_, California, on \_\_\_\_\_ [*date*].

\_\_\_\_\_ [*signature*]  
[*typed name*]

### Legal Topics:

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law  
Conservators & Guardians  
Conservators General Overview  
Estate, Gift & Trust Law  
Conservators & Guardians  
Conservators Appointment



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DIVISION IV: WILLS AND TRUSTS  
CHAPTER 66A CONSERVATORSHIPS  
PART IV. FORMS  
A. NOMINATING INSTRUMENTS

*25-66A California Legal Forms--Transaction Guide § 66A.203*

**§ 66A.203 Nomination of Separate Conservators of Person and Estate**

**[1] Comment--Use of Form**

This form may be used when a potential or proposed conservatee, or an eligible relative of a proposed conservatee, wishes to nominate separate conservators of the person and of the estate. For the nomination of a conservator of the person, see § 66A.200. For the nomination of a conservator of the estate, see § 66A.201. For the nomination of a conservator of the person and estate, see § 66A.202. For the nomination of an individual as conservator of the person and a trust company as conservator of the estate, see § 66A.204. For the nomination of joint conservators, see § 66A.205.

For the legal rules governing the nomination and appointment of conservators, see *discussion under § 66A.11* et seq.

For discussion of optional provisions that may be added to this form if desired, and discussion of the formal requisites of an instrument nominating a conservator, see § 66A.200[1].

**[2] FORM**

**Nomination of Separate Conservators of Person and Estate**

NOMINATION OF SEPARATE CONSERVATORS OF PERSON  
AND ESTATE

**Introductory Paragraph**

1. I, \_\_\_\_\_ [name], residing at \_\_\_\_\_ [street address, city, state, zip], [if nomination is by a relative, add: the \_\_\_\_\_ (state relationship, e.g., brother) of \_\_\_\_\_ (name of proposed conservatee)], wish to nominate separate conservators of \_\_\_\_\_ [my person and estate or the person and estate of \_\_\_\_\_ (name of proposed conservatee)] [if nomination is to take place at some

*time in the future, add:* to act in the event that \_\_\_\_\_ (I am *or* he is *or* she is) unable properly to provide for \_\_\_\_\_ (my *or* his *or* her) personal needs for physical health, food, clothing, or shelter, and \_\_\_\_\_ (am *or* is) substantially unable to manage \_\_\_\_\_ (my *or* his *or* her) own financial resources or resist fraud or undue influence, or in the event that a court of competent jurisdiction shall, for any other reason, determine that such a conservator should be appointed].

### Revocation of Former Nominations

2. I hereby revoke all former instruments nominating conservators [*if nomination by relative, add:* for \_\_\_\_\_ (*name of proposed conservatee*)] executed by me.

### Nomination of Conservator

3. I nominate \_\_\_\_\_ [*name*], \_\_\_\_\_ [*street address, city, state, zip*] as conservator of \_\_\_\_\_ [*my person or the person of* \_\_\_\_\_ (*name of proposed conservatee*)] and \_\_\_\_\_ [*name*] of \_\_\_\_\_ [*street address, city, state, zip*] as conservator of \_\_\_\_\_ [*my estate or the estate of* \_\_\_\_\_ (*name of proposed conservatee*)].

### Nomination of Alternate Conservator

4. If \_\_\_\_\_ [*name of person nominated in Paragraph 3 as conservator of the person*] shall for any reason be unable or unwilling to act or to continue to act as conservator of \_\_\_\_\_ [*my person or the person of* \_\_\_\_\_ (*name of proposed conservatee*)], then I nominate \_\_\_\_\_ [*name*], \_\_\_\_\_ [*street address, city, state, zip*] as conservator of \_\_\_\_\_ [*my person or the person of* \_\_\_\_\_ (*name of proposed conservatee*)]. If \_\_\_\_\_ [*name of person nominated in Paragraph 3 as conservator of the estate*] shall for any reason be unable or unwilling to act or to continue to act as conservator of \_\_\_\_\_ [*my estate or the estate of* \_\_\_\_\_ (*name of proposed conservatee*)], then I nominate \_\_\_\_\_ [*name*], \_\_\_\_\_ [*street address, city, state, zip*] as conservator of \_\_\_\_\_ [*my estate or the estate of* \_\_\_\_\_ (*name of proposed conservatee*)].

Executed at \_\_\_\_\_, California, on \_\_\_\_\_ [*date*].

\_\_\_\_\_ [*signature*]  
[*typed name*]

### Legal Topics:

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law  
Conservators & Guardians  
Conservators  
General Overview  
Estate, Gift & Trust  
Law  
Conservators & Guardians  
Conservators  
Appointment



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DIVISION IV: WILLS AND TRUSTS  
CHAPTER 66A CONSERVATORSHIPS  
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A. NOMINATING INSTRUMENTS

*25-66A California Legal Forms--Transaction Guide § 66A.204*

**§ 66A.204 Nomination of Individual as Conservator of Person and Trust Company as Conservator of Estate**

**[1] Comment--Use of Form**

This form may be used when a potential or proposed conservatee, or an eligible relative of a proposed conservatee, wishes to nominate an individual as conservator of the person and a trust company as conservator of the estate.

A corporation or association that is authorized to conduct the business of a trust company in California [*see Fin. Code § 107; Prob. Code § 83* ("trust company" defined)] may serve as conservator of an estate but not of a person [*Prob. Code § 300*]. As defined in the Financial Code, the "trust business" includes, among other things, the business of acting as conservator of estates under the appointment of any court or the authority of any state or federal law [*Fin. Code § 106*].

Before a trust company is nominated to act as a conservator, the attorney should determine whether the company would be willing to serve in that capacity. In the selection of a proposed conservator, willingness to shoulder the responsibilities of the conservatorship is no less important than legal qualification and ability. Unless the conservatorship assets are considerable, the conservator's compensation may be meager. Although trust companies and certain nonprofit charitable corporations are legally qualified to accept appointment as conservators [*see discussion under § 66A.11[2], above*], they are often unwilling to do so unless the conservatee's assets are sufficient to assure that they will be adequately compensated for their efforts.

For the nomination of a conservator of the person, see § 66A.200. For the nomination of a conservator of the estate, see § 66A.201. For the nomination of a conservator of the person and estate, see § 66A.202. For the nomination of separate conservators of the person and estate, see § 66A.203. For the nomination of joint conservators, see § 66A.205. For discussion of the legal rules governing the nomination and appointment of conservators, see *discussion under § 66A.11 et seq.*

For discussion of optional provisions that may be added to this form and the formal requisites of an instrument nominating a conservator, see § 66A.200[1].

**[2] FORM**

### Nomination of Individual as Conservator of Person and Trust Company as Conservator of Estate

#### NOMINATION OF INDIVIDUAL AS CONSERVATOR OF PERSON AND TRUST COMPANY AS CONSERVATOR OF ESTATE

##### Introductory Paragraph

1. I, \_\_\_\_\_ [name], residing at \_\_\_\_\_ [street address, city, state, zip], [if nomination is by a relative, add: the \_\_\_\_\_ (state relationship, e.g., brother) of \_\_\_\_\_ (name of proposed conservatee)], wish to nominate conservators of \_\_\_\_\_ [my person and estate or the person and estate of \_\_\_\_\_ (name of proposed conservatee)] [if nomination is to take place at some time in the future, add: to act in the event that \_\_\_\_\_ (I am or he is or she is) unable properly to provide for \_\_\_\_\_ (my or his or her) personal needs for physical health, food, clothing, or shelter, and \_\_\_\_\_ (am or is) substantially unable to manage \_\_\_\_\_ (my or his or her) own financial resources or resist fraud or undue influence, or in the event that a court of competent jurisdiction shall, for any other reason, determine that such a conservator should be appointed].

##### Nomination of Conservator

2. I nominate \_\_\_\_\_ [name], \_\_\_\_\_ [street address, city, state, zip] as conservator of \_\_\_\_\_ [my person or the person of \_\_\_\_\_ (name of proposed conservatee)] and \_\_\_\_\_ [full and exact name of trust company], or any successor thereof, as conservator of \_\_\_\_\_ [my estate or the estate of \_\_\_\_\_ (name of proposed conservatee)].

##### Nomination of Alternate Conservator

3. If \_\_\_\_\_ [name of person nominated in Paragraph 2 as conservator of the person] shall for any reason be unable or unwilling to act or to continue to act as conservator of \_\_\_\_\_ [my person or the person of \_\_\_\_\_ (name of proposed conservatee)], then I nominate \_\_\_\_\_ [name], \_\_\_\_\_ [street address, city, state, zip] as conservator of \_\_\_\_\_ [my person or the person of \_\_\_\_\_ (name of proposed conservatee)]. If \_\_\_\_\_ [exact name of trust company], or any successor thereof, shall for any reason be unable or unwilling to act or to continue to act as conservator of \_\_\_\_\_ [my estate or the estate of \_\_\_\_\_ (name of proposed conservatee)], then I nominate \_\_\_\_\_ [name], \_\_\_\_\_ [street address, city, state, zip] as conservator of \_\_\_\_\_ [my estate or the estate of \_\_\_\_\_ (name of proposed conservatee)].

Executed at \_\_\_\_\_, California, on \_\_\_\_\_ [date].

\_\_\_\_\_ [signature]  
[typed name]

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law  
Conservators & Guardians  
Conservators  
General Overview  
Estate, Gift & Trust Law  
Conservators & Guardians  
Conservators  
Appointment



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A. NOMINATING INSTRUMENTS

*25-66A California Legal Forms--Transaction Guide § 66A.205*

**§ 66A.205 Nomination of Joint Conservators [Prob. Code § 2105]**

**[1] Comment**

**[a] Use of Form**

This form may be used when a potential or proposed conservatee, or an eligible relative of a proposed conservatee, wishes to nominate joint conservators of the person, of the estate, or of the person and estate [*see Prob. Code § 2105*].

For the nomination of a conservator of the person, see § 66A.200. For the nomination of a conservator of the estate, see § 66A.201. For the nomination of a conservator of the person and estate, see § 66A.202. For the nomination of separate conservators of the person and estate, see § 66A.203. For the nomination of an individual as conservator of the person and a trust company as conservator of the estate, see § 66A.204.

For discussion of optional provisions that may be added to this form if desired, and discussion of the formal requisites of an instrument nominating a conservator, see § 66A.200[1].

**[b] Powers of Joint Conservators**

The court may, in its discretion, appoint two or more joint conservators of the person [*Prob. Code § 2105(a)(1)*], of the estate [*Prob. Code § 2105(a)(2)*], or of the person and estate [*Prob. Code § 2105(a)(3)*]. When joint conservators are appointed, each must qualify in the same manner as a sole conservator [*Prob. Code § 2105(b)*].

If two joint conservators are appointed, they must concur to exercise a power [*Prob. Code § 2105(c)(1)*]. When more than two are appointed a majority must concur [*Prob. Code § 2105(c)(2)*]. For a discussion of the liability of a joint conservator of the estate for the breach of a fiduciary duty by another joint conservator [*see Prob. Code § 2105.5*].

**[c] Formal Requisites**

For the legal rules governing the nomination and appointment of conservators, see *discussion under § 66A.11 et seq.*

**[2] FORM****Nomination of Joint Conservators**

## NOMINATION OF JOINT CONSERVATORS

**Introductory Paragraph**

1. I, \_\_\_\_\_ [name], residing at \_\_\_\_\_ [street address, city, state, zip], [if nomination is by a relative, add: the \_\_\_\_\_ (state relationship, e.g., brother) of \_\_\_\_\_ (name of proposed conservatee)], wish to nominate joint conservators of \_\_\_\_\_ [my person or my estate or my person and estate or the person of \_\_\_\_\_ (name of proposed conservatee) or the estate of \_\_\_\_\_ (name of proposed conservatee) or the person and estate of \_\_\_\_\_ (name of proposed conservatee)] [if nomination is to take place at some time in the future, add (as appropriate):, to act in the event that \_\_\_\_\_ (I am or he is or she is) unable properly to provide for \_\_\_\_\_ (my or his or her) personal needs for physical health, food, clothing, or shelter, \_\_\_\_\_ (and or or) \_\_\_\_\_ (am or is) substantially unable to manage \_\_\_\_\_ (my or his or her) own financial resources or resist fraud or undue influence, or in the event that a court of competent jurisdiction shall, for any other reason, determine that such a conservator should be appointed].

**Revocation of Former Nominations**

2. I hereby revoke all former instruments nominating conservators [if nomination by relative, add: for \_\_\_\_\_ (name of proposed conservatee)] executed by me.

**Nomination of Conservators**

3. I nominate \_\_\_\_\_ [names and addresses] as joint conservators of \_\_\_\_\_ [my \_\_\_\_\_ (person or estate or person and estate) or the \_\_\_\_\_ (person or estate or person and estate) of \_\_\_\_\_ (name of proposed conservatee)].

**Nomination of Alternate Conservators**

4. If any one or more of the persons nominated in Paragraph 3 shall for any reason be unable or unwilling to act or to continue to act as joint conservator or joint conservators, I nominate the persons named below, in the order of priority listed, to fill the resulting vacancy or vacancies:

First: \_\_\_\_\_ [name and full address of first alternate nominee].

Second: \_\_\_\_\_ [name and full address of second alternate nominee].

*[List any other additional nominees in order of priority of nomination.]*

Executed at \_\_\_\_\_, California, on \_\_\_\_\_ *[date]*.

\_\_\_\_\_ *[signature]*

*[typed name]*

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawConservators & GuardiansConservatorsGeneral OverviewEstate, Gift & Trust

LawConservators & GuardiansConservatorsAppointment



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*25-66A California Legal Forms--Transaction Guide §§ 66A.206-66A.209*

**[Reserved]**

§§ 66A.206[Reserved]



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DIVISION IV: WILLS AND TRUSTS  
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 B. OPTIONAL PROVISIONS

*25-66A California Legal Forms--Transaction Guide § 66A.210*

**§ 66A.210 Provision Stating Reasons for Nomination**

**[1] Comment--Use of Form**

This form may be used to state the reasons for a nomination. If the proposed conservatee has nominated a conservator (and subject to the rule that the proposed conservatee must at the time of the nomination have sufficient capacity to form an intelligent preference), the court must appoint the nominee unless it finds that appointment of the nominee is not in the best interests of the proposed conservatee. If the nomination is made by someone other than the proposed conservatee, the court may or may not appoint the nominee, depending upon whether the appointment would serve the best interests of the proposed conservatee [*Prob. Code § 1812(a)*].

Since the best interests of the proposed conservatee are controlling in all cases, it may be useful to state the reasons for the nomination. The statement may be of assistance to the court in making its findings, and it may help to sustain those findings against subsequent attack. The statement may also serve to explain the nomination to family members. If, for example, a person other than a relative of the proposed conservatee is the nominee, a statement of the reasons for the nomination may help to explain the nomination to relatives who would otherwise question it.

**[2] FORM**

**Provision Stating Reasons for Nomination**

Reasons for Selection of Nominee

My nomination of \_\_\_\_\_ [*name of nominee*] is made because \_\_\_\_\_ [*state reasons, e.g., for many years I have had the benefit of \_\_\_\_\_ (his or her) assistance in managing my investments and in preparing my tax returns; because of this relationship and the further fact that \_\_\_\_\_ (he or she) has managed \_\_\_\_\_ (his or her) own affairs extremely well, I have great confidence in \_\_\_\_\_ (his or her) ability to handle well all fiduciary duties on my behalf*].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawConservators & GuardiansConservatorsGeneral OverviewEstate, Gift & Trust

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B. OPTIONAL PROVISIONS

*25-66A California Legal Forms--Transaction Guide § 66A.211*

**§ 66A.211 Provision Stating That Specific Person Is Not Nominated**

**[1] Comment--Use of Form**

This form may be used to state that a specific person is intentionally not nominated as conservator. Since the best interests of the proposed conservatee must always govern the appointment of a conservator [*Prob. Code § 1812(a)*], the court may be influenced by such a statement (although the statement will never be controlling). If the person making the nomination wishes to exclude a particular relative from acting as conservator, the statement may help to explain why some person other than that relative is nominated [*see discussion under § 66A.210[1]*].

**[2] FORM**

**Provision Stating That Specific Person Is Not Nominated**

Provision Stating That Specific Person Is Not Nominated

**Specific Person Not Nominated**

I have intentionally failed to nominate \_\_\_\_\_ [*full name and relationship, if any, to person making nomination*] as conservator. It is my specific intention and wish that \_\_\_\_\_ [*he or she*] shall not, under any circumstances, act as conservator of my person or estate. [*If desired, add statement of reasons, e.g.:*  
\_\_\_\_\_ (*name*) and I have not spoken to each other for many years, and I have no confidence in \_\_\_\_\_ (*his or her*) ability to properly care for either my person or my estate. Further, there appears to be a fundamental personality clash between us that would prevent \_\_\_\_\_ (*him or her*) from properly caring for my person or estate.]

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law  
Conservators & Guardians  
Conservators Appointment  
General Overview  
Estate, Gift & Trust  
Law  
Conservators & Guardians  
Conservators Appointment



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CHAPTER 66A CONSERVATORSHIPS  
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B. OPTIONAL PROVISIONS

*25-66A California Legal Forms--Transaction Guide § 66A.212*

**§ 66A.212 Waiver of Bond**

**[1] Comment**

**[a] Use of Form**

This form is a waiver of bond. It is designed to relieve a conservator of the statutory obligation to post a bond for the benefit of the conservatee and other persons interested in the conservatorship estate. When used, it should be added to the instrument by which the conservator is nominated.

Although the statutes do not explicitly authorize a person who nominates a conservator to waive the requirement of a bond, they give the court discretion to require (or dispense with the requirement of) a bond in various circumstances [see [b], below]. A waiver by the person making the nomination may, in appropriate cases, be considered by the court in deciding whether or not to require a bond.

For nominating instruments for conservators, see §§ 66A.200 (nomination of conservator of person), 66A.201 (nomination of conservator of estate), 66A.202 (nomination of conservator of person and estate), 66A.203 (nomination of separate conservators of person and estate), 66A.204 (nomination of individual as conservator of person and trust company as conservator of estate), and 66A.205 (nomination of joint conservators).

**[b] General Requirements for Conservator's Bond**

Except as otherwise provided by statute, every conservator must give a bond, conditioned on the faithful execution of the duties of the office according to law, to protect the conservatee and all persons interested in the conservatorship estate [Prob. Code § 2320(a), (b)]. This general rule is, however, subject to the following exceptions:

- A person appointed as conservator of the person only need not file a bond unless a bond is required by the court [Prob. Code § 2322]. Since the court has discretion to require (or not require) a bond of a conservator of the person, a waiver by the person making the nomination may, in appropriate cases, help to persuade the court that a bond need not be required.

- If a conservatee subject to a conservatorship of the estate has sufficient capacity to waive the bond and elects to do so, the court in its discretion may permit the filing of a bond in a reduced amount [*Prob. Code* § 2321; for amount of bond, *see* [d], *below*]. Since, under these circumstances, the court has discretion to reduce the amount of a bond, a waiver by the person making the nomination may help to persuade the court that a reduced bond will adequately protect the conservatee.

- If it appears likely that the estate will satisfy the conditions of *Prob. Code* § 2628(a) for its duration, the court may dispense with the requirement of a bond [*Prob. Code* § 2323(a)].

An estate will satisfy the requirements of *Prob. Code* § 2628(a) if the net value of the estate (exclusive of the conservatee's residence) is less than \$15,000, the monthly income (exclusive of public benefit payments) is less than \$2,000, and all income, if not retained, is spent for the benefit of the conservatee [*Prob. Code* § 2628(a)]. If it appears at any time that the estate does not satisfy the conditions of *Prob. Code* § 2628(a), the court may require a bond. Since, under these circumstances, the court has discretion whether to require a bond, a waiver by the person making the nomination may similarly help to persuade the court that a bond need not be required, or that a reduced bond will adequately protect the conservatee.

#### **[c] Exemption for Trust Company**

A trust company [*see* *Fin. Code* § 107, *Prob. Code* § 83 ("trust company" defined); *see also* § 66A.11[2]] nominated as conservator will be unaffected by a provision waiving bond, since trust companies are never required to post bonds [*Prob. Code* § 301(a)]. If, however, a trust company nominated as conservator is unwilling to act in that capacity, this provision may become important, since it will then apply to the successor nominee.

#### **[d] Amount of Bond**

A conservator's bond may be given by an admitted surety insurer [*see Code Civ. Proc.* §§ 995.120(a) ("admitted surety insurer" defined), 995.610 et seq. (bond and undertaking requirements for admitted surety insurers), *Ins. Code* § 105 (surety insurance)] or by a personal surety. If the bond is given by an admitted surety insurer, it must be equal to the sum of the following [*Prob. Code* § 2320(c)]:

- The value of the personal property of the estate;
- The probable annual gross income of all the property of the estate;
- The probable annual gross payments receivable by the conservatee from state and federal public entitlement programs [*see Welf. & Inst. Code* § 11000 et seq. (aid and medical assistance); *Welf. & Inst. Code* § 16100 et seq. (services for care of children); *Welf. & Inst. Code* § 17000 et seq. (county aid and relief to indigents); 42 U.S.C. § 401 et seq. (federal old age, survivors, and disability insurance benefits); 42 U.S.C. § 1382 et seq. (determination of benefits under federal Supplemental Security Income program for aged, blind, and disabled); *see also Code Civ. Proc.* § 995.610 et seq. (admitted surety insurers)]; and
- As of January 1, 2008, the reasonable amount for the costs or recovery to collect on the bond. However, any attorney's fees and costs incurred in a successful action for surcharge against a conservator or guardian for breach of his or her duty will be a surcharge against the conservator or guardian, and, if unpaid, will be recovered against surety on the bond [*Prob. Code* § 2320 (c)(4)].

If the bond is given by a personal surety, it must be twice the amount required for a bond given by an admitted surety insurer [*Prob. Code* § 2320(d); *see Code Civ. Proc.* §§ 995.510, 995.520 (personal sureties)].

If a conservator has knowledge of facts from which he knows or should know that the bond posted is less than the amount required by statute, the conservator, and the attorney, if any, are required to make an ex parte application for an order increasing the bond to the required amount [*Prob. Code* § 2320.1]. If the court requires additional bond upon hearing the account, the additional bond must be filed before the order approving the account and related matters, including fees, is filed by the court and becomes effective [*Prob. Code* § 2320.2].

**[e] Bond For Joint Conservators**

If joint conservators are appointed, the court may require the conservators to furnish separate bonds, a joint bond, or a combination of joint and separate bonds [*Prob. Code* § 2326(a)]. If a joint bond is furnished, the liability on the bond will be joint and several [*Prob. Code* § 2326(b)].

**[f] Reduction, Addition, or Substitution**

The conservatorship statutes contain provisions governing reductions or additions to the amount of required bonds [*see Prob. Code* §§ 2320.1, 2328-2330, 2334].

**[g] Cautionary Note**

Careful consideration should be given before including a waiver of bond. Bonds provide important protection to a conservatee and that protection may be lost if bond is waived. For discussion, see *Ch. 66, Guardianships*, § 66.220[1][g].

**[2] FORM**

**Waiver of Bond**

**Waiver of Bond**

I hereby waive the filing of a bond or other undertaking by any conservator or conservators nominated by me.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law  
 Conservators & Guardians  
 Conservators  
 General Overview  
 Estate, Gift & Trust Law  
 Conservators & Guardians  
 Conservators Appointment



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DIVISION IV: WILLS AND TRUSTS  
CHAPTER 67 FUTURE INTERESTS AND PERPETUITIES

*25-67 California Legal Forms--Transaction Guide 67.syn*

**§ 67.syn Synopsis to Chapter 67: FUTURE INTERESTS AND PERPETUITIES**

§ 67.01 California Statutes

§ 67.02 Federal Statutes

§§ 67.03-67.04 [Reserved]

§ 67.05 Law Reviews

§ 67.06 Annotations

§ 67.07 Text References

[1] Matthew Bender Sources

[2] Additional Text References

§§ 67.08-67.09 [Reserved]

§ 67.10 Interest in Property

[1] In General

[2] Real Property

[3] Personal Property

§ 67.11 Present Interest in Real Property

[1] In General

[2] Fee Simple

[3] Defeasible Fee

[4] Life Estate

§ 67.12 Future Interest in Real Property

[1] In General

[2] Reversionary Interests

[a] Reversion

[b] Possibility of Reverter; Right of Reentry

[c] Power of Termination

[d] Requirements for Exercising Power of Termination

[e] Duration of Power of Termination

[f] Expiration of Obsolete Power of Termination

[g] Effect of Expiration of Power of Termination

[3] Remainder

[a] Definition

[b] Vested Remainder

[c] Contingent Remainder

[4] Executory Interest

§ 67.13 Condition on Present or Future Interest

[1] In General

[2] Condition Depending on Wrongful Act

[3] Condition Restraining Marriage

[4] Condition Restraining Alienation

[5] Racial, National, or Ethnic Restriction

§ 67.14 Termination of Future Interest

§ 67.15 Transfer of Future Interest

§ 67.16 California Rule Against Perpetuities

- [1] Purpose and Background
- [2] Common Law Rule
- [3] Uniform Statutory Rule Against Perpetuities (USRAP)
- [4] Retroactive Application of Rule
- [5] Application in Particular Cases
  - [a] Nonvested Future Interest
  - [b] Power of Appointment
  - [c] Accumulation of Income
- [6] 90-Year Wait-and-See Rule
- [7] Time of Creation of Interest
- [8] Measuring Life
- [9] Gift Over to Beneficiary's Spouse
- [10] Posthumous Children
- [11] Exclusions
  - [a] Interest Valid Under Court Order or Settlement
  - [b] Interest Arising Out of Nondonative Transfer
  - [c] Fiduciary Power
  - [d] Charitable Gift or Gift to Government
  - [e] Interest Not Subject to Common Law Rule
- [12] Reformation of Otherwise Invalid Disposition

§ 67.17 Perpetuity Saving Clause

- [1] In General
- [2] "Later of" Provision
- [3] Effect of USRAP on Perpetuity Saving Clause

[4] Alternative Distribution Provision

§ 67.18 Other Time Limitations

[1] Lease of Real Property

[2] Honorary Trust

[3] Termination of Trust at End of Perpetuity Period

§ 67.19 Estate Tax Treatment of Future Interests

[1] In General

[2] Marital Deduction

[3] Generation-Skipping Transfer Tax

§ 67.20 Gift Tax Treatment of Future Interests

[1] In General

[2] Annual Gift Tax Exclusion

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*25-67 California Legal Forms--Transaction Guide Scope*

**Scope**

Scope

This chapter covers future-interest provisions in wills and trust instruments. The legal background discusses the various types of present and future interests and estates that may be created. It also discusses conditions that govern present and future interests, along with rules governing the termination and transfer of future interests. It includes a discussion of the rule against perpetuities, including the common law rule, the Uniform Statutory Rule Against Perpetuities, the use of perpetuity saving clauses, and special perpetuities limitations. Also discussed are estate tax, gift tax, and income tax consequences of future interests. The transaction guide provides checklists for drafting provisions to create present and future interests in property. The forms include forms for granting a life estate with remainder, for granting a future interest to take effect on the occurrence of a specified condition, and for granting a fee simple interest subject to a power of termination. The forms also include perpetuity saving clauses that may be used in a will without a trust, a will with a trust, or an inter vivos trust instrument.



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*25-67 California Legal Forms--Transaction Guide § 67.01*

**§ 67.01 California Statutes**

Interests in property.

Present and future interests. *Civ. Code §§ 689, 690.*

Perpetual and limited interests. *Civ. Code §§ 691, 692.*

Creation of alternative future interests. *Civ. Code § 696.*

Transfer of future interests. *Civ. Code § 699.*

Conditions of property ownership.

Conditions precedent and subsequent. *Civ. Code § 708.*

Illegal conditions. *Civ. Code § 709.*

Restraints on alienation. *Civ. Code § 711.*

Termination of future interests. *Civ. Code § 739 et seq.*

Estates and interests in real property.

Types of estates. *Civ. Code § 761.*

Reversion defined. *Civ. Code § 768.*

Remainder defined. *Civ. Code § 769.*

Rights of life tenants. *Civ. Code § 818.*

Obligations of life tenants. *Civ. Code § 840.*

Notice and rules for preservation of power of termination. *Civ. Code § 880.310 et seq.*

Powers of termination.

Defined. *Civ. Code § 885.010.*

Abolition of fee simple determinable and possibility of reverter. *Civ. Code § 885.020.*

Duration of powers of termination. *Civ. Code § 885.030.*

Expiration of obsolete powers. *Civ. Code § 885.040.*

Exercise of power within five years after breach. *Civ. Code § 885.050.*

Unenforceability of expired power. *Civ. Code § 885.060.*

Uniform Statutory Rule Against Perpetuities (USRAP).

Application of USRAP to power of appointment. *Prob. Code § 690.*

Effect of USRAP on trust provision prohibiting termination of trust. *Prob. Code § 15413.*

Termination of trust following expiration of perpetuity period provided under USRAP. *Prob. Code § 15414.*

Application of USRAP to nonvested interest or unexercised power of appointment. *Prob. Code § 21202.*

General rule against perpetuities. *Prob. Code § 21205.*

Rule against perpetuities for powers of appointment. *Prob. Code §§ 21206, 21207.*

Perpetuity-saving clause. *Prob. Code § 21209.*

Time of creation of interest. *Prob. Code § 21210 et seq.*

Reformation of disposition. *Prob. Code § 21220.*

Exclusions from USRAP. *Prob. Code § 21225.*

Measuring lives. *Prob. Code § 21230.*

### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Estates Created by Trusts & Wills Future Interests General Overview Estate, Gift & Trust

Law Estates Created by Trusts & Wills Future Interests Executory Interests Estate, Gift & Trust Law Estates Created by  
Trusts & Wills Future Interests Remainder Interests General Overview Estate, Gift & Trust Law Estates Created by Trusts  
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*25-67 California Legal Forms--Transaction Guide § 67.02*

**§ 67.02 Federal Statutes**

Future interests subject to estate tax. *I.R.C. § 2033.*

Property transferred during decedent's lifetime in which decedent retained right to possession or enjoyment is included in decedent's taxable estate. *I.R.C. § 2036(a).*

Property transferred inter vivos is included in transferor's taxable estate if transferor retained reversionary interest valued in excess of 5 percent of value of property. *I.R.C. § 2037.*

Availability of marital deduction for gifts of future interests. *I.R.C. § 2056(b)(1), (5), (7), (8).*

Gift of future interest does not qualify for annual gift tax exclusion. *I.R.C. § 2503(b)(1).*

Gift of future interest may be subject to federal gift tax. *I.R.C. § 2511(a).*

Gift tax treatment of disposition of life interest for which marital deduction was previously elected. *I.R.C. § 2519.*

Availability of marital deduction for gift of future interests. *I.R.C. § 2523(b), (e)-(g).*

Optional postponement of estate tax attributable to reversionary or remainder interest until six months after termination of preceding interests. *I.R.C. § 6163.*

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Estates Created by Trusts & Wills Future Interests General Overview Real Property  
Law Estates Future Interests General Overview Tax Law Federal Estate & Gift Taxes Deductions Marital Deduction (IRC

secs. 2056, 2523)General OverviewTax LawFederal Estate & Gift TaxesGifts (IRC secs. 2035, 2501-2524)Annual  
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B. Secondary Sources

*25-67 California Legal Forms--Transaction Guide § 67.05*

**§ 67.05 Law Reviews**

Dukeminier & Krier, *The Rise of the Perpetual Trust*, 50 *U.C.L.A. L. Rev.* 1303 (2003).

Comment, *Dynasty Trusts and the Rule Against Perpetuities*, 116 *Harvard L. Rev.* 2588 (2003).

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Chester, *Modification and Termination of Trusts in the 21st Century: The Uniform Trust Code Leads a Quiet Revolution*, 35 *Real Prop., Prob., & Tr. J.* 697 (2001).

Dobris, *The Death of the Rule Against Perpetuities, or the RAP Has No Friends--An Essay*, 35 *Real Prop., Prob., & Tr. J.* 601 (2000).

Graber, *Choosing the Chosen: The Validity of Racial Restrictions on the Alienation of Property in Israel and the United States*, 73 *S. Cal. L. Rev.* 437 (2000).

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Jordan, *The Present State of Sales of Future Interests*, 88 *J. Tax'n* 336 (1998).

Kalinka, *Should the Gift of a Limited Partnership Interest Constitute a Future Interest?* 76 *Taxes* 12 (1998).

Cunningham, *The Hazards of Tinkering With the Common Law of Future Interests: The California Experience*, 48 *Hastings L.J.* 667 (1997).

Horowitz, *Economic Reality in Estate Planning: The Remainder Interest Sale--Revitalized and Ready for Action*, 75 *Taxes* 291 (1997).

Dukeminier, *The Uniform Statutory Rule Against Perpetuities and the GST Tax: New Perils for Practitioners and New Opportunities*, 30 *Real Prop., Prob., & Tr. J.* 185 (1995).

Halbach, *USRAP Perpetuities Reform: Cy Pres and Wait-and-See Benefits With No Need to Revise Existing Documents or Practices*, 13 *CEB Estate Planning & California Probate Reporter* 96-98 (December 1991).

Bloom & Dukeminier, *Perpetuities Reformers Beware: The USRAP Tax Trap*, 25 *Real Prop., Prob. & Tr. J.* 203 (Spring 1990).

Coskran, *Assignment and Sublease Restrictions: The Tribulations of Leasehold Transfers*, 22 *Loyola L.A. L.Rev.* 405 (1989).

Dukeminier, *Uniform Statutory Rule Against Perpetuities: Ninety Years in Limbo*, 34 *U.C.L.A. L. Rev.* 1023 (1987).

Dukeminier, *A Modern Guide to Perpetuities*, 74 *Calif. L. Rev.* 1867 (1986).

Waggoner, *The Uniform Statutory Rule Against Perpetuities*, 21 *Real Prop., Prob., and Tr. J.* 569 (1986).

Bird, *Trust Termination: Unborn, Living, and Dead Hands*, 36 *Hastings L.J.* 563 (1985).

Comment, *The Approval Clause in a Lease: Toward a Standard of Reasonableness*, 17 *U.S.F. L. Rev.* 681 (1983).

### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law  
 Estates Created by Trusts & Wills  
 General Overview  
 Estate, Gift & Trust Law  
 Estates Created by Trusts & Wills  
 Invalid Restraints & Rule Against Perpetuities  
 Real Property Law  
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*25-67 California Legal Forms--Transaction Guide § 67.06*

**§ 67.06 Annotations**

Annot., Duty as Between Life Tenant and Remainderman With Respect to Cost of Improvements or Repairs Made Under Compulsion of Governmental Authority, 48 A.L.R.4th 1012 (1986) .

Annot., Life Tenant's Death as Affecting Rights Under Lease Given by Him, 14 A.L.R.4th 1054 (1982).

Annot., Wills: Gift to Persons Individually Named but Also Described in Terms of Relationship to Testator or Another as Class Gift, 13 A.L.R.4th 978 (1982).

Annot., Duty to Pay Real-Property Taxes as Affected by Time of Commencement or Termination of Life Estate, 8 A.L.R.4th 643 (1981).

Annot., Relinquishment of Interest by Life Beneficiary in Possession as Accelerating Remainder of Which There Is Substitutional Gift in Case Primary Remainderman Does Not Survive Life Beneficiary, 7 A.L.R.4th 1084 (1981).

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law  
Estates Created by Trusts & Wills  
General Overview  
Estate, Gift & Trust Law  
Estates Created by Trusts & Wills  
Invalid Restraints & Rule Against Perpetuities  
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**§ 67.07 Text References**

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Ch. 27, *Deeds and Recording*.

Ch. 60, *Estate Planning*.

Ch. 60A, *Gifts*.

Ch. 61, *Will Drafting and Complete Will Forms*.

Ch. 63, *Will Provisions*.

Ch. 70, *Complete Revocable Trust Forms*.

Ch. 72, *Irrevocable Trusts*.

California Real Estate Law & Practice(Matthew Bender).

Ch. 340, *Estates in Real Property*.

Ch. 341, *Invalid Restraints and Perpetuities*.

California Wills and Trusts(Matthew Bender).

Ch. 24, *Devises--General Considerations*.

Powell On Real Property(Matthew Bender)

Ch. 11- 16 (present interests).

Ch. 19-33 (future interests).

Ch. 71-75A (perpetuities).

**[2] Additional Text References**

Witkin, Summary of California Law, vol. 12 *Real Property*, §§ 9-31 (present estates), 127-170 (future interests), 171-186 (perpetuities), 190-203 (conditions and restraints) (10th ed. 2005).

Restatement of Property (American Law Inst. 1936), §§ 14-152 (present interests), 153-314 (future interests), 370-403 (perpetuities), 404-438 (restraints on alienation).

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Estates Created by Trusts & Wills General Overview Estate, Gift & Trust Law Trusts General Overview Estate, Gift & Trust Law Wills General Overview Real Property Law Estates General Overview Real Property Law Estates Future Interests Invalid Restraints & Rule Against Perpetuities



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*25-67 California Legal Forms--Transaction Guide §§ 67.08-67.09*

**[Reserved]**

§§ 67.08[Reserved]



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*25-67 California Legal Forms--Transaction Guide § 67.10*

**§ 67.10 Interest in Property**

**[1] In General**

Every interest in property is either a present interest or a future interest [*Civ. Code § 688(1)*]. The owner of a present interest is entitled to immediate possession of the property [*Civ. Code § 689*], while the owner of a future interest is entitled to possession only at a future time [*Civ. Code § 690*]. A mere possibility, such as the expectancy of an heir apparent, is not an interest of any kind [*Civ. Code § 700*].

Every interest in property is also either perpetual or limited [*Civ. Code § 688(2)*]. A perpetual interest has a duration equal to that of the property [*Civ. Code § 691*], while a limited interest has a duration less than that of the property [*Civ. Code § 692*].

**[2] Real Property**

Interests in real property are referred to as estates and are specifically classified in *Civ. Code § 761 et seq.* [*Civ. Code § 701*; *see §§ 67.11-67.18*].

**[3] Personal Property**

The Civil Code does not classify interests in personal property in the same way that it classifies interests in real property. The names and classifications for real property interests apply to personal property interests only as expressly provided in the code [*Civ. Code § 702*]. Courts have, nevertheless, recognized the validity and enforceability of life estates and remainder interests in trusts of personal property [*see, e.g., Randall v. Bank of America (1941) 48 Cal. App. 2d 249, 255, 119 P.2d 754* (remainder interest in certificate of deposit)].

**PRACTICE TIP:**

A bequest of personal property typically creates a present interest in the property. A future interest is most commonly created in real property. Although it is legally possible to create a future interest in personal property by a will, such a bequest is generally impractical and not recommended. The impracticality arises from the difficulty of tracing ownership of personal property and enforcing the





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**§ 67.11 Present Interest in Real Property**

**[1] In General**

Four types of present interests in real property are recognized in California. They are [*Civ. Code § 761*]:

- Estates of inheritance or perpetual estates (fees) [*see [2], below*].
- Life estates [*see [4], below*].
- Estates for years, which have a duration fixed in terms of one or more years [*see Restatement of Property, § 19*].
- Estates at will, which are terminable solely at the will of the transferor, subject to certain restrictions imposed by statute [*see Civ. Code § 789; Restatement of Property, § 21*].

As their names imply, the four recognized estates are classified according to the period of enjoyment.

Estates of inheritance and life estates are freehold estates [*Civ. Code § 765*]. Freehold estates are distinguished from other forms of estates in that they are of indeterminate duration [ *Pacific Southwest Realty Co. v. County of Los Angeles (1991) 1 Cal. 4th 155, 162, 2 Cal. Rptr. 2d 536, 820 P.2d 1046* ]. Estates for years are chattels real [*Civ. Code § 765*], that is, they are treated as personal property even though the substance of the estate is real property [ *Pacific Southwest Realty Co. v. County of Los Angeles (1991) 1 Cal. 4th 155, 162, 2 Cal. Rptr. 2d 536, 820 P.2d 1046* ]. Estates at will are chattel interests [*Civ. Code § 765*], that is, personal property.

**[2] Fee Simple**

Every estate of inheritance is a fee simple (or absolute fee) unless it is defeasible or conditional [*Civ. Code § 762; see [3], below*]. The owner of a fee simple interest in real property has absolute dominion over the property and may use or dispose of it at will, subject only to the general laws [*Civ. Code § 679*].

The common law estate tail (or fee tail), which restricts ownership to the grantee's direct descendants, does not exist in California but, if attempted, is deemed to be a fee simple absolute, unless limited by a valid remainder [*Civ. Code* § 763]. A remainder in fee limited on an estate that would be an estate tail under the common law is valid as a contingent limitation on the fee. It vests in possession on the death of the first taker without issue living at the time of the taker's death [*Civ. Code* § 764].

### [3] Defeasible Fee

At common law, there are two types of defeasible fees: a fee simple determinable with a possibility of reverter, and a fee simple subject to a condition subsequent with a right of reentry [*see Restatement of Property* §§ 44, 45]. These types of defeasible fee do not exist in California, but an attempt to create such an estate will be treated as creating a fee simple subject to a condition subsequent with a power of termination [*see Civ. Code* §§ 885.010, 885.020; *see also* § 67.11[4]].

#### EXAMPLE:

A grant of real property to a city on the condition that the property be used solely for a specified purpose, otherwise the property will pass to another person or revert to the grantor or the grantor's successors in interest, constitutes a grant of a fee simple subject to a condition subsequent [ *see City of Palm Springs v. Living Desert Reserve* (1999) 70 Cal. App. 4th 613, 620-623, 82 Cal. Rptr. 2d 859 ; *Walton v. City of Red Bluff* (1991) 2 Cal. App. 4th 117, 121, 3 Cal. Rptr. 2d 275] . Unless and until the transferee of such an estate breaches the conditions imposed by the transferor, the transferee is in the same position as an owner in fee simple absolute [ *City of Palm Springs v. Living Desert Reserve* (1999) 70 Cal. App. 4th 613, 621, 82 Cal. Rptr. 2d 859] .

### [4] Life Estate

A life estate is an estate lasting for the duration of a life or lives in being at the creation of the estate [*see Restatement of Property*, § 18]. It is usually measured by the life of the holder of the estate but may be measured also by the life of another [*see Civ. Code* § 766; *Restatement of Property*, § 18, comment (a)].

A life estate may be created by a will [*see Estate of Giacomelos* (1961) 192 Cal. App. 2d 244, 245, 13 Cal. Rptr. 245] and is deemed to be created on the testator's death [*see Civ. Code* § 749]. No particular words are necessary to create a life estate in real property; any language that adequately expresses the intention to create a life estate is sufficient [ *Estate of Nichols* (1962) 199 Cal. App. 2d 783, 795, 19 Cal. Rptr. 93 ; *see, e.g., Estate of Bernatas* (1958) 162 Cal. App. 2d 693, 695, 328 P.2d 539 (language in will by which testator left her home to her niece, but stated that her husband could "live in at as long as he wishes while he is alone," created life estate in husband with remainder in niece)]. A devise providing that the property must go to another person on the death of the initial devisee transfers only a life estate, even when the words "life estate" are not used [ *Estate of Mulholland* (1971) 20 Cal. App. 3d 392, 397, 97 Cal. Rptr. 617] .

The owner of a life estate may use the property in the same manner as the owner of a fee simple but must not take any action that would harm the property [*see Civ. Code* § 818]. The life tenant must repair any structures on the property and must pay all taxes and other annual charges as well as a just proportion of extraordinary assessments benefiting the property as a whole [*see Civ. Code* § 840]. A life tenant cannot transfer the property or dispose of it by will [ *Estate of Mulholland* (1971) 20 Cal. App. 3d 392, 397, 97 Cal. Rptr. 617] .

Some life estates are absolute, meaning that the owner of the life estate can do almost anything with his or her interest other than commit waste. Other life estates are determinable or contingent because of limitations placed on them; for example, a life estate that exists only as long as the life tenant resides on the property is a determinable or contingent life estate [ *Forrest v. Elam* (1979) 88 Cal. App. 3d 164, 170, 151 Cal. Rptr. 591] .

#### PRACTICE TIP:

A testator should not make a devise creating a life estate without first considering the disadvantages of such a devise. Legal life estates are generally inflexible arrangements. The rights of the life tenant and the remainder beneficiary are prescribed by law and not by the will. The life tenant's right to reasonable use of the property, coupled with the duty not to commit waste, is an invitation to conflict between the life tenant and the remainder beneficiary. Life estates are particularly unsuitable if there is any likelihood that the property subject to the life estate will be sold. A testator might wish to give his or her surviving spouse the right to use the family residence for life; however, if the residence is sold while the surviving spouse is still alive, difficult questions as to the proper use and disposition of the sale proceeds may arise.

Circumstances under which a life estate might appeal to a client will almost always indicate the desirability of creating a trust. A trust will satisfy the purposes of a life estate while providing greater flexibility in the use of the property. The trust instrument will typically provide for contingencies, such as the illness of the life tenant. If the subject property is the family residence, the trust instrument can state the circumstances under which the residence can be sold, the use that can be made of the proceeds of the sale, and whether the proceeds can be reinvested in another residence. Even if the trust instrument does not specifically provide for a particular contingency, it will be much easier to invoke the court's aid in fashioning an appropriate response to a contingency when the property is held in trust rather than in a life estate.

If the client is reluctant to use a trust (believing, perhaps, that a trust will be too complex), a life estate may be appropriate for property that is likely to be retained in the family during the lifetime of the life tenant (such as a family farm).

Although trusts are most commonly used to qualify transfers to a surviving spouse for the estate tax marital deduction [*see I.R.C. § 2056; see also § 67.19[2]*], a transfer of a legal life estate to a surviving spouse may qualify for the marital deduction, as qualified terminable interest property (QTIP) under *I.R.C. § 2056(b)(7)*.

### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law  
 Estates Created by Trusts & Wills  
 Estates in Fee  
 Estate, Gift & Trust Law  
 Estates Created by Trusts & Wills  
 Life Estates  
 General Overview  
 Real Property Law  
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*25-67 California Legal Forms--Transaction Guide § 67.12*

**§ 67.12 Future Interest in Real Property**

**[1] In General**

A future interest in property is an interest that is not, but may become, a present interest [*Restatement of Property*, § 153, comment (b); *Estate of Sigourney* (2001) 93 Cal. App. 4th 593, 604, 113 Cal. Rptr. 2d 274]. There are three types of future interests at common law:

- A reversionary interest, including a power of termination, is an interest in favor of the transferor or the transferor's successors in interest [*see Restatement of Property*, § 154(a); *see also* [2], *below*].
- A remainder is an interest in favor of someone other than the transferor or the transferor's successors in interest, which will become a present interest on the expiration of all prior interests created simultaneously [*see Restatement of Property*, § 156; *see also* [3], *below*].
- An executory interest is any other interest in favor of someone other than the transferor or the transferor's successors in interest [*see* [4], *below*].

The only future interests recognized by law in California are those set forth in the Civil Code [*Civ. Code* § 703]. A future interest is not void merely because of the improbability of the contingency on which it is limited to take effect [*Civ. Code* § 697]. Two or more future interests may be created to take effect in the alternative, so that if the first in order fails to vest, the next in succession may be substituted for it and take effect accordingly [*Civ. Code* § 696]. A future interest can be limited to successors, heirs, issue, or children; in that case, a posthumous child is entitled to take in the same manner as if living at the parent's death [*Civ. Code* § 698]. Future interests pass by succession, will, and transfer, in the same manner as present interests in property [*Civ. Code* § 699].

**[2] Reversionary Interests**

**[a] Reversion**

A reversion is the residue of an estate left by operation of law in the grantor or the grantor's successors, or in a testator's

successors, on the termination of the estate that was granted or devised [*see Civ. Code* § 768].

At common law, a reversionary interest is any future interest in favor of the transferor or the transferor's successors in interest [*see Restatement of Property*, § 154(1)]. When a transferor transfers less than his or her entire interest in the property, the untransferred segment of ownership is a reversionary interest if it includes either the certainty or the possibility that the transferor may again become entitled to a present interest in the property when the transferred interest ends [*see Restatement of Property*, § 154, comment (a)].

#### **[b] Possibility of Reverter; Right of Reentry**

At common law, a possibility of reverter or right of reentry is a future interest created in conjunction with a defeasible fee [*see* § 67.10(3)]. In the case of a possibility of reverter, the present interest automatically reverts to the transferor on the occurrence of a specified condition, without any action by the transferor [*see Restatement of Property*, § 154(3)]. In the case of a right of reentry, the transferor may recover the present interest by affirmatively exercising that right [*see Restatement of Property*, § 155].

These future interests do not exist in California. Every interest that would be classified as a possibility of reverter at common law is classified and enforceable as a power of termination [*Civ. Code* § 885.020; *see* [c], *below*]. A right of reentry also is deemed to be a power of termination under California law [*see Civ. Code* § 885.010(c)].

#### **[c] Power of Termination**

A power of termination is the power to terminate a fee simple estate on the occurrence of a condition subsequent to which the estate is subject. It makes no difference whether the power is characterized in the instrument that creates or evidences it as a power of termination, a possibility of reverter, a right of reentry, or otherwise [*Civ. Code* § 885.010(a)(1)].

A power of termination includes the power created in a transferee to terminate a fee simple estate in order to enforce a restriction on the use of the property, which is in the form of a limitation or a condition subsequent to which the estate is subject. It makes no difference whether the power is characterized in the instrument that creates or evidences it as an executory interest, an executory interest preceded by a fee simple determinable, an executory limitation, or otherwise [*Civ. Code* § 885.010(a)(2)].

#### **[d] Requirements for Exercising Power of Termination**

A power of termination can be exercised only by notice or civil action. If the power is of record, the exercise must also be of record. The notice must be given, or the civil action must be commenced, within five years after breach of the condition to which the fee simple estate is subject, unless the parties have agreed to a longer period by a waiver or extension recorded before the expiration of the five-year period [*Civ. Code* § 885.050].

#### **[e] Duration of Power of Termination**

A power of termination expires 30 years after the date the instrument reserving, transferring, or evidencing it is recorded [*Civ. Code* § 885.030(a)(1)]. The duration of a power may be extended until 30 years after the date a notice of intent to preserve the power is recorded, if the notice is recorded before the power would otherwise expire [*Civ. Code* § 885.030(a)(2); *see Civ. Code* § 880.310 *et seq.*]. It may be preserved for successive 30-year periods by recording a notice before the expiration of each preceding notice [*see Civ. Code* § 885.030(a)(3)].

These provisions concerning expiration of a power of termination apply notwithstanding any contrary provision in the instrument reserving, transferring, or evidencing the power (or in another recorded document), unless the instrument (or other document) provides for an earlier expiration date [*Civ. Code* § 885.030(b)].

Although recordation of a notice of intent to preserve a power of termination does not preclude a court from determining that it has been abandoned or is otherwise unenforceable, it does create a presumption (affecting the burden of proof) that the person who claims the power has not abandoned it and does not intend to abandon it [*Civ. Code* § 880.310(b)]. The form for the notice of intent is prescribed by statute [*Civ. Code* § 880.340; see Ch. 27, *Deeds and Recording*].

#### **[f] Expiration of Obsolete Power of Termination**

A power of termination expires if it becomes obsolete [*Civ. Code* § 885.040(a)]. A power becomes obsolete if either [*Civ. Code* § 885.040(b)]:

- The restriction to which the fee simple estate is subject is of no actual and substantial benefit to the holder of the power.
- Enforcement of the power would not effectuate the purpose of the restriction to which the estate is subject.
- It is otherwise inequitable to enforce the power because of changed conditions or circumstances [*e.g., Walton v. City of Red Bluff (1991) 2 Cal. App. 4th 117, 135, 3 Cal. Rptr. 2d 275* (noting cases holding that right of reentry, now called power of termination, may be lost if neighborhood conditions change)].

However, a power of termination granted, without consideration, to a public entity or a tax-exempt organization cannot expire during the life of the grantor by reason of becoming obsolete [*Civ. Code* § 885.040(c)].

#### **[g] Effect of Expiration of Power of Termination**

Expiration of a power of termination makes the power unenforceable and is equivalent for all purposes to a termination of the power of record and a quitclaim of the power to the owner of the fee simple estate. Recording a termination or quitclaim is not necessary to terminate or evidence the termination of the power [*Civ. Code* § 885.060(a)].

Expiration of a power terminates the restriction to which the fee simple estate is subject and makes the restriction unenforceable by any other means, including injunction and damages [*Civ. Code* § 885.060(b)]. This does not apply, however, to a restriction that also is an equitable servitude enforceable by injunction; that restriction will remain enforceable by injunction and other available remedies but is not enforceable by a power of termination [*Civ. Code* § 885.060(c)].

### **[3] Remainder**

#### **[a] Definition**

A remainder is a future estate, other than a reversion, that is dependent on a preceding estate [*Civ. Code* § 769]. At common law, a remainder is any future interest that is limited in a transferee's favor in such a manner that it can become a present interest on the expiration of all prior interests created simultaneously, and which cannot divest any interest except an interest left in the transferor [*Restatement of Property*, § 156(1)].

Remainders are classified as vested or contingent. A vested remainder is a present, fixed right of future enjoyment. A contingent remainder is an inchoate right of enjoyment, which can become a present, fixed right in the future under specified circumstances [*see Powell On Real Property*, P 274 (Matthew Bender)].

**[b] Vested Remainder**

Although California cases generally characterize remainders simply as vested or contingent, the courts have recognized the common law categories of vested remainders--indefeasibly vested, vested subject to open, and vested subject to complete defeasance [see *Restatement of Property*, § 157; e.g., *Estate of Ferry* (1961) 55 Cal. 2d 776, 783, 13 Cal. Rptr. 180, 361 P.2d 900 (vested subject to defeasance); *Estate of Stanford* (1957) 49 Cal. 2d 120, 125, 315 P.2d 681 (vested subject to open); *Bochte v. Chess* (1954) 124 Cal. App. 2d 321, 325, 268 P.2d 493 (indefeasibly vested)].

- A remainder is indefeasibly vested if the remainder beneficiary or the remainder beneficiary's successors in interest are certain to acquire a present interest at some future date and are also certain to be entitled to retain that interest permanently [see *Restatement of Property*, § 157, comment (f)].

- A remainder is vested subject to open if the remainder beneficiary or the remainder beneficiary's successors in interest are certain to acquire a present interest in some part of the property at some future date and are also certain to be entitled to retain that interest permanently, but the amount or proportion of the share to which the remainder beneficiary will be entitled may increase or decrease before the date it becomes a present interest [see *Restatement of Property*, § 157, comment (l)]. A common example of this type of interest is a remainder to an indeterminate class of children.

- A remainder is vested subject to complete defeasance when there is a person who would take the interest if all prior interests were to end immediately, but who has no certainty of retaining that present interest, and who in most cases has no certainty of ever acquiring a present interest [see *Restatement of Property*, § 157, comment (p)]. Stated differently, a remainder interest is vested, subject to complete defeasance if the holder of the remainder is in existence and ascertained, and his or her interest is not subject to a condition precedent, although his or her right to possession or enjoyment on the expiration of the prior interests is subject to termination, such as by the exercise of a power of appointment [ *Ammco Ornamental Iron, Inc. v. Wing* (1994) 26 Cal. App. 4th 409, 418, 31 Cal. Rptr. 2d 564]. For example, persons in existence who are specifically designated in a trust instrument to take in default of the exercise of a power of appointment by the holder of the preceding estate, are beneficiaries of the trust and have vested remainder interests in it, although their interests are subject to complete defeasance [ *Ammco Ornamental Iron, Inc. v. Wing* (1994) 26 Cal. App. 4th 409, 418-419, 31 Cal. Rptr. 2d 564; see *Civ. Code* § 781 (power of appointment does not prevent vesting of future estate limited to take effect if power is not executed)].

The remainder interest after a life estate vests on the death of the person whose life is the measuring life (usually the life tenant) and cannot be accelerated by any other event [see *Civ. Code* § 780; *Estate of Hoiby* (1983) 150 Cal. App. 3d 233, 237, 197 Cal. Rptr. 682].

**[c] Contingent Remainder**

It is not the uncertainty of actual enjoyment, but the uncertainty of the right to enjoyment, that make a remainder contingent [ *Estate of Lawrence* (1941) 17 Cal. 2d 1, 8, 108 P.2d 893]. A contingent remainder (also called a remainder subject to a condition precedent) exists when it is impossible to point to any person who would take if all prior interests were to end immediately [see *Restatement of Property*, § 157, comment (u)]. It is a remainder limited to take effect on an event that may never happen, or may not happen until after the preceding estate ends, or is limited to a person not in being or ascertained [see *Powell On Real Property*, PP 274, 278 (Matthew Bender)].

A remainder is not void merely because of the improbability of the contingency on which it is limited to take effect [*Civ. Code* § 697]. However, the law favors vested remainders over contingent remainders. Any doubt will be resolved in favor of vesting, and an interest will be found to be contingent only if it is clearly shown that this was the transferor's

intent [*see Estate of Stanford (1957) 49 Cal. 2d 120, 124-125, 315 P.2d 681 ; Estate of Woodworth (1993) 18 Cal. App. 4th 936, 940, 942-946, 22 Cal. Rptr. 2d 676*].

#### **[4] Executory Interest**

At common law, all future interests in favor of anyone other than the transferor or the transferor's successors in interest, with the exception of remainders [*see [3], above*], were classified as executory interests (also known as executory limitations or conditional limitations) [*see Restatement of Property, §§ 25, 158(2)*]. A springing executory interest would operate to defeat an interest in the transferor's favor, such as a transfer to take effect only if and when the transferee attains a specified age. A shifting executory interest would operate to defeat an interest held by a third person, such as a gift over to a third person if a remainder beneficiary died without issue [*see Restatement of Property, § 25, comment (e)*].

In California, a common law executory interest falls within the broad statutory definition of a remainder because it is a future estate, other than a reversion, dependent on a preceding estate [*see Civ. Code § 769*]. A future interest may commence at a future day, without the intervention of a preceding estate or on the termination of a preceding estate by lapse of time or otherwise [*Civ. Code § 767*].

Moreover, a fee may be limited on a fee, on a contingency that, if it should occur, must occur within the period of the rule against perpetuities [*Civ. Code § 773*]. A remainder may be limited on a contingency that, if it occurs, will operate to abridge or determine the preceding estate; and such an interest is deemed a conditional limitation [*Civ. Code § 778*].

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law  
 Estates Created by Trusts & Wills  
 Future Interests  
 Executory Interests  
 Estate, Gift & Trust Law  
 Estates Created by Trusts & Wills  
 Future Interests  
 Remainder Interests  
 General Overview  
 Real Property Law  
 Estates  
 Future Interests  
 Executory Interests  
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 Estates  
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DIVISION IV: WILLS AND TRUSTS  
CHAPTER 67 FUTURE INTERESTS AND PERPETUITIES  
PART II. LEGAL BACKGROUND

*25-67 California Legal Forms--Transaction Guide § 67.13*

**§ 67.13 Condition on Present or Future Interest**

**[1] In General**

An interest in property is conditional if the time when enjoyment of the property is to begin or end depends on events [*Civ. Code § 707*]. Conditions are either precedent or subsequent. Conditions precedent fix the beginning of the right, and conditions subsequent fix the ending of the right [*Civ. Code § 708*].

Conditions subsequent are not favored because they tend to destroy estates [*see City of Palm Springs v. Living Desert Reserve (1999) 70 Cal. App. 4th 613, 622, 82 Cal. Rptr. 2d 859*]. There are also statutory limitations on the duration of a power to terminate a fee simple estate in order to enforce a condition subsequent [*see § 67.12[2][e], [ff]*]. However, if the creating instrument clearly provides that the transferee will forfeit the property or that the transferor or the transferor's successor in interest may enter the property on breach of the condition, then the transfer will be upheld as a transfer of a fee simple subject to a condition subsequent [ *City of Palm Springs v. Living Desert Reserve (1999) 70 Cal. App. 4th 613, 622, 82 Cal. Rptr. 2d 859*].

As a general rule, a transferor may condition a transfer of property on whatever conditions the transferor desires [*see, e.g., City of Palm Springs v. Living Desert Reserve (1999) 70 Cal. App. 4th 613, 620-626, 82 Cal. Rptr. 2d 859* (property transferred to city on condition that it be used solely as a desert wildlife preserve)]. There are, however, several categories of impermissible conditions [*see [2]-[5], below*].

**[2] Condition Depending on Wrongful Act**

If a condition precedent requires the performance of a wrongful act, the instrument containing the condition is void. If the condition precedent requires the performance of an act that is not wrongful in and of itself but is otherwise unlawful, the instrument takes effect, but the condition is void [*Civ. Code § 709*].

**[3] Condition Restraining Marriage**

Conditions imposing restraints on marriage, except the marriage of a minor, are void [*Civ. Code § 710*]. For example, a bequest of trust income to a surviving spouse for her lifetime or until her remarriage or cohabitation was void as a

restraint on marriage, when the testimony showed that the testator was extremely jealous and did not intend to provide for his wife if she formed another relationship [ *Estate of Guidotti* (2001) 90 Cal. App. 4th 1403, 1407, 109 Cal. Rptr. 2d 674] .

This prohibition does not extend to limitations that are not intended to forbid marriage but only to give use of the property until marriage [Civ. Code § 710]. Thus, a devise to a surviving spouse "during widowhood," or words to that effect, ordinarily will be upheld [see *Estate of Horgan* (1949) 91 Cal. App. 2d 618, 620-621, 205 P.2d 706 (testator's intent, ascertained from entire will, determines how devise will be construed)].

#### **[4] Condition Restraining Alienation**

Conditions restraining the alienation of property are void if they are repugnant to the interest created [Civ. Code § 711]. This statute codifies the common law prohibition against unreasonable restraints on alienation [ *Carma Developers (California), Inc. v. Marathon Development California, Inc.* (1992) 2 Cal. 4th 342, 355, 6 Cal. Rptr. 2d 467, 826 P.2d 710] . Reasonable restrictions on alienation have been held to be consistent with the statute [ *City of Oceanside v. McKenna* (1989) 215 Cal. App. 3d 1420, 1427, 264 Cal. Rptr. 275] .

Reasonableness is determined by comparing the justification for the particular restraint on alienation with the quantum of restraint actually imposed by it. The greater the restraint, the stronger the justification must be to support it [ *Wellenkamp v. Bank of America* (1978) 21 Cal. 3d 943, 948-949, 148 Cal. Rptr. 379, 582 P.2d 970] .

Restraints on alienation in the transfer of a fee estate generally are considered repugnant to the interest created because they tend to defeat the very purpose of that interest [ *Carma Developers (California), Inc. v. Marathon Development California, Inc.* (1992) 2 Cal. 4th 342, 358-359, 6 Cal. Rptr. 2d 467, 826 P.2d 710 ); see *Taormina Theosophical Community Inc. v. Silver* (1983) 140 Cal. App. 3d 964, 973-974, 190 Cal. Rptr. 38 (invalidating restriction on sale of property to anyone other than theosophist at least 50 years of age); but see *Zlotoff v. Tucker* (1984) 154 Cal. App. 3d 988, 993, 201 Cal. Rptr. 692 (upholding liquidated damages provision in property sale agreement requiring buyer to pay extra \$20,000 on reselling property to named individual, which was limited in time)].

When the interest created is a leasehold, a restriction on alienation is less likely to be considered repugnant, because a lease, by its very nature, is limited in duration and scope and is therefore already less alienable than a fee estate [ *Carma Developers (California), Inc. v. Marathon Development California, Inc.* (1992) 2 Cal. 4th 342, 358-359, 6 Cal. Rptr. 2d 467, 826 P.2d 710 ; see *Kendall v. Ernest Pestana, Inc.* (1985) 40 Cal. 3d 488, 498-500, 220 Cal. Rptr. 818, 709 P.2d 837 (finding no justification for giving lessor unrestricted right to disapprove proposed assignee absent express lease provision giving lessor that right)]. In addition, any restriction on alienation of a lessee's interest is less detrimental to the overall free flow of property than a comparable restriction on a fee estate; and restrictions on alienation of a leasehold interest, particularly a commercial interest, do not implicate an owner's right to transfer property to those the owner chooses, such as heirs, or concern over present owners tying up property indefinitely [ *Carma Developers (California), Inc. v. Marathon Development California, Inc.* (1992) 2 Cal. 4th 342, 359, 6 Cal. Rptr. 2d 467, 826 P.2d 710] .

#### **[5] Racial, National, or Ethnic Restriction**

Any provision in any deed of real property in California that purports to restrict the right of any person to sell, lease, rent, use, or occupy the property to persons of a particular racial, national, or ethnic group, by providing for payment of a penalty, forfeiture, reverter, or otherwise, is void [Civ. Code § 782]. Any deed or other written instrument relating to title to real property, or any written covenant, condition, or restriction annexed to that deed or instrument or made a part of it, by reference or otherwise, which purports to forbid, restrict, or condition the right of any person to sell, buy, lease, rent, use, or occupy the property, because of the race or color of the person, is deemed to be revised to omit that provision [Civ. Code § 785.2(a)].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Estates Created by Trusts & Wills General Overview Estate, Gift & Trust Law Estates Created by Trusts & Wills Future Interests Remainder Interests Contingent Remainders Estate, Gift & Trust Law Estates Created by Trusts & Wills Invalid Restraints & Rule Against Perpetuities Real Property Law Estates General Overview Real Property Law Estates Future Interests Invalid Restraints & Rule Against Perpetuities



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*25-67 California Legal Forms--Transaction Guide § 67.14*

**§ 67.14 Termination of Future Interest**

A future interest may be defeated in any manner or by any act or means authorized by the person creating the interest at the time of creating the interest [*Civ. Code § 740*]. If a future interest is contingent on the death of a specified person without successors, heirs, issue, or children, the interest is defeated by the birth of that person's posthumous child who is capable of taking by succession [*Civ. Code § 739*].

A future interest cannot be defeated or barred by any act of the owner of a preceding interest, or by the destruction of the preceding interest by forfeiture, surrender, merger, or otherwise [*Civ. Code § 741*]. Nor can a future interest that is valid at its creation be defeated by the termination of the preceding interest before the happening of the contingency on which the future interest is limited to take effect [*Civ. Code § 742*]. If the contingency occurs later, the future interest takes effect in the same manner and to the same extent as if the preceding interest had continued until its normal termination [*Civ. Code § 742*].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law  
Estates Created by Trusts & Wills  
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*25-67 California Legal Forms--Transaction Guide § 67.15*

**§ 67.15 Transfer of Future Interest**

Future interests are transferable by succession, will, or inter vivos transfer, in the same manner as present interests [*Civ. Code § 699*]. The transferability of a future interest is not affected by its classification as a vested or contingent interest [*Estate of Ferry (1961) 55 Cal. 2d 776, 13 Cal. Rptr. 180, 361 P.2d 900*].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Energy & Utilities Law  
Conveyances  
Rule Against Perpetuities  
Estate, Gift & Trust Law  
Estates Created by Trusts & Wills  
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*25-67 California Legal Forms--Transaction Guide § 67.16*

**§ 67.16 California Rule Against Perpetuities**

**[1] Purpose and Background**

The rule against perpetuities is designed to promote the free transferability of property by limiting the property owner's power to control its disposition after his or her death. Although the rule is of ancient origin, it applies to a broad range of modern property interests, including personal property as well as real property and equitable interests as well as legal estates [*see Reagh v. Kelley (1970) 10 Cal. App. 3d 1082, 1096, 89 Cal. Rptr. 425 ; see also Strong v. Theis (1986) 187 Cal. App. 3d 913, 920, 232 Cal. Rptr. 272* (options and preemptive rights are property interests subject to rule against perpetuities)]. The rule applies only to the vesting of future interests, not to vested present interests [ *Reagh v. Kelley (1970) 10 Cal. App. 3d 1082, 1097, 89 Cal. Rptr. 425* ] . Because the rule is based on public policy rather than private convenience, it cannot be waived [ *United California Bank v. Bottler (1971) 16 Cal. App. 3d 610, 616, 94 Cal. Rptr. 227* ] .

California adopted a statutory formulation of the common law rule against perpetuities in 1951 [*see former Civ. Code § 715.2*]. In 1992, that was replaced with the Uniform Statutory Rule Against Perpetuities (USRAP) [*see Prob. Code § 21200 et seq.*].

**[2] Common Law Rule**

The California codification of the common law rule against perpetuities as stated in former *Civ. Code § 715.2* was that no interest in real or personal property shall be good unless it must vest, if at all, not later than 21 years after some life in being at the creation of the interest and any period of gestation involved in the situation to which the limitation applies.

At common law, the validity of a future interest is determined as of the time of its creation. If there was then any conceivable possibility that the interest would not vest or terminate within the time limits of the rule, the entire interest is invalid [ *Shaver v. Clanton (1994) 26 Cal. App. 4th 568, 572, 31 Cal. Rptr. 2d 595 ; Strong v. Theis (1986) 187 Cal. App. 3d 913, 920, 232 Cal. Rptr. 272 ; see Recommendation Relating to Uniform Statutory Rule Against Perpetuities, 20 Cal. L. Revision Comm'n Reports 2501, 2511 (1990)*]. Whether vesting or termination within the statutory period was likely, or whether disposition appeared reasonable or unreasonable under the circumstances, was

immaterial [*see Estate of Grove (1977) 70 Cal. App. 3d 355, 361-362, 138 Cal. Rptr. 684*].

### **[3] Uniform Statutory Rule Against Perpetuities (USRAP)**

The Uniform Statutory Rule Against Perpetuities (USRAP) [*see Prob. Code § 21200 et seq.*] supersedes the common law rule against perpetuities [*Prob. Code § 21201*]. This rule provides, in essence, that a future interest is valid if it either satisfies the common law rule against perpetuities or actually vests or terminates within 90 years after creation of the interest [*see Prob. Code § 21205*].

The fundamental difference between USRAP and the common law rule is that USRAP does not automatically invalidate an interest from its inception. Under the common law rule, the validity of a future interest is determined as of the time of its creation [*see [7], below*]. If there was any conceivable possibility that the interest would not vest or terminate within the time limits of the rule (21 years plus a life in being at the creation of the interest) [*see former Civ. Code § 715.2*], then the interest was invalid from the moment of its creation [*see Recommendation Relating to Uniform Statutory Rule Against Perpetuities, 20 Cal. L. Revision Comm'n Reports 2501, 2511 (1990)*].

In contrast, USRAP focuses on what actually happens to a future interest after it is created. An interest that would be invalid under the common law rule because, at the time the interest was created, it was conceivable that it might vest or terminate more than 21 years after the death of a person alive when the interest was created, is valid under USRAP if it actually vests or terminates within 90 years after it is created. During the 90-year period, persons with a potential interest in the property wait to see whether the interest, in fact, vests or terminates. By grafting this 90-year wait-and-see rule onto the common law rule, USRAP eliminates the harsh potential of the common law rule for total invalidation of an interest from the moment of its creation [*see Recommendation Relating to Uniform Statutory Rule Against Perpetuities, 20 Cal. L. Revision Comm'n Reports 2501, 2552 (1990)*].

USRAP applies to three general types of future interests:

- Nonvested future interests [*see Prob. Code §§ 21202(a), 21205; see also [5], below*];
- Powers of appointment [*see Prob. Code §§ 21202(a), 21206, 21207; see also [6], below*]; and
- Accumulations of income [*see Civ. Code §§ 722, 724(a); see also [7], below*].

Certain interests are specifically excluded from USRAP [*see Prob. Code §§ 21202(b), 21225; [13]-[17], below*].

### **[4] Retroactive Application of Rule**

USRAP applies to all nonvested future interests and unexercised powers of appointment, whether they were created on, before, or after January 1, 1992, the operative date of USRAP in California [*Prob. Code § 21202(a)*]. It does not apply to vested interests [*Prob. Code §§ 21202(a), 21205*].

The adoption of USRAP does not require the revision, reexecution, or republication of instruments in existence before January 1, 1992, because USRAP does not invalidate perpetuity saving clauses that were valid under the common law rule [*see Recommendation Relating to Uniform Statutory Rule Against Perpetuities, 20 Cal. L. Revision Comm'n Reports 2501, 2519 (1990)*].

### **[5] Application in Particular Cases**

#### **[a] Nonvested Future Interest**

A nonvested future interest is invalid unless one of the following conditions is satisfied [*Prob. Code § 21205*]:

- When the interest was created, it was certain to vest or terminate no later than 21 years after the death of an individual then alive.

- The interest either vests or terminates within 90 years after its creation.

The first rule is sometimes called the "validating side" of the common law rule against perpetuities. USRAP does not include the so-called invalidating side of the common law rule--it does not invalidate an interest merely because it might vest or terminate more than 21 years after the death of an individual alive when the interest is created. Under USRAP, an interest that is not valid under the common law rule because, at the time of its creation, it was not certain to vest or terminate within 21 years after the death of an individual then alive may still be validated under the 90-year wait-and-see rule [*Prob. Code § 21205(b)*; see [6], *below*].

A future interest is "nonvested" in this context if it is subject to an unsatisfied condition precedent, or is "vested" if it is owned free and clear of conditions precedent [*see Recommendation Relating to Uniform Statutory Rule Against Perpetuities*, 20 Cal. L. Revision Comm'n Reports 2501, 2552 (1990)]. A nonvested interest may be created when a devise is made to a class of persons. If that class could include persons not yet born when the devise takes effect, their interests are nonvested because they are subject to the unsatisfied condition precedent of being born. All class gifts that are subject to open are regarded as nonvested interests for purposes of USRAP [*see Recommendation Relating to Uniform Statutory Rule Against Perpetuities*, 20 Cal. L. Revision Comm'n Reports 2501, 2552-2553 (1990)].

#### **[b] Power of Appointment**

USRAP applies to powers of appointment [*Prob. Code § 690*]. A general power of appointment that is not presently exercisable because of a condition precedent is in valid unless one of the following conditions is satisfied [*Prob. Code § 21206*]:

- When the power is created, the condition precedent is certain to be satisfied or become impossible to satisfy no later than 21 years after the death of an individual then alive.

- The condition precedent either is satisfied or becomes impossible to satisfy within 90 years after its creation.

A nongeneral power of appointment or a general testamentary power of appointment is invalid unless one of the following conditions is satisfied [*Prob. Code § 21207*]:

- When the power is created, it is certain to be irrevocably exercised or otherwise to terminate no later than 21 years after the death of an individual then alive.

- The power is irrevocably exercised or otherwise terminates within 90 years after its creation.

#### **[c] Accumulation of Income**

Dispositions of income to accrue and be received in the future are governed by the rules applicable to future interests [*Civ. Code § 722*]. Although an accumulation of income may be directed by any valid will, trust, or transfer in writing, an accumulation of income generally cannot extend beyond the time permitted for the vesting of future interests under the rule against perpetuities [*Civ. Code § 724(a)*]. If a will or trust instrument requires that income be accumulated for a longer time, the requirement is void insofar as it applies to the longer period, but such a requirement will not affect the validity of any other provision of the will or trust [*Civ. Code § 725*].

A trust that forms part of a profit-sharing or retirement plan may accumulate income until the trust fund is sufficient, in the trustor's opinion, to accomplish the purposes of the trust, whether or not the accumulation exceeds the limits of the rule against perpetuities [*Civ. Code* § 724(b)].

#### **[6] 90-Year Wait-and-See Rule**

The 90-year wait-and-see rule of USRAP shifts the perpetuities focus from what might happen to an interest as viewed at the time of its creation to what actually happens to the interest within 90 years after its creation [*see Prob. Code* §§ 21205(b), 21206(b), 21207(b)]. The period of 90 years is an approximation of the common law period of lives in being plus 21 years [*see Recommendation Relating to Uniform Statutory Rule Against Perpetuities*, 20 Cal. L. Revision Comm'n Reports 2501, 2513 (1990)]. This 90-year wait-and-see rule can validate an otherwise invalid interest but cannot invalidate a valid interest.

#### **PRACTICE TIP:**

Any interest that remains unvested and untermiated on expiration of the 90-year period is invalid and terminates. In actual practice, any person who has a potential interest in an unvested or untermiated interest or power of appointment will most likely become concerned about the interest or appointment as the end of the 90-year period approaches. If vesting or termination before expiration of the period is impossible (or even unlikely), this person may seek reformation of the interest under *Prob. Code* § 21220 [*see* [12], *below*].

#### **[7] Time of Creation of Interest**

The time of creation of an interest or a power is generally determined by statutes other than USRAP or under general principles of property law [*Prob. Code* § 21210]. The time allowed for vesting or termination of an interest or power of appointment under USRAP begins at the time of the creation of the interest or power. For example, an interest or power created by an inter vivos trust generally is created on the date that the trust property is irrevocably transferred to the trustee, because an inter vivos trust is generally effective only on the irrevocable transfer of property to the trustee to be held subject to the trust instrument [*see Recommendation Relating to Uniform Statutory Rule Against Perpetuities*, 20 Cal. L. Revision Comm'n Reports 2501, 2579-2580 (1990)].

However, there are three exceptions to the general rule that the time of creation is to be determined under other applicable statutes or general principles of property law.

- If there is a person who alone can exercise a power to become the unqualified beneficial owner of a nonvested future interest, a general power of appointment not presently exercisable because of a condition precedent, a nongeneral power of appointment, or a general testamentary power of appointment, then the interest or power is created when the power to become the unqualified beneficial owner terminates [*Prob. Code* § 21211(a); *see Prob. Code* §§ 21206, 21207; *see also Recommendation Relating to Uniform Statutory Rule Against Perpetuities*, 20 Cal. L. Revision Comm'n Reports 2501, 2580-2585 (1990)].

- A joint power with respect to community property held by individuals who are married to each other is a power that is exercisable by one person alone [*Prob. Code* § 21211(b); *see Recommendation Relating to Uniform Statutory Rule Against Perpetuities*, 20 Cal. L. Revision Comm'n Reports 2501, 2580-2585 (1990)].

- A nonvested future interest or power of appointment arising from a transfer of property to a previously funded trust or other existing property arrangement is created when the nonvested interest or power in the original contribution was created [*Prob. Code* § 21212; *see Recommendation Relating to*

Uniform Statutory Rule Against Perpetuities, 20 Cal. L. Revision Comm'n Reports 2501, 2585-2586 (1990)].

### **[8] Measuring Life**

Under the common law rule against perpetuities, the validity of a nonvested interest or power of appointment is determined by measuring off 21 years after the death of a person alive at the time of the creation of the interest. Under the former California codification of the common law rule, the period was stated to be 21 years after some life in being at the creation of the interest [*see former Civ. Code § 715.2*]. Under USRAP's restatement of the common law rule, the period is stated to be 21 years after the death of an individual then alive [*Prob. Code §§ 21205(a), 21206(a), 21207(a)*].

The life in being at the creation of the interest or the individual then alive is frequently referred to as the measuring life. The measuring life must be the life of some person who is alive at the time of creation of the interest or power of appointment. The person may be the survivor of a designated group or class of persons. However, when multiple lives are selected to govern the time of vesting, the persons designated must not be so numerous or so situated that evidence of their deaths is likely to be unreasonably difficult to obtain [*Prob. Code § 21230*].

### **[9] Gift Over to Beneficiary's Spouse**

USRAP includes a special rule designed to validate a future interest that follows a gift over to the spouse of a named beneficiary [*see Prob. Code § 21231*]. The following example illustrates this rule:

#### **EXAMPLE:**

Mr. Brown devises property to his son for life, then to his son's wife for life, with the remainder to the son's then-surviving issue. It is conceivable that the son's wife might not be alive at the time of Mr. Brown's death, yet the remainder to the son's issue is conditional on their survival of the wife. The wife's life cannot be the measuring life, because she might not be an individual alive at the time of creation of the remainder [ *see Prob. Code §§ 21205(a), 21206(a), 21207(a)*; *see also* [10], *below* ]. Because the wife might die more than 21 years after the death of either the son or Mr. Brown, it is conceivable that the remainder would not vest in the issue until more than 21 years after the death of the survivor of Mr. Brown or his son. Therefore, the remainder would violate the rule against perpetuities.

To eliminate this kind of violation, USRAP provides that, in determining the validity of a nonvested future interest, an individual described as the spouse of an individual alive at the commencement of the perpetuity period is deemed to be an individual alive when the interest is created, whether or not the individual so described was actually then alive [*Prob. Code § 21231*].

### **[10] Posthumous Children**

In determining whether a nonvested future interest or a power of appointment is valid under USRAP, the possibility that a child will be born to an individual after the individual's death is disregarded [*Prob. Code § 21208*]. This rule gives the same result as the common law rule under which the perpetuity period of 21 years was extended by the human gestation period of nine months [*see Restatement (Second) of Property, Donative Transfers, § 1.3, comment (h)*].

Unlike the common law rule, however, *Prob. Code § 21208* takes into account modern medical advances such as sperm banks, frozen embryos, and artificial insemination, enabling a child to be born more than nine months after a parent's death. That possibility will not invalidate a gift under the rule against perpetuities. Because of the language of *Prob. Code § 21208*, it is unnecessary to extend the statutory period of 21 years by an additional nine months when drafting a dispositive instrument.

The statute applies only to perpetuity questions. It does not apply to questions of whether an after-born child qualifies as

the taker of a beneficial interest or as a member of a class [*see* Recommendation Relating to Uniform Statutory Rule Against Perpetuities, 20 Cal. L. Revision Comm'n Reports 2501, 2573 (1990); *see also* *Civ. Code* §§ 698, 739 (rights of posthumous child in future interest; future interest defeated by birth of posthumous child); *Prob. Code* §§ 249.5-249.8, 6407, 6453(c) (inheritance rights of child conceived after decedent's death; inheritance rights of after-born heirs; parent-child relationship for inheritance purposes in case of posthumously conceived child)].

### **[11] Exclusions**

#### **[a] Interest Valid Under Court Order or Settlement**

USRAP does not apply to any future interest or power of appointment when the validity of that interest or power has been determined in a judicial proceeding or by a settlement among interested persons [*Prob. Code* § 21202(b)].

#### **[b] Interest Arising Out of Nondonative Transfer**

USRAP generally does not apply to nonvested future interests and powers of appointment arising out of nondonative transfers. A nondonative transfer is commonly a commercial transaction, such as an option, right of first refusal, commercial lease, or easement [*see* *Shaver v. Clanton* (1994) 26 Cal. App. 4th 568, 571, 574, 576, 31 Cal. Rptr. 2d 595 ; *see also* Recommendation Relating to Uniform Statutory Rule Against Perpetuities, 20 Cal. L. Revision Comm'n Reports 2501, 2595 (1990)]. Whether a transfer is donative or nondonative is generally determined by whether it is supported by consideration. However, this is not always the case. If a transfer is essentially gratuitous in nature, it is to be regarded as donative even if it is supported by consideration [*see* Recommendation Relating to Uniform Statutory Rule Against Perpetuities, 20 Cal. L. Revision Comm'n Reports 2501, 2595 (1990)].

Nondonative transfers that are exempt from the provisions of USRAP may, nevertheless, be limited in duration by other statutes [*see, e.g., Civ. Code* § 715 *et seq.* (limiting duration of specified types of commercial leases); *Shaver v. Clanton* (1994) 26 Cal. App. 4th 568, 571, 574, 576, 31 Cal. Rptr. 2d 595 (lease amendment giving lessees series of five-year options to renew lease was exempt from USRAP, but total term of lease was limited to 99 years by *Civ. Code* § 718); *see also* § 67.18[1]].

USRAP specifically applies to certain nondonative transactions that arise from domestic situations, even when the transactions are supported by substantial consideration. Transactions that fall into this category include premarital and postmarital agreements, dissolution settlements, contracts to make or not to revoke a will, and transfers made in satisfaction of a duty of support [*Prob. Code* § 21225(a); *see* Recommendation Relating to Uniform Statutory Rule Against Perpetuities, 20 Cal. L. Revision Comm'n Reports 2501, 2595 (1990)]. Reciprocal transfers are also subject to USRAP, whether or not they are supported by consideration [*Prob. Code* § 21225(a)(8); *see* Recommendation Relating to Uniform Statutory Rule Against Perpetuities, 20 Cal. L. Revision Comm'n Reports 2501, 2596 (1990)]. A reciprocal transfer is a transfer of property to a trust in exchange for another transfer of property to a trust of which the original transferor is the lifetime beneficiary. Assets transferred to a trust as part of a reciprocal transfer are included in the gross estate of the original transferor on the original transferor's death [*see* *United States v. Estate of Grace* (1969) 395 U.S. 316, 89 S. Ct. 1730, 23 L. Ed. 2d 332].

#### **[c] Fiduciary Power**

Fiduciary powers generally are subject to USRAP [*see* Recommendation Relating to Uniform Statutory Rule Against Perpetuities, 20 Cal. L. Revision Comm'n Reports 2501, 2595 (1990)]. However, the following fiduciary powers are specifically excluded from USRAP:

- A fiduciary's power relating to the administration or management of assets, including the power of a fiduciary to sell, lease, or mortgage property, and the power of a fiduciary to determine principal and income [*Prob. Code* § 21225(b)].

- A power to appoint a fiduciary [*Prob. Code § 21225(c)*].
- A discretionary power of a trustee to distribute principal before termination of a trust to a beneficiary having an indefeasibly vested interest in the income and principal [*Prob. Code § 21225(d)*].

#### **[d] Charitable Gift or Gift to Government**

USRAP does not apply to a nonvested future interest held by a charity, government, or governmental agency or subdivision, if that interest is preceded by an interest held by another charity, government, or governmental agency or subdivision [*Prob. Code § 21225(e)*]. This treatment of charitable and governmental gifts is substantially identical to the treatment of these gifts under the common law rule against perpetuities [*see Recommendation Relating to Uniform Statutory Rule Against Perpetuities, 20 Cal. L. Revision Comm'n Reports 2501, 2516, 2597-2598 (1990)*].

If a nonvested future interest given to a charity is preceded by a charitable gift, the nonvested future interest is not subject to the rule against perpetuities. However, if the nonvested future interest given to a charity is preceded by a private, noncharitable gift, the gift to the charity is subject to the rule [*see Recommendation Relating to Uniform Statutory Rule Against Perpetuities, 20 Cal. L. Revision Comm'n Reports 2501, 2598 (1990)*]. The practical effect of this rule is to exempt charitable interests from the application of the rule against perpetuities only when all interests in the property are donated to charity. When the transfer is of a split-interest, such as a charitable remainder trust with an income interest transferred to a private, noncharitable beneficiary and the remainder donated to a charity, the charitable remainder is invalid unless it complies with the rule.

#### **[e] Interest Not Subject to Common Law Rule**

USRAP does not apply to future interests, powers of appointment, or arrangements that were not subject to the common law rule against perpetuities, or that are excluded by other statutes [*Prob. Code § 21225(g)*]. Because possibilities of reverter, rights of entry and reentry, and powers of termination are all excluded from the operation of the common law rule, they are similarly excluded from the operation of USRAP [*see Recommendation Relating to Uniform Statutory Rule Against Perpetuities, 20 Cal. L. Revision Comm'n Reports 2501, 2599 (1990)*].

#### **[12] Reformation of Otherwise Invalid Disposition**

A disposition that would otherwise be invalid under USRAP may be validated by judicial reformation. USRAP includes specific rules governing judicial reformation of invalid dispositions [*see Prob. Code § 21220*]. These rules operate in much the same way that the *cy pres* rule formerly applied to interests that violated the rule against perpetuities [*see former Civ. Code § 715.5; Estate of Grove (1977) 70 Cal. App. 3d 355, 362-365, 138 Cal. Rptr. 684; see also Recommendation Relating to Uniform Statutory Rule Against Perpetuities, 20 Cal. L. Revision Comm'n Reports 2501, 2515-2516 (1990)*], although the USRAP rules are somewhat more explicit.

Under USRAP, any person may petition the court to reform a disposition in the manner that most closely approximates the transferor's manifested plan of distribution and is within the 90-year wait-and-see rule [*Prob. Code § 21220; see [6, above]*]. The court must reform the disposition when one of the following conditions exists:

- A nonvested future interest or a power of appointment becomes invalid under USRAP [*Prob. Code § 21220(a)*].
- A class gift is not, but might become, invalid under USRAP and the time has arrived when the share of any class member is to take effect in possession or enjoyment [*Prob. Code § 21220(b)*].

■ A nonvested future interest that is not valid under the "validating side" of USRAP's codification of the common law rule against perpetuities [*see Prob. Code § 21205(a)*; *see also* [5][a], *above*] can vest, but not within 90 years after its creation [*Prob. Code § 21220(c)*].

In most cases it will not be necessary to reform a disposition under USRAP because the 90-year wait-and-see rule validates most interests that do not meet the strict test of the common law rule [*see Prob. Code §§ 21205(b), 21206(b), 21207(b)*]. Because a disposition will not be invalidated until the expiration of the 90-year period, reformation generally will not be necessary until the expiration of that period. However, reformation may be possible before the expiration of 90 years in the case of a class gift when a member of the class is entitled to enjoyment of a share before 90 years have expired [*see Recommendation Relating to Uniform Statutory Rule Against Perpetuities, 20 Cal. L. Revision Comm'n Reports 2501, 2515 (1990)*].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law  
Estates Created by Trusts & Wills  
Invalid Restraints & Rule Against Perpetuities  
Real Property Law  
Estates  
Future Interests  
Invalid Restraints & Rule Against Perpetuities



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DIVISION IV: WILLS AND TRUSTS  
CHAPTER 67 FUTURE INTERESTS AND PERPETUITIES  
PART II. LEGAL BACKGROUND

*25-67 California Legal Forms--Transaction Guide § 67.17*

**§ 67.17 Perpetuity Saving Clause**

**[1] In General**

A perpetuity saving clause is a provision in a will, trust, or other instrument that is designed to prevent an inadvertent violation of the rule against perpetuities. It is sometimes also called a termination clause [*see* Recommendation Relating to Uniform Statutory Rule Against Perpetuities, 20 Cal. L. Revision Comm'n Reports 2501, 2575 (1990)].

Perpetuity saving clauses are typically used to override other provisions of an instrument. A perpetuity saving clause is not part of the dispositive provisions of the instrument but operates independently. It provides that all interests created under the instrument must vest no later than a specified future time, and also typically provides that a trust must terminate at the end of the specified time [*see* Recommendation Relating to Uniform Statutory Rule Against Perpetuities, 20 Cal. L. Revision Comm'n Reports 2501, 2575 (1990)].

Perpetuity saving clauses typically provide that property interests that have not vested earlier, and powers of appointment that have not been exercised earlier, will terminate 21 years after the death of a specified person (who may be the survivor of a specified class) alive at the time of creation of the interests or powers. These clauses override other provisions of the governing instrument by placing an upper limit of 21 years on vesting or termination [*see* Recommendation Relating to Uniform Statutory Rule Against Perpetuities, 20 Cal. L. Revision Comm'n Reports 2501, 2575 (1990); *see also* § 67.32].

**[2] "Later of" Provision**

Before the enactment of USRAP, the California rule against perpetuities validated a nonvested interest if it was certain to vest or terminate within 60 years after its creation [*see* former *Civ. Code* § 715.6]. Under this 60-year alternative rule, some perpetuity saving clauses limited the time for vesting or termination to the later of the traditional 21-year period or the alternative 60-year period.

USRAP accommodates "later of" perpetuity saving clauses. If language in a governing instrument seeks to disallow the vesting or termination of an interest or trust beyond the "later of" a period not exceeding 21 years or another period that exceeds or might exceed 21 years after the death of a person alive at the creation of the trust or other arrangement, that

language is inoperative to the extent that it produces a period that exceeds 21 years after a life in being at the creation of the interest or seeks to operate in any similar fashion [*Prob. Code § 21209(a)*].

In effect, this limits "later of" language to 21 years after a life in being at the creation of the interest, thus transforming a "later of" clause into a traditional 21-year perpetuity saving clause. Therefore, under USRAP, there is no longer any reason to include a "later of" saving clause in an instrument [*see Recommendation Relating to Uniform Statutory Rule Against Perpetuities*, 20 Cal. L. Revision Comm'n Reports 2501, 2527, 2575-2576 (1990)].

Although USRAP generally applies to nonvested future interests and unexercised powers of appointment regardless of when they were created, the "later of" provisions of *Prob. Code § 21209(a)* apply only to governing instruments executed on or after January 1, 1992 [*Prob. Code § 21209(b)*].

### **[3] Effect of USRAP on Perpetuity Saving Clause**

A perpetuity saving clause may be used in any instrument that creates a future interest: for example, a will creating a trust or an instrument creating an inter vivos trust. However, it may be appropriate to include a perpetuity saving clause in a will that does not create a trust if the will creates a power of appointment, a remainder to take effect after the expiration of a life estate, or another interest or power that may vest or be exercised at some time in the future.

The 90-year wait-and-see rule [*see Prob. Code §§ 21205(b), 21206(b), 21207(b)*; *see also § 67.16[6]*] has greatly reduced the dangers of violating the rule against perpetuities. Because it is improbable that a perpetuities violation will actually occur under USRAP, the question arises whether it is still desirable to include a saving clause or whether reliance on the 90-year wait and see rule is sufficient. Although the likelihood that an interest created in California will be invalidated on perpetuities grounds is now remote, if, after executing a will or trust in California, the testator or settlor moves to a state that has not adopted USRAP, the risk of a perpetuities violation, and the value of a saving clause, could increase dramatically. Even if the testator or settlor does not move to another state, if the will or trust creates an interest that remains nonvested and unterminated at the end of the 90-year waiting period, a problem might arise at that time. Although a court can reform the interest so that it will not violate the rule against perpetuities [*see Prob. Code § 21220*; *see also § 67.16[12]*], a judicial proceeding is not an ideal solution to a potential problem that could be avoided by careful drafting.

### **[4] Alternative Distribution Provision**

Every perpetuity saving clause should include an alternative distribution provision that specifies what is to happen if the interest terminates because of the rule against perpetuities. If a trust is terminated because of the saving clause, the trustee should have directions as to how the trust property is to be distributed. As a general rule, the alternative distribution plan should approximate the original distribution plan. The best result will usually be reached by requiring the trustee to distribute the trust property to the income beneficiaries in the same proportion that they are entitled to receive income immediately before the termination. If that proportion is not fixed by the trust instrument, then the instrument can require the trustee to distribute the property to the income beneficiaries as a class.

### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Energy & Utilities Law  
 Conveyances  
 Rule Against Perpetuities  
 Estate, Gift & Trust Law  
 Estates Created by Trusts & Wills  
 Invalid Restraints & Rule Against Perpetuities  
 Real Property Law  
 Estates  
 Future Interests  
 Invalid Restraints & Rule Against Perpetuities



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*25-67 California Legal Forms--Transaction Guide § 67.18*

**§ 67.18 Other Time Limitations**

**[1] Lease of Real Property**

Leases of real property are subject to the following time limitations:

- A lease that is to commence at a certain time or on the occurrence of a future event becomes invalid if its term does not actually commence in possession within 30 years [*Civ. Code § 715*].
- Agricultural leases are limited to a term of 51 years [*Civ. Code § 717*].
- Leases of municipal property and oil and gas leases are limited to a term of 99 years [*Civ. Code §§ 718, 718f*].

**[2] Honorary Trust**

A trust for a noncharitable corporation or unincorporated society, or for a lawful noncharitable purpose, may be performed by the trustee for only 21 years [*Prob. Code § 15211*]. Although the explicit terms of *Prob. Code § 15211* apply to any trust created for a lawful noncharitable purpose, the Law Revision Commission notes indicate the intention to limit this section to honorary trusts [*see Recommendation Relating to Uniform Statutory Rule Against Perpetuities, 20 Cal. L. Revision Comm'n Reports 2501, 2518, 2539 (1990)*]. When a person transfers property for a stated purpose but without designating a beneficiary, an honorary trust is created. An example of an honorary trust is a devise of property for the erection or maintenance of tombstones, the care of graves, and the saying of masses [*see Estate of Hamilton (1919) 181 Cal. 758, 771, 186 P. 587; Estate of Holtermann (1962) 206 Cal. App. 2d 460, 473, 23 Cal. Rptr. 685*].

Another type of honorary trust is a trust for the care and maintenance of pets. A trust for the care of a designated domestic or pet animal may be performed by the trustee for the life of the animal [*Prob. Code § 15212*]. The trust will terminate on the animal's death [*see Prob. Code § 15212, see also Recommendation Relating to Uniform Statutory Rule Against Perpetuities, 20 Cal. L. Revision Comm'n Reports 2501, 2540 (1990)*].

These time limitations apply whether or not there is a beneficiary who can seek enforcement or termination of the trust, and whether or not the terms of the trust contemplate a longer duration [*Prob. Code* §§ 15211, 15212].

### **[3] Termination of Trust at End of Perpetuity Period**

Neither the common law rule against perpetuities nor USRAP requires the termination of a trust that continues beyond the permissible perpetuities period. Because the rule against perpetuities applies only to nonvested interests, it has no application to a trust in which all interests are vested [*see* § 67.16[5][a]].

However, *Prob. Code* § 15414 sets forth a procedure for discretionary termination of a trust that continues in existence for more than 21 years after the death of a person alive at the time of creation of the trust, or for more than 90 years after the creation of the trust, whichever period is longer [*see* Recommendation Relating to Uniform Statutory Rule Against Perpetuities, 20 Cal. L. Revision Comm'n Reports 2501, 2541 (1990)]. If a trust continues in existence after the longer of those two periods, a court may terminate the trust on petition of the attorney general or any person who would be affected by the termination, but only if the court finds that the termination would be in the public interest or in the best interest of a majority of the persons who would be affected by the termination [*Prob. Code* § 15414(b)].

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Energy & Utilities Law  
Conveyances  
General Overview  
Estate, Gift & Trust Law  
Estates Created by Trusts & Wills  
Future Interests  
General Overview  
Estate, Gift & Trust Law  
Trusts  
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*25-67 California Legal Forms--Transaction Guide § 67.19*

**§ 67.19 Estate Tax Treatment of Future Interests**

**[1] In General**

Because a future interest is an interest in property [*Civ. Code § 688(1)*], it is included in the gross estate of the owner for estate tax purposes [*see I.R.C. §§ 2031, 2033* (definition of gross estate; inclusion of property in which decedent had interest)]. A future interest may be included in the gross estate of the transferor or the transferee depending on the nature and extent of the interest transferred or retained. If a future interest is created by a will or trust, the testator or settlor may retain some interest in the property that requires inclusion of the property in the testator's or settlor's estate for estate tax purposes. For example:

- *Retained life estate.* Property transferred during the decedent's lifetime in which the decedent retained a right to possession or enjoyment is included in the decedent's taxable estate [*I.R.C. § 2036(a)*]. If a decedent made a lifetime transfer of a remainder interest in property and retained a life estate in all the transferred property, the entire value of the property ordinarily is included in the decedent's taxable estate [*see Treas. Reg. § 20.2036-1(a)*].
- *Reversionary interest.* The value of the decedent's gross estate will include the value of all property in which the decedent retained a reversionary interest if, immediately before the decedent's death, the reversionary interest was valued in excess of 5 percent of the value of the whole property and if possession or enjoyment of the property by others could be obtained only by surviving the decedent [*I.R.C. § 2037(a)*; *Treas. Reg. § 20.2037-1(c)(2)*].
- *General power of appointment.* The value of all property over which a decedent held a general power of appointment at the time of death is included in the decedent's gross estate [*I.R.C. § 2041(a)(2)*]. A general power of appointment is a power that is exercisable in favor of the decedent, the decedent's estate, the decedent's creditors, or the creditors of the decedent's estate [*I.R.C. § 2041(b)(1)*]. It includes all powers that are in substance and effect powers of appointment, regardless of the nomenclature used in creating them and regardless of local property law connotations [*Treas. Reg. § 20.2041-(b)(1)*].

- *Vested remainder.* The value of a vested remainder interest owned by a decedent is included in the decedent's gross estate even if the remainder may be defeasible [*see Rev. Rul. 67-370, 1967-2 C.B. 324*].

- *Power of termination.* A contingent remainder or power of termination, when defeated by the decedent's death, is not included in the decedent's gross estate [*see Rev. Rul. 55-438, 1955-2 C.B. 601*].

Future interests included in a decedent's taxable estate are valued at their fair market value on the date of death [*Treas. Reg. §§ 20.2031-1(b), 20.2031-9*]. Remainders, reversions, life estates, and terms for years are valued for federal estate and gift tax purposes at values established in the IRS valuation tables [*see Treas. Reg. § 20.2031-10(f)*].

Payment of the portion of the estate tax attributable to a reversionary or remainder interest may, at the executor's election, be postponed until six months after termination of the precedent interest or interests in the property [*I.R.C. § 6163(a)*]. This provision for an extension of time is limited to cases in which reversionary or remainder interests are included in the decedent's gross estate as such, and does not apply to cases in which the decedent created future interests by his or her own testamentary act [*Treas. Reg. § 20.6163-1(a)*]. After the expiration of the six-month period of postponement, an extension may be granted for reasonable cause for a reasonable period of up to three years [*I.R.C. § 6163(b)*].

## [2] Marital Deduction

Generally a devise of a life estate or other terminable estate to the testator's surviving spouse does not qualify for the estate tax marital deduction [*I.R.C. § 2056(b)(1); Treas. Reg. § 20.2056(b)-1(b)*]. However, there are three significant exceptions to this rule.

One exception applies if the surviving spouse is given an income interest followed by a general power of appointment [*I.R.C. § 2056(b)(5); see Ch. 71, Marital Deduction Trust Provisions, §§ 71.13[5], 71.231*]. Another exception applies to spousal interests in charitable remainder trusts [*I.R.C. § 2056(b)(8)*]. For discussion, see Ch. 74, *Split-Interest Charitable Trusts* .

The most significant exception in current estate planning practice applies to life estates composed of qualified terminable interest property (QTIP), that is, property as to which the surviving spouse is entitled to all of the income for life, payable annually or at more frequent intervals, and which no person has a power to appoint to anyone other than the surviving spouse during the spouse's lifetime [*I.R.C. § 2056(b)(7)*]. The typical life estate in real property will qualify for the marital deduction under this second exception if the executor elects to qualify it, because the surviving spouse ordinarily would be entitled to all of the income by statute [*Civ. Code § 732; see Civ. Code § 748*]. For additional discussion, see Ch. 71, *Marital Deduction Trust Provisions* .

Whether an interest fails to qualify for the marital deduction because it is a terminable interest is determined by reference to the property interest that actually passed from the decedent. Subsequent conversions of the property are immaterial. For example, if a husband left his entire estate to his wife for life with remainder to their children, the interest that passes to the wife is a nondeductible, terminable interest, even if the wife agrees with the children to take a fractional share of the estate in fee in place of the life interest, or sells the life estate for cash, or acquires the children's remainder interest by purchase or gift [*Treas. Reg. § 20.2056(b)-1(e)(3)*].

## [3] Generation-Skipping Transfer Tax

Arrangements involving life estates and remainders, or estates for years, may have generation-skipping transfer (GST) tax consequences. For purposes of the GST tax, these arrangements are included in the definition of a trust [*I.R.C. § 2652(b)(1)*]. If an interest in property held in trust terminates, whether by death, lapse of time, release of a power, or

otherwise, in favor of a beneficiary who is assignable to a generation that is two or more generations below that of the transferor, then the transfer is a taxable termination [*I.R.C.* § 2612(a)(1)]. For example, if a father gives his child a life estate in property with remainder to grandchildren, the tax will be imposed on the value of the property when the child dies and the property passes to the grandchildren [*see I.R.C.* §§ 2601, 2611, 2612(a)]. However, any remaining portion of a transferor's GST tax exemption [*see I.R.C.* § 2631(a), (c)] may be used to offset the tax.

Under current law, the GST tax is repealed for generation-skipping transfers after 2009 [*I.R.C.* § 2264].

For general discussion of the GST tax, see Ch. 60, *Estate Planning* .

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law  
Estates Created by Trusts & Wills  
Future Interests  
General Overview  
Real Property  
Law  
Estates  
Future Interests  
General Overview  
Tax Law  
Federal Estate & Gift Taxes  
Definition of Gross Estate  
Tax Law  
Federal Estate & Gift Taxes  
Taxable Property  
General Overview  
Tax Law  
Federal Estate & Gift Taxes  
Taxable Property  
Property Held at Death (IRC secs. 2033, 2044)  
General Overview



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*25-67 California Legal Forms--Transaction Guide § 67.20*

**§ 67.20 Gift Tax Treatment of Future Interests**

**[1] In General**

Inter vivos gifts of present and future interests, like other gifts of property, are subject to federal gift tax in appropriate instances [*see I.R.C. § 2511(a)*]. Generally, when a donor transfers less than his or her entire interest in the property, the gift tax is applicable to the interest transferred. However, if the donor's retained interest cannot be measured on the basis of generally accepted valuation principles, the gift tax is applied to the entire value of the property. For example, if a 67-year-old donor transfers a life estate to a 25-year-old donee, with remainder to the donee's issue, or in default of issue, with reversion to the donor, the entire value of the property will be subject to the gift tax [*Treas. Reg. § 25.2511-1(e)*].

The value of a gift of a future interest is its value at the date of the gift [*Treas. Reg. § 25.2512-1*]. It is not discounted to the present worth of the right to receive the gift at a future time [ *Allen v. Commissioner (1944) 3 T.C. 1224, 1231-1232* ].

**[2] Annual Gift Tax Exclusion**

Gifts of future interests do not qualify for the annual gift tax exclusion [*I.R.C. § 2503(b)(1)*; *Treas. Reg. § 25.2503-3(a)*]. The entire value of a gift of a future interest must be included in the total amount of taxable gifts for the calendar year in which the gift was made [*Treas. Reg. § 25.2503-1*]. The Treasury Regulations state that a "future interest" is a legal term, and includes reversions, remainders, and other interests or estates, whether vested or contingent, and whether or not supported by a particular interest or estate, which are limited to commence in use, possession, or enjoyment at some future date [*Treas. Reg. § 25.2503-3(a)*].

An income interest in property transferred in trust qualifies for the exclusion if it takes effect at the inception of the transfer, but only the income interest qualifies [*see Treas. Reg. § 25.2503-3(b)*]. For example, if A transfers property in trust, with income to B and remainder to C, the value of the transfer must be divided into the portion allocable to the income interest and the portion allocable to the remainder. This allocation is made according to standard tables [*see Treas. Reg. § 25.2512-5(f)*]. The annual exclusion applies only against the value of the income interest so measured, even if the income beneficiary and the remainder beneficiary are the same person.

Special rules apply with respect to gifts to minors. An outright gift to a minor is treated as a present interest, whether or not a guardian has been appointed. Limitations placed on the minor or the guardian by state law are disregarded. Only limitations on present enjoyment created by the form of the gift (as in a transfer in trust) raise the question of the existence of a future interest [ *Rev. Rul. 54-500* ]. Even when a trust is created, the transfer may be treated as an outright gift if the powers of the trustee are the same as those of a legal guardian [ *Rev. Rul. 59-78* ]. If the trustee's powers exceed those of a guardian, the income interest may qualify as a present interest even if the remainder interest does not [see *Treas. Reg. § 25.2503-4(c)*]. A transfer for the benefit of a minor will not be treated as a gift of a future interest (and therefore will qualify for the annual exclusion) if the following conditions exist [*Treas. Reg. § 25.2503-4(a)*]:

- Both the property and the income from the property may be expended by the minor or for the minor's benefit before the minor reaches majority.
- Any portion of the property and the income from the property not expended by the minor or for the minor's benefit will pass to the minor when the minor reaches majority.
- If the minor dies before reaching majority, any portion of the property or its income not disposed of for the minor's benefit will be payable either to the minor's estate or as the minor may appoint in a general power of appointment.

Transfers to trusts that meet these requirements will qualify for the annual exclusion. The entire amount of the transfer, not just the portion allocable to the income interest, qualifies. In effect, transfers to qualifying trusts are treated as an outright gift to the minor if both income and principal are paid as required. An income interest alone that meets these requirements qualifies for the exclusion, even if the remainder interest does not [ *Commissioner v. Herr (3d Cir. 1962) 303 F.2d 780, 782* ; *Rev. Rul. 68-670, 1968-2 C.B. 413* ].

### [3] Marital Deduction

If the income from property is payable to the donor or another individual for life or a term of years, with remainder to the donor's spouse or to the estate of the donor's spouse, a gift tax marital deduction is allowed for the present value of the remainder [*Treas. Reg. § 25.2523(a)-1(d), (e)*].

The marital deduction is allowed for a spouse's vested indefeasible interest in trust principal and a fixed portion of trust income to be accumulated and paid on termination of the trust, if the spouse's interest would survive as an asset of his or her estate if the spouse dies before termination [ *Rev. Rul. 54-470, 1954-2 C.B. 320* ].

If a donor wishes to give his or her spouse a life interest or an income interest for a term of years in property, and at the same time wishes to sell the remainder, the donor may obtain a gift tax marital deduction with respect to the life estate or income term transferred to the spouse if he or she sells the entire remainder first [*I.R.C. § 2523(b)(1)*].

A donor cannot claim a marital deduction for the gift of a terminable interest to his or her spouse if (1) the donee also transferred an interest in the same property to any person other than his or her spouse (or the spouse's estate) for less than an adequate and full consideration in money or money's worth, and (2) the other person may thereby possess or enjoy any part of the property after the termination or failure of his or her spouse's interest [*I.R.C. § 2523(b)(1)*; *Treas. Reg. § 25.2523(b)-1(b)(1)*]. The following terminable interests do not qualify for the marital deduction [*Treas. Reg. § 25.2523(b)-1(b)(6)(I), (ii)*]:

- A gift of property to the donor's spouse for life, with the remainder interest to the donor's children.

- A gift of property for the benefit of the donor's spouse and the donor's son or daughter, when the income is payable to the spouse for life, and on his or her death the principal is to be distributed to the son or daughter or his or her descendants, but if the son or daughter should die without descendants leaving the spouse surviving, then the principal is to be distributed to the spouse.

It makes no difference for the disallowance of the marital deduction whether the succeeding interest is given to the person other than the donee spouse simultaneously with the transfer to the spouse or at an earlier time [*Treas. Reg. § 25.2523(b)-1(b)(2)*].

For further discussion, see Ch. 60A, *Gifts* .

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Tax Law Federal Estate & Gift Taxes Gifts (IRC secs. 2035, 2501-2524) General Overview Tax Law Federal Estate & Gift Taxes Gifts (IRC secs. 2035, 2501-2524) Annual Exclusions Tax Law Federal Estate & Gift Taxes Gifts (IRC secs. 2035, 2501-2524) Completed Gifts Retention of Power Tax Law Federal Estate & Gift Taxes Gifts (IRC secs. 2035, 2501-2524) Elements Transfers Among Family Members Tax Law Federal Estate & Gift Taxes Gifts (IRC secs. 2035, 2501-2524) Valuation



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*25-67 California Legal Forms--Transaction Guide § 67.21*

**§ 67.21 Income Tax Treatment of Future Interests**

For income tax purposes, the settlor of a trust is treated as the owner of any portion of a trust in which the settlor has a reversionary interest in either the principal or the income if, as of the inception of that portion of the trust, the value of the reversionary interest exceeds 5 percent of the value of the portion [*I.R.C. § 673(a)*]. However, the settlor will not be treated as the owner under this rule if the reversionary interest takes effect only on the death of a lineal descendant of the settlor before the descendant reaches age 21 [*I.R.C. § 673(b)*].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Tax LawFederal Income Tax ComputationGeneral OverviewTax LawFederal Taxpayer GroupsIncome Taxation of Estates, Trusts & BeneficiariesGrantor Trusts (IRC secs. 671-679)



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*25-67 California Legal Forms--Transaction Guide §§ 67.22-67.99*

**[Reserved]**

§§ 67.22[Reserved]



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PART III. TRANSACTION GUIDE  
A. Client Interview--Facts and Documents

*25-67 California Legal Forms--Transaction Guide § 67.100*

**§ 67.100 Facts**

1. Information about client.
  - a. Name and address.
  - b. Age.
  - c. Marital status; if married, name of spouse.
2. Information about property to be transferred.
  - a. Real property.
    - (1) Street address.
    - (2) Legal description.
  - b. Personal property.
    - (1) Description.
    - (2) Location.
  - c. Nature of client's interest in property (such as fee simple, life estate, or remainder).
  - d. Whether property is separate or community property.

e. If title is held by more than one person:

(1) Form in which title is held (such as tenancy in common, joint tenancy, or other form).

(2) Name, address, and relationship to client of each other person holding title.

(3) Whether interest being transferred is total ownership interest in property or only client's interest (if client owns only partial interest).

f. Whether any deed, will, trust, or other instrument imposes any restriction on client's power to transfer or otherwise dispose of property.

3. Form of transfer.

a. Testamentary or inter vivos.

b. Outright or in trust.

c. Gift or transfer for consideration.

4. Information about transferees.

a. Name and address of each individual who will or could receive interest in property, and type of interest.

b. If transferees are class of individuals, such as children or grandchildren:

(1) Description of class.

(2) Names and birth dates of presently living class members.

5. How transaction will be structured.

a. Time, event, or conditions on which transfer will take effect.

b. Persons entitled to immediate present possession of property when transfer takes effect.

c. Time, events, or conditions on which these persons' interest in property will or may terminate (such as death or other stated event).

d. Persons who will come into possession of property on termination of preceding interest.

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Estates Created by Trusts & Wills General Overview Estate, Gift & Trust Law Estates Created by Trusts & Wills Future Interests General Overview Real Property Law Estates General Overview Real Property Law Estates Future Interests General Overview Real Property Law Estates Present Estates General Overview



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PART III. TRANSACTION GUIDE  
A. Client Interview--Facts and Documents

*25-67 California Legal Forms--Transaction Guide § 67.101*

**§ 67.101 Documents**

1. Deed to real property.
2. Documents evidencing title to personal property.
3. Copy of any will, trust, or other instrument transferring interest in property to client.
4. Copy of any contract or other instrument restricting or otherwise affecting client's right to transfer property.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Estates Created by Trusts & Wills General Overview Estate, Gift & Trust Law Estates Created by Trusts & Wills Future Interests General Overview Real Property Law Deeds General Overview Real Property Law Estates General Overview Real Property Law Estates Future Interests General Overview



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*25-67 California Legal Forms--Transaction Guide §§ 67.102-67.109*

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*25-67 California Legal Forms--Transaction Guide § 67.110*

**§ 67.110 Use of Future Interest Provisions**

1. If transfer of personal property is contemplated, determine whether using future interest provision is best method of accomplishing client's goal.

**NOTE:**

Future interests are most often used in connection with real property and trusts. Although there is nothing prohibiting gifts of future interests in personal property, such gifts are ordinarily impractical. Because it is far more difficult to keep track of personal property than real property, it is difficult to ensure that the property will actually be disposed of in the precise manner intended by the client [*see § 67.10[3]*].

2. Determine what conditions and limitations, if any, are required to make gift or bequest in manner intended by client.

**NOTE:**

The client may desire dispositions or conditions that are legally impossible or practically unfeasible, or that attempt to exercise an unreasonable amount of control over the subsequent disposition of the estate. The client should be advised of the undesirability of any such contemplated course of action. For a discussion of illegal conditions, see § 67.13.

a. Conditions precedent, such as:

(1) Prior estate of less than fee simple that must terminate before property vests in beneficiary.

**NOTE:**

Successive life estates are an example of prior estates that must terminate [*see* § 67.202].

- (2) Gift dependent on occurrence of some event before property will vest in beneficiary.

**NOTE:**

An example of such an executory devise is a gift to a child provided he or she completes four years of college by a certain date and, if not, to another child.

- b. Conditions subsequent, such as:

- (1) Provision that if property is not used for specified purpose, title passes to another beneficiary.

**NOTE:**

An example is a gift of property to a city for as long as it is used for a park [*see* § 67.221].

- (2) Provision that unless certain events occur, title passes to another beneficiary.

**NOTE:**

An example is a gift to a child, but if the child has no children living at his or her death, then to another.

- c. Conditions expanding or restricting life tenant's use of property, such as:

- (1) Conditional power to sell, lease, mortgage, or transfer property based on factors such as health, income, or educational requirements.

- (2) Requirement for beneficiary to occupy residential property or operate business.

3. Consider whether there are any unfavorable tax considerations that would preclude use of future interests [*see* §§ 67.19-67.21].

4. Determine whether proposed disposition complies with rule against perpetuities [*see* § 67.16].

5. Consider whether alternative methods of disposition are preferable to use of future interests.

**NOTE:**

Complex future interest provisions are disfavored by courts and tend to be difficult to draft. In addition, these provisions may have undesirable tax consequences [*see* §§ 67.19-67.21], often create a lack of needed flexibility in dealing with the property, and (in general) tend to result in litigation and to create other difficulties for the recipients. In view of statutory limitations on duration [*see* § 67.12[3][c]] and judicial rules of construction, these interests may not produce the desired effects. Alternative methods of disposition, therefore, should be considered.

- a. Unconditional transfers.

**NOTE:**

Unconditional transfers will not provide a transferor with the same measure of control as future interests. However, they are usually more advantageous in almost every other

respect. The client should be advised to consider whether a condition is of such importance as to warrant dealing with the problems noted above.

b. Trusts.

**NOTE:**

Trusts provide a measure of management and control over property and can be used to accomplish most of the same purposes as outright gifts of future interests, while providing more flexibility in many cases. Estate planners often prefer trusts when a large estate is involved. Future interest provisions may be more practical for small estates.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Estates Created by Trusts & Wills Future Interests General Overview Estate, Gift & Trust Law Estates Created by Trusts & Wills Future Interests Executory Interests Estate, Gift & Trust Law Estates Created by Trusts & Wills Future Interests Remainder Interests General Overview Real Property Law Estates Future Interests General Overview Real Property Law Estates Future Interests Executory Interests



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*25-67 California Legal Forms--Transaction Guide § 67.111*

**§ 67.111 Selecting Appropriate Present and Future Interests**

1. Confirm that planned disposition will dispose of transferor's entire interest (both present interest and future interest) in property.

**NOTE:**

Except in unusual instances when the transferor intentionally retains an interest in the transferred property, any transfer should dispose of the transferor's entire interest, including the rights to both present and future enjoyment.

2. Determine appropriate present interest.

a. If client wishes to make transfer unconditional and of infinite duration, transfer should be made in fee simple [*see § 67.11[2]*].

b. If client wishes transfer to be of potentially infinite duration but to terminate on occurrence of particular event or contingency, transfer may be made in fee simple subject to power of termination [*see §§ 67.11[3], 67.12[2][c], 67.221*].

**NOTE:**

There are statutory restrictions on the duration of a power of termination [*see Civ. Code § 885.010 et seq.; see also § 67.12[2][e]*].

c. If client desires property to be used by one or more individuals for life, transfer should be made as one or more life estates followed by one or more remainder interests [*see §§ 67.11[4], 67.201-67.209*].

3. Determine appropriate future interest.

a. If client wants currently living person to be entitled to possession and enjoyment of property on termination of immediately preceding interest, transferee should be given vested remainder [*see* §§ 67.12[3][b], 67.200].

b. If client wants currently living person to be entitled to possession and enjoyment of property only on occurrence of particular event, remainder may be made contingent on occurrence of that event [*see* §§ 67.12[3][c], 67.207].

(1) Transferee's interest may be conditioned on surviving until specified time.

(2) Transferee may be required to perform specified act (if not illegal or harmful).

c. If client wants to transfer property to one transferee, but have ownership shift to another transferee if specified contingency occurs, transfer should be made as shifting executory interest [*see* §§ 67.12[4], 67.208].

d. If client wants to retain present interest or leave present interest in his or her heirs, but transfer property to qualifying transferee at later date, transfer should be made as springing executory interest [*see* §§ 67.12[4], 67.220].

4. If client holds preexisting future interest such as reversion following prior inter vivos transfer, provision for disposition of that interest should be made in client's will [*see* § 67.230].

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Estates Created by Trusts & Wills General Overview Estate, Gift & Trust Law Estates Created by Trusts & Wills Future Interests General Overview Estate, Gift & Trust Law Estates Created by Trusts & Wills Future Interests Executory Interests Estate, Gift & Trust Law Estates Created by Trusts & Wills Future Interests Remainder Interests General Overview Estate, Gift & Trust Law Estates Created by Trusts & Wills Life Estates General Overview



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*25-67 California Legal Forms--Transaction Guide §§ 67.112-67.119*

**[Reserved]**

§§ 67.112[Reserved]



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PART III. TRANSACTION GUIDE  
C. Drafting Guide

*25-67 California Legal Forms--Transaction Guide § 67.120*

**§ 67.120 General Drafting Rules**

1. In drafting transfer of present or future interest:

- a. Include language creating desired estates or interests.
- b. Identify beneficiaries.
- c. Specify any conditions or limitations on estates or interests.

2. In drafting future interest provisions, verify that interest created does not violate rule against perpetuities [*see §§ 67.16-67.18*], and observe following rules:

- a. Reversions arise by operation of law and express language is not required.
- b. Remainders can be created merely by use of "then to" or "with remainder to" or like words.
- c. Powers of termination are created by same language used in creating fee.
- d. Other future interests, such as executory interests, can be created merely by using "then to" or like words.
- e. To avoid uncertainty, precise nature of intended interest should be specified.

3. To create life estate, specify following:

- a. Whether estate will endure for life tenant's life or for life of another specified individual [*see* § 67.201].
- b. Any special powers granted to or limitations imposed on life tenant [*see* § 67.206].
- c. Successive life tenants, if desired [*see* § 67.202].
- d. Any conditions precedent or subsequent [*see* § 67.13].

4. If client insists on creation of defeasible fee (fee simple subject to power of termination), observe following rules:

- a. Specify that transferor will hold property for "as long as" it is used for desired purpose, or "on condition that" specified condition exists or does not exist [*see* § 67.221].

**NOTE:**

At common law, each of the above phrases creates a different defeasible estate. However, by statutory modification of the common law rules, in California use of either of the above alternatives will create a fee simple subject to a power of termination [*see Civ. Code* §§ 885.010, 885.020].

- b. Grant holder of power right to terminate interest on occurrence of specified condition.
- c. State that transferor intends to create power of termination.
- d. Consider limiting power by:

- (1) Limiting time for exercising power after occurrence of condition.
- (2) Fixing right to exercise power in certain individuals that can be determined.
- (3) Ensuring that power does not vest in large class of persons under legal disability.

**NOTE:**

Although there are statutory limitations on the duration of powers of termination [*see Civ. Code* §§ 885.030, 885.040], a transferor is not prohibited from further restricting the scope or duration of the power [*see Civ. Code* § 885.030(b)]. Depending on the reasons for creating the power, it may be desirable, for flexibility, to limit the duration and scope of the power to the greatest extent not inconsistent with its purpose.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law  
 Estates Created by Trusts & Wills  
 General Overview  
 Estate, Gift & Trust Law  
 Estates Created by Trusts & Wills  
 Future Interests  
 General Overview  
 Estate, Gift & Trust Law  
 Estates Created by Trusts & Wills  
 Future Interests  
 Remainder Interests  
 General Overview  
 Estate, Gift & Trust Law  
 Estates Created by Trusts & Wills  
 Invalid Restraints & Rule Against Perpetuities  
 Real Property Law  
 Estates  
 Future Interests  
 General Overview



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*25-67 California Legal Forms--Transaction Guide § 67.121*

**§ 67.121 Description of Beneficiaries**

1. If identities of beneficiaries are known, specifically describe them by:
  - a. Stating each beneficiary's full name.
  - b. Stating each beneficiary's relationship to transferor.
  - c. Providing address or other identifying information for beneficiary whose name is common in family or frequently encountered.
  
2. If identities of all beneficiaries are not known and they constitute class, describe class as specifically as possible by:
  - a. Giving beneficiaries' parentage by full names of father and mother.
  - b. Describing parent as spouse of known parent if one parent is as yet unidentified.
  - c. Confining description of unknown spouse to particular time or location if limitation on class of potential spouses is desired.
  - d. Ascertaining whether any class members have predeceased client and deciding whether any of these members should be expressly included or excluded.
  - e. Describing class by subclasses if class may be broken into subclasses.

**NOTE:**

For example, grandchildren may be described as the children of specifically named

children of the testator ("the children of my son Jason Michael Smith").

3. If there are multiple transferees, specify how property will be apportioned among them; either:

- a. Specified fractional shares [*see, e.g., Ch. 63, Will Provisions, § 63.550* (residuary clause in will)]; or
- b. Class gift.

**NOTE:**

When a will, trust, or other instrument that expresses no contrary intention provides for "issue" or "descendants" to take without specifying the manner in which they are to take, the property will be distributed in the manner provided in *Prob. Code § 240*. For discussion of this statutory pattern of distribution, see *Ch. 61, Will Drafting and Complete Will Forms, § 61.15[6][d]*. If the drafter of the instrument does not want the property distributed in this manner, it is important to specify an alternative method of distribution. For additional discussion of the alternative patterns of distribution specified in the Probate Code, and advice on drafting remainders to members of a class, see § 67.204; see also *Ch. 61, Will Drafting and Complete Will Forms, § 61.15[6][d]*, and *Ch. 63, Will Provisions, § 63.551*.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Estates Created by Trusts & Wills Future Interests General Overview Estate, Gift & Trust Law Estates Created by Trusts & Wills Future Interests Remainder Interests General Overview Estate, Gift & Trust Law Trusts Beneficiaries General Overview Real Property Law Estates Future Interests General Overview Real Property Law Estates Future Interests Remainders



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C. Drafting Guide

*25-67 California Legal Forms--Transaction Guide § 67.122*

**§ 67.122 Drafting Condition on Present or Future Interest**

1. Ensure that wording of any condition cannot be construed as creating anything other than conditional gift.

**NOTE:**

Carelessly worded conditions may be construed as creating a covenant, trust, or easement instead of a condition. Conditions should not be stated in precatory language (using words such as "wish" or "desire") because these terms may be construed as a nonbinding request rather than a command [*see Estate of Collias (1951) 37 Cal. 2d 587, 589-590, 233 P.2d 554*].

2. Draft complete conditions that do not require judicial construction or interpretation.

- a. Include complete information concerning all individuals involved.
- b. Specify occurrence or event relating to condition.
- c. Specify where, when, and how condition must be fulfilled.
- d. State why condition is being imposed.

3. Specify any requirement of survivorship.

**NOTE:**

Contingencies such as survivorship have significant tax consequences for the transferees. If the condition has not occurred before the transferee's death, the interest is not taxable to his or her estate. If the transferee must survive to take the interest, the interest is not

included in his or her estate if he or she does not survive [I.R.C. § 2033].

4. State whether condition must occur before transferee is entitled to possession of property.

5. If condition will cause beneficiary's right to possession to terminate after it has taken effect, draft condition to occur after transfer has taken effect.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Estates Created by Trusts & Wills General Overview Estate, Gift & Trust Law Estates Created by Trusts & Wills Estates in Fee Estate, Gift & Trust Law Estates Created by Trusts & Wills Future Interests General Overview Estate, Gift & Trust Law Estates Created by Trusts & Wills Future Interests Remainder Interests Contingent Remainders Estate, Gift & Trust Law Trusts Interpretation



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PART III. TRANSACTION GUIDE  
C. Drafting Guide

*25-67 California Legal Forms--Transaction Guide § 67.123*

**§ 67.123 Avoiding Violation of Rule Against Perpetuities**

1. Select one or more persons as measuring lives for purposes of rule against perpetuities, observing following rules:

a. Persons must be "in being" at time transfer takes effect.

b. Persons should have some relevant involvement in dispositive scheme, although they need not take interest themselves.

(1) Measuring life may take interest, as in gift to individual with remainder to each of that individual's children.

(2) Measuring life may be nontaker, as in gift to children of living individual who is not personally made beneficiary.

c. Number of lives in being may be specified, with transfer of final interest to occur on death of youngest life in being or up to 21 years thereafter.

(1) To maximize permissible period, group of young children may be made measuring lives.

(2) Group should not be so numerous or so situated that evidence of members' deaths is likely to be unreasonably difficult to obtain.

(3) If measuring lives are described as members of class, rather than by name as individuals, verify that class cannot expand after gift takes effect.

**NOTE:**

A violation of the rule against perpetuities most often arises when grandchildren are used as the measuring lives. Because the class of grandchildren can expand after the transferor's death, a disposition using the class of grandchildren (without any limitation) as the measuring lives violates the rule. To avoid problems, it is recommended that the measuring lives be limited to those class members who are alive when the transfer takes effect or to specifically named individual class members who are alive when the instrument is drafted.

2. Ensure that interest must vest no later than 21 years after death of measuring life [*Prob. Code* §§ 21205(a), 21206(a), 21207(a)].

a. 21-year period need not relate to minority of persons who are to take on attaining age of majority.

b. 21-year period must follow, not precede, measuring lives.

3. If instrument makes class gift or calls for some other complex property distribution (for instance, creates trust), include perpetuity-saving clause [*see* §§ 67.17, 67.231-67.233].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Energy & Utilities Law  
Conveyances  
Rule Against Perpetuities  
Estate, Gift & Trust Law  
Estates Created by Trusts & Wills  
Invalid Restraints & Rule Against Perpetuities  
Real Property Law  
Estates  
Future Interests  
Invalid Restraints & Rule Against Perpetuities



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*25-67 California Legal Forms--Transaction Guide §§ 67.124-67.199*

**[Reserved]**

§§ 67.124[Reserved]



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DIVISION IV: WILLS AND TRUSTS  
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PART IV. FORMS

A. Provisions Granting Life Estates and Remainders

*25-67 California Legal Forms--Transaction Guide § 67.200*

**§ 67.200 Simple Testamentary Gift of Life Estate and Remainder**

**[1] Comment**

**[a] Use of Form**

This form is a will provision that may be used when the testator intends to give a life estate in real property, followed by a remainder to one or more individuals, all of whom are living when the will is drafted. For a discussion of the features and limitations of life estates, see § 67.11[4].

If all of the remainder beneficiaries are living at the time of the gift, the remainder is vested and thus is not subject to the rule against perpetuities [see § 67.16[5][a]].

**[b] Tax Considerations**

If any intended beneficiary is assignable to a generation that is two or more generations below that of the testator, the generation-skipping transfer tax may apply to the transfer [see I.R.C. § 2601 et seq.; see also § 67.19[3]].

If the life estate is given to the surviving spouse and the testator wants the gift to qualify for the marital deduction as a gift of qualified terminable interest (QTIP) property, the *form in § 67.209* may be used in place of this form. For discussion of the marital deduction, see § 67.19[2].

**[2] FORM**

**Simple Testamentary Gift of Life Estate and Remainder**

[*paragraph number*]. I give to [*name of life tenant and relationship to testator or other means of identification, e.g., my sister Jane Brown*] for life, with remainder to \_\_\_\_\_ [*name of remainder beneficiary and relationship to testator or other means of identification; if two or more individuals are to share in remainder, specify proportions (such as "equally")*] on the death of \_\_\_\_\_ [*name of life tenant*], the real property situated in

\_\_\_\_\_ County, California, commonly known as \_\_\_\_\_ [address] and more particularly described as follows: [description].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Estates Created by Trusts & Wills Future Interests Remainder Interests General Overview Estate, Gift & Trust Law Estates Created by Trusts & Wills Life Estates General Overview Real Property Law Estates Future Interests Remainders Real Property Law Estates Present Estates Life Estates



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A. Provisions Granting Life Estates and Remainders

*25-67 California Legal Forms--Transaction Guide § 67.201*

**§ 67.201 Life Estate Measured by Life of Person Other Than Life Tenant**

**[1] Comment--Use of Form**

This form is a will provision that may be used when a testator intends to give an individual a life estate measured by the life of another individual (sometimes known as a life estate *per autre vie*). Such an estate is permitted in California by statute [*Civ. Code* § 766]. For a discussion of the features and limitations of life estates, see § 67.11[4].

If all of the remainder beneficiaries are living at the time of the gift, the remainder is vested and thus is not subject to the rule against perpetuities [*see* § 67.16[5][a]].

**[2] FORM**

**Life Estate Measured by Life of Person Other Than Life Tenant**

[*paragraph number*]. I give to [*name of life tenant and relationship to testator or other means of identification, e.g., my sister Jane Brown*] for the life of \_\_\_\_\_ [*name of measuring life and relationship to testator or other means of identification*], with remainder to \_\_\_\_\_ [*name of remainder beneficiary and relationship to testator or other means of identification; if two or more individuals are to share in remainder, specify proportions (such as "equally")*] on the death of \_\_\_\_\_ [*name of measuring life*], the real property situated in \_\_\_\_\_ County, California, commonly known as \_\_\_\_\_ [*address*] and more particularly described as follows: [*description*].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Estates Created by Trusts & Wills Life Estates General Overview Real Property Law Estates Present Estates Life Estates



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A. Provisions Granting Life Estates and Remainders

*25-67 California Legal Forms--Transaction Guide § 67.202*

**§ 67.202 Successive Life Estates**

**[1] Comment--Use of Form**

This form is a will provision that gives two or more individuals successive life estates in real property. For a discussion of the features and limitations of life estates, see § 67.11[4].

If all of the remainder beneficiaries are living at the time of the gift, the remainder is vested and thus is not subject to the rule against perpetuities [see § 67.16[5][a]].

**[2] FORM**

**Successive Life Estates**

[*paragraph number*]. I give to [*name of first life tenant and relationship to testator or other means of identification, e.g., my sister Jane Brown*] for life, then to \_\_\_\_\_ [*name of second life tenant and relationship to testator or other means of identification*] for life, with remainder to \_\_\_\_\_ [*name of remainder beneficiary and relationship to testator or other means of identification; if two or more individuals are to share in remainder, specify proportions (such as "equally")*] on the death of \_\_\_\_\_ [*name of second life tenant*], the real property situated in \_\_\_\_\_ County, California, commonly known as \_\_\_\_\_ [*address*] and more particularly described as follows: [*description*].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Estates Created by Trusts & Wills Invalid Restraints & Rule Against Perpetuities Estate, Gift & Trust Law Estates Created by Trusts & Wills Life Estates General Overview Real Property Law Estates Future Interests Invalid Restraints & Rule Against Perpetuities Real Property Law Estates Present Estates Life Estates



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A. Provisions Granting Life Estates and Remainders

*25-67 California Legal Forms--Transaction Guide § 67.203*

**§ 67.203 Life Estate With Remainder to Class of Children**

**[1] Comment**

**[a] Use of Form**

This form is a complex will provision that may be used to give a life estate in real property followed by a remainder to a class of children, some or all of whom may not yet be in existence at the testator's death. It avoids problems in complying with the rule against perpetuities by limiting the time of distribution to the maximum period permitted by the rule [*see § 67.16*]. It provides that the remainder interest will be divided into shares on the death of the life tenant, and illustrates two alternative ways for distributing the remainder. The first alternative provides that each class member will receive his or her share at age 21. The second alternative provides that distribution will be postponed until all class members have reached age 21.

To avoid problems with complying with the rule against perpetuities, this form excludes children born after the life tenant's death. It also provides that the issue of any child who predeceased the life tenant will receive that child's share.

Provisions involving class gifts are more often used in trusts of personal property than in dispositions of real property. Although there is nothing to prevent their use in dispositions of real property, they are often undesirable because they make it difficult to dispose of the property if it becomes desirable to do so.

A variety of trust distribution provisions making class gifts can be found in Ch. 64, *Testamentary Trusts: Payment and Distribution Provisions*, and in Ch. 70, *Complete Revocable Trust Forms*, as well as in Ch. 61, *Will Drafting and Complete Will Forms*.

**[b] Determining Members of Class**

Unless the will provides otherwise, a devise of a future interest to a class includes all persons answering the class description at the time the devise is to take effect in enjoyment [Restatement (Second) of Property, §§ 26.1-26.2]. The class can grow after the testator's death and before the devise takes effect in enjoyment [ *Estate of Grove (1977) 70*

*Cal. App. 3d 355, 361, 138 Cal. Rptr. 684* . It can also shrink when a potential class member dies before the future interest vests [ *Estate of Haney (1959) 174 Cal. App. 2d 1, 14-15, 344 P.2d 16* ] .

The appeal of a class gift lies in the fact that it automatically takes into account any increase or decrease in the category of individuals whom the testator wishes to benefit.

### **[c] Rule Against Perpetuities**

A class gift in a will has the potential for violating the rule against perpetuities. If persons not yet born when the testator dies are entitled to participate in a class gift under the will, their interests are subject to the condition precedent of being born. They are thus nonvested interests and therefore subject to the rule against perpetuities [*Prob. Code § 21205; see § 67.16[5][a]*].

The risk of violating the rule has been greatly reduced by the enactment in California of the Uniform Statutory Rule Against Perpetuities (USRAP) [*Prob. Code § 21200 et seq.*]. Under USRAP, a nonvested future interest is valid, even if it does not meet the strict test of the common law rule against perpetuities, if it actually vests or terminates within 90 years after its creation [*Prob. Code § 21205(b); see § 67.16[6]*].

USRAP has not completely eliminated the need to consider perpetuity questions. The possibility of a perpetuity violation must still be considered whenever a complex disposition of property to take effect at some future time is planned. Perpetuity violations are most likely to occur when property is disposed of (either outright or in trust) in such a way that full and unconditional ownership of all interests in the property is not to be determined until a long time after the testator's death. When that is the case, the attorney should include a perpetuity-saving clause in the will or trust instrument [*see §§ 67.17 (discussion of perpetuity-saving clauses), 67.231-67.233 (sample clauses)*].

For a detailed discussion of USRAP, see § 67.16.

### **[d] Generation-Skipping Transfer Tax**

Giving a remainder interest in property to a class may have generation-skipping transfer (GST) tax consequences. For a discussion of the GST tax, see § 67.19[3].

## **[2] FORM**

### **Life Estate With Remainder to Class of Children**

[*paragraph number*]. I give to [*name of life tenant who is a person living at time gift takes effect, and relationship to testator or other means of identification, e.g., my brother John Brown*], for life, the real property situated in \_\_\_\_\_ County, California, commonly known as \_\_\_\_\_ [*address*] and more particularly described as follows: [*description*], with remainder to be divided into as many shares as there are children of [*name of parent or parents and relationship to testator or other means of identification, e.g., my brother John Brown*] who are living at the termination of the above-described life estate or who died before termination of the life estate leaving issue surviving at the termination of the life estate. Each living child will receive one share, to be held as a tenant in common, and the issue of each deceased child will take in equal shares the share set aside on account of that deceased child.

[*EITHER*]

[*For distribution to each individual on reaching age 21:*]

If any person entitled to all or part of any share has not reached age 21 on termination of the life estate, the share or part of a share to which that person would be entitled must be held in trust by \_\_\_\_\_ [name of trustee], as Trustee. The income therefrom must be [paid to that person annually *or* accumulated], and the share, along with [any unpaid income *or* the accumulated income], must be distributed to that person when he or she reaches age 21.

[OR]

[To postpone distribution until all individuals reach age 21:]

If any person entitled to all or part of any share has not reached age 21 on termination of the life estate, all shares must be held in trust by \_\_\_\_\_ [name of trustee], as Trustee. The income therefrom must be [paid to each person entitled thereto annually in proportion to each person's respective share *or* accumulated]. Each person or each deceased person's heirs at law must receive outright the share or part of a share to which that person is entitled, along with [any unpaid income *or* the accumulated income] attributable to that share, when all living persons for whom a share or part of a share was set aside on termination of the life estate have reached age 21, or when the last living person for whom a share or part of a share was set aside on termination of the life estate dies without having reached age 21.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Estates Created by Trusts & Wills Future Interests Remainder Interests General Overview Estate, Gift & Trust Law Estates Created by Trusts & Wills Life Estates General Overview Estate, Gift & Trust Law Estates Created by Trusts & Wills Life Estates Rule in Shelley's Case Real Property Law Estates Future Interests Remainders Real Property Law Estates Present Estates Life Estates



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A. Provisions Granting Life Estates and Remainders

*25-67 California Legal Forms--Transaction Guide § 67.204*

**§ 67.204 Life Estate With Remainder to Grandchildren**

**[1] Comment**

**[a] Use of Form**

This form may be used to grant successive life estates to the testator's spouse and children followed by a remainder in favor of the testator's grandchildren who survive the death of the testator's last child to die. It assumes at least one grandchild living at the time the provision is drafted. It grants a share to each of the testator's other grandchildren, ensuring that all grandchildren who meet the survivorship requirement will receive a share, whether or not they are alive when the provision is drafted.

The appeal of a class gift lies in the fact that it automatically takes into account any increase or decrease in the category of individuals whom the testator intends to benefit. For example, if the number of grandchildren might increase after the will is drafted, a class gift to the grandchildren as a class would not require modifying the will each time a new grandchild is born. If a devise is made to persons as a class, the right of persons to take the devise will depend on whether they answer the class description at the time of the testator's death or, in the case of a future interest, at the time the devise is to take effect in enjoyment [*see Prob. Code § 21101*].

It is possible that a grandchild will fail to meet the survivorship requirement but still leave issue (great-grandchildren). This form accommodates that possibility by providing that issue of any deceased grandchild will receive that grandchild's share on the death of the testator's last child to die, in one of the following ways:

- Under *Prob. Code § 240*--which requires division into as many equal shares as there are living members of the nearest generation of issue then living, and deceased members of that generation who leave issue then living--each living member of the nearest generation of issue then living would receive one share, and the share of each deceased member of that generation that leaves issue then living would be divided in the same manner among his or her then-living issue.
- Under *Prob. Code § 246*--which requires division into as many equal shares as there are living

children of the designated ancestor, if any, and deceased children who leave issue then living--each living child of the designated ancestor would be allocated one share, and the share of each deceased child who leaves issue then living would be divided in the same manner.

■ Under *Prob. Code* § 247--which requires division into as many equal shares as there are living members of the nearest generation of issue then living and deceased members of that generation who leave issue then living--each living member of the nearest generation of issue then living would be allocated one share, and the remaining shares, if any, would be combined and then divided and allocated in the same manner among the remaining issue as if the issue already allocated a share and their descendants were then deceased.

Those three options embody stirpital distribution, that is, *per stirpes* (according to family branching). The alternative is distribution *per capita*, by which the distributees would take in equal shares and in their individual rights, without reference to their family branches or the right of representation [*see Estate of Edwards (1988) 203 Cal. App. 3d 1366, 1372, 250 Cal. Rptr. 779*].

### **[b] Rule Against Perpetuities**

Perpetuity problems may arise in two situations. First, if this provision is modified to give a remainder interest to grandchildren of someone other than the testator (such as issue of a brother of the testator), it is possible that not all of the children of that person will be in existence at the time of the testator's death, and thus may not be lives in being for purposes of the rule against perpetuities. Second, if the testator wants to delay distribution beyond the death of his or her last child and until the occurrence of some other stated event, such as until the youngest grandchild reaches age 35, it is possible that all interests might not vest until more than 21 years after a life in being at the creation of the interest.

In either of these situations, the problem may be addressed by using named grandchildren as the measuring lives, since at least one of them can be expected to be living at the time of the testator's death, and by further providing that all interests must vest not later than 21 years after the death of the last-surviving grandchild specifically named in the will. Alternatively, in the first situation described above, the class may be limited to the grandchildren of those children who are alive at the testator's death, thereby permitting the lives of the surviving children to be used as measuring lives. To avoid difficulties, however, it is recommended that this type of provision be avoided.

### **[c] Generation-Skipping Transfer Tax**

Arrangements involving life estates and remainders, or estates for years, may have generation-skipping transfer (GST) tax consequences. For purposes of the GST tax, this provision creates an interest that is included within the definition of a trust [*I.R.C. § 2652(b)(1)*]. If an interest in property held in trust terminates, whether by death, lapse of time, release of a power, or otherwise, in favor of a beneficiary who is assignable to a generation that is two or more generations below that of the transferor, then the transfer is a taxable termination [*I.R.C. § 2612(a)(1)*]. Thus, the property is subject to the tax when the children's life interests terminate in favor of the grandchildren [*see I.R.C. §§ 2601, 2611, 2612(a)*]. Any remaining portion of the transferor's GST tax exemption [*see I.R.C. §§ 2010(c), 2631(a), (c)*] may be used to offset the tax.

For further discussion of the GST tax, see § 67.19[3].

## **[2] FORM**

### **Life Estate With Remainder to Grandchildren**

[*paragraph number*]. I give to my spouse \_\_\_\_\_ [*name of testator's spouse*], for life, then to my children \_\_\_\_\_ [*names of children*], for life only, with cross-remainders for life only, the real property

situated in \_\_\_\_\_ County, California, commonly known as \_\_\_\_\_ [address] and more particularly described as follows: [description]; remainder equally to my grandchildren \_\_\_\_\_ [names of all living grandchildren], and to each of my other grandchildren surviving the last of my children to die. If any grandchild, whether or not specifically named in this will, does not survive the death of the last of my children to die, and leaves issue surviving, the share to which that grandchild would have been entitled had he or she survived the death of my last child to die must be distributed to his or her issue \_\_\_\_\_ [in the manner provided in Probate Code Section \_\_\_\_\_ (240 or 246 or 247) or per capita and not per stirpes, the issue to take in equal shares, whether or not of the same generation].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Estates Created by Trusts & Wills Future Interests Remainder Interests General Overview Estate, Gift & Trust Law Estates Created by Trusts & Wills Invalid Restraints & Rule Against Perpetuities Estate, Gift & Trust Law Estates Created by Trusts & Wills Life Estates General Overview Real Property Law Estates Future Interests Remainders Real Property Law Estates Present Estates Life Estates



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A. Provisions Granting Life Estates and Remainders

*25-67 California Legal Forms--Transaction Guide § 67.205*

**§ 67.205 Life Estate With Power of Sale in Executor**

**[1] Comment--Use of Form**

This form creates a life estate in residential property, with a power in the executor to sell the property at the direction of the life tenant and reinvest the proceeds in other residential property that the life tenant wants to occupy. This type of provision gives a measure of flexibility to the disposition and ensures that the life tenant will be able to change residence if desired or if the circumstances so require.

**[2] FORM**

**Life Estate With Power of Sale in Executor**

[*paragraph number*]. I give to \_\_\_\_\_ [*name of life tenant and relationship to testator or other means of identification, e.g., my child Jane Brown*], for life or for as long as he/she wishes to occupy the property as his/her residence, the real property situated in \_\_\_\_\_ County, California, commonly known as \_\_\_\_\_ [*address*] and more particularly described as follows: [*description*]. In the event that \_\_\_\_\_ [*name of life tenant*] decides not to reside on the property and indicates this intention in writing to my executor or his/her successor, I authorize my executor or his/her successor to sell the property and to apply the proceeds of the sale to the purchase of any other residential property that \_\_\_\_\_ [*name of life tenant*] elects to occupy. On the death of \_\_\_\_\_ [*name of life tenant*], the above-described property, or any proceeds from the sale thereof together with any property purchased with the proceeds, must be given to \_\_\_\_\_ [*name of remainder beneficiary and relationship to testator or other means of identification*].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Estates Created by Trusts & Wills Life Estates General Overview Real Property Law Estates Present Estates Life Estates



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A. Provisions Granting Life Estates and Remainders

*25-67 California Legal Forms--Transaction Guide § 67.206*

**§ 67.206 Life Estate With Power of Sale in Life Tenant**

**[1] Comment--Use of Form**

This form may be used to provide a surviving spouse or other individual with a life estate and the power to sell or dispose of all or part of the property. This form places no limitation on that power but may be modified to add limitations, such as to require the assent of a third person or to require a particular disposition of the proceeds.

A number of considerations may dictate granting a life tenant the power to sell the property, particularly when the purpose of the devise is to provide for the life tenant's care, support, and maintenance. Economic conditions, property deterioration, and increased financial burdens may make it worthwhile for the testator to permit a sale at the discretion of the life tenant.

This devise does not amount to a grant of a fee simple estate to the life tenant. The remainder beneficiaries retain their remainder interest subject to the life tenant's power of sale [*see Civ. Code §§ 740, 741; see also § 67.14*].

**[2] FORM**

**Life Estate With Power of Sale in Life Tenant**

[*paragraph number*]. I give to [*name of life tenant and relationship to testator or other means of identification, e.g., my wife Jane Brown*], for life, the real property situated in \_\_\_\_\_ County, California, commonly known as \_\_\_\_\_ [*address*] and more particularly described as follows: [*description*]. I authorize him/her to sell and convey this property at any time and subject to whatever conditions he/she deems suitable. I also authorize him/her to invest and reinvest the proceeds from any such sale in any manner and for any purposes that he/she deems proper, without being required to account to any person or court for any part of this property or any part of the proceeds of sale. On the death of \_\_\_\_\_ [*name of life tenant*], the above-described property, or any proceeds from the sale thereof together with any property purchased with the proceeds, must be given to \_\_\_\_\_ [*name of remainder beneficiary and relationship to testator or other means of identification*].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law  
Estates Created by Trusts & Wills  
Life Estates  
General Overview  
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Present Estates  
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DIVISION IV: WILLS AND TRUSTS  
CHAPTER 67 FUTURE INTERESTS AND PERPETUITIES  
PART IV. FORMS

A. Provisions Granting Life Estates and Remainders

*25-67 California Legal Forms--Transaction Guide § 67.207*

**§ 67.207 Life Estate With Alternative Contingent Remainder**

**[1] Comment--Use of Form**

This form creates a life estate with remainder to take effect on a specified condition, with an alternative disposition in the event the specified condition fails. Additional alternative dispositions may be created if desired, so that if the first in order fails, the next can be substituted. Thus it is possible to construct a series of alternative contingent remainders so that the testator can control the disposition of the property in the event that one or more of the contingencies fails. This device is specifically authorized by statute in California [*see Civ. Code § 696*].

The usual type of contingent remainder will vest in both right and enjoyment on a condition precedent. A condition precedent is one that fixes the beginning of the right to possession of the interest [*Civ. Code § 708*]. Because the interest does not vest until the condition occurs, a contingent remainder is subject to the rule against perpetuities [*see § 67.16*].

For further discussion of contingent remainders, see § 67.12[3][c].

**[2] FORM**

**Life Estate With Alternative Contingent Remainder**

[*paragraph number*]. I give to [*name of life tenant and relationship to testator or other means of identification, e.g., my son John Brown*], for life, the real property situated in \_\_\_\_\_ County, California, commonly known as \_\_\_\_\_ [*address*] and more particularly described as follows: [*description*]; remainder to \_\_\_\_\_ [*name of first remainder beneficiary and relationship to testator or other means of identification*] on condition that \_\_\_\_\_ [*specify condition which must occur within period permitted by rule against perpetuities, e.g., he/she survives the life tenant*], but if this condition should fail, then to \_\_\_\_\_ [*name of alternative remainder beneficiary and relationship to testator or other means of identification*].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Estates Created by Trusts & Wills Future Interests Remainder Interests Contingent  
Remainders Estate, Gift & Trust Law Estates Created by Trusts & Wills Life Estates General Overview Real Property  
Law Estates Future Interests Remainders Real Property Law Estates Present Estates Life Estates



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*25-67 California Legal Forms--Transaction Guide § 67.208*

**§ 67.208 Life Estate With Vested Remainder to Shift on Condition Subsequent**

**[1] Comment--Use of Form**

This provision creates a life estate with vested remainder, subject to divestment on a condition subsequent. The condition subsequent is typically the death of the vested remainder beneficiary without issue. If the vested remainder beneficiary should die without surviving issue, his or her interest in the property terminates in favor of an alternative beneficiary. At common law, the alternative beneficiary's interest is characterized as a shifting executory interest. Such an interest is within California's broad statutory definition of a remainder [*see Civ. Code § 769; see also § 67.12[4]*].

**[2] FORM**

**Life Estate With Vested Remainder to Shift on Condition Subsequent**

[*paragraph number*]. I give to [*name of life tenant and relationship to testator or other means of identification, e.g., my son John Brown*], for life, the real property situated in \_\_\_\_\_ County, California, commonly known as \_\_\_\_\_ [*address*] and more particularly described as follows: [*description*]; remainder to \_\_\_\_\_ [*name of vested remainder beneficiary and relationship to testator or other means of identification*], but if \_\_\_\_\_ [*s pecify condition subsequent, e.g., he/she dies without surviving issue*], then to \_\_\_\_\_ [*name of alternative beneficiary who will take remainder and relationship to testator or other means of identification*].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Estates Created by Trusts & Wills Future Interests Remainder Interests Vested  
Remainders Estate, Gift & Trust Law Estates Created by Trusts & Wills Life Estates General Overview Real Property  
Law Estates Future Interests Remainders Real Property Law Estates Present Estates Life Estates



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*25-67 California Legal Forms--Transaction Guide § 67.209*

**§ 67.209 Life Estate to Surviving Spouse and Direction to Elect Estate Tax Marital Deduction**

**[1] Comment**

**[a] Use of Form**

This form is a will provision that gives the testator's surviving spouse a life estate in real property, with remainder to the testator's children. It is intended for use when the testator wants the gift to qualify for the estate tax marital deduction [*see I.R.C. § 2056(b)(7); see also § 67.19[2]*].

This form contains a statement that the testator intends that the interest will constitute a qualifying income interest for life for purposes of the estate tax marital deduction under *I.R.C. § 2056(b)(7)*. The interest would qualify for the deduction without this statement, but it is included to alert the executor, who must affirmatively elect the deduction [*see I.R.C. § 2056(b)(7)(B)(v)*].

This provision is unnecessary in the case of property held by the spouses in joint tenancy, because such property will pass by operation of law to the surviving spouse on the testator's death.

**[b] Availability of Marital Deduction**

A transfer will not qualify for the marital deduction if the property passes in the form of a nondeductible terminable interest [*I.R.C. § 2056(a), (b)*]. For purposes of this rule, a terminable interest is generally an interest that will terminate or fail on the lapse of time or the occurrence or nonoccurrence of some contingency [*I.R.C. § 2056(b); Treas. Reg. § 20.2056(b)-1(b)*]. Life estates and estates for years are terminable interests [*Treas. Reg. § 20.2056(b)-1(b)*].

A life estate in property that passes to a surviving spouse is not a nondeductible terminable interest if all of the following conditions exist [*I.R.C. § 2056(b)(7)*]:

- The surviving spouse is given the right to receive all of the income from the property, payable at least annually.

- No person has a power to appoint any part of the property to any person other than the surviving spouse during the surviving spouse's lifetime.
- The deceased spouse's executor elects to treat the property on the deceased spouse's estate tax return as qualified terminable interest property (QTIP).

Although this type of interest is most often associated with QTIP trusts [*see* Ch. 71, *Marital Deduction Trusts* ], there is nothing in the statute making it inapplicable to other types of life interests as long as they meet all applicable requirements.

### **[c] Amount of Marital Deduction**

A marital deduction is available for the full value of a transfer of qualified terminable interest property [*I.R.C.* § 2056(b)(7)(A)(I), (ii)]. In the case of a gift of a life estate in a family residence to a surviving spouse, with remainder to the testator's children, the testator's estate can claim an estate tax marital deduction for the full value of the residence, not merely the value of the spouse's life estate. However, the remainder interest does not escape taxation entirely. Instead, the full value of the residence will be taxable in the estate of the surviving spouse on his or her death [*I.R.C.* § 2044].

Whether the election of the marital deduction will be advantageous, or whether it would be preferable to have the property taxed in the estate of the testator rather than the estate of the spouse, will depend on the economic situations of the spouse and the remainder beneficiaries, the relative sizes of the estates of the testator and the spouse, and the spouse's probable life expectancy.

### **[d] Requirements for Qualified Terminable Interest Property**

In order for a transfer to qualify as qualified terminable interest property, the surviving spouse must have a qualifying income interest for life in the property [*I.R.C.* § 2056(b)(7)(B)(I)(II)]. The surviving spouse has a qualifying income interest for life if (1) he or she is entitled to all of the income from the property payable annually or at more frequent intervals, and (2) no person has a power to appoint any part of the property to any person other than the surviving spouse (except a power exercisable only at or after the surviving spouse's death) [*I.R.C.* § 2056(b)(7)(B)(ii)]. In California, an ordinary life estate in real property will qualify for the marital deduction because, by statute, the life tenant is entitled to all of the income [*Civ. Code* §§ 732, 748].

### **[e] Election of Marital Deduction**

The executor must affirmatively elect to have the marital deduction apply to gifts of qualified terminable interest property [*I.R.C.* § 2056(b)(7)(B)(I)(III)]. The election is made on the estate's federal tax return and, once made, is irrevocable [*I.R.C.* § 2056(b)(7)(B)(v)].

This form contains a provision permitting the executor to waive the election if it appears, at the time the estate tax return is filed, that it would be more advantageous to have the gift taxed in the testator's estate rather than in the estate of the surviving spouse.

### **[f] Generation-Skipping Transfer Tax**

If the holders of the remainder interest are the testator's grandchildren or other beneficiaries assignable to a generation two or more levels below the testator's generation, the generation-skipping transfer (GST) tax may apply [*see I.R.C.* §§ 2601, 2611, 2612(a), 2652(b)(1)]. For further discussion of the GST tax, see § 67.19[3].

**[2] FORM****Life Estate to Surviving Spouse and Direction to Elect Estate Tax Marital Deduction**

[*paragraph number*]. I give to my spouse, \_\_\_\_\_ [*name of spouse*], for life, with remainder to \_\_\_\_\_ [*name of remainder beneficiary and relationship to testator or other means of identification; if two or more individuals are to share in remainder, specify proportions (such as "equally")*] on the death of \_\_\_\_\_ [*name of spouse*], the real property situated in \_\_\_\_\_ County, California, commonly known as \_\_\_\_\_ [*address*] and more particularly described as follows: [*description*]. It is my intent that this life interest to my spouse will constitute a qualifying income interest for life for purposes of the estate tax marital deduction. I direct my executor to elect to have the estate tax marital deduction apply to this gift unless my executor determines, in the exercise of his/her best judgment that sufficient funds to provide for the care, support, and maintenance of my spouse for life in his/her accustomed lifestyle will be available to my spouse without the tax savings that would result from the election, and that a failure to make the election will result in a net tax savings when the probable tax consequences of the election on my spouse's estate are taken into account.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law  
 Estates Created by Trusts & Wills  
 Life Estates  
 General Overview  
 Real Property  
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 Deductions  
 Marital Deduction (IRC secs. 2056, 2523)  
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A. Provisions Granting Life Estates and Remainders

*25-67 California Legal Forms--Transaction Guide § 67.210*

**§ 67.210 Surviving Spouse to Have Use of Property Until Death or Remarriage**

**[1] Comment**

**[a] Use of Form**

This form is a will provision that gives the testator's surviving spouse the use of specified real property for life or until remarriage. On the death or remarriage of the surviving spouse, the property will pass outright to specified individuals in fee simple. This type of provision is typically used when the testator wants to ensure that his or her spouse will have a residence for life but expects that this protection will not be necessary if the surviving spouse remarries. The recipients of the property on the death or remarriage of the surviving spouse will typically be the testator's children.

This provision is ineffective respecting property held by the spouses in joint tenancy, because such property will pass by operation of law to the surviving spouse on the testator's death.

**[b] Condition in Restraint of Marriage**

In drafting this type of provision, the attorney must ensure that the provision is not an illegal restraint on marriage. Conditions imposing restraints on marriage, except on the marriage of a minor, are void [*Civ. Code § 710*]. For a discussion of the considerations in drafting such a provision, see § 67.13[3].

**[2] FORM**

**Surviving Spouse to Have Use of Property Until Death or Remarriage**

[*paragraph number*]. I give to my spouse \_\_\_\_\_ [*name of spouse*], for life or until he/she remarries, the real property situated in \_\_\_\_\_ County, California, commonly known as \_\_\_\_\_ [*address*] and more particularly described as follows: [*description*]. On the death or remarriage of my spouse, this property shall go to \_\_\_\_\_ [*name of remainder beneficiary and relationship to testator or other means of identification*]. The intent and purpose of this provision is to provide for my spouse by giving





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*25-67 California Legal Forms--Transaction Guide §§ 67.211-67.219*

**[Reserved]**

§§ 67.211[Reserved]



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B. Other Types of Future Interests

*25-67 California Legal Forms--Transaction Guide § 67.220*

**§ 67.220 Future Interest to Take Effect on Specified Condition**

**[1] Comment--Use of Form**

This provision makes a gift that will take effect only on a specified condition, without the intervention of a preceding estate. At common law, such an interest is called a springing executory interest. Such an interest is within California's broad statutory definition of a remainder [*see Civ. Code § 769; see also § 67.12[4]*].

This type of transfer is most commonly made inter vivos, such as a gift to a child conditioned on marriage or completion of a college education. If it is made as a testamentary disposition, the testator need not dispose of the preceding estate at the time the interest is created [*see Civ. Code §§ 767, 771*]. In such a case, the present interest normally remains in the testator's heirs or residuary beneficiaries. As a practical matter, a testamentary trust is likely to be a more desirable method of accomplishing the same result.

In this type of disposition, there is no assurance that the specified condition will ever occur. The testator may wish to consider this eventuality and limit the time for occurrence of the condition, with an alternative disposition if the condition does not occur within the designated period.

**[2] FORM**

**Future Interest to Take Effect on Specified Condition**

[*paragraph number*]. I give to [*name of recipient and relationship to donor or other means of identification, e.g., my son John Brown*] at the time [*specify condition, e.g., he is graduated from college or he first marries*], the real property situated in \_\_\_\_\_ County, California, commonly known as \_\_\_\_\_ [*address*] and more particularly described as follows: [*description*].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Estates Created by Trusts & Wills Future Interests General Overview Estate, Gift & Trust  
Law Estates Created by Trusts & Wills Future Interests Executory Interests Real Property Law Estates Future  
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*25-67 California Legal Forms--Transaction Guide § 67.221*

**§ 67.221 Fee Simple Subject to Condition Subsequent (Power of Termination)**

**[1] Comment**

**[a] Use of Form**

This provision creates a fee simple estate that may terminate on a specified condition. Under California law, this interest is classified as a fee simple subject to a condition subsequent [*Civ. Code § 885.020*]. The right to terminate the fee simple on the occurrence of the condition is known as a power of termination and is a future interest [*Civ. Code § 885.020*]. When the condition occurs, the fee simple does not revert automatically to the holder of the power; instead, the holder must affirmatively exercise the power by notice or civil action within five years after the occurrence of the condition [*Civ. Code § 885.050*].

Any estate that would be characterized at common law as a fee simple determinable is deemed enforceable as a fee simple subject to a condition subsequent [*Civ. Code § 885.020*]. Any future interest that would be classified at common law as a right of reentry or possibility of reverter is enforceable as a power of termination [*Civ. Code §§ 885.010, 885.020*]. For further discussion of powers of termination, see § 67.12[2][c].

**[b] Drafting Considerations**

Because they divest an estate on the occurrence of a condition subsequent, powers of termination must be drafted with great care. Conditions subsequent are not favored because they tend to destroy estates, and a provision will not be construed to create a condition subsequent if the language of the provision will bear any other reasonable construction [*Hawley v. Kafitz (1905) 148 Cal. 393, 394, 83 P. 248*].

**PRACTICE TIP:**

Defeasible fees may also be undesirable because they place excessive restrictions on the use of the property and create difficulties in alienating it. The attorney should advise the client to seriously consider whether a condition subsequent is of such importance that it should cause termination of the interest. In most cases, a trust can be used to accomplish the same goals while providing considerably more

flexibility.

### **[c] Duration of Power of Termination**

Unlike the common law right of reentry or possibility of reverter, a power of termination does not have a potentially infinite duration. The holder of the power must take steps to preserve it every 30 years, otherwise the power will expire [Civ. Code § 883.030; *see* § 67.12[2][e]].

### **[d] Estate Tax Consequences**

A transfer of a defeasible fee for a charitable purpose subject to a condition that may defeat that purpose will still qualify for the estate tax charitable deduction if the likelihood of the condition's occurring appears to be negligible at the time of the testator's death [Treas. Reg. § 25.2055-2(b)].

## **[2] FORM**

### **Fee Simple Subject to Condition Subsequent (Power of Termination)**

[*paragraph number*]. I give to \_\_\_\_\_ [*name of recipient, e.g., the City of Paradise*], on condition that [*state condition, e.g., the property is used as a public park*], the real property situated in \_\_\_\_\_ County, California, commonly known as \_\_\_\_\_ [*address*] and more particularly described as follows: [*description*]. If [*restate condition in the negative, e.g., the property is no longer being used as a public park*], then my heirs and successors have the power to terminate all of the right, title, and interest in the property granted by this provision, in the manner provided by law for the exercise of a power of termination, and shall thereupon have and enjoy this property as if this gift had not been made.

### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Estates Created by Trusts & Wills Estates in Fee Estate, Gift & Trust Law Estates Created by Trusts & Wills Future Interests General Overview Real Property Law Estates Future Interests Right of Entry Real Property Law Estates Present Estates General Overview Real Property Law Estates Present Estates Fee Simple Estates



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B. Other Types of Future Interests

*25-67 California Legal Forms--Transaction Guide §§ 67.222-67.229*

**[Reserved]**

§§ 67.222[Reserved]



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*25-67 California Legal Forms--Transaction Guide § 67.230*

**§ 67.230 Testamentary Gift of Existing Future Interest**

**[1] Comment--Use of Form**

This form may be used to make a testamentary gift of an existing future interest. In California, future interests are transferable by succession, will, and inter vivos transfer in the same manner as present interests [*Civ. Code § 699*]. There is no distinction between vested interests, contingent interests, and executory interests in this regard [ *Estate of Ferry (1961) 55 Cal. 2d 776, 785, 13 Cal. Rptr. 180, 361 P.2d 900* ] .

**[2] FORM**

**Testamentary Gift of Existing Future Interest**

[*paragraph number*]. I give to [*name of beneficiary and relationship to testator or other means of identification, e.g., my son John Brown*] \_\_\_\_\_ [*specify interest, e.g., my power of termination under the will of* \_\_\_\_\_ (*specify*)] in the real property situated in \_\_\_\_\_ County, California, commonly known as \_\_\_\_\_ [*address*] and more particularly described as follows: [*description*].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Estates Created by Trusts & Wills Future Interests General Overview Estate, Gift & Trust Law Wills Bequests & Devises Real Property Law Estates Future Interests General Overview



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*25-67 California Legal Forms--Transaction Guide § 67.231*

**§ 67.231 Perpetuity Saving Clause for Will Without Trust**

**[1] Comment**

**[a] Use of Form**

This form is a perpetuity saving clause for use in a will that does not create a trust but makes a class gift or otherwise makes a complex distribution of property to vest some time in the future. It is designed to ensure that all dispositions made under the will comply with the rule against perpetuities [*see* § 67.16]. (A perpetuity saving clause generally is not necessary in a simple will.)

**[b] Uniform Statutory Rule Against Perpetuities**

Since the enactment of the Uniform Statutory Rule Against Perpetuities [*Prob. Code* § 21200 *et seq.*] and its 90-year wait-and-see rule [*Prob. Code* §§ 20205(b), 21206(b), 21207(b); *see* § 67.16[6]], the risk of violating the rule against perpetuities in California has become negligible. It is still advisable, however, to include a perpetuity saving clause in any instrument that provides for a complicated disposition of property to take effect at some time in the future.

**[c] Purpose of Perpetuity Saving Clause**

A perpetuity saving clause is a provision in an instrument that is designed to guard against the inadvertent violation of the rule against perpetuities by setting an overall limit on the time within which interests created under the instrument must vest or terminate [*see* § 67.17[1]]. A perpetuity saving clause is not part of the dispositive provisions of the instrument but overrides those provisions.

**[d] Perpetuity Period**

This form states that every disposition made in the will must vest in interest no later than 21 years after the death of a named person, whose life is to be the measuring life [*see* § 67.16[8]]. To achieve the maximum permissible duration, the measuring life is generally described as the last survivor of the issue of the testator living when the will takes effect.

The chosen period is 21 years. It is not extended by any period of gestation because, in determining whether a nonvested property interest or a power of appointment is valid, the possibility that a child will be born to an individual after the individual's death is to be disregarded [*Prob. Code* § 21208; *see* § 67.16[10]].

#### **[e] Reformation of Disposition**

This form includes language designed to guide the court should it become necessary to construe or reform a provision in or disposition made by the will. When a court undertakes to reform a provision or disposition, it must be guided by the transferor's manifested plan of distribution [*see Prob. Code* § 21220; *see also* § 67.16[12]].

#### **[2] FORM**

##### **Perpetuity Saving Clause for Will Without Trust**

[*paragraph number*]. Notwithstanding any other provision of this will, every disposition made in this will must vest in interest (although not necessarily in possession) no later than 21 years after the death of [*designate measuring life, e.g., the last survivor of my issue or the last survivor of my spouse and my issue*] living at the time of my death. It is my purpose and intent that all dispositions that I have made in this will must vest within the period of the rule against perpetuities and that no interest created or passing under this will may be construed so as to be invalid under that rule.

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Estates Created by Trusts & Wills Invalid Restraints & Rule Against Perpetuities Estate, Gift & Trust Law Wills General Overview



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*25-67 California Legal Forms--Transaction Guide § 67.232*

**§ 67.232 Perpetuity Saving Clause for Will With Trust**

**[1] Comment--Use of Form**

This form is a perpetuity saving clause that may be used in a will that creates a trust. It provides that any trust created by the will, or by the exercise of any power of appointment created by the will, must terminate no later than 21 years after the death of the last survivor of a designated person alive at the date of the testator's death. The clause is designed to ensure that no power of appointment, income accumulation, spendthrift clause, or other provision of any trust created by the will can be invalidated for failure to comply with the rule against perpetuities.

Since the enactment of the Uniform Statutory Rule Against Perpetuities [*Prob. Code § 21200 et seq.*] and its 90-year wait-and-see rule [*Prob. Code §§ 20205(b), 21206(b), 21207(b); see § 67.16[6]*], the risk of violating the rule against perpetuities in California has become negligible. It is still advisable, however, to include a perpetuity saving clause in any instrument that creates a trust or otherwise provides for a complicated disposition of property to take effect at some time in the future.

Although the rule against perpetuities does not require the termination of a trust within the perpetuity period if all interests in the trust either vest or terminate within that period, it is generally advisable to require the termination of the trust on the expiration of that period. This will ensure that all interests and powers created by the trust will either vest or terminate within the applicable period.

A perpetuity saving clause in a trust instrument should include an alternative distribution provision. If the trust is terminated under the saving clause, the trustee should have directions as to how the trust property is to be distributed. An alternative distribution provision will give the trustee appropriate directions in this regard [*see § 67.17[4]*].

**[2] FORM**

**Perpetuity Saving Clause for Will With Trust**

[*paragraph number*]. Notwithstanding any other provision of this will, every trust created by this will [*add, if*

*applicable:* or by the exercise of any power of appointment created by this will] must terminate no later than 21 years after the death of [*designate measuring life, e.g., the last survivor of my issue or the last survivor of my spouse and my issue*] living at the time of my death. If a trust is terminated under this paragraph, the trustee must distribute all of the principal and undistributed income of the trust to the income beneficiaries of the trust in the proportion in which they are entitled (or eligible, in the case of discretionary payments) to receive income immediately before the termination. If that proportion is not fixed by the terms of this will, the trustee must distribute all of the trust property to the persons then entitled or eligible to receive income from the trust \_\_\_\_\_ [*specify pattern of distribution, e.g., outright in a manner that, in the trustee's opinion, will give effect to my intent in creating the trust, the trustee's decision to be final and incontestable by anyone or as a class, in the manner provided in California Probate Code Section \_\_\_\_\_ (240 or 246 or 247) or in equal shares, regardless of whether all of these persons are members of the same generation*].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Estates Created by Trusts & Wills Invalid Restraints & Rule Against Perpetuities Estate, Gift & Trust Law Trusts Testamentary Trusts Estate, Gift & Trust Law Wills General Overview



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*25-67 California Legal Forms--Transaction Guide § 67.233*

**§ 67.233 Perpetuity Saving Clause for Inter Vivos Trust Instrument**

**[1] Comment--Use of Form**

This form is a perpetuity saving clause that may be used in an inter vivos trust instrument. It provides that the trust created by the instrument, or by the exercise of any power of appointment created by the instrument, must terminate no later than 21 years after the death of a designated person alive at the date of execution of the instrument. The clause is designed to ensure that no power of appointment, income accumulation, spendthrift clause, or other provision of any trust created by the instrument will be invalidated for failure to comply with the rule against perpetuities.

The perpetuity saving clause in this form limits the vesting of interests or the duration of trusts to 21 years after the death of a named person, whose life is to be the measuring life [*see § 67.16[8]*]. To achieve the maximum permissible duration, the measuring life is generally described as the last survivor of the issue of the settlor who are living when the instrument takes effect. In the case of an inter vivos trust this will be the date of creation of the trust. However, the date of creation of the trust will depend on whether the trust is initially revocable or irrevocable. If the trust is irrevocable from the outset, the date of creation of the trust for perpetuity purposes is the date the trust is funded. If the trust is initially revocable, the date of creation of the trust for purposes of the perpetuity saving clause should not be the date the trust is funded or the trust instrument is executed but should be the date the trust becomes irrevocable.

In the usual case, it will serve no useful purpose to determine the measuring life until the trust becomes irrevocable. For example, if a married settlor with two living children executes a revocable living trust instrument, and later has two additional children, it is unlikely that the settlor would wish to measure off the perpetuity period from the date the trust instrument was executed, because that would exclude the third and fourth children from the group of measuring lives. It is far more probable that the settlor would want to include all of the children as measuring lives.

**[2] FORM**

**Perpetuity Saving Clause for Inter Vivos Trust Instrument**

[*paragraph number*]. Notwithstanding any other provision of this instrument, any trust created by this instrument or by

a power of appointment created by this instrument that has not terminated earlier must terminate no later than 21 years after the death of the last survivor of \_\_\_\_\_ [*name individuals, e.g., the settlor and the issue of the settlor living on the date of execution of this instrument or describe class of persons whose lives are to be measuring lives, e.g., the beneficiaries of the trust who are living on the date of execution of this instrument*]. If a trust is terminated because of the preceding sentence, the trustee must distribute the principal and undistributed income of the trust to the income beneficiaries of the trust in the same proportion that they are entitled to receive income immediately before the termination. If that proportion is not fixed by the terms of this instrument, distribution must be to the persons entitled to receive income immediately before the termination [*specify distribution plan, e.g., in the manner provided in California Probate Code Section 240*]. If there is no person who is entitled to receive income immediately before the termination, the trustee must distribute the principal and undistributed income to [*name distributees or specify class, e.g., the issue of the settlor then surviving in the manner provided in California Probate Code Section 240*].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Estates Created by Trusts & Wills Invalid Restraints & Rule Against Perpetuities Estate, Gift & Trust Law Trusts Irrevocable Living Trusts Estate, Gift & Trust Law Trusts Revocable Living Trusts



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DIVISION IV: WILLS AND TRUSTS  
CHAPTER 68 DURABLE POWERS OF ATTORNEY FOR PROPERTY MANAGEMENT

*25-68 California Legal Forms--Transaction Guide 68.syn*

**AUTHOR:** Reviewed by Albert G. Handelman

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§ 68.01 California Statutes

§ 68.02 Federal Statutes

§§ 68.03-68.04 [Reserved]

§ 68.05 Law Reviews and Periodicals

§ 68.06 Text References

[1] Matthew Bender Sources

[2] Additional Text References

§§ 68.07-68.09 [Reserved]

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[2] Governing Law

[a] Power of Attorney Law

[b] General Law of Agency

[3] Types

[a] Powers for Property Management

[b] Powers for Personal Care

[c] Powers for Health Care

[d] General Powers

[e] Special Powers

[f] Immediately Effective Powers

[g] Springing Powers

[h] Powers Executed on Printed Forms

[i] Statutory Form Powers

[j] Attorney-Drafted Powers

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[5] Uses in Estate Planning

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- [5] Duty to Deliver Possession of Property on Termination of Authority
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- [1] Third Persons Required to Respect Authority
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§ 68.18 Multiple Attorneys in Fact

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§ 68.111 Client's Personal and Financial Situation

Scope

§ 68.112 Potential Attorneys in Fact

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§ 68.113 When Power of Attorney Will Become Effective

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§ 68.114 Duration of Power

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§ 68.115 Powers of Attorney in Fact

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§§ 68.117-68.129 [Reserved]

§ 68.130 Execution of Durable Power of Attorney

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§ 68.140 Durable Power of Attorney for Property Management

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[a] Use of Form

[b] Powers From Uniform Statutory Form

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[l] Compensation

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[n] Power to Petition Court

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[p] Execution

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[2] Form

Durable Power of Attorney for Property Management and Other Personal Affairs (Long Form)

§ 68.201 Durable Power of Attorney for Property Management and Personal Affairs (Short Form)

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[b] Powers

[c] Power Over Specific Item or Class of Property

[d] Gifts

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[f] Compensation

[g] Exculpation of Attorney in Fact

[h] Power to Petition Court

[i] Governing Law

[j] Execution and Acknowledgment

[k] Recording Fact of Attorney's Advice

[2] Form

Durable Power of Attorney for Property Management and Personal Affairs (Short Form)

§§ 68.202-68.209 [Reserved]

§ 68.210 Notice of Revocation of Durable Power of Attorney

[1] Comment

[a] Use of Form

[b] Principal's Right to Revoke Power of Attorney

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[e] Revocation of Attorney in Fact's Authority

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Notice of Revocation of Durable Power of Attorney

§ 68.211 Transmittal Letter for Notice of Revocation

[1] Comment

[a] Use of Form

[b] Effect of Giving Notice

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Transmittal Letter for Notice of Revocation

§ 68.212 Statement Warning Principal of Legal Consequences of Durable Power of Attorney for Property Management

[1] Comment

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[2] Form

Statement Warning Principal of Legal Consequences of Durable Power of Attorney for Property Management

§ 68.213 Principal's Statement Regarding Warning

[1] Comment

[a] Use of Form

[b] Statement Regarding Warning

[2] Form

Principal's Statement Regarding Warning

Reviewed by Albert G. Handelmann\*

**FOOTNOTES:**

(n122)Footnote \*. Mr. Handelman is a member of the State Bar of California and a partner in the law firm of Merrill, Arnone & Handelman in Santa Rosa, California. He received his B.S. degree, cum laude, from the Wharton School, University of Pennsylvania, and his J.D. degree from the University of Southern California. Mr. Handelman is a certified specialist in Probate, Estate Planning, and Trust Law (California State Board of Legal Specialization), and a Fellow of the American College of Trust and Estate Counsel. He has frequently written and spoken throughout California for both professional and industry groups on a variety of subjects in the field of estate planning and administration. He is an officer and a director of the Redwood Empire Estate Planning Council.



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DIVISION IV: WILLS AND TRUSTS  
CHAPTER 68 DURABLE POWERS OF ATTORNEY FOR PROPERTY MANAGEMENT

*25-68 California Legal Forms--Transaction Guide Scope*

**AUTHOR:** Reviewed by Albert G. Handelmann

### **Scope**

Reviewed by Albert G. Handelmann\* Scope

This chapter covers durable powers of attorney for property management. It is designed as an introduction to the subject and a practical guide to the proper use of these devices.

The Legal Background discusses the rules of agency that apply to durable powers of attorney for property management, with emphasis on the comprehensive set of statutes known as the Power of Attorney Law. It describes how durable powers of attorney for property management are used in modern estate planning practice. It includes a detailed discussion of rules governing the creation of durable powers of attorney and the qualifications, selection, authority, duties, and resignation of attorneys in fact. It also discusses the relations of attorneys in fact with third parties, the compensation of attorneys in fact, and rules governing multiple and successor attorneys in fact. The Transaction Guide provides checklists for a variety of purposes relating to durable powers of attorney.

The Forms part of the chapter includes complete forms for the creation of durable powers of attorney for property management. It also includes statements that may be used to warn the principal of the legal consequences of signing a durable power of attorney, as well as forms that may be used to revoke a power of attorney.

Durable powers of attorney for property management are powerful and flexible devices. They are widely used by modern estate planners to complement the more traditional estate planning tools, wills and trusts. An attorney who prepares a durable power of attorney for a client should explore the client's need for other estate planning services. Recognizing that durable powers of attorney are but one weapon in the attorney's estate planning arsenal, the attorney should familiarize himself or herself with the broad principles of estate planning discussed elsewhere in this publication.

A durable power of attorney for property management is an integral part of many estate plans, and as such, its provisions must be coordinated with the client's other estate planning documents. For example, a living trust may authorize the trustee to cooperate in specified ways with an attorney in fact acting under a durable power of attorney. Knowledge of those provisions is essential if the planner is to properly tailor the power of attorney to dovetail with the living trust.

Ch. 60, *Estate Planning*, is an introduction to the subject of estate planning and a guide to other chapters in this publication that cover particular aspects of that subject, such as wills, trusts, lifetime gifts, and contracts that affect wills and trusts.

For coverage of nondurable powers of attorney, see Ch. 98, *Powers of Attorney* .

Durable powers of attorney for health care are now classified as a species of "advance health care directive" under California law, and, as such, are governed by the provisions of the Health Care Decisions Law [*Prob. Code* § 4600 *et seq.*] rather than the Power of Attorney Law. Advance health care directives, including powers of attorney for health care, are now covered in Ch. 104, *Health Care Transactions, Consents, and Directives* .

**FOOTNOTES:**

(n123)Footnote \*. Mr. Handelman is a member of the State Bar of California and a partner in the law firm of Merrill, Arnone & Handelman in Santa Rosa, California. He received his B.S. degree, cum laude, from the Wharton School, University of Pennsylvania, and his J.D. degree from the University of Southern California. Mr. Handelman is a certified specialist in Probate, Estate Planning, and Trust Law (California State Board of Legal Specialization), and a Fellow of the American College of Trust and Estate Counsel. He has frequently written and spoken throughout California for both professional and industry groups on a variety of subjects in the field of estate planning and administration. He is an officer and a director of the Redwood Empire Estate Planning Council.



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PART I. RESEARCH GUIDE  
A. Primary Sources

*25-68 California Legal Forms--Transaction Guide § 68.01*

**AUTHOR:** Reviewed by Albert G. Handelman

**§ 68.01 California Statutes**

General rules of agency.

Definition of agency. *Civ. Code §§ 2295-2300.*

Authority of agents. *Civ. Code §§ 2304-2326.*

Obligations of principal to persons dealing with agent. *Civ. Code §§ 2330-2339.*

Obligations of agents to third persons. *Civ. Code §§ 2342-2345.*

Delegation of agency. *Civ. Code §§ 2349-2351.*

Termination of agency. *Civ. Code §§ 2355-2357.*

Natural Death Act. *Health & Safety Code §§ 7185-7194.5.*

Power of Attorney Law.

Definitions and general provisions. *Prob. Code §§ 4000-4054.*

Powers of attorney generally. *Prob. Code §§ 4100-4310.*

Uniform Statutory Form Power of Attorney. *Prob. Code §§ 4400-4465.*

Judicial proceedings concerning powers of attorney. *Prob. Code §§ 4500-4545.*

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Business & Corporate Law Agency Relationships General Overview Business & Corporate Law Agency Relationships Agents Distinguished General Overview Estate, Gift & Trust Law Powers of Attorney General Overview Estate, Gift & Trust Law Powers of Attorney Durable Powers



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A. Primary Sources

*25-68 California Legal Forms--Transaction Guide § 68.02*

**AUTHOR:** Reviewed by Albert G. Handelman

**§ 68.02 Federal Statutes**

Federal estate tax.

Imposition and rate of tax. *I.R.C. § 2001.*

Unified credit against estate tax. *I.R.C. § 2010.*

Transfers with retained life estate. *I.R.C. § 2036.*

Transfers taking effect at death. *I.R.C. § 2037.*

Revocable transfers. *I.R.C. § 2038.*

Powers of appointment. *I.R.C. § 2041.*

Proceeds of life insurance. *I.R.C. § 2042.*

Marital deduction. *I.R.C. § 2056.*

Federal gift tax.

Imposition of tax. *I.R.C. § 2501.*

Rate of tax. *I.R.C. § 2502.*

Taxable gifts. *I.R.C.* § 2503.

Unified credit against gift tax. *I.R.C.* § 2505.

Transfers in general. *I.R.C.* § 2511.

Gifts to spouse. *I.R.C.* § 2523.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Powers of Attorney General Overview Estate, Gift & Trust Law Powers of Attorney Durable Powers Tax Law Federal Estate & Gift Taxes General Overview



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A. Primary Sources

*25-68 California Legal Forms--Transaction Guide §§ 68.03-68.04*

**AUTHOR:** Reviewed by Albert G. Handelman

**[Reserved]**

§§ 68.03[Reserved]



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B. Secondary Sources

*25-68 California Legal Forms--Transaction Guide § 68.05*

**AUTHOR:** Reviewed by Albert G. Handelman

**§ 68.05 Law Reviews and Periodicals**

Sturgul, *Financial Durable Powers of Attorney (With Form)*, 41(5) *Prac. Law.* 21 (1995).

Berry & Kesterson, *Your Tax Practice and Durable Powers of Attorney*, 7 *Prac. Tax Law.* 23 (Spring 1993).

Montgomery & Wright, *Beware the Hidden Dangers of Durable Power of Attorney*, Pt. 2, 105 *L.A. Daily J.* 7 (Dec. 17, 1992).

Montgomery & Wright, *Beware the Hidden Dangers of Durable Power of Attorney*, Pt. 1, 105 *L.A. Daily J.* 7 (Dec. 16, 1992).

Montgomery & Wright, *Durable Power of Attorney Can Be Used in Tax Planning*, 105 *L.A. Daily J.* 7 (Dec. 16, 1992).

Schlenger, et al, *Gifts Made Under a Durable Power of Attorney Are Ruled Revocable*, 9 *Est. Plan.* 370 (1992).

Schlesinger & Scheiner, *Estate Planning Using Powers of Attorney*, 131 *Tr. & Est.* 38(7) (1992) .

McGovern, *Trusts, Custodianships, and Durable Powers of Attorney*, 27 *Real Prop., Prob. & Tr. J.* 1 (1992).

Grobe, *Planning for Incapacity: Use of Durable Powers of Attorney and Other Devices*, 22 *Beverly Hills B. Ass'n J.* 311 (Fall 1988).

Lombard, *10 Reasons Why You Should Be Recommending the Durable Power of Attorney to Clients*, 1 *Prob. & Prop.* 28 (1987).

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Powers of Attorney General Overview Estate, Gift & Trust Law Powers of Attorney Durable Powers



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B. Secondary Sources

*25-68 California Legal Forms--Transaction Guide § 68.06*

**AUTHOR:** Reviewed by Albert G. Handelman

**§ 68.06 Text References**

**[1] Matthew Bender Sources**

California Legal Forms(Matthew Bender).

Ch. 60, *Estate Planning* .

Ch. 60A, *Gifts*.

Ch. 70, *Complete Revocable Trust Forms* .

Ch. 98, *Powers of Attorney* .

Ch. 106, *Anatomical Gifts* .

California Wills and Trusts(Matthew Bender).

Ch. 3, *Selecting the Proper Estate Planning Devices*.

Ch. 151, *Durable Powers of Attorney for Property Management*.

Modern Estate Planning(Matthew Bender).

Ch. 36, *Estate Planning Goals*.

Ch. 37, *Using Revocable Living Trusts*.

**[2] Additional Text References**

California Durable Power of Attorney Handbook (Cal. C.E.B. 1995).

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Powers of Attorney General Overview Estate, Gift & Trust Law Powers of Attorney Durable Powers



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*25-68 California Legal Forms--Transaction Guide §§ 68.07-68.09*

**AUTHOR:** Reviewed by Albert G. Handelman

**[Reserved]**

§§ 68.07[Reserved]



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*25-68 California Legal Forms--Transaction Guide § 68.10*

**AUTHOR:** Reviewed by Albert G. Handelman

**§ 68.10 Durable Power of Attorney**

**[1] Definition**

A durable power of attorney is a written instrument by which one person authorizes another to act as his or her agent notwithstanding (or as a result of) the first person's subsequent incapacity [*see Prob. Code §§ 4022* ("power of attorney" defined), 4124 ("durable power of attorney" defined)]. The person who confers the authority is the "principal" [*Prob. Code § 4026*], and the person on whom the authority is conferred is known as the "attorney in fact" [*Prob. Code § 4014*].

The fact that a durable power of attorney is exercisable when the principal is incapacitated is its distinguishing characteristic. When a nondurable power of attorney is created, the authority of the attorney in fact generally terminates if and when the principal loses the capacity to contract [*Prob. Code § 4155(a)*; *see § 68.11[6]* (capacity to contract)], although the attorney in fact may have ostensible authority to act under a nondurable power when a third person who has no actual knowledge of the principal's incapacity acts in good faith under the power [*Prob. Code § 4304(b)*]. Under a durable power of attorney, in contrast, acts done by the attorney in fact while the principal is incapacitated have the same effect as if the principal were not incapacitated; that is, they inure to the benefit of, and bind, both the principal and the principal's successors in interest in the same way that they would have if the principal had full capacity [*Prob. Code § 4125*].

**[2] Governing Law**

**[a] Power of Attorney Law**

In California, powers of attorney are subject to a special set of statutes known as the Power of Attorney Law, which became operative on January 1, 1995 [*Civ. Code § 2400*; *Prob. Code § 4000 et seq.*]. This law restructured the former power of attorney statutes [*see former Civ. Code §§ 2400-2514*, repealed Jan. 1, 1995, by Stats. 1994, ch. 307] and relocated them in the Probate Code. The Power of Attorney Law was located in the Probate Code to emphasize the estate planning characteristics of the durable power of attorney and to assist attorneys and the general public in

distinguishing powers of attorney executed for personal reasons from powers of attorney used in business transactions [*Comprehensive Power of Attorney Law*, 24 Cal. L. Revision Comm'n Reports 111, 120-121 (1994)].

For the effect of a power of attorney provision making a power subject to the Power of Attorney Law, see § 68.200[1][o].

### **[b] General Law of Agency**

All powers of attorney, both durable and nondurable, are forms of the agency relationship [*see Comprehensive Power of Attorney Law*, 24 Cal. L. Revision Comm'n Reports 111, 121 (1994)] and, as such, subject to the general rules governing agents and agency set forth in the Civil Code [*see Civ. Code* §§ 2019-2022 (agents), 2295-2400 (agency)]. These rules apply to powers of attorney in all cases except those in which the Power of Attorney Law [*see Prob. Code* §§ 4000-4948; *see also* [a], *above*] provides a specific rule [*Prob. Code* § 4051].

### **[3] Types**

#### **[a] Powers for Property Management**

A durable power of attorney that gives the attorney in fact authority to make decisions relating to the principal's property is described as a durable power of attorney for property management [*see Prob. Code* § 4123(b)]. Durable powers of attorney for property management are widely used in California and elsewhere to provide for the management of property that the principal cannot, or chooses not to, manage personally. When a durable power for property management is also a "springing power," it provides a mechanism whereby the principal's property may be managed by the attorney in fact at some future time or in the event of a future contingency, such as the principal's disability or incapacity [*see Prob. Code* § 4030; *see also* [g], *below*].

A durable power of attorney that gives the attorney in fact authority with regard to the principal's property may grant authority to make decisions concerning all or part of the principal's real property, personal property, or both; it may confer authority over property owned by the principal at the time the power of attorney is executed or property that is not acquired until a later time; and it may confer authority over property that is located outside California, as well as that located within the state [*Prob. Code* § 4123(b)].

When a power of attorney grants authority with regard to all the principal's property, there is no need to describe each item or parcel of property as to which authority is granted [*Prob. Code* § 4123(b)].

#### **[b] Powers for Personal Care**

A durable power of attorney that gives the attorney in fact authority to make decisions relating to the personal care of the principal is described as a durable power of attorney for personal care [*see Prob. Code* § 4123(c)]. Decisions that the attorney in fact may make pursuant to a durable power of attorney for personal care include determining where the principal will live, providing meals, hiring household employees, providing transportation, handling mail, and arranging recreation and entertainment for the principal [*Prob. Code* § 4123(c)].

#### **PRACTICE TIP:**

*Prob. Code* § 4123(c), regarding durable powers of attorney for personal care, is new and its provisions are not yet fully understood. For example, an attorney in fact acting under a durable power of attorney for property management may need to handle business-related mail, although only the section on the durable power of attorney for personal care specifically mentions handling mail. That section probably refers only to handling personal mail, not business-related mail. *Commentary by Albert G. Handelman.*

A durable power of attorney for personal care is similar in some respects to a power of attorney for health care, but

should be distinguished from it. While a durable power of attorney for personal care authorizes the attorney in fact to make many decisions of a personal nature, it does not authorize the attorney in fact to make health care decisions for the principal unless it contains specific authority to that effect, and unless the power of attorney meets the special requirements for powers of attorney for health care [ see Ch. 104, *Health Care Transactions, Consents, and Directives* ].

### **[c] Powers for Health Care**

Powers of attorney for health care allow a designated agent to make health care decisions for the principal to the same extent that the principal could make health care decisions if the principal had the capacity to do so [*Prob. Code* § 4683(a)]. The agent is also authorized by statute to make decisions that may be effective after the principal's death, including making dispositions under the Uniform Anatomical Gift Act [*Health & Safety Code* § 7150 *et seq.*; see Ch. 106, *Anatomical Gifts* ], authorizing an autopsy [see *Health & Safety Code* § 7113], and directing the disposition of the principal's remains [*Prob. Code* § 4683(b); see *Health & Safety Code* § 7100 *et seq.*]. These powers are subject to any limitations contained in the durable power of attorney [*Prob. Code* § 4683]. Powers of attorney for health care are an important personal planning tool for clients and should be discussed with every client in connection with preparation of the client's estate plan.

Prior to July 1, 2000, durable powers of attorney for health care, like other durable powers of attorney, were governed by the general provisions of the Power of Attorney Law [*Prob. Code* § 4100 *et seq.*], augmented by special provisions applicable specifically to durable powers of attorney for health care [former *Prob. Code* § 4600 *et seq.*, repealed eff. July 1, 2000]. Effective July 1, 2000, however, powers of attorney for health care are no longer governed by the Power of Attorney Law [see *Prob. Code* § 4050(a)(1)]. Instead, they are governed by the Health Care Decisions Law [*Prob. Code* § 4600 *et seq.*; see *Prob. Code* § 4680], which incorporates the Uniform Health Care Decisions Act [*Prob. Code* § 4670 *et seq.*].

The Health Care Decisions Law uses the term "power of attorney for health care" rather than "durable power of attorney for health care." Under the Health Care Decisions Law, powers of attorney for health care are treated as a species of "advance health care directive" [*Prob. Code* § 4605], a term that also includes any written or oral direction by a patient concerning a health care decision by that patient, including selection and discharge of health care providers, approval or disapproval of medical treatments and procedures, and directions to provide or withhold all forms of health care [see *Prob. Code* §§ 4605, 4617, 4623 (applicable definitions)]. Under the Uniform Health Care Decisions Law, a power of attorney is legally sufficient if it satisfies the requirements for an advance health care directive under *Prob. Code* § 4673 [*Prob. Code* § 4680]. These requirements are discussed in Ch. 104, *Health Care Transactions, Consents, and Directives*, which also contains a form for "advance health care directive" that includes a power of attorney for health care. Ch. 104, *Health Care Transactions, Consents, and Directives*, also contains discussion of the use of powers of attorney for health care in estate planning.

Even when powers of attorney for health care were governed by the Power of Attorney law, the standard practice was to create a separate instrument for a durable power of attorney for health care, rather than combining it with a durable power of attorney for property management. Since these two types of powers are now governed by completely different statutes, the use of separate instruments is essential.

The Health Care Decisions Law applies to all powers of attorney for health care, regardless of whether they were executed before, on, or after July 1, 2000 [*Prob. Code* § 4665(a)]. However, the Health Care Decisions Law does not affect the validity of any durable power of attorney for health care executed before July 1, 2000, as long as it was valid under prior law [*Prob. Code* § 4665(d)]. Similarly, any durable power of attorney executed on a printed form that was valid under prior law is also valid, regardless of whether it was executed before, on, or after July 1, 2000 [*Prob. Code* § 4665(e)].

Proceedings concerning durable powers of attorney for health care commenced before July 1, 2000, are governed by the Health Care Decisions Law unless the court determines that application of a particular provision of that law would substantially interfere with the effective conduct of the proceedings or the rights of the parties and other interested persons, in which case the particular provision does not apply, and prior law instead applies [*Prob. Code* § 4665(c)]. All proceedings involving durable powers of attorney for health care commenced after July 1, 2000, are governed by the Health Care Decisions Law [*Prob. Code* § 4665(b)].

#### **[d] General Powers**

A power of attorney that gives the attorney in fact authority to act on behalf of the principal with respect to all lawful subjects and purposes, and that does not limit the attorney in fact's authority to a particular act, subject, or purpose, is generally referred to as a "general" power [*see Prob. Code* § 4123(a)]. When a principal creates a general power of attorney, the attorney in fact has all the authority to act that a person having the capacity to contract may carry out through an attorney in fact specifically authorized to take the action [*Prob. Code* § 4260; *see Civ. Code* § 1556 (capacity to contract); *see also* § 68.11[6]].

It is theoretically possible for a general power of attorney to be a durable power. In practice, however, general powers of attorney are almost always nondurable, and durable powers are almost always "special" [*see* [e], *below*]. Although durable powers of attorney for property management often confer very broad authority on the attorney in fact, such a power of attorney, by definition, limits the attorney in fact's authority to the management of the principal's property and, if uncoupled with other authority, would thus be classified as a special power [*see Prob. Code* § 4262; *see also* [e], *below*].

For coverage of nondurable powers of attorney, see Ch. 98, *Powers of Attorney* .

#### **[e] Special Powers**

A power of attorney that limits the authority of the attorney in fact to particular acts, subjects, or purposes, is described as a "special" power of attorney [*see Prob. Code* §§ 4123(a), 4262]. When a power of attorney limits the attorney in fact's authority in this way, the attorney in fact has the authority granted in the power, as limited in the power, and the authority incidental, necessary, or proper to carry out the granted authority [*Prob. Code* § 4262]. As already noted [*see* [d], *above*], durable powers of attorney are almost always special powers.

#### **[f] Immediately Effective Powers**

A power of attorney may, by its terms, become effective on execution. When a power of attorney is drafted in this way, it is referred to as an "immediately effective" power, to distinguish it from a "springing" power [*see* [g], *below*]. An immediately effective power of attorney may be either durable or nondurable.

#### **[g] Springing Powers**

A power of attorney is described as a "springing" power if, by its terms, it is to become effective at a specified future time or on the occurrence of a specified future event or contingency, such as the subsequent incapacity of the principal [*Prob. Code* § 4030]. Although a springing power may be either durable or nondurable [*Prob. Code* § 4030], powers of this kind are usually durable. Many prospective principals feel that, although they are currently quite capable of conducting their own affairs, they may need the assistance of another person at some time in the future; such people will often wish to authorize an attorney in fact to perform acts or make decisions for them only at such time as they are unable to do those acts or make those decisions personally. A springing power may be an attractive estate planning vehicle for people of this kind [*see* [5], *below* (estate planning uses for durable powers of attorney)].

Despite its inherent attractiveness, the springing power of attorney has traditionally been viewed with some suspicion

by estate planners. Springing powers are not authorized in all states, and in particular cases it may be difficult to determine when the "triggering" event described in the power (typically the principal's incapacity) has occurred. For this reason, third parties have in the past been hesitant to rely on the authority of an attorney in fact designated in a springing power [*see Recommendations Relating to Powers of Attorney*, 20 Cal. L. Revision Comm'n Reports 401, 410 (1989)].

In California, the Power of Attorney Law addresses this problem by providing that in a springing power the principal may designate one or more persons who, by a written declaration under penalty of perjury, have the power to determine conclusively whether the specified event or contingency has occurred [*Prob. Code § 4129(a)*].

**PRACTICE TIP:**

It is not clear from the statute whether the person or persons holding this power must be named or may simply be described by the role they play. For example, can the durable power of attorney simply make reference to the principal's treating physician, or must a specific doctor be named? Caution suggests specifically naming the person or persons to hold the power in cases where that is possible. *Commentary by Albert G. Handelman.*

The power to make this designation may be conferred on the attorney in fact named in the power or some other person, and it may authorize the designated person to make the determination either alone or jointly with other persons [*Prob. Code § 4129(a)*]. However, the Power of Attorney Law also provides that this method is not the exclusive method for determining when the attorney in fact's authority becomes exercisable [*Prob. Code § 4129(d)*].

**PRACTICE TIP:**

Although this authority must be used cautiously, its availability greatly enhances the usefulness of springing powers, and makes their increased use more likely. *Commentary by Albert G. Handelman.*

**[h] Powers Executed on Printed Forms**

Although durable powers of attorney are important documents with potentially far-reaching consequences, many durable powers are executed on printed forms without the assistance of attorneys. Recognizing this, the Power of Attorney Law requires that, when a printed form is used to execute a durable power of attorney for property management (other than the statutory form power of attorney) and the principal does not have the advice of legal counsel, the form must contain a special notice printed in not less than 10-point boldface type [*Prob. Code § 4128(a)*]. This notice contains warnings regarding the nature of a durable power of attorney, the scope of the attorney in fact's authority under it, and the importance of carefully reading and understanding the document before signing it [*Prob. Code § 4128(a)*]. The text of the required notice is set forth in *Prob. Code § 4128(a)* and reproduced in full in § 68.212[2].

Similar (but not identical) notices are required on statutory form powers of attorney [*Prob. Code § 4401; see [i], below*].

**[i] Statutory Form Powers**

The Power of Attorney Law includes the Uniform Statutory Form Power of Attorney Act [*see Prob. Code §§ 4400-4465*], which includes the text of a complete power of attorney for property management [*see Prob. Code § 4401; see also Ch. 98, Powers of Attorney* ]. When this form is properly completed and the principal's signature is acknowledged, the form is legally sufficient for all of the purposes stated in it [*Prob. Code §§ 4401, 4402*]. The text of the statutory form power of attorney is presented in Ch. 98, *Powers of Attorney*.

The Uniform Statutory Form Power of Attorney includes a list of powers that may be conferred on (or withheld from) the attorney in fact by simply initialing (or not initialing) spaces on the form [*Prob. Code § 4401*]. The Uniform Act contains a set of statutory provisions construing the powers that may be granted under the statutory power [*see Prob. Code §§ 4450-4465*]. One of those provisions describes the general powers that are conferred on the attorney in fact

when the statutory form is used [*see Prob. Code § 4450*], while additional provisions construe particular items in the list of powers set forth on the form [*see Prob. Code §§ 4451-4463*]. This provides the statutory form with both certainty and precision, and is one of its advantages. However, the listed powers, together with the statutory provisions construing those powers, may also be copied into an attorney-drafted form and thus achieve the same certainty and precision while permitting custom tailoring of the document [for an attorney-drafted form that adopts this approach, *see § 68.200[2]*].

The Uniform Statutory Form has the advantages of simplicity and ease of use. However, it shares the disadvantages of most other printed forms, in that it is somewhat rigid and does not offer the same opportunities as an attorney-drafted power for tailoring the language of the power to the client's individual needs and preferences.

Before January 1, 1991, the text of a statutory "short form" power of attorney was set forth in the Civil Code [*see former Civ. Code §§ 2450-2473*, as enacted by Stats. 1984, ch. 602, amended by Stats. 1985, ch. 403, and repealed by Stats. 1990, ch. 986]. Notwithstanding this repeal, the Power of Attorney Law includes a provision validating powers of attorney executed under the old "short forms." If a form complied with the repealed sections, a power of attorney executed on the old form will be as valid if executed after the repeal as it would have been if executed before [*Prob. Code § 4409(a)*]. This rule is designed to protect persons who unwarily use forms printed before the date of the repeal without knowledge that the supporting statutes have been repealed [*Recommendations Relating to Powers of Attorney*, 20 Cal. L. Revision Comm'n Reports 401, 457 (1990)].

#### **[j] Attorney-Drafted Powers**

A durable power of attorney, like a nondurable power of attorney, may be drafted by an attorney and specially tailored to the client's particular needs and desires. When an attorney drafts a durable power of attorney, however, it is not always necessary for the attorney to draft an entirely original form. Many of the provisions of the Uniform Statutory Form Power of Attorney [*see Prob. Code §§ 4400-4465*; *see also [i], above*] are carefully crafted and quite useful. In many cases, these provisions may profitably be incorporated into attorney-drafted forms.

In all cases, a principal who executes a power of attorney prepared by an attorney will (or at least *should*) have the advantage of the attorney's advice and counsel to make sure that the power meets the principal's needs and desires and is drafted and executed in compliance with all of the statutory formalities.

#### **[4] Purposes**

A power of attorney may be created for any lawful purpose or purposes [*Prob. Code § 4123(a)*]. The Power of Attorney Law specifically provides that an attorney in fact may be granted authority with regard to the principal's property, personal care, or any other matter [*Prob. Code § 4123(a)*].

#### **[5] Uses in Estate Planning**

##### **[a] As Complements of Wills and Trusts**

Durable powers of attorney are widely used in modern estate planning practice. Indeed, many estate planners consider durable powers of attorney essential complements of wills and trusts in the completion of effective and complete estate plans.

##### **[b] Advantages**

The advantages of durable powers of attorney lie in their versatility, their flexibility, and the comparative ease with which they can be used. A client who executes one or more durable powers of attorney may rest secure in the knowledge that, in the event of a life-threatening illness or injury, his or her wishes regarding the management of his or her affairs will be respected.

### **[c] As Substitute for Conservatorship**

A client who executes a durable power of attorney for personal care [*see Prob. Code § 4123(c); see also [3][b], above*], or a durable power of attorney for property management [*see Prob. Code § 4123(b); see also [3][a], above*], may also have some assurance that, in the event the client becomes disabled, it will not be necessary to apply to the court for the protection of a conservator. Conservatorships are cumbersome, slow, sometimes demeaning, and often very costly judicial proceedings. They have the potential not only of seriously depleting the client's financial resources, but also of violating the client's privacy and fomenting disputes among the client's family members.

### **[d] As Substitute for Revocable ("Living") Trust**

A properly executed durable power of attorney for property management may also make it unnecessary for a client to establish a revocable ("living") trust. While a living trust may be effective to provide for the management of trust property if the client later becomes incapacitated, a living trust will be effective for that purpose only as to property that has been properly transferred to the trustee. The trustee will have no authority over property that has not been formally subjected to the trust. In contrast, a properly drafted durable power of attorney will be effective to give the attorney in fact authority over all of the client's property, or any portion of the property specified in the power. There is no need to formally transfer any property to the attorney in fact; rather, the attorney in fact may exercise authority over the property at the time and on the terms and conditions specified by the client in the power. For detailed coverage of revocable ("living") trusts, see Ch. 70, *Complete Revocable Trust Forms* .

A client who wishes to execute both a living trust and a durable power of attorney for property management may do so. The client may wish, for example, to create a living trust for the principal purpose of avoiding probate of the trust assets after death. The client may wish to retain title to some assets, while transferring others to the trustee under the trust. If the client later becomes incapacitated, the trustee (or successor trustee, if the client was the original trustee) will have authority to manage the trust assets, and the attorney in fact will have authority to manage the client's other assets. In appropriate case, the same person may act both as trustee (or successor trustee) and attorney in fact.

Such an arrangement need not be regarded as superfluous or redundant, since the formalities required for transferring assets to the trustee will be different than the formalities required for subjecting assets to the authority of the attorney in fact, even when one person is acting in both capacities. Similarly, the terms, conditions, and times under which the attorney in fact's authority will be effective may differ markedly from those under which the trustee's (or successor trustee's) authority will be effective. This will be particularly true if the durable power of attorney is a "springing power" [*see Prob. Code § 4030; see also [3][g], above*]. When that is the case, the attorney in fact will have no authority over the client's assets until occurrence of the "triggering" event (for example, the client's incapacity). In contrast, the trustee must normally be given authority over trust assets before such a triggering event occurs (that is, before the client becomes incapacitated). However, a durable power may in appropriate cases give the attorney in fact authority to transfer some or all of the client's assets to a trust after such an event has occurred [*see Prob. Code § 4264(b)*], or even to create a trust and fund it with the client's property [*see Prob. Code § 4264(a), (c); see also Prob. Code § 4401* (uniform statutory form power of attorney)].

#### **PRACTICE TIP:**

Only in unusual situations will a client make a conscious decision to not put important assets into his or her living trust. However, in some cases, this will happen. For example, when the client is about to sell or refinance a piece of real property, the decision may be made to omit that asset from the initial funding of the trust, waiting to put the replacement property into the trust, or waiting until the refinancing transaction has been completed. The chance that the client may become incapacitated before the funding occurs (or may forget to put the asset into the trust) makes this power an important one. In other cases, the trust may be executed before all of the formal funding documents are completed and executed. Again, the attorney in fact's power to fund the trust can salvage the estate plan in the event that the

principal should become incapacitated before the trust is formally funded. *Commentary by Albert G. Handelman.*

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Powers of Attorney General Overview Estate, Gift & Trust Law Powers of Attorney Durable Powers



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PART II. LEGAL BACKGROUND

*25-68 California Legal Forms--Transaction Guide § 68.11*

**AUTHOR:** Reviewed by Albert G. Handelman

**§ 68.11 Creation**

**[1] Execution**

Every durable power of attorney must be signed [*Prob. Code § 4121(b)*]. If the principal is able to sign personally, he or she should do so. If the principal is unable to sign personally, however, the power may be signed by some other person in the principal's presence and at the principal's direction [*Prob. Code § 4121(b)*].

**[2] Acknowledgment**

Every durable power of attorney must be acknowledged before a notary public or signed by at least two qualified witnesses [*Prob. Code § 4121(c)*]. Acknowledgment is not required unless the statutory witness requirements [*see [3], below*] are not satisfied. In many cases, however, it will be easier to acknowledge the instrument before a notary public than to comply with the statutory requirements for witnesses. For the statutory form for a certificate of acknowledgment, see *Civ. Code § 1189* and §§ *68.200[2]*, *68.201[2]*, and *68.202[2]*.

**PRACTICE TIP:**

Although the law clearly makes a witnessed durable power of attorney as valid as one that has been acknowledged before a notary public, many third parties will more readily honor the acknowledged document. For this reason, many planners insist that every durable power of attorney be notarized, even if it is unlikely to ever be offered for recording. *Commentary by Albert G. Handelman.*

**[3] Witnesses**

If the power of attorney is signed by witnesses and not acknowledged before a notary public [*see Prob. Code § 4121(c); see also [2], above*], there must be two witnesses [*Prob. Code § 4121(c)*]. Both of the witnesses must be adults [*see Fam. Code § 6501* (adult as person 18 years of age or older)], and neither may be the attorney in fact designated in the power [*Prob. Code § 4122(a), (b)*]. Further, each witness must witness either the signing of the instrument by the principal or the principal's acknowledgment of the signature or the power of attorney [*Prob. Code § 4122(c)*].

The term "acknowledgment, used with respect to powers of attorney in *Prob. Code* §§ 4121 and 4122, is not defined. These statutes also do not state that the principal must show the power of attorney to the witnesses. Therefore, nothing in these statutes precludes a principal from acknowledging the document orally [ *Estate of Rabinowitz (2003) 114 Cal. App. 4th 635, 638-639, 7 Cal. Rptr. 3d 722* ] .

The statute also does not specify *when* the witnesses must sign the power of attorney [*Prob. Code* § 4121(c); *Estate of Rabinowitz (2003) 114 Cal. App. 4th 635, 639, 7 Cal. Rptr. 3d 722* ] . In *Estate of Rabinowitz* [ *Estate of Rabinowitz (2003) 114 Cal. App. 4th 635, 639, 7 Cal. Rptr. 3d 722* ] , the court held that attestations made after the decedent's death by the decedent's mother and cousin that decedent had made an acknowledgment of a power of attorney naming his brother as his attorney in fact satisfied the Probate Code requirement of signatures by two witnesses, when the brothers exercise of the power of attorney benefited charity and there was no evidence of fraud in the witnesses post-death signatures [ *Estate of Rabinowitz (2003) 114 Cal. App. 4th 635, 639-642, 7 Cal. Rptr. 3d 722* ] .

#### **[4] Date**

Every power of attorney must contain the date of its execution [*Prob. Code* § 4121(a)]. The date may be essential to establish when the power of attorney became effective or, in the case of a power of attorney that terminates at the end of a specified term, to determine when the power terminates.

#### **[5] Words Showing Durability**

A durable power of attorney must contain some words showing the intent of the principal that the authority conferred on the attorney in fact will be exercisable notwithstanding the principal's subsequent incapacity [*see Prob. Code* § 4124]. While this intention is typically shown by a statement that the power of attorney "shall not be affected by subsequent incapacity of the principal" or "shall become effective upon the incapacity of the principal" [*Prob. Code* § 4124(a), (b); *see* § 68.10[3][g]], any similar words will be sufficient to create a durable power [*Prob. Code* § 4124(c)].

#### **[6] Capacity to Create Power of Attorney**

Under the Power of Attorney Law, any natural person having the capacity to contract may execute a power of attorney and thus act as a "principal" [*Prob. Code* § 4120; *see Prob. Code* §§ 4022, 4026]. In California, all persons are capable of contracting, except minors, persons of unsound mind, and persons deprived of civil rights [*Civ. Code* § 1556]. A minor is generally any person who is under the age of 18 years [*Fam. Code* § 6500; *see Fam. Code* § 6701].

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:

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*25-68 California Legal Forms--Transaction Guide § 68.12*

**AUTHOR:** Reviewed by Albert G. Handelman

**§ 68.12 Qualifications of Attorney in Fact**

**[1] Capacity to Contract**

Any person having the capacity to contract is qualified to act as an attorney in fact in California [*Prob. Code § 4200*]. This includes artificial entities such as corporations, partnerships, limited liability companies, and associations, as well as natural persons [*see Prob. Code § 56* ("person" defined); *see also Comprehensive Power of Attorney Law*, 24 Cal. L. Revision Comm'n Reports 111, 126 (1994)].

**[2] Age**

Although the Power of Attorney Law does not explicitly require that an attorney in fact be an adult, it implicitly imposes this requirement on any natural person selected to act as an attorney in fact by requiring that the attorney in fact have the capacity to contract [*see Prob. Code § 4200*]. Minors (unemancipated persons under the age of 18 years) are not capable of contracting in California [*Civ. Code § 1556; see § 68.11[6]*].

**[3] Sound Mind**

A natural person selected to serve as attorney in fact must also be of sound mind [*see Prob. Code § 4200* (capacity to contract); *Civ. Code § 1556* (persons of unsound mind incapable of contracting)].

**[4] Effect of Designating Unqualified Person**

If a principal designates an unqualified person as attorney in fact, neither the designation nor any acts of that attorney in fact will affect the immunities of third persons provided for in the Power of Attorney Law [*Prob. Code § 4201; see Prob. Code §§ 4300-4310* (rules governing relations of attorneys in fact with third persons); *see also § 68.16*]. Similarly, such a designation will not relieve the unqualified person of any applicable duties to the principal or the principal's successors [*Prob. Code § 4201; see Prob. Code §§ 4230-4238* (duties of attorneys in fact); *see also § 68.15*].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

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*25-68 California Legal Forms--Transaction Guide § 68.13*

**AUTHOR:** Reviewed by Albert G. Handelman

**§ 68.13 Selection of Attorney in Fact**

**[1] Importance**

The selection of an appropriate attorney in fact is essential if the principal is to derive all of the anticipated benefits of the durable power of attorney.

**[2] Ability and Willingness to Act**

An attorney in fact must be both able and willing to act on the principal's behalf.

**PRACTICE TIP:**

While it should go without saying, before signing a durable power of attorney the client should discuss with each potential attorney in fact his or her willingness to act in that capacity. Having the initial named attorney in fact sign the durable power of attorney shows his or her willingness to act. However, caution should be exercised, when appropriate, to avoid unintentionally imposing on the attorney in fact the duty to act in a given situation under the provisions of *Prob. Code § 4230(c)* [ *see § 68.15[2]*]. Possibly just as important, having that person's signature appear on the document may help to convince a third party to honor the durable power of attorney when it is first presented by the attorney in fact. *Commentary by Albert G. Handelman.*

If the attorney in fact is to be a natural person, a person who has a genuine interest in the principal's welfare and who can be trusted to assume responsibility for important decisions regarding the principal's personal and business affairs will be most suitable. It is also important to select a person who has the ability to assume responsibility of the type called for under the power of attorney. A person who has some experience in managing property or making financial decisions ordinarily will be preferable to a person who has no such experience.

**[3] Maturity**

Maturity is often a desirable quality in an attorney in fact. However, the principal should not lose sight of the time period during which the attorney in fact will be called on to act. Decisions under some durable powers of attorney may have to be made at distant times in the future. This will often be the case if the power is a "springing" power [*see Prob. Code § 4030; see also § 68.10[3][g]*] under which the attorney in fact's authority will be exercisable only after the principal has become incapacitated. In cases of this kind, the age and health of the prospective attorney in fact should be considered. It will often be desirable to select an attorney in fact who is no older than the principal, or perhaps quite a few years younger, rather than one who is considerably older than the principal, as an older person may be unable to carry out the duties called for under the power after the "triggering" event has occurred.

#### **[4] Knowledge of Principal's Affairs**

All other things being equal, a person who has an intimate knowledge of the principal's affairs will often be the best choice for attorney in fact. A spouse or an adult child will often satisfy this requirement. If there is no spouse or adult child, a close relative or trusted friend may be a good choice, providing that the relative or friend is both willing and able to act as attorney in fact.

#### **PRACTICE TIP:**

The selection and "education" of an attorney in fact should be handled in the same way one would treat the selection of any fiduciary. First, the individual's permission to be named, and his or her consent to the appointment should be obtained. Second, the principal should explain to the attorney in fact his or her goals, attitudes about money and his or her family, and personal situation. There is a side benefit to encouraging one's clients to have such a conversation with potential appointees. Because this discussion may take place years before the attorney in fact will ever be called on to act, and, because such personal topics will be discussed, the client will be required to think carefully about the person he or she will select to fill this role. This enhances the likelihood that the client will select an appropriate individual to act as attorney in fact. *Commentary by Albert G. Handelman.*

#### **[5] When Power of Attorney Has Short Duration**

If the power of attorney is a "special" power [*see Prob. Code §§ 4123(a), 4262; see also § 68.10[3][e]*] and it is not contemplated that the attorney in fact's duties will be of long duration (for example, when the power authorizes the attorney in fact to carry out a single transaction, or a relatively short series of transactions, such as the sale of a house or some other piece of property), the choice of a suitable attorney in fact may be somewhat less onerous than it would be when the power of attorney is "open-ended" and the attorney in fact's duties may extend over a long period of time. Even in cases of this kind, however, it is essential to choose an attorney in fact who is both willing and able to act in that capacity.

#### **[6] Trustworthiness**

Trustworthiness is always an essential characteristic of any attorney in fact, while a conflict of interest between the attorney in fact and the principal should always be regarded as a disqualifying factor [*see Prob. Code § 4232* (attorney in fact's duty to avoid conflicts of interest); *see also § 68.15[6]*].

#### **[7] Artificial Entity**

In rare cases, a principal may select an artificial entity to act as attorney in fact. For example, a bank or trust company (perhaps one that has also agreed to serve as trustee under a trust created by the principal) may in some cases be willing to act as attorney in fact under a durable power of attorney. When an artificial entity is selected, however, ability and willingness to serve are no less important than when a natural person is selected.

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Powers of Attorney General Overview Estate, Gift & Trust Law Powers of Attorney Durable Powers



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*25-68 California Legal Forms--Transaction Guide § 68.14*

**AUTHOR:** Reviewed by Albert G. Handelman

**§ 68.14 Authority of Attorney in Fact**

**[1] Scope**

Under general agency rules, an attorney in fact may be authorized to do any acts that the principal might do, except those requiring the principal's personal attention [*Civ. Code § 2304*; see [2][a], *below* (acts requiring principal's personal attention)]. Under the Power of Attorney Law, a principal may grant authority to an attorney in fact to act on the principal's behalf with respect to all lawful subjects and purposes, or with respect to one or more express subjects or purposes [*Prob. Code § 4123(a)*]. The attorney in fact may be granted authority with regard to the principal's property, personal care, or any other matter [*Prob. Code § 4123(a)*].

Once appointed, an attorney in fact has authority to do everything necessary or proper and usual, in the ordinary course of business, to effect the purpose of the agency [*Civ. Code § 2319*].

**[2] Authority That May Not Be Granted**

**[a] Acts That Require Principal's Personal Attention**

The general rules of agency set forth in the Civil Code contain rules that limit the exercise of authority by an agent and, hence, by an attorney in fact. The first of these rules is that an agent cannot be authorized to do any acts to which the principal "is bound to give his personal attention" [*Civ. Code § 2304*]. Acts to which the principal is required to give personal attention are generally acts that require the principal's knowledge, consent, or judgment [Restatement (Second) of Agency § 17]. Thus the principal may not generally authorize an agent to create a work of art that the principal is required to create, to give testimony or an affidavit that requires the principal's personal knowledge, to enter into a marriage contract on the principal's behalf, or to cast the principal's vote in a public election [*see* Restatement (Second) of Agency § 17, Illustrations, cmts. b, c].

**[b] Authority to Commit Fraud on Principal**

The Civil Code rules also provide that an attorney in fact can never have authority to do an act that constitutes a "fraud upon the principal" [*Civ. Code* § 2306]. Acts that fall within the terms of this proscription include taking the principal's funds under false pretenses, making secret profits from transactions entered into as the principal's agent, refusing to account for the principal's funds, withholding information from the principal, and converting the principal's property to the agent's own uses [ *Kinert v. Wright (1947) 81 Cal. App. 2d 919, 925, 185 P.2d 364* ].

### [c] Wills

The Power of Attorney Law forbids the principal from authorizing the attorney in fact to make, publish, declare, amend, or revoke the principal's will [*Prob. Code* § 4265(a)]. Note that this same restriction does not apply to dealings with a trust created by or to be created for the principal. Indeed, such powers are frequently granted [*see* [3], *below*].

### [3] Authority That Must Be Specifically Granted

The Power of Attorney Law includes a rule limiting the authority that a principal may give an attorney in fact to act with respect to trusts, gifts, disclaimers, and certain other matters. This rule does not expressly prohibit a principal from granting the specified authority; rather it provides that the attorney in fact may not perform specified acts unless the power of attorney expressly authorizes the attorney in fact to do so. Acts that fall within the scope of this rule are the following [*Prob. Code* § 4264]:

- Creating, modifying, or revoking a trust.
- Funding a trust with the principal's property if the trust was not created by the principal or by a person authorized to create a trust on the principal's behalf.
- Making or revoking a gift of the principal's property in trust or otherwise [*see Estate of Stephens (2002) 28 Cal. 4th 665, 672, 122 Cal. Rptr. 2d 358, 49 P.3d 1093* (this provision prohibits attorneys in fact from making gifts of principal's property to themselves); *Estate of Huston (1997) 51 Cal. App. 4th 1721, 1726, 60 Cal. Rptr. 2d 217* (power of attorney conferring authority to sell, exchange, transfer, or convey property for principal's benefit does not authorize conveyance as gift or without substantial consideration; conveyance outside scope of conferred power is void)].
- Exercising the right to make a disclaimer on the principal's behalf (although this rule does not limit the attorney in fact's authority to disclaim a detrimental transfer to the principal with the approval of the court).
- Creating or changing survivorship interests in the principal's property or in any property in which the principal may have an interest.
- Designating or changing the designation of beneficiaries to receive any property, benefit, or contract right on the principal's death [*see Schubert v. Reynolds (2002) 95 Cal. App. 4th 100, 106, 115 Cal. Rptr. 2d 285* (attorney in fact who executed trust providing life estate in the decedent's residence to herself with remainder to decedent's grandchildren attempted to change beneficiary designation in violation of *Prob. Code* § 4264(f))].
- Making a loan to the attorney in fact.

### [4] Revocation of Authority

#### [a] Revocation by Principal

A principal may revoke the authority of the attorney in fact in accordance with the terms of the power of attorney (if it includes any terms relating to revocation) or simply by informing the attorney in fact orally or in writing that the attorney in fact's authority is revoked, or when and under what circumstances it is revoked [*Prob. Code* § 4153(a)]. The right of the principal to revoke the attorney in fact's authority in writing may not be limited by any provision of the power of attorney [*Prob. Code* § 4153(a)(2)].

The principal may also revoke the attorney in fact's authority by revoking the power itself, either in accordance with its own terms (if it includes any terms relating to revocation) or simply by a writing stating that the power is revoked [*Prob. Code* § 4151(a)]. The right of the principal to revoke a power of attorney by a writing cannot be limited by any terms of the power of attorney itself [*Prob. Code* § 4151(a)(2)]. For further discussion, see § 68.210[1][b].

#### **[b] Revocation by Principal's Legal Representative**

If, after a principal executes a durable power of attorney, a court of the principal's domicile appoints a conservator or guardian of the principal's estate, or some other fiduciary charged with the management of the principal's property, the conservator, guardian, or other fiduciary may revoke the attorney in fact's authority by a writing advising the attorney in fact that his or her authority is revoked, or when and under what circumstances it is revoked [*Prob. Code* § 4153(a)(3)]. However, such a revocation is effective only when it is approved by the court [*Prob. Code* § 4206]. For further discussion, see § 68.210[1][c], [d].

#### **[c] Protection From Liability After Revocation**

The revocation of a power of attorney or of the attorney in fact's authority under a power is apparently effective when made. However, third persons (and possibly also attorneys in fact) who do not have notice of such a revocation have some protection from liability. *Prob. Code* §§ 4151(b) and 4153(b) provide that an attorney in fact or third person who does not have notice that the power or the attorney in fact's authority under the power has been revoked is protected from liability as provided in *Prob. Code* §§ 4300-4310. By their terms, however, *Prob. Code* §§ 4300-4310 apply only to third persons. For example, *Prob. Code* § 4303(a) provides that a third person who acts in good faith reliance on a power of attorney is not liable to the principal or any other person for so acting if the power of attorney is presented to the third person by the attorney in fact designated in the power, if the power appears on its face to be valid, and if it includes a notary public's certificate of acknowledgment [ *see* § 68.11[2]] or is signed by two witnesses [ *see* § 68.11[3]]. *Prob. Code* §§ 4300-4310 contain no similar protection for an attorney in fact who acts in good faith reliance on a power of attorney without notice that it, or the attorney in fact's authority under it, has been revoked. Notwithstanding this, it may be successfully argued that the general language of *Prob. Code* §§ 4151(b) and 4153(b) described above provides some protection for the attorney in fact in cases of this kind.

#### **PRACTICE TIP:**

Because there is only limited protection for the principal in the event that the attorney in fact continues to act after the power has been revoked, caution dictates that written notice of the revocation be delivered to all third parties with whom the principal believes the attorney in fact might do business. *Commentary by Albert G. Handelman.*

#### **[d] Revocation by Dissolution or Annulment of Marriage**

If a principal designates his or her spouse as attorney in fact and, after executing the power, the principal's marriage to the attorney in fact is dissolved or annulled, the principal's designation of the former spouse as an attorney in fact is revoked [*Prob. Code* § 4154(a)]. However, if the principal later remarries the attorney in fact, the attorney in fact's authority will be revived [*Prob. Code* § 4154(b)].

#### **[5] Modification of Authority**

**[a] By Principal**

A principal may modify a power of attorney in accordance with its terms (if it contains any terms relating to modification) or by executing an instrument in the same manner as the original power [*Prob. Code § 4150(a)*; see *Estate of Huston (1997) 51 Cal. App. 4th 1721, 1727, 60 Cal. Rptr. 2d 217* (principal's oral assent to unauthorized transaction by attorney in fact is not sufficient to ratify transaction; because power of attorney must be in writing, any act agent performs acting under power of attorney must be ratified in writing to be valid)].

**[b] Protection From Liability After Modification**

The modification of a power of attorney, like the revocation of a power [see [4], above], apparently is effective when made, but the attorney in fact and third persons are protected from liability for acting in good faith reliance on the power when they have no notice that it has been modified. This protection is set forth in *Prob. Code § 4150(b)*, which provides that an attorney in fact or third person who does not have notice of the modification is protected from liability as provided in *Prob. Code §§ 4300-4310*. These sections include a provision explicitly protecting third persons from liability when specified conditions have been met [see *Prob. Code § 4303*; see also [4][c], above], but no similar provision protecting the attorney in fact from liability. Notwithstanding this, it may be successfully argued that the general language of *Prob. Code § 4150(b)* described above provides some protection for the attorney in fact in cases of this kind.

**[6] Termination of Authority****[a] As Provided in Power of Attorney**

The Power of Attorney Law provides that the authority of an attorney in fact may be terminated "in accordance with the terms of the power of attorney" [*Prob. Code § 4152(a)(1)*]. Under this rule, the attorney in fact's authority will terminate if, for example, the power of attorney specifies a term, and the term has expired, or if the power specifies that the authority extends only to a specific transaction, or may be exercised only with respect to particular property, and the transaction is completed or the principal divests himself or herself of the property.

**[b] By Extinction of Subject or Fulfillment of Purpose**

The Power of Attorney Law also provides that the authority of the attorney in fact is terminated by "extinction of the subject or fulfillment of the purpose of the power of attorney" [*Prob. Code § 4152(a)(2)*]. This rule is closely related to the rule under which the attorney in fact's authority terminates in accordance with the terms of the power of attorney [see [a], above]. Like that rule, this rule would terminate the attorney in fact's authority if, for example, the power of attorney limited the attorney in fact's authority to a particular transaction and that transaction was completed, or if the power conferred authority only with respect to specific property owned by the principal and the principal later divested himself or herself of that property. Other similar circumstances would also result in the termination of the attorney in fact's authority under this rule [see *Comprehensive Power of Attorney Law*, 24 Cal. L. Revision Comm'n Reports 111, 136-137, 176-177 (1994)].

**[c] On Occurrence of Specified Events**

The Power of Attorney Law also provides that the attorney in fact's authority will terminate on the happening of specified events [*Prob. Code § 4152(a)(3)-(9)*; see *Comprehensive Power of Attorney Law*, 24 Cal. L. Revision Comm'n Reports 111, 136-137, 176-177 (1994)]:

- Revocation of the attorney in fact's authority in accordance with the rules specified in *Prob. Code § 4153* [see [4], above].

- The death of the principal, except as to specific authority permitted by statute to be exercised after the principal's death [*see, e.g., Prob. Code §§ 4304(a)* (good faith reliance on attorney in fact's authority after principal's death), 4305(a) (good faith reliance on attorney in fact's authority after issuance of affidavit); *see also* [4][c], *above*; § 68.16[2], [3]].
- Removal of the attorney in fact, either by the principal or by a court.
- Resignation of the attorney in fact.
- Incapacity of the attorney in fact (except that a temporary incapacity suspends the attorney in fact's authority only during the period of the incapacity).
- Dissolution or annulment of the marriage of the attorney in fact and principal (although the attorney in fact's authority will be revived if the attorney in fact and principal later remarry) [*see Prob. Code § 4154(b)*; *see also* [4][a], *above*].
- Death of the attorney in fact.

#### **[7] Delegation of Authority**

An attorney in fact may delegate authority to perform mechanical acts to one or more persons qualified to exercise the delegated authority [*Prob. Code § 4205(a)*]. However, any authority delegated pursuant to this rule may also be revoked at the option of the attorney in fact [*Prob. Code § 4205(a)*].

The delegation of authority by an attorney in fact does not relieve the attorney in fact of any responsibility or duty to the principal [ *see § 68.15* (duties of the attorney in fact)]. On the contrary, an attorney in fact who delegates authority remains fully responsible to the principal for the exercise or nonexercise of the delegated authority [*Prob. Code § 4205(b)*].

#### **[8] Inconsistent Authority**

If a principal grants inconsistent authority to one or more attorneys in fact [ *see § 68.18* (multiple attorneys in fact)] in two or more powers of attorney, the authority granted last controls to the extent of the inconsistency [*Prob. Code § 4130(a)*]. This rule cannot be limited or varied by any term in a power of attorney [*Prob. Code § 4130(b)*].

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Business & Corporate LawAgency RelationshipsAuthority to ActGeneral OverviewBusiness & Corporate LawAgency RelationshipsAuthority to ActTypes of AuthorityEstate, Gift & Trust LawPowers of AttorneyGeneral OverviewEstate, Gift & Trust LawPowers of AttorneyDurable PowersEstate, Gift & Trust LawPowers of AttorneyInterpretation



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DIVISION IV: WILLS AND TRUSTS  
CHAPTER 68 DURABLE POWERS OF ATTORNEY FOR PROPERTY MANAGEMENT  
PART II. LEGAL BACKGROUND

*25-68 California Legal Forms--Transaction Guide § 68.15*

**AUTHOR:** Reviewed by Albert G. Handelman

**§ 68.15 Duties of Attorney in Fact**

**[1] Duty to Follow Principal's Instructions**

To the extent reasonably practicable under the circumstances, an attorney in fact has a duty to keep in regular contact with the principal, to communicate with the principal, and to follow the principal's instructions [*Prob. Code § 4234(a)*]. In appropriate circumstances, the attorney in fact may disobey the principal, but only with court approval [*Prob. Code § 4234(b)*].

If the principal becomes wholly or partially incapacitated, or if there is a question concerning the principal's capacity to give instructions to and supervise the attorney in fact, the attorney in fact may consult with a person previously designated by the principal for this purpose, and may also consult with and obtain information needed to carry out the attorney in fact's duties from the principal's spouse, physician, attorney, or accountant, or from a member of the principal's family, or any other person, business entity, or government agency, with respect to matters to be undertaken on the principal's behalf and affecting the principal's personal affairs, welfare, family, property, and business interests [*Prob. Code § 4235*].

A person from whom information is requested has a duty to disclose relevant information to the attorney in fact [*Prob. Code § 4235*].

**[2] Duty to Act**

Under the Power of Attorney Law, a person who is designated as attorney in fact generally has no duty to exercise the authority granted in the power of attorney, even when the principal has become incapacitated, is missing, or is otherwise unable to act [*Prob. Code § 4230(a)*; *Comprehensive Power of Attorney Law*, 24 Cal. L. Revision Comm'n Reports 111, 126-128 (1994)]. This is true even if the attorney in fact has acted under the power of attorney in the past, as the Power of Attorney Law expressly provides that the fact that a person may have acted as attorney in fact in one or more transactions does not obligate the person to act in subsequent transactions [*Prob. Code § 4230(b)*].

When it recommended this rule, the Law Revision Commission stated that it was intended to facilitate the use of powers of attorney in California. The Commission noted that, in the usual case, the principal seeks a person who has the ability to act if action becomes necessary, but would rarely expect to impose a duty to act on an attorney in fact who chooses not to act, and that a potential attorney in fact may be reluctant to accept the designation if he or she believes that there is a legal duty to act [*Comprehensive Power of Attorney Law*, 24 Cal. L. Revision Comm'n Reports 111, 128 (1994)]. Under this rule, the attorney in fact may refuse to act because of personal inconvenience, because he or she believes others are in a better position to act for the principal, because he or she believes that the situation warrants the appointment of a court-supervised guardian or conservator, or for any other reason. In some cases, the attorney in fact may simply choose to wait until a situation arises before deciding whether or not to act under the power of attorney [*Comprehensive Power of Attorney Law*, 24 Cal. L. Revision Comm'n Reports 111, 128 (1994)].

The rule is otherwise, however, if the attorney in fact has already commenced a transaction. In that case, the attorney in fact has a duty to complete the transaction and to observe the standard of care required of all fiduciaries [*Prob. Code § 4230(b)*; *Comprehensive Power of Attorney Law*, 24 Cal. L. Revision Comm'n Reports 111, 128 (1994); see [7], below (discussion of standard of care)].

The attorney in fact also has a duty to act if he or she has expressly agreed in writing to act for the principal. Under those circumstances, the attorney in fact has a duty to act pursuant to the terms of the agreement, and the agreement can be enforced against the attorney in fact regardless of whether there is any consideration to support a contractual obligation [*Prob. Code § 4230(c)*].

### **[3] Duty to Keep Records and Account**

An attorney in fact has a duty to keep records of all transactions entered into on behalf of the principal [*Prob. Code § 4236(a)*]. Although an attorney in fact does not have a general duty to make an account of transactions entered into on behalf of the principal, a duty to do that arises in the following circumstances [*Prob. Code § 4236(b)*]:

- When the principal requests an account.
- When the power of attorney requires the attorney in fact to account and specifies to whom the account is to be made.
- If the principal is still living, when a conservator of the principal's estate requests an account.
- If the principal is deceased, when the principal's personal representative or successor in interest requests an account.
- When the court orders an account.

Termination of an attorney in fact's authority does not relieve the attorney in fact of any duty to render an account of actions taken as attorney in fact [*Prob. Code § 4238(c)*]. When an attorney in fact's authority is terminated, the attorney in fact has a duty to deliver copies of any records relating to transactions undertaken on the principal's behalf that are requested by the person or persons to whom possession or control of the principal's property is delivered [*Prob. Code § 4238(b)*; see *Prob. Code § 4238(a)* (duty to deliver principal's property); see also [5], below].

### **[4] Duty to Keep Principal's Property Separate and Distinct**

An attorney in fact has a duty to keep the principal's property separate and distinct from other property in a manner adequate to identify the property clearly as belonging to the principal [*Prob. Code § 4233(a)*]. An attorney in fact may comply with this rule by holding the principal's property either in the principal's name or in the name of the attorney in

fact as attorney in fact for the principal [*Prob. Code § 4233(b)*].

#### **[5] Duty to Deliver Possession of Property on Termination of Authority**

On termination of an attorney in fact's authority, the attorney in fact has a duty to promptly deliver possession or control of the principal's property to the person or persons entitled to delivery [*Prob. Code § 4238(a)*]. If the principal is not incapacitated, the property must be turned over to the principal, or as directed by the principal [*Prob. Code § 4238(a)(1)*]. If the principal is incapacitated, the property must be turned over to the following persons with the following priority [*Prob. Code § 4238(a)(2)*]:

- A qualified successor attorney in fact.
- As to any community property, to the principal's spouse.
- To the conservator or guardian of the principal's estate.
- If the principal is deceased, to the principal's personal representative, if any, or the principal's successors.

#### **[6] Duty to Avoid Conflicts of Interest**

An attorney in fact has a duty to act solely in the interest of the principal and to avoid conflicts of interest [*Prob. Code § 4232(a)*]. However, an attorney in fact is not in violation of this rule solely because the attorney in fact also benefits from acting for the principal, has conflicting interests in relation to the property, care, or affairs of the principal, or acts in an inconsistent manner regarding the respective interests of the principal and the attorney in fact [*Prob. Code § 4232(b)*].

#### **[7] Duty to Observe Standard of Care**

When dealing with the principal's property, the attorney in fact has a duty to observe the standard of care that would be observed by a prudent person dealing with the property of another [*Prob. Code § 4231(a)*]. This is the familiar "prudent person" rule to which trustees and other fiduciaries are subject [*see Prob. Code § 16040(b)*]. For a discussion of the prudent person rule, see Ch. 64A, *Testamentary Trusts: Trustee Provisions*, § 64A.39[7].

Beyond the prudent person rule, the attorney in fact is not limited by any other statute restricting investments by fiduciaries [*Prob. Code § 4231(a)*]. If the attorney in fact has special skills or expertise, however, or was selected on the basis of representations of special skills or expertise, the attorney in fact has a duty to observe the standard of care that would be observed by others with similar skills or expertise [*Prob. Code § 4231(c)*]. An attorney in fact with special skills has a duty to apply the full extent of those skills [*Prob. Code § 4237*].

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Business & Corporate Law Agency Relationships Duties & Liabilities General Overview Estate, Gift & Trust Law Powers of Attorney General Overview Estate, Gift & Trust Law Powers of Attorney Interpretation



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DIVISION IV: WILLS AND TRUSTS  
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PART II. LEGAL BACKGROUND

*25-68 California Legal Forms--Transaction Guide § 68.16*

**AUTHOR:** Reviewed by Albert G. Handelman

**§ 68.16 Relations of Attorney in Fact With Third Parties**

**[1] Third Persons Required to Respect Authority**

The Power of Attorney Law requires that third persons accord an attorney in fact acting pursuant to the provisions of a power of attorney the same rights and privileges that would be accorded the principal if the principal were personally present and seeking to act [*Prob. Code § 4300*]. This rule recognizes that the attorney in fact acts in place of the principal and that, when the attorney in fact is acting within the scope of the power of attorney, he or she must be treated as if the principal were acting [*Comprehensive Power of Attorney Law*, 24 Cal. L. Revision Comm'n Reports 111, 195 (1994)].

However, this rule does not require third persons to honor the attorney in fact's authority or conduct business with the attorney in fact if the principal could not require the third party to act or conduct business in the same circumstances [*Prob. Code § 4300*], nor does it require a third person to engage in any transaction with an attorney in fact if the attorney in fact has previously breached any agreement with the third person [*Prob. Code § 4309*].

**[2] Reliance on Attorney in Fact's Authority**

Third persons are entitled to rely on, contract with, and deal with an attorney in fact with respect to the subjects and purposes encompassed or expressed in the power of attorney without regard to whether the power of attorney expressly authorizes the specific act, transaction, or decision by the attorney in fact [*Prob. Code § 4301*].

When requested to engage in transactions with an attorney in fact, however, a third person may ask the attorney in fact to provide identification, specimens of the signatures of the principal and the attorney in fact, and any other information reasonably necessary or appropriate to identify the principal and the attorney in fact and to facilitate the actions of the third person in transacting business with the attorney in fact [*Prob. Code § 4302*]. If these things are not provided, the third person has no duty to comply with the power of attorney [*Prob. Code § 4302*]. The third person may also require the attorney in fact to provide the current and permanent residence addresses of the principal before agreeing to engage in a transaction with the attorney in fact [*Prob. Code § 4302*].

A third person who acts in good faith reliance on a power of attorney is not liable to the principal or to any other person for so acting if *all* of the following requirements are satisfied [*Prob. Code § 4303(a)*]:

- The power of attorney is presented to the third person by the attorney in fact designated in the power of attorney.
- The power of attorney appears on its face to be valid.
- The power of attorney is signed by two witnesses or includes a notary public's certificate of acknowledgment; *see Kaneko v. Yager (2004) 120 Cal. App. 4th 970, 980-981, 16 Cal. Rptr. 3d 183* (this immunity is inapplicable if third person relied on power of attorney that did not contain notary public's certificate of acknowledgment or signatures of two witnesses).

The fact that the third person acted in good faith in reliance on the power of attorney does not, by itself, provide a complete defense to the principal's complaint [ *Kaneko v. Yager (2004) 120 Cal. App. 4th 970, 981, 16 Cal. Rptr. 3d 183* ]. The foregoing rule is not intended to imply that a third person is liable for acting in reliance on a power of attorney in other circumstances [*Prob. Code § 4303(b)*].

A third person may even be entitled to rely on the authority of an attorney in fact after the principal has died if the third person has no knowledge of the principal's death and acts in good faith under the power [*Prob. Code § 4304(a)*]. Any action taken under these circumstances binds the principal's successors in interest, unless it is invalid or unenforceable under some other rule of law [*Prob. Code § 4304(a)*].

### **[3] Affidavit of Good Faith**

The Power of Attorney Law authorizes the attorney in fact to execute an affidavit stating that, at the time the power was exercised, the attorney in fact did not have actual knowledge of the principal's death or of the termination of the power of attorney or the attorney in fact's authority under it. If any person acts in good faith reliance on the power, an affidavit of this kind will be conclusive proof that the power had not been revoked or terminated at the time the power was exercised [*Prob. Code § 4305(a)*]. If exercise of the power of attorney requires the execution and delivery of any recordable instrument, the affidavit will also be recordable when it has been authenticated [*Prob. Code § 4305(a)*]. However, an affidavit of this kind will be effective only if the power has been terminated by the principal's death or by express revocation or termination of the attorney in fact's authority; it will not be effective if the power has expired at a specified time or on the occurrence of a specified event other than express revocation or a change in the principal's capacity [*Prob. Code § 4305(b)*].

If a third person refuses to accept the attorney in fact's authority after the attorney in fact has furnished an affidavit of this kind, and if it thereafter becomes necessary to commence an action or proceeding to confirm the attorney in fact's authority or qualifications, the third person will be liable for attorney's fees incurred in the action or proceeding, unless the court determines that the third person believed in good faith that the attorney in fact was not qualified or was attempting to exceed or improperly exercise the attorney in fact's authority [*Prob. Code § 4306(a)*].

### **[4] Certified Copy of Power**

The Power of Attorney Law authorizes attorneys at law, notary publics, and certain state and local officials to certify that a copy of a power of attorney is a true and correct copy of an original and thereby invest the copy with the same force and effect as the original [*Prob. Code § 4307*]. The certification must state that the certifying person (who may be an attorney authorized to practice law in California, a notary public in the state, or an official of a state or political subdivision who is authorized to make certifications) has examined the original power and the copy and that the copy is

a true and correct copy of the original [*Prob. Code § 4307(b), (c)*]. This rule applies to powers of attorney executed outside California as well as those executed in this state, and is designed to facilitate the use in California of powers executed in other jurisdictions [*Comprehensive Power of Attorney Law*, 24 Cal. L. Revision Comm'n Reports 111, 200-201 (1994)].

#### **[5] Special Rule for Financial Institutions**

The Power of Attorney Law does not require a financial institution to open a deposit account for a principal at the request of an attorney in fact if the principal is not currently a depositor of the financial institution; nor does it require a financial institution to lend money to the attorney in fact on the principal's behalf if the principal is not currently a borrower of the financial institution [*Prob. Code § 4310*; see *Prob. Code § 40* ("financial institution" defined)].

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Business & Corporate Law Agency Relationships Duties & Liabilities Third Parties Estate, Gift & Trust Law Powers of Attorney General Overview Estate, Gift & Trust Law Powers of Attorney Durable Powers



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*25-68 California Legal Forms--Transaction Guide § 68.17*

**AUTHOR:** Reviewed by Albert G. Handelman

**§ 68.17 Compensation of Attorney in Fact**

**[1] Legal Authority for Reasonable Compensation**

Before January 1, 1995, California law neither required a principal to compensate an attorney in fact for services rendered under a power of attorney nor prohibited an attorney in fact from receiving compensation for those services [*see Comprehensive Power of Attorney Law*, 24 Cal. L. Revision Comm'n Reports 111, 134 (1994)]. The Power of Attorney Law, which became operative on that date, provides that an attorney in fact is entitled to reasonable compensation for services rendered to the principal as attorney in fact, and to reimbursement for reasonable expenses incurred as a result of acting in that capacity [*Prob. Code § 4204*]. However, the Power of Attorney Law makes it clear that the principal may limit the application of this provision by providing otherwise in the power [*Prob. Code § 4101(a)*; *see Comprehensive Power of Attorney Law*, 24 Cal. L. Revision Comm'n Reports 111, 123 (1994)].

**[2] Rarely Paid in Practice**

Before the adoption of the Power of Attorney Law, compensation was rarely paid to attorneys in fact. This was attributable more to the fact that attorneys in fact are typically friends or family members who act as an accommodation to the principal than to the absence of any legal provision for compensation. There is no reason to expect that attorneys in fact will in the future seek compensation when they are acting out of a sense of family duty or affection. However, the Power of Attorney Law makes it more important than before to address the issue of compensation in the power itself.

Compensation ordinarily will not be called for unless the attorney in fact is a stranger, a professional fiduciary, or an artificial entity such as a corporation. Under these circumstances, the attorney in fact will almost always expect compensation as a precondition to rendering services.

When deciding whether to compensate the attorney in fact, the principal should remember that a person who has been designated as an attorney in fact is typically under no duty to exercise the authority granted in the power of attorney [*Prob. Code § 4230(a)*; *see § 68.15[2]*]; and, if the designated attorney expects compensation for serving, the principal

should either provide for compensation or select another attorney in fact.

### **[3] Estate Planning Advantages of Compensation**

Compensation may be appropriate, even when the attorney in fact is to be a close friend or family member and would be willing to act without compensation. Compensation may in appropriate circumstances be a means of removing funds from the principal's estate and avoiding estate taxation of those funds on the principal's death. While any compensation paid to the attorney in fact for services rendered under the power of attorney will be subject to income tax in the hands of the attorney in fact, the income tax rates will in many cases be less than the rates at which the same funds would be subject to estate tax if they were not removed from the principal's estate. The principal's age, health, and overall financial condition, as well as the relation of the prospective attorney in fact to the principal and the identities of any other persons who would be the natural objects of the principal's bounty, should be considered before any decision is made in this regard.

### **[4] Reimbursement for Expenses**

Whether or not the power of attorney provides for compensation for the attorney in fact, it would seem to be reasonable in almost every case to provide that the attorney in fact be reimbursed for reasonable expenses incurred while acting as attorney in fact.

### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Business & Corporate Law Agency Relationships Duties & Liabilities Compensation Estate, Gift & Trust Law Powers of Attorney General Overview Estate, Gift & Trust Law Powers of Attorney Durable Powers



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PART II. LEGAL BACKGROUND

*25-68 California Legal Forms--Transaction Guide § 68.18*

**AUTHOR:** Reviewed by Albert G. Handelman

**§ 68.18 Multiple Attorneys in Fact**

**[1] Statutory Authorization**

A principal may designate more than one attorney in fact in one or more powers of attorney [*Prob. Code § 4202(a)*]. When authority is granted to two or more attorneys in fact, it can only be exercised by their unanimous act, unless the power of attorney itself provides otherwise [*see Prob. Code §§ 4101(a)* (power of principal to vary statutory rules), 4202(b) (unanimous action)]. However, if an attorney in fact is unavailable because of absence, illness, or other temporary incapacity, the other attorneys in fact may exercise authority under the power as if they were the only attorneys in fact when necessary to accomplish the purposes of the power or to avoid irreparable injury to the principal's interests [*Prob. Code § 4202(d)*].

**[2] Authority of Remaining Attorney in Fact When Vacancy Occurs**

If there are two or more attorneys in fact and a vacancy occurs, the remaining attorneys in fact may exercise the authority conferred as if they were the only attorneys in fact [*Prob. Code § 4202(c)*].

**[3] Liability**

An attorney in fact is not liable for the actions of other attorneys in fact, unless the attorney in fact participates in, knowingly acquiesces in, or conceals a breach of fiduciary duty committed by another attorney in fact [*Prob. Code § 4202(e)*].

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Business & Corporate Law Agency Relationships Authority to Act General Overview Estate, Gift & Trust Law Powers of Attorney General Overview Estate, Gift & Trust Law Powers of Attorney Durable Powers



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*25-68 California Legal Forms--Transaction Guide § 68.19*

**AUTHOR:** Reviewed by Albert G. Handelman

**§ 68.19 Successor Attorneys in Fact**

**[1] Statutory Authorization**

A principal may designate one or more successor attorneys in fact to act if the authority of a predecessor attorney in fact terminates [*Prob. Code § 4203(a)*; *see § 68.14[6]* (termination of authority)]. Further, a principal who creates a durable power of attorney for personal care or property management may authorize a third person to designate one or more successor attorneys in fact at any time [*Prob. Code § 4203(b)*]. Any qualified person, including the initial attorney in fact or any successor, may be given the authority to do this; however, the third person must be designated by name, by office, or by function [*Prob. Code § 4203(b)*].

**PRACTICE TIP:**

There can be some benefit to allowing any acting attorney in fact to nominate successors to serve when the list of named alternates provided in the durable power of attorney itself has been exhausted. Often, the durable power of attorney will not be utilized until many years after it is drafted, and named alternates can die or become impossible to locate. The ability of the acting attorney in fact to name an available, qualified successor makes it more likely that there will be no gap in service under the instrument. *Commentary by Albert G. Handelman.*

**[2] Liability**

A successor attorney in fact is not liable for any action of the predecessor attorney in fact [*Prob. Code § 4203(c)*].

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Estate, Gift & Trust Law Powers of Attorney General Overview Estate, Gift & Trust Law Powers of Attorney Durable Powers Estate, Gift & Trust Law Powers of Attorney Revocation & Termination



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PART II. LEGAL BACKGROUND

*25-68 California Legal Forms--Transaction Guide § 68.20*

**AUTHOR:** Reviewed by Albert G. Handelman

**§ 68.20 Resignation of Attorney in Fact**

**[1] Notice to Principal or Conservator**

Under the Power of Attorney Law, an attorney in fact may resign by giving notice to the principal, if the principal is competent [*Prob. Code § 4207(a)(1)*]. If a conservator has been appointed for the principal, the attorney in fact must give notice of resignation to the conservator [*Prob. Code § 4207(a)(2)*].

**[2] Written Agreement With Designated Successor**

If a successor attorney in fact has been designated in the power of attorney, or pursuant to the terms of the power [*see Prob. Code § 4203(a); see also § 68.19*], the attorney in fact may resign by written agreement with that successor [*Prob. Code § 4207(a)(3)*].

**[3] Court Order**

In any case, the attorney in fact may resign by court order [*Prob. Code § 4207(a)(4)*].

**[4] No Limitation in Power of Attorney**

The right of the attorney in fact to resign as provided in the Power of Attorney Law [*see Prob. Code § 4207(a); see also [1]-[3], above*] is not subject to limitation in the power of attorney [*Prob. Code § 4207(b)*].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Powers of Attorney General Overview Estate, Gift & Trust Law Powers of Attorney Revocation & Termination



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*25-68 California Legal Forms--Transaction Guide §§ 68.21-68.99*

**AUTHOR:** Reviewed by Albert G. Handelman

**[Reserved]**

§§ 68.21[Reserved]



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A. Client Interview--Facts and Documents

*25-68 California Legal Forms--Transaction Guide § 68.100*

**AUTHOR:** Reviewed by Albert G. Handelman

**§ 68.100 Facts**

**NOTE:**

A durable power of attorney is usually prepared as part of a complete estate plan. Ch. 60, *Estate Planning*, § 60.200[2], is a client interview checklist designed to be used by an estate planning attorney at the initial client interview. This checklist includes questions designed to elicit all of the personal and financial information necessary to begin the preparation of an estate plan.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Powers of Attorney General Overview  
Estate, Gift & Trust Law Powers of Attorney Durable Powers  
Estate, Gift & Trust Law Powers of Attorney Interpretation



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A. Client Interview--Facts and Documents

*25-68 California Legal Forms--Transaction Guide § 68.101*

**AUTHOR:** Reviewed by Albert G. Handelman

**§ 68.101 Documents**

**NOTE:**

If the originals of any of the documents listed below are not available to the client or if, by reason of their special value or other considerations, they should not be turned over to the attorney, copies may be furnished. For a discussion of the rules governing the deposit of estate planning documents with an attorney for safekeeping, see *Ch. 60, Estate Planning, § 60.18*.

1. Any power of attorney previously executed by client.
2. Any will previously executed by client.
3. Any trust instrument previously executed by client.
4. Any contract affecting client's power to authorize attorney in fact to act on client's behalf, including premarital and other marital property agreements.
5. Deeds to real property.
6. Deeds of trust or mortgages.
7. Certificates for stocks, bonds, or other securities.
8. Life insurance policies owned by client or on client's life.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Powers of Attorney General Overview  
Estate, Gift & Trust Law Powers of Attorney Durable  
Powers Estate, Gift & Trust Law Powers of Attorney Interpretation



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A. Client Interview--Facts and Documents

*25-68 California Legal Forms--Transaction Guide §§ 68.102-68.109*

**AUTHOR:** Reviewed by Albert G. Handelman

**[Reserved]**

§§ 68.102[Reserved]



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*25-68 California Legal Forms--Transaction Guide § 68.110*

**AUTHOR:** Reviewed by Albert G. Handelman

**§ 68.110 Conflicts of Interest**

1. If clients are husband and wife, determine if their interests are subject to actual or potential conflicts or interests arising from:

- a. Previous marriages;
- b. Children by previous marriages.
- c. One spouse with substantially larger estate than other.
- d. Interest expressed by either or both spouses in transmuting some or all of their property from community to separate or separate to community.
- e. Interest expressed by either spouse in transferring property to someone other than other spouse.
- f. Previous attorney-client relationship between attorney and one spouse.

**NOTE:**

Conflicts of interest may arise in the preparation of durable powers of attorney in much the same way that they would arise in connection with other estate planning services. Conflicts of interest are most likely to arise when the attorney is asked to represent clients who are husband and wife. For further consideration of this important preliminary question, see *Ch. 60, Estate Planning, § 60.110*.

2. If there are conflicts of interest, determine whether clients would be willing:

- a. To waive conflict; and
- b. To give attorney written authorization to proceed with dual representation.

**NOTE:**

The attorney cannot ethically represent a husband and wife with conflicting interests without first explaining the facts giving rise to the conflict and obtaining written authorization from both clients to proceed with the dual representation [*Cal. Rules Prof. Conduct, Rule 3-310(B), (C)*]. For a conflict of interest disclosure for dual representation, see *Ch. 60, Estate Planning, § 60.201[2]*.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Business & Corporate Law Agency Relationships Agents Distinguished Fiduciary Relationships General Overview Estate, Gift & Trust Law Powers of Attorney General Overview



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*25-68 California Legal Forms--Transaction Guide § 68.111*

**AUTHOR:** Reviewed by Albert G. Handelman

**§ 68.111 Client's Personal and Financial Situation**

**NOTE:**

Because powers of attorney are usually prepared as part of an overall estate plan, the attorney should know as much about the client's personal and financial situation when preparing a durable power of attorney for property management as he or she would know when preparing a will or trust instrument.

1. Review and become thoroughly familiar with client's personal situation, including:

- a. Client's age and health.
- b. Client's marital status.
- c. Identity, age, and health of client's spouse, if any.
- d. Client's children, grandchildren, and other close relatives.

2. Review and become thoroughly familiar with client's financial situation, including:

- a. Approximate value of all of client's property.
- b. Whether client's property is separate, community, or mixed.
- c. Location of client's property.

d. Whether client has any business interests and, if so:

- (1) Whether client is personally engaged in management of business.
- (2) In what form business is owned (such as sole proprietorship, corporation, partnership, or limited liability company).
- (3) Identities of any other persons with interests in client's business.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Powers of Attorney General Overview Estate, Gift & Trust Law Powers of Attorney Durable Powers



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*25-68 California Legal Forms--Transaction Guide § 68.112*

**AUTHOR:** Reviewed by Albert G. Handelman

**§ 68.112 Potential Attorneys in Fact**

1. Determine if any of following are potential candidates for attorney in fact:

- a. Client's spouse.
- b. Client's adult children or grandchildren.
- c. Other relatives.
- d. Friends.
- e. Business associates.
- f. Artificial entity.

**NOTE:**

In rare cases, a bank or trust company may be willing to act as attorney in fact under a durable power of attorney. When an artificial entity is selected, however, ability and willingness to serve are no less important than when a natural person is selected, and compensation will almost always be expected [ *see* § 68.13[7]].

2. Determine if potential attorney in fact is legally qualified to serve because he or she is [*Prob. Code* § 4200; *see Civ. Code* § 1556]:

- a. At least 18 years of age;

- b. Of sound mind; and
- c. Not deprived of civil rights.

**NOTE:**

For discussion of the legal qualifications of an attorney in fact, see § 68.12.

3. Determine if potential attorney in fact is actually qualified to serve because he or she is:
- a. Personally acquainted with client and client's personal and financial affairs.
  - b. Trusted by client.
  - c. In good health.
  - d. Experienced in management of money and/or property.
  - e. Mature and dependable.

**NOTE:**

For a discussion of the factors that will make a potential attorney in fact a good choice, see § 68.13.

4. Determine if potential attorney in fact is willing to accept power of attorney in writing.

**NOTE:**

Although acceptance by the attorney in fact is not essential to the validity of a durable power of attorney, it is good practice to seek the attorney in fact's acceptance when the power is executed, as the attorney in fact may otherwise fail or refuse to act at some time in the future, and it may then be too late to appoint another attorney in fact [ *see* § 68.200[1][p]]. An attorney in fact does not have a duty to act unless he or she has agreed to do so, or unless he or she has already begun a transaction, in which case there is a duty to complete the transaction [*see Prob. Code* § 4230; *see also* § 68.15[2]].

5. Determine if there should be multiple attorneys in fact.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Powers of Attorney General Overview Estate, Gift & Trust Law Powers of Attorney Durable Powers



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*25-68 California Legal Forms--Transaction Guide § 68.113*

**AUTHOR:** Reviewed by Albert G. Handelman

**§ 68.113 When Power of Attorney Will Become Effective**

1. Determine whether power should become effective:

- a. On execution; or
- b. Only on client's incapacity.

**NOTE:**

A power of attorney that is to become effective on the occurrence of a specified future event or contingency, such as the subsequent incapacity of the principal, is a type of "springing" power [*Prob. Code § 4030*]. "Springing" powers are widely used by estate planners, since many clients feel that they will not need the services of an attorney in fact until such time as they are no longer able to manage their own affairs [ *see § 68.10[3][f]*, [g]].

2. If power is to become effective on client's incapacity, determine if client's incapacity should be determined:

- a. By written declaration under penalty of perjury signed by two physicians.

**NOTE:**

*Prob. Code § 4129(a)* authorizes the principal to designate one or more persons who, by a written declaration under penalty of perjury, have the power to determine conclusively when the "triggering" event or contingency in a "springing" power of attorney has occurred [ *see § 60.200[1][k]*].

**PRACTICE TIP:**

It is not clear from the statute whether the person or persons holding this power must be named or may simply be described by the role they play. For example, can the durable power of attorney simply make reference to the principal's treating physician, or must a specific doctor be named? Caution suggests specifically naming the person or persons to hold the power in cases where that is possible. *Commentary by Albert G. Handelman.*

- b. By court order.
- c. By written declaration under penalty of perjury signed by two physicians or by court order.
- d. In some other way.

**NOTE:**

It is essential to provide in a "springing" power of attorney some clear and practical method for determining when the "triggering" event or contingency has occurred. For further discussion, see § 68.200[1][k].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Powers of Attorney General Overview  
Estate, Gift & Trust Law Powers of Attorney Durable  
Powers Estate, Gift & Trust Law Powers of Attorney Interpretation



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*25-68 California Legal Forms--Transaction Guide § 68.114*

**AUTHOR:** Reviewed by Albert G. Handelman

**§ 68.114 Duration of Power**

1. Determine whether power should:

a. Specify termination date;

**NOTE:**

Durable Powers of attorney do not usually specify a termination date, though it is legally possible to include a provision doing so.

b. Be of indefinite duration; or

c. Apply only during specified periods (for example, when principal is out of country).

2. If power is to have specified termination date, determine if date should be:

a. Date certain; or

b. Specified period of months or years after execution.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Powers of Attorney General Overview Estate, Gift & Trust Law Powers of Attorney Durable Powers Estate, Gift & Trust Law Powers of Attorney Revocation & Termination



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*25-68 California Legal Forms--Transaction Guide § 68.115*

**AUTHOR:** Reviewed by Albert G. Handelman

**§ 68.115 Powers of Attorney in Fact**

1. Determine whether durable power of attorney should:

a. Include detailed specification of attorney in fact's powers taken from *Prob. Code §§ 4450-4463*; or

**NOTE:**

These are powers that may be incorporated by reference into the Uniform Statutory Form Power of Attorney [*see Prob. Code §§ 4400-4465*]. They are generally well-crafted provisions and suitable for inclusion in most attorney-drafted durable powers of attorney for property management. The long-form durable power of attorney for property management in § 68.200 [2] includes a detailed specification of these powers.

b. Summarize statutory powers.

**NOTE:**

The powers in *Prob. Code §§ 4450-4463* may be summarized. The short-form durable power of attorney for property management in § 68.201[2] summarizes these powers.

2. Determine whether durable power of attorney should give attorney in fact power to:

a. Create, modify, or revoke a trust.

b. Fund a trust with principal's property if trust was not created by principal or by person authorized to create trust on principal's behalf.

- c. Make or revoke gift of principal's property in trust or otherwise.
- d. Exercise right to make disclaimer on principal's behalf.
- e. Create or change survivorship interests in principal's property.
- f. Designate or change designation of beneficiaries to receive any property, benefit, or contract right on principal's death.
- g. Make loan to attorney in fact.

**NOTE:**

The powers in PP a through g, *above*, may not be exercised by an attorney in fact unless the power of attorney expressly authorizes the attorney in fact to do so [*Prob. Code* § 4264; *see* § 68.14[3]]. All of these powers (except the power to make a loan to the attorney in fact) are important estate planning powers. They should be granted to the attorney in fact only after carefully considering their estate planning implications and only if the attorney and client are both satisfied that the powers are consistent with other aspects of the client's estate plan. For general estate planning considerations, see Ch. 60, *Estate Planning* .

3. Determine whether durable power of attorney for property management should give attorney in fact power to make gifts.

**NOTE:**

The power to make gifts can be an important enhancement to a client's estate plan. If the client is incapacitated, and if it is in the client's interest to reduce the total size of the client's taxable estate, it may be in the client's interest to authorize the attorney in fact to make gifts. The planner should also consider whether the principal has personally engaged in a regular giving program. However, the power to make gifts may have adverse estate tax implications unless it is appropriately restricted. For general coverage of gifts, see Ch. 60A, *Gifts* . For the advantages of giving the attorney in fact the power to make gifts, see § 68.200[1][e]. For restrictions that may be placed on the power to make gifts, see § 68.200[1][h].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Powers of Attorney General Overview Estate, Gift & Trust Law Powers of Attorney Durable Powers Estate, Gift & Trust Law Powers of Attorney Interpretation Estate, Gift & Trust Law Powers of Attorney Limited Powers



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*25-68 California Legal Forms--Transaction Guide § 68.116*

**AUTHOR:** Reviewed by Albert G. Handelman

**§ 68.116 Compensation of Attorney in Fact**

1. Determine whether attorney in fact should:

- a. Be expected to serve as accommodation to principal and without compensation; or
- b. Receive compensation for services rendered under power of attorney.

**NOTE:**

Unless the power of attorney provides otherwise, the attorney in fact will be entitled to reasonable compensation [*Prob. Code § 4204*]. In practice, however, most attorneys in fact probably act as an accommodation to the principal and without any expectation of compensation [ *see §§ 68.17, 68.200[1][1]*].

2. If attorney in fact is to receive compensation for services rendered under power, determine:

- a. If attorney in fact should receive "reasonable" compensation.
- b. If attorney in fact should receive compensation according to hourly rate.
- c. If attorney in fact's compensation should be subject to "cap."

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Business & Corporate Law Agency Relationships Duties & Liabilities Compensation Estate, Gift & Trust Law Powers of

AttorneyGeneral Overview



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*25-68 California Legal Forms--Transaction Guide §§ 68.117-68.129*

**AUTHOR:** Reviewed by Albert G. Handelman

**[Reserved]**

§§ 68.117[Reserved]



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*25-68 California Legal Forms--Transaction Guide § 68.130*

**AUTHOR:** Reviewed by Albert G. Handelman

**§ 68.130 Execution of Durable Power of Attorney**

1. Arrange for execution of durable power for property management in attorney's office or, if client is unable to visit attorney's office, in client's home, office, hospital, or elsewhere.
2. Before asking client to execute durable power for property management, present all of following to client:
  - a. Original durable power of attorney for property management.
  - b. Original statement in § 68.212[2] warning client of legal consequences of executing durable power of attorney for property management.
  - c. Original statement in § 68.213[2] by which client will acknowledge that he or she has been fully advised regarding legal consequences of signing power of attorney and has been shown and read statement in § 68.212[2].
3. Ask client to read all documents in P 2a-c, *above*.
4. After client has read all documents in P 2a-c, *above*, ask client to sign them.

**NOTE:**

The client should sign personally. If he or she is unable to do so, however, the power may be signed by some other person in the client's presence and at the client's direction [*Prob. Code § 4121(b)*; *see § 68.11[1]*]. If the power of attorney is to be signed by witnesses (rather than acknowledged before a notary public), the witnesses should be present and personally observe the client's signature; if this is not

possible, however, the client may acknowledge to the witnesses that he or she signed the power [*Prob. Code § 4122(c)*]. For witness requirements, see P 6b, *below*.

5. If attorney in fact has agreed to sign acceptance, procure attorney in fact's signature.

**NOTE:**

Obtaining the attorney in fact's acceptance when the power is executed may avoid later problems [ *see § 68.112*, P 5].

6. To comply with statutory requirements for acknowledgment or witnesses [*see Prob. Code §§ 4121(c), 4122*], do one of following:

- a. Have client's signature acknowledged before notary public; or
- b. Have power of attorney signed by at least two witnesses, both of whom must be adults and neither of whom may be attorney in fact designated in power of attorney.

**NOTE:**

Every durable power of attorney must be acknowledged before a notary public or signed by at least two qualified witnesses [*Prob. Code § 4121(c)*; *see Prob. Code § 4122* (witness requirements); *see also § 68.11[3]*]. Acknowledgment is generally preferable to witnesses, since it may be necessary to record the power of attorney if the attorney in fact deals with real property, and acknowledgment before a notary public is a prerequisite to recording [*Gov. Code § 27287*]. Acknowledgment may also help to secure acceptance of the power of attorney by third parties.

7. Sign lawyer's certificate at end of power [ *see § 68.201[1][j]*].

8. Provide for storage of durable power of attorney as follows:

- a. Have client keep an original.
- b. Retain an original.
- c. When appropriate, deliver an original to first named attorney in fact.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Powers of Attorney General Overview Estate, Gift & Trust Law Powers of Attorney Durable Powers



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*25-68 California Legal Forms--Transaction Guide § 68.131*

**AUTHOR:** Reviewed by Albert G. Handelman

**§ 68.131 Revocation of Durable Power of Attorney**

1. Arrange for execution of notice of revocation of durable power of attorney [ *see* § 68.210[2]] in attorney's office or, if client is unable to visit attorney's office, in client's home, office, hospital, or elsewhere.
2. Before asking client to execute notice of revocation, present original of notice to client and ask client to read it.
3. After client has read notice of revocation, ask client to sign it.
4. Have client's signature acknowledged before notary public.

**NOTE:**

There is no legal requirement that a notice of revocation of a power of attorney be acknowledged or even witnessed [*see Prob. Code* § 4151(a)(2)]. If the power of attorney was recorded, however, acknowledgment or other certified proof of execution will be necessary before the notice of revocation can be recorded [*see Gov. Code* § 27287]. As in the case of the power itself, acknowledgment may also help to secure acceptance of the revocation by third parties.

5. Send copy of notice of revocation with cover letter to attorney in fact and all other interested parties.

**NOTE:**

Although the Power of Attorney Law does not require that a written revocation of a power of attorney be communicated to the attorney in fact to be effective [*see Prob. Code* §§

4151, 4152], the attorney in fact and third parties will not be liable for acts taken in good faith reliance on a power of attorney without notice that it has been revoked [*see Prob. Code* §§ 4151(b), 4152(b), 4153(b), 4305(a); *see also* § 68.14[4][c]]. For a transmittal letter, see § 68.211[2].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Powers of Attorney General Overview  
Estate, Gift & Trust Law Powers of Attorney Durable  
Powers Estate, Gift & Trust Law Powers of Attorney Revocation & Termination



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California Legal Forms--Transaction Guide

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DIVISION IV: WILLS AND TRUSTS  
CHAPTER 68 DURABLE POWERS OF ATTORNEY FOR PROPERTY MANAGEMENT  
PART III. TRANSACTION GUIDE  
C. Procedural Guide

*25-68 California Legal Forms--Transaction Guide §§ 68.132-68.139*

**AUTHOR:** Reviewed by Albert G. Handelman

**[Reserved]**

§§ 68.132[Reserved]



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DIVISION IV: WILLS AND TRUSTS  
CHAPTER 68 DURABLE POWERS OF ATTORNEY FOR PROPERTY MANAGEMENT  
PART III. TRANSACTION GUIDE  
D. Drafting Guide

*25-68 California Legal Forms--Transaction Guide § 68.140*

**AUTHOR:** Reviewed by Albert G. Handelman

**§ 68.140 Durable Power of Attorney for Property Management**

1. If client wishes to give attorney in fact broad authority to manage client's property and to specify attorney in fact's powers and duties in detail, select long-form durable power of attorney in § 68.200[2].

**NOTE:**

*The form in § 68.200[2] contains a wide variety of alternative provisions and may be tailored to the client's individual needs and preferences. Those alternatives are discussed in § 68.200[1].*

2. If client wishes to give attorney in fact broad authority to manage principal's property but does not wish to include detailed specification of powers in long-form durable power of attorney, select short-form durable power of attorney for property management in § 68.201[2].

**NOTE:**

*The form in § 68.201[2] contains a wide variety of alternative provisions and may be tailored to the client's individual needs and preferences. Those alternatives are discussed in § 68.201[1].*

3. To establish written record that client was fully advised as to consequences of executing durable power of attorney for property management, prepare:

a. Statement in § 68.212[2] warning client of legal consequences of executing power; and

b. Statement in § 68.213[2] by which principal will acknowledge that he or she has been fully advised and has been shown and has read warnings in statement in § 68.212[2].

**NOTE:**

Although this procedure is not required by law, it is good practice and will establish a written record that the client was duly advised and received the warning statement in § 68.212[2]. For discussion, see § 68.212[1].

**PRACTICE TIP:**

Query, though, whether use of the statement in § 68.212[2] may increase the planner's liability. *Commentary by Albert G. Handelman.*

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Powers of Attorney General Overview  
Estate, Gift & Trust Law Powers of Attorney Durable  
Powers Estate, Gift & Trust Law Powers of Attorney Limited Powers



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D. Drafting Guide

*25-68 California Legal Forms--Transaction Guide §§ 68.141-68.199*

**AUTHOR:** Reviewed by Albert G. Handelman

**[Reserved]**

§§ 68.141[Reserved]



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DIVISION IV: WILLS AND TRUSTS  
CHAPTER 68 DURABLE POWERS OF ATTORNEY FOR PROPERTY MANAGEMENT  
PART IV. FORMS

A. Complete Durable Powers of Attorney for Property Management

*25-68 California Legal Forms--Transaction Guide § 68.200*

**AUTHOR:** Reviewed by Albert G. Handelman

**§ 68.200 Durable Power of Attorney for Property Management and Other Personal Affairs (Long Form)**

**[1] Comment**

**[a] Use of Form**

This form is a durable power of attorney for property management and other personal affairs. It is the most comprehensive and flexible of the durable power of attorney forms in this chapter. It may be used whenever the principal wishes to create a durable power of attorney for property management and to specify the attorney in fact's powers and duties in detail.

**[b] Powers From Uniform Statutory Form**

The powers granted to the attorney in fact by Sections 1.01 through 1.15 of this form are taken from *Prob. Code §§ 4450-4464*, which state powers that may be incorporated by reference into the Uniform Statutory Form Power of Attorney [*see Prob. Code §§ 4400-4465*]. These provisions contain detailed descriptions of the powers of the attorney in fact to act with regard to the principal's property and other related matters. They are generally well-crafted provisions and suitable for inclusion in most attorney-drafted durable powers of attorney for property management. If the principal objects to one or more of these provisions, however, Sections 1.01 through 1.15 should be modified to meet the objections.

**[c] Power Over Specific Item or Class of Property**

This form may be used to give the attorney in fact power and authority over all of the principal's property, or only part of the property. The introductory section of the form includes an optional provision that may be used if the principal chooses to limit the attorney in fact's power and authority to a specific item or items, or to a defined class, of the principal's property.

When the principal chooses to limit the attorney in fact's authority to something less than all of the principal's property, the principal will have the authority conferred and no more. Although many of the provisions of the form give the attorney in fact power over various types of property (for example, real property, personal property, securities, insurance policies, and business interests), the attorney in fact's power to act with respect to these various types of property will be strictly limited if the attorney in fact's authority is limited only to a specific item, items, or class of the principal's property.

When the principal wishes to restrict the attorney in fact's authority in this way, the property over which the attorney in fact is to have authority should be described with sufficient particularity so there will be no doubt which property is to be included within the scope of the power and which is to be excluded.

#### **[d] Power to Create, Modify, or Revoke Trust**

The Power of Attorney Law includes a rule limiting the authority that a principal may give an attorney in fact to affect trusts created by the principal, or in which the principal has any of specified interests. Under this rule, an attorney in fact may not create, modify, or revoke a trust, or use the principal's property to fund a trust not created by the principal or a person authorized to create a trust on the principal's behalf, unless the power of attorney expressly authorizes the attorney in fact to do so [*Prob. Code § 4264(a), (b)*]. Under the same rule, the attorney in fact may not designate or change the designation of beneficiaries to receive any property, benefit, or contract right on the principal's death, unless authorized to do so in the power of attorney [*Prob. Code § 4264(f)*]. Thus, when an attorney-in-fact executed a trust providing a life estate in the decedent's residence to herself with the remainder to the decedent's grandchildren, she attempted to change the beneficiary designation from that provided in the decedent's will or the laws of intestate succession, and therefore violated the provisions of *Prob. Code § 4264(f)* [ *Schubert v. Reynolds (2002) 95 Cal. App. 4th 100, 106, 115 Cal. Rptr. 2d 285* ] .

If the principal wishes to give the attorney in fact power to do any of the actions mentioned above, the power of attorney must include a provision so stating.

Section 1.16 of this form specifies whether the attorney in fact will have power to do any of these things and, if so, whether the attorney in fact's power will be limited in any way.

#### **PRACTICE TIP:**

The planner may want to suggest to the client including a limitation, possibly precatory, describing the estate planning goals to be achieved. This could take the form of specific goals that the client would like to have the attorney in fact consider, or it could simply be an admonition to have any change further the estate planning goals evidenced by the principal's other estate planning documents at the time the power is exercised. *Commentary by Albert G. Handelman.*

This section is optional. If it is not included in the power of attorney, the attorney in fact will not have the power to do any of the things specified in the rule. For further discussion, see § 68.14[3].

#### **[e] Gifts**

Properly used, lifetime gifts can be very useful estate planning tools. Making gifts after the principal has become incapacitated can be an excellent means of reducing the size of the principal's estate and reducing the estate taxes that will be due on the death of the principal or the principal's spouse.

Section 1.20 of this form is a provision designed to provide for suitable lifetime gifts to be made on the principal's behalf by the attorney in fact. It is an optional provision and need not be included in every durable power of attorney for property management. When it is desirable to reduce estate taxes, however, a provision of this type, properly tailored to

the principal's individual needs, may serve a useful purpose.

A well-drafted provision empowering an attorney in fact to make lifetime gifts must address three concerns:

- Who will be designated as the permissible donees of the gifts.
- Whether all donees are to be treated equally, or whether one or more donees will (or may) have preferences over others.
- What limits should be placed on the amount of the gifts.

The first two choices should be made by the principal. While the third choice must also be made by the principal, the attorney should carefully counsel the principal as to the important legal consequences of that choice.

It may be desirable, for example, to limit the amount of the gifts in one calendar year to the amount of the annual gift tax exclusion [*see I.R.C. § 2503(b)*]; for discussion of the annual exclusion and the applicable exclusion amounts, *see Ch. 60A, Gifts, § 60A.32[4]*. This will avoid any gift tax liability and guard against erosion of the "applicable exclusion amount" of the unified credit against gift and estate taxes [*see I.R.C. § 2010(c)*] (table of graduated amounts) and discussion in *§ 60.13[5][b]* available to the donor. However, a limitation of this kind would not apply to gifts that incur no gift tax, such as gifts to the principal's spouse, which qualify for the unlimited marital deduction [*see I.R.C. § 2056; see also Ch. 71, Marital Deduction Trust Provisions* ].

It may also be desirable to limit the attorney in fact's power to make gifts to himself or herself. This may be done by completely prohibiting gifts to the attorney in fact or by authorizing them, but limiting the amount of the gifts in some appropriate way.

Gifts to the attorney in fact may be limited to amounts necessary for the attorney in fact's support, medical care, and education [*see* [2], Section 1.20(d), *below* (first alternative)]. When this is done, the attorney in fact's power will be limited by an "ascertainable standard" and the attorney in fact will not be deemed to have a general power of appointment over the principal's property, which would make the property subject to gift and estate tax in the hands of the attorney in fact [*see I.R.C. §§ 2041(b)(1)*] (general power of appointment for estate tax purposes), 2514(c) (general power of appointment for gift tax purposes); *see also Ch. 60, Estate Planning, § 60.13[1][g]*].

Gifts to the attorney in fact may also be limited to the greater of \$5,000 or 5 percent of the assets subject to the power [*see* [2], *below*, Section 1.20(d) (second alternative)]. This limitation will also prevent the attorney in fact's power to make gifts to himself or herself from being deemed a general power of appointment. However, a so-called "5 or 5" power is effective only for gift tax purposes [*see I.R.C. §§ 2041(b)(2), 2514(e)*]. Unlike the "ascertainable standard" limitation, it is not effective for estate tax purposes [*see Ch. 64, Testamentary Trusts: Payment and Distribution Provisions* , § 64.302[1][b]].

#### **[f] Nomination of Conservator**

A durable power of attorney may be used to nominate a conservator of the principal's person or estate [*Prob. Code § 4126(a)*]. While such a nomination is not binding on the appointing court, the court is required to appoint the nominee unless it finds that the appointment would not be in the principal's best interests [*Prob. Code §§ 1810, 4126(b)*]; *see Conservatorship of Ramirez (2000) 90 Cal. App. 4th 390, 401-403, 108 Cal. Rptr. 2d 581* ; *see also In re Marriage of Caballero (1994) 27 Cal. App. 4th 1139, 1151-1152, 33 Cal. Rptr. 2d 46* (attorney in fact may bring action on principal's behalf only as a guardian ad litem; rebuttable presumption exists in favor of appointment of designated attorney in fact and conservator nominee as guardian ad litem)].

A conservator usually will not be necessary if the principal has an attorney in fact appointed under a durable power of attorney for property management and an attorney in fact appointed under a durable power of attorney for health care, especially if one of these instruments includes powers for personal care [ *see* § 68.10[5][c]]. However, the creation of durable powers of attorney does not guarantee that the court will never appoint a conservator. Conditions may change after the durable powers of attorney are executed, and the need for one or more conservatorships may later become apparent.

It is good practice to provide for the possibility that a conservator may eventually become necessary by nominating a conservator in the power of attorney. Section 1.21 of this form is a provision nominating conservators both of the principal's person and the principal's estate. The same person may be nominated for both of these positions, or different persons, at the principal's option.

The person nominated to serve as conservator may be the same person designated as attorney in fact. If a conservator is appointed, the attorney in fact must account to the conservator [*Prob. Code* § 4206(a)]. If the person chosen to act as attorney in fact is capable and trustworthy, it will often make sense to have the same person serve as conservator. If after appointment of the attorney in fact it becomes evident that the person selected to act in that capacity does not possess these qualities, the court will probably appoint some other person to serve as conservator [*see Prob. Code* §§ 1810, 4126(b)].

The nomination of a conservator in a durable power of attorney may be superseded by a later written nomination [*Prob. Code* §§ 1810, 4126(b)]. This guarantees that, so long as the principal is competent, he or she will retain the right to change his or her mind at any time.

**PRACTICE TIP:**

Durable powers of attorney are often explained to clients as the final means by which the necessity for imposition of a conservatorship may be avoided. Indeed, they may well fill that role in actual practice. However, the planner should focus on the fact that there are two distinct types of probate conservatorships: conservatorships of the person, and conservatorships of the estate. A power of attorney for health care [ *see* Ch. 104, *Health Care Transactions, Consents, and Directives* ], especially when coupled with a durable power of attorney for personal care, largely replaces a conservatorship of the person. A durable power of attorney for property management essentially obviates the need for a conservatorship of the estate.

Accordingly, many planners believe that the use of a durable power of attorney to nominate conservators should take into account this natural alignment. Thus, a power of attorney for health care would include a nomination of conservators of the person only, and a durable power of attorney for property management would include a nomination of conservators of the estate only. *Commentary by Albert G. Handelman.*

For detailed discussion of the use of powers of attorney for health care, and their governing statute, the Health Care Decisions Law [*Prob. Code* § 4600 *et seq.*], *see* Ch. 104, *Health Care Transactions, Consents, and Directives* .

**[g] Restrictions on Property Management Powers**

If the attorney in fact should die before the principal, and if the attorney in fact holds certain powers over the principal's estate at the time of his or her death, all or part of the principal's property could be included in the attorney in fact's estate for federal estate tax purposes. To avoid this result, the power of attorney should include provisions negating some of the potentially unfavorable aspects of the attorney in fact's powers over the principal's property.

**[h] Restrictions on Power to Make Gifts**

Under *I.R.C. § 2041*, the value of the gross estate of a decedent includes the value of all property over which the decedent holds a general power of appointment at the time of death [*I.R.C. § 2041(a)(2)*]. A power to affect the beneficial enjoyment of property will be deemed a general power of appointment if it can be exercised in favor of the holder of the power, the holder's estate or creditors, or creditors of the holder's estate [*I.R.C. § 2041(b)(1)*]. Whether a power of appointment is a general power for estate tax purposes must always be determined by examining the substance of the power and not merely its form [*Treas. Reg. § 20.2041-1(b)(1)*]. If the attorney in fact has unlimited power to make gifts of the principal's property to himself or herself, or to his or her creditors, the attorney in fact will be deemed to hold a general power of appointment over the principal's property; and, if the power is held at the time of the attorney in fact's death, the property would be included in the attorney in fact's estate for federal estate tax purposes.

To avoid this result, the power of the attorney in fact to make gifts to himself or herself may be limited or absolutely prohibited. If the power is limited, it may be limited by an "ascertainable standard" relating to the attorney in fact's health, education, support, or maintenance. When a power is limited to such an "ascertainable standard," it is not a general power of appointment for estate tax purposes, and property subject to the power will not be included in the holder's estate for estate tax purposes [*see I.R.C. § 2041(b)(1)(A)*; *see also* [e], *above*]. For a provision limiting the attorney in fact's power to make gifts to himself or herself to an "ascertainable standard," see Section 1.20(d) of this form (first alternative).

The power of the attorney in fact to make gifts to himself or herself may also be limited to the greater of \$5,000 or 5 percent of the value of the property subject to the power. When a power is limited to the "5 or 5" amount, it is not deemed a general power of appointment for federal gift tax purposes (but not for estate tax purposes) [*I.R.C. § 2514(e)*]. For a provision limiting the attorney in fact's power to make gifts to himself or herself to the "5 or 5" amount, see Section 1.20(d) of this power (second alternative).

The power may also be limited to the greater of the "5 or 5" amount or the amount of the annual exclusion [*see I.R.C. § 2503(b)*; *see also Ch. 60, Estate Planning, § 60.14[2]*]. This will assure that the power will not be deemed a general power of appointment for gift tax purposes, and also assure that no gift tax will be due on any gifts made under the power, although it will not remove the danger that the power will be considered a general power of appointment for estate tax purposes. For a provision limiting the attorney in fact's power to make gifts to himself or herself in this way, see Section 1.20(d) of this form (third alternative).

Perhaps the easiest way of avoiding the potential estate tax dangers of giving the attorney in fact power to make gifts to himself or herself is simply to prohibit gifts to the attorney in fact or to any person to whom the attorney in fact owes an obligation of support. For a provision doing this, see Section 1.20(d) of this form (fourth alternative).

#### **[i] Restrictions on Power to Deal With Insurance Policies**

Under *I.R.C. § 2042*, the value of a decedent's gross estate includes the proceeds of any insurance policy on the decedent's life if, at the time of the decedent's death, the decedent possessed any "incidents of ownership" in the policy [*I.R.C. § 2042(2)*]. For estate tax purposes, "incidents of ownership" include the power to change the beneficiary of the policy, to surrender or cancel the policy, to assign the policy, to pledge the policy for a loan, and to exercise certain other rights and powers over the policy [*Treas. Reg. § 20.2042-1(c)(2)*; *see Ch. 60, Estate Planning, § 60.13[1][h]*].

If the principal owns a life insurance policy on the life of the attorney in fact, and if the attorney in fact has power to exercise "incidents of ownership" in the policy, the policy could be included in the attorney in fact's estate for estate tax purposes. This could happen, for example, if the principal is a married woman who owns a life insurance policy on her husband's life. If the principal's husband is designated as attorney in fact, and if the power of attorney gives the attorney in fact power to deal with the insurance policy, the proceeds of the policy could be included in the attorney in fact's estate on the attorney in fact's death. To avoid this result, the power may prohibit the attorney in fact from exercising any "incidents of ownership" over life insurance policies on the attorney in fact's life. For a provision doing this, see

Section 1.22(c) of this form.

**[j] Restrictions on Powers Over Irrevocable Trust Created by Attorney in Fact**

Under *I.R.C. § 2036*, the gross estate of a decedent includes the value of all property as to which the decedent has made a transfer, by trust or otherwise, under which the decedent has retained the possession or enjoyment of the property, or the right to receive the income from the property, for any period not ascertainable without reference to the decedent's death, or that does not in fact end before the decedent's death [*I.R.C. § 2036(a)*]. Under *I.R.C. § 2038*, the gross estate of a decedent includes the value of all property as to which the decedent has made a transfer, by trust or otherwise, under which he or she has retained the power to alter, amend, revoke, or terminate the transfer [*I.R.C. § 2038(a)(1)*]. If the power of attorney gives the attorney in fact power over a trust created by the attorney in fact, there is a possibility that the trust property might be included in the attorney in fact's estate under either or both of these provisions.

Assume, for example, that a husband created a trust and that he made the trust irrevocable so that the trust assets would not be included in his estate for federal estate tax purposes. Assume further that he appointed his wife as trustee of the trust. If the wife thereafter executes a durable power of attorney under which the husband is attorney in fact, and if the terms of the power of attorney can be construed to give the attorney in fact the power to exercise the wife's authority as trustee of the irrevocable trust, the trust assets might be included in the attorney in fact's estate for federal estate tax purposes, contrary to his wishes. To avoid this result, the power of attorney may simply prohibit the attorney in fact from acting as trustee of an irrevocable trust as to which he or she is also the settlor. For a provision doing this, see Section 1.22(a) of this form.

**PRACTICE TIP:**

More to the point, an attorney in fact shouldn't--and arguably cannot--be permitted to exercise any powers held by the principal as trustee of any trust (except, perhaps, those non-discretionary, ministerial duties which might be delegated to the attorney in fact by the principal/trustee under a specific power of delegation contained in the trust). A trust should never be drawn to allow an incapacitated trustee's attorney in fact to exercise powers as trustee as a matter of right. Similarly, a trust should never be drawn to allow a fit trustee's attorney in fact under a non-springing power to raise any claim of right to exercise the trustee's powers as a matter of right. Not only will this accord with the generally understood inability of a trustee to delegate discretionary acts, but it will also eliminate any concern about possible inadvertent estate tax inclusion problems for the attorney in fact under *I.R.C. §§ 2036* and *2038*.  
*Commentary by Albert G. Handelman.*

**[k] Determination of Incapacity**

If the power of attorney provides that it will be effective only on the principal's incapacity, it is a type of "springing" power [*see Prob. Code § 4030; see also § 68.10[3][g]*] and should contain some provision specifying how it will be determined if the principal has become incapacitated; and, if the principal becomes incapacitated, how it will be determined if and when the principal regains his or her capacity.

The Power of Attorney Law provides one method by which these determinations can be made. *Prob. Code § 4129(a)* authorizes the principal to designate one or more persons who, by a written declaration under penalty of perjury, have the power to determine conclusively when the "triggering" event or contingency in a springing power of attorney has occurred. The section permits the principal to authorize the attorney in fact or some other person to perform this function, either alone or jointly with other persons [*Prob. Code § 4129(a)*]. When the designated person or persons make the written declaration under penalty of perjury, third persons may act in reliance on the declaration without liability to the principal or to any other person, regardless of whether the specified event or contingency has actually occurred [*Prob. Code § 4129(b)*].

*Prob. Code § 4129(a)* does not provide the exclusive method for determining when the principal has become incapacitated [*Prob. Code § 4129(d)*]. It does provide a practical method, however; and, since the statute protects third persons who rely on the written declaration under penalty of perjury, it is good practice to follow the method suggested by the statute.

Section 2.01 of this form adopts that method, but also provides that the principal may be determined to have become incapacitated by court order. A court order may in some circumstances make more sense than a written declaration under penalty of perjury, and third persons who rely on court orders will have equally good protection from liability.

Section 2.02 provides a similar method for determining if and when the principal regains his or her capacity.

### **[l] Compensation**

Unless the power of attorney provides otherwise, the attorney in fact will be entitled to reasonable compensation for services rendered as attorney in fact, and to reimbursement for reasonable expenses incurred as a result of acting in that capacity [*Prob. Code § 4204*; see *Comprehensive Power of Attorney Law*, 24 Cal. L. Revision Comm'n Reports 111, 134 (1994); see also § 68.17].

In practice, most attorneys in fact probably act as an accommodation to the principal and without any expectation of compensation. In particular cases, however, compensation may not only be justified, but demanded. This is most likely to be the case when an artificial entity is designated as attorney in fact [ see § 68.13[7]], or when the principal's property and affairs are extensive and it would require considerable time and effort over a long period of time to adequately manage them.

It is important in all cases to address the issue of compensation, either by providing that the attorney in fact will not receive compensation, or by providing some means of determining how the attorney in fact will be compensated. Section 2.03 of this form provides various alternative provisions for addressing this issue.

### **[m] Exculpation of Attorney in Fact**

The duties of the attorney in fact are spelled out in some detail in the Power of Attorney Law [see *Prob. Code §§ 4230-4238*; see also § 68.15]. An attorney in fact who fails to carry out his or her duty in some respect may be liable, not only to the principal, but also to third parties.

Many prospective attorneys in fact will expect some kind of protection against this risk. Attorneys in fact who are close friends or relatives of the principal and who do not receive compensation for serving as attorney in fact will often be reluctant to serve without some assurance that they will not be held liable for inadvertent or merely technical breaches of their statutory duties. Section 2.07 of this form is a provision that will relieve the attorney in fact of all liability for actions taken or not taken in good faith, except willful misconduct and gross negligence. It is an optional provision, and should be included in the power of attorney only when appropriate under all of the circumstances.

It is never wise to give the attorney in fact complete freedom from liability for breaches of the attorney in fact's duties. In particular cases, it may be unwise to include any exculpatory provision in the power of attorney. If, for example, the attorney in fact is to be an artificial entity [ see § 68.13[7]] or a professional fiduciary, and if the attorney in fact is to receive adequate compensation for serving as attorney in fact, it may be quite reasonable to hold the attorney in fact to strict compliance with the statutory duties. Any risk of liability on the part of such an attorney in fact can be guarded against by acquiring liability insurance.

### **[n] Power to Petition Court**

The Power of Attorney Law permits the principal, the attorney in fact, and certain other persons to petition the court for various orders relating to a power of attorney for property management and the attorney in fact's duties and powers under the power [*Prob. Code* §§ 4540-4545]. Orders may be sought, among other things, determining whether the power of attorney is in effect or has terminated, passing on the acts or proposed acts of the attorney in fact, compelling the attorney in fact to submit accounts or reports, and, in appropriate circumstances, revoking the attorney in fact's authority under the power [*Prob. Code* § 4541].

The Power of Attorney Law also permits the principal by express provision in the power of attorney to eliminate the authority of certain persons (but not the principal, the principal's conservator, or the public guardian) to petition the court [*Prob. Code* § 4503(a)]. However, this may be done only if the principal is represented by a duly licensed attorney when the power is executed and the attorney signs a certificate stating that he or she advised the principal concerning his or her rights in connection with the power of attorney and the applicable law and, after being so advised, the principal executed the power [*Prob. Code* § 4503].

It is not good practice to totally eliminate the power to petition the court, since the statutory petition procedure provides valuable protection against misuse of the power of attorney. In particular cases, however, it may be desirable to eliminate the right of selected persons to petition, particularly if the principal has reason to suspect that those persons might attempt to frustrate the purposes of the power through court proceedings.

In some cases, it may also be desirable to eliminate the power of some persons to petition the court while other persons are living and competent. For example, the power may provide that, while the principal's spouse is living and competent, the principal's children will not have the power to petition the court. In appropriate circumstances this may protect the spouse from undesirable judicial challenges mounted by the principal's children.

Section 2.09 of this form is a provision that may be used to eliminate the authority of a specified person or persons to petition the court. When this provision is used, the power of attorney must include the lawyer's certificate required by *Probate Code* § 4503(a)(2). For the form for this certificate, see the Lawyer's Certificate that follows the Certificate of Acknowledgment in this form.

### **[o] Governing Law**

If a power of attorney provides that the California Power of Attorney Law [*see Prob. Code* § 4000 *et seq.*; *see also* § 68.10[2][a]] governs the power, or if it otherwise indicates the principal's intention that the power is to be governed by the Power of Attorney Law, the Law governs the power and applies to acts and transactions of the attorney in fact, whether inside or outside of California, when any of the following conditions is satisfied [*Prob. Code* § 4052(a)]:

- The principal or attorney in fact was domiciled in California when the principal executed the power of attorney.
- The authority conferred on the attorney in fact relates to property, acts, or transactions in California.
- The acts or transactions of the attorney in fact occurred or were intended to occur in California.
- The principal executed the power of attorney in California.
- There is a reasonable relationship between California and the subject matter of the power of attorney.

If the power does not provide that it will be governed by the Power of Attorney Law, that Law will nevertheless govern the power and apply to the acts and transactions of the attorney in fact in California if the principal was domiciled in California when the power of attorney was executed or if the principal executed the power in California [*Prob. Code* §

4052(b)].

If the Power of Attorney Law is applicable to a power of attorney under any of the rules described above, the power will remain subject to the law even if the principal or attorney in fact later change their domiciles or if property that was subject to the law is removed from the state [*Prob. Code* § 4052(c)].

The Power of Attorney Law is a modern and comprehensive statute. When any of the bases for application of the law described above are present, it is probably good practice to provide that the law will govern the power. Section 3.03 of this form is a provision that may be used to do this.

#### **[p] Execution**

A durable power of attorney must be signed, either by the principal personally or by some other person in the principal's presence and at the principal's direction [*Prob. Code* § 4121(b)].

There is no requirement that the attorney in fact sign the power. However, procuring the attorney in fact's signature will help to assure that the designated attorney in fact is willing to serve. Under the Power of Attorney Law, a person designated as attorney in fact has no duty to exercise the authority granted by the power of attorney [*Prob. Code* § 4230(b); see § 68.15[2]], and some attorneys in fact may wait until a situation arises before deciding whether to act under the power [see *Comprehensive Power of Attorney Law*, 24 Cal. L. Revision Comm'n Reports 111, 128 (1994)]. This form includes space for the principal's signature and a separate space for the attorney in fact's acceptance.

#### **[q] Acknowledgment**

Every durable power of attorney for property management or personal care must be acknowledged before a notary public or signed by at least two qualified witnesses [*Prob. Code* § 4121(c); see *Prob. Code* § 4122 (witness requirements); see also § 68.11[3]]. Although acknowledgment may be avoided, it will rarely make sense to do so. If the attorney in fact is to deal with the principal's real property, it may be necessary to record the power of attorney, and acknowledgment or other certified proof of execution is a prerequisite to recording [*Gov. Code* § 27287]. Acknowledgment may also help to secure acceptance of the power of attorney by third parties.

#### **[r] Recording Fact of Attorney's Advice**

The Power of Attorney Law requires that a warning be included on all printed durable power of attorney forms sold or otherwise distributed for use in California by persons who do not have the advice of legal counsel [see *Prob. Code* § 4128(a)]. The warning is intended to apprise persons who use the forms without legal assistance that they are important legal documents and that serious consequences will result from their use.

Although there is no requirement that the statutory warning be included in an attorney-drafted power, some attorneys believe that it is good practice to do so. When the warning is in the power, the principal will be required to read it when he or she reads the power of attorney; and the principal's signature at the end of the power will acknowledge that the principal has been put on notice as to the contents of the warning.

The statutory warning is not in every respect suitable for inclusion in the power itself, since some terms of the warning may be interpreted as varying or modifying other terms of the power. Instead, it is recommended that the statutory warning be given to the principal in a separate document, that the principal be asked to read and initial the document, and that a third document stating that the principal was duly advised by the attorney and that the principal received the written warning be presented to the principal for signature at the same time as the power of attorney. In this way, the principal will be clearly warned, and a written record that the principal was warned will be established. For further discussion, see §§ 68.205[1], 68.206[1], and 68.207[1].

**[2] Form****Durable Power of Attorney for Property Management and Other Personal Affairs (Long Form)**  
DURABLE POWER OF ATTORNEY FOR MANAGEMENT OF PROPERTY AND PERSONAL AFFAIRS

*[To appoint attorney(s) in fact and successor, if any, select one of following three alternatives:]*

*[First alternative--to appoint one attorney in fact and one successor:]*

I, \_\_\_\_\_ [name of principal], currently a resident of \_\_\_\_\_ [county and state], hereby appoint \_\_\_\_\_ [name of attorney in fact], currently a resident of \_\_\_\_\_ [county and state], as my attorney in fact. If \_\_\_\_\_ [name of attorney in fact] dies, resigns, or is unwilling or unable to act because of incapacity or otherwise, I appoint \_\_\_\_\_ [name of successor attorney in fact], currently a resident of \_\_\_\_\_ [county and state], as my attorney in fact. All references in this document to "my attorney in fact" refer to the attorney in fact acting at the pertinent time.

*[Second alternative--to appoint two attorneys in fact and require them to act unanimously, except in case of vacancy:]*

I, \_\_\_\_\_ [name of principal], currently a resident of \_\_\_\_\_ [county and state], hereby appoint \_\_\_\_\_ [name of first attorney in fact], currently a resident of \_\_\_\_\_ [county and state], and \_\_\_\_\_ [name of second attorney in fact], currently a resident of \_\_\_\_\_ [county and state], as my attorneys in fact. These two persons must act unanimously in all matters referred to in this power of attorney, and when so acting they will be referred to as "my attorney in fact." Whenever a signature is required of my attorney in fact, both of these persons will be required to sign. If either of these persons dies, resigns, or is unable or unwilling to act because of incapacity, or any other reason, however, the remaining person must act alone and, when so acting, will be referred to as "my attorney in fact."

*[Third alternative--to appoint two attorneys in fact and authorize them to act separately:]*

I, \_\_\_\_\_ [name of principal], currently a resident of \_\_\_\_\_ [county and state], hereby appoint \_\_\_\_\_ [name of first attorney in fact], currently a resident of \_\_\_\_\_ [county and state], and \_\_\_\_\_ [name of second attorney in fact], currently a resident of \_\_\_\_\_ [county and state], as my attorneys in fact. Each of these persons, acting alone, has full power and authority to act on my behalf under the terms of this power of attorney, and either, when so acting, will be referred to as "my attorney in fact."

*[Continue as follows:]*

I intend by this power of attorney to create a durable power of attorney pursuant to the California Power of Attorney Law, but specifically not including the provisions of that law relating to durable powers of attorney for health care. This power of attorney will be effective \_\_\_\_\_ [immediately on its execution and will not be affected by my subsequent incapacity or on my incapacity as determined in accordance with Section 2.01 of this power or specify date certain, e.g., on July 31, 2000, and will not be affected by my subsequent incapacity].

*[If power is to become effective on principal's incapacity, add:]*

If, after it has been determined in accordance with Section 2.01 that I have become incapacitated, it should be determined in accordance with Section 2.02 of this power that I have regained my capacity, the powers granted to my attorney in fact in this power will forthwith cease.

*[Optional; insert following provision only if power is to have specified termination date:]*

Unless this power is sooner revoked, my attorney in fact will have and may exercise the powers granted in this durable power of attorney until \_\_\_\_\_ *[specify date, e.g., December 31, 2001]*, on which date this power will terminate.

*[Optional: insert following provision if attorney in fact is to have power only over specific item or items, or a specific class, of property, and not over all of the principal's property:]*

This power deals only with my interest in \_\_\_\_\_ *[describe property, e.g., the dwelling house and lot at 120 Shady Lane, Smalltown, California, and particularly described as Lot 14, Block 20, Map of Shady Acres, County of Pacific, California]*. Notwithstanding any other provision of this power, the powers that I give to my attorney in fact in this power will extend to that interest, and to the full extent of that interest; but they will not extend to, and my attorney in fact will have no power or authority over, any other interest that I may have in any other property, except only to the extent that the management of the property described above will necessarily affect the other interest.

*[Continue as follows:]*

I give my attorney in fact the powers specified in this power of attorney with the understanding that they will be exercised for my benefit, on my behalf, and solely in a fiduciary capacity.

## ARTICLE ONE POWERS

Section 1.01. *Construction of Powers Generally.* Except as otherwise limited or extended in this power of attorney, I give my attorney in fact the power to do all of the following:

- (a) Demand, receive, and obtain by litigation or otherwise, money or other things of value to which I am, may become, or claim to be entitled, and conserve, invest, disburse, or use anything so received for the purposes intended.
- (b) Contract in any manner with any person on terms agreeable to my attorney in fact, to accomplish a purpose of a transaction, and perform, rescind, reform, release, or modify the contract or another contract made by me or on my behalf.
- (c) Execute, acknowledge, seal, and deliver a deed, revocation, mortgage, lease, notice, check, release, or other instrument my attorney in fact considers desirable to accomplish a purpose of a transaction.
- (d) Prosecute, defend, submit to arbitration, settle, and propose or accept a compromise with respect to a claim existing in my favor or against me or intervene in litigation relating to the claim.
- (e) Seek on my behalf the assistance of a court to carry out an act authorized by this power of attorney.
- (f) Engage, compensate, and discharge an attorney, accountant, expert witness, or other assistant.

(g) Keep appropriate records of each transaction, including an accounting of receipts and disbursements.

(h) Prepare, execute, and file a record, report, or other document my attorney in fact considers desirable to safeguard or promote my interest under a statute or governmental regulation.

(i) Reimburse my attorney in fact for expenditures properly made by my attorney in fact in exercising the powers granted by this power of attorney.

(j) In general, do any other lawful act.

Section 1.02. *Real Property Transactions*. I give my attorney in fact the power to do all of the following:

(a) Accept as a gift or as security for a loan, reject, demand, buy, lease, receive, or otherwise acquire an interest in real property or a right incident to real property.

(b) Sell, exchange, convey with or without covenants, quitclaim, release, surrender, mortgage, encumber, partition, consent to partitioning, subdivide, apply for zoning, rezoning, or other governmental permits, plat or consent to platting, develop, grant options concerning, lease, sublease, or otherwise dispose of an interest in real property or a right incident to real property.

(c) Release, assign, satisfy, and enforce by litigation or otherwise a mortgage, deed of trust, encumbrance, lien, or other claim to real property that exists or is asserted.

(d) Do any act of management or of conservation with respect to an interest in real property, or a right incident to real property, owned, or claimed to be owned, by me, including all of the following:

(1) Insuring against a casualty, liability, or loss.

(2) Obtaining or regaining possession, or protecting the interest or right, by litigation or otherwise.

(3) Paying, compromising, or contesting taxes or assessments, or applying for and receiving refunds in connection with them.

(4) Purchasing supplies, hiring assistance or labor, and making repairs to or alterations in the real property.

(e) Use, develop, alter, replace, remove, erect, or install structures or other improvements on real property in or incident to which I have, or claim to have, an interest or right.

(f) Participate in a reorganization with respect to real property or a legal entity that owns an interest in or right incident to real property and receive and hold shares of stock or obligations received in a plan of reorganization, and act with respect to them, including all of the following:

(1) Selling or otherwise disposing of them.

(2) Exercising or selling an option, conversion, or similar right with respect to them.

(3) Voting them in person or by proxy.

(g) Change the form of title of an interest in or right incident to real property.

(h) Dedicate to public use, with or without consideration, easements or other real property in which I have, or claim to have, an interest or right.

Section 1.03. *Tangible Personal Property Transactions*. I give my attorney in fact the power to do all of the following:

(a) Accept as a gift or as security for a loan, reject, demand, buy, receive, or otherwise acquire ownership or possession of tangible personal property or an interest in tangible personal property.

(b) Sell, exchange, convey with or without covenants, release, surrender, mortgage, encumber, pledge, hypothecate, create a security interest in, pawn, grant options concerning, lease, sublease to others, or otherwise dispose of tangible personal property or an interest in tangible personal property.

(c) Release, assign, satisfy, or enforce by litigation or otherwise, a mortgage, security interest, encumbrance, lien, or other claim on behalf of the principal, with respect to tangible personal property or an interest in tangible personal property.

(d) Do an act of management or conservation with respect to tangible personal property or an interest in tangible personal property on my behalf, including all of the following:

(1) Insuring against casualty, liability, or loss.

(2) Obtaining or regaining possession, or protecting the property or interest, by litigation or otherwise.

(3) Paying, compromising, or contesting taxes or assessments or applying for and receiving refunds in connection with taxes or assessments.

(4) Moving from place to place.

(5) Storing for hire or on a gratuitous bailment.

(6) Using, altering, and making repairs or alterations.

Section 1.04. *Stock and Bond Transactions*. With respect to any stocks and bonds, mutual funds, and other securities, or any interest therein, that I now own or that may hereafter be acquired by or for me, I give my attorney in fact the power to do all of the following:

(a) Buy, sell, and exchange stocks, bonds, mutual funds, and all other types of securities and financial instruments [*optional*: except commodity futures contracts and call and put options on stocks and stock indexes].

(b) Receive certificates and other evidences of ownership with respect to securities.

(c) Exercise voting rights with respect to securities in person or by proxy, enter into voting trusts, and consent to limitations on the right to vote.

[*Optional provision*:]

Section 1.05. *Commodities and Option Transactions*. I give my attorney in fact the power to do all of the following:

(a) Buy, sell, exchange, assign, settle, and exercise commodity futures contracts and call and put options on stocks and stock indexes traded on a regulated option exchange.

(b) Establish, continue, modify, and terminate option accounts with a broker.

[Continue with the following:]

Section 1.06. *Transactions With Banks and Financial Institutions*. I give my attorney in fact the power to do all of the following:

- (a) Continue, modify, and terminate an account or other banking arrangement made by me or on my behalf.
- (b) Establish, modify, and terminate an account or other banking arrangement with a bank, trust company, savings and loan association, credit union, thrift company, industrial loan company, brokerage firm, or other financial institution selected by my attorney in fact.
- (c) Hire or close a safe deposit box or space in a vault.
- (d) Contract to procure other services available from a financial institution as the attorney in fact considers desirable.
- (e) Withdraw by check, orders, or otherwise money or property of mine deposited with or left in the custody of a financial institution.
- (f) Receive bank statements, vouchers, notices, and similar documents from a financial institution and act with respect to them.
- (g) Enter a safe deposit box or vault and withdraw or add to the contents.
- (h) Borrow money at an interest rate agreeable to my attorney in fact and pledge as security personal property of mine necessary in order to borrow, pay, renew, or extend the time of payment of a debt of mine.
- (i) Make, assign, draw, endorse, discount, guarantee, and negotiate promissory notes, checks, drafts, and other negotiable or nonnegotiable paper of mine, or payable to me or my order, receive the cash or other proceeds of those transactions, and accept a draft drawn by a person on me and pay it when due.
- (j) Receive for me and act on a sight draft, warehouse receipt, or other negotiable or nonnegotiable instrument.
- (k) Apply for and receive letters of credit, credit cards, and traveler's checks from a financial institution, and give an indemnity or other agreement in connection with letters of credit.
- (l) Consent to an extension of the time of payment with respect to commercial paper or a financial transaction with a financial institution.

Section 1.07. *Business Operating Transactions*. I give my attorney in fact the power to do all of the following:

- (a) Operate, buy, sell, enlarge, reduce, and terminate a business interest.
- (b) To the extent that an agent is permitted by law to act for a principal and subject to the terms of the partnership agreement,
  - (1) Perform a duty or discharge a liability and exercise a right, power, privilege, or option that I have, may have, or claim to have, under a partnership agreement, whether or not I am a partner.
  - (2) Enforce the terms of a partnership agreement by litigation or otherwise.
  - (3) Defend, submit to arbitration, settle, or compromise litigation to which I am a party because of membership in the

partnership.

(c) Exercise in person or by proxy, or enforce by litigation or otherwise, a right, power, privilege, or option I have or claim to have as the holder of a bond, share, or other instrument of similar character, and defend, submit to arbitration, settle, or compromise litigation to which I am a party because of a bond, share, or similar instrument.

(d) With respect to a business owned solely by me,

(1) Continue, modify, renegotiate, extend, and terminate a contract made with an individual or a legal entity, firm, association, or corporation by me or on my behalf with respect to the business before execution of this power of attorney.

(2) Determine the policy of the business as to (A) the location of its operation, (B) the nature and extent of its business, (C) the methods of manufacturing, selling, merchandising, financing, accounting, and advertising employed in its operation, (D) the amount and types of insurance carried, and (E) the mode of engaging, compensating, and dealing with its accountants, attorneys, and other agents and employees.

(3) Change the name or form of organization under which the business is operated and enter into a partnership agreement with other persons or organize a corporation to take over all or part of the operation of the business.

(4) Demand and receive money due or claimed by me or on my behalf in the operation of the business, and control and disburse the money in the operation of the business.

(e) Put additional capital into a business in which I have an interest.

(f) Join in a plan of reorganization, consolidation, or merger of the business.

(g) Sell or liquidate a business or part of it at the time and on the terms my attorney in fact considers desirable.

(h) Represent me in establishing the value of a business under a buy-out agreement to which I am a party.

(i) Prepare, sign, file, and deliver reports, compilations of information, returns, or other papers with respect to a business that are required by a governmental agency or instrumentality or that my attorney in fact considers desirable, and make related payments.

(j) Pay, compromise, or contest taxes or assessments and do any other act that my attorney in fact considers desirable to protect me from illegal or unnecessary taxation, fines, penalties, or assessments with respect to a business, including attempts to recover, in any manner permitted by law, money paid before or after the execution of this power of attorney.

Section 1.08. *Insurance and Annuity Transactions.* I give my attorney in fact the power to do all of the following:

(a) Continue, pay the premium or assessment on, modify, rescind, release, or terminate any contract procured by me or on my behalf that insures or provides an annuity to me or another person, whether or not I am a beneficiary under the contract.

(b) Procure new, different, and additional contracts of insurance and annuities for me and my dependents, and select the amount, type of insurance or annuity, and mode of payment.

(c) Pay the premium or assessment on, modify, rescind, release, or terminate a contract of insurance or annuity procured by my attorney in fact.

(d) Designate the beneficiary of the contract, \_\_\_\_\_ [including *or* not including] the power to designate \_\_\_\_\_ [himself *or* herself *or* themselves] as the \_\_\_\_\_ [beneficiary *or* beneficiaries] of the contract, or an extension, renewal, or substitute for the contract, regardless of whether the contract was procured by me or by my attorney in fact.

(e) Apply for and receive a loan on the security of the contract of insurance or annuity.

(f) Surrender and receive the cash surrender value.

(g) Exercise an election.

(h) Change the manner of paying premiums.

(i) Change or convert the type of insurance contract or annuity as to any insurance contract or annuity to which I have or claim to have a power described in this section.

(j) Change the beneficiary of a contract of insurance or annuity, \_\_\_\_\_ [including *or* but not including] the power to designate \_\_\_\_\_ [himself *or* herself *or* themselves] as the \_\_\_\_\_ [beneficiary *or* beneficiaries], regardless of whether the contract of insurance or annuity was procured by me or by my attorney in fact.

(k) Apply for and procure government aid to guarantee or pay premiums of a contract of insurance on my life.

(l) Collect, sell, assign, hypothecate, borrow on, or pledge my interest in a contract of insurance or annuity.

(m) Pay from proceeds or otherwise, compromise or contest, and apply for refunds in connection with, a tax or assessment levied by a taxing authority with respect to a contract of insurance or annuity or its proceeds or liability accruing by reason of the tax or assessment.

Section 1.09. *Estate, Trust, and Other Beneficiary Transactions.* In all matters that affect a trust, probate estate, guardianship, conservatorship, escrow, custodianship, or other fund in or from which I am, may become, or claim to be entitled, as a beneficiary, to a share or payment, I give my attorney in fact the power to do all of the following:

(a) Accept, reject, disclaim, receive, receipt for, sell, assign, release, pledge, exchange, or consent to a reduction in or modification of a share in or payment from the fund.

(b) Demand or obtain by litigation or otherwise money or any other thing of value to which I am, may become, or claim to be entitled by reason of the fund.

(c) Initiate, participate in, and oppose litigation to ascertain the meaning, validity, or effect of a deed, will, declaration of trust, or other instrument or transaction affecting my interest.

(d) Initiate, participate in, and oppose litigation to remove, substitute, or surcharge a fiduciary.

(e) Conserve, invest, disburse, and use anything received for an authorized purpose.

(f) Transfer an interest of mine in real property, stocks, bonds, accounts with financial institutions, insurance, and other property to the trustee of a revocable trust created by me as settlor.

(g) Convey or release any contingent or expectant interests in property, including marital property rights, and any rights of survivorship incident to joint tenancy or tenancy by the entirety.

(h) Make any election or election and agreement referred to in *California Probate Code Section 13502 or 13503.*

Section 1.10. *Claims and Litigation*. I give my attorney in fact the power to do all of the following:

(a) Assert and prosecute before a court or administrative agency a claim, claim for relief, cause of action, counterclaim, cross-complaint, or offset, and defend against an individual, a legal entity, or government, including suits to recover property or any other thing of value, to recover damages sustained by me, to eliminate or modify tax liability, or to seek an injunction, specific performance, or other relief.

(b) Bring an action to determine adverse claims [*optional*]; intervene in litigation, and act as amicus curiae].

(c) In connection with litigation,

(1) Procure an attachment, garnishment, libel, order of arrest, or other preliminary, provisional, or intermediate relief, and use any available procedure to effect, enforce, or satisfy a judgment, order, or decree.

(2) Perform any lawful act, including acceptance of tender, offer of judgment, admission of facts, submission of a controversy on an agreed statement of facts, consent to examination before trial, and bind me in litigation.

(d) Submit to arbitration, settle, and propose or accept a compromise with respect to a claim or litigation.

(e) Waive the issuance and service of process on me; accept service of process; appear for me; designate persons on whom process directed to me may be served; execute and file or deliver stipulations on my behalf; verify pleadings; seek appellate review; procure and give surety and indemnity bonds; contract and pay for the preparation and printing of records and briefs; receive and execute and file or deliver a consent, waiver, release, confession of judgment, satisfaction of judgment, notice, agreement, or other instrument in connection with the prosecution, settlement, or defense of a claim or litigation.

(f) Act for me with respect to bankruptcy or insolvency proceedings, whether voluntary or involuntary, concerning me or some other person, or with respect to a reorganization proceeding, or with respect to an assignment for the benefit of creditors, receivership, or application for the appointment of a receiver or trustee, that affects an interest of mine in property or any other thing of value.

(g) Pay a judgment against me or a settlement made in connection with litigation, and receive and conserve money or any other thing of value paid in settlement of or as proceeds of a claim or litigation.

Section 1.11. *Personal and Family Maintenance*. I give my attorney in fact the power to do all of the following, subject to Section 1.20(d):

(a) Do the acts necessary to maintain my usual standard of living, [*if principal wishes to include spouse or other family members, add: the usual standard of living of my \_\_\_\_\_ (describe family members, e.g., wife and children or husband, children, and grandchildren)*], and the usual standard of living of any other individuals customarily or legally entitled to my support, including providing living quarters by purchase, lease, or other contract, or paying the operating costs, including interest, amortization payments, repairs, and taxes, on premises owned by me.

(b) Provide for the individuals described in subsection (a) all of the following:

(1) Normal domestic help.

(2) Usual vacations and travel expenses.

(3) Funds for shelter, clothing, food, appropriate education, and other current living costs.

(c) Pay for the individuals described in subsection (a) necessary medical, dental, and surgical care, hospitalization, and custodial care.

(d) Continue any provision made by me, for the individuals described in subsection (a), for automobiles or other means of transportation, including registering, licensing, insuring, and replacing them.

(e) Maintain or open charge accounts for the convenience of the individuals described in subsection (a) and open new accounts my attorney in fact considers desirable to accomplish a lawful purpose.

(f) Continue payments incidental to my membership in or affiliation with a church, club, society, order, or other organization and continue contributions to those organizations.

Section 1.12. *Government Benefits Transactions.* With respect to benefits from Social Security, Medicare, Medi-Cal, or other governmental programs, or from civil or military service, I give my attorney in fact the power to do all of the following:

(a) Execute vouchers in my name for allowances and reimbursements payable to me by the United States or a foreign government or by a state or subdivision of a state, including allowances and reimbursements for my transportation and transportation of my \_\_\_\_\_ [wife *or* husband], my children, and other individuals customarily or legally entitled to my support, and for shipment of our household effects.

(b) Take possession and order the removal and shipment of my property from a post, warehouse, depot, dock, or other place of storage or safekeeping, either governmental or private; and execute and deliver a release, voucher, receipt, bill of lading, shipping ticket, certificate, or other instrument for that purpose.

(c) Prepare, file, and prosecute my claim to a benefit or assistance, financial or otherwise, to which I claim to be entitled under a statute or governmental regulation.

(d) Prosecute, defend, submit to arbitration, settle, and propose or accept a compromise with respect to any benefits I may be entitled to receive.

(e) Receive the financial proceeds of a claim of the type described in this section; conserve, invest, disburse, or use anything received for a lawful purpose.

Section 1.13. *Retirement Plan Transactions.* I give my attorney in fact the power to do all of the following:

(a) Select payment options under any retirement plan in which I participate, including plans for self-employed individuals, \_\_\_\_\_ [including *or* but not including] the power to designate \_\_\_\_\_ [himself *or* herself *or* themselves] as the \_\_\_\_\_ [beneficiary *or* beneficiaries].

(b) Designate beneficiaries under retirement plans and change existing designations, \_\_\_\_\_ [including *or* but not including] the power to designate \_\_\_\_\_ [himself *or* herself *or* themselves] as the \_\_\_\_\_ [beneficiary *or* beneficiaries].

(c) Make voluntary contributions to retirement plans.

(d) Exercise the investment powers available under any self-directed retirement plan.

(e) Make rollovers of plan benefits into other retirement plans.

(f) If authorized by the plan, borrow from, sell assets to, and purchase assets from the plan.

(g) Waive my right to be a beneficiary of a joint or survivor annuity if I am a spouse who is not employed.

Section 1.14. *Tax Matters*. I give my attorney in fact the power to do all of the following:

(a) Prepare, sign, and file federal, state, local, and foreign income, gift, payroll, FICA returns, and other tax returns, claims for refunds, requests for extension of time, petitions regarding tax matters, and any other tax-related documents, including receipts, offers, waivers, consents (including consents and agreements under *Internal Revenue Code Section 2032A* or any successor section), closing agreements, and any power of attorney required by the Internal Revenue Service or other taxing authority with respect to a year beginning with and including the year \_\_\_\_\_ and ending with and including the year \_\_\_\_\_.

**PRACTICE TIP:**

It is important that the years be exactly specified for which this power is to be effective. The Internal Revenue Service insists on its own power of attorney forms that specific years (or quarters in the case of quarterly taxes) be set forth [ *see* Ch. 98, *Powers of Attorney* ]. This can be a broad range of years, e.g., 1990 through 2030, but simply saying "all years" will not suffice in the Service's view. Indeed, in the Service's own forms, note only the types of taxes must be enumerated, but the exact form numbers of each return must be listed, such as 709, 1040, etc. If the planner believes that tax powers are likely to be important, review of the instructions accompanying the Service's own power of attorney, Form 2848, should be seriously considered. These instructions explain the rules limiting who is entitled to represent any taxpayer before the Service, and would deny that power to an attorney in fact who does not fit into one of the listed categories of representatives. *Commentary by Albert G. Handelman.*

(b) Pay taxes due, collect refunds, post bonds, receive confidential information, and contest deficiencies determined by the Internal Revenue Service or other taxing authority for any of the taxes and tax periods specified above.

(c) Exercise any election I may have under federal, state, local, or foreign tax law.

(d) Act for me in all tax matters before the Internal Revenue Service and any other taxing authority for any of the taxes and tax periods specified above.

Section 1.15. *Property Acquired After Execution and Property Located and Powers Exercised Outside State*. The powers granted to my attorney in fact in this power of attorney are exercisable equally with respect to an interest I have when this power of attorney is executed or one that I acquire later, whether or not the property is located in California, and whether or not the powers are exercised or the power of attorney is executed in this state.

[*Optional; to specify attorney in fact's power to affect trust created by principal, select one of two following provisions:*]

[*First alternative--power to create, modify, or revoke trust:*]

Section 1.16. *Creation, Modification, or Revocation of Trust*. I give my attorney in fact the power to establish any trust with my assets for \_\_\_\_\_ [my sole benefit *or* my benefit and the benefit of my \_\_\_\_\_ (wife *or* husband) *or* my benefit, the benefit of my \_\_\_\_\_ (wife *or* husband), and the benefit of my dependents] on such terms as my attorney in fact determines are necessary or proper; to transfer any asset in which I have an interest to any such trust or to any trust that I have created; and to exercise in whole or in part, release, or let lapse any power I may have as an individual and not as a fiduciary under any trust, whether or not created by me, including any power of appointment, amendment, revocation, or withdrawal, but subject to the limitation that a trust that I have created may be modified or revoked by my attorney in fact only if it is expressly permitted by the trust instrument. My attorney in fact \_\_\_\_\_ [may *or* may not] be the trustee of any trust established by

\_\_\_\_\_ [him or her or them].

[*Second alternative--power to modify, revoke, or transfer assets to existing trust:*]

Section 1.16. *Modification, Revocation, or Transfer of Assets to Existing Trust.* I give my attorney in fact the power to transfer any asset in which I have an interest to the trustee then acting under the trust instrument executed by me on \_\_\_\_\_ [date], and exercise in whole or in part, release, or let lapse, any power I may have as settlor under that instrument, including any power of appointment, amendment, revocation, withdrawal of assets, voting or directing the voting of shares of stock, managing or directing the investments subject to the trust, borrowing assets from the trust, and removing the trustee, but subject to the limitation that the trust may be modified or revoked by my attorney in fact only if it is expressly permitted by the terms of the trust instrument that are in effect at the time the modification or revocation is to be made.

**PRACTICE TIP:**

The planner may want to suggest to the client including a limitation, possibly precatory, describing the estate planning goals to be achieved. This could take the form of specific goals that the client would like to have the attorney in fact consider, or it could simply be an admonition to have any change further the estate planning goals evidenced by the principal's other estate planning documents at the time the power is exercised. *Commentary by Albert G. Handelman.*

[*Optional; power to provide for religious or spiritual needs:*]

Section 1.17. *Religious or Spiritual Needs.* I give my attorney in fact the power to provide, in connection with my care, and in accordance with my established beliefs and customary activities, for the presence and involvement of church persons, clergy, or other persons to attend to my spiritual needs and permit them access to me, maintain or arrange for my membership in religious organizations, and permit my access to their activities and publications, including books, tapes, and similar materials.

[*Optional; power to care for pets:*]

Section 1.18. *Pets.* I give my attorney in fact the power to house, or arrange for the housing, support, and maintenance of, any animals that I own or have custody of and to pay reasonable boarding, kenneling, and veterinary fees for such animals [*optional provision for disposal of animal:*, or if the support and maintenance of any such animal becomes unreasonably expensive, to dispose of the animal in a humane fashion, preferably by finding another home for the animal].

[*Optional; power to make funeral and burial arrangements:*]

Section 1.19. *Funeral and Burial Arrangements.* I give my attorney in fact the power to arrange for my funeral or other memorial service and for burial or cremation of my remains, including the purchase of a burial plot or other place for interment of my remains or ashes.

**PRACTICE TIP:**

Extreme caution should be exercised before including a provision such as this in a durable power of attorney for property management. Most often, a provision dealing with this exact subject matter will be included in a power of attorney for health care, and the attorney in fact acting under each power may not

be the same person. In order to avoid a conflict regarding this very sensitive power, the planner should carefully review other documents which the client has already executed to determine whether a problem might arise by use of this provision. *Commentary by Albert G. Handelman.*

[Optional; power to make gifts:]

Section 1.20. *Gifts.* I give my attorney in fact the power to make gifts, grants, or other transfers without consideration, of cash or other property, either outright or in trust, including the forgiveness of indebtedness, in accordance with the provisions of this section.

(a) Gifts may be made to \_\_\_\_\_ [designate permissible donees, e.g., my wife, my issue, and any of my dependents or my husband and my children].

[If gifts to be made to charitable donees, add:]

(b) Gifts may be made to any charitable organization \_\_\_\_\_ [that my attorney in fact may in my attorney in fact's discretion select or to which I have contributed in the five years preceding the date that this power becomes effective]. My attorney in fact may complete any charitable pledges of mine that have not been completed at the time that this power becomes effective.

[If gifts may be made for medical or educational expenses of designated persons, add:]

(c) Amounts may be paid on behalf of \_\_\_\_\_ [designate persons, e.g., my wife, my children, and my grandchildren or my husband and any of my issue] directly to providers of educational services and medical care within the meaning of *Internal Revenue Code Section 2503(e)*.

[Optional; to limit or prohibit gifts to attorney in fact, select one of four following provisions:]

[First alternative--gifts limited by "ascertainable standard":]

(d) Notwithstanding any other provision in this section, my attorney in fact may make gifts to \_\_\_\_\_ [himself or herself or themselves], but only if \_\_\_\_\_ [he is or she is or they are] in need of funds to meet the reasonable expenses of the following: (1) support in accordance with \_\_\_\_\_ [his or her or their] accustomed manner of living; (2) medical, dental, hospital, and nursing services, and other costs relating to the health care of my attorney in fact; or (3) the education of my attorney in fact.

[Second alternative--gifts limited to "5 or 5" amount:]

(d) Notwithstanding any other provision in this section, my attorney in fact may make gifts to \_\_\_\_\_ [himself or herself or themselves], but any such gifts in any calendar year may not exceed the greater of \$5,000 or 5 percent of the assets subject to this power.

[Third alternative--gifts limited to "5 or 5" amount, but not more than annual exclusion:]

(d) Notwithstanding any other provision in this section, my attorney in fact may make gifts to \_\_\_\_\_ [himself or herself or themselves], but any such gifts in any calendar year may not exceed the greater of \$5,000 or 5 percent of the assets subject to this power; however, if a gift made pursuant to the 5 percent provision would cause the imposition of a federal gift tax on the principal because the aggregate amount of any gifts made in any one calendar year to my attorney in fact would, but for this limitation, exceed the amount that may be made

free of federal gift tax to \_\_\_\_\_ [him or her or them], then the amount of any gifts in any calendar year to my attorney in fact must not exceed the amount that may be made free of federal gift tax to \_\_\_\_\_ [him or her or them].

[*Fourth alternative--no gifts to attorney in fact:*]

(d) Notwithstanding any other provision in this section, my attorney in fact may not make any gift to \_\_\_\_\_ [himself or herself or themselves] or to any person to whom my attorney in fact owes an obligation of support.

[*Optional; to require substantially equal gifts to principal's descendants add:*]

(e) If my attorney in fact makes any gift to any descendant of mine, a gift of substantially equal value must be made to any other descendant of mine of the same generation.

**PRACTICE TIP:**

This provision should be included only after fully discussing its impact with the client. Typically, a power such as this will be designed for use as a "sprinkling power," rather than one requiring equal gifts to members of specific classes. In such cases, this provision could undermine the client's estate planning goals, either causing unwanted "balancing" distributions to be made, or convincing the attorney in fact to avoid making any distributions at all, including those the principal would have wanted to be made.

*Commentary by Albert G. Handelman.*

[*Optional; to give directions as to payment of gift taxes, select one of two following alternatives:*]

[*First alternative--attorney in fact to pay gift tax:*]

(f) My attorney in fact may pay any gift tax that may arise by reason of any gift made.

[*Second alternative--no gift tax because gifts limited to annual gift tax exclusion:*]

(f) Any gifts made pursuant to this section will not be future interests within the meaning of *Internal Revenue Code Section 2503*, and the aggregate amount of any gifts made in any one calendar year to an individual must not exceed the amount that may be made free of federal gift tax to a person. The limitations in the preceding sentence will not apply to any gifts that incur no federal gift tax, such as, for example, gifts that qualify for the unlimited federal marital gift tax deduction or the charitable deduction.

[*Continue as follows:*]

(g) My attorney in fact may consent to the splitting of gifts under *Internal Revenue Code Section 2513* or successor sections if my \_\_\_\_\_ [wife or husband] makes gifts to any one or more of my descendants or to a charitable institution.

[*Optional: to nominate conservator, select one of two following provisions:*]

**PRACTICE TIP:**

Durable powers of attorney are often explained to clients as the final means by which the necessity for imposition of a conservatorship may be avoided. Indeed, they may well fill that role in actual practice. However, the planner should focus on the fact that there are two distinct types of probate

conservatorships: conservatorships of the person, and conservatorships of the estate. A power of attorney for health care [ see Ch. 104, *Health Care Transactions, Consents, and Directives* ], especially when coupled with a durable power of attorney for personal care, largely replaces a conservatorship of the person. A durable power of attorney for property management essentially obviates the need for a conservatorship of the estate.

Accordingly, many planners believe that the use of a durable power of attorney to nominate conservators should take into account this natural alignment. Thus, a power of attorney for health care would include a nomination of conservators of the person only, and a durable power of attorney for property management would include a nomination of conservators of the estate only. *Commentary by Albert G. Handelman.*

[*First alternative--one nominee as conservator of both person and estate:*]

Section 1.21. *Conservator.* If at any time proceedings are initiated for the appointment of a conservator of my person or my estate or both, I hereby nominate \_\_\_\_\_ [name of nominee], currently a resident of \_\_\_\_\_ [county and state], as conservator of both my person and my estate. I hereby waive the requirement of a bond if \_\_\_\_\_ [name of nominee] is appointed as conservator of my estate. I request that, if \_\_\_\_\_ [he or she] is appointed conservator of my estate by a court of this state, the court make an order granting \_\_\_\_\_ [him or her] all or as many of the independent powers listed in *California Probate Code Section 2591* as the court finds appropriate.

[*Second alternative--different nominees for conservator of person and conservator of estate:*]

Section 1.21. *Conservator.* If at any time proceedings are initiated for the appointment of a conservator of my person, I nominate \_\_\_\_\_ [name], currently a resident of \_\_\_\_\_ [county and state], as conservator of my person. If at any time proceedings are initiated for the appointment of a conservator of my estate, I nominate \_\_\_\_\_ [name], currently a resident of \_\_\_\_\_ [county and state], as conservator of my estate. [Add if applicable: I hereby waive the requirement of a bond if \_\_\_\_\_ [name] is appointed as conservator of my estate.] I request that, if \_\_\_\_\_ [name of person nominated as conservator of estate] is appointed conservator of my estate by a court of this state, the court make an order granting to such person all or as many of those independent powers listed in *California Probate Code Section 2591* as the court finds appropriate.

[*Third alternative--attorney in fact authorized to nominate conservators of person and estate:*]

Section 1.21. *Power to Nominate Conservator.* If at any time proceedings are initiated for the appointment of a conservator of my person or my estate or both, I authorize my attorney[s] in fact to nominate whomever \_\_\_\_\_ [he or she or they], in \_\_\_\_\_ [his or her or their] discretion, believe[s] appropriate as conservator of my estate, [but not] including the power to nominate \_\_\_\_\_ [himself or herself or themselves], and whomever \_\_\_\_\_ [he or she or they], in \_\_\_\_\_ [his or her or their] discretion, believe[s] appropriate as conservator of my person, [but not] including the power to nominate \_\_\_\_\_ [himself or herself or themselves]. I authorize my attorney[s] in fact to waive the requirement of a bond for any person so appointed, if my attorney[s] in fact, in \_\_\_\_\_ [his or her or their] discretion, believe[s] that such a waiver is appropriate.

[*Continue as follows:*]

Section 1.22. *Restrictions on Property Management Powers.* Notwithstanding any other provision of this power, my attorney in fact will not have any of the following powers related to property management:

(a) To use my property to discharge the legal obligations of my attorney in fact, including but not limited to the support of the dependents of my attorney in fact, except for those dependents to whom I also, along with my attorney in fact, owe a duty of support.

(b) To exercise any incident of ownership over any insurance policy that I own and that insures the life of my attorney in fact.

## ARTICLE TWO AMPLIFYING PROVISIONS

*[If power of attorney becomes effective only on principal's incapacity, add:]*

Section 2.01. *Determination of Incapacity.* For all purposes under this power, I will be deemed to be incapacitated at such time as \_\_\_\_\_ *[specify name(s) of person(s) who will make determination]*, by written declaration under penalty of perjury, certify that I am unable properly to care for myself or for my person or property; or, when a court of competent jurisdiction, by order so determines. The original declaration, or a certified copy of the court order, as the case may be, made or issued in accordance with this section, must be attached to the original of this power of attorney and may be recorded in any county or counties in which the original has been recorded. Any person may act in reliance on a written declaration or court order made or issued in accordance with this section, without the necessity of inquiring as to whether I am in fact incapacitated as provided in this section.

*[If power of attorney becomes effective only on principal's incapacity, add:]*

Section 2.02. *Determination of Regained Capacity.* After a determination of incapacity in accordance with Section 2.01, I will be deemed to have regained capacity at such time as \_\_\_\_\_ *[specify name(s) of person(s) who will make determination]*, by written declaration under penalty of perjury, certify that I have regained the capacity to properly care for myself or for my person or property; or, when a court of competent jurisdiction, by order so determines. The original declaration, or a certified copy of the court order, as the case may be, made or issued in accordance with this section, must be attached to the original of this power of attorney and may be recorded in any county or counties in which the original has been recorded. Any person may act in reliance on a written declaration or court order made or issued in accordance with this section, without the necessity of inquiring as to whether I am in fact incapacitated as provided in this section.

*[To provide for attorney in fact's compensation, or to prohibit compensation, select one of four following provisions:]*

*[First alternative--no compensation:]*

Section 2.03. *No Compensation.* My attorney in fact will not be entitled to compensation for any services rendered as attorney in fact under this power.

*[Second alternative--reasonable compensation:]*

Section 2.03. *Compensation.* My attorney in fact will be entitled to reasonable compensation for services rendered as attorney in fact under this power of attorney. Factors that should be considered in determining the amount of the compensation are: the time expended by my attorney in fact, the value of the property over which my attorney in fact exercises control and management, and the complexity of the transactions entered into by my attorney in fact. My attorney in fact may pay the compensation from my assets once each \_\_\_\_\_ [*time period of payment, e.g., month or year*], and must keep records of the services performed, the time spent in performing them, and the date and amount of each payment. [*To place overall limit on amount of compensation, add: The amount of the compensation to which my attorney in fact will be entitled under this section will in no event exceed \_\_\_\_\_ (specify limit, e.g., 2 percent of the fair market value of the property over which my attorney in fact exercises control and management, determined on an annual basis or the sum of \$100 per month or the sum of \$1,000 per year).*] [*To require attorney in fact to give third party notice of compensation, add: My attorney in fact must, once each \_\_\_\_\_ (time period, e.g., month or year), provide \_\_\_\_\_ (name and address of third party) with a written notice showing the total time spent in performing the services, a description of the services performed, and the amount of compensation paid to \_\_\_\_\_ (himself or herself or themselves) for each such time period.*] [*If compensation is to be divided between two attorneys in fact, add: The two persons serving as my attorney in fact must divide the total amount of compensation between them in proportion to the work done and the attention given to the assets subject to their management by each of them.*]

**PRACTICE TIP:**

The age of the principal at the time of execution of the document should be considered before including specific dollar amount limits. What may seem to be a reasonable fee at the time of execution could be viewed as paltry 30 years later, when the attorney in fact is spending significant time managing the principal's affairs. While this problem could be avoided with the inclusion of a cost-of-living escalator clause, such clauses tend to be rather lengthy, and the amount of space devoted to such a clause might seem out of place in relation to the purpose of the durable power of attorney. *Commentary by Albert G. Handelman.*

[*Third alternative--reasonable compensation based on corporate trustee's fees:*]

Section 2.03. *Compensation.* My attorney in fact will be entitled to reasonable compensation for services rendered as attorney in fact. The amount of compensation will be determined in accordance with the fees of corporate trustees for inter vivos trusts in effect during the period of management in the city where the largest part of the assets subject to this power of attorney are located. My attorney in fact may pay the compensation from my assets once each \_\_\_\_\_ [*time period of payment, e.g., month or year*], and must keep records of the services performed, the time spent in performing them, the fee schedule consulted to determine the amount of the compensation, and the date and amount of each payment. [*To place overall limit on amount of compensation, add: The amount of the compensation to which my attorney in fact will be entitled under this section will in no event exceed \_\_\_\_\_ (specify limit, e.g., 2 percent of the fair market value of the property over which my attorney in fact exercises control and management, determined on an annual basis or the sum of \$100 per month or the sum of \$1,000 per year).*] [*To require attorney in fact to give third party notice of compensation, add: My attorney in fact must, once each \_\_\_\_\_ (time period, e.g., month or year), provide \_\_\_\_\_ (name and address of third party) with a written notice showing the amount of time spent in performing the services, a description of the services performed, the fee schedule consulted to determine the amount of the compensation, and the date and amount of each payment.*] [*If compensation is to be divided between two attorneys in fact, add: The two persons serving as my attorney in fact must divide the total amount of compensation between them in proportion to the work done and the attention given to the assets subject to their management by each of them.*]

**PRACTICE TIP:**

The age of the principal at the time of execution of the document should be considered before including specific dollar amount limits. What may seem to be a reasonable fee at the time of execution could be viewed as paltry 30 years later, when the attorney in fact is spending significant time managing the principal's affairs. While this problem could be avoided with the inclusion of a cost-of-living escalator clause, such clauses tend to be rather lengthy, and the amount of space devoted to such a clause might seem out of place in relation to the purpose of the durable power of attorney. *Commentary by Albert G. Handelman.*

[*Fourth alternative--compensation according to hourly rate:*]

Section 2.03. *Compensation.* My attorney in fact will be entitled to compensation for services rendered as attorney in fact under this power at the rate of \_\_\_\_\_ [*specify amount, e.g., \$20*] per hour. My attorney in fact may pay the compensation from my assets once each \_\_\_\_\_ [*time period of payment, e.g., month or year*], and must keep records of the services performed, the time spent in performing them, and the date and amount of each payment. [*To place overall limit on amount of compensation, add: The amount of the compensation to which my attorney in fact will be entitled under this section will in no event exceed \_\_\_\_\_ (specify limit, e.g., 2 percent of the fair market value of the property over which my attorney in fact exercises control and management, determined on an annual basis or the sum of \$100 per month or the sum of \$1,000 per year).*] [*To require attorney in fact to give third party notice of compensation, add: My attorney in fact must, once each \_\_\_\_\_ (time period, e.g., month or year), provide \_\_\_\_\_ (name and address of third party) with a written notice showing the amount of time spent in performing the services, a description of the services performed, the fee schedule consulted to determine the amount of the compensation, and the date and amount of each payment.*] [*If compensation is to be divided between two attorneys in fact, add: The two persons serving as my attorney in fact must divide the total amount of compensation between them in proportion to the work done and the attention given to the assets subject to their management by each of them.*]

**PRACTICE TIP:**

The age of the principal at the time of execution of the document should be considered before including specific dollar amount limits. What may seem to be a reasonable fee at the time of execution could be viewed as paltry 30 years later, when the attorney in fact is spending significant time managing the principal's affairs. While this problem could be avoided with the inclusion of a cost-of-living escalator clause, such clauses tend to be rather lengthy, and the amount of space devoted to such a clause might seem out of place in relation to the purpose of the durable power of attorney. *Commentary by Albert G. Handelman.*

[*Continue as follows:*]

Section 2.04. *Reimbursement for Costs and Expenses.* My attorney in fact will be entitled to reimbursement from my property for expenditures properly made in performing the services conferred by me in this power. My attorney in fact must keep records of any such expenditures and reimbursement.

Section 2.05. *Reliance by Third Parties.* To induce third parties to act in accordance with the powers granted to my attorney in fact in this document, I represent and warrant:

(a) If this document is revoked or amended for any reason, I, my estate, my heirs, successors, and assigns will hold any third party harmless from any loss suffered, or liability incurred, by the third party in acting in accordance with this

document before the third party's receipt of written notice of termination or amendment.

(b) Subject to any other provisions of this power, the powers conferred on my attorney in fact may be exercised alone, and my attorney in fact's signature or act under the authority granted in this document may be accepted by third parties as fully authorized by me and with the same force and effect as if I were personally present, competent, and acting on my own behalf.

(c) No person who acts in reliance on any representation of my attorney in fact as to the scope of my attorney in fact's authority granted under this document will incur any liability to me, my estate, my heirs, successors, or assigns for permitting my attorney in fact to exercise any such power, nor will any person who deals with my attorney in fact be responsible to determine or ensure the proper application of funds or property.

(d) All third parties from whom my attorney in fact may request information regarding my personal affairs or my physical or mental health, including medical, dental, and hospital records, are hereby authorized to provide such information to my attorney in fact without limitation and are released from any legal liability whatsoever to me, my estate, my heirs, successors, or assigns for complying with those requests. I authorize in advance all physicians, dentists, psychiatrists, and psychologists who have treated me, and all other providers of health care, including hospitals, to release to my attorney in fact all information or photocopies of any records that my attorney in fact may request. If I am able to confirm this authorization at the time of the request, third parties may seek such confirmation from me, but this authorization will not be conditional on that confirmation. Physicians, hospitals, and other providers of health care must treat the request of my attorney in fact as that of a legal representative of an incompetent patient (as contemplated by *California Civil Code Section 56.11(c)(2)*, or any successor section) and must honor that request on that basis. I waive any privilege applicable to such information and records, and to any communication pertaining to me and made in the course of a physician-patient or psychiatrist-patient relationship.

Section 2.06. *Ratification.* I ratify and confirm all that my attorney in fact does or causes to be done under the authority granted in this power. All contracts, promissory notes, checks, or other bills of exchange, drafts, other obligations, stock powers, instruments, and other documents signed, endorsed, drawn, accepted, made, executed, or delivered by my attorney in fact will bind me, my estate, my heirs, successors, and assigns.

[*Optional; insert only if principal wishes to relieve attorney in fact of liability for acts other than willful misconduct or gross negligence:*]

Section 2.07. *Exculpation of Attorney in Fact.* My attorney in fact will not be liable to me or any of my successors in interest for any action taken or not taken in good faith, but will be liable for any willful misconduct or gross negligence.

[*Continue as follows:*]

Section 2.08. *Revocation and Amendment.* I revoke any and all durable powers of attorney for property management and personal care (but not durable powers of attorney for health care) that I have executed before executing this power of attorney. I retain the right to revoke or amend this power and to substitute other attorneys in fact in place of my attorney in fact. Amendments to this power of attorney must be made in writing by me personally (not by my attorney in fact). They must be attached to the original of this document and, if the original is recorded, must be recorded in the same county or counties as the original, although failure to record any amendment will not alter its affect.

[*Optional; to eliminate power of specific person(s) to petition court:*]

Section 2.09. *Power to Petition Court.* I expressly eliminate, pursuant to *California Probate Code Section 4503(a)*, the

authority of \_\_\_\_\_ [name(s) or description, e.g., my son, Robert J. Green or my children or grandchildren] to petition the court under *California Probate Code Sections 4540 et seq.*, or any successor sections [if desired, add further specification, e.g., so long as my wife is living and competent].

ARTICLE THREE  
GENERAL PROVISIONS

[To specify form of attorney in fact's signature, select one of following provisions:]

[First alternative--one attorney in fact:]

Section 3.01. *Signature of Attorney in Fact.* My attorney in fact must use the following form when signing on my behalf pursuant to this power: " \_\_\_\_\_ [name of principal] by \_\_\_\_\_ [name of attorney in fact], \_\_\_\_\_ [his or her] attorney in fact."

[Second alternative--two attorneys in fact, required to act unanimously:]

Section 3.01. *Signature of Attorney in Fact.* My attorney in fact must use the following form when signing on my behalf pursuant to this power: " \_\_\_\_\_ [name of principal] by \_\_\_\_\_ [name of first attorney in fact] and \_\_\_\_\_ [name of second attorney in fact], \_\_\_\_\_ [his or her] attorney in fact."

[Third alternative--two attorneys in fact, with power to act alone:]

Section 3.01. *Signature of Attorney in Fact.* \_\_\_\_\_ When signing on my behalf pursuant to this power, [name of first attorney in fact] must use the following form: " \_\_\_\_\_ [name of principal] by \_\_\_\_\_ [name of first attorney in fact], \_\_\_\_\_ [his or her] attorney in fact." When signing on my behalf pursuant to this power, \_\_\_\_\_ [name of second attorney in fact] must use the following form: " \_\_\_\_\_ [name of principal] by \_\_\_\_\_ [name of second attorney in fact], \_\_\_\_\_ [his or her] attorney in fact."

[Continue as follows:]

Section 3.02. *Severability.* If any of the provisions of this power are found to be invalid for any reason, that invalidity will not affect any of the other provisions of this power, and all invalid provisions will be wholly disregarded.

Section 3.03. *Governing Law.* This power of attorney is executed according to the provisions of the Power of Attorney Law of California, and all questions relating to the validity, interpretation, and administration of this power will be determined in accordance with that law.

This Durable Power of Attorney is executed by me on \_\_\_\_\_ [month, day], \_\_\_\_\_ [year], at \_\_\_\_\_, California.

\_\_\_\_\_ [signature]

[name of principal]

ACCEPTANCE BY ATTORNEY IN FACT

Dated: \_\_\_\_\_.

[EITHER, for one attorney in fact:]

\_\_\_\_\_ [signature]

[name of attorney in fact]

[OR, for two attorneys in fact:]

\_\_\_\_\_ [signature]

[name of first attorney in fact]

\_\_\_\_\_ [signature]

[name of second attorney in fact]

**PRACTICE TIP:**

A prospective attorney in fact may be reluctant to sign a durable power of attorney if he or she will be legally obligated to act under it at some unspecified time in the possibly distant future. The planner may wish to include a statement that will make *Probate Code Section 4230(c)* inapplicable, even though the attorney in fact has signed the durable power of attorney. Such a provision could read as follows: "In signing this durable power of attorney, the attorney in fact acknowledges and accepts \_\_\_\_\_ [his or her] appointment as attorney in fact; provided, however, that this acknowledgment and acceptance is not meant to indicate that the attorney in fact agrees to act under this durable power of attorney at any particular time, under any particular circumstances, or regarding any particular transaction, and the provisions of *Prob. Code § 4230(c)* shall not apply to this durable power of attorney despite the attorney in fact's execution of this acknowledgment and acceptance." *Commentary by Albert G. Handelman.*

ACKNOWLEDGMENT

[Acknowledgments taken in California must be in the following form (Civ. Code § 1189(a)):]

State of California )  
County of \_\_\_\_\_ )  
 )  
 )

On \_\_\_\_\_ [date], before me, \_\_\_\_\_ [name and title of officer taking acknowledgment], personally appeared \_\_\_\_\_ [name(s) of person(s) signing instrument], \_\_\_\_\_ who proved to me on the basis of satisfactory evidence to be the person[s] whose name[s] \_\_\_\_\_ [is or are] subscribed to the within instrument and acknowledged to me that \_\_\_\_\_ [he or she or they] executed the same in \_\_\_\_\_ [his or her or their] authorized \_\_\_\_\_ [capacity or capacities], and that by \_\_\_\_\_ [his or her or their] signature[s] on the instrument the person[s], or the entity upon behalf of which the person[s] acted, executed the instrument.

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

WITNESS my hand and official seal.

Signature \_\_\_\_\_ [Seal]

[Include lawyer's certificate required by Prob. Code § 4503(a)(2) if power of attorney includes provision in Section 2.09 limiting authority to petition court:]

**LAWYER'S CERTIFICATE**

(Prob. Code § 4503(a)(2))

I am a lawyer authorized to practice law in the state where this power of attorney was executed, and the principal was my client at the time this power of attorney was executed. I have advised my client concerning \_\_\_\_\_ [his or her] rights in connection with this power of attorney and the applicable law and the consequences of signing or not signing this power of attorney, and my client, after being so advised, has executed this power of attorney.

Dated: \_\_\_\_\_

\_\_\_\_\_ [signature]

[name of attorney]

Law Firm: \_\_\_\_\_ [firm name]

Address: \_\_\_\_\_

Telephone Number: \_\_\_\_\_

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
 Estate, Gift & Trust Law Powers of Attorney General Overview  
 Estate, Gift & Trust Law Powers of Attorney Durable  
 Powers Estate, Gift & Trust Law Powers of Attorney Limited Powers



38 of 193 DOCUMENTS

California Legal Forms--Transaction Guide

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DIVISION IV: WILLS AND TRUSTS  
CHAPTER 68 DURABLE POWERS OF ATTORNEY FOR PROPERTY MANAGEMENT  
PART IV. FORMS

A. Complete Durable Powers of Attorney for Property Management

*25-68 California Legal Forms--Transaction Guide § 68.201*

**AUTHOR:** Reviewed by Albert G. Handelman

**§ 68.201 Durable Power of Attorney for Property Management and Personal Affairs (Short Form)**

**[1] Comment**

**[a] Use of Form**

This form is a short-form durable power of attorney for property management and other personal affairs. It contains many of the same provisions of the long-form durable power of attorney for property management in § 68.200. It may be used, for example, to designate one attorney in fact, or two attorneys in fact. It may be used to empower the attorney in fact to make gifts, and to place appropriate limitations on that power. Other provisions of this form, however, have been simplified and shortened.

This form may be suitable for use when the principal wishes to give the attorney in fact broad discretion to manage the principal's property but does not wish to include the detailed specification of powers found in the long-form durable power of attorney for property management in § 68.200.

**[b] Powers**

Most of the powers conferred on the attorney in fact in this form are taken from *Prob. Code §§ 4450-4464*, which state powers that may be incorporated by reference into the Uniform Statutory Form Power of Attorney [*see Prob. Code §§ 4400-4465*]. Unlike the long-form durable power of attorney in § 68.200[2], however, this form summarizes the statutory powers, rather than restating them verbatim.

**[c] Power Over Specific Item or Class of Property**

This form may be used to give the attorney in fact power and authority over all of the principal's property, or only part of the property. The introductory section of the form includes an optional provision that may be used if the principal chooses to limit the attorney in fact's power and authority to a specific item or items, or to a defined class, of the

principal's property. For a discussion of this optional provision and its use in a durable power of attorney, see § 68.200[1][c].

#### **[d] Gifts**

This form may be used to give the attorney in fact the power to make gifts on the principal's behalf [see [2], Section 1.18, *below* ]. It may also be used to place limits on that power to avoid potentially unfavorable tax results that might otherwise result from the power. For the tax consequences of giving the attorney in fact unlimited gift-making power, see § 68.200[1][e].

#### **[e] Determination of Incapacity**

If the power of attorney is to become effective only on the principal's incapacity, it is a type of "springing" power [see *Prob. Code* § 4030; see also § 68.10[3][g]] and should contain some provision specifying how it will be determined if the principal has become incapacitated. The Power of Attorney Law provides a reasonable and practical method for making this determination [see *Prob. Code* § 4129(a); see also § 68.200[1][k]]. However, the method provided by the Power of Attorney Law is not exclusive, and the principal may provide for other methods in the power of attorney. For a provision adopting the statutory method, but also allowing a determination of incapacity to be made by court order, see *Section 2.01* of this form. For further discussion of the issues raised by incapacity when a durable power of attorney provides that it will become effective only on the principal's incapacity, see § 68.200[1][k].

#### **[f] Compensation**

This form offers various alternative provisions regarding compensation of the attorney in fact [see [2], Section 2.03, *below* ]. Unless the power of attorney provides otherwise, the attorney in fact is entitled to reasonable compensation for services rendered as attorney in fact [*Prob. Code* §§ 4101(a), 4204].

In some cases, reasonable compensation may be appropriate; in others, however, the attorney in fact will be a close family member or friend and will be willing to act as an accommodation to the principal and without any compensation. For discussion of the compensation of attorneys in fact, and appropriate power of attorney provisions relating to that subject, see §§ 68.17 and 68.200[1][l].

#### **[g] Exculpation of Attorney in Fact**

The power of attorney may contain a provision relieving the attorney in fact of liability for acts taken or not taken in good faith under the power of attorney [see [2], Section 2.07, *below* ]. An exculpatory provision may in some cases may be helpful in inducing an otherwise unwilling person to agree to act as attorney in fact. In other cases, however, an exculpatory provision will not only be unnecessary, but should be avoided. For a general discussion of durable power of attorney provisions exculpating the attorney in fact of liability, see § 68.200[1][m].

#### **[h] Power to Petition Court**

A durable power of attorney may limit (or absolutely prohibit) the right of third persons to petition the court for various orders relating to the power and the attorney in fact's duties and powers under the power [see *Prob. Code* §§ 4540-4545]. Although it is inadvisable to totally prohibit court petitions, it may be desirable in particular cases to limit the right of specified individuals to petition the court. For a discussion of court petitions, see § 68.200[1][n]. For a durable power of attorney provision that may be used to limit the right of specified persons to petition the court, see Section 2.09 of this form.

#### **[i] Governing Law**

If a durable power of attorney indicates the principal's intention that it be governed by the California Power of Attorney Law [*see Prob. Code § 4000 et seq.*], and if there are certain minimum contacts between the principal, the attorney in fact, or the power and the State of California [*see Prob. Code § 4052(a); see also § 68.200[1][o]*], the Power of Attorney Law will govern the power and apply to all acts and transactions of the attorney in fact, whether inside or outside of California. Since the Power of Attorney Law is a modern and comprehensive set of statutes, it is ordinarily good practice to provide in the power that the law will govern the power. For a provision doing this, see Section 3.03 of this power. For further discussion of the Power of Attorney Law and provisions applying it to powers of attorney, see §§ 68.10[2][a] and 68.200[1][o].

### **[j] Execution and Acknowledgment**

The durable power of attorney must be signed, either by the principal personally or by some other person in the principal's presence and at the principal's direction [*Prob. Code § 4121(b)*]. Although acknowledgment is not mandatory, acknowledgment or other certified proof of execution is a prerequisite to recordation [*see Gov. Code § 27287*] and may help to secure acceptance of the power of attorney by third parties [ *see § 68.200 [1][p], [q]*].

### **[k] Recording Fact of Attorney's Advice**

The Power of Attorney Law requires that a warning be included on all printed durable power of attorney forms sold or otherwise distributed for use in California by persons who do not have the advice of legal counsel [*see Prob. Code §§ 4128(a)* (durable power for property management), *4703(a)* (durable power for health care)]. This warning is intended to apprise persons who use the forms without legal assistance that they are important legal documents and that serious consequences will result from their use.

Although there is no requirement that the statutory warning be included in an attorney-drafted power, some attorneys believe that it is good practice to do so. When the warning is in the power, the principal will be required to read it when he or she reads the power of attorney; and the principal's signature at the end of the power will acknowledge that the principal has been put on notice as to the contents of the warning.

The statutory warning is not in every respect suitable for inclusion in the power itself, since some terms of the warning may be interpreted as varying or modifying other terms of the power. Instead, it is recommended that the statutory warning be given to the principal in a separate document, that the principal be asked to read and initial the document, and that a third document stating that the principal was duly advised by the attorney and that the principal received the written warning be presented to the principal for signature at the same time as the power of attorney. In this way, the principal will be clearly warned, and a written record that the principal was warned will be established. For further discussion, see §§ 68.205[1], 68.206[1], and 68.207[1]

### **[2] Form**

#### **Durable Power of Attorney for Property Management and Personal Affairs (Short Form)**

#### **DURABLE POWER OF ATTORNEY FOR MANAGEMENT OF PROPERTY AND PERSONAL AFFAIRS**

*[To appoint attorney(s) in fact and successor, if any, select one of the following alternatives:]*

*[First alternative: to appoint one attorney in fact and one successor:]*

I, \_\_\_\_\_ [*name of principal*], currently a resident of \_\_\_\_\_ [*county and state*], hereby appoint \_\_\_\_\_ [*name of attorney in fact*], currently a resident of \_\_\_\_\_ [*county and state*], as my attorney in fact. If \_\_\_\_\_ [*name of attorney in fact*] dies, resigns, or is unwilling or

unable to act because of incapacity or otherwise, I appoint \_\_\_\_\_ [*name of successor attorney in fact*], currently a resident of \_\_\_\_\_ [*county and state*], as my attorney in fact. All references in this document to "my attorney in fact" refer to the attorney in fact acting at the pertinent time.

[*Second alternative--to appoint two attorneys in fact and require them to act unanimously, except in case of vacancy:*]

I, \_\_\_\_\_ [*name of principal*], currently a resident of \_\_\_\_\_ [*county and state*], hereby appoint \_\_\_\_\_ [*name of first attorney in fact*], currently a resident of \_\_\_\_\_ [*county and state*], and \_\_\_\_\_ [*name of second attorney in fact*], currently a resident of \_\_\_\_\_ [*county and state*], as my attorneys in fact. These two persons must act unanimously in all matters referred to in this power of attorney, and when so acting they will be referred to as "my attorney in fact." Whenever a signature is required of my attorney in fact, both of these persons will be required to sign. If either of these persons dies, resigns, or is unable or unwilling to act because of incapacity, or any other reason, however, the remaining person must act alone and, when so acting, will be referred to as "my attorney in fact."

[*Third alternative--to appoint two attorneys in fact and authorize them to act separately:*]

I, \_\_\_\_\_ [*name of principal*], currently a resident of \_\_\_\_\_ [*county and state*], hereby appoint \_\_\_\_\_ [*name of first attorney in fact*], currently a resident of \_\_\_\_\_ [*county and state*], and \_\_\_\_\_ [*name of second attorney in fact*], currently a resident of \_\_\_\_\_ [*county and state*], as my attorneys in fact. Each of these persons, acting alone, will have full power and authority to act on my behalf under the terms of this power of attorney, and either, when so acting, will be referred to as "my attorney in fact."

[*Continue as follows:*]

I intend by this power of attorney to create a durable power of attorney pursuant to the California Power of Attorney Law, but specifically not including the provisions of that law relating to durable powers of attorney for health care. This power of attorney will be effective \_\_\_\_\_ [immediately on its execution and will not be affected by my subsequent incapacity *or* on my incapacity as determined in accordance with Section 2.01 of this power *or specify date certain, e.g., on July 31, 2000, and will not be affected by my subsequent incapacity.*]

[*If power is to become effective on principal's incapacity, add:*]

If, after it has been determined in accordance with Section 2.01 that I have become incapacitated, it should be determined in accordance with Section 2.02 of this power that I have regained my capacity, the powers granted to my attorney in fact in this power will forthwith cease.

[*Optional provision; insert only if power is to have specified termination date:*]

Unless this power is sooner revoked, my attorney in fact will have and may exercise the powers granted in this power until \_\_\_\_\_ [*specify date, e.g., December 31, 2001*], on which date this power will terminate.

[*Optional; insert following provision if attorney in fact is to have power only over specific item or items, or a specific class, of property, and not over all of the principal's property:*]

This power deals only with my interest in \_\_\_\_\_ [*describe property, e.g., the dwelling house and lot at 120 Shady Lane, Smalltown, California, and particularly described as Lot 14, Block 20, Map of Shady Acres, County of Pacific, California*]. Notwithstanding any other provision of this power, the powers that I give to my attorney in fact in this power extend to that interest, and to the full extent of that interest; but they do not extend to, and my attorney in fact will have no power or authority over, any other interest that I may have in any other property, except only to the extent that the management of the property described above will necessarily affect the other interest.

[*Continue as follows:*]

I give my attorney in fact the powers specified in this power of attorney with the understanding that they will be exercised for my benefit, on my behalf, and solely in a fiduciary capacity.

## ARTICLE ONE POWERS

Section 1.01. *Construction of Powers Generally.* Except as otherwise limited or extended in this power of attorney, I give my attorney in fact the power to do all of the following:

- (a) Demand, receive, and obtain by litigation or otherwise, money or other things of value to which I am, may become, or claim to be entitled, and conserve, invest, disburse, or use anything so received for the purposes intended.
- (b) Contract in any manner with any person on terms agreeable to my attorney in fact, to accomplish a purpose of a transaction, and perform, rescind, reform, release, or modify the contract or another contract made by me or on my behalf.
- (c) Execute, acknowledge, seal, and deliver a deed, revocation, mortgage, lease, notice, check, release, or other instrument my attorney in fact considers desirable to accomplish a purpose of a transaction.
- (d) Prosecute, defend, submit to arbitration, settle, and propose or accept a compromise with respect to, a claim existing in my favor or against me or intervene in litigation relating to the claim.
- (e) Seek on my behalf the assistance of a court to carry out an act authorized by this power of attorney.
- (f) Engage, compensate, and discharge an attorney, accountant, expert witness, or other assistant.
- (g) Keep appropriate records of each transaction, including an accounting of receipts and disbursements.
- (h) Prepare, execute, and file a record, report, or other document my attorney in fact considers desirable to safeguard or promote my interest under a statute or governmental regulation.
- (i) Reimburse my attorney in fact for expenditures properly made by my attorney in fact in exercising the powers granted by this power of attorney.
- (j) In general, do any other lawful act.

Section 1.02. *Real and Personal Property.* I give my attorney in fact the power to take any actions that my attorney in fact considers necessary or desirable for the management or maintenance of any real or personal property in which I own an interest when this power is executed, or in which I later acquire an interest, including the power to acquire, sell, and convey ownership of property; control the manner in which property is managed, maintained, and used; change the

form of title in which property is held; satisfy and grant security interests and other encumbrances on property; obtain and make claims on insurance policies covering risks of loss or damage to property; accept or remove tenants; collect proceeds generated by property; ensure that any needed repairs are made to property; exercise rights of participation in real estate syndicates or other real estate ventures; make improvements to property; and perform any other acts described in *California Probate Code Sections 4451 and 4452*, except acts that conflict with or are limited by a more specific provision in this power.

Section 1.03. *Securities*. I give my attorney in fact the power to take any actions that my attorney in fact considers necessary or desirable with respect to any securities that I own when this power becomes effective, or that are acquired thereafter, including the power to purchase and sell securities; exercise voting rights with respect to securities; collect dividends, interest, and any other proceeds generated by securities; transfer title to securities; and perform any other acts described in *California Probate Code Section 4453*, except acts that conflict with or are limited by a more specific provision in this power. For purposes of this section, the term "securities" includes stocks, bonds, mutual funds, and all other types of securities and financial instruments [*optional*], except commodity futures contracts and call and put options on stocks and stock indexes].

[*Optional provision*:]

Section 1.04. *Commodity Futures and Options*. I give my attorney in fact the power to take any actions that my attorney in fact considers necessary or desirable with respect to any commodity futures contracts and options that I own when this power becomes effective, or that are acquired thereafter, including the power to purchase, sell, or exercise commodity futures contracts and options; establish, modify, and terminate option accounts with a broker; and perform any other acts described in *California Probate Code Section 4454*, except acts that conflict with or are limited by a more specific provision in this power. For purposes of this section, the term "options" means call and put options on stocks and stock indexes traded on a regulated option exchange.

[*Continue with the following*:]

Section 1.05. *Financial Institutions*. I give my attorney in fact the power to take any actions that my attorney in fact considers necessary or desirable in connection with any financial institution in which I have an account or an interest in an account when this power is executed, or in which I later acquire an account or an interest in an account, including the power to continue, modify, or terminate existing accounts; open new accounts; draw, endorse, and deposit checks, drafts, and other negotiable instruments; prepare, receive, and deliver financial statements; establish, maintain, or close safe deposit boxes; borrow money; apply for and receive traveler's checks and letters of credit; extend payment periods with respect to commercial paper; and perform any other acts described in *California Probate Code Section 4455*, except acts that conflict with or are limited by a more specific provision in this power. For purposes of this section, the term "financial institution" includes, but is not limited to, banks, trust companies, savings banks, commercial banks, building and loan associations, savings and loan companies or associations, credit unions, industrial loan companies, thrift companies, and brokerage firms.

Section 1.06. *Business Operations*. I give my attorney in fact the power to take any actions that my attorney in fact considers necessary or desirable in connection with any business venture in which I have an interest when this power is executed, or in which I later acquire an interest, including the power to execute and enforce my obligations and rights as a partner in any general or limited partnership to the extent permitted by law and any applicable partnership agreement; enforce my rights as the holder of a bond or similar instrument issued by any business in which I have an interest; discharge my duties and enforce my rights in any sole proprietorship; expand, recapitalize, or reorganize any business to the extent my interest in that business allows; collect proceeds generated by any business in which I have an interest and to which I am entitled; sell or liquidate my interest in a business; and perform any other acts described in *California*

*Probate Code Section 4456*, except acts that conflict with or are limited by a more specific provision in this power.

Section 1.07. *Insurance and Annuities*. I give my attorney in fact the power to take any actions that my attorney in fact considers necessary or desirable with respect to any insurance or annuity contracts in which I have an interest when this power is executed, or in which I later acquire an interest, including the power to acquire additional insurance coverage of any type or additional annuities; continue existing insurance or annuity contracts; agree to modifications in the terms of insurance or annuity contracts in which I have an interest; borrow against insurance or annuity contracts in which I have an interest, to the extent allowed under the contract terms; change beneficiaries under existing contracts and name beneficiaries under new contracts, \_\_\_\_\_ [including *or* but not including] the power to designate \_\_\_\_\_ [himself *or* herself *or* themselves] as the \_\_\_\_\_ [beneficiary *or* beneficiaries]; receive dividends, proceeds, and other benefits generated by the contracts; transfer interests in insurance or annuity contracts to the extent permitted under the terms of those contracts; and perform any other acts described in *California Probate Code Section 4457*, except acts that conflict with or are limited by a more specific provision in this power.

Section 1.08. *Estate, Trust, and Other Beneficiary Transactions*. I give my attorney in fact the power to take any actions that my attorney in fact considers necessary or desirable in order to act, to the extent an agent is permitted to do so by law and by any controlling instrument, with respect to any estate or trust in which I have an interest when this power is executed, or in which I later acquire an interest, including the power to receive payments to which I am entitled from any estate or trust; participate in all proceedings concerning any estate or trust in which I have an interest; execute disclaimers of any interests I may have in any estate or trust; convey or release any contingent interests I may have in any estate or trust; [optional: make any election available to a surviving spouse under *California Probate Code Section 13502* or *13503*;] and perform any other acts described in *California Probate Code Section 4458*, except acts that conflict with or are limited by a more specific provision in this power. For purposes of this section, the term "estate or trust" means all matters that affect a trust, probate estate, guardianship, conservatorship, escrow, custodianship, or other fund in or from which I am, may become, or claim to be entitled, as a beneficiary, to a share or payment. The powers described in this section do not include the power to create, modify, or revoke trusts.

Section 1.09. *Claims and Litigation*. I give my attorney in fact the power to take any actions that my attorney in fact considers necessary or desirable with respect to any claim that I may have or that has been asserted against me and with respect to any legal proceeding in which I have an interest when this power is executed, or in which I later acquire an interest, including the power to institute, prosecute, and defend legal proceedings and claims on my behalf; file actions to determine adverse claims, intervene in litigation, and act as amicus curiae in any proceedings affecting my interests; seek preliminary, provisional, or intermediate relief on my behalf; apply for the enforcement or satisfaction of judgments that have been rendered in my favor; participate fully in the development of claims and proceedings; submit any dispute in which I have an interest to arbitration; submit and accept settlement offers and participate in settlement negotiations; handle all procedural aspects, such as service of process, filing of appeals, stipulations, verifications, waivers, and all other matters in any way affecting the process of any claim or litigation; fully participate in any voluntary or involuntary bankruptcy proceeding involving me or in which I am a claimant; satisfy judgments that have been rendered against me; and perform any other acts described in *California Probate Code Section 4459*, except acts that conflict with or are limited by a more specific provision in this power.

Section 1.10. *Personal and Family Maintenance*. I give my attorney in fact the power to take any actions that my attorney in fact considers necessary or desirable in order to effectively conduct my personal affairs and to discharge any and all obligations I may owe to myself and to family members and other third persons who are customarily or legally entitled to my support when this power is executed, or that are undertaken thereafter, including the power to take steps to ensure that our usual standard of living is maintained; arrange for medical and dental care; continue existing charge accounts, open new charge accounts, and make payments thereon; provide for transportation; maintain correspondence; prepare, maintain, and preserve personal records and documents; maintain membership in any social, religious, or professional organization and make contributions thereto; and perform any other acts described in *California Probate Code Section 4460*, except acts that conflict with or are limited by a more specific provision in this power, subject to

## Section 1.18.

[If I have granted my agent under my \_\_\_\_\_ (durable power of attorney for health care *or* advance health care directive) the power to make certain decisions and exercise certain powers regarding my personal life and medical care, my attorney(s) in fact must make any payments relating to those decisions or exercise of those powers as directed by my health care agent, and \_\_\_\_\_ (is *or* are) hereby released from any and all liability for making these payments.]

Section 1.11. *Government Benefits.* With respect to any government benefits either existing when this power is executed or accruing thereafter, whether in this state or elsewhere, I give my attorney in fact the power to take all actions that my attorney in fact considers necessary or desirable, including the power to execute and deliver vouchers related to government benefits; take possession of and store property as allowed under any government benefit program in which I have an interest; prepare and submit claims for government benefits to which I may be entitled; collect proceeds due to me under any government benefit plan; and perform any other acts described in *California Probate Code Section 4461*, except acts that conflict with or are limited by a more specific provision in this power. For purposes of this section, the term "government benefits" means benefits from Social Security, Medicare, Medi-Cal, or other governmental programs, or from civil or military service.

Section 1.12. *Retirement Plans.* I give my attorney in fact the power to take any actions that my attorney in fact considers necessary or desirable in order to maintain or participate in any retirement plan in which I have an interest when this power is executed, or in which I later acquire an interest, including the power to select the manner in which benefits under the plan are to be paid; designate beneficiaries under the plan, \_\_\_\_\_ [including *or* but not including] the power to designate \_\_\_\_\_ [himself *or* herself *or* themselves] as the \_\_\_\_\_ [beneficiary *or* beneficiaries]; make voluntary contributions to the plan; make rollovers from one plan into another; to the extent authorized by the plan, borrow from the plan and sell the assets of the plan; and perform any other acts described in *California Probate Code Section 4462*, except acts that conflict with or are limited by a more specific provision in this power.

Section 1.13. *Tax Matters.* I give my attorney in fact the power to do all of the following:

(a) Prepare, sign, and file federal, state, local, and foreign income, gift, payroll, FICA returns, and other tax returns, claims for refunds, requests for extension of time, petitions regarding tax matters, and any other tax-related documents, including receipts, offers, waivers, consents (including consents and agreements under *Internal Revenue Code Section 2032A* or any successor section), closing agreements, and any power of attorney required by the Internal Revenue Service or other taxing authority with respect to a year beginning with and including the year \_\_\_\_\_ and ending with and including the year \_\_\_\_\_.

**PRACTICE TIP:**

It is important that the years be exactly specified for which this power is to be effective. The Internal Revenue Service insists on its own power of attorney forms that specific years (or quarters in the case of quarterly taxes) be set forth [ *see* Ch. 98, *Powers of Attorney* ]. This can be a broad range of years, e.g., 1990 through 2030, but simply saying "all years" will not suffice in the Service's view. Indeed, in the Service's own forms, note only the types of taxes must be enumerated, but the exact form numbers of each return must be listed, such as 709, 1040, etc. If the planner believes that tax powers are likely to be important, review of the instructions accompanying the Service's own power of attorney, Form 2848, should be seriously considered. These instructions explain the rules limiting who is entitled to represent any taxpayer before the Service, and would deny that power to an attorney in fact who does not fit into one of the listed categories of representatives. *Commentary by Albert G. Handelman.*

(b) Pay taxes due, collect refunds, post bonds, receive confidential information, and contest deficiencies determined

by the Internal Revenue Service or other taxing authority for any of the taxes and tax periods specified above.

(c) Exercise any election I may have under federal, state, local, or foreign tax law.

(d) Act for me in all tax matters before the Internal Revenue Service and any other taxing authority for any of the taxes and tax periods specified above.

(e) Perform any other acts described in *California Probate Code Section 4463*, except acts that conflict with or are limited by a more specific provision in this power.

Section 1.14. *Property Acquired After Execution and Property Located and Powers Exercised Outside State.* The powers granted to my attorney in fact in this power of attorney are exercisable equally with respect to an interest I have when this power of attorney is executed or one that I acquire later, whether or not the property is located in California, and whether or not the powers are exercised or the power of attorney is executed in this state.

Section 1.15. *Power to Create, Modify, and Revoke Trusts.* I give my attorney in fact the power to take any action that my attorney in fact considers necessary or desirable with respect to trusts that exist when this power is executed or that are established thereafter (other than powers that I hold in a fiduciary capacity or solely by virtue of being a beneficiary of any trust), including the power to establish trusts for my benefit or the benefit of [my \_\_\_\_\_ (wife or husband),] my issue, and any other of my dependents; contribute or transfer assets to any trust in which I have an interest; and exercise any power I may have as an individual (not as a fiduciary), other than as a trust beneficiary, such as borrowing trust assets, amending or revoking a trust agreement, and voting shares of stock, but subject to the limitation that any trust I have created may be modified or revoked by my attorney in fact only if expressly permitted by the trust instrument. This section must not be construed as limiting the authority of my attorney in fact to exercise any power, with respect to trusts, that I may hold in a fiduciary capacity or as a trust beneficiary, to the extent that such authority is specifically given elsewhere in this power.

Section 1.16. *Pets.* I give my attorney in fact the power to house, or arrange for the housing, support, and maintenance of, any animals that I own or have custody of and to pay reasonable boarding, kenneling, and veterinary fees for such animals [*optional provision for disposal of animal:*, or if the support and maintenance of any such animal becomes unreasonably expensive, to dispose of the animal in a humane fashion, preferably by finding another home for the animal].

[*First alternative--power to make funeral and burial arrangements if no similar provision appears in principal's durable power of attorney for health care:*]

Section 1.17. *Funeral and Burial Arrangements.* I give my attorney in fact the power to arrange for my funeral or other memorial service and for burial or cremation of my remains, including the purchase of a burial plot or other place for interment of my remains or ashes.

[*Second alternative--power to make funeral and burial arrangements if similar provision appears in principal's durable power of attorney for health care:*]

Section 1.17. *Funeral and Burial Arrangements.* I give my attorney in fact the power to arrange for my funeral or other memorial service and for burial or cremation of my remains, including the purchase of a burial plot or other place for interment of my remains or ashes, as directed by my agent under my \_\_\_\_\_ [durable power of attorney for health care or advance health care directive], for which payments my attorney in fact is hereby released from any and all liability.

[Continue as follows:]

Section 1.18. *Gifts*. I give my attorney in fact the power to make gifts, grants, or other transfers without consideration, of cash or other property, either outright or in trust, including the power to forgive indebtedness and consent to gift splitting under *Internal Revenue Code Section 2513* or successor sections. The powers granted under this section must be exercised, if at all, in favor of \_\_\_\_\_ [designate permissible donees, e.g., my wife, my issue, and any of my dependents or my husband and my children]. Any gifts made under this section must not be future interests within the meaning of *Internal Revenue Code Section 2503*, and the aggregate amount of any gifts made in any one calendar year to any one individual must not exceed the amount that may be made free of federal gift tax to a person. The limitations in the preceding sentence do not apply to any gifts that incur no federal gift tax, such as, for example, gifts that qualify for the unlimited federal gift tax marital deduction or charitable deduction.

[To limit or prohibit gifts to attorney in fact, select one of the following provisions:]

[First alternative--gifts to attorney in fact in accordance with "ascertainable standard":]

Section 1.19. *Gifts to Attorney in Fact Limited to Ascertainable Standard*. Notwithstanding any other provision in this power, my attorney in fact may make gifts in amounts not to exceed the annual federal gift tax exclusion to \_\_\_\_\_ [himself or herself or themselves], but only if \_\_\_\_\_ [he is or she is or they are] in need of funds to meet the reasonable expenses of the following: (1) support in accordance with \_\_\_\_\_ [his or her or their] accustomed manner of living; (2) medical, dental, hospital, and nursing services, and other costs relating to the health care of my attorney in fact; and (3) the education of my attorney in fact.

[OR]

[Second alternative--no gifts to attorney in fact:]

Section 1.19. *No Gifts to Attorney in Fact*. Notwithstanding any other provision in this power, my attorney in fact must not make any gift to \_\_\_\_\_ [himself or herself or themselves] or to any person to whom my attorney in fact owes an obligation of support [add if applicable: unless I also owe that person an obligation of support].

[OR]

[Third alternative--unlimited gifts to attorney in fact:]

Section 1.19. *Gifts to Attorney in Fact*. Notwithstanding any other provision in this power, I authorize my attorney[s] in fact in fact to make gifts to \_\_\_\_\_ [himself or herself or themselves].

[Continue with the following:]

[First alternative--nomination of conservator:]

Section 1.20. *Nomination of Conservator*. If proceedings are initiated for the appointment of a conservator of my person

or my estate or both, I nominate \_\_\_\_\_ [name of nominee], of \_\_\_\_\_ [address], as conservator of my person, estate, or person and estate. I waive the requirement of a bond if \_\_\_\_\_ [name of nominee] is appointed as conservator of my estate. I request that, if the person named above is appointed conservator of my estate, the court make an order granting to that person all or as many of those independent powers listed in *California Probate Code Section 2591* as the court deems appropriate.

[OR]

[Second alternative--attorney in fact authorized to nominate conservators of person and estate:]

Section 1.20. *Power to Nominate Conservator.* If proceedings are initiated for the appointment of a conservator of my person or my estate or both, I authorize my attorney[s] in fact to nominate whomever \_\_\_\_\_ [he or she or they], in \_\_\_\_\_ [his or her or their] discretion believe[s] appropriate as conservator of my person or my estate or both, [but not] including \_\_\_\_\_ [himself or herself or themselves]. I authorize my attorney[s] in fact to waive the requirement of a bond for any person appointed, if \_\_\_\_\_ [he or she or they] believe[s] a waiver is appropriate.

[Continue with the following:]

Section 1.21. *Other Matters.* Except for those actions that conflict with or are limited by another provision in this power, I give my attorney in fact the power to act as my alter ego with respect to all matters and affairs that are not included in the other provisions of this power, to the extent that a principal can act through an agent. This section does not authorize my attorney in fact to make health care decisions, as defined in *California Probate Code Section 4617*.

Section 1.22. *Incidental Powers.* In connection with the exercise of any of the powers described in the preceding sections, I give my attorney[s] in fact full authority, to the extent that a principal can act through an agent, to take all actions that \_\_\_\_\_ [he believes or she believes or they believe] necessary, proper, or convenient, to the extent that I could take these actions myself, including the following powers:

- (a) To prepare, execute, and file documents and maintain records;
- (b) To enter into contracts;
- (c) To hire, discharge, and pay reasonable compensation to attorneys, accountants, expert witnesses, or other assistants;
- (d) To engage in litigation regarding a claim in favor of or against me;
- (e) To execute, acknowledge, seal, and deliver any instrument; and
- (f) To perform any other acts described in *California Probate Code Section 4450*, except those acts that conflict with or are limited by a more specific provision in this power.

Section 1.23. *Restrictions on Property Management Powers.* Notwithstanding any other provision of this power, my attorney in fact does not have any of the following powers related to property management:

- (a) To use my property to discharge the legal obligations of my attorney in fact, including but not limited to the support of the dependents of my attorney in fact, except for those dependents to whom I also, along with my attorney in

fact, owe a duty of support.

(b) To exercise any incident of ownership over any insurance policy that I own and that insures the life of my attorney in fact.

(c) To exercise the powers of a trustee under an irrevocable trust of which my attorney in fact is the settlor and of which I am a trustee.

ARTICLE TWO  
AMPLIFYING PROVISIONS

*[If power of attorney becomes effective only on principal's incapacity, add:]*

Section 2.01. *Determination of Incapacity.* For all purposes under this power, I will be deemed to be incapacitated at such time as \_\_\_\_\_ *[specify name(s) of person(s) who will make determination]*, by written declaration under penalty of perjury, certify that I am unable properly to care for myself or for my person or property; or, when a court of competent jurisdiction, by order so determines. The original declaration, or a certified copy of the court order, as the case may be, made or issued in accordance with this section, must be attached to the original of this power of attorney and may be recorded in any county or counties in which the original has been recorded. Any person may act in reliance on a written declaration or court order made or issued in accordance with this section, without the necessity of inquiring as to whether I am in fact incapacitated as provided in this section.

*[If power of attorney becomes effective only on principal's incapacity, add:]*

Section 2.02. *Determination of Regained Capacity.* After a determination of incapacity in accordance with Section 2.01, I will be deemed to have regained capacity at such time as \_\_\_\_\_ *[specify person(s) who will make determination, e.g., two physicians licensed to practice under the laws of the state in which I am then domiciled]*, by written declaration under penalty of perjury, certify that I have regained the capacity to properly care for myself or for my person or property; or, when a court of competent jurisdiction, by order so determines. The original declaration, or a certified copy of the court order, as the case may be, made or issued in accordance with this section, must be attached to the original of this power of attorney and may be recorded in any county or counties in which the original has been recorded. Any person may act in reliance on a written declaration or court order made or issued in accordance with this section, without the necessity of inquiring as to whether I am in fact incapacitated as provided in this section.

*[To provide for attorney in fact's compensation, or to prohibit compensation, select one of the following provisions:]*

*[First alternative--no compensation:]*

Section 2.03. *No Compensation.* My attorney in fact will not be entitled to compensation for any services rendered as attorney in fact under this power.

*[OR]*

*[Second alternative--reasonable compensation:]*

Section 2.03. *Compensation.* My attorney in fact will be entitled to reasonable compensation for services rendered as attorney in fact under this power of attorney. Factors that should be considered in determining the amount of the compensation are: the time expended by my attorney in fact, the value of the property over which my attorney in fact exercises control and management, and the complexity of the transactions entered into by my attorney in fact. My attorney in fact may pay the compensation from my assets once each \_\_\_\_\_ [*time period of payment, e.g., month or year*], and must keep records of the services performed, the time spent in performing them, and the date and amount of each payment. [*To place overall limit on amount of compensation, add: The amount of the compensation to which my attorney in fact is entitled under this section must in no event exceed \_\_\_\_\_ (specify limit, e.g., 2 percent of the fair market value of the property over which my attorney in fact exercises control and management, determined on an annual basis or the sum of \$100 per month or the sum of \$1,000 per year).*] [*To require attorney in fact to give third party notice of compensation, add: My attorney in fact must, once each \_\_\_\_\_ (time period, e.g., month or year), provide \_\_\_\_\_ (name and address of third party) with a written notice showing the total time spent in performing the services, a description of the services performed, and the amount of compensation paid to \_\_\_\_\_ (himself or herself or themselves) for each such time period.*] [*If compensation is to be divided between two attorneys in fact, add: The two persons serving as my attorney in fact must divide the total amount of compensation between them in proportion to the work done and the attention given to the assets subject to their management by each of them.*]

**PRACTICE TIP:**

The age of the principal at the time of execution of the document should be considered before including specific dollar amount limits. What may seem to be a reasonable fee at the time of execution could be viewed as paltry 30 years later, when the attorney in fact is spending significant time managing the principal's affairs. While this problem could be avoided with the inclusion of a cost-of-living escalator clause, such clauses tend to be rather lengthy, and the amount of space devoted to such a clause might seem out of place in relation to the purpose of the durable power of attorney. *Commentary by Albert G. Handelman.*

[*Continue with the following:*]

Section 2.04. *Reimbursement for Costs and Expenses.* My attorney in fact will be entitled to reimbursement from my property for expenditures properly made in performing the services conferred by me in this power. My attorney in fact must keep records of any such expenditures and reimbursement.

Section 2.05. *Reliance by Third Parties.* To induce third parties to rely on the provisions of this power, I, for myself and on behalf of my heirs, successors, and assigns, hereby waive any privilege that may attach to information requested by my attorney in fact in the exercise of any of the powers described herein. Moreover, on behalf of my heirs, successors, and assigns, I hereby agree to hold harmless any third party who acts in reliance on this power for damages or liability incurred as a result of that reliance.

Section 2.06. *Ratification.* I ratify and confirm all that my attorney in fact does or causes to be done under the authority granted in this power. All contracts, promissory notes, checks, or other bills of exchange, drafts, other obligations, stock powers, instruments, and other documents signed, endorsed, drawn, accepted, made, executed, or delivered by my attorney in fact will bind me, my estate, my heirs, successors, and assigns.

Section 2.07. *Exculpation of Attorney in Fact.* My attorney in fact will not be liable to me or any of my successors in interest for any action taken or not taken in good faith, but will be liable for any willful misconduct or gross negligence.

Section 2.08. *Revocation and Amendment.* I revoke any and all durable powers of attorney for property management and personal care (but not durable powers of attorney for health care) that I have executed before executing this power of attorney. I retain the right to revoke or amend this power and to substitute other attorneys in fact in place of my attorney in fact. Amendments to this power of attorney must be made in writing by me personally (not by my attorney in fact). They must be attached to the original of this document and, if the original is recorded, must be recorded in the same county or counties as the original, although failure to record any amendment will not alter its affect.

[Optional; to limit power of specific person(s) to petition court:]

Section 2.09. *Power to Petition Court.* I expressly eliminate, pursuant to *California Probate Code Section 4503(a)*, the authority of \_\_\_\_\_ [name(s) or description, e.g., my son, Robert J. Green or my children or grandchildren] to petition the court under *California Probate Code Section 4540 et seq.* or any successor sections [if desired, add further specification, e.g., so long as my wife is living and competent].

[Continue with the following:]

### ARTICLE THREE GENERAL PROVISIONS

[To specify form of attorney in fact's signature, select one of the following provisions:]

[First alternative--one attorney in fact:]

Section 3.01. *Signature of Attorney in Fact.* My attorney in fact must use the following form when signing on my behalf pursuant to this power: " \_\_\_\_\_ [name of principal] by \_\_\_\_\_ [name of attorney in fact], \_\_\_\_\_ [his or her] attorney in fact."

[OR]

[Second alternative--two attorneys in fact, required to act unanimously:]

Section 3.01. *Signature of Attorney in Fact.* My attorney in fact must use the following form when signing on my behalf pursuant to this power: " \_\_\_\_\_ [name of principal] by \_\_\_\_\_ [name of first attorney in fact] and \_\_\_\_\_ [name of second attorney in fact], \_\_\_\_\_ [his or her] attorney in fact."

[OR]

[Third alternative--two attorneys in fact, with power to act alone:]

Section 3.01. *Signature of Attorney in Fact.* \_\_\_\_\_ When signing on my behalf pursuant to this power, [name of first attorney in fact] must use the following form: " \_\_\_\_\_ [name of principal] by \_\_\_\_\_ [name of first attorney in fact], \_\_\_\_\_ [his or her] attorney in fact." When

signing on my behalf pursuant to this power, \_\_\_\_\_ [*name of second attorney in fact*] must use the following form: " \_\_\_\_\_ [*name of principal*] by \_\_\_\_\_ [*name of second attorney in fact*], \_\_\_\_\_ [*his or her*] attorney in fact."

[*Continue with the following:*]

Section 3.02. *Severability*. If any of the provisions of this power are found to be invalid for any reason, that invalidity will not affect any of the other provisions of this power, and all invalid provisions will be wholly disregarded.

Section 3.03. *Governing Law*. This power of attorney is executed according to the provisions of the Power of Attorney Law of California, and all questions relating to the validity, interpretation, and administration of this power will be determined in accordance with that Law.

This Durable Power of Attorney is executed by me on \_\_\_\_\_ [*month, day*], \_\_\_\_\_ [*year*], at \_\_\_\_\_, California.

\_\_\_\_\_ [*signature*]

[*name of principal*]

#### ACCEPTANCE BY ATTORNEY IN FACT

Dated: \_\_\_\_\_.

[*EITHER, if only one attorney in fact:*]

\_\_\_\_\_ [*signature*]

[*name of attorney in fact*]

[*OR, if two attorneys in fact:*]

\_\_\_\_\_ [*signature*]

[*name of first attorney in fact*]

\_\_\_\_\_ [*signature*]

[*name of second attorney in fact*]

#### **PRACTICE TIP:**

A prospective attorney in fact may be reluctant to sign a durable power of attorney if he or she will be legally obligated to act under it at some unspecified time in the possibly distant future. The planner may

wish to include a statement that will make *Prob. Code § 4230(c)* inapplicable, even though the attorney in fact has signed the durable power of attorney. Such a provision could read as follows: "In signing this durable power of attorney, the attorney in fact acknowledges and accepts \_\_\_\_\_ [his or her] appointment as attorney in fact; provided, however, that this acknowledgment and acceptance is not meant to indicate that the attorney in fact agrees to act under this durable power of attorney at any particular time, under any particular circumstances, or regarding any particular transaction, and the provisions of *Probate Code Section 4230(c)* shall not apply to this durable power of attorney despite the attorney in fact's execution of this acknowledgment and acceptance." *Commentary by Albert G. Handelman.*

ACKNOWLEDGMENT

[Acknowledgments taken in California must be in the following form (Civ. Code § 1189(a)):]

State of California )  
County of \_\_\_\_\_ )  
 )  
 )

On \_\_\_\_\_ [date], before me, \_\_\_\_\_ [name and title of officer taking acknowledgment], personally appeared \_\_\_\_\_ [name(s) of person(s) signing instrument], \_\_\_\_\_ who proved to me on the basis of satisfactory evidence to be the person[s] whose name[s] \_\_\_\_\_ [is or are] subscribed to the within instrument and acknowledged to me that \_\_\_\_\_ [he or she or they] executed the same in \_\_\_\_\_ [his or her or their] authorized \_\_\_\_\_ [capacity or capacities], and that by \_\_\_\_\_ [his or her or their] signature[s] on the instrument the person[s], or the entity on behalf of which the person[s] acted, executed the instrument.

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

WITNESS my hand and official seal.

Signature \_\_\_\_\_ .....[Seal]

[Include lawyer's certificate required by Probate Code Section 4503(a)(2) if power of attorney includes provision in Section 2.09 limiting authority to petition court:]

LAWYER'S CERTIFICATE  
(Prob. Code § 4503(a)(2))

I am a lawyer authorized to practice law in the state where this power of attorney was executed, and the principal was my client at the time this power of attorney was executed. I have advised my client concerning \_\_\_\_\_ [his or her] rights in connection with this power of attorney and the applicable law and the consequences of signing or not signing this power of attorney, and my client, after being so advised, has executed this power of attorney.

Dated: \_\_\_\_\_

\_\_\_\_\_ [signature]

[*name of attorney*]

Law Firm: \_\_\_\_\_ [*firm name*]

Address: \_\_\_\_\_

Telephone Number: \_\_\_\_\_

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Powers of Attorney General Overview Estate, Gift & Trust Law Powers of Attorney Durable Powers Estate, Gift & Trust Law Powers of Attorney Limited Powers



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California Legal Forms--Transaction Guide

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DIVISION IV: WILLS AND TRUSTS  
CHAPTER 68 DURABLE POWERS OF ATTORNEY FOR PROPERTY MANAGEMENT  
PART IV. FORMS

A. Complete Durable Powers of Attorney for Property Management

*25-68 California Legal Forms--Transaction Guide §§ 68.202-68.209*

**AUTHOR:** Reviewed by Albert G. Handelman

**[Reserved]**

§§ 68.202[Reserved]



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DIVISION IV: WILLS AND TRUSTS  
CHAPTER 68 DURABLE POWERS OF ATTORNEY FOR PROPERTY MANAGEMENT  
PART IV. FORMS  
B. Ancillary Documents

*25-68 California Legal Forms--Transaction Guide § 68.210*

**AUTHOR:** Reviewed by Albert G. Handelman

**§ 68.210 Notice of Revocation of Durable Power of Attorney**

**[1] Comment**

**[a] Use of Form**

This form is a notice of revocation of a durable power of attorney. When completed, it should be delivered to the attorney in fact [*see [f], below*].

This form may be used to revoke any durable power of attorney executed by the principal, whether the power is for property management, personal care, or both. It identifies the power of attorney to be revoked by stating the date on which it was executed, the attorney in fact acting under it, and, if the power was recorded, the date and place of recordation. It then states that the power of attorney and all power and authority granted under it are revoked.

**[b] Principal's Right to Revoke Power of Attorney**

Under the Power of Attorney Law, the principal may revoke a power of attorney at any time [*Prob. Code § 4151(a)*]. The revocation may be accomplished by a writing stating that the power is revoked or, if the power of attorney itself specifies some other manner of revocation, by complying with the terms of the power [*Prob. Code § 4151(a)*]. The right of the principal to revoke a power of attorney by a writing cannot be limited by any terms of the power of attorney itself [*Prob. Code § 4151(b)*].

**[c] Revocation by Incapacitated Principal**

The Power of Attorney Law does not explicitly require that the principal be competent at the time of the revocation [*compare Prob. Code § 4120* (natural person having "capacity to contract" may execute power of attorney) *with Prob. Code § 4151(a)* (principal "may revoke" power of attorney--no requirement of capacity to contract)]. It may be persuasively argued, however, that an attempted revocation by an incapacitated principal will be ineffective.

The statutory warning that is required to be included in every printed form of durable power of attorney sold or otherwise distributed in California for use by a person who does not have the advice of legal counsel advises the principal that "You have the right to revoke or terminate this durable power of attorney at any time, so long as you are competent" [*Prob. Code* § 4128(a); *see* § 68.212[2] (full text of statutory warning)]. Since the attorney in fact has a duty to act in the principal's best interests [*see Prob. Code* § 4232(a); *see also* § 68.15[6]], the attorney in fact cannot simply acquiesce in the principal's attempted revocation if the attorney in fact has doubts as to the principal's capacity. Instead, the attorney in fact should first inquire into the wording, if any, of the power of attorney respecting revocation. (The durable power of attorney forms in this chapter simply state that the principal retains the right to revoke or amend the power and to substitute other attorneys in fact in place of the designated attorney in fact.) If the attorney in fact is satisfied that the revocation is effective according to the terms of the power, the attorney in fact should attempt to ascertain the principal's capacity. In this regard, the attorney in fact may consult third persons, such as the principal's spouse, other relatives, friends, physicians, attorneys, or accountants [*see Prob. Code* § 4235; *see also* § 68.15 [1]]. If the attorney in fact still has doubts as to the principal's capacity, the attorney in fact should seek legal counsel, or even petition the court for an order determining whether the revocation is effective [*see Prob. Code* §§ 4540, 4541(a)].

#### **[d] Revocation by Conservator or Guardian**

If a conservator, guardian, or other fiduciary has been appointed for the principal, the right of the principal to revoke the power of attorney passes to the conservator, guardian, or other fiduciary [*Prob. Code* § 4153(a)(3)]. However, any revocation by such a fiduciary will be effective only after it has been approved by the court [*Prob. Code* § 4206].

#### **[e] Revocation of Attorney in Fact's Authority**

The principal may revoke the attorney in fact's authority without revoking the power of attorney by simply informing the attorney in fact orally or in writing that the attorney in fact's authority is revoked, or when and under what circumstances it is revoked [*Prob. Code* § 4153(a)]. The right of the principal to revoke the attorney in fact's authority may not be limited by any provision of the power of attorney [*Prob. Code* § 4153(a)(2)]. Although the Power of Attorney Law does not explicitly require that the principal be competent to revoke the attorney in fact's authority, the principal's power to do this should be subject to the same limitations as the principal's power to revoke the power of attorney, as discussed in [c], above.

#### **[f] Notice of the Revocation**

The Power of Attorney Law does not require that a written revocation be communicated to the attorney in fact to be effective [*see Prob. Code* §§ 4151, 4152]. However, the Law protects the attorney in fact and third parties from liability for acts taken in good faith reliance on a power of attorney without notice that it has been revoked [*see Prob. Code* §§ 4151(b), 4152(b), 4153(b), 4305(a); *see also* § 68.14[4][c]]. For this reason, notice should always be given to the attorney in fact and other interested parties when the power is revoked. Notice should also be given to the attorney in fact when the attorney in fact's authority (but not the power itself) is revoked [*see* [e], above]. For a cover letter that maybe used to transmit a notice of revocation, see § 68.211.

#### **[g] Recordation**

This document should be acknowledged before a notary public. If the power of attorney was recorded, the notice of revocation should also be recorded. Acknowledgment or other certified proof of execution is a prerequisite to recordation [*Gov. Code* § 27287].

#### **[2] Form**

##### **Notice of Revocation of Durable Power of Attorney**

NOTICE OF REVOCATION OF DURABLE POWER OF ATTORNEY

I, \_\_\_\_\_ [name of principal], currently a resident of \_\_\_\_\_ [county and state], executed a durable power of attorney for \_\_\_\_\_ [property management or personal care or property management and personal care] on \_\_\_\_\_ [date], under which \_\_\_\_\_ [name(s) of attorney(s) in fact] \_\_\_\_\_ [was or were] empowered to act as my attorney[s] in fact \_\_\_\_\_ [if durable power is known to be recorded, add:, and which was recorded on \_\_\_\_\_ (date) in \_\_\_\_\_ (record location, e.g., Volume 199, at page 1324, Official Records of the County of Pacific, State of California]. I hereby declare that that power of attorney and all power and authority granted under it are immediately revoked and withdrawn.

This Notice of Revocation of Durable Power of Attorney is executed by me on \_\_\_\_\_ [date], at \_\_\_\_\_ [city and state].

\_\_\_\_\_ [signature]  
[name of principal]

ACKNOWLEDGMENT

[Acknowledgments taken in California must be in the following form (Civ. Code § 1189(a)):]

State of California )  
County of \_\_\_\_\_ )  
 )

On \_\_\_\_\_ [date], before me, \_\_\_\_\_ [name and title of officer taking acknowledgment], personally appeared \_\_\_\_\_ [name(s) of person(s) signing instrument], \_\_\_\_\_ who proved to me on the basis of satisfactory evidence to be the person[s] whose name[s] \_\_\_\_\_ [is or are] subscribed to the within instrument and acknowledged to me that \_\_\_\_\_ [he or she or they] executed the same in \_\_\_\_\_ [his or her or their] authorized \_\_\_\_\_ [capacity or capacities], and that by \_\_\_\_\_ [his or her or their] signature[s] on the instrument the person[s], or the entity upon behalf of which the person[s] acted, executed the instrument.

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

WITNESS my hand and official seal.

Signature \_\_\_\_\_ .....[Seal]

Legal Topics:

For related research and practice materials, see the following legal topics:  
Estate, Gift & Trust Law Powers of Attorney General Overview  
Estate, Gift & Trust Law Powers of Attorney Durable Powers  
Estate, Gift & Trust Law Powers of Attorney Revocation & Termination



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DIVISION IV: WILLS AND TRUSTS  
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 PART IV. FORMS  
 B. Ancillary Documents

*25-68 California Legal Forms--Transaction Guide § 68.211*

**AUTHOR:** Reviewed by Albert G. Handelman

**§ 68.211 Transmittal Letter for Notice of Revocation**

**[1] Comment**

**[a] Use of Form**

This form is a cover letter that may be used to transmit a notice of revocation of a durable power of attorney [ *see* § 68.210] to the attorney in fact and other interested parties. It consists of a single paragraph that identifies the revoked power, informs the recipient of the revocation, and refers the recipient to the enclosed copy of the notice of revocation.

**[b] Effect of Giving Notice**

Although the Power of Attorney Law does not require that a written revocation be communicated to the attorney in fact to be effective [*see Prob. Code §§ 4151, 4152*], the attorney in fact and third parties will not be liable for acts taken in good faith reliance on a power of attorney without notice that it has been revoked [*see Prob. Code §§ 4151(b), 4152(b), 4153(b), 4305(a); see also § 68.14[4][c]*]. Notice should thus be given whenever a power is revoked.

**[2] Form**

**Transmittal Letter for Notice of Revocation**

\_\_\_\_\_ [date]  
 \_\_\_\_\_ [Name of recipient]  
 \_\_\_\_\_ [Street address]  
 \_\_\_\_\_ [City, state, and zip code]

Re: Durable Power of Attorney for \_\_\_\_\_ [Property Management *or* Personal Care *or* Property Management and Personal Care] of \_\_\_\_\_ [name of principal], executed on \_\_\_\_\_ [

*date*]

Dear \_\_\_\_\_:

Enclosed is a copy of a Notice of Revocation of the above-referenced durable power of attorney. The enclosed Notice was duly executed by the principal, \_\_\_\_\_ [*name of principal*], on \_\_\_\_\_ [*date*]. Please be advised that the agency relationship established in the power of attorney is terminated for all purposes.

Sincerely,

\_\_\_\_\_ [*attorney's signature*]

[*typed name*]

cc: \_\_\_\_\_ [*name of principal*]

\_\_\_\_\_ [*names of third parties with whom attorney in fact may do business*]

enclosure[s]

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Powers of Attorney General Overview Estate, Gift & Trust Law Powers of Attorney Durable Powers Estate, Gift & Trust Law Powers of Attorney Revocation & Termination



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*25-68 California Legal Forms--Transaction Guide § 68.212*

**AUTHOR:** Reviewed by Albert G. Handelman

**§ 68.212 Statement Warning Principal of Legal Consequences of Durable Power of Attorney for Property Management**

**[1] Comment**

**[a] Use of Form**

This form is a statement warning the principal of the legal consequences of signing a durable power of attorney for property management. It consists of the exact wording of the statutory warning in *Prob. Code § 4128(a)*. If this form is to be given to the principal separate from the durable power of attorney, its language should be slightly revised to indicate exactly which durable power it applies to [*see [b], below*].

**PRACTICE TIP:**

Practitioners will want to consider whether to use the statutory warning in an attorney-drafted durable power of attorney for property management [*see Prob. Code § 4128(a)*]. Some practitioners feel that such a warning may add to the attorney's potential liability by having the client sign a document implying that the attorney has told the client everything he or she needs to know before signing a durable power of attorney. In any event, if included in an attorney-drafted power of attorney, the statutory warning can be tailored to the facts of the particular case [*see [b], below*].

**[b] Warning Regarding Legal Consequences of Power**

The Power of Attorney Law requires that every printed form of durable power of attorney sold or otherwise distributed in California for use by a person who does not have the advice of legal counsel (other than a durable power of attorney for health care) contain a warning statement in not less than 10-point boldface type, or a reasonable equivalent, explaining the power of attorney and the legal consequences of executing it [*Prob. Code § 4128(a), (c)*].

Although there is no requirement that the statutory warning be included in an attorney-drafted power, some attorneys

believe that it is good practice to do so. When the warning is in the power, the principal will be required to read it when he or she reads the power of attorney; and the principal's signature at the end of the power will also acknowledge that the principal has been put on notice as to the contents of the warning.

However, the statutory warning is not in every respect suitable for inclusion in the power itself. Some terms of the warning may be interpreted as varying or modifying other terms of the power. For this reason, it is recommended that the statutory warning be given to the principal in a separate document. This form is that document.

When this form is used, it should be presented to the principal at the same time as the power of attorney. The principal should be asked to read the form at the same time as the power of attorney, and to affix his or her initials in the space provided at the end. The principal should also be asked to sign a separate statement acknowledging receipt of the statutory warning and stating that he or she was fully advised by the attorney.

## **[2] Form**

### **Statement Warning Principal of Legal Consequences of Durable Power of Attorney for Property Management**

#### **NOTICE TO PERSON EXECUTING DURABLE POWER OF ATTORNEY**

*Probate Code Section 4128(a)*

A durable power of attorney is an important legal document. By signing the durable power of attorney, you are authorizing another person to act for you, the principal. Before you sign this durable power of attorney, you should know these important facts:

Your agent (attorney in fact) has no duty to act unless you and your agent agree otherwise in writing.

This document gives your agent the powers to manage, dispose of, sell, and convey your real and personal property, and to use your property as security if your agent borrows money on your behalf. This document does not give your agent the power to accept or receive any of your property, in trust or otherwise, as a gift, unless you specifically authorize the agent to accept or receive a gift.

Your agent will have the right to receive reasonable payment for services provided under this durable power of attorney unless you provide otherwise in this power of attorney.

The powers you give your agent will continue to exist for your entire lifetime, unless you state that the durable power of attorney will last for a shorter period of time or unless you otherwise terminate the durable power of attorney. The powers you give your agent in this durable power of attorney will continue to exist even if you can no longer make your own decisions respecting the management of your property.

You can amend or change this durable power of attorney only by executing a new durable power of attorney or by executing an amendment through the same formalities as an original. You have the right to revoke or terminate this durable power of attorney at any time, so long as you are competent.

This durable power of must be dated and must be acknowledged before a notary public or signed by two witnesses. If it is signed by two witnesses, they must witness either (1) the signing of the power of attorney or (2) the principal's signing or acknowledgment of his or her signature. A durable power of attorney that may affect real property should be acknowledged before a notary public so that it may easily be recorded.

You should read this durable power of attorney carefully. When effective, this durable power of attorney will give your agent the right to deal with property that you now have or might acquire in the future. The durable power of attorney is important to you. If you do not understand the durable power of attorney, or any provision of it, then you should obtain the assistance of an attorney or other qualified person.

\_\_\_\_\_ [*principal's initials*]

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Powers of Attorney General Overview Estate, Gift & Trust Law Powers of Attorney Durable Powers



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DIVISION IV: WILLS AND TRUSTS  
 CHAPTER 68 DURABLE POWERS OF ATTORNEY FOR PROPERTY MANAGEMENT  
 PART IV. FORMS  
 B. Ancillary Documents

*25-68 California Legal Forms--Transaction Guide § 68.213*

**AUTHOR:** Reviewed by Albert G. Handelman

**§ 68.213 Principal's Statement Regarding Warning**

**[1] Comment**

**[a] Use of Form**

This form is a statement reciting that the attorney has fully advised the principal regarding the legal consequences of signing the durable power of attorney and that the principal has been shown and has read the warning in *Prob. Code § 4128(a)*. For the text of the statutory warning, see § 68.212[2].

**[b] Statement Regarding Warning**

The warning in *Prob. Code § 4128(a)* is required to be included in all printed forms of durable power of attorney for property management sold or otherwise distributed in California for use by a person who does not have the advice of counsel. It is discussed in § 68.211.

Although this warning is not required to be included in attorney-drafted durable powers of attorney, it is good practice to furnish the principal with a copy of the warning whenever a durable power of attorney is executed. The client should be requested to initial the statutory warning and to sign a separate statement acknowledging that the attorney has fully advised the client concerning the client's rights and that the client has read the warning.

**[2] Form**

**Principal's Statement Regarding Warning**

STATEMENT OF \_\_\_\_\_ [*name of principal*]

I, \_\_\_\_\_ [*name of principal*], am the principal under a durable power of attorney for property management, which \_\_\_\_\_ [*was or were*] prepared for me by \_\_\_\_\_ [*name of*

*attorney*] and which I am executing at the same time that I am executing this statement. \_\_\_\_\_ [*Name of attorney*] has advised me fully concerning my rights in connection with \_\_\_\_\_ [this or these] durable power[s] of attorney and explained the applicable law and the consequences of signing or not signing \_\_\_\_\_ [this or these] durable power[s] of attorney. I have been shown and have read the warnings contained in *California Probate Code Section 4128(a)*, \_\_\_\_\_ [a copy of which is or copies of which are] attached and which I have initialed.

Executed on \_\_\_\_\_ [date], at \_\_\_\_\_ [city and state].

\_\_\_\_\_ [signature]

[name of principal]

### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Powers of Attorney General Overview Estate, Gift & Trust Law Powers of Attorney Durable Powers



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DIVISION IV: WILLS AND TRUSTS

CHAPTER 68A USING FAMILY PARTNERSHIPS AND OTHER BUSINESS ENTITIES IN ESTATE PLANNING

*25-68A California Legal Forms--Transaction Guide 68A.syn*

**AUTHOR:** Steven M. Goldberg Practice Consultant

**§ 68A.syn Synopsis to Chapter 68A: USING FAMILY PARTNERSHIPS AND OTHER BUSINESS ENTITIES IN ESTATE PLANNING**

§ 68A.01 California Sources

[1] Statutes

[2] Rules of Professional Conduct

§ 68A.02 Federal Sources

[1] Statutes

[2] Regulations

§§ 68A.03-68A.04 [Reserved]

§ 68A.05 Law Reviews and Periodicals

§ 68A.06 Annotations

§ 68A.07 Text References

[1] Matthew Bender Sources

[2] Additional Text References

§§ 68A.08-68A.09 [Reserved]

§ 68A.10 Family Business Defined

§ 68A.11 Characteristics of Family Businesses

- [1] Multigenerational Aspects
- [2] Family Business as Active Trade or Business
  - [a] Concentrated Ownership and Management
  - [b] Long-Term Perspective
  - [c] Shared Family Interests and Values
- [3] Family Business for Asset Management

§ 68A.12 Ownership Structure

- [1] Entities Most Commonly Used in Family Businesses
  - [a] In General
  - [b] Partnerships
  - [c] Limited Liability Companies
- [2] Effect of Structure on Personal Liability
  - [a] General Partners
  - [b] Limited Partners
  - [c] Limited Liability Company Members
- [3] Effect of Structure on Transferability

§ 68A.13 Impact of Family Dynamics

- [1] Family Relationships May Affect Strategic Planning
- [2] Use of Nonlegal Advisors

§ 68A.14 Management Issues

- [1] Types of Management Structures
- [2] Succession Problems Unique to Family Businesses
  - [a] Overview
  - [b] Restricted Pool of Successors

[c] Age, Gender, and Generational Issues

[d] Effect of Subsequent Generational Transfers

§ 68A.15 Difficulties in Continuing Family Businesses and Critical Need for Planning

§ 68A.16 Ethical Considerations in Advising Family Businesses

[1] Counsel's Degree of Involvement in Family Matters

[2] Avoiding Conflicts of Interest

[a] Conflicts in Family Business Context

[b] Assess Potential for Conflicts and Inform Parties

[c] Identify Business Entity as Client

§§ 68A.17-68A.29 [Reserved]

§ 68A.30 Partnership Tax Treatment

§ 68A.31 Purchase or Gift of Interest in Family Partnership; Income Splitting

§§ 68A.32-68A.39 [Reserved]

§ 68A.40 Gift Valuation

[1] General Rule: Fair Market Value as of Date of Gift

[2] Special Valuation Rules

[a] Valuation of Transferred and Retained Senior Interests Required

[b] Valuation of Preferred Corporate Stock and Partnership Interests in Freeze Transactions

[c] Valuation of Intra-Family Retained and Transferred Interests in Trust

[d] Valuation of Options and Interests Subject to Buy-Sell Agreement

[e] Treatment of Certain Lapsing Rights and Restrictions

§ 68A.41 Annual Gift Tax Exclusion

§ 68A.42 Effect of Transfers Within Three Years of Death

§ 68A.43 Effect of Estate Tax on Family Businesses

§ 68A.44 Deduction for Qualified Family-Owned Business Interests

[1] "Qualified Family-Owned Business Interest" Defined

[a] In General

[b] Interests Not Qualifying as QFOBIs

[c] Interests Not Included in QFOBI Calculation

[2] Eligibility for Deduction

[3] Maximum Amount of Deduction; Coordination With Unified Credit

[4] Recapture of Estate Tax Savings

[5] Deduction Inapplicable to Gift and Generation-Skipping Transfer Tax

[6] Detailed Planning Required to Use Deduction

§ 68A.45 Tax-Free Redemption of Stock to Pay Estate Taxes

[1] Section 303 Redemption Treated as Sale or Exchange

[2] Qualifications for Tax-Free Redemption

[a] Qualifying Percentage Requirements

[b] Qualifying Dollar Limitations

[c] Inclusion in Gross Estate

[3] Effect of Gifts Within Three Years of Death

[4] Redemption of Generation-Skipping Stock

§ 68A.46 Extension of Estate Tax Payments Attributable to Closely Held Business Interests

[1] Thirty-Five Percent Rule Permits Deferral and Installment Payments

[2] Additional Qualifications for Election

[3] Acceleration of Deferred Tax

[a] Disposition of 50 Percent of Interest

[b] Section 303 Redemptions Not Treated as Distribution

[c] Nonpayment or Late Payment of Taxes

[4] Installment Payment of Certain Generation-Skipping Transfer Taxes

[5] Exhaustion of Administrative Remedies Before Seeking Declaratory Relief With Respect to Election

§§ 68A.47-68A.59 [Reserved]

§ 68A.60 Effect of Generation-Skipping Transfer Tax on Family Businesses

[1] Imposition of Tax

[a] Transfers on Which Tax Is Imposed

[b] Rate of Tax

[2] Exemptions and Exclusions From Tax

[a] GST Exemption

[b] Other Exclusions or Exemptions

§§ 68A.61-68A.69 [Reserved]

§ 68A.70 Property Tax

§ 68A.71 Documentary Transfer Tax

§ 68A.72 Inheritance Taxes

§§ 68A.73-68A.79 [Reserved]

§ 68A.80 Assessing Client's Risk Tolerance

§ 68A.81 Coordinating Succession, Family, and Estate Planning

[1] Minimizing Separation of Management and Ownership

[2] Avoiding Conflicts in Succession

[3] Use of Buy-Sell Agreements

[4] Balancing Conflicting Goals of Retaining Control, Financial Security, and Minimizing Taxes

[5] Use of Family Limited Partnerships and Limited Liability Companies

[a] Family Limited Partnerships

[b] Family Limited Liability Companies

[c] Planning to Avoid I.R.C. § 2701 Valuation Rules

[d] Planning to Avoid I.R.C. § 2704 Valuation Rules

[e] Using GRATs and GRUTs

§ 68A.82 Using Valuation Discounts

[1] Effect of Valuation Discounts

[2] Primary Factors Affecting Valuation

[a] Limited Control

[b] Marketability and Liquidity

[c] Restrictions on Transferability

[3] Documentation of Basis for Valuation Discounts

[a] Selection of Appraisers

[b] Organizational or Operating Agreement

[c] Documentation Guidelines

[4] Avoiding Step Transaction Characterization

[5] Use of Assignee's Interest

[6] Penalty for Substantial Undervaluation of Property

[7] Balancing Maximum Discounts and Business Purposes

§ 68A.83 Avoiding Gain on Formation

§ 68A.84 Appropriate Assets for Contribution to Family Business

[1] Selecting Appropriate Assets

[2] Effect of Retention of Possession or Enjoyment of Transferred Assets

§ 68A.85 Selling the Family Business

§§ 68A.86-68A.99 [Reserved]

§ 68A.100 Facts for Family Limited Partnership

Scope

§ 68A.101 Facts for Family Limited Liability Company

Scope

§ 68A.102 Documents for Family Limited Partnership or Family Liability Company

Scope

§§ 68A.103-68A.109 [Reserved]

§ 68A.110 Using Family Business for Estate Planning Purposes

Scope

§ 68A.111 Evaluating Family Dynamics and Existing Management Structure; Preparing for Succession

Scope

§§ 68A.112-68A.119 [Reserved]

§ 68A.120 Forming Family Limited Partnership

Scope

§ 68A.121 Forming Family Limited Liability Company

Scope

§ 68A.122 Checklist for Establishing and Maintaining Separate Character of Business

Scope

§§ 68A.123-68A.129 [Reserved]

§ 68A.130 Procedures After Family Business Organized

Scope

§§ 68A.131-68A.199 [Reserved]

§ 68A.200 Family Limited Partnership Agreement

[1] Comment

[a] Use of Form

[b] Variation of ULPA '08 Provisions

[c] Provisions Affecting Valuation Discounts

[d] Formation of Limited Partnerships

[e] Allocation of Profit and Loss

[f] Removal of General Partner

[g] Dissolution of Partnership

[2] FORM

Family Limited Partnership Agreement

§ 68A.201 Family Limited Liability Company Operating Agreement--Manager-Managed

[1] Comment

[a] Use of Form

[b] Contents of Agreement

[c] Conversion to Single Member-Managed Agreement

[2] FORM

Family Limited Liability Company Operating Agreement--Manager-Managed

§§ 68A.202-68A.209 [Reserved]

§ 68A.210 General Partner Compensation

[1] Comment--Use of Form

[2] FORM

General Partner Compensation

§ 68A.211 General Partner Succession

[1] Comment--Use of Form

[2] FORM

General Partner Succession

§ 68A.212 General Partner Has Absolute Distribution Authority

[1] Comment--Use of Form

[2] FORM

General Partner's Absolute Distribution Authority

§ 68A.213 Limitations on Authority of General Partners

[1] Comment--Use of Form

[2] FORM

Limitations on Authority of General Partners

§ 68A.214 Limited Partner Acknowledgment That Cash Distributions May Not Cover Tax Liability

[1] Comment--Use of Form

[2] FORM

Limited Partner Acknowledgment that Cash Distributions May Not Cover Tax Liability

§ 68A.215 Limited Partners May Engage in Competing Activities

[1] Comment--Use of Form

[2] FORM

Limited Partners May Engage in Competing Activities

§ 68A.216 Transfers From Custodianships

[1] Comment

[a] Use of Form

[b] Gifts to Minors

[c] When Transferor Should Not Act as Custodian

[2] FORM

Transfers From Custodianships

§ 68A.217 Consent of Spouse

[1] Comment--Use of Form

[2] FORM

Consent of Spouse

§ 68A.218 Buy-Out as Consequence of Marital Dissolution

[1] Comment--Use of Form

[2] FORM

Buy-Out as Consequence of Marital Dissolution

§ 68A.219 Provision Requiring Prenuptial Agreements for Limited Partners

[1] Comment--Use of Form

[2] FORM

Provision Requiring Prenuptial Agreements for Limited Partners

§ 68A.220 Grant of Special Power of Attorney

[1] Comment--Use of Form

[2] FORM

Grant of Special Power of Attorney

§ 68A.221 Determination of Fair Market Value

[1] Comment--Use of Form

[2] FORM

Determination of Fair Market Value

§ 68A.222 Waiver of Right to Seek Dissolution Not Required by Agreement

[1] Comment--Use of Form

[2] FORM

Waiver of Right to Seek Dissolution Not Required by Agreement

§§ 68A.223-68A.239 [Reserved]

§ 68A.240 Client Letter Summarizing Use of Family Limited Partnerships

[1] Comment

[a] Use of Form

[b] Reviewing Letter

[2] FORM

Client Letter Summarizing Use of Family Limited Partnerships

§ 68A.241 Client Letter Emphasizing Need for Estate and Business Succession Planning

[1] Comment

[a] Use of Form

[b] Reviewing Letter

[2] FORM

Client Letter Emphasizing Need for Estate and Business Succession Planning

Steven M. Goldberg\*  
Practice Consultant

**FOOTNOTES:**

(n125)Footnote \*. Steven M. Goldberg is a partner in the Santa Rosa office of FRIEDEMANN GOLDBERG LLP, specializing in estate planning, including the formation of limited partnerships.



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DIVISION IV: WILLS AND TRUSTS

CHAPTER 68A USING FAMILY PARTNERSHIPS AND OTHER BUSINESS ENTITIES IN ESTATE PLANNING

*25-68A California Legal Forms--Transaction Guide Scope*

**AUTHOR:** Steven M. Goldberg Practice Consultant

### **Scope**

Steven M. Goldberg\*  
Practice Consultant Scope

This chapter covers the use of family businesses in estate planning. It is designed as an introduction to this subject, describing the unique problems faced by estate planners in this area. The chapter includes an extensive discussion in Legal Background of important tax rules and hazards that must be considered whenever a family limited partnership, family limited liability company, or other family business entity is being considered. These include federal estate tax, gift tax, income tax, and generation-skipping transfer tax rules, as well as California property tax issues. The Legal Background concludes with a discussion of planning strategies to achieve the best possible family, family business, and estate tax results.

The Transaction Guide includes a client interview checklist and procedural guides for advising clients in the formation of family limited partnerships and family limited liability companies. The forms in the chapter include a complete family limited partnership agreement, a complete family limited liability company agreement, miscellaneous alternative provisions, and client letters.

For analysis of the most appropriate entity structure, see Ch. 1B, *Selecting Form of Business Entity*. Ch. 15, *General Partnerships*, covers general partnerships; Ch. 16, *Formation of Limited Partnerships*, covers the formation and operation of limited partnerships. Chs. 60- 74 cover estate planning, including chapters on wills, trusts, lifetime gifts, durable powers of attorneys, and contracts that affect wills and trusts.

### **FOOTNOTES:**

(n126)Footnote \*. Steven M. Goldberg is a partner in the Santa Rosa office of FRIEDEMANN GOLDBERG LLP, specializing in estate planning, including the formation of limited partnerships.



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PART I. RESEARCH GUIDE  
A. Primary Sources

*25-68A California Legal Forms--Transaction Guide § 68A.01*

**AUTHOR:** Steven M. Goldberg Practice Consultant

**§ 68A.01 California Sources**

**[1] Statutes**

Ownership of property as tenants in partnership. *Civ. Code §§ 682(2), 684.*

Uniform Limited Partnership Act of 2008. *Corp. Code § 15900 et seq.*

Definitions. *Corp. Code § 15901.02.*

Formation. *Corp. Code § 15902.01 et seq.*

Limited partners. *Corp. Code § 15903.01 et seq.*

General partners. *Corp. Code § 15904.01 et seq.*

Contributions and distributions. *Corp. Code § 15905.01 et seq.*

Transferable interests; rights of transferees and creditors. *Corp. Code § 15907.01 et seq.*

Dissolution. *Corp. Code § 15908.01 et seq.*

Conversion and merger. *Corp. Code § 15911.01 et seq.*

Beverly-Killea Limited Liability Company Act. *Corp. Code § 17000 et seq.*

General provisions. *Corp. Code § 17000 et seq.*

Formation. *Corp. Code § 17050 et seq.*

Members. *Corp. Code § 17100 et seq.*

Management. *Corp. Code § 17150 et seq.*

Finance. *Corp. Code § 17200 et seq.*

Distributions and withdrawals. *Corp. Code § 17250 et seq.*

Interests and assignment of interests. *Corp. Code § 17300 et seq.*

Dissolution. *Corp. Code § 17350 et seq.*

Foreign limited liability companies. *Corp. Code § 17450 et seq.*

Class actions and derivative actions. *Corp. Code § 17500 et seq.*

Merger. *Corp. Code § 17550 et seq.*

Dissenting members' rights. *Corp. Code § 17600 et seq.*

Miscellaneous provisions. *Corp. Code § 17650 et seq.*

Fee provisions. *Gov. Code § 12190.*

Rights and obligations during marriage. *Fam. Code §§ 700-1620.*

Property rights. *Fam. Code §§ 750-755.*

Characterization of marital property. *Fam. Code §§ 760-853.*

Division of property on dissolution of marriage or legal separation. *Fam. Code § 2500 et seq.*

Distribution of property among heirs or beneficiaries. *Prob. Code §§ 240-247.*

Disclaimers of interests under wills and trusts. *Prob. Code §§ 260-295.*

Wills. *Prob. Code § 6100 et seq.*

Creation and validity of trusts. *Prob. Code § 15200 et seq.*

Transfer of ownership interests not transfer for reassessment purposes unless transfer involves change of control or majority interest. *Rev. & Tax. Code § 64.*

Documentary transfer tax. *Rev. & Tax. Code § 11901 et seq.*

California's pick-up estate tax. *Rev. & Tax. Code § 13302.*

Minimum franchise tax on limited partnerships. *Rev. & Tax. Code § 17935.*

Minimum franchise tax and fees on limited liability companies. *Rev. & Tax. Code §§ 17942, 23153.*

Requirement that limited liability companies file California tax return. *Rev. & Tax. Code § 18633.5.*

## **[2] Rules of Professional Conduct**

Avoiding adverse interests. *Cal. Rules Prof. Cond., Rule 3-300.*

Avoiding representation of adverse interests. *Cal. Rules Prof. Cond., Rule 3-310.*

Communication. *Cal. Rules Prof. Cond., Rule 3-500.*

Fees for legal services. *Cal. Rules Prof. Cond., Rule 4-200.*

### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Business & Corporate Law  
 General Partnerships  
 General Overview  
 Business & Corporate Law  
 Limited Partnerships  
 General Overview  
 Estate, Gift & Trust Law  
 General Overview



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A. Primary Sources

*25-68A California Legal Forms--Transaction Guide § 68A.02*

**AUTHOR:** Steven M. Goldberg Practice Consultant

**§ 68A.02 Federal Sources**

**[1] Statutes**

Tax-free redemption of stock to pay estate taxes. *I.R.C. § 303.*

Limitation on losses and credits from passive activities. *I.R.C. § 469.*

Income taxation of partners and partnership. *I.R.C. § 701 et seq.*

Income of partners. *I.R.C. § 702.*

Taxable year of partner and partnership. *I.R.C. § 706.*

Continuation or termination of partnerships. *I.R.C. § 708.*

Liquidating distribution. *I.R.C. § 731.*

Optional adjustment to basis of partnership property. *I.R.C. §§ 732-734, 743, 754.*

Gain on unrealized receivables and inventory items. *I.R.C. §§ 735, 751.*

Sale or exchange. *I.R.C. § 741.*

Method of electing adjustment to basis of partnership property. *I.R.C. § 754.*

Basis of property. *I.R.C. § 1012.*

Imposition and rate of estate tax. *I.R.C. § 2001.*

Unified credit against estate tax. *I.R.C. § 2010.*

Gifts within three years of death. *I.R.C. § 2035.*

Transfers for insufficient consideration. *I.R.C. § 2043.*

"Qualified family-owned business interest" deduction. *I.R.C. § 2057.*

Gift valued as of date of gift. *I.R.C. §§ 2501, 2512.*

Gifts by husband or wife to third party. *I.R.C. § 2513.*

Gifts to spouse. *I.R.C. § 2523.*

Generation-skipping transfer tax. *I.R.C. § 2601 et seq.*

Generation-skipping transfer defined. *I.R.C. § 2611.*

Taxable terminations, taxable distributions, and direct skips. *I.R.C. § 2612.*

Generation-skipping transfer tax exemption. *I.R.C. §§ 2631, 2632.*

Special valuation rules. *I.R.C. §§ 2701-2704.*

Gift tax returns. *I.R.C. § 6019.*

Partnership information income tax return. *I.R.C. §§ 6031, 6072.*

Deferring estate tax payments. *I.R.C. § 6166.*

## **[2] Regulations**

Income taxation of partners and partnerships. *Treas. Reg. §§ 1.701-1.771.*

Taxable year of partner and partnership. *Treas. Reg. § 1.706-1.*

Liquidating distribution. *Treas. Reg. §§ 1.731-1, 1.736-1.*

Election to adjust basis of partnership property. *Treas. Reg. §§ 1.732-1, 1.732-2, 1.733-1, 1.734-1, 1.734-2, 1.743-1, 1.754-1.*

Gain on unrealized receivables and inventory items. *Treas. Reg. §§ 1.735-1, 1.751-1.*

Sale or exchange. *Treas. Reg. § 1.741-1.*

Filing partnership information tax returns. *Treas. Reg. § 1.6031-1.*

Definition of gross estate; valuation of property. *Treas. Reg. § 20.2031-1.*

Valuation of business interests subject to buy-sell agreements. *Treas. Reg. §§ 20.2031-2(h), 20.2031-3(c).*

Valuation of partnership interests for federal estate tax purposes. *Treas. Reg. § 20.2031-3.*

Transfers with retained life estate. *Treas. Reg. § 20.2036-1.*

Transfers taking effect at death. *Treas. Reg. § 20.2037-1.*

Revocable transfers. *Treas. Reg. § 20.2038-1.*

Valuation of gift of partnership interest to family member for estate tax purposes; treatment of unpaid qualified payments at death of transferor or applicable family member. *Treas. Reg. §§ 25.2701-1-25.2701-8.*

Valuation of partnership interest subject to option, contract to purchase, or other agreement for estate tax purposes. *Treas. Reg. §§ 25.2703-1, 25.2703-2.*

Estate tax effect of (1) transfer of interest in family partnership through lapse of voting and liquidation rights, and (2) restrictions on liquidation of interest in family partnership. *Treas. Reg. §§ 25.2704-1-25.2704-3.*

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Business & Corporate Law  
General Partnerships  
General Overview  
Business & Corporate Law  
Limited Partnerships  
General Overview  
Estate, Gift & Trust Law  
General Overview  
Tax Law  
Federal Taxpayer Groups  
Limited Liability Companies & Partnerships  
General Overview



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*25-68A California Legal Forms--Transaction Guide §§ 68A.03-68A.04*

**AUTHOR:** Steven M. Goldberg Practice Consultant

**[Reserved]**

§§ 68A.03[Reserved]



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*25-68A California Legal Forms--Transaction Guide § 68A.05*

**AUTHOR:** Steven M. Goldberg Practice Consultant

**§ 68A.05 Law Reviews and Periodicals**

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### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Business & Corporate Law  
 General Partnerships  
 General Overview  
 Business & Corporate Law  
 Limited Partnerships  
 General Overview  
 Estate, Gift & Trust Law  
 General Overview  
 Tax Law  
 Federal Taxpayer Groups  
 Limited Liability Companies & Partnerships  
 General Overview



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B. Secondary Sources

*25-68A California Legal Forms--Transaction Guide § 68A.06*

**AUTHOR:** Steven M. Goldberg Practice Consultant

**§ 68A.06 Annotations**

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**Legal Topics:**

For related research and practice materials, see the following legal topics:  
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**AUTHOR:** Steven M. Goldberg Practice Consultant

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Ch. 1B, *Selecting Form of Business Entity*.

Ch. 12C, *Limited Liability Companies*.

Ch. 15, *General Partnerships*.

Ch. 16, *Formation of Limited Partnerships*.

Ch. 17, *Buying and Selling a Business or Professional Practice*.

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**Legal Topics:**

For related research and practice materials, see the following legal topics:

Business & Corporate Law  
Closely Held Corporations  
General Overview  
Business & Corporate Law  
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General Overview  
Business & Corporate Law  
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Business & Corporate Law  
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**[Reserved]**

§§ 68A.08[Reserved]



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*25-68A California Legal Forms--Transaction Guide § 68A.10*

**AUTHOR:** Steven M. Goldberg Practice Consultant

**§ 68A.10 Family Business Defined**

A "family business" is an enterprise that is owned or controlled by members of the same family. The term refers to the actual dollars and cents ownership of the business, rather than its legal structure. The term alerts business people to the hybrid psychological dimensions of businesses and family dynamics. However, many entrepreneurs may be uncomfortable with the term because of negative connotations related to nepotism, as well as a perception that a family business is somehow not as professional as a nonfamily business.

Businesses owned by families account for approximately 90 percent of businesses in the United States. Although family businesses range from small sole proprietorships to Fortune 500 companies, most are relatively small. Nevertheless, they share many characteristics, challenges, and problems unique to family businesses [*see § 68A.11*]. The fact that many family businesses share similar problems can be useful in encouraging family members to face their conflicts. Issues tend to arise when the family component [*see § 68A.13*] conflicts with the business ownership and management components, resulting in potentially conflicting goals and operations.

Family businesses are frequently set up not to operate an active trade or business, but to manage other family investments, from rental real property to securities. This use of a family business has tax and nontax estate planning aspects [*see § 68A.11[3]*].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Business & Corporate Law Closely Held Corporations General Overview Estate, Gift & Trust Law General Overview



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**AUTHOR:** Steven M. Goldberg Practice Consultant

**§ 68A.11 Characteristics of Family Businesses**

**[1] Multigenerational Aspects**

An important characteristic of family businesses is their entrepreneurial nature: Typically an individual funds, organizes, and manages the business and assumes the business risks. Thus, management is centralized, streamlined, and accountable. This entrepreneurial characteristic often imports creativity and dynamism into the business. However, problems often result when succeeding generations are not so entrepreneurially inclined, or when the founder is unwilling to transfer management authority.

The discussion in Part A of this chapter will primarily be of interest to a family business entity that is an active trade or business. However, the tax discussion, beginning with § 68A.30, and the estate planning discussion, beginning with § 68A.80, should also be consulted.

**[2] Family Business as Active Trade or Business**

**[a] Concentrated Ownership and Management**

Ordinarily, family business ownership and management are concentrated in a single individual or a small number of family members, and the business is managed for the benefit of the family. This concentration tends to preserve resources and focus operations. This concentrated ownership and management sharply contrasts with a publicly held corporation, in which professionals manage the business for shareholders who are not involved in business operations. In a publicly held corporation, professional managers have individual interests in preserving and enhancing their position and authority, while shareholders often have a greater interest in securing immediate economic benefits in the form of dividends rather than long term business planning.

As family businesses are passed to or shared among succeeding generations, this confluence of ownership and management tends to dissipate. For example, senior generations may retire and younger generations may not want to

participate actively in the business. Business advisors should be alert to this possibility and be prepared to devise strategies to minimize the separation of ownership from management and, recognizing the unique dynamics of the family, reduce the risk of family conflict over the distribution of the value of the business.

Inactive business assets such as real estate, life insurance policies, and unrelated investment assets may be used to equalize the economic value of assets passing to participating and nonparticipating family members. However, the distribution of nonbusiness assets must be considered in light of the continued viability and vitality of the business itself.

### **[b] Long-Term Perspective**

Family businesses tend toward a long-term perspective in terms of business goals, and make decisions focusing on the long-term benefits to the business. In contrast, publicly held corporations often look to the short term and may make business decisions based on quarterly balance sheet concerns to the arguable detriment of long term growth.

### **[c] Shared Family Interests and Values**

Because family businesses tend to involve a group of people who share similar interests and goals, they are often managed under a structure that emphasizes those shared values and goals. This characteristic may provide for business continuity and singularity of purpose.

When a family is committed to the long-term success of the business, the business has a much better chance of surviving the transfer to the next generation. Absent a shared commitment, divergent family interests may seriously hinder the successful transfer of the business. In this situation, alternatives such as an outright sale, merger, or nonfamily management should be considered.

#### **PRACTICE TIP:**

In determining whether the business should be transferred within the family or sold outright, a key factor is often the degree of involvement of the younger generation (or close family relatives) in the day-to-day business operations. Business owners are more likely to retain the business if family members are dependent on the business for their livelihood. Further, these family members may find it difficult to obtain commensurate employment outside the family business, particularly if they are senior employees who have little experience outside the family business. *Commentary by Steven M. Goldberg.*

### **[3] Family Business for Asset Management**

Rather than being established for the purpose of operating an active trade or business, many family business entities are created to manage passive assets. For these entities, some business aspects are of little consequence; the estate planning issues are often the primary focus, and the entity exists mainly as a means of controlling the assets, providing for proper management over a long period of time, and reducing or eliminating income, gift, and estate taxes. This type of family business entity typically has as its centerpiece the "crown jewels" of the family, typically a significant piece of real property, or valuable other property such as securities, or both. Although this type of family business can be classified as an estate planning tool, it is important to recognize that it can and usually does satisfy many non-tax-related estate planning goals. In fact, it will generally be unwise to enter into a family business solely for the purpose of reducing taxes.

For these types of entities, the discussion of tax issues, beginning with § 68A.30, and estate planning issues, beginning with § 68A.80, will be most important.

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:

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**AUTHOR:** Steven M. Goldberg Practice Consultant

**§ 68A.12 Ownership Structure**

**[1] Entities Most Commonly Used in Family Businesses**

**[a] In General**

Family businesses may take any of the following forms:

- Sole proprietorships
- General or limited partnerships
- C and S corporations
- Limited liability companies

For estate planning purposes, the most commonly used entities are limited partnerships, limited liability companies, and S corporations. For considerations in selecting a form of business entity generally, *see* Ch. 1B, *Selecting Form of Business Entity*.

**[b] Partnerships**

The choice of a general or a limited partnership in the context of a family business and partnership estate tax freeze is essentially dictated by nontax considerations, such as retention of control and exposure to liability, because both entities enjoy similar tax treatment [*see Treas. Reg. § 301.7701-3(b)*]. General partnerships are ordinarily easier and cheaper to form and dissolve than the more complicated limited partnerships. However, limited partnerships provide the advantage of limited liability, although the business owner typically retains a major capital interest and participates as general partner. The additional advantage of control that the general partner enjoys in a limited partnership has made the limited

partnership far more common for estate planning purposes.

For discussion of general partnerships generally, *see* Ch. 15, *General Partnerships* ; for discussion of considerations in forming limited partnerships generally, *see* Ch. 16, *Formation of Limited Partnerships* .

### **[c] Limited Liability Companies**

The use of a limited liability company (LLC) may be a viable planning alternative to a partnership. LLCs are designed to provide the owners and members with protection against personal liability for the debts and obligations of the LLC while being taxed in the same manner as a partnership. Protection from liability is the primary advantage of an LLC over a partnership, when some or all of the partners may be subject to unlimited liability. However, because most estate tax issues in the LLC context have yet to be addressed by either the Internal Revenue Service (IRS) or courts or appraisers, estate planners must carefully assess whether the LLC is the proper choice of a business entity for estate planning purposes. For discussion of LLCs generally, *see* Ch. 12C, *Limited Liability Companies* .

#### **PRACTICE TIP:**

The IRS has issued several private letter rulings indicating that gifts of a limited partnership interest qualify for the gift tax annual exclusion as a gift of a present interest [*see Priv. Ltr. Rul. 9415007, 9131006, 8611004* ; *but cf. TAM 97-51-003* (if partnership agreement contains no distribution provisions, there is no present interest, and, therefore, gift does not qualify for annual exclusion)]. There is no reason to believe the IRS would take a contrary position with regards to an LLC, so long as the LLC articles of organization contain distribution provisions. Thus, consistent with the primary estate planning objective of transferring assets out of an estate, taxpayers may make gifts of LLC membership interests to use the annual gift exclusions and lifetime transfer exemptions. *Commentary by Steven M. Goldberg.*

### **[2] Effect of Structure on Personal Liability**

#### **[a] General Partners**

General partners, like sole proprietors, are personally liable for the obligations and liabilities of the business, even in excess of the amount invested. Thus, not only are business assets vulnerable, but personally owned assets are also subject to the risks of the business [*Corp. Code §§ 16305, 16306(a)*; for discussion of liability of general partners generally, *see* Ch. 15, *General Partnerships* ].

#### **[b] Limited Partners**

In contrast to general partners [*see [a], above*], the liability of limited partners ordinarily is limited to their capital contributions, any commitments for future contributions, and, when partnership assets are insufficient to satisfy partnership liabilities, any distributions received from the partnership [*Corp. Code §§ 15903.03, 15905.09(b)*]; for discussion of liability of limited partners generally, *see* Ch. 16, *Formation of Limited Partnerships* ]. However, limited liability status may be lost if the proper formalities are not observed in the formation of the limited partnership or if the limited partner participates in the management and control of the partnership [*Corp. Code §§ 15903.03, 15903.06*].

#### **[c] Limited Liability Company Members**

Members of LLCs are not ordinarily personally liable for any debt, obligation, or liability of the LLC arising in contract, tort, or otherwise solely by virtue of that membership [*Corp. Code § 17101(a)*]. Effective January 1, 2000, members are subject to liability under the common law governing alter ego liability [*Corp. Code § 17101(b)*, as amended by Stats. 1999, ch. 490]. However, members may agree to be obligated personally for any or all of the LLC's debts, obligations, and liabilities, as long as that agreement meets certain requirements [*Corp. Code § 17101(e)*]. For discussion of the

liability of members of LLCs generally, see Ch. 12C, *Limited Liability Companies* .

### **[3] Effect of Structure on Transferability**

The legal structure of the family business often affects the transferability and marketability of the business interests, and the manner in which the business owners restrict the transferability of those interests. Most commonly, buy-sell agreements are used to restrict the transfer of business interests to nonfamily members. However, as the business ages, buy-sell agreements may also need to restrict or limit transfers of ownership interests to family members who do not actively participate in the business. For discussion of the use of buy-sell agreements, see § 68A.81[3]. Family members may have an interest in restricting transferability and marketability of business interests to obtain the greatest valuation discounts for estate and gift tax purposes [*see* § 68A.40].

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Business & Corporate LawGeneral OverviewBusiness & Corporate LawClosely Held CorporationsGeneral  
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*25-68A California Legal Forms--Transaction Guide § 68A.13*

**AUTHOR:** Steven M. Goldberg Practice Consultant

**§ 68A.13 Impact of Family Dynamics**

**[1] Family Relationships May Affect Strategic Planning**

Attorneys advising family businesses must identify the internal dynamics or culture of the family, particularly dynamics that may affect or override business operations and issues related to succession. The psychological history of the family, emotional conflicts, relationship issues, and attitudes and goals regarding the business can complicate the resolution of an otherwise straightforward legal or tax problem. This complication results from the intersection of the family and business operating structures and conflicting family and business goals.

The most meticulously crafted, coordinated, and beneficial family business financial, succession, and estate planning may have ruinous results for the family if the intrafamily dynamics are not carefully analyzed during the strategic planning process. The best way to avoid family business conflicts is to identify the following:

- The goals of the business.
- The business owners.
- The family members.
- The leadership potential and business abilities of members of the next generation.
- Any existing conflicts and rivalries within the family.

All of these factors must then be incorporated into the business and estate plans [*see § 68A.71*].

Family issues and problems may exist regarding the children. For example, an adult child may be economically

dependent on the parents or the family business. This dependency may cause resentment in the other children, particularly when the parents delay transferring control. Further, if the child is employed by the business but becomes disenchanted with its direction or designated successor, the child may not be able to secure a sufficiently similar position outside the family business.

It is not uncommon for a business entrepreneur to fear the loss of control over the business. Even more commonly, a surviving spouse with limited "hands on" experience with the business may be deterred by the complexity of combined business and estate planning strategies. Further, a family business owner may be apprehensive about whether the family members can cooperate and get along with each other.

**PRACTICE TIP:**

It is possible that the business owner and the family may be so embroiled in family matters that business operations and planning suffer. To deal with these potential problems, counsel is often well-advised to associate professionals trained in dealing with family problems, such as a psychologist or family business consultant [*see* [2], *below*]. *Commentary by Steven M. Goldberg.*

**[2] Use of Nonlegal Advisors**

The determination of whether a family limited partnership is the most advantageous vehicle for the family, as well as resolution of issues related to partnership formation, typically involves a team of advisors, which may include certified public accountants, bankers, financial planners, business organization advisors, and legal counsel. Attorneys specializing in business transactions or trust and estate litigation may be required to assist the estate planner.

When serious and divisive conflicts exist within the family structure or business, counsel should consider suggesting that the client consult a family business consultant, psychologist, mediator, or other nonlegal advisor on ways to handle the conflict. Clients should be advised that timely assistance is likely to be the best course for the business and family, and may be significantly less costly.

The more common approach is for the client or family, and not the attorney, to retain the family business consultant. However, the attorney should be prepared to assist in finding a suitable consultant if the client requests that help.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

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**AUTHOR:** Steven M. Goldberg Practice Consultant

**§ 68A.14 Management Issues**

**[1] Types of Management Structures**

As with other businesses, family business management runs the gamut from sole owner and manager, managing partner or member, or consultant to decision-making by consensus.

A solely owned and managed business typically involves a single family member, usually a parent or grandparent, as the key decision-maker. This type of business may also employ junior family members in the business, but they usually lack decision-making and planning authority and experience. As the business and the owner age, the owner may begin to train the next generation with an eye toward delegating significant management roles to junior family members. This stage is often the most critical, as the owner may be loath to transfer power in time to adequately train the successors. After the successful transfer of business authority to the next generation, the former sole owner and manager often continues involvement as a business advisor or consultant.

**PRACTICE TIP:**

Counsel should identify the management structure of the family business. The management structure is often distinct from and is not necessarily determined by the legal structure of the business (such as sole proprietor, partnership, corporation, or limited liability company). Counsel should consider whether the existing structure is appropriate for the existing state of the business, as well as whether that structure is likely to survive the full transfer of authority to the next generation. When multiple successors are available, some form of shared authority must be devised that incorporates the existing family dynamics, including sibling rivalry. Typically, the need for shared authority is served by a partnership structure, such as a family limited partnership or limited liability company, which can also be used to minimize taxes. *Commentary by Steven M. Goldberg.*

**[2] Succession Problems Unique to Family Businesses**

**[a] Overview**

Succession issues represent the bulk of the problems facing family businesses. The issues of management succession, family leadership, personal financial security and business ownership are all intertwined. However, a carefully conceived succession plan will not only help the business prosper, but can also help keep family relationships in harmony.

In a typical situation, the parent-business owners will pass some assets to their children in some form of joint ownership. Thus, the family business moves from one or two individuals having authority and power to run the business to a group of siblings. The siblings must learn to work together, share authority, and optimize the business, while preserving healthy family relationships [*see generally*, Lane, Dashew, Bork & Jaffe, *Working With Family Businesses: A Guide for Professionals*, 42(6) *Prac. Law.* 83 (1996)].

Another problem in family businesses is the emotional or psychological component involved in passing the business to the next generation and sharing authority, as distinct from a business issue. The parent-business owner(s) may have a strong emotional attachment to the business, and be reluctant to pass ownership to untried children. The business may have taken on the role of a demanding child that the owner cannot trust someone else to manage. Further, running the business may be a source of personal pride, identity, and self esteem for the owner, so that detachment from the active management of the business may cause fears of loneliness and lack of purpose and power. Counsel should not rush the transfer process, but should take every opportunity to ameliorate and smooth the transfer. If the owner remains unable to let go of business control, the best succession and estate planning will fail.

**PRACTICE TIP:**

In addition to the inherent reluctance to deal with the consequences of death and estate taxation, the business owner may be unwilling to face his or her own retirement or the question of the identity of the successor. However, family members will tend to develop their own expectations if the succession issues are not handled; it may be more difficult to deal with those expectations in the future than facing them in the present. Counsel is well-advised to encourage a client to prepare and install a succession plan.

*Commentary by Steven M. Goldberg.*

**[b] Restricted Pool of Successors**

When family business owners wish to keep the business within the family, determining the best successors to manage the business can be difficult given the limited pool of successors. The successor must have both business and personal skills to address and resolve business issues and family conflicts. Counsel should attempt to identify the leaders within the family, as well as those members with the necessary financial acumen and experience to lead the business. The timing of the business transfer may require the appointment of an interim manager (often a key employee); further, family rivalries may require the appointment of an external manager [*see generally*, Jurinski & Zwick, *Solving Problems in Succession Planning for Family Businesses*, 44(5) *Prac. Law.* 51 (1998)].

**[c] Age, Gender, and Generational Issues**

Family businesses encounter myriad age, gender, and generational issues. A generation gap may exist between current management and the designated successors that requires the appointment of an interim manager. A professional gap also often exists between generations; while one generation is in the process of retiring, the next generation is still receiving education and training in managing the business. Further, the family culture may retain some gender bias, with control most likely passed to the eldest male child without regard to ability and talent.

The business owner may also have trouble letting go of the control of the business for personal reasons, even when capable successors are ready to take control. The owner may have great personal attachment to the managerial role and

fear the boredom of retirement. The owner may be relying on the business to fund retirement, and fear that the transfer of managerial responsibilities may lead to the failure of the business.

**[d] Effect of Subsequent Generational Transfers**

Succession issues become even more complicated when the business is passed to subsequent generations. Most commonly, the separation between management and ownership becomes increasingly acute. Further, just as siblings had to find some common business ground to allow them to work together, the addition of a new generation of family members can exacerbate conflicts and require new conflict resolution techniques.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Business & Corporate Law  
Closely Held Corporations  
Management Duties & Liabilities  
Business & Corporate Law  
Corporations  
Directors & Officers  
Management Duties & Liabilities  
General Overview  
Business & Corporate Law  
General Partnerships  
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**AUTHOR:** Steven M. Goldberg Practice Consultant

**§ 68A.15 Difficulties in Continuing Family Businesses and Critical Need for Planning**

Many of the unique characteristics of family businesses discussed in § 68A.14 create hazards that affect the continuity of the family business. Statistically, a majority of family businesses do not survive the transfer to succeeding generations. Therefore, advance planning can be critical to the survival and prosperity of the business, as well as to the success or failure of the client's other estate planning goals.

Each client's financial, business, and family situations are unique. After examining the facts and circumstances of the family, the family business, and the client's goals, it may be clear that family cohesiveness is likely to make the transfer of the business relatively smooth. Alternatively, it may become clear that the best plan to preserve the family is to sell the business outright to family members, key employees, or on the open market. However, the decision to sell the family business may be complicated by those same family business characteristics. For example, a business owner may have a strong emotional attachment to the business, might not want to foreclose the dream of passing the business to the heirs, and may have a tendency to overvalue his or her life's work. When a client is leaning toward selling the business, counsel should determine whether that decision is based on an actual desire to dispose of the business, or is considered to be the simplest way to ameliorate family conflict.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Business & Corporate Law Closely Held Corporations General Overview Business & Corporate Law Limited Liability  
 Companies General Overview Business & Corporate Law Limited Partnerships General Overview Estate, Gift & Trust  
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DIVISION IV: WILLS AND TRUSTS  
CHAPTER 68A USING FAMILY PARTNERSHIPS AND OTHER BUSINESS ENTITIES IN ESTATE PLANNING  
PART II. LEGAL BACKGROUND  
A. Overview of Family Business Entities

*25-68A California Legal Forms--Transaction Guide § 68A.16*

**AUTHOR:** Steven M. Goldberg Practice Consultant

**§ 68A.16 Ethical Considerations in Advising Family Businesses**

**[1] Counsel's Degree of Involvement in Family Matters**

When advising an existing family business (or assisting in the organization or purchase of a business for a family), counsel should assess how comfortable he or she is with working for these types of clients. Specifically, counsel needs to determine the degree to which he or she is willing to be involved in family crisis management in the context of legal representation. As discussed in preceding sections, attorneys can completely ignore family issues to the detriment of business and estate planning. Nevertheless, counsel may establish the scope of the legal representation, and make concerted efforts to remain within those limits.

**[2] Avoiding Conflicts of Interest**

**[a] Conflicts in Family Business Context**

Advising family businesses can result in myriad conflict of interest issues. Particular cases likely to give rise to conflict issues include the following:

- Whether the attorney should draft a buy-sell agreement for a group of family shareholders who claim there is no conflict, but the attorney perceives that a conflict will arise in the future.
- The sale of the business.
- When shares in the business will be given as gifts to other family members.

In addition to the responsibility of representing the business owners (and the business), counsel may be perceived as a counselor to individual family business members who may have interests that diverge from the interests of the business and each other. For example, if a couple has a business they want to convert into a family limited partnership or limited

liability company and begin passing assets to their children who will be active in the business, identifying the client and avoiding providing legal advice to other participants can be complicated. Counsel may also face conflict of interest issues when drafting a buy-sell or other transfer restriction agreement; the business owner may want more restrictions than the minority interest holders, and the parties may disagree on the valuation of the business interests. Conflict issues also arise in the estate planning context when the goals of the parents, such as personal financial security and retirement income, are not seen as in the best interests of the next generation (or the business itself).

For further discussion of conflict of interest, see Ch. 1A, *Role of Counsel in Starting a New Business*. Forms addressing conflicts of interest and dual representation are set forth in Ch. 1A and Ch. 60, *Estate Planning*.

### **[b] Assess Potential for Conflicts and Inform Parties**

Because the family members are unlikely to secure independent and individualized legal assistance, counsel must assess the potential for a conflict of interest. Absent serious conflicts between family members, counsel may represent clients with potentially conflicting interests. To provide multiple representation, counsel must fully disclose the potential pitfalls of multiple representation in writing and secure each party's written and informed consent [*see Cal. Rules Prof. Cond., Rule 3-310(C)*]. Counsel must give written disclosure of the relevant circumstances and any actual or reasonably foreseeable adverse consequences to the joint representation [*Cal. Rules Prof. Cond., Rule 3-310(A), (C)*]. In giving disclosure, counsel must exercise caution in determining whether disclosure of a particular matter is appropriate [*see, e.g., Bus & Prof. Code § 6068(e)* (duty of counsel to maintain client's confidences inviolate)]. If the potentially conflicting interests result in actual conflict, counsel must obtain an additional written informed consent [*see Cal. Rules Prof. Cond., Rule 3-310(C)(2)* (discussion)].

Some conflicts exist for which disclosure is insufficient to permit continued representation [*see, e.g., Woods v. Superior Court (1983) 149 Cal. App. 3d 931, 197 Cal. Rptr. 185; Klemm v. Superior Court (1977) 75 Cal. App. 3d 893, 142 Cal. Rptr. 509*]. In those situations, it is appropriate to recommend that independent counsel be retained.

#### **PRACTICE TIP:**

Counsel may address potential conflict issues in an engagement letter that outlines the scope of the proposed representation, identifying the client as the business owner [*see [c], below*] and advising other parties to obtain separate representation. The scope of representation may be reiterated in subsequent client letters that further outline the scope of representation. *Commentary by Steven M. Goldberg.*

### **[c] Identify Business Entity as Client**

When representing the business entity, counsel must tailor the representation to the concept that the organization itself (operating through its highest authorized officer or controlling body) is the client [*Cal. Rules Prof. Cond., Rule 3-600(A)*]; *see* ABA Model Code of Professional Responsibility § 5-18]. Counsel must inform other participants in the business that the entity is the client whenever it becomes apparent that the entity's interests are or may become adverse any of those participants [*Cal. Rules Prof. Cond., Rule 3-600(D)*].

#### **PRACTICE TIP:**

When advisable, counsel should consider securing acknowledgments of nonrepresentation and confidentiality waivers from individual family members. Counsel may also suggest the use of other professionals, such as accountants and insurance agents, who are not subject to the same ethical restrictions as attorneys. *Commentary by Steven M. Goldberg.*

### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law  
General Overview  
Legal Ethics  
Client Relations  
Accepting Representation



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*25-68A California Legal Forms--Transaction Guide §§ 68A.17-68A.29*

**AUTHOR:** Steven M. Goldberg Practice Consultant

**[Reserved]**

§§ 68A.17[Reserved]



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 a. Income Taxation

*25-68A California Legal Forms--Transaction Guide § 68A.30*

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**§ 68A.30 Partnership Tax Treatment**

Properly constituted limited partnerships, limited liability companies, and S corporations, the entities most commonly used in the family business context, are subject to or can elect partnership tax treatment and avoid income taxation at the entity level [*see I.R.C. §§ 701 et seq., 1361 et seq.*]. These are separate tax-reporting entities for income tax purposes, and must file an informational return that details income and deductions [*I.R.C. § 6031(a)*], but are not separate taxable entities [*I.R.C. § 701*]. Items of income, losses, deductions, and credits flow through to individual partners, LLC members, or S corporation shareholders, who report and pay any tax due on their individual income tax returns [*I.R.C. §§ 701, 702, 704, 1366*]. In contrast, a C corporation is a separate tax-paying entity for federal and state tax purposes [*I.R.C. § 11; Rev. & Tax. Code §§ 23038, 23151*].

Limited partnerships, LLCs and S corporations must pay a tax--that is not deductible for state tax purposes--for the privilege of doing business in California [*Rev. & Tax. Code §§ 17851.5, 17935, 17941, 17948, 23153*]. LLCs must pay a graduated entity level fee based on total income from all sources derived from or attributable to California [*Rev. & Tax. Code §§ 17942* (fee applicable to income of \$250,000 or more), *23038(b)(2)(B)(iii)*]. However, an LLC that is exempt from taxes and fees under *Rev. & Tax. Code § 23701h* or *Rev. & Tax. Code § 23701x* and that is not taxed as a corporation for California tax purposes is not subject to the annual minimum franchise tax, and thus not subject to this annual fee [*see Rev. & Tax. Code §§ 17941(d), 23701h(b), 23701x(b); see also I.R.C. § 501(c)(2), (25)* (title holding companies)].

The income taxation of partners and partnerships is notoriously complex on numerous issues, including the following:

- Allocation of income and/or deductions not in proportion to the partners' interests.
- Contribution of appreciated property.

- Purchase or sale of partnership interests.
- Basis adjustments at death.
- Treatment of inventory or other ordinary income items.

For discussion of partnership taxation generally, see Ch. 15, *General Partnerships* .

The sole proprietorship, partnership, and LLC forms of business entities do not offer participants the option of retaining income in the business entity for tax purposes. A sole proprietor is taxed on 100 percent of net income [*I.R.C.* §§ 61(a), 62(a)(1) (business losses may be deducted on proprietor's individual return)], while each partner or LLC member must include his or her share of income (and other items) in personal income and pay tax accordingly, regardless of whether the items, or their cash equivalent, were actually distributed [*I.R.C.* §§ 701, 702(a), 704(b)]. Like partners in a partnership, S corporation shareholders report their proportionate share of income on their individual tax returns [*I.R.C.* § 1366(a)]. Only a C corporation, which first pays a corporate level tax on its earnings [*I.R.C.* § 11(b)], may choose not to distribute its earnings to shareholders as dividends, but risks a substantial penalty tax if earnings are accumulated above reasonable business needs for the purpose of avoiding the income tax imposed on shareholders [*I.R.C.* §§ 531-537].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Tax Law Federal Taxpayer Groups Limited Liability Companies & Partnerships General Overview



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         a. Income Taxation

*25-68A California Legal Forms--Transaction Guide § 68A.31*

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**§ 68A.31 Purchase or Gift of Interest in Family Partnership; Income Splitting**

By giving a family member a partnership interest in a family partnership or an LLC membership in a family LLC, or by having a family member buy the partnership interest or LLC membership, partnership or limited liability company income may be split among family members if certain requirements are met [*I.R.C. § 704(c), (e)*]. For these purposes, "family" means an individual's spouse, ancestors, and lineal descendants, and trusts for the primary benefit of those persons [*I.R.C. § 704(e)(3)*]. However, although income splitting may be accomplished among family members [*see I.R.C. § 704(e); Treas. Reg. § 1.704-1*], it has spawned an enormous amount of litigation, particularly among family members in partnerships, resulting in stringent Internal Revenue Code requirements.

In general, a family member is recognized as a legitimate partner or limited liability company member if he or she owns a partnership or membership (capital) interest in an entity in which capital is a material income-producing factor, regardless of whether that interest was derived by purchase or gift [*I.R.C. § 704(e)(1)*]. This capital requirement eliminates the possibility of income splitting in most personal service businesses in which the owner provides the principal service of the business and capital is not an income-producing factor [*see Payton v. United States (5th Cir. 1970) 425 F.2d 1324, cert. denied, 400 U.S. 957 (1970)*].

If minor children become partners or LLC members, a fiduciary must be appointed unless the minor child is competent to manage property on an equal basis with adults [*see Treas. Reg. § 1.704-1(e)(2)(viii)*]. The unearned income of children under the age of 18 may be taxed at rates applicable to the parents rather than the child [*I.R.C. § 1(g)*], which reduces the incentive to shift income to minor children.

A family member receiving a gift of a partnership or LLC membership interest is taxed on his or her distributive share of partnership or LLC income according to the partnership or LLC operating agreement, except to the extent that both of the following are true [*I.R.C. § 704(e)(2); see also Treas. Reg. § 1.704-1(e)(3)(I)(a), (c)*]:

- The share is determined without allowance of reasonable compensation for services rendered to the entity by the donor.
- The portion of the share attributable to donated capital is proportionately greater than the share of the donor attributable to the donor's capital.

An interest purchased by one family member from another is considered created by gift from the seller. The fair market value of the purchased interest is considered to be donated capital [*I.R.C. § 704(e)(3)*].

For further discussion of partnership taxation, see Ch. 15, Part B, *Dissolution of General Partnerships* .

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Business & Corporate Law Limited Liability Companies General Overview Business & Corporate Law Limited Partnerships General Overview Tax Law Federal Taxpayer Groups Limited Liability Companies & Partnerships General Overview Tax Law Federal Taxpayer Groups Limited Liability Companies & Partnerships Family Partnerships (IRC sec. 704)



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a. Income Taxation

*25-68A California Legal Forms--Transaction Guide §§ 68A.32-68A.39*

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**[Reserved]**

§§ 68A.32[Reserved]



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 b. Gift and Estate Taxation

*25-68A California Legal Forms--Transaction Guide § 68A.40*

**AUTHOR:** Steven M. Goldberg Practice Consultant

**§ 68A.40 Gift Valuation**

**[1] General Rule: Fair Market Value as of Date of Gift**

In general, gift tax is imposed on the fair market value of a gift at the date of the gift [*see I.R.C. §§ 2501, 2512*]. A gift is deemed to occur for tax purposes if the value of the transferred property exceeds the value in money or money's worth of any consideration given; consideration that is not reducible to a value in money or money's worth is disregarded [*Treas. Reg. § 25.2512-8*].

"Fair market value" is the price at which the property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or to sell, and both having reasonable knowledge of relevant facts. Most commonly, this amount is the retail value of the property [*see Treas. Reg. § 25.2512-1* (it is irrelevant to gift tax valuation that donee of personal property could not resell it at its retail value)]. However, the fair market value of transferred real property may be based on the objective, realistic potential use of the property, and factors such as a change in zoning must be taken into consideration for purposes of gift tax valuation [ *Frazee v. Commissioner (1992) 98 T.C. 554* ].

The regulations provide many examples of the valuation of different types of property and property interests. For example, stocks and bonds are ordinarily valued at their prices on the stock exchange or over-the-counter market at the mean between the highest and lowest selling prices on the date of the gift; if no sales occurred on the date of the gift, the fair market value will be a "weighted average" of the means between the highest and lowest sales on the nearest days before and after the gift, if those days were within a reasonable time of the sale [*Treas. Reg. § 25.2512-2(b)*]. The valuation of an interest in a business is its net value determined by all relevant factors, including a fair appraisal on the date of the gift of all tangible and intangible business assets and factors relating to the valuation of corporate stock [ *Rev. Rul. 59-60, 1959-1 C.B. 237* ].

**PRACTICE TIP:**

The same principles that govern the valuation of property for estate tax purposes also apply to the valuation of gifts. However, there is no alternative valuation date or special use valuation for gifts as there is for estates [see [2], below]. *Commentary by Steven M. Goldberg.*

**[2] Special Valuation Rules****[a] Valuation of Transferred and Retained Senior Interests Required**

Congress enacted rules in 1990 designed to curtail an individual's ability to make lifetime transfers to family members of future appreciation in property. These rules, found in *I.R.C. §§ 2701 through 2704* (Chapter 14 of Subtitle B of the Internal Revenue Code), replaced the anti-estate-tax-freeze rules of former *I.R.C. § 2036(c)* [former *I.R.C. § 2036(c)*, repealed by Pub. L. No. 101-508, 101st Cong., 2d Sess., § 11601 (Nov. 5, 1990)]. The current valuation rules are effective as to transfers occurring after October 8, 1990.

Prior to the enactment of the current version of *I.R.C. § 2036(c)*, a common estate planning strategy was to create junior and senior interests in a business entity or other property, with the junior interests receiving the rights to future appreciation and little else. The subsequent transfer by gift of the junior interest produced a very favorable valuation for those junior rights, allowing future appreciation to be transferred with little transfer tax cost. Congress and the IRS perceived this strategy as a problem.

Thus, the 1990 legislation directly addressed the perceived problem by valuing any retained interest other than a "qualified interest" at zero, unless the retained interest meets specified exceptions, thereby causing the gift of the junior interest to equal the gift of the entire entity. As of October 8, 1990, any gift of a junior interest that does not meet the special rules in Chapter 14 will have disastrous transfer tax effects. Chapter 14 goes well beyond simply addressing senior and junior interests, however, and, as intended, can dramatically affect the valuation of gifts of partnership interests owned by families.

The special valuation rules focus on four distinct issues:

- *I.R.C. § 2701* provides for the valuation of preferred corporate stock and partnership interests in freeze transactions [see [b], below].
- *I.R.C. § 2702* deals with valuation in the context of a transfer in trust or the retention of a term interest in property that operates similar to a trust [see [c], below].
- *I.R.C. § 2703* covers options and buy-sell agreements [see [d], below].
- *I.R.C. § 2704* deals with the effect of lapsing rights on valuation [see [e], below].

In general, the current special valuation rules accept a present gift and focus on the valuation of that gift. Structuring partnerships and corporations without preferred interests is one of the most common ways of avoiding *I.R.C. § 2701*. However, even partnerships and corporation with only one class of equity ownership are still subject to the valuation rules of *I.R.C. §§ 2703* and *2704*.

**PRACTICE TIP:**

IRS challenges to valuations discounts asserted in connection with transferred partnership interests have in recent years focused on the interpretation and implementation of *I.R.C. §§ 2703* and *2704*. A thorough understanding of those *I.R.C.* sections and applicable state partnership or corporate law is essential to the professional advisor seeking to aid the aggressive client who wishes to obtain the valuation discounts.

*Commentary by Steven M. Goldberg.*

### **[b] Valuation of Preferred Corporate Stock and Partnership Interests in Freeze Transactions**

Special valuation rules apply when an interest in a corporation or partnership is transferred to (or for the benefit of) a family member and the transferor retains an applicable retained interest [*see I.R.C. § 2701*]. The rules are used both to determine whether the transfer is a gift and to determine the value of the gift and the rights retained after the transfer [*I.R.C. § 2701(a)(1)*].

In general, an "applicable retained interest" is any interest in an entity with respect to which there is either of the following [*I.R.C. § 2701(b)(1)(A), (B)*]:

- A distribution right where the family controls the entity prior to the transfer.
- A liquidation, put, call, or conversion right.

A "distribution right" is the right to receive distributions with respect to an equity interest. The term does not include any of the following [*I.R.C. § 2701(c)(1); Treas. Reg. § 25.2701-2(b)(3), (4)(iii)*]:

- A right to receive distributions with respect to an interest that is junior to the rights of the transferred interest.
- Any extraordinary payment right.
- Any right of a partner to receive fixed guaranteed payments.

Unlike a liquidation, put, call or conversion right, a distribution right is valued under Chapter 14 only if the family controls the entity before the transfer.

Liquidation, put, call or conversion rights are collectively referred to in the Regulations as an "extraordinary payment right," all of which are valued at zero when held by the transferor [*Treas. Reg. § 25.2701-1(a)(2)(i)*]. Essentially, an extraordinary payment right is any right the exercise or nonexercise of which affects the value of the transferred interest, with the exception of mandatory payment rights, liquidation participation rights, nonlapsing conversion rights, and fixed guaranteed payments under *I.R.C. § 707(c)* [*Treas. Reg. § 25.2701-2(b)(1), (2); Treas. Reg. § 25.2701-2(b)(4)*].

Since the transfer must be to a "family member" and, in the case of a distribution right, the entity must have been in the control of the "family" before the transfer for *I.R.C. § 2701* to apply, the definitions of these terms are important to the application of the special valuation rules. A "family member" includes the transferor's spouse and the lineal descendants (and their spouses) of the transferor or the transferor's spouse [*I.R.C. § 2701(e)(1)*]. For purposes of determining control, "applicable family member" includes any lineal descendant of any parent of the transferor or the transferor's spouse [*I.R.C. § 2701(b)(2)(C)*]. A transferor is treated as owning any interest held indirectly through a corporation, partnership, trust, or other entity, with the result that multiple attributions are possible [*I.R.C. § 2701(e)(3); Treas. Reg. § 25.2701-1(b)(2)(ii)*].

Once it is determined that an applicable retained interest exists, Chapter 14 provides methods for determining the value of the interest, provided the retained interest does not qualify for one or more of the specified exceptions to the application of these special valuation rules.

#### **PRACTICE TIP:**

*I.R.C. § 2701* applies to transfers of interests after October 8, 1990, not to the creation of the interests.

Thus, a pre-1990 corporate recapitalization could involve a post-1990 transfer of an interest. The post-1990 transfer may be covered by the current valuation rules even through the recapitalization itself predated the October 8, 1990, effective date. *Commentary by Steven M. Goldberg.*

Under *I.R.C. § 2701*, a four-step subtraction method is used to determine the value of an individual's gift [*Treas. Reg. § 25.2701-3*]. Under this method, the amount of the transfer is determined by subtracting the value of all family-held equity interests senior to the transferred interest from the fair market value of all family-held interests in the entity determined immediately before the transfer. Thus, if an applicable retained interest is the only senior equity interest, the junior interest will be charged with the entire value of all interests held in the entity by the family. Family-held senior equity interests other than applicable retained interests are valued at their fair market value and subtracted from the value of the total family interest. The balance is then appropriately allocated among the transferred interests and other family-held subordinate equity interests [*Treas. Reg. § 25.2701-3(a)(1)*]. An equity interest is a "senior equity interest" if it carries a right to distributions of income or capital that is preferred to the rights of the transferred interest [*Treas. Reg. § 25.2701-3(a)(2)(ii)*]. If a senior equity interest is also an applicable retained interest that meets none of the exceptions in *I.R.C. § 2701*, it will, of course, be valued at zero. Finally, certain discounts and other appropriate reductions are permissible.

More specifically, the four-step process is applied as set forth in the regulations:

- First, the fair market value of family-held interests must be determined as if held by a single individual using a consistent set of assumptions [*Treas. Reg. § 25.2701-3(a)(2)(i), (b)(1)*].
- Second, this amount is reduced by the sum of the fair market value of family-held senior equity interests (not including applicable retained interests) and the value of applicable retained interests held by the transferor or applicable family members subject to special adjustment [*Treas. Reg. § 25.2701-3(b)(2)*]. A special adjustment avoids attributing value to a transferred interest in excess of the family interest percentage. For this purpose, the family interest percentage is the highest ownership percentage of family-held interests in any class of subordinate equity or in all classes of subordinate equity taken in the aggregate [*Treas. Reg. § 25.2701-3(b)(5)*].
- Third, the tentative amount of the gift is determined by allocating the amount determined in the second step among the transferred interests and other family-held subordinate equity interests beginning with the most senior class of subordinate equity [*Treas. Reg. § 25.2701-3(b)(3)*].
- Fourth, the amount allocated to transferred interests in the third step is reduced by minority and similar discounts [*see § 68A.72*], the value of a retained interest under *I.R.C. § 2702* [*see [c], below*], and any consideration received by the transferor [*Treas. Reg. § 25.2701-3(b)(4)*].

A special minimum value rule applies in valuing junior equity interests [*I.R.C. § 2701(a)(4); Treas. Reg. § 25.2701-3(c)*]. "Junior equity interests" are common stock, or in the case of a partnership, any partnership interest under which the rights to income and capital (or, to the extent provided in regulations, the rights as to either income or capital) are junior to the rights of all other classes of partnership interests [*Treas. Reg. § 25.2701-3(c)(2)*]. The minimum value that can be assigned to a junior equity interest may not be less than its pro rata portion of 10 percent of the sum of the total value of all equity interests in the entity, plus any debt the entity owes to the transferor or applicable family members determined without regard to certain guarantees and qualified deferred compensation [*I.R.C. § 2701(a)(4); Treas. Reg. § 25.2701-3(c)(1)*]. For this purpose, indebtedness incurred to pay current operating expenses, and a lease of property for which adequate lease payments are made on a current basis, are not treated as indebtedness [*Treas. Reg. § 25.2701-3(c)(3)(i)(A), (ii)*].

Case activity in this area provides further guidance. The Second Circuit held that, in principle, an adjustment in stock

price for a potential tax liability should be taken into account in valuing stock, even when no actual liquidation of the entity is planned. The same is true when no sale or distribution of assets is planned by the entity [*see Irene Eisenberg v. Commissioner (1998) 155 F.3d 50, acq. AOD CC-1999-001, 1999-4 I.R.B. 4*]. The IRS has acquiesced in this holding. Further, in a case involving shares burdened by corporate tax liability, but if no liquidation or asset sale is contemplated as of the valuation date, the Tax Court held it is inappropriate for the full amount of the tax to be allowed at a discount [*see Estate of Artemus D. Davis v. Commissioner (1998) 110 T.C. No 35, 110 T.C. 530*].

Senior family members often wish to secure a stream of regular, guaranteed income after forming a family business entity and transferring assets to the business. The transferor may be planning for retirement, or may simply wish to continue receiving the benefits of his or her life work. The special valuation rule of *I.R.C. § 2701* applies to partnership interests when the transferring partner retains a preference regarding distributions or extraordinary payment rights. The application of *I.R.C. § 2701* results in the value of the applicable retained senior equity interest (a preferred distribution right) being valued at zero [*I.R.C. § 2701(a)(1), (3), (c); Treas. Reg. § 25.2701-2(a)(2)*].

However, if the distribution right constitutes a qualified payment, the retained interest is not valued at zero [*I.R.C. § 2701(a)(1), (3), (c)(1)(B)(iii); Treas. Reg. § 25.2701-2(a)(2); see I.R.C. § 707(c)*]. A "qualified payment" right is a right to receive any of the following distributions [*I.R.C. § 2701(c)(3); Treas. Reg. § 25.2701-2(b)(6), (c)(2)*]:

- A dividend payable on a periodic basis (but at least annually) under any cumulative preferred stock, to the extent it is determined at a fixed rate.
- Any other cumulative distribution payable on a periodic basis (but at least annually) with respect to an equity interest, to the extent determined at a fixed rate or fixed amount.
- Any distribution right for which an election has been made to treat the distribution as a qualified payment.

This special valuation rule does not apply in several situations, including the following:

- If market quotations are readily available on an established securities exchange for either the transferred or the retained interest [*I.R.C. § 2701(a)(1), (2)(A)*].
- When the transferor's retained interest is of the same class as the transferred interest [*I.R.C. § 2701(a)(2)(B); see Priv. Ltr. Rul. 9229028*], such as when the transferor makes a gift of common stock to a family member and retains rights only in that class of common stock. Using a single class of equity ownership is probably the most common way that a partnership or closely held corporation avoids the application of *I.R.C. § 2701*.
- If the rights in a retained interest are the same as all of the rights in the transferred interests in the business entity, other than nonlapsing differences in voting power or, in the case of a partnership, nonlapsing differences with respect to management and limitations on liability [*I.R.C. § 2701(a)(2)(C)*]. Thus, the valuation rule would not apply if a transferor made a gift of a partnership interest when all the partnership interests share proportionally in all items of income, loss, deduction and gain. For example, *I.R.C. § 2701* does not apply if the retained and transferred interests both consisted of two classes of common stock that shared in all liquidations, distributions, and other rights in a two-to-one ratio. However, the valuation rule would apply in the case of a partnership interest when the transferor or an applicable family member has the right to change the liability of the transferee of the transferred property [*I.R.C. § 2701(a)(2)(C)*].
- An individual transfers to a member of the individual's family equity interests to the extent that the

transfer results in a proportionate reduction of each class of equity interest held before the transfer by the transferor and all applicable family members in the aggregate [*Treas. Reg. § 25.2701-1(c)(4)*; *Priv. Ltr. Rul. 9248026, 9226063*].

- An applicable retained interest confers a distribution right consisting of a right to a qualified payment but has no liquidation, put, call, or conversion rights [*I.R.C. § 2701(c)(2)(C)*].

Differences between classes of partnership interests attributable to nonlapsing provisions necessary to comply with partnership allocation requirements [*see, e.g., I.R.C. § 704(b)*] are treated as nonlapsing differences with respect to limitations on liability [*I.R.C. § 2701(a)(2)*; *Treas. Reg. § 25.2701-1(c)(3)*]. Any difference that lapses due to a state or federal law is considered to be a nonlapsing difference [*I.R.C. § 2701(a)(2)*].

### **[c] Valuation of Intra-Family Retained and Transferred Interests in Trust**

Under *I.R.C. § 2702*, the value of an interest transferred in trust is determined by suppressing the value of the retained interest and increasing the value of the transferred interest. While *I.R.C. § 2702* will not generally apply to family business entities, it is nevertheless useful in planning to avoid Chapter 14 for a business to understand the fundamentals of *I.R.C. § 2702*.

To determine whether a transfer of an interest in trust to or for the benefit of a member of the transferor's family is a gift, and the value of that transfer, the value of any trust interest retained by the transferor or an applicable family member is zero unless the retained interest is a qualified interest [*I.R.C. § 2702(a)(1), (2)(A)*; *see Treas. Reg. § 25.2702-2(a)(6)*; *see also I.R.C. § 2701(e)(2)* ("applicable family member" defined); the rules governing trust and term interests are effective for transfers made after October 8, 1990]. Stated differently, the value of a gift of an interest in trust to a family member is equal to the value of the transferred property less the value of any interest retained by the transferor or an applicable family member. All retained interests other than qualified interests are valued at zero [*I.R.C. § 2702(a)(1), (2)(A)*; *see Treas. Reg. § 25.2702-2(a)(6)*].

The retention of a term interest (such as a life estate) in property is considered to be a retention of an interest in trust [*I.R.C. § 2702(c)(1)*]. An interest is deemed to be retained by the transferor or an applicable family member only if it is held by the same individual both before and after the transfer [*Treas. Reg. § 25.2702-2(a)(3)*].

A "qualified interest" means a qualified annuity interest, a qualified unitrust interest, or a qualified remainder interest [*I.R.C. § 2702(b)*; *Treas. Reg. § 25.2702-3(b)(1), (4), (e)*], and is any of the following:

- Any interest that contains a right to receive fixed amounts payable at least annually.
- Any interest that includes a right to receive fixed amounts that are payable at least annually and are a fixed percentage of the fair market value of the trust property (determined annually).
- Any noncontingent remainder interest if all of the other interests in the trust are payments as described in the two preceding paragraphs.

Payment of a qualified interest cannot be subject to any contingency other than the holder's survival until the commencement (or throughout the term) of the holder's interest, or the settlor's right to revoke the spouse's interest in the case of a revocable spousal interest [*Treas. Reg. § 25.2702-3(d)(2)*]. The term of the interest also must be fixed and ascertainable at the creation of the trust. The term must be for the life of the holder, for a specified term of years, or for the shorter of those two periods [*Treas. Reg. § 25.2702-3(d)(4)*]. A spouse's interest is a qualified interest if the term of the interest is fixed and ascertainable at the creation of the trust and the spouse's right to receive the annuity is contingent only on his or her survival and his or her spouse's power to revoke [*Treas. Reg. § 25.2702-3(e)*, Ex. (8)]. A

spouse's interest is not a qualified interest, however, if his or her annuity is a contingent interest that is payable only if the settlor dies before the end of the trust term [*Treas. Reg. § 25.2702-3(e)*, Ex. (9)].

Qualified interests are valued according to the usual rules for valuing trust interests. A member of the family, for purposes of valuing transfers of interests in trusts, includes any of the following [*I.R.C. §§ 2702(e), 2704(c)(2)*]:

- The transferor's spouse.
- Any ancestor or lineal descendent of the transferor or the transferor's spouse.
- Any sibling of the transferor.
- Any spouse of the transferor's siblings, ancestor or lineal descendants.

**EXAMPLE:**

Smith transfers property to an irrevocable trust, retaining the right to receive the income of the trust for 10 years. On the expiration of the 10-year term, the trust terminates and the trust corpus is to be paid to Smith's child. However, if Smith dies during the 10-year term, the entire trust corpus is to be paid to Smith's estate at that time. The interests retained by Smith are valued at zero because neither is a qualified interest. Thus, the amount of Smith's gift is the fair market value of the property transferred to the trust [*Treas. Reg. § 25.2702-2(d)*, Ex. (1)]. *I.R.C. § 2702* effectively eliminates the "grantor retained income trust" as a planning option, except for use in connection with personal residences, as discussed below.

Special valuation rules apply to joint purchases of property with multiple term interests, which include property acquired in one transaction or in a series of related transactions [*I.R.C. § 2702(c)*; *Treas. Reg. §§ 25.2702-2(c), 25.2702-4*].

**PRACTICE TIP:**

As with all gifts, the gift tax statute of limitations regarding transfers subject to the valuation rules governing trust interests, preferred interests in business entities, and increases in taxable gifts only runs if the transfer is adequately disclosed on a gift tax return. This requirement began with transfers subject to the special valuation rules and has now been expanded to cover the valuation of all gifts. *Commentary by Steven M. Goldberg.*

The special valuation rules do not apply to the following:

- Incomplete gifts [*I.R.C. § 2702(a)(3)(A)(i)*]. An "incomplete gift" is any transfer that would not be treated as a gift whether or not consideration was received for the transfer [*I.R.C. § 2702(a)(3)(B)*]. However, an "interest" includes a power if the retention of the power prevents the transfer of an interest in property from being a completed gift [*Treas. Reg. § 25.2702-2(a)(4)*].
- Transfers in which the sole trust property is a personal residence inhabited by persons holding term interests, or transfers in which a personal residence and a limited amount of cash are placed in qualified personal residence trust [*I.R.C. § 2702(a)(3)(A)(ii)*; *Treas. Reg. § 25.2702-5(c)*]. For discussion of qualified personal residence trusts generally, see Ch. 72, *Irrevocable Trusts* .
- The assignment of a remainder interest if the only retained interest of the transferor or an applicable family member is as a permissible recipient of distributions of income in the sole discretion of an independent trustee [*Treas. Reg. § 25.2702-1(c)(6)*].

- The transfer of an interest in trust if the only interest in the trust, other than the remainder interest or a qualified annuity or unitrust interest, is an interest qualifying for a charitable deduction [*Treas. Reg. § 25.2702-1(c)(5)*].
- Transfers of an interest in trust to a family member if the remainder interest in the trust qualifies for the gift tax charitable remainder contribution deduction [*Treas. Reg. § 25.2702-1(c)(3)*].

#### **[d] Valuation of Options and Interests Subject to Buy-Sell Agreement**

In general, *I.R.C. § 2703* requires the value of property to be determined for purposes of gift and estate tax valuation without regard to any option, agreement, or other right to acquire or use the property at a price less than its fair market value (determined without regard to the option, agreement or right). Property value is also determined without regard to any restriction on the right to sell or use the property [*I.R.C. § 2703(a)*]. The effect of a restriction is unaffected by whether the restriction is in the partnership agreement or in a separate agreement; a restriction may also be implicit in the entity's capital structure [*see Treas. Reg. § 25.2703-1(a)(3)*].

The rule disregarding transfer restrictions does not apply if the option, agreement, right, or restriction meets the following requirements [*see I.R.C. § 2703(b)*]:

- The agreement is a bona fide business arrangement [*see St. Louis County Bank v. United States (8th Cir. 1982) 674 F.2d 1207* (maintenance of family control in and of itself is not sufficient reason to respect buy-sell agreement that does not approximate bona fide business standard)].
- The agreement is not a device to transfer property to members of the decedent's family for less than full and adequate consideration.
- The agreement has terms comparable to similar arrangements entered into by persons in an arm's-length transaction [*see Treas. Reg. § 25.2703-1(b)(3), (4)(ii)*].

The third requirement above does not mean that a buy-sell agreement *must* have been made at arm's length, only that the terms *could have been negotiated* at arm's length. The requirement is met if terms of the right or restriction could have been obtained in a fair bargain between unrelated parties dealing with each other at arm's length in the same business. The requirement may be met by showing that the arrangement conforms to the general practice among unrelated parties under negotiated agreements in the same business [*see Treas. Reg. § 25.2703-1(b)(4); Estate of Blount, TC Memo 2004-116* (taxpayer must produce evidence of agreements actually negotiated by persons at arm's length, under similar circumstances, and in similar businesses that are comparable to terms of challenged agreement)].

Each of these three requirements must be tested independently and pass the test for a right or restriction to be respected for valuation purposes. Similarly, each right or restriction must be tested separately [*Treas. Reg. § 25.2703-1(b)(2), (5)*]. Meeting these three requirements will generally be difficult and is likely to require expert testimony.

#### **EXAMPLES:**

A mandatory buy-sell agreement entered into, granted, or substantially modified after October 8, 1990, is not taken into account for valuation purposes unless the agreement meets all of the above requirements [*see I.R.C. § 2703*]. Further, an agreement calling for mandatory sale at death has no effect on valuation if the decedent can freely transfer his or her interest during lifetime. Finally, the agreement must not be an illegal restraint or alienation under local law [*Citizens Fidelity Bank & Trust Co v. United States (W.D. Ky. 1962) 209 F. Supp. 254*].

The rule generally requiring that transfer restrictions be ignored for valuation purposes [*see I.R.C. § 2703*] does not apply if 50 percent of the entity or property subject to the restriction is owned by someone other than the transferor's family, and the outside owners are subject to the same restriction [*Treas. Reg. § 25.2703-1(b)(3)*].

Agreements entered into before October 8, 1990, are not subject to *I.R.C. § 2703*. Thus, great care should be taken whenever any amendment to an agreement entered into before October 8, 1990, is contemplated [*Treas. Reg. § 25.2703-1(c)*]. Despite not being subject to *I.R.C. § 2703*, a grandfathered buy-sell agreement must still meet the tests set forth by the courts that existed prior to the enactment of *I.R.C. § 2703* to be honored for estate tax purposes.

*I.R.C. § 2703* has been used repeatedly by the IRS to challenge asserted valuation discounts in connection with family limited partnerships. Specifically, the IRS has attempted to invalidate partnership agreements that establish valuation of partnership interests. For discussion of the need to adequately support and document valuation discounts, see § 68A.82[3].

In 1997, the IRS issued four letter rulings relating to partnerships created when the parent/transferor was dying. In each case, the partnership interest and local applicable state law provided restrictions with regard to a partner's (transferee's) ability to sell or use the property. In each case, the decedent's estate claimed that the "property" transferred was the partnership interest and the only restriction on the right to sell the partnership interest was the requirement of consent by the general partner to any sale or transfer. However, the IRS disagreed, concluding that it was the underlying partnership assets that were transferred. The steps of the transactions were viewed as a single continuous and integrated scheme. The rulings merged the transaction of the transfers into one with the result being deemed a transfer of the assets and not just a partnership interest. Further, all of the transfers were deemed to be a means or device to transfer property for less than full and adequate consideration, and none could be classified as bona fide, arms' length business arrangements [*see Priv. Ltr. Rul. 9719006, 9723009, 9725002, 9730004*].

The IRS approach has been widely criticized as ignoring concepts of property law under state laws. In each ruling, it was clearly a partnership interest, a recognized form of property, that was being transferred. The IRS argument appears more suited to a step transaction doctrine because the rulings all included so-called "death bed" transfers. Full adoption of the IRS argument would also apply *I.R.C. § 2703* in an arguably overbroad manner that would disallow virtually all valuation adjustments for any family owned business.

**PRACTICE TIP:**

The language and reasoning in all four letter rulings were nearly identical and clearly indicate the IRS's strong and continued opposition to valuation discounts taken in connection with family limited partnerships. It remains to be seen whether the courts will apply the IRS argument. In the meantime, many practitioners have reported that they are still forming partnerships and believe that appropriate discounts for minority interests or lack of control or marketability should still be taken [*see § 68A.72*].  
*Commentary by Steven M. Goldberg.*

In two 1997 technical advice memoranda related to similar "death bed" family limited partnerships (FLPs), the IRS successfully asserted the step-transaction theory [*see § 68A.82[4]; see TAM 97-19-006, 97-19-009*]. The IRS also argued that the FLPs were essentially created at death for reasons other than a bona fide business arrangement and that restrictions on the right to sell or use the underlying assets should not be recognized for valuation purposes. Because no bona fide business purpose supported the FLPs and they were merely a means of transferring property for less than adequate consideration and avoiding estate taxes, the IRS ignored the partnership agreement for valuation purposes. Invalidating the entity structure resulted in the disallowance of any valuation discounts [*see TAM 97-19-006, 97-19-009*]. The IRS's theory rests on traditional tax doctrine that economic substance can be asserted over the form that taxpayers choose to use [*see Gregory v. Helvering (1935) 293 U.S. 465, 55 S. Ct. 266, 79 L. Ed. 596*].

**PRACTICE TIP:**

As a result of the private letter rulings and technical advice memoranda discussed above, many practitioners continue to believe that the many valid nontax purposes for forming family limited partnerships or other business entities should be fully explored with the client and documented in the file and in the entity's records. *Commentary by Steven M. Goldberg.*

### **[e] Treatment of Certain Lapsing Rights and Restrictions**

For estate and gift tax purposes, the lapse of a voting or liquidation right in a family-controlled partnership or corporation is treated as a transfer by gift, or, if the lapse occurs at the holder's death, a transfer that is includable in the gross estate of the decedent [*I.R.C. § 2704(a)(1)*; *Treas. Reg. § 25.2704-1(a)*; see *Treas. Reg. § 25.2704-1(a)(2)(iv), (v)* ("voting rights" and "liquidation rights" defined)]. A lapse occurs when the right is restricted or eliminated; however, a liquidation right does not lapse when an interest conferring the right is transferred [*Treas. Reg. § 25.2704-1(b), (c)(1)*].

The right to liquidate an entity can have a significant effect on the value of the interest in the entity. For example, a discount for lack of marketability may not apply if the person can liquidate the entity and receive a share of the underlying assets. In that event, the person's estate may be valued by looking at the entity's underlying assets instead of the property interest in the entity.

*I.R.C. § 2704(a)* seeks to prevent the lapse of a right that is the subject of a transfer from reducing the value of the person's estate or the value of the gift. If, however, the lapse of the right results from a transfer but is not caused by the transfer, *I.R.C. § 2704(a)* will not apply [*Treas. Reg. § 25.2704-1(f)*, Ex. 4].

#### **EXAMPLE:**

If a 70 percent shareholder transfers a 30 percent interest in the corporation and loses the right to liquidate because the interest falls below 50 percent, *I.R.C. § 2704* will not apply.

The value of the transfer is the excess of the value of the interests in the entity held by the individual holding the rights immediately before the lapse over the sum of the value of those same interests immediately after the lapse (as if they were held by one individual) [*Treas. Reg. § 25.2704-1(d)*]. The prelapse value is determined as if the voting and liquidation rights were nonlapsing [*I.R.C. § 2704(a)(2)*].

Certain restrictions on liquidation are disregarded in making valuations under *I.R.C. § 2704(b)*. A professional advising clients in connection with family limited partnerships should closely scrutinize *I.R.C. § 2704(b)*. If a restriction on liquidation is ignored, the transferor may have the right to liquidate the entity and the underlying assets of the entity (or the transferor's pro rata share of those assets) are what will be valued rather than the interest in the entity.

Under *I.R.C. § 2704(b)*, any "applicable restriction" created after October 8, 1990, that effectively limits the ability of a corporation or partnership to liquidate (or the ability of a partner or shareholder to withdraw and liquidate his or her ownership interest) is disregarded in valuing a transfer among family members if both of the following are true [*I.R.C. § 2704(b)(1), (2)*; *Treas. Reg. § 25.2704-2(a), (b)*; see Pub. L. No. 101-508, § 11602(e)]:

- The transferor and family members control the corporation or partnership immediately before the transfer [see *I.R.C. §§ 2701(b)(2), 2704(c)(1)*; *Treas. Reg. § 25.2701-2(b)(5)* ("control" defined)].
- The restriction either lapses in whole or in part after the transfer or can be removed by the transferor or members of his or her family, either alone or collectively [see *I.R.C. § 2704(c)(2)*; *Treas. Reg. § 25.2702-2(a)(1)* ("member of the family" defined)].

If an applicable restriction is disregarded, the transferred interest is valued as if the restriction does not exist, looking only to the rights of the transferor under the state law that would apply but for the restrictions [*Treas. Reg. §*

25.2704-2(c)].

The term "applicable restriction" does not include any of the following, which therefore will *not* be disregarded for purposes of the above rules [*I.R.C. § 2704(b)(3)*; *Treas. Reg. § 25.2704-2(b)*]:

- A commercially reasonable restriction that arises as part of financing by the corporation or partnership with a person who is not related to the transferor or transferee, or a member of the family of either.
- Any restriction imposed or required by federal or state law.
- An option, right to use property, or agreement that is subject to *I.R.C. § 2703*.

The most important of these exceptions are the restrictions otherwise applicable under state law, discussed in more detail below.

The Treasury Secretary is authorized to provide that other restrictions may be disregarded if they have the effect of reducing the value of the transferred interest for purposes of estate and gift taxation, but do not ultimately reduce the value of the interest to the transferee [*I.R.C. § 2704(b)(4)*]. Although regulations clarify that *I.R.C. § 2704* does not apply to certain lapses of liquidation rights that occur because of changes in state law, or that would result in double taxation [*Treas. Reg. § 25.2704-1(c)(2)(ii), (iii)*], regulations explaining the application of *I.R.C. § 2704* to other lapsing rights are reserved, and have not been issued [*see Treas. Reg. § 25.2704-1(e)*].

An "applicable restriction" includes a limitation in the governing instruments of an entity, on the ability to wholly or partially liquidate the entity that is more restrictive than the otherwise applicable provisions of state law. Stated differently, a restriction will be disregarded to the extent that the restrictions on a corporation's or partnership's ability to liquidate are more restrictive than the limitations that would otherwise apply under state law [*I.R.C. § 2704(b)(3)(B)*; *Treas. Reg. § 25.2704-2(b)*; *see Kerr v. Commissioner of Int. Rev. (5th Cir. 2002) 292 F.3d 490* (if restrictions fail removability requirement, they cannot be "applicable restrictions" and it is irrelevant whether restrictions are more restrictive than state law)]. The IRS has focused many of its recent challenges to FLPs in this area [*see, e.g., Priv. Ltr. Rul. 9919009*; *TAM 97-30-004*, *97-36-004*].

#### **EXAMPLES:**

If a family limited partnership agreement bars the taxpayer from withdrawing and liquidating the ownership interests, but state law would otherwise permit the taxpayer to withdraw and receive fair value for the liquidated interest after six months written notice, the restriction is an applicable restriction that must be ignored for valuation purposes. Alternatively, if state law permits a limited partner to withdraw and liquidate his or her ownership interest, the argument supporting a lack of marketability discount is jeopardized [*see § 68A.82*].

As a result, state law regarding the liquidation of an entity is extremely important in the proper structuring of a family business. For example, in *California, Corp. Code § 15908.01(b)* states that a limited partnership can be dissolved by the consent of all general partners and of limited partners owning a majority of the rights to receive distributions as limited partners at the time the consent is to be effective. A partnership that wanted to provide assurance to its minority limited partners that dissolution would not occur might wish to provide for more than one general partner and adhere to the state rules regarding dissolution. This structure should also have the effect of preventing a majority limited partner from having the ability to unilaterally liquidate the partnership. If a majority limited partner cannot unilaterally dissolve the partnership, valuation adjustments for lack of marketability would be appropriate. Furthermore, since the restrictions on the ability to liquidate are not more restrictive than state law, *I.R.C. § 2704(b)* should not apply.

The Fifth Circuit has upheld a marketability discount for family partnership interests for gift tax purposes based on liquidation and withdrawal restrictions because of the required consent of a non-family limited partner. The restriction could not be removed solely by family members and therefore did not constitute an applicable restriction that would be disregarded for purposes of gift tax valuation. The court held that *I.R.C. § 2704(b)(2)(ii)* provides no exception permitting courts to disregard the presence of non-family limited partners, even when the non-family limited partner stipulated to its probable consent to the removal of the restriction. Thus, even though the non-family limited partner stipulated that it would convert its interests into cash as soon as possible (so long as the transaction was in the partner's best interest and that the partner would receive fair market value for its interests) and had no reason to oppose the removal of the partnership restrictions, these restrictions could not be treated as removable by family members after the transfer [ *Kerr v. Commissioner of Int. Rev. (5th Cir. 2002) 292 F.3d 490* ] .

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Tax Law Federal Estate & Gift Taxes Gifts (IRC secs. 2035, 2501-2524) General Overview Tax Law Federal Estate & Gift Taxes Gifts (IRC secs. 2035, 2501-2524) Valuation



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 CHAPTER 68A USING FAMILY PARTNERSHIPS AND OTHER BUSINESS ENTITIES IN ESTATE PLANNING  
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*25-68A California Legal Forms--Transaction Guide § 68A.41*

**AUTHOR:** Steven M. Goldberg Practice Consultant

**§ 68A.41 Annual Gift Tax Exclusion**

For calendar years 2002-2005, a donor may make gifts of up to \$11,000 per donee per year without being subject to federal gift tax [ *Rev. Proc. 2004-71, 2004-50 I.R.B. 970* (2005 exclusion amount); *Rev. Proc. 2003-85*, § 3.26(1), *2003-49 I.R.B. 1184* (2004 exclusion amount); *Rev. Proc. 2002-70*, § 3.24(1), *2002-46 I.R.B. 845* (2003 exclusion amount); *Rev. Proc. 2001-59*, § 3.19(1), *2001-52 I.R.B. 623* (2002 exclusion amount); *see I.R.C. § 2503(b)* (annual inflation adjustments to amount of annual exclusion)]. (For gifts made before 2002, the annual gift tax exclusion was \$10,000 [ *Rev. Proc. 2001-13*, § 3.17, *2001-3 I.R.B. 337* ].) The exclusion for each donee applies without regard to the total number of donees [*see I.R.C. § 2503(b)(1)*]. However, the exclusion is available only for gifts of a present interest [*I.R.C. § 2503(b)*].

**PRACTICE TIP:**

A donor need not file a gift tax return if no gifts in excess of the annual exclusion amount are made [*I.R.C. § 6019*]. However, with gifts of partnership interests, it may be advisable to file a gift tax return even if the value gifted would qualify for the annual gift tax exclusion to start the statute of limitations running in regard to the value of the gift. *Commentary by Steven M. Goldberg.*

If the donor is married and both spouses make gifts, the maximum tax-free amount for a joint gift is twice the exclusion amount per donee, or \$22,000 per donee per year (for gifts made in calendar years from 2002 through 2005) [*see discussion above*]. The same "double" exclusion is available when only one spouse makes a gift to a person other than the donor's spouse, provided that the donor's spouse consents to split the gift [*see I.R.C. § 2513(a)*].

**PRACTICE TIP:**

With advance planning, a senior family member can use the annual gift tax exclusion to shield gifts to junior family members before forming the family business (or converting the business into a family business entity for estate planning purposes) to fund capital contributions or purchases of entity interests

by junior family members. *Commentary by Steven M. Goldberg.*

For more detailed discussion of the gift tax annual exclusion, see *Ch. 60A, Gifts, § 60A.32[4]*.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Tax Law Federal Estate & Gift Taxes Gifts (IRC secs. 2035, 2501-2524) Annual Exclusions



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*25-68A California Legal Forms--Transaction Guide § 68A.42*

**AUTHOR:** Steven M. Goldberg Practice Consultant

**§ 68A.42 Effect of Transfers Within Three Years of Death**

Gifts made during the lifetime of the donor ordinarily are not included in the gross estate of the donor [*see I.R.C. § 2035(a), (d)*]. However, certain transfers made within three years of the death of the donor are added back to the estate [*see I.R.C. § 2035(a)*], unless the transfer was a bona fide sale for adequate and full consideration in money or money's worth [*I.R.C. § 2035(d)*]. For example, if a life insurance policy is transferred within three years of death, the policy proceeds are fully includable in the donor's estate, even if no gift tax return was required for the transfer [*I.R.C. §§ 2035(a), (c), 2042*].

Transfers with retained life estates [*I.R.C. § 2036*], transfers taking effect at death [*I.R.C. § 2037*], and revocable transfers [*I.R.C. § 2038*] are included in the gross estate if made within three years of death [*I.R.C. § 2035(a)*]. Further, any gift tax paid by the donor or the estate on all gifts made by the donor or the donor's spouse (to account for gift-splitting) within three years of the donor's death is included in the donor's gross estate, regardless of whether the value of the gift is added back to the estate [*I.R.C. § 2035(b)*]; *see Rev. Rul. 81-229, 1981-2 CB 176*; *see also Estate of Gamble v. Commissioner, 69 T.C. 942 (1978), acq., 1981-2 C.B. 1*; *Rev. Rul. 81-302, 1981-2 C.B. 170* (state gift taxes paid within three years of death are not includable in federal gross estate)].

The amount included in the gross estate because of the three-year rule is the value of the transferred property on the date of death or alternate valuation date, if elected. It is irrelevant that the donee of the property has sold or otherwise disposed of it within the three-year period [ *Rev. Rul. 72-282, 1972-1 C.B. 306* ]. Gifts included in the gross estate under the three-year rule are entitled to a step-up (or step-down) in basis [*I.R.C. § 1014*; for decedents dying after 2009, a modified carryover basis rule generally applies, so a step-up basis does not apply (*I.R.C. § 1022*); *see Ch 60, Estate Planning*, for a detailed discussion].

**PRACTICE TIP:**

All gifts made within three years of death are included in the donor's gross estate for purposes of determining the estate's qualification for *I.R.C. § 303* stock redemptions [*see I.R.C. § 303; see also § 68A.45*], special use valuations [*I.R.C. § 2032A*], and deferral of estate tax payment for closely held businesses [*see I.R.C. § 6166; see also § 68A.46*]. *Commentary by Steven M. Goldberg.*

Gifts, other than gifts of life insurance, for which no gift tax return was required to be filed because of the annual exclusion (or the unlimited exclusion for qualified tuition and medical expense payments), are specifically excluded from the gifts within three years of death rules [*I.R.C. §§ 2035(c)(3), 2503(b), (e)*].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Tax Law Federal Estate & Gift Taxes Definition of Gross Estate Tax Law Federal Estate & Gift Taxes Taxable Property Lifetime Transfers (IRC secs. 2035-2038) Gifts Within Three Years of Death



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*25-68A California Legal Forms--Transaction Guide § 68A.43*

**AUTHOR:** Steven M. Goldberg Practice Consultant

**§ 68A.43 Effect of Estate Tax on Family Businesses**

Without significant advance estate planning, estate tax can have a crippling effect on family businesses. Even with reduced estate and gift tax rates [*see I.R.C. §§ 2001(c), 2502*], a family business faces enormous financial challenges. Cash and other assets needed for the survival of the business may have to be diverted to meet tax obligations, and the estate and business may have serious liquidity problems.

Although the federal estate tax has been repealed effective for decedents dying after 2009 [*I.R.C. § 2210(a)*], for the time being, at least, it remains in effect. Moreover, it is likely that significant changes will be made to the estate tax law before 2010. Estate tax planning after 2001 involves to some degree guessing how long a client will live. For clients who die in 2010, there will be no estate tax due [*I.R.C. § 2210(a)*]. For clients who are likely to live past 2010, estate tax planning for larger estates will involve many of the same considerations and planning techniques as the law before the 2001 legislation because, in the absence of further legislation between now and then, the law will be the same prior to enactment of the 2001 legislation [*I.R.C. § 2210(a)*]. For decedents dying between now and before 2011, estate planning may require year-to-year refinements tailored to each client, as transitional increases in the estate tax unified credit, estate tax rate decreases, and other changes take effect [*see I.R.C. §§ 2001(c), 2010(c), 2505*]. For a more detailed discussion of the prospective estate tax repeal, see § 60.112A.

Most family businesses do not survive the transfer to the next generation. Only proper estate and succession planning can ensure that the business owners have the optimal use of their assets during their lifetimes and maximum after-tax distribution of those assets to their heirs after death. Planning for the estate involves maximizing wealth by minimizing income, gift, and estate taxes. However, the business owner's objectives are crucial to a meaningful, coordinated estate plan [*see § 68A.71*].

**PRACTICE TIP:**

Many family business owners become more amenable to succession and estate planning when they are aware of the potential consequences of the estate tax and of the failure to arrange for the transfer of the business. The earlier the planning, the more likely it is that the business owner's overall, combined objectives may be met. *Commentary by Steven M. Goldberg.*

For further discussion, see Ch. 60, *Estate Planning* .

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawGeneral OverviewTax LawFederal Estate & Gift TaxesGeneral Overview



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*25-68A California Legal Forms--Transaction Guide § 68A.44*

**AUTHOR:** Steven M. Goldberg Practice Consultant

**§ 68A.44 Deduction for Qualified Family-Owned Business Interests**

**[1] "Qualified Family-Owned Business Interest" Defined**

**[a] In General**

For estates of decedents dying before 2004, an estate is allowed a limited deduction for family-owned business interests [I.R.C. § 2057]. The deduction is repealed for estates of decedents dying after 2003 [I.R.C. § 2057(j)].

A "qualified family-owned business interest" (QFOBI) is any interest as a proprietor in a trade or business carried on as a proprietorship by the decedent or the decedent's family [I.R.C. § 2057(e)(1)(A)]. A QFOBI also is any interest in any entity, regardless of the form in which it is held, with a principal place of business in the United States, if ownership is held at least 50 percent by the decedent and members of the decedent's family, 70 percent by two families, or 90 percent by three families. However, the decedent's family must own at least 30 percent of the trade or business [I.R.C. § 2057(e)(1)(B), (2)]. The term "interest in an entity" means an equity or ownership interest in the entity; therefore, promissory notes issued by a family-owned business cannot be deducted as QFOBIs [Letter Rul. 200410002].

For purpose of the QFOBI, a decedent is treated as engaged in a trade or business if any member of the decedent's family is engaged in that trade or business [I.R.C. § 2057(e)(1)]. Specific rules apply for determining the percentage ownership of corporations, partnerships, and tiered entities [I.R.C. § 2057(e)(3)].

**[b] Interests Not Qualifying as QFOBIs**

The term "qualified family-owned business interest" does not include any of the following interests in a trade or business:

- If its principal place of business is outside the United States [I.R.C. § 2057(e)(2)(A)].
- If the stock or debts of the business (or a controlled group of which the entity was a member) were readily tradable on an established securities market or a secondary market at any time within three years of the decedent's death [I.R.C. § 2057(e)(2)(B); see I.R.C. § 267(f)(1)].
- If more than 35 percent of the adjusted ordinary gross income of the business for the year of the decedent's death would qualify as personal holding company income if the business were a corporation [I.R.C. § 2057(e)(2)(C); see I.R.C. § 543(a)].

### [c] Interests Not Included in QFOBI Calculation

The value of a QFOBI does not include any of the following:

- That portion of an interest in a trade or business attributable to cash or marketable securities in excess of the reasonably expected day-to-day working capital needs of the company [I.R.C. § 2057(e)(2)(D)(i); see *Bardahl Mfg Corp. v. Commissioner* (1965) 24 T.C.M. 1030, T.C. Memo. 1965-200 (working capital analysis using historical average)].
- Any passive assets, such as assets producing certain dividends, rents, royalties, interest, and similar income, that produce or are held for the production of personal holding company income [see I.R.C. § 2057(e)(2)(C)] or foreign personal holding company income [I.R.C. § 2057(e)(2)(D)(ii); see I.R.C. § 954(c)(1)]. However, with regard to property leased by the decedent to a member of the decedent's family on a net cash basis, income from the lease is not treated as personal holding company income or an asset producing personal holding company income, if the income would not be so treated if the lessor had engaged directly in the activities in which the lessee engaged with respect to that property [I.R.C. § 2057(e)(2)].

### PRACTICE TIP:

Documenting working capital needs, ordinarily required to avoid the accumulated earnings tax, is critical to maximizing the QFOBI deduction. *Commentary by Steven M. Goldberg.*

### [2] Eligibility for Deduction

To be eligible for the QFOBI deduction, an estate must satisfy five requirements:

- The decedent must have been a United States citizen or resident at the time of death [I.R.C. § 2057(b)(1)].
- The aggregate value of the decedent's QFOBIs passed to qualified heirs must exceed 50 percent of the decedent's adjusted gross estate (the "50-percent liquidity test") [I.R.C. § 2057(b)]. The 50-percent liquidity test is applied by adding all transfers of QFOBIs by the decedent to qualified heirs at the time of the decedent's death, plus lifetime gifts of QFOBIs after 1976 to members of the decedent's family that were continuously held until the date of death, and comparing this total to the decedent's adjusted gross estate [I.R.C. § 2057(b)(3); see I.R.C. § 2057(c) ("adjusted gross estate" defined)]. To the extent a decedent held QFOBIs in more than one trade or business, all those interests are aggregated for purposes of applying the 50-percent liquidity test [I.R.C. § 2057(b)-(d)].
- The decedent (or a member of the decedent's family) must have owned and materially participated in the trade or business for at least five of the eight years preceding the decedent's death [I.R.C. §

2057(b)(1)(D)]. Further, each qualified heir (or member of the qualified heir's family) must materially participate in the trade or business for at least five years of any eight-year period within 10 years following the decedent's death [*I.R.C. § 2057(f)(1)(A)*; *see I.R.C. § 2032A(c)(6)(B)*]. "Material participation" is defined in terms that are both complex and vague [*see I.R.C. § 2032A(e)(6)*].

- The executor must elect to apply the QFOBI deduction on the decedent's estate tax return [*see I.R.C. § 2057(b)(1)(B)*]. In addition to making the election, the executor must file a written recapture agreement, signed by each person who has an interest in any property designated in the agreement, in which each person consents to the application of additional estate tax if a recapture event occurs [*I.R.C. § 2057(b)(1)(B), (h)*].

- The decedent must die before January 1, 2004 [*I.R.C. § 2057(j)*].

### [3] Maximum Amount of Deduction; Coordination With Unified Credit

An estate may deduct the adjusted value of a decedent's QFOBI for estate tax purposes if those interests comprise more than 50 percent of the decedent's estate and certain other requirements are met [*I.R.C. § 2057(a)(1), (b)*; *see [2], above*]. The maximum deduction that may be taken is \$675,000 [*I.R.C. § 2057(a)(2)*]. The deduction is repealed for estates of decedents dying after 2003 [*I.R.C. § 2057(j)*].

Use of the QFOBI deduction can significantly reduce the decedent's gross estate, and hence, estate taxes. However, if the QFOBI deduction is taken, the applicable exclusion amount with respect to the unified credit is maximized at \$625,000 regardless of the amount of the unified credit in effect [*see I.R.C. § 2010(c)*], subject to an increase if the QFOBI deduction taken is less than \$675,000, but not above the maximum applicable exclusion in effect [*I.R.C. § 2057(a)(3)*; *see I.R.C. § 2010(c)*].

#### EXAMPLE:

Taxpayer dies in year 2003 with an estate of \$1.4 million, including a "qualified family owned business" with an adjusted value of \$800,000. The applicable exclusion amount for the year 2003 is \$1 million [*see I.R.C. § 2010(c)*]. The estate elects and qualifies for a \$675,000 QFOBI deduction. The estate can thus shield \$1.3 million of assets from the estate tax, i.e. the \$675,000 QFOBI deduction plus the \$625,000 applicable exclusion amount [*I.R.C. §§ 2010(c), 2057(a)(2), (3)(A)*].

#### PRACTICE TIP:

Reducing the taxable estate by using the QFOBI deduction reduces the maximum amount of the federal credit for state death taxes paid [*see I.R.C. § 2011*, repealed for estates of decedent dying after 2004 (*I.R.C. § 2011(f)*)]. If the state imposes something other than a "pick-up" tax, as does California [*see Rev. & Tax. Code § 13302*; *see also § 68A.72*], there may be additional financial consequences to the use of the deduction, particularly if the state inheritance laws do not track the federal definition of the taxable estate. *Commentary by Steven M. Goldberg.*

### [4] Recapture of Estate Tax Savings

The benefit of the QFOBI deduction is subject to recapture through imposition of an additional estate tax if, within 10 years of the decedent's death and before the qualified heir's death, one of the following recapture events occurs [*I.R.C. § 2057(f), (g)*]:

- A qualified heir ceases to meet the material participation requirements.
- A qualified heir disposes of any portion of his or her interest in the family-owned business, other than by a disposition to a member of the qualified heir's family or through a conservation contribution [

*see I.R.C. § 170(h)*].

- The principal place of business of the trade or business ceases to be located in the United States.
- A qualified heir loses American citizenship and does not transfer the QFOBI in a qualifying trust or other security arrangement [*see I.R.C. § 2057(g)*].

**PRACTICE TIP:**

The estate tax savings stemming from the use of the QFOBI election benefits the residuary beneficiaries of the estate. If the recapture tax is triggered, the liability for the recapture tax falls on the family members who inherit the business. Those family members should be made aware of the possibility of their liability for the recapture tax before agreeing to the QFOBI election. In addition, the repeal of the estate tax does not eliminate these compliance requirements in order to avoid recapture of the estate tax. Thus, a qualified heir must continue to materially participate in the family owned business interest for which the deduction under *I.R.C. § 2057* is claimed for at least 10 years following the decedent's death [*I.R.C. § 2057(f)*]. *Commentary by Steven M. Goldberg.*

The QFOBI recapture rules are not as strict as those applied to special use valuations, and are phased out over the 10-year period [*see I.R.C. § 2057(f)(2)*].

**PRACTICE TIP:**

Counsel should advise clients operating QFOBIs to document the purposes of nonroutine sales of inventory or fixed assets to avoid the possibility of triggering the recapture tax by a nonroutine sale. For example, a decision to sell and lease back business machinery should be documented with the business reasons supporting the disposition. *Commentary by Steven M. Goldberg.*

**[5] Deduction Inapplicable to Gift and Generation-Skipping Transfer Tax**

The QFOBI deduction is not available for purposes of the gift tax or the generation-skipping transfer tax [*I.R.C. § 2057(a)(1)*]. Therefore, any gift tax or generation-skipping transfer tax is imposed on the full value of the business.

**[6] Detailed Planning Required to Use Deduction**

The use of the QFOBI deduction can be an important estate planning tool for owners of family businesses. However, the intricacies of the rules and the potential for recapture may deter them from its use. Maximizing the deduction requires careful and intricate planning during the decedent's life, the administration of the estate, and the 10-year period following the decedent's death and the transfer of the family business to the qualified family members.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law [General Overview](#) [Tax Law](#) [Federal Estate & Gift Taxes](#) [Deductions](#) [General Overview](#)



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*25-68A California Legal Forms--Transaction Guide § 68A.45*

**AUTHOR:** Steven M. Goldberg Practice Consultant

**§ 68A.45 Tax-Free Redemption of Stock to Pay Estate Taxes**

**[1] Section 303 Redemption Treated as Sale or Exchange**

When a substantial portion of a client's estate will likely hold closely held stock in a C corporation, a "Section 303 redemption" may become an integral part of the estate plan. This special redemption allows an estate to avoid dividend treatment when redeeming stock to raise funds for death taxes and funeral and administration expenses. Stated differently, this type of stock redemption is treated as a sale or exchange, provided that certain qualifications are met [*see* [2], *below*; *see also I.R.C. § 303*]. If the redemption is treated as a sale, the basis is subtracted to determine the taxable amount. With dividends, basis is not subtracted, which results in a higher taxable amount.

**[2] Qualifications for Tax-Free Redemption**

**[a] Qualifying Percentage Requirements**

To qualify for a tax-free "Section 303" redemption, the value of the decedent's closely held stock must exceed 35 percent of the value of the decedent's adjusted gross estate. A decedent's adjusted gross estate is the decedent's gross estate reduced by the estate's allowable deductible administration expenses and debts [*I.R.C. § 303(b)(2)(A)*; *see I.R.C. §§ 2053, 2054*].

For purposes of this percentage test, all stock of the corporation or corporations includable in the decedent's estate is considered, even if the estate redeems only one class of stock [*Treas. Reg. § 1.303-2(c)*], including stock the decedent did not own at the time of death. For example, stock transferred by a decedent before death is considered under the percentage test if it is included in the decedent's estate [ *Rev. Rul. 84-76, 1984-1 C.B. 91* ]. Further, a decedent's gross estate includes stock that was part of the decedent's spouse's estate that had not been distributed at the time of the decedent's death, but was available for distribution. The amount of stock included in the decedent's gross estate is a

percentage of the stock equal to the percentage of the estate to which the decedent was entitled [ *Rev. Rul. 69-616, 1969-2 C.B. 45* ].

**PRACTICE TIP:**

If a shareholder anticipates that Section 303 redemption will be part of the estate plan, the shareholder should ensure that the stock interest meets the 35-percent test [*I.R.C. § 303(b)(2)(A)*]. To meet this test, the shareholder could make inter vivos gifts of property other than stock, or transfer property other than stock to the corporation in return for stock. Ordinarily, if the shareholder controls the corporation immediately after the transfer, no gain or loss is recognized by the shareholder [*see I.R.C. §§ 351(a), 368(c)*]. *Commentary by Steven M. Goldberg.*

Under certain circumstances, the stock of two or more corporations may be used for the purpose of meeting the 35-percent requirement. Specifically, the stock of two or more corporations may be used to meet the 35-percent requirement if the value of the stock of each corporation included in the decedent's gross estate exceeds 20 percent of the value of the outstanding stock of that corporation [*I.R.C. § 303(b)(2)(B)*]. Stock owned by the decedent and the decedent's surviving spouse as joint tenants, tenants in common, tenants by the entirety or as community property is considered to be owned by the decedent for purposes of the 20-percent rule. This spousal attribution rule applies only for purposes of determining which corporations to aggregate under the 20-percent rule and not for assessing whether the 35-percent requirement is met [*I.R.C. § 303(b)(2)(B)*]. However, stock owned through a beneficial interest or by attribution may not be used to meet the percentage requirements [ *Estate of Byrd v. Commissioner (5th Cir. 1967) 388 F.2d 223, aff'g 46 T.C. 25 (1966)* ].

**[b] Qualifying Dollar Limitations**

A distribution of property in redemption of stock qualifies for Section 303 treatment only to the extent that the amount of the distribution does not exceed the sum of the following [*I.R.C. § 303(a)*]:

- Federal estate and state inheritance taxes imposed because of decedent's death.
- All interest collected with respect to the taxes imposed because of decedent's death.
- All administration expenses allowable as estate tax deductions, including executor's and attorneys' fees, plus allowable funeral and administration expenses.

The taxes considered in this calculation include state and federal estate, inheritance, legacy, and succession taxes [*I.R.C. § 303(a)(1)*]. The amount taken into account is the net tax liability after the allowance of any credit, relief, discount, refund, remission or reduction of tax [*Treas. Reg. § 1.303-2(h)*]. In addition, a distribution in redemption of a shareholder's stock is only eligible for Section 303 treatment to the extent that estate and inheritance taxes reduce the shareholder's interest in the estate [*I.R.C. § 303(b)(3)*].

**[c] Inclusion in Gross Estate**

The redeemed stock must be includable in the decedent's gross estate for Section 303 treatment [*I.R.C. § 303(a)*]. For purposes of determining whether stock is includable in the decedent's gross estate, "gross estate" means the gross estate as computed in accordance with *I.R.C. § 2031* or, in the case of a nonresident alien, in accordance with *I.R.C. § 2106* [*Treas. Reg. § 1.303-2(b)*]. Stock subject to tax as a result of a generation-skipping transfer occurring at or after death is deemed included in the individual's gross estate and is eligible for Section 303 treatment [*I.R.C. § 303(d)*].

The redeemed stock must have been actually owned by the decedent as of the date of death. A redemption of stock not owned by a decedent at death does not qualify for Section 303 treatment even when the stock is included in the

decedent's gross estate as a transfer within three years of death [ *Rev. Rul. 84-76, 1984-1 C.B. 91 ; see § 68A.42*]. Stock not owned at the date of death that is includable in the decedent's gross estate is, however, taken into account in determining the percentage requirements [*see [a], above*].

Even though stock is "Section 306" stock, a Section 303 redemption can take place if the Section 303 requirements are otherwise met [*Treas. Reg. § 1.303-2(d); see I.R.C. § 306*].

Stock with a basis determined with reference to the basis of stock that was included in decedent's gross estate is also eligible for Section 303 treatment [*I.R.C. § 303(c)*]. The stock need not be redeemed by the executor or administrator of an estate to qualify. When stock included in an estate is exchanged for new stock, the basis of which is determined by reference to the basis of the old stock, the new stock qualifies for a Section 303 redemption just as if the old stock had been redeemed [*Treas. Reg. § 1.303-2(d)*]. Examples of "new" stock that qualify for Section 303 treatment include the following:

- Stock received in a spin-off [*see Rev. Rul. 77-377, 1977-2 C.B. 111 ; see also I.R.C. § 355*].
- Stock received in a reorganization [*see I.R.C. § 368*].
- Stock received in an exchange [*see I.R.C. § 1036* (tax free exchange of common stock for common stock in same corporation and tax free exchange of preferred stock for preferred stock in same corporation)] or distribution to which *I.R.C. § 305(a)* applied. *I.R.C. § 305(a)* deals with tax-free stock dividends, such as common stock dividends issued with respect to the common stock of the same corporation.

*I.R.C. § 303* applies to redemptions of stock jointly owned by a decedent and another party [*see I.R.C. § 2040*], provided that the stock was included in the decedent's gross estate [*see Treas. Reg. § 1.303-2(f)*]. Transferred stock whose voting rights were retained by the transferor would in all likelihood also be eligible for Section 303 treatment if included in the transferor's gross estate [*see I.R.C. § 2036(b)*].

**PRACTICE TIP:**

The transfer of closely held stock to a revocable trust should not affect the eligibility of the estate for an *I.R.C. § 303* redemption. A revocable trust to which the stock has been assigned will be fully includable in the gross estate. *Commentary by Steven M. Goldberg.*

**[3] Effect of Gifts Within Three Years of Death**

Gifts made within three years of death are included in decedents' gross estates for purposes of determining qualification for *I.R.C. § 303* redemptions, even if the gift is not otherwise includable in the decedent's gross estate [*see § 68A.42; I.R.C. § 2035(c)(1)*]. For most other purposes, transfers within three years of a decedent's death are not includable in the gross estate, except for the following [*see I.R.C. § 2035(a)*]:

- Transfers of life insurance.
- Transfers with retained life estates.
- Transfers taking effect at death.
- Revocable transfers.
- Transfers under power of appointment.

Transfers to a spouse that qualify for the unlimited gift tax marital deduction are includable in the gross estate for purposes of determining qualification for *I.R.C. § 303* redemptions [*I.R.C. § 2035(c)(1), (3)*]. The only gifts that are not includable for this purpose are gifts that qualify for the annual gift tax exclusion [*see § 68A.41; see also Ch. 60A, Gifts, § 60A.32[4]*] and the unlimited exclusion for qualified tuition and medical expense payments [*I.R.C. §§ 2035(c)(3), 2503(b), (e)*].

**PRACTICE TIP:**

Substantial predeath transfers can be made that qualify for the annual gift tax and qualified tuition and medical expense payment exclusions, and effectively reduce the value of the gross estate for purposes of meeting the Section 303 percentage requirements. *Commentary by Steven M. Goldberg.*

**[4] Redemption of Generation-Skipping Stock**

Stock subject to a generation-skipping transfer may be redeemed under *I.R.C. § 303* to pay generation-skipping transfer taxes, provided the generation-skipping transfer occurs at or as a result of the death of an individual, and the 35-percent test [*see [2][a], above*] is applied solely with respect to the generation-skipping transfer rather than that transfer plus the estate [*I.R.C. § 303(d)*]. However, the time period within which the redemption must be made and the limitation on the amount of stock that can be redeemed are applied by reference to the date of the generation-skipping transfer, as opposed to the date of death [*I.R.C. § 303(d)(3)*].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Business & Corporate Law  
Closely Held Corporations  
General Overview  
Business & Corporate Law  
Corporations  
Finance  
Dividends & Reacquisition of Shares  
Cancellation & Redemption  
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*25-68A California Legal Forms--Transaction Guide § 68A.46*

**AUTHOR:** Steven M. Goldberg Practice Consultant

**§ 68A.46 Extension of Estate Tax Payments Attributable to Closely Held Business Interests**

**[1] Thirty-Five Percent Rule Permits Deferral and Installment Payments**

When the value of a decedent's interest in one or more interests in a closely held business includable in the decedent's gross estate exceeds 35 percent of the decedent's adjusted gross estate, the executor may elect to pay all or part of the federal estate tax attributable to that interest in two to 10 equal annual installments [*I.R.C. § 6166(a)(1)*]. The election permits deferral over a 14-year period because the deferred payments begin on a date selected by the executor not more than five years after the original due date of the tax. Annual interest payments are made for five years, followed by 10 annual installments of principal and interest. In essence, the last year of interest and the first year of principal overlap [*I.R.C. § 6166(a)(1), (3); see I.R.C. § 6151(a)*].

For purposes of deferral and installment payments, "interest in a closely held business" means any of the following [*I.R.C. § 6166(b)(1)*]:

- An interest as a proprietor in the trade or business carried on as a proprietorship.
- An interest as a partner in a partnership carrying on a trade or business, if either of the following is true:
  - Twenty percent or more of the total capital interest in the partnership is included in determining the gross estate of the decedent, or
  - The partnership had 45 or fewer partners (15 or fewer partners for decedents dying before 2002).

- Stock in a corporation carrying on a trade or business if either of the following is true:
  - Twenty percent or more in value of the voting stock of the corporation is included in determining the gross estate of the decedent, or
  - The corporation had no more than 45 shareholders (no more than 15 shareholders for decedents dying before 2002).

**PRACTICE TIP:**

The definition of what constitutes a trade or business is the subject of significant interest on the part of the IRS. For partnerships holding rental real estate, a partnership constitutes a trade or business if the partnership provides services. A taxpayer can secure a determination if the partnership qualifies under *I.R.C. § 6166*. *Commentary by Steven M. Goldberg*.

In determining the estate tax value of a closely held corporation, the executor should consider the total tax picture. For example, in certain cases, the business should be valued at a high enough level to meet the 35-percent test [*see I.R.C. §§ 303, 6166*]. In other situations, it may be more advisable to use the alternate valuation date or a special use valuation to arrive at the lowest valuation for the business. If either the estate or the recipients of the business assets have a liquidity problem, the business should be valued, if possible, at a level high enough to qualify for the deferral under *I.R.C. § 6166*.

The maximum amount of tax that may be paid in installments is the portion of tax due bearing the same ratio to the total estate tax as the ratio of the value of the closely held business to the total adjusted gross estate [*I.R.C. § 6166(a)(2)*]. The estate must pay interest on the deferred estate taxes. A favorable 2-percent rate applies to the amount of deferred estate tax attributable to the first \$1 million in taxable value of the closely held business. The interest rate imposed on the amount of the deferred estate tax attributable to the taxable value of the closely held business in excess of \$1 million is reduced to an amount equal to 45 percent of the rate applicable to underpayment of taxes [*I.R.C. § 6166(j)(1), (2)*]. The \$1 million figure is subject to annual inflation adjustments after 1998. For decedents dying in 2005, for example, the figure is \$1,170,000 [ *Rev. Proc. 2004-71, 2004-50 I.R.B. 970* ]. Interest paid on deferred estate taxes is not deductible for estate or income tax purposes [*I.R.C. §§ 163(k), 2053(a)(2), (c)(1)(D)*].

Although the election ordinarily permits deferral over a 14-year period, as discussed above, when the decedent's estate meets the 20-percent ownership requirement only because interests held by family members are treated as owned by the decedent [*I.R.C. §§ 267(c)(4), 6166(b)(2)(D)*], and the interest in the closely held business is a partnership or stock that is not readily tradable, the five-year deferral is unavailable. Therefore, the estate tax payments may be spread over only 10 years, and the 2-percent interest rate that applies to a portion of the unpaid estate tax under the deferral election [*see I.R.C. § 6601(j)*] is not available [*I.R.C. § 6166(b)(7)(A); see I.R.C. § 6166(b)(7)(B)* ("non-readily traceable stock" defined)].

An estate with a qualifying property interest held through holding companies that claims installment payment of estate tax must make all installment payments of estate tax (which will include both principal and interest) relating to a qualifying property interest held through holding companies over five years [*I.R.C. § 6166(b)(8)(B)(ii)*, effective for decedents dying after 2001]. The estate of a decedent with an interest in a qualifying lending and financing business [*see I.R.C. § 6166(b)(10)(B)* for a definition of businesses that qualify] may pay the installments over five (rather than 10) years, and the 5-year deferral for principal is not allowed. The payments (which include both principal and interest) must begin on the due date of the estate tax return (without regard to extensions) [*I.R.C. § 6166(b)(10)(A)(ii), (iii)*, effective for decedents dying after 2001].

In determining whether a closely held business meets the 35-percent requirement [*see I.R.C. § 6166(a)(1)*], the value of

corporate passive assets is not considered [I.R.C. § 6166(b)(9)(A), (B)]. Stock in a holding company therefore ordinarily would not qualify for estate tax deferral [I.R.C. § 6166(b)(9)(B)(ii)]. Under a statutory exception, however, tax deferral is permitted for holding company stock to the extent of the portion of the stock that represents directly ownership by the holding company in a closely held corporation carrying on a trade or business [I.R.C. §§ 6166(b)(8), 6166(b)(9)(B)(ii)]. This rule for holding companies applies, however, only if the stock is non-readily-tradable stock [I.R.C. § 6166(b)(8)(B); see I.R.C. § 6166(b)(7)(B)]. If this requirement is not met, but all the stock of each holding company taken into account is non-readily-tradable, then installment payments are permitted, but only over five years [I.R.C. § 6166(b)(8)(B)(ii), effective for decedents dying after 2001].

**PRACTICE TIP:**

To increase the chances that the deferral and installment payment options may be available to the estate, it may be appropriate to reduce the other assets of estate by attempting to make lifetime gifts more than three years before death. *Commentary by Steven M. Goldberg.*

**[2] Additional Qualifications for Election**

For the estate to elect to extend payment of estate taxes for closely held business interests, both the following must also be true:

- The decedent must have been a United States citizen or resident at the date of death [I.R.C. § 6166(a)(1), (3); see I.R.C. § 6151(a)].
- The business must have been actively carrying on a trade or business [I.R.C. § 6166(b)(1)(A), (B), (9)].

**[3] Acceleration of Deferred Tax**

**[a] Disposition of 50 Percent of Interest**

The installment payment election is terminated, and the deferred estate tax payments are accelerated, on any subsequent sale, exchange, or other distribution of 50 percent or more of the value of the decedent's interest in a closely held business. Similarly, acceleration is triggered when 50 percent or more of the value of the trade or business is withdrawn [I.R.C. § 6166(g)(1)(A)].

On disposition or withdrawal of 50 percent, the unpaid installments must be paid on notice and demand by the IRS. Dispositions and withdrawals are aggregated to determine the applicability of the acceleration rules [I.R.C. § 6166(g)(1)(A)]. Certain exchanges of stock, recapitalizations, and other neutral changes in the identity or form of doing business do not accelerate the payment of estate taxes [see I.R.C. § 6166(g)(1)(C)].

Transfers by the estate of an interest in a closely held business to a beneficiary, trustee, or heir of the decedent is not a distribution for purposes of acceleration of deferred payments [I.R.C. § 6166(g)(1)(D)]. However, a subsequent transfer by the beneficiary, trustee, or heir will trigger acceleration of deferred payments unless the transfer is made by reason of the death of the transferor and the transferee is a member of the transferor's family [I.R.C. §§ 267(c)(4), 6166(g)(1)(D)].

Acceleration of payment of deferred tax is subject to different rules for holding companies. A disposition of any interest in holding company stock or the withdrawal of money or other property from such a holding company is treated as a disposition or withdrawal that can trigger acceleration [I.R.C. § 6166(g)(1)(E)]. In addition, any disposition of any interest in the stock, money or property of the underlying corporation can trigger acceleration [I.R.C. § 6166(g)(1)(F)].

**[b] Section 303 Redemptions Not Treated as Distribution**

When closely held business stock is redeemed to pay estate taxes [*I.R.C. § 303; see § 68A.45*], the redemption of the stock and the withdrawal of money and other property distributed from the business in the redemption is not treated as a distribution or withdrawal for purposes of accelerating the payment of the deferred taxes [*I.R.C. § 6166(g)(1)(B)*]. However, an amount equal to the redemption distribution must be paid toward the estate tax due on or before the earlier of the first installment due date following the redemption or within one year of the redemption. To determine whether future withdrawals or dispositions exceed the 50 percent limitation, the value of the interest in the closely held business is reduced by the value of the stock redeemed [*I.R.C. § 6166(g)(1)(B)(ii); see Rev. Rul. 86-54, 1986-1 C.B. 356*].

#### **[c] Nonpayment or Late Payment of Taxes**

Acceleration of deferred taxes is also ordinarily triggered by a failure to pay or a delinquent payment of tax or interest [*I.R.C. § 6166(g)(3)(A)*]. However, a late payment does not trigger acceleration if the full amount of the delinquent payment is paid within six months of the payment's due date [*I.R.C. § 6166(g)(3)(B)*].

#### **[4] Installment Payment of Certain Generation-Skipping Transfer Taxes**

When the deferral election is made, any generation-skipping transfer tax [*see I.R.C. § 2601 et seq.; see also § 68A.60*] imposed on an interest in a closely held business transferred in a direct skip [*see I.R.C. § 2612(c)*] occurring at the same time as, and as a result of, the decedent's death is treated as an additional estate tax. As such, the generation-skipping tax is also payable in installments [*I.R.C. § 6166(i)*].

#### **[5] Exhaustion of Administrative Remedies Before Seeking Declaratory Relief With Respect to Election**

An executor who has made an election to extend the time for payment of estate tax with respect to an interest in a closely held business under *I.R.C. § 6166* may request a declaratory judgment from the tax court if the IRS has done any of the following [*I.R.C. § 7479*]:

- Determined that the election cannot be made with respect to the estate or property included in the estate.
- Failed to make a determination with respect to the estate or any property included in the estate within 180 days after the executor filed the election.
- Made a determination that the extension of time for payment no longer applies with respect to the estate or any property included in the estate.

A declaratory judgment may not be issued, however, unless the executor has exhausted all administrative remedies [*I.R.C. § 7479(b)*]. To exhaust administrative remedies, an executor must [ *Rev. Proc. 2005-33, 2005-24 I.R.B. 1231* ]:

- Timely file a Form 706, United States Estate (and Generation-Skipping Transfer) Tax Return on behalf of the estate and attach the election to extend the time to pay under *I.R.C. § 6166(a)*.
- For a deficiency assessed with respect to an estate for which the executor did not make an election to extend the time to pay on Form 706, an executor who wishes to pay the deficiency in installments must elect to extend the time to pay the deficiency under *I.R.C. § 6166(h)* by filing a notice of election with the IRS within 60 days after the date that notice and demand for payment of the deficiency is made.
- Request, in writing, an appeals conference within 30 days after the date of mailing of the IRS preliminary determination letter, or by any later date for responding to the letter agreed on by the executor and the IRS

- Participate fully in the appeals conference.

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Tax Law Federal Estate & Gift Taxes Estate Tax Returns Payments



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*25-68A California Legal Forms--Transaction Guide §§ 68A.47-68A.59*

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**[Reserved]**

§§ 68A.47[Reserved]



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*25-68A California Legal Forms--Transaction Guide § 68A.60*

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**§ 68A.60 Effect of Generation-Skipping Transfer Tax on Family Businesses**

**[1] Imposition of Tax**

**[a] Transfers on Which Tax Is Imposed**

**NOTE**

**REGARDING GENERATION-SKIPPING TRANSFER TAX REPEAL.** The generation-skipping tax (GST) has been repealed, effective for generation-skipping transfers after 2009 [*I.R.C. § 2664*]. Similarly, the estate tax has been repealed, effective for decedents dying after 2009 [*I.R.C. § 2210(a)*]. Until then, however, both taxes remain in effect. Moreover, under a sunset provision of the 2001 legislation, that enacted the repeals, all provisions of the legislation--including the repeal of the GST and the estate tax--do not apply to generation-skipping transfers, or to estates of decedents dying, after December 31, 2010 [Pub. Law 107-16, § 901]. Thus, unless the provisions repealing the GST and estate tax are re-enacted before 2010, the GST law in effect before enactment of the 2001 legislation will apply after 2010 [*see* Pub. Law 107-16, § 901; *see I.R.C. §§ 2601-2663*, before amendment by Pub. Law 107-16]. Many commentators feel that significant changes will be made to the estate tax law, and probably the GST, before 2010. Planning around the GST after 2001 involves to some degree guessing how long a client will live. Under the law as currently constituted, for transfers made in 2010 no GST tax will be due [*I.R.C. § 2264*]. But for clients who are likely to live past 2010 and make taxable transfers after that time, the same GST considerations will apply as would have applied under the law as it existed prior to the 2001 legislation because under the current statutory scheme the post-2001 law will revert to the law as it existed prior to the 2001 legislation [Pub. Law 107-16, § 901]. For more extensive commentary on the repeal of the federal estate and generation-skipping transfer tax, see § 60.112A.

The generation-skipping transfer (GST) tax is imposed on direct transfers to persons more than one generation below

that of the transferor. The GST tax also applies to transfers in trust with beneficiaries two or more generations below that of the transferor, depending on which beneficiaries receive distributions from the trust (that is, "taxable distributions" or "taxable terminations") [*I.R.C. §§ 2601, 2613*]. If all beneficiaries of a trust are two or more generations removed, the transfer to the trust is a direct skip.

For example, a GST tax is imposed on a transfer that benefits the transferor's grandchild or great-grandchild, on the occurrence of any of the following three events [*see I.R.C. § 2611*]:

- A taxable termination of an interest in property held in trust.
- A taxable distribution, including a distribution of income.
- A direct skip (an outright transfer).

The following transfers are not treated as generation-skipping transfers for purposes of the GST tax [*I.R.C. § 2611(b)*]:

- Any transfer, other than a direct skip, from a trust to the extent that the transfer is subject to estate or gift tax with respect to a person in the first generation below that of the grantor.
- Any transfer that, if made during the life of an individual, would not be treated as a taxable gift because it was made for education or medical expenses of the transferee.
- Any transfer to the extent that the transferred property was subject to a prior GST tax, the transferee in the prior transfer was in the same or a lower generation than the transferee in the present transfer, and the transfer does not have the effect of avoiding the GST tax.

#### **[b] Rate of Tax**

The GST tax is imposed at a flat rate, equal to the maximum gift and estate tax rate, and is assessed in addition to the gift or estate tax payable on the transfer. The tax rate is multiplied by the inclusion ratio [*see I.R.C. § 2642*] with respect to the transfer to determine the tax due [*see I.R.C. §§ 2001(c), 2641*].

### **[2] Exemptions and Exclusions From Tax**

#### **[a] GST Exemption**

The most important exemption from the GST tax is the GST exemption, which allows every individual an exemption that may be allocated to lifetime transfers of property [*I.R.C. § 2631(a)*]. The exemption amount depends on the year of the transfer. Prior to 2004, the basic amount of this exemption was \$1,000,000, subject to annual adjustment for inflation [*I.R.C. § 2631(c)*, prior to amendment by Pub. L. 107-16]; the adjusted amount for 2003, for example, was \$1,120,000 [ *Rev. Proc. 2002-70, 2002-46 I.R.B. 845* ]. Beginning in 2004, the amount of the GST exemption is equal to the applicable exclusion amount for the federal estate tax [*I.R.C. § 2631(c)*, as amended by Pub. L. 107-16, § 521(c)]. Thus, for 2004 and 2005, the GST exemption amount is \$1,500,000; for 2006, 2007, and 2008, the amount is \$2,000,000; and for 2009, it is \$3,500,000 [*I.R.C. §§ 2010(c), 2631(c)*]. For additional discussion of the GST exemption, see *Ch. 60, Estate Planning, § 60.16[3]*. Spouses making generation-skipping transfers may elect to treat the transfer as made one half by each spouse [*I.R.C. § 2652(a)(2)*].

Special rules apply in allocating the GST exemption [*I.R.C. § 2632*]. An individual (or that individual's executor) may allocate GST exemption to any property transferred by that individual [*I.R.C. § 2631(a)*]. Once made, an allocation is irrevocable [*I.R.C. § 2631(b)*]. All later appreciation attributable to property to which the GST exemption has been

allocated is exempt from the GST tax [H.R. Rep. No. 99-426, 99th Cong, 2nd Sess 826 (1985)].

If an individual makes a direct skip while living, any unused GST tax exemption is automatically allocated to a direct skip to the extent necessary to make the inclusion ratio for that property equal to zero [I.R.C. § 2632(b)(1)]. An individual can elect out of the automatic allocation for lifetime direct skips [I.R.C. § 2632(b)(3)]. If any individual makes an indirect skip [see I.R.C. § 2632(c)(3)(A)] while living, then any unused portion of such individual's GST tax exemption is allocated to the property transferred to the extent necessary to produce the lowest possible inclusion ratio [I.R.C. § 2632(c)(1), effective for transfers subject to estate or gift tax made after December 31, 2000, and to estate tax inclusion periods ending after December 31, 2000].

An individual can elect not to have the automatic allocation rules apply to an indirect skip, and any such election will be deemed timely if filed on a timely-filed gift tax return for the calendar year in which the transfer was made or deemed to have been made or on such later date or dates as may be prescribed by the Treasury Secretary. An individual can elect not to have the automatic allocation rules apply to any or all transfers made to a particular trust and can elect to treat any trust as a generation-skipping transfer trust with respect to any or all transfers made to the trust. The election can be made on a timely-filed gift tax return for the calendar year for which the election is to become effective [I.R.C. § 2632(c)(5); *Treas. Reg.* § 26.2632-1(b)(2)(iii)(B), (C), (4)(iv) (manner and time for making election out, and example of language that may be used in statement required to elect out)].

An election not to have the automatic allocation rules apply may be made with respect to any of the following [*Treas. Reg.* § 26.2632-1(b)(2)(iii)(A)]:

- One or more prior year transfers made to a specified trust or trusts.
- One or more (or all) current year transfers made to a specified trust or trusts.
- One or more (or all) future transfers made to a specified trust or trusts.
- All future transfers made to all trusts whether or not in existence at the time the election out is made.
- Any combination of the above.

An election out does not affect the automatic allocation of the GST exemption to any transfer that is not covered by the election out statement. An election out with respect to future transfers remains in effect unless and until terminated and, once made, a transferor need not file a Form 709 in future years solely to prevent the automatic allocation of the GST exemption to any future transfer covered by the election out [*Treas. Reg.* § 26.2632-1(b)(2)(iii)(D)].

Requests for an extension of time to allocate a GST exemption are governed by *Treas. Reg.* § 301.9100-3 [I.R.C. § 2642(g)(1)(B); see Letter Rul. 200322015 (60-day extension to allocate exemption granted to grantor who reasonably relied on qualified tax professional who failed to make allocation; Letter Rul. 200324041 (60-day extension to allocate exemption to lifetime transfers made to irrevocable trust granted to grantor and his wife, when accounting firm they retained to prepare tax returns related to trust failed to advise them to allocate their GST exemption to these transfers)]. A simplified alternate method for allocating the GST exemption is provided by *Rev. Proc.* 2004-46, 2004-31 I.R.B. 142 .

The GST tax exemption can be allocated retroactively when there is an unnatural order of death. If a lineal descendant of the transferor predeceases the transferor, then the transferor can allocate any unused GST exemption to any previous transfer or transfers to the trust on a chronological basis. A transferor may retroactively allocate GST exemption to a trust when a beneficiary (1) is a non-skip person; (2) is a lineal descendant of the transferor's grandparent or a grandparent of the transferor's spouse; (3) is a generation younger than the generation of the transferor, and (4) dies

before the transferor [*I.R.C. § 2632(d)(1)*].

**[b] Other Exclusions or Exemptions**

In addition to the GST exemption, the following are excluded or exempted from the GST tax, effective for GSTs occurring after 1997 [*see I.R.C. §§ 2601, 2611(b), 2651(e)*]:

- All gifts qualifying for the transferor's annual gift tax exclusion [*see I.R.C. § 2503*], with the exception of gifts to trust subject to a power of withdrawal, when the trust has more than one beneficiary or otherwise does not meet the requirements of *I.R.C. § 2642(e)*.
- Transfers to grandchildren if the parent is deceased (transferee treated as child of transferor and all lineal descendants moved up one generation).
- Transfers to second generation or collateral heirs (such as grandnieces and grandnephews), if the decedent has no lineal descendants at the time of the transfer and the collateral heir's parent (such as the niece or nephew of the transferor) is deceased at the time of the transfer.

**PRACTICE TIP:**

Often, planning for the generation-skipping transfer tax is aimed at limiting generation-skipping transfers to transfers that are exempt and fully utilizing each individual's exemption in those estates in which a skip is appropriate. The tax is complex, and a full explanation of it is beyond the scope of this chapter. For further discussion, see Ch. 60, *Estate Planning . Commentary by Steven M. Goldberg*.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Tax Law Federal Estate & Gift Taxes Generation-Skipping Transfer Taxes (IRC secs. 2601-2663)



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*25-68A California Legal Forms--Transaction Guide §§ 68A.61-68A.69*

**AUTHOR:** Steven M. Goldberg Practice Consultant

**[Reserved]**

§§ 68A.61[Reserved]



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*25-68A California Legal Forms--Transaction Guide § 68A.70*

**AUTHOR:** Steven M. Goldberg Practice Consultant

**§ 68A.70 Property Tax**

California taxes real property using an acquisition date valuation system. Proposition 13, passed in 1978, places a cap on property taxes by limiting reappraisals to changes in ownership rather than annual reappraisals [*see* Cal. Const., art. XIII(A)]. In general, transfers of any interest in real property between a corporation, partnership, or other legal entity and a shareholder, partner, or any other person, and between entities, constitute changes in ownership that may trigger the reassessment of the value of the real property and a resulting change in taxes [*see* Cal. Const., art. XIII(A), § 2; *see also* *Rev. & Tax. Code* §§ 61(j), 62; 18 Cal. Code Reg. § 162.001].

A "change in ownership" is a transfer of a present interest in real property, including any beneficial use, the value of which is substantially equal to the value of the fee interest [*Rev. & Tax. Code* § 60]. For example, a transfer of real property from a partnership to individual general partners constitutes a change in ownership if the proportionate ownership interests are altered. [ *Munkdale v. Giannini* (1995) 35 Cal. App. 4th 1104, 1108-1114, 41 Cal. Rptr. 2d 805 (dissolution of partnership with transfer of certain properties to one partner and other properties to other partner constitutes change in ownership); *Zapara v. County of Orange* (1994) 26 Cal. App. 4th 464, 468-470, 31 Cal. Rptr. 2d 555 (two-step transaction in which one partner purchased other partners' partnership interests and then partnership transferred title to partnership real property to this partner constituted change in ownership)].

However, no change in ownership occurs in certain tax-free or other specified reorganizations, or if the transfer preserves the previous owners' proportionate interests in the property and the transfer is only a change in the means of holding the property. For example, a change in ownership does not include any transfer between individuals and a legal entity, such as a cotenancy to a partnership, that results solely in a change in the method of holding title to the real property and in which proportional ownership interests of the transferors and transferees, whether represented by stock, partnership interests, or otherwise, in each piece of transferred real property, remain the same after the transfer [*Rev. & Tax. Code* § 62(a)(2); 18 Cal. Code Reg. § 462.180(b)(2), (d)]. Thus, a transfer of real property from A and B, as equal cotenants, to a corporation in which A and B each take back 50 percent of the stock does not result in a change in

ownership. However, if A and B each take back 49 percent of the stock and C receives 2 percent of the stock, then there is a change in ownership with respect to the entire property [18 Cal. Code Reg. § 462.180(b)(2), Example 2]. Another example is a statutory conversion or merger of a partnership into a limited liability company or other partnership (or a limited liability company into a partnership), when the new entity remains the same or succeeds to the assets of the disappearing entity without other act or transfer and the partners or members of the disappearing entity maintain the same ownership interest in the profits and capital of the new entity that they held in the disappearing entity [18 Cal. Code Reg. § 462.180(d)].

The purchase or transfer of ownership interests in legal entities, such as the transfer of limited partnership or limited liability interests, does not constitute a transfer of the entity's real property unless the purchase or transfer involves a change of control or is of a majority interest in the entity [Rev. & Tax. Code § 64(a), (c)]. Under the "control" or "majority ownership interest" rule, if one partner acquires control of the business (i.e., a majority ownership interest in any partnership or limited liability company) a property tax reassessment occurs as to all real property owned by the business [Rev. & Tax. Code § 64(c)]. A change of ownership does not result, however, from an interspousal transfer in which one spouse obtains control. For example, there is no change in ownership if a wife transfers her 30 percent ownership interest in a partnership to her husband who also has a 30 percent ownership in the partnership, with the result that he then has a 60 percent ownership interest [18 Cal. Code Reg. § 462.220(b)].

In addition, if a transfer to a partnership or corporation was exempt from reassessment because the proportionate interests in the entity after the transfer were the same as the proportionate interests in the property before the transfer, a subsequent cumulative transfer of more than 50 percent in the entity will cause reassessment of the underlying property [Rev. & Tax. Code § 64(d)].

Certain transfers of real property between parents and children do not constitute changes in ownership and therefore do not trigger a reassessment of the property. This exclusion applies to the principal residence of the parent and to the first \$1 million of assessed value of other real property. Because the assessed value is often far less than the fair market value, this exclusion can be quite valuable [see Cal. Const., art. XIII A, § 2(h)(1); Rev. & Tax. Code § 63.1(c)(3) (term "child" includes any child born of parent transferor, any child adopted before age 18, stepchild or spouse of stepchild, son-in-law or daughter-in-law of parent transferor, and certain foster children)]. However, a transfer by a parent to a limited partnership wholly owned by the parent and that parent's children is treated as a change of ownership and is not eligible for the parent-child exemption [ *Penner v. County of Santa Barbara* (1995) 37 Cal. App. 4th 1672, 1676-1680, 44 Cal. Rptr. 2d 606] .

Specified transfers of real property between grandparents and grandchildren also do not constitute changes in ownership and therefore do not trigger a reassessment of the property [see Rev. & Tax. Code § 63.1(a)(3)].

No change in ownership occurs with respect to interspousal transfers of family limited partnership interests [see Rev. & Tax. Code § 63; 18 Cal. Code Reg. § 460.220]. This exclusion from reassessment applies even when the transfer is to an irrevocable QTIP trust [see 18 Cal. Code Reg. § 462.220(d)]. Similarly, no change in ownership occurs with respect to transfers between registered domestic partners [Rev. & Tax. Code § 62(p); see Fam. Code § 297 (definition)].

#### **PRACTICE TIP:**

In planning a partnership or other family business entity, it can be difficult to preserve the existing property tax assessment when a family owns multiple real properties, especially if there is more than one current owner. Since an inadvertent transfer causing reassessment will likely cause increased annual property taxes, counsel should carefully plan transfers of real property to partnerships or other business entities. The cumulative effect of increased annual property taxes may be so large that significant changes are made to the business formation plan. In some cases, this impact can cause a family to decide not to form the entity. *Commentary by Steven M. Goldberg.*

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Tax LawState & Local TaxesReal Property TaxGeneral OverviewTax LawState & Local TaxesReal Property  
TaxAssessment & ValuationGeneral OverviewTax LawState & Local TaxesReal Property TaxAssessment &  
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*25-68A California Legal Forms--Transaction Guide § 68A.71*

**AUTHOR:** Steven M. Goldberg Practice Consultant

**§ 68A.71 Documentary Transfer Tax**

Under the Documentary Transfer Tax Act [*Rev. & Tax. Code § 11901 et seq.*], a local legislative body may impose a transfer tax on each deed, instrument, or writing by which real property sold within the county is granted, assigned, transferred, or otherwise conveyed to or vested in another person when the consideration or value of the interest or property conveyed, exclusive of the value of any lien or encumbrance remaining on the property at the time of sale, exceeds \$100 [*Rev. & Tax. Code § 11911(a), (b)*]. Thus, California counties may impose a documentary transfer tax on transfers of real property. Cities within counties that have imposed a documentary transfer tax may also tax these transfers [*Rev. & Tax. Code § 11911(a), (b)*; *see Rev. & Tax. Code § 11911(c)* (credit allowed against county transfer tax for amount of transfer tax imposed by city); *see also Rev. & Tax. Code § 11925(b)* (tax inapplicable to certain partnerships holding real property)].

A deed may not be recorded unless any required documentary transfer tax or taxes have been paid [*Rev. & Tax. Code § 11933*]. If a deed is recorded without the requisite payment, the failure to collect the tax does not affect the constructive notice imparted by recordation of the deed.

The rate of the documentary transfer tax may vary greatly among cities and counties.

**PRACTICE TIP:**

As with the imposition of property taxes [*see § 68A.70*], certain cities allow an existing partnership to convert to an LLC without incurring a documentary transfer tax, provided that the LLC is considered a continuation of the original partnership for federal tax purposes [*see, e.g., Stats. 1996, ch. 57, § 29* (LLCs)]. Because of the potentially significant variance in the rate of documentary transfer taxes from one city or county to another, it may be prudent to advise the client about these differences. For discussion of LLCs generally, *see Ch. 12C, Limited Liability Companies . Commentary by Steven M. Goldberg.*

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Real Property LawPurchase & SaleGeneral OverviewTax LawState & Local TaxesGeneral OverviewTax LawState &  
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*25-68A California Legal Forms--Transaction Guide § 68A.72*

**AUTHOR:** Steven M. Goldberg Practice Consultant

**§ 68A.72 Inheritance Taxes**

California imposes a pick-up estate tax. In general, the tax equals the amount of the excess, if any, of (1) the maximum allowable amount of the federal credit for state death taxes attributable to property located in California, over (2) the federal estate tax payable by the estate [*Rev. & Tax. Code § 13302*]. Like federal law [*see § 68A.35*], California now allows deferral or installment payment of this tax [*see Rev. & Tax. Code § 13550*], although numerous questions exist regarding the application of the governing provision [*see Montgomery, California Estate Tax: California Offers Deferral in Conformity With I.R.C. § 6166*, 5(2) Cal. Tr. & Est. Q. 4 (Summer 1999)].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Tax LawState & Local TaxesGeneral OverviewTax LawState & Local TaxesEstate & Gift TaxGeneral OverviewTax LawState & Local TaxesEstate & Gift TaxEstate TaxImposition of Tax



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DIVISION IV: WILLS AND TRUSTS  
CHAPTER 68A USING FAMILY PARTNERSHIPS AND OTHER BUSINESS ENTITIES IN ESTATE PLANNING  
PART II. LEGAL BACKGROUND  
B. Family Business Tax Issues  
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*25-68A California Legal Forms--Transaction Guide §§ 68A.73-68A.79*

**AUTHOR:** Steven M. Goldberg Practice Consultant

**[Reserved]**

§§ 68A.73[Reserved]



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DIVISION IV: WILLS AND TRUSTS  
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*25-68A California Legal Forms--Transaction Guide § 68A.80*

**AUTHOR:** Steven M. Goldberg Practice Consultant

**§ 68A.80 Assessing Client's Risk Tolerance**

Along with assessing the business and family goals and the dynamics of the family relationships, counsel must make an assessment of the client's appropriate level of risk, which involves the financial ability to tolerate risk and the client's attitude toward risk. Factors that may influence a client's risk tolerance include the following:

- Age and health.
- Marital status and family responsibilities.
- Current and expected future earnings, stability of employment, and the financial status of the business.
- Outside sources of income, including trusts, gifts and expected inheritances.
- Overall assets, liabilities, and net worth.

**PRACTICE TIP:**

Analyzing and establishing the appropriate risk level for a client is one of the most crucial prerequisites for family business and estate planning, because business and estate planning objectives may have to be adjusted to accommodate the client's emotional disposition to risk. It is clear that the IRS views family limited partnerships and valuation discounts with a jaundiced and occasionally aggressive view. Therefore, it is important to educate the client to the potential benefits and detriments of gift and estate tax savings devices.

Equally as important as assessing how well a client is financially situated to tolerate risk is determining the client's emotional tolerance for risk. Because "risk" and "safety" are highly subjective concepts, it is

essential that the client define risk in his or her own terms. Counsel should also consider reviewing the client's investment history; investment experience may reveal attitudes inconsistent with what the client believes and states about his or her attitude toward risk.

Occasionally a client's financial tolerance for risk diverges from his or her emotional tolerance. In general, it is advisable to accept the more conservative of the two. A person may have a high risk tolerance by temperament, but heavy family responsibilities and limited liquid resources might nevertheless warrant a relatively low level of risk.

The financial and emotional abilities to bear risk both change over time, as a client's situation, goals, and attitudes change. Business and estate plans may need to be adapted to accommodate these changes.

*Commentary by Steven M. Goldberg.*

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law  
General Overview



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*25-68A California Legal Forms--Transaction Guide § 68A.81*

**AUTHOR:** Steven M. Goldberg Practice Consultant

**§ 68A.81 Coordinating Succession, Family, and Estate Planning**

**[1] Minimizing Separation of Management and Ownership**

A common strategy in transferring business ownership to the next generation is to focus business ownership in the hands of those leading or working for the business. However, many business-owning parents wish to treat their children equally and will lean toward passing equal shares of the business to their children. For example, the senior generation might equalize wealth transfers by passing business assets to active participants in the business and nonbusiness assets to the nonparticipants. Alternatively, the client might consider transferring voting and nonvoting interests.

This approach can be problematic and disruptive in the family business context, and increasingly complicated as the business passes to succeeding generations. Sibling rivalry and feelings of alienation can erupt because of the perceived disparate treatment. If some children work in the business and others do not, their interests as to salaries, dividends, business expansion, and other business decisions will diverge.

On the other hand, transferring equal shares of the business to participants and nonparticipants alike carries its own dangers: The next generation may not be equally talented or able to effectively work together. Participants may feel that the division is unjust. Nonparticipants may feel rejected.

**PRACTICE TIP:**

Children who do not participate in the family business may complain about the lack of financial return, particularly in the early years when cash or property is used to fund the transfer of the business interests. Most family businesses will not be able to fund buy-outs.

If a client is unable to transfer sufficient amounts of nonbusiness assets to equalize gifts of business assets during his or her lifetime, the client may be able to use life insurance proceeds to equalize the transfer after death. *Commentary by Steven M. Goldberg.*

## [2] Avoiding Conflicts in Succession

To avoid succession conflicts, counsel might well consider encouraging dialogue between the older and younger generations about individual and family goals and business goals, and the best manner and methods to reach them. With a shared vision of the future, the family can identify the type of business leadership needed and assess the qualifications of the proposed successors. Counsel might consider convening regular family meetings to promote discussion and agreement or, according to counsel's comfort level, conduct individual interviews with family members. Counsel might also help to develop formal or informal family mission statements. In working with the family as a whole or with individual family members, however, counsel must always keep in mind ethical obligations regarding representation (who is the client), confidentiality, and potential conflicts of interest [*see* § 68A.16].

Further, counsel can help to identify prospective business leaders, and encourage the training and development of leadership in the designated successors. In addition, counsel can encourage early delegations of authority in advance of the business transfer; the younger generation may need to demonstrate its capabilities to manage the business to the satisfaction of the older generation.

Counsel can also help draft a family employment policy to define who is eligible to work for the business, when and under what conditions, and how specific individuals fit into the current and future structure of the business. An employment policy might do any or all of the following:

- Identify the class of future employees and managers.
- Specify any educational or outside business experience qualifications and prerequisites for employment and management.
- State the preferred or mandatory degree of participation and the nature of performance evaluations.
- Provide for mentoring, apprenticeship, and in-house training by senior family members or nonfamily employees.
- Address nepotism issues.

At a minimum, the employment policy should provide that family members should be employed according to their experience and ability to contribute to the growth and development of the business, or implement a training program so that family members can achieve the requisite experience and skills.

### **PRACTICE TIP:**

The business succession plan (and any coordinated estate plan) should be fully communicated to the affected family members. *Commentary by Steven M. Goldberg.*

## [3] Use of Buy-Sell Agreements

Buy-sell agreements come in two basic types:

- Cross-purchase agreements among shareholders.
- Redemption agreements with the corporation.

Buy-sell agreements can be used both to restrict the transfer of business interests, ensuring continuity of shareholder interest and providing for estate liquidity, and to freeze the value of the interest for gift and estate tax purposes.

However, the value of the interest will be determined without regard to the restriction unless the restriction satisfies the requirements of *I.R.C. § 2703(b)*. For further discussion, see § 68A.40[2][d].

The use of buy-sell agreements can be very advantageous for a small business entity by providing continuity of ownership and management, avoiding potential problems, and helping in resolving problems. Among the purposes these agreements may serve include the following [*see* Ch. 8D, *Buy-Sell Agreements* ]:

- Restricting management and control of the entity.
- Providing for retirement or disability income.
- Providing for post-death income.
- Ensuring continuity of ownership.
- Preventing conflicts over business policies and practices.
- Providing liquidity to pay taxes and other expenses.
- Settling major shareholder disputes.
- Restricting alienation or transfer of ownership.

Buy-sell agreements may impose several different types of transfer restrictions:

- One party must sell stock and another must buy.
- Absolute restrictions on stock transfer.
- "Consent" restrictions on stock transfer.
- "Option" restrictions.
- Restrictions on who may be a transferee of stock.
- Parties are required to buy stock on occurrence of a specified event (such as, the death of shareholder).

Under a mandatory buy-sell agreement, the estate must sell and the business entity or other buyer must buy the shares or interests at a fixed price at death. In general, only the interest holder's estate is given permission to sell the shares. If the interest holder is entitled to sell the interests during his or her lifetime, that authority must be qualified by first refusal rights granted to the entity or other buyer designated in the agreement [*see, e.g., Estate of Newhouse v. Commissioner (1990) 94 T.C. 193 (1990), nonacq., 1991-2 C.B. 1* ].

**PRACTICE TIP:**

Under the theory that anticipating and planning for issues before they arise can ease potential problems and help prevent conflicts from erupting at inappropriate times, counsel should consider including a promise in the buy-sell agreement requiring the signing of prenuptial agreements. If this type of promise is already in place and required for all parties, a particular affected family member is less likely to object to it. Of course, it is also possible that a requirement of prenuptial agreements will provoke strong

resentments from those required to comply with it. An alternative to the prenuptial requirement would be a spousal consent to a particular buy-sell agreement. Similarly, the entity agreement or a separate buy-sell agreement should address the effect of divorce. Further, the entity agreement or buy-sell agreement should also include a provision requiring confidentiality. *Commentary by Steven M. Goldberg.*

For further discussion of and forms related to the use and funding of buy-sell agreements, see Ch. 8D, *Buy-Sell Agreements*.

#### **[4] Balancing Conflicting Goals of Retaining Control, Financial Security, and Minimizing Taxes**

Throughout any discussion with clients of business succession and estate planning, there may be a constant tension in objectives. A family business owner's goals often conflict with each other as well as with sound business practice. On the one hand, the owner wishes to maintain control and management of the assets, to protect his or her financial security through cash flow, and to provide tax shelter. Simultaneously, the owner wishes to limit the family's exposure to estate and gift taxes that will be due on the transfer of these assets. If the business continues to prosper, the value of the business assets in the owner's estate will also grow, as will the ultimate transfer taxes.

##### **PRACTICE TIP:**

An entity agreement can create a significant potential for deadlock, e.g., by requiring that the two decision-making general partners must agree on business decisions. The value of the fractional interest subject to transfer may be reduced and the applicable valuation discount increased by the requirement. However, the potential "cost" of a deadlock on a critical business decision may be quite high and even result in dissolution. The desire to maximize valuation discounts and minimize taxes must always be balanced against sound business practice. *Commentary by Steven M. Goldberg.*

#### **[5] Use of Family Limited Partnerships and Limited Liability Companies**

##### **[a] Family Limited Partnerships**

Family limited partnerships (FLPs) can be extremely useful estate planning tools. A FLP operates in a similar fashion as other limited partnerships, but provides the owners with a technique for obtaining numerous estate planning goals, including the reduction of estate and gift taxes in intergenerational transfers while maintaining control of the company. FLPs provide significant benefits in effective family asset management, the transfer of ownership interests, and potential dispute resolution [*see generally* Stephanson, *How to Establish a Successful Family Limited Partnership*, 44(7) *Prac. Law* 41 (1998)].

Nevertheless, caution must be exercised in using the FLP structure because the IRS scrutinizes FLP arrangements for perceived abuses, particularly in the use of valuation discounts [*see* § 68A.82], and challenges should be expected. Clients should be cautioned about the risk. Specifically, the IRS has focused its valuation challenges in the following areas:

- The lack of a legitimate business purpose for the FLP [*see I.R.C. § 2703; see also* § 68A.82].
- The impact of applicable restrictions on valuation [*see I.R.C. § 2704; see also* § 68A.82].
- Condensing the formation of the FLP and gifts of partnership interests into a single, "step transaction" [*see* § 68A.82[4]].
- The true character and separateness of the FLP.

**PRACTICE TIP:**

With regard to step transaction treatment, many practitioners believe that the period of time between formation of the partnership and the transfer of a limited partnership interest is irrelevant to the value of the interest. Rather, they believe that unless the transferee actually obtains control of the underlying partnership asset, the property to be valued is the limited partnership interest. *Commentary by Steven M. Goldberg.*

FLPs are created pursuant to state limited partnership laws. Under the Uniform Limited Partnership Act of 2008 (ULPA '08) [*Corp. Code §§ 15900-15912.07*], a limited partnership must have at least one general partner and at least one limited partner [*Corp. Code § 15901.02(q)*]. An individual may own a general partnership interest and a limited partnership interest as long as there are at least two different partners [*see Corp. Code § 15901.02(q)*].

A typical FLP consists of senior family members (parents) who contribute assets to the limited partnership in exchange for general and limited partnership interests. The limited partnership interests are usually given to junior family members (children). The general partner (or partners) retains operational control over the business, making all business decisions, and remains personally liable for the debts. As limited partners, the children may not participate in management decisions without losing their limited liability [*see Corp. Code §§ 15903.03*].

**PRACTICE TIP:**

Counsel should evaluate the facts of each client's situation to determine whether FLP formation might be better located in another state [*see § 68A.40[2][e]*]. *Commentary by Steven M. Goldberg.*

Once an FLP is created, property is transferred to the limited partnership in exchange for general and limited partnership interests. As the general partners, the parents retain control of the business and can make gifts of the limited partnership interests to their children. The parents usually retain a small percent interest in the company, with the children owning the remaining percentages. However, the parents are still classified as general partners and can therefore make management decisions.

The transfer of appreciated assets to the limited partners is also a very useful planning device. When a gift of a limited partnership interest is given, the future appreciation of a proportional interest in the underlying assets will not be part of the donor's estate. Further, the income attributable to the limited partnership interests given as gifts do not become part of the donor's estate.

FLP agreements typically confer complete discretion over business matters to one or more general partners. Because this absolute authority can create continuity problems if the partnership has a sole general partner, prudence suggests the use of a corporate or other entity as a general partner, or multiple general partners. Further, if the client wishes to secure an estate tax discount on partnership units, the client should not be the sole general partner because death may result in the lapse of a liquidation right that affects valuation [*see § 68A.30[2][e]*; *see also I.R.C. § 2704(a)*]. In general, it is important for estate tax valuation purposes that no one partner has a unilateral right to dissolve the partnership [*see § 68A.40[2][e]*]. If multiple general partners are used, the partnership agreement should address control issues between the general partners.

**PRACTICE TIP:**

Although a significant potential for deadlock among the decision-making general partners may depress the value of the fractional interest and possibly increase the applicable valuation discount, the desire to maximize discounts must always be balanced against sound business judgment. Because the general partners of a limited partnership are exposed to unlimited liability, the LLC vehicle may be more attractive and advantageous to avoid liability issues [*see [b], below*]. *Commentary by Steven M. Goldberg.*

### **[b] Family Limited Liability Companies**

Limited liability companies (LLCs) have become increasingly popular due to the attraction of corporate limited liability and partnership flow-through federal and state income tax treatment. Family LLCs are also becoming advantageous vehicles for estate planning purposes: Formation and operating requirements can be easier to explain to clients and cheaper to organize than FLPs, although the annual California tax on LLCs [*see Rev. & Tax. Code § 17942; see also § 68A.30*] with significant gross revenues will be higher than the annual franchise tax on limited partnerships [*see [a], above*]. An LLC can be structured to mirror the operations of an FLP, shield members from liability, and achieve similar valuation discounts. In California, the majority dissolution provision in default law [*see Corp. Code § 17350(b)*] makes it easier to dissolve the LLC and may lead to somewhat lower discounts.

Although the IRS has not yet launched a concerted attack on LLCs as estate planning tools, it can be expected that attacks similar to those used against limited partnerships will be used against LLCs. For example, the IRS can be expected to argue that any provision in an operating agreement for a California LLC that requires a percentage greater than a simple majority to dissolve an LLC is an applicable restriction under *I.R.C. § 2704(b)* that is ignored for valuation purposes. As discussed in § 68A.40[2][*e*], when the decedent possesses the unilateral right to dissolve an entity, the underlying property of the entity will be valued rather than the interest in the business entity.

LLCs are created pursuant to state LLC law. Under California law, an LLC is formed when one or more persons executes and files articles of organization with the Secretary of State and the members enter into an operating agreement [*Corp. Code § 17050(a), (c)*]. Under the law in effect prior to January 1, 2000, LLCs must have two or more members (unless the LLC is dissolving) [*Corp. Code §§ 17001(t), 17050(b)*]. Effective January 1, 2000, LLCs may have one or more members [*Corp. Code §§ 17001(t), 17050(b)*, as amended by Stats. 1999, ch. 490].

#### **PRACTICE TIP:**

Counsel should evaluate the facts of each client's situation to determine whether LLC formation might be better located in another state. Thus, the first step in determining whether a LLC is the most favorable way to organize a business is to examine the state LLC statutes. These statutes can significantly affect valuation discounts [*see §§ 68A.42[2][e], 68A.82*]. Even when state law requirements are satisfied and the company qualifies as an LLC in the state of formation, compliance does not automatically guarantee federal tax treatment as a partnership. This can result from the state law's failure to require at least two members in an LLC, a federal requirement for partnership tax treatment [*Treas. Reg. § 301.7701-3(a)*]. For example, although California follows the federal check-the-box entity classification rules [*see Rev. & Tax. Code §§ 17024.5(d), (e)(1), 23051.5(d), (e)(1); see also Treas. Reg. §§ 301.7701-1-301.7701-6*], California LLC law permits the formation of single-member LLCs [*Corp. Code §§ 17001(t), 17050(b)*], which would not qualify for federal partnership tax treatment [*Treas. Reg. § 301.7701-3(a)*].

Careful scrutiny of state LLC laws is necessary if the entity is planning to choose partnership tax treatment for income tax purposes. Conversely, a single-member LLC can have valuation advantages: There can be no argument about a loss of value on formation in a single-member LLC. *Commentary by Steven M. Goldberg.*

For further discussion, see Ch. 12C, *Limited Liability Companies* .

### **[c] Planning to Avoid I.R.C. § 2701 Valuation Rules**

*I.R.C. § 2701* applies to family LLCs in the same manner and method as it does to family limited partnerships. The special valuation rule applies when an individual transfers an interest to or for the benefit of a family member, while retaining a liquidation, put, call, conversion or distribution right, and the interest transferred is not of the same class or proportionally the same as the retained interest [*see § 68A.40[2][b]*]. In the LLC context, this rule may be avoided by

not creating different classes of interests or, alternatively, limiting the differences to only a difference in the right to vote or manage the LLC. For example, it might be appropriate to form a member-managed LLC, in which a member could receive additional income or compensation for management services to the LLC. This method of income shifting appears to be acceptable in both LLCs and partnerships without triggering a Section 2701 problem.

Another alternative method for shifting wealth may be to use a gift/leaseback. In this arrangement, the business owner transfers appreciating assets to younger family members through a family business entity, which freezes the estate and creates the income shifting opportunities regarding the use of the donated asset. The owner receives income in the form of lease payments from the family business entity. However, the lease must satisfy the following requirements [*Treas. Reg. § 25.2701-3(c)(3)(ii)* (safe harbor)]:

- The lease payments must be for full and adequate consideration.
- A good faith effort must have been made to determine the fair market value of rental property under the lease.
- The terms of the lease reflect the value as determined.

#### **[d] Planning to Avoid I.R.C. § 2704 Valuation Rules**

When an FLP agreement or family LLC operating agreement affords certain partners or members unilateral rights to liquidate, those rights may trigger the valuation provisions of *I.R.C. § 2704(a)*. Even if there is no unilateral right to liquidate, if the transferor and family control the entity, the lapse is treated under the special valuation rules [*see I.R.C. § 2704(a)*; *see also § 68A.40[2][e]*]. However, if the other partners or members cannot immediately liquidate the transferor's interest, no transfer occurs [*see I.R.C. § 2704(a)*]. This ability to liquidate is determined with reference to state law as modified by the partnership or operating agreement.

To avoid the application of *I.R.C. § 2704(b)*, which ignores restrictions on liquidation that are more restrictive than state law [*see § 68A.40[2][e]*], the partnership agreement or operating agreement can be drafted so that any restriction on the right to liquidate is no more restrictive than the state law governing the matter. Conversely, the partnership agreement or LLC operating agreement should not be less restrictive than state law either, since the less restrictive provisions would affect valuation. The value of the transferred interest for gift and estate tax purposes is the value of future cash distributions [*see I.R.C. § 2704(b)*; *Treas. Reg. §§ 25.2704-1(c)*, *25.2704-2*]. Alternatively, a partnership agreement may avoid the application of *I.R.C. § 2704(b)* by requiring the consent of a non-family partner to the removal of liquidation and withdrawal restrictions. *I.R.C. § 2704(b)(2)(ii)* provides no exception permitting courts to disregard the presence of non-family limited partners, even when the non-family limited partner stipulates to its probable consent to the removal of the restriction; therefore, these restrictions could not be treated as removable by family members after the transfer. Because these restrictions did not constitute an applicable restriction, they cannot be disregarded for purposes of gift tax valuation, regardless of whether the restrictions are more restrictive than the applicable state law [*Kerr v. Commissioner of Int. Rev. (5th Cir. 2002) 292 F.3d 490*].

#### **PRACTICE TIP:**

Counsel may wish to consider a variety of possibilities in structuring the partnership to ensure that no one person possesses the unilateral right to dissolve the partnership while including no restrictions on the right to liquidate in the partnership agreement that are greater than applicable state law. For example, a partner who owns a minority interest in a partnership will usually not have the ability to unilaterally liquidate the partnership under applicable state law. Similarly, a partnership with more than one general partner is often more difficult to liquidate under applicable state law than a partnership with only one general partner. Furthermore, since the death of general partner may be a dissolution event under state law, it may be appropriate to have a corporate general partner, assuming the right to liquidate the

corporate general partner is not held by the transferor, or a trust, provided that the trust does not terminate upon the death of the transferor/trustee. Care should be taken, however, in attempting to achieve these goals. For example, the IRS may attack a transfer done simply to put a controlling partner or shareholder in a minority position. Further, the shift of a majority partner to minority status could also trigger property tax reassessment [*see* § 68A.70], depending on previous transfers to the partnership and of partnership interests. *Commentary by Steven M. Goldberg.*

### **[e] Using GRATs and GRUTs**

One of the more popular ways to freeze an estate with FLP and LLC interests or S corporation stock, is to use the asset to fund a grantor retained annuity trust (GRAT) or a grantor retained unitrust (GRUT). In general, the GRAT is more popular than the GRUT because to the extent that the rate of appreciation of assets in a GRAT is greater than the applicable federal rate, a transfer will be accomplished that is not generating any estate taxes.

An entity taxed as a partnership may be entitled to basis adjustments [*see I.R.C. §§ 743, 754*; valuation under *I.R.C. § 2702* is discussed in § 68A.40[2][c]]. However, these basis adjustments are only available if the asset is transferred at death and receives a stepped-up basis [*see I.R.C. § 1014*; for decedents dying after 2009, a modified carryover basis rule generally applies, so a step-up basis does not apply (*I.R.C. § 1022*); *see* Ch. 60, *Estate Planning*, for a detailed discussion], which might make the use of a GRAT or GRUT less desirable if the asset has a low basis.

### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Business & Corporate Law Closely Held Corporations General Overview Estate, Gift & Trust Law General Overview Tax Law Federal Estate & Gift Taxes General Overview



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*25-68A California Legal Forms--Transaction Guide § 68A.82*

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**§ 68A.82 Using Valuation Discounts**

**[1] Effect of Valuation Discounts**

Many factors can restrict or reduce the value of an interest in a family business, such as a family limited partnership or limited liability company. These include the following:

- The nature of the business entity.
- Provisions in the limited partnership agreement or limited liability company operating agreement.
- Indirect ownership of the partnership's assets.

If the reductions decrease the estimated value of an interest below the holder's proportionate share in the partnership assets, these reductions are referred to as "valuation discounts."

The three major areas in which the IRS ordinarily accepts valuation discounts are discussed in [2], *below*. However, the IRS may still reject these valuation discounts unless they represent a bona fide business arrangement--fair and comparable to similar arm's length transactions. Of course, the IRS and practitioners often disagree about the circumstances under which valuation discounts should be granted. A client's willingness to challenge the IRS should be discussed before entering into the transaction [*see* § 68A.80].

**[2] Primary Factors Affecting Valuation**

**[a] Limited Control**

The degree of control a holder of an interest in a family business can exercise over business decisions is a major factor affecting the value of the interest. In general, an interest with limited or no control over business decisions is worth less

than a controlling interest in the business.

In most limited partnerships, control is vested in the hands of the general partners and the limited partners have very limited authority [*see Corp. Code § 15903.03(b)*] (actions limited partners can take without being deemed to participate in management and control), (c)(list not exclusive)]. With regard to LLCs, the degree of control depends on the management structure of the entity, that is, whether the entity is managed by one or more managers or by all the members. Nevertheless, if the fractional LLC interest carries limited decision-making authority, that interest may have a lower valuation.

**PRACTICE TIP:**

Typically, discounts for a minority interest and lack of marketability are claimed together in valuation discounts. Family limited partnerships and limited liability companies have generally been entitled to both minority interest discounts and lack of marketability discounts. Together these discounts can range from 30 to 60 percent.

Typically, discounts affecting gifts are higher than transfers at death because gifts usually involve minority interests. Furthermore, each gift is independently valued while the entire interest included in the estate is valued as one interest at death. Thus, the principles of gift taxation make discounts easier to achieve for lifetime transfers than for transfers at death. However, if the decedent's interest is less than 50 percent of the business at the time of the decedent's death, the estate may be able to sustain discounts similar to those available for gifted minority interests. *Commentary by Steven M. Goldberg.*

The valuation discount of a fractional interest in a family business is affected not only by the relative (percentage) size of the interest but also by the number of other fractional interests that would need to agree to force some business decision. With sufficient advance planning, if the client wishes a particular percentage of interests to constitute a majority for purposes of control, the client might consider starting to give smaller interests that have no decision-making authority.

The IRS is particularly concerned with the lack-of-control discount that may be applied when FLP interests are given or transferred.

**[b] Marketability and Liquidity**

The lack of marketability and liquidity associated with fractional interests in family businesses is another critical factor affecting the value of the interest. The lack of marketability discount reflects the fact that it is difficult to sell partial interests in a privately held company. No ready market exists for the interests; no pool of investors is ready to purchase these interests; no clearinghouse exists to provide financial information about these interests; and no organized exchange prices or sells these interests.

Marketability discounts ordinarily range from 10 to 30 percent. Factors that affect marketability include the following:

- The amount of cash-flow distributions from the partnership attributable to the fractional interest.
- The amount and nature of partnership debt.
- The nature and value of partnership assets.
- Whether the general partner is entitled to reasonable compensation for services rendered, which will reduce the partnership's cash flow.

- Whether the general partner has discretion over the timing and amount of distributions.
- The partnership's history with regard to distributions.

Recent case activity in this area provides further guidance. In one case, the Tax Court upheld a 30 percent discount for lack of marketability and set forth a nonexclusive list of 10 factors that must be considered when determining the discount [*see Mandelbaum v. Commissioner (1995) 69 T.C.M. 2852, T.C. Memo. 1995-255*]. The court held that in general the entity can be valued as if it were a publicly held business and then discounted for not being publicly held. In another case, the Tax Court also discussed the use of experts and made it clear that the opinion of an expert can be ignored if it is not, in the court's opinion, properly substantiated [*see Estate of Kaufman v. Commissioner (1999) 77 T.C.M. 1779, T.C. Memo. 1999-119* (court ignored opinions of both experts and ruled that because taxpayer had not met its burden of proof, IRS' valuation would be accepted)].

In another case, in which the IRS had acquiesced, the Second Circuit held that, in principle, an adjustment in stock price for a potential tax liability should be taken into account in valuing stock, even when no actual liquidation of the entity is planned. This is also true when there is no sale or distribution of assets planned by the entity [*see Eisenberg v. Commissioner (1998), acq. AOD CC-1999-001, 1999-4 I.R.B. 4*]. Further, the Tax Court held that in a case involving shares burdened by corporate tax liability, but if no liquidation or asset sale is contemplated as of the valuation date, it is inappropriate for the full amount of the tax to be allowed at a discount [*see Estate of Davis v. Commissioner (1998) 110 T.C. 530*].

### **[c] Restrictions on Transferability**

Transfer restrictions can significantly reduce the value of an interest in a family business and form the basis for substantial discounts. In the family business context, these restrictions typically take the form of a unanimous consent to the transfer or a right of first refusal. The potential limiting effect of requiring unanimous consent of all partners to a transfer is self-explanatory, although likely to be ignored under *I.R.C. § 2704(b)*.

A right of first refusal commonly requires an interest holder who receives an offer to buy the interest from outside the business to first offer the interest for sale to one or more of the other partners. This restriction limits the marketability of the interest: Potential purchasers may be deterred from negotiating a purchase price that can then be matched by the existing partners and the purchaser may seek a discount to compensate for that risk.

### **[3] Documentation of Basis for Valuation Discounts**

#### **[a] Selection of Appraisers**

To sufficiently document the value of a family business interest [*see [c], below*], as well as any applicable discounts, clients should retain at least two appraisers. For example, if some of the underlying assets of a family business entity are real properties, one appraiser should be experienced in business valuation, while the other should be a real estate specialist. Depending on the nature of the family business and any noncash assets transferred to it, additional appraisers may be needed.

If the business owner will be making annual gifts following formation, those gifts should also be appraised. However, the cost of obtaining the appraisal should be weighed against the potential benefit.

#### **PRACTICE TIP:**

It may be appropriate to make annual gifts in December in one year and January of the following year, thus allowing one appraisal to cover annual gifts from two years. *Commentary by Steven M. Goldberg.*

#### **[b] Organizational or Operating Agreement**

The organizational or operating agreement of the family business entity is ordinarily the primary source for determining the appropriate valuation discount. Therefore, careful planning in advance of formation and precise drafting is critical to securing the desired valuation discount [*see* [c], *below*]. For example, a limited partnership agreement might state that limited partners take no part in and have no control over management decisions and restrict the limited partner's control over day-to-day business operations, partnership distributions, and selling partnership assets. These provisions establish that the partnership interest lacks control rights, which would support a minority interest discount [*see* [2][a], *above*]. Since that provision would be in accord with default state law, it would not be ignored under *I.R.C.* § 2704(b).

### **[c] Documentation Guidelines**

In particular because of the IRS antipathy toward family limited partnership interest discounts and its history of challenging the valuation of interests subject to transfer restrictions, it is important to secure a fact-based, individualized appraisal of the partnership or limited liability membership interests. Both the IRS and the Tax Court require substantial authority to support the designated value of the interest and the amount of the discount.

The business appraiser's opinion must rely on specific, objective information, and the data used for comparison should be as comparable as possible to the interest being valued. It is not sufficient to rely on case precedent to support a valuation; the facts and characteristics of each family business are likely to be sufficiently diverse to preclude useful comparison [*see, e.g., Estate of Berg (1991) 61 T.C.M. 2949, T.C. Memo. 1991-279* (amount of discounts from precedent not persuasive)].

Factors relevant to determining the value of the business interest and the amount of the discount include [*see Mandelbaum v. Commissioner (1995) 69 T.C.M. 2852, T.C. Memo. 1995-255 ; see also Estate of Kaufman v. Commissioner (1999) 77 T.C.M. 1779, T.C. Memo. 1999-119*]:

- The organizational or operating agreement of the business entity [*see* [b], *above*].
- The financial history of the business.
- The nature of the business assets, including the nature and amount of partnership debt.
- The income-generating ability of the business.
- Anticipated business development.
- The rate of return from the business, including a record of distributions.

### **PRACTICE TIP:**

The valuation of family limited partnership and limited liability company discounts may appropriately be based on similar transactions involving publicly registered limited partnerships. The appraisal should identify comparable partnerships and look to secondary market transactions to estimate value.  
*Commentary by Steven M. Goldberg.*

### **[4] Avoiding Step Transaction Characterization**

When formation of the family business entity, transfer of assets to the entity, and gifts of fractional interests occur in close proximity to the taxpayer's death, the IRS has successfully asserted that these transactions should be properly seen as part of a single testamentary transfer [*see, e.g., TAM 97-19-006* (death within two days of FLP formation and gifts), *97-19-009* (death within 54 days of FLP formation and gifts)]. In this situation, the IRS argued the following:

- The business arrangement served merely to transfer assets to family members who would have otherwise received the assets under the taxpayer's existing testamentary plan.
- No business purpose was served.
- The arrangement served the purpose of reducing the value of the taxpayer's estate and taxes due.

Because the beneficiaries' "inheritance" was more or less unchanged by the existence of the family business entity, the IRS ignored the FLP structure and the asserted valuation discounts: What actually passed to the beneficiaries, the IRS held, were the transferred assets themselves and not fractional FLP interests [*see TAM 97-19-006 , 97-19-009*].

Similarly, in a series of private letter rulings dealing with family limited partnerships formed in close proximity to the taxpayer's death, the IRS viewed the steps of the transactions as a single continuous and integrated scheme. Under these letter rulings, the IRS merged the transfers into one transaction, with the result being deemed a transfer of the underlying partnership assets rather than a partnership interest. None of the transfers could be classified as bona fide, arms' length business arrangements. All of the transfers were deemed to be means of transferring property for less than full and adequate consideration and avoiding estate taxes [*see Priv. Ltr. Rul. 9719006, 9723009, 9725002, 9730004*].

**PRACTICE TIP:**

Counsel should be particularly cautious in structuring a "death bed" family business entity. Advance planning can be critical to the success of the arrangement for gift and estate tax purposes. Of course, clients cannot be forced into estate planning, and can sometimes die without advance notice. However, when the timing will be close, extra effort should be made to establish a bona fide business purpose for the arrangement. *Commentary by Steven M. Goldberg.*

**[5] Use of Assignee's Interest**

An assignee's interest might be used to avoid the IRS's disregarding for valuation purposes a liquidation restriction that is more restrictive than the applicable state law [*see I.R.C. § 2704(b)(3)(B); Treas. Reg. § 25.2704-2(b); § 68A.81[5][c]*]. For example, a partnership agreement might structure an assignee's interest that is not entitled to any rights granted to a limited partner other than the right to receive all or part of the assignor's share of distributable income. Even under state law, the holder of the assignee's interest would not be entitled to withdraw and liquidate his or her interest.

The use of an assignee's interest can also be beneficial because the interest may be unattractive to prospective purchasers who may be uninterested in purchasing less than a limited partnership interest. The fact that it may be more difficult to sell the interest may tend to support a higher valuation discount.

**PRACTICE TIP:**

Counsel should consider having senior family members designate the donee of an interest as an assignee rather than as a limited partner. *Commentary by Steven M. Goldberg.*

**[6] Penalty for Substantial Undervaluation of Property**

A penalty may be imposed for the substantial undervaluation of property for estate or gift tax purposes [*I.R.C. § 6662(a), (b)(5)*]. Understatement of an estate or gift tax valuation is substantial if the value of any property is 65 percent or less of the amount determined to be the correct amount of the valuation [*I.R.C. § 6662(g)(1)*]. However, no penalty is imposed unless the portion of the underpayment attributable to the substantial understatement exceeds \$5,000 [*I.R.C. § 6662(g)(2)*].

The IRS may waive the penalty on a showing of reasonable cause and good faith effort by the taxpayer [*I.R.C. § 6664(c)(1)*]. For example, the Tax Court found that a taxpayer made a reasonable valuation and good faith effort when the taxpayer lacked sophistication in valuation and tax matters and therefore relies on a professional adviser's judgment and advice [*see Mandelbaum v. Commissioner (1995) 69 T.C.M. 2852, T.C. Memo. 1995-255*]. In addition to reliance on experts, reasonableness and good faith may be found when the taxpayer relies on a professional appraisal.

### **[7] Balancing Maximum Discounts and Business Purposes**

Maximizing valuation discounts to reduce gift and estate taxes is often a key goal of estate planning in the family business context. However, this goal must be balanced against the individual goals of the partners, the retirement goals of the business owner, and prudent business judgment.

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Business & Corporate Law  
Closely Held Corporations  
Valuation  
Estate, Gift & Trust Law  
General Overview  
Tax Law  
Federal Estate & Gift Taxes  
Alternative & Special Use Valuation (IRC secs. 2032, 2032A, 2701-2704)  
General Overview  
Tax Law  
Federal Estate & Gift Taxes  
Taxable Property  
General Overview



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DIVISION IV: WILLS AND TRUSTS  
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PART II. LEGAL BACKGROUND  
C. Planning Strategies

*25-68A California Legal Forms--Transaction Guide § 68A.83*

**AUTHOR:** Steven M. Goldberg Practice Consultant

**§ 68A.83 Avoiding Gain on Formation**

In general, the contribution of property to a partnership in exchange for partnership interest does not result in the recognition of gain or loss for the partner. Rather, the partner receives a basis in the partnership interest that equals the adjusted basis of the contributed asset [*I.R.C. §§ 722, 723*]. However, this rule does not apply to contributions of property to an investment company partnership if the contribution "diversifies" the contributing partner's assets [*see I.R.C. § 721*].

When encumbered property is contributed to the partnership, the contributing partner is treated as having transferred the entire debt and assumed a portion of the debt equal to that partner's share of the partnership liability [*I.R.C. § 752; Treas. Reg. § 1.752-1*]. The portion of the debt from which the partner is relieved is treated as a distribution of money to that partner [*I.R.C. § 752(b); Treas. Reg. § 1.752-1(c)*]. The partner's share of the partnership liabilities is treated as a contribution of money to the partnership [*I.R.C. § 752(a); Treas. Reg. § 1.752-1(b)*]. If that distribution exceeds the partner's adjusted basis in the partnership, this partner must recognize the excess as a gain [*I.R.C. § 731(a)(1); Treas. Reg. § 1.731-1(a)*]. No gain is recognized if the partner's adjusted basis in the partnership is greater than the amount of the distribution of money to the partner.

Some degree of caution should accompany the contribution of appreciated assets to the partnership or other family business entity. If a partner transfers appreciated property to the partnership and receives a distribution of property other than that property within seven years of contribution, the partner will recognize gain to the extent that the value of the distributed property exceeds the adjusted basis of the partnership interest [*see I.R.C. § 737*]. Similarly, the partner may recognize gain if the partnership distributes the appreciated property to another partner within seven years [*see I.R.C. § 704(c)*].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Tax Law Federal Taxpayer Groups Limited Liability Companies & Partnerships Basis (IRC secs. 704, 705, 722-724, 731-735, 737, 742, 751, 754, 755) Partner Interests Tax Law Federal Taxpayer Groups Limited Liability Companies & Partnerships Contributions to Partnerships (IRC secs. 721-724) General Overview Tax Law Federal Taxpayer Groups Limited Liability Companies & Partnerships Contributions to Partnerships (IRC secs. 721-724) Basis of Property Tax Law Federal Taxpayer Groups Limited Liability Companies & Partnerships Contributions to Partnerships (IRC secs. 721-724) Nonrecognition of Gains & Losses



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*25-68A California Legal Forms--Transaction Guide § 68A.84*

**AUTHOR:** Steven M. Goldberg Practice Consultant

**§ 68A.84 Appropriate Assets for Contribution to Family Business**

**[1] Selecting Appropriate Assets**

In general, business-related assets and investment assets are the safest to transfer to the new family business entity. Personal property unrelated to business functions, such as collectibles and memorabilia, ordinarily should not be transferred to the entity. For example, when a taxpayer transferred personal property, including an automobile, to family LLCs in addition to business-related assets, the IRS attacked the transaction for lacking a business purpose [*see TAM 97-36-004* ; *see also I.R.C. § 2703*, discussed in § 68A.40[2][d]]. The IRS concluded that the transfer of personal-use assets served no business purpose and the primary purpose of the transfer was to depress the value of the estate and avoid estate tax. Therefore, the IRS disregarded the existence of the entities [ *TAM 97-36-004* (LLCs formed two months before death)].

**PRACTICE TIP:**

Although the special valuation rules do not apply to transfers in trust when the sole trust property is a personal residence inhabited by persons holding term interests, or transfers in which a personal residence and a limited amount of cash are placed in a qualified personal residence trust (QPRT) [*I.R.C. § 2702(a)(3)(A)(ii)*; *Treas. Reg. § 25.2702-5(c)*], the exception applies only to QPRTs. As a result, it is generally not advisable to transfer personal residences to a family business.

The transfer of noncertificated personal property is achieved through a bill of sale, stock power, or other form of assignment. Assets with certificates of title require specific conveyance by writing. Transfers of real estate should be recorded, and encumbered property may require the consent of the lender. Encumbered property for which the debt exceeds the adjusted basis requires particular attention; a transfer of the property may cause recognition of gain to the transferor. *Commentary by Steven M. Goldberg.*

**[2] Effect of Retention of Possession or Enjoyment of Transferred Assets**

Once a family business is formed and operating, the business owner/transferor needs to respect the existence and integrity of the business and comply with the requisite business formalities. If a transferor retains possession or enjoyment of assets transferred to the business, those assets remain in the transferor's gross estate for purposes of estate tax [see *Estate of Schauerhamer v. Commissioner* (1997) 73 T.C.M. 2855, T.C. Memo 1997-242 ; see also I.R.C. § 2036(a)(1)]. For example, stock in an operating company that the decedent transferred to a holding company organized as a limited liability company was not includable in the decedent's gross estate because the transfer was a bona fide sale for full and adequate consideration. However, membership units in the limited liability company that the decedent transferred to a family limited partnership were includable in his estate when there was an implied agreement under which the decedent retained an interest in the transferred units [Estate of Wayne C. Bongard (2005) 124 T.C. No. 8] . Similarly, rental real estate transferred from a decedent's revocable trust to a family limited partnership was includable in the decedent's gross estate when there was an implied agreement that the decedent would retain, for her life, the right to the property's rental income and its economic benefit [ *Estate of Virginia A. Bigelow*, T.C. Memo. 2005-65 ] , *aff'd*, 2007 U.S. App. LEXIS 22030 .

In *Estate of Schauerhamer v. Commissioner*, the taxpayer established three FLPs, transferred business holdings to these entities, and made gifts of partnership interests to the taxpayer's children. Although each FLP had its own bank account, the taxpayer deposited partnership income into her personal bank account. The taxpayer used the account as her personal checking account, paying both personal and partnership expenses. No records were maintained to separate partnership and nonpartnership income. When the taxpayer died a year after forming the FLPs, her estate excluded the value of the transferred assets from the gross estate. The Tax Court disagreed, concluding that the term "enjoyment" included the economic benefits of the property. The fact that the transferor deposited FLP income into her personal account constituted evidence that the taxpayer retained the possession or enjoyment of the property [ *Estate of Schauerhamer v. Commissioner* (1997) 73 T.C.M. 2855, T.C. Memo 1997-242 ] .

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Business & Corporate Law Closely Held Corporations General Overview Business & Corporate Law Closely Held Corporations Formation Estate, Gift & Trust Law General Overview Tax Law Federal Taxpayer Groups Limited Liability Companies & Partnerships Contributions to Partnerships (IRC secs. 721-724) General Overview



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*25-68A California Legal Forms--Transaction Guide § 68A.85*

**AUTHOR:** Steven M. Goldberg Practice Consultant

**§ 68A.85 Selling the Family Business**

In some situations, an analysis of the unique characteristics of a family business leads to the inevitable conclusion that passing the business to heirs is not in the best interests of the family, the business, or both. For example, financial constraints, family conflict, or a lack of commitment to the business may make transferring the business intact to the next generation difficult or imprudent despite the potential for gift and estate tax savings. Alternatives to maintaining the business intact for the next generation include the sale of the business, merger, or maintaining the business by importing nonfamily members into management and ownership roles.

The business owner may decide to sell the business to the family members who actively participate in the business, if feasible. Alternatively, a business owner may decide that the best means of achieving his or her lifetime financial and estate planning goals, including maintaining some degree of family harmony, is to sell the business outside the family, either to key employees or on the open market. In addition to key employees, potential buyers include business competitors, suppliers, or customers.

The business owner's need for financial security and cash is ordinarily a top priority. However, if the business owner is not dependent on the business, the owner might consider an installment sale.

**PRACTICE TIP:**

If counsel will be involved in the process of selling the business, counsel should note his or her degree of involvement and the scope of representation in a client letter. Counsel should also be prepared to structure and document an adequate, organized, and efficient reasonable due diligence inquiry.

*Commentary by Steven M. Goldberg.*

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Business & Corporate Law Closely Held Corporations Dissolution & Winding Up Estate, Gift & Trust Law General

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*25-68A California Legal Forms--Transaction Guide §§ 68A.86-68A.99*

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**[Reserved]**

§§ 68A.86[Reserved]



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A. Client Interview--Facts and Documents

*25-68A California Legal Forms--Transaction Guide § 68A.100*

**AUTHOR:** Steven M. Goldberg Practice Consultant

**§ 68A.100 Facts for Family Limited Partnership**

1. Names, addresses, telephone numbers, social security or taxpayer identification number, and taxable year of following:

- a. Client and client's spouse.
- b. Prospective limited and general partners.

**NOTE:**

For additional information to acquire about family members, see P 43, *below*.

- c. Other heirs.
- d. Existing key employees.

**NOTE:**

The full name and last known street and mailing address of each partner must be included in the partnership's records [*Corp. Code § 15901.11(1)*]. The names and addresses of the general partners must be included in the certificate of limited partnership [*Corp. Code § 15901.11(1)(4)*].

2. Name and address of agent for service of process on:

- a. Partnership.

**NOTE:**

This information must be included in the certificate of limited partnership; however, if the agent is a corporation, only its name need be included [*Corp. Code § 15902.01(a)(3)*]. See the NOTE to § 68A.110, P 13b.

b. Any corporations or partnerships that are partners of partnership.

3. Type and general characteristics of business to be conducted.

4. Name proposed for partnership, such as:

**NOTE:**

The partnership's name must be included in its certificate of limited partnership [*Corp. Code § 15902.01(a)(1)*].

a. Family name.

b. Names of all general partners; or

c. Fictitious business name, i.e., any name other than name of limited partnership as filed with Secretary of State [*see Bus. & Prof. Code §§ 17900-17930; see also Ch. 1A, Role of Counsel in Starting a New Business*].

5. Partnership addresses (including county):

a. Street address of its initial designated office.

**NOTE:**

This information must be included in the certificate of limited partnership [*Corp. Code § 15902.01(a)(2)*].

b. Other business addresses.

6. Term of partnership, including:

**NOTE:**

Under the ULPA '08, a limited partnership has a perpetual duration [*see Corp. Code § 15901.04(c)*]. This default provision, however, may be varied by the partnership agreement [*see Corp. Code § 15901.10(b)*].

a. Date partnership is to commence operations.

**NOTE:**

The length of "lead time" required before the partnership can commence business will be determined in part by the estimated time it will take to sell the limited partnership interests.

b. Length of time partnership is to continue.

(1) Specified period.

(2) Specified period or until sooner dissolved and wound up in accordance with partnership agreement.

(3) Until dissolved by agreement.

(4) Until specified undertaking is completed.

(5) Until dissolved following occurrence of specific act or event.

(6) Any combination of these.

**NOTE:**

Generally, the family limited partnership has a significant term, e.g., 20 to 50 years, indicating its long term outlook. The longer term tends to reduce the initial value of limited partnership interests, because it alerts potential investors of the length of time it may take to recover the initial investment.

7. Partnership capital necessary to commence operations.

8. Initial capital contributions by general and limited partners.

**NOTE:**

This information must be included in the records to be kept by the partnership [*see Corp. Code § 15901.11*].

a. Cash.

b. Property, including:

(1) Description and valuation.

(2) Contributing partner's adjusted income tax basis.

c. Services rendered, including description and valuation.

d. Promissory note, including amount.

**NOTE:**

A partner's contribution to the partnership may consist of a promissory note or other binding obligation to contribute money or property [*see Corp. Code § 15905.01*]. The obligation of any partner to make a contribution may be compromised only by the written consent of all of the partners [*Corp. Code § 15905.02(c)*]. A creditor of a limited partnership which extends credit or otherwise acts in reliance on an obligation described in *Corp. Code § 15905.02(a)* (obligation to contribute), without notice of any compromise, may enforce the original obligation [*Corp. Code § 15905.02(c)*]. These rules will not be construed to affect the rights of third-party creditors of the partnership to seek equitable remedies nor any rights existing under the Uniform Fraudulent Transfer Act [*Corp. Code § 15905.02(d)(7)*; *see Civ. Code § 3439 et seq.*].

e. Other obligation to contribute money or property or to render services, including description and valuation.

9. Details of any arrangements made among prospective partners for future contributions of capital.

**NOTE:**

Ordinarily, no arrangements for future contributions of capital exist at the formation stage. However, when the partners are family members, discussions may have occurred regarding whether the partnership will be permitted to "call" for additional contributions. A partner's obligation to contribute to a limited partnership is not excused by the partner's death, disability, or other inability to perform personally [*Corp. Code § 15905.02(a)*].

10. Whether any general partner intends to contribute and share in profit and loss as limited partner [*see Corp. Code § 15644*].

**NOTE:**

The interest of a general partner as a limited partner must be separately stated in the partnership agreement. A person may be both a general partner and a limited partner. A person that is both a general and a limited partner has the rights, powers, duties, and obligations provided by the ULPA '08 and the partnership agreement in each capacity. When the person acts as a general partner, the person is subject to the obligations, duties, and restrictions under the ULPA '08 and the partnership agreement for general partners. When the person acts as a limited partner, the person is subject to the obligations, duties, and restrictions under the ULPA '08 and the partnership agreement for limited partners [*Corp. Code § 15901.13*].

11. Whether an obligation of any partner to make contributions may be compromised and, if so, whether consent of all partners should be required.

**NOTE:**

Unless otherwise provided in the partnership agreement, the obligation of a partner to make a contribution may be compromised only with the written consent of all of the partners [*Corp. Code § 15905.02(c)*].

12. Details of arrangements for any partner to do following:

**NOTE:**

The ULPA '08 permits a partner to lend money to and transact other business with the partnership unless otherwise provided in the partnership agreement [*Corp. Code § 15901.12*]. However, if the limited partnership is subject to regulation by the Commissioner of Corporations, there are generally restrictions on transactions between the partnership and a general partner [*see, e.g., 10 Cal. Code Reg. §§ 260.140.1-260.140.114.10* (real estate syndicates)]. These transactions involve conflicts of interest that will have to be carefully spelled out in any offering memorandum or prospectus [*see, e.g., 10 Cal. Code Reg. §§ 260.140.114.5(c)(2), 260.140.117.3; see also Ch. 29C, Public Real Estate Syndicates* ].

- a. Transact business with partnership.
- b. Loan property or cash to partnership.
- c. Lease property to partnership, including terms of a lease.

13. Share of each partner in profits and losses.

**NOTE:**

Profits and losses must be allocated in the manner provided in the partnership agreement. If that does not so provide, they must be allocated in the same manner as the partners share distributions [*Corp. Code § 15905.035*]. Distributions must be shared among the partners on the basis of the value, as stated in the required records when the limited partnership decides to make the distribution, of the contributions the limited partnership has received from each partner [*Corp. Code § 15905.03*]. An allocation not in proportion to the partners' contributions must comply with *I.R.C. § 704(b)*, which presents considerable complications.

14. Amount of time each general partner will be required to devote to partnership business, and:

- a. Whether partner has or may have outside business activities.
- b. If partner has or may have outside business activities, restrictions, if any, to be placed on those activities.

15. Special duties, if any, each general partner will perform:

- a. Division of labor according to each partner's level of skill, training, or other factors.
- b. Designation of managing partners:

**NOTE:**

Each general partner has equal rights in the management and conduct of the limited partnership's activities. Except as expressly provided in the ULPA '08, any matter relating to the activities of the limited partnership may be exclusively decided by the general partner or, if there is more than one general partner, by a majority of the general partners [*Corp. Code § 15904.06(a)*].

- (1) Designation of managing partner; or
- (2) Designation of partners to serve on management committee.

16. Any limitations to be imposed on amount or types of partnership liabilities that any general partner may incur.

17. Weight accorded each partner's vote:

- a. General partners.

**NOTE:**

Ordinarily, each general partner's vote counts equally toward the resolution of a partnership issue. The general partners may wish to weight some votes more heavily than others, such as by apportioning voting power on the basis of capital contribution or share in profits, and may do so in the partnership agreement [*see Corp. Code § 15901.10, 15904.06(a)*]. General partnership votes can also be based on the relative general partnership interests each general partner holds.

- b. Limited partners.

18. Vote required for approval or disapproval by general partners of administrative and/or business matters occurring in the ordinary course of partnership business.

19. Voting rights of limited partners, *i.e.*, matters on which limited partners may be allowed to vote.

**NOTE:**

The ULPA '08 gives the limited partners the right to vote on, propose, or call a meeting of the partners without being deemed to be participating in the control of the business [*see Corp. Code § 15903.03(b)(5)*].

20. Voting rights of limited partners applicable to removal of general partner.

21. Voting requirements of limited partners applicable to admission of new general partner and election to continue business after general partner ceases to be partner and there is no remaining or surviving general partner [*see Corp. Code § 15908.01(c)(2)*].

**NOTE:**

The limited partners have the right to vote on these matters [*see Corp. Code § 15903.03* (actions not deemed to be participation in control of business)]. A limited partnership is dissolved, and its activities must be wound up, upon the passage of 90 days after the dissociation of a person as a general partner if the limited partnership does not have a remaining general partner, unless before the end of the period consent to continue the activities of the limited partnership and admit at least one general partner is given by limited partners owning a majority of the rights to receive distributions as limited partners at the time the consent is to be effective, and at least one person is admitted as a general partner in accordance with the consent [*Corp. Code § 15908.01(c)(2)*]. If the partnership's offering of limited partnership interests is subject to the jurisdiction of the Commissioner of Corporations, the Commissioner will have required that the limited partnership agreement give a majority of the partners the right to vote to remove and replace a general partner by majority vote [*see 10 Cal. Code Reg. § 260.140.116.2*]. If the partnership's offering of limited partnership interests is subject to the jurisdiction of the Commissioner of Corporations, the Commissioner will have required that the limited partnership agreement give a majority of the partners the right to vote to remove and replace a general partner by majority vote [*see 10 Cal. Code Reg. § 260.140.116.2*].

22. Amount of salary or other remuneration to be paid to any partner, if any.

a. Basis for making salary determination:

(1) Amount of time devoted to business.

(2) Performance standards rather than length of employment.

b. Whether salaries paid should be deducted before computing net profits, or charged against partners' shares of net profits [*see I.R.C. § 707(c)*; *see also Ch. 15, Part A, Formation of General Partnerships*].

23. Rights of partners to distributions during operation of partnership.

**NOTE:**

A "distribution" is a transfer of money or property from a limited partnership to a partner in the partner's capacity as a partner or to a transferee on account of a transferable interest owned by the transferee [*Corp. Code § 15901.02(f)*]. A partner does not have a right to any distribution before the dissolution and

winding up of the limited partnership unless the partnership decides to make an interim distribution [*Corp. Code § 15905.04*]. Furthermore, a person does not have a right to receive a distribution on account of dissociation [*Corp. Code § 15905.05*].

- a. Frequency of distributions to be specified in partnership agreement.
- b. Extent of each distribution to be specified in partnership agreement, either:
  - (1) Full share of profits for period involved; or
  - (2) Part of profits, with balance transferred to capital account.
- c. Details of any arrangement by which any limited partner will have priority over other limited partners.
- d. Whether obligation of partner to return distribution made in violation of ULPA '08 may be compromised and, if so, under what conditions.

**NOTE:**

Unless otherwise provided in the partnership agreement, the obligation of a partner to return a money or property distributed in violation of ULPA '08 may be compromised only by the consent of all of the partners [*Corp. Code § 15905.02(c)*].

- e. Whether limited partners will be given right to receive property other than money in any distribution.

**NOTE:**

Unless otherwise provided in the partnership agreement, a partner does not have a right to receive any distribution from a limited partnership in any form other than cash [*Corp. Code § 15905.06*].

- f. Whether any partner may be compelled to accept distribution of assets in kind in lieu of proportionate cash distribution being made to other partners.

**NOTE:**

A limited partnership may distribute an asset in kind to the extent that each partner receives a percentage of the asset equal to the partner's share of distributions [*Corp. Code § 15905.06*; see *Corp. Code § 15908.09*].

- 24. Frequency with which accountings of partnership affairs will be required.

**NOTE:**

The ULPA '08 requires only that the partnership maintain records, including financial statements, for the six most recent years [*Corp. Code § 15901.11*]. The limited partners have access to these records [*see Corp. Code § 15903.04*].

- 25. When financial statement should be distributed to all partners.

- 26. When copies of partnership's tax returns should be:

- a. Prepared by the partnership, i.e., whether partnership should be required to prepare them in advance of date on which partners' returns are due to IRS.

b. Distributed to all partners.

27. Extent to which limited partnership interests may be assigned or sold [*see Corp. Code §§ 15907.01, 15907.02*].

**NOTE:**

The only interest of a partner which is transferable is the partner's transferable interest. A transferable interest is personal property [*Corp. Code § 15907.01*]. "Transferable interest" is defined as a partner's right to receive distributions [*Corp. Code § 15901.02(ak)*]. A transfer, in whole or in part, of a partner's transferable interest is permissible [*Corp. Code § 15907.02(a)*]. A partnership may be taxed as a corporation if its interests are assignable to the extent they are "publicly traded" [*I.R.C. § 7704*]. "Publicly traded" means either (1) traded on an established securities market [*I.R.C. § 7704(b)(1)*], or (2) readily tradable on a secondary market [*I.R.C. § 7704(b)(2); see Conf. Rep. No. 100-495, Pub. L. No. 100-203, p. 948 (definitions)*]. A partnership's interests, however, will be treated as publicly traded on a secondary market only if they were issued in a transaction registered under the Securities Act of 1933 [*see 15 U.S.C. §§ 77a-77aa*], or in a transaction that was not registered when the partnership either (1) has more than 500 partners, or (2) offers each unit of partnership interest for less than \$20,000 [*see IRS 1988-2 C.B. 386, Notice 88-75*].

The provisions of the partnership agreement affecting the ability of a partner to transfer or assign partnership interests are among the more important provisions of the agreement. Rights of first refusal or other restrictions are common. Restrictions that are too severe may prevent the gift of a limited partnership interest from qualifying for the gift tax annual exclusion.

28. Criteria for admission of additional limited partners:

**NOTE:**

A person becomes a limited partner as provided in the partnership agreement, as the result of a conversion or merger [*see Corp. Code § 15911.01 et seq.*], or with the consent of all the partners [*Corp. Code § 15903.01*].

29. Rules for partnership meetings:

**NOTE:**

Unlike prior law [*see, e.g., Corp. Code § 15637 (CRLPA, repealed January 1, 2010)*], the ULPA '08 does not contain default provisions regarding partnership meetings. Therefore, the partnership agreement should set forth any desired provisions governing this topic [*see Ballantine & Sterling, California Corporation Laws, Ch. 25, Limited Partnerships*, § 732.01[2] (Matthew Bender)].

a. Place where meetings will held.

b. When notice of meeting will be deemed to have been sent, time of either:

- (1) Deposit in mail.
- (2) Personal delivery.
- (3) Delivery to common carrier for transmission.
- (4) Transmission by notice giver by electronic means.

(5) Oral notice communicated in person or by telephone or wireless to:

(a) Actual recipient; or

(b) Person at office of recipient who sender has reason to believe will communicate promptly to actual recipient.

(6) Other time to be specified in partnership agreement.

c. Proportion of limited partnership interests required to constitute quorum at partnership meetings.

d. Whether partnership agreement should permit or limit action to be taken without meeting on written consent.

e. Whether notice of adjourned meeting need be given.

30. Whether general partners may be removed or expelled and, if so, grounds for removal and vote required to cause removal.

**NOTE:**

*Corp. Code § 15906.03* provides that a person is dissociated from a limited partnership as a general partner upon the person's expulsion as a general partner pursuant to the partnership agreement [*see Corp. Code § 15906.03(c)*]; *see also Corp. Code § 15906.03(b)* (dissociation upon any event specified in partnership agreement), (d) (expulsion upon unanimous consent of partners in certain circumstances); Ch. 16, **Formation of Limited Partnerships**, § 16.37].

31. Whether partnership agreement should provide for specific consequences to general partner for breach of partnership agreement [*see Corp. Code § 15906.04* (liability for wrongful dissociation); *see also Ch. 16, Formation of Limited Partnerships*, § 16.37].

32. Rules to govern withdrawal of general partner.

**NOTE:**

*Corp. Code § 15906.03* provides that a person is dissociated from a limited partnership upon the limited partnership's having notice of the person's express will to withdraw as a general partner or on a later date specified by the person [*Corp. Code § 15906.03(a)*]. The partnership agreement may not vary the power of a person to dissociate as a general partner by express will, except to require that the notice be in a record [*Corp. Code § 15901.10(b)(8)*]; *see Corp. Code §§ 15906.03, 15906.04(a)*; *see also Ch. 16, Formation of Limited Partnerships*, § 16.37].

33. Rules restricting or preventing general partner from assigning or encumbering partnership interest.

34. If partnership is to be for fixed term, whether partnership agreement should provide that withdrawal of general partner prior to expiration of term will be treated as breach of agreement.

35. Rules desired to govern withdrawal of limited partner:

**NOTE:**

A person is dissociated from a limited partnership as a limited partner upon notice of the person's express will to withdraw as a limited partner or on a later date specified by the person [*Corp. Code § 15906.01(b)(1)*]; *see Ch. 16, Formation of Limited Partnerships*, § 16.33].

- a. Whether withdrawal will be permitted.

**NOTE:**

A person does not have a right to dissociate as a limited partner before the termination of the limited partnership [*Corp. Code § 15906.01(b)(1)*]. However, a person is dissociated from a limited partnership as a limited partner upon the occurrence of various events specified in *Corp. Code § 15906.01(b)*, including withdrawal; *see Ch. 16, Formation of Limited Partnerships, § 16.33*].

- b. If time or events permitting limited partner to withdraw are specified:

- (1) Time when limited partner may withdraw; or
- (2) Events that must occur before withdrawal will be permitted.

- c. Whether withdrawing limited partner will receive distribution [*see Corp. Code § 15905.04* (distributions before dissolution); *Ch. 16, Formation of Limited Partnerships, § 16.40*].

36. Whether partnership agreement should provide for specific consequences to limited partner for breach of partnership agreement.

37. Method of disposing of interest of general partner who dies, resigns, retires, or is expelled, if partnership agreement permits or requires disposition:

- a. Sale of partner's interest to remaining partners.
- b. Liquidation of partner's interest through purchase by partnership.
- c. Manner in which purchase price will be determined.
- d. Whether purchase price is to be funded by insurance and, if so, whether:
  - (1) Insurance is to be carried by each partner, or general partner on all other general partners, or by partnership.
  - (2) Necessary arrangements have been made.
- e. Identity of persons to whom partnership interest may be bequeathed and under what conditions.

38. Whether any limited partner is to have priority over any other limited partner for return of his or her contribution.

39. Rules to specify when partnership should be dissolved and wound up [*see Corp. Code § 15908.01*]:

**NOTE:**

The procedures involved in the dissolution and winding up of limited partnerships are discussed in *Ch. 16A, Dissolution of Limited Partnerships* .

- a. Time to be specified for, or event that will precipitate, dissolution and winding up.
- b. Number of general and limited partners needed for written consent to dissolution and winding up.

**NOTE:**

*Corp. Code § 15908.01(b)* provides that a limited partnership is dissolved, and its activities must be wound up, upon the consent of all general partners and of limited partners owning a majority of the rights to receive distributions as limited partners at the time the consent is to be effective [*Corp. Code § 15908.01(b)*; see Ch. 16A *Dissolution of Limited Partnerships* ].

- c. Whether dissolution and winding up will be required if general partner ceases to be general partner and at least one other general partner remains.

**NOTE:**

*Corp. Code § 15908.01(c)(1)* provides that a limited partnership is dissolved, and its activities must be wound up, after the dissociation of a general partner if the limited partnership has at least one remaining general partner, and a consent to dissolve is given within 90 days after the dissociation by partners owning a majority of the rights to receive distributions as partners at the time the consent is to be effective [*Corp. Code § 15908.01(c)(1)*; see Ch. 16A, *Dissolution of Limited Partnerships* ].

- d. Whether new general partner may be admitted if sole general partner ceases to be general partner.

**NOTE:**

*Corp. Code § 15908.01(c)(2)* provides that a limited partnership is dissolved and its activities must be wound up upon the passage of 90 days after such a dissociation, unless before the end of that period a consent to continue the activities of the limited partnership and admit at least one general partner is given by limited partners owning a majority of the rights to receive distributions as limited partners at the time the consent is to be effective, and at least one person is admitted as a general partner in accordance with the consent [*Corp. Code § 15908.01(c)(2)*; see Ch. 16A, *Dissolution of Limited Partnerships* ]. Adherence to the standard set forth in *Corp. Code § 15908.01* is recommended to keep the dissolution standard strict without being characterized as an "applicable restriction" under *I.R.C. § 2704(b)*.

- e. Whether dissolution and winding up will be required if last limited partner ceases to be limited partner.

**NOTE:**

*Corp. Code § 15908.01(d)* provides that a limited partnership is dissolved and its activities must be wound up upon the passage of 90 days after such a dissociation, unless before the end of that period the limited partnership admits at least one limited partner [*Corp. Code § 15908.01(d)*; see Ch. 16A, *Dissolution of Limited Partnerships* ].

- 40. Rules to govern winding up on dissolution [*see Corp. Code § 15908.03*]:

**NOTE:**

A limited partnership agreement may not vary the requirement to wind up the partnership's business as specified in *Corp. Code § 15908.03* [*Corp. Code § 15901.10(b)(10)*].

- a. Which partners should be required by partnership agreement to wind up partnership business.

**NOTE:**

If a dissolved partnership does not have a general partner, a person to wind up the dissolved limited partnership's activities may be appointed by the consent of limited partners owning a majority of the rights to receive distributions as limited partners at the time the consent is to be effective [*Corp. Code § 15908.03(c)*]. If a limited partnership does not have a general partner and within a reasonable time following dissolution no person has been appointed pursuant to *Corp. Code § 15908.03(c)*, or for other good cause, on application of any partner the appropriate court may order judicial supervision of the winding up, including appointment of a person to wind up the dissolved limited partnership's activities [*Corp. Code § 15908.03(d)*].

- b. If limited partners wind up partnership affairs, whether they should be allowed reasonable compensation [*see Corp. Code § 15908.03(e)*].

41. Rules desired for application of assets on dissolution and after satisfaction of liabilities to creditors.

**NOTE:**

In winding up a limited partnership's activities, the assets of the limited partnership, (including any contributions required) must be applied to satisfy the limited partnership's obligations to creditors, including to the extent permitted by law, partners that are creditors [*Corp. Code § 15908.09(a)*]. Any surplus remaining after the limited partnership complies with this requirement must be returned to the partners as they share in distributions [*Corp. Code § 15908.09(b)*; *see Corp. Code § 15908.09(c)* (rules applicable when assets are insufficient)].

42. Whether interests in partnership will be evidenced by certificates of interest issued by partnership.

43. Information about family members, including:

**NOTE:**

The following information should be obtained about family members who are potential heirs of the client even if they are not currently involved in the family business.

- a. Age.
- b. Educational background.
- c. Work experience.
- d. Whether currently employed in family business.
- e. Whether employment in family business, or particular position, has been promised.
- f. Current salary.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Business & Corporate Law Limited Partnerships General Overview Business & Corporate Law Limited Partnerships Formation Estate, Gift & Trust Law General Overview



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California Legal Forms--Transaction Guide

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DIVISION IV: WILLS AND TRUSTS  
CHAPTER 68A USING FAMILY PARTNERSHIPS AND OTHER BUSINESS ENTITIES IN ESTATE PLANNING  
PART III. TRANSACTION GUIDE  
A. Client Interview--Facts and Documents

*25-68A California Legal Forms--Transaction Guide § 68A.101*

**AUTHOR:** Steven M. Goldberg Practice Consultant

**§ 68A.101 Facts for Family Limited Liability Company**

1. Names, addresses, telephone numbers, social security or taxpayer identification number, taxable year, and marital status of following:

- a. Client and client's spouse.
- b. Prospective members and managers.

**NOTE:**

For additional information to acquire about family members, see P 43, *below* [*see also* § 68A.111].

- c. Other heirs.
- d. Existing key employees.

2. Name and address of agent for service of process on:

- a. LLC.

**NOTE:**

The name and address of the LLC's initial agent for service of process must be included in the articles of organization; however, if the agent is a corporation, only its name need be included [*Corp. Code* § 17051(a); *see Corp. Code* §§ 17057(b), 17061(d); *see also* § 12C.200].

b. Any corporations or partnerships that are members of LLC.

3. Type and general characteristics of business to be conducted.

**NOTE:**

This information must be included in the articles of organization [*Corp. Code § 17051(a)*; *see § 12C.200*].

4. Name proposed for LLC, such as:

**NOTE:**

The LLC's name must be included in its filing documents [*see, e.g., Corp. Code §§ 17051(a), 17052*].

a. Family name.

b. Fictitious business name; i.e., any name other than name of LLC as filed with Secretary of State [*see Bus. & Prof. Code §§ 17900-17930; see also Ch. 1A, Role of Counsel in Starting a New Business*].

5. Whether LLC will be managed by:

**NOTE:**

This information must be included in the articles of organization [*see Corp. Code §§ 17051(a)(5), 17151(b)*; *see also § 12C.200*].

a. One manager.

b. Multiple managers.

c. Single member.

d. All members.

6. LLC addresses (including county):

a. Street address of its principal executive office.

b. Other business addresses.

c. Address of office in California in which LLC records are to be kept [*see Corp. Code § 17058(a)*].

7. Duration of LLC, including:

a. Date LLC is to commence operations.

**NOTE:**

The length of "lead time" required before the LLC can commence business will be determined in part by the estimated time it will take to sell or make gifts of LLC membership interests.

## b. Length of time LLC is to continue.

- (1) Specified period of time.
- (2) Specified period or until sooner dissolved and wound up in accordance with operating agreement.
- (3) Until dissolved by agreement.
- (4) Latest date on which LLC is to dissolve [*see* § 68A.201[2], Section 1.03].
- (5) Until specified undertaking is completed (before termination date if one is specified).
- (6) Until dissolved following occurrence of specific act or event (before termination date if one is specified).
- (7) Any combination of above.

**NOTE:**

In general, a family LLC has a significant term, such as 20 to 50 years, indicating its long term outlook. The longer term tends to reduce the initial value of membership interests, because it alerts potential investors of the length of time it may take to recover the initial investment.

## 7. LLC capital necessary to commence operations.

## 8. Initial capital contributions by members, managers, and investors.

**NOTE:**

This information must be included in the records to be kept by the LLC [*see Corp. Code* § 17058(a)]. A person admitted to an LLC as a member need not make any contribution in money, property, services, or other obligation to contribute money or property or to render services to acquire a membership interest [*see Corp. Code* § 17200(a)].

## a. Cash.

## b. Property, including:

- (1) Description and valuation.

**NOTE:**

This description should include any liabilities to which the contributed property is subject at the time of contribution, as well as any liabilities that the LLC assumes in connection with that property.

- (2) Contributing member's adjusted income tax basis.

## c. Services rendered, including description and valuation.

**NOTE:**

In particular, this description should include any pre-formation services and costs for which a member expects capital account credit.

d. Promissory note, including amount.

**NOTE:**

A member's contribution may consist of a promissory note or other binding obligation to contribute money or property [*Corp. Code § 17001(g)*]. The obligation of any member to make a contribution may be compromised only by the written consent of all of the members [*Corp. Code § 17201(b)*]. See P10, **below**.

e. Other obligations to render services, including description and valuation.

f. Description and valuation of any contractual rights being contributed to LLC.

9. Details of any arrangements made among prospective members for future contributions of capital [*see § 68A.201[2]*, Section 2.03].

**NOTE:**

Ordinarily, no arrangements for future contributions of capital exist at the formation stage. However, when the members are family members, discussions may have occurred regarding whether the LLC will be permitted to "call" for additional contributions. Once the LLC has been formed, no member may be required to make any additional contribution unless otherwise provided in the operating agreement [*Corp. Code § 17200(b)*].

a. Amount, nature, description, and agreed value of any additional contributions agreed to be made by members.

b. When additional contributions are to be made.

10. Whether an obligation of any member to make contributions may be compromised or released and, if so, whether consent of all members should be required.

**NOTE:**

Unless otherwise provided in the articles of organization or operating agreement, the obligation of a member to make a contribution may be compromised only with the written consent of all of the members [*Corp. Code § 17201(b)(1)*]. However, the compromise does not affect the rights of a person whose claim against the LLC arose before the receipt of notice, if that person had knowledge of the original obligation before the claim arose and the compromise occurred after the time the claim arose. Any other person with a claim against an LLC may enforce only the existing obligations of a member to make a contribution to the LLC [*Corp. Code § 17201(b)(2)*]. A person with a claim against an LLC may not enforce a conditional obligation of a member, such as a capital contribution payable on a discretionary call of the LLC before the time the call occurs, unless the conditions have been waived or satisfied [*Corp. Code § 17201(c)*]. These rules do not affect the rights of third party creditors of the LLC to seek equitable remedies or any rights existing under the Uniform Fraudulent Transfer Act [*Corp. Code § 17201(d)*; *see Civ. Code §§ 3439-3439.11*].

11. Consequences of member's failure to make required contribution to LLC.

## 12. Details of arrangements for any member to do following:

**NOTE:**

A member may lend money to and transact other business with the LLC and, subject to other applicable law, has the same rights and obligations with respect to the LLC as a person who is not a member [*Corp. Code § 17004(a)*]. However, if the LLC is subject to regulation by the Commissioner of Corporations, there are generally restrictions on transactions between the LLC and the managers or members [*see, e.g., 10 Cal. Code Reg. §§ 260.140.1-260.140.114.10* (real estate syndicates)]. These transactions involve conflicts of interest that will have to be carefully spelled out in any offering memorandum or prospectus [*see, e.g., 10 Cal. Code Reg. §§ 260.140.114.5(c)(2), 260.140.117.3; see also Ch. 29C, Public Real Estate Syndicates* ].

- a. Transact business with LLC.
- b. Loan property or cash to LLC.
- c. Lease property to LLC, including terms of a lease.

## 13. Share of each member in profits and losses.

**NOTE:**

This information must be included in the LLC records [*Corp. Code § 17058(a)(1)*]. Unless otherwise provided in the operating agreement, profits and losses must be allocated in proportion to the contributions of each member [*Corp. Code § 17202*]. An allocation not in proportion to the members' contributions must comply with *I.R.C. § 704(b)*, which presents considerable complications.

## 14. Amount of time each manager will be required to devote to LLC business, and:

- a. Whether manager has or may have outside business activities [*see § 68A.201[2], Section 4.03*].
- b. If manager has or may have outside business activities, restrictions, if any, to be placed on those activities.

## 15. Special duties, if any, each manager will perform:

- a. Division of labor according to each manager's level of skill, training, or other factors.
- b. Designation of officers [*see § 12C.227*]:

## 16. Any limitations to be imposed on amount or types of LLC liabilities that any manager may incur.

## 17. Weight accorded vote of each manager and/or member.

## 18. Vote required for approval or disapproval by managers of administrative and/or business matters occurring in the ordinary course of business.

19. Voting rights of members [*see Corp. Code § 17103*].

20. Voting rights of members applicable to amending operating agreement or articles of organization [*see Corp. Code § 17103(a)(2), (b)*].
21. Voting requirements of members on dissolution and merger [*see Corp. Code §§ 17103(c), 17350(b), 17551*].
22. Amount of salary or other remuneration to be paid to managers and members, if any.
- a. Basis for making salary determination:
  - b. Amount of time devoted to business.
  - c. Performance standards rather than length of employment.
  - d. Whether salaries paid should be deducted before computing net profits, or charged against members' shares of net profits [*see I.R.C. § 707(c); see also Ch. 12C, Limited Liability Companies* ].
23. Rights of members to distributions during operation of business.

**NOTE:**

A "distribution" is a transfer of money or property by an LLC to its members without consideration [*Corp. Code § 17001(j)*]. Unless otherwise provided in the operating agreement, distributions that are a return of capital must be made in proportion to the contributions of each member, and those that are not must be made in proportion to the allocation of profits [*Corp. Code § 17250*].

- a. Frequency of distributions to be specified in operating agreement.
- b. Extent of each distribution to be specified in operating agreement, either:
  - (1) Full share of profits for period involved; or
  - (2) Part of profits, with balance transferred to capital account.
- c. Details of any arrangement by which any manager or member will have priority over others.
- d. Whether obligation of member to return distribution made in violation of CRLPA may be compromised and, if so, under what conditions [*see Corp. Code §§ 17254(e), 17255*].
- e. Whether manager will be given right to receive property other than money in any distribution.
- f. Whether any manager or member may be compelled to accept distribution of assets in kind in lieu of proportionate cash distribution being made to other members.

**NOTE:**

No member may be compelled to accept a distribution of any asset in kind except on dissolution and winding up unless the operating agreement provides to the contrary [*see Corp. Code § 17253*].

24. Frequency with which accountings of business affairs will be required.
25. When financial statement should be distributed to all members.

**NOTE:**

Members, managers, and holders of economic interests are permitted to inspect required records [*see Corp. Code §§ 17058, 17106(b)*]. Only LLCs with 35 or more members are entitled to receive annual statements [*see Corp. Code § 17106(c)*]. An LLC with more than 35 members must render an annual report and members representing at least five percent of the voting interests of members, or three or more members may request quarterly accountings [*Corp. Code § 17106(c)*]. Any request, inspection, or copying of business records by a member or holder of an economic interest may be made by that person or by that person's agent or attorney [*Corp. Code § 17106(i)*].

26. When copies of LLC's tax returns should be:

- a. Prepared by the LLC, i.e., whether LLC should be required to prepare them in advance of date on which members' returns are due to IRS.
- b. Distributed to all members.

27. Extent to which membership interests may be assigned or sold [*see Corp. Code § 17301*].

**NOTE:**

A membership or economic interest is assignable in whole or in part except as provided in the articles of organization or operating agreement [*Corp. Code § 17301(a)*]. The provisions of an operating agreement affecting the ability of a member to transfer or assign membership or economic interests are among the more important provisions of the agreement. Rights of first refusal or other restrictions are common. However, restrictions that are too severe may prevent the gift of a membership interest from qualifying for the gift tax annual exclusion.

28. Criteria for admission of additional members:

- a. When membership interest is to be acquired directly from LLC:
  - (1) Contributions and other financial requirements.
  - (2) Consent required.
- b. When membership interest will be acquired from assignor, whether operating agreement should admit assignee as member.

29. Rules for LLC member meetings:

- a. Place where meetings will held [*see Corp. Code § 17104(a)*].

**NOTE:**

Members may participate in a meeting through the use of conference telephones or electronic video screen communication, as long as all members participating in the meeting can hear one another, or by electronic transmission by and to the LLC [*Corp. Code § 17104(f)*; *see Corp. Code § 17001(o)(1), (2)*]. Participation in this way constitutes presence in person at the meeting [*Corp. Code § 17104(f)*].

- b. When notice of meeting will be deemed to have been sent, time of either [*see Corp. Code § 17001(ao)*]:

- (1) Deposit in mail.
- (2) Personal delivery.
- (3) Delivery to common carrier for transmission.
- (4) Transmission by notice giver by electronic means.

**NOTE:**

Notice by electronic means will be deemed given when delivered by electronic transmission by the LLC [*Corp. Code § 17001(o)(1), (2)*]. Unless prohibited by the articles of organization and if authorized by the operating agreement, members not physically present may participate in person or by proxy at a member meeting by electronic transmission by and to the LLC or by electronic video screen communication [*Corp. Code § 17104(a); see Corp. Code § 17001(o)(1), (2)*].

- (5) Oral notice communicated in person or by telephone or wireless to:
  - (a) Actual recipient; or
  - (b) Person at office of recipient who sender has reason to believe will communicate promptly to actual recipient.
- (6) Other time to be specified in operating agreement.

c. Proportion of membership interests required to constitute quorum at meetings.

**NOTE:**

Unless otherwise provided in the operating agreement, a majority in interest of the members represented in person or by proxy constitutes a quorum at a meeting [*Corp. Code § 17104(h)(1)*]. A majority in interest of the members means more than 50 percent of the interests of members in current profits from business operations, unless a different proportion is specified in the operating agreement [*Corp. Code § 15611(v)*].

d. Whether operating agreement should permit or limit action to be taken without meeting on written consent [*see Corp. Code § 157104(i)*].

**NOTE:**

If authorized by the operating agreement and not prohibited by the articles of organization, members not physically present may participate in person or by proxy at a member meeting by electronic transmission by and to the LLC or by electronic video screen communication [*Corp. Code § 17104(a); see Corp. Code § 17001(o)(1), (2)*].

e. Whether notice of adjourned meeting need be given [*see Corp. Code § 17104(d)*].

30. Whether managers or members may be removed or expelled and, if so:

- a. Grounds for removal and vote required to cause removal.

- b. Whether operating agreement should provide against, or condition, expulsion because, for example, an order for relief is entered against manager under Chapter 7 of federal bankruptcy law.
- c. Notice period required before any manager's or member's removal or expulsion can become effective.

**NOTE:**

The operating agreement should specify when any notice will be deemed to have been sent [*see Corp. Code §§ 17001(ao), 17104(a)*].

31. Whether operating agreement should provide for specific consequences to member or manager for breach of operating agreement.

**NOTE:**

This type of provision is enforceable in accordance with its terms unless the member or manager seeking to invalidate the provision establishes that the provision was unreasonable under the circumstances existing when the agreement was made. The specific consequences may include any of the following: (1) loss of voting, approval, or other rights; (2) liquidated damages; or (3) a reduction of the defaulting manager's or member's economic rights.

32. Rules to govern withdrawal of managers.

33. Rules restricting or preventing manager or member from assigning or encumbering membership interest.

34. If LLC is to be for fixed term, whether operating agreement should provide that withdrawal of manager before expiration of term will be treated as breach of agreement.

35. Rules to govern withdrawal of members.

36. Whether operating agreement should provide for specific consequences to member for breach of operating agreement.

**NOTE:**

This type of provision is enforceable in accordance with its terms unless the member seeking to invalidate the provision establishes that the provision was unreasonable under the circumstances existing when the agreement was made. The specific consequences may include any of the following: (1) loss of voting, approval, or other rights; (2) liquidated damages; or (3) a reduction of the defaulting member's economic rights.

37. Method of disposing of interest of manager or member who dies, resigns, retires, or is expelled, if operating agreement permits or requires disposition:

- a. Sale of member's interest to remaining members.
- b. Liquidation of member's interest through purchase by LLC.
- c. Manner in which purchase price will be determined.
- d. Whether purchase price is to be funded by insurance and, if so, whether:

(1) Insurance is to be carried by each member on all other members, or by LLC.

(2) Necessary arrangements have been made.

e. Identity of persons to whom membership or economic interest may be devised and under what conditions.

38. Whether any member is to have priority over any other member for return of his or her contribution.

39. Rules to specify when LLC should be dissolved and wound up [see *Corp. Code § 17350 et seq.*]:

**NOTE:**

The procedures involved in the dissolution and winding up of LLCs are discussed in Ch. 12C, *Limited Liability Companies* .

a. Time to be specified for, or event that will precipitate, dissolution and winding up.

b. Number of members needed for written consent to dissolution and winding up.

c. Whether dissolution and winding up will be required if manager ceases to be manager and at least one other manager remains.

d. Whether new manager may be admitted if sole manager ceases to be manager.

40. Rules to govern winding up on dissolution [see *Corp. Code § 17350 et seq.*]:

a. Which members should be required by agreement to wind up business.

b. If member wind up business affairs, whether they should be allowed reasonable compensation.

41. Rules desired for distribution of assets on dissolution and after satisfaction of liabilities to creditors:

42. Whether interests in LLC will be evidenced by certificates of interest issued by LLC.

43. Information about family members, including:

**NOTE:**

The following information should be obtained about family members who are potential heirs of the client even if they are not currently involved in the family business.

a. Age.

b. Educational background.

c. Work experience.

d. Whether currently employed in family business.

e. Whether employment in family business, or particular position, has been promised.

f. Current salary.

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DIVISION IV: WILLS AND TRUSTS  
CHAPTER 68A USING FAMILY PARTNERSHIPS AND OTHER BUSINESS ENTITIES IN ESTATE PLANNING  
PART III. TRANSACTION GUIDE  
A. Client Interview--Facts and Documents

*25-68A California Legal Forms--Transaction Guide § 68A.102*

**AUTHOR:** Steven M. Goldberg Practice Consultant

**§ 68A.102 Documents for Family Limited Partnership or Family Liability Company**

1. Instruments evidencing client's, client's spouse's, and any prospective partners' or members' legal or equitable title to real or personal property intended to be conveyed to partnership.
2. Any instruments that will be used to convey title to real or personal property to partnership or limited liability company.
3. Documents evidencing leases on property to be acquired.
4. Documents evidencing leases under which partnership or limited liability company will occupy property as subtenant of one or more partners or members.
5. Licenses and permits issued to partners or members or their existing businesses.
6. Contracts and/or franchise agreements to be assigned to partnership or limited liability company.
7. Financial statements for any existing business to be acquired.
8. Insurance policies on any real or personal property to be transferred to partnership or limited liability company.
9. Licenses or other documents securing:
  - a. Copyrights.

- b. Patent rights.
- c. Trade names, trademarks, and/or service marks.

10. Relevant personal documents of client and client's spouse, including:

- a. Any previously executed wills.
- b. Any previously executed trusts.

**NOTE:**

Revocable and irrevocable trusts can be general partners. Existing revocable trusts ordinarily must be amended to include provisions compatible with the family limited partnership and the anticipated income, gift, and estate tax results. For example, specific authority should be given to allow the trustee to serve as a general partner. Similarly, the applicable investment standard in the trust should anticipate that the trust can invest a majority or all of its assets in the partnership without the duty to diversity.

- c. Life insurance policies.

**NOTE:**

Life insurance proceeds can be used to buy out heirs who do not participate in the family business. Insurance on the life of the client poses significant estate planning issues. See *California Wills and Trusts, Ch. 3, Selecting the Proper Estate Planning Devices, § 3.06[2]* (Matthew Bender).

11. Relevant personal documents of family members including:

- a. Any previously executed wills.
- b. Any previously executed trusts.
- c. Life insurance policies.
- d. Any judgments.

12. Documents relating to marriage or termination of marriage of client, client's spouse, and family members including:

**NOTE:**

The documents listed below should be requested from the client only when factual information presented by the client or otherwise adduced by counsel raises concerns that additional instruments might affect the formation or operation of the family business. For example, contentious divorce proceedings might affect the desirability of retaining a prospective former in-law in the business, the transfer of property to the business, and bequests.

- a. Existing prenuptial agreements.
- b. Property settlement agreements and separation agreements.

c. Divorce decrees.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Business & Corporate Law Limited Liability Companies Formation Business & Corporate Law Limited Partnerships Formation Estate, Gift & Trust Law General Overview



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A. Client Interview--Facts and Documents

*25-68A California Legal Forms--Transaction Guide §§ 68A.103-68A.109*

**AUTHOR:** Steven M. Goldberg Practice Consultant

**[Reserved]**

§§ 68A.103[Reserved]



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B. Preliminary Determinations

*25-68A California Legal Forms--Transaction Guide § 68A.110*

**AUTHOR:** Steven M. Goldberg Practice Consultant

**§ 68A.110 Using Family Business for Estate Planning Purposes**

1. Determine client's overall estate objectives.

**NOTE:**

It is not unusual for some of the objectives or goals listed below to conflict. Counsel should endeavor to rank these objectives or goals in terms of their importance to the client. Strategies used to meet one goal may counter strategies used to achieve another, and counsel should be alert to potential conflicts of interest.

- a. Income for life of client and surviving spouse.
- b. Equal division of assets to children.
- c. Minimizing estate and gift taxes.
- d. Passing business to heirs to secure their future.

2. Estimate value of client's assets.

**NOTE:**

Counsel must analyze and weigh the gains to be derived from estate planning against both the financial costs and the separation of assets from the client's control. As a rule of thumb, a client should have approximately \$2 million of net worth and be prepared to make lifetime gifts in excess of the annual gift exclusion amount to warrant the expense

of forming a family limited partnership. If the client is only planning to make annual gifts shielded by the annual exclusion, a limited partnership might still be used, but the expense of documenting the value of the gifted interest may outweigh the value of the valuation discount obtained. For discussion of gift valuation and the annual exclusion, see §§ 68A.40, 68A.41, respectively.

3. Identify current and long term goals of business owner and family business:

**NOTE:**

The goals of the family business should be distinguished from the goals of the family. The goal of a typical family is to nurture children into adulthood and help family members develop self-esteem and survival skills. Business goals tend to focus on economic success and generating profits. As an example of when these goals might conflict, a parent may feel that a child might not be able to earn a secure living outside the confines of the family business. The parent might wish to preserve the family business as a source of employment and income, despite countervailing concerns, but the result might also tie the child to a troubled business or negatively affect the child's self-esteem by realizing that the parent does not think the child can "make it" on his or her own.

- a. Evaluate client's current financial situation.
- b. Determine business owner's retirement goals and needs.
- c. Determine whether client is financially secure apart from business or will be relying on business proceeds for retirement.

4. Evaluate family culture [*see* § 68A.111].

5. Examine nature of business operations.

- a. Existing structure of business.
- b. Whether business owner manages or is involved with day-to-day business operations.
- c. Whether business is run by managers who are not family members.
- d. Whether business owner's children are involved with day-to-day business operations.

6. Ascertain client's objectives regarding family business.

a. If client wishes business to stay within family, ascertain how and to whom client wishes to transfer control of business.

- (1) Are any heirs interested in and capable of pursuing client's business?

**NOTE:**

Planning for management succession in the context of a family business is essential. The client must consider whom he or she wishes to run the business after the client leaves the business, as well as alternative potential managers if the chosen successor is not able to take over immediately after the client's death. However, management crises may still

occur, such as the untimely death of an active business owner or the business leader. Counsel should be ready to propose alternatives, such as an interim manager or business consultant. For further information, see §§ 68A.111 and 68A.121.

b. If client wants business to support client's surviving spouse, determine how business assets can be used to provide income for surviving spouse.

c. If client wishes to dispose of business during his or her lifetime, advise client to identify pool of potential purchasers, such as key employees, large customers, suppliers, and competitors.

**NOTE:**

Counsel should note counsel's own degree of involvement and scope of representation in a client letter, such as whether and to what extent counsel will be involved in the negotiations. Counsel should also be prepared to structure and document an adequate, organized, and efficient reasonable due diligence inquiry. Environmental, labor, employment, intellectual property, tax, and employee benefit issues may need to be addressed. For further discussion, see Ch. 17, *Buying and Selling a Business or Professional Practice* .

7. Evaluate degree of risk client is willing to face.

**NOTE:**

The IRS has aggressively challenged discount valuations of family business interests. If the client is risk-adverse, the nontax advantages of the partnership can still be obtained, and the client can choose not to pursue the valuation discounts. However, in certain circumstances, the IRS may choose to assert a valuation discount, such as the death of a spouse when no estate tax is due but a step-up in basis is occurring.

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Estate, Gift & Trust LawGeneral Overview



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*25-68A California Legal Forms--Transaction Guide § 68A.111*

**AUTHOR:** Steven M. Goldberg Practice Consultant

**§ 68A.111 Evaluating Family Dynamics and Existing Management Structure; Preparing for Succession**

**NOTE:**

Any succession plan for the business must be coordinated with the estate plan [*see § 68A.110*] to ensure that the business owner's goals, including retirement security, minimizing taxes, and maintaining family harmony, are satisfied.

1. Assess the dynamics or culture of client's family including:

- a. Intrafamily communication systems in business context.
- b. Intrafamily communication systems in nonbusiness context.
- c. Decision-making structure of business.
- d. Family decision-making style.
- e. How well family members get along with each other.
- f. Sibling rivalry.
- g. Expectations of family members.
- h. Current and long term goals of business [*see § 68A.110*].

- i. Current and long term goals of client [*see* § 68A.110].
2. Identify current and future business leaders and family leaders, if different.
3. Identify key employees and determine their expectations with regard to their future with business.
4. Develop informal family employment policy.

**NOTE:**

Counsel rarely formalizes a family employment policy in writing. Some issues are more or less covered by a buy-sell agreement. Nevertheless, even an informal policy is helpful in defining who can work for the business, under what conditions, and with what performance requirements [*see* P 6, *below*].

5. Ascertain pool of potential successors within family.
6. Establish criteria for business successor.
  - a. Family membership or key employee.
  - b. Age, gender, or marital status requirements.
  - c. Education and training requirements.
  - d. Requisite skills and experience, and whether some experience must be outside family business.
  - e. Support of other family members.
  - f. Support of key employees.

7. Identify immediate successor.

**NOTE:**

The client, with assistance from counsel, must identify the proper management successor(s)(and alternatives) for the business. Factors include education, experience in the family business, similar experience in other businesses, relevant talents and skills, "leadership qualities," and personal qualities such as honesty, maturity, and work ethics. The strengths and weaknesses of each potential candidate should be evaluated.

8. Identify alternative successor.
9. Establish specific responsibilities for business leaders.
10. Determine appropriate compensation.
11. Communicate succession plan throughout family and to existing employees.

**NOTE:**

If a formal succession plan will be distributed among family members, the plan should also cover, as needed, proportional business ownership, leadership positions and responsibilities, and a timetable for implementation.

## 12. Implement succession plan:

**NOTE:**

Counsel can assist in smoothing the transfer of business leadership by suggesting techniques that introduce and involve the successors in daily business operations and serve to train the successors.

- a. Assuming that family members are already involved in business, consider promotions, specific job titles, and inclusion on board of directors, if any.
- b. Encourage client to delegate authority and assign key tasks to successors.
- c. Evaluate usefulness of mentoring by senior employees.
- d. Consider structuring performance evaluations by client, key employee, or outside, unbiased business persons.
- e. Schedule regular meetings between officers and management.
- f. Encourage open communication and effective conflict resolution.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Business & Corporate Law Limited Liability Companies Formation Business & Corporate Law Limited Liability Companies Management Duties & Liabilities Business & Corporate Law Limited Partnerships Formation Business & Corporate Law Limited Partnerships Management Duties & Liabilities Estate, Gift & Trust Law General Overview



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*25-68A California Legal Forms--Transaction Guide §§ 68A.112-68A.119*

**AUTHOR:** Steven M. Goldberg Practice Consultant

**[Reserved]**

§§ 68A.112[Reserved]



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*25-68A California Legal Forms--Transaction Guide § 68A.120*

**AUTHOR:** Steven M. Goldberg Practice Consultant

**§ 68A.120 Forming Family Limited Partnership**

1. Identify client's business and estate planning goals [*see § 68A.110*].
  - a. Evaluate client's business and estate planning goals.
  - b. Estimate size of client's estate.
  - c. Determine business owner's retirement goals and needs.
2. Assess the dynamics or culture of client's family [*see § 68A.111*].
  - a. Family decision-making style.
  - b. Expectations of family members.
3. Educate business owner about advantages and need for advance planning and potentially dire consequence of failure to adequately plan.
4. Identify property to be transferred to business entity.

**NOTE:**

Personal property unrelated to family business operations, such as a personal automobile, should not be transferred to the partnership. The transfer would not likely be supported by a bona fide business purpose, and the IRS may argue that the transfer was an attempt to artificially depress the size of the estate.

5. Select appraisers.

**NOTE:**

Counsel should select appraisers to appraise the value of the assets to be transferred to the family business and to appraise the value of the partnership interests [*see* § 68A.82[3][a]].

6. Identify income and real property tax issues connected with property to be transferred.

7. If family business appears to be viable option as business and as means to pass on wealth while minimizing taxes, research applicable state laws to determine most advantageous state for formation (or reformulation).

8. Select general partner(s) from among the following:

**NOTE:**

It may be necessary to create a business entity as an appropriate general partner.

a. Individuals.

**NOTE:**

If the client plans to secure an estate tax discount on partnership units, the client should not be the sole general partner because his or her death will result in the withdrawal of the general partner, which in turn may be an act of dissolution, thereby possibly eliminating any valuation discount [*see I.R.C. 2704(a); see also* § 68A.40[2][e]]. Extreme caution should be exercised whenever the client wishes to use a single individual as the sole general partner.

b. C or S corporations.

c. Limited liability companies.

d. Revocable trusts.

**NOTE:**

Existing revocable trusts will most likely need to be amended to be compatible with the partnership and to achieve the desired income and estate tax goals. See § 68A.101, P 10, NOTE.

9. Determine successorship and formulate succession plan [*see* § 68A.111].

10. Determine proportional ownership issues.

**NOTE:**

One technique for avoiding succession problems is to transfer ownership interests only to family members who actively participate in the business. However, the interest of nonparticipating family members may diverge from those of the business and its active participants: The nonparticipants may want a higher return on their inheritances, or to be bought out, to the detriment of the business.

Although business owners typically transfer ownership to their children, it may be more effective from an estate planning view to consider the grandchildren if the parents are also transferring assets out of their estates.

11. Consider making gifts to family members in advance of partnership formation to fund purchases of capital interest in partnership or to preserve exact percentage of shared ownership.

**NOTE:**

A common estate planning and tax minimizing technique is to have the succeeding generation purchase business interests from the senior generation using funds derived from the income of the business. Alternatively, the senior generation may give business interests or assets to fund the purchase. In either situation, counsel should carefully assess the financial impact on the business--the cash or asset drain may seriously hinder business operations and expansion. Further, the problem may be exacerbated by the fact that many buy-out plans are staggered over a long period of time.

When assets are transferred to an entity, the assets are not subject to reassessment if the ownership is exactly the same following the transfer [*see Rev. & Tax. Code § 64*]. The client may wish to transfer cash or assets to children before forming the family business entity to fund partial purchases of the entity assets and avoid reassessment.

12. Secure taxpayer identification number for business.

13. Form business entity in accordance with applicable state law.

a. Draft, and have all original general and limited partners execute, limited partnership agreement [*Corp. Code § 15902.01*].

**NOTE:**

While ULPA '08 requires a limited partnership to have an agreement, it does not prescribe specific language and does not require that partnership agreement to be written [*Corp. Code § 15902.01*; *see Corp. Code § 15901.02(x)* ("partnership agreement" defined)]. Under the ULPA '08, except as provided below, the partnership governs relations among the partners and between the partners and the partnership. To the extent that the agreement does not otherwise provide, the ULPA '08 governs relations among the partners and between the partners and the partnership [*Corp. Code § 15901.10(a)*]. The partnership agreement, however, **may not** vary certain statutory provisions [*see Corp. Code § 15901.10(b)*]; *see also Ch. 16, Formation of Limited Partnerships, § 16.21[4][b]*].

(1) Establish business purpose for family limited partnership.

**NOTE:**

Many valid business or nontax purposes support the formation of passive or active asset family limited partnerships. Valid business reasons include: (1) consolidating family assets and diversifying risk, (2) grooming the next generation for their future roles in the business, and (3) protecting a child's inheritance from creditors including the effects of a marital dissolution.

(2) Include restrictions on transferability, such as right of first refusal.

(3) Include corporate or other entity as general partner.

(4) Provide for compensation or potential for compensation for general partner.

b. Select agent for service of process to be named in certificate of limited partnership and maintained within California [*see Corp. Code §§ 15901.14(a)(2), 15901.16(d)(1), 15902.01(a)(3)*].

**NOTE:**

After formation, limited partnerships must continuously maintain an agent for the service of process within California [*Corp. Code § 15901.14(a)(2)*]. The name and address of individuals or the name of the corporation designated as the agent for service of process must be included in the certificate of limited partnership [*Corp. Code §§ 15901.14(c), 15901.16(d)(1)*]. If a corporation is designated as agent for service of process, it must file a certificate disclosing the places it can be served with process and the name of each person authorized to accept service of process, among other matters [*see Corp. Code §§ 15901.14(c), 15901.16(d)(1)*]; *see also Corp. Code § 1505*].

c. Complete and file original and at least two copies of certificate of limited partnership [*see Ch. 16, Formation of Limited Partnerships* ], together with filing fee [*see Gov. Code § 12188(b)*] with Secretary of State.

**NOTE:**

The Secretary of State will compare and certify two copies of the certificate without charge [*see Gov. Code § 12185*]. For a detailed guide to drafting and filing a limited partnership certificate, see Ch. 16, *Formation of Limited Partnerships* .

A limited partnership is formed when the certificate is filed in the office of the Secretary of State [*Corp. Code § 15902.01(c)*]. A limited partnership that is defectively formed due to its failure to file a certificate of limited partnership may be treated as a general partnership [*see American Alternative Energy v. Windridge, Inc. (1996) 42 Cal. App. 4th 551, 560-562, 49 Cal. Rptr. 2d 686* (noncompliance with certificate requirement rendered entity general partnership with capacity to sue)].

d. Pay minimum franchise tax to Franchise Tax Board [*Rev. & Tax. Code § 17935*].

**NOTE:**

Limited partnerships must pay the minimum franchise tax if they are doing business in California [*Rev. & Tax. Code § 17935(a)*]. For taxable years beginning before January 1, 2011, "Doing business" is defined as actively engaging in any transaction for the purpose of financial or pecuniary gain or profit [*Rev. & Tax. Code § 23101(a)*]. For taxable years beginning on or after January 1, 2011, a taxpayer is doing business in California if certain conditions relating to organization, sales, property value, or compensation paid are met [*see Rev. & Tax Code § 23101(b)*]; *see also Ch. 12B, Foreign Corporations and Associations, § 12B.31*]. In addition, limited partnerships that have executed, acknowledged, and filed a certificate of limited partnership [*see Corp. Code § 15902.01*] must pay the minimum franchise tax [*Rev. & Tax. Code § 17935(b)(1)*]. This tax is payable for each taxable year or portion of taxable year, until a certificate of cancellation is filed [*Rev. & Tax. Code § 17935(b)(1)*]; *see Corp. Code § 15902.03*].

14. Draft buy-sell agreements, or other restrictions on transfer of partnership interests [*see Ch. 8D, Buy-Sell Agreements* ].

15. Establish separate bank account for business.

16. Prepare nonpersonal assets for transfer to partnership.

a. Retitle assets in partnership's name.

**NOTE:**

The transfer of encumbered real estate to the partnership may require the consent of lenders. In addition, transfers of encumbered property for which the debt exceeds the income tax basis can result in taxable gain.

- b. Record change of ownership of real property.

**NOTE:**

Although recording is not mandatory, counsel should advise the partnership that, on receipt of the certificate of limited partnership from the Secretary of State, it should record a certified copy of certificate in the office of the county recorder of any county in which the limited partnership owns real property [*see Corp. Code § 15902.01(e)*]. Recording creates a conclusive presumption in favor of any bona fide purchaser or encumbrancer for value of partnership real property in the county in which the certificate is recorded that the persons named as general partners in the certificate are all of the general partners, among other matters [*see Corp. Code §§ 15902.01(e)*].

17. Give partnership units to family members.

**NOTE:**

If feasible, it may be advantageous to delay making gifts of fractional partnership interests. Allowing the limited partnership to mature may serve to support the valuation discounts applied to the gift. Further, a significant period of time between partnership formation and the subsequent gift, whether inter vivos or testamentary, makes it less likely that the IRS will try to compress the transactions into a single, integrated step transaction [*see § 68A.82[4]*]. Nevertheless, once the partnership is properly formed, gifts can be made of partnership interests and delays may be imprudent.

18. Redraft contracts with important clients and suppliers.

19. Advise partnership to designate and continuously maintain within California an office at which partnership records [*see P 20, below*] are to be kept [*Corp. Code §§ 15901.11, 15901.14*].

20. Advise partnership to maintain following types of records at designated office [*Corp. Code § 15901.11; see paragraph 19, above*]:

**NOTE:**

A limited partnership agreement may not vary the information required under *Corp. Code § 15901.11* [*Corp. Code § 15901.10(b)(4)*].

- a. Current list of full name and last known street and mailing address of each partner.

**NOTE:**

This list must separately identify the general partners in alphabetical order and the limited partners in alphabetical order [*Corp. Code § 15901.11(1)*].

- b. Copy of initial certificate of limited partnership and:

- (1) All certificates of amendment and restatements.
- (2) Executed copies of any powers of attorney pursuant to which any certificate has been

executed.

- c. Copies of partnership's federal, state, and local income tax returns and reports, if any, for prior six years.
- d. Copies of original partnership agreement and all amendments.
- e. Partnership financial statements for prior six years.
- f. Copy of any record made by limited partnership during past three years of any consent given by or vote taken of any partner pursuant to ULPA '08 or partnership agreement.
- g. Copy of any filed certificate of conversion or merger.
- h. Unless contained in partnership agreement made in record, record stating:
  - (1) Amount of cash, and description and statement of agreed value of other benefits, contributed and agreed to be contributed by each partner;
  - (2) Times at which or events upon which additional contributions agreed to be made by each partner are to be made;
  - (3) For person that is both general and limited partner, specification of what transferable interest person owns in each capacity; and
  - (4) Any events upon which limited partnership will be dissolved and activities wound up.

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Business & Corporate Law Limited Partnerships General Overview Business & Corporate Law Limited Partnerships Formation Estate, Gift & Trust Law General Overview



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*25-68A California Legal Forms--Transaction Guide § 68A.121*

**AUTHOR:** Steven M. Goldberg Practice Consultant

**§ 68A.121 Forming Family Limited Liability Company**

1. Identify client's business and estate planning goals [*see § 68A.110*].
  - a. Evaluate client's business and estate planning goals.
  - b. Estimate size of client's estate.
  - c. Determine business owner's retirement goals and needs.
2. Assess dynamics or culture of client's family [*see § 68A.111*].
  - a. Family decision-making style.
  - b. Expectations of family members.
3. Educate business owner about advantages and need for advance planning and potentially dire consequence of failure to adequately plan.
4. Identify property to be transferred to business entity.

**NOTE:**

Personal property unrelated to family business operations, such as a personal automobile, should not be transferred to the family LLC. The transfer would not likely be supported by a bona fide business purpose, and the IRS may argue that the transfer was an attempt to artificially depress the size of the estate.

5. Select appraisers.

**NOTE:**

Counsel should select appraisers to appraise the value of the assets to be transferred to the family business and to appraise the value of the membership interests [*see* § 68A.82[3][a]].

6. Identify income and real property tax issues connected with property to be transferred, such as valuation, liabilities, and basis.

7. If family business appears to be viable option as business and as means to pass on wealth while minimizing taxes, research applicable state laws to determine most advantageous state for formation (or reformulation).

8. Select manager(s) from among the following:

**NOTE:**

The articles of organization or operating agreement may prescribe the number and qualifications of managers who may but need not be natural persons [*Corp. Code* § 17151(c)].

a. Individuals.

**NOTE:**

If the client plans to secure an estate tax discount on membership units, the client should not be the sole manager because his or her death will result in the withdrawal of the sole manager, which in turn may be an act of dissolution under the operating agreement, thereby possibly eliminating any valuation discount [*see I.R.C. 2704(a); see also* § 68A.40[2][e]]. Extreme caution should be exercised whenever the client wishes to use a single individual as the sole manager.

b. C or S corporations.

c. Limited liability companies or limited partnerships.

d. Revocable trusts.

**NOTE:**

Existing revocable trusts will most likely need to be amended to be compatible with the partnership and to achieve the desired income and estate tax goals. See § 68A.101, P 10.

9. Determine successorship and formulate succession plan [*see* § 68A.111].

10. Determine proportional ownership issues.

**NOTE:**

One technique for avoiding succession problems is to transfer ownership interests only to family members who actively participate in the business. However, the interest of nonparticipating family members may diverge from those of the business and its active participants. The nonparticipants may want a higher return on their inheritances, or to be bought out, to the detriment of the business.

Although business owners typically transfer ownership to their children, it may be more effective from an estate planning view to consider the grandchildren if the parents are also transferring assets out of

their estates.

11. Consider making gifts to family members in advance of LLC formation to fund purchases of capital interest in LLC or to preserve exact percentage of shared ownership.

**NOTE:**

A common estate planning and tax minimizing technique is to have the succeeding generation purchase business interests from the senior generation using funds derived from the income of the business. Alternatively, the senior generation may give business interests or assets to fund the purchase. In either situation, counsel should carefully assess the financial impact on the business--the cash or asset drain may seriously hinder business operations and expansion. Further, the problem may be exacerbated by the fact that many buy-out plans are staggered over a long period of time.

When assets are transferred to an entity, the assets are not subject to reassessment if the ownership is exactly the same following the transfer [*see Rev. & Tax. Code § 64*]. The client may wish to transfer cash or assets to children before forming the family business entity to fund partial purchases of the entity assets and avoid reassessment.

12. Secure taxpayer identification number for business.
13. Form business entity in accordance with applicable state law.

a. Select agent for service of process to be named in articles of organization and maintained within California [*see Corp. Code §§ 17051(a), 17057(b), 17061(d)*].

b. Prepare, execute, and file articles of organization [*see Corp. Code §§ 17050, 17051, 17056; see §§ 12C.120, 12C.200, 12C.219*].

**NOTE:**

The original and at least one properly executed copy should be filed with the Secretary of State together with the applicable fee [*Corp. Code § 17050(a); see Gov. Code § 12190(b)(fee)*]. If the original is filed with two copies, the LLC unit will certify two copies for no additional charge [*Gov. Code § 12185*]. For a detailed guide to drafting and filing the articles of organization, see *Ch. 12C, Limited Liability Companies, § 12C.120*.

c. Prepare operating agreement, either before or after filing articles of organization [*see § 68A.201; see also § 12C.140*]:

**NOTE:**

While an LLC must have an operating agreement, the governing statutes do not prescribe the specific language and do not require that the partnership agreement to be written [*see Corp. Code § 17059; see also Corp. Code § 17001(ab)* ("operating agreement" defined)]. Rather, with limited exceptions, the governing statutes provide the rules that will apply absent a contrary provision in the agreement [*see Corp. Code § 17005*]. The operating agreement is not filed with Secretary of State [*see Secretary of State's LLC form packet*].

- (1) Establish business purpose for family limited partnership [*see § 68A.201[2]*].

**NOTE:**

Many valid business or nontax purposes support the formation of passive or active asset

family LLCs. Valid business reasons include: (1) consolidating family assets and diversifying risk, (2) grooming the next generation for their future roles in the business, and (3) protecting a child's inheritance from creditors including the effects of a marital dissolution.

(2) Include restrictions on transferability, such as right of first refusal.

(3) Provide for compensation or potential for compensation for managers.

d. File initial statement of information within 90 days after filing articles of organization together with applicable filing fee [*Corp. Code § 17060(a)*; see *Gov. Code § 12190(k)(fee)*; see also *§ 12C.125, 12C.210*].

e. Pay minimum franchise tax to Franchise Tax Board [*see Rev. & Tax. Code §§ 17941, 23153(d)(1)*].

**NOTE:**

For further discussion of tax filings, see *§ 12C.129*.

14. Draft buy-sell agreements or other restrictions on transfer of LLC interests [*see Ch. 8D, Buy-Sell Agreements* ].

15. Establish separate bank account for business.

16. Prepare nonpersonal assets for transfer to LLC.

a. Retitle assets in LLC's name.

**NOTE:**

The transfer of encumbered real estate to the LLC may require the consent of lenders. In addition, transfers of encumbered property for which the debt exceeds the income tax basis can result in taxable gain.

b. Record change of ownership of real property.

**NOTE:**

Although recording is not mandatory, counsel should advise the LLC that it should record a certified copy of its articles in the office of the county recorder of any county in which the LLC owns real property. Recording creates a conclusive presumption in favor of any bona fide purchaser or encumbrancer for value of LLC real property in the county in which the certified copy is recorded of the statements contained in the articles [*Corp. Code § 17052(f)*].

17. Give membership interests to family members.

**NOTE:**

If feasible, it may be advantageous to delay making gifts of fractional LLC interests. Allowing the LLC to mature may serve to support the valuation discounts applied to the gift. Further, a significant period of time between formation and the subsequent gift, whether inter vivos or testamentary, makes it less likely that the IRS will try to compress the transactions into a single, integrated step transaction [*see § 68A.82[4]*]. Nevertheless, once the LLC is properly formed, gifts can be made of LLC interests and delays may be imprudent or impractical.

18. Redraft contracts with important clients and suppliers.

19. Advise LLC to establish and continuously maintain within California an office at which LLC records [*see* P 20, *below*] are to be kept [*Corp. Code § 17057(a)*].

20. Advise LLC to maintain following types of records in an office that may, but need not be, place of its business, in California [*Corp. Code § 17058(a)*]:

a. Current list, in alphabetical order by name, of the following for each member and each holder of economic interest:

(1) Full name and last known business or residence address.

(2) Contribution to LLC.

(3) Share in profits and losses.

b. If LLC is managed by one or more managers and not by all members [*see Corp. Code § 17151(b)*], current list of full name and business or residence address of each manager.

c. Copy of certificate of articles of organization and:

(1) All certificates of amendment.

(2) Executed copies of any powers of attorney pursuant to which articles and any amendments have been executed.

c. Copies of LLC's federal, state, and local income tax or information returns and reports, if any, for prior six taxable years.

d. Copy of original LLC operating agreement and:

(1) All certificates of amendment.

(2) Executed copies of any powers of attorney pursuant to which articles and any amendments have been executed.

e. Copies of LLC financial statements for prior six fiscal years.

f. LLC books and records as they relate to internal affairs of LLC, for at least current and past four fiscal years.

### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Business & Corporate Law Limited Liability Companies General Overview Business & Corporate Law Limited Liability Companies Formation Estate, Gift & Trust Law General Overview



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PART III. TRANSACTION GUIDE  
C. Procedural Guide

*25-68A California Legal Forms--Transaction Guide § 68A.122*

**AUTHOR:** Steven M. Goldberg Practice Consultant

**§ 68A.122 Checklist for Establishing and Maintaining Separate Character of Business**

**NOTE:**

Counsel should consider sending a letter to the client explaining how to respect the integrity of the partnership, including the proper manner of executing documents on the partnership's behalf and how to respect and preserve the limited liability of the limited partners.

1. Maintain history of business operations for family business.

**NOTE:**

Creating and maintaining a history of business operations may help establish a credible business purpose for the family business and help avoid step transaction treatment [*see* § 68A.82[4]].

2. To extent possible, establish and substantiate bona fide business purpose for family limited partnership and transfer restrictions.

**NOTE:**

The IRS may challenge valuation discounts based on transfer restrictions if formation of the family business is used to transfer wealth to family members for less than full and adequate consideration [*see I.R.C. § 2703; see also* § 68A.40[2][d]].

3. Whenever necessary, secure independent appraisals to value partnership assets and partnership interests before transfer [*see* § 68A.82[3][a]].

4. Have business keep separate bank accounts.

**NOTE:**

Partnership income should be deposited in partnership accounts. Clients may be tempted to treat the partnership's bank accounts as their personal accounts for their personal and exclusive use. Treating the partnership's bank accounts as personal accounts will endanger the separate and independent nature of the partnership, and result in unfortunate tax results: either (1) redemption treatment triggering taxable gain to the partner or (2) compensation treatment resulting in ordinary income.

5. Maintain current records of partners' capital accounts.

6. Keep accounting and tax records current and file all requisite tax returns [*see* § 68A.130].

7. Document working capital needs.

**NOTE:**

Documentation of working capital needs is particularly necessary to maximize the "qualified family owned business interest" (QFOBI) deduction in the estate tax context [*see* § 68A.44]. Any portion of an interest in a trade or business attributable to the sum of cash and marketable securities in excess of reasonably anticipated day-to-day working capital needs of that trade or business is not a QFOBI [*I.R.C.* § 2057(e)(2)(D)].

8. If estate plan anticipates relying on QFOBI estate tax deduction, document family members' participation in family business.

**NOTE:**

The above deduction is repealed for estates of decedents dying after 2003 [*I.R.C.* § 2057(j)].

Documentation of family members' participation in the family business is important in the QFOBI context [*see* § 68A.44]. For the estate to qualify for the QFOBI deduction, the decedent or the decedent's family must have owned the business and materially participated in business operations for at least five out of the eight years before death [*I.R.C.* § 2057(b)(1)(D)]. Further, each qualified heir or member of the qualified heir's family must materially participate in the trade or business for at least five years of any eight-year period within 10 years following the death [*I.R.C.* § 2057(f)(1)(A); *see I.R.C.* § 2032A(c)(6)(B)]. The rules governing "material participation" are both complex and vague [*see I.R.C.* §§ 1402(a), 2032A(e)(6)] and have been the subject of much litigation.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Business & Corporate Law Limited Liability Companies Formation Business & Corporate Law Limited Partnerships Formation Estate, Gift & Trust Law General Overview



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*25-68A California Legal Forms--Transaction Guide §§ 68A.123-68A.129*

**AUTHOR:** Steven M. Goldberg Practice Consultant

**[Reserved]**

§§ 68A.123[Reserved]



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*25-68A California Legal Forms--Transaction Guide § 68A.130*

**AUTHOR:** Steven M. Goldberg Practice Consultant

**§ 68A.130 Procedures After Family Business Organized**

1. Advise client to respect integrity of business [*see* § 68A.121].

**NOTE:**

Counsel should remain involved with the family business after formation to help the client maintain the integrity of the family limited partnership structure. The client should not commingle family limited partnership funds with personal or nonpartnership funds and assets.

2. Advise client to comply with ongoing formalities of business.

**NOTE:**

A family ignores the family business entity structure at its own peril--the IRS may argue that the entire entity formation process was a sham. Counsel should consider sending the client reminder letters regarding the actions necessary to maintain the family business structure.

- a. Keep proper accounting and tax records.
- b. Document working capital needs.

**NOTE:**

Documentation of working capital needs is particularly critical in the context of the "qualified family owned business interest" (QFOBI) deduction for estate taxes [*I.R.C.* §

2057; the deduction is repealed for estates of decedents dying after 2003 (*I.R.C.* § 2057(j)); *see* § 68A.44]. Any portion of an interest in a trade or business attributable to the sum of cash and marketable securities in excess of reasonably anticipated day-to-day working capital needs of that trade or business is not a QFOBI [*I.R.C.* § 2057(e)(2)(D)].

c. File annual informational tax returns.

d. File any required certificates.

3. If client will be making taxable gifts, advise client to do the following:

a. Secure appraisal for annual gifts.

**NOTE:**

It may be appropriate to make annual gifts in December in one year and January of the following year, thus allowing one appraisal to cover the annual gifts from two years.

b. File annual gift tax returns [*I.R.C.* §§ 2512, 6019].

**NOTE:**

As with all gifts, the gift tax statute of limitations regarding transfers subject to the valuation rules governing trust interests, preferred interests in business entities, and increases in taxable gifts only runs if the transfer is adequately disclosed on a gift tax return. This requirement began with transfers subject to the special valuation rules and has now been expanded to cover all gifts. Adequate disclosure consists of providing details as to the nature of both the retained and transferred interests [*see I.R.C.* § 6501(c)(9)]. As of the date of publication, the IRS has issued proposed regulations [*see 63 Fed. Reg. 70701*] containing some widely criticized requirements.

If the donor is married and both spouses make gifts, the maximum tax-free annual amount for a joint gift is twice the exclusion amount per donee, or \$20,000, subject to inflation adjustments after 1998. The same "double" exclusion is available when only one spouse makes a gift to a person other than the donor's spouse, provided that the donor's spouse consents to split the gift [*see I.R.C.* § 2513(a)].

4. If client will be making nontaxable gifts, advise client to do following:

a. Secure reappraisal for annual gifts.

**NOTE:**

It may be appropriate to make annual gifts in December in one year and January of the following year, thus allowing one appraisal to cover the annual gifts from two years.

b. File annual gift tax returns [*I.R.C.* §§ 2512, 6019].

**NOTE:**

A donor need not file a gift tax return if no gifts in excess of the annual exclusion amount are made [*I.R.C.* § 6019]. When the client and the client's spouse make a gift of \$20,000 or less to a single donee, and the gift otherwise qualifies for the annual exclusion, the client should file a return to register the spouse's consent. However, with gifts of partnership interests, it may be advisable to file a gift tax return even if the value gifted would qualify for the annual gift tax exclusion to start the statute of limitations

running in regard to the value of the gift.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Business & Corporate Law Limited Liability Companies General Overview Business & Corporate Law Limited Liability Companies Formation Business & Corporate Law Limited Partnerships General Overview Business & Corporate Law Limited Partnerships Formation Estate, Gift & Trust Law General Overview



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*25-68A California Legal Forms--Transaction Guide §§ 68A.131-68A.199*

**AUTHOR:** Steven M. Goldberg Practice Consultant

**[Reserved]**

§§ 68A.131[Reserved]



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DIVISION IV: WILLS AND TRUSTS  
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 PART IV. FORMS  
 A. Organizational Documents

*25-68A California Legal Forms--Transaction Guide § 68A.200*

**AUTHOR:** Steven M. Goldberg Practice Consultant

**§ 68A.200 Family Limited Partnership Agreement**

**[1] Comment**

**[a] Use of Form**

This form is a complete agreement for a family limited partnership to be formed under the Uniform Limited Partnership Act of 2008 (ULPA '08) [*Corp. Code §§ 15900-15912.07*]. It is designed for use by persons who already run a business, or will organize or purchase a business. This form is to be used when the business owner or organizer does not currently contemplate the subsequent addition of new limited partners to obtain additional capital.

Although ULPA '08 requires that the partners enter into a limited partnership agreement [*Corp. Code § 15902.01; see [d], below*], the agreement need not be as long or as complex as this form since ULPA '08 provides numerous rules that will apply unless the partnership agreement provides to the contrary. However, even when the drafter of the partnership agreement wishes to follow the statutory requirements, it is good practice to include them in the agreement in any case, both as an easy reference and because the law may be amended in a manner not anticipated by the partners or their counsel.

For a detailed guide to the statutory provisions that apply in the absence of provisions in the agreement to the contrary and alternate suggestions for the drafting of a limited partnership agreement, see Ch. 16, *Formation of Limited Partnerships*. For additional limited partnership agreements for use by limited partnerships that intend to make public or private offerings conforming to federal and California securities laws, see Ch. 29B, *Nonpublic Real Estate Syndicates*.

**[b] Variation of ULPA '08 Provisions**

Except as otherwise described *below*, the partnership agreement governs relations among the partners and between the partners and the partnership. To the extent the partnership agreement does not otherwise provide, the ULPA '08 governs

relations among the partners and between the partners and the partnership [*Corp. Code § 15901.10(a)*; see also Ch. 16, *Formation of Limited Partnerships*].

A partnership agreement *may not* [*Corp Code § 15901.10(b)*]:

- (1) Vary a limited partnership's power under *Corp. Code § 15901.05* to sue, be sued, and defend in its own name.
- (2) Vary the law applicable to a limited partnership under *Corp. Code § 15901.06* [see Ch. 16, *Formation of Limited Partnerships*, § 16.14].
- (3) Vary the requirements of *Corp. Code § 15902.04* (signature requirements for filed "records").
- (4) Vary the information required by *Corp. Code § 15901.11* (information required to be retained at limited partnership's designated office) [see Ch. 16, *Formation of Limited Partnerships*, § 16.23[2]; see also paragraph 7.03 of this form] or unreasonably restrict the right to information under *Corp. Code § 15903.04* (limited partners) [see Ch. 16, *Formation of Limited Partnerships*, § 16.30[1]; see also paragraph 7.04 of this form] or *Corp. Code § 15904.07* (general partners) [see Ch. 16, *Formation of Limited Partnerships*, § 16.34[4]]. However, the partnership agreement may impose reasonable restrictions on the availability and use of information obtained under those sections and may define appropriate remedies, including liquidated damages, for a breach of any reasonable restriction on use.
- (5) Eliminate the duty of loyalty under *Corp. Code § 15904.08* [see Ch. 16, *Formation of Limited Partnerships*, § 16.35[2]; see also paragraph 6.03 of this form], but the partnership agreement may: (a) identify specific types or categories of activities that do not violate the duty of loyalty, if not manifestly unreasonable; and (b) specify the number or percentage of partners which may authorize or ratify, after full disclosure to all partners of all material facts, a specific act or transaction that otherwise would violate the duty of loyalty.
- (6) Unreasonably reduce the duty of care under *Corp. Code § 15904.08(a)* [see Ch. 16, *Formation of Limited Partnerships*, § 16.35[2]; see also paragraph 6.03 of this form].
- (7) Eliminate the obligation of good faith and fair dealing of limited partners under *Corp. Code § 15903.05(b)* [see Ch. 16, *Formation of Limited Partnerships*, § 16.35[2]] and of general partners under *Corp. Code § 15904.08(d)* [see Ch. 16, *Formation of Limited Partnerships*, § 16.35[2]; see also paragraph 6.03 of this form], but the partnership agreement may prescribe the standards by which the performance of this obligation is to be measured, if the standards are not manifestly unreasonable.
- (8) Vary the power of a person to dissociate as a general partner under *Corp. Code § 15906.04(a)* except to require that the notice under *Corp. Code § 15906.03(a)* be in a record [see Ch. 16, *Formation of Limited Partnerships*, § 16.37].
- (9) Eliminate the power of a court to decree dissolution in the circumstances specified in *Corp. Code § 15908.02(a)* [see Ch. 16A, *Dissolution of Limited Partnerships*].
- (10) Vary the requirement to wind up the partnership's business as specified in *Corp. Code § 15908.03* [see Ch. 16A, *Dissolution of Limited Partnerships*].
- (11) Unreasonably restrict the right of a partner to maintain an action as provided in *Corp. Code § 15910.01 et seq.*

(12) Restrict the right of a partner to approve a conversion or merger [*see* Ch. 16B, *Conversion and Merger of Limited Partnerships* ].

(13) Vary the provisions of Article 11.5 (regarding dissenting limited partners' rights to dissent in a conversion or merger), except to the extent expressly permitted by those provisions [*see* Ch. 16B, *Conversion and Merger of Limited Partnerships* ].

(14) Restrict rights under the ULPA '08 of a person other than a partner or a transferee.

### **[c] Provisions Affecting Valuation Discounts**

This form provides that the limited partners will contribute capital to the limited partnership in the form of cash, property, or services [*see* [2], Section 4.03, *below* ]. From a tax standpoint, formation of a family limited partnership looks more like a bona fide business arrangement negotiated at arm's length if all the limited partners make some cash or property contribution to the partnership. Nevertheless, it is not necessary for all family members to contribute. Later gifts of partnership interests to noncontributing family members should be respected as long as there are valid nontax reasons for forming the partnership. Consolidation of family assets, diversification of risk and the retention of management control by the general partner or partners are valid business purposes for establishing a family limited partnership.

The degree of control an owner of a business interest has over partnership decisions is one of the most significant factors affecting the value of a fractional limited partnership interest [*see* § 68A.82[2][a]]. This form (mirroring state law) clearly bars the limited partners from participating in the management and control of the partnership. The form also limits the limited partners' ability to participate in day-to-day operations, but allows employment [*see* [2], Section 6.02, *below* ]. However, the goal of maximizing valuation discounts must always be evaluated in the context of prudent business practice. When a fractional interest might be sufficient to affect major partnership decisions, the business owner should analyze the goals of the individual partners.

This form contains a right of first refusal, first to the general partners and then to the limited partners [*see* [2], Section 10.02, *below* ]. Partnership agreements typically contain a right of first refusal, requiring a partner who receives an independent offer to purchase a partnership interest to first offer that interest to the partnership [*see* § 68A.82[2][c]]. The existence of this obligation reduces the marketability of the interest because prospective purchasers may be deterred, or seek a discount to cover the risk of the partnership purchasing the interest. For example, prospective purchasers might be unwilling to incur costs or face delays while valuing the partnership interest if the general partners can match the offer and purchase the interest.

Provisions affecting dissolution are among the most important provisions affecting valuation discounts [*see* § 68A.40[2][e]]. The agreement should not permit dissolution in any fashion that is less restrictive than the state law standard, which requires unanimous consent of the general partners and a majority consent of the limited partners [*see* [2], Section 13.02, *below* ]. Using more than one general partner will also make it more difficult for the partnership to dissolve. Limiting the duration of the partnership to a term of years is crucial [*see* [2], Section 1.04, *below* ]. In California, a limited partner has no right to withdraw when there is no term. Thus, the use of a term should not be viewed as an applicable restriction thereby allowing an appraiser to consider the effect a long term would have on a potential investor.

### **[d] Formation of Limited Partnerships**

In order to form a limited partnership, the partners must enter into a partnership agreement and the general partners must file a certificate of limited partnership with the Secretary of State [*Corp. Code* § 15902.01(a); *see* § 68A.120]. The

partnership agreement need not be written [*see Corp. Code § 15902.01(a); see also Corp. Code § 15901.02(x)* ("partnership agreement" defined)]. However, it is advisable to memorialize an oral agreement in a written form to prevent subsequent disagreements over the agreement's terms. A limited partnership is formed when the certificate of limited partnership is filed [*Corp. Code § 15902.01(c)*].

For further discussion of the formation of a limited partnership, including name requirements and the need to maintain certain records and an office and agent for service of process in California, see Ch. 16, *Formation of Limited Partnerships*.

#### **[e] Allocation of Profit and Loss**

The profits and losses of a limited partnership must be allocated among the partners in the manner provided in the partnership agreement. If the agreement does not otherwise provide, profits and losses must be allocated in the same manner as the partners share distributions [*Corp. Code § 15905.035*]. A distribution by a limited partnership must be shared among the partners on the basis of the value, as stated in the required records when the partnership decides to make the distribution, of the contributions the limited partnership has received for each partner [*Corp Code § 15905.03*]. This form allows allocation of profit and loss among the partners in equal proportions, in proportion to their capital contributions, or in proportions specified in the form [*see [2], Section 5.01, below*]. Counsel should be aware that failure to allocate in accord with proportional interests requires compliance with *I.R.C. § 704(b)*. For discussion, see § 68A.40[2][b].

#### **[f] Removal of General Partner**

This form allows removal of a general partner by affirmative vote of a majority or greater percentage in interest of the limited partners who are not also general partners [*see [2], Section 6.05, below*]. It also allows specification that a general partner may be removed only for cause. By allowing removal only for cause and specifying a large percentage requirement, e.g., 80 percent, the agreement acts to cement in control by the general partners. In no event should removal of a general partner be allowed by affirmative vote of less than a majority in interest of the limited partners.

#### **[g] Dissolution of Partnership**

This form allows dissolution by unanimous consent of the general partners and the consent of a majority of interest of the limited partners [*see [2], Section 13.02, below*]. Requiring more than a majority of interest of the limited partners is an "applicable restriction" under *I.R.C. § 2704(b)* [*see § 68A.81[5][d]*]; requiring a vote of less than all of the general partners and a majority in interest of the limited partners waters down or eliminates the estate tax valuation discount [*see § 68A.40*].

### **[2] FORM**

#### **Family Limited Partnership Agreement**

\_\_\_\_\_ FAMILY PARTNERSHIP  
LIMITED PARTNERSHIP AGREEMENT

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15.15. Execution by Spouses	_____
15.16. Consent of Spouses	_____

15.17. Election of Adjusted Basis	_____
15.18. Counterparts	_____
15.19. Headings	_____
15.20. Pronouns	_____
15.21. Statutory References	_____
15.22. Other Instruments	_____
EXHIBIT A. List of Partners	_____

\_\_\_\_\_ FAMILY PARTNERSHIP  
LIMITED PARTNERSHIP AGREEMENT

This Limited Partnership Agreement is entered into on \_\_\_\_\_[*date*], by and between \_\_\_\_\_[*identify general partners, e.g., \_\_\_\_\_, a California corporation, and \_\_\_\_\_ [name]*] (collectively referred to as "General Partners"), and \_\_\_\_\_[*name*] and \_\_\_\_\_[*name*] (collectively referred to as "Limited Partners"). The General and Limited Partners agree as follows.

**ARTICLE 1**  
**ORGANIZATIONAL MATTERS**

1.01. The General Partners and the Limited Partners agree to form a limited partnership (the Partnership), pursuant to the provisions of the Uniform Limited Partnership Act of 2008 [*Corp. Code § 15900 et seq.*].

**Purpose of Partnership**

1.02. The purpose and character of the business of this Partnership is \_\_\_\_\_[*specify, e.g., to acquire, hold, operate and maintain real estate, to provide centralized management of the business of the partners, to protect certain partners from the risk of economic loss in exchange for a restricted interest in future profits, and to do all other acts as may be reasonable and necessary to further the business of the Partnership*]. The Partnership may also engage in any activities that are related or incidental to that business. [*Optional: In addition, the partnership has been formed to promote the long-term interests of the partners, and its investment outlook is likely to take that range of interests into account.*]

**Name of Partnership**

1.03. The name of this Partnership shall be "\_\_\_\_\_, a California Limited Partnership." The business of the Partnership shall be conducted under that name. [*Add, if desired: The name of the Partnership may be changed by the General Partners by giving written notice of the change to the Limited Partners and by filing a certificate of amendment or restated certificate with the Secretary of State.*]

**Term of Partnership**

1.04. The term of the Partnership commences on \_\_\_\_\_ [\_\_\_\_\_ (*specify the filing date*

of the partnership's Certificate of Limited Partnership or a date not more than 90 days after the date the certificate is received by the Secretary of State), and continues until \_\_\_\_\_ (specify either dissolved as provided in this Agreement or \_\_\_\_\_ (specify date), unless earlier dissolved) or, to state a term of years, the date \_\_\_\_\_ (specify date, whichever is earlier, either this Agreement is signed or the Partnership's Certificate of Limited Partnership was filed with the Secretary of State) and terminates on December 31 of the year that is 30 years from that date].

### **Certificate of Limited Partnership**

1.05. The General Partners will immediately execute a Certificate of Limited Partnership and cause that Certificate to be filed in the office of the Secretary of State of California. Thereafter, \_\_\_\_\_ [all or not less than one] of the General Partners will execute and cause to be filed certificates of amendment of the Certificate of Limited Partnership (or Restated Certificates of Limited Partnership) whenever required by the Uniform Limited Partnership Act of 2008 [*Corp. Code § 15900 et seq.*] or this Agreement. The General Partners will execute and cause to be filed original or amended certificates evidencing the formation and operation of the Partnership whenever required under the laws of any other states in which the Partnership determines to do business. The General Partners will also record a certified copy of the Certificate and any amendment in the office of the county recorder in every county in which the Partnership owns real property.

### **Partnership Office; Agent**

1.06. The designated office of the Partnership is \_\_\_\_\_ [address], \_\_\_\_\_ County, California, or at any other place within \_\_\_\_\_ County, California, as may be determined from time to time by the General Partners. If the General Partners change the office of the Partnership, they must give written notice of the change of address to each Limited Partner at least \_\_\_\_\_ [number] days before that change. The Partnership will continuously maintain an office and registered agent for service of process in California. The registered agent is \_\_\_\_\_ [name].

### **Addresses of Partners**

1.07. The addresses of the General Partners and the Limited Partners are set forth on Exhibit A.

## **ARTICLE 2 DEFINITIONS**

2.01. When used in this Agreement, and except as otherwise stated in this Agreement or as the context of this Agreement requires, the terms defined in this Section 2.01, for the purposes of this Agreement, have the meanings specified in this Section 2.01.

(1) "Agreement" means this Limited Partnership Agreement, as originally executed and as amended from time to time.

(2) "Assignee" means a person who has acquired a beneficial interest in the limited partnership interest of a Limited Partner, but who is not a "substituted Limited Partner."

(3) "Assigning Limited Partner" means a Limited Partner who has assigned a beneficial interest in that Partner's limited partnership interest, but the Assignee of which has not become a "substituted limited partner."

(4) "Cash available for distribution" means total cash income from operations during any given accounting period, plus the cash proceeds, if any, from the sale or other disposition, refinancing, or liquidation of Partnership property, less cash expenses as well as any allowances or reserves for contingencies or for repair to and maintenance of properties, and anticipated obligations the General Partners in their discretion deem necessary during the same accounting period.

(5) "Code" means the Internal Revenue Code of 1986, as amended.

(6) "Distribution" means any cash distributed to the Partners from cash available for distribution.

(7) "General Partners" refers to \_\_\_\_\_ [name of general partner], \_\_\_\_\_ [name of general partner], and \_\_\_\_\_ [name of general partner], or any successor.

(8) "Limited Partner" refers to any person who is admitted to the Partnership, either as an original Limited Partner or as a substituted Limited Partner, and who executes this Agreement. A "new Limited Partner" is a Limited Partner other than an original or substituted Limited Partner who has purchased a limited partnership interest from the Partnership by making the required contribution to the Partnership.

(9) "Majority in interest of the Limited Partners" means more than \_\_\_\_\_ [specify percentage, e.g., 50] percent of the interests of the Limited Partners.

(10) "Net income" and "net loss" mean the net income or net loss of the Partnership as determined for the purposes of computing federal income taxes pursuant to the Internal Revenue Code in accordance with generally accepted accounting principles; provided, however, that the partnership in the discretion of the General Partner(s) may use the cash method of accounting.

(11) "Partners" or "the Partners" refers collectively to the General Partners and the Limited Partners. Reference to "Partner" is a reference to any one of the Partners.

(12) "Partnership" refers to the Limited Partnership created under this Agreement and the Certificate of Limited Partnership to be filed with the Office of the Secretary of State pursuant to the Uniform Limited Partnership Act of 2008 [*Corp. Code § 15900 et seq.*]

(13) "Partnership Interest" refers to any general or limited partnership interest.

(14) "Person" means an individual, partnership, limited partnership, limited liability company, corporation, trust, estate, association, or any other entity.

(15) "Spouse" means a person who (a) is legally married to and not legally separated from the other if the other is living; or (b) was married to and not legally separated from the other at the time of the other's death.

(16) "Tax Matters Partner," as defined by the Code [*see I.R.C. § 6231*] refers to \_\_\_\_\_ [name], or \_\_\_\_\_ [his or her] successor, as specified in Section 3.09, *below* .

(17) "Vote" includes written consent.

### **ARTICLE 3**

#### **MEMBERS OF PARTNERSHIP**

3.01. The name of each original General Partner is as follows: \_\_\_\_\_ [name], \_\_\_\_\_ [name], and \_\_\_\_\_ [name].

### **Original Limited Partners**

3.02. The name of each original Limited Partner is as follows: \_\_\_\_\_ [name], \_\_\_\_\_ [name], and \_\_\_\_\_ [name].

### **Admission of Additional General Partners**

3.03. Subject to any other provision of this Agreement, a person may be admitted as a General Partner after the Certificate of Limited Partnership is filed only with the written consent of \_\_\_\_\_ [specify, e.g., each] General Partner and the vote or written consent of \_\_\_\_\_ [specify, e.g., a majority in interest or higher percentage] of the Limited Partners.

### **Replacement of Sole Remaining General Partner**

3.04. [Add, if there is more than one General Partner: If a General Partner ceases to be a General Partner and there is one or more remaining General Partners, the Partnership shall not dissolve if the remaining General Partner or all the remaining General Partners if more than one remains, continue the business of the Partnership.] If a General Partner ceases to be a General Partner and there is no remaining General Partner, one or more new General Partners may be admitted to the Partnership on the written consent of \_\_\_\_\_ [specify number or percentage of limited partnership interests of the limited partners, e.g., a majority in interest or all] of the Limited Partners; provided that the Limited Partners agree in writing to continue the business of the Partnership pursuant to Section 13.03 of this Agreement.

### **Admission of Additional Limited Partners**

3.05. Subject to the provisions of Article 10 of this Agreement, governing transfers of partnership interests, a person may acquire an interest in the Partnership directly from the Partnership and be admitted as an additional Limited Partner on \_\_\_\_\_ [specify, e.g., the vote of the General Partners or the vote of all members of the Partnership].

### **Admission of Substituted Limited Partner**

3.06. The assignee of a limited partnership interest may be admitted as a substituted Limited Partner with the vote or written consent of \_\_\_\_\_ [specify, e.g., all of the General Partners and \_\_\_\_\_ (all or other proportion) of the Limited Partners].

### **Amendment of Partnership Records**

3.07. On admission of a General Partner or Limited Partner, the General Partners will add the name, address, contribution, and that Partner's share in Partnership profits or losses to the list of Partners kept in the designated office of the Partnership.

**Additional Partners Bound by Agreement**

3.08. Before any person is admitted to the Partnership as a General or Limited Partner, that person shall agree in writing to be bound by all of the provisions of this Agreement.

**Tax Matters Partner**

3.09. (a) The Tax Matters Partner ("TMP") of the Partnership is \_\_\_\_\_[*name*], a General Partner, or a successor as may be chosen by a majority in interest of the Limited Partners. The TMP will keep the Partners informed of all administrative and judicial proceedings, and furnish each Partner who so requests in writing a copy of each notice or other communication received by the TMP from the Internal Revenue Service (except any notices or communications sent directly to the requesting Partner).

(b) The TMP will employ experienced tax counsel to represent the Partnership in connection with any audit, examination, or investigation of the Partnership by the Internal Revenue Service and in connection with all subsequent administrative and judicial proceedings arising out of that audit. The tax counsel is responsible for representing the Partnership. It is the responsibility of the General Partner(s) and of the Limited Partners, at their expense, to employ tax counsel to represent their respective separate interests.

(c) The relationship of the TMP to the Limited Partners is that of a fiduciary, performing its fiduciary obligations as TMP in the manner that will serve the best interests of the Partnership and the Limited Partners.

(d) The TMP is authorized to take any of the following actions without first obtaining the consent of any Partner:

(1) Enter into a settlement agreement with the Internal Revenue Service that purports to bind partners other than the TMP.

(2) File any petition contemplated by *I.R.C. § 6226(a)* or *6228*.

(3) Intervene in any action contemplated by *I.R.C. § 6226(b)*.

(4) Enter into any agreement extending the period of limitations contemplated by *I.R.C. § 6229(b)(1)(B)*.

(e) The Partnership will indemnify the TMP against all judgments, fines, amounts paid in settlement, and expenses (including attorney's fees) reasonably incurred by the TMP in any civil, criminal or investigative proceeding in which the TMP is involved or threatened to be involved by reason of being the TMP, provided that the TMP acted in good faith, within what the TMP reasonably believed to be within scope of his or her authority and for a purpose that the TMP reasonably believed to be in the best interests of the Partnership or Limited Partners. The TMP will not be indemnified under this provision against any liability to the Partnership or Limited Partners to which the TMP would otherwise be subject by reason of willful misfeasance, bad faith, gross negligence, or reckless disregard of the duties involved in the conduct of obligations as the TMP. This indemnification is not deemed exclusive of any other rights to which those indemnified may be entitled under any applicable statute, agreement, vote of the Partners, or otherwise.

(f) The TMP may resign by giving 30 days' written notice to each Partner. On the resignation, death, legal incompetence, or bankruptcy of the person serving as the TMP, a successor to serve in that position will be chosen by a majority of interest of the Limited Partners.

(g) Expenses incurred by the TMP constitute Partnership expenses and will be paid by the Partnership. The fees and

expenses of tax counsel employed by the TMP to represent the Partnership constitute Partnership expenses and will be borne by the Partnership.

[*Optional:*]

### **Certificate of Interest**

3.10. The interest of a Partner or assignee may be evidenced by a certificate of interest in the Partnership. The certificate will be in the form to be determined by the General Partners. The assignment and transfer of the interest represented by the certificate, and the admission of transferees of the certificate, will be determined in accordance with Articles 3 and 10 of this Agreement.

[*Continue with the following:*]

## **ARTICLE 4 FINANCING**

### **Capitalization**

4.01. The capital contributions of the Partners, the units issued in exchange for those contributions pursuant to this Article 4, and the percentage interests of each Partner are set forth on Exhibit A. Exhibit A will be periodically revised to reflect additional contributions, transfers of Partnership Interests, and any other changes affecting the Partners or their respective capital contributions. All capital contributions constitute general funds of the Partnership available for any purpose within the Partnership's stated purpose as set forth in Section 1.02. If a Partnership Interest is transferred, the capital contributions attributable to the transferred units will continue to be attributed to those units as set forth on Exhibit A.

### **General Partner Capital Contribution**

4.02. (a) Each of the original General Partners named in this Agreement agrees to contribute to the capital of the Partnership \_\_\_\_\_ [*specify contribution or as set forth in Exhibit A*].

(b) Each new or replacement General Partner admitted after the execution of this Agreement agrees to contribute, before admission to the Partnership, a sum determined by the General Partners. In the alternative, or in addition to the contribution provided for in this Agreement, the remaining General Partners may require a General Partner who is being admitted to replace a former General Partner to purchase the interest of the former General Partner pursuant to Sections 10.04, 10.05, and 10.06 of this Agreement. These provisions are subject, however, to any requirements for approval by the Limited Partners specified elsewhere in this Agreement. If there are no remaining General Partners, the contribution and interest of a new or replacement General Partner will be determined by the Limited Partners in accordance with Section 3.04 of this Agreement.

### **Limited Partner Capital Contribution**

[Choose one of the following:]

4.03. Each of the Limited Partners agrees to contribute to the capital of the Partnership \_\_\_\_\_ [specify contribution or as set forth in Exhibit A].

[Or]

4.03. The Limited Partners agree to contribute to the capital of the Partnership cash as follows:  
 \_\_\_\_\_ [name of limited partner], \$ \_\_\_\_\_ [specify amount]; \_\_\_\_\_ [name of limited partner], \$ \_\_\_\_\_ [specify amount]; and \_\_\_\_\_ [name of limited partner], \$ \_\_\_\_\_ [specify amount].

[Or]

4.03. The property or services contributed to the initial capital of the Partnership by each Limited Partner is as follows:

Name	Type of Contribution	Agreed Valuation
_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____

[Continue with the following:]

**Initial Capital Contributions From New Limited Partners**

4.04. Each new Limited Partner admitted to the Partnership agrees to contribute to the capital of the Partnership \_\_\_\_\_ [an amount determined by the General Partners or the sum of \$ \_\_\_\_\_ in cash or describe].

**Additional Capital Contributions**

4.05. (a) No Limited Partner may be required to make any additional contributions of capital to the Partnership.

(b) The General Partner(s) may propose that additional capital contributions be made to the Partnership whenever funds are required for the Partnership's stated purpose as set forth in Section 1.02. The General Partner(s) must notify all Limited Partners of any proposal for additional capital contributions. A proposal for additional capital contributions must be adopted on the approval of the General Partner(s) and \_\_\_\_\_ [a majority in interest or 75 percent of the Limited Partnership Units]. All Partners must be promptly notified of any approved proposal for additional capital contributions. Unless otherwise agreed by all Partners, all additional capital contributions are to be made in proportion to the percentage interests of the Partners.

(c) If any Partner fails to remit his or her share of an approved additional capital contribution within \_\_\_\_\_ [*specify, e.g., 30 days*] after the date scheduled for additional capital contributions, the Partners who have remitted their share may elect to advance the amounts necessary to cover the noncontributing Partner's portion of the additional capital contribution. Each contributing Partner has the right but is not obligated to contribute the portion attributable to his or her proportion of the units held by the contributing Partners. A majority in interest of the contributing Partners may elect to handle these additional capital contributions as follows:

(1) Treat these additional capital contributions as loans to the Partnership, bearing interest at a rate of \_\_\_\_\_ [*specify, e.g., 10 percent*] compounded annually. These loans, with interest, must be paid in full before any distributions pursuant to a dissolution of the Partnership.

(2) Elect to issue new Partnership units in exchange for these additional capital contributions. The number of units issued will be determined by the General Partner(s) based on the fair market value of the Partnership's assets at the time of the contribution.

### **Interest on Contributions**

4.06. No interest will be paid on any capital contributions to the Partnership capital.

### **Withdrawal and Return of Capital**

4.07. (a) No Partner may withdraw any portion of the capital of the Partnership and no Partner, General or Limited, is entitled to the return of that Partner's contribution to the capital of the Partnership except on the dissolution of the Partnership or the withdrawal of that Partner from the Partnership and that Partner's compliance with Sections 10.02 and/or 10.03 of this Agreement.

(b) No Partner is entitled to demand the distribution of Partnership property other than cash as part of the return of that Partner's capital contribution to the Partnership.

(c) No Limited Partner has a priority over any other Limited Partner as to the return of a contribution on the dissolution of the Partnership.

## **ARTICLE 5**

### **ALLOCATION AND DISTRIBUTION OF PROFITS AND LOSSES**

#### **Allocation of Profits and Losses**

5.01. The net profits of the Partnership are allocated to, and any net losses suffered by the Partnership will be borne by, the Partners \_\_\_\_\_ [in equal proportions *or* in proportion to their capital contributions *or* in the following proportions:]

#### GENERAL PARTNERS

Name

Percent

\_\_\_\_\_

\_\_\_\_\_

_____	_____
_____	_____
<b>LIMITED PARTNERS</b>	
<b>Name</b>	<b>Percent</b>
_____	_____
_____	_____
_____	_____

**Distribution of Cash Available for Distribution**

5.02. The cash available for distribution, as determined by the General Partners, will be distributed to the Partners in the proportions specified in Section 5.01 \_\_\_\_\_ [*specify time related to accounting period, e.g., at the close of each calendar quarter or within \_\_\_\_\_ (number) days after the close of each \_\_\_\_\_ (specify period, e.g., taxable year of the Partnership)*]. In determining the cash available for distribution, the General Partner may take into account accounts payable; the need for working capital for anticipated operating expenses, capital improvements and replacements; and any contingent liabilities of the Partnership.

**Distributions Other Than Cash**

5.03. No Partner has the right to receive property other than money on the distribution of profits. No Partner may be compelled to accept the distribution of any asset in kind from the Partnership in lieu of any distribution of money due that Partner.

**Priorities Among Limited Partners**

5.04. No Limited Partner is entitled to any priority or preference over any other Limited Partner as to the distribution of cash available for distribution.

**ARTICLE 6  
MANAGEMENT OF PARTNERSHIP AFFAIRS**

**Control and Management**

6.01. The General Partners have the sole and exclusive control of the Limited Partnership. Subject to any limitations expressly set forth in this Agreement, the General Partners have the power and authority to take any action from time to time as they may deem to be necessary, appropriate, or convenient in connection with the management and conduct of the business and affairs of the Partnership, including without limitation, the power to do the following:

- (1) Acquire property, including real or personal property, for the use of the Partnership on the terms and conditions as the General Partners may, from time to time, determine to be advantageous to the Partnership;

- (2) Dispose of Partnership property, either in the ordinary course of the business of the Partnership or, from time to time, when the General Partners deem the disposition to be in the best interests of the Partnership;
- (3) Finance the Partnership's activities by borrowing money from third parties on the terms and under the conditions as the General Partners deem appropriate. When money is borrowed for Partnership purposes, the General Partners are authorized to pledge, mortgage, encumber, or grant a security interest in Partnership properties as security for the repayment of those loans;
- (4) Employ, retain, or otherwise secure the services of any personnel or firms deemed necessary by the General Partners for or to facilitate the conduct of Partnership business affairs, all on the terms and for the consideration as the General Partners deem advisable; and
- (5) Take any and all other action permitted by law that is customary in or reasonably related to the conduct of the Partnership business or affairs.

If there is more than one General Partner, each General Partner may act separately for the Partnership. In the event of a dispute concerning or regarding a matter or action to be taken, the dispute shall be resolved by a vote of a majority interest of the General Partnership, determined on a percentage basis of general partnership interests owned by each General Partner. Notwithstanding the foregoing, any act of dissolution or an act that could reasonably lead to dissolution shall require the unanimous vote of the General Partners.

#### **Restrictions on Limited Partners**

6.02. (a) The Limited Partners take no part in and have no control over the partnership's management and operations. [*Optional*: Specifically, the Limited Partners have no authority over the amount and timing of cash distributions from the Partnership, initiating partnership expenditures or the sale of partnership assets, or hiring decisions.]

(b) The Limited Partners have no obligation or right to take part, directly or indirectly, in the general, day-to-day conduct of the business of the Partnership, except as otherwise permitted in this Agreement and except for the following:

- (1) Acting as a contractor for or an agent or employee of the Partnership or a General Partner, or an officer, director, or shareholder of a corporate General Partner.
- (2) Consulting with and advising a General Partner with regard to the business of the Partnership.
- (3) Acting as surety for the Partnership or guaranteeing one or more specific debts of the Partnership.
- (4) Approving or disapproving an amendment to this Agreement.

#### **General Partners' Duties of Loyalty and Care General Partners**

6.03. (a) The fiduciary duties that a General Partner owes to the Limited Partnership and the other partners are the duties of loyalty and care under *Corporations Code Section 15904.08(b), (c)*.

(b) A General Partner's duty of loyalty to the Limited Partnership and the other partners is limited to the following:

- (1) To account to the Limited Partnership and hold as trustee for it any property, profit, or benefit derived by the General Partner in the conduct and winding up of the Limited Partnership's activities or derived from a use by the General Partner of Limited Partnership property, including the appropriation of a Limited Partnership opportunity.
- (2) To refrain from dealing with the Limited Partnership in the conduct or winding up of the Limited Partnership's activities as or on behalf of a party having an interest adverse to the Limited Partnership.
- (3) To refrain from competing with the Limited Partnership in the conduct or winding up of the Limited Partnership's activities.
- (c) A General Partner's duty of care to the Limited Partnership and the other partners in the conduct and winding up of the Limited Partnership's activities is limited to refraining from engaging in grossly negligent or reckless conduct, intentional misconduct, or a knowing violation of law.
- (d) A General Partner must discharge the duties to the Limited Partnership and the other Partners under the Uniform Limited Partnership Act of 2008 or this Partnership Agreement and exercise any rights consistently with the obligation of good faith and fair dealing.
- (e) A General Partner does not violate a duty or obligation under the Uniform Limited Partnership Act of 2008 or this Partnership Agreement merely because the General Partner's conduct furthers the Partner's own interest.

#### **Authority for Use of Nominees**

6.04. All Partners recognize that practical difficulties exist in doing business as a Limited Partnership, occasioned by third parties seeking to determine the capacity of the General Partners to act for and on behalf of the Partnership, or for other reasons. Therefore, the Limited Partners specifically authorize the General Partners to acquire all real and personal property, arrange all financing, enter contracts, and complete all other arrangements needed to effectuate the purpose of this Partnership, either in their own names or in the name of a nominee, without having to disclose the existence of this Partnership. If the General Partners decide to transact the Partnership business in their own names or in the name of a nominee, they shall place a written declaration of trust in the Partnership books and records that acknowledges the capacity in which the nominee acts and the name of the Partnership as the true or equitable owner.

#### **Removal of General Partners**

6.05. (a) Any General Partner may be removed [*optional: only for cause and only*] by the affirmative vote of \_\_\_\_\_ [a majority or specify larger percentage, e.g. 80 percent] in interest, not in number, of the Limited Partners who are not also General Partners. Written notice of a General Partner's removal must be served on that Partner by certified mail. The notice must set forth the day on which the removal is to be effective, and that date may not be less than 30 days after the service of notice on the General Partner. If there is no other remaining General Partner, and the Limited Partners fail to elect a new General Partner pursuant to Section 3.04 of this Agreement within \_\_\_\_\_ [*specify time, e.g., 90 days*] after the removal becomes effective, the Partnership will be dissolved and its business wound up and terminated.

(b) If the removal of a General Partner does not cause the dissolution of the Partnership, the General Partner's interest may be purchased pursuant to Sections 10.04 or 10.05 of this Agreement. Otherwise, removal causes that Partner's interest in the Partnership to be converted to that of a Limited Partner. A former General Partner whose interest has been converted to that of a Limited Partner has the same rights and obligations under this Agreement as any other Limited

Partner.

### **Limited Partners' Obligation of Good Faith and Fair Dealing**

6.06. Pursuant to *Corporations Code Section 15903.05(b)*, a Limited Partner must discharge the duties to the Limited Partnership and the other Partners under the Uniform Limited Partnership Act of 2008 or this Partnership Agreement and exercise any rights consistently with the obligation of good faith and fair dealing.

## **ARTICLE 7 BOOKS, RECORDS, AND ACCOUNTS**

### **Partnership Accounting Practices**

7.01. (a) The Partnership books shall be kept on a \_\_\_\_\_ [cash *or* accrual] basis. The Partnership books shall be closed and balanced and audited by an independent certified public accountant at the end of each fiscal year of the Partnership.

(b) The fiscal year of the Partnership \_\_\_\_\_ [is the calendar year *or* ends on the last day of \_\_\_\_\_ (*specify month, e.g., June*) of each calendar year *or* will be determined by the General Partners *or specify other fiscal year*].

### **Maintenance of Records and Accounts**

7.02. At all times, the General Partners must maintain or cause to be maintained true and proper books, records, reports, and accounts in which all Partnership transactions will be entered fully and accurately. The books and records of the Partnership will be kept, and the financial position and the results of its operations recorded, in accordance with the accounting methods followed for federal income tax purposes.

### **Required Records**

7.03. In accordance with *Corporations Code Section 15901.11*, the Partnership must maintain at its designated office the following information:

- (1) A current list showing the full name and last known street and mailing address of each Partner, separately identifying the General Partners, in alphabetical order, and the Limited Partners, in alphabetical order.
- (2) A copy of the initial certificate of limited partnership, and all amendments to and restatements of the certificate, together with signed copies of any powers of attorney under which any certificate, amendments, or restatement has been signed.
- (3) A copy of any filed certificate of conversion or merger.
- (4) A copy of the limited partnership's federal, state, and local income tax returns and reports, if any, for the six most recent years.

- (5) A copy of any partnership agreement made in a record, and any amendment made in a record to any partnership agreement.
- (6) A copy of any financial statement of the Limited Partnership for the six most recent years.
- (7) A copy of any record made by the Limited Partnership during past three years of any consent given by or vote taken of any Partner pursuant to the ULPA '08 or partnership agreement.
- (8) Unless contained in a partnership agreement made in a record, a record stating:
- (a) The amount of cash, and a description and statement of the agreed value of the other benefits, contributed and agreed to be contributed by each Partner;
  - (b) The times at which or events upon which additional contributions agreed to be made by each Partner are to be made;
  - (c) For any person that is both a General Partner and a Limited Partner, specification of what transferable interest the person owns in each capacity; and
  - (d) Any events upon which the Limited Partnership will be dissolved and its activities wound up.

#### **Limited Partners' Right to Required Information**

7.04. Pursuant to *Corporations Code Section 15903.04(a)*, a Limited Partner may, on 10 days' demand pursuant to a record received by the Limited Partnership, inspect and copy any information required to be maintained pursuant to *Corp. Code § 15901.11*, specified in Paragraph 7.03 above, during regular business hours in the partnership's designated office. The Limited Partner need not have any particular purpose for seeking this information.

#### **Access to Other Records by Limited Partners**

7.05. Pursuant to *Corporations Code Section 15903.04(b)*, a Limited Partner may, during regular business hours and at a reasonable location specified by the Limited Partnership, obtain from the Limited Partnership and inspect and copy true and full information regarding the state of the activities and financial condition of the Limited Partnership and other information regarding its activities that is just and reasonable if:

- (1) The Limited Partner seeks the information for a purpose reasonably related to the partner's interest as a Limited Partner;
- (2) The Limited Partner makes a demand in a record received by the Limited Partnership, describing with reasonable particularity the information sought and the purpose for seeking the information; and
- (3) The information sought is directly connected to the Limited Partner's purpose.

Pursuant to *Corporations Code Section 15903.04(c)*, within 10 days after receiving a demand, the Limited Partnership, in a record, must inform the Limited Partner that made the demand:

- (1) What information the Limited Partnership will provide in response to the demand;

- (2) When and where the Limited Partnership will provide the information; and
- (3) If the Limited Partnership declines to provide any demanded information, the partnership's reasons for declining.

### **Amendments to Agreement**

7.06. The General Partner(s) will promptly furnish any Limited Partner who executed a power of attorney authorizing a General Partner to execute an amendment to this Agreement with a copy of any amendment to this Agreement executed by a General Partner pursuant to that power of attorney. As used in this Section, the term "promptly" means \_\_\_\_\_ [*specify, e.g., within 5 business days*] after the execution of the amendment.

[*For a power of attorney, see § 68A.220.*]

### **Income Tax Data**

7.07. The General Partner(s) will send to each Partner, within \_\_\_\_\_ [*specify period*] after the end of each taxable year, such information as is necessary for each Partner to complete his or her federal and state income tax or information returns.

### **Partnership Tax or Information Returns**

7.08 The General Partner(s) will send to each Partner a copy of the Partnership's federal, state, and local income tax or information returns for each taxable year within \_\_\_\_\_ [*specify period*] days after the end of each taxable year.

### **Capital Accounts**

7.09. The Partnership will establish and maintain individual Capital Accounts for each General Partner and Limited Partner in accordance with the Partnership's method of accounting, *I.R.C. § 704(b)*, the regulations thereunder, and the following provisions:

- (1) The fair market value of a Partner's initial capital contribution to the Partnership; any additional contributions to the Partnership, such as a Partner's distributive share of profits; any amounts transferred to the Capital Account from that Partner's income account pursuant to this Agreement; and the amount of any Partnership liabilities assumed by the Partner will be credited to each Partner's Capital Account.
- (2) Each Partner's Capital Account will be debited for the amount of cash and the fair market value of any property distributed to the Partner pursuant to this Agreement, the Partner's distributive share of losses, and the amount of any liabilities of the Partner that are assumed by the Partnership or that are secured by property contributed by the Partner to the Partnership.
- (3) The Capital Account also includes a pro rata share of the fair market value of any property contributed to the Partnership by a nonpartner.
- (4) If the Partnership makes a non-pro rata distribution to any Partner, the Capital Accounts of the other Partners will be

adjusted to reflect the fair market value of Partnership assets immediately before the capital distribution.

(5) If any Partnership Interest is transferred in accordance with this Agreement, the transferee succeeds to the Capital Account of the transferor, to the extent of the transferred interest.

### **Income Accounts**

7.10. An individual income account will be maintained for each Partner. At the close of each \_\_\_\_\_ [specify accounting period, e.g., fiscal year], each Partner's share of the net profits or net losses of the Partnership will be credited or debited to, and that Partner's distributions received during each fiscal year will be deducted from, that Partner's income account, and any resulting balance or deficit shall be transferred to or charged against that Partner's Capital Account, as defined in Section 7.09 of this Agreement.

### **Banking**

7.11. The General Partner(s) will open and maintain a separate bank account in the name of the Partnership with \_\_\_\_\_ [name of bank], in which there shall be deposited all of the funds of the Partnership. No other funds may be deposited in the account. The funds in that account must be used solely for the business of the Partnership, and all withdrawals from that account are to be made only on checks signed by \_\_\_\_\_ [any of the General Partners or all of the General Partners or any other person or persons whom the General Partners may designate from time to time].

## **ARTICLE 8**

### **RIGHTS, POWERS, DUTIES, AND RESTRICTIONS OF PARTNERS**

#### **General Partners' Exclusive Right to Manage**

8.01. The General Partners have full and exclusive charge and control of the management, conduct, and operation of the Partnership in all matters and respects. In the event of a dispute concerning or regarding a matter or action to be taken, the dispute shall be resolved by a vote of a majority interest of the General Partners, determined on a percentage basis of general partnership interests owned by each General Partner. Notwithstanding the foregoing, any act of dissolution or an act that could reasonably lead to dissolution shall require the unanimous vote of the General Partners.

#### **Devotion of Time by General Partner(s)**

8.02. The General Partner(s) must devote \_\_\_\_\_ [his/her/their entire care, attention, and business capacity to the affairs of the Partnership or the level of care, attention, and business capacity to the affairs of the Partnership as may be reasonably necessary]. [Consider adding the following sentence if the second alternative in the previous sentence is used: In this connection, the Partners acknowledge that any General Partner may be the Manager or General Partner of other partnerships and may continue to manage other partnerships, and may continue to engage in other \_\_\_\_\_ [specify types of businesses, e.g., distinct or related businesses, whether or not competitive with the business of the Partnership].

#### **Voting Rights of General Partners**

8.03. All General Partners have equal rights in the management and conduct of the Partnership business. Any difference arising with regard to the ordinary course of the Partnership business will be decided by a majority of the General Partners.

[See § 68A.213 for form restricting authority of general partners.]

#### **Restrictions on General Partner(s)**

8.04. Except as otherwise expressly provided in this Agreement, each/the General Partner is subject to all the restrictions imposed on General Partners by the Uniform Limited Partnership Act of 2008 [*Corp. Code § 15900 et seq.*], and has all the rights and powers granted to General Partners under those statutes.

#### **Compensation of General Partners**

8.05. The General Partner(s) shall be entitled to reasonable annual compensation for [his/her/their] services to the Partnership. This compensation will be deducted by the Partnership as an ordinary and necessary expense of the Partnership business before determination of net profits or cash available for distribution.

#### **Voting Rights of Limited Partners**

8.06. (a) In addition to any other voting rights granted the Limited Partners under this Agreement, the Limited Partners have the right to vote on the following matters \_\_\_\_\_ [*specify e.g.*]:

- (1) The dissolution and winding up of the Partnership, pursuant to Section 13.02;
- (2) The merger of the Partnership or the sale, exchange, lease, mortgage, pledge, or other transfer of, or granting a security interest in, all or a substantial part of the assets of the Partnership other than in the ordinary course of its business;
- (3) The incurring of indebtedness by the Partnership other than in the ordinary course of its business;
- (4) A change in the nature of the Partnership's business;
- (5) Transactions in which the General Partners have an actual or potential conflict of interest either with the Limited Partners or the Partnership;
- (6) An election to continue the business of the Partnership when a General Partner ceases to be a General Partner and no General Partner remains.

(b) All of the actions specified in Subparagraph (a) of this Section 8.06 of this Agreement may be taken following the vote of \_\_\_\_\_ [*specify voting margin, e.g., a majority in interest of the Limited Partners*].

(c) The Limited Partners have the right to vote on the admission of an additional General Partner. Except as specifically provided in Subparagraphs (d) and (e) of this Section 8.06 or any other provision of this Agreement, the admission of an additional General Partner may be accomplished on the affirmative vote of \_\_\_\_\_ [a majority in interest

of the Limited Partners *or provide for vote by greater than majority in interest of limited partners*].

(d) The Limited Partners have the right to vote on an election to continue the business of the Partnership and the admission of one or more General Partners after all General Partners have ceased to be General Partners. These actions may only be taken on the approval by a majority of the Limited Partners.

(e) The Limited Partners have the right to vote on any other matters related to the business of the Partnership that are made subject to the approval or disapproval of the Limited Partners by this Agreement.

### **Loans to the Partnership**

8.07. Nothing in this Agreement prevents a Partner from lending money to the Partnership on a promissory note or similar evidence of indebtedness for a reasonable rate of interest. Any Partner lending money to the Partnership has the same rights and risks regarding the loan as would any person or entity making the loan who was not a member of the Partnership.

### **Transaction of Business With Partnership**

8.08. Except as otherwise provided in this Agreement, a Partner \_\_\_\_\_ [\_\_\_\_\_ (may *or* may not) transact other business with the Partnership *or* may transact only the following types of business with the Partnership: \_\_\_\_\_ (*specify*)]. If any Partner transacts business with the Partnership, that Partner has the same rights and obligations with regard to the Partnership as a person who is not a Partner.

[*Optional: Add if Section 8.02 does not prohibit general partners from engaging in other businesses (see § 68A.215):*]

### **Partners Engaging in Other Business**

8.09. Except as otherwise provided in Section 8.02 of this Agreement, any of the Partners may engage in or possess an interest in other business ventures of every nature and description independently or with others, including but not limited to \_\_\_\_\_ [*specify types of business*]. Neither the Partnership nor the Partners have any right by virtue of this Agreement in and to any independent ventures or to the income or profits derived from them.

[*Continue with the following. The ULPA '08 does not contain default provisions regarding partnership meetings; the following provisions are suggestions only.*]

## **ARTICLE 9 PARTNERSHIP MEETINGS**

### **Call and Place of Meetings**

9.01. (a) Meetings of the Partners will be held at \_\_\_\_\_ [the Principal Executive Office of the Partnership *or* at any place selected by the person or persons calling the meeting *or specify place of meeting within or outside California*] at the call and pursuant to the written request of the General Partners, or of Limited Partners representing

more than \_\_\_\_\_ [*specify, e.g., 10 percent of the interests of Limited Partners*], for consideration of any of the matters as to which Limited Partners are entitled to vote pursuant to Section 8.06 of this Agreement.

(b) The Partners may participate in a meeting through the use of conference telephones (or similar communications equipment), providing that all Partners participating in the meeting can hear one another. Participation in this type of telephone meeting constitutes presence in person at the meeting.

(c) Partners must also meet annually by \_\_\_\_\_ [*specify calendar date by which annual meeting must take place*].

### **Notice of Meeting**

9.02. In the case of a meeting pursuant to Section 9.01, subsection (a), of this Agreement, immediately on receipt of a written request stating that the Partner or Partners request a meeting on a specific date (which date shall not be less than 10 nor more than 60 days after the receipt of the request by the General Partner(s)), or in the case of each annual meeting pursuant to Section 9.01, subsection (c), of this Agreement, the General Partner(s) must give notice of the meeting to all Partners entitled to vote, as determined in accordance with Section 14.01 of this Agreement. Valid notice may not be given less than 10 nor more than 60 days before the date of the meeting. The notice must state the place, date, and hour of the meeting and the general nature of the business to be transacted. No business other than the business stated in the notice of the meeting may be transacted at the meeting. Notice must be given \_\_\_\_\_ [*personally or by mail or specify other means of written communication*], addressed to each Partner entitled to vote at the meeting at the address for the Partner appearing on the books of the Partnership.

### **Quorum**

9.03. At any duly held or called meeting of Partners, a \_\_\_\_\_ [*majority in interest or specify other percentage, e.g., 75 percent*] of the Limited Partners represented [*in person or by proxy or in person*] constitutes a quorum. The Partners present at a duly called or held meeting at which a quorum is present may continue to transact business until adjournment, notwithstanding the withdrawal of enough Partners to leave less than a quorum, if any action taken, other than adjournment, is approved by the requisite percentage of interests of Limited Partners.

### **Adjournment of Meetings**

9.04. A Partnership meeting at which a quorum is present may be adjourned to another time or place, and any business that might have been transacted at the original meeting may be transacted at the adjourned meeting. If a quorum is not present at an original meeting, that meeting may be adjourned by the vote of a majority of the interests represented either in person or by proxy. Notice of the adjourned meeting need not be given to Partners entitled to notice if the time and place of the adjourned meeting are announced at the meeting at which the adjournment is taken, unless (1) the adjournment is for more than 45 days, or (2) after the adjournment, a new record date is fixed for the adjourned meeting, in which case notice of the adjourned meeting shall be given to each Partner of record entitled to vote at the adjourned meeting.

### **Meetings Not Duly Called, Noticed, or Held**

9.05. The transactions of any meeting of Partners, however called and noticed, and wherever held, shall be as valid as though consummated at a meeting duly held after regular call and notice, if a quorum is present at that meeting, either in

person or by proxy, and if, either before or after the meeting, each of the persons entitled to vote, not present in person or by proxy, signs either a written waiver of notice as defined in Section 9.06 of this Agreement, a consent to the holding of the meeting as defined in Section 9.07 of this Agreement, or an approval of the minutes of the meeting.

### **Waiver of Notice**

9.06. Attendance of a Partner at a meeting constitutes waiver of notice, except when that Partner objects, at the beginning of the meeting, to the transaction of any business on the ground that the meeting was not lawfully called or convened. Attendance at a meeting is not a waiver of any right to object to the consideration of matters required to be described in the notice of the meeting and not so included, if the objection is expressly made at the meeting. Any partner approval at a meeting (other than unanimous approval by Limited Partners of an election to continue the business of the Partnership after the retirement, death, or adjudication of incompetence of a General Partner) is valid only if the general nature of the proposal is stated in any written waiver of notice.

### **Consent to Action Without Meeting**

9.07. Any action that may be taken at any meeting of the Partners may be taken without a meeting if a consent in writing, setting forth the action so taken, is signed by Partners having not less than the minimum number of votes that would be necessary to authorize or take that action at a meeting at which all Partners entitled to vote on the matter were present and voted. If the Limited Partners are requested to consent to a matter without a meeting, each Partner shall be given notice of the matter to be voted on in the manner described in Section 9.02. If any General Partner, or Limited Partners representing more than 10 percent of the interests of the Limited Partners, requests a meeting for the purpose of discussing or voting on the matter so noticed, notice of a meeting shall be given pursuant to Section 9.02, and no action may be taken until the meeting is held. Unless delayed by a request for and the conduct of a meeting, any action taken without a meeting is effective 15 days after the required minimum number of voters have signed consents to action without a meeting; however, the action is effective immediately if all General Partners and Limited Partners representing at least 90 percent of the interests of the Limited Partners sign consents to the action without a meeting.

### **Proxies**

9.08. (a) Every Partner entitled to vote may authorize another person or persons to act by proxy with regard to that Partner's interest in the Partnership.

(b) Any proxy purporting to have been executed in accordance with Section 9.08 of this Agreement is presumptively valid.

(c) No proxy is valid after the expiration of 11 months from the date of the proxy unless otherwise provided in the proxy. Subject to Subparagraphs (f) and (g) of this Section 9.08, every proxy continues in full force and effect until revoked by the person executing it. The dates contained on the proxy forms presumptively determine the order of execution, regardless of the postmark dates on the envelopes in which they are mailed.

(d) A proxy is not revoked by the death or incapacity of the person executing it, unless (except as provided in Subparagraph (f) of this Section 9.08), before the vote is counted, written notice of the death or incapacity of the maker is received by the Partnership.

(e) Revocation of a proxy is effected by a writing delivered to the Partnership stating that the proxy is revoked or by a subsequent proxy executed by the Partner who executed the original proxy or, as to any meeting, by the attendance and

exercise of the right to vote at that meeting by the Partner who executed the proxy.

(f) A proxy that states that it is irrevocable is irrevocable for the period specified in the proxy when it is held by any creditor or creditors of the Partnership or the Partner who extended or continued credit to the Partnership or the Partner in consideration of the proxy, if the proxy states that it was given in consideration of that credit and also states the name of the person extending or continuing credit. In addition, a proxy may be made irrevocable (notwithstanding Subparagraph (d) of this Section 9.08) if it is given to secure the performance of a duty or to protect a title, either legal or equitable, until the happening of events that, by its terms, discharge the obligations secured by it.

(g) Notwithstanding the period of irrevocability specified in the proxy as provided in Subparagraph (f) of this Section 9.08, the proxy becomes revocable when the debt of the Partnership or Partner is paid.

(h) A proxy may be revoked, notwithstanding a provision making it irrevocable, by the assignment of the interest in the Partnership of the Partner who executed the proxy to an assignee without knowledge of the existence of the proxy and the admission of that assignee to the Partnership as a Partner.

(i) The General Partner(s) may, in advance of any Partnership meeting, prescribe additional regulations concerning the manner of execution and filing of proxies and their validation.

## **ARTICLE 10**

### **TRANSFER OF INTERESTS**

#### **Conditions for Transfer**

10.01. A Limited Partner may sell, assign, transfer, encumber, or otherwise dispose of an interest in the Partnership subject to the provisions of this Article 10.

#### **Permitted Transfers**

10.02. (a) If a Limited Partner receives a bona fide offer for the purchase of all or a part of that Limited Partner's interest in the Partnership, that Limited Partner must either refuse that offer or give the General Partners written notice setting out full details of that offer. The notice must specify, among other things, the name of the offeror, the percentage of interest in the Partnership covered by the offer, the terms of payment, whether for cash or credit and, if on credit, the time and interest rate, as well as all other consideration being received or paid in connection with the proposed transaction, and all other terms, conditions, and details of the offer.

(b) On receipt of the notice with regard to that offer, the General Partner(s) [has/have] the exclusive right and option, exercisable at any time during a period of 30 days from the date of the notice, to purchase the interest in the Partnership covered by the offer in question at the same price and on the same terms and conditions of the offer as set out in the notice. If the General Partner(s) decide(s) to exercise the option, the General Partner(s) must give written notice to that effect to the Limited Partner desiring to sell, and the sale and purchase must be consummated within 30 days. If the General Partner(s) [does/do] not elect to exercise [his/her/their] option or waive(s) [his/her/their] rights in writing, the selling Limited Partner must be so notified in writing and, subject to any prohibitions or restrictions on transfer imposed by the General Partner(s) for purposes of compliance with applicable securities law, is free to sell the interest in the Partnership covered by the offer, if the sale is consummated within 90 days, or the interest once again becomes subject to the restrictions of this Article 10 of this Agreement. The sale, if permitted, must be made strictly on the terms and conditions and to the person described in the required notice.

(c) If the General Partner(s) fail(s) to purchase all of the portion of the selling Limited Partner's interest in the Partnership specified in the notice to the General Partner(s) provided in Section 10.02 of this Agreement, the General Partner(s) shall, at the expiration of \_\_\_\_\_ [number] days after receipt by the General Partner(s) of that notice, transmit a copy of the notice to each of the remaining Limited Partners. Each of the remaining Limited Partners shall have \_\_\_\_\_ [number] days after the mailing of that notice to serve on the General Partner(s) notice in writing of that Limited Partner's intention to purchase (on the terms and conditions set forth in the selling Partner's notice) that portion of the selling Partner's interest as the offering Partner's interest in the \_\_\_\_\_ [profits or capital] of the Partnership bears to the total interest of all \_\_\_\_\_ [profits or capital] of the Partnership. Provided, however, if any Limited Partner fails to purchase a proportionate share of the interest offered by the selling Partner, notice of that fact shall be given to each Limited Partner by the General Partner(s), and the interest may be purchased by any one or more of the other Limited Partners.

(d) Any assignment made to anyone, not already a Partner, is effective only to give the assignee the right to receive distributions, and allocations of income, gain, loss, deduction, credit, or similar items to which the assignor would otherwise be entitled does not relieve the assignor from liability under any agreement to make additional contributions to capital; does not relieve the assignor from liability under the provisions of this Agreement; and does not give the assignee the right to become a substituted Limited Partner. Neither the General Partners nor the Partnership are required to determine the tax consequences to a Limited Partner or the Limited Partner's assignee, arising from the assignment of a Limited Partnership interest. The Partnership will continue with the same basis and Capital Account for the assignee as was attributable to the former owner who assigned the Limited Partnership interest. The Partnership interest of the General Partner(s) cannot be voluntarily assigned or transferred except pursuant to Section 10.04 of this Agreement or when the transfer occurs by operation of law.

#### **Death, Bankruptcy, or Incompetence of Limited Partner**

10.03. If any Limited Partner dies or is adjudged incompetent or bankrupt by any court of competent jurisdiction, the remaining General and Limited Partners have an option to purchase the Partnership interest of that Limited Partner by paying to the person legally entitled to that interest, within \_\_\_\_\_ [number] days after the date of death or the adjudication of incompetency or bankruptcy, the fair market value of that Partnership interest as determined by an appraiser. Each remaining General and Limited Partner has the right to purchase that proportionate part of the deceased, incompetent, or bankrupt Limited Partner's interest in the Partnership as the remaining Partner's interest in the \_\_\_\_\_ [profits or capital] of the Partnership bears to the total interest of all \_\_\_\_\_ [profits or capital] of the Partnership. Provided, however, if any remaining General or Limited Partner fails to purchase a proportionate share of the interest offered by the selling Partner, notice of that fact must be given to each General and Limited Partner, and it may be purchased by any one or more of the remaining General or Limited Partners.

#### **Option to Buy Terminated Interest of General Partner**

10.04. When any General Partner ceases to be a General Partner, the remaining General Partner(s) may continue the Partnership business and may purchase the interest of that General Partner ("the withdrawing General Partner") in the assets and goodwill of the Partnership. The remaining General Partner(s) [has/have] an option, exercisable by [him/her/them] at any time within \_\_\_\_\_ [number] days after the date on which the withdrawing General Partner ceases to be a General Partner, to purchase the withdrawing General Partner's interest by paying to the person legally entitled the value of that interest determined as provided in Section 10.06 of this Agreement.

#### **Sale to New General Partner**

10.05. When any General Partner ceases to be a General Partner, and the remaining General Partner(s) \_\_\_\_\_ [is *or* are] unable or unwilling to exercise the option provided for in Section 10.04 of this Agreement, the interest of the withdrawing General Partner may be purchased by a new General Partner during the option period set forth in Section 10.04 of this Agreement, on admission of the new General Partner to the Partnership and on payment of the value of that interest determined as provided in Section 10.06 of this Agreement.

#### **Purchase Price for General Partner's Interest**

10.06. The value of the interest of a withdrawing General Partner, for the purposes of Section 10.04 of this Agreement, is the fair market value of that interest as determined by appraisal as of the date on which the General Partner ceased to be a General Partner of the Partnership. The withdrawing General Partner shall also be entitled to the General Partner's distributive share of any net profits earned by the Partnership up to the date on which the withdrawing General Partner ceased to be a General Partner of the Partnership if that amount is disregarded in determining the fair market value of the General Partner's interest.

#### **Duties of Remaining General Partners**

10.07. On the purchase and sale of a withdrawing General Partner's interest, the remaining General Partners will assume all obligations of the Partnership and shall hold the withdrawing General Partner, the personal representative and estate of the withdrawing General Partner, and the property of the withdrawing General Partner free and harmless from all liability for those obligations. Further, the remaining General Partners, at their own expense, must immediately amend the Certificate of Limited Partnership as required by the Uniform Limited Partnership Act of 2008 [*Corp. Code § 15900 et seq.*], and cause to be prepared, executed, acknowledged, filed, served, and published all other notices required by law to protect the withdrawing General Partner or the personal representative and estate of the withdrawing General Partner from all liability for the future obligations of the Partnership business.

### **ARTICLE 11 LIABILITIES OF PARTNERS**

#### **Liability of General Partners**

11.01. Except as otherwise provided in this Agreement, the liability of the General Partner(s) arising from the conduct of the business affairs or operations of the Partnership or for the debts of the Partnership is unrestricted.

#### **Liability of Limited Partners**

11.02. Except as expressly stated in this Agreement, the liability of the Limited Partners is restricted and limited to the amount of the actual capital contributions each Limited Partner makes or agrees to make to the Partnership. No Limited Partner is personally liable for any debt, obligation, or liability of the Partnership. [*Optional:* The Limited Partners may not be required to pay to the Partnership or to any other Partner any deficit or negative balance that may periodically exist in their respective Capital Accounts (as defined in Section 7.09 of this Agreement) as a result of any allocation made in accordance with this Agreement.]

### **ARTICLE 12**

## **PROHIBITED TRANSACTIONS**

### **Specified Acts**

12.01. During the time of the organization or continuance of this Partnership, neither the General nor Limited Partners may take, and the Partners specifically promise not to do, any of the following actions:

- (1) Use the name of the Partnership (or any substantially similar name) or any trademark or trade name adopted by the Partnership, except in the ordinary course of the Partnership business.
- (2) Disclose to any nonpartner any of the Partnership business practices, trade secrets, or any other information not generally known to the business community.
- (3) Do any other act or deed with the intention of harming the business operations of the Partnership.
- (4) Do any act contrary to this Agreement, except with the prior express written approval of all Partners.
- (5) Do any act that would make it impossible to carry on the intended or ordinary business of the Partnership.
- (6) Confess a judgment against the Partnership.
- (7) Abandon or transfer or dispose of real or personal Partnership property.

### **Use of Partnership Assets**

12.02. The General Partner(s) may not use, and specifically promise(s) not to use, directly or indirectly, the assets of this Partnership for any purpose other than conducting the business of the Partnership, for the full and exclusive benefit of all its Partners.

## **ARTICLE 13**

### **DISSOLUTION OF THE PARTNERSHIP**

#### **Dissolution and Winding Up**

13.01. The Partnership will be dissolved, and its affairs will be wound up, on the expiration of the term provided for the existence of the Partnership in Section 1.04 of this Agreement or on the occurrence of any of the events specified in Sections 13.02 through 13.05 of this Agreement, whichever is the first to occur.

#### **Dissolution by Consent**

13.02. The Partnership will be dissolved on any date specified in a consent to dissolution signed by all of the General Partners and a majority in interest of the Limited Partners.

#### **Dissolution on Loss of General Partner**

13.03. (a) The Partnership will dissolve and its affairs will be wound up when a General Partner ceases to be a General Partner under this Agreement, unless (1) at the time there is at least one other General Partner and the remaining General Partner, or all the General Partners if more than one remains, continue the business of the Partnership, or (2) if no General Partner remains, the Limited Partners take the actions described in Subparagraph (b) of Section 13.03 of this Agreement.

(b) If a General Partner ceases to be a General Partner and there is no remaining General Partner, the Partnership will dissolve and its affairs will be wound up unless \_\_\_\_\_ [*specify a majority or specify a greater percentage*] in interest of the Limited Partners agree in writing to continue the business of the Partnership and admit one or more new General Partner(s) within \_\_\_\_\_ [*specify, e.g., 90 days*] after the last remaining General Partner ceased to be a General Partner. [*Optional: The Limited Partners agree to make \_\_\_\_\_ (best or all reasonable) efforts to select and admit a new general partner within that period.*]

#### **Dissolution on Sale or Disposition of Assets**

13.04. The Partnership will be dissolved and its affairs wound up when its assets are sold or otherwise disposed of and the only property of the Partnership consists of cash available for distribution to the Partners, and there are no reasonably current plans to reinvest that cash; provided, however, that a disposition of the Partnership's assets shall require the consent of all General Partners and a majority in interest of the Limited Partners.

#### **Dissolution by Judicial Decree**

13.05. The Partnership will be dissolved and its affairs wound up when required by a decree of judicial dissolution entered under *Corp. Code § 15908.02*.

#### **Winding Up**

13.06. After dissolution, the Limited Partnership continues only for the purpose of winding up its activities. Pursuant to *Corporations Code Section 15908.03*, in winding up, the Limited Partnership may: amend its certificate of limited partnership to state that the partnership is dissolved; preserve the Limited Partnership business or property as a going concern for a reasonable time; prosecute and defend actions and proceedings, whether civil, criminal, or administrative; transfer the Limited Partnership's property; settle disputes by mediation or arbitration; file a certificate of cancellation; and perform other necessary acts. In winding up, it must discharge the Limited Partnership's liabilities, settle and close its activities, and marshal and distribute its assets.

If there is no General Partner, a person to wind up may be appointed by the consent of Limited Partners owning a majority of the rights to receive distributions as limited partners at the time the consent is to be effective. The person so appointed has the powers of a General Partner under *Corporations Code Section 15908.04*, and must promptly amend the certificate of limited partnership to state: that the partnership does not have a General Partner, the name of the person appointed to wind it up, and the address of that person. If one or more Limited Partners wind up the affairs of the Partnership, those Limited Partners [*are or are not*] entitled to reasonable compensation.

#### **Liquidation and Distribution**

13.07. The person or persons responsible for winding up the affairs of the Partnership pursuant to Section 13.06 of this Agreement will take full account of the Partnership assets and liabilities, liquidating the assets of the Partnership as promptly as is consistent with obtaining the fair value of those assets, and applying and distributing the proceeds in the following order:

(1) To creditors of the Partnership, including Partners who are creditors to the extent permitted by law, in satisfaction of liabilities of the Partnership other than liabilities for any of the following:

(a) Distributions owing to Partners before their withdrawal from the Partnership and before the dissolution and winding up of the Partnership.

(b) Distributions owing to Partners on their withdrawal from the Partnership.

(2) Except as otherwise provided in this Agreement, to Partners and former Partners in satisfaction of liabilities for distributions owing to them before their withdrawal from the Partnership and before dissolution and winding up of the Partnership and on their withdrawal from the Partnership.

(3) To the Partners in accordance with the provisions set forth in this Agreement for the distribution of the assets of the Partnership.

#### **Cancellation of Certificate of Limited Partnership**

13.08. On completion of the winding up of the Partnership's affairs, \_\_\_\_\_ [all or specify lesser number] of the General Partners must execute and file in the office of the Secretary of State a certificate of cancellation of the Certificate of Limited Partnership. If the Limited Partners are winding up the Partnership's affairs pursuant to Section 13.06 of this Agreement, the person authorized by a majority in interest of the Limited Partners must execute and file the certificate of cancellation of the Certificate of Limited Partnership.

#### **ARTICLE 14 RECORD DATES**

##### **Setting Record Date for Meetings**

14.01. The record date for determining the Partners entitled to notice of meetings, the right to vote at any meeting, or the right to take any other lawful action with regard to a meeting or the conduct of a vote by the Partners is the date set by \_\_\_\_\_ [the General Partners or the Limited Partners representing more than 10 percent of the Limited Partners' interests or both the General Partners and the Limited Partners representing more than 10 percent of the Limited Partners' interests]. However, the record date may not be more than 60 nor less than 10 days before the date of the meeting nor more than 60 days before any other action.

##### **Setting Record Date for Distributions**

14.02. The record date for determining the Partners entitled to any distribution or the right to take any other lawful action will be \_\_\_\_\_ [specify date or time in relation to the action, e.g., 10 days before that date]; however that date may not be more than 60 days before any such action.

**Automatic Record Date**

14.03. In the absence of any action setting a record date, the record date will be determined as follows:

- (1) The record date for determining the Partners entitled to notice of, or to vote at, meetings will be at the close of business on the business day preceding the day on which notice is given, or, if notice is waived, at the close of business on business day preceding the day on which meeting is held.
- (2) The record date for determining Partners entitled to give consent to Partnership action in writing without a meeting is the day on which the first written consent is given.
- (3) The record date for determining Partners for any other purpose is at the close of business on the day on which the General Partners adopt the record date or the 60th day before the date of action relating to that other purpose, whichever is later.
- (4) The record date for adjourned meetings is the record date set in determining the Partners entitled to notice of, or to vote at, the original meeting; however, the Partners who called that meeting may fix a new record date for the adjourned meeting and must fix a new record date if the meeting is adjourned for more than 45 days from the date set for the original meeting.

**ARTICLE 15  
MISCELLANEOUS PROVISIONS****Entire Agreement**

15.01. This Agreement contains the entire understanding among the Partners and supersedes any prior written or oral agreements between them regarding the subject matter contained in this Agreement. There are no representations, agreements, arrangements, or understandings, oral or written, between and among the Partners relating to the subject matter of this Agreement that are not fully expressed in this Agreement.

**Binding Effect**

15.02. Subject to the provisions of this Agreement relating to transferability, this Agreement is binding on and inures to the benefit of the Partners, and their respective assigns, successors in interest, personal representatives, estates, heirs, and legatees of each of the Partners.

**Amendments**

15.03. (a) Subject to Subparagraph (b) of Section 15.03 of this Agreement, the provisions of this Agreement may be amended by [the vote of a majority in interest of the Limited Partners and the unanimous consent of the General Partners *or* the unanimous consent of the Limited Partners *or specify other percentage*]. Any amendment of this Agreement must be in writing, dated, and executed by all Partners. If any conflict arises between the provisions of any amendment and the original Agreement as previously amended, the most recent provisions control. [*Optional; do not use if inconsistent with any voting requirements specified elsewhere in agreement*: No amendment shall, without the unanimous consent of all Partners, modify the Partnership interests of the Partners or the allocation of profits or losses

or distributions, change the compensation provided for the General Partners, or amend this Section.]

(b) The provisions of this Agreement governing the right of the Limited Partners to vote on the admission of a General Partner or an election to continue the business of the Partnership after a General Partner ceases to be a General Partner and there is no remaining or surviving General Partner, may not be amended. [Add, if desired: Any other provisions of this Agreement that provide for the voting rights of Limited Partners may be amended only on a \_\_\_\_\_ (specify voting margin, e.g., unanimous) vote of the Limited Partners.]

### **Attorneys' Fees**

15.04. If any dispute between the Partnership and the Partners or among the Partners results in litigation or arbitration, the prevailing party is entitled to recover from the other party all reasonable fees, costs, and expenses of enforcing any right of the prevailing party, including without limitation, reasonable attorneys' fees and expenses.

### **Notices**

15.05. All notices must be in writing, which may include facsimile. Notice will be deemed to have been given and received when delivered to the Partners at the addresses shown for them in the records of the Partnership. All notices to the Partnership must be delivered to the Partnership at its [principal place of business *or* principal executive office] in California. Partners may designate another address in substitution of the addresses shown for them in the records of the Partnership for notice by giving [specify, e.g., 5 days] prior written notice to the Partnership.

### **Mediation and Arbitration**

15.06. (a) Except as otherwise provided in this Agreement, all disputes arising out of, or relating to, this Agreement or breach of this Agreement will be settled by mediation, or by arbitration conducted pursuant to Part III, Title 9 of the *California Code of Civil Procedure, Sections 1280 et seq.*, before [specify, e.g., a single arbitrator] in [location], California. Before commencing arbitration, the parties must attempt in good faith to settle the dispute by mediation. Any matter not resolved by mediation must be submitted to [specify, e.g., the American Arbitration Association for arbitration in San Francisco, California].

(b) All costs of the arbitration, including but not limited to the arbitrator's fee, any administration fees, and the costs for use of the facilities during the arbitration proceedings, will be borne equally by the parties to the arbitration.

(c) The arbitrator has discretion to award reasonable attorney's fees to the prevailing party (or the most prevailing party).

(d) The arbitrator does not have any authority to alter, amend, or modify any of the terms of this Agreement, and may not grant any remedy that is either barred by the terms of this Agreement or not available in a court of law.

### **Exhibits**

15.07. All Exhibits attached to this Agreement are incorporated and will be treated as if set forth in the body of this Agreement.

### **Additional Instruments and Acts**

15.08. Each Partner agrees to execute and deliver additional documents and instruments, and to perform whatever acts may be necessary or appropriate to effectuate and perform all of the terms, provisions, and conditions of this Agreement and the transactions contemplated by this Agreement.

#### **Reliance on Person Signing Agreement**

15.09. If a Partner is not a natural person, neither the Partnership nor any individual Partners are (1) required to determine the authority of the individual signing this Agreement to make any commitment or undertaking on behalf of the entity that is the Partner that is not a natural person, or any fact or circumstance bearing on the existence of the authority of that individual, or (2) responsible for the application or distribution of proceeds paid or credited to individuals signing this Agreement on behalf of that entity.

#### **No Interest in Partnership Property**

15.10. No Partner has any interest in any specific property of the Partnership. Each Partner irrevocably waives for the term of the Partnership any right to maintain any action for partition with respect to Partnership property.

#### **Time Is of the Essence**

15.11. All dates and times stated in this Agreement are of the essence.

#### **Cumulative Remedies**

15.12. All remedies under this Agreement are cumulative and do not exclude any other remedies provided by law.

#### **Governing Law**

15.13. All questions with regard to the construction of this Agreement and the rights and liabilities of the parties will be governed by the laws of the State of California.

#### **Severability**

15.14. If any provisions of this Agreement or the application of any provision to any person or circumstance are declared by a court of competent jurisdiction to be invalid, void, or unenforceable, the remainder of this Agreement or the application of that provision to persons or circumstances other than those to which it is held invalid continue in full force and effect.

#### **Execution by Spouses**

15.15. This Agreement is executed by the Partners and by the spouses of Partners when those spouses are not themselves Partners. The signature of a spouse who is not a Partner may not be construed as making that spouse a

Partner or as imposing on that spouse any responsibility for any Partnership obligation, but merely as recording that spouse's consent to the execution by his or her spouse of this Agreement and to all of its terms and conditions to the extent that community property interests, if any, may be involved.

### **Consent of Spouses**

[For separate spousal consent form, see § 68A.217.]

15.16. Within [*specify, e.g., 10 days*] after any individual becomes a Partner or a Partner marries, that Partner will have \_\_\_\_\_ [his or her] spouse execute a consent form (1) acknowledging that the spouse has read the Agreement; (2) consenting to any sale of that interest pursuant to the Agreement; and (3) promising to take no action to hinder the operation of the Agreement on the Partner's interest, or any interest that the spouse might have in that Partner's interest.

### **Election of Adjusted Basis**

15.17. In the event of a transfer of all or part of the interest of a Limited Partner, the General Partners may elect, on behalf of the Partnership, to adjust the basis of the Partnership property pursuant to *Section 754 of the Internal Revenue Code*. All other elections required or permitted to be made by the Partnership under the Internal Revenue Code must be made by the General Partners in whatever manner as will, in their opinion, be most advantageous to a majority in interest of the Limited Partners. Each Partner agrees to supply the Partnership with all necessary and proper information in order to effectuate any tax election.

### **Counterparts**

15.18. This Agreement may be executed in several counterparts and all counterparts so executed constitute one agreement that is binding on all of the parties, notwithstanding that all of the parties are not signatory to the original or the same counterpart.

### **Headings**

15.19. The headings preceding the Sections of this Agreement are for convenience of reference only, are not a part of this Agreement, and are to be disregarded in the interpretation of any portion of this Agreement.

### **Pronouns**

15.20. All pronouns and variations are deemed to refer to the masculine, feminine, or neuter, singular or plural, as the context in which they are used requires.

### **Statutory References**

15.21. Any reference to the Internal Revenue Code, the Treasury Regulations, the Act, the California Corporations Code, the California Code of Civil Procedure or other statutes includes all amendments, modifications, or replacements

of the specific sections and provisions concerned.

**Other Instruments**

15.22. The parties to this Agreement covenant and agree that they shall execute all other instruments and documents that are or may become necessary or convenient to effectuate and carry out the Partnership created by this Agreement.

Executed on \_\_\_\_\_ [date], at \_\_\_\_\_ [city], California.

**GENERAL PARTNERS:**

\_\_\_\_\_ [signature]

[typed name]

\_\_\_\_\_ [signature]

[typed name]

\_\_\_\_\_ [signature]

[typed name]

**LIMITED PARTNERS:**

\_\_\_\_\_ [signature]

[typed name]

\_\_\_\_\_ [signature]

[typed name]

\_\_\_\_\_ [signature]

[typed name]

**SPOUSES:**

\_\_\_\_\_ [signature]

[typed name]

\_\_\_\_\_ [signature]

[typed name]

\_\_\_\_\_ [signature]

[typed name]

**EXHIBIT A**

\_\_\_\_\_ [name], a California Limited Partnership

List of Partners

General Partners:

Name of Partner	Address	Total Initial Contribution	Units Issued	Percentage Interest
_____	_____	_____	_____	_____
_____	_____	_____	_____	_____

Limited Partners:

Name of Partner	Address	Total Initial Contribution	Units Issued	Percentage Interest
_____	_____	_____	_____	_____
_____	_____	_____	_____	_____
_____	_____	_____	_____	_____

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
 Business & Corporate Law Limited Partnerships General Overview Business & Corporate Law Limited Partnerships Formation Estate, Gift & Trust Law General Overview



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California Legal Forms--Transaction Guide

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DIVISION IV: WILLS AND TRUSTS  
CHAPTER 68A USING FAMILY PARTNERSHIPS AND OTHER BUSINESS ENTITIES IN ESTATE PLANNING  
PART IV. FORMS  
A. Organizational Documents

*25-68A California Legal Forms--Transaction Guide § 68A.201*

**AUTHOR:** Steven M. Goldberg Practice Consultant

**§ 68A.201 Family Limited Liability Company Operating Agreement--Manager-Managed**

**[1] Comment**

**[a] Use of Form**

This form is a complete manager-managed operating agreement for a family limited liability company. It should be modified to meet the particular operating needs of the LLC being formed.

The members of an LLC must enter into an operating agreement either before or after the filing of the LLC's articles of organization [*Corp. Code § 17050(a)*]. An "operating agreement" is any agreement among all the members as to the affairs of the LLC and the conduct of its business in a manner not inconsistent with law or the LLC's articles, including amendments to those articles. For a foreign LLC, all documents that serve a like function under the laws of the jurisdiction in which the foreign LLC is organized is defined as an operating agreement under the California Act [*Corp. Code § 17001(ab)*]. An operating agreement may be written or oral, and it may be as simple as an agreement to organize an LLC [*Corp. Code § 17001(ab)*]. In most cases, it is best to have a written operating agreement, since it is likely to be the key document of an LLC. The operating agreement is not filed with the office of the Secretary of State [Secretary of State's LLC form packet].

Many of the same types of provisions typically found in corporate bylaws or partnership agreements may be appropriate in a LLC operating agreement if the members so desire. For a variety of corporate bylaw provisions, see Ch. 4, *Bylaws* . For partnership provisions, see Ch. 15, Part A, *Formation of General Partnerships* . For other provisions that may be appropriate to this type of agreement, see Ch. 8C, *Close Corporation Shareholder Agreements* . The complexity of the agreement depends on the drafter and the wishes of the members. For further discussion, see Ch. 12C, *Limited liability Companies*.

**[b] Contents of Agreement**

This form contains many provisions covering a great variety of topics; it must be revised as needed for each particular limited liability company. In general, a well-drafted, relatively detailed operating agreement should contain provisions addressing some or all of the following topics:

- Definitions of terms used in the agreement [*see, e.g.,* [2], Section 5.01(c), *below*]. Note that an operating agreement may not vary the definitions set forth in *Corp. Code § 17001*, except as specifically provided in that section [*Corp. Code § 17005(b)(1)*].
- Extent and nature of the LLC's business.
- The operative date of the agreement.
- Specification of the rights and duties of members [*see* [2], art. 3, *below*].
- Information on initial and additional capital contributions [*see* [2], Section 2.01, *below*]. In this regard, Paragraph 2.03 permits additional capital contributions on specified terms.
- Names and addresses of members [*see* [2], Exhibit A, *below*].
- Management provisions [*see* [2], art. 4, *below*].
- Information on capital accounts and capital structure [*see* [2], art. 2, *below*].
- Amendment of operating agreement [*see* [2], Section 10.09, *below*].
- Members' right, if any, to withdraw, including buyout rights enforceable by withdrawing member and exercisable by remaining members. In this regard, the provisions in this form contemplate that members may not voluntarily withdraw [*see* [2], art. 4, *below*], that membership interests are not freely transferrable and that prior consent of the other members is required. The form contains buyout provisions giving the remaining members either the option or the duty to purchase the interest of any member who dies or who is expelled under the terms of the operating agreement [*see* [2], art. 4, *below*]. Many other arrangements for the transfer of membership interests are possible, depending on what the members want to do. If the LLC members wish to have a different type of buy-sell arrangement, consult Ch. 12C, *Limited Liability Companies*. Further, appropriate provisions from the corporate or partnership materials in this publication may be adapted to a LLC agreement [*see* Ch. 8D, *Buy-Sell Agreements* (close corporations); Ch. 15, Part A, *Formation of General Partnerships*, Pt. A, §§ 15.240-15.262 (partnerships)].
- Allocations of items of LLC profits, losses, gain, deduction and credit [*see* art. 5, *below*].
- Accounting, records, financial statements, and reports [*see* [2], art. 8, *below*].
- Time, manner, and priority of distributions [*see* [2], art. 5, *below*].
- Dissolution and winding up [*see* [2], art. 9, *below*]. Among other circumstances, this agreement permits dissolution on the agreement of a majority interest of the members or on the occurrence of specific events that are deemed to constitute a failure of the LLC achieve its intended purpose. The latter provision is intended to provide a "safety valve" if the LLC is formed for a specific purpose and there is uncertainty over whether all the necessary conditions for fulfillment of that purpose will exist in the future [*see* [2], Section 9.1(e), *below*].

- Provisions governing indemnification [see [2], Section 10.01, *below* ].
- A spousal consent under which the spouses of the members consent to the terms of the Agreement with respect to any portion of the membership interests that are community property [see [2], Exhibit D, *below*]. This consent should be executed by all the spouses of the LLC members. For additional discussion of the law relating to this type of spousal consent, see Ch. 12C, *Limited Liability Companies* , and Ch. 8C, *Close Corporation Shareholder Agreements*, § 8C.203.
- A schedule showing the respective contributions of cash, property, or services to be made by each member, and the percentage interest in the LLC allocated to each member. This schedule may be amended from time to time to reflect subsequent adjustments in the interests of the members due to additional contributions, purchase of the interest of a deceased or departing member, or other sources [see [2], Exhibit A, *below*].

The operating agreement should also specify any respects in which the default provisions of the LLC Act are to be changed or rendered inapplicable to the LLC [see *Corp. Code* § 17005(e); see also § 12C.10[3]]. With regard to changes in some default provisions, only a written operating agreement is effective [see *Corp. Code* § 17005(b), (c)]. If any provision of the articles of an LLC conflicts with its written operating agreement, the articles control [*Corp. Code* § 17005(f)].

### **[c] Conversion to Single Member-Managed Agreement**

This form is drafted for an LLC that will have more than one member, and it contains provisions appropriate for that situation. However, since January 1, 2000, California LLCs have been permitted to have only a single member [*Corp. Code* §§ 17001(t), 17050(b)]. This basic manager-managed LLC operating agreement may be adapted for use in a single-member LLC. For federal tax purposes, a LLC with only one member is disregarded as an entity separate from its owner for federal tax purposes unless it elects to be taxed as an "association" (corporation) [*Treas. Reg.* § 301.7701-3(a)].

Counsel should consider whether the retention, deletion, or modification of the relevant provisions of this agreement is appropriate in a one-member situation. For example, provisions governing allocations and profit-sharing should be reviewed and ordinarily deleted from the agreement. However, although provisions governing contributions, voting rights, and so on may seem superfluous in a single-member LLC, it may be desirable to retain many of these provisions even when the LLC will be formed with a single member. Even if not anticipated at the time of formation, the admission of additional members may become desirable at a future time due to changing or unanticipated circumstances, and those provisions may obviate the need for revising the operating agreement of a single-member LLC that subsequently admits additional members.

### **[2] FORM**

#### **Family Limited Liability Company Operating Agreement--Manager-Managed**

OPERATING AGREEMENT OF  
\_\_\_\_\_, LLC  
A CALIFORNIA LIMITED LIABILITY COMPANY

Effective: \_\_\_\_\_

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**OPERATING AGREEMENT OF**

\_\_\_\_\_ *[name]*, LLC

**A CALIFORNIA LIMITED LIABILITY COMPANY**

This Operating Agreement ("Agreement") of \_\_\_\_\_ *[name]*, is made and effective as of \_\_\_\_\_ *[date]*, by \_\_\_\_\_ *[names of members and investors]* and any party subsequently admitted as a Member in accordance with the terms and conditions of this Agreement (the "Members"), with reference to the following facts:

**RECITALS**

On \_\_\_\_\_ *[date]*, Articles of Organization for \_\_\_\_\_, LLC ("Company"), a limited liability company organized under the laws of the State of California, were filed with the California Secretary of State.

The Members have formed the Company for the purpose of encouraging and facilitating the Members' interest in acquiring, holding and managing investments in a consolidated single entity and to provide protection for the personal assets of the Members against possible future claims by Company creditors. The Members further seek to obtain the

advantages of flexibility in business, tax and investment planning, and diversification of risk not available through trusts, corporations or individual ownership of assets.

The Members desire to provide for capitalization of the Company, relationships among the Members, terms and procedures for admission of additional persons as Members, rules for orderly succession of ownership and control of the Company, and appropriate restrictions to prevent ownership of interests in the Company by persons not admitted by the affirmative decision of the Members and involvement of non-Members in the management and operation of the Company.

The parties therefore desire to adopt and approve this Operating Agreement for the Company.

## AGREEMENT

NOW, THEREFORE, the Members by this Agreement set forth the operating agreement for the Company under the laws of the State of California on the terms and subject to the conditions set forth in this Operating Agreement.

### ARTICLE 1 ORGANIZATIONAL MATTERS

**1.01 Formation.** \_\_\_\_\_ has formed a California limited liability company under the laws of the State of California by filing Articles of Organization ("Articles") with the California Secretary of State and adopting this Operating Agreement. The rights and liabilities of the Members shall be determined pursuant to the Beverly-Killea Liability Act as codified in *California Corporations Code Section 17000 et seq.* ("LLC Act") and this Agreement.

**1.02 Name.** The name of the Company is \_\_\_\_\_ [name]. The Company may conduct business under that name or any other name approved by the Members.

**1.03 Term.** The term of the Company commenced as of the date of the filing of the Articles and, unless sooner terminated under Section 9.01, terminates on [specify date, e.g., December 31, 2050].

**1.04 Office and Agent.** The Company will continuously maintain an office and registered agent in the State of California as required by the LLC Act. The principal office of the Company is at \_\_\_\_\_ [address], California, or other location as the Manager, with the approval of the Members, may determine. The registered agent will be the Manager or any other person or entity that may be designated by all of the Members.

**1.05 Business of the Company.** Notwithstanding the purpose of the Company described in these Articles, the Company will not engage in any business other than the following without the consent of all of the Members:

(a) The business of investigating, making, holding, managing, and disposing of investments in limited liability companies, marketable securities, partnerships, closely held companies and businesses and real property (referred to as "Properties" or a "Property"), including those assets listed and described in greater detail on Exhibit B to this Agreement as well as investments that may be made in the future. The Manager will amend Exhibit B from time to time to include newly acquired investments or delete those that have been sold, but the inclusion or exclusion of an asset on Exhibit B is not determinative of whether the asset is owned by the Company; and

(b) Such other activities directly related to the foregoing activities as may be necessary or advisable in the reasonable opinion of the Manager to further those activities.

### ARTICLE 2 CAPITAL CONTRIBUTIONS

**2.01 Initial Capital Contributions.** \_\_\_\_\_ [Name or Each Member] will make the initial contribution to capitalize the Company in the amount shown opposite \_\_\_\_\_ [his or her or his or her] name on Exhibit A attached to this Agreement. No Member will be required to make any additional contributions to the capital of the Company. Except as provided in this Agreement, no Member may withdraw his or her capital contributions.

**2.02 Capital Accounts.** The Company will establish and maintain an individual capital account for each Member ("Capital Account"). In general, a Member's Capital Account will be (1) increased by (a) the Member's capital contributions, and (b) the Member's allocable share of Net Profits; and (2) decreased by (a) the Member's allocable share of Net Losses, and (b) the amount or value of any distribution made to the Member; provided, however that in the unlikely event these general rules conflict with requirements set forth in Treas. Reg. § 1.704-1(b)(2)(iv) of the *Income Tax Regulations*, or other applicable regulations, under the Internal Revenue Code ("Regulations"), the applicable provisions of the Regulations will control. In the event a Member transfers all or a part of a Membership Interest in accordance with this Agreement, the portion of the Capital Account attributable to the transferred Membership Interest will carryover to the new owner of the Membership Interest.

**2.03 Additional Capital Contributions.** Any Member may make additional cash capital contributions to the Company at any time, with the consent of the Manager, to the extent the Manager determines that additional capital contributions are reasonably necessary or related to the business of the Company as set forth in Section 1.04 or the establishment of reasonable reserves for those activities; provided, however, that no Member may be required to make any additional contributions.

**2.04 Adjustment of Membership Interests.** In the event additional capital contributions are made to the Company as set forth in Section 2.02 of this Agreement, the Members' respective Membership Interests will be modified to take account of the level of capital contributions made by each. The adjustments of the percentages of Membership Interests will be made by the Manager based on his or her reasonable judgment of the value of the additional capital contribution compared to the value of the Company immediately before the additional capital contribution. Exhibit A will be amended to reflect any additional capital contribution or adjustment in Members' Percentage Interests.

**2.05 No Interest.** The Company will not pay any interest on capital contributions.

**2.06 Loans.** Any Member may, with the consent and agreement of the Manager, lend money to the Company. If a Member makes a loan, the amount of the loan will not be treated as a capital contribution to the Company but will be a debt due from the Company and will be designated as a loan and documented in the form of a promissory note bearing interest at a rate (1) not less than the Applicable Federal Rate published under *I.R.C. § 1272* for loans of identical term and duration, and (2) not in excess of the maximum rate permitted by law.

### ARTICLE 3 MEMBERS

**3.01 Membership Interest; Percentage Interest.** Each Member will have a "Membership Interest" in the Company that comprises the Member's entire interest in the Company including the Member's economic interest, the right to vote on or participate in the management, and the right to receive information concerning the business and affairs of the Company. A Member's "Economic Interest" means the rights to receive distributions from the Company and allocations of Net Profits and Net Losses and items of income and expense from the Company pursuant to this Agreement and the LLC Act, expressed as a percentage of those items ("Percentage Interest"). Members' Percentage Interests will be set forth on Exhibit A and will be adjusted from time to time as required in Section 2.04.

**3.02 Admission of Additional Members.** Except as provided in Section 6.02 relating to admission of Permitted Transferees, additional Members may be admitted only with the approval of all of the Members on execution of a Subscription Agreement in the form of Exhibit C, attached to this Agreement. Additional Members will make a capital

contribution as determined by the Manager, subject to the consent of all of the Members, and participate in "Net Profits", "Net Losses" (as those terms are defined in Section 5.01), and distributions of the Company on the terms as are determined by the Manager and approved by the Members. Exhibit A will be amended on the admission of an additional Member to set forth that Member's name, capital contribution, and Percentage Interest.

**3.03 Members; Approval Requirements.** No annual or regular meetings of the Members are required. However, if meetings are held, the meetings may be called, noticed, held, and conducted in any manner permitted under the LLC Act. In any instance in which the approval of the Members is required under this Agreement, that approval may be obtained in any manner permitted by the LLC Act. Unless otherwise provided in this Agreement, approval of the Members means the approval of a majority interest of the Members, which for purposes of this Agreement means those Members who hold a majority of the Percentage Interests held by all of the Members.

**3.04 Withdrawals or Resignations.** Any Member may withdraw or resign as a Member at any time on 60 days prior written notice to the Company, without prejudice to the rights, if any, of the Company or the other Members under any contract other than this Agreement to which the withdrawing Member is a party. In the event of withdrawal, that Member's Membership Interest will be terminated, that Member will thereafter only have the rights of a transferee as described in Section 6.04, the Membership Interest is subject to purchase and sale as provided in Article 7, and the Company will not be required to distribute any property or other assets or any portion of the capital contributions or Capital Account of the withdrawing Member until similar distributions are made to Members who have not resigned or withdrawn from the Company.

#### ARTICLE 4 MANAGEMENT AND CONTROL OF THE COMPANY

##### 4.01 Management of the Company by Manager.

(a) **Exclusive Management by Manager.** Subject to the provisions of the Articles and this Agreement relating to actions required to be approved by the Members, the business, property and affairs of the Company will be managed and all powers of the Company will be exercised by or under the direction of the Manager.

(b) **Agency Authority of Manager.** Subject to Section 4.03, the Manager is authorized to endorse checks, drafts, and other evidence of indebtedness made payable to the order of the Company, and may sign all checks, drafts, and other instruments obligating the Company to pay money, and may sign contracts and obligations on behalf of the Company.

##### 4.02 Election of Manager.

(a) **Number, Term, and Qualifications.** The Manager may be a Member, but is not required to be a Member. \_\_\_\_\_[name] will initially act as the sole Manager. The number of Managers of the Company may be increased or decreased from time to time by the affirmative vote or written consent of Members holding a majority of the Percentage Interests held by all of the Members (a "Majority Interest"), provided that in no instance will there be less than one Manager and provided further that if the number of Managers is changed, the Articles will be amended to set forth the new number of Managers. Unless he or she resigns or is removed, each Manager holds office indefinitely. Managers will be elected by the affirmative vote or written consent of a Majority Interest of the Members.

(b) **Resignation.** Any Manager may resign at any time by giving written notice to the Members without prejudice to the rights, if any, of the Company under any contract other than this Agreement to which the Manager is a party. The resignation of any Manager is effective on receipt of that notice, or at any later time specified in the notice. Unless otherwise specified in the notice, the acceptance of the resignation is not necessary to make it effective. The resignation of a Manager who is also a Member does not affect the Manager's rights as a Member and does not constitute a withdrawal of a Member.

(c) **Removal.** The Manager may be removed at any time, with or without cause, by the affirmative vote or written consent of a Majority Interest of the Members at a meeting called expressly for that purpose. Any removal does not affect the Manager's rights as a Member or constitute a withdrawal of a Member. For purpose of this Section, "cause" means fraud, gross negligence, willful misconduct, embezzlement, or a breach of the Manager's obligations under this Agreement.

(d) **Vacancies.** Any vacancy occurring for any reason in the Manager's position may be filled by the affirmative vote or written consent of a Majority Interest of the Members.

#### 4.03 Powers of Manager.

(a) **Powers of Manager.** Without limiting the generality of Section 4.01, but subject to the limitations set forth in Section 4.03 and to the express limitations set forth elsewhere in this Agreement, the Manager has all necessary powers to manage and carry out the purposes, business, investments, property, and affairs of the Company, including, without limitation, the power to exercise on behalf and in the name of the Company all of the powers described in *Corporations Code § 17003*.

(b) **Limitations on Power of Manager.** The Manager does not have authority under this Agreement to cause the Company to engage in the following transactions without first obtaining the affirmative vote or written consent of a Majority Interest of the Members:

- (1) The merger of the Company with another limited liability company or corporation, general partnership, limited partnership, or other business entity;
- (2) An alteration of the primary purpose or business of the Company as set forth in Section 1.04;
- (3) Any act that would make it impossible to carry on the ordinary business of the Company; and
- (4) Any other transaction described in this Agreement as requiring the vote, consent, or approval of the Members.

4.04 **Performance of Duties; Liability of Manager.** The Manager is not liable to the Company or to any Member for any loss or damage sustained by the Company or any Member, unless the loss or damage results from fraud, deceit, intentional misconduct, or a knowing violation of law by the Manager. The Manager will perform all managerial duties in good faith, in a manner reasonably believed to be in the best interests of the Company and its Members, and with the level of care, including reasonable inquiry, as an ordinarily prudent person in a like position would use under similar circumstances. A Manager who so performs the duties of Manager will not have any liability by reason of being or having been a Manager of the Company.

4.05 **Devotion of Time.** The Manager is not obligated to devote all of his or her time or business efforts to the affairs of the Company. The Manager will devote whatever time, effort and skill as the Manager deems appropriate for the operation of the Company.

4.06 **Compensation of the Manager.** The Manager is not entitled to compensation for activities or services undertaken on behalf of the Company, other than the Manager's Membership Interest in Net Profits and distributions pursuant to Article 5.

4.07 **Competing Activities.** The Manager may engage or invest in, independently or with others, any business activity of any type or description, including without limitation those that might be the same as or similar to the Company's business and that might be in direct or indirect competition with the Company. Neither the Company nor any Member has any right in or to such other ventures or activities or to the income or proceeds derived from those ventures and

activities. The Manager is not obligated to present any investment opportunity or prospective economic advantage to the Company, even if the opportunity is of the character that, if presented to the Company, could be taken by the Company. The Manager has the right to hold any investment opportunity or prospective economic advantage for his or her own account or to recommend that opportunity to persons or entities other than the Company. The Members waive any and all rights and claims that they may otherwise have against the Manager as a result of any of these activities.

**4.08 Expenses.** The Company will reimburse the Manager for the actual cost of materials used for or by the Company and for out of pocket expenses incurred on behalf of the Company. The Company will also pay or reimburse the Manager for organizational expenses (including, without limitation, legal and accounting fees and costs) incurred to form the Company, prepare and file the Articles, and complete this Agreement.

**4.09 Limited Liability.** No person who is a Manager of the Company will be personally liable under any judgment of a court, or in any other manner, for any debt, obligation, or liability of the Company, whether that liability or obligation arises in contract, tort, or otherwise, solely by reason of being a Manager of the Company.

#### ARTICLE 5 ALLOCATIONS OF NET PROFITS AND NET LOSSES AND DISTRIBUTIONS

##### 5.01 Allocations of Net Profit and Net Loss.

(a) **Net Loss.** Net Loss will be allocated to the Members in proportion to their Percentage Interests. Notwithstanding the previous sentence, loss allocations to a Member will, to the extent possible, be made only to the extent that the loss allocations do not create a deficit Capital Account balance for that Member in excess of an amount, if any, equal to that Member's share of Minimum Gain of the Company (as defined below). Any loss not allocated to a Member because of the foregoing provision will be allocated to the other Members (to the extent the other Members are not limited in respect of the allocation of losses under this Section 5.01(a)). Any loss reallocated under this Section 5.01(a) will be taken into account in computing subsequent allocations of income and losses pursuant to this Article 5, so that the net amount of any item so allocated and the income and losses allocated to each Member pursuant to this Article 5, to the extent possible, will be equal to the net amount that would have been allocated to each Member pursuant to this Article 5 if no reallocation of losses had occurred under this Section 5.01(a).

(b) **Net Profit.** Net Profit will be allocated to the Members in proportion to their Percentage Interests.

(c) **Definitions.** As used in this Agreement, the following terms have the meanings set forth below:

(1) "Net Profit" and "Net Loss" mean the income, gain, loss, deductions, and credits of the Company in the aggregate or separately stated, as appropriate, determined in accordance with the method of accounting at the close of each fiscal year employed on the Company's information tax return filed for federal income tax purposes; provided, however that Net Profit and Net Loss does not include any items that are specially allocated pursuant to Section 5.02.

(2) "Fiscal Year" for the Company means the calendar year, unless and until changed to a different fiscal year with the consent of a Majority Interest of the Members.

(3) "Minimum Gain" means the excess of the fair market value of a Property over the tax basis of that Property, provided that Minimum Gain is never less than the excess of the amount, if any, by which the Nonrecourse Liability secured by a Property exceeds the tax basis of that Property.

(4) "Nonrecourse Liability" means any liability secured by a Property or Company assets with respect to which no Member (or a party closely related to the Member) is personally liable.

**5.02 Special Allocations.** Although allocations different than those set forth in Section 5.01 are not anticipated, for federal tax purposes the Company is required to follow certain special allocation rules in the event of unanticipated economic circumstances. Accordingly, notwithstanding Section 5.01:

(a) **Minimum Gain Chargeback.** If there is a net decrease in Company Minimum Gain during any fiscal year, each Member will be specially allocated items of Company income and gain for that fiscal year (and, if necessary, in subsequent fiscal years) in an amount equal to the portion of that Member's share of the net decrease in Company Minimum Gain that is allocable to the disposition of Company property subject to a Nonrecourse Liability, which share of net decrease will be determined in accordance with *Treas. Reg. § 1.704-2(g)(2)*. Allocations pursuant to this Section 5.02(a) will be made in proportion to the amounts required to be allocated to each Member under this Section 5.02(a). The items to be so allocated will be determined in accordance with *Treas. Reg. § 1.704-2(f)*. This Section 5.02(a) is intended to comply with the minimum gain chargeback requirement contained in *Treas. Reg. § 1.704-2(f)* and will be interpreted consistently therewith.

(b) **Chargeback of Minimum Gain Attributable to Member Nonrecourse Debt.** If there is a net decrease in Company Minimum Gain attributable to a Member Nonrecourse Debt, during any fiscal year, each Member who has a share of the Company Minimum Gain attributable to that Member Nonrecourse Debt (which share will be determined in accordance with *Treas. Reg. § 1.704-2(i)(5)*) will be specially allocated items of Company income and gain for that fiscal year (and, if necessary, in subsequent Fiscal years) in an amount equal to that portion of that Member's share of the net decrease in Company Minimum Gain attributable to that Member Nonrecourse Debt that is allocable to the disposition of Company property subject to that Member Nonrecourse Debt (which share of the net decrease will be determined in accordance with *Treas. Reg. § 1.704-2(i)(5)*). Allocations pursuant to this Section 5.02(b) will be made in proportion to the amounts required to be allocated to each Member under this Section 5.02(b). The items to be so allocated will be determined in accordance with *Treas. Reg. § 1.704-2(i)(4)*. This Section 5.02(b) is intended to comply with the minimum gain chargeback requirement contained in *Treas. Reg. § 1.704-2(i)(4)* and will be interpreted consistently therewith.

(c) **Nonrecourse Deductions.** Any nonrecourse deductions (as defined in *Treas. Reg. § 1.704-2(b)(1)*) for any fiscal year or other period will be specially allocated to the Members in proportion to their respective Percentage Interests.

(d) **Member Nonrecourse Deductions.** Those items of Company loss, deduction, or *I.R.C. § 705(a)(2)(B)* expenditures that are attributable to Member Nonrecourse Debt for any fiscal year or other period will be specially allocated to the Member who bears the economic risk of loss with respect to the Member Nonrecourse Debt to which those items are attributable in accordance with *Treas. Reg. § 1.704-2(i)*.

(e) **Qualified Income Offset.** If a Member unexpectedly receives any adjustments, allocations, or distributions described in *Treas. Reg. § 1.704-1(b)(2)(ii)(d)(4), (5) or (6)*, or any other event creates a deficit balance in a Member's Capital Account in excess of that Member's share of Company Minimum Gain, items of Company income and gain will be specially allocated to that Member in an amount and manner sufficient to eliminate the excess deficit balance as quickly as possible. Any special allocations of items of income and gain pursuant to this Section 5.02(e) will be taken into account in computing subsequent allocations of income and gain pursuant to this Article 5 so that the net amount of any item so allocated and the income, gain, and losses allocated to each Member pursuant to this Article 5 to the extent possible, will be equal to the net amount that would have been allocated to each Member pursuant to the provisions of this Section 5.02(e) if those unexpected adjustments, allocations, or distributions had not occurred.

**5.03 Internal Revenue Code Section 704(c) Allocations.** Notwithstanding any other provision in this Article 5, in accordance with *I.R.C. § 704(c)* and the regulations promulgated thereunder, items of income, gain, loss, and deduction with respect to any property contributed to the capital of the Company will, solely for tax purposes, be allocated among the Members so as to take account of any variation between the adjusted basis of that property to the Company for federal income tax purposes and its fair market value on the date of contribution. Allocations pursuant to this Section

5.03 are solely for purposes of federal, state, and local taxes. As such, they do not affect or will in any way be taken into account in computing a Member's Capital Account or share of profits, losses, or other items or distributions pursuant to any provision of this Agreement.

**5.04 Allocation of Net Profits and Losses and Distributions in Respect of a Transferred Interest.** If any Membership Interest is transferred, or is increased or decreased by reason of the admission of a new Member or otherwise, during any fiscal year of the Company, Net Profits or Net Losses for that fiscal year will be assigned to the Members and other holders of Membership Interests according to any method permitted under *I.R.C. § 706*. Notwithstanding any provision above to the contrary, gain or loss of the Company realized in connection with a sale or other disposition of any of the assets of the Company will be allocated solely to the parties owning Membership Interests as of the date that sale or other disposition occurs.

**5.05 Distributions.** Subject to applicable law and any limitations contained elsewhere in this Agreement, the Manager may, from time to time, cause the Company to make distributions out of funds not needed for operations by the Company. These distributions will be made in amounts and at such times as determined by the Manager. Distributions will be made to the Members in proportion to their Percentage Interests.

#### ARTICLE 6 TRANSFER AND ASSIGNMENT OF INTERESTS

**6.01 Transfer and Assignment of Interests.** No Member is entitled to transfer, assign, convey, sell, encumber, or in any way alienate, whether voluntarily or involuntarily or for full consideration or without consideration, all or any part of his or her Membership Interest or Economic Interest (in each case, a "Transfer") except pursuant to Section 6.02.

**6.02 Permitted Transfers.** Notwithstanding the restriction set forth in Section 6.01, any Member or Economic Interest holder is entitled to transfer, from time to time, any or all of his or her Membership or Economic Interest: (1) with the prior approval of a Majority Interest of the Members, (2) to any other Member, (3) to \_\_\_\_\_ [name] or a lineal descendant of \_\_\_\_\_ [name], or to a trust for the benefit of those persons, (4) pursuant to the right of first refusal procedures set forth in Section 6.03, and (5) pursuant to the procedures set forth in Article 7. Notwithstanding the foregoing, no Transfer will be permitted under this Section 6.02 unless the transferee complies with the requirements of Section 6.04 of this Agreement.

**6.03 Right of First Refusal.** If any Member or Economic Interest holder (a "Transferor") receives a bona fide offer to purchase all or any part of the Transferor's Economic Interest or otherwise proposes to transfer all or any part of the Transferor's Economic Interest (or is required by operation of law or other involuntary transfer to do so), the Transferor must first offer that Economic Interest to the Company and the other Members in accordance with the following provisions:

(a) The Transferor will deliver a written notice ("Option Notice") to the Company and the other Members stating (1) the Transferor's bona fide intention to transfer that Economic Interest, (2) the Economic Interest to be transferred, (3) the purchase price and terms of payment for which the Transferor proposes to transfer the Economic Interest, and (4) the name and address of the proposed transferee.

(b) The Company has the right, but not the obligation, to elect to purchase any share of that Economic Interest proposed to be transferred on the price and terms of payment designated in the Option Notice. The Company will exercise this right only with the approval of a Majority Interest of the Members other than the Transferor. The right will be exercised, if at all, by written notice given by the Company to the Transferor and the other Members within 20 days after receipt of the Option Notice. If the Option Notice provides for the payment of non-cash consideration, the Company may elect to pay the consideration in cash equal to the Manager's good faith estimate of the present fair market value of the non-cash consideration. The failure of the Company to submit a notice within the applicable period set forth in this Article constitutes an election by the Company not to purchase any of the Economic Interest that may be so transferred.

(c) If, for any reason, the Company does not elect to purchase the entire Economic Interest referred to in the Offer Notice, then all Members other than the Transferor have the right, but not the obligation, to elect to purchase any share of that remaining Economic Interest on the price and terms of payment designated in the Option Notice, which right may be exercised by written notice given by each other Member to the Transferor, the Company and the other Members within 45 days after receipt of the Option Notice. If the Option Notice provides for the payment of non-cash consideration, the other Members may elect to pay the consideration in cash equal to the good faith estimate of the present fair market value of the non-cash consideration, as that estimate is made by a Majority Interest of those other Members. If the total amount of the Economic Interest specified in the notices received from the other Members exceeds the amount of the remaining Economic Interest, the remaining Economic Interest will be allocated among the electing other Members pro rata according to their Membership Interests. The failure of any other Member to submit a notice within the applicable period set forth in this Article constitutes an election by that other Member not to purchase any of the remaining Economic Interest.

(d) If the Company and other Members elect to purchase or obtain any or all of the Economic Interest designated in the Option Notice, then the closing of that purchase will occur within 60 days after receipt of the Option Notice. The Transferor, the Company, and the other Members will execute all documents and instruments and make all deliveries that reasonably may be required to consummate the purchase.

(e) If the Company and the other Members elect not to purchase or obtain, or default in their obligation to purchase or obtain, all of the Economic Interest designated in the Option Notice, then the Transferor may transfer the portion of the Economic Interest described in the Option Notice not so purchased, to the proposed transferee, providing that the transfer (1) is completed within 90 days after the date of the Option Notice, and (2) is made on terms no less favorable to the Transferor than disclosed in the Option Notice. If the Economic Interest is not so transferred, the Transferor must give a new Option Notice in accordance with this Article or otherwise comply with Section 6.02 before any other or subsequent transfer of the Economic Interest.

**6.04 Substitution of Members.** A transferee of a Membership Interest has the right to become a substitute Member only if (1) the transferee meets the requirements of Section 6.02, (2) the transferee executes an instrument satisfactory to all Members accepting and adopting the terms and provisions of this Agreement, and (3) the transferee pays any reasonable expenses in connection with his or her admission as a new Member. The admission of a substitute Member does not release the Member who assigned the Membership Interest from any liability that that Member may have to the Company.

**6.05 Effect of Transfers.** Upon a Transfer in violation of this Article 6, and until and unless any transferee may be admitted as a substitute Member under Section 6.04, the transferee has no right to vote or participate in the management of the Company or to exercise any rights of a Member. The transferee is only entitled to receive the share of the Company's Net Profits, Net Losses, and distributions of the Company's assets to which the transferor would otherwise be entitled. Notwithstanding the immediately preceding sentences, any Transfer in violation of this Article 6 shall be null and void.

## ARTICLE 7 CONSEQUENCES OF TRIGGERING EVENTS, MARITAL DISSOLUTION, AND TERMINATION OF MEMBERSHIP INTEREST

**7.01 Triggering Event.** Upon the (1) withdrawal or resignation of a Member, or (2) a Transfer or attempted Transfer of any Membership Interest in violation of Article 6, whether that Transfer or attempted Transfer occurs by reason of a voluntary or involuntary act, including death, bankruptcy, dissolution of marriage, or attempted sale ("Triggering Event"), the Company will continue, without dissolution or liquidation, unless Members holding a 50 percent majority of the Percentage Interests held by Members other than the Member who caused the Triggering Event ("Remaining

Members") vote within 90 days after the Triggering Event to dissolve the Company. Unless the Remaining Members vote to dissolve the Company, the Company and/or the Remaining Members have the right to purchase, and if that right is exercised, the Member (or his or her legal representative) whose actions, or circumstances resulted in the Triggering Event ("Former Member") will sell, the Former Member's Membership Interest ("Former Member's Interest") as provided in this Article 7.

**7.02 Purchase Price.** The purchase price for the Former Member's Interest will be the fair market value of the Former Member's Interest on the date of the Triggering Event as determined under this Agreement (the "Purchase Price"). The fair market value of the Former Member's Interest will be determined by the Manager, and the Manager will notify the Former Member of the value determined within 45 days following receipt of actual notice of the Triggering Event. If the Former Member or that Former Member's legal representative deems the Manager's determination of fair market value to vary from the fair market value of the Former Member's Interest by more than [*specify, e.g., 10 percent*], that party will be entitled to require an appraisal by providing notice of the request for appraisal within 15 days after notice of the Manager's determination of fair market value. In that event, the value of the Former Member's Interest will be determined by three independent appraisers, one selected by the Former Member or that Former Member's legal representative, one selected by the Company, and one selected by the two appraisers so named. The fair market value of the Former Member's Interest will be the average of the two appraisals closest in amount to each other. In the event the fair market value is determined to vary from the Manager's determination of fair market value by less than [*specify above percentage, e.g., 10 percent*], the party requesting the appraisal will pay all expenses of all the appraisals incurred, and the purchase price will be the fair market value as originally determined by the Manager. In all other events, the party requesting the appraisal will pay one-half of the appraisal expenses and the other party will pay one-half of the appraisal expenses. Notwithstanding the foregoing, if the Triggering Event results from a breach of this Agreement by the Former Member, the purchase price will be reduced by an amount equal to the damages suffered by the Company or the Remaining Members as a result of that breach. In determining fair market value, the Manager and the appraisers will consider appropriate discounts for illiquidity and minority status of the Former Member's Interest.

**7.03 Notice of Intent to Purchase.** Within 30 days after the fair market value of the Former Member's Interest has been determined in accordance with Section 7.02, each Remaining Member must notify the Members in writing of his or her desire to purchase a portion of the Former Member's Interest. The failure of any Remaining Member to submit a notice within the applicable period constitutes an election on the part of the Member not to purchase any of the Former Member's Interest. Each Remaining Member so electing to purchase will be entitled to purchase a portion of the Former Member's Interest in the same proportion that the Membership Interest of the Remaining Member bears to the aggregate of the Membership Interests of all of the Remaining Members electing to purchase the Former Member's Interest.

**7.04 Election to Purchase Less Than All of the Former Member's Interest.** If any Remaining Member elects to purchase none or less than all of his or her pro rata share of the Former Member's Interest, then the Remaining Members can elect to purchase more than their respective pro rata shares. If the Remaining Members fail to purchase the entire interest of the Former Member, the Company may purchase any remaining share of the Former Member's Interest.

**7.05 Payment of Purchase Price.** The Company or the Remaining Members, as the case may be, will pay the purchase price at the closing in the form of (1) cash; (2) a full-recourse promissory note of the Company (the "Note") bearing interest at the rate published in the *Wall Street Journal* as its prime rate in effect on the day of Closing; or (3) a combination of cash and a Note. Principal and interest on the Note will be payable in a maximum of 36 equal monthly installments with payments commencing one month following Closing. In all cases, the Note will be prepayable without premium or penalty.

**7.06 Closing of Purchase of Former Member's Interest.** The closing for the sale of a Former Member's Interest pursuant to this Article 7 shall be held at 10:00 A.M. at the principal office of Company no later than 60 days after the determination of the Purchase Price, except that if the closing date falls on a Saturday, Sunday, or California legal holiday, then the closing will be held on the next succeeding business day. At the closing, the Former Member will

deliver to the Company or the Remaining Members an instrument of transfer (containing warranties of title and no encumbrances) conveying the Former Member's Interest. The Former Member, the Company and the Remaining Members will do all things and execute and deliver all papers as may be reasonably necessary fully to consummate the sale and purchase in accordance with the terms and provisions of this Agreement.

#### **7.07 Dissolution of Marriage.**

(a) Any Membership Interest subject to transfer, disposition, or allocation in connection with a marital settlement agreement, legal separation, dissolution of marriage, or annulment of marriage (a "Marital Dissolution"), as to the entire interest, community or separate, of any Member and any Member's spouse, will be allocated in the property division to the extent possible to the Member and not the Member's spouse (the "Former Spouse"). If, however, a Former Spouse receives, retains, or is awarded any Membership Interest, the Former Spouse will promptly give notice thereof to the Company, and the Company and/or the Members other than the Former Spouse will have the right to purchase, and the Former Spouse will have the obligation to sell, that Former Spouse's Membership Interest as provided in this Section 7.07.

(b) In the event of a Marital Dissolution (and notwithstanding Section 7.03), the Member spouse in the Marital Dissolution has the option, exercisable for a period of 90 days following Marital Dissolution (or the transfer of the Membership Interest pursuant to the Marital Dissolution, if later), to purchase any or all of the Former Spouse's Membership Interest at the price and terms provided in this Section 7.07.

(c) If, for any reason, the Member spouse does not exercise the option to purchase all of the Former Spouse's Membership Interest within 90 days after the Marital Dissolution (or the transfer of the Membership Interest pursuant to the Marital Dissolution, if later), the Member spouse will promptly give notice of that fact to the Company and to the remaining Members. The Company will have the assignable option, exercisable at any time thereafter, to purchase and redeem any or all of the Former Spouse's Membership Interest at the price and on the terms provided in this Section 7.07.

(d) A purchase of the Membership Interest of a Former Spouse pursuant to this Section 7.07 will be initiated by the Company or the Member exercising the Company's right as assignee by providing a notice of intent to purchase to the Manager and the Former Spouse. Within 30 days following the determination of the purchase price pursuant to Section 7.07(e), *below*, the Company or Member who filed the notice of intent to purchase will, by written notice to the Former Spouse, either confirm or withdraw that notice. If the notice of intent to purchase is confirmed, the closing for the sale of the Former Spouse's Membership Interest will be held pursuant to the procedure for closing of sale of a Former Member's Interest under Sections 7.05 and 7.06 of this Agreement.

(e) The purchase price of a Former Spouse's Membership Interest will be determined pursuant to the method set forth in Section 7.02; provided that the determination of the purchase price will be initiated by a notice of intent to purchase and all deadlines will be measured from the date of that notice rather than from the notice of a Triggering Event; and, further provided that the purchase price will be determined as of the Marital Dissolution, unless that notice of intent to purchase is given more than 180 days after the Marital Dissolution, in which event, the determination will be made as of the date notice of intent to purchase is given.

(f) If the Company and the Members collectively do not exercise their option as to all of the Former Spouse's Membership Interest, then the Former Spouse will continue to hold the Membership Interest subject to the provisions of this Agreement, including the terms of Section 6.04 which sets forth conditions on the right of the Former Spouse to become a substitute Member.

#### **ARTICLE 8 ACCOUNTING, RECORDS, REPORTING BY MEMBERS**

**8.01 Books and Records.** The books and records of the Company will be kept in accordance with the accounting methods followed for federal income tax purposes. The Company will maintain at its principal office in California all of the following:

- (a) A current list of the full name and last known business or residence address of each Member, together with the capital contributions, capital account, and Membership Interest of each Member;
- (b) A copy of the Articles and any and all amendments thereto, together with executed copies of any powers of attorney pursuant to which the Articles or any amendments have been executed;
- (c) Copies of the Company's federal, state, and local income tax or information returns and reports, if any, for the six most recent taxable years;
- (d) A copy of this Agreement and any and all amendments thereto, together with executed copies of any powers of attorney pursuant to which this Agreement or any amendments thereto have been executed;
- (e) Copies of the financial statements of the Company, if any, for the six most recent fiscal years; and
- (f) The Company's books and records as they relate to the internal affairs of the Company for at least the current and past four fiscal years.

**8.02 Reports.** The Company shall cause to be filed, in accordance with the Act, all reports and documents required to be filed with any governmental agency. The Company shall cause to be prepared at least annually information concerning the Company's operations necessary for the completion of the Members' federal and state income tax returns. The Company shall send or cause to be sent to each Member within 90 days after the end of each taxable year

- (a) such information as is necessary to complete the Members' federal and state income tax or information returns and
- (b) a copy of the Company's federal, state, and local income tax or information returns for the year.

**8.03 Bank Accounts.** The Manager will maintain the funds of the Company in one or more separate bank accounts in the name of the Company, and will not permit the funds of the Company to be commingled in any fashion with the funds of any other person or entity.

**8.04 Tax Matters for the Company.** \_\_\_\_\_ [name] is designated as "Tax Matters Partner" (as defined in *I.R.C. § 6231*), to represent the Company (at the Company's expense) in connection with all examinations of the Company's affairs by tax authorities and to expend Company funds for professional services and costs associated therewith.

## ARTICLE 9 DISSOLUTION AND WINDING UP

**9.01 Conditions of Dissolution.** The Company will dissolve on the occurrence of any of the following events:

- (a) Entry of a decree of judicial dissolution pursuant to *Corp. Code § 17351*;
- (b) The vote of a Majority Interest of the Members;
- (c) The vote of 50 percent of the Remaining Members to dissolve in accordance with Section 7.01 within 90 days after the occurrence of a Triggering Event; or
- (d) The sale of all or substantially all of the assets of Company.

(e) The occurrence of any event that makes it unlawful or impossible to carry on the business of the Company.

9.02 **Winding Up.** On the dissolution of the Company, the Company's assets will be disposed of and its affairs wound up. The Company will give written notice of the commencement of the dissolution to all of its known creditors.

9.03 **Order of Payment of Liabilities on Dissolution.** After determining that all the known debts and liabilities of the Company have been paid or adequately provided for, the remaining assets will be distributed to the Members in accordance with their positive capital account balances, after taking into account Net Profit and Net Loss allocations for the Company's fiscal year during which liquidation occurs.

9.04 **Limitations on Payments Made in Dissolution.** Except as otherwise specifically provided in this Agreement, each Member will be entitled to look only to the assets of the Company for the return of his or her positive Capital Account balance and will have no recourse for his or her Capital Contribution and/or share of Net Profits against any other Member.

9.05 **Certificates.** The Company will file with the California Secretary of State a Certificate of Dissolution on the dissolution of the Company and a Certificate of Cancellation on the completion of the winding up of the Company's affairs.

#### ARTICLE 10 GENERAL PROVISIONS

*[For an alternative indemnification provision, see § 12C.221[2], P 11.]*

10.01 **Indemnification of Agents.** The Company will indemnify the Manager and any Member and may indemnify any person who was or is a party or is threatened to be made a party to any threatened, pending, or completed action, suit or proceeding by reason of the fact that he or she is or was a Manager, Member, officer, employee, or other agent of the Company or that, being or having been such a Manager, Member, officer, employee, or agent, he or she is or was serving at the request of the Company as a manager, director, officer, employee, or other agent of another limited liability company, corporation, partnership, joint venture, trust, or other enterprise (all such persons being referred to hereinafter as an "agent"), to the fullest extent permitted by applicable law in effect on the date of this Agreement and to such greater extent as applicable law may hereafter from time to time permit.

10.02 **Complete Agreement.** This Agreement and the Articles constitute the complete and exclusive statement of agreement among the Members with respect to the subject matter herein and therein and replace and supersede all prior written and oral agreements among the Members. To the extent that any provision of the Articles conflict with any provision of this Agreement, the Articles shall control.

10.03 **Binding Effect.** Subject to the provisions of this Agreement relating to transferability, this Agreement will be binding on and inure to the benefit of the Members, and their respective successors and permitted assigns.

10.04 **Interpretation.** All headings are inserted only for convenience and ease of reference and are not to be considered in the interpretation of any provision of this Agreement. Numbered or lettered articles, sections and subsections contained in this Agreement refer to articles, sections and subsections of this Agreement unless otherwise expressly stated. In the event any claim is made by any Member relating to any conflict, omission, or ambiguity in this Agreement, no presumption or burden of proof or persuasion will be implied by virtue of the fact that this Agreement was prepared by or at the request of a particular Member or his or her counsel.

10.05 **Jurisdiction.** Each Member consents to the exclusive jurisdiction of the state and federal courts sitting in \_\_\_\_\_, California or the \_\_\_\_\_ District of California in any action on a claim arising

out of, under or in connection with this Agreement or the transactions contemplated by this Agreement, provided that the claim is not required to be arbitrated pursuant to Section 10.08. Each Member further agrees that personal jurisdiction over him or her may be effected by service of process by registered or certified mail addressed as provided in Section 10.7 of this Agreement, and that when so made will be as if served upon him or her personally within the State of California.

**10.06 Severability.** If any provision of this Agreement or the application of any such provision to any person or circumstance shall be held invalid, the remainder of this Agreement or the application of such provision to persons or circumstances other than those to which it is held invalid shall not be affected thereby.

**10.07 Notices.** Any notice to be given or to be served on the Company or any party to this Agreement in connection with this Agreement must be in writing (which may include facsimile) and will be deemed to have been given and received when delivered to the address specified by the party to receive the notice. Notices will be given to a Member at the address specified in Exhibit A. Any party may, at any time by giving five days' prior written notice to the other Members, designate any other address in substitution of the foregoing address to which notice will be given.

**10.08 Mediation and Arbitration.**

(a) **Mediation or Arbitration Required.** Except as otherwise provided in this Agreement, any controversy or claim arising out of or relating to this Agreement or its breach will be settled by mediation, or by arbitration before a single arbitrator in the City of \_\_\_\_\_, California.

(b) **Mediation.** Before the commencement of arbitration proceedings, the parties will attempt in good faith to settle their dispute by mediation.

*[For an alternative arbitration provision, see § 12C.221[2], Section 12.08.]*

(c) **Arbitration.** Any matter not settled by mediation will be submitted to the American Arbitration Association for arbitration in the City of \_\_\_\_\_, California. The costs of the arbitration, including any American Arbitration Association administration fee, the arbitrator's fee, and costs for the use of facilities during the hearings, will be borne equally by the parties to the arbitration. Attorneys' fees may be awarded to the prevailing or most prevailing party at the discretion of the arbitrator. The provisions of *Sections 1282.6, 1283, and 1283.05 of the California Code of Civil Procedure* apply to the arbitration. The arbitrator will not have any power to alter, amend, modify, or change any of the terms of this Agreement, or any power to grant any remedy that is either prohibited by the terms of this Agreement, or not available in a court of law.

**10.09 Amendments.** All amendments to this Agreement will be in writing and signed by all Members affected by the amendment.

**10.10 Attorney Fees.** In the event that any dispute under or related to this Agreement between the Company and the Members or among the Members should result in litigation or arbitration, the prevailing party in the dispute will be entitled to recover from the other party all reasonable fees, costs, and expenses of enforcing any right of the prevailing party, including without limitation, reasonable attorneys' fees and expenses, all of which will be deemed to have accrued upon the commencement of the action and be paid whether or not the action is prosecuted to judgment. Any judgment or order entered in the action will contain a specific provision providing for the recovery of attorney fees and costs incurred in enforcing the judgment and an award of prejudgment interest from the date of the breach at the maximum rate allowed by law.

**10.11 Remedies Cumulative.** The remedies under this Agreement are cumulative and do not exclude any other

remedies to which any person may be lawfully entitled.

**10.12 Spousal Consents.** Concurrently with the execution of this Agreement, each married Member's spouse will execute the form of Spousal Consent attached to this Agreement as Exhibit D, and each Member agrees that all future spouses of that Member will execute this form on or before marriage.

IN WITNESS WHEREOF, all of the Members of \_\_\_\_\_, LLC, a California limited liability company, have executed this Agreement, effective as of the date written above.

MANAGER: \_\_\_\_\_ [signature]

[typed name]

[date]

MEMBER: \_\_\_\_\_ [signature]

[typed name]

[date]

MEMBER: \_\_\_\_\_ [signature]

[typed name]

[date]

#### **EXHIBIT A**

#### **CAPITAL CONTRIBUTIONS AND PERCENTAGE INTERESTS OF MEMBERS AS OF \_\_\_\_\_**

MEMBER'S NAME AND ADDRESS	MEMBER'S CAPITAL CONTRIBUTIONS	MEMBER'S PERCENTAGE INTERESTS
	\$	%
	\$	%
	\$	%
	\$	%
	\$	%

#### **EXHIBIT B**

#### **INVESTMENTS OF THE COMPANY (As of \_\_\_\_\_ [date])**

#### **EXHIBIT C**

#### **SUBSCRIPTION AGREEMENT \_\_\_\_\_, LLC**

**A CALIFORNIA LIMITED LIABILITY COMPANY**

I wish to become a Member of \_\_\_\_\_, LLC, a California Limited Liability Company ("Company"). I have read the Operating Agreement of the Company dated \_\_\_\_\_ [date] ("Operating Agreement") and I know and understand the terms of the Operating Agreement. I hereby subscribe to the Operating Agreement and agree to abide by and be subject to all of the terms and provisions of the Operating Agreement and agree that my Membership Interest is subject to the provisions of the Operating Agreement.

Date: \_\_\_\_\_

AGREED TO AND ACCEPTED ON BEHALF OF \_\_\_\_\_, LLC, A CALIFORNIA LIMITED LIABILITY COMPANY

Date: \_\_\_\_\_

\_\_\_\_\_, LLC, A CALIFORNIA LIMITED LIABILITY COMPANY

By: \_\_\_\_\_

[typed name], Manager

**EXHIBIT D****CONSENT OF SPOUSE**

The undersigned spouse of a party to the Operating Agreement of \_\_\_\_\_, LLC ("Company") dated as of \_\_\_\_\_ [date] ("Agreement") acknowledges and agrees on his or her own behalf that: I have read the Agreement and I understand its contents. I am aware that by its provisions my spouse is subject to limited rights to receive payout of his or her investment and interest in the Company in the event of a termination of his or her participation as a Member in the Company, including my community interest (if any) in it. I further understand that these provisions apply whether the termination of his or her interest as a Member occurs voluntarily (e.g., as a result of withdrawal) or involuntarily (e.g., as the result of death, expulsion, or bankruptcy). I hereby consent to and approve of the provisions of the Agreement, and agree that the Membership Interest and my interest in it are subject to the provisions of the Agreement and that I will take no action at any time to hinder operation of the Agreement on that Membership Interest or my interest in it.

\_\_\_\_\_ [signature]

[typed name]

\_\_\_\_\_ [date]

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Business & Corporate Law Limited Liability Companies General Overview Business & Corporate Law Limited Liability Companies Formation Business & Corporate Law Limited Liability Companies Management Duties & Liabilities Estate, Gift & Trust Law General Overview



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CHAPTER 68A USING FAMILY PARTNERSHIPS AND OTHER BUSINESS ENTITIES IN ESTATE PLANNING  
PART IV. FORMS  
A. Organizational Documents

*25-68A California Legal Forms--Transaction Guide §§ 68A.202-68A.209*

**AUTHOR:** Steven M. Goldberg Practice Consultant

**[Reserved]**

§§ 68A.202[Reserved]



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 B. Related Family Business Provisions

*25-68A California Legal Forms--Transaction Guide § 68A.210*

**AUTHOR:** Steven M. Goldberg Practice Consultant

**§ 68A.210 General Partner Compensation**

**[1] Comment--Use of Form**

This form is a partnership agreement provision stating that the general partners are entitled to compensation for services performed for the partnership [see § 68A.200[2], Section 8.05]. The amount of compensation should be reasonable and competitive as relates to comparable services. If the general partner is a parent, the compensation may provide a fixed stream of income.

Affording the general partners the right to compensation for services rendered to the partnership is one way of affecting the marketability of a limited partnership interest. Compensation paid to the general partners reduces the cash flow to the partners, potentially depressing the value of the partnership interest. Compensation for services rendered is essentially required in a family partnership by *I.R.C. § 704(e)(2)*.

**[2] FORM**

**General Partner Compensation**

Compensation for General Partners

\_\_\_\_\_. The General Partner(s) [is/are] entitled to compensation for services rendered to the Partnership, and the Partnership will pay to the General Partner(s) compensation for any services the General Partner(s) render(s) to the Partnership in an amount commensurate with the value of services rendered, as determined by the General Partner(s). Compensation must be at reasonable and competitive rates for comparable services available in the areas in which the Partnership owns property.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Business & Corporate Law Limited Partnerships Management Duties & Liabilities



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*25-68A California Legal Forms--Transaction Guide § 68A.211*

**AUTHOR:** Steven M. Goldberg Practice Consultant

**§ 68A.211 General Partner Succession**

**[1] Comment--Use of Form**

This form is a provision governing general partner succession designed for inclusion in a family limited partnership agreement. Typically, limited partnership agreements permit the general and limited partners to vote on the inclusion of new general partners, and afford the limited partners the right to admit a new general partner after the sole remaining general partner ceases to be a partner [*see § 68A.200[2], Sections 3.03, 3.04*]. This alternative provision permits someone outside the partnership to nominate and vote on successor general partners. This person might be the business owner's executor, a trusted business advisor, or a key employee.

**[2] FORM**

**General Partner Succession**

Replacement of Sole Remaining General Partner

\_\_\_\_\_. If a sole remaining General Partner ceases to be a General Partner and there is no remaining General Partner, one or more new General Partners may be admitted to the Partnership. \_\_\_\_\_ [*Name of executor, trusted business advisor, or key employee*] and the Limited Partners may nominate candidates for General Partner. New General Partners may be admitted to the Partnership on the written consent of \_\_\_\_\_ [*name of executor, trusted business advisor, or key employee*] and [*specify number or percentage of limited partnership interests of the limited partners, e.g., a majority in interest or all*] of the Limited Partners; provided, however, that the Limited Partners agree in writing to continue the business of the Partnership pursuant to Section [*specify section number*] of this Agreement.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Business & Corporate Law Limited Partnerships General Overview Business & Corporate Law Limited Partnerships Dissolution & Winding Up Business & Corporate Law Limited Partnerships Formation Business & Corporate Law Limited Partnerships Management Duties & Liabilities



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*25-68A California Legal Forms--Transaction Guide § 68A.212*

**AUTHOR:** Steven M. Goldberg Practice Consultant

**§ 68A.212 General Partner Has Absolute Distribution Authority**

**[1] Comment--Use of Form**

This form provides that general partners have absolute control over the timing and amount of cash distributions to the limited partners [*see § 68A.200[2], Section 5.02*]. This provision tends to reduce the marketability of a limited partnership interest, thereby increasing the applicable valuation discount and depressing the fair market value of that interest. For discussion of the use of valuation discounts, see §§ 68A.40 and 68A.82.

Counsel should note that giving the general partners absolute control over cash distributions could cause a gift of a partnership interest to fail the "present interest" requirement of the annual gift tax exclusion [*see § 68A.41*]. Further, the fiduciary duty of the general partners should not be weakened, since doing so could cause the IRS to examine whether a retained interest exists for estate tax purposes [*see § 68A.40[2][b]*].

**[2] FORM**

**General Partner's Absolute Distribution Authority**

Absolute Distribution Authority

\_\_\_\_\_. The General Partner(s) may elect from time to time to make cash distributions from the Partnership to the Limited Partners in proportion to their interests. Cash distributions may be limited in order to reinvest and grow the assets of the Partnership to further the long term outlook of the Partnership.

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
 Business & Corporate Law Limited Partnerships General Overview Business & Corporate Law Limited

Partnerships Management Duties & Liabilities



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*25-68A California Legal Forms--Transaction Guide § 68A.213*

**AUTHOR:** Steven M. Goldberg Practice Consultant

**§ 68A.213 Limitations on Authority of General Partners**

**[1] Comment--Use of Form**

This form limits the authority of the general partners to manage the family business by requiring that certain actions require the affirmative vote of a majority in interest of the limited partners, and that certain actions require the affirmative vote of all the limited partners. It can be substituted for the more general provision limiting the authority of general partners, as set forth in the complete family limited partnership agreement [*see § 68A.200[2]*, Section 8.04]. It is important to coordinate the language of this provision with the provision governing the voting rights of the limited partners [*see § 68A.200[2]*, Section 8.06] to ensure that they are entitled to vote on each of the actions requiring their approval. This provision must also be coordinated with any provision restricting the authority of general and limited partners to take specific acts [*see, e.g., § 68A.200[2]*, Section 12.01 (specified prohibited transactions)].

**[2] FORM**

**Limitations on Authority of General Partners**

\_\_\_\_\_. (a) Notwithstanding the provisions of [*identify provision authorizing general partner powers, e.g., Section 8.03 of this Agreement*], the consent of a majority in interest of the Limited Partners is required to take the following actions:

- (1) Loan Partnership funds in excess of \_\_\_\_\_ [*specify amount, e.g., \$25,000*] to any Partner.
- (2) Loan Partnership funds to any Partner for a term exceeding \_\_\_\_\_ [*specify term, e.g., one year*].
- (3) Possess Partnership property, or assign rights in Partnership property, without a Partnership purpose.
- (4) Make any non-pro rata distribution or return of capital to any Partner, except as otherwise expressly authorized by

this Agreement.

- (5) Perform any act that would subject any Limited Partner to liability as a General Partner.
  - (6) Confess a judgment against the Partnership.
  - (7) File or consent to file a petition for bankruptcy for or against the Partnership.
  - (8) Perform any act that renders or would render the continuation of ordinary Partnership business impossible.
  - (9) Perform any action in contravention of this Agreement.
- (b) The General Partners may not take any of the following actions without the prior unanimous, written consent of all Limited Partners:
- (1) Amend the Partnership Agreement.
  - (2) Change or reorganize the Partnership into any other legal form of business.
  - (3) Directly or indirectly hold any beneficial interests in any deed of trust, mortgage, or other encumbrance that is secured by a lien on Partnership property.

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Business & Corporate Law Limited Partnerships General Overview Business & Corporate Law Limited Partnerships Management Duties & Liabilities



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*25-68A California Legal Forms--Transaction Guide § 68A.214*

**AUTHOR:** Steven M. Goldberg Practice Consultant

**§ 68A.214 Limited Partner Acknowledgment That Cash Distributions May Not Cover Tax Liability**

**[1] Comment--Use of Form**

This form provides that, by signing the partnership agreement, each limited partner acknowledges that the partner may not receive sufficient cash distributions from the partnership during a particular accounting period to cover income taxes imposed on that partner's distributive share of partnership income. The form is designed to notify limited partners of the potential for phantom income. For further discussion, see Ch. 15, *General Partnerships* .

**[2] FORM**

**Limited Partner Acknowledgment that Cash Distributions May Not Cover Tax Liability**

\_\_\_\_\_. By signing this Agreement, each Limited Partner acknowledges that he or she may not receive sufficient cash distributions from the Partnership during a specific [accounting year *or* reporting period] to cover income taxes imposed on that Partner's distributive share of the Partnership's taxable income or gain for that [year *or* period].

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
 Business & Corporate Law Limited Partnerships General Overview Business & Corporate Law Limited Partnerships Formation



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*25-68A California Legal Forms--Transaction Guide § 68A.215*

**AUTHOR:** Steven M. Goldberg Practice Consultant

**§ 68A.215 Limited Partners May Engage in Competing Activities**

**[1] Comment--Use of Form**

This form provides that the limited partners may participate or invest in business activities that might be in direct or indirect competition with the Partnership [*see § 68A.200[2], Section 8.09*]. The form clarifies that neither the partnership nor any other individual partner has any right to income derived from those investments. The form further provides that the limited partners may keep any investment opportunity or prospective economic advantage for themselves, need not present it to the partnership, and may recommend it to nonpartners.

This form can be tailored to limit the scope of the investment freedom provided to the limited partners. Further, this form can be adapted to cover any other family members who might not hold a limited partnership interest.

**[2] FORM**

**Limited Partners May Engage in Competing Activities**

Competing Activities

\_\_\_\_\_. The Limited Partners may, independently or with others, participate or invest in any business activity of any description, including without limitation business activities that might be the same as or similar to the Partnership's business and that might compete, directly or indirectly, with the Partnership. Neither the Partnership nor any other partner is entitled to any right in or to those other business activities, or to any income or proceeds derived from those other business activities. The Limited Partners are not obligated to present any investment opportunity or prospective economic advantage to the Partnership, including when the opportunity is of a type that, if presented to the Partnership, could be taken by the Partnership. The Limited Partners have the right to hold any investment opportunity or prospective economic advantage for their own account, or to recommend that opportunity or advantage to persons outside the Partnership.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Business & Corporate Law Limited Partnerships General Overview Business & Corporate Law Limited Partnerships Formation Business & Corporate Law Limited Partnerships Management Duties & Liabilities



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*25-68A California Legal Forms--Transaction Guide § 68A.216*

**AUTHOR:** Steven M. Goldberg Practice Consultant

**§ 68A.216 Transfers From Custodianships**

**[1] Comment**

**[a] Use of Form**

This form provides that, when a limited partnership interest is held by a custodian for a minor, the interest is transferable to the minor when he or she reaches the age of majority [*see* [b], *below*]. The form further provides that no offer to purchase need be made to the partnership. The form may be used when a limited partnership interest will be transferred to a minor.

**[b] Gifts to Minors**

Minor children do not have the legal capacity to manage their own property, and some other person must ordinarily act on their behalf. This other person may be a guardian [*see Prob. Code § 1500 et seq.*], a custodian under the California Uniform Transfers to Minors Act (CUTMA) [*see Prob. Code § 3900 et seq.*], or a trustee acting under a trust instrument.

Property held for a minor by a guardian or a custodian under CUTMA is ordinarily transferred to the minor when he or she reaches the age of 18. However, an instrument of inter vivos transfer may postpone the ultimate transfer to a later time, not to exceed the minor's twenty-first birthday [*Prob. Code §§ 3920, 3920.5(b), (e)*]. Any attempt to delay distribution beyond age 21 will be futile [*Prob. Code § 3920.5(h)*]. Because children who have attained the age of majority may still lack the maturity to properly manage substantial sums of money or property, a trust may be an appropriate vehicle to secure property management after the child reaches the age of majority.

For discussion of CUTMA, see Ch. 60A, *Gifts*. Guardianships for minor children are discussed in Ch. 66, *Guardianship and Conservatorship Planning*. Inter vivos trusts are discussed in Ch. 72, *Irrevocable Trusts*. For further discussion of problems faced by minors who acquire property by gift or inheritance, see *California Wills and Trusts*,

Ch. 28, *Devises to Minors* , and Ch. 37, *Nomination of Guardians for Minor Children* (Matthew Bender).

**[c] When Transferor Should Not Act as Custodian**

CUTMA permits the transferor to act as custodian of a wide variety of gifts made under the Act [*see Prob. Code § 3909(a)*]. In general, the transferor can act as custodian if the transfer is reflected in the public records or notice of the transfer is given to an appropriate third person [Recommendation Relating to Uniform Transfers to Minors Act, 17 Cal. L. Revision Comm'n Reports 601, 620 (1984)].

However, the transferor should not be the custodian for gifts when the transfer of possession and control to a third party is necessary to establish donative intent and consummation of the transfer [Recommendation Relating to Uniform Transfers to Minors Act, 17 Cal. L. Revision Comm'n Reports 601, 620 (1984)]. For example, a transferor cannot generally act as custodian if the transfer is not reflected in the public records and no notice of the transfer is given to a third person. The transferor cannot simply keep the gift property and purport to make an irrevocable transfer by executing and retaining an instrument transferring the property to himself or herself as custodian [Recommendation Relating to Uniform Transfers to Minors Act, 17 Cal. L. Revision Comm'n Reports 601, 621 (1984)]. This rule is designed to avoid uncertainty and discourage fraud. Further, if the transferor acts as custodian, the transfer will not ordinarily qualify as a completed gift obligation for federal gift tax purposes.

For further discussion of CUTMA and federal gift tax law, see Ch. 60A, *Gifts* .

**[2] FORM**

**Transfers From Custodianships**

Transfers From Custodianships

\_\_\_\_\_. Notwithstanding Section(s) [*specify section(s) delineating transfer restrictions and right of first refusal provisions in partnership agreement, e.g., 10.01 through 10.04*] of this Agreement, any Limited Partner Interest held by a custodian for a minor [*optional: under the laws of \_\_\_\_\_ (specify state)*] are fully transferable and assignable to the minor when the minor reaches the age of [*specify ages 18, 19, 20, or 21, as desired*]. Such a Limited Partner Interest is fully transferable without an offer for purchase being made to the Partnership.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Business & Corporate Law Limited Partnerships General Overview Business & Corporate Law Limited Partnerships Formation



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*25-68A California Legal Forms--Transaction Guide § 68A.217*

**AUTHOR:** Steven M. Goldberg Practice Consultant

**§ 68A.217 Consent of Spouse**

**[1] Comment--Use of Form**

This form is a spousal consent and acknowledgment form. By its terms, the spouse acknowledges that his or her spouse has granted the partnership an option to purchase his or her partnership interest, including the community property interest. The form constitutes approval of the terms of the partnership agreement, acknowledgment that any interest of the spouse is subject to the terms of the partnership agreement, a promise not to hinder the operation of the partnership agreement, and the spouse's consent to any sale of a limited partnership interest to the partnership.

This form may be included as an exhibit to the complete limited partnership agreement [*see § 68A.200[2]*]. It may also be used as a separate instrument to record spousal consents after the execution of the partnership agreement.

**[2] FORM**

**Consent of Spouse**

Consent of Spouse

The undersigned spouse of a party to the \_\_\_\_\_ [*family name*] Family Limited Partnership Agreement acknowledges on his or her own behalf:

1. I have read the \_\_\_\_\_ [*family name*] Family Limited Partnership Agreement and understand its contents.

2. I am aware that under the \_\_\_\_\_ [*family name*] Family Limited Partnership Agreement, my spouse has granted the Partnership and/or the other Limited Partners an option to purchase all or part of his or her Partnership Interest, including my community interest in that Partnership Interest, if any.

3. I approve of the provisions of the \_\_\_\_\_[*family name*] Family Limited Partnership Agreement, and agree that my spouse's Partnership Interest and any interest that I might have in that Partnership Interest are subject to the provisions of the \_\_\_\_\_[*family name*] Family Limited Partnership Agreement.

4. I consent to any such sale under the \_\_\_\_\_[*family name*] Family Limited Partnership Agreement.

5. I will take no action at any time to hinder the operation of the \_\_\_\_\_[*family name*] Family Limited Partnership Agreement on that

Partnership Interest or any interest I might have in that Partnership Interest.

Date: \_\_\_\_\_.

\_\_\_\_\_ [*signature*]  
[*typed name*]

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Business & Corporate Law Limited Partnerships General Overview Business & Corporate Law Limited Partnerships Formation



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*25-68A California Legal Forms--Transaction Guide § 68A.218*

**AUTHOR:** Steven M. Goldberg Practice Consultant

**§ 68A.218 Buy-Out as Consequence of Marital Dissolution**

**[1] Comment--Use of Form**

This form deals with the consequences of the marital dissolution of a limited partner. The form provides that a limited partnership interest must be allocated in the property division to the limited partner rather than the limited partner's spouse to the extent possible. The form further provides that if a former spouse receives any limited partnership interest, that former spouse must promptly notify the partnership. The limited partner previously married to the former spouse has the first option to purchase all or part of the limited partnership interest. The partnership and/or the other limited partners (other than the former spouse) then have the right to purchase the former spouse's limited partnership interest. If the partnership and/or the limited partners do not exercise their options as to all of the former spouse's limited partnership interest, the former spouse may continue to hold the interest subject to the terms of the family partnership agreement [*see § 68A.200[2]*].

This form is silent as to the existence of a prenuptial agreement. Although counsel should consider including a promise in the buy-sell agreement requiring the signing of prenuptial agreements [*see § 68A.81[3]*], this requirement may provoke strong resentment. An alternative would be a spousal consent to a particular buy-sell agreement. However, if a prenuptial agreement or other outside agreement includes provisions concerning the effect of divorce, this form should not conflict with that agreement, and the form should reference that agreement.

This form can also be used in a separate buy-sell agreement. For buy-sell agreements generally, see Ch. 8D, *Buy-Sell Agreements*.

**[2] FORM**

**Buy-Out as Consequence of Marital Dissolution**

Dissolution of Marriage; Buy-Out

\_\_\_\_\_. (a) Any Limited Partnership Interest subject to transfer, disposition, or allocation in connection with a marital settlement agreement, legal separation, dissolution of marriage, or annulment ("Marital Dissolution"), as to the entire interest, whether community or separate property, of any Limited Partner and any Limited Partner's spouse, must be allocated in the property division to the Limited Partner and not the Limited Partner's spouse ("Former Spouse") to the extent possible. However, if a Former Spouse receives, retains, or is awarded any Limited Partnership Interest, the Former Spouse must promptly notify the Partnership. The Partnership and/or the other Limited Partners (other than the Former Spouse) have the right to purchase, and the Former Spouse has the duty to sell, the Former Spouse's Limited Partnership Interest as provided in this Section \_\_\_\_\_ of this Agreement.

(b) Notwithstanding any other provision specifying a time limit for notifying the Partnership of the intent to purchase, in the event of a Marital Dissolution, the Limited Partner has the option, exercisable for [*specify, e.g., 90 days*] following the later of Marital Dissolution or the transfer of the Limited Partnership Interest pursuant to Marital Dissolution, to purchase any or all of the Former Spouse's Limited Partnership Interest at the price and on the terms provided in this Section \_\_\_\_\_ of this Agreement.

(c) If the Limited Partner does not exercise the option to purchase all of the Former Spouse's Limited Partnership Interest within [*specify same option period as in (b), above*], the Limited Partner must promptly give notice of that fact to the Partnership and the other Limited Partners. The Partnership has an assignable option, exercisable at any time thereafter, to purchase and redeem any or all of the Former Spouse's Limited Partnership Interest at the price and on the terms provided in this Section \_\_\_\_\_ of this Agreement.

(d) A purchase of a Former Spouse's Limited Partnership Interest is initiated by the Partnership (or the Limited Partner(s) exercising the Partnership's right as assignee) by providing written notice of intent to purchase to the General Partner(s) and the Former Spouse. Within 30 days after the determination of price, the Partnership (or the Limited Partner(s) who filed the notice of intent to purchase) must give written notice to the Former Spouse to confirm or withdraw the notice of intent to purchase. If the notice of intent to purchase is confirmed, the closing for the sale must be held in accordance with the closing procedures specified in Section \_\_\_\_\_ of this Agreement for the sale of a Former Limited Partner's Interest.

(e) The purchase price of a Former Spouse's Limited Partnership Interest is determined as provided in Section \_\_\_\_\_ of this Agreement, except that the determination of the purchase price is initiated by the notice of intent to purchase, and all deadlines are measured from the date of that notice. Further, the purchase price is determined as of the Marital Dissolution or, if the notice of intent to purchase is given more than [*specify period, e.g., 180 days*] after the Marital Dissolution, as of the date of the notice of intent to purchase.

(f) If the Partnership and the Limited Partners do not exercise their option as to all of the Former Spouse's Limited Partnership Interest, the Former Spouse may continue to hold the interest, subject to the terms of the Agreement.

### Legal Topics:

For related research and practice materials, see the following legal topics:

Business & Corporate Law Limited Partnerships General Overview Business & Corporate Law Limited Partnerships Dissolution & Winding Up Business & Corporate Law Limited Partnerships Formation



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DIVISION IV: WILLS AND TRUSTS  
 CHAPTER 68A USING FAMILY PARTNERSHIPS AND OTHER BUSINESS ENTITIES IN ESTATE PLANNING  
 PART IV. FORMS  
 B. Related Family Business Provisions

*25-68A California Legal Forms--Transaction Guide § 68A.219*

**AUTHOR:** Steven M. Goldberg Practice Consultant

**§ 68A.219 Provision Requiring Prenuptial Agreements for Limited Partners**

**[1] Comment--Use of Form**

This form is a provision designed to be included in a family limited partnership agreement requiring all limited partners to execute a prenuptial agreement before marriage. This provision should be used in conjunction with a spousal consent provision acknowledging the effect of right of first refusal provisions (or other transfer restrictions) on the spouse's community property interest in the limited partnership interest [*see § 68A.200[2], Section 15.16*]. As an alternative to this form, the partnership agreement may set out the consequences of marital dissolution [*see § 68A.218*].

**[2] FORM**

**Provision Requiring Prenuptial Agreements for Limited Partners**

Execution of Prenuptial Agreements

\_\_\_\_\_. The Limited Partners agree to make [best *or* reasonable *or* good faith] efforts to execute a prenuptial agreement before any marriage occurring after the date of this Agreement. [*Optional: The Limited Partners further promise full disclosure of their assets in the negotiation of a prenuptial agreement, and that the prenuptial agreement will be drafted and executed with the assistance of counsel.*]

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
 Business & Corporate Law Limited Partnerships General Overview Business & Corporate Law Limited Partnerships Formation



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*25-68A California Legal Forms--Transaction Guide § 68A.220*

**AUTHOR:** Steven M. Goldberg Practice Consultant

**§ 68A.220 Grant of Special Power of Attorney**

**[1] Comment--Use of Form**

This form is a special power of attorney, executed by the limited partners, irrevocably appointing the general partner as their attorney in fact to execute, sign, acknowledge, record and file specified partnership documents on behalf of the limited partners and the partnership. When included in a limited partnership agreement, the provision is ordinarily placed in the article containing miscellaneous provisions [*see § 68A.200, Section 15.01 et seq.*].

**[2] FORM**

**Grant of Special Power of Attorney**

Grant of Special Power of Attorney

\_\_\_\_\_. (a) By their execution of this Agreement, the Limited Partners, jointly and severally, irrevocably constitute and appoint the General Partner(s), \_\_\_\_\_ [*name(s)*], with full power of substitution, to be their true and lawful attorney in fact, in their name, place and stead, to make, execute, sign, acknowledge, deliver, record, and file, on behalf of them and on behalf of the Partnership, the following:

- (1) Deeds of trust, security agreements, and transfer documents.
- (2) Assignments of Partnership Interests or other documents of transfer to be delivered in connection with the transfer or purchase of a partnership interest.
- (3) A Certificate of Limited Partnership, any amendments to that Certificate, and any other certificates or instruments that may be required to be filed by the Partnership or the Partners under the laws of California and any other jurisdiction whose laws may be applicable to the Partnership.

(4) A Certificate of Cancellation of the Partnership and any other instruments or documents as may be deemed necessary or desirable by the General Partner on the termination of the Partnership business.

(5) Any and all amendments to the instruments described above in Subparagraphs (1) through (4) or this Section \_\_\_\_\_ of this Agreement, provided that those amendments are either required by law to be filed, are consistent with this Agreement, or have been authorized by the particular Limited Partners.

(6) Any document or instrument needed to reflect any reduction in a Limited Partner's Capital Account or percentage interest.

(7) Any and all other instruments or documents that may be deemed reasonably necessary or desirable by the General Partner(s) to carry out fully the provisions of this Agreement in accordance with its terms.

(b) This grant of authority is a Special Power of Attorney coupled with an Interest, is irrevocable, and survives the granting Limited Partner's death, incapacity, or dissolution.

(c) This grant of authority survives the delivery of an assignment by a Limited Partner of the whole or any portion of the partner's interest.

(d) The General Partner(s) may exercise this special power of attorney by a facsimile signature, or by listing all of the Limited Partners executing any instrument with a single signature as attorney in fact for all of them.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Business & Corporate Law Limited Partnerships General Overview Business & Corporate Law Limited Partnerships Formation



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*25-68A California Legal Forms--Transaction Guide § 68A.221*

**AUTHOR:** Steven M. Goldberg Practice Consultant

**§ 68A.221 Determination of Fair Market Value**

**[1] Comment--Use of Form**

This form is a provision for a family limited partnership agreement stating the method for valuing the fair market value of a partnership interest subject to transfer. The interest is valued by multiplying the current appraised value of the partnership's tangible assets by (1) the applicable percentage interest and (2) the discounted percentage reflecting the lack of marketability and other restrictions applicable to the partnership interest. The form also covers the selection and payment of the appraiser.

Use of this form should be considered in all partnerships, since *I.R.C. § 2703* will normally disregard any restriction on value in a family-owned partnership and thus require the use of fair market value. The provision should alert the partners that an experienced appraiser of partnership interests will be needed.

**[2] FORM**

**Determination of Fair Market Value**

Determination of Fair Market Value

\_\_\_\_\_. (a) The "Fair Market Value" of a Partnership Interest in the \_\_\_\_\_ [name] Family Limited Partnership is the amount determined by multiplying (1) the "Current Appraised Value" of the Partnership's tangible assets [see P (c), *below*], by (2) the percentage interest represented by the Partnership Interest being transferred, by (3) the "Discounted Percentage."

(b) The Current Appraised Value must be determined by an appraiser selected by the General Partner(s). If there is no General Partner at that time, the appraiser may be selected by a majority in interest of the Limited Partners, excluding the interest held by the transferring Partner. The appraiser must be independent of and unaffiliated with the Partnership

and the person or persons selecting the appraiser. The appraiser must have at least [*specify experience requirements for appraiser, e.g., five years experience*] in valuing the type of asset involved. The appraiser's fee will be paid by the Partnership.

(c) The "Current Appraised Value" equals the appraiser's determination of the Fair Market Value of the Partnership's tangible assets as of the date notice of intent to sell is given to the Partnership or the date of the event triggering the determination of value, as applicable. "Tangible assets" means all tangible assets of the Partnership, including but not limited to the properties, available cash, investment and deposit accounts; the term "tangible assets" does not include any valuation of goodwill or other intangible assets. The appraiser's valuation must account for the amount of all loans, encumbrances, liens, and other liabilities of the Partnership as of the valuation date. The valuation must take into account the fair market value of the properties and other assets, and should consider the inability of a Limited Partner to affect management and the limited liability of a Limited Partner, the potential unlimited liability of a General Partner and the effect a General Partner has on management, and all other appropriate valuation adjustments, including but not limited to adjustments for lack of marketability and/or minority interests, if applicable.

(d) The appraiser's determination must be made within [*specify, e.g., 30 days*] of the circumstances requiring the determination of fair market value.

(e) The appraiser's determination of Fair Market Value is final, binding, and conclusive.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Business & Corporate Law Limited Partnerships General Overview Business & Corporate Law Limited Partnerships Dissolution & Winding Up Business & Corporate Law Limited Partnerships Formation



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*25-68A California Legal Forms--Transaction Guide § 68A.222*

**AUTHOR:** Steven M. Goldberg Practice Consultant

**§ 68A.222 Waiver of Right to Seek Dissolution Not Required by Agreement**

**[1] Comment--Use of Form**

This form is a provision for inclusion in a family limited partnership agreement, under which the partners waive any right to seek the dissolution of the partnership when dissolution is not otherwise required by the partnership agreement. Specifically, the form waives each partner's right to seek the appointment of a receiver or trustee to liquidate the partnership or to seek judicial dissolution when it is impracticable to continue partnership business in accordance with the agreement, or when dissolution is reasonably necessary to protect the partner's rights or interests. Whether the use of this form is appropriate or advisable will depend to a great extent on the client's and counsel's assessment of the operating dynamics of the family [*see* §§ 68A.13, 68A.81, 68A.111]. This provision may also constitute an "applicable restriction" affecting the valuation discount under *I.R.C. § 2704(b)* [*see* § 68A.40[2][e]], but may nevertheless be appropriate for certain clients.

**[2] FORM**

**Waiver of Right to Seek Dissolution Not Required by Agreement**

Waiver of Right to Seek Dissolution

\_\_\_\_\_. The [Limited Partners *or* General and Limited Partners] acknowledge that irreparable damage could be done to the Partnership's reputation and goodwill if one or more Partners bring a judicial action to dissolve the Partnership under circumstances under which dissolution is not required by [*specify, e.g.,* Article 13] of this Agreement. This Agreement has been drafted carefully to treat all parties fairly, and to provide an equitable value and payment for Partnership Interests. Therefore, except when dissolution is required by [*specify, e.g.,* Article 13] of this Agreement and no one has liquidated the Partnership, each [Limited Partner *or* General and Limited Partner] hereby waives any right to initiate legal action to seek the appointment of a receiver or trustee to liquidate the Partnership, or to seek a decree of judicial dissolution of the Partnership on the ground that (1) it is not reasonably practicable to continue

the business in conformity with the Partnership Agreement, or (2) dissolution is reasonably necessary for the protection of the rights or interests of the complaining Partner.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Business & Corporate Law Limited Partnerships General Overview Business & Corporate Law Limited Partnerships Dissolution & Winding Up Business & Corporate Law Limited Partnerships Formation



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*25-68A California Legal Forms--Transaction Guide §§ 68A.223-68A.239*

**AUTHOR:** Steven M. Goldberg Practice Consultant

**[Reserved]**

§§ 68A.223[Reserved]



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*25-68A California Legal Forms--Transaction Guide § 68A.240*

**AUTHOR:** Steven M. Goldberg Practice Consultant

**§ 68A.240 Client Letter Summarizing Use of Family Limited Partnerships**

**[1] Comment**

**[a] Use of Form**

This form is a client letter designed to educate the client about the need for advance estate planning and the potential benefits of the use of family limited partnerships, such as valuation discounts [*see § 68A.40[2]*]. The form assumes that the client has some form of family business in existence.

Educating the client about the need for estate planning is very significant. Because of high estate and gift tax rates, failing to adequately plan and coordinate business and estate planning will have a deleterious effect on the size of the overall estate passed to younger generations, as well as potentially crippling the family business. However, it is important not to oversell the use and benefits of family limited partnerships. This chapter provides guidelines for the use of family limited partnerships, in terms of financial thresholds, family issues, potentially complicated creation and administration of family limited partnerships, and the financial planning involved in maximizing the tax benefits of the entity [*see § 68A.80 et seq.*].

This letter can also be combined with client letters typically sent at the end of the year, that summarize the tax changes that might be of interest to the client. This type of client letter should be sent to clients sufficiently before the end of the year to permit the use of tax planning strategies, for example, the use of the annual gift tax exclusion.

**[b] Reviewing Letter**

Counsel should review all client letters before mailing to ensure that all issues and potential problems that can arise in the course of the subject of the letter are covered. As a rule of thumb, the letter should be reviewed with the idea that a client should not be able to state that his or her lawyer "never warned me about that."

**[2] FORM****Client Letter Summarizing Use of Family Limited Partnerships**

[Letterhead]

\_\_\_\_\_ [date]

[Name and address of client]

Dear \_\_\_\_\_ [Name of client] :

[I am *or* We are] writing to alert you to the need for estate planning, in particular with regard to your \_\_\_\_\_ [specify type of business, e.g., real estate management] business, and the potential estate tax savings that may be achieved through careful and precise estate planning. Specifically, this letter outlines the advantages and disadvantages of the use of family limited partnerships. Given the current high estate and gift tax rates, the failure to adequately plan for the transfer of the business to younger generations can seriously affect the net value of bequests and have a crippling effect on the business itself.

[If client letter will include summary of annual tax changes, add: This letter also summarizes the more significant aspects of the federal tax changes of \_\_\_\_\_ (specify year or title of act), which may affect your financial and estate plans.]

**SUMMARY****USE OF FAMILY LIMITED PARTNERSHIPS**

1. **Business Purpose.** A family limited partnership must have a bona fide business purpose. Examples include making money and securing joint management of business property.

In addition, a family limited partnership allows a family to act as an integrated economic unit. Older generations can maintain control of the business and assets while teaching business and investment skills to younger generations. With proper planning, the pooled assets can retain their economic power, or avoid division of business interests, even after the senior generation passes on. It is important to treat the partnership as a separate entity and to provide information to the partners and, where appropriate, to seek their input.

2. **Asset Protection.** Creditors of a partner ordinarily cannot reach the assets of the partnership without a charging order obtained from a court. A "charging order" entitles a creditor to receive distributions attributable to the debtor-partner directly from the partnership, but does not entitle the holder to require that the partnership make distributions. The partnership may repurchase the partnership interest subject to a charging order at the interest's fair market value (i.e., the discounted value of the partnership interest rather than a proportional share of the partnership's underlying assets).

3. **Retained Control.** The general partner retains control over the limited partnership, including investment decisions, distributions, and all other aspects of management. Under California law, limited partners may not participate in the management and control of a limited partnership without losing their limited liability. However, the general partner has a fiduciary duty to treat the limited partners fairly.

4. **Valuation Discounts.** The value of a limited partnership interest is generally less than the value of a pro rata share of partnership assets when a partner's ability to sell or assign the interest is significantly restricted, a single partner cannot force dissolution, or the duration of the partnership is lengthy. Further, because partners own a fractional share of the partnership, rather than a complete interest in one or more smaller assets that might be easily liquidated, the value of the partnership interest is less than the pro rata share of partnership assets. These types of discounts in the context of estate and gift taxes are typically referred to as discounts for lack of marketability and minority interest discounts. Although discounts will vary depending on the nature of the underlying partnership assets and the anticipated return on the partnership interest, these discounts can be applied to transfer the discounted value out of your estate to your children, which results in income and asset appreciation outside of your estate. The use of valuation discounts requires appraisals of the partnership interests and comparisons with other limited partnership interests that, for example, are not subject to transfer restrictions.

5. **Taxation.** Income derived from partnership assets passes through to the partners in proportion to their percentage ownership interests. Real property transferred to a family limited partnership is exempt from reassessment only when the property owners will own the partnership in precisely the same proportions as they owned the property before transfer. Taking advantage of this exemption from reassessment requires careful planning.

6. **Advantages.** Using a family limited partnership allows the business owner to achieve tax benefits without losing control. Using valuation discounts can result in substantial estate and gift tax savings. The discounts apply to lifetime gifts of partnership interests and interests transferred at death, although discounts with respect to lifetime gifts may be easier to sustain. Gifts shift both the discounted value of the interest out of the estate, as well as income attributable to that interest. This income-shifting effect can result in less income tax overall if the limited partner is subject to lower tax rates than the donor.

7. **Disadvantages.** Using a family limited partnership is aggressive for tax purposes, and it is a complicated entity subject to complicated income tax rules. The Internal Revenue Service views these entities with a jaundiced eye, and its use may trigger an audit. Further, estate and gift tax rules might be legislatively changed.

The cost of a family limited partnership, including legal, accounting, appraisal, formation, and ongoing expenses, ranges from [*specify estimated cost, e.g., \$15,000 to \$30,000*], depending on the complexity of the partnership and the nature of the transferred assets. However, ongoing annual expenses, such as filing fees, accounting, appraisals, and income tax compliance, are likely to be outweighed by estate tax savings.

8. **Timing.** Formation of a family limited partnership cannot be accomplished overnight. After the decision is made to form the partnership, an agreement must be drafted and reviewed, general partners and property appropriate for transfer to the partnership must be identified, appraisal(s) must be secured, the partnership must be registered, formal transfer of property must take place, and gifts must be made. This process can be lengthy and time and asset consuming.

[*If desired, add summary of year's tax changes that might affect client's tax situation.*]

[*If tax summary included, add:* This letter greatly simplifies the complex tax changes enacted \_\_\_\_\_ (in \_\_\_\_\_ (year) or by the \_\_\_\_\_ (name of tax legislation)). This letter is intended for general informational purposes, to inform you of recent tax developments. This letter is not tailored to your specific tax planning needs; it is not intended to provide specific legal advice for your situation and should not be relied on as such.]

[*Continue with the following:*]

[I or We] welcome the opportunity to consult with you on these or other concerns that you might have.

Best regards.

Sincerely, \_\_\_\_\_ [*signature*]

[*attorney's name*]

[*firm name*]

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Business & Corporate Law Limited Partnerships General Overview



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*25-68A California Legal Forms--Transaction Guide § 68A.241*

**AUTHOR:** Steven M. Goldberg Practice Consultant

**§ 68A.241 Client Letter Emphasizing Need for Estate and Business Succession Planning**

**[1] Comment**

**[a] Use of Form**

This form is a client letter designed to communicate the need for estate planning as well as business succession planning for family businesses. Many family businesses do not survive the transition to the second generation, in no small part due to the lack of coordinated estate and business succession planning. The failure to act in this area can endanger the family's well-being. This letter educates the client about the advantages of planning and the potential adverse consequences of failing to plan.

Succession planning is part of the job of a family business leader. However, the business owner may be unwilling to face his or her own retirement (or death). Further, as the family business moves from one or two individuals having authority and power to run the business to a group of siblings, additional stresses are placed on the business. When succession issues are not handled in advance, family members will tend to develop their own expectations; those expectations may be more difficult to deal with in the future than facing the issue in the present. Counsel is well-advised to encourage a client to prepare and install a succession plan.

For further discussion, see §§ *68A.14*[2], *68A.15*, *69.43*, and *68A.81*[1], [2].

**[b] Reviewing Letter**

Counsel should review all client letters before mailing to ensure that all issues and potential problems that can arise in the course of the subject of the letter are covered. As a rule of thumb, the letter should be reviewed with the notion that a client should not be able to state that his or her lawyer "never warned me about that."

**[2] FORM**

### Client Letter Emphasizing Need for Estate and Business Succession Planning

[Letterhead]

\_\_\_\_\_ [date]

[Name and address of client]

Dear \_\_\_\_\_ [Name of client] :

[I am or We are] writing about the important need for individual estate planning, business succession planning, and the coordination of these plans. Without a coordinated plan, a significant portion of a family's wealth may go toward death taxes, and the business may be crippled.

Because current estate and gift and generation-skipping transfer tax rates are high, an unplanned estate may suffer significant tax consequences. Most family businesses do not survive the transfer to the next generation. Optimally, estate planning should begin as wealth begins to accumulate. The earlier the planning, the more likely it is that the business owner's overall, combined objectives may be met.

Often one of the least attractive features of family business leadership is the selection of a successor. However, the failure to develop a succession plan could endanger the family's future financial well-being and may lead to family discord. Further, absent a succession plan, family members will tend to develop their own expectations about their future roles in the business, which may be more difficult to deal with in the future than facing the issue now.

Therefore, planning for leadership succession is critical to the long-term survival of family businesses and is part of the job description. By sharing your vision of the future, both family and business, and by preparing for leadership succession, you can provide your business with its best chances for survival and prosperity.

[I or We] welcome the opportunity to consult with you on these or other concerns that you might have.

Best regards.

Sincerely, \_\_\_\_\_ [signature]

[attorney's name]

[firm name]

#### Legal Topics:

For related research and practice materials, see the following legal topics:

Business & Corporate Law Limited Partnerships General Overview Estate, Gift & Trust Law General Overview



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DIVISION IV: WILLS AND TRUSTS  
CHAPTER 69 CHARITABLE DISPOSITIONS

*25-69 California Legal Forms--Transaction Guide 69.syn*

**§ 69.syn Synopsis to Chapter 69: CHARITABLE DISPOSITIONS**

§ 69.01 California Statutes

§ 69.02 Federal Statutes

§ 69.03 Federal Regulations

§ 69.04 Law Reviews

§ 69.05 Annotations

§ 69.06 Text References

[1] Related Forms With Tax Analysis

[2] Related California Forms

[3] Additional Text References

§ 69.07 Pamphlets

§§ 69.08-69.09 [Reserved]

§ 69.10 Modern Role of Charitable Dispositions

§ 69.11 Legal Aspects of Charitable Dispositions

§ 69.12 Cy Pres Doctrine

§ 69.13 Rule Against Perpetuities

§ 69.14 Forms of Charitable Disposition

[1] In General

[2] Testamentary Disposition

[3] Outright Inter Vivos Gift

[4] Charitable Trust

[5] Private Foundation

§ 69.15 Federal Income Tax Deduction

[1] In General

[2] Definition of "Charitable Contribution"

[3] Excluded Contributions

[4] Contributions Qualifying for Maximum Deduction

[5] Contributions of Appreciated Property

[6] Additional Deductions for Contributions of Qualified Intellectual Property

[7] Carryover for Excess Contributions

§ 69.16 Federal Estate and Gift Tax Deductions

[1] In General

[2] Qualifying Organizations

[3] Particular Types of Contributions

[4] Valuation of Gifts

§ 69.17 Estate Tax Exclusion for Gift of Qualified Conservation Easement

[1] Nature of Exclusion

[2] Limitations on Amount of Exclusion

[3] Ownership Requirements and Qualified Contributors

[4] Location of Land

[5] Terms of Qualified Conservation Easement

§ 69.18 California Income Tax Deduction

§§ 69.19-69.99 [Reserved]

§ 69.100 Facts

Scope

§ 69.101 Documents

Scope

§§ 69.102-69.119 [Reserved]

§ 69.120 Availability of Charitable Deduction

Scope

§ 69.121 Valuation of Property

Scope

§ 69.122 Estimate of Available Federal Income Tax Deduction

Scope

§ 69.123 Other Tax Computations

Scope

§ 69.124 Acceptability of Contribution

Scope

§§ 69.125-69.139 [Reserved]

§ 69.140 Inter Vivos Gifts

Scope

§ 69.141 Testamentary Dispositions

Scope

§§ 69.142-69.159 [Reserved]

§ 69.160 General Drafting Requirements and Inter Vivos Instruments

Scope

§ 69.161 Testamentary Instruments

Scope

§§ 69.162-69.179 [Reserved]

§ 69.180 Computation of Federal Income Tax Deduction for Charitable Gifts

Scope

§ 69.181 Computation of California Individual Income Tax Charitable Deduction

Scope

§§ 69.182-69.299 [Reserved]

§ 69.300 Letter Formalizing Charitable Gift

[1] Comment

[a] Use of Form

[b] Need for More Formal Gift Instrument

[c] Importance of Written Record

[2] FORM

Letter Formalizing Charitable Gift

§ 69.301 Corporate Resolution for Charitable Contribution

[1] Comment

[a] Use of Form

[b] Federal Income Tax Considerations

[2] FORM

Corporate Resolution for Charitable Contribution

§§ 69.302-69.319 [Reserved]

§ 69.320 General Form for Inter Vivos Gift to Charitable Organization

[1] Comment

[a] Use of Form

[b] Modification of Form for Gifts to Specific Types of Entities

[c] Execution, Delivery, and Validity in General

[d] Tax Considerations in Inter Vivos Gifts--In General

[2] FORM

General Form for Inter Vivos Gift to Charitable Organization

§ 69.321 Corporate Gift of Inventory for Care of Ill or Needy or Qualified Research Contribution

[1] Comment

[a] Use of Form

[b] Tax Treatment of Qualified Contributions

[c] Contributions of Inventory for Care of Ill, Needy, or Infants

[d] Qualified Research Contributions

[2] FORM

Corporate Gift of Inventory for Care of Ill or Needy or Qualified Research Contribution

§§ 69.322-69.339 [Reserved]

§ 69.340 General Form of Acceptance and Receipt

[1] Comment

[a] Use of Form

[b] Importance of Written Records

[c] Time Frame for Obtaining Receipt

[2] FORM

General Form of Acceptance and Receipt

§ 69.341 Acceptance and Receipt of Corporate Gift of Inventory for Care of Ill or Needy or for Scientific Research

[1] Comment--Use of Form

[2] FORM

Acceptance and Receipt of Corporate Gift of Inventory for Care of Ill or Needy or for Scientific Research

§§ 69.342-69.359 [Reserved]

§ 69.360 Pecuniary Devise to Charity--General Form

[1] Comment

[a] Use of Form

[b] Importance of Determining Tax Consequences

[c] Description of Beneficiary

[d] Alternate Beneficiary

[2] FORM

Pecuniary Devise to Charity--General Form

§ 69.361 Testamentary Gift of Property to Charity--General Form

[1] Comment

[a] Use of Form

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[2] FORM

Testamentary Gift of Property to Charity--General Form

§ 69.362 Residuary Devise to Charity

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[2] FORM

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§ 69.363 Selection of Charity to Be Made by Executor

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[2] FORM

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§ 69.364 Selection of Charity to Be Made by Trustee

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[2] FORM

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§ 69.365 Disposition for Specific Purpose With Discretion to Use for Other Charitable Purpose

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[2] FORM

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§ 69.366 Disposition Exclusively for Specific Purpose--Alternative Disposition of Amounts Not So Expended

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[2] FORM

Disposition Exclusively for Specific Purpose--Alternative Disposition of Amounts Not So Expended

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Disposition Exclusively for Benefit of Specific Organization

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[1] Comment

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§ 69.381 Gift for Construction or Acquisition of Property for Religious Purposes

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[2] FORM

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§ 69.382 Gift to Support Missionary Activities

[1] Comment--Use of Form

[2] FORM

Gift to Support Missionary Activities

§ 69.383 Contribution for Performance of Religious Services

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[a] Use of Form

[2] FORM

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§§ 69.384-69.399 [Reserved]

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Gift to Social Welfare Organization for Benefit of Undeprivileged Persons

§ 69.441 Gift to Social Welfare Organization for New Facilities

[1] Comment--Use of Form

[2] FORM

Gift to Social Welfare Organization for New Facilities

§ 69.442 Gift for Benefit of Institutional Residents

[1] Comment--Use of Form

[2] FORM

Gift for Benefit of Institutional Residents

§§ 69.443-69.459 [Reserved]

§ 69.460 Gift of Land to Municipal Authority for Civic Purposes

[1] Comment--Use of Form

[2] FORM

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[1] Comment

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[b] Federal Estate Tax Considerations

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CHAPTER 69 CHARITABLE DISPOSITIONS

*25-69 California Legal Forms--Transaction Guide Scope*

**Scope**

Scope

This chapter deals with contributions of money and donations of property to charitable organizations. It discusses both testamentary devises and inter vivos dispositions, and covers dispositions by corporations as well as by individuals. Various methods for making charitable contributions are noted and discussed. The tax treatment of charitable contributions is discussed in detail. The Transaction Guide is designed to assist the attorney in selecting the proper method for making a charitable disposition, drafting the necessary documents, and making certain that maximum tax advantages will be obtained. The forms include instruments for various kinds of charitable dispositions.

This chapter does not discuss the formation, operation, or tax treatment of charitable trusts, which are discussed in Ch. 74, *Split-Interest Charitable Trusts* . It does not deal with the creation of charitable foundations or nonprofit corporations, which are discussed in Ch. 13, *Nonprofit Corporations* . Finally, it does not duplicate the discussion of the general law pertaining to gifts, which is covered in Ch. 60A, *Gifts* .

Charitable dispositions by individuals are often part of the estate planning process. In every case, the effect on the overall estate plan should always be considered in advance. Estate planning in general is discussed in Ch. 60, *Estate Planning* .

Because this chapter focuses on planning and making effective charitable dispositions, it deals only with current law. The reader should not rely on this text for discussion of the tax treatment of trusts in existence prior to the Economic Recovery Tax Act of 1981 [Pub. L. 97-34], or charitable dispositions made prior to that time.



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**§ 69.01 California Statutes**

Definition of "transfer." *Civ. Code § 1039.*

Voluntary transfer without consideration. *Civ. Code § 1040.*

Validity of transfer without writing. *Civ. Code § 1052.*

Transfer in writing as grant, conveyance, or bill of sale. *Civ. Code § 1053.*

No conditional delivery of grant to grantee. *Civ. Code § 1056.*

Writing necessary for transfer of real property. *Civ. Code § 1091.*

Definition of "gift." *Civ. Code § 1146.*

Delivery necessary for verbal gift. *Civ. Code § 1147.*

Irrevocability of gift, other than gift in view of impending death. *Civ. Code § 1148.*

Written consent of spouse necessary for certain gifts of community personal property. *Fam. Code § 1100(b).*

Joinder of spouse necessary for certain transfers of community real property. *Fam. Code § 1102.*

Rights of surviving spouse in community property. *Prob. Code § 100.*

Rights of surviving spouse in quasi-community property. *Prob. Code § 101.*

Property subject to disposition by will. *Prob. Code § 6101.*

Who may take a disposition by will. *Prob. Code § 6102.*

Applicability of Uniform Statutory Rule Against Perpetuities to nonvested property interests held by charity. *Prob. Code § 21225(e).*

Internal Revenue Code provisions relating to deductions for individuals apply to California deductions. *Rev. & Tax. Code § 17201.*

Internal Revenue Code provisions relating to deductions for estates, trusts, beneficiaries, and decedent's apply to California deductions. *Rev. & Tax. Code § 17731.*

Organizations exempt from California Bank and Corporation Tax Law. *Rev. & Tax. Code §§ 23701-23710.*

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Trusts Charitable Trusts Estate, Gift & Trust Law Wills Bequests & Devises



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*25-69 California Legal Forms--Transaction Guide § 69.02*

**§ 69.02 Federal Statutes**

Federal income tax charitable deduction. *I.R.C. § 170.*

Allowance of deduction. *I.R.C. § 170(a).*

Percentage limitations. *I.R.C. § 170(b).*

Definition of "charitable contribution." *I.R.C. § 170(c).*

Carryover of excess contributions. *I.R.C. § 170(d).*

Reduction of deduction for certain gifts of property. *I.R.C. § 170(e).*

Disallowance of deduction in certain cases. *I.R.C. § 170(f).*

Amounts paid to maintain certain students as members of taxpayer's household. *I.R.C. § 170(g).*

Treatment of certain amounts paid to or for benefit of educational institutions. *I.R.C. § 170(l).*

Treatment of income from intellectual property contribution. *I.R.C. § 170(m).*

Tax-exempt organizations. *I.R.C. §§ 501-505.*

Exemption on certain corporations, trusts, and other organizations. *I.R.C. § 501.*

Requirements for exemption. *I.R.C. § 503.*

Private foundations and termination of private foundation status. *I.R.C. § 507.*

Definition of "private foundation." *I.R.C. § 509.*

Income tax charitable deduction for estates. *I.R.C. § 642(c).*

Limitation on income tax charitable deduction for estates. *I.R.C. § 681.*

Rules for determining basis. *I.R.C. §§ 1011-1023.*

Basis of property acquired by gifts and transfers in trust. *I.R.C. § 1015.*

Definition of "gross estate" for estate tax purposes. *I.R.C. § 2031.*

Alternate valuation for estate tax purposes. *I.R.C. § 2032.*

Valuation of certain farm and business property. *I.R.C. § 2032A.*

Federal estate tax charitable deduction. *I.R.C. § 2055.*

Federal gift tax charitable deduction. *I.R.C. § 2522.*

Special penalty taxes on activities of private foundations. *I.R.C. §§ 4940-4049.*

Return required if donee of charitable deduction property disposes of property within two years after receipt. *I.R.C. § 6050L.*

### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Tax Law Federal Estate & Gift Taxes Deductions Charitable Deductions (IRC secs. 2055, 2522, 2524) General Overview  
 Tax Law Federal Estate & Gift Taxes Deductions Charitable Deductions (IRC secs. 2055, 2522, 2524) Disallowance of Deductions  
 Tax Law Federal Estate & Gift Taxes Deductions Charitable Deductions (IRC secs. 2055, 2522, 2524) Transfers for Charitable, Public & Religious Uses  
 Tax Law Federal Income Tax Computation Deductions for Nonbusiness Expenses Charitable Contributions (IRC sec. 170) General Overview



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**§ 69.03 Federal Regulations**

Regulations governing federal income tax charitable deduction. *Treas. Reg. §§ 1.170A-1-1.170A-12.*

Documentation of deduction. *Treas. Reg. § 1.170A-1(a)(2).*

Reduction for contributions of certain appreciated property. *Treas. Reg. § 1.170A-4.*

Future interests in tangible personal property. *Treas. Reg. § 1.170A-5.*

Contributions of partial interests in property not in trust. *Treas. Reg. § 1.170A-7.*

Limitations on charitable deductions by individuals. *Treas. Reg. § 1.170A-8.*

Organizations qualifying for maximum 50 percent deduction limitation. *Treas. Reg. § 1.170A-9.*

Valuation of remainder interests in real property to charity. *Treas. Reg. § 1.170A-12.*

Valuation of property for federal estate tax purposes. *Treas. Reg. §§ 20.2031-1-20.2031-10.*

Valuation of annuities, life estates, remainders, and other partial interests in property. *Treas. Reg. § 20.2031-10.*

Regulations governing federal estate tax charitable deduction. *Treas. Reg. §§ 20.2055-1-20.2055-5.*

Regulations governing federal gift tax charitable deduction. *Treas. Reg. §§ 25.2522(a)-1-25.2522(d)-1.*

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Tax Law Federal Estate & Gift Taxes Deductions Charitable Deductions (IRC secs. 2055, 2522, 2524) General Overview Tax Law Federal Income Tax Computation Deductions for Nonbusiness Expenses Charitable Contributions (IRC sec. 170) General Overview Tax Law Federal Income Tax Computation Deductions for Nonbusiness Expenses Charitable Contributions (IRC sec. 170) Allowance of Deduction Tax Law Federal Income Tax Computation Deductions for Nonbusiness Expenses Charitable Contributions (IRC sec. 170) Disallowance of Deduction Tax Law Federal Taxpayer Groups Income Taxation of Estates, Trusts & Beneficiaries Credits & Deductions (IRC secs. 641-668, 671, 681, 685) Deductions



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*25-69 California Legal Forms--Transaction Guide § 69.04*

**§ 69.04 Law Reviews**

Wood, *Charitable Contributions of Property: No Bargain Sale Deduction on Condemnation*, 19 *J. Real Est. Tax'n* 258 (1992).

Leavitt, *When Is a Gift to the Minister Not a Gift to the Church? The Impact of Davis v. United States* 110 *S. Ct.* 2014 (1990) , 66 *Tul. L. Rev.* 245 (1991).

Sommer, *Charitable to Whom? Rethinking the Method by Which Charitable Donations Are Made to Support Missionary Work*, 15 *S. Ill. U. L.J.* 373 (1991).

Rapkin, *Turning the Valuation Tables*, 128 *Trusts & Est.* 59 (August 1989) .

Popovich, *It Pays to Give It Away--Sometimes: Inter Vivos Charitable Remainder Unitrusts in Estate Planning*, 15 *Pepp. L. Rev.* 367 (1988).

Teitell, *Philanthropy & Estate Planning*, 128 *Trusts & Est.* 56 (May 1989) .

Spuehler, *Creative Charitable Contributions as a Tax Shelter*, 33 *Major Tax Plan.* 2-1 (1981).

Mangum, *Charitable Transfers and Estate Planning*, 38 *N.Y.U. Tax. Inst.* 40-1 (1980).

Teitell, *Charitable Donations of Art Works: The Special Considerations Involved*, 51 *J. Tax'n* 326 (1979).

Report, *Planning Considerations for Charitable Contributions*, 13 *Real Prop., Prob. & Tr. J.* 581 (1978).

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsCharitable TrustsEstate, Gift & Trust LawWillsBequests & DevisesTax LawFederal  
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*25-69 California Legal Forms--Transaction Guide § 69.05*

**§ 69.05 Annotations**

*Annot., Federal Income Tax Charitable Deductions: Property Fair-Market-Value Determinations, 90 A.L.R. Fed. 402 (1988) .*

*Annot., Federal Tax-Exempt Status as Nonprofit "Social Welfare" Organization Under 26 USCS § 501(c)(4), 87 A.L.R. Fed. 708 (1988).*

*Annot., Validity, as for a Charitable Purpose, of Trust for Publication or Distribution of Particular Books or Writings, 34 A.L.R. 4th 419 (1984).*

*Annot., Enforceability of subscription under conditional charitable pledge, 97 A.L.R.3d 1054 (1980).*

*Annot., Deductibility from testator's gross estate, under 26 USCS § 2055, of bequests for public, charitable, and religious uses, 46 A.L.R. Fed. 246 (1980) .*

*Annot., Payments made in connection with placing person in home for aged operated by qualified charitable organization as constituting tax deductible charitable contributions under § 170 of Internal Revenue Code of 1954 (26 USCS § 170), 34 A.L.R. Fed. 840 (1977) .*

*Annot., Payments made to qualified charitable organization in connection with education of taxpayer's children as constituting deductible charitable contribution under § 170 of Internal Revenue Code of 1954 (26 USCS § 170) or nondeductible expense under § 262 of Internal Revenue Code of 1954 (26 USCS § 262), 33 A.L.R. Fed. 373 (1977) .*

*Annot., Construction and application of statutes apportioning or prorating estate taxes, 71 A.L.R.3d 247 (1976).*

*Annot., Effect on charitable trust or bequest for particular school or school district, or students or*

graduates thereof, of change in school or district structure or organization, *68 A.L.R.3d 977 (1976)* .

Annot., Taxpayer's conveyance or dedication of land to or for use of governmental entity as charitable contribution qualifying for tax deduction under *26 USCS § 170, 30 A.L.R. Fed. 796 (1976)*.

Annot., Division of charitable gift among several claimants where named donee is nonexistent, *67 A.L.R.3d 442 (1975)*.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsCharitable TrustsEstate, Gift & Trust LawWillsBequests & DevisesTax LawFederal Estate & Gift TaxesDeductionsCharitable Deductions (IRC secs. 2055, 2522, 2524)General OverviewTax LawFederal Income Tax ComputationDeductions for Nonbusiness ExpensesCharitable Contributions (IRC sec. 170)General Overview



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*25-69 California Legal Forms--Transaction Guide § 69.06*

**§ 69.06 Text References**

**[1] Related Forms With Tax Analysis**

Rabkin & Johnson, Current Legal Forms with Tax Analysis, Ch. 11, *Contributions to Charities*  
(Matthew Bender)

**[2] Related California Forms**

California Legal Forms (Matthew Bender).

Ch. 13, *Nonprofit Corporations* .

Ch. 27, *Deeds and Recording* .

Ch. 27A, *Dedication* .

Ch. 60, *Estate Planning* .

Ch. 61, *Will Drafting and Complete Will Forms*.

Ch. 62, *Codicils* .

Ch. 63, *Will Provisions* .

Ch. 64, *Testamentary Trusts: Payment and Distribution Provisions* .

Ch. 64A, *Testamentary Trusts: Trustee Provisions* .

Ch. 64B, *Testamentary Trusts: Administrative Provisions* .

Ch. 67, *Future Interests* .

Ch. 70, *Complete Revocable Trust Forms* .

Ch. 74, *Split-Interest Charitable Trusts* .

California Wills & Trusts (Matthew Bender).

Division I, *Complete Inter Vivos Trust Forms*, Subdivision F, *Miscellaneous Trusts*.

Division II, *Individual Inter Vivos Trust Provisions*, Pt. 4, *Payments and Distributions*.

Division III, *Complete Will Forms*.

Division IV, *Individual Will Provisions*, Pt. 30, *Particular Devises*.

### [3] Additional Text References

California Wills and Trusts (Matthew Bender).

Ch. 30, *Charitable Devises* .

Ch. 116, *Charitable Remainder Trusts* .

Ch. 117, *Charitable Lead Trusts* .

Modern Estate Planning, Ch. 10, *Charitable Transfers* (Matthew Bender).

Nossaman & Wyatt, Trust Administration and Taxation, Ch. 3, *Validity--Charitable Trusts* (Matthew Bender).

Witkin, Summary of California Law, vol. 13, *Trusts*, §§ 289-310 (10th ed. 2005).

### Legal Topics:

For related research and practice materials, see the following legal topics:

Tax Law Federal Estate & Gift Taxes Deductions Charitable Deductions (IRC secs. 2055, 2522, 2524) General Overview Tax Law Federal Income Tax Computation Deductions for Nonbusiness Expenses Charitable Contributions (IRC sec. 170) General Overview Tax Law State & Local Taxes Estate & Gift Tax Estate Tax Deductions



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**§ 69.07 Pamphlets**

IRS Publication 78, *Cumulative List of Organizations Described in Section 170(c) of the Internal Revenue Code*, available online at [www.irs.gov/charities](http://www.irs.gov/charities).

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Tax LawFederal Estate & Gift TaxesDeductionsCharitable Deductions (IRC secs. 2055, 2522, 2524)General OverviewTax LawFederal Income Tax ComputationDeductions for Nonbusiness ExpensesCharitable Contributions (IRC sec. 170)General Overview



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*25-69 California Legal Forms--Transaction Guide §§ 69.08-69.09*

**[Reserved]**

§§ 69.08[Reserved]



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*25-69 California Legal Forms--Transaction Guide § 69.10*

**§ 69.10 Modern Role of Charitable Dispositions**

Charitable dispositions have traditionally been motivated by social, religious, or humanitarian concerns. Although these concerns still play a significant role in charitable giving, the goal of achieving favorable tax treatment has assumed an increasingly important role in motivating charitable dispositions and serving as a guide for the selection of appropriate charitable beneficiaries. In fact, the principal practical difference between charitable and noncharitable dispositions now lies in the tax treatment accorded these dispositions. The tax aspects of charitable dispositions are discussed in § 69.15[1].

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
 Estate, Gift & Trust LawPersonal GiftsGeneral OverviewEstate, Gift & Trust LawTrustsCharitable TrustsEstate, Gift & Trust LawWillsBequests & DevisesTax LawFederal Estate & Gift TaxesDeductionsCharitable Deductions (IRC secs. 2055, 2522, 2524)General OverviewTax LawFederal Income Tax ComputationDeductions for Nonbusiness ExpensesCharitable Contributions (IRC sec. 170)General Overview



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*25-69 California Legal Forms--Transaction Guide § 69.11*

**§ 69.11 Legal Aspects of Charitable Dispositions**

At common law, a disposition is charitable if (1) it is made for a charitable purpose and (2) the ultimate recipients of the disposition are the community as a whole, or an unascertainable and indefinite portion of the community [ *Lynch v. Spilman* (1967) 67 Cal. 2d 251, 261, 62 Cal. Rptr. 12, 431 P.2d 636 ; *Estate of Henderson* (1941) 17 Cal. 2d 853, 857, 112 P.2d 605]. A disposition is made for a charitable purpose if its aims and accomplishments are of general religious, educational, political, or social interest [ *Estate of Henderson* (1941) 17 Cal. 2d 853, 857, 112 P.2d 605]. Charitable purposes include (1) the relief of poverty, (2) the advancement of education, (3) the advancement of religion, (4) the promotion of health, (5) governmental or municipal purposes, and (6) other purposes beneficial to the community [ *Lynch v. Spilman* (1967) 67 Cal. 2d 251, 261, 62 Cal. Rptr. 12, 431 P.2d 636 ; *Estate of Breeden* (1989) 208 Cal. App. 3d 981, 985, 256 Cal. Rptr. 813].

The common law definition stated above has only limited relevance to the practical considerations encountered in planning and drafting most modern charitable dispositions. Although there is a large body of case law dealing with what is or is not a charitable disposition, much of the practical importance of that distinction disappeared with the repeal of provisions that formerly placed percentage limitations on testamentary devises to charity [see former *Prob. Code* §§ 41-43 (repealed 1971)]. However, the characterization of a disposition as charitable still has two important practical consequences: First, charitable dispositions are subject to the cy pres doctrine, which permits the court to apply a charitable disposition to some purpose other than that specified by the donor when the purpose specified by the donor cannot be precisely carried out [see § 69.12]. Second, the Uniform Statutory Rule Against Perpetuities [see *Prob. Code* §§ 21200-21231] is not applicable to dispositions made directly to charitable donees (although it is applicable to "nonvested" future interests created in favor of charitable donees) [see § 69.13].

A discussion of whether a given disposition is a "charitable" disposition now normally refers to its classification for tax purposes. The common law definition of a charitable contribution and the tax law definitions are not identical [see *Estate of Breeden* (1989) 208 Cal. App. 3d 981, 991-992, 985, 256 Cal. Rptr. 813]. Many dispositions that may be classified as charitable at common law will not qualify as charitable contributions for tax purposes [see § 69.15[2] and succeeding headings; see also § 69.120]. Similarly, a trust may qualify as a charitable trust for purposes of the common law even though a transfer of property to the trust would not qualify as a charitable contribution under the Internal Revenue Code [see *Estate of Breeden* (1989) 208 Cal. App. 3d 981, 991-992, 985, 256 Cal. Rptr. 813].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Trusts Charitable Trusts Estate, Gift & Trust Law Wills Bequests & Devises Tax Law Federal Estate & Gift Taxes Deductions Charitable Deductions (IRC secs. 2055, 2522, 2524) General Overview Tax Law Federal Estate & Gift Taxes Deductions Charitable Deductions (IRC secs. 2055, 2522, 2524) Transfers for Charitable, Public & Religious Uses Tax Law Federal Income Tax Computation Deductions for Nonbusiness Expenses Charitable Contributions (IRC sec. 170) General Overview



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*25-69 California Legal Forms--Transaction Guide § 69.12*

**§ 69.12 Cy Pres Doctrine**

The law favors charitable dispositions, and instruments providing for such dispositions will be liberally construed in order to accomplish the intent of the donor [ *Estate of Tarrant (1951)* 38 Cal. 2d 42, 46, 237 P.2d 505]. If, however, a charitable disposition cannot be given effect in the precise manner specified by the donor, a court may invoke the cy pres doctrine to permit the disposition to take effect in a manner consistent with the testator's general intent. The rule of cy pres makes it possible for a court to carry out a testamentary trust established for a particular charitable purpose if the testator has expressed a general charitable intent but for some reason his or her purpose cannot be accomplished in the manner specified in the will [ *Estate of Puckett (1980)* 111 Cal. App. 3d 46, 50, 168 Cal. Rptr. 311]. When the court invokes the cy pres rule, it directs that the property be applied to a charitable purpose related to the purpose originally intended by the transferor [ *Estate of Klinkner (1978)* 85 Cal. App. 3d 942, 951, 151 Cal. Rptr. 20]. In the case of a disposition made by will, for example, the cy pres doctrine typically results in the transfer of the devised property to a charitable beneficiary that performs the same function as the beneficiary named in the will or, if no charity performs a precisely identical function, to a charitable beneficiary that performs a function that is consistent with the testator's intent.

The cy pres rule has been applied to uphold gifts when the named recipients have refused to accept them [see *Estate of Faulkner (1954)* 128 Cal. App. 2d 575, 579-581, 275 P.2d 818], when the recipients could not be precisely identified [see *Estate of Gatlin (1971)* 16 Cal. App. 3d 644, 649-650, 94 Cal. Rptr. 295], when an organization named as devisee under a will did not come into existence until after the testator's death [see *Estate of Lamb (1971)* 19 Cal. App. 3d 859, 866-869, 97 Cal. Rptr. 46], and when the testator did not specify a precise charitable purpose or name a specific charity as the recipient of a devise [see *Estate of Quinn (1958)* 156 Cal. App. 2d 684, 685, 688, 320 P.2d 219 (direction that residue of estate "go to charity")].

In determining whether the cy pres rule should be invoked, the court must first determine whether the disposition was motivated by a general charitable purpose or intent. A testator is said to have had a "general charitable intent" when the particular disposition is of a generally charitable nature and not intended to benefit a specific charitable entity [ *Estate of Puckett (1980)* 111 Cal. App. 3d 46, 51, 168 Cal. Rptr. 311]. If the gift is intended to benefit only a specific beneficiary, the cy pres rule cannot be invoked, because its application would frustrate the donor's intent [ *Estate of Klinkner (1978)* 85 Cal. App. 3d 942, 951, 151 Cal. Rptr. 20].

The cy pres rule is not a substitute for careful drafting. When the amount of a charitable gift is substantial, failure to describe charitable beneficiaries clearly and carefully invites litigation by charitable organizations seeking all or part of the gift. Even when the amount of the gift is relatively small, application of the cy pres rule will require court involvement and generate unnecessary expense and delay. Precise description of the charitable beneficiary is always the best method for ensuring that a charitable disposition is actually used for the purpose intended by the donor.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsInterpretationEstate, Gift & Trust LawWillsBequests & DevisesEstate, Gift & Trust LawWillsInterpretationRules of ConstructionGeneral OverviewTax LawFederal Estate & Gift TaxesDeductionsCharitable Deductions (IRC secs. 2055, 2522, 2524)General OverviewTax LawFederal Income Tax ComputationDeductions for Nonbusiness ExpensesCharitable Contributions (IRC sec. 170)General Overview



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 CHAPTER 69 CHARITABLE DISPOSITIONS  
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*25-69 California Legal Forms--Transaction Guide § 69.13*

**§ 69.13 Rule Against Perpetuities**

Any charitable disposition that is to take effect in the future must be scrutinized for possible violation of the rule against perpetuities. In California, perpetuities are subject to the Uniform Statutory Rule Against Perpetuities (USRAP) [*see Prob. Code §§ 21200-21231*], which includes a recodification of the common law rule against perpetuities [*see Prob. Code §§ 21205(a), 21206(a), 21207(a)*]. Under that recodification, a "nonvested" property interest is invalid unless, when the interest is created, it is certain to either vest or terminate no later than 21 years after the death of a person alive at the time of creation [*Prob. Code § 21205(a); but see Prob. Code § 21205(b)* (90-year "wait-and-see" rule)]. For purposes of the USRAP, a property interest is "nonvested" when it is subject to an unsatisfied condition precedent and "vested" when it is owned free of all conditions precedent [*see Black's Law Dictionary* (5th ed. 1979) at 1401-1402].

A direct gift or devise to a charitable donee will not cause a perpetuities problem, since the gift or devise will be "vested" and thus not subject to the USRAP. Similarly, a charitable remainder (to take effect after an intervening life estate or estates) will not raise the danger of a perpetuities violation if the remainder is vested at all times. If, however, the remainder is subject to an unsatisfied condition precedent (for example, the death of the life tenant without issue), the remainder will remain nonvested until the condition has either been satisfied or removed. During such time as the remainder is nonvested, it is potentially subject to the USRAP.

If the life tenant is a charitable or governmental donee, a remainder to another charitable or governmental donee will not be subject to the USRAP [*Prob. Code § 21225(e)*]. This treatment of charitable and governmental gifts is substantially identical to the treatment of charitable and governmental gifts under the common law rule against perpetuities. Under that rule, gifts to charity were not granted a blanket immunity from the rule against perpetuities. If, however, a gift vested in a charity within the applicable period, later gifts to other charities were not subject to the rule [*see former Civ. Code § 715* (no perpetuities allowed except for eleemosynary purposes), repealed Jan. 1, 1992; *see also Estate of Sutro* (1909) 155 Cal. 727, 734-738, 102 P. 920].

For general coverage of the rule against perpetuities, see Ch. 67, *Future Interests and Perpetuities* .

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Estates Created by Trusts & Wills Invalid Restraints & Rule Against Perpetuities Estate, Gift & Trust Law Trusts Interpretation Estate, Gift & Trust Law Wills Interpretation Rules of Construction General Overview Real Property Law Estates Future Interests Invalid Restraints & Rule Against Perpetuities



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*25-69 California Legal Forms--Transaction Guide § 69.14*

**§ 69.14 Forms of Charitable Disposition**

**[1] In General**

There is a variety of methods for making a charitable disposition, and the legal considerations related to the disposition will vary according to the method selected. A charitable disposition by an individual may be either inter vivos or testamentary. A disposition may be either outright or in trust. If the amount is sufficiently large, creation of a charitable foundation may be another option available to the donor.

**[2] Testamentary Disposition**

With the exception of their tax treatment, testamentary dispositions to charity are governed by the same provisions as other testamentary dispositions, and they are subject to the same general considerations and formalities in drafting and execution [*see Ch. 61, Will Drafting and Complete Will Forms, §§ 61.130 (general drafting rules), 61.131 (organization), 61.150-61.162 (execution)*].

The Probate Code at one time limited testamentary gifts to charity to specified percentages of the testator's estate [*see former Prob. Code §§ 41-43 (repealed 1971)*]. These limits no longer apply, however, and a testator may now devise any portion of his or her estate (up to the whole) to a charity or charities. Of course, a will that leaves an inordinate amount to a charity while ignoring relatives may be challenged on the ground that the testator was not mentally competent at the time the will was executed [*see Prob. Code § 6100.5 (persons who are not mentally competent to make a will); see also Ch. 61, Will Drafting and Complete Will Forms, §§ 61.11*] or that the will was procured by duress, menace, fraud, or undue influence [*see Prob. Code § 6104 (execution of will or part of will ineffective to extent procured by duress, menace, fraud, or undue influence)*]. Additionally, a surviving spouse may elect to take against the will if the testator attempts to dispose of all or part of the spouse's share of the community and quasi-community property without the spouse's consent [*see Prob. Code §§ 100, 101, 6101; see also Ch. 61, Will Drafting and Complete Will Forms, § 61.14[5]*].

**[3] Outright Inter Vivos Gift**

The formal requirements for inter vivos gifts to a charity are the same as the formal requirements for inter vivos gifts to

other beneficiaries. The law governing gifts in general is discussed in Ch. 60A, *Gifts*, and is not repeated here. Most of the legal questions related to charitable inter vivos gifts are tax-related. Because of the tax benefits, adequate documentation of charitable gifts is particularly important [see § 69.180, P 6].

Inter vivos charitable gifts may be more advantageous than testamentary transfers because of their immediate income tax benefits. However, testamentary transfers have the obvious advantage of permitting the testator to use and enjoy the property during his or her lifetime.

#### [4] Charitable Trust

In the strict legal sense, a trust is created by any charitable disposition, even an outright gift, because a gift to a charitable organization is deemed to have been made in trust to carry out the objects for which the organization was created [see *Estate of Klinkner (1978) 85 Cal. App. 3d 942, 946, 151 Cal. Rptr. 20*; *Estate of Lamb (1971) 19 Cal. App. 3d 859, 866, 97 Cal. Rptr. 46*]. For this reason courts frequently refer to the gift as a "charitable trust" and the charity as the "trustee" even when the gift is actually made outright to the charitable organization [see *In re Estate of De Mars (1937) 20 Cal. App. 2d 514, 519, 67 P.2d 374*; see also *Estate of Gatlin (1971) 16 Cal. App. 3d 644, 648-650, 94 Cal. Rptr. 295*]. In dealing with the law in this area, it must be kept in mind that there is a practical distinction between the trust relationship created by all charitable bequests and a trust established by a formal inter vivos or testamentary trust instrument.

To create a charitable trust, there must be [ *L.B. Research & Education Found. v. UCLA Found. (2005) 130 Cal. App. 4th 171, 177, 29 Cal. Rptr. 3d 710* ]:

- A proper manifestation by the settlor of an intention to create a trust;
- A charitable purpose; and
- Trust property.

A gift may have a charitable purpose and yet not constitute a charitable trust. The owner of property, instead of creating a trust, may transfer the property to another on the condition that if the transferee fails to perform a specified act, the transferee's interest will be forfeited either to the transferor or to a designated third party. In such a case, the transferee's interest is subject to a condition subsequent and is not held in trust [ *L.B. Research & Education Found. v. UCLA Found. (2005) 130 Cal. App. 4th 171, 177, 29 Cal. Rptr. 3d 710* ]. Whether a trust or a condition is created depends on the transferor's manifested intention. The fact that the word "condition" is used does not necessarily indicate that a condition and not a trust is intended, because trusts can be created by words of condition. Property given on condition that it will be applied to specified charitable purposes is particularly likely to be construed as having been given in a charitable trust [ *L.B. Research & Education Found. v. UCLA Found. (2005) 130 Cal. App. 4th 171, 177-178, 29 Cal. Rptr. 3d 710* ]. The question to be decided in such cases is whether the donor intended to provide that if the property were not used for the designated charitable purpose it should revert either to the donor's estate or to a contingent donee, or the donor intended to impose an enforceable obligation on the donees to devote it to those purposes [ *L.B. Research & Education Found. v. UCLA Found. (2005) 130 Cal. App. 4th 171, 178-180, 29 Cal. Rptr. 3d 710* (conditional contract, not charitable trust, was created by instrument giving contribution of \$1 million to university but also providing that if this money was not used as directed, fund must be transferred to another institution)].

Modern donor-created charitable trusts usually are split-interest charitable trusts in which either the income interest or the remainder interest is paid to the charity and the other interest is paid to noncharitable beneficiaries. If the estate is not sufficiently large to justify creation of a separate trust, payment into an existing pooled income fund may be an acceptable alternative. These types of trusts are the subject matter of Ch. 74, *Split-Interest Charitable Trusts*. If the donor does not wish to split the income and remainder interests between charitable and noncharitable beneficiaries,

there is ordinarily no advantage, either from a tax standpoint or for administrative purposes, to creating a separate trust rather than simply making an outright gift to a pre-existing charitable organization.

If all of the beneficial interests in a trust are held by charitable or governmental beneficiaries, the trust will not be subject to the Uniform Statutory Rule Against Perpetuities (USRAP), and there will be no danger of invalidating the trust or any of its provisions under the rule against perpetuities [*see Prob. Code* § 21225(e) and § 69.13]. If, however, the interest of the charitable beneficiary follows the interest of a nongovernmental or noncharitable beneficiary, a perpetuities problem may arise. Assume, for example, that the trust instrument requires the trustee to pay all of the trust income to the settlor's son for life, then to the son's surviving issue for their lives, with a contingent remainder to a charitable beneficiary if the son dies without surviving issue. Under these circumstances, the contingent remainder to the charitable beneficiary is a "nonvested" interest under the USRAP and subject to the rule against perpetuities [*see* § 69.13].

### **[5] Private Foundation**

References to "private foundations" appear throughout the tax discussion in this chapter. The tax law related to creation and operation of charitable private foundations is one of the most complex areas in the entire Internal Revenue Code, and a detailed discussion is beyond the scope of this chapter. However, a brief summary is included here to aid the attorney in understanding the general role of private foundations. [For additional discussion of private foundations and tax-exempt organizations in general, *see* Ch. 13B, *Tax-Exempt Status for Nonprofit Entities*; *see also* Rabkin & Johnson, *Federal Income, Gift and Estate Taxation*, Ch. 59, *Charities*, § 59.04].

The Internal Revenue Code defines the term "private foundation" by exclusion [*see I.R.C.* § 509(a)]. A private foundation is generally a tax-exempt organization that is organized and operated exclusively for a valid charitable purpose [*see I.R.C.* § 501(c)(3); *see also* § 69.15[2], P 2], and that does not derive a substantial part of its support from the government or from direct or indirect contributions by the general public [*I.R.C.* § 509(a)(1); *see I.R.C.* §§ 170(b)(1)(A), 501(c)(3); *Treas. Reg.* § 1.509(a)-1; *see also* *Treas. Reg.* § 1.170A-9(e)(2) (determination whether charitable organization is "publicly supported")]. Private foundations are subject to a variety of special regulations and restrictions, including special penalty taxes for violating restrictions on self-dealing [*see I.R.C.* § 4941], failure to distribute income [*see I.R.C.* § 4942], excess business holdings [*see I.R.C.* § 4943], and investments that jeopardize their charitable purpose [*I.R.C.* § 4944]. "Private operating foundations" are special foundations that meet distribution and asset requirements qualifying them for the 50 percent maximum charitable deduction [*I.R.C.* § 170(b)(1)(A)(vi), (E)(i); *see I.R.C.* § 4942(j)(3) (definition of "operating foundation"); *see also* Ch. 13B, *Tax-Exempt Status for Nonprofit Entities*, § 13B.20[5]; *see also* Rabkin & Johnson, *Federal Income, Gift and Estate Taxation*, Ch. 59, *Charities*, § 59.04]. Generally, private operating foundations are directly involved in performing charitable services.

In the case of extremely large estates, creation of a private foundation may be feasible. Creation of such a foundation may generate tax advantages for a very wealthy donor, while concurrently permitting the donor to exercise a greater measure of control over the activities of the charity than would otherwise be possible. However, there are numerous restrictions and pitfalls in the complex tax laws related to charitable foundations, and these should be thoroughly investigated prior to undertaking this course of action. It should also be kept in mind that the expenses generated by creation and administration of such a foundation render this device impractical in the large majority of cases.

### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Personal Gifts General Overview Estate, Gift & Trust Law Trusts Charitable Trusts Estate, Gift & Trust Law Wills Bequests & Devises



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*25-69 California Legal Forms--Transaction Guide § 69.15*

**§ 69.15 Federal Income Tax Deduction**

**[1] In General**

Taxpayers who itemize deductions are permitted to take income tax deductions for contributions made during the year to qualifying charitable organizations [*I.R.C. § 170(a)(1)*]. The amount that may be deducted varies, depending on the donor, the nature of the property contributed, and the character and status of the donee.

An individual donor may deduct up to 50 percent of the donor's "contribution base" (adjusted gross income computed without regard to any net operating loss carryback [*see I.R.C. § 172*]) for the taxable year for contributions to specified classes of charitable organizations [*I.R.C. § 170(b)(1)(A), (F)*; *see § 69.15[4]*]. Contributions by individuals to other charitable organizations (primarily private nonoperating foundations) are also deductible, but only to the extent that these contributions do not exceed the lesser of: (1) 30 percent of the individual's contribution base for the taxable year, or (2) the excess of 50 percent of the taxpayer's contribution base for the taxable year over the amount of charitable contributions to organizations that qualify for the 50 percent limitation noted above [*I.R.C. § 170(b)(1)(B)*].

The deduction for contributions of capital gain property (property that would have realized long-term capital gain if sold at its fair market value at the time of the contribution) is limited to 30 percent of the taxpayer's contribution base [*see I.R.C. § 170(b)(1)(C)*] or, in the case of contributions to organizations that do not qualify for the maximum deduction, to the lesser of: (1) 20 percent of the taxpayer's contribution base for the taxable year, or (2) the excess of 30 percent of that contribution base over the amount of contributions of capital gain property made to organizations qualifying for the maximum (50 percent) deduction [*I.R.C. § 170(b)(1)(D)(i)*]. For purposes of these limitations, contributions of capital gain property are taken into account after all other charitable contributions [*I.R.C. § 170(b)(1)(C)(i), (b)(1)(D)(i)*]. However, a five-year carryover is permitted for any excess over 30 percent [*I.R.C. § 170(b)(1)(C)(ii), (D)(ii)*; *see § 69.15[7]*]. As an alternative to the 30 percent limit, the donor may elect to have capital gain property that is contributed to an organization qualifying for the maximum (50 percent) deduction limit treated under the rules applicable to contributions of appreciated capital gain property [*I.R.C. § 170(b)(1)(C)(iii), (e)*; *Treas. Reg. §§ 1.170A-4(a), (b)(2)(iii), 1.170A-8(d)(2)*; *see § 69.15[5]*].

A corporation's charitable deduction is limited to 10 percent of its taxable income, computed in a specified manner [*see*

*I.R.C. § 170(b)(2); see also § 69.180).*

No deduction is allowed for contributions of \$250 or more unless the taxpayer substantiates the contribution by a contemporaneous written acknowledgment from the donee organization [*I.R.C. § 170(f)(8)(A)*]. The acknowledgment must contain specified information in order to meet the statutory substantiation requirement [*see I.R.C. § 170(f)(8)(B)*]; *see also §§ 69.140 P 9, 69.160 P 6, 69.180 P 6*].

In addition, no deduction is allowed for any contribution of property for which a deduction of more than \$500 is claimed, unless the taxpayer includes a description of the property with the return for the taxable year in which the contribution is made or, for contributions of more than \$5,000, attaches to the return a qualified appraisal of the property [*I.R.C. § 170(f)(11)(A)-(D)*]. An appraisal need not be provided for a donation of cash, property described in *I.R.C. § 1221(a)(1)*, publicly traded securities, or any qualified vehicle for which an acknowledgment under *I.R.C. § 170(f)(12)(B)* is provided [*I.R.C. § 170(f)(11)(A)(ii)*]. For purposes of determining the dollar amount thresholds of this provision, all similar items of property donated to one or more donees are treated as one property [*I.R.C. § 170(f)(11)(F)*].

A deduction for a contribution of a motor vehicle, boat, or airplane, the claimed value of which exceeds \$500, is not allowed unless the taxpayer substantiates the contribution by a contemporaneous written acknowledgment of the contribution by the donee organization and includes the acknowledgment with the taxpayer's return [*I.R.C. § 170(f)(12)*; *2005-25 I.R.B. 1287, Notice 2005-44, § 3* (requirements for contemporaneous written acknowledgment)]. A donor who is claiming a deduction for the fair market value of a qualified vehicle must be able to substantiate that value. A reasonable method for determining the fair market value of a vehicle is by referring to an established used vehicle pricing guide [ *2005-25 I.R.B. 1287, Notice 2005-44, § 5* (IRS is to issue regulations limiting fair market value of vehicle to amount not in excess of price listed in used vehicle pricing guide for private party sale of similar vehicle)].

## **[2] Definition of "Charitable Contribution"**

For purposes of the federal income tax charitable deduction, "charitable contribution" means a contribution or gift to or for the use of any of the following [*I.R.C. § 170(c)*]:

- Any unit of federal, state, or local government, but only if the contribution or gift is made for exclusively public purposes.
- A corporation, trust, community chest, fund, or foundation: (1) that is created or organized in or under the law of the United States or any state, possession, or political subdivision (including the District of Columbia); (2) that is organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, or to foster national or international amateur sports competition (but only if it is a "qualified amateur sports organization" [*see I.R.C. § 501(j)*] or does not provide athletic facilities or equipment), or the prevention of cruelty to children or animals; (3) no part of the earnings of which inures to the benefit of any private shareholder or individual; and (4) that is not ineligible for tax-exempt status [*see I.R.C. § 501(c)(3)*] for engaging in lobbying or participating in political campaigns (in the case of contributions by a corporation to a trust, chest, fund, or foundation, a deduction is allowed only for contributions to be used within the United States or its possessions).
- A post or organization of war veterans, or an auxiliary unit or society, trust, or foundation of any such organization, if it is organized in the United States and no part of its earning benefits any private shareholder or individual.
- In the case of a contribution by an individual, a domestic fraternal society, order, or association operating under the lodge system, but only if the contribution or gift is to be used exclusively for

religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals.

- A cemetery company organized and operated exclusively for the benefit of its members, or any other nonprofit corporation chartered solely as a cemetery corporation and not permitted by its charter to engage in any business not necessarily incident to that purpose, if no part of its net earnings benefits any private shareholder or individual.

Donations to a charitable organization are deductible only if made out of a detached and disinterested generosity. If a contribution benefits the donor as well as the charity, the primary purpose controls. A contribution may not be deducted if the expectation of personal benefit is the primary motive [ *Babilonia v. Commissioner of Internal Revenue* (9th Cir. [T.C.] 1982) 681 F.2d 678, 679] .

A donation to a charitable organization of securities when the donor retains the right to manage the investment under a limited power of attorney may be eligible for an income tax and gift tax deduction, as long as the charitable organization has the right to withdraw any or all of the assets at any time and to terminate the limited power of attorney and management agreement. This retention of investment management control is not substantial enough to affect the deductibility of the contributed property [Letter Ruls. 200445023, 200445024].

### [3] Excluded Contributions

Direct contributions to individuals (as opposed to organizations) do not qualify as charitable contributions [see, e.g., Letter Rul. 200437032 (decendent's residuary bequest to beneficiary who is individual that is member of religious order and has taken vow of poverty does not qualify for estate tax charitable deduction under *I.R.C. § 2055(a)*)]. However, there is a limited exception for amounts paid by an individual to maintain a student as a member of the individual's household under a placement program operated by a charitable organization [see *I.R.C. § 170(g)*; *Treas. Reg. § 1.170A-2*].

Contributions of services do not qualify for the income tax charitable deduction. However, unreimbursed expenditures incident to rendering services to a charitable organization are deductible [*Treas. Reg. § 1.170A-1(g)*], unless the expenditures are made to influence legislation [*I.R.C. § 170(f)(6)*]. The standard mileage rate used for determining a charitable deduction attributable to the use of a passenger automobile in performing donated services is 14 cents per mile [*I.R.C. § 170(i)* (applicable to tax years beginning after December 31, 1997)].

A gift of less than the taxpayer's entire interest in property generally is not deductible [*I.R.C. § 170(f)(3)(A)*]. However, there are exceptions for contribution of a remainder interest in a personal residence or farm [*I.R.C. § 170(f)(3)(B)(i)*], contribution of an undivided portion of the taxpayer's entire interest in property [*I.R.C. § 170(f)(3)(B)(ii)*], or a "qualified conservation contribution" [*I.R.C. § 170(f)(3)(B)(iii), (h)*]. A contribution of a remainder interest in a trust is not deductible unless the trust is a charitable remainder annuity trust, a charitable remainder unitrust [see *I.R.C. § 664*], or a pooled income fund [*I.R.C. § 170(f)(2)(A)*; see *I.R.C. § 642(c)(5)*]. Income interests in trust must be in the form of a guaranteed annuity or a fixed percentage of the trust's assets distributed yearly [*I.R.C. § 170(f)(2)(B)*]. For a detailed treatment of this subject, see Ch. 74, *Split-Interest Charitable Trusts* .

If the donor's entire interest in property consists of a partial interest, such as an income or remainder interest, the donor may claim a charitable deduction for the contribution of that interest [*Treas. Reg. § 1.170A-7(a)(2)(i)*].

If a charitable contribution is subject to any liability, or liability is assumed by the charity or any other person, the available deduction is reduced by the amount of certain interest, to the extent necessary to avoid deduction of the same amount both as an interest deduction under *I.R.C. § 163* and as a deduction for charitable contributions under *I.R.C. § 170* [*I.R.C. § 170(f)(5)*; *Treas. Reg. § 1.170A-3*].

No deduction is allowed for contributions to an organization that conducts lobbying activities on matters of direct financial interest to the donor's trade or business if the principal purpose of the contribution is to avoid federal income tax by securing a deduction that would have been disallowed as a business expense deduction [*see I.R.C. § 162(e)*] (disallowance of business expense deduction for specified lobbying activities) if the donor had conducted the activities directly [*I.R.C. § 170(f)(9)*]. These prohibited lobbying activities include [*I.R.C. § 162(e)*]:

- Influencing legislation;
- Participating in political campaigns;
- Attempting to influence the public with respect to elections, legislative matters, or referendums; and
- Communicating directly with specified senior officials of the executive branch in an attempt to influence official actions.

#### **[4] Contributions Qualifying for Maximum Deduction**

The maximum 50 percent charitable deduction for individuals is available for contributions to the following classes of charitable organizations [*see I.R.C. § 170(b)(1)(A)*; *Treas. Reg. § 1.170A-9*]:

- Churches, or conventions or associations of churches;
- Qualifying educational organizations (including qualifying nonprofit day care centers [*see I.R.C. § 501(k)*]);
- Qualifying hospitals and medical research organizations;
- Organizations for the benefit of qualifying state and municipal colleges;
- Units of federal, state, or local government, if the contribution is made for exclusively public purposes [*see I.R.C. § 170(c)(1)*];
- Corporations, trusts, community chests, funds, or foundations operated for one of the purposes specified in the second category in the list in § 69.15[2] (religious, charitable, scientific, etc. purposes) and which ordinarily receive a substantial part of their support from federal, state, or local government or from direct or indirect contributions by the general public;
- Certain private foundations [*see I.R.C. §§ 170(b)(1)(F)*], including private operating foundations [*see I.R.C. § 4942(j)(3)*], certain other qualifying private foundations that make charitable distributions equal to 100 percent of the contributions received [*see I.R.C. § 4942(g)*] (definition of "qualifying distributions"); *Treas. Reg. § 1.170A-9(h)*], and certain private foundations that pool all contributions in a common fund [*see I.R.C. § 170(b)(1)(F)*; *Treas. Reg. § 1.170A-9(i)*]; and
- Organizations that are excluded by *I.R.C. § 509(a)(2)* or (3) from the definition of private foundation. *I.R.C. § 509(a)(2)* excludes certain organizations that receive broad public support [*see Treas. Reg. § 1.509(a)-3*], while *I.R.C. § 509(c)(3)* excludes qualifying "support organizations" organized and operated to carry out the functions of charitable organizations and certain other publicly supported organizations not classified as private foundations [*see I.R.C. § 509(a)(1), (2)*] and not controlled directly or indirectly by "disqualified persons" [*I.R.C. § 509(a)(3)*; *Treas. Reg. § 1.509(a)-4*];

*see I.R.C. § 4946*], as well as public safety testing organizations [*I.R.C. § 509(c)(4)*].

The general categories listed above have been considerably simplified due to the space limitations of this chapter. Both the Internal Revenue Code [*see I.R.C. § 170(b)(1)(A)*] and the applicable regulations [*see Treas. Reg. § 1.170A-9*] prescribe very detailed and complex tests for determining whether organizations qualify for the 50 percent limit. If the amount of the contribution could potentially equal a substantial portion (20 to 30 percent or more) of the donor's contribution base for the taxable year, the attorney should verify that the donee organization has qualified for the 50 percent limit before making a charitable disposition to that organization on behalf of a client [*see § 69.120*].

### **[5] Contributions of Appreciated Property**

The Internal Revenue Code places significant limitations on the available charitable deduction in many cases if the gift property has appreciated in value since its acquisition by the donor [*see I.R.C. § 170(e); Treas. Reg. § 1.170A-4*]. For purposes of these limitations, gift property is classified as either ordinary income property or long-term capital gain property [*see I.R.C. § 170(e)(1); Treas. Reg. § 1.170A-4(a)*].

"Ordinary income property" is property any portion of the gain on which would not have been long-term capital gain if the donor had sold the property at its fair market value at the time of its contribution to the charitable organization. Examples include property held as inventory [*but see* discussion of special exception for certain contributions of inventory, *below*], a work of art or manuscript created by the donor, letters or memorandums prepared by or for the donor, or a capital asset held for one year or less [*Treas. Reg. § 1.170A-4(b)(1); see I.R.C. § 1222(1)*]. In determining the available charitable deduction, the fair market value of ordinary income property must be reduced by the amount that would have been recognized as gain (other than long-term capital gain) if the property had been sold at its fair market value at the time of the contribution [*I.R.C. § 170(e)(1)(A); Treas. Reg. § 1.170A-4(a)(1)*]. The effect of this requirement is to limit the charitable deduction to the donor's basis in the property, which generally is its cost. Thus, the available charitable deduction will be minimal for items with a zero basis or a very low basis, such as a painting donated by the artist, which may be deducted only to the extent of the cost of the materials and not the artist's nondeductible personal services [*see I.R.C. § 170(e)(1)(B); Treas. Reg. §§ 1.170A-1(g), 1.170A-4(a)(1), (b)(1)*].

"Long-term capital gain property" is property on which the donor would have realized long-term capital gain if the property had been sold at its fair market value at the time of the contribution; in other words, gain from the sale of a capital asset held for more than one year [*see I.R.C. §§ 1221, 1222(3)*]. The rules reducing the charitable deduction for appreciated property are generally inapplicable to long-term capital gain property, with certain important exceptions [*I.R.C. § 170(e)(1); Treas. Reg. § 1.170A-4(a), (b)(2); see below*]. Thus, a deduction is allowed for the full fair market value of the appreciated property. However, the deduction is limited if the property falls into any of the following categories [*I.R.C. § 170(e)(1)(B); Treas. Reg. § 1.170A-4(b)(2)* (defining "Section 170(e) capital gain property")]:

- Property contributed to a private foundation that does not qualify for the 50 percent deduction [*see § 69.15[4]*], unless the property consists of securities that are capital gain property and for which market quotations are readily available on an established securities market (in which case contributions of up to 10 percent of a corporation's stock are deductible at fair market value) [*I.R.C. § 170(e)(5)*].
- Tangible personal property contributed to or for the use of a charitable organization which is put to an "unrelated use" (a use unrelated to the purpose or function constituting the basis for the charitable organization's tax-exempt status [*Treas. Reg. § 1.170A-4(b)(3)*]).
- Any patent, copyright (other than as described in *I.R.C. § 1221(a)(3)* or *§ 1231(b)(1)(C)*), trademark, trade name, trade secret, know-how, software (other than as described in *I.R.C. § 197(e)(3)(A)(i)*), or similar property, or applications or registrations of this property. For discussion of special rules applicable to contributions of qualified intellectual property, see *§ 69.15[6]*.

- Property that is contributed to an organization qualifying for the 50 percent deduction and that would otherwise be subject to the 30-percent limit on capital gain property, but which the donor elects to have treated under the appreciated property rules of *I.R.C. § 170(e)* [*I.R.C. § 170(b)(1)(C)(iii)*]; *see also* discussion in § 69.15[1].

The value of property falling into any of the above categories ordinarily must be reduced by the full amount that would have been capital gain had the property been sold by the donor at its fair market value [*I.R.C. § 170(e)(1)(B)*].

Two special exceptions from the above reduction requirement are available for contributions by corporations. If a contribution of inventory by a corporation meets specified requirements and is to be used by the donee solely for the care of the ill, the needy, or infants, its value is reduced by only one-half the amount of any short-term capital gain (instead of the entire amount of that gain), plus any amount by which the charitable contribution exceeds twice the basis of the property [*I.R.C. § 170(e)(3)*; *Treas. Reg. § 1.170A-4A*]. A similar reduction is available to corporations that contribute scientific equipment to institutions of higher learning [*see I.R.C. § 170(e)(4)* (qualified research contributions)]. For additional information on the special rules applicable to these types of contributions, see § 69.321[1].

#### **[6] Additional Deductions for Contributions of Qualified Intellectual Property**

The amount of a donor's initial charitable contribution deduction for contributions of qualified intellectual property is limited to the lesser of (1) the fair market value of the property or (2) the donor's adjusted basis in the property [*see I.R.C. § 170(e)(1)(A),(B)(iii)*; *Treas. Reg. § 1.170A-4(a)(1)* and discussion in § 69.15[5]]. However, as discussed below, a donor also may be able to deduct additional amounts based on a percentage of the income subsequently received by or accrued to the donee with respect to the property [*I.R.C. § 170(m)*].

*I.R.C. § 170(m)* permits donors to make contributions of intellectual property and obtain, in addition to the initial deduction otherwise available for the contribution, a deduction for income received or accrued up to 10 years after the date of the contribution [*I.R.C. § 170(m)(1)* (deduction), (5) (10-year limitation); *but see I.R.C. § 170(m)(2)* (additional deductions allowed only to extent that aggregate of specified percentages of qualified donee income exceeds initial deduction claimed by donor)]. This deduction permits a donor to donate qualifying intellectual property and thereafter claim a charitable deduction in future years for income received by the donee from royalties and other similar rights. The amount of the deduction is based on a decreasing scale, with a 100 percent deduction available for the first two years and gradually reduced amounts thereafter [*see I.R.C. § 170(m)(7)*].

The deduction is available for any net income received by or accrued to the donee which is properly allocated to the qualified intellectual property [*I.R.C. § 170(m)(3)*]. In each taxable year of the donor, the donor receives a deduction for income that was received by or accrued to the donee in the donee's taxable year that ended within that taxable year of the donor [*see I.R.C. § 170(m)(4)*]. The amount of net income for purposes of the deduction cannot exceed the net income reported by the donee [*I.R.C. § 170(m)(10)(B)*].

Income cannot be allocated to qualified intellectual property for purposes of this deduction if that income is received by or accrued to the donee more than 10 years after the date of contribution of the property [*I.R.C. § 170(m)(5)*], or if the income is received by or accrued to the donee after expiration of the legal life of the intellectual property [*I.R.C. § 170(m)(6)*]. The deduction is unavailable for any taxable year after the 12th taxable year of the donor which ends on or after the date of the contribution [*I.R.C. § 170(m)(10)(C)*].

Property qualifying for the deduction generally includes any patent, copyright (with limited exceptions), trademark, trade name, trade secret, know-how, software (also with limited exceptions), or similar property, or applications or registrations of such property [*I.R.C. § 170(m)(9)*; *see I.R.C. § 170(e)(1)(B)(iii)*], other than property contributed to for

the use of a private foundation [*I.R.C. § 170(m)(9)*; *see I.R.C. § 170(e)(1)(B)(ii)* (limited exception for specified types of foundations); *see also I.R.C. § 509(a)* (private foundation defined)]. In order to qualify for the deduction, the amount of the contribution must have been reduced by operation of *I.R.C. § 170(e)(1)* [*I.R.C. § 170(m)(8)(A)*; *see discussion in § 69.15[5]*].

In addition, the donor must inform the donee, at the time of the contribution, that the donor intends to treat the contribution as a qualified intellectual property contribution in the manner described above [*I.R.C. § 170(m)(8)(B)*]. A donor satisfies the notification requirement if the donor delivers or mails to the donee, at the time of the contribution, a written statement containing the following [ *2005-23 I.R.B. 1203, Notice 2005-41* ]:

- The donor's name, address, and taxpayer identification number;
- A description of the qualified intellectual property in sufficient detail to identify the property received by the donee;
- The date of the contribution; and
- A statement that the donor intends to treat the contribution as a qualified intellectual property contribution for purposes of *I.R.C. §§ 170(m)* and *6050L*.

#### **[7] Carryover for Excess Contributions**

If an individual taxpayer's charitable contributions to organizations qualifying for the maximum 50 percent limitation [*see § 69.15[4]*] exceed 50 percent of the taxpayer's contribution base, the amount in excess of 50 percent may be carried forward to each of the five succeeding taxable years. The deduction claimed in any succeeding year cannot exceed the lesser of (1) 50 percent of the taxpayer's contribution base in the year the deduction is claimed, taking into account all contributions treated as having been made in that year; or (2) any remaining amount of the excess contribution not previously claimed as a deduction [*I.R.C. § 170(d)(1)(A)*]. The carryover is available even if the donor does not itemize deductions in the year of contribution [*Treas. Reg. § 1.170A-10(a)(2)*].

A similar carryover exists for excess contributions to organizations qualifying for the 30 percent deduction limitation [*I.R.C. § 170(b)(1)(B)(ii)*]. Corporations are also allowed a similar five-year carryover [*see I.R.C. § 170(d)(2)(A)*].

Any carryover for charitable contributions must be reduced to the extent that it reduces the donor's taxable income as computed for purposes of determining net operating loss carrybacks and carryovers [*see I.R.C. § 172(b)(2)*], and increases a net operating loss carryover to a succeeding taxable year [*I.R.C. § 170(d)(1)(B)* (individuals), (2)(B) (corporations)].

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Tax LawFederal Income Tax ComputationDeductions for Nonbusiness ExpensesCharitable Contributions (IRC sec. 170)General OverviewTax LawFederal Income Tax ComputationDeductions for Nonbusiness ExpensesCharitable Contributions (IRC sec. 170)Allowance of DeductionTax LawFederal Income Tax ComputationDeductions for Nonbusiness ExpensesCharitable Contributions (IRC sec. 170)Burdens of ProofTax LawFederal Income Tax ComputationDeductions for Nonbusiness ExpensesCharitable Contributions (IRC sec. 170)Capital Gain & Ordinary Income PropertyTax LawFederal Income Tax ComputationDeductions for Nonbusiness ExpensesCharitable Contributions (IRC sec. 170)Carryovers



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CHAPTER 69 CHARITABLE DISPOSITIONS  
PART II. LEGAL BACKGROUND

*25-69 California Legal Forms--Transaction Guide § 69.16*

**§ 69.16 Federal Estate and Gift Tax Deductions**

**[1] In General**

Deductions from federal estate and gift taxes are allowed for dispositions to qualifying charities [*see I.R.C. §§ 2055 (estate tax), 2522 (gift tax)*]. Unlike the income tax deduction, there are no percentage limitations on the estate and gift tax charitable deductions. The gift tax charitable deduction is allowed for all qualifying gifts made during the calendar year [*see I.R.C. § 2522(a)*], while the estate tax deduction is available for all bequests, legacies, devises, or transfers to qualifying charities, up to the value of the gross estate [*see I.R.C. § 2055(a), (d)*]. However, if any federal or state death taxes are paid out of charitable bequests, the estate tax charitable deduction is reduced by the amount of those taxes [*I.R.C. § 2055(c); Treas. Reg. § 20.2055-3*].

**[2] Qualifying Organizations**

The lists of organizations that may receive contributions qualifying for the charitable deductions under the estate tax [*I.R.C. § 2055(a)*] and the gift tax [*I.R.C. § 2522(a)*] are generally coextensive. The list of organizations qualifying for the federal income tax deduction is not similarly coextensive, although most organizations that qualify for one deduction will also qualify for the other [*see I.R.C. § 170(b)(1)(A), (B)*; *see also § 69.15[2], [4]*]. Contributions to the following categories of organizations qualify for both the estate tax and gift tax deductions [*I.R.C. §§ 2055(a), 2522(a)*]:

- Units of federal, state, or local governments, for exclusively public purposes.
- Corporations organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, including the encouragement of art and the fostering of national or international amateur sports competition, but only if all of the following apply:
  - No parts of their activities involve the provision of athletic facilities or equipment;
  - They are not disqualified for tax exemption under *I.R.C. § 501(c)(3)* by reason of attempting to influence legislation;

- They do not participate or intervene in any campaign on behalf of (or in opposition to) an candidate for public office; and
- No part of the earnings of the contribution inures to the benefit of any private stockholder or individual.
- A trustee or trustees, or a fraternal society, order, or association operating under the lodge system, but only if all of the following apply:
  - The contributions or gifts are to be used exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals;
  - The trustee, trustees, society, order, or association would not be disqualified for tax exemption under *I.R.C. § 501(c)(3)* by reason of attempting to influence legislation; and
  - The trustee, trustees, society, order, or association does not participate or intervene in any campaign on behalf of (or in opposition to) an candidate for public office.
- Any veterans' organization incorporated by Act of Congress, or its local chapters or posts, but only if no part of the net earnings of the contribution inures to the benefit of any private shareholder or individual.

In addition, certain contributions of stock to employee stock option plans (ESOPs) are deductible for estate tax purposes if they are made by charitable remainder trusts [*I.R.C. § 2055(a)(5)*; *see I.R.C. § 664(g)*].

For gift tax purposes, a similar but somewhat more restrictive list of eligible recipients governs gifts by nonresident aliens [*I.R.C. § 2522(b)*].

Bequests to fraternal societies or orders that engage in social and fraternal as well as charitable purposes qualify for the federal estate tax charitable deduction only if the testator has limited use of the bequest to exclusively charitable purposes [ *First Nat. Bank of Omaha v. United States (8th Cir. [Neb.] 1982) 681 F.2d 534, 541-542, cert. denied, 459 U.S. 1104 (1983)* (no estate tax charitable deduction for bequest to chapter of Masonic order); *see § 69.480*].

Bequests to private nonprofit cemetery associations to maintain cemetery plots do not automatically qualify for the federal estate tax deduction [*see I.R.C. § 2055(a)(3)*], although they do qualify for the federal income tax charitable deduction [*see First Nat. Bank of Omaha v. United States (8th Cir. [Neb.] 1982) 681 F.2d 534, 540-541, cert. denied, 459 U.S. 1104 (1983)* (deduction denied when primary purposes was to maintain testator's family plot rather than to serve community interest)].

### **[3] Particular Types of Contributions**

Split-interest contributions (contributions whereby only part of the donor's interest in the property is received by charitable organizations), whether testamentary, inter vivos, or a combination of both, generally do not qualify for the estate and gift tax charitable deductions [*see I.R.C. §§ 2055(e)(2), 2522(c)(2)*]. Inter vivos gifts with a life estate or other retained interest in the donor generally do not qualify for the gift tax charitable deduction [*see I.R.C. § 2522(c)(2)*]. However, exceptions to the preceding rules are provided for contribution of a remainder interest in a personal residence or farm [*I.R.C. §§ 2055(e)(2), 2522(c)(2)*; *see I.R.C. § 170(f)(3)(B)(i)*], contribution of an undivided portion of the taxpayer's entire interest in property [*see I.R.C. § 170(f)(3)(B)(ii)*], qualified conservation contributions [*see I.R.C. § 170(f)(3)(B)(iii), (h)*], split-interest charitable trusts meeting specified requirements [*I.R.C. §§ 2055(e)(2)(A)*,

2522(c)(2)(A); see Ch. 74, *Split-Interest Charitable Trusts* ], guaranteed annuity interests, and interests providing for a guaranteed yearly distribution of a fixed percentage of the fair market value of the property ("unitrust" interests) [I.R.C. §§ 2055(e)(2)(B), 2522(c)(2)(B); *Treas. Reg.* § 25.2522(c)-3(c)(2)(v), (vi)]. In the case of a charitable contribution of a work of art, the work of art and its copyright are regarded as separate properties except when the recipient is a private foundation (other than a private operating foundation), and the donor's retention of the copyright therefore does not result in a split-interest gift [I.R.C. §§ 2055(e)(4), 2522(c)(3)].

No deduction will be allowed for a bequest of stock to a charity if, during the period of estate administration, a noncharitable beneficiary is to receive dividends from the stock [ *Rev. Rul.* 83-45, 1983-1 C.B. 233 ].

No deduction is allowable for charitable transfers subject to a condition precedent, unless the possibility that the charitable transfer will not become effective is so remote as to be negligible. A deduction is allowable if the estate or interest of the charity would be defeated by a condition subsequent, provided the possibility of occurrence of the condition appears to be negligible at the time of the gift (or, for estate tax purposes, at the time of the decedent's death) [*Treas. Reg.* §§ 20.2055-2(b), 25.2522(c)-3(b)].

The contribution to a qualified charity of a license to use a patent is not deductible when the donor retains the right to license the patent to others. The contribution of a patent subject to a conditional restriction also is not deductible, unless the likelihood of the reversion is so remote as to be negligible. The contribution of a patent subject to a license or transfer restriction is deductible, but the restriction reduces the value of the contribution [ *Rev. Rul.* 2003-28, 2003-11 I.R.B. 594 ].

The deduction may also be disallowed for a contribution to a new organization that has not yet given proper notice of intention to apply for recognition of tax-exempt status [see I.R.C. § 508(a), (d)(2)(B)], or, under certain circumstances, for a contribution to a private foundation on which a penalty tax has been imposed for violation of the restrictions on certain activities of such foundations, or which has a governing instrument that does not meet specified requirements [I.R.C. §§ 2055(e)(1), 2522(c)(1); see I.R.C. §§ 508(d), (e), 507(a), (c); see also I.R.C. § 4948(c)(4) (foreign foundations)].

For purposes of the estate tax charitable deduction, property that is included in a decedent's estate by virtue of a power of appointment [see I.R.C. § 2041] and that is received by a charitable donee is considered a bequest by the decedent [I.R.C. § 2055(c)].

#### **[4] Valuation of Gifts**

For purposes of the federal estate and gift tax charitable deductions, the value of the charitable gift is determined by the same methods used to value property in computing the taxable gifts or taxable estate.

For federal estate tax purposes, property is generally valued at its fair market value at the time of the decedent's death [I.R.C. § 2031; *Treas. Reg.* § 20.2031-1(b)]. The executor may elect as an alternate valuation date the date of distribution, sale, exchange, or other disposition of the property, or the date six months after the decedent's death if the property is not disposed of by that time [I.R.C. § 2032(a)]. For purposes of the estate tax charitable deduction, property valued under this alternate method is valued as of the date of the decedent's death, with adjustments for any difference in value, other than differences due merely to the lapse of time or the occurrence or nonoccurrence of a contingency, as of six months after the decedent's death or, in the case of property disposed of before that time, as of the date of disposition [I.R.C. § 2032(b)]. An estate cannot elect this alternate valuation method unless the election would decrease both the value of the gross estate and the amount of federal estate tax due [I.R.C. § 2032(c)]. Special rules govern valuation of farm and certain other real property [see I.R.C. § 2032A].

For federal gift tax purposes, property is valued at its fair market value on the date of the gift [I.R.C. § 2512(a); *Treas.*

*Reg. § 25.2512-1*. When property is transferred for less than adequate and full consideration in money or money's worth, the available deduction is the amount by which the value of the property exceeds the value of the consideration [*I.R.C. § 2512(b)*]. For purposes of the gift tax charitable deduction, the value of a partial interest in property is its value on the date of the gift. The fair market value of an annuity, life estate, term for years, remainder, reversion, or unitrust interest is its present value (as opposed to its value at the time of possession) [*Treas. Reg. § 25.2522(c)-3(d)*].

The Internal Revenue Service has developed extensive rules and valuation tables for the valuation of particular classes of property [*see Treas. Reg. §§ 20.2031-1-20.2031-10* (estate tax), *25.2512-1-25.2512-9* (gift tax)].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Tax Law Federal Estate & Gift Taxes Deductions Charitable Deductions (IRC secs. 2055, 2522, 2524) General Overview  
Tax Law Federal Estate & Gift Taxes Deductions Charitable Deductions (IRC secs. 2055, 2522, 2524) Disallowance of Deductions  
Tax Law Federal Estate & Gift Taxes Deductions Charitable Deductions (IRC secs. 2055, 2522, 2524) Transfers for Charitable, Public & Religious Uses



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*25-69 California Legal Forms--Transaction Guide § 69.17*

**§ 69.17 Estate Tax Exclusion for Gift of Qualified Conservation Easement**

**[1] Nature of Exclusion**

For decedents dying on or after January 1, 1998, an exclusion is available for a "qualified conservation easement" as defined in *I.R.C. § 2031(c)(8)(b)*. Basically, this exclusion allows a decedent, family member, executor, or trustee to grant to a qualified charitable organization [*see I.R.C. 170(h)(3)*] an easement in qualifying real property [*see I.R.C. 170(h)(2)*] restricting the use of that property to conservation purposes [*see I.R.C. 170(h)(4)(A)*], and exclude a portion of the value of that property from the decedent's gross estate for federal estate tax purposes [*I.R.C. § 2031(c)(1)*], while retaining ownership and use of the property to the extent not incompatible with the easement. The executor must elect the exclusion on the estate tax return on or before the due date (including extensions) for filing the return, and the exclusion, once made, is irrevocable [*I.R.C. § 2031(c)(1), (6)*].

The exclusion is complex and subject to numerous qualifications and conditions, which are discussed in greater detail below. Among the more important of these is that the easement include a prohibition on more than a de minimis use for a commercial recreational activity [*I.R.C. § 2031(c)(8)(b)*].

**[2] Limitations on Amount of Exclusion**

The exclusion is limited to the lesser of the following [*I.R.C. § 2031(c)(1); see I.R.C. § 2031(c)(2)*] ("applicable percentage"), (3) ("exclusion limitation")]:

- 40 percent of the value of the land, reduced by 2 percentage points for each percentage point (or fraction of a percentage point) by which the value of the qualified conservation easement is less than 30 percent of the value of the land (determined without regard to the value of the easement and reduced by the value of any retained development rights).
- The amount of the "exclusion limitation" available in the year of the decedent's death.

The "exclusion limitation" is determined in accordance with the following table [*I.R.C. § 2031(c)(3)*]:

In the estates of decedents dying during:	The exclusion limitation is:
---	------------------------------

1998	\$100,000
1999	\$200,000
2000	\$300,000
2001	\$400,000
2002 or thereafter	\$500,000

### [3] Ownership Requirements and Qualified Contributors

The land subject to the qualified conservation easement must have been owned by the decedent or a member of the decedent's family for three continuous years before the decedent's death [*I.R.C. § 2031(c)(8)(A)(ii)*], and the contribution must have been made by the decedent, the executor of the decedent's estate, the trustee of a trust that includes the land subject to the easement, or members of the decedent's family [*I.R.C. § 2031(c)(8)(C)*]. For these purposes, "member of the decedent's family" means one or more of the following [*I.R.C. § 2031(c)(8)(C)*; *see I.R.C. § 2032A(e)(2)*]:

- An ancestor, spouse, or lineal descendant of the decedent.
- A lineal descendant of the decedent's spouse or parent.
- A spouse of any lineal descendant of the decedent, the decedent's spouse, or the decedent's parent.

### [4] Location of Land

Effective for decedents dying after 2000, a qualified conservation easement may be claimed with respect to any land that is located in the United States or its possessions [*I.R.C. § 2031(c)(8)(A)(i)*]. For prior years, the land had to be located within 25 miles of a metropolitan area (as defined by the Office of Management and Budget) or a national park or wilderness area, or within 10 miles of an Urban National Forest (as designated by the Forest Service of the U.S. Department of Agriculture) [*I.R.C. § 2031(c)(8)(A)(i)*, before amendment by Pub Law 107-16].

### [5] Terms of Qualified Conservation Easement

The term "qualified conservation easement" basically means a "qualified conservation contribution" [*see I.R.C. § 170(h)(1)*] to a charitable organization [*see I.R.C. § 170(h)(3)*] (defining "qualified organization" as a governmental unit or charitable organization described in *I.R.C. § 170(b)(1)(A)(v), (vi), (c)(2)*, or certain private operating foundations described in *I.R.C. § 509*) of a perpetual easement exclusively for conservation purposes [*I.R.C. §§ 2031(c)(8)(B), 170(h)(1), (2)(C)*]. For purposes of the estate tax exclusion, "conservation purpose" means any of the following that will yield a significant public benefit [*I.R.C. §§ 170(h)(4)(A), 2031(c)(8)(B)*]:

- Preservation of land areas for outdoor recreation by, or the education of, the general public.
- Protection of a relatively natural habitat of fish, wildlife, or plants, or similar ecosystem. A contribution of property for this purpose is deductible even if the public's access to the property is restricted [*Treas. Reg. § 1.170A-14(d)(3)*].
- Preservation of open space (including farmland and forest land) for the scenic enjoyment of the public, or under a clearly delineated federal, state or local governmental conservation policy.

The requirement that the easement be used exclusively for conservation purposes is intended to limit deductible contributions to those transfers that require the donee to hold the easement exclusively for conservation purposes; that

is, they may not be transferable by the donee in exchange for money, other property, or services. A contribution of a qualified real property interest may be exclusively for conservation purposes only if it is protected in perpetuity [*I.R.C. § 170(h)(5)(A)*; see *Estate of Glass v. Commissioner (2005) 124 T.C. No. 16* (charitable contributions of conservation easements on undeveloped lakefront property to nonprofit nature conservancy were qualified conservation contributions; donee was long-standing nature conservancy, holding of conservation easements was directly related to its tax-exempt purposes, and donee agreed to enforce preservation-related restrictions included in easements in perpetuity)].

In addition, for purposes of the federal estate tax exclusion, the easement must include a prohibition on more than a de minimis use for commercial recreation activity [*I.R.C. §§ 2031(c)(8)(B)*].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Real Property Law Limited Use Rights Easements Conservation Easements Tax Law Federal Estate & Gift Taxes Definition of Gross Estate



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*25-69 California Legal Forms--Transaction Guide § 69.18*

**§ 69.18 California Income Tax Deduction**

The Internal Revenue Code sections applicable to deductions apply to deductions under the California Personal Income Tax Law [*Rev. & Tax. Code § 17201*; see *I.R.C. §§ 161 et seq.* (itemized deductions for individuals and corporations), 211 et seq. (additional itemized deductions for individuals), 261 et seq. (items not deductible); see also *Rev. & Tax. Code § 17001 et seq.* (Personal Income Tax Law)]. The Internal Revenue Code provisions apply as enacted on January 1 of a specified year [see *Rev. & Tax. Code § 17024.5(a)(1)*]. For example, for taxable years beginning on or after January 1, 2005, the California deduction is determined in accordance with the terms of the Internal Revenue Code as enacted on January 1, 2005 [*Rev. & Tax. Code § 17024.5(a)(1)(N)*]. The legislature changes the conformity date on a regular basis by advancing the year. In theory this advancement should occur on an annual basis; however, past history has shown that it is not automatic. For example, from 1993 to 1996 and 2001 to 2004 the Legislature was unable to agree on blanket incorporation of federal changes and instead made piecemeal amendments to the Revenue and Taxation Code. To determine the conformity date for a given year, the attorney should refer to the latest amended version of *Rev. & Tax. Code § 17024.5(a)(1)*.

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Tax Law State & Local Taxes Income Tax Individuals, Estates & Trusts Deductions



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*25-69 California Legal Forms--Transaction Guide §§ 69.19-69.99*

**[Reserved]**

§§ 69.19[Reserved]



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PART III. TRANSACTION GUIDE  
A. Client Interview--Facts and Documents

*25-69 California Legal Forms--Transaction Guide § 69.100*

**§ 69.100 Facts**

1. Information about donor:

a. Name, address, and telephone number.

b. Whether donor is:

(1) An individual; or

**NOTE:**

Charitable dispositions are often a preconceived part of an individual's overall estate plan. Even when they are not, the attorney should also consider how a substantial charitable gift will affect the estate plan and vice versa. For general information on developing an estate plan, and forms to elicit the necessary information from the client, see Ch. 60, *Estate Planning*.

(2) A corporation.

c. Marital status.

d. General background financial information for tax purposes:

(1) Approximate gross annual income.

(2) Approximate taxable income.

(3) If client is an individual, approximate value of total estate of individual and individual's spouse.

(4) Whether donor anticipates filing federal gift tax return in year of gift.

(5) Donor's taxable year.

(6) Accounting method, if donor is a corporation.

2. Information about property being given to charity:

a. Type of property (e.g., money, securities, works of art).

b. Amount of cash gift.

c. Value of noncash gift:

(1) Current fair market value.

(2) Cost at which property was originally acquired.

d. How property was originally acquired:

(1) Manner in which acquired (e.g., purchase, gift, inheritance).

(2) Date acquired, or, if donor created property, approximate date of completion.

e. How title to property is currently held:

(1) By client.

(2) By client and spouse as joint tenants.

(3) By client and any other entities or individuals, either jointly or in common.

(4) Other.

f. If client is married, whether property is separate or community property.

g. Whether property is subject to any mortgage, note, lien, or other encumbrance.

3. Form and extent of charitable disposition:

a. Type of gift, either:

(1) Inter vivos; or

(2) Testamentary.

b. Form of gift, either:

(1) Outright disposition;

(2) Split-interest trust with both charitable and noncharitable beneficiaries [*see* Ch. 74, *Split-Interest Charitable Trusts* ]; or

(3) Other.

c. Interest being disposed of to charity:

(1) Client's entire interest in property.

(2) Less than client's entire interest.

(a) Nature of interest being disposed of.

(b) Disposition of remainder of client's interest (sale, retention by client, or prior or concurrent gift to third party).

d. Whether disposition is to be subject to any conditions precedent or subsequent.

4. Purpose of disposition:

a. Charitable purpose:

(1) General; or

(2) Specific (described with sufficient detail to determine precise purpose), such as:

(a) Use for particular purpose or activity.

(b) Benefit of specific entity, as opposed to specific charitable purpose.

b. Tax purposes, if any:

(1) Income tax deduction.

(2) Estate tax deduction.

c. Other purpose.

5. Information about charity.

a. Name, address, and telephone number of charity.

**NOTE:**

In the case of an organization with many individual branches or subdivisions, such as fraternal lodges and many religious institutions, it is important to determine the particular branch that will be the recipient.

b. Individual to contact regarding donation, if known by client.

c. General activities of organization.

**NOTE:**

This information will help the attorney determine at the outset whether a charitable disposition by a client is practical from a tax standpoint. Methods for determining whether specific organizations qualify for the charitable deduction are discussed in § 69.120.

- (1) Organization's charitable purpose.
- (2) Whether property being disposed of will be used to further that purpose.
- (3) Whether organization engages in lobbying or other political activities.
- (4) Whether organization has tax-exempt status, if known to donor.
- (5) Whether organization is publicly supported.

6. If charitable disposition is to be a testamentary gift, names of alternate beneficiaries in the event primary beneficiary does not take gift, either:

- a. Other charities; or
- b. Noncharitable beneficiaries such as family members or relatives of client.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawPersonal GiftsGeneral OverviewEstate, Gift & Trust LawTrustsCharitable TrustsEstate, Gift & Trust LawWillsBequests & Devises



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DIVISION IV: WILLS AND TRUSTS  
CHAPTER 69 CHARITABLE DISPOSITIONS  
PART III. TRANSACTION GUIDE  
A. Client Interview--Facts and Documents

*25-69 California Legal Forms--Transaction Guide § 69.101*

**§ 69.101 Documents**

1. Existing documents relating to dealings between donor and charity concerning gift, including:
  - a. Any written agreement between donor and charity.
  - b. If charity solicited gift in writing, copy of instrument soliciting gift.
2. Documents relating to ownership and encumbrances on gift property.
  - a. Deed, if real property is involved.
  - b. Documents evidencing title to personal property, if any, such as:
    - (1) Certificate of title or vehicle registration.
    - (2) Share certificates or equivalent instruments evidencing ownership of securities.
  - c. Documents evidencing any mortgages, liens, or other encumbrances on property.
3. Documents relating to value of gift property.
  - a. Copy of signed professional appraisal, if any.
  - b. Certificate of authenticity or other equivalent document, if any.
  - c. Receipt or cancelled check, if property was acquired by purchase.

d. If property was acquired by gift, copy of donor's federal gift tax return (IRS Form 709), if any.

e. If property was acquired by bequest or inheritance, copy of federal estate tax return (IRS Form 706), if any.

4. Copy of donor's most recent federal income tax return.

5. Copy of donor's prior federal gift tax returns, if any.

6. For a testamentary gift, copy of donor's existing Will.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawPersonal GiftsGeneral OverviewEstate, Gift & Trust LawTrustsCharitable TrustsEstate, Gift & Trust LawWillsBequests & Devises



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*25-69 California Legal Forms--Transaction Guide §§ 69.102-69.119*

**[Reserved]**

§§ 69.102[Reserved]



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B. Preliminary Determinations

*25-69 California Legal Forms--Transaction Guide § 69.120*

**§ 69.120 Availability of Charitable Deduction**

1. For an inter vivos gift, determine whether intended donee is a charitable organization that will qualify gift for federal income tax deduction [*see I.R.C. § 170(c)*; *see also* discussion in § 69.15[2]].

a. If intended donee is a unit or subdivision of federal, state, or local government, and gift is made for exclusively public purposes [*I.R.C. § 170(c)(1)*], IRS will allow deduction regardless of whether or not it has issued ruling confirming particular entity's tax status [*see Cumulative List of Organizations Described in Section 170(c) of the Internal Revenue Code of 1954*, IRS Pub. No. 78, Preface, Part I].

b. If intended donee is a nongovernmental organization falling within any of the general categories listed in § 69.15[2], determine whether IRS has issued ruling or determination letter confirming that contributions to organization are deductible.

**NOTE:**

The IRS will not recognize the deductibility of a contribution to a nongovernmental entity unless the organization has received such a letter [*see Cumulative List of Organizations Described in Section 170(c) of the Internal Revenue Code of 1954*, IRS Pub. No. 78, Preface, Part I].

(1) Consult *Cumulative List of Organizations Described in Section 170(c) of the Internal Revenue Code of 1954*, IRS Publication No. 78.

**NOTE:**

IRS Publication No. 78 lists organizations that have received IRS rulings confirming that contributions to them qualify for the income tax charitable deduction. The most recent

update of Publication 78 can be accessed online via [www.irs.gov/charities](http://www.irs.gov/charities). The list is extensive but not all-inclusive, and includes advance rulings.

The attorney may generally rely on a listing in IRS Publication No. 78 as confirmation that a contribution is deductible [ *Rev. Proc. 82-39, 1982-2 C.B. 759* ]. However, changes and deletions of status are not listed in the quarterly cumulative supplements. In this situation, when the IRS revokes a ruling or determination letter, contributions to the organization by persons unaware of the organization's change in status will normally be deductible if made on or before the date when notice is published in the Internal Revenue Service Bulletin. However, the deduction may be disallowed prior to that time if the individual had actual knowledge of the revocation, was aware that it was imminent, or was in part responsible for or aware of the activities giving rise to the revocation [ *Rev. Proc. 82-39, 1982-2 C.B. 759* ]. If the attorney is unfamiliar with the charity or has any reason to suspect its tax status, it may be prudent to verify its current status with the IRS.

(2) If organization is not listed in IRS Publication No. 78, obtain copy of determination letter from organization or Internal Revenue Service.

**NOTE:**

If the organization is not listed in IRS Publication No. 78, a copy of the determination letter ordinarily will serve as evidence of deductibility [ *Cumulative List of Organizations Described in Section 170(c) of the Internal Revenue Code of 1954* , IRS Pub. No. 78, Preface, Part I]. If the letter is obtained from the organization, the attorney might consider verifying its current status with the IRS if there are any doubts [ *see Rev. Proc. 72-3, §§ 13* (effect of revocation)].

Contributions to many kinds of tax-exempt organizations do not qualify for the charitable deduction. The attorney should make certain that the determination letter classifies the organization into one of the qualifying categories.

For general information concerning an organization's tax status, and information on obtaining copies of determination letters, contact the Exempt Organizations Division of the appropriate IRS District Office. The IRS District Office in San Francisco has indicated that it takes approximately one month to obtain a copy of a determination letter.

2. Determine whether contributions to organization are subject to the 50 percent or 30 percent deduction limitation [ *I.R.C. § 170(b)(1)(A), (B)*; *see* discussion in § 69.15[4]].

**NOTE:**

The listings in IRS Publication No. 78 are coded to allow determination of the general class of organization and whether it qualifies for the 50-percent or 30-percent limitation. An attorney may rely on a listing in IRS Publication No. 78 as advance assurance of public charity status to the same extent that the listing may be relied upon as assurance that the contribution will be deductible [ *Rev. Proc. 82-39, 1982-2 C.B. 759, 760* ; *see* the NOTE in § 69.120, P 1(b)(1)].

a. General categories qualifying for 50 percent deduction limitation ("50-percent organizations"):

(1) Churches.

(2) Qualifying educational institutions, including nonprofit day care centers for children [see *I.R.C.* § 501(k)].

(3) Hospitals and qualifying medical research organizations.

(4) Qualifying organizations for the benefit of state and municipal colleges.

(5) Units of government.

(6) Public charities.

(7) Private operating foundations [see discussion in § 69.14[5]].

(8) Certain other private foundations meeting specified requirements [see *I.R.C.* § 170(b)(1)(A)(vii), (viii), (E); see also discussion in § 69.15[4]].

b. General categories qualifying for 30-percent deduction limitation ("30-percent organizations"):

(1) Veterans organizations.

(2) Fraternal societies.

(3) Nonprofit cemetery corporations.

(4) Private foundations not qualifying for 50-percent limitation.

3. Determine whether prospective donee is in any of following categories for purposes of federal estate tax [see *I.R.C.* § 2055(a)] or federal gift tax [see *I.R.C.* § 2522(a)] charitable deductions [see discussion in § 69.16[2]]:

a. Unit of federal, state, or local government, if contribution is made for exclusively public purpose.

b. Corporation organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, including the encouragement of art and the fostering of national or international amateur sports competition, but only if all of the following requirements are met:

(1) No part of its activities involve the provision of athletic facilities or equipment.

(2) It is not disqualified for tax exemption under *I.R.C.* § 501(c)(3) by reason of attempting to influence legislation.

(3) It does not participate or intervene in any campaign on behalf of (or in opposition to) an candidate for public office.

(4) No part of the earnings of the contribution inures to the benefit of any private stockholder or individual.

c. A trustee or trustees, or a fraternal society, order, or association operating under the lodge system, but only if all of the following requirements are met:

(1) The contributions or gifts are to be used exclusively for religious, charitable,

scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals.

(2) The trustee(s), society, order, or association would not be disqualified for tax exemption under *I.R.C. § 501(c)(3)* by reason of attempting to influence legislation.

(3) The trustee(s), society, order, or association does not participate or intervene in any campaign on behalf of (or in opposition to) an candidate for public office.

d. Veterans' organization incorporated by Act of Congress, or its local chapters or posts, but only if no part of the net earnings of the contribution inures to the benefit of any private shareholder or individual.

e. Employee stock option plan (ESOP), but only if contribution is to be made by charitable remainder trust and estate tax deduction only is sought [*I.R.C. § 2055(a)(5)*; see *I.R.C. § 664(g)*].

4. Determine whether prospective donee is qualified charitable organization under California Personal Income Tax Law [*Rev. & Tax. Code § 17201*; see *Rev. & Tax. Code §§ 17001 et seq.* (Personal Income Tax Law); see also § 69.18].

**NOTE:**

An organization that qualifies as a charitable organization under the Internal Revenue Code will also qualify as a charitable organization under the California Personal Income Tax Law. The California charitable deduction is determined in accordance with the provisions of the Internal Revenue Code [*Rev. & Tax. Code § 17201*] as enacted on January 1 of a specified year [see *Rev. & Tax. Code § 17024.5(a)(1)*]. For discussion, see § 69.18.

5. Verify that deduction is available for type of property and property interest contributed [see §§ 69.15[3], 69.16[3]].

**NOTE:**

The attorney should be especially careful to verify the availability of the deduction when the charitable organization will receive less than the donor's entire interest in the property, as only specified categories of these transfers are eligible for a charitable deduction. For split-interest charitable trusts, see Ch. 74, *Split-Interest Charitable Trusts* .

The attorney also must be on guard against inadvertently creating a split interest. For example, no deduction will be allowed for a bequest of stock to a charity if, during the period of estate administration, a noncharitable beneficiary is to receive dividends from the stock [ *Rev. Rul. 83-45, 1983-1 C.B. 233* ].

6. Confirm that organization does not conduct lobbying activities, on matters of direct personal interest to donor's trade or business, that would have been disallowed as a business expense deduction for donor [see *I.R.C. § 162(e)* (disallowance of business expense deduction for specified lobbying activities)] if donor had conducted them directly [*I.R.C. § 170(f)(9)*].

**NOTE:**

If the donor's principal purpose in making the contribution is to obtain a charitable deduction by contributing to an organization that engages in lobbying activities for which the donor could not claim a business expense deduction if the donor had conducted the activities directly, no charitable deduction will be allowed [*I.R.C. § 170(f)(9)*; see § 69.15[3]].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Tax Law Federal Estate & Gift Taxes Deductions Charitable Deductions (IRC secs. 2055, 2522, 2524) General  
Overview Tax Law Federal Income Tax Computation Deductions for Nonbusiness Expenses Charitable Contributions  
(IRC sec. 170) General Overview



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*25-69 California Legal Forms--Transaction Guide § 69.121*

**§ 69.121 Valuation of Property**

1. Determine applicable valuation date.

a. For income and gift tax purposes, property is valued at fair market value on date of gift [*see I.R.C. § 170(e)(1)(A)* (income tax); *I.R.C. § 2512* (gift tax); *Treas. Reg. §§ 1.170A-1(c)(1)* (income tax), *25.2512-1* (gift tax); *Rev. & Tax. Code § 17201*].

b. For federal estate tax purposes, property is valued at date of donor's death or at optional valuation date not more than six months after death [*I.R.C. §§ 2031-2032A*; *Treas. Reg. § 20.2031-1(b)*; *see § 69.16[4]*].

2. Determine fair market value of property.

**NOTE:**

The Internal Revenue Service has developed extensive rules and valuation tables applicable to particular interests in property [*see Treas. Reg. §§ 20.2031-1-20.2031-10* (estate tax), *25.2512-1-25.2512-9* (gift tax)].

a. If claimed value of contributed property exceeds \$5,000 [*I.R.C. § 170(f)(11)(A)-(E)*]; obtain "qualified appraisal" [*Treas. Reg. § 1.170A-13(c)(2)(i)(A)*], which must:

**NOTE:**

An appraisal need not be provided for a donation of cash, property that is stock in trade of the taxpayer or other property of a kind that would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year, property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business [*see I.R.C. § 1221(a)(1)*], publicly traded securities, or any qualified

vehicle for which a qualified contemporaneous written acknowledgment [*see I.R.C. § 170(f)(12)(A)*] (general acknowledgment requirement), (B) (contents of acknowledgment) is provided [*I.R.C. § 170(f)(11)(A)(ii)*]. For purposes of determining the \$5,000 threshold amount, all similar items of property donated to one or more donees are treated as one property [*I.R.C. § 170(f)(11)(F)*].

(1) Be made no earlier than 60 days before date of contribution of appraised property [*Treas. Reg. § 1.170A-13(c)(3)(i)(A)*];

(2) Be received by donor before due date (including extensions) of return on which a deduction is first claimed for donation [*Treas. Reg. § 1.170A-13(c)(3)(iv)(B)*];

(3) Be prepared, signed, and dated by a "qualified appraiser" [*Treas. Reg. § 1.170A-13(c)(3)(i)(B)*].

**NOTE:**

A "qualified appraiser" must (1) hold himself or herself out to the public as an appraiser or perform appraisals on a regular basis [*Treas. Reg. § 1.170A-13(c)(5)(i)(A)*], (2) be qualified to make appraisals of the type of property being valued [*Treas. Reg. § 1.170A-13(c)(5)(i)(B)*], (3) not be the donor, donee, or taxpayer [*Treas. Reg. § 1.170A-13(c)(5)(i)(C), (iv)*], and (4) understand that an intentionally false or fraudulent overstatement of the value of the property may subject the appraiser to civil penalties [*Treas. Reg. § 1.170A-13(c)(5)(i)(D)*].

(4) Include all of following information:

(a) Description of property in sufficient detail for person who is not generally familiar with type of property to ascertain that property appraised is property that was (or will be) contributed [*Treas. Reg. § 1.170A-13(c)(3)(ii)(A)*].

(b) If property contributed is tangible, its physical condition [*Treas. Reg. § 1.170A-13(c)(3)(ii)(B)*].

(c) Date (or expected date) of contribution [*Treas. Reg. § 1.170A-13(c)(3)(ii)(C)*].

(d) Terms of any agreement or understanding by or on behalf of donor or donee relating to use, sale, or other disposition of property [*Treas. Reg. § 1.170A-13(c)(3)(ii)(D)*].

(e) Name, address, and (if required under *I.R.C. § 6109*) taxpayer identification number of qualified appraiser [*Treas. Reg. § 1.170A-13(c)(3)(ii)(E)*].

(f) Qualifications of appraiser, including background, experience, education, and membership (if any) in professional appraisal associations [*Treas. Reg. § 1.170A-13(c)(3)(ii)(F)*].

(g) Statement that appraisal was prepared for income tax purposes [*Treas. Reg. § 1.170A-13(c)(3)(ii)(G)*].

(h) Date (or dates) on which property was appraised [*Treas. Reg. § 1.170A-13(c)(3)(ii)(H)*].

(i) Appraised fair market value of property on date (or expected date) of contribution [*Treas. Reg. § 1.170A-13(c)(3)(ii)(I)*; *see Treas. Reg. § 1.170A-1(c)(2)* (fair market value defined)].

(j) Method of valuation used to determine fair market value [*Treas. Reg. § 1.170A-13(c)(3)(ii)(J)*].

(k) Specific basis for valuation, such as specific comparable sales or statistical sampling [*Treas. Reg. § 1.170A-13(c)(3)(ii)(K)*].

(5) Attach copy of appraisal to donor's return [*I.R.C. § 170(f)(11)(C), (D)*].

b. If claimed value of contributed property does not exceed \$5,000, obtain and keep either of following:

(1) Receipt from donee showing [*Treas. Reg. § 1.170A-13(b)(1)*]:

(a) Name of donee;

(b) Date and location of contribution; and

(c) Description of property in detail reasonably sufficient under circumstances; or

**NOTE:**

A letter or other written communication from the donee acknowledging receipt of the contribution, showing the date of the contribution, and containing the required description of the property contributed will qualify as a receipt for this purpose. Although the fair market value of the property is one of the circumstances to be taken into account in determining the amount of detail to be included on the receipt, that value need not be stated on the receipt [*Treas. Reg. § 1.170A-13(b)(1)(iii)*].

(2) Reliable written record showing following [*Treas. Reg. § 1.170A-13(b)(1), (2)*]:

**NOTE:**

A receipt is not required if it is impractical to obtain a receipt (e.g., if the property is deposited at a charity's unattended drop site) [*Treas. Reg. § 1.170A-13(b)(1)(iii)*].

(a) Name and address of donee organization;

(b) Date and location of contribution;

(c) Description of property in detail reasonably sufficient under circumstances;

(d) Fair market value of property at time of contribution, method used in determining fair market value, and, if valuation was determined by appraisal, copy of signed report of appraiser; and

(e) In case of capital gain property [*see I.R.C. § 170(e)*] only: cost or other basis of property, reduction in amount of contribution taken into account by reason of *I.R.C. § 170(e)(1)*, and manner in which that reduction was determined.

(3) If amount of deduction being claimed exceeds \$500, include description of donated property with donor's return [*I.R.C. § 170(f)(11)(B)*].

c. Value of remainder interest in pooled income fund, charitable remainder annuity trust, or charitable unitrust is present value less value of income interest [*Treas. Reg. §§ 1.170A-7(c), 1.642(c)-6, 1.664-2(c), 1.664-4; see Ch. 74, Split-Interest Charitable Trusts*].

d. For federal income tax purposes, value of remainder interest in real property not in trust is present value, taking into account depreciation and depletion [*Treas. Reg. §§ 1.170A-7(c), 1.170A-12*].

e. Other future interests are valued at fair market value (present value) on date of contribution [*Treas. Reg. §§ 1.170A-7(c), 20.2031-10, 25.2522(c)-3(d)*].

3. For a testamentary gift, consider likelihood that value of property will increase or decrease between time that will is prepared and actual date of testator's death.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Tax Law Federal Estate & Gift Taxes Deductions Charitable Deductions (IRC secs. 2055, 2522, 2524) General Overview  
Tax Law Federal Income Tax Computation Deductions for Nonbusiness Expenses Charitable Contributions (IRC sec. 170) General Overview  
Tax Law Federal Income Tax Computation Valuation General Overview



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*25-69 California Legal Forms--Transaction Guide § 69.122*

**§ 69.122 Estimate of Available Federal Income Tax Deduction**

**NOTE:**

For additional information on computing the federal income tax deduction for charitable contributions, see § 69.180.

1. Determine donor's basis in property for federal income tax purposes [*see I.R.C. § 1011*].
  - a. If property was acquired by purchase, basis is donor's cost [*I.R.C. § 1012*].
  - b. If property is inventory, basis is most recent inventory value [*I.R.C. § 1013*].
  - c. If property was acquired by bequest or inheritance, basis is fair market value at date of decedent's death [*I.R.C. § 1014*; for decedents dying after 2009, a modified carryover basis rule generally applies, so a step-up basis does not apply (*I.R.C. § 1022*); *see Ch. 60, Estate Planning*, for a more detailed discussion].
  - d. If property was acquired by gift, basis is original donor's basis [*I.R.C. § 1015*; *see I.R.C. § 1041* (transfers of property between spouses)].

**NOTE:**

If the gift was made after September 2, 1958, the basis is increased by the amount of any gift tax paid with respect to the gift, but not above the fair market value of property on the date of the gift [*I.R.C. § 1015(d)(1)(A)*].

If the gift was a gift between spouses, the donee's basis is the adjusted basis of the donor, determined without regard to *I.R.C. § 1015* [*I.R.C. §§ 1015(e), 1041(b)(2)*].

e. If property was acquired by transfer between spouses or incident to divorce, property is treated as if donee acquired it by gift, and donee's basis is adjusted basis of donor [I.R.C. § 1041(b)].

**NOTE:**

For purposes of the above rule, a transfer is "incident to divorce" if it occurs within one year after the date on which the marriage ceases or is related to the cessation of the marriage [I.R.C. § 1041(c)].

f. If property is subject to depreciation or depletion, refer to donor's most recent federal income tax return to determine adjusted basis at end of last taxable year, and reduce by additional depreciation or depletion allowable in current year to date of contribution [I.R.C. §§ 167, 611-613A].

g. If property is being sold to charity at less than its fair market value (a "bargain sale"), basis for computing charitable deduction is amount bearing same ratio to adjusted basis as amount realized from sale bears to fair market value of property [I.R.C. § 1011(b); see *Treas. Reg. § 1.1011-2*].

2. Determine character of asset for purposes of federal income tax charitable deduction, either:

a. Ordinary income property;

**NOTE:**

"Ordinary income property" is property any portion of the gain on which would not have been long-term capital gain if the donor had sold the property at its fair market value at the time of contribution [I.R.C. § 170(e); *Treas. Reg. § 1.170A-4(b)(1)*]. Examples include inventory [*but see* discussion of special exception for certain contributions of inventory, *below*], a work of art or manuscript created by the donor, letters or memorandums prepared by or for the donor, or a capital asset held for one year or less [*Treas. Reg. § 1.170A-4(b)(1)*; see I.R.C. § 1222(a)(1)].

b. Long-term capital gain property;

**NOTE:**

"Long-term capital gain property" (referred to in the regulations as "Section 170(e) capital gain property" [*Treas. Reg. § 1.170A-4(b)(2)*]) is property on which the donor would have realized long-term capital gain if the property had been sold at its fair market value at the time of the contribution; in other words, gain from the sale of a capital asset held for more than one year [*Treas. Reg. § 1.170A-4(b)(2)*; see I.R.C. §§ 1221, 1222(3)].

c. Inventory of corporation, or property used in its trade or business, to be used by donee solely for care of the ill, the needy, or infants [I.R.C. § 170(e)(3)(A), see I.R.C. § 1221(a)(1), (a)(2)]; or

**NOTE:**

Special favorable rules apply to qualified contributions by corporations [see I.R.C. § 170(e)(3), (4); see also P 3(c), *below*; and § 69.321].

d. Scientific equipment manufactured and contributed by corporation to institution of higher education for use in experimentation or research [see I.R.C. § 170(e)(4)].

3. Determine whether fair market value must be reduced to take into account appreciation in value or other factors.

a. Reduce fair market value of ordinary income property [see P 2(a), *above*] by amount that would have

been recognized as gain (other than long-term capital gain) if property had been sold at its fair market value at time of contribution [*I.R.C. § 170(e)(1)(A)*; *Treas. Reg. § 1.170A-4(a)(1)*].

**NOTE:**

The effect of this requirement is to limit the charitable deduction to the donor's basis in the property. Some of the practical effects of this limitation are noted in § 69.15[5].

b. Treatment of long-term capital gain property [*see* P 2(b), *above*].

(1) No reduction in fair market value of long-term capital gain property is ordinarily required.

(2) Reduce fair market value of long-term capital gain property by full amount that would have been long-term capital gain had property been sold at fair market value [*I.R.C. § 170(e)(1)(B)*] if:

(a) Property is contributed to private foundation that does not qualify for 50 percent deduction limitation, unless property consists of securities [*I.R.C. § 170(e)(5)*]:

**NOTE:**

If the following two requirements are met, contributions of up to ten percent of a corporation's stock are deductible at fair market value [*I.R.C. § 170(e)(5)*].

(i) That are capital gain property; and

(ii) For which market quotations are readily available on established securities market.

(b) Property is tangible personal property that is put to use unrelated to purpose or function constituting basis for charity's tax-exempt status [*Treas. Reg. § 1.170A-4(b)(3)*];

(c) Any patent, copyright (other than as described in *I.R.C. § 1221(a)(3)* or *§ 1231(b)(1)(C)*), trademark, trade name, trade secret, know-how, software (other than as described in *I.R.C. § 197(e)(3)(A)(i)*), or similar property, or applications or registrations of this property; or

(d) Property is contributed to 50-percent organization and donor elects to have property treated under rules governing appreciated property in lieu of 30 percent deduction limit on capital gain property [*I.R.C. § 170(b)(1)(C)(iii)*, *(e)(1)*; *see also* discussion in § 69.15[1]].

**NOTE:**

If the property is given to a 50-percent organization, an individual donor may elect either to have the 30-percent limit apply to all contributions of capital gain property or to have the reduction rule stated in P 3(b)(2), above, apply in lieu of the 30-percent limit [*I.R.C. § 170(b)(1)(C)(iii)*; *Treas. Reg. § 1.170A-8(d)(2)*]. This election gives the donor a choice between deducting the full fair market value of the property (less any portion that would not have been long-term capital gain) up to 30 percent of the donor's contribution base, or instead deducting an amount less than fair market value (basis plus 60 percent of long-term capital gain) up to 50 percent of the contribution base. Normally, it is more advantageous to elect the 30-percent limit rather than the reduction rule. Since any excess over 30 percent qualifies for a 5-year carryover [*I.R.C. § 170(b)(1)(C)(ii)*], a donor who elects the 30-percent limit will ultimately be able to claim a deduction for the full value of

the property in most cases. However, if it is important for the donor to deduct the maximum possible dollar amount in the year of the gift, and the basis of the property plus 60 percent of any appreciation in value significantly exceeds 30 percent of the taxpayer's contribution base, election of the reduction rule will permit a greater deduction in the year of the gift.

The above election is available only for contributions to 50-percent organizations [*see I.R.C. § 170(b)(1)(C)*]. No election is available for contributions to 30-percent organizations, which are automatically subject to the reduction rule as well as the 30 percent limit [*see I.R.C. § 170(b)(1)(C)(i), (b)(1)(D), (e)(1)(B)(i)*]. Contributions of tangible personal property that is put to a use unrelated to the purpose or function constituting the basis for the charity's tax-exempt status are also automatically subject to the reduction rule, regardless of whether the charity is a 50-percent or 30-percent organization [*I.R.C. § 170(b)(1)(C)(i), (e)(1)(B)(ii)*].

c. If donor is a corporation and property is either inventory to be used solely for the care of the ill, the needy, or infants [*see Paragraph 2(c), above*] or qualified scientific property donated to an institution of higher learning [*see Paragraph 2(d), above*], reduction is only one half (instead of entire amount) of any gain that is not long-term capital gain, plus any amount by which charitable deduction exceeds twice the basis of property [*I.R.C. § 170(e)(3)(B), (4)(A); Treas. Reg. § 1.170A-4A*].

**NOTE:**

In order to qualify for this deduction, the charity must adhere to specific restrictions on use of the gift, and the donor must receive a written representation from the donee that the use will be in accordance with these restrictions [*I.R.C. § 170(e)(3)(A)(iii), (4)(B)(vii); see § 69.321 and Comment*].

4. Using donor's most recent federal income tax return, determine whether donor has an existing charitable contributions carryover or net operating loss carryover [*see discussion in § 69.15[7]*].

5. Estimate amount of federal income tax deduction and resultant tax savings [*see § 69.180*].

6. If donor is a corporation, determine most advantageous time to make gift and claim deduction [*see I.R.C. § 170(a)(2)*].

**NOTE:**

A charitable deduction ordinarily must be taken in the taxable year in which it is actually made, regardless of the corporation's accounting method. Corporations on the accrual basis may, however, elect to treat a contribution as made in the year in which it is authorized by the board of directors, if it is paid on or before the fifteenth day of the third month of the following year [*I.R.C. § 170(a)(2)*].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Tax Law Federal Estate & Gift Taxes Basis of Property Acquired From Decedents (IRC sec. 1014) General Overview Tax Law Federal Income Tax Computation Deductions for Nonbusiness Expenses Charitable Contributions (IRC sec. 170) General Overview Tax Law Federal Income Tax Computation Valuation General Overview



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*25-69 California Legal Forms--Transaction Guide § 69.123*

**§ 69.123 Other Tax Computations**

1. For inter vivos contributions, compute estimated California income tax deduction.

**NOTE:**

The California deduction is determined in accordance with the provisions of the Internal Revenue Code [*Rev. & Tax. Code § 17201*] as enacted on January 1 of a specified year [*see Rev. & Tax. Code § 17024.5(a)(1)*]. For discussion, see § 69.18.

2. For inter vivos contributions, verify that contribution will qualify for federal gift tax charitable deduction [*see I.R.C. § 2522*].

**NOTE:**

Contributions qualifying for the federal income tax charitable deduction usually will also qualify for the federal gift tax deduction; however, there are exceptions. If tax planning is a major factor, it may be necessary to select a different charitable beneficiary if the primary beneficiary does not qualify. However, if the total value of all of the donor's gifts (both charitable and noncharitable) during the calendar year does not exceed the annual gift tax exclusion amount [*see I.R.C. § 2503(b)*]; for discussion of the annual exclusion and the applicable exclusion amounts, which are adjusted annually for inflation, *see Ch. 60A, Gifts, § 60A.32[4]*] or double that amount in case of split gifts by husband and wife [*see I.R.C. § 2513(a)*] (gift-splitting), it does not matter whether the charitable dispositions qualify for the charitable deduction, since they will pass free under the annual exclusion in any event.

For a guide to computing federal gift tax liability in general, see *Ch. 60A, Gifts, § 60A.130*.

- a. Verify that property qualifies for deduction [*see* § 69.16[2], [3]].
- b. Determine fair market value of property on date of gift [*see* § 69.121].
- c. Determine amount of available deduction.
  - (1) Deduction is ordinarily available for full fair market value of property [*I.R.C.* § 2522(a); *Treas. Reg.* § 25.2522(a)-1(a)].
  - (2) When property is transferred for less than adequate and full consideration in money or money's worth, deduction is amount by which value of property exceeds value of gift [*I.R.C.* § 2512(b)].

3. For testamentary dispositions to charity, verify that transfer will qualify for federal estate tax deduction [*see* § 69.16[2], [3]].

**NOTE:**

The utility of charitable dispositions (both inter vivos and testamentary) as an estate planning device depends on a number of factors, such as the size of the donor's total estate, the disposition of the portion of the estate not given to charity, and the probable estate and gift tax liability of both the donor and the donor's spouse. These matters are discussed in Ch. 60, *Estate Planning* .

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Tax LawFederal Estate & Gift TaxesDeductionsCharitable Deductions (IRC secs. 2055, 2522, 2524)General OverviewTax LawFederal Income Tax ComputationDeductions for Nonbusiness ExpensesCharitable Contributions (IRC sec. 170)General OverviewTax LawState & Local TaxesIncome TaxIndividuals, Estates & TrustsDeductions



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*25-69 California Legal Forms--Transaction Guide § 69.124*

**§ 69.124 Acceptability of Contribution**

1. If contribution is to be made for a specific purpose, contact prospective donee to verify that gift can be accepted for that purpose.
2. If land is to be donated for public use, contact local government to determine whether dedication will be accepted for intended purpose.
3. If contribution consists of tangible personal property, contact prospective donee to verify that contribution will be acceptable in that form.
4. Determine whether prospective donee has any established rules or procedures for accepting charitable contributions.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawPersonal GiftsGeneral OverviewEstate, Gift & Trust LawTrustsCharitable TrustsEstate, Gift & Trust LawWillsBequests & Devises



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*25-69 California Legal Forms--Transaction Guide §§ 69.125-69.139*

**[Reserved]**

§§ 69.125[Reserved]



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*25-69 California Legal Forms--Transaction Guide § 69.140*

**§ 69.140 Inter Vivos Gifts**

**NOTE:**

The general requirements for inter vivos gifts are discussed in Ch. 60A, *Gifts*. The steps listed below are typically of particular importance in inter vivos gifts to charitable organizations.

1. If donor is a corporation, draft resolution authorizing gift [*see* § 69.301].
2. Draft cover letter to accompany formal gift instrument [*see* § 69.300].
3. Draft formal gift instrument, if one will be used [*see* § 69.160; *see also* § 69.300[1]].
4. If gift is of real property, prepare deed conveying real property to charity [for deed forms, *see* Ch. 27, *Deeds and Recording*].
5. If necessary, draft acceptance and receipt of gift to be executed by representative of charity [*see* § 69.340].

**NOTE:**

Some charities that regularly accept contributions will provide a standard receipt. If property is given to such an organization and the donor imposes no restrictions upon the use of the property, it is ordinarily unnecessary for the donor or attorney to prepare a separate document acknowledging receipt.

If the value of the contribution is \$250 or more and the donor wants to claim a federal income tax deduction for the gift, the charity's acknowledgment of the contribution must meet the statutory requirements listed in P 9, *below* [*see I.R.C. § 170(f)(8)*].

If the donor is a corporation and the gift is inventory contributed for the ill, the needy, or infants, or scientific property, and the donor wishes to qualify for special federal income tax treatment [*I.R.C. § 170(e)(3), (4)*; *see § 69.122*, PP 2(c), (d), 3(c); *see also § 69.321[1]*], the donor must obtain from the charity a written statement representing that the property will be used in the manner and for the purposes specified by statute [*I.R.C. § 170(e)(3)(B)(iii), (4)(B)(vii)*; *see § 69.341*].

6. Have donor execute gift instruments.

- a. Cover letter accompanying gift.
- b. Gift instrument.

**NOTE:**

If the gift property is community or quasi-community property, it is strongly recommended that the gift instrument be signed by both the donor and the donor's spouse [*see § 69.320[1]*]. If the property is held in joint tenancy or tenancy in common, and the entire property is being given, all owners should sign.

- c. Deed to real property [*see Ch. 27, Deeds and Recording*].

7. If gift is of personal property and title is evidenced by a written instrument, such as a vehicle registration or a share certificate, arrange for instrument to be transferred or reissued to indicate change in ownership.

8. Deliver gift and gift instruments to charity, or verify that valid delivery has been effected.

9. Obtain signed acknowledgment of gift from authorized representative of charity.

- a. If value of gift is \$250 or more, and donor wants to claim federal income tax deduction for contribution, obtain acknowledgment no later than the earlier of [*I.R.C. § 170(f)(8)(C)*]:

**NOTE:**

In order to obtain a federal income tax deduction for a charitable contribution of \$250 or more, the donor must obtain a "contemporaneous" written acknowledgment from the donee organization [*I.R.C. § 170(f)(8)(A)*]. The donor must obtain the acknowledgment by the earlier of the two dates specified below in order for it to be considered "contemporaneous" for federal income tax purposes [*I.R.C. § 170(f)(8)(C)*].

(1) Date on which donor files a federal income tax return for taxable year in which contribution was made; or

(2) Due date (including any extensions) for filing such a return.

- b. If value of gift is \$250 or more, and donor wants to claim federal income tax deduction for contribution, make certain that acknowledgment includes all of following [*I.R.C. § 170(f)(8)(B)*]:

(1) Amount of any cash contributed.

(2) Description (but not value) of any property other than cash.

(3) Statement whether donee organization provided any goods or services in consideration for all or part of the contributed property, and if so:

(a) Description and good faith estimate of the value of those goods or services; or

(b) If goods or services consist solely of intangible religious benefits, statement to that effect.

**NOTE:**

"Intangible religious benefit" means any such benefit that is provided by an organization organized exclusively for religious purposes and which generally is not sold in a commercial transaction outside the donative context [*I.R.C. § 170(f)(8)(B)*]. Presumably, this means masses, memorial services, and other religious activities for which no fee is actually charged but for which a donation traditionally is made.

10. Obtain and provide one of following, if applicable:

**NOTE:**

No deduction is allowed for any contribution of property for which a deduction of more than \$500 is claimed, unless the taxpayer includes a description of the property with the return for the taxable year in which the contribution is made or, for contributions of more than \$5,000, attaches to the return a qualified appraisal of the property [*I.R.C. § 170(f)(11)(A)-(E)*]. An appraisal need not be provided for a donation of cash, property that is stock in trade of the taxpayer or other property of a kind that would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year, property held by the taxpayer primarily for sale to customers in the ordinary course of the customer's trade or business [*see I.R.C. § 1221(a)(1)*], publicly traded securities, or any qualified vehicle for which a qualified contemporaneous written acknowledgment [*see I.R.C. § 170(f)(12)(A)* (general acknowledgment requirement), (B) (contents of acknowledgment)] is provided [*I.R.C. § 170(f)(11)(A)(ii)*]. For purposes of determining the dollar amount thresholds of this provision, all similar items of property donated to one or more donees are treated as one property [*I.R.C. § 170(f)(11)(F)*]. For a detailed discussion of the requirements for the appraisal, see § 69.121.

a. Description of donated property for which a deduction of more than \$500 is claimed.

b. Appraisal of donated property for which a deduction of more than \$5,000 is claimed.

11. For a contribution of a motor vehicle, boat, or airplane, with claimed value exceeding \$500, obtain contemporaneous written acknowledgment of contribution by donee organization that includes following information [*I.R.C. § 170(f)(12)(A), (B)*; 2005-25 *I.R.B. 1287, Notice 2005-44*, § 3 (requirements for contemporaneous written acknowledgment)]:

**NOTE:**

A deduction for a contribution of a motor vehicle, boat, or airplane, the claimed value of which exceeds \$500, is not allowed unless the taxpayer substantiates the contribution by a contemporaneous written acknowledgment of the contribution by the donee organization and includes the acknowledgment with the taxpayer's return [*I.R.C. § 170(f)(12)(A)(i), (B), (E)*]. If the donee organization sells the vehicle without any significant intervening use or material improvement, the amount of the deduction cannot exceed the gross proceeds received from the sale [*I.R.C. § 170(f)(12)(A)(ii)*]. To constitute a "significant

intervening use," the donee organization must actually use the vehicle to substantially further the organization's regularly conducted activities, and the use must be significant. Incidental use is not a significant intervening use. "Material improvement" includes a major repair or improvement that improves the condition of the vehicle in a manner that significantly increases its value. Cleaning, minor repairs, and routine maintenance are not material improvements. An improvement funded by an additional payment to the donee organization from the donor of the vehicle cannot constitute a material improvement [ 2005-25 I.R.B. 1287, Notice 2005-44 , § 7].

An acknowledgment is considered contemporaneous if the donee organization provides it within 30 days of the sale of the vehicle or the contribution of the qualified vehicle [I.R.C. § 170(f)(12)(C)].

- a. Donor's name and taxpayer identification number.
- b. Vehicle identification number or similar number.
- c. If donee organization sells vehicle without any significant intervening use or material improvement:
  - (1) Certification that vehicle was sold in an arm's length transaction between unrelated parties;
  - (2) Gross proceeds from the sale; and
  - (3) Statement that deductible amount may not exceed amount of gross proceeds.
- d. If vehicle is not sold:
  - (1) Certification of intended use or material improvement of vehicle and intended duration of use;
  - (2) Certification that vehicle will not be transferred in exchange for money, other property, or services before completion of use or improvement.

12. If gift is of real property, verify that deed has been recorded.

### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawPersonal GiftsGeneral OverviewEstate, Gift & Trust LawPersonal GiftsElements of Valid GiftsGeneral OverviewEstate, Gift & Trust LawPersonal GiftsLifetime GiftsEstate, Gift & Trust LawPersonal GiftsProceduresGeneral Overview



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*25-69 California Legal Forms--Transaction Guide § 69.141*

### § 69.141 Testamentary Dispositions

**NOTE:**

The general rules and considerations in drafting will provisions, and the formalities for execution of wills, are discussed in the Ch. 61, *Will Drafting and Complete Will Forms* . Codicils are discussed in Ch. 62, *Codicils* . For discussion of testamentary trusts, see Ch. 64, *Testamentary Trusts: Payment and Distribution Provisions* , Ch. 64A, *Testamentary Trusts: Trustee Provisions* , and Ch. 64B, *Testamentary Trusts: Administrative Provisions* .

1. Decide on appropriate format for disposition; either:

**NOTE:**

For a discussion of the considerations in deciding whether to use a codicil or draft a new will, see Ch. 62, *Codicils*, § 62.101[1].

- a. Provision to be inserted into new will; or
- b. Codicil to existing will.

2. Draft will provision or codicil making charitable disposition [*see* § 69.161].

3. Have testator execute will or codicil with appropriate formalities [*see* Ch. 61, *Will Drafting and Complete Will Forms*, §§ 6.150 et seq.].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsTestamentary TrustsEstate, Gift & Trust LawWillsBequests & DevisesEstate, Gift & Trust LawWillsCodicilsGeneral Overview



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*25-69 California Legal Forms--Transaction Guide §§ 69.142-69.159*

**[Reserved]**

§§ 69.142[Reserved]



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D. Drafting Guide for Instruments Making Charitable Dispositions

*25-69 California Legal Forms--Transaction Guide § 69.160*

**§ 69.160 General Drafting Requirements and Inter Vivos Instruments**

**NOTE:**

For a general format for inter vivos charitable gift instruments, see § 69.320. For appropriate language for gifts to specific types of charities, refer to the testamentary gift forms in this chapter [*see* § 69.360-69.367 (general forms); § 69.380-69.383 (religious institutions); § 69.400-69.404 (educational institutions, museums, and similar institutions); §§ 69.420, 69.421 (hospitals and scientific organizations); § 69.440-69.442 (social welfare organizations); and § 69.480 (fraternal society, order, or association operating under the lodge system)]. Inter vivos dedications of land to government entities are discussed in Ch. 27A, *Dedication* .

1. Identify donor and charity with certainty.

a. Full legal name and address of donor.

b. If donor is a corporation, trust, or other entity, add statement to that effect; e.g.,  
" \_\_\_\_\_ [*name*], a California corporation."

c. Full name and address of charity.

**NOTE:**

If donee is a branch or chapter of a larger entity, as in the case of a fraternal order or religious organization, the specific branch or chapter should be identified.

2. Include words of gift; e.g., "I, \_\_\_\_\_ [*donor*], give \_\_\_\_\_ [*property*] to \_\_\_\_\_ [*charity*]."

3. If interest being given is less than an absolute interest in gift property, such as a life estate, fractional interest, income interest, remainder interest, or other future interest, clearly describe interest being given.

**NOTE:**

Gifts of less than the donor's entire interest in property generally do not qualify for the charitable deduction unless they come within specific exceptions [*see* discussion in §§ 69.15[3], 69.16[3]]. However, when the donor's entire interest in property consists of a partial interest such as an income or remainder interest, the donor may claim a charitable deduction for the contribution of that interest [*Treas. Reg. § 1.170A-7(a)(1)(i)*].

For language creating specific types of future interests, see Ch. 67, *Future Interests and Perpetuities* .

4. Describe property so that it can be clearly identified.

**NOTE:**

Rules and suggestions for describing specific types of property are contained in Ch. 61, *Will Drafting and Complete Will Forms*, § 61.130. Although that discussion is directed toward testamentary instruments, it is applicable to inter vivos instruments as well.

5. Specify any limitations or conditions on gift.

**NOTE:**

The testator or attorney should verify that any limitations are acceptable to the charity.

a. If gift is to be used for any general purposes of donee, include statement to that effect [*see, e.g., §§ 69.360, 69.361*].

b. If gift is to be put to a specific use, state that use [*see, e.g., § 69.320; see also § 69.365*].

c. If charity has discretion to use gift for any charitable purpose other than that specified by donor, include statement to that effect [*see, e.g., § 69.365*].

d. If gift is to be used only for purpose and use specified by donor, and for no other purpose, include specific statement to that effect [*see § 69.366*].

e. If only income from gift property is to be expended, state how principal may be invested [*see, e.g., § 69.320*].

6. If instrument will also serve as donee's contemporaneous written acknowledgment of contribution for purposes of substantiating contribution of \$250 or more for federal income tax purposes [*see I.R.C. § 170(f)(8); see also § 69.140, P 9*], include [*see I.R.C. § 170(f)(8)(B)*]:

a. Amount of cash contributed;

b. Description (but not value) of any property other than cash; and

c. Statement whether donee provided any goods or services in consideration for any part of donated property, and if so:

(1) Description and good faith estimate of value of those goods and services; or

(2) If goods or services consisted solely of intangible religious benefits, statement to that effect.

7. Include space for date and place of execution.

8. Include space for signature of donor.

**NOTE:**

If the gift is community or quasi-community property, space for signature of the donor's spouse should also be included [*see* § 69.320 and comment].

9. Include acknowledgment if desired [*see* § 69.320].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Personal Gifts Elements of Valid Gifts General Overview Estate, Gift & Trust Law Personal Gifts Procedures General Overview



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D. Drafting Guide for Instruments Making Charitable Dispositions

*25-69 California Legal Forms--Transaction Guide § 69.161*

### § 69.161 Testamentary Instruments

**NOTE:**

The following guide contains general drafting rules and procedures. For additional information, *see* Ch. 61, *Will Drafting and Complete Will Forms* .

1. For a will or trust provision (other than a split-interest charitable trust), use general format illustrated in this chapter [*see* § 69.360-69.460] and in the forms in Ch. 63, *Will Provisions* .
2. For a codicil, use format illustrated in forms in Ch. 62, *Codicils* .
3. Identify beneficiary [*see* Ch. 61, *Will Drafting and Complete Will Forms*, § 61.130].
4. Describe property.

**NOTE:**

The Probate Code classifies all testamentary gifts into six basic categories [*see* *Prob. Code* § 21117]. For discussion of these categories, *see* Ch. 63, *Will Provisions*, § 63.351[1][b].

- a. Specific gift [*see* *Prob. Code* § 21117(a) ("specific gift" defined); *see also* Ch. 63, *Will Provisions*, § 63.370[1]].
- b. General gift [*see* *Prob. Code* § 21117(b) ("general gift" defined); *see also* Ch. 63, *Will Provisions*, § 63.351[1]].

c. Demonstrative gift [*see Prob. Code § 21117(c)* ("demonstrative gift" defined); *see also Ch. 63, Will Provisions, § 63.390[1]*].

(1) Source or fund from which devise is to be satisfied.

(2) Item or amount of devise.

d. General pecuniary gift [*see Prob. Code §§ 21117(d)* ("general pecuniary gift" defined), *21118(b)* ("pecuniary gift" defined); *see also Ch. 63, Will Provisions, § 63.351[1]*].

e. Annuity [*see Prob. Code § 21117(e)* ("annuity" defined); *see also Ch. 63, Will Provisions, § 63.508[1]*].

f. Residuary gift [*see Prob. Code § 21117(f)* ("residuary gift" defined); *see also Ch. 63, Will Provisions, § 63.530[1]*].

5. If interest being given is only partial interest in property (less than fee simple), describe interest [*see NOTE in § 69.160, P 3*].

**NOTE:**

Before drafting a provision giving a partial or split interest in property to a charity, the attorney should carefully evaluate the tax treatment and effects of the contemplated disposition. For discussion, *see § 69.16[3]*; *see also Ch. 74, Split-Interest Charitable Trusts* .

6. Include any conditions or limitations on gift.

a. Purpose for which gift is made.

**NOTE:**

Although it is generally inadvisable to include a statement of motivation or purpose in a will, a clearly defined statement of purpose may be useful in a provision making a charitable disposition. If the disposition cannot be given in the precise manner contemplated by the testator, a statement of purpose may help a court determine the testator's intent for purposes of applying the cy pres doctrine [*see § 69.12*].

(1) If testator has general charitable intent, then:

(a) Make statement of purpose as general as possible [*see §§ 69.360, 69.361*]; or

(b) State primary purpose and add statement giving charity discretion if property cannot be used for stated purpose [*see § 69.365*].

(2) If it is important to testator that gift be used exclusively for specific purpose:

(a) Statement should be as narrowly drawn as is necessary to clearly express that purpose [*see § 69.366*]; and

(b) Statement may specify that gift must be used exclusively for specified purpose and for no other purpose [*see § 69.366*].

(3) If testator's primary concern is benefiting specific organization, rather than use of gift for a

particular purpose [*see* § 69.367]:

(a) Add statement to that effect, and

(b) Specify that gift will either fail or go to named alternate beneficiaries if named charity does not take gift.

b. Other conditions precedent or subsequent [*see* the Legal Background to Ch. 67, *Future Interests and Perpetuities*].

**NOTE:**

Conditional gifts should be avoided whenever possible. The attorney should verify that any conditions will not render the gift unacceptable to the charity or result in loss or significant reduction in the available charitable deduction.

7. If gift is subject to an encumbrance (such as a mortgage on real property), consider including provision requiring encumbrance to be discharged out of assets of estate [*see* Ch. 63, *Will Provisions*, § 63.313].

8. Specify alternate beneficiary in event primary beneficiary cannot or does not take charitable gift [*see, e.g.*, § 69.360]; either:

**NOTE:**

The alternate beneficiary can be named either in the provision making the charitable disposition or elsewhere in the will.

a. Alternate charitable beneficiary; or

**NOTE:**

It is preferable to name a specific alternate beneficiary rather than simply including a general statement to the effect that the gift is to go to another organization performing a similar function, since a general statement may encourage litigation between various charitable entities seeking all or part of the gift [*see* discussion in § 69.12].

b. Noncharitable beneficiary.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Trusts Testamentary Trusts Estate, Gift & Trust Law Wills Bequests & Devises



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D. Drafting Guide for Instruments Making Charitable Dispositions

*25-69 California Legal Forms--Transaction Guide §§ 69.162-69.179*

**[Reserved]**

§§ 69.162[Reserved]



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E. Related and Subsequent Procedures

*25-69 California Legal Forms--Transaction Guide § 69.180*

**§ 69.180 Computation of Federal Income Tax Deduction for Charitable Gifts**

1. Determine donor's contribution base for year of gift.

a. For individual donor, contribution base is adjusted gross income, computed without regard to any net operating loss carryback to taxable year [*I.R.C. § 170(b)(1)(G)*]; *see I.R.C. § 172*.

b. For corporate donor, contribution base is taxable income computed without regard to [*I.R.C. § 170(b)(2)*]:

(1) Charitable deduction itself.

(2) Special deductions available to corporations [*I.R.C. §§ 241-250*], except deductions for organizational expenditures [*see I.R.C. § 248*].

(3) Any net operating loss carryback to taxable year.

(4) Any capital loss carryback to taxable year under *I.R.C. § 1212(a)(1)*.

2. Determine amount of deduction for each gift made during year.

a. Amount is fair market value, reduced as specified in (b), (c), and (d), *below*.

**NOTE:**

The treatment of specific classes of property is discussed in greater detail in § 69.122.

b. Reduce gifts of ordinary income property [*see Treas. Reg. § 1.170A-4(b)(1)*]; *see also § 69.122, P 2(a)*] by amount of ordinary income that would have been realized if property had been sold at fair

market value [I.R.C. § 170(e)(1)(A); see § 69.122, P 3(a)].

c. Reduce gifts of long-term capital gain property [see *Treas. Reg. § 1.170A-4(b)(2)*; see also § 69.122, P 2(b)] by full amount that would have been long-term capital gain had property been sold at fair market value [I.R.C. § 170(e)(1)(B); see § 69.122, P 3(b)] if:

(1) Property is contributed to a private foundation that does not qualify for 50 percent deduction, unless property consists of securities [I.R.C. § 170(e)(5)]:

**NOTE:**

If the following two requirements are met, contributions of up to 10 percent of a corporation's stock are deductible at fair market value [I.R.C. § 170(e)(5)].

(a) That are capital gain property; and

(b) For which market quotations are readily available on an established securities market.

(2) Property is tangible personal property that is put to a use unrelated to purpose or function constituting basis for charity's tax-exempt status [*Treas. Reg. § 1.170A-4(b)(3)*].

(3) Any patent, copyright (other than as described in I.R.C. § 1221(a)(3) or § 1231(b)(1)(C)), trademark, trade name, trade secret, know-how, software (other than as described in I.R.C. § 197(e)(3)(A)(i)), or similar property, or applications or registrations of this property; or

(4) In an appropriate case, donor elects to have property treated under rules governing appreciated property in lieu of 30 percent deduction limit on capital gain property [I.R.C. § 170(b)(1)(C)(iii), (e); *Treas. Reg. §§ 1.170A-4(b)(2)(iii), 1.170A-8(d)(2)*].

**NOTE:**

For a discussion of this election, see NOTE in § 69.122, P 3(b)(2).

d. If donor is a corporation and property is either inventory to be used solely for care of ill, needy, or infants, or is a qualified research contribution [see § 69.321[1]; see also § 69.122, P 2(c), (d)], reduce fair market value by [I.R.C. § 170(e)(3)(B), (4)(A); *Treas. Reg. § 1.170A-4A*]:

(1) One half of any gain that is not long-term capital gain; plus

(2) Any amount by which charitable deduction exceeds twice the basis of property.

3. For individual donor, categorize deduction amounts as follows [see §§ 69.120, 69.122; see also discussion in § 69.15[4]]:

a. Contributions, other than long-term capital gain property described in (b), below, to organizations qualifying for maximum 50 percent deduction limitation [I.R.C. § 170(b)(1)(A)].

b. Contributions of long-term capital gain property subject to special 30 percent deduction limitation [see I.R.C. § 170(b)(1)(C)] that:

(1) Are contributed to organizations that otherwise would qualify for 50 percent limit [*see I.R.C. § 170(b)(1)(A)*]; and

(2) Donor elects to have treated under 30 percent limit rather than reduced as specified in Paragraph 2(c)(3), *above* [*see NOTE* in § 69.122].

c. Contributions, other than long-term capital gain property, to organizations qualifying for 30 percent deduction limitation [*see I.R.C. § 170(b)(1)(B)*].

d. Contributions of capital gain property to organizations qualifying for 30-percent deduction limitation [*see I.R.C. § 170(b)(1)(D)*].

4. For individual donor, compute total available deduction in taxable year, in following order:

a. Contributions to 50-percent organizations [*see Paragraph 3(a), above*], other than contributions of long-term capital gain property described in Paragraph 3(b), *above*, up to 50 percent of donor's contribution base; any excess is carried over to subsequent taxable years.

b. Contributions (to 50-percent organizations) of long-term capital gain property subject to special 30-percent deduction limitation [*see Paragraph 3(b), above*], to the extent of the lesser of the following [*I.R.C. § 170(b)(1)(C)(i)*]; any excess is carried over to subsequent taxable years [*I.R.C. § 170(b)(1)(C)(ii)*]:

(1) Any portion of 50 percent of contribution base remaining after deducting amounts described in Paragraph 4(a), *above*; or

(2) Thirty percent of donor's contribution base.

c. Contributions to 50-percent organizations that have been carried over from past five years, starting with oldest, to extent of any remaining portion of 50 percent of contribution base; any excess from past four years is carried over [*see I.R.C. § 170(d)(1)(A)*].

**NOTE:**

If the donor also has a net operating loss carryover, any charitable contributions carryover must be reduced to the extent that the excess charitable contributions have the effect of increasing the amount of the net operating loss carryover [*see I.R.C. § 170(d)(1)(B)*].

d. Contributions, to 50-percent organizations, of long term capital gain property subject to 30-percent limitation that have been carried over from past five years, starting with oldest, to extent of lesser of the following; any excess from past four years is carried over [*I.R.C. § 170(b)(1)(C)(ii), (d)(1)*]:

(1) Any portion of 50 percent of contribution base remaining after deducting amounts described in Paragraphs 4(a), (b), and (c), *above*; or

(2) Any excess of 30 percent of contribution base over deductions described in Paragraph 4(b), *above*.

e. Contributions, other than long term capital gain property, to organizations qualifying for 30-percent deduction limitation, to the extent of the lesser of the following; any excess is carried over to subsequent taxable years [*I.R.C. § 170(b)(1)(B)*]:

(1) Thirty percent of contribution base; or

(2) Excess of 50 percent of contribution base over all deductions made under Paragraphs 4(a)-(d), *above*.

f. Contributions of capital gain property to organizations qualifying for 30-percent deduction limitation, to the extent of the lesser of the following; any excess is carried over to subsequent taxable years [*see I.R.C. § 170(b)(1)(D)*]:

(1) Twenty percent of contribution base; or

(2) Excess of 30 percent of contribution base over all deductions made under Paragraphs 4(a)-(e), *above*.

g. Contributions to organizations qualifying for 30-percent deduction limitation, other than contributions of long term capital gain property, that have been carried over from past five years (beginning with deductions made in tax years ending after July 18, 1984) to extent of any excess of 30 percent of contribution base over all deductions made under Paragraphs 4(a)-(f), *above*; any excess from past four years is carried over to subsequent taxable years [*I.R.C. § 170(b)(1)(B)*]:

h. Contributions of capital gain property to organizations qualifying for 30-percent deduction limitation that have been carried over from past five years (beginning with deductions made in tax years ending after July 18, 1984), to the extent of the lesser of the following; any excess from past four years is carried over to subsequent taxable years [*see I.R.C. § 170(b)(1)(D)*]:

(1) Twenty percent of contribution base; or

(2) Excess of 30 percent of contribution base over all deductions made under Paragraphs 4(a)-(g), *above*.

5. For corporate donor, compute total allowable deduction in tax year, in following order [*see I.R.C. § 170(b)(2)*]:

a. Contributions paid or treated as paid [*see I.R.C. § 170(a)(2)*; *see also* NOTE in § 69.122, P 6] in current year, to extent of 10 percent of contribution base [*see § 69.180*, P 1(b) (computation of contribution base for corporations)]; any excess is carried over.

b. Amounts carried over from past five years, starting with oldest, to extent of any remaining portion of 10 percent of contribution base; any excess from past four years is carried over [*see I.R.C. § 170(d)(2)*].

**NOTE:**

If the donor corporation also has a net operating loss carryover, any charitable contribution must be reduced to the extent that the excess charitable contributions have the effect of increasing the amount of net operating loss carryover [*see I.R.C. § 170(d)(2)(B)*].

6. Assemble documentation in support of charitable deduction, as follows:

**NOTE:**

The Omnibus Budget Reconciliation Act of 1993 [Pub. L. No. 93-66] (OBRA) imposed a substantiation requirement for contributions of \$250 or more, as enumerated in (a), *below* [*see I.R.C. § 170(f)(8)*]. The

documentation requirements discussed in the remainder of this P6 predate OBRA and are set forth in the Treasury Regulations. The two sets of requirements are not fully coextensive, and are also duplicative to some extent. The requirements imposed by the regulations are generally more detailed than the OBRA requirements, but the \$250 threshold value at which the OBRA requirements apply is lower than that for most of the requirements imposed by the regulations. Until such time as the regulations may be amended, compliance with both sets of requirements is the safest course.

a. If value of gift is \$250 more, donee's contemporaneous written acknowledgment of gift is required [*see I.R.C. § 170(f)(8)*].

(1) Acknowledgment must meet requirements listed in § 69.160, P 6 [*see I.R.C. § 170(f)(8)(B)*].

(2) If donor did not obtain acknowledgment at time gift was made, obtain acknowledgment at any time up to earlier of [*I.R.C. § 170(f)(8)(C)*]:

**NOTE:**

Acknowledgments are regarded as "contemporaneous" if they are obtained by the earlier of the dates listed below [*I.R.C. § 170(f)(8)(C)*].

(a) Date on which donor files a return for taxable year in which contribution is made; or

(b) Due date (including any extensions) for filing such a return.

b. If taxpayer claims deduction for cash contribution, taxpayer must maintain cancelled check, receipt, or other reliable written record for each contribution, showing all of following [*Treas. Reg. § 1.170A-13(a)(1)*]:

(1) Name of donee;

(2) Date of contribution; and

(3) Amount of contribution.

**NOTE:**

A letter or other communication from the charitable donee acknowledging receipt of the contribution and showing the date and amount of the contribution qualifies as a receipt [*Treas. Reg. § 1.170A-13(a)(1)(ii)*].

c. If taxpayer claims deduction for noncash contribution of property valued at \$500 or less, taxpayer must maintain reliable written records for each item of property donated, showing all of following [*Treas. Reg. § 1.170A-13(b)(1), (2)*].

(1) Donee organization's name and address.

(2) Date and location of contribution.

(3) Description of property in detail reasonable under circumstances.

**NOTE:**

If the property consists of securities, the description must include the name of the issuer, the type of security, and whether or not the donated security is regularly traded on a stock exchange or in the over-the-counter market [*Treas. Reg. § 1.170A-13(b)(2)(ii)(C)*].

(4) Fair market value of property at time of contribution, method used to determine value, and, if property was appraised, copy of signed report of appraiser.

(5) If property is subject to appreciated property reduction rules [*see I.R.C. § 170(e); see also § 69.180, P 2(b), (c)*], adjusted basis, amount of reduction, and how it was computed; and, if taxpayer elects application of appreciated property reduction rules [*see § 69.180, P 2(c)(3)*], years for which election was made and contributions to which it applies.

(6) If taxpayer contributed less than taxpayer's entire interest in property, all of following:

(a) Total amount claimed as deduction for current tax year and amount claimed as deduction in any prior year or years for contributions of other interests in same property;

(b) Each donee's name and address;

(c) Place where property is located or kept (if tangible); and

(d) Name of any person other than donee having actual possession.

(7) Terms of any agreement or understanding relating to use, sale, or other disposition of contributed property.

d. If taxpayer claims deduction for noncash contribution of property valued at more than \$500, but not more than \$5,000, taxpayer must maintain receipt from donee showing all of following [*Treas. Reg. § 1.170A-13(b)(1), (c)*]:

(1) Name and address of donee;

(2) Date and location of contribution;

(3) Description of property.

**NOTE:**

The detail of the description must be reasonably sufficient under the circumstances. Although the fair market value of the property is one of the circumstances to be taken into account in determining the amount of detail to be included on the receipt, the value need not be stated on the receipt. A letter or other written communication from the donee acknowledging receipt of the contribution, showing the date of the contribution, and containing the required description of the property contributed constitutes a receipt for this purpose. A receipt is not required if the contribution is made in circumstances in which it is impractical to obtain a receipt (for example, by depositing property at a charity's unattended drop site). In such cases, however, the taxpayer must maintain reliable written records showing all of the information required by *Treas. Reg. § 1.170A-13(b)(1), (2)*. A description of donated property for which a deduction of more than \$500 is claimed must be included with the donor's return [*I.R.C. § 170(f)(1)(B)*].

e. If taxpayer claims deduction for noncash contribution of property valued at more than \$5,000 taxpayer must do all of following:

**NOTE:**

An appraisal need not be provided for a donation of cash, property described in *I.R.C. § 1221(a)(1)*, publicly traded securities, or any qualified vehicle for which an acknowledgment under *I.R.C. § 170(f)(12)(B)* is provided [*I.R.C. § 170(f)(11)(A)(ii)*]. For purposes of determining the \$5,000 threshold amount, all similar items of property donated to one or more donees are treated as one property [*I.R.C. § 170(f)(11)(F)*].

(1) Obtain appraisal prepared, signed, and dated by qualified appraiser, showing all of following [*Treas. Reg. § 1.170A-13(c)(3)(i), (ii)*]:

(a) Description of property containing enough detail so that person not generally familiar with the type of property can ascertain that appraised property is same as contributed property;

(b) For tangible property, its physical condition;

(c) Date (or expected date) of contribution;

(d) Terms of any agreement or understanding relating to use, sale, or other disposition of property, including any restrictions on donee's right to use or dispose of property;

(e) Name, address, and taxpayer identification number, if any, of qualified appraiser, or person or entity (other than donor) who engaged appraiser;

(f) Qualifications of qualified appraiser, including background, experience, education, and membership in any professional appraisal association;

(g) Statement that appraisal was prepared for income tax purposes;

(h) Date or dates on which property was valued; and

(i) Appraised fair market value of property on date or expected date of contribution, valuation method used, and specific basis for valuation, if any, such as any specific comparable sales transactions.

**NOTE:**

Only one qualified appraisal is required for a group of similar items contributed in the same year. However, the information listed above must be provided for each item of similar property, except the appraiser may select and use a group description for any items whose aggregate value is appraised at \$100 or less. A separate qualified appraisal is required for each item of property that is not included in a group of similar items of property [*Treas. Reg. § 1.170A-13(c)(3)(iv)(A)*].

(2) Attach copy of appraisal to donor's tax return [*I.R.C. § 170(f)(11)(C), (D)*].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Tax Law Federal Income Tax Computation Deductions for Nonbusiness Expenses Charitable Contributions (IRC sec. 170) General Overview



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*25-69 California Legal Forms--Transaction Guide § 69.181*

**§ 69.181 Computation of California Individual Income Tax Charitable Deduction**

**NOTE:**

Before passage of the California Personal Income Tax Fairness, Simplification, and Conformity Act of 1987 [Stats. 1987, ch. 1138, operative Sept. 24, 1987], California rules relating to the charitable deduction differed in material respects from the federal rules for the same deduction [*see* § 69.18]. With the passage of the Act, California law was conformed to federal law [*Rev. & Tax. Code* § 17201; *see Rev. & Tax. Code* § 17024.5(a)(1) (conformity dates for particular tax years); *see also* § 69.18].

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Tax Law State & Local Taxes Income Tax Individuals, Estates & Trusts Deductions



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*25-69 California Legal Forms--Transaction Guide §§ 69.182-69.299*

**[Reserved]**

§§ 69.182[Reserved]



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1. Miscellaneous Documents

*25-69 California Legal Forms--Transaction Guide § 69.300*

**§ 69.300 Letter Formalizing Charitable Gift**

**[1] Comment**

**[a] Use of Form**

This form is a letter to a charity memorializing a charitable gift. It should be mailed or hand delivered to the recipient organization, accompanied in appropriate instances by any other gift documents such as a formal gift instrument, documents of title (deed to real property, vehicle registration, share certificates, and similar documents), and, in the case of cash, by a check or money order for the amount of the gift. For a discussion of delivery requirements generally, see Ch. 60A, *Gifts* .

**[b] Need for More Formal Gift Instrument**

In most cases this letter and an acknowledgement of receipt of the gift [*see § 69.340*] will sufficiently document the gift for tax purposes [*see discussion in [c], below*], and a more formal gift document will be unnecessary. However, if the donor wishes to state the purpose of the gift and/or enumerate the terms and conditions on which it is given, or if the gift is an item of substantial value, it may be desirable to utilize, in addition to this letter, a more formal gift instrument such as § 69.320.

**[c] Importance of Written Record**

Written records of charitable contributions must be maintained to support the donor's tax deductions. If an individual claims a charitable deduction of more than \$200 for an item of property other than cash, additional information on the property must be attached to the donor's federal income tax return [*Treas. Reg. § 1.170A-1(a)(2)(ii)*; *see § 69.180*, P 6].

In addition, an appraisal by a qualified appraiser is mandatory if the claimed value of the property, plus the claimed value of all similar items of property donated to one or more donees, exceeds \$5,000, or \$10,000 if the property consists of nonpublicly traded stock [Pub. L. No. 98-369, § 155(a)(1), (2)]. The taxpayer must attach to the return an appraisal

summary, in a form provided by the Internal Revenue Service, signed by the qualified appraiser and containing the appraiser's taxpayer identification number. The summary must also be acknowledged by the donee of the appraised property [Pub. L. No. 98-369, § 155(a)(1)(B), (a)(3)].

The IRS may also require a statement concerning the gift from the donee organization [*Treas. Reg. § 1.170A-1(a)(2)(iii)*]; see § 69.180, P 6(c)].

## [2] FORM

### Letter Formalizing Charitable Gift

[*Business or personal letterhead*]

\_\_\_\_\_ [date]

\_\_\_\_\_ [name of charitable organization]

\_\_\_\_\_ [street and number]

\_\_\_\_\_ [city, state, zip code]

Dear Sir or Madam:

The purpose of this letter is to formally notify you that \_\_\_\_\_ [name of donor] is contributing to your organization the sum of \$ \_\_\_\_\_ [or, if personal property rather than cash is being enclosed, describe property, e.g., one concert grand piano].

[Add if additional documents are enclosed:]

The following documents pertaining to this gift are enclosed:

1. \_\_\_\_\_ [describe, e.g., A certified check for \$ \_\_\_\_\_].
2. \_\_\_\_\_ [e.g., A formal gift instrument setting forth the terms and conditions on which this gift is to take effect].
3. \_\_\_\_\_ [e.g., An acknowledgment of receipt to be signed by an authorized representative of your organization upon receipt of this gift and returned to the above address].
4. \_\_\_\_\_ [specify any other documents accompanying letter, such as a deed, share certificate, or other document of title].

This gift is made only on the terms and conditions described in the enclosed Declaration of Gift and is to be used for the purpose or purposes described therein [or, if a formal gift instrument is not used, purpose of gift may be stated].

[If gift is to be picked up by donee, add:]

Please arrange to pick up the above property no later than \_\_\_\_\_ [date].

Sincerely,

\_\_\_\_\_ [signature of donor]

[typed name]

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Personal Gifts General Overview Estate, Gift & Trust Law Personal Gifts Procedures General  
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*25-69 California Legal Forms--Transaction Guide § 69.301*

**§ 69.301 Corporate Resolution for Charitable Contribution**

**[1] Comment**

**[a] Use of Form**

This form is a corporate resolution authorizing disbursement of corporate funds or property for a charitable contribution. It is designed to be included in the minutes of a directors' meeting, but may be easily adapted if the action is to be taken by unanimous written consent of the directors. For a discussion of the powers and duties of directors, the conduct of meetings, and corporate recordkeeping requirements in general, see Ch. 5, *Directors' Meetings, Actions, and Resolutions*.

**[b] Federal Income Tax Considerations**

The Internal Revenue Code permits a corporation to take an income tax deduction for its charitable contributions [*I.R.C. § 170(a)(1)*]. Ordinarily, the deduction must be taken in the taxable year in which the contribution is actually made, regardless of the corporation's accounting method. However, corporations on the accrual basis may elect to treat a contribution as made in the year in which it is authorized by the board of directors if it is paid on or before the fifteenth day of the third month of the following year [*I.R.C. § 170(a)(2)*].

A corporation's charitable deduction is limited to 10 percent of its taxable income, computed in a specified manner [*I.R.C. § 170(b)(2)*; see § 69.180, P 1(b)]. Corporations, like individuals, are permitted a five-year carryover for contributions in excess of 10 percent of taxable income made in a specified year [*I.R.C. § 170(d)(2)*; see discussion in § 69.15[7]].

Special tax benefits are available for qualified contributions by corporations of inventory to be used for the care of the ill, needy, or infants [*I.R.C. § 170(e)(3)*], or of scientific equipment to institutions of higher education for use in experimentation or research [*I.R.C. § 170(e)(4)*]. For a detailed discussion of the available benefits, the Internal Revenue Code requirements, and a gift instrument that may be used to make such a contribution, see § 69.321.

**[2] FORM****Corporate Resolution for Charitable Contribution****RESOLUTION AUTHORIZING CHARITABLE CONTRIBUTION**

WHEREAS, the Board of Directors believes it is consistent and compatible with the purposes of this corporation to promote \_\_\_\_\_[*state specific purpose of charity to be designated as donee; e.g., better housing for economically underprivileged segments of the community in which this corporation is located*]; therefore, be it:

RESOLVED, that this corporation [*add if desired: through its President*] contribute to \_\_\_\_\_[*exact name and address of specific charity; or such charities as the President in his (or her) absolute discretion may designate*], the sum of \_\_\_\_\_ dollars (\$\_\_\_\_\_) [*or, if property other than cash is to be donated, describe property*], to be used for the purpose specified above [*or state more specific purpose with particularity*].

[*Add if amount of gift is to be limited to corporation's maximum income tax deduction for charitable year:*]

RESOLVED FURTHER, that the recipient [*or all recipients*] of this contribution, and all purposes or uses made of this contribution, must be recognized by the Internal Revenue Service as organizations, purposes, and uses for which a charitable deduction from federal income tax is allowed; and that the total amount of this contribution [*or all charitable contributions made by this corporation*] shall not exceed ten percent of the taxable income of this corporation for the taxable year ending \_\_\_\_[*year*], computed as provided in *Section 170(b)(2) of the Internal Revenue Code*. If the total amount of this contribution [*or all charitable contributions made by this corporation*] is greater than ten percent of the taxable income of this corporation as provided above, the total amount shall be reduced to that percentage.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawPersonal GiftsGeneral OverviewEstate, Gift & Trust LawPersonal GiftsProceduresGeneral OverviewEstate, Gift & Trust LawPersonal GiftsProceduresEvidence



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*25-69 California Legal Forms--Transaction Guide §§ 69.302-69.319*

**[Reserved]**

§§ 69.302[Reserved]



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2. Formal Inter Vivos Gift Instruments

*25-69 California Legal Forms--Transaction Guide § 69.320*

**§ 69.320 General Form for Inter Vivos Gift to Charitable Organization**

**[1] Comment**

**[a] Use of Form**

This form is an instrument for making an inter vivos gift of personal property to a charitable organization. It is a general form that can be used for most types of inter vivos transfers to charity. For a discussion of when this form should be used, and when a less formal gift instrument will suffice, see § 69.300[1].

When the subject matter of the gift is real property, the transfer should be made by deed [*see Ch. 27, Deeds and Recording*]. For formal language making conditional fee simple transfers of real property, and discussion of the applicable law, see Ch. 67, *Future Interests and Perpetuities*.

**[b] Modification of Form for Gifts to Specific Types of Entities**

This is a general form illustrating an appropriate format for formal instruments making inter vivos charitable gifts. The testamentary gift forms in this chapter include numerous provisions for gifts to specific types of entities. To avoid unnecessary duplication, forms for identical inter vivos gifts are not included in this chapter. To modify this form for specific types of gifts, the attorney should refer to the appropriate testamentary gift provision and incorporate the relevant language into an inter vivos gift instrument, using the format illustrated in this form. For gifts to religious institutions, see §§ 69.380-69.383. For gifts to educational institutions, museums, and similar institutions, see §§ 69.400-69.404. For gifts to hospitals and scientific organizations generally, see §§ 69.420 and 69.421. For gifts to social welfare organizations, see §§ 69.440-69.442. Inter vivos dedications of land to a government entity are discussed in Ch. 27A, *Dedication*. For inter vivos instruments transferring property into an existing pooled income fund, see Ch. 74, *Split-Interest Charitable Trusts*, §§ 74.231-74.233.

**[c] Execution, Delivery, and Validity in General**

This form should be signed by the donor. If the gift is community or quasi-community property, both spouses should sign.

A gift of community property requires written consent of the other spouse [*Fam. Code § 1000(b)*]. A spouse may dispose of quasi-community property without the consent of the other spouse, but the other spouse may acquire certain rights in the property after the donor spouse's death [*see Prob. Code § 102*]. In the case of a gift deed to real property, both spouses must sign [*Fam. Code § 1102*].

This form includes an optional acknowledgment clause. However, failure to include an acknowledgment will not invalidate the gift. A statement of acceptance to be signed by the donee is also included. However, a more formal receipt such as § 69.340 may be used if desired.

When a formal gift instrument such as this form is used, it should be delivered to the donor accompanied by a cover letter such as § 69.300, together with any other documents pertaining to the gift. For a discussion of delivery requirements, and the mechanics and validity of gifts in general, see Ch. 60A, *Gifts* .

#### **[d] Tax Considerations in Inter Vivos Gifts--In General**

Before making a charitable gift, it is vital that the attorney examine its tax consequences. The tax treatment of charitable contributions and the importance of the federal income and gift tax charitable deductions are discussed in the Legal Background. The steps in determining the tax treatment of a particular contribution are *treated in detail in § 69.120 et seq.*, and are not repeated here. However, the attorney should keep in mind the following basic questions relating to the tax treatment of any charitable contribution:

- Has the IRS determined that contributions to the prospective donee will qualify for the federal income tax charitable deduction [*see § 69.120, P 1*]?
- If the donor is an individual rather than a corporation, is the donee organization a "50-percent organization" or a "30-percent organization" [*see § 69.120, P 2; see also I.R.C. § 170(b)(1)(A), (B)*]?
- If the property being donated is something other than cash, is it classified as ordinary income property or long-term capital gain property [*see § 69.122, PP 2, 3*]? Because of the unfavorable treatment of ordinary income property, the available tax deduction for charitable contributions of such property often is minimal.
- What percentage of the donor's income for the tax year is represented by the gift and by all other charitable gifts made in the tax year? If this percentage exceeds the maximum amount deductible in the year of the contribution, is a carryover available, and does the donor already have carryovers from past years [*see § 69.122, P 4; see also discussion in § 69.15[7]*]?

#### **[2] FORM**

##### **General Form for Inter Vivos Gift to Charitable Organization**

I [or We], \_\_\_\_\_ [*donor's full name*] ("Donor"), give to \_\_\_\_\_ [*exact legal name and address of charity; if an obscure group, consider adding: a charitable organization*] ("Donee"), the sum of \$ \_\_\_\_\_ ..... [*or if subject matter of gift is personal property, describe, e.g., my concert grand piano or, where several items of property are involved: those items of property more particularly described on the attached Schedule A, which is incorporated by reference*] .

[If conditions are attached to gift, they should be enumerated in the following manner. The following provisions are illustrative only; for language applicable to specific types of gifts, see 60.30-69.460.]

This gift shall be invested through any other trust or fund managed for the benefit of the Donee, and shall remain in trust as principal. The income therefrom shall be paid or applied not less frequently than annually to the following purposes in the order of priority set forth below, until all such income has been expended:

- (1) To support and maintain the exterior grounds, yard, gardens, and landscaped areas on the premises occupied by the Donee, including such additions and improvements as the Donee determines are necessary or beneficial, but not including the acquisition of additional land or the construction of additional buildings;
- (2) To conduct free educational programs on botany and horticulture for the benefit of the general public; and
- (3) For any other general use related to the purpose or function constituting the basis for the Donee's exemption from taxation under *Internal Revenue Code* § 501.

This gift is made on the terms and conditions specified in this instrument. The Donee, by its acceptance of this gift, warrants and represents that this gift shall be held and administered in accordance with all the terms and conditions enumerated herein.

Dated: \_\_\_\_\_, at \_\_\_\_\_ [city], California.

\_\_\_\_\_ [signature of donor]  
 [typed name]

[If gift is community or quasi-community property, add:]

\_\_\_\_\_ [signature of donor's spouse]  
 [typed name]

[Or, if gift is community or quasi-community property and donor's spouse is not also named as a donor, add:]

**Consent of Spouse**

I hereby consent to the above described gift.

Dated: \_\_\_\_\_

\_\_\_\_\_ [signature of donor's spouse]  
 [typed name]

[Optional:]

**Acknowledgment**

[Acknowledgments taken in California must be in the following form ( Civ. Code § 1189(a) ):]

State of California, )  
 County of \_\_\_\_\_ )  
 )  
 )

On \_\_\_\_\_ [date], before me, \_\_\_\_\_ [name and title of officer taking acknowledgment], personally appeared \_\_\_\_\_ [name(s) of person(s) signing instrument], \_\_\_\_\_ [who proved to me on the basis of satisfactory evidence] to be the person[s] whose name[s] \_\_\_\_\_ [is or are] subscribed to the within instrument and acknowledged to me that \_\_\_\_\_ [he or she or they] executed the same in \_\_\_\_\_ [his or her or their] authorized \_\_\_\_\_ [capacity or capacities], and that by \_\_\_\_\_ [his or her or their] signature[s] on the instrument the person[s], or the entity upon behalf of which the person[s] acted, executed the instrument.

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

WITNESS my hand and official seal.

Signature \_\_\_\_\_ [Seal]

[Optional:]

### Acceptance of Gift

I hereby accept the above described gift on the terms and conditions specified in the foregoing instrument.

Dated: \_\_\_\_\_

\_\_\_\_\_ [name of donee]

By: \_\_\_\_\_ [signature]

[typed name and title]

### Legal Topics:

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawPersonal GiftsGeneral OverviewEstate, Gift & Trust LawPersonal GiftsLifetime GiftsEstate, Gift & Trust LawPersonal GiftsProceduresGeneral Overview



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 CHAPTER 69 CHARITABLE DISPOSITIONS  
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 A. Inter Vivos Gifts  
 2. Formal Inter Vivos Gift Instruments

*25-69 California Legal Forms--Transaction Guide § 69.321*

**§ 69.321 Corporate Gift of Inventory for Care of Ill or Needy or Qualified Research Contribution**

**[1] Comment**

**[a] Use of Form**

This form is to be used by a corporation for making a charitable gift, either of inventory to be used for the care of the ill, the needy, or infants, or of scientific research property. Qualifying transfers of such property receive more favorable tax treatment than other ordinary income property [*I.R.C. § 170(e)(3), (4); see § 69.321[1][b]*]. In addition to other requirements, the donee must give the donor a written representation that the property will be used in a manner that meets Internal Revenue Code requirements. For a form for such a representation, see § 69.341. For general information regarding charitable gift instruments, see § 69.320[1].

**[b] Tax Treatment of Qualified Contributions**

In computing the available federal income tax charitable deduction, the fair market value of property must ordinarily be reduced by the amount of gain which would not have been long-term capital gain had the property been sold by the donor at its fair market value on the date of the gift [*I.R.C. § 170(e)(1)(A)*]. The effect of this rule is to reduce the available deduction for such property to the donor's basis. Property subject to this reduction is referred to as "ordinary income property" [*Treas. Reg. § 1.170A-4(b)(1)*], and includes inventory and depreciable and real property used in the donor's trade or business [*I.R.C. §§ 1221(a)(1), (a)(2), 1222(3); Treas. Reg. § 1.170A-4(b)(1)*].

A special exception is available to corporations for qualified contributions, either of inventory for the care of the ill, needy, or infants, or of scientific equipment to institutions of higher education for experimentation or research. Property qualifying for this exception is reduced by only one-half the amount of gain that would not have been long-term capital gain [*I.R.C. § 170(e)(3)(B)(i), (4)(A)*] (instead of the entire amount of such gain), plus the amount, if any, by which the charitable deduction (computed in the manner described above) exceeds twice the basis of the property [*I.R.C. § 170(e)(3)(B)(ii), (4)(A)*].

The favorable tax treatment described above is available only for contributions by corporations [*I.R.C. § 170(e)(3)(A), (4)(B)*]. The corporate donor is still subject to the general rule limiting its contributions in any taxable year to a maximum of 10 percent of its taxable income [*I.R.C. § 170(b)(2)*].

### **[c] Contributions of Inventory for Care of Ill, Needy, or Infants**

Property will qualify for the favorable tax treatment discussed above if it is inventory or depreciable or real property used in the donor's trade or business [*I.R.C. §§ 170(e)(3)(A), 1221(a)(1), (a)(2)*]. The donee must be a charitable organization described in *I.R.C. § 501(c)(3)*. Contributions to private foundations, other than private operating foundations, do not qualify [*I.R.C. § 170(e)(3)(A); see I.R.C. §§ 509(a), 4942(j)(3)*]. In addition, the gift must meet all of the following requirements [*I.R.C. § 170(e)(3)(A)(i)-(iv)*]:

- The donee's use of the property must be related to the purpose or function constituting the basis for the donee's tax-exempt status under *I.R.C. § 501*, and the property must be used by the donee solely for the care of the ill, the needy, or infants.
- The property may not be transferred by the donee in exchange for money, other property, or services.
- The donor must obtain from the donee a written statement representing that the use and disposition of the property will be in accordance with the two criteria stated above [*see § 69.341*].
- If the property is subject to regulation under the Federal Food, Drug, and Cosmetic Act, it must fully satisfy all applicable requirements of that Act and the applicable regulations.

### **[d] Qualified Research Contributions**

Property will also qualify for the favorable tax treatment discussed above if it is a "qualified research contribution"; in other words, a contribution of scientific property constructed by the donor and donated to an institution of higher education [*I.R.C. § 170(e)(4)*]. The property must be inventory or property held primarily for sale to customers in the ordinary course of the donor's trade or business [*I.R.C. §§ 170(e)(4)(B), 1221(a)(1)*]. The gift must also meet the following requirements [*I.R.C. § 170(e)(4)(B)(i)-(vii)*]:

- The donee must be an educational institution of higher learning which normally maintains a regular faculty and curriculum and normally has a regularly enrolled body of pupils or students in attendance at the place where its educational activities are regularly carried on [*see I.R.C. §§ 170(b)(1)(A)(ii), 3304(f)*].
- The property must be constructed by the donor. Property is "constructed by the donor" only if the cost of the parts used in construction does not exceed 50 percent of the donor's basis in the property [*I.R.C. § 170(e)(3)(C)*].
- The contribution must be made not later than two years after the date construction of the property is substantially completed.
- The donee must be the original user of the property.
- The property must be scientific equipment or apparatus substantially all of the use of which by the donee is for research or experimentation or for research training in the United States in physical or biological sciences.
- The property cannot be transferred by the donee in exchange for money, property, or other services.

■ The donor must receive from the donee a written representation that the use and disposition of the property will be in accordance with (5) and (6) above [see § 69.341].

[2] FORM

**Corporate Gift of Inventory for Care of Ill or Needy or Qualified Research Contribution**

\_\_\_\_\_ [name of donor corporation] ("Donor") gives to \_\_\_\_\_ [exact legal name and address of donee] ("Donee"), \_\_\_\_\_ [describe property; or where several items are involved, add: those items of property more particularly described on the attached Schedule A incorporated by reference herein].

This gift is made subject to the terms and conditions specified in this instrument. The Donee, by its acceptance of this gift, warrants and represents that this gift shall be held, administered, and used in accordance with all the terms and conditions enumerated herein.

[If gift will be used for the care of the ill, the needy, or infants, insert the following:]

(1) This gift shall be used by the Donee solely for the care of the ill, the needy, or infants. The use of this property by the Donee shall be related to the purpose or function constituting the basis for the Donee's exemption from federal income taxation under Section 501 of the Internal Revenue Code.

[Or, for a qualified research contribution to an institution of higher learning, insert the following:]

(1) Substantially all of the Donee's use of this gift shall be for research or experimentation, within the meaning of Internal Revenue Code, or for research training, in the United States in physical or biological sciences.

[Continue with the following:]

(2) The Donee shall not transfer this gift to any other party in exchange for money, other property, or services.

Dated: \_\_\_\_\_, at \_\_\_\_\_ [city], California.

\_\_\_\_\_ [name of corporation]

By \_\_\_\_\_ [signature]

[typed name and title]

[Optional:]

**Acknowledgment**

[Acknowledgments taken in California must be in the following form ( Civ. Code § 1189(a) ):]

State of California, )  
County of \_\_\_\_\_ )  
 )  
 )

On \_\_\_\_\_ [date], before me, \_\_\_\_\_ [name and title of officer taking acknowledgment], personally appeared \_\_\_\_\_ [name(s) of person(s) signing instrument], \_\_\_\_\_ [who proved to me on the basis of satisfactory evidence] to be the person[s] whose name[s] \_\_\_\_\_ [is or are]

subscribed to the within instrument and acknowledged to me that \_\_\_\_\_ [he *or* she *or* they] executed the same in \_\_\_\_\_ [his *or* her *or* their] authorized \_\_\_\_\_ [capacity *or* capacities], and that by \_\_\_\_\_ [his *or* her *or* their] signature[s] on the instrument the person[s], or the entity upon behalf of which the person[s] acted, executed the instrument.

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

WITNESS my hand and official seal.

Signature \_\_\_\_\_ [Seal]

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Personal Gifts General Overview Estate, Gift & Trust Law Personal Gifts Procedures General Overview



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*25-69 California Legal Forms--Transaction Guide §§ 69.322-69.339*

**[Reserved]**

§§ 69.322[Reserved]



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3. Acceptance of Gift by Charity

*25-69 California Legal Forms--Transaction Guide § 69.340*

**§ 69.340 General Form of Acceptance and Receipt**

**[1] Comment**

**[a] Use of Form**

This form is an instrument by which the recipient of an inter vivos charitable gift formally acknowledges receipt and acceptance of the gift and, in appropriate instances, warrants that the gift will be used in accordance with the terms, conditions, and instructions in the gift instrument. The acknowledgment of receipt may be drafted by the donor's attorney at the time the formal gift instrument is prepared, and forwarded to the donee to be signed by an appropriate representative and returned to the donor.

Requirements for valid acceptance and delivery of gifts in general are discussed in Ch. 60A, *Gifts* .

**[b] Importance of Written Records**

No federal income tax charitable deduction is allowed for any gift of \$250 or more unless the donor substantiates the gift with a contemporaneous written acknowledgment by the donee [*see I.R.C. § 170(f)(8)*]; *see also* §§ 69.140, P 9, 69.160, P 6, 69.180, P 6]. This form meets the statutory requirements for a contemporaneous written acknowledgment. A written acknowledgment of receipt also serves as evidence that ownership of the gift property was actually transferred by the donee, and that the gift property was delivered and accepted.

**[c] Time Frame for Obtaining Receipt**

Ordinarily a receipt is obtained at the time the contribution is made. However, for contributions of \$250 or more that are subject to the substantiation requirements noted in [b], *above*, it is sufficient if the donee's written acknowledgment is obtained on or before the earlier of (1) the date which the donor files a return for the taxable year in which the contribution is made; or (2) the due date (including extensions) for filing that return [*I.R.C. § 170(f)(8)(C)*].

**[2] FORM****General Form of Acceptance and Receipt****Acceptance and Receipt of Gift**

\_\_\_\_\_ [full legal name of donee institution], a \_\_\_\_\_ [describe legal status of organization, e.g., a nonprofit corporation or a private operating foundation] whose principal office is located at \_\_\_\_\_ [address], acknowledges the receipt of a gift of \$ \_\_\_\_\_ [or describe specific items of property] from \_\_\_\_\_ [name of donor]. This gift was received on \_\_\_\_\_ [this date or specify date of receipt if different from date of acknowledgment] at \_\_\_\_\_ [the above address or address at which gift was actually received]. [Add if gift is in satisfaction of an earlier pledge: The pledge of \$ \_\_\_\_\_ by \_\_\_\_\_ (name of donor) made on \_\_\_\_\_ [date], is fully satisfied by this gift.]

[If donee has not provided any goods or services in consideration for all or part of the donated property:]

\_\_\_\_\_ [donee] has not provided any goods or services in consideration, in whole or in part, for the \_\_\_\_\_ [money or property or money and property] described above.

[Or, if donee has provided goods or services in consideration for all or part of the donated property:]

In consideration of the \_\_\_\_\_ [money or property or money and property] described above, \_\_\_\_\_ [donee] has provided or will provide \_\_\_\_\_ [describe goods or services; if services consist solely of intangible religious benefits, state: intangible religious benefits] [if goods or services provided by donee consist of anything other than intangible religious benefits, add statement of value, e.g., the value of which \_\_\_\_\_ (donee) estimates in good faith to be \$ \_\_\_\_\_].

[If gift was made subject to particular terms and conditions, add the following:]

\_\_\_\_\_ [donee] has reviewed the instrument making the above gift and understands all terms and conditions contained therein. \_\_\_\_\_ [donee] agrees to accept this gift on the terms and conditions described in the gift instrument, and to respect and abide by all such terms and conditions in the administration, use, and disposition of this gift [if desired, add: specifically including, but not limited to, \_\_\_\_\_ (enumerate one or more specific terms and conditions)].

Dated: \_\_\_\_\_.

\_\_\_\_\_ [name of donee]

By \_\_\_\_\_ [signature]

[typed name and title]

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Estate, Gift & Trust Law Personal Gifts Elements of Valid Gifts Acceptance



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*25-69 California Legal Forms--Transaction Guide § 69.341*

**§ 69.341 Acceptance and Receipt of Corporate Gift of Inventory for Care of Ill or Needy or for Scientific Research**

**[1] Comment--Use of Form**

This form is a special instrument acknowledging receipt of an inter vivos charitable gift, either of inventory to be used for the care of the ill, the needy, or infants, or of scientific property for research. Qualifying transfers of such property by corporations receive favorable tax treatment not available to other contributions of ordinary income property [*I.R.C. § 170(e)(3), (4)*]. The tax treatment of such contributions, and the requirements for eligibility, are discussed in detail in § 69.321[1].

One important requirement is that the donor must obtain from the donee a written representation that the property will be used in a manner meeting Internal Revenue Code requirements [*I.R.C. § 170(e)(3)(A)(iii), (e)(4)(B)(vii)*]. This special acknowledgment may be used to satisfy this requirement, as well as the general recordkeeping requirements applicable to all charitable gifts [*see I.R.C. § 170(f)(8); see also §§ 69.140, P 9, 69.160, P 6, 69.180, P 6*].

The *form in § 69.340* is a general acknowledgment that may be used in other situations.

**[2] FORM**

**Acceptance and Receipt of Corporate Gift of Inventory for Care of Ill or Needy or for Scientific Research**

**Acceptance and Receipt of Gift**

\_\_\_\_\_ [full legal name of donee institution], a \_\_\_\_\_ [describe legal status of organization, e.g., a nonprofit corporation or a private operating foundation] whose principal office is located at \_\_\_\_\_ [address], acknowledges the receipt of a gift of \_\_\_\_\_ [describe specific items of property] from \_\_\_\_\_ [name of donor]. This gift was received on \_\_\_\_\_ [this date or specify date of receipt if different from date of acknowledgment] at \_\_\_\_\_ [the above address or

address at which gift was actually received].

[If donee has not provided any goods or services in consideration for all or part of the donated property:]

\_\_\_\_\_ [donee] has not provided any goods or services in consideration, in whole or in part, for the property described above.

[Or, if donee has provided goods or services in consideration for all or part of the donated property:]

In consideration of the property described above, \_\_\_\_\_ [donee] has provided or will provide \_\_\_\_\_ [describe goods or services; if services consist solely of intangible religious benefits, state: intangible religious benefits] [if goods or services provided by donee consist of anything other than intangible religious benefits, add statement of value, e.g., the value of which \_\_\_\_\_ (donee) estimates in good faith to be \$\_\_\_\_\_].

[Continue with the following:]

\_\_\_\_\_ [donee] has reviewed the instrument making the above gift and understands all terms and conditions contained therein. \_\_\_\_\_ [donee] agrees to accept this gift on the terms and conditions described in the gift instrument, and to respect and abide by all such terms and conditions in the administration, use, and disposition of this gift. \_\_\_\_\_ [donee] warrants and represents that:

[If gift will be used for the care of the ill, the needy, or infants, insert the following:]

(1) This gift will be used solely for the care of the ill, the needy, or infants. All use of this property will be related to the purpose or function constituting the basis for the exemption from federal income taxation granted to \_\_\_\_\_ [donee] under *Section 501 of the Internal Revenue Code*.

[Or, for a qualified research contribution to an institution of higher learning, insert the following:]

(1) Substantially all use of this gift will be for research or experimentation, within the meaning of *Section 174 of the Internal Revenue Code*, or for research training, in the United States in physical or biological sciences.

[Continue with the following:]

(2) This gift will not be transferred to any other party in exchange for money, other property, or services.

Dated: \_\_\_\_\_.

\_\_\_\_\_ [name of donee]

By \_\_\_\_\_ [signature]

[typed name and title]

### Legal Topics:

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Personal Gifts Elements of Valid Gifts Acceptance Estate, Gift & Trust Law Personal  
Gifts Procedures General Overview Estate, Gift & Trust Law Personal Gifts Procedures Evidence



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*25-69 California Legal Forms--Transaction Guide §§ 69.342-69.359*

**[Reserved]**

§§ 69.342[Reserved]



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 B. Testamentary Dispositions to Charity  
 1. General Provisions

*25-69 California Legal Forms--Transaction Guide § 69.360*

**§ 69.360 Pecuniary Devise to Charity--General Form**

**[1] Comment**

**[a] Use of Form**

This form is a will provision giving a specified amount of cash to a charitable organization. It is a general form that may be used for any general pecuniary gift [*see Prob. Code §§ 21117(d), 21118* ("general pecuniary gift" defined)] not otherwise covered by the forms in this chapter dealing with specific types of gifts [*see § 69.380-69.480*]. It is intended for use when the testator has a general charitable intent; that is, when his or her principal concern is simply that the designated sum be used for any charitable purpose, as opposed to a more specifically defined purpose [*see §§ 69.365, 69.366*] or for the benefit of a specific organization [*see § 69.367*]. This form is a will provision, but it may be adapted for a codicil by using the format illustrated in Ch. 62, *Codicils*. If the subject matter of the gift is personal property other than cash, *see § 69.361*.

**[b] Importance of Determining Tax Consequences**

Before using this form or any other will provision in this chapter, the attorney should determine whether it is important to obtain a federal estate tax deduction for the charitable contribution, and, if so, whether a contribution to the organization under consideration will qualify for the deduction. General estate planning considerations, including the role of charitable dispositions, are discussed in Ch. 60, *Estate Planning*. Classes of organizations qualifying for the federal estate tax charitable deduction are discussed in §§ *69.16[2], 69.120*.

**[c] Description of Beneficiary**

In making any testamentary gift, it is important that the beneficiary be adequately described. This is particularly important in the case of charitable dispositions to organizations that have branches, chapters, or other subdivisions, such as fraternal societies and many religious institutions. Although a more general description will not necessarily invalidate the gift [*see discussion in § 69.12*], it is prudent to include the full proper name of the organization (e.g., "Loyal Order

of Moose, Los Angeles Lodge No. \_\_\_\_\_"), as well as its address.

It has been held that an attorney is not liable to a charitable beneficiary for including an ambiguous description of the beneficiary in a will because, among other reasons, the task of proving whether the ambiguity was the result of the negligence of the drafting attorney or a deliberate choice on the part of the testator would impose an "insurmountable burden" [ *Ventura County Humane Society v. Holloway* (1974) 40 Cal. App. 3d 897, 904-905 (gift to "Society for the Prevention of Cruelty to Animals (Local or National)")]. Further, an attorney is not liable for using words suggested or selected by the testator if they later prove to be ambiguous [ *Ventura County Humane Society v. Holloway* (1974) 115 Cal. Rptr.464] . Nevertheless, it is suggested that in the best interests of the client the better practice is to verify that the client has provided the correct name of the beneficiary organization, and, if the client suggests a description that is general in nature or otherwise inherently ambiguous, to advise the client that use of such a description is likely to result in litigation between charitable organizations that come within that description.

#### **[d] Alternate Beneficiary**

This form and most of the other will provisions in this chapter contain a clause providing for disposition to an alternate beneficiary in the event that the primary beneficiary fails for any reason to take the gift. It is highly desirable that the will contain such an alternate disposition. In the case of a noncharitable beneficiary, a gift that fails to take effect will simply pass under the residuary clause of the will unless the testator has made some other alternate disposition. This general rule also applies to charitable gifts. However, because of the liberal application of the cy pres doctrine [see discussion in § 69.12], there is a somewhat greater likelihood of litigation between charitable institutions and the residuary beneficiaries if the named charity fails to take the gift. The unfortunate result is that litigation expenses may consume much of the gift. One way of reducing the likelihood of such a situation is to clearly specify an alternate beneficiary.

#### **[2] FORM**

##### **Pecuniary Devise to Charity--General Form**

I give to \_\_\_\_\_ [exact legal name and address of charity; if an obscure group, consider adding: a charitable organization], the sum of \_\_\_\_\_ dollars (\$\_\_\_\_\_) [if gift is to be paid out of a specific fund (a demonstrative legacy), identify fund, e.g., from my savings account no. \_\_\_\_\_ at \_\_\_\_\_ (name and address of financial institution)], to be used by said organization for its general purposes. In the event that \_\_\_\_\_ [restate name of charity] fails for any reason to take this gift, I direct that it shall instead \_\_\_\_\_ [go to \_\_\_\_\_ (name and address of alternate beneficiary) or specify another alternate disposition, e.g., be disposed of as part of the residue of my estate.].

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:  
Estate, Gift & Trust Law Wills Bequests & Devises



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 1. General Provisions

*25-69 California Legal Forms--Transaction Guide § 69.361*

**§ 69.361 Testamentary Gift of Property to Charity--General Form**

**[1] Comment**

**[a] Use of Form**

This form is a will provision making a gift of one or more specific items of property to a charitable organization. It may be used for any gift or property not otherwise covered by the forms in this chapter [*see §§ 69.380-69.460*]. Like § 69.360, it is intended for use where the testator has a general charitable intent. For additional information relevant to the use of this form, see § 69.360[1]. If the subject matter of the gift is cash rather than items of property, § 69.360 should be used instead of this form.

Before drafting any devise to a charity, the attorney should determine the charity's correct legal name and verify that it is qualified to receive charitable devises under the Internal Revenue Code. This can be done by contacting the organization's development office or by consulting IRS Publication No. 78, the *Cumulative List of Organizations Described in Section 170(c) of the Internal Revenue Code* .

It is always good practice to specify what will happen to the devised property if a charitable devisee fails to take, or fails to qualify as a charitable devisee at the time of the testator's death. This form allows the drafter to specify that the gift will go to an alternate beneficiary, or that it will lapse and become part of the residue of the testator's estate.

**[b] Tax Considerations--Gifts of Partial Interests**

As noted in § 69.360[1], it is important to determine the tax consequences of any contemplated disposition and the effect of that disposition on the overall estate plan. In the case of gifts to specific items of property, as opposed to cash, a federal estate tax deduction is generally unavailable for gifts of less than the testator's entire interest in property. For example, if a testamentary gift of stock is made to a charity, no deduction will be allowed if, during the period of estate administration, a noncharitable beneficiary is to receive dividends from the stock [ *Rev. Rul. 83-45, 1983-1 C.B. 233* ]. The importance of this rule, and its exceptions, are discussed in § 69.16[3]. For language to be used in making a gift of

a future interest when it has been determined that the tax consequences of such a gift are acceptable to the testator, see Ch. 67, *Future Interests and Perpetuities* .

**[2] FORM**

**Testamentary Gift of Property to Charity--General Form**

I give \_\_\_\_\_ [*describe property, e.g., the real property and all improvements thereon located in the County of Pacific, State of California, and generally known as 14 Elm Street, Smalltown, California,*] to \_\_\_\_\_ [*correct legal name of charity, including any chapter or affiliate designation*] \_\_\_\_\_ [*if charity is obscure, add appropriate description, e.g., a charitable organization or, a religious organization or, a scientific and educational organization*]. If \_\_\_\_\_ [*name of charitable devisee*] fails for any reason to take this property, or if on the date of my death it is not an organization described in *Internal Revenue Code Section 2055(a)*, this gift shall \_\_\_\_\_ [*instead go to \_\_\_\_\_ (name and description of alternate beneficiary) or lapse and shall become part of the residue of my estate*].

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Estate, Gift & Trust Law Wills Bequests & Devises



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*25-69 California Legal Forms--Transaction Guide § 69.362*

**§ 69.362 Residuary Devise to Charity**

**[1] Comment--Use of Form**

This form is a will provision that may be used to give the residue of the testator's estate to charity. A residuary gift is a testamentary transfer of property that remains after all specific and general gifts have been satisfied [*Prob. Code* § 21117(f); see *Prob. Code* § 21117(a) ("specific gift" defined), (b) ("general gift" defined)]. A residuary gift passes all property that the testator owns at death [see *Prob. Code* § 21105 (property that passes by will)].

Like §§ 69.360 and 69.361, this form is intended for use when the testator has a general charitable intent. When the testator desires that the gift be put to a more specific use, see §§ 69.365-69.367 and the forms for dispositions to particular classes of entities [§§ 69.380-69.480]. For general information relevant to testamentary dispositions to charity, see § 69.360[1].

**[2] FORM**

**Residuary Disposition to Charity**

I give the residue of my estate to \_\_\_\_\_ [*exact legal name and address of charity; if an obscure group, consider adding: a charitable organization*], to be used by that organization for its general purposes. In the event that \_\_\_\_\_ [*restate name of charity*] fails for any reason to take all or any part of the residue of my estate, then I give any part thereof that is not so taken to \_\_\_\_\_ [*name and address of alternate beneficiary*].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Wills Bequests & Devises Estate, Gift & Trust Law Wills Residuary Clauses



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*25-69 California Legal Forms--Transaction Guide § 69.363*

**§ 69.363 Selection of Charity to Be Made by Executor**

**[1] Comment--Use of Form**

This form is a will provision leaving a specified amount of cash or other property to one or more charitable organizations to be selected by the executor of the estate following the testator's death. This provision may be used when the testator wishes to make a testamentary disposition to charity but does not have a specific beneficiary in mind, or when the testator would prefer for tax or other reasons to have the charity evaluated after his or her death. Because of the nature of the disposition, it is obviously suitable only when the testator has a general charitable intent.

This provision gives the executor a special power of appointment in favor of an indefinite class of charities [*see Prob. Code § 611* ("general" and "special" powers of appointment); *Estate of Dailey (1982) 130 Cal. App. 3d 993, 998, 182 Cal. Rptr. 95* (executor as donee given power to determine members of class of beneficiaries); *see also Ch. 64, Testamentary Trusts: Payment and Distribution Provisions, § 64.43[1] et seq.*].

For general information relevant to testamentary dispositions to charity, see Ch. 64, *Testamentary Trusts: Payment and Distribution Provisions*, §§ 69.240[1] and 69.241[1].

**[2] FORM**

**Selection of Charity to Be Made by Executor**

I give the sum of \_\_\_\_\_ dollars (\$\_\_\_\_\_) [*or describe property, e.g., my grand piano or, if several items of property are involved: those items of my property more particularly described on Schedule A attached to this Will and incorporated by reference herein*], to any one or more charities as my executor may in his [*or her*] discretion select, for the general purposes of any such charity chosen [; provided, however, that my executor shall select only charities that entitle my estate to a deduction from federal estate tax under *Section 2055 of the Internal Revenue Code* for all amounts (*or property*) so given]. This property is to be handled by my executor as a charitable disposition during administration of my estate, and is to be distributed in its entirety [through any one or more decrees of preliminary

distribution, but at the latest] through the final decree of distribution of my estate, with the actual recipients being specified by name or allocation in that [*or* the pertinent] decree.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Powers of Appointment Estate, Gift & Trust Law Wills Beneficiaries General Overview Estate, Gift & Trust Law Wills Bequests & Devises



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*25-69 California Legal Forms--Transaction Guide § 69.364*

**§ 69.364 Selection of Charity to Be Made by Trustee**

**[1] Comment--Use of Form**

This form is a will provision leaving a specified amount of cash or other property to the trustee of a trust established by the testator, to be distributed to charity by the trustee. The transfer is solely for charitable purposes and is wholly independent of any other trust created by the testator. This provision may be used in place of the *form in § 69.363* when the testator prefers to have the charities designated by a third party other than the executor. It may be modified if a third party other than a trustee will have the power to designate the charities that receive the gift. Like the preceding will provisions in this chapter [*see § 69.360-69.363*], this provision should be used only when the testator has a general charitable intent. The power conferred on the trustee or other third party amounts to a presently exercisable imperative special power of appointment in favor of an indefinite class of charities [*see Prob. Code §§ 611-613; see also § 69.363[1]*].

It is recommended that the provision specify a reasonable time limit for the distribution to charity. Ordinarily, there should be no reason to postpone distribution beyond the date of entry of the decree of final distribution of the estate. Specification of a longer period normally serves no useful purpose and creates the possibility of increased administration expenses.

For general information relevant to all testamentary dispositions to charity, see §§ *69.360[1]* and *69.361[1]*.

**[2] FORM**

**Selection of Charity to Be Made by Trustee**

I give to \_\_\_\_\_ [*name of trustee, or the Trustee of the Trust created under Article \_\_\_\_\_ of this will*], in trust, the sum of \$\_\_\_\_\_ dollars [*or describe property*], to be distributed to any one or more charities as the Trustee may in his [*or her*] discretion select, for the general purposes of any such charity chosen [; provided, however, that the Trustee shall select only charities which entitle my estate to a deduction from federal estate tax under *Section*

2055 of the Internal Revenue Code for all amounts (or property) so given]. The Trustee shall retain this sum [or property] while making any necessary investigation and evaluation of potential charitable recipients. Pending such disposition, the Trustee shall hold this amount [or property] separate from all other assets and property of my estate, and shall not commingle it with any other funds or property held in trust. No part of this disposition is to be invested in any manner [other than being deposited in a savings account]. The Trustee shall be entitled to a sum not to exceed \$\_\_\_\_\_ dollars as his [or her] fee, and shall be entitled to reimbursement for any other reasonable expenses of administration in connection with this distribution. The Trustee shall distribute the entire amount [or all property] governed by this provision no later than \_\_\_\_\_[specify time period; e.g., one year from the date of my death or the date of the final decree of distribution of my estate, whichever occurs later] .

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Powers of Appointment Estate, Gift & Trust Law Trusts Charitable Trusts Estate, Gift & Trust Law Trusts Testamentary Trusts



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*25-69 California Legal Forms--Transaction Guide § 69.365*

**§ 69.365 Disposition for Specific Purpose With Discretion to Use for Other Charitable Purpose**

**[1] Comment--Use of Form**

This form is a will provision that may be used when the testator wishes to give money or property to charity to be used for a specific purpose, but also wishes to give the charity discretion to use the gift for other purposes. If the testator desires that the gift should be used exclusively for a specified purpose and for no other purpose, the *form in § 69.366* should be used instead of this form. The choice of this type of form over a more binding direction is discussed in § 69.366[1]. In general, however, it is preferable to give the charity more discretion. For general information relevant to all testamentary dispositions to charity, see §§ 69.360[1] and 69.361[1].

**[2] FORM**

**Disposition for Specific Purpose With Discretion to Use for Other Charitable Purpose**

I give to \_\_\_\_\_ [exact legal name and address of charity; if an obscure group, consider adding: a charitable organization], the sum of \$\_\_\_\_\_ dollars [or describe specific items of property], to be used by said organization \_\_\_\_\_ [describe specific purpose for which gift is made, e.g., to purchase kitchen appliances and equipment for use in its program to provide meals to orphans and underprivileged children]. In the event that this gift cannot be used for the preceding purpose [, or if the above organization in the exercise of its discretion determines that it could be better used for another charitable purpose], it may be used for any other charitable purpose that such organization may direct. If \_\_\_\_\_ [restate name of charity] fails for any reason to take this gift, I direct that it shall instead \_\_\_\_\_ [go to \_\_\_\_\_ (name and address of alternate beneficiary) or specify another alternate disposition, e.g., be disposed of as part of the residue of my estate].

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
 Estate, Gift & Trust Law Wills Bequests & Devises



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*25-69 California Legal Forms--Transaction Guide § 69.366*

**§ 69.366 Disposition Exclusively for Specific Purpose--Alternative Disposition of Amounts Not So Expended**

**[1] Comment**

**[a] Use of Form**

This form is a will provision that may be used when the testator wishes to make a charitable gift to be used exclusively for a specific purpose. It should be used if the testator does *not* have a general charitable intent [*see § 69.360[1]*].

Where it is of paramount importance to the testator that a charitable gift should be used only for a particular purpose, that fact should be clearly stated in the Will provision making the disposition. Courts favor charitable dispositions and endeavor to carry them into effect whenever possible, and can apply the *cy pres* doctrine to permit a charitable gift that cannot be given effect in the precise manner specified by the testator to take effect in a manner consistent with the testator's intent [ *Estate of Gatlin (1971) 16 Cal. App. 3d 644, 648, 94 Cal. Rptr. 295* ; *see* discussion in § 69.12]. Therefore, if the testator wants the gift to fail if it cannot be used for the specified purpose, it is important to include a clear statement to that effect.

Where this form is used, the testator or attorney should contact the charity in advance to verify that the gift will be accepted for the stated purpose. Failure to make an advance determination greatly increases the risk that the gift will fail at the time of the testator's death.

For general information relevant to all testamentary dispositions to charity, see §§ 69.360[1] and 69.361[1].

**[b] Should Use of Gift Be Limited to Specified Purpose?**

Where the testator has a strong wish that the gift be used for a specific purpose, the attorney has a choice between using this form, which provides that the gift will fail if not put to the specified use, or the *form in § 69.365*, which specifies a primary use but permits the organization to direct the gift to another use if it cannot be used for the stated purpose. Which of these forms is most appropriate depends on the significance which the testator attaches to the purpose. Unless

the testator is adamant that the gift be used only for the stated purpose, it is recommended that the *form in § 69.365* be used. This is because there is obviously considerably less likelihood that the gift will fail if the charity is given greater discretion to determine its use. In addition, if the alternate beneficiary is an individual or other noncharitable beneficiary, failure of the charitable gift may disrupt the estate plan by depriving the estate of a needed federal estate tax deduction.

Where this form is used, one possible method of minimizing the chance that the gift will fail is to name one or more alternate beneficiaries that perform the same function as the primary beneficiary, and provide that the alternate beneficiaries can take only on the same conditions as the primary beneficiary.

## [2] FORM

### Disposition Exclusively for Specific Purpose--Alternative Disposition of Amounts Not So Expended

I give to \_\_\_\_\_ [*exact legal name and address of charity; if an obscure group, consider adding: a charitable organization*], the sum of \$\_\_\_\_\_ dollars [*or describe specific items of property*], to be used by said organization \_\_\_\_\_ [*describe specific purpose for which gift is made, e.g., to purchase redwood trees to be planted along the northeast border of Central Park*]. I direct that this gift may be accepted only on the precise terms and conditions specified herein, and that it shall be used only for the exact purpose stated in this disposition and for no other similar purpose. If \_\_\_\_\_ [*restate name of charity*] fails for any reason to accept and use this gift for the exact purpose specified herein, I direct that it shall instead \_\_\_\_\_ [*go to \_\_\_\_\_ (name and address of alternate beneficiary) or specify another alternate disposition, e.g., be disposed of as part of the residue of my estate*].

### Legal Topics:

For related research and practice materials, see the following legal topics:  
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*25-69 California Legal Forms--Transaction Guide § 69.367*

**§ 69.367 Disposition Exclusively for Benefit of Specific Organization**

**[1] Comment**

**[a] Use of Form**

This form is a will provision that may be used when the testator's primary intent in making a charitable gift is to benefit a specific organization rather than to make a contribution for a specific charitable purpose. This situation typically occurs where the testator is a member of a religious group or a society such as a fraternal order. If the named charity is intended merely to function as a conduit through which the gift will pass, the *form in § 69.360* or another appropriate form should be used. If a noncharitable alternate beneficiary is named, any anticipated federal estate tax charitable deduction will be lost if the primary beneficiary does not take the gift.

For general information relevant to all testamentary dispositions to charity, see §§ *69.360[1]* and *69.361[1]*.

**[b] Application of Cy Pres Doctrine**

Under the cy pres rule, a charitable disposition that cannot go to the charity named in the will ordinarily will go to another charity performing the same or a similar function [*see discussion in § 69.12*]. If the testator's primary purpose is to benefit the designated organization, such a result would be contrary to the testator's actual intent. Therefore, cy pres is inapplicable if the charitable gift is meant to benefit only the named organization, as evidenced from the will or extrinsic evidence [ *Estate of Klinkner (1978) 85 Cal. App. 3d 942, 951, 151 Cal. Rptr. 20* ]. The primary purpose of this form is to clearly state the testator's intent for the benefit of any reviewing court.

**[2] FORM**

**Disposition Exclusively for Benefit of Specific Organization**

I give to \_\_\_\_\_ [*exact legal name and address of charity; if an obscure group, consider adding: a*

charitable organization], the sum of \$\_\_\_\_\_ dollars [*or describe specific items of property*], to be used by that organization for its general purposes [*or describe specific purpose for which gift is made*]. The primary purpose of this gift is to benefit the above organization; and, in the event that this organization fails for any reason to take this gift, this gift shall not pass to any other organization having a similar function or purpose, but instead shall \_\_\_\_\_[go to \_\_\_\_\_ (*name and address of alternate beneficiary*) or specify another alternate disposition, e.g., be disposed of as part of the residue of my estate].

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
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*25-69 California Legal Forms--Transaction Guide §§ 69.368-69.379*

**[Reserved]**

§§ 69.368[Reserved]



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*25-69 California Legal Forms--Transaction Guide § 69.380*

**§ 69.380 Gift for Support of Clergy Member**

**[1] Comment**

**[a] Use of Form**

This form is a will provision giving a specified amount of cash to a religious institution for the support of a clergy member. It provides for investment of the principal and payment of the income for the stated purpose. For an outright gift without any investment requirement, appropriate language from this form should be added to the *form in § 69.360*. For general information relevant to all testamentary dispositions to charity, see §§ *69.360[1]* and *69.361[1]*.

**[b] Designation of Beneficiary**

Many religious groups are subdivided into parishes or similar individual units, and dissimilar religious groups sometimes have confusingly similar names. For this reason, the beneficiary should be precisely described by its full legal name and address, not merely by a general denominational designation such as "the Methodist Church in San Francisco" or "the Archbishop of Los Angeles and San Diego" [*see, e.g., Estate of Cleaver (1981) 126 Cal. App. 3d 341, 178 Cal. Rptr. 729*]. If there is any question about the proper name for the recipient, or which subdivision should actually be designated as beneficiary, the attorney or client should contact the institution personally to resolve the matter.

**[c] Individual Clergy Member as Beneficiary--Tax Considerations**

Caution must be exercised in designating an individual clergy member as the recipient of a religious contribution, or the federal estate tax charitable deduction may be disallowed. Because the deduction is available only for contributions to or for the use of corporations and associations organized for religious purposes [*I.R.C. § 2055(a)(2)*; *Treas. Reg. § 1.2055-1(a)(2)*], contributions to individual members of religious orders (usually members of the testator's family) have been disallowed [*see Estate of George W. Dichtel (1958) 30 T.C. 1258, 1261-1262*], even if the testator was aware that the donee was under a legally enforceable obligation to turn over all bequests to the church [*see Barry's Estate v. C.I.R.*

(9th Cir. [T.C.] 1962) 311 F.2d 681, 683-684 ; Letter Rul. 200437032, 2004 PLR LEXIS 614 (decedent's residuary bequest to beneficiary who is individual that is member of religious order and has taken vow of poverty does not qualify for estate tax charitable deduction under I.R.C. § 2055(a); see also Cox v. Commissioner (2d Cir. [T.C.] 1961) 297 F.2d 36] . In one case, for example, funds that a mother and father transferred to their sons while the sons served as full-time, unpaid missionaries for the Church of Jesus Christ of Latter-day Saints were not charitable contributions "to or for the use of" the church within the meaning of I.R.C. § 170(c). A contribution is "for the use of" a qualified organization only if it is held in a legally enforceable trust for the organization, or in some similar legal arrangement [ Davis v. United States (1990) 495 U.S. 472, 486, 110 S. Ct. 2014, 109 L. Ed. 2d 457] . If an individual clergy member is named as the recipient of the bequest, it is important that the provision include language creating a legal or equitable interest in the religious institution itself [see Cox v. Commissioner (2d Cir. [T.C.] 1961) 297 F.2d 36, 38] . The simplest method of creating such an interest is to specify that the gift is made in trust to the clergy member for the benefit of the religious organization; however, it is strongly recommended that this device be avoided entirely if possible. For special considerations when religious services are involved, see § 69.383[1].

## [2] FORM

### Gift for Support of Clergy Member

I give to \_\_\_\_\_[*exact name and address of specific church or other religious institution*] the sum of \$\_\_\_\_\_, to provide for [or, go toward] the support of a \_\_\_\_\_[*designate member of clergy, e.g., minister or priest or rabbi; or other individual to be supported*]. The principal may be invested through any trust or fund managed for the benefit of the donee. The income shall be used first for adequate support of the individual recipient in amounts determined by the appropriate authorities of the donee institution. Any excess income shall be used to furnish the recipient with an appropriate expense account or to furnish [or supplement] the recipient's rent in an adequate residence [; and any income remaining after fulfillment of all the above purposes shall be applied to the general purposes of the donee institution]. In the event that \_\_\_\_\_[*restate name of church*] fails for any reason to take this gift, I direct that this gift shall instead \_\_\_\_\_[go to \_\_\_\_\_ (*name and address of alternate beneficiary*) or specify another alternate disposition, e.g., be disposed of as part of the residue of my estate].

### Legal Topics:

For related research and practice materials, see the following legal topics:  
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*25-69 California Legal Forms--Transaction Guide § 69.381*

**§ 69.381 Gift for Construction or Acquisition of Property for Religious Purposes**

**[1] Comment--Use of Form**

This form is a will provision that may be used when the testator wishes to make a testamentary gift of money or land for construction of a church building or another religious purpose. Many religious institutions maintain building funds for this purpose. Before making such a gift, the testator should determine whether it is realistic or possible for the institution to accept the gift for this purpose.

Designation of the correct beneficiary is discussed in § 69.380[1]. For general information relevant to all testamentary dispositions to charity, see §§ 69.360[1] and 69.361[1].

**[2] FORM**

**Gift for Construction or Acquisition of Property for Religious Purposes**

I give to \_\_\_\_\_ [*exact name and address of specific church or other religious institution*] the sum of \$ \_\_\_\_\_ [*or that real property known as \_\_\_\_\_ (address); more formal legal description may be incorporated in an appended inventory*], for [*or toward*] \_\_\_\_\_ [*specify purpose: e.g., construction of a new church building and acquisition of any fixtures or furnishings for such building, consistent with its purpose*]. If any portion of this gift remains after this purpose has been fully satisfied [*if testator wishes to give church more discretion regarding use of gift, add.;* or if the appropriate authorities of \_\_\_\_\_ (*restate name of church*) determine that this gift cannot be used for this purpose], then [this gift or] any remaining portion thereof shall be used for the general purposes of the above institution [*or specify more specific alternative purpose*]. In the event that \_\_\_\_\_ [*restate name of church*] fails for any reason to take this gift, I direct that this gift shall instead \_\_\_\_\_ [*go to \_\_\_\_\_ (name and address of alternate beneficiary) or specify another alternate disposition, e.g., be disposed of as part of the residue of my estate*].

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
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*25-69 California Legal Forms--Transaction Guide § 69.382*

**§ 69.382 Gift to Support Missionary Activities**

**[1] Comment--Use of Form**

This form is a will provision making a gift to support missionary activities or other similar activities of a religious institution. Designation of the correct beneficiary is discussed in § 69.380[1]. For general information relevant to all testamentary dispositions to charity, see §§ 69.360[1] and 69.361[1].

**[2] FORM**

**Gift to Support Missionary Activities**

**Outright Gift Without Restriction**

I give to \_\_\_\_\_[*exact name and address of specific church or other religious institution*] the sum of \$\_\_\_\_\_ [or describe property being given], to be used to further the missionary [or public relations or goodwill] activities of the above institution in [or among] \_\_\_\_\_[*specify particular country, geographic region, people, or culture, or state: all people, wherever situated*]. In the event that \_\_\_\_\_[*restate name of church*] fails for any reason to take this gift, I direct that this gift shall instead \_\_\_\_\_[go to \_\_\_\_\_ (*name and address of alternate beneficiary*) or specify another alternate disposition, e.g., be disposed of as part of the residue of my estate].

[OR]

**Investment of Principal and Payment of Income**

I give to \_\_\_\_\_[*exact name and address of specific church or other religious institution*] the sum of

\$\_\_\_\_\_, the principal of which shall be invested through any trust or fund managed for the benefit of the above donee, and the income from which shall be used to support the missionary [or public relations or goodwill] activities of the above institution in [or among] \_\_\_\_\_[specify particular country, geographic region, people, or culture, or state: all people, wherever situated]. In the event that \_\_\_\_\_[restate name of church] fails for any reason to take this gift, I direct that this gift shall instead \_\_\_\_\_[go to \_\_\_\_\_ (name and address of alternate beneficiary) or specify another alternate disposition, e.g., be disposed of as part of the residue of my estate].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

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*25-69 California Legal Forms--Transaction Guide § 69.383*

**§ 69.383 Contribution for Performance of Religious Services**

**[1] Comment--Use of Form**

**[a] Use of Form**

This form is a will provision giving money to be used for performance of religious services, such as Masses in a Roman Catholic church.

In making this type of bequest, particular attention should be paid to the designation of the beneficiary. Although a bequest to an individual clergy member to perform religious services in memory of the decedent has been held to create a trust for charitable uses under California law [ *Estate of Hamilton (1919) 181 Cal. 758, 771, 186 P. 587* ], the Internal Revenue Service has ruled that a bequest to a member of a religious order to say Masses for the dead is nondeductible even if the order requires that the clergyman take a vow of poverty. The IRS takes the position that in such a case the gift passes to the order under a contractual arrangement between the individual clergy member and the order rather than by way of the decedent's bequest under the will [ *Rev. Rul. 68-459, 1968-2 C.B. 411* ; see *Letter Rul. 200437032, 2004 PLR LEXIS 614* (decedent's residuary bequest to beneficiary who is individual that is member of religious order and has taken vow of poverty does not qualify for estate tax charitable deduction under *I.R.C. § 2055(a)*)]. To avoid this situation, it is probably the better practice in most cases to make the bequest to the institution rather than to a specific individual or, in appropriate instances, to the Archbishop of the particular region as a corporation sole. If an individual recipient is designated, it is suggested that there is a greater chance of obtaining a charitable deduction if the gift is made to that individual in trust for the specified purpose [see *Cox v. Commissioner (2d Cir. [T.C.] 1961) 297 F.2d 36, 38* ] ; however, it is recommended that this device be avoided entirely if at all possible. For additional discussion of this problem, see the discussion in § 69.380[1][c].

If the testator wishes to specify the number of services to be performed, he or she should be instructed to contact the church in question and determine whether it is customary to allocate a specific sum for each such service.

For general information relevant to all testamentary dispositions to charity, see §§ 69.360[1] and 69.361[1].

**[2] FORM****Contribution for Performance of Religious Services**

I give to \_\_\_\_\_ [e.g., the Archbishop of \_\_\_\_\_, a corporation sole *or exact name and address of specific church or other religious institution*] the sum of \$\_\_\_\_\_, to be used for \_\_\_\_\_ [specify purpose, e.g., the saying of \_\_\_\_\_ (number, if desired) Masses for my soul]. [Optional: These Masses are to be said (or These services are to be held) at \_\_\_\_\_ (name of church) on \_\_\_\_\_ (time, if any, e.g., each anniversary of my death) by \_\_\_\_\_ (name of clergy member).]

**Legal Topics:**

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*25-69 California Legal Forms--Transaction Guide §§ 69.384-69.399*

**[Reserved]**

§§ 69.384[Reserved]



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*25-69 California Legal Forms--Transaction Guide § 69.400*

**§ 69.400 Gift for Educational Facilities**

**[1] Comment**

**[a] Use of Form**

This form is a will provision giving money or property to an educational institution for construction or improvement of educational facilities. If the money or property is to be used only for a narrowly defined purpose, the donor or attorney should verify in advance that this purpose is compatible with the institution's own plans. If real property is involved, the donor must consider whether the size and location of the property would render it useful to the institution. For information on descriptions, and general information relevant to all testamentary dispositions to charity, see §§ 69.360[1] and 69.361[1].

**[b] Federal Estate Tax Considerations for Gifts to Educational Institutions**

A federal estate tax charitable deduction is allowed for contributions to corporations and associations operated exclusively for educational purposes [*I.R.C. § 2055(a)(2); Treas. Reg. § 20.2055-1(a)(2)*]. As a general rule, both the courts and the IRS have been comparatively liberal in allowing this deduction [*see, e.g., Rev. Rul. 60-367, 1960-2 C.B. 73* (gift to college for housing for members of specific fraternity); *Marine Midland Trust Co. of Southern N.Y. v. McGowan* (2d Cir. [N.Y.] 1955) 223 F.2d 408 (deduction allowed for contribution to fraternity where all parties agreed property was to be used only for educational purposes)]; there are no specific limitations comparable to those used in determining availability of the 50-percent deduction limit for federal income tax purposes [*see I.R.C. § 170(b)(1)(A)(ii); Treas. Reg. § 1.170A-9(b)(1), (2)*].

**[c] Institutions Practicing Racial Discrimination**

Educational institutions practicing policies that discriminate against individuals on the basis of race or national origin are not regarded as "charitable" because their discriminatory policies are contrary to the well-established federal policy against racial discrimination in education. Therefore, these institutions are ineligible for federal tax-exempt status and

contributions to such institutions are ineligible for the federal income tax charitable deduction. This restriction extends to schools operated by religious institutions, and applies to policies such as discrimination in admissions and restrictions on interracial marriage and dating [ *Rev. Rul. 71-447, 1971-2 C.B. 230* ; *Rev. Rul. 75-231, 1975-1 C.B. 158* (both issued under *I.R.C. §§ 170, 501(c)(3)*); see *Bob Jones University v. United States (1983), 461 U.S. 574, 103 S. Ct. 2017, 76 L. Ed. 2d 157*].

## [2] FORM

### Gift for Educational Facilities

I give to \_\_\_\_\_ [*exact legal name and address of educational institution; if an obscure group, consider adding: an educational institution*], the sum of \$ \_\_\_\_\_ [*or describe real property*], to be used [*or to go toward*] \_\_\_\_\_ [*describe specific purpose for which gift is made, e.g., construction of classroom facilities or a science library or other purpose*]. [*If institution is to be given greater discretion in use of gift, add: In the event that this gift cannot be so used, or if the governing body of the above institution in the exercise of its discretion determines that it could be better used, this gift may be used for construction of such other buildings or facilities as the governing body of the above institution may direct.*] If \_\_\_\_\_ [*restate name of institution*] fails for any reason to take this gift, I direct that it shall instead \_\_\_\_\_ [*go to \_\_\_\_\_ (name and address of alternate beneficiary) or specify another alternate disposition, e.g., be disposed of as part of the residue of my estate*].

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*25-69 California Legal Forms--Transaction Guide § 69.401*

**§ 69.401 Gift for Athletic or Recreational Facilities**

**[1] Comment--Use of Form**

This form is a will provision giving money or property to an educational institution for construction or improvement of recreational or athletic facilities. The illustrated provision is somewhat more detailed than will be necessary in most cases, and is included to illustrate drafting possibilities where the gift is sufficiently large to warrant dealing with such contingencies. For additional information on gifts to educational institutions, see § 69.400[1]. For information on descriptions, and general information relevant to all testamentary dispositions to charity, see §§ 69.360[1] and 69.361[1].

This provision is for use when the beneficiary is an educational institution. A charitable deduction is also available for contributions to noneducational groups which are organized and operated exclusively to foster national or international amateur sports competition [I.R.C. §§ 2055(a)(2), 2522(a)(2)]. No part of the activities of such a group may involve the provision of athletic facilities or equipment [I.R.C. §§ 2055(a)(2), 2522(a)(2)], except in the case of contributions to a "qualified amateur sports organization"; that is, one organized primarily to conduct national or international amateur sports competition, or to support and develop amateur athletes for national or international sports competition [I.R.C. § 501(j)(2), 2522(a)].

**[2] FORM**

**Gift for Athletic or Recreational Facilities**

I give to \_\_\_\_\_[*exact legal name and address of educational institution; if an obscure group, consider adding: an educational institution*], the sum of \$ \_\_\_\_\_[*or describe real property*], to be used [or to go toward] \_\_\_\_\_[*describe particular facilities, e.g., construction of an indoor Olympic swimming pool, including lockers, dressing rooms, and similar adjunct facilities or a gymnasium with accommodations for up to 3,000 spectators or describe other use*], to be located on \_\_\_\_\_[*describe location, either generally, e.g., the property of the above institution at a location determined by its governing body or with particularity, e.g., on that real*

property which I have given to the above institution under Article \_\_\_\_\_ of this will]. This facility shall be permanently known as \_\_\_\_\_[*name*]. Any portion of the above amount unspent or remaining after construction is completed shall be invested through any other trust fund managed for the benefit of the above institution, and the income therefrom shall be used exclusively for maintenance of the above facility and for hiring and paying the salaries of the staff, including a director [*or instructor*]. [*If institution is to be given greater discretion in use of gift, add:* In the event that this gift cannot be so used, or if the governing body of the above institution in the exercise of its discretion determines that it could be better used, this gift may be used to construct or provide such other athletic or recreational facilities as the governing body of the above institution may direct.] If \_\_\_\_\_[*restate name of institution*] fails for any reason to take this gift, I direct that it shall instead \_\_\_\_\_[*go to \_\_\_\_\_ (name and address of alternate beneficiary) or specify another alternate disposition, e.g., be disposed of as part of the residue of my estate*].

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*25-69 California Legal Forms--Transaction Guide § 69.402*

**§ 69.402 Creation of Scholarship Fund**

**[1] Comment--Use of Form**

This form is a will provision establishing a scholarship fund. The principal is to be invested and the income paid to support students meeting eligibility standards set forth in the instrument. This provision should only be used where the gift is sufficiently large to warrant creation of a separate fund that will generate enough income to provide a meaningful scholarship. When smaller amounts are involved, it is easier to simply make a cash gift into an existing fund [*see* § 69.360]. For additional information on gifts to educational institutions, see § 69.400[1]. For general information relevant to all testamentary dispositions to charity, see §§ 69.360[1] and 69.361[1].

**[2] FORM**

**Creation of Scholarship Fund**

I give to \_\_\_\_\_ [*exact legal name and address of educational institution or administering foundation*], the sum of \$\_\_\_\_\_, for the establishment of a perpetual scholarship fund. This fund shall be permanently known as the \_\_\_\_\_ [*name*] Scholarship Fund, and shall be held and administered on the terms set forth below:

(a) The amount specified above shall constitute the principal of the fund and shall be invested through any other trust or fund managed for the benefit of the above institution. The above institution may accept additional contributions to the principal of this fund to be administered in accordance with these terms.

(b) The income accruing to this fund shall [*or may, at the discretion of the appointing committee,*] be awarded annually to one or more qualified candidates to support their attendance at \_\_\_\_\_ [*name of particular institution, or: any college or university of their choice*], for \_\_\_\_\_ [*if scholarship is made for a specific purpose, specify, e.g., study leading toward the degree of \_\_\_\_\_ (specify, e.g., Bachelor of Arts) in the field of \_\_\_\_\_ (specify, e.g., medieval history) or graduate study in \_\_\_\_\_ (specify field or area)*].

(c) The appointing committee shall be named by the governing body [*or* shall consist of \_\_\_\_\_ (*specify, e.g.,* the tenured professors in the history department)] of the above institution. The appointing committee shall establish conditions for the award of this scholarship in accordance with acceptable modern standards of scholarship administration and consistent with the purpose of this fund, and shall institute rules to assure that all candidates meet and maintain appropriate academic standards.

(d) The amount awarded to each candidate in any single academic year shall not exceed \_\_\_\_\_ [*specify maximum; either a dollar amount, e.g., (\$1,000) or other limitation, e.g., an amount which the appointing committee determines is reasonable to pay the tuition and incidental expenses, including living expenses, of a regularly enrolled full-time student at the above institution*]. The amount awarded is [*or is not*] to be determined on the basis of the candidate's need. [Candidates are to be exclusively (*or preferably*) drawn from \_\_\_\_\_ (*specify, e.g., dependents of families with annual incomes of less than \$10,000 or culturally and financially underprivileged neighborhoods or communities*).]

(e) A candidate who has once been awarded a grant under this scholarship shall thereafter be preferred as a candidate until such time as the appointing committee determines that the candidate has completed his or her academic program, or has ceased to make reasonable progress toward such completion, or has ceased to be regularly enrolled at the above institution [*or an institution of higher learning*].

(f) Any interest not awarded to any qualified candidate in the year that such interest accrued shall not be awarded in any subsequent year, but shall be added to the principal of this fund.

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*25-69 California Legal Forms--Transaction Guide § 69.403*

**§ 69.403 Creation of Professorship or Teaching Position**

**[1] Comment--Use of Form**

This form is a will provision giving a specific amount of money to fund the salary for a teaching position or establish a "professor's chair" on the faculty of an educational institution. Use of this provision should be considered only when the amount given will generate enough income to provide such a salary; in other words, it is normally suitable only for very substantial gifts. It is recommended that gifts of smaller amounts be made as simple cash gifts or gifts into an existing fund earmarked for faculty salaries [*see § 69.360 (general form for cash gift)*]. For additional information on gifts to educational institutions, see § 69.400[1]. For general information relevant to all testamentary dispositions to charity, see §§ 69.360[1] and 69.361[1].

**[2] FORM**

**Creation of Professorship or Teaching Position**

I give to \_\_\_\_\_ [*exact legal name and address of educational institution or administering foundation*], the sum of \$\_\_\_\_\_, for the establishment and perpetuation of a teaching position [*or professorship or chair*] on its faculty in the Department [*or School or College*] of \_\_\_\_\_ [*subject; e.g., Biology*]. The principal shall be invested through any fund or trust managed for the benefit of the above institution. The appropriate authorities of the above institution shall decide what portion of the income is to be designated as the salary of the recipient instructor [*or professor*] for each year, and the remaining income, if any, is to be allocated to the Department of \_\_\_\_\_ for its current needs and expenses. Any person filling this position will serve according to all normal rules and procedures in force at the above institution during such time [*note any special qualifications; e.g., provided that such person must have a competent background in and be accredited to teach the subjects of anatomy or physiology*]. This faculty position shall be permanently known as the \_\_\_\_\_ [*name of position; normally that of donor followed by subject matter, e.g., Ralph Waldo Smith Professor of Anatomy and Physiology*].

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*25-69 California Legal Forms--Transaction Guide § 69.404*

**§ 69.404 Gift of Tangible Personal Property to Museum or Similar Institution**

**[1] Comment**

**[a] Use of Form**

This form is a will provision giving one or more items of tangible personal property to a museum or other comparable institution. It may be used where the testator wishes to donate an individual item or an entire collection. Before this provision is used, it is recommended that either the testator or the attorney contact the institution and determine whether it is willing to accept the donation on the terms and conditions established by the testator. If the gift consists of cash rather than tangible personal property, § 69.360 (a general form for gifts of cash) should be used instead of this form.

Descriptions of property are generally *covered in § 69.361[1]*. If the property involved is a collection or accumulation consisting of a number of items, each item should be described in detail in a separate inventory attached to the will and incorporated by reference into the provision making the gift.

For general information relevant to all testamentary dispositions to charity, see §§ *69.360[1]* and *69.361[1]*.

**[b] Federal Estate Tax Treatment of Works of Art and Similar Items**

A federal estate tax charitable deduction is available for testamentary gifts to corporations and associations organized and operated exclusively for literary or educational purposes, including the encouragement of art [*I.R.C. § 2055(a)(2); Treas. Reg. § 20.2055-1(a)(2)*]. For federal estate tax purposes, property is generally valued at its fair market value at the time of the decedent's death [*I.R.C. § 2031; Treas. Reg. § 20.2031-1(b)*]; see discussion in § 69.16[4]. This valuation rule applies even to property created by the testator (as in the case of a testamentary gift of paintings by the artist), and should not be confused with federal income tax valuation rules generally limiting the available deduction for such contributions to the donor's basis [*see I.R.C. § 170(e)(1)(A), (B); Treas. Reg. § 1.170A-4(a)(1), (b)(1)*]; see also discussion in § 69.15[5].

Donation of collections, individual works of art, and similar items is frequently a valuable estate planning tool for large estates. It permits the estate to obtain a deduction for the full fair market value of unproductive assets or items that have less personal appeal to the beneficiaries than to the testator, while relieving the estate tax burden on assets that are more productive. Where estate tax savings are an important consideration, it is especially important to decide in advance upon a suitable beneficiary and to verify that the gift will be accepted.

**[2] FORM**

**Gift of Tangible Personal Property to Museum or Similar Institution**

I give to \_\_\_\_\_ [*exact name and address of institution*] my \_\_\_\_\_ [*if a single item is involved, include precise description: for a painting or other work of art, include title of work and name of artist; or, for a collection or accumulation, include general description and incorporate detailed inventory by reference, e.g., entire collection of nineteenth- and early twentieth-century original Art Nouveau posters, more particularly itemized and described in Schedule A attached to this will and incorporated by reference herein*], located at \_\_\_\_\_ [*describe location or whereabouts of item*], to be housed by the above institution \_\_\_\_\_ [*as it deems appropriate or specify any special conditions, e.g., in a separate, permanent display area to be constructed with the funds provided for that purpose under Article \_\_\_\_\_ of this will, with appropriate staff*]. If \_\_\_\_\_ [*restate name of institution*] fails for any reason to take this gift, I direct that it shall instead \_\_\_\_\_ [*go to \_\_\_\_\_ (name and address of alternate beneficiary) or specify another alternate disposition, e.g., be disposed of as part of the residue of my estate*].

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*25-69 California Legal Forms--Transaction Guide §§ 69.405-69.419*

**[Reserved]**

§§ 69.405[Reserved]



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*25-69 California Legal Forms--Transaction Guide § 69.420*

**§ 69.420 Gift for Project or Research in Science or Medicine**

**[1] Comment**

**[a] Use of Form**

This form is a will provision giving a specified amount of cash for a scientific project or scientific research. For general information relevant to all testamentary dispositions to charity, see §§ 69.360[1] and 69.361[1].

**[b] Tax Considerations in Gifts for Scientific Projects and Research**

A federal estate tax deduction is available for contributions to any corporation or association operated exclusively for scientific purposes [*I.R.C. § 2055(a)(2)*]. However, no part of the earnings of the corporation or association can inure to the benefit of any stockholder or individual, other than as a legitimate object of its scientific purpose [*I.R.C. § 2055(a)(2); Treas. Reg. § 20.2055-1(a)(2)*]. Scientific projects and medical research may obviously have important economic consequences. To obtain a charitable deduction for such a contribution, it is important to verify that the organization's purpose is exclusively charitable. For example, contributions to local medical societies have been disallowed because the organizations directly or indirectly engage in lobbying activities and provide other noncharitable services to their members [*see Krohn v. United States (D. Colo. 1965) 246 F.Supp. 341 ; see also Hammerstein v. Kelley (8th Cir. [Mo.] 1965) 349 F.2d 928 (bequest to medical society library held nondeductible)*].

**[2] FORM**

**Gift for Project or Research in Science or Medicine**

I give to \_\_\_\_\_ [*exact legal name and address of hospital, educational institution, nonprofit testing company, or other organization*], the sum of \$ \_\_\_\_\_, to be used for research in the area of \_\_\_\_\_ [*describe specific purpose, e.g., heart disease*].

*[If gift is of appropriate size, consider adding conditions such as the following:]*

Up to \$\_\_\_\_\_ may be expended in the construction of suitable facilities, including the acquisition of any necessary equipment. The remainder shall be invested in any trust or fund managed for the benefit of the above institution, and the income therefrom shall be used to provide for the salaries of staff members whose duties are substantially connected with research in the field of \_\_\_\_\_*[specify]*, and for ongoing expenses of the project. The entire research project is to be known as the \_\_\_\_\_*[name]* Project.

*[Continue with the following:]*

In the event that \_\_\_\_\_*[restate name of organization]* fails for any reason to accept this gift, I direct that it shall instead \_\_\_\_\_*[go to \_\_\_\_\_ (name and address of alternate beneficiary) or specify another alternate disposition, e.g., be disposed of as part of the residue of my estate]*.

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*25-69 California Legal Forms--Transaction Guide § 69.421*

**§ 69.421 Gift of Equipment or New Facilities to Hospital**

**[1] Comment--Use of Form**

This form is a will provision giving money or property to a hospital for construction or addition of new hospital facilities or equipment. If the testator intends to specify a narrow purpose for the gift, it is important that the hospital be contacted in advance to determine whether it can use the gift for the purposes to be designated. For general information relevant to all testamentary dispositions to charity, see §§ 69.360[1] and 69.361[1].

**[2] FORM**

**Gift of Equipment or New Facilities to Hospital**

I give to \_\_\_\_\_[*exact legal name and address of hospital*] the sum of \$\_\_\_\_\_ for [*or toward*] construction and addition [*or acquisition*] of \_\_\_\_\_[*specify facilities or equipment to be constructed or added, e.g., a new wing devoted to obstetrics, including labor rooms, delivery rooms, infant receiving quarters, and related services or new hemodialysis equipment*].

[*If gift is of appropriate size, consider adding conditions such as the following:*]

Up to \$\_\_\_\_\_ may be expended for construction of suitable facilities, including the acquisition of any necessary equipment. The remainder shall be invested in any trust or fund managed for the benefit of the above institution, and the income therefrom shall be used to provide for the salaries of staff members whose duties are substantially connected with the facility, and for ongoing expenses. The facility shall be permanently known as \_\_\_\_\_[*name*].

[*Continue with the following:*]

In the event that \_\_\_\_\_ [*restate name of organization*] fails for any reason to accept this gift, I direct that it shall instead \_\_\_\_\_ [go to \_\_\_\_\_ (*name and address of alternate beneficiary*) or specify another alternate disposition, e.g., be disposed of as part of the residue of my estate].

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*25-69 California Legal Forms--Transaction Guide §§ 69.422-69.439*

**[Reserved]**

§§ 69.422[Reserved]



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*25-69 California Legal Forms--Transaction Guide § 69.440*

**§ 69.440 Gift to Social Welfare Organization for Benefit of Undeprived Persons**

**[1] Comment--Use of Form**

This form is a will provision giving a specified amount of cash to a social welfare organization for ultimate distribution to underprivileged persons; in other words, traditional almsgiving. Because no federal estate tax deduction is available for direct contributions to individuals, such a contribution today must be made through a charitable organization if the testator is to derive any tax benefits. This provision requires investment of the principal and payment of the income for the stated purpose. Thus, the size of the gift must be sufficient to generate enough income to make the gift worthwhile. The organization may be able to pool smaller contributions, but it is probably better practice simply to make such gifts outright to the organization for the stated purpose, without any investment requirement [*see* § 69.365].

For general information relevant to all testamentary dispositions to charity, see §§ 69.360[1] and 69.361[1].

**[2] FORM**

**Gift to Social Welfare Organization for Benefit of Undeprived Persons**

I give to \_\_\_\_\_ [*exact legal name and address of organization*] the sum of \$\_\_\_\_\_, for eleemosynary distribution among underprivileged persons in \_\_\_\_\_ [*specify geographic region, e.g., Los Angeles County or further restrict to cultural or occupational groups, e.g., the Mexican-American community in Los Angeles County or migrant farmworkers in California*]. The principal shall be invested through any other trust fund managed for the benefit of the above institution. The income shall be distributed to the recipients on the basis of need as determined from formal application or discovery by the staff of the above organization, and shall be awarded only following reasonable research and confirmation of the facts in each case. \_\_\_\_\_ [*restate name of organization*] shall establish formal criteria for eligibility for grants from this fund. Grants may be made for activities including but not limited to the following, as determined in each instance in the absolute discretion of the above organization: \_\_\_\_\_ [*specify, e.g., supplemental income for food, rent, and other living expenses, underwriting or guaranteeing small proprietary enterprises, or tuition and educational expenses toward acquiring job skills*]. In the event

that \_\_\_\_\_ [*restate name of organization*] fails for any reason to accept this gift, I direct that it shall instead \_\_\_\_\_ [go to \_\_\_\_\_ (*name and address of alternate beneficiary*) or specify another *alternate disposition, e.g.,* be disposed of as part of the residue of my estate].

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*25-69 California Legal Forms--Transaction Guide § 69.441*

**§ 69.441 Gift to Social Welfare Organization for New Facilities**

**[1] Comment--Use of Form**

This form is a will provision giving money or property to a social welfare organization to provide physical facilities such as a counseling facility or similar venture. It is designed for gifts that are sufficiently large to support the construction or operation of such a facility. Smaller gifts should be made in the form of cash donations for the stated purpose [see § 69.365]. For information on the description of property generally, see § 69.361[1]. For general information relevant to all testamentary dispositions to charity, see §§ 69.360[1] and 69.361[1].

**[2] FORM**

**Gift to Social Welfare Organization for New Facilities**

I give to \_\_\_\_\_ [exact legal name and address of organization] the sum of \$ \_\_\_\_\_ [or describe specific property], to be used by said organization \_\_\_\_\_ [describe specific purpose for which gift is made, e.g., for the construction and operation of a facility for counseling, treatment, and rehabilitation of alcoholics]. [Up to \$ \_\_\_\_\_ may be expended for the acquisition of land and construction of physical facilities, including furnishings and equipment. The remainder, if any, shall be invested through any other trust or fund managed for the benefit of the above institution, and the income therefrom shall be used to support staff members whose duties are substantially connected with the work of the facility, and for its current expenses. The facility shall be permanently known as the \_\_\_\_\_ (name, e.g., Wilbur Smith Memorial Alcohol Rehabilitation Center)]. In the event that \_\_\_\_\_ [restate name of organization] fails for any reason to accept this gift, I direct that it shall instead \_\_\_\_\_ [go to \_\_\_\_\_ (name and address of alternate beneficiary) or specify another alternate disposition, e.g., be disposed of as part of the residue of my estate].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Wills Bequests & Devises



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DIVISION IV: WILLS AND TRUSTS  
 CHAPTER 69 CHARITABLE DISPOSITIONS  
 PART IV. FORMS  
 B. Testamentary Dispositions to Charity  
 5. Social Welfare

*25-69 California Legal Forms--Transaction Guide § 69.442*

**§ 69.442 Gift for Benefit of Institutional Residents**

**[1] Comment--Use of Form**

This form is a will provision giving money or property to a social welfare organization to be used to help support the expenses of recreational and educational activities for institutionalized persons, such as elderly nursing home residents or persons in mental institutions.

If an estate tax charitable deduction is desired, care should be taken in designating the beneficiary of this type of provision. For example, no federal estate tax deduction would be available for a direct gift to a private nursing home that is operated for profit rather than as a nonprofit charitable institution [*see I.R.C. § 2055(a)(2); Treas. Reg. § 20.2055-1(a)(2)*].

For general information relevant to all testamentary dispositions to charity, see §§ 69.360[1] and 69.361[1].

**[2] FORM**

**Gift for Benefit of Institutional Residents**

I give to \_\_\_\_\_ [*exact legal name and address of institution or social welfare organization*] the sum of \$ \_\_\_\_\_, to be used to provide participatory recreational [*and/or educational*] experiences for its institutional residents. The principal shall be invested through any other trust or fund managed for the benefit of \_\_\_\_\_ [*restate name of social welfare institution*]. The income shall be expended for in-house and outside activities of a recreational or educational nature which are generally accessible and of interest to residents, including but not limited to the following activities: \_\_\_\_\_ [*specify, e.g., visits to museums, parks, playgrounds, recreational centers, and entertainment such as theatrical productions, concerts, and motion pictures*]. Programs shall be selected and individual participants chosen in accordance with the regulations and procedures of the institution involved. In the event that \_\_\_\_\_ [*restate name of organization*] fails for any reason to accept this gift, I direct that it shall instead \_\_\_\_\_ [*go to \_\_\_\_\_ (name and address of alternate*

*beneficiary) or specify another alternate disposition, e.g., be disposed of as part of the residue of my estate].*

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Wills Bequests & Devises



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*25-69 California Legal Forms--Transaction Guide §§ 69.443-69.459*

**[Reserved]**

§§ 69.443[Reserved]



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 B. Testamentary Dispositions to Charity  
 6. Government Entities

*25-69 California Legal Forms--Transaction Guide § 69.460*

**§ 69.460 Gift of Land to Municipal Authority for Civic Purposes**

**[1] Comment--Use of Form**

This form is a will provision giving land to a municipal government for a civic purpose, such as a public city park. Such a gift amounts to a common law dedication, and must be accepted by the appropriate municipal authority before it becomes effective. Therefore, it is important to contact the appropriate municipal authorities in advance to determine whether the proposed dedication will be acceptable. For a detailed discussion of the law governing dedication, see Ch. 27A, *Dedication*. For general information relevant to all testamentary dispositions to charity, see §§ 69.360[1] and 69.361[1].

Contributions to or for the use of the United States or any state, territory, or political subdivision, qualify for the federal estate tax charitable deduction if they are made for exclusively public purposes [*I.R.C. § 2055(a)(1); Treas. Reg. § 20.2055-1(a)(1)*].

**[2] FORM**

**Gift of Land to Municipal Authority for Civic Purposes**

I give to \_\_\_\_\_ [*exact name of governmental entity, e.g., the City and County of San Francisco or the Orange County Flood Control District, etc.*], that real property known as \_\_\_\_\_ [*address or general description*], more fully described in Appendix A attached to and incorporated by reference into this will], \_\_\_\_\_ [*state purpose, e.g., to be used as a public park and children's recreation center*]. The property shall be designated by an appropriate plaque or other official civic reference as the \_\_\_\_\_ [*name, e.g., Wilbur Smith Memorial Park*]. In the event that \_\_\_\_\_ [*restate name of governmental entity*] fails for any reason to accept this gift, I direct that it shall instead \_\_\_\_\_ [*go to \_\_\_\_\_ (name and address of alternate beneficiary) or specify another alternate disposition, e.g., be disposed of as part of the residue of my estate*].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Wills Bequests & Devises Real Property Law Ownership & Transfer Transfer Not By  
Deed Dedication General Overview Real Property Law Ownership & Transfer Transfer Not By Deed Dedication Procedure



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B. Testamentary Dispositions to Charity  
6. Government Entities

*25-69 California Legal Forms--Transaction Guide §§ 69.461-69.479*

**[Reserved]**

§§ 69.461[Reserved]



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DIVISION IV: WILLS AND TRUSTS  
CHAPTER 69 CHARITABLE DISPOSITIONS  
PART IV. FORMS  
B. Testamentary Dispositions to Charity  
7. Fraternal Organizations

*25-69 California Legal Forms--Transaction Guide § 69.480*

**§ 69.480 Gift to Fraternal Organization**

**[1] Comment**

**[a] Use of Form**

This form is a will provision giving money or property to a fraternal order or society to be used for a charitable purpose. Due to the federal estate tax treatment of gifts to this type of organization, will provisions making these gifts must be more specific than most other charitable dispositions [*see* § 69.480[1][b]], and must be more carefully drafted. In describing the donee, it is important that the full name of the organization be specified, including the name or number of the specific lodge or chapter and its address [*see* § 69.360[1][c]].

For general information relevant to all testamentary dispositions to charity, see §§ 69.360[1] and 69.361[1].

**[b] Federal Estate Tax Considerations**

A testamentary gift to a fraternal society, order, or association operating under the lodge system qualifies for the federal estate tax charitable deduction if the gift is to be used exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals [*I.R.C.* § 2055(a)(3)]. However, a gift to such an organization that engages in both charitable and noncharitable activities will qualify for the federal estate tax charitable deduction only if the testator has specifically limited its use to exclusively charitable purposes [ *First Nat. Bank of Omaha v. United States* (8th Cir. [Neb.] 1983) 681 F.2d 534, 541-542, *cert. denied*, 459 U.S. 1104 (no estate tax charitable deduction for bequest of Masonic order)]. The limitation must be definite and legally enforceable [ *First Nat. Bank of Omaha v. United States* (8th Cir. [Neb.] 1983) 681 F.2d 534, 542, *cert. denied*, 459 U.S. 1104 ; *Mississippi Valley Trust Co. v. Commissioner of Int. Rev.* (8th Cir. [B.T.A.] 1934) 72 F.2d 197, 199, *cert. denied*, 293 U.S. 604 (1934)].

Most if not all fraternal societies and similar organizations engage in social and fraternal as well as charitable activities. Accordingly, this form contains a provision limiting the use of the gift to a specific charitable purpose, or, alternatively,

any purpose qualifying for the federal estate tax charitable deduction.

An organization will not qualify for the federal estate tax deduction if a substantial part of its activities consists of carrying on propaganda or otherwise attempting to influence legislation, or if it participates in any political campaign, including publishing or distributing statements, on behalf of or in opposition to any candidate for public office [*I.R.C. § 2055(a)(3); Treas. Reg. § 20.2055-1(a)(3)*].

## [2] FORM

### Gift to Fraternal Organization

I give to \_\_\_\_\_ [*exact legal name and address of social or fraternal organization, including name or number of local chapter, if any*] the sum of \$ \_\_\_\_\_ [*or describe property, e.g., my grand piano or, where several items of property are involved: those items of my property more particularly described on Schedule A attached to this will and incorporated by reference herein*], to be used

[*If gift is made for a specific charitable purpose:*]

\_\_\_\_\_ [*describe specific charitable purpose for which gift is made, e.g., in the above organization's program to support orphans and underprivileged children*]. If this gift cannot be used for the preceding purpose, or if the above organization, in the exercise of its discretion, determines that it could be better used for another charitable purpose, it may be used for any other purpose that the above organization may direct, provided that it shall be used only for purposes that will entitle my estate to claim a federal estate tax charitable deduction for this gift [*for alternative language limiting use of the gift exclusively to a single specified purpose, see § 69.366*].

[*Or, if testator does not wish to limit gift to a specific purpose:*]

for any religious, charitable, scientific, literary, or educational purposes (including the prevention of cruelty to children or animals) that the above organization in the exercise of its sole discretion may direct; provided, however, that this gift shall be used exclusively for purposes that will entitle my estate to claim a federal estate tax charitable deduction for this gift.

[*Continue with the following:*]

In the event that \_\_\_\_\_ [*restate name of social or fraternal organization*] fails for any reason to take this gift, I direct that this property shall instead \_\_\_\_\_ [*go to \_\_\_\_\_ (name and address of alternate beneficiary) or specify another alternate disposition, e.g., be disposed of as part of the residue of my estate*].

### Legal Topics:

For related research and practice materials, see the following legal topics:  
Estate, Gift & Trust Law Wills Bequests & Devises



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DIVISION IV: WILLS AND TRUSTS  
CHAPTER 70 COMPLETE REVOCABLE TRUST FORMS

*26-70 California Legal Forms--Transaction Guide 70.syn*

**AUTHOR:** Reviewed by Albert G. Handelman

**§ 70.syn Synopsis to Chapter 70: COMPLETE REVOCABLE TRUST FORMS**

§ 70.01 California Statutes

§ 70.02 Federal Sources

[1] Statutes

[2] Regulations

§§ 70.03-70.04 [Reserved]

§ 70.05 Law Reviews and Periodicals

§ 70.06 Text References

[1] Matthew Bender Sources

[2] Additional Text References

§§ 70.07-70.09 [Reserved]

§ 70.10 Introduction to the Revocable Trust

[1] Definition

[2] Types of Revocable Trusts

[3] Uses

[a] Probate Avoidance

[b] Asset Management and Avoidance of Conservatorship

[c] Preserving Privacy

[d] Saving Taxes

[4] Choosing Between Revocable Trust and Testamentary Trust

[a] In General

[b] Probate Considerations

[c] Asset Management Considerations

[d] Privacy Considerations

[e] Testamentary Formalities

[f] Time and Expense of Administration

[5] Choosing Between Revocable Inter Vivos Trust and Irrevocable Inter Vivos Trust

[6] Presumption of Revocability

§ 70.11 Creation

[1] Settlers

[2] Elements of a Trust

[a] In General

[b] Intent

[c] Property

[d] Purpose

[e] Beneficiaries

[3] Trust Instrument

[a] Nature and Types

[b] Use

[4] Funding

[a] In General

[b] Community Property

[c] Separate Property

[d] Separate and Community Property

[e] Joint Tenancy Property

[f] S Corporation Stock

§ 70.12 Drafting

[1] In General

[a] General Principles Governing Construction of Trust Instruments

[b] Basic Drafting Principles

[c] Style and Organization of Trust Instrument

[2] Name of Trust

[3] Family Information

[4] Trust Estate

[a] Definition

[b] Characterization of Property

[c] Additions

[5] Revocability and Amendment

[a] In General

[b] Revocation by Sole Settlor

[c] Revocation by Joint Settlers

[d] Revocation by Surviving Settlor

[e] Manner of Revocation

[f] Amendment

[g] Revocation or Amendment by Conservator

[h] Amendment or Revocation by Attorney in Fact

[6] Payments and Distributions

[a] In General

[b] Accumulations of Income

[c] Mandatory and Discretionary Distributions

[d] During Settlor's Lifetime

[e] Payment of Taxes, Debts, and Expenses

[f] After Death of First Settlor in Two-Settlor Trust

[g] After Death of Sole Settlor

[h] After Death of Surviving Settlor in a Two-Settlor Trust

[i] Disclaimer Trust

[j] Division of Trusts for Generation-Skipping Transfer Tax Purposes

[7] Trustee

[a] Appointment

[b] Successors

[c] Co-Trustees

[d] Bond

[e] Powers

[8] Concluding Provisions

[a] In General

[b] Perpetuities Savings Clause

[c] Simultaneous Death Clause

[d] No-Contest Clause

[e] Definitions

[f] Number and Gender

[g] Governing Law

§ 70.13 Execution

[1] In General

[2] Acknowledgment

§ 70.14 Amending the Trust Instrument

[1] In General

[2] Amendment to Original Instrument

[3] Amended and Restated Trust Instrument

[4] Execution

§§ 70.15-70.99 [Reserved]

§ 70.100 Facts

Scope

§ 70.101 Documents

Scope

§§ 70.102-70.109 [Reserved]

§ 70.110 Suitability of Revocable Trust for Client's Purposes

Scope

§ 70.111 Features of Revocable Trust

Scope

§§ 70.112-70.119 [Reserved]

§ 70.120 Basic Trust Arrangement

Scope

§ 70.121 Modification of Individual Trust Provisions

Scope

§§ 70.122-70.199 [Reserved]

§ 70.200 Revocable Trust for Unmarried Settlor

[1] Comment

- [a] Use of Form
- [b] Modifying Basic Pattern of Distribution
- [c] Trust Declaration Format
- [d] Family Information
- [e] Trust Estate
- [f] Rights and Powers of Settlor
- [g] Payments and Distributions During Settlor's Lifetime
- [h] Special Gift on Settlor's Death
- [i] Treatment of Remaining Trust Assets Following Settlor's Death
- [j] Division of Trust for Generation-Skipping Transfer Tax Purposes
- [k] Trustee
- [l] Successor Trustees
- [m] Removal, Resignation, and Filling Vacancies
- [n] Trustee's Bond
- [o] Trustee's Powers

[2] FORM

Revocable Trust for Unmarried Settlor

§ 70.201 Nonformula Marital Deduction Trust for Married Settlers

[1] Comment

- [a] Use of Form
- [b] Nonformula Versus Formula Marital Deduction Trust
- [c] Trust Declaration Format
- [d] Family Information
- [e] Revocation and Amendment by Settlers
- [f] Settlers' Powers to Direct Investments and Borrow From Trust Estate

[g] Payments and Distributions While Both Settlers Are Living

[h] Special Gift on Deceased Settlor's Death

[i] Payments and Distributions After Death of Deceased Settlor

[j] Disclaimer Trust

[k] Payments and Distributions After Death of Surviving Settlor

[l] Division of Trust for Generation-Skipping Transfer Tax Purposes

[m] Trustees

[n] Trustee's Powers

[2] FORM

Nonformula Marital Deduction Trust for Married Settlers

§ 70.202 Formula Marital Deduction Trust for Married Settlers--Survivor's Trust, QTIP Trust, and Bypass Trust

[1] Comment

[a] Use of Form

[b] General Features of Estate Plan

[c] Advantages

[d] Trust Declaration Format

[e] Family Information

[f] Revocation and Amendment by Settlers

[g] Settlers' Powers to Direct Investments and Borrow From Trust Estate

[h] Payments and Distributions While Both Settlers Are Living

[i] Special Gift on Death of Deceased Settlor

[j] Survivor's Trust

[k] Marital Deduction Formula

[l] QTIP Trust

[m] Bypass Trust

[n] "Five or Five" Power Over Bypass Trust Principal

[o] Disclaimer Trust

[p] Payments and Distributions After Death of Surviving Settlor

[q] Division of Trust for Generation-Skipping Transfer Tax Purposes

[r] Settlers as Co-Trustees

[s] Surviving Settlor as Trustee of Bypass and Disclaimer Trusts

[t] Third Party or Trust Company as Trustee

[u] Concluding Provisions

[v] Modification to Fit More Complicated Distribution Patterns Involving Children From Prior Marriages

[2] FORM

Formula Marital Deduction Trust for Married Settlers--Survivor's Trust, QTIP Trust, and Bypass Trust

§ 70.203 Formula Marital Deduction Trust for One Married Settlor--QTIP Trust and Bypass TRUST

[1] Comment

[a] Use of Form

[b] Trust Property

[c] Trust Declaration Format

[d] Family Information

[e] Rights and Powers of Settlor

[f] Payments and Distributions During Settlor's Lifetime

[g] Special Gift on Settlor's Death

[h] Marital Deduction Formula

[i] QTIP Trust

[j] Bypass Trust

[k] "Five or Five" Power Over Bypass Trust Principal

[l] Disclaimer Trust

[m] Payments and Distributions After Death of Surviving Spouse

[n] Payments and Distributions if Settlor Is Not Survived by Spouse

[o] Division of Trust for Generation-Skipping Transfer Tax Purposes

[p] Trustee

[q] Successor Trustees

[r] Surviving Spouse as Trustee

[s] Concluding Provisions

[2] FORM

Formula Marital Deduction Trust for One Married Settlor--QTIP Trust and Bypass TRUST

§§ 70.204-70.209 [Reserved]

§ 70.210 Trust Created by One Settlor--"Family Pot" Trust with Sprinkling Provisions on Death of Settlor

[1] Comment

[a] Use of Form

[b] Nature of "Family Pot" Trust

[c] Description of Beneficiaries

[d] Sprinkling Provisions

[e] Standard of Discretion in Sprinkling Provisions

[f] Consideration of Beneficiary's Other Resources

[g] Treatment of Undistributed Income

[h] Repayment of Discretionary Principal Distributions

[i] Distribution of Trust Assets and Termination of Trust

[j] Treatment of Issue of Deceased Beneficiaries

[k] "Sensitive Trustee" Issues

[l] Generation-Skipping Transfer Tax Considerations

[2] FORM

Trust Created by One Settlor--"Family Pot" Trust with Sprinkling Provisions on Death of Settlor

§ 70.211 Trust Created by One Settlor--Trust Divided Into Separate Trusts or Shares on Death of Settlor

[1] Comment

[a] Use of Form

[b] Nature of "Separate Share" Trust

[c] Description of Beneficiaries

[d] Shares of Beneficiaries

[e] Treatment of Each Share

[f] Payments and Distributions During Lifetimes of Beneficiaries

[g] Distribution of Trust Principal and Termination of Trust

[2] FORM

Trust Created by One Settlor--Trust Divided Into Separate Trusts or Shares on Death of Settlor

§ 70.212 Trust Created by Two Settlers--"Family Pot" Trust With Sprinkling Provisions on Death of Surviving Settlor

[1] Comment--Use of Form

[2] FORM

Trust Created by Two Settlers--"Family Pot" Trust With Sprinkling Provisions on Death of Surviving Settlor

§ 70.213 Trust Created by One Settlor--"Family Pot" Trust With Sprinkling Provisions on Death of Settlor's Surviving Spouse

[1] Comment--Use of Form

[2] FORM

Trust Created by One Settlor--"Family Pot" Trust With Sprinkling Provisions on Death of Settlor's Surviving Spouse

§§ 70.214-70.219 [Reserved]

§ 70.220 Introductory Provision for Trust Agreement

[1] Comment

[a] Use of Form

[b] Comparison Between Declaration of Trust and Trust Agreement

[c] Signature Requirements

[d] Advantages and Disadvantages

[2] FORM

Introductory Provision for Trust Agreement

§§ 70.221-70.229 [Reserved]

§ 70.230 Additions by Settlor(s) Only

[1] Comment

[a] Use of Form

[b] Limiting Right to Settlor(s)

[2] FORM

Additions by Settlor(s) Only

§ 70.231 Additions to Trust Prohibited

[1] Comment

[a] Use of Form

[b] Additions to Trust

[2] FORM

Additions to Trust Prohibited

§§ 70.232-70.239 [Reserved]

§ 70.240 Power of Revocation Is Personal to Settlor(s)

[1] Comment

[a] Use of Form

[b] Exercise of Settlor's Powers by Others

[c] Limitation of Authority to Revoke Trust

[2] FORM

Power of Revocation Is Personal to Settlor(s)

§§ 70.241-70.249 [Reserved]

§ 70.250 Special Gift From Two-Settlor Trust--Pecuniary Gift on First Death Only if Specified Settlor Dies First

[1] Comment

[a] Use of Form

[b] "Special Gifts" in General

[c] Gifts Dependent on Order of Death of Settlers

[d] Drafting Considerations

[2] FORM

Special Gift From Two-Settlor Trust--Pecuniary Gift on First Death Only if Specified Settlor Dies First

§ 70.251 Special Gift From One-Settlor Trust--Pecuniary Gift to Charity on Settlor's Death

[1] Comment--Use of Form

[2] FORM

Special Gift From One-Settlor Trust--Pecuniary Gift to Charity on Settlor's Death

§ 70.252 Special Gift From Two-Settlor Trust--Pecuniary Gift to Charity on First Death, Regardless of Order of Death of Settlers

[1] Comment--Use of Form

[2] FORM

Special Gift From Two-Settlor Trust--Pecuniary Gift to Charity on First Death, Regardless of Order of Death of Settlers

§ 70.253 Special Gift From Two-Settlor Trust--Pecuniary Gift to Charity on First Death Only if Specified Settlor Dies First

[1] Comment--Use of Form

[2] FORM

Special Gift From Two-Settlor Trust--Pecuniary Gift to Charity on First Death Only if Specified Settlor Dies First

§ 70.254 Special Gift From One-Settlor Trust--Gifts of Tangible Personal Property on Settlor's Death

[1] Comment

[a] Use of Form

[b] Gifts of Tangible Personal Property From Revocable Trust

[c] Disposition of Property Prior to Time of Gift

[2] FORM

Special Gift From One-Settlor Trust--Gifts of Tangible Personal Property on Settlor's Death

§ 70.255 Special Gift From Two-Settlor Trust--Gifts of Tangible Personal Property on First Death Only if Specified Settlor Dies First

[1] Comment

[a] Use of Form

[b] Contingency Relating to Order of Settlor's Deaths

[2] FORM

Special Gift From Two-Settlor Trust--Gifts of Tangible Personal Property on First Death Only if Specified Settlor Dies First

§§ 70.256-70.279 [Reserved]

§ 70.280 Simultaneous Death Clause Reversing Statutory Presumption--One-Settlor Trust

[1] Comment

[a] Use of Form

[b] Statutory Presumption

[c] Reversing Statutory Presumption

[2] FORM

Simultaneous Death Clause Reversing Statutory Presumption--One-Settlor Trust

§ 70.281 Simultaneous Death Clause Reversing Statutory Presumption--Two-Settlor Trust

[1] Comment--Use of Form

[2] FORM

Simultaneous Death Clause Reversing Statutory Presumption--Two-Settlor Trust

§§ 70.282-70.289 [Reserved]

§ 70.290 Signature Block for Trust Agreement

[1] Comment

[a] Use of Form

[b] Execution

[c] Acknowledgment

[2] FORM

Signature Block for Trust Agreement

Reviewed by Albert G. Handelmann\*

**FOOTNOTES:**

(n128)Footnote \*. Mr. Handelman is a member of the State Bar of California and a partner in the law firm of Merrill, Arnone & Handelman in Santa Rosa, California. He received his B.S. degree, cum laude, from the Wharton School, University of Pennsylvania, and his J.D. degree from the University of Southern California. Mr. Handelman is a certified specialist in Probate, Estate Planning, and Trust Law (California State Board of Legal Specialization), and a Fellow of the American College of Trust and Estate Counsel. He has frequently written and spoken throughout California for both professional and industry groups on a variety of subjects in the field of estate planning and administration. He is an officer and a director of the Redwood Empire Estate Planning Council.



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DIVISION IV: WILLS AND TRUSTS  
CHAPTER 70 COMPLETE REVOCABLE TRUST FORMS

*26-70 California Legal Forms--Transaction Guide Scope*

**AUTHOR:** Reviewed by Albert G. Handelman

**Scope**

Reviewed by Albert G. Handelman\* Scope

This chapter covers revocable trusts, which are also commonly referred to as "revocable inter vivos trusts" or "living trusts." The Legal Background discusses the nature of revocable trusts, their use in estate planning, the basic content and format of trust instruments, and general drafting principles. The Transaction Guide provides a step-by-step guide to the forms. Part A of the forms consists of complete trust forms based on typical fact situations likely to be encountered in practice. Part B illustrates several alternative patterns of distribution that may be substituted for distribution provisions in the complete forms in appropriate cases. Part C includes alternative distribution provisions that may be substituted for the comparable provisions that appear in the complete forms.

The complete trust forms in Part A include all the provisions that typically will be needed in a complete revocable trust. Due to space considerations, this chapter does not illustrate the thousands of possible alternative and optional provisions that might conceivably be included in such a trust. For a range of alternative provisions, the reader may consult Ch. 64, *Testamentary Trusts: Payment and Distribution Provisions*, Ch. 64A, *Testamentary Trusts: Trustee Provisions*, and Ch. 64B, *Testamentary Trusts: Administrative Provisions*. Many of the forms in those chapters may be adapted for use in revocable trusts. Attorneys who want to view an even wider range of alternative provisions should refer to Matthew Bender's specialty publication, *California Wills & Trusts*. Specific references to *California Wills & Trusts* are included in appropriate locations in this chapter.

The forms in Part A include complete marital deduction trusts, along with basic commentary on their use. For detailed discussion of the marital deduction and its use in estate planning, as well as alternative forms for both testamentary and revocable marital deduction trusts, see Ch. 71, *Marital Deduction Trust Provisions*. The planning and drafting of a trust is part of the overall estate planning process. A revocable trust should be created only after the attorney has carefully evaluated the client's estate planning needs and goals. General estate planning principles are covered in Ch. 60, *Estate Planning*.

Testamentary trusts may be used in place of or in addition to revocable trusts. For discussion of the planning and drafting of testamentary trusts, see Ch. 61, *Will Drafting and Complete Will Forms*, and Ch. 63, *Will Provisions*. For general principles of planning, drafting, and funding *irrevocable* trusts, see Ch. 72. For insurance trusts, see Ch. 73. For

split-interest charitable trusts, see Ch. 74.

**FOOTNOTES:**

(n129)Footnote \*. Mr. Handelman is a member of the State Bar of California and a partner in the law firm of Merrill, Arnone & Handelman in Santa Rosa, California. He received his B.S. degree, cum laude, from the Wharton School, University of Pennsylvania, and his J.D. degree from the University of Southern California. Mr. Handelman is a certified specialist in Probate, Estate Planning, and Trust Law (California State Board of Legal Specialization), and a Fellow of the American College of Trust and Estate Counsel. He has frequently written and spoken throughout California for both professional and industry groups on a variety of subjects in the field of estate planning and administration. He is an officer and a director of the Redwood Empire Estate Planning Council.



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DIVISION IV: WILLS AND TRUSTS  
CHAPTER 70 COMPLETE REVOCABLE TRUST FORMS  
PART I. RESEARCH GUIDE  
A. Primary Sources

*26-70 California Legal Forms--Transaction Guide § 70.01*

**AUTHOR:** Reviewed by Albert G. Handelman

**§ 70.01 California Statutes**

Characterization of marital property. *Fam. Code §§ 750-853.*

Interests of spouses in community property. *Fam. Code § 751.*

Community property transferred in trust. *Fam. Code § 761.*

Separate property of husband and wife. *Fam. Code § 770.*

Management and control of community property. *Fam. Code §§ 1100-1103.*

Consent of spouse for disposition of property. *Fam. Code § 1100.*

Sale or lease of community real property. *Fam. Code § 1102.*

Distribution and administration of property in cases of simultaneous death. *Prob. Code §§ 220-226.*

Distribution when survivorship cannot be established. *Prob. Code § 220.*

Disposition when right to property conditional on survivorship. *Prob. Code § 222.*

Distribution of property among heirs or beneficiaries. *Prob. Code §§ 240-247.*

Distribution when will or trust refers to *Prob. Code § 240* or fails to specify manner of distribution. *Prob. Code § 245.*

Distribution when will or trust calls for division "per stirpes" or "by right of representation." *Prob. Code § 246.*

Distribution when will or trust calls for division "per capita at each generation." *Prob. Code § 247.*

Disclaimers of interests under wills and trusts. *Prob. Code §§ 260-295.*

"Disclaimer" defined. *Prob. Code § 265.*

"Interest" defined. *Prob. Code § 267.*

Trust company as fiduciary.

Appointment of trust company. *Prob. Code § 300.*

Oath and bond of trust company. *Prob. Code § 301.*

Exercise of settlor's right to revoke or amend trust by conservator of settlor. *Prob. Code § 2580(b)(11).*

Power of Attorney Law. *Prob. Code § 4000 et seq.*

Uniform Durable Power of Attorney Act. *Prob. Code §§ 4001, 4124-4127, 4206, 4304, 4305.*

Health Care Decisions Law (governing durable powers of attorney). *Prob. Code § 4600 et seq.* (effective July 1, 2000).

Disposition of estates without administration. *Prob. Code § 13000 et seq.*

Collection or transfer of small estate without administration. *Prob. Code § 13000 et seq.*

Passage of property to surviving spouse without administration. *Prob. Code § 13500 et seq.*

Methods of creating trust. *Prob. Code § 15200.*

Intention to create trust. *Prob. Code § 15201.*

Trust property. *Prob. Code § 15202.*

Trust purpose. *Prob. Code § 15203.*

Designation of beneficiary. *Prob. Code § 15205.*

Validity of trust when settlors and beneficiaries are same persons. *Prob. Code § 15209.*

Modification and termination of trusts. *Prob. Code §§ 15400-15414.*

Presumption of revocability. *Prob. Code § 15400.*

Method of revocation by settlor. *Prob. Code § 15401.*

Power to revoke includes power to modify. *Prob. Code § 15402.*

Disposition of property on termination. *Prob. Code § 15410.*

Trustees and beneficiaries. *Prob. Code § 15600 et seq.*

Acceptance of trust by trustee. *Prob. Code § 15600.*

Rejection of trust. *Prob. Code § 15601.*

Trustee's bond. *Prob. Code § 15602.*

Vacancy in office of trustee. *Prob. Code § 15643.*

Appointment of trustee to fill vacancy. *Prob. Code § 15660.*

Rules for interpretation of instruments. *Prob. Code §§ 21101-21140.*

Perpetuities. *Prob. Code § 21200 et seq.*

Limitations on transfers to drafters and others. *Prob. Code § 21350 et seq.*

Construction of instruments to comply with Internal Revenue Code. *Prob. Code § 21500 et seq.*

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Trusts Revocable Living Trusts Family Law Marital Duties & Rights Property Rights General Overview Real Property Law Estates Present Estates Marital Estates General Overview Real Property Law Estates Present Estates Marital Estates Community Property Real Property Law Estates Present Estates Marital Estates Separate Property



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A. Primary Sources

*26-70 California Legal Forms--Transaction Guide § 70.02*

**AUTHOR:** Reviewed by Albert G. Handelman

**§ 70.02 Federal Sources**

**[1] Statutes**

Income tax consequences of settlor holding certain powers to alter interests of beneficiaries in principal or income. *I.R.C. § 674.*

Income tax consequences of settlor holding power to revoke trust. *I.R.C. § 676.*

Income tax consequences of person other than grantor holding power to vest principal or income in himself or herself. *I.R.C. § 678.*

Basis of surviving spouse's one-half interest in community property. *I.R.C. § 1014(b)(6).*

Imposition and rate of estate tax. *I.R.C. § 2001.*

Unified credit against estate tax. *I.R.C. § 2010.*

Definition of gross estate. *I.R.C. § 2031.*

Inclusion in gross estate of all property to extent of decedent's interest. *I.R.C. § 2033.*

Estate tax consequences of transferring property to trust while retaining lifetime interest in trust property. *I.R.C. § 2036.*

Estate tax consequences of holding power to revoke trust. *I.R.C. § 2038.*

Estate tax consequences of holding power of appointment over trust assets. *I.R.C. § 2041.*

Estate tax marital deduction. *I.R.C. § 2056.*

Unified credit against gift tax. *I.R.C. § 2505.*

Estate tax consequences of disclaimers of property. *I.R.C. § 2518.*

Generation-skipping transfer tax. *I.R.C. §§ 2601-2663.*

## **[2] Regulations**

"General power of appointment" defined. *Treas. Reg. § 20.2041-1(c)(1).*

Powers limited by "ascertainable standard." *Treas. Reg. § 20.2041-1(c)(2).*

"Five or Five" powers. *Treas. Reg. § 20.2041-3(d)(3).*

## **Legal Topics:**

For related research and practice materials, see the following legal topics:

Tax Law Federal Estate & Gift Taxes Definition of Gross Estate Tax Law Federal Taxpayer Groups Income Taxation of Estates, Trusts & Beneficiaries General Overview Tax Law Federal Taxpayer Groups Income Taxation of Estates, Trusts & Beneficiaries Credits & Deductions (IRC secs. 641-668, 671, 681, 685) General Overview Tax Law Federal Taxpayer Groups Income Taxation of Estates, Trusts & Beneficiaries Grantor Trusts (IRC secs. 671-679) Tax Law Federal Taxpayer Groups Income Taxation of Estates, Trusts & Beneficiaries Imposition of Tax



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**[Reserved]**

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B. Secondary Sources

*26-70 California Legal Forms--Transaction Guide § 70.05*

**AUTHOR:** Reviewed by Albert G. Handelman

**§ 70.05 Law Reviews and Periodicals**

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Phillips, *Taxes and Living Trusts; There are Important Tax Differences Between Probate Estates and Living Trusts*, 9 Cal. Law. 68 (Feb. 1989).

Kroll, *Matters of Life and Death: Are Living Trusts Making Probate a Dying Field?* 9 Cal. Law. 28 (Jan. 1989).

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Estate, Gift & Trust LawTrustsRevocable Living Trusts



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*26-70 California Legal Forms--Transaction Guide § 70.06*

**AUTHOR:** Reviewed by Albert G. Handelman

**§ 70.06 Text References**

**[1] Matthew Bender Sources**

California Wills and Trusts (Matthew Bender).

Ch. 3, *Selecting the Proper Estate Planning Devices.*

Ch. 90, *Requisites of a Valid Trust.*

Ch. 91, *Planning the Trust.*

Ch. 92, *Settlors and Beneficiaries.*

Ch. 93, *Appointment of Trustees.*

Ch. 94, *Trust Property.*

Ch. 95, *Trust Provisions for Payment and Distribution of Income and Principal.*

Ch. 111, *Revocable Inter Vivos Trusts.*

Ch. 112, *The Marital Deduction and Marital Deduction Trusts.*

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Ch. 3, *Estate Planning Goals*.

Ch. 6, *Income Taxation of Estates and Trusts*.

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**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsGeneral OverviewEstate, Gift & Trust LawTrustsAdministrationEstate, Gift & Trust  
LawTrustsBeneficiariesGeneral OverviewEstate, Gift & Trust LawTrustsCreationEstate, Gift & Trust  
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§§ 70.07[Reserved]



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PART II. LEGAL BACKGROUND

*26-70 California Legal Forms--Transaction Guide § 70.10*

**AUTHOR:** Reviewed by Albert G. Handelman

**§ 70.10 Introduction to the Revocable Trust**

**[1] Definition**

A revocable trust is simply a trust that can be revoked by the settlor [*see* Black's Law Dictionary 1517-1518 (7th ed. 1999)]. A settlor who creates a revocable trust typically retains the power to revoke the trust during his or her lifetime.

All revocable trusts are "inter vivos" or "living" trusts; that is, trusts that are created and become operational during the lifetime of the settlor. Since a settlor can revoke a trust only while the settlor is living, a revocable trust may be created only during the settlor's lifetime. In contrast, trusts created by will are known as "testamentary trusts" and are always irrevocable [*see* § 70.10[3]; *see also* Ch. 64, *Testamentary Trusts: Payment and Distribution Provisions* ]. Although an inter vivos trust can be either revocable or irrevocable, the terms "living trust" and "inter vivos trust" are almost always used to refer specifically to revocable inter vivos trusts.

Most revocable trusts become irrevocable at some point during their existence. Typically, this will occur on the settlor's death, although it is theoretically possible to establish a trust that will become irrevocable on the occurrence of an earlier contingency. It should be noted that for gifts made after 2009, except as provided in regulations, a transfer to a trust will be treated as a taxable gift, unless the trust is treated as wholly owned by the donor or the donor's spouse under the grantor trust provisions of the Internal Revenue Code [*I.R.C.* § 2511(c); *see I.R.C.* §§ 671-679 (grantor trust provisions)].

**PRACTICE TIP:**

If an initially revocable trust becomes irrevocable prior to the death of the settlor, an adverse gift tax consequence ordinarily will result. This is because there will be a completion of the gift of the remainder interest in the trust property upon the settlor's loss of the power to revoke the trust [ *see I.R.C.* § 2511(a); *Treas. Reg.* § 25.2511-2(b)]. In practice, it is difficult to conceive of a case in which a revocable trust is designed to become irrevocable prior to the settlor's death when it would not have been more logical simply to start with an irrevocable trust. *Commentary by Albert G. Handelman.*

When a trust is created by joint settlors, a portion of the trust usually becomes irrevocable on the first settlor's death, with the balance typically remaining revocable during the lifetime of the surviving settlor.

## [2] Types of Revocable Trusts

There are many types of revocable trusts, and these trusts are often categorized according to their purpose, or according to the general pattern of distribution specified in the trust instrument. Some of the more commonly encountered terms used to describe specific characteristics of revocable (as well as testamentary) trusts are:

(1) "Pot" (or "family pot") trust, which describes a single trust fund or share with multiple beneficiaries (who, in the case of a "family pot" trust, are members of the same family; typically the children and grandchildren of the settlor).

(2) "Separate share" trust, which describes a trust set up for the benefit of only one income beneficiary; typically a child or grandchild of the settlor under an arrangement whereby a single trust instrument creates separate trusts for each beneficiary.

(3) "Sprinkling" trust, which describes a trust that gives the trustee discretion to allocate trust income and/or principal among the various trust beneficiaries in accordance with criteria specified in the trust instrument.

(4) "Marital deduction" trust, which describes a trust designed to avoid federal estate tax on the death of the settlor by naming the settlor's spouse as life beneficiary of the trust in a manner that will qualify for the federal estate tax marital deduction [*I.R.C. § 2056*]. Marital deduction trusts are further subdivided into "lifetime income/power of appointment" trusts [*see I.R.C. § 2056(b)(5)*], "qualified terminable interest property" (or "QTIP") trusts [*see I.R.C. § 2056(b)(7)*], "qualified domestic trusts" (or "QDOTs") [*see I.R.C. § 2056A*], and "estate trusts" [*see I.R.C. § 2056(b)(1)*; *Treas. Reg. § 20.2056(e)-2(b)*]. Marital deduction trusts are discussed separately in Ch. 71.

(5) "Bypass" or "credit shelter" trust, which describes a trust that is designed to avoid taxation in the estates of both the settlor and the settlor's surviving spouse by taking advantage of the unified credit against federal estate and gift taxes [*see I.R.C. § 2510*]. Bypass trusts typically are used in conjunction with marital deduction trusts and are also discussed in Ch. 71.

(6) "Spendthrift" trust, which describes a trust designed to protect the trust assets from the creditors or prospective creditors of the beneficiary.

A given trust may possess a combination of the characteristics discussed above. Thus, for example, a bypass trust may also be a "sprinkling" trust as well as a "spendthrift" trust. Moreover, it is common for trust instruments to establish more than one individual trust, or to provide for division or (less frequently) combination of trusts at various points during the duration of the estate plan contemplated by the trust instrument.

## [3] Uses

### [a] Probate Avoidance

In California, revocable trusts are commonly created for the purpose of avoiding probate of the trust assets on the settlor's death. Because the trustee and not the settlor holds title to the assets, it is not necessary to subject the assets to probate administration when the settlor dies. The trustee continues to hold the assets after the settlor's death. This continuity of title is not affected by the settlor's death. If the settlor was the original trustee, a successor trustee

(designated in the trust instrument or appointed by the court) will take over the original trustee's duties when the settlor dies. Settlers commonly serve as trustees of revocable inter vivos trusts without impairing the probate avoidance objectives of the trusts.

Probate administration is a highly regulated judicial procedure designed to conserve and marshal the assets of deceased persons, to assure that taxes and creditors' claims are properly paid out of the decedent's assets, and to distribute the assets to the persons entitled to distribution. However, it also can be expensive and time-consuming [*see* Ch. 65, *Executors*, for a general description of probate administration; *see also* California Probate Practice (Matthew Bender) for detailed coverage of the probate process]. The compensation of personal representatives and their attorneys is generally determined according to a statutory schedule based on the "value of the estate accounted for," without reduction for liens or encumbrances on the estate property [*see Prob. Code* §§ 10800 (personal representative), 10810 (attorney)]. Further, probate assets ordinarily cannot be distributed to the recipients until certain formalities have been complied with and the court has made an order for distribution [*see Prob. Code* § 11750 (responsibility of personal representative for distribution); *see also Prob. Code* §§ 11600-11642 (order for distribution)].

**PRACTICE TIP:**

Many of the comparisons between the time and expense involved in a formal probate administration and the time and expense involved in a private trust administration overlook the practical realities in a typical postmortem trust administration. With respect to the time involved, while many trusts theoretically can be distributed within days after the settlor's death, in practice this rarely happens and is often inadvisable. If the deceased settlor was one of two married settlors, frequently complex decisions regarding division and allocation of assets to various subtrusts must be made. In many cases, regardless of the identity of the settlors, a federal estate tax return must be filed and taxes paid. The return is not due until nine months after the settlor's death, and if taxes must be paid the decision is almost always made to wait until the due date to file the return and pay the taxes. If liquidity and/or solvency are problems (whether for payment of taxes or other claims and expenses), the trustee rarely will be free to make distributions before other higher priority cash needs are satisfied. Thus, many trust administrations will take as long to complete as the typical probate administration.

With respect to the expense, it is true that private trusts are not subject to statutory fees. However, attorneys and accountants are often involved in handling various aspects of trust administration, including taxes. Attorneys may bill monthly in private trust administrations, whereas in probate proceedings they typically wait until the conclusion of the administration to receive any fees. Especially in mid-sized estates (\$500,000 to \$1 million) where there are problems with creditors or others, the final expense may not be vastly different from that incurred in the probate situation. Also, it must be observed that in many cases when a relative is acting as the executor, no statutory commissions will be claimed (because the same person will inherit the funds which would otherwise be received as a fee subject to tax on earned income). While it is true that this same person would be unlikely to claim a fee for serving as trustee, it should be noted that automatically including the statutory executor's commissions in an expense comparison often ignores reality. *Commentary by Albert G. Handelman.*

All of this can be avoided if the settlor creates a revocable trust and transfers assets to the trustee during his or her lifetime. In some cases, however, it may not always be clear whether probate avoidance is desirable.

**PRACTICE TIP:**

For example, if siblings have never gotten along well and it seems likely that there will be disharmony after their parents have died, a formal probate proceeding may make more sense. When the court is involved from the beginning, many little arguments that might escalate into major litigation outside the court's view can be settled with less acrimony and expense. *Commentary by Albert G. Handelman.*

Further, probate will be avoided only to the extent that assets are actually transferred to the trustee while the settlor is living. If an asset is outside the trust when the settlor dies, that asset is not part of the trust and cannot be dealt with by the trustee or successor trustee. Unless the asset can be transferred in some other way (for example, by a judicial "set aside" or affidavit procedure), the asset will be subject to probate.

A full discussion of the advantages and disadvantages of probate is beyond the scope of this chapter. For a discussion of that subject, see Ch. 60, *Estate Planning*. For a detailed description of probate and the duties of personal representatives, see Ch. 65, *Executors*.

### **[b] Asset Management and Avoidance of Conservatorship**

Asset management is the second major reason for creating a revocable trust. A settlor who is unable or unwilling to manage his or her own assets may prefer to transfer that responsibility to someone else. Asset management may be achieved by entering into a management contract with a professional investment adviser or manager, or by creating a trust and transferring the assets that are to be managed to the trustee. The trustee will have the responsibility for collecting income from the assets, paying expenses (including taxes) attributable to the assets, seeing to it that the assets are properly insured and maintained, and, when appropriate, selling the assets and investing the proceeds in other property.

Asset management is ordinarily a concern to two classes of persons: (1) those who are unsuited by training, experience, or natural ability to manage assets that they have acquired by inheritance or gift; and (2) persons who cannot manage their own assets because they are incapacitated, or who are concerned that they may become incapacitated at some later time. For example, spouses and children with little business experience or aptitude sometimes inherit substantial estates that they are ill-prepared to manage. Realizing their limitations, they may elect to transfer the assets to the trustee of a revocable trust so that the trustee will manage the assets. If the assets are valuable, they may select a trustee with professional property management experience (for example, a bank, trust company, or individual professional private fiduciary).

A person who has acquired a substantial estate through his or her own efforts may have no difficulty in managing the assets now, but may anticipate that he or she may lose interest or have difficulties in the future. Such a person may create a revocable trust, name himself or herself as the original trustee, designate another person (or bank) as the successor trustee, and authorize the successor trustee to take over the trust if and when the settlor no longer wants to manage the trust assets or becomes incapacitated. This will help to avoid the necessity for seeking the appointment of a conservator if the settlor ever becomes incapacitated [*see Prob. Code § 1801(b)* (conservator of estate may be appointed for person who is unable to manage own financial resources or resist fraud or undue influence)]. Conservatorships, like probate proceedings, are highly regulated and typically involve expensive and time-consuming judicial proceedings [*see Prob. Code §§ 1400-3925* (guardianship, conservatorship, and other protective proceedings)]. A revocable trust (particularly when executed in conjunction with a durable power of attorney for property management) [*see Prob. Code §§ 4123(a), (b), (c), 4124, 4125*, and discussion in § 60.17[7]] may avoid the need for a conservatorship.

### **[c] Preserving Privacy**

The revocable trust is well suited to preserving the settlor's privacy, both during the settlor's lifetime and after the settlor's death. If assets are held in the name of the trustee, it may be possible to conceal the settlor's true identity as the owner of the trust assets. Third parties, such as brokers, transfer agents, and title insurers, may ask to examine the trust instrument (which will, of course, disclose the identity of the settlor), but the instrument itself is not a public document. It need not be recorded, and it can be shielded from unwanted public examination (except in the rare case when litigation concerning the affairs of the trust becomes necessary).

A property owner will rarely be concerned about concealing his or her identity as owner while he or she is living and

capable of managing the property. However, an owner will often be concerned about protecting his or her privacy in the event of incapacity or death. If a conservatorship proceeding should ever become necessary, all records of the proceeding would be available for public inspection. The mere existence of the conservatorship proceedings would be embarrassing to many property owners and their family members. Further, after the property owner's death, probate proceedings may seriously impair the family's privacy. All documents filed in a probate proceeding are public documents and available for public inspection. This includes the will, the inventory of assets, the names and addresses of the heirs (and the proportions in which each will share in the probate estate), the existence and the amount of creditor's claims, and the details of any will contest or similar dispute. All of this can be avoided by a revocable trust, which is a private document (like a contract) and need not be recorded or filed with any court (unless, of course, the trust is the subject of litigation).

**PRACTICE TIP:**

While privacy is often touted as a strong reason for using a revocable trust as the central vehicle of one's estate plan, this is rarely a meaningful concern for most individuals. The typical person has financial affairs and an estate plan that would neither shock nor surprise his or her friends, relatives and neighbors. For this reason, most of us need not worry that some prying acquaintance will go to the courthouse to research our lives through our probate files. This virtually never happens, and in the rare cases when it does, there is little worth "hiding." Conversely, however, those who are famous (if only within their local community) or controversial, or who have wealth or estate plans that would surprise others who might inquire, will often decide to use revocable trusts precisely because of the privacy they offer. *Commentary by Albert G. Handelman.*

**[d] Saving Taxes**

Clients sometimes are under the impression that revocable trusts may be used as tax-savings devices. As a general proposition, this is not true. Revocable trusts are often described as "tax-neutral"--that is, as a general rule they neither increase nor decrease overall income or estate tax liability. Because the settlor retains the power to revoke a revocable trust, no irrevocable transfer of the trust assets takes place until the settlor dies, and the settlor's assets therefore are included in the settlor's estate for federal estate tax purposes [*see I.R.C. § 2038*]. Similarly, the income of a revocable trust is taxed to the settlor for federal income tax purposes [*I.R.C. § 676*].

Virtually any tax planning that can be achieved with a revocable trust can also be achieved through inter vivos gifts [*see Ch. 60A, Gifts*], testamentary gifts, or other means, with one important exception noted below. In fact, from a drafting standpoint, it is often easier to draft outright property dispositions that will achieve favorable tax consequences than it is to draft revocable trusts that will achieve comparable tax treatment. For example, it is a relatively simple matter to draft outright dispositions of property that will qualify for the federal estate tax marital or charitable deductions [*see I.R.C. §§ 2055, 2056*]. In contrast, revocable trusts must meet specific and often very technical requirements in order to qualify for these deductions [*see I.R.C. §§ 2055(e)(2)(A), 2056(b)*; *see also I.R.C. § 664*; Chs. 71, 74].

The general rule that revocable inter vivos trusts are "tax-neutral" is subject to one important exception: A settlor may create a trust that will use the settlor's unified credit against federal estate and gift tax [*see I.R.C. §§ 2010, 2505*] to allow the trust assets to escape taxation on both the settlor's death and the death of the settlor's surviving spouse, while concurrently giving the surviving spouse substantial rights and powers (but not absolute control) over the trust assets. This is done by naming the surviving spouse as life beneficiary of the trust, and in some cases as trustee as well, and then giving the surviving spouse as much control over the trust assets as the tax laws allow. If such a trust is properly drafted, the surviving spouse will not be treated as owner of the trust even though he or she has considerable practical control over it, and the remaining trust assets will pass to the remainder beneficiaries (typically the settlor's children and issue). This result could *not* be achieved by an outright gift of assets to the surviving spouse, since the spouse would then own those assets outright and the assets would be included in the spouse's taxable estate. This is the basic principle behind so-called "bypass" or "credit shelter" trusts, which are an important tool in family estate planning. As might be

expected, these trusts must be carefully drafted to assure that they do not run afoul of the tax laws by granting the surviving spouse too much power, thereby causing inclusion of the trust property in the surviving spouse's estate. Bypass trusts are generally used in conjunction with marital deduction formula trusts [*see* the forms in §§ 70.202[2] and 70.203[2], which contain marital deduction and bypass trusts], and are discussed in greater detail in Ch. 71, Marital Deduction Trust Provisions, § 71.14.

**PRACTICE TIP:**

These same tax planning devices may be incorporated into a will that includes testamentary trusts, with the same estate tax results. Furthermore, the mere use of a revocable trust does not automatically guarantee the availability of any of these advantages. Rather, as is the case with testamentary trusts, the instrument must be carefully drafted to include appropriate provisions that will provide for the optimal use of the unified credit against gift and estate taxes and the unlimited marital deduction (as well as other tax-saving planning tools). *Commentary by Albert G. Handelman.*

**[4] Choosing Between Revocable Trust and Testamentary Trust**

**[a] In General**

A revocable inter vivos trust differs from a testamentary trust in important ways. Unlike a revocable inter vivos trust, a testamentary trust generally cannot be used to avoid probate [*see* [b], *below*]. A testamentary trust also may not be used to obtain property management during the settlor's lifetime [*see* [c], *below*] or to preserve the settlor's privacy [*see* [d], *below*].

**[b] Probate Considerations**

Although a will may be executed long before the testator's death, a testamentary trust does not come into being until the testator dies. Further, a testamentary trust usually does not become effective until the will is admitted to probate and the court orders that property be distributed to the trustee pursuant to the will. When the court makes an order of distribution to a trustee named in the will, it determines the existence and validity of the trust and describes all of the property that passes to the trustee. The terms of the order of distribution supersede the terms of the will, except when there is an ambiguity in the order and it is necessary to refer to the will to resolve the ambiguity [*see California Wills & Trusts*, § 110.08[2] (Matthew Bender)].

Certain small estates may be transferred to a testamentary trust without the necessity of first probating the estate. For example, if the gross value of all of the decedent's real and personal property in California does not exceed \$100,000, the trustee may collect money, receive tangible personal property, or have a chose in action transferred to the trustee by filing an affidavit with the person or persons holding the money, property, or chose in action [*Prob. Code* § 13100; *see Prob. Code* § 13006(a) (testamentary trust as "successor of the decedent")]. A similar procedure may be used to transfer real property to the trust when the gross value of all of the decedent's real property located in California does not exceed \$20,000 [*see Prob. Code* §§ 13200-13210; *see also Prob. Code* § 13006(a) (testamentary trust as "successor of the decedent")].

**PRACTICE TIP:**

In practice, it is rare to come across real property located in California with a gross fair market value of less than \$20,000. *Commentary by Albert G. Handelman.*

The trustee may also petition the court for an order transferring real or personal property to the trust when the value of the estate does not exceed \$100,000 [*see Prob. Code* §§ 13150-13158].

**PRACTICE TIP:**

A so-called "pourover will" (one that adds the residue of the probate estate to a revocable inter vivos

trust) can yield the same result as the transfer of property to a testamentary trust as described above. However, it may be more difficult to convince third parties to recognize the authority of the trustee of a testamentary trust that has not been established pursuant to a court order than it would be to get the same third parties to recognize the authority of the trustee of a revocable trust. Moreover, there is a question whether one would ever choose to create a trust with total assets of less than \$100,000. This would rarely make sense in light of the expenses in fees, higher tax brackets and tax preparation charges to which the small trust would be subject. If the concern is the protection of a minor's interest in property, it will usually be more expedient to use a custodial arrangement under the California Uniform Transfers to Minors Act [ *Prob. Code §§ 3900-3925*]. *Commentary by Albert G. Handelman.*

However, these "summary" procedures are available only when the estate is small and only when it is deemed expedient to proceed without a court order establishing and funding the trust. In most cases, it is either necessary or preferable to proceed through formal probate proceedings to determine the existence and terms of a testamentary trust and to determine the identity and value of all of the trust property.

#### **[c] Asset Management Considerations**

Since a testamentary trust does not come into existence until after the death of the settlor, it obviously cannot be used to obtain property management during the testator's lifetime [see § 70.10[3][b] for discussion of the use of revocable trusts for property management]. However, a testamentary trust can be used to provide for management of property after the testator's death. For example, the testator's spouse or children may be unable to personally manage property that the testator wishes to leave to them. If the property is left in trust rather than devised outright, it will then be managed by the trustee until such time as it is distributed or the trust is terminated.

#### **[d] Privacy Considerations**

Since wills that create trusts are typically probated, a testamentary trust cannot be used to preserve the testator's privacy, or the privacy of family members [see § 70.10[3][c] for discussion of the use of revocable trusts to preserve privacy]. The terms of the will, the nature and amount of the assets, and the identities and shares of the beneficiaries all become a matter of public record during probate proceedings.

#### **[e] Testamentary Formalities**

Since a testamentary trust can be created only by a valid will, the trust instrument must be executed with all of the formalities required for the execution of a will. This means that it must be properly signed by the testator and at least two witnesses [see *Prob. Code § 6110* and discussion of the execution and attestation of wills in Ch. 61, *Will Drafting and Complete Will Forms* ].

#### **PRACTICE TIP:**

Testamentary trusts may also be established under holographic wills meeting the requirements set forth in *Probate Code Section 6111*. Of course, holographic wills are often fraught with problems, and are more likely to be contested than formal, witnessed wills. Given the complexity inherent in creating any testamentary trust, the use of a holographic will to establish a testamentary trust is strongly discouraged. *Commentary by Albert G. Handelman.*

An inter vivos trust instrument need not be witnessed [see § 70.11 for discussion of the execution requirements for inter vivos trust instruments].

#### **PRACTICE TIP:**

While there may not be the same specific, formal requirements surrounding the execution of a trust instrument as there are for a will, proper execution of a trust instrument is important in order to clearly

establish that the trustee and settlor understand and accept the terms of the trust(s) to be established pursuant to the instrument. Additionally, sound practice dictates that in most instances the signatures of the trustee and settlor be acknowledged before a notary public. While contests of revocable inter vivos trusts are relatively rare, this may be because their use has only begun to be broadly popular in recent years. It can be anticipated that with the increasing number of deaths of settlors of such trusts in the coming years, there will be a corresponding increase in the number of contests of those trusts. Prudence requires that formal and consistent procedures be established for the execution of revocable trust instruments as part of one's office practices. *Commentary by Albert G. Handelman.*

#### **[f] Time and Expense of Administration**

The various advantages of revocable trusts over testamentary trusts must be balanced against the time and expense of startup and administration associated with revocable trusts.

When a revocable trust is created, assets must be retitled in the name of the trustee, and a separate bank account must be established. These startup costs usually will substantially exceed the cost of simply having an attorney draft a will that contains a testamentary trust. A testamentary trust, in effect, defers these costs until after the client's death, when many of them will eventually be covered by statutory commissions to personal representatives and statutory attorneys' fees payable in probate proceedings. Some clients may opt for this immediate saving, even when it will ultimately increase expenses to the estate by subjecting the estate to probate costs, because they would rather see the shares of their heirs reduced than incur additional expense during their own lifetimes.

Further, after the trust is operational, separate records must be kept, and the settlors must respect the legal formalities of the trust as a separate entity when dealing with trust property. As a practical matter, this may be bothersome to persons who are used to dealing freely with their own property. If someone other than the settlor is the trustee, the settlor will have to deal with the trust assets through the trustee, rather than directly. Moreover, a third-party trustee such as a bank or trust company will charge a fee for management of the trust assets. When a testamentary trust is used, these issues will arise, if at all, only after the settlor's death.

For discussion of the startup procedures for revocable trusts, see *California Wills & Trusts*, Ch. 140, *Implementing the Inter Vivos Trust* (Matthew Bender).

#### **[5] Choosing Between Revocable Inter Vivos Trust and Irrevocable Inter Vivos Trust**

Revocable inter vivos trusts differ from irrevocable inter vivos trust in one obvious key respect: revocability. Although this difference in itself is relatively simple to understand, the consequences that flow from the difference have enormous importance.

Since the right to revoke a trust is an important and valuable right, a settlor will usually give up that right only in return for some advantage. Typically, this advantage will be a tax advantage. As discussed in [3][d], *above*, a revocable trust is not treated as a separate entity for tax purposes. In contrast, irrevocable trusts that meet applicable tax requirements *are* treated as separate entities for federal income and estate tax purposes. Income generated by the trust is taxed to the trust itself, or to the trust beneficiaries, rather than to the settlor, and trust assets will not be subject to estate taxation in the settlor's estate when the settlor dies.

Creation of an irrevocable trust, or transfer to an existing irrevocable trust, may generate gift tax liability to the settlor or donor at the time of transfer. However, any subsequent appreciation in the trust assets ordinarily is removed from the settlor's estate, and thereby may escape some or all of the estate and income tax to which it otherwise would be subject.

The essential difference between the uses of revocable versus irrevocable trusts in estate planning may be better

understood if the irrevocable trust is thought of as a gift substitute and the revocable trust is thought of as a probate substitute. An irrevocable trust is used to give property away during the settlor's lifetime, while a revocable trust is used to retain the property during the settlor's lifetime and pass it to designated beneficiaries without probate after the settlor's death.

Detailed discussion of irrevocable trusts is beyond the scope of this chapter. For discussion, see Ch. 72, *Irrevocable Trusts*. For discussion of the tax consequences of creating a revocable trust, see § 70.10[3][d]. For detailed coverage of the use, planning, and drafting of irrevocable inter vivos trusts, see California Wills & Trusts, Ch. 114, *Irrevocable Inter Vivos Trusts* (Matthew Bender).

#### **[6] Presumption of Revocability**

*Prob. Code § 15400* provides that a trust is revocable by the settlor unless expressly made irrevocable by the trust instrument. This rule creates a presumption of revocability, which may be overcome only by an express statement in the instrument. However, *Prob. Code § 15400* applies only if [*Prob. Code § 15400*]:

- The settlor is domiciled in California when the trust is created;
- The trust instrument is executed in California; and
- The trust instrument provides that the law of California governs the trust.

The California presumption of revocability is contrary to the majority rule in the United States [*see California Wills & Trusts, Ch. 114, Irrevocable Inter Vivus Trusts, § 114.02[3]* (Matthew Bender)]. In most states, a trust is irrevocable unless the settlor reserves the right to revoke when the trust is created [California-Nevada Annual Conf. of the United Methodist Church v. St. Luke's United Methodist Church (2004) 121 Cal. App. 4th 754, 768, 17 Cal. Rptr. 3d 442 (presumption of revocability has been rule in California since 1931 and applies to trusts created since then)]; *see Recommendation Proposing the Trust Law*, 18 Cal. L. Rev. Comm'n Reports 1207, 1268 (1986)]. Because clients who have executed trust instruments often move from state to state, and because the loss of the power to revoke a trust can be devastating, it is essential when drafting any trust instrument to clearly state whether the settlor reserves the power to revoke the trust [*see § 70.12[5]*].

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsRevocable Living TrustsEstate, Gift & Trust LawTrustsTestamentary Trusts



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California Legal Forms--Transaction Guide

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DIVISION IV: WILLS AND TRUSTS  
CHAPTER 70 COMPLETE REVOCABLE TRUST FORMS  
PART II. LEGAL BACKGROUND

*26-70 California Legal Forms--Transaction Guide § 70.11*

**AUTHOR:** Reviewed by Albert G. Handelman

**§ 70.11 Creation**

**[1] Settlers**

A person who establishes a revocable trust is referred to as the "settlor," "grantor," or "trustor." The California statutes generally use the term "settlor" [*see, e.g., Prob. Code § 15201*], and that term therefore has also been adopted in this publication. The Internal Revenue Code and implementing regulations use the term "grantor" [*see, e.g., I.R.C. §§ 671-679*].

A trust may be created by more than one settlor, acting jointly. Although the Probate Code does not specifically state that a trust can be created by more than one person [*see, e.g., Prob. Code §§ 15200, 15201*], the practice is extremely common, and references in the code to "joint settlers" clearly indicate that such arrangements are contemplated [*see, e.g., Prob. Code §§ 15209(b), 15401(b)*]. Joint settlers usually are married persons, although unmarried cohabiting persons, and, less frequently, other persons, also sometimes create trusts as joint settlers.

**[2] Elements of a Trust**

**[a] In General**

In California, four elements are essential to the creation of an "express" trust [ *California-Nevada Annual Conf. of the United Methodist Church v. St. Luke's United Methodist Church* (2004) 121 Cal. App. 4th 754, 767, 17 Cal. Rptr. 3d 442] :

- Intent [*see Prob. Code § 15201; see also [b], below*];
- Property [*see Prob. Code § 15202; see also [c], below*];
- A purpose [*see Prob. Code § 15203; see also [d], below*]; and

- At least one beneficiary [*see Prob. Code § 15205(a)*; *see also [e], below*].

An "express" trust is a trust that is declared in express terms and that arises from the voluntary action of the settlor or settlors and the trustee [Black's Law Dictionary (6th ed. 1990) at 1511]. A trust is not an "express" trust if it is classified as a "resulting" trust or a "constructive" trust. A "resulting" trust is a trust that arises when property is transferred under circumstances showing that the transferee was not intended to take a beneficial interest in the trust property [*Restatement (Second) of Trusts, § 404*]. A "constructive" (or "involuntary") trust is a remedy imposed by a court of equity to compel a person who wrongfully holds property that belongs to another to transfer the property to the rightful owner [ *Calistoga Civic Club v. City of Calistoga (1983) 143 Cal. App. 3d 111, 117, 191 Cal. Rptr. 571* ] . For a discussion of the classification of trusts, with detailed discussion of the differences between "express" trusts, "resulting" trusts, and "constructive" trusts, see *California Wills & Trusts, Ch. 80 Introduction to Trusts, § 80.03* (Matthew Bender).

### **[b] Intent**

An express trust is created only if the settlor properly manifests an intention to create a trust [*Prob. Code § 15201*]. Although no particular words are necessary to create a trust, the language used must unequivocally manifest an intention that the trust property be held by the trustee for the benefit of the beneficiary or beneficiaries [ *Estate of Shaw (1926) 198 Cal. 352, 360, 246 P. 48* ; *Hayden Plan Co. v. Wood (1929) 97 Cal. App. 1, 9-10, 275 P. 248* ] . The intention to create a trust is typically manifested in a written document called a trust "instrument" [*see [3], below*].

### **PRACTICE TIP:**

In most instances, trusts are established under declarations rather than agreements. Thus, the only formally expressed "intention" is generally found in the settlor's consent to and/or acceptance of the terms of the trust as declared by the trustee. It is for this reason that all of the forms in this volume for declarations of trust specifically provide for the execution of the instrument by the settlor as well as by the trustee. *Commentary by Albert G. Handelman.*

### **[c] Property**

A trust is created only if there is trust property [*Prob. Code § 15202*]. This element is generally satisfied when property is transferred to the trustee to be held pursuant to the terms of the trust instrument. It has been held that at least under some circumstances, simply listing an asset in a schedule attached to and incorporated by reference into a trust instrument may suffice to transfer the asset to the trust [ *Estate of Heggstad (1993) 16 Cal. App. 4th 943, 947-951, 20 Cal. Rptr. 2d 433* (trust created by declaration of trust); *Estate of Powell (2000) 83 Cal. App. 4th 1434, 1441, 100 Cal. Rptr. 2d 501* (trust created by declaration of trust); *see Prob. Code § 15200(a)* (trust may be created by a declaration by the owner that he or she holds property as trustee); *see also § 70.11[3][b]*]. However, the proper practice is to formally retitle the asset in the name of the trustee [for discussion, *see California Wills & Trusts, Ch. 140, Implementing and Funding the Inter Vivos Trust* (Matthew Bender); *see also* discussion of trust funding in [4], *below*].

Although each item of property held by the trustee need not be described in detail, the trust property must be capable of being readily identified [*see Garrison v. Edward Brown & Sons (1944) 25 Cal. 2d 473, 480* ; *Estate of Northcutt (1940) 16 Cal. 2d 683, 688-689, 107 P.2d 607* ] . Broadly inclusive property descriptions, such as "all of my property" or "all of the property I own at the time of my death," will usually be sufficient, although more specific descriptions may be necessary for specific items, such as cash or a cash equivalent [*see Molera v. Cooper (1916) 173 Cal. 259, 261, 160 P. 231* ; *Ilse v. Burgess (1938) 28 Cal. App. 2d 654, 656, 83 P.2d 527 P.2d527*]. This is only the minimum legal requirement, however. In the revocable trust context, the proper practice is to include a clear and detailed description of all trust assets, either in the trust instrument itself or, more frequently, in a schedule attached to and incorporated by reference into the trust instrument.

### **[d] Purpose**

A trust must have a purpose [*see California Wills & Trusts, Requisites of a Valid Trust, § 90.05[1]* (Matthew Bender)]. Although a trust may be created for any purpose that is not illegal or against public policy [*Prob. Code § 15203*], the purpose must be reasonably certain [ *Estate of Ralston (1943) 1 Cal. 2d 724, 726, 37 P.2d 76* ; *Estate of Berges (1977) 76 Cal. App. 3d 106, 110, 142 Cal. Rptr. 635* ]. If the stated purpose is not definite enough for the trust to be carried out, the purpose is not reasonably certain and no trust is created [ *Estate of Gaines (1940) 15 Cal. 2d 255, 265-266, 100 P.2d 1055* ].

**PRACTICE TIP:**

Occasionally, the exact purpose of the trust will be expressly stated in the instrument. For example, the document may explain that the settlor's purpose in creating the trust is primarily to provide for a particular beneficiary, with the interests of all other beneficiaries being of secondary importance. Similarly, a trust may specifically state that it is the settlor's purpose in creating the trust to provide for the education of a particular individual or to provide supplementary payments for the "special needs" of a beneficiary receiving public benefits payments. More often, however, the exact purpose of the trust is not stated expressly, but may be inferred from the specific provisions of the trust, most particularly its dispositive provisions. *Commentary by Albert G. Handelman.*

**[e] Beneficiaries**

A private (that is, non-charitable) trust may be created only if there is at least one beneficiary [*see Prob. Code § 15205(a)*]. A beneficiary may be an individual or a class of individuals. When the beneficiary is a class, the members of the class must be ascertainable with reasonable certainty [*Prob. Code § 15205(b)(1)*]. The requirement of a beneficiary may also be satisfied if the trustee or some other person is given the power to select the beneficiaries [*Prob. Code § 15205(b)(2)*].

The beneficiary or beneficiaries of a charitable trust may be designated with less specificity than the beneficiary or beneficiaries of a non-charitable trust. Since it is the nature of most charitable trusts to bestow their benefits broadly on large numbers of people, the courts have generally sustained charitable trusts when the beneficiaries have been designated only in a very general way [*see Fay v. Howe (1902) 136 Cal. 599, 601-603, 69 P. 423* ("deserving aged native-born in the town of Southboro, Massachusetts"); *In re Estate of DeMars 20 Cal. App. 2d 514, 515-516, 67 P.2d 374 (1937)* ("the poor soldiers [of] Letterman Hospital")].

A settlor may be the beneficiary, provided that all of the interests in the trust (legal and equitable) are not united (or "merged") in the settlor [*see Prob. Code § 15209*]. All of the interests in a trust are not united in the settlor merely because the settlor is the trustee and also has a lifetime interest in the trust property, provided other persons will have interests in the trust property after the settlor's death [*see Prob. Code § 15209*].

**[3] Trust Instrument**

**[a] Nature and Types**

A revocable inter vivos trust typically is created by a written document known as the "trust instrument." There are two basic forms of trust instruments: the "trust agreement" and the "declaration of trust."

A "trust agreement" is a two-party instrument by which the settlor transfers property to the trustee and the trustee agrees to hold it in trust under terms of the agreement. If, as is often the case, the settlor is also to serve as trustee, he or she will execute the agreement in both capacities. If the settlor and the trustee are different persons, each will execute the agreement in his or her individual capacity.

A "declaration of trust" is a one-party instrument in which the trustee unilaterally declares that the trustee is holding

property as trustee under terms of the trust instrument. Only the trustee is required to execute the declaration. However, it is common for the settlor to sign the declaration to signify his or her approval of the terms of the trust.

#### **[b] Use**

Either a trust agreement or a declaration of trust, when properly drafted, will create a valid trust. Prior to 1993, the choice was largely a matter of individual preference. Attorneys who preferred the trust agreement format often did so on the ground that when a client is to act both as trustee and settlor, the agreement format requires the client to sign in both capacities and thus emphasizes for the client the distinction between the two roles. However, the 1993 case of *Estate of Heggstad* [ *Estate of Heggstad (1993) 16 Cal. App. 4th 943, 20 Cal. Rptr. 2d 433*] has prompted many estate planners who preferred trust agreements to re-evaluate their preference. In *Heggstad*, the court of appeal held that a parcel of real property that was described as a trust asset in a schedule attached to the trust declaration was trust property even though it had never been formally conveyed to the trust. The court specifically referred to language in *Prob. Code § 15200(a)* that permits a trust to be created by a "declaration by the owner of property that the owner holds the property as trustee" [ *Estate of Heggstad (1993) 16 Cal. App. 4th 943, 947-951, 20 Cal. Rptr. 2d 433* ; see also *Estate of Powell (2000) 83 Cal. App. 4th 1434, 1441, 100 Cal. Rptr. 2d 501* ] . The court did not speculate on whether the result would have been the same if the trust in question had been created by a trust agreement rather than a declaration, but since the result under a declaration is clear, many California estate planners now recommend that revocable trusts be created by declarations rather than trust agreements.

#### **[4] Funding**

##### **[a] In General**

The process of transferring property to a trust (or, more precisely, to the trustee) is commonly referred to as "funding" the trust. The benefits of a revocable inter vivos trust generally are not available unless the trust is properly funded. For a discussion of the process of transferring property to a trust, see *California Wills & Trusts, Ch. 140, Implementing and Funding the Inter Vivos Trust* (Matthew Bender).

Most assets held by a typical settlor may be used to fund a revocable trust. Cash, securities, and real property are commonly transferred to revocable trusts. Some assets, however, cannot be held in a trust, may be unsuitable for inclusion in a trust, or are subject to special rules when held in a trust. These assets include professional practices and corporations, unincorporated businesses, general partnership interests, joint tenancy property [see [e], below], untitled personal property, S corporation stock [see *I.R.C. §§ 1361-1379* and discussion in [f], below], and *I.R.C. § 1244* stock [see *Ch. 6I, Issuance of Equity Securities, § 6I.21*]. For a more detailed discussion of assets that are unsuitable for a revocable trust, or that are subject to special problems or restrictions when held in trust, see *California Wills & Trusts, Ch. 3, Selecting the Proper Estate Planning Devices, § 3.05[2][e]* (Matthew Bender) and *California Wills & Trusts, Ch. 94, Trust Property* (Matthew Bender).

A revocable trust may be funded with community property [see [b], below], separate property [see [c], below], or a combination of the two [see [d], below].

##### **[b] Community Property**

Often, the bulk of a married couple's estate will consist of community property [for discussion of the rules governing the characterization of property as separate or community property, see *Ch. 121, Provisions for Division of Property, §§ 121.30-121.40*]. When a community property asset is transferred to a revocable trust, it is usually desirable to preserve the community property character of the asset. One reason for doing so is that each spouse's rights to the ultimate management and control of the property are thereby preserved. Another reason is that in the event of a complete or partial revocation of the trust, the parties will be restored to the status with regard to their property that existed prior to its transfer to the trust.

Moreover, retention of community property status has an important tax advantage. When one spouse dies, only one-half of the community property is included in the deceased spouse's gross estate for federal tax purposes, whereas all of the deceased spouse's separate property is included [*see I.R.C. § 2033* (property in which decedent had an interest)]. Nevertheless, both halves of the community property receive a new basis determined by the fair market value of the property at the time of the deceased spouse's death [*see I.R.C. § 1014(b)(6)*]; for decedents dying after 2009, a modified carryover basis rule generally applies, so a step-up basis does not apply (*I.R.C. § 1022*); *see* Ch. 60, *Estate Planning*, for a detailed discussion]. If the property has appreciated substantially since it was purchased, and if the property is later sold, this valuation (commonly called a "stepped-up" or "double stepped-up" basis) may produce substantial income tax savings. For further discussion, see *California Wills & Trusts, Ch. 3, Selecting the Proper Estate Planning Device, § 3.04[5][d]* (Matthew Bender).

The character of community property may be preserved after it has been transferred to the trust if the trust instrument provides that the trust is revocable as to the community property during the marriage and that the power, if any, to modify the trust as to the rights and interests in the community property during the marriage may be exercised only with the joinder or consent of both spouses [*Fam. Code § 761(a)*]. When a revocable inter vivos trust is funded with community property, it is common for the spouses to act as joint or co-settlors of the trust. A revocable inter vivos trust instrument typically will provide that the entire trust is revocable during the joint lifetimes of the settlors, and that after the death of the first settlor, the survivor will retain the right to revoke the trust as to his or her share of the community property during the survivor's lifetime.

Unless the trust instrument expressly provides otherwise, a power to revoke as to community property may be exercised by either spouse acting alone [*Fam. Code § 761(b)*]. This rule operates as an important exception to the general rule that except as otherwise provided in the trust instrument, each settlor may revoke the trust *as to the portion of the trust property contributed by that settlor* [*see Prob. Code § 15401(b)*]. In one case involving a trust that was revocable at any time during the life of either spouse and that was funded with community property, revocation by the surviving spouse after the first spouse's death resulted in one-half of the trust assets being returned to the surviving spouse and the other half being disposed of according to the deceased spouse's will. Under *Prob. Code § 100*, the community property in the trust was transmuted at the first spouse's death to separate property. Therefore, survivor's revocation was effective only as to his half of the trust corpus [ *Estate of Powell (2000) 83 Cal. App. 4th 1434, 1441, 100 Cal. Rptr. 2d 501* ].

If either settlor's statutory right to unilaterally revoke the trust as to community property is restricted, it is likely that the settlor will be held to have made a taxable gift to the remainder beneficiaries on transfer of the property to the trust [*see I.R.C. § 2511(a)* (tax applies whether gift is direct or indirect); *Treas. Reg. § 25.2511-2(b)* (cessation of donor's dominion or control over property constitutes gift), (f) (relinquishment or termination of power to change beneficiaries of transferred property completes gift)]. Therefore, revocable trusts typically provide that each settlor will have the power to unilaterally revoke the trust as to community property [*see § 70.12[5][c]*; for forms, *see §§ 70.201[2]*, P 3.01, *70.202[2]*, P 3.01].

When married persons establish a revocable trust, it is common for them to name themselves as co-trustees. When the settlors are co-trustees, it is a good idea for the trust to delineate the extent of their powers over community property *as trustees*, as distinct from their revocation powers as settlors [*see §§ 70.201[2]*, P 6.06, *70.202[2]*, P 6.06].

### **[c] Separate Property**

A revocable inter vivos trust may be funded with the separate property of a married person. When that is done, the married person will often serve as the trustee. However, the spouse or some other person may act as the trustee or co-trustee without affecting the separate property character of the trust property [*see California Wills & Trusts, Ch. 111, Revocable Inter Vivos Trusts, § 111.05[2]* (Matthew Bender)]. When a joint settlor contributes his or her separate property to a revocable trust, that settlor will retain the right to unilaterally revoke the trust as to that property, unless

the trust instrument provides otherwise [*Prob. Code § 15401(b)*; *see § 70.12[5][c]*].

#### **[d] Separate and Community Property**

Married persons who wish to fund a revocable inter vivos trust with a combination of separate and community property may create either separate trusts for the different types of property or a so-called "mixed property trust" that includes both separate and community property. Many estate planners believe that it is easier to deal with separate and community property in separate trusts, and recommend that approach when possible. In addition, mixed property trusts are usually more difficult to draft. When separate trusts are used, separate provisions can be drafted to suit each type of property, and the danger of inadvertent commingling can be avoided. Nevertheless, mixed property trusts are commonly used, in part because some clients are reluctant to accept multi-trust plans that they may regard as confusing and complex.

When a mixed property trust is created to hold community property, it is desirable to have the community property retain its community property character in the trust [*see [b], above*]. This may be done by including a trust provision making the trust revocable by either spouse as to the community property [*see [b], above; see also Fam. Code § 761*].

Furthermore, the trust instrument should spell out the differences between the rights of the parties with respect to community property and their rights with respect to separate property. Typically, each spouse will have absolute management and control rights with respect to that spouse's separate property, and no rights with respect to the management and control of the other spouse's property. If, as is commonly the case, the joint settlors name themselves as co-trustees, their powers as trustees (as opposed to their powers as settlors) should be delineated in a similar manner.

Married persons who wish to create a revocable inter vivos trust with a combination of separate and community property may also consider the option of transmuting the property before it is transferred to the trust. Community property may be transmuted to separate property, and separate property may be transmuted to community property. However, transmutations are subject to special rules designed to protect the rights of the spouses [*see Fam. Code §§ 850-853*]. For coverage of transmutation agreements, see Ch. 112, *Postnuptial Agreements* .

#### **[e] Joint Tenancy Property**

Many married couples hold title to their real property in joint tenancy. However, property held in joint tenancy form may actually be community property, regardless of the form in which title is held [*see Tomaiier v. Tomaiier (1944) 23 Cal. 2d 754, 146 P.2d 905* (evidence admissible to show that parties intended property to be community property, regardless of form of title)]. This rule, coupled with the effect of the California transmutation statutes [*see Fam. Code § 852*], can generate difficult questions regarding the true character of property held in joint tenancy form [*see, e.g., Estate of MacDonald (1990) 51 Cal. 3d 262, 272, 272 Cal. Rptr. 153, 794 P.2d 911*]. Moreover, a direct transfer of joint tenancy property to a trust automatically severs the joint tenancy interest [*see Civ. Code § 683.2(a)*] and raises issues as to whether the resulting interests are community property, or separate property held as tenants in common. For discussion of these issues, see *California Wills & Trusts, Ch. 3, Selecting the Proper Estate Planning Devices, § 3.06[1][b]* (Matthew Bender). To avoid these problems, experienced estate planners recommend that when joint tenancy property is transferred to a revocable trust, the property always should first be converted to community property by means of a transmutation agreement or conveyance. For discussion, see *California Wills & Trusts, Ch. 140, Implementing and Funding the Inter Vivos Trust, § 140.06[9][a]* (Matthew Bender).

#### **[f] S Corporation Stock**

S corporation stock may be transferred to a trust, but only after the consequences of the transfer are carefully considered. An S corporation is a small business corporation that has elected to be taxed as a partnership rather than a corporation under Subchapter S of Chapter 1 of Subtitle A of the Internal Revenue Code [*see I.R.C. §§ 1361-1379*]. To

qualify for taxation under Subchapter S, a corporation must have no more than 100 shareholders [*I.R.C. § 1361(b)(1)(A)*] (applicable to tax years beginning after December 31, 2004; for earlier tax years, the corporation must have no more than 75 shareholders). All of the shareholders (except for estates, certain qualifying trusts, and tax-exempt organizations described below) must be individuals [*I.R.C. § 1361(b)(1)(B)*] (applicable to tax years beginning after December 31, 1997; for earlier tax years, the shareholders must all be individuals, except for estates and certain qualifying trusts), and none of the shareholders can be nonresident aliens [*I.R.C. § 1361(b)(1)(C)*]. The corporation cannot have more than one class of stock [*I.R.C. § 1361(b)(1)(D)*].

To qualify as a shareholder in an S corporation, an organization must be a qualified pension, profit-sharing, or stock-bonus plan described in *I.R.C. § 401(a)*, and exempt from income taxation under *I.R.C. § 501(a)*, or a tax-exempt organization described in *I.R.C. § 501(c)(3)* that is exempt from income taxation under *I.R.C. § 501(a)* [*I.R.C. § 1361(b)(1)(B), (c)(6)*].

A trust may hold stock in an S corporation if statutory requirements are met. If a citizen or resident of the United States is treated as owner of all the trust under the grantor trust rules [*see I.R.C. §§ 671-679* and discussion in § 60.15[3][b]], the trust may properly hold the stock during the owner's lifetime and for two years thereafter [*I.R.C. § 1361(c)(2)(A)(i), (ii)*] (applicable to tax years beginning after December 31, 1996), and the deemed owner or the deemed owner's estate will be treated as the shareholder [*I.R.C. § 1361(c)(2)(B)(i), (ii)*]. If stock is transferred to a trust as a result of a will, the trust may continue to hold it for two years after the stock is transferred to it [*I.R.C. § 1361(c)(2)(A)(iii)*] (applicable to tax years beginning after December 31, 1996) and the estate of the testator will be treated as the shareholder [*I.R.C. § 1361(c)(2)(B)(iii)*]. If a trust was created primarily to exercise the voting power of S corporation stock, it may properly hold the stock without time limitations [*I.R.C. § 1361(c)(2)(A)(iv)*] (applicable to tax years beginning after December 31, 1996), and each beneficiary will be treated as a shareholder [*I.R.C. § 1361(c)(2)(B)(iv)*].

A Qualified Subchapter S Trust (QSST) may also hold stock in an S corporation without time limitations [*I.R.C. § 1361(d)*]. A QSST is a trust that distributes all of its income to one person who is a citizen or resident of the United States [*I.R.C. § 1361(d)(3)(B)*]. A substantially separate and independent share of a trust may also qualify as a QSST if it distributes all of its income to one person who is a citizen or resident of the United States [*I.R.C. § 1361(d)(3)(B)*]; *see I.R.C. § 663(c)* (separate shares treated as separate trusts). The terms of a QSST must require, among other things, that there will be only one income beneficiary during the life of the current income beneficiary [*I.R.C. § 1361(d)(3)(A)*]. During the current beneficiary's lifetime, the trust will not cease to qualify as a QSST merely because there may be multiple beneficiaries after the current beneficiary's death [*see I.R.C. § 1361(d)(3)(A)*]. The beneficiary or legal representative must elect to have the trust treated as a QSST [*I.R.C. § 1361(d)(1), (2)*].

In tax years beginning after December 31, 1996, an Electing Small Business Trust (ESBT) may also hold stock in an S corporation [*I.R.C. § 1361(c)(2)(A)(v)*] (applicable to tax years beginning after December 31, 1996); *I.R.C. § 1361(e)* (applicable to tax years beginning after December 31, 1996). The rules for ESBTs vary according to the applicable tax years. For tax years beginning after December 31, 1996, and before January 1, 1998, a trust will qualify as an ESBT if it does not have as a beneficiary any person other than an individual, an estate, or a qualified charitable beneficiary, which holds a contingent interest and is not a potential current beneficiary [*I.R.C. § 1361(e)(1)(A)(i)*] (applicable to tax years beginning after December 31, 1996, and before January 1, 1998); *see I.R.C. § 170(c)(2)-(5)* (qualified charitable beneficiaries, other than governmental organizations). For tax years beginning after December 31, 1997, a trust will qualify as an ESBT if it does not have as a beneficiary any person other than an individual, an estate, or a qualified charitable beneficiary or, if they hold only contingent interests and are not potential current beneficiaries, state governments, or U.S. possessions, or any of their political subdivisions, or the United States or the District of Columbia [*I.R.C. § 1361(e)(1)(A)(i)*] (applicable to tax years beginning after December 31, 1997); *see I.R.C. § 170(c)(1)-(5)* (qualified charitable beneficiaries). In all cases, the trust will qualify as an ESBT only if no interest in the trust was acquired by purchase and the trustee makes the necessary election [*I.R.C. § 1361(e)(1)(A)(ii), (iii)*]; *see I.R.C. § 1361(b)(3)* (election). An ESBT may not be a QSST for which there is a current election or a trust that is exempt from income taxation [*I.R.C. § 1361(e)(1)(B)*]. If a trust qualified as an ESBT, each potential current beneficiary will be

treated as a shareholder of the S corporation [*I.R.C. § 1361(c)(2)(B)(v)*] (applicable to tax years beginning after December 31, 1996)].

Because the rules relating to S corporations are technical and complex, any transfer of S corporation stock to a trust should be planned with care. Any transfer of S corporation stock to a trust that will cause the corporation to lose its S status should be avoided. For example, stock in an S corporation should not be transferred to a trust with more than one beneficiary if the effect of the gift would be to raise the number of shareholders to more than 75 [*I.R.C. § 1361(b)(1)(A)*] (applicable to tax years beginning after December 31, 1996; for earlier tax years, the corporation must have no more than 35 shareholders)]. If an S corporation's status has been terminated, it cannot make another election for five years, unless the IRS consents [*I.R.C. § 1362(g)*]. However, a termination may be disregarded if the circumstances leading to it were inadvertent, if steps are taken to cure it within a reasonable time, and if the corporation and its shareholders agree to make any adjustments that may be required for the period of termination [*I.R.C. § 1362(f)*].

For a detailed discussion of S corporations and the Subchapter S election, see Ch. 2B, *Electing Subchapter S Status* .

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsCreationEstate, Gift & Trust LawTrustsRevocable Living Trusts



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California Legal Forms--Transaction Guide

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DIVISION IV: WILLS AND TRUSTS  
CHAPTER 70 COMPLETE REVOCABLE TRUST FORMS  
PART II. LEGAL BACKGROUND

*26-70 California Legal Forms--Transaction Guide § 70.12*

**AUTHOR:** Reviewed by Albert G. Handelman

**§ 70.12 Drafting**

**[1] In General**

**[a] General Principles Governing Construction of Trust Instruments**

Prior to 1995, the general Probate Code rules governing the construction and interpretation of wills said nothing about the applicability of those rules to inter vivos trusts, resulting in uncertainty over the extent to which these rules applied to trusts that were not created by will. This uncertainty was clarified in 1994 when the Legislature repealed the then-existing provisions governing the construction of wills [*see* Stats. 1994, ch. 806, § 21, *repealing Prob. Code §§ 6140-6179*, eff. Jan. 1, 1995] and substituted a similar series of provisions [*Prob. Code §§ 21101-21140*] that apply to wills, trusts, deeds, and "any other instrument[s]" [*Prob. Code § 21101*].

Enactment of these statutes means that the general rules applicable to construction of wills are now expressly applicable to inter vivos trusts. Rules that are especially significant in the context of inter vivos trusts are the survivorship rules [*see Prob. Code § 21109*], the "anti-lapse" statute [*see Prob. Code § 21110*], the construction of gifts to "heirs" [*see Prob. Code § 21114*], the rules governing persons included for purposes of class gifts [*see Prob. Code § 21115(a)*], and the rules for interpretation of language and resolution of inconsistencies [*see Prob. Code §§ 21120, 21121*]. These rules are discussed generally in the Legal Background to Ch. 61, *Will Drafting and Complete Will Forms*, and specifically in the comments to the relevant forms in Ch. 63, *Will Provisions* .

The paramount rule in the construction of trusts, as in wills, is that the intent of the settlor (or testator) controls the legal effect of all dispositions made in the trust instrument [*Prob. Code § 21102(a)*]. The statutory rules of construction apply only when the intention of the transferor is *not* indicated by the trust instrument [*Prob. Code § 21102(b)*]. However, these provisions do not limit the use of extrinsic evidence, to the extent otherwise authorized by law, to determine the testator's intention [*Prob. Code § 21102(c)*].

**[b] Basic Drafting Principles**

The drafting of a trust instrument is not governed by rigid rules of style or format, but rather by general considerations of clarity, precision, and simplicity. The legal formalities applicable to wills (and testamentary trusts) are inapplicable to revocable trusts. Because the intention of the testator is controlling [*Prob. Code* § 21102(a); see discussion in [a], *above*], an attorney's goal in drafting a trust instrument should be to record the settlor's intentions accurately, to avoid ambiguities and uncertainties, and to anticipate problems that are likely to arise in interpreting or construing the instrument.

Under case law, the test is not what the settlor *intended to say*, but what the settlor *intended by what he or she in fact said in the instrument* [see *Title Ins. & Trust Co. v. Duffill* (1923) 191 Cal. 629, 642, 218 P. 14; *Kropp v. Sterling Sav. & Loan Assn.* (1970) 9 Cal. App. 3d 1033, 1044-1045, 88 Cal. Rptr. 878]. Further, a trust instrument must be construed on the basis of the instrument as a whole and not on the basis of an individual provision or provisions in the instrument [see *Prob. Code* § 21121; *Estate of Bixby* (1961) 55 Cal. 2d 819, 824, 13 Cal. Rptr. 411, 362 P.2d 43; *Brock v. Hall* (1949) 33 Cal. 2d 885, 887, 206 P.2d 360]. If a court is called upon to construe a trust instrument, it must examine the entire instrument with a view to discovering the settlor's general scheme, plan, or purpose [see *County Nat. Bank etc. Co. v. Sheppard* (1955) 136 Cal. App. 2d 205, 215, 288 P.2d 880; *Estate of Raymond* (1950) 96 Cal. App. 2d 808, 814, 216 P.2d 515] and read each word or phrase in the light of the entire instrument rather than as an isolated statement of intention [see *Estate of Raymond* (1950) 96 Cal. App. 2d 808, 814, 216 P.2d 515; *Randall v. Bank of America* (1941) 48 Cal. App. 2d 249, 252, 119 P.2d 754; *Lawrence v. Wilson* (1919) 44 Cal. App. 690, 693, 187 P. 30; see also *Prob. Code* § 21120 (instruments interpreted to give every provision some effect)].

### **[c] Style and Organization of Trust Instrument**

The statutory rules that bear on the creation of a trust are almost wholly substantive [see § 70.11[2] for discussion of the elements of a valid trust]. They do not prescribe any rules of style, and do not specify how a trust instrument must be organized. Generally, any logical organization that is designed to reflect the settlor's intentions and to avoid ambiguities and uncertainties will be sufficient. However, certain conventions regarding trust organization have developed over the years. The trust forms in this chapter generally follow those conventions. For illustrative purposes, the discussion that follows is largely geared to those trust forms and the conventions reflected in them.

#### **PRACTICE TIP:**

While the order in which the various provisions of a properly drafted trust instrument may vary from practitioner to practitioner, most of the individual elements of such a trust as explained in this chapter are incorporated by all experienced practitioners. *Commentary by Albert G. Handelman.*

### **[2] Name of Trust**

The trust instrument should establish the name of the trust. If more than one trust is created by the instrument, each trust should be named.

The name of a trust may include appropriate identifying information, such as the name of the settlor, the name of the person or family for whose benefit the trust is created, and the year in which the trust is created. For example, a revocable inter vivos trust created by John A. Smith in 1994 could be named the "John A. Smith 1994 Trust" [see § 70.200[2], P 1.02]. Similarly, a revocable inter vivos trust created in 1994 by Robert B. Jones and Jenny C. Jones could be named the "Jones Family 1994 Trust" [see § 70.201[2], P 1.02] or the "Robert B. Jones and Jenny C. Jones 1994 Trust." The inclusion of the year of creation in the name of the trust will help to distinguish the trust from other trusts that may be created in subsequent years by the same settlor or settlors for similar purposes. For example, John A. Smith may create another trust in 1995 and name that trust the "John A. Smith 1995 Trust."

If more than one trust is created by a trust instrument, the instrument may give a collective name to those trusts and state that each separate trust created under the instrument will be referred to by adding the name or designation of the

separate trust as it appears in the appropriate Paragraph of the instrument [*see* §§ 70.202[2], P 1.02, 70.203[2], P 1.02].

The trust name, as well as information identifying the instrument creating the trust, will be used when property is transferred to the trustee. The instrument of transfer will name the trustee and identify him or her as trustee. For example, a deed conveying real property to the revocable inter vivos trust created by Robert B. Jones and Jenny C. Jones might designate the grantees as "Robert B. and Jenny C. Jones as trustees under the Jones Family 1994 Trust, created by declaration of trust dated June 1, 1994."

### **[3] Family Information**

The trust instrument should include basic information about the settlor's family and marital status. If the settlor has children or grandchildren who are to be beneficiaries of the trust, stating their names and birthdates will serve a useful purpose. Distributions often occur on specific birthdays, and setting forth the beneficiaries' birthdates will help the trustee determine when the distributions are to be made.

### **[4] Trust Estate**

#### **[a] Definition**

The trust instrument often will include language identifying the trust property and subjecting that property to the authority of the trustee. This will typically be done by including a definition of the words "trust estate" and stating that the "trust estate" will be "held, administered, and distributed as provided in this instrument" [*see* §§ 70.200[2], P 2.01, § 70.201[2], P 2.01, § 70.202[2], P 2.01, § 70.203[2], P 2.01].

The trust property may be identified in the trust instrument itself, or included in an attached schedule. Most estate planners prefer to use a schedule of assets to avoid having to include a long list of assets among the substantive provisions of the trust instrument, and because a schedule can be amended without affecting the rest of the trust instrument.

#### **PRACTICE TIP:**

Experienced practitioners do not rely on the schedule of assets attached to the trust instrument to fund the trust. Rather, they formally transfer each asset into the name of the trustee. Accordingly, many practitioners do not amend the schedule of assets originally attached to the trust, but they do include a statement in the trust instrument itself explaining that the trust estate will include all assets set forth on the schedule of assets "together with such other assets as may be transferred to the trustee from time to time." *Commentary by Albert G. Handelman.*

If the trust uses the trust declaration format [*see* § 70.11[3]], a provision specifying that property is included in the trust estate may be sufficient, in and of itself, to create a trust with respect to that property, even if the property is never formally conveyed to the trustee [*see Estate of Heggstad (1993) 16 Cal. App. 4th 943, 947-951, 20 Cal. Rptr. 2d 433* (trust created by declaration of trust); *see also Estate of Powell (2000) 83 Cal. App. 4th 1434, 1441, 100 Cal. Rptr. 2d 501* (trust created by declaration of trust); *Prob. Code § 15200(a)* (trust may be created by a declaration that owner holds property as trustee)]. The result is less clear if the trust agreement format is used [*see* § 70.11[3]]. In either case, however, the proper practice is to formally transfer each asset to the trust by means of an appropriate written instrument [*see* §§ 70.11[2][c], [4][e]; *see also California Wills & Trusts, Ch. 140, Implementing and Funding the Inter Vivos Trust* (Matthew Bender)].

#### **[b] Characterization of Property**

Special provisions may be necessary to protect the character of trust property as separate property or community property [*see* § 70.11[4]]. If the trust is to be a "mixed trust" including both community and separate property [*see* §

70.11[4][d]], the instrument typically will state that community property will continue to be community property after it is transferred to the trust, and that separate property will continue to be separate property [see §§ 70.201[2], P 2.02, § 70.202[2], P 2.02].

### **[c] Additions**

Trust instruments typically include provisions specifying whether the trustee is authorized to accept additions to the trust and, if so, from what sources. Revocable inter vivos trusts typically are not funded all at once. The settlors will often contribute some property to the trust at the time of creation, and add more property in later years. It is also common for settlors (acting in their capacity as trustees) to withdraw property from revocable inter vivos trusts from time to time and to replace the withdrawn property with other property. For this reason, it is almost always advisable to authorize the trustee to accept additions to a revocable inter vivos trust from the settlor(s) [see § 70.230[2] (additions by settlors only)]. In most cases, the settlors will also wish to authorize the trustee to accept additions from third parties as well [see §§ 70.200[2], P 2.02, § 70.201[2], P 2.03, § 70.202[2], P 2.03, § 70.203[2], P 2.02]. In rare cases, the trustee will be prohibited from accepting additions [see § 70.231[2] (form)].

## **[5] Revocability and Amendment**

### **[a] In General**

Every revocable inter vivos trust instrument should include a clause clearly stating that the trust is revocable and specifying how and by whom it may be revoked. Failure to include such a clause may endanger the revocability of the trust, with possibly disastrous consequences for the settlor's estate plan [see § 70.10[6]]. Additionally, if a settler wishes to make a particular method of revocation the only way to revoke a trust, care must be taken to ensure the revocation clause is explicitly exclusive, or revocation of trust by way of statute may be held to be valid [*Prob. Code* § 15401(a)(2), see *Masry v. Masry*, (2008) 166 Cal. App. 4th 738, 740, 82 Cal. Rptr. 3d 915 (Family trust provided trustors power to revoke by writing delivered to the other trustor, however as revocation provision was not explicitly exclusive, revocation by delivering notice of revocation to oneself as trustee was held valid and in compliance with *Prob. Code* § 15401(a)(2))].

The trust instrument should also specify how and by whom the trust may be amended. Although a power to revoke might appear at first glance to include a power to amend, trusts created by joint settlors typically distinguish between the power to revoke and the power to amend, and restrict the latter to preclude one spouse from changing the terms of the trust without the other's knowledge or consent [see [f], below].

### **[b] Revocation by Sole Settlor**

If the trust has only one settlor, the instrument will typically state that the trust may be amended, revoked, or terminated by the settlor, in whole or in part, at any time during the settlor's lifetime [see §§ 70.200[2], P 3.01, 70.203[2], P 3.01]. The trust will then become irrevocable on the settlor's death.

### **[c] Revocation by Joint Settlers**

If there are two settlors, the revocation clause must be drafted with more care. If the trust is funded in whole or in part with community property, and if the settlors wish the community property to retain its community character after it has been transferred to the trust, the clause *must* contain language providing that the trust will be revocable as to community property during the joint lifetimes of the settlors [*Fam. Code* § 761(a); see §§ 70.201[2], P 3.01, 70.202[2], P 3.01]. By statute, such a power to revoke as to community property is exercisable by either spouse acting alone, unless the trust instrument provides otherwise [*Fam. Code* § 761(b)]. For tax reasons, it is inadvisable to restrict this power of revocation in the trust instrument. If either settlor's statutory right to unilaterally revoke the trust as to community property is restricted, it is likely that the settlor will be held to have made a taxable gift to the remainder beneficiaries on

transfer of the property to the trust [*see I.R.C. § 2511(a); Treas. Reg. § 25.2511-2(b)* (relinquishment of dominion and control over property may constitute taxable gift)].

If the trust is to be a "mixed property trust," containing both community property and separate property, the revocation provisions should give both spouses the unilateral power to revoke the trust as to community property, and a spouse who contributes separate property the unilateral right to revoke the trust as to that property [*see § 70.11[3][d]; see also §§ 70.201[2], P 3.01, 70.202[2], P 3.01*]. Such a provision will reinforce the general statutory rule (applicable to all property *other than* community property that will retain its community property character after being transferred to the trust) that unless the instrument provides otherwise, each settlor may revoke the trust as to the portion of the trust contributed by that settlor [*Prob. Code § 15401(b)*].

#### **[d] Revocation by Surviving Settlor**

When there are two settlors, the instrument must also state whether all or part of the trust can be revoked after the death of the first settlor. In practice, at a minimum, the surviving settlor is usually given the right to revoke the trust as to the survivor's own separate property, and his or her share of the settlors' community property. This is done (1) because the survivor normally will want to be able to exercise ultimate control over his or her own property; and (2) to avoid the gift tax problems that can result when a settlor gives up his or her right of management or control over the trust property [*see [a], above*]. To facilitate this division, the survivor's share of the property is commonly segregated into a separate "survivor's trust" after the death of the first spouse, and that trust remains revocable by the surviving spouse during his or her lifetime [*see § 70.12[6][f]; see also § 71.15 in Ch. 71, Marital Deduction Trust Provisions*].

Under some circumstances, the surviving settlor may also be given the power to revoke the trust as to a portion of the deceased spouse's assets. Such a power will, of course, deprive the deceased settlor of a substantial measure of control over the ultimate disposition of his or her own property because the survivor may then revoke the trust and dispose of the property as he or she wishes at any time. However, in a significant number of cases, the clients' desire to give the surviving spouse maximum control over the couple's assets may overcome concern over the ultimate disposition of those assets. When a nonformula marital deduction trust is used, the entire trust may simply remain revocable by the surviving settlor, if desired. In the typical formula marital deduction trust, the surviving settlor's share is divided into assets qualifying for the marital deduction [*see I.R.C. § 2056*] and assets intended to pass under the deceased settlor's unified credit [*see I.R.C. § 2010; see also Ch. 71, Marital Deduction Trust Provisions, § 71.12*]. If desired, the surviving settlor may be given the power to revoke the trust as to the portion of the assets designed to qualify for the marital deduction, although this deprives the deceased settlor of any control over what ultimately happens to those assets. When the marital deduction share is made revocable in this manner, it is often lumped together with the survivor's share of the trust assets, and both shares are placed in a single lifetime income/power of appointment marital deduction trust [*see I.R.C. § 2056(b)(5); see also Ch. 71, Marital Deduction Trust Provisions, § 71.15[4]*]. However, the surviving settlor may *not* be given the power to revoke the trust as to the portion of the assets designed to qualify for the unified credit of the deceased spouse (in other words, the assets earmarked for the bypass trust) without defeating important tax purposes of the trust. For more detailed discussion of these issues in the context of the marital deduction and marital deduction planning, see Ch. 71, *Marital Deduction Trust Provisions*.

#### **[e] Manner of Revocation**

If the trust instrument specifies the manner in which the trust may be revoked, the trust can only be revoked in that manner [*Prob. Code § 15401(a)(1)*]. The settlor should specify in the trust instrument how the trust is to be revoked, remembering that the method specified will control [*see Gardenhire v. Superior Court (2005) 127 Cal. App. 4th 882, 890, 26 Cal. Rptr. 3d 143; Conservatorship of Irvine (1995) 40 Cal. App. 4th 1334, 1344-1345, 47 Cal. Rptr. 2d 587 (amendment of trust)*].

When a trust expressly permits revocation during the settlor's lifetime by written notice signed by the settlor and

delivered to the trustee, and the settlor does not limit or qualify the term "written notice," the settlor is deemed to have authorized revocation by *any* writing that unambiguously manifests his or her intention to revoke the trust, including a will [ *Gardenhire v. Superior Court (2005) 127 Cal. App. 4th 882, 888, 26 Cal. Rptr. 3d 143* ]. The power to revoke a trust by will need not be specifically and expressly stated in the trust [ *Gardenhire v. Superior Court (2005) 127 Cal. App. 4th 882, 893-895, 26 Cal. Rptr. 3d 143* ].

Typically the instrument will provide that a revocation can be accomplished by a written instrument, signed by the settlor or settlors and delivered to the trustee [see §§ 70.200[2], P 3.01, 70.201[2], P 3.03, 70.202[2], P 3.03, 70.203[2], P 3.01]. If there are two settlors and the instrument permits a revocation by one settlor acting alone, the instrument will typically require the revoking settlor to deliver a copy of the revoking instrument to the other settlor as well as to the trustee [see §§ 70.201[2], P 3.03, 70.202[2], P 3.03].

#### **[f] Amendment**

Unless the trust instrument provides otherwise, if a trust is revocable by the settlor, the settlor may amend or modify the trust by the procedure prescribed for revocation of the trust [*Prob. Code § 15402*]. Since the method prescribed in the trust instrument for revocation is binding on the settlor [see *Prob. Code § 15401(a)(1)* and discussion in [e], *above*], the same method controls the manner in which the trust may be amended or modified and is equally binding on the settlor [ *Conservatorship of Irvine (1995) 40 Cal. App. 4th 1334, 1344-1345, 47 Cal. Rptr. 2d 587* ].

In a one-settlor trust, there is no reason why the settlor's power to amend the trust should not be coextensive with the power of revocation. The appropriate section of the trust should simply give the settlor the absolute power to revoke or amend the trust instrument.

In the case of a two-settlor trust, the power to amend the trust usually will *not* be coextensive with the power of revocation. With respect to community property, the trust is usually made revocable by *either* spouse, as discussed in [c], *above* [see *Fam. Code § 761(a), (b)*]. However, to preserve the character of community property in the trust, the trust instrument must provide that the power to modify (i.e., amend) the trust as to the rights and interests in community property during the marriage may be exercised only with the joinder or consent of *both* spouses [*Fam. Code § 761(a); see § 70.11[4][b]*]. This requirement prevents one spouse from amending the trust to effect a unilateral transmutation of the other's community property. If the trust is a "mixed trust" containing separate as well as community property, it should give each settlor the right to amend the trust with respect to his or her separate property, to avoid depriving either settlor of control over his or her own assets.

#### **[g] Revocation or Amendment by Conservator**

The trust instrument may also confer the right to revoke or amend the trust on a third party or parties acting for or on behalf of the settlor or settlors.

If a conservator is appointed for a settlor, whether or not the conservator will have the power to exercise a right of revocation or amendment held by the settlor depends on the provisions of the trust instrument. A conservator may petition the court for an order authorizing the conservator to revoke or amend the trust [see *Prob. Code § 2580(b)(11)*]. However, the court may not grant that authority if the trust instrument evidences an intent to reserve these rights exclusively to the settlor, if the instrument expressly provides that a conservator may not revoke or amend the trust, or if the instrument otherwise evidences an intent that would be inconsistent with authorizing the conservator to exercise the power of revocation or amendment [*Prob. Code § 2580(b)(11); see Johnson v. Kotyck (1999) 76 Cal. App. 4th 83, 87-88, 90 Cal. Rptr. 2d 99* ]. If the instrument is silent on the issue of revocation or amendment by the conservator, the court will have authority to decide whether the conservator should be permitted to exercise the right [see *Prob. Code § 2580(b)(11)*].

It is not necessary to address the issue of revocation or amendment by a conservator if the power is conferred on an attorney in fact acting under a durable power of attorney [*see* [h], *below*].

### **[h] Amendment or Revocation by Attorney in Fact**

A durable power of attorney for property management is a versatile instrument that can play an important part in a comprehensive estate plan [*see Prob. Code* §§ 4123(a), (b), (c), 4124, 4125; *see also Ch. 60, Estate Planning, § 60.17[7]*]. The proper use of a durable power of attorney can help to avoid many difficult problems that would otherwise have to be addressed by a conservator [*see* § 70.10[3][b]]. When an attorney in fact is given authority to act for the principal, the authority can be limited, qualified, or conditioned in any way the principal deems appropriate.

A trust may not be modified by an attorney in fact acting under a power of attorney unless the trust instrument expressly permits such a revocation [*Prob. Code* § 15401(c); *but see Prob. Code* § 15401(e) (rule applicable only to instruments executed on or after July 1, 1987; prior trusts governed by prior law)]. However, this impediment can be avoided by including a trust provision giving any attorney in fact acting under a valid and enforceable durable power of attorney executed by the settlor under the Uniform Durable Power of Attorney Act the power to exercise the settlor's power to revoke or amend the trust [*see* §§ 70.200[2], P 3.04, 70.201[2], P 3.09, 70.202[2], P 3.09, 70.203[2], P 3.04; *see also Prob. Code* §§ 4001, 4124-4127, 4206, 4304, 4305 (Uniform Durable Power of Attorney Act)]. The trust instrument may limit the attorney in fact's authority by providing that the attorney in fact can amend or revoke the trust only if distribution of the settlor's estate is not substantially altered by the amendment or revocation, and no adverse tax consequences result to the estate [*see* §§ 70.200[2], P 3.04, 70.201[2], P 3.09, 70.202[2], P 3.09, 70.203[2], P 3.04].

Some settlors will be reluctant to grant any person, even an attorney in fact chosen by the settlor, authority to amend or revoke the trust. A settlor who harbors such misgivings may provide that the power of the attorney in fact to act for or on behalf of the settlor will not extend to the power to amend, revoke, or terminate the trust [*see* §§ 70.200[2] (optional language in P 3.04), 70.201[2] (optional language in P 3.09), 70.202[2] (optional language in P 3.09), 70.203[2] (optional language in P 3.04); *see also* § 70.240[2] (statement that power of revocation is personal to settlors)]. A provision of this kind can be drafted so that it will prohibit any amendment or revocation by a conservator as well as an attorney in fact [*see* §§ 70.200[2] (optional language in P 3.04), 70.201[2] (optional language in P 3.09), 70.202[2] (optional language in P 3.09), 70.203[2] (optional language in P 3.04)].

## **[6] Payments and Distributions**

### **[a] In General**

The payments and distributions provisions of the trust instrument specify who will receive money or other property from the trust, in what amounts or proportions, and when. As used in this chapter, the word "payments" generally applies to trust income, and the word "distributions" to trust principal [*see* discussion in *Ch. 64, Testamentary Trusts: Payment and Distribution Provisions, § 64.37*]. The payments and distributions provisions of the trust instrument must be carefully planned. They must be mutually consistent and drafted in such a way as to avoid inconsistencies or inaccuracies that run the risk of frustrating the settlor's plans or the trust's goals.

### **[b] Accumulations of Income**

When the beneficiaries of a trust are minors or young adults, settlors sometimes prefer to accumulate income, in whole or in part, rather than paying it out to the trust beneficiaries. However, because of the compressed income tax rates applicable to income of trusts [*see I.R.C. § 1(e)*], accumulations of income can have undesirable tax consequences [for discussion of the income taxation of trusts and estates, *see Ch. 60, Estate Planning, § 60.15*]. These tax consequences must be balanced against the benefits of accumulation to determine whether or not accumulation is desirable. One alternative may be to pay income to a custodian of a minor under the Uniform Transfers to Minors Act [*Prob. Code* §§ 3900-3925], although the maximum age by which custodial property must be distributed under the UTMA [*see Prob.*

*Code §§ 3920, 3920.5*] may be younger than that preferred by many clients [for discussion of the UTMA, *see* the Legal Background to Ch. 60A, *Gifts*]. Often clients will opt for accumulation even after considering the unfavorable income tax consequences. For additional discussion of mandatory accumulations of income, see *California Wills & Trusts, Ch. 95, Trust Provisions for Payment and Distribution of Income and Principal, § 95.06[2]*.

### **[c] Mandatory and Discretionary Distributions**

Trust payments and distributions may be either mandatory or discretionary. Mandatory payments and distributions are fixed by the terms of the trust instrument and *must* be made by the trustee once all terms and conditions for the distributions have been satisfied. Typical mandatory provisions include provisions for the periodic distribution of all income, the distribution of a fixed amount of principal when the beneficiary reaches a stated age, or a right in the beneficiary to demand payment of specified amounts of income and/or distribution of principal from the trustee. Mandatory distributions are simple, easy to follow, and place less responsibility on the trustee. However, they also lack flexibility.

In contrast, discretionary payments and distributions are not fixed by the terms of the trust instrument. Rather, the trust instrument sets out specified criteria for payments and distributions, and allows the trustee to apply these standards in determining whether payments of distributions are proper. Typically, these standards are related to the financial needs of the beneficiaries. A commonly used standard is the so-called "ascertainable standard," under which income and/or principal may be distributed as need for the "health, education, support, and maintenance" of the beneficiary.

Discretionary payments and distributions provide greater flexibility and for that reason are often more desirable than mandatory payments and distributions. However, the discretionary aspect of the payments creates tax pitfalls, and under some circumstances adverse tax consequences may result if too much discretion is given to the trustee. The danger arises when a trustee is also a beneficiary of the trust, or owes a legal obligation of support to a beneficiary of the trust. For income tax purposes, a trustee who has the power, exercisable solely by himself or herself, to vest income or principal of any portion of the trust in himself or herself, is treated as the owner of that portion of the trust and is taxed on the income from that portion of the trust, whether or not that income is actually paid to the trustee [*I.R.C. § 678(a)(1)*]. This is not always the determinative factor, but it must be taken into account in appropriate cases in deciding whether or not to provide for discretionary payments and distributions.

More importantly, a trustee/beneficiary who has an unrestricted power to appoint any portion of the trust income to himself or herself is deemed to have a general power of appointment over the trust assets, and those assets will be included in the trustee's estate [*I.R.C. § 2041*] unless appropriate precautions are taken. A trustee in this situation is commonly referred to as a "sensitive" trustee. In such a situation, the trust drafter may avoid inclusion of the property in the trustee's estate by either (1) limiting the trustee's power by an "ascertainable standard" relating to the health, education, support, or maintenance of the beneficiary [*I.R.C. § 2041(b)(1)(A)*] (see above); (2) providing that the trustee may exercise the power only with the concurrence of another person who is either the creator of the power (i.e., the settlor) or who has a substantial interest in the trust that would be adversely affected by the exercise of the power (i.e., another trust beneficiary) [*I.R.C. § 2041(b)(1)(C)*]; or (3) appointing a "special trustee" to make all distributions to the trustee/beneficiary. For more detailed discussion of the tax considerations generated by discretionary payment and distribution powers in the trustee, see *California Wills & Trusts, Ch. 96, Powers of Trustee, § 96.08[3]*, and Ch. 95, *Trust Provisions for Payment and Distribution of Income and Principal, §§ 95.06[1][c], [3][d]* (Matthew Bender).

### **[d] During Settlor's Lifetime**

The payments and distributions provisions of a revocable inter vivos trust instrument usually give the settlor free and unrestricted access to the principal and income of the trust as long as the settlor is living. Since the settlor is treated as the owner of the trust property for both income and estate tax purposes [*see I.R.C. §§ 676* (income tax), 2038 (estate tax)], there is no tax reason to restrict or limit the settlor's access to the income or principal.

Free and unrestricted access to the trust income may be insured by either requiring the trustee to pay all of the income to the settlor, or by giving the settlor the right to demand income at any time and for any reason [*see* §§ 70.200[2], P 4.01, 70.201[2], PP 4.01, 4.02, 70.202[2], PP 4.01, 4.02, 70.203[2], P 4.01]. If the trustee is to be required to pay all of the income to the settlor, the instrument will ordinarily provide that the payments are to be made at regular intervals (for example, monthly, quarterly, or annually) [*see* §§ 70.200[2], P 4.01, 70.203[2], P 4.01].

The settlor's right to trust principal may be ensured by giving the settlor the right to demand principal at any time and for any reason, or by giving the trustee discretion to make principal distributions to the settlor whenever the trustee determines that the settlor needs principal [*see* §§ 70.200[2], P 4.02, 70.201[2], PP 4.03, 4.04, 70.202[2], PP 4.03, 4.04, 70.203[2], P 4.02]. As long as the settlor retains the power to revoke the trust, it can be expected that the trustee will be generous in satisfying the settlor's needs for principal.

### **[e] Payment of Taxes, Debts, and Expenses**

On the death of a settlor, arrangements need to be made for payment of the expenses of the settlor's estate, and for death taxes. These items are charges against the settlor's estate, and the executor (if there is one) of the settlor's estate has a duty to pay them [*see Prob. Code* §§ 11401 ("debt" defined), 11420-11424 (payment), 11640(a),(c) (payment of debts as condition for final distribution of estate)]. If a decedent does not make different arrangements, the beneficiaries' shares of the estate will abate to pay these expenses in the manner prescribed by the Probate Code [*Prob. Code* §§ 21400-21405; for discussion of the statutory abatement rules, *see Ch. 63, Will Provisions, § 63.416*]. However, if the governing instrument provides a different pattern for abatement, that pattern will control [*Prob. Code* § 21400]. If the bulk of a decedent's assets are in a revocable trust, it may make sense to provide for the payment of these expenses from the trust assets, and specify the trust shares from which payment will be made [*see* §§ 70.200[2], PP 5.02 (death taxes), 5.03 (expenses), 70.201[2], PP 5.02 (death taxes), 5.03 (expenses), 70.202[2], P 5.02 (death taxes, debts, and expenses), 70.203[2], PP 5.02 (death taxes), 5.03 (expenses)].

Special Probate Code rules govern the payment of estate taxes [*see Prob. Code* §§ 20100-20125]. With specified exceptions [*see Prob. Code* § 20110(b)(2) (federal law controls)], these rules basically provide that estate taxes will be equitably prorated among the persons interested in the estate [*Prob. Code* § 20110] in the proportion that the value of the property received by each person bears to the value of property received by all persons interested in the estate [*Prob. Code* § 20111]. In making this proration, allowances for credits, deductions, and other adjustments allowed by the federal tax law are factored in [*Prob. Code* § 20112(a)], so that persons who receive property for which a deduction or credit is allowed are not charged with a proportionate share of the overall tax liability. For more detailed discussion of the statutory proration rules, *see Ch. 63, Will Provisions, § 63.310[1]*. Since a revocable trust can generate substantial estate tax liability, the trust instrument should specify how that liability is to be discharged.

The statutory proration rules provide a method of apportionment that generally will be fair, equitable, and in accord with the decedent's intentions. Therefore, many revocable trusts, including the trust forms in this chapter, contain a provision adopting or essentially restating the statutory proration rules, and providing that they will govern allocation of tax liability attributable to the trust assets [*see* §§ 70.200[2], P 5.02, 70.201[2], P 5.02, 70.203[2], P 5.02 (optional language)].

However, a settlor or decedent has the power to vary the statutory rules governing the proration of taxes [*Prob. Code* § 20110(b)(2)]. For example, if most of the decedent's assets are held in a revocable trust, the decedent may want to provide that all estate taxes will be paid out of the trust assets [*see* §§ 70.200[2], P 5.02, 70.201[2], P 5.02, 70.202[2], P 5.02, 70.203[2], P 5.02 (optional language)]. Conversely, if the decedent wants certain assets to pass tax free, either under the revocable trust or the decedent's will, the estate plan may be structured accordingly.

The statutory procedure for prorating estate taxes does not include consideration of future income tax consequences.

Unless income tax consequences can be ascertained with reasonable certainty for purposes of equitable reallocation at the time of distribution, the beneficiaries of an estate are responsible for paying their own future income taxes [ *Klein v. Hughes* (2005) 133 Cal. App. 4th 121, 128-131, 34 Cal. Rptr. 3d 613] .

In a marital deduction trust, tax apportionment provisions must be structured with a view toward preservation of the marital deduction. Ordinarily, this means that the tax apportionment provision should not designate a specific source or fund out of which death taxes are to be paid if any part of that fund is intended to qualify for the marital deduction. For additional discussion, see *California Wills & Trusts, Ch. 23, Provisions for Payment of Taxes, Expenses, and Debts, § 23.03[2][c], [d]* (Matthew Bender).

Coordination between the settlor's will and the revocable trust instrument is important. The attorney should make certain that any tax payment provisions in both instruments are consistent and appropriate considering the respective amount of assets that will pass through the trust and the probate estate. For example, it makes little sense to require estate taxes to be paid out of the residue of the decedent's probate estate if the bulk of his or her assets are in an inter vivos trust.

**PRACTICE TIP:**

It is crucial that boilerplate tax allocation clauses not be used in the estate planning process, regardless of whether or not a revocable trust is being employed. Just as important as coordinating the tax provisions of the settlor's will with those appearing in the trust instrument is the task of determining which assets will become part of the settlor's gross estate for estate tax purposes and which of those assets will generate an estate tax liability. For example, in addition to probate assets and assets held in the revocable trust, a settlor's gross estate might include assets held in qualified plan or individual retirement accounts, as well as proceeds of insurance policies insuring the life of the settlor. The specific tax provisions used must take into account both the potential sources of tax liability as well as the potential sources of payment of the tax. *Commentary by Albert G. Handelman.*

For more detailed coverage of will and trust provisions covering the apportionment of taxes, expenses, and debts, see 1 *California Wills & Trusts, Chapter 23, Provisions for Payment of Taxes, Expenses, and Debts* (Matthew Bender).

**[f] After Death of First Settlor in Two-Settlor Trust**

In a two-settlor trust, it is necessary to specify what will happen to the trust assets after the death of the first settlor. In theory, it is possible to provide simply that the trust will be terminated and its assets distributed to the survivor. Doing so, however, would eliminate the advantages of probate avoidance on the survivor's death [see § 70.10[3][a]], asset management for the survivor [see § 70.10[3][b]], and, in the case of married settlors, the tax advantages that may be available through the use of bypass ("credit shelter") trusts [see § 70.10[3][d]; see also Ch. 71, *Marital Deduction Trust Provisions*, § 71.11, for discussion of marital deduction planning and the role of bypass trusts]. In practice, therefore, the trust almost always continues for the lifetime of the surviving settlor.

The rights of the surviving settlor to receive principal and income should be specified in the trust instrument. In the case of trusts designed to qualify for the federal estate tax marital deduction [I.R.C. § 2056] and/or the federal unified credit against estate and gift taxes [I.R.C. § 2010], the distribution rights of the parties are shaped to an important degree by the requirements of the federal estate tax laws. If the joint settlors are not married to one another (i.e., they are unrelated cohabiting individuals or have some other relationship, such as parent and child), the trust drafter has much greater flexibility.

In the usual case, the settlors are married persons and all or part of the trust assets are community property. When the first settlor dies, the trust assets are usually divided into two or more new trusts [see § 71.12 in Ch. 71, *Marital Deduction Trust Provisions* ]. One of these trusts will contain the survivor's separate property and his or her share of

the community property. This trust is commonly referred to as the "survivor's trust." The settlor will usually have the broadest possible powers to receive income and principal from this trust during his or her lifetime [for discussion of survivors' trusts, see § 71.15 in Ch. 71, *Marital Deduction Trust Provisions*]. The remaining assets consist of the deceased spouse's separate property and his or her share of the community property. In most cases, the trust will be designed so that some or all of this property will qualify for the federal estate tax marital deduction [*I.R.C.* § 2056]. If a marital deduction formula trust is used, a formula will provide for a further division of assets into a share designed to qualify for the marital deduction and a second share designed to qualify for the unified credit [*I.R.C.* § 2010]. The marital deduction share will be placed in a marital deduction trust, which will be either a lifetime income/power of appointment trust [*I.R.C.* § 2056(b)(5)] (which may be combined with the survivor's share in a single trust) or a Qualified Terminable Interest Property ("QTIP") Trust [*I.R.C.* § 2056(b)(7)]. In either case, all the income of the marital deduction trust must be payable to the surviving spouse. The surviving spouse may also be given rights to receive or request trust principal.

The portion of the trust assets designed to qualify for the unified credit are placed in a "bypass" or "credit shelter" trust, the terms of which usually provide for distribution of some portion of the income to the surviving settlor. A bypass trust may also permit or require the distribution of income or principal to other persons, such as the settlors' children. The terms of the bypass trust must be drafted carefully to avoid inclusion of the bypass trust principal in the surviving settlor's estate, which would defeat the whole purpose of the bypass trust. The limitations applicable to payments and distributions from bypass trusts are discussed in Ch. 71, *Marital Deduction Trust Provisions*, § 71.14.

This discussion presents only a very brief and simplified overview of the structure of the typical marital deduction trust; these trusts, and the applicable income and distribution requirements, are discussed in detail in Ch. 71.

#### **[g] After Death of Sole Settlor**

When a sole settlor dies, the trust assets often pass to one or more income beneficiaries. If the settlor is married, the income beneficiary may be the spouse of the settlor, under a marital deduction trust similar to that which would be used in a testamentary marital deduction trust [see Ch. 61, *Will Drafting and Complete Will Forms*, § 61.210], and more or less comparable (with allowance for the special issues presented in a two-settlor trust) to that described for joint settlors in [c], above. If the settlor is not married at the time of death, the beneficiaries may be children, grandchildren, issue, or other persons.

When children and/or issue are to be the trust beneficiaries, the settlor must decide whether the trust should be divided into separate shares for the individual beneficiaries, or whether the assets should be retained in a single "family pot" trust. The general characteristics of each approach, and their respective advantages and disadvantages, are discussed in § 70.210[1][b] and in Ch. 64, *Testamentary Trusts: Payment and Distribution Provisions*, §§ 64.200[1] and 64.203[1]. As a general proposition, a family pot trust provides greater flexibility to address the individual circumstances of each beneficiary, but is more likely to generate animosity among beneficiaries because of the unequal treatment they may receive under the "sprinkling" provisions of a family pot trust. In contrast, separate trusts give each beneficiary a predetermined share of the total assets, but provide less flexibility to accommodate beneficiaries whose needs may be significantly different from one another.

If the beneficiaries are children or issue, the trust commonly will either accumulate income until the beneficiaries reach a stated age, or provide for limited payments of income for the support of the beneficiaries until they reach a stated age. It is also common to provide for distributions of principal for support of the beneficiaries if the income of the trust is insufficient for that purpose. As beneficiaries get older, they may be given increased rights to demand income and principal from the trust. In the usual case, at some point the trust principal will be distributed to the beneficiaries and the trust will terminate. The distribution of principal may take place all at once, such as when the beneficiary attains the age of 30, or may occur in increments, such as the beneficiary's 25th, 30th, and 35th birthdays.

The trust should also specify what will happen if one of the remainder beneficiaries dies leaving issue surviving. In most cases, the deceased beneficiary's share will be divided among his or her issue according to one of the statutory patterns of distribution [*see Prob. Code §§ 240, 245-247*; for discussion of these patterns, *see Ch. 61, Will Drafting and Complete Will Forms, § 61.15[6][d]*], and thereafter will be distributed to the issue or held in trust for them for some specified period of time. Often a pattern of distribution identical to that specified for the settlor's children is used.

In unusual cases, a trust may be drafted so that it continues for one or more additional generations, subject to the limitations of the rule against perpetuities. A trust designed to continue for as long as legally possible is sometimes referred to as a "maximum duration trust."

#### **[h] After Death of Surviving Settlor in a Two-Settlor Trust**

After the death of the surviving settlor in a two-settlor trust, the trust (or multiple trusts created in a marital deduction trust plan) typically either terminate or continue for some period of time in favor of the ultimate beneficiaries, usually the children and/or grandchildren of the settlors. Any number of arrangements are possible, depending on the age and economic situations of the beneficiaries, as well as many other factors. The arrangement may involve separate share trusts or a single "pot trust" for all beneficiaries, or some combination of both. The drafter's options basically parallel those available on the death of a sole settlor (or the sole settlor's spouse), as discussed in § 70.12[6][f].

#### **[i] Disclaimer Trust**

A "disclaimer" is a writing that declines, refuses, renounces, or disclaims an interest in property that would otherwise be taken by a beneficiary [*Prob. Code § 265*]. If a person makes a "qualified disclaimer" [*see I.R.C. § 2518(b)*] of an interest in property, the interest will be treated for estate and gift tax purposes as if it had never been transferred to that person [*I.R.C. § 2518(a)*]. The requirements for a "qualified disclaimer" under federal and California law [*see Prob. Code §§ 260-295*] are discussed in *Ch. 60A, Gifts, § 60A.230[1]*.

A qualified disclaimer can be a valuable estate planning tool. Disclaimers can be used to shift assets from beneficiaries in high tax brackets to those in lower tax brackets, or to shift assets away from a marital deduction trust and into the hands of the remainder beneficiaries if it would be advantageous, for tax purposes or otherwise, to do so on the first settlor's death.

In order to constitute a "qualified disclaimer" for federal tax purposes, the disclaimed interest must pass, without any direction on the part of the person making the disclaimer, to the decedent's spouse or a person other than the person making the disclaimer [*I.R.C. § 2518(b)(4)*]. This means that in order to obtain the tax advantages that may be available through the use of qualified disclaimers, a preexisting mechanism must exist to enable the property to pass to the desired persons. The mechanism commonly used to achieve these advantages is a disclaimer trust. Basically, a disclaimer trust provides that any trust assets disclaimed by the primary income beneficiary of the trust will pass to a separate trust in favor of one or more other persons, typically the remainder beneficiaries [*see Letter Rul. 200442047* (example of use of series of disclaimer trusts)]. Under the typical marital deduction trust plan, the disclaimer trust will have terms similar or identical to those of the bypass trust.

Most knowledgeable estate planners strongly recommend including a disclaimer trust provision in every trust, even when the parties do not anticipate making any disclaimers. The disclaimer trust greatly increases the flexibility available to the settlor's executor and the trustee, and may prove invaluable in meeting unanticipated contingencies. If no disclaimers are made, the disclaimer trust simply never becomes operative. All the complete trust forms in this chapter contain disclaimer trusts.

#### **[j] Division of Trusts for Generation-Skipping Transfer Tax Purposes**

When a trust pays income to a person who is two or more generations below the generation of the settlor (such as a grandchild), a potential for generation-skipping transfer tax ("GST") liability exists [*see I.R.C. §§ 2611(a), 2612, 2613(a)*]. Although the GST tax has been repealed effective for generation-skipping transfers after 2009 [*I.R.C. § 2664; see Ch. 60, Estate Planning* , for a detailed discussion], until then it remains in effect. Proper planning can help minimize GST liability.

GST liability is computed by multiplying the maximum federal estate tax rate [*see I.R.C. § 2001(c)(1)*] by a number known as the "inclusion ratio" [*I.R.C. § 2641(a)*]. The inclusion ratio will always be a number between zero and one. A transfer with an inclusion ratio of zero is wholly exempt from the tax, while a transfer with an inclusion ratio of one is fully subject to the tax. Transfers with an inclusion ratio between zero and one are partly exempt and partly subject to the tax.

Every individual has an exemption (called the "GST exemption") [*see I.R.C. §§ 2631(a), (c), 2010(c)* and discussion in § 60.16[3]]. The transferor or the transferor's executor may allocate the exemption to any property subject to the tax [*I.R.C. §§ 2613(a), 2632*]. Allocations are made according to statutory rules in the absence of allocations by the transferor or transferor's executor [*see I.R.C. § 2632*]. The GST exemption is factored into the calculation of the inclusion ratio. It reduces the inclusion ratio of property to which the exemption is applied [*see I.R.C. § 2642(a)*]. If the exemption is applied against the full value of property, that property has an inclusion ratio of zero and is not taxed.

A trustee can establish inclusion ratios of zero and one by severing a trust that is subject to the GST tax in a "qualified severance." If a qualified severance is made, the trusts resulting from the severance are treated as separate trusts for purposes of the GST tax [*I.R.C. § 2642(a)(3)(A)*, effective for severances occurring after December 31, 2000]. The severance may be made at any time [*I.R.C. § 2642(a)(3)(C)*]. A qualified severance is a division of a single trust and the creation of two or more trusts if the following requirements are met [*I.R.C. § 2642(a)(3)(B)(i)*]:

- The single trust was divided on a fractional basis; and
- The terms of the new trusts, in the aggregate, provide for the same succession of interests of beneficiaries as are provided in the original trust.

If a trust has an inclusion ratio of greater than zero and less than one, a severance is a qualified severance only if the single trust is divided into two trusts, one of which receives a fractional share of the total value of all trust assets equal to the applicable fraction of the single trust immediately before the severance. In that case, the trust receiving the fractional share will have an inclusion ratio of zero and the other trust will have an inclusion ratio of one [*I.R.C. § 2642(a)(3)(B)(ii)*].

Proposed treasury regulations explain the proper procedure, timing, and required reporting of a qualified severance, and the permitted methods of funding the trusts resulting from such a severance. Each new trust must receive assets with a value equal to a fraction or percentage of the total value of the trusts assets. For example, the severance of a single trust into one trust funded with 40 percent of the trust assets and another trust funded with the remaining 60 percent of the trust assets satisfies this requirement. Similarly, a severance stated in terms of a fraction of the trust assets such that one trust is to receive, for example, that fraction of the trust assets the numerator of which is \$1,500,000 and the denominator of which is the fair market value of the trust assets on a specified date, and the second trust is to receive the remaining fraction, satisfies this requirement. However, the severance of a trust based on a pecuniary amount (for example, one trust is to be funded with \$1,500,000, and the other trust is to be funded with the balance of the trust corpus), does not satisfy this requirement [*see Prop. Treas. Reg. § 26.2642-6(b)(3)*]. Each separate trust need not be funded with a pro rata portion of each asset held by the original trust; they may be funded on a non pro rata basis if funding is based on the total fair market value of the assets on the funding date [*Prop. Treas. Reg. § 26.2642-6(b)(3)*].

The beneficiaries of each separate trust resulting from the severance need not be identical to those of the original trust.

For trusts that grant the trustee the discretionary power to make non pro rata distributions to beneficiaries, the separate trusts are considered to have the same succession of interests of beneficiaries if the following qualifications are satisfied:

- The terms of the separate trusts are the same as the terms of the original trust.
- The severance does not shift a beneficial interest in the trust to any beneficiary in a lower generation than the person or persons who held the beneficial interest in the original trust.
- The severance does not extend the time for vesting of any beneficial interest in the trust beyond the period provided for in the original trust [Prop. *Treas. Reg.* § 26.2642-6(b)(4)].

A qualified severance must be reported by taking all of the following steps [Prop. *Treas. Reg.* § 26.2642-6(c)]:

- Filing a Form 706-GS(T) (Generation-Skipping Transfer Tax Return for Terminations) and writing "Qualified Severance" in red at the top.
- Attaching a "Notice of Qualified Severance" that clearly identifies the trust that is being severed and the new trusts created, and that provides the inclusion ratio of the trust that is being severed and the inclusion ratios of the new trusts.
- Filing the return and attached notice even if the severance does not result in a taxable termination.

Each complete trust form in this chapter contains a provision that (depending on the language selected) requires or permits the trustee to divide any trust created by the instrument into "exempt" and "non-exempt" trusts for purposes of allocating the GST exemption [see *I.R.C.* § 2631]. The exempt trust will contain property equal in value to the amount of the GST exemption that the executor intends to allocate to the trust. It will have an inclusion ratio of zero and thus will not be subject to the tax. The non-exempt trust will contain the balance of the trust property. It will have an inclusion ratio of one and be fully subject to the tax. The trustee is authorized (but not required) to make distributions that would otherwise be subject to GST tax from the exempt trust, and distributions that are not subject to GST tax from the non-exempt trust.

This complex provision is designed to provide maximum flexibility in allocating the full generation-skipping transfer tax exemption. It helps assure that the entire GST exemption will be applied to property that would otherwise incur GST liability. In the usual case, distributions to children will be made from the non-exempt trust, while distributions to grandchildren will be made from the exempt trust. If desired, assets in the exempt trust may be left to grow for future generations. Moreover, this approach opens up other planning opportunities by allowing the trustee to pursue growth-oriented investments for the exempt trusts and income-oriented investments in the non-exempt trusts. For additional discussion of this type of planning, see *California Wills & Trusts*, Ch. 113, *Generation-Skipping Transfers and Trust Strategies*. For a more detailed discussion of the operation of the generation-skipping transfer tax, see *Ch. 60, Estate Planning*, § 60.16.

It is recommended that a provision such as the one described above be included in every revocable trust, even if the settlor does not anticipate any realistic possibility of GST liability. Predeceased beneficiaries and unanticipated increases in the value of trust assets may combine to generate GST liability when none was expected. If GST issues never arise, the provision simply never becomes operative. It is recommended that division of the trusts be made optional rather than mandatory, except when the size of the trust estate is large enough to make GST liability a virtual certainty.

#### [7] Trustee

**[a] Appointment**

Every trust must have at least one trustee. When the trust is created by a sole settlor, the settlor will often name himself or herself as the trustee. If the settlor is an older person, he or she may appoint an adult child to serve as trustee, or to serve as co-trustee with the parent [see [c], *below*, for further discussion of co-trustees].

Inter vivos trust instruments typically name the trustee or co-trustees in the introductory clause of the trust, which establishes the basic format of the instrument. If the instrument is a declaration of trust [see § 70.11[2]], the trustee (or co-trustees) will execute the declaration [see §§ 70.200[2], P 1.01, 70.201[2], P 1.01, 70.202[2], P 1.01, 70.203[2], P 1.01]. If the instrument is a trust agreement [see § 70.220[2]], the trustee (or co-trustees) will be designated as a party or parties to the agreement [for signature blocks for declarations of trust, see § 70.290[2]]. No other provision appointing or designating a co-trustee or co-trustees will be necessary. However, other provisions may be necessary to designate a successor trustee or co-trustees [see [b], [c], *below*].

**[b] Successors**

The trust instrument should make some provision for an alternate or successor trustee (or co-trustees) to serve in the event any vacancy occurs in the position of trustee [see *Prob. Code* § 15660(b) (vacancy in office of trustee will be filled as provided in trust instrument)]. If the instrument makes no provision for alternates or successors, it is necessary to apply to the court for the appointment of a successor trustee [see *Prob. Code* § 15660(d) (authority of court to fill vacancy)].

The instrument may designate a successor or alternate trustee by name, or name several successors and specify the order (for example, first, second, and third) in which they will be entitled to serve [see §§ 70.200[2], P 6.02, 70.201[2], P 6.02, 70.202[2], P 6.02, 70.203[2], P 6.02]. The instrument may also authorize acting trustees or third parties to designate successor trustees, or may provide that the settlor or settlors will have the right to designate alternate or successor trustees while they are living [see §§ 70.200[2], P 6.02, 70.201[2], P 6.02, 70.202[2], P 6.02, 70.203[2], P 6.02]. In appropriate circumstances, the instrument may also give the beneficiaries the authority to designate successors. When the beneficiaries are given this right, the instrument will often specify that the right can be exercised by a majority of the adult beneficiaries who are then entitled to receive income under the trust, or who would be entitled to receive a distribution of principal if the trust were then terminating.

**PRACTICE TIP:**

Whenever any provision is included in the trust instrument authorizing anybody other than the settlor to nominate a successor trustee, consideration should be given to restricting the group of individuals or institutions from which a successor may be selected. For example, a certain group of individuals (e.g., the settlor's children) may be "sensitive trustees" for whom tax problems would be created if they were to serve as trustee. In other cases, the settlor simply may not like or trust a particular individual, such as a former spouse, an in-law, or an improvident child. In such cases, the instrument should be described as accurately as possible which individuals or groups may or may not be nominated to serve as successor trustee. *Commentary by Albert G. Handelman.*

For additional forms relating to the appointment of successor trustees, see California Wills & Trusts Forms, Division II, *Individual Inter Vivos Trust Provisions*, Form 5.20 (Matthew Bender). For further discussion of alternate and successor trustees, see *California Wills & Trusts*, Ch. 93, *Appointment of Trustees*, § 93.05[2] (Matthew Bender).

**[c] Co-Trustees**

When a husband and wife join to create a revocable inter vivos trust, they will often name themselves as co-trustees [see §§ 70.201[2], P 1.01, 70.202[2], P 1.01]. This enables them to maintain personal control over the trust and often

simplifies income tax reporting for the trust [*see California Wills & Trusts, Ch. 111, Revocable Inter Vivos Trusts, § 111.07* (Matthew Bender) for discussion of the income tax reporting requirements of revocable trusts].

When a husband and wife serve as co-trustees, special provisions should be made for successor trustees [*see [b], above*]. These provisions should adequately cover the possibility that only one of the co-trustees will cease to serve, or that both will do so. While the settlors (co-trustees) are living, they can be given the option to designate successors if either or both of them resign [*see §§ 70.201[2], P 6.02, 70.202[2], P 6.02*]. If one of the co-trustees ceases to serve and no successor is designated, the instrument can provide that the other co-trustee will act as the sole trustee [*see §§ 70.201[2], P 6.02, 70.202[2], P 6.02*]. If both co-trustees cease to serve and they do not designate a successor (either because they fail to act or because both are deceased), the instrument can designate a successor trustee or trustees by name [*see §§ 70.201[2], P 6.02, 70.202[2], P 6.02*].

#### **[d] Bond**

Trustees generally are not required to post bonds to secure the performance of their duties [*see Prob. Code § 15602(a)*]. A bond will be required of a trustee only if the trust instrument requires a bond, the court finds a bond necessary to protect the interests of the beneficiaries or other persons having an interest in the trust, or the court fills a vacancy in the office of trustee with an individual who is not named as trustee in the trust instrument [*Prob. Code § 15602(a)*]. In most cases, a bond will be neither necessary nor desirable. Further, a bond will never be required when a trustee company is serving as trustee [*Prob. Code §§ 301(a), 15602(e)*] The complete trust forms in this chapter waive bond for the trustee.

In rare circumstances, the settlor may wish to require that the trustee post a bond. This requirement will generally be imposed only when the trustee will be an individual who is not also the principal beneficiary of the trust and the settlor believes that the additional security to be derived by requiring a bond will protect the beneficiaries. A bond may be appropriate, for example, when one of the settlor's children is to serve as trustee and all of the children are to be beneficiaries. If there is any reason to believe that the child who serves as trustee would not discharge all of his duties in a competent and even-handed manner, or if there is reason to believe that the child who serves as trustee would be subject to suspicions on the part of the other children, a bond may help to protect (or at least to assuage the suspicions of) the beneficiaries.

#### **PRACTICE TIP:**

Of course, in such circumstances, the practitioner should inquire closely why the client would be willing to allow such a person to act as trustee in the first place. When the client has such serious reservations about the trustworthiness, fairness, impartiality, or competence of a potential successor trustee, the drafter should suggest that the client consider alternative candidates for that role, including banks, trust companies, and individual professional private fiduciaries. *Commentary by Albert G. Handelman.*

Some attorneys choose to deal with the subject of the trustee's bond by providing that a bond will not be required when the settlor is serving as trustee, but that a bond will be required of any other trustee. A variation on this provision is to provide that a bond will not be required of the settlor or any trustee named as trustee in the trust instrument, but a bond will be required of any other trustee not named in the instrument. Optional language can be added forbidding the beneficiaries from waiving the requirement of a bond.

#### **[e] Powers**

Every trust instrument should contain provisions describing, defining, and limiting the powers of the trustee. These provisions can simply refer to and incorporate the powers conferred on trustees by law, or provide detailed lists of powers that the trustee will have the authority to exercise.

A general provision relating to the powers of the trustee will often provide that, to carry out the purposes of the trust, the

trustee will have "all of the powers now or hereafter conferred on trustees by law," or words to similar effect. The advantage of incorporating the statutory powers by reference is that it reduces the overall length of the trust instrument. However, many experienced planners recommend including a detailed list of the trustee's powers in every trust agreement [see §§ 70.200[2], P 6.07, 70.201[2], P 6.08, 70.202[2], P 6.08, 70.203[2], P 6.08]. Such a list shows all persons interested in the trust exactly what powers the trustee has and does not have. This will be helpful when the trustee deals with third parties, such as banks, brokers, transfer agents, title insurers, and others. It may also be useful as a guide to nonprofessional trustees, and to trust beneficiaries who have questions about the scope of the trustee's powers. Finally, the inclusion of a detailed list of trustee powers also makes it possible for the settlor or settlors to tailor the trustee's powers to the particular needs of the trust. This can be particularly important when it is desirable for tax reasons to restrict the trustee's powers. A general statement of the trustee's powers is not a suitable vehicle for such tailoring.

A detailed discussion of the powers of trustees is beyond the scope of this chapter. For general coverage of trustee powers, see Ch. 64A, *Testamentary Trusts: Trustee Provisions*. For more detailed discussion of trustee powers, see 2 California Wills & Trusts, Chapter 96, *Powers and Duties of Trustee* (Matthew Bender).

## **[8] Concluding Provisions**

### **[a] In General**

Trust provisions that are essential to the operation or interpretation of the trust but that do not logically fit into other articles will often be grouped together at the end of the instrument under the heading of "Concluding Provisions." Provisions that should be included in this article will generally include perpetuities savings clauses [see [b], *below*], simultaneous death clauses [see [c], *below*], no-contest clauses [see [d], *below*], definitional clauses [see [e], *below*], number and gender clauses [see [f], *below*], governing law clauses [see [g], *below*], and similar matters.

### **[b] Perpetuities Savings Clause**

A perpetuities savings clause is designed to guard against the inadvertent violation of the rule against perpetuities by setting an overall limit on the time within which interests created under the instrument must vest or terminate. When used, a perpetuities savings clause is not part of the dispositive provisions of the instrument, but operates independently of those provisions.

Every private (non-charitable) trust instrument should include a perpetuities savings clause. Although the adoption in California of the Uniform Statutory Rule Against Perpetuities [see *Prob. Code* §§ 21200-21231 (Uniform Statutory Rule Against Perpetuities) operative Jan. 1, 1992; see also *Prob. Code* §§ 21205(b), 21206(b), 21207(b) (90-year "wait-and-see" rule)] has dramatically reduced the danger of violating the rule against perpetuities, good drafting practice still requires the inclusion of an appropriately drafted savings clause in any instrument that creates a trust or otherwise calls for a complicated disposition of property to take effect at some time in the future [see Halbach, *USRAP Perpetuities Reform: Cy Pres and Wait-and-See Benefits With No Need to Revise Existing Documents or Practices*, 13 CEB Estate Planning & California Probate Reporter 96, 98 (December 1991)].

The rule against perpetuities requires that property interests and powers of appointment either vest or terminate within a specified period of time (generally 21 years after the death of a person or persons alive when the interest or power is created) [see *Prob. Code* §§ 21205 (nonvested property interests), 21206, 21207 (powers of appointment)]. It does not require the termination of a trust within the specified period if all interests in the trust either vest or terminate within that period. Notwithstanding this, it is generally good practice to require the termination of a trust on expiration of the perpetuities period, as this will ensure that all interests and powers created by the trust will either vest or terminate within the applicable period [see §§ 70.200[2], P 7.01, 70.201[2], P 7.01, 70.202[2], P 7.01, 70.203[2], P 7.01].

If a trust is terminated under the terms of a perpetuities savings clause, the trustee should have directions as to how the trust property is to be distributed. These directions can be set forth in an alternative distribution clause, specifically requiring the trustee to distribute property to a designated person or persons if the trust is terminated under the savings clause [see §§ 70.200[2], P 7.01, 70.201[2], P 7.01, 70.202[2], P 7.01, 70.203[2], P 7.01].

For a detailed discussion of the rule against perpetuities and its use in California, see the Legal Background to Volume 12, Chapter 67, *Future Interests and Perpetuities*. For further coverage of the same subject, see 1 *California Wills & Trusts, Chapter 24, Devises--General Considerations, Section 24.09* (Matthew Bender).

### **[c] Simultaneous Death Clause**

When a trust is created by joint settlors, it may include a special clause governing the disposition of the trust property in the event that the settlors die in a common disaster or under other circumstances that render it difficult or impossible to determine who died first. Such a clause may also be used when there is only one settlor and there is a possibility that the settlor and one of the principal beneficiaries under the instrument may die in a common disaster. A clause that does this is called a "simultaneous death clause."

The Probate Code includes a special rule for the distribution of property in cases of simultaneous death. Under that rule, if title to or devolution of property depends upon the priority of two people's deaths and it cannot be established by clear and convincing evidence which of the two died first, each person's property will be dealt with as if he or she had survived the other [*Prob. Code* § 220]. This presumption avoids the double administration and taxation of property that might otherwise be necessary when two people die at or close to the same time.

A trust instrument may deal with the possibility of simultaneous death by reaffirming the Probate Code presumption or "reversing" it. Although it is not essential to reaffirm the Probate Code presumption, doing so confirms the settlor's intention that the presumption is to apply. Simultaneous death clauses reaffirming the Probate Code presumption vary somewhat in their terms, depending on whether there are one or two settlors [see §§ 70.201[2], P 7.02, 70.202[2], P 7.02 (two settlors); §§ 70.200[2], P 7.02, 70.203[2], P 7.02 (one settlor)].

It can be advantageous for estate tax purposes to "reverse" the Probate Code presumption when one of two persons, typically a spouse, has a significantly larger estate than the other. In this situation, the statutory presumption preserves the disparity in the sizes of the spouses' estates following their deaths, with the result that one spouse's estate may be taxed at a significantly higher rate than the other. On the other hand, if the Probate Code presumption is "reversed" as to the estate of the spouse with the greater estate, in the event of simultaneous death the assets of that spouse would pass as though the spouse with the lesser estate had survived--presumably, some portion of the assets of the spouse with the larger estate would pass into and ultimately through the estate of the spouse with the smaller estate. Depending on the nature and amounts of the dispositions made by the spouse with the larger estate, the net effect in some situations will be toward equalization of the estates of the spouses. This can reduce the overall estate tax rate applicable to the combined estates of the spouses, and thereby achieve tax savings. However, reversal of the presumption must be specifically limited to the spouse with the larger estate. If it is not, pouring the estate of the spouse with the smaller estate into the estate of the spouse with the larger estate would serve no useful purpose and in fact could increase rather than reduce the combined estate tax liability of the two estates.

In any case, the theoretical estate tax liabilities of the parties should be carefully computed before reversing the presumption, to ensure that under the specific circumstances presented, reversal of the presumption will have the desired effect. For additional discussion, and an example of a situation in which tax savings can be achieved by reversing the statutory presumption, see *California Wills & Trusts, Ch. 21, Devises, § 21.05* (Matthew Bender). The Probate Code presumption can be "reversed" by simply providing that in the event of simultaneous death, the person with the smaller estate will be deemed to have survived the person with the larger estate. [see §§ 70.280[2] (one-settlor trust), 70.281[2] (two-settlor trust)].

### **[d] No-Contest Clause**

No-contest clauses are commonly included in wills for the purpose of discouraging will contests by providing that any person who contests the will or any of its provisions will receive nothing under the instrument. However, no-contest clauses do not usually cover property that passes outside the will. If all or substantially all of the testator's property will pass on the testator's death through a revocable inter vivos trust, the will's no-contest clause may be largely ineffective, since a person may freely contest the will and still receive any benefits he or she would be entitled to receive under the trust. This result can be avoided by including a no-contest clause in the trust instrument as well as in the will.

A no-contest clause in an inter vivos trust instrument will typically provide that if any beneficiary under the trust instrument directly or indirectly opposes, objects to, or seeks to invalidate any provision of the instrument, or any provision of the settlor's will, that person will receive nothing under the instrument, and any interest in the trust property that the person would otherwise have been entitled to receive will pass as if the person had predeceased the settlor [*see* §§ 70.200[2], P 7.03, 70.201[2], P 7.03, 70.202[2], P 7.03, 70.203[2], P 7.03]. For further discussion of no-contest clauses and their use, see Ch. 63, *Will Provisions*, § 655[1]. For detailed coverage of disinheritance and no-contest clauses, see 2 *California Wills & Trusts*, Chapter 40, *Disinheritance and No-Contest Clauses* (Matthew Bender).

### **[e] Definitions**

It is good drafting practice to include one or more provisions defining key words and phrases that are used in other parts of the instrument. Definitions of this kind will add to the precision of the instrument, clarify the settlor's intentions, and help to avoid litigation should disputes later arise as to the precise meaning of a word or phrase. Words and phrases that should generally be defined in the instrument include "death taxes" [*see* §§ 70.200[2], P 7.04, 70.201[2], P 7.04, 70.202[2], P 7.04, 70.203[2], P 7.04], "debts and expenses" [*see* §§ 70.200[2], P 7.05, 70.201[2], P 7.05, 70.202[2], P 7.05, 70.203[2], P 7.05], "deceased settlor" and "surviving settlor" [*see* §§ 70.201[2], P 7.06, 70.202[2], P 7.06], "child" and "children" [*see* §§ 70.200[2], P 7.06, 70.201[2], P 7.07, 70.202[2], P 7.07, 70.203[2], P 7.06], and "issue" [*see* §§ 70.200[2], P 7.07, 70.201[2], P 7.08, 70.202[2], P 7.08, 70.203[2], P 7.07].

### **[f] Number and Gender**

Trusts instruments often include one or more provisions designed to clarify number and gender references in other provisions of the instrument. These provisions typically state that references in the instrument in the masculine gender will be deemed to include the feminine and neuter genders, and vice versa; and that references to the singular will be deemed to include the plural, and vice versa, wherever the context permits [*see* §§ 70.200[2], P 7.09, 70.201[2], P 7.10, 70.202[2], P 7.10, 70.203[2], P 7.09]. These provisions may help to clarify the terms of other trust provisions where number and gender references are otherwise uncertain, ambiguous, or imprecise.

### **[g] Governing Law**

Trust instruments should include a provision stating that all questions concerning the validity, interpretation, and administration of the trust will be governed by the law of a particular state [*see* §§ 70.200[2], P 7.12, 70.201[2], P 7.13, 70.202[2], P 7.13, 70.203[2], P 7.12]. Although the power of a settlor to specify that the trust will be governed by the law of a particular state is subject to some limitations, the power is generally and widely recognized [*see* 1 *California Wills & Trusts*, § 5.07[3] (Matthew Bender)].

Most settlors who create trusts in California will want legal questions concerning the operation and administration of the trust to be governed by California law. If a settlor executes a trust instrument in California and later moves to another state, it may still be preferable to have California law apply to the trust. The trust will probably have been planned with California law in mind, and the law of the other state may either be unknown or less favorable to the purposes and goals of the trust. For this reason, most California trust instruments provide that all questions concerning

the validity, interpretation, and administration of the instrument will be governed by the law of California, regardless of the domicile of any trustee or beneficiary [*see* §§ 70.200[2], P 7.12, 70.201[2], P 7.13, 70.202[2], P 7.13, 70.203[2], P 7.12]. If the settlor prefers to designate the law of some other state, the provision can be modified accordingly.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsGeneral OverviewEstate, Gift & Trust LawTrustsCreationEstate, Gift & Trust LawTrustsInterpretationEstate, Gift & Trust LawTrustsRevocable Living Trusts



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DIVISION IV: WILLS AND TRUSTS  
CHAPTER 70 COMPLETE REVOCABLE TRUST FORMS  
PART II. LEGAL BACKGROUND

*26-70 California Legal Forms--Transaction Guide § 70.13*

**AUTHOR:** Reviewed by Albert G. Handelman

**§ 70.13 Execution**

**[1] In General**

Inter vivos trust instruments are not subject to the same execution requirements as wills. Although every trust instrument must be signed, there is no requirement that the signatures be witnessed, or that the witnesses sign their names, as in the case of a will [*see Prob. Code §§ 6110(c)(1), 6112 (witnesses)*].

If the trust instrument is an agreement [*see § 70.11[3]*], it must be signed by the settlor or settlors and the trustee or co-trustees [*see §§ 70.200[2], P 8.01, 70.201[2], P 8.01, 70.202[2], P 8.01, 70.203[2], P 8.01*]. If the instrument is a declaration of trust [*see § 70.11[3]*], only the trustee is required to sign. However, it is generally considered good practice for the settlor or settlors to signify approval of the terms of a declaration of trust by adding their signatures to that of the trustee. All the signature blocks for the complete forms in this chapter provide space for the signature of the settlor or settlors.

When a settlor is also trustee (or one of the co-trustees), there is no requirement that the settlor sign the trust instrument in both capacities. However, it is the practice of some experienced estate planning attorneys to ask a client who is to serve in dual capacities to sign the instrument twice, to underscore the dual capacities in which the client is acting.

**[2] Acknowledgment**

There is no legal requirement that a trust instrument be acknowledged before a notary public [*see Civ. Code § 1217 (unrecorded instrument valid as between parties and persons with knowledge of instrument); see also Civ. Code §§ 1180-1207(acknowledgment and proof of execution of instruments)*]. However, the instrument cannot be recorded unless the signatures are properly acknowledged [*see Gov. Code § 27287 (acknowledgment of execution or proof by subscribing witness as prerequisite to recordation)*]. Although transfer documents signed by trustees (for example, deeds, deeds of trust, and leases) are frequently recorded, trust instruments themselves are not usually recorded. Nevertheless, it may be desirable in some cases to record the trust instrument. If it is necessary to establish the succession of the trustees, for example, the trust instrument may be recorded to establish the succession provisions of

the instrument. However, recordation is not always necessary even when the right to succession is in issue, since the facts essential to establish the right may be set forth in an affidavit, and the affidavit may be recorded in place of the full trust instrument.

Even when recordation is not necessary, acknowledgment of the instrument may help to authenticate the client's signature. This may be helpful if the authenticity of the instrument is ever put at issue.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsGeneral OverviewEstate, Gift & Trust LawTrustsCreationEstate, Gift & Trust

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DIVISION IV: WILLS AND TRUSTS  
CHAPTER 70 COMPLETE REVOCABLE TRUST FORMS  
PART II. LEGAL BACKGROUND

*26-70 California Legal Forms--Transaction Guide § 70.14*

**AUTHOR:** Reviewed by Albert G. Handelman

**§ 70.14 Amending the Trust Instrument**

**[1] In General**

The settlor will generally retain the right to amend a revocable trust instrument for life, or, much less frequently, for some other period of time. When the settlor retains the right to revoke a trust, the lesser right to amend the trust is also retained [*Prob. Code* § 15402; *but see* § 70.12[5][f] regarding limitations on the power to amend a two-settlor trust that are typically imposed by the trust instrument]. When a trust becomes irrevocable, it also becomes unamendable unless the trust instrument provides otherwise. Amendments are often prompted by changes in the settlor's financial status or family situation, or by changes in the tax laws.

A trust may be amended either by a separate "amendment" to the original trust instrument, or by an amended and restated trust instrument.

**[2] Amendment to Original Instrument**

If the proposed amendment is relatively insubstantial, it may be accomplished by drafting a separate "amendment," which is analogous in some respects to making a codicil to a will. The amendment should identify the original instrument (and any prior amendments) by title and date and state whether it is the first, second, third, or subsequent amendment of that instrument. If, for example, the original trust was named the "Jones Family 1994 Trust" and the amendment is the *first amendment* to that trust, it will be titled "*First Amendment* to Jones Family 1991 Trust."

The amendment should clearly specify which sections of the original instrument are to be modified or deleted. If provisions are to be added, the terms of the added provisions should be set forth in full, together with a clear statement identifying which provisions of the original instrument the added provisions are intended to supersede. An amendment to an existing trust instrument should be drafted in much the same way that a codicil to a will is drafted. For detailed coverage of codicils, see Chapter 62, *Codicils*.

**[3] Amended and Restated Trust Instrument**

An "amended and restated instrument" should be drafted if the changes in the original instrument are substantial and require extensive changes in the original trust instrument. Like an "amendment," an amended and restated instrument should indicate the instrument it is intended to amend and state whether it is the first, second, or third (and so on) instrument of its type. Unlike an amendment, however, an amended and restated instrument will restate all of the terms of the original instrument, *as amended*. The title of the instrument should reflect the amendment, for example, "Jones Family 1994 Trust--First Amended and Restated Declaration of Trust."

#### **[4] Execution**

Both amendments and amended and restated trust instruments should be executed in the same manner as the original trust instrument. For a discussion of the execution procedures for inter vivos trust instruments, see *Section 70.13*.

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsModification & TerminationEstate, Gift & Trust LawTrustsRevocable Living Trusts



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DIVISION IV: WILLS AND TRUSTS  
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**AUTHOR:** Reviewed by Albert G. Handelman

**[Reserved]**

§§ 70.15[Reserved]



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DIVISION IV: WILLS AND TRUSTS  
CHAPTER 70 COMPLETE REVOCABLE TRUST FORMS  
PART III. TRANSACTION GUIDE  
A. Client Interview--Facts and Documents

*26-70 California Legal Forms--Transaction Guide § 70.100*

**AUTHOR:** Reviewed by Albert G. Handelman

**§ 70.100 Facts**

1. Personal information.

**NOTE:**

*Section 60.200[2]* in Chapter 60, *Estate Planning*, is a client interview checklist designed to be used by an attorney at the initial client interview regarding an estate planning matter. This checklist includes questions designed to elicit all of the personal information necessary to begin the preparation of an estate plan.

2. Financial information.

**NOTE:**

*Section 60.200[2]* is also designed to elicit the financial information necessary to begin the preparation of an estate plan.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsGeneral OverviewEstate, Gift & Trust LawTrustsCreationEstate, Gift & Trust LawTrustsRevocable Living Trusts



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DIVISION IV: WILLS AND TRUSTS  
CHAPTER 70 COMPLETE REVOCABLE TRUST FORMS  
PART III. TRANSACTION GUIDE  
A. Client Interview--Facts and Documents

*26-70 California Legal Forms--Transaction Guide § 70.101*

**AUTHOR:** Reviewed by Albert G. Handelman

**§ 70.101 Documents**

**NOTE:**

Copies of these documents will suffice if the originals are unavailable for any reason.

1. Any will previously executed by client.
2. Any trust instrument previously executed by client.
3. Any contract affecting client's power to make or revoke a will or trust (for example, a contract to make a will or not to revoke a will), including an antenuptial agreement.
4. Any instrument evidencing client's rights in any other property to be placed in trust (for example, a transmutation agreement, antenuptial agreement, or marital settlement agreement).
5. Deeds to any real property to be placed in trust.
6. Deeds of trust or mortgages to be placed in trust.
7. Certificates for stocks, bonds, or other securities to be placed in trust.
8. Recent statements for all bank, savings and loan, brokerage, and other accounts to be placed in trust.
9. Insurance policies to be placed in trust.

10. Documents evidencing title to any other personal property to be placed in trust (for example, vehicle, boat, or aircraft registration).

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsGeneral OverviewEstate, Gift & Trust LawTrustsCreationEstate, Gift & Trust LawTrustsRevocable Living Trusts



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DIVISION IV: WILLS AND TRUSTS  
CHAPTER 70 COMPLETE REVOCABLE TRUST FORMS  
PART III. TRANSACTION GUIDE  
A. Client Interview--Facts and Documents

*26-70 California Legal Forms--Transaction Guide §§ 70.102-70.109*

**AUTHOR:** Reviewed by Albert G. Handelman

**[Reserved]**

§§ 70.102[Reserved]



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DIVISION IV: WILLS AND TRUSTS  
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PART III. TRANSACTION GUIDE  
B. Preliminary Determinations

*26-70 California Legal Forms--Transaction Guide § 70.110*

**AUTHOR:** Reviewed by Albert G. Handelman

**§ 70.110 Suitability of Revocable Trust for Client's Purposes**

1. Determine whether, for one or more of the following reasons, it is desirable to avoid probate on client's death:

- a. Size of client's estate and circumstances of beneficiaries are such that probate would almost certainly be required.
- b. Client wishes to avoid costs and delays of probate.
- d. Client is willing to incur additional expenses to establish and fund revocable trust now.
- e. Client owns real property located in more than one state.
- f. Client owns substantial life insurance that could be used to fund trust.

**PRACTICE TIP:**

If a client is considering putting any significant amount of insurance on his or her own life into a revocable trust, the practitioner should have the client give serious consideration to the alternative of using an irrevocable life insurance trust to hold those insurance policies. This technique can achieve substantial estate tax savings on the death of the client. *Commentary by Albert G. Handelman.*

- g. Benefits of probate avoidance offset administrative cost of trust during client's lifetime and additional inconvenience of dealing with property through trust rather than directly.

2. Determine whether, for either or both of the following reasons, it is desirable to establish a mechanism for asset management for client:

- a. Client is unable or unwilling to manage own assets.
- b. Client wishes to avoid conservatorship in event of disability or incapacity.

3. Determine whether client deems it desirable to preserve privacy of client and client's financial affairs.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsGeneral OverviewEstate, Gift & Trust LawTrustsCreationEstate, Gift & Trust LawTrustsRevocable Living Trusts



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*26-70 California Legal Forms--Transaction Guide § 70.111*

**AUTHOR:** Reviewed by Albert G. Handelman

**§ 70.111 Features of Revocable Trust**

1. If client is married, determine whether client should establish revocable trust as sole settlor, or as joint settlor with spouse.

**NOTE:**

Resolution of this issue will depend on a number of questions that are centered on the nature of the client's property. If the trust assets will consist exclusively of the separate property of one individual, that person will create the trust as a sole settlor. Conversely, if the bulk of the trust assets will be community property, it is easier to draft a single trust for both spouses as joint settlors. If the estate contains significant percentages of both separate and community property, the attorney may either draft a joint settlor trust for the community property and separate sole settlor trusts for the separate property of each spouse, or may place both the separate and community property in a so-called "mixed property" trust [*see § 70.11[4][d]*].

The nature of the dispositions planned by the spouses may also affect the decision to draft a single trust or separate trusts. If the spouses want significantly different dispositions of their respective property, different trusts may be the best way to implement their dispositive plans.

The determinations in this Transaction Guide contain numerous references to "client and spouse." Although it may sound obvious, the attorney should bear in mind that when he or she prepares a trust for two spouses, both of the spouses are clients and the attorney owes equal duties to each of them. Conflicts of interest can arise in this context that will make representation of both spouses unwise or ethically impermissible. For determinations

relating to the existence of a conflict of interest, see *Section 60.110* in Chapter 60, **Estate Planning** ; see also California Wills & Trusts, Chapter 4, *Ethical Considerations and Professional Responsibility* . In any situation involving representation of both spouses, the attorney must be alert for actual or potential conflict of interest situations [see § 60.110 in Ch. 60, **Estate Planning**].

2. Determine who will serve as trustee(s).

a. During lifetime(s) of client:

**NOTE:**

The trust forms in this publication assume that the client (or both spouses, in the case of a two-settlor trust) will want to serve as initial trustees.

- (1) Client, in a one settlor trust;
- (2) Both settlors, in a two-settlor trust; or
- (3) Third party such as professional trustee or trusted family member.

b. In a two-settlor trust, after death of first settlor:

**NOTE:**

The complete two-settlor trusts in this chapter assume that the surviving settlor in a two-settlor trust will be trustee after the death of the first settlor.

- (1) Surviving settlor; or
- (2) Third party such as professional trustee or trusted family member.

c. After death of settlor (or death of surviving settlor, in a two-settlor trust):

- (1) Professional trustee;
- (2) One or more trusted family members or associates; or
- (3) Combination of the two.

3. Determine identity of trust beneficiaries.

- a. Client.
- b. Spouse.
- c. Children.
- d. Person with special needs (for example, disability or incapacity).

4. If client is to be beneficiary, determine provisions for:

a. Payment of income during client's lifetime.

b. Distributions of principal during client's lifetime.

c. Distribution of trust principal after client's death:

(1) Outright distribution to named beneficiary or beneficiaries.

(2) Continued administration of trust for benefit of surviving beneficiary or beneficiaries.

5. If client and spouse are to be beneficiaries, determine provisions for:

a. Payment of income during joint lifetimes of client and spouse.

(1) All income to client and spouse.

(2) Income at request of client and spouse.

(3) Income at discretion of trustee.

b. Distributions of principal during joint lifetimes of client and spouse.

(1) Income at request of client and spouse.

(2) Income at discretion of trustee.

c. Distribution of trust principal after death of first spouse to die:

(1) Outright distribution to spouse or other beneficiary or beneficiaries.

(2) Continued administration of trust for benefit of spouse or other beneficiary or beneficiaries.

6. If surviving spouse is to be beneficiary after death of first spouse, determine basic plan for administration and distribution of trust assets after death of first spouse to die:

a. Survivor's trust, if trust is created by client and spouse as joint settlors.

**NOTE:**

A survivor's trust is a trust designed to hold property that the surviving spouse owned before the death of the first spouse to die--the surviving spouse's separate and quasi-community property (if any), and the surviving spouse's one-half interest in the community property of the spouses [*see* § 71.15 in Ch. 71, *Marital Deduction Trust Provisions*].

b. Nonformula marital deduction trust [*see* § 70.201[1]].

c. Formula marital deduction trust [*see* § 70.202[1]].

## d. Bypass trust.

**NOTE:**

A bypass (or "credit shelter") trust is ordinarily designed to confer lifetime benefits on the surviving spouse while avoiding inclusion of the trust assets in the estate of either spouse for estate tax purposes [*see* § 70.12[6][f]; *see also* §§ 71.11, 71.14 in Ch. 71, *Marital Deduction Trust Provisions* ].

## e. Disclaimer trust.

**NOTE:**

A disclaimer trust is a trust designed to hold property that the surviving spouse disclaims after the death of the first spouse to die [*see* § 70.12[6][i]; *see also* § 71.16 in Ch. 71, *Marital Deduction Trust Provisions* ].

7. If trust plan is to include survivor's trust [*see* P 6(a), *above*], determine provisions for:

- a. Payments of income.
- b. Distributions of principal.
- c. Distribution of trust principal on death of surviving spouse.

8. If trust plan is to include nonformula marital deduction trust [*see* P 6(b), *above*], determine provisions for:

- a. Payments of income during joint lifetimes of client and spouse.
- b. Distributions of principal during joint lifetimes of client and spouse.
- c. Payments of income after death of first spouse to die.
- d. Distributions of principal after death of first spouse to die.
- e. Distribution of trust principal after death of surviving spouse.

9. If trust is to include formula marital deduction trust [*see* PP 6(b), (c), *above*], determine what type of formula should be used to apportion trust assets between marital deduction share and nonmarital share (bypass trust):**NOTE:**

The use and consequences of these various formulas are discussed in detail in Ch. 71.

## a. Pecuniary formula, either:

**NOTE:**

A pecuniary marital deduction formula clause requires that assets be allocated between the marital and nonmarital shares based on their value.

- (1) Pecuniary marital deduction formula [*see* § 70.202[1][k]; *see also* §§ 71.200, 71.201

in Ch. 71, *Marital Deduction Trust Provisions*]; or

**NOTE:**

A pecuniary marital deduction formula clause funds the marital deduction share first, and allocates the balance of the trust assets to the nonmarital share (bypass trust).

(2) Pecuniary bypass formula [*see* §§ 71.202, 71.203 in Ch. 71, *Marital Deduction Trust Provisions* ].

**NOTE:**

A pecuniary bypass formula clause funds the nonmarital share (bypass trust) first, and allocates the balance of the trust assets to the marital deduction share.

b. Fractional formula clause [*see* §§ 71.204, 71.205 in Ch. 71, *Marital Deduction Trust Provisions* ].

**NOTE:**

A fractional formula clause, in contrast to a pecuniary formula clause, divides each and every trust asset between the marital deduction share and the nonmarital share (bypass trust), so that the respective shares hold fractional interests in each and every item of trust property.

10. If trust plan is to include marital deduction trust (either formula or nonformula) [*see* PP 6(b), (c), *above*], determine what type of marital deduction trust should be used:

**NOTE:**

Either type of trust will qualify for the marital deduction. Because of its flexibility, the QTIP trust is probably the most widely used marital deduction trust in modern estate planning practice. For further discussion, see Ch. 71.

a. Qualified terminable interest property (QTIP) trust [*I.R.C.* § 2056(b)(7); *see* §§ 70.202[2], 70.203[2]]; or

b. Lifetime income/power of appointment trust [*I.R.C.* § 2056(b)(5); *see* § 71.13 [4] in Ch. 71, *Marital Deduction Trust Provisions* ].

11. If trust plan is to include bypass trust [*see* NOTE to P 6(d), *above*] in favor of surviving spouse, determine provisions for:

- a. Payments of income.
- b. Distributions of principal.
- c. Distribution of trust principal on death of surviving spouse.

12. If trust plan is to include disclaimer trust [*see* NOTE to P 6(e), *above*], determine provisions for:

- a. Payments of income.
- b. Distributions of principal.

13. If client is not married or spouse will not be beneficiary, determine identity of beneficiaries and pattern of payment

and distribution:

a. Payment of income to client while client is living:

- (1) All income to client.
- (2) Income to client at client's request.

b. Distributions of principal to client while client is living:

- (1) Distributions to client at client's request.
- (2) Distributions to client in trustee's discretion.

c. Payments of income and distributions of principal after client's death:

- (1) To one beneficiary.
- (2) To two or more beneficiaries from separate trusts.
- (3) To two or more beneficiaries from one trust.

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Estate, Gift & Trust Law Trusts Revocable Living Trusts



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*26-70 California Legal Forms--Transaction Guide §§ 70.112-70.119*

**AUTHOR:** Reviewed by Albert G. Handelman

**[Reserved]**

§§ 70.112[Reserved]



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*26-70 California Legal Forms--Transaction Guide § 70.120*

**AUTHOR:** Reviewed by Albert G. Handelman

**§ 70.120 Basic Trust Arrangement**

**NOTE:**

The complete trust *forms in Sections 70.200 through 70.203* have been designed to fit typical fact situations. These complete forms include all of the provisions that would most often be required to draft a complete revocable trust instrument for a client. Except to the extent that individual provisions should be varied or modified as indicated, these complete trust instruments may be used as set forth in this chapter.

1. If client is unmarried and wishes to create trust for own benefit during client's lifetime and for benefit of one or more beneficiaries after client's death, select complete trust instrument in *Section 70.200[2]*.

a. If trust will benefit one principal beneficiary (e.g., an "only child" or a favorite niece or nephew) after settlor's death, use form without modification.

b. If trust will benefit more than one principal beneficiary (e.g., all the settlor's children) after settlor's death, modify form as follows:

**NOTE:**

See *Sections 70.210[1]* and *70.211[1]* for more detailed information on these patterns of distribution.

(1) To create "family pot" trust with sprinkling provisions on settlor's death, substitute provisions in *Section 70.210[2]*; or

(2) To create separate trusts or shares for each beneficiary on settlor's death, substitute provisions in *Section 70.211[2]*.

2. If client is married and wishes to create nonformula marital deduction trust for benefit of client and spouse during their joint lifetimes, select complete trust instrument in *Section 70.201[2]*.

a. If client wants trust to be divided into separate trusts or shares for children and issue (or other beneficiaries) on death of surviving settlor, use form without modification.

b. If client wants trust to be held as a "family pot" trust with sprinkling provisions, for collective benefit of children and issue (or other beneficiaries) on death of surviving settlor, substitute provisions in *Section 70.212[2]*.

3. If client is married, wishes to create trust for benefit of client and spouse during joint lifetimes, and has large enough estate to make marital deduction formula trust advantageous, select complete trust instrument in *Section 70.202[2]*.

a. Marital deduction formula:

(1) To include pecuniary marital deduction formula, use form without modification [*see also* provisions in § 71.201 in Ch. 71, *Marital Deduction Trust Provisions* , for a sample pecuniary marital deduction formula clause with additional optional language].

(2) To include pecuniary bypass formula, substitute provisions in *Section 71.203* in Ch. 71, *Marital Deduction Trust Provisions* .

(3) To include fractional formula, substitute provisions in *Section 71.205* in Ch. 71, *Marital Deduction Trust Provisions* .

b. Type of marital deduction trust:

(1) To use qualified terminable interest (QTIP) trust [*I.R.C. § 2056(b)(7)*], use form without modification.

(2) To use lifetime income/power of appointment trust [*I.R.C. § 2056(b)(5)*] containing separate survivor's trust and separate marital deduction trust, select appropriate option in marital deduction formula clause and substitute provisions in *Section 71.231* in Ch. 71, *Marital Deduction Trust Provisions* .

(3) To use lifetime income/power of appointment trust [*I.R.C. § 2056(b)*] in which survivor's share and marital deduction share are combined into a single trust, select appropriate option in marital deduction formula clause and substitute provisions in *Section 71.231* in Ch. 71, *Marital Deduction Trust Provisions* .

c. Treatment of beneficiaries on death of surviving settlor:

(1) If client wants trust to be divided into separate trusts or shares for children and issue (or other beneficiaries) on death of surviving settlor, use form without modification.

(2) If client wants trust to be held as a "family pot" trust with sprinkling provisions, for

collective benefit of children and issue (or other beneficiaries) on death of surviving settlor, substitute provisions in *Section 70.212[2]*.

4. If client is married, and wishes to create trust for benefit of client and spouse during joint lifetimes, *but wishes to fund trust solely with client's own separate or quasi-community property*, select complete trust instrument in § 70.203[2].

a. Marital deduction formula:

(1) To include pecuniary marital deduction formula, use form without modification [*see also § 71.200[2]* in Ch. 71, *Marital Deduction Trust Provisions* , for a sample pecuniary marital deduction formula clause with additional optional language].

(2) To include pecuniary bypass formula, substitute provisions in *Section 71.202* in Ch. 71, *Marital Deduction Trust Provisions* .

(3) To include fractional formula, substitute provisions in *Section 71.204* in Ch. 71, *Marital Deduction Trust Provisions* .

b. Type of marital deduction trust:

(1) To use qualified terminable interest (QTIP) trust [*I.R.C. § 2056(b)(7)*], use form without modification.

(2) To use lifetime income/power of appointment trust [*I.R.C. § 2056(b)(5)*], select appropriate option in marital deduction formula clause and substitute provisions in *Section 71.231* in Ch. 71, *Marital Deduction Trust Provisions* .

c. Treatment of beneficiaries on death of settlor:

(1) If client wants trust to be divided into separate trusts or shares for children and issue (or other beneficiaries) on death of settlor, use form without modification.

(2) If client wants trust to be held as a "family pot" trust with sprinkling provisions, for collective benefit of children and issue (or other beneficiaries) on death of settlor, substitute provisions in *Section 70.213[2]*.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsGeneral OverviewEstate, Gift & Trust LawTrustsCreationEstate, Gift & Trust LawTrustsInterpretationEstate, Gift & Trust LawTrustsRevocable Living Trusts



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*26-70 California Legal Forms--Transaction Guide § 70.121*

**AUTHOR:** Reviewed by Albert G. Handelman

**§ 70.121 Modification of Individual Trust Provisions**

**NOTE:**

It is obvious that the terms of any trust agreement, particularly the dispositive provisions desired by the client and provisions relating to the settlor's marital status and family members, but also the powers and duties of the trustees, the payment of estate taxes, and others, may have to be modified to fit the circumstances of the estate plan. A complete guide to all variations reasonably likely to be required in a given case would far exceed the space limitations of this publication.

Numerous individual and alternative trust provisions for use in testamentary trusts are illustrated in Ch. 64, *Testamentary Trusts: Payment and Distribution Provisions*, Ch. 64A, *Testamentary Trusts: Trustee Provisions*, and Ch. 64B, *Testamentary Trusts: Administrative Provisions*. Many of these provisions are also suitable for revocable inter vivos trusts, and can be adapted to that purpose with only minor modifications. This section provides a guide only to alternative provisions that are specific to inter vivos trusts, have no counterpart in testamentary trusts, and are illustrated in Part C of the forms in this chapter.

For a large selection of provisions designed specifically for revocable inter vivos trusts, and extensive commentary on their use, see *California Wills & Trusts Forms, Division 2, Individual Inter Vivos Trust Provisions* (Matthew Bender).

1. To change basic format of trust instrument from declaration of trust to trust agreement [for discussion, see § 70.11[3]]:

**NOTE:**

The complete trust forms in this chapter are all drafted as declarations of trust [see §

70.11[3]]. However, they may easily be adapted to the trust agreement format if desired.

a. Substitute introductory language in *Section 70.220[2]* for Paragraph 1.01 of any of the complete forms in this chapter, and

b. Substitute signature and execution block in *Section 70.290[2]* for the signature and execution block in the form being modified.

2. To limit trustee's right to accept additions to trust:

**NOTE:**

In most cases, it is desirable to authorize the trustee to accept additions to the trust, either from the settlor or settlors or from other sources. In rare cases, however, the settlor may wish to prohibit additions [*see* §§ 70.12[4][c], 70.231[1]].

a. To permit trustee to accept additions only from settlors, substitute *form in Section 70.230[2]* for following provisions in complete trust forms:

(1) Paragraph 2.02 in *Section 70.200[2]*.

(2) Paragraph 2.03 in *Section 70.201[2]*.

(3) Paragraph 2.03 in *Section 70.202[2]*.

(4) Paragraph 2.02 in *Section 70.203[2]*.

b. To prohibit trustee from accepting additions to trust, substitute *form in Section 70.231[2]* for following provisions in complete trust forms:

(1) Paragraph 2.02 in *Section 70.200[2]*.

(2) Paragraph 2.03 in *Section 70.201[2]*.

(3) Paragraph 2.03 in *Section 70.202[2]*.

(4) Paragraph 2.02 in *Section 70.203[2]*.

3. To state that right to revoke trust is personal to settlor(s) and may not be exercised by any other person(s), substitute *form in Section 70.240[2]* for following provisions in complete trust forms:

**NOTE:**

It is usually desirable to include a provision authorizing other persons (such as attorneys in fact or conservators) to exercise rights or powers that the settlor could exercise personally if the settlor should ever be unable to exercise those rights or powers personally. However, some settlors will be reluctant to grant any person authority to revoke the trust [*see* §§ 70.12[5], 70.240[1][c]].

a. Paragraph 3.04 in *Section 70.200[2]*.

b. Paragraph 3.09 in *Section 70.201[2]*.

c. Paragraph 3.09 in *Section 70.202[2]*.

d. Paragraph 3.04 in *Section 70.203[2]*.

4. To require trustee to make one or more "special gifts" on the death of the settlor (or the first settlor in a two-settlor trust), use the following provisions in place of, or in addition to, Paragraph 5.01 in any of the complete trust forms in this chapter:

**NOTE:**

As used in this publication, the term "special gift" refers to a gift to a person who is not one of the primary beneficiaries of the bulk of the trust assets. Such a gift is analogous, in some respects, to a specific devise or a general pecuniary devise in a will [*see* §§ 70.200[1][h], 70.250[1][b]].

a. To make pecuniary special gift from two-settlor trust on first death only if a specified settlor dies first, use form in *Section 70.250*.

b. To make pecuniary special gift to charity from one-settlor trust, use form in *Section 70.251*.

c. To make pecuniary special gift to charity from two-settlor trust on first death, regardless of order of death of settlors, use form in *Section 70.252*.

d. To make pecuniary special gift to charity from two-settlor trust on first death only if a specified settlor dies first, use Form in *Section 70.253*.

e. To make special gift of tangible personal property from one-settlor trust on settlor's death, use form in *Section 70.254*.

f. To make special gift of tangible personal property from two-settlor trust on first death only if a specified settlor dies first, use form in *Section 70.255*.

5. To reverse statutory presumption regarding simultaneous death, substitute following provisions for their counterparts in the complete forms:

**NOTE:**

*Probate Code Section 220* establishes a rule that applies when the right to receive property depends upon the priority of two persons' deaths and it cannot be established by clear and convincing evidence that one of the persons survived the other. Under that rule, the person whose property is to be distributed is presumed to have survived the person to whom the property is to be distributed. The complete trust instruments in this chapter all include a provision reaffirming this statutory presumption [*see* §§ 70.200[2], P 7.02, 70.201[2], P 7.02, P 7.02, 70.203[2], P 7.02]. In special cases, however, it may be advantageous to "reverse" the statutory presumption and treat the property of a particular person as if that person had died first, so that the property will be distributed to the other person before it is distributed to other beneficiaries [*see* § 70.280[1][c]].

a. To reverse presumption in a one-settlor trust, substitute *form in Section 70.280[2]* for:

(1) Paragraph 7.02 in *Section 70.200[2]*.

(2) Paragraph 7.02 in *Section 70.203[2]*.

b. To reverse presumption in a one-settlor trust, substitute *form in Section 70.281[2]* for:

(1) Paragraph 7.02 in *Section 70.201[2]*.

(2) Paragraph 7.02 in *Section 70.202[2]*.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsModification & TerminationEstate, Gift & Trust LawTrustsRevocable Living Trusts



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*26-70 California Legal Forms--Transaction Guide §§ 70.122-70.199*

**AUTHOR:** Reviewed by Albert G. Handelman

**[Reserved]**

§§ 70.122[Reserved]



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A. Complete Trust Instruments

*26-70 California Legal Forms--Transaction Guide § 70.200*

**AUTHOR:** Reviewed by Albert G. Handelman

**§ 70.200 Revocable Trust for Unmarried Settlor**

**[1] Comment**

**[a] Use of Form**

This form is a complete trust instrument for a sole settlor who wishes to create a revocable inter vivos trust for his or her own benefit during his or her lifetime, and for the benefit of another person after the settlor's death. The trust provides for income payments and discretionary principal distributions to the beneficiary after the settlor's death, with outright distribution of the trust principal to the beneficiary in three installments.

This type of trust is typically created by an unmarried person. Less frequently, such a trust may be created by a married person who does not want to provide for his or her surviving spouse, either because the spouse has sufficient assets of his or her own to survive without being provided for, or because the settlor has provided for the spouse in another trust or by will.

**[b] Modifying Basic Pattern of Distribution**

This form can be used as a basic template for most types of revocable trusts that are likely to be created by an unmarried person. The fact situation contemplated in this form is that the settlor is an unmarried person who wants his or her assets to go to one beneficiary, such as an only child, a grandchild, a favorite relative, or a close friend. In many cases, however, the settlor may want to spread his or her assets among a number of different beneficiaries, such as children, grandchildren, or relatives. This form can be modified for that purpose as follows:

- (1) To create a "family pot" trust--that is, a single trust in favor of a number of beneficiaries following the settlor's death [*see § 70.210[1]*], delete Paragraph 5.04 of this trust, and substitute the provisions in § 70.210[2].

(2) To create a "separate share" trust--that is, a trust that on the death of the settlor will be divided into separate trusts or shares, each having only one beneficiary [see §§ 70.210[1][b], 70.211[1][b]], delete Paragraph 5.04 of this trust, and substitute the provisions in § 70.211[2].

The rest of the trust provisions in this form are fundamentally compatible with these alternative distribution schemes. However, the resulting instrument must always be reviewed carefully to guard against any inadvertent inconsistencies generated by a particular fact pattern.

### **[c] Trust Declaration Format**

This trust instrument uses the trust declaration format. A "declaration of trust" is a one-party instrument in which the trustee unilaterally declares that the trustee is holding property as trustee under terms of the trust instrument [see [2], P 1.01, *below*]. Only the trustee is required to execute the declaration. However, it is common for the settlor to sign the declaration to signify his or her approval of the terms of the trust [for signature blocks for declarations of trust, see [2], P 8.01, *below*].

A trust agreement, in contrast, is a two-party agreement between the settlor and the trustee. Either format will create a valid inter vivos trust, and prior to 1993 the choice was largely a matter of the drafter's preference. However, as discussed in § 70.11[3][b], many estate planners now believe that the trust declaration format is more advantageous as a result of the decision in *Estate of Heggstad (1993) 16 Cal. App. 4th 943, 20 Cal. Rptr. 2d 433*. In *Heggstad*, the court of appeal held that a parcel of real property that was described as a trust asset in a schedule attached to the trust declaration was trust property even though it was never formally conveyed to the trust. The court specifically referred to language in *Prob. Code § 15200(a)* that permits a trust to be created by a "declaration by the owner of property that the owner holds the property as trustee" [ *Estate of Heggstad (1993) 16 Cal. App. 4th 943, 947-951, 20 Cal. Rptr. 2d 433*; see *Estate of Powell (2000) 83 Cal. App. 4th 1434, 1441, 100 Cal. Rptr. 2d 501*]. The court did not speculate on whether the result would have been the same if the trust in question had been created by a trust agreement rather than a declaration, but since the result under a declaration is clear, many California estate planners now recommend that revocable trusts be created by declarations rather than trust agreements.

### **[d] Family Information**

This form includes paragraphs that may be used to provide information about the settlor's family. Family information ordinarily will cover the settlor's marital status [see [2], P 1.04, *below*], the settlor's children [see [2], P 1.05, *below*], and may also include grandchildren, particularly if they are children of a deceased child of the settlor [see [2], P 1.05, *below*]. If the settlor has no living children, or had children who are now deceased, those facts can be stated. The names and birthdates of children and grandchildren may also be included. For discussion of the utility of including family information in a trust instrument, see § 70.12[3].

As noted in [a], *above*, this form assumes that the settlor is an unmarried person. If a married settlor wishes to create a trust that does not provide for his or her spouse, the marital declaration provisions of this trust may be modified accordingly. For an illustrative marital status declaration for a married person, see § 70.203[2], P 1.04.

### **[e] Trust Estate**

Property is one of the essential elements of every trust [*Prob. Code § 15202*; see § 70.11[2][c], [4]]. The words "trust estate" are used in this form to refer to the trust property. Paragraph 1.01 defines the "trust estate."

It is common for attorneys to attach a list of assets to the trust instrument. Designated as Schedule A in this form, this list includes all of the property that is to be transferred to the trustee at the outset of the trust. If the trust is not to be "fully funded" until a later date, Schedule A may include a skeleton list of assets, or only one asset (for example, the

sum of \$100), and additional property may be added to it at a later date.

**PRACTICE TIP:**

It is less important that Schedule A be completed or kept up to date as assets are added to the trust than it is that the assets that are to comprise the trust are formally transferred to the trustee, such as by recording a deed for real property, having a new signature card prepared for a bank account, and so on.  
*Commentary by Albert G. Handelman.*

**[f] Rights and Powers of Settlor**

This form gives the settlor the right to amend, revoke, or terminate the trust, in whole or in part, at any time during the settlor's lifetime [*see* [2], P 3.01, *below*]. Upon the settlor's death, the trust becomes irrevocable.

The form also gives the settlor the power to direct the investments of the trust [*see* [2], P 3.02, *below*]. This provision will not be important while the settlor is serving as trustee [*see* [k], *below*]. However, it will give the settlor control over trust investments if the settlor does not choose to serve as trustee, or if the settlor should resign or become disabled after serving as the trustee for a period of time. The form also gives the settlor broad powers to borrow money from the trust estate [*see* [2], P 3.03, *below*].

The form includes a provision authorizing an attorney in fact acting under a durable power of attorney to exercise the settlor's rights and powers over the trust estate during any time that the settlor is unable to exercise those rights and powers personally [*see* [2], P 3.04, *below*]. If no attorney in fact is acting for the settlor, then the settlor's rights can be exercised by a duly appointed conservator, but only after petition to the court. If the settlor does not wish to delegate the power to amend or revoke the trust, this provision may be amended by the addition of optional language stating that all of the settlor's powers, except the power to amend, revoke, or terminate the trust, can be exercised by the attorney in fact or conservator [*see* [2], P 3.04, *below*]. For further discussion of the revocability of a trust, and delegating the power to revoke a trust to an attorney in fact or conservator, see *Section 70.12[5]*.

**[g] Payments and Distributions During Settlor's Lifetime**

This form gives the settlor the right to receive income payments and principal distributions during his or her lifetime [*see* [2], art. 4, *below*]. The trustee can be required to pay the settlor all of the income of the trust, or as much of the income as the settlor may request from time to time [*see* [2], P 4.01, *below*]. In either case, the settlor will have the substantial right to enjoy all of the trust income.

The trustee can also be required to distribute principal to the settlor on the settlor's request, or when the trustee in the exercise of the trustee's discretion determines that principal distributions should be made [*see* [2], P 4.02, *below*]. In either case, the settlor will have the substantial right to enjoy all of the trust principal.

The form includes a provision giving an attorney in fact acting under a durable power of attorney authority to request income or principal on the settlor's behalf if the settlor is unable to make those requests personally. If there is no attorney in fact, then the trustee will have the right to make the requests for the settlor [*see* [2], P 4.03, *below*].

**[h] Special Gift on Settlor's Death**

This form includes a provision making a so-called "special gift" on the settlor's death [*see* [2], P 5.01, *below*]. The term "special gift," as used in this form, means a gift that the trustee is required to make after the settlor's death to someone other than the residuary beneficiary. It is analogous, in many respects, to a specific devise or a general pecuniary devise in a will. The special gift in this form is a pecuniary devise, but special gifts of tangible personal property are not uncommon [*see* § 70.254[1]].

The special gift will be made before any distributions are made to the principal beneficiary. The special gift typically will be made to a family member or friend whom the settlor wishes to remember after his or her death, but whom the settlor does not wish to receive the full benefit of the residue of the trust estate.

If the settlor does not wish to make a special gift, this provision can be deleted. If the settlor wants to make more than one special gift, identical provisions may be included as necessary.

#### **[i] Treatment of Remaining Trust Assets Following Settlor's Death**

After the special gift has been made [see [h], above], the remainder of the trust estate will be held for one beneficiary. This beneficiary will often be a minor or young adult who is expected to need the benefits of property management for a temporary period of time after the settlor's death, depending on his or her age at the time of the settlor's death.

The trust principal will be distributed to the beneficiary in three installments at three specified ages. A typical pattern of distribution would be to distribute one-third of the principal to the beneficiary at age 21, one-third at age 25, and one-third at age 30. However, these ages are not inflexible. The needs of the residuary beneficiary should be balanced against his or her intelligence, experience, and level of maturity, to determine what ages are most appropriate for distributions.

Until all of the trust principal has been distributed, the trustee will make income payments and principal distributions to the beneficiary. The form requires the trustee to pay all of the income to the beneficiary on a current basis and to make principal distributions at the trustee's discretion. The trustee's discretion can be limited by an "ascertainable standard" or a broader standard. A standard is an "ascertainable standard" if distributions can be made only for the beneficiary's "health, education, support, and maintenance" [see *Treas. Reg. § 20.2041-1(c)(2)*; see also § 70.12[6][c] and Ch. 64, *Testamentary Trusts: Payment and Distribution Provisions*, § 64.51[4]]. A standard is not "ascertainable" if distributions can be made for other purposes, such as for the beneficiary's "comfort, welfare, and happiness" [see *Treas. Reg. § 20.2041-1(c)(2)*]. An ascertainable standard should be used if the beneficiary is to be the trustee after the settlor's death and the drafter wants to avoid having the trust assets included in the beneficiary's estate for federal estate tax purposes [see *I.R.C. § 2041(b)(1)(A)* (power limited by ascertainable standard is not general power of appointment for estate tax purposes)]. In almost all other cases (in other words, any situation not involving expenditures for the support of a trustee's dependent), a broader standard may be used at the option of the settlor. The settlor should bear in mind, however, that in practice even an ascertainable standard is broad enough to encompass almost any reasonable, non-frivolous expenditure.

#### **PRACTICE TIP:**

If the remainder beneficiary is a minor at the time the trust is being drafted, consideration may be given to accumulating income until a specified age (such as 18 or 21), and only thereafter providing for mandatory payments of current income to the beneficiary. This will avoid having large sums paid out to a parent, guardian, or custodian under the California Uniform Transfers to Minors Act during the beneficiary's minority. Such payments may distort the settlor's intention in two ways: (1) substantial amounts of property set aside by the settlor for the beneficiary's benefit will be managed by someone other than the trustee designated by the settlor; and (2) a potentially large sum will be distributable to the beneficiary before he or she would have received any lump sum distribution under the trust (possibly as early as age 18). *Commentary by Albert G. Handelman.*

#### **[j] Division of Trust for Generation-Skipping Transfer Tax Purposes**

This form contains a complex provision permitting or requiring the trustee to divide the trust into exempt and non-exempt trusts for generation-skipping transfer tax (GST) purposes. For discussion of this provision, see *Section 70.12[6][j]*. Although GST liability may seem like a remote possibility in a trust that has only one beneficiary who is a

child of the settlor, the situation may change if the beneficiary dies prior to final distribution of the trust assets and the next person in line to receive the assets is in a generation that is two or more generations below that of the settlor [*see I.R.C. §§ 2611(a), 2612, 2613(a)*]. For that reason, it is recommended that a this provision be included in every revocable trust. If it is not needed, the provision simply will never become operative. Unless the value of the trust assets is substantial, it is recommended that this provision be drafted to make division of the trusts optional rather than mandatory.

### **[k] Trustee**

Any qualified person may serve as the trustee of this trust. A sole settlor who creates a revocable inter vivos trust will often act as the initial trustee. Since a revocable inter vivos trust cannot be used to achieve income or estate tax savings while the settlor is still living, there is no tax reason to appoint a third party as trustee. If the settlor is an older person, however, the settlor may appoint an adult child to serve as trustee, or to serve as co-trustee with the parent. In this form, the initial trustee is named in the opening paragraph of the trust instrument [*see* [2], P 1.01, *below* ; *see also* § 70.12[7][a]].

### **[l] Successor Trustees**

This form includes a provision for successor trustees [*see* [2], P 6.02, *below* ]. It provides that if the trustee resigns, or is unable or unwilling to act as trustee, the settlor may designate a successor trustee. If the trustee ceases to act as trustee and no successor trustee is designated by the settlor within a specified period of time, then specific persons and entities will succeed to the office of trustee. The provision names those persons and entities and specifies the order in which they will be entitled to succeed. Typically, successor trustees will be other trusted relatives or a professional trustee (bank or individual).

Because the trust contemplates that there will be only one beneficiary, the beneficiary may not also be the sole trustee, or the trust will be extinguished under the doctrine of merger [*see Estate of Washburn (1909) 11 Cal. App. 735, 746, 106 P. 415*]. A sole beneficiary may be named as a co-trustee [*Restatement (Second) of Trusts § 115(2)*]. However, if the beneficiary is a minor or young person whom the settlor believes needs enough asset management protection to merit continuing the trust in the first instance, it would make little sense to name the beneficiary as a successor co-trustee.

### **[m] Removal, Resignation, and Filling Vacancies**

This form includes provisions dealing with removal of the trustee, resignation by the trustee, and filling vacancies in the office of trustee. Paragraph 6.03 gives the settlor unlimited power to remove and replace the trustee, at any time and for any reason. It also gives the court the power to remove the trustee, upon petition by any beneficiary, when the trustee has committed a breach of trust, has become insolvent, or has shown other unfitness to administer the trust.

Paragraph 6.04 prescribes the procedure for the resignation of the trustee. Although it gives the trustee the right to resign at any time without specifying a reason, it requires the trustee to give notice of the resignation a specified time before it is to take effect, and it provides that a resignation will become effective only upon acceptance of the trust by the successor trustee.

Paragraph 6.05 gives the court the power to fill vacancies in the office of the trustee when the vacancy is not filled in some other way. It provides that in selecting a trustee, the court must give consideration to the wishes of any beneficiary who is at least 14 years of age, although the court is not bound by those wishes.

### **[n] Trustee's Bond**

This form includes a provision stating that no bond will be required of any trustee. As discussed in *Section 70.12[7][d]*,

a bond requirement will generate additional expense for the estate, and may cause problems because it may be difficult to procure a bond for an individual trustee. However, circumstances can arise in which it may be desirable to require a bond [see § 70.12[7][d] for discussion]. If the settlor wants to require a bond for individuals who are successor trustees, the provision should be modified accordingly. A bond will never be required of a trust company [Prob. Code §§ 301(a), 15602(e)].

### **[o] Trustee's Powers**

This form includes a detailed list of the trustee's powers [see [2], P 6.07, below]. As discussed in Section 70.12[7][e], trustee powers may either be incorporated by reference or set out in detail in the trust instrument. This publication recommends that a complete set of trustee powers be included in every trust. If the trustee's powers are ever questioned, or if the trustee is ever requested to perform a particular act, a detailed list will make it easier to determine precisely what powers the trustee does and does not have. The detailed list in this form is introduced by general language making it clear that the listed powers are in addition to other powers conferred on trustees by law, and the trustee's powers are to be exercised in furtherance of the purposes of the trust and subject to any limitations stated elsewhere in the trust instrument [see [2], P 6.07, below].

This form also includes general provisions relating to and defining the trustee's powers. For example, Paragraph 6.08 is a general provision stating that the grant to the trustee of a specific power is not to be deemed a limitation on the trustee's general powers, while Paragraph 6.09 permits the trustee to disclaim, release, or restrict the scope of any power or discretion that the trustee holds under the instrument. Paragraph 6.10 gives the trustee discretion to permit income beneficiaries to occupy real property forming a part of the trust estate, and Paragraph 6.11 gives the trustee discretion to terminate a trust when the value of the trust principal has become so low that continued administration of the trust is uneconomical.

## **[2] FORM**

### **Revocable Trust for Unmarried Settlor**

#### DECLARATION OF TRUST

##### ARTICLE 1 : Creation of Trust

1.01. Declaration. \_\_\_\_\_ [identify trustee(s), e.g., Mary E. Smith or North Berkeley National Bank & Trust Co.] (the "trustee [s]") hereby declare[s] that \_\_\_\_\_ [he has or she has or it has or they have] received certain property (the "trust estate") from \_\_\_\_\_ [identify settlor, e.g., Mary E. Smith, of Berkeley, California] (the "settlor"), and hold [s] that property in trust, to be held, administered, and distributed according to the terms of this instrument.

1.02. Name of Trust. The name of the trust created by this instrument shall be \_\_\_\_\_ [name of trust, e.g., The Mary E. Smith 1995 Trust].

1.03. Effective Date. This declaration shall be effective \_\_\_\_\_ [on the date it is executed by the parties or immediately upon execution by all the parties or specify other effective date].

1.04. Marital Status. The settlor \_\_\_\_\_ [has never been or is not currently] married.

[If settlor is widow or widower, add:]

The settlor was previously married to \_\_\_\_\_ [*name of deceased spouse, e.g., Melvin D. Smith*], who died \_\_\_\_\_ [*year or date, e.g., in 1990 or on or about August 1, 1990*].

[*Or, if settlor's marriage was dissolved or annulled, add:*]

The settlor was previously married to \_\_\_\_\_ [*name of previous spouse, e.g., Melvin D. Smith*], but that marriage was \_\_\_\_\_ [*dissolved or annulled*] [*if desired, add details, e.g., by the Superior Court of the State of California for the County of Alameda*] \_\_\_\_\_ [*year or date, e.g., in 1990 or on or about July 1, 1990*].

1.05. Children. The settlor has \_\_\_\_\_ [*never had any children or no living children or*]  
\_\_\_\_\_ (*number*) living \_\_\_\_\_ (*child or children*), whose name(s) and date(s) of  
birth \_\_\_\_\_ (*is or are*) as follows:

Name	Date of Birth
<i>e.g., Barney F. Smith</i>	<i>e.g., June 3, 1966</i>

[*If settlor had children who are now deceased, add:*]

The settlor has \_\_\_\_\_ [*number, e.g., one or two*] child[ren] who \_\_\_\_\_ [*is or are*] now  
deceased: \_\_\_\_\_ [*name(s) and date(s) of death, e.g., Clyde A. Smith, who died on or about May 1,  
1985*].

[*If settlor has living grandchild(ren), add if desired:*]

1.06. Grandchildren. The settlor has \_\_\_\_\_ [*number, e.g., one or two*] grandchild[ren] who  
\_\_\_\_\_ [*is or are*] now living:

Name	Date of Birth
<i>e.g., Petunia S. Smith,</i>	<i>e.g., January 23, 1987</i>

## ARTICLE 2 : Trust Estate

2.01. Definition of Trust Estate. All of the property described in Schedule A, attached to this instrument, and any other property that may hereafter be subject to this trust, is referred to in this instrument as the "trust estate," and shall be held, administered, and distributed as provided in this instrument.

2.02. Additions to Trust. From time to time, the trustee may accept additions to this trust from any source. Any additions to the trust shall be made by designating in writing the property to be added, or by titling any account, deed, or similar asset in the name of the trustee, as trustee of this trust, or any alternate or successor trustee acting under this instrument. During any time that the settlor is not also serving as trustee or cotrustee of this trust, any transfer of property to the trust under this paragraph shall be effective only upon written acceptance by the trustee. Any designation by a third party, whether by will, deed, account title designation, or similar transfer, shall also be a transfer to the trust estate upon written acceptance by the trustee. Any property added to the trust estate shall be held, administered, and distributed in accordance with the terms of this instrument.

## ARTICLE 3 : Rights and Powers of Settlor

3.01. Revocation and Amendment. This trust may be revoked, amended, or terminated at any time and for any reason by a writing signed by the settlor and delivered to the trustee in person or by certified mail.

\_\_\_\_\_ [Promptly upon *or* Within \_\_\_\_\_ days after] receipt of any instrument revoking or terminating the trust, the trustee shall deliver any and all property affected by the revocation or termination to the settlor, or to a person or persons designated in that writing to receive that property. Upon the death of the settlor, this trust shall be irrevocable and not subject to amendment.

3.02. Investments. The settlor shall have the power from time to time to direct the trustee to do any or all of the following:

- (a) Invest trust funds in specified securities, properties, or other forms of investment;
- (b) Retain specified securities, properties, or other forms of investment held in trust under this instrument; and
- (c) Sell, encumber, lease, abandon, or dispose of any trust property.

All such directions shall be in writing, signed by the settlor, and delivered to the trustee in person or by certified mail. If a direction is to remain in effect for a specified period of time only, or to be subject to any condition or conditions, the writing must specify the period of time and the condition or conditions. If trust property is invested in accordance with any direction given as specified in this paragraph, the trustee shall not be liable for losses sustained as a direct or indirect result of the trustee's compliance with the direction. After the settlor's death, no person shall have the power to direct the trustee to invest trust property.

3.03. Borrowing. While the settlor is living, the settlor shall have the power to borrow money from the trust estate in such amounts and on such terms as the settlor may specify in a writing or writings delivered to the trustee in person or by certified mail. The settlor's power to borrow money as provided in this paragraph shall extend to both the income and the principal of the trust estate.

3.04. Exercise of Settlor's Rights and Powers by Others. Notwithstanding any other provision of this instrument, any right or power that the settlor could exercise personally under the terms of this instrument, \_\_\_\_\_ [except *or* including] the power to amend, revoke, or terminate \_\_\_\_\_ [this trust *or* any trust created by this instrument], may be exercised for and on behalf of the settlor by any attorney in fact who, at the time of the exercise, is duly appointed and acting for the settlor under a valid and enforceable durable power of attorney executed by the settlor under the Uniform Durable Power of Attorney Act, or any successor statute; or, if there is no such attorney in fact, by a duly appointed and acting conservator of the settlor, after petition to the court in accordance with *California Probate Code Section 2580*, or any successor statute [*add optional clause to limit authority to amend or revoke, e.g.:*; provided, however, that the power to amend, revoke, or terminate \_\_\_\_\_ (this trust *or* any trust created by this instrument), in whole or in part, may be exercised by an attorney in fact or conservator only if distribution of the settlor's estate during the settlor's lifetime is not substantially altered by the amendment, revocation, or termination, and the amendment, revocation, or termination does not result in any adverse tax consequences to the settlor's estate].

#### ARTICLE 4 : Payments and Distributions During Settlor's Lifetime

4.01. Payments of Income. So long as the settlor is living, the trustee shall pay to or apply for the benefit of the settlor \_\_\_\_\_ [all of the net income of the trust *or* as much of the net income of the trust as the settlor shall from time to time request of the trustee in writing]. [*If trustee is to pay all income:* Payments shall be made in monthly or other convenient installments, but not less often than annually. *Or if settlor is to have right to request payments:* A request made pursuant to this paragraph may specify that the payments are to be made periodically.]

4.02. Distributions of Principal. So long as the settlor is living, the trustee shall distribute to or apply for the benefit of the settlor as much of the principal of the trust as \_\_\_\_\_ [the settlor shall from time to time request of the trustee in writing *or* the trustee, in the trustee's discretion, deems necessary or appropriate for the settlor's comfort, welfare, and happiness]. [*If settlor is to have right to request distributions, add: A request made pursuant to this paragraph may specify that distributions are to be made periodically.*]

4.03. Requests on Settlor's Behalf. If, at any time, the settlor is unable personally to make a request of the trustee, the settlor's right to make the request may be exercised for or on behalf of the settlor by an attorney in fact who, at the time of the exercise, is duly appointed and acting for the settlor under a valid and enforceable durable power of attorney executed by the settlor under the Uniform Durable Power of Attorney Act, or any successor statute; or, if there is no such attorney in fact, by the trustee acting for and on behalf of the settlor. The trustee shall have discretion to determine when the settlor is unable personally to make a request for purposes of this paragraph.

4.04. Trustee's Power to Make Gifts at Direction of Settlor. During the settlor's lifetime, the trustee shall distribute such sums of trust principal to any person or persons who are the natural objects of the settlor's bounty as the settlor may direct in writing. In the event that the settlor is unable to direct the trustee in writing under this Paragraph due to incapacity, such a direction may be made on the settlor's behalf by a duly authorized attorney in fact acting under a valid durable power of attorney executed by the settlor under the Uniform Durable Power of Attorney Act (or successor statute) [*optional*]; so long as the durable power of attorney so executed by the settlor specifically authorizes the attorney in fact to exercise a withdrawal or gifting power through enforceable demands on the trustee]; provided, however, that the amount of gifts pursuant to the direction of an attorney in fact to any one person in any one year shall not exceed the annual amount excluded from gift tax under *Internal Revenue Code Section 2503(b)* (or a successor statute).

#### ARTICLE 5 : Payments and Distributions After Settlor's Death

5.01. Special Gift. Upon the settlor's death, the trustee shall distribute the sum of \$\_\_\_\_\_ to \_\_\_\_\_ [*name of beneficiary, e.g., Linda S. Harris*] [*if desired, add survivorship clause, e.g., if she survives the settlor (for 60 days)*]. [*If distribution is conditioned on survival, add alternative disposition, e.g.: If \_\_\_\_\_ Linda W. Harris does not survive the settlor (for 60 days), this gift shall \_\_\_\_\_ (e.g., lapse or be distributed to Patricia J. Harris).*]

5.02. Payment of Death Taxes. All death taxes payable by reason of the settlor's death [*to include taxes on assets passing outside trust, add*]; whether attributable to assets of this trust or to assets outside the trust,] shall be \_\_\_\_\_ [paid by the trustee out of the trust estate *or* equitably prorated and apportioned among the persons interested in the settlor's estate as provided in the California Probate Code].

5.03. Payment of Debts and Expenses. All debts and expenses of the settlor and the trust may, in the trustee's discretion, be \_\_\_\_\_ [paid by the trustee out of the trust estate *or* equitably prorated and apportioned among the persons interested in the settlor's estate in the same manner as the death taxes].

5.04. Disposition of Trust Upon Death of Settlor. Upon the death of the settlor, the trustee shall hold, administer, and distribute the assets of the trust as follows:

(a) The trustee shall pay to or apply for the benefit of \_\_\_\_\_ [*name of beneficiary, e.g., Petunia S. Smith*] all of the net income of the trust, in monthly or other convenient installments [as agreed upon by \_\_\_\_\_ (*e.g., Petunia S. Smith*) and the trustee], but not less often than annually, until \_\_\_\_\_ [he *or* she] reaches the age of \_\_\_\_\_ [*e.g., 30*] years.

(b) The trustee shall distribute to or apply for the benefit of \_\_\_\_\_ [*name of beneficiary; e.g., Petunia*

S. Smith], until \_\_\_\_\_ [he or she] reaches the age of \_\_\_\_\_ [e.g., 30] years, as much of the principal of the trust as the trustee, in the trustee's discretion, deems necessary, when added to the income payments from this trust, for \_\_\_\_\_ [his or her] \_\_\_\_\_ [to specify an "ascertainable standard": health, education, support, and maintenance or to specify a broader standard: comfort, welfare, and happiness]. All decisions of the trustee regarding payments under this subparagraph, if any, are within the trustee's discretion and shall be final and incontestable by anyone.

(c) When \_\_\_\_\_ [name, e.g., Petunia S. Smith] reaches the age of \_\_\_\_\_ [e.g., 21] years, the trustee shall distribute to \_\_\_\_\_ [him or her] outright an amount from the trust principal equal to \_\_\_\_\_ [fraction or percentage, e.g., one-third or thirty-three and one-third percent] of the fair market value of the principal of the trust, determined as of the first day of the calendar month preceding the month in which the distribution is made. If \_\_\_\_\_ [name, e.g., Petunia S. Smith] reaches the age of \_\_\_\_\_ [e.g., 21] years before the settlor's death, then upon the settlor's death the trustee shall distribute to \_\_\_\_\_ [him or her] outright an amount from the trust principal equal to \_\_\_\_\_ [fraction or percentage, e.g., one-third or thirty-three and one-third percent] of the fair market value of the principal of the trust, and the balance shall be retained in trust pursuant to the applicable provisions of this paragraph.

(d) When \_\_\_\_\_ [name, e.g., Petunia S. Smith] reaches the age of \_\_\_\_\_ [e.g., 25] years, the trustee shall distribute to \_\_\_\_\_ [him or her] outright an amount from the trust principal equal to \_\_\_\_\_ [fraction or percentage, e.g., one-half or fifty percent] of the fair market value of the remaining principal of the trust, determined as of the first day of the calendar month preceding the month in which the distribution is made. If \_\_\_\_\_ [name, e.g., Petunia S. Smith] reaches the age of \_\_\_\_\_ [e.g., 25] years before the settlor's death, then upon the settlor's death the trustee shall distribute to \_\_\_\_\_ [him or her] outright an amount from the trust principal equal to \_\_\_\_\_ [fraction or percentage, e.g., two-thirds or sixty-six and two-thirds percent] of the fair market value of the principal of the trust, and the balance shall be retained in trust pursuant to the applicable provisions of this paragraph.

(e) When \_\_\_\_\_ [name, e.g., Petunia S. Smith] reaches the age of \_\_\_\_\_ [e.g., 30] years, the trustee shall distribute to \_\_\_\_\_ [him or her] outright the balance of the trust property. If \_\_\_\_\_ [name, e.g., Petunia S. Smith] reaches the age of \_\_\_\_\_ [e.g., 30] years before the settlor's death, then upon the settlor's death the trustee shall distribute all of the trust principal to \_\_\_\_\_ [him or her] outright.

(f) If \_\_\_\_\_ [e.g., Petunia S. Smith] dies before the trust property has been fully distributed as provided in this paragraph, this trust shall terminate and the trustee shall distribute any undistributed balance of the trust property outright to \_\_\_\_\_ [e.g., the issue of Petunia S. Smith or specify other beneficiaries] [if beneficiaries are members of a class, specify pattern of distribution, e.g.: in the manner provided in California Probate Code section \_\_\_\_\_ (specify either 240, 246, or 247) or in equal shares, regardless of whether or not all such issue are members of the same generation]. If \_\_\_\_\_ [e.g., none of the issue of Petunia S. Smith] survive at the time of distribution, any remaining trust property shall be distributed outright to \_\_\_\_\_ [alternative disposition, e.g., the heirs of the settlor].

5.05. Consideration of Other Resources. In making any \_\_\_\_\_ [distributions of principal or payments of income or payments of income or distributions of principal] from this trust for \_\_\_\_\_ [specify standard of discretion as set forth in provision authorizing the discretionary distribution, e.g., the health, education, support, and maintenance or care and comfort] of \_\_\_\_\_ [e.g., Petunia S. Smith], the trustee shall take into consideration, to the extent the trustee deems advisable, any other income or resources available to \_\_\_\_\_ [him or her] that are known to the trustee and that are reasonably available for that purpose.

5.06. Undistributed Payments and Distributions. Upon termination of any beneficiary's right to receive income payments or principal distributions as provided in this instrument, all payments and distributions that are accrued but undistributed by the trustee at the date of the termination shall be distributed to the beneficiary next entitled to the successive interest under the terms of this instrument.

5.07. Determinations of Principal and Income. Except as otherwise specifically provided in this instrument, the trustee shall determine all questions as to what is principal and what is income of the trust estate, and all questions respecting the apportionment and allocation of receipts and expenditures between principal and income accounts, in accordance with the California Revised Uniform Principal and Income Act as that Act exists at the time the determination is made. However, the trustee shall have discretion to determine any such matter for which there is no provision in the California Revised Uniform Principal and Income Act or in this instrument.

5.08. Administration of Generation-Skipping Trusts. The provisions of this paragraph apply to any trust under this instrument that is created on or at any time after the settlor's death and in which there is property that is or may become subject to the federal generation-skipping transfer tax:

(a) Upon written notification by the settlor's executor that the executor intends to allocate any part of the generation-skipping transfer tax exemption that is available to the settlor under *Internal Revenue Code Section 2631(a)* to some but not all of the property in any trust to which this paragraph applies, the trustee \_\_\_\_\_ [shall *or may*, in the trustee's discretion,] divide that trust into two separate trusts, to be designated as the Exempt Trust and the Non-Exempt Trust. [*If trustee has discretionary power to divide trusts: If the trustee elects to divide a trust in the manner provided in this Paragraph, the or, if division of trusts is mandatory rather than discretionary: The*] Exempt Trust shall contain the share of the property of that trust equal in value to the amount of the generation-skipping transfer tax exemption that the executor intends to allocate to the trust. The Non-Exempt Trust shall contain the balance of the property of that trust. It is the settlor's intention that the executor then actually allocate the generation-skipping transfer tax exemption to the Exempt Trust and not to the Non-Exempt Trust, so that the Exempt Trust shall have an inclusion ratio of zero for federal generation-skipping transfer tax purposes and the Non-Exempt Trust shall have an inclusion ratio of one for federal generation-skipping transfer tax purposes. The Trustee shall not be liable for relying on the written instructions of the executor when acting in accordance with this subparagraph.

(b) In allocating assets between the Exempt Trust and Non-Exempt Trust for purposes of this Paragraph, the trustee shall \_\_\_\_\_ [*for a pecuniary allocation: allocate the trust assets between the Exempt Trust and Non-Exempt Trust in cash or in kind, or partly in each, on a pro rata or non pro rata basis, and in undivided interests or not or, for a fractional allocation: allocate to each trust a fractional share of each and every substantial interest or right held by the trust being divided*]. [*If preceding sentence provides for a pecuniary allocation, add: If the allocation is not made within 15 months from the date of the settlor's death, the trustee shall pay interest, at the legal rate, from the date of the settlor's death to the date of distribution. For purposes of allocation under this Paragraph, assets shall be valued at their values \_\_\_\_\_ (to use date of distribution values: on the date or dates of distribution or, to use valuation for estate tax purposes: as finally determined for federal estate tax purposes; provided that any assets allocated in kind shall be allocated between the Exempt Trust and the Non-Exempt Trust in a manner that fairly reflects net appreciation or depreciation in the value of the assets in the trust being divided, measured from the date of the settlor's death to the date of payment).*]

(c) Regardless of whether or not subparagraph (a) applies, if the amount of the settlor's generation-skipping transfer tax exemption actually allocated by the executor (or automatically allocated under *Internal Revenue Code Section 2632*) to a trust to which this paragraph applies is equal to the value of the property of that trust so that the entire trust has an inclusion ratio of zero for federal generation-skipping transfer tax purposes, the entire trust shall be referred to as the Exempt Trust. On the other hand, if no part of the settlor's generation-skipping transfer tax exemption is actually allocated to the trust by the executor (or automatically allocated under *Internal Revenue Code Section 2632*) so that the

entire trust has an inclusion ratio of one for federal generation-skipping transfer tax purposes (or if the settlor is not the transferor of that trust for generation-skipping transfer tax purposes), the entire trust shall be referred to as the Non-Exempt Trust.

(d) The trustee may, but is not required to, administer the trusts under this instrument to which this paragraph applies in such a manner that distributions made during the trust terms to "skip persons" (as defined in *Internal Revenue Code* § 2613(a) or any equivalent successor statute) are made from Exempt Trusts, and distributions made during the trust terms to "non-skip persons" (as defined in *Internal Revenue Code* § 2613(b) or any equivalent successor statute) are made from Non-Exempt trusts.

(e) The purpose of this paragraph is to allow the trustee to administer the trusts so as to decrease the amount of generation-skipping transfer taxes owed on generation-skipping transfers from the trusts. The trustee shall balance that consideration against any other tax and nontax considerations, and may disregard the generation-skipping transfer tax consequences to the extent that the trustee determines that doing so will allow the trustee to carry out the settlor's intentions in creating the trusts. All decisions of the trustee under this subparagraph are within the trustee's discretion and shall be final and incontestable by anyone.

(f) If, in the trustee's judgment, at any time after the execution of this trust instrument any statute, regulation, court decision, or administrative ruling imposes different or additional requirements on the trust in connection with the generation-skipping transfer tax, the trustee may petition the court to amend the terms of the trust to meet those requirements and achieve the purpose of this Paragraph.

#### ARTICLE 6 : Trustee

6.01. Definition. Unless the context requires otherwise, all references in this instrument to "the trustee" shall be deemed to refer to whoever is serving as trustee or co-trustees, and shall include alternate or successor trustees or co-trustees.

6.02. Successor Trustees. If, for any reason, the trustee fails or ceases to act as trustee, the settlor shall have the power to designate any suitable entity or person to act as successor trustee. The successor trustee shall be designated by a signed writing delivered to the person or entity designated as successor. If the trustee ceases to act as trustee and no successor trustee is designated by the settlor within \_\_\_\_\_ [e.g., 14 days] after the vacancy occurs, the following persons, in the order of priority indicated, shall be successor trustee:

First, \_\_\_\_\_ [name and place of residence or business, e.g., Maxwell J. Smith, of San Francisco, California];

Second, \_\_\_\_\_ [name and place of residence or business, e.g., Fritz P. Garcia, of Hillsborough, California];

Third, \_\_\_\_\_ [name and place of residence or business, e.g., North Berkeley National Bank & Trust Co., Berkeley, California].

6.03. Removal and Replacement. (a) Notwithstanding any other provision of this instrument, the settlor shall have the power, at any time and for any reason, with or without cause, to remove any trustee acting under this instrument and appoint another trustee to replace the removed trustee. Removal shall be effected by giving a written notice of removal to the trustee to be removed and to the person or entity legally entitled to act as successor trustee. The removal shall become effective upon delivery to the settlor of a written acceptance of the trust by the successor trustee, and the settlor shall promptly notify the trustee being removed of the receipt of that acceptance.

(b) The court shall have the power to remove the trustee upon petition by any beneficiary, for any of the following

reasons:

- (1) Commission of a breach of trust.
- (2) Insolvency or other unfitness to administer the trust.
- (3) Hostility or lack of cooperation among the co-trustees that impairs the administration of the trust.
- (4) Failure or refusal to act.
- (5) Other good cause, as determined by the court.

6.04. Resignation. Any trustee may resign at any time, without giving a reason for the resignation, by giving written notice, at least \_\_\_\_\_ [specify; e.g., 30 days] before the time the resignation is to take effect, to the settlor, if living, to any other trustee then acting, to any persons authorized to designate a successor trustee, to all living trust beneficiaries known to the trustee (or, in the case of a minor beneficiary, to the parent or guardian of that beneficiary), and to the successor trustee, if a successor has been designated in accordance with the provisions of this instrument. A resignation shall be effective upon written acceptance of the trust by a successor trustee.

6.05. Vacancies. If a vacancy should occur in the office of the trustee, whether by reason of death, resignation, removal, or other cause, and no successor trustee is appointed as provided in this instrument, the court shall appoint a new trustee to fill the vacancy. In filling a vacancy, the court may, in its discretion, appoint the original or any other number of trustees. In selecting a trustee, the court shall give consideration to the wishes of the beneficiaries who are 14 years of age or older.

6.06. Bond. No bond or undertaking shall be required of any individual who serves as a trustee under this instrument [optional; except any successor trustee appointed by court order under Paragraph 6.05 of this instrument].

6.07. Powers. To carry out the purposes of the trust created under this instrument, and subject to any limitations stated elsewhere in this instrument, the trustee shall, in addition to all of the powers now or hereafter conferred on trustees by law, have the power to do all of the following:

(a) Retain property received into the trust at its inception, or later added to the trust, as long as the trustee considers that retention is in the best interests of the trust or in furtherance of the goals of the settlor in creating the trust, as determined from this trust instrument, but subject to the standards set forth in *California Probate Code Section 16040* and the Uniform Prudent Investor Act.

(b) Invest and manage trust assets as a prudent investor would, by considering the purposes, terms, distribution requirements, and other circumstances of the trust. In satisfying this standard, the trustee shall exercise reasonable care, skill, and caution. The trustee's investment and management decisions respecting individual assets and courses of action must be evaluated not in isolation, but in the context of the trust portfolio as a whole, and as a part of an overall investment strategy having risk and return objectives reasonably suited to the trust. Among the circumstances that are appropriate to consider in investing and managing trust assets are the following, to the extent relevant to the trust or its beneficiaries:

- (1) General economic conditions.
- (2) The possible effect of inflation or deflation.

- (3) The expected tax consequences of investment decisions or strategies.
- (4) The role that each investment or course of action plans within the overall trust portfolio.
- (5) The expected total return from income and the appreciation of capital.
- (6) Other resources of the beneficiaries known to the trustee as determined from information provided by them.
- (7) Needs for liquidity, regularity of income, and preservation or appreciation of capital.
- (8) An asset's special relationship or special value, if any, to the purposes of the trust or to one or more of the beneficiaries.

The trustee may invest in any kind of property of type of investment or engage in any course of action or investment strategy consistent with the standards set forth in this provision or the Uniform Prudent Investor Act, as set forth in *California Probate Code Sections 16045-16054* or any successor sections.

- (c) In the trustee's discretion, invest or reinvest in mutual funds, money market funds, investment trusts, regulated investment companies, market funds, and index funds, and in the shares or securities of any such funds or companies, that persons of prudence, discretion, and intelligence acquire for their own account.
- (d) Acquire and maintain as a trust asset a life insurance policy on the life of any person, including the trustee, issued by any company and in any amount that the trustee may deem advisable, and exercise all rights of ownership granted in that policy.
- (e) With or without court authorization, sell (for cash or on deferred payments, and with or without security), convey, exchange, partition, and divide trust property; grant options for the sale or exchange of trust property for any purpose, whether the contract is to be performed or the option is to be exercised within or beyond the term of the trust; and lease trust property for any purpose, for terms within or extending beyond the expiration of the trust, regardless of whether the leased property is commercial or residential and regardless of the number of units leased.
- (f) Engage in any transactions with the personal representative of the estate of the settlor that are in the best interest of any trusts created in this instrument.
- (g) Manage, control, improve, and maintain all real and personal trust property.
- (h) Subdivide or develop land; make or obtain the vacation of plats and adjust boundaries, or adjust differences in valuation on exchange or partition by giving or receiving consideration; and dedicate land or easements to public use with or without consideration.
- (i) Make ordinary or extraordinary repairs or alterations in buildings or other trust property, demolish any improvements, raze existing party walls or buildings, and erect new party walls or buildings, as the trustee deems advisable.
- (j) Enter into oil, gas, and other mineral leases, on terms deemed advisable by the trustee; enter into any pooling, unitization, repressurization, community, or other types of agreements relating to the exploration, development, operation, and conservation of mineral properties; drill, mine, and otherwise operate for the development of oil, gas, and other minerals; contract for the installation and operation of absorption and repressuring plants; and install and maintain

pipelines. Any such leases or agreements may be for a term within or extending beyond the term of the trust.

(k) In the trustee's discretion, abandon any [*optional*: unproductive or wasted] trust asset or interest therein.

(l) Employ and discharge agents and employees, including but not limited to attorneys, accountants, investment and other advisers, custodians of assets, property managers, real estate agents and brokers, and appraisers, to advise and assist the trustees in the management of any trusts created under this trust instrument, and compensate them from the trust property. [*Optional*: The agents and employees may be associated or affiliated with the trustee, or may be descendants or other persons related to the trustee or to the settlor, or a company associated with any such persons.] [*Optional*: The trustee is entitled to rely on the advice of any professional adviser employed under this provision. Reasonable compensation paid to any such agents or employees shall not diminish the compensation to which the trustee is otherwise entitled.]

(m) With respect to securities held in trust, exercise all the rights, powers, and privileges of an owner, including, but not limited to, the power to vote, give proxies, and pay assessments and other sums deemed by the trustee necessary for the protection of the trust property; participate in voting trusts, pooling agreements, foreclosures, reorganizations, consolidations, mergers, and liquidations and, in that connection, deposit securities with and transfer title to any protective or other committee under such terms as the trustee deems advisable; exercise or sell stock subscription or conversion rights; and accept and retain as investments of the trust any securities or other property received through the exercise of any of the foregoing powers.

(n) Hold securities or other trust property in the trustee's own name or in the name of a nominee, without disclosure of the trust, or in unregistered form, so that title may pass by delivery.

(o) Deposit securities in a securities depository that is either licensed or exempt from licensing.

(p) Borrow money for any trust purpose from any person or entity, on such terms and conditions as the trustee deems advisable, and obligate the trust for repayment; encumber any trust property by mortgage, deed of trust, pledge, or otherwise, whether for terms within or extending beyond the term of the trust, as the trustee deems advisable, to secure repayment of any such loan; replace, renew, and extend any such loan or encumbrance; and pay loans or other obligations of the trust deemed advisable by the trustee.

(q) Procure and carry, at the expense of the trust, insurance in such forms and in such amounts as the trustee deems advisable to protect the trust property against damage or loss, and to protect the trustee against liability with respect to third persons.

(r) Enforce any obligation owing to the trust, including any obligation secured by a deed of trust, mortgage, or pledge held as trust property, and to purchase any property subject to a security instrument held as trust property at any sale under that instrument.

(s) Extend the time for payment of any note or other obligation held as an asset of, and owing to, the trust, including accrued or future interest, and extend the time for repayment beyond the term of the trust.

(t) Pay or contest any claim against the trust; release or prosecute any claim in favor of the trust; or, in lieu of payment, contest, release, or prosecution, adjust, compromise, or settle any such claim, in whole or in part, and with or without consideration.

(u) At trust expense, prosecute or defend actions, claims, or proceedings of whatever kind for the protection of the trust property and of the trustee in the performance of the trustee's duties, and employ and compensate attorneys, advisers, and other agents as the trustee deems advisable.

6.08. Grant of Specific Powers Not to Limit General Powers. The grant to the trustee of a specific power or powers in this instrument shall not limit the trustee from exercising any other power that may be necessary or appropriate for the trustee to exercise in furtherance of the purposes of this instrument or to permit the trustee to fulfill the trustee's responsibilities and duties with respect to the trust.

6.09. Disclaimer or Release of Powers. The trustee may disclaim, release, or restrict the scope of any power or discretion that the trustee may hold under this instrument, whether expressly granted in this instrument or implied by law. The trustee shall disclaim a power in the manner required by applicable federal or California law. The trustee shall release or restrict any power or discretion by giving written notice to the beneficiary or beneficiaries then entitled to current income payments, specifying the power or discretion to be released or restricted, the nature of the restriction, and, if appropriate, the person or persons to whom the released or restricted power shall pass and be exercisable. If a power is disclaimed, the power shall be available to and exercisable by the successor trustee.

6.10. Discretion to Permit Income Beneficiaries to Occupy Real Property. The trustee may permit any current income beneficiary of this trust to occupy any real property that forms a part of the trust. The terms of the occupancy shall be determined by the trustee, in the trustee's discretion, and may include, but are not limited to, rent-free occupancy or occupancy in consideration of full or partial payment of mortgage or trust deed payments, taxes, assessments, insurance, maintenance, and ordinary repairs.

6.11. Early Termination of Trusts. The trustee shall have the power, in the trustee's discretion, to terminate any trust created under this trust instrument whenever the fair market value of the trust falls below \_\_\_\_\_ [*specify amount, e.g.: \$25,000*], or becomes so small in relation to the costs of administration as to make continuing administration uneconomical. Upon termination, the trustee shall distribute the principal and any accrued or undistributed net income to the income beneficiaries in proportion to their shares of the income. If no fixed amount of income is payable to specific beneficiaries, the trustee shall distribute the principal and any accrued or undistributed net income in equal shares to those beneficiaries who would then be entitled to income payments from the trust.

6.12. Division or Distribution in Cash or in Kind. In order to satisfy a pecuniary gift or to distribute or divide trust assets into shares or partial shares, the trustee may distribute or divide those assets in kind, or divide undivided interests in those assets, or sell all or any part of those assets and distribute or divide the property in cash, in kind, or partly in cash and partly in kind. Property distributed to satisfy a pecuniary gift under this trust instrument shall be valued at its fair market value at the time of distribution.

6.13. Payments and Distributions to or for Benefit of Beneficiaries. In lieu of making a direct payment or distribution to any beneficiary who at the time of the payment or distribution is a minor or suffering from a legal disability, or who appears to the trustee by reason of illness, age, injury, or other cause, to be unable to accept the payment or distribution or to make intelligent or responsible use of the same, the trustee may make the payment or distribution to any conservator or guardian duly appointed and acting for and on behalf of the beneficiary; to any custodian acting for and on behalf of the beneficiary under the Uniform Gifts to Minors Acts or Uniform Transfers to Minors Act of any state (including a suitable custodian selected by the trustee); to any suitable person or persons, such as a relative or friend, with whom the beneficiary is residing; to any other person, firm, or agency for services rendered or to be rendered for the beneficiary's assistance or benefit; or to accounts in the beneficiary's name with financial institutions. The receipt of payments by any of the foregoing shall constitute a sufficient acquittance of the trustee for all purposes.

6.14. Written Notice to Trustee. Until the trustee receives written notice of any death or other event upon which the right to payments from any trust may depend, the trustee shall incur no liability for disbursements made in good faith to persons whose interests may have been affected by that event.

6.15. Duty to Account. The trustee shall render accounts at least annually, at the termination of a trust, and upon a change of trustees, to the persons and in the manner required by law.

#### **PRACTICE TIP**

*Probate Code Section 16062* requires the trustee of any trust to provide an annual account to the beneficiaries, except under limited circumstances, such as when the trust may be revoked, when the beneficiary waives an accounting, or when the trustee and the beneficiary are the same person [*see Prob. Code § 16064*]. The contents of the annual account are described in *Probate Code Section 16063*. Generally, the accounting must reveal all of the information required in a formal accounting, although it may be presented in summary form. Additionally, information must be provided regarding trustee, attorney, and accountant compensation, and statements regarding the rights of the beneficiary to challenge the actions of the trustee must be included [*see Prob. Code § 16063*].

In light of these provisions, the planner may wish to consider omitting the requirement that an accounting be provided. This provision would only add the burden of preparing a full, formal accounting, which can always be required by the beneficiary in any case when he or she feels that more detail must be revealed by the trustee [*see Prob. Code §§ 16061, 16062(a)*]. Indeed, many attorneys specifically waive the requirement that any accounting whatsoever be rendered by the trustee. Even with such a waiver in the trust instrument, a beneficiary could still obtain an accounting if it appears that a material breach of the trust has occurred [*see Prob. Code § 16064*]. *Commentary by Albert G. Handelman*.

#### **ARTICLE 7 : Concluding Provisions**

7.01. Perpetuities Savings Clause. Notwithstanding any other provision of this instrument, any trust created by this instrument or by a power of appointment created by this instrument that has not terminated earlier shall terminate no later than 21 years after the death of the last survivor of \_\_\_\_\_ [*name individual(s) or describe class of persons whose life or lives are to be the measuring life or lives, e.g.: the settlor and the issue of the settlor living on the date of the settlor's death or the beneficiaries of the trust who are living on the date of the settlor's death*]. If a trust is terminated because of the preceding sentence, the trustee shall distribute the principal and undistributed income of the trust to the income beneficiaries of the trust in the same proportion that they are entitled to receive income immediately before the termination. If that proportion is not fixed by the terms of this instrument, distribution shall be to the persons entitled to receive income immediately before the termination \_\_\_\_\_ [*specify distribution plan, e.g., in the manner provided in California Probate Code Section 240*]. If there is no person who is entitled to receive income immediately before the termination, the trustee shall distribute the principal and undistributed income to \_\_\_\_\_ [*name distributee(s) or specify class, e.g., the issue of the settlor then surviving in the manner provided in California Probate Code Section 240*].

7.02. Simultaneous Death. If the settlor and any beneficiary under this instrument die under circumstances in which the order of their deaths cannot be established by clear and convincing evidence, the settlor shall be deemed to have survived the beneficiary, and this instrument shall be construed accordingly.

7.03. No-Contest Clause. If any beneficiary under this instrument, singularly or in combination with any other person or persons, directly or indirectly contests this instrument or the will of the settlor, in whole or in part, or opposes, objects to, or seeks to invalidate any of the provisions of this instrument or of the will of the settlor, or seeks to succeed to any part of the estate of the settlor other than in the manner specified in this instrument or in the will of the settlor, then the right of that person to take any interest given to him or her by this instrument shall be void, and any gift or other interest in the trust property to which the beneficiary would otherwise have been entitled shall pass as if he or she had predeceased the settlor [*optional: without issue*].

7.04. Definition of Death Taxes. As used in this instrument, the term "death taxes" means all inheritance, estate, succession, and other similar taxes that are payable by any person on account of that person's interest in the decedent's estate or by reason of the decedent's death, including penalties and interest, but excluding the following:

- (a) Any additional tax that may be assessed under *Internal Revenue Code Section 2032A*.
- (b) Any federal estate taxes recoverable, pursuant to *Internal Revenue Code Section 2207A*, from the holder or recipient of any qualified terminable interest property that is included in the settlor's federal gross estate under *Internal Revenue Code Section 2044*.
- (c) Any federal or state tax imposed on a generation-skipping transfer, as that term is defined in the federal tax laws, unless that generation-skipping transfer tax is payable directly out of the assets of a trust created by this instrument.

7.05. Definition of Debts and Expenses. As used in this instrument, the term "debts and expenses" shall include the following:

- (a) All costs, expenses of litigation, counsel fees, or other charges that the trustee incurs in connection with the determination of the amount of the death taxes, interest, or penalties referred to in Paragraph 5.02 of this instrument, and
- (b) legally enforceable debts, funeral expenses, expenses of last illness, and administration and property expenses.

7.06. Definition of Child and Children. As used in this instrument, the words "child" and "children" refer to natural children and to children who have been legally adopted by the parent or parents from or through whom their right to inherit or to take is determined and derived.

7.07. Definition of Issue. As used in this instrument, the word "issue" refers to all lineal descendants of all generations, with the relationship of parent and child at each generation being determined by the definitions of "child" and "children" set forth in this instrument.

7.08. Definition of Education. As used in this instrument, the term "education" refers to the following:

- (a) Education at public or private elementary, junior high, middle, or high schools, including boarding schools;
- (b) Undergraduate, graduate, and postgraduate study in any field, whether or not of a professional character, in colleges, universities, or other institutions of higher learning;
- (c) Specialized formal or informal training in music, the stage, the handicrafts, or the arts, whether by private instruction or otherwise; and
- (d) Formal or informal vocational or technical training, whether through programs or institutions devoted solely to vocational or technical training, or otherwise.

7.09. Number and Gender. As used in this instrument, references in the masculine gender shall be deemed to include the feminine and neuter gender, and vice versa, and references to the singular shall be deemed to include the plural, and vice versa, wherever the context so permits.

7.10. Captions. The captions appearing in this instrument are for convenience of reference only, and shall be disregarded in determining the meaning and effect of the provisions of this instrument.

7.11. Severability Clause. If any provision of this instrument is invalid, that provision shall be disregarded, and the remainder of this instrument shall be construed as if the invalid provision had not been included.

7.12. California Law to Apply. All questions concerning the validity, interpretation, and administration of this instrument, including any trusts created under this instrument, shall be governed by the laws of the State of California, regardless of the domicile of any trustee or beneficiary.

7.13. Gifts to "Heirs." For any gift to heirs of the settlor that is made in this instrument, those heirs shall be determined as if the settlor had died intestate at the time for distribution prescribed in this instrument, and the identity and shares of those heirs shall be determined according to the California laws of succession that concern separate property not acquired from a previously deceased spouse and that are in effect at the death of the settlor.

ARTICLE 8 : Execution

8.01. Execution. \_\_\_\_\_ [I or we] certify that \_\_\_\_\_ [I or we] have read the foregoing declaration of trust and that it correctly states the terms and conditions under which the trust estate is to be held, administered, and distributed. As trustee[s], \_\_\_\_\_ [I or we] approve this declaration of trust in all particulars, and agree to be bound by its terms and conditions.

Executed on \_\_\_\_\_ [month, day], \_\_\_\_\_ [year], at \_\_\_\_\_ [city or town, and state, in which declaration of trust is signed, e.g., Berkeley, California].

TRUSTEE[S]

[For individual trustee: ]

\_\_\_\_\_ [signature]

[typed name]

[For corporate trustee: ]

[typed name of corporate trustee]

By:

\_\_\_\_\_ [signature of first authorized employee]

[typed name]

\_\_\_\_\_ [signature of second authorized employee]

[typed name]

Acceptance by Settlor. I, as settlor of the trust [s] created by this declaration of trust, certify that I have read the foregoing declaration of trust and that it correctly states the terms and conditions under which the trust estate is to be held, administered, and distributed. I approve this declaration of trust in all particulars, and agree to be bound by its terms and conditions.

\_\_\_\_\_ [signature of settlor]

[typed name]

ACKNOWLEDGMENT

[Acknowledgements taken in California must be in the following form (Civ. Code § 1189(a))]:

State of California )  
 County of \_\_\_\_\_ ) ss

On \_\_\_\_\_ [date], before me, \_\_\_\_\_ [name of notary], personally appeared \_\_\_\_\_ [name(s)], who proved to me on the basis of satisfactory evidence to be the person[s] whose name[s] \_\_\_\_\_ [is or are] subscribed to the within instrument, and acknowledged to me that

\_\_\_\_\_ [he or she or they] executed the same in \_\_\_\_\_ [his or her or their] authorized  
\_\_\_\_\_ [capacity or capacities], and that by \_\_\_\_\_ [his or her or their] signature[s] on  
the instrument the person[s], or the entity upon behalf of which the person[s] acted, executed the instrument.

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

WITNESS my hand and official seal.

\_\_\_\_\_ [signature of notary]  
[typed name]

**SCHEDULE A  
SCHEDULE OF TRUST ASSETS**

Description of Asset

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsGeneral OverviewEstate, Gift & Trust LawTrustsCreationEstate, Gift & Trust  
LawTrustsRevocable Living Trusts



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California Legal Forms--Transaction Guide

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DIVISION IV: WILLS AND TRUSTS  
CHAPTER 70 COMPLETE REVOCABLE TRUST FORMS  
PART IV. FORMS  
A. Complete Trust Instruments

*26-70 California Legal Forms--Transaction Guide § 70.201*

**AUTHOR:** Reviewed by Albert G. Handelman

**§ 70.201 Nonformula Marital Deduction Trust for Married Settlers**

**[1] Comment**

**[a] Use of Form**

This form is a complete trust instrument that may be used by married settlors who wish to create a revocable trust for their own benefit during their lifetimes and the benefit of their children following their deaths, but who are not concerned about reducing estate taxes in the estate of the surviving settlor.

This trust uses the federal estate tax marital deduction [*I.R.C. § 2056*] to eliminate all tax on the death of the first settlor. However, this trust does *not* use a marital deduction formula to take advantage of the unified credit [*see I.R.C. §§ 2010* (estate tax), *2505* (gift tax)] to avoid or reduce the overall estate tax burden on the settlors' combined estates. For a marital deduction formula trust for joint settlors, see the *form in § 70.202[2]*.

**[b] Nonformula Versus Formula Marital Deduction Trust**

Nonformula trusts typically are used by settlors who are more interested in giving the surviving spouse maximum control over the trust assets than in saving federal estate tax when the surviving spouse dies. Such persons usually have combined estates that are not large enough to be seriously affected by the estate tax; or, regardless of the size of their estates, are not concerned about the ultimate tax consequences to their children or other beneficiaries.

In a formula marital deduction trust, a portion of the trust assets is placed in a "bypass" or "credit shelter" trust that is structured to escape taxation in the surviving settlor's estate and thereby pass tax-free to the ultimate beneficiaries [*see §§ 70.10[3][d]*, *70.12[6][f]*, *70.202*, P 5.09 (form); *see also § 71.14[1]* in Ch. 7, *Marital Deduction Trust Provisions* 1]. As a trade-off for the fact that the property in the bypass trust escapes taxation in the surviving spouse's estate, the surviving spouse must give up a measure of control over the assets in the bypass trust [*see §§ 70.10[3][d]*, *70.12[6][c]*; *see also § 71.14* in Ch. 71, *Marital Deduction Trust Provisions* ]. In contrast, when a nonformula marital deduction trust

is used, there is no need to limit the surviving spouse's powers over the trust assets, since those assets will be included in the survivor's estate in any event. Because one of the main attractions of nonformula trusts is the fact that they can permit the surviving spouse to exercise a greater degree of control than formula trusts, the terms of a nonformula trust typically are drafted to maximize the surviving settlor's control. The provisions in this form reflect that purpose.

When the settlors' combined estates are modest--e.g., not greater in value than the sum of the two "applicable exclusion amounts" that will be available in the years of their deaths [*see I.R.C. §§ 2010(c)* (table of graduated amounts) and discussion in § 60.13[4][b]]--there will be no estate tax liability in any event, and a formula trust will provide no advantage over a nonformula trust. Once the combined estates begin to exceed the sum of the two "applicable exclusion amounts," however, it becomes increasingly more advantageous from a tax point of view to use the marital deduction and unified credit in tandem to reduce the estate tax that would otherwise be payable in the estate of the second spouse to die. This kind of coordinated estate plan can be achieved only through the use of a formula marital deduction trust.

It is important to consider the possibility that assets in the spouses' combined estates will appreciate in value between the time the trust is created and the death of the surviving spouse. Even in a relatively modest estate, sufficient appreciation could cause the total value of the combined estate to exceed the amount protected under the unified credit.

**PRACTICE TIP:**

Selection of an estate plan of the type created by this form entails certain risks for the clients, particularly the risk that their estate may grow in value to the point where estate tax planning might have been warranted. The practitioner must be cautious in recommending an estate plan which, for the most part, provides for no mandatory estate tax planning. Especially in the case of younger clients, when the potential for growth or appreciation of assets is substantial, care must be exercised before employing the form shown in this section.

Similarly, clients' selection of such a plan entails certain risks for the estate planner, particularly the risk that the clients' children or other beneficiaries may attack the planner for not "insisting" that the clients adopt an estate plan that requires the minimization of estate taxes. Accordingly, an attorney who is considering the use of this form should write a letter to the clients setting forth the possible pitfalls of using this type of estate plan and confirming that it is the clients' desire to prefer simplicity over mandatory tax savings.

One option other than the formula marital deduction trust is the use of a disclaimer trust, which allows the surviving settlor to make the postmortem decision of whether or not to engage in tax planning involving the use of the deceased settlor's unified credit. This option is demonstrated in the form illustrated in this section. Nevertheless, it bears observation that relying solely on the making of a disclaimer in order to use the unified credit means that in a possibly significant number of cases, no tax planning at all will take place. Only by employing a formula marital deduction trust will the estate planner be *assured* that the unified credit will be fully used in all cases in which its use will provide an overall tax saving. *Commentary by Albert G. Handelman.*

For an overview of the operation of the federal estate and gift tax laws, see *Ch. 60, Estate Planning, §§ 60.13, 60.14*. For more detailed discussion of marital deduction formulas and marital deduction planning, see *Ch. 71, Marital Deduction Trust Provisions*.

**[c] Trust Declaration Format**

This trust instrument uses the trust declaration format. A "declaration of trust" is a one-party instrument in which the trustee unilaterally declares that the trustee is holding property as trustee under terms of the trust instrument [*see [2], P 1.01, below*]. Only the trustee is required to execute the declaration. However, it is common for the settlor to sign the

declaration to signify his or her approval of the terms of the trust [for signature blocks for declarations of trust, *see* [2], P 8.01, *below* ].

A trust agreement, in contrast, is a two-party agreement between the settlor and the trustee. Either format will create a valid inter vivos trust, and prior to 1993 the choice was largely a matter of the drafter's preference. However, many estate planners now believe that the trust declaration format is more advantageous as a result of the decision in *Estate of Heggstad (1993) 16 Cal. App. 4th 943, 20 Cal. Rptr. 2d 433* . In *Heggstad*, the court of appeal held that a parcel of real property that was described as a trust asset in a schedule attached to the trust declaration was trustproperty even though it was never formally conveyed to the trust. The court specifically referred to language in *Prob. Code § 15200(a)* that permits a trust to be created by a "declaration by the owner of property that the owner holds the property as trustee" [ *Estate of Heggstad (1993) 16 Cal. App. 4th 943, 947-951, 20 Cal. Rptr. 2d 433* ; *see Estate of Powell (2000) 83 Cal. App. 4th 1434, 1441, 100 Cal. Rptr. 2d 501* ] . The court did not speculate on whether the result would have been the same if the trust in question had been created by a trust agreement rather than a declaration, but since the result under a declaration is clear, many California estate planners now recommend that revocable trusts be created by declarations rather than trust agreements.

#### **[d] Family Information**

It is assumed in this form that the settlors have children, and that neither settlor has children from a prior marriage [*see* [2], P 1.04, *below* ]. If either settlor has children from a previous marriage, each of those children should be identified by name, date of birth, and name of the child's other parent. For a form listing children from a prior marriage, *see* § 70.203, P 1.05 (provision for one-settlor trust).

#### **[e] Revocation and Amendment by Settlers**

This form gives the settlors the power to amend, revoke, or terminate the trust at any time while they are both living [*see* [2], P 3.01, *below* ]. Either settlor, acting alone, may revoke or terminate the trust as to any separate and quasi-community property of that settlor, and as to the community property of the settlors. As discussed in *Section 70.12[5][c]*, the unilateral right to revoke as to community property is necessary both to preserve the character of any community property assets contributed to the trust [*see Fam. Code § 761(a), (b)*] and to avoid potential gift tax liability that could result if either settlor renounced his or her statutory right to unilaterally revoke the trust as to community property [*see I.R.C. § 2511(a); Treas. Reg. § 25.2511-2(b)*](relinquishment of dominion and control over property may constitute taxable gift)].

The trust may be modified or amended by either spouse acting alone as to that spouse's separate and quasi-community property in the trust. However, a modification or amendment of the trust affecting any community property of the settlors may be made only by the settlors acting jointly [*see* [2], P 3.01, *below* ]. As discussed in § 70.12[5][f], this power is also necessary to preserve the character of community property transferred to the trust [*see Fam. Code § 761(a)*].

After the death of the deceased settlor, the surviving spouse retains the power of revocation and amendment over all of the trust assets except the Disclaimer Trust [*see* [2], P 3.02, *below* ; *see also* [j], *below* (discussion of Disclaimer Trust)]. This broad power of revocation furthers the goal of maximizing the surviving settlor's control over trust assets, which is typically an important goal in the creation of a nonformula marital deduction trust [*see* [b], *above*].

#### **[f] Settlers' Powers to Direct Investments and Borrow From Trust Estate**

The settlors are also given powers to direct investments and to borrow money from the trust estate. While both settlors are living, these powers may be exercised with respect to community property only by both settlors acting jointly [*see* [2], PP 3.05, 3.07, *below* ]. After the death of the deceased settlor, the surviving settlor may exercise these powers [*see*

[2], PP 3.06, 3.08, *below* ]. Again, these broad powers are consistent with the goal of maximizing the surviving settlor's control over the trust assets [*see* [b], *above*]. Optional language restricts the surviving settlor from borrowing from the Disclaimer Trust [*see* [j], *below* (discussion of Disclaimer Trust)]. If the surviving settlor is given the power to borrow from the Disclaimer Trust, language restricting the terms of any loan should be included to assure that the surviving settlor's powers over that trust are not overbroad.

### **[g] Payments and Distributions While Both Settlers Are Living**

While both settlers are living, they will have the right to receive as much of the net income of the community property of the trust as they request [*see* [2], P 4.01, *below* ]. If either settlor has contributed separate or quasi-community property to the trust, that settlor will have substantially identical income rights in that property [*see* [2], P 4.02 *below* ]. The settlers also have analogous rights to request distributions of principal from the community property, separate property, and quasi-community property [*see* [2], PP 4.03, 4.04, *below* ].

### **[h] Special Gift on Deceased Settlor's Death**

This form includes a provision making a so-called "special gift" on the deceased settlor's death [*see* [2], P 5.01, *below* ]. The term "special gift," as used in this form means a gift that the trustee is required to make after the deceased settlor's death to someone other than the residuary beneficiary. It is analogous, in many respects, to a specific devise or a general pecuniary devise in a will. The special gift in this form is a pecuniary devise, but special gifts of tangible personal property are not uncommon [*see* § 70.255[2] (form)].

The special gift will be made before any distributions are made to the surviving settlor or any other beneficiary. The special gift typically will be made to a family member or friend whom the settlor wishes to remember after his or her death, but whom the settlor does not wish to receive the full benefit of the residue of the trust estate.

If the settlor does not wish to make a special gift, this provision can be deleted. If the settlor wants to make more than one special gift, identical provisions may be included as necessary.

The special gift used in this form is not intended to qualify for the federal estate tax marital deduction. Therefore, if the amount of the gift exceeds the amount protected by the available unified credit [*see* I.R.C. § 2010], it will be subject to estate tax. Under the tax payment provision in this form [*see* [2], P 5.02., *below* ], the special gift will *not* be exempt from proration of estate taxes, with the result that the actual amount that will pass to the recipient may be less than the pecuniary amount specified in the special gift provision. If, as is frequently the case, the settlers want a special gift to pass to the recipient tax free, the tax payment provision in the form must be modified to exclude the special gift from any liability for estate taxes. Before modifying the tax provision, however, the settlers should be reminded that if the special gift is to pass tax free, any tax attributed to the special gift will have to be paid out of other trust assets that would otherwise go to the surviving settlor or other trust beneficiaries.

### **[i] Payments and Distributions After Death of Deceased Settlor**

After the special gift has been made (or if there is to be no special gift), the trustee will hold the remaining assets in a single trust for the benefit of the surviving settlor. This trust is designed to qualify for the marital deduction as a lifetime income/power of appointment trust [*see* I.R.C. § 2056(b)(5); for additional discussion of this type of trust, *see* § 71.13 [5] in Ch. 71, *Marital Deduction Trust Provisions*]. Although most estate planners generally prefer qualified terminable interest property ("QTIP") trusts [*see* I.R.C. § 2056(b)(7)] to lifetime income/power of appointment trusts because QTIP trusts offer greater postmortem planning flexibility [*see* discussion of QTIP trusts in § 71.13 [4] in Ch. 71, *Marital Deduction Trust Provisions*], the use of a lifetime income/power of appointment trust is appropriate for a nonformula trust when tax consequences are secondary and the goal is to maximize the surviving spouse's control over the trust assets. For a QTIP trust created by joint settlers, *see* Section 70.202[2].

Under the lifetime income/power of appointment trust in this form, the surviving settlor will receive all of the income from the trust and have a general power of appointment over the trust assets exercisable on his or her death. The trust must contain these terms in order to qualify for the marital deduction as a lifetime income/power of appointment trust [*I.R.C. § 2056(b)(5)*]. The surviving settlor will also have an unlimited power to invade the trust principal during his or her lifetime. The surviving spouse will retain the right to revoke the entire trust (except the Disclaimer trust, discussed below) at any time and for any reason.

### **[j] Disclaimer Trust**

This form gives the surviving spouse the option to disclaim all or part of the assets that he or she would otherwise receive on the death of the deceased spouse. Any assets that are thus disclaimed will be held in a special Disclaimer Trust. The Disclaimer Trust is designed so that the trust assets will not be included in the surviving spouse's taxable estate when the surviving spouse dies. To achieve this tax treatment, the surviving spouse's rights in and powers over the Disclaimer Trust are appropriately limited. First, the surviving spouse has no power of revocation over the Disclaimer Trust. Second, the surviving spouse will receive principal from the Disclaimer Trust only in accordance with an "ascertainable standard." In other words, the surviving spouse has only a limited right to receive principal from the Disclaimer Trust.

The Disclaimer Trust provides for mandatory payments of income to the surviving spouse. Alternatively, the trust instrument may permit income payments, like principal distributions, only in accordance with an ascertainable standard. However, if the amount of income generated by the Disclaimer Trust exceeds what is necessary to maintain the surviving spouse in accordance with the specified standard, any excess income will be accumulated in the trust, where it will be taxed at the relatively high income tax rates applied to trust income [*see I.R.C. § 1(e)*]. This the reason why this form provides for payment of all income.

The Disclaimer Trust will provide some postmortem planning flexibility in the event that unanticipated changes in the settlors' circumstances make it advantageous for the surviving settlor to disclaim some part of the trust property. As discussed in § 70.12[6][i], many experienced estate planners advocate including a disclaimer trust in every trust instrument. However, it is especially important in this particular trust, since it provides the only available flexibility to accomplish any meaningful postmortem tax planning. If, for example, the settlors "win the lottery," inherit a large sum of money, or are awarded a large personal injury judgment, this flexibility may suddenly become very important. If the Disclaimer Trust is not needed, it simply will never become operative.

### **[k] Payments and Distributions After Death of Surviving Settlor**

After the death of the surviving settlor, any remaining portion of the trust assets that the surviving settlor does not dispose of under his or her general power of appointment [*see [i], above*] (including any assets remaining in the Disclaimer Trust) will be held in a "family pot" trust for the benefit of the settlor's children until the youngest child reaches a specified age, such as 25 [*see [2], PP 5.04(e)*] (payments made in accordance with disclaimer trust terms), 5.07 (terms of disclaimer trust)]. If the settlors would prefer a "separate share" arrangement whereby each child has his or her own discrete trust or share [*see §§ 70.210[1][b], 70.211[1][b]* for discussion], the form can be modified appropriately. For a sample "separate share" arrangement that can be adapted for use with this trust, see § 70.202[2], Paragraph 5.10.

If any of the settlors' children predecease the surviving settlor and leave issue who survive the surviving settlor, the share of each deceased child will be divided among the child's issue and distributed to those issue. Optional language permits the share of any issue who is under a stated age to be retained in a separate trust for that issue until he or she reaches the age of distribution. Many clients prefer the latter option, which assures that the shares of any grandchildren will be kept in trust until they reach an age that the settlors believe is appropriate for them to receive the trust property.

If all the settlors' children predecease the surviving settlor, and leave no surviving issue, the property will be given to a named charity, or disposed of in some other manner designated by the settlors.

### **[l] Division of Trust for Generation-Skipping Transfer Tax Purposes**

This form contains a complex provision permitting or requiring the trustee to divide the trust into exempt and non-exempt trusts for generation-skipping transfer tax (GST) purposes. For discussion of this provision, *see* § 70.12[6][j]. Although GST liability may seem like a remote possibility in a nonformula marital deduction trust that is not directed toward maximizing tax savings, the situation may change if the assets appreciate substantially and any of the beneficiaries are in a generation that is two or more generations below that of the settlors [*see I.R.C. §§ 2611(a), 2612, 2613(a)*]. For this reason, it is recommended that the provision be included. If it is not needed, the provision simply will never become operative. Since it is assumed that the value of the trust assets are modest (and will probably be less than the available GST exemption) [*see I.R.C. §§ 2631, 2010(c)*]; for the exemption amounts. *See Ch. 60, Estate Planning, § 60.16[3]*], it is recommended that this provision be drafted to make division of the trusts optional rather than mandatory.

#### **PRACTICE TIP:**

Despite the fact that the recommended provision provides postmortem planning flexibility without requiring any specific action on the part of the surviving settlor, the practitioner may sometimes encounter considerable resistance if he or she suggests adding this type of provision to a particular estate plan. This is because the provision is somewhat lengthy and technical to the point that most clients do not understand it, the flexibility it provides, or the benefit of having that flexibility. In the face of such client opposition, the planner should consider carefully whether such a provision is likely to make a significant difference in the plan. Such considerations should include a review of the clients' assets, analysis of the specific dispositive provisions of the plan after the surviving settlor's death, and a determination of whether or not the use of the deceased settlor's generation-skipping transfer tax exemption, via the disclaimer trust (or plus the full surviving settlor's exemption is likely to cover all potential generation-skipping transfers [*I.R.C. § 2631*]. *Commentary by Albert G. Handelman*).

### **[m] Trustees**

When a revocable inter vivos trust is funded with community property, it is common for the spouses to act as joint or co-trustees of the trust during their lifetimes. It is assumed that the settlors will act as the co-trustees of this trust during their lifetimes, and that the surviving settlor will thereafter continue as sole trustee [*see* [2], P 1.01, *below*]. However, the form includes a full complement of provisions designed to provide for successor trustees to serve in the event one or both of the settlors ceases to act as trustee [*see* [2], PP 6.01- 6.05, *below*]. If the trust continues after the death of the surviving settlor, it will be necessary to appoint a successor trustee in any case.

### **[n] Trustee's Powers**

This form includes a detailed list of the trustee's powers [*see* [2], P 6.08, *below*]. This publication recommends that a complete set of trustee powers be included in every trust. For general discussion of the list of trustee powers included in the forms in this publication, and other general provisions governing the conduct of the trustee, *see* § 70.200[1][o].

When a marital deduction trust is involved, modifications to the statutory trustee powers should be considered very carefully. Powers that appear innocuous in themselves may imperil the marital deduction if they might conceivably affect the surviving spouse's right to all the trust income or limit the survivor's general power of appointment over trust assets. For example, a power or duty to retain unproductive trust assets will disqualify the trust from the marital deduction unless the surviving settlor has the power to compel the trustee to make the assets productive [*Treas. Reg. § 20.2056(b)-5(f)(4)*]. Obviously, any power to withhold or accumulate income during the surviving settlor's lifetime will also disqualify the trust.

**[2] FORM****Nonformula Marital Deduction Trust for Married Settlers**

## DECLARATION OF TRUST

## ARTICLE 1 : Creation of Trust

1.01. Declaration. \_\_\_\_\_ [*identify trustee(s), e.g., Jeffrey G. Baxter and Mary S. Baxter, husband and wife, of Anaheim, California or First National Bank and Trust Co.*] (the "trustee[s]") hereby declare[s] that \_\_\_\_\_ [he has *or* she has *or* it has *or* they have] received certain property (the "trust estate") from \_\_\_\_\_ [*identify settlors, e.g., Jeffrey G. Baxter and Mary S. Baxter, husband and wife, of Anaheim, California*] (the "settlors"), and hold[s] that property in trust, to be held, administered, and distributed according to the terms of this instrument.

1.02. Name of Trust. The name of the trust created by this instrument shall be \_\_\_\_\_ [*name of trust, e.g., The Baxter Family 1995 Trust*].

1.03. Effective Date. This declaration shall be effective \_\_\_\_\_ [on the date it is executed by the parties *or* immediately upon execution by all of the parties *or specify other effective date*].

1.04. Children. The settlors have \_\_\_\_\_ living \_\_\_\_\_ [child *or* children], whose name[s] and date[s] of birth \_\_\_\_\_ [is *or* are] as follows:

Name	Date of Birth
[e.g., Linda S. Baxter	January 28, 1990]
[e.g., Robert B. Baxter	May 31, 1992]
[e.g., Patricia R. Baxter	October 6, 1994]

Neither settlor has any deceased children.

## ARTICLE 2 : Trust Estate

2.01. Definition of Trust Estate. All of the property described in Schedule A, attached to this instrument, and any other property that may hereafter be subject to this trust, is referred to in this instrument as the "trust estate," and shall be held, administered, and distributed as provided in this instrument.

2.02. Character of Trust Assets. All community property of the settlors transferred to this trust, and the proceeds of all such property, shall continue to be the community property of the settlors under the laws of California. All separate property shall remain the separate property, and all quasi-community property shall remain the quasi-community property, of the contributing settlor.

2.03. Additions to Trust. From time to time, the trustee may accept additions to this trust from any source. Any additions to the trust shall be made by designating in writing the property to be added, or by titling any account, deed, or similar asset in the name of the trustee, as trustee of this trust, or any alternate or successor trustee acting under this instrument. During any time that neither settlor is serving as trustee or cotrustee of this trust, any transfer of property to the trust under this paragraph shall be effective only upon written acceptance by the trustee. Any designation by a third party, whether by will, deed, account title designation, or similar transfer, shall also be a transfer to the trust estate upon written acceptance by the trustee. Any property added to the trust estate shall be held, administered, and distributed in

accordance with the terms of this instrument.

### ARTICLE 3 : Rights and Powers of Settlers

3.01. Powers of Revocation and Amendment While Both Settlers Are Living. During the joint lifetimes of the settlers, this trust may be revoked or terminated, in whole or in part, by either settlor as to any separate and quasi-community property of that settlor and any community property of the settlers. This trust may be modified or amended by either settlor acting alone as to any separate and quasi-community property of that settlor, and by both spouses acting jointly as to any community property of the settlers.

3.02. Revocation and Amendment After Death of Deceased Settlor. After the death of the deceased settlor, the surviving settlor may at any time amend, revoke, or terminate any trust created by this instrument, other than the Disclaimer Trust, which shall be irrevocable and not subject to amendment. Upon the death of the surviving settlor, every trust created by this instrument shall be irrevocable and not subject to amendment.

3.03. Method of Revocation or Amendment. Any amendment, revocation, or termination shall be made only by a writing signed by the amending or revoking settlor or settlers and delivered to the trustee in person or by certified mail. If the writing is signed by only one settlor and the other settlor is living, a copy of the writing shall also be delivered to the other settlor in person or by certified mail.

3.04. Delivery of Property After Revocation. \_\_\_\_\_ [Promptly upon *or* Within \_\_\_\_\_ days after] receipt of any writing revoking or terminating the trust as to any community property forming part of the trust estate, the trustee shall deliver the affected property to the settlers or to a person or persons designated by both settlers in that writing to receive the property. Unless otherwise provided in the revocation or this trust instrument, any community property so returned shall continue to be the community property of the settlers. \_\_\_\_\_ [Promptly upon *or* Within \_\_\_\_\_ days after] receipt of any writing revoking or terminating the trust as to any separate or quasi-community property of either settlor, the trustee shall deliver the affected property to the revoking settlor or to a person or persons designated in that writing to receive the property.

3.05. Power to Direct Investments While Both Settlers Are Living. While both settlers are living, the settlers shall have the power from time to time to direct the trustee to do any or all of the following:

- (a) Invest trust funds in specified securities, properties, or other forms of investment;
- (b) Retain specified securities, properties, or other forms of investment held in trust under this instrument; and
- (c) Sell, encumber, lease, abandon, or dispose of any trust property.

Directions with respect to any portion of the trust estate that is the community property of the settlers may be given only by a writing signed by both settlers. Directions with respect to any portion of the trust estate that is separate or quasi-community property of one settlor may be given by a writing signed by that settlor alone. If a direction is to remain in effect for a specified period of time only, or to be subject to any other condition or conditions, the writing must specify the period of time and the condition or conditions. If trust property is invested in accordance with any direction given as specified in this paragraph, the trustee shall not be liable for losses sustained as a direct or indirect result of the trustee's compliance with the direction.

3.06. Power to Direct Investments After Death of Deceased Settlor. After the death of the deceased settlor and while the surviving settlor is living, the surviving settlor shall have the power from time to time to direct the trustee to sell, exchange, or invest property of any trust created under this instrument, except the Disclaimer Trust. No person shall have the power to direct the trustee to invest property of the Disclaimer Trust. Any direction given to the trustee shall be

in writing and signed by the surviving settlor. If a direction is to remain in effect for a specified period of time only, or to be subject to any other condition or conditions, the writing must specify the period of time and the condition or conditions. If trust property is invested in accordance with any direction given as specified in this paragraph, the trustee shall not be liable for losses sustained as a direct or indirect result of the trustee's compliance with the direction. After the death of the surviving settlor, no person shall have the power to direct the trustee to invest any trust property.

3.07. Power to Borrow From Trust Estate While Both Settlers Are Living. While both settlers are living, the settlers shall have the power to borrow from the income or principal of the trust estate, with or without security, as provided in this paragraph. Any loan from any portion of the trust estate that is the community property of the settlers may be made only by a writing signed by both settlers, filed with the trustee, and specifying the amount and terms of the loan. Any loan from any portion of the trust estate that is the separate or quasi-community property of one of the settlers may be made only by a writing signed by that settlor, filed with the trustee, and specifying the amount and terms of the loan.

3.08. Power to Borrow From Trust Estate After Death of Deceased Settlor. After the death of the deceased settlor, the surviving settlor shall have the power to borrow from the income or principal of any trust created under this instrument [optional:; except the Disclaimer Trust]. Any such loan may be made only by a writing signed by the surviving settlor, filed with the trustee, and specifying the amount and terms of the loan. [If surviving settlor is given power to borrow from the Disclaimer Trust (see above), include the following language: Any loan made from the Disclaimer Trust to the surviving settlor shall be made on such reasonable security and at such a reasonable rate of interest as would generally be appropriate for a market loan of similar amount and term and for a similar purpose.]

3.09. Exercise of Settlers' Rights and Powers by Others. Notwithstanding any other provision of this instrument, any right or power that either settlor could exercise personally under the terms of this instrument, \_\_\_\_\_ [except or including] the power to amend, revoke, or terminate \_\_\_\_\_ [this trust or any trust created by this instrument], may be exercised for and on behalf of that settlor by any attorney in fact who, at the time of the exercise, is duly appointed and acting for that settlor under a valid and enforceable durable power of attorney executed by that settlor under the Uniform Durable Power of Attorney Act, or any successor statute; or, if there is no such attorney in fact, by a duly appointed and acting conservator of that settlor, after petition to the court in accordance with *California Probate Code Section 2580*, or any successor statute [add optional clause to limit authority to amend or revoke, e.g.::; provided, however, that the power to amend, revoke, or terminate \_\_\_\_\_ (this trust or any trust created by this instrument), in whole or in part, may be exercised for or on behalf of that settlor by an attorney in fact or conservator only if distribution of that settlor's estate during that settlor's lifetime is not substantially altered by the amendment, revocation, or termination, and the amendment, revocation, or termination does not result in any adverse tax consequences to that settlor's estate].

#### ARTICLE 4 : Payments and Distributions While Both Settlers Are Living

4.01. Payments of Income From Community Property. While both settlers are living, the trustee shall pay to or apply for the benefit of the settlers, or either of them, as much of the net income of the community property of the trust as the settlers, or either of them, shall from time to time request of the trustee in writing. A request pursuant to this paragraph may specify that payments are to be made periodically.

4.02. Payments of Income From Separate and Quasi-Community Property. While both settlers are living, the trustee shall pay to or apply for the benefit of a settlor whose separate or quasi-community property constitutes part of the trust estate as much of the net income of that property as the settlor shall from time to time request of the trustee in writing. A request pursuant to this paragraph may specify that payments are to be made periodically.

4.03. Distributions of Principal From Community Property. While both settlers are living, the trustee shall distribute to or apply for the benefit of the settlers, or either of them, as much of the principal of the community property of the trust, up to the whole thereof, as the settlers, or either of them, shall from time to time request of the trustee in writing. A

request pursuant to this paragraph may specify that distributions are to be made periodically. Any money or other property paid or distributed to or for the benefit of the settlors, or either of them, from the community property of the trust shall remain the community property of the settlors. A settlor who receives any such property shall have the same obligations with respect to that property that he or she would have with respect to community property generally.

4.04. Distributions of Principal From Separate and Quasi-Community Property. While both settlors are living, the trustee shall distribute to or apply for the benefit of a settlor whose separate or quasi-community property constitutes part of the trust estate as much of the principal of that property, up to the whole thereof, as the settlor shall from time to time request of the trustee in writing. A request pursuant to this paragraph may specify that distributions are to be made periodically.

4.05. Requests on Settlor's Behalf. If, at any time, either settlor is unable personally to make a request of the trustee, the settlor's right to make the request may be exercised for or on behalf of the settlor by an attorney in fact who, at the time of the exercise, is duly appointed and acting for the settlor under a valid and enforceable durable power of attorney executed by the settlor under the Uniform Durable Power of Attorney Act, or any successor statute; or, if there is no such attorney in fact, by the trustee acting for and on behalf of the settlor. The trustee shall have discretion to determine when the settlor is unable personally to make a request for purposes of this paragraph.

4.06. Settlor's Obligation for Community Property Distributed. Any payment of income or principal from the trust community property to or for the benefit of the settlors, or either of them, shall remain the community property of the settlors. A settlor who receives any such payment shall have the same obligations respecting that property that he or she would have with respect to all community property generally.

4.07. Trustee's Power to Make Gifts at Direction of Settlor. So long as both settlors are living, the trustee shall have the power to make gifts, as specified in this Paragraph:

(a) Community Property. The trustee shall distribute such sums of community property trust principal to such person or persons who are the natural objects of the settlors' bounty, as the settlors, acting jointly, may direct in writing.

(b) Separate and Quasi-Community Property. The trustee shall distribute such sums of trust principal that is the separate property or the quasi-community property of a settlor to such person or persons who are the natural objects of that settlor's bounty, as that settlor may direct in writing.

(c) Incapacity of a Settlor. In the event that a settlor is unable to direct the trustee in writing under this Paragraph due to incapacity, such a direction may be made on the settlor's behalf by a duly authorized attorney in fact acting under a valid durable power of attorney executed by the settlor under the Uniform Durable Power of Attorney Act (or successor statute) [optional: as long as the durable power of attorney so executed by the settlor specifically authorizes the attorney in fact to exercise such a withdrawal power, or power to make gifts from trust principal, through enforceable demands on the trustee]; provided, however, that the total amount of any such gifts made pursuant to the direction of an attorney in fact to any one person in any one year shall not exceed the annual amount excluded from gift tax under *Internal Revenue Code Section 2503(b)* (or a successor statute).

#### ARTICLE 5 : Payments and Distributions After Death of Deceased Settlor

5.01. Special Gift. On the death of the deceased settlor, the trustee shall distribute the sum of \$ \_\_\_\_\_ to \_\_\_\_\_ [name of beneficiary, e.g., Amy Bush] [if desired, add survivorship clause, e.g., if she survives the deceased settlor or if she survives the deceased settlor for 60 days]. [If distribution is conditioned on survival, add alternative disposition, e.g.: If \_\_\_\_\_ (name, e.g., Amy Bush) does not survive the deceased settlor (for that period), this gift shall \_\_\_\_\_ (e.g., lapse or be distributed to Albert W. Hall)]. This gift may be satisfied only out of the deceased settlor's one-half interest in the community property of the settlors or

the deceased settlor's interest in his or her separate or quasi-community property.

5.02. Payment of Taxes. All death taxes payable by reason of the deceased settlor's death [*to include taxes on assets passing outside trust, add:*, whether attributable to assets of this trust or to assets outside the trust,] shall be \_\_\_\_\_ [paid by the trustee out of the trust estate *or* equitably prorated and apportioned among the persons interested in the settlor's estate as provided in the California Probate Code]. However, payments under this paragraph shall be made only out of the deceased settlor's separate property or the deceased settlor's one-half interest in the community or quasi-community property and shall not be made from the surviving settlor's property. [*To except property qualifying for marital deduction from apportionment, add: Any death taxes attributable to any property passing to the surviving settlor that qualifies for the federal estate tax marital deduction shall be paid pro rata out of property that does not qualify for the marital deduction, so that property qualifying for the marital deduction shall pass to the surviving settlor free of any death taxes*].

5.03. Payment of Debts and Expenses. All debts and expenses attributable to any property in the trust or the deceased settlor's estate may, in the trustee's discretion, be \_\_\_\_\_ [paid by the trustee out of the trust estate *or* equitably prorated and apportioned among the persons interested in the settlor's estate in the same manner as the death taxes].

5.04. Disposition of Trust on Death of Deceased Settlor. Upon the death of the deceased settlor, and after any distributions or payments under Paragraphs 5.01 through 5.03 of this instrument have been made, the trustee shall hold, administer, and distribute the assets of the trust as follows:

(a) The trustee shall pay to or apply for the benefit of the surviving settlor all of the net income of the trust, in monthly or other convenient installments, as agreed upon by the surviving settlor and the trustee, but not less often than annually. Any other provision of this instrument to the contrary notwithstanding, in determining the net income of the trust payable under this paragraph, the trustee shall include all income that must be considered as income to qualify the trust for the federal estate tax marital deduction, and shall make no deductions from gross income that would prevent the trust from qualifying for that deduction. It is the intention of the settlors that the surviving settlor, as the beneficiary of a marital deduction trust, shall have substantially that degree of beneficial enjoyment of the trust during his or her lifetime that the principles of the law of trusts accord to a person who is unqualifiedly designated as the life beneficiary of a trust, and the trustee shall exercise the trustee's discretion in a manner that is consistent with this expressed intention. It is also the intention of the settlors that the trust produce for the surviving settlor during his or her lifetime the income, or that the surviving settlor shall have the benefit of the trust property, as is consistent with the value of the trust property and with its preservation.

(b) The trustee shall distribute to or apply for the benefit of the surviving settlor as much of the principal of the trust, up to the whole thereof, as the surviving settlor shall from time to time request of the trustee in writing. A request pursuant to this paragraph may specify that distributions are to be made periodically.

(c) On the death of the surviving settlor, the trustee may pay any death taxes [*add if appropriate: attributable to property held in the trust*] and the expenses of the last illness and funeral of the surviving settlor out of the principal of the trust, unless the trustee determines that other adequate provisions have been made for payment of these expenses.

(d) On the death of the surviving settlor, the trustee shall distribute the trust property then remaining, including all principal and undistributed income, to the person, persons, or entities, including the estate of the surviving settlor, on such terms and conditions, either outright or in trust, or by creating further powers of appointment, as the surviving settlor shall appoint by his or her valid last will specifically referring to and exercising this power of appointment. The trustee may rely upon any instrument admitted to probate as the last will of the surviving settlor in carrying out the terms of the power of appointment and shall not be liable for any good faith act in reliance upon that will, even if it is later determined to be invalid with respect to its purported exercise of this power of appointment. In the event the will of

the surviving settlor is not offered for probate, the trustee may make an independent determination with respect to the validity of the will and whether or not the will has effectively exercised this power of appointment. If the trustee receives no notice of the existence of a will of the surviving settlor within six months after the death of the surviving settlor, the trustee may distribute the trust assets and income as if this power of appointment had not been exercised, and shall in that event be conclusively presumed to have acted in good faith, even if a valid will is later discovered.

(e) If any property subject to the foregoing power of appointment is not effectively appointed by the surviving settlor, that property, after any payment of taxes, debts, and expenses pursuant to the applicable provisions of this instrument, shall be distributed \_\_\_\_\_ [if generation-skipping transfer taxes are not a concern: to the Disclaimer Trust created in this instrument, to be held, administered, and distributed as part of the Disclaimer Trust *or to account for generation-skipping transfer tax consequences*: in the manner specified in Paragraph 5.07 pertaining to the Disclaimer Trust. However, the property disposed of pursuant to this subparagraph shall not be considered to be part of the Disclaimer Trust unless this trust and the Disclaimer Trust have the same inclusion ratios for federal generation-skipping transfer tax purposes].

5.05. Disclaimer of Property. Any property or portion of property that is disclaimed by the surviving settlor shall be held, administered, and distributed according to the terms of the Disclaimer Trust. However, if the surviving settlor also disclaims an interest in all or any portion of the Disclaimer Trust, the disclaimed interest shall be administered and distributed as if the surviving settlor predeceased the deceased settlor.

5.06. Treatment of Disclaimer Trust During Lifetime of Surviving Settlor. During the lifetime of the surviving settlor, the trustee shall hold, administer, and distribute the assets of the Disclaimer Trust as follows:

(a) The trustee shall pay to or apply for the benefit of the surviving settlor, for life, all of the net income of the trust, in monthly or other convenient installments as agreed upon by the surviving settlor and the trustee, but not less often than annually.

(b) The trustee shall distribute to or apply for the benefit of the surviving settlor, for life, as much of the principal of the trust as the trustee, in the trustee's discretion, deems necessary for the surviving settlor's health, education, support, and maintenance. All decisions of the trustee regarding payments under this subparagraph, if any, shall be within the trustee's discretion and shall be final and incontestable by anyone.

(c) Upon the death of the surviving settlor, the trustee shall hold, administer, and distribute the trust as a single trust for the benefit of the children of the settlors and the surviving issue of any deceased children of the settlors as provided in Paragraph 5.07 of this instrument.

5.07. Disposition of Disclaimer Trust Upon Death of Surviving Settlor. Upon the death of the surviving settlor, the trustee shall hold, administer, and distribute the assets of the Disclaimer Trust as follows:

(a) The trustee shall pay or distribute to or apply for the benefit of any one or more of the children of the settlors, until the youngest child reaches the age of \_\_\_\_\_ [e.g., 25] years, in monthly or other convenient installments, but not less often than annually, as much of the net income and principal of the trust as the trustee, in the trustee's discretion, deems necessary for the health, education, support, and maintenance of each of them. In making these payments and distributions, the trustee may pay, distribute, or apply more to or for some beneficiaries than others, and may make payments or distributions to or for one or more beneficiaries to the exclusion of others. [Optional: No amount paid or applied as provided in this subparagraph need be repaid to the trustee or restored to the trust.] All decisions of the trustee regarding payments under this subparagraph shall be within the trustee's discretion and final and incontestable by anyone. The trustee shall accumulate and add to principal any net income not distributed.

(b) At any time or times before the time specified in this instrument for distribution of the assets of this trust, the trustee,

in the trustee's discretion, may make an early distribution of principal to any of the children of the settlors if, in the trustee's opinion, there is a valid reason for making the distribution [*optional*: and if the remaining principal and income will be adequate for the reasonable health, education, support, and maintenance of all of the beneficiaries]. The trustee shall deduct the early distribution, valued on the date that the distribution is made, without interest, from the share ultimately distributed to the child [*optional*: or his or her issue]. Early distributions to a child shall not exceed, in the aggregate, [*if amount of distributions is to be limited to specified fraction or percentage of beneficiary's distributive share of trust, add*: \_\_\_\_\_ (fraction or percentage, e.g., 50 percent of or one-third of)] the portion of the trust that would be distributed to that child, after offsetting any prior early distributions and any loans or advances not repaid to the trustee, if the trust were to be terminated and its assets distributed on the date that the early distribution is made. However, no child who is a trustee or co-trustee of the trust shall have the power to make early distributions of principal to himself or herself pursuant to this subparagraph]. The trustee, upon making any distribution in accordance with this subparagraph, shall give the beneficiary receiving the distribution written notice identifying the distribution as "an early distribution under Paragraph 5.07(b)."

(c) When the youngest child of the settlors reaches the age of \_\_\_\_\_ [*e.g.*, 25] years, the trustee shall distribute the balance of the trust property among the children of the settlors then living, in equal shares. If any of the children of the settlors are deceased at the time of distribution and leave issue surviving, the share that would have been taken by that child had he or she survived shall be divided among his or her issue \_\_\_\_\_ [in the manner provided in California Probate Code Section \_\_\_\_\_ (*specify either 240 or 246 or 247*) or in equal shares, regardless of whether or not all such issue are members of the same generation]. The share of each issue [who has attained the age of \_\_\_\_\_ [*e.g.*, 25 years] shall be distributed outright to that issue. [The share of any issue who has not attained the age of \_\_\_\_\_ (*e.g.*, 25 years) shall be placed in a separate trust for that issue, held and administered in accordance with this Paragraph, and distributed to that issue when he or she attains the age of \_\_\_\_\_ (*e.g.*, 25 years)]. If all the children of the settlors die before reaching the age of \_\_\_\_\_ [*e.g.*, 25] years without surviving issue, the trustee shall distribute the balance of the trust property outright to \_\_\_\_\_ [*alternative disposition, e.g.*, the Regents of the University of California or the heirs of the settlors].

5.08. Release, Disclaimer, or Restriction of Power of Appointment. Notwithstanding any other provision of this instrument, any power of appointment created by this instrument, whether expressly granted in this instrument or implied by law, may be released, disclaimed, or restricted in scope. Any such power may be released to the extent and in the manner set forth in California Probate Code Section 661 and disclaimed to the extent and in the manner set forth in *California Probate Code Sections 260-295*, or any applicable successor statutes that exist on the date of exercise of the release or disclaimer.

5.09. Consideration of Beneficiary's Other Resources. In making any discretionary payments of income or distributions of principal from any trust created by this instrument for the benefit of any person, the trustee may take into consideration, to the extent the trustee deems advisable, any other income or resources available to that person that are known to the trustee and that are reasonably available for that purpose.

5.10. Trustee's Power to Determine Income and Principal. Unless otherwise specifically provided in this instrument, the determination of all matters with respect to what is principal and income of any trust under this instrument and the apportionment and allocation of receipts, expenses, and other charges between principal and income shall be governed by the provisions of the California Revised Uniform Principal and Income Act from time to time existing. The trustee in the trustee's discretion shall determine any matter not provided for either in this instrument or in the California Revised Uniform Principal and Income Act.

5.11. Trustee Shall Favor Income Beneficiaries. The primary purpose in establishing the trusts created by this instrument is to benefit the persons who are the income beneficiaries. It is the settlors' intention that the trustee shall exercise the powers and discretion granted in this instrument in favor of the persons who are the then-current income

beneficiaries of the trust, except when such an exercise would be inconsistent with other provisions of this instrument. In each instance, the rights of subsequent beneficiaries and remainder beneficiaries shall be considered subordinate to the rights of the then-current income beneficiaries. This declaration of intention is intended to include, but is not limited to, investment policy, the exercise of discretionary powers to determine what constitutes principal and what constitutes income, and the determination of the amounts to be paid to or applied for the benefit of the income beneficiaries.

#### **PRACTICE TIP**

Caution should be used before the above provision is employed. In many cases, the settlors do not intend to primarily benefit income beneficiaries, but instead have just as much interest in providing for the remainder beneficiaries. In those cases, this provision should be omitted. *Commentary by Albert G. Handelman.*

5.12. Administration of Generation-Skipping Trusts. The provisions of this paragraph apply to any trust under this instrument that is created on or at any time after the deceased settlor's death and in which there is property that is or may become subject to the federal generation-skipping transfer tax:

(a) Upon written notification by the deceased settlor's executor that the executor intends to allocate any part of the generation-skipping transfer tax exemption that is available to the deceased settlor under *Internal Revenue Code Section 2631(a)* to some but not all of the property in any trust to which this paragraph applies, the trustee

\_\_\_\_\_ [shall *or* may, in the trustee's discretion,] divide that trust into two separate trusts, to be designated as the Exempt Trust and the Non-Exempt Trust. [*If trustee has discretionary power to divide trusts: If the trustee elects to divide a trust in the manner provided in this Paragraph, the *or, if division of trusts is mandatory rather than discretionary:* The] Exempt Trust shall contain the share of the property of that trust equal in value to the amount of the generation-skipping transfer tax exemption that the executor intends to allocate to the trust. The Non-Exempt Trust shall contain the balance of the property of that trust. It is the settlors' intention that the executor then actually allocate the generation-skipping transfer tax exemption to the Exempt Trust and not to the Non-Exempt Trust, so that the Exempt Trust shall have an inclusion ratio of zero for federal generation-skipping transfer tax purposes and the Non-Exempt Trust shall have an inclusion ratio of one for federal generation-skipping transfer tax purposes. The Trustee shall not be liable for relying on the written instructions of the executor when acting in accordance with this subparagraph.*

(b) In allocating assets between the Exempt Trust and Non-Exempt Trust for purposes of this Paragraph, the trustee shall \_\_\_\_\_ [*for a pecuniary allocation: allocate the trust assets between the Exempt Trust and Non-Exempt Trust in cash or in kind, or partly in each, on a pro rata or non pro rata basis, and in undivided interests or not *or, for a fractional allocation: allocate to each trust a fractional share of each and every substantial interest or right held by the trust being divided.* [*If preceding sentence provides for a pecuniary allocation, add: If the allocation is not made within 15 months from the date of the deceased settlor's death, the trustee shall pay interest, at the legal rate, from the date of the deceased settlor's death to the date of distribution. For purposes of allocation under this Paragraph, assets shall be valued at their values \_\_\_\_\_ (to use date of distribution values: on the date or dates of distribution *or, to use valuation for estate tax purposes: as finally determined for federal estate tax purposes; provided that any assets allocated in kind shall be allocated between the Exempt Trust and the Non-Exempt Trust in a manner that fairly reflects net appreciation or depreciation in the value of the assets in the trust being divided, measured from the date of the deceased settlor's death to the date of payment.*]**

(c) Regardless of whether subparagraph (a) applies, if the amount of the deceased settlor's generation-skipping transfer tax exemption actually allocated by the executor (or automatically allocated under *Internal Revenue Code Section 2632*) to a trust to which this paragraph applies is equal to the value of the property of that trust so that the entire trust has an inclusion ratio of zero for federal generation-skipping transfer tax purposes, the entire trust shall be referred to as the

Exempt Trust. On the other hand, if no part of the deceased settlor's generation-skipping transfer tax exemption is actually allocated to the trust by the executor (or automatically allocated under *Internal Revenue Code Section 2632*) so that the entire trust has an inclusion ratio of one for federal generation-skipping transfer tax purposes (or if the deceased settlor is not the transferor of that trust for generation-skipping transfer tax purposes), the entire trust shall be referred to as the Non-Exempt Trust.

(d) The trustee may, but is not required to, administer the trusts under this instrument to which this paragraph applies in such a manner that distributions made during the trust terms to "skip persons" (as defined in *Internal Revenue Code Section 2613(a)* or any equivalent successor statute) are made from Exempt Trusts, and distributions made during the trust terms to "non-skip persons" (as defined in *Internal Revenue Code Section 2613(b)* or any equivalent successor statute) are made from Non-Exempt trusts.

[*Optional:*]

(e) If the trustee determines that the burdens of generation-skipping transfer taxes, income taxes, and death taxes on a Non-Exempt Trust, either settlor's estate, or the beneficiaries of that trust would be reduced, the trustee may petition the court to amend the trust to grant to one or more trust beneficiaries who are non-skip persons in a generation below the deceased settlor a general testamentary power of appointment over all or a specified portion of that Non-Exempt Trust. Any power to amend the trust is within the discretion of the court, and the preceding sentence shall not be construed to give the trustee any power that the trustee does not already have under California trust law to petition the court under the appropriate circumstances, nor shall it be construed to limit the power of the trustee or any beneficiary under the California trust law to petition the court under the appropriate circumstances.

[*Continue with the following:*]

(f) The purpose of this paragraph is to allow the trustee to administer the trusts so as to decrease the amount of generation-skipping transfer taxes owed on generation-skipping transfers from the trusts. The trustee shall balance that consideration against any other tax and nontax considerations, and may disregard the generation-skipping transfer tax consequences to the extent that the trustee determines that doing so will allow the trustee to carry out the settlors' intentions in creating the trusts. All decisions of the trustee under this subparagraph are within the trustee's discretion and shall be final and incontestable by anyone.

(g) If, upon the death of the surviving settlor, (1) the surviving settlor is considered to be the transferor of any Non-Exempt Trust established by this instrument for generation-skipping transfer tax purposes, and (2) the surviving settlor's executor allocates any part of the generation-skipping transfer tax exemption that is available to the surviving settlor under *Internal Revenue Code Section 2631(a)* (or any equivalent successor statute) to that Non-Exempt Trust so that the entire trust then has an inclusion ratio of zero for federal generation-skipping transfer tax purposes, that trust shall then be considered to be an Exempt Trust for purposes of this paragraph of the trust instrument.

(h) In no event may the trustee exercise any power under this paragraph in a manner that will impair the marital deduction.

(i) If, in the trustee's judgment, at any time after the execution of this trust instrument any statute, regulation, court decision, or administrative ruling imposes different or additional requirements on the trust in connection with the generation-skipping transfer tax, the trustee may petition the court to amend the terms of the trust to meet those requirements and achieve the purpose of this Paragraph.

ARTICLE 6 : Trustee

6.01. Definition. Unless the context requires otherwise, all references in this instrument to "the trustee" shall be deemed to refer to whoever is serving as trustee or co-trustees, and shall include alternate or successor trustees or co-trustees.

6.02. Successor Trustees. (a) If, while both settlors are living, any co-trustee fails or ceases to act as co-trustee, the settlors shall have the power to designate any suitable person or entity to act as successor co-trustee. This power may be exercised \_\_\_\_\_ [only by both settlors, acting jointly *or* by the settlors, acting either jointly or individually]. The successor co-trustee shall be designated by a signed writing delivered to the person or entity designated as successor. If a successor trustee is not designated in this way, then no successor co-trustee shall be appointed. Rather, the remaining co-trustee shall have full power to act as trustee and to complete the trust administration.

(b) If, after the death of the deceased settlor, any trustee or co-trustee fails or ceases to act as trustee or co-trustee, the surviving settlor shall have the power to designate any suitable person or entity to act as successor trustee or co-trustee. The successor trustee or co-trustee shall be designated by a signed writing delivered to the person or entity designated as successor.

(c) If, for any reason, the office of trustee becomes vacant and no trustee is designated under subparagraphs (a) or (b) of this paragraph, the following persons, in the order of priority indicated, shall be successor trustee:

First, \_\_\_\_\_ [*name and place of residence or business, e.g., William J. Gray, of Anaheim, California*];

Second, \_\_\_\_\_ [*name and place of residence or business, e.g., Sandra M. Green, of Buena Park, California*];

Third, \_\_\_\_\_ [*name and place of residence or business, e.g., First National Bank and Trust Company, Los Angeles, California*].

6.03. Removal and Replacement. (a) Notwithstanding any other provision of this instrument, while both settlors are living, the settlors, acting jointly, shall have the power, at any time and for any reason, to remove any trustee acting under this instrument and appoint another trustee to replace the removed trustee. After the death of the deceased settlor, the surviving settlor shall have the power, at any time and for any reason, to remove any trustee acting under this instrument and appoint another trustee to replace the removed trustee. Removal shall be effected by giving a written notice of removal to the trustee to be removed and to the person or entity legally entitled to act as successor trustee. The removal shall become effective upon delivery to the settlors (or the surviving settlor) of a written acceptance of the trust by the successor trustee. The settlors (or the surviving settlor) shall promptly notify the trustee being removed of the receipt of that acceptance.

(b) The court shall have the power to remove the trustee upon petition by any beneficiary, for any of the following reasons:

- (1) Commission of a breach of trust.
- (2) Insolvency or other unfitness to administer the trust.
- (3) Hostility or lack of cooperation among the co-trustees that impairs the administration of the trust.
- (4) Failure or refusal to act.
- (5) Other good cause, as determined by the court.

6.04. Resignation. Any trustee may resign at any time, without giving a reason for the resignation, by giving written notice, at least \_\_\_\_\_ [specify; e.g., 30 days] before the time the resignation is to take effect, to the settlors, if living, to any other trustee then acting, to any persons authorized to designate a successor trustee, to all living trust beneficiaries known to the trustee (or, in the case of a minor beneficiary, to the parent or guardian of that beneficiary), and to the successor trustee, if any has been designated under the provisions of this instrument. A resignation shall be effective upon written acceptance of the trust by a successor trustee.

6.05. Vacancies. If a vacancy should occur in the office of the trustee, whether by reason of death, resignation, removal, or other cause, and no successor trustee is appointed as provided in this instrument, the court shall appoint a new trustee to fill the vacancy. In filling a vacancy, the court may, in its discretion, appoint the original or any other number of trustees. In selecting a trustee, the court shall give consideration to the wishes of the beneficiaries who are 14 years of age or older.

6.06. Exercise of Management Powers While Settlor's Are Co-Trustees. While both settlors are acting as co-trustees under this instrument, with respect to community property held in the trust, either of them may be sole signatory of all checks and other withdrawal instruments drawn on any trust account, and of any instruments of conveyance of trust property other than community real property or a community property interest in a business operated and managed by one settlor. A settlor acting as a trustee and operating or managing a business that is community property may, acting alone, sell, exchange, encumber, or dispose of that business after giving prior notice to the other settlor of any sale, lease, exchange, encumbrance, or other disposition of all or substantially all of the personal property used in the operation of the business (including personal property used for agricultural purposes). Any and all powers relating to the management of any trust property that comprises the separate or quasi-community property of either settlor shall be exercised only by the settlor who contributed that property to the trust.

6.07. Bond. No bond or undertaking shall be required of any individual who serves as a trustee under this instrument [optional; except any successor trustee appointed by court order under Paragraph 6.05 of this instrument].

6.08. Powers. To carry out the purposes of the trusts created under this instrument, and subject to any limitations stated elsewhere in this instrument, the trustee shall, in addition to all of the powers now or hereafter conferred on trustees by law, have the power to do all of the following:

(a) Retain property received into the trust at its inception, or later added to the trust, as long as the trustee considers that retention is in the best interests of the trust or in furtherance of the goals of the settlor in creating the trust, as determined from this trust instrument, but subject to the standards set forth in *California Probate Code Section 16040*. and the Uniform Prudent Investor Act.

(b) Invest and manage trust assets as a prudent investor would, by considering the purposes, terms, distribution requirements, and other circumstances of the trust. In satisfying this standard, the trustee shall exercise reasonable care, skill, and caution. The trustee's investment and management decisions respecting individual assets and courses of action must be evaluated not in isolation, but in the context of the trust portfolio as a whole, and as a part of an overall investment strategy having risk and return objectives reasonably suited to the trust. Among the circumstances that are appropriate to consider in investing and managing trust assets are the following, to the extent relevant to the trust or its beneficiaries:

- (1) General economic conditions.
- (2) The possible effect of inflation or deflation.
- (3) The expected tax consequences of investment decisions or strategies.

- (4) The role that each investment or course of action plans within the overall trust portfolio.
- (5) The expected total return from income and the appreciation of capital.
- (6) Other resources of the beneficiaries known to the trustee as determined from information provided by them.
- (7) Needs for liquidity, regularity of income, and preservation or appreciation of capital.
- (8) An asset's special relationship or special value, if any, to the purposes of the trust or to one or more of the beneficiaries.

The trustee may invest in any kind of property of type of investment or engage in any course of action or investment strategy consistent with the standards set forth in this provision or the Uniform Prudent Investor Act, as set forth in *California Probate Code Sections 16045-16054* or any successor sections.

- (c) In the trustee's discretion, invest or reinvest in mutual funds, money market funds, investment trusts, regulated investment companies, market funds, and index funds, and in the shares or securities of any such funds or companies, that persons of prudence, discretion, and intelligence acquire for their own account.
- (d) Acquire and maintain as a trust asset a life insurance policy on the life of any person, including the trustee, issued by any company and in any amount that the trustee may deem advisable, and exercise all rights of ownership granted in that policy; provided, however, that as to any assets of the trust (other than assets held in the Disclaimer Trust), the surviving settlor shall have the right, by delivery of a written instrument to the trustee, to require the trustee to convert any such policy into productive property within a reasonable time following the receipt of that request.
- (e) With or without court authorization, sell (for cash or on deferred payments, and with or without security), convey, exchange, partition, and divide trust property; grant options for the sale or exchange of trust property for any purpose, whether the contract is to be performed or the option is to be exercised within or beyond the term of the trust; and lease trust property for any purpose, for terms within or extending beyond the expiration of the trust, regardless of whether the leased property is commercial or residential and regardless of the number of units leased.
- (f) Engage in any transactions with the personal representative of the estate of either settlor that are in the best interest of any trusts created in this instrument.
- (g) Manage, control, improve, and maintain all real and personal trust property.
- (h) Subdivide or develop land; make or obtain the vacation of plats and adjust boundaries, or adjust differences in valuation on exchange or partition by giving or receiving consideration; and dedicate land or easements to public use with or without consideration.
- (i) Make ordinary or extraordinary repairs or alterations in buildings or other trust property, demolish any improvements, raze existing party walls or buildings, and erect new party walls or buildings, as the trustee deems advisable.
- (j) Enter into oil, gas, and other mineral leases, on terms deemed advisable by the trustee; enter into any pooling, unitization, repressurization, community, or other types of agreements relating to the exploration, development, operation, and conservation of mineral properties; drill, mine, and otherwise operate for the development of oil, gas, and

other minerals; contract for the installation and operation of absorption and repressuring plants; and install and maintain pipelines. Any such leases or agreements may be for a term within or extending beyond the term of the trust.

(k) In the trustee's discretion, abandon any [*optional*: unproductive or wasted] trust asset or interest therein.

(l) Employ and discharge agents and employees, including but not limited to attorneys, accountants, investment and other advisers, custodians of assets, property managers, real estate agents and brokers, and appraisers, to advise and assist the trustees in the management of any trusts created under this trust instrument, and compensate them from the trust property. [*Optional*: The agents and employees may be associated or affiliated with the trustee, or may be descendants or other persons related to the trustee or to the settlor, or a company associated with any such persons.] [*Optional*: The trustee is entitled to rely on the advice of any professional adviser employed under this provision. Reasonable compensation paid to any such agents or employees shall not diminish the compensation to which the trustee is otherwise entitled.]

(m) With respect to securities held in trust, exercise all the rights, powers, and privileges of an owner, including, but not limited to, the power to vote, give proxies, and pay assessments and other sums deemed by the trustee necessary for the protection of the trust property; participate in voting trusts, pooling agreements, foreclosures, reorganizations, consolidations, mergers, and liquidations and, in that connection, deposit securities with and transfer title to any protective or other committee under such terms as the trustee deems advisable; exercise or sell stock subscription or conversion rights; and accept and retain as investments of the trust any securities or other property received through the exercise of any of the foregoing powers.

(n) Hold securities or other trust property in the trustee's own name or in the name of a nominee, without disclosure of the trust, or in unregistered form, so that title may pass by delivery.

(o) Deposit securities in a securities depository that is either licensed or exempt from licensing.

(p) Borrow money for any trust purpose from any person or entity, on such terms and conditions as the trustee deems advisable, and obligate the trust for repayment; encumber any trust property by mortgage, deed of trust, pledge, or otherwise, whether for terms within or extending beyond the term of the trust, as the trustee deems advisable, to secure repayment of any such loan; replace, renew, and extend any such loan or encumbrance; and pay loans or other obligations of the trust deemed advisable by the trustee.

(q) In the trustee's discretion, make loans to beneficiaries out of funds of the trust, and guarantee the repayment of loans made to beneficiaries by third parties by encumbering trust assets.

(r) Procure and carry, at the expense of the trust, insurance in such forms and in such amounts as the trustee deems advisable to protect the trust property against damage or loss, and to protect the trustee against liability with respect to third persons.

(s) Enforce any obligation owing to the trust, including any obligation secured by a deed of trust, mortgage, or pledge held as trust property, and to purchase any property subject to a security instrument held as trust property at any sale under that instrument.

(t) Extend the time for payment of any note or other obligation held as an asset of, and owing to, the trust, including accrued or future interest, and extend the time for repayment beyond the term of the trust.

(u) Pay or contest any claim against the trust; release or prosecute any claim in favor of the trust; or, in lieu of payment, contest, release, or prosecution, adjust, compromise, or settle any such claim, in whole or in part, and with or without consideration.

(v) At trust expense, prosecute or defend actions, claims, or proceedings of whatever kind for the protection of the trust property and of the trustee in the performance of the trustee's duties, and employ and compensate attorneys, advisers, and other agents as the trustee deems advisable.

6.09. Grant of Specific Powers Not to Limit General Powers. The grant to the trustee in this instrument of a specific power or powers shall not limit the trustee from exercising any other power that may be necessary or appropriate for the trustee to exercise in furtherance of the purposes of this instrument or to permit the trustee to fulfill the trustee's responsibilities and duties with respect to the trust.

6.10. Retention of Family Residence. Notwithstanding any other provision of this instrument, the trustee shall retain, in any trust or trusts created by this trust instrument, any interest in real property used by the settlors as their principal residence at the time of the first settlor's death ("the family residence"), and shall deal with the family residence in accordance with the following terms and conditions:

(a) During his or her lifetime, the surviving settlor shall have the right to occupy the family residence (or any substitute residence or residential property purchased as provided in this paragraph of the trust instrument) free of any rent.

(b) The trustee shall pay as much of the mortgage or trust deed payments, property taxes, assessments, insurance, maintenance, and ordinary repairs on the family residence (or on any substitute residence or residential property purchased as provided in this paragraph of the trust instrument) as corresponds to the trust's proportionate interest in the same. The trustee shall make those payments out of income or principal of the trust or trusts in accordance with the principles applicable to charging of payments under California law, but in no event shall payment be made in a manner that disqualifies any part of any trust, that would otherwise so qualify, for the federal estate tax marital deduction.

(c) The surviving settlor, at his or her option, shall have the right to advise the trustee in writing that he or she no longer wishes to occupy the family residence and to direct the trustee to sell it, or any interest therein. In deciding on the terms and conditions relating to any sale, the trustee shall take into account all relevant factors, including, but not limited to, the intent of the settlors that no sale be made in a "forced sale" situation (other than at the direction of the surviving settlor) or at a time when, because of high mortgage rates or otherwise, the residential real estate market is depressed. In selling the family residence, the trustee may dispose of it on such terms as the trustee deems desirable, including an installment sale or any other desirable method of disposing of the family residence, provided that if the sale is for consideration other than cash, the purchaser's obligation shall be secured by a first deed of trust. In the event of a sale, the surviving settlor may direct the trustee in writing to apply the proceeds of the sale to the purchase of a substitute residence or residential property, of comparable or lesser value, to be selected by the surviving settlor, or to reinvest the proceeds in any manner that he or she may direct, provided that any such investments satisfy normal fiduciary standards of prudence and safety, and to use the income from reinvestment to pay the rental or lease payments on another residence or residential property, to be selected by the surviving settlor. Any net trust accounting income from any such investments, in excess of the trust share of the rental costs and any other expenses of trust administration, shall be added to the other trust income and distributed in accordance with the relevant provisions of the trust or trusts as set forth in Article 5 of this trust instrument.

[*Optional:*]

(d) If the surviving settlor does not direct the trustee to sell the family residence, he or she shall have the right to direct the trustee in writing to lease it, or any interest in it. In the event of lease, the trustee shall continue to pay the expenses of maintaining the family residence as specified above, subject to the lease terms, and shall use the entire net income from the lease to pay the mortgage, rental, or lease payments on another residence or residential property, to be selected and occupied by the surviving settlor. Any net trust accounting income from any lease of the family residence, in excess

of the trust's share of the cost of the mortgage, rental, or lease payments on another residence or residential property, shall be added to the other trust income and distributed in accordance with the relevant provisions of the trust or trusts, as set forth in Article 5 of this trust instrument.]

[*Continue with the following:*]

(e) Upon the death of the surviving settlor, the trust's interest in either the family residence, any proceeds remaining from the sale of the family residence, or any substitute residence or residential property purchased by the trustee with any proceeds of sale or lease of the family residence, shall be distributed in accordance with the applicable provisions of the trust or trusts in which the interest or interests are held, as set forth in Article 5 of this trust instrument.

6.11. Power to Divide or Combine Trusts. The trustee shall have the power to divide a single trust into separate shares, each to be administered in accordance with the terms and conditions of the single trust from which they were created, when the trustee, in the trustee's discretion, determines that division is desirable or advisable in view of tax considerations (including considerations related to the income tax, the gift tax, the estate tax, and the generation-skipping transfer tax) or other objectives of the trusts and their beneficiaries. The trustee shall not be required to make a physical segregation or division of the various trust shares created under this trust instrument, except as segregation or division may be required by reason of the termination and distribution of any of the trusts, but the trustee shall keep separate accounts and records for different undivided interests. The trustee, in the trustee's discretion, shall have the further power to combine two or more trusts having substantially the same terms into a single trust for purposes of administration, when tax or other factors indicate that such combination would be desirable or advisable. [Optional: In deciding whether to combine trusts, the trustee should consider the generation-skipping transfer tax "inclusion ratio" of the trusts to be combined. Trusts having the same inclusion ratios may be combined. Trusts having different inclusion ratios generally should not be combined unless their inclusion ratios are maintained unchanged through substantially separate and independent shares of different beneficiaries, within the meaning of *Internal Revenue Code Section 2654(b)*, and the applicable regulations thereunder.]

6.12. Early Termination of Trusts. The trustee shall have the power, in the trustee's discretion, to terminate any trust created under this trust instrument whenever the fair market value of the trust falls below \_\_\_\_\_ [specify amount, e.g.: \$25,000], or becomes so small in relation to the costs of administration as to make continuing administration uneconomical. Upon termination, the trustee shall distribute the principal and any accrued or undistributed net income to the income beneficiaries in proportion to their shares of the income. If no fixed amount of income is payable to specific beneficiaries, the trustee shall distribute the principal and any accrued or undistributed net income in equal shares to those beneficiaries who would then be entitled to income payments from the trust.

6.13. Division or Distribution in Cash or in Kind. In order to satisfy a pecuniary gift or to distribute or divide trust assets into shares or partial shares, the trustee may distribute or divide those assets in kind, or divide undivided interests in those assets, or sell all or any part of those assets and distribute or divide the property in cash, in kind, or partly in cash and partly in kind. Property distributed to satisfy a pecuniary gift under this trust instrument shall be valued at its fair market value at the time of distribution.

6.14. Payments and Distributions to or for Benefit of Beneficiaries. In lieu of making a direct payment or distribution to any beneficiary who at the time of the payment or distribution is a minor or suffering from a legal disability, or who appears to the trustee by reason of illness, age, injury, or other cause, to be unable to accept the payment or distribution or to make intelligent or responsible use of the same, the trustee may make the payment or distribution to any conservator or guardian duly appointed and acting for and on behalf of the beneficiary; to any custodian acting for and on behalf of the beneficiary under the Uniform Gifts to Minors Acts or Uniform Transfers to Minors Act of any state, including a suitable custodian selected by the trustee; to any suitable person or persons, such as a relative or friend, with

whom the beneficiary is residing; to any other person, firm, or agency for services rendered or to be rendered for the beneficiary's assistance or benefit; or to accounts in the beneficiary's name with financial institutions. The receipt of payments by any of the foregoing shall constitute a sufficient acquittance of the trustee for all purposes.

6.15. Limitation on Powers That Would Imperil Marital Deduction. Notwithstanding any other provision of this instrument, the trustee shall exercise power and discretion over any trust or trust share designed to qualify for the federal estate tax marital deduction only in a manner consistent with all statutory and regulatory requirements for the full allowance of the marital deduction for that trust or share.

6.16. Power to Disclaim or Release Powers. Any trustee may disclaim, release, or restrict the scope of any power or discretion that the trustee may hold in connection with any trust created under this instrument, whether the power or discretion is expressly granted in this instrument or is implied by law. The trustee shall disclaim a power in the manner required by applicable federal or California law. The trustee shall release or restrict any power or discretion by giving written notice to the beneficiary or beneficiaries then entitled to current distribution of income from the trust, specifying the power or discretion to be released or restricted, the nature of the restriction, and, if appropriate, the person or persons to whom the released or restricted power shall pass and be exercisable. If a power is disclaimed, the power shall be available to and exercisable by the other trustee or trustees.

6.17. Trustee's Liability. No [optional: "family" or individual] trustee [optional: who is serving without compensation under this trust instrument] shall be liable to any interested party for acts or omissions of that trustee, except those resulting from that trustee's willful misconduct or gross negligence. [Optional: As used in this provision, a "family" trustee is a trustee who is related to the settlors by blood or marriage.] This standard shall also apply regarding a trustee's liability for the acts or omissions of any co-trustee or predecessor trustee.

#### **PRACTICE TIP**

One should carefully consider whether or not the above provision should be included. In effect, this provision partially relieves the trustee of liability in exchange for the trustee's waiver of any claim to compensation. This provision may be omitted if the client prefers not to allow the trustee to effectively "buy" a lesser standard of conduct by waiving compensation. While the savings in compensation may sound attractive, the settlor should consider whether or not it might be preferable, in the long run, to pay for the trustee's time and services and require, in return, that the trustee adhere to a high standard of conduct. *Commentary by Albert G. Handelman.*

6.18. Written Notice to Trustee. Until the trustee receives written notice of any death or other event upon which the right to payments from any trust may depend, the trustee shall incur no liability for disbursements made in good faith to persons whose interests may have been affected by that event.

6.19. Duty to Account. The trustee shall render accounts at least annually, at the termination of a trust, and upon a change of trustees, to the persons and in the manner required by law.

#### **PRACTICE TIP**

*Probate Code Section 16062* requires the trustee of any trust to provide an annual account to the beneficiaries, except under limited circumstances, such as when the trust may be revoked, when the beneficiary waives an accounting, or when the trustee and the beneficiary are the same person [see *Prob. Code § 16064*]. The contents of the annual account are described in *Probate Code Section 16063*. Generally, the accounting must reveal all of the information required in a formal accounting, although it may be presented in summary form. Additionally, information must be provided regarding trustee,

attorney and accountant compensation, and statements regarding the rights of the beneficiary to challenge the actions of the trustee must be included [*see Prob. Code § 16063*].

In light of these provisions, the planner may wish to consider omitting the requirement that an accounting be provided. This provision would only add the burden of preparing a full, formal accounting, which can always be required by the beneficiary in any case when he or she feels that more detail must be revealed by the trustee [*see Prob. Code §§ 16061, 16062(a)*]. Indeed, many attorneys specifically waive the requirement that any accounting whatsoever be rendered by the trustee. Even with such a waiver in the trust instrument, a beneficiary could still obtain an accounting if it appears that a material breach of the trust has occurred [*see Prob. Code § 16064*]. *Commentary by Albert G. Handelman.*

#### ARTICLE 7 : Concluding Provisions

7.01. Perpetuities Savings Clause. Notwithstanding any other provision of this instrument, any trust created by this instrument or by a power of appointment created by this instrument that has not terminated earlier shall terminate no later than 21 years after the death of the last survivor of \_\_\_\_\_ [*name individual(s) or describe class of persons whose life or lives are to be the measuring life or lives, e.g., the settlors and the issue of the settlors living on the date of the deceased settlor's death or the beneficiaries of the trust who are living on the date of the deceased settlor's death*]. If a trust is terminated because of the preceding sentence, the trustee shall distribute the principal and undistributed income of the trust to the income beneficiaries of the trust in the same proportion that they are entitled to receive income immediately before the termination. If that proportion is not fixed by the terms of this instrument, distribution shall be to the persons entitled to receive income immediately before the termination \_\_\_\_\_ [*specify distribution plan, e.g., in the manner provided in California Probate Code Section 240*]. If there is no person who is entitled to receive income immediately before the termination, the trustee shall distribute the principal and undistributed income to \_\_\_\_\_ [*name distributee(s) or specify class, e.g., the issue of the settlors then surviving, in the manner provided in California Probate Code Section 240*].

7.02. Simultaneous Death. If the settlors die under circumstances in which the order of their deaths cannot be established by clear and convincing evidence, each settlor shall be deemed to have survived the other, and this instrument shall be construed accordingly. If the settlors, or either of them, and any beneficiary under this instrument die under circumstances in which the order of their deaths cannot be established by clear and convincing evidence, the settlor or settlors, as the case may be, shall be deemed to have survived the beneficiary, and this instrument shall be construed accordingly.

7.03. No-Contest Clause. If any beneficiary under this instrument, singularly or in combination with any other person or persons, directly or indirectly contests this instrument or the wills of the settlors in whole or in part, or opposes, objects to, or seeks to invalidate any of the provisions of this instrument or of the wills of the settlors, or seeks to succeed to any part of the estate of the settlors other than in the manner specified in this instrument or in the wills of the settlors, then the right of that person to take any interest given to him or her by this instrument shall be void, and any gift or other interest in the trust property to which the beneficiary would otherwise have been entitled shall pass as if he or she had predeceased the settlors [*optional: without issue*].

7.04. Definition of Death Taxes. As used in this instrument, the term "death taxes" means all inheritance, estate, succession, and other similar taxes that are payable by any person on account of that person's interest in the decedent's estate or by reason of the decedent's death, including penalties and interest, but excluding the following:

- (a) Any additional tax that may be assessed under *Internal Revenue Code Section 2032A*.
- (b) Any federal estate taxes recoverable, pursuant to *Internal Revenue Code Section 2207A*, from the holder or recipient of any qualified terminable interest property that is included in the settlor's federal gross estate under *Internal Revenue*

*Code Section 2044.*

(c) Any federal or state tax imposed on a generation-skipping transfer, as that term is defined in the federal tax laws, unless that generation-skipping transfer tax is payable directly out of the assets of a trust created by this instrument.

7.05. Definition of Debts and Expenses. As used in this instrument, the term "debts and expenses" shall include the following:

(a) All costs, expenses of litigation, counsel fees, or other charges that the trustee incurs in connection with the determination of the amount of the death taxes, interest, or penalties referred to in Paragraph 5.02 of this instrument, and

(b) Legally enforceable debts, funeral expenses, expenses of last illness, and administration and property expenses.

7.06. Definition of Deceased Settlor and Surviving Settlor. As used in this instrument, the words "deceased settlor" refer to the first settlor to die, and the words "surviving settlor" refer to the other settlor.

7.07. Definition of Child and Children. As used in this instrument, the words "child" and "children" refer to natural children and to children who have been legally adopted by the parent or parents from or through whom their right to inherit or to take is determined and derived.

7.08. Definition of Issue. As used in this instrument, the word "issue" refers to all lineal descendants of all generations, with the relationship of parent and child at each generation being determined by the definitions of "child" and "children" set forth in this instrument.

7.09. Definition of Education. As used in this instrument, the term "education" refers to the following:

(a) Education at public or private elementary, junior high, middle, or high schools, including boarding schools;

(b) Undergraduate, graduate, and postgraduate study in any field, whether or not of a professional character, in colleges, universities, or other institutions of higher learning;

(c) Specialized formal or informal training in music, the stage, the handicrafts, or the arts, whether by private instruction or otherwise; and

(d) Formal or informal vocational or technical training, whether through programs or institutions devoted solely to vocational or technical training, or otherwise.

7.10. Number and Gender. As used in this instrument, references in the masculine gender shall be deemed to include the feminine and neuter genders, and vice versa, and references to the singular shall be deemed to include the plural, and vice versa, wherever the context so permits.

7.11. Captions. The captions appearing in this instrument are for convenience of reference only, and shall be disregarded in determining the meaning and effect of the provisions of this instrument.

7.12. Severability Clause. If any provision of this instrument is invalid, that provision shall be disregarded, and the remainder of this instrument shall be construed as if the invalid provision had not been included.

7.13. California Law to Apply. All questions concerning the validity, interpretation, and administration of this instrument, including any trusts created under this instrument, shall be governed by the laws of the State of California,

regardless of the domicile of any trustee or beneficiary.

7.14. Gifts to "Heirs." For any gift to heirs of either or both settlors that is made in this instrument, those heirs shall be determined as if the settlor or settlors had died intestate at the time for distribution prescribed in this instrument, and the identity and shares of those heirs shall be determined according to the California laws of succession that concern separate property not acquired from a previously deceased spouse and that are in effect at the death of the settlor or settlors.

#### ARTICLE 8 : Execution

8.01. Execution. We certify that we have read the foregoing declaration of trust and that it correctly states the terms and conditions under which the trust estate is to be held, administered, and distributed. As trustees of the trusts created by this declaration of trust, we approve this declaration of trust in all particulars, and agree to be bound by its terms and conditions. As settlors of the trusts created by this declaration of trust, we approve this declaration of trust in all particulars, and agree to be bound by its terms and conditions.

Executed on \_\_\_\_\_ [month, day], \_\_\_\_\_ [year], at \_\_\_\_\_ [city or town, and state, in which declaration of trust is signed, e.g., Orange, California].

#### TRUSTEES/SETTLORS

\_\_\_\_\_ [signature of trustee/settlor]

[typed name]

\_\_\_\_\_ [signature of trustee/settlor]

[typed name]

#### ACKNOWLEDGMENT

[Acknowledgements taken in California must be in the following form (Civ. Code § 1189(a))]:

\_\_\_\_\_ )  
 State of California )  
 County of \_\_\_\_\_ )

On \_\_\_\_\_ [date], before me, \_\_\_\_\_ [name and title of officer taking acknowledgment], personally appeared \_\_\_\_\_ [name(s)], who proved to me on the basis of satisfactory evidence to be the persons whose names are subscribed to the within instrument and acknowledged to me that they executed the same in their authorized capacities, and that by their signatures on the instrument the persons, or the entity upon behalf of which the persons acted, executed the instrument.

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

WITNESS my hand and official seal.

Signature \_\_\_\_\_ (SEAL)

#### SCHEDULE A

#### SCHEDULE OF TRUST ASSETS

*Description of Asset*

*Character of Asset [e.g., separate or com-*

*munity property]*

_____	_____
_____	_____
_____	_____
_____	_____
_____	_____

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsMarital Deduction TrustsEstate, Gift & Trust LawTrustsRevocable Living Trusts



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California Legal Forms--Transaction Guide

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DIVISION IV: WILLS AND TRUSTS  
 CHAPTER 70 COMPLETE REVOCABLE TRUST FORMS  
 PART IV. FORMS  
 A. Complete Trust Instruments

*26-70 California Legal Forms--Transaction Guide § 70.202*

**AUTHOR:** Reviewed by Albert G. Handelman

**§ 70.202 Formula Marital Deduction Trust for Married Settlers--Survivor's Trust, QTIP Trust, and Bypass Trust**

**[1] Comment**

**[a] Use of Form**

This form is a complete trust instrument that may be used by married settlors who wish to create a revocable trust for their own benefit during their lifetimes and the benefit of their children (or other beneficiaries) following their deaths, and who wish to save or reduce estate taxes by taking full advantage of the marital deduction [*see I.R.C. § 2056*] and the unified credit [*see I.R.C. §§ 2010* (estate tax), *2505* (gift tax)].

Under this form, no federal estate tax will be due on the death of the first settlor (referred to in this form as the "deceased settlor"), because the marital deduction and the deceased settlor's unified credit will shelter the entire estate from federal estate tax. Moreover, the portion of the assets sheltered by the deceased settlor's unified credit will also avoid taxation when the second settlor (referred to in this form as the "surviving settlor") dies. The net effect of this plan will be to avoid or reduce estate taxes in the combined estates of both settlors. It is assumed that the combined estates of the two settlors are large enough to enable them to benefit from this kind of planning.

**PRACTICE TIP:**

In using this form, the attorney should bear in mind that this estate plan, by itself, will not necessarily automatically result in the lowest possible amount of death taxes being paid when considering the total taxes paid at both deaths. This is because the plan ensures only that the unified credit of the first settlor to die will be fully utilized. Unfortunately, the first effective tax bracket of 41% (i.e., the first bracket after the "applicable exclusion amount" available in the estates of decedents dying after 2001 and before the year 2004) [*see I.R.C. § 2010(c)* (table of graduated amounts) and discussion in § 60.13[4][b]], extends only to transfers up to \$1 million. Above that amount, the marginal estate tax rate continues to increase until it hits the maximum rate [*see I.R.C. § 2001(c)*]. If the surviving settlor's taxable estate will exceed \$

1 million, then further savings are possible by fully utilizing the lower estate tax brackets of the deceased settlor by voluntarily paying some estate tax at the deceased settlor's death. This can be done by having the surviving settlor disclaim some portion of the property that would otherwise pass to the QTIP Trust. This form enables this to be done with great flexibility via the use of a Disclaimer Trust. See § 70.202[1][o]. In practice, surviving spouses often refuse to make this disclaimer, even though taxes can be lowered. Nevertheless, the practitioner can at least leave the door open to this sort of planning by including the Disclaimer Trust provisions. *Commentary by Albert G. Handelman.*

### **[b] General Features of Estate Plan**

This trust implements an estate plan that is typical of marital deduction formula trusts created by married settlors. Under this form, the settlors retain broad powers over the trust during their joint lifetimes [see [2], Articles 3, 4, *below*]. When the first settlor dies, the trust is divided into three separate trusts [see [2], P 5.03, *below*]. The first trust, referred to as the "survivor's trust," contains all of the surviving spouse's separate property, together with one-half of the community property of the settlors, and remains fully revocable by the surviving spouse during his or her lifetime. When the surviving settlor dies, this trust will pass to the person or persons designated by the surviving settlor, or, if the settlor does not designate anyone, to the children or other persons named in the instrument [see [2], PP 5.03(a), (b), 5.07, *below*].

The deceased spouse's separate property, and his or her share of the community property, is further divided into two trusts. This division is accomplished by means of a formula, known as a "marital deduction formula" [see [2], P 5.03(c), *below*]. One trust will contain assets designed to qualify for the federal estate tax marital deduction. This trust, known as the "marital deduction trust," is designed to qualify for the federal estate tax marital deduction as a "qualified terminable interest property" ("QTIP") trust [I.R.C. § 2056(b)(7); see [2], P 5.08, *below*]. The form can be modified to accommodate a "lifetime income/power of appointment trust" [I.R.C. § 2056(b)(5)] if desired [see § 71.13[5] in Ch. 71, *Marital Deduction Trust Provisions* ].

#### **PRACTICE TIP:**

If the "lifetime income/power of appointment" type of marital deduction trust is selected, consideration may be given to combining the marital deduction trust with survivor's trust. This will combine the tax planning provided by a marital deduction formula trust with the simplicity of a nonformula marital deduction trust. By modifying the forms in this manner, one less trust will be created, meaning one less tax return will have to be filed, and one less set of trust books maintained. Combination of the survivor's trust and the marital deduction trust is discussed in §§ 71.14[4] and 71.231[1][f] in Ch. 71, *Marital Deduction Trust Provisions* . The formula clauses in contain optional language, not appearing in this form, that allows the drafter to create an estate plan in which the marital deduction assets and the survivor's assets are pooled in a single trust. *Commentary by Albert G. Handelman.*

The marital deduction trust will pay income (and principal, if desired) to the surviving settlor for life, and on his or her death the balance will go to the children or other beneficiaries designated by the settlors.

The third trust, known as the "bypass trust," is designed to take advantage of the deceased settlor's unified credit. With certain restrictions, bypass trust income will be paid to the surviving settlor for life, and will pass to the children or other designated beneficiaries on his or her death [see [2], P 5.09, *below*].

### **[c] Advantages**

Either a nonformula marital deduction trust such as the *form in § 70.201*, or a formula trust like the one in this form, will eliminate estate tax in the estate of the first spouse to die. However, a nonformula trust does nothing to reduce the federal estate that will be due on the death of the second spouse. In contrast, the trust in this form allows a portion of the

deceased settlor's estate (the "bypass trust") to bypass the estate of the surviving settlor and thereby escape taxation in the survivor's estate. If the combined estates of the two settlors, taking into account the likelihood of asset appreciation during both their lifetimes, are likely to exceed the "applicable exclusion amount" that will be available in the year of the second spouse's death [*see I.R.C. § 2010(c)* (table of graduated amounts) and discussion in § 60.13[4][b]] a marital deduction formula trust will have a tax advantage over a nonformula trust. This advantage becomes increasingly greater as the size of the settlors' combined estates increases. For a comparison of the advantages and disadvantages of formula and nonformula trusts, see § 70.201[1][b].

This form also is designed to provide a high degree of postmortem tax planning flexibility. Features such as the QTIP trust [*see* [2], P 5.08, *below* ], the Disclaimer Trust [*see* [2], P 5.11, *below* ], and the provision authorizing division of the trust for generation-skipping transfer tax purposes [*see* [2], P 5.15, *below* ], all enhance the tax planning flexibility available to the trustee after the first settlor's death.

#### **[d] Trust Declaration Format**

This trust instrument uses the trust declaration format. A "declaration of trust" is a one-party instrument in which the trustee unilaterally declares that the trustee is holding property as trustee under terms of the trust instrument [*see* [2], P 1.01, *below* ]. Only the trustee is required to execute the declaration. However, it is common for the settlors to sign the declaration to signify their approval of the terms of the trust [for signature blocks for declarations of trust, *see* [2], P 8.01, *below* ]. For discussion of the distinction between a trust declaration and a trust agreement, and the advantages and disadvantages of the two formats, see *Section 70.11[3]*.

#### **[e] Family Information**

It is assumed in this form that the settlors have children, and that neither settlor has children from a prior marriage [*see* [2], P 1.04, *below* ]. For a form containing sample provisions listing children from a prior marriage, see *Section 70.203[2]*, Paragraph 1.05. That provision can be adapted to the two-settlor trust illustrated in this form. For a discussion of drafting problems that can arise when either or both settlors have children from a previous marriage, see [v], *below*.

#### **[f] Revocation and Amendment by Settlers**

This form gives the settlors the power to amend, revoke, or terminate the trust at any time while they are both living [*see* [2], P 3.01, *below* ]. Either settlor, acting alone, may revoke or terminate the trust as to any separate and quasi-community property of that settlor, and as to the community property of the settlors. As discussed in *Section 70.12[5][c]*, the unilateral right to revoke as to community property is necessary both to preserve the character of any community property assets contributed to the trust [*see Fam. Code § 761(a), (b)*] and to avoid potential gift tax liability that could result if either settlor renounced his or her statutory right to unilaterally revoke the trust as to community property [*see I.R.C. § 2511(a); Treas. Reg. § 25.2511-2(b)* (relinquishment of dominion and control over property may constitute taxable gift)]. The unilateral right to revoke as to separate property will assure that each spouse retains control over his or her separate property, and will reinforce the general statutory rule (applicable to all property other than community property that will retain its character as such in the trust) that unless the instrument provides otherwise, each settlor may revoke the trust as to the portion of the trust contributed by that settlor [*Prob. Code § 15401(b)*].

The trust may be modified or amended by either spouse acting alone as to that spouse's separate and quasi-community property in the trust. However, a modification or amendment of the trust affecting any community property of the settlors may be made only by the settlors acting jointly [*see* [2], P 3.01, *below* ]. As discussed in *Section 70.12[5][f]*, this power is also necessary to preserve the character of community property transferred to the trust [*see Fam. Code § 761(a)*]. After the death of the deceased settlor, the surviving spouse retains the power of revocation and amendment over the Survivor's trust [*see* [2], P 3.02, *below* ; *see also* [j], *below* (discussion of Survivor's Trust)]. All the other trusts

become irrevocable on the deceased settlor's death *see* [o], *below* (irrevocability of Disclaimer Trust)].

#### **[g] Settlor's Powers to Direct Investments and Borrow From Trust Estate**

The settlors are also given powers to direct investments and to borrow money from the trust estate. While both settlors are living, these powers may be exercised with respect to community property only by both settlors acting jointly [*see* [2], PP 3.05, 3.07, *below* ]. After the death of the deceased settlor, the surviving settlor may exercise investment powers only with respect to the assets of the survivor's trust, while optional language permits the imposition of a similar restriction on the power to borrow from the trust estate [*see* [2], PP 3.06, 3.08, *below* ].

#### **[h] Payments and Distributions While Both Settlor's Are Living**

While both settlors are living, they will have the right to receive as much of the net income of the community property of the trust as they request [*see* [2], P 4.02, *below* ]. If either settlor has contributed separate or quasi-community property to the trust, that settlor will have substantially identical income rights in that property [*see* [2], P 4.01, *below* ]. The settlors also have analogous rights to request distributions of principal from the community property, separate property, and quasi-community property [*see* [2], PP 4.03, 4.04, *below* ].

#### **[i] Special Gift on Death of Deceased Settlor**

This form includes a provision making a so-called "special gift" on the deceased settlor's death [*see* [2], P 5.01, *below* ]. The term "special gift," as used in this form, means a gift that the trustee is required to make after the settlor's death to someone other than the residuary beneficiary. It is analogous, in many respects, to a specific devise or a general pecuniary devise in a will. The special gift in this form is a pecuniary devise, but special gifts of tangible personal property are not uncommon [*see* § 70.255[2] (form)].

The special gift will be made before any distributions are made to the surviving settlor or any other beneficiary. The special gift typically will be made to a family member or friend whom the settlor making the gift wishes to remember after his or her death, but whom that settlor does not wish to receive the full benefit of the residue of the trust estate. The special gift in this form is not contingent upon whether or not a particular settlor is the first settlor to die, but special gifts based on such a contingency are common. For an alternative special gift provision that makes a pecuniary gift that is dependent on a particular settlor being the first settlor to die, *see* § 70.250[2].

If neither settlor wants to make a special gift, this provision can be deleted. If more than one special gift is to be made, identical provisions may be included as necessary.

The special gift used in this form is not intended to qualify for the federal estate tax marital deduction. Therefore, if the amount of the gift exceeds the amount protected by the available unified credit [*see* I.R.C. § 2010], it will be subject to estate tax. Under the tax payment provision in this form [*see* [2], P 5.02, *below* ], the special gift will *not* be exempt from proration of estate taxes, with the result that the actual amount that will pass to the recipient may be less than the pecuniary amount specified in the special gift provision. If, as is frequently the case, the settlors want a special gift to pass to the recipient tax free, the tax payment provision in the form must be modified to exclude the special gift from any liability for estate taxes. Before modifying the tax provision, however, the settlors should be reminded that if the special gift is to pass tax free, any tax attributed to the special gift will have to be paid out of other trust assets that would otherwise go to the surviving settlor or other trust beneficiaries.

#### **PRACTICE TIP:**

Even if the amount of the special gift does not exceed the amount protected by the available unified credit, if it is at all large it can have a serious impact on the estate plan. For example, if part of the plan is intended to create a bypass trust that will ultimately pass tax free to the deceased settlor's children, a large nonmarital special gift will significantly reduce the amount that can be placed into the bypass trust

without creating an immediate tax. Thus, caution must be exercised, not only in including special gifts, but in evaluating the effect of special gifts on the tax liabilities generated and the size of any remaining nonmarital gifts. *Commentary by Albert G. Handelman.*

### **[j] Survivor's Trust**

After the special gift has been made (or if there is no special gift), the trustee will be required to divide the trust estate into three shares or trusts [see [b], *above*]. These are referred to in this form as the "Survivor's Share" [see [2], PP 5.03(a), (b), 5.07, *below* ], the "Marital Deduction Share" (or "QTIP Trust") [see [2], PP 5.03(c), (d), 5.08, *below* ], and the "Nonmarital Share" (or "Bypass Trust") [see [2], PP 5.03(e), (f), 5.09, *below* ]. The Survivor's Share is carved out first. The Survivor's Share will consist of the surviving settlor's share of the community property, and any separate or quasi-community property contributed to the trust by the surviving settlor [see [2], P 5.03(a), *below*]. The Survivor's Share will be held as a separate trust called the Survivor's Trust.

Since the Survivor's Trust will consist exclusively of property that the surviving settlor owned before the death of the deceased settlor, the surviving settlor will continue to be regarded as the owner of the Survivor's Trust for all income and estate tax purposes, and there is no reason to restrict the surviving settlor's control over the trust. Accordingly, this form provides that the Survivor's Trust will be subject to amendment, revocation, or termination by the surviving settlor at any time and for any reason [see [2], P 3.02, *below* ]. On the death of the surviving settlor, the Survivor's Trust will become irrevocable [see [2], P 3.02, *below* ].

The surviving settlor will receive all of the net income of the Survivor's Trust for life [see [2], P 5.07(a), *below*], and have an unlimited right to request principal distributions [see [2], P 5.07(b), *below*]. After the death of the surviving settlor, the trust principal and any undistributed income will be distributed to whoever the surviving settlor designates in his or her will [see [2], P 5.07(c), *below*]. In other words, the surviving settlor has a general testamentary power of appointment over the trust assets [see *Prob. Code* §§ 611(a), 612(a); see also discussion of powers of appointment in Ch. 64, *Testamentary Trusts: Payment and Distribution Provisions*, § 64.43 et seq.]. If the surviving settlor does not exercise this power of appointment, the trustee is required to distribute the principal and undistributed income to the persons or entities entitled to distribution of the Bypass Trust [see [2], P 5.07(c), *below*; see also [2], P 5.09, *below* (bypass trust)].

### **[k] Marital Deduction Formula**

After the Survivor's Trust has been carved out of the trust assets, the remainder of the trust, consisting of the deceased settlor's separate property and his or her half of the settlor's community property, will be further subdivided into a Marital Deduction Share designed to qualify for the federal estate tax marital deduction, and a Nonmarital Share that does not qualify for the federal estate tax marital deduction but that will be protected under the deceased settlor's unified credit. The actual dollar amount of the trust assets allocated to each share is determined by means of a formula, known as a marital deduction formula [see [2], P 5.03(c), *below*]. Essentially, this formula apportions assets between the Marital Deduction Share and the Nonmarital Share in a manner that will assure that the Nonmarital Share is funded to the extent of the available unified credit, and the balance of the estate is allocated to the Marital Deduction Share where it will be protected from taxation by the marital deduction.

Marital deduction formulas can be either "pecuniary" or "fractional." This trust uses a pecuniary formula, which allocates to each trust assets having a dollar value determined by the formula. Once the value has been determined, particular assets will be allocated to each share. In contrast, a fractional formula requires the trustee to allocate a fractional share of each trust asset to the Marital and Nonmarital Shares. The advantages and disadvantages of pecuniary and fractional formulas are discussed in Ch. 71, *Marital Deduction Trust Provisions*; see also California Wills & Trusts, Ch. 112, *The Marital Deduction and Marital Deduction Trusts* (Matthew Bender).

A pecuniary formula marital deduction clause can specify that the marital deduction share will be equal to a specified pecuniary amount, with the residue being allocated to the nonmarital share. Conversely, it can specify that the nonmarital share will be equal to a specified pecuniary amount, with the residue being allocated to the marital deduction share. This form follows the first of these two approaches, which is (at least arguably) the most frequently used by estate planners. When this approach is used, the marital deduction share will be limited to the specified amount, determined as of the date of distribution. If assets appreciate in value between the date of death and the date of distribution, the appreciation will be allocated to the nonmarital share.

**PRACTICE TIP:**

The choice of whether to define the marital deduction amount or the bypass amount with a pecuniary formula often hinges on the size of the estate. When a pecuniary gift--including a gift defined by a pecuniary formula--is funded with an asset that has appreciated between the date of death and the date of distribution to the trust, a capital gain is recognized. Thus, many practitioners choose to use the pecuniary formula to define the gift they expect to be smaller when the first settlor dies. For example, if the deceased settlor's taxable estate (not considering the trust assets attributable to the surviving settlor) is expected to be \$800,000, then the pecuniary formula would be used to define the marital deduction amount. On the other hand, if the deceased settlor's taxable estate is expected to be \$2 million, then the pecuniary formula would be used to define the bypass amount. In each instance, the larger gift would be the residuary (that is, the non-pecuniary) share, which would tend to minimize the exposure to capital gains taxes. *Commentary by Albert G. Handelman.*

If the trust drafter wants to modify this form to use a different type of marital deduction formula, the following provisions may be substituted:

(1) To use a "pecuniary bypass formula" specifying that the nonmarital share will be equal to a specified amount, delete Paragraph 5.03 of this trust, and substitute the *form in Section 71.203[2]* in Ch. 71, *Marital Deduction Trust Provisions*.

(2) To use a "fractional formula" [see above], delete Paragraphs 5.03 and 5.04 of this trust, and substitute the *form in Section 71.205[2]* in Ch. 71, *Marital Deduction Trust Provisions*.

Many sensitive issues are presented when a marital deduction formula clause is drafted. A detailed discussion of those issues is beyond the scope of this comment. For further discussion, see Ch. 71, *Marital Deduction Trust Provisions*; see also 3 California Wills & Trusts, Chapter 112, *The Marital Deduction and Marital Deduction Trusts* (Matthew Bender).

**[I] QTIP Trust**

The marital deduction share of this trust is placed in a marital deduction trust [see [2], P 5.08, *below*]. The marital deduction trust used in this form is a qualified terminable interest property (or "QTIP") trust, the terms of which comply with the "qualified terminable interest property" provisions of *Internal Revenue Code Section 2056(b)(7)*. As required by the tax rules, all the income from the QTIP Trust is payable to the surviving settlor for life, and no person has any power to appoint any part of the property to any person other than the surviving spouse during his or her lifetime [*I.R.C. § 2056(b)(7)(B)(ii)*]. After the death of the deceased settlor, his or her executor must make an irrevocable election on the estate tax return filed for the deceased spouse's estate to treat the all or part of the trust assets as QTIP property [*I.R.C. § 2056(b)(7)(B)(i)(III), (v)*].

The surviving spouse need not be given a power of appointment over the assets of a QTIP trust. Thus, the deceased settlor may specify who will receive the trust property after the death of the surviving settlor. This makes QTIP trusts particularly suitable for clients who do not want the surviving spouse to be able to alter the dispositions of the client's

assets after the deceased spouse's death. The "classic" situation calling for the use of a QTIP trust is one in which there are children of a former marriage and animosity exists between those children and the current spouse. However, as discussed in Ch. 71, *Marital Deduction Trust Provisions*, there are important reasons for using a QTIP trust even when no such considerations are present. Essentially, because the deceased spouse's executor can elect to qualify all or only part of the trust for the marital deduction, the QTIP trust allows a much wider measure of portmortem planning flexibility. Most experienced estate planners recommend using a QTIP trust whenever possible.

The most common alternative to a QTIP trust is a so-called "lifetime income/power of appointment trust," which will also qualify for the federal estate tax marital deduction [*see I.R.C. § 2056(b)(5)*]. Under such a trust, the surviving spouse must be entitled (as with a QTIP trust) to all the trust income for life. In addition, the survivor must be given the right, in the form of a general power of appointment, to designate the recipient of all remaining trust assets on the survivor's death. Since the survivor has such broad powers over the trust assets, a lifetime income/power of appointment trust is suitable only when each of the settlors has a high degree of confidence that the other will dispose of the remaining assets in the manner that will be consistent with the wishes of the deceased spouse. Moreover, a lifetime income/power of appointment trust lacks the postmortem planning flexibility available through use of the QTIP trust. However, it is nevertheless preferred by some settlors who want to demonstrate their confidence in one another by giving each other a great measure of control over the disposition of one another's property.

If the drafter wants to convert the marital deduction trust in this form into a lifetime income/power of appointment trust, Paragraph 5.07 of this form should be deleted, and the form in *Section 71.231 [2]* substituted in its place. In addition, when a lifetime income/power of appointment trust is used, the trust drafter should consider combining the survivor's share and the marital deduction share into a single trust, as noted in the Practice Tip in [1][b], above [*see also* §§ 71.14 [4] and 71.231[1][f] in Ch. 71, *Marital Deduction Trust Provisions*]. In the latter case, the marital deduction formula clause will also have to be modified to reflect the creation of two rather than three trusts. The formula clauses in Ch. 71 contain optional language, not appearing in this form, that allows the drafter to create an estate plan in which the marital deduction assets and the survivor's assets are pooled in a single trust.

### **[m] Bypass Trust**

Assets attributable to the deceased settlor that are not allocated to the QTIP Trust will go into the Nonmarital Share [*see* [2], P 5.03(e), *below*]. The Nonmarital Share will be placed in a Bypass Trust [*see* [2], PP 5.03(f), 5.09, *below*]. The Bypass Trust is structured so that the trust assets will "bypass" (that is, escape taxation in) the surviving settlor's estate. Such a trust is also sometimes referred to as a "credit shelter" trust, because it uses the unified credit available to the deceased settlor to "shelter" a portion of the deceased settlor's estate from taxation.

The trustee is given discretion to pay income and distribute principal from the bypass trust to the surviving settlor according to an "ascertainable standard" [*see* [2], P 5.09(a)]. The specification of an "ascertainable standard" will ensure that the trust assets will not be included in the gross estate of the surviving settlor for estate tax purposes, even if the surviving settlor serves as the trustee [*see I.R.C. § 2041(b)(1)(A); Treas. Reg. § 20.2041-1(c)(2); see also* § 70.12[6][c] and Ch. 64, *Testamentary Trusts: Payment and Distribution Provisions*, § 64.51[4]]. If desired, the terms of the bypass trust may be modified to require mandatory payment of all income to the surviving settlor, coupled with discretionary payments of principal in accordance with an ascertainable standard. Mandatory payment of income may avoid adverse income tax consequences in some cases by avoiding the high income tax rates applicable to accumulated trust income [*see I.R.C. § 1(e)*], unless the surviving settlor is also likely to be in a high income tax bracket. Any potential income tax savings should be computed after considering the probable size of the surviving spouse's estate, and balanced against any competing non-tax goals of the settlors.

### **[n] "Five or Five" Power Over Bypass Trust Principal**

The surviving settlor is also given a "five or five" power over the principal of the Bypass Trust [*see* [2], P 5.09(b)],

*below*]. This power permits the surviving settlor to withdraw up to \$5,000 or five percent of the trust, whichever is greater, in each calendar year. This power is optional and should be included only after carefully considering the consequences of the power.

The advantage of a five or five power is that it gives the surviving settlor control over a portion of the trust principal without the constraints imposed by an ascertainable standard. Thus, for example, the spouse may use the power to make annual tax-free gifts to the children to take advantage of the annual gift tax exclusion [*see I.R.C. § 2503(b)*]; for discussion of the annual exclusion and the applicable exclusion amounts, which are adjusted annually for inflation, *see Ch. 60A, Gifts, § 60A.32[4]*].

However, a five or five power can also have adverse tax consequences. A power to invade the principal of a trust will not cause the trust principal to be included in the estate of the person who holds the power if the power is limited to the greater of \$5,000 or five percent of the current value of the trust each year [*see I.R.C. § 2041(b)(2)*; *Treas. Reg. § 20.2041-3(d)(3)* and *§ 70.212[2]*]. However, the power must be "non-cumulative"; that is, it must lapse if it is not exercised by the end of a calendar year [*I.R.C. § 2041(b)(2)*; *Treas. Reg. § 20.2041-3(d)(3)*].

In addition, any property subject to an unexercised five or five power in the year of the holder's death will be included in the holder's estate for estate tax purposes [*see I.R.C. § 2041(b)(2)*]. Furthermore, the I.R.S. takes the position that a beneficiary who holds a five or five power over the principal of a trust will be treated as the owner of the trust for income tax purposes [ *Priv. Ltr. Rul. 8142061* ; *Priv. Ltr. Rul. 8326074* ; *see I.R.C. § 678* (income tax consequences of power to invade trust corpus)]. Thus, the surviving settlor will have to pay any income tax due on the trust income, even if the five or five power is used to transfer property to someone else, or is not used at all. If the surviving settlor is receiving all the trust income in any event, this will not increase his or her tax liability. However, if trust income is being distributed to other parties, or being left to accumulate in the trust, the additional income tax liability that a five or five power will impose on the surviving settlor may be undesirable.

If the settlors do not want to have part of the trust assets included in the surviving settlor's estate for estate tax purposes, and to have the surviving settlor treated as the owner of the trust for income tax purposes, the five or five power should be omitted.

#### **PRACTICE TIP:**

It should be borne in mind that granting the surviving settlor a five or five power over the Bypass Trust also can simply distort the settlors' estate plan. From the deceased settlor's perspective, the Bypass Trust principal should only be tapped as a last resort; indeed, many revocable trusts specifically provide that the Bypass Trust's principal may (or should) be invaded only after the principal of all other trusts created under the instrument has been exhausted [ *see, e.g., [2], P 5.09(a), below*]. Such a provision is intended, in part, to give some assurance to each settlor that should he or she die first, the maximum portion possible of the assets he or she leaves will pass to his or her intended beneficiaries, regardless of any later changes that may be made by the surviving settlor as to those trusts which remain revocable (such as the Survivor's Trust). At the same time, such a provision protects both settlors' tax plan. The Bypass Trust's assets will pass free of death tax at the surviving settlor's death. Thus, it is advantageous to allow as much growth as possible to occur in this trust. If the surviving settlor regularly exercises a five or five power he or she may hold over the Bypass Trust, then the tax plan intended by the instrument will be compromised, even if the compromise is inadvertent. *Commentary by Albert G. Handelman.*

#### **[o] Disclaimer Trust**

This form gives the surviving settlor the option to disclaim all or part of the assets that he or she would receive on the death of the deceased settlor [*see [2], P 5.06, below* ]. Any assets that are disclaimed will be held in a special "Disclaimer Trust" [*see [2], P 5.11, below* ]. As discussed in *§ 70.12[6][i]*, many experienced estate planners advocate

including a disclaimer trust in every trust instrument.

The Disclaimer Trust, like the Bypass Trust [see [m], *above*], is designed so that the trust assets will not be included in the surviving settlor's taxable estate when the surviving settlor dies. To achieve this tax treatment, the surviving settlor's rights in and powers over the Disclaimer Trust are appropriately limited. First, the surviving settlor has no power of revocation over the disclaimer trust [see [2], P 3.02, *below*]. Second, the surviving settlor will receive income and principal only in accordance with an "ascertainable standard" [see [2], P 5.11(a), *below*; see also *Treas. Reg. § 20.2041-1(c)(2)* and Ch. 64, *Testamentary Trusts: Payment and Distribution Provisions*, § 64.51[4]]. If desired, the terms of the disclaimer trust, like those of the bypass trust [see [m], *above*], may be modified to require mandatory payment of all income to the surviving settlor, coupled with discretionary payments of principal in accordance with an ascertainable standard. See [1][m], *above*, for discussion of potential income tax advantages to the latter approach.

In the context of the estate plan implemented by this trust, the Disclaimer Trust provides additional postmortem planning flexibility in the event that unanticipated changes in the settlors' circumstances make it advantageous for the surviving settlor to disclaim some part of the trust property. For example, to minimize overall estate taxes in the estates of both settlors, it may be desirable to pay some additional estate tax on the death of the first settlor by having the surviving settlor disclaim property that would otherwise pass into the marital deduction trust. The disclaimer trust gives the survivor that option.

One factor that can weigh against actually disclaiming an inheritance is the increasing estate tax unified credit [see *I.R.C. § 2010(c)*]. If the surviving settlor is in good health and is likely to survive several years, it may be prudent not to disclaim and not to pay estate tax in the deceased settlor's estate. By not disclaiming, the surviving settlor can enjoy the increasing estate tax exemption resulting from the increasing exclusion amount. The surviving settlor may even avoid estate taxes altogether, with the enacted repeal of the estate taxes, for decedents dying after 2009 [see *I.R.C. §§ 2010(c), 2210(a)*]. There is a great deal of uncertainty with respect to planning in this area, because optimal results are dependent on the year of death of the surviving settlor. In addition, although the estate tax is repealed for decedents dying after 2009, a sunset provision of the repealing legislation re-imposes the estate tax at its pre-2001 rates after 2010, unless Congress re-enacts repeal of the estate tax before that time [*I.R.C. § 2210(a)*; Pub. Law 107-16, § 901]. Many commentators feel legislative changes will be made regarding the repeal before 2010 [for discussion, see Ch. 60, *Estate Planning*, § 60.12A].

If the surviving settlor does not disclaim any property, the Disclaimer Trust simply will never become operative.

#### **[p] Payments and Distributions After Death of Surviving Settlor**

After the death of the surviving settlor, the trustee will distribute the assets of the Survivor's Trust as directed by the surviving settlor in a testamentary power of appointment [see [2], P 5.07(c), *below*; see also [iii], *above*]. If the surviving settlor fails to appoint the property to anyone, it will pass in the same manner as the property in the Bypass Trust.

The assets of the QTIP and Bypass Trusts, and any assets that may have been allocated to the Disclaimer Trust, will be divided into separate shares for each named child and the issue of each named child who dies before the surviving settlor [see PP 5.08(i), 5.09(c), 5.11(b), *below*]. The share of any child who has reached a specified age (for example, 30 years) will be distributed outright, while the shares of children who have not reached that age will be retained in separate trusts for those children [see PP 5.09(d), 5.11(c), *below*]. Each child will receive all of the income from his or her trust, plus as much of the principal as is necessary to maintain the child in accordance with a standard specified in the instrument [see [2], P 5.10(a), (b), *below*].

#### **PRACTICE TIP:**

Many practitioners provide that income will be accumulated until the beneficiary attains a specified age,

after which he or she will automatically receive the income periodically. In this way, income need not be distributed to a young beneficiary under circumstances in which the creation of a guardianship or a custodial account might otherwise be required. *Commentary by Albert G. Handelman.*

The trust principal will be distributed to the child in two increments when the child reaches specified ages (for example, 25 years and 30 years) [see [2], P 5.10(c), (d), *below*].

The share of any deceased child is given outright to the issue of that child if those issue have reached a specified age (such as 30), or held in trust for minor issue until they reach that age [see [2], P 5.10(e), *below*]. The latter provision creates a remote possibility of a violation of the rule against perpetuities, but under the current "wait and see" rule [Prob. Code § 21205; see discussion under "Rule Against Perpetuities--In General" and succeeding headings in the Legal Background to Ch. 67, *Future Interests and Perpetuities*] and the perpetuities savings clause in this instrument [see [2], P 7.01, *below* ], there is no chance of a violation that could disrupt the estate plan. If the deceased child has no issue, his or her share is divided among the other children and issue of the settlors.

This form may be modified to provide for a "family pot" arrangement, rather than a separate share arrangement, on the death of the surviving settlor. Under a "family pot" arrangement, the trust assets are lumped together in a single trust, rather than segregated into separate shares as provided in this form. The trustee usually will be given the power to "sprinkle" income, and principal if desired, among the various trust beneficiaries. To convert this trust into a "family pot" trust following the death of the surviving settlor, Paragraphs 5.09, 5.10, and 5.11 of this form should be deleted and replaced with the alternative provisions in § 70.212[2]. For additional discussion about "family pot" trusts, see § 70.210[1][b].

#### **[q] Division of Trust for Generation-Skipping Transfer Tax Purposes**

This form contains a complex provision permitting or requiring the trustee to divide the trust into exempt and non-exempt trusts for generation-skipping transfer tax (GST) purposes. This provision may become important if the trust assets are substantial and distributions are made to grandchildren or more remote issue. For discussion of this provision, see § 70.12[6][j]. For a discussion of the operation of the generation-skipping transfer tax and its application to trust planning, see the Legal Background to Ch. 60, *Estate Planning*; for further discussion, see California Wills & Trusts, Ch. 113, *Generation-Skipping Transfers and Trust Strategies* (Matthew Bender).

#### **[r] Settlers as Co-Trustees**

The settlors may act as the co-trustees of this trust, or may select some other person or entity (such as a bank or trust company) to serve as trustee. When married persons create a revocable trust, they usually will want to act as trustees of the trust during their lifetimes.

No adverse tax consequences will result from the settlors serving as co-trustees during their lifetimes, because the trust will have no tax consequences while the settlors are living. Since the settlors retain the power to revoke the trust at any time and for any reason while they are both living [see [2], P 3.01, *below* ], they are deemed to be the owners of the trust for income tax purposes [see I.R.C. § 676] and, on their deaths, the trust principal will be included in their gross estates for federal estate tax purposes [see I.R.C. § 2038].

After the death of the deceased settlor, the assets of the Survivor's Trust [see [2], PP 5.03(a), (b), 5.07, *below* ] and the QTIP Trust [see [2], PP 5.03(c), (d), 5.08, *below* ] will be included in the surviving settlor's gross estate for federal estate tax purposes, and no adverse consequences will result if the surviving settlor continues to serve as the trustee of these trusts.

#### **[s] Surviving Settlor as Trustee of Bypass and Disclaimer Trusts**

As discussed above, both the Bypass Trust [see [2], PP 5.03(e), (f), 5.09, *below* ] and the Disclaimer Trust [see [2], PP 5.06, 5.11, *below* ] are designed to escape taxation in the surviving settlor's estate. If the surviving settlor is to serve as the trustee of these trusts, care should be taken not to give the trustee overly broad administrative powers. In these circumstances, it is essential to limit the trustee's power to invade the principal of the trust to an "ascertainable standard." If the surviving settlor, as trustee of the Bypass Trust or the Disclaimer Trust, has an unlimited power to invade the principal of those trusts, the power will be deemed a general power of appointment and will cause the trust assets to be included in the surviving settlor's gross estate for estate tax purposes [see *I.R.C. § 2041(b)(1)*]. However, a power to invade the principal of a trust will not be construed as a general power of appointment if it is limited by an "ascertainable standard" relating to the health, education, support, or maintenance of the beneficiary of the power [*I.R.C. § 2041(b)(1)(A)*].

This form does give the trustee the power to invade the principal of the Bypass and Disclaimer Trusts for the benefit of the surviving settlor. That power is limited by an "ascertainable standard" [see [2], PP 5.09(a), 5.11(a), *below*], so the power will not, in itself, require that the trust assets be included in the estate of the surviving settlor for estate tax purposes.

Even when the power is limited by an "ascertainable standard," it may be unwise to give the surviving settlor unlimited discretion to allocate receipts and expenses of the Bypass and Disclaimer Trusts to income and principal, or even to give the trustee power to allocate receipts and expenses to income and principal in accordance with the Uniform Principal and Income Act [see *Prob. Code §§ 16320-16375*]. Under *Prob. Code § 16313*, the trustee is not required to set aside a reserve or allowance from trust income for depreciation or depletion of any trust property unless the trust instrument expressly requires a reserve or allowance. Thus, the trustee could invest in heavily depreciable and depletable assets without creating any reserve or allowance for depreciation or depletion, thereby substantially increasing the income at the expense of the principal. This could be considered an unlimited right to invade the trust principal and thereby cause the assets in the Bypass and Disclaimer Trusts to be included in the surviving settlor's estate for estate tax purposes [see *Darling v. Commissioner (1965) 43 T.C. 520, 534-535* (disallowance of charitable deduction for value of remainder interest transferred to charity when donors retained broad lifetime powers over trust property)]. To guard against this danger, the trust should specifically require the trustee to establish reserves for depreciation and depletion [see [2], P 5.14, *below* ].

The trustee's power to purchase bonds at a premium without any requirement that the premium be amortized can also favor the income beneficiary. When a bond is purchased at a premium, the income is increased and the principal is decreased, since the value of the bond at maturity is less than the amount paid to acquire the bond. To avoid any danger that the power to purchase bonds at a premium will be deemed a general power of appointment over the trust assets, the trust instrument should require the trustee to amortize the premiums [see [2], P 6.08(w), *below*].

The trust instrument authorizes a surviving settlor who serves as trustee of the Bypass and Disclaimer Trusts to disclaim any power that would endanger the tax goals of those trusts [see [2], P 6.16, *below* ]. The attorney may choose to delete the limitations on the trustee's powers discussed above and instead rely on this general disclaimer clause to deal with any powers that become troublesome at the time the surviving spouse actually become trustee. However, these provisions may also serve to alert the trustee to problem areas and guard against any inadvertent failure to disclaim a potentially troublesome interest.

#### **[t] Third Party or Trust Company as Trustee**

If the settlors do not want to restrict the trustee's powers over the Bypass and Disclaimer Trusts as suggested in [s], above, they may prefer to designate a third party, or a trust company, to serve as trustee. The appointment of a disinterested third party as trustee will avoid any potential problems that might arise from the surviving settlor's retention of particular powers over those trusts. This form is suitable for use when a third party or trust company is the

trustee.

### **[u] Concluding Provisions**

Article 7 of this form contains miscellaneous provisions common to all the trust forms in this chapter. These provisions have been adapted as appropriate for a marital deduction trust. For discussion of these provisions, see § 70.12[8].

### **[v] Modification to Fit More Complicated Distribution Patterns Involving Children From Prior Marriages**

This form assumes that the settlors have no children from previous marriages. Obviously, however, second marriages are common, especially in the context of QTIP trusts. The format illustrated in this form can be adapted to incorporate distribution patterns involving children from prior marriages, but in some cases significant modifications will be required.

When there are children from a prior marriage, the settlors will want to treat these children in one of three basic ways:

First and most simply, if the spouses wish to treat all the children equally--in effect, treat children from prior marriages as part of their current family--only minor modifications to this form are necessary. The children and issue declaration should be modified to indicate that there are children from a previous marriage, and the references in the distribution provisions should be drafted to refer to the children of either settlor.

Second, if the spouses want "mirror image" treatment--that is, each spouse wants his or her share of the property to go to his or her own children and not the children of the other spouse, but the pattern of distribution for each set of children is otherwise identical--the distribution provisions of the various trusts may be modified accordingly. For example, the trust may be modified to provide that regardless of the order of death of the settlors, the survivor's trust will default to the survivor's children if the survivor does not appoint it in some other manner, and the deceased spouse's children will be beneficiaries of the bypass trust. In this scenario, modification of the default provision of the survivor's trust is especially important to assure that in the event of a nonexercise of the survivor's power of appointment, the property will not default to the wrong set of children.

Third, each spouse may want to dispose of his or her share in a completely different manner than that desired by the other settlor. There are thousands of possible variations within this pattern. For example, one settlor may want to exclude specific children, while the other settlor wants to include them. The settlors may desire different ages of distribution, or different rights over income and principal, for their respective children. Or one or both spouses may want to distribute his or her portion of the trust assets in unequal shares.

When the spouses want different distribution patterns, the modifications that must be made to this form are more complex. Essentially, the trust drafter must include two different sets of trust provisions for the Survivor's Trust and Bypass Trust, contingent on the order of death of the settlors. Only one of those sets of provisions will actually take effect. If Settlor A dies first, then Survivor's Trust A and Bypass Trust A will become operative, while if Settlor B dies first, then Survivor's Trust B and Bypass Trust B will become operative instead. The default provisions in both Survivor's Trusts must be carefully examined to make sure that the desired results will be achieved. If the parties want different treatment for minor children and/or the issue of deceased children, two separate sets of provisions may have to be substituted for the provisions set out in Paragraph 5.10 as well. For a sample QTIP trust illustrating many of these modifications, see California Wills & Trusts Forms, Division 1, *Complete Inter Vivos Trusts*, Trust 33.

## **[2] FORM**

### **Formula Marital Deduction Trust for Married Settlers--Survivor's Trust, QTIP Trust, and Bypass Trust**

#### DECLARATION OF TRUST

ARTICLE 1 : Creation of Trust

1.01. Declaration. \_\_\_\_\_[identify trustee(s), e.g., William T. Bowen and Lucy R. Bowen, husband and wife, of Fresno, California or Double Eagle Bank] (the "trustee[s]") hereby declare[s] that \_\_\_\_\_[he has or she has or it has or they have] received certain property (the "trust estate") from \_\_\_\_\_[identify settlors, e.g., William T. Bowen and Lucy R, Bowen, husband and wife, of Fresno, California] (the "settlors"), and hold [s] that property in trust, to be held, administered, and distributed according to the terms of this instrument.

1.02. Names of Trusts. The trusts created by this instrument shall be known collectively as \_\_\_\_\_[name of trust, e.g., The William T. Bowen and Lucy R. Bowen 1995 Trust or The BowenFamily 1995Trust], and each separate trust created under this instrument shall be referred to by adding the name or designation of that separate trust as it appears in the appropriate paragraph of this instrument.

1.03. Effective Date. This declaration shall be effective \_\_\_\_\_[on the date it is executed by the parties or immediately upon execution by all of the parties or specify other effective date].

1.04. Children. The settlors have \_\_\_\_\_ living \_\_\_\_\_ child [ren], whose name[s] and date[s] of birth \_\_\_\_\_[is or are] as follows:

Name	Date of Birth
[e.g., William T. Bowen, Jr.	February 1, 1990]
[e.g., Elaine W. Bowen	May 15, 1992]
[e.g., Joshua J. Bowen	December 1, 1994]

Neither settlor has any deceased children.

ARTICLE 2 : Trust Estate

2.01. Definition of Trust Estate. All of the property described in Schedule A, attached to this instrument, and any other property that may hereafter be subject to this trust, is referred to in this instrument as the "trust estate," and shall be held, administered, and distributed as provided in this instrument.

2.02. Character of Trust Assets. All community property of the settlors transferred to this trust, and the proceeds of all such property, shall continue to be the community property of the settlors under the laws of California. All separate property shall remain the separate property, and all quasi-community property shall remain the quasi-community property, of the contributing settlor.

2.03. Additions to Trust. From time to time, the trustee may accept additions to this trust from any source. Any additions to the trust shall be made by designating in writing the property to be added, or by titling any account, deed, or similar asset in the name of the trustee, as trustee of this trust, or any alternate or successor trustee acting under this instrument. During any time that neither settlor is serving as trustee or cotrustee of this trust, any transfer of property to the trust under this paragraph shall be effective only upon written acceptance by the trustee. Any designation by a third party, whether by will, deed, account title designation, or similar transfer, shall also be a transfer to the trust estate upon written acceptance by the trustee. Any property added to the trust estate shall be held, administered, and distributed in accordance with the terms of this instrument.

ARTICLE 3 : Rights and Powers of Settlers

3.01. Powers of Revocation and Amendment While Both Settlers Are Living. During the joint lifetimes of the settlors,

any trust created by this instrument may be revoked or terminated, in whole or in part, by either settlor as to any separate and quasi-community property of that settlor and any community property of the settlors. Any trust created by this instrument may be modified or amended by either spouse acting alone as to any separate and quasi-community property of that settlor, and by both spouses acting jointly as to any community property of the settlors.

3.02. Revocation and Amendment After Death of Deceased Settlor. After the death of the deceased settlor, the surviving settlor may at any time amend, revoke, or terminate the Survivor's Trust. All other trusts shall become irrevocable and shall not be subject to amendment after the death of the deceased settlor. Upon the death of the surviving settlor, every trust created by this instrument shall be irrevocable and not subject to amendment.

3.03. Method of Revocation or Amendment. Any amendment, revocation, or termination shall be made only by a writing signed by the amending or revoking settlor or settlors and delivered to the trustee in person or by certified mail. If the writing is signed by only one settlor and the other settlor is living, a copy of the writing shall also be delivered to the other settlor in person or by certified mail.

3.04. Delivery of Property After Revocation. \_\_\_\_\_ [Promptly upon *or* Within \_\_\_\_\_ days after] receipt of any writing revoking or terminating the trust as to any community property forming part of the trust estate, the trustee shall deliver the affected property to the settlors or to a person or persons designated in that writing to receive the property. Unless otherwise provided in the revocation or this trust instrument, any community property so returned shall continue to be the community property of the settlors. \_\_\_\_\_ [Promptly upon *or* Within \_\_\_\_\_ days after] receipt of any writing revoking or terminating the trust as to any separate or quasi-community property of either settlor, the trustee shall deliver the affected property to the revoking settlor or to a person or persons designated in that writing to receive the property.

3.05. Power to Direct Investments While Both Settlers Are Living. While both settlors are living, the settlors shall have the power from time to time to direct the trustee to do any or all of the following:

- (a) Invest trust funds in specified securities, properties, or other forms of investment;
- (b) Retain specified securities, properties, or other forms of investment held in trust under this instrument; and
- (c) Sell, encumber, lease, abandon, or dispose of any trust property.

Directions with respect to any portion of the trust estate that is the community property of the settlors may be given only by a writing signed by both settlors. Directions with respect to any portion of the trust estate that is separate or quasi-community property of one settlor may be given by a writing signed by that settlor alone. If a direction is to remain in effect for a specified period of time only, or to be subject to any condition or conditions, the writing must specify the period of time and the condition or conditions. If trust property is invested in accordance with any direction given as specified in this paragraph, the trustee shall not be liable for losses sustained as a direct or indirect result of the trustee's compliance with the direction.

3.06. Power to Direct Investments After Death of Deceased Settlor. After the death of the deceased settlor and while the surviving settlor is living, the surviving settlor shall have the power from time to time to direct the trustee to sell, exchange, or invest property of the Survivor's Trust and the QTIP Trust. No person shall have the power to direct the trustee to invest property of any other trust after the death of the deceased settlor. Any direction given to the trustee shall be in writing and signed by the surviving settlor. If a direction is to remain in effect for a specified period of time only, or to be subject to any other condition or conditions, the writing must specify the period of time and the condition or conditions. If trust property is invested in accordance with any direction given as specified in this paragraph, the trustee shall not be liable for losses sustained as a direct or indirect result of the trustee's compliance with the direction. After the death of the surviving settlor, no person shall have the power to direct the trustee to invest any trust property.

3.07. Power to Borrow From Trust Estate While Both Settlers Are Living. While both settlers are living, the settlers shall have the power to borrow from the income or principal of the trust estate, with or without security, as provided in this paragraph. Any loan from any portion of the trust estate that is the community property of the settlers may be made only by a writing signed by both settlers, filed with the trustee, and specifying the amount and terms of the loan. Any loan from any portion of the trust estate that is the separate or quasi-community property of one of the settlers may be made only by a writing signed by that settlor, filed with the trustee, and specifying the amount and terms of the loan.

3.08. Power to Borrow From Trust Estate After Death of Deceased Settlor. After the death of the deceased settlor, the surviving settlor shall have the power to borrow from the income or principal of \_\_\_\_\_ [to permit surviving settlor to borrow from any trust created by instrument, including the Bypass Trust and the Disclaimer Trust: any trust created by this instrument or, to prohibit surviving settlor from borrowing from Bypass Trust or Disclaimer Trust: the Survivor's Trust and the QTIP Trust]. Any such loan may be made only by a writing signed by the surviving settlor, filed with the trustee, and specifying the amount and terms of the loan. [If surviving settlor is given power to borrow from the Bypass Trust and the Disclaimer Trust (see above), include the following language: Any loan made from the Bypass Trust or the Disclaimer Trust to the surviving settlor shall be made on such reasonable security and at such a reasonable rate of interest as would generally be appropriate for a market loan of similar amount and term and for a similar purpose.]

3.09. Exercise of Settlers' Rights and Powers by Others. Notwithstanding any other provision of this instrument, any right or power that either settlor could exercise personally under the terms of this instrument, \_\_\_\_\_ [except or including] the power to amend, revoke, or terminate \_\_\_\_\_ [this trust or any trust created by this instrument], may be exercised for and on behalf of that settlor by any attorney in fact who, at the time of the exercise, is duly appointed and acting for that settlor under a valid and enforceable durable power of attorney executed by that settlor under the Uniform Durable Power of Attorney Act, or any successor statute; or, if there is no such attorney in fact, by a duly appointed and acting conservator of that settlor, after petition to the court in accordance with *California Probate Code Section 2580*, or any successor statute [add optional clause to limit authority to amend or revoke, e.g.,; provided, however, that the power to amend, revoke, or terminate \_\_\_\_\_ (this trust or any trust created by this instrument), in whole or in part, may be exercised for or on behalf of that settlor by an attorney in fact or conservator only if distribution of that settlor's estate during that settlor's lifetime is not substantially altered by the amendment, revocation, or termination, and the amendment, revocation, or termination does not result in any adverse tax consequences to that settlor's estate].

#### ARTICLE 4 : Payments and Distributions While Both Settlers Are Living

4.01. Payments of Income From Community Property. While both settlers are living, the trustee shall pay to or apply for the benefit of the settlers, or either of them, as much of the net income of the community property of the trust as the settlers, or either of them, shall from time to time request of the trustee in writing. A request pursuant to this paragraph may specify that payments are to be made periodically.

4.02. Payments of Income From Separate and Quasi-Community Property. While both settlers are living, the trustee shall pay to or apply for the benefit of a settlor whose separate or quasi-community property constitutes part of the trust estate as much of the net income of that property as the settlor shall from time to time request of the trustee in writing. A request pursuant to this paragraph may specify that payments are to be made periodically.

4.03. Distributions of Principal From Community Property. While both settlers are living, the trustee shall distribute to or apply for the benefit of the settlers, or either of them, as much of the principal of the community property of the trust, up to the whole thereof, as the settlers, or either of them, shall from time to time request of the trustee in writing. A request pursuant to this paragraph may specify that distributions are to be made periodically. Any money or other property paid or distributed to or for the benefit of the settlers, or either of them, from the community property of the

trust shall remain the community property of the settlors. A settlor who receives any such property shall have the same obligations with respect to that property that he or she would have with respect to community property generally.

4.04. Distributions of Principal From Separate and Quasi-Community Property. While both settlors are living, the trustee shall distribute to or apply for the benefit of a settlor whose separate or quasi-community property constitutes part of the trust estate as much of the principal of that property, up to the whole thereof, as the settlor shall from time to time request of the trustee in writing. A request pursuant to this paragraph may specify that distributions are to be made periodically.

4.05. Requests on Settlor's Behalf. If, at any time, either settlor is unable personally to make a request of the trustee, the settlor's right to make the request may be exercised for or on behalf of the settlor by an attorney in fact who, at the time of the exercise, is duly appointed and acting for the settlor under a valid and enforceable durable power of attorney executed by the settlor under the Uniform Durable Power of Attorney Act, or any successor statute; or, if there is no such attorney in fact, by the trustee acting for and on behalf of the settlor. The trustee shall have discretion to determine when the settlor is unable personally to make a request for purposes of this paragraph.

4.06. Settlor's Obligation for Community Property Distributed. Any payment of income or principal from the trust community property to or for the benefit of the settlors, or either of them, shall remain the community property of the settlors. A settlor who receives any such payment shall have the same obligations respecting that property that he or she would have with respect to all community property generally.

4.07. Trustee's Power to Make Gifts at Direction of Settlor's. So long as both settlors are living, the trustee shall have the power to make gifts, as specified in this Paragraph:

(a) Community Property. The trustee shall distribute such sums of community property trust principal to such person or persons who are the natural objects of the settlors' bounty, as the settlors, acting jointly, may direct in writing.

(b) Separate and Quasi-Community Property. The trustee shall distribute such sums of trust principal that is the separate property or the quasi-community property of a settlor to such person or persons who are the natural objects of that settlor's bounty, as that settlor may direct in writing.

(c) Incapacity of a Settlor. In the event that a settlor is unable to direct the trustee in writing under this Paragraph due to incapacity, such a direction may be made on the settlor's behalf by a duly authorized attorney in fact acting under a valid durable power of attorney executed by the settlor under the Uniform Durable Power of Attorney Act (or successor statute) [optional: as long as the durable power of attorney so executed by the settlor specifically authorizes the attorney in fact to exercise such a withdrawal power, or power to make gifts from trust principal, through enforceable demands on the trustee]; provided, however, that the total amount of any such gifts made pursuant to the direction of an attorney in fact to any one person in any one year shall not exceed the annual amount excluded from gift tax under *Internal Revenue Code Section 2503(b)* (or a successor statute).

#### ARTICLE 5 : Payments and Distributions After Death of Deceased Settlor

5.01. Special Gift. On the death of the deceased settlor, the trustee shall distribute the sum of \$ \_\_\_\_\_ to \_\_\_\_\_ [name of beneficiary, e.g., Robert H. Bowen] [if desired, add survivorship clause, e.g., if he survives the deceased settlor or if he survives the deceased settlor for 60 days]. [If distribution is conditioned on survival, add alternative disposition, e.g., If \_\_\_\_\_ (e.g., Robert H. Bowen) does not survive the deceased settlor (for that period), this gift shall \_\_\_\_\_ (e.g., lapse or be distributed to Ursula J. Bowen)]. This gift may be satisfied only out of the deceased settlor's one-half interest in the community property of the settlors or the deceased settlor's interest in his or her separate or quasi-community property.

5.02. Payment of Taxes, Debts, and Expenses. After the deceased settlor's death, upon receipt by the trustee of a written statement from the personal representative of the deceased settlor's estate requesting that the trustee pay death taxes, debts, and expenses (as defined in Article 7) with respect to any property in the deceased settlor's estate, the trustee shall pay, either directly or to the personal representative, any amounts requested by the personal representative for those purposes, in the manner specified below. The trustee may rely on the personal representative's statement and shall not be liable for any act or omission by the personal representative in protesting or failing to protest the legality, propriety, or amount of the death taxes, debts, and expenses. If there is no personal representative, the trustee shall make the payments directly. Payments of debts and expenses may, in the trustee's discretion, be made by the trustee from the trust estate. All death taxes payable by reason of the death of the deceased settlor shall be paid by the trustee out of the trust estate. Payment of death taxes and expenses shall be charged to the nonmarital share (as defined in Paragraph 5.03), except for any death taxes that are attributable to a disclaimer of property under this instrument by the surviving settlor, which shall be paid from the Disclaimer Trust. Payment of any debts allocable against the separate property of the deceased settlor shall be charged against the nonmarital share. Debts allocable against community property shall be allocated to the survivor's share and the nonmarital share in accordance with California law in effect at the death of the deceased settlor, so long as charges against the survivor's share do not exceed the value of community property allocable to that share.

5.03. Disposition of Trust on Death of Deceased Settlor. On the death of the deceased settlor, and after any distributions or payments under Paragraphs 5.01 and 5.02 of this instrument, the trustee shall divide the trust estate into three shares, hereafter referred to as the Survivor's Share, the Marital Deduction Share, and the Nonmarital Share.

(a) The Survivor's Share shall consist of the portion of the trust estate consisting of the surviving settlor's one-half interest in the settlors' community property, the surviving settlor's one-half interest in the deceased settlor's quasi-community property, and all of the surviving settlor's separate property and quasi-community property.

(b) The Survivor's Share shall be held, administered, and distributed according to the terms of the Survivor's Trust as set forth in Paragraph 5.07.

(c) The Marital Deduction Share shall consist of assets (excluding assets included in the Survivor's Share) having a value equal to the minimum amount necessary to eliminate (or reduce to the maximum extent possible) any federal estate tax at the death of the deceased settlor, taking into account the following:

(1) The net value of all other property that passes or has passed to the surviving settlor under this trust instrument, the will of the deceased settlor, or otherwise, and that qualifies for the federal estate tax marital deduction. For purposes of this subparagraph, any qualified disclaimer made by the surviving settlor shall be disregarded, and any property that will qualify as qualified terminable interest property under *Internal Revenue Code Section 2056(b)(7)* if the requisite election is made shall be considered to be qualified terminable interest property, regardless of whether the election is made;

(2) All federal estate tax deductions and exclusions actually allowed other than the marital deduction;

(3) The applicable exclusion amount, as specified in *Internal Revenue Code Section 2010*, available to the estate of the deceased settlor,

(4) The credit for state death taxes available to the estate of the deceased settlor, to the extent that the use of that credit does not result in or increase any death tax payable to any state; and

(5) Any other allowable credits available to the estate of the deceased settlor (except the credit for tax on prior transfers from a "transferor," as defined in *Internal Revenue Code Section 2013*, who dies within two years after the date of death of the deceased settlor), but only to the extent that those credits do not disqualify this gift from receiving the marital

deduction.

(d) The Marital Deduction Share shall be held, administered, and distributed according to the terms of the QTIP Trust as set forth in Paragraph 5.08.

(e) The Nonmarital Share shall consist of all assets not allocated to the Survivor's Share or the Marital Deduction Share under the formula specified in this paragraph.

(f) The Nonmarital Share shall be held, administered, and distributed according to the terms of the Bypass Trust as set forth in Paragraph 5.09.

5.04. Allocation and Valuation of Assets. In allocating assets between the marital deduction share and the nonmarital share, the trustee shall allocate the trust assets in cash or in kind, or partly in each, on a pro rata or non pro rata basis, and in undivided interests or not; subject, however, to the following:

(a) Only assets that qualify for the marital deduction shall be allocated to the marital deduction share.

(b) Assets allocated in kind shall be \_\_\_\_\_ [to use date of distribution values: valued for purposes of allocation on the date or dates of distribution or, to use valuation for estate tax purposes under "minimum worth" test: deemed to satisfy the marital deduction amount on the basis of their values as finally determined for federal estate tax purposes, but in no event shall the date of distribution values be less than the amount of the marital deduction or, to use valuation for estate tax purposes under "fair representation" test: deemed to satisfy the marital deduction amount on the basis of their values as finally determined for federal estate tax purposes; provided, however, that the trustee shall act impartially, consistent with equitable principles requiring impartiality among beneficiaries, in allocating assets in satisfaction of the marital deduction share, so that any distribution of assets in satisfaction of the marital deduction share shall be made of assets, including cash, fairly representative of appreciation or depreciation in the value of all property thus available for distribution].

(c) The trustee shall not allocate assets that qualify for the foreign death tax credit to the marital deduction share unless all other assets or interests available for allocation have been so allocated.

[Optional: (d) Any incidents of ownership to a policy of insurance on the life of a person other than the deceased settlor shall be allocated to the nonmarital share.]

5.05. Intention That Marital Deduction Share Qualify for Marital Deduction. The settlors intend that the marital deduction share qualify for the federal estate tax marital deduction, and this instrument shall be construed accordingly.

5.06. Disclaimer of Property. Notwithstanding any other provision of this instrument, any property or portion of property that is disclaimed by the surviving settlor shall be held, administered, and distributed according to the terms of the Disclaimer Trust. However, if the surviving settlor also disclaims an interest in all or any portion of the Disclaimer Trust, the disclaimed interest shall be administered and distributed as if the surviving settlor predeceased the deceased settlor.

5.07. Survivor's Trust. The trustee shall hold, administer, and distribute the assets of the Survivor's Trust as follows:

(a) The trustee shall pay to or apply for the benefit of the surviving settlor all of the net income of the trust, in monthly or other convenient installments as agreed upon by the surviving settlor and the trustee, but not less often than annually, for life.

(b) The trustee shall distribute to the surviving settlor such amounts from the principal of the trust, up to the whole of

the trust principal, as the surviving settlor may request of the trustee in writing from time to time.

(c) On the death of the surviving settlor, the trustee shall distribute the trust property then remaining, including all principal and undistributed income, to the person, persons, or entities, including the estate of the surviving settlor, on such terms and conditions, either outright or in trust, or by creating further powers of appointment, as the surviving settlor shall appoint by his or her valid last will specifically referring to and exercising this power of appointment. The trustee may rely upon any instrument admitted to probate as the last will of the surviving settlor in carrying out the terms of the power of appointment and shall not be liable for any good-faith act in reliance upon that will, even if for any reason it is later determined to be invalid with respect to its purported exercise of this power of appointment. In the event the will of the surviving settlor is not offered for probate, the trustee may make an independent determination with respect to the validity of the will and whether or not the will has effectively exercised this power of appointment. If the trustee receives no notice of the existence of a will of the surviving settlor within six months after the death of the surviving settlor, the trustee may distribute the trust assets and income as though this power of appointment had not been exercised and shall in that event be conclusively presumed to have acted in good faith, even if a valid will is thereafter discovered.

(d) If any of the property subject to this power of appointment is not effectively appointed by the surviving settlor, that property, after any payment of taxes, debts, and expenses pursuant to the applicable provisions of this instrument, shall be distributed \_\_\_\_\_ [if generation-skipping transfer taxes are not a concern: to the Bypass Trust created in this instrument, to be held, administered, and distributed as part of the Bypass Trust or to account for generation-skipping transfer tax consequences: in the manner specified in Paragraph 5.09 applicable to the Bypass Trust. However, the property disposed of pursuant to this subparagraph shall not be considered to be part of the Bypass Trust unless this trust and the Bypass Trust have the same inclusion ratios for federal generation-skipping transfer tax purposes].

5.08. QTIP Trust. The trustee shall hold, administer, and distribute the assets of the QTIP Trust as follows:

(a) If the executor has elected that the trust qualify for the federal estate tax marital deduction under *Internal Revenue Code Section 2056(b)(7)* (or any equivalent successor section), the trustee shall thereafter administer the trust in a manner that will not invalidate the election or disqualify the property in which the surviving settlor has a qualifying income interest for life. Any provision of this trust that could be deemed to invalidate the qualification under *Internal Revenue Code Section 2056(b)(7)* shall be disregarded.

(b) If an election is made under *Internal Revenue Code Section 2056(b)(7)* (or any equivalent successor section) to qualify some but not all of the property allocated to the QTIP Trust for the federal estate tax marital deduction, the QTIP Trust shall be divided into two separate trusts pursuant to the terms of the election. The division shall be based on the fair market value of the trust assets at the time of the division. One of the trusts shall contain the share of the trust assets for which the election has been made and shall be designated as the Qualifying QTIP Trust. The other trust shall contain the share of the trust assets for which the election has not been made and shall be designated the Nonqualifying QTIP Trust. The Nonqualifying QTIP Trust shall be subject to all of the rights, interests, powers, and other terms prescribed for the Qualifying QTIP Trust. If a partial election is made and the trust is divided into two separate trusts, the terms "trust," "marital deduction trust," and "QTIP Trust," as used in this paragraph and elsewhere in this trust instrument, shall be construed in a manner consistent with the provisions of this subparagraph of the trust instrument.

[Optional:]

(c) It is the settlors' intent that the executor of the deceased settlor's estate shall notify the trustee in writing if the executor intends to make an election under *Internal Revenue Code Section 2056(b)(7)* (hereafter referred to as "the estate tax election") and also intends to make an election under *Internal Revenue Code Section 2652(a)(3)* (or any

equivalent successor section) to have the estate tax election disregarded for federal generation-skipping transfer tax purposes with respect to some but not all of the property in the QTIP Trust. Upon receipt of written notification, the trustee shall divide the QTIP Trust into two separate trusts, to be known as the Exempt QTIP Trust and the Non-Exempt QTIP Trust, in accordance with Paragraph 5.15 of this trust instrument concerning the administration of generation-skipping trusts. Property allocated to the Exempt QTIP Trust must be fairly representative of the appreciation or depreciation of all QTIP Trust property. It is the settlors' intent that the executor shall then actually make the election under *Internal Revenue Code Section 2652(a)(3)* with respect to the Exempt QTIP Trust and not the Non-Exempt QTIP Trust. If a partial estate tax election is to be made, then this subparagraph, if applicable at all, shall apply only with respect to the Qualifying QTIP Trust. The trustee shall not be liable for relying on the written instructions of the executor when acting in accordance with the provisions of this subparagraph. Nothing in this subparagraph shall be construed as being inconsistent with Paragraph 5.15 of this trust instrument concerning the administration of generation-skipping trusts, which shall apply to the QTIP trust without regard to the application of the remainder of this subparagraph.

[Continue with the following:]

(d) The trustee shall pay to or apply for the benefit of the surviving settlor, so long as the surviving settlor lives, the entire net income of the trust, in monthly or other convenient installments as agreed upon by the surviving settlor and the trustee, but not less often than annually. [Optional: In determining the net income of the trust distributable to the surviving settlor, the trustee shall include all income that must be considered as income in order for the trust to qualify for the marital deduction under the federal estate tax law, and shall make no deductions from gross income that would prevent the trust from qualifying for that marital deduction, notwithstanding any contrary provisions of this instrument or any applicable provisions of state law. Assuming the trust has qualified under *Internal Revenue Code Section 2056(b)(7)*, then any grant of rights, powers, discretion, and authority to the trustee in any provision of this instrument or any statute relating thereto shall not be effective if and to the extent that the provision or statute, if effective, would disqualify, for federal estate tax purposes, the marital deduction trust held under this paragraph. It is the intention of the settlors that the surviving settlor, as the beneficiary of a marital deduction trust, shall have substantially that degree of beneficial enjoyment of the trust during his or her lifetime that the principles of the law of trusts accord to a person who is unqualifiedly designated as the life beneficiary of a trust, and the trustee shall not exercise the trustee's discretion in a manner that is not in accord with this expressed intention. It is also the intention of the settlors that the trust produce for the surviving settlor during his or her lifetime the income, or that the surviving settlor shall have the benefit of the trust property, as is consistent with the value of the trust property and with its preservation.]

(e) The trustee shall distribute to or apply for the benefit of the surviving settlor, for life, as much of the principal of the trust as the trustee, in the trustee's discretion, deems necessary, when added to the income payments from this trust, for his or her \_\_\_\_\_ [to specify an "ascertainable standard": health, education, support, and maintenance or specify some other standard, e.g., comfort, welfare, and happiness]. All decisions of the trustee regarding payments under this subparagraph, if any, are within the trustee's discretion and shall be final and incontestable by anyone. Notwithstanding any other provision of this instrument, the trustee shall not make any discretionary payments of principal from the QTIP Trust to the surviving settlor unless the principal of the Survivor's Trust has been exhausted.

(f) On the death of the surviving settlor, the trustee, in the trustee's discretion, may pay the taxes, debts, and expenses arising on his or her death, unless the trustee determines that other adequate provisions have been made for payment of these expenses. Any payments made under this paragraph \_\_\_\_\_ [may be made out of income or principal (or partly from each) of the QTIP Trust or shall be made first out of the income or principal of the QTIP Trust and the Survivor's Trust, and then out of the income or principal of the Bypass Trust and the Disclaimer Trust, if any, to the extent that the QTIP Trust is insufficient for that purpose].

(g) On the death of the surviving settlor, the net income of the trust then accrued but uncollected, and all net income

remaining in the hands of the trustee, shall be distributed to the estate of the surviving settlor. The trust principal shall be dealt with as set forth below in this paragraph.

(h) The trustee shall determine from the personal representative of the estate of the surviving settlor the amount of the federal estate tax allocable to the property of the trust by reason of *Internal Revenue Code Section 2207A* (the "Section 2207A tax share") and shall set aside a portion of the trust principal for the purpose of paying that tax upon written demand of the personal representative.

(i) On the death of the surviving settlor, the trustee shall distribute the balance of the principal of the QTIP Trust (or all of the QTIP Trust principal, if the personal representative of the estate of the surviving settlor does not in due course make written demand for payment of the Section 2207A tax share), \_\_\_\_\_ [if generation-skipping transfer tax consequences are not a concern: to the Bypass Trust created in this trust instrument, to be held, administered, and distributed as part of the Bypass Trust or to account for generation-skipping transfer tax consequences: in the manner specified in Paragraph 5.09 applicable to the Bypass Trust. However, the property disposed of pursuant to this subparagraph shall not be considered to be part of the Bypass Trust unless this trust and the Bypass Trust have the same inclusion ratios for federal generation-skipping transfer tax purposes].

5.09. Bypass Trust. The trustee shall hold, administer, and distribute the assets of the Bypass Trust as follows:

(a) The trustee shall pay or distribute to or apply for the benefit of the surviving settlor, for life, in monthly or other convenient installments, but not less often than annually, as much of the net income of the trust, and as much of the principal of the trust, as the trustee, in the trustee's discretion, deems necessary for his or her health, education, support, and maintenance. All decisions of the trustee regarding payments under this subparagraph, if any, are within the trustee's discretion and shall be final and incontestable by anyone. The trustee shall accumulate and add to principal any net income not distributed. Notwithstanding any other provision of this instrument, the trustee shall not make discretionary payments of principal from the Bypass Trust to the surviving settlor unless the principal of the QTIP Trust and the Survivor's Trust has been exhausted.

(b) In addition to any other payments and distributions that the surviving settlor may receive under this instrument, the trustee shall distribute to the surviving settlor during the surviving settlor's lifetime, such amounts from the principal of the trust estate as he or she may from time to time request of the trustee in writing, not to exceed in any calendar year the greater of \$5,000 or five percent of the value of the principal of the trust, determined as of the end of the calendar year. This right of withdrawal is not cumulative, so that if the surviving settlor does not withdraw the full amount that he or she is entitled to withdraw under this provision in any calendar year, the right to withdraw the amount not withdrawn shall lapse at the end of the calendar year. This power shall exist each year until the death of the surviving settlor.

(c) On the death of the surviving settlor, the trustee shall divide the trust property into as many shares of equal market value as are necessary to create one share for (1) each of the following children of the settlors who survives the surviving settlor: \_\_\_\_\_ [e.g., Thomas M. Bowen, Jr., Elaine W. Bowen, and Joshua J. Bowen]; and (2) the issue who survive the surviving settlor of each aforementioned child who predeceases the surviving settlor.

(d) Each share created for a surviving child shall be distributed outright to that child if that child has reached the age of \_\_\_\_\_ [e.g., 30] years at the time the assets of the trust are divided. If the child has not reached the age of \_\_\_\_\_ [e.g., 30] years at that time, the share created for the child shall be held, administered, and distributed by the trustee in a separate trust as set forth in Paragraph 5.10 of this instrument.

(e) Each share created for the issue of a deceased child shall be divided among those issue \_\_\_\_\_ [in the manner provided in California Probate Code Section \_\_\_\_\_ (specify either 240 or 246 or 247) or in equal shares, regardless of whether or not all such issue are members of the same generation]. The share of each issue

who has attained the age of \_\_\_\_\_ [e.g., 30] years shall be distributed outright to that issue. The share of any issue who has not attained the age of \_\_\_\_\_ [e.g., 30] years shall be held, administered, and distributed in a separate trust for that issue as set forth in Paragraph 5.10 of this instrument.

(f) If all the aforementioned children of the settlors die without surviving issue before the trust property has been distributed as provided in this Paragraph, the trustee shall distribute any undistributed balance of the trust property outright to \_\_\_\_\_ [alternative disposition, e.g., the Regents of the University of California or the heirs of the surviving settlor].

5.10. Separate Trusts for Children and Issue. The trustee shall hold, administer, and distribute the assets of each separate trust established for a child or issue under Paragraph 5.09 as follows:

(a) The trustee shall pay to or apply for the benefit of that child or issue all of the net income of the trust, in monthly or other convenient installments, but not less often than annually, until that child or issue reaches the age of \_\_\_\_\_ [e.g., 30] years.

(b) The trustee shall distribute to or apply for the benefit of that child or issue, until he or she reaches the age of \_\_\_\_\_ [e.g., 30] years, as much of the principal of the trust as the trustee, in the trustee's discretion, deems necessary, when added to the income payments from this trust, for his or her \_\_\_\_\_ [to specify an "ascertainable standard": health, education, support, and maintenance or specify some other standard, e.g., comfort, welfare, and happiness]. All decisions of the trustee regarding payments under this subparagraph, if any, are within the trustee's discretion and shall be final and incontestable by anyone.

(c) When that child or issue reaches the age of \_\_\_\_\_ [e.g., 25] years, the trustee shall distribute to him or her outright an amount from the trust principal equal to \_\_\_\_\_ [fraction or percentage, e.g., one half or 50 percent] of the fair market value of the principal of the trust, determined as of the first day of the calendar month preceding the month in which the distribution is made. If that child or issue has already reached the age of \_\_\_\_\_ [e.g., 25] years when property is first allocated to this trust, then upon making the allocation, the trustee shall distribute to him or her outright an amount from the trust principal equal to \_\_\_\_\_ [fraction or percentage, e.g., one half or 50 percent] of the fair market value of the principal of the trust, and the balance shall be retained in trust pursuant to the applicable provisions of this paragraph.

(d) When \_\_\_\_\_ that child or issue reaches the age of \_\_\_\_\_ [e.g., 30] years, the trustee shall distribute to him or her outright the balance of the trust property.

(e) If that child or issue dies before the trust property has been distributed as provided in this paragraph, the assets of his or her separate trust shall be divided among his or her issue in \_\_\_\_\_ [the manner provided in California Probate Code Section \_\_\_\_\_ (specify either 240 or 246 or 247) or equal shares, regardless of whether or not all such issue are members of the same generation]. The share of each issue who has attained the age of \_\_\_\_\_ [e.g., 30] years shall be distributed outright to that issue. The share of any issue who has not attained the age of \_\_\_\_\_ [e.g., 30] years shall be held, administered, and distributed in a separate trust for that issue as set forth in this Paragraph. If that child or issue dies without issue before the trust property has been distributed as provided in this paragraph, the trustee shall distribute the entire undistributed balance of his or her separate share outright among the other then-living persons for whom separate shares were created \_\_\_\_\_ [in the manner provided in California Probate Code Section \_\_\_\_\_ (specify either 240 or 246 or 247) or in equal shares, regardless of whether or not all such issue are members of the same generation]; provided, however, that if any part of that balance would otherwise be distributed to a person for whose benefit a trust is being administered under this paragraph, that part shall instead be added to that trust and shall thereafter be administered according to its terms. If there are no surviving persons who may take the share of that child or issue under this paragraph, any remaining portion of that share shall be distributed outright to

\_\_\_\_\_ [alternative disposition, e.g., the Regents of the University of California or the heirs of the settlors].

5.11. Disclaimer Trust. The trustee shall hold, administer, and distribute the assets of the Disclaimer Trust as follows:

(a) The trustee shall pay or distribute to or apply for the benefit of the surviving settlor, for life, in monthly or other convenient installments, but not less often than annually, as much of the net income of the trust, and as much of the principal of the trust, as the trustee, in the trustee's discretion, deems necessary for his or her health, education, support, and maintenance. All decisions of the trustee regarding payments under this subparagraph, if any, are within the trustee's discretion and shall be final and incontestable by anyone. The trustee shall accumulate and add to principal any net income not distributed.

(b) On the death of the surviving settlor, the trustee shall divide the trust property into as many shares of equal market value as are necessary to create one share for each child named in Paragraph 5.09 who survives the surviving settlor, and one share for the issue who survive the surviving settlor of each child named in Paragraph 5.09 who predeceases the surviving settlor.

(c) Each share created for a surviving child shall be distributed outright to that child if that child has reached the age of \_\_\_\_\_ [e.g., 30] years at the time the assets of the trust are divided. If the child has not reached the age of \_\_\_\_\_ [e.g., 30] years at that time, the share created for the child shall be held, administered, and distributed by the trustee in a separate trust as set forth in Paragraph 5.10 of this instrument.

(d) Each share created for the issue of a deceased child shall be divided among those issue \_\_\_\_\_ [in the manner provided in California Probate Code Section \_\_\_\_\_ (specify either 240 or 246 or 247) or in equal shares, regardless of whether or not all such issue are members of the same generation]. The share of each issue who has attained the age of \_\_\_\_\_ [e.g., 30] years shall be distributed outright to that issue. The share of any issue who has not attained the age of \_\_\_\_\_ [e.g., 30] years shall be held, administered, and distributed in a separate trust for that issue asset forth in Paragraph 5.10 of this instrument.

(e) If all the children named in Paragraph 5.09 die without surviving issue before the trust property has been distributed as provided in this paragraph, the trustee shall distribute any undistributed balance of the trust property outright to \_\_\_\_\_ [alternative disposition, e.g., the Regents of the University of California or the heirs of the settlors].

5.12. Release, Disclaimer, or Restriction of Power of Appointment. Notwithstanding any other provision of this instrument, any power of appointment created by this instrument, whether expressly granted in this instrument or implied by law, may be released, disclaimed, or restricted in scope. Any such power may be released to the extent and in the manner set forth in *California Probate Code Section 661* and disclaimed to the extent and in the manner set forth in *California Probate Code Sections 260-295*, or any successor sections, as they exist at the date of exercise of the release or disclaimer.

5.13. Consideration of Beneficiary's Other Resources. In making any payments of income or distributions of principal from any trust created by this instrument for \_\_\_\_\_ [specify standard of discretion as set forth in provision authorizing the discretionary distribution, e.g., the health, education, support, and maintenance or care and comfort] of any person, the trustee shall take into consideration, to the extent the trustee deems advisable, any other income or resources available to that person that are known to the trustee and that are reasonably available for that purpose.

5.14. Trustee's Power to Determine Income and Principal. Unless otherwise specifically provided in this instrument, the determination of all matters with respect to what is principal and income of the trust estate and the apportionment and

allocation of receipts, expenses, and other charges between principal and income shall be governed by the provisions of the California Revised Uniform Principal and Income Act from time to time existing. The trustee in the trustee's discretion shall determine any matter not provided for either in this instrument or in the California Revised Uniform Principal and Income Act. Notwithstanding any other provision of this instrument or of the California Revised Uniform Principal and Income Act, the trustee must establish a reserve for depreciation of all income-producing real and personal property and of capital improvements, and for extraordinary repairs. In addition, a reasonable reserve for depletion of all depletable natural resources, including, but not limited to, oil, gas, and mineral and timber property, shall be charged to income from time to time; distributions by mutual funds and similar entities of gains from the sale or other disposition of property shall be credited to principal; and a reasonable reserve for amortization of all intangible property with a limited economic life including, but not limited to, patents and copyrights shall be charged to income from time to time.

5.15. Administration of Generation-Skipping Trusts. The provisions of this paragraph apply to any trust under this instrument that is created on or at any time after the deceased settlor's death and in which there is property that is or may become subject to the federal generation-skipping transfer tax:

(a) Upon written notification by the deceased settlor's executor that the executor intends to allocate any part of the generation-skipping transfer tax exemption that is available to the deceased settlor under *Internal Revenue Code Section 2631(a)* to some but not all of the property in any trust to which this paragraph applies, the trustee

\_\_\_\_\_ [shall *or* may, in the trustee's discretion,] divide that trust into two separate trusts, to be designated as the Exempt Trust and the Non-Exempt Trust. [*If trustee has discretionary power to divide trusts: If the trustee elects to divide a trust in the manner provided in this Paragraph, the or, if division of trusts is mandatory rather than discretionary: The*] Exempt Trust shall contain the share of the property of that trust equal in value to the amount of the generation-skipping transfer tax exemption that the executor intends to allocate to the trust. The Non-Exempt Trust shall contain the balance of the property of that trust. It is the settlors' intention that the executor then actually allocate the generation-skipping transfer tax exemption to the Exempt Trust and not to the Non-Exempt Trust, so that the Exempt Trust shall have an inclusion ratio of zero for federal generation-skipping transfer tax purposes and the Non-Exempt Trust shall have an inclusion ratio of one for federal generation-skipping transfer tax purposes. The Trustee shall not be liable for relying on the written instructions of the executor when acting in accordance with this subparagraph.

(b) In allocating assets between the Exempt Trust and Non-Exempt Trust for purposes of this Paragraph, the trustee shall \_\_\_\_\_ [*for a pecuniary allocation: allocate the trust assets between the Exempt Trust and Non-Exempt Trust in cash or in kind, or partly in each, on a pro rata or non pro rata basis, and in undivided interests or not or, for a fractional allocation: allocate to each trust a fractional share of each and every substantial interest or right held by the trust being divided*]. [*If preceding sentence provides for a pecuniary allocation, add: If the allocation is not made within 15 months from the date of the deceased settlor's death, the trustee shall pay interest, at the legal rate, from the date of the deceased settlor's death to the date of distribution. For purposes of allocation under this Paragraph, assets shall be valued at their values \_\_\_\_\_ (to use date of distribution values: on the date or dates of distribution or, to use valuation for estate tax purposes: as finally determined for federal estate tax purposes; provided that any assets allocated in kind shall be allocated between the Exempt Trust and the Non-Exempt Trust in a manner that fairly reflects net appreciation or depreciation in the value of the assets in the trust being divided, measured from the date of the deceased settlor's death to the date of payment).*]

(c) Regardless of whether or not subparagraph (a) applies, if the amount of the deceased settlor's generation-skipping transfer tax exemption actually allocated by the executor (or automatically allocated under *Internal Revenue Code Section 2632*) to a trust to which this paragraph applies is equal to the value of the property of that trust so that the entire trust has an inclusion ratio of zero for federal generation-skipping transfer tax purposes, the entire trust shall be referred to as the Exempt Trust. On the other hand, if no part of the deceased settlor's generation-skipping transfer tax exemption is actually allocated to the trust by the executor (or automatically allocated under *Internal Revenue Code Section 2632*)

so that the entire trust has an inclusion ratio of one for federal generation-skipping transfer tax purposes (or if the deceased settlor is not the transferor of that trust for generation-skipping transfer tax purposes), the entire trust shall be referred to as the Non-Exempt Trust.

(d) The trustee may, but is not required to, administer the trusts under this instrument to which this paragraph applies in such a manner that distributions made during the trust terms to "skip persons" (as defined in *Internal Revenue Code Section 2613(a)* or any equivalent successor statute) are made from Exempt Trusts, and distributions made during the trust terms to "non-skip persons" (as defined in *Internal Revenue Code Section 2613(b)* or any equivalent successor statute) are made from Non-Exempt trusts.

[*Optional:*]

(e) If the trustee determines that the burdens of generation-skipping transfer taxes, income taxes, and death taxes on a Non-Exempt Trust, either settlor's estate, or the beneficiaries of that trust would be reduced, the trustee may petition the court to amend the trust to grant to one or more trust beneficiaries who are non-skip persons in a generation below the deceased settlor a general testamentary power of appointment over all or a specified portion of that Non-Exempt Trust. Any power to amend the trust is within the discretion of the court, and the preceding sentence shall not be construed to give the trustee any power that the trustee does not already have under California trust law to petition the court under the appropriate circumstances, nor shall it be construed to limit the power of the trustee or any beneficiary under the California trust law to petition the court under the appropriate circumstances.

[*Continue with the following:*]

(f) The purpose of this paragraph is to allow the trustee to administer the trusts so as to decrease the amount of generation-skipping transfer taxes owed on generation-skipping transfers from the trusts. The trustee shall balance that consideration against any other tax and nontax considerations, and may disregard the generation-skipping transfer tax consequences to the extent that the trustee determines that doing so will allow the trustee to carry out the settlors' intentions in creating the trusts. All decisions of the trustee under this subparagraph are within the trustee's discretion and shall be final and incontestable by anyone.

(g) If, upon the death of the surviving settlor, (1) the surviving settlor is considered to be the transferor of any Non-Exempt Trust established by this instrument for generation-skipping transfer tax purposes, and (2) the surviving settlor's executor allocates any part of the generation-skipping transfer tax exemption that is available to the surviving settlor under *Internal Revenue Code Section 2631(a)* (or any equivalent successor section) to that Non-Exempt Trust so that the entire trust then has an inclusion ratio of zero for federal generation-skipping transfer tax purposes, that trust shall then be considered to be an Exempt Trust for purposes of this paragraph of the trust instrument.

(h) In no event may the trustee exercise any power under this paragraph in a manner that will impair the marital deduction.

(i) If, in the trustee's judgment, at any time after the execution of this trust instrument any statute, regulation, court decision, or administrative ruling imposes different or additional requirements on the trust in connection with the generation-skipping transfer tax, the trustee may petition the court to amend the terms of the trust to meet those requirements and achieve the purpose of this Paragraph.

#### ARTICLE 6 : Trustee

6.01. Definition. Unless the context requires otherwise, all references in this instrument to "the trustee" shall be deemed

to refer to whoever is serving as trustee or co-trustees, and shall include alternate or successor trustees or co-trustees.

6.02. Successor Trustees. (a) If, while both settlors are living, any trustee or co-trustee fails or ceases to act or to continue to act, the settlors shall have the power to designate any suitable person or entity to act as successor to that trustee or co-trustee. This power may be exercised \_\_\_\_\_ [only by both settlors, acting jointly *or* by the settlors, acting either jointly or individually]. The successor shall be designated by a signed writing delivered to the person or entity designated as successor. If a successor trustee is not designated in this way, [*include only if settlors are initially to serve as co-trustees*: no successor co-trustee shall be appointed. Rather, the remaining co-trustee shall act as sole trustee and shall have full power to complete the trust administration.

(b) If, after the death of the deceased settlor, any trustee or co-trustee fails or ceases to act as trustee or co-trustee, the surviving settlor shall have the power to designate any suitable person or entity to act as successor trustee or co-trustee. The successor trustee or co-trustee shall be designated by a signed writing delivered to the person or entity designated as successor.

(c) If, for any reason, the office of trustee becomes vacant and no trustee is designated under subparagraphs (a) or (b) of this paragraph, the following persons, in the order of priority indicated, shall be successor trustee:

First, \_\_\_\_\_ [*name and place of residence or business, e.g., William J. Gray, of Sacramento, California*];

Second, \_\_\_\_\_ [*name and place of residence or business, e.g., Sandra M. Green, of Roseville, California*];

Third, \_\_\_\_\_ [*name and place of residence or business, e.g., Double Eagle Bank, Fresno, California*].

6.03. Removal and Replacement. (a) Notwithstanding any other provision of this instrument, while both settlors are living, the settlors, acting jointly, shall have the power, at any time and for any reason, to remove any trustee acting under this instrument and appoint another trustee to replace the removed trustee. After the death of the deceased settlor, the surviving settlor shall have the power, at any time and for any reason, to remove any trustee acting under this instrument and appoint another trustee to replace the removed trustee. Removal shall be effected by giving a written notice of removal to the trustee to be removed and to the person or entity legally entitled to act as successor trustee. The removal shall become effective upon delivery to the settlors (or the surviving settlor) of a written acceptance of the trust by the successor trustee. The settlors (or the surviving settlor) shall promptly notify the trustee being removed of the receipt of that acceptance.

(b) The court shall have the power to remove the trustee upon petition by any beneficiary, for any of the following reasons:

- (1) Commission of a breach of trust.
- (2) Insolvency or other unfitness to administer the trust.
- (3) Hostility or lack of cooperation among the co-trustees that impairs the administration of the trust.
- (4) Failure or refusal to act.
- (5) Other good cause, as determined by the court.

6.04. Resignation. Any trustee may resign at any time, without giving a reason for the resignation, by giving written

notice, at least \_\_\_\_\_ [specify; e.g., 30 days] before the time the resignation is to take effect, to the settlors if living, to any other trustee then acting, to any persons authorized to designate a successor trustee, to all living trust beneficiaries known to the trustee (or, in the case of a minor beneficiary, to the parent or guardian of that beneficiary), and to the successor trustee, if any has been appointed under the provisions of this instrument. A resignation shall be effective upon written acceptance of the trust by a successor trustee.

6.05. Vacancies. If a vacancy should occur in the office of trustee, whether by reason of death, resignation, removal, or other cause, and no successor trustee is appointed as provided in this instrument, the court shall appoint a new trustee to fill the vacancy. In filling a vacancy, the court may, in its discretion, appoint the original or any other number of trustees. In selecting a trustee, the court shall give consideration to the wishes of the beneficiaries who are fourteen years of age or older.

6.06. Exercise of Management Powers While Settlers Are Co-Trustees. While both settlors are acting as co-trustees under this instrument, with respect to community property held in the trust, either of them may be sole signatory of all checks and other withdrawal instruments drawn on any trust account, and of any instruments of conveyance of trust property other than community real property or a community property interest in a business operated and managed by one settlor. A settlor acting as a trustee and operating or managing a business that is community property may, acting alone, sell, exchange, encumber, or dispose of that business after giving prior notice to the other settlor of any sale, lease, exchange, encumbrance, or other disposition of all or substantially all of the personal property used in the operation of the business (including personal property used for agricultural purposes). Any and all powers relating to the management of any trust property that comprises the separate or quasi-community property of either settlor shall be exercised only by the settlor who contributed that property to the trust.

6.07. Bond. No bond or undertaking shall be required of any individual who serves as a trustee under this instrument *optional*; except any successor trustee appointed by court order under Paragraph 6.05 of this instrument].

6.08. Powers. To carry out the purposes of the trusts created under this instrument, and subject to any limitations stated elsewhere in this instrument, the trustee shall, in addition to all of the powers now or hereafter conferred on trustees by law, have the power to do all of the following:

(a) Retain property received into the trust at its inception, or later added to the trust, as long as the trustee considers that retention is in the best interests of the trust or in furtherance of the goals of the settlor in creating the trust, as determined from this trust instrument, but subject to the standards set forth in *California Probate Code Section 16040* and the Uniform Prudent Investor Act.

(b) Invest and manage trust assets as a prudent investor would, by considering the purposes, terms, distribution requirements, and other circumstances of the trust. In satisfying this standard, the trustee shall exercise reasonable care, skill, and caution. The trustee's investment and management decisions respecting individual assets and courses of action must be evaluated not in isolation, but in the context of the trust portfolio as a whole, and as a part of an overall investment strategy having risk and return objectives reasonably suited to the trust. Among the circumstances that are appropriate to consider in investing and managing trust assets are the following, to the extent relevant to the trust or its beneficiaries:

- (1) General economic conditions.
- (2) The possible effect of inflation or deflation.
- (3) The expected tax consequences of investment decisions or strategies.
- (4) The role that each investment or course of action plans within the overall trust portfolio.

- (5) The expected total return from income and the appreciation of capital.
- (6) Other resources of the beneficiaries known to the trustee as determined from information provided by them;
- (7) Needs for liquidity, regularity of income, and preservation or appreciation of capital.
- (8) An asset's special relationship or special value, if any, to the purposes of the trust or to one or more of the beneficiaries.

The trustee may invest in any kind of property of type of investment or engage in any course of action or investment strategy consistent with the standards set forth in this provision or the Uniform Prudent Investor Act, as set forth in *California Probate Code Sections 16045-16054* or any successor sections.

- (c) In the trustee's discretion, invest or reinvest in mutual funds, money market funds, investment trusts, regulated investment companies, market funds, and index funds, and in the shares or securities of any such funds or companies, that persons of prudence, discretion, and intelligence acquire for their own account.
- (d) Acquire and maintain as a trust asset a life insurance policy on the life of any person, including the trustee, issued by any company and in any amount that the trustee may deem advisable, and exercise all rights of ownership granted in that policy; provided, however, that as to any assets of the trust (other than assets held in the Bypass Trust and the Disclaimer Trust), the surviving settlor shall have the right, by delivery of a written instrument to the trustee, to require the trustee to convert any such policy into productive property within a reasonable time following the receipt of that request.
- (e) With or without court authorization, sell (for cash or on deferred payments, and with or without security), convey, exchange, partition, and divide trust property; grant options for the sale or exchange of trust property for any purpose, whether the contract is to be performed or the option is to be exercised within or beyond the term of the trust; and lease trust property for any purpose, for terms within or extending beyond the expiration of the trust, regardless of whether the leased property is commercial or residential and regardless of the number of units leased.
- (f) Engage in any transactions with the personal representative of the estate of the settlor that are in the best interest of any trusts created in this instrument.
- (g) Manage, control, improve, and maintain all real and personal trust property.
- (h) Subdivide or develop land; make or obtain the vacation of plats and adjust boundaries, or adjust differences in valuation on exchange or partition by giving or receiving consideration; and dedicate land or easements to public use with or without consideration.
- (i) Make ordinary or extraordinary repairs or alterations in buildings or other trust property, demolish any improvements, raze existing party walls or buildings, and erect new party walls or buildings, as the trustee deems advisable.
- (j) Enter into oil, gas, and other mineral leases, on terms deemed advisable by the trustee; enter into any pooling, unitization, repressurization, community, or other types of agreements relating to the exploration, development, operation, and conservation of mineral properties; drill, mine, and otherwise operate for the development of oil, gas, and other minerals; contract for the installation and operation of absorption and repressuring plants; and install and maintain

pipelines. Any such leases or agreements may be for a term within or extending beyond the term of the trust.

(k) In the trustee's discretion, abandon any [*optional*: unproductive or wasted] trust asset or interest therein.

(l) Employ and discharge agents and employees, including but not limited to attorneys, accountants, investment and other advisers, custodians of assets, property managers, real estate agents and brokers, and appraisers, to advise and assist the trustees in the management of any trusts created under this trust instrument, and compensate them from the trust property. [*Optional*: The agents and employees may be associated or affiliated with the trustee, or may be descendants or other persons related to the trustee or to the settlor, or a company associated with any such persons.] [*Optional*: The trustee is entitled to rely on the advice of any professional adviser employed under this provision. Reasonable compensation paid to any such agents or employees shall not diminish the compensation to which the trustee is otherwise entitled.]

(m) With respect to securities held in trust, exercise all the rights, powers, and privileges of an owner, including, but not limited to, the power to vote, give proxies, and pay assessments and other sums deemed by the trustee necessary for the protection of the trust property; participate in voting trusts, pooling agreements, foreclosures, reorganizations, consolidations, mergers, and liquidations, and, in that connection, deposit securities with and transfer title to any protective or other committee under such terms as the trustee deems advisable; exercise or sell stock subscription or conversion rights; and accept and retain as investments of the trust any securities or other property received through the exercise of any of the foregoing powers.

(n) Hold securities or other trust property in the trustee's own name or in the name of a nominee, without disclosure of the trust, or in unregistered form, so that title may pass by delivery.

(o) Deposit securities in a securities depository that is either licensed or exempt from licensing.

(p) Borrow money for any trust purpose from any person or entity, on such terms and conditions as the trustee deems advisable, and obligate the trust for repayment; encumber any trust property by mortgage, deed of trust, pledge, or otherwise, whether for terms within or extending beyond the term of the trust, as the trustee deems advisable, to secure repayment of any such loan; replace, renew, and extend any such loan or encumbrance; and pay loans or other obligations of the trust deemed advisable by the trustee.

(q) In the trustee's discretion, make loans to beneficiaries out of funds of the trust, and guarantee the repayment of loans made to beneficiaries by third parties by encumbering trust assets.

(r) Procure and carry, at the expense of the trust, insurance in such forms and in such amounts as the trustee deems advisable to protect the trust property against damage or loss, and to protect the trustee against liability with respect to third persons.

(s) Enforce any obligation owing to the trust, including any obligation secured by a deed of trust, mortgage, or pledge held as trust property, and purchase any property subject to a security instrument held as trust property at any sale under that instrument.

(t) Extend the time for payment of any note or other obligation held as an asset of, and owing to, the trust, including accrued or future interest, and extend the time for repayment beyond the term of the trust.

(u) Pay or contest any claim against the trust; release or prosecute any claim in favor of the trust; or, in lieu of payment, contest, release, or prosecution, adjust, compromise, or settle any such claim, in whole or in part, and with or without consideration.

(v) At trust expense, prosecute or defend actions, claims, or proceedings of whatever kind for the protection of the trust property and of the trustee in the performance of the trustee's duties, and employ and compensate attorneys, advisers, and other agents as the trustee deems advisable.

(w) Purchase bonds at such premiums as the trustee shall, in the trustee's discretion, deem advisable; provided, however, that any premium paid by the trustee for any bond shall be periodically repaid to principal out of the interest received on the bond, in a reasonable manner as the trustee determines and, to the extent necessary, from the proceeds on the sale or other disposition of the bond.

6.09. Grant of Specific Powers Not to Limit General Powers. The grant to the trustee in this instrument of a specific power or powers shall not limit the trustee from exercising any other power that may be necessary or appropriate for the trustee to exercise in furtherance of the purposes of this instrument or to permit the trustee to fulfill the trustee's responsibilities and duties with respect to the trust.

6.10. Retention of Family Residence. Notwithstanding any other provision of this instrument, the trustee shall retain, in any trust or trusts created by this trust instrument, any interest in real property used by the settlors as their principal residence at the time of the first settlor's death ("the family residence"), and shall deal with the family residence in accordance with the following terms and conditions:

(a) During his or her lifetime, the surviving settlor shall have the right to occupy the family residence (or any substitute residence or residential property purchased as provided in this paragraph of the trust instrument) free of any rent.

(b) The trustee shall pay as much of the mortgage or trust deed payments, property taxes, assessments, insurance, maintenance, and ordinary repairs on the family residence (or on any substitute residence or residential property purchased as provided in this paragraph of the trust instrument) as corresponds to the trust's proportionate interest in the same. The trustee shall make those payments out of income or principal of the trust or trusts in accordance with the principles applicable to charging of payments under California law, but in no event shall payment be made in a manner that disqualifies any part of any trust, that would otherwise so qualify, for the federal estate tax marital deduction.

(c) The surviving settlor, at his or her option, shall have the right to advise the trustee in writing that he or she no longer wishes to occupy the family residence and to direct the trustee to sell it, or any interest therein. In deciding on the terms and conditions relating to any sale, the trustee shall take into account all relevant factors, including, but not limited to, the intent of the settlors that no sale be made in a "forced sale" situation (other than at the direction of the surviving settlor) or at a time when, because of high mortgage rates or otherwise, the residential real estate market is depressed. In selling the family residence, the trustee may dispose of it on such terms as the trustee deems desirable, including an installment sale or any other desirable method of disposing of the family residence, provided that if the sale is for consideration other than cash, the purchaser's obligation shall be secured by a first deed of trust. In the event of a sale, the surviving settlor may direct the trustee in writing to apply the proceeds of the sale to the purchase of a substitute residence or residential property, of comparable or lesser value, to be selected by the surviving settlor, or to reinvest the proceeds in any manner that he or she may direct, provided that any such investments satisfy normal fiduciary standards of prudence and safety, and to use the income from reinvestment to pay the rental or lease payments on another residence or residential property, to be selected by the surviving settlor. Any net trust accounting income from any such investments, in excess of the trust's share of the rental costs and any other expenses of trust administration, shall be added to the other trust income and distributed in accordance with the relevant provisions of the trust or trusts as set forth in Article 5 of this trust instrument.

[*Optional:*]

(d) If the surviving settlor does not direct the trustee to sell the family residence, he or she shall have the right to direct

the trustee in writing to lease it, or any interest in it. In the event of lease, the trustee shall continue to pay the expenses of maintaining the family residence as specified above, subject to the lease terms, and shall use the entire net income from the lease to pay the mortgage, rental, or lease payments on another residence or residential property, to be selected and occupied by the surviving settlor. Any net trust accounting income from any lease of the family residence, in excess of the trust's share of the cost of the mortgage, rental, or lease payments on another residence or residential property, shall be added to the other trust income and distributed in accordance with the relevant provisions of the trust or trusts, as set forth in Article 5 of this trust instrument.

[*Continue with the following:*]

(e) Upon the death of the surviving settlor, the trust's interest in either the family residence, any proceeds remaining from the sale of the family residence, or any substitute residence or residential property purchased by the trustee with any proceeds of sale or lease of the family residence, shall be distributed in accordance with the applicable provisions of the trust or trusts in which the interest or interests are held, as set forth in Article 5 of this trust instrument.

6.11. Power to Divide or Combine Trusts. The trustee shall have the power to divide a single trust into separate shares, each to be administered in accordance with the terms and conditions of the single trust from which they were created, when the trustee, in the trustee's discretion, determines that division is desirable or advisable in view of tax considerations (including considerations related to the income tax, the gift tax, the estate tax, and the generation-skipping transfer tax) or other objectives of the trusts and their beneficiaries. The trustee shall not be required to make a physical segregation or division of the various trust shares created under this trust instrument, except as segregation or division may be required by reason of the termination and distribution of any of the trusts, but the trustee shall keep separate accounts and records for different undivided interests. The trustee, in the trustee's discretion, shall have the further power to combine two or more trusts having substantially the same terms into a single trust for purposes of administration, when tax or other factors indicate that such combination would be desirable or advisable. [*Optional:* In deciding whether to combine trusts, the trustee should consider the generation-skipping transfer tax "inclusion ratio" of the trusts to be combined. Trusts having the same inclusion ratios may be combined. Trusts having different inclusion ratios generally should not be combined unless their inclusion ratios are maintained unchanged through substantially separate and independent shares of different beneficiaries, within the meaning of *Internal Revenue Code Section 2654(b)*, and the applicable regulations thereunder.]

6.12. Early Termination of Trusts. The trustee shall have the power, in the trustee's discretion, to terminate any trust created under this trust instrument whenever the fair market value of the trust falls below \_\_\_\_\_ [*specify amount, e.g.: \$25,000*], or becomes so small in relation to the costs of administration as to make continuing administration uneconomical. Upon termination, the trustee shall distribute the principal and any accrued or undistributed net income to the income beneficiaries in proportion to their shares of the income. If no fixed amount of income is payable to specific beneficiaries, the trustee shall distribute the principal and any accrued or undistributed net income in equal shares to those beneficiaries who would then be entitled to income payments from the trust.

6.13. Division or Distribution in Cash or in Kind. In order to satisfy a pecuniary gift or to distribute or divide trust assets into shares or partial shares, the trustee may distribute or divide those assets in kind, or divide undivided interests in those assets, or sell all or any part of those assets and distribute or divide the property in cash, in kind, or partly in cash and partly in kind. Property distributed to satisfy a pecuniary gift under this trust instrument shall be valued at its fair market value at the time of distribution.

6.14. Payments and Distributions to or for Benefit of Beneficiaries. In lieu of making a direct payment or distribution to any beneficiary who at the time of the payment or distribution is a minor or suffering from a legal disability, or who appears to the trustee by reason of illness, age, injury, or other cause, to be unable to accept the payment or distribution

or to make intelligent or responsible use of the same, the trustee may make the payment or distribution to any conservator or guardian duly appointed and acting for and on behalf of the beneficiary; to any custodian acting for and in behalf of the beneficiary under the Uniform Gifts to Minors Acts or Uniform Transfers to Minors Act of any state including a suitable custodian selected by the trustee; to any suitable person or persons, such as a relative or friend, with whom the beneficiary is residing; to any other person, firm, or agency for services rendered or to be rendered for the beneficiary's assistance or benefit; or to accounts in the beneficiary's name with financial institutions. The receipt of payments by any of the foregoing shall constitute a sufficient acquittance of the trustee for all purposes.

6.15. **Limitation on Powers That Would Imperil Marital Deduction.** Notwithstanding any other provision of this instrument, the trustee shall exercise power and discretion over any trust or trust share designed to qualify for the federal estate tax marital deduction only in a manner consistent with all statutory and regulatory requirements for the full allowance of the marital deduction for that trust or share.

6.16. **Power to Disclaim or Release Powers.** Any trustee may disclaim, release, or restrict the scope of any power or discretion that the trustee may hold in connection with any trust created under this instrument, whether the power or discretion is expressly granted in this instrument or is implied by law. The trustee shall disclaim a power in the manner required by applicable federal or California law. The trustee shall release or restrict any power or discretion by giving written notice to the beneficiary or beneficiaries then entitled to current distribution of income from the trust, specifying the power or discretion to be released or restricted, the nature of the restriction, and, if appropriate, the person or persons to whom the released or restricted power shall pass and be exercisable. If a power is disclaimed, the power shall be available to and exercisable by the other trustee or trustees.

6.17. **Trustee's Liability.** No [*optional*: "family" or individual] trustee [*optional*: who is serving without compensation under this trust instrument] shall be liable to any interested party for acts or omissions of that trustee, except those resulting from that trustee's willful misconduct or gross negligence. [*Optional*: As used in this provision, a "family" trustee is a trustee who is related to the settlors by blood or marriage.] This standard shall also apply regarding a trustee's liability for the acts or omissions of any co-trustee or predecessor trustee.

#### **PRACTICE TIP**

One should carefully consider whether or not the above provision should be included. In effect, this provision partially relieves the trustee of liability in exchange for the trustee's waiver of any claim to compensation. This provision may be omitted if the client prefers not to allow the trustee to effectively "buy" a lesser standard of conduct by waiving compensation. While the savings in compensation may sound attractive, the settlor should consider whether or not it might be preferable, in the long run, to pay for the trustee's time and services and require, in return, that the trustee adhere to a high standard of conduct. *Commentary by Albert G. Handelman.*

6.18. **Written Notice to Trustee.** Until the trustee receives written notice of any death or other event upon which the right to payments from any trust may depend, the trustee shall incur no liability for disbursements made in good faith to persons whose interests may have been affected by that event.

6.19. **Duty to Account.** The trustee shall render accounts at least annually, at the termination of a trust, and upon a change of trustees, to the persons and in the manner required by law.

#### **PRACTICE TIP**

*Probate Code Section 16062* requires the trustee of any trust to provide an annual account to the beneficiaries, except under limited circumstances, such as when the trust may be revoked, when the

beneficiary waives an accounting, or when the trustee and the beneficiary are the same person [*see Prob. Code § 16064*]. The contents of the annual account are described in *Probate Code Section 16063*. Generally, the accounting must reveal all of the information required in a formal accounting, although it may be presented in summary form. Additionally, information must be provided regarding trustee, attorney and accountant compensation, and statements regarding the rights of the beneficiary to challenge the actions of the trustee must be included [*see Prob. Code § 16063*].

In light of these provisions, the planner may wish to consider omitting the requirement that an accounting be provided. This provision would only add the burden of preparing a full, formal accounting, which can always be required by the beneficiary in any case when he or she feels that more detail must be revealed by the trustee [*see Prob. Code §§ 16061, 16062(a)*]. Indeed, many attorneys specifically waive the requirement that any accounting whatsoever be rendered by the trustee. Even with such a waiver in the trust instrument, a beneficiary could still obtain an accounting if it appears that a material breach of the trust has occurred [*see Prob. Code § 16064*]. *Commentary by Albert G. Handelman.*

#### ARTICLE 7 : Concluding Provisions

7.01. Perpetuities Savings Clause. Notwithstanding any other provision of this instrument, any trust created by this instrument or by a power of appointment created by this instrument that has not terminated earlier shall terminate no later than 21 years after the death of the last survivor of \_\_\_\_\_ [*name individual(s) or describe class of persons whose life or lives are to be the measuring life or lives, e.g., the settlors and the issue of the settlors living on the date of the deceased settlor's death or the beneficiaries of the trust who are living on the date of the deceased settlor's death*]. If a trust is terminated because of the preceding sentence, the trustee shall distribute the principal and undistributed income of the trust to the income beneficiaries of the trust in the same proportion that they are entitled to receive income immediately before the termination. If that proportion is not fixed by the terms of this instrument, distribution shall be to the persons entitled to receive income immediately before the termination \_\_\_\_\_ [*specify distribution plan, e.g., in the manner provided in California Probate Code Section 240*]. If there is no person who is entitled to receive income immediately before the termination, the trustee shall distribute the principal and undistributed income to \_\_\_\_\_ [*name distributee(s) or specify class, e.g., the issue of the settlors then surviving in the manner provided in California Probate Code Section 240*].

7.02. Simultaneous Death. If the settlors die under circumstances in which the order of their deaths cannot be established by clear and convincing evidence, each settlor shall be deemed to have survived the other, and this instrument shall be construed accordingly. If the settlors, or either of them, and any beneficiary under this instrument die under circumstances in which the order of their deaths cannot be established by clear and convincing evidence, the settlor or settlors, as the case may be, shall be deemed to have survived the beneficiary, and this instrument shall be construed accordingly.

7.03. No-Contest Clause. If any beneficiary under this instrument, singularly or in combination with any other person or persons, directly or indirectly contests this instrument or the wills of the settlors in whole or in part, or opposes, objects to, or seeks to invalidate any of the provisions of this instrument or of the wills of the settlors, or seeks to succeed to any part of the estate of the settlors other than in the manner specified in this instrument or in the wills of the settlors, then the right of that person to take any interest given to him or her by this instrument shall be void, and any gift or other interest in the trust property to which the beneficiary would otherwise have been entitled shall pass as if he or she had predeceased the settlors [*optional: without issue*].

7.04. Definition of Death Taxes. As used in this instrument, the term "death taxes" means all inheritance, estate, succession, and other similar taxes that are payable by any person on account of that person's interest in the decedent's estate or by reason of the decedent's death, including penalties and interest, but excluding the following:

(a) Any additional tax that may be assessed under *Internal Revenue Code Section 2032A*.

(b) Any federal estate taxes recoverable, pursuant to *Internal Revenue Code Section 2207A*, from the holder or recipient of any qualified terminable interest property that is included in the settlor's federal gross estate under *Internal Revenue Code Section 2044*.

(c) Any federal or state tax imposed on a generation-skipping transfer, as that term is defined in the federal tax laws, unless that generation-skipping transfer tax is payable directly out of the assets of a trust created by this instrument.

7.05. Definition of Debts and Expenses. As used in this instrument, the term "debts and expenses" shall include the following:

(a) All costs, expenses of litigation, counsel fees, or other charges that the trustee incurs in connection with the determination of the amount of the death taxes, interest, or penalties referred to in Paragraph 5.02 of this instrument, and

(b) Legally enforceable debts, funeral expenses, expenses of last illness, and administration and property expenses.

7.06. Definition of Deceased Settlor and Surviving Settlor. As used in this instrument, the words "deceased settlor" refer to the first settlor to die, and the words "surviving settlor" refer to the other settlor.

7.07. Definition of Child and Children. As used in this instrument, the words "child" and "children" refer to natural children and to children who have been legally adopted by the parent or parents from or through whom their right to inherit or to take is determined and derived.

7.08. Definition of Issue. As used in this instrument, the word "issue" refers to all lineal descendants of all generations, with the relationship of parent and child at each generation being determined by the definitions of "child" and "children" set forth in this instrument.

7.09. Definition of Education. As used in this instrument, the term "education" refers to the following:

(a) Education at public or private elementary, junior high, middle, or high schools, including boarding schools;

(b) Undergraduate, graduate, and postgraduate study in any field, whether or not of a professional character, in colleges, universities, or other institutions of higher learning;

(c) Specialized formal or informal training in music, the stage, the handicrafts, or the arts, whether by private instruction or otherwise; and

(d) Formal or informal vocational or technical training, whether through programs or institutions devoted solely to vocational or technical training, or otherwise.

7.10. Number and Gender. As used in this instrument, references in the masculine gender shall be deemed to include the feminine and neuter genders, and vice versa, and references to the singular shall be deemed to include the plural, and vice versa, wherever the context so permits.

7.11. Captions. The captions appearing in this instrument are for convenience of reference only, and shall be disregarded in determining the meaning and effect of the provisions of this instrument.

7.12. Severability Clause. If any provision of this instrument is invalid, that provision shall be disregarded, and the

remainder of this instrument shall be construed as if the invalid provision had not been included.

7.13. California Law to Apply. All questions concerning the validity, interpretation, and administration of this instrument, including any trusts created under this instrument, shall be governed by the laws of the State of California, regardless of the domicile of any trustee or beneficiary.

7.14. Gifts to "Heirs." For any gift to heirs of either or both settlors that is made in this instrument, those heirs shall be determined as if the settlor or settlors had died intestate at the time for distribution prescribed in this instrument, and the identity and shares of those heirs shall be determined according to the California laws of succession that concern separate property not acquired from a previously deceased spouse and that are in effect at the death of the settlor or settlors.

#### ARTICLE 8 : Execution

8.01. Execution. \_\_\_\_\_ [I or we] certify that \_\_\_\_\_ [I or we] have read the foregoing declaration of trust and that it correctly states the terms and conditions under which the trust estate is to be held, administered, and distributed. As trustee[s], \_\_\_\_\_ [I or we] approve this declaration of trust in all particulars, and agree to be bound by its terms and conditions.

Executed on \_\_\_\_\_ [month, day], \_\_\_\_\_ [year], at \_\_\_\_\_ [city or town, and state, in which declaration of trust is signed, e.g., Fresno, California].

TRUSTEE[S]

[For individual trustee:]

\_\_\_\_\_ [signature]  
[typed name]

[For corporate trustee:]

[typed name of corporate trustee]

By:

\_\_\_\_\_ [signature of first authorized employee]  
[typed name]

\_\_\_\_\_ [signature of second authorized employee]  
[typed name]

Acceptance by Settlers. We, as settlors of the trusts created by this declaration of trust, certify that we have read the foregoing declaration of trust and that it correctly states the terms and conditions under which the trust estate is to be held, administered, and distributed. We approve this declaration of trust in all particulars, and agree to be bound by its terms and conditions.

Executed on \_\_\_\_\_ [month, day], \_\_\_\_\_ [year], at \_\_\_\_\_ [city or town, and state, in which declaration of trust is signed, e.g., Fresno, California].

SETTLOR[S]

\_\_\_\_\_ [signature of settlor]  
[typed name]

\_\_\_\_\_ [signature of settlor]  
[typed name]

ACKNOWLEDGMENT

[Acknowledgements taken in California must be in the following form (Civ. Code § 1189(a))]:

State of California )  
County of \_\_\_\_\_ )

On \_\_\_\_\_ [date], before me, \_\_\_\_\_ [name and title of officer taking acknowledgment], personally appeared \_\_\_\_\_ [names], who proved to me on the basis of satisfactory evidence to be the persons whose names are subscribed to the within instrument and acknowledged to me that they executed the same in their authorized capacities, and that by their signatures on the instrument the persons, or the entity upon behalf of which the persons acted, executed the instrument.

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

WITNESS my hand and official seal.

Signature \_\_\_\_\_ (SEAL)

SCHEDULE A

SCHEDULE OF TRUST ASSETS

<i>Description of Asset</i>	<i>Character of Asset [e.g., separate or community property]</i>
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Estate, Gift & Trust LawTrustsMarital Deduction TrustsEstate, Gift & Trust LawTrustsRevocable Living TrustsTax

LawFederal Estate & Gift TaxesCredits (IRC secs. 2010-2016, 2505)Tax LawFederal Estate & Gift  
TaxesDeductionsMarital Deduction (IRC secs. 2056, 2523)General Overview



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California Legal Forms--Transaction Guide

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DIVISION IV: WILLS AND TRUSTS  
CHAPTER 70 COMPLETE REVOCABLE TRUST FORMS  
PART IV. FORMS  
A. Complete Trust Instruments

*26-70 California Legal Forms--Transaction Guide § 70.203*

**AUTHOR:** Reviewed by Albert G. Handelman

**§ 70.203 Formula Marital Deduction Trust for One Married Settlor--QTIP Trust and Bypass TRUST**

**[1] Comment**

**[a] Use of Form**

This form is a complete trust instrument designed to be used by a married person who wishes to create a revocable trust that will benefit himself or herself and his or her spouse during their lifetimes and their children after their deaths, and that will avoid or reduce estate taxes by taking full advantage of the marital deduction [*see I.R.C. § 2056*] and the unified credit [*see I.R.C. §§ 2010* (estate tax), *2505* (gift tax)].

Under this form, if the settlor is survived by his or her spouse, no federal estate tax will be due on the settlor's death because the marital deduction and the settlor's unified credit will shelter the entire estate from federal estate tax. Moreover, the portion of the assets sheltered by the settlor's unified credit will also avoid taxation when the settlor's spouse dies. The net effect of this plan will be to avoid or reduce estate taxes in the combined estates of both spouses. It is assumed that the combined estates of the spouses are large enough to enable them to benefit from this kind of planning.

If the settlor is not survived by his or her spouse, the trust estate will be divided into shares for the settlor's children and held, administered, and distributed at specified ages.

**[b] Trust Property**

This trust is basically similar to the two-settlor trust in *Section 70.202[2]* [*see § 70.202[1][b]* for discussion of the basic plan underlying that form], except that it has been adapted for one settlor. When one married person creates a marital deduction trust, it is usually because that person has a significant separate or quasi-community property estate. Often, such a trust will be created in conjunction with a second revocable trust, created by both spouses, that will contain their community property. Segregation of separate and quasi-community property into a separate trust avoids the drafting,

recordkeeping, and administrative problems that can result when separate and community property are lumped together in a so-called "mixed property" trust.

Ordinarily, it is impractical for a married sole settlor to create a marital deduction trust that contains community property. Community property that is transferred to a trust will lose its community character unless the trust, originally or as amended before or after the transfer, provides that the power, if any, to modify the trust as to the rights and interests in that property may be exercised only with the joinder or consent of both spouses [*Fam. Code* § 761(a), (b)]. A trust that is created by a sole settlor cannot meet that requirement unless the trust instrument gives the settlor's spouse the power to join with the settlor in modifying the trust as to the rights and interests in the community property. Moreover, funding such a trust would require the conveyance of a fractional interest in each community property asset to the trust, which is likely to cause a myriad of administration problems later on. In short, it is a bad idea. Revocable trusts containing community property are almost always two-settlor trusts such as the forms contained in *Sections* 70.201[2] (nonformula trust) and 70.202[2] (formula trust).

### **[c] Trust Declaration Format**

This trust instrument uses the trust declaration format. A "declaration of trust" is a one-party instrument in which the trustee unilaterally declares that the trustee is holding property as trustee under terms of the trust instrument [*see* [2], P 1.01]. Only the trustee is required to execute the declaration. However, it is common for the settlor to sign the declaration to signify his or her approval of the terms of the trust [for signature blocks for declarations of trust [*see* [2], P 8.01]. For discussion of the distinction between a trust declaration and a trust agreement, and the advantages and disadvantages of the two formats, *see Section* 70.11[3].

### **[d] Family Information**

It is assumed in this form that the settlor has children. It is also assumed that the settlor has previously been married and has one or more children from the prior marriage [*see* [2], PP 1.04, 1.05, *below* ]. Finally, it is assumed that the settlor wants all his or her children to share equally in the trust assets. This is a common fact pattern for a married settlor with a large separate property estate [*see* [b], *above*], as well as for the use of a qualified terminable interest property ("QTIP") trust [*see* [i], *below*]. However, the existence of children from a prior marriage is not a prerequisite to use of the type of estate plan illustrated in this form. If the settlor has not been previously married, or has no children from a prior marriage, the appropriate family information simply can be deleted.

### **[e] Rights and Powers of Settlor**

This form gives the settlor the right to amend, revoke, or terminate the trust, in whole or in part, at any time during the settlor's lifetime [*see* [2], P 3.01, *below* ]. Upon the settlor's death, the trust becomes irrevocable.

The form also gives the settlor the power to direct the investments of the trust [*see* [2], P 3.02, *below* ]. This provision will not be important while the settlor is serving as trustee [*see* [p], *below*]. However, it will give the settlor control over trust investments if the settlor later wants another person to take over as trustee. The form also gives the settlor broad powers to borrow money from the trust estate [*see* [2], P 3.03, *below* ].

The form includes a provision authorizing an attorney in fact acting under a durable power of attorney to exercise the settlor's rights and powers over the trust estate during any time that the settlor is unable to exercise those rights and powers personally [*see* [2], P 3.04, *below* ]. If no attorney in fact is acting for the settlor, then the settlor's rights can be exercised by a duly appointed conservator, but only after petition to the court. If the settlor does not wish to delegate the power to amend or revoke the trust, this provision may be amended by the addition of optional language stating that all of the settlor's powers, except the power to amend, revoke, or terminate the trust, can be exercised by the attorney in fact or conservator [*see* [2], P 3.04, *below* ]. For further discussion of the revocability of a trust, and delegation of the

power to revoke a trust to an attorney in fact or conservator, see *Section 70.12[5]*.

#### **[f] Payments and Distributions During Settlor's Lifetime**

This form gives the settlor the right to receive income payments and principal distributions during his or her lifetime [see [2], art. 4, *below*]. The trustee can be required to pay the settlor all of the income of the trust, or as much income as the settlor may request from time to time [see [2], P 4.01, *below*]. In either case, the settlor will have the substantial right to enjoy all of the trust income.

The trustee can be required to distribute principal to the settlor on the settlor's request, or when the trustee in the exercise of the trustee's discretion determines that principal distributions should be made [see [2], P 4.02, *below*]. In either case, the settlor will have the substantial right to enjoy all of the trust principal.

The form includes a provision giving an attorney in fact acting under a durable power of attorney authority to request income or principal on the settlor's behalf if the settlor is unable to make those requests personally. If there is no attorney in fact, then the trustee will have the right to make the requests for the settlor [see [2], P 4.03, *below*].

#### **[g] Special Gift on Settlor's Death**

After the settlor's death, the trustee is required to make a "special gift" [see [2], P 5.01, *below*]. The term "special gift," as used in this form, means a gift that the trustee is required to make after the settlor's death to someone other than the residuary beneficiary. It is analogous, in many respects, to a specific devise or a general pecuniary devise in a will. The special gift in this form is a pecuniary devise, but special gifts of tangible personal property are not uncommon [see § 70.254[2] (form)].

The special gift will be made before any distributions are made to the surviving spouse or any other beneficiary. The special gift typically will be made to a family member or friend whom the settlor wishes to remember after his or her death, but whom the settlor does not wish to receive the full benefit of the residue of the trust estate.

If the settlor does not wish to make a special gift, this provision can be deleted. If the settlor wants to make more than one special gift, identical provisions may be included as necessary.

The special gift used in this form is not intended to qualify for the federal estate tax marital deduction. Therefore, if the amount of the gift exceeds the amount protected by the available unified credit [see *I.R.C. § 2010*], it will be subject to estate tax. Under the tax payment provision in this form [see [2], P 5.02, *below*], the special gift will *not* be exempt from proration of estate taxes, with the result that the actual amount that will pass to the recipient may be less than the pecuniary amount specified in the special gift provision. If, as is frequently the case, the settlor wants a special gift to pass to the recipient tax free, the tax payment provision in the form must be modified to exclude the special gift from any liability for estate taxes. Before modifying the tax provision, however, the settlor should be reminded that if the special gift is to pass tax free, any tax attributed to the special gift will have to be paid out of other trust assets that would otherwise go to the surviving spouse or other trust beneficiaries.

#### **PRACTICE TIP**

Even if the amount of the special gift does not exceed the amount protected by the available unified credit, if it is at all large it can have a serious impact on the estate plan. For example, if part of the plan is intended to create a bypass trust that will ultimately pass tax free to the settlor's children, a large nonmarital special gift will significantly reduce the amount that can be placed into the bypass trust without creating an immediate tax. Thus, caution must be exercised, not only in including special gifts, but in evaluating the effect of special gifts on the tax liabilities generated and the size of any remaining nonmarital gifts. *Commentary by Albert G. Handelman.*

### [h] Marital Deduction Formula

After the special gift has been made (or if there is to be no special gift) [see [g], *above*], the distribution of the trust estate will vary, depending on whether or not the settlor is survived by his or her spouse. If the settlor is *not* survived by his or her spouse, the trust assets will simply be divided into shares for the settlor's children in the manner described in [n], *below*, and the marital deduction provisions of the trust will never become operative [see [2], P 5.07, *below*].

If the settlor *is* survived by his or her spouse, then on the settlor's death the trust assets are divided into a Marital Deduction Share designed to qualify for the federal estate tax marital deduction, and a Nonmarital Share that does not qualify for the federal estate tax marital deduction [I.R.C. § 2056] but that will be protected under the deceased settlor's unified credit [I.R.C. § 2010].

#### PRACTICE TIP

The provisions of the Bypass Trust to be funded with the Nonmarital Share, as contained in the form in this section [ see [j], *below*], cannot qualify for the federal estate tax marital deduction because all income is not required to be distributed at least annually to the settlor's surviving spouse, and the settlor's children are included as potential income beneficiaries during the surviving spouse's lifetime. In actual practice, the great majority of bypass trusts provide that all income be paid at least annually to the surviving spouse alone, and their other provisions also qualify them for the federal estate tax marital deduction QTIP election described in *Internal Revenue Code § 2056(b)(7)*. Of course, were one to make the QTIP election as to a bypass trust, the entire tax planning aspect of the estate plan would be undermined. Thus, one should never include language in any trust form requiring the personal representative to make the QTIP election as to any trust which qualifies for that election. *Commentary by Albert G. Handelman.*

The actual dollar amount of the trust assets allocated to each share is determined by means of a formula, known as a marital deduction formula. Essentially, this formula apportions assets between the Marital Deduction Share and the Nonmarital Share in a manner that will assure that the Nonmarital Share is funded to the extent of the available unified credit, and the balance of the estate is allocated to the Marital Deduction Share where it will be protected from taxation by the marital deduction.

Marital deduction formulas can be either "pecuniary" or "fractional." This trust uses a pecuniary formula that funds the Marital Deduction Share first. For discussion of the use of marital deduction formula clauses, see *Section 70.202[1][k]*; for more detailed discussion, see Ch. 71, *Marital Deduction Trust Provisions*; see also 2 California Wills & Trusts, Chapter 112, *The Marital Deduction and Marital Deduction Trusts* (Matthew Bender). If the trust drafter wants to modify this form to use a different type of marital deduction formula, the following provisions may be substituted:

(1) To use a "pecuniary bypass formula" specifying that the Nonmarital Share will be equal to a specified amount, delete Paragraph 5.04 of this form, and substitute the form in *Ch. 71, Marital Deduction Trust Provisions, § 71.202[2]*.

(2) To use a "fractional formula" [see *above*], delete Paragraphs 5.04 and 5.05 of this form, and substitute the form in *Ch. 71, Marital Deduction Trust Provisions, § 71.204[2]*.

### [i] QTIP Trust

The Marital Deduction Share is placed in a marital deduction trust. The marital deduction trust used in this form is a qualified terminable interest property (or "QTIP") trust, the terms of which comply with the "qualified terminable interest property" provisions of *Internal Revenue Code Section 2056(b)(7)*. As required by the tax rules, all the income from the QTIP Trust is payable to the settlor's surviving spouse for life, and no person has any power to appoint any

part of the property to any person other than the settlor's surviving spouse during his or her lifetime [*I.R.C.* § 2056(b)(7)(B)(ii)]. After the death of the settlor, his or her executor must make an irrevocable election on the estate tax return filed for the settlor's estate to treat the all or part of the trust assets as QTIP property [*I.R.C.* § 2056(b)(7)(B)(i)(III), (v)].

The settlor's surviving spouse need not be given a power of appointment over the assets of a QTIP trust. Thus, the settlor may specify who will receive the trust property after the death of the surviving spouse. This makes QTIP trusts particularly suitable for clients who do not want their spouses to be able to alter the dispositions of the client's assets after the client's death. The "classic" situation calling for the use of a QTIP trust is one in which there are children of a former marriage and animosity exists between those children and the client's current spouse. However, as discussed in Ch. 71, *Marital Deduction Trust Provisions*, there are important reasons for using a QTIP trust even when no such considerations are present. Essentially, because the settlor's executor can elect to qualify all or only part of the trust for the marital deduction, the QTIP trust allows a much wider measure of portmortem planning flexibility. Most experienced estate planners recommend using a QTIP trust whenever possible.

The most common alternative to a QTIP trust is a so-called "lifetime income/power of appointment trust," which will also qualify for the federal estate tax marital deduction [*see I.R.C.* § 2056(b)(5)]. Under such a trust, the settlor's surviving spouse must be entitled (as with a QTIP trust) to all the trust income for life. In addition, the settlor's surviving spouse must be given the right, in the form of a general power of appointment, to designate the recipient of all remaining trust assets on his or her death. Since the settlor's surviving spouse has such broad powers over the trust assets, a lifetime income/power of appointment trust is suitable only when the settlor has a high degree of confidence that his or her spouse will dispose of the remaining assets in a manner that will be consistent with the wishes of the settlor. Moreover, a lifetime income/power of appointment trust lacks the postmortem planning flexibility available through use of the QTIP trust.

If the drafter wants to convert the marital deduction trust into this form into a lifetime income/power of appointment trust, Paragraphs 5.04 and 5.09 should be deleted, the form in Ch. 71, *Marital Deduction Trust Provisions*, § 71.231[2], substituted in their place, and references to the QTIP trust in the remainder of the instrument modified to refer to the lifetime income/power of appointment trust instead.

A detailed discussion of QTIP trusts is beyond the scope of this comment. For further coverage of that subject, see § 70.202[1][1]. For general coverage of the marital deduction, see Ch. 71 and California Wills & Trusts, Ch. 112, *The Marital Deduction and Marital Deduction Trusts* (Matthew Bender).

### **[j] Bypass Trust**

Assets that are not allocated to the QTIP Trust will go into the Nonmarital Share. The Nonmarital Share will be placed in a Bypass Trust [*see* [2], P 5.10, *below*]. The Bypass Trust is structured so that the trust assets will "bypass" (that is, escape taxation in) the surviving spouse's estate [*see* [2], P 5.10, *below*]. Such a trust is also sometimes referred to as a "credit shelter" trust because it uses the deceased settlor's unified credit [*see I.R.C.* § 2010] to "shelter" a portion of the estate from federal estate tax.

The trustee has discretion to distribute income and principal of the Bypass Trust to the settlor's surviving spouse and children according to an "ascertainable standard" [*see* [2], P 5.10(a), *below*]. The specification of an "ascertainable standard" will ensure that the trust assets will not be included in the gross estate of the surviving spouse for estate tax purposes, even if the surviving spouse serves as the trustee [*see I.R.C.* § 2041(b)(1)(A); *Treas. Reg.* § 20.2041-1(c)(2); *see also* Ch. 64, *Testamentary Trusts: Payment and Distribution Provisions*, § 64.51[4]]. If desired, the terms of the bypass trust may be modified to require mandatory payment of all income to the surviving spouse, coupled with discretionary payments of principal in accordance with an ascertainable standard. Mandatory payment of income may avoid adverse income tax consequences in some cases by avoiding the high income tax rates applicable to accumulated

trust income [*see I.R.C. § 1(e)*]. Any potential income tax savings should be computed after considering the probable size of the surviving spouse's estate, and balanced against any competing non-tax goals of the settlor.

#### **[k] "Five or Five" Power Over Bypass Trust Principal**

The settlor's surviving spouse is also given a "five or five" power over the principal of the Bypass Trust [*see [2], P 5.10(b), below*]. This power permits the surviving spouse to withdraw up to \$5,000 or five percent of the trust, whichever is greater, in each calendar year. This power is optional and should be included only after carefully considering the consequences of the power.

The advantage of a five or five power is that it gives the surviving spouse control over a portion of the trust principal without the constraints imposed by an ascertainable standard. Thus, for example, the spouse may use the power to make annual tax-free gifts to the children to take advantage of the annual gift tax exclusion [*see I.R.C. § 2503(b)*; for discussion of the annual exclusion and the applicable exclusion amounts, which are adjusted annually for inflation, *see Ch. 60A, Gifts, § 60A.32[4]*].

However, a five or five power can also have adverse tax consequences for the surviving spouse. A power to invade the principal of a trust will not cause the trust principal to be included in the estate of the person who holds the power if the power is limited to the greater of \$5,000 or five percent of the current value of the trust each year [*see I.R.C. § 2041(b)(2); Treas. Reg. § 20.2041-3(d)(3) and § 70.212[2]*]. However, the power must be "non-cumulative"; that is, it must lapse if it is not exercised by the end of a calendar year [*I.R.C. § 2041(b)(2); Treas. Reg. § 20.2041-3(d)(3)*].

Any property subject to an unexercised five or five power in the year of the holder's death will be included in the holder's estate for estate tax purposes [*see I.R.C. § 2041(b)(2)*]. Moreover, the IRS takes the position that a beneficiary who holds a five or five power over the principal of a trust will be treated as the owner of a portion of the trust for income tax purposes [*Priv. Ltr. Rul. 8142061 ; Priv. Ltr. Rul. 8326074 ; see I.R.C. § 678* (income tax consequences of power to invade trust corpus)]. Thus, the settlor's surviving spouse will have to pay any income tax due on the trust income, even if the five or five power is used to transfer property to someone else, such as the children, or is not used at all.

If the settlor does not want to have part of the trust assets included in the surviving settlor's estate for estate tax purposes, and to have the surviving spouse treated as the owner of the trust for income tax purposes, the five or five power should be omitted.

#### **PRACTICE TIP**

The trust drafter should also bear in mind that granting the settlor's surviving spouse a five or five power over the Bypass Trust can simply distort the settlor's estate plan. From the settlor's perspective, the Bypass Trust's principal should be tapped only as a last resort; indeed, many revocable trusts specifically provide that invasion of the Bypass Trust's principal may (or should) be made only after the principal of all other trusts created under the instrument has been exhausted. Similarly, the invasion provisions of a sole settlor's Bypass Trust often require the trustee to carefully consider the surviving spouse's other resources before making a distribution of principal. Such provisions are intended, in part, to give some assurance to the settlor that if he or she dies before his or her spouse, the maximum possible portion of the assets he or she leaves will pass to his or her intended beneficiaries, regardless of the provisions of his or her surviving spouse's estate plan. At the same time, such a provision protects the settlor's tax plan, and the Bypass Trust's assets will pass free of death tax at the surviving spouse's death. Thus, it is advantageous to allow as much growth as possible to occur in this trust. If the surviving spouse regularly exercises a five or five power he or she may hold over the Bypass Trust, then the tax plan intended by the instrument will be compromised, even if the compromise is inadvertent. *Commentary by Albert G. Handelman.*

### [l] Disclaimer Trust

This form gives the surviving spouse the option to disclaim all or part of the assets that he or she would receive on the death of the settlor [see [2], P 5.08, *below*]. Any assets that are disclaimed will be held in a special "Disclaimer Trust" [see [2], P 5.12, *below*]. As discussed in § 70.12[6][i], many experienced estate planners advocate including a disclaimer trust in every trust instrument.

The Disclaimer Trust, like the Bypass Trust [see [j], *above*], is designed so that the trust assets will not be included in the surviving spouse's taxable estate when the surviving spouse dies. To achieve this tax treatment, the surviving spouse's rights in and powers over the Disclaimer Trust are appropriately limited. First, the surviving spouse has no power of revocation over the disclaimer trust [see [2], P 3.01, *below*]. Second, the surviving spouse will receive income and principal only in accordance with an "ascertainable standard" [see [2], P 5.12(a), *below*; see also *Treas. Reg. § 20.2041-1(c)(2)* and Ch. 64, *Testamentary Trusts: Payment and Distribution Provisions*, § 64.51[4]]. If desired, the terms of the disclaimer trust, like those of the bypass trust [see [m], *above*], may be modified to require mandatory payment of all income to the surviving spouse, coupled with discretionary payments of principal in accordance with an ascertainable standard. See [1][j], *above*, for discussion of potential income tax advantages to the latter approach.

The Disclaimer Trust provides additional postmortem planning flexibility in the event that unanticipated changes in the circumstances of the settlor and his or her spouse make it advantageous for the surviving spouse to disclaim some part of the trust property. For example, to minimize overall estate taxes in the estates of both spouses, it may be desirable to pay some additional estate tax on the death of the first spouse by having the surviving spouse disclaim property that would otherwise pass into the marital deduction trust. The Disclaimer Trust gives the survivor that option. Whether the option should be exercised will depend in part on the increasing estate tax unified credit [see *I.R.C. § 2010(c)*]. If the surviving spouse is in good health and is likely to survive several years, it may be prudent to not disclaim and not to pay estate tax in the deceased settlor's estate. By not disclaiming, the surviving spouse can enjoy the increasing estate tax exemption resulting from the increasing exclusion amount. The surviving spouse may even avoid estate taxes altogether, with the enacted repeal of the estate taxes, for decedents dying after 2009 [see *I.R.C. §§ 2010(c), 2210(a)*]. There is a great deal of uncertainty with respect to planning in this area, because optimal results are dependent on the year of death of the surviving spouse. In addition, although the estate tax has been repealed for decedents dying after 2009, a sunset provision of the repealing legislation re-imposes the estate tax at its pre-2001 rates after 2010 unless Congress re-enacts the repeal before that time [*I.R.C. § 2210(a)*; Pub. Law 107-16, § 901]. Many commentators feel legislative changes will be made regarding the repeal before 2010 [for discussion, see *Ch. 60, Estate Planning*, § 60.12A].

If the surviving spouse does not disclaim any property, the Disclaimer Trust simply will never become operative.

### [m] Payments and Distributions After Death of Surviving Spouse

On the death of the surviving spouse, the trustee will divide the assets of the QTIP, Bypass, and Disclaimer Trusts into shares for each of the settlor's children and the issue of each child who dies before the surviving spouse [see [2], PP 5.09(i), 5.10(c), 5.12(b), *below*]. The share of any child who has reached a specified age (for example, 30 years) will be distributed outright, while the shares of children who have not reached that age will be retained in separate trusts for those children [see [2], PP 5.09(i), 5.10(d), 5.12(c), *below*]. Each child will receive all of the income from his or her trust, plus as much of the principal as is necessary to maintain the child in accordance with a standard specified in the instrument [see [2], P 5.11(a), *below*]. If the trust drafter would prefer to avoid creating a situation in which income may be paid to very young children (or, more accurately, to the guardians or custodians of minor children), the income payment provision may be modified to provide for an accumulation of income until the beneficiary reaches a stated age (such as 18 or 21), and payment of income thereafter. However, accumulation of income can have negative income tax consequences due to the high income tax rates applicable to relatively small amounts of income [see *I.R.C. § 1(e)* (tax rates applicable to income of estates and trusts)].

The trust principal will be distributed to the child in two increments when the child reaches specified ages (for example, 25 years and 30 years) [see [2], P 5.11(b), (c), *below*]. The share of any deceased child is given outright to the issue of that child if those issue have reached a specified age (such as 30), or held in trust for minor issue until they reach that age [see [2], P 5.10(e), *below*]. The latter provision creates a remote possibility of a violation of the rule against perpetuities, but under the current "wait and see" rule [*Prob. Code* § 21205; see Ch. 67, *Future Interests and Perpetuities*, § 67.16] and the perpetuities savings clause in this instrument, there is no chance of a violation that could disrupt the estate plan. If the deceased child has no issue, his or her share is divided among the other children and issue of the settlor.

This form may be modified to provide for a "family pot" arrangement, rather than a separate share arrangement, on the death of the surviving spouse. Under a "family pot" arrangement, the trust assets are lumped together in a single trust, rather than segregated into separate shares as provided in this form. The trustee usually will be given the power to "sprinkle" income, and principal if desired, among the various trust beneficiaries. To convert this trust into a "family pot" trust following the death of the surviving spouse, Paragraphs 5.07, 5.10, 5.11, and 5.12 of this form should be deleted and replaced with the alternative provisions in § 70.213[2]. For additional discussion about "family pot" trusts, see § 70.210[1][b].

#### **[n] Payments and Distributions if Settlor Is Not Survived by Spouse**

If the settlor's spouse dies before the settlor, then on the settlor's death the trustee will be required to divide the trust estate into equal shares for each of the settlor's children and the issue of each child who dies before the settlor [see [2], P 5.07, *below*]. These shares will be held, administered, and distributed in a manner identical to that described in [m], above.

#### **[o] Division of Trust for Generation-Skipping Transfer Tax Purposes**

This form contains a complex provision permitting or requiring the trustee to divide the trust into exempt and non-exempt trusts for generation-skipping transfer tax (GST) [*I.R.C.* § 2601 *et seq.*] purposes. This provision may become important if the trust assets are substantial and distributions are made to grandchildren or more remote issue. For discussion of this provision, see § 70.12[6][j]. For a discussion of the operation of the generation-skipping transfer tax and its application to trust planning, see Ch. 60, *Estate Planning*, § 60.16; for further discussion, see *California Wills & Trusts*, Ch. 113, *Generation-Skipping Transfers and Trust Strategies* (Matthew Bender). Note that the generation-skipping transfer tax, like the estate tax, has been repealed, effective for generation-skipping transfers after 2009 [*I.R.C.* § 2664]. However, it is uncertain whether or not this repeal will take effect as scheduled, and significant changes in the status of the GST are possible prior to the slated repeal date. For discussion, see Ch. 60 *Estate Planning*, § 60.16.

#### **[p] Trustee**

The settlor may act as the trustee of this trust, or may select some other person or entity (such as a bank or trust company) to serve as the trustee. A sole settlor who creates a revocable marital deduction trust usually will want to act as trustee of the trust during his or her lifetime.

No adverse tax consequences will result if the settlor serves as the trustee. Because the settlor retains the power to revoke the trust while he or she is living [see [2], P 3.01, *below*], the settlor will be treated as the owner of the trust for both income and estate tax purposes whether the settlor or some other person or entity serves as the trustee [see *I.R.C.* §§ 676 (income tax), 2038 (estate tax)].

If the settlor prefers to appoint some other person or entity to serve as the trustee, this may be done without endangering

any of the goals of the trust. A settlor who wishes to obtain professional property management may prefer to name a corporate trustee, such as a bank or trust company, or a trusted friend or business associate. If the settlor is elderly and has an adult child who has some skill in handling property, the settlor may appoint that child to serve as the trustee.

### **[q] Successor Trustees**

On the settlor's death, or in the event the settlor resigns while still living, a successor trustee will succeed to the trustee's duties. The successor may be the surviving spouse, or some other person or entity.

The settlor will have the power to designate a successor trustee if the settlor resigns or becomes unable to act as trustee [see [2], P 6.02, *below*]. If the settlor does not (or cannot) designate a successor, then the successor will be a person or entity named in the instrument. This form provides space for naming successor trustees and specifying the order in which they will be entitled to succeed to the office of trustee if the settlor does not designate a successor [see [2], P 6.02, *below*]. If a vacancy should occur in the office of the trustee and no successor trustee is appointed as provided in the instrument, the court is authorized to appoint a successor trustee or co-trustees to fill the vacancy [see [2], P 6.04, *below*].

### **[r] Surviving Spouse as Trustee**

If the surviving spouse is to serve as trustee after the settlor's death, precautions should be taken to make sure that the trustee has no powers that would cause the assets of the Bypass Trust [see [2], PP 5.04(c), (d), 5.10, *below*] or Disclaimer Trust [see [2], PP 5.08, 5.12, *below*] to be included in the surviving spouse's estate. These trusts are designed so that their assets will not be included in the surviving spouse's estate for estate tax purposes. The trustee's powers, as set out in this form, are limited in such a way that this goal will not be endangered. Care should be taken in modifying or varying the trustee's powers if the surviving spouse is to serve as trustee of the Bypass or Disclaimer Trusts. For additional discussion of the limitations that should be placed on the surviving spouse's power over the Bypass Trust and Disclaimer Trust, see *Section 70.202[1][s]*. It is extremely important that attorneys be aware of these limitations before attempting to modify these trusts. For detailed discussion of the selection of trustees and tax issues presented by trustee powers, see 2 California Wills & Trusts, Chapter 93, *Appointment of Trustees*, and Chapter 96, *Powers and Duties of Trustee* (Matthew Bender). If an independent trustee is to serve after the death of the settlor, wider latitude will be permissible in drafting the trustee's powers.

No adverse tax consequences will result if the surviving spouse serves as the trustee of the QTIP Trust [see [2], PP 5.04(a), (b), 5.09, *below*]. This trust is designed to qualify for the marital deduction [see [2], P 5.06, *below*]. Property that qualifies for the marital deduction as QTIP property will be included in the gross estate of the surviving spouse, regardless of whether the surviving spouse or some other person or entity serves as the trustee [*I.R.C. § 2044(b)(1)(A)*].

### **[s] Concluding Provisions**

Article 7 of this form contains miscellaneous provisions common to all the trust forms in this chapter. These provisions have been adapted as appropriate for a marital deduction trust. For discussion of these provisions, see *Section 70.12[8]*.

## **[2] FORM**

### **Formula Marital Deduction Trust for One Married Settlor--QTIP Trust and Bypass TRUST**

#### **DECLARATION OF TRUST**

#### **ARTICLE 1 : Creation of Trust**

1.01. Declaration. \_\_\_\_\_ [*identify trustee(s), e.g., Edward J. Greeble of San Diego, California or Sunset National Bank*] (the "trustee [s]") hereby declare[s] that \_\_\_\_\_ [he has *or* she has *or* it has *or* they have] received certain property (the "trust estate") from \_\_\_\_\_ [*identify settlor, e.g., Edward J. Greeble, of San Diego, California*] (the "settlor"), and hold [s] that property in trust, to be held, administered, and distributed according to the terms of this instrument.

1.02. Names of Trusts. The trusts created by this instrument shall be known collectively as \_\_\_\_\_ [*name of trust, e.g., The Edward J. Greeble 1995 Trust or The GreebleFamily 1995Trust*], and each separate trust created under this instrument shall be referred to by adding the name or designation of that separate trust as it appears in the appropriate paragraph of this instrument.

1.03. Effective Date. This declaration shall be effective \_\_\_\_\_ [on the date it is executed by the parties *or* immediately upon execution by all of the parties *or specify other effective date*].

1.04. Marital Status. The settlor is married to \_\_\_\_\_ [*name of spouse, e.g., Marilyn W. Greeble*], and all references in this trust instrument to the settlor's " \_\_\_\_\_ [husband *or* wife]" are to \_\_\_\_\_ [him *or* her]. [*If settlor was married previously: The settlor was previously married to \_\_\_\_\_ (name of former spouse, e.g., Jean A. Greeble), but that marriage was \_\_\_\_\_ [dissolved or annulled] \_\_\_\_\_ [if desired, add details relating to dissolution or annulment, e.g., in \_\_\_\_\_ (year) or by judgment of the Superior Court of the State of California for the County of \_\_\_\_\_, action no. \_\_\_\_\_, dated \_\_\_\_\_].*]

1.05. Children. The settlor has \_\_\_\_\_ [number] living \_\_\_\_\_ [child *or* children], whose name [s] and date[s] of birth \_\_\_\_\_ [is *or* are] as follows:

Name	Date of Birth	_____
		[Father <i>or</i> Mother]
[e.g., Edward J. Greeble, Jr.]	August 1, 1985	Jean A. Greeble
[e.g., Evelyn W. Greeble]	June 15, 1988	Jean A. Greeble
[e.g., Patricia L. Greeble]	October 1, 1990	Marilyn W. Greeble

The settlor has no deceased children.

## ARTICLE 2 : Trust Estate

2.01. Definition of Trust Estate. All of the property described in Schedule A, attached to this instrument, and any other property that may hereafter be subject to this trust, is referred to in this instrument as the "trust estate," and shall be held, administered, and distributed as provided in this instrument.

2.02. Additions to Trust. From time to time, the trustee may accept additions to this trust from any source. Any additions to the trust shall be made by designating in writing the property to be added, or by titling any account, deed, or similar asset in the name of the trustee, as trustee of this trust, or any alternate or successor trustee acting under this instrument. During any time that the settlor is not also serving as trustee or cotrustee of this trust, any transfer of property to the trust under this paragraph shall be effective only upon written acceptance by the trustee. Any designation by a third party, whether by will, deed, account title designation, or similar transfer, shall also be a transfer to the trust estate upon written acceptance by the trustee. Any property added to the trust estate shall be held, administered, and distributed in accordance with the terms of this instrument.

### ARTICLE 3 : Rights and Powers of Settlor

3.01. Revocation and Amendment. While the settlor is living, this trust may be revoked, amended, or terminated at any time and for any reason by a writing signed by the settlor and delivered to the trustee in person or by certified mail.

\_\_\_\_\_ [Promptly upon *or* Within \_\_\_\_\_ days after] receipt of any instrument revoking or terminating the trust, the trustee shall deliver any and all property affected by the revocation or termination to the settlor, or to a person or persons designated in that writing to receive that property. Upon the death of the settlor, this trust shall be irrevocable and not subject to amendment.

3.02. Investments. The settlor shall have the power from time to time to direct the trustee to do any or all of the following:

(a) Invest trust funds in specified securities, properties, or other forms of investment;

(b) Retain specified securities, properties, or other forms of investment held in trust under this instrument; and

(c) Sell, encumber, lease, abandon, or dispose of any trust property. All directions shall be in writing, signed by the settlor, and delivered to the trustee in person or by certified mail. If the directions are subject to any conditions, or are to be effective only during a specified period of time, the writing shall specify the conditions and the applicable period of time. The trustee shall incur no liability for losses resulting directly or indirectly from any investment made or retained in compliance with a direction given by the settlor as provided in this paragraph. After the settlor's death, no person shall have the power to direct the trustee to invest trust property.

3.03. Borrowing. While the settlor is living, the settlor shall have the power to borrow money in such amounts and on such terms as the settlor may specify in a writing or writings delivered to the trustee in person or by certified mail. The settlor's power to borrow money as provided in this paragraph shall extend to both the income and the principal of the trust estate.

3.04. Exercise of Settlor's Rights and Powers by Others. Notwithstanding any other provision of this instrument, any right or power that the settlor could exercise personally under the terms of this instrument, \_\_\_\_\_ [except *or* including] the power to amend, revoke, or terminate \_\_\_\_\_ [this trust *or* any trust created by this instrument], may be exercised for and on behalf of the settlor by any attorney in fact who, at the time of the exercise, is duly appointed and acting for the settlor under a valid and enforceable durable power of attorney executed by the settlor under the Uniform Durable Power of Attorney Act, or any successor statute; or, if there is no such attorney in fact, by a duly appointed and acting conservator of the settlor, after petition to the court in accordance with *California Probate Code Section 2580*, or any successor statute [*add optional clause to limit authority to amend or revoke, e.g.,; provided, however, that the power to amend, revoke, or terminate \_\_\_\_\_ (this trust or any trust created by this instrument), in whole or in part, may be exercised by an attorney in fact or conservator only if distribution of the settlor's estate during the settlor's lifetime is not substantially altered by the amendment, revocation, or termination, and the amendment, revocation, or termination does not result in any adverse tax consequences to the settlor's estate*].

#### **PRACTICE TIP**

It is not uncommon to require that the durable power of attorney under which the attorney in fact is attempting to act specifically refer to the power to exercise the settlor's rights under the trust instrument as granted in that instrument. Sometimes a power of attorney is granted for a very specific purpose, such as handling a particular transaction, or dealing with the principal's affairs while he or she is out of the country. By requiring that the power of attorney specifically mention the power to exercise the settlor's rights under his or her trust, there can be some assurance that the settlor/principal intended that the

attorney in fact have the authority to take actions in regard to the trust. *Commentary by Albert G. Handelman.*

#### ARTICLE 4 : Payments and Distributions During Settlor's Lifetime

4.01. Payments of Income. So long as the settlor is living, the trustee shall pay to or apply for the benefit of the settlor \_\_\_\_\_ [all of the net income of the trust *or* as much of the net income of the trust as the settlor shall from time to time request of the trustee in writing]. [*If trustee is to pay all income:* Payments shall be made in monthly or other convenient installments, but not less often than annually. *Or if settlor is to have right to request payments:* A request made pursuant to this paragraph may specify that the payments are to be made periodically.]

4.02. Distributions of Principal. So long as the settlor is living, the trustee shall distribute to or apply for the benefit of the settlor as much of the principal of the trust as \_\_\_\_\_ [the settlor shall from time to time request of the trustee in writing *or* the trustee, in the trustee's discretion, deems necessary or appropriate for the settlor's comfort, welfare, and happiness].

4.03. Requests on Settlor's Behalf. If, at any time, the settlor is unable personally to make a request of the trustee, the settlor's right to make the request may be exercised for or on behalf of the settlor by an attorney in fact who, at the time of the exercise, is duly appointed and acting for the settlor under a valid and enforceable durable power of attorney executed by the settlor under the Uniform Durable Power of Attorney Act, or any successor statute; or, if there is no such attorney in fact, by the trustee acting for and on behalf of the settlor. The trustee shall have discretion to determine when the settlor is unable personally to make a request for purposes of this paragraph.

#### **PRACTICE TIP**

See the Practice Tip following Paragraph 3.04, above. *Commentary by Albert G. Handelman.*

4.04. Trustee's Power to Make Gifts at Direction of Settlor. During the settlor's lifetime, the trustee shall distribute such sums of trust principal to any person or persons who are the natural objects of the settlor's bounty as the settlor may direct in writing. In the event that the settlor is unable to direct the trustee in writing under this Paragraph due to incapacity, such a direction may be made on the settlor's behalf by a duly authorized attorney in fact acting under a valid durable power of attorney executed by the settlor under the Uniform Durable Power of Attorney Act (or successor statute) [*optional:*, as long as the durable power of attorney so executed by the settlor specifically authorizes the attorney in fact to exercise such a withdrawal power, or power to make gifts from trust principal, through enforceable demands on the trustee]; provided, however, that the total amount of any such gifts made pursuant to the direction of an attorney in fact to any one person in any one year shall not exceed the annual amount excluded from gift tax under *Internal Revenue Code Section 2503(b)* (or a successor statute).

#### ARTICLE 5 : Payments and Distributions After Settlor's Death

5.01. Special Gift. On the settlor's death, the trustee shall distribute the sum of \$\_\_\_\_\_ to \_\_\_\_\_ [name of beneficiary, e.g., Ruth B. Greeble] [*if desired, add survivorship clause, e.g., if she survives the settlor or if she survives the settlor for 60 days*]. [*If distribution is conditioned on survival, add alternative disposition, e.g.: If \_\_\_\_\_ Ruth B. Greeble does not survive the settlor (for that period), this gift shall \_\_\_\_\_ (e.g., lapse or be distributed to Linda J. Wilson)*].

5.02. Payment of Death Taxes. All death taxes payable by reason of the settlor's death [*to include taxes on assets passing outside trust, add:*, whether attributable to assets of this trust or to assets outside the trust,] shall be \_\_\_\_\_ [paid by the trustee out of the trust estate *or* equitably prorated and apportioned among the persons interested in the settlor's estate as provided in the California Probate Code].

5.03. Payment of Debts and Expenses. All debts and expenses of the settlor and the trust may, in the trustee's discretion, be \_\_\_\_\_ [paid by the trustee out of the trust estate *or* equitably prorated and apportioned among the persons interested in the settlor's estate in the same manner as the death taxes].

5.04. Division of Trust Estate if Settlor Is Survived by \_\_\_\_\_ [Wife *or* Husband]. If the settlor is survived by \_\_\_\_\_ [his wife *or* her husband], on the death of the settlor, and after any distributions or payments under Paragraphs 5.01 through 5.03 of this instrument, the trustee shall divide the trust estate into two shares, hereafter referred to as the Marital Deduction Share and the Nonmarital Share.

(a) The Marital Deduction Share shall consist of assets having a value equal to the minimum amount necessary to eliminate (or reduce to the maximum extent possible) any federal estate tax at the death of the settlor, taking into account the following:

(1) The net value of all other property that passes or has passed to the settlor's \_\_\_\_\_ [husband *or* wife] under this trust instrument, the will of the settlor, or otherwise and that qualifies for the federal estate tax marital deduction. For purposes of this subparagraph, any qualified disclaimer made by the settlor's \_\_\_\_\_ [husband *or* wife] shall be disregarded, and any property that will qualify as qualified terminable interest property under *Internal Revenue Code Section 2056(b)(7)* if the requisite election is made shall be considered to be qualified terminable interest property, regardless of whether the election is made;

(2) All federal estate tax deductions and exclusions actually allowed, other than the marital deduction;

(3) The applicable exclusion amount, as specified in *Internal Revenue Code Section 2010*, available to the estate of the settlor;

(4) The credit for state death taxes available to the estate of the settlor, to the extent that the use of that credit does not result in or increase any death tax payable to any state; and

(5) Any other allowable credits available to the estate of the settlor (except the credit for tax on prior transfers from a "transferor," as defined in *Internal Revenue Code Section 2013*, who dies within two years after the date of death of the settlor), but only to the extent that those credits do not disqualify this gift from receiving the marital deduction.

(b) The Marital Deduction Share shall be held, administered, and distributed according to the terms of the Qualified Terminable Interest Property ("QTIP") Trust as set forth in Paragraph 5.09.

(c) The Nonmarital Share shall consist of all assets not allocated to the Marital Deduction Share under the formula specified in this paragraph.

(d) The Nonmarital Share shall be held, administered, and distributed according to the terms of the Bypass Trust as set forth in Paragraph 5.10.

5.05. Allocation and Valuation of Assets. In allocating assets between the marital deduction share and the nonmarital share, the trustee shall allocate the trust assets in cash or in kind, or partly in each, on a pro rata or non pro rata basis, and in undivided interests or not; subject, however, to the following:

(a) Only assets that qualify for the marital deduction shall be allocated to the marital deduction share.

(b) Assets allocated in kind shall be \_\_\_\_\_ [to use date of distribution values: valued for purposes of allocation on the date or dates of distribution *or*, to use valuation for estate tax purposes under "minimum worth" test:

deemed to satisfy the marital deduction amount on the basis of their values as finally determined for federal estate tax purposes, but in no event shall the date of distribution values be less than the amount of the marital deduction *or, to use valuation for estate tax purposes under "fair representation" test*: deemed to satisfy the marital deduction amount on the basis of their values as finally determined for federal estate tax purposes; provided, however, that the trustee shall act impartially, consistent with equitable principles requiring impartiality among beneficiaries, in allocating assets in satisfaction of the marital deduction share, so that any distribution of assets in satisfaction of the marital deduction share shall be made of assets, including cash, fairly representative of appreciation or depreciation in the value of all property thus available for distribution].

(c) The trustee shall not allocate assets that qualify for the foreign death tax credit to the marital deduction share unless all other assets or interests available for allocation have been so allocated.

[*Optional*: (d) Any incidents of ownership to a policy of insurance on the life of a person other than the settlor shall be allocated to the nonmarital share.]

5.06. Intention That Marital Deduction Share Qualify for Marital Deduction. The settlor intends that the marital deduction share qualify for the federal estate tax marital deduction, and this instrument shall be construed accordingly. Except as otherwise provided in this instrument with respect to the QTIP election, no fiduciary shall take any action or exercise any power that may impair the federal estate tax marital deduction.

5.07. Disposition of Trust Estate if Settlor Is Not Survived by \_\_\_\_\_ [Wife *or* Husband]. If the settlor is not survived by [his wife *or* her husband], upon the death of the settlor, and after any distributions or payments pursuant to Paragraphs 5.01 through 5.03 of this instrument, the trustee shall divide the trust property into as many shares of equal market value as are necessary to create one share for each child of the settlor who survives the settlor, and one share for the issue who survive the settlor of each child of the settlor who predeceases the settlor.

(a) Each share created for a surviving child of the settlor shall be distributed outright to that child if that child has reached the age of \_\_\_\_\_ [e.g., 30] years at the time the assets of the trust are divided. If the child has not reached the age of \_\_\_\_\_ [e.g., 30] years at that time, the share created for the child shall be held, administered, and distributed by the trustee in a separate trust as set forth in Paragraph 5.11 of this instrument.

(b) Each share created for the issue of a deceased child shall be divided among those issue \_\_\_\_\_ [in the manner provided in California Probate Code Section \_\_\_\_\_ (*specify either 240 or 246 or 247*) *or* in equal shares, regardless of whether or not all such issue are members of the same generation]. The share of each issue who has attained the age of \_\_\_\_\_ [e.g., 30] years shall be distributed outright to that issue. The share of any issue who has not attained the age of \_\_\_\_\_ [e.g., 30] years shall be held, administered, and distributed in a separate trust for that issue as set forth in Paragraph 5.11 of this instrument.

(c) If all the children of the settlor die without surviving issue before the trust property has been distributed as provided in this paragraph, the trustee shall distribute any undistributed balance of the trust property outright to \_\_\_\_\_ [*alternative disposition, e.g., the Regents of the University of California or the heirs of the settlor*].

5.08. Disclaimer of Property. Notwithstanding any other provision of this instrument, any property or portion of property that is disclaimed by the settlor's \_\_\_\_\_ [husband *or* wife] shall be held, administered, and distributed according to the terms of the Disclaimer Trust. However, if the settlor's \_\_\_\_\_ [husband *or* wife] also disclaims an interest in all or any portion of the Disclaimer Trust, the disclaimed interest shall be administered and distributed as if the settlor's \_\_\_\_\_ [husband *or* wife] predeceased the settlor.

5.09. QTIP Trust. The trustee shall hold, administer, and distribute the assets of the QTIP Trust as follows:

(a) If the executor has elected that the trust qualify for the federal estate tax marital deduction under *Internal Revenue Code Section 2056(b)(7)* (or any equivalent successor section), the trustee shall thereafter administer the trust in a manner that will not invalidate the election or disqualify the property in which the settlor's \_\_\_\_\_ [husband or wife] has a qualifying income interest for life. Any provision of this trust that could be deemed to invalidate the qualification under *Internal Revenue Code Section 2056(b)(7)* shall be disregarded.

(b) If an election is made under *Internal Revenue Code Section 2056(b)(7)* (or any equivalent successor section) to qualify some but not all of the property allocated to the QTIP Trust for the federal estate tax marital deduction, the QTIP Trust shall be divided into two separate trusts pursuant to the terms of the election. The division shall be based on the fair market value of the trust assets at the time of the division. One of the trusts shall contain the share of the trust assets for which the election has been made and shall be designated as the Qualifying QTIP Trust. The other trust shall contain the share of the trust assets for which the election has not been made and shall be designated the Nonqualifying QTIP Trust. The Nonqualifying QTIP Trust shall be subject to all of the rights, interests, powers, and other terms prescribed for the Qualifying QTIP Trust. If a partial election is made and the trust is divided into two separate trusts, the terms "trust," "marital deduction trust," and "QTIP Trust," as used in this paragraph and elsewhere in this trust instrument, shall be construed in a manner consistent with the provisions of this subparagraph of the trust instrument.

[Optional:]

(c) It is the settlor's intent that the executor of the settlor's estate shall notify the trustee in writing if the executor intends to make an election under *Internal Revenue Code Section 2056(b)(7)* (hereafter referred to as "the estate tax election") and also intends to make an election under *Internal Revenue Code Section 2652(a)(3)* (or any equivalent successor section) to have the estate tax election disregarded for federal generation-skipping transfer tax purposes with respect to some but not all of the property in the QTIP Trust. Upon receipt of written notification, the trustee shall divide the QTIP Trust into two separate trusts, to be known as the Exempt QTIP Trust and the Non-Exempt QTIP Trust, in accordance with Paragraph 5.15 of this trust instrument concerning the administration of generation-skipping trusts. Property allocated to the Exempt QTIP Trust must be fairly representative of the appreciation or depreciation of all QTIP Trust property. It is the settlor's intent that the executor shall then actually make the election under *Internal Revenue Code Section 2652(a)(3)* with respect to the Exempt QTIP Trust and not the Non-Exempt QTIP Trust. If a partial estate tax election is to be made, then this subparagraph, if applicable at all, shall apply only with respect to the Qualifying QTIP Trust. The trustee shall not be liable for relying on the written instructions of the executor when acting in accordance with the provisions of this subparagraph. Nothing in this subparagraph shall be construed as being inconsistent with Paragraph 5.15 of this trust instrument concerning the administration of generation-skipping trusts, which shall apply to the QTIP trust without regard to the application of the remainder of this subparagraph.

(d) The trustee shall pay to or apply for the benefit of the settlor's \_\_\_\_\_ [husband or wife], so long as the settlor's \_\_\_\_\_ [husband or wife] lives, the entire net income of the trust, in monthly or other convenient installments as agreed upon by the settlor's \_\_\_\_\_ [husband or wife] and the trustee, but not less often than annually. [Optional: In determining the net income of the trust distributable to the settlor's \_\_\_\_\_ (husband or wife), the trustee shall include all income that must be considered as income in order for the trust to qualify for the marital deduction under the federal estate tax law, and shall make no deductions from gross income that would prevent the trust from qualifying for that marital deduction, notwithstanding any contrary provisions of this instrument or any applicable provisions of state law. Assuming the trust has qualified under *Internal Revenue Code Section 2056(b)(7)*, then any grant of rights, powers, discretion, and authority to the trustee in any provision of this instrument or any statute relating thereto shall not be effective if and to the extent that the provision or statute, if effective, would disqualify, for federal estate tax purposes, the marital deduction trust held under this paragraph. It is the intention of the settlor that the settlor's \_\_\_\_\_ (husband or wife), as the beneficiary of a marital deduction trust, shall have substantially that degree of beneficial enjoyment of the trust during

\_\_\_\_\_ (his or her) lifetime that the principles of the law of trusts accord to a person who is unqualifiedly designated as the life beneficiary of a trust, and the trustee shall not exercise the trustee's discretion in a manner that is not in accord with this expressed intention. It is also the intention of the settlor that the trust produce for the settlor's \_\_\_\_\_ (husband or wife) during \_\_\_\_\_ (his or her) lifetime the income, or that the settlor's \_\_\_\_\_ (husband or wife) shall have the benefit of the trust property, as is consistent with the value of the trust property and with its preservation.]

(e) The trustee shall distribute to or apply for the benefit of the settlor's \_\_\_\_\_ [husband or wife], for life, as much of the principal of the trust as the trustee, in the trustee's discretion, deems necessary, when added to the income payments from this trust, for \_\_\_\_\_ [his or her] \_\_\_\_\_ to specify an "ascertainable standard": health, education, support, and maintenance or specify some other standard, e.g., comfort, welfare, and happiness]. All decisions of the trustee regarding payments under this subparagraph, if any, are within the trustee's discretion and shall be final and incontestable by anyone.

(f) On the death of the settlor's \_\_\_\_\_ [husband or wife], the trustee, in the trustee's discretion, may pay the taxes, debts, and expenses arising on \_\_\_\_\_ [his or her] death, unless the trustee determines that other adequate provisions have been made for payment of these expenses. Any payments made under this paragraph \_\_\_\_\_ [may be made out of income or principal (or partly from each) of the QTIP Trust or shall be made first out of the income or principal of the QTIP Trust, and then out of the income or principal of the Bypass Trust and the Disclaimer Trust, if any, to the extent that the QTIP Trust is insufficient for that purpose].

(g) Upon the death of the settlor's \_\_\_\_\_ [husband or wife], the net income of the trust then accrued but uncollected and all net income remaining in the hands of the trustee shall be distributed to the estate of the settlor's \_\_\_\_\_ [husband or wife]. The trust principal shall be dealt with as set forth below in this paragraph.

(h) The trustee shall determine from the personal representative of the estate of the settlor's \_\_\_\_\_ [husband or wife] the amount of the federal estate tax allocable to the property of the trust by reason of *Internal Revenue Code Section 2207A* (the "Section 2207A tax share") and shall set aside a portion of the trust principal for the purpose of paying that tax upon written demand of the personal representative.

(i) Upon the death of the settlor's \_\_\_\_\_ [husband or wife], the trustee shall distribute the balance of the principal of the QTIP Trust (or all of the QTIP Trust principal, if the personal representative of the estate of the settlor's \_\_\_\_\_ [husband or wife] does not in due course make written demand for payment of the Section 2207A tax share), \_\_\_\_\_ [if generation-skipping transfer tax consequences are not a concern: to the Bypass Trust created in this trust instrument, to be held, administered, and distributed as part of the Bypass Trust or to account for generation-skipping transfer tax consequences: in the manner specified in Paragraph 5.10 applicable to the Bypass Trust. However, the property disposed of pursuant to this subparagraph shall not be considered to be part of the Bypass Trust unless this trust and the Bypass Trust have the same inclusion ratios for federal generation-skipping transfer tax purposes].

5.10. Bypass Trust. The trustee shall hold, administer, and distribute the assets of the Bypass Trust as follows:

(a) The trustee shall pay or distribute to or apply for the benefit of the settlor's \_\_\_\_\_ [husband or wife] during \_\_\_\_\_ [his or her] lifetime, and the settlor's children during the lifetime of the settlor's \_\_\_\_\_ [husband or wife], in monthly or other convenient installments, but not less often than annually, as much of the net income of the trust, and as much of the principal of the trust, as the trustee, in the trustee's discretion, deems necessary for the \_\_\_\_\_ [to specify an "ascertainable standard": health, education, support, and maintenance or specify some other standard, e.g., comfort, welfare, and happiness] of each of them. In making these payments, the trustee may pay, distribute, or apply more to or for some beneficiaries than others, and may make payments or distributions to or for one or more beneficiaries to the exclusion of others. The trustee shall accumulate and

add to principal any net income not distributed. Notwithstanding any other provision of this instrument, the trustee shall not make discretionary payments of principal from the Bypass Trust to the settlor's \_\_\_\_\_ [husband or wife] unless the principal of the QTIP Trust has been exhausted.

(b) In addition to any other payments and distributions that the settlor's \_\_\_\_\_ [husband or wife] may receive under this instrument, the trustee shall distribute to the settlor's \_\_\_\_\_ [husband or wife], during \_\_\_\_\_ [his or her] lifetime, such amounts from the principal of the trust estate as \_\_\_\_\_ [he or she] may from time to time request of the trustee in writing, not to exceed in any calendar year the greater of \$5,000 or five percent of the value of the principal of the trust, determined as of the end of the calendar year. This right of withdrawal is not cumulative, so that if the settlor's \_\_\_\_\_ [husband or wife] does not withdraw the full amount that \_\_\_\_\_ [he or she] is entitled to withdraw under this provision in any calendar year, the right to withdraw the amount not withdrawn shall lapse at the end of the calendar year. This power shall exist each year until the death of the settlor's \_\_\_\_\_ [husband or wife].

(c) On the death of the settlor's \_\_\_\_\_ [husband or wife], the trustee shall divide the trust property into as many shares of equal market value as are necessary to create one share for each child of the settlor who survives the settlor's \_\_\_\_\_ [husband or wife], and one share for the issue who survive the settlor's \_\_\_\_\_ [husband or wife] of each child of the settlor who predecease the settlor's \_\_\_\_\_ [husband or wife].

(d) Each share created for a surviving child shall be distributed outright to that child if that child has reached the age of \_\_\_\_\_ [e.g., 30] years at the time the assets of the trust are divided. If the child has not reached the age of \_\_\_\_\_ [e.g., 30] years at that time, the share created for the child shall be held, administered, and distributed by the trustee in a separate trust as set forth in Paragraph 5.11 of this instrument.

(e) Each share created for the issue of a deceased child shall be divided among those issue \_\_\_\_\_ [in the manner provided in California Probate Code Section \_\_\_\_\_ (specify either 240 or 246 or 247) or in equal shares, regardless of whether or not all such issue are members of the same generation]. The share of each issue who has attained the age of \_\_\_\_\_ [e.g., 30] years shall be distributed outright to that issue. The share of any issue who has not attained the age of \_\_\_\_\_ [e.g., 30] years shall be held, administered, and distributed in a separate trust for that issue asset forth in Paragraph 5.11 of this instrument.

(f) If all the children of the settlor die without surviving issue before the trust property has been distributed as provided in this paragraph, the trustee shall distribute any undistributed balance of the trust property outright to \_\_\_\_\_ [alternative disposition, e.g., the Regents of the University of California or the heirs of the settlor].

5.11. Separate Trusts for Children and Issue. The trustee shall hold, administer, and distribute the assets of the separate trust for each child or issue as follows:

(a) The trustee shall pay or distribute to or apply for the benefit of that child or issue, until he or she reaches the age of \_\_\_\_\_ [e.g., 30] years, in monthly or other convenient installments, but not less often than annually, as much of the net income of the trust, and as much of the principal of the trust, as the trustee, in the trustee's discretion, deems necessary for his or her \_\_\_\_\_ [to specify an "ascertainable standard": health, education, support, and maintenance or specify some other standard, e.g., comfort, welfare, and happiness]. All decisions of the trustee regarding payments under this subparagraph, if any, are within the trustee's discretion and shall be final and incontestable by anyone. The trustee shall accumulate and add to principal any net income not distributed.

(b) When that child or issue reaches the age of \_\_\_\_\_ [e.g., 25] years, the trustee shall distribute to him or her outright an amount from the trust principal equal to \_\_\_\_\_ [fraction or percentage, e.g., one half

or fifty percent] of the fair market value of the principal of the trust, determined as of the first day of the calendar month preceding the month in which the distribution is made. If that child or issue has already reached the age of \_\_\_\_\_ [e.g., 25] years when property is first allocated to this trust, then upon making the allocation, the trustee shall distribute to him or her outright an amount from the trust principal equal to \_\_\_\_\_ [fraction or percentage, e.g., one half or fifty percent] of the fair market value of the principal of the trust, and the balance shall be retained in trust pursuant to the applicable provisions of this paragraph.

(c) When that child or issue reaches the age of \_\_\_\_\_ [e.g., 30] years, the trustee shall distribute to him or her outright the balance of the trust property.

(d) If that child or issue dies before the trust property has been distributed as provided in this paragraph, the assets of his or her separate trust shall be divided among his or her issue in \_\_\_\_\_ [the manner provided in California Probate Code Section \_\_\_\_\_ (specify either 240 or 246 or 247) or equal shares, regardless of whether or not all such issue are members of the same generation]. The share of each issue who has attained the age of \_\_\_\_\_ [e.g., 30] years shall be distributed outright to that issue. The share of any issue who has not attained the age of \_\_\_\_\_ [e.g., 30] years shall be held, administered, and distributed in a separate trust for that issue as set forth in this Paragraph. If that child or issue dies without issue before the trust property has been distributed as provided in this paragraph, the trustee shall distribute the entire undistributed balance of his or her separate share outright among the other then-living persons for whom separate shares were created \_\_\_\_\_ [in the manner provided in California Probate Code Section \_\_\_\_\_ (specify either 240 or 246 or 247) or in equal shares, regardless of whether or not all such issue are members of the same generation]; provided, however, that if any part of that balance would otherwise be distributed to a person for whose benefit a trust is being administered under this paragraph, that part shall instead be added to that trust and thereafter shall be administered according to its terms. If there are no surviving persons who may take the share of that child or issue under this paragraph, any remaining portion of that share shall be distributed outright to \_\_\_\_\_ [alternative disposition, e.g., the Regents of the University of California or the heirs of the settlor].

5.12. Disclaimer Trust. The trustee shall hold, administer, and distribute the assets of the Disclaimer Trust as follows:

(a) The trustee shall pay or distribute to or apply for the benefit of the settlor's \_\_\_\_\_ [husband or wife], for life, in monthly or other convenient installments, but not less often than annually, as much of the net income of the trust, and as much of the principal of the trust, as the trustee, in the trustee's discretion, deems necessary for \_\_\_\_\_ [his or her] \_\_\_\_\_ [to specify an "ascertainable standard": health, education, support, and maintenance or specify some other standard, e.g., comfort, welfare, and happiness]. All decisions of the trustee regarding payments under this subparagraph, if any, are within the trustee's discretion and shall be final and incontestable by anyone. The trustee shall accumulate and add to principal any net income not distributed.

(b) On the death of the settlor's \_\_\_\_\_ [husband or wife], the trustee shall divide the trust property into as many shares of equal market value as are necessary to create one share for each child of the settlor who survives the settlor's \_\_\_\_\_ [husband or wife], and one share for the issue who survive the settlor's \_\_\_\_\_ [husband or wife] of each child of the settlor who predeceases the settlor's \_\_\_\_\_ [husband or wife].

(c) Each share created for a surviving child shall be distributed outright to that child if that child has reached the age of \_\_\_\_\_ [e.g., 30] years at the time the assets of the trust are divided. If the child has not reached the age of \_\_\_\_\_ [e.g., 30] years at that time, the share created for the child shall be held, administered, and distributed by the trustee in a separate trust as set forth in Paragraph 5.11 of this instrument.

(d) Each share created for the issue of a deceased child shall be divided among those issue \_\_\_\_\_ [in

the manner provided in California Probate Code Section \_\_\_\_\_ (specify either 240 or 246 or 247) or in equal shares, regardless of whether or not all such issue are members of the same generation]. The share of each issue who has attained the age of \_\_\_\_\_ [e.g., 30] years shall be distributed outright to that issue. The share of any issue who has not attained the age of \_\_\_\_\_ [e.g., 30] years shall be held, administered, and distributed in a separate trust for that issue asset forth in Paragraph 5.11 of this instrument.

(e) If all the children of the settlor die without surviving issue before the trust property has been distributed as provided in this paragraph, the trustee shall distribute any undistributed balance of the trust property outright to \_\_\_\_\_ [alternative disposition, e.g., the Regents of the University of California or the heirs of the settlor(s)].

5.13. Consideration of Beneficiary's Other Resources. In making any payments of income or distributions of principal from any trust created by this instrument for \_\_\_\_\_ [specify standard of discretion as set forth in provision authorizing the discretionary distribution, e.g., the health, education, support, and maintenance or care and comfort] of any person, the trustee shall take into consideration, to the extent the trustee deems advisable, any other income or resources available to that person that are known to the trustee and that are reasonably available for that purpose.

5.14. Trustee's Power to Determine Income and Principal. Unless otherwise specifically provided in this instrument, the determination of all matters with respect to what is principal and income of the trust estate and the apportionment and allocation of receipts, expenses, and other charges between principal and income shall be governed by the provisions of the California Revised Uniform Principal and Income Act from time to time existing. The trustee in the trustee's discretion shall determine any matter not provided for either in this instrument or in the California Revised Uniform Principal and Income Act. Notwithstanding any other provision of this instrument or of the California Revised Uniform Principal and Income Act, the trustee must establish a reserve for depreciation of all income-producing real and personal property and of capital improvements, and for extraordinary repairs. In addition, a reasonable reserve for depletion of all depletable natural resources, including, but not limited to, oil, gas, and mineral and timber property, shall be charged to income from time to time; distributions by mutual funds and similar entities of gains from the sale or other disposition of property shall be credited to principal; and a reasonable reserve for amortization of all intangible property with a limited economic life including, but not limited to, patents and copyrights shall be charged to income from time to time.

5.15. Administration of Generation-Skipping Trusts. The provisions of this paragraph apply to any trust under this instrument that is created on or at any time after the settlor's death and in which there is property that is or may become subject to the federal generation-skipping transfer tax:

(a) Upon written notification by the settlor's executor that the executor intends to allocate any part of the generation-skipping transfer tax exemption that is available to the settlor under *Internal Revenue Code Section 2631(a)* to some but not all of the property in any trust to which this paragraph applies, the trustee \_\_\_\_\_ [shall or may, in the trustee's discretion,] divide that trust into two separate trusts, to be designated as the Exempt Trust and the Non-Exempt Trust. [If trustee has discretionary power to divide trusts: If the trustee elects to divide a trust in the manner provided in this Paragraph, the or, if division of trusts is mandatory rather than discretionary: The] Exempt Trust shall contain the share of the property of that trust equal in value to the amount of the generation-skipping transfer tax exemption that the executor intends to allocate to the trust. The Non-Exempt Trust shall contain the balance of the property of that trust. It is the settlor's intention that the executor then actually allocate the generation-skipping transfer tax exemption to the Exempt Trust and not to the Non-Exempt Trust, so that the Exempt Trust shall have an inclusion ratio of zero for federal generation-skipping transfer tax purposes and the Non-Exempt Trust shall have an inclusion ratio of one for federal generation-skipping transfer tax purposes. The Trustee shall not be liable for relying on the written instructions of the executor when acting in accordance with this subparagraph.

(b) In allocating assets between the Exempt Trust and Non-Exempt Trust for purposes of this Paragraph, the trustee shall \_\_\_\_\_ [for a pecuniary allocation: allocate the trust assets between the Exempt Trust and Non-Exempt Trust in cash or in kind, or partly in each, on a pro rata or non pro rata basis, and in undivided interests or not or, for a fractional allocation: allocate to each trust a fractional share of each and every substantial interest or right held by the trust being divided]. [If preceding sentence provides for a pecuniary allocation, add: If the allocation is not made within 15 months from the date of the settlor's death, the trustee shall pay interest, at the legal rate, from the date of the settlor's death to the date of distribution. For purposes of allocation under this Paragraph, assets shall be valued at their values \_\_\_\_\_ (to use date of distribution values: on the date or dates of distribution or, to use valuation for estate tax purposes: as finally determined for federal estate tax purposes; provided that any assets allocated in kind shall be allocated between the Exempt Trust and the Non-Exempt Trust in a manner that fairly reflects net appreciation or depreciation in the value of the assets in the trust being divided, measured from the date of the settlor's death to the date of payment).]

(c) Regardless of whether or not subparagraph (a) applies, if the amount of the settlor's generation-skipping transfer tax exemption actually allocated by the executor (or automatically allocated under *Internal Revenue Code Section 2632*) to a trust to which this paragraph applies is equal to the value of the property of that trust so that the entire trust has an inclusion ratio of zero for federal generation-skipping transfer tax purposes, the entire trust shall be referred to as the Exempt Trust. On the other hand, if no part of the settlor's generation-skipping transfer tax exemption is actually allocated to the trust by the executor (or automatically allocated under *Internal Revenue Code Section 2632*) so that the entire trust has an inclusion ratio of one for federal generation-skipping transfer tax purposes (or if the settlor is not the transferor of that trust for generation-skipping transfer tax purposes), the entire trust shall be referred to as the Non-Exempt Trust.

(d) The trustee may, but is not required to, administer the trusts under this instrument to which this paragraph applies in such a manner that distributions made during the trust term to "skip persons" (as defined in *Internal Revenue Code Section 2613(a)* or any equivalent successor statute) are made from Exempt Trusts, and distributions made during the trust term to "non-skip persons" (as defined in *Internal Revenue Code Section 2613(b)* or any equivalent successor statute) are made from Non-Exempt trusts.

[Optional:]

(e) If the trustee determines that the burdens of generation-skipping transfer taxes, income taxes, and death taxes on a Non-Exempt Trust, the settlor's estate, or the beneficiaries of that trust would be reduced, the trustee may petition the court to amend the trust to grant to one or more trust beneficiaries who are non-skip persons in a generation below the settlor a general testamentary power of appointment over all or a specified portion of that Non-Exempt Trust. Any power to amend the trust is within the discretion of the court, and the preceding sentence shall not be construed to give the trustee any power that the trustee does not already have under California trust law to petition the court under the appropriate circumstances, nor shall it be construed to limit the power of the trustee or any beneficiary under the California trust law to petition the court under the appropriate circumstances.

[Continue with the following:]

(f) The purpose of this paragraph is to allow the trustee to administer the trusts so as to decrease the amount of generation-skipping transfer taxes owed on generation-skipping transfers from the trusts. The trustee shall balance that consideration against any other tax and nontax considerations, and may disregard the generation-skipping transfer tax consequences to the extent that the trustee determines that doing so will allow the trustee to carry out the settlor's intentions in creating the trusts. All decisions of the trustee under this subparagraph are within the trustee's discretion and shall be final and incontestable by anyone.

(g) If, upon the death of the settlor's surviving spouse, (1) the settlor's surviving spouse is considered to be the transferor of any Non-Exempt Trust established by this instrument for generation-skipping transfer tax purposes, and (2) the surviving spouse's executor allocates any part of the generation-skipping transfer tax exemption that is available to the surviving spouse under *Internal Revenue Code Section 2631(a)* (or any equivalent successor statute to that Non-Exempt Trust so that the entire trust then has an inclusion ratio of zero for federal generation-skipping transfer tax purposes, that trust shall then be considered to be an Exempt Trust for purposes of this paragraph of the trust instrument.

(h) In no event may the trustee exercise any power under this paragraph in a manner that will impair the marital deduction.

(i) If, in the trustee's judgment, at any time after the execution of this trust instrument any statute, regulation, court decision, or administrative ruling imposes different or additional requirements on the trust in connection with the generation-skipping transfer tax, the trustee may petition the court to amend the terms of the trust to meet those requirements and achieve the purpose of this Paragraph.

#### ARTICLE 6 : Trustee

6.01. Definition. Unless the context requires otherwise, all references in this instrument to "the trustee" shall be deemed to refer to whoever is serving as trustee or co-trustees, and shall include alternate or successor trustees or co-trustees.

6.02. Successor Trustees. If the trustee resigns or is unable or unwilling to act or continue to act as trustee, the settlor shall have the power to designate any suitable entity or person to act as successor trustee. The successor trustee shall be designated by a signed writing delivered to the person or entity designated as successor. If a successor trustee is not designated, the following persons, in the order of priority indicated, shall be successor trustee:

First, \_\_\_\_\_ [*name and place of residence or business, e.g., Marilyn W. Greeble, of San Diego, California*];

Second, \_\_\_\_\_ [*name and place of residence or business, e.g., Ruth B. Greeble, of La Jolla, California*];

Third, \_\_\_\_\_ [*name and place of residence or business, e.g., Sunset National Bank, San Diego, California*].

6.03. Resignation. Any trustee may resign at any time, without giving a reason for the resignation, by giving written notice, at least \_\_\_\_\_ [*specify; e.g., 30 days*] before the time the resignation is to take effect, to the settlor, if living, to any other trustee then acting, to any persons authorized to designate a successor trustee, to all living trust beneficiaries known to the trustee (or, in the case of a minor beneficiary, to the parent or guardian of that beneficiary), and to the successor trustee, if any has been designated under the provisions of this instrument. A resignation shall be effective upon written acceptance of the trust by a successor trustee.

6.04. Vacancies. If a vacancy should occur in the office of the trustee, whether by reason of death, resignation, removal, or other cause, and no successor trustee is appointed as provided in this instrument, the court shall appoint a new trustee to fill the vacancy. In filling a vacancy, the court may, in its discretion, appoint the original or any other number of trustees. In selecting a trustee, the court shall give consideration to the wishes of the beneficiaries who are 14 years of age or older.

6.05. Co-Trustees to Act by Majority Vote. At any time when there are two or more trustees serving under this instrument, they shall act by majority vote, and any exercise of a power or discretion by a majority of the trustees shall

have the same effect as an exercise by all of them [if unanimity is to be required for any specified actions, specify those actions; e.g.,; except that the initial trust property, commonly known as the "High Eagle Ranch" in Riverside County, California, shall not be sold, conveyed, exchanged, transferred, liquidated, or otherwise disposed of without the unanimous consent of all of the trustees then acting]. [Optional provision to permit a third party to resolve disputes in case of deadlock: If, by reason of their failure to agree in the manner required by this paragraph, the trustees shall be unable to exercise a power or discretion conferred on them by this instrument, or to take any other appropriate or necessary action, \_\_\_\_\_ (name), of \_\_\_\_\_ (city and state), shall have the power to direct the trustees in writing with respect to the manner in which that power or discretion shall be exercised or not exercised. The trustees shall promptly comply with any written direction received from \_\_\_\_\_ (name) pursuant to this provision and shall incur no liability to any interested party for following that direction, or for failing to act in the absence of any such direction.]

6.06. Co-Trustee May Delegate Acts to Other Co-Trustees. \_\_\_\_\_ [If instrument contains provision requiring either unanimous or majority action: Notwithstanding any other provision of this instrument, any or if instrument does not contain such provision: Any] one or more of the co-trustees may, from time to time, delegate to another co-trustee or co-trustees routine acts of trust administration [optional:; and may establish bank or other accounts for the trust that will honor the signature of one, or fewer than all, of the co-trustees then serving].

6.07. Bond. No bond or undertaking shall be required of any individual who serves as a trustee under this instrument [optional:; except any successor trustee appointed by court order under Paragraph 6.04 of this instrument].

6.08. Powers. To carry out the purposes of the trusts created under this instrument, and subject to any limitations stated elsewhere in this instrument, the trustee shall, in addition to all of the powers now or hereafter conferred on trustees by law, have the power to do all of the following:

(a) Retain property received into the trust at its inception, or later added to the trust, as long as the trustee considers that retention is in the best interests of the trust or in furtherance of the goals of the settlor in creating the trust, as determined from this trust instrument, but subject to the standards set forth in *California Probate Code Section 16040* and the Uniform Prudent Investor Act.

(b) Invest and manage trust assets as a prudent investor would, by considering the purposes, terms, distribution requirements, and other circumstances of the trust. In satisfying this standard, the trustee shall exercise reasonable care, skill, and caution. The trustee's investment and management decisions respecting individual assets and courses of action must be evaluated not in isolation, but in the context of the trust portfolio as a whole, and as a part of an overall investment strategy having risk and return objectives reasonably suited to the trust. Among the circumstances that are appropriate to consider in investing and managing trust assets are the following, to the extent relevant to the trust or its beneficiaries:

- (1) General economic conditions.
- (2) The possible effect of inflation or deflation.
- (3) The expected tax consequences of investment decisions or strategies.
- (4) The role that each investment or course of action plans within the overall trust portfolio.
- (5) The expected total return from income and the appreciation of capital.
- (6) Other resources of the beneficiaries known to the trustee as determined from information provided by them;

(7) Needs for liquidity, regularity of income, and preservation or appreciation of capital.

(8) An asset's special relationship or special value, if any, to the purposes of the trust or to one or more of the beneficiaries.

The trustee may invest in any kind of property of type of investment or engage in any course of action or investment strategy consistent with the standards set forth in this provision or the Uniform Prudent Investor Act, as set forth in *California Probate Code Sections 16045-16054* or any successor sections.

(c) In the trustee's discretion, invest or reinvest in mutual funds, money market funds, investment trusts, regulated investment companies, market funds, and index funds, and in the shares or securities of any such funds or companies, that persons of prudence, discretion, and intelligence acquire for their own account.

(d) Acquire and maintain as a trust asset a life insurance policy on the life of any person, including the trustee, issued by any company and in any amount that the trustee may deem advisable, and exercise all rights of ownership granted in that policy; provided, however, that as to any assets of the trust (other than assets held in the Disclaimer Trust), the settlor's surviving spouse shall have the right, by delivery of a written instrument to the trustee, to require the trustee to convert any such policy into productive property within a reasonable time following the receipt of that request.

(e) With or without court authorization, sell (for cash or on deferred payments, and with or without security), convey, exchange, partition, and divide trust property; grant options for the sale or exchange of trust property for any purpose, whether the contract is to be performed or the option is to be exercised within or beyond the term of the trust; and lease trust property for any purpose, for terms within or extending beyond the expiration of the trust, regardless of whether the leased property is commercial or residential and regardless of the number of units leased.

(f) Engage in any transactions with the personal representative of the estate of the settlor that are in the best interest of any trusts created in this instrument.

(g) Manage, control, improve, and maintain all real and personal trust property.

(h) Subdivide or develop land; make or obtain the vacation of plats and adjust boundaries, or adjust differences in valuation on exchange or partition by giving or receiving consideration; and dedicate land or easements to public use with or without consideration.

(i) Make ordinary or extraordinary repairs or alterations in buildings or other trust property, demolish any improvements, raze existing party walls or buildings, and erect new party walls or buildings, as the trustee deems advisable.

(j) Enter into oil, gas, and other mineral leases, on terms deemed advisable by the trustee; enter into any pooling, unitization, repressurization, community, or other types of agreements relating to the exploration, development, operation, and conservation of mineral properties; drill, mine, and otherwise operate for the development of oil, gas, and other minerals; contract for the installation and operation of absorption and repressuring plants; and install and maintain pipelines. Any such leases or agreements may be for a term within or extending beyond the term of the trust.

(k) In the trustee's discretion, abandon any [*optional*: unproductive or wasted] trust asset or interest therein.

(l) Employ and discharge agents and employees, including but not limited to attorneys, accountants, investment and other advisers, custodians of assets, property managers, real estate agents and brokers, and appraisers, to advise and

assist the trustees in the management of any trusts created under this trust instrument, and compensate them from the trust property. [*Optional*: The agents and employees may be associated or affiliated with the trustee, or may be descendants or other persons related to the trustee or to the settlor, or a company associated with any such persons.] [*Optional*: The trustee is entitled to rely on the advice of any professional adviser employed under this provision. Reasonable compensation paid to any such agents or employees shall not diminish the compensation to which the trustee is otherwise entitled.]

(m) With respect to securities held in trust, exercise all the rights, powers, and privileges of an owner, including, but not limited to, the power to vote, give proxies, and pay assessments and other sums deemed by the trustee necessary for the protection of the trust property; participate in voting trusts, pooling agreements, foreclosures, reorganizations, consolidations, mergers, and liquidations, and, in connection therewith, deposit securities with and transfer title to any protective or other committee under such terms as the trustee deems advisable; exercise or sell stock subscription or conversion rights; and accept and retain as investments of the trust any securities or other property received through the exercise of any of the foregoing powers.

(n) Hold securities or other trust property in the trustee's own name or in the name of a nominee, without disclosure of the trust, or in unregistered form, so that title may pass by delivery.

(o) Deposit securities in a securities depository that is either licensed or exempt from licensing.

(p) Borrow money for any trust purpose from any person or entity, on such terms and conditions as the trustee deems advisable, and obligate the trust for repayment; encumber any trust property by mortgage, deed of trust, pledge, or otherwise, whether for terms within or extending beyond the term of the trust, as the trustee deems advisable, to secure repayment of any such loan; replace, renew, and extend any such loan or encumbrance; and pay loans or other obligations of the trust deemed advisable by the trustee.

(q) In the trustee's discretion, make loans to beneficiaries out of funds of the trust, and guarantee the repayment of loans made to beneficiaries by third parties by encumbering trust assets.

(r) Procure and carry, at the expense of the trust, insurance in such forms and in such amounts as the trustee deems advisable to protect the trust property against damage or loss, and to protect the trustee against liability with respect to third persons.

(s) Enforce any obligation owing to the trust, including any obligation secured by a deed of trust, mortgage, or pledge held as trust property, and purchase any property subject to a security instrument held as trust property at any sale under that instrument.

(t) Extend the time for payment of any note or other obligation held as an asset of, and owing to, the trust, including accrued or future interest, and extend the time for repayment beyond the term of the trust.

(u) Pay or contest any claim against the trust; release or prosecute any claim in favor of the trust; or, in lieu of payment, contest, release, or prosecution, adjust, compromise, or settle any such claim, in whole or in part, and with or without consideration.

(v) At trust expense, prosecute or defend actions, claims, or proceedings of whatever kind for the protection of the trust property and of the trustee in the performance of the trustee's duties, and employ and compensate attorneys, advisers, and other agents as the trustee deems advisable.

(w) Purchase bonds at such premiums as the trustee shall, in the trustee's discretion, deem advisable; provided, however, that any premium paid by the trustee for any bond shall be periodically repaid to principal out of the interest received on

the bond, in a reasonable manner as the trustee determines and, to the extent necessary, from the proceeds on the sale or other disposition of the bond.

6.09. Grant of Specific Powers Not to Limit General Powers. The grant to the trustee in this instrument of a specific power or powers shall not limit the trustee from exercising any other power that may be necessary or appropriate for the trustee to exercise in furtherance of the purposes of this instrument or to permit the trustee to fulfill the trustee's responsibilities and duties with respect to the trust.

6.10. Retention of Family Residence. Notwithstanding any other provision of this instrument, the trustee shall retain, in any trust or trusts created by this trust instrument, any interest in real property used by the settlor and the settlor's \_\_\_\_\_ [husband *or* wife] as their principal residence at the time of the settlor's death ("the family residence"), and shall deal with the family residence in accordance with the following terms and conditions:

(a) During \_\_\_\_\_ [his *or* her] lifetime, the settlor's \_\_\_\_\_ [husband *or* wife] shall have the right to occupy the family residence (or any substitute residence or residential property purchased as provided in this paragraph of the trust instrument) free of any rent.

(b) The trustee shall pay as much of the mortgage or trust deed payments, property taxes, assessments, insurance, maintenance, and ordinary repairs on the family residence (or on any substitute residence or residential property purchased as provided in this paragraph of the trust instrument) as corresponds to the trust's proportionate interest in the same. The trustee shall make those payments out of income or principal of the trust or trusts in accordance with the principles applicable to charging of payments under California law, but in no event shall payment be made in a manner that disqualifies any part of any trust, that would otherwise so qualify, for the federal estate tax marital deduction.

(c) The settlor's \_\_\_\_\_ [husband *or* wife], at \_\_\_\_\_ [his *or* her] option, shall have the right to advise the trustee in writing that \_\_\_\_\_ [he *or* she] no longer wishes to occupy the family residence and to direct the trustee to sell it, or any interest therein. In deciding on the terms and conditions relating to any sale, the trustee shall take into account all relevant factors, including, but not limited to, the intent of the settlor that no sale be made in a "forced sale" situation (other than at the direction of the settlor's \_\_\_\_\_ [husband *or* wife]) or at a time when, because of high mortgage rates or otherwise, the residential real estate market is depressed. In selling the family residence, the trustee may dispose of it on such terms as the trustee deems desirable, including an installment sale or any other desirable method of disposing of the family residence, provided that if the sale is for consideration other than cash, the purchaser's obligation shall be secured by a first deed of trust. In the event of a sale, the settlor's \_\_\_\_\_ [husband *or* wife] may direct the trustee in writing to apply the proceeds of the sale to the purchase of a substitute residence or residential property, of comparable or lesser value, to be selected by the settlor's \_\_\_\_\_ [husband *or* wife], or to reinvest the proceeds in any manner that \_\_\_\_\_ [he *or* she] may direct, provided that any such investments satisfy normal fiduciary standards of prudence and safety, and to use the income from reinvestment to pay the rental or lease payments on another residence or residential property, to be selected by the settlor's \_\_\_\_\_ [husband *or* wife]. Any net trust accounting income from any such investments, in excess of the trust's share of the rental costs and any other expenses of trust administration, shall be added to the other trust income and distributed in accordance with the relevant provisions of the trust or trusts as set forth in Article 5 of this trust instrument.

[*Optional:*]

(d) If the settlor's \_\_\_\_\_ [husband *or* wife] does not direct the trustee to sell the family residence, \_\_\_\_\_ [he *or* she] shall have the right to direct the trustee in writing to lease it, or any interest in it. In the event of lease, the trustee shall continue to pay the expenses of maintaining the family residence as specified above, subject to the lease terms, and shall use the entire net income from the lease to pay the mortgage, rental, or lease

payments on another residence or residential property, to be selected and occupied by the settlor's \_\_\_\_\_ [husband or wife]. Any net trust accounting income from any sale or lease of the family residence, in excess of the trust share of the cost of the mortgage, rental, or lease payments on another residence or residential property, shall be added to the other trust income and distributed in accordance with the relevant provisions of the trust or trusts, as set forth in Article 5 of this trust instrument.

[Continue with the following:]

(e) Upon the death of the settlor's \_\_\_\_\_ [husband or wife], the trust's interest in either the family residence, any proceeds remaining from the sale of the family residence, or any substitute residence or residential property purchased by the trustee with any proceeds of sale or lease of the family residence, shall be distributed in accordance with the applicable provisions of the trust or trusts in which the interest or interests are held, as set forth in Article 5 of this trust instrument.

6.11. Power to Divide or Combine Trusts. The trustee shall have the power to divide a single trust into separate shares, each to be administered in accordance with the terms and conditions of the single trust from which they were created, when the trustee, in the trustee's discretion, determines that division is desirable or advisable in view of tax considerations (including considerations related to the income tax, the gift tax, the estate tax, and the generation-skipping transfer tax) or other objectives of the trusts and their beneficiaries. The trustee shall not be required to make a physical segregation or division of the various trust shares created under this trust instrument, except as segregation or division may be required by reason of the termination and distribution of any of the trusts, but the trustee shall keep separate accounts and records for different undivided interests. The trustee, in the trustee's discretion, shall have the further power to combine two or more trusts having substantially the same terms into a single trust for purposes of administration, when tax or other factors indicate that such combination would be desirable or advisable. [Optional: In deciding whether to combine trusts, the trustee should consider the generation-skipping transfer tax "inclusion ratio" of the trusts to be combined. Trusts having the same inclusion ratios may be combined. Trusts having different inclusion ratios generally should not be combined unless their inclusion ratios are maintained unchanged through substantially separate and independent shares of different beneficiaries, within the meaning of *Internal Revenue Code Section 2654(b)*, and the applicable regulations thereunder.]

6.12. Early Termination of Trusts. The trustee shall have the power, in the trustee's discretion, to terminate any trust created under this trust instrument whenever the fair market value of the trust falls below \_\_\_\_\_ [specify amount, e.g.: \$25,000], or becomes so small in relation to the costs of administration as to make continuing administration uneconomical. Upon termination, the trustee shall distribute the principal and any accrued or undistributed net income to the income beneficiaries in proportion to their shares of the income. If no fixed amount of income is payable to specific beneficiaries, the trustee shall distribute the principal and any accrued or undistributed net income in equal shares to those beneficiaries who would then be entitled to income payments from the trust.

6.13. Division or Distribution in Cash or in Kind. In order to satisfy a pecuniary gift or to distribute or divide trust assets into shares or partial shares, the trustee may distribute or divide those assets in kind, or divide undivided interests in those assets, or sell all or any part of those assets and distribute or divide the property in cash, in kind, or partly in cash and partly in kind. Property distributed to satisfy a pecuniary gift under this trust instrument shall be valued at its fair market value at the time of distribution.

6.14. Payments and Distributions to or for Benefit of Beneficiaries. In lieu of making a direct payment or distribution to any beneficiary who at the time of the payment or distribution is a minor or suffering from a legal disability, or who appears to the trustee by reason of illness, age, injury, or other cause, to be unable to accept the payment or distribution or to make intelligent or responsible use of the same, the trustee may make the payment or distribution to any

conservator or guardian duly appointed and acting for and on behalf of the beneficiary; to any custodian acting for and on behalf of the beneficiary under the Uniform Gifts to Minors Acts or Uniform Transfers to Minors Act of any state, including a suitable custodian selected by the trustee; to any suitable person or persons, such as a relative or friend, with whom the beneficiary is residing; to any other person, firm, or agency for services rendered or to be rendered for the beneficiary's assistance or benefit; or to accounts in the beneficiary's name with financial institutions. The receipt of payments by any of the foregoing shall constitute a sufficient acquittance of the trustee for all purposes.

6.15. **Limitation on Powers That Would Imperil Marital Deduction.** Notwithstanding any other provision of this instrument, the trustee shall exercise power and discretion over any trust or trust share designed to qualify for the federal estate tax marital deduction only in a manner consistent with all statutory and regulatory requirements for the full allowance of the marital deduction for that trust or share.

6.16. **Power to Disclaim or Release Powers.** Any trustee may disclaim, release, or restrict the scope of any power or discretion that the trustee may hold in connection with any trust created under this instrument, whether the power or discretion is expressly granted in this instrument or is implied by law. The trustee shall disclaim a power in the manner required by applicable federal or California law. The trustee shall release or restrict any power or discretion by giving written notice to the beneficiary or beneficiaries then entitled to current distribution of income from the trust, specifying the power or discretion to be released or restricted, the nature of the restriction, and, if appropriate, the person or persons to whom the released or restricted power shall pass and be exercisable. If a power is disclaimed, the power shall be available to and exercisable by the other trustee or trustees.

6.17. **Trustee's Liability.** No [optional: "family" or individual] trustee [optional: who is serving without compensation under this trust instrument] shall be liable to any interested party for acts or omissions of that trustee, except those resulting from that trustee's willful misconduct or gross negligence. [Optional: As used in this provision, a "family" trustee is a trustee who is related to the settlors by blood or marriage.] This standard shall also apply regarding a trustee's liability for the acts or omissions of any co-trustee or predecessor trustee.

#### **PRACTICE TIP**

One should carefully consider whether or not the above provision should be included. In effect, this provision partially relieves the trustee of liability in exchange for the trustee's waiver of any claim to compensation. This provision may be omitted if the client prefers not to allow the trustee to effectively "buy" a lesser standard of conduct by waiving compensation. While the savings in compensation may sound attractive, the settlor should consider whether or not it might be preferable, in the long run, to pay for the trustee's time and services and require, in return, that the trustee adhere to a high standard of conduct. *Commentary by Albert G. Handelman.*

6.18. **Written Notice to Trustee.** Until the trustee receives written notice of any death or other event upon which the right to payments from any trust may depend, the trustee shall incur no liability for disbursements made in good faith to persons whose interests may have been affected by that event.

6.19. **Duty to Account.** The trustee shall render accounts at least annually, at the termination of a trust, and upon a change of trustees, to the persons and in the manner required by law.

#### **PRACTICE TIP**

*Probate Code Section 16062* requires the trustee of any trust to provide an annual account to the beneficiaries, except under limited circumstances, such as when the trust may be revoked, when the beneficiary waives an accounting, or when the trustee and the beneficiary are the same person [see *Prob.*

*Code § 16064*. The contents of the annual account are described in *Probate Code Section 16063*. Generally, the accounting must reveal all of the information required in a formal accounting, although it may be presented in summary form. Additionally, information must be provided regarding trustee, attorney, and accountant compensation, and statements regarding the rights of the beneficiary to challenge the actions of the trustee must be included [*see Prob. Code § 16063*].

In light of these provisions, the planner may wish to consider omitting the requirement that an accounting be provided. This provision would only add the burden of preparing a full, formal accounting, which can always be required by the beneficiary in any case when he or she feels that more detail must be revealed by the trustee [*see Prob. Code §§ 16061, 16062(a)*]. Indeed, many attorneys specifically waive the requirement that any accounting whatsoever be rendered by the trustee. Even with such a waiver in the trust instrument, a beneficiary could still obtain an accounting if it appears that a material breach of the trust has occurred [*see Prob. Code § 16064*]. *Commentary by Albert G. Handelman*.

#### ARTICLE 7 : Concluding Provisions

7.01. Perpetuities Savings Clause. Notwithstanding any other provision of this instrument, any trust created by this instrument or by a power of appointment created by this instrument that has not terminated earlier shall terminate no later than 21 years after the death of the last survivor of \_\_\_\_\_ [*name individual(s) or describe class of persons whose life or lives are to be the measuring life or lives, e.g., the settlor and the issue of the settlor living on the date of the settlor's death or the beneficiaries of the trust who are living on the date of the settlor's death*]. If a trust is terminated because of the preceding sentence, the trustee shall distribute the principal and undistributed income of the trust to the income beneficiaries of the trust in the same proportion that they are entitled to receive income immediately before the termination. If that proportion is not fixed by the terms of this instrument, distribution shall be to the persons entitled to receive income immediately before the termination \_\_\_\_\_ [*specify distribution plan, e.g., in the manner provided in California Probate Code Section 240*]. If there is no person who is entitled to receive income immediately before the termination, the trustee shall distribute the principal and undistributed income to \_\_\_\_\_ [*name distributee(s) or specify class, e.g., the issue of the settlor then surviving in the manner provided in California Probate Code Section 240*].

7.02. Simultaneous Death. If the settlor and any beneficiary under this instrument die under circumstances in which the order of their deaths cannot be established by clear and convincing evidence, the settlor shall be deemed to have survived the beneficiary, and this instrument shall be construed accordingly.

7.03. No-Contest Clause. If any beneficiary under this instrument, singularly or in combination with any other person or persons, directly or indirectly contests this instrument or the will of the settlor in whole or in part, or opposes, objects to, or seeks to invalidate any of the provisions of this instrument or of the will of the settlor, or seeks to succeed to any part of the estate of the settlor other than in the manner specified in this instrument or in the will of the settlors, then the right of that person to take any interest given to him or her by this instrument shall be void, and any gift or other interest in the trust property to which the beneficiary would otherwise have been entitled shall pass as if he or she had predeceased the settlor [*optional: without issue*].

7.04. Definition of Death Taxes. As used in this instrument, the term "death taxes" means all inheritance, estate, succession, and other similar taxes that are payable by any person on account of that person's interest in the decedent's estate or by reason of the decedent's death, including penalties and interest, but excluding the following:

- (a) Any additional tax that may be assessed under *Internal Revenue Code Section 2032A*.
- (b) Any federal estate taxes recoverable, pursuant to *Internal Revenue Code Section 2207A*, from the holder or recipient of any qualified terminable interest property that is included in the settlor's federal gross estate under *Internal Revenue*

*Code Section 2044.*

(c) Any federal or state tax imposed on a generation-skipping transfer, as that term is defined in the federal tax laws, unless that generation-skipping transfer tax is payable directly out of the assets of a trust created by this instrument.

7.05. Definition of Debts and Expenses. As used in this instrument, the term "debts and expenses" shall include the following:

(a) All costs, expenses of litigation, counsel fees, or other charges that the trustee incurs in connection with the determination of the amount of the death taxes, interest, or penalties referred to in Paragraph 5.02 of this instrument, and

(b) Legally enforceable debts, funeral expenses, expenses of last illness, and administration and property expenses.

7.06. Definition of Child and Children. As used in this instrument, the words "child" and "children" refer to natural children and to children who have been legally adopted by the parent or parents from or through whom their right to inherit or to take is determined and derived.

7.07. Definition of Issue. As used in this instrument, the word "issue" refers to all lineal descendants of all generations, with the relationship of parent and child at each generation being determined by the definitions of "child" and "children" set forth in this instrument.

7.08. Definition of Education. As used in this instrument, the term "education" refers to the following:

(a) Education at public or private elementary, junior high, middle, or high schools, including boarding schools;

(b) Undergraduate, graduate, and postgraduate study in any field, whether or not of a professional character, in colleges, universities, or other institutions of higher learning;

(c) Specialized formal or informal training in music, the stage, the handicrafts, or the arts, whether by private instruction or otherwise; and

(d) Formal or informal vocational or technical training, whether through programs or institutions devoted solely to vocational or technical training, or otherwise.

7.09. Number and Gender. As used in this instrument, references in the masculine gender shall be deemed to include the feminine and neuter gender, and vice versa, and references to the singular shall be deemed to include the plural, and vice versa, wherever the context so permits.

7.10. Captions. The captions appearing in this instrument are for convenience of reference only, and shall be disregarded in determining the meaning and effect of the provisions of this instrument.

7.11. Severability Clause. If any provision of this instrument is invalid, that provision shall be disregarded, and the remainder of this instrument shall be construed as if the invalid provision had not been included.

7.12. California Law to Apply. All questions concerning the validity, interpretation, and administration of this instrument, including any trusts created under this instrument, shall be governed by the laws of the State of California, regardless of the domicile of any trustee or beneficiary.

7.14. Gifts to "Heirs." For any gift to heirs of either or both settlors that is made in this instrument, those heirs shall be

determined as if the settlor or settlors had died intestate at the time for distribution prescribed in this instrument, and the identity and shares of those heirs shall be determined according to the California laws of succession that concern separate property not acquired from a previously deceased spouse and that are in effect at the death of the settlor or settlors.

ARTICLE 8 : Execution

8.01. Execution. \_\_\_\_\_ [I or we] certify that \_\_\_\_\_ [I or we] have read the foregoing declaration of trust and that it correctly states the terms and conditions under which the trust estate is to be held, administered, and distributed. As trustee[s], \_\_\_\_\_ [I or we] approve this declaration of trust in all particulars, and agree to be bound by its terms and conditions.

Executed on \_\_\_\_\_ [month, day], \_\_\_\_\_ [year], at \_\_\_\_\_ [city or town, and state, in which declaration of trust is signed, e.g., San Diego, California].

TRUSTEE[S]

[For individual trustee: ]

\_\_\_\_\_ [signature]

[typed name]

[For corporate trustee: ]

[typed name of corporate trustee]

By:

\_\_\_\_\_ [signature of first authorized employee]

[typed name]

\_\_\_\_\_ [signature of second authorized employee]

[typed name]

Acceptance by Settlor. I, as settlor of the trusts created by this declaration of trust, certify that I have read the foregoing declaration of trust and that it correctly states the terms and conditions under which the trust estate is to be held, administered, and distributed. I approve this declaration of trust in all particulars, and agree to be bound by its terms and conditions.

Executed on \_\_\_\_\_ [month, day], \_\_\_\_\_ [year], at \_\_\_\_\_ [city or town, and state, in which declaration of trust is signed, e.g., San Diego, California].

SETTLOR

\_\_\_\_\_ [signature of settlor]

[typed name]

ACKNOWLEDGMENT

[Acknowledgements taken in California must be in the following form (Civ. Code § 1189(a))]:

State of California )  
County of \_\_\_\_\_ )

On \_\_\_\_\_ [date], before me, \_\_\_\_\_ [name and title of officer taking acknowledgment], personally appeared \_\_\_\_\_ [name(s)], who proved to me on the basis of satisfactory evidence to be the person[s] whose name[s] \_\_\_\_\_ [is or are] subscribed to the within instrument and acknowledged to me that \_\_\_\_\_ [he or she or they] executed the same in \_\_\_\_\_ [his or her or their]

authorized \_\_\_\_\_ [capacity *or* capacities], and that by \_\_\_\_\_ [his *or* her *or* their] signature[s] on the instrument the person[s], or the entity upon behalf of which the person[s] acted, executed the instrument.

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

WITNESS my hand and official seal.

Signature \_\_\_\_\_ (SEAL)

SCHEDULE A

SCHEDULE OF TRUST ASSETS

*Description of Asset*

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**Legal Topics:**

For related research and practice materials, see the following legal topics:  
 Estate, Gift & Trust LawTrustsMarital Deduction TrustsEstate, Gift & Trust LawTrustsRevocable Living TrustsTax  
 LawFederal Estate & Gift TaxesCredits (IRC secs. 2010-2016, 2505)Tax LawFederal Estate & Gift  
 TaxesDeductionsMarital Deduction (IRC secs. 2056, 2523)General OverviewTax LawFederal Estate & Gift TaxesGifts  
 (IRC secs. 2035, 2501-2524)Imposition of Taxes



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California Legal Forms--Transaction Guide

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DIVISION IV: WILLS AND TRUSTS  
CHAPTER 70 COMPLETE REVOCABLE TRUST FORMS  
PART IV. FORMS  
A. Complete Trust Instruments

*26-70 California Legal Forms--Transaction Guide §§ 70.204-70.209*

**AUTHOR:** Reviewed by Albert G. Handelman

**[Reserved]**

§§ 70.204[Reserved]



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California Legal Forms--Transaction Guide

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DIVISION IV: WILLS AND TRUSTS  
 CHAPTER 70 COMPLETE REVOCABLE TRUST FORMS  
 PART IV. FORMS  
 B. Alternative Sets of Trust Distribution Provisions

*26-70 California Legal Forms--Transaction Guide § 70.210*

**AUTHOR:** Reviewed by Albert G. Handelman

**§ 70.210 Trust Created by One Settlor--"Family Pot" Trust with Sprinkling Provisions on Death of Settlor**

**[1] Comment**

**[a] Use of Form**

This form contains a set of trust distribution provisions creating a so-called "family pot" trust on the death of a sole settlor. It is designed to replace Paragraph 5.04 of the *form in Section 70.200[2]* when an unmarried settlor creates a trust that will have more than one beneficiary on the settlor's death, and the settlor wishes to keep all the assets in a single trust after his or her death for the collective benefit of those beneficiaries. When these provisions are used, Paragraph 5.04 of the *form in Section 70.200[2]* should be deleted and replaced with these provisions, and the remainder of Article 5 in that form renumbered accordingly. All incidental references to the affected sections, as well as any references to the beneficiaries, should also be checked and conformed as necessary.

It is assumed that the beneficiaries of the trust will be the settlor's children (and the issue of any deceased children), since that is the most common circumstance under which this type of trust is created. If the beneficiaries are grandchildren or more remote relatives, the trust terms must be modified accordingly, or a separate share arrangement such as that illustrated in the *form in Section 70.211[2]* used instead.

**[b] Nature of "Family Pot" Trust**

A "family pot" trust is one in which the trust assets are pooled together for the collective benefit of a group of beneficiaries, rather than segregated into separate and distinct shares for each beneficiary. Typically, a "family pot" trust contains a "sprinkling" provision that allows the trustee to allocate income, and often principal, among the beneficiaries in accordance with their individual needs [*see discussion in [d]-[e], below*]. The flexibility of family pot trusts to address the varying needs of individual beneficiaries is the principal reason for their use. A second advantage is administrative simplicity: because all the assets are lumped together until the time of distribution, there is often no need to keep track of the respective shares of the beneficiaries, as would be the case with a "separate share" trust.

The biggest disadvantage of a "family pot" trust is that because the trustee is usually given discretion to treat the beneficiaries unequally, trust distributions can generate friction and animosity among the beneficiaries. A second disadvantage is that final distribution of the trust assets usually must be postponed until the youngest beneficiary reaches a specified age, which means that older beneficiaries must wait for the younger ones to mature before they can get their distributive shares. The latter problem, however, can be ameliorated by providing for staggered distributions and, if desired, by permitting the trustee to make advance distributions in appropriate situations.

For additional discussion of the differences between "family pot" trusts and "separate share" trusts, see *Ch. 64, Testamentary Trusts: Payment and Distribution Provisions*, §§ 64.200[1][d] and 64.201[1][b].

### **[c] Description of Beneficiaries**

It is assumed in this form that the beneficiaries will be the children and issue of the settlor. The settlor's spouse may also be made the beneficiary of a family pot trust, but the spouse's interest in such a trust would not qualify for the federal estate tax marital deduction [*see I.R.C. § 2056(b)*]. Therefore, unless the trust is very small or the settlor does not intend to claim the marital deduction, the spouse should not be a beneficiary of the trust created by this form [for a form creating a bypass trust for the settlor's spouse and children, followed by a family pot trust for the settlor's children and issue, see the form in § 70.213[2]].

The beneficiaries are the children and issue of the settlors *as a class*. Using a class gift in this matter can be useful because it will accommodate additional children without the need to amend the dispositive provisions of the trust. For this reason, it is usually best to describe the beneficiaries as a class when possible.

If the settlor wants to omit one or more specific class members, it may be possible to limit the class description accordingly (e.g., "the children and issue of the settlor, except for Joseph Smith"). Alternatively, if the settlor is unlikely to have additional children, the beneficiaries may simply be described by name (e.g., "Catherine Smith, Rodney Smith, and Elaine Smith"). This form also presupposes that the ultimate distribution of trust assets will be made in equal shares [*see* [2], P 5.05(d), *below*]. If the ultimate distribution is to be made in *unequal* shares, a class description may be unworkable. Often, however, a separate share arrangement is more likely to be used when unequal distributions are desired.

If the beneficiaries are persons other than children, issue, or any other easily definable group (e.g., "the settlor's nieces and nephews"), it is usually necessary to identify them by name.

### **[d] Sprinkling Provisions**

This form contains provisions giving the trustee the power to distribute income and principal among the trust beneficiaries in accordance with a specified standard. Such provisions are known as "sprinkling provisions" because they give the trustee the power to "sprinkle" income among the beneficiaries. The trustee is not required to distribute income or principal equally if unequal distributions are necessary to maintain the various beneficiaries according to the standard specified in the instrument. A sprinkling power can apply to payments of income, distributions of principal, or both. The provisions in this form apply the sprinkling power to both payments of income [*see* [2], P 5.05(a), *below*] and distributions of principal [*see* [2], P 5.05(b), *below*]. If the power is to be limited to one or the other, the appropriate language in the form can simply be deleted.

Sprinkling provisions are popular because they give the trustee the ability to allocate trust resources to the beneficiaries based on their respective needs, rather than according to a predetermined fractional allocation. For example, if one of the settlor's children is attending law school while the others are gainfully employed, the law student may need substantially more money than the other children to meet his or her tuition and basic living expenses. Under a sprinkling

provision, the trustee could allocate a greater share of the total trust assets to this specific beneficiary. In contrast, under a separate share arrangement, each beneficiary would receive principal and income only from his or her own fractional share of the total trust assets, without regard to the relative needs of all the beneficiaries.

On the negative side, sprinkling provisions can cause or exacerbate animosity between family members. If the trustee allocates trust assets unequally, those beneficiaries who receive less may resent those who receive more, and feel that they have been treated unfairly. This can put a lot of pressure on the trustee and, in extreme cases, lead to litigation between the trustee and the beneficiaries. If, after analyzing the personalities and financial circumstances of the persons who will be trust beneficiaries, the settlor believes that unequal treatment of trust beneficiaries may create animosity, the settlor may want to consider a separate share arrangement instead of a "family pot" trust.

The broad discretion given to the trustee in a sprinkling trust also creates the potential for favoritism and abuse by the trustee. The appointment of a neutral trustee who will administer the trust in a fair and impartial manner becomes increasingly more critical as the trustee's discretion is increased.

### **[e] Standard of Discretion in Sprinkling Provisions**

The standard of discretion specified in a "sprinkling" provision can be any standard desired by the settlor. It is common to use an "ascertainable standard"--that is, a standard relating to the health, education, support, and maintenance of the beneficiary. Such a standard will permit the trustee to pay for almost any reasonable expense incurred by a trust beneficiary. Although there is little law on exactly what expenses might reasonably be paid pursuant to an ascertainable standard, presumably such a standard would exclude items such as extensive recreational travel, gifts to third parties, and extravagant purchases that are beyond the beneficiary's usual standard of living. If the settlor wants to give the trustee the power to accommodate an even broader range of expenses, a broader (non-ascertainable) standard--typically "comfort, welfare, and happiness"--may be substituted.

#### **PRACTICE TIP**

Quite often, an ascertainable standard will be related to the beneficiary's standard of living at a particular point in time, such as the date of the trust instrument, or as of the date of the settlor's death. In such a case, it would probably be difficult to justify invasions of principal designed to go far beyond the beneficiary's usual standard of living. Thus, the language of the invasion standard should be tailored to the desires of the individual settlor. *Commentary by Albert G. Handelman.*

This form uses separate subparagraphs for the payment of income and distribution of principal, rather than a single subparagraph governing both income and principal [*see* [2], P 5.05(a) (income), (b) (principal), *below*]. This permits the drafter to specify one standard for payment of income and a second standard for distribution of principal. For example, if the settlor wants to give the trustee broad discretion to pay trust income, but to restrict the purposes for which trust principal may be distributed in order to preserve the trust assets, this form will accommodate that possibility.

### **[f] Consideration of Beneficiary's Other Resources**

In a sprinkling trust, it is especially important to specify whether or not the trustee should consider the beneficiary's other resources in applying the standard of discretion specified in the trust instrument. Ordinarily, the settlor will want these resources taken into account in making payments and distributions.

For example, if one beneficiary is well off and able to provide for his or her own support, and another is not, it may make the most sense to allocate trust resources to the beneficiary who most needs them. Paragraph 5.05 in the *form in § 70.200[2]* is a provision requiring the trustee to take other resources of the beneficiary into consideration. That provision ordinarily should be incorporated into every sprinkling trust. In the unlikely event that the settlor wants the trust to provide support for the beneficiaries *without* regard to their other resources, a provision to the latter effect

should be substituted. For an example of such a provision, see California Wills & Trusts Forms, Division 2, *Individual Inter Vivos Trust Provisions*, Part 4, Alternative 4.480-2.

#### **PRACTICE TIP**

Frequently the trustee will have no direct knowledge of the beneficiary's other resources. For this reason, it is advisable to describe in the trust instrument the extent of inquiry that the trustee is expected to make. In some cases, this may be no inquiry at all; in others, some specific measures must be taken, for example, reviewing a financial statement from the beneficiary. The rigor of any such required inquiry must be directly related to the intention of the settlor in making it relatively easy or relatively difficult for a beneficiary to invade the trust principal for his or her benefit. *Commentary by Albert G. Handelman.*

#### **[g] Treatment of Undistributed Income**

Any income that the trustee does not distribute will be added to the trust principal. As discussed in *Ch. 60, Estate Planning, § 60.15[3][e]*, the accumulation of income can have undesirable income tax consequences. Specifically, the tax brackets for trusts are substantially compressed [*see I.R.C. § 1(a)-(d), (i)(2)* (individual income tax rates), (*e*) (rates applicable to trusts and estates)], as a result of which trusts pay significantly more tax than individuals on comparable amounts of income. For this reason, it is preferable from a tax point of view to distribute trust income rather than accumulate it in the trust. However, in some cases, such as when a beneficiary is a minor or is incapable of managing money, accumulation may be preferable to distribution. These matters generally are best left to the discretion of the trustee.

#### **[h] Repayment of Discretionary Principal Distributions**

The settlor should consider whether or not to require that discretionary distributions of principal be repaid by the recipient. Ordinarily, such repayment takes the form of a deduction from the ultimate share of trust principal distributed by that beneficiary. The feelings of settlors may vary on this issue. This form provides three options: (1) no repayment; (2) repayment at the discretion of the trustee; and (3) automatic repayment [*see [2], P 5.05(b), below*]. The first and third options are self-explanatory. The second option, giving the trustee discretion to require repayment, may be useful when the trustee is also given a very broad standard of discretion--for example, it may make sense to require reimbursement for distributions made to cover the purchase of a home or luxury items, but not distributions for basic expenses.

#### **PRACTICE TIP**

In one sense, the idea of requiring a beneficiary of a principal distribution from a pot trust to repay that distribution goes against the very nature of a pot trust. That is, a pot trust is intended to allow for substantially varying degrees of benefit to be enjoyed by each beneficiary of the trust. In contrast, the concept of repayment may be seen as suggesting that some equalization of benefits was intended by the settlor.

In any event, one should consider whether such a provision would be enforceable. Because a pot trust is designed to address specific current needs of the beneficiaries, it may be that once the distribution is made, the money will be spent and it will prove to be difficult or impossible for the beneficiary to make repayment. This issue, in turn, is affected by when the repayment may be requested by the trustee, and on what terms.

Finally, one should carefully consider the consequences before using the second alternative. If the trustee may, but need not, request repayment, the trustee will be under tremendous pressure from a distributee to not require repayment, while other beneficiaries may demand that repayment be required. Similarly, disparate treatment of beneficiaries in this area could create problems among the beneficiaries, as well as between the trustee and the beneficiaries. *Commentary by Albert G. Handelman.*

**[i] Distribution of Trust Assets and Termination of Trust**

This form provides that the trust assets ultimately will be distributed to the children in equal shares (less any deductions for advance distributions of principal) [see [2], P 5.05(d), *below*]. This distribution will occur in two steps or stages that are keyed to the age of the settlor's youngest child. One half will be distributed to the beneficiaries when the settlor's youngest child reaches the first specified age, such as 25, and the balance when the youngest child reaches the second specified age, such as 30. Any other ages that the settlor believes appropriate may be substituted. Alternatively, the trust assets may be distributed all at once, or in more than two stages. For examples of provisions making a single-step or a three-step distribution, see California Wills & Trusts Forms, Division 2, *Individual Inter Vivos Trust Provisions*, Part 4, Alternatives 4.410-1 (1-step distribution), 4.410-3 (3-step distribution). Another alternative method of distribution is to require that the pot trust be split into separate shares for the respective beneficiaries when the youngest beneficiary reaches the stated age, and place each of the separate shares in a separate trust that will be distributed to the particular beneficiary when that beneficiary reaches the age or ages at which the settlor wants distribution to occur.

The necessity of waiting until the youngest child reaches a specified age before the trust property is distributed may work a hardship on the other children, who are required to wait until they are older to receive their share of the trust assets. This can mean that trust assets would be unavailable to these beneficiaries for important purposes such as purchasing a home, starting a business, educating their children, and so on. To reduce the undesirable effects on older beneficiaries, this form contains an optional provision permitting the trustee to make advance distributions of principal, up to a specified percentage of the share that the beneficiary would otherwise receive, if a valid reason exists for the distribution [see [2], P 5.05(c), *below*]. This optional language may be deleted if the settlor does not want to provide for early withdrawal rights.

**[j] Treatment of Issue of Deceased Beneficiaries**

The possibility exists that one or more of the settlor's children may die prior to final distribution of the trust assets, leaving surviving issue. Because of the time frame of the distributions contemplated in this form, any surviving issue of deceased children will probably be minors at the time the trust assets are distributed and the trust is terminated. To avoid having to make an outright disposition of the trust assets to minor issue under these circumstances, this form provides that the share of any such issue will continue to be held in trust until that issue reaches the age at which he or she would have been entitled to receive the property outright [see [2], P 5.05(h), *below*]. In effect, it creates a separate trust for each surviving issue who is under a specified age at the time the family pot trust is terminated. This provision creates a remote possibility of a violation of the rule against perpetuities, but under the current "wait and see" rule [see *Prob. Code* § 21205(b); see also *Ch. 67, Future Interests and Perpetuities*, § 67.16] and the perpetuities savings clause that is included in the *form in Section 70.200[2]* [see § 70.200[2], P 7.01], there is no chance of a violation that could disrupt the estate plan.

**[k] "Sensitive Trustee" Issues**

This form assumes that the trustee will not be a person who is also a beneficiary of the trust. If the settlor contemplates that one or more of the trust beneficiaries (such as older children) will serve as trustees at some point during the existence of the trust, the trustee of a sprinkling trust may be subject to undesirable income and estate tax consequences unless the trust provisions are carefully structured to avoid this result. The two problems that must be considered are:

- (1) A trustee who has the power, exercisable solely by himself or herself, to vest income or principal of any portion of the trust in himself or herself, is treated as the owner of that portion of the trust and is taxed on the income from that portion of the trust, whether or not that income is actually paid to the trustee [*I.R.C.* § 678(a)(1)]; and
- (2) A trustee/beneficiary who has an unrestricted power to appoint any portion of the trust income to

himself or herself is deemed to have a general power of appointment over the trust assets, and those assets will be included in the trustee's estate [I.R.C. § 2041] unless appropriate precautions are taken.

The simplest way to avoid these problems is to avoid naming a beneficiary as trustee. The income tax issues can be avoided by providing that any distributions of income to the trustee/beneficiary can be required only with the consent of another person, either a co-trustee or a "special trustee" appointed specifically for that purpose [see I.R.C. § 678(a)(1)]. The estate tax problems may be addressed by either (1) limiting the trustee's power by an "ascertainable standard" relating to the health, education, support, or maintenance of the beneficiary [I.R.C. § 2041(b)(1)(A)]; (2) providing that the trustee may exercise the power only with the concurrence of another person who is either the creator of the power or who has a substantial interest in the trust that would be adversely affected by the exercise of the power (i.e., another trust beneficiary) [I.R.C. § 2041(b)(1)(C)]; or (3) appointing a "special trustee" to make all distributions to the trustee-beneficiary.

For additional discussion of the tax considerations generated by discretionary payment and distribution powers in the trustee, see § 70.12[6][c]; see also *California Wills & Trusts*, Ch. 96, *Powers of Trustee*, § 96.08[3]; Ch. 95, *Trust Provisions for Payment and Distribution of Income and Principal*, § 95.06[1][c], [3][d] (Matthew Bender).

### [I] Generation-Skipping Transfer Tax Considerations

#### PRACTICE TIP

An attorney who plans a family pot trust should be aware of the generation-skipping transfer tax implications of a family pot trust that will be held for the benefit of more than one generation below that of the settlor, when some of the beneficiaries are members of the generation immediately below the generation of the settlor. In such a trust, some of the beneficiaries will be "non-skip persons" (i.e., the settlor's children) [see I.R.C. § 2613(b)], and the remaining beneficiaries will be "skip persons" (i.e., the settlor's grandchildren and any more remote descendants) [see I.R.C. § 2613(a)]. Ideally, such a trust will be made completely exempt from the generation-skipping transfer tax through allocation of the settlor's GST exemption [see I.R.C. § 2631(a), (c) (base exemption is \$1 million, with upward adjustments for inflation for generation-skipping transfers made in calendar years after 1998) and discussion in § 60.16[3]].

However, what can be done if the family pot trust in question will be larger than the available amount of the settlor's GST exemption? One solution might be to divide into two portions, one with a value equal to the available amount of the settlor's GST exemption and the other holding the balance of the original trust's assets. The settlor's entire GST exemption can then be allocated to the first trust, giving it an inclusion ratio of zero [see I.R.C. § 2642] and making it entirely exempt from the generation-skipping transfer tax. The other trust will then have an inclusion ratio of one and be completely subject to the tax. Of course, if some portion of the settlor's GST exemption has already been allocated (or can be more wisely allocated to other transfers), the trust designed to receive the allocation of the settlor's tax exemption will be appropriately smaller. The generation-skipping transfer tax provisions in the complete trust forms in this chapter give the trustee discretion to divide trusts into exempt and non-exempt trusts for generation-skipping transfer tax purposes, and are broad enough to authorize the type of division discussed in this Practice Tip.

Once such a split has been made, it is imperative that the trustee administer the separate trusts to take full advantage of the different inclusion ratios. If the payments or distributions are to be made to the settlor's children, they should be made first from the trust with the inclusion ratio of one, until that trust is completely exhausted. Even though distributions from that trust are *potentially* subject to the generation-skipping transfer tax, distributions to non-skip persons will not generate a tax. Likewise, payments or distributions to the settlor's grandchildren should be made first from the trust with the

inclusion ratio of zero. Because the trust, and distributions from it, are exempt from the generation-skipping transfer tax, these generation-skipping transfers will go untaxed. For more detailed discussion of these and other generation-skipping transfer tax planning considerations, see California Wills & Trusts, Chapter 113, *Generation-Skipping Transfers and Trust Strategies*. Commentary by Albert G. Handelman.

**[2] FORM**

**Trust Created by One Settlor--"Family Pot" Trust with Sprinkling Provisions on Death of Settlor**

[Replaces § 70.200[2], P 5.04]

5.04. Disposition of Trust Upon Death of Settlor. On the death of the settlor, the trustee shall hold, administer, and distribute the trust as a single trust for the benefit of \_\_\_\_\_ [name(s) or description(s) of beneficiaries, e.g., the children of the settlor and the surviving issue of any deceased children of the settlor] in accordance with Paragraph 5.05 of this instrument applicable to the Sprinkling Trust. If \_\_\_\_\_ [name(s) or description(s), e.g., the children of the settlor] all predecease the settlor without leaving issue who survive the settlor, the trustee shall distribute any undistributed balance of the trust property outright to \_\_\_\_\_ [alternative disposition, e.g., the heirs of the settlor or the California Mountain Lion Awareness League].

5.05. Sprinkling Trust. The trustee shall hold, administer, and distribute the assets of the Sprinkling Trust as follows:

(a) The trustee shall pay to or apply for the benefit of any one or more of the children of the settlor and the surviving issue of any deceased children of the settlor, until the youngest then-living child of the settlor reaches the age of \_\_\_\_\_ [e.g., 30] years, in monthly or other convenient installments, but not less often than annually, as much of the net income of the trust as the trustee, in the trustee's discretion, deems necessary for the \_\_\_\_\_ [to specify an "ascertainable standard": health, education, support, and maintenance or specify some other standard, e.g., comfort, welfare, and happiness] of each of them. In making these payments, the trustee may pay to or apply more for some beneficiaries than for others, and may make payments to or for one or more beneficiaries to the exclusion of others. All decisions of the trustee regarding payments under this subparagraph, if any, are within the trustee's discretion and shall be final and incontestable by anyone. The trustee shall accumulate and add to principal any net income not distributed.

(b) The trustee shall distribute to or apply for the benefit of any one or more of the children of the settlor and the surviving issue of any deceased children of the settlor, until the youngest then-living child of the settlor reaches the age of \_\_\_\_\_ [e.g., 30] years, as much of the principal of the trust as the trustee, in the trustee's discretion, deems necessary, when added to the income payments from this trust, for the \_\_\_\_\_ [to specify an "ascertainable standard": health, education, support, and maintenance or specify some other standard, e.g., comfort, welfare, and happiness] of each of them. In making these distributions, the trustee may distribute or apply more for some beneficiaries than for others, and may make distributions to or for one or more beneficiaries to the exclusion of others. [No amount paid out or applied under this subparagraph (b) need thereafter be repaid to the trustee or restored to the trust or The trustee \_\_\_\_\_ (shall or may, in the trustee's discretion,) deduct any amount so distributed to any beneficiary, valued on the date that the distribution is made, without interest, from the amounts distributed to that beneficiary under (d) and (f), below.] All decisions of the trustee regarding distributions under this subparagraph, if any, shall be final and incontestable by anyone.

[Optional provision for early distribution of principal; may be omitted if desired:]

(c) The trustee, in the trustee's discretion, may at any time or times prior to the time specified in this instrument for

distribution of the trust property, make an early distribution of principal to any \_\_\_\_\_ [child of the settlor or beneficiary] if, in the trustee's opinion, there is a valid reason for making the distribution [and if the remaining principal and income will be adequate for the reasonable health, education, support, and maintenance of all of the beneficiaries]. The trustee shall deduct the early distribution, valued on the date that the distribution is made, without interest, from the share ultimately distributed to the \_\_\_\_\_ [child or beneficiary] or his or her issue. Early distributions to any [child or beneficiary] shall not exceed, in the aggregate, [if amount of distributions is to be limited to a specified fraction or percentage of the beneficiary's distributive share of the trust, add: \_\_\_\_\_ (fraction or percentage, e.g., 50 percent or one third) of] that portion of the trust that would be distributable to that particular \_\_\_\_\_ [child or beneficiary], after offsetting any prior early distributions and any loans or advances not repaid to the trustee, if the trust were to be terminated and its assets distributed on the date that the early distribution is made. The trustee, upon making any distribution in accordance with this subparagraph, shall give the beneficiary receiving the distribution written notice identifying the distribution as "an early distribution under Paragraph 5.05(c)."

[Continue with the following:]

(d) When there is no living child of the settlor under the age of \_\_\_\_\_ [e.g., 25] years, the trustee shall distribute among the children of the settlor then living, in equal shares, an amount from the trust principal equal to \_\_\_\_\_ [fraction or percentage, e.g., one half or 50 percent] of the fair market value of the principal of the trust, determined as of the first day of the calendar month preceding the month in which the distribution is made. If no child of the settlor survives to the age of \_\_\_\_\_ [e.g., 25] years, but there are surviving issue of one or more children of the settlor on the death of the last child of the settlor, then on the death of the last surviving child of the settlor, the entire trust estate shall be divided among the issue as provided in (e), below.

(e) If any of the children of the settlor are deceased at the time of the distribution provided for in (d), above, and leave issue surviving, the share that would have been taken by that child if he or she had survived shall be divided among his or her issue \_\_\_\_\_ [in the manner provided in California Probate Code Section \_\_\_\_\_ (specify either 240 or 246 or 247) or in equal shares, regardless of whether or not all such issue are members of the same generation]. The share of each issue who has attained the age of \_\_\_\_\_ [e.g., 25] years shall be distributed outright to that issue. The share of any issue who has not attained the age of \_\_\_\_\_ [e.g., 25] years shall be held, administered, and distributed as provided in (h), below.

(f) When there is no living child of the settlor under the age of \_\_\_\_\_ [e.g., 30] years, the trustee shall distribute to the children of the settlor then living, in equal shares, the balance of the trust property. If no child of the settlor survives to the age of \_\_\_\_\_ [e.g., 30] years, but there are surviving issue of one or more children of the settlor on the death of the last child of the settlor to die, then on the death of the last surviving child of the settlor, the remaining trust estate shall be divided among the issue as provided in (g), below.

(g) If any of the children of the settlor are deceased at the time of the distribution provided for in (f), above, and leave issue surviving, the share that would have been taken by that child if he or she had survived shall be divided among his or her issue \_\_\_\_\_ [in the manner provided in California Probate Code Section \_\_\_\_\_ (specify either 240 or 246 or 247) or in equal shares, regardless of whether or not all such issue are members of the same generation]. The share of each issue who has attained the age of \_\_\_\_\_ [e.g., 30 years] shall be distributed outright to that issue. The share of any issue who has not attained the age of \_\_\_\_\_ [e.g., 30] years shall be held, administered, and distributed as provided in (h), below.

(h) The share of any issue who is under the age specified for outright distribution at the time of any distribution made

pursuant to (e) or (g), above, shall be retained in trust for that issue until he or she attains the age at which he or she would have been entitled to receive that distribution outright. Until that issue reaches the specified age, the trustee shall pay or distribute to or apply for the benefit of that issue as much of the income and principal of that issue's share of the trust as the trustee, in the trustee's discretion, deems necessary for the \_\_\_\_\_ [to specify an "ascertainable standard": health, education, support, and maintenance or specify some other standard, e.g., comfort, welfare, and happiness] of that issue. When that issue reaches the specified age, the trustee shall distribute the property outright to that issue. If that issue dies before reaching the age of distribution, the trustee shall distribute the share of that issue outright among the issue of that issue (or, if there are none, among the issue of the nearest ancestor of that issue who is also an issue of the settlor and who has issue then surviving, or if there are no such issue, among the heirs of the settlor), \_\_\_\_\_ [in the manner provided in California Probate Code Section \_\_\_\_\_ (specify either 240 or 246 or 247) or in equal shares, regardless of whether or not all such issue are members of the same generation]; provided that if any part of the share of that issue would otherwise be distributed to a person for whose benefit a trust or share is being administered under this instrument, that part shall instead be added to that trust or share and thereafter shall be administered according to its terms.

(i) If all the children of the settlor die without surviving issue before the trust property has been distributed as provided in this paragraph, the trustee shall distribute any undistributed balance of the trust property outright to \_\_\_\_\_ [alternative disposition, e.g., the heirs of the settlor or the California Mountain Lion Awareness League].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsCreationEstate, Gift & Trust LawTrustsRevocable Living Trusts



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California Legal Forms--Transaction Guide

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DIVISION IV: WILLS AND TRUSTS  
 CHAPTER 70 COMPLETE REVOCABLE TRUST FORMS  
 PART IV. FORMS  
 B. Alternative Sets of Trust Distribution Provisions

*26-70 California Legal Forms--Transaction Guide § 70.211*

**AUTHOR:** Reviewed by Albert G. Handelman

**§ 70.211 Trust Created by One Settlor--Trust Divided Into Separate Trusts or Shares on Death of Settlor**

**[1] Comment**

**[a] Use of Form**

This form contains a set of trust distribution provisions creating "separate share" trusts for individual beneficiaries on the death of a sole settlor. It is designed to replace Paragraph 5.04 of the form in *Section 70.200[2]* when an unmarried settlor creates a trust that will have more than one beneficiary on the settlor's death, and the settlor wants to divide the trust into separate trusts or shares for the individual trust beneficiaries. When these provisions are used, Paragraph 5.04 of the form in *Section 70.200[2]* should be deleted and replaced with these provisions, and the remainder of Article 5 of that form renumbered accordingly. All incidental references to the affected sections, as well as any references to the beneficiaries, should also be checked and conformed as necessary.

It is assumed that the beneficiaries of the trust will be the settlor's children and the issue of any deceased children. However, a separate share arrangement is easily adaptable to most other patterns of distribution as well.

**[b] Nature of "Separate Share" Trust**

In a "separate share" arrangement, each trust beneficiary receives his or her own share of the trust assets on the death of the settlor. That share is held separately from the shares of other beneficiaries, and no beneficiary has any interest in the shares of the other beneficiaries. Thus, each beneficiary must look solely to his or her own share for support. In contrast, under a "family pot" trust, the trust assets are pooled in a single trust and each beneficiary typically receives assets in accordance with his or her needs. For discussion of the advantages and disadvantages of "family pot" trusts relative to "separate share" arrangements, see § 70.210[1][b]; see also *Ch. 64, Testamentary Trusts: Payment and Distribution Provisions*, §§ 64.200[1][c] and 64.201[1][b].

**[c] Description of Beneficiaries**

It is assumed in this form that the beneficiaries will be the children and other issue of the settlor. The disposition is made to the children and other issue of the settlor *as a class*. For discussion of the use of class descriptions as opposed to naming specific individuals, see § 70.210[1][c].

#### **[d] Shares of Beneficiaries**

Under this form, on the settlor's death the trust will be divided into a number of shares equal to the number of the settlor's surviving children plus the number of the settlor's deceased children who died leaving surviving issue [see [2], P 5.04(a), *below*]. Each child receives one share [see [2], P 5.04(b), *below*]. The share of each deceased child is divided among the deceased child's issue in accordance with a statutory pattern of distribution selected by the settlor [see [2], P 5.04(c), *below*; for discussion of the statutory patterns of distribution, see *Ch. 61, Will Drafting and Complete Will Forms*, § 61.15].

This form assumes that the shares of the children will be equal. In the vast majority of cases, settlors will want their children to share equally in the trust assets. However, settlors sometimes want the division to be made in unequal shares. When this is the case, the provision should specify the fraction or percentage of the total trust assets that should be allocated to each share, and the beneficiaries must be specifically identified (which may make drafting the disposition as a class gift impractical). For examples of provisions making unequal divisions of trust assets, see California Wills & Trusts Forms, Division 2, *Individual Inter Vivos Trust Provisions*, Part 4, Alternatives 4.240-10-4.240-12.

#### **[e] Treatment of Each Share**

Some settlors will want the payment of income and distribution of principal to be handled identically for each child. Others may want individual children treated differently in this regard. For illustrative purposes, this provision shows elements of both approaches. It assumes that the settlor has several children, and, with one exception, wants payments and distributions to these children to be handled in the same manner [see [2], P 5.04(b), *below*]. It further assumes that the settlor has one child who is to be treated differently from the others [see [2], P 5.04(b), *below*]. This child may be one whom the settlor regards as financially irresponsible, incapable of managing money, or otherwise likely to squander his or her inheritance. For examples of more complex provisions providing specific methods of treating individual trust shares, see California Wills & Trusts Forms, Division 2, *Individual Inter Vivos Trust Provisions*, Part 4, Alternatives 4.240-9, 4.240-12.

In this form, one group of trust provisions applies to all the settlor's children except the one receiving different treatment [see [2], P 5.05, *below*]. A second set of provisions applies exclusively to the child who is to be treated differently [see [2], P 5.06, *below*]. As noted above, this manner of distribution is purely illustrative. If the settlor wants all the children treated equally, the optional material can be deleted and the remaining paragraphs renumbered accordingly.

Note that the payment and distribution provisions applicable to the one child receiving special treatment are *not* designed to preserve any entitlement that child might have to government assistance benefits. So-called "special needs trusts," designed to preserve a trust beneficiary's entitlement to government benefits to the maximum extent possible, require special provisions and are beyond the scope of this chapter. For a detailed discussion of special needs trusts, see California Wills & Trusts, Chapter 118, *Special Needs Trusts* (Matthew Bender). For illustrative special needs trusts, see California Wills & Trusts Forms, Division 1, *Complete Inter Vivos Trusts*, Trust 3, § 5.05 (special needs trust provisions for one beneficiary of revocable trust) and Trust 43 (irrevocable special needs trust).

#### **[f] Payments and Distributions During Lifetimes of Beneficiaries**

This form provides for a relatively common and simple pattern of distribution: payment of all trust income to the

beneficiary until he or she reaches a specified age, supplemented by as much of the trust principal as is necessary to support the beneficiary until that time [*see* [2], P 5.05(a), (b), *below*]. The principal payments are made according to a specified standard, which can be an "ascertainable standard" relating to the health, education, support, and maintenance of the beneficiary or, if desired by the settlor, some broader standard. For discussion of the use of ascertainable standards, see *Section 70.12[6][c]* and Ch. 64, *Testamentary Trusts: Payment and Distribution Provisions*, § 64.51[4].

Some attorneys prefer not to provide for the payment of all trust income to or for the benefit of a minor, especially if the trust income is likely to be substantial and to exceed the amount reasonably necessary for support of the minor. As an alternative to the approach illustrated in Paragraph 5.05, payments and distributions of both principal *and* income can be made discretionary. When income payments are discretionary, any unpaid income will be added to principal. Still another approach preferred by many attorneys is simply to accumulate income until the beneficiary reaches a specified age, such as 18 or 21, and then provide for mandatory payment of all income from that time until the trust principal is finally distributed. As discussed in *Chapter 60, Estate Planning*, § 60.15[3][e], the accumulation of income can have undesirable income tax consequences. Nevertheless, some settlors would prefer to pay more income tax than to distribute the income to a minor or young adult whom they believe is not responsible enough to make proper use of it. In the context of this form, it makes sense to restrict income payments to a beneficiary who is not trusted enough to receive his or her share of the trust estate outright during his or her lifetime. Hence, this approach is taken in Paragraph 5.06 of the form.

#### **[g] Distribution of Trust Principal and Termination of Trust**

This form provides that with the exception of the one child receiving special treatment, each of the settlor's children will receive his or her share of the trust assets when he or she reaches a specified age, such as 30 [*see* [2], P 5.05(d), *below*]. As an alternative to this simple method of outright distribution, the trust may provide for a two-step distribution similar to that illustrated in *Section 70.210[2]*, a three-step distribution, or any other pattern of distribution desired by the settlor. For provisions illustrating these approaches as specifically applied to separate share trusts, see *California Wills & Trusts Forms, Division 2, Individual Inter Vivos Trust Provisions, Part 4, Alternatives 4.420-2, 4.420-3*.

If any of the children die prior to the age at which they are to receive their share of the trust outright, their share is divided among their issue, if any, at the time of their death. Issue over a specified age will receive their shares outright, while the shares of those issue under the stated age will be retained in trust for them until they reach that age [*see* [2], PP 5.05(e), 5.07]. This provision creates a remote possibility of a violation of the rule against perpetuities, but under the current "wait and see" rule [*see Prob. Code* § 21205(b); *see also Ch. 67, Future Interests and Perpetuities*, 67.16] and the perpetuities savings clause that is included in the *form in Section 70.200[2]* [*see* § 70.200[2], P 7.01], there is no chance of a violation that could disrupt the estate plan.

The trust for the one child who is receiving special treatment will continue for that child's entire lifetime [*see* [2], P 5.06(a)]. When that child dies, his or her share of the trust assets will be divided among his or her issue. Issue over a specified age will receive their shares outright, while the shares of those issue under the stated age will be retained in trust until they reach that age [*see* [2], PP 5.06(c), 5.07].

#### **PRACTICE TIP**

If the beneficiary of this special trust has issue, the special trust will automatically create a generation-skipping transfer. Thus, special consideration should be given to allocation of the settlor's exemption from the generation-skipping transfer tax [*see I.R.C. § 2631*] to this share. The fact that this will be a generation-skipping trust is not "bad" in and of itself, and proper planning for this eventuality may actually confer an extra benefit upon the beneficiary of this share and his or her issue. However, it is important that this fact be considered in advance and discussed with the client at the stage of designing the trust. This will allow the planner to determine whether the client is willing to confer the potential advantages of allocation of the generation-skipping transfer tax exemption unequally in favor of the child

who is having the lifetime trust created for his or her benefit. *Commentary by Albert G. Handelman.*

**[2] FORM**

**Trust Created by One Settlor--Trust Divided Into Separate Trusts or Shares on Death of Settlor**

[Replaces § 70.200[2], P 5.04]

5.04. Disposition of Trust Upon Death of Settlor.

(a) On the death of the settlor the trustee shall divide the trust property into as many shares of equal market value as are necessary to create one share for each child of the settlor who survives the settlor, and one share for the issue who survive the settlor of each child of the settlor who predeceases the settlor.

(b) Each share created for a surviving child of the settlor [*to make exception for one or more shares held for specific persons, add: except the share(s), if any, created for \_\_\_\_\_ (name[s], e.g., John B. Smith)*] shall be distributed outright to that child if that child has reached the age of \_\_\_\_\_ [*e.g., 30*] years. If the child has not reached the age of \_\_\_\_\_ [*e.g., 30*] years, the share created for the child shall be held, administered, and distributed by the trustee in a separate trust as set forth in Paragraph 5.05 of this instrument. [*To make exception for one or more shares held for specific persons, add: The share(s), if any, created for \_\_\_\_\_ (name[s], e.g., John B. Smith) shall be held, administered, and distributed by the trustee in a separate trust according to the terms set forth in Paragraph 5.06 applicable to the Trust for \_\_\_\_\_ (e.g., John B. Smith), regardless of \_\_\_\_\_ (his age or her age or their ages) at the time of the settlor's death.*]

(c) Each share created for the issue of a deceased child of the settlor shall be divided among those issue \_\_\_\_\_ [in the manner provided in California Probate Code Section \_\_\_\_\_ (*specify either 240 or 246 or 247*) or in equal shares, regardless of whether or not all such issue are members of the same generation]. The share of each issue who has attained the age of \_\_\_\_\_ [*e.g., 30*] years shall be distributed outright to that issue. The share of any issue who has not attained the age of \_\_\_\_\_ [*e.g., 30*] years shall be held, administered, and distributed in a separate trust for that issue as set forth in Paragraph 5.07 of this instrument.

(d) If all the children of the settlor predecease the settlor without leaving issue who survive the settlor, the trustee shall distribute any undistributed balance of the trust property outright to \_\_\_\_\_ [*alternative disposition, e.g., the heirs of the settlor or the California Mountain Lion Awareness League*].

5.05. Separate Trusts for Children. The trustee shall hold, administer, and distribute the assets of the separate trust for each child as follows:

(a) The trustee shall pay to or apply for the benefit of that child all of the net income of the trust, in monthly or other convenient installments [agreed upon by that child and the trustee], but not less often than annually, until that child reaches the age of \_\_\_\_\_ [*e.g., 30*] years.

(b) The trustee shall distribute to or apply for the benefit of that child, until that child reaches the age of \_\_\_\_\_ [*e.g., 30*] years, as much of the principal of the trust as the trustee, in the trustee's discretion, deems necessary [, when added to the income payments from this trust,] for that child's \_\_\_\_\_ [*to specify an "ascertainable standard": health, education, support, and maintenance or specify some other standard, e.g., comfort, welfare, and happiness*]. All decisions of the trustee regarding payments under this subparagraph, if any, are within the trustee's discretion and shall be final and incontestable by anyone.

(c) On the death of that child, the trustee may pay [any death taxes (*add if appropriate*: attributable to property held in the trust) and] the expenses of the last illness and funeral of that child out of the principal of the trust, unless the trustee determines that other adequate provisions have been made for payment of these expenses.

(d) When that child reaches the age of \_\_\_\_\_ [e.g., 30] years, the trustee shall distribute to that child outright the balance of the trust property.

(e) If that child dies before the trust property has been distributed as provided in this paragraph, the assets of that child's separate trust shall be divided among that child's issue \_\_\_\_\_ [in the manner provided in California Probate Code Section \_\_\_\_\_ (*specify either: 240 or 246 or 247*) or in equal shares, regardless of whether or not all such issue are members of the same generation]. The share of each issue who has attained the age of \_\_\_\_\_ [e.g., 30] years shall be distributed outright to that issue. The share of any issue who has not attained the age of \_\_\_\_\_ [e.g., 30] years shall be held, administered, and distributed in a separate trust for that issue as set forth in Paragraph 5.07 of this instrument. If that child dies without issue before the trust property has been distributed as provided in this paragraph, the trustee shall distribute the entire undistributed balance of that child's separate share outright among the other then-living persons for whom separate shares were created \_\_\_\_\_ [in the manner provided in California Probate Code Section \_\_\_\_\_ (*specify either 240 or 246 or 247*) or in equal shares, regardless of whether or not all such persons are members of the same generation]; provided, however, that if any part of that balance would otherwise be distributed to a person for whose benefit a trust is being administered under this paragraph, that part shall instead be added to that trust and shall thereafter be administered according to its terms. If there are no surviving persons who may take the share of that child under this paragraph, any remaining trust property shall be distributed outright to \_\_\_\_\_ [*alternative disposition, e.g., the heirs of the settlor or the California Mountain Lion Awareness League*].

5.06 Trust for \_\_\_\_\_ [e.g., John B. Smith]. The trustee shall hold, administer, and distribute the assets of the trust for \_\_\_\_\_ [e.g., John] as follows:

(a) The trustee shall pay or distribute to or apply for the benefit of \_\_\_\_\_ [e.g., John B. Smith], for life, in monthly or other convenient installments, but not less often than annually, as much of the net income of the trust, and as much of the principal of the trust, as the trustee, in the trustee's discretion, deems necessary for \_\_\_\_\_ [e.g., John B. Smith's] \_\_\_\_\_ [*to specify an "ascertainable standard": health, education, support, and maintenance or specify some other standard, e.g., comfort, welfare, and happiness*]. All decisions of the trustee regarding payments under this subparagraph, if any, are within the trustee's discretion and shall be final and incontestable by anyone. The trustee shall accumulate and add to principal any net income not distributed.

(b) On the death of \_\_\_\_\_ [e.g., John B. Smith], the trustee may pay [any death taxes (*add if appropriate*: attributable to property held in the trust) and] the expenses of the last illness and funeral of \_\_\_\_\_ [e.g., John B. Smith] out of the principal of the trust, unless the trustee determines that other adequate provisions have been made for payment of these expenses.

(c) On the death of \_\_\_\_\_ [e.g., John B. Smith], the trustee shall divide the trust property among \_\_\_\_\_ [e.g., John B. Smith's] issue \_\_\_\_\_ [in the manner provided in California Probate Code Section \_\_\_\_\_ (*specify either: 240 or 246 or 247*) or in equal shares, regardless of whether or not all such issue are members of the same generation]. The share of each issue who has attained the age of \_\_\_\_\_ [e.g., 30] years shall be distributed outright to that issue. The share of any issue who has not attained the age of \_\_\_\_\_ [e.g., 30] years shall be held, administered, and distributed in a separate trust for that issue as set forth in Paragraph 5.07 of this instrument. If the issue of \_\_\_\_\_ [e.g., John B. Smith] all predecease \_\_\_\_\_ [e.g., John B. Smith], the trustee shall distribute any undistributed balance of the trust property outright among the other then-living persons for whom separate trusts were created under this instrument, in \_\_\_\_\_ [the manner provided in California Probate Code Section \_\_\_\_\_].

\_\_\_\_\_ (specify either 240 or 246 or 247) or equal shares, regardless of whether or not all those persons are members of the same generation]; provided, however, that if any part of that balance would otherwise be distributed to a person for whom a trust is being administered under this instrument, that part instead shall be added to that trust and thereafter shall be administered according to its terms. If there are no surviving persons who may take the trust assets under this paragraph, any remaining trust assets shall be distributed outright to \_\_\_\_\_ [alternative disposition, e.g., the heirs of the settlor or the California Mountain Lion Awareness League].

5.07. Separate Trusts for Issue of Each Deceased Child. The trustee shall hold, administer, and distribute the assets of each separate trust for an issue of a deceased child of the settlor as follows:

(a) The trustee shall pay or distribute to or apply for the benefit of the beneficiary, until the beneficiary reaches the age of \_\_\_\_\_ [e.g., 30] years, in monthly or other convenient installments, but not less often than annually, as much of the net income of the trust, and as much of the principal of the trust, as the trustee, in the trustee's discretion, deems necessary for the beneficiary's \_\_\_\_\_ [to specify an "ascertainable standard": health, education, support, and maintenance or specify some other standard, e.g., comfort, welfare, and happiness]. All decisions of the trustee regarding payments under this subparagraph, if any, are within the trustee's discretion and shall be final and incontestable by anyone. The trustee shall accumulate and add to principal any net income not distributed.

(b) When the beneficiary reaches the age of \_\_\_\_\_ [e.g., 30] years, the trustee shall distribute to the beneficiary outright the balance of the trust property.

(c) If the beneficiary dies before the trust property has been distributed as provided in this paragraph, the assets of his or her separate trust shall be divided among his or her issue \_\_\_\_\_ [in the manner provided in California Probate Code Section \_\_\_\_\_ (specify either: 240 or 246 or 247) or in equal shares, regardless of whether or not all such issue are members of the same generation]. The share of each issue who has attained the age of \_\_\_\_\_ [e.g., 30] years shall be distributed outright to that issue. The share of any issue who has not attained the age of \_\_\_\_\_ [e.g., 30] years shall be held, administered, and distributed in a separate trust for that issue as set forth in this paragraph. If the beneficiary dies without issue before the trust property has been distributed as provided in this paragraph, the trustee shall distribute the entire undistributed balance of his or her separate share outright among the issue of the nearest ancestor of that beneficiary who is also an issue of the settlor and who has issue then surviving, \_\_\_\_\_ [in the manner provided in California Probate Code Section \_\_\_\_\_ (specify either 240 or 246 or 247) or in equal shares, regardless of whether or not all such issue are members of the same generation]; provided, however, that if any part of that balance would otherwise be distributed to a person for whose benefit a trust is being administered under this paragraph, that part shall instead be added to that trust and shall thereafter be administered according to its terms. If there are no surviving persons who may take the share of the beneficiary under this paragraph, any remaining trust property shall be distributed outright to \_\_\_\_\_ [alternative disposition, e.g., the heirs of the settlor or the California Mountain Lion Awareness League].

### Legal Topics:

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsCreationEstate, Gift & Trust LawTrustsRevocable Living Trusts



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DIVISION IV: WILLS AND TRUSTS  
CHAPTER 70 COMPLETE REVOCABLE TRUST FORMS  
PART IV. FORMS  
B. Alternative Sets of Trust Distribution Provisions

*26-70 California Legal Forms--Transaction Guide § 70.212*

**AUTHOR:** Reviewed by Albert G. Handelman

**§ 70.212 Trust Created by Two Settlers--"Family Pot" Trust With Sprinkling Provisions on Death of Surviving Settlor**

**[1] Comment--Use of Form**

This form contains a set of trust distribution provisions creating a so-called "family pot" trust on the death of the surviving settlor in a two-settlor trust. It is designed to modify the terms of the form in *Section 70.202[2]*, a two-settlor marital deduction trust, by replacing Paragraphs 5.09, 5.10, and 5.11 of that form. It assumes that the trust will contain a survivor's trust, a marital deduction trust, and a bypass trust. It also assumes that a disclaimer trust is being used.

The form in *Section 70.202[2]*, the two-settlor marital deduction trust in this publication, provides that on the death of the surviving settlor, the trust assets (including any portion of the survivor's trust not appointed by the surviving settlor under the general power of appointment granted to him or her under the form in *Section 70.202[2]*) will be divided into separate trusts or shares for the settlor's children and issue. The provisions in this form convert that "separate share" arrangement into a "family pot" arrangement instead. The other distribution arrangements, such as the terms of the survivor's trust and the marital deduction trust, and distributions from the bypass and disclaimer trusts during the lifetime of the surviving settlor, are unaffected.

For discussion of the use of "family pot" trusts and "sprinkling" provisions, see *Section 70.210[1][b], [d]-[f]*. Otherwise, the general commentary in *Section 70.202[1]* regarding the use of the form in *Section 70.202[2]* continues to apply to that form as modified by these provisions.

When these provisions are used, all incidental references to the affected sections, as well as any references to the beneficiaries, should also be checked and conformed as necessary.

**[2] FORM**

**Trust Created by Two Settlers--"Family Pot" Trust With Sprinkling Provisions on Death of Surviving**

**Settlor**

[Replaces § 70.202[2], P 5.09]

5.09. Bypass Trust. The trustee shall hold, administer, and distribute the assets of the Bypass Trust as follows:

(a) The trustee shall pay or distribute to or apply for the benefit of the surviving settlor, for life, in monthly or other convenient installments, but not less often than annually, as much of the net income of the trust, and as much of the principal of the trust, as the trustee, in the trustee's discretion, deems necessary for his or her health, education, support, and maintenance. All decisions of the trustee regarding payments under this subparagraph, if any, are within the trustee's discretion and shall be final and incontestable by anyone. The trustee shall accumulate and add to principal any net income not distributed. Notwithstanding any other provision of this instrument, the trustee shall not make discretionary payments of principal from the Bypass Trust to the surviving settlor unless the principal of the QTIP Trust and the Survivor's Trust has been exhausted.

(b) In addition to any other payments and distributions that the surviving settlor may receive under this instrument, the trustee shall distribute to the surviving settlor, during the surviving settlor's lifetime, such amounts from the principal of the trust estate as he or she may from time to time request of the trustee in writing, not to exceed in any calendar year the greater of \$5,000 or five percent of the value of the principal of the trust, determined as of the end of the calendar year. This right of withdrawal is not cumulative, so that if the surviving settlor does not withdraw the full amount that he or she is entitled to withdraw under this provision in any calendar year, the right to withdraw the amount not withdrawn shall lapse at the end of the calendar year. This power shall exist each year until the death of the surviving settlor.

**PRACTICE TIP**

One may want to consider eliminating this "5 or 5 power" from the Bypass Trust. The Bypass Trust ordinarily is intended to grow as much as possible, in order to allow the maximum amount possible to pass tax-free on the death of the surviving settlor. Frequent exercise of this power by the surviving settlor will undercut this planning, and violates the intention expressed in the last sentence of Paragraph 5.09(a) that the Bypass Trust be invaded only after the QTIP and Survivor's Trusts have been exhausted.

*Commentary by Albert G. Handelman.*

(c) On the death of the surviving settlor, the trustee shall hold, administer, and distribute the trust for the benefit of the children of the settlors and the surviving issue of any deceased children of the settlors in accordance with Paragraph 5.10 of this instrument applicable to the Sprinkling Trust for Children and Issue. If the children of the settlors and the surviving issue of any deceased children of the settlors all predecease the surviving settlor, the trustee shall distribute any undistributed balance of the trust property outright to \_\_\_\_\_ [alternative disposition, e.g., one half to the heirs of the deceased settlor and one half to the heirs of the surviving settlor or the California Mountain Lion Awareness League].

[Replaces § 70.202[2], P 5.10]

5.10. Sprinkling Trust for Children and Issue. The trustee shall hold, administer, and distribute the assets of the Sprinkling Trust as follows:

(a) The trustee shall pay to or apply for the benefit of any one or more of the children of the settlors and the surviving issue of any deceased children of the settlors, until the youngest then-living child of the settlors reaches the age of \_\_\_\_\_ [e.g., 30] years, in monthly or other convenient installments, but not less often than annually, as

much of the net income of the trust as the trustee, in the trustee's discretion, deems necessary for the \_\_\_\_\_ [to specify an "ascertainable standard": health, education, support, and maintenance *or specify some other standard, e.g.,* comfort, welfare, and happiness] of each of them. In making these payments, the trustee may pay to or apply more for some beneficiaries than for others, and may make payments to or for one or more beneficiaries to the exclusion of others. All decisions of the trustee regarding payments under this subparagraph, if any, are within the trustee's discretion and shall be final and incontestable by anyone. The trustee shall accumulate and add to principal any net income not distributed.

(b) The trustee shall distribute to or apply for the benefit of any one or more of the children of the settlors and the surviving issue of any deceased children of the settlors, until the youngest then-living child of the settlors reaches the age of \_\_\_\_\_ [e.g., 30] years, as much of the principal of the trust as the trustee, in the trustee's discretion, deems necessary, when added to the income payments from this trust, for the \_\_\_\_\_ [to specify an "ascertainable standard": health, education, support, and maintenance *or specify some other standard, e.g.,* comfort, welfare, and happiness] of each of them. In making these distributions, the trustee may distribute or apply more to some beneficiaries than to others, and may make distributions to or for one or more beneficiaries to the exclusion of others. [No amount paid out or applied under this subparagraph (b) need thereafter be repaid to the trustee or restored to the trust *or* The trustee \_\_\_\_\_ (shall *or* may, in the trustee's discretion,) deduct any amount so distributed to any beneficiary, valued on the date that the distribution is made, without interest, from the amounts distributed to that beneficiary under (d), *below*.] All decisions of the trustee regarding distributions under this subparagraph, if any, shall be final and incontestable by anyone.

[Optional provision for early distribution of principal; may be omitted if desired:]

(c) The trustee, in the trustee's discretion, may at any time or times prior to the time specified in this instrument for distribution of the trust property, make an early distribution of principal to any \_\_\_\_\_ [child of the settlors *or* beneficiary] if, in the trustee's opinion, there is a valid reason for making the distribution [and if the remaining principal and income will be adequate for the reasonable health, education, support, and maintenance of all of the beneficiaries]. The trustee shall deduct the early distribution, valued on the date that the distribution is made, without interest, from the share ultimately distributed to the \_\_\_\_\_ [child *or* beneficiary] or his or her issue. Early distributions to any [child *or* beneficiary] shall not exceed, in the aggregate, [if amount of distributions is to be limited to a specified fraction or percentage of the beneficiary's distributive share of the trust, add: \_\_\_\_\_ (fraction or percentage, e.g., 50 percent *or* one third) of] that portion of the trust that would be distributable to that particular \_\_\_\_\_ [child *or* beneficiary], after offsetting any prior early distributions and any loans or advances not repaid to the trustee, if the trust were to be terminated and its assets distributed on the date that the early distribution is made. The trustee, upon making any distribution in accordance with this subparagraph, shall give the beneficiary receiving the distribution written notice identifying the distribution as "an early distribution under Paragraph 5.05(c)."

[Continue with the following:]

(d) When there is no living child of the settlor under the age of \_\_\_\_\_ [e.g., 30] years, the trustee shall distribute to the children of the settlors then living, in equal shares, the balance of the trust property. If no child of the settlors survives to the age of \_\_\_\_\_ [e.g., 30] years, but there are surviving issue of one or more children of the settlors on the death of the last child of the settlors, then on the death of the last surviving child of the settlors to die, the remaining trust estate shall be divided among the issue as provided in (e), below.

(e) If any of the children of the settlors are deceased at the time of the distribution provided for in (d), above, and leave issue surviving, the share that would have been taken by that child if he or she had survived shall be divided among his

or her issue \_\_\_\_\_ [in the manner provided in California Probate Code Section \_\_\_\_\_ (specify either 240 or 246 or 247) or in equal shares, regardless of whether or not all such issue are members of the same generation]. The share of each issue who has attained the age of \_\_\_\_\_ [e.g., 30 years] shall be distributed outright to that issue. The share of any issue who has not attained the age of \_\_\_\_\_ [e.g., 30] years shall be held, administered, and distributed as provided in (f), below.

(f) The share of any issue who is under the age specified for outright distribution at the time of any distribution made pursuant to (d), above, shall be retained in trust for that issue until he or she attains the age of \_\_\_\_\_ [e.g., 30] years. Until that issue reaches the age of \_\_\_\_\_ [e.g., 30] years, the trustee shall pay or distribute to or apply for the benefit of that issue as much of the income and principal of that issue's share of the trust as the trustee, in the trustee's discretion, deems necessary for the \_\_\_\_\_ [to specify an "ascertainable standard": health, education, support, and maintenance or specify some other standard, e.g., comfort, welfare, and happiness] of that issue. When that issue reaches the age of \_\_\_\_\_ [e.g., 30] years, the trustee shall distribute the property outright to that issue. If that issue dies before reaching the age of \_\_\_\_\_ [e.g., 30] years, the trustee shall distribute the share of that issue outright among the issue of that issue (or, if there are none, among the issue of the nearest ancestor of that issue who is also an issue of the settlors and who has issue then surviving, or if there are no such issue, to the heirs of the settlors, one half to the heirs of the deceased settlor and one half to the heirs of the surviving settlor) \_\_\_\_\_ [in the manner provided in California Probate Code Section \_\_\_\_\_ (specify either 240 or 246 or 247) or in equal shares, regardless of whether or not all such issue are members of the same generation]; provided that if any part of the share of that issue would otherwise be distributed to a person for whose benefit a trust or share is being administered under this instrument, that part shall instead be added to that trust or share and thereafter shall be administered according to its terms.

(g) If all the children of the settlors die without surviving issue before the trust property has been distributed as provided in this paragraph, the trustee shall distribute any undistributed balance of the trust property outright \_\_\_\_\_ [alternative disposition, e.g., one half to the heirs of the deceased settlor and one half to the heirs of the surviving settlor or to the California Mountain Lion Awareness League].

[Replaces § 70.202[2], P 5.11]

5.11. Disclaimer Trust. The trustee shall hold, administer, and distribute the assets of the Disclaimer Trust as follows:

(a) The trustee shall pay or distribute to or apply for the benefit of the surviving settlor, for life, in monthly or other convenient installments, but not less often than annually, as much of the net income of the trust, and as much of the principal of the trust, as the trustee, in the trustee's discretion, deems necessary for his or her health, education, support, and maintenance. All decisions of the trustee regarding payments under this subparagraph, if any, are within the trustee's discretion and shall be final and incontestable by anyone. The trustee shall accumulate and add to principal any net income not distributed.

(b) On the death of the surviving settlor, the trustee shall hold, administer, and distribute the trust for the benefit of the children of the settlors and the surviving issue of any deceased children of the settlors in accordance with Paragraph 5.10 of this instrument applicable to the Sprinkling Trust for Children and Issue. If the children of the settlors and the surviving issue of any deceased children of the settlors all predecease the surviving settlor, the trustee shall distribute any undistributed balance of the trust property outright \_\_\_\_\_ [alternative disposition, e.g., one half to the heirs of the deceased settlor and one half to the heirs of the surviving settlor or to the California Mountain Lion Awareness League].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsCreationEstate, Gift & Trust LawTrustsRevocable Living Trusts



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DIVISION IV: WILLS AND TRUSTS  
CHAPTER 70 COMPLETE REVOCABLE TRUST FORMS  
PART IV. FORMS  
B. Alternative Sets of Trust Distribution Provisions

*26-70 California Legal Forms--Transaction Guide § 70.213*

**AUTHOR:** Reviewed by Albert G. Handelman

**§ 70.213 Trust Created by One Settlor--"Family Pot" Trust With Sprinkling Provisions on Death of Settlor's Surviving Spouse**

**[1] Comment--Use of Form**

This form contains a set of trust distribution provisions creating a so-called "family pot" trust on the death of a sole settlor's surviving spouse (or, if the spouse does not survive, on the death of the settlor). It is designed to modify the terms of the *form in Section 70.203[2]*, a one-settlor marital deduction trust, by replacing Paragraphs 5.07, 5.10, 5.11, and 5.12 of that form. It assumes that the trust will follow the standard 2-trust arrangement consisting of a marital deduction trust and a bypass trust. It also assumes that a disclaimer trust is being used.

The *form in Section 70.203[2]*, the one-settlor marital deduction trust in this publication, provides that on the death of the settlor's surviving spouse, or on the settlor's death if the settlor's spouse predeceases the settlor, the trust will be divided into separate trusts or shares for the settlor's children and issue. The provisions in this form convert the separate share arrangement into a "family pot" arrangement instead. The other distribution arrangements, such as the terms of the marital deduction trust and distributions from the bypass and disclaimer trusts during the lifetime of the settlor's surviving spouse, are unaffected.

For discussion of the use of "family pot" trusts and "sprinkling" provisions, see *Section 70.210[1][b], [d]-[f]*. Otherwise, the general commentary in *Section 70.203* regarding the use of that form remains applicable to that form as modified by these provisions.

When these provisions are used, all incidental references to the affected sections, as well as any references to the beneficiaries, should also be checked and conformed if necessary.

**[2] FORM**

**Trust Created by One Settlor--"Family Pot" Trust With Sprinkling Provisions on Death of Settlor's**

**Surviving Spouse**

[Replaces § 70.203[2], P 5.07]

5.07. Disposition of Trust Estate if Settlor Is Not Survived by \_\_\_\_\_ [Wife or Husband]. If the settlor is not survived by \_\_\_\_\_ [his wife or her husband], on the death of the settlor the trustee shall hold, administer, and distribute the trust as a single trust for the benefit of the children of the settlor and the surviving issue of any deceased children of the settlor in accordance with Paragraph 5.11 of this instrument applicable to the Sprinkling Trust for Children and Issue. If the children of the settlor all predecease the settlor without leaving issue who survive the settlor, the trustee shall distribute any undistributed balance of the trust property outright to \_\_\_\_\_ [alternative disposition, e.g., the heirs of the settlor or the California Mountain Lion Awareness League].

[Replaces § 70.203[2], P 5.10]

5.10. Bypass Trust. The trustee shall hold, administer, and distribute the assets of the Bypass Trust as follows:

(a) The trustee shall pay or distribute to or apply for the benefit of the settlor's \_\_\_\_\_ [husband or wife] during \_\_\_\_\_ [his or her] lifetime, and the settlor's children during the lifetime of the settlor's \_\_\_\_\_ [husband or wife], in monthly or other convenient installments, but not less often than annually, as much of the net income of the trust, and as much of the principal of the trust, as the trustee, in the trustee's discretion, deems necessary for the \_\_\_\_\_ [to specify an "ascertainable standard": health, education, support, and maintenance or specify some other standard, e.g., comfort, welfare, and happiness] of each of them. In making these payments, the trustee may pay, distribute, or apply more to or for some beneficiaries than others, and may make payments or distributions to or for one or more beneficiaries to the exclusion of others. The trustee shall accumulate and add to principal any net income not distributed. Notwithstanding any other provision of this instrument, the trustee shall not make discretionary payments of principal from the Bypass Trust to the settlor's \_\_\_\_\_ [husband or wife] unless the principal of the QTIP Trust has been exhausted.

(b) In addition to any other payments and distributions that the settlor's \_\_\_\_\_ [husband or wife] may receive under this instrument, the trustee shall distribute to the settlor's \_\_\_\_\_ [husband or wife], during \_\_\_\_\_ [his or her] lifetime, such amounts from the principal of the trust estate as \_\_\_\_\_ [he or she] may from time to time request of the trustee in writing, not to exceed in any calendar year the greater of \$5,000 or five percent of the value of the principal of the trust, determined as of the end of the calendar year. This right of withdrawal is not cumulative, so that if the settlor's \_\_\_\_\_ [husband or wife] does not withdraw the full amount that \_\_\_\_\_ [he or she] is entitled to withdraw under this provision in any calendar year, the right to withdraw the amount not withdrawn shall lapse at the end of the calendar year. This power shall exist each year until the death of the settlor's \_\_\_\_\_ [husband or wife].

**PRACTICE TIP**

The "five or five" power above is included primarily for illustrative purposes, to provide a model for drafting such a provision when it is appropriate to include one. In the majority of cases, it may be better practice to eliminate this "5 or 5 power" from the Bypass Trust. The Bypass Trust is ordinarily intended to grow as much as possible, in order to allow the maximum amount possible to pass tax-free on the death of the settlor's spouse. Frequent exercise of this power by the surviving spouse will undercut this tax planning. Additionally, since the settlor's children are permissible sprinkling beneficiaries of this trust, the inclusion of such a power may be contrary to the settlor's basic dispositive intentions in many cases, since it allows the surviving spouse to deplete the Bypass Trust to the detriment of the settlor's

children. Indeed, when the settlor's children are named as beneficiaries of the Bypass Trust, it is not uncommon for the surviving spouse not to be included as a beneficiary of the Bypass Trust at all. The latter situation most commonly occurs when the settlor or the settlor's spouse is quite wealthy and other assets will provide more than sufficient income for the surviving spouse. *Commentary by Albert G. Handelman.*

(c) On the death of the settlor's \_\_\_\_\_ [husband *or* wife], the trustee shall hold, administer, and distribute the trust for the benefit of the children of the settlor and the surviving issue of any deceased children of the settlor in accordance with Paragraph 5.11 of this instrument applicable to the Sprinkling Trust for Children and Issue. If the children of the settlor and the surviving issue of any deceased children of the settlor all predecease the settlor's \_\_\_\_\_ [husband *or* wife], the trustee shall distribute any undistributed balance of the trust property outright to \_\_\_\_\_ [alternative disposition, e.g., the heirs of the settlor *or* the California Mountain Lion Awareness League].

[Replaces § 70.203[2], P 5.11]

5.11. Sprinkling Trust for Children and Issue. The trustee shall hold, administer, and distribute the assets of the Sprinkling Trust as follows:

(a) The trustee shall pay to or apply for the benefit of any one or more of the children of the settlor and the surviving issue of any deceased children of the settlor, until the youngest then-living child of the settlor reaches the age of \_\_\_\_\_ [e.g., 30] years, in monthly or other convenient installments, but not less often than annually, as much of the net income of the trust as the trustee, in the trustee's discretion, deems necessary for the \_\_\_\_\_ [to specify an "ascertainable standard": health, education, support, and maintenance *or* specify some other standard, e.g., comfort, welfare, and happiness] of each of them. In making these payments, the trustee may pay to or apply more for some beneficiaries than for others, and may make payments to or for one or more beneficiaries to the exclusion of others. All decisions of the trustee regarding payments under this subparagraph, if any, are within the trustee's discretion and shall be final and incontestable by anyone. The trustee shall accumulate and add to principal any net income not distributed.

(b) The trustee shall distribute to or apply for the benefit of any one or more of the children of the settlor and the surviving issue of any deceased children of the settlor, until the youngest then-living child of the settlor reaches the age of \_\_\_\_\_ [e.g., 30] years, as much of the principal of the trust as the trustee, in the trustee's discretion, deems necessary, when added to the income payments from this trust, for the \_\_\_\_\_ [to specify an "ascertainable standard": health, education, support, and maintenance *or* specify some other standard, e.g., comfort, welfare, and happiness] of each of them. In making these distributions, the trustee may distribute or apply more to some beneficiaries than to others, and may make distributions to or for one or more beneficiaries to the exclusion of others. [No amount paid out or applied under this subparagraph (b) need thereafter be repaid to the trustee or restored to the trust *or* The trustee \_\_\_\_\_ (shall *or* may, in the trustee's discretion,) deduct any amount so distributed to any beneficiary, valued on the date that the distribution is made, without interest, from the amounts distributed to that beneficiary under (d), below.] All decisions of the trustee regarding distributions under this subparagraph, if any, shall be final and incontestable by anyone.

[Optional provision for early distribution of principal; may be omitted if desired:]

(c) The trustee, in the trustee's discretion, may at any time or times prior to the time specified in this instrument for distribution of the trust property, make an early distribution of principal to any \_\_\_\_\_ [child of the settlor *or* beneficiary] if, in the trustee's opinion, there is a valid reason for making the distribution [and if the remaining

principal and income will be adequate for the reasonable health, education, support, and maintenance of all of the beneficiaries]. The trustee shall deduct the early distribution, valued on the date that the distribution is made, without interest, from the share ultimately distributed to the \_\_\_\_\_ [child or beneficiary] or his or her issue. Early distributions to any [child or beneficiary] shall not exceed, in the aggregate, [if amount of distributions is to be limited to a specified fraction or percentage of the beneficiary's distributive share of the trust, add: \_\_\_\_\_ (fraction or percentage, e.g., 50 percent or one third) of] that portion of the trust that would be distributable to that particular \_\_\_\_\_ [child or beneficiary], after offsetting any prior early distributions and any loans or advances not repaid to the trustee, if the trust were to be terminated and its assets distributed on the date that the early distribution is made. The trustee, upon making any distribution in accordance with this subparagraph, shall give the beneficiary receiving the distribution written notice identifying the distribution as "an early distribution under Paragraph 5.05(c)."

[Continue with the following:]

(d) When there is no living child of the settlor under the age of \_\_\_\_\_ [e.g., 30] years, the trustee shall distribute to the children of the settlor then living, in equal shares, the balance of the trust property. If no child of the settlor survives to the age of \_\_\_\_\_ [e.g., 30] years, but there are surviving issue of one or more children of the settlor on the death of the last child of the settlor, then on the death of the last surviving child of the settlor to die, the remaining trust estate shall be divided among the issue as provided in (e), below.

(e) If any of the children of the settlor are deceased at the time of the distribution provided for in (d), above, and leave issue surviving, the share that would have been taken by that child if he or she had survived shall be divided among his or her issue \_\_\_\_\_ [in the manner provided in California Probate Code Section \_\_\_\_\_ (specify either 240 or 246 or 247) or in equal shares, regardless of whether or not all such issue are members of the same generation]. The share of each issue who has attained the age of \_\_\_\_\_ [e.g., 30 years] shall be distributed outright to that issue. The share of any issue who has not attained the age of \_\_\_\_\_ [e.g., 30] years shall be held, administered, and distributed as provided in (f), below.

(f) The share of any issue who is under the age specified for outright distribution at the time of any distribution made pursuant to (d), above, shall be retained in trust for that issue until he or she attains the age of \_\_\_\_\_ [e.g., 30] years. Until that issue reaches the age of \_\_\_\_\_ [e.g., 30] years, the trustee shall pay or distribute to or apply for the benefit of that issue as much of the income and principal of that issue's share of the trust as the trustee, in the trustee's discretion, deems necessary for the \_\_\_\_\_ [to specify an "ascertainable standard": health, education, support, and maintenance or specify some other standard, e.g., comfort, welfare, and happiness] of that issue. When that issue reaches the age of \_\_\_\_\_ [e.g., 30] years, the trustee shall distribute the property outright to that issue. If that issue dies before reaching the age of \_\_\_\_\_ [e.g., 30] years, the trustee shall distribute the share of that issue outright among the issue of that issue (or, if there are none, among the issue of the nearest ancestor of that issue who is also an issue of the settlor and who has issue then surviving, or, if there are no such issue, among the heirs of the settlor), \_\_\_\_\_ [in the manner provided in California Probate Code Section \_\_\_\_\_ (specify either 240 or 246 or 247) or in equal shares, regardless of whether or not all such issue are members of the same generation]; provided that if any part of the share of that issue would otherwise be distributed to a person for whose benefit a trust or share is being administered under this instrument, that part shall instead be added to that trust or share and thereafter shall be administered according to its terms.

(g) If all the children of the settlor die without surviving issue before the trust property has been distributed as provided in this paragraph, the trustee shall distribute any undistributed balance of the trust property outright to \_\_\_\_\_ [alternative disposition, e.g., the heirs of the settlor or the California Mountain Lion Awareness

League].

[Replaces § 70.203[2], P 5.12]

5.12. Disclaimer Trust. The trustee shall hold, administer, and distribute the assets of the Disclaimer Trust as follows:

(a) The trustee shall pay or distribute to or apply for the benefit of the settlor's \_\_\_\_\_ [husband *or* wife], for life, in monthly or other convenient installments, but not less often than annually, as much of the net income of the trust, and as much of the principal of the trust, as the trustee, in the trustee's discretion, deems necessary for \_\_\_\_\_ [his *or* her] \_\_\_\_\_ [to specify an "ascertainable standard": health, education, support, and maintenance *or* specify some other standard, e.g., comfort, welfare, and happiness]. All decisions of the trustee regarding payments under this subparagraph, if any, are within the trustee's discretion and shall be final and incontestable by anyone. The trustee shall accumulate and add to principal any net income not distributed.

(b) On the death of the settlor's \_\_\_\_\_ [husband *or* wife], the trustee shall hold, administer, and distribute the trust for the benefit of the children of the settlor and the surviving issue of any deceased children of the settlor in accordance with Paragraph 5.11 of this instrument applicable to the Sprinkling Trust for Children and Issue. If the children of the settlor and the surviving issue of any deceased children of the settlor all predecease the settlor's \_\_\_\_\_ [husband *or* wife], the trustee shall distribute any undistributed balance of the trust property outright to \_\_\_\_\_ [alternative disposition, e.g., the heirs of the settlor *or* the California Mountain Lion Awareness League].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

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B. Alternative Sets of Trust Distribution Provisions

*26-70 California Legal Forms--Transaction Guide §§ 70.214-70.219*

**AUTHOR:** Reviewed by Albert G. Handelman

**[Reserved]**

§§ 70.214[Reserved]



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 1. Introductory Provisions

*26-70 California Legal Forms--Transaction Guide § 70.220*

**AUTHOR:** Reviewed by Albert G. Handelman

**§ 70.220 Introductory Provision for Trust Agreement**

**[1] Comment**

**[a] Use of Form**

This form is an introductory provision for a trust agreement. When used, it will form the first paragraph of the trust instrument.

**[b] Comparison Between Declaration of Trust and Trust Agreement**

An inter vivos trust instrument may take the form of either a declaration of trust or a trust agreement. A declaration of trust is a one-party instrument in which the trustee unilaterally declares that the trustee is holding property as trustee under terms of the instrument. A trust agreement is a two-party instrument under which the settlor transfers property to the trustee and the trustee agrees to hold the property in trust under terms of the agreement. Either a declaration of trust or a trust agreement is legally sufficient to create an inter vivos trust, and either may be used when there are one or more settlors or one or more trustees. For introductory provisions for declarations of trust, see §§ 70.200[2], Paragraph 1.01, 70.201[2], Paragraph 1.01, 70.202[2], Paragraph 1.01, 70.203[2], Paragraph 1.01.

**[c] Signature Requirements**

A trust agreement must be signed by both the settlor and the trustee, while a declaration can be signed only by the trustee. In practice, however, this difference is largely illusory. It is common practice for the settlor as well as the trustee to sign a declaration of trust, in order to indicate that the settlor approves the terms of the declaration. When the settlor is also the trustee, only the settlor is required to sign a trust agreement, although the signature must be in the settlor's dual capacities as both settlor and trustee. For signature blocks for a trust agreement, see § 70.290[2].

**[d] Advantages and Disadvantages**

Either a trust agreement or a declaration of trust, when properly drafted, will create a valid trust. Prior to 1993, the choice was largely a matter of individual preference. Attorneys who preferred the trust agreement format often did so on the ground that when a client is to act both as trustee and settlor, the agreement format requires the client to sign in both capacities and thus emphasizes for the client the distinction between the two roles. As discussed in § 70.11[3][b], however, the 1993 case of *Estate of Heggstad* [ *Estate of Heggstad (1993) 16 Cal. App. 4th 943, 20 Cal. Rptr. 2d 433*] has prompted many estate planners who preferred trust agreements to re-evaluate their preference.

In *Heggstad*, the court of appeal held that a parcel of real property that was described as a trust asset in a schedule attached to a trust declaration was trust property *even though it was never formally conveyed to the trust*. The court specifically referred to language in *Prob. Code § 15200(a)* that permits a trust to be created by a "declaration by the owner of property that the owner holds the property as trustee" [ *Estate of Heggstad (1993) 16 Cal. App. 4th 943, 947-951, 20 Cal. Rptr. 2d 433* ; see *Estate of Powell (2000) 83 Cal. App. 4th 1434, 1441, 100 Cal. Rptr. 2d 501* ] . The court did not speculate on whether the result would have been the same if the trust in question had been created by a trust agreement rather than a declaration, but since the result under a declaration is clear, many California estate planners now recommend that revocable trusts be created by declarations rather than trust agreements. They do so in the belief that a trust declaration may provide a measure of additional protection for both the settlor and the attorney in case, for any reason, an item that was intended to be trust property never actually gets formally conveyed to the trust.

**[2] FORM****Introductory Provision for Trust Agreement**

1.01. Parties. This trust agreement is made by \_\_\_\_\_ [*identify settlor(s), e.g., John Q. Smith of Anytown, California or John Q. Smith and Mary L. Smith, husband and wife, of Anytown, California*] (the "settlor[s]"), as settlor[s], and \_\_\_\_\_ [*identify trustee(s), e.g., First National Bank of Anytown or John Q. Smith of Anytown, California or John Q. Smith and Mary L. Smith, husband and wife, of Anytown, California*] (the "trustee[s]"), as trustee[s]. The settlor[s] hereby transfer[s] and assign[s] to the trustee[s] certain property (the "trust estate"), in trust, to be held, administered, and distributed as provided in this instrument.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

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*26-70 California Legal Forms--Transaction Guide §§ 70.221-70.229*

**AUTHOR:** Reviewed by Albert G. Handelman

**[Reserved]**

§§ 70.221[Reserved]



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2. Trust Estate

*26-70 California Legal Forms--Transaction Guide § 70.230*

**AUTHOR:** Reviewed by Albert G. Handelman

**§ 70.230 Additions by Settlor(s) Only**

**[1] Comment**

**[a] Use of Form**

This form is a trust provision that may be used to limit the right to add property to an inter vivos trust to the settlor or settlors of that trust. When used, this provision will be included in Article 2 of the trust instrument in the complete trusts in this chapter.

**[b] Limiting Right to Settlers**

Most revocable inter vivos trusts, including the complete forms in this chapter, permit the trustee of a revocable inter vivos trust to accept additions to the trust from any source. Sometimes, however, the settlor(s) may wish to limit the right to add property to a revocable trust to the settlor or settlors themselves. This provision will give effect to that intention.

**PRACTICE TIP**

It is unusual to find such a provision in a revocable trust. In irrevocable trusts, such provisions are more common, at least to the extent that they prohibit contributions from beneficiaries of the trust. In those cases, the intent may be to protect the beneficiaries from adverse income and estate tax consequences.

*Commentary by Albert G. Handelman.*

**[2] FORM**

**Additions by Settlor(s) Only**

2.02. Additions to Trust. From time to time, the Trustee may accept additions to the trust, but only from the settlor[s] [*optional*: or a duly authorized agent or agents of (either *or* both of) the settlor(s)]. All such additions shall become a part of the trust estate and shall be held, administered, and distributed in accordance with the terms of this instrument.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

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*26-70 California Legal Forms--Transaction Guide § 70.231*

**AUTHOR:** Reviewed by Albert G. Handelman

**§ 70.231 Additions to Trust Prohibited**

**[1] Comment**

**[a] Use of Form**

This form is a trust provision that may be used to prohibit additional property from being added to the trust estate. When used, this provision will be included in Article 2 of the trust instrument in the complete trusts in this chapter.

**[b] Additions to Trust**

Trust instruments typically include provisions specifying whether the trustee is authorized to accept additions to the trust and, if so, from what source. In most cases, it is desirable to permit the trustee to accept additions to the trust, either from the settlor or settlors or from any source or sources without restriction [*see § 70.12[4][c]*]. In rare cases, the settlor may wish to prohibit additions. This form may be used to record those wishes.

**PRACTICE TIP**

Provisions such as this one are extremely rare. Outside of charitable remainder annuity trusts [*see Ch. 74, Split-Interest Charitable Trusts* ], where similar provisions are mandatory, one will rarely encounter such a provision. *Commentary by Albert G. Handelman.*

**[2] FORM**

**Additions to Trust Prohibited**

2.02. Additions to Trust Prohibited. The Trustee shall not accept any additions to the trust.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

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*26-70 California Legal Forms--Transaction Guide §§ 70.232-70.239*

**AUTHOR:** Reviewed by Albert G. Handelman

**[Reserved]**

§§ 70.232[Reserved]



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3. Rights and Powers of Settlor(s)

*26-70 California Legal Forms--Transaction Guide § 70.240*

**AUTHOR:** Reviewed by Albert G. Handelman

**§ 70.240 Power of Revocation Is Personal to Settlor(s)**

**[1] Comment**

**[a] Use of Form**

This form is a trust provision stating that the right to revoke the trust is personal to the settlor (or settlors) and may not be exercised by any other person. When used, this provision will be included in Article 3 of the trust instrument in the complete trusts in this chapter.

**[b] Exercise of Settlor's Powers by Others**

Revocable inter vivos trust instruments frequently authorize designated third parties to exercise the settlor's rights for the settlor in the event that the settlor is unable to exercise those rights personally. When the settlor's estate plan includes a durable power of attorney for property management, the power to exercise the settlor's rights in the event of disability is frequently conferred on the attorney in fact named in the durable power of attorney; or, if there is no attorney in fact, on a conservator, after obtaining a court order [*see § 70.12[5][h]*]. Giving the attorney in fact this general authority to act on behalf of a disabled settlor may help to maintain the revocability of the trust while the settlor is disabled, and thereby avoid the trouble and expense of conservatorship proceedings [*see § 70.12[5][h]*].

**[c] Limitation of Authority to Revoke Trust**

Some settlors, while wanting to provide for exercise of their rights as described in [b], above, may be reluctant to grant authority to revoke the trust to anyone else, even an attorney in fact chosen by the settlor. If this is the case, the settlor may grant the attorney in fact authority to exercise all of the rights and powers that the settlor could personally exercise under the trust instrument, except the power to amend, revoke, or terminate the trust [*see §§ 70.200[2]*, P 3.04 (optional language), *70.201[2]*, P 3.09 (optional language), *70.202[2]*, P 3.09 (optional language), *70.203[2]*, P 3.04 (optional

language)]. A settlor who wants to make an even stronger statement on the issue of revocation by third parties may explicitly state that the right to revoke the trust is personal to the settlor and may not be exercised by any other person or persons in the settlor's behalf. This form may be used for that purpose.

Use of this form is not strictly necessary, since the general rule is that a trust may not be modified or revoked by an attorney in fact unless it is expressly permitted in the trust instrument [*Prob. Code § 15401(c)*]. However, clarification of the settlor's intentions is always desirable and will serve to apprise the trustee and any attorney in fact of the limitations on their authority.

## [2] FORM

### Power of Revocation Is Personal to Settlor(s)

\_\_\_\_\_ Power of Revocation Personal to Settlor[s]. The power to revoke this trust as set forth in Paragraph \_\_\_\_\_ of this instrument is personal to the settlor [s] and shall not be exercised by any other person or persons on the \_\_\_\_\_ [his *or* her *or* their] behalf.

### Legal Topics:

For related research and practice materials, see the following legal topics:

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*26-70 California Legal Forms--Transaction Guide §§ 70.241-70.249*

**AUTHOR:** Reviewed by Albert G. Handelman

**[Reserved]**

§§ 70.241[Reserved]



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*26-70 California Legal Forms--Transaction Guide § 70.250*

**AUTHOR:** Reviewed by Albert G. Handelman

**§ 70.250 Special Gift From Two-Settlor Trust--Pecuniary Gift on First Death Only if Specified Settlor Dies First**

**[1] Comment**

**[a] Use of Form**

This form may be used in a two-settlor trust to require the trustee to pay a specified sum of money to a named person on the death of the first settlor, but only if a specified settlor is the first settlor to die. When used in the complete trust forms in this chapter, this provision should appear at the beginning of Article 5, "Payments and Distributions After Death of Deceased Settlor." It may be used in addition to, or in place of, Paragraph 5.01 in the *forms in Sections 70.201[2] or 70.202[2]*.

**[b] "Special Gifts" in General**

The term "special gift," as used in this chapter, means a distribution of cash or property that the trustee is required to make out of the trust assets to someone other than the principal income or remainder beneficiaries of the trust. If all (or substantially all) of the settlor's estate is to be disposed of under a trust rather than a will, a special gift will serve many of the same purposes as a pecuniary or specific devise in a will.

A special gift usually will be made on a settlor's death. The beneficiary or beneficiaries usually will be persons or entities whom the settlor wishes to benefit, but who are not the principal beneficiaries of the trust. For example, beneficiaries may be favorite nephews or nieces, specific grandchildren, a class of relatives, friends, charitable institutions [*see §§ 70.251-70.255*], or a combination of these beneficiaries.

**[c] Gifts Dependent on Order of Death of Settlers**

The special gift provisions in the complete two-settlor trusts in this chapter require that a gift be made on the death of

the first settlor, regardless of the order of death of the settlors [*see* §§ 70.201[2], P 5.01, 70.202[2], P 5.01]. In many cases, this kind of arrangement may not reflect the intentions of the settlors. For example, one settlor may want to give a sum to one of his or her relatives on that settlor's death, but not on the death of the other settlor.

This provision, in contrast to the special gift provisions in the complete forms in this chapter, requires the trustee to make the gift only if a designated settlor is the first settlor to die. This form also requires that the gift be made out of the deceased settlor's share of the assets.

#### **[d] Drafting Considerations**

If the settlor wants to name more than one recipient of special gifts, the amount and name should be stated for each recipient, e.g., "... the sum of \$4,000 to Arthur R. White; the sum of \$1,000 to each of the deceased settlor's nieces and nephews, and the sum of \$500 to the San Diego County chapter of the California Cactus and Succulent Society." If more than two or three gifts are being made, it may be clearer if the provision is subdivided and each gift set out in a separate subdivision. An optional survivorship condition may be added if desired.

#### **[2] FORM**

##### **Special Gift From Two-Settlor Trust--Pecuniary Gift on First Death Only if Specified Settlor Dies First**

Special Gift[s]. If \_\_\_\_\_ [*name of settlor*] is the deceased settlor, upon \_\_\_\_\_ [*his or her*] death the trustee shall distribute \_\_\_\_\_ [*for each beneficiary, give the following information: the sum of \$ \_\_\_\_\_ to \_\_\_\_\_ (name, e.g., Arthur R. White or class description, e.g., each of the deceased settlor's then-living grandchildren). [If gift is conditioned on survival, add appropriate alternative disposition, e.g., If \_\_\_\_\_ (name of beneficiary, e.g., Arthur R. White or a donee) does not survive the deceased settlor (add if desired: for \_\_\_\_\_ [e.g., 60] days), \_\_\_\_\_ (this gift or the gift to that donee) shall \_\_\_\_\_ (e.g., lapse or be distributed to William T. White).]* \_\_\_\_\_ [*This gift or These gifts*] may be satisfied only out of the deceased settlor's one-half interest in the settlors' community property, the deceased settlor's interest in \_\_\_\_\_ [*his or her*] quasi- community property, or the deceased settlor's separate property.

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:  
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*26-70 California Legal Forms--Transaction Guide § 70.251*

**AUTHOR:** Reviewed by Albert G. Handelman

**§ 70.251 Special Gift From One-Settlor Trust--Pecuniary Gift to Charity on Settlor's Death**

**[1] Comment--Use of Form**

This form may be used in a one-settlor trust to require the trustee to pay a specified sum of money to one or more charitable institutions on the death of the settlor. When used in the complete trust forms in this chapter, this provision should appear at the beginning of Article 5, "Payments and Distributions After Death of Deceased Settlor." It may be used in addition to, or in place of, Paragraph 5.01 in the *forms in Sections 70.200[2] or 70.203[2]*. It includes language for an alternate disposition in the event that the initial devisee is unable to accept the contribution for any reason, or no longer qualifies as a charitable organization for federal estate tax purposes.

Before drafting any provision making a charitable gift, the attorney should determine the charity's correct legal name and verify that it is qualified to receive charitable devises under the Internal Revenue Code. For discussion, see Chapter 69, *Charitable Dispositions* .

For general discussion of special gifts, see *Section 70.250[1]*; see also *Section 70.200[1][h]*.

**[2] FORM**

**Special Gift From One-Settlor Trust--Pecuniary Gift to Charity on Settlor's Death**

Special Gift[s] to Charity. *[If trust instrument includes formula marital deduction clause, insert:* Regardless of whether the settlor is survived by \_\_\_\_\_ (his wife or her husband),] [O]n the settlor's death, the trustee shall distribute \_\_\_\_\_ *[for each charitable beneficiary, give the following information:* the sum of \$\_\_\_\_\_ to \_\_\_\_\_ *(correct legal name of charity, including any chapter or affiliate designation)]*. If \_\_\_\_\_ *[name of charitable beneficiary]* fails for any reason to take this gift, or if on the date of the settlor's death it is not an organization described in *Internal Revenue Code Section 2055(a)*, this gift shall

\_\_\_\_\_ [lapse *or* go to any similar charitable organization that qualifies under *Internal Revenue Code Section 2055(a)* designated by the trustee *or specify another alternate disposition*].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

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*26-70 California Legal Forms--Transaction Guide § 70.252*

**AUTHOR:** Reviewed by Albert G. Handelman

**§ 70.252 Special Gift From Two-Settlor Trust--Pecuniary Gift to Charity on First Death, Regardless of Order of Death of Settlers**

**[1] Comment--Use of Form**

This form may be used in a two-settlor trust to require the trustee to distribute a specified sum of money to one or more charitable institutions on the death of the first settlor to die, regardless of the order of death of the settlors. When used in the complete trust forms in this chapter, this provision should appear at the beginning of Article 5, "Payments and Distributions After Death of Deceased Settlor." It may be used in addition to, or in place of, Paragraph 5.01 in the *forms in Sections 70.201[2] or 70.202[2]*. It includes language for an alternate disposition in the event that the initial devisee is unable to accept the contribution for any reason, or no longer qualifies as a charitable organization for federal estate tax purposes.

Before drafting any provision making a charitable gift, the attorney should determine the charity's correct legal name and verify that it is qualified to receive charitable devises under the Internal Revenue Code. For discussion, see Chapter 69, *Charitable Dispositions* .

For general discussion of special gifts, see *Section 70.250[1]*; see also *Section 70.200[1][h]*.

**[2] FORM**

**Special Gift From Two-Settlor Trust--Pecuniary Gift to Charity on First Death, Regardless of Order of Death of Settlers**

Special Gift[s] to Charity. Upon the death of the deceased settlor, the trustee shall distribute \_\_\_\_\_ [for each charitable beneficiary, give the following information: the sum of \$\_\_\_\_\_ to \_\_\_\_\_ (correct legal name of charity, including any chapter or affiliate designation)]. If

\_\_\_\_\_ [name of charitable beneficiary] fails for any reason to take this gift, or if on the date of the deceased settlor's death it is not an organization described in *Internal Revenue Code Section 2055(a)*, this gift shall \_\_\_\_\_ [lapse or go to any similar charitable organization that qualifies under *Internal Revenue Code Section 2055(a)* designated by the trustee or specify another alternate disposition]. \_\_\_\_\_ [This gift or These gifts] may be satisfied only out of the deceased settlor's one-half interest in the settlors' community property, the deceased settlor's interest in his or her quasi-community property, or the deceased settlor's separate property.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

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*26-70 California Legal Forms--Transaction Guide § 70.253*

**AUTHOR:** Reviewed by Albert G. Handelman

**§ 70.253 Special Gift From Two-Settlor Trust--Pecuniary Gift to Charity on First Death Only if Specified Settlor Dies First**

**[1] Comment--Use of Form**

This form may be used in a two-settlor trust to require the trustee to pay a specified sum of money to one or more charitable institutions on the death of the first settlor, but only if a specified settlor is the first settlor to die. When used in the complete trust forms in this chapter, this provision should appear at the beginning of Article 5, "Payments and Distributions After Death of Deceased Settlor." It may be used in addition to, or in place of, Paragraph 5.01 in the *forms in Sections 70.201[2] or 70.202[2]*.

This form is essentially identical to the *form in Section 70.250[2]*, except that it is drafted for a charitable disposition rather than one to a named person. For general discussion of special gifts, see *Section 70.250[1]*; see also *Section 70.200[1][h]*.

Before drafting any provision making a charitable gift, the attorney should determine the charity's correct legal name and verify that it is qualified to receive charitable devises under the Internal Revenue Code. For discussion, see Chapter 69, *Charitable Dispositions* .

**[2] FORM**

**Special Gift From Two-Settlor Trust--Pecuniary Gift to Charity on First Death Only if Specified Settlor Dies First**

Special Gift[s] to Charity. If \_\_\_\_\_ [name of settlor] is the deceased settlor, on \_\_\_\_\_ [his or her] death the trustee shall distribute \_\_\_\_\_ [for each charitable beneficiary, give the following information: the sum of \$ \_\_\_\_\_ to \_\_\_\_\_ (correct

*legal name of charity, including any chapter or affiliate designation*). If \_\_\_\_\_ [*name of charitable beneficiary*] fails for any reason to take this gift, or if on the date of \_\_\_\_\_ [*name of settlor*]'s death it is not an organization described in *Internal Revenue Code Section 2055(a)*, this gift shall \_\_\_\_\_ [*lapse or go to any similar charitable organization that qualifies under Internal Revenue Code Section 2055(a) designated by the trustee or specify another alternate disposition*]. \_\_\_\_\_ [*This gift or These gifts*] may be satisfied only out of the deceased settlor's one-half interest in the settlors' community property, the deceased settlor's interest in \_\_\_\_\_ [*his or her*] quasi-community property, or the deceased settlor's separate property.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

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*26-70 California Legal Forms--Transaction Guide § 70.254*

**AUTHOR:** Reviewed by Albert G. Handelman

**§ 70.254 Special Gift From One-Settlor Trust--Gifts of Tangible Personal Property on Settlor's Death**

**[1] Comment**

**[a] Use of Form**

This form may be used in a one-settlor trust to require the trustee to distribute one or more items of tangible personal property to a designated beneficiary on the settlor's death. When used in the complete trust forms in this chapter, this provision should appear at the beginning of Article 5, "Payments and Distributions After Death of Deceased Settlor." It may be used in addition to, or in place of, Paragraph 5.01 in the *forms in Sections 70.200[2] or 70.203[2]*.

For general discussion of special gifts, see *Section 70.250[1]*; see also *Section 70.200[1][h]*.

**[b] Gifts of Tangible Personal Property From Revocable Trust**

Most estate planners recommend against holding ordinary tangible personal property in trust because it is harder to manage and keep track of than intangibles such as securities, bank accounts, and real property. Instead, they advise clients to make specific gifts of such property by will. However, it is still a common practice for clients to transfer everything to their revocable trust and then make gifts from the trust that are analogous to specific gifts under a will. This practice makes more sense when the assets in question are valuable and probate avoidance is the client's primary consideration.

A danger in making this type of gift is that the asset in question will never be transferred to the trust, or that disputes may arise in the absence of clear documentation. When the client wants to transfer tangible personal property to a revocable trust, it is essential that the transfer be documented in writing.

**[c] Disposition of Property Prior to Time of Gift**

This type of provision must specify what will happen if the property in question is not in the trust at the time of the settlor's death. This alternative gives the drafter a choice of specifying either that (1) the gift will simply lapse in that situation; or (2) a cash gift will be made in the alternative.

## [2] FORM

### Special Gift From One-Settlor Trust--Gifts of Tangible Personal Property on Settlor's Death

Special Gifts of Personal Property. *[If trust instrument includes formula marital deduction clause, insert: Regardless of whether the settlor is survived by \_\_\_\_\_ (his wife or her husband),] [O]n the settlor's death, the trustee shall make the following distributions:*

(a) \_\_\_\_\_ *[describe property, e.g., The fourteen-karat gold dinner ring listed in Schedule A, together with the trust's interest in any insurance on that ring,]* to \_\_\_\_\_ *[name of beneficiary and relationship to settlor or other means of identification, e.g., the settlor's sister, Ellen S. Jones],* if \_\_\_\_\_ *[he or she]* survives the settlor, and if \_\_\_\_\_ *[he or she]* does not survive the settlor, this gift shall *[specify alternate recipients if desired, e.g., instead be made to the settlor's other sister, Ruby Jones, if she survives the settlor, and if she does not survive the settlor, this gift shall (continue as necessary)]* lapse. If this property is not in the trust on the date of the settlor's death, \_\_\_\_\_ *[this gift shall lapse or the trustee shall distribute \_\_\_\_\_ (specify sum of money, e.g., \$3,000 or describe alternate item(s) of personal property) to the recipient in lieu of this gift].*

(b) \_\_\_\_\_ *[describe property, e.g., The sterling silver flatware service listed in Schedule A, together with the trust's interest in any insurance on the same,]* to \_\_\_\_\_ *[name of beneficiary and relationship to settlor or other means of identification, e.g., the settlor's niece, Clementine Jones],* if \_\_\_\_\_ *[he or she]* survives the settlor, and if \_\_\_\_\_ *[he or she]* does not survive the settlor, this gift shall *[specify alternate recipients if desired, e.g., instead be made to the settlor's cousin, Derrick Crane, if he survives the settlor, and if he does not survive the settlor, this gift shall (continue as necessary)]* lapse. If this property is not in the trust on the date of the settlor's death, \_\_\_\_\_ *[this gift shall lapse or the trustee shall distribute \_\_\_\_\_ (specify sum of money, e.g., \$3,000 or describe alternate item(s) of personal property) to the recipient in lieu of this gift].*

*[Continue as necessary for each additional special gift of property.]*

### Legal Topics:

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsGeneral OverviewEstate, Gift & Trust LawTrustsRevocable Living Trusts



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*26-70 California Legal Forms--Transaction Guide § 70.255*

**AUTHOR:** Reviewed by Albert G. Handelman

**§ 70.255 Special Gift From Two-Settlor Trust--Gifts of Tangible Personal Property on First Death Only if Specified Settlor Dies First**

**[1] Comment**

**[a] Use of Form**

This form may be used in a two-settlor trust to require the trustee to distribute one or more items of tangible personal property to a designated beneficiary on the first settlor's death, but only if a specified settlor is the first settlor to die. When used in the complete trust forms in this chapter, this provision should appear at the beginning of Article 5, "Payments and Distributions After Death of Deceased Settlor." It may be used in addition to, or in place of, Paragraph 5.01 in the *forms in Sections 70.201[2] or 70.202[2]*.

For general discussion of special gifts, see *Section 70.250[1]*; see also *Section 70.200[1][h]*. For discussion of special gifts of personal property, see *Section 70.254[1][b]*.

**[b] Contingency Relating to Order of Settlor's Deaths**

Since this type of provision is normally used to dispose of items of personal property associated with a particular settlor, it is assumed that this type of gift will almost always be contingent on a particular settlor being the first settlor to die. In order to ensure that the disposition works as planned, the tangible personal property should be described in "Schedule A" as the separate (or quasi-community) property of the settlor on whose death the gift is to be made. If the property in question is community property, a transmutation must be made to make the gift work as planned.

**[2] FORM**

**Special Gift From Two-Settlor Trust--Gifts of Tangible Personal Property on First Death Only if Specified**

**Settlor Dies First**

Special Gifts of Personal Property. If \_\_\_\_\_ [name of settlor] is the deceased settlor, on the deceased settlor's death the trustee shall distribute each of the following items of property to the persons named below:

(a) \_\_\_\_\_ [describe property, e.g., the fourteen-karat gold dinner ring listed in Schedule A, together with the trust's interest in any insurance on that ring,] to \_\_\_\_\_ [name of beneficiary and relationship to settlor or other means of identification, e.g., the deceased settlor's sister, Ellen S. Jones], if \_\_\_\_\_ [he or she] survives the deceased settlor, and if \_\_\_\_\_ [he or she] does not survive the deceased settlor, this gift shall [specify alternate recipients if desired, e.g., instead be made to the deceased settlor's other sister, Ruby Jones, if she survives the deceased settlor, and if she does not survive the deceased settlor, this gift shall (continue as necessary)] lapse. If this property is not in the trust on the date of the deceased settlor's death, \_\_\_\_\_ [this gift shall lapse or the trustee shall distribute \_\_\_\_\_ (specify sum of money, e.g., \$3,000 or describe alternate item(s) of personal property) to the recipient in lieu of this gift].

(b) \_\_\_\_\_ [describe property, e.g., the sterling silver flatware service listed in Schedule A, together with the trust's interest in any insurance on the same,] to \_\_\_\_\_ [name of beneficiary and relationship to settlor or other means of identification, e.g., the deceased settlor's niece, Clementine Jones], if \_\_\_\_\_ [he or she] survives the deceased settlor, and if \_\_\_\_\_ [he or she] does not survive the deceased settlor, this gift shall [specify alternate recipients if desired, e.g., instead be made to the deceased settlor's cousin, Derrick Crane, if he survives the deceased settlor, and if he does not survive the deceased settlor, this gift shall (continue as necessary)] lapse. If this property is not in the trust on the date of the deceased settlor's death, \_\_\_\_\_ [this gift shall lapse or the trustee shall distribute \$ \_\_\_\_\_ (specify sum of money, e.g., \$3,000 or describe alternate item(s) of personal property) to the recipient in lieu of this gift].

[Continue as necessary for each additional special gift of property.]

[(c)] These gifts may be satisfied only out of the deceased settlor's separate or quasi-community property.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsGeneral OverviewEstate, Gift & Trust LawTrustsRevocable Living Trusts



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*26-70 California Legal Forms--Transaction Guide §§ 70.256-70.279*

**AUTHOR:** Reviewed by Albert G. Handelman

**[Reserved]**

§§ 70.256[Reserved]



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*26-70 California Legal Forms--Transaction Guide § 70.280*

**AUTHOR:** Reviewed by Albert G. Handelman

**§ 70.280 Simultaneous Death Clause Reversing Statutory Presumption--One-Settlor Trust**

**[1] Comment**

**[a] Use of Form**

This form is a simultaneous death clause reversing the statutory presumption that a person to whom property is to be distributed on the death of another person will be presumed to have died before that other person [*see Prob. Code § 220 and § 70.12[8][c]*]. When used in the complete trust forms in this chapter, this form will be included in the article of the trust instrument titled "Concluding Provisions."

This form is designed for a trust created by one settlor. For a substantially identical form suitable for a trust instrument created by two settlors, see *Section 70.281*.

**[b] Statutory Presumption**

*Probate Code Section 220* prescribes a rule for determining how property will be distributed or administered in so-called "simultaneous death" situations. Under that section, if title to or devolution of property depends on determining which of two persons died first, and it cannot be established by clear and convincing evidence which one actually was the first to die, the property of each person will be administered, distributed, or otherwise dealt with as if that person had survived the other. This rule, in effect, establishes a presumption that the person whose property is to be distributed survived the person to whom the property is to be distributed. It avoids double administration and taxation of property in the estates of persons who derive no actual benefit from or use of the property.

**[c] Reversing Statutory Presumption**

Under some circumstances, it may be advantageous to reverse the statutory presumption and treat the property of one of

the persons as if that person had died first, so that the property will pass through the estate of the other decedent before it is distributed to the ultimate beneficiaries. This kind of treatment can be desirable when one of the spouses has a substantially larger estate than the other and the two estates can be "equalized" for estate tax purposes by distributing some of all of the estate of the spouse with the larger estate to the spouse with the smaller estate. For a more detailed discussion of the circumstances under which it can be advantageous to "equalize" estates by "reversing" the presumption established by *Probate Code Section 220*, see *Section 70.12[8][c]*.

## [2] FORM

### Simultaneous Death Clause Reversing Statutory Presumption--One-Settlor Trust

Simultaneous Death. If the settlor and \_\_\_\_\_ [*name or description of beneficiary, e.g., the settlor's spouse or Arthur W. Blue*] die under circumstances in which the order of their deaths cannot be established by clear and convincing evidence, \_\_\_\_\_ [*name or description of beneficiary, e.g., the settlor's spouse or Arthur W. Blue*] shall be deemed to have survived the settlor, and this instrument shall be construed accordingly.

#### Legal Topics:

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsCreationEstate, Gift & Trust LawTrustsInterpretationEstate, Gift & Trust LawTrustsRevocable Living Trusts



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*26-70 California Legal Forms--Transaction Guide § 70.281*

**AUTHOR:** Reviewed by Albert G. Handelman

**§ 70.281 Simultaneous Death Clause Reversing Statutory Presumption--Two-Settlor Trust**

**[1] Comment--Use of Form**

This form is a simultaneous death clause reversing the statutory presumption that a person to whom property is to be distributed on the death of another person will be presumed to have died before the other person [*see Prob. Code § 220 and § 70.12[8][c]*]. When used in the complete trust forms in this chapter, this form will be included in the article of the trust instrument titled "Concluding Provisions."

This form is suitable for use in a trust instrument with two settlors. For a substantially identical form designed for use in a trust instrument with only one settlor, see *Section 70.280[2]*. For comment on the circumstances under which a provision like this one should be used, see *Section 70.280[1]*.

**[2] FORM**

**Simultaneous Death Clause Reversing Statutory Presumption--Two-Settlor Trust**

Simultaneous Death. If the settlors die under circumstances in which the order of their deaths cannot be established by clear and convincing evidence, \_\_\_\_\_ [*name of settlor who will be deemed to have survived, e.g., Alice J. Rose*] shall be deemed to have survived \_\_\_\_\_ [*name of other settlor, e.g., David K. Rose*], and this instrument shall be construed accordingly.

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
 Estate, Gift & Trust LawTrustsCreationEstate, Gift & Trust LawTrustsInterpretationEstate, Gift & Trust LawTrustsRevocable Living Trusts



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*26-70 California Legal Forms--Transaction Guide §§ 70.282-70.289*

**AUTHOR:** Reviewed by Albert G. Handelman

**[Reserved]**

§§ 70.282[Reserved]



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6. Signature and Execution

*26-70 California Legal Forms--Transaction Guide § 70.290*

**AUTHOR:** Reviewed by Albert G. Handelman

**§ 70.290 Signature Block for Trust Agreement**

**[1] Comment**

**[a] Use of Form**

This form is a signature block suitable for use in an inter vivos trust instrument that is drafted as a trust agreement rather than a declaration of trust. It should be used in conjunction with § 70.220[2], which contains the corresponding introductory language for a trust agreement. The complete trust forms in this chapter are drafted as declarations of trust rather than trust agreements. For discussion of the differences between a declaration of trust and a trust agreement, and the reasons why declarations of trust may be preferable under current law, see § 70.220[1]; see also § 70.11[3].

**[b] Execution**

The minimum requirements for execution of an inter vivos trust are much less formal than those applicable to wills. There are no complex witness or signature requirements. Ordinarily the signature of the parties is all that is required.

When the settlors are also trustees, drafting practices with respect to the signatures of the parties vary. Some attorneys have the settlor(s) sign twice, once as settlor(s) and a second time as trustee(s). The rationale for this approach is that it emphasizes to the client the legal distinction between these two roles. Other attorneys prefer to have the settlor-trustee(s) sign only once, feeling that the duplicated signature is redundant. Ultimately the choice boils down to personal preference. This form illustrates the dual signature format. If desired, it may be modified to provide for a single signature as both settlors and trustees.

The signature blocks for corporate trustees provide space for two signatures of corporate representatives. Many corporate trustees insist on two signatures.

**[c] Acknowledgment**

There is no legal requirement that a declaration of trust be acknowledged before a notary public [*see Civ. Code § 1217* (unrecorded instrument valid as between parties and persons with knowledge of instrument); *see also Civ. Code §§ 1180-1207*(acknowledgment and proof of execution of instruments)]. However, acknowledgment or other certified proof of execution is necessary if the instrument is ever to be recorded [*see Gov. Code § 27287; see also § 70.13[2]*]. In addition, acknowledgment may help to authenticate the signatures of the parties. For these reasons, acknowledgment is recommended.

**[2] FORM****Signature Block for Trust Agreement**

Execution. \_\_\_\_\_ [I or we] certify that \_\_\_\_\_ [I or we] have read the foregoing trust agreement and that it correctly states the terms and conditions under which the trust estate is to be held, administered, and distributed. The settlor[s] approve[s] this trust agreement in all particulars. The trustee[s] approve[s] and accept[s] the trust[s] provided for in this trust agreement.

Executed on \_\_\_\_\_ [month, day], \_\_\_\_\_ [year], at \_\_\_\_\_ [city or town, and state, in which trust agreement is signed, e.g., San Francisco, California].

**SETTLOR[S]**

\_\_\_\_\_ [signature of settlor]  
[typed name]

[For a two-settlor trust:]

\_\_\_\_\_ [signature of second settlor]  
[typed name]

**TRUSTEE[S]**

[For each individual trustee:]

\_\_\_\_\_ [signature]  
[typed name]

[For corporate trustee:]

[typed name of corporate trustee]

By:





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*26-71 California Legal Forms--Transaction Guide 71.syn*

**AUTHOR:** Reviewed by Albert G. Handelman

**§ 71.syn Synopsis to Chapter 71: MARITAL DEDUCTION TRUST PROVISIONS**

§ 71.01 California Statutes

§ 71.02 Federal Sources

[1] Statutes

[2] Regulations

§§ 71.03-71.04 [Reserved]

§ 71.05 Law Reviews and Periodicals

§ 71.06 Text References

[1] Matthew Bender Sources

[2] Additional Text References

§§ 71.07-71.09 [Reserved]

§ 71.10 The Marital Deduction

[1] Definition

[2] Pre-1982 Law

[3] Requirements

[a] Estate Tax

[b] Gift Tax

[4] Terminable Interest Rule

[a] General Rule

[b] Interest Conditioned on Survival for Limited Time

[c] Life Estate Plus Power of Appointment

[d] Qualified Terminable Interest Property (QTIP)

[e] Life Estate Plus Charitable Remainder

[5] Transfers to Noncitizen Spouses

[a] Marital Deduction Generally Unavailable

[b] Exceptions

§ 71.11 Marital Deduction Planning

[1] Coordination of Tax and Nontax Goals

[2] Threshold Estate Value for Marital Deduction Planning

[3] Coordination of Marital Deduction and Unified Credit

[a] General Principles

[b] Example Illustrating Tax Savings

[4] Practical Considerations

§ 71.12 Division of Estate into Marital and Nonmarital Shares

[1] In General

[2] Division of Revocable Trust

[3] Marital Deduction Formulas

[a] Advantage to Use of Formulas

[b] Pecuniary Formula

[c] Fractional Formula

§ 71.13 Marital Deduction Trusts

[1] In General

[2] Formula Versus Nonformula Trusts

[3] Effect of Terminable Interest Requirements

[4] Qualified Terminable Interest Property (QTIP) Trust

[5] Lifetime Income Plus Power of Appointment Trust

[6] Estate Trust

[7] Qualified Domestic Trust (QDOT)

[a] In General

[b] Required Trust Provisions

[c] Exclusion for Principal Residence

[d] Other Marital Deduction Requirements

[e] Reformation of Governing instrument

§ 71.14 Bypass Trusts

[1] In General

[2] Limitations on Rights of Surviving Spouse

[a] Tax Issues

[b] Solutions to Income Tax Issues

[c] Solutions to Estate Tax Issues

[d] Powers That Can Safely Be Granted to Surviving Spouse

[3] Right to Invade Principal

[4] Five or Five Power

§ 71.15 Survivor's Trusts

[1] Nature of Trust

[2] Revocability

[3] Payments and Distributions

[4] Pooling Survivor's Assets and Assets Qualifying for Marital Deduction

§ 71.16 Disclaimer Trusts

[1] In General

[2] "Qualified" Disclaimers

[a] Definition

[b] Requirements

[3] Uses

§§ 71.17-71.19 [Reserved]

§ 71.20 California Statutes Designed to Preserve Marital Deduction

[1] In General

[2] Construction of Marital Deduction Gifts

[3] Application to Estate Tax Formulas

[4] Drafting Considerations

§§ 71.21-71.99 [Reserved]

§ 71.100 Facts

Scope

§ 71.101 Documents

Scope

§§ 71.102-71.109 [Reserved]

§ 71.110 Suitability of Marital Deduction Trust

Scope

§ 71.111 Basic Features of Marital Deduction and Bypass Trusts

Scope

§ 71.112 Payments and Distributions from Trusts

Scope

§§ 71.113-71.119 [Reserved]

Scope

§ 71.120 Drafting Guide for Marital Deduction (and Survivor's) Trusts

Scope

§ 71.121 Drafting Guide for Bypass Trusts

Scope

§§ 71.122-71.199 [Reserved]

§ 71.200 Pecuniary Marital Deduction Formula for One-Settlor Trust

[1] Comment

[a] Use of Form

[b] Formula Clauses

[c] Pecuniary and Fractional Formulas

[d] Marital Deduction Formulas and Bypass Formulas

[e] Formula Amount

[f] Pick and Choose Clauses

[g] Valuation Issues

[2] Form

Pecuniary Marital Deduction Formula for One-Settlor Trust

§ 71.201 Pecuniary Marital Deduction Formula for Two-Settlor Trust

[1] Comment

[a] Use of Form

[b] Division of Trust Estate on Death of First Joint Settlor

[2] Form

Pecuniary Marital Deduction Formula for Two-Settlor Trust

§ 71.202 Pecuniary Bypass Formula for One-Settlor Trust

[1] Comment

[a] Use of Form

[b] Pecuniary Bypass Formulas

[2] Form

Pecuniary Bypass Formula for One-Settlor Trust

§ 71.203 Pecuniary Bypass Formula for Two-Settlor Trust

[1] Comment

[a] Use of Form

[b] Pecuniary Bypass Formulas

[c] Division of Trust Estate Into Shares

[2] Form

Pecuniary Bypass Formula for Two-Settlor Trust

§ 71.204 Fractional Formula for One-Settlor Trust

[1] Comment

[a] Use of Form

[b] Fractional Formula

[2] Form

Fractional Formula for One-Settlor Trust

§ 71.205 Fractional Formula for Two-Settlor Trust

[1] Comment

[a] Use of Form

[b] Division of Trust Estate Into Shares

[2] Form

Fractional Formula for Two-Settlor Trust

§§ 71.206-71.209 [Reserved]

§ 71.210 Pecuniary Marital Deduction Formula Devise and Residuary Clause

[1] Comment

[a] Use of Form

[b] Pecuniary Formula Clauses in Wills

[2] Form

Pecuniary Marital Deduction Formula Devise and Residuary Clause

§ 71.211 Pecuniary Bypass Formula Devise and Residuary Clause

[1] Comment

[a] Use of Form

[b] Use of Pecuniary Bypass Formula In Will

[2] Form

Pecuniary Bypass Formula Devise and Residuary Clause

§ 71.212 Fractional Formula Residuary Clause

[1] Comment

[a] Use of Form

[b] Fractional Formula in Will

[2] Form

§§ 71.213-71.219 [Reserved]

§ 71.220 Allocation and Valuation of Assets Under Pecuniary Formula

[1] Comment

[a] Use of Form

[b] Allocation and Valuation Under Pecuniary Formula Clause

[c] Date of Distribution Values

[d] Date of Death Values

[2] Form

Allocation and Valuation of Assets Under Pecuniary Formula

§ 71.221 Intention That Marital Deduction Share Qualify for Marital Deduction

[1] Comment

[a] Use of Form

[b] Exception for QTIP Election

[2] Form

Intention That Marital Deduction Share Qualify for Marital Deduction

§ 71.222 Qualification Provision for Qualified Domestic Trust (QDOT)

[1] Comment

[a] Use of Form

[b] Marital Deduction When Spouse is Noncitizen

[c] Power to Amend or Reform Trust Instrument

[2] Form

Qualification Provision for Qualified Domestic Trust (QDOT)

§§ 71.223-71.229 [Reserved]

§ 71.230 Qualified Terminable Interest Property (QTIP) Trust

[1] Comment

[a] Use of Form

[b] Income

[c] Principal

[d] Generation-Skipping Transfer Tax Language

[2] Form

Qualified Terminable Interest Property (QTIP) Trust

§ 71.231 Lifetime Income/Power of Appointment Trust

[1] Comment

[a] Use of Form

[b] Income Requirements

[c] Distributions of Principal

[d] Power of Appointment Requirement

[e] Planning Considerations

[f] Drafting Options in Two-Settlor Inter Vivos Trusts

[2] Form

Lifetime Income/Power of Appointment Trust

§ 71.232 Estate Trust

[1] Comment

[a] Use of Form

[b] Features of Estate Trust

[c] Disadvantages

[d] Drafting

[2] Form

Estate Trust

Reviewed by Albert G. Handelmann\*

**FOOTNOTES:**

(n131)Footnote \*. Mr. Handelman is a member of the State Bar of California and a partner in the law firm of Merrill, Arnone & Handelman in Santa Rosa, California. He received his B.S. degree, cum laude, from the Wharton School, University of Pennsylvania, and his J.D. degree from the University of Southern California. Mr. Handelman is a certified specialist in Probate, Estate Planning, and Trust Law (California State Board of Legal Specialization), and a Fellow of the American College of Trust and Estate Counsel. He has frequently written and spoken throughout California for both professional and industry groups on a variety of subjects in the field of estate planning and administration. He is an officer and a director of the Redwood Empire Estate Planning Council.



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CHAPTER 71 MARITAL DEDUCTION TRUST PROVISIONS

*26-71 California Legal Forms--Transaction Guide Scope*

**AUTHOR:** Reviewed by Albert G. Handelman

**Scope**

Reviewed by Albert G. Handelman\* Scope

This chapter discusses the federal estate tax marital deduction [*I.R.C. § 2056*] and "marital deduction trusts"--that is, trusts that are specifically designed to qualify for the marital deduction. Both testamentary and inter vivos ("living") trusts may be marital deduction trusts. An inter vivos marital deduction trust may be created jointly by a husband and wife, or by one of the spouses as sole settlor.

This chapter explains the marital deduction [*see I.R.C. § 2056*], the unified credit [*see I.R.C. §§ 2010* (estate tax), 2505 (gift tax)], marital deduction trusts, bypass trusts, and "qualified domestic trusts" for noncitizens [*see I.R.C. § 2056A*]. It explains how the marital deduction and the unified credit may be used together to optimize estate tax savings in the combined estates of a married couple.

Complete marital deduction trusts are located in other chapters. Wills containing complete testamentary marital deduction trusts are located in Ch. 61, *Will Drafting and Complete Will Forms* . Complete inter vivos marital deduction trusts are located in Ch. 70, *Complete Revocable Trust Forms* . The forms in this chapter are designed to augment those complete forms, and to illustrate alternative drafting approaches.

For general coverage of basic estate planning principles, see Ch. 60, *Estate Planning* . For general coverage of testamentary trusts, see Ch. 64, *Testamentary Trusts: Payment and Distribution Provisions* , Ch. 64A, *Testamentary Trusts: Trustee Provisions* , and Ch. 64B, *Testamentary Trusts, Administrative Provisions* . For general coverage of revocable inter vivos trusts, see Ch. 70, *Complete Revocable Trust Forms* .

**FOOTNOTES:**

(n132)Footnote \*. Mr. Handelman is a member of the State Bar of California and a partner in the law firm of Merrill, Arnone & Handelman in Santa Rosa, California. He received his B.S. degree, cum laude, from the Wharton School, University of Pennsylvania, and his J.D. degree from the University of Southern California. Mr. Handelman is a certified specialist in Probate, Estate Planning, and Trust Law (California State Board of Legal Specialization), and a Fellow of the American College of Trust and Estate Counsel. He has frequently written and spoken throughout California for both professional and industry groups on a variety of subjects in the field of estate planning and

administration. He is an officer and a director of the Redwood Empire Estate Planning Council.



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PART I. RESEARCH GUIDE  
A. Primary Sources

*26-71 California Legal Forms--Transaction Guide § 71.01*

**AUTHOR:** Reviewed by Albert G. Handelman

**§ 71.01 California Statutes**

Disclaimers of testamentary and other interests. *Prob. Code §§ 260-295.*

"Marital deduction" and "marital deduction gift" defined. *Prob. Code § 21520.*

Marital deduction gifts. *Prob. Code § 21522.*

Instruments dated before September 12, 1981, making gifts providing maximum allowable marital deduction. *Prob. Code § 21523.*

Marital deduction gifts made in trust. *Prob. Code § 21524.*

Conditions on marital deduction gifts. *Prob. Code § 21525.*

Liability of fiduciary for decision to make QTIP election under specified sections of Internal Revenue Code. *Prob. Code § 21526.*

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsCreationEstate, Gift & Trust LawTrustsMarital Deduction Trusts



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*26-71 California Legal Forms--Transaction Guide § 71.02*

**AUTHOR:** Reviewed by Albert G. Handelman

**§ 71.02 Federal Sources**

**[1] Statutes**

Estate taxation of property in revocable trust. *I.R.C. § 2038.*

Estate taxation of property subject to general power of appointment. *I.R.C. § 2041.*

Allowance of federal estate tax marital deduction. *I.R.C. § 2056(a).*

Marital deduction not allowed for terminable interests. *I.R.C. § 2056(b)(1).*

Marital deduction if interest of spouse is conditioned on survival for limited period. *I.R.C. § 2056(b)(3).*

Marital deduction valuation of interest passing to surviving spouse. *I.R.C. § 2056(b)(4).*

Marital deduction allowable for property subject to life estate plus power of appointment. *I.R.C. § 2056(b)(5).*

Qualified Terminable Interest Property (QTIP). *I.R.C. § 2056(b)(7).*

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Qualified disclaimers. *I.R.C. § 2518.*

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Property subject to general power of appointment includible in holder's gross estate for federal estate tax purposes. *Treas. Reg. §§ 20.2041-1, 20.2041-3.*

Certain property for which marital deduction previously allowed is included in estate of surviving spouse. *Treas. Reg. § 20.2044-1.*

Allowance of marital deduction for federal estate tax purposes. *Treas. Reg. § 20.2056(a)-1.*

Marital deduction not allowed for life estate or other terminable interests. *Treas. Reg. § 20.2056(b)-1.*

Marital deduction for interest in unidentified assets. *Treas. Reg. § 20.2056(b)-2.*

Marital deduction if interest of spouse is conditioned on survival for limited period. *Treas. Reg. § 20.2056(b)-3.*

Marital deduction valuation of interest passing to surviving spouse. *Treas. Reg. § 20.2056(b)-4.*

Marital deduction allowable for life estate in trust with power of appointment given to surviving spouse. *Treas. Reg. § 20.2056(b)-5.*

Qualified Terminable Interest Property and QTIP trusts.

QTIP election. *Treas. Reg. § 20.2056(b)-7(b).*

Qualifying income interests. *Treas. Reg. §§ 20.2056(b)-7(d), 20.2056(b)-5(f)*

Coordination of marital and charitable deductions. *Treas. Reg. §§ 20.2056(b)-8, 20.2056(b)-9.*

Marital deduction for gift tax purposes. *Treas. Reg. §§ 25.2523(a) - 1-25.2523(e)-1.*

### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Tax LawFederal Estate & Gift TaxesDeductionsMarital Deduction (IRC secs. 2056, 2523)General OverviewTax LawFederal Estate & Gift TaxesDeductionsMarital Deduction (IRC secs. 2056, 2523)LimitationsTax LawFederal Estate & Gift TaxesDeductionsMarital Deduction (IRC secs. 2056, 2523)ScopeTax LawFederal Estate & Gift TaxesPowers of Appointment (IRC secs. 2041, 2514)General Overview



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*26-71 California Legal Forms--Transaction Guide §§ 71.03-71.04*

**AUTHOR:** Reviewed by Albert G. Handelman

**[Reserved]**

§§ 71.03[Reserved]



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B. Secondary Sources

*26-71 California Legal Forms--Transaction Guide § 71.05*

**AUTHOR:** Reviewed by Albert G. Handelman

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**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsMarital Deduction TrustsTax LawFederal Estate & Gift TaxesDeductionsMarital Deduction (IRC secs. 2056, 2523)General OverviewTax LawFederal Estate & Gift TaxesDeductionsMarital Deduction (IRC secs. 2056, 2523)LimitationsTax LawFederal Estate & Gift TaxesDeductionsMarital Deduction (IRC secs. 2056, 2523)Scope



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*26-71 California Legal Forms--Transaction Guide § 71.06*

**AUTHOR:** Reviewed by Albert G. Handelman

**§ 71.06 Text References**

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Ch. 112, *The Marital Deduction and Marital Deduction Trusts.*

Ch. 113, *Generation-Skipping Transfers and Trust Strategies.*

MODERN ESTATE PLANNING (Matthew Bender).

Ch. 1, *Federal Estate Tax Basics.*

Ch. 2, *Gift Tax Basics.*

Ch. 13, *Estate and Gift Tax Marital Deduction.*

Ch. 18, *Generation-Skipping Transfer Tax.*

Ch. 22, *General Principles of Income Taxation of Trusts and Estates*.

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**[2] Additional Text References**

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**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsCreationEstate, Gift & Trust LawTrustsMarital Deduction TrustsEstate, Gift & Trust LawTrustsRevocable Living TrustsTax LawFederal Estate & Gift TaxesDeductionsMarital Deduction (IRC secs. 2056, 2523)General OverviewTax LawFederal Estate & Gift TaxesGeneration-Skipping Transfer Taxes (IRC secs. 2601-2663)



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PART II. LEGAL BACKGROUND

*26-71 California Legal Forms--Transaction Guide § 71.10*

**AUTHOR:** Reviewed by Albert G. Handelman

**§ 71.10 The Marital Deduction**

**[1] Definition**

The federal estate and gift tax laws allow a deduction for qualifying transfers from one spouse to the other [*I.R.C. §§ 2056* (estate tax), *2523* (gift tax); *see* [3], *below*, for the basic rules regarding qualifying transfers]. In the case of the estate tax, the law allows a deduction from the gross taxable estate equal to the value of any property interest that passes from a decedent to the decedent's surviving spouse in a qualifying manner [*I.R.C. § 2056(a)*]. In the case of the gift tax, the law allows a deduction, in computing taxable gifts, during each calendar year, equal to the full value of any property interest transferred to the donor's spouse by a qualifying gift during that year [*I.R.C. § 2523(a)*]. These deductions are universally referred to, individually and collectively, as the "marital deduction."

The purpose of the marital deduction is to treat a husband and wife as a single unit for computing estate taxation. Any assets not taxed in a decedent's estate are taxable in the surviving spouse's estate under *I.R.C. § 2044* [Davis v. C.I.R. (9th Cir. [Cal.] 2005) *394 F.3d 1294, 1297 fn. 1*].

Since 1981, the marital deduction has been "unlimited" [*see* [2], *below*]. That is, it has not been capped by any dollar amount or percentage. The unlimited marital deduction allows a husband and wife to transfer any amount of property between themselves without incurring any gift or estate tax liability. In its present unlimited form, the marital deduction reflects the policy of Congress that transfers of property between a husband and wife should be free of transfer taxes.

**[2] Pre-1982 Law**

The marital deduction was first enacted as part of the Revenue Act of 1948. Its original purpose was to equalize the estate and gift tax treatment of property owned by married persons in common law and community property states. In community property states, property acquired during marriage is owned by the spouses in equal shares and, when one spouse dies, one half of the community property is included in the deceased spouse's estate. In common law states, property acquired during marriage is owned by the spouse in whose name the property is titled. When such a spouse dies, all of the property is subject to inclusion in the deceased spouse's estate.

To equalize this disparity, the original marital deduction permitted the deduction of up to one half of the "adjusted gross estate" on the death of the deceased spouse. The "adjusted gross estate" was determined by first valuing the decedent's gross estate and then deducting the value of any community property included in that estate. Thus, the marital deduction afforded little or no benefit to residents of community property states.

The Tax Reform Act of 1976 enhanced the marital deduction by permitting the deduction of one half of the gross estate or \$250,000, whichever was greater. The effect of this change was to permit full deduction of transfers to a spouse up to \$250,000, and one-half over \$250,000.

In 1981, the \$250,000 limit was abolished for the estates of all decedents dying after December 31, 1981. The 1981 change resulted in the current unlimited marital deduction. This deduction provides a substantial benefit to all married persons, including those who reside in community property states. The discussion in this chapter is all based on the law applicable to decedents dying after December 31, 1981.

### **[3] Requirements**

#### **[a] Estate Tax**

Under current law, a transfer of property from a deceased person to the deceased person's spouse will qualify for the federal estate tax marital deduction if all of the following requirements are satisfied:

- The deceased person is survived by his or her spouse [*see Treas. Reg. § 20.2056(a)-1(b)(i)*];
- With limited exceptions, the surviving spouse is a citizen of the United States [*I.R.C. § 2056(d)(1)*]; *see I.R.C. § 2056A* (qualified domestic trust) and [5][b], *below*];
- The property "passes" to the surviving spouse, either by will, operation of law, disclaimer, inter vivos trust, or contract [*I.R.C. § 2056(a), (c)*; *Treas. Reg. § 20.2056(e)-1*];
- The value of the property is included in the deceased spouse's gross estate for federal estate tax purposes [*I.R.C. § 2056(a)*]; and
- The property does not pass in the form of a nondeductible "terminable interest" [*I.R.C. § 2056(a), (b)*]; *see* [4], *below*].

#### **[b] Gift Tax**

A transfer of property from a living person to that person's spouse will qualify for the federal gift tax marital deduction if all of the following requirements are satisfied [*I.R.C. § 2523(a), (b)*]:

- The gift is completed during the calendar year for which the deduction is sought;
- The donee is the spouse of the donor at the time the gift is made; and
- The gift does not take the form of a nondeductible "terminable interest" [*see* [4], *below*].

### **[4] Terminable Interest Rule**

#### **[a] General Rule**

A transfer will not qualify for the marital deduction for either estate or gift tax purposes if property passes or is transferred in the form of a nondeductible "terminable interest" [*I.R.C.* §§ 2056(a), (b) (estate tax), 2523(a), (b) (gift tax)]. For purposes of this rule, a "terminable interest" is generally an interest that will terminate or fail on the lapse of time or the occurrence or nonoccurrence of some contingency [*I.R.C.* §§ 2056(b), 2523(b); *Treas. Reg.* § 20.2056(b)-1(b)]. A terminable interest is nondeductible if another interest in the same property passes from the deceased spouse to some other person for less than an adequate and full consideration and, on termination or failure of the surviving spouse's interest, the other person (or the other person's heirs) may possess or enjoy any part of the property [*I.R.C.* §§ 2056(b), 2523(b); *Treas. Reg.* § 20.2056(b)-1(c)].

Life estates, estates for years, and annuities are all terminable interests [*Treas. Reg.* § 20.2056(b)-1(b)]. Copyrights and patents are also terminable interests, since they terminate on the lapse of time [*Treas. Reg.* § 20.2056(b)-1(b)]. However, bonds, notes, or similar contractual obligations, the discharge of which would not have the effect of an annuity or term for years, are not terminable interests [*Treas. Reg.* § 20.2056(b)-1(b)].

Whether an interest fails to qualify for the marital deduction because it is a terminable interest is determined by reference to the property interest that actually passed from the decedent. Subsequent conversions of the property are immaterial. For example, if a decedent bequeaths his or her estate to his or her spouse for life with a remainder to their children, the interest that passes to the spouse is a nondeductible, terminable interest, even if the spouse agrees with the children to take a fractional share of the estate in fee in place of the life interest, sells the life estate for cash, or acquires the children's remainder interest by purchase or gift [*Treas. Reg.* § 20.2056(b)-1(e)(3)].

No marital deduction is allowed for a property interest that the decedent directs his or her executor or trustee to convert after the decedent's death into a terminable interest for his or her surviving spouse [*Treas. Reg.* § 20.2056(b)-1(f)].

The terminable interest rule is subject to important exceptions [*see* [b]-[e], *below*]. Understanding these exceptions, and making proper use of them in wills and trusts, is the one of the most important functions of the estate planner.

#### **[b] Interest Conditioned on Survival for Limited Time**

An interest passing to a spouse is not nondeductible merely because it will terminate if the surviving spouse dies within six months after the deceased spouse's death, or as a result of a common disaster that also results in the deceased spouse's death, providing the spouse does not in fact die under those conditions [*I.R.C.* § 2056(b)(3); *Treas. Reg.* §§ 20.2056(b)-1(d)(1), 20.2056(b)-3]. This exception permits gifts and devises to a spouse to be conditioned on survival for up to six months. For further discussion of survivorship conditions in wills and trusts, see *CALIFORNIA WILLS AND TRUSTS, Ch. 24, Devises--General Considerations, § 24.03[6]*, and *CALIFORNIA WILLS AND TRUSTS, Ch. 112, The Marital Deduction and Marital Deduction Trusts, § 112.06[4]* (Matthew Bender).

#### **[c] Life Estate Plus Power of Appointment**

A lifetime interest in property that passes to a surviving spouse is not a nondeductible terminable interest if the surviving spouse is given a general power of appointment over the property in addition to the right to receive all of the income from the property for life [*I.R.C.* § 2056(b)(5)]. A power of appointment is a general power of appointment for this purpose if it can be exercised in favor of the surviving spouse and/or the surviving spouse's estate, whether or not it is also exercisable in favor of others [*I.R.C.* § 2056(b)(5); *see Civ. Code* § 1381.2(a) (definition of "general" power of appointment)]. This exception to the terminable interest rule has given rise to one of the most popular forms of marital deduction trusts, the so-called "lifetime income/power of appointment trust," which is discussed in detail in § 71.13[5].

#### **[d] Qualified Terminable Interest Property (QTIP)**

A lifetime interest in property that passes to a surviving spouse is not a nondeductible terminable interest if [*I.R.C.* §

2056(b)(7)]:

- The surviving spouse is given the right to receive all of the income from the property, payable at least annually;
- No person has a power to appoint any part of the property to any person other than the surviving spouse during the surviving spouse's lifetime; and
- The deceased spouse's executor elects to treat the property on the deceased spouse's estate tax return as "qualified terminable interest property."

This exception to the terminable interest rule has given rise to another widely used type of marital deduction trust, the so-called "QTIP trust." For a detailed discussion of QTIP trusts, see § 71.13[4].

### **[e] Life Estate Plus Charitable Remainder**

A lifetime interest in property that passes to a surviving spouse in trust is not a nondeductible terminable interest if the surviving spouse is the only beneficiary who is not a charitable beneficiary or an ESOP beneficiary and the remainder interest passes to a charity in the form of a charitable remainder trust [*I.R.C. § 2056(b)(8)*; see *I.R.C. §§ 170(c)* ("charitable contribution" defined), 664 (charitable remainder annuity trusts and unitrusts)]. The surviving spouse's interest need not be an interest for life to qualify for the marital deduction; however, for purposes of *I.R.C. § 664*, an annuity or unitrust interest payable to a spouse for a term of years cannot be payable for a term that exceeds 20 years [*Treas. Reg. § 20.2056(b)-8(a)(2)*]. The marital deduction is allowed even if the transfer to the surviving spouse is conditioned on the spouse's payment of state death taxes, if any, attributable to the qualified charitable remainder trust [*Treas. Reg. § 20.2056(b)-8(a)(3)*].

If an interest in property qualifies for a marital deduction under *I.R.C. § 2056(b)(8)*, no election may be made with respect to the property under *I.R.C. § 2056(b)(7)* (QTIP election) [*Treas. Reg. § 20.2056(b)-8(a)(1)*]. However, in the case of a charitable remainder trust when the decedent's spouse is not the only noncharitable beneficiary, e.g., when the noncharitable interest is payable to the spouse for life and then to another individual for life, the qualification of the interest as qualified terminable interest property is determined solely under *I.R.C. § 2056(b)(7)* and not under *I.R.C. § 2056(b)(8)* [*Treas. Reg. § 20.2056(b)-8(b)*].

For more detailed discussion of charitable remainder trusts, see Ch. 74, *Split-Interest Charitable Trusts*. For discussion of planning and drafting options for marital deduction trusts having a charitable remainder beneficiary, see *CALIFORNIA WILLS & TRUSTS, Ch. 112, The Marital Deduction and Marital Deduction Trusts, § 112.05[6]* (Matthew Bender).

### **[5] Transfers to Noncitizen Spouses**

#### **[a] Marital Deduction Generally Unavailable**

The marital deduction generally is available only for transfers of property to United States citizens. If the spouse of a transferor or decedent is not a United States citizen, transfers of property to the spouse will not qualify for the marital deduction [*I.R.C. §§ 2056(d)(1)* (estate tax), 2523(i)(1) (gift tax)].

However, the Internal Revenue Code contains special provisions designed to compensate for the loss of the deduction in these circumstances. First, a significantly greater annual exclusion is allowed for gifts to a non-citizen spouse [see *I.R.C. § 2523(i)* (base annual exclusion amount is \$100,000, with upward adjustments for inflation for gifts made in calendar years after 1998)]. Second, if estate taxes are paid in the estate of the deceased spouse on property that passes to a

non-citizen spouse, a credit will be allowed in the estate of the non-citizen spouse for the amount of the taxes [*I.R.C. § 2056(d)(3)*; *see I.R.C. § 2013* (credit for death taxes paid on previous transfers)]. This credit is available regardless of the length of time that has elapsed between the deaths of the two spouses.

### **[b] Exceptions**

Notwithstanding the general rule discussed in [a], *above*, there are two circumstances under which transfers to noncitizen spouses are eligible for the marital deduction. First, the deduction will be available if the noncitizen spouse becomes a United States citizen before the date on which the estate tax return is filed in the deceased spouse's estate [*I.R.C. § 2056(d)(4)*]. However, the non-citizen spouse must have been a resident of the United States at all times after the deceased spouse's death and before becoming a citizen [*I.R.C. § 2056(d)(4)*]. This exception will likely help only persons who began the naturalization process before the death of the deceased spouse.

Second, the deduction will be available if the property is transferred to the non-citizen spouse in the form of a "qualified domestic trust," commonly called a "QDOT" [*I.R.C. §§ 2056(d)(2)(A), 2056A*]. The requirements for QDOTs are detailed and specific, and are designed to ensure that the noncitizen spouse cannot remove assets from the trust with the idea of taking them out of the country to avoid taxation. In many cases, creation of a QDOT may be the only practical alternative to substantial tax liability when one of the spouses is a noncitizen. The QDOT requirements are discussed in § 71.13[7].

### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Tax LawFederal Estate & Gift TaxesDeductionsMarital Deduction (IRC secs. 2056, 2523)General OverviewTax LawFederal Estate & Gift TaxesDeductionsMarital Deduction (IRC secs. 2056, 2523)LimitationsTax LawFederal Estate & Gift TaxesDeductionsMarital Deduction (IRC secs. 2056, 2523)Scope



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PART II. LEGAL BACKGROUND

*26-71 California Legal Forms--Transaction Guide § 71.11*

**AUTHOR:** Reviewed by Albert G. Handelman

**§ 71.11 Marital Deduction Planning**

**[1] Coordination of Tax and Nontax Goals**

Both tax and nontax goals should be kept in mind whenever an estate is planned, a will is drafted, or a trust is established. Although tax-saving goals may play an important role in determining how a client's estate should be disposed of, they should always be balanced against nontax considerations. If tax goals are inconsistent with the client's nontax goals, the relative importance of the two should be considered carefully. The ideal estate plan will coordinate tax and nontax considerations in a manner that will give effect to the client's wishes in the least expensive manner possible.

**[2] Threshold Estate Value for Marital Deduction Planning**

If the combined value of a married couple's two estates does not exceed the amount necessary to generate estate taxes, tax goals ordinarily will play no role in planning their estates. No tax will be due if the combined value of the two estates does not exceed the "applicable exclusion amount" that is available in the year of the second spouse's death [*see I.R.C. § 2010(c)*] (exclusion amount is \$675,000 for decedents dying in 2001, \$1 million for decedents dying in 2002 and 2003, \$1.5 million for decedents dying in 2004 and 2005, \$2 million for decedents dying in 2006, 2007, and 2008, and \$3.5 million for decedents dying in 2009), and discussion in § 60.13[4][b]], provided the couple has not made any taxable gifts during their lifetimes [*see* Ch. 60A, *Gifts* , for discussion of the federal gift tax]. If the combined value of their estates is less than that amount, the two estates will be fully protected by the unified credit against estate and gift taxes [*see I.R.C. §§ 2010* (estate tax), 2505]. If the combined value of the two estates exceeds the "applicable exclusion amount" available in the year of the second spouse's death, however, there is a potential for estate tax liability. When this appears to be a possibility, tax-saving opportunities should be evaluated and considered in developing the client's estate plan.

In determining whether tax planning is necessary, the possibility that the combined value of the clients' estates will grow before the second spouse dies must be considered. The increasing estate tax unified credit [*I.R.C. § 2010(c)*] and scheduled repeal of the estate tax must also be taken into account [*I.R.C. § 2210(a)*; *see* Ch. 60, *Estate Planning*, § 60.12A for a detailed discussion regarding the estate tax repeal]. Many clients consult their lawyers only infrequently

regarding estate planning matters. If there is a reasonable likelihood that the clients' combined estates will eventually exceed the amount that can be sheltered by the "applicable exclusion amount" available in the year of the second spouse's death, it will be prudent to develop an estate plan in advance to accommodate the possibility.

It is usually impossible, of course, to predict with any degree of certainty the exact year in which the surviving spouse's death will occur. The increase in the "applicable credit amount" described above may be enough to wholly or partially offset any anticipated appreciation in the value of many small or moderately-sized estates during the phase-in period. However, the practitioner should not automatically assume that this will be the case. Unanticipated inflation or appreciation of assets, among other factors, may wholly or partially negate the effect of the increase in the "applicable credit amount." Therefore, if the value of the combined estates is close to the amount of the "applicable credit amount" available *at the time the estate plan is being developed*, or there appears to be any possibility of a significant increase in the future (such as by inheritance, for example), prudence strongly suggests that attention be given to tax planning.

Avoiding estate planning because of the scheduled repeal of the estate tax for decedents dying after 2009 [*see I.R.C. § 2210(a)*] is also unwise. This is because, under a sunset provision of the 2001 legislation, the repeal of the estate tax does not apply to estates of decedents dying, gifts made, or generation-skipping transfers, after December 31, 2010 [Pub. Law 107-16, § 901]. Thus, unless the provision repealing the estate tax is re-enacted before 2010, the estate tax law that was in effect before enactment of the 2001 legislation (including the 55 percent maximum estate tax rate) will once again apply after 2010 [*see Pub. Law 107-16, § 901; I.R.C. § 2001*, before amendment by Pub. Law 107-16]. Most commentators feel that significant changes will be made to the estate tax law before 2010. For additional discussion of the repeal of the estate tax, see *Ch. 60, Estate Planning, § 60.12A*.

**PRACTICE TIP:**

When the combined estates of a married couple currently are less than the "applicable exclusion amount" that is likely to be available in the year of the second spouse's death [*see I.R.C. § 2010(c)*], but it appears that growth may cause the total value to exceed that amount by the death of the surviving spouse, flexibility is required. If the documents mandate a plan that would make sense only if tax planning were important, then failure of the estates to grow to more than the "applicable exclusion amount" could result in the creation of an impractical plan that is cumbersome and expensive to administer. Indeed, this could also be the case when the amount of taxes being faced is so small in contrast to the administrative burdens imposed that one would ordinarily prefer to pay the tax and utilize a plan that is simpler to administer. Conversely, ignoring the possibility of the future need for tax planning could be disastrous, and could result in a malpractice claim against the estate planner.

In these circumstances, the estate planner should give careful consideration to disclaimer planning. This will allow the surviving spouse (and the fiduciaries appointed by the deceased spouse) to engage in postmortem tax planning that will take into account the situation as it actually exists at the death of the first spouse to die. This could occur decades after the estate planning documents were drafted. For discussion of disclaimer trusts and their role in estate planning, see § 71.16. *Commentary by Albert G. Handelman.*

**[3] Coordination of Marital Deduction and Unified Credit**

**[a] General Principles**

Due to the unlimited marital deduction [*see § 71.10[1]*], when one spouse dies it is possible to avoid paying any estate tax simply by transferring all the deceased spouse's property to the surviving spouse in a manner that qualifies for the marital deduction. This will protect the surviving spouse by giving the survivor the full benefit of the decedent's property without any corresponding tax burden, and, in the case of an outright distribution, without any restrictions whatsoever on the survivor's use of the assets. However, such a transfer often will increase the tax burden in the estate

of the surviving spouse. This means that a smaller portion of the couple's total estate ultimately will pass to their children, issue, or other beneficiaries. For an illustration of this principle, see the example in [b], *below*.

The goal of many estate plans is to minimize overall combined tax liability *in the estates of both spouses*. This goal is accomplished by coordinating the marital deduction with the "applicable exclusion amounts" available in the estates of both spouses to shelter as much property as possible from taxation on the surviving spouse's death. If the deceased spouse does not transfer all his or her property to the surviving spouse in a manner that qualifies for the marital deduction, but instead transfers enough of that property to the surviving spouse in a manner that takes full advantage of the "applicable exclusion amount" available in the year of the deceased spouse's death [*see I.R.C. § 2010(c)* (table of graduated amounts) and discussion in § 60.13[4][b]], a significant tax saving may be achieved. The example in [b], *below*, illustrates the advantages of this type of planning.

**PRACTICE TIP:**

In fact, in order to fully minimize taxes (or at least have the best chance of doing so), the estate planner traditionally has wanted to create a plan that would tend to equalize the size of each spouse's taxable estate. In this way, each spouse's estate would take advantage of the lowest available estate tax brackets, and each estate would end up in the same marginal bracket (or, at least, would be only one marginal bracket apart). However, in many cases this would require that some estate tax be paid at the first death. In other words, the surviving spouse would not have all of the couple's assets available to himself or herself, because some of those assets would be used to pay estate taxes. Thus, while this sort of plan may result in the lowest total estate tax bill, it is usually quite difficult to convince clients of the wisdom of such a plan. *Commentary by Albert G. Handelman.*

With the gradually increasing estate tax unified credit (which increases from \$675,000 for decedents dying in 2001 to \$3.5 million for decedent dying in 2009) [*see I.R.C. § 2010(c)*], and the scheduled repeal of the estate tax for decedents dying after 2009 [*I.R.C. § 2210(a)*; *see Ch. 60, Estate Planning, § 60.12A*, for a detailed discussion], equalizing the value of estates of spouses may be counter-productive. The best result in any given case, unfortunately, may depend on the particular year the spouses die, and planning around date-of-death events cannot be done with any likelihood of accuracy.

A transfer of property will take full advantage of the "applicable exclusion amount" available in the year of the deceased spouse's death if it is transferred outright to the children or other ultimate beneficiaries, or if the property is placed in a trust with those persons as remainder beneficiaries. A trust that accomplishes this goal is known as a "bypass" (or "credit shelter") trust, and may be structured to give the surviving spouse the right to receive all of the trust income (and even some of the trust principal) during his or her lifetime while requiring that the remainder be distributed to other beneficiaries on the death of the surviving spouse. If the bypass trust is properly planned and drafted, no part of the trust assets will be included in the estate of the surviving spouse for estate tax purposes. For more detailed discussion of bypass trusts, see § 71.14.

**[b] Example Illustrating Tax Savings**

The advantages of coordinating the marital deduction and unified credit can best be illustrated by an example. For purposes of this example, assume that Mr. and Mrs. Wilson have a combined estate valued at \$3,000,000, all of which is community property. Assume further that Mr. Wilson dies before Mrs. Wilson.

If Mr. Wilson leaves all of his property to Mrs. Wilson in a manner that qualifies for the marital deduction, no estate tax will be due in the estate of Mr. Wilson. However, estate tax will be due in the estate of Mrs. Wilson. Assuming that the value of the combined estates does not change between the two deaths, than if Mrs. Wilson dies in 2003, \$3,000,000 will be included in her estate. Assuming that the "applicable exclusion amount" is then \$1 million [*see I.R.C. § 2010(c)* (table of graduated amounts) and discussion in § 60.13[4][b]], \$ 1 million worth of property will be sheltered from

taxation and the remaining \$ 2 million will be subject to estate tax. The tax on this estate would be \$945,000 [*see I.R.C. §§ 2001(c), 2010*].

If, however, Mr. Wilson leaves only \$500,000 to Mrs. Wilson in a manner that qualifies for the marital deduction, and if he places the remaining \$1 million in his estate in a bypass trust, then when Mrs. Wilson dies only \$2 million will be included in her estate (again assuming no change in the value of the property between the two deaths). Of this \$2 million, \$1 million will be sheltered from estate tax under the "applicable exclusion amount" available in Mrs. Wilson's estate and \$1 million will actually be subject to estate tax. Mrs. Wilson's estate would generate an estate tax of \$445,000 [*see I.R.C. § 2001(c)*]. The bypass trust would have saved \$500,000 in estate taxes in the combined estates of Mr. and Mrs. Wilson.

#### **[4] Practical Considerations**

As noted in [1], *above*, the development of an estate plan for a specific client requires balancing that client's dispositive wishes with the potential tax liability. In the context of marital deduction planning, married persons often want to leave everything to one another, with their children and/or grandchildren receiving whatever is left over. The simplest method to effect such a plan is simply to leave everything outright to the surviving spouse. However, as indicated in [3][b], *above*, this approach may cause a greater portion of the surviving settlor's estate to be consumed in taxes than would be the case if more rigorous tax planning measures were implemented. With the gradually increasing estate tax unified credit (which increases from \$675,000 for decedents dying in 2001 to \$3.5 million for decedent dying in 2009) [*see I.R.C. § 2010(c)*], and the scheduled repeal of the estate tax for decedents dying after 2009 [*I.R.C. § 2210(a)*; *see Ch. 60, Estate Planning, § 60.12A*, for a detailed discussion], however, leaving everything to a healthy surviving spouse may yield the best tax result, at least for estates that do not exceed the applicable exclusion amount.

Conversely, the use of a bypass trust (or other planning equivalent) to achieve tax savings requires that the surviving spouse give up a degree of control over a portion of the couple's assets, in order to assure that those assets will not be included in the survivor's estate. Although the remaining control that the surviving spouse can still exercise is substantial, it is not absolute [for discussion of permissible extent of the surviving spouse's control over a bypass trust, *see § 71.14[2]*]. Thus, in many cases, a key aspect of the planning process will entail balancing the desire to give the survivor absolute control over the trust assets against the need to impose limits on that control for tax planning purposes. It is probably safe to say that in the majority of cases, the limitations that must be imposed for tax purposes will not be a significant impediment to the survivor's reasonable day-to-day use of the assets. However, in some cases clients may express a strong preference to "keep it simple," or simply be unconcerned about what happens after their deaths as long as they have unrestricted powers over their property during their lifetimes. In these situations, a simple marital deduction gift of all the decedent's property to the survivor may be the only alternative.

The size of the estate is the key variable that should be considered. If the estate is barely over the "applicable exclusion amount" [*see I.R.C. § 2010(c)* (table of graduated amounts) and discussion in *§ 60.13[4][b]*], which represents the threshold for potential estate tax liability [*see [2], above*], the actual dollar savings that can be achieved by the type of coordinated planning discussed in [3], *above*, may be minimal, and the client may not deem it important enough to merit a complicated plan involving a bypass trust. As the size of the estate increases, however, the potential tax savings also increase, and the value of coordinated marital deduction planning increases as well.

#### **PRACTICE TIP:**

One must always consider the expenses and other deductions that may serve to bring an estate below (or barely above) the applicable exclusion amount. If potential deductions are not considered, it is possible for the planner to suggest a plan that, in the actual circumstances, may prove more complicated (and more difficult and expensive to administer) than is necessary or appropriate. *Commentary by Albert G. Handelman.*

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Trusts Marital Deduction Trusts Tax Law Federal Estate & Gift Taxes Deductions Marital Deduction (IRC secs. 2056, 2523) General Overview Tax Law Federal Estate & Gift Taxes Deductions Marital Deduction (IRC secs. 2056, 2523) Limitations Tax Law Federal Estate & Gift Taxes Deductions Marital Deduction (IRC secs. 2056, 2523) Scope



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DIVISION IV: WILLS AND TRUSTS  
CHAPTER 71 MARITAL DEDUCTION TRUST PROVISIONS  
PART II. LEGAL BACKGROUND

*26-71 California Legal Forms--Transaction Guide § 71.12*

**AUTHOR:** Reviewed by Albert G. Handelman

**§ 71.12 Division of Estate into Marital and Nonmarital Shares**

**[1] In General**

The example in § 71.11[2][b] illustrates that in order to achieve the tax savings available through coordination of the marital deduction and the unified credit, it may be necessary to divide a decedent's estate into a portion that is intended to qualify for the marital deduction, and a second portion that is intended to pass under the decedent's unified credit (in other words, to the bypass trust or outright to some beneficiary or beneficiaries other than the surviving spouse). In this chapter, these two portions are referred to as the "marital deduction share" and the "nonmarital share," respectively.

The marital deduction share may either be given outright to the surviving spouse or placed in a marital deduction trust [ *see* § 71.13]. The nonmarital share may either be given outright to persons *other than* the surviving spouse, or may be placed in a "bypass" ("credit shelter") trust that provides lifetime benefits to the surviving spouse and/or other persons and a remainder interest in favor of persons other than the surviving spouse [ *see* § 71.14]. In the testamentary trust context, a typical "two-trust" marital deduction estate plan calls for the creation of a marital deduction trust and a bypass trust [*see, e.g., the forms in §§ 61.213[2], 61.214[2]*].

**[2] Division of Revocable Trust**

When a married person, or two married persons as joint settlors, create a revocable trust, there is no need for an immediate allocation of trust assets to marital and nonmarital shares. That need arises only on the death of the settlor, or, in the case of a two-settlor trust, on the death of the first settlor to die. Thus, revocable marital deduction trusts typically establish only a single trust until the death of the settlor (or first settlor, in the case of a two-settlor trust), and contain provisions specifying the manner in which the trust assets will be divided and allocated on the settlor's (or first settlor's) death.

If the trust was created by one married settlor acting alone, the trust will be divided into marital and nonmarital shares on the settlor's death (assuming the settlor's spouse survives the settlor). The division typically results in the creation of a marital deduction trust and a bypass trust under an arrangement similar to that used in a testamentary trust. For an

example of a complete trust containing these features, see the *form in § 70.203[2]* in Ch. 70, *Complete Revocable Trust Forms*.

If the trust was created by two married settlors acting jointly, a more complex division is required. In addition to the marital and nonmarital shares, a third share may be necessary to accommodate the survivor's portion of any community property held in the trust, as well as the survivor's interest in any of his or her own separate and quasi-community property held in the trust. This share is referred to in this chapter as the "survivor's share," and is usually retained in a "survivor's trust" over which the survivor retains broad powers, including a continuing power of revocation [ *see § 71.15*]. Thus, on the death of the first spouse, a revocable trust created by joint settlors typically is divided into at least three trusts: a survivor's trust, a marital deduction trust, and a bypass trust. When a lifetime income/power of appointment trust is used, the marital deduction assets can be combined with the survivor's assets under some circumstances [ *see § 71.15[4]*].

### **[3] Marital Deduction Formulas**

#### **[a] Advantage to Use of Formulas**

Estates can be divided into marital and nonmarital shares in various ways. For example, the client can simply leave some specific assets to his or her surviving spouse and other property to other beneficiaries. Alternatively, the client can assign arbitrary dollar values to the two shares; providing, for example, that \$600,000 worth of property (or \$625,000, or \$650,000, or any other fixed amount) will be left in such a way that it will escape taxation in the estate of the surviving spouse and the balance of the property will be left to the surviving spouse, either outright or in trust.

These approaches are inflexible, however, and often will not achieve the best tax results. It is usually better to provide for the division of the estate according to a formula. Formulas of this kind are commonly described as "marital deduction formulas." A properly drafted formula clause will allocate the client's property between the marital and nonmarital shares in a manner that will provide maximum flexibility and achieve the most favorable tax treatment consistent with the client's other estate planning goals.

Marital deduction formulas are generally classified as "pecuniary" formulas [ *see [b], below* ] or "fractional" formulas [ *see [c], below* ].

#### **[b] Pecuniary Formula**

A pecuniary formula clause allocates assets to the marital or nonmarital share, up to a dollar amount determined by the formula. Commonly-used language, which has been adopted for the pecuniary formula clauses in this publication, requires funding up to "the minimum amount necessary to eliminate federal estate tax at the death of the deceased settlor" [ *see the forms in §§ 71.200-71.203* (inter vivos trusts), *71.210, 71.211* (testamentary trusts)]. The clause can allocate the formula amount to either the marital deduction share (a "pecuniary marital deduction formula") [ *see §§ 71.200, 71.201* (inter vivos trusts), *71.210* (testamentary trusts)] or the nonmarital share (a "pecuniary bypass formula") [ *see §§ 71.202, 71.203* (inter vivos trusts), *71.211* (testamentary trusts)]. If the pecuniary amount is allocated to the marital deduction share, the rest of the property will be allocated to the nonmarital deduction share. Conversely, if the pecuniary amount is allocated to the nonmarital deduction share, the residue will be allocated to the marital deduction share.

Pecuniary formula clauses enjoy wide popularity among estate planners. They avoid the administrative headaches commonly encountered when individual assets are divided between the two shares according to a fractional formula clause [ *see [c], below* ]. They also give the executor or trustee discretion to select the specific assets that will be used to fund the respective shares (subject to limitations designed to promote fairness in the allocation [ *see Rev. Proc. 64-19, 1964-1 C.B. 682* ]). After the client's death, the executor or trustee can determine which assets are most suitable for

allocation to the two shares. The executor or trustee can also decide whether it would be advantageous to allocate assets with a good potential for future appreciation to the marital deduction share or the nonmarital deduction share. Overall estate tax liability will often be reduced if assets with a good potential for future appreciation are allocated to the nonmarital deduction share, since this share will escape estate taxation when the surviving spouse dies while the marital deduction share will be subject to estate taxation at that time. For additional discussion, see §§ 71.200[1][g], 71.220[1][b] (valuation issues); see also *CALIFORNIA WILLS & TRUSTS, Ch. 112, The Marital Deduction and Marital Deduction Trusts, § 112.03[6]* (Matthew Bender).

### **[c] Fractional Formula**

A fractional formula clause divides *each asset* subject to the formula into fractional shares, and specifies that the marital deduction share will consist of the smallest fractional share of the assets necessary to eliminate estate taxes in the client's estate (or reduce those taxes to the maximum extent possible) [ see §§ 71.204, 71.205 (inter vivos trusts), 71.212 (testamentary trusts)]. Because each share receives a fractional interest in each asset, fractional formula clauses do not create the funding or valuation problems that can arise when estates are divided according to pecuniary formula clauses. Both the marital deduction share and the nonmarital share receive interests in the same assets, and no beneficiary can claim that another beneficiary got "better" assets. However, fractional formula clauses require the different beneficiaries to become co-owners of each asset, and do not give the executor or trustee any discretion to determine which assets should be allocated to each share. This can cause difficulties in administration. For this reason, fractional formula clauses are used less frequently than pecuniary formula clauses.

### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsMarital Deduction TrustsTax LawFederal Estate & Gift TaxesDeductionsMarital Deduction (IRC secs. 2056, 2523)General Overview



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DIVISION IV: WILLS AND TRUSTS  
 CHAPTER 71 MARITAL DEDUCTION TRUST PROVISIONS  
 PART II. LEGAL BACKGROUND

*26-71 California Legal Forms--Transaction Guide § 71.13*

**AUTHOR:** Reviewed by Albert G. Handelman

**§ 71.13 Marital Deduction Trusts**

**[1] In General**

Any trust that is designed to qualify for the marital deduction may be described as a "marital deduction trust." A marital deduction trust may be either an inter vivos trust [ *see* Ch. 70, *Complete Revocable Trusts* ] or a testamentary trust [ *see* Ch. 64, *Testamentary Trusts: Payment and Distribution Provisions* , Ch. 64A, *Testamentary Trusts: Trustee Provisions* , Ch. 64B, *Testamentary Trusts: Administrative Provisions* ; *see also* Ch. 61, *Will Drafting and Complete Will Forms* ]. Although a gift does not have to be made in trust to qualify for the marital deduction [ *see* § 71.10[3] (marital deduction requirements)], trusts are flexible and adaptable devices and are very widely used as the vehicles for making marital deduction gifts.

When a marital deduction gift is made in trust, it may accomplish other goals besides qualifying for the marital deduction. A trust permits the settlor to maintain control over the trust property by specifying the terms and conditions under which the trust will be administered and the trust property will be distributed. A trust also permits the settlor to divide the benefits of the trust property among two or more generations of beneficiaries. Trusts also give the beneficiaries the benefits of property management. If the surviving spouse cannot or does not wish to personally manage the trust property, some other person (or even a professional trustee such as a bank or trust company) can be selected to do so for the surviving spouse. This will be particularly desirable if the surviving spouse is disabled or aged. For additional discussion of the uses and advantages of trusts, *see* Ch. 70, *Complete Revocable Trust Forms*, § 70.10[3], [4].

**[2] Formula Versus Nonformula Trusts**

A marital deduction trust may simply provide that all assets will be held in trust for the surviving spouse on the death of the first spouse, or it may divide the trust assets into marital and nonmarital shares by means of a formula [ *see* § 71.12[3] for discussion of marital deduction formulas]. A marital deduction trust that does not use a formula is often referred to as a "nonformula trust." Nonformula trusts are often used when the size of the estate is not substantial enough to generate significant estate tax liability, or when the spouses are willing to incur additional taxes in the

survivor's estate as a tradeoff for giving the surviving spouse a greater degree of control over the trust assets during his or her lifetime. For additional discussion of these planning considerations, see § 71.11[4]. For a complete nonformula marital deduction trust, see the *form in Ch. 70, Complete Revocable Trust Forms*, § 70.201[2].

In contrast, a "formula" marital deduction trust uses a marital deduction formula to divide the trust assets into marital and nonmarital shares on the death of the first settlor [for additional discussion of marital deduction formulas, see § 71.12[3]]. Formula marital deduction trusts generally are the most effective vehicles for reducing the overall federal estate tax in the estates of both spouses [see § 71.12[3][b] for an example of the tax savings that can be achieved by use of formula]. For examples of complete marital deduction formula trusts, see the *forms in Ch. 70, Complete Revocable Trust Forms*, §§ 70.202[2] (trust created by joint settlors), 70.203[2] (trust created by sole married settlor).

### [3] Effect of Terminable Interest Requirements

A life interest in a decedent's spouse is a "terminable interest" for purposes of the marital deduction [see *I.R.C. § 2056(b); Treas. Reg. § 20.2056(b)-1(g)*, Ex. 1; see also § 71.10[4]]. Thus, a marital deduction trust that provides for a life interest in the surviving spouse and a remainder in favor of someone else will not qualify for the marital deduction *unless* it qualifies as one of the types of "terminable interests" for which a marital deduction is specifically allowed [see § 71.10[4]]. Four general types of marital deduction trusts that comply with those requirements are widely used by estate planners. Those types are discussed in [4] through [7], *below*.

### [4] Qualified Terminable Interest Property (QTIP) Trust

Although property passing from a decedent to a surviving spouse generally qualifies for a marital deduction from the federal estate tax under *I.R.C. § 2056(a)*, terminable interests passing to the surviving spouse are not deductible unless they qualify for an exception under *I.R.C. § 2056(b)(7)* [*I.R.C. § 2056(b)(1)*]. Because the marital deduction is "strictly construed and applied," every condition for the exception must be met [see *Davis v. C.I.R.* (9th Cir. [Cal.] 2005) 394 F.3d 1294, 1298 *fn.* 2].

A trust will qualify for the marital deduction as a qualified terminable interest property (QTIP) trust if it meets all of the following requirements [*I.R.C. § 2056(b)(7)*]:

- The surviving spouse has the right to receive all of the income from the trust for life [see *Treas. Reg. §§ 20.2056(b)-7(d)*, 20.2056(b)-5(f) (income requirements for QTIP trusts); see also *Estate of Whiting, T.C. Memo. 2004-68* (estate tax marital deduction for assets passing to marital deduction trust was permitted although trust document authorized trustee to withhold any otherwise required distributions to beneficiary if trustee determined that beneficiary was disabled because of age, illness, or other cause; because trust document as a whole did not permit trustee to withhold income distributions, marital trust qualified for deduction); *Estate of Charles N. Aronson, T.C. Memo. 2003-189* (surviving spouse's interest in testamentary trust did not qualify for estate tax marital deduction as QTIP when will unambiguously stated that spouse was to receive only as much income from trust as she needed during her lifetime; it did not designate spouse as life beneficiary of trust or sole income beneficiary for life); *I.R.S. Technical Advice Memorandum 200505022* (property that passes to QTIP trust does not qualify for estate tax marital deduction if will provides that distributions to surviving spouse are limited to specific purposes subject to trustee's approval; this interest is not unqualified right to receive all trust income); *I.R.S. Technical Advice Memorandum 200444023* (trust does not qualify for marital deduction when extent to which trust income is to be paid to surviving spouse is within trustee's discretion); *I.R.S. Technical Advice Memorandum 200339003* (trust for benefit of spouse that is funded, in part, with stock that has never paid dividends may still qualify for federal estate tax marital deduction as QTIP)];
- The income is payable to the surviving spouse annually or at more frequent intervals;

- No person other than the surviving spouse has an interest in the trust principal during the surviving spouse's lifetime;
- No person has a power to appoint any part of the property to any person other than the surviving spouse except at or after the surviving spouse's death [*see* I.R.S. Technical Advice Memorandum, 200234017 (surviving spouse does not have qualifying income interest for life in trust for marital deduction purposes if spouse has power during life or at death to appoint trust income and principal to children or more remote descendants)]; and
- The executor or trustee makes an election on the estate tax return to qualify the trust property as QTIP property [*see* *Treas. Reg. § 20.2056(b)-7(b)* (QTIP election requirements)].

Language in a marital deduction trust providing that if the income payable to the surviving spouse exceeded the amount the trustee deemed necessary for the surviving spouse's needs, best interests, and welfare, the trustee could accumulate the excess amount, was held to be sufficiently broad to entitle the surviving spouse "to all the income from the property for life" under *I.R.C. § 2056(b)(7)(B)(ii)* [*Davis v. C.I.R.* (9th Cir. [Cal.] 2005) 394 F.3d 1294, 1298]. However, other language, such as "necessary or proper to provide for the surviving spouse's care, maintenance, and support" or "for the surviving spouse's usual and customary standard of living," does not comply with *I.R.C. § 2056(b)(7)* because reformation of the instrument creating the interest would be required to grant the QTIP deduction [*Davis v. C.I.R.* (9th Cir. [Cal.] 2005) 394 F.3d 1294, 1298-1299 (trust that gives surviving children discretion to distribute income to provide for surviving spouse's "health, education, and support" is insufficient for QTIP purposes)]. Such language in the trust instrument will make the surviving spouse's life estate in the trust too restricted to qualify for the QTIP election even if the surviving spouse is the sole trustee, because it is possible that the surviving spouse will not remain as trustee until his or her death [*Davis v. C.I.R.* (9th Cir. [Cal.] 2005) 394 F.3d 1294, 1300-1302 (possibility, however remote, that surviving spouse might resign or become incapacitated prevents provision naming surviving spouse as trustee from automatically qualifying otherwise deficient trust for marital deduction under *I.R.C. § 2056(b)(7)*)].

When a decedent chooses to limit the degree of control the surviving spouse will have over the income from terminable interest property, the decedent also precludes the possibility that his or her estate may claim a QTIP deduction under *I.R.C. § 2056(b)(7)* [*Davis v. C.I.R.* (9th Cir. [Cal.] 2005) 394 F.3d 1294, 1299]. A marital deduction under *I.R.C. § 2056(b)(7)* is available only if the decedent gives the surviving spouse complete control over the income from a property for life. If the surviving spouse's interest in the property income is limited and, therefore, cannot be equated with virtual ownership, the estate may not claim a marital deduction under *I.R.C. § 2056(b)(7)* [*Davis v. C.I.R.* (9th Cir. [Cal.] 2005) 394 F.3d 1294, 1299]. A surviving spouse's complete control of trust income sufficient to qualify for the marital deduction is not defeated by allowances for trust administration provided in the statute and regulations [*Davis v. C.I.R.* (9th Cir. [Cal.] 2005) 394 F.3d 1294, 1299 *fn.* 6].

In determining whether an interest that passes in a trust to a surviving spouse qualifies for a QTIP deduction under *I.R.C. § 2056(b)(7)*, a court first looks to state law to determine the nature and extent of the property interest granted to the surviving spouse, then to federal law to determine whether these property rights are ultimately subject to taxation [*United States v. Craft* (2002) 535 U.S. 274, 278, 122 S. Ct. 1414, 152 L.Ed.2d 437; *Davis v. C.I.R.* (9th Cir. [Cal.] 2005) 394 F.3d 1294, 1299].

An income interest for a term of years, or a life estate subject to termination on the occurrence of a specified event (e.g., remarriage), is not a qualifying income interest for life [*Treas. Reg. § 20.2056(b)-7(d)(3)*]. An income interest in a trust does not fail to constitute a qualifying income interest for life merely because the trustee has the power to distribute principal to or for the benefit of the surviving spouse [*Treas. Reg. § 20.2056(b)-7(d)(6)*].

The QTIP trust is the most widely used type of marital deduction trust. It gives the surviving spouse a high degree of

enjoyment and use of the trust property, while permitting the settlor(s) to determine in advance who will receive the property on the surviving spouse's death. This can be particularly desirable if one or both of the spouses have children by previous marriages and wish to ensure that those children will receive the trust property after the death of the surviving spouse.

Further, when it comes time to elect to qualify the trust property as QTIP property, the executor or trustee may make a partial QTIP election [*Treas. Reg. § 20.2056(b)-7(b)*]. The option to make a partial election provides a great deal of flexibility in funding the trust after the deceased spouse's death.

A QTIP trust will not qualify for the marital deduction, however, unless the election is actually made. An inadvertent failure to make the election may disqualify the entire trust from the marital deduction. The QTIP election, once made, is irrevocable [*I.R.C. § 2056(b)(7)(B)(v)*; see *Letter Rul. 200323010* (miscalculation in value of property for which QTIP election was made on estate tax return did not preclude marital deduction for full value of property that would actually fund QTIP trust)].

For further discussion of QTIP trusts, and a sample set of dispositive provisions for a QTIP trust, see § 71.230.

#### **[5] Lifetime Income Plus Power of Appointment Trust**

Although property passing from a decedent to a surviving spouse generally qualifies for a marital deduction from the federal estate tax under *I.R.C. § 2056(a)*, life estates passing to the surviving spouse are not deductible unless they qualify for an exception under *I.R.C. § 2056(b)(5)* [*I.R.C. § 2056(b)(1)*]. Because the marital deduction is "strictly construed and applied," every condition for the exception must be met [*see Davis v. C.I.R. (9th Cir. [Cal.] 2005) 394 F.3d 1294, 1298 fn. 2*].

A trust will qualify for the marital deduction as a lifetime income/power of appointment trust if it meets all of the following requirements [*I.R.C. § 2056(b)(5)*; *Treas. Reg. § 20.2056(b)-5(a)*]:

- The surviving spouse has the right to receive all of the income from the trust (or all the income from a "specific portion" of the trust) for life;
- The income is payable to the surviving spouse annually or at more frequent intervals;
- The surviving spouse has a general power of appointment over the trust assets (that is, the power to appoint the assets to the surviving spouse or the surviving spouse's estate, whether or not there is also a power to appoint the assets in favor of others); and
- No person other than the surviving spouse has any power to appoint any part of the assets to any person other than the surviving spouse.

The power to appoint the trust property on the death of the surviving spouse [*see P (3), above*] must be exercisable by the surviving spouse alone [*I.R.C. § 2056(b)(5)*]. The power must also be "exercisable in all events" [*I.R.C. § 2056(b)(5)*; *Treas. Reg. § 20.2056(b)-5(a)(4)*]. This means that it cannot be subject to limitations such as remarriage [*see Johnson v. Commissioner (1977) 36 T.C.M. (CCH) 539*].

If either the right to income or the power of appointment passing to the surviving spouse pertains to only a "specific portion" of a property interest passing from the decedent, the marital deduction is allowed only to the extent that the rights in the surviving spouse meet all of the conditions described above [*see Treas. Reg. § 20.2056(b)-5(b)*]. While the rights over the income and the power must coexist as to the same interest in property, there is no requirement that the rights over the income or the power as to the interest must be in the same proportion [*Treas. Reg. § 20.2056(b)-5(b)*].

However, if the rights over income extend over a smaller share of the property interest than the share with respect to which the power of appointment requirements are satisfied, then the deductible interest will be limited to the smaller share. Similarly, if the power of appointment extends to a smaller portion of the property interest than the portion over which the income rights pertain, the deductible interest cannot exceed the value of the portion to which the power of appointment applies [*Treas. Reg. § 20.2056(b)-5(b)*]. For example, if the decedent leaves to the surviving spouse the right to receive annually all of the income from a particular property interest, but a power of appointment as to only half of that interest, then only half of the property interest is treated as a deductible interest [*Treas. Reg. § 20.2056(b)-5(b)*].

If a trust is created during the decedent's lifetime, it is immaterial whether or not the interest passing in the trust satisfies the conditions for the marital deduction before the decedent's death [*Treas. Reg. § 20.2056(b)-5(f)(6)*]. If the trust may be terminated during the life of the surviving spouse, under his or her exercise of a power of appointment or by distribution of the principal to him or her, the interest passing in trust satisfies the condition that the spouse be entitled to receive all of the income, as long as the surviving spouse is entitled to the income until the trust terminates or has the right, exercisable in all events, to have the principal distributed to him or her at any time during his or her life [*Treas. Reg. § 20.2056(b)-5(f)(6)*].

An interest passing in trust fails to satisfy the requirement that the surviving spouse be entitled to all of the income, to the extent that: (1) the income is required to be accumulated in whole or in part, or may be accumulated in the discretion of any person other than the surviving spouse; (2) the consent of any person other than the surviving spouse is required as a condition precedent to distribution of the income; or (3) any person other than the surviving spouse has the power to alter the terms of the trust so as to deprive the spouse of his or her right to the income [*Treas. Reg. § 20.2056(b)-5(f)(7)*]. An interest passing in trust will not fail to satisfy the requirement that the spouse be entitled to all of the income merely because its terms provide that the surviving spouse's right to the income is not subject to assignment, alienation, pledge, attachment, or creditors' claims [*Treas. Reg. § 20.2056-5(f)(7)*].

A decedent's estate was not entitled to a marital deduction for the property passing to a trust when language in the trust instrument directing the trustee to consider the surviving spouse's "accustomed manner of living" in making income distributions was a significant restriction that prevented the surviving spouse from having the requisite command over the income. In addition, the surviving spouse did not possess a general power of appointment over the trust property for purposes of *I.R.C. § 2056(b)(5)* because the trust instrument provided that principal could only be invaded for the surviving spouse's health, support, and maintenance [ *Estate of Ralph H. Davis, T.C. Memo. 2003-55* ; see *Treas. Reg. § 20.2056(b)-5(f)(8)*].

Lifetime income/power of appointment trusts were the standard form of marital deduction trust before the advent of QTIP trusts, and these trusts remain in common use. Although most experienced planners prefer QTIP trusts because of the greater postmortem planing flexibility they offer, clients sometimes prefer lifetime income/power of appointment trusts because they give the surviving spouse a freer hand in disposing of the trust assets on his or her death. In a two-settlor revocable trust, the same effect is frequently accomplished by combining the marital deduction share with the survivor's trust [ see § 71.15[4]].

For further discussion of lifetime income/power of appointment trusts, and a sample set of dispositive provisions, see § 71.231.

## [6] Estate Trust

A trust will qualify for the marital deduction as an "estate trust" if all of the beneficial interests in the trust (both income and remainder) are left to the surviving spouse or the surviving spouse's estate [see *Commissioner v. Estate of Ellis (3d Cir. [T.C.] 1958) 252 F.2d 109, 111-115* ; *Treas. Reg. § 20.2056(e)-2(b)*]. The surviving spouse need not receive all of the income from the property, as long as the remainder is distributed to the surviving spouse's estate. Thus, an estate trust can give the trustee discretion to determine when and how much income should be paid to the surviving spouse.

A trust will qualify for the marital deduction as an estate trust in any one of the following circumstances [Treas. Reg. § 20.2056(e)-2(b)(1)(i)-(iii)]:

- If the trust income is paid to the surviving spouse for life, and on the surviving spouse's death the trust assets are distributed to the surviving spouse's executor or administrator;
- If the trust income is paid to the surviving spouse for a period of years, after which the trust assets are distributed to the surviving spouse or the surviving spouse's estate; or
- The trust income is accumulated for a term of years or the surviving spouse's lifetime, and the augmented fund is paid to the surviving spouse or the surviving spouse's estate.

Most estate trusts call for income payments to the spouse for life, with remainder to the surviving spouse's executor or estate.

Estate trusts are relatively simple to draft. However, the trust assets will be subject to probate administration on the death of the surviving spouse. Further, the deceased spouse will have no control over the ultimate disposition of the assets, since they will pass on the surviving spouse's death as provided in the surviving spouse's will or, in the absence of a will, according to the laws of intestate succession. Estate trusts are inflexible arrangements and are only rarely used in modern estate planning.

For further discussion of estate trusts, and a sample trust remainder provision creating an estate trust, see § 71.232.

## **[7] Qualified Domestic Trust (QDOT)**

### **[a] In General**

Transfers of property to a spouse who is not a United States citizen generally do not qualify for the marital deduction [ *see* § 71.10[5]]. This rule, with one important exception, extends to transfers in trust. If a deceased spouse dies after November 10, 1988, and the surviving spouse is not a United States citizen, a trust will not qualify for the marital deduction *unless* it is a "qualified domestic trust" (commonly called a "QDOT") that meets all of the requirements of *I.R.C. § 2056A* [*I.R.C. § 2056(d)(1), (2)*; *see* *Treas. Reg. § 20.2056A-1(a)* (effective date)]. The QDOT requirements are extremely important when one of the spouses is a noncitizen inasmuch as in many cases the creation of a QDOT will be the only option by which the spouses can avail themselves of the marital deduction [ *see* § 71.10[5]].

*I.R.C. § 2056A* imposes a special tax on any distribution of principal made from a QDOT before the death of the surviving spouse, and on any property remaining in the trust on the date of the surviving spouse's death [*I.R.C. § 2056A(b)(1)*]. The tax is imposed at the same rate as the estate tax [*I.R.C. § 2056A(b)(2)*]. To make sure that the tax is collected, *I.R.C. § 2056A* provides that the governing instrument of a QDOT must require that at least one trustee be a domestic corporation or an individual citizen of the United States and that no principal be distributed from the trust unless the domestic corporation or individual citizen has the right to withhold the tax from the distribution [*I.R.C. § 2056A(a)(1)*]. The domestic corporation or individual citizen is referred to in the regulations as the "U.S. Trustee" [*Treas. Reg. § 20.2056A-2(c)*].

In order for a trust to qualify as a QDOT, the deceased settlor's executor must make an election to have the trust treated as a QDOT [*I.R.C. § 2056A(a)(3)*].

### **[b] Required Trust Provisions**

The Internal Revenue Code specifies two basic requirements for the trust instrument of a QDOT. First, the trust instrument must (except as provided in Treasury Regulations) require that at least one trustee of the trust be an individual citizen of the United States or a domestic corporation [*I.R.C. § 2056A(a)(1)(A)*]. Second, the trust instrument must provide that no distribution, other than a distribution of income, may be paid from the trust unless a trustee who is an individual citizen of the United States or domestic corporation has the right to withhold from that distribution the tax imposed by *I.R.C. § 2056A* on that distribution [*I.R.C. § 2056A(a)(1)(B)*]. The Secretary of the Treasury is given broad authority to prescribe additional regulations to ensure that the tax imposed by *I.R.C. § 2056A* is collected [*I.R.C. § 2056A(a)(2)*].

The Treasury Regulations substantially expand upon the basic Internal Revenue Code requirements. The regulations provide that specific provisions be included in the governing instrument of a QDOT. The required provisions vary depending on whether the fair market value of the trust assets determined as of the date of the decedent spouse's death (or the alternate valuation date if applicable) is greater or less than \$ 2 million. If the fair market value exceeds \$2 million (determined without reduction for any indebtedness with respect to the assets) the governing instrument of the QDOT must require one of the following:

- That during the entire term of the QDOT at least one U.S. Trustee be a bank as defined in *I.R.C. § 581*; or, alternatively, that at least one trustee be a United States branch of a foreign bank and that a U.S. Trustee act as a cotrustee with the foreign bank trustee [*Treas. Reg. § 20.2056A-2(d)(1)(i)(A)*].
- That the U.S. Trustee furnish the Internal Revenue Service with a bond in an amount equal to 65 percent of the fair market value of the trust assets (without regard to any indebtedness on the assets) as of the date of the decedent spouse's death, or the alternate valuation date if applicable [*Treas. Reg. § 20.2056A-2(d)(1)(i)(B)*]. The bond must be filed with the decedent spouse's estate tax return and be in a form prescribed by the regulations [*Treas. Reg. § 20.2056A-2(d)(1)(i)(B)(2), (4)*].
- That the U.S. Trustee furnish an irrevocable letter of credit issued by a bank as defined in *I.R.C. § 581*, or issued by a foreign bank and confirmed by a bank as defined in *I.R.C. § 581*, in an amount equal to 65 percent of the fair market value of the trust assets (determined without regard to any indebtedness on the assets) as of the date of the decedent spouse's death, or the alternate valuation date if applicable [*Treas. Reg. § 20.2056A-2(d)(1)(i)(C)*]. The letter of credit, like the bond, must be filed with the decedent spouse's estate tax return and be in a form prescribed by the regulations [*Treas. Reg. § 20.2056A-2(d)(1)(i)(C)(2), (5)*].

If the fair market value is \$2 million or less (again determined without reduction for any indebtedness with respect to the assets), the governing instrument must either meet the governing instrument requirements of a trust with assets of more than \$2 million (described above) or require that no more than 35 percent of the fair market value of the trust assets consist of real property located outside the United States [*Treas. Reg. § 20.2056A-2(d)(1)(ii)*].

In many cases, it will be difficult at the time the governing instrument is drafted to determine whether the trust will or will not meet the \$2 million threshold at the time of the deceased spouse's death. Accordingly, the regulations permit the governing instrument to state the requirements in the alternative and to leave the determination as to which requirements will actually apply to be determined at the date of death (or alternate valuation date, if applicable) [*see Requirements to Ensure Collection of Section 2056A Estate Tax, 60 Fed. Reg. 43555 (August 22, 1995)*].

#### **[c] Exclusion for Principal Residence**

The deceased spouse's executor may elect to exclude up to \$600,000 in value attributable to real property owned directly by the QDOT that is used by the surviving spouse as the spouse's principal residence and that passes, or is treated as passing, to the QDOT for purposes of the marital deduction [*Treas. Reg. § 20.2056A-2(d)(1)(iv)(A)*]. This

exclusion may be made for the purpose of determining whether the \$2 million threshold amount has been reached or for determining the amount of the bond or letter of credit that may be used to satisfy the requirements for a QDOT with assets in excess of \$2 million [*Treas. Reg. § 20.2056A-2(d)(1)(iv)(A), (B)*]. However, it may not be made for purposes of determining whether more than 35 percent of the QDOT consists of foreign real property [*Treas. Reg. § 20.2056A-2(d)(1)(iv)(C)*].

#### **[d] Other Marital Deduction Requirements**

The QDOT is a type of marital deduction trust and, as such, it must meet the other requirements of the marital deduction. Accordingly, the Treasury Regulations provide that, in addition to the special requirements of *I.R.C. § 2056A*, a QDOT trust must qualify for the marital deduction as one of the following [*Treas. Reg. § 20.2056A-2(b)*]:

- A QTIP trust [*see I.R.C. § 2056(b)(7)* and discussion in [4], *above*];
- A lifetime income plus power of appointment trust [*see I.R.C. § 2056(b)(5)* and discussion in [5], *above*];
- An estate trust [*see Treas. Reg. § 20.2056(c)-2(b)(1)(i)* and discussion in [6], *above*]; or
- A charitable remainder trust of which the surviving spouse is the only noncharitable beneficiary [*see I.R.C. § 2056(b)(8)* and discussion in *CALIFORNIA WILLS & TRUSTS, Ch. 112, The Marital Deduction and Marital Deduction Trusts, § 112.05[6]* (Matthew Bender)].

#### **[e] Reformation of Governing instrument**

If a trust would qualify for the marital deduction but for the fact that its governing instrument does not meet all of the governing instrument requirements of a QDOT, the instrument will be deemed to meet those requirements if it is reformed or amended either in accordance with the instrument itself, or the deceased spouse's will, or in a judicial proceeding [*Treas. Reg. § 20.2056A-4(a)(1)*]. A reformation or amendment in accordance with the terms of the will or trust instrument must be completed by the time prescribed (including any extensions) for filing the deceased spouse's estate tax return [*Treas. Reg. § 20.2056A-4(a)(1)*]. Judicial reformation must be commenced within that time [*Treas. Reg. § 20.2056A-4(a)(2)*].

It is always good practice when drafting a will or trust instrument that sets up a QDOT to give the executor or trustee power to amend and reform the terms of the trust instrument whenever necessary to comply with the requirements of a QDOT [ *see § 71.222[2]*].

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsCreationEstate, Gift & Trust LawTrustsMarital Deduction TrustsEstate, Gift & Trust LawTrustsRevocable Living TrustsEstate, Gift & Trust LawTrustsTestamentary Trusts



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DIVISION IV: WILLS AND TRUSTS  
CHAPTER 71 MARITAL DEDUCTION TRUST PROVISIONS  
PART II. LEGAL BACKGROUND

*26-71 California Legal Forms--Transaction Guide § 71.14*

**AUTHOR:** Reviewed by Albert G. Handelman

**§ 71.14 Bypass Trusts**

**[1] In General**

A "bypass" trust is a trust that is designed to qualify for the "applicable exclusion amount" [*see I.R.C. § 2010(c)*] (table of graduated amounts) and discussion in § 60.13[4][b] in the estate of the surviving spouse. Bypass trusts are also known as "credit shelter trusts," "exemption trusts," "credit trusts," or "nonmarital trusts."

Although bypass trusts do not qualify for the federal estate tax marital deduction, they are very frequently used in conjunction with marital deduction trusts and play a critically important role in estate planning [*see discussion in § 71.11[3][b]*]. Bypass trusts are designed to shelter the "applicable exclusion amount" from taxation on the first spouse's death, provide benefits to the surviving spouse (or other beneficiaries, if desired) for life, and on the death of the surviving spouse (or other beneficiaries), distribute the trust assets among remainder beneficiaries, usually the settlor's children. If a bypass trust is properly planned and drafted, the surviving spouse will be able to receive substantial benefits from the trust, and the trust assets will not be included in the survivor's estate when he or she dies. A typical bypass trust will provide income to the surviving spouse for life, limited access to the trust principal, and distribution of the remaining trust assets, either outright or in trust, to the children and issue of the settlor(s) on the death of the surviving spouse.

Bypass trusts are the single most important exception to the rule that revocable inter vivos trusts and testamentary trusts are "tax-neutral," because an outright gift to either the surviving spouse or the deceased spouse's children will not achieve a comparable result [for discussion of the concept that revocable trusts are "tax-neutral," and bypass trusts as an exception to this general principle, *see Ch. 70, Complete Revocable Trust Forms, § 70.10[3][d]*]. The deceased settlor could, of course, achieve the same tax treatment for the property simply by giving it to his or her children outright, but that would deprive the surviving spouse of any rights to use or enjoy the property. A bypass trust allows the deceased settlor both to give his or her spouse significant rights to use and enjoy the trust property and to allow the property to escape taxation when the spouse dies.

Although it is most common to name the surviving spouse as sole life beneficiary of a bypass trust, other beneficiaries may be designated if desired. For example, some bypass trusts are drafted to make the surviving spouse and the deceased spouse's children beneficiaries of the bypass trust, often under a sprinkling arrangement. Or, if the surviving spouse has sufficient assets to maintain himself or herself without recourse to the bypass trust, the bypass trust may be set up to provide income and principal for the deceased spouse's children or other beneficiaries, rather than the surviving spouse.

There are a number of potential income and estate tax pitfalls in drafting bypass trusts [see [2][a], *below*], and distribution provisions must be given careful consideration. Careless drafting can result in the inclusion of the trust assets in the surviving spouse's estate, thereby completely defeating the purpose of the trust.

## **[2] Limitations on Rights of Surviving Spouse**

### **[a] Tax Issues**

Many married couples want the surviving spouse to have absolute control over the bypass trust during his or her lifetime. To that end, clients commonly want the surviving spouse to be both the trustee of the bypass trust and a beneficiary of that trust. The danger for the attorney is that in attempting to accommodate the clients' wishes, the surviving spouse may inadvertently be granted powers in excess of those permitted by the tax laws, with the result that the surviving settlor will be deemed to be the owner of the assets for income tax purposes, estate tax purposes, or both.

Two basic tax problems arise when a spouse is named as trustee of the bypass trust:

- (1) A trustee who has the power, exercisable solely by himself or herself, to vest income or principal of any portion of the trust in himself or herself, is treated as the owner of that portion of the trust and is taxed on the income from that portion of the trust, whether or not that income is actually paid to the trustee [*I.R.C. § 678(a)(1)*]. Thus, if there are other beneficiaries of the trust besides the surviving spouse, and the surviving spouse has a "sprinkling" power over the trust assets [for discussion of "sprinkling" powers, see *ch. 70, Complete Revocable Trust Forms, § 70.210[1][d]*], the trust income may will be taxed to the surviving settlor even if he or she distributes the income to the other trust beneficiaries.
- (2) A trustee/beneficiary who has an unrestricted power to appoint any portion of the trust assets to himself or herself is deemed to have a general power of appointment over the trust assets, and those assets will be included in the trustee's estate [*I.R.C. § 2041*] unless appropriate precautions are taken.

### **[b] Solutions to Income Tax Issues**

The simplest solutions to the potential income tax problem noted in [a], above, are:

- (1) Make the surviving settlor the sole income beneficiary of the bypass trust;
- (2) If there are to be other beneficiaries, do not give the surviving settlor a "sprinkling" power over the trust income, and instead provide for mandatory income payments to those beneficiaries in equal shares;  
or
- (3) If the sprinkling power is essential, name someone other than the surviving spouse as trustee.

If none of these alternatives is acceptable, the only remaining option to avoid the income tax problem is to provide that any distributions of income to the surviving settlor can be made only with the consent of another person, either a

co-trustee or a "special trustee" appointed specifically for that purpose [*see I.R.C. § 678(a)(1)*].

**PRACTICE TIP:**

The estate planner should also bear in mind that in some cases, it may actually be advantageous to have all of the income of a bypass trust with a "sprinkling" provision taxed to the surviving spouse. Suppose, for example, that the surviving spouse is wealthy, with more than enough income to provide comfortably for himself or herself. In such a case, the surviving spouse may be concerned about transferring as much of his or her estate as possible to his or her children with the least amount of tax. As trustee of the bypass trust, he or she could exercise the sprinkling power to distribute all the current income to his or her children. Nevertheless, all the income will be taxed to the surviving spouse. The children will receive all the income free of tax, and the surviving spouse's estate will be reduced by the amount of the income tax, thus lowering the eventual estate tax bite. Notice that if the bypass trust required that all of the income be paid currently to the children, the children would receive only the net amount of income after the payment of income tax, and the surviving spouse would have a larger estate subject to estate tax. Thus, in such circumstances, the income tax "problems" described above could actually provide a net tax benefit for the family when considered as a whole. *Commentary by Albert G. Handelman.*

**[c] Solutions to Estate Tax Issues**

The simplest way to address the estate tax problems discussed in [a], above, is to name someone other than the surviving spouse as trustee of the bypass trust. If this alternative is unacceptable, the problems may be addressed by either:

- (1) Limiting the trustee's power to distribute trust principal by an "ascertainable standard" relating to the health, education, support, or maintenance of the beneficiary [*I.R.C. § 2041(b)(1)(A)*]; *see* [3], *below*; *see also* discussion of "ascertainable standards" in Ch. 70, *Complete Revocable Trust Forms*, §§ 70.12[6][c], 70.200[1][i] and Ch. 64, *Testamentary Trusts: Payment and Distribution Provisions*, § 64.51[4];
- (2) Providing that the trustee may distribute trust assets to the surviving settlor only with the concurrence of another person who has a substantial interest in the trust that would be adversely affected by the exercise of the power (i.e., another trust beneficiary) [*I.R.C. § 2041(b)(1)(C)*]; or
- (3) Appointing a "special trustee" to make all distributions of principal to the surviving settlor.

**[d] Powers That Can Safely Be Granted to Surviving Spouse**

With careful drafting, it is possible to give the surviving spouse the beneficial enjoyment of the bypass trust during his or her lifetime while still avoiding the tax problems noted in [a], above. These two goals can be achieved if the bypass trust cannot be revoked by the surviving spouse, if the surviving spouse's rights to receive income and principal are properly limited, and if the trust principal will be distributed to other beneficiaries (that is, surviving children or grandchildren) on the surviving spouse's death.

The surviving spouse's lifetime interest in the bypass trust may include the following rights without destroying the tax-saving goals of the trust:

- (1) The right to receive all of the income from the trust at least annually [*see* [b], *above*, regarding the tax issues that can arise in connection with "sprinkling" powers];
- (2) The right to receive trust principal pursuant to an "ascertainable standard" relating to the surviving

spouse's health, education, support, or maintenance [*see I.R.C. § 2041(b)(1)(A)*]; *see also* discussion in [3], *below*]; and

(3) The right to receive the greater of \$5,000 or 5 percent of the value of the trust principal each year [*see also* discussion in [4], *below*].

The right to receive all of the income from a trust does not cause the trust assets to be included in the taxable estate of a trust beneficiary, so this right can safely be conferred on the surviving spouse without endangering the tax-saving goals of the trust.

### **[3] Right to Invade Principal**

The right to invade the principal of a trust will cause the trust assets to be included in the gross taxable estate of the person who holds the power if the power is a general power of appointment [*I.R.C. § 2041(a)*]. A power is a "general power of appointment" if the person who holds it can exercise it in his or her own favor, in favor of his or her estate, in favor of his or her creditors, or in favor of the creditors of his or her estate [*I.R.C. § 2041(b)(1)*].

A power that would otherwise be a general power of appointment will not be so classified if the power is limited by an "ascertainable standard" relating to the holder's "health, education, support, or maintenance" [*I.R.C. § 2041(b)(1)(A)*]; *Treas. Reg. § 20.2041-1(c)(2)*]. Thus it is permissible to give the surviving spouse the right to receive principal of the bypass trust pursuant to an "ascertainable standard."

### **[4] Five or Five Power**

The surviving spouse may also be given the right to withdraw the greater of \$5,000 or five percent of the current value of the trust each year. A power of this kind is commonly described as a "five or five power" and may safely be held by a beneficiary without causing the trust principal to be included in the beneficiary's estate for federal estate tax purposes [*see I.R.C. § 2041(b)(2)*]; *Treas. Reg. § 20.2041-3(d)(3)*]. However, the IRS takes the position that the surviving spouse will be treated as the owner of the trust for income tax purposes if the surviving spouse holds a "five or five" power [*Priv. Ltr. Rul. 8142061* ; *Priv. Ltr. Rul. 8326074* ; *see I.R.C. § 678* (income tax consequences of invasion power)]. Before deciding to include a "five or five" power in the bypass trust, the attorney and the settlor should balance the greater access to trust principal that the power would give the surviving spouse against the adverse income tax consequences of the power. For general discussion of "five or five" powers and a sample trust provision conferring such a power, *see Chapter 70, Complete Revocable Trust Forms, Section 70.203 [1][k], [2]*.

### **PRACTICE TIP:**

It should be borne in mind that granting the surviving settlor a five or five power over the bypass trust also can distort the estate plan. From the deceased spouse's perspective, the bypass trust's principal should only be tapped as a last resort; indeed, many revocable trusts specifically provide that the bypass trust principal may (or should) be invaded only after the principal of all other trusts created under the instrument has been exhausted. Such a provision is intended, in part, to give some assurance to each spouse that should he or she die first, the maximum portion possible of the assets he or she leaves will pass to his or her intended beneficiaries, regardless of any later changes that may be made by the surviving spouse as to any trusts (such as a survivor's trust) that remain revocable. At the same time, such a provision protects both spouse' tax plan. The bypass trust's assets will pass free of death tax at the surviving spouse's death. Thus, it is advantageous to allow as much growth as possible to occur in this trust. If the surviving spouse regularly exercises a five or five power he or she may hold over the bypass trust, then the tax plan intended by the instrument will be compromised, even if the compromise is inadvertent. *Commentary by Albert G. Handelman.*

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsCreationEstate, Gift & Trust LawTrustsMarital Deduction TrustsEstate, Gift & Trust  
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DIVISION IV: WILLS AND TRUSTS  
CHAPTER 71 MARITAL DEDUCTION TRUST PROVISIONS  
PART II. LEGAL BACKGROUND

*26-71 California Legal Forms--Transaction Guide § 71.15*

**AUTHOR:** Reviewed by Albert G. Handelman

**§ 71.15 Survivor's Trusts**

**[1] Nature of Trust**

When married persons jointly create a revocable inter vivos trust, that trust typically will contain community property of the settlors, and may also contain separate property or quasi-community property of one or both settlors. When the first settlor dies, one-half of the community property and quasi-community property in the trust belongs to the surviving settlor by operation of law [*Prob. Code §§ 100(a), 101(a)*], unless the spouses have agreed to a non-pro-rata division of the property [*see Prob. Code §§ 100(b), 101(b)*]. Since this property, as well as any trust property that is the separate property of the surviving settlor, belongs to the surviving settlor outright, the surviving settlor will want to be able to deal with (and dispose of) that portion of the trust property as he or she sees fit. To accommodate the statutory property rights of the surviving settlor, it is necessary to separate the survivor's share of the trust assets from the deceased settlor's share of the assets, and place the survivor's assets into a separate trust or share. This share is referred to as a "survivor's trust."

When a survivor's trust is needed, it will be carved out of the trust when the trust assets are divided on the death of the first settlor [*see § 70.12* for a discussion of the division of a revocable trust; *see also* [3], *below*].

**[2] Revocability**

Since the survivor's trust will contain property that the surviving spouse owned before the death of the deceased spouse, and since the death of the deceased spouse will have no effect on the surviving spouse's ownership rights in the trust, the survivor's trust will be fully revocable (and amendable) by the surviving spouse during the survivor's lifetime. Retention of the right to revoke the trust will, of course, require that the trust assets be included in the estate of the surviving spouse for estate tax purposes [*see I.R.C. § 2038*]. However, unless these assets were sold or otherwise disposed of by the surviving spouse during his or her lifetime, they would be included in his or her estate in any event.

**[3] Payments and Distributions**

The surviving spouse typically will have the right to receive all of the income from the survivor's trust, or as much of the income as the surviving spouse may demand of the trustee. The surviving spouse will also have broad rights to invade the trust principal. Principal may be invaded on demand; or, if the settlors prefer, the trustee may be given broad discretion to make principal distributions to the surviving spouse.

On the death of the surviving spouse, it is common to provide that the assets will pass to the person or persons designated by the surviving spouse, or, if the survivor fails to appoint the property to anyone, to specified persons. The trust provisions in this publication provide that unappointed property in the survivor's trust will pass under the provisions applicable to the bypass trust [ *see Ch. 70, Complete Revocable Trust Forms, § 70.202[2], P 5.07(d)*].

#### **[4] Pooling Survivor's Assets and Assets Qualifying for Marital Deduction**

If any part of the trust assets belonging to the deceased settlor are intended to qualify for the federal estate tax marital deduction under the rules applicable to lifetime income/power of appointment trusts [ *see I.R.C. § 2056(b)(5); see also §§ 71.13[5], 71.231[1]*], the marital deduction assets may be pooled with the surviving settlor's assets in the survivor's trust. Some estate planners prefer this kind of drafting approach because it results in a more streamlined trust instrument. However, the limitation on this approach is that the marital deduction assets must be made subject to the same terms and conditions of the survivor's share, including the absolute power to revoke the trust and do anything the survivor wants with the trust assets [ *see [2], above*]. This degree of control exceeds even that commonly granted to the surviving settlor in a lifetime income/power of appointment trust [ *see § 71.13[5]*]. For this reason, as well as the fact that the remainder beneficiaries of the marital deduction share may be different than those of the survivor's share, pooling marital deduction assets with the survivor's assets will be impractical in many cases.

When a QTIP trust is used, it is totally impractical to pool the marital deduction trust assets and the survivor's assets, because the limitations associated with QTIP trusts [ *see § 71.13[4]*] are completely incompatible with the surviving spouse's broad powers over the survivor's share. When a QTIP trust is used, it is always necessary to create separate survivor's and marital deduction trusts.

When the survivor's assets and marital deduction assets are to be combined in a single trust, a so-called "two-way split" (survivor's trust and bypass trust) will occur on the death of the first settlor. When the survivor's share and the marital deduction assets are to be held separately, a so-called "three-way split" (survivor's trust, marital deduction trust, and bypass trust) will occur instead [ *see §§ 71.201[1][b], 71.231[1][f]*].

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:  
Estate, Gift & Trust Law/Trusts/Revocable Living Trusts



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PART II. LEGAL BACKGROUND

*26-71 California Legal Forms--Transaction Guide § 71.16*

**AUTHOR:** Reviewed by Albert G. Handelman

**§ 71.16 Disclaimer Trusts**

**[1] In General**

A "disclaimer trust" is a trust that is designed to be funded with any property that the surviving spouse disclaims after the death of the deceased spouse. Disclaimer trusts may be useful estate planning devices after the death of the first spouse. If property that the surviving spouse would otherwise be entitled to receive (either outright or in trust) upon the death of the deceased spouse is effectively disclaimed under rules set forth in the Internal Revenue Code [*see I.R.C. § 2518; Treas. Reg. §§ 25.2518-1-25.2518-3*], the property may be removed from the surviving spouse's estate for estate tax purposes and transferred to another trust, which may accomplish many of the same purposes as the bypass trust.

**[2] "Qualified" Disclaimers**

**[a] Definition**

The Probate Code defines a "disclaimer" as any document that declines, refuses, renounces, or disclaims an interest that would otherwise be taken by a beneficiary [*Prob. Code § 265*]. The Internal Revenue Code defines a "qualified disclaimer" as an irrevocable and unqualified refusal by a person to accept an interest in property [*I.R.C. § 2518(b)*]. If an interest in property is subject to a qualified disclaimer, the interest will be treated for federal gift and estate tax purposes as if it had never been transferred to the disclaiming party [*I.R.C. § 2518(a)*].

**[b] Requirements**

A disclaimer is a "qualified disclaimer" for federal tax purposes if it meets all of the following requirements [*see I.R.C. § 2518(b); see also Prob. Code §§ 260-295* (California disclaimer requirements)]:

- The disclaimer is in writing.
- The disclaimer is received by the transferor, the transferor's legal representative, or the holder of

legal title to the interest which is to be disclaimed not later than nine months after the later of (1) the transfer creating the interest and (2) the disclaiming party's twenty-first birthday.

- The disclaimer is received before the disclaiming party has accepted the interest or any of its benefits. Acts constituting acceptance include using the property or the interest in the property; accepting dividends, interest, or rents from the property; directing others to act with respect to the property or interest in the property; or exercising a power of appointment over the property [*Treas. Reg. § 25.2518-2(d)(1)*]. Making claims of ownership of a future interest in a trust on loan applications constitutes acceptance because it is an action that produces some immediately tangible benefit [ *Cassel v. Kolb* (9th Cir. 2003) 321 F.3d 868]. If a transferee who disclaims an interest in property is also a fiduciary, actions taken in the exercise of fiduciary powers to preserve or maintain the disclaimed property are not treated as an acceptance of that property [*Treas. Reg. § 25.2518-2(d)(2)*]; see Letter Rul. 200406038 (individual's disclaimer of interest in limited liability company was qualified disclaimer, even though in her fiduciary capacity, she also executed amendment to LLC agreement)].

- As a result of the disclaimer, the interest passes without any direction on the part of the disclaiming party to some other person.

The person who makes the disclaimer cannot designate the person or persons who will take the disclaimed property. Any express or implied agreement that the disclaimed interest may be given or devised by the person making the disclaimer will disqualify the disclaimer [*Treas. Reg. § 25.2518-2(e)(1), (2)*]; see Letter Rul. 200420007 (disclaimer was qualified even though property would pass to charitable foundation of which transferee was a director, when actions would be taken to prevent transferee from having any say over administration of property by foundation). This rule means that in order to make use of the estate planning advantages of disclaimers, the will or trust instrument must specify who will take any disclaimed property, or provide a permissible mechanism, such as a disclaimer trust, for determining who the takers will be.

The rule that the party making the disclaimer cannot direct the disposition of the disclaimed interest generally extends to powers of appointment. In the case of a disclaimer made by a surviving spouse, the disclaimer will be disqualified if the surviving spouse retains the right to direct the beneficial enjoyment of the disclaimed property, whether as trustee or otherwise, unless the power is limited by an ascertainable standard [*Treas. Reg. § 25.2518-2(e)(2)*]; see *Treas. Reg. § 25.2518-2(e)(5)* Example 5]. This means, as a practical matter, that if the will or trust creates a disclaimer trust into which any property disclaimed by the surviving spouse will pass, the surviving spouse may be given the power to distribute income, principal, or both from the trust during his or her lifetime, as long as the power is limited by an ascertainable standard. However, the requirement that any power be limited to an ascertainable standard effectively precludes the surviving spouse from holding a power of appointment--regardless of whether the power is general or special--to dispose of the remaining assets of the disclaimer trust on his or her death [see *Treas. Reg. § 25.2518-2(e)(5)* Example 5]. Similar rules apply in the case of a disclaimer made by a beneficiary other than the surviving spouse, except that unlike a power held by the surviving spouse, it appears that a power subject to an ascertainable standard may be held *only* in a fiduciary capacity (for example, as trustee) [see *Treas. Reg. § 25.2518-2(e)(1)(i), (5)* Examples 11, 12]. The practical point is that a disclaimer trust should *not* give the disclaiming beneficiary the power to dispose of the trust assets on the beneficiary's death.

For further discussion of "qualified disclaimers," see CALIFORNIA WILLS & TRUSTS, Ch. 22, *Property Devised by Will* (Matthew Bender).

### [3] Uses

Disclaimer trusts have a variety of uses. In appropriate cases, they may be employed to utilize the exclusion amount of the first spouse to die, to qualify an otherwise unqualified devise or trust for the marital deduction [see *I.R.C. § 2056*], to

reduce or eliminate the marital deduction, or to avoid the unfavorable tax consequences of trustee powers. Any trust, including a standard marital deduction trust plan that calls for the creation of a marital deduction trust [ *see* § 71.13] and a bypass trust [ *see* § 71.14], may also provide for a disclaimer trust to receive and administer any property that the surviving spouse chooses to disclaim after the death of the deceased spouse.

**EXAMPLE:**

Assume, for example, that Mr. Brown makes a will in which he leaves all of his property to his wife, Mrs. Brown. Assume further that Mr. Brown dies in 2004, when the "applicable exclusion amount" available in his estate is \$1,500,000 [ *see* I.R.C. § 2010(c) (table of graduated amounts) and discussion in § 60.13[4][b]]. Mr. Brown's will provides that if Mrs. Brown disclaims any of the property, the disclaimed property will pass into a "disclaimer trust." Assume further that when Mr. Brown dies, his estate is valued for federal tax purposes at \$3,000,000. Although all of this property would be sheltered from estate tax in Mr. Brown's estate by virtue of the marital deduction [ *see* I.R.C. § 2056], any remaining property in excess of the applicable exclusion amount in effect at the time of Mrs. Brown's death [ *see* I.R.C. § 2010(c)] would be subject to estate taxation in Mrs. Brown's estate on her death. The exact amount Mrs. Brown will want to disclaim to avoid estate taxes on her own estate will depend on the year she dies, which usually cannot be anticipated. This may in any case depend on her age, health, and financial needs. Whatever property she does disclaim will then pass to the disclaimer trust and be sheltered from estate taxation when Mrs. Brown dies.

Often, the surviving spouse will disclaim the applicable exclusion amount available in the deceased spouse's estate--in the example given, \$1,500,000--in order to maximize the value of the disclaimer trust on the death of the surviving spouse. In this example (assuming that Mr. Brown has not made any other dispositions of property that would use up any portion of the applicable exclusion amount available to his estate), if Mrs. Brown disclaims \$1,500,000 on her husband's death, that amount would pass to the disclaimer trust and be free of estate taxation on her death. The actual amount of tax savings achieved will depend on the applicable exclusion amount and maximum tax rates that are in effect in the year in which Mrs. Brown dies [ *see* I.R.C. § 2001(c); *see also* Ch. 60, *Estate Planning*, § 60.13[4][b], [5]]. In many cases the amount of savings can be very substantial.

A disclaimer trust also may make it possible to defer the final decision about the amount of the property included in the marital deduction trust until after the first spouse dies. This will be desirable if there is any likelihood that the overall value of the surviving spouse's estate will change substantially after the first spouse dies.

In some cases a disclaimer may be used to qualify a trust that would not otherwise qualify for the marital deduction. For example, a testamentary trust from which the testator's surviving spouse is to receive all of the income for life, but which also gives the trustee the power to invade the trust corpus for the support of the testator's daughter during the life of the surviving spouse, would not qualify for the marital deduction as a qualified terminable interest property (QTIP) trust because of the power given to the trustee [ *see* I.R.C. § 2056(b)(7)(B)(ii)(II)]. However, if the daughter were to disclaim the right to receive the corpus, the trust would qualify for the deduction, assuming all of the other requirements of a qualified disclaimer were met [ *Treas. Reg.* § 25.2518-3(d), Example 11].

Because of the flexibility provided by disclaimer trusts, some experienced estate planners recommend including a disclaimer trust in any will or trust instrument as a matter of course, even when it is not anticipated that the surviving spouse will want to disclaim any property. Unanticipated events may cause the financial considerations of the parties to change. If, for example, they "win the lottery," inherit a large sum of money, or are awarded a large personal injury judgment, the flexibility provided by a disclaimer trust may suddenly become very important. The complete marital deduction trusts in this publication all contain disclaimer trusts [ *see* Ch. 70, *Complete Revocable Trust Forms*, §§ 70.201, PP 5.06, 5.07 (nonformula trust), 70.202, P 5.11 (formula trust--two settlors), 70.203, P 5.12 (formula trust--one

settlor)]. If the disclaimer trust is not needed, it simply will never become operative.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsGeneral OverviewEstate, Gift & Trust LawTrustsCreationEstate, Gift & Trust LawTrustsTestamentary Trusts



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*26-71 California Legal Forms--Transaction Guide §§ 71.17-71.19*

**AUTHOR:** Reviewed by Albert G. Handelman

**[Reserved]**

§§ 71.17[Reserved]



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*26-71 California Legal Forms--Transaction Guide § 71.20*

**AUTHOR:** Reviewed by Albert G. Handelman

**§ 71.20 California Statutes Designed to Preserve Marital Deduction**

**[1] In General**

Because the marital deduction contains numerous pitfalls for the unwary, California has enacted a series of provisions [*Prob. Code §§ 21500-21526*] designed to guard against inadvertent loss of the marital deduction through improper or incomplete drafting. These provisions, which apply unless the trust instrument expressly or by necessary implication make them inapplicable [*Prob. Code § 21502(a)*], are designed to assure that certain terms and conditions commonly found in trusts are interpreted in such a way as to avoid some of these pitfalls, and to assure minimum federal estate tax liability. A settlor or testator may expressly incorporate these provisions into a trust instrument if desired [*Prob. Code § 21502(b)*].

The rules discussed in this section are inapplicable to estate trusts [*Prob. Code § 21521*].

**[2] Construction of Marital Deduction Gifts**

The basic rule specified in these statutes is that marital deduction gifts (i.e., gifts intended to qualify for the federal estate or gift tax marital deduction [*Prob. Code § 21520*]) will be construed to comply with the marital deduction provisions of the Internal Revenue Code [*Prob. Code § 21522*]. A marital deduction gift may be satisfied only with property that qualifies for the marital deduction [*Prob. Code § 21522(c)*], and the trustee may not take any action or have any power that impairs the deduction as applied to the marital deduction gift [*Prob. Code § 21522(b)*]. In addition, the following specific rules apply to the construction of marital deduction gifts:

- The transferor's spouse will be deemed to be the only beneficiary of the trust during his or her lifetime [*Prob. Code § 21524(a)*].
- The transferor's spouse will be deemed to be entitled to all of the income from the marital deduction trust, not less frequently than annually, for life [*Prob. Code § 21524(b)*]; see *Treas. Reg. § 20.2056(b)-7(g)* (local law taken into account in determining whether or not QTIP income requirements

are satisfied)].

- The transferor's spouse has the right to require that the trustee make unproductive property productive, or convert it into productive property within a reasonable time [*Prob. Code § 21524(c)*].
- Any income in a QTIP trust that is accrued but unpaid at the time of the surviving spouse's death will pass to the surviving spouse's estate unless the trust provides for a different disposition that qualifies for the marital deduction [*Prob. Code § 21524(d)*].
- Any survivorship condition applicable to the transferor's spouse that exceeds or might exceed six months will be limited to six months as applied to the marital deduction gift [*Prob. Code § 21525(a)*]; see *Prob. Code § 21525(b)* (rule for simultaneous death clauses)].

*Prob. Code § 21522* will not be applied to "reform" an instrument to enable it to qualify for the marital deduction absent evidence that the testator intended the interest to qualify for the deduction [*Davis v. C.I.R.* (9th Cir. [Cal.] 2005) 394 F.3d 1294, 1300-1301] .

### **[3] Application to Estate Tax Formulas**

When a will or trust contains a formula intended to eliminate federal estate tax, the California statutes provide that the formula will be applied to eliminate or reduce the federal estate tax to the maximum extent possible [*Prob. Code § 21503(a)*]. If the formula refers to a maximum fraction or amount that will not result in estate tax, it will be construed to refer to the maximum fraction or amount that will not result in or increase federal estate tax [*Prob. Code § 21503(b)*].

### **[4] Drafting Considerations**

Although the California marital deduction statutes may provide some margin of safety to attorneys, they are not and should not be a substitute for proper drafting. These provisions are essentially designed to remedy drafting errors found in marital deduction trusts. A properly drafted marital deduction trust should contain provisions that effectively do the same things as the statute, and the existence of the statute does not negate the desirability of including such provisions. Moreover, issues may arise regarding whether the trust terms that differ from these statutes "expressly or by necessary implication" make the statutes inapplicable [*see Prob. Code § 21502(a)*]. Accordingly, attorneys are cautioned not to place exclusive reliance on these statutes to cure poor drafting.

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsInterpretationEstate, Gift & Trust LawTrustsMarital Deduction Trusts



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*26-71 California Legal Forms--Transaction Guide §§ 71.21-71.99*

**AUTHOR:** Reviewed by Albert G. Handelman

**[Reserved]**

§§ 71.21[Reserved]



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PART III. TRANSACTION GUIDE  
A. Client Interview--Facts And Documents

*26-71 California Legal Forms--Transaction Guide § 71.100*

**AUTHOR:** Reviewed by Albert G. Handelman

**§ 71.100 Facts**

**NOTE:**

For a guide to the initial client interview regarding an estate planning matter, see Ch. 60, *Estate Planning Guide*. The guide appearing below highlights some of the specific facts that are necessary to advise a client regarding the suitability of establishing a marital deduction trust.

The determinations in this Transaction Guide contain numerous references to "client and spouse." Although it may sound obvious, the attorney should bear in mind that when he or she prepares a trust for two spouses, both of the spouses are clients and the attorney owes equal duties to each of them. Conflicts of interest can arise in this context that will make representation of both spouses unwise or ethically impermissible. For determinations relating to the existence of a conflict of interest, see § 60.110 in Ch. 60, *Estate Planning*; see also CALIFORNIA WILLS & TRUSTS, Ch. 4, *Ethical Considerations and Professional Responsibility* (Matthew Bender). In any situation involving representation of both spouses, the attorney must be alert for actual or potential conflict of interest situations [ *see Ch. 60, Estate Planning § 60.110*].

1. Client's name, address, telephone number, date of birth, and occupation.
2. Name, address, telephone number, date of birth, and occupation of client's spouse.
3. Information regarding any prior marriages of client and spouse.
4. Names and birth dates of all children and issue of client and spouse; and, if any children are not of client's current marriage, identity of other parent.

5. Identity of persons other than spouse for whom client wishes to provide, such as the following:
  - a. Children, grandchildren, and other relatives.
  - b. Other individuals.
  - c. Charities.
6. Physical and mental health of:
  - a. Client.
  - b. Spouse.
  - c. Children.
  - d. Other beneficiaries.
7. Value of all assets in which client and spouse hold ownership interest, including property held:
  - a. As separate property of client and/or spouse.
  - b. As community property of client and spouse.
  - c. In joint tenancy with spouse or other persons.
  - d. In tenancy in common with spouse or other persons.
  - e. In trust.
  - f. As donee of power of appointment.
8. Relative financial status of client's children and other proposed beneficiaries.
9. Likelihood that client's property will appreciate or depreciate after death.
10. Lifetime plans and needs of client and spouse, including:
  - a. Anticipated retirement age.
  - b. Basic living expenses, including food, housing, clothing, and transportation.
  - c. Known or anticipated medical expenses.
  - d. Expenses of special retirement plans, including travel and hobbies.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsGeneral OverviewEstate, Gift & Trust LawTrustsMarital Deduction Trusts



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PART III. TRANSACTION GUIDE  
A. Client Interview--Facts And Documents

*26-71 California Legal Forms--Transaction Guide § 71.101*

**AUTHOR:** Reviewed by Albert G. Handelman

**§ 71.101 Documents**

1. Prior wills of client and spouse, including any codicils.
2. Prior agreements affecting disposition of estate:
  - a. Contract to make will.
  - b. Antenuptial or postnuptial agreements with spouse.
  - c. Prior marital settlement agreement, dissolution or divorce judgments, or court orders affecting disposition of estate.
3. Documents relating to previous inter vivos transfers by client.
  - a. Inter vivos trust instruments.
  - b. Copies of any prior federal gift tax returns.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsGeneral OverviewEstate, Gift & Trust LawTrustsMarital Deduction Trusts



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*26-71 California Legal Forms--Transaction Guide §§ 71.102-71.109*

**AUTHOR:** Reviewed by Albert G. Handelman

**[Reserved]**

§§ 71.102[Reserved]



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B. Preliminary Determinations

*26-71 California Legal Forms--Transaction Guide § 71.110*

**AUTHOR:** Reviewed by Albert G. Handelman

**§ 71.110 Suitability of Marital Deduction Trust**

**NOTE:**

This guide focuses on matters specific to marital deduction trusts. For general estate planning considerations, see the Transaction Guide to Ch. 60, *Estate Planning*. For general considerations relating to testamentary trusts, see Ch. 64, *Testamentary Trusts: Payment and Distribution Provisions*, Ch. 64A, *Testamentary Trusts: Trustee Provisions*, and Ch. 64B: *Testamentary Trusts: Administrative Provisions*. For inter vivos trusts, see the Transaction Guide to Ch. 70, *Complete Revocable Trust Forms*.

1. Determine reasons why client wants to create trust.

**NOTE:**

The client's purpose for creating a trust will determine whether or not a trust is the most suitable estate planning device, the type of trust to be created, and the provisions that will be included in the trust instrument.

- a. To provide professional management of trust assets.
- b. To avoid probate of trust assets.
- c. To provide for spouse both before and after client's death.
- d. To insure that trust estate passes to client's children or other beneficiaries on death of surviving spouse.

- e. To protect surviving spouse from client's own potential mismanagement of trust property.
- f. To protect surviving spouse from spouse's potential mismanagement of trust property.
- g. To minimize estate taxes in estate of first spouse to die.
- h. To minimize total estate taxes on the estates of both spouses.

2. Determine whether value of combined estates of client and client's spouse is such that substantial estate tax savings may be realized by:

a. Sheltering all or part of combined estates from estate taxation under unified credits available in estates of client and client's spouse.

(1) Are combined estates likely to be worth less than the "applicable exclusion amount" available in the year of the surviving spouse's death?

**NOTE:**

The unified credit is one of the key provisions of the estate and gift tax law [*see I.R.C. §§ 2010* (estate tax), *2505* (gift tax)]. To determine the amount of property in a particular estate that can be sheltered from taxation under the unified credit, it is necessary to determine the "applicable exclusion amount" available in the estate. The amount of property that can be sheltered by the estate tax unified credit varies and depends on the year of death. The amount is \$675,000 for decedents dying in 2001, \$1 million for decedents dying in 2002 and 2003, \$1.5 million for decedents dying in 2004 and 2005, \$2 million for decedents dying in 2006, 2007, and 2008, and \$3.5 million for decedents dying in 2009 [*I.R.C. § 2010(c)*]. The gift tax unified credit is \$675,000 for gifts made in 2001, and \$1 million for all years thereafter [*I.R.C. §§ 2101(c), 2505(a)(1)*]. Planning around the estate tax unified credit to some degree involves the typically impossible task of guessing when a client will die [*see I.R.C. § 2010(c)* (table of graduated amounts) and discussion in § 60.13[4][b]]. If the combined estates of the client and the client's spouse are likely to be worth less than the "applicable exclusion amount" at the time of the second spouse's death, all of the property can be sheltered from taxation under the unified credit and no special steps need be taken to shelter more property.

(2) Are combined estates likely to be worth more than the "applicable exclusion amount" available in the year of the surviving spouse's death?

**NOTE:**

If the combined estates of the client and the client's spouse are likely to be worth more than the "applicable exclusion amount" [*see I.R.C. § 2010(c)* (table of graduated amounts) and discussion in § 60.13[4][b)] available in the estate of the second spouse to die, the unified credit will not shelter all of the property from estate taxation when the second spouse dies and the unified credit available in the first spouse's estate should also be used. This can be done by creating a "bypass trust" that will escape taxation in the second spouse's estate. See discussion in §§ 71.11 and 71.14.

b. Sheltering all or part of combined estates from estate taxation under marital deduction.

**NOTE:**

All of the property in the first spouse's estate can be sheltered from estate taxation by simply transferring it to the surviving spouse in a way that will qualify for the marital deduction [*see I.R.C. § 2056*]. The marital deduction is unlimited in amount. However, no marital deduction is available in the estate of the second spouse. If the first spouse to die creates a "bypass trust," the assets of the trust will not be subject to taxation in the estate of the second spouse. See discussion in §§ *71.11* and *71.14*.

## 3. Determine whether trust is undesirable or unnecessary because:

- a. Cost of establishing and administering trust is prohibitive for client's purposes.
- b. Client has no need of trust form of ownership apart from estate tax savings.
- c. Property may be removed from client's estate by irrevocable inter vivos trust [ *see Ch. 72, Irrevocable Trusts* ] and lifetime gifts [ *see Ch. 60A, Gifts* ].
- d. Property that would form trust estate can be devised to spouse outright.

**NOTE:**

An outright devise to the surviving spouse will qualify for the marital deduction [*see I.R.C. § 2056*]. Since the marital deduction is unlimited in amount, all of the estate of the deceased spouse can be sheltered from estate taxation if all of the estate is devised outright to the surviving spouse. However, estate taxes may be owed when the surviving spouse dies if the combined estates are valued in excess of the applicable exclusion amount [*see I.R.C. § 2010(c)*] and if a "bypass trust" is not created when the deceased spouse dies. See discussion in §§ *71.11[2]* and *71.14[1]*; see also *Ch. 70, Complete Revocable Trust Forms, § 70.10[3][d]*.

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Estate, Gift & Trust LawTrustsMarital Deduction Trusts



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B. Preliminary Determinations

*26-71 California Legal Forms--Transaction Guide § 71.111*

**AUTHOR:** Reviewed by Albert G. Handelman

**§ 71.111 Basic Features of Marital Deduction and Bypass Trusts**

**NOTE:**

This section assumes that the client has decided to establish a marital deduction trust.

1. Determine whether client should establish inter vivos or testamentary trust.

**NOTE:**

For general discussion of the advantages of revocable inter vivos trusts, see *Ch. 70, Complete Revocable Trust Forms*, § 70.10[3], [4].

a. Does client wish to obtain following benefits of revocable inter vivos trust:

(1) Probate avoidance?

**NOTE:**

Revocable inter vivos trusts are widely used to avoid probate. Testamentary trusts, in contrast, are subject to probate administration in the same way as outright devises. For a discussion of the advantages and disadvantages of probate administration, see *Ch. 70, Complete Revocable Trust Forms*, § 70.10[3][a], [4][b]; *see also* Ch. 60, *Estate Planning* .

(2) Lifetime property management?

**NOTE:**

Since revocable inter vivos trusts come into existence during the lifetimes of their settlors,

they can be used to obtain property management while the settlors are still alive. Testamentary trusts do not come into existence until after the settlor (testator) has died, and cannot be used to obtain lifetime property management. For discussion, see *Ch. 70, Complete Revocable Trust Forms, § 70.10[2][b]*.

(3) Property management in the event of disability?

**NOTE:**

If the client becomes disabled or otherwise unable to manage his or her own property, the trustee (or successor trustee, if the client was the initial trustee) may manage the property for the client. A revocable inter vivos trust may thus avoid the necessity of appointing a conservator. For discussion, see *Ch. 70, Complete Revocable Trust Forms, § 70.10[2][b]*.

b. Does client wish to obtain following benefits of testamentary trust:

(1) Marital deduction and bypass trust provisions that will become effective after client's death?

(2) Avoidance of expense and inconvenience of establishing inter vivos trust while client is still living?

**NOTE:**

When a revocable inter vivos trust is established, property must be transferred to the trustee while the settlor is still living, or the benefits of the trust will be lost. This involves expense and inconvenience which is not necessary in the case of a testamentary trust.

(3) Judicial supervision of client's estate by probate court after client's death?

**NOTE:**

Assets that are devised to a testamentary trust are subject to probate administration. Probate estates are subject to close judicial scrutiny designed to make sure that the property is properly conserved, debts are properly paid, and the property is distributed to the proper person or persons. For further discussion of probate administration, see *Ch. 65, Executors*. The assets of a revocable inter vivos trust are not subject to probate administration, either during the client's lifetime or after the client's death, although the court may be petitioned to make orders in case of disputes.

2. If client prefers inter vivos trust over testamentary trust [*see P 1, above*], determine how many trusts will have to be drafted:

**NOTE:**

When the client and his or her spouse own community property and wish to create a revocable trust, it is necessary as a practical matter for them to act as joint settlors [*see Ch. 70, Complete Revocable Trust Forms, § 70.202[1][b]*], for discussion of the impracticality of creating a trust for the community property interest of only one settlor]. If either the client or spouse also wants to put separate property in trust, the attorney must decide whether to create a separate trust for the separate property of each spouse or to combine the separate property with the community property in a so-called "mixed property" trust. Although some estate planners do not like mixed property trusts because of problems with tracing separate and community assets and limiting the rights of the spouses in each other's separate property, mixed property trusts nevertheless are commonly drafted. For additional discussion, see *Ch. 70, Complete Revocable Trust Forms, § 70.11[4]*.

- a. Trust for community property of client and spouse;
- b. Separate trusts for separate property of each spouse; or
- c. One "mixed property trust" containing both separate and community property of client and spouse.

3. Determine whether to draft formula or nonformula trust [ *see* §§ 71.11[4], 71.13[2]].

- a. Will use of marital deduction formula significantly reduce combined estate tax liability of client and spouse?

**NOTE:**

See § 71.110, P 2, for determinations relating to the tax liability of the estate. As the combined value of the client's estates climbs above the "applicable exclusion amount" [see I.R.C. § 2010(c) and discussion in § 60.13[4][b]] that is likely to be available in the estate of the second spouse to die, the amount of tax savings that can be achieved by a marital deduction formula usually increases accordingly.

- b. Are client and spouse willing to give up a measure of control over their assets in return for tax savings generated by use of formula clause.

**NOTE:**

When a marital deduction formula clause is used, the surviving spouse must give up absolute control over the assets of the bypass trust in order to achieve the desired tax savings [see discussion in § 71.14[2]]. Although the surviving spouse may still exercise a substantial degree of control over those assets [ see § 71.14[4][d]], some clients may not want to give up anything during their lifetimes, even if it increases estate tax liability after the survivor's death. As a practical matter, the attorney should explain to such a client the probable amount of actual tax savings, based on the size of the client's estate, and suggest that the client weigh that saving against any inconvenience that a bypass trust may cause the surviving spouse.

4. If client selects formula marital deduction trust, decide:

- a. What type of marital deduction formula to use; either:

(1) Pecuniary marital deduction formula [ *see* §§ 71.12[3][b], 71.200[1][c] for discussion];

(2) Pecuniary bypass formula [ *see* §§ 71.12[3][b], 71.200[1][c], [d], 71.203[1][b] for discussion]; or

(3) Fractional formula [ *see* §§ 71.12[3][c], 71.200[1][c], 71.204[1][b] for discussion].

- b. What kind of marital deduction trust should be prepared:

(1) Qualified terminable interest property (QTIP) trust [ *see* §§ 71.13[4], 71.230; *see also* I.R.C. § 2056(b)(7)];

**NOTE:**

Most experienced estate planners recommend that QTIP trusts be used whenever possible, due to the postmortem flexibility they offer [ *see* § 71.13[4]]. QTIP trusts are the only real option when the client wants to be certain that the trust assets will be disposed of in the manner preferred by the client after the death of the surviving settlor. Thus, when animosity may exist between the surviving spouse and the remainder beneficiaries (such as when there are children from a prior marriage), a QTIP is the only option that will provide the degree of security desired by the client.

(2) Lifetime income/power of appointment trust [ *see* §§ 71.13[5], 71.231; *see also* I.R.C. § 2056(b)(5)]; or

**NOTE:**

Lifetime income/power of appointment trusts are less popular among estate planners than QTIP trusts because they do not offer the same degree of postmortem planning flexibility. However, clients who are unwilling to restrict the surviving settlor's control over the trust assets sometimes feel strongly about using them.

(3) Estate trust [ *see* §§ 71.13[6], 71.232].

**NOTE:**

Estate trusts are rarely used in modern estate planning.

c. If client and spouse will be joint settlors [ *see* P 1, *above*], and elect to create lifetime income/power of appointment trust [ *see* (b), *above*], determine whether assets qualifying for marital deduction will be either:

(1) Placed in a separate marital deduction trust (a "three-trust split"); or

**NOTE:**

The attorney must determine whether the trust will provide for a "two-trust split" or a "three-trust split" on the death of the first spouse. If the powers of the surviving settlor over the assets qualifying for the marital deduction are to be more limited than his or her powers over her own assets in the trust, creation of a separate marital deduction trust is necessary. If, however, the survivor's powers over the survivor's assets and the marital deduction assets are to be coextensive, it is simpler to combine the survivor's assets with the marital deduction trust assets in a single trust that qualifies as a lifetime income/power of appointment trust. For additional discussion, see §§ 71.15[4], 71.201[1][b], 71.231[1][f].

When a QTIP trust is selected, there is no comparable issue. A "three-trust split" (survivor's trust, QTIP trust, and bypass trust) is for all intents and purposes mandatory.

(2) Combined with survivor's assets in a survivor's trust the terms of which qualify for the marital deduction (a "two-trust split").

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsMarital Deduction TrustsEstate, Gift & Trust LawTrustsRevocable Living TrustsEstate, Gift & Trust LawTrustsTestamentary Trusts



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DIVISION IV: WILLS AND TRUSTS  
CHAPTER 71 MARITAL DEDUCTION TRUST PROVISIONS  
PART III. TRANSACTION GUIDE  
B. Preliminary Determinations

*26-71 California Legal Forms--Transaction Guide § 71.112*

**AUTHOR:** Reviewed by Albert G. Handelman

**§ 71.112 Payments and Distributions from Trusts**

1. For inter vivos trust, determine what provisions trust should include for payment of income and distribution of principal while both spouses are living.

**NOTE:**

While both spouses are living, a revocable inter vivos trust generally gives the spouses the maximum rights to use the income and principal of the trust. The trust will remain fully revocable as long as both spouses are alive. See Chapter 70, *Complete Revocable Trust Forms*, for further discussion and sample provisions. Of course, no benefits will be payable from a testamentary trust, since a testamentary trust does not come into existence until the testator dies.

2. Determine what provisions trust should include for payment of income and distribution of principal after death of first spouse.

**NOTE:**

On the death of the first spouse, the trust will generally be divided into marital deduction and nonmarital shares. In the case of a two-settlor revocable trust, a survivor's share will also be created.

a. From survivor's trust, if any:

**NOTE:**

For an example of a complete set of provisions for a survivor's trust, see *Chapter 70*,

**Complete Revocable Trust Forms, Section 70.202 [2], Paragraph 5.07.** If assets qualifying for the marital deduction will be pooled with the survivor's assets in the survivor's trust [ *see* § 71.111[4][c]], the payment and distribution provisions of the bypass trust must also conform to the requirements for a lifetime income/power of appointment trust [ *see* (b), *below*].

- (1) All income, or as much income as surviving spouse demands, to surviving spouse;
- (2) As much principal as surviving spouse demands, to surviving spouse;
- (3) Trustee's right to invade principal for benefit of surviving spouse (in event of surviving spouse's incapacity or otherwise);
- (4) Revocability by surviving spouse at any time;
- (5) On survivor's death, payment of remaining trust balance either:
  - (a) To persons designated by surviving spouse under general power of appointment;
  - (b) To specifically identified persons or beneficiaries; or
  - (c) In manner specified in bypass trust.

b. From marital deduction trust:

- (1) All income to surviving spouse for life, payable annually or at more frequent intervals.

**NOTE:**

This requirement is mandatory for both QTIP trusts [ *see* I.R.C. § 2056(b)(7)(B)(ii)(I); *see also* Treas. Reg. §§ 20.2056(b)-7(d), 20.2056(b)-5(f) (income requirements for QTIP trusts)] and lifetime income/power of appointment trusts [ *see* I.R.C. § 2056(b)(5); *see also* Treas. Reg. § 20.2056(b)-5(f) (income requirements for lifetime income/power of appointment trusts)].

- (2) No person has power to appoint any portion of assets to anyone other than surviving spouse.

**NOTE:**

This requirement is also mandatory for both QTIP trusts [ *see* I.R.C. § 2056(b)(7)(B)(ii)(II)] and lifetime income/power of appointment trusts [ *see* I.R.C. § 2056(b)(5)].

- (3) Distributions of principal, either:

**NOTE:**

Neither a QTIP trust nor a lifetime income/power of appointment trust is required to distribute principal to the surviving spouse. However, it is a common practice to permit such distributions to ensure that the surviving spouse will have enough money to live comfortably and meet any unanticipated contingencies that exceed the amount of income generated by the trust. The power to distribute principal to or for the benefit of the surviving spouse ordinarily will not jeopardize the marital deduction [ *see* Treas. Reg. §§

20.2056(b)-5(j) (lifetime income/power of appointment trusts), 20.2056(b)-7(d)(6) (QTIP trusts)].

(a) As requested by surviving spouse; or

(b) At trustee's discretion pursuant to standard specified in trust instrument.

**NOTE:**

The standard specified in the trust instrument may be either an "ascertainable standard" relating to the health, education, support, and maintenance of the surviving spouse [ *see* § 71.14[3]; *see also* discussion of "ascertainable standards" in Ch. 70, *Complete Revocable Trust Forms* , §§ 70.12[6][d], 70.200[1][i] and Ch. 64, *Testamentary Trusts: Payment and Distribution Provisions* , § 64.51[4]], or a broader standard such as "comfort, welfare, and happiness."

(4) Disposition of trust assets on death of surviving settlor:

(a) For QTIP trust, payment to person or persons designated by settlor(s) or testator in trust instrument.

**NOTE:**

With a QTIP trust, the settlor or testator has the power to designate the ultimate recipients of the trust property in the trust instrument. The QTIP provision in this chapter provides that on the death of the surviving settlor, the QTIP trust assets will be added to the bypass trust and disposed of as part of that trust [ *see* § 71.230 [2]]. An alternate pattern of distribution may be substituted if desired.

(b) For lifetime income/power of appointment trust, to person or persons (if any) designated by surviving spouse pursuant to general power of appointment.

**NOTE:**

This requirement is mandatory for lifetime income/power of appointment trusts [ *see* *I.R.C.* § 2056(b)(5)]. The provision in this chapter states that if the surviving settlor fails to appoint the property, it will pass in the manner specified in the bypass trust [ *see* § 71.231[2]].

(c) For estate trust, to surviving spouse's executor or estate [ *see* § 71.232[2]].

c. From bypass trust: [ *see* § 71.121]

**NOTE:**

Bypass provisions must be planned carefully to avoid creating income tax problems or inadvertently causing the trust assets to be included in the surviving settlor's estate. Before deciding on the pattern of payments and distributions from the bypass, the drafter should refer to *Section 71.14 [2]*, which discusses the potential tax pitfalls, how to avoid those pitfalls, and powers that can safely be granted to the surviving spouse when he or she acts as trustee of the bypass trust.

(1) Income payments.

(2) Principal distributions, if any.

(3) Ultimate distribution of assets and termination of trust.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsMarital Deduction TrustsEstate, Gift & Trust LawTrustsRevocable Living TrustsEstate,  
Gift & Trust LawTrustsTestamentary Trusts



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*26-71 California Legal Forms--Transaction Guide §§ 71.113-71.119*

**AUTHOR:** Reviewed by Albert G. Handelman

**[Reserved]**

§§ 71.113[Reserved]



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C. Drafting Guide

*26-71 California Legal Forms--Transaction Guide*

**AUTHOR:** Reviewed by Albert G. Handelman

**NOTE:**

The basic decision of whether to create a revocable inter vivos trust or a testamentary trust should be made before this Drafting Guide is read. For discussion of the advantages and disadvantages of testamentary trusts and revocable inter vivos trusts, see Volume 11, Ch. 60, *Estate Planning*. See also Ch. 64, *Testamentary Trusts: Payment and Distribution Provisions*, Ch. 64A, *Testamentary Trusts: Trustee Provisions*, Ch. 64B, *Testamentary Trusts: Administrative Provisions*, and Ch. 70, *Complete Revocable Trust Forms*.

There are as many potential variations among the terms of marital deduction trusts as there are clients who create them, and a complete guide to all the possible variations in marital deduction trust terms is beyond the scope of this publication. The complete forms in Ch. 70, *Complete Revocable Trust Forms*, illustrate standard patterns of distribution for the most common types of marital deduction trusts typically prepared for clients. The forms in Ch. 61, *Will Drafting and Complete Will Forms*, perform a similar function with respect to wills. The provisions in this chapter illustrate basic types of additional and alternative provisions that can be used to modify the complete forms. Other provisions common to all trusts are illustrated in Ch. 70, *Complete Revocable Trust Forms*, Ch. 64, *Testamentary Trusts: Payment and Distribution Provisions*, Ch. 64A, *Testamentary Trusts: Trustee Provisions*, and Ch. 64B, *Testamentary Trusts: Administrative Provisions*. Many of the provisions in those chapters can be adapted to inter vivos trusts.

For a more complete set of individual will and trust provisions, as well as sample complete forms illustrating distribution patterns in addition to those that appear in Chapter 70, the reader should refer to Matthew Bender's specialty publication, CALIFORNIA WILLS & TRUSTS FORMS, Vols. 1-3.



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*26-71 California Legal Forms--Transaction Guide § 71.120*

**AUTHOR:** Reviewed by Albert G. Handelman

**§ 71.120 Drafting Guide for Marital Deduction (and Survivor's) Trusts**

1. Select appropriate complete trust form to use as pattern:

- a. For two-settlor nonformula revocable trust, use form in *Chapter 70, Complete Revocable Trust Forms, § 70.201[2]*.
- b. For two-settlor formula revocable trust, use form in *Chapter 70, § 70.202[2]*.
- c. For one-settlor formula revocable trust, use form in *Chapter 70, § 70.203[2]*.
- d. For testamentary trust, use form in *Chapter 61, Will Drafting and Complete Will Forms, § 61.210*.

2. For formula marital deduction trust, select appropriate formula clause, as follows:

**NOTE:**

A formula clause requires that the estate or trust be divided into marital deduction and nonmarital shares. For general discussion of formula clauses, *see § 71.12[3]*.

a. For inter vivos trust:

**NOTE:**

The complete trust forms in *Chapter 70 [§§ 70.202 [2], 70.203 [2]]* already incorporate pecuniary marital deduction formulas. They need to be modified only if another type of formula is desired.

(1) To divide one-settlor trust according to pecuniary marital deduction formula, select form in *Section 71.200[2]*.

(2) To divide one-settlor trust according to pecuniary bypass formula, select form in *Section 71.202[2]*.

(3) To divide one-settlor trust according to fractional formula, select form in *Section 71.204[2]*.

(4) To divide two-settlor trust according to pecuniary marital deduction formula, select form in *Section 71.201[2]*.

(5) To divide two-settlor trust according to pecuniary bypass formula, select form in *Section 71.203[2]*.

(6) To divide two-settlor trust according to fractional formula, select form in *Section 71.205[2]*.

b. For testamentary trust:

(1) To divide estate according to pecuniary marital deduction formula, select form in *Section 71.210[2]*.

(2) To divide estate according to pecuniary bypass formula, select form in *Section 71.222[2]*.

(3) To divide estate according to fractional formula, select form in *Section 71.212[2]*.

3. If pecuniary formula clause was selected in (2), above, include provision for allocation and valuation of assets [ *see* § 71.220[2]].

4. Include general qualifying provision for marital deduction share [ *see* § 71.221[2]].

5. For two-settlor trusts, draft survivor's trust [ *see* § 71.15; for model complete survivor's trust, *see* Ch. 70, § 70.202[2], P 5.07].

**NOTE:**

A survivor's trust contains the separate, quasi-community, and community property of the surviving spouse and therefore should grant the surviving spouse virtually absolute powers over the trust assets, including the power of revocation. For general discussion of survivor's trusts, *see* *Section 71.15*. If the survivor's trust will also contain the marital deduction assets, the terms of the survivor's trust must qualify for the marital deduction as a lifetime income/power of appointment trust [*see* (6)(b), *below*]. For discussion, *see* *Sections 71.15 [4], 71.201[1][b], 71.231[1][f]*.

6. Select distribution provisions for marital deduction trust as follows:

**NOTE:**

The complete trust forms in *Chapter 70* [§§ 70.202 [2], 70.203[2]] are set up as QTIP trusts. They need to be modified only if they are to be converted to a lifetime income/power of appointment trust or an estate trust.

a. For qualified terminable interest property (QTIP) trust, use form in *Section 71.230[2]*.

- b. For lifetime income/power of appointment trust, use form in *Section 71.231[2]*.
  - c. For estate trust, use form in *Section 71.232[2]*.
7. For qualified domestic trust (QDOT) [*see* discussion in § 71.13[7], add qualification provision in *Section 71.222[2]*].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsCreationEstate, Gift & Trust LawTrustsMarital Deduction TrustsEstate, Gift & Trust  
LawTrustsRevocable Living TrustsEstate, Gift & Trust LawTrustsTestamentary Trusts



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*26-71 California Legal Forms--Transaction Guide § 71.121*

**AUTHOR:** Reviewed by Albert G. Handelman

**§ 71.121 Drafting Guide for Bypass Trusts**

**NOTE:**

When both a marital deduction trust and a bypass trust are created, one formula clause will direct the division of the trust or estate into survivor's (when applicable), marital deduction, and nonmarital shares. The marital deduction share will be held under the terms of the marital deduction trust, and the nonmarital share will be held under the terms of the bypass trust. It is not necessary to select a separate formula clause for the creation of a bypass trust.

1. Select appropriate complete trust form to use as pattern:

a. For two-settlor revocable trust, use form in *Chapter 70, Complete Revocable Trust Forms, Section 70.202[2]*.

b. For one-settlor revocable trust, use form in *Chapter 70, Section 70.203[2]*.

c. For testamentary trust, use form in *Chapter 61, Will Drafting and Complete Will Forms*, § 61.210.

2. Modify sample form as necessary to effect distribution pattern desired by client.

**NOTE:**

A wide degree of latitude is permitted in drafting the distribution for bypass trusts. However, limits must be observed, or the trust assets will be subject to estate taxation when the surviving spouse dies and the tax-saving goals of the trust will not be achieved [ *see* § 71.14[2]-[4]].

a. Income provisions, either:

(1) All income to surviving spouse for life;

(2) Income payments to surviving spouse pursuant to "ascertainable standard" [ *see Ch. 70, § 70.202[2]*, P 5.09(a)];

(3) Income payments "sprinkled" among surviving spouse and issue pursuant to "ascertainable standard" [ *see Ch. 70, § 70.203[2]*, P 5.10(a)]; or

(4) Income payments to persons other than surviving spouse.

b. "Five or five" power [ *see I.R.C. § 2041(b)(2)*; *see* discussion in § 71.14[4]] permitting spouse to withdraw limited amounts of trust principal [ *see Ch. 70, §§ 70.202[2]*, P 5.09(b), 70.203[2], P 5.10(b)].

c. Discretionary payments of principal to surviving spouse and/or other trust beneficiaries pursuant to ascertainable standard [ *see Ch. 70, §§ 70.202[2]*, P 5.09(a), 70.203[2], P 5.10(a)].

d. Treatment of bypass trust assets on death of surviving spouse:

(1) Outright distribution to named persons.

(2) Division into separate shares for children and issue, with retention in trust for beneficiaries under specified ages [ *see Ch. 70, §§ 70.202[2]*, PP 5.09(c)-(f), 5.10, 70.203 [2], PP 5.10(c)-(f), 5.11].

(3) Retention in "family pot" trust for issue of settlor(s) or testator [ *see Ch. 70, §§ 70.212[2]* (two-settlor trust), 70.211[2] (one-settlor trust)].

3. Conform terms of disclaimer trust in sample form to reflect any modifications to bypass trust made pursuant to Paragraph 2, above.

**NOTE:**

The complete marital deduction trust forms in Chapter 70 all contain disclaimer trusts [ *see Ch. 70, §§ 70.202[2]*, P 5.11; 70.203[2], P 5.12]. As discussed in the comments to those forms and in *Section 71.16*, the inclusion of a disclaimer trust is highly recommended. The terms of the disclaimer trust ordinarily will parallel those of the bypass trust, since the disclaimer trust, like the bypass trust, exists primarily to divert property that would otherwise be taxed in the estate of the surviving spouse.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsCreationEstate, Gift & Trust LawTrustsMarital Deduction TrustsEstate, Gift & Trust LawTrustsRevocable Living TrustsEstate, Gift & Trust LawTrustsTestamentary Trusts



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*26-71 California Legal Forms--Transaction Guide §§ 71.122-71.199*

**AUTHOR:** Reviewed by Albert G. Handelman

**[Reserved]**

§§ 71.122[Reserved]



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DIVISION IV: WILLS AND TRUSTS  
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 PART IV. FORMS  
 A. Formula Clauses  
 1. Inter Vivos Trusts

*26-71 California Legal Forms--Transaction Guide § 71.200*

**AUTHOR:** Reviewed by Albert G. Handelman

**§ 71.200 Pecuniary Marital Deduction Formula for One-Settlor Trust**

**[1] Comment**

**[a] Use of Form**

This form is a pecuniary marital deduction formula clause for a one-settlor inter vivos trust. It requires the trustee to divide the trust estate into marital deduction and nonmarital shares, and to fix the value of the marital deduction share in a pecuniary amount. The division will be made upon the settlor's death, but only if the settlor is survived by his or her spouse. For a general discussion of marital deduction formulas and their use in estate planning, see § 71.12.

This form is essentially identical to the one incorporated into the complete trust form in *Ch. 70, Complete Revocable Trust Forms*, § 70.203[2]. For discussion of the use of that form, see § 70.203[1]. For a comparable formula for use in a revocable trust created by a husband and wife as joint settlors, see § 71.201[2].

When this form is used, the trust drafter must also include in the trust instrument the form in § 71.220[2], relating to valuation of trust assets for purposes of the pecuniary formula clause [for discussion, see [g], *below*].

**[b] Formula Clauses**

A formula clause divides an estate (or trust) into shares according to a formula. In the case of a marital deduction trust created by one settlor, the formula typically divides the assets of the trust or estate into a marital deduction share and a nonmarital share. The marital deduction share is designed to qualify for the federal estate tax marital deduction [see *I.R.C. § 2056*], and the nonmarital share is designed to take advantage of the unified credit by sheltering the "applicable exclusion amount" [see *I.R.C. § 2010(c)* (table of graduated amounts) and discussion in § 60.13[4][b]] in the estate of the first spouse to die and "bypassing" the estate of the surviving spouse.

### [c] Pecuniary and Fractional Formulas

Pecuniary formulas assign a dollar value to one of the shares, and fund the other share with the residue of the estate or trust. A pecuniary formula permits the trustee or other fiduciary to select the actual assets with which the respective shares will be funded. In contrast, fractional formulas require that a specified fraction of each estate asset be assigned to the respective shares.

Pecuniary formula clauses are the most popular marital deduction formula clauses. They offer a wide degree of funding flexibility and avoid administrative headaches associated with fractional formula clauses. For a discussion of fractional formula clauses, see § 71.204[1].

### [d] Marital Deduction Formulas and Bypass Formulas

A pecuniary formula may fix the value of either the marital deduction share or the nonmarital share. When the formula is used to fix the value of the marital deduction share, the remaining assets subject to the formula are allocated to the nonmarital share. This type of formula is referred to in this publication as a "pecuniary marital deduction formula," and is illustrated in the form in this section. Conversely, when the formula is used to fix the value of the nonmarital share, the remaining assets are allocated to the marital deduction share. The latter type of formula is referred to in this publication as a "pecuniary bypass formula" and is illustrated in the forms in §§ 71.202[2] (one-settlor trust) and 71.203[2] (two-settlor trust).

The practical difference between these two kinds of formulas is in the treatment of appreciated assets. Assets in the trust or estate may appreciate or depreciate in value after the death of the first spouse but before the two shares actually have been funded. Under a pecuniary marital deduction formula, the appreciation or depreciation will be allocated to the nonmarital share. Conversely, under a pecuniary bypass formula, the appreciation or depreciation will be transferred to the marital deduction share.

In recent history, assets have tended to appreciate more often than they have depreciated. Since the assets of the nonmarital share will not be subject to estate taxation on the death of the surviving spouse, while the assets of the marital deduction share will be taxed in the survivor's estate, many estate planners prefer to fund the marital deduction share by the pecuniary formula and to transfer the potential for appreciation to the nonmarital share, where it will be sheltered from estate taxation when the surviving spouse dies. This feature accounts for the popularity of pecuniary marital deduction formula clauses. For further discussion, see California Wills & Trusts, Ch. 112, *The Marital Deduction and Marital Deduction Trusts* (Matthew Bender).

#### **PRACTICE TIP:**

Selection of a pecuniary marital deduction formula over a pecuniary bypass formula is not as simple as making an "educated guess" about whether assets are likely to appreciate or depreciate between the date of death and the date of funding the respective trusts. While the formula looks at estate tax values (ordinarily date of death values) in determining the pecuniary amount, the pecuniary amount is usually funded using date of distribution values [*see* [g], *below*]. If an asset funding the pecuniary share (whether it is the marital deduction share or the bypass share) has appreciated between those two dates, a capital gains tax is assessed on the amount of the appreciation. Thus, many estate planners determine whether to define the marital deduction amount or the bypass amount as the pecuniary share based on the size of the estate. If the estate is very large, so that the marital deduction share will be larger than the bypass share, a pecuniary bypass formula would be selected. Conversely, if the estate is too large to be completely sheltered by the "applicable exclusion amount" available in the estate of the surviving spouse, but not too large to be completely sheltered by the sum of the two "applicable exclusion amounts" available in the estates of the two spouses, the planner might choose a pecuniary marital deduction formula. In either case, exposure to the capital gains tax would have been minimized. *Commentary by Albert G.*

*Handelman.*

### **[e] Formula Amount**

The formula clause in this form sets the value of the marital deduction share at the minimum amount necessary to eliminate (or reduce to the maximum extent possible) any federal estate tax at the death of the settlor. It also specifies other factors that must be taken into account in determining this amount, such as the value of any other property that passes or has passed to the surviving spouse and that qualifies for the marital deduction, the unified credit available in the estate of the deceased spouse [*see I.R.C. § 2010*], and all other estate tax deductions and credits. Note that the credit for state death taxes [*I.R.C. § 2011*], referred to in subsection (a)(4) of this form, is repealed for decedents dying after 2004 [*I.R.C. § 2011(f)*].

### **[f] Pick and Choose Clauses**

Pecuniary formula clauses that permit the executor or trustee to select the assets with which the marital deduction share is to be funded are commonly called "pick and choose" or "flexible funding" clauses. This type of clause permits the executor or trustee to allocate assets with a good potential for appreciation to the nonmarital share (bypass trust), where they will escape taxation on the death of the surviving spouse. The ultimate decision as to which assets to allocate to the two shares may be deferred until after the death of the deceased spouse, when the advisability of allocating particular assets to one share or the other will be more readily apparent. For this reason, a "pick and choose" clause can introduce valuable flexibility into the estate plan. Most pecuniary formula clauses, including those used in the forms in this publication, are "pick and choose" clauses.

### **[g] Valuation Issues**

Under a pecuniary formula clause, the size of the pecuniary gift is determined based on final estate tax values of the property in the estate. For purposes of a decedent's federal estate tax return, property is valued at its value on the date of the decedent's death [*I.R.C. § 2031(a)*]. The executor may elect instead, however, to have property valued at the earlier of (1) the date of distribution, or (2) six months after the date of the decedent's death [*I.R.C. § 2032(a)*]. This latter date is referred to as the "alternate valuation date." If elected, the alternate valuation date must be used to value each and every asset in the decedent's estate [*I.R.C. § 2032(a); Treas. Reg. § 20.2032-1(b)(1)* (partial election not permitted)].

Once the amount of the pecuniary gift has been determined in the manner specified above, the individual assets must be valued for purposes of satisfying the pecuniary gift. This form gives the attorney the option of requiring that either date of death values or date of distribution values will be used in making this latter determination. If the will or trust instrument is silent on this point, the Probate Code provides that date of distribution values will be used [*Prob. Code § 21120(a)*].

If date of death values are used, there is a possibility that the values assigned to the each asset might not reflect the economic realities at the time the trust is actually funded. To address this problem, the IRS has promulgated two tests, known as the "fairly representative" and "minimum worth" tests [*see Rev. Proc. 64-19, 1964-1 C.B. 682*]. When date of death values are used, the will or trust instrument must direct the trustee or executor to comply with one or the other of these tests [*see Rev. Proc. 64-19, 1964-1 C.B. 682*].

To address these issues, the forms in this publication contain a separate provision dealing with valuation of assets for marital deduction purposes. This form appears in § 71.220[2]. That form must be included in any marital deduction trust in which any of the pecuniary formula clauses contained in this publication are used. For additional discussion of valuation issues, and the various valuation options available to the trust drafter, see the discussion in § 71.220[1].

### **[2] Form**

### Pecuniary Marital Deduction Formula for One-Settlor Trust

Division of Trust Estate If Settlor Is Survived by \_\_\_\_\_ [Wife *or* Husband]. If the settlor is survived by \_\_\_\_\_ [his wife *or* her husband], on the death of the settlor, the trustee shall divide the trust estate into two shares, hereafter referred to as the Marital Deduction Share and the Nonmarital Share.

(a) The Marital Deduction Share shall consist of assets having a value equal to the minimum amount necessary to eliminate (or reduce to the maximum extent possible) any federal estate tax at the death of the settlor, taking into account the following:

(1) The net value of all other property that passes or has passed to the settlor's

\_\_\_\_\_ [husband *or* wife] under this trust instrument, the will of the settlor, or otherwise and that qualifies for the federal estate tax marital deduction. For purposes of this subparagraph, any qualified disclaimer made by the settlor's

\_\_\_\_\_ [husband *or* wife] shall be disregarded, and any property that will qualify as qualified terminable interest property under *Internal Revenue Code Section 2056(b)(7)* if the requisite election is made shall be considered to be qualified terminable interest property, regardless of whether the election is made;

(2) All federal estate tax deductions and exclusions actually allowed, other than the marital deduction;

(3) The applicable exclusion amount, as specified in *Internal Revenue Code Section 2010*, available to the estate of the settlor;

(4) The credit for state death taxes available to the estate of the settlor, to the extent that the use of that credit does not result in or increase any death tax payable to any state; and

(5) Any other allowable credits available to the estate of the settlor (except the credit for tax on prior transfers from a "transferor," as defined in *Internal Revenue Code Section 2013*, who dies within two years after the date of the settlor's death), but only to the extent that those credits do not disqualify this gift from receiving the marital deduction.

(b) The Marital Deduction Share shall be held, administered, and distributed according to the terms of the \_\_\_\_\_ [Power of Appointment Trust *or* Qualified Terminable Interest Property (QTIP) Trust] as set forth in Paragraph \_\_\_\_\_ of this instrument.

(c) The Nonmarital Share shall consist of all assets not allocated to the Marital Deduction Share under the formula specified in this paragraph.

(d) The Nonmarital Share shall be held, administered, and distributed according to the terms of the Bypass Trust as set forth in Paragraph \_\_\_\_\_ of this instrument.

#### Legal Topics:

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsMarital Deduction TrustsEstate, Gift & Trust LawTrustsRevocable Living TrustsTax LawFederal Estate & Gift TaxesDeductionsMarital Deduction (IRC secs. 2056, 2523)General Overview



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*26-71 California Legal Forms--Transaction Guide § 71.201*

**AUTHOR:** Reviewed by Albert G. Handelman

**§ 71.201 Pecuniary Marital Deduction Formula for Two-Settlor Trust**

**[1] Comment**

**[a] Use of Form**

This form is a pecuniary marital deduction formula clause for a two-settlor inter vivos trust. It is similar to the form in § 71.200, but has been adapted for use in a marital deduction trust created by joint settlors, as opposed to a sole settlor. For an illustration of the use of this provision in a complete marital deduction trust, see Paragraph 5.04 of the form in *Ch. 70, Complete Revocable Trust Forms, § 70.202[2]*.

For general information about marital deduction formula clauses, and pecuniary marital deduction formula clauses in particular, see § 71.200[1]. The commentary in that section is important and should be reviewed before this form is used.

When this form is used, the trust drafter must also include in the trust instrument the form in § 71.220[2], relating to valuation of trust assets for purposes of the pecuniary formula clause [for discussion, see §§ 71.200[1][g], 71.220[1]].

**[b] Division of Trust Estate on Death of First Joint Settlor**

In a two-settlor trust, as in a one-settlor trust, the trust estate is divided into separate trusts or shares on the death of the first spouse. However, the division of a two-settlor trust is more complicated than for a one-settlor trust. A two-settlor trust contains, in addition to the assets of the deceased settlor, the surviving spouse's share of any community property in the trust. It may also contain separate property and quasi-community property of the surviving settlor.

This form segregates the assets owned by the surviving settlor into a separate share, referred to as the survivor's share, and places that share in a "survivor's trust." For discussion of this division, see §§ 71.12[2], 71.15. The survivor's trust

typically will remain revocable by the surviving spouse during his or her lifetime.

After the survivor's share has been established, the remaining trust assets are segregated into a marital share and a nonmarital share, in much the same manner as described in § 71.200[1][b] with respect to a one-settlor trust. The trust drafter has two options with respect to the marital share. The marital share may be either (1) combined with the survivor's share as part of the survivor's trust; or (2) placed in a separate marital deduction trust. Option 1--combination with the survivor's share--can be exercised only if (1) the survivor's trust is set up in a manner that will qualify it as a lifetime income/power of appointment trust for marital deduction purposes [*see I.R.C. § 2056(b)(5); see also §§ 71.13[5], 71.15[4], 71.231[1]* for discussion]; and (2) the settlors are willing to give the survivor powers over the marital deduction property equal to those that the survivor may exercise over his or her own assets in the trust, including the power of revocation. If the marital deduction trust will be a qualified terminable interest (QTIP) trust [*I.R.C. § 2056(b)(7); see §§ 71.13[4], 71.230[1]* for discussion], or if the survivor's powers over the marital deduction trust assets are to be more restricted than his or her powers over the survivor's trust, then Option 2--separate treatment for the survivor's share and the marital deduction share--must be exercised [ *see § 70.202 [2]*, P 5.03, for an illustration of the use of this option in a complete form creating a QTIP trust].

The nonmarital share must remain segregated from the other trust assets in any case, to avoid inclusion in the surviving settlor's estate. The form in this section assumes, as is usually the case, that the nonmarital share will be placed in a bypass trust [for additional discussion of bypass trusts, *see § 71.14*]. Thus, depending on which of the two options noted in the preceding paragraph is selected, this form will divide the trust either into two trusts (a "two-trust split") or three trusts (a "three-trust split"). The *form in § 70.202[2]* in Ch. 70, *Complete Revocable Trust Forms*, illustrates a three-trust split. For a complete trust instrument illustrating a two-trust split, see CALIFORNIA WILLS & TRUSTS FORMS, Division 1, *Complete Inter Vivos Trusts*, Trust 32 (Matthew Bender).

For additional discussion, see § 71.231[1][f]; *see also CALIFORNIA WILLS & TRUSTS, Ch. 112, The Marital Deduction and Marital Deduction Trusts, § 112.03[5][b]* (Matthew Bender).

## [2] Form

### Pecuniary Marital Deduction Formula for Two-Settlor Trust

Division of Trust Estate After Death of Deceased Settlor. On the death of the deceased settlor, the trustee shall divide the trust estate into three shares, hereafter referred to as the Survivor's Share, the Marital Deduction Share, and the Nonmarital Share.

(a) The Survivor's Share shall consist of the portion of the trust estate consisting of the surviving settlor's one-half interest in the settlors' community property, the surviving settlor's one-half interest in the deceased settlor's quasi-community property, and all of the surviving settlor's separate property and quasi-community property.

(b) The Survivor's Share shall be held, administered, and distributed according to the terms of the Survivor's Trust as set forth in Paragraph \_\_\_\_\_ of this instrument.

(c) The Marital Deduction Share shall consist of assets (excluding assets included in the Survivor's Share) having a value equal to the minimum amount necessary to eliminate (or reduce to the maximum extent possible) any federal estate tax at the death of the deceased settlor, taking into account the following:

- (1) The net value of all other property that passes or has passed to the surviving settlor under this trust instrument, the will of the deceased settlor, or otherwise and that qualifies for the federal estate tax marital deduction. For purposes of this subsection, any qualified disclaimer made by the surviving settlor shall be disregarded, and any property that will qualify as qualified terminable interest property under *Internal Revenue Code Section 2056(b)(7)* if the requisite election is made shall be considered to be

qualified terminable interest property, regardless of whether the election is made;

(2) All federal estate tax deductions and exclusions actually allowed other than the marital deduction;

(3) The applicable exclusion amount, as specified in *Internal Revenue Code Section 2010*, available to the estate of the deceased settlor;

(4) The credit for state death taxes available to the estate of the deceased settlor, to the extent that the use of that credit does not result in or increase any death tax payable to any state; and

(5) Any other allowable credits available to the estate of the deceased settlor (except the credit for tax on prior transfers from a "transferor," as defined in *Internal Revenue Code Section 2013*, who dies within two years after the date of death of the deceased settlor), but only to the extent that those credits do not disqualify this gift from receiving the marital deduction.

(d) The Marital Deduction Share shall be \_\_\_\_\_ [for an outright devise: distributed outright to the surviving settlor or, to establish a marital deduction trust: held, administered, and distributed according to the terms of the \_\_\_\_\_ (Power of Appointment Trust or Qualified Terminable Interest Property (QTIP) Trust) as set forth in Paragraph \_\_\_\_\_ of this instrument or, to combine marital deduction share with survivor's share in survivor's trust: added to the Survivor's Trust established in subparagraph (b), above].

(e) The Nonmarital Share shall consist of all assets not allocated to the Survivor's Share or the Marital Deduction Share under the formula specified in this paragraph.

(f) The Nonmarital Share shall be held, administered, and distributed according to the terms of the Bypass Trust as set forth in Paragraph \_\_\_\_\_ of this instrument.

### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsMarital Deduction TrustsEstate, Gift & Trust LawTrustsRevocable Living TrustsTax LawFederal Estate & Gift TaxesDeductionsMarital Deduction (IRC secs. 2056, 2523)General Overview



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*26-71 California Legal Forms--Transaction Guide § 71.202*

**AUTHOR:** Reviewed by Albert G. Handelman

**§ 71.202 Pecuniary Bypass Formula for One-Settlor Trust**

**[1] Comment**

**[a] Use of Form**

This form is a pecuniary bypass formula clause for a one-settlor inter vivos trust. It requires the trustee to divide the trust estate into marital deduction and nonmarital shares, and to fix the value of the nonmarital share in a pecuniary amount. The division will be made upon the settlor's death, but only if the settlor is survived by his or her spouse.

For a general discussion of marital deduction formulas and their use in estate planning, see § 71.12. For general information on pecuniary formula clauses in general, and the distinctions between a pecuniary bypass formula and a pecuniary marital deduction formula, see § 71.200[1].

When this form is used, the trust drafter must also include in the trust instrument the *form in § 71.220[2]*, relating to valuation of trust assets for purposes of the pecuniary formula clause [for discussion, *see §§ 71.200[1][g], 71.220[1]*].

**[b] Pecuniary Bypass Formulas**

A pecuniary formula may be used to fix the value of either the marital deduction share or the nonmarital share. This form fixes the value of the nonmarital share and allocates the balance of the trust assets to the marital deduction share.

A formula that fixes the value of the nonmarital share will have the effect of allocating post-death appreciation or depreciation of trust assets to the marital deduction share. Thus, post-death appreciation will not be taxed in the deceased spouse's estate due to the availability of the unlimited marital deduction [*see I.R.C. § 2056*], but any such appreciation in the assets allocated to the marital deduction share will be subject to tax in the surviving spouse's estate when the surviving spouse dies. In contrast, a pecuniary marital deduction formula clause, which fixes the value of the

marital deduction share, will shift that appreciation and depreciation into the nonmarital share. Since the nonmarital share is not subject to estate taxation when the surviving spouse dies, and since in recent history assets have tended to appreciate more often than they have depreciated, pecuniary marital deduction formula clauses are more widely used than pecuniary nonmarital formula clauses [*see also* the Practice Tip in § 71.200[1][d]].

## [2] Form

### Pecuniary Bypass Formula for One-Settlor Trust

Division of Trust Estate If Settlor Is Survived by \_\_\_\_\_ [Wife *or* Husband]. If the settlor is survived by \_\_\_\_\_ [his wife *or* her husband], on the death of the settlor, the trustee shall divide the trust estate into two shares, hereafter referred to as the Marital Deduction Share and the Nonmarital Share.

(a) The Nonmarital Share shall consist of the largest amount, if any, of property that can pass free of federal estate tax by reason of (1) the applicable exclusion amount available to the settlor's estate; (2) the credit for state death taxes available to the settlor's estate, to the extent that the use of that credit does not result in or increase any death tax payable to any state; and (3) any other allowable credits or exclusions available to the settlor's estate (except the credit for tax on prior transfers from a "transferor," as defined in *Internal Revenue Code Section 2013*, who dies within two years after the date of the settlor's death), but only to the extent that those credits do not disqualify the Marital Deduction Share from receiving the marital deduction. Any qualified disclaimer made by the settlor's \_\_\_\_\_ [wife *or* husband] shall be disregarded in determining this amount. [*Optional*: The amount of this pecuniary gift may be affected by a number of considerations, including but not limited to the following:

(1) The net value of all property that passes or has passed to the settlor's

\_\_\_\_\_ (wife *or* husband) under this instrument, the will of the settlor, or otherwise, and that qualifies for federal estate tax purposes and that does not qualify for the federal estate tax marital or charitable deduction;

(2) The value of all property disposed of by the settlor that constitutes "adjusted taxable gifts"; and

(3) All charges to principal that are deductible under *Internal Revenue Code Section 2053* but that are not deducted in computing the federal estate tax liability for the gross estate of the settlor. Because of the foregoing factors it is possible that no property will pass to the Nonmarital Share.]

(b) The Nonmarital Share shall be held, administered, and distributed according to the terms of the Bypass Trust as set forth in Paragraph \_\_\_\_\_ of this instrument.

(c) The Marital Deduction Share shall consist of all assets not allocated to the Nonmarital Share under the formula specified in this paragraph.

(d) The Marital Deduction Share shall be held, administered, and distributed according to the terms of the \_\_\_\_\_ [Power of Appointment Trust *or* Qualified Terminable Interest Property (QTIP) Trust] as set forth in Paragraph \_\_\_\_\_ of this instrument.

### Legal Topics:

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsCreationEstate, Gift & Trust LawTrustsMarital Deduction TrustsEstate, Gift & Trust LawTrustsRevocable Living Trusts



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*26-71 California Legal Forms--Transaction Guide § 71.203*

**AUTHOR:** Reviewed by Albert G. Handelman

**§ 71.203 Pecuniary Bypass Formula for Two-Settlor Trust**

**[1] Comment**

**[a] Use of Form**

This form is a pecuniary bypass formula clause for a two-settlor inter vivos trust. It requires the trustee to divide the trust estate into survivor's, marital deduction, and nonmarital shares, and to fix the value of the nonmarital share in a pecuniary amount. The division will be made upon the death of the first settlor.

When this form is used, the trust drafter must also include in the trust instrument the *form in § 71.220[2]*, relating to valuation of trust assets for purposes of the pecuniary formula clause [for discussion, *see §§ 71.200[1][g]*, *71.220[1]*].

**[b] Pecuniary Bypass Formulas**

The pecuniary bypass formula in this form is essentially the same as the *form in § 71.202[2]*, adapted to a two-settlor trust. Pecuniary bypass formulas are not used as widely as pecuniary marital deduction formulas. For discussion of pecuniary bypass formulas, *see § 71.202[1]*. For additional discussion of the use of marital deduction formulas, and related issues, *see § 71.200[1]*.

**[c] Division of Trust Estate Into Shares**

This form divides the trust estate into the same three shares (survivor's share, marital deduction share, and nonmarital share) as the pecuniary marital deduction formula in *§ 71.201[2]*. Like the latter form, this form permits the settlors to establish three separate trusts (survivor's trust, marital deduction trust, and bypass trust), or, in the alternative, to combine the survivor's share and marital deduction share into a single trust, resulting in the creation of a total of two trusts (survivor's trust qualifying for marital deduction, and bypass trust). For discussion of these alternative approaches,

see § 71.201[1][b].

**[2] Form**

**Pecuniary Bypass Formula for Two-Settlor Trust**

Division of Trust Estate After Death of Deceased Settlor. On the death of the deceased settlor, the trustee shall divide the trust estate into three shares, hereafter referred to as the Survivor's Share, the Marital Deduction Share, and the Nonmarital Share.

(a) The Survivor's Share shall consist of the portion of the trust estate consisting of the surviving settlor's one-half interest in the settlors' community property, the surviving settlor's one-half interest in the deceased settlor's quasi-community property, and all of the surviving settlor's separate property and quasi-community property.

(b) The Survivor's Share shall be held, administered, and distributed according to the terms of the Survivor's Trust as set forth in Paragraph \_\_\_\_\_ of this instrument.

(c) The Nonmarital Share shall consist of the largest amount, if any, of property (excluding assets included in the Survivor's Share) that can pass free of federal estate tax by reason of (1) the applicable exclusion amount available to the estate of the deceased settlor; (2) the credit for state death taxes available to the estate of the deceased settlor, to the extent that the use of that credit does not result in or increase any death tax payable to any state; and (3) any other allowable credits or exclusions available to the estate of the deceased settlor (except the credit for tax on prior transfers from a "transferor," as defined in *Internal Revenue Code Section 2013*, who dies within two years after the date of death of the deceased settlor), but only to the extent that those credits do not disqualify the Marital Deduction Share from receiving the marital deduction. Any qualified disclaimer made by the surviving settlor shall be disregarded in determining this amount. [Optional: The amount of this pecuniary gift may be affected by a number of considerations, including but not limited to the following:

(1) The net value of all property disposed of by the will of the deceased settlor that is included in the gross estate of the deceased settlor for federal estate tax purposes and that does not qualify for the federal estate tax marital or charitable deduction;

(2) The value of all property disposed of by the deceased settlor that constitutes "adjusted taxable gifts"; and

(3) All charges to principal that are deductible under *Internal Revenue Code Section 2053* but that are not deducted in computing the federal estate tax liability for the gross estate of the deceased settlor. Because of the foregoing factors it is possible that no property will pass to the Nonmarital Share.]

(d) The Nonmarital Share shall be held, administered, and distributed according to the terms of the Bypass Trust as set forth in Paragraph \_\_\_\_\_ of this instrument.

(e) The Marital Deduction Share shall consist of all assets not allocated to the Survivor's Share or the Nonmarital Share under the formula specified in this section.

(f) The Marital Deduction Share shall be \_\_\_\_\_ [to establish a marital deduction trust: held, administered, and distributed according to the terms of the \_\_\_\_\_ (Power of Appointment Trust or Qualified Terminable Interest Property (QTIP) Trust)] as set forth in Paragraph \_\_\_\_\_ of this instrument or, to combine marital deduction share with survivor's share in survivor's trust: added to the Survivor's Trust established in Subparagraph (b), above].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsCreationEstate, Gift & Trust LawTrustsMarital Deduction TrustsEstate, Gift & Trust  
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*26-71 California Legal Forms--Transaction Guide § 71.204*

**AUTHOR:** Reviewed by Albert G. Handelman

**§ 71.204 Fractional Formula for One-Settlor Trust**

**[1] Comment**

**[a] Use of Form**

This form is a fractional formula clause for a one-settlor trust. It requires the trustee to divide the trust estate into a marital deduction share and a nonmarital share, and to determine the value of the marital deduction share according to a fractional formula. The division will be made upon the settlor's death, but only if the settlor is survived by his or her spouse. For a fractional formula clause suitable for use in a two-settlor trust, see § 71.205[2].

**[b] Fractional Formula**

When a fractional formula clause is used, a fractional share of each trust asset will be allocated to the marital deduction share and the nonmarital share. The fractional share that is allocated to the marital deduction share is typically stated as the smallest fractional share of the residuary assets necessary to eliminate estate taxes in the client's estate, or to reduce those taxes to the maximum extent possible.

The funding and valuation problems that arise when pecuniary formula clauses are used do not arise when fractional formulas are used. It is not necessary for the executor or trustee to allocate particular assets to the marital deduction and nonmarital shares, since each asset is divided between the two shares. Since fractional formula clauses require the different beneficiaries to become co-owners of each assets, however, administrative difficulties can arise. For this reason, fractional formula clauses are used less frequently than pecuniary formula clauses, although some estate planners prefer them. For further discussion of fractional formula clauses, see § 71.12[3][c]. For a comparison between pecuniary formula clauses and fractional formula clauses, and discussion of pecuniary formula clauses, see § 71.200[1].

**[2] Form**

### Fractional Formula for One-Settlor Trust

Division of Trust Estate If Settlor Is Survived by \_\_\_\_\_ [Wife *or* Husband]. If the settlor is survived by \_\_\_\_\_ [his wife *or* her husband], on the death of the settlor, the trustee shall divide the trust estate into two shares, hereafter referred to as the Marital Deduction Share and the Nonmarital Share.

(a) The Marital Deduction Share shall consist of the smallest fractional share of the trust estate that, when added to the total value for federal estate tax purposes of all other interests in property that pass or have passed from the settlor to the settlor's \_\_\_\_\_ [wife *or* husband], that qualify for the marital deduction, and that are includible in the settlor's gross estate for federal estate tax purposes, will entirely eliminate (or reduce to the maximum possible extent) any federal estate tax payable at the settlor's death, after taking into account:

(1) All available deductions and exclusions taken in determining the estate tax payable by reason of the death of the settlor's death; and

(2) The applicable exclusion amount and the state death tax credit (but only to the extent that use of the state death tax credit does not increase the state death taxes payable or the federal death taxes payable in any event, without reference to the availability of that credit), but no other credits.

Any property or interest in property with respect to which a credit for foreign death taxes is allowed for federal estate tax purposes shall not be allocated to the Marital Deduction Share unless the other property of the settlor's estate is insufficient to fund fully the Marital Deduction Share.

(b) It is the settlor's intent that assets qualifying for the federal estate tax marital deduction shall be allocated to the Marital Deduction Share only to the extent that such an allocation will reduce the federal estate tax otherwise payable by reason of the settlor's death. The executor shall allocate the assets as between the Marital Deduction Share and the Nonmarital Share in cash or in kind, or partly in each, on a pro rata basis. Any assets allocated in kind shall be valued for purposes of allocation at their values on the date or dates of distribution.

(c) The Marital Deduction Share shall be held, administered, and distributed according to the terms of the \_\_\_\_\_ [Power of Appointment Trust *or* Qualified Terminable Interest Property (QTIP) Trust] as set forth in Paragraph \_\_\_\_\_ of this instrument.

(d) The Nonmarital Share shall consist of all assets not allocated to the Marital Deduction Share under the formula specified in this paragraph.

(e) The Nonmarital Share shall be held, administered, and distributed according to the terms of the Bypass Trust as set forth in Paragraph \_\_\_\_\_ of this instrument.

### Legal Topics:

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsCreationEstate, Gift & Trust LawTrustsMarital Deduction TrustsEstate, Gift & Trust LawTrustsRevocable Living Trusts



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*26-71 California Legal Forms--Transaction Guide § 71.205*

**AUTHOR:** Reviewed by Albert G. Handelman

**§ 71.205 Fractional Formula for Two-Settlor Trust**

**[1] Comment**

**[a] Use of Form**

This form is a fractional formula clause for a two-settlor inter vivos trust. It requires the trustee to divide the trust estate into survivor's, marital deduction, and nonmarital shares, and to determine the value of the marital deduction share according to a fractional formula. The division will be made upon the death of the first settlor to die.

For discussion of fractional formulas, see §§ 71.12[3][c], 71.204[1]. § 71.204[2] contains a fractional formula suitable for a one-settlor trust.

**[b] Division of Trust Estate Into Shares**

This form divides the trust estate into the same three shares (survivor's share, marital deduction share, and nonmarital share) as the pecuniary marital deduction formula in § 71.201[2]. Like the latter form, this form permits the settlors to establish three separate trusts (survivor's trust, marital deduction trust, and bypass trust), or, in the alternative, to combine the survivor's share and marital deduction share into a single trust, resulting in the creation of a total of two trusts (survivor's trust qualifying for marital deduction, and bypass trust). For discussion of these alternative approaches, see § 71.201[1][b].

**[2] Form**

**Fractional Formula for Two-Settlor Trust**

Division of Trust Estate After Death of Deceased Settlor. On the death of the deceased settlor, the trustee shall divide

the trust estate into three shares, hereafter referred to as the Survivor's Share, the Marital Deduction Share, and the Nonmarital Share.

(a) The Survivor's Share shall consist of the portion of the trust estate consisting of the surviving settlor's one-half interest in the settlors' community property, the surviving settlor's one-half interest in the deceased settlor's quasi-community property, and all of the surviving settlor's separate property and quasi-community property.

(b) The Survivor's Share shall be held, administered, and distributed according to the terms of the Survivor's Trust as set forth in Paragraph \_\_\_\_\_ of this instrument.

(c) The Marital Deduction Share shall consist of the smallest fractional share of the trust estate (excluding assets included in the Survivor's Share) that, when added to the total value for federal estate tax purposes of all other interests in property that pass or have passed from the deceased settlor to the surviving settlor, that qualify for the marital deduction, and that are includible in the gross estate of the deceased settlor for federal estate tax purposes, will entirely eliminate (or reduce to the maximum possible extent) any federal estate tax payable at the death of the deceased settlor, after taking into account:

(1) All available deductions and exclusions taken in determining the estate tax payable by reason of the death of the deceased settlor; and

(2) The applicable exclusion amount and the state death tax credit (but only to the extent that use of the state death tax credit does not increase the state death taxes payable or the federal death taxes payable in any event, without reference to the availability of that credit), but no other credits.

Any property or interest in property with respect to which a credit for foreign death taxes is allowed for federal estate tax purposes shall not be allocated to the Marital Deduction Share unless the other property of the estate of the deceased settlor is insufficient to fund fully the Marital Deduction Share.

(d) It is the intent of the settlors that assets qualifying for the federal estate tax marital deduction shall be allocated to the Marital Deduction Share only to the extent that such an allocation will reduce the federal estate tax otherwise payable by reason of the death of the deceased settlor. The executor shall allocate the assets as between the Marital Deduction Share and the Nonmarital Share in cash or in kind, or partly in each, on a pro rata basis. Any assets allocated in kind shall be valued for purposes of allocation at their values on the date or dates of distribution.

(e) The Marital Deduction Share shall be \_\_\_\_\_ [held, administered, and distributed according to the terms of the \_\_\_\_\_ (Power of Appointment Trust *or* Qualified Terminable Interest Property (QTIP) Trust) as set forth in Paragraph \_\_\_\_\_ of this instrument *or, to combine marital deduction share with survivor's share in survivor's trust:* added to the Survivor's Trust established in subparagraph (b), above].

(f) The Nonmarital Share shall consist of all assets not allocated to the Survivor's Share or the Marital Deduction Share under the formula specified in this paragraph.

(g) The Nonmarital Share shall be held, administered, and distributed according to the terms of the Bypass Trust as set forth in Paragraph \_\_\_\_\_ of this instrument.

### Legal Topics:

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsCreationEstate, Gift & Trust LawTrustsMarital Deduction TrustsEstate, Gift & Trust LawTrustsRevocable Living Trusts



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PART IV. FORMS  
A. Formula Clauses  
1. Inter Vivos Trusts

*26-71 California Legal Forms--Transaction Guide §§ 71.206-71.209*

**AUTHOR:** Reviewed by Albert G. Handelman

**[Reserved]**

§§ 71.206[Reserved]



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 A. Formula Clauses  
 2. Testamentary Trusts

*26-71 California Legal Forms--Transaction Guide § 71.210*

**AUTHOR:** Reviewed by Albert G. Handelman

**§ 71.210 Pecuniary Marital Deduction Formula Devise and Residuary Clause**

**[1] Comment**

**[a] Use of Form**

This form is a pecuniary marital deduction formula for use in a will. It may be used to make a marital deduction devise (either outright or in trust), and a residuary devise that will not qualify for the marital deduction and will be placed in a bypass trust. In effect, it will divide the testator's estate into marital deduction and nonmarital shares, with the value of the marital deduction share being determined by a pecuniary formula. For a discussion of pecuniary formulas, their use in marital deduction estate planning, and their operation see § 71.200[1].

This disposition will take effect only if the testator's spouse survives the testator. An alternative residuary disposition must be included in the will to deal with the possibility that the testator's spouse will predecease the testator.

When this form is used, the will drafter must also include in the will the *form in § 71.220[2]*, relating to valuation of assets for purposes of the pecuniary formula clause.

**[b] Pecuniary Formula Clauses in Wills**

Although a pecuniary formula in a will ultimately achieves a result similar to that of a comparable formula in an inter vivos trust, the formula is stated in a somewhat different format in a will, due to the differences between wills and inter vivos trust instruments. In an inter vivos trust, the formula clause simply divides the trust assets into the appropriate shares (marital deduction share and nonmarital share, as well as survivor's share in the case of a two-settlor trust). In a will, a pecuniary formula clause makes a general pecuniary devise and allocates that devise either to the marital deduction share, as in this form (a "pecuniary marital deduction formula"), or to the nonmarital share, as in the *form in § 70.211[2]* (a "pecuniary bypass formula"). Other will provisions may make specific or pecuniary devises to named

persons, as in any other will. The residuary clause of the will then allocates the remaining assets to the other share. When a pecuniary marital deduction formula clause such as this form is used, the residuary devise of the will allocates the balance of the testator's property to the nonmarital (bypass) share. Conversely, when a pecuniary bypass formula is used, the residuary clause allocates the balance of the testator's property to the marital deduction share. For complete wills containing a pecuniary marital deduction formula, see *Ch. 61, Will Drafting and Complete Will Forms*, §§ 61.213[2], 61.214[2].

Pecuniary marital deduction formulas are probably the most frequently used marital deduction formulas, because they permit post-death appreciation in the assets of the estate to be allocated to the nonmarital share, which will escape taxation on the death of the surviving spouse [see the Practice Tip in § 71.200[1][d] for discussion of considerations in selecting a pecuniary formula]. For discussion, see § 71.200[1]. For a pecuniary bypass formula, see § 71.211[2].

## [2] Form

### Pecuniary Marital Deduction Formula Devise and Residuary Clause

[Insert in article of will that makes particular devises:]

Marital Deduction Gift. If my \_\_\_\_\_ [wife or husband] survives me [specify survivorship period if desired, e.g., for \_\_\_\_\_ (e.g., six months)], I give a pecuniary gift (referred to as the "marital deduction gift"), in the amount determined in this paragraph, \_\_\_\_\_ [for an outright devise: outright to \_\_\_\_\_ (him or her) or, to establish a marital deduction trust: to the trustee, to be held, administered, and distributed according to the terms set forth in Article \_\_\_\_ applicable to the \_\_\_\_\_ (Power of Appointment Trust or Qualified Terminable Interest Property (QTIP) Trust)]. The marital deduction gift shall be the minimum amount necessary to eliminate (or reduce to the maximum extent possible) any federal estate tax at my death, taking into account the following:

(a) The net value of all other property that passes or has passed to my \_\_\_\_\_ [wife or husband] under this will or otherwise and that qualifies for the federal estate tax marital deduction. For purposes of this subparagraph of the will, any qualified disclaimer made by my \_\_\_\_\_ [wife or husband] shall be disregarded, and any property that will qualify as qualified terminable interest property under *Internal Revenue Code Section 2056(b)(7)* if my executor makes the requisite election shall be considered to be qualified terminable interest property, regardless of whether the election is made;

(b) All federal estate tax deductions and exclusions actually allowed other than the marital deduction;

(c) The applicable exclusion amount, as specified in *Internal Revenue Code Section 2010*, available to my estate;

(d) The credit for state death taxes available to my estate, to the extent that the use of that credit does not result in or increase any death tax payable to any state; and

(e) Any other allowable credits available to my estate (except the credit for tax on prior transfers from a "transferor," as defined in *Internal Revenue Code Section 2013*, who dies within two years after the date of my death), but only to the extent that those credits do not disqualify this gift from receiving the marital deduction.

If my \_\_\_\_\_ [wife or husband] does not survive me [specify survivorship period if desired, e.g., for \_\_\_\_\_ (e.g., six months)], this gift shall lapse and become part of the residue of my estate.

[Insert as residuary clause of will:]

Disposition of Residue. If my \_\_\_\_\_ [wife or husband] survives me \_\_\_\_\_ [if

*desired, add survivorship period not to exceed six months, e.g., for six months], I give the residue of my estate (referred to as the "bypass gift") to the trustee, to be held, administered, and distributed according to the terms set forth in Paragraph \_\_\_\_\_ applicable to the Bypass Trust.*

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsCreationEstate, Gift & Trust LawTrustsMarital Deduction TrustsEstate, Gift & Trust LawTrustsTestamentary TrustsEstate, Gift & Trust LawWillsResiduary Clauses



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*26-71 California Legal Forms--Transaction Guide § 71.211*

**AUTHOR:** Reviewed by Albert G. Handelman

**§ 71.211 Pecuniary Bypass Formula Devise and Residuary Clause**

**[1] Comment**

**[a] Use of Form**

This form is a pecuniary bypass formula for use in a will. It may be used to make a nonmarital devise (that is, a devise that does not qualify for the marital deduction) in trust, and a residuary devise (either outright or in trust) that will qualify for the marital deduction. In effect, it will divide the testator's estate into marital deduction and nonmarital shares, with the value of the nonmarital share being determined by a pecuniary formula. For a discussion of pecuniary formulas, their use in marital deduction estate planning, and their operation, see § 71.200[1].

In this form, the nonmarital devise is described as the "bypass gift." This is because the nonmarital share is customarily held in a "bypass trust" that will be sheltered from estate taxation when the surviving spouse dies. For a general discussion of bypass trusts, see § 71.14.

This disposition will take effect only if the testator's spouse survives the testator. An alternative residuary disposition must be included to deal with the possibility that the testator's spouse will predecease the testator.

When this form is used, the will drafter must also include in the will the *form in § 71.220[2]*, relating to valuation of assets for purposes of the pecuniary formula clause.

**[b] Use of Pecuniary Bypass Formula In Will**

A pecuniary formula may be used to fix the value of either the marital deduction share or the nonmarital share. When the formula is used to fix the value of the marital deduction share, as in the *form in § 71.210[2]* (a "pecuniary marital deduction formula"), the residue is allocated to the nonmarital share. Conversely, when the formula is used to fix the

value of the nonmarital share, as in this form (a "pecuniary bypass formula"), the residue is allocated to the marital deduction share. For additional discussion of the operation of pecuniary formula clauses in wills, see § 71.210[1][b].

Pecuniary marital deduction formulas [ *see* § 71.210[2]] are more commonly used than pecuniary bypass formulas because they allocate any post-death appreciation in the assets of the estate to the nonmarital share, which will escape taxation on the death of the surviving spouse. For discussion, see § 71.200[1][b]-[d] [*see* the Practice Tip in § 71.200[1][d] for discussion of considerations in selecting a pecuniary formula].

## [2] Form

### Pecuniary Bypass Formula Devise and Residuary Clause

[*Insert in article of will that makes particular devises:*]

Bypass Gift. If my \_\_\_\_\_ [wife or husband] survives me \_\_\_\_\_ [*if desired, add survivorship period not to exceed six months, e.g., for six months*], I give a pecuniary gift (referred to as the "bypass gift"), in the amount determined in this paragraph, to the trustee, to be held, administered, and distributed according to the terms set forth in Article \_\_\_\_\_ applicable to the Bypass Trust. The bypass gift shall be the largest amount, if any, of property that can pass free of federal estate tax by reason of (1) the applicable exclusion amount, as specified in *Internal Revenue Code Section 2010*, available to my estate; (2) the credit for state death taxes available to my estate, to the extent that the use of that credit does not result in or increase any death tax payable to any state; and (3) any other allowable credits or exclusions available to my estate (except the credit for tax on prior transfers from a "transferor," as defined in *Internal Revenue Code Section 2013*, who dies within two years after the date of my death), but only to the extent that those credits or exclusions do not disqualify the marital deduction gift from receiving the marital deduction. Any qualified disclaimer made by my \_\_\_\_\_ [wife or husband] shall be disregarded in determining this amount. [*Optional: The amount of this pecuniary gift may be affected by a number of considerations, including but not limited to the following:*

(a) The net value of all property disposed of by this will or otherwise that is included in my gross estate for federal estate tax purposes and that does not qualify for the federal estate tax marital or charitable deduction;

(b) The value of all property disposed of by me that constitutes "adjusted taxable gifts"; and

(c) All charges to principal that are deductible under *Internal Revenue Code Section 2053* but that are not deducted in computing the federal estate tax liability for my gross estate.

Because of the foregoing factors it is possible that no property will pass pursuant to this provision.] If my \_\_\_\_\_ [wife or husband] does not survive me [*specify survivorship period if desired, e.g., for \_\_\_\_\_ (e.g., six months)*], this gift shall lapse and become part of the residue of my estate.

[*Insert as residuary clause of will:*]

Disposition of Residue. If my \_\_\_\_\_ [wife or husband] survives me \_\_\_\_\_ [*if desired, add survivorship period not to exceed six months, e.g., for six months*], I give the residue of my estate (referred to as the "marital deduction gift") \_\_\_\_\_ [*for an outright devise: outright to \_\_\_\_\_ (him or her) or, to establish a marital deduction trust: to the trustee, to be held, administered, and distributed according to the terms set forth in Article \_\_\_\_\_ applicable to the \_\_\_\_\_ (Power of Appointment Trust or Qualified Terminable Interest Property (QTIP) Trust)*].

### Legal Topics:

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsCreationEstate, Gift & Trust LawTrustsMarital Deduction TrustsEstate, Gift & Trust  
LawTrustsTestamentary TrustsEstate, Gift & Trust LawWillsResiduary Clauses



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*26-71 California Legal Forms--Transaction Guide § 71.212*

**AUTHOR:** Reviewed by Albert G. Handelman

**§ 71.212 Fractional Formula Residuary Clause**

**[1] Comment**

**[a] Use of Form**

This form is a fractional formula residuary clause for a will. It requires the executor to divide the residue of the estate into a marital deduction share and a nonmarital share, and to determine the value of the marital deduction share according to a fractional formula. The marital deduction share may be given to the testator's surviving spouse either outright or in trust, while the nonmarital share is typically placed in a "bypass" trust designed to escape taxation on the death of the testator's surviving spouse [*see* discussion of bypass trusts in § 71.14].

This form may be used as an alternative to the pecuniary formula clauses illustrated in §§ 71.210[2] (pecuniary marital deduction formula) and 71.211[2] (pecuniary bypass formula).

This disposition will take effect only if the testator's spouse survives the testator. An alternative residuary disposition must be included to deal with the possibility that the testator's spouse will predecease the testator.

**[b] Fractional Formula in Will**

When a fractional formula is used to divide an estate into marital deduction and nonmarital shares, the respective shares will receive a fractional interest in each and every asset in the residue of the estate. The fractional share that is allocated to the marital deduction share typically is stated as the smallest fractional share of the residuary assets necessary to eliminate estate taxes in the client's estate, or to reduce those taxes to the maximum extent possible. All the rest of the residuary assets are allocated to the nonmarital share.

The funding and valuation problems that arise when pecuniary formula clauses are used do not arise when fractional

formulas are used. It is not necessary for the executor to allocate particular assets to the marital deduction and nonmarital shares, since each asset is divided between the two shares. Since fractional formula clauses require the different beneficiaries to become co-owners of each asset, however, administrative difficulties can arise. For this reason, fractional formula clauses are used less frequently than pecuniary formula clauses.

For further discussion of fractional formula clauses, see §§ 71.12[3][c] and 71.204[1][b].

## [2] Form

Disposition of Residue. If my \_\_\_\_\_ [wife *or* husband] survives me \_\_\_\_\_ [if desired, add survivorship period not to exceed six months, e.g., for six months], I give the residue of my estate as follows:

(a) The executor shall divide the residue of my estate into two shares, which are hereafter referred to as the Marital Deduction Share and the Nonmarital Share.

(b) The Marital Deduction Share shall consist of the smallest fractional share of the residue of my estate that, when added to the total value for federal estate tax purposes of all other interests in property that pass or have passed from me to or in trust for my \_\_\_\_\_ [husband *or* wife], and that are includible in my gross estate for federal estate tax purposes and qualify for the marital deduction, will entirely eliminate (or reduce to the maximum possible extent) any federal estate tax payable at my death, after taking into account (1) all available deductions and exclusions taken in determining the estate tax payable by reason of my death; (2) the applicable exclusion amount and the state death tax credit (but only to the extent that use of the state death tax credit does not increase the state death taxes payable or the federal death taxes payable in any event, without reference to the availability of that credit), but no other credits; and (3) the net value of all other property, whether given under this will or otherwise, that passes at the time of my death, or has passed before my death, to or in trust for my \_\_\_\_\_ [husband *or* wife], that is included in my gross estate, and that qualifies for the federal estate tax marital deduction. Any property or interest in property with respect to which a credit for foreign death taxes is allowed for federal estate tax purposes shall not be allocated to the Marital Deduction Share unless the other property of my estate is insufficient to fund fully the Marital Deduction Share.

(c) It is my intent that assets qualifying for the federal estate tax marital deduction shall be allocated to the Marital Deduction Share only to the extent that such an allocation will reduce the federal estate tax otherwise payable by reason of my death. The executor shall allocate the assets as between the Marital Deduction Share and the Nonmarital Share in cash or in kind, or partly in each, on a pro rata basis. Any assets allocated in kind shall be valued for purposes of allocation at their values on the date or dates of distribution.

(d) I give the Marital Deduction Share \_\_\_\_\_ [for an outright devise: outright to my \_\_\_\_\_ (husband *or* wife) or, to establish a marital deduction trust: to the trustee, to be held, administered, and distributed according to the terms set forth in Article \_\_\_\_\_ applicable to the \_\_\_\_\_ (Power of Appointment Trust *or* Qualified Terminable Interest Property (QTIP) Trust)].

(e) The Nonmarital Share shall consist of that portion of the residue of my estate that is not included in the Marital Deduction Share under the formula set forth in this paragraph.

(f) I give the Nonmarital Share to the trustee, to be held, administered, and distributed according to the terms set forth in Article \_\_\_\_\_ applicable to the Bypass Trust.

## Legal Topics:

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsCreationEstate, Gift & Trust LawTrustsMarital Deduction TrustsEstate, Gift & Trust  
LawTrustsTestamentary TrustsEstate, Gift & Trust LawWillsResiduary Clauses



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*26-71 California Legal Forms--Transaction Guide §§ 71.213-71.219*

**AUTHOR:** Reviewed by Albert G. Handelman

**[Reserved]**

§§ 71.213[Reserved]



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DIVISION IV: WILLS AND TRUSTS  
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 PART IV. FORMS  
 B. Ancillary Provisions

*26-71 California Legal Forms--Transaction Guide § 71.220*

**AUTHOR:** Reviewed by Albert G. Handelman

**§ 71.220 Allocation and Valuation of Assets Under Pecuniary Formula**

**[1] Comment**

**[a] Use of Form**

This form should be used in any will or trust instrument containing a pecuniary formula clause, to specify how assets are to be allocated between the marital and nonmarital shares, and how assets are to be valued for purposes of that allocation. It should be included whenever the trust instrument contains either a pecuniary marital deduction formula [see forms in §§ 71.200[2], 71.201[2] (inter vivos trusts), 71.210[2] (testamentary trust)] or a pecuniary bypass formula [see forms in §§ 71.202[2], 71.203[2] (inter vivos trusts), 71.211[2] (testamentary trust)]. This form should *not* be used with a fractional formula clause [ see §§ 71.204[2], 71.205[2] (inter vivos trusts), 71.212[2] (testamentary trust)]. The form language is drafted for use in either an inter vivos trust or a testamentary trust.

**[b] Allocation and Valuation Under Pecuniary Formula Clause**

When a pecuniary formula clause is used to divide a trust estate, the executor or trustee will have to decide what assets to allocate to the marital deduction share and the nonmarital share, and what values to assign to the assets when they are allocated.

For federal estate tax purposes, assets are usually valued at their value on the date of the decedent's death [I.R.C. § 2031(a)]. However, the executor may elect to value property at the date on which the property is actually distributed or the date six months after the decedent's death, whichever is earlier [I.R.C. § 2032(a)(1), (2)]. In drafting a trust instrument, the attorney should specify whether "date of death" values or "date of distribution" values should be used in allocating assets between the marital deduction share and the nonmarital share. This form permits the drafter to select either date of death values or date of distribution values for the purpose of allocating assets to the respective shares created by the pecuniary formula clause.

**[c] Date of Distribution Values**

Valuation of assets as of the date of distribution ordinarily will promote the greatest fairness, since the two trusts will receive assets that are fairly valued at the time of allocation. However, date-of-distribution valuation may raise income tax issues. When an appreciated or depreciated asset is transferred in satisfaction of a pecuniary bequest, income tax gain or loss may be realized. For income tax purposes, the basis of an asset received from a deceased person ordinarily is the fair market value of the asset at the time of the deceased person's death [*I.R.C. § 1014(a)(1)*]; for decedents dying after 2009, a modified carryover basis rule generally applies, so a step-up basis does not apply (*I.R.C. § 1022*); see Ch. 60, *Estate Planning*, for a detailed discussion]. If the fair market value of the asset exceeds its basis and the asset is transferred to satisfy a gift in a specific dollar amount (that is, a pecuniary gift), the difference between the fair market value and the basis will be recognized as gain [*Treas. Reg. § 1.661(a)-2(f)(1)*]. Conversely, if the fair market value of the asset is less than its basis and the asset is transferred to satisfy a gift in a specific dollar amount (that is, a pecuniary gift), a loss will be recognized [*Treas. Reg. § 1.661(a)-2(f)(1)*].

**[d] Date of Death Values**

Recognition of gain and loss will be avoided if the assets are valued as of the date of the decedent's death [*see I.R.C. § 1014*; for decedents dying after 2009, a modified carryover basis rule generally applies, so a step-up basis does not apply (*I.R.C. § 1022*); see Ch. 60, *Estate Planning*, for a detailed discussion]. However, when date of death valuation is used, a danger exists that the assets actually allocated to the two trusts might not affect economic reality.

Assets in a trust or estate may fluctuate in value between the date of death and the date of distribution. Although this fluctuation in value usually will not be substantial, in large estates even minor fluctuations in value can have a significant financial impact. In such a case, there may be a disparity between the value of the two shares for estate tax purposes and the value of the assets actually received by the two trusts. Under these circumstances, there is a potential for the use of date of death values as a device to transfer post-death appreciation to the nonmarital share (where it will escape taxation on the surviving spouse's death) rather than the marital deduction share, thereby in effect underfunding the marital deduction share.

To limit the potential for abuse in connection with the use of date of death values, the IRS has established rules governing date of death valuation. These rules, contained in *Revenue Procedure 64-19 [Rev. Proc. 64-19, 1964-1 C.B. 682]*, require that when date of death valuation is used, either (1) distributions must fairly reflect the appreciation and depreciation in estate or trust assets during administration (or, in the case of a living trust, during the time between the settlor's death and funding of the marital deduction share)--the so-called "fairly representative" test; or (2) the marital deduction share must be funded to an amount at least equal to the marital deduction actually taken on the federal income tax return--the so-called "minimum worth" test. When date of death values are used, this form gives the drafter the option of selecting either test. While the minimum worth test appears to give the greatest flexibility because it merely establishes a floor for the marital deduction share, thereby permitting the executor or trustee to divert appreciated property to the exempt portion once the floor amount of the marital deduction share has been satisfied, the executor or trustee nevertheless must adhere to basic principles of fairness in allocating assets. The Probate Code requires trustees to deal with trust beneficiaries impartially [*Prob. Code § 16003*] and to exercise discretion reasonably and not in an arbitrary manner [*Prob. Code § 16080*].

**[2] Form****Allocation and Valuation of Assets Under Pecuniary Formula**

Allocation and Valuation of Assets. In allocating assets between the marital deduction \_\_\_\_\_ [*for a testamentary trust: gift or, for an inter vivos trust: share*] and the bypass \_\_\_\_\_ [*gift or share*], the \_\_\_\_\_ [*for a testamentary trust: executor or, for an inter vivos trust: trustee*] shall allocate the trust

assets that qualify for the marital deduction between the marital deduction \_\_\_\_\_ [gift or share] and the nonmarital \_\_\_\_\_ [gift or share] in cash or in kind, or partly in each, on a pro rata or non pro rata basis, and in undivided interests or not; subject, however, to the following:

(a) Only assets that qualify for the marital deduction shall be allocated to the marital deduction \_\_\_\_\_ [gift or share].

(b) Assets allocated in kind shall be \_\_\_\_\_ [to use date of distribution values: valued for purposes of allocation on the date or dates of distribution or, to use valuation for estate tax purposes under "minimum worth" test: deemed to satisfy the marital deduction amount on the basis of their values as finally determined for federal estate tax purposes, but in no event shall the date of distribution values be less than the amount of the marital deduction or, to use valuation for estate tax purposes under "fairly representative" test: deemed to satisfy the marital deduction amount on the basis of their values as finally determined for federal estate tax purposes; provided, however, that the \_\_\_\_\_ (executor or trustee) shall act impartially, consistent with equitable principles requiring impartiality among beneficiaries, in allocating assets in satisfaction of the marital deduction \_\_\_\_\_ (gift or share), so that any distribution of assets in satisfaction of the marital deduction \_\_\_\_\_ (gift or share) shall be made of assets, including cash, fairly representative of appreciation or depreciation in the value of all property thus available for distribution].

(c) The trustee shall not allocate assets that qualify for the foreign death tax credit to the marital deduction \_\_\_\_\_ (gift or share) unless all other assets or interests available for allocation have been so allocated.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsCreationEstate, Gift & Trust LawTrustsModification & Termination



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B. Ancillary Provisions

*26-71 California Legal Forms--Transaction Guide § 71.221*

**AUTHOR:** Reviewed by Albert G. Handelman

**§ 71.221 Intention That Marital Deduction Share Qualify for Marital Deduction**

**[1] Comment**

**[a] Use of Form**

This form is a provision stating that the marital deduction share is intended to qualify for the federal estate tax marital deduction and that the trustee may not take any action or exercise any power that may impair the deduction, except as otherwise provided in the instrument with respect to the QTIP election [*see* [b], *below*].

This form may be used in any instrument that creates a trust, whether the instrument is inter vivos or testamentary, and regardless of whether the trust is created by one settlor or two.

This form is in the nature of a "saving" clause, since a properly drafted marital deduction trust should not permit the trustee to take any actions that are incompatible with the marital deduction. However, it may prove valuable in the event that some aspect of a broad grant of powers to the trustee is later deemed to be incompatible with the marital deduction, or in the event that the tax laws governing the marital deduction change.

**[b] Exception for QTIP Election**

This form includes optional language that should be added if the instrument creates a qualified terminable interest property (QTIP) trust [*see* *I.R.C. § 2056(b)(7)*]. When a QTIP trust is used, the executor will have to decide whether or not to elect to have all or part of the QTIP trust assets qualify for the marital deduction [ *see* §§ 71.10[4][d], 71.13 [4]]. In some cases, it may be desirable not to make a QTIP election, or to make only a partial QTIP election. This form should not tie the executor's hands and require that a QTIP election be made; or that the election, if made, must be made with respect to all of the eligible assets. The optional language will permit the executor to exercise discretion in making or not making a QTIP election.

**[2] Form****Intention That Marital Deduction Share Qualify for Marital Deduction**

It is \_\_\_\_\_ [*for testamentary trust: my or for one-settlor inter vivos trust: the settlor's or for two-settlor inter vivos trust: the settlors'*] intention that the marital deduction share shall qualify for the federal estate tax marital deduction, and this \_\_\_\_\_ [*instrument or will*] shall be construed accordingly. [*If QTIP election is contemplated, add: Except as otherwise provided in this \_\_\_\_\_ (will or instrument) with respect to the QTIP election,*] [N]o fiduciary shall take any action or exercise any power that may impair the federal estate tax marital deduction.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsCreationEstate, Gift & Trust LawTrustsMarital Deduction Trusts



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DIVISION IV: WILLS AND TRUSTS  
CHAPTER 71 MARITAL DEDUCTION TRUST PROVISIONS  
PART IV. FORMS  
B. Ancillary Provisions

*26-71 California Legal Forms--Transaction Guide § 71.222*

**AUTHOR:** Reviewed by Albert G. Handelman

**§ 71.222 Qualification Provision for Qualified Domestic Trust (QDOT)**

**[1] Comment**

**[a] Use of Form**

This form may be used to convert a marital deduction trust into a qualified domestic trust (QDOT) [*see I.R.C. §§ 2056(d)(1), (2), 2056A*]. It is designed to be inserted in the trust instrument of a QTIP trust [*see I.R.C. § 1056(b)(7)*] and discussion in § 71.13[4] or a lifetime income plus power of appointment trust [*see I.R.C. § 2056(b)(5)*] and discussion in § 71.13[5] when the trust would not otherwise qualify for the marital deduction because the surviving spouse is not a citizen of the United States [*I.R.C. § 2056(d)(1), (2)*].

**[b] Marital Deduction When Spouse is Noncitizen**

If the deceased spouse dies after November 10, 1988, and the surviving spouse is not a citizen of the United States, a trust will not qualify for the marital deduction unless it is a QDOT that meets all of the requirements of *Internal Revenue Code Section 2056A* [*I.R.C. § 2056(d)(1), (2)*; *see Treas. Reg. § 20.2056A-1(a)* (effective date)]. The Treasury Regulations mandate specific provisions that must be included in the governing instrument of a QDOT [*see Temp. Treas. Reg. § 20.2056A-2T(d)*]. These provisions vary depending on whether the fair market value of the trust assets at the time of the deceased spouse's death is greater or less than \$ 2 million. Since it will often be difficult to determine in advance whether the trust will meet the \$ 2 million threshold, this provision states the requirements in the alternative and leaves the final determination as to which requirements will actually apply to be determined at the date of death (or alternate valuation date, if applicable) [*see Requirements to Ensure Collection of Section 2056A Estate Tax, 60 Fed. Reg. 43555 (1995)*]. If the drafter believes that there is no realistic chance that the trust assets will exceed \$2 million, or that the trust assets will be less than that amount, one or the other set of requirements may be eliminated. However, in the interest of caution it is recommended that both sets of alternative requirements ordinarily be retained in the instrument. For further discussion of the required trust provisions, see § 71.13[7][b].

**[c] Power to Amend or Reform Trust Instrument**

This provision gives the trustee (in the case of an inter vivos trust) or the executor (in the case of a testamentary trust) power to amend or reform the trust instrument whenever necessary to comply with the requirements of *Internal Revenue Code Section 2056A*. This power is authorized by the regulations and will provide some assurance that the trust will always meet the QDOT requirements [see discussion in § 71.13[7][d].

**[2] Form****Qualification Provision for Qualified Domestic Trust (QDOT)**

If, on \_\_\_\_\_ [for testamentary trust: my death or for one-settlor inter vivos trust: the settlor's death or for two-settlor inter vivos trust: the death of the deceased settlor], \_\_\_\_\_ [my \_\_\_\_\_ (husband or wife) or the settlor's \_\_\_\_\_ (husband or wife) or the surviving settlor] is not a citizen of the United States, it is \_\_\_\_\_ [my or the settlor's or the settlors'] intention that the \_\_\_\_\_ [Power of Appointment Trust or QTIP Trust] created by this instrument shall qualify as a "Qualified Domestic Trust" ("QDOT") under the provisions of *Internal Revenue Code Section 2056A*, as amended, if qualification as a QDOT is required for the assets of the \_\_\_\_\_ [Power of Appointment Trust or QTIP Trust] to qualify for the federal estate tax marital deduction. In that case, the following provisions shall apply to the \_\_\_\_\_ [Power of Appointment Trust or QTIP Trust] as long as and to the extent that they are required for it to qualify as a QDOT:

(a) The \_\_\_\_\_ [Power of Appointment Trust or QTIP Trust] shall at all times have at least one trustee (called the U.S. Trustee) who is an individual citizen of the United States or a domestic corporation.

(b) If at any time any noncitizen of the United States, or a foreign corporation, is designated to become the sole trustee under the provisions of the trust, then that person or entity shall not serve as sole trustee, but shall serve as cotrustee along with the person or entity designated as the successor trustee under the terms of the trust, if that successor trustee would be a U.S. Trustee. If either (1) this \_\_\_\_\_ [will or instrument] makes no provision for a successor trustee; (2) the designated successor trustee would not be a U.S. Trustee, or (3) all nominations for successor trustee have been exhausted, then \_\_\_\_\_ [my \_\_\_\_\_ (husband or wife) or the settlor's \_\_\_\_\_ (husband or wife) or the surviving settlor] or any other person or entity shall petition the court to appoint a U.S. Trustee to serve as cotrustee along with the noncitizen or foreign corporation cotrustee. If \_\_\_\_\_ [my \_\_\_\_\_ (husband or wife) or the settlor's \_\_\_\_\_ (husband or wife) or the surviving settlor] was to have become the sole trustee but for the provisions of this section, and if \_\_\_\_\_ [he or she or he or she] becomes a citizen of the United States after appointment of another trustee pursuant to this subsection, then after providing written notice to that other cotrustee, \_\_\_\_\_ [my \_\_\_\_\_ (husband or wife) or the settlor's \_\_\_\_\_ (husband or wife) or the surviving settlor], if \_\_\_\_\_ [he or she or he or she] so chooses, may remove the other cotrustee and become sole trustee.

(c) No distribution (other than a distribution of income) may be made from the \_\_\_\_\_ [Power of Appointment Trust or QTIP Trust] unless the U.S. Trustee has the right to withhold from that distribution the tax imposed by *Internal Revenue Code Section 2056A* on that distribution. The U.S. Trustee is hereby granted the power to withhold that tax from any such distribution.

(d) If the fair market value of the assets of the \_\_\_\_\_ [Power of Appointment Trust or QTIP Trust], determined without reduction for any indebtedness with respect to the assets, as finally determined for federal estate tax purposes, exceeds \$2 million as of the date of \_\_\_\_\_ [for testamentary trust: my death or, for one-settlor inter vivos trust: the settlor's death or, for two-settlor inter vivos trust: the death of the deceased settlor], or the alternate valuation date if applicable, the trust shall during its entire term meet at least one of the requirements

listed in (1) through (3), below. \_\_\_\_\_ [For testamentary trust: My or, for one-settlor inter vivos trust: The settlor's or, for two-settlor inter vivos trust: The deceased settlor's] executor, as defined in *Internal Revenue Code Section 2203*, shall determine which of the three requirements shall actually apply at the date of \_\_\_\_\_ [for testamentary trust: my death or, for one-settlor inter vivos trust: the settlor's death or, for two-settlor inter vivos trust: the death of the deceased settlor], or the alternate valuation date if applicable:

(1) The trust shall have at least one acting trustee that is a bank as defined in *Internal Revenue Code Section 581*, or a United States branch of a foreign bank, provided that if one trustee is a United States branch of a foreign bank, a U.S. Trustee must act as a cotrustee with the foreign bank trustee during the entire term of the trust;

(2) The U.S. Trustee must furnish a bond in favor of the Internal Revenue Service in an amount equal to 65 percent of the fair market value of the trust assets (without regard to any indebtedness thereon) as of the date of

\_\_\_\_\_ [for testamentary trust: my death or, for one-settlor inter vivos trust: the settlor's death or, for two-settlor inter vivos trust: the death of the deceased settlor] (or the alternate valuation date if applicable), as finally determined for federal estate tax purposes and as further adjusted to account for the value of any real property wherever situated (and related furnishings) owned directly by the trust that is used by

\_\_\_\_\_ [my

\_\_\_\_\_ (husband or wife) or the settlor's

\_\_\_\_\_ (husband or wife) or the surviving settlor] as

\_\_\_\_\_ [his or her or his or her] principal residence; or

(3) The U.S. Trustee must furnish an irrevocable letter of credit issued by a bank as defined in *Internal Revenue Code Section 581*, by a United States branch of a foreign bank, or issued by a foreign bank and confirmed by a bank as defined in *Internal Revenue Code Section 581*, in an amount equal to 65 percent of the fair market value of the trust assets (without regard to any indebtedness thereon) as of the date of

\_\_\_\_\_ [for testamentary trust: my death or, for one-settlor inter vivos trust: the settlor's death or, for two-settlor inter vivos trust: the death of the deceased settlor] (or the alternate valuation date if applicable), as finally determined for federal estate tax purposes and as further adjusted to account for the value of any real property wherever situated (and related furnishings) owned directly by the trust that is used by

\_\_\_\_\_ [my

\_\_\_\_\_ (husband or wife) or the settlor's

\_\_\_\_\_ (husband or wife) or the surviving settlor] as

\_\_\_\_\_ [his or her or his or her] principal residence.

(e) If the fair market value of the assets of the \_\_\_\_\_ [Power of Appointment Trust or QTIP Trust], determined without reduction for any indebtedness with respect to the assets, as finally determined for federal

estate tax purposes, is \$ 2 million or less as of the date of \_\_\_\_\_ [for *testamentary trust*: my death or, for *one-settlor inter vivos trust*: the settlor's death or, for *two-settlor inter vivos trust*: the death of the deceased settlor], or the alternate valuation date if applicable, the trust shall during its entire term meet the requirements listed in either (d)(1), (d)(2), or (d)(3), above, or, in the alternative, no more than 35 percent of the fair market value of the trust assets, determined annually on the last date of the taxable year of the trust (or on the last day of the calendar year if the trust does not have a taxable year), may consist of real property located outside the United States. \_\_\_\_\_ [For *testamentary trust*: My or, for *one-settlor inter vivos trust*: The settlor's or, for *two-settlor inter vivos trust*: The deceased settlor's] executor, as defined in *Internal Revenue Code Section 2203*, shall determine which of these four requirements shall actually apply at the date of \_\_\_\_\_ [for *testamentary trust*: my death or, for *one-settlor inter vivos trust*: the settlor's death or, for *two-settlor inter vivos trust*: the death of the deceased settlor], or the alternate valuation date if applicable.

(f) \_\_\_\_\_ [For *testamentary trust*: My executor or, for *one-settlor inter vivos trust*: The settlor's executor or, for *two-settlor inter vivos trust*: The deceased settlor's executor], as defined in *Internal Revenue Code Section 2203*, is authorized to make the election to qualify the \_\_\_\_\_ [Power of Appointment Trust or QTIP Trust] as a QDOT in the manner prescribed by law. [If the marital deduction trust is a QTIP trust, add: However, this subsection shall not be construed as affecting the executor's power to make or not to make an estate QTIP election under *Internal Revenue Code Section 2056(b)(7)* with respect to some or all of the amount that may qualify for the marital deduction.]

(g) The \_\_\_\_\_ [Power of Appointment Trust or QTIP Trust] shall meet all requirements prescribed by the Secretary of the Treasury by regulations from time to time to ensure the collection of the tax imposed by *Internal Revenue Code Section 2056A*. \_\_\_\_\_ [for *testamentary trust*: My executor or, for *one-settlor inter vivos trust*: The settlor's executor or, for *two-settlor inter vivos trust*: The deceased settlor's executor], as defined in *Internal Revenue Code Section 2203*, is authorized to amend and reform the terms of this instrument whenever necessary to comply with those regulations or otherwise to assure that the trust will qualify for the marital deduction as a QDOT under applicable law.

(h) This section shall not apply if, pursuant to *Internal Revenue Code Section 2056(d)(4), (1)* \_\_\_\_\_ [my \_\_\_\_\_ (husband or wife) or the settlor's \_\_\_\_\_ (husband or wife) or the surviving settlor] becomes a citizen of the United States before the day on which the federal estate tax return is filed, and (2) \_\_\_\_\_ [my \_\_\_\_\_ (husband or wife) or the settlor's \_\_\_\_\_ (husband or wife) or the surviving settlor] is a resident of the United States at all times after the date of \_\_\_\_\_ [my or the settlor's or the deceased settlor's] death and before becoming a citizen of the United States.

### Legal Topics:

For related research and practice materials, see the following legal topics:  
Estate, Gift & Trust LawTrustsCreationEstate, Gift & Trust LawTrustsMarital Deduction Trusts



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DIVISION IV: WILLS AND TRUSTS  
CHAPTER 71 MARITAL DEDUCTION TRUST PROVISIONS  
PART IV. FORMS  
B. Ancillary Provisions

*26-71 California Legal Forms--Transaction Guide §§ 71.223-71.229*

**AUTHOR:** Reviewed by Albert G. Handelman

**[Reserved]**

§§ 71.223[Reserved]



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DIVISION IV: WILLS AND TRUSTS  
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PART IV. FORMS  
C. Payment and Distribution Provisions

*26-71 California Legal Forms--Transaction Guide § 71.230*

**AUTHOR:** Reviewed by Albert G. Handelman

**§ 71.230 Qualified Terminable Interest Property (QTIP) Trust**

**[1] Comment**

**[a] Use of Form**

This form may be used to provide for income payments and principal distributions from a qualified terminable interest property (QTIP) trust [*see I.R.C. § 2056(b)(7)*]. This form may be used in any will or inter vivos trust instrument that creates a QTIP trust. For a general discussion of QTIP trusts, see § 71.13[4]. For sample complete trust forms that include QTIP trusts, see *Ch. 70, Complete Revocable Trust Forms*, §§ 70.202[2], P 5.08 (two-settlor trust), 70.203[2], P 5.09 (one-settlor trust). For more detailed coverage of the role of QTIP trusts in estate planning, see *CALIFORNIA WILLS & TRUSTS, Ch. 112, The Marital Deduction and Marital Deduction Trusts*, §§ 112.05[2], 112.09[2] (Matthew Bender).

**[b] Income**

A trust will qualify for the marital deduction as a QTIP trust only if the surviving spouse has the right to receive all of the income from the trust for life, and only if the income is payable to the spouse annually or at more frequent intervals [*I.R.C. § 2056(b)(7)*; *see Treas. Reg. §§ 20.2056(b)-5(f), 20.2056(b)-7(d)(2)* (income requirements for QTIP trusts)].

Income payments to the surviving spouse need not commence immediately after the first spouse's death. A delay is permitted if it is related to the administration of the estate and the administration is not prolonged unreasonably [*Treas. Reg. § 20.2056(b)-5(f)(9)*; *see Treas. Reg. § 20.2056(b)-7(d)(2)* (application to QTIP trusts)]. While the estate is being administered, the executor may have discretion to allocate some of the expenses of administration to the income of the marital deduction property, and if the discretion is exercised in a reasonable manner the marital deduction will not be impaired. However, administration expenses must not be allocated to the income of the marital deduction trust in such a way that the allocation constitutes a "material limitation" on the surviving spouse's right to the income. The regulations provide that, in determining the value of the interest in property passing to the surviving spouse, account must be taken

of the effect of any "material limitations" on the surviving spouse's right to income from the property [*Treas. Reg. § 20.2056(b)-4(a)*].

**EXAMPLE:**

Assume that property is devised in trust for the benefit of the surviving spouse but that the income from the property from the date of the decedent's death until the distribution of the property to the trustee is to be used to pay expenses incurred in the administration of the estate.

In this case, the regulations provide that the surviving spouse's right to the income from the trust property is subject to a "material limitation" and the amount of the marital deduction must be reduced [*Treas. Reg. § 20.2056(b)-4(a)*].

It is not always easy, however, to determine when the payment of administration expenses out of the income of the marital deduction trust will constitute a "material limitation." In *Commissioner v. Estate of Hubert* (1997), [*Commissioner v. Estate of Hubert* (1997) 520 U.S. 93, 117 S. Ct. 1124, 137 L. Ed. 2d 235.] the United States Supreme Court considered the issue without settling it. In *Estate of Hubert*, the decedent's \$30 million estate was divided in about equal shares between a marital deduction trust and a charitable trust. Each trust was valued at about \$14 million, while administration expenses amounted to \$2 million. Income received during administration was \$6 million. The estate paid about \$1,500,000 of the expenses from income and the rest from principal. The Internal Revenue Service challenged the allocation, arguing that it subjected the income rights of the surviving spouse to a "material limitation" and required a dollar-for-dollar reduction in the marital and charitable deductions. The Supreme Court affirmed the Tax Court's opinion that no reduction was required [*Commissioner v. Estate of Hubert* (1997) 520 U.S. 93, 117 S. Ct. 1124, 137 L. Ed. 2d 235, 251]. Although it found that under the facts of the case the allocation of \$1,500,000 of expenses to \$6 million of income did not constitute a "material limitation" on the right to the income, it could not muster a majority opinion to explain why [*Commissioner v. Estate of Hubert* (1997) 520 U.S. 93, 117 S. Ct. 1124, 137 L. Ed. 2d 235 (plurality opinion by Kennedy, J., joined by Rehnquist, Ch. J., and Stevens and Ginsburg, JJ; concurring opinion by O'Connor, J., joined by Souter and Thomas, JJ.; dissenting opinion by Scalia, J., joined by Breyer, J.)]. *Estate of Hubert* demonstrates the need for care in allocating administration expenses to the income of a marital deduction trust, although it provides no clear guidelines as to how that care should be exercised. However, an allocation will probably not run afoul of the "material limitation" rule if normal expenses of an on-going nature are charged to income. It is important to note that the executor in *Estate of Hubert* did not charge all administrative expenses to income. Similar discretion is advised, at least until further clarification of this issue is provided.

This form is designed to give the surviving spouse a qualifying lifetime income interest in the QTIP trust. For further discussion, see §§ 71.10[4][d] and 71.13[4].

**[c] Principal**

The rules relating to QTIP trusts neither require nor prohibit principal distributions to the surviving spouse [*see I.R.C. § 2056(b)(7)*]. An income interest in a trust will not be disqualified from the marital deduction solely because the trustee has the power to distribute principal to or for the benefit of the surviving spouse. The fact that property distributed to the surviving spouse may subsequently be distributed by the spouse to another person does not violate the QTIP requirements *unless* the surviving spouse is legally bound to transfer the distributed property to another person without full and adequate consideration [*Treas. Reg. § 20.2056(b)-7(d)(6)*].

Since the assets of the trust will be subject to estate tax in the surviving spouse's estate in any event [*I.R.C. § 2044(b)(1)(A)*], it is not necessary to limit the surviving spouse's right to principal distributions to an "ascertainable standard" relating to the surviving spouse's "health, education, support, or maintenance." However, it may be desirable to limit the right to do so. If the QTIP election is not made, or if only a partial QTIP election is made, it may be desirable to exclude all or part of the trust assets from the surviving spouse's estate, and this will be possible only if the

surviving spouse's right to receive principal is limited to an "ascertainable standard" [*I.R.C. § 2041(b)(1)(A); Treas. Reg. § 20.2041-1(c)(2)*]. Moreover, in some situations it may be necessary to restrict the surviving spouse's rights over the trust principal to preserve the trust principal for the ultimate beneficiaries. This may be particularly important, for example, when the spouse is a second spouse and animosity exists between the spouse and the decedent's children from a former marriage.

A QTIP trust must not authorize the distribution of principal to any person other than the surviving spouse during the surviving spouse's lifetime [*I.R.C. § 2056(b)(7)(B)(ii)(II)*].

#### **[d] Generation-Skipping Transfer Tax Language**

Subparagraph (c) of this form contains optional language permitting the trustee to divide the QTIP trust for generation-skipping transfer tax purposes. This language is designed to permit the trustee to take advantage of the so-called "reverse QTIP election" that is available under the generation-skipping transfer tax. In basic terms, this election allows the trustee to make the QTIP election for federal estate and gift tax purposes while effectively ignoring that election for generation-skipping transfer tax purposes. This is accomplished by making an election to opt out of a previously made QTIP election when determining the identity of the transferor for generation-skipping transfer tax purposes [*see I.R.C. § 2652(a)(3)*]. Without the reverse QTIP election, the inclusion of property in the recipient spouse's gross estate for federal estate tax purposes (under the QTIP election) would cause the recipient spouse to be treated as the transferor of the property for generation-skipping transfer tax purposes [*see I.R.C. § 2652(a)(1)*].

Unlike the QTIP election itself, with respect to which partial elections are permitted [*see Treas. Reg. § 20.2056(b)-(7)(b)(2)(i)*], the reverse QTIP election may be made only for *all* of the property in a QTIP trust [*I.R.C. § 2652(a)(3); Treas. Reg. § 26.2652-2(a)*]. However, under the general rules permitting trusts to be divided for generation-skipping transfer tax purposes, a trust may be split into several trusts for purposes of taking advantage of the reverse QTIP election [*see Treas. Reg. §§ 26.2652-2(a), 26.2654-1(c)(2)*]. Thus, if there is any possibility that it will be advantageous to reverse only a portion of a QTIP election for generation-skipping transfer tax purposes, consideration must be given at the planning and drafting stages to allow for division of the marital deduction QTIP trust. The optional language in subparagraph (c) of the form permits such a division.

For additional discussion of the reverse QTIP election, see *CALIFORNIA WILLS & TRUSTS, Ch. 113, Generation-Skipping Transfers and Trust Strategies*, §§ 113.04[2][b], 113.11[3][d] (Matthew Bender). For a general discussion of the operation of the generation-skipping transfer tax, see *Ch. 60, Estate Planning, § 60.16; see also § 70.12[6][j]* in *Ch. 70, Complete Revocable Trust Forms*.

#### **[2] Form**

##### **Qualified Terminable Interest Property (QTIP) Trust**

QTIP Trust. The trustee shall hold, administer, and distribute the assets of the QTIP Trust as follows:

(a) If the executor has elected that the trust qualify for the federal estate tax marital deduction under *Internal Revenue Code Section 2056(b)(7)* (or any equivalent successor section), the trustee shall thereafter administer the trust in a manner that will not invalidate the election or disqualify the property in which \_\_\_\_\_ [*for testamentary trust: my \_\_\_\_\_ (husband or wife) or for one-settlor trust: the settlor's \_\_\_\_\_ (husband or wife) or for two-settlor trust: the surviving settlor*] has a qualifying income interest for life. Any provision of this instrument that could be deemed to invalidate the qualification under *Internal Revenue Code Section 2056(b)(7)* shall be disregarded.

(b) If an election is made under *Internal Revenue Code Section 2056(b)(7)* (or any equivalent successor section) to qualify some but not all of the property allocated to the QTIP Trust for the federal estate tax marital deduction, the

QTIP Trust shall be divided into two separate trusts pursuant to the terms of the election. The division shall be based on the fair market value of the trust assets at the time of the division. One of the trusts shall contain the share of the trust assets for which the election has been made and shall be designated as the Qualifying QTIP Trust. The other trust shall contain the share of the trust assets for which the election has not been made and shall be designated as the Nonqualifying QTIP Trust. The Nonqualifying QTIP Trust shall be subject to all of the rights, interests, powers, and other terms prescribed for the Qualifying QTIP Trust. If a partial election is made and the trust is divided into two separate trusts, the terms "trust," "marital deduction trust," and "QTIP Trust," as used in this paragraph and elsewhere in this instrument, shall be construed in a manner consistent with the provisions of this subparagraph of the trust instrument.

[Optional:]

(c) It is \_\_\_\_\_ [for testamentary trust: my or, for one-settlor inter vivos trust: the settlor's or for two-settlor inter vivos trust: the settlors'] intent that the executor of \_\_\_\_\_ (for testamentary trust: my or for one-settlor inter vivos trust: the settlor's or for two-settlor inter vivos trust: the deceased settlor's) estate shall notify the trustee in writing if the executor intends to make an election under *Internal Revenue Code Section 2056(b)(7)* (hereafter referred to as "the estate tax election") and also intends to make an election under *Internal Revenue Code Section 2652(a)(3)* (or any equivalent successor section) to have the estate tax election disregarded for federal generation-skipping transfer tax purposes with respect to some but not all of the property in the QTIP Trust. Upon receipt of written notification, the trustee shall divide the QTIP Trust into two separate trusts, to be known as the Exempt QTIP Trust and the Non-Exempt QTIP Trust, in accordance with Paragraph \_\_\_\_\_ of this instrument concerning the administration of generation-skipping trusts. Property allocated to the Exempt QTIP Trust must be fairly representative of the appreciation or depreciation of all QTIP Trust property. It is \_\_\_\_\_ [for testamentary trust: my or, for one-settlor inter vivos trust: the settlor's or for two-settlor inter vivos trust: the settlors'] intent that the executor shall then actually make the election under *Internal Revenue Code Section 2652(a)(3)* with respect to the Exempt QTIP Trust and not the Non-Exempt QTIP Trust. If a partial estate tax election is to be made, then this subparagraph, if applicable at all, shall apply only with respect to the Qualifying QTIP Trust. The trustee shall not be liable for relying on the written instructions of the executor when acting in accordance with the provisions of this subparagraph. Nothing in this subparagraph shall be construed as being inconsistent with Paragraph \_\_\_\_\_ of this instrument concerning the administration of generation-skipping trusts, which shall apply to the QTIP trust without regard to the application of the remainder of this subparagraph.]

(d) The trustee shall pay to or apply for the benefit of \_\_\_\_\_ [for testamentary trust: my \_\_\_\_\_ (wife or husband) or for one-settlor inter vivos trust: the settlor's \_\_\_\_\_ (wife or husband) or for two-settlor inter vivos trust: the surviving settlor], so long as the \_\_\_\_\_ [he or she or he or she] lives, the entire net income of the trust, in monthly or other convenient installments as agreed upon by \_\_\_\_\_ [my \_\_\_\_\_ (wife or husband) or the settlor's \_\_\_\_\_ (wife or husband) or the surviving settlor] and the trustee, but not less often than annually. [Optional: In determining the net income of the trust distributable to \_\_\_\_\_ (my \_\_\_\_\_ [wife or husband] or the settlor's \_\_\_\_\_ [wife or husband] or the surviving settlor), the trustee shall include all income that must be considered as income for the trust to qualify for the marital deduction under the federal estate tax law, and shall make no deductions from gross income that would prevent the trust from qualifying for that marital deduction, notwithstanding any contrary provisions of this instrument or any applicable provisions of state law. Assuming the trust has qualified under *Internal Revenue Code Section 2056(b)(7)*, then any grant of rights, powers, discretion, and authority to the trustee in any provision of this instrument or any statute relating thereto shall not be effective if and to the extent that the provision or statute, if effective, would disqualify, for federal estate tax purposes, the marital deduction trust held under this paragraph. It is \_\_\_\_\_ (my or the settlor's or the settlors') intention that \_\_\_\_\_ (my \_\_\_\_\_ [wife or husband] or the settlor's \_\_\_\_\_ [wife or husband] or the surviving settlor), as the beneficiary of a marital deduction trust, shall have substantially that degree of beneficial enjoyment of the trust during \_\_\_\_\_ (his or her or his or her) lifetime that the

principles of the law of trusts accords to a person who is unqualifiedly designated as the life beneficiary of a trust, and the trustee shall not exercise the trustee's discretion in a manner that is not in accord with this intention. It is also \_\_\_\_\_ (my *or* the settlor's *or* the settlors') intention that the trust produce for \_\_\_\_\_ (my \_\_\_\_\_ [wife *or* husband] *or* the settlor's \_\_\_\_\_ [wife *or* husband] *or* the surviving settlor) during \_\_\_\_\_ (his *or* her *or* his *or* her) lifetime the income, or that \_\_\_\_\_ (my \_\_\_\_\_ [wife *or* husband] *or* the settlor's \_\_\_\_\_ [wife *or* husband] *or* the surviving settlor) shall have the benefit of the trust property, consistent with the value of the trust property and with its preservation.]

(e) The trustee shall distribute to or apply for the benefit of \_\_\_\_\_ [my \_\_\_\_\_ (wife *or* husband) *or* the settlor's \_\_\_\_\_ (wife *or* husband) *or* the surviving settlor], for life, as much of the principal of the trust as the trustee, in the trustee's discretion, deems necessary, when added to the income payments from this instrument, for \_\_\_\_\_ [his *or* her *or* his *or* her] \_\_\_\_\_ [to specify an "ascertainable standard": health, education, support, and maintenance *or* specify some other standard, e.g., comfort, welfare, and happiness]. All decisions of the trustee regarding payments under this subparagraph, if any, are within the trustee's discretion and shall be final and incontestable by anyone.

(f) On the death of \_\_\_\_\_ [my \_\_\_\_\_ (wife *or* husband) *or* the settlor's \_\_\_\_\_ (wife *or* husband) *or* the surviving settlor], the trustee, in the trustee's discretion, may pay the taxes, debts, and expenses arising on \_\_\_\_\_ [his *or* her *or* his *or* her] death, unless the trustee determines that other adequate provisions have been made for payment of these expenses. Any payments made under this Paragraph \_\_\_\_\_ [may be made out of income or principal (or partly from each) of the QTIP Trust *or* shall be made first out of the income or principal of the QTIP Trust, and then out of the income or principal of the Bypass Trust to the extent that the QTIP Trust is insufficient for that purpose.]

(g) Upon the death of \_\_\_\_\_ [my \_\_\_\_\_ (wife *or* husband) *or* the settlor's \_\_\_\_\_ (wife *or* husband) *or* the surviving settlor], the net income of the trust then accrued but uncollected and all net income remaining in the hands of the trustee shall be distributed to \_\_\_\_\_ [his *or* her *or* his *or* her] estate. The trust principal shall be dealt with as set forth below in this paragraph.

(h) The trustee shall determine from the personal representative of the estate of \_\_\_\_\_ [my \_\_\_\_\_ (wife *or* husband) *or* the settlor's \_\_\_\_\_ (wife *or* husband) *or* the surviving settlor] the amount of the federal estate tax allocable to the property of the trust by reason of *Internal Revenue Code Section 2207A* and shall set aside a portion of the trust principal for the purpose of paying that tax upon written demand of the personal representative.

(i) Upon the death of \_\_\_\_\_ [my \_\_\_\_\_ (wife *or* husband) *or* the settlor's \_\_\_\_\_ (wife *or* husband) *or* the surviving settlor], the trustee shall distribute the balance of the principal of the QTIP Trust (or all of the QTIP Trust principal, if the personal representative of the estate of \_\_\_\_\_ [my \_\_\_\_\_ (wife *or* husband) *or* the settlor's \_\_\_\_\_ (wife *or* husband) *or* the surviving settlor] does not in due course make written demand), \_\_\_\_\_ [if generation-skipping transfer tax consequences are not a concern: to the Bypass Trust created in this instrument, to be held, administered, and distributed as part of the Bypass Trust *or* to account for generation-skipping transfer tax consequences: in the manner specified in Paragraph \_\_\_\_\_ applicable to the Bypass Trust. However, the property disposed of pursuant to this subparagraph shall not be considered to be part of the Bypass Trust unless this instrument and the Bypass Trust have the same inclusion ratios for federal generation-skipping transfer tax purposes].

### Legal Topics:

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsCreationEstate, Gift & Trust LawTrustsMarital Deduction Trusts



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DIVISION IV: WILLS AND TRUSTS  
 CHAPTER 71 MARITAL DEDUCTION TRUST PROVISIONS  
 PART IV. FORMS  
 C. Payment and Distribution Provisions

*26-71 California Legal Forms--Transaction Guide § 71.231*

**AUTHOR:** Reviewed by Albert G. Handelman

**§ 71.231 Lifetime Income/Power of Appointment Trust**

**[1] Comment**

**[a] Use of Form**

This form creates a trust that will qualify for the marital deduction as a "lifetime income/power of appointment" trust [*see I.R.C. § 2056(b)(5)*]. It may be used in any will or inter vivos instrument that will create a lifetime income/power of appointment trust. When used to convert the complete one-settlor trust instrument in § 70.203[2] in Ch. 70, *Complete Revocable Trust Forms*, from a QTIP trust into a lifetime income/power of appointment trust, it will replace Paragraph 5.09 of that form. When used to convert the complete two-settlor trust instrument in § 70.202[2] in Chapter 70 from a QTIP trust into a lifetime income/power of appointment trust, it will replace Paragraph 5.08 of that form. If a so-called "two-way split" instead of a "three-way split" is made, then this form will replace Paragraph 5.07 (the survivor's trust) as well as Paragraph 5.08 of the form in § 70.202[2] [*see [f], below*, for discussion].

For a general discussion of power of appointment trusts, see § 71.13[5].

**[b] Income Requirements**

A trust will qualify for the marital deduction as a lifetime income/power of appointment trust only if the surviving spouse has the right to receive all of the income from the trust (or from a "specific portion" of the trust) for life, and only if the income is payable to the spouse annually or at more frequent intervals [*I.R.C. § 2056(b)(5)*]. This form is designed to give the surviving spouse a qualifying lifetime income interest in the lifetime income/power of appointment trust. For further discussion, see §§ 71.10[4][c], 71.13[5].

Income payments to the surviving spouse need not commence immediately after the first spouse's death. A delay is permitted if it is related to the administration of the estate and the administration is not prolonged unreasonably [*Treas. Reg. § 20.2056(b)-5(f)(9)*; *see Treas. Reg. § 20.2056(b)-7(d)(2)* (application to QTIP trusts)]. Further, the executor may

have discretion to allocate some of the expenses of administration to the income of the marital deduction property. However, this allocation must not be made in such a way that the income is deemed to be subject to "material limitations" [*see Treas. Reg. § 20.2056(b)-4(a)*; *see also Commissioner v. Estate of Hubert (1997) 520 U.S. 93, 117 S. Ct. 1124, 137 L. Ed. 2d 235*]. For discussion, see § 71.230[1][b].

### **[c] Distributions of Principal**

A lifetime income/power of appointment trust almost always provides for principal distributions to the surviving spouse. This may be done without jeopardizing the marital deduction [*see Treas. Reg. § 20.2056(b)-5(j)*]. Since the surviving spouse will have a general power of appointment over the trust assets, the assets will be included in the surviving spouse's estate for estate tax purposes in any event [*I.R.C. § 2041(a)(2)*]. Thus, there is no need, at least for tax reasons, to limit the spouse's right to receive principal to an "ascertainable standard" relating to the surviving spouse's "health, education, support, or maintenance" [*see I.R.C. § 2041(b)(1)(A)*; *Treas. Reg. § 20.2041-1(c)(2)*]. Therefore, it is generally appropriate to give the surviving spouse an unlimited right to invade the trust assets during the surviving spouse's lifetime. Accordingly, this form grants the surviving spouse an unlimited right to demand trust principal. If desired, however, this right may be restricted or limited with a view toward preserving the trust principal for the remainder beneficiaries. In the latter case, it may make sense to limit invasion rights by an "ascertainable standard."

In addition to the unlimited right to request distributions of principal, this form also contains standard invasion language permitting the trustee to pay principal in accordance with an ascertainable standard. This language might seem redundant in light of the surviving spouse's unlimited right to invade principal, but it ensures that the trustee will be able to pay principal to or for the surviving spouse to meet basic needs if the surviving spouse becomes incapacitated and is unable to make requests for trust principal to meet his or her needs.

### **[d] Power of Appointment Requirement**

A trust will qualify for the marital deduction as a lifetime income/power of appointment trust only if the surviving spouse is given a general power of appointment over the trust assets [*I.R.C. § 2056(b)(5)*]. A power of appointment is a general power of appointment for this purpose if it can be exercised in favor of the surviving spouse, the surviving spouse's estate, or either, whether or not it is also exercisable in favor of others [*I.R.C. § 2056(b)(5)*; *see Civ. Code § 1381.2(a)* (definition of general power of appointment)]. This form grants the surviving spouse the required power of appointment.

### **[e] Planning Considerations**

Most experienced estate planners prefer to use QTIP trusts [*see I.R.C. § 2056(b)(7)*] instead of lifetime income/power of appointment trusts. As discussed in *Section 71.13[4]*, QTIP trusts provide significantly greater postmortem tax planning flexibility. They also permit the deceased spouse to exercise a greater amount of control over the ultimate disposition of the trust assets since, in contrast to a lifetime income/power of appointment trust, there is no need to give the surviving spouse a general power of appointment over QTIP trust assets [*see [b]-[d], above*] for a discussion of the power of appointment requirements]. However, clients who want the surviving spouse to have the broadest possible control over the trust assets will sometimes insist on the use of a lifetime income/power of appointment trust.

The complete formula marital deduction trusts in Chapter 70, *Complete Revocable Trust Forms*, illustrate QTIP trusts because, as indicated above, QTIPs are generally preferred and recommended by experienced estate planners [*see §§ 70.202[2], 70.203[2]*]. However, those forms may be converted into lifetime income/power of appointment trusts by the use of this form [*see [a], above*]. For examples of complete lifetime income/power of appointment trust forms, see CALIFORNIA WILLS & TRUSTS FORMS, Division 1, *Complete Inter Vivos Trusts*, Trusts 21 (one-settlor trust), 31 (two-settlor trust/three-way split), and 32 (two-settlor trust/two-way split).

### [f] Drafting Options in Two-Settlor Inter Vivos Trusts

When a married couple, as joint settlors, create an inter vivos marital deduction formula trust, the provisions in this chapter, and the trust instruments in Chapter 70, *Complete Revocable Trust Forms*, typically will require a division of the trust assets into a survivor's share, a marital deduction share, and a nonmarital (bypass) share, on the death of the first settlor to die [ see §§ 71.201[2], 71.203[2], 71.205 [2] (formula clauses for two-settlor trusts); see also §§ 70.202[2], 70.203[2] (complete forms)]. When the marital deduction share is to qualify as a lifetime income/power of appointment trust, it may either be placed in a separate marital deduction trust (a so-called "three-way split," since it results in the creation of three trusts) or combined with the survivor's assets in the survivor's share (a "two-way split"). If a "three-way split" is used, the trust will contain a survivor's trust, a marital deduction trust, and a bypass trust. Conversely, if a two-way split is used, the trust will contain only a survivor's trust (which includes both the survivor's assets and the assets qualifying for the marital deduction) and a bypass trust. For additional discussion, see *Section 71.201[1][b]*; see also *Section 71.12[2]*.

A three-way split must be made if the assets qualifying for the marital deduction will be treated differently from the survivor's assets--for example, by denying the survivor a right of revocation over the marital deduction assets, or restricting the survivor's right to receive principal during his or her lifetime. Otherwise, a two-way split simplifies the trust instrument. If a two-way split is used, the trust will be named the Survivor's Trust; otherwise, it will be called the "Power of Appointment Trust."

#### [2] Form

##### Lifetime Income/Power of Appointment Trust

Power of Appointment [or, for a two-settlor trust that makes a "two-trust split" on the death of the first settlor: Survivor's] Trust. The trustee shall hold, administer, and distribute the assets of the Power of Appointment [or Survivor's] Trust as follows:

(a) The trustee shall pay to or apply for the benefit of \_\_\_\_\_ [for testamentary trust: my \_\_\_\_\_ (wife or husband) or for one-settlor inter vivos trust: the settlor's \_\_\_\_\_ (wife or husband) or for two-settlor inter vivos trust: the surviving settlor], so long as the \_\_\_\_\_ [he or she or he or she] lives, the entire net income of the trust, in monthly or other convenient installments as agreed upon by \_\_\_\_\_ [my \_\_\_\_\_ (wife or husband) or the settlor's \_\_\_\_\_ (wife or husband) or the surviving settlor] and the trustee, but not less often than annually. [Optional: In determining the net income of the trust distributable to \_\_\_\_\_ (my \_\_\_\_\_ [wife or husband] or the settlor's \_\_\_\_\_ [wife or husband] or the surviving settlor), the trustee shall include all income that must be considered as income for the trust to qualify for the marital deduction under the federal estate tax law, and shall make no deductions from gross income that would prevent the trust from qualifying for that marital deduction, notwithstanding any contrary provisions of this instrument or any applicable provisions of state law. It is \_\_\_\_\_ (my or the settlor's or the settlors') intention that \_\_\_\_\_ (my \_\_\_\_\_ [wife or husband] or the settlor's \_\_\_\_\_ [wife or husband] or the surviving settlor), as the beneficiary of a marital deduction trust, shall have substantially that degree of beneficial enjoyment of the trust during \_\_\_\_\_ (his or her or his or her) lifetime that the principles of the law of trusts accord to a person who is unqualifiedly designated as the life beneficiary of a trust, and the trustee shall not exercise the trustee's discretion in a manner that is not in accord with this intention. It is also \_\_\_\_\_ (my or the settlor's or the settlors') intention that the trust produce for \_\_\_\_\_ (my \_\_\_\_\_ [wife or husband] or the settlor's \_\_\_\_\_ [wife or husband] or the surviving settlor) during \_\_\_\_\_ (his or her or his or her) lifetime the income, or that \_\_\_\_\_ (my \_\_\_\_\_ [wife or husband] or the settlor's \_\_\_\_\_ [wife or husband] or the surviving settlor) shall have the benefit of the trust property, that is consistent with the value of the trust property and with its

preservation.]

(b) The trustee shall distribute to or apply for the benefit of \_\_\_\_\_ [my \_\_\_\_\_ (wife or husband) or the settlor's \_\_\_\_\_ (wife or husband) or the surviving settlor] during \_\_\_\_\_ [his or her or his or her] lifetime, as much of the principal of the trust as the trustee, in the trustee's discretion, deems necessary for the health, education, support, and maintenance of \_\_\_\_\_ [my \_\_\_\_\_ (wife or husband) or the settlor's \_\_\_\_\_ (wife or husband) or the surviving settlor]. All decisions of the trustee regarding payments under this subparagraph, if any, shall be within the trustee's discretion and shall be final and incontestable by anyone.

(c) The trustee shall distribute to \_\_\_\_\_ [my \_\_\_\_\_ (wife or husband) or the settlor's \_\_\_\_\_ (wife or husband) or the surviving settlor] during \_\_\_\_\_ [his or her or his or her] lifetime, such amounts from the principal of the trust, up to the whole thereof, as \_\_\_\_\_ [he or she or he or she] may request of the trustee in writing from time to time.

(d) On the death of \_\_\_\_\_ [my \_\_\_\_\_ (wife or husband) or the settlor's \_\_\_\_\_ (wife or husband) or the surviving settlor], and subject to any power of appointment exercised by \_\_\_\_\_ [him or her or him or her], the trustee, in the trustee's discretion, may pay the taxes, debts, and expenses arising on \_\_\_\_\_ [his or her or his or her] death, unless the trustee determines that other adequate provisions have been made for payment of these expenses. Any payments made under this Paragraph \_\_\_\_\_ [may be made out of income or principal (or partly from each) of the Power of Appointment (or Survivor's) Trust or shall be made first out of the income or principal of the Power of Appointment (or Survivor's) Trust, and then out of the income or principal of the Bypass Trust to the extent that the Power of Appointment (or Survivor's) Trust is insufficient for that purpose].

(e) On the death of \_\_\_\_\_ [my \_\_\_\_\_ (wife or husband) or the settlor's \_\_\_\_\_ (wife or husband) or the surviving settlor], the trustee shall distribute the trust property then remaining, including all principal and undistributed income, to the person, persons, or entities, including the estate of \_\_\_\_\_ [my \_\_\_\_\_ (wife or husband) or the settlor's \_\_\_\_\_ (wife or husband) or the surviving settlor], on such terms and conditions, either outright or in trust, or by creating further powers of appointment, as \_\_\_\_\_ [my \_\_\_\_\_ (wife or husband) or the settlor's \_\_\_\_\_ (wife or husband) or the surviving settlor] shall appoint by \_\_\_\_\_ [his or her or his or her] valid last will specifically referring to and exercising this power of appointment. The trustee may rely upon any instrument admitted to probate as the last will of \_\_\_\_\_ [my \_\_\_\_\_ (wife or husband) or the settlor's \_\_\_\_\_ (wife or husband) or the surviving settlor] in carrying out the terms of the power of appointment and shall not be liable for any good-faith act in reliance upon that will, even if for any reason it is later determined to be invalid with respect to its purported exercise of this power of appointment. In the event the will of \_\_\_\_\_ [my \_\_\_\_\_ (wife or husband) or the settlor's \_\_\_\_\_ (wife or husband) or the surviving settlor] is not offered for probate, the trustee may make an independent determination with respect to the validity of the will and whether or not the will has effectively exercised this power of appointment. If the trustee receives no notice of the existence of a will of \_\_\_\_\_ [my \_\_\_\_\_ (wife or husband) or the settlor's \_\_\_\_\_ (wife or husband) or the surviving settlor] within six months after \_\_\_\_\_ [his or her or his or her] death, the trustee may distribute the trust assets and income as if this power of appointment had not been exercised and shall in that event be conclusively presumed to have acted in good faith, even if a valid will is thereafter discovered.

(f) If any of the property subject to this power of appointment is not effectively appointed by \_\_\_\_\_ [my \_\_\_\_\_ (wife or husband) or the settlor's \_\_\_\_\_ (wife or husband) or the surviving settlor], that property, after any payment of taxes, debts, and expenses pursuant to the applicable provisions of this instrument, shall be distributed \_\_\_\_\_ [specify alternative disposition in the event that power of appointment is not exercised; provision may specify a separate pattern of distribution of may

*refer to the dispositive provisions of another trust created by the same instrument, e.g., (if generation-skipping transfer tax consequences are not a concern): to the Bypass Trust created in this instrument, to be held, administered, and distributed as part of the Bypass Trust or to account for generation-skipping transfer tax consequences: in the manner specified in Paragraph \_\_\_\_\_ applicable to the Bypass Trust. However, the property disposed of pursuant to this subparagraph shall not be considered to be part of the Bypass Trust unless this trust and the Bypass Trust have the same inclusion ratios for federal generation-skipping transfer tax purposes].*

(g) Notwithstanding any other provision of this instrument, any power of appointment created by this instrument, whether expressly granted in this instrument or implied by law, may be released, disclaimed, or restricted in scope. Any such power may be released to the extent and in the manner set forth in *California Civil Code Section 1388.2* and disclaimed to the extent and in the manner set forth in *California Probate Code Sections 260-295*, or any successor statutes in effect on the date of exercise of the release or disclaimer.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsCreationEstate, Gift & Trust LawTrustsMarital Deduction Trusts



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DIVISION IV: WILLS AND TRUSTS  
 CHAPTER 71 MARITAL DEDUCTION TRUST PROVISIONS  
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*26-71 California Legal Forms--Transaction Guide § 71.232*

**AUTHOR:** Reviewed by Albert G. Handelman

**§ 71.232 Estate Trust**

**[1] Comment**

**[a] Use of Form**

This form is a trust provision that gives the remainder of a trust to the surviving spouse. It may be used in any will or trust instrument that will create a so-called "estate trust" designed to qualify for the federal estate tax marital deduction.

**[b] Features of Estate Trust**

An estate trust is one in which all beneficial interests (income and remainder) are held in favor of the surviving spouse or the surviving spouse's estate [*see* Treas. Reg. § 20.2056(e)-2(b)]. Typically, the trust income is payable to the surviving spouse for life, and on the spouse's death the trust assets are distributed to the spouse's estate, where they will pass under the terms of his or her will. The surviving spouse's income interest may be for a term of years rather than for life, or the trust may provide for an accumulation of income and payment of the trust assets to the surviving spouse or the spouse's estate [*see* Treas. Reg. § 20.2056(e)-2(b)(1)]. This feature of permitting accumulation of income is unique among marital deduction trusts, since all other types of marital deduction trusts require payment of all income to the surviving spouse at least annually [*see I.R.C. § 2056(b)(5),(7)(B)(ii)(I)*].

For further discussion of estate trusts, see *Section 71.13 [6]*; see also *CALIFORNIA WILLS & TRUSTS, Chapter 112, The Marital Deduction and Marital Deduction Trusts, Section 112.05[5]* (Matthew Bender).

**[c] Disadvantages**

Estate trusts are rarely used in modern estate planning. When an estate trust is used, the remainder will be subject to estate taxation in the estate of the surviving spouse, and it will also be subject to probate administration in the survivor's estate. Further, the surviving spouse will have the power of ultimate disposition of the remainder. It will pass according

to the terms of the surviving spouse's will or, if there is no will, under the laws of intestate succession. Most estate planners find that QTIP trusts or power of appointment trusts are better suited to accomplish modern estate planning goals.

#### **[d] Drafting**

Notwithstanding their obvious deficiencies, estate trusts are relatively simple to draft. Unlike QTIP and power of appointment trusts, estate trusts need not provide for the payment of all of the income to the surviving spouse. However, the trust property, after termination of the income interest, must be payable to the spouse, the spouse's executor, or the spouse's estate [*see* Treas. Reg. § 20.2056(e)-2(b)(1)]. Thus, it is possible to provide for almost any kind of income distributions to the surviving spouse from an estate trust, provided that the remainder is includible in the surviving spouse's estate.

This form provides only the qualifying remainder disposition. The drafter must include appropriate provisions for the payment or accumulation of income. Suitable income and principal provisions may be borrowed from the QTIP and lifetime income/power of appointment trust forms [ *see* §§ 71.230[2], 71.231 [2]], or adapted to meet the wishes of the client.

#### **[2] Form**

##### **Estate Trust**

Remainder. On the death of \_\_\_\_\_ [*for testamentary trust: my* \_\_\_\_\_ (*wife or husband*) *or for one-settlor inter vivos trust: the settlor's* \_\_\_\_\_ (*wife or husband*) *or for two-settlor inter vivos trust: the surviving settlor*], this trust shall terminate and the trustee shall distribute the remaining trust assets outright to the estate of \_\_\_\_\_ [*my* \_\_\_\_\_ (*wife or husband*) *or the settlor's* \_\_\_\_\_ (*wife or husband*) *or the surviving settlor*].

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsCreationEstate, Gift & Trust LawTrustsMarital Deduction Trusts



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DIVISION IV: WILLS AND TRUSTS  
CHAPTER 72 IRREVOCABLE TRUSTS

*26-72 California Legal Forms--Transaction Guide 72.syn*

**AUTHOR:** Reviewed by Albert G. Handelman

**§ 72.syn Synopsis to Chapter 72: IRREVOCABLE TRUSTS**

§ 72.01 California Statutes

§ 72.02 Federal Sources

[1] Statutes

[2] Regulations

§§ 72.03-72.04 [Reserved]

§ 72.05 Law Reviews and Periodicals

§ 72.06 Text References

[1] Matthew Bender Sources

[2] Additional Text References

§§ 72.07-72.09 [Reserved]

§ 72.10 Irrevocable Inter Vivos Trust--Nature and Uses

[1] In General

[2] Uses

§ 72.11 Income Tax Considerations

[1] In General

[2] Prohibited Interests and Powers

[a] In General

[b] Reversionary Interests

[c] Power to Control Beneficial Enjoyment

[d] Administrative Powers

[e] Power to Revoke

[f] Power to Distribute Income

§ 72.12 Estate Tax Considerations

[1] In General

[2] Prohibited Interests and Powers

[a] Retained Life Estate

[b] Reversionary Interests

[c] Powers to Revoke or Amend

[d] General Power of Appointment

[e] Incidents of Ownership in Life Insurance

[3] Life Insurance Payable to Insured's Estate

[4] Life Insurance Transferred Within Three Years of Death

[a] Life Insurance as Exception to General Rule

[b] Doctrine of Constructive Transfer

§ 72.13 Gift Tax Considerations

[1] In General

[2] Annual Exclusion

[a] In General

[b] Completed Transfer

[c] Present Interest Requirement

[d] Minor's Trust Under I.R.C. § 2503(c)

[3] Transferring Post-Gift Appreciation

[4] "Crummey" Powers

[a] In General

[b] Use to Qualify Gift for Annual Exclusion

[c] Use in Life Insurance Trusts

[d] Estate and Gift Tax Consequences of Lapse of Power

[e] Drafting to Avoid Consequences of Lapse

[f] "Crummey" Power Combined with Testamentary Power of Appointment

[g] "Hanging" Power

[h] Notice to Beneficiary

[i] Time Limit on Exercise of Power

[j] Legal Incapacity of Beneficiary

[k] Agreement Not to Exercise Power

[l] Gift-Splitting

§ 72.14 Life Insurance Trust

[1] In General

[2] Uses

[a] In General

[b] Increasing Estate

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[d] Centralized Management

[3] Advantages of Trust Over Outright Gifts

§ 72.15 Trust for Minor Under I.R.C. § 2503(c)

[1] In General

[2] Uses

[3] Requirements

[a] In General

[b] Trustee's Discretion

[c] Distribution of Property at Age 21

[d] Continuation of Trust After 21

[e] Distribution of Property on Beneficiary's Death

§ 72.16 Grantor Retained Income Trust (GRIT)

[1] In General

[2] Uses

[3] Valuation

[a] Valuation Under Basic Gift Tax Rules

[b] Valuation Under I.R.C. § 2702

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[4] Grantor Retained Annuity Trust (GRAT)

[a] Nature and Purpose of GRAT

[b] "Qualified Interest"

[c] Effect of Interest Rates

[d] Effect of Settlor's Death During Trust Term

[5] Grantor Retained Unitrust (GRUT)

[6] Qualified Personal Residence Trust (QPRT)

[a] In General

[b] Uses

[c] Requirements

§§ 72.17-72.99 [Reserved]

Scope

§ 72.100 Facts

§ 72.101 Documents

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§§ 72.102-72.109 [Reserved]

§ 72.110 Suitability of Irrevocable Trust for Client's Purposes

Scope

§ 72.111 Suitability of Life Insurance Trust for Client's Purposes

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§ 72.112 Suitability of Minor's Trust Under I.R.C. § 2503(c) for Client's Purposes

Scope

§ 72.113 Suitability of Qualified Personal Residence Trust (QPRT) for Client's Purposes

Scope

§§ 72.114-72.119 [Reserved]

§ 72.120 Basic Trust Forms

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§§ 72.121-72.199 [Reserved]

§ 72.200 Irrevocable Life Insurance Trust; One Settlor

[1] Comment

[a] Use of Form

[b] Declaration of Trust Format

[c] Grantor Trust Rules

[d] Use of Income to Pay Premiums

[e] Control of Beneficial Enjoyment

[f] Administrative Powers

[g] Limitation on Settlor's Powers for Estate Tax Purposes

[h] "Crummey" Powers

[i] QTIP Trust

[j] Bypass Trust

[k] Administration of Generation-Skipping Trusts

[2] FORM

Irrevocable Life Insurance Trust; One Settlor

§ 72.201 Irrevocable Life Insurance Trust; Married Settlers; "Second-to-Die" Life Insurance

[1] Comment

[a] Use of Form

[b] Declaration of Trust Format

[c] Grantor Trust Rules

[d] Limitation on Settlers' Powers for Estate Tax Purposes

[e] "Crummey" Powers

[f] Administration of Generation-Skipping Trusts

[2] FORM

Irrevocable Life Insurance Trust; Married Settlers; "Second-to-Die" Life Insurance

§§ 72.202-72.209 [Reserved]

§ 72.210 Irrevocable Trust for Minor(s) [I.R.C. § 2503(c)]

[1] Comment

[a] Uses of Trust

[b] Declaration of Trust Format

[c] Generation-Skipping Transfer Tax

[d] Division of Trust Estate

[e] Termination of Trust

[f] Selection of Trustee

[g] Successor Trustees

[2] FORM

Irrevocable Trust for Minor(s) [

§§ 72.211-72.219 [Reserved]

§ 72.220 Qualified Personal Residence Trust (QPRT)

[1] Comment

[a] Use of Form

[b] Basic Tax Treatment

[c] Term Interest

[d] Personal Residence

[e] Interests of Spouses in Same Residence

[f] Holding Cash

[g] Sale of Residence

[h] Destruction of or Damage to Residence

[i] Disposition of Proceeds Following Failure to Repair or Replace Residence

[j] Remainder

[k] Reversion

[l] Eligibility for Exclusion of Gain From Sale of Principal Residence

[m] Effect on Property Tax

[n] Use of Residence on Termination of Trust

[2] FORM

Qualified Personal Residence Trust (QPRT)

§ 72.221 Grantor Retained Annuity Trust (GRAT)

[1] Comment

[a] Use of Form

[b] Significance of GRAT as Estate Planning Tool

[c] Provision for Reversion of Trust Assets

[d] Establishing Separate GRATs for Spouses

[e] Funding GRAT

[f] Naming Settlor as Trustee

[2] FORM

Grantor Retained Annuity Trust (GRAT)

Reviewed by Albert G. Handelmann\*

**FOOTNOTES:**

(n134)Footnote \*. Mr. Handelman is a member of the State Bar of California and practices in Santa Rosa, California. He received his B.S. degree, cum laude, from the Wharton School, University of Pennsylvania, and his J.D. degree from the University of Southern California. Mr. Handelman is a certified specialist in Probate, Estate Planning, and Trust Law (California State Board of Legal Specialization), and a Fellow of the American College of Trust and Estate Counsel. He has frequently written and spoken throughout California for both professional and industry groups on a variety of subjects in the field of estate planning and administration. He is an officer and a director of the Redwood Empire Estate Planning Council.



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DIVISION IV: WILLS AND TRUSTS  
CHAPTER 72 IRREVOCABLE TRUSTS

*26-72 California Legal Forms--Transaction Guide Scope*

**AUTHOR:** Reviewed by Albert G. Handelman

**Scope**

Reviewed by Albert G. Handelman\* Scope

This chapter covers irrevocable inter vivos trusts. The Legal Background surveys federal and state law governing the planning, drafting, execution, and attestation of irrevocable inter vivos trusts. The Transaction Guide covers preliminary considerations that are critical to the proper planning of such a trust, and includes a drafting guide to the use of the complete trust forms in the chapter. The forms section includes complete irrevocable trust forms that have been chosen to illustrate basic irrevocable trust arrangements that are commonly used by estate planners.

An irrevocable trust is an important estate planning document and, when its use has been determined to be appropriate, should be planned and prepared as part of a comprehensive estate plan. Ch. 60, *Estate Planning*, is a general introduction to the subject of estate planning and a guide to the other estate planning chapters in this publication. It should be consulted before any other estate planning documents are prepared. Lifetime gifts and gift-giving strategies are covered in Ch. 60A, *Gifts*.

Due to space limitations, this chapter does not illustrate the thousands of possible alternative and optional provisions that can be included in an irrevocable trust. For a broad range of provisions that can be adapted for use in irrevocable trusts, see Ch. 70, *Complete Revocable Trust Forms*, and Ch. 71, *Marital Deduction Trust Provisions*. Ch. 64, *Testamentary Trusts: Payment and Distribution Provisions*, Ch. 64A, *Testamentary Trusts: Trustee Provisions*, and Ch. 64B, *Testamentary Trusts: Administrative Provisions*, may also be consulted for alternative provisions that can be used, or modified for use, in inter vivos trusts. For an even wider range of alternative provisions, see Matthew Bender's specialty publication, *California Wills & Trusts*. Specific references to *California Wills & Trusts* are included in appropriate places in this chapter.

**FOOTNOTES:**

(n135)Footnote \*. Mr. Handelman is a member of the State Bar of California and practices in Santa Rosa, California. He received his B.S. degree, cum laude, from the Wharton School, University of Pennsylvania, and his J.D. degree from the University of Southern California. Mr. Handelman is a certified specialist in Probate, Estate Planning, and Trust Law (California State Board of Legal Specialization), and a Fellow of the American College of Trust and Estate Counsel. He has frequently written and spoken throughout California for both professional and industry groups on a

variety of subjects in the field of estate planning and administration. He is an officer and a director of the Redwood Empire Estate Planning Council.



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**§ 72.01 California Statutes**

Minor is individual under 18 years of age. *Fam. Code § 6500.*

Adult is individual 18 years of age or older. *Fam. Code § 6500.*

Powers of appointment.

"General" and "special" powers of appointment. *Prob. Code § 611.*

"Testamentary" and "presently exercisable" powers of appointment. *Prob. Code § 612.*

Individual 18 years or older and of sound mind may make will. *Prob. Code § 6100.*

Implementation of Cal. Const., art. XIII A (Proposition 13).

Transfers not considered changes of ownership for purposes of Proposition 13. *Rev. & Tax. Code § 62.*

Transfers to certain family members not considered changes of ownership for purposes of Proposition 13. *Rev. & Tax. Code § 63.1.*

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Estate, Gift & Trust LawTrustsIrrevocable Living Trusts



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**§ 72.02 Federal Sources**

**[1] Statutes**

Income tax treatment of grantors and others treated as substantial owners. *I.R.C. §§ 671-679.*

Trust income, deductions, and credits attributed to grantors and others as substantial owners. *I.R.C. § 671.*

Definitions and rules. *I.R.C. § 672.*

Reversionary interests. *I.R.C. § 673.*

Power to control beneficial enjoyment. *I.R.C. § 674.*

Administrative powers. *I.R.C. § 675.*

Power to revoke. *I.R.C. § 676.*

Income for benefit of grantor. *I.R.C. § 677.*

Person other than grantor treated as substantial owner. *I.R.C. § 678.*

Determination of applicable federal rate. *I.R.C. § 1274(d).*

Unified credit against estate tax. *I.R.C. § 2010.*

Gross estate. *I.R.C. §§ 2031-2046.*

Definition of gross estate. *I.R.C. § 2031.*

Property in which decedent had an interest. *I.R.C. § 2033.*

Adjustments for gifts made within three years of death. *I.R.C. § 2035.*

Transfers with retained life estate. *I.R.C. § 2036.*

Transfers taking effect at death. *I.R.C. § 2037.*

Revocable transfers. *I.R.C. § 2038.*

Powers of appointment. *I.R.C. § 2041.*

Proceeds of life insurance. *I.R.C. § 2042.*

Determination of gift tax liability. *I.R.C. §§ 2501-2505.*

Imposition of tax. *I.R.C. § 2501.*

Taxable gifts. *I.R.C. § 2503.*

Unified credit against gift tax. *I.R.C. § 2505.*

Transfers for gift tax purposes. *I.R.C. §§ 2511-2519.*

Transfers in general. *I.R.C. § 2511.*

Valuation of gifts. *I.R.C. § 2512.*

Gifts by husband or wife to third party. *I.R.C. § 2513.*

Powers of appointment. *I.R.C. § 2514.*

Special valuation rules. *I.R.C. §§ 2701-2704.*

Special valuation in case of transfers of certain interests in corporations or partnerships. *I.R.C. § 2701.*

Special valuation in case of transfers of interests in trusts. *I.R.C. § 2702.*

Valuation tables. *I.R.C. § 7520.*

## **[2] Regulations**

Income tax treatment of estates, trusts, and beneficiaries.

Excepted powers exercisable by any person. *Treas. Reg. § 1.674(b)-1.*

Gross estate.

Transfers with retained life estate. *Treas. Reg. § 20.2036-1.*

Transfers taking effect at death. *Treas. Reg. § 20.2037-1.*

Revocable transfers. *Treas. Reg. § 20.2038-1.*

Powers of appointment; in general. *Treas. Reg. § 20.2041-1.*

Proceeds of life insurance. *Treas. Reg. § 20.2042-1.*

Taxable estate.

Limitation of marital deduction in case of life estate or other terminable interest. *Treas. Reg. § 20.2056(b)-1.*

Transfers subject to gift taxation.

Transfers in general. *Treas. Reg. § 25.2511-1.*

Cessation of donor's dominion and control. *Treas. Reg. § 25.2511-2.*

Valuation of annuities, unitrust interests, interests for life or term of years, and remainder or reversionary interests transferred after April 30, 1999. *Treas. Reg. § 25.2512-5.*

Valuation of annuities, unitrust interests, interests for life or term of years, and remainder or reversionary interests transferred before May 1, 1999. *Treas. Reg. § 25.2512-5A.*

Gifts by husband or wife to third party considered as made one-half by each. *Treas. Reg. § 25.2513-1.*

Special valuation rules.

Special valuation in case of transfers of interests in trust. *Treas. Reg. § 25.2702-1.*

Qualified interests. *Treas. Reg. § 25.2702-3.*

Personal residence trusts. *Treas. Reg. § 25.2702-5.*

### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Tax Law Federal Taxpayer Groups Income Taxation of Estates, Trusts & Beneficiaries Grantor Trusts (IRC secs. 671-679)



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§§ 72.03[Reserved]



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*26-72 California Legal Forms--Transaction Guide § 72.05*

**AUTHOR:** Reviewed by Albert G. Handelman

**§ 72.05 Law Reviews and Periodicals**

Rhine, *Annual Exclusion Gifts Require Special Care When Using Crummey Powers*, 27 *Tax Adviser* 264 (1996).

Malin, *Crummey Withdrawal Rights: Watch Your Step*, 10 *Prob. & Prop.* 52 (1996).

Slavutin, *Tax Traps to Avoid in the Ownership and Transfer of Life Insurance*, 74 *Taxes* 26 (1996).

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Steinkamp, *Estate and gift taxation of powers of appointment limited by ascertainable standards*, 79 *Marquette L. Rev.* 195 (Fall 1995).

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Daiker, *Insurance Trusts Require Careful Set-Up and Follow-Up*, 23 *Tax'n for Law.* 89 (1994).

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Fiore, *Life Insurance Trusts*, 178 J. Acct. 30 (July 1994).

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Gassman & Conetta, *Explaining the Crummey Withdrawal Power to Clients*, 7 Prac. Tax Law. 83 (Winter 1993).

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Gallo, *Life Insurance Trusts Offer Tax Savings and Liquidity*, 22 Tax'n for Law. 19 (1993).

Christensen, *The Wise Yet Risky Practice of Making Gifts to Minors*, 132 Tr. & Est. 73 (1993) .

Olsen, *Lapsing Crummey Powers and the GST Tax*, 24 Tax Adviser 290 (1993).

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Taylor, *Of GRATs and GRUTs: Trusts Offer Benefits Linked to Interest Rates*, 78 A.B.A. J. 95 (Oct. 1992).

Christensen, *Digging Deeper Into Irrevocable Life Insurance Trusts*, 131 Tr. & Est. 65 (1992) .

Harris, *Avoiding Lapse Treatment for Crummey Trust Transfers*, 131 Tr. & Est. 45 (1992) .

Fiore & Ramsbacher, *Crummey Powers for Contingent Beneficiaries OK'd*, 19 Est. Plan. 10 (1992).

Lustgarten, *Irrevocable Life Insurance Trusts*, 50 Inst. on Fed. Tax'n 3-2 (1992).

Thomsen, *Irrevocable Life Insurance Trust Planning Into the Nineties*, 9 B.U. J. Tax L. 109 (1991).

Christensen, *Irrevocable Life Insurance Trusts to the Rescue (for Smaller as Well as Large Estates)*, 131 Tr. & Est. 53 (1992) .

### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsIrrevocable Living TrustsEstate, Gift & Trust LawTrustsLife Insurance TrustsTax LawFederal Taxpayer GroupsIncome Taxation of Estates, Trusts & BeneficiariesGrantor Trusts (IRC secs. 671-679)



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**AUTHOR:** Reviewed by Albert G. Handelman

**§ 72.06 Text References**

**[1] Matthew Bender Sources**

California Wills Trusts (Matthew Bender)

Ch. 2, *Overview of Tax Laws Affecting the Disposition of Estates* .

Ch. 3, *Selecting the Proper Estate Planning Devices* .

Ch. 114, *Irrevocable Inter Vivos Trusts* .

Ch. 115, *Life Insurance Trusts* .

Modern Estate Planning (Matthew Bender)

Ch. 3, *Estate Planning Goals* .

Ch. 4, *Gifts* .

Ch. 5, *Estate Taxation of Lifetime Transfers* .

Ch. 6, *Income Taxation of Estates and Trusts* .

Ch. 6A, *Grantor Trusts* .

Ch. 17, *Life Insurance* .

Ch. 21A, *Valuation of Intrafamily Transfers--the Anti-Estate Tax Freeze Rules* .

**[2] Additional Text References**

Drafting California Irrevocable Living Trusts, 2d ed. (Cal. C.E.B. 1996).

Estate Planning Practice (Cal. C.E.B. 1987).

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Trusts Irrevocable Living Trusts Tax Law Federal Taxpayer Groups Income Taxation of Estates,  
Trusts & Beneficiaries Grantor Trusts (IRC secs. 671-679)



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§§ 72.07[Reserved]



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PART II. LEGAL BACKGROUND

*26-72 California Legal Forms--Transaction Guide § 72.10*

**AUTHOR:** Reviewed by Albert G. Handelman

**§ 72.10 Irrevocable Inter Vivos Trust--Nature and Uses**

**[1] In General**

An irrevocable inter vivos trust is a trust that is created during the settlor's lifetime and over which the settlor retains no power of alteration, amendment, or revocation.

Although the typical revocable inter vivos trust [ *see* Ch. 70, *Complete Revocable Trust Forms* ] is drafted to become irrevocable at some point during its existence (typically on the death of the settlor), such a trust is not usually described as an irrevocable trust, because the reasons for creating it are different from the reasons for creating a trust that is irrevocable from its inception. Nevertheless, once a revocable trust becomes irrevocable, it is taxed under the same provisions of the Internal Revenue Code as a trust that was irrevocable from its inception. Thus, some of the tax rules discussed in this chapter may influence the drafting of revocable as well as irrevocable trusts.

For general coverage of revocable trusts, see Ch. 70, *Complete Revocable Trust Forms* .

**[2] Uses**

Irrevocable inter vivos trusts are used for a variety of purposes, some tax-related and others unrelated to any tax considerations. All of these purposes, however, are based on the essential characteristic of the irrevocable inter vivos trust: *its ability to remove property from the settlor's estate without permitting the beneficiaries to gain immediate control over the property.*

This characteristic makes the irrevocable trust particularly useful as a gift substitute. The settlor may remove the trust property from his or her estate in much the same way that the property would be removed by an outright gift. The donee receives the use and enjoyment of the trust property, and the property is removed from the settlor's estate for federal estate tax purposes. However, the donee does not gain management and control over the property, since it is held and managed by the trustee on the terms and conditions stated in the trust instrument.

**PRACTICE TIP:**

In order to obtain the removal of the trust property from the settlor's estate as described above, the settlor's rights to enjoy the property in any meaningful way must also be removed from the settlor. In the case of some of the trusts described in this chapter, the settlor's rights to enjoy the trust property do not cease immediately upon the creation of the trust. Rather, those rights terminate at some specified point later in the settlor's lifetime. In some of the strategies described in this chapter, a bit of a gamble is taken regarding just how long the settlor is likely to live; if the settlor dies before his or her rights to enjoy the trust property have terminated, the trust property will be included in his or her estate. The key point to remember is this: merely using an irrevocable trust does not cause the removal of the trust property from the settlor's taxable estate. Rather, it is the design and administration of the trust which will accomplish that goal. *Commentary by Albert G. Handelman.*

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Estate, Gift & Trust LawTrustsIrrevocable Living Trusts



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**AUTHOR:** Reviewed by Albert G. Handelman

**§ 72.11 Income Tax Considerations**

**[1] In General**

An irrevocable inter vivos trust can save income taxes during the settlor's lifetime. If the settlor does not retain certain prohibited interests in or powers over the trust property [*see* [2], *below*], the trust will be treated as a separate entity for income tax purposes and the trust income will be taxed at its own rates, rather than those of the settlor.

**PRACTICE TIP:**

It is important to observe, however, that the income tax rate brackets applicable to trusts are greatly compressed when compared to those applicable to individual taxpayers. That is, trusts hit the maximum federal income tax bracket very quickly (for example, in 1997 the maximum 39.6% federal income tax bracket began at only \$8,100 of income). It is quite possible that the settlor personally will be in a lower marginal bracket than the trust, meaning that there would be an advantage to having the settlor, rather than the trust, pay tax on the "trust's" income. In fact, some of the strategies described in this chapter are designed to result in the settlor paying income tax on income which will be enjoyed by his or her children or others, under the income tax grantor trust rules. In this way, the value of a gift can be maximized while keeping down the gift tax value of the transfer and reducing the amount left in the settlor's estate. *Commentary by Albert G. Handelman.*

**[2] Prohibited Interests and Powers**

**[a] In General**

If the settlor retains certain prohibited interests in or powers over the trust or the trust property, the settlor *will* be treated as the owner of the trust for income tax purposes and income from the trust property will be taxable to the settlor [*I.R.C. § 671*]. A person other than the settlor may also be treated as the owner of the trust for income tax purposes if that person holds a prohibited interest in or power over the trust and the person does not qualify as an "adverse party." For purposes of this rule, a person who has a substantial beneficial interest in the trust that would be adversely affected by

the exercise or nonexercise of a power that he or she holds is an "adverse party," while all other persons are "nonadverse parties" [I.R.C. § 672(a), (b)].

The prohibited interests and powers are set forth in the so-called "grantor trust rules" of I.R.C. §§ 671-679 and discussed in [b] through [f], below.

**PRACTICE TIP:**

It is crucial to distinguish between "ownership" of a trust or a portion of a trust for income tax purposes under the income tax grantor trust rules and the standards for inclusion of assets in the settlor's estate for estate tax purposes. The standards vary, often more than is first apparent, and trust assets deemed "owned" by a settlor for income tax purposes frequently are not includable in the settlor's estate for estate tax purposes. Planning with irrevocable trusts may include specific consideration of these different rules, with the goal of creating a so-called "defective trust," one whose income is taxable to the settlor but whose assets are not included in the settlor's estate for estate tax purposes. *Commentary by Albert G. Handelman.*

**[b] Reversionary Interests**

Under I.R.C. § 673, the settlor will be treated as the owner of any portion of a trust in which the settlor has a reversionary interest in either the principal or the income if, as of the inception of that portion of the trust, the value of the interest exceeds 5 percent of the value of the portion [I.R.C. § 673(a)]. However, a settlor will not be treated as the owner under this rule if the reversionary interest takes effect only on the death of a lineal descendant of the settlor before the descendant reaches the age of 21 years [I.R.C. § 673(b)]. For further discussion of the income tax consequences of the retention of reversionary interests, see California Wills Trusts, Ch. 82, *Basic Tax Considerations in Trust Planning*, § 82.05[2] (Matthew Bender).

**[c] Power to Control Beneficial Enjoyment**

Under I.R.C. § 674, the settlor will be treated as the owner of a trust if beneficial enjoyment of the principal or income is subject to a power of disposition exercisable by the settlor, a "nonadverse party," or both, without the approval or consent of an "adverse party" [I.R.C. § 674(a); for definitions of "adverse party" and "nonadverse party," see I.R.C. § 672(a), (b) and discussion in [1], above]. Notwithstanding this rule, however, the following powers *will not* cause the settlor to be treated as the owner under I.R.C. § 674:

- A power to apply income to the support of a dependent (other than the settlor's spouse) whom the settlor is legally obligated to support, except to the extent that the income is actually used for that purpose [I.R.C. § 674(b)(1); see I.R.C. § 677(b)].
- A power that can only affect the beneficial enjoyment of the income for a period commencing after the occurrence of an event, so that the settlor would not be treated as the owner under I.R.C. § 673 if the power were a reversionary interest. However, the settlor may be treated as the owner after the occurrence of the event unless the power is relinquished [I.R.C. § 674(b)(2); see I.R.C. § 673].
- A power exercisable only by will, other than a power in the settlor to appoint the income when the income is or may be accumulated in the discretion of the settlor or a "nonadverse party," or both, without the approval or consent of an "adverse party" [I.R.C. § 674(b)(3); see I.R.C. § 672(a), (b)].
- A power to allocate principal or income among charitable beneficiaries [I.R.C. § 674(b)(4)].
- A power to distribute income or principal to or for a beneficiary, beneficiaries, or class of

beneficiaries, provided that the power is limited by an "ascertainable standard" set forth in the trust instrument [*I.R.C. § 674(b)(5)(A), (d)*]. A power is an "ascertainable standard" for this purpose if it is a clearly measurable standard under which the holder of a power is legally accountable [*Treas. Reg. § 1.674(b)-1(b)(5)(i)*]. A power to distribute principal for the "education, support, maintenance, or health" of the beneficiary, for the beneficiary's "reasonable support and comfort," or to enable the beneficiary to maintain his or her "accustomed standard of living," is limited by a "reasonably definite standard", while a power to distribute principal for the beneficiary's "pleasure, desire, or happiness" is not [*Treas. Reg. § 1.674(b)-1(b)(5)(i)*]. If the trust instrument provides that the determination of the trustee "shall be conclusive" with respect to the exercise or nonexercise of a power, the power is not limited by a "reasonably definite standard" [*Treas. Reg. § 1.674(b)-1(b)(5)(i)*].

- A power to distribute principal to or for any current income beneficiary, provided that the distribution must be chargeable against the proportionate share of principal held in trust for the payment of income to the beneficiary as if the principal constituted a separate trust [*I.R.C. § 674(b)(5)(B)*]. However, this does not include a power to add to the beneficiary, beneficiaries, or class of beneficiaries designated to receive the income or principal, except when such an action is to provide for afterborn or after-adopted children [*I.R.C. § 674(b)(5)*].

- A power to distribute or apply income to or for any current income beneficiary, or to accumulate income for the beneficiary, provided that any accumulated income must ultimately be payable to the beneficiary, the beneficiary's estate, the beneficiary's appointees, or persons named as alternate takers in default of appointment [*I.R.C. § 674(b)(6)*].

- A power to distribute or apply income, or to accumulate the income, during such time as the current income beneficiary is under the age of 21 years or under any legal disability [*I.R.C. § 674(b)(7)*].

For further discussion of the income tax consequences of retained powers to control beneficial enjoyment, see California Wills Trusts, Ch. 82, *Basic Tax Considerations in Trust Planning*, § 82.05[3] (Matthew Bender).

#### **[d] Administrative Powers**

Under *I.R.C. § 675*, the settlor will be treated as the owner of the trust if the settlor or a "nonadverse party" [*see I.R.C. § 672(a), (b)* and discussion in [1], *above*] holds any of the following administrative powers over the trust and the power or powers can be exercised without the approval or consent of an "adverse party" [*I.R.C. § 675*]:

- The power to deal with the trust property, or income from the trust property, for less than an adequate consideration in money or money's worth [*I.R.C. § 675(1)*].

- The power to borrow the trust property or income from the trust property, directly or indirectly, without adequate interest or adequate security, except when a trustee who is not the settlor is authorized under a general lending power to make loans to any person without regard to interest or security [*I.R.C. § 675(2)*].

- The power to vote certain stock, to control certain investments of trust funds, or to reacquire the trust principal by substituting other property of equivalent value, if the power can be exercised in a nonfiduciary capacity without the approval or consent of any person in a fiduciary capacity [*I.R.C. § 675(4)*].

For further discussion of the income tax consequences of retained administrative powers, see California Wills Trusts, Ch. 82, *Basic Tax Considerations in Trust Planning*, § 82.05[4] (Matthew Bender).

**[e] Power to Revoke**

Under *I.R.C. § 676*, the settlor will be treated as the owner of any portion of a trust if the power to reconstitute title in the trust is exercisable by the settlor or a "nonadverse party," or both [*I.R.C. § 676(a)*]; for the meaning of "adverse party" and "nonadverse party," see *I.R.C. § 672(a), (b)* and discussion in [1], *above*. For further discussion of the income tax consequences of retained powers of revocation, see California Wills Trusts, Ch. 82, *Basic Tax Considerations in Trust Planning*, § 82.05[5] (Matthew Bender).

**[f] Power to Distribute Income**

Under *I.R.C. § 677*, the settlor will be treated as the owner of any portion of a trust whose income may be (1) distributed to the settlor or the settlor's spouse, (2) held or accumulated for future distribution to the settlor or the settlor's spouse, or (3) applied to the payment of life insurance premiums on certain policies on the life of the settlor or the settlor's spouse, without the approval or consent of any "adverse party" [for the meaning of "adverse party" and "nonadverse party," see *I.R.C. § 672(a), (b)* and discussion in [1], *above*]. For further discussion of the income tax consequences of retained powers to distribute income, see California Wills Trusts, Ch. 82, *Basic Tax Considerations in Trust Planning*, § 82.05[6] (Matthew Bender).

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Trusts Irrevocable Living Trusts Tax Law Federal Taxpayer Groups Income Taxation of Estates, Trusts & Beneficiaries Grantor Trusts (IRC secs. 671-679)



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California Legal Forms--Transaction Guide

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DIVISION IV: WILLS AND TRUSTS  
CHAPTER 72 IRREVOCABLE TRUSTS  
PART II. LEGAL BACKGROUND

*26-72 California Legal Forms--Transaction Guide § 72.12*

**AUTHOR:** Reviewed by Albert G. Handelman

**§ 72.12 Estate Tax Considerations**

**[1] In General**

An irrevocable inter vivos trust can save estate taxes on the settlor's death if the trust is structured so that it will remove the trust property from the settlor's gross estate for estate tax purposes [see *I.R.C. §§ 2033, 2036, 2037, 2038, 2041*; for definition of "gross estate," see *I.R.C. § 2031* and discussion in *Ch. 60, Estate Planning, § 60.13[1]*]. If the settlor retains certain interests in or powers over the trust property at the time of death, the property will be included in the settlor's gross estate. Conversely, if the settlor does not retain any of these interests or powers, the property will not be included in the settlor's gross estate [for the prohibited interests and powers, see [2], below].

**[2] Prohibited Interests and Powers**

**[a] Retained Life Estate**

Under *I.R.C. § 2036*, the value of the settlor's gross estate will include the value of all property that the settlor transferred during his or her lifetime but as to which the settlor retained the right to enjoy the property or its income for the settlor's lifetime, or for any period that does not in fact end before the settlor's death [*I.R.C. § 2036(a)*].

The trust property will be included in the settlor's estate under this rule if the settlor retains possession of the property, the right to receive the income from the property, or the right, either alone or in conjunction with any other person, to designate those who will possess or enjoy the property or its income [*I.R.C. § 2036(a)*]. The property will also be included if the trustee has the power to use the principal or income to satisfy one or more of the settlor's legal obligations, such as the obligation to support a child or a spouse [*Treas. Reg. § 20.2036-1(b)(2)*].

If the settlor retains an unrestricted power to remove the trustee and appoint the settlor as the successor trustee, the settlor will be deemed to have the powers of the trustee for purposes of this rule and, if the trustee has the power to designate those who will possess or enjoy the property or its income, the trustee's power will be attributed to the settlor and the trust property will also be included in the settlor's estate [*I.R.C. § 2036(a)(2)*; *Treas. Reg. §§ 20.2036-1(b)(3)*],

20.2038-1(a)]. If, however, the settlor retains the power to replace the trustee with an individual or corporate successor who is not "related or subordinate" to the settlor, the trustee's powers will not be attributed to the settlor for this purpose, and the property need not be included in the settlor's estate [ *Rev. Rul. 95-58, 1995-2 C.B. 191* ; see *I.R.C. § 672(c)* ("related or subordinate party" defined)].

If the trust owns a life insurance policy on the settlor's life [see discussion in § 72.14], the trust income may be used to pay the policy premiums without causing the trust principal to be included in the settlor's estate under *I.R.C. § 2036* [ *Bennett v. United States (N.D. Ill. 1960) 185 F. Supp. 577, 585* ] .

For further discussion of the estate tax consequences of retaining a life estate in the trust property, see California Wills Trusts, Ch. 2, *Overview of Tax Laws Affecting the Disposition of Estates* , § 2.06[2][c], Ch. 114, *Irrevocable Inter Vivos Trusts* , § 114.04[2][a], and Ch. 115, *Life Insurance Trusts*, § 115.03[4] (Matthew Bender).

### **[b] Reversionary Interests**

Under *I.R.C. § 2037*, the value of the settlor's gross estate will include the value of all property in which the settlor retained a reversionary interest if, immediately before the settlor's death, the reversionary interest was valued in excess of 5 percent of the value of the whole property and if possession or enjoyment of the property by others could be obtained only by surviving the settlor [*I.R.C. § 2037(a)*]. For this purpose, the term "reversionary interest" includes a possibility that the property transferred by the settlor may return to the settlor or the settlor's estate, and a possibility that the property transferred by the settlor may become subject to a power of disposition by the settlor [*Treas. Reg. § 20.2037-1(c)(2)*]. However, it does not include the possibility that the property may be received through inheritance [*Treas. Reg. § 20.2037-1(c)(2)*].

For further discussion of the estate tax consequences of retaining a reversionary interest, see California Wills Trusts, Ch. 2, *Overview of Tax Laws Affecting the Disposition of Estates* , § 2.06[2][d]; Ch. 114, *Irrevocable Inter Vivos Trusts* , § 114.04[2][b]; and Ch. 115, *Life Insurance Trusts* , § 115.03[5] (Matthew Bender).

### **[c] Powers to Revoke or Amend**

Under *I.R.C. § 2038*, the trust property will be included in the settlor's estate for estate tax purposes if the settlor retains the power to alter, amend, revoke, or terminate the trust [*I.R.C. § 2038(a)*]. This rule does not require that the settlor have the power to recover the trust property; it is sufficient if the settlor has the power to *change the enjoyment of the trust property* through the exercise of a power to alter, amend, or terminate the trust.

If the power to alter or amend the trust is held by a third-party trustee, the power will be attributed to the settlor if the settlor retains the unrestricted power to remove the third party and appoint himself or herself as successor trustee [*I.R.C. § 2038(a)*; *Treas. Reg. § 20.2038-1(a)(3)*]. The power will also be attributed to the settlor if the settlor retains the power to remove the trustee and appoint a successor who is "related or subordinate" to the settlor [ *Rev. Rul. 95-58, 1995-2 C.B. 191* ]. However, the power will not be attributed to the settlor merely because the settlor has the power to replace the trustee with an individual or corporate successor who is not "related or subordinate" to the settlor [ *Rev. Rul. 95-58, 1995-2 C.B. 191* ; see *I.R.C. § 672(c)* ("related or subordinate party" defined)].

### **[d] General Power of Appointment**

If the settlor retains a general power of appointment over the trust property, the property will be included in the settlor's gross estate for estate tax purposes under *I.R.C. § 2041* [*I.R.C. § 2041(a)*]. For purposes of this rule, a power is a "general power of appointment" if it is exercisable in favor of the settlor, the settlor's estate, the settlor's creditors, or creditors of the settlor's estate [*I.R.C. § 2041(b)(1)*; see *Prob. Code § 611(a)* (general power of appointment)].

A power to consume, invade, or appropriate property for the settlor's benefit is not a "general power of appointment" if it is limited by an "ascertainable standard" relating to the settlor's health, education, support, or maintenance [*I.R.C. § 2041(b)(1)(B)*; see *Prob. Code § 611(b)*]. For language that properly subjects a power to an "ascertainable standard," see *Treas. Reg. § 20.2041-1(c)(2)* and the discussion in § 72.11[2][c], above.

A general power of appointment held by a trustee may be attributed to the settlor if the settlor has the power to remove the trustee and appoint himself or herself as successor trustee [*Treas. Reg. § 20.2041-1(b)(1)*]. If, for example, the trustee has the power to appoint the principal of the trust for the benefit of individuals including the trustee or successor trustee, and also gives the settlor the unrestricted power to remove the trustee and appoint a successor, the trustee's power of appointment will be attributed to the settlor [*Treas. Reg. § 20.2041-1(b)(1)*; see also *Treas. Reg. §§ 20.2036-1(b)(3)*, *20.2038-1(a)*]. The trustee's power will also be attributed to the settlor if the settlor has the power to replace the trustee with someone who is "related or subordinate" to the settlor [ *Rev. Rul. 95-58*, *1995-2 C.B. 191*; see *I.R.C. § 672(c)* ("related or subordinate party" defined)].

For further discussion of the estate tax consequences of holding a general power of appointment, see *California Wills Trusts*, Ch. 2, *Overview of Tax Laws Affecting the Disposition of Estates*, § 2.06[4]; Ch. 114, *Irrevocable Inter Vivos Trusts*, § 114.04[d]; Ch. 115, *Life Insurance Trusts*, § 115.03[7] (Matthew Bender). For detailed discussion of powers of appointment and their classifications, see *California Wills Trusts*, Ch. 31, *Powers of Appointment* (Matthew Bender).

#### **[e] Incidents of Ownership in Life Insurance**

If an irrevocable inter vivos trust holds a life insurance policy on the settlor's life, and if, at the time of death, the settlor possesses any "incidents of ownership" in the policy, the policy will be included in the settlor's gross estate for estate tax purposes under *I.R.C. § 2042(2)*. The term "incidents of ownership" is not limited to ownership of a policy in a legal sense, but refers to the right of the insured or the insured's estate to the economic benefits of the policy [*Treas. Reg. § 20.2042-1(c)(2)*]. Thus it is broad enough to include the power to change the beneficiary, to surrender or cancel the policy, to assign the policy, to revoke an assignment of the policy, to pledge the policy for a loan, and to obtain a loan from the insurer against the surrender value of the policy [*Treas. Reg. § 20.2042-1(c)(2)*].

The power to do these things may result from the terms of the trust instrument, or merely from the terms of the insurance policy itself. In either case, the proceeds will be included in the insured's estate. In one case, for example, the insured was legally obligated by a prenuptial agreement to designate a trust as beneficiary of a life insurance policy. He made the required designation, but failed to notify the insurer that the policy proceeds were to be paid to the trust. Because the insured possessed all of the incidents of ownership at the time of death, the proceeds were includible in the insured's gross estate, despite the prenuptial agreement [ *Puchner v. United States (E.D. Wis. 1967) 274 F. Supp. 704, 709-710* ]. In another case, the proceeds of a flight insurance policy were included in the insured's estate for estate tax purposes even though the insured had named his wife as beneficiary of the policy, allowed her to pay the premiums, and delivered the policy to her, because the policy provided that the beneficiary could be changed only by a written endorsement on the policy and the insured had not made the required endorsement [ *Commissioner v. Noel (1965) 380 U.S. 678, 684, 85 S. Ct. 1238, 14 L. Ed. 2d 159* ].

A completed transfer by the settlor to an irrevocable trust of all "incidents of ownership" in a life insurance policy on the settlor's life will avoid inclusion of the insurance proceeds in the settlor's estate [*I.R.C. § 2042(2)*]. This is usually accomplished by completing the insurer's change of ownership and beneficiary designation forms, and designating the trust as both the owner and beneficiary of the policy. It is essential, however, to complete all of the required forms with care to make sure that all of the insurer's transfer requirements are met. If the settlor held any incidents of ownership in the policy prior to its transfer to the trust, then the policy proceeds will still be included in his or her estate if he or she dies within three years of the transfer of the incidents of ownership to the trust [*I.R.C. §§ 2035(a), 2042*].

For further discussion of the estate tax consequences of retaining "incidents of ownership" in a life insurance policy, see California Wills Trusts, Ch. 115, *Life Insurance Trusts*, § 115.03[2] (Matthew Bender).

### **[3] Life Insurance Payable to Insured's Estate**

If an irrevocable inter vivos trust holds a life insurance policy on the settlor's life, and if any proceeds of the policy are receivable by the executor on the settlor's death, the amount received will be included in the settlor's gross estate for federal estate tax purposes under *I.R.C. § 2042(1)*. This will happen regardless of whether the estate or executor is specifically named as the beneficiary under the terms of the policy [*Treas. Reg. § 20.2042-1(b)(1)*]. If, for example, the proceeds are receivable by another beneficiary subject to a legally binding obligation to pay taxes, debts, or other obligations of the insured's estate, any portion of the proceeds used to pay those items will be deemed to be receivable by the executor and thus includible in the insured's estate [*Treas. Reg. § 20.2042-1(b)(1)*]. Similarly, if the trust instrument requires the trustee to use the proceeds to pay taxes, debts, or other obligations of the settlor's estate, the proceeds will be included in the settlor's estate [ *Pacific Nat'l Bank v. Commissioner (1939) 40 B.T.A. 128 ; Hooper v. Commissioner (1940) 41 B.T.A. 114* ] . If the trustee is authorized but not required to use the proceeds for that purpose, the proceeds are includible in the settlor's estate only to the extent that they are actually used for that purpose [ *Old Colony Trust Co. v. Commissioner (1939) 39 B.T.A. 871 ; Wade v. Commissioner (1942) 47 B.T.A. 21* ] .

There is nothing in the Internal Revenue Code that includes life insurance proceeds in the gross estate of the insured merely because the trustee of a trust established by the insured has the power to lend the proceeds to the insured's estate with adequate security and at reasonable interest, or to purchase assets from the settlor's estate at their fair market value, even if after the proceeds are transferred to the executor the executor uses them to pay taxes, debts, or other expenses of the insured's estate [*see I.R.C. § 2042*].

#### **PRACTICE TIP:**

As will be seen, these rules form the core of irrevocable life insurance trust planning in many cases. Often, the idea is to obtain the *use* of life insurance proceeds in the settlor's estate *indirectly* through a loan or the receipt of funds used to purchase estate assets. In this way, the liquidity afforded by life insurance is available without subjecting the proceeds to estate tax in the deceased settlor's estate.  
*Commentary by Albert G. Handelman.*

For further discussion of the estate tax treatment of life insurance proceeds payable to the estate of the insured, see California Wills Trusts, Ch. 115, *Life Insurance Trusts*, § 115.03[1][a], [b] (Matthew Bender).

### **[4] Life Insurance Transferred Within Three Years of Death**

#### **[a] Life Insurance as Exception to General Rule**

Property that a decedent transfers within three years of death generally is not included in the decedent's estate for federal estate tax purposes. However, this is not the case with life insurance policies. If a settlor transfers a life insurance policy to an irrevocable trust, and if the settlor dies within three years after making the transfer, the policy will be included in the settlor's estate if the policy would have been included in the settlor's estate under *I.R.C. § 2042* if retained by the settlor [*I.R.C. §§ 2035(a), 2042*].

#### **[b] Doctrine of Constructive Transfer**

If the settlor was the original owner of the life insurance policy, and if the settlor dies within three years after the policy is transferred to the trust, the rule including the policy in the settlor's estate if the settlor dies within three years after the transfer clearly applies [*see I.R.C. § 2042(2)* and discussion of "incidents of ownership" in § 72.12[2][e]]. However, it is possible that inclusion may also be required if the settlor was not the original owner, but paid the premiums on the policy after it was transferred to the trust. In 1984, the Internal Revenue Service took the position that a policy

originally issued to a third party and thereafter transferred to a trust will be included in the insured's estate if the insured paid premiums on the policy within three years of death. Under these circumstances, the IRS argued, the third party must be deemed the settlor's agent for purposes of transferring the policy to the trust, and the proceeds will be included in the settlor's estate under the doctrine of "constructive transfer" [ *Priv. Ltr. Rul. 8509005 (Nov. 28, 1984)* ]. Both the Sixth Circuit and Tenth Circuit Courts of Appeals have declined to apply the doctrine of "constructive transfer" when the only basis for doing so is that the settlor paid the premiums on the policy [see *Estate of Leder v. C.I.R. (10th Cir. 1989) 893 F.2d 237, 242* ; *Estate of Headrick v. C.I.R. (6th Cir. 1990) 918 F.2d 1263, 1268*].

Notwithstanding these court decisions, a prudent attorney will take steps to avoid the possibility that the doctrine of "constructive transfer" might be invoked to include the policy when the settlor pays premiums within three years of death. This can be done by establishing the trust before the policy is applied for, by removing the settlor from the process of acquiring the policy to the greatest extent possible, by transferring sufficient funds to the trust to cover premiums on the policy well before the policy is acquired, and by making sure that funds transferred to the trust are not equal to the premiums on the policy. For further discussion, see California Wills Trusts, Ch. 115, *Life Insurance Trusts*, § 115.03[3][b] (Matthew Bender).

**PRACTICE TIP:**

It is not at all clear that the IRS presently intends to make the "constructive trust" argument in the context of life insurance trusts. However, care is warranted, because insurance trusts are, at least occasionally, employed in situations which the IRS believes to be "abusive." In some situations, individuals are encouraged to establish charitable remainder trusts for tax rather than charitable reasons. In many of these cases, these individuals are also encouraged to establish irrevocable life insurance trusts as "wealth replacement" devices to make up the "loss" that would otherwise be incurred by the settlor's children regarding the charitable trust assets. The IRS is unhappy about the selling of charitable planned giving as a tax avoidance scheme, and can be expected to attack any element incorporated into any such plan on any basis available. Thus, particular caution should be exercised when an irrevocable life insurance trust is being established in conjunction with a charitable remainder trust. *Commentary by Albert G. Handelman.*

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsIrrevocable Living TrustsTax LawFederal Estate & Gift TaxesDefinition of Gross EstateTax LawFederal Estate & Gift TaxesTaxable PropertyLifetime Transfers (IRC secs. 2035-2038)General OverviewTax LawFederal Estate & Gift TaxesTaxable PropertyLifetime Transfers (IRC secs. 2035-2038)Transfers With Retained Life EstateTax LawFederal Estate & Gift TaxesTaxable PropertyProperty Held at Death (IRC secs. 2033, 2044)General Overview



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DIVISION IV: WILLS AND TRUSTS  
CHAPTER 72 IRREVOCABLE TRUSTS  
PART II. LEGAL BACKGROUND

*26-72 California Legal Forms--Transaction Guide § 72.13*

**AUTHOR:** Reviewed by Albert G. Handelman

**§ 72.13 Gift Tax Considerations**

**[1] In General**

An irrevocable inter vivos trust may also be used to avoid gift taxes or, when gift taxes cannot be avoided completely, minimize the impact of gift taxes on the settlor's estate plan. By taking advantage of the annual gift tax exclusion [*see I.R.C. § 2503* and discussion in [2], *below*], and by structuring transfers to the trust so that the gift property is effectively removed from the settlor's estate for estate tax purposes [*see* discussion in § 72.12], irrevocable trusts may contribute to an effective overall estate plan.

**[2] Annual Exclusion**

**[a] In General**

An exclusion (called the "annual exclusion") is available for gifts made to each donee by each donor during a calendar year [*I.R.C. § 2503(b)*]. The amount of the annual gift tax exclusion, which is subject to annual adjustment for inflation, is \$13,000 for calendar years 2009-2010 [ *Rev. Proc. 2009-50, 2009-45 IRB 624 (2010Amount), Rev. Proc. 2008-66, 2008-45 IRB (2009 Amount)*]. For gifts made between 2006-2008, the annual gift tax exclusion was \$12,000 [*Rev. Proc. 2006-53, 2006-48 IRB 996 (2007Amount), Rev. Proc. 2005-70, 2005-47 IRB 979 (2006 Amount)*]. \$11,000 for calendar years 2002 through 2005 [*I.R.C. § 2503(b); Rev. Proc. 2004-71, 2004-50 I.R.B. 970 (2005 exclusion amount); Rev. Proc. 2003-85 , § 3.26(1), 2003-49 I.R.B. 1184 (2004 exclusion amount); Rev. Proc. 2002-70 , § 3.24(1), 2002-46 I.R.B. 845 (2003 exclusion amount); Rev. Proc. 2001-59 , § 3.19(1), 2001-52 I.R.B. 623 (2002 exclusion amount)*]. For gifts made before 2002, the annual gift tax exclusion was \$10,000 [ *Rev. Proc. 2001-13 , § 3.17, 2001-3 I.R.B. 337* ]. The amount of the annual exclusion can be effectively doubled if gifts are made by a husband and wife [*see I.R.C. § 2513(a)* (gift-splitting)].

If the gift is to the donor's spouse and the spouse is not a citizen of the United States, the amount of the exclusion is significantly greater [*see I.R.C. § 2523(i)* (base annual exclusion amount is \$100,000, with upward adjustments for inflation for gifts made in calendar years after 1998)]. The amount of the annual exclusion for noncitizen spouses also is

adjusted annually for inflation [*I.R.C.* § 2503(b)]. For gifts made in 2010, the amount of the exclusion is \$134,000 [Rev. Proc. 2009-50, 2009-45 IRB 624 (2010 Amount)]. For gifts made in 2009, the amount of the exclusion is \$133,000 [Rev. Proc. 2008-66, 2008-45 IRB 1107 (2009) Amount]. For gifts made in 2008, the amount of the exclusion is \$128,000 [Rev. Proc. 2007-45, 2007-45 IRB 976 (2008) Amount]. For gifts made in 2007, the amount of the exclusion is \$125,000 [Rev. Proc. 2006-53, 2006-48 IRB 996 (2007 Amount)]. For gifts made in 2006, the amount of the exclusion is \$120,000 [Rev. Proc. 2005-70, 2005-47 IRB 979 (2006 Amount)]. For gifts made in 2005, the amount of the exclusion is \$117,000 [*I.R.C.* §§ 2503(b), 2523(I); *Rev. Proc.* 2004-71, 2004-50 *I.R.B.* 970 ]. For gifts made in 2004, the amount of the exclusion is \$114,000 [ *Rev. Proc.* 2003-85 , § 3.26(2), 2003-49 *I.R.B.* 1184 ]. For gifts made in 2003, the amount of the exclusion is \$112,000 [ *Rev. Proc.* 2002-70 , § 3.24(2), 2002-46 *I.R.B.* 845 ]. For gifts made in 2002, the amount of the exclusion is \$110,000 [ *Rev. Proc.* 2001-59 , § 3.19(2), 2001-52 *I.R.B.* 623 ].

### **[b] Completed Transfer**

A transfer of property to an irrevocable trust will qualify for the annual exclusion only if the transfer is "complete" for gift tax purposes [*see Treas. Reg.* § 25.2511-2]. A transfer is complete for gift tax purposes if the donor gives up "dominion and control" over the transferred property and retains no right to change the disposition of the property, for the donor's own benefit or that of another [*Treas. Reg.* § 25.2511-2(b)].

If, on the other hand, the donor reserves some power over the disposition of the property, the gift may be incomplete [*Treas. Reg.* § 25.2511-2(b)]. Powers that will render a transfer incomplete for gift tax purposes include the power to revest beneficial title to the property in the donor, the power to name new beneficiaries, or the power to change the interests of the beneficiaries as between themselves, unless the power is limited by a fixed or "ascertainable standard" [*Treas. Reg.* § 25.2511-2(c); for discussion of "ascertainable standards," *see* § 72.11[2][c]].

For purposes of this rule, the donor will be deemed to have any power that is exercisable by the donor in conjunction with any person not having a substantial adverse interest in the disposition of the transferred property or its income [*Treas. Reg.* § 25.2511-2(e)].

### **[c] Present Interest Requirement**

A lifetime transfer of property to an irrevocable trust will qualify for the annual exclusion only if it is a gift of a "present interest" in property [*see I.R.C.* § 2503(b)(1); *Treas. Reg.* § 25.2503-3] or if it qualifies as a "minor's trust" under *I.R.C.* § 2503(c) [*see* discussion under [d], *below*]. A "present interest" is an unrestricted right to the immediate use, possession, or enjoyment of the trust property or its income [*Treas. Reg.* § 25.2503-3(b)]. When a gift is made to a trust, the beneficiaries and not the trustee are the donees for gift tax purposes [*Treas. Reg.* § 25.2503-2(a); *Helvering v. Hutchings* (1941) 312 U.S. 393, 396, 61 S. Ct. 653, 85 L. Ed. 909]. Thus an interest in a trust is a "present interest" only when the beneficiaries have the right to the immediate use, possession, or enjoyment of the trust property or its income [*Treas. Reg.* § 25.2503-2(a); *Treas. Reg.* § 25.2503-3(b)].

A beneficiary will have a "present interest" in a trust if the beneficiary has the "immediate" right to receive income from the trust property [*see Treas. Reg.* § 25.2503-3(b) (unrestricted right to "immediate" use, possession, or enjoyment of property or income from property is a "present interest"). A right to receive income is "immediate" if the payments are to start immediately and are not to be postponed until some future date. However, the payments need not be made on the same date as the gift. It is sufficient if the payments are made at regular intervals of reasonable length. Annual distributions of income usually will qualify for this purpose [ *Fondren v. Commissioner of Int. Rev.* (1945) 324 U.S. 18, 21, 65 S. Ct. 499, 89 L. Ed. 668]. A right to receive income is not "immediate" if the payments are postponed until some future date, if the income is to be accumulated for distribution at some future time, or if the right to receive the income depends on the discretion of the trustee [*see Treas. Reg.* § 25.2503-3(c)].

A beneficiary may also have a "present interest" in a trust if the beneficiary has the right to demand payments (or

withdrawals) from the trust, or if the trust is a trust for a beneficiary under the age of 21 that meets the requirements of *I.R.C. § 2503(c)*. The right to demand payments (or withdrawals) from a trust is commonly called a "Crummey" power [*see Crummey v. C.I.R. (9th Cir. [T.C.] 1968) 397 F.2d 82*] and is discussed in § 72.14[4]. Trusts that meet the requirements of *I.R.C. § 2503(c)* are discussed in [d], *below*.

#### **[d] Minor's Trust Under I.R.C. § 2503(c)**

A trust that does not qualify for the annual gift tax exclusion under *I.R.C. § 2503(b)(1)* because the beneficiary does not have a "present interest" in the trust [*see discussion in [c], above*] may qualify for the exclusion if it meets the requirements of *I.R.C. § 2503(c)*. A transfer of property to an irrevocable trust will qualify for the exclusion under *I.R.C. § 2503(c)* if the gift property and its income may be expended by or for the benefit of the donee before the donee reaches the age of 21 and will, to the extent not so expended, pass to the donee when the donee reaches 21 [*I.R.C. § 2503(c)(1), (2)(A)*]. If the donee dies before reaching 21, any undistributed portion of the gift property and income must be payable to the donee's estate, or as the donee may appoint under a general power of appointment [*I.R.C. § 2503(c)(2)(B)*; *see I.R.C. § 2514(c)* ("general power of appointment" defined) and discussion in § 72.12[22][d]]. For a more detailed discussion of the requirements of *I.R.C. § 2503(c)*, see § 72.15. For techniques for drafting a trust that meets those requirements, see § 72.210.

#### **[3] Transferring Post-Gift Appreciation**

If a lifetime transfer of property to an irrevocable trust is a "completed transfer" for gift tax purposes [*see discussion in § 72.13[2][b]*], the transfer will also remove any post-transfer appreciation on the property from the settlor's estate. This will be true whether the original transfer was subject to gift tax, sheltered from gift tax under the annual exclusion [*see I.R.C. § 2503(b)*] and discussion in [2], *above*, or applied against the settlor's unified transfer credit [*see I.R.C. § 2505* and discussion in *Ch. 60, Estate Planning, § 60.14[5]*]. If the transferred property has a good potential for appreciation, this may result in considerable estate tax savings, even when the initial transfer is potentially subject to gift tax.

#### **PRACTICE TIP:**

There are, however, potential drawbacks in this circumstance. For capital gains purposes, property transferred by gift has basis in the hands of the donee equal to the basis it had in the hands of the donor [*I.R.C. § 1015(a)*]. Thus, if the donor transfers property with a low basis (and hence substantial built in capital gains), the donee will, upon disposition of the transferred property in a transaction subject to capital gains tax, be required to pay that tax on the gains inherent in the pre- and post-transfer appreciation of the property. On the other hand, property transferred at death and included in the estate of the transferor for estate tax purposes has as its basis in the hands of the donee the value finally established for the property for estate tax purposes in the donor's estate. Thus, built in capital gains tax liability is typically eliminated for transfers occurring at death [*I.R.C. § 1014(a)*, effective for decedents dying before 2010 (*I.R.C. § 1014(f)*); a modified carryover basis rule applies generally for decedents dying after 2009 (*I.R.C. § 1022*)]. While capital gains tax rates are substantially lower than estate tax rates [*see I.R.C. § 1(a)-(e), (i)(2), (h)*], careful consideration of the results in a particular case must be given before advising a client to make a lifetime transfer simply to avoid estate tax on post-transfer appreciation. *Commentary by Albert G. Handelman.*

Transferring post-gift appreciation is one of the underlying goals of the grantor retained income trust (GRIT) and is discussed in detail in § 72.16.

#### **[4] "Crummey" Powers**

##### **[a] In General**

A "Crummey" power is a power given to the beneficiary of a trust to demand withdrawals from the trust during a

specified period of time. The name derives from the landmark case of *Crummey v. C.I.R.* [ *Crummey v. C.I.R. (9th Cir. [T.C.] 1968) 397 F.2d 82* ], in which the Ninth Circuit sanctioned the use of current withdrawal powers to qualify gifts to such a trust for the annual gift tax exclusion.

In *Crummey*, the settlors established irrevocable inter vivos trusts for the benefit of their four children, one of whom was a minor. The trust instrument authorized the settlors to make additions to the trusts and authorized each child (or the child's guardian) to demand the withdrawal each year of a specified sum of money from the trust established for that child. The court held that the beneficiaries' power to demand the withdrawal of the gift property rendered the gifts "present interests" and thus qualified them for the annual exclusion [ *Crummey v. C.I.R. (9th Cir. [T.C.] 1968) 397 F.2d 82, 83* ].

### **[b] Use to Qualify Gift for Annual Exclusion**

"Crummey" powers are typically used to qualify lifetime gifts to an irrevocable trust for the annual gift tax exclusion [see *I.R.C. § 2503(b)*; for discussion of the annual exclusion and the applicable exclusion amounts, which are adjusted annually for inflation, see § 72.13[2][a]; see also *Ch. 60A, Gifts, § 60A.32[4]*]. A properly drafted "Crummey" power will qualify such a gift as a "present interest" [see *Treas. Reg. § 25.2503-3* and discussion in § 72.13[2][c]] even when the trust instrument does not require that the trust income be distributed to the beneficiary on a current basis. If the donor (normally the settlor) has made no other gifts to or for the benefit of the beneficiary in a particular year, he or she can give the trust an amount equal to the full annual exclusion amount, and the entire gift will be sheltered from gift tax under the annual exclusion.

### **PRACTICE TIP:**

While a "Crummey" power can be used to qualify what would otherwise be a gift of a future interest for the annual gift tax exclusion, a trap may exist for "Crummey" gifts in the context of the federal generation-skipping transfer tax. Normally, gifts that qualify for the annual gift tax exclusion are assigned an inclusion ratio of zero for generation-skipping transfer tax purposes, thus avoiding the imposition of the generation-skipping transfer tax [ *I.R.C. § 2642(c)(1)*]. However, in most cases in which the annual gift tax exclusion is made available through the use of a "Crummey" power, the general rule does not apply, and the transfer to the trust will constitute a "direct skip" subject to the generation-skipping transfer tax [ *I.R.C. § 2642(c)(2)*]. The generation-skipping transfer tax can be avoided either by allocating some of the transferor's GST exemption to the gift in trust [see *I.R.C. §§ 2631 and 2632*] or by allowing the beneficiary of the "Crummey" power to be the only trust beneficiary and to receive all of the property from the trust (or have some right or power which will cause the trust property to be included in the beneficiary's estate for estate tax purposes) [see *I.R.C. § 2642(c)(2)*]. Unfortunately, the former plan may be seen as "wasting" that portion of the GST exemption or otherwise not fit into the client's plan, and the latter approach is likely to cause some significant distortion of the underlying trust (which would rarely comply with the limits described above). In any event, awareness of these rules is important when the planner is advising the client and designing a trust that includes "Crummey" powers. *Commentary by Albert G. Handelman.*

Some settlors may be reluctant to confer "Crummey" powers on beneficiaries for fear that they will actually withdraw the gift property from the trust and thereby frustrate the purpose of the trust. This fear is rarely well based, however, for "Crummey" powers are infrequently exercised during the time specified in the powers and, by their own terms, typically lapse after a specified period of time so that future withdrawals cannot be made.

### **[c] Use in Life Insurance Trusts**

Although "Crummey" powers may be used in any type of irrevocable inter vivos trust, they are most useful in irrevocable life insurance trusts, where they can make it possible for the settlor to make annual gifts to the trust to cover

insurance premiums while sheltering the gifts from gift taxation under the annual exclusion. In a typical life insurance trust with a "Crummey" power, the settlor makes annual cash gifts to the trust. Although the "Crummey" power gives the beneficiary (or beneficiaries) the right to withdraw the gift during a specified period, the power is rarely exercised and the power lapses at the end of a specified period. After the power has lapsed, the gift becomes part of the trust principal and is used by the trustee to pay premiums on the life insurance policy (or policies) owned by the trust.

#### **[d] Estate and Gift Tax Consequences of Lapse of Power**

The lapse of a "Crummey" power has some potentially important tax consequences. Since a "Crummey" power is a general power of appointment [*see I.R.C. § 2041(b)(1)* (definition of "general power of appointment") and discussion in § 72.12[2][d]], and since the lapse of a general power of appointment is deemed a transfer for gift tax purposes under *I.R.C. § 2514*, the lapse of a "Crummey" power may be a taxable gift from the beneficiary who holds the power to the remainder beneficiaries of the trust [*see I.R.C. § 2514(e)*]. Further, since the lapse of a general power of appointment will cause property subject to the power to be included in the gross estate of the beneficiary who holds the power if the disposition would have caused the property to be included in the power holder's estate *I.R.C. §§ 2035-2038*, the lapse of a "Crummey" power will cause the property subject to the power to be included in the power holder's estate if, after the lapse, the power holder retains the right to receive income from the trust property [*see I.R.C. § 2041(a)(2)* (estate tax consequences of release of power by disposition of type that would cause inclusion of property under *I.R.C. §§ 2035-2038* if it were transfer of property); *see also I.R.C. § 2036* (estate tax consequences of transferring property and retaining right to income from property for life); *I.R.C. § 2041(b)(2)* (lapse of power as release of power)]. Under *I.R.C. § 2036*, if a person transfers property and after the transfer retains the right to receive the income from the property for life, the property is includible in the person's gross estate for estate tax purposes [*I.R.C. § 2036(a)(1)*].

In a life insurance trust, the beneficiary who holds the "Crummey" power typically has the right to receive income from the trust property (after the payment of insurance premiums). Thus the lapse of a "Crummey" power held by a beneficiary who has a lifetime income interest in the trust will cause the property subject to the power to be included in the beneficiary's gross estate for estate tax purposes [*see I.R.C. § 2036(a)(1)* (estate tax consequences of retention for life of possession or enjoyment of property); *I.R.C. § 2041(a)(2)* (when release of power of appointment requires inclusion of property in gross estate); *I.R.C. § 2041(b)(2)* (lapse of power as release)] unless some precautions are taken to avoid that result [*see discussion in [e], below*].

#### **[e] Drafting to Avoid Consequences of Lapse**

The unfavorable gift and estate tax consequences of the lapse of a "Crummey" power [*see discussion in [d], above*] can be avoided if the power is made within the so-called "five or five limit." Under *I.R.C. § 2041(b)(2)*, the lapse of a power of appointment will not cause property subject to the power to be included in the gross estate of the power holder if the power is limited to the greater of \$5,000 or 5 percent of the total value of the trust assets available to satisfy the power, determined on an annual basis. Under *I.R.C. § 2514(e)*, the lapse of a general power of appointment will not be deemed a gift for gift tax purposes if the power is subject to the same limit of \$5,000 or 5 percent. For this reason, many "Crummey" powers are routinely limited to the greater of \$5,000 or 5 percent of the total assets of the trust. This limit is often stated in terms of the governing provisions of the Internal Revenue Code. Thus the "Crummey" provisions in this publication contain optional language providing that the amount that the beneficiary can withdraw during any calendar year cannot exceed the amount that may from time to time be specified in *I.R.C. § 2041(b)(2)* as the maximum amount of property with respect to which the lapse of a general power of appointment will not be deemed a release of a general power of appointment [*see § 72.200[2]*, Section 4.01(b); § 72.200[2], Section 4.01(b)]. If the "Crummey" power is also a "hanging" power, special alternative language is required [*see discussion in [g], below*].

Subjecting a "Crummey" power to the give or five limit may limit its usefulness. The amount of the annual gift tax exclusion, which is subject to annual adjustment for inflation, is \$11,000 for calendar years 2002 through 2005 [*I.R.C. § 2503(b)*; *Rev. Proc. 2004-71, 2004-50 I.R.B. 970* (2005 exclusion amount); *Rev. Proc. 2003-85*, § 3.26(1), 2003-49

*I.R.B. 1184* (2004 exclusion amount); *Rev. Proc. 2002-70*, § 3.24(1), *2002-46 I.R.B. 845* (2003 exclusion amount); *Rev. Proc. 2001-59*, § 3.19(1), *2001-52 I.R.B. 623* (2002 exclusion amount)]. For gifts made before 2002, the annual gift tax exclusion was \$10,000 [ *Rev. Proc. 2001-13*, § 3.17, *2001-3 I.R.B. 337* ]. The value of the exclusion can be doubled if a husband and wife join to make gifts [see *I.R.C. § 2513(a)* (gift-splitting)]. However, the five or five limit will fully shelter an \$11,000 gift from the unfavorable estate and gift tax consequences of lapse only if the total value of the trust property is \$220,000 or more (\$440,000 or more if the gift is valued at \$22,000). When a trust owns a large amount of life insurance, gifts that fall within the five or five limit may not fully cover the large policy premiums [see, e.g., *Estate of Leder v. C.I.R. (10th Cir. [T.C.] 1989) 893 F.2d 237, 238* (premiums on \$1 million policy were \$3,879.08 per month)]. If this is a problem, the attorney and the client should determine whether premiums on the insurance to be owned by the trust can be fully covered by annual gifts if the "Crummey" power is subject to a five or five limit. Since annual exclusions are available for all of the beneficiaries who hold "Crummey" powers, the more the beneficiaries the larger the potential shelter. In appropriate cases, the number of annual exclusions may be increased by adding grandchildren as beneficiaries [see *Estate of Cristofani v. Commissioner (1991) 97 T.C. 74, 81-82* ]. If the total amount of all the annual exclusions will fully cover the premiums even when the "Crummey" power is subject to a five or five limit, the power can safely be drafted with that limit. If the premiums cannot be fully covered with a five or five limit, the attorney may consider combining a "Crummey" power with a testamentary power of appointment [see *Prob. Code § 612(a)* (testamentary power of appointment defined) and discussion in [f], below].

For further discussion of the lapse of "Crummey" powers and drafting techniques to avoid the consequences of lapse, see California Wills Trusts, Ch. 115, *Life Insurance Trusts*, § 115.07[4] (Matthew Bender).

#### **[f] "Crummey" Power Combined with Testamentary Power of Appointment**

The unfavorable gift tax consequences of the lapse of a "Crummey" power can be avoided by drafting the power so that a lapse will not constitute a completed transfer for gift tax purposes [see discussion in § 72.13[2][b]]. A transfer will not be complete for gift tax purposes if the transferor retains a testamentary power to appoint the remainder among his or her descendants [*Treas. Reg. § 25.2511-2(b)*; see *Prob. Code § 612(a)* (testamentary power of appointment is exercisable only by will)]. When a "Crummey" power lapses, the beneficiary who holds the power is considered the transferor for gift tax purposes. If the beneficiary retains the testamentary power to appoint the remainder among his or her descendants after the lapse, the lapse is not a transfer subject to gift tax and no gift tax liability will be incurred [Priv. Ltr. Ruls. 8825111 (Mar. 30, 1988), 8545076 (Aug. 14, 1985)]. When the beneficiary is given a testamentary power of appointment, the "Crummey" power need not be subject to the five or five limitation [see discussion in [e], above] in order to avoid the gift tax problems described in [c], above.

However, if the beneficiary's taxable estate does not exceed the "applicable exclusion amount" (unified credit) [see *I.R.C. § 2010(c)* (table of graduated amounts) and discussion in § 60.13[4][b]] available in the beneficiary's estate, including this property in the beneficiary's estate will not result in any estate tax liability.

If the beneficiary survives the termination of the trust, any property that the beneficiary receives would be included in the beneficiary's gross estate in any case. However, a testamentary power of appointment should not be given if the beneficiary is the settlor's spouse, because the goal of the estate plan typically will be to bypass the spouse's estate. For this reason, it is generally preferable to make the "Crummey" power subject to a five or five limit when the spouse is the beneficiary who may exercise the power, or use a "hanging" power [see [g], below].

It is important to note that combining a "Crummey" power with a testamentary power of appointment is effective only to avoid the unfavorable gift tax consequences of a lapse of the power and will have no effect on the unfavorable estate tax consequences [see discussion in [d], above].

#### **[g] "Hanging" Power**

The unfavorable gift and estate tax consequences of the lapse of a "Crummey" power may be avoided in appropriate cases by providing that the power will not fully lapse each year, but will carry over to subsequent years. This type of power, called a "hanging power," typically will provide that if a beneficiary has the power to demand the withdrawal of principal exceeding the greater of \$5,000 or 5 percent of the total value of the trust assets during a calendar year, the power to withdraw amounts in excess of \$5,000 or 5 percent will not lapse at the end of that calendar year but will be carried over into subsequent years. Only the power to withdraw amounts up to the greater of \$5,000 or 5 percent of the total value of the trust assets will lapse each year. The remainder will "hang" over from year to year [for a form creating a hanging "Crummey" power, *see* California Wills Trusts, Alt. 4.850-3 (Matthew Bender)].

When gifts to a trust are designed to take maximum advantage of the annual exclusion and the amount that lapses at the end of the year is subject to a five or five limit, the amount subject to withdrawal typically will increase during the early years of the trust. If the beneficiaries do not exercise their withdrawal powers, however, the total value of the trust assets will also increase, and the value of the trust assets may eventually be sufficient to fully shelter the current gift amount under the five or five limit. If the trust continues to grow thereafter, amounts that lapse under the five or five limit will exceed the current gifts amount. The excess will then reduce the amounts that accumulated in previous years, and the total amount that "hangs" over will decrease.

"Hanging" Crummey powers are aggressive estate planning tools and should be used only when the client is willing to assume some risk in return for the potential tax saving advantages. For further discussion, see California Wills Trusts, Ch. 115, *Life Insurance Trusts*, § 115.07[4][d] (Matthew Bender).

#### **[h] Notice to Beneficiary**

Although the opinion in the *Crummey* case [*see Crummey v. C.I.R. (9th Cir. [T.C.] 1968) 397 F.2d 82*] did not require that the beneficiaries be notified of their right to demand withdrawals from the trust, the IRS requires that the beneficiaries be notified of their withdrawal rights and given a reasonable opportunity to exercise them before they lapse.

In one case, the settlor created a trust on December 29, 1979. The trust instrument gave the beneficiary a power to demand the withdrawal of trust property and provided that the power would lapse if not exercised by the end of the year. The beneficiary was not advised of the existence of the power, and it lapsed at the end of the year. The IRS held that the annual exclusion was not available because the settlor had failed to communicate the existence of the power and had narrowly restricted the time for its exercise [ *Rev. Rul. 81-7, 1981-1 C.B. 474* ].

In another case, the settlor created an irrevocable trust on December 29, 1981, with \$50,000. The trust instrument gave the beneficiary the power to demand the withdrawal of the amount transferred to the trust or the annual exclusion amount, whichever was less. The trustee was required to give the beneficiary notice of the beneficiary's withdrawal power within 10 days of any transfer to the trust, and the power terminated 45 days after receiving written notice. The IRS held that the annual exclusion was available for 1981, even though the beneficiary's initial withdrawal right did not expire until 1982, since the beneficiary was given notice of the power and a reasonable time within which to exercise it. The fact that the withdrawal right expired in a year after the gift was made did not alter this result [ *Rev. Rul. 83-108, 1983-2 C.B. 167* ].

Although no published ruling has yet required that the trust instrument require the trustee to notify the beneficiary when a gift is made to the trust, such a provision is recommended. Since the IRS seems to be more concerned about the conduct of the parties than the terms of the trust instrument [*see Rev. Rul. 81-7, 1981-1 C.B. 474* ], failure to give notice may be fatal even when the instrument requires notice. For further discussion, see California Wills Trusts, Ch. 115, *Life Insurance Trusts*, § 115.07[5] (Matthew Bender).

#### **[i] Time Limit on Exercise of Power**

The trust instrument should specify a time limit within which the beneficiary may exercise the "Crummey" power. This may be a specified number of days after notice of the existence of the power is given to the beneficiary [see discussion in [h], *above*], or before the end of the calendar year. However, the time limit must give the beneficiary a reasonable period of time within which to exercise the power. The IRS has approved time limits of the end of the calendar year [ *Priv. Ltr. Rul. 7826050* ], within three months after receipt of a written notice of the transfer to the trust [ *Priv. Ltr. Rul. 8008040* ], within 60 days after the receipt of a written notice of transfer [ *Priv. Ltr. Ruls. 7939061* , *7947066* , *8007080* , *8014078* ], and within 30 days after written notice of the transfer [ *Priv. Ltr. Ruls. 8003152* , *8004172* , *8006048* , *8024084* , *8134135* ]. Specifying a firm date after which the power can no longer be exercised will give the trustee a certain date after which the gift funds can be used to pay premiums.

### **[j] Legal Incapacity of Beneficiary**

If a trust instrument gives a beneficiary who is subject to a legal disability the power to require withdrawals from a trust, a question may arise as to whether the beneficiary's withdrawal power is real or merely illusory, and whether the beneficiary in fact has a "present interest" in the property subject to the power [see *I.R.C. § 2503(b)(1)* and discussion in § 72.13[2][c]].

The IRS has allowed a "Crummey" power to qualify as a "present interest" when the power is held by a minor, providing there is no impediment in the trust instrument or local law to the appointment of a guardian for the minor [ *Rev. Rul. 73-405* ]. The IRS has also stated that a natural guardian may exercise the power on behalf of the minor, even if the natural guardian is the donor [ *Tech. Adv. Mem. 7935006 (March 18, 1979)* ; *Priv. Ltr. Rul. 8022048 (March 4, 1980)* ]. If three days are required to appoint a guardian for a minor, however, the IRS has stated that at least that much time must be allowed for the exercise of the withdrawal right [ *Priv. Ltr. Rul. 7922107 (March 5, 1979)* ]. In any case, it is advisable for the trust instrument to expressly authorize the guardian to exercise the power of withdrawal in behalf of the minor [see *Naumoff v. Commissioner (1983) 46 T.C.M. 852* ] .

### **[k] Agreement Not to Exercise Power**

Regardless of the terms of the trust instrument, there should be no agreement among the parties that the "Crummey" power will not in fact be exercised. Any agreement of this kind may negate the terms of the instrument, render the power illusory, and make gifts to the trust ineligible for the annual exclusion [see *Treas. Reg. § 20.2056(b)-5(g)(2)*; *Estate of Cook v. Commissioner (1970) 29 T.C.M. 298* ; *Ellis v. United States (D.C. Md. 1968) 280 F. Supp. 786* ] .

### **[l] Gift-Splitting**

When spouses elect to split a gift to an irrevocable trust [see *I.R.C. § 2513* and discussion in § 72.13[2][a]], the amount that may be withdrawn under a "Crummey" power may be twice the amount that could be withdrawn if the gift were made by one spouse only. However, exercise of the power cannot be contingent on split-gift treatment, since the IRS has held that such a gift will not qualify as a "present interest" [ *Priv. Ltr. Rul. 8022048 (March 4, 1980)* ] .

Further, gift-splitting is not possible when a married person makes a gift to his or her spouse [see *I.R.C. § 2513(a)* (gift-splitting permitted when gift is made by one spouse to any person other than his or her spouse)], or when one spouse makes a gift of property in which that spouse has given the other spouse a general power of appointment [*Treas. Reg. § 25.2513-1(b)(3), (4)*]. Since a "Crummey" power is a general power of appointment [see *I.R.C. § 2041(b)(1)* (definition of "general power of appointment") and discussion in § 72.12[2][d]], gift-splitting is not possible when a married person creates a trust in which the married person's spouse has a "Crummey" power. Gifts may properly be split, however, to the extent that beneficiaries other than the spouse hold "Crummey" powers.

### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsIrrevocable Living TrustsTax LawFederal Estate & Gift TaxesGifts (IRC secs. 2035, 2501-2524)Annual ExclusionsTax LawFederal Estate & Gift TaxesGifts (IRC secs. 2035, 2501-2524)Completed GiftsGeneral OverviewTax LawFederal Estate & Gift TaxesGifts (IRC secs. 2035, 2501-2524)Completed GiftsDeliveryTax LawFederal Estate & Gift TaxesGifts (IRC secs. 2035, 2501-2524)Completed GiftsRetention of Power



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California Legal Forms--Transaction Guide

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DIVISION IV: WILLS AND TRUSTS  
CHAPTER 72 IRREVOCABLE TRUSTS  
PART II. LEGAL BACKGROUND

*26-72 California Legal Forms--Transaction Guide § 72.14***AUTHOR:** Reviewed by Albert G. Handelman**§ 72.14 Life Insurance Trust****[1] In General**

A life insurance trust is a trust that is created for the purpose of acquiring and owning a life insurance policy (or policies). Although any type of trust (revocable or irrevocable, inter vivos or testamentary) may own life insurance, the special ability of the irrevocable inter vivos trust to remove trust property from the settlor's estate for estate tax purposes [*see* discussion in § 72.12[1]] makes it peculiarly well-suited for life insurance ownership. A properly structured and administered irrevocable inter vivos trust can own a life insurance policy on the settlor's life and the policy will not be included in the settlor's gross estate for estate tax purposes [*see I.R.C. § 2031*]. This can result in very substantial estate tax savings to the settlor's estate. Since irrevocable inter vivos trusts are so widely used to own insurance policies, the term "life insurance trust" should be understood in this chapter to refer to an irrevocable trust, unless otherwise qualified.

**[2] Uses****[a] In General**

Life insurance trusts are used for a variety of purposes. They can be used, for example, to increase the total value of the settlor's estate [*see* [b], *below*], to provide liquidity to the settlor's estate or heirs [*see* [c], *below*], or to provide a mechanism for centralized management and control of insurance proceeds after the settlor's death [*see* [d], *below*]. Because irrevocable inter vivos trusts are peculiarly well-suited to remove property from the settlor's estate for federal estate tax purposes [*see* discussion in § 72.12[1]], they are often used to achieve tax savings by removing property from the settlor's gross estate. In the typical case, the creation of a life insurance trust will be motivated by multiple goals, some that are tax-specific and others that are unrelated to any tax-savings goal.

For further discussion of life insurance trusts and their creation, see California Wills Trusts, Ch. 115, *Life Insurance Trusts* (Matthew Bender).

**[b] Increasing Estate**

The proceeds of life insurance on the settlor's life may be a good source of capital with which income may be generated to meet long-term needs of the surviving spouse or other family members. Further, a properly structured and administered life insurance trust can be used to transmit insurance proceeds free of any estate tax obligations [*see* discussion in § 72.12].

**[c] Liquidity**

The life insurance trust is peculiarly well-suited to plan for liquidity needs after the settlor's death. Liquidity needs may result from various causes, such as the anticipated need for the payment of death taxes, expenses of administering the settlor's estate, or support for the settlor's surviving spouse or other family members. Without a ready source of cash with which to satisfy obligations of this kind, the settlor's estate may suffer in substantial ways. If, for example, there is insufficient cash in the settlor's estate to pay death taxes, it may be necessary to sell assets belonging to the estate, often at unfavorable prices and under unfavorable conditions.

**[d] Centralized Management**

Another advantage of a life insurance trust is that it may be used to subject all proceeds from insurance on the settlor's life to the same management and administrative procedures. The trustee may be the same person who is the executor of the settlor's estate, which can do much to make sure that a coordinated approach will be taken to administering all of the assets and properly resolving disputes among beneficiaries.

**[3] Advantages of Trust Over Outright Gifts**

Many of the same goals that can be achieved by a life insurance trust can also be achieved by making outright gifts to family members. For example, a client may make cash gifts to family members, who may then use the gift funds to purchase life insurance on the client's life. On the client's death, proceeds from the insurance may be used to provide for the family's long-term needs, without the expense and inconvenience normally associated with a trust.

However, other considerations may militate in favor of the creation of a trust. A trust not only provides a centralized mechanism for the conservation and administration of the insurance proceeds; it may also provide for the varying needs of several beneficiaries, such as the settlor's spouse, children, and even grandchildren.

**PRACTICE TIP:**

A life insurance trust allows avoidance of all transfer taxes, including generation-skipping transfer taxes, in a way which direct, outright gifts to family members for use in purchasing life insurance on the donor simply cannot achieve. Through proper allocation of the donor/insured's GST exemption as the life insurance trust is funded, a large fund -- perhaps well in excess of the donor/insured's \$1 million GST exemption -- can be made entirely exempt from estate *and* generation-skipping transfer taxes as of the donor/insured's death, possibly benefitting many generations before any transfer tax is again imposed on the trust's assets. *Commentary by Albert G. Handelman.*

Most importantly, the trust can give the settlor some assurance that the goals for which the trust was created will in fact be achieved after his or her death. Because outright gifts must be made without "strings" [*see* discussion in § 72.10[2]], there is considerably less assurance that they will end up actually being used for the purposes intended by the client.

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Estate, Gift & Trust LawTrustsLife Insurance Trusts



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DIVISION IV: WILLS AND TRUSTS  
CHAPTER 72 IRREVOCABLE TRUSTS  
PART II. LEGAL BACKGROUND

*26-72 California Legal Forms--Transaction Guide § 72.15***AUTHOR:** Reviewed by Albert G. Handelman**§ 72.15 Trust for Minor Under I.R.C. § 2503(c)****[1] In General**

*I.R.C. § 2503(c)* provides the basis for a special trust that may be created for the benefit of a beneficiary who is under the age of 21. If the requirements of the section are met, property may be transferred to the trust and sheltered from gift taxation under the annual exclusion [*see I.R.C. § 2503(b)* and discussion in § 72.13[2]] even though the beneficiary does not have the right to current distribution of either trust principal or income.

Although trusts that meet the requirements of *I.R.C. § 2503(c)* are customarily described as "minors' trusts" [*see heading to I.R.C. § 2503(c)*], the section actually applies to all persons under the age of 21 years. In California, all persons who have reached the age of 18 are adults [*see Fam. Code §§ 6500, 6501*]. Thus, in California, *I.R.C. § 2503(c)* also applies to adults who are between 18 and 21 years of age.

**[2] Uses**

A trust that meets the requirements of *I.R.C. § 2503(c)* may be used to confer both future and current benefits on a beneficiary who is under the age of 21 years, while at the same time qualifying transfers to the trust for the annual exclusion. The trustee has discretion to make distributions to or for the beneficiary [*see discussion in [3][b], below*], and any property that is not so distributed must pass to the beneficiary when the beneficiary reaches 21 [*see discussion in [3][c], below*]. Thus the trust achieves the twin goals of allowing accumulations of income until the beneficiary reaches 21 and currently sheltering transfers to the trust from the gift tax under the annual gift tax exclusion [*see I.R.C. § 2503(b)*]; for discussion of the annual exclusion and the applicable exclusion amounts, which are adjusted annually for inflation, *see § 72.13[2][a]*; *see also Ch. 60A, Gifts, § 60A.32[4]*.

**[3] Requirements****[a] In General**

A gift, either outright or in trust, will qualify for the annual gift tax exclusion under *I.R.C. § 2503(c)* if the gift property and its income may be expended by or for the benefit of the donee before the donee reaches age 21 [*I.R.C. § 2503(c)(1)*]; see discussion in [b], *below*] and will, to the extent not so expended, pass to the donee when the donee reaches 21 [*I.R.C. § 2503(c)(2)(A)*]; see discussion in [c], *below*]. If the donee dies before reaching 21, any undistributed portion of the gift property and its income must be payable to the donee's estate, or as the donee may appoint under a general power of appointment [*I.R.C. § 2503(c)(2)(B)*]; see *I.R.C. § 2514(c)* (general power of appointment defined); see also discussion in [d], *below*].

**PRACTICE TIP:**

Notice that unlike most trusts funded with "Crummey" powers, minors' trusts do not run afoul of the rules under *I.R.C. § 2642(c)(2)*, and thus will be exempt from generation-skipping transfer taxes.

*Commentary by Albert G. Handelman.*

**[b] Trustee's Discretion**

*I.R.C. §§ 2503(c)* does not require that principal or income actually be distributed to the beneficiary, but only that principal and income "may be expended" by or for the benefit of the beneficiary [*I.R.C. § 2503(c)(1)*]. A discretionary power in the trustee to make principal or income payments to or for the beneficiary's benefit will thus suffice, providing that the trust instrument contains no "substantial restrictions" on the exercise of the trustee's discretion [*Treas. Reg. § 25.2503-4(b)*].

The IRS has held that the trustee's discretion is not subject to "substantial restrictions" if the trust provisions, read as a whole, approximate the term "benefits" as used in *I.R.C. § 2503(c)* [ *Heidrich v. Commissioner, (1971) 55 T.C. 746, 750-752* ; *Rev. Rul. 67-270, 1967-2 C.B. 349* ]. Under this test, a trust instrument that authorizes the trustee to pay as much of the income "as may be necessary for the education, comfort and support of the beneficiary" does not impose "substantial restrictions" [ *Heidrich v. Commissioner, (1971) 55 T.C. 746, 750-751* ; *Rev. Rul. 67-270, 1967-2 C.B. 349* ]. However, a trust provision that limits the amounts of principal that the trustee may distribute to amounts "needed because of illness, infirmity or disability" [see *Pettus v. Commissioner, (1970) 54 T.C. 112, 121-122* ], or that requires the trustee to consider "other resources available to the beneficiary" [ *Rev. Rul. 69-345, 1969-1 C.B. 226* ], does impose substantial restrictions.

**[c] Distribution of Property at Age 21**

A trust will meet the requirements of *I.R.C. § 2503(c)* if trust principal and income not previously distributed to the beneficiary "will ... pass to" the beneficiary when the beneficiary reaches 21 [*I.R.C. § 2503(c)(2)(A)*]. However, this language does not require that the property be held until the beneficiary reaches the age of 21. A distribution to the beneficiary before 21 will not adversely affect the annual gift tax exclusion [ *Rev. Rul. 73-287, 1973-2 C.B. 321* ].

**[d] Continuation of Trust After 21**

Some settlors may be reluctant to permit the beneficiary to receive all of the undistributed principal and income when the beneficiary reaches 21. Although *I.R.C. § 2503(c)* states that a trust will meet its requirements if undistributed income "will ... pass" to the beneficiary when the beneficiary reaches 21 [*I.R.C. § 2503(c)(2)(A)*], it has been held that this provision does not require actual distribution to the beneficiary at 21, and that merely giving the beneficiary a right to terminate the trust on reaching 21 will suffice [ *Heidrich v. Commissioner, (1971) 55 T.C. 746, 752-753* ; *Rev. Rul. 74-43, 1974-1 C.B. 285* ; see *Treas. Reg. § 25.2503-4(b)(2)*]. The right to terminate the trust after the beneficiary reaches 21 may be a continuing right or a right exercisable for a specified period after the beneficiary's twenty-first birthday [ *Heidrich v. Commissioner, (1971) 55 T.C. 746, 752-753* ; *Rev. Rul. 74-43, 1974-1 C.B. 285* ; see *Priv. Ltr. Rul. 8507017, 8039023* ].

A trust that gives the beneficiary the right to terminate the trust during a specified period after the beneficiary's

twenty-first birthday is sometimes called a "window trust." A trust created for the benefit of a beneficiary under the age of 21 but which continues after the beneficiary has reached 21 is sometimes called a *Herr* trust, after the case of *C.I.R. v. Herr*, in which the Third Circuit allowed an annual exclusion under *I.R.C. § 2503(c)* even though the trust was to continue until the beneficiary reached the age of 30 [ *Commissioner v. Herr* (3d Cir. [T.C.] 1962) 303 F.2d 780 ]. The court reasoned that the right to receive income before the beneficiary reached 21 was separate from the right to receive income or principal after the beneficiary reached 21. Since the beneficiary had a qualifying right to receive income before reaching 21, gifts to the trust before the beneficiary reached 21 qualified for the annual exclusion under *I.R.C. § 2503(c)*, even though the trust continued after the beneficiary's twenty-first birthday. *Herr* makes it clear that the annual exclusion is available before the beneficiary reaches 21 when the trust continues thereafter.

If the beneficiary does not elect to terminate the trust at 21, the question arises whether gifts made to the trust after the beneficiary's twenty-first birthday will qualify for the annual exclusion. The gifts would qualify if the beneficiary had a "Crummey" withdrawal power [see *Crummey v. C.I.R.* (9th Cir. [T.C.] 1968) 397 F.2d 82 and discussion in § 72.13[4]] exercisable after reaching 21. The gifts would also qualify if the beneficiary was given an immediate right to receive all of the income of the trust on a current basis [see discussion in § 72.13[2][c]].

#### **[e] Distribution of Property on Beneficiary's Death**

If the beneficiary dies before reaching age 21, undistributed principal and income must be payable to the beneficiary's estate, or as the beneficiary may appoint under a general power of appointment [*I.R.C. § 2503(c)(2)(B)*; see *I.R.C. § 2514(c)* (general power of appointment defined)]. This requirement may be satisfied by giving the beneficiary a testamentary power of appointment [ *Rev. Rul. 75-351, 1975-2 C.B. 368* ]. A testamentary power of appointment is a power of appointment that is exercisable by will [*Prob. Code § 612(a)*]. In California, a will may be made by any person of sound mind over the age of 18 years [*Prob. Code § 6100*]. If the trust is to terminate when the beneficiary reaches 21, the beneficiary will thus have three years within which to exercise the testamentary power. In most cases, however, the beneficiary will not exercise the power. Thus, it is advisable to name a taker or takers in default. The annual exclusion will not be lost merely because the trust instrument designates takers in default [*Treas. Reg. § 25.2503-4(b)(3)*].

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsIrrevocable Living TrustsTax LawFederal Estate & Gift TaxesGifts (IRC secs. 2035, 2501-2524)Annual ExclusionsTax LawFederal Estate & Gift TaxesGifts (IRC secs. 2035, 2501-2524)Imposition of Taxes



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DIVISION IV: WILLS AND TRUSTS  
CHAPTER 72 IRREVOCABLE TRUSTS  
PART II. LEGAL BACKGROUND

*26-72 California Legal Forms--Transaction Guide § 72.16***AUTHOR:** Reviewed by Albert G. Handelman**§ 72.16 Grantor Retained Income Trust (GRIT)****[1] In General**

A grantor retained income trust (GRIT) is an irrevocable inter vivos trust in which the settlor retains a present interest for a term of years. At the end of the specified term, the trust terminates and the trust property passes to one or more remainder beneficiaries. The settlor's retained interest is usually an income interest, although it may also be a possessory interest, such as the right to use or retain possession of the property for the specified term.

At the time that a GRIT is created, the settlor makes an irrevocable transfer of the remainder interest in the trust property. This is a present transfer of a future interest in property and, as such, is usually classified as a taxable gift [*I.R.C. § 2501(a)*].

There are many different types and variations of GRITs, including the grantor retained annuity trust (GRAT) [*see § 72.16[4]*], the grantor retained unitrust (GRUT) [*see § 72.16[5]*], and the qualified personal residence trust (QPRT) [*see §§ 72.16[6], 72.203*]. Each of these trusts is subject to particular rules that must be carefully followed when the trusts are created, funded, and administered.

**[2] Uses**

GRITs are typically used to transfer property from one person (such as a parent) to another person or persons (such as a child or children) at a reduced transfer tax cost. When the trust is created, the settlor is deemed to have made a present gift of the remainder interest in the property. The tax is based on the value of the remainder interest, determined as of the time of creation of the trust, and this value is always less than the value of the whole property. On expiration of the specified term, the entire interest in the property passes to the remainder beneficiary or beneficiaries, typically without imposition of any additional transfer taxes.

If the settlor dies before expiration of the term, a part of the value of the property will be included in the settlor's estate for estate tax purposes, since the gross estate includes the value of any property which the settlor has transferred (in trust

or otherwise) while retaining the possession, use, or income for any period that does not in fact end before the settlor's death [I.R.C. § 2036(a)(1); see § 72.12[2][a]]. If the settlor does not die before expiration of the term, however, the entire value of the property will have been effectively removed from the settlor's estate for estate tax purposes.

The present transfer of the remainder interest will not qualify for the annual gift tax exclusion [see I.R.C. § 2503(b)(1) and discussion in § 72.13[2]], since a remainder is a future interest and the annual exclusion is available only for present interests in property [I.R.C. § 2503(b); Treas. Reg. § 25.2503-3; see discussion in § 72.13[2][c]]. However, payment of cash to satisfy the gift tax can be avoided if the settlor's unified credit is applied to the gift [see I.R.C. § 2505 (unified credit against gift tax) and discussion in Ch. 60, Estate Planning, § 60.14[5]]. If the value of the gift exceeds the "applicable exclusion amount" (unified credit) available in the year of the transfer [see I.R.C. § 2010(c) (table of graduated amounts) and discussion in § 60.13[4][b]; see also I.R.C. § 2505(a)(1) ("applicable credit amount" for gift tax purposes)], or if the unused portion of the "applicable exclusion amount" is inadequate to completely shelter the transfer from gift tax, gift tax will have to be paid on the transfer at the time the transfer is made.

A properly planned and funded GRIT will make it possible for the settlor to ultimately transfer the value of the entire property to a designated remainder beneficiary or beneficiaries while paying gift tax on only part of that value. Since the trust is irrevocable, any post-transfer appreciation is also transferred to the remainder beneficiary or beneficiaries without tax [see discussion in § 72.13[3]]. In many cases, this will result in significant overall transfer tax savings, and likely overall tax savings even taking into account the impact of the capital gains tax. While the settlor must assume the risk that he or she may die before expiration of the specified term and thus subject his or her estate to some additional estate tax, this risk will often be acceptable when balanced against the potential tax savings to be derived from the arrangement.

#### **PRACTICE TIP:**

Even if the settlor dies before expiration of the term, he or she actually is no worse off from a transfer tax perspective than if he or she had not established the GRIT in the first place. This is because the calculation of the settlor's federal estate tax liability reduces the tax due by the amount of gift taxes previously paid on property included in the settlor's gross estate for estate tax purposes. While the trust assets, including any appreciation since the date of the transfer to the GRIT, will be included in the gross estate, the tax is calculated so as to effectively refund any gift tax paid and restore any portion of the unified credit applied at the time of the transfer to the GRIT. Still, there are expenses in establishing and administering the GRIT that must be considered, along with all of the emotional and other factors that may be weighed by a client in deciding whether to establish a GRIT. *Commentary by Albert G. Handelman.*

### **[3] Valuation**

#### **[a] Valuation Under Basic Gift Tax Rules**

When property is transferred to a GRIT, the value of the gift to the remainder beneficiaries is determined by first valuing the whole property and then subtracting the value of the interest retained by the settlor [Treas. Reg. §§ 25.2512-5, 25.2702-1(b)]. Under general gift tax valuation rules, the value of a retained interest is determined by referring to valuation tables published by the IRS [see Treas. Reg. §§ 25.2512-5, 25.2702-1 et seq.; Rev. 1989-1 C.B. 660, Notice 89-24]. The tables are contained in treasury regulations and in IRS Publications 1457 ("Actuarial Values, Book Aleph"), 1458 ("Actuarial Values, Book Beth"), and 1459 ("Actuarial Values, Book Gimel") [see Treas. Reg. § 25.2512-5(d)(4)], which may be purchased from the Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402. Under these tables, if the settlor's interest in the property is retained for a relatively long term of years, its value will be relatively high and the value of the remainder interest will be correspondingly low. Conversely, if the settlor's interest is retained for a relatively short term of years, its value will be relatively low and the value of the remainder interest will be correspondingly high. In either case, however, the value of the transferred interest

as determined under traditional gift-tax valuation rules will be less than the value of the whole property, and the amount that is subject to gift tax will be less than the current value of the entire property [*but see I.R.C. § 2702(a)(2)(A)* and discussion in [b], *below*, for special valuation when remainder beneficiaries are family members].

#### **[b] Valuation Under I.R.C. § 2702**

Since 1990, valuation of the retained interest in a GRIT in which the remainder interest is transferred to members of the settlor's family has been subject to special rules set forth in *I.R.C. § 2702*. Under *I.R.C. § 2702*, the retained interest must be valued at zero if an individual transfers property in trust for the benefit of "a member of the transferor's family" and the individual or an "applicable family member" retains an interest in the trust [*I.R.C. § 2702(a)(2)(A)*]. For purposes of these rules, the term "member of the transferor's family" includes the settlor's spouse, the transferor's brothers and sisters, ancestors and lineal descendants of the transferor or the transferor's spouse, and spouses of any of the brothers, sisters, ancestors, or lineal descendants [*I.R.C. § 2702(a)*; *see I.R.C. § 2701(e)(1)*]. The phrase "applicable family member" includes the transferor's spouse, ancestors of the transferor or the transferor's spouse, and the spouse of any such ancestor [*I.R.C. § 2702(a)(1)*; *see I.R.C. § 2701(e)(2)*].

When the valuation rules of *I.R.C. § 2702* are applicable and the retained interest in the trust is valued at zero, the value of the remainder interest is equal to the value of the whole property, and the whole value is subject to gift tax. This substantially reduces the advantage of the trust by requiring that the entire value of the property be subject to gift tax at the time the trust is established. When this happens, the only possible tax savings will result from any post-transfer appreciation of the trust property [*see discussion in § 72.13[3]*]. In some cases the potential for post-transfer appreciation may be great enough to make this an attractive possibility. This may be the case, for example, if the trust property is stock in a family-owned corporation that is expected to grow substantially in future years. In the usual case, however, post-transfer appreciation will not make up for the amount of unified credit consumed or gift tax paid at the inception of the trust.

#### **[c] Exceptions to I.R.C. § 2702**

The valuation rules of *I.R.C. § 2702* [*see [b], above*] do not apply to trusts in which the retained interest is a "qualified interest" as defined in *I.R.C. § 2702(b)* [*see Treas. Reg. § 25.2702-3*]. A "qualified interest" may be an annuity interest in a grantor retained annuity trust (or "GRAT"), a unitrust interest in a grantor retained unitrust (or "GRUT"), or a noncontingent remainder interest, if all the other interests in the trust are annuity interests in a GRAT or unitrust interests in a GRUT [*I.R.C. § 2702(b)*; *Treas. Reg. § 25.2702-3(b)(1)(ii), (c)(1)(ii)*]. "GRATs" are subject to special valuation rules discussed in [4], *below*. "GRUTs" are discussed in [5], *below*.

The valuation rules of *I.R.C. § 2702* are similarly inapplicable when the trust property is a residence to be used as a personal residence by persons holding term interests in the trust [*I.R.C. § 2702(a)(3)*]. A personal residence trust (or "PRT") is subject to special rules that make it a relatively inflexible estate planning tool [*see Treas. Reg. § 25.2702-5(a), (b)*]. However, the Treasury has adopted somewhat more flexible rules for the so-called "qualified personal residence trust" or "QPRT" [*Treas. Reg. § 25.2702-5(c)*]. This trust, sometimes called a "house GRIT," can be a useful tax-savings tool and is frequently encountered in estate planning practice. The rules governing the creation and administration of qualified personal residence trusts are discussed in [6], *below*.

Finally, the rules of *I.R.C. § 2702* do not apply if the transfer is an "incomplete transfer" [*I.R.C. § 2702(a)(3)(A)(i), (B)*]. Whether an interest is "incomplete" is to be determined according to traditional gift tax rules. [*see Treas. Reg. § 25.2511-2*].

#### **[4] Grantor Retained Annuity Trust (GRAT)**

##### **[a] Nature and Purpose of GRAT**

A grantor retained annuity trust (GRAT) is a type of GRIT in which the grantor (or any of the grantor's "applicable family members") [see *I.R.C. § 2701(e)(2)* and discussion in § 72.16[3][b]] retains the right to receive periodic payments in fixed dollar amounts for life or for a specified term of years [*I.R.C. § 2702(b)(1)*]. The periodic payments (or "annuity") must be received at least annually [*I.R.C. § 2702(b)(1)*]. A GRAT must be funded with cash or with income-producing property so that it can support the periodic payments.

A grantor may save transfer tax by setting up a GRAT. Under the GRAT, the grantor retains an annuity interest for a specified term. At the expiration of that term, the trust property passes to a child or other person named in the GRAT. Gift tax is payable, but only on the present value of the remainder interest, which is the value of the property transferred to the GRAT less the value of the retained annuity interest. However, if the retained annuity interest is *not* a "qualified interest" under *I.R.C. § 2702* [see [b], below], then it is treated as having zero value, and gift tax is payable on the entire value of the property transferred to the GRAT.

Any post-transfer appreciation in the value of the trust property will escape transfer tax, but only if the grantor survives the trust term. If the grantor dies during the trust term, the trust property will be included in his or her gross estate under *I.R.C. § 2036* [see [d], below]. In such an event, however, the consequences for the grantor are the same as if he or she had not set up a GRAT, except for setup and administration costs.

For a form for a GRAT, see § 72.221.

#### **[b] "Qualified Interest"**

If a trust qualifies as a GRAT, the interest retained by the grantor (or the grantor's "applicable family member") is a "qualified interest" for purposes of *I.R.C. § 2702* and subject to special valuation rules set forth in *I.R.C. § 7520* [*I.R.C. § 2702(a)(2)(B), (b)(1)*]. The valuation is made according to special IRS valuation tables and by assuming an interest rate of 120 percent of the federal midterm rate (rounded to the nearest two-tenths of one percent) for the month in which the valuation date falls. The applicable tables are in treasury regulations [see *Treas. Reg. § 20.7520-1(c)(1)*] and in IRS Publications 1457 ("Actuarial Values, Book Aleph"), 1458 ("Actuarial Values, Book Beth"), and 1459 ("Actuarial Values, Book Gimel") [see *Treas. Reg. § 20.7520-1(c)(2)*]. The federal midterm rate is the interest rate determined monthly by the Secretary of the Treasury for debt instruments with terms between three and nine years [*I.R.C. § 1274(d)(1)*]. Valuation of the retained interest in a GRAT is highly technical and complex.

A "qualified interest" for purposes of *I.R.C. § 2702* is a qualified annuity interest, a qualified unitrust interest, or a qualified remainder interest [*Treas. Reg. § 25.2702-2(a)(5)*], but for the settlor's power of revocation [*Treas. Reg. § 25.2702-2(a)(6)*]. Payment of a qualified interest cannot be subject to any contingency other than the holder's survival until the commencement (or throughout the term) of the holder's interest, or the settlor's right to revoke the spouse's interest in the case of a revocable spousal interest [*Treas. Reg. § 25.2702-3(d)(2)*]. The term of the interest must also be fixed and ascertainable at the creation of the trust [*Treas. Reg. § 25.2702-3(d)(4)*]. A spouse's interest is a qualified interest if the term of the interest is fixed and ascertainable at the creation of the trust and the spouse's right to receive the annuity is contingent only on his or her survival and his or her spouse's power to revoke [*Treas. Reg. § 25.2702-3(e)*, Example 8]. A spouse's interest is not a qualified interest, however, if his or her annuity is a contingent interest that is payable only if the settlor dies before the end of the trust term [*Treas. Reg. § 25.2702-3(e)*, Example 9].

#### **[c] Effect of Interest Rates**

A GRAT can be a useful estate planning tool when interest rates are low and, because of those low interest rates, the settlor's retained annuity interest would be given a correspondingly high value. When the federal midterm rate is low, the retained annuity interest will be worth more than when the same rate is high, and the gift value of the remainder interest will be worth less. Thus, the trust property can be transferred to the settlor's family members at a lower transfer tax cost than would be the case when the federal midterm rate is high. Depending on the annuity amount retained by the

settlor, this can result in significant transfer tax savings, especially if the assets in the GRAT produce a total return over the term of the GRAT that is higher than that assumed under the IRS tables. Conversely, a GRAT generally will be less useful when interest rates are high, because the gift tax cost of establishing the trust will be higher.

#### **[d] Effect of Settlor's Death During Trust Term**

Whether interest rates are high or low, however, the attorney and the settlor should always remember that the trust property will be included in the settlor's estate if the settlor dies before expiration of the trust term [*see I.R.C. § 2036(a)* (value of property included in decedent's estate if decedent retains income for any period which does not in fact end before death)] and that the entire value of the assets in the GRAT at the time of the settlor's death will be subject to estate tax [*see I.R.C. § 2036(a)*]. The estate planning value of a GRAT is thus dependent on fluctuating interest rates, on the growth in the trust assets over the term of the GRAT, and on the percentage of payout retained by the settlor [*see Taylor, Of GRATs and GRUTs: Trusts Offer Benefits Linked to Interest Rates, 78 A.B.A. Jour. 95 (Oct. 1992)*].

GRATs are sophisticated estate planning tools and should be used only by attorneys who are well-acquainted with their advantages and potential disadvantages.

#### **[5] Grantor Retained Unitrust (GRUT)**

A grantor retained unitrust (GRUT) is a type of GRIT in which the grantor (or any of the grantor's "applicable family members") [*see I.R.C. § 2701(e)(2)* and discussion in § 72.16[3][b]] retain the right to receive a fixed percentage of the fair market value of the trust property for life or for a specified term of years (a "unitrust" interest) [*I.R.C. § 2702(b)(1)*]. Like an annuity interest in a GRAT [*see* discussion in [4], *above*], the unitrust interest in a GRUT must be paid at least annually [*I.R.C. § 2702(b)(2)*]. If a trust qualifies as a GRUT, the unitrust interest retained by the grantor (or the grantor's "applicable family member") is a "qualified interest" [*see* discussion in § 72.16[3][b]] for purposes of *I.R.C. § 2702*, and subject to special valuation under *I.R.C. § 7520* [*I.R.C. § 2702(a)(2)(B), (b)(2)*; *see* discussion in [4], *above*]. The value of the remainder interest in a GRUT is less significantly affected by interest rates than the value of the remainder interest in a GRAT [*see Taylor, Of GRATs and GRUTs: Trusts Offer Benefits Linked to Interest Rates, 78 A.B.A.J. 95 (Oct. 1992)*]. Therefore, the gift tax costs of establishing a GRUT will not vary greatly depending on the current level of interest rates. Instead, valuation is based on the percentage of payout that the settlor keeps. Thus, the usefulness of the GRUT as an estate planning tool depends on careful valuation of the retained and remainder interests in the trust. The risk that the settlor will die before expiration of the trust term and that the trust property will thus be included in the settlor's estate must also be carefully calculated [*see I.R.C. § 2036(a)* (value of property included in decedent's estate if decedent retains income for any period that does not in fact end before death); *see also § 72.12[2][a]*].

A unitrust interest in a GRUT affords the settlor some protection against inflation. This is because the amounts that the settlor will receive during the trust term are keyed to the value of the trust property and, if that value rises, the amount received by the settlor will also rise. If the trust property declines in value, however, the unitrust interest will also decline. If the trust property is not expected to appreciate in value, or if there is a possibility of depreciation during the trust term, a GRAT may be more advantageous to the settlor than a GRUT. A GRAT may also be expected to result in a lower overall transfer tax cost, as the gift tax due on the transfer of the remainder interest generally will be lower than that due on the transfer of the remainder interest in a GRUT. Of course, the relative savings that will be achieved in any specific case should be carefully calculated to make sure that these general statements hold true under the particular facts of that case.

GRUTs, like GRATs, are sophisticated estate planning tools and should be used only by estate planners who are familiar with their advantages and disadvantages.

#### **[6] Qualified Personal Residence Trust (QPRT)**

### [a] In General

A qualified personal residence trust (or "QPRT") is a personal residence trust (or "PRT") that meets special requirements prescribed in the Treasury regulations [*see Treas. Reg. § 25.2702-5(c)*]. It is not subject to the special valuation rules of *I.R.C. § 2702* [*see § 72.16[3][b]* for discussion] but is governed by the traditional rules of gift tax valuation [*Treas. Reg. § 25.2702-5(a)*; *see § 72.16[3][a]* for discussion]. Under the traditional rules, the retained interest is not valued at zero, but is determined by reference to the IRS gift tax valuation tables [*see Treas. Reg. § 25.2512-5*]. QPRTs are sometimes called "QPRGRITs," "house GRITs," or "personal residence GRITs."

A QPRT differs from an ordinary PRT in that it may sell the personal residence (or collect insurance proceeds if the residence is damaged or destroyed) and reinvest the proceeds in another personal residence within two years after the date of sale, or by the date of termination of the settlor's interest in the trust, whichever is earlier [*Treas. Reg. § 25.2702-5(c)(5)(ii)(C), (7)(ii), (iii)*]. Unlike a PRT, a QPRT may purchase a residence with cash transferred to the trust and, after the residence has been purchased, may hold additional cash for the purpose of making mortgage payments or paying expenses on the residence [*Treas. Reg. § 25.2702-5(c)(5)(ii)*].

### [b] Uses

The QPRT is the most popular GRIT used in current estate planning. It is used by settlors (typically parents) who wish to transfer personal residences to family members (typically children) at reduced transfer tax costs. The original transfer to a QPRT may be of a personal residence or cash with which a personal residence is to be purchased.

Once property has been transferred to a QPRT, the settlor is deemed to have made a transfer of the remainder interest in the trust property to the remainder beneficiaries. The value of the remainder interest is determined by subtracting the value of the interest retained by the settlor from the value of the entire property [*see Treas. Reg. § 25.2512-5(a)(1)(i)*]. The value of the remainder interest depends in large part on the trust term. If the term is relatively long, the value of the remainder is relatively low and the gift tax cost of transferring it to the remainder beneficiaries is correspondingly low. If the trust term is relatively short, the value of the remainder is relatively high and the gift tax cost of transferring it to the trust is correspondingly high.

If the settlor does not die within the specified trust term, the trust property will be distributed to the remainder beneficiaries without further gift or estate tax. If the settlor dies before the trust has terminated, however, the trust assets will be included in the settlor's gross estate for estate tax purposes because the settlor retained the use of the transferred property for a period that did not end before the settlor's death [*I.R.C. § 2036(a)(1)*; *see § 71.12[2][a]*].

Although a relatively long trust term will result in a relatively low gift tax, it will also increase the risk that the settlor will die before termination of the trust and that the trust property will be included in the settlor's gross estate. In using a QPRT, it is thus necessary to balance the advantages of a reduced gift tax against the risk that the trust property will be included in the settlor's estate for gift tax purposes.

### [c] Requirements

The IRS has developed a sample form for a QPRT (with one term holder) that meets the requirements of *I.R.C. § 2702(a)(3)(A)* and *Treas. Reg. § 25.2702-5(c)* [*see Rev. Proc. 2003-42, 2003-1 C.B. 993*]. This form is illustrated in § 72.220.

### Legal Topics:

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Trusts Irrevocable Living Trusts Tax Law Federal Estate & Gift Taxes Gifts (IRC secs. 2035,

2501-2524)General OverviewTax LawFederal Estate & Gift TaxesGifts (IRC secs. 2035, 2501-2524)ElementsTransfers  
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*26-72 California Legal Forms--Transaction Guide §§ 72.17-72.99*

**AUTHOR:** Reviewed by Albert G. Handelman

**[Reserved]**

§§ 72.17[Reserved]



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A. Client Interview--Facts and Documents

*26-72 California Legal Forms--Transaction Guide*

**AUTHOR:** Reviewed by Albert G. Handelman

**NOTE:**

An irrevocable trust should be planned and prepared as part of a comprehensive estate plan. Ch. 60, *Estate Planning*, is a general introduction to the subject of estate planning and a guide to other estate planning chapters in this publication. It should be consulted before any estate planning documents are prepared. Lifetime gifts and gift-giving strategies are covered in Ch. 60A, *Gifts*.



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*26-72 California Legal Forms--Transaction Guide § 72.100*

**AUTHOR:** Reviewed by Albert G. Handelman

**§ 72.100 Facts**

**NOTE:**

Ch. 60, *Estate Planning*, § 60.200[2] contains a client interview checklist designed to be used by an estate planning attorney at the initial client interview. It includes questions designed to elicit all of the personal and financial information necessary to begin the preparation of an estate plan. It should also be used in connection with the preparation of an irrevocable trust.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsCreationEstate, Gift & Trust LawTrustsIrrevocable Living Trusts



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*26-72 California Legal Forms--Transaction Guide § 72.101*

**AUTHOR:** Reviewed by Albert G. Handelman

**§ 72.101 Documents**

**NOTE:**

If originals of any of the documents described below are not available, copies may be furnished.

1. Any will previously executed by client.
2. Any trust instrument previously executed by client.
3. Any contract affecting client's power to make or revoke a will or trust (for example, contract to make will or devise, contract not to revoke will or devise, contract to die intestate, or prenuptial agreement).
4. Any contact evidencing client's rights in property (for example, joint venture agreement or partnership agreement).
5. Deeds to real property.
6. Notes (and securing deeds of trust) or mortgages.
7. Certificates for stocks, bonds, or other securities.
8. Life insurance policies owned by client or on client's life.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsCreationEstate, Gift & Trust LawTrustsIrrevocable Living Trusts



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*26-72 California Legal Forms--Transaction Guide §§ 72.102-72.109*

**AUTHOR:** Reviewed by Albert G. Handelman

**[Reserved]**

§§ 72.102[Reserved]



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*26-72 California Legal Forms--Transaction Guide § 72.110*

**AUTHOR:** Reviewed by Albert G. Handelman

**§ 72.110 Suitability of Irrevocable Trust for Client's Purposes**

1. Determine whether client wishes to permanently part with trust property.

**NOTE:**

An irrevocable trust, unlike a revocable trust, is not a tentative arrangement that can be changed, revised, or revoked at the client's option. When a client transfers property to an irrevocable trust, the client permanently parts with the property. If the trust is properly structured, the client will have no power to change, revise, or revoke the trust at some time in the future.

2. If client wishes to permanently part with trust property, determine whether outright gift would suit client's wishes and needs, considering following features of outright gifts:

**NOTE:**

An irrevocable inter vivos trust can be best understood as a gift substitute. When a client transfers property to an irrevocable trust, the client has permanently parted with the trust property and has permanently conferred benefits on the trust beneficiaries. If a client wishes to confer benefits on specified persons, that may be done simply by making gifts to those persons. Before any decision is made to create an irrevocable trust, the client should consider whether an outright gift or gifts might better meet the needs of the proposed beneficiaries while at the same time satisfying the client's own needs and wishes.

a. Donees will receive immediate economic benefits of gift property.

b. Client will permanently lose economic benefits of gift property and cannot reclaim it in future, even if client should later be in financial need.

c. Gift property will be removed from client's gross estate for federal estate tax purposes.

**NOTE:**

If an irrevocable trust is properly structured, the trust property will be removed from the settlor's gross estate for federal estate tax purposes [for definition of "gross estate," *see I.R.C. § 2031* and discussion in *Ch. 60, Estate Planning, § 60.13[1]*]. If, however, the settlor retains certain prohibited interests in and powers over the trust property [*see I.R.C. §§ 2033, 2036, 2037, 2038, 2041*], the trust property will be included in the settlor's gross estate, even though the trust is irrevocable. For discussion, *see § 72.12*.

d. Gift may be sheltered from gift tax under annual gift tax exclusion.

**NOTE:**

An exclusion (called the "annual exclusion") is available for gifts made to each donee by each donor during a calendar year [*I.R.C. § 2503(b)*]; for discussion of the annual exclusion and the applicable exclusion amounts, which are adjusted annually for inflation, *see § 72.13[2][a]*; *see also Ch. 60A, Gifts, § 60A.32[4]*. The amount of the exclusion can be effectively doubled if gifts are made by a husband and wife [*see I.R.C. § 2513(a)* (gift-splitting)]. If the gift is to the donor's spouse and the spouse is not a citizen of the United States, the amount of the exclusion is significantly greater [*see I.R.C. § 2523(i)*]; for discussion, *see § 72.13[2][a]*; *see also Ch. 60A, Gifts, § 60A.32[5]*.

e. Client will no longer be liable for income tax on income produced by gift property, or have benefit of deductions or credits associated with gift property.

f. Costs of making gift will ordinary be minimal.

**NOTE:**

An attorney's assistance may be necessary to make certain gifts, and to prepare and file any gift tax returns required. However, many gifts can be made without legal assistance, particularly if they are completely sheltered from gift tax under the annual gift tax exclusion [*see I.R.C. §§ 2503(b), 2513(a)*]; *Treas. Reg. § 25.2513-1*; *see also [d], above*].

3. Determine whether irrevocable trust would suit client's needs and wishes, considering following facts:

a. Trust beneficiaries will receive economic benefits of trust property, but control of property will be in hands of trustee, subject to terms and conditions of trust instrument.

b. Economic consequences of creating irrevocable trust are effective when property is transferred to trustee, not (as in case of revocable trust) at some future time, such as client's death or death of client's spouse.

**NOTE:**

A revocable inter vivos trust may best be understood as a will substitute. While the settlor is living and competent, the settlor may change, revise, modify, or even revoke the trust. The trust does not become irrevocable until the settlor dies, after which time the trust property will be held, administered, and distributed as provided in the trust instrument. In

contrast, an irrevocable trust (as that term is used in this chapter), is irrevocable from the outset. Whatever economic consequences are to flow from the trust will be determined at the time the trust is created and funded.

c. Since trust will be irrevocable, client cannot reassert possession of or control over trust property at some time in future.

d. If client should demonstrate financial need at future time, client cannot reclaim trust property to meet that need.

**NOTE:**

An irrevocable trust should be created only if the client is satisfied that he or she will not need the trust property at some time in the future. Property transferred to an irrevocable trust should be property that the client is reasonably satisfied that neither the client nor the client's spouse or children (if they are not to be beneficiaries of the trust) will ever need in the future.

e. Property transferred to trust will be removed from client's estate for federal estate tax purposes.

**NOTE:**

If an irrevocable trust is properly structured and administered, the trust property will be removed from the settlor's gross estate [*see I.R.C. § 2031*] for federal estate tax purposes. See the NOTE to P 2[c], above.

f. Unless trust is structured as "grantor trust", client will no longer be liable for income tax on income produced by trust property, or have benefit of deductions or credits associated with trust property.

**NOTE:**

A grantor trust is a trust in which the settlor holds certain powers or interests that, under *I.R.C. §§ 671-679*, require that the settlor be treated as the owner of the trust for income tax purposes. When the settlor is treated as the owner of the trust for income tax purposes, all income, deductions, and credits are passed through the trust and reported on the settlor's individual income tax returns. If the trust is not a grantor trust, the trust and not the settlor is taxable on the income and entitled to the deductions and credits. For discussion, see § 72.200[1][c].

g. Client may make annual transfers to trust that are sheltered from gift tax if transfers meet "present interest" requirement of gift tax law for either of following reasons:

**NOTE:**

The annual gift tax exclusion is available only for gifts of "present interests" in property [*see I.R.C. § 2503(b)*]. A "present interest" is an unrestricted right to the immediate use, possession, or enjoyment of property or the income from property [*Treas. Reg. § 25.2503-3(b)*]. If the right to the use or possession of property is postponed, or if it depends on the satisfaction of some condition or the occurrence of some event, the annual exclusion is not available. For discussion, see § 72.13[2][c].

(1) Because beneficiaries of trust are given "Crummey" withdrawal rights.

**NOTE:**

The "present interest" requirement may be satisfied by giving the beneficiaries annual rights to demand payments (or withdrawals) from the trust. A right of this kind is commonly described as a "Crummey right" or "Crummey power" [*see Crummey v. C.I.R.* (9th Cir. [T.C.] 1968) 397 F.2d 82]. If the right is properly structured, the beneficiaries will be deemed to have "present interests" in annual transfers made to the trust and the transfers will qualify for the annual gift tax exclusion [*see I.R.C. §§ 2503(b), 2513(a); Treas. Reg. § 25.2513-1*]. For discussion, see § 72.13[4].

(2) Because beneficiary of trust is minor and trust qualifies for annual gift-tax exclusion under *I.R.C. § 2503(c)*.

**NOTE:**

Property may be transferred to a trust created for the benefit of a beneficiary who is under 21 years of age, and annual transfers to the trust may be sheltered from gift taxation under the annual exclusion if the trust meets the requirements of *I.R.C. § 2503(c)*. These transfers may be sheltered from gift taxation even though the beneficiary does not have the right to current distribution of either trust principal or income. For discussion, see §§ 72.15 and 72.210.

h. Costs will be incurred in connection with both creation and maintenance of trust.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsGeneral OverviewEstate, Gift & Trust LawTrustsIrrevocable Living Trusts



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*26-72 California Legal Forms--Transaction Guide § 72.111*

**AUTHOR:** Reviewed by Albert G. Handelman

**§ 72.111 Suitability of Life Insurance Trust for Client's Purposes**

1. Determine whether client's estate would benefit from creation of life insurance trust, considering following facts:

- a. Life insurance will increase total value of client's estate [ *see* § 72.14[2][b]].
- b. Death benefits will provide liquidity to settlor's estate or heirs [ *see* § 72.14[2][b]] in form of cash that can be used to:
  - (1) Pay estate or other transfer taxes due after client's death.
  - (2) Provide support for client's spouse, children, grandchildren, or other family members on either short- or long-term basis.
  - (3) Replace decrease in value of client's estate attributable to transfer taxes due after client's death, costs of administration of client's probate estate, or similar costs.
- c. Trust will provide mechanism for centralized management and control of insurance proceeds after client's death [ *see* § 72.14[2][c]].
- d. Trust will give client some assurance that client's intentions will be carried out after client's death.

**NOTE:**

A trust must be used for the purposes and on the terms and conditions stated in the trust instrument. An outright gift, in contrast, must be made without "strings" and may or may not be used for the purposes intended by the donor [ *see* §§ 72.10[2], 72.14[3]].

e. Death benefits will not be included in client's gross estate for federal estate tax purposes [ *see* § 72.12].

2. Determine whether benefits of trust would be justified in view of costs:

- a. Of creating and maintaining trust.
- b. Of acquiring and maintaining life insurance.

**NOTE:**

Premiums paid on the life insurance will be the principal cost of maintaining the trust. However, there may be other costs, such as trustee fees, bank charges, accounting fees, attorneys' fees, interest on any loans made against the cash value of the insurance, and similar items.

3. Determine whether costs of trust, including annual premiums on life insurance owned by trust, can be covered by annual gifts to trust [ *see* § 72.110, P 3(g)].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsGeneral OverviewEstate, Gift & Trust LawTrustsLife Insurance Trusts



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*26-72 California Legal Forms--Transaction Guide § 72.112*

**AUTHOR:** Reviewed by Albert G. Handelman

**§ 72.112 Suitability of Minor's Trust Under I.R.C. § 2503(c) for Client's Purposes**

1. Determine whether client wishes to make current gifts to beneficiary under 21 years of age.

**NOTE:**

Although trusts that meet the requirements of *I.R.C. § 2503(c)* are customarily described as "minors' trusts" [*see* heading to *I.R.C. § 2503(c)*], the section actually applies to all persons under 21 years of age. In California, a person becomes an adult upon reaching the age of 18 [*see Fam. Code §§ 6500, 6501*]. Thus, in California, a trust may be created under *I.R.C. § 2503(c)* for adults who are 18 years of age but not yet 21, as well as for minors.

2. Determine whether client can afford to make substantial annual transfers to trust.

**NOTE:**

Annual transfers up to the full amount of the available annual gift tax exclusion [*see I.R.C. § 2503(b)*]; for discussion of the annual exclusion and the applicable exclusion amounts, which are adjusted annually for inflation, *see § 72.13[2][a]*; *see also Ch. 60A, Gifts, § 60A.32[4]*] may be sheltered from gift taxation if they are made to a trust that meets the requirements of *I.R.C. § 2503(c)* [*see I.R.C. § 2503(b), (c)*; *see also § 72.110, P 2(d)* and discussion in *§ 72.15*]. Although lesser amounts may also be transferred to the trust, the costs of creating and maintaining the trust will not usually be justified if the annual transfers to the trust are small.

3. Determine whether client would prefer to make annual transfers in trust rather than outright for one or more of following reasons:

a. Because client believes beneficiary should not be entrusted with management and control of transferred property on current basis.

b. Because client wishes trustee to make discretionary distributions of income and principal to beneficiary.

**NOTE:**

*I.R.C. § 2503(c)* does not require that principal or income actually be distributed to the beneficiary, but only that principal and income "may be expended" by or for the benefit of the beneficiary [*I.R.C. § 2503(c)(1)*]. A discretionary power in the trustee to make principal or income payments to or for the beneficiary's benefit will thus meet the requirements of the section [*see § 72.15[3][b]*].

c. Because client wishes trust to continue after beneficiary reaches 21 years of age.

**NOTE:**

Although *I.R.C. § 2503(c)* states that a trust will meet its requirements if undistributed income "will ... pass" to the beneficiary when the beneficiary reaches 21 [*I.R.C. § 2503(c)(2)(A)*], it has been held that this provision does not require actual distribution to the beneficiary at 21 and that merely giving the beneficiary a right to terminate the trust on reaching 21 will suffice [ *Heidrich v. Commissioner, (1971) 55 T.C. 746, 752-753 ; Rev. Rul. 74-43, 1974-1 C.B. 285 ; see Treas. Reg. § 25.2503-4(b)(2)*]. If the beneficiary has a right to terminate the trust at age 21 but does not exercise the right, the trust may continue thereafter and transfers made to the trust before the beneficiary reaches 21 will still qualify for the annual exclusion [*see Commissioner v. Herr (3d Cir. [T.C.] 1962) 303 F.2d 780 ; see also* discussion in § 72.15[3][d]].

d. Because no adverse tax consequences would be suffered if beneficiary died before reaching 21 and trust property were included in beneficiary's gross estate for federal estate tax purposes.

**NOTE:**

If the beneficiary dies before reaching 21, any undistributed portion of the gift property and its income must be payable to the beneficiary's estate, or as the beneficiary may appoint under a general power of appointment [*I.R.C. § 2503(c)(2)(B)*]; *see I.R.C. § 2514(c)* (general power of appointment defined); *see also* discussion in § 72.15[3][a], [d]]. Ordinarily this will not present a problem, because the estates of most beneficiaries under 21 will be less than the "applicable exclusion amount" [*see I.R.C. § 2010(c)*] and discussion in § 60.13[4] and no estate tax will be payable.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

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*26-72 California Legal Forms--Transaction Guide § 72.113*

**AUTHOR:** Reviewed by Albert G. Handelman

**§ 72.113 Suitability of Qualified Personal Residence Trust (QPRT) for Client's Purposes**

1. Determine whether client has personal residence that client intends to eventually transfer to specified beneficiaries, such as children.

**NOTE:**

The personal residence can be a principal residence or a second home [*Treas. Reg. § 25.2702-5(b)(2)(i), (c)(2)(i)*]. Under the regulations, the definition of "principal residence" is to be determined under the rules of former *I.R.C. § 1034* (repealed effective May 6, 1997) [*Treas. Reg. § 25.2702-5(c)(2)(i)(A)*]. Under the latter rules, a principal residence could consist of a dwelling house situated on real property, a condominium, an interest in a cooperative housing corporation, a houseboat, or a motor home [*see I.R.C. § 1034(f); Treas. Reg. § 1.1034-1(c)(3)(i); Rev. Rul. 64-31, 1964-1 C.B. 300*]. *I.R.C. § 1034* was repealed by the Taxpayer Relief Act of 1997 [P.L. 105-34, § 312(b)]; however, it appears unlikely that this repeal was intended to have any impact on the types of interests that can qualify as a residence for QPRT purposes.

2. Determine whether client needs tax-saving strategies because combined values of estates of client and spouse are likely to exceed the "applicable exclusion amount" (unified credit) [*see I.R.C. § 2010(c)* (table of graduated amounts) and discussion in § 60.13[4][b]] available in the year of the surviving spouse's death.

3. Determine whether client is willing to give up ownership of personal residence at end of trust term.

**NOTE:**

The client will have the right to use and occupy the personal residence during a specified

period of time (the trust "term"), at the end of which ownership of the residence will pass to the remainder beneficiaries. By the terms of the trust, the client will be required to give up possession of the residence at the end of the term. The length of the term is usually determined by balancing the term holder's age and probable life expectancy against the tax savings that can be realized from reducing the value of the remainder interest by postponing distribution to the remainder beneficiaries for as long as possible. Since QPRTs are frequently drafted for elderly clients, the term is often ten years or less. For discussion, see § 72.220[1][d].

4. Determine whether potential transfer tax savings attributable to trust are justified in view of estimated costs of creating and maintaining trust, considering all of following:

a. Transfer of personal residence to trust will be treated for gift tax purposes as gift of remainder to remainder beneficiaries, with value of remainder determined by subtracting value of retained interest from value of entire property [*Treas. Reg. § 25.2512-5(a), (d)*].

b. If client dies before trust has terminated, trust property will be included in client's gross estate because client retained use of property for period that did not end before client's death [*I.R.C. § 2036(a)*].

c. If client does not die during trust term, property will be distributed to remainder beneficiaries without any other gift or estate tax [ *see § 72.220[1][a]*].

d. Remainder beneficiaries will not receive stepped-up basis on transfer, because basis of property received by gift is same as basis in hands of donor [*I.R.C. § 1015(a)*].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsGeneral OverviewEstate, Gift & Trust LawTrustsIrrevocable Living Trusts



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*26-72 California Legal Forms--Transaction Guide §§ 72.114-72.119*

**AUTHOR:** Reviewed by Albert G. Handelman

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DIVISION IV: WILLS AND TRUSTS  
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PART III. TRANSACTION GUIDE  
C. Drafting Guide

*26-72 California Legal Forms--Transaction Guide § 72.120*

**AUTHOR:** Reviewed by Albert G. Handelman

**§ 72.120 Basic Trust Forms**

**NOTE:**

The complete trust forms in this chapter have been chosen to illustrate basic irrevocable trust arrangements that will commonly be encountered in the attorney's office. Before drafting a trust instrument for a particular client, the attorney should examine each of these complete trusts and determine which one most nearly meets the client's needs. Any of the trust instruments may be modified as necessary to address a client's particular needs, wishes, or concerns. For trust provisions useful in modifying the complete trust forms in this chapter, see Ch. 70, *Complete Revocable Trust Forms*, and Ch. 71, *Marital Deduction Trust Provisions*; see also Ch. 64, *Testamentary Trusts: Payment and Distribution Provisions*, Ch. 64A, *Testamentary Trusts: Trustee Provisions*, and Ch. 64B, *Testamentary Trusts: Administrative Provisions*.

1. Select trust instrument in § 72.200[2] (irrevocable life insurance trust) if client:
  - a. Is married.
  - b. Has young children.
  - c. Wishes to act as sole settlor in creating irrevocable life insurance trust to own one or more policies of life insurance on client's life, with death benefits payable to trustee on client's death.
  - d. Intends to make annual gifts to the trust out of client's separate property assets to cover the life insurance premiums.

e. Wishes to give spouse and children "Crummey" powers to withdraw annual gifts made to trust [ *see* § 72.110, P 3(g)(1); *see also* § 72.13[4]], but understands that if children do not exercise powers, gifts can be used to pay premiums on life insurance held by trust.

f. Wishes spouse to serve as trustee.

g. Intends trustee to receive death benefits of life insurance on client's death.

h. If spouse survives client, wishes death benefits to be held for benefit of surviving spouse during surviving spouse's lifetime.

i. On death of surviving spouse, wishes remaining trust property:

(1) To be held in sprinkling trust for benefit of any of children who are under a specified age (e.g., 25 years).

(2) When youngest child reaches specified age, to be distributed outright to children, either in lump sum or in installments.

2. Select trust instrument in § 72.201[2] (irrevocable life insurance trust) if there are two clients and clients:

a. Are married.

b. Have young children.

c. Wish to create a single irrevocable life insurance trust to own a policy or policies of life insurance providing for death benefits to be paid to trustee on death of second spouse to die (i.e., "second-to-die" life insurance).

**NOTE:**

Individual policies on the lives of each client can also be used in this type of arrangement.

d. Intend to make annual gifts to trust out of client's separate and/or community property assets to cover life insurance premiums.

e. Wish to give children "Crummey" powers to withdraw annual gifts made to trust [ *see* § 72.110, P 3(g)(1); *see also* § 72.13[4]] but understand that, if children do not exercise powers, gifts can be used to pay premiums on life insurance held by trust.

f. Understand that neither spouse will serve as trustee.

g. Intend trustee to receive death benefits of life insurance.

h. After death of second client to die, wish death benefits:

(1) To be held in sprinkling trust for benefit of any of children who are under a specified age (e.g., 25 years).

(2) When youngest child reaches the specified age, to be distributed outright to children,

either in lump sum or in installments.

3. Select trust instrument in § 72.210[2] (irrevocable trust for benefit of minor under *I.R.C.* § 2503(c)) if clients:

- a. Are parents or grandparents.
- b. Wish to create trust for benefit of child or grandchild who is under 21 years of age [*see* NOTE in § 72.112, P 1].
- c. Are prepared to make substantial annual transfers to trust.
- d. Wish trustee to exercise discretion in making distributions of income and principal to beneficiary [*see* NOTE in § 72.112, P 3(b)].
- e. Wish trust to continue after beneficiary reaches 21 [*see* NOTE in § 72.112, P 3(c)].

**NOTE:**

This an optional feature of this type of minor's trust.

f. Are satisfied that no (or only limited) adverse tax consequences would be suffered if beneficiary died before reaching age 21 and trust property were included in beneficiary's gross estate for federal estate tax purposes [*see* NOTE in § 72.112, P 3(d)].

4. Select trust in § 72.211[2](qualified personal residence trust, or QPRT) if client:

- a. Is parent.
- b. Has qualifying personal residence that he or she wishes to continue to use or occupy for period of years [*see* NOTE in § 72.113, P 1].
- c. Wishes to transfer personal residence to family members (usually children) at some time in future.
- d. Wishes to reduce overall tax burden on transfer by reserving right to use or occupy residence for period of years, at end of which ownership will pass to remainder beneficiaries (usually children).
- e. Understands that by transferring personal residence to trust and reserving use or occupancy for period of years ("trust term"):

(1) Original transfer will be treated as gift of remainder interest to remainder beneficiaries and be subject to gift tax [*see* § 72.113, P 4(a)].

(2) Property will be included in client's gross estate for federal estate tax purposes if client dies before end of trust term, because client will have retained use of property for period that did not end before his or her death [*see I.R.C.* § 2036(a); *see also* § 72.113, P 4(b)].

(2) Ownership of property will pass to remainder beneficiaries without further transfer tax if client does not die before end of trust term [*see* NOTE in § 72.113, P 3].

(3) Remainder beneficiaries will not receive stepped-up basis on transfer, because basis

of property received by gift is same as basis in hands of donor [*see I.R.C. § 1015(a)*; *see also § 72.113, P 4(d)*].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsGeneral OverviewEstate, Gift & Trust LawTrustsCreationEstate, Gift & Trust LawTrustsIrrevocable Living Trusts



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California Legal Forms--Transaction Guide

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DIVISION IV: WILLS AND TRUSTS  
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*26-72 California Legal Forms--Transaction Guide §§ 72.121-72.199*

**AUTHOR:** Reviewed by Albert G. Handelman

**[Reserved]**

§§ 72.121[Reserved]



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DIVISION IV: WILLS AND TRUSTS  
CHAPTER 72 IRREVOCABLE TRUSTS  
PART IV. FORMS  
A. Insurance Trusts

*26-72 California Legal Forms--Transaction Guide § 72.200*

**AUTHOR:** Reviewed by Albert G. Handelman

**§ 72.200 Irrevocable Life Insurance Trust; One Settlor**

**[1] Comment**

**[a] Use of Form**

This form is an irrevocable inter vivos life insurance trust designed for use by one settlor. It is assumed that the settlor is married and has young children, that the life insurance premiums will be paid with separate property assets, and that the settlor's spouse will serve as trustee.

**PRACTICE TIP:**

Most California couples have only community property, not separate property. The drafter can fashion a simple transmutation agreement for situations where separate property is needed. For example, the agreement can provide that cash used to pay premiums on insurance (or contributed to a trust holding insurance) on the life of the husband will be deemed to be and transmuted to the husband's separate property. *Commentary by Albert G. Handelman.*

It is contemplated that the principal asset of this trust will consist of one or more policies of life insurance on the settlor's life. During the settlor's lifetime, the settlor will make annual gifts to the trust to cover the life insurance premiums. The children will have "Crummey" powers to withdraw the gifts during a specified period (if necessary, the spouse can also be given a "Crummey" power) [ *see Section 4.01*]. If they do not do so, the gifts will be used to cover the premiums. At the settlor's death, the trustee will receive the life insurance death benefits. If the settlor's spouse is surviving, the benefits will be held, administered, invested, and distributed for the surviving spouse's benefit [ *see Section 4.03*]. After the death of the spouse, the trust property will be held in a sprinkling trust for the benefit of any of the children who are under a specified age (e.g., 25 years) [ *see Sections 4.04, 4.07*]. When the youngest child reaches the specified age, the trust property will be distributed to the children, either in a lump sum or in installments [ *see Section 4.07*].

### **[b] Declaration of Trust Format**

Two basic formats for trust instruments, called trust agreements and declarations of trust, are used by California attorneys to create inter vivos trusts. This trust uses the trust declaration format [ *see* Section 1.01].

When a trust is created by a trust agreement, the settlor and the trustee agree in writing that the settlor has transferred property to the trustee and that the trustee is holding the property as trustee under terms of the trust instrument. A settlor who is to serve as the original trustee will sign the agreement both as settlor and as trustee.

When a trust is created by a declaration of trust, the trustee declares in writing that the trustee is holding property as trustee under terms of the trust instrument. Although the settlor is not legally required to sign the declaration in his or her capacity as settlor, good practice requires that the settlor sign the declaration to indicate his or her approval of the terms of the trust. In any event, the settlor will have to sign the declaration if he or she is to serve as the original trustee, or one of the original co-trustees.

### **[c] Grantor Trust Rules**

This trust has been designed as a "grantor" trust. A "grantor" trust is a trust in which the settlor holds certain powers or interests that, under the "grantor trust" rules of the Internal Revenue Code [*see I.R.C. §§ 671-679*], require that the settlor be treated as the owner of the trust for income tax purposes. When the settlor is treated as the owner of the trust for income tax purposes, all income, deductions, and credits are passed through the trust and reported on the settlor's individual income tax returns.

Before the adoption of the Tax Reform Act of 1986, it was standard procedure to design a life insurance trust as a "grantor" trust, so the settlor could take any deductions for interest paid on loans against the policy. Although the personal interest deduction is no longer available, many life insurance trusts are still designed to qualify as "grantor" trusts so that the settlor will be able to deduct interest should the interest deduction ever be restored. Under the current law, there is neither an advantage nor a disadvantage in establishing a trust as a "grantor" trust. If the decision is made not to establish the trust as a "grantor" trust, some provisions of this trust must be modified as suggested in [d] through [f], below.

#### **PRACTICE TIP:**

Irrevocable life insurance trusts are often described as either "funded" or "unfunded." A funded life insurance trust holds, in addition to the life insurance policies, assets whose income can be used to pay the premiums on the policies. Most life insurance trusts are unfunded, and hold few if any assets other than the policies themselves. If the client wishes to establish a funded life insurance trust, the question of whether to make the trust a "grantor" trust takes on much more importance. *Commentary by Albert G. Handelman.*

### **[d] Use of Income to Pay Premiums**

Under the "grantor trust" rules [*see I.R.C. §§ 671-679* and discussion in [c], *above*], the settlor will be treated as the owner of the trust for income tax purposes if the income may be used, without the consent of an "adverse party," to pay premiums on life insurance on the life of the settlor or the settlor's spouse [*I.R.C. § 677(a)(3)*]. An "adverse party" is a person who has a substantial beneficial interest in the trust that would be adversely affected by the exercise or non-exercise of a power that he or she possesses [*I.R.C. § 672(a)*], and the settlor's spouse might be considered an "adverse party" if he or she serves as trustee. However, Section 4.02 of this trust provides that premiums will be paid first with the net income of the trust and that trust principal will be used for this purpose only if the income is insufficient. This should insure that the trust will be treated as a "grantor" trust even if the spouse is deemed to be an "adverse party."

If a "non-grantor" trust is preferred, Section 4.02 should be modified to require the trustee to pay premiums out of principal and to accumulate all income and maintain it in a separate account. The trustee should also be forbidden to add accumulated income to principal. Provisions of this kind should avoid the application of *I.R.C. § 677(a)(3)*, although no direct authority has been found that supports this result.

For further discussion, see California Wills Trusts, Ch. 115, *Life Insurance Trusts*, § 115.05[2][b] (Matthew Bender).

### **[e] Control of Beneficial Enjoyment**

Under the "grantor trust" rules [*see I.R.C. §§ 671-679* and discussion in [c], *above*], the settlor will be treated as the owner of the trust for income tax purposes if the beneficial enjoyment of the trust income or principal is subject to a power of disposition exercisable by the settlor or a "nonadverse party," or both, without the approval or consent of an "adverse party" [*I.R.C. § 674(c)*; for definition of "adverse party," *see I.R.C. §§ 671-679* and discussion in [d], *above*]. Sections 4.02, 4.04, and 4.10 of this trust give the trustee wide discretion to make distributions of income and principal to the settlor's spouse and children without the consent of any "adverse party" and should cause the trust to be considered a "grantor" trust for income tax purposes.

However, this rule is subject to important exceptions. Under *I.R.C. § 674(b)(1)*, for example, certain powers to apply income to the support of a dependent will not require that the settlor be treated as the owner of the trust for income tax purposes. Under *I.R.C. § 674(c)*, a power that is exercisable by an "independent trustee" without the approval or consent of any other person will not require that the settlor be treated as the owner of the trust. A trustee who is not the settlor (or "grantor") and is not related to or subservient to the settlor's (or "grantor's") wishes is deemed to be an "independent" trustee for this purpose [*I.R.C. § 674(c)*]. Further, if a power to distribute, apportion, or accumulate income to or for a beneficiary or beneficiaries is exercisable by a trustee who is not the grantor or a spouse living with the grantor, and if the trustee can exercise the power without the approval or consent of any other person, the power will not require that the settlor be treated as the owner of the trust for income tax purposes if the power is limited by a "reasonably definite external standard" set forth in the trust instrument [*I.R.C. § 674(d)*].

If a "non-grantor" trust is preferred, an "independent trustee" may be appointed and given the power to make discretionary distributions of principal and income without the approval or consent of any other person. The trust may also qualify as a "non-grantor" trust if distributions are limited by a "reasonably definite external standard," which is presumably the same as the "ascertainable standard" relating to health, maintenance, support, and education described in *I.R.C. § 2041(b)(1)(A)* [*see Treas. Reg. § 20.2041-1(c)(2)* and discussion in § 70.12[6][c]]. In theory, such a standard imposes a significant limitation on the ability of the trustee to make distributions to or for the benefit of the beneficiaries, but as a practical matter most types of distributions commonly made by a trustee will come within the parameters of what is permitted by an ascertainable standard.

The trust will also qualify as a "non-grantor" trust if an "adverse party" is appointed as trustee [*see Treas. Reg. § 1.672(a)-1*]. Although the settlor's spouse cannot receive any part of the income under *I.R.C. § 677* without causing the trust to be a "grantor" trust, the spouse cannot qualify as an "adverse party" with respect to the income. Although one or more of the settlor's children may qualify as "adverse parties," a child will rarely be a good choice as trustee, both because children are often too young and inexperienced to properly carry out the duties of the trustee and because the selection of one child in preference to another could result in family rivalries or disputes that may impede the proper administration of the trust.

For further discussion, see California Wills Trusts, Ch. 115, *Life Insurance Trusts*, § 115.05[2][c] (Matthew Bender).

### **[f] Administrative Powers**

Under the "grantor trust" rules [*see I.R.C. §§ 671-679* and discussion in [c], *above*], the settlor will be treated as the owner of the trust for income tax purposes if the settlor or a "nonadverse party" [*see I.R.C. § 672(a)* and discussion in [d], *above*] holds certain administrative powers over the trust. If the trust is designed to be a "nongrantor" trust, *I.R.C. § 675* must be examined carefully to make sure that the trust instrument does not grant any of the prohibited powers to the trustee. For further discussion, see California Wills Trusts, Ch. 115, *Life Insurance Trusts, § 115.05[2][d]* (Matthew Bender).

#### **[g] Limitation on Settlor's Powers for Estate Tax Purposes**

Section 3.02 of this trust provides that, notwithstanding any other provision of the trust instrument, the settlor will not have certain rights, powers, discretions, or "incidents of ownership" [*see § 72.12[2][3]*] in the trust or the trust property. The rights, powers, and interests described in that section, if retained by the settlor, would cause the trust property to be included in the settlor's estate for federal estate tax purposes under *I.R.C. §§ 2036, 2038, 2041, or 2042*. A provision of this kind should be included in every trust instrument when the trust is designed to remove the trust property from the settlor's gross estate for federal estate tax purposes.

#### **[h] "Crummey" Powers**

Section 4.01 of this trust gives the settlor's children the right to withdraw any gift made to the trust within 30 days after the gift is made, or 30 days after the children are given notice of the gift, whichever is later. The right is subject to terms and conditions that make it qualify as a "Crummey" power [*see Crummey v. C.I.R. (9th Cir. [T.C.] 1968) 397 F.2d 82* and discussion in § 72.13[4]].

"Crummey" powers typically are used to qualify lifetime gifts to an irrevocable trust for the annual gift tax exclusion [*see I.R.C. § 2503(b)*]; for discussion of the annual exclusion and the applicable exclusion amounts, which are adjusted annually for inflation, *see § 72.13[2][a]*; *see also Ch. 60A, Gifts, § 60A.32[4]*. Properly drafted "Crummey" powers may serve a useful purpose in any type of irrevocable trust. However, they are most often associated with irrevocable life insurance trusts in which the settlor makes annual cash gifts to the trust in an amount sufficient to cover premiums on the life insurance owned by the trust, and the trust instrument gives the beneficiaries the right to withdraw the gifts during a specified period. The power to withdraw the gifts is rarely exercised--generally, such an exercise would run counter to the wishes of the settlor--and after the power lapses the trustee can use the gifts to pay the premiums.

The "Crummey" power in this form is subject to a "5 or 5" limitation [*see I.R.C. § 2041(b)(2)*] to avoid potential unfavorable estate gift tax consequences [for discussion, *see § 72.13[4][e]*]. If the insurance premiums will be too high to make this approach work, it may be necessary to use a different approach such as a limited testamentary power of appointment [*see § 72.13[4][f]*] or a "hanging" power [*see § 72.13[4][g]*] to achieve the desired result.

For a more detailed discussion of "Crummey" powers and their use in irrevocable inter vivos trusts, see § 72.13[4].

#### **[i] QTIP Trust**

Section 4.03 of this trust provides that if the settlor's spouse survives the settlor and any part of the trust estate is includible in the settlor's gross estate for federal estate tax purposes, the includible portion will be held for the benefit of the spouse in a qualified terminable interest property (QTIP) trust. Section 4.05 sets forth the administrative and distributive provisions of the QTIP trust.

A QTIP trust is designed to qualify for the unlimited marital deduction [*see I.R.C. § 2056(b)(7)* and detailed discussion in § 71.13[4]]. Because of other provisions of this trust, it is not expected that any of the trust property will be included in the settlor's estate for federal estate tax purposes. Sections 4.03 and 4.05 are included in the instrument merely as a precaution to insure that, if any part of the trust property should be deemed to be a part of the settlor's taxable estate, it

will qualify for the marital deduction and not result in any increase in the estate tax burden on the settlor's estate.

**PRACTICE TIP:**

The qualification of the surviving spouse's interest in the trust for the estate tax marital deduction is often more important than it may at first appear. It is not at all uncommon for an irrevocable life insurance trust to be funded with a policy that has already been issued at the time the trust is established. Typically, before the policy was put into the trust, it had been owned by the settlor in his or her name alone (although one must consider the possible community property rights of the non-insured spouse). Once the settlor transfers the policy to the trust, *I.R.C. § 2035(d)(2)* still makes the policy proceeds includible in the insured/settlor's estate should he or she die within three years after the transfer. In such cases, qualifying the trust for the estate tax marital deduction (when the surviving spouse will have an income interest) is a crucial safeguard. While the untimely death of the insured and the need to rely on the marital deduction will mean eventual inclusion of the trust in the surviving spouse's estate, failure to take even this precaution will result in potential immediate estate tax liability on the insurance proceeds. *Commentary by Albert G. Handelman.*

**[j] Bypass Trust**

Section 4.03 of this trust provides that if the settlor's spouse survives the settlor and any part of the trust estate is not includible in the settlor's gross estate for federal estate tax purposes, the portion that is not includible in the settlor's gross estate will be held for the benefit of the spouse in a bypass trust. Section 4.06 sets forth the administrative and distributive provisions of the bypass trust.

Inclusion of a bypass trust in this kind of instrument is optional. Many trusts simply use one set of provision for the spouse that can qualify for the QTIP election if necessary. If only one set of provisions will work regardless of whether the trust is included in the settlor's gross estate, then the "dual" trust approach need not be used. The same true with respect to the "sprinkling trust" created in Section 4.07; inclusion of such provisions is not required.

A bypass trust is designed to provide lifetime benefits to a surviving spouse but to escape taxation in (or "bypass") the surviving spouse's estate on his or her death. A properly drafted bypass trust can confer substantial economic benefit on the surviving spouse while limiting the surviving spouse's interests in and powers over the trust in such a way that the surviving spouse will not be deemed the owner of the trust for federal estate tax purposes. On the surviving spouse's death, the trust can be distributed or held for remainder beneficiaries, such as the settlor's children. For a general discussion of bypass trusts, see § 61.212[1][f].

**[k] Administration of Generation-Skipping Trusts**

Section 4.10 of this trust governs the administration of any trust created by the trust instrument in which there is property that is or may become subject to the federal generation-skipping transfer tax [*see I.R.C. §§ 2601-2664*]. It should be noted that the GST tax has been repealed effective for generation-skipping transfers after 2009 [*I.R.C. § 2664*]. Until then, however, it remains in effect. Section 4.10 is designed to give the settlor's executor flexibility to eliminate or minimize any generation-skipping transfer tax that would otherwise be due after the settlor's death.

Before discussing the details of Section 4.10, it is important to note that this section--which can be a key provision in revocable inter vivos or testamentary trusts--reflects only "catch up" planning at best in the context of an irrevocable insurance trust. In that context, if there are GST concerns, they should be addressed by the settlors at the time contributions are made to the trust. For example, if a settlor contributes \$30,000 to the trust, subject to Crummey rights, the trustee pays the premium, and then the settlor dies, the trustee collects the proceeds of the policy (say \$1,000,000). If the settlor had timely allocated GST exemption to the *contribution*, it would have taken only \$30,000 of the settlor's exemption to make the entire trust exempt [*see I.R.C. §§ 2010(c), 2631(a), (c), 2632*]. On the other hand, if the settlor

relies on the trustee and executor to coordinate the allocation of the exemption after the settlor's death, it will take the \$1 million of the settlor's GST exemption to make the entire trust exempt [see I.R.C. §§ 2010(c), 2631(a), (c), 2632]. Clearly, therefore, if GST problems are anticipated, the exemption should be allocated a bit each year. This situation also may present a good leveraging opportunity to apply the exemption a bit at a time and intentionally create a multi-generational, long-lasting trust to take full advantage of the exemption.

Nevertheless, a provision such as Section 4.10 should still be included to provide a safety valve and permit flexibility in postmortem planning. Under Section 4.10, if the executor elects to allocate any portion of the settlor's generation-skipping transfer tax exemption [see I.R.C. §§ 2010(c), 2631(a), (c)] to any property in any trust to which Section 4.10 applies, that section requires or permits the executor to split the trust in question into two trusts, one (called the Exempt Trust, with an "inclusion ratio" of zero) which is exempt from the tax and the other (the Non-Exempt Trust, with an "inclusion ratio" of one) which is not. The trustee is then given discretion to make payments and distributions to "non-skip" beneficiaries [see I.R.C. § 2613(b) ("non-skip person" defined)], such as children, from the non-exempt trust, and payments and distributions to beneficiaries who are "skip persons" [see I.R.C. § 1613(a) ("skip person" defined)], such as grandchildren, from the exempt trust. This will ensure optimal utilization of the settlor's GST exemption [see I.R.C. §§ 2010(c), 2631(a), (c)].

A trust may be divided for generation-skipping transfer tax purposes if division is required by the trust instrument [Treas. Reg. § 26.2654-1(b)(1)(i)], or if either local law or the governing instrument gives the trustee discretion to divide it [Treas. Reg. § 26.2654-1(b)(1)(ii)]. When a trust is divided pursuant to the trustee's discretionary authority, however, the terms of each of the new trusts must provide for the same succession of interests and beneficiaries as are provided in the original trust, and the division must occur (or a reformation proceeding, if required, must be commenced) before the date prescribed for filing the federal estate tax return (including any extensions granted) for the estate of the transferor [Treas. Reg. § 26.2654-1(b)(1)(ii)]. The new trusts may be funded on either a fractional or a pecuniary basis, but funding on a fractional basis is required unless the trust instrument specifically requires funding on a pecuniary basis [Treas. Reg. § 26.2654-1(b)(1)(ii)(C)(1)]. If a trust is funded on a fractional basis, the separate trusts need not be funded with a pro rata portion of each asset held by the original trust, but the funding must be based on the fair market value of the assets on the date of funding or done in a manner that fairly reflects the net appreciation or depreciation in the value of the assets from the valuation date to the date of funding [Treas. Reg. § 26.2654-1(b)(1)(ii)(C)(1)]. If the trust instrument requires pecuniary funding, the trustee must pay interest on the pecuniary amount unless it is set aside within 15 months after the date of death [Treas. Reg. § 26.2654-1(b)(1)(ii)(C)(2); see Treas. Reg. §§ 26.2642-2(b)(4)(i), (ii), 26.2654-1(a)(1)(ii)]. Further, if the pecuniary amount is payable in kind on the basis of value other than the date of distribution value of the assets, the assets must be allocated in a manner that fairly reflects net appreciation or depreciation in the assets from the valuation date to the date of payment [Treas. Reg. § 26.2654-1(a)(1)(ii)(B)].

Dividing trusts in this way will make it easier to compute generation-skipping transfer taxes on distributions made from the new trusts. Following division of the trust, the executor or trustee will have discretion to allocate the transferor's GST exemption to the separate trusts [Treas. Reg. § 26.2654-1(b)(3)]. Discretionary invasions of principal can be made to children first from the non-exempt trust. Because the children will be non-skip persons, no generation-skipping transfer tax will be due as a result of these distributions. Meanwhile, the exempt trust will continue to grow for the benefit of future generations.

Furthermore, different investment objectives can be pursued for each trust. For example, growth-oriented investments may be pursued by the exempt trust, while income-oriented investments can be held in the non-exempt trust.

If the settlor's estate is so large that generation-skipping transfer taxes are unavoidable, mandatory division may be preferable to discretionary division. If, however, a division would create very small exempt trusts, discretionary division may be preferable, particularly if the trusts are designed to terminate in favor of a non-skip person when he or she reaches a specified age. Because the chance of actually incurring a generation-skipping transfer tax in these

circumstances will be rather slight, the executor or trustee may prefer to administer a trust with an inclusion ratio between zero and one rather than administering two trusts, one of which is too small to be administratively convenient.

A provision giving an executor discretion to divide a trust for generation-skipping transfer tax purposes will generally give the executor greater flexibility than a provision requiring division for that purpose. When the executor is given discretion, however, there is a risk that the executor may through inadvertence or neglect fail to make a division that would be advantageous to the estate.

The generation-skipping transfer tax is complex and technical, and strategies for minimizing its impact on an estate require careful planning. For an extended discussion of the tax, see *California Wills Trusts*, Ch. 113, *Generation-Skipping Transfers and Trust Strategies* (Matthew Bender). For further discussion of the comparative advantages and disadvantages of mandatory and discretionary division of trusts for generation-skipping transfer tax purposes, see *California Wills Trusts*, Ch. 113, *Generation-Skipping Transfers and Trust Strategies*, § 113.11[3][b].

## [2] FORM

### Irrevocable Life Insurance Trust; One Settlor

[Name of trust, if desired; e.g., JOHN DOUGLAS WHITE 1997 TRUST]

## DECLARATION OF TRUST

### Article 1: Creation of Trust

1.01. **Parties.** [Identify trustee, e.g., Catherine Archer White] (the "trustee") hereby declares that \_\_\_\_\_ [he or she] has received certain property (the "trust estate") from [identify settlor, e.g., John Douglas White of Los Angeles, California] (the "settlor"), and holds that property in trust to be held, administered, and distributed according to the terms of this instrument.

1.02. **Names of Trusts.** The trusts created by this instrument shall be known collectively as the [set forth name of settlor and year in which established, e.g., John Douglas White 1997 Trust], and each separate trust created under this instrument shall be referred to by adding the name or designation of that separate trust as it appears in the appropriate section of this instrument.

1.03. **Marital Status.** The settlor is married to [name of spouse, e.g., Catherine Archer White], and all references in this trust instrument to the settlor's "[husband or wife]" are to [him or her].

1.04. **Identification of Living Child[ren].** The settlor has [number] living \_\_\_\_\_ [child or children], whose name[s] and date[s] of birth [is or are] as follows:

\_\_\_\_\_ [e.g., Thomas John White, who was born on January 3, 1993]  
 \_\_\_\_\_ Richard Douglas White, who was born on June 16, 1995]  
 \_\_\_\_\_ Elizabeth Catherine White, who was born on August 1, 1997].

1.05. **No Deceased Children.** The settlor has no deceased children.

### Article 2: Trust Estate

2.01. **Definition of Trust Estate.** All property subject to this instrument from time to time is referred to as the "trust

estate" and shall be held, administered, and distributed as provided in this instrument. The trustee shall hold, administer, and distribute the property described in Schedule A, any other property that may be hereafter subject to this trust, and the income and proceeds attributable to all such property, in accordance with the provisions of this instrument.

2.02. **Additions to Trust.** From time to time, the trustee may accept additions to this trust from any source [except the settlor's spouse]. All such additions shall become a part of the trust estate and shall be held, administered, and distributed in accordance with the terms of this instrument. That additional property shall become part of the trust estate upon written acceptance of it by the trustee. Any additions to the trust shall be made by designating in writing the property to be added. However, the titling of any account, deed, or similar asset in the name of the trustee, as trustee of this trust, or any alternate or successor trustee acting under this instrument, shall be deemed to be a transfer to this trust. Any designation by a third party, whether by will, deed, account title designation, or similar transfer, shall also be a transfer to the trust estate.

### Article 3: Rights and Powers of Settlor

3.01. **Irrevocability of Trust.** This trust is irrevocable. It may not be amended, revoked, or terminated, in whole or in part, except as otherwise specified in this instrument.

3.02. **Limitation on Powers of Settlor.** Notwithstanding any other provision of this instrument, the settlor shall not have:

(a) Any right to the possession or enjoyment of the principal or income of the trust estate, or any part of the trust estate, or any right, either alone or in conjunction with any other person, to designate the persons who will possess or enjoy the principal or income of the trust estate, or any part of the trust estate, as those terms are used in *Internal Revenue Code Section 2036*.

(b) Any right to vote (directly or indirectly) any shares of stock of a controlled corporation, as that term is defined in *Internal Revenue Code Section 2036(b)(2)*, that may be part of the trust estate.

(c) Any power or discretion in any capacity whatever, either alone or in conjunction with any other person, to alter, amend, revoke, or terminate the enjoyment of the trust estate, as those terms are used in *Internal Revenue Code Section 2038*.

(d) Any power that is exercisable in favor of the settlor, the settlor's estate, the settlor's creditors, or creditors of the settlor's estate, or any other power that would constitute a general power of appointment, as defined in *Internal Revenue Code Section 2041*.

(e) Any incidents of ownership, as that term is defined in *Internal Revenue Code Section 2042*, as amended, in any insurance policy that is part of the trust estate.

(f) Any power or discretion that would cause the trust estate, or any part of the trust estate, to be included in the gross estate of the settlor under any provisions of the Internal Revenue Code, as amended.

### Article 4: Payments and Distributions

4.01. **Right to Withdraw Gifts.** So long as the settlor is living, the settlor's living children shall have the right to withdraw any gift made to the trust in accordance with the following provisions:

(a) The trustee shall promptly give written notice to each of the settlor's children of each gift made to the trust.

(b) Each of the settlor's children who are then living may withdraw a fraction of the gift equal to one divided by the number of the settlor's children who are then living, or any portion of that fraction; provided, however that the aggregate amounts that each of the settlor's children may withdraw during any calendar year from the gifts to the trust from any one donor shall not exceed the amount which may from time to time be specified for gift tax exclusion in *Internal Revenue Code Section 2503(b)*, as amended, for gifts from one donor to one donee (the "annual exclusion amount") per person; and provided further that the aggregate amount that each of the settlor's children may withdraw during any calendar year from the gifts to the trust from all donors shall not exceed the amount that may from time to time be specified in *Internal Revenue Code Section 2041(b)(2)*, as amended, as the maximum amount of property with respect to which the lapse of a general power of appointment will not be deemed a release of a general power of appointment (the "non-taxable amount").

(c) The power of any person to withdraw a gift as specified in this section must be exercised, if at all, by electing to do so in an instrument in writing delivered to the trustee within 30 days after the later of (1) the date on which the gift is made, or (2) the date on which the person is given notice of the gift.

(d) The right of any person to withdraw a gift as specified in this section is noncumulative. If any person does not withdraw the full amount of the gift or gifts that the person is entitled to withdraw within the time limit specified for exercise of the right, the right to withdraw the amount not withdrawn shall lapse and may not be exercised after the time limit specified.

(e) If any person who has a right to withdraw a gift as specified in this section is a minor or is otherwise subject to any legal incapacity, the trustee shall give the written notice required to be given as specified in this section to the guardian or conservator of that person, and the guardian or conservator may make the withdrawal on behalf of that person. Any property delivered to a guardian or conservator shall be held by the guardian or conservator for the benefit and use of that person.

**4.02. Payment of Income During Settlor's Lifetime.** While the settlor is living, the trustee shall apply so much of the net income of the trust, if any, remaining after the withdrawals provided in Section 4.01 as may be necessary to pay the premiums on any and all policies of life insurance on the settlor's life which are part of the trust estate. If the net income of the trust is insufficient for that purpose, the trustee may apply so much of the principal of the trust remaining after whose withdrawals as may be necessary to pay those premiums. During the lifetime of the settlor's [wife *or* husband], the trustee shall pay to or apply for the benefit of the settlor's [wife *or* husband] as much of the net income of the trust remaining after those withdrawals and those income payments as the trustee, in the trustee's discretion, deems necessary for the health, education, support, and maintenance of the settlor's [wife *or* husband]. If the settlor survives the settlor's [wife *or* husband], the trustee shall, after the death of the settlor's [wife *or* husband], pay to or apply for the benefit of \_\_\_\_\_ [designate alternate beneficiary or beneficiaries, e.g., the settlor's then-living children] \_\_\_\_\_ [specify period during which payments will be made, e.g., during their lifetimes or until \_\_\_\_\_ (specify condition upon which payment of all income will cease, e.g., the youngest child reaches the age of 25 years)], as much of the net income of the trust, if any, remaining after those withdrawals and those income payments as the trustee, in the trustee's discretion, deems necessary for the [to specify an "ascertainable standard": health, education, support, and maintenance *or* specify some other standard, e.g., comfort, welfare, and happiness] of each of them. In making these payments, the trustee may pay to or apply more for some beneficiaries than for others, and may make payments to or for one or more beneficiaries to the exclusion of others. All decisions of the trustee regarding payments under this subsection, if any, are within the trustee's discretion and shall be final and incontestable by anyone. All payments made pursuant to this provision shall be made in monthly or other convenient installments, but not less often than annually. The trustee shall accumulate and add o principal any income not distributed.

**4.03. Disposition of Trust Estate If Settlor Is Survived by [Wife *or* Husband].** If the settlor is survived by \_\_\_\_\_ [his wife *or* her husband], and upon the death of the settlor any part of the trust estate is includible in the gross estate of the settlor for federal estate tax purposes, then upon the death of the settlor the trustee

shall hold, administer and distribute the part that is includible in the gross estate of the settlor for federal estate tax purposes as a single trust for the benefit of the settlor's [wife *or* husband] in accordance with Section 4.08 of this instrument applicable to the QTIP Trust. If the settlor is survived by \_\_\_\_\_ [his wife *or* her husband], and upon the death of the settlor any part of the trust estate is not includible in the gross estate of the settlor for federal estate tax purposes, then upon the death of the settlor the trustee shall hold, administer and distribute the part that is not includible in the gross estate of the settlor for federal estate tax purposes as a single trust for the benefit of the settlor's [wife *or* husband] in accordance with Section 4.09 of this instrument applicable to the Bypass Trust.

**4.04. Disposition of Trust Estate If Settlor Is Not Survived by [Wife *or* Husband].** If the settlor is not survived by \_\_\_\_\_ [his wife *or* her husband], then on the death of the settlor the trustee shall hold, administer, and distribute the trust as a single trust for the benefit of the children of the settlor and the issue of any deceased children of the settlor in accordance with Section 4.10 of this instrument applicable to the Sprinkling Trust. If the children of the settlor all predecease the settlor without leaving issue who survive the settlor, the trustee shall distributed any undistributed balance of the trust property outright to [*alternative disposition, e.g.,* the heirs of the settlor *or* the Los Angeles County chapter of the American Heart Association].

**4.05. QTIP Trust.** The trustee shall hold, administer, and distribute the assets of the QTIP Trust as follows:

(a) If the executor has elected that the trust qualify for the federal estate tax marital deduction under *Internal Revenue Code § 2056(b)(7)* (or any equivalent successor section), the trustee shall thereafter administer the trust in a manner that will not invalidate the election or disqualify the property in which the settlor's [husband *or* wife] has a qualifying income interest for life. Any provisions of this trust that could be deemed to invalidate the qualification under *Internal Revenue Code § 2056(b)(7)* shall be disregarded.

(b) If an election is made under *Internal Revenue Code Section 2056(b)(7)* (or any equivalent successor section) to qualify some but not all of the property allocated to the QTIP Trust for the federal estate tax marital deduction, the QTIP Trust shall be divided into two separate trusts pursuant to the terms of the election. The division shall be based on the fair market value of the trust assets at the time of the division. One of the trusts shall contain the share of the trust assets for which the election has been made and shall be designated as the Qualifying QTIP Trust. The other trust shall contain the share of the trust assets for which the election has not been made and shall be designated the Nonqualifying QTIP Trust. The Nonqualifying QTIP Trust shall be subject to all of the rights, interests, powers, and other terms prescribed for the Qualifying QTIP Trust. If a partial election is made and the trust is divided into two separate trusts, the terms "trust," "marital deduction trust," and "QTIP Trust," as used in this section and elsewhere in this trust instrument, shall be construed in a manner consistent with the provisions of this subsection of the trust instrument.

[*Optional:* (c) The executor of the settlor's estate shall notify the trustee in writing if the executor intends to make an election under *Internal Revenue Code Section 2056(b)(7)* (hereafter referred to as "the estate tax election") and also intends to make an election under *Internal Revenue Code Section 2652(a)(3)* (or any equivalent successor section) to have the estate tax election disregarded for federal generation-skipping transfer tax purposes with respect to some but not all of the property in the QTIP Trust. Upon receipt of written notification, the trustee shall divide the QTIP Trust into two separate trusts, to be known as the Exempt QTIP Trust and the Non-Exempt QTIP Trust, in accordance with Section 4.13 of this trust instrument concerning the administration of generation-skipping trusts. Property allocated to the Exempt QTIP Trust must be fairly representative of the appreciation or depreciation of all QTIP Trust property. The executor shall then actually make the election under *Internal Revenue Code Section 2652(a)(3)* with respect to the Exempt QTIP Trust and not the Non-Exempt QTIP Trust. If a partial estate tax election is to be made, then this subsection, if applicable at all, shall apply only with respect to the Qualifying QTIP Trust. The trustee shall not be liable for relying on the written instructions of the executor when acting in accordance with the provisions of this subsection. Nothing in this subsection shall be construed as being inconsistent with Section 4.13 of this trust instrument concerning the administration of generation-skipping trusts, which shall apply to the QTIP trust without regard to the application of the remainder of this subsection.

(d) The trustee shall pay to or apply for the benefit of the settlor's [husband *or* wife], so long as the settlor's [husband *or* wife] lives, the entire net income of the trust, in monthly or other convenient installments as agreed upon by the settlor's [husband *or* wife] and the trustee, but not less often than annually. [*Optional*: In determining the net income of the trust distributable to the settlor's \_\_\_\_\_ (husband *or* wife), the trustee shall include all income that must be considered as income in order for the trust to qualify for the marital deduction under the federal estate tax law, and shall make no deductions from gross income that would prevent the trust from qualifying for that marital deduction, notwithstanding any contrary provisions of this instrument or any applicable provisions of state law. Assuming the trust has qualified under *Internal Revenue Code Section 2056(b)(7)*, then any grant of rights, powers, discretion, and authority to the trustee in any provision of this instrument or any statute relating thereto shall not be effective if and to the extent that the provision or statute, if effective, would disqualify, for federal estate tax purposes, the marital deduction trust held under this section. It is the intention of the settlors that the settlor's \_\_\_\_\_ (husband *or* wife), as the beneficiary of a marital deduction trust, shall have substantially that degree of beneficial enjoyment of the trust during \_\_\_\_\_ (his *or* her) lifetime that the principles of the law of trusts accord to a person who is unqualifiedly designated as the life beneficiary of a trust, and the trustee shall not exercise the trustee's discretion in a manner that is not in accord with this expressed intention. It is also the intention of the settlor that the trust produce for the settlor's \_\_\_\_\_ (husband *or* wife) during \_\_\_\_\_ (his *or* her) lifetime the income, or that the settlor's \_\_\_\_\_ (husband *or* wife) shall have the benefit of the trust property, that is consistent with the value of the trust property and with its preservation.]

(e) The trustee shall distribute to or apply for the benefit of the settlor's spouse, during \_\_\_\_\_ [his *or* her] lifetime, as much of the principal of the trust as the trustee, in the trustee's discretion, deems necessary [, when added to the income payments from this trust,] for \_\_\_\_\_ [his *or* her *or* his *or* her] [*to specify "ascertainable standard": health, education, support, and maintenance or specify some other standard, e.g., comfort, welfare, and happiness*]. All decisions of the trustee regarding payments under this subsection, if any, are within the trustee's discretion and shall be final and incontestable by anyone.

(f) On the death of the settlor's [husband *or* wife], the trustee, in the trustee's discretion, may pay the [taxes,] debts[, and expenses arising on \_\_\_\_\_ [his *or* her] death, unless the trustee determines that other adequate provisions have been made for payment of these expenses. Any payments made under this section [may be made out of income or principal (or partly from each) of the QTIP Trust or shall be made first out of the income or principal of the QTIP Trust, and then out of the income or principal of the Bypass Trust to the extent that the QTIP Trust is insufficient for that purpose].

(g) Upon the death of the settlor's [husband *or* wife], the net income of the trust then accrued but uncollected and all net income remaining in the hands of the trustee shall be distributed to the estate of the settlor's [husband *or* wife]. The trust principal shall be dealt with as set forth below in this section.

(h) The trustee shall determine from the personal representative of the estate of the settlor's [husband *or* wife] the amount of the federal estate tax allocable to the property of the trust by reason of *Internal Revenue Code Section 2207A* and shall set aside a portion of the trust principal for the purpose of paying that tax upon written demand of the personal representative.

(i) On the death of the settlor's [husband *or* wife], the trustee shall distribute the balance of the principal of the QTIP Trust (or all of the QTIP Trust principal, if the personal representative of the estate of the settlor's [husband *or* wife] does not in due course make written demand), \_\_\_\_\_ [*if generation-skipping transfer taxes are not a concern*: to the Bypass Trust, to be held, administered, and distributed as part of the Bypass Trust *or to account for generation-skipping transfer tax consequences*: in the manner specified in Section 4.09 applicable to the Bypass Trust. However, the property disposed of pursuant to this subsection shall not be considered to be a part of the Bypass Trust unless this trust and the Bypass Trust have the same inclusion ratios for federal generation-skipping transfer tax

purposes].

**4.06. Bypass Trust.** The trustee shall hold, administer, and distribute the assets of the Bypass Trust as follows:

(a) The trustee shall pay to or apply for the benefit of the settlor's [husband *or* wife] all of the net income of the trust, in monthly or other convenient installments as agreed upon by the settlor's [husband *or* wife], but not less often than annually, for life.

(b) The trustee shall distribute to or apply for the benefit of the settlor's [husband *or* wife] for life, as much of the principal of the trust as the trustee, in the trustee's discretion, deems necessary [, when added to the income payments from this trust,] for \_\_\_\_\_[his *or* her] health, education, support, and maintenance. All decisions of the trustee regarding payments under this subsection, if any, are within the trustee's discretion and shall be final and incontestable by anyone.

(c) On the death of the settlor's [husband *or* wife], the trustee shall distribute the trust property then remaining, including all principal and undistributed income, to the person or persons appointed by the settlor's [husband *or* wife] from among \_\_\_\_\_[*identify class of permissible appointees in a manner that will assure creation of a limited rather than a general power of appointment, e.g., the issue of the settlor then living or his issue then living or her issue then living*]. The appointment shall be in the amounts or proportions, and on such terms and conditions, outright or in trust, or by creating further powers of appointment, as the settlor's [husband *or* wife] shall appoint by \_\_\_\_\_[his *or* her] valid last will specifically referring to and exercising this power of appointment. If any of the property subject to this power of appointment is not effectively appointed by the settlor's [husband *or* wife], that property shall be retained or distributed by the trustee as follows:

(1) If any of the settlor's children are then living and under the age of [*e.g.*, 25 years], the trustee shall hold, administer, and distribute the trust in accordance with the provisions of Section 4.10 of this instrument relating to the Sprinkling Trust; and

(2) If no children of the settlor are then living, the trustee shall distribute the trust in accordance with the provisions of Section 4.08 of this instrument.

**4.07. Sprinkling Trust.** The trustee shall hold, administer, and distribute the assets of the Sprinkling Trust as follows:

(a) The trustee shall pay or distribute to or apply for the benefit of any one or more of the children of the settlor who are under the age of [*e.g.*, 25 years], their names and identities to be determined as of the date of the settlor's death or the death of the settlor's spouse, whichever occurs last, until the youngest child reaches the age of [*e.g.*, 25 years], in monthly or other convenient installments, but not less often than annually, as much of the net income of the trust, and as much of the principal of the trust, as the trustee, in the trustee's discretion, deems necessary for the [*to specify "ascertainable standard": health, education, support, and maintenance or specify some other standard, e.g., comfort, welfare, and happiness*] of each of them. In making these payments and distributions, the trustee may pay, distribute, or apply more to or for some beneficiaries than others, and may make payments or distributions to or for one or more beneficiaries to the exclusion of others. [No amount paid out or applied need thereafter be repaid to the trustee or restored to the trust.] All decisions of the trustee regarding payments under this subsection, if any, are within the trustee's discretion and shall be final and incontestable by anyone. The trustee shall accumulate and add to principal any net income not distributed.

(b) When the settlor's youngest child reaches the age of [*e.g.*, 25] years, the trustee shall distribute among the children of the settlor then living, in equal shares, an amount from the trust principal equal to [*fraction or percentage, e.g., one half or fifty percent*] of the fair market value of the principal of the trust, determined as of the first day of the calendar month preceding the month in which the distribution is made.

(c) If any of the children of the settlor are deceased at the time of distribution and leave issue surviving, the share that would have been taken by that child had \_\_\_\_\_ [he or she or he or she] survived shall be divided among \_\_\_\_\_ [his or her or his or her] issue \_\_\_\_\_ [in the manner provided in California Probate Code Section \_\_\_\_\_ (240 or 246 or 247) or in equal shares, regardless of whether or not all such issue are members of the same generation]. [Optional: Any sum that would otherwise be distributed to a person who is a minor shall be retained in trust until \_\_\_\_\_ (specify event triggering distribution of balance of trust estate, e.g., the youngest child of the settlor(s) reaches the age of 30 years) and shall be distributed outright to the beneficiary at that time.]

(d) When the youngest child of the settlor reaches the age of [e.g., 30] years, the trustee shall distribute to the children of the settlor then living, in equal shares, the balance of the trust property. If any of the children of the settlor are deceased at the time of distribution and leave issue surviving, the share that would have been taken by that child had \_\_\_\_\_ [he or she or he or she] survived shall be divided among [his or her or his or her] issue \_\_\_\_\_ [in the manner provided in California Probate Code Section \_\_\_\_\_ (240 or 246 or 247) or in equal shares, regardless of whether or not all such issue are members of the same generation].

(e) If all the children of the settlor die without surviving issue before the trust property has been distributed as provided in this section, the trustee shall distribute any undistributed balance of the trust property outright to [alternative disposition, e.g., the Los Angeles County chapter of the American Heart Association or the heirs of the settlor].

**4.08. Distribution of Remainder.** If, at any time before full distribution of the trust estate, \_\_\_\_\_ [designate beneficiaries of trust, e.g., the settlor's wife and children or the settlor's children or the settlor's children or the settlor's issue or the beneficiaries designated in this instrument] are all deceased and no other disposition of the trust estate is directed by this instrument, all of the remaining portion of the trust estate shall then be distributed to \_\_\_\_\_ [specify pattern of distribution or distributee, e.g., the San Francisco Charitable Works Institute or the person or persons who are the settlor's heirs at law, in the manner provided in California Probate Code Section \_\_\_\_\_ (240 or 246 or 247)].

**4.09. Trustee's Power to Determine Income and Principal.** Unless otherwise specifically provided in this instrument, the determination of all matters with respect to what is principal and income of any trust under this instrument and the apportionment and allocation of receipts, expenses, and other charges between principal and income shall be governed by the provisions of the California Revised Uniform Principal and Income Act from time to time existing. The trustee in the trustee's discretion shall determine any matter not provided for either in this instrument or in the California Revised Uniform Principal and Income Act.

**4.10. Administration of Generation-Skipping Trusts.** The provisions of this section apply to any trust under this instrument that is created upon the settlor's death and in which there is property that is or may become subject to the federal generation-skipping transfer tax:

(a) Upon written notification by the settlor's executor that the executor intends to allocate any part of the generation-skipping transfer tax exemption that is available to the settlor under *Internal Revenue Code Section 2631(a)* to some but not all of the property in any trust to which this section applies, the trustee [shall or may, in the trustee's discretion,] divide that trust into two separate trusts, to be designated as the Exempt Trust and the Non-Exempt Trust. [If trustee has discretionary power to divide trusts: If the trustee elects to divide a trust in the manner provided in this section, the or, if division of trusts is mandatory rather than discretionary: The] Exempt Trust shall contain the share of the property of that trust equal in value to the amount of the generation-skipping transfer tax exemption that the executor intends to allocate to the trust. The Non-Exempt Trust shall contain the balance of the property of that trust. It is the settlor's intention that the executor then actually allocate the generation-skipping transfer tax exemption to the Exempt Trust and not to the Non-Exempt Trust so that the Exempt Trust shall have an inclusion ratio of zero for federal

generation-skipping transfer tax purposes and the Non-Exempt Trust shall have an inclusion ratio of one for federal generation-skipping transfer tax purposes. The trustee shall not be liable for relying on the written instructions of the executor when acting in accordance with this subsection.

(b) In allocating assets between the Exempt Trust and Non-Exempt Trust for purposes of this section, the trustee shall [for *pecuniary allocation*: allocate the trust assets between the Exempt Trust and Non-Exempt Trust in cash or in kind, or partly in each, on a pro rata or non pro rata basis, and in undivided interests or not or, for *fractional allocation*: allocate to each trust a fractional share of each and every substantial interest or right held by the trust being divided]. [If preceding sentence provides for *pecuniary allocation*, add: If the allocation is not made within 15 months from the date of the settlor's death, the trustee shall pay interest, at the legal rate, from the date of the settlor's death to the date of distribution. For purposes of allocation under this section, assets shall be valued at their values \_\_\_\_\_ (to use *date of distribution values*: on the date or dates of distribution or, to use *valuation for estate tax purposes*: as finally determined for federal estate tax purposes; provided that any assets allocated in kind shall be allocated between the Exempt Trust and the Non-Exempt Trust in a manner that fairly reflects the net appreciation or depreciation in the value of the assets in the trust being divided, measured from the date of the settlor's death to the date of payment).]

(c) Regardless of whether or not subsection (a) applies, if the amount of the settlor's generation-skipping transfer tax exemption actually allocated by the executor to a trust to which this section applies is equal to the value of the property of that trust so that the entire trust has an inclusion ratio of zero for federal generation-skipping transfer tax purposes, the entire trust shall be referred to as the Exempt Trust. On the other hand, if no part of the settlor's generation-skipping transfer tax exemption is actually allocated to the trust by the executor so that the entire trust has an inclusion ratio of one for federal generation-skipping transfer tax purposes (or if the settlor is not the transferor of that trust for generation-skipping transfer tax purposes), the entire trust shall be referred to as the Non-Exempt Trust.

(d) The trustee may, but is not required to, administer the trusts under this instrument to which this section applies in such a manner that distributions made during the trust terms to "skip persons" (as defined in *Internal Revenue Code Section 2613(a)* or any equivalent successor section) are made from Exempt Trusts, and distributions made during the trust terms to "non-skip persons" (as defined in *Internal Revenue Code Section 2613(b)* or any equivalent successor section) are made from Non-Exempt trusts.

[Optional: (e) If the trustee determines that the burdens of generation-skipping transfer taxes, income taxes, and death taxes on a Non-Exempt Trust, the settlor's estate, or the beneficiaries of that trust would be reduced, the trustee may petition the court to amend the trust to grant to one or more trust beneficiaries who are non-skip persons in a generation below the settlor a general testamentary power of appointment over all or a specified portion of that Non-Exempt Trust. Any power to amend the trust is within the discretion of the court, and the preceding sentence shall not be construed to give the trustee any power that the trustee does not already have under California trust law to petition the court under the appropriate circumstances, nor shall it be construed to limit the power of the trustee or any beneficiary under the California trust law to petition the court under the appropriate circumstances.]

(f) The purpose of this section is to allow the trustee to administer the trusts so as to decrease the amount of generation-skipping transfer taxes owed on generation-skipping transfers from the trusts. The trustee shall balance that consideration against any other tax and non-tax considerations, and may disregard the generation-skipping transfer tax consequences to the extent that the trustee determines that doing so will allow the trustee to carry out the settlor's intentions in creating the trusts. All decisions of the trustee under this subsection are within the trustee's discretion and shall be final and incontestable by anyone.

(g) If, in the trustee's judgment, at any time after the execution of this trust instrument, any statute, regulation, court decision, or administrative ruling imposes different or additional requirements on the trust in connection with the generation-skipping transfer tax the trustee may petition the court to amend the terms of the trust to meet those requirements and achieve the purpose of this section.

(h) If, upon the death of the settlor's surviving spouse, (1) the settlor's surviving spouse is considered to be the transferor of any Non-Exempt Trust established by this instrument for generation-skipping transfer tax purposes, and (2) the surviving spouse's executor allocates any part of the generation-skipping transfer tax exemption that is available to the settlor's surviving spouse under *Internal Revenue Code Section 2631(a)* (or any equivalent successor section) to that Non-Exempt Trust so that the entire trust then has an inclusion ratio of zero for federal generation-skipping transfer tax purposes, that trust shall then be considered to be an Exempt Trust for purposes of this section of the trust instrument.

(i) In no event may the trustee exercise any power under this section in a manner that will impair the marital deduction.

#### Article 5: Trustee

**5.01. Successor Trustee.** If the office of trustee becomes vacant by reason of death, incapacity, or any other reason, and no successor trustee or co-trustees have been designated under any other provisions of this trust instrument, then [name(s) and description(s), e.g., Robert James White, who resides at 14000 Exposition Road, North Hollywood, California, or Double Eagle National Bank of Los Angeles, California, or Robert James White, who resides at 14000 Exposition Boulevard, North Hollywood, California, and Double Eagle National Bank of Los Angeles, California,] shall be successor [trustee or co-trustees]. If \_\_\_\_\_ [name(s) of successor trustee or co-trustees] [is or are all] unwilling or unable to serve as successor trustee, a new trustee or co-trustees shall be appointed by the court. [To limit class of permissible individual trustees, add appropriate limitation, e.g., Any individual trustee or co-trustee not specifically named in this section who is appointed under this section shall be appointed from among the issue of the settlor, unless no issue of the settlor is able and willing to serve.]

[Optional: **5.02. Replacement of Co-trustee.** If, at any time when two or more persons or entities are serving as co-trustees, any one or more (but less than all) of them are unable or unwilling for any reason to continue to serve as co-trustees, and no successor co-trustee has been designated under any other applicable provision of this trust instrument, a new co-trustee may be appointed by the court. If no new co-trustee is appointed, the remaining co-trustee or co-trustees shall have full power to act as trustee or co-trustees and to continue the trust administration.]

**5.03. Definition of "Trustee."** Reference in this instrument to "the trustee" shall be deemed a reference to whoever is serving as trustee or co-trustees, and shall include alternate or successor trustees or co-trustees, unless the context requires otherwise.

**5.04. Bond.** \_\_\_\_\_ [No bond or undertaking shall be required of any (optional: corporate) trustee named in or Bond shall be required of any trustee serving under] this instrument.

**5.05. Compensation of Trustee.** The trustee shall be entitled to reasonable compensation for services rendered, payable without court order. [Optional: The settlor believes that a fee of \$\_\_\_\_\_ is a reasonable annual amount to compensate the trustee for all of the ordinary services that will be required of the trustee during an annual period. Additional compensation in a reasonable amount may be proper to compensate the trustee for any extraordinary services rendered by the trustee, all without court order.] [Optional: If a trustee serves for only part of a calendar year, the annual compensation shall be prorated according to the number of days during that year that the trustee was acting as trustee during that year.]

**5.06. Custody of Life Insurance Policy.** The trustee shall keep custody of any life insurance policy that is part of the trust estate or that designates the trust as beneficiary.

**5.07. Life Insurance Powers.** To carry out the purposes of the trusts created under this instrument, and subject to any limitations stated elsewhere in this instrument, the trustee shall, in addition to the other powers conferred on the trustee by law and by this instrument, have the power to do all of the following:

- (a) Purchase life insurance on the life of any person.
- (b) Exercise all incidents of ownership, options, benefits, rights, and privileges with respect to any life insurance policy that is part of the trust estate.
- (c) Pay premiums, assessments, or other charges on any life insurance policy that is part of the trust estate or that may designate the trust as beneficiary.
- (d) Borrow funds from the insurer in accordance with the terms of any life insurance policy that is part of the trust estate or that may designate the trust as beneficiary, for the purpose of paying any premiums, assessments, or other charges.
- (e) Otherwise do anything necessary or proper to keep any such policy a binding contract of insurance.
- (f) Collect any and all sums payable under any life insurance policy or employee benefit plan, and exercise any of the allowable options for the payment of any such sums. The trustee shall collect any disability payments under any life insurance policy that is part of the trust estate. Notwithstanding any other provision of this instrument, the settlor specifically intends that the trustee retain and continue to hold any life insurance policy transferred to or secured by the trust at any time, without any obligation to diversify any such investment. The trustee shall not be liable to any beneficiary of this trust, the settlor, or any person or entity for the retention of any such life insurance policy, and no beneficiary shall have any right to recoupment or restoration of any loss suffered as the result of any such retention. As a specific limitation of the trustee's liability, the trustee is relieved of any obligation to evaluate the insurance investments annually or otherwise, or to evaluate the degree to which insurance and/or premiums are guaranteed, as well as the effect of company operations on product performance. The trustee has no responsibility to advise the settlor or beneficiaries of any perceived increased investment risk in the maintenance of any such life insurance policies. The trustee is relieved of any obligation to minimize exposure of the beneficiaries in the event of a perceived increase in investment risk attributable to the retention of any such insurance policies. The trustee shall not be liable for failure to maintain any insurance policy in force if the trust assets are insufficient to pay for premiums or assessments currently due on or in connection with that policy.

**5.08. General Powers of Trustee.** To carry out the purposes of the trusts created under this instrument, and subject to any limitations stated elsewhere in this instrument, the trustee shall, in addition to all of the powers now or hereafter conferred on trustees by law, have the power to do all of the following:

- (a) Retain property received into the trust at its inception, or later added to the trust, as long as the trustee considers that retention in the best interests of the trust or in furtherance of the goals of the settlor in creating the trust, as determined from this trust instrument, but subject to the standards of the prudent investor rule as set forth in the California Uniform Prudent Investor Act, as amended from time to time.
- (b) Invest and manage the trust assets as a prudent investor would, by considering the purposes, terms, distribution requirements, and other circumstances of the trust. In satisfying this standard, the trustee shall exercise reasonable care, skill, and caution. The trustee's investment and management decisions respecting individual assets and courses of action must be evaluated not in isolation, but in the context of the trust portfolio as a whole and as a part of an overall investment strategy having risk and return objectives reasonably suited to the trust. Among circumstances that are appropriate to consider in investing and managing trust assets are the following, to the extent relevant to the trust or its beneficiaries:
  - (1) General economic conditions.
  - (2) The possible effect of inflation or deflation.

- (3) The expected tax consequences of investment decisions or strategies.
- (4) The role that each investment or course of action plays within the overall trust portfolio.
- (5) The expected total return from income and the appreciation of capital.
- (6) Other resources of the beneficiaries known to the trustee as determined from information provided by the beneficiaries.
- (7) Needs for liquidity, regularity of income, and preservation or appreciation of capital.
- (8) An asset's special relationship or special value, if any, to the purposes of the trust or to one or more of the beneficiaries.

The trustee may invest in any kind of property or type of investment or engage in any course of action or investment strategy consistent with the standards set forth in the Uniform Prudent Investor Act, as set forth in *Probate Code Sections 16045-16054*, or any successor sections.

- (c) In the trustee's discretion, invest or reinvest in mutual funds, money market funds, investment trusts, regulated investment companies, market funds, and index funds, and in the shares or securities of any such funds or companies, that persons of prudence, discretion, and intelligence acquire for their own account.
- (d) With or without court authorization, sell (for cash or on deferred payments, and with or without security), convey, exchange, partition, and divide trust property; grant options for the sale or exchange of trust property for any purpose, whether the contract is to be performed or the option is to be exercised within or beyond the term of the trust; and lease trust property for any purpose, for terms within or extending beyond the expiration of the trust, regardless of whether the leased property is commercial or residential and regardless of the number of units leased.
- (e) In the trustee's discretion, lend money from the trust estate to the probate estate of the settlor, irrespective of whether the trustee and the executor may be the same person, provided that any such loan is adequately secured and bears a reasonable rate of interest.
- (f) In the trustee's discretion, use funds or credit of the trust estate to purchase property from the probate estate of the settlor at its fair market value as determined by the trustee in the trustee's discretion.
- (g) Engage in any transactions with the personal representative of the estate of the settlor that are in the best interest of any trust created in this instrument.
- (h) Manage, control, improve, and maintain all real and personal trust property.
- (i) Subdivide or develop land; make or obtain the vacation of plats and adjust boundaries, or adjust differences in valuation on exchange or partition by giving or receiving consideration; and dedicate land or easements to public use with or without consideration.
- (j) Make ordinary or extraordinary repairs or alterations in buildings or other trust property, demolish any improvements, raze existing party walls or buildings, and erect new party walls or buildings, as the trustee deems advisable.

(k) Enter into oil, gas, and other mineral leases, on terms deemed advisable by the trustee; enter into any pooling, unitization, repressurization, community, or other types of agreements relating to the exploration, development, operation, and conservation of mineral properties; drill, mine, and otherwise operate for the development of oil, gas, and other minerals; contract for the installation and operation of absorption and repressuring plants; and install and maintain pipelines. Any such leases or agreements may be for a term within or extending beyond the term of the trust.

(l) In the trustee's discretion, abandon any [unproductive or wasted] trust asset or interest therein.

(m) Employ and discharge agents and employees, including but not limited to attorneys, accountants, investment and other advisers, custodians of assets, property managers, real estate agents and brokers, and appraisers, to advise and assist the trustees in the management of any trusts created under this trust instrument, and compensate them from the trust property. [*Optional*: The agents and employees may be associated or affiliated with the trustee, or may be descendants or other persons related to the trustee or to the settlor, or a company associated with any such persons.] [*Optional*: The trustee is entitled to rely on the advice of any professional advisers employed under this provision. Reasonable compensation paid to any such agents or employees shall not diminish the compensation to which the trustee is otherwise entitled.]

(n) With respect to securities held in trust, exercise all the rights, powers, and privileges of an owner, including, but not limited to, the power to vote, give proxies, and pay assessments and other sums deemed by the trustee necessary for the protection of the trust property; participate in voting trusts, pooling agreements, foreclosures, reorganizations, consolidations, mergers, and liquidations, and, in connection therewith, deposit securities with and transfer title to any protective or other committee under such terms as the trustee deems advisable; exercise or sell stock subscription or conversion rights; and accept and retain as investments of the trust any securities or other property received through the exercise of any of the foregoing powers.

(o) Hold securities or other trust property in the trustee's own name or in the name of a nominee, without disclosure of the trust, or in unregistered form, so that title may pass by delivery.

(p) Deposit securities in a securities depository that is either licensed or exempt from licensing.

(q) Borrow money for any trust purpose from any person or entity, on such terms and conditions as the trustee deems advisable, and obligate the trust for repayment; encumber any trust property by mortgage, deed of trust, pledge, or otherwise, whether for terms within or extending beyond the term of the trust, as the trustee deems advisable, to secure repayment of any such loan; replace, renew, and extend any such loan or encumbrance; and pay loans or other obligations of the trust deemed advisable by the trustee.

(r) Procure and carry, at the expense of the trust, insurance in such forms and in such amounts as the trustee deems advisable to protect the trust property against damage or loss, and to protect the trustee against liability with respect to third persons.

(s) Enforce any obligation owing to the trust, including any obligation secured by a deed of trust, mortgage, or pledge held as trust property, and purchase any property subject to a security instrument held as trust property at any sale under that instrument.

(t) Extend the time for payment of any note or other obligation held as an asset of, and owing to, the trust, including accrued or future interest, and extend the time for repayment beyond the term of the trust.

(u) Pay or contest any claim against the trust; release or prosecute any claim in favor of the trust; or, in lieu of payment, contest, release, or prosecution, adjust, compromise, or settle any such claim, in whole or in part, and with or without consideration.

(v) At trust expense, prosecute or defend actions, claims, or proceedings of whatever kind for the protection of the trust property and of the trustee in the performance of the trustee's duties, and employ and compensate attorneys, advisers, and other agents as the trustee deems advisable.

**5.09. Power to Combine Trust Assets.** Each trust created under this trust instrument shall constitute a separate trust and be administered and accounted for accordingly; however, the assets of all of the trusts may be combined and held for the trust beneficiaries without physical division into separate trusts until time of distribution.

**5.10. Early Termination of Trusts.** The trustee shall have the power, in the trustee's discretion, to terminate any trust created under this trust instrument whenever the fair market value of the trust falls below [*specify amount, e.g., \$25,000*], or becomes so small in relation to the costs of administration as to make continuing administration uneconomical. Upon termination, the trustee shall distribute the principal and any accrued or undistributed net income to the income beneficiaries in proportion to their shares of the income. If no fixed amount of income is payable to specific beneficiaries, the trustee shall distribute the principal and any accrued or undistributed net income in equal shares to those beneficiaries who would then be entitled to income payments from the trust.

**5.11. Division or Distribution in Cash or in Kind.** In order to satisfy a pecuniary gift or to distribute or divide trust assets into shares or partial shares, the trustee may distribute or divide those assets in kind, or divide undivided interests in those assets, or sell all or any part of those assets and distribute or divide the property in cash, in kind, or partly in cash and partly in kind. Property distributed to satisfy a pecuniary gift under this trust instrument shall be valued at its fair market value at the time of distribution.

**5.12. Payments to Incapacitated Persons.** If at any time any trust beneficiary is a minor, or it appears to the trustee that any trust beneficiary is incapacitated, incompetent, or for any other reason not able to receive payments or make intelligent or responsible use of the payments, the trustee, in lieu of making direct payments to the trust beneficiary, may make payments to the beneficiary's conservator or guardian; to the beneficiary's custodian under the Uniform Gifts to Minors Act or Uniform Transfers to Minors Act of any state; to one or more suitable persons as the trustee deems proper, such as a relative of or a person residing with the beneficiary, to be used for the beneficiary's benefit; to any other person, firm, or agency for services rendered or to be rendered for the beneficiary's assistance or benefit; or to accounts in the beneficiary's name with financial institutions. The receipt of payments by any of the foregoing shall constitute a sufficient acquittance of the trustee for all purposes.

**5.13. Grant of Specific Powers Not to Limit Exercise of General Powers.** The enumeration of specific powers under this trust instrument shall not limit the trustee from exercising any other power with respect to any trusts created by this trust instrument that may be necessary or appropriate for the trustee to have and exercise in order to carry out the purposes of the trusts or to permit the trustee to fulfill the trustee's responsibilities and duties with respect to the trust.

**5.14. Trust Distributions Shall Not Discharge Obligations of Support.** Notwithstanding any other provision of this trust instrument, no income or principal of the trust shall be used to discharge, in whole or in part, the legal obligation of any person to support or educate any beneficiary of this trust. In determining the legal obligation of any person to support and educate a beneficiary of this trust, the existence of this trust and the funds made available under it shall not be taken into account.

**5.15. Limitation on Powers That Would Imperil Marital Deduction.** Notwithstanding any other provision of this trust instrument, the trustee shall exercise power and discretion over any trust or trust share designed to qualify for the federal estate tax marital deduction only in a manner consistent with all statutory and regulatory requirements for the full allowance of the marital deduction for that trust or share.

**5.16. Surviving Spouse's Power Over Bypass Trust Not to Constitute General Power of Appointment.**

Notwithstanding any other provision of this trust instrument, at any time that the settlor's surviving spouse is serving as trustee of the Bypass Trust, any power or discretion exercisable by the settlor's surviving spouse with respect to that trust, whether granted by this trust instrument or conferred by law, insofar as that power or discretion may be exercisable to consume, invade, or appropriate property for the benefit of the settlor's surviving spouse, \_\_\_\_\_ [his or her] estate, \_\_\_\_\_ [his or her] creditors, or the creditors of \_\_\_\_\_ [his or her] estate, shall be exercisable only for \_\_\_\_\_ [his or her] health, education, support, and maintenance.

**5.17. Limitations on Trustee's Powers.** Notwithstanding any other provision of this instrument, the powers of the trustee shall be subject to the following limitations:

(a) The trustee shall have no power or discretion with respect to any life insurance policy on the life of the trustee that constitutes an incident of ownership (as that term is used in *Internal Revenue Code Section 2042*, as amended) in that policy.

(b) The trustee shall have no power or discretion with respect to the distribution of income or principal to or for the trustee's benefit, or in satisfaction of the trustee's legal obligations.

(c) If the trustee would, but for this provision, have had any power or discretion described in (a) or (b), above, that power or discretion shall be exercised by the co-trustee, if any, and if there is no co-trustee, by the next-named successor trustee acting as special co-trustee. If the next-named successor trustee shall for any reason fail to qualify or cease to act as special co-trustee, the next-named successor trustee shall act as successor special co-trustee. If all named successor trustees shall for any reason fail to qualify or cease to act as special co-trustee, the trustee shall appoint a successor special co-trustee, other than the trustee so appointing. The responsibilities of the special co-trustee shall be limited to the exercise of powers and discretions under this section.

**5.18. Power to Disclaim or Release Powers.** The trustee may disclaim, release, or restrict the scope of any power or discretion that the trustee may hold in connection with any trust created under this instrument, whether the power or discretion is expressly granted in this instrument or is implied by law. The trustee shall disclaim a power in the manner required by applicable federal or California law. The trustee shall release or restrict any power or discretion by giving written notice to the beneficiary or beneficiaries then entitled to current distribution of income from the trust, specifying the power or discretion to be released or restricted, the nature of the restriction, and, if appropriate, the person or persons to whom the released or restricted power shall pass and be exercisable. If a power is disclaimed, the power shall be available to and exercisable by [*if trust nominates co-trustees: the other trustee or trustees or, if trust nominates a successor trustee: the successor trustee*].

**5.19. Duty to Account.** The trustee shall render accounts at least annually, at the termination of a trust, and upon a change of trustees, to the persons and in the manner required by law.

#### Article 6: Concluding Provisions

**6.01. Perpetuities Saving Clause.** Notwithstanding any other provision of this instrument, every trust created by this instrument[, or by the exercise of any power of appointment created by this instrument,] shall terminate no later than 21 years after the death of the last survivor of [*designate measuring life or lives, e.g., the settlor's issue or the settlor's spouse and issue*] who are alive at the creation of the trust. For purposes of this perpetuities saving clause, a trust shall be deemed to have been created on the date the trust becomes irrevocable or the date of the death of the settlor, whichever occurs first. If a trust is terminated under this section, the trustee shall distribute all of the principal and undistributed income of the trust to the income beneficiaries of the trust in the proportion in which they are entitled (or eligible, in the case of discretionary payments) to receive income immediately before the termination. If that proportion is not fixed by the terms of the trust, the trustee shall distribute all of the trust property to the persons then entitled or

eligible to receive income from the trust \_\_\_\_\_ [specify pattern of distribution, e.g., outright in a manner that, in the trustee's opinion, will give effect to the intent of the settlor in creating the trust, the trustee's decision to be final and incontestable by anyone *or* as a class, in the manner provided in California Probate Code Section \_\_\_\_\_ (240 *or* 246 *or* 247) *or* in equal shares, regardless of whether or not all such issue are members of the same generation].

**6.02. Definitions of Child and Children.** As used in this instrument, the terms "child" and "children" refer to natural children and to children who have been legally adopted by the parent or parents from or through whom their right to inherit or to take is determined or derived.

**6.03. Definition of Issue.** As used in this instrument, the term "issue" refers to all lineal descendants of all generations, with the relationship of parent and child at each generation being determined by the definitions of "child" and "children" set forth in this instrument.

**6.04. Definition of Incapacity.** For purposes of this instrument, a person shall be deemed "incapacitated" if and for so long as a court of competent jurisdiction has made a finding to that effect, or a guardian or conservator of that person's estate or person duly appointed by a court of competent jurisdiction is serving, or upon certification by two physicians (licensed to practice under the laws of the state where the person is domiciled at the time of the certification) that the person is unable properly to care for himself or herself or for his or her property. The latter certification shall be made by each physician in a written declaration under penalty of perjury.

**6.05. Definition of Education.** As used in this instrument, the term "education" refers to the following:

- (a) Education at public or private elementary, junior high, middle, or high schools, including boarding schools;
- (b) Undergraduate, graduate, and postgraduate study in any field, whether or not of a professional character, in colleges, universities, or other institutions of higher learning;
- (c) Specialized formal or informal training in music, the stage, the handicrafts, or the arts, whether by private instruction or otherwise; and
- (d) Formal or informal vocational or technical training, whether through programs or institutions devoted solely to vocational or technical training, or otherwise.

**6.06. Number and Gender.** As used in this instrument, references in the masculine gender shall be deemed to include the feminine and neuter gender, and vice versa, and references to the singular shall be deemed to include the plural, and vice versa, wherever the context so permits.

**6.07. Captions.** The captions appearing in this instrument are for convenience of reference only, and shall be disregarded in determining the meaning and effect of the provisions of this instrument.

**6.08. Severability Clause.** If any provision of this instrument is invalid, that provision shall be disregarded, and the remainder of this instrument shall be construed as if the invalid provision had not been included.

**6.09. California Law to Apply.** All questions concerning the validity, interpretation, and administration of this instrument, including any trusts created under this instrument, shall be governed by the laws of the State of California, regardless of the domicile of any trustee or beneficiary.

**6.10. Gifts to "Heirs."** For any gift to heirs of the settlor that is made in this instrument, those heirs shall be determined as if the settlor had died intestate at the time for distribution prescribed in this instrument, and the identity and shares of

those heirs shall be determined according to the California laws of succession that concern separate property not acquired from a previously deceased spouse and that are in effect at the death of the settlor.

Article 7: Signature and Execution

7.01. **Execution.** The trustee hereby approves this instrument and accepts the trusts provided for in it, certifying that it correctly states the terms and conditions under which the trust estate is to be held, administered, and distributed.

Executed on \_\_\_\_\_ [date], at \_\_\_\_\_ [city or town and state].

TRUSTEE[S]

\_\_\_\_\_ [signature of trustee]  
[typed name]

**Acceptance by Settlor.** I am the settlor of the trusts created by this instrument. I have read this instrument, which correctly states the terms and conditions under which the trust estate is to be held, administered, and distributed. I approve this instrument in all particulars and agree to be bound by its terms and conditions.

\_\_\_\_\_ [signature of settlor]  
[typed name]

**ACKNOWLEDGMENT**

[Acknowledgements taken in California must be in the following form (Civ. Code § 1189(a))]:

State of California )  
County of \_\_\_\_\_ ) ss.

On \_\_\_\_\_ [date], before me, \_\_\_\_\_ [name of notary], personally appeared \_\_\_\_\_ [name(s)], who proved to me on the basis of satisfactory evidence to be the person[s] whose name[s] [is or are] subscribed to the within instrument, and acknowledged to me that \_\_\_\_\_ [he or she or they] executed the same in \_\_\_\_\_ [his or her or their] authorized \_\_\_\_\_ [capacity or capacities], and that by \_\_\_\_\_ [his or her or their] signature[s] on the instrument the person[s], or the entity upon behalf of which the person[s] acted, executed the instrument.

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

WITNESS my hand and official seal.

\_\_\_\_\_ [signature of notary]  
[typed name]

**SCHEDULE A  
SCHEDULE OF TRUST ASSETS**

Description of Asset	Character of Asset
_____	_____
_____	_____

_____	_____
_____	_____
_____	_____

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsIrrevocable Living TrustsEstate, Gift & Trust LawTrustsLife Insurance Trusts



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California Legal Forms--Transaction Guide

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DIVISION IV: WILLS AND TRUSTS  
CHAPTER 72 IRREVOCABLE TRUSTS  
PART IV. FORMS  
A. Insurance Trusts

*26-72 California Legal Forms--Transaction Guide § 72.201*

**AUTHOR:** Reviewed by Albert G. Handelman

**§ 72.201 Irrevocable Life Insurance Trust; Married Settlers; "Second-to-Die" Life Insurance**

**[1] Comment**

**[a] Use of Form**

This form is an irrevocable inter vivos life insurance trust designed for use by married settlers in connection with a "second-to-die" life insurance policy. It is assumed that the settlers have young children and that neither settlor will serve as trustee.

**PRACTICE TIP:**

Trusts of this type can also be prepared to hold individual policies on either or both of the settlers, perhaps in addition to "second-to-die" policies. The key element of this trust is that neither spouse can have any incidents of ownership in any policy in the trust, and thus neither can receive any benefits under the trust. When the combined values of several different policies, both individual and "second-to-die," are relatively low, use of a single trust might make sense. On the other hand, if the face amounts of both the individual and "second-to-die" policies are substantial enough, it probably makes sense to use two trusts (or three, if there are significant amounts of individual insurance on each spouse's life) in order to afford the surviving spouse the opportunity to receive lifetime benefits from the trust. If two trusts holding individual policies are to be established, care must be taken to avoid the reciprocal trust doctrine [ *see United States v. Grace Estate*, 395 U.S. 316 (1969), 395 U.S. 316, 89 S. Ct. 1730, 69-1 USTC P 12,609, 23 AFTR2d 69-1954 ; *Exchange Bank & Trust Co. v. United States*, Ct. Cl. Dec. 21,1981, 82-1 USTC P 13,444. ; *but see Tobin v. Commissioner*, 183 F.2d 919 (5th Cir. 1950), 50-2 USTC P 9397, 30 AFTR 822 ]. *Commentary by Albert G. Handelman.*

It is assumed that the principal asset of this trust will consist of a life insurance policy that provides for death benefits to be paid on the death of the second settlor to die. Until that time, the trustee will hold the policy and pay the premiums. The settlers' children are the income beneficiaries of the trust. Before the death of the second settlor, the settlers will

make annual gifts to the trust to cover the life insurance premiums. The children will have "Crummey" powers to withdraw the gifts during a specified period [ *see Section 4.01*]. If they do not withdraw the gifts, however, they will be used to cover the premiums. At the death of the second settlor, the trustee will receive the life insurance death benefits. If any of the settlors' children are under a specified age (e.g., 25 years), the trustee will hold the proceeds in a sprinkling trust, with discretion to pay income and principal to the children [ *see Section 4.03*]. When the youngest child reaches the specified age, the trust property will be distributed to the children, either in a lump sum or in installments [ *see Section 4.03*].

### **[b] Declaration of Trust Format**

Two basic formats for trust instruments, called trust agreements and declarations of trust, are used by California attorneys to create inter vivos trusts. This trust uses the trust declaration format [ *see Section 1.01*].

### **[c] Grantor Trust Rules**

This trust has been designed as a "grantor" trust [ *see § 72.200[1][c]*]. Before the adoption of the Tax Reform Act of 1986, it was standard procedure to design a life insurance trust as a "grantor" trust, so the settlor could take any deductions for interest paid on loans against the policy. Although the personal interest deduction is no longer available, many life insurance trusts are still designed to qualify as "grantor" trusts so that the settlor will be able to deduct interest should the interest deduction ever be restored. Under the current law, there is neither an advantage nor a disadvantage in establishing a trust as a "grantor" trust. If the decision is made not to establish the trust as a "grantor" trust, some provisions of this trust must be modified. For general discussion of trusts that are designed to qualify as "grantor" trusts, specific provisions that will ensure that a trust qualifies in this way, and modifications that may be used to avoid such a qualification, see § 72.200[1][c]-[f].

### **[d] Limitation on Settlor's Powers for Estate Tax Purposes**

Section 3.02 of this trust provides that notwithstanding any other provision of the trust instrument, the settlors will not have certain rights, powers, discretions, or "incidents of ownership" [ *see § 72.12[2][3]*] in the trust or the trust property. The rights, powers, and interests described in the section would, if retained by the settlors, cause the trust property to be included in the settlors' estates for federal estate tax purposes under *I.R.C. §§ 2036, 2038, 2041, or 2042*. This type of provision should be included in every trust instrument when the trust is designed to remove the trust property from the settlors' gross estates for federal estate tax purposes.

### **[e] "Crummey" Powers**

Section 4.01 of this trust gives the settlors' children the right to withdraw any gift made to the trust within 30 days after the gift is made, or 30 days after the children are given notice of the gift, whichever is later. The right is subject to terms and conditions that make it qualify as a "Crummey" power [ *see Crummey v. C.I.R. (9th Cir. [T.C.] 1968) 397 F.2d 82* and discussion in § 72.13[4]].

"Crummey" powers typically are used to qualify lifetime gifts to an irrevocable trust for the annual gift tax exclusion [ *see I.R.C. § 2503(b)*; for discussion of the annual exclusion and the applicable exclusion amounts, which are adjusted annually for inflation, *see § 72.13[2][a]*; *see also Ch. 60A, Gifts, § 60A.32[4]*]. Properly drafted "Crummey" powers may serve a useful purpose in any type of irrevocable trust. However, they are most useful in irrevocable life insurance trusts under which the settlors make annual cash gifts to the trust in an amount sufficient to cover premiums on the life insurance owned by the trust, and the trust instrument gives the beneficiaries the power to withdraw the gifts during a specified period. The power to withdraw the gifts will rarely be exercised because such an exercise would be contrary to the settlors' intent and would frustrate the purpose of the trust. After the power lapses, the trustee can use the gifts to pay the premiums.

For a more detailed discussion of "Crummey" powers and their use in irrevocable inter vivos trusts, see § 72.13[4].

### [f] Administration of Generation-Skipping Trusts

Section 4.06 of this trust governs the administration of any trust created by the trust instrument in which there is property that is or may become subject to the federal generation-skipping transfer tax [*see I.R.C. §§ 2601-2664*]. Note that the GST tax has been repealed effective for generation-skipping transfers after 2009 [*I.R.C. § 2664*]. Until then, however, it remains in effect. As discussed in § 72.200[1][k], it is important to realize that Section 4.06, while potentially useful in providing post-mortem planning flexibility, reflects only "catchup" planning in the context of an irrevocable insurance trust. If there are GST concerns, they should be addressed by the settlors at the time contributions are made to the trust.

Section 4.06 is designed to give the settlors' executors flexibility to eliminate or minimize any generation-skipping transfer tax that otherwise would be due after the death of either settlor. If either executor elects to allocate any portion of either settlor's generation-skipping transfer tax exemption [*see I.R.C. §§ 2010(c), 2631(a), (c)*] to any trust property in any trust to which Section 4.06 applies, the section requires or permits the executor to split the trust in question into two trusts, one (called the Exempt Trust, and with an "inclusion ratio" of zero) which is exempt from the tax and the other (the Non-Exempt Trust, with an "inclusion ratio" between zero and one) which is not. The trustee is then given discretion to make payments and distributions to "non-skip" beneficiaries [*see I.R.C. § 2613(b)* ("non-skip person" defined)], such as children, from the non-exempt trust, and payments and distributions to beneficiaries who are "skip persons" [*see I.R.C. § 2613(a)* ("skip person" defined)], such as grandchildren, from the exempt trust. This will ensure maximum utilization of the settlor's GST exemption [*see I.R.C. §§ 2010(c), 2631(a), (c)*].

For general discussion of this provision and its use in an irrevocable inter vivos trust, see § 72.200[1][k]. For an extended discussion of the generation-skipping transfer tax, see *California Wills & Trusts*, Ch. 113, *Generation-Skipping Transfers and Trust Strategies* (Matthew Bender).

### [2] FORM

#### Irrevocable Life Insurance Trust; Married Settlers; "Second-to-Die" Life Insurance

[*Name of trust, if desired; e.g.,* **ROBERT CHARLES BLACK AND JEAN POTTER BLACK 2005 TRUST**]

### DECLARATION OF TRUST

#### Article 1: Creation of Trust

1.01. **Parties.** [*Identify trustee(s), e.g.,* Matthew R. Black of San Francisco, California, *or* Double Eagle National Bank of San Francisco, California *or* Matthew R. Black of San Francisco, California, and Double Eagle National Bank of San Francisco, California,] (the "trustee[s]") hereby declare[s] that \_\_\_\_\_ [he has *or* she has *or* it has *or* they have] received certain property (the "trust estate") from [*identify settlors, e.g.,* Robert Charles Black and Jean Potter Black of San Francisco, California,] (the "settlors"), and hold[s] that property in trust to be held, administered, and distributed according to the terms of this instrument.

1.02. **Names of Trusts.** The trusts created by this instrument shall be known collectively as the [*set forth names of settlors and year in which established, e.g.,* Robert Charles Black and Jean Potter Black 2005 Trust], and each separate trust created under this instrument shall be referred to by adding the name or designation of that separate trust as it appears in the appropriate section of this instrument.

1.03. **Identification of Living Child(ren).** The settlors have [*number*] living \_\_\_\_\_ [child *or* children],

whose name[s] and date[s] of birth [is or are] as follows:

[e.g., Mary Margaret Black, who was born on June 10, 1989]

[e.g., David Charles Black, who was born on September 8, 1991]

[e.g., Elizabeth Jean Black, who was born on August 18, 1994]

[If there are any stepchildren, identify, e.g.:]

[Name of settlor, e.g., Robert Charles Black] also has the following \_\_\_\_\_ [child or children], whose name[s] and date[s] of birth [is or are] as follows:

[e.g., Mary Anne Black, who was born on January 3, 1983]

[e.g., Robert Charles Black, Jr., who was born on April 16, 1985].

1.05. **No Deceased Children.** Neither settlor has any deceased children.

#### Article 2: Trust Estate

2.01. **Definition of Trust Estate.** All property subject to this instrument from time to time is referred to as the "trust estate" and shall be held, administered, and distributed as provided in this instrument. The trustee shall hold, administer, and distribute the property described in Schedule A, any other property that may be hereafter subject to this trust, and the income and proceeds attributable to all such property, in accordance with the provisions of this instrument.

2.02. **Additions to Trust.** From time to time, the trustee may accept additions to this trust from any source. All such additions shall become a part of the trust estate and shall be held, administered, and distributed in accordance with the terms of this instrument. That additional property shall become part of the trust estate upon written acceptance of it by the trustee. Any additions to the trust shall be made by designating in writing the property to be added. However, the titling of any account, deed, or similar asset in the name of the trustee, as trustee of this trust, or any alternate or successor trustee acting under this instrument, shall be deemed to be a transfer to this trust. Any designation by a third party, whether by will, deed, account title designation, or similar transfer, shall also be a transfer to the trust estate.

#### Article 3: Rights and Powers of Settlers

3.01. **Irrevocability of Trust.** This trust is irrevocable. It may not be amended, revoked, or terminated, in whole or in part, except as otherwise specified in this instrument.

3.02. **Limitation on Powers of Settlers.** Notwithstanding any other provision of this instrument, neither settlor shall have:

(a) Any right to the possession or enjoyment of the principal or income of the trust estate, or any part of the trust estate, or any right, either alone or in conjunction with any other person, to designate the persons who will possess or enjoy the principal or income of the trust estate, or any part of the trust estate, as those terms are used in *Internal Revenue Code Section 2036*.

(b) Any right to vote (directly or indirectly) any shares of stock of a controlled corporation, as that term is defined in *Internal Revenue Code Section 2036(b)(2)*, that may be part of the trust estate.

(c) Any power or discretion in any capacity whatever, either alone or in conjunction with any other person, to alter, amend, revoke, or terminate the enjoyment of the trust estate, as those terms are used in *Internal Revenue Code Section*

2038.

(d) Any power that is exercisable in favor of the settlors, or either of them, the settlors' estates, the settlors' creditors, or creditors of the settlors' estates, or any other power that would constitute a general power of appointment, as defined in *Internal Revenue Code Section 2041*.

(e) Any incidents of ownership, as that term is defined in *Internal Revenue Code Section 2042*, as amended, in any insurance policy that is part of the trust estate.

(f) Any power or discretion that would cause the trust estate, or any part of the trust estate, to be included in the gross estates of the settlors, or either of them, under any provisions of the Internal Revenue Code, as amended.

#### Article 4: Payments and Distributions

**4.01. Right to Withdraw Gifts.** So long as either settlor is living, \_\_\_\_\_ [identify beneficiary or beneficiaries who will have withdrawal rights, e.g., the living children of the settlors (, or either of them),] shall have the right to withdraw any gift made to the trust in accordance with the following provisions:

(a) The trustee shall promptly give written notice to \_\_\_\_\_ [identify beneficiary or beneficiaries who will have withdrawal rights, e.g., the settlors' then-living children] of each gift made to the trust.

(b) Each of the settlors' children who are then living may withdraw a fraction of the gift equal to one divided by the number of the settlors' who are then living, or any portion of that fraction; provided, however, that the aggregate amounts that each of the settlor's children may withdraw during any calendar year from the gifts to the trust from any one donor shall not exceed the amount which may from time to time be specified for gift tax exclusion in *Internal Revenue Code Section 2503(b)*, as amended, for gifts from one donor to one donee (the "annual exclusion amount") per person; and provided further that the aggregate amount that each of the settlor's children may withdraw during any calendar year from the gifts to the trust from all donors shall not exceed the amount that may from time to time be specified in *Internal Revenue Code Section 2041(b)(2)*, as amended, as the maximum amount of property with respect to which the lapse of a general power of appointment will not be deemed a release of a general power of appointment (the "non-taxable amount").

(c) The power of any person to withdraw a gift as specified in this section must be exercised, if at all, by electing to do so in an instrument in writing delivered to the trustee within 30 days after the later of (1) the date on which the gift is made, or (2) the date on which the person is given notice of the gift.

(d) The right of any person to withdraw a gift as specified in this section is noncumulative. If any person does not withdraw the full amount of the gift or gifts that the person is entitled to withdraw within the time limit specified for exercise of the right, the right to withdraw the amount not withdrawn shall lapse and may not be exercised after the time limit specified.

(e) If any person who has a right to withdraw a gift as specified in this section is a minor or is otherwise subject to any legal incapacity, the trustee shall give the written notice required to be given as specified in this section to the guardian or conservator of that person, and the guardian or conservator may make the withdrawal on behalf of that person. Any property delivered to a guardian or conservator shall be held by the guardian or conservator for the benefit and use of that person.

**4.02. Payment of Income During Lifetimes of Settlers.** So long as both settlors are living and, after the death of the deceased settlor, during the lifetime of the surviving settlor, the trustee shall apply so much of the income of the trust, if any, remaining after the withdrawal provided in Section 4.01 as may be necessary to pay the premiums on any and all

policies of life insurance on the lives of the settlors which are part of the trust estate. If the remaining net income of the trust is insufficient for those payments, the trustee may apply so much of the principal of the trust remaining after those withdrawals as may be necessary to pay those premiums. The trustee shall pay to or apply for the benefit of \_\_\_\_\_ [designate income beneficiary or beneficiaries, e.g., the settlors' then-living children] \_\_\_\_\_ [specify period during which payments may be made, e.g., during their lifetimes or until \_\_\_\_\_ (specify condition on which payment of all income will cease, e.g., the youngest child reaches the age of 25 years)], as much of the net income of the trust, if any, remaining after those withdrawals and those income payments as the trustee, in the trustee's discretion, deems necessary for the [to specify "ascertainable standard": health, education, support, and maintenance or specify some other standard, e.g., comfort, welfare, and happiness] of each of them. In making these payments, the trustee may pay to or apply more for some beneficiaries than for others, and may make payments to or for one or more beneficiaries to the exclusion of others. All decisions of the trustee regarding payments under this subsection, if any, are within the trustee's discretion and shall be final and incontestable by anyone. All payments made pursuant to this provision shall be made in monthly or other convenient installments, but not less often than annually. The trustee shall accumulate and add to principal any net income not distributed.

**4.03. Disposition of Trust Estate on Death of Surviving Settlor.** Upon the death of the surviving settlor, the trustee shall hold, administer, and distribute the assets of the trust estate as follows:

(a) The trustee shall pay or distribute to or apply for the benefit of any one or more of the children of the settlors who are under the age of [e.g., 25 years], their names and identities to be determined as of the date of the death of surviving settlor, until the youngest child reaches the age of [e.g., 25 years], in monthly or other convenient installments, but not less often than annually, as much of the net income of the trust, and as much of the principal of the trust, as the trustee, in the trustee's discretion, deems necessary for the [to specify "ascertainable standard": health, education, support, and maintenance or specify some other standard, e.g., comfort, welfare, and happiness] of each of them. In making these payments and distributions, the trustee may pay, distribute, or apply more to or for some beneficiaries than others, and may make payments or distributions to or for one or more beneficiaries to the exclusion of others. [No amount paid out or applied need thereafter be repaid to the trustee or restored to the trust.] All decisions of the trustee regarding payments under this subsection, if any, are within the trustee's discretion and shall be final and incontestable by anyone. The trustee shall accumulate and add to principal any net income not distributed.

(b) When the settlors' youngest child reaches the age of [e.g., 25] years, the trustee shall distribute among the children of the settlors then living, in equal shares, an amount from the trust principal equal to [fraction or percentage; e.g., one half or 50 percent] of the fair market value of the principal of the trust, determined as of the first day of the calendar month preceding the month in which the distribution is made.

(c) If any of the children of the settlors are deceased at the time of distribution and leave issue surviving, the share that would have been taken by that child had \_\_\_\_\_ [he or she or he or she] survived shall be divided among \_\_\_\_\_ [his or her or his or her] issue \_\_\_\_\_ [in the manner provided in California Probate Code Section \_\_\_\_\_ (240 or 246 or 247) or in equal shares, regardless of whether or not all such issue are members of the same generation]. [Optional: Any sum that would otherwise be distributed to a person who is a minor shall be retained in trust until \_\_\_\_\_ (specify event triggering distribution of balance of trust estate, e.g., the youngest child of the settlors reaches the age of 30 years) and shall be distributed outright to the beneficiary at that time.]

(d) When the youngest child of the settlors reaches the age of [e.g., 30] years, the trustee shall distribute to the children of the settlors then living, in equal shares, the balance of the trust property. If any of the children of the settlors are deceased at the time of distribution and leave issue surviving, the share that would have been taken by that child had \_\_\_\_\_ [he or she or he or she] survived shall be divided among \_\_\_\_\_ [his or her or his or her] issue \_\_\_\_\_ [in the manner provided in California Probate Code Section \_\_\_\_\_ (240 or 246 or 247) or in equal shares, regardless of whether or not all such issue are members

of the same generation].

(e) If all the children of the settlors die without surviving issue before the trust property has been distributed as provided in this section, the trustee shall distribute any undistributed balance of the trust property outright to [*alternative disposition, e.g., the Santa Clara County chapter of the American Red Cross or the heirs of the surviving settlor*].

**4.04. Distribution of Remainder If No Other Disposition Is Directed in Trust Instrument.** If, at any time before full distribution of the trust estate, all of the children of the settlors are deceased and no other disposition of the trust estate is directed by this instrument, all of the remaining portion of the trust estate shall then be distributed to \_\_\_\_\_ [*specify pattern of distribution or distributee, e.g., the settlor's issue* \_\_\_\_\_] (in the manner provided in California Probate Code Section \_\_\_\_\_ [240 or 246 or 247] or in equal shares, regardless of whether or not all such issue are members of the same generation)].

**4.05. Trustee's Power to Determine Income and Principal.** Unless otherwise specifically provided in this instrument, the determination of all matters with respect to what is principal and income of any trust under this instrument and the apportionment and allocation of receipts, expenses, and other charges between principal and income shall be governed by the provisions of the California Revised Uniform Principal and Income Act from time to time existing. The trustee in the trustee's discretion shall determine any matter not provided for either in this instrument or in the California Revised Uniform Principal and Income Act.

**4.06. Administration of Generation-Skipping Trusts.** The provisions of this section apply to any trust under this instrument that is created upon the death of either settlor and in which there is property that is or may become subject to the federal generation-skipping transfer tax:

(a) Upon written notification by either settlor's executor that the executor intends to allocate any part of the generation-skipping transfer tax exemption that is available to that settlor under *Internal Revenue Code Section 2631(a)* to some but not all of the property in any trust to which this section applies, the trustee [shall or may, in the trustee's discretion,] divide that trust into two separate trusts, to be designated as the Exempt Trust and the Non-Exempt Trust. [*If trustee has discretionary power to divide trusts: If the trustee elects to divide a trust in the manner provided in this section, the or, if division of trusts is mandatory rather than discretionary: The*] Exempt Trust shall contain the share of the property of that trust equal in value to the amount of the generation-skipping transfer tax exemption that the executor intends to allocate to the trust. The Non-Exempt Trust shall contain the balance of the property of that trust. It is the settlors' intention that the executor then actually allocate the generation-skipping transfer tax exemption to the Exempt Trust and not to the Non-Exempt Trust so that the Exempt Trust shall have an inclusion ratio of zero for federal generation-skipping transfer tax purposes and the Non-Exempt Trust shall have an inclusion ratio of one for federal generation-skipping transfer tax purposes. The trustee shall not be liable for relying on the written instructions of the executor when acting in accordance with this subsection.

(b) In allocating assets between the Exempt Trust and Non-Exempt Trust for purposes of this section, the trustee shall [*for pecuniary allocation: allocate the trust assets between the Exempt Trust and Non-Exempt Trust in cash or in kind, or partly in each, on a pro rata or non pro rata basis, and in undivided interests or not or, for fractional allocation: allocate to each trust a fractional share of each and every substantial interest or right held by the trust being divided*]. [*If preceding sentence provides for pecuniary allocation, add: If the allocation is not made within 15 months from the date of death of the settlor whose exemption is being allocated, the trustee shall pay interest, at the legal rate, from the date of the settlor's death to the date of distribution. For purposes of allocation under this section, assets shall be valued at their values* \_\_\_\_\_ (*to use date of distribution values: on the date or dates of distribution or, to use valuation for estate tax purposes: as finally determined for federal estate tax purposes; provided that any assets allocated in kind shall be allocated between the Exempt Trust and the Non-Exempt Trust in a manner that fairly reflects the net appreciation or depreciation in the value of the assets in the trust being divided, measured from the date of the settlor's death to the date of payment*).]

(c) Regardless of whether or not subsection (a) applies, if the amount of either settlor's generation-skipping transfer tax exemption actually allocated by the executor to a trust to which this section applies is equal to the value of the property of that trust so that the entire trust has an inclusion ratio of zero for federal generation-skipping transfer tax purposes, the entire trust shall be referred to as the Exempt Trust. On the other hand, if no part of the settlor's generation-skipping transfer tax exemption is actually allocated to the trust by the executor so that the entire trust has an inclusion ratio of one for federal generation-skipping transfer tax purposes (or if the settlor is not the transferor of that trust for generation-skipping transfer tax purposes), the entire trust shall be referred to as the Non-Exempt Trust.

(d) The trustee may, but is not required to, administer the trusts under this instrument to which this section applies in such a manner that distributions made during the trust terms to "skip persons" (as defined in *Internal Revenue Code Section 2613(a)* or any equivalent successor section) are made from Exempt Trusts, and distributions made during the trust terms to "non-skip persons" (as defined in *Internal Revenue Code Section 2613(b)* or any equivalent successor section) are made from Non-Exempt trusts.

[*Optional:* (e) If the trustee determines that the burdens of generation-skipping transfer taxes, income taxes, and death taxes on a Non-Exempt Trust, either settlor's estate, or the beneficiaries of that trust would be reduced, the trustee may petition the court to amend the trust to grant to one or more trust beneficiaries who are non-skip persons in a generation below the settlor a general testamentary power of appointment over all or a specified portion of that Non-Exempt Trust. Any power to amend the trust is within the discretion of the court, and the preceding sentence shall not be construed to give the trustee any power that the trustee does not already have under California trust law to petition the court under the appropriate circumstances, nor shall it be construed to limit the power of the trustee or any beneficiary under the California trust law to petition the court under the appropriate circumstances.]

(f) The purpose of this section is to allow the trustee to administer the trusts so as to decrease the amount of generation-skipping transfer taxes owed on generation-skipping transfers from the trusts. The trustee shall balance that consideration against any other tax and non-tax considerations, and may disregard the generation-skipping transfer tax consequences to the extent that the trustee determines that doing so will allow the trustee to carry out the settlors' intentions in creating the trusts. All decisions of the trustee under this subsection are within the trustee's discretion and shall be final and incontestable by anyone.

(g) If, in the trustee's judgment, at any time after the execution of this trust instrument, any statute, regulation, court decision, or administrative ruling imposes different or additional requirements on the trust in connection with the generation-skipping transfer tax the trustee may petition the court to amend the terms of the trust to meet those requirements and achieve the purpose of this section.

#### Article 5: Trustee

5.01. **Successor Trustees.** If the office of trustee becomes vacant by reason of death, incapacity, or any other reason, and no successor trustee or co-trustees have been designated under any other provisions of this trust instrument, then \_\_\_\_\_ [for a sole individual successor, name and description, e.g., Melissa B. Brown, who resides at \_\_\_\_\_ (address) or, for co-trustees, names and descriptions, e.g., Melissa B. Brown, who resides at \_\_\_\_\_ (address), and Richard R. Black, who resides at \_\_\_\_\_ (address), or any one or more of them or, for corporate trustee, name and description, e.g., Second State Bank, Los Angeles, California] shall be the successor [trustee or co-trustees]. If \_\_\_\_\_ [name(s) of successor trustee or co-trustees] [is or are all] unwilling or unable to serve as successor trustee, a new trustee or co-trustees shall be appointed by the court. [To limit class of permissible individual trustees, add appropriate limitation, e.g.: Any individual trustee or co-trustee not specifically named in this section who is appointed under this section shall be appointed from among the issue of the settlors, unless no issue of the settlors is able and willing to serve.]

**5.02. Replacement of Co-trustee.** If, at any time when two or more persons or entities are serving as co-trustees, any one or more (but less than all) of them are unable or unwilling for any reason to continue to serve as co-trustees, and no successor co-trustee has been designated under any other applicable provision of this trust instrument, a new co-trustee may be appointed by the court. If no new co-trustee is appointed, the remaining co-trustee or co-trustees shall have full power to act as trustee or co-trustees and to continue the trust administration.

**5.03. Definition of Trustee.** Reference in this instrument to "the trustee" shall be deemed a reference to whoever is serving as trustee or co-trustees, and shall include alternate or successor trustees or co-trustees, unless the context requires otherwise.

**5.04. Bond.** \_\_\_\_\_ [No bond or undertaking shall be required of any (*optional*: corporate) trustee named in *or* Bond shall be required of any trustee serving under] this instrument.

**5.05. Compensation of Trustee.** The trustee shall be entitled to reasonable compensation for services rendered, payable without court order. [*Optional*: The settlors believe that a fee of \$\_\_\_\_\_ is a reasonable annual amount to compensate the trustee for all of the ordinary services that will be required of the trustee during an annual period. Additional compensation in a reasonable amount may be proper to compensate the trustee for any extraordinary services rendered by the trustee, all without court order.] [*Optional*: If a trustee serves for only part of a calendar year, the annual compensation shall be prorated according to the number of days during that year that the trustee was acting as trustee during that year.]

**5.06. Custody of Life Insurance Policy.** The trustee shall keep custody of any life insurance policy that is part of the trust estate or that designates the trust as beneficiary.

**5.07. Life Insurance Powers.** To carry out the purposes of the trusts created under this instrument, and subject to any limitations stated elsewhere in this instrument, the trustee shall have, in addition to the other powers conferred on the trustee by law and by this instrument, the power to do all of the following:

- (a) Purchase life insurance on the life of any person.
- (b) Exercise all incidents of ownership, options, benefits, rights, and privileges with respect to any life insurance policy that is part of the trust estate.
- (c) Pay premiums, assessments, or other charges on any life insurance policy that is part of the trust estate or that may designate the trust as beneficiary.
- (d) Borrow funds from the insurer in accordance with the terms of any life insurance policy that is part of the trust estate or that may designate the trust as beneficiary, for the purpose of paying any premiums, assessments, or other charges.
- (e) Otherwise do anything necessary or proper to keep any such policy a binding contract of insurance.
- (f) Collect any and all sums payable under any life insurance policy or employee benefit plan, and exercise any of the allowable options for the payment of any such sums. The trustee shall collect any disability payments under any life insurance policy that is part of the trust estate. Notwithstanding any other provision of this instrument, the settlors specifically intend that the trustee retain and continue to hold any life insurance policy transferred to or secured by the trust at any time, without any obligation to diversify any such investment. The trustee shall not be liable to any beneficiary of this trust, the settlors, or any person or entity for the retention of any such life insurance policy, and no beneficiary shall have any right to recoupment or restoration of any loss suffered as the result of any such retention. As a specific limitation of the trustee's liability, the trustee is relieved of any obligation to evaluate the insurance investments annually or otherwise, or to evaluate the degree to which insurance and/or premiums are guaranteed, as

well as the effect of company operations on product performance. The trustee has no responsibility to advise the settlor or beneficiaries of any perceived increased investment risk in the maintenance of any such life insurance policies. The trustee is relieved of any obligation to minimize exposure of the beneficiaries in the event of a perceived increase in investment risk attributable to the retention of any such insurance policies. The trustee shall not be liable for failure to maintain any insurance policy in force if the trust assets are insufficient to pay for premiums or assessments currently due on or in connection with that policy.

**5.08. General Powers of Trustee.** To carry out the purposes of the trusts created under this instrument, and subject to any limitations stated elsewhere in this instrument, the trustee shall have all of the following powers, in addition to all of the powers now or hereafter conferred on trustees by law:

(a) Retain property received into the trust at its inception, or later added to the trust, as long as the trustee considers that retention in the best interests of the trust or in furtherance of the goals of the settlors in creating the trust, as determined from this trust instrument, but subject to the standards of the prudent investor rule as set forth in the California Uniform Prudent Investor Act, as amended from time to time.

(b) Invest and manage the trust assets as a prudent investor would, by considering the purposes, terms, distribution requirements, and other circumstances of the trust. In satisfying this standard, the trustee shall exercise reasonable care, skill, and caution. The trustee's investment and management decisions respecting individual assets and courses of action must be evaluated not in isolation, but in the context of the trust portfolio as a whole and as a part of an overall investment strategy having risk and return objectives reasonably suited to the trust. Among circumstances that are appropriate to consider in investing and managing trust assets are the following, to the extent relevant to the trust or its beneficiaries:

- (1) General economic conditions.
- (2) The possible effect of inflation or deflation.
- (3) The expected tax consequences of investment decisions or strategies.
- (4) The role that each investment or course of action plays within the overall trust portfolio.
- (5) The expected total return from income and the appreciation of capital.
- (6) Other resources of the beneficiaries known to the trustee as determined from information provided by the beneficiaries.
- (7) Needs for liquidity, regularity of income, and preservation or appreciation of capital.
- (8) An asset's special relationship or special value, if any, to the purposes of the trust or to one or more of the beneficiaries.

The trustee may invest in any kind of property or type of investment or engage in any course of action or investment strategy consistent with the standards set forth in the Uniform Prudent Investor Act, as set forth in *Probate Code Sections 16045-16054*, or any successor sections.

(c) In the trustee's discretion, invest or reinvest in mutual funds, money market funds, investment trusts, regulated investment companies, market funds, and index funds, and in the shares or securities of any such funds or companies, that persons of prudence, discretion, and intelligence acquire for their own account.

(d) With or without court authorization, sell (for cash or on deferred payments, and with or without security), convey, exchange, partition, and divide trust property; grant options for the sale or exchange of trust property for any purpose, whether the contract is to be performed or the option is to be exercised within or beyond the term of the trust; and lease trust property for any purpose, for terms within or extending beyond the expiration of the trust, regardless of whether the leased property is commercial or residential and regardless of the number of units leased.

(e) In the trustee's discretion, lend money from the trust estate to the probate estates of the settlors, irrespective of whether the trustee and the executor may be the same person, provided that any such loan is adequately secured and bears a reasonable rate of interest.

(f) In the trustee's discretion, use funds or credit of the trust estate to purchase property from the probate estates of the settlors at its fair market value as determined by the trustee in the trustee's discretion.

(g) Engage in any transactions with the personal representative of the estates of the settlors that are in the best interest of any trust created in this instrument.

(h) Manage, control, improve, and maintain all real and personal trust property.

(i) Subdivide or develop land; make or obtain the vacation of plats and adjust boundaries, or adjust differences in valuation on exchange or partition by giving or receiving consideration; and dedicate land or easements to public use with or without consideration.

(j) Make ordinary or extraordinary repairs or alterations in buildings or other trust property, demolish any improvements, raze existing party walls or buildings, and erect new party walls or buildings, as the trustee deems advisable.

(k) Enter into oil, gas, and other mineral leases, on terms deemed advisable by the trustee; enter into any pooling, unitization, repressurization, community, or other types of agreements relating to the exploration, development, operation, and conservation of mineral properties; drill, mine, and otherwise operate for the development of oil, gas, and other minerals; contract for the installation and operation of absorption and repressuring plants; and install and maintain pipelines. Any such leases or agreements may be for a term within or extending beyond the term of the trust.

(l) In the trustee's discretion, abandon any [unproductive or wasted] trust asset or interest therein.

(m) Employ and discharge agents and employees, including but not limited to attorneys, accountants, investment and other advisers, custodians of assets, property managers, real estate agents and brokers, and appraisers, to advise and assist the trustees in the management of any trusts created under this trust instrument, and compensate them from the trust property. [*Optional*: The agents and employees may be associated or affiliated with the trustee, or may be descendants or other persons related to the trustee or to the settlors, or a company associated with any such persons.] [*Optional*: The trustee is entitled to rely on the advice of any professional advisers employed under this provision. Reasonable compensation paid to any such agents or employees shall not diminish the compensation to which the trustee is otherwise entitled.]

(n) With respect to securities held in trust, exercise all the rights, powers, and privileges of an owner, including, but not limited to, the power to vote, give proxies, and pay assessments and other sums deemed by the trustee necessary for the protection of the trust property; participate in voting trusts, pooling agreements, foreclosures, reorganizations, consolidations, mergers, and liquidations, and, in connection therewith, deposit securities with and transfer title to any protective or other committee under such terms as the trustee deems advisable; exercise or sell stock subscription or conversion rights; and accept and retain as investments of the trust any securities or other property received through the

exercise of any of the foregoing powers.

(o) Hold securities or other trust property in the trustee's own name or in the name of a nominee, without disclosure of the trust, or in unregistered form, so that title may pass by delivery.

(p) Deposit securities in a securities depository that is either licensed or exempt from licensing.

(q) Borrow money for any trust purpose from any person or entity on such terms and conditions as the trustee deems advisable, and obligate the trust for repayment; encumber any trust property by mortgage, deed of trust, pledge, or otherwise, whether for terms within or extending beyond the term of the trust, as the trustee deems advisable, to secure repayment of any such loan; replace, renew, and extend any such loan or encumbrance; and pay loans or other obligations of the trust deemed advisable by the trustee.

(r) Procure and carry, at the expense of the trust, insurance in such forms and in such amounts as the trustee deems advisable to protect the trust property against damage or loss, and to protect the trustee against liability with respect to third persons.

(s) Enforce any obligation owing to the trust, including any obligation secured by a deed of trust, mortgage, or pledge held as trust property, and purchase any property subject to a security instrument held as trust property at any sale under that instrument.

(t) Extend the time for payment of any note or other obligation held as an asset of, and owing to, the trust, including accrued or future interest, and extend the time for repayment beyond the term of the trust.

(u) Pay or contest any claim against the trust; release or prosecute any claim in favor of the trust; or, in lieu of payment, contest, release, or prosecution, adjust, compromise, or settle any such claim, in whole or in part, and with or without consideration.

(v) At trust expense, prosecute or defend actions, claims, or proceedings of whatever kind for the protection of the trust property and of the trustee in the performance of the trustee's duties, and employ and compensate attorneys, advisers, and other agents as the trustee deems advisable.

**5.09. Power to Combine Trust Assets.** Each trust created under this trust instrument shall constitute a separate trust and be administered and accounted for accordingly; however, the assets of all of the trusts may be combined and held for the trust beneficiaries without physical division into separate trusts until time of distribution.

**5.10. Early Termination of Trusts.** The trustee shall have the power, in the trustee's discretion, to terminate any trust created under this trust instrument whenever the fair market value of the trust falls below [*specify amount, e.g., \$25,000*], or becomes so small in relation to the costs of administration as to make continuing administration uneconomical. Upon termination, the trustee shall distribute the principal and any accrued or undistributed net income to the income beneficiaries in proportion to their shares of the income. If no fixed amount of income is payable to specific beneficiaries, the trustee shall distribute the principal and any accrued or undistributed net income in equal shares to those beneficiaries who would then be entitled to income payments from the trust.

**5.11. Division or Distribution in Cash or in Kind.** In order to satisfy a pecuniary gift or to distribute or divide trust assets into shares or partial shares, the trustee may distribute or divide those assets in kind, or divide undivided interests in those assets, or sell all or any part of those assets and distribute or divide the property in cash, in kind, or partly in cash and partly in kind. Property distributed to satisfy a pecuniary gift under this trust instrument shall be valued at its fair market value at the time of distribution.

**5.12. Payments to Legally Incapacitated Persons.** If at any time any trust beneficiary is a minor, or it appears to the trustee that any trust beneficiary is incapacitated, incompetent, or for any other reason not able to receive payments or make intelligent or responsible use of the payments, then the trustee, in lieu of making direct payments to the trust beneficiary, may make payments to the beneficiary's conservator or guardian; to the beneficiary's custodian under the Uniform Gifts to Minors Act or Uniform Transfers to Minors Act of any state; to one or more suitable persons as the trustee deems proper, such as a relative of or a person residing with the beneficiary, to be used for the beneficiary's benefit; to any other person, firm, or agency for services rendered or to be rendered for the beneficiary's assistance or benefit; or to accounts in the beneficiary's name with financial institutions. The receipt of payments by any of the foregoing shall constitute a sufficient acquittance of the trustee for all purposes.

**5.13. Grant of Specific Powers Not to Limit Exercise of General Powers.** The enumeration of specific powers under this trust instrument shall not limit the trustee from exercising any other power with respect to any trusts created by this trust instrument that may be necessary or appropriate for the trustee to have and exercise in order to carry out the purposes of the trusts or to permit the trustee to fulfill the trustee's responsibilities and duties with respect to the trust.

**5.14. Trust Distributions Shall Not Discharge Obligations of Support.** Notwithstanding any other provision of this trust instrument, no income or principal of the trust shall be used to discharge, in whole or in part, the legal obligation of any person to support or educate any beneficiary of this trust. In determining the legal obligation of any person to support and educate a beneficiary of this trust, the existence of this trust and the funds made available under it shall not be taken into account.

**5.15. Limitations on Trustee's Powers.** Notwithstanding any other provision of this instrument, the powers of the trustee shall be subject to the following limitations:

(a) The trustee shall have no power or discretion with respect to any life insurance policy on the life of the trustee that constitutes an incident of ownership (as that term is used in *Internal Revenue Code Section 2042*, as amended) in that policy.

(b) The trustee shall have no power or discretion with respect to the distribution of income or principal to or for the trustee's benefit, or in satisfaction of the trustee's legal obligations.

(c) If the trustee would, but for this provision, have had any power or discretion described in (a) or (b), above, that power or discretion shall be exercised by the co-trustee, if any, and if there is no co-trustee, by the next-named successor trustee acting as special co-trustee. If the next-named successor trustee shall for any reason fail to qualify or cease to act as special co-trustee, the next-named successor trustee shall act as successor special co-trustee. If all named successor trustees shall for any reason fail to qualify or cease to act as special co-trustee, the trustee shall appoint a successor special co-trustee, other than the trustee so appointing. The responsibilities of the special co-trustee shall be limited to the exercise of powers and discretions under this section.

**5.16. Power to Disclaim or Release Powers.** The trustee may disclaim, release, or restrict the scope of any power or discretion that the trustee may hold in connection with any trust created under this instrument, whether the power or discretion is expressly granted in this instrument or is implied by law. The trustee shall disclaim a power in the manner required by applicable federal or California law. The trustee shall release or restrict any power or discretion by giving written notice to the beneficiary or beneficiaries then entitled to current distribution of income from the trust, specifying the power or discretion to be released or restricted, the nature of the restriction, and, if appropriate, the person or persons to whom the released or restricted power shall pass and be exercisable. If a power is disclaimed, the power shall be available to and exercisable by [*if trust nominates co-trustees: the other trustee or trustees or, if trust nominates a successor trustee: the successor trustee*].

**5.17. Duty to Account.** The trustee shall render accounts at least annually, at the termination of a trust, and upon a

change of trustees, to the persons and in the manner required by law.

#### Article 6: Concluding Provisions

6.01. **Perpetuities Saving Clause.** Notwithstanding any other provision of this instrument, every trust created by this instrument[, or by the exercise of any power of appointment created by this instrument,] shall terminate no later than 21 years after the death of the last survivor of [*designate measuring life or lives, e.g., the settlors and their issue*] who are alive at the creation of the trust. For purposes of this perpetuities saving clause, a trust shall be deemed to have been created on the date the trust becomes irrevocable or the date of the death of the surviving settlor, whichever occurs first. If a trust is terminated under this section, the trustee shall distribute all of the principal and undistributed income of the trust to the income beneficiaries of the trust in the proportion in which they are entitled (or eligible, in the case of discretionary payments) to receive income immediately before the termination. If that proportion is not fixed by the terms of the trust, the trustee shall distribute all of the trust property to the persons then entitled or eligible to receive income from the trust \_\_\_\_\_ [*specify pattern of distribution, e.g., outright in a manner that, in the trustee's opinion, will give effect to the intent of the settlors in creating the trust, the trustee's decision to be final and incontestable by anyone or as a class, in the manner provided in California Probate Code Section \_\_\_\_\_ (240 or 246 or 247) or in equal shares, regardless of whether or not all such issue are members of the same generation*].

6.02. **"Deceased Settlor" and "Surviving Settlor."** In this instrument, the first settlor to die is referred to as the "deceased settlor" and the other settlor is referred to as the "surviving settlor."

6.03. **Definitions of Child and Children.** As used in this instrument, the terms "child" and "children" refer to natural children and to children who have been legally adopted by the parent or parents from or through whom their right to inherit or to take is determined or derived.

6.04. **Definition of Issue.** As used in this instrument, the term "issue" refers to all lineal descendants of all generations, with the relationship of parent and child at each generation being determined by the definitions of "child" and "children" set forth in this instrument.

6.05. **Definition of Incapacity.** For purposes of this instrument, a person shall be deemed "incapacitated" if and for so long as a court of competent jurisdiction has made a finding to that effect, or a guardian or conservator of that person's estate or person duly appointed by a court of competent jurisdiction is serving, or upon certification by two physicians (licensed to practice under the laws of the state where the person is domiciled at the time of the certification) that the person is unable properly to care for himself or herself or for his or her property. The latter certification shall be made by each physician in a written declaration under penalty of perjury.

6.06. **Definition of Education.** As used in this instrument, the term "education" refers to the following:

- (a) Education at public or private elementary, junior high, middle, or high schools, including boarding schools;
- (b) Undergraduate, graduate, and postgraduate study in any field, whether or not of a professional character, in colleges, universities, or other institutions of higher learning;
- (c) Specialized formal or informal training in music, the stage, the handicrafts, or the arts, whether by private instruction or otherwise; and
- (d) Formal or informal vocational or technical training, whether through programs or institutions devoted solely to vocational or technical training, or otherwise.

6.07. **Number and Gender.** As used in this instrument, references in the masculine gender shall be deemed to include the feminine and neuter gender, and vice versa, and references to the singular shall be deemed to include the plural, and vice versa, wherever the context so permits.

6.08. **Captions.** The captions appearing in this instrument are for convenience of reference only, and shall be disregarded in determining the meaning and effect of the provisions of this instrument.

6.09. **Severability Clause.** If any provision of this instrument is invalid, that provision shall be disregarded, and the remainder of this instrument shall be construed as if the invalid provision had not been included.

6.10. **California Law to Apply.** All questions concerning the validity, interpretation, and administration of this instrument, including any trusts created under this instrument, shall be governed by the laws of the State of California, regardless of the domicile of any trustee or beneficiary.

6.11. **Gifts to "Heirs."** For any gift to heirs of either or both settlors that is made in this instrument, those heirs shall be determined as if the settlor or settlors had died intestate at the time for distribution prescribed in this instrument, and the identity and shares of those heirs shall be determined according to the California laws of succession that concern separate property not acquired from a previously deceased spouse and that are in effect at the death of the settlor or settlors.

#### Article 7: Execution

7.01. **Execution.** The trustee[s] hereby approve[s] this instrument and accept[s] the trust[s] provided for in it, certifying that it correctly states the terms and conditions under which the trust estate is to be held, administered, and distributed.

Executed on \_\_\_\_\_ [date], at \_\_\_\_\_ [city or town and state].

#### TRUSTEE[S]

[For individual trustee(s): ]

\_\_\_\_\_ [signature of trustee]

[typed name]

[Add additional signature line(s) for co-trustee(s) ]

[For corporate trustee: ]

[typed name of corporate trustee]

By:

\_\_\_\_\_ [signature of first authorized employee]

[typed name] \_\_\_\_\_ [signature of second authorized employee]

[typed name]

**Acceptance by Settlers.** We are the settlors of the trusts created by this instrument. We have read this instrument, which correctly states the terms and conditions under which the trust estate is to be held, administered, and distributed. We approve this instrument in all particulars and agree to be bound by its terms and conditions.

\_\_\_\_\_ [signature of first settlor]

[typed name]

\_\_\_\_\_ [signature of second settlor]

[typed name]

#### ACKNOWLEDGMENT

[Acknowledgements taken in California must be in the following form (Civ. Code § 1189(a))]:

State of California )  
 County of \_\_\_\_\_ ) ss  
 )

On \_\_\_\_\_ [date], before me, \_\_\_\_\_ [name of notary], personally appeared \_\_\_\_\_ [name(s)], who proved to me on the basis of satisfactory evidence to be the person[s] whose name[s] [is or are] subscribed to the within instrument, and acknowledged to me that \_\_\_\_\_ [he or she or they] executed the same in \_\_\_\_\_ [his or her or their] authorized \_\_\_\_\_ [capacity or capacities], and that by \_\_\_\_\_ [his or her or their] signature[s] on the instrument the person[s], or the entity upon behalf of which the person[s] acted, executed the instrument.

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

WITNESS my hand and official seal.

\_\_\_\_\_ [signature of notary]  
 [typed name]

**SCHEDULE A  
 SCHEDULE OF TRUST ASSETS**

Description of Asset	Character of Asset
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
 Estate, Gift & Trust LawTrustsIrrevocable Living TrustsEstate, Gift & Trust LawTrustsLife Insurance Trusts



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California Legal Forms--Transaction Guide

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DIVISION IV: WILLS AND TRUSTS  
CHAPTER 72 IRREVOCABLE TRUSTS  
PART IV. FORMS  
A. Insurance Trusts

*26-72 California Legal Forms--Transaction Guide §§ 72.202-72.209*

**AUTHOR:** Reviewed by Albert G. Handelman

**[Reserved]**

§§ 72.202[Reserved]



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California Legal Forms--Transaction Guide

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DIVISION IV: WILLS AND TRUSTS  
CHAPTER 72 IRREVOCABLE TRUSTS  
PART IV. FORMS  
B. Trusts for Minors

*26-72 California Legal Forms--Transaction Guide § 72.210*

**AUTHOR:** Reviewed by Albert G. Handelman

**§ 72.210 Irrevocable Trust for Minor(s) [I.R.C. § 2503(c)]**

**[1] Comment**

**[a] Uses of Trust**

This form is an irrevocable inter vivos trust for the benefit of one or more beneficiaries under the age of 21 years. The trust is designed to meet the requirements of *I.R.C. § 2503(c)* and thus to qualify transfers to the trust for the annual gift tax exclusion [*see I.R.C. § 2503(b)* and discussion in § 72.13[2][a]]. If the trust does not meet the requirements of *I.R.C. § 2503(c)*, transfers to the trust may not meet the "present interest" requirements of the annual exclusion [*see Treas. Reg. § 25.2503-3* and discussion in § 72.13[2][c]]. Transfers to this trust may be made on an annual basis to maximize the benefits of the annual exclusion.

This type of trust ordinarily will be established by parents or grandparents who wish to transfer cash or other property to a trust for the benefit of their children or grandchildren. However, other relatives (and even unrelated persons) may also establish this kind of trust.

**[b] Declaration of Trust Format**

Two basic formats for trust instruments, called trust agreements and declarations of trust, are used by California attorneys to create inter vivos trusts. This trust uses the trust declaration format [*see* Section 1.01].

**[c] Generation-Skipping Transfer Tax**

The generation-skipping transfer tax (GST) ordinarily will not be an obstacle to the creation of a trust under *I.R.C. § 2503(c)*, even when the settlors are grandparents and the beneficiaries are their grandchildren. Transfers covered by the gift tax annual exclusion generally avoid the GST because they are assigned an inclusion ratio of zero [*I.R.C. § 2642(c)(1), (3)(A)*]. A transfer to a trust will be assigned an inclusion ratio of zero if (1) the trust is for the benefit of an

individual, (2) no part of the principal or income may be distributed to anyone other than that individual during the individual's lifetime, and (3) if the individual dies before termination of the trust the assets will be includible in the individual's gross estate for federal tax purposes [I.R.C. § 2642(c)(2)]. I.R.C. § 2503(c) requires that, if the beneficiary dies before reaching the age of 21, the trust property must be payable to the beneficiary's estate or as the beneficiary may appoint under a general power of appointment [I.R.C. § 2503(c)(2)(A); see I.R.C. § 2514(c) (general power of appointment defined)]. Property that is included in a decedent's estate, or that is subject to a general power of appointment held by the decedent, is includible in the decedent's gross estate for federal estate tax purposes [I.R.C. § 2041(a)(2)]. Thus transfers of property to a trust that meets the requirements of I.R.C. § 2503(c) will not be subject to the GST tax.

For an extended discussion of the tax, see California Wills Trusts, Ch.113, *Generation-Skipping Transfers and Trust Strategies* (Matthew Bender).

#### **[d] Division of Trust Estate**

This form may be used to create a trust for the benefit of one or several beneficiaries. If there is to be only one beneficiary, the entire trust will be held for the benefit of the one beneficiary [ see Section 4.01 of form (first alternative)]. If there are two or more beneficiaries, the trustee must divide the trust estate into separate trusts and hold one trust for the benefit of each beneficiary [ see Section 4.01 of form (second alternative)]. Division of the trust into separate trusts is essential if transfers to the trust are to qualify for the annual gift tax exclusion (and thereby also receive a generation-skipping transfer tax inclusion ration of zero). Since the trustee is given discretion over distributions of principal and income [ see Section 4.02 of form; see also I.R.C. § 2503(c) and discussion in § 72.15[3][b]], if the trust is not divided into separate trusts no single beneficiary would ever be assured of receiving any part of the income or principal and no beneficiary would have a present interest in the trust [Treas. Reg. § 25.2503-3(c), Example (3); for discussion of present interest requirement, see § 72.13[2][c]]. When the trust is properly divided into separate trusts, transfers to the trust will qualify for as many annual exclusions as there are beneficiaries.

#### **[e] Termination of Trust**

Although I.R.C. § 2503(c) states that a trust will meet its requirements if undistributed income "will ... pass" to the beneficiary when the beneficiary reaches 21 [I.R.C. § 2503(c)(2)(A)], the section does not require actual distribution to the beneficiary at 21. If the beneficiary has the right to terminate the trust on reaching 21, the requirements of the section are satisfied [ *Heidrich v. Commissioner*, (1971) 55 T.C. 746, 752-753 ; *Rev. Rul. 74-43, 1974-1 C.B. 285* ; see *Treas. Reg. § 25.2503-4(b)(2)*].

The right to terminate the trust may be exercisable during a specified period after the beneficiary reaches the age of 21 [ see Section 4.03 of form], or may be a continuing right exercisable after the beneficiary reaches that age [ *Heidrich v. Commissioner*, (1971) 55 T.C. 746, 752-753 ; *Rev. Rul. 74-43, 1974-1 C.B. 285* ; see *Priv. Ltr. Rul. 8507017, 8039023* ]. In either case, the instrument should specify what will happen to the trust property if the beneficiary does not exercise the right to terminate the trust. Typically, the trustee will be required to distribute any remaining principal and income to the beneficiary at a specified age, or in installments at various ages [ see Section 4.03 of form]. The settlor has wide latitude in specifying what will happen to undistributed trust property if the beneficiary does not exercise the right to terminate the trust. The instrument may even require that the property be held in trust until the beneficiary's death.

#### **[f] Selection of Trustee**

The selection of the trustee for this trust will depend on whether the settlor wishes to remove the trust property from his or her estate for estate tax purposes. Most settlors will wish to do this, and will take precautions so that the trust property will not be included in their estates. Some settlors, however, may be unconcerned about removing the trust

property from their estates. If, for example, it is not reasonably foreseeable that the value of the settlor's entire estate will exceed the "applicable exclusion amount" (unified credit) [*see I.R.C. § 2010(c)* (table of graduated amounts) and discussion in § 60.13[4][b]] available in the year of the settlor's death, the settlor may not wish to take any precautions to remove the property from his or her estate. Similarly, if the settlor is relatively young and the risk that he or she might die before the trust terminates is relatively slight, the risk may be acceptable under all of the circumstances.

A settlor who is not concerned about the possible inclusion of the trust property in his or her estate may safely serve as trustee. However, a settlor who is concerned about inclusion should not serve as trustee, because the trustee's discretion over distributions of principal and income [*see Section 4.02* of form] is a power to designate the person or persons who will possess or enjoy the property or its income. If the settlor dies before the trust terminates, the power will require inclusion under *I.R.C. § 2036(a)(2)*. This is the case even if the discretion is exercisable only in conjunction with another person, or only in conjunction with a person who has an adverse interest [*Treas. Reg. § 20.2036-1(b)(3)*].

If the settlor strongly wishes to manage the trust property as trustee, but also wishes to avoid inclusion of the trust property in his or her estate, discretion over distributions may be given to a special trustee, with the ordinary powers of management reserved to the settlor. The fact that someone other than the settlor has discretion over trust distributions will not cause the property to be included in the settlor's estate [*Treas. Reg. § 20.2036-1(b)(3)*].

### **[g] Successor Trustees**

If the settlor wishes to remove the trust property from his or her estate for estate tax purposes [*see* discussion in [f], *above*], care should be taken in drafting the trust provisions relating to successor trustees. If the settlor retains an unrestricted power to remove the trustee and appoint himself or herself as successor, the settlor will be deemed to have the powers of the trustee for estate tax purposes. Since the trustee's discretion over distributions of principal and income amounts to the power to designate those who will possess or enjoy the property or its income, the trustee's power will be attributed to the settlor and the trust property will also be included in the settlor's estate if the settlor dies before the trust terminates [*I.R.C. § 2036(a)(2)*; *Treas. Reg. §§ 20.2036-1(b)(3), 20.2038-1(a)*]. If, however, the settlor retains the power to replace the trustee with an individual or corporate successor who is not "related or subordinate" to the settlor, the trustee's powers will not be attributed to the settlor for this purpose, and the property will not be included in the settlor's estate [*Rev. Rul. 95-58, 1995-2 C.B. 191*; *see I.R.C. § 672(c)* ("related or subordinate party" defined)].

### **[2] FORM**

#### **Irrevocable Trust for Minor(s) [**

*[Name of trust, if desired, e.g., JOSEPH EDWARD GREEN 1998 TRUST]*

### **DECLARATION OF TRUST**

#### Article 1: Creation of Trust

1.01. **Parties.** [*Identify trustee(s), e.g., William Henry Green, who resides at 400 Serra Lane, San Diego, California, or Double Eagle National Bank of San Diego, California, or William Henry Green, who resides at 400 Serra Lane, San Diego, California, and Double Eagle National Bank of San Diego, California,*] (the "trustee[s]") hereby declare[s] that \_\_\_\_\_ [he has *or* she has *or* it has *or* they have] received certain property (the "trust estate") from \_\_\_\_\_ [*identify settlor[s], e.g., Joseph Edward Green of San Diego, California,*] (the "settlor[s]"), and hold[s] that property in trust to be held, administered, and distributed according to the terms of this instrument.

1.02. **Name of Trust.** The trust created by this instrument shall be known as the [*specify, e.g., Joseph Edward Green 1998 Trust*].

## Article 2: Trust Estate

2.01. **Definition of Trust Estate.** All of the property described in Schedule A, attached to this instrument, and any other property that may hereafter be subject to this trust, is referred to in this instrument as the "trust estate" and shall be held, administered, and distributed as provided in this instrument.

2.02. **Additions to Trust.** From time to time, the trustee may accept additions to this trust from any source. Any additions to the trust shall be made by designating in writing the property to be added. However, the titling of any account, deed, or similar asset in the name of the trustee, as trustee of this trust, or any alternate or successor trustee acting under this instrument, shall be deemed to be a transfer to this trust. Any designation by a third party, whether by will, deed, account title designation, or similar transfer, shall also be a transfer to the trust estate.

## Article 3: Rights and Powers of Settlers

3.01. **Irrevocability of Trust.** This trust is irrevocable. It may not be amended, revoked, or terminated, in whole or in part, except as specified in this instrument.

## Article 4: Payments and Distributions

*[If trust will have only one beneficiary, use the following:]*

4.01. **Beneficiary.** This trust is created for the benefit of \_\_\_\_\_ *[name of beneficiary]*, who was born on \_\_\_\_\_ *[date]* and is the \_\_\_\_\_ *[specify, e.g., child or grandchild]* of the settlor. The trust estate shall be held, administered, and distributed by the trustee for \_\_\_\_\_ *[his or her]* benefit as provided in this instrument.

*[Or, if trust will have more than one beneficiary, use the following:]*

4.01. **Beneficiaries and Division of Trust Estate.** The trustee shall immediately divide the trust estate into *[number of beneficiaries, e.g., two]* equal shares and shall set aside and allocate one share for the benefit of each of the following persons:

1. \_\_\_\_\_ *[name of beneficiary]*, who was born on \_\_\_\_\_ *[date]*, and who is the \_\_\_\_\_ *[specify, e.g., child or grandchild]* of the settlor.

2. \_\_\_\_\_ *[name of beneficiary]*, who was born on \_\_\_\_\_ *[date]*, and who is the \_\_\_\_\_ *[specify, e.g., child or grandchild]* of the settlor.

*[Continue to list beneficiaries as needed]*

Each of the shares so allocated shall be held, administered, and distributed in a separate trust as provided in this instrument.

*[Continue with the following:]*

4.02. **Payment of Income and Distribution of Principal Until Age 21.** So long as *[the beneficiary or a beneficiary for whose benefit a separate trust has been set aside]* is under the age of 21 years, the income of the trust *[if more than one*

*beneficiary, add:* set aside for that beneficiary] shall be added to principal, and the trustee may pay to or apply for the benefit of [the *or that*] beneficiary as much of the income and principal of [the *or that*] trust as the trustee, in the trustee's discretion, deems necessary or appropriate for [the *or that*] beneficiary's health, education, maintenance, support, comfort, welfare, and happiness. In determining the amount to be paid to or for the benefit of [the *or that*] beneficiary, the trustee is not required to consider [the *or that*] beneficiary's other income or resources.

**4.03. Power to Terminate Trust at Age 21.** [The beneficiary *or* Each beneficiary for whose benefit a separate trust has been set aside] shall have the power to terminate the trust [*if more than one beneficiary, add:* set aside for that beneficiary] by so electing in an instrument in writing delivered to the trustee within [*specify time, e.g., 60 days*] after [the *or that*] beneficiary has reached the age of 21 years. Upon receipt of a such an instrument, the trustee shall immediately distribute the entire undistributed balance of [the *or that*] trust to [the *or that*] beneficiary.

**4.04. Payment of Income and Distribution of Principal After Age 21.** If [the beneficiary *or* any beneficiary for whose benefit a separate trust has been set aside] does not exercise the power to terminate [the *or that*] trust upon reaching the age of 21 years, as specified above, [the *or that*] trust shall be retained by the trustee and held, administered, and distributed in accordance with the terms of Section 4.02 of this instrument.

**4.05. Distribution of Balance.** When [the beneficiary *or* any beneficiary for whose benefit a separate trust has been set aside] reaches the age of [*specify, e.g., 25 years*], the trustee shall distribute [*for single distribution:* all of the undistributed balance *or specify fraction for partial distribution, e.g., one half of the principal or one third of the principal*] of the [the *or that*] trust [him *or her or him or her*], free of trust.

[*Include the following only if first distribution was partial:*]

When \_\_\_\_\_ [he *or she or he or she*] reaches the age of [*specify, e.g., 30 years*], the trustee shall distribute [*for single distribution of balance:* all of the undistributed balance *or specify fraction for partial distribution, e.g., one half of the then-remaining principal*] of [the *or that*] trust to [him *or her or him or her*], free of trust.

[*Include the following only if the second distribution was partial:*]

When \_\_\_\_\_ [he *or she or he or she*] reaches the age of [*specify, e.g., 35 years*], the trustee shall distribute all of the undistributed balance [the *or that*] trust to [him *or her or him or her*], free of trust.

**4.06. Distribution In Case of Death Before Full Distribution.** If [the beneficiary *or* any beneficiary for whose benefit a separate trust has been set aside] dies before reaching the age of 21 years, or before receiving full distribution of [the *or that*] trust, the trustee shall distribute all of the then-remaining balance of the [the *or that*] trust, including all principal and undistributed income, to the person, persons, or entities, including [the *or that*] beneficiary's own estate, and on such terms and conditions, either outright or in trust, as [the *or that*] beneficiary shall appoint by \_\_\_\_\_ [his *or her or his or her*] valid last will specifically referring to and exercising this power of appointment. Any part of that balance not effectively appointed by [the *or that*] beneficiary in this manner shall be distributed, free of trust, to the then-living issue of the settlor(s) \_\_\_\_\_ [in the manner provided in California Probate Code Section \_\_\_\_\_ (240 *or* 246 *or* 247) *or* in equal shares, regardless of whether or not all such issue are members of the same generation]. However, if any part of that balance would otherwise be distributed to a person for whose benefit a trust is then being administered under this instrument, that part shall instead be added to that trust and thereafter be administered according to its terms. If there is no issue of the settlor(s) then living and no other distribution of that balance is directed by this instrument, then all of that balance then remaining shall be distributed to \_\_\_\_\_ [*specify distributee or distributees, e.g., the Regents of the University of California or the lawful issue of Martha R. Wilson* \_\_\_\_\_] (in the manner provided in California

Probate Code Section \_\_\_\_\_ [240 or 246 or 247] or in equal shares, regardless of whether or not all such issue are members of the same generation)].

**4.07. Trustee's Power to Determine Income and Principal.** Unless otherwise specifically provided in this instrument, the determination of all matters with respect to what is principal and income of any trust under this instrument and the apportionment and allocation of receipts, expenses, and other charges between principal and income shall be governed by the provisions of the California Revised Uniform Principal and Income Act from time to time existing. The trustee in the trustee's discretion shall determine any matter not provided for either in this instrument or in the California Revised Uniform Principal and Income Act.

**4.08. Spendthrift Clause.** The interests of the beneficiaries under this instrument are not transferable by voluntary or involuntary assignment or by operation of law, and shall be free from the claims of creditors and from attachment, execution, bankruptcy, and other legal process, to the maximum extent permitted by law.

#### Article 5: Trustee

**5.01. Successor Trustees.** If the office of trustee becomes vacant by reason of death, incapacity, or any other reason, and no successor trustee or co-trustees have been designated under any other provisions of this trust instrument, then \_\_\_\_\_ [for a sole individual successor, name and description, e.g., Melissa B. Brown, who resides at \_\_\_\_\_ (address) or, for co-trustees, names and descriptions, e.g., Melissa B. Brown, who resides at \_\_\_\_\_ (address), and Richard R. Black, who resides at \_\_\_\_\_ (address), or any one or more of them or, for corporate trustee, name and description, e.g., Second State Bank, Los Angeles, California] shall be the successor [trustee or co-trustees]. If \_\_\_\_\_ [name(s) of successor trustee or co-trustees] [is or are all] unwilling or unable to serve as successor trustee, a new trustee or co-trustees shall be appointed by the court. [To limit class of permissible individual trustees, add appropriate limitation, e.g.: Any individual trustee or co-trustee not specifically named in this section who is appointed under this section shall be appointed from among the issue of the settlors, unless no issue of the settlors is able and willing to serve.]

**5.02. Replacement of Co-trustee.** If, at any time when two or more persons or entities are serving as co-trustees, any one or more (but less than all) of them are unable or unwilling for any reason to continue to serve as co-trustees, and no successor co-trustee has been designated under any other applicable provision of this trust instrument, a new co-trustee may be appointed by the court. If no new co-trustee is appointed, the remaining co-trustee or co-trustees shall have full power to act as trustee or co-trustees and to continue the trust administration.

**5.03. Definition of Trustee.** Reference in this instrument to "the trustee" shall be deemed a reference to whoever is serving as trustee or co-trustees, and shall include alternate or successor trustees or co-trustees, unless the context requires otherwise.

**5.04. Bond.** \_\_\_\_\_ [No bond or undertaking shall be required of any (optional: corporate) trustee named in or Bond shall be required of any trustee serving under] this instrument.

**5.05. Compensation of Trustee.** The trustee shall be entitled to reasonable compensation for services rendered, payable without court order. [Optional: The settlor(s) believe(s) that \$\_\_\_\_\_ is a reasonable annual amount to compensate the trustee for all of the ordinary services that will be required of the trustee during an annual period. Additional compensation in a reasonable amount may be proper to compensate the trustee for any extraordinary services rendered by the trustee, all without court order.] [Optional: If a trustee serves for only part of a calendar year, the annual compensation shall be prorated according to the number of days during that year that the trustee was acting as trustee during that year.]

**5.06. General Powers of Trustee.** To carry out the purposes of the trust[s] created under this instrument, and subject to

any limitations stated elsewhere in this instrument, the trustee shall, in addition to all of the powers now or hereafter conferred on trustees by law, have the power to do all of the following:

(a) Retain property received into the trust at its inception, or later added to the trust, as long as the trustee considers that retention in the best interests of the trust or in furtherance of the goals of the settlor[s] in creating the trust, as determined from this trust instrument, but subject to the standards of the prudent investor rule as set forth in the California Uniform Prudent Investor Act, as amended from time to time.

(b) Invest and manage the trust assets as a prudent investor would, by considering the purposes, terms, distribution requirements, and other circumstances of the trust. In satisfying this standard, the trustee shall exercise reasonable care, skill, and caution. The trustee's investment and management decisions respecting individual assets and courses of action must be evaluated not in isolation, but in the context of the trust portfolio as a whole and as a part of an overall investment strategy having risk and return objectives reasonably suited to the trust. Among circumstances that are appropriate to consider in investing and managing trust assets are the following, to the extent relevant to the trust or its beneficiaries:

- (1) General economic conditions.
- (2) The possible effect of inflation or deflation.
- (3) The expected tax consequences of investment decisions or strategies.
- (4) The role that each investment or course of action plays within the overall trust portfolio.
- (5) The expected total return from income and the appreciation of capital.
- (6) Other resources of the beneficiaries known to the trustee as determined from information provided by the beneficiaries.
- (7) Needs for liquidity, regularity of income, and preservation or appreciation of capital.
- (8) An asset's special relationship or special value, if any, to the purposes of the trust or to one or more of the beneficiaries.

The trustee may invest in any kind of property or type of investment or engage in any course of action or investment strategy consistent with the standards set forth in the Uniform Prudent Investor Act, as set forth in *Probate Code Sections 16045-16054*, or any successor sections.

(c) Retain or acquire unproductive or underproductive property.

(d) In the trustee's discretion, invest or reinvest in mutual funds, money market funds, investment trusts, regulated investment companies, market funds, and index funds, and in the shares or securities of any such funds or companies, that persons of prudence, discretion, and intelligence acquire for their own account.

(e) With or without court authorization, sell (for cash or on deferred payments, and with or without security), convey, exchange, partition, and divide trust property; grant options for the sale or exchange of trust property for any purpose, whether the contract is to be performed or the option is to be exercised within or beyond the term of the trust; and lease trust property for any purpose, for terms within or extending beyond the expiration of the trust, regardless of whether the leased property is commercial or residential and regardless of the number of units leased.

- (f) Manage, control, improve, and maintain all real and personal trust property.
- (g) Subdivide or develop land; make or obtain the vacation of plats and adjust boundaries, or adjust differences in valuation on exchange or partition by giving or receiving consideration; and dedicate land or easements to public use with or without consideration.
- (h) Make ordinary or extraordinary repairs or alterations in buildings or other trust property, demolish any improvements, raze existing party walls or buildings, and erect new party walls or buildings, as the trustee deems advisable.
- (i) Enter into oil, gas, and other mineral leases, on terms deemed advisable by the trustee; enter into any pooling, unitization, repressurization, community, or other types of agreements relating to the exploration, development, operation, and conservation of mineral properties; drill, mine, and otherwise operate for the development of oil, gas, and other minerals; contract for the installation and operation of absorption and repressuring plants; and install and maintain pipelines. Any such leases or agreements may be for a term within or extending beyond the term of the trust.
- (j) In the trustee's discretion, abandon any [unproductive or wasted] trust asset or interest therein.
- (k) Employ and discharge agents and employees, including but not limited to attorneys, accountants, investment and other advisers, custodians of assets, property managers, real estate agents and brokers, and appraisers, to advise and assist the trustees in the management of any trusts created under this trust instrument, and compensate them from the trust property. [*Optional:* The agents and employees may be associated or affiliated with the trustee, or may be descendants or other persons related to the trustee or to the settlor, or a company associated with any such persons.] [*Optional:* The trustee is entitled to rely on the advice of any professional advisers employed under this provision. Reasonable compensation paid to any such agents or employees shall not diminish the compensation to which the trustee is otherwise entitled.]
- (l) With respect to securities held in trust, exercise all the rights, powers, and privileges of an owner, including, but not limited to, the power to vote, give proxies, and pay assessments and other sums deemed by the trustee necessary for the protection of the trust property; participate in voting trusts, pooling agreements, foreclosures, reorganizations, consolidations, mergers, and liquidations, and, in connection therewith, deposit securities with and transfer title to any protective or other committee under such terms as the trustee deems advisable; exercise or sell stock subscription or conversion rights; and accept and retain as investments of the trust any securities or other property received through the exercise of any of the foregoing powers.
- (m) Hold securities or other trust property in the trustee's own name or in the name of a nominee, without disclosure of the trust, or in unregistered form, so that title may pass by delivery.
- (n) Deposit securities in a securities depository that is either licensed or exempt from licensing.
- (o) Borrow money for any trust purpose from any person or entity on such terms and conditions as the trustee deems advisable, and obligate the trust for repayment; encumber any trust property by mortgage, deed of trust, pledge, or otherwise, whether for terms within or extending beyond the term of the trust, as the trustee deems advisable, to secure repayment of any such loan; replace, renew, and extend any such loan or encumbrance; and pay loans or other obligations of the trust deemed advisable by the trustee.
- (p) Procure and carry, at the expense of the trust, insurance in such forms and in such amounts as the trustee deems advisable to protect the trust property against damage or loss, and to protect the trustee against liability with respect to third persons.

(q) Enforce any obligation owing to the trust, including any obligation secured by a deed of trust, mortgage, or pledge held as trust property, and purchase any property subject to a security instrument held as trust property at any sale under that instrument.

(r) Extend the time for payment of any note or other obligation held as an asset of, and owing to, the trust, including accrued or future interest, and extend the time for repayment beyond the term of the trust.

(s) Pay or contest any claim against the trust; release or prosecute any claim in favor of the trust; or, in lieu of payment, contest, release, or prosecution, adjust, compromise, or settle any such claim, in whole or in part, and with or without consideration.

(t) At trust expense, prosecute or defend actions, claims, or proceedings of whatever kind for the protection of the trust property and of the trustee in the performance of the trustee's duties, and employ and compensate attorneys, advisers, and other agents as the trustee deems advisable.

**5.07. Power to Combine Trust Assets.** Each trust created under this trust instrument shall constitute a separate trust and be administered and accounted for accordingly; however, the assets of all of the trusts may be combined and held for the trust beneficiaries without physical division into separate trusts until time of distribution.

**5.08. Early Termination of Trusts.** The trustee shall have the power, in the trustee's discretion, to terminate any trust created under this instrument whenever the fair market value of the trust becomes so small in relation to the costs of administration as to make continuing administration uneconomical. Upon termination, the trustee shall distribute the principal and any accrued or undistributed net income to the income beneficiaries in proportion to their shares of the income. If no fixed amount of income is payable to specific beneficiaries, the trustee shall distribute the principal and any accrued or undistributed net income in equal shares to those beneficiaries who would then be entitled to income payments from the trust.

**5.09. Division or Distribution in Cash or in Kind.** In order to satisfy a pecuniary gift or to distribute or divide trust assets into shares or partial shares, the trustee may distribute or divide those assets in kind, or divide undivided interests in those assets, or sell all or any part of those assets and distribute or divide the property in cash, in kind, or partly in cash and partly in kind. Property distributed to satisfy a pecuniary gift under this trust instrument shall be valued at its fair market value at the time of distribution.

**5.10. Payments to Legally Incapacitated Persons.** If at any time any trust beneficiary is a minor, or it appears to the trustee that any trust beneficiary is incapacitated, incompetent, or for any other reason not able to receive payments or make intelligent or responsible use of the payments, then the trustee, in lieu of making direct payments to the trust beneficiary, may make payments to the beneficiary's conservator or guardian; to the beneficiary's custodian under the Uniform Gifts to Minors Acts or Uniform Transfers to Minors Act of any state; to one or more suitable persons as the trustee deems proper, such as a relative of or a person residing with the beneficiary, to be used for the beneficiary's benefit; to any other person, firm, or agency for services rendered or to be rendered for the beneficiary's assistance or benefit; or to accounts in the beneficiary's name with financial institutions. The receipt of payments by any of the foregoing shall constitute a sufficient acquittance of the trustee for all purposes.

**5.11. Grant of Specific Powers Not to Limit Exercise of General Powers.** The enumeration of specific powers under this trust instrument shall not limit the trustee from exercising any other power with respect to any trusts created by this trust instrument that may be necessary or appropriate for the trustee to have and exercise in order to carry out the purposes of the trusts or to permit the trustee to fulfill the trustee's responsibilities and duties with respect to the trust.

**5.12. Trust Distributions May Not Discharge Obligations of Support.** Notwithstanding any other provision of this

trust instrument, no income or principal of the trust shall be used to discharge, in whole or in part, the legal obligation of any person to support or educate any beneficiary of this trust. In determining the legal obligation of any person to support and educate a beneficiary of this trust, the existence of this trust and the funds made available under it shall not be taken into account.

**5.13. Power to Disclaim or Release Powers.** Any trustee may disclaim, release, or restrict the scope of any power or discretion that the trustee may hold in connection with any trust created under this instrument, whether the power or discretion is expressly granted in this instrument or is implied by law. The trustee shall disclaim a power in the manner required by applicable federal or California law. The trustee shall release or restrict any power or discretion by giving written notice to the beneficiary or beneficiaries then entitled to current distribution of income from the trust, specifying the power or discretion to be released or restricted, the nature of the restriction, and, if appropriate, the person or persons to whom the released or restricted power shall pass and be exercisable. If a power is disclaimed, the power shall be available to and exercisable by the successor trustee.

**5.14. Written Notice to Trustee.** Until the trustee receives written notice of any death or other event upon which the right to payments from any trust may depend, the trustee shall incur no liability for disbursements made in good faith to persons whose interests may have been affected by that event.

**5.15. Duty to Account.** The trustee shall render accounts at least annually, at the termination of a trust, and upon a change of trustees, to the persons and in the manner required by law.

#### Article 6: Concluding Provisions

**6.01. Perpetuities Saving Clause.** Notwithstanding any other provision of this instrument, every trust created by this instrument[, or by the exercise of any power of appointment created by this instrument,] shall terminate no later than 21 years after the death of the last survivor of [*designate measuring life or lives, e.g., the settlor's issue or the settlors and their issue*] who are alive at the creation of the trust. For purposes of this perpetuities saving clause, a trust shall be deemed to have been created on the date the trust becomes irrevocable or the date of the death of the [*for two-settlor trust: surviving*] settlor, whichever occurs first. If a trust is terminated under this section, the trustee shall distribute all of the principal and undistributed income of the trust to the income beneficiaries of the trust in the proportion in which they are entitled (or eligible, in the case of discretionary payments) to receive income immediately before the termination. If that proportion is not fixed by the terms of the trust, the trustee shall distribute all of the trust property to the persons then entitled or eligible to receive income from the trust \_\_\_\_\_ [*specify pattern of distribution, e.g., outright in a manner that, in the trustee's opinion, will give effect to the intent of the settlor(s) in creating the trust, the trustee's decision to be final and incontestable by anyone or as a class, in the manner provided in California Probate Code Section \_\_\_\_\_ (240 or 246 or 247) or in equal shares, regardless of whether all of such persons are members of the same generation*].

**6.02. Definitions of Child and Children.** As used in this instrument, the terms "child" and "children" refer to natural children and to children who have been legally adopted by the parent or parents from or through whom their right to inherit or to take is determined or derived.

**6.03. Definition of Issue.** As used in this instrument, the term "issue" refers to all lineal descendants of all generations, with the relationship of parent and child at each generation being determined by the definitions of "child" and "children" set forth in this instrument.

**6.04. Definition of Incapacity.** For purposes of this instrument, a person shall be deemed "incapacitated" if and for so long as a court of competent jurisdiction has made a finding to that effect, or a guardian or conservator of that person's estate or person duly appointed by a court of competent jurisdiction is serving, or upon certification by two physicians (licensed to practice under the laws of the state where the person is domiciled at the time of the certification) that the

person is unable properly to care for himself or herself or for his or her property. The latter certification shall be made by each physician in a written declaration under penalty of perjury.

6.05. **Definition of Education.** As used in this instrument, the term "education" refers to the following:

- (a) Education at public or private elementary, junior high, middle, or high schools, including boarding schools;
- (b) Undergraduate, graduate, and postgraduate study in any field, whether or not of a professional character, in colleges, universities, or other institutions of higher learning;
- (c) Specialized formal or informal training in music, the stage, the handicrafts, or the arts, whether by private instruction or otherwise; and
- (d) Formal or informal vocational or technical training, whether through programs or institutions devoted solely to vocational or technical training, or otherwise.

6.06. **Number and Gender.** As used in this instrument, references in the masculine gender shall be deemed to include the feminine and neuter gender, and vice versa, and references to the singular shall be deemed to include the plural, and vice versa, wherever the context permits.

6.07. **Captions.** The captions appearing in this instrument are for convenience of reference only, and shall be disregarded in determining the meaning and effect of the provisions of this instrument.

6.08. **Severability Clause.** If any provision of this instrument is invalid, that provision shall be disregarded, and the remainder of this instrument shall be construed as if the invalid provision had not been included.

6.09. **California Law to Apply.** All questions concerning the validity, interpretation, and administration of this instrument, including any trusts created under this instrument, shall be governed by the laws of the State of California, regardless of the domicile of any trustee or beneficiary.

6.10. **Gifts to "Heirs."** For any gift to heirs of [the settlor *or* either or both settlors] that is made in this instrument, those heirs shall be determined as if the [settlor *or*] settlor[s] had died intestate at the time for distribution prescribed in this instrument, and the identity and shares of those heirs shall be determined according to the California laws of succession that concern separate property not acquired from a previously deceased spouse and that are in effect at the death of the [settlor *or*] settlor[s].

#### Article 7: Signature and Execution

7.01. **Execution.** The trustee[s] hereby approve[s] this instrument and accept[s] the trust[s] provided for in it, certifying that it correctly states the terms and conditions under which the trust estate is to be held, administered, and distributed.

Executed on \_\_\_\_\_ [date], at \_\_\_\_\_ [city or town and state].

TRUSTEE[S]

[For individual trustee(s): ]

\_\_\_\_\_ [signature of trustee]

[typed name]

[Add additional signature line(s) for co-trustee(s) ]

[For corporate trustee: ]

[typed name of corporate trustee]

By:

\_\_\_\_\_ [signature of first authorized employee]

[typed name]

\_\_\_\_\_ [signature of second authorized employee]

[typed name]

**Acceptance by Settlor.** I am the settlor named in the foregoing instrument. I have read the instrument, which correctly states the terms and conditions under which the trust estate is to be held, administered, and distributed. I approve it in all particulars and agree to be bound by its terms and conditions.

\_\_\_\_\_ [signature of settlor]

[typed name]

**ACKNOWLEDGMENT**

[Acknowledgements taken in California must be in the following form (Civ. Code § 1189(a))]:

State of California )  
County of \_\_\_\_\_ ) ss

On \_\_\_\_\_ [date], before me, \_\_\_\_\_ [name of notary], personally appeared \_\_\_\_\_ [name(s)], who proved to me on the basis of satisfactory evidence to be the person[s] whose name[s] [is or are] subscribed to the within instrument, and acknowledged to me that \_\_\_\_\_ [he or she or they] executed the same in \_\_\_\_\_ [his or her or their] authorized \_\_\_\_\_ [capacity or capacities], and that by \_\_\_\_\_ [his or her or their] signature[s] on the instrument the person[s], or the entity upon behalf of which the person[s] acted, executed the instrument.

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

WITNESS my hand and official seal.

\_\_\_\_\_ [signature of notary]

[typed name]

**SCHEDULE A  
SCHEDULE OF TRUST ASSETS**

Description of Asset	Character of Asset
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsIrrevocable Living TrustsTax LawFederal Estate & Gift TaxesGifts (IRC secs. 2035, 2501-2524)General Overview



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California Legal Forms--Transaction Guide

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DIVISION IV: WILLS AND TRUSTS  
CHAPTER 72 IRREVOCABLE TRUSTS  
PART IV. FORMS  
B. Trusts for Minors

*26-72 California Legal Forms--Transaction Guide §§ 72.211-72.219*

**AUTHOR:** Reviewed by Albert G. Handelman

**[Reserved]**

§§ 72.211[Reserved]



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DIVISION IV: WILLS AND TRUSTS  
CHAPTER 72 IRREVOCABLE TRUSTS  
PART IV. FORMS  
C. Grantor Retained Income Trusts

*26-72 California Legal Forms--Transaction Guide § 72.220*

**AUTHOR:** Reviewed by Albert G. Handelman

**§ 72.220 Qualified Personal Residence Trust (QPRT)**

**[1] Comment**

**[a] Use of Form**

This form is a complete qualified personal residence trust (QPRT). It is based on the sample form issued by the IRS for a qualified personal residence trust (QPRT) [*see Rev. Proc. 2003-42, 2003-1 C.B. 993*]. It satisfies all of the requirements for a QPRT under *I.R.C. § 2702(a)(3)(A)* and *Treas. Reg. § 25.2702-5(c)*. It is designed for a QPRT with one transferor for a term equal to the lesser of the life of the term holder or a term of years.

The IRS will recognize a trust as meeting all of the QPRT requirements if (1) the trust instrument is substantially similar to the sample declaration or properly integrates one or more of the sample alternate provisions into a document that is substantially similar to the sample declaration; and (2) the trust operates in a manner that is consistent with the terms of the trust instrument and is a valid trust under applicable local law. A trust instrument that contains substantive provisions in addition to those provided in the sample declaration (other than properly integrated alternate provisions or provisions necessary to establish a valid trust under applicable local law), or that omits any of the provisions of the sample declaration, will not necessarily be disqualified, but it will not be automatically assured of qualification [*Rev. Proc. 2003-42, 2003-1 C.B. 993*, § 3]. This form follows the language of the sample form almost exactly, with minor nonsubstantive deviations to conform to the style and format of the other forms in this publication.

For a trust to qualify as a QPRT, the governing instrument must contain all of the provisions required under the regulations, and these provisions, by their terms, must continue in effect during the existence of any term interest in the trust [*Treas. Reg. § 25.2702-5(c)(1)*].

**[b] Basic Tax Treatment**

For gift tax purposes, the original transfer of the residence to the QPRT will be treated as a gift of the remainder to the

remainder beneficiaries. The value of the remainder will be determined by first determining the fair market value of the entire property and then subtracting the value of the retained interest [*Treas. Reg. § 25.2512-5(a), (d)*].

If the settlor dies before the trust has terminated, the trust property will be included in the settlor's gross estate because the settlor retained the use of the property for a period that did not end before the settlor's death [*I.R.C. § 2036(a)*]. If the settlor does not die during the trust term, however, the property will be distributed to the remainder beneficiaries without any other gift or estate tax. However, the beneficiaries will not receive a stepped-up basis on the transfer, because the basis of property that is received by gift is the same as the basis in the hands of the donor [*I.R.C. § 1015(a)*].

For additional discussion of the use of qualified personal residence trusts, see § 72.16[6]; see also California Wills Trusts, Ch. 114, *Irrevocable Trusts*, § 114.10[7] (Matthew Bender).

### **[c] Term Interest**

A QPRT will give a specified person or persons (called the "term holder" or "term holders" in the Treasury regulations) the right to use and occupy the personal residence during a specified period of time, generally called the "term" or the "trust term." The interest of the specified person or persons during the "term" is described in the regulations as the "term interest" [*see Treas. Reg. § 25.2702-5(c)(1)*].

The "term" may be the lifetime of a designated person or, if there are two term holders, their lifetimes. It is more usual, however, for the term to be stated as a specific number of years, in order to avoid inclusion of the trust property in the settlor's gross estate. When a term is specified, its length should be determined by balancing the term holder's age and probable life expectancy against the tax savings that can be realized from reducing the value of the remainder interest by postponing distribution to the remainder beneficiaries for as long as possible. Since QPRTs are frequently drafted for elderly term holders/clients, the term is often 10 years or less.

If the term is a specified number of years, the trust instrument typically will provide that the term will expire earlier if the term holder dies before expiration of the specified number of years [*see Section 2.03 of form*]. Such a provision recognizes that the tax-saving purposes of the trust will be frustrated by an early death. Since the gross estate of a decedent will include property that the decedent had the right to use or enjoy at the time of death [*see I.R.C. § 2036(a)* and discussion in § 72.12[2][a]], most settlors (who are typically the term holders) will wish to control the disposition of the residence if they die before the expiration of the term of years. This can be done by specifying in the trust instrument that the property will be distributed to the settlor's (or surviving settlor's) estate if the settlor (or surviving settlor) dies before expiration of the term of years [*see Section 2.03 of form*]. Such a provision, in effect, creates a reversion. As discussed in [k], *below*, a reversion is desirable because it reduces the value of the remainder interest and the amount of gift tax that will have to be paid on the transfer.

Potential generation-skipping transfer (GST) tax consequences under *I.R.C. § 2601* on termination of the trust by reason of the settlor's death during the QPRT term should also be considered. The settlor may prefer to design the dispositive provisions to avoid any GST transfer in the event of his or her death during the term because, under *I.R.C. § 2642(f)*, no allocation of a GST exemption can be made until the end of the QPRT term.

The trust instrument must require that any income of the trust be distributed to the term holder at least annually until the term interest expires [*Treas. Reg. § 25.2702-5(c)(3)*; *see Section 2.02(c)* of form]. It must also prohibit "distributions of corpus" to any beneficiary other than the settlor before expiration of the term interest [*Treas. Reg. § 25.2702-5(c)(4)*; *see Section 2.02(h)* of form].

As discussed in [e], *below*, most estate planners prefer to use two separate QPRTs when the residence is a community property asset. However, if a husband and wife join to transfer their interests in a residence to the same trust, the instrument must prohibit any person other than one of the spouses from holding a term interest in the trust concurrently

with the other spouse [*Treas. Reg. § 25.2702-5(c)(2)(iv)*].

The trust instrument must prohibit commutation (prepayment) of the term holder's interest [*Treas. Reg. § 25.2702-5(c)(6)*]; see Section 2.02(g) of form].

#### **[d] Personal Residence**

A QPRT can hold only one personal residence, and that residence must be used as the personal residence of the term holder, who ordinarily is the settlor [*Treas. Reg. § 25.2702-5(b)(1), (c)(7)(i)*]. However, a personal residence can be either a principal residence or a second home [*Treas. Reg. § 25.2702-5(b)(2)(i), (c)(2)(i)*]. The trust can also hold a fractional interest in the settlor's principal residence or second home [*Treas. Reg. § 25.2702-5(b)(2)(i)(C), (c)(2)(i)(C)*]. Under the regulations, the definition of "principal residence" is to be determined under the rules of former *I.R.C. § 1034* (repealed effective May 6, 1997) [*Treas. Reg. § 25.2702-5(c)(2)(i)(A)*]. Under the latter rules, a principal residence could consist of a dwelling house situated on real property, a condominium, an interest in a cooperative housing corporation, a houseboat, or a motor home [see *I.R.C. § 1034(f)*; *Treas. Reg. § 1.1034-1(c)(3)(i)*; *Rev. Rul. 64-31, 1964-1 C.B. 300*]. *I.R.C. § 1034* was repealed by the Taxpayer Relief Act of 1997 [P.L. 105-34, § 312(b)]; however, it appears unlikely that this repeal was intended to have any impact on the types of interests that can qualify as a residence for QPRT purposes.

During the term of the trust, the residence cannot be occupied by any person other than the term holder or the term holder's spouse or dependents, and it must be available for the term holder's use at all times. During the term of the trust, the residence must be used primarily as a residence [*Treas. Reg. § 25.2702-5(b)(1), (c)(2)(iii)*].

A personal residence may include appurtenant structures used for residential purposes and a reasonable amount of adjacent land, but it cannot include any personal property in the residence (such as household furniture or furnishings) [*Treas. Reg. § 25.2702-5(b)(2)(ii)*]. The residence may be improved after the trust is created. However, all improvements must meet the requirements of a personal residence [*Treas. Reg. § 25.2702-5(c)(5)(ii)(B)*]. Section 2.01(c) of the form is an optional provision that permits the trustee to accept additions of cash to the trust for specified purposes. A provision in the trust instrument that permits these additions is not required in order to qualify the trust as a QPRT [*Treas. Reg. § 25.2702-5(c)(5)(ii)(A)*].

#### **[e] Interests of Spouses in Same Residence**

Spouses who hold interests (including community property interests) in the same residence and who wish to establish a QPRT may transfer their interests to the same trust, or establish separate QPRTs for their respective interests [see *Treas. Reg. § 25.2702-5(b)(2)(iv), (c)(2)(i)(c), (iv)*]. If the spouses transfer their respective interests to the same trust, the trust instrument must prohibit any person other than one of the spouses from holding a term interest in the trust concurrently with the other spouse [*Treas. Reg. § 25.2702-5(b)(2)(iv), (c)(2)(iv)*]. When spouses join in transferring their interests in the same residence to a single trust, each spouse will be deemed to have made a gift of his or her interest in the residence. On completion of the transfer, the spouses' community property interests in the residence will cease, since they cannot retain interests (community or otherwise) in property they have given away.

Many estate planners prefer to create separate QPRTs when married persons wish to contribute their personal residence to a QPRT. The Treasury regulations provide that a QPRT may be funded with an undivided fractional interest in an otherwise qualifying personal residence [*Treas. Reg. § 25.2702-5(c)(2)(i)(c)*] and also provide that spouses may contribute a fractional portion of their interests in the same residence to a QPRT [*Treas. Reg. § 25.2702-5(b)(2)(iv), (c)(2)(iv)*]. When separate QPRTs are created, each trust will be funded with an undivided one-half interest in the residence. Each trust will provide for a reversion [see discussion in [k], below] on the settlor's death. If the first spouse to die dies before expiration of the term of years specified in that spouse's trust, the trust estate will be subject to the payment of any estate taxes that may be due in that spouse's estate under *I.R.C. § 2036(a)* [see discussion in §

72.12[2][a]]. The trust estate can then be disposed of either under terms of the deceased spouse's will, or as provided in a revocable inter vivos trust created by the deceased spouse.

Failure to provide for a reversion on the death of each spouse could have very unfavorable estate tax consequences. This is the case whether the spouses establish separate trusts or join to establish a single trust. The deceased spouse's interest in the residence would be taxable in the deceased spouse's gross estate under *I.R.C. § 2036(a)* even though the property had passed beyond the control of the deceased spouse's estate and collection of the estate taxes would be problematic. Further, the deceased spouse's interest in the residence would not qualify for the marital deduction, since it would be subject to termination on expiration of the specified term of years and would violate the "terminable interest rule." Under that rule, the marital deduction is not available for any interest in property that is subject to termination or failure on the lapse of time, the occurrence of an event or contingency, or the failure of occurrence of some contingency or event [*I.R.C. § 2056(b)(1)*].

If the deceased spouse's interest is brought back under terms of a reversion, however, the interest can be transferred to the surviving spouse either under the deceased spouse's will or under a revocable inter vivos trust. If the interest is transferred by either method, it would not have to be subject to termination on expiration of the term of years and could qualify for the marital deduction [*I.R.C. § 2056(a)*]. The surviving spouse would then be able to put the first spouse's half of the property into the survivor's own QPRT.

#### **[f] Holding Cash**

The trust instrument must generally prohibit the trust from holding any assets other than the one personal residence [*Treas. Reg. § 25.2702-5(c)(5)(i)*; see *Section 2.01(b)* of form]. However, it can permit the settlor to initially transfer cash to the trust to cover the purchase of the residence if the purchase is made within three months after the trust is created and the trustee has previously entered into a contract to purchase the residence [*Treas. Reg. § 25.2702-5(c)(5)(ii)(A)(1)(iii)*; see *Section 2.01(c)* of form]. It also can authorize the settlor to add cash to the trust to cover mortgage payments, expenses, or improvements, provided the expenses are already incurred or the improvements are to be paid for by the trust within six months after the addition is made [*Treas. Reg. § 25.2702-5(c)(5)(ii)(A)(1)(i), (ii)*; see *Section 2.01(c)* of form].

If the instrument permits the trustee to hold cash for any of the authorized purposes, it must require the trustee to determine at least quarterly what amounts are held by the trust for the payment of expenses and to immediately distribute any amounts in excess of the permitted amounts to the settlor [*Treas. Reg. § 25.2702-5(c)(5)(ii)(A)(2)*; see *Section 2.02(c)* of form].

#### **[g] Sale of Residence**

The trust instrument may permit the sale of the residence (except as set forth in *Treas. Reg. § 25.2702-5(c)(9)*, discussed *below*); the proceeds of the sale must be held in a separate account [*Treas. Reg. § 25.2702-5(c)(5)(ii)(C)*; see *Section 2.02(f)* of form]. If the instrument permits this, however, it must also provide that the trust will cease to be a QPRT if the proceeds of the sale have not been used to acquire a new residence within two years after the date of sale [*Treas. Reg. § 25.2702-5(c)(7)(ii)*; see *Section 2.04(a)(2)* of form]. If the trust term expires before a new residence has been acquired, the trust will cease to be a QPRT when the term expires [*Treas. Reg. § 25.2702-5(c)(7)(ii)*].

Under *Treas. Reg. § 25.2702-5(c)(9)*, added effective December 23, 1997, and applicable to trusts created after May 16, 1996 [*Treas. Reg. § 25.2702-7*], the trust instrument must prohibit the trust from selling or transferring the personal residence, directly or indirectly, to the settlor, the settlor's spouse, or an entity controlled by the settlor or the settlor's spouse during the retained term interest of the trust, or at any time after the retained term interest that the trust is a grantor trust [for rules governing grantor trusts, see *I.R.C. §§ 671-678* and discussion in § 72.11[2][a]]. For a provision complying with this regulation, see *Section 2.02(e)* of the form.

A sale or transfer to another grantor trust of the settlor or the settlor's spouse is considered a sale or transfer to the settlor or the settlor's spouse. However, a distribution for no consideration, on or after the expiration of the retained term interest, to another grantor trust of the settlor or the settlor's spouse pursuant to the express terms of the trust will not be considered a sale or transfer to the settlor or the settlor's spouse if the other grantor trust prohibits the sale or transfer of the property to the settlor, the settlor's spouse, or an entity controlled by the settlor or the settlor's spouse [*Treas. Reg. § 25.2702-5(c)(9)*].

If the settlor dies before the expiration of the retained interest, *Treas. Reg. § 25.2702-5(c)(9)* does not apply to the distribution for no consideration of the residence to any person, including the settlor's estate, pursuant to the express terms of the trust, or pursuant to the exercise of a power retained by the settlor under the terms of the trust. *Treas. Reg. § 25.2702-5(c)(9)* also is inapplicable to an outright distribution for no consideration of the residence to the settlor's spouse after the expiration of the retained trust term pursuant to the express terms of the trust [*Treas. Reg. § 25.2702-5(c)(9)*].

This amendment was motivated by IRS concern that a QPRT might be used, not to transfer the personal residence to younger members of the settlor's family, but to transfer other assets to future generations through a so-called "bait and switch" transaction. In such a transaction, the settlor places the residence in trust with the intention of purchasing it from the trust just before the expiration of the retained term; after the settlor purchases the residence, the remainder beneficiaries receive the proceeds of the sale rather than the residence itself. The IRS believes that this does not comport with Congress's intention in permitting the creation of a QPRT [Proposed Rules, Fed. Reg., April 16, 1996, pp. 16623-16625].

A trust that does not comply with one or more of the requirements imposed by *Treas. Reg. § 25.2702-5(b)* or *(c)* will nevertheless be treated as satisfying those requirements if it is modified to comply with the requirements. Modification must be by judicial reformation, or nonjudicial reformation if effective under state law [*Treas. Reg. § 25.2702-5(a)(2)*]. For trusts created before January 1, 1997, the reformation of the trust to comply with the requirements of the amended regulation must have been commenced within 90 days after December 23, 1997, and completed within a reasonable time after commencement. For trusts created after December 31, 1996, reformation must be commenced within 90 days after the due date (including extensions) for filing the gift tax return reporting the transfer of the residence under *I.R.C. § 6075* and completed within a reasonable time after commencement; if reformation is not completed by the due date, the settlor or settlor's spouse must attach a statement to the gift tax return stating that the reformation has been commenced or will be commenced within the 90-day period [*Treas. Reg. § 25.2702-5(a)(2)*].

#### **[h] Destruction of or Damage to Residence**

The trust instrument must provide that the trust will cease to be a QPRT if the residence ceases to be used or held for use as a personal residence of the term holder [*Treas. Reg. § 25.2702-5(c)(7)(i)*; see Section 2.04(a) of form]. A residence is held for use as a personal residence of the term holder as long as it is not occupied by any other person (other than the term holder's spouse or dependent) and is available at all times for use by the term holder as a personal residence [*Treas. Reg. § 25.2702-5(c)(7)(i)*]. If the residence is destroyed or so damaged that it can no longer be used as a personal residence, the trust will cease to be a QPRT unless the residence is replaced or repaired, or a new residence is acquired, within two years [*Treas. Reg. § 25.2702-5(c)(7)(iii)*; see Section 2.04(a)(3) of form].

The trust instrument may permit the trust to hold one or more insurance policies on the residence [*Treas. Reg. § 25.2702-5(c)(5)(ii)(D)*; see Section 2.01(b) of form]. The instrument may also permit the trust to hold any insurance proceeds payable as a result of damage to or destruction of the residence in a separate account [*Treas. Reg. § 25.2702-5(c)(5)(ii)(D)*; see Section 2.02(f) of form]. If the instrument permits the trust to hold insurance proceeds, it must also provide that the trust will cease to be a qualified personal residence trust if the proceeds have not been used to replace or repair the residence within two years after the date of sale [*Treas. Reg. § 25.2702-5(c)(7)(ii)*; see Section

2.04(a)(3) of form]. If the trust term expires before the residence has been replaced or repaired, the trust will cease to be a qualified personal residence trust when the term expires [*Treas. Reg. § 25.2702-5(c)(7)(ii)*].

### **[i] Disposition of Proceeds Following Failure to Repair or Replace Residence**

If the trust ceases to be a qualified personal residence trust because the residence has been sold and a new residence has not been acquired within the required two-year period, or if it ceases to be a qualified personal residence trust because the residence has been destroyed and not replaced within the two-year period, the trust instrument must provide for the disposition of the remaining trust estate (which in the usual case will be the proceeds of the sale or the insurance proceeds, as the case may be). This can be done in one of three ways [*Treas. Reg. § 25.2702-5(c)(8)*]:

- By providing that the trust estate will be distributed outright to the term holder (usually the settlor).
- By providing that the trust will be converted to a qualified annuity trust [*see Treas. Reg. §§ 25.2702-3, 25.2702-5(c)(8)(ii)*; *see* Article III of form for terms of qualified annuity trust].
- By giving the trustee discretion to either distribute the trust estate outright to the term holder or convert it to a qualified annuity trust.

A trust instrument will comply with the regulations if it gives the settlor the right to require the trustee to acquire a new residence if the first residence has been sold, or to replace the first residence if it has been destroyed, and if it further provides that if a new residence is not purchased or a destroyed residence is not replaced within two years, the remaining trust estate will be disposed of in one of the three ways described above [*see* Section 2.04 of form].

It is possible to convert part of the trust estate to a qualified annuity trust and reinvest the rest in a new residence [*Treas. Reg. § 25.2702-5(c)(8)(ii)(C)(3)*]. This may be done if, after the first residence is sold or destroyed, the settlor decides to replace it with a less expensive residence, or one which is acquired by use of less than all of the insurance proceeds. If the assets are converted to a qualified annuity trust, the right to receive the annuity must begin on the date the residence is sold, damaged, or destroyed [*Treas. Reg. § 25.2702-5(c)(8)(ii)(B)*; *see* Section 3.02 of form]. However, the trust instrument may authorize the trustee to defer the annuity payments until 30 days after the assets are converted to a qualified annuity trust if the deferred payments bear interest from the date of sale, damage, or destruction [*Treas. Reg. § 25.2702-5(c)(8)(ii)(B)*; *see* Section 3.04 of form].

### **[j] Remainder**

The trust instrument should identify the person or persons who will receive the trust estate on expiration of the term interest [*see* discussion of term interest in [c], *above*]. The trust estate may be distributed to any person or persons, whether they are individuals, classes of persons, or trusts. The interest that is distributed on the expiration of the trust term is properly described as the "remainder" or the "remainder interest," and the persons who will receive the interest are the "remainder beneficiaries."

A remainder provision may adopt any of a wide variety of distributive options. For example, it may provide that the remainder will be distributed to one named beneficiary, or that it will be divided in equal shares among two or more beneficiaries [*see* Section 2.03 of form]. When the remainder is to be divided among two or more beneficiaries, those beneficiaries may be identified by name, or by membership in a class.

In most cases, the remainder interest will be distributed outright. A qualified personal residence trust will not usually require that the residence be held in trust beyond the expiration of the trust term. However, the trust instrument may require that the share of a beneficiary be held in trust if the beneficiary is under a specified age (for example, 21 years) at the time of distribution.

**[k] Reversion**

Neither the Internal Revenue Code nor the Treasury Regulations require that the trust instrument of a QPRT include a reversion in the settlor. It is good practice, however, to include a reversion, and QPRTs almost always do so. Since the trust property will be included in the settlor's gross estate for estate tax purposes if the settlor dies before expiration of the trust term [*see I.R.C. § 2036(a)* and discussion in § 72.12[2][a]], the property should be brought back under the control of the settlor's personal representative or trustee where it can be made available for payment of the estate taxes. If the trust instrument provides that the trust will terminate if the settlor dies before expiration of the specified term of years [*see* Section 2.03 of form], and if it further provides that in that eventuality the trust estate must be distributed to the settlor's estate, the trust property can be available for the payment of estate taxes on the settlor's death. Inclusion of a reversion also reduces the value of the remainder interest, thereby reducing the amount of gift tax that must be paid on the initial transaction. In some cases, the savings can be dramatic and will increase the overall appeal of the QPRT as a tax-saving device.

**[l] Eligibility for Exclusion of Gain From Sale of Principal Residence**

Since the trust instrument must require that any income of the trust be distributed to the settlor at least once a year [*see Treas. Reg. § 25.2702-5(c)(3)* and discussion in [c], *above*], a QPRT is a "grantor trust" for income tax purposes [*see I.R.C. §§ 671-679* (grantors and others treated as substantial owners)] and the settlor will be treated as the owner of the trust for income tax purposes [*see I.R.C. § 677* (income for benefit of grantor)]. Thus, the settlor may elect to take advantage of the \$250,000 exclusion (\$500,000 for most married couples) of gain on the sale of a principal residence [*I.R.C. § 121*; *see I.R.C. § 671* (trust income, deductions, and credits attributable to grantors and others as substantial owners)].

**[m] Effect on Property Tax**

The property tax benefits of Proposition 13 [*see* Cal. Const., art. XIII A, § 1] will not be lost when the taxpayer's "principal residence" is transferred through the medium of a trust to the transferor's children [*Rev. & Tax. Code § 63.1(a)(1)*; *see Rev. & Tax. Code § 63.1(c)(9)*] ("transfer" includes transfer through medium of inter vivos or testamentary trust).

If the residence is *not* the taxpayer's "principal residence," the benefits of Proposition 13 will nevertheless be preserved if the transfer is to the children and the "full cash value" (determined for property tax purposes) [*see* Cal. Const., art. XIII A, § 2 ("full cash value" defined)] does not exceed \$1,000,000 (the property tax base on the first \$1 million in value will still be preserved) [*Rev. & Tax. Code § 63.1(a)(2)*].

The original transfer of a personal residence to a QPRT does not require any reassessment of taxes under Proposition 13. Under *Rev. & Tax. Code § 62*, no "change in ownership" will have occurred for Proposition 13 purposes as long as the settlor retains the right to use and occupy the residence [*Rev. & Tax. Code § 62(d), (e)*]. If the original trust term [*see* discussion in [d], *above*] does not exceed 12 years, a reversion to the settlor [*see* discussion in [l], *above*] within that time will not cause a reassessment [*Rev. & Tax. Code § 62(d)*]. Further, if the remainder beneficiaries are the settlor's children and the residence is the settlor's principal residence, no reassessment will be required when the trust terminates and the residence is distributed to the children [*Rev. & Tax. Code § 63.1(a)(1), (c)(7)*].

If the residence is not the settlor's principal residence, the transfer on termination of the trust will also be free of reassessment up to the first \$1,000,000 in value [*Rev. & Tax. Code § 63.1(a)(2), (c)(7)*].

**[n] Use of Residence on Termination of Trust**

The settlor may be required to leave the personal residence when it is distributed to the remainder beneficiaries.

However, the remainder beneficiaries may also permit the settlor to remain in the residence if the settlor pays rent for its use. Some planners believe that this kind of rental arrangement may be desirable because it will result in further transfers of assets from the settlor to the remainder beneficiaries, and these transfers will be free of gift or estate tax (although subject to income tax in the hands of the remainder beneficiaries).

It may be risky, however, to enter into a lease arrangement before the end of the original trust term. Although the IRS, in a private letter ruling, has allowed a settlor, before expiration of the QPRT term, to enter into a lease arrangement to take effect upon expiration of the term [*see Priv. Ltr. Rul. 9249014*], in the absence of stronger authority there is still concern among estate planners that such a lease could defeat the purposes of the trust. It is a familiar principle of tax law that the substance of a transaction controls over its form. Further, under the so-called "sham transaction" rule, courts have long refused to recognize transaction that are entered into solely to gain a tax advantage. If, before the residence is transferred to the trust, there is any arrangement, whether formal or informal, that the settlor will not in fact lose the use of the residence on expiration of the trust term, but will have some right to remain in the residence beyond that time, it is possible that the trust might not be recognized as a QPRT and the advantages of the trust could be totally lost.

## [2] FORM

### Qualified Personal Residence Trust (QPRT)

[Name of trust, if desired; e.g., **CHRISTOPHER EDWARD BROWN PERSONAL RESIDENCE TRUST**]

### DECLARATION OF TRUST

This trust agreement is made this \_\_\_\_ day of \_\_\_\_\_, by and between \_\_\_\_\_ (hereinafter "the Transferor"), and \_\_\_\_\_ as the trustee (hereinafter "the Trustee"), hereby creating the \_\_\_\_\_ Trust.

### ARTICLE I. RETAINED INTEREST AND IRREVOCABILITY

1.01. **Retained Interest.** The Transferor intends by this Instrument to establish a qualified personal residence trust within the meaning of *Revenue Procedure 2003-42*, *Internal Revenue Code § 2702(a)(3)(A)*, and *§ 25.2702-5(c)* of the Treasury Gift Tax Regulations (hereinafter "the Treasury regulations"). Accordingly, the Transferor retains no right, title, or interest in any trust asset except as specifically provided in this trust instrument. Any provision of this instrument that would disqualify the trust as a qualified personal residence trust at any time shall be void to the extent necessary to avoid such a disqualification. Notwithstanding any other provision of this instrument, the Trustee shall take no action that would jeopardize the trust's status as a qualified personal interest trust.

1.02. **Irrevocable.** This trust is irrevocable and therefore may not be modified, amended, or revoked by the Transferor or any other person. Notwithstanding the preceding sentence, however, the Trustee shall have the power, acting alone, to amend the trust to the extent provided in *§ 25.2702-5(a)(2)* of the Treasury regulations (or any subsequent regulation or statute) in any manner required for the sole purpose of ensuring that the trust qualifies as a qualified personal residence trust for purposes of *Internal Revenue Code § 2702(a)(3)(A)* and *§ 25.2702-5(c)* of the Treasury regulations (including with respect to the grantor retained annuity trust ("GRAT") administered under Article III, the qualification of the annuity interest under *Internal Revenue Code § 2702(b)(1)* and *§ 25.2702-3* of the Treasury regulations).

### ARTICLE II. QUALIFIED PERSONAL RESIDENCE TRUST

2.01. **Funding of the Qualified Personal Residence Trust ("QPRT").**

*[If transferor currently owns residence that will constitute trust corpus:]*

(a) **Residence.** The Transferor transfers and assigns to the Trustee all of the transferor's interests in and rights to certain real property, including all improvements thereon and appurtenances thereto, known as \_\_\_\_\_ *[legal description and/or address]*. This property, or any property acquired as a replacement, will hereinafter be referred to as the "Residence." The Trustee accepts the Residence and agrees to hold, manage, and distribute the Residence and any other trust property under the terms set forth in this instrument.

*[Or, if transferor does not currently own residence that will constitute trust corpus:]*

(a) **Cash for Purchase of Residence.** The Transferor transfers \$\_\_\_\_\_ to the Trustee and confirms that the Transferor intends to transfer to the Trustee additional cash in an amount sufficient to allow the Trustee to purchase a residence to be used as a personal residence of the Transferor. The Trustee accepts that amount, agrees to hold it in a separate account, and agrees to use it and any additional cash contributed under (c)(4), below, to purchase, within 3 months after the date on which this trust is created, such a residence (hereinafter referred to as "the Residence"). The Trustee agrees to hold, manage, and distribute the Residence and any other trust property under the terms set forth in this instrument.

*[Continue with the following]*

(b) **Assets of the Trust.** Except as provided in Sections 2.01(c), 2.02(f), and 2.04 of this Article II, the Trustee is prohibited from holding, at any time during the term of the QPRT, any property other than (1) an interest in one (and only one) Residence that meets the requirements of a personal residence of the Transferor as set forth in § 25.2702-5(c)(2) of the Treasury regulations, and (2) policies of insurance on the Residence.

*[If transferor currently owns residence that will constitute trust corpus:]*

(c) **Additions to QPRT.** From time to time, the Trustee may accept an addition of cash to the QPRT in an amount which, when added to any cash already held, does not exceed the amount reasonably required for: (1) the payment of QPRT expenses (including, without limitation, mortgage payments) already incurred or reasonably expected to be paid by the trust within 6 months after the date the addition is made; (2) the cost of improvements to the Residence to be paid by the trust within 6 months after the date the addition is made; and (3) the purchase by the trust of a replacement Residence within 3 months after the date the addition is made, provided that no addition may be made, or held by the Trustee, for the purchase of a replacement Residence unless the Trustee has, prior to receipt of the addition, entered into a contract to purchase that Residence. The Trustee shall hold the additions of cash received in accordance with this subsection (c) in a separate account.

*[Or, if transferor does not currently own residence that will constitute trust corpus:]*

(c) **Additions to QPRT.** From time to time, the Trustee may accept an addition of cash to the QPRT in an amount which, when added to any cash already held, does not exceed the amount reasonably required for: (1) the payment of QPRT expenses (including, without limitation, mortgage payments) already incurred or reasonably expected to be paid by the trust within 6 months after the date the addition is made; (2) the cost of improvements to the Residence to be paid by the trust within 6 months after the date the addition is made; (3) the purchase by the trust of a replacement Residence within 3 months after the date the addition is made, provided that no addition may be made, or held by the Trustee, for

this purpose unless the Trustee has, prior to receipt of the addition, entered into a contract to purchase that Residence; and (4) the purchase by the trust of the initial Residence within 3 months of the date the trust is created, provided that no addition may be made, or held by the Trustee, for the purchase of the initial Residence unless the trustee has, prior to receipt of the addition, entered into a contract to purchase that Residence. The Trustee shall hold the additions of cash received in accordance with this subsection (c) in a separate account.

[Continue with the following:]

## 2.02. Administration of Trust.

(a) **Use and Management of Residence.** The Trustee shall hold and maintain the Residence as a personal residence of the Transferor during the period beginning on the date of creation of the trust and continuing through the date of termination of the trust (hereinafter "the term of the QPRT"). During the term of the QPRT, the Transferor shall have the exclusive rent-free use, possession, and enjoyment of the Residence.

(b) **Payment of Expenses.** The Transferor shall be responsible for the payment of all costs associated with the Residence, including, but not limited to, mortgage payments, property taxes, utilities, repairs, maintenance, and insurance. The Trustee's responsibility for the maintenance of the Residence and for other costs associated with the Residence is limited to the extent of any trust income and additions of cash for that purpose received by the Trustee in accordance with this Article II. If the Trustee has insufficient funds to pay these costs and expenses, the Trustee shall notify the Transferor, who shall be responsible for the unpaid balance of these costs and expenses. In addition, the Trustee from time to time may make improvements to the Residence, but the Trustee's authority and responsibility to do so is limited to the extent of any trust income, insurance proceeds, and additions of cash for that purpose received by the Trustee in accordance with this Article.

(c) **Distributions of Cash to Transferor.** Any net income of the QPRT shall be distributed to the Transferor, not less frequently than annually. In addition, the Trustee shall determine, not less frequently than quarterly, whether the cash held by the QPRT exceeds the amount permitted to be held by the Trustee and shall immediately distribute the excess, if any, to the Transferor. Within 30 days of the date of termination of the QPRT, the Trustee shall distribute outright to the Transferor (or to the estate of the Transferor, as the case may be), any amounts held by the QPRT pursuant to Section 2.01(c) of this Article II that are not used to pay QPRT expenses due and payable on the date of termination (including expenses directly related to the termination of the QPRT).

(d) **Reinvestment of Trust Assets.** Except as provided in Section 2.02(e) of this Article II, the Trustee may sell the Residence from time to time upon terms and conditions the Trustee deems appropriate. The Trustee may disburse from time to time any or all of the amounts described in Section 2.01(a) and (c), above, and in Section 2.02(e), below, including all income and capital gains thereon, as the Trustee deems appropriate for the purchase or construction of a replacement Residence to be owned by the trust or for the reconstruction or repair of the Residence. These disbursements shall be made, and any reconstruction and repairs shall be completed, within the time periods necessary to allow this trust to continue to qualify as a QPRT, but the Trustee shall not be held liable for any failure in this regard unless the Trustee has acted (or failed to act) through willful default or gross negligence.

(e) **Prohibition on Sale of Residence to Transferor or Related Parties.** The Trustee is prohibited from selling or transferring (as defined in § 25.2702-5(c)(9) of the Treasury regulations) the Residence, directly or indirectly, to the Transferor, the Transferor's spouse, or an entity controlled by the Transferor or the Transferor's spouse during the retained term interest of the QPRT, or at any time after the termination of the retained term interest in the QPRT while the trust is treated as owned in whole or in part by the Transferor or the Transferor's spouse under *Internal Revenue Code* §§ 671-678.

(f) **Receipt of Proceeds With Respect to Residence.** If the Residence is sold, the Trustee shall hold the proceeds of the sale (along with any income accrued thereon) in a separate account. If the Residence is damaged, destroyed, or involuntarily converted within the meaning of *Internal Revenue Code § 1033*, the Trustee shall hold any proceeds payable as a result thereof (consisting either of insurance proceeds in the case of damage or destruction to the Residence or the proceeds payable on involuntary conversion) in a separate account. The proceeds (and any interest thereon) so received shall be held, administered, and distributed by the Trustee as provided in this Article II.

(g) **Commutation of Interests.** The Transferor's interest in the QPRT may not be sold, commuted, or prepaid by any person.

(h) **Prohibited Distributions.** Except to the extent provided in Section 2.04, the Trustee may not make any distribution of income or principal from the QPRT to or for the benefit of any person other than the Transferor prior to the termination of the QPRT.

2.03. **Termination of Trust.** The trust's date of termination shall be the earlier of \_\_\_\_\_[*date*], or the date of the Transferor's death. Except as otherwise provided in Section 2.04, the Trustee shall distribute the trust property at the end of the term of the QPRT as provided in this Section 2.03. If the date of termination is \_\_\_\_\_[*date*], the Trustee shall distribute all of the property of the trust (other than any amounts due the Transferor pursuant to this trust instrument) to [*designate transferees and, if more than one, specify shares*]. If the date of termination is the earlier death of the Transferor, the Trustee shall distribute all trust property (other than any amounts due the Transferor's estate pursuant to this trust instrument) to [*designate transferees and, if more than one, specify shares*].

#### 2.04. Cessation of Qualification as a Personal Residence Trust.

##### (a) Cessation Date.

(1) The trust shall cease to be a QPRT on the date on which the Residence ceases to be used or held for use as a personal residence of the Transferor within the meaning of § 25.2702-5(c)(7) of the Treasury regulations (other than for reasons described in (2) and (3), below).

(2) In the event of a sale of the Residence, the trust shall cease to be a QPRT on the first to occur of the following: (i) the date which is 2 years after the date of sale; (ii) the date of termination as determined in Section 2.03; or (iii) the date on which a replacement residence is acquired by the Trustee. If the first to occur is the acquisition of a replacement Residence by the Trustee, then the QPRT shall continue with respect to that replacement Residence, and the trust shall cease to be a QPRT only to the extent of any sale proceeds then held by the Trustee and not used for the purchase of the replacement residence.

(3) If the residence is damaged or destroyed, thus making it unusable as a personal residence, the trust shall cease to be a QPRT on the first to occur of the following dates: (i) the date that is 2 years after the date of damage or destruction; (ii) the date of termination as determined in Section 2.03; or (iii) replacement of or repairs to the Residence are completed or a new Residence is acquired by the Trustee. If the first to occur is the completion of the replacement or repair (or the acquisition of a new Residence), then the QPRT shall continue with respect to the repaired Residence or the new Residence, and the trust shall cease to be a QPRT only to the extent of any insurance proceeds then held by the Trustee and not used for the replacement or repair of the Residence (or the purchase of the new Residence).

(b) **Distribution on Cessation.** Within 30 days after the date on which the trust ceases to be a QPRT with respect to any of its assets, and after satisfying the provisions of Section 2.04(c) of this Article II, the Trustee shall distribute the trust

assets with respect to which the trust has ceased to qualify as a QPRT to a separate share of this trust to be referred to and administered as a GRAT in accordance with Article III, below. That GRAT shall continue until the date of termination as defined in Section 2.03.

(c) **Multiple GRATs.** Because it may be possible to have more than one cessation of qualification during the term of the QPRT, the Trustee shall create and fund a separate GRAT for each cessation and each GRAT shall be administered as a separate share of the trust in accordance with Article III.

#### ARTICLE III. GRANTOR RETAINED ANNUITY TRUST

3.01. **Separate Share.** Each GRAT administered as a separate share under this Article III (each of which is referred to as "the GRAT" with regard to that separate share) is intended to provide for the payment of a qualified annuity interest as defined in § 25.2702-2 of the Treasury regulations for the benefit of the Transferor. No amount shall be paid before the termination of this trust other than to or for the Transferor's benefit.

3.02. **Right to Receive Annuity.** In each taxable year of the GRAT, beginning with the year that begins on the cessation date (as defined below), the Trustee shall pay to the Transferor an annuity, the amount of which shall be determined in accordance with Section 3.05. The right of the Transferor to receive the annuity amount begins on the cessation date.

3.03. **Cessation Date.** The cessation date is the date on which the Residence ceases to be used or held for use as a personal residence of the Transferor, the date of sale of the Residence, or the date of damage to or destruction of the Residence that renders the Residence unusable as a residence, as the case may be.

3.04. **Payment of Annuity.** The annuity amount shall be paid in equal [monthly *or* quarterly *or* semi-annual *or* annual] installments. The annuity amount shall be paid first from the net income of the GRAT and, to the extent net income is not sufficient, from principal. The Trustee may defer payment of any annuity amount otherwise payable after the cessation date until the date that is 30 days after the date that the assets are converted to a GRAT as provided in this trust instrument. Any deferred payment of the annuity amount shall bear interest for the period of deferral, compounded annually, at a rate not less than the rate prescribed in *Internal Revenue Code § 7520* in effect on the cessation date. The Trustee shall reduce the aggregate deferred annuity payments by the amount of income actually distributed to the Transferor during the deferral period.

3.05. **Computation of Annuity Amount.** The amount of the annuity payable to the Transferor shall be determined as follows:

(a) If, on the date that any property of the trust is converted from the QPRT to a GRAT (hereinafter the "conversion date"), the assets of the trust do not include a Residence used or held for use as a personal residence of the Transferor, the annuity shall be the amount determined by dividing the lesser of (1) the value of the interest retained by the Transferor (as of the date of the original transfer, or (2) the value of all the trust assets (as of the conversion date), by the annuity factor determined for the original term of the Transferor's interest and at the rate used in valuing the retained interest at the time of the original transfer to the QPRT.

(b) If, on the conversion date, the assets of the trust include a Residence used or held for use as a personal residence of the Transferor, the annuity shall be the amount determined under (a), above, multiplied by a fraction. The numerator of the fraction is the excess of the fair market value of the assets of the trust on the conversion date over the fair market value of the assets as to which the trust continues as a QPRT, and the denominator of the fraction is the fair market value of the trust assets on the conversion date.

(c) In computing the annuity amount for any second or subsequent GRAT to be administered under this Article III, the

Trustee shall make appropriate adjustments to the formulas above in this Section 3.05 that are consistent with the applicable provisions of the Code and the regulations thereunder, and with the Transferor's intent to maintain qualification of each of the trust shares hereunder as a QPRT or a GRAT.

(d) If there is an error in the determination of the annuity amount, then, within a reasonable period after the error is discovered, the difference between the annuity amount payable and the amounts actually paid shall be paid to or for the use of the Transferor by the Trustee in the event of an underpayment, or shall be repaid by the Transferor to the Trustee in the event of an overpayment.

3.06. **Proration.** Notwithstanding the preceding Sections of this Article III, in determining the annuity amount for a short taxable year, the Trustee shall prorate the annuity amount on a daily basis. In determining the annuity amount for the taxable year of the termination of the GRAT, the Trustee shall prorate the annuity amount for the final period of the annuity interest on a daily basis.

3.07. **Additional Contributions Prohibited.** No additional contributions shall be made to the GRAT after its creation.

3.08. **Termination of GRAT.** The GRAT shall continue through the date of termination of the QPRT, as defined in Section 2.03 of Article II, and shall then terminate. On termination of the GRAT, the Trustee shall distribute all of the trust property in the manner described in Section 2.03 as if the GRAT property had been part of the QPRT disposed of under that provision.

3.09. **No Commutation.** The Transferor's interest in the annuity amount may not be sold, commuted, or prepaid by any person.

#### ARTICLE IV. GENERAL PROVISIONS

4.01. **Captions.** The captions appearing in this instrument are for convenience of reference only, and shall be disregarded in determining the meaning and effect of the provisions of this instrument.

4.02. **Severability Clause.** If any provision of this instrument is invalid, that provision shall be disregarded, and the remainder of this instrument shall be construed as if the invalid provision had not been included.

4.03. **Taxable Year.** The taxable year of the trust shall be the calendar year.

4.04. **Governing Law.** The operation of the trust shall be governed by the laws of the state of California. The Trustee, however, shall not have or exercise any power or discretion granted under applicable law that would prevent: (1) the QPRT administered under Article II from meeting the requirements for a qualified personal residence trust under *Internal Revenue Code* § 2702(a)(3)(A) and § 25.2702-5(c) of the Treasury regulations; or (2) the Transferor's interest in any GRAT administered under Article II from meeting the requirements for a qualified annuity interest under § 25.2702-3 of the Treasury regulations.

Executed on \_\_\_\_\_ [date] at \_\_\_\_\_ [city or town and state].

TRUSTEE[S]

[For individual trustee(s):]

\_\_\_\_\_ [signature of trustee]

[*typed name*]

[*Add additional signature line(s) for co-trustee(s)*]

[*For corporate trustee:*]

[*typed name of corporate trustee*]

By:

\_\_\_\_\_ [*signature of first authorized employee*]

[*typed name*]

\_\_\_\_\_ [*signature of second authorized employee*]

[*typed name*]

**Acceptance by Transferor.** I am the transferor named in the foregoing instrument. I have read the instrument, which correctly states the terms and conditions under which the trust estate is to be held, administered, and distributed. I approve it in all particulars and agree to be bound by its terms and conditions.

\_\_\_\_\_ [*signature of settlor*]

[*typed name*]

#### **ACKNOWLEDGMENT**

[*Acknowledgements taken in California must be in the following form (Civ. Code § 1189(a))*]:

State of California )  
County of \_\_\_\_\_ ) ss

On \_\_\_\_\_ [*date*], before me, \_\_\_\_\_ [*name of notary*], personally appeared \_\_\_\_\_ [*name(s)*], who proved to me on the basis of satisfactory evidence to be the person[s] whose name[s] [is or are] subscribed to the within instrument, and acknowledged to me that \_\_\_\_\_ [he or she or they] executed the same in \_\_\_\_\_ [his or her or their] authorized \_\_\_\_\_ [capacity or capacities], and that by \_\_\_\_\_ [his or her or their] signature[s] on the instrument the person[s], or the entity upon behalf of which the person[s] acted, executed the instrument.

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

WITNESS my hand and official seal.

\_\_\_\_\_ [*signature of notary*]

[*typed name*]

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Trusts Irrevocable Living Trusts Tax Law Federal Estate & Gift Taxes Gifts (IRC secs. 2035, 2501-2524) Elements Transfers Among Family Members Tax Law Federal Estate & Gift Taxes Taxable Property Lifetime Transfers (IRC secs. 2035-2038) General Overview Tax Law Federal Taxpayer Groups Income Taxation of Estates, Trusts

& Beneficiaries Grantor Trusts (IRC secs. 671-679)



132 of 132 DOCUMENTS

California Legal Forms--Transaction Guide

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DIVISION IV: WILLS AND TRUSTS  
CHAPTER 72 IRREVOCABLE TRUSTS  
PART IV. FORMS  
C. Grantor Retained Income Trusts

*26-72 California Legal Forms--Transaction Guide § 72.221*

**AUTHOR:** Reviewed by Albert G. Handelman

**§ 72.221 Grantor Retained Annuity Trust (GRAT)**

**[1] Comment**

**[a] Use of Form**

This form is a complete grantor retained annuity trust (GRAT). It is designed to be used by a settlor to make a gift, usually to one or more family members, of cash of income-producing property in which the settlor (or an appropriate family member) retains an annuity interest; that is, the right to receive periodic payments in fixed dollar amounts for life or for a specified term of years. The interest retained by the settlor or family member is a "qualified interest" for purposes of *I.R.C. § 2702* [ *see § 72.16[4]*], making the interest subject to special valuation under *I.R.C. § 7520*. The trust prohibits the payment of the annuity interest by a note, other debt instrument, option, or similar financial arrangement as required by *Treas. Reg. § 25.2702-3*.

This trust does not allow contributions or additions to the trust estate after the settlor's initial contribution. It is recommended that a separate GRAT be established with the subsequent contributions.

**[b] Significance of GRAT as Estate Planning Tool**

The value of the GRAT as an estate planning tool depends on fluctuating interest rates, the growth of the value of the trust assets over the term of the GRAT, and the percentage payout retained by the settlor. When interest rates are low, the settlor's retained interest has a correspondingly high value, and results in a lower transfer tax cost than when interest rates are high. Using a properly drafted GRAT, the settlor can make a transfer of the trust assets to the remainder beneficiaries at a future time, while retaining a present interest in the property and paying gift tax on only a portion of the property's actual value. Because the trust is irrevocable, any post-transfer appreciation is removed from the settlor's estate.

However, the gift to the remainder beneficiaries does *not* qualify for the annual gift exclusion because it is a future

interest. Payment of cash to satisfy the gift tax can be avoided if the "applicable credit amount" of the settlor's unified credit is applied to the gift. If the value of the gift exceeds the applicable exclusion amount (or, if the unused portion of the applicable credit amount is inadequate to completely shelter the transfer from gift tax), gift tax must be paid on the transfer at the time the transfer is made. However, assuming the settlor does not die during the trust term, the trust assets, as well as any appreciation on the property after the trust is funded, have been effectively removed from the settlor's estate for federal estate tax purposes.

If the settlor dies before the trust terminates, the trust assets will be included in the settlor's gross estate under *I.R.C. § 2036(a)*, because the settlor retained income for a period that did not end before death. If the settlor dies after the trust term, the trust assets will be distributed to the remainder beneficiaries without further transfer tax, but the remainder beneficiaries will not receive a stepped-up basis on the transfer.

#### **[c] Provision for Reversion of Trust Assets**

Under this trust, the settlor will retain an annuity interest in the trust assets for a specified term of years. At the end of that time, if the settlor is alive, the property will be distributed to specified remainder beneficiaries, typically the settlor's children. It provides an optional provision for reversion of the assets transferred to the trust if the settlor dies before the trust term expires, and an alternative for distribution of the trust assets by power of appointment exercised in the settlor's will (including to the settlor's estate) if the settlor dies before the trust term expires.

The purpose of including a reversion is to make the trust assets available for payment of the estate taxes, because all or some portion of the assets transferred to the trust will be taxable in the settlor's estate if the settlor dies before the trust term expires. It is also designed to reduce the value of the remainder interest and therefore the amount of gift tax that will have to be paid on the transaction.

If the reversion alternative providing a general testamentary power of appointment is used, default provisions making an alternative disposition of the trust assets in the event the power is not exercised should also be included.

#### **[d] Establishing Separate GRATs for Spouses**

This trust is designed for use by a sole settlor. However, married persons may also contribute their interests in the assets to be transferred to the GRAT. When this is done, it is preferable for each spouse to establish a separate GRAT and to fund the separate GRAT with that spouse's undivided one-half interest in the trust assets.

It is simpler and more straightforward to draft a GRAT with a sole settlor than one with joint settlors, and there are no substantial planning disadvantages to separate trusts. Separate GRATs will be necessary, in fact, if the spouses are not the same age, because the calculation of each respective gift will be different. While some married persons may express a preference for a joint instrument, this preference can usually be overcome by explaining the advantages of separate instruments.

If the deceased spouse's interest is brought back under the terms of a reversion, that interest can then be transferred to the surviving spouse under the deceased spouse's will or a revocable inter vivos trust. If the interest is transferred by either method, it will qualify for the marital deduction, and the surviving spouse will then be able to put the deceased spouse's half of the assets into the survivor's GRAT.

#### **[e] Funding GRAT**

A GRAT must be funded with cash, income-producing property, or other assets that can easily be distributed to the grantor to support the annuity. For example, shares of stock can easily be distributed to the grantor, while an undivided interest in real estate is more cumbersome to value and distribute. Because the GRAT is a grantor trust, no realization of

income will occur on the distribution of appreciated property to the grantor to satisfy the annuity payment. The GRAT must provide that the required annuity payments cannot be made by a note, other debt instrument, option, or similar financial arrangement

### **[f] Naming Settlor as Trustee**

There is no legal prohibition or tax disadvantage to naming the settlor as the trustee of a GRAT. However, some attorneys believe that if someone other than the settlor is appointed as the trustee, the settlor is more likely to appreciate the irrevocable character of the trust and to understand that, by transferring assets to the trust, he or she is surrendering ownership and control of the assets.

The remainder beneficiaries of a GRAT will often be the settlor's adult children. When this is the case, and the settlor is not named as the trustee, one of the children will often be a good choice to serve as the trustee.

### **[2] FORM**

#### **Grantor Retained Annuity Trust (GRAT)**

[ *Name of trust, if desired, e.g.,* **JOHN K. SMITH ANNUITY TRUST** ]

### **TRUST AGREEMENT**

#### Article 1: Creation of Trust

Section 1.01. **Parties.** This trust agreement is made by [*identify settlor, e.g.,* John K. Smith of Smalltown, California], as settlor, and [*identify trustee, e.g.,* Arthur J. Smith, of Smalltown, California], as trustee. The settlor hereby transfers and assigns to the trustee certain assets (the "trust estate"), in trust, to be held, administered, and distributed as provided in this instrument.

Section 1.02. **Name of Trust.** The name of the trust created by this instrument is the [*name of trust, e.g.,* John K. Smith Annuity Trust].

Section 1.03. **Purpose of Trust.** The settlor intends by this instrument to create a trust that qualifies as a "grantor retained annuity trust" within the meaning of *Internal Revenue Code Section 2702(b)(1)* and the regulations issued thereunder, as they may be amended from time to time, and the provisions of this instrument must be interpreted to carry out that intention. Notwithstanding any other provision of this instrument, any power granted to the trustee, the exercise of which might cause the trust not to satisfy those requirements or which would jeopardize the trust's status as a grantor retained annuity trust, must be deemed not to exist. Any provisions of this instrument that would disqualify the trust as a grantor retained annuity trust are void to the extent necessary to avoid such a disqualification.

Section 1.04. **Effective Date.** This instrument is effective on the date the settlor signs it, and transfers and delivers to the trustee the property described in Schedule A that is attached to this instrument and by this reference made a part of this instrument.

#### Article 2: Trust Estate

Section 2.01. **Definition of Trust Estate.** All assets subject to this instrument from time to time are referred to as the "trust estate," and must be held, administered, and distributed as provided in this instrument.

Section 2.02. **Trust Assets.** The trustee must hold, administer, and distribute the property described in Schedule A, and

the income and proceeds attributable to this property, in accordance with the provisions of this instrument.

2.03. **Additions to Trust Prohibited.** The trustee may not accept any additions to the trust.

#### Article 3: Rights and Powers of Settlor

Section 3.01. **Trust Irrevocable; Limited Power of Amendment by Trustee.** The trust is irrevocable. However, the trustee has the power, acting alone, to amend the trust in any manner required for the sole purpose of ensuring that the trust qualifies and continues to qualify as a grantor retained annuity trust within the meaning of *Internal Revenue Code Section 2702(b)* and the regulations issued thereunder, as they may be amended from time to time.

#### Article 4: Distribution of Income and Principal

*[If annuity amount is based on percentage of fair market value of trust property, use the following:]*

Section 4.01. **Payment of Annuity Amount.** Until the settlor's interest in the trust is terminated as provided in Section 4.08, the trustee must pay to or for the benefit of the settlor each taxable year of the trust an "annuity amount" equal to *[specify percentage]* percent of the initial net fair market value of the property transferred to the trustee on the establishment of the trust. The trustee must pay the annuity amount in cash or in kind, or partly in each. Any income of the trust for a taxable year in excess of the annuity amount must be added to the principal. Issuance of a note, other debt instrument, option, or other similar financial arrangement, directly or indirectly, in satisfaction of the annuity amount does not constitute payment of the annuity amount.

*[Or, if annuity amount is fixed dollar amount, use the following:]*

Section 4.01. **Payment of Annuity Amount.** Until the settlor's interest in the trust is terminated as provided in Section 4.08, the trustee must pay to or for the benefit of the settlor each taxable year of the trust an "annuity amount" equal to *[\$specify fixed dollar amount]*. The trustee must pay the annuity amount in cash or in kind, or partly in each. Any income of the trust for a taxable year in excess of the annuity amount must be added to the principal. Issuance of a note, other debt instrument, option, or other similar financial arrangement, directly or indirectly, in satisfaction of the annuity amount does not constitute payment of the annuity amount.

*[Continue with the following:]*

Section 4.02. **Frequency of Installment Payments.** The trustee *[may or must]* pay the annuity amount in *[monthly or quarterly]* or more frequently installments, but in no event less frequently than annually. The trustee may make any December quarterly payment of the annuity amount after the close of the taxable year, as long as the payment is made no later than the date by which the trustee is required to file the federal income tax return of the trust for the taxable year without regard to extensions.

Section 4.03. **Payment of Annuity Amounts in Short Years.** In the case of a short taxable year, which is for a period of less than 12 months, the annuity amount must be determined by multiplying the annuity amount by a fraction, the numerator of which is the number of days in the taxable year of the trust, and the denominator of which is 365 (or 366 if February 29 is a day included in the subject taxable year of the trust).

Section 4.04. **Valuation of Trust Property.** In computing the net fair market value of the trust assets, all of the trust's assets and liabilities as of the date of computation must be taken into account without regard to whether particular items are taken into account in determining the income or the principal of the trust. All determinations of net fair market value

must be made exclusively by the trustee. The trustee's decision, reached in good faith, is final and binding on all persons interested in the trust. If the net fair market value of the trust assets is incorrectly determined, the trustee must, in the case of undervaluation, pay to, or in the case of overvaluation, collect from the recipient, or the personal representative of the recipient, an amount equal to the difference between the amount the trustee would have paid if the correct value had been used and the amount the trustee actually paid. Each adjustment must be made within a reasonable period after final determination of the value.

**Section 4.05. No Distributions Other Than to Settlor.** Notwithstanding any state law existing or enacted after the date the settlor signs this instrument, no distributions of the trust may be made to or for the benefit of any person other than the settlor during the period of the settlor's interest in the trust as specified in Section 4.08. However, an amount is not deemed distributed to or for the benefit of any person other than the settlor if the amount is transferred for full and adequate consideration, used to pay expenses properly chargeable to the trust estate, or distributed to an applicable family member.

**Section 4.06. No Commutations.** Commutation (prepayment) of the settlor's interest is prohibited.

**Section 4.07. Reimbursement of Settlor for Income Tax Liability.** The trustee must reimburse the settlor for the excess of the settlor's personal income tax liability over the settlor's personal income tax liability computed as if the trust were not a grantor trust.

**Section 4.08. Termination of Settlor's Interest in Trust.** The settlor's interest in the trust terminates on the date that is [number of years, e.g., 10] years after the effective date of this instrument, or on the settlor's death, whichever occurs first.

*[If trust estate will revert to settlor's estate on settlor's death, use the following:]*

**Section 4.09. Reversion.** If the settlor's interest in the trust terminates on the settlor's death, as provided in Section 4.08, the trustee must distribute all of the trust estate then remaining, including all principal and undistributed income, to the settlor's estate.

*[Or, if trust estate will be distributed to persons appointed in settlor's will on settlor's death, use the following:]*

**Section 4.09. Reversion.** If the settlor's interest in the trust terminates on the settlor's death, as provided in Section 4.08, the trustee must distribute all of the trust estate then remaining, including all principal and undistributed income, to the person, persons, or entities, including the settlor's estate, that the settlor appoints by the settlor's valid last will specifically referring to and exercising this power of appointment. The trustee may rely on any instrument admitted to probate as the settlor's last will in carrying out the terms of this power of appointment and is not liable for any good-faith act in reliance on that will, even if for any reason it is later determined to be invalid with respect to its purported exercise of this power of appointment. If probate is not otherwise required or instituted, the trustee may rely on any will that on its face appears to be the last validly exercised will of the settlor. If the trustee does not receive notice of the existence of a will of the settlor within [number, e.g., six] months after the settlor's death, the trustee may distribute the trust assets and income as if this power of appointment had not been exercised and, in this event, is conclusively presumed to have acted in good faith, even if a valid will is later discovered. Any property subject to this power of appointment that is not effectively appointed by the settlor must be distributed to \_\_\_\_\_ [identify revocable living trust, e.g., the John k. Smith, Revocable Trust, dated March 31, 2004], as it may be amended, if that trust is then in existence; and, if it is not then in existence, to the settlor's issue [in the manner provided in California Probate Code Section \_\_\_\_\_ (240 or 246 or 247) or in equal shares regardless of whether or not all such issue are members of the same generation].

[Continue with the following:]

[If remainder interest is to be divided in equal shares and distributed to beneficiaries outright, use the following:]

**Section 4.10. Remainder.**

(a) \_\_\_\_\_ [If trust provides for reversion of trust assets to settlor's estate on settlor's death before end of trust term, insert: If the settlor's interest in the trust terminates on the date that is \_\_\_\_\_ (number of years, e.g., 10) years after the date of execution of this instrument as provided in Section 4.08 or, if trust does not provide for reversion of trust assets to settlor's estate on settlor's death before end of trust term, insert: When the settlor's interest in the trust terminates as provided in Section 4.08], the trustee must divide the trust property into as many shares of equal market value as are necessary to create one share for each of the following persons who is then living, or who is not then living but leaves issue then living: [names, e.g., John K. Smith II, Susan Smith Wheelwright, and Norman Smith].

(b) Each share created for a person named in subsection (a) who is then living must be distributed outright to that person.

(c) Each share created for a person named in subsection (a) who is not then living but who leaves issue then living must be divided among those issue [in the manner provided in California Probate Code Section \_\_\_\_\_ (240 or 246 or 247) or in equal shares regardless of whether or not all such issue are members of the same generation]. The share of each issue who has attained the age of [number of years, e.g., 21] years must be distributed outright to that issue. The share of each issue who has not yet attained this age must be held, administered, and distributed in a separate trust for that issue.

(d) If there are no living persons who may take the trust property under this section, the trustee must distribute any undistributed balance of the trust property outright to [specify alternative disposition, e.g., the settlor's heirs or the Marin County chapter of the Anonymous Artists of America].

[Or, if remainder interest is to be distributed to one named beneficiary outright, use the following:]

**Section 4.10. Remainder.**

(a) \_\_\_\_\_ [If trust provides for reversion of trust assets to settlor's estate on settlor's death before end of trust term, insert: If the settlor's interest in the trust terminates on the date that is \_\_\_\_\_ (number of years, e.g., 10) years after the date of execution of this instrument as provided in Section 4.08 or, if trust does not provide for reversion of trust assets to settlor's estate on settlor's death before end of trust term, insert: When the settlor's interest in the trust terminates as provided in Section 4.08], the trustee must distribute the assets of the trust outright to [name, e.g., Susan Smith Wheelwright].

(b) If [name, e.g., Susan Smith Wheelwright] is not then living, the assets of the trust must be divided among the issue of [name, e.g., Susan Smith Wheelwright] [in the manner provided in California Probate Code Section \_\_\_\_\_ (240 or 246 or 247) or in equal shares regardless of whether or not all such issue are members of the same generation]. The share of each issue who has attained the age of [number of years, e.g., 21] years must be distributed outright to that issue. The share of each issue who has not yet attained this age must be held, administered, and distributed in a separate trust for that issue.

(c) If there are no living persons who may take the trust property under this section, the trustee must distribute any

undistributed balance of the trust property outright to [specify alternative disposition, e.g., the settlor's heirs or the Marin County chapter of the Anonymous Artists of America].

[Or, if remainder interest is to be divided in equal shares among members of a specified class and distributed to class members outright, use the following:]

#### Section 4.10. **Remainder.**

(a) \_\_\_\_\_ [If trust provides for reversion of trust assets to settlor's estate on settlor's death before end of trust term, insert: If the settlor's interest in the trust terminates on the date that is \_\_\_\_\_ (number of years, e.g., 10) years after the date of execution of this instrument as provided in Section 4.08 or, if trust does not provide for reversion of trust assets to settlor's estate on settlor's death before end of trust term, insert: When the settlor's interest in the trust terminates as provided in Section 4.08], the trustee must divide the trust property into as many shares of equal market value as are necessary to create one share for each \_\_\_\_\_ [identify beneficiaries, e.g., child of the settlor or child of Janice B. Dalton] who is then living and one share for each \_\_\_\_\_ [identify beneficiaries, e.g., child of the settlor or child of Janice B. Dalton] who is not then living but who leaves issue then living.

(b) Each share created for a \_\_\_\_\_ [identify beneficiary, e.g., child] who is then living must be distributed outright to that \_\_\_\_\_ [identify beneficiary, e.g., child].

(c) Each share created for a \_\_\_\_\_ [identify beneficiary, e.g., child] who is not then living but who leaves issue then living must be divided among those issue [in the manner provided in California Probate Code Section \_\_\_\_\_ (240 or 246 or 247) or in equal shares regardless of whether or not all such issue are members of the same generation]. The share of each issue who has attained the age of [number of years, e.g., 21] years must be distributed outright to that issue. The share of each issue who has not yet attained this age must be held, administered, and distributed in a separate trust for that issue.

(d) If there are no living persons who may take the trust property under this section, the trustee must distribute any undistributed balance of the trust property outright to [specify alternative disposition, e.g., the settlor's heirs or the Marin County chapter of the Anonymous Artists of America].

[Continue with the following:]

Section 4.11. **Trustee's Power to Determine Income and Principal.** Unless otherwise specifically provided in this instrument, the determination of all matters with respect to what is principal and income of any trust under this instrument and the apportionment and allocation of receipts, expenses, and other charges between principal and income are governed by the provisions of the Uniform Principal and Income Act (*Probate Code Section 16320 et seq.*). The trustee has the discretion to determine any matter not provided for either in this instrument or in the Act.

Section 4.12. **Spendthrift Clause.** The interests of the beneficiaries under this instrument are not transferable by voluntary or involuntary assignment, or by operation of law. These interests are free from the claims of creditors and from attachment, execution, bankruptcy, and other legal process, to the maximum extent permitted by law.

#### Article 5: Trustee

Section 5.01. **Successor Trustees.** If the office of trustee becomes vacant by reason of death, incapacity, or any other reason, the following, in order of priority indicated, shall be trustee: [indicate name and address of each successor

*trustee, e.g., first, Alexander W. Smeed, who resides at 123 First Avenue, Smalltown, California; then Bank of Berkeley, West Oakland Branch].*

Section 5.02. **Definition of "Trustee."** Reference in this instrument to "the trustee" is deemed a reference to whoever is serving as trustee, and includes alternate or successor trustees or co-trustees, unless the context requires otherwise.

Section 5.03. **Waiver of Bond.** No bond or undertaking may be required of any individual who serves as a trustee under this instrument.

Section 5.04. **Resignation of Trustee.** Any trustee may resign at any time, without giving a reason for the resignation, by giving written notice, as least [*specify number of days, e.g., 30 days*] before the time the resignation is to take effect, to the settlor, if living, to any other trustee then acting, to all living trust beneficiaries known to the trustee (or, in the case of a minor beneficiary, to the parent or guardian of that beneficiary), and to the successor trustee. A resignation is effective on written acceptance of the trust by the successor trustee.

Section 5.05. **General Powers of Trustee.** To carry out the purposes of the trusts created under this instrument, and subject to any limitations stated elsewhere in this instrument, the trustee has all of the following powers, in addition to all of the powers now or hereafter conferred on trustees by law:

(a) Retain property received into the trust at its inception, as long as the trustee considers this retention is in the trust's best interests or in furtherance of the settlor's goals in creating the trust, as determined from this trust instrument, but subject to the standards of the prudent investor rule as set forth in the California Uniform Prudent Investor Act (*Probate Code Section 16045 et seq.*).

(b) In the trustee's discretion, invest or reinvest in mutual funds, money market funds, investment trusts, regulated investment companies, market funds, and index funds, and in the share or securities of any such funds or companies, that persons of prudence, discretion, and intelligence acquire for their own account.

(c) With or without court authorization, sell (for cash or on deferred payments, and with or without security), convey, exchange, partition, and divide trust property; grant options for the sale or exchange of trust property for any purposes, whether the contract is to be performed or the option is to be exercised within or beyond the trust term; and lease trust property for any purpose, for terms within or extending beyond the trust term, regardless of whether the leased property is commercial or residential and regardless of the number of units leased.

(d) Manage, control, improve, and maintain all real and personal trust property.

(e) Subdivide or develop land; make or obtain the vacation of plats and adjust boundaries, or adjust differences in valuation on exchange or partition by giving or receiving consideration; and dedicate land or easements to public use with or without consideration.

(f) Make ordinary or extraordinary repairs or alterations in buildings or other trust property, demolish any improvements, raze existing part walls or buildings, erect new party walls or buildings, as the trustee deems advisable.

(g) In the trustee's discretion, abandon any trust assets or interest therein.

(h) Employ and discharge agents and employees, including, but not limited to, attorneys, accountants, investment and other advisers, custodians of assets, property managers, real estate agents and brokers, and appraisers, to advise and assist the trustee in the management of the trusts created under this instrument, and compensate them from the trust property.

(i) With respect to securities held in trust, exercise all the rights, powers, and privileges of an owner, including, but not limited to, the power to vote, give proxies, and pay assessments; participate in voting trusts, pooling agreements, reorganizations, consolidations, mergers, and liquidations; deposit securities with and transfer title to any protective or other committee under such terms as the trustee deems advisable; exercise or sell stock subscription or conversion rights; and accept and retain as investments of the trust any securities or other property received through the exercise of any of these powers.

(j) Hold securities or other trust property in the trustee's own name or in the name of a nominee, without disclosure of the trust, or in unregistered form, so that title may pass by delivery.

(k) Borrow money for any trust purpose from any person or entity, including one acting as trustee under this instrument, on such terms and conditions as the trustee deems advisable, and obligate the trust for repayment; encumber any trust property by mortgage, deed of trust, pledge, or otherwise, whether for terms within or extending beyond the trust term, as the trustee deems advisable, to secure payment of any such loan; replace, renew, and extend any loan or encumbrance; and pay loans or other obligations of the trust deemed advisable by the trustee.

(l) Secure and maintain, at the trust's expense, insurance in such forms and in such amounts as the trustee deems advisable to protect the trust property against damage or loss, and to protect the trustee against liability to third persons.

(m) Enforce any obligation owed to the trust, including any obligation secured by a deed of trust, mortgage, or pledge held as trust property, and purchase any property subject to a security instrument held as property at any sale under that instrument.

(n) Pay or contest any claim against the trust, and release or prosecute any claim in favor of the trust, or compromise or settle any such claim, in whole or in part.

(o) At trust expense, prosecute and defend actions, claims, or proceedings for the protection of the trust property and of the trustee in the performance of the trustee's duties, and employ and compensate attorneys, advisers, and other agents the trustee deems advisable.

**Section 5.06. Trustee's Good Faith Actions Binding.** Every action taken in good faith by the trustee is conclusive and binding on all persons interested in the property of the trust.

**Section 5.07. No Power to Terminate Trust.** Notwithstanding the powers granted to the trustee in this instrument, the trustee does not have the power to terminate the trust before the termination of the settlor's interest in the trust as provided in Section 4.08.

**Section 5.08. Division or Distribution in Cash or in Kind.** In order to satisfy a pecuniary gift or to distribute or divide trust assets into shares, the trustee may distribute or divide those assets in kind, or divide undivided interests in those assets, or sell all or any part of those assets and distribute or divide the property in cash, in kind, or partly in cash and partly in kind. Property distributed to satisfy a pecuniary gift under this instrument must be valued at its fair market value at the time of distribution.

**Section 5.09. Grant of Specific Powers Not to Limit Exercise of General Powers.** The enumeration of specific powers under this trust instrument does not limit the trustee from exercising any other power with respect to any trusts created by this instrument that may be necessary or appropriate for the trustee to have and exercise in order to carry out the purposes of the trusts or to permit the trustee to fulfill the trustee's responsibilities and duties with respect to the trusts.

**Section 5.10. Notice to Trustee.** Until the trustee receives written notice of any death or other event on which the right

to payments from the trust may depend, the trustee incurs no liability for disbursements made in good faith to persons whose interests may have been affected by that event.

Section 5.11. **Duty to Account.** The trustee must render accounts at least annually, at the termination of the trust, and on a change of trustees, to the persons and in the manner required by law.

#### Article 6: Concluding Provisions

Section 6.01. **Perpetuities Savings Clause.** Notwithstanding any other provision of this instrument, every trust created by this instrument must terminate no later than 21 years after the death of the last survivor of [*designate measuring life or lives, e.g., the settlor's spouse and issue*] who are alive at the creation of the trust. If the trust is terminated under this section, the trustee must distribute all of the principal and undistributed income of the trust to the income beneficiaries of the trust in the proportion in which they are entitled to receive income immediately before the termination.

Section 6.02. **Captions.** The captions appearing in this instrument are for convenience of reference only, and must be disregarded in determining the meaning and effect of the provisions of this instrument.

Section 6.03. **Severability Clause.** If any provision of this instrument is invalid, that provision must be disregarded, and the remainder of this instrument construed as if the invalid provision had not been included.

Section 6.04. **Taxable Year.** The taxable year of the trust is the calendar year.

Section 6.05. **Governing Law.** All questions concerning the validity, interpretation, and administration of this instrument, including any trusts created under this instrument, are governed by the laws of the state of California, regardless of the domicile of any trustee or beneficiary. However, in any conflict with *Internal Revenue Code Section 2702(b)(1)*, the treasury regulations promulgated thereunder, or any other federal legislative or regulatory requirements for the qualification of this trust as a grantor retained annuity trust, those laws shall govern.

Executed on \_\_\_\_\_ [date] at \_\_\_\_\_ [city or town and state].

#### TRUSTEE

[For individual trustee:]

\_\_\_\_\_ [signature of trustee]

[typed name]

[For corporate trustee:]

[typed name of corporate trustee]

\_\_\_\_\_ [signature of first authorized employee]

[typed name]

\_\_\_\_\_ [signature of second authorized employee]

[typed name]

**Acceptance by Settlor.** I am the settlor named in the foregoing instrument. I have read the instrument, which correctly states the terms and conditions under which the trust estate is to be held, administered, and distributed. I approve it in all particulars and agree to be bound by its terms and conditions.

\_\_\_\_\_ [signature of settlor]

[typed name]

#### ACKNOWLEDGMENT

[Acknowledgements taken in California must be in the following form (Civ. Code § 1189(a))]:

State of California

County of \_\_\_\_\_

On \_\_\_\_\_ [date], before me, \_\_\_\_\_ [name of notary], personally appeared \_\_\_\_\_ [name(s)], who proved to me on the basis of satisfactory evidence to be the person[s] whose name[s] [is or are] subscribed to this instrument, and acknowledged to me that \_\_\_\_\_ [he or she or they] executed the same in \_\_\_\_\_ [his or her or their] authorized \_\_\_\_\_ [capacity or capacities], and that by [his or her or their] signature[s] on the instrument the person[s], or the entity on behalf of which the person[s] acted, executed the instrument.

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

WITNESS my hand and official seal.

\_\_\_\_\_ [signature of notary]

[typed name]

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Trusts Irrevocable Living Trusts Tax Law Federal Estate & Gift Taxes Taxable Property Lifetime Transfers (IRC secs. 2035-2038) General Overview



1 of 187 DOCUMENTS

California Legal Forms--Transaction Guide

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DIVISION IV: WILLS AND TRUSTS  
CHAPTER 73 FUNDING A REVOCABLE TRUST

*26-73 California Legal Forms--Transaction Guide 73.syn*

**AUTHOR:** Margaret Johnson Hazel Lange Reviewed by James V. Quillinan

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[2] FORM

## Assignment of Copyright

## § 73.371 Letter of Instructions to Copyright Office

[1] Comment--Use of Form

[2] FORM

## Letter of Instructions to Copyright Office

Margaret Johnsonn\*

Hazel Langen\*\*

Reviewed by James V. Quillinann\*\*\*

**FOOTNOTES:**

(n139)Footnote \*. Margaret Johnson is a freelance paralegal who contracts with law offices to assist with estate and trust administration, federal estate tax, conservatorships and guardianships, estate planning, and related matters. Mrs. Johnson attended Grand View College, Des Moines, Iowa and University of Santa Clara, Santa Clara, California, where she graduated from the University of Santa Clara Institute for Paralegal Education in 1981. She is a member of the Paralegal Association of Santa Clara County (PASCCO) and serves on the board of the Trust and Estate Administration Section. She is the co-author of "*Transferring Property Without Probate*," published by California Continuing Education of the Bar (CEB) in 1987.

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DIVISION IV: WILLS AND TRUSTS  
CHAPTER 73 FUNDING A REVOCABLE TRUST

*26-73 California Legal Forms--Transaction Guide Scope*

**AUTHOR:** Margaret Johnson Hazel Lange Reviewed by James V. Quillinan

**Scope**

Margaret Johnson\* Hazel Langen\*\* Reviewed by James V. Quillinann\*\*\* Scope

This chapter is a practical guide to the initial start-up and funding of revocable inter vivos trusts. It discusses the importance of funding, the issues that arise in funding the trust, and the mechanics of transferring various types of assets from the settlor(s) to the trust. The transaction guide provides a step-by-step guide to transferring particular types of assets to a trust. The forms include deeds and other documents to be used to transfer title from the settlors to the trust.

This chapter focuses on the initial funding of the living trust. It does not deal with issues of trust division and asset allocation that arise on the death of a settlor, nor with postmortem planning issues involving marital deduction trusts. However, many of the forms in this chapter may be used or adapted for postmortem transfers.

The creation of inter vivos trusts is discussed in Ch. 70, *Complete Revocable Trust Forms* . Basic estate planning considerations are discussed in Ch. 60, *Estate Planning* .

**FOOTNOTES:**

(n142)Footnote \*. Margaret Johnson is a freelance paralegal who contracts with law offices to assist with estate and trust administration, federal estate tax, conservatorships and guardianships, estate planning, and related matters. Mrs. Johnson attended Grand View College, Des Moines, Iowa and University of Santa Clara, Santa Clara, California, where she graduated from the University of Santa Clara Institute for Paralegal Education in 1981. She is a member of the Paralegal Association of Santa Clara County (PASCCO) and serves on the board of the Trust and Estate Administration Section. She is the co-author of *"Transferring Property Without Probate,"* published by California Continuing Education of the Bar (CEB) in 1987.

(n143)Footnote \*\*. Hazel Lange is a Senior Trust & Estate Administration Paralegal at the Law Offices of Schneider, Luce, Quillinan & Morgan in Mountain View, California. Ms. Lange is a graduate of the University of San Francisco with a Bachelor of Science Degree in Organizational Behavior in 1988. She received her Paralegal Certificate in 1976 from Canada College in Redwood City, CA. She specializes in estate and trust administration, conservatorships, and guardianships, and is currently serving a second term as President of the California Alliance of Paralegal Associations (CAPA). She is the co-author of *"Transferring Property Without Probate,"* published by California

Continuing Education of the Bar (CEB) in 1987 (Rev. 1989, 1992, 1994 and 1996). She also participated as a paralegal in the audio taping of "*Transferring Assets After Death*," Mentor Access Pack (MAP), published by CEB in 1992, which was named as first runner-up in the Technology Awards Competition sponsored by the Association of Continuing Legal Education Administrators (ACLEA).

(n144)Footnote \*\*\*. James V. Quillinan received his B.A. in History from Stanford University in 1970 and his J.D. from the University of Santa Clara in 1974. He is a partner in Schneider, Luce, Quillinan & Morgan in Mountain View, California. Mr. Quillinan is a member of and advisor to the Executive Committee of the State Bar Estate Planning, Trust and Probate Law Section, and was Chair of that Committee in 1989-1990. He is an author, frequent lecturer, coordinator of the State Bar's work with the California Law Revision Commission, and a speaker at the State Bar's annual program and the "Computers Now" program. Mr. Quillinan is a member of the California State Bar Estate Planning, Trust and Probate Law Advisory Commission. He is a member of the Palo Alto, San Mateo County, and Santa Clara County Bar Associations, a Fellow of the American College of Trust & Estate Counsel, and a Certified Specialist in Estate Planning, Trust and Probate Law.



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CHAPTER 73 FUNDING A REVOCABLE TRUST  
PART I. RESEARCH GUIDE  
A. Primary Sources

*26-73 California Legal Forms--Transaction Guide § 73.01*

**AUTHOR:** Margaret Johnson Hazel Lange Reviewed by James V. Quillinan

**§ 73.01 California Sources**

**[1] Statutes**

Statute of frauds for real property transfers. *Civ. Code § 1091.*

Grant deed--statutory form. *Civ. Code § 1092.*

Purported grantor's acquisition of right or title to real property after execution of grant deed purporting to convey fee simple title of same to another person causes right or title so acquired to vest automatically in grantee. *Civ. Code § 1106.*

Implied grant deed covenants that grantor has not previously conveyed same estate to anyone other than grantee, and that property is free from encumbrances. *Civ. Code § 1113.*

Issuance of corporate securities. *Corp. Code §§ 416-418.*

Shares in a professional corporation may be held only by one licensed in that profession. *Corp. Code § 13407.*

Effect of transfer or conveyance of interest in partnership. *Corp. Code §§ 15027* (pre-1997 partnership act), 16502 (Uniform Partnership Act of 1994).

Restrictive legend for small stock offering. *Corp. Code § 25102(h)(1).*

Characterization of marital property generally. *Fam. Code §§ 760-853.*

Presumptions concerning nature of property. *Fam. Code §§ 802, 803.*

Transmutation of property generally. *Fam. Code §§ 850-853.*

Express declaration for change in characterization of property. *Fam. Code § 852(a).*

Registration of manufactured home, mobilehome, commercial coach, truck camper, or floating home may be in name of trusteeship. *Health & Safety Code § 18080.1.*

Community property in revocable trust. *Prob. Code § 104.*

Disclaimer of interests generally. *Prob. Code §§ 260-295.*

Statute of frauds for trusts in real property. *Prob. Code § 15206.*

Presumption of revocability of trust. *Prob. Code § 15400.*

Method of revocation of trust by settlor. *Prob. Code § 15401.*

Limits on rights of beneficiary of revocable trust. *Prob. Code § 15800.*

Duties of trustee of revocable trust. *Prob. Code § 16001.*

Powers of trustees generally. *Prob. Code §§ 16200-16249.*

Judicial proceedings concerning trusts. *Prob. Code §§ 17000-17457.*

Certification of trust. *Prob. Code § 18100.5.*

Recording change of trustee. *Prob. Code §§ 18105-18108.*

Creditors' rights against revocable trust during settlor's lifetime. *Prob. Code § 18200.*

Payment of claims, debts, and expenses from revocable trust of deceased settlor. *Prob. Code §§ 19000-19403.*

Notice to creditors in revocable trust. *Prob. Code §§ 19050-19054.*

Exemption from taxation for sale of mobile home to revocable trust. *Rev. & Tax. Code § 6285(b).*

Registration and transfer of vessels. *Veh. Code §§ 9840-9917.*

## **[2] Regulations**

Restrictions on transfer required in legend on stock certificate. *10 Cal. Code Reg. §§ 260.141.1, 260.141.10, 260.141.11, 260.534.*

Voluntary inter vivos trust defined. *10 Cal Code Reg. § 260.019.1.*

Corporate securities transferrable to revocable trust. *10 Cal. Code Reg. §§ 260.102.5, 260.105.9.*

Restrictions on ownership of shares in professional medical corporations apply both to legal and equitable *title*. *16 Cal. Code Reg. § 1348*.

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Estate, Gift & Trust Law Trusts Revocable Living Trusts



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*26-73 California Legal Forms--Transaction Guide § 73.02*

**AUTHOR:** Margaret Johnson Hazel Lange Reviewed by James V. Quillinan

**§ 73.02 Federal Sources**

**[1] Statutes**

Pensions, profit sharing, and stock bonus plans constituting qualified trusts. *I.R.C. § 401(a)*.

HR 10 or Keogh self employment benefits plans; definitions and rules. *I.R.C. § 401(c)*.

Annuity defined. *I.R.C. § 401(g)*.

Qualified cash or deferred arrangements; 401(k) benefits defined. *I.R.C. § 401(k)*.

Taxability of employee's trust benefits generally. *I.R.C. § 402*.

Rules and exclusions for rollovers from exempt trusts. *I.R.C. § 402(c)*.

Surviving spouse of decedent employee treated in the same manner as employee for purposes of rollover. *I.R.C. § 402(c)(9)*.

Tax on lump sum distributions from employee benefit plans. *I.R.C. § 402(e)(4)(D)*.

Individual Retirement Account (IRA) defined. *I.R.C. § 408(a)*.

Simplified Employee Pension Plan defined. *I.R.C. § 408(k)*.

Qualifications for tax credit employee stock ownership plans. *I.R.C. § 409.*

Incentive stock options transferable only by will or descent; exercisable only by holder during holder's lifetime. *I.R.C. § 422(b)(5).*

Income realization upon redemption of matured U.S. savings bonds. *I.R.C. § 454(c).*

Oil and gas wells; percentage depletion disallowed. *I.R.C. §§ 613(d), 613A(a).*

Optional basis adjustment for partnership property. *I.R.C. § 743.*

Small business stock defined. *I.R.C. § 1244(c).*

Small Business Corporation definition and valuation. *I.R.C. § 1244(c)(3).*

Estate or trust not an "individual" for purposes of loss on sale of stock in Qualifying Small Business Corporation. *I.R.C. § 1244(d)(4).*

S corporation defined. *I.R.C. § 1361(a)(1).*

Grantor trust may hold shares in S corporation. *I.R.C. § 1361(c)(2)(A)(i).*

Time limitations for trust as shareholder in S corporation after death of "deemed owner" of trust. *I.R.C. § 1361(c)(2)(A)(ii).*

Special rules for qualified Subchapter S trusts (QSSTs). *I.R.C. § 1361(d).*

Beneficiary of Subchapter S trust may elect S corporation status. *I.R.C. § 1361(d)(2).*

S corporation status election must be filed for each corporation represented in the trust's holdings. *I.R.C. § 1361(d)(2)(B)(i).*

Qualified Subchapter S trust (QSST) defined. *I.R.C. § 1361(d)(3).*

Termination of S corporation status. *I.R.C. § 1362(d).*

S Corporation income or loss attributed to shareholders. *I.R.C. § 1366.*

Life insurance; incidents of ownership. *I.R.C. § 2042(2).*

Estate tax marital deduction. *I.R.C. § 2056.*

Disclaimer of interest in property by beneficiary. *I.R.C. § 2518.*

Employee Stock Ownership Plan defined. *I.R.C. § 4975(e)(7).*

Lender may not exercise option under due-on-sale clause upon a transfer to an inter vivos trust when borrower is trust beneficiary. *12 U.S.C. § 1701j-3(d)(8).*

Federal Securities Act of 1933. *15 U.S.C. § 77a et seq.*

Securities defined. *15 U.S.C. § 77b(a)(1)*.

Registration as constructive notice of claim of ownership of trademark. *15 U.S.C. § 1072*.

Trademark defined. *15 U.S.C. § 1127*.

Copyright definitions. *17 U.S.C. § 101*.

Duration of copyrights. *17 U.S.C. §§ 302-305*.

## **[2] Regulations**

Depletion deduction for oil and gas well interests. *Treas. Reg. § 1.611-2(a)(1)*.

Trust not entitled to ordinary loss deduction on sale of small business stock. *Treas. Reg. § 1.1244(a)-1(b)*.

Federal Home Loan Bank Board regulations governing due-on-sale clauses. *12 C.F.R. § 591.5(b)(1)(vi)*.

Restricted securities defined. *17 C.F.R. § 230.144(a)(3)*.

Security held by trust deemed acquired on date acquired by settlor. *17 C.F.R. § 230.144(d)(3)(vi)*.

## **[3] Rulings**

Basis adjustment on death of grantor partner for partnership interests held by grantor trust. *Rev. Rul. 79-84, 1979-1 C.B. 223*.

Tax implications for grantor trust as partner in loss-generating partnership. *Rev. Rul. 77-402, 1977-2 C.B. 222*.

Transfer of installation obligation back to grantor is not an accelerated disposition. *Rev. Rul. 76-100, 1976-1 C.B. 123*.

Transfer of installment obligation to trust does not constitute taxable disposition. *Rev. Rul. 74-613, 1974-2 C.B. 153*.

## **Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Trusts Revocable Living Trusts Tax Law Federal Estate & Gift Taxes Taxable Property Lifetime Transfers (IRC secs. 2035-2038) Revocable Transfers Tax Law Federal Taxpayer Groups Income Taxation of Estates, Trusts & Beneficiaries Grantor Trusts (IRC secs. 671-679)



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§§ 73.03[Reserved]



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*26-73 California Legal Forms--Transaction Guide § 73.06*

**AUTHOR:** Margaret Johnson Hazel Lange Reviewed by James V. Quillinan

**§ 73.06 Text References**

**[1] Matthew Bender Sources**

Ballantine & Sterling, *California Corporation Laws* (4th ed.), Ch. 7, *Issuance of Shares* , § 135 (Matthew Bender).

*California Family Law Practice and Procedure* (2d ed.), Ch. 20, *Community Property: General Characterization and Division Principles* ; Part B, *Characterization of Property* (Matthew Bender).

*California Probate Practice* (Matthew Bender).

Ch. 4, *Transfer of Property Without Administration* (Matthew Bender).

Ch. 12A, *Claims Against Decedent's Revocable Trust* (Matthew Bender).

*California Wills & Trusts* (Matthew Bender).

Ch. 3, *Selecting the Proper Estate Planning Devices* (Matthew Bender).

Ch. 81, *Planning the Trust* (Matthew Bender).

Ch. 82, *Basic Tax Considerations in Trust Planning* (Matthew Bender).

Ch. 94, *Trust Property* (Matthew Bender).

Ch. 111, *Revocable Inter Vivos Trusts* , § 111.04, *Funding* (Matthew Bender).

Ch. 140, *Implementing the Inter Vivos Trust* (Matthew Bender).

Hartog & Dirkes, *California Trust Practice* (Matthew Bender).

*Environmental Law Practice Guide*, § 7.04(2), *Liability of Fiduciaries as Owners of Contaminated Property* (Matthew Bender).

**[2] Additional Text References**

*Restatement (Third) of Trusts (1992)*, § 227, Comment (1)(prudent investor rule).

Witkin, *Summary of California Law*, vol. 11, *Community Property*, §§ 191-197; vol. 13, *Trusts*, §§ 194-198 (10th ed. 2005).

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law  
Trusts  
Revocable Living Trusts  
Tax Law  
Federal Estate & Gift Taxes  
Taxable Property  
Lifetime Transfers (IRC secs. 2035-2038)  
Revocable Transfers  
Tax Law  
Federal Taxpayer Groups  
Income Taxation of Estates,  
Trusts & Beneficiaries  
Grantor Trusts (IRC secs. 671-679)



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*26-73 California Legal Forms--Transaction Guide §§ 73.07-73.09*

**AUTHOR:** Margaret Johnson Hazel Lange Reviewed by James V. Quillinan

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PART II. LEGAL BACKGROUND

*26-73 California Legal Forms--Transaction Guide § 73.10*

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**§ 73.10 The Trust Administration Process**

**[1] Importance**

Current trends in California estate planning reflect a significant shift from the use of wills to the use of the revocable inter vivos ("living") trust as the primary estate planning device. The reasons for this shift--primarily probate avoidance, continuity of administration, and tax flexibility--are discussed in Ch. 60, *Estate Planning*, and Ch. 70, *Complete Revocable Trust Forms*. As a result of this shift, the procedures for starting up and administering inter vivos trusts have taken on an increasingly greater importance in the typical estate planning practice.

The successful implementation of a living trust does not end with execution of the trust instrument. In fact, execution of the trust instrument marks the beginning, rather than the end, of the trust administration process [*see* [2], *below*]. Attorneys who prepare living trusts need to be familiar with these procedures so they can help their clients get their trusts "up and running" after the trust instrument itself has been prepared and executed.

**[2] Contrasted With Probate Administration**

The drafting and execution of a will is a relatively simple procedure and, in the majority of cases, the testator is not required to take any ancillary steps with respect to his or her assets. After execution of the will, it remains essentially dormant until the settlor's death, at which point the judicially-supervised process of estate administration and distribution begins.

In contrast, the administration of a trust is an ongoing process that involves appreciably more time and effort during the lifetime of the settlor. After a trust instrument is executed, steps must be taken to permit the trust to function as an independent entity, and the assets that will be held in the trust must be transferred to the trust. Thereafter, the trustee must manage the trust assets, make investment decisions, and distribute income and principal to the beneficiaries, in accordance with the trust instrument [*see Prob. Code §§ 16000-16465* (statutory provisions governing trust administration)].

In contrast to the administration of an estate after the death of a testator, a trust normally operates essentially outside the judicial system. The powers and duties of trustees are spelled out in some detail in the Trust Law [*see Prob. Code §§ 16000-16249* (powers and duties of trustees)]. The Probate Code grants the superior court jurisdiction over the internal affairs of trusts [*see Prob. Code §§ 17000-17006*] and authorizes trustees and beneficiaries to petition the court to determine matters with respect to the existence or internal affairs of a trust [*see Prob. Code § 17200*]. Nevertheless, unless someone concerned with the trust takes affirmative steps to involve a court, the administration of a trust proceeds on its own without court involvement, much in the same manner as the day-to-day affairs of a corporation or partnership.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsGeneral OverviewEstate, Gift & Trust LawTrustsAdministrationEstate, Gift & Trust LawTrustsRevocable Living Trusts



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PART II. LEGAL BACKGROUND

*26-73 California Legal Forms--Transaction Guide § 73.11*

**AUTHOR:** Margaret Johnson Hazel Lange Reviewed by James V. Quillinan

**§ 73.11 Roles of Attorney and Client**

**[1] Settlers as Trustees**

When joint settlers create an inter vivos trust, they usually will name themselves as trustees and continue to serve in that capacity until one of them dies or becomes incapacitated. For purposes of discussing the start-up procedures of the trust, this chapter generally assumes that the settlers will serve as trustees at the inception of the trust. The settlor/trustees continue to be referred to in this chapter as the "settlor(s)," except when discussing matters solely relating to their capacity as trustees.

**[2] Attorney's Role**

The degree to which the attorney will be required to participate in the start-up process will be determined to a great extent by the wishes and sophistication of the settlers, and the trustee, if the trustee is someone other than the settlor(s).

Many steps in the trust start-up process do not inherently require the participation of an attorney. For example, the creation of new bank accounts in the name of the trust, and the transfer of assets in existing bank accounts to the new trust accounts can easily be performed by a nonlawyer without any special experience or expertise. Similarly, retitling motor vehicles, boats, and similar assets is within most people's ability. On the other hand, attorney participation in a conveyance of real property is ordinarily advisable, since an attorney will ordinarily prepare, or supervise the preparation of, a deed conveying real property to a trust [for discussion of conveyances of real property to a trust, *see* § 73.13]. In between there is a "gray area" encompassing such assets as securities, mutual funds, and other investments. Some clients may have sufficient skill and experience to make these transfers, while others will not.

Transferring assets to a trust can be time-consuming. If the settlers have numerous and/or diverse assets, the attorney should caution them that having an attorney perform all the start-up procedures will be expensive. To the extent that the settlers are able to perform start-up procedures themselves, they may be able to save some cost as well as gain practical experience in the operation of the trust. In some cases, however, this approach may be impractical and the attorney may have to do virtually everything for the settlers to get the trust up and running.

### **[3] Involving the Settlor**

Involving the settlors in the start-up and funding process is especially important when the settlors are also acting as trustees. This approach allows the settlor to learn first hand how the trust works, and to learn about the practical application of the theory behind a trust to particular assets.

The settlor-trustee who participates in the initial transfer of assets will also be better prepared when other assets are added to the trust. At the very least, such a settlor-trustee will recognize the importance of properly adding an asset to the trust, and will know when it is important to contact an attorney about an addition. At best, such a settlor-trustee will be able to accomplish future additions to the trust without needlessly involving the attorney.

### **[4] Documentation and Follow-Up**

One of the greatest dangers to a well-conceived estate plan is that the client will fail to take the steps necessary to implement it. Failure to fund the trust or to transfer particular assets to it can defeat the tax or dispositive goals of the estate plan. Failure to transfer assets, or to clearly document asset transfers, can also lead to litigation over the ultimate disposition of the property, especially when the beneficiaries under the settlor's will are not the same, or do not take in the same proportions, as the beneficiaries under the trust. Thus, it is important that the attorney not only draft the trust instrument, but also that he or she take the follow up steps to assure that the trust is fully funded.

If the settlor rather than the attorney is to be responsible for transferring particular assets to the trust, the attorney should make sure that the client understands the importance of doing so, and that there is no misunderstanding between the settlor and the attorney as to who is responsible for taking the particular steps. Thus, the attorney should send the settlor a set of written instructions specifically noting assets that the attorney will not be handling and stating that the settlor is responsible for taking the necessary steps to transfer those assets to the trust.

Follow-up is also important, to make sure that the settlor has actually done what he or she needs to do. The attorney should schedule a review with the settlor approximately 60 days after the date the trust is executed. This allows enough time for the transfer of most, if not all, of the assets.

Once all assets that were intended to be held in the trust have been transferred to the trust, the attorney's involvement in the initial implementation of the trust will end. If any asset has not been transferred, the attorney should take appropriate steps to have that asset transferred to the trust.

### **Legal Topics:**

For related research and practice materials, see the following legal topics:  
Estate, Gift & Trust LawTrustsGeneral OverviewEstate, Gift & Trust LawTrustsAdministrationEstate, Gift & Trust LawTrustsCreationEstate, Gift & Trust LawTrustsRevocable Living Trusts



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**AUTHOR:** Margaret Johnson Hazel Lange Reviewed by James V. Quillinan

**§ 73.12 Formalities of Asset Transfer**

**[1] Importance**

The trustee has no legal authority to administer assets that have not been transferred to the trust. If there is an assumption that the assets are not in trust, a court-supervised probate administration of those assets may be required on the death of the settlor. The focus of the funding process, therefore, should be to clearly document the asset transfer, so that there will be absolutely no question after the settlor's death that the asset is in fact held by the trust. Accordingly, any formalities required to effect a transfer of the asset should be followed. The formalities that should be observed for particular types of assets are discussed in detail in the remainder of this chapter.

**[2] Assets Listed In Trust But Not Formally Transferred to Trust**

Trust instruments commonly list the assets that will initially be held in the trust, either in the trust instrument itself or, more commonly, in a schedule attached to the trust instrument. In some cases, the act of listing an asset in the trust instrument may be sufficient, by itself, to transfer the asset to the trust.

In *Estate of Heggstad* [ *Estate of Heggstad (1993) 16 Cal. App. 4th 943, 20 Cal. Rptr. 2d 433* ], a settlor created a revocable inter vivos trust by a trust declaration. A list of the initial trust property, described in the declaration as Schedule A, was attached to the declaration and incorporated in it. Schedule A included a description of the settlor's personal residence by its street address, and as a partnership interest rather than a cotenancy. The settlor never formally transferred the residence to the trust by deed or otherwise. After the settlor's death, a dispute arose between the successor trustee and the heirs of the settlor's estate as to whether the residence had been effectively transferred to the trust or still remained subject to disposition as part of the probate estate. In holding that the property was part of the trust, the court specifically referred to language in *Prob. Code § 15200(a)* that permits a trust to be created by a "declaration by the owner of property that the owner holds the property as trustee." The court held that Schedule A was part of the settlor's "declaration" and that since it included a description of the settlor's personal residence, it was effective to make the residence subject to the trust even though the residence had never been formally conveyed to the trust [ *Estate of Heggstad (1993) 16 Cal. App. 4th 943, 947-951, 20 Cal. Rptr. 2d 433* ]. In a similar case, the court

held that simply listing the settlors' residence as a trust asset on a schedule attached to the trust declaration was sufficient to transfer the property to a trust, and that it was not necessary to record a deed from the settlors to the trust or to the trustees, or to record the trust [ *Estate of Powell (2000) 83 Cal. App. 4th 1434, 1443, 100 Cal. Rptr. 2d 501* ] .

*Heggstad* and *Powell* appear to stand for the proposition that a trust declaration by a settlor-trustee is legally effective to transfer property specifically described in the declaration to the trust, even when that property is not formally transferred by deed or other conveyance. This provides an important safety valve for settlors who neglect to take standard follow-up steps to implement an inter vivos trust. It is important to emphasize, however, that *Heggstad* and *Powell* should be viewed *only* as a safety valve, and do not eliminate the need to formally document the transfer of assets to the trust. Attorneys who rely on the declaration alone to transfer title run the risk of creating substantial headaches after the settlor's death, and conceivably put themselves at risk for malpractice liability if anything goes wrong later. One practical problem is simply getting transfer agents, title companies, and other third parties to accept assets as trust assets without a formal transfer document.

Still another problem with relying on a listing in the trust schedule is that the scope of *Heggstad* and *Powell* is uncertain. The cases may not be applicable to all situations involving assets not formally transferred to a trust. For example, the courts in *Heggstad* and *Powell* did not speculate on whether the result would have been the same if the trusts in question had been created by a trust agreement rather than by a declaration [for discussion of the distinction between trust agreements and trust declarations, and the effect of *Heggstad* on the use of these instruments, see §§ 70.11[3], 70.200[1][c]]. Questions also exist as to whether *Heggstad* and *Powell* apply to assets in other states or assets held in certificate form. Litigation may be the only way to resolve *Heggstad* and *Powell* issues. And, of course, *Heggstad* and *Powell* are wholly inapplicable to a declaration by a trustee *other than* the settlor. There is no reason to put the trust and trustees to this needless risk and expense, and for this reason estate planners universally recommend formally documenting asset transfers.

### **[3] Transmutation**

#### **[a] In General**

Care must be taken when a revocable trust instrument is drafted, and again when the revocable trust is funded, to make sure that any transmutations of property from separate property to community property, or from community property to separate property, intended by married persons are properly documented. Any transmutation of property made by spouses on or after January 1, 1985, is invalid unless made in writing by an "express declaration" that is made, joined in, consented to, or accepted by the spouse whose interest in the property is adversely affected [*Fam. Code* § 852(a), (d); for law applicable before Jan. 1, 1985, see discussion in § 60.12[5][c]]. Gifts between spouses of clothing, jewelry, and other tangible items of a personal nature, and of a value that is not substantial under the circumstances of the marriage, are not covered by this requirement [*Fam. Code* § 852(c)]. However, all other property, both real and personal, is subject to this requirement [*Fam. Code* § 852(a)].

#### **[b] Holding in *Estate of MacDonald***

In *Estate of MacDonald*, the California Supreme Court held that to satisfy the statutory requirement of an "express declaration," a writing must expressly state that the characterization or ownership of the property is being changed [ *Estate of MacDonald (1990) 51 Cal. 3d 262, 273, 272 Cal. Rptr. 153, 794 P.2d 911* ; *In re Marriage of Starkman (2005) 129 Cal. App. 4th 659, 663-665, 28 Cal. Rptr. 3d 639* (clause in trust agreement providing that property transferred to trust is community property unless transferor spouse identifies it as separate property was insufficient to transmute husband's separate property, which he failed to identify as separate property, to community property)]. Use of extrinsic evidence to prove that the writing effected a transmutation is precluded [ *Estate of MacDonald (1990) 51 Cal. 3d 262, 264, 272 Cal. Rptr. 153, 794 P.2d 911* ] . There is no requirement that the word "transmutation," or any other particular term, be used in the declaration, although the words "transmutation," "community property," or

"separate property" might be used in particular cases [ *Estate of MacDonald (1990) 51 Cal. 3d 262, 272, 272 Cal. Rptr. 153, 794 P.2d 911* ]. The declaration may simply state that the spouse whose interest is adversely affected "gives" to the other spouse "any interest" he or she may have in the property affected [ *Estate of MacDonald (1990) 51 Cal. 3d 262, 272, 272 Cal. Rptr. 153, 794 P.2d 911* ].

There is no exception from the "express declaration" requirement for partial performance of an agreement to transmute property [ *In re Marriage of Benson (2005) 36 Cal. 4th 1096, 1100, 32 Cal. Rptr. 3d 471, 116 P.3d 1152* ]. *Fam. Code* § 852(a) is stated in the negative--that is, an agreement to change the character of marital property, is *not* valid *unless* it is in writing, contains an express declaration by which the transmutation is made, and is accepted in some fashion by the adversely affected spouse--as though all intendments weigh against finding compliance with the requirements for transmutation in the usual case. Furthermore, no exception to the requirement of an "express" written declaration appears in *Fam. Code* § 852(a). The California Supreme Court has concluded that these features suggest the legislature envisioned a standard for transmutions from which married couples could not freely depart [ *In re Marriage of Benson (2005) 36 Cal. 4th 1096, 1104, 32 Cal. Rptr. 3d 471, 116 P.3d 1152* ]. The writing requirement of *Fam. Code* § 852(a) cannot be satisfied when there is no writing at all about the subject property, and when a transmutation would have to be inferred from acts surrounding the parties' purported agreement [ *In re Marriage of Benson (2005) 36 Cal. 4th 1096, 1107, 32 Cal. Rptr. 3d 471, 116 P.3d 1152* ].

The Supreme Court's holding in *Estate of MacDonald* is of critical importance for estate planning attorneys. Many estate plans for married persons involve at least some rearrangement of the form in which the spouses hold title to their property. This rearrangement need not take the dramatic form of retitling the deed to the spouses' family home. It may consist of such seemingly innocuous actions as designating beneficiaries for pension plans, 401(k) accounts, IRAs, Keogh plans, annuity plans, and life insurance policies [for discussion of these kinds of retirement benefits, *see* § 73.27]. In *Estate of MacDonald*, for example, the transmutation consisted of changing the designated beneficiaries under an IRA account held by the husband so that his revocable trust was designated as the beneficiary. It was conceded that the IRA was community property. The wife simply signed a card provided by the trustee of the IRA consenting to the new beneficiary designation. The husband's children by a former marriage were the principal beneficiaries of his revocable trust. The Supreme Court held that the wife's signature on the card did not meet the statutory requirements of an "express declaration" and thus was invalid as an attempted transmutation. After the wife's death, she was held to still hold a community property interest in the IRA and it formed a part of her probate estate [ *Estate of MacDonald (1990) 51 Cal. 3d 262, 266-267, 272 Cal. Rptr. 153, 794 P.2d 911* ].

In *In re Marriage of Starkman*, the court held that a clause in a trust agreement, which provided that the property transferred to the trust was community property unless the transferor spouse identified it as separate property, was insufficient to create a transmutation to community property of the husband's separate property which he transferred to the trust and did not identify as separate property [ *In re Marriage of Starkman (2005) 129 Cal. App. 4th 659, 663-665, 28 Cal. Rptr. 3d 639* ]. Neither this provision, nor any other provision of the trust agreement, unambiguously established that the husband was effecting a change of ownership of his separate property by transferring it to the trust without designating it as his separate property. A transmutation might have been held to occur if the trust agreement had provided that any property a spouse transferred to the trust "becomes" or is "changed into" community property or if the trust agreement had provided that a purpose of the trust was to effect the transmutation of the parties' separate estates to community property [ *In re Marriage of Starkman (2005) 129 Cal. App. 4th 659, 665, 28 Cal. Rptr. 3d 639* ].

If any aspect of an estate plan has the effect of depriving either spouse of property rights by changing the characterization of property from separate to community or community to separate, care must be taken to observe the transmutation requirements enunciated in *Estate of MacDonald*. The holding in this case has several implications. First, it makes clear that an oral transmutation of property, if made on or after January 1, 1985, is invalid and unenforceable [see *Fam. Code* § 852(e)]. Any transmutation made after that date must, at the minimum, be made in writing [*Fam. Code* § 852; *Estate of MacDonald (1990) 51 Cal. 3d 262, 272, 272 Cal. Rptr. 153, 794 P.2d 911* ]. Second, any deed or other instrument reciting that married persons hold title to real property in "joint tenancy" (or in some other form of

holding property that is inconsistent with community property) does not meet the requirements for a transmutation agreement because it is not "made, joined in, consented to, or accepted by the spouse whose interest in the property is adversely affected" within the requirements of *MacDonald* [see *Fam. Code* § 852(a)]. Third, the language of any writing that is claimed to transmute property is not an "express declaration" unless it "contains language which expressly states that the characterization or ownership of the property is being changed" [ *Estate of MacDonald (1990) 51 Cal. 3d 262, 272, 272 Cal. Rptr. 153, 794 P.2d 911* ] .

It is important to keep in mind, however, that a rearrangement of property owned by spouses will not always have the effect of a transmutation. In *Estate of Peterson*, the Court of Appeal drew a distinction between an intent to transmute property, which is subject to the *MacDonald* requirements, and an intent merely to transfer property without probate when one of the spouses dies, which is not subject to *MacDonald* [see *Estate of Petersen (1994) 28 Cal. App. 4th 1742, 1750, 34 Cal. Rptr. 2d 449* ; see also *Prob. Code* § 5022(a) (consent of spouse to nonprobate transfer not a transmutation of spouse's interest in the property)]. For a discussion of that case, and the distinctions between transmutations and nonprobate transfers, see § 60.12[5][c].

### **[c] Codicil as Transmutation Agreement**

One way of meeting the transmutation requirements set forth in *Estate of MacDonald* [see *Fam. Code* § 852(a); see also *Estate of MacDonald (1990) 51 Cal. 3d 262, 272, 272 Cal. Rptr. 153, 794 P.2d 911* , and discussion in [b], above] is for spouses to execute codicils containing an "express declaration" that meets the *MacDonald* test. If either spouse has any interest in a life insurance policy or retirement plan that the other spouse wishes to transfer to some person other than the surviving spouse while the surviving spouse is still living, the codicil of the first spouse to die can simply give the surviving spouse any interest in the policy or retirement plan the first spouse may have at the time of death. The court in *MacDonald* held that words by which one spouse "gives" the other spouse any interest the first spouse may have in a particular account or asset will meet the statutory requirements of an "express declaration" [see *Fam. Code* § 852(a); *Estate of MacDonald (1990) 51 Cal. 3d 262, 273, 272 Cal. Rptr. 153, 794 P.2d 911* ] . For a codicil that will accomplish this purpose, see § 62.05.

### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsGeneral OverviewEstate, Gift & Trust LawTrustsAdministrationEstate, Gift & Trust LawTrustsRevocable Living Trusts



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DIVISION IV: WILLS AND TRUSTS  
 CHAPTER 73 FUNDING A REVOCABLE TRUST  
 PART II. LEGAL BACKGROUND

*26-73 California Legal Forms--Transaction Guide § 73.13*

**AUTHOR:** Margaret Johnson Hazel Lange Reviewed by James V. Quillinan

**§ 73.13 Real Property**

**[1] Conveyance by Deed**

Real property includes land, and generally whatever is affixed to land, incidental or appurtenant to land, or immovable by law [*see Civ. Code § 658*]. Real property title is conveyed to a trust by recording a deed transferring title from the settlor or settlors to the trustee [*see Civ. Code § 1092* (statutory form for grant deed)]. Either a quitclaim deed [*see [2], below*] or a grant deed [*see [3], below*] will suffice to transfer California real property to an inter vivos trust.

Real property conveyances are discussed in detail in Ch. 27, *Deeds and Recording*. The discussion in this section briefly highlights the relevant considerations for the convenience of the reader.

The granting parties should sign the deed before a notary public. Although acknowledgment is not essential to the validity of a deed [*see Civ. Code § 1091*], it is a prerequisite to recording [*Gov. Code § 27287*]. The deed must include a declaration of the amount of tax due, signed by the grantor or the grantor's agent [*Rev. & Tax Code § 11933; see Rev. & Tax Code § 11911*]. The assessor's parcel number (APN) must be indicated on the deed [*see Rev. & Tax. Code § 11911.1*]. An address where the deed can be returned following recordation must also be provided [*Gov. Code § 27321.5*].

Consideration is not an essential requirement of the instrument [*Civ. Code § 1040; Freeman v. LaMorte (1957) 148 Cal. App. 2d 670, 673, 307 P.2d 734*].

**[2] Quitclaim Deed**

A quitclaim deed has no implied warranty of title. A quitclaim deed uses the words, "quitclaim, release and remise" as opposed to "grant and convey," which is the language found in all other deeds. Therefore, the quitclaim deed implies only that the grantor releases to the grantee whatever interest he or she has in the property at the time of execution, without any implied warranty [ *Klamath Land & Cattle Co. v. Roemer (1970) 12 Cal. App. 3d 613, 91 Cal. Rptr. 112; Southern Pac. Co. v. Dore (1917) 34 Cal. App. 521, 168 P. 147*]. The quitclaim deed is designed to eliminate concern

over potential clouds on title by conveying to the grantee only whatever estate the grantor actually possesses in the property.

### **[3] Grant Deed**

The grant deed is the method most commonly used to convey fee title to real property. The grant deed uses the term "grant" as the operative word of conveyance [*see Civ. Code §§ 1092, 1113*] and has two implied warranties [*Civ. Code § 1113*]:

- First, that before the execution of the conveyance, the grantor has not conveyed the same estate, or any right, title, or interest therein to any person other than the grantee; and
- Second, that the estate conveyed is, at the time of the execution of the conveyance, free from encumbrances done, made or suffered by the grantor, or any person claiming under the grantor.

A grant deed also conveys to the grantee all after-acquired title of the grantor. This means that if the grantor's title was defective or something less than the grantor purported to convey, and the grantor acquires a more perfect title after the conveyance to the grantee, then the additional interest passes automatically to the grantee under the original deed [*Civ. Code § 1106*].

### **[4] Trust Transfer Deed**

"Trust transfer deeds" are special deed forms developed by some title companies for use in transferring real property to an inter vivos trust. The trust transfer deed is a form of grant deed and, as such, contains the same implied warranties as any other grant deed [*see [3], above*]. The trust transfer deed can be used to transfer title to real property into a revocable inter vivos trust, or to make a variety of other trust-related conveyances, including transfers from a trustee to a successor holding title to trust assets.

### **[5] Warranty Deed**

A warranty deed contains express covenants, typically including a covenant of warranty, a covenant for quiet possession or enjoyment, a covenant of seisin, a covenant of right to convey, a covenant against encumbrances, and a covenant for further assurance. Warranty deeds are seldom used in California, because buyers rely on title insurance for protection against loss resulting from title problems. For further discussion of warranty deeds, see "Warranty Deeds" in the Legal Background to Ch. 27, *Deeds and Conveyancing*; see also California Real Estate Law and Practice, Ch. 80, *Deeds and Transfer of Title* (Matthew Bender).

### **[6] Deed Requirements**

Deeds must be in writing and signed by the grantor in order to satisfy the Statute of Frauds, which requires that any transfer of an interest in real property (with a few minor exceptions) must be in writing and signed by the parties who are to be bound by the transfer [*Civ. Code § 1091*]. A grantor may sign by making his or her mark, but a signature by mark usually must be accompanied by the signatures of witnesses who can attest to the grantor's execution of the deed [*see Civ. Code § 14*].

The deed should identify the trust as the grantee by specifying the name(s) of the trustees, the name of the trust, and the date of execution of the trust instrument. Like other deeds, a deed conveying property to a trustee must be notarized and recorded in the county where the property is located [*Civ. Code §§ 1169, 1170*]. For more detailed discussion of the content and requirements relating to deeds, see Ch. 27, *Deeds and Recording* .

### **[7] Loans on Real Property**

**[a] Existing Loans**

Before any real property is transferred to a trust, the attorney should determine whether the transfer will have any effect on any existing loans on the real property. A review of the loan documents to determine the effect of title insurance and due-on-sale or transfer clauses is recommended.

The Garn-St. Germain Depository Institution Act of 1982 prohibits lenders from enforcing due-on-sale clauses when residential real property is transferred into an inter vivos trust in which the borrower is and remains the beneficiary and occupant, unless the borrower refuses to provide the lender with reasonable means acceptable to the lender by which the lender will be assured of timely notice of any subsequent transfer of the beneficial interest or change in occupancy [12 U.S.C. § 1701j-3(d)]. However, the protection afforded by these authorities does not extend to the transfer of commercial real property to an inter vivos trust.

Title insurance is discussed in Ch. 26A, *Title Insurance*. Due-on-sale clauses and other related encumbrances are discussed in greater detail in § 25A.41.

**[b] Ability to Refinance Loan**

The clients should be advised that some lenders will not finance or refinance a real estate loan in the name of the trustees. If the clients intend to take out loans against the property in the future, or to refinance an existing loan, it may be necessary to prepare a deed to transfer title back to the settlors as individuals until the financing is approved.

**[8] New Acquisitions**

When settlors acquire any new real estate assets (including ranch property and time-share interests) after creation of the trust, they should be advised to title the deed in the trust name. Settlors should also be so advised at the time the trust is executed.

**[9] Property Contaminated With Hazardous Waste**

Federal environmental laws applicable to trustees include the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA) [42 U.S.C. §§ 9601-9675], which imposes strict liability for investigation and cleanup of hazardous waste sites. CERCLA does not differentiate between persons who own contaminated property on their own behalf and those who hold contaminated property in a fiduciary capacity [see 42 U.S.C. § 9607(a)]. Therefore, although the issue is not fully settled, and various complex issues may exist, there is a possibility that the trustee may be liable, under certain circumstances, for cleanup costs from personal assets as well as assets of the trust estate [see *City of Phoenix, Arizona v. Garbage Services Co.* (D. Ariz. 1993) 827 F. Supp. 600 ; but see 57 Fed. Reg. 18344, 18349 (EPA staff comments relating to trustee liability)].

Another danger is that the assets of a trust containing contaminated real property may be depleted if the trust itself is liable for the cleanup costs [see 42 U.S.C. § 9607(a) (present owners liable for cleanup costs)]. Cleanup costs may be substantial and might conceivably exceed the value of the property itself. For this reason, it is important that the settlors attempt to determine whether real property is contaminated before transferring that property to a trust. If real property is in fact contaminated, it may be unsuitable as a trust asset.

CERCLA liability is discussed in greater detail in Ch. 33, *Contamination Considerations in Real Property Transactions*, § 33.10. Other statutes creating potential liability are also discussed in Ch. 33.

**[10] Real Property Tax Issues**

Before transferring real property to a trust, the attorney should review applicable state laws regarding real property

transfers that constitute a "change in ownership" for purposes of any applicable real property taxes.

In California, as a general rule, the transfer of real property results in a reassessment of the real property for property tax purposes [*Rev. & Tax. Code* §§ 50, 110.1(a)(2)(A); *see Rev. & Tax. Code* §§ 60 ("change in ownership" defined), 61 (transfers specifically included in definition of "change in ownership"); *18 Cal. Code Reg. § 462.160(a)* (transfer by trustor or any other person of real property into trust is change in ownership of property at time of transfer)].

However, certain transfers of real property are exempt from reassessment [*see Rev. & Tax. Code* §§ 62 (transfers excluded from statutory definition of "change in ownership"), 63 ("change of ownership" does not include transfers between spouses), 63.1(a)(1) ("change in ownership" does not include transfers between parents and children)]. The following transfers in trust do not constitute changes in ownership:

- The transfer of real property by the trustor to an irrevocable trust in which the trustor is the sole present beneficiary of the trust [*Rev. & Tax. Code* § 62(d); *18 Cal. Code Reg. § 462.160(b)(1)(A)*]. However, a change in ownership of trust property occurs to the extent that persons other than the trustor are or become present beneficiaries of the trust unless otherwise excluded from change in ownership. If the trustee of an irrevocable trust has total discretion ("sprinkle power") to distribute trust income or property to a number of potential beneficiaries, the real property in the trust is subject to change in ownership because the trustee could potentially distribute it to a non-excludable beneficiary, unless all potential beneficiaries have an available exclusion from change in ownership [*18 Cal. Code Reg. § 462.160(b)(1)(A)*].
- The transfer of real property or ownership interests in a legal entity holding interests in real property by the trustor to an irrevocable trust in which the trustor retains the reversion and the beneficial interest of any person other than the trustor does not exceed 12 years in duration [*Rev. & Tax. Code* § 62(d); *18 Cal. Code Reg. § 462.160(b)(1)(B)*].
- The transfer of an ownership interest in a legal entity holding an interest in real property by the trustor into an irrevocable trust in which the trustor is the sole present beneficiary or to a trust in which the trustor retains the reversion. However, a change in ownership of the real property held by the legal entity occurs if *Rev. & Tax. Code* §§ 61(j), 64(c), or 64(d) applies because the change in ownership laws governing interests in legal entities apply regardless of whether these interests are held by a trust [*18 Cal. Code Reg. § 462.160(b)(1)(C)*].
- The transfer of real property or an ownership interest in a legal entity holding an interest in real property by the trustor to a trust that is revocable by the trustor [*Rev. & Tax. Code* § 62(d); *18 Cal. Code Reg. § 462.160(b)(2)*]. A change in ownership occurs, however, at the time a revocable trust becomes irrevocable, unless the trustor remains or becomes the sole present beneficiary or unless otherwise excluded from change in ownership [*Rev. & Tax. Code* § 61(h); *18 Cal. Code Reg. § 462.160(b)(2)*].
- The transfer is one to which the interspousal exclusion applies [*18 Cal. Code Reg. § 462.160(b)(3)*]. The interspousal exclusion applies to any interspousal transfer, including transfers to a trustee for the beneficial use of a spouse, or the surviving spouse of a deceased transferor, or by a trustee of such a trust to the spouse of the trustor, and transfers that take effect on the death of a spouse [*Rev. & Tax. Code* § 63(a), (b)]. A change in ownership of trust property occurs, however, to the extent that persons other than the trustor's spouse are or become present beneficiaries of the trust, unless otherwise excluded from change in ownership [*18 Cal. Code Reg. § 462.160(b)(3)*].
- The transfer is to a trustee for the beneficial use of a registered domestic partner, or the surviving registered domestic partner of a deceased transferor, or by a trustee of such a trust to the registered

domestic partner of the trustor [*Rev. & Tax. Code* § 62(p)(1) (this exclusion commences with lien date for 2006-07 fiscal year)].

- The transfer is one to which the parent-child or grandparent-grandchild exclusion applies and for which a timely claim has been made as required by law [*see Rev. & Tax. Code* § 63.1]. A change in ownership of trust property occurs, however, to the extent that persons for whom the parent-child or grandparent-grandchild exclusion is not applicable are or become present beneficiaries of the trust, unless otherwise excluded from change in ownership [*18 Cal. Code Reg.* § 462.160(b)(4)].
- The transfer is to a trust that results in the proportional interests of the beneficiaries in the property remaining the same before and after the transfer [*18 Cal. Code Reg.* § 462.160(b)(5)].
- The transfer is from one trust to another and meets the requirements of one of the transfers described, above [*18 Cal. Code Reg.* § 462.160(b)(6)].

The termination of a trust, or portion of a trust, generally constitutes a change in ownership at the time of termination [*18 Cal. Code Reg.* § 462.160(c)]. However, the following terminations do not constitute changes in ownership:

- A termination that results in the distribution of trust property according to the terms of the trust to a person or entity that received a present interest (either use of or income from the property) when the trust was created, when it became irrevocable, or at some other time. A change in ownership occurs, however, when the remainder or reversionary interest becomes possessory if the holder of that interest is a person or entity other than the present beneficiary, unless otherwise excluded from a change in ownership [*18 Cal. Code Reg.* § 462.160(d)(1)].
- A termination that results from the trustor's exercise of a power of revocation and the property is transferred by the trustee back to the trustor [*Rev. & Tax. Code* § 62(d); *18 Cal. Code Reg.* § 462.160(d)(2)].
- The trust term did not exceed 12 years in duration and, on termination, the property reverts to the trustor [*Rev. & Tax. Code* § 62(d); *18 Cal. Code Reg.* § 462.160(d)(3)].
- The termination results in a transfer to which the interspousal exclusion applies [*Rev. & Tax. Code* § 63; *18 Cal. Code Reg.* § 462.160(d)(4)].
- The termination results in a transfer to which the parent-child or grandparent-grandchild exclusion applies, and for which a timely claim has been filed as required by law [*Rev. & Tax. Code* § 63.1; *18 Cal. Code Reg.* § 462.160(d)(5)].
- The termination results in the transfer to the beneficiaries who receive the same proportional interests in the property that they held before the termination of the trust [*18 Cal. Code Reg.* § 462.160(d)(6)].
- The termination results in the transfer from one trust to another and meets the requirements of one of the terminations described above [*18 Cal. Code Reg.* § 462.160(d)(7)].

If the settlors own real property located outside California, it is important to contact a qualified local attorney in the relevant state to find out what effect, if any, the proposed transfer would have on the taxation of that property.

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsGeneral OverviewEstate, Gift & Trust LawTrustsAdministrationEstate, Gift & Trust LawTrustsRevocable Living TrustsReal Property LawDeedsGeneral OverviewReal Property LawDeedsTypesGeneral Overview



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DIVISION IV: WILLS AND TRUSTS  
CHAPTER 73 FUNDING A REVOCABLE TRUST  
PART II. LEGAL BACKGROUND

*26-73 California Legal Forms--Transaction Guide § 73.14*

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**§ 73.14 Oil and Gas**

**[1] Types of Oil and Gas Interests Transferable to Trust**

**[a] In General**

Interests in oil, gas, and minerals may be held in a limited partnership, a royalty trust, or outright. There are five types of oil and gas interests that may be transferred to a revocable trust:

- Mineral leases.
- Working interests.
- Operating interests.
- Overriding royalty interests.
- Production payments.

These interests are discussed briefly in the remainder of this section. For more detailed discussion of oil, gas, and mineral interests, see Ch. 36, *Oil and Gas Rights and Leases*, Part A and Ch. 36A, *Mining Claims, Timber Interests, and Water Rights*.

**[b] Mineral Leases**

Mineral leases are considered real property in some states and personal property in others. Property subject to an unexpired mineral lease is subject to the lease even if it has not produced or has ceased to produce.

The maximum permissible term of a mineral lease, as well as the customs and practices with respect to the terms of

such leases, vary from state to state. The maximum permissible duration of an oil, gas, or mineral lease in California is 99 years. After that time the lease becomes unenforceable even if the term specified in the lease has not expired or the condition that would cause termination of the lease has not yet occurred [*Civ. Code* § 718f]. The owner of real property subject to an unrecorded mineral right may bring an action to terminate the right if the right has remained dormant for 20 years or more and the owner of the mineral right has not recorded a notice of intent to preserve the right during that time [*Civ. Code* §§ 883.210, 883.220(c), 883.230; *see Civ. Code* §§ 883.210-883.270].

In California, there is no requirement that a mineral lease be recorded, but recordation is recommended to protect the holder's interest [*see Civ. Code* §§ 1213 (recordation of conveyances), 1215 ("conveyance" includes all instruments creating or alienating any interest in real property), 1219 (recordation of oil and gas leases)]. The client(s) can convey title to a mineral lease to a revocable trust by recording a mineral deed [*see* § 75.231] or an oil and gas lease [*see* § 75.210]. A mineral deed covers mineral interests only. When recorded in California, it must be recorded in the county where the real property is located, in the same manner as other instruments affecting real property [*Civ. Code* § 1169]. A grant deed [*see Civ. Code* § 1092] can be used if the mineral interest is in California. Recording requirements in other states should be verified with local counsel in those states.

### **[c] Working or Operating Interests**

A "working interest" is a fee interest in land under which the owner has the right to drill for, develop, and produce oil and gas [*Pub. Res. Code* § 3316.11]. A working interest is deemed to be vested in the owner even if his or her right to drill or produce is delegated to some other person under an operating arrangement or some other type of agreement [*Pub. Res. Code* § 3316.11]. A "working interest" is also sometimes called an "operating interest."

A working interest may be transferred through an assignment of an oil and gas lease [*see* § 73.234].

### **[d] Overriding Royalty Interest**

For oil and gas purposes, the term "royalty" generally refers to a fractional interest in the oil and gas produced from a particular piece of land. A royalty may be "created" either by reservation when an oil and gas lease is entered into or by grant to a third person [ *La Laguna Ranch Co. v. Dodge (1941) 18 Cal. 2d 132, 135, 114 P.2d 351* ]. The term "overriding royalty" is customarily used to describe a fractional interest in the lessee's share of all of the oil and gas produced under an oil and gas lease [ *La Laguna Ranch Co. v. Dodge (1941) 18 Cal. 2d 132, 135, 114 P.2d 351* ]. It is in addition to the share of oil and gas produced from the land that is reserved for the land owner [Meeker v. Ambassador Oil Co. (10th Cir. [Okla.] 1962) 308 F.2d 875, 882] and must be created by the oil lessee from his or her share, after payment of the landowner's oil royalty [ *La Laguna Ranch Co. v. Dodge (1941) 18 Cal. 2d 132, 135, 114 P.2d 351* ]. For further discussion of overriding royalties, see § 36.09A[1][c].

The lessee under an oil and gas lease may create an overriding royalty by grant when he or she transfers a fractional part of his or her interest to a third person [ *La Laguna Ranch Co. v. Dodge (1941) 18 Cal. 2d 132, 135, 114 P.2d 351* ]. An assignment of an overriding interest should be used to transfer title to an overriding royalty interest [*see* § 73.233].

### **[e] Production Payment**

A production payment is similar to a working interest. A bonus payment is made to the owner(s) for a specified amount of time (such as 3 years) to hold the lease in case the well is not being produced. The type of assignment that the settlors will execute to transfer title to a revocable trust will depend on what kind of interest is being held; i.e., mineral interest, overriding interest, or working interest. The conveyance deed should coincide with the type of oil and gas interest.

### **[f] Ratification of Oil & Gas Lease**

A ratification of an oil and gas lease [*see* § 73.235] is used to ratify a previously negotiated lease and is used in estates

when the previous party is deceased.

## **[2] Tax Considerations**

*I.R.C. § 613A* eliminated percentage depletion for most oil and gas interests [*see I.R.C. § 613A(a)*]. However, cost depletion is still available to independent producers and royalty owners. Cost depletion for independent producers and royalty owners is limited to 15 percent of gross income from the property, but may not exceed 65 percent of taxable income [*I.R.C. § 613A(c)*]. Cost depletion is similar to depreciation and is allowed under *Treas. Reg. § 1.611-2(a)(1)* [*see also I.R.C. §§ 611, 612; Treas. Reg. § 1.612-1* (basis for cost depletion)]. The transfer of "proven" oil and gas interests to a grantor trust will not nullify the right to percentage depletion for independent producers and royalty owners [*see I.R.C. § 671* (income, deductions, and credits attributable to property of grantor trust are included in computing taxable income of grantor)].

### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsGeneral OverviewEstate, Gift & Trust LawTrustsAdministrationEstate, Gift & Trust LawTrustsRevocable Living TrustsReal Property LawOil & Gas



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*26-73 California Legal Forms--Transaction Guide § 73.15*

**AUTHOR:** Margaret Johnson Hazel Lange Reviewed by James V. Quillinan

**§ 73.15 Restrictions on Transfer of Securities**

**[1] Transfer Restrictions**

The transfer of certain stock, including almost all stock in privately held corporations, may be restricted by federal or California securities regulations. Transfer of such stock may also be subject to restrictions imposed by shareholders' agreements and buy-sell agreements. Depending on the circumstances, any or all of these restrictions may make it impossible or unwise to transfer the stock to a trust.

Restrictions on the transfer of corporate securities are discussed in detail in Ch. 6, *Securities Regulation Issues* . Buy-sell agreements are discussed in detail in Ch. 8D, *Buy-Sell Agreements* .

**[2] Restrictive Legends**

Any restrictions must be set forth by legend on the face of the stock certificate, or on the back of the certificate with incorporating language on the face of the certificate [*see 10 Cal. Code Reg. § 260.141.1*]. By carefully reading the stock certificate, the attorney will be able to determine whether it is subject to any restrictions.

**PRACTICE TIP:**

When the new certificates are reissued titled to the trustee, the secretary of the corporation will issue the new certificate(s) with the same legend.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Business & Corporate LawCorporationsShareholdersTransfers of SharesEstate, Gift & Trust LawTrustsGeneral OverviewEstate, Gift & Trust LawTrustsAdministrationEstate, Gift & Trust LawTrustsRevocable Living Trusts



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*26-73 California Legal Forms--Transaction Guide § 73.16*

**AUTHOR:** Margaret Johnson Hazel Lange Reviewed by James V. Quillinan

**§ 73.16 Federal Securities Act of 1933**

**[1] Definition of "Security"**

Section 2(1) of the Federal Securities Act of 1933 defines the term "security" to mean[15 U.S.C. § 77b(a)(1)]:

[A]ny note, stock, treasury stock, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit for a security, fractional undivided interest in oil, gas, and other mineral rights, any put, call, straddle, option or privilege on any security, certificate of deposit, or group or index of securities (including any interest therein or based on the value thereof), or any put, call, straddle, option or privilege entered into on a national securities exchange relating to foreign currency, or in general, any interest or instrument commonly known as a "security," or any certificate of interest or participation in temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase any of the foregoing.

It is evident that the statutory definition quoted above is very broad. In addition, the statutory definition of "security" has been further expanded by case law [see *Securities & Exch. Com. v. Howey Co. (1946) 328 U.S. 293, 66 S. Ct. 1100, 90 L. Ed. 1244*]. As a rule of thumb, the attorney should assume that anything common sense would suggest is a security probably is one, and then some. If the attorney sees any possibility that an asset might legally constitute a security, the question should be researched. A share of stock will almost always be a security. For additional discussion regarding what constitutes a security, see Marsh & Volk, *Practice Under the California Securities Laws, Ch. 5, Problems Relating to Special Types of Issuers Securities* (Matthew Bender).

**[2] Registration**

Section 5 of the Federal Securities Act of 1933 requires that securities be registered before any offer or sale is made [15 U.S.C. § 77f]. There are many exemptions from the registration requirement, however, and most privately held

companies that issue stock find an exemption that allows them to offer stock without registration.

Non-issuer shareholders who have acquired stock directly or indirectly from the issuer, or from an affiliate of the issuer, in a transaction or chain of transactions not involving any public offering, are subject to resale limitations, i.e., restrictions on selling or transferring the stock [*17 C.F.R. § 230.144(a)(3)(i)*].

Section 4(1) of the Federal Securities Act of 1933 provides that the registration provisions of Section 5 "shall not apply to ... transactions by any person other than an issuer, underwriter, or dealer" [*15 U.S.C. § 77d(1)*]. Thus, the transfer from the individual settlors into their revocable trust is exempt.

**PRACTICE TIP:**

In the context of whether an apparent non-issuer stock sale is exempt, frequent references to SEC Rule 144 [*17 C.F.R. § 230.144*] will be encountered. Rule 144 provides a "safe harbor" for non-issuers who want to transfer stock with assurance that they are in compliance with exemption requirements. A transfer into one's own revocable trust does not require recourse to Rule 144, since such a transfer does not constitute a "sale" [Securities Act, § 2(3), *15 U.S.C. § 77b(a)(3)*]. However, securities transferred to the trustee of the client's revocable trust are subject to the same restrictions pursuant to Rule 144 that existed for the settlor. Furthermore, if the client's securities are not allowed to be sold for two years pursuant to Rule 144, the transfer to the client's revocable trust does not require the statutory period to begin anew, and the securities will be deemed to have been acquired when they were acquired by the settlor [*17 C.F.R. § 230.144(d)(3)(vi)*].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Securities Law Initial Public Offerings & the Securities Act of 1933 General Overview Securities Law Initial Public Offerings & the Securities Act of 1933 Definitions Security Securities Law Initial Public Offerings & the Securities Act of 1933 Registration of Securities General Overview



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*26-73 California Legal Forms--Transaction Guide § 73.17*

**AUTHOR:** Margaret Johnson Hazel Lange Reviewed by James V. Quillinan

**§ 73.17 California Securities Law of 1968**

**[1] California Definition of "Security"**

At the state level, California securities are regulated by the California Securities Law of 1968 [*see Corp. Code § 25000 et seq.*]. California has adopted a very broad definition of security that is similar to that set out under federal law [*see Corp. Code § 25019*]. Like federal law, the statutory definition has been further expanded by California case law, and in fact has been expanded even more broadly than has the federal definition [*see Silver Hills Country Club v. Sobieski (1961) 55 Cal. 2d 811, 13 Cal. Rptr. 186, 361 P.2d 906*]. For more detailed discussion of the California definition, see Ch. 6, *Securities Regulation Issues*; *see also* Marsh & Volk, *Practice Under the California Securities Laws*, Ch. 5, *Problems Relating to Special Types of Issuers Securities* (Matthew Bender).

**[2] Qualification of Securities in California**

California securities law requires that all securities offered or sold in California be "qualified" (the California equivalent of registration) unless they are exempt from qualification [*Corp. Code §§ 25100-25105*]. It is illegal to offer or sell in California any security that is not qualified or exempted [*Corp. Code §§ 25110, 25120, 25130*].

**[3] Exemption for Transfer to Revocable Trust**

Like the Federal Securities Act of 1933 [*see discussion in § 73.16[2]*], California securities law provides many exemptions from the requirement of qualification. *Corp. Code § 25104(a)*, which parallels Section (4)(1) of the Federal Securities Act [*15 U.S.C. § 77d(1)*], exempts non-issuer resale of securities. The specific language of *Corp. Code § 25104(a)* exempts "[a]ny offer or sale of a security by the bona fide owner thereof for his or her own account," as long as it is sold without advertising and not through a broker-dealer in a public offering.

Most non-publicly traded stock has been issued under exemptions provided by *Corp. Code § 25102(f)* or *(h)*, or by permit. Securities issued under the *Corp. Code § 25102(h)* exemption generally require the prior written consent of the California Commissioner of Corporations [*Corp. Code § 25133*]. However, an exception to this requirement is made for

transfers into a settlor's revocable living trust [*10 Cal. Code Reg. § 260.141.11(b)(4)* (exception for transfers to trustee for account of transferor or transferor's ancestors, descendants, or spouse), (6)(exception for transfers by way of gift or donation)].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Securities LawBlue Sky LawsGeneral OverviewSecurities LawBlue Sky LawsSecurities Exempt From  
RegistrationSecurities LawBlue Sky LawsSecurities Registration



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*26-73 California Legal Forms--Transaction Guide § 73.18*

**AUTHOR:** Margaret Johnson Hazel Lange Reviewed by James V. Quillinan

**§ 73.18 Shareholders Agreements**

Pre-existing shareholders' agreements may have restrictions against transfer of the stock without shareholder approval. In particular, any buy-sell agreements, transfer restrictions, voting agreements, or other similar provisions, must be complied with before the transfer. Thus, the attorney should first review any shareholders' agreement to be certain that the transfer is permitted, and if not, to obtain required consent of all other owners as necessary.

**PRACTICE TIP:**

If the legend on the face of the certificate does not describe the precise terms of the restriction, the attorney, paralegal, or trustee should contact the issuing company and request the terms of the restriction before transfer.

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Business & Corporate LawCorporationsShareholdersTransfers of Shares



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*26-73 California Legal Forms--Transaction Guide § 73.19*

**AUTHOR:** Margaret Johnson Hazel Lange Reviewed by James V. Quillinan

**§ 73.19 Stock Options**

**[1] In General**

An option is a contract under which a corporation grants a person or other corporation the right to buy a certain amount of the first corporation's securities (usually common shares) at a fixed price within a specified period of time [Ballantine & Sterling, California Corporation Laws, Ch. 7, *Issuance of Shares and Indebtedness*, § 135.01(1) (Matthew Bender)]. The most common use of options to purchase shares is in connection with employee stock option plans [Ballantine & Sterling, California Corporation Laws, Ch. 7, *Issuance of Shares and Indebtedness*, § 135.01(1) (Matthew Bender)]. Generally, some percentage of the total number of option shares becomes exercisable at different points in time, e.g., 20 percent per year for five years, but in no case later than 10 years [*I.R.C. § 422(b)(3)*]. If the stock appreciates between the time of the agreement and the purchase, the employee can purchase at the bargain price.

**[2] Incentive Stock Options**

The employee enjoys favorable tax treatment if the stock option plan set up by the employer meets the statutory definition of an Incentive Stock Option (ISO), sometimes also referred to as a "statutory stock option," as defined in *I.R.C. § 422*.

Incentive stock option status, along with the favorable tax treatment, can be lost if the conditions required by *I.R.C. § 422* are not met. One of the statutory conditions that must be met is that the option, by its terms, may not be transferred by the grantee "otherwise than by will or the laws of descent and distribution," and, during the grantee's lifetime, may be exercisable only by the grantee [*I.R.C. § 422(b)(5)*].

Because of the statutory restrictions noted above, incentive stock options generally should not be transferred to a revocable trust. It may be advisable, however, to assign to the trustee or successor trustee *the right to exercise the option after the death of the settlor*. The trustee can exercise the option in his or her capacity as trustee.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Contracts LawTypes of ContractsOption ContractsSecurities LawBlue Sky LawsOptions, Subscription Rights & Warrants



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*26-73 California Legal Forms--Transaction Guide § 73.20*

**AUTHOR:** Margaret Johnson Hazel Lange Reviewed by James V. Quillinan

**§ 73.20 Partnership Interests**

**[1] In General**

A partnership is an association formed by two or more persons to carry on a business as co-owners for profit [*see Corp. Code § 16101(9)*]; *see also Civ. Code § 684*].

California law recognizes two basic types of partnerships, general partnerships [*see Corp. Code § 16100 et seq.* (Uniform Partnership Act of 1994)] and limited partnerships [*see Corp. Code §§ 15900 et seq.* (Uniform Limited Partnership Act of 2008), 15611 (CRLPA, repealed January 1, 2010)]; *see also Corp. Code §§ 15912.04, 15912.06* (operative date of ULPA '08 and limited application of former limited partnership acts prior to January 1, 2010)]. In general partnerships, the partners have equal rights to control and manage the partnership business [*see Corp. Code § 16301*], and they are jointly and severally liable for the partnerships debts [*see Corp. Code § 16306*]. In limited partnerships, the general partners have all of the rights of management and control of the partnership business and are personally liable for the partnership debts [*see Corp. Code §§ 15904.04, 15904.06* (ULPA '08), 15643 (CRPLA)], while the limited partners do not participate in the management and control of the business and generally are not liable for partnership debts beyond the amounts of their capital contributions [*Corp. Code §§ 15903.03(a)* (ULPA '08), 15632(a) (CRLPA)].

A limited liability partnership is a type of general partnership that is engaged in the practice of law, accountancy, or architecture, and that has complied with the applicable registration formalities and limited the extent of its liability to creditors [*see Corp. Code §§ 16951-16962* (Uniform Partnership Act of 1994)]. For detailed coverage of limited liability partnerships, see Ch. 16C, *Limited Liability Partnerships* .

**[2] Governing Law**

In California, all general partnerships are now governed by the Uniform Partnership Act of 1994 (UPA '94) [*Corp. Code § 16100 et seq.* regardless of when they were formed [*see Corp. Code § 16111(a), (b)*]. For additional discussion of the transition to the UPA '94, and discussion of partnership law in general, see Ch. 15, *General Partnerships*, Part A.

As for limited partnerships, before January 1, 2010 the Uniform Limited Partnership Act of 2008 (ULPA '08) [*Corp. Code § 15900 et seq.*] governs only (1) limited partnerships formed on or after January 1, 2008, and (2) with certain exceptions, limited partnerships formed before January 1, 2008 that elect to be subject to that act [*Corp. Code § 15912.06(a)*]. On and after January 1, 2010, ULPA '08 governs all limited partnerships [*Corp. Code § 15912.06(b)*]. For additional discussion of the transition to the ULPA '08 and discussion of limited partnership law in general, see Ballantine & Sterling, California Corporation Laws, Ch. 25, *Limited Partnerships*, Part A (Matthew Bender).

### [3] Limited Partnerships

Under the CRLPA, an interest in a limited partnership may be assigned in whole or in part [*Corp. Code § 15672(a)*]; for form, *see § 73.260*]. Unless the partnership agreement provides otherwise, however, an assignment of a limited partnership interest does not entitle the assignee to become a limited partner; it merely gives the assignee the right to receive, to the extent assigned, the distributions and allocations of income, gain, loss, deduction, or credit to which the assignor would have been entitled [*Corp. Code § 15672(a)*]. However, the assignee may become a partner if the partnership agreement so provides or if all of the general partners and a majority in interest of the limited partners consent [*Corp. Code § 15674(a)*]. On becoming a limited partner, the assignee is entitled to exercise all of the rights and obligated to perform all of the obligations of the original limited partner [*Corp. Code § 15674(b)*].

Under the ULPA '08, the only interest of a partner that is transferable is the partner's transferable interest; that interest is personal property [*Corp. Code § 15907.01*]. "Transferable interest" means a partner's right to receive distributions [*Corp. Code § 15901.02(a-k)*]. A transfer, in whole or in part, of a partner's transferable interest: (1) is permissible; (2) does not by itself cause the partner's dissociation or a dissolution and winding up of the limited partnership's activities; and (3) does not, as against the other partners or the partnership, entitle the transferee to participate in the management or conduct of the partnership's activities, to require access to information concerning the partnership's transactions except as otherwise described below, or to inspect or copy the required information or the partnership's other records or to exercise any other rights or powers of a partner interest [*Corp. Code § 15907.02(a)*]. A transferee has a right to receive, in accordance with the transfer, distributions to which the transferor would otherwise be entitled [*Corp. Code § 15907.02(b)*]. However, a transferee of a partnership interest may become a limited partner if and to the extent that the partnership agreement provides, or all general partners and a majority in interest of the limited partners consent [*Corp. Code § 15907.02(h)*]. A transferee that becomes a partner with respect to a transferable interest is liable for the transferor's obligations under *Corp. Code §§ 15905.02 and 15905.09*, but is not obligated for liabilities unknown to the transferee at the time the transferee became a partner [*Corp. Code § 15907.02(g)*].

If a limited partnership interest is transferable, the settlor should give the general partner written instructions. The letter should specify the trust's name and tax identification number and the trustee's name and address. The general partner may also ask to be shown some of the pages of the trust (e.g., the first page, the page containing the name and effective date of the trust, and the page or pages showing the signatures of the settlors). If the partnership is small and has a limited number of partners, the managing partner will often accept the settlor's word that the trust has been created and will not insist on seeing the trust pages. However, it is good practice to observe formalities in matters of this kind, as proper documentation of the transfer of partnership interests is always important.

If a certificate of limited partnership interest has been issued to the settlor [*see Corp. Code § 15638 (CRLPA)*], the general partner may also require that the original certificate be returned. The general partner will often request that the settlor execute an assignment of the limited partnership interest on a form supplied by the general partner.

It may also be necessary to formally amend the limited partnership agreement to admit the new partner to the partnership. This may be necessary, for example, if the assigning partner's name appears in the agreement. Under these circumstances, it may be desirable to substitute the name of the new partner for that of the old partner.

Although California does not require that the limited partnership certificate be amended when the limited partner's interest is transferred [*see Corp. Code §§ 15622(b), 15631 (CRLPA); Corp. Code § 15902.02 (ULPA '08)*], other states may impose such a requirement. In such a case, the transfer may be delayed until the partner's attorney has amended the certificate. This may be necessary to assure that the transfer does not violate applicable securities laws and would not result in a termination of the partnership for income tax purposes [*see I.R.C. § 708(b)(1)(B)* (partnership terminated if more than 50 percent of total interest in capital and profits sold or exchanged within 12-month period)]. The general partner will often charge a fee for the review and preparation of documentation by the partnership's counsel.

#### **[4] General Partnerships**

If a partner attempts to transfer his or her interest in a general partnership to a trust without first obtaining the consent of the other partners, the trust will not automatically become a partner. Instead, it becomes the assigning partner's assignee and, as such, is entitled to the assigning partner's share of the profits, losses, and distributions of the partnership [*Corp. Code § 16502*].

If the partnership is a partnership "at will" (a partnership in which the partners have not agreed to remain partners for a definite period of time or until the completion of a particular undertaking, but only as long as they wish to continue the association) [*see Corp. Code § 16101(11)*], the other partners may dissociate themselves and wind up the partnership business at any time [*see Corp. Code §§ 16601(1), 16801(1)*]. Even if the partnership is organized for a definite term, a partner may be expelled from the partnership, either in accordance with the terms of the partnership agreement or, when particular circumstances permit, by unanimous vote of the other partners or order of a court [*see Corp. Code § 16601(35)*]. In any case, the Uniform Partnership Act of 1994 explicitly provides that a person may become a partner only with the consent of all of the partners [*Corp. Code § 16401(i)*].

General partnership agreements normally contain terms that prevent a partner from transferring his or her interest without first complying with procedures specified in the partnership agreement. These procedures can significantly restrict the transferability of a general partnership interest. For this reason it is essential to ascertain the terms of the agreement before attempting to transfer any general partnership interest to the trust.

A trust that becomes a general partner will become jointly and severally liable for the partnership debts [*see Corp. Code § 16306*]. For this reason, it is important to investigate the potential liabilities of the partnership before assigning any interest in the partnership to the trust.

#### **PRACTICE TIP:**

The trust will have unlimited liability for debts of a general partnership and limited liability and generally no management control over a limited partnership.

The successful transfer of a partnership interest generally requires an abundance of written documentation in the form of transfer documents, consents from other partners, and an amendment to the partnership agreement.

Special requirements apply to the transfer of a general partnership interest in a limited partnership [*see Corp. Code §§ 15641* (admission of additional general partners), *15674(a), 15674(d)* (assignment of general partner's interest; removal by limited partners)].

#### **[5] Tax Considerations**

If a grantor trust [*see I.R.C. §§ 672-677* and discussion in § 60.15[3][b]] is a partner, the grantor is treated for income tax purposes as the owner of the partnership interest [*see Rev. Rul. 77-402, 1977-2 C.B. 222*]. If the partnership elects under *I.R.C. § 754* to adjust the basis of partnership property on a partner's death, the partnership interest is allowed a basis adjustment under *I.R.C. § 743* [*see Rev. Rul. 79-84, 1979-1 C.B. 223*].

It is generally unwise for a settlor to transfer an investment purchased as a tax shelter to the settlor's revocable trust. A typical tax shelter generates early losses followed by deferred recognition of gain. The transfer of a tax shelter to a revocable trust creates a deferred gain that will not be covered by a cash recognition out of that tax shelter.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Business & Corporate Law  
General Partnerships  
General Overview  
Business & Corporate Law  
Limited Partnerships  
General Overview



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**AUTHOR:** Margaret Johnson Hazel Lange Reviewed by James V. Quillinan

**§ 73.21 Small Business Corporations**

**[1] In General**

Under *I.R.C. § 1244*, a small business corporation is one in which the aggregate amount of money and other property received by the corporation for stock as a contribution to capital and as paid-in surplus does not exceed \$1 million [*I.R.C. § 1244(c)(3)(A)*]. For purposes of determining the value of a small business corporation, the amount taken into account with respect to any property other than money is the amount equal to the adjusted basis to the corporation of that property for determining gain, reduced by any liability to which the property was subject or that was assumed by the corporation [*I.R.C. § 1244(c)(3)(B)*]. The preceding determination must be made as of the time the property was received by the corporation [*I.R.C. § 1244(c)(3)(B)*].

**[2] Section 1244 Stock**

The term "section 1244 stock" means stock of a domestic corporation if [*I.R.C. § 1244(c)(1)*]:

- At the time the stock was issued, the corporation was a small business corporation;
- The stock issued was by the corporation for money or other property (other than stock and securities); and
- The corporation, during the period of its five most recent taxable years ending before the date the loss on such stock was sustained, derived more than 50 percent of its aggregate gross receipts from sources other than royalties, rents, dividends, interests, annuities, and sales or exchanges of stocks or securities.

**[3] Tax Implications**

*I.R.C. § 1244(a)* allows an individual to treat up to \$50,000 of loss on section 1244 stock (\$100,000 in the case of a

married couple filing a joint return) as ordinary loss rather than a loss from the sale or exchange of a capital asset [*I.R.C. § 1244(a), (b)*]. In order to claim a deduction under *I.R.C. § 1244*, the individual or partnership sustaining the loss must have continuously held the stock from the date of issuance [*Treas. Reg. § 1.1244(a)-1(b)(2)*].

However, a trust or estate is not entitled to ordinary loss treatment under *I.R.C. § 1244*, regardless of how the stock is acquired [*I.R.C. § 1244 (d)(4)* (for purposes of *I.R.C. § 1244*, "individual" does not include a trust or estate); *Treas. Reg. § 1.1244(a)-1(b)*]. Thus stock issued under *I.R.C. § 1244* should not be transferred into a revocable trust.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Business & Corporate Law Closely Held Corporations General Overview Business & Corporate Law Corporations General Overview Tax Law Federal Taxpayer Groups S Corporations General Overview Tax Law Federal Taxpayer Groups S Corporations Elections (IRC secs. 1362-1363) Termination (IRC sec. 1362)



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**AUTHOR:** Margaret Johnson Hazel Lange Reviewed by James V. Quillinan

**§ 73.22 S Corporations**

**[1] In General**

An S corporation is a small business corporation that has elected to be taxed as a partnership rather than a corporation under Subchapter S of Chapter 1 of Subtitle A of the Internal Revenue Code [*see I.R.C. §§ 1361-1379*]. The chief characteristic of an S corporation is that its income or loss is not recognized by the corporation but flows through to the individual members in the same manner as a partnership [*I.R.C. § 1366(b)*].

To qualify for taxation under Subchapter S, a corporation must have no more than 100 shareholders [*I.R.C. § 1361(b)(1)(A)*] (applicable to tax years beginning after December 31, 2004; for earlier tax years, the corporation must have no more than 75 shareholders). All of the shareholders (except for estates and certain qualifying trusts and associations described below) must be individuals [*I.R.C. § 1361(b)(1)(B)*] (applicable to tax years beginning after December 31, 1997; for earlier tax years, the shareholders must all be individuals, except for estates and certain qualifying trusts), and none of the shareholders can be nonresident aliens [*I.R.C. § 1361(b)(1)(C)*]. The corporation cannot have more than one class of stock [*I.R.C. § 1361(b)(1)(D)*].

**[2] Grantor Trust as Shareholder**

If a citizen or resident of the United States is treated as owner of all of the trust under the grantor trust rules [*see I.R.C. §§ 671-679* and discussion in § 60.15[3][b]], the trust may properly hold the stock during the owner's lifetime [*I.R.C. § 1361(c)(2)(A)(i)*] and for two years thereafter [*I.R.C. § 1361(c)(2)(A)(ii)*] (applicable to tax years beginning after December 31, 1996), and the deemed owner or the deemed owner's estate will be treated as the shareholder [*I.R.C. § 1361(c)(2)(B)(i), (ii)*].

**[3] Termination of Status by Shareholder**

A shareholder can terminate a Subchapter S election [*see I.R.C. § 1362(a)*] only by formal revocation [*I.R.C. § 1362(d)(1)(A)*]. Further, an election may be revoked only if shareholders holding more than one-half of the shares of

stock of the corporation on the day on which the revocation is made consent to the revocation [I.R.C. § 1362(d)(1)(B)].

#### **[4] Qualified Subchapter S Corporation Trust (QSST)**

A Qualified Subchapter S Trust (QSST) is a trust that distributes all of its income to one person who is a citizen or resident of the United States [I.R.C. § 1361(d)(3)(B)]. A substantially separate and independent share of a trust may also qualify as a QSST if it distributes all of its income to one person who is a citizen or resident of the United States [I.R.C. § 1361(d)(3)(B); see I.R.C. § 663(c) (separate shares treated as separate trusts)].

The terms of a QSST must require, among other things, that there will be only one income beneficiary during the current income beneficiary's lifetime [I.R.C. § 1361(d)(3)(A)]. During the current beneficiary's lifetime, the trust will not cease to qualify as a QSST merely because there may be multiple beneficiaries after the current beneficiary's death [see I.R.C. § 1361(d)(3)(A)].

The beneficiary or legal representative, not the trustee, must elect to have the trust treated as a QSST [I.R.C. § 1361(d)(1), (2)].

#### **[5] Electing Small Business Trust**

In tax years beginning after December 31, 1996, an Electing Small Business Trust (ESBT) may also hold stock in an S corporation [I.R.C. § 1361(c)(2)(A)(v) (applicable to tax years beginning after December 31, 1996); I.R.C. § 1361(e) (applicable to tax years beginning after December 31, 1996); for discussion of Subchapter S corporation, see [4], above].

The rules for ESBTs vary according to the applicable tax year. For tax years beginning after December 31, 1996, and before January 1, 1998, a trust qualified as an ESBT if it did not have as a beneficiary any person other than an individual, an estate, or a qualified charitable beneficiary, which held a contingent interest and was not a potential current beneficiary [I.R.C. § 1361(e)(1)(A)(i) (applicable to tax years beginning after December 31, 1996, and before January 1, 1998); see I.R.C. § 170(c)(25) (qualified charitable beneficiaries, other than governmental organizations)]. For tax years beginning after December 31, 1997, a trust will qualify as an ESBT if it does not have as a beneficiary any person other than an individual, an estate, or a qualified charitable beneficiary or, if they hold only contingent interests and are not potential current beneficiaries, state governments, or U.S. possessions, or any of their political subdivisions, or the United States or the District of Columbia [I.R.C. § 1361(e)(1)(A)(i) (applicable to tax years beginning after December 31, 1997); see I.R.C. § 170(c)(15) (qualified charitable beneficiaries)]. In all cases, the trust will qualify as an ESBT only if no interest in the trust was acquired by purchase and the trustee makes the necessary election [I.R.C. § 1361(e)(1)(A)(ii), (iii); see I.R.C. § 1361(e)(3) (election)]. An ESBT may not be a QSST for which there is a current election or a trust that is exempt from income taxation [I.R.C. § 1361(e)(1)(B); for discussion of QSST, see [4], above]. If a trust qualifies as an ESBT, each potential current beneficiary will be treated as a shareholder of the S corporation [I.R.C. § 1361(c)(2)(B)(v) (applicable to tax years beginning after December 31, 1996)].

#### **[6] Transfer of S Corporation Stock**

Because the rules relating to S corporations, QSSTs, and ESBTs are technical and complex, any transfer of S corporation stock should be planned with care. Any transfer that will cause the corporation to lose its S status should be avoided. For example, stock in an S corporation should not be transferred to a trust with more than one beneficiary if the effect of the transfer would be to raise the number of shareholders to more than 75 [I.R.C. § 1361(b)(1)(A) (applicable to tax years beginning after December 31, 1996; for earlier tax years, the corporation must have no more than 35 shareholders)]. If an S corporation's status has been terminated, it cannot make another election for five years, unless the I.R.S. consents [I.R.C. § 1362(g)]. However, a termination may be disregarded if the circumstances leading to it were inadvertent, if steps are taken to cure it within a reasonable time, and if the corporation and its shareholders

agree to make any adjustments that may be required for the period of termination [*I.R.C.* § 1362(f)].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Business & Corporate Law  
Closely Held Corporations  
General Overview  
Tax Law  
Federal Taxpayer Groups  
S Corporations  
General Overview



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DIVISION IV: WILLS AND TRUSTS  
CHAPTER 73 FUNDING A REVOCABLE TRUST  
PART II. LEGAL BACKGROUND

*26-73 California Legal Forms--Transaction Guide § 73.23*

**AUTHOR:** Margaret Johnson Hazel Lange Reviewed by James V. Quillinan

**§ 73.23 Sole Proprietorship**

A sole proprietorship is a form of business in which a natural person directly owns the assets used in the business and directly owes the liabilities of the business [*see* Ballantine & Sterling, California Corporation Laws, Ch. 2, *Choice of Form of Doing Business*, § 22.02 (Matthew Bender)]. A sole proprietorship is transferred to the trust when the settlor executes and delivers a bill of sale for the sole proprietorship to the trustee [*Civ. Code* §§ 1053, 1054, 1055; *Com. Code* § 2401(3)].

Although a sole proprietorship may not involve all, or even a major proportion, of the owner's personal assets, all of those assets are subject to the risks of the business, unless recourse to them is limited by agreement [*see* Ballantine & Sterling, California Corporation Laws, Ch. 2, *Choice of Form of Doing Business*, § 22.02 (Matthew Bender)]. When a trust becomes the ownership of a sole proprietorship, creditors may have recourse to other trust assets to satisfy the debts of the business. The potential dangers of this liability should be investigated before a sole proprietorship is transferred to the trust.

If a sole proprietorship leases property for the conduct of its business, arrangements should be made for an assignment of that lease to the trust.

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Business & Corporate LawSole Proprietorships



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*26-73 California Legal Forms--Transaction Guide § 73.24*

**AUTHOR:** Margaret Johnson Hazel Lange Reviewed by James V. Quillinan

**§ 73.24 Professional Practice**

A business that requires a professional license may be owned and operated only by a licensed professional. Thus, a sole proprietorship owned by a licensed person, or shares in a corporation that is qualified to render professional services, may only be transferred to a licensed person, or to a corporation qualified to render those services [*Corp. Code § 13407*].

When spouses have joined to create a trust and they wish to contribute stock in a professional corporation to the trust, they may properly do so, providing at least one of them is properly licensed. According to a Legal Opinion issued by the California Department of Consumer Affairs, shares in a professional corporation may be transferred to a revocable trust created by the spouses if all of the following requirements are met [Legal Opinion, 79-5 (Feb. 16, 1979), Cal. Dept. Consumer Affairs]:

- The interest of the nonlicensed spouse in the stock of the corporation does not exceed that spouse's one-half community property interest.
- If the licensed spouse dies before the nonlicensed spouse, the shares must be sold and the proceeds distributed according to the terms of the trust.
- On the death of the nonlicensed spouse, any nonlicensed beneficiary is entitled only to a beneficial interest in the proceeds from the sale of the shares.
- The trustee, who must be a licensed person, must have exclusive control and powers relating to the shares of the professional corporation.

The opinion suggests that the last two requirements actually be stated in the trust agreement.

**PRACTICE TIP:**

In order to avoid a violation of *Corp. Code § 13407*, most professional corporations will have a buy-out agreement with the shareholders. It may be advisable to contact the corporation within the six month period following the date of death of the licensed shareholder.

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Business & Corporate Law Professional Associations & Corporations



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*26-73 California Legal Forms--Transaction Guide § 73.25*

**AUTHOR:** Margaret Johnson Hazel Lange Reviewed by James V. Quillinan

**§ 73.25 Bonds**

**[1] In General**

A bond is a written promise, given in return for money or its equivalent, to pay a fixed sum of money, plus interest in a stated amount, at a future time or times. If a bond is given by a business corporation, it is described as a "corporate" bond; if it is given by a city, town, county, state, or territorial division of a state, it is described as a "municipal" bond.

**[2] Bearer Bond Held in Book Entry**

Most municipal bonds are not registered, but are issued in bearer form, with proceeds payable to the holder. When a bond is in bearer form, a certificate is issued, but it does not show title. If bearer bonds are held in a brokerage account, no certificate will be issued.

Since bearer bonds are negotiable instruments, the certificates should be placed in a safe-deposit box registered in the trustee's name. The trustee should never commingle trust assets with personal assets.

**[3] U.S. Savings Bonds**

A United States saving bond is a certificate of debt by which the federal government promises to pay the holder a stated amount of interest for a stated time and to repay the loan on the expiration date. Bonds in Series E and H were issued until 1980. Series EE and HH have been issued since 1980.

All transfers of U.S. savings bonds are handled by the Federal Reserve Board in Kansas City, Missouri. A stockbroker may act as an intermediary in facilitating the transfer of a bond.

A U.S. savings bond can be transferred to a revocable trust for the benefit of the grantor without causing accrued interest on the bond to be taxed to the grantor at the time of transfer [ *Ltr. Rul. 7826024 (Mar. 28, 1978)* ]. On the grantor's death, interest can be reported on the grantor's last income tax return, as if it were owned outright by the

deceased grantor [*I.R.C. § 454(a)*].

#### **[4] Treasury Securities**

The United States Treasury Department issues three types of marketable securities, which are denominated as bills, notes, and bonds. They are direct obligations of the United States government. They are originally issued through public auctions. After issue, however, they may be bought or sold in the secondary market at prevailing market prices.

The principal distinction between bills, notes, and bonds is the length of time (or term) they are outstanding. Treasury bills are short-term obligations issued within a term of one year or less. Notes have a term of a least one year but not more than 10 years. Treasury bonds have a term of more than 10 years.

Treasury notes and bonds bear a stated interest rate that is payable semi-annually. Treasury bills, in contrast, are sold at a discount from par, which is the amount the holder will be paid at maturity. This discount represents the interest on the bill.

#### **PRACTICE TIP:**

Treasury Bonds are sold by the Federal Reserve Bank in Kansas City, MO, or may be purchased through local banks. Treasury bonds are sold in denominations as low as \$1,000.

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:

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*26-73 California Legal Forms--Transaction Guide § 73.26*

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**§ 73.26 Tangible Personal Property**

**[1] Registered Items**

Some items of tangible personal property are registered with specific government agencies. These items typically will bear an identification number, and title will be evidenced by a certificate of ownership or similar document. The most common examples of this type of personal property are motor vehicles, boats, and trailers. The rules of the governing agency will determine the proper procedure for transferring this kind of tangible personal property. Before making any effort to transfer such an item to the trust, the attorney should determine the agency rules and comply with them.

If the settlor is financing the purchase of an item of tangible personal property (such as an automobile), the settlor will appear as the registered owner on the title registration, and the lender will appear as the legal owner [*see Veh. Code §§ 4450, 4453(a), 6302*]. The settlor cannot transfer full legal title to the trust without the permission of the legal owner [*see Veh. Code §§ 5600(a)* (transfer of vehicle invalid unless statutory transfer requirements satisfied), *5751* (on transfer of vehicle by registered owner, both registered and legal owner must sign certificate of ownership)]. It is essential, therefore, to obtain the permission of the lender before the transfer can be made.

Even when it is legally possible to do so, it is often unwise to transfer a vehicle registered with the California Department of Motor Vehicles to a trust unless it has unusual or special value. Transferring title to a motor vehicle after the death of the owner can usually be accomplished without serious legal complications. The DMV has forms that may be used to transfer a vehicle without probate when the estate is of an appropriately small size.

**[2] Unregistered Items**

Most items of tangible personal property are not registered with governmental agencies. For this kind of property there is ordinarily no formal record of ownership. Although a writing is not required to transfer most items of tangible personal property [*see Civ. Code § 1052*], if the settlor wishes to transfer a particular item of tangible personal property to the trust some written record of the transfer should be made. This is especially true if it is likely that a question may arise after the settlor's death as to whether the property was owned by the settlor individually or by

the trust. Unregistered tangible personal property can be transferred to the trust by the simple means of an assignment executed by the settlor and delivered to the trustee [*see Com. Code § 2401(2); Civ. Code § 1054*].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsGeneral OverviewEstate, Gift & Trust LawTrustsAdministrationEstate, Gift & Trust LawTrustsRevocable Living Trusts



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*26-73 California Legal Forms--Transaction Guide § 73.27*

**AUTHOR:** Margaret Johnson Hazel Lange Reviewed by James V. Quillinan

**§ 73.27 Retirement Benefits**

**[1] Qualified Plans**

A qualified retirement plan is a trust created or organized in the United States that forms part of a stock, pension, or profit-sharing plan of an employer for the exclusive benefit of the employer's employees and their beneficiaries [*see I.R.C. § 401(a)*]. Contributions may be made to the trust by the employer, by the employees, or by both the employer and the employees. The trust must meet specific statutory requirements in order to be classified as a qualified plan [*see I.R.C. § 401*].

**[2] Qualified Annuity Plan**

A qualified annuity plan is an employer plan that purchases retirement annuities for employees, the cost of which is tax deductible to the employer, and which meets the applicable requirements of *I.R.C. § 401(a)(2)*.

An annuity must have a designated beneficiary and owner. If the trust was created by a single person, it should be named as the primary beneficiary of the annuity to receive all benefits under the plan. Non-spousal beneficiaries may not roll over benefits received after the employee's death [*I.R.C. § 402(c)(9)*].

It is generally desirable for a married settlor to designate his or her spouse as the primary beneficiary under an annuity plan, as this will permit the surviving spouse to roll the benefit over to another qualified plan (such as an IRA) and thereby spread income tax liability for the benefits over the surviving spouse's lifetime [*I.R.C. § 402(c)(9)*]. A revocable trust generally will not qualify for rollover treatment [*I.R.C. § 402(c)*].

Despite the advantages of rollover treatment, there can be disadvantages to designating the surviving spouse as the beneficiary under an annuity plan.

First, if the settlor has children by a former marriage, the settlor will often wish to confer some (or all) of the annuity benefits on the children. If the settlor wishes to divide the benefits between the surviving spouse and the children by the

former marriage, a trust will often be the most convenient way in which to do this.

Second, if the surviving spouse has little or no ability to handle money, it will often be desirable to confer the benefits on a trustee who can manage them for the benefit of the spouse and any other beneficiaries the settlor may choose to name.

Third, if all of the benefits under the plan are payable to the surviving spouse, there is a danger that the marital deduction could be overfunded. When the marital deduction is overfunded, some of the estate tax benefits of the "applicable credit amount" (unified credit) [*see I.R.C. § 2010(c)*] (table of graduated amounts) and discussion in § 60.13[4][b] available in the settlor's estate will be lost.

It is important to keep in mind, however, that the surviving spouse can be deprived of annuity benefits only if he or she waives those rights in writing [*see I.R.C. §§ 401(a)(11), 417(a)*]. Waivers of the right to receive annuity benefits are subject to stringent requirements that must be strictly satisfied before any effort to confer the benefits on some person other than the surviving spouse will be effective [*see I.R.C. § 417(a)*].

### **[3] Individual Retirement Account (IRA)**

#### **[a] Traditional IRAs**

An Individual Retirement Account (IRA) is a trust that is created or organized in the United States for the exclusive benefit of an individual (or the individual's beneficiaries) and that meets the requirements of *I.R.C. § 408*. The trustee is a bank or other person who demonstrates the ability to administer the trust consistent with the applicable requirements [*I.R.C. § 408(a)(2), (h)*]. If the participant dies before the money or other property held in the IRA has been distributed, it will be paid to the designated beneficiary or beneficiaries [*see I.R.C. § 408(a)*].

For taxable years beginning before 2002, an individual generally may make deductible contributions to a traditional IRA up to the lesser of \$2,000 or the individual's compensation. The maximum annual dollar contribution limit for traditional IRA contributions is \$3,000 for 2002 through 2004, \$4,000 for 2005 through 2007, and \$5,000 for 2008. After 2008, the limit is adjusted annually for inflation in \$500 increments [*I.R.C. § 219(b)(5)(A), (C)*]. In the case of a married couple, deductible IRA contributions of up to the above amounts can be made for each spouse (including, for example, a homemaker who does not work outside the home), if the combined compensation of both spouses is at least equal to the contributed amount [*I.R.C. § 219(c)*].

Individuals who have attained age 50 may make additional catch-up IRA contributions. The otherwise maximum contribution limit (before application of the AGI phase-out limits) for an individual who has attained age 50 before the end of the taxable year is increased by \$500 for 2002 through 2005, and \$1,000 for 2006 and thereafter [*I.R.C. § 219(b)(5)(B)*].

The above contribution deduction limits are reduced if either the individual or the individual's spouse is an active participant in an employer-sponsored retirement plan. In that case, the dollar limit is phased out for taxpayers with adjusted gross income over specified levels for the taxable year [*I.R.C. § 219(g)*].

Money or other property held in an IRA generally is exempt from income taxation while it is held in the IRA [*I.R.C. § 408(e)(1)*]. However, collectibles such as works of art, rugs, antiques, precious metals or gems, stamps, coins, and similar items are not exempt from taxation in an IRA and should not be contributed to such an account [*I.R.C. § 408(m)*].

Withdrawals or distributions from an IRA generally are included in the gross income of the payee or distributee [*I.R.C. § 408(d)*], unless they are taken out in the form of a rollover [*I.R.C. § 408(d)(3)*]. When money or other property is

rolled over, it is contributed to another IRA or qualified account, in which it becomes eligible for the same income tax-deferral benefits as in the original IRA. Distributions from an IRA after 2001 may generally be rolled over into a qualified plan, Section 403(b) annuity, or governmental Section 457 plan [*I.R.C. § 408(d)(3)*]. Nondeductible contributions to an IRA, however, cannot be rolled over from an IRA into a qualified plan, Section 403(b) annuity, or Section 457 plan. In the case of a distribution from a traditional IRA that is rolled over into an eligible rollover plan that is not an IRA, the distribution is attributed first to amounts other than after-tax contributions [*I.R.C. § 408(d)(3)(A)(ii)*]. Tax-free rollovers can result in substantial income tax savings.

Rollover treatment generally is not available for withdrawals or distributions from an IRA if the designated beneficiary acquired the account by reason of the participant's death [*I.R.C. § 408(d)(3)(C)*]. If the designated beneficiary was the participant's surviving spouse, however, rollover treatment is available [*I.R.C. §§ 402(c)(9), 408(d)(3)(C)(ii)(II)*]; see *Priv. Ltr. Rul. 200532060* (to extent amounts standing in surviving spouse's IRA are timely rolled over to IRA set up by decedent and maintained in decedent's name, rolled over amounts are not included in taxpayer's gross income for year in which distributed); *Priv. Ltr. Rul. 200526023* (proceeds from IRA distributed to decedent's estate and then paid to surviving spouse as sole beneficiary of estate is not inherited IRA with respect to surviving spouse)]. Since naming a revocable trust as the beneficiary of an IRA is not the same as designating the surviving spouse as the beneficiary of the account, rollover treatment is not available when the trust is the beneficiary [*I.R.C. §§ 402(c)(9), 408(d)(3)(C)(ii)(II)*].

A beneficiary's disclaimer of a beneficial interest in a decedent's IRA is a qualified disclaimer under *I.R.C. § 2518* (if all of the requirements of that section are met), even though, before making the disclaimer, the beneficiary receives the required minimum distribution for the year of the decedent's death from the IRA. The beneficiary may make a qualified disclaimer with respect to all or a portion of the balance of the IRA, other than the income attributable to the required minimum distribution that the beneficiary received, as long as at the time the disclaimer is made, the disclaimed amount and the income attributable to that amount are paid to the successor beneficiary entitled to receive the disclaimed amount or are segregated in a separate account [ *Rev. Rul. 2005-36, 2005-26 I.R.B. 1368* ].

### **[b] Roth IRAs**

The Taxpayer Relief Act of 1997 [Pub. L. No. 105-34] established a new type of IRA [see *I.R.C. §§ 408A, 4973(f)*]; see also *I.R.C. §§ 219(c)(1)(B), 408(i)*], called a "Roth IRA" [*I.R.C. § 408A*]. To be treated as a Roth IRA, the account must be so designated when established [*I.R.C. § 408A(b)*].

Roth IRAs generally are treated in the same manner as traditional IRAs [*I.R.C. § 408A(a)*]. However, there are income limits on the use of Roth IRAs [see *I.R.C. § 408A(c)(3)*]. Unlike traditional IRAs, contributions to a Roth IRA are not deductible [*I.R.C. § 408A(c)(1)*]. The maximum yearly contributions to traditional and Roth IRAs combined for taxable years beginning before 2002, is the lesser of \$2,000 or the individual's compensation. For taxable years beginning in 2002 through 2004, the dollar limit is \$3,000, for 2005 through 2007 the dollar limit is \$4,000, for 2008 the dollar limit is \$5,000, and after 2008, the dollar limit is adjusted annually for inflation in \$500 increments [*I.R.C. § 408A(c)(2), (3)(A)*]; see *I.R.C. § 219(b)(1), (5)(A), (C)*], not counting rollover contributions that meet the requirements of *I.R.C. § 408(d)(3)* [see *I.R.C. § 408A(e)*]. Contributions to a Simplified Employee Pension Plan (see below) are not taken into account for purposes of calculating the maximum dollar limit [*I.R.C. § 408A(f)*]. Unlike traditional IRAs, taxpayers may contribute to a Roth IRA after age 70 [*I.R.C. § 408A(c)(4)*]. Like traditional IRAs, excess contributions to a Roth IRA are subject to a six percent tax [see *I.R.C. § 4973(f)*].

The mandatory distribution rules that apply to traditional IRAs [see *I.R.C. § 408(a)(6), (b)(3)*] do not apply to Roth IRAs [*I.R.C. § 408A(c)(5)*]. A qualified distribution from a Roth IRA is not includible in the taxpayer's gross income [*I.R.C. § 408A(d)(1)(A)*]. Thus, earnings in a Roth IRA may grow tax-free, rather than tax-deferred, as long as the account meets specified requirements on distribution [for the requirements, see *I.R.C. § 408A(d)(2)*].

Individuals with an adjusted gross income of less than \$100,000 may convert a traditional IRA into a Roth IRA [see

*I.R.C. § 408A(c)(3)(B)* (setting forth special rules for calculating adjusted gross income for purposes of determining eligibility for conversion to Roth IRA)]. Effective January 1, 2010, individuals may convert a traditional IRA into a Roth IRA regardless of their adjusted gross income [P.L. 109-222, § 512(a), (c), 120 Stat. 365 (repealing current version of *I.R.C. § 403(c)(3)(B)* containing the \$100,000 limitation, and renumbering balance of subsection)].

#### **[c] Deemed IRAs Under Qualified Employer Plans**

If a qualified employer plan permits employees to make voluntary employee contributions to a separate account or annuity that (1) is established under the plan, and (2) meets the requirements applicable to either traditional IRAs or Roth IRAs, then the separate account or annuity is deemed a traditional IRA or a Roth IRA, as applicable, for all federal tax purposes [*I.R.C. § 408(q)(1)*, effective for plan years beginning after December 31, 2002]. For example, the reporting requirements applicable to IRAs apply. The deemed IRA and contributions to it are not subject to the Code rules pertaining to the eligible retirement plan. In addition, the deemed IRA and contributions to it are not taken into account in applying such rules to any other contributions under the plan [*I.R.C. § 408(q)(1)*]. The deemed IRA, and contributions to it are subject to the exclusive benefit and fiduciary rules of ERISA to the extent otherwise applicable to the plan, and are not subject to the ERISA reporting and disclosure, participation, vesting, funding, and enforcement requirements applicable to the eligible retirement plan [29 U.S.C. § 1003(c) (*ERISA § 4(c)*)].

A qualified employer plan that allows separate accounts or annuities of employees to be deemed traditional IRAs or Roth IRAs for tax purposes does not violate any Code requirements by doing so [*I.R.C. § 408(q)(2)*]. For this purpose, a qualified employer plan includes a qualified plan [see *I.R.C. § 401(a)*], Section 403(b) annuity, or an eligible deferred compensation governmental plan [*I.R.C. § 408(q)(3)(A)*; see *I.R.C. § 457(b)*].

#### **[4] 401(k) Plan**

A trust created or organized in the United States that forms part of a profit-sharing or stock bonus plan and that meets the requirements of *I.R.C. § 401(k)* is described as a "401(k) plan." Under a typical 401(k) plan, the employee authorizes deductions to be made from his or her pay and contributed to the plan, and the employer makes matching contributions on the employee's behalf [see *I.R.C. § 401(k)(2)(A)*]. The contributions made by the employer are held in the plan until the employee's death, disability, or severance from employment, or until the employee reaches the age of 59½ years, whichever occurs first [*I.R.C. § 401(k)(2)(B)*]; effective for distributions after December 31, 2001; for distributions before 2002, a condition of "separation from service" was used in lieu of "severance from employment" (*I.R.C. § 401(k)(2)(A)(I)*, before amendment by Pub. Law 107-16)]. A 401(k) plan that meets all of the applicable requirements is classified as a "qualified plan" for purposes of the federal income tax law [*I.R.C. § 401(a), (k)(1)*].

If the settlor is a married person, the surviving spouse generally should be named as the primary beneficiary of the 401(k) plan. Favorable income tax treatment is generally available to the surviving spouse because the surviving spouse has the right to roll any distribution from a 401(k) plan over to another qualified plan, such as an IRA [*I.R.C. § 402(c)*]. Rollover treatment generally is not available when a trust is the beneficiary [*I.R.C. §§ 402(c)(9), 408(d)(3)(C)(ii)(II)*].

An employee who terminates employment before death may elect to roll over a 401(k) plan to an IRA [*I.R.C. § 402(c)*]. After rollover to an IRA, the assets formerly held in the 401(k) plan will be subject to the same rules that apply to other IRAs [see [3], *above*].

#### **[5] Keogh Plan**

A trust created or organized in the United States that forms part of a profit-sharing or stock bonus plan and that meets the requirements of *I.R.C. § 401(c)* is described as a "Keogh Plan" or "HR 10 Plan." A Keogh Plan generally is a plan in which a self-employed individual, or a partner who owns more than 10 percent of either the capital or the profit interest in a partnership, contributes part of his or her earned income to the plan [*I.R.C. § 401(c)*]. Withdrawals and distributions

from Keogh Plans are subject to rules similar to those that apply to withdrawals and distributions from IRAs and 401(k) plans [*I.R.C. § 401(a), (c)*; see [3] and [4], *above*]. A Keogh Plan that meets all of the applicable requirements is also classified as a "qualified plan" for purposes of the federal income tax law [*I.R.C. § 401(a), (c)*].

#### **[6] Simplified Employee Pension Plan (SEP)**

A simplified employee pension plan (SEP) is an IRA that is established by an employer, to which the employer makes contributions, and that meets minimum coverage and nondiscrimination requirements set forth in *I.R.C. § 408(k)*. Under a SEP, the employee may elect a salary reduction arrangement under which the employer makes payments directly to the employee in cash [*I.R.C. § 408(k)*]. For rules applicable to IRAs, see discussion in [3], *above*.

#### **[7] Employee Stock Ownership Plan (ESOP)**

A trust created or organized in the United States that is designed primarily to invest in employer securities and that meets the requirements of *I.R.C. § 409* is described as an employee stock ownership plan (ESOP) [*I.R.C. §§ 401(a), 409(a)*]. Benefits under an ESOP generally are provided in the form of securities of the employer, although they may also be paid in cash [*I.R.C. § 409(h)*].

If the settlor is a married person, it is often advisable to name the surviving spouse as the primary beneficiary under an ESOP. The advantages of doing this are as follows:

- In most cases, the benefit paid to the surviving spouse will qualify for the marital deduction [*I.R.C. § 2056*].
- Benefits paid to a surviving spouse will qualify for rollover treatment [*I.R.C. § 402(c)(9)*] and this can produce significant income tax savings. Rollover treatment generally is not available when a trust is the beneficiary [*I.R.C. §§ 402(c)(9), 408(d)(3)(C)(ii)(II)*].
- The surviving spouse can disclaim all or part of the benefit, which may be advantageous if proper disclaimer planning has been done [*see Prob. Code §§ 260-295; I.R.C. § 2518*].
- The surviving spouse can lessen the income tax impact of a distribution from an ESOP by electing five-year or 10-year averaging and capital gains treatment, when they are available [*I.R.C. § 402(e)(4)(B)*].

It is not always advantageous, however, to name the surviving spouse as primary beneficiary of an ESOP plan. The possible disadvantages of doing this are as follows:

- There is a possibility that the marital deduction may be overfunded, with a consequent loss of some of the estate tax benefits of the of the "applicable credit amount" (unified credit) [*see I.R.C. § 2010(c)*] (table of graduated amounts) and discussion in § 60.13[4][b] available in the settlor's estate.
- If the settlor has children by a former marriage, he or she may wish to confer some or all of the benefits of the ESOP on those children, and a trust will often be the only practical vehicle for doing this.
- If the surviving spouse lacks the ability to manage money wisely, it may be preferable to transfer the ESOP benefits to a trustee so that the trustee can manage them for the benefit of the spouse and any other beneficiaries.

Even when it is desirable to transfer the benefits to a trust rather than to name the surviving spouse as the beneficiary, it

may not be possible to do so. The surviving spouse can be deprived of ESOP benefits only if he or she waives those rights in writing [*see I.R.C. §§ 401(a)(11), 417(a)*]. Waivers of the right to receive benefits are subject to stringent requirements that must be strictly satisfied before any effort to confer the benefits on some person other than the surviving spouse will be effective [*see I.R.C. § 417(a)*].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsGeneral OverviewEstate, Gift & Trust LawTrustsAdministrationEstate, Gift & Trust LawTrustsRevocable Living TrustsPensions & Benefits LawGeneral OverviewPensions & Benefits LawEmployee Benefit PlansGeneral Overview



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*26-73 California Legal Forms--Transaction Guide § 73.28*

**AUTHOR:** Margaret Johnson Hazel Lange Reviewed by James V. Quillinan

**§ 73.28 Life Insurance**

**[1] In General**

Life insurance is a contract under which one person (customarily called the "insurer"), for a stipulated consideration (customarily called the "premium"), agrees to pay a second person (customarily called the "beneficiary") a stipulated sum of money on the death of a third person (customarily called the "insured") [California Insurance Law Practice, Ch. 20, *Nature and Types of Life Insurance*, § 20.02[1] (Matthew Bender); *see Ins. Code § 101*].

For estate tax purposes, the value of a decedent's estate includes the proceeds of any life insurance policy on the decedent's life that are receivable by the decedent's executor [*I.R.C. § 2042(1)*]. The value of the estate also includes the proceeds of any life insurance policy on the decedent's life that are not receivable by the executor but in which the decedent possessed, at the time of death, any "incidents of ownership," exercisable or in conjunction with any person [*I.R.C. § 2042(2)*]. An "incident of ownership" is a power or right to change the beneficiary of the policy, surrender or cancel the policy, assign the policy, revoke an assignment of the policy, pledge the policy for a loan, or obtain a loan from the insurer against the surrender value of the policy [*Treas. Reg. § 20.2042-1(c)(2)*].

**[2] As Trust Asset**

Irrevocable inter vivos trusts are frequently used to acquire and own life insurance policies during the lifetime of the settlor and, after the settlor's death, to receive and hold the death benefits for the benefit of designated beneficiaries. An irrevocable inter vivos trust is particularly suited for this purpose because, if it is properly planned and executed, the trust assets will be removed from the settlor's estate for federal estate tax purposes. This may result in significant estate tax savings, and also provide valuable liquidity after the settlor's death. Because irrevocable inter vivos trusts are so often used to own, acquire, and manage the death benefits of life insurance policies, the term "insurance trust" (or "life insurance trust") is widely understood to mean an irrevocable (and not revocable) inter vivos trust that is specially created and funded to accomplish these purposes. For general coverage of life insurance trusts, see Ch. 72, *Irrevocable Trusts* .

Although irrevocable inter vivos trusts are particularly well-suited to own and administer the benefits of life insurance, a revocable inter vivos trust may also be made the beneficiary of a life insurance contract. The death benefits of a life insurance policy may be paid to any kind of trust, including a revocable inter vivos trust [*Prob. Code* §§ 6300, 6321]. Irrevocability may be desirable when the settlor wishes to remove the insurance policy from his or her estate for federal estate tax purposes. In many cases, however, removal of the insurance policy from the estate is not strictly necessary; further, the settlor may be unable to afford to part on a permanent basis with the money needed to fund the premiums of a life insurance policy. If the death benefits of the policy are substantial, the premiums may also be substantial, and not every settlor will be able to afford the luxury of permanently removing them from his or her estate. Making a revocable inter vivos trust the beneficiary of death benefits may make more sense, particularly when the settlor's overall estate is modest and the premiums are not beyond the settlor's means.

When the death benefits of life insurance are payable to a revocable trust, several advantages may result. First, the insurance proceeds will be held with other trust assets for the benefit of the beneficiary or beneficiaries and administered, invested, and distributed according to a single, coherent plan. Second, the death benefits will provide the settlor's tax estate with a valuable measure of liquidity, providing the cash necessary to pay administrative expenses, debts, and taxes. If the revocable trust is properly planned and executed, it may also be divided upon the settlor's death into marital deduction and bypass trusts that will help to maximize estate tax savings, again according to a coherent and unified plan. For general coverage of marital deduction trusts and trust planning, see Ch. 71, *Marital Deduction Trust Provisions* .

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsGeneral OverviewEstate, Gift & Trust LawTrustsAdministrationEstate, Gift & Trust LawTrustsRevocable Living TrustsInsurance LawLife InsuranceGeneral OverviewInsurance LawLife InsuranceAssignments & Transfers



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**AUTHOR:** Margaret Johnson Hazel Lange Reviewed by James V. Quillinan

**§ 73.29 Installment Obligations**

An installment obligation is a debt that is payable at different successive periods according as agreed upon between the debtor (or obligor) and the creditor (or obligee). A promissory note is one form of an installment obligation.

An installment obligation may properly be transferred to a revocable trust. When this is done, the transfer does not constitute an accelerated disposition for tax purposes [ *Rev. Rul. 81-98, 1981-1 C.B. 40* ; *Rev. Rul. 74-613* , ]. A transfer of an installment obligation back to the grantor is also permissible and does not constitute an accelerated disposition [ *Rev. Rul. 76-100, 1976-1 CB 123* ; *Priv. Ltr. Rul. 8011060 (Dec. 30, 1979)* ; *Priv. Ltr. Rul. 8001045 (Oct. 10, 1979)* ; *Priv. Ltr. Rul. 7943063 (July 26, 1979)* ]. If the note is still held by the trust after the settlor's death, then no disposition occurs. However, a disposition may occur if the note is distributed outright to a trust beneficiary [*I.R.C. §453 (e)(6)(C)*; *Rev. Rul. 76-100, 1976-1 C.B. 123* ; *Rev. Rul. 55-159, 1955-1 C.B. 391* ].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Contracts LawTypes of ContractsInstallment ContractsEstate, Gift & Trust LawTrustsGeneral OverviewEstate, Gift & Trust LawTrustsAdministrationEstate, Gift & Trust LawTrustsRevocable Living Trusts



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**AUTHOR:** Margaret Johnson Hazel Lange Reviewed by James V. Quillinan

**§ 73.30 Liquid Assets**

Cash held in bank accounts, savings and loan associations, brokerage accounts, certificates of deposit, money market accounts, savings and loans associations, brokerage cash accounts, credit union accounts, and the equivalent, are generally described as liquid assets. Liquid assets are proper assets for contribution to revocable trusts. Substantial balances of cash are often transferred to revocable inter vivos trusts for the purpose of avoiding probate and providing trust liquidity. Smaller balances, however, are often held outside the trust, if for no other reason than that they are likely to be needed by the settlor in the day-to-day transaction of his or her business and will be more readily accessible if they are held in the settlor's individual name rather than in the trust.

It may not be necessary to transfer title of the client's checking accounts which are used for normal household and living expenses to the revocable trust. If the client maintains more than \$5,000 in a household checking account, it may be advantageous to transfer the account into the revocable trust to later avoid probate in case other assets are discovered at the time of the client's death which would result in the entire estate outside of trust exceeding the \$100,000 exclusion under *Prob. Code § 13100*. Assets valued at less than \$100,000 and assets held in joint tenancy title can be collected under the affidavit procedure provided in *Prob. Code § 13101*. All other liquid asset accounts should be transferred to the client's revocable trust.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

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**AUTHOR:** Margaret Johnson Hazel Lange Reviewed by James V. Quillinan

**§ 73.31 Motor Vehicles**

It is often unnecessary to transfer title to the settlor's motor vehicles to the trust. If, after the settlor's death, the total value of all assets owned outside the trust does not exceed \$100,000, those assets may be transferred by the affidavit method without the necessity for probate administration [*see Prob. Code § 13100* and discussion in § 73.30]. Further, the Vehicle Code contains several provisions providing for the simple transfer without probate proceedings of the title to motor vehicles after the death of an owner.

First, if the owner of a vehicle registered under the Vehicle Code dies and leaves no other property requiring probate, the person or persons entitled to the vehicle may obtain a transfer of title by simply presenting the appropriate registration and a declaration under penalty of perjury to the Department of Motor Vehicles (DMV). The declaration must show the date and place of the owner's death, and must state the following [*Veh. Code § 5910(b)(2)*]:

- That the owner left no other property necessitating probate;
- That no probate proceeding has been or is now being conducted in California;
- That the declarant is entitled to the vehicle under the will or the laws of intestate succession;
- That no person has a superior right to the vehicle;
- That there are no unsecured creditors or, if there are, that their claims have been paid in full or otherwise discharged.

The DMV may also require that the declarant produce a death certificate and the names and addresses of any other heirs or beneficiaries [*Veh. Code § 5910(b)(3), (4)*]. This simple transfer procedure is available regardless of the value of the vehicle [*Veh. Code § 5910(a)*].

Second, if a motor vehicle is registered in the names of two or more co-owners in the alternative, with the word "or" between their names, upon the death of either co-owner the deceased co-owner's interest will pass to the surviving co-owner or co-owners as if the title or interest in the vehicle was held in joint tenancy, unless a contrary intention is set forth in writing on the application for registration [*Veh. Code § 4150.5(a)*].

Third, title to a motor vehicle may also be registered in "beneficiary form," with a direction to transfer ownership to a designated beneficiary on the owner's death [*see Veh. Code § 4150.7(a)*]. The certificate of ownership must include, after the owner's name, the words "transfer on death to" or "TOD" followed by the name of the beneficiary [*Veh. Code § 4150.7(b)*]. As long as the owner is living, the signature or consent of the beneficiary is not required for any transaction relating to the vehicle [*Veh. Code § 4150.7(c)*]. After the owner's death, the surviving beneficiary may secure a transfer of ownership by presenting the certificate of ownership to the DMV together with a declaration under penalty of perjury stating the date and place of the owner's death and that the declarant is entitled to the vehicle as the designated beneficiary [*Veh. Code § 5910.5(e)*]. The DMV may also require that the declarant produce a certificate of death [*Veh. Code § 5910.5(e)(3)*].

In addition to automobiles and trucks, various types of vehicles are subject to registration under the Vehicle Code and the simple transfer procedures just described. These include trailers [*see Veh. Code § 4000(a)(1)*], motorcycles [*see Veh. Code § 38012(b)(1)*], snowmobiles [*see Veh. Code § 38012(b)(2)*], sand or dune buggies [*see Veh. Code § 38012(b)(3)*], "house cars" [*see Veh. Code § 362*], certain mobilehomes [*see Veh. Code § 396*], and certain trailer coaches [*see Veh. Code § 5352, 5353*].

If the client owns a motor vehicle that has unusual value, or that the client has purchased for the purpose of investment, it may make sense under the circumstances to transfer title to that vehicle to the revocable trust.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

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**AUTHOR:** Margaret Johnson Hazel Lange Reviewed by James V. Quillinan

**§ 73.32 Vessels**

If the client owns a boat or other vessel, it will often be unnecessary to transfer its title to the revocable trust. Registration and transfer of title to vessels is subject to many of the same rules that apply to motor vehicles registered with the DMV [see discussion in § 73.31]. The Vehicle Code contains numerous provisions relating to the registration of so-called "undocumented vessels," that is, vessels that do not have marine documents issued by the United States Bureau of Customs or any successor agency [see *Veh. Code* §§ 9840 *et seq.*; see also *Veh. Code* § 9840(g)]. For example, *Veh. Code* § 9852.5 contains provisions under which title to an undocumented vessel held by co-owners may be transferred to the surviving co-owner, and *Veh. Code* § 9852.7 contains similar provisions permitting the transfer of title when title to the undocumented vessel is held in "beneficiary form." Further, if the total value of all assets that the client owns outside the trust does not exceed \$100,000, those assets may be simply transferred after the client's death by the affidavit method without the necessity for probate administration [see *Prob. Code* § 13101 and discussion in § 73.30].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

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**§ 73.33 Manufactured Homes, Mobilehomes, and Floating Homes**

It will often be unnecessary to transfer title to a manufactured home, mobilehome, floating home, or similar home to a revocable trust. Homes of this kind are subject to registration with the California Department of Housing and Community Development (HCD) [*see Health & Safety Code §§ 18000 et seq.*] and subject to special transfer provisions administered by that agency [*see Health & Safety Code § 18098 et seq.*]. Provisions of the Health and Safety Code permit title to manufactured homes, mobilehomes, and floating homes to be transferred after the death of the owner without probate proceedings. These provisions are substantially similar to the Vehicle Code provisions that permit title to motor vehicles to be transferred without probate proceedings after the death of an owner [*see discussion in § 73.31*]. For example, any person who has succeeded to ownership of a manufactured home, mobilehome, or floating home under the owner's will or the laws of intestate succession may, at least 40 days after the death of the owner, submit a declaration under penalty of perjury showing his or her right to the property, and the Department will promptly effectuate the transfer [*see Health & Safety Code § 18102(a)*]. A similar provision permits the simple transfer of ownership when title to the home was held in "beneficiary form" [*see Health & Safety Code § 18102.2(a)*].

Notwithstanding these provisions, transfer of title to the trust may be desirable or necessary in various circumstances. If, for example, the manufactured home, mobile home, floating home, or other item has a substantial value and the settlor wishes it to be held with other trust assets and managed and distributed for the benefit of the trust beneficiaries, it should obviously be transferred to the trust. If the home is permanently affixed to a foundation, however, it is considered real property and is not subject to transfer under the Health and Safety Code provisions [*see Rev. & Tax. Code § 5805*]. A home of this type must be treated in the same manner as other real property.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

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**§ 73.34 Aircraft**

The laws governing aircraft can be found in Federal Aviation Regulations (FAR) Part 47 and 49, "Aircraft Registration." A copy of these regulations may be obtained by writing to:

Superintendent of Documents  
U.S. Government Printing Office  
Washington, D.C. 20591

All aircraft registered in the United States must be registered through the following address:

Federal Aviation Administration  
P. O. Box 25504  
Oklahoma City, Oklahoma 73125  
Telephone 405-954-3011

**Legal Topics:**

For related research and practice materials, see the following legal topics:

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**§ 73.35 Safe Deposit Boxes**

Whether the client should transfer assets held in a safe deposit box to the revocable trust will depend on the nature and value of those assets. It usually is not difficult to obtain access to a safe deposit box after the death of the owner. If the owner of box is deceased, any person who has a key to the box may obtain access to it before probate proceedings have begun by providing the financial institution in which the box is located with proof of the owner's death and reasonable proof of the identity of the person seeking access [*Prob. Code § 331(b)*]. The person may inspect and inventory the contents of the box under the supervision of an employee of the financial institution and remove any wills, trust instruments, or burial instructions found in it [*Prob. Code § 331(d)*]. However, the financial institution must photocopy any documents removed from the box, and it may charge the person seeking access for the cost of the photocopies [*Prob. Code § 331(d)*].

A settlor should never commingle trust property with non-trust assets. If the settlor wishes to store important trust documents (or tangible personal property belonging to the trust) in a safe deposit box, a separate box should be obtained for this purpose. Documents and tangible personal property belonging to the settlor personally should be stored in the settlor's personal safe deposit box.

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
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**§ 73.36 Patents and Trademarks**

A patent is an invention or discovery of a new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement of such an invention or discovery [*see 35 U.S.C. § 101*]. A trademark is a word, name, symbol, or device (or any combination of these things) that a person is using or intends to use in commerce to identify and distinguish his or her goods from those manufactured or sold by others [*15 U.S.C. § 1127*]. A trademark that is used to identify and distinguish services as opposed to products is known as a service mark [*15 U.S.C. § 1127*].

Both patents and trademarks are subject to registration under federal statutes. Trademarks are governed by Chapter 22 of Title 15 of the United States Code [*15 U.S.C. §§ 1051 et seq.*], while patents are governed by Title 35 of the same code [*35 U.S.C. §§ 1 et seq.*]. Responsibility for administering these statutes is vested in the United States Patent and Trademark Office in Washington, D.C.

There is no legal requirement that a patent or trademark be registered. However, registration confers certain protections upon the patent or trademark holder and is advisable in many circumstances.

Legal documents evidencing ownership of a patent or trademark, together with any pending patent or trademark applications and any royalties received or to be received from the use of either of these rights, may be transferred to a revocable trust. The Patent and Trademark Office will accept for recordation almost any form of legal documentation evidencing a change of ownership from an individual to a revocable trust. Assignments are handled by the Assignment Branch of the United States Patent and Trademark Office, Washington, D.C. 20231. General information regarding assignments of U.S. patents and trademarks may be obtained by calling 703-308-9723.

If the estate planning attorney's experience in patent and trademark matters is limited, he or she should consult a specialist. Under the California Rules of Professional Conduct, an attorney who does not have sufficient skill and knowledge to competently perform the services that a client requests has a duty to acquire the necessary skill and knowledge before the services are performed, or associate or consult another attorney who is reasonably believed to be competent [*Cal. Rules Prof. Conduct, Rule 3-110(B)*]. Further, an attorney must refer a client to a specialist, or

recommend the assistance of a specialist, if a reasonably skillful and careful practitioner would do so under similar circumstances [ *Horne v. Peckham* (1979) 97 Cal. App. 3d 404, 414-415, 158 Cal. Rptr. 714].

**PRACTICE TIP:**

The procedures discussed in this section pertain only to U.S. patents and trademarks. They do not cover foreign patents and trademarks.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsGeneral OverviewEstate, Gift & Trust LawTrustsAdministrationEstate, Gift & Trust LawTrustsRevocable Living TrustsPatent LawOwnershipPatents as PropertyTrademark LawConveyancesGeneral Overview



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**AUTHOR:** Margaret Johnson Hazel Lange Reviewed by James V. Quillinan

**§ 73.37 Copyrights**

**[1] In General**

A single system of protection for copyrights was established in the United States by the Federal Copyright Act of 1976 [*see 17 U.S.C. § 101 et seq.*]. This Act abolished the former system under which unpublished works were protected by the common law and published works were protected by statutory law. Under the 1976 Act, copyright protection is extended to any original work of authorship as soon as it is fixed in a tangible medium of expression from which it can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device [*see 17 U.S.C. § 102(a)*]. Copyright protection is available for original works that are fixed in any tangible medium of expression, whether known now or later developed [*17 U.S.C. § 102(a)*]. Works of authorship that are protected under the 1976 Act include literary, musical, dramatic, graphic, pictorial, architectural, audiovisual, choreographic, and sculptural works, as well as motion pictures, sound recordings, and pantomimes [*17 U.S.C. § 102(a)*].

**PRACTICE TIP:**

A copyright does not include titles, slogans and symbols. Titles, slogans and symbols are matters of trademark law.

**[2] Duration**

Before the enactment of the Federal Copyright Act of 1976, statutory copyright protection was granted for an initial term of 28 years and could be renewed for an additional 28 years. Under the Act of 1976, if a work was created on or after January 1, 1978, copyright protection is available from the date of creation and for 70 years after the death of the author [*see 17 U.S.C. § 302(a)*]. If the work was created jointly by two or more authors who did not work for hire, copyright protection is available for the lifetime of the last surviving author plus 70 years [*17 U.S.C. § 302(b)*]. Any copyright that was existing in its first term on January 1, 1978, continues for 28 years from the date it was originally secured [*17 U.S.C. § 304(a)(1)(A)*].

**[3] Notice of Copyright**

Before January 1, 1978, a notice of copyright had to be placed on a published work to secure the protection of the copyright law. Under the Federal Copyright Act of 1976, there is no requirement that a notice be placed on the published work, but a notice may give the copyright holder additional protection in the event of an infringement suit. If it is proven that the defendant in the infringement suit had access to the published work, and if the work included a copyright notice in the form and position required by statute [*see 17 U.S.C. §§ 401(b), (c)* (visually perceptible copies), *402(b),(c)* (phonorecords)], the defendant generally cannot rely on the defense of innocent infringement in mitigation of actual or statutory damages [*see 17 U.S.C. §§ 401(d)* (visually perceptible copies), *402(d)* (phonorecords); *but see 17 U.S.C. § 504(c)(2)* (statutory damages against nonprofit educational institution, library, archives, or public broadcaster as remitted if infringer believed fair use doctrine applied)].

#### **[4] Registration**

Copyrights are registered with the Registrar of Copyrights at the Library of Congress in Washington, D.C. To obtain public information concerning copyrights call or write

Library of Congress, Room 401  
James Madison Memorial Building  
101 Independence Avenue, S.E.  
Washington, D.C. 20559  
Telephone: 202-479-0700

Any letter of inquiry should be directed to

Information Section  
Copyright Office  
Library of Congress  
Washington, D.C. 20559

The copyright telephone hotline number is (202) 707-9100.

#### **[5] Transfer**

The ownership of a copyright may be transferred in whole or in part by any writing signed by the copyright owner or the copyright owner's agent [*17 U.S.C. § 204(a)*].

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Copyright Law  
Conveyances  
General Overview  
Estate, Gift & Trust Law  
Trusts  
General Overview  
Estate, Gift & Trust Law  
Trusts  
Administration  
Estate, Gift & Trust Law  
Trusts  
Revocable Living Trusts



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DIVISION IV: WILLS AND TRUSTS  
CHAPTER 73 FUNDING A REVOCABLE TRUST  
PART II. LEGAL BACKGROUND

*26-73 California Legal Forms--Transaction Guide §§ 73.38-73.99*

**AUTHOR:** Margaret Johnson Hazel Lange Reviewed by James V. Quillinan

**[Reserved]**

§§ 73.38[Reserved]



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DIVISION IV: WILLS AND TRUSTS  
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 PART III. TRANSACTION GUIDE  
 A. Client Interview--Facts and Documents

*26-73 California Legal Forms--Transaction Guide § 73.100*

**AUTHOR:** Margaret Johnson Hazel Lange Reviewed by James V. Quillinan

**§ 73.100 Facts**

**NOTE:**

Counsel should have obtained detailed information about the clients' assets in connection with planning and drafting the trust instrument and other estate planning documents. For a list of the basic facts that should be obtained during that process, see Ch. 60, *Estate Planning*. The form in § 60.200 is a client interview checklist that can be used to assemble the necessary information. See also Ch. 70, *Complete Revocable Trust Forms*, for general discussion of information that will be needed during the planning process. For another client questionnaire, see California Wills & Trusts Forms, Div. IX, *Miscellaneous Estate Planning Documents*, Miscellaneous Document 5 (Matthew Bender).

When an attorney prepares a trust for a husband and wife, both spouses are clients and the attorney owes an equal duty to each of them. A conflict of interest can arise that may make representation of both spouses unwise or unethical [see Ch. 60, *Estate Planning*, § 60.110; see also California Wills & Trusts, Ch. 4, *Ethical Consideration and Professional Responsibility* (Matthew Bender)]. For a sample conflict of interest disclosure for dual representation, see California Wills & Trusts Forms, Div. IX, *Miscellaneous Estate Planning Documents*, Miscellaneous Document 1 (Matthew Bender).

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
 Estate, Gift & Trust LawTrustsGeneral OverviewEstate, Gift & Trust LawTrustsAdministrationEstate, Gift & Trust LawTrustsCreationEstate, Gift & Trust LawTrustsRevocable Living Trusts



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DIVISION IV: WILLS AND TRUSTS  
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PART III. TRANSACTION GUIDE  
A. Client Interview--Facts and Documents

*26-73 California Legal Forms--Transaction Guide § 73.101*

**AUTHOR:** Margaret Johnson Hazel Lange Reviewed by James V. Quillinan

**§ 73.101 Documents**

1. Copies of evidence of ownership of all assets to be transferred to trust:
  - a. Deeds to real property.
  - b. Notes and deeds of trust.
  - c. Condominium conveyance documents for time-share interests.
  - d. Bank statements, including but not limited to:
    - (1) Money market accounts.
    - (2) Certificates of deposit.
    - (3) Credit union accounts.
  - e. Stock statements.
  - f. Stock certificates or brokerage account statements for all stock to be transferred to trust.
  - g. Mutual fund statements.
  - h. Partnership agreements.

- i. Stock options plans and agreements.
- j. Evidence of ownership of intellectual property.
- k. Treasury notes and treasury bills statements.
- l. United States savings bonds.
- m. Lease agreements relating to any leasehold interests.
- n. Life insurance and casualty policies.
- o. Annuity and retirement contracts.
- p. Employee benefit plan documents, including IRA accounts and Keogh account statements.
- q. Certificate of title and current registration for:
  - (1) Automobiles.
  - (2) Boats.
  - (3) Aircraft.
- 2. Contracts affecting property or interests to be transferred into inter vivos trust.
- 3. Copies of buy-sell agreements and bylaws for closely held business interests and shareholder agreements.
- 4. Marital agreements affecting ownership of property to be transferred to trust, including:
  - a. Premarital agreements.
  - b. Postnuptial agreements.
  - c. Marital dissolution agreements affecting any current property of settlors.
- 5. List of household goods and tangible personal property.

**NOTE:**

The list does not have to be exhaustive but should include, at a minimum, major assets and assets of particular value. Assets of lesser value (such as clothing, furniture, and personal effects) can be listed by category rather than individually itemized.

- 6. Copies of current federal and state income tax returns.

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
 Estate, Gift & Trust LawTrustsGeneral OverviewEstate, Gift & Trust LawTrustsAdministrationEstate, Gift & Trust  
 LawTrustsCreationEstate, Gift & Trust LawTrustsRevocable Living Trusts



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*26-73 California Legal Forms--Transaction Guide §§ 73.102-73.109*

**AUTHOR:** Margaret Johnson Hazel Lange Reviewed by James V. Quillinan

**[Reserved]**

§§ 73.102[Reserved]



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DIVISION IV: WILLS AND TRUSTS  
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PART III. TRANSACTION GUIDE  
B. Preliminary Determinations

*26-73 California Legal Forms--Transaction Guide*

**AUTHOR:** Margaret Johnson Hazel Lange Reviewed by James V. Quillinan

**NOTE:**

For discussion relating to the suitability of a revocable trust as an estate planning device, see Ch. 60, *Estate Planning* , and Ch. 70, *Complete Revocable Trust Forms* . For additional discussion, see California Wills & Trusts, Ch. 3, *Selecting the Proper Estate Planning Devices* (Matthew Bender).



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PART III. TRANSACTION GUIDE  
B. Preliminary Determinations

*26-73 California Legal Forms--Transaction Guide § 73.110*

**AUTHOR:** Margaret Johnson Hazel Lange Reviewed by James V. Quillinan

**§ 73.110 Identifying Assets to Be Transferred to Trust**

1. Review list of client's assets supplied by client.

2. For each asset, determine whether asset:

a. Will be transferred to trust;

b. Will be held outside trust, or

**NOTE:**

Some assets may either be unsuitable as trust assets because they are difficult to manage within the framework of a trust, because there are legal or contractual restrictions that prohibit or limit the settlors' ability to transfer them to the trust, or because the transfer would have undesirable tax consequences. The Legal Background to this chapter discusses considerations relating to specific assets. Additional information relevant to this topic may be found in the Legal Background to Ch. 60, *Estate Planning*. For additional discussion, see California Wills & Trusts, Ch. 3, *Selecting the Proper Estate Planning Devices*, Ch. 94, *Trust Property*, and Ch. 140, *Implementing and Funding the Inter Vivos Trust* (Matthew Bender).

c. Requires a designation of beneficiary.

3. Determine whether there are any legal or contractual restrictions on transferring property to trust, such as:

a. Buy-sell agreements affecting disposition of partnership interests or stock in closely-held corporations

[ *see* § 73.18; buy-sell agreements are discussed in detail in ch. 8D, *Buy-Sell Agreements* ].

b. Transfer restrictions on closely-held securities [ *see* § 73.15[1]; transfer restrictions are discussed in detail in ch. 6, *Securities Regulation Issues* ].

c. Limitations of disposition of property imposed by agreements between settlor and a former spouse, including:

(1) Premarital agreements.

(2) Postmarital agreements.

(3) Marital settlement agreements incident to dissolution of former marriage.

4. Determine whether any preliminary transmutations of property will be necessary before trust is funded.

**NOTE:**

The most common situation in which a transmutation is advisable is the case of joint tenancy real property held by the settlors. It is generally regarded as inadvisable to transfer joint tenancy property directly to a trust. For a general discussion of joint tenancy interests in estate planning, see § 60.12[5]; see also *California Wills & Trusts, Ch. 3, Selecting the Proper Estate Planning Devices*, § 3.06[1][b], and Ch. 140, *Implementing and Funding the Inter Vivos Trust* (Matthew Bender).

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsGeneral OverviewEstate, Gift & Trust LawTrustsCreationEstate, Gift & Trust LawTrustsRevocable Living Trusts



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*26-73 California Legal Forms--Transaction Guide § 73.111*

**AUTHOR:** Margaret Johnson Hazel Lange Reviewed by James V. Quillinan

**§ 73.111 Mechanics of Transferring Assets to Trust**

1. Review procedures for transferring each of settlors' assets to trust.

**NOTE:**

The Procedural Guide describes the steps necessary to transfer specific types of assets to an inter vivos trust. Before beginning the funding process, the attorney should review the steps necessary to transfer each asset to become familiar with the steps involved.

2. For each asset, determine whether attorney or settlors will be responsible for taking steps necessary to make transfer.

**NOTE:**

This determination should be made in consultation with the settlors and after the attorney has made his or her own determination as to whether the settlors will be able to understand and perform the necessary steps, as well as the likelihood that they will actually do so [ *see § 73.11[4]*]. Failure to fund a trust in accordance with the estate plan can be a disaster for all involved (including the attorney) and can lead to unnecessary and expensive litigation.

a. Will settlors be able to understand and execute the necessary procedures?

b. Are settlors willing to do so?

c. If settlors want attorney to "do all the work," do settlors understand that this will

increase trust start-up costs?

d. What is likelihood that settlors will fail to take the necessary steps even if they express a wish or willingness to do so?

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsGeneral OverviewEstate, Gift & Trust LawTrustsAdministrationEstate, Gift & Trust LawTrustsCreation



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*26-73 California Legal Forms--Transaction Guide §§ 73.112-73.119*

**AUTHOR:** Margaret Johnson Hazel Lange Reviewed by James V. Quillinan

**[Reserved]**

§§ 73.112[Reserved]



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C. Procedural Guide to Transferring Specific Assets to Trust

*26-73 California Legal Forms--Transaction Guide § 73.120*

**AUTHOR:** Margaret Johnson Hazel Lange Reviewed by James V. Quillinan

**§ 73.120 Preliminary Procedures**

1. Discuss funding process prospectively with settlors and make certain that settlors understand:
  - a. Importance of funding trust and consequences of failure to do so.
  - b. Respective responsibilities of attorney and settlors relative to procedures to be taken to transfer each asset to trust.
  - c. Exact steps that must be taken to perform each transfer or step that will be responsibility of settlor.
2. Confirm respective responsibilities of parties in written memorandum to settlors.

**NOTE:**

Confirmation of the parties' respective responsibilities serves a dual purpose. First, it obviously protects the attorney from a potential malpractice claim based on failure to fund the trust. Second, it gives the settlors a written record that they may use as a reference source and checklist to make sure they are doing everything they need to do. To achieve both these purposes, the memorandum should be detailed and specific.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsGeneral OverviewEstate, Gift & Trust LawTrustsAdministrationEstate, Gift & Trust LawTrustsCreationEstate, Gift & Trust LawTrustsRevocable Living Trusts



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C. Procedural Guide to Transferring Specific Assets to Trust

*26-73 California Legal Forms--Transaction Guide § 73.121*

**AUTHOR:** Margaret Johnson Hazel Lange Reviewed by James V. Quillinan

**§ 73.121 Residential Real Property**

**NOTE:**

This discussion assumes that the real property is located in California. If it is located elsewhere, see § 73.124.

1. Review due-on-sale clause in deed of trust, if any, and if concern exists over possible effect of clause, write mortgage lender [*see* § 73.200] to:

**NOTE:**

Many deeds of trust contain due-on-sale clauses. For a discussion of the enforceability of these clauses, see § 73.13[7][a].

- a. Obtain lender's approval of change of title.
  - b. Verify that settlors' obligations under existing loan provisions will remain the same.
2. Obtain and review deed to determine how title is held, legal description, and assessor's parcel number.
  3. If title is held in joint tenancy, convert property to community property by preparing either:

**NOTE:**

Transfer of joint tenancy property to a trust severs the joint tenancy. Most experienced attorneys recommend transmuting joint tenancy property to community property before conveying it to a revocable trust. For discussion of estate planning issues that arise in

connection with joint tenancy property, see § 60.12[5]; see also *California Wills & Trusts, Ch. 3, Selecting the Proper Estate Planning Devices*, § 3.06[1][b], and Ch. 140, *Implementing and Funding the Inter Vivos Trust* (Matthew Bender).

a. Deed conveying property from parties as joint tenants to parties as community property, or

b. Transmutation agreement converting property from joint tenancy property to community property.

**NOTE:**

For discussion of the statutes governing transmutation agreements, and transmutation agreement forms, see *Ch. 112, Posnuptial Agreements*, § 112.15; see also California Wills & Trusts Forms, Div. IX, *Miscellaneous Estate Planning Documents*, Miscellaneous Documents 30 and 31 (Matthew Bender).

4. Prepare appropriate deed.

a. Determine type of deed [ *see* § 73.13[1]-[6]; *see also* Ch. 27, *Deeds and Recording* ], either:

(1) Grant deed [ *see* § 73.212]; or

**NOTE:**

§ 73.212 is a trust transfer deed that has the same effect as a grant deed.

(2) Quitclaim deed.

b. Make sure deed conforms to recorder's specifications.

c. Title should read as follows:

\_\_\_\_\_ [name(s) of trustee(s), e.g., VERNAL LANGJON and MARZEL LANGJON], as Trustees, or their successors in interest, under the \_\_\_\_\_ [name of trust, e.g., LANGJON FAMILY REVOCABLE TRUST], DATED \_\_\_\_\_.

5. Have all transferors execute deed before a notary public [ *see* § 73.201 (acknowledgment)].

6. Prepare and obtain transferee's signature on Preliminary Change of Ownership form [§ 73.213]

**NOTE:**

Only one signature is required.

7. Record deed.

a. Forward original and one copy of executed deed, together with Preliminary Change of Ownership form, to county recorder's office of county where real property is situated, and request recordation of deed.

**NOTE:**

The recorder's office is required to forward the Preliminary Change of Ownership form to the county assessor's office.

b. Submit check for appropriate fee to recorder's office.

**NOTE:**

Recording fees vary from county to county. Check with the recorder's office for the appropriate fee.

c. Provide stamped, self-addressed return envelope, and request county recorder to return an endorsed recorded copy of deed.

**NOTE:**

The recorder's office will return the original deed after the microfilming has been completed. This process may take as long as four to six weeks.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsGeneral OverviewEstate, Gift & Trust LawTrustsAdministrationEstate, Gift & Trust LawTrustsRevocable Living TrustsReal Property LawOwnership & TransferGeneral Overview



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*26-73 California Legal Forms--Transaction Guide § 73.122*

**AUTHOR:** Margaret Johnson Hazel Lange Reviewed by James V. Quillinan

**§ 73.122 Commercial Real Property**

**NOTE:**

The procedures for transferring title to commercial real property to an inter vivos trust are identical to those listed in § 73.121, *above*, for residential real property.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsGeneral OverviewEstate, Gift & Trust LawTrustsAdministrationEstate, Gift & Trust LawTrustsRevocable Living TrustsReal Property LawOwnership & TransferGeneral Overview



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*26-73 California Legal Forms--Transaction Guide § 73.123*

**AUTHOR:** Margaret Johnson Hazel Lange Reviewed by James V. Quillinan

**§ 73.123 Ranch and Farming Property**

**NOTE:**

The procedures for transferring title to agricultural real property to an inter vivos trust are identical to those listed in § 73.121, *above*, for residential real property.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsGeneral OverviewEstate, Gift & Trust LawTrustsAdministrationEstate, Gift & Trust LawTrustsRevocable Living TrustsReal Property LawOwnership & TransferGeneral Overview



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*26-73 California Legal Forms--Transaction Guide § 73.124*

**AUTHOR:** Margaret Johnson Hazel Lange Reviewed by James V. Quillinan

**§ 73.124 Real Property Outside California**

1. Determine what agency handles the recordation of deeds in state and county in which real property is situated.

**NOTE:**

The attorney should review the recording stamp on the old deed, or determine the area code and check with the information operator for a telephone number of the recording agency for the appropriate state and county.

2. Telephone recording agency in county where real property is located and:

a. Determine:

(1) What documentation is required, and

(2) Amount of recording fees.

(3) Amount of time typically required to process recording request and return executed copy of deed.

b. Request that recording agency to forward all required forms to attorney's office, or ascertain whether a California deed is acceptable.

3. Prepare appropriate deed, either *form in § 73.212* or out-of-state equivalent.

**NOTE:**

See § 73.121, P (4)(c), for the proper form of title.

4. Prepare other documentation, if necessary.
5. Have all transferors execute deed before a notary public [ *see* § 73.201 (acknowledgment)].
6. Record deed.
  - a. Forward original and one copy of executed deed, together with any other necessary documentation, to recording agency in county where real property is situated, and request recordation of deed.
  - b. Submit check for appropriate fee.
  - c. Provide stamped, self-addressed return envelope, and request agency to return an endorsed recorded copy of deed.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsGeneral OverviewEstate, Gift & Trust LawTrustsAdministrationEstate, Gift & Trust LawTrustsRevocable Living TrustsReal Property LawOwnership & TransferGeneral Overview



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C. Procedural Guide to Transferring Specific Assets to Trust

*26-73 California Legal Forms--Transaction Guide § 73.125*

**AUTHOR:** Margaret Johnson Hazel Lange Reviewed by James V. Quillinan

**§ 73.125 Time-Share Interests in United States**

1. Determine type of ownership in time-share interest:

**NOTE:**

The owner receives either an actual fee interest in the subject property, which is referred to as a "time-share estate" or an "interval ownership," or a mere right to use the property, which is referred to as a "time-share use." For additional discussion of time-share interests, see Ch. 33A, *Time-Share Projects* .

a. Time-Share Estate.

**NOTE:**

A "time-share estate" is a right of occupancy in a time-share project which is coupled with an estate in the real property [*Bus. & Prof. Code § 11003.5(b)*].

b. Time-Share Use.

**NOTE:**

A "time-share use" is a licensed or contractual or membership right of occupancy in a time-share project which is not coupled with an estate in the real property [*Bus. & Prof. Code § 11003.5(c)*].

2. Contact administrative offices where settlor purchased the time-share interest to determine what documentation is required to transfer title to client's revocable trust.

3. Review title documentation that was recorded when time-share interest was initially purchased (condominium conveyance for time-share unit or certificate of membership) and verify:

- a. How title of ownership is held.
- b. Legal description of settlor's unit.
- c. Assessor's parcel number, if any.
- d. The common address.

4. If property in question is located in California, follow steps specified in § 73.121 to convey title to trust.

**NOTE:**

The steps are the same as those for transferring title to residential real property.

5. If interest is located outside California,

a. Determine what agency handles the recordation of deeds in state and county in which real property is situated.

**NOTE:**

The attorney should review the recording stamp on the old deed, or determine the area code and check with the information operator for a telephone number of the recording agency for the appropriate state and county.

b. Telephone recording agency in county where real property is located and determine:

- (1) What documentation is required.

**NOTE:**

Some states require an assessor questionnaire comparable to the Preliminary Change of Ownership form required by the county assessor in California.

- (2) Amount of recording fees.

- (3) Amount of time typically required to process recording request and return executed copy of deed.

c. Request that recording agency forward all required forms to attorney's office, or ascertain whether a California deed is acceptable.

d. Prepare appropriate instrument transferring title, either:

**NOTE:**

See § 73.121, P (4)(c), for the proper form of title.

- (1) Deed [ *see* § 73.212]; or

- (2) Assignment of time-share interest for time-share ownership outside California [ *see* § 73.220].

e. If time-share-interest is located in State of Hawaii:

(1) Prepare Exemption from Conveyance Tax, Form P-64B (Rev. 1991) [ *see* § 73.221], and

(2) Submit exemption form along with deed when deed is submitted for recordation.

f. Prepare other documentation, if necessary.

g. Have all transferors execute deed before a notary public [ *see* § 73.201 (acknowledgment)].

h. Record deed.

(1) Forward original and one copy of executed deed or assignment, together with any other necessary documentation, to recording agency in county where interest is situated, and request recordation.

(2) Submit check for appropriate fee.

(3) Provide stamped, self-addressed return envelope, and request agency to return an endorsed recorded copy of deed or assignment.

i. Follow up with the recorder's office if original deed has not been returned within six to eight weeks.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsGeneral OverviewEstate, Gift & Trust LawTrustsAdministrationEstate, Gift & Trust LawTrustsRevocable Living TrustsReal Property LawCommon Interest CommunitiesTimesharesReal Property LawOwnership & TransferGeneral Overview



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*26-73 California Legal Forms--Transaction Guide § 73.126*

**AUTHOR:** Margaret Johnson Hazel Lange Reviewed by James V. Quillinan

**§ 73.126 Foreign Time-Share Ownership Interests**

1. Verify whether or not settlor can record title in country where time-share interest is situated.

**NOTE:**

Some foreign countries prohibit United States citizens from owning a fee simple or equivalent interest in time-share ownerships.

2. Review settlors' time-share condominium conveyance documents to determine:

- a. Whether title has been recorded in settlors' names as individuals, and
- b. Whether time-share ownership interest can be transferred to settlors' revocable trust.

**NOTE:**

If the deed prohibits or restricts transfer of the time-share interest, see Paragraph 9, below.

3. Contact the time-share development where settlors purchased time-share interest to determine what agency handles recordation of legal documents in area where property is located.

**NOTE:**

If the attorney is unable to contact the time-share development, it may be worthwhile to directly contact an agency comparable to a county recorder's office, or contact a title company in the area where the client's time-share interest is situated.

4. Request that agency forward any necessary legal documentation, or ascertain whether or not a deed in the form of a

United States deed will suffice.

5. Prepare appropriate deed [ *see* § 73.212] or other form of documentation.

**NOTE:**

See § 73.121, P (4)(c), for the proper form of title in an instrument comparable to a United States deed.

6. Have all transferors execute deed before a notary public [ *see* § 73.201 (acknowledgment)].

7. If required, submit pertinent pages from settlors' revocable trust agreement, e.g.;

- a. Full copy or abstract.
- b. First page.
- c. Pertinent pages pertaining to trustee powers and duties.
- d. Signature pages of settlors and trustee.
- e. Page containing all-purpose notary acknowledgment.

8. Forward all required documentation to appropriate agency for recordation, together with any required fee.

9. If transfer of interest is prohibited by deed:

- a. Prepare form for assignment of foreign time-share interest outside United States [ *see* § 73.207].

**NOTE:**

See § 73.121, P (4)(c), for the proper form of title.

- b. Have all transferors execute deed before a notary public [ *see* § 73.201 (acknowledgment)].
- c. Instruct settlors to place executed Assignment with original trust agreement.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsGeneral OverviewEstate, Gift & Trust LawTrustsAdministrationEstate, Gift & Trust LawTrustsRevocable Living TrustsReal Property LawCommon Interest CommunitiesTimesharesReal Property LawOwnership & TransferGeneral Overview



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C. Procedural Guide to Transferring Specific Assets to Trust

*26-73 California Legal Forms--Transaction Guide § 73.127*

**AUTHOR:** Margaret Johnson Hazel Lange Reviewed by James V. Quillinan

**§ 73.127 Oil and Gas Interests**

1. Review settlors' document to determine whether investment is registered in company's records and/or recorded in settlors' name.
2. Ascertain from managing company whether they can provide settlors with a blank mineral deed and/or assignment form for completion, or whether managing company will accept an assignment prepared by attorney's office for settlors.
3. Prepare either:

**NOTE:**

For discussion about which of the following forms to use in particular circumstances, see § 73.14[1]. See § 73.121, P (4)(c), for the proper form of title.

- a. Grant deed (mineral interest) [ *see* § 73.230];
- b. Mineral deed [ *see* § 73.231];
- c. Oil and gas lease [ *see* § 73.232];
- d. Assignment of overriding royalty [ *see* § 73.233];
- e. Assignment of oil and gas lease [ *see* § 73.234]; or

- f. Ratification of oil & gas lease [ *see* § 73.235].
4. Have all transferors execute deed before a notary public [ *see* § 73.201 (acknowledgment)].
  5. Contact county recorder or county clerk in state and county where oil and gas interest is located to determine fee for recordation.
  6. Inquire whether it is necessary to prepare and submit a preliminary change of ownership form to county recorder or county clerk.
  7. Send original of appropriate deed or assignment to county recorder or county clerk for recordation with required fee and any other documentation:
    - a. Provide a stamped self-addressed envelope, and return an endorsed, recorded copy of deed or assignment to attorney's office pending return of original deed or assignment.
    - b. Provide a second stamped self-addressed return envelope and request that county recorder return original deed or assignment when recordation process has been completed.
  8. Send copy of endorsed recorded mineral deed to managing company.

**NOTE:**

Once the change of title is in effect, the managing company must change its books/records to reflect the change.

9. Obtain amended division order by instructing paying company to prepare and return an amended division order.
10. Provide settlors' social security numbers and have settlors sign amended division order as trustees.
11. Return amended division order to managing company with letter instructing company to change its records to reflect ownership by settlors' revocable trust.

**NOTE:**

The letter should indicate that the company's records reflect the form of title noted in § 73.121, P (4)(c).

12. Instruct managing company to:
  - a. Initiate pay status to settlors' revocable trust for royalty payments, and
  - b. Forward the royalty payments to settlors as trustees.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsGeneral OverviewEstate, Gift & Trust LawTrustsAdministrationEstate, Gift & Trust LawTrustsRevocable Living TrustsReal Property LawOil & GasReal Property LawOwnership & TransferGeneral Overview



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*26-73 California Legal Forms--Transaction Guide § 73.128*

**AUTHOR:** Margaret Johnson Hazel Lange Reviewed by James V. Quillinan

**§ 73.128 Federally-Registered Securities**

1. Determine whether to:

- a. Retain stockbroker's services [*see* P 2]; or
- b. Deal directly with transfer agent [*see* P 3].

2. If stockbroker is engaged in connection with transfer:

- a. Arrange for settlors to meet stockbroker and complete a new account application to set up a trust account.
- b. Instruct settlors that stockbroker will require the following documents:
  - (1) Settlor's original stock certificates.
  - (2) Stock assignment separate from certificate [*see* form in § 73.250].

**NOTE:**

Each owner is required to have his or her signature guaranteed in the presence of an officer of a commercial bank, trust company, or a member of the New York stock exchange authorized to signature or medallion guarantee the assignment or stock power.

- (3) Complete copy of trust instrument, or pertinent pages (face page, trustee powers, signature and notary pages).

(4) Trustee's Certification of Trust if settlors reside in state of New York or transfer agent is domiciled in the state of New York [*see form in* § 73.200].

(5) Letter of instructions signed by settlors authorizing stockbroker to reissue new share certificate in trust name.

**NOTE:**

The letter should specify the form of title that should appear on the new certificates. See § 73.121, P (4)(c), for the proper form of title.

c. Have settlors deliver original certificates, stock assignment separate from Certificate and/or irrevocable stock and/or bond powers, and letter of instructions to stockbroker.

d. Instruct stockbroker to:

(1) Send above documentation to transfer agent for reissue, and

(2) Provide transfer agent with an address to which the new certificates should be returned.

3. If transfer will be made through transfer agent directly:

a. Determine who transfer agent is for particular stock.

**NOTE:**

To obtain this information, the attorney should check with a local brokerage firm or consult *Standard & Poor's Guide* at a local library.

b. Locate and obtain settlors' original stock certificates.

c. Prepare stock assignment separate from certificate [*see form in* § 73.250].

**NOTE:**

Each owner is required to have his or her signature guaranteed in the presence of an officer of a commercial bank, trust company, or a member of the New York stock exchange authorized to signature or medallion guarantee the assignment or stock power.

d. Provide complete copy of trust instrument, or pertinent pages (face page, trustee powers, signature and notary pages).

e. Prepare Trustee's Certification of Trust if settlors reside in state of New York or transfer agent is domiciled in the state of New York [*see form in* § 73.200].

f. Prepare letter of instructions, signed by settlors, authorizing transfer agent to reissue new share certificate in trust name.

**NOTE:**

The letter should specify the form of title that should appear on the new certificates. See § 73.121, P (4)(c), for the proper form of title.

g. Mail original stock certificates, stock power, attorney certification, and letter of instructions to

transfer agent.

- (1) Use registered or certified mail with return receipt requested.
- (2) Instruct transfer agent to return the reissued certificates.
- (3) Provide an address.

**NOTE:**

The entire process typically takes a month to six weeks.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsGeneral OverviewEstate, Gift & Trust LawTrustsAdministrationEstate, Gift & Trust LawTrustsRevocable Living TrustsSecurities LawInitial Public Offerings & the Securities Act of 1933Registration of SecuritiesProhibitions & Restrictions



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**AUTHOR:** Margaret Johnson Hazel Lange Reviewed by James V. Quillinan

**§ 73.129 Restricted Securities**

1. Determine identity of transfer agent for stock.

**NOTE:**

To obtain this information, the attorney should check with a local brokerage firm or consult *Standard & Poor's Guide* at a local library.

2. Assist settlors in locating the original stock certificates.

3. Prepare stock assignment separate from certificate [*see form in § 73.250*].

**NOTE:**

Each owner is required to have his or her signature guaranteed in the presence of an officer of a commercial bank, trust company, or a member of the New York stock exchange authorized to signature or medallion guarantee the assignment or stock power.

4. Provide complete copy of trust instrument, or pertinent pages (face page, trustee powers, signature and notary pages).

5. Prepare letter of instructions, signed by settlors, authorizing transfer agent to reissue new share certificate in trust name.

**NOTE:**

The letter should specify the form of title that should appear on the new certificates. See § 73.121, P (4)(c), for the proper form of title.

6. Mail original stock certificates, stock power, attorney certification, and letter of instructions to transfer agent.

- a. Use registered or certified mail with return receipt requested.
- b. Instruct transfer agent to return the reissued certificates.
- c. Provide an address.
- d. Mark calendar to expect receipt of reissued certificate within a month to six weeks.

7. Upon receipt of reissued certificates, examine certificates to verify that legend lists exactly the same restrictions that appeared on original certificates.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsGeneral OverviewEstate, Gift & Trust LawTrustsAdministrationEstate, Gift & Trust LawTrustsRevocable Living TrustsSecurities LawInitial Public Offerings & the Securities Act of 1933Registration of SecuritiesProhibitions & Restrictions



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*26-73 California Legal Forms--Transaction Guide § 73.130*

**AUTHOR:** Margaret Johnson Hazel Lange Reviewed by James V. Quillinan

**§ 73.130 Incentive Stock Options**

1. Contact employer that issued stock option plan to determine if company can provide settlor with an assignment form.
2. Alternatively, or if assignment form is unavailable, prepare an assignment of right to exercise stock option plan after death of settlor [*see* form in § 73.253].
3. Have settlors execute assignment before a notary public [*see* § 73.201 (acknowledgment)].
4. Place executed assignment with client's original estate planning documents.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsGeneral OverviewEstate, Gift & Trust LawTrustsAdministrationEstate, Gift & Trust LawTrustsRevocable Living TrustsSecurities LawGeneral Overview



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*26-73 California Legal Forms--Transaction Guide § 73.131*

**AUTHOR:** Margaret Johnson Hazel Lange Reviewed by James V. Quillinan

**§ 73.131 Closely Held Business Interest**

1. Refer to and review all buy-sell agreements and by-laws to determine whether or not settlor who owns interest is prohibited from transferring interest to trust.
2. Determine whether, after transfer of interest to trust, individual or corporation nominated as successor trustee of trust will agree, and have the expertise, to continue business in event settlor with business expertise is first settlor to die.
3. Consider whether it will be necessary or desirable to appoint a "special trustee" who has expertise to continue business.

**NOTE:**

If the attorney concludes that appointment of a special trustee is necessary, and the trust instrument does not already provide for one, it may be necessary to amend the trust instrument to provide for appointment of a special trustee. For provisions governing the appointment of a special trustee, see California Wills & Trusts Forms, Div. II, *Individual Inter Vivos Trust Provisions*, Part 5, *Trustee*, Alts. 5.40-1, 5.40-2 (Matthew Bender).

4. Determine whether trustee will serve as a director, officer, and/or employee.
5. Determine how trustee's compensation will be arranged.
6. Determine whether E&O (errors & omissions) insurance coverage will be provided for trustee.
7. Cancel certificates for previously issued shares and place canceled certificates in appropriate section of

corporate minute book of business.

8. Reissue new certificates for number of shares previously issued, in name of revocable trust.

**NOTE:**

See § 73.121, P (4)(c), for the proper form of title.

9. Indicate cancellation and reissue of shares in the corporate ledger kept in corporate minute book.

10. Store reissued certificates in safekeeping or advise settlors to place certificates in their safe deposit box.

**NOTE:**

Presently, there is no requirement to notify the Secretary of State of the transfer of shares to the settlors' revocable trust.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Business & Corporate Law Closely Held Corporations General Overview Estate, Gift & Trust Law Trusts General Overview Estate, Gift & Trust Law Trusts Administration Estate, Gift & Trust Law Trusts Revocable Living Trusts



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*26-73 California Legal Forms--Transaction Guide § 73.132*

**AUTHOR:** Margaret Johnson Hazel Lange Reviewed by James V. Quillinan

**§ 73.132 Partnership Interests**

1. Review partnership agreement to ascertain whether settlor partner is a general or a limited partner.
2. For a limited partnership interest, review Beneficiary's Share, of Income, Deductions, Credits, etc., (IRC Form 1040, Schedule K-1) to determine identity of general partner.
3. Review partnership agreement to determine whether transfer to a revocable trust is an authorized assignment.
4. If a settlor is member of partnership that is engaged in professional practice (e.g., law or medical partnership) in which each partner is licensed member of profession, review discussion in § 73.24 and advise settlors how to proceed.

**NOTE:**

The client's interest cannot be transferred to a revocable trust unless certain conditions are complied with [ *see* § 73.24].

5. Review partnership agreement to determine who must consent to transfer.
6. If review of partnership agreement reveals that an amendment is necessary before settlor's interest can be transferred to revocable trust:
  - a. Contact general partners and ascertain whether they will accept an amendment prepared by attorney's office on behalf of settlor.

- b. If so, prepare amendment of limited partnership agreement and assignment, assumption and consent [*see* form in § 73.260].
- c. Have settlor who owns partnership interest execute document before a notary public [*see* § 73.201 (acknowledgment)].
- d. Forward amendment to general partner for review and signature.
- e. Request that general partner return an executed copy of amendment to attorney's office.

7. If transfer to revocable trust is *not* prohibited (and no amendment of partnership agreement is required):

- a. Obtain and forward settlor's original certificate of ownership to general partners.
- b. Provide social security number of settlor.

**NOTE:**

If the settlors are married, generally one social security number is sufficient.

- c. Prepare an assignment of partnership interest with consent [*see* form in § 73.260].
- d. Have settlor who owns partnership interest execute document before a notary public [*see* § 73.201 (acknowledgment)].
- e. Submit pertinent articles of trust agreement, including pages that identify trust name, trustee powers, signatures, and notary public signature.
- f. Submit transfer fee, if required.
- g. Request that general partners:
  - (1) Review and sign consent.
  - (2) Return assignment of interest form along with signed consent.
  - (3) Reissue certificate of limited partnership interest in revocable trust name.

**NOTE:**

See § 73.121, P (4)(c), for the proper form of title.

h. Forward reissued certificate of ownership to settlors for safekeeping, or determine if settlors want attorney's office to retain original assignments and consent for safekeeping.

8. Advise general partner to file certificate of amendment to certificate of limited partnership with Secretary of State if transfer to trust (or any other event) results in any of the following:

- a. Under CRLPA [*Corp. Code* § 15622(b), repealed January 1, 2010]):
  - (1) Change in limited partner's name.

- (2) Change in street address of principal executive office.
- (3) Change in address of general partner.
- (4) Change in address of partner's agent for service of process (unless corporate agent is designated).
- (5) Appointment of new agent for service of process.
- (6) Admission of general partner.
- (7) Cessation of general partner to be general partner.
- (8) Discovery by any of general partners of any false or erroneous material statement contained in original certificate or any prior amendment.

b. Under ULPA '08 (*Corp. Code* § 15903.02(b), operative January 1, 2008):

**NOTE:**

For the operative date of the Uniform Limited Partnership Act of 2008 and the limited application of former limited partnership acts prior to January 1, 2010, *see Corp. Code* §§ 15912.04, 15912.06 (operative date and limited). For discussion of the procedure for amending a limited partnership certificate under that Act, *see* Ch. 16, ***Formation of Limited Partnerships*** .

- (1) Admission of new general partner.
- (2) Dissociation of person as general partner.
- (3) Appointment of person to wind up limited partnership's activities under *Corp. Code* § 15908.03(c), (d) (appointment by partners or court).

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Business & Corporate Law  
 General Partnerships  
 Management Duties & Liabilities  
 Rights of Partners  
 Transfers of Interests  
 Business & Corporate Law  
 Limited Partnerships  
 General Overview  
 Estate, Gift & Trust Law  
 Trusts  
 General Overview  
 Estate, Gift & Trust Law  
 Trusts  
 Administration  
 Estate, Gift & Trust Law  
 Trusts  
 Revocable Living Trusts



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**AUTHOR:** Margaret Johnson Hazel Lange Reviewed by James V. Quillinan

**§ 73.133 Small Business Corporation**

**NOTE:**

A revocable trust SHOULD NOT hold or sell the stock of a qualifying small business corporation under *I.R.C. § 1244*, or the corporation will lose the ordinary loss deduction available to individuals and partnerships under *Treas. Reg. § 1.244(a)-1(b)*. For discussion, see § 73.21[3].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Business & Corporate Law Closely Held Corporations General Overview Estate, Gift & Trust Law Trusts General Overview Estate, Gift & Trust Law Trusts Administration Estate, Gift & Trust Law Trusts Revocable Living Trusts Tax Law Federal Taxpayer Groups S Corporations General Overview



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*26-73 California Legal Forms--Transaction Guide § 73.134*

**AUTHOR:** Margaret Johnson Hazel Lange Reviewed by James V. Quillinan

**§ 73.134 S Corporation**

1. Review revocable trust instrument to determine if it contains language to qualify as a Qualified Subchapter S Trust (QSST).

**NOTE:**

For discussion, see § 73.22.

2. If trust does not contain QSST provision, prepare amendment to trust instrument adding such a provision.

**NOTE:**

For a provision containing the necessary language to allow a revocable trust to qualify as a QSST, see California Wills & Trusts Forms, Div. II, *Individual Inter Vivos Trust Provisions*, Part 5, *Trustee*, Alt. 5.505-1 (Matthew Bender).

3. Cancel all certificates previously issued in settlor's name and place canceled certificates in appropriate section of corporation's corporate minute book.

4. Reissue certificate for number of shares previously issued in settlor's name, in name of revocable trust.

**NOTE:**

See § 73.121, P (4)(c), for the proper form of title.

5. Indicate cancellation and reissue of shares on corporate ledger kept in corporation's corporate minute book.

6. Instruct settlors to place reissued certificates in safekeeping (preferably in a safe deposit box).

**NOTE:**

Presently, there is no present requirement to notify the Secretary of State of the transfer to the revocable trust.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Business & Corporate Law  
Closely Held Corporations  
General Overview  
Estate, Gift & Trust Law  
Trusts  
General Overview  
Estate, Gift & Trust Law  
Trusts  
Administration  
Estate, Gift & Trust Law  
Trusts  
Revocable Living Trusts  
Tax Law  
Federal Taxpayer Groups  
S Corporations  
General Overview



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*26-73 California Legal Forms--Transaction Guide § 73.135*

**AUTHOR:** Margaret Johnson Hazel Lange Reviewed by James V. Quillinan

**§ 73.135 Sole Proprietorship**

1. Consider whether business will continue after death of proprietor, and whether trustee has sufficient expertise to continue business.

**NOTE:**

Holding a sole proprietorship in the trust name may not be preferable from the settlors' perspective. Other business entities may better serve the settlors in a trust context. For more detailed discussion of the estate planning issues presented by business interests, see *California Wills & Trusts, Ch. 29, Devises of Business Interests, § 29.02* (Matthew Bender).

If the successor trustee nominated in the trust instrument does not have the necessary expertise to continue the business after the proprietor's death, it may be necessary to appoint a special trustee to operate the business. If the attorney concludes that appointment of a special trustee is necessary, and the trust instrument does not already provide for one, it may be necessary to amend the trust instrument to provide for appointment of a special trustee. For provisions governing the appointment of a special trustee, see Ch. 64A, *Testamentary Trusts: Trustee Provisions* ; see also California Wills & Trusts Forms, Div. II, *Individual Inter Vivos Trust Provisions, Part 5, Trustee, Alts. 5.40-1, 5.40-2* (Matthew Bender).

2. Review assets and liabilities of business to determine whether assets are sufficient to cover known or contingent liabilities of business.

**NOTE:**

If the business has significant actual or potential liabilities, it may be inadvisable to transfer it to a trust. On a settlor's death, assets held in a revocable trust will be subject to creditors' claims if the assets of the probate estate are insufficient to cover those claims [*Prob. Code § 19001(a)*]. However, creditors' claims can be cut off by the filing a trustee's notice to creditors [*Prob. Code § 19003*], in which case creditors have a limited time within which to make any claims against the trust assets [*see Prob. Code § 19100(a)*]; for discussion of the procedure for filing claims against assets of a revocable trust, see California Probate Practice, Ch. 12A, *Claims Against Decedent's Revocable Trust* (Matthew Bender)]. Thus, if the business is *not* transferred to the trust, and the trustee's notice procedure is used, there is only a limited period during which creditors' claims can be asserted after the proprietor's death. After that period has expired, creditors of the business can no longer assert claims against the trust assets. On the other hand, if the business is placed in the trust, the trust's potential liability for creditors' claims will continue throughout the duration of the time the business remains in the trust.

3. If decision is made to transfer sole proprietorship to trust, prepare and have settlors execute assignment of sole proprietorship [*see form in § 73.261*].
4. Consider use of fictitious business name for business after assets and liabilities have been transferred to trust to facilitate lifetime operations of business, under proprietor's individual name or a name sufficient to identify business as a separate and distinct asset of trust.

**NOTE:**

For information on fictitious business names, see § 1A.51.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Business & Corporate Law  
Sole Proprietorships  
Estate, Gift & Trust Law  
Trusts  
General Overview  
Estate, Gift & Trust Law  
Trusts  
Administration  
Estate, Gift & Trust Law  
Trusts  
Revocable Living Trusts



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**AUTHOR:** Margaret Johnson Hazel Lange Reviewed by James V. Quillinan

**§ 73.136 Interest in Professional Practice**

1. Determine whether transfer of interest to trust is permissible.

**NOTE:**

If a settlor is an owner of or a partner in a professional practice, or a stockholder in a professional corporation, the settlor's interest cannot be transferred to a revocable trust unless certain conditions are met [*see Corp. Code § 13407*; *see also* discussion in § 73.24]. These conditions may make transfer of such an interest to a trust impossible or unwise. Moreover, most professional partnerships and corporations have buy-sell agreements in place. The remaining steps apply only in those few instances in which the attorney determines that a transfer is legally possible and appropriate.

2. Cancel certificates for previously issued shares in professional corporation and place canceled certificates under appropriate section in corporation's corporate minute book.

3. Reissue new certificates for number of shares previously issued in name of revocable trust.

**NOTE:**

See § 73.121, P (4)(c), for the proper form of title.

4. Indicate cancellation and reissue of shares on corporate ledger kept in corporate minute book.

5. Place reissued certificates in safekeeping or advise settlors to place certificates in his or her safe deposit box.

**NOTE:**

Presently, there is no requirement to notify the Secretary of State of the transfer to the client's revocable trust.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Business & Corporate Law Professional Associations & Corporations Estate, Gift & Trust Law Trusts General  
Overview Estate, Gift & Trust Law Trusts Administration Estate, Gift & Trust Law Trusts Revocable Living Trusts



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**AUTHOR:** Margaret Johnson Hazel Lange Reviewed by James V. Quillinan

**§ 73.137 Corporate Bonds**

1. Determine whether to:

a. Retain stockbroker's services [*see* P 2]; or

**NOTE:**

If the settlors intend to buy and sell securities in future, they should be advised to open a brokerage account in the name of the trust.

b. Deal directly with transfer agent [*see* P 3].

**NOTE:**

If the settlors only wish to transfer existing corporate bonds, and no future transactions are anticipated, the settlors should be advised to handle the transfer through a transfer agent.

2. If stockbroker is engaged in connection with transfer, advise settlor to arrange appointment with brokerage firm to complete application to open brokerage account in name of trust.

**NOTE:**

See § 73.121, P (4)(c), for the proper form of title to be used for the account.

3. If transfer will be made through transfer agent directly, determine who transfer agent is.

**NOTE:**

To obtain this information, the attorney should check with a local brokerage firm or consult *Standard &*

*Poor's Guide* at a local library.

4. Ask settlors to assemble and deliver all original corporate bonds to attorney's office.

5. Complete stock assignment separate from certificate [*see form in § 73.250*].

**NOTE:**

See § 73.121, P (4)(c), for the proper form of title to be used for the new title on the certificate or stock power.

6. Have each bond holder execute assignment and/or power for each transfer before:

a. Bank or trust company officer, or

b. Member firm of nationally recognized security exchange authorized to make signature or medallion guarantee.

7. Prepare letter of instructions to brokerage firm and/or transfer agent [*see § 73.251*] and obtain signature of each bond holder.

8. Mail original bond certificate, assignment and/or power, and letter of instructions to transfer agent or brokerage firm.

9. Use registered or certified mail with return receipt requested.

10. Mark calendar to expect receipt of reissued certificate within a month to six weeks.

11. Upon receipt of reissued bond certificates instruct settlors to place reissued certificates in safekeeping (preferably in safe deposit box).

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Business & Corporate LawCorporationsFinanceGeneral OverviewEstate, Gift & Trust LawTrustsGeneral OverviewEstate, Gift & Trust LawTrustsAdministrationEstate, Gift & Trust LawTrustsRevocable Living Trusts



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*26-73 California Legal Forms--Transaction Guide § 73.138*

**AUTHOR:** Margaret Johnson Hazel Lange Reviewed by James V. Quillinan

**§ 73.138 Municipal Bonds--Unregistered**

**NOTE:**

A written assignment placed with the client's revocable trust will reflect the client's intention to transfer the bearer bonds to the revocable trust.

1. Prepare written assignment of bearer bond to trust [*see* form in § 73.252].
2. Have settlors sign assignment of bearer bond to revocable trust in presence of notary public [*see* § 73.201 (acknowledgment)].
3. Place executed assignment of bearer bond with original revocable trust instrument.
4. If bearer bond is held in a stock brokerage account, instruct stockbroker to simply change title of client's account to name of revocable trust.

**NOTE:**

See § 73.121, P (4)(c), for the proper form of title to be used for the account. No new certificate will be issued for unregistered municipal bearer bonds.

5. Request stockbroker to provide attorney's office with written confirmation of transfer.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsGeneral OverviewEstate, Gift & Trust LawTrustsAdministrationEstate, Gift & Trust

LawTrustsRevocable Living TrustsGovernmentsLocal GovernmentsFinance



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**AUTHOR:** Margaret Johnson Hazel Lange Reviewed by James V. Quillinan

**§ 73.139 Municipal Bonds--Registered**

1. Ask settlors to provide all original municipal bonds certificates.
2. Complete stock assignment separate from certificate [*see form in § 73.250*]. or

**NOTE:**

See § 73.121, P (4)(c), for the proper form of title to be used for the new title on the assignment or power.

3. Have each bond holder execute an assignment and/or power for each transfer.

**NOTE:**

The bond holder must sign before a bank or trust company officer or a member firm of a nationally recognized securities exchange authorized to give signature or medallion guarantee.

4. Prepare letter of instructions to brokerage firm and/or transfer agent [*see form in § 73.251*].
5. Have each bond holder sign letter of instructions.
6. Mail original bond certificates, stock assignment and/or stock power, and letter of instructions to transfer agent or brokerage firm, by registered or certified mail with return receipt requested.
7. Mark calendar to expect to receive reissued certificate within a month to six weeks.

8. Instruct settlors to place bonds in safekeeping (preferably in a safe deposit box) upon receipt.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsGeneral OverviewEstate, Gift & Trust LawTrustsAdministrationEstate, Gift & Trust LawTrustsRevocable Living TrustsGovernmentsLocal GovernmentsFinance



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*26-73 California Legal Forms--Transaction Guide § 73.140*

**AUTHOR:** Margaret Johnson Hazel Lange Reviewed by James V. Quillinan

**§ 73.140 United States Savings Bonds**

**NOTE:**

All transfers of United States Savings Bonds are handled by the Federal Reserve Bank in Kansas City, MO. The client's stockbroker may act as an intermediary and provide this service.

1. Contact settlors' bank or Federal Reserve Bank in Kansas City, MO., (800) 333-2919 or (816) 881-2409, and obtain appropriate form to transfer savings bonds to revocable trust [*see* Request for Reissue of United States Savings Bonds/Notes in Name of Trustee of Personal Trust Estate, form PD 1851, reproduced in § 73.270].

2. Have all owners sign on reverse side of Form PD 1851 to transfer U.S. Savings Bonds Series E and EE and Series H and HH.

**NOTE:**

The client's signature is not required on the reverse side of the bonds themselves, since the bonds are not being liquidated.

a. Have settlors sign before appropriate officer from a bank, savings and loan or credit union authorized to give signature guarantee.

**NOTE:**

The Federal Reserve Bank WILL NOT accept a stockbroker's signature guarantee or medallion guarantee.

b. Arrange for appropriate signatures of named POD beneficiary:

(1) For Series E or Series H bonds, POD beneficiary must sign on reverse side of Form PD 1851 to *approve* transfer to revocable trust.

(2) For Series EE and HH bonds, named POD beneficiary's signature is *not* required on Form PD 1851 to transfer Series EE or Series HH bonds to revocable trust.

3. Prepare letter of instructions [*see form in § 73.251*] to Federal Reserve Bank to transfer settlors' U.S. Savings bonds to trust.

**NOTE:**

See § 73.121, P (4)(c), for the proper form of title.

4. Mail Form PD 1851, original savings bonds, and letter of instructions, by registered or certified mail with return receipt requested, to Federal Reserve Bank in Kansas City, MO., at following address:

P. O. Box 440  
Kansas City, MO. 64198

5. Mark calendar to expect to receive reissued bonds within a month to six weeks.

6. Write or telephone to obtain information from:

Federal Reserve Bank of Los Angeles  
P.O. Box 2077  
Terminal Annex  
Los Angeles, CA 90051  
(213) 624-7398, or

Federal Reserve Bank of San Francisco  
101 Market Street  
San Francisco, CA 94105  
(415) 974-2330

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsGeneral OverviewEstate, Gift & Trust LawTrustsAdministrationEstate, Gift & Trust LawTrustsRevocable Living Trusts



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*26-73 California Legal Forms--Transaction Guide § 73.141*

**AUTHOR:** Margaret Johnson Hazel Lange Reviewed by James V. Quillinan

**§ 73.141 Treasury Bonds**

**NOTE:**

Treasury bonds are only issued in book entry form (not certificate form).

1. Review settlors' treasury bond statement to determine account number.
2. Obtain Form 5178, Treasury Direct Transaction Request [reproduced in § 73.271], from Federal Reserve Bank in Kansas City, MO., by calling (800) 333-2919 or (816) 881-2409, and complete as follows:
  - a. Settlors' account number and account name must be stated *exactly* as they appear on settlors' statement.
  - b. Request for name change must be in following form:

"VERNAL LANGJON and MARZEL LANGJON, Trustees UTD, DATED  
\_\_\_\_\_."
  - c. Under "Taxpayer Identification Number Change," list first named account holder's social security number.
  - d. Under "telephone number change," indicate settlors' work and home telephone numbers.
  - e. Under "Authorization," both owners should date and sign Form 5178 on reverse side before an appropriate commercial bank or savings and loan, officer authorized to guarantee signatures.

f. "Certification" section should be completed by officer of commercial bank or savings and loan authorized to give signature guarantee.

**NOTE:**

The Federal Reserve Bank will NOT accept a signature guaranteed by a stockbroker or credit union.

3. Prepare letter of instructions to Federal Reserve Bank or settlors' local bank [*see* form in § 73.251], and have settlors sign letter of instructions.

4. Mail Form 5178 and letter of instructions to Federal Reserve Bank in Kansas City, MO at:

P. O. Box 440  
Kansas City, MO. 64198

5. Have settlors review future treasury bonds statements to confirm that transfer has been made.

6. Write or telephone to obtain information from:

Federal Reserve Bank of Los Angeles  
P.O. Box 2077  
Terminal Annex  
Los Angeles, CA 90051  
(213) 624-7398, or

Federal Reserve Bank of San Francisco  
101 Market Street  
San Francisco, CA 94105  
(415) 974-2330

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsGeneral OverviewEstate, Gift & Trust LawTrustsAdministrationEstate, Gift & Trust LawTrustsRevocable Living Trusts



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*26-73 California Legal Forms--Transaction Guide § 73.142*

**AUTHOR:** Margaret Johnson Hazel Lange Reviewed by James V. Quillinan

**§ 73.142 Qualified Annuity Plan**

1. Contact settlors' insurance company and obtain change of beneficiary designation and spousal consent form for annuity contract.

2. Complete and have settlors execute change of beneficiary designation form and spousal consent.

a. For single persons, new primary beneficiary designation should read:

THE TRUSTEE THEN IN OFFICE UNDER THE TERMS OF THE  
\_\_\_\_\_ [*name of trust*], DATED \_\_\_\_\_.

b. For married persons, new primary beneficiary should be participant's spouse.

c. For married persons, contingent beneficiary should read:

THE TRUSTEE THEN IN OFFICE UNDER THE TERMS OF THE  
\_\_\_\_\_ [*name of trust*], DATED \_\_\_\_\_.

3. Review settlors' estate planning documents to determine whether it is necessary to execute codicil or agreement in conjunction with annuity beneficiary designation to satisfy requirements of *Estate of MacDonald (1990) 51 Cal. 3d 262, 272 Cal. Rptr. 153, 794 P.2d 911* [ see § 73.12[3][b]] concerning characterization of property.

4. Have settlors execute a codicil or enter into a joint agreement if it is necessary to comply with *MacDonald*.

**NOTE:**

A codicil should suffice. For form, see § 62.05.

5. Prepare letter of instructions to accompany change of beneficiary designation [*see* form in § 73.280].
6. Request insurance company to send confirmation when transfer has been made on its records.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsGeneral OverviewEstate, Gift & Trust LawTrustsAdministrationEstate, Gift & Trust LawTrustsRevocable Living Trusts



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*26-73 California Legal Forms--Transaction Guide § 73.143*

**AUTHOR:** Margaret Johnson Hazel Lange Reviewed by James V. Quillinan

**§ 73.143 Individual Retirement Accounts (IRA)**

1. Contact client's account holder and obtain change of beneficiary designation form for IRA trust account.
2. Complete and have settlors execute change of beneficiary designation form and spousal consent.
  - a. For single persons, revocable trust should be named as primary beneficiary of IRA to receive all benefits under trust account, and new primary beneficiary designation should read:

THE TRUSTEE THEN IN OFFICE UNDER THE TERMS OF THE  
 \_\_\_\_\_ [name of trust], DATED \_\_\_\_\_.

- b. For married persons, primary beneficiary should be participant's spouse to allow surviving spouse to defer the payment of income taxes by rolling over benefit.

- c. For married persons, contingent beneficiary should read:

THE TRUSTEE THEN IN OFFICE UNDER THE TERMS OF THE  
 \_\_\_\_\_ [name of trust], DATED \_\_\_\_\_.

3. Review settlors' estate planning documents to determine whether it is necessary to execute codicil or agreement in conjunction with IRA beneficiary designation to satisfy requirements of *Estate of MacDonald (1990) 51 Cal. 3d 262, 272 Cal. Rptr. 153, 794 P.2d 911* [ see § 73.12[3][b] ] concerning characterization of property.

4. Have settlors execute a codicil or enter into a joint agreement if it is necessary to comply with *MacDonald*.

**NOTE:**

A codicil should suffice. For form, see § 62.05.

5. Prepare letter of instructions to accompany change of beneficiary designation [*see form in § 73.280*].

6. Request insurance company to send confirmation when transfer has been made on its records.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsGeneral OverviewEstate, Gift & Trust LawTrustsAdministrationEstate, Gift & Trust LawTrustsRevocable Living TrustsPensions & Benefits LawEmployee Benefit PlansIndividual Retirement Accounts



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*26-73 California Legal Forms--Transaction Guide § 73.144*

**AUTHOR:** Margaret Johnson Hazel Lange Reviewed by James V. Quillinan

**§ 73.144 Employee Benefits**

1. Contact the client's employer and obtain change of beneficiary designation form for employee benefit plan.
2. Complete and have settlors execute change of beneficiary designation form and spousal consent.
  - a. For an unmarried person, revocable trust should be named as primary beneficiary of plan to receive all benefits under trust account, and new primary beneficiary designation should read as follows:
 

THE TRUSTEE THEN IN OFFICE UNDER THE TERMS OF THE  
 \_\_\_\_\_ [*name of trust*], DATED \_\_\_\_\_.
  - b. For married persons, primary beneficiary should be participant's spouse, to give surviving spouse ability to defer payment of income taxes by rolling over benefit.
  - c. For married persons, contingent beneficiary designation should be to trust; language identical to that in Paragraph 2(a), *above*, should be used to make designation.
3. Determine if it is necessary to execute codicil or agreement in conjunction with beneficiary designation to satisfy requirements of *Estate of MacDonald (1990) 51 Cal. 3d 262, 272 Cal. Rptr. 153, 794 P.2d 911* [ *see* § 73.12[3][b]] concerning characterization of property.
4. Have settlors execute codicil or enter into joint agreement if necessary to comply with *MacDonald*.

**NOTE:**

A codicil should suffice. For form, see § 62.05.

5. Prepare letter of instructions to accompany change of beneficiary designation [*see* form in § 73.280].
6. Request that insurance company send confirmation when transfer has been made on its records.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsGeneral OverviewEstate, Gift & Trust LawTrustsAdministrationEstate, Gift & Trust LawTrustsRevocable Living TrustsPensions & Benefits LawEmployee Benefit PlansGeneral Overview



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*26-73 California Legal Forms--Transaction Guide § 73.145*

**AUTHOR:** Margaret Johnson Hazel Lange Reviewed by James V. Quillinan

**§ 73.145 Pension Plans**

1. Contact client's employer and obtain change of beneficiary designation form for pension plan.
2. Complete and have settlors execute change of beneficiary designation form and spousal consent.
  - a. For an unmarried person, revocable trust should be named as primary beneficiary of plan to receive all benefits under trust account, and new primary beneficiary designation should read as follows:

THE TRUSTEE THEN IN OFFICE UNDER THE TERMS OF THE  
 \_\_\_\_\_ [*name of trust*], DATED \_\_\_\_\_.

- b. For married persons, primary beneficiary should be participant's spouse, to give surviving spouse ability to defer payment of income taxes by rolling over benefit.
  - c. For married persons, contingent beneficiary designation should be to trust; language identical to that in Paragraph 2(a), above, should be used to make designation.
3. Determine if it is necessary to execute codicil or agreement in conjunction with beneficiary designation to satisfy requirements of *Estate of MacDonald (1990) 51 Cal. 3d 262, 272 Cal. Rptr. 153, 794 P.2d 911* [ see § 73.12[3][b]] concerning characterization of property.
4. Have settlors execute codicil or enter into joint agreement if necessary to comply with *Estate of MacDonald*.

**NOTE:**

A codicil should suffice. For form, see § 62.05.

5. Prepare letter of instructions to accompany change of beneficiary designation [*see* form in § 73.280].
6. Request company to send confirmation when transfer has been made on its records.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsGeneral OverviewEstate, Gift & Trust LawTrustsAdministrationEstate, Gift & Trust LawTrustsRevocable Living TrustsPensions & Benefits LawEmployee Benefit PlansGeneral OverviewPensions & Benefits LawEmployee Retirement Income Security Act (ERISA)General Overview



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*26-73 California Legal Forms--Transaction Guide § 73.146*

**AUTHOR:** Margaret Johnson Hazel Lange Reviewed by James V. Quillinan

**§ 73.146 Employee Stock Ownership Plan (ESOPS)**

1. Contact client's employer and obtain change of beneficiary designation form for ESOP plan.
2. Complete and have settlors execute change of beneficiary designation form and spousal consent.
  - a. For an unmarried person, revocable trust should be named as primary beneficiary of plan to receive all benefits under trust account, and new primary beneficiary designation should read as follows:

THE TRUSTEE THEN IN OFFICE UNDER THE TERMS OF THE  
\_\_\_\_\_ [*name of trust*], DATED \_\_\_\_\_.

- b. For married persons, primary beneficiary should be participant's spouse, to give surviving spouse ability to defer payment of income taxes by rolling over benefit.
  - c. For married persons, contingent beneficiary designation should be to trust; language identical to that in Paragraph 2(a), *above*, should be used to make designation.
3. Determine if it is necessary to execute codicil or agreement in conjunction with beneficiary designation to satisfy requirements of *Estate of MacDonald (1990) 51 Cal. 3d 262, 272 Cal. Rptr. 153, 794 P.2d 911 [ see § 73.12[3][b]]* concerning characterization of property.
4. Have settlors execute codicil or enter into joint agreement if necessary to comply with *MacDonald*.

**NOTE:**

A codicil should suffice. For form, see § 62.05.

5. Prepare letter of instructions to accompany change of beneficiary designation [*see* form in § 73.280].
6. Request company to send confirmation when the transfer has been made on its records.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsGeneral OverviewEstate, Gift & Trust LawTrustsAdministrationEstate, Gift & Trust LawTrustsRevocable Living TrustsPensions & Benefits LawEmployee Benefit PlansEmployee Stock Ownership Plans



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*26-73 California Legal Forms--Transaction Guide § 73.147*

**AUTHOR:** Margaret Johnson Hazel Lange Reviewed by James V. Quillinan

**§ 73.147 Employee Life Insurance**

1. Contact client's employer and obtain change of beneficiary designation form for life insurance policy.
2. Complete and have settlors execute change of beneficiary designation form and spousal consent; using following language for new beneficiary designation:

THE TRUSTEE THEN IN OFFICE UNDER THE TERMS OF THE  
 \_\_\_\_\_ [*name of trust*], DATED \_\_\_\_\_.

3. Determine if it is necessary to execute codicil or agreement in conjunction with beneficiary designation to satisfy requirements of *Estate of MacDonald (1990) 51 Cal. 3d 262, 272 Cal. Rptr. 153, 794 P.2d 911 [ see § 73.12[3][b]]* concerning characterization of property.
4. Have settlors execute codicil or enter into joint agreement if necessary to comply with *MacDonald*.

**NOTE:**

A codicil should suffice. For form, see § 62.05.

5. Request insurance company to send confirmation when transfer has been made on its records.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsGeneral OverviewEstate, Gift & Trust LawTrustsAdministrationEstate, Gift & Trust LawTrustsRevocable Living TrustsInsurance LawLife InsuranceBeneficiariesGeneral OverviewPensions & Benefits

LawEmployee Benefit PlansGeneral Overview



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*26-73 California Legal Forms--Transaction Guide § 73.148*

**AUTHOR:** Margaret Johnson Hazel Lange Reviewed by James V. Quillinan

**§ 73.148 Installment Obligations**

1. Review installment obligation held by settlor(s) to determine whether said obligation is:

- a. Unsecured; or
- b. Secured by deed of trust or other security.

2. If installment obligation is unsecured, settlors should assign obligation to revocable trust to indicate intent to fund revocable trust with obligation:

- a. Prepare assignment of promissory note [*see* form in § 73.290].
- b. Arrange for settlors to sign assignment in front of a notary public.
- c. Present assignment to debtor and ask debtor to sign acknowledgment:
  - (1) Recognizing assignment; and
  - (2) Indicating that future payments will be made to trustees in following form:

\_\_\_\_\_ [*name(s) of trustee(s), e.g., VERNAL LANGJON and MARZEL LANGJON*], as Trustees under the terms of the \_\_\_\_\_ [*name of trust, e.g., LANGJON FAMILY REVOCABLE TRUST*], DATED \_\_\_\_\_.

d. Have settlors date and endorse original promissory note on reverse side; following language is recommended:

As a conveyance without consideration to change the manner in which the interest of the parties is held, we, \_\_\_\_\_ [name(s) of settlor(s)] assign to \_\_\_\_\_ [name(s) of trustee(s)], as Trustees of the \_\_\_\_\_ [name of trust], dated \_\_\_\_\_, all right, title and interest in this promissory note for \$ \_\_\_\_\_ [amount of note], dated \_\_\_\_\_, and signed by \_\_\_\_\_ [name(s) of payor(s)].

\_\_\_\_\_ [signature(s) of settlor(s)/assignor(s)]

e. Attach assignment of promissory note to client's original promissory note, once assignment has been completed and debtor has acknowledged assignment.

f. Instruct settlors to retain original promissory note and assignment in safekeeping.

3. If promissory note is secured, settlors should prepare and record assignment of deed of trust to revocable trust:

a. Obtain form for assignment of deed of trust from any title company, or prepare own form [see form in § 73.291].

b. Have settlors execute assignment of deed of trust before a notary public.

c. Complete preliminary change of ownership form [see form in § 73.213].

d. Record assignment of deed of trust in county where settlor's real property is located.

e. Mail original preliminary change of ownership form with assignment of deed of trust to county recorder, and instruct Recorder to forward preliminary change of ownership form to the county assessor.

f. Mail a copy of assignment of deed of trust to debtor when assignment of deed of trust has been recorded and returned.

g. Attach assignment of deed of trust to original deed of trust to indicate progression of title.

h. Instruct settlors to retain original promissory note and assignment of deed of trust in safekeeping.

### Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawTypes of ContractsInstallment ContractsEstate, Gift & Trust LawTrustsGeneral OverviewEstate, Gift & Trust LawTrustsAdministrationEstate, Gift & Trust LawTrustsRevocable Living Trusts



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*26-73 California Legal Forms--Transaction Guide § 73.149*

**AUTHOR:** Margaret Johnson Hazel Lange Reviewed by James V. Quillinan

**§ 73.149 Liquid Assets**

1. Collect all passbooks and most recent statements to determine:
  - a. Names, addresses, and telephone numbers of financial institutions.
  - b. Account numbers.
  - c. How title is held.
  - d. Approximate value of each account.
  - e. Whether any accounts have automatic deposits.
2. Request new signature cards from each financial institution, and complete for each account holder, showing title in following form:

VERNAL LANGJON and MARZEL LANGJON, Trustees of THE LANGJON  
FAMILY REVOCABLE TRUST,

DATED \_\_\_\_\_.

3. Have settlors execute cards and arrange to personally deliver the new signature cards to financial institutions.

**NOTE:**

The banks will have their own documentation and procedures and will insist that those procedures be followed.

4. If it is inconvenient for settlors to personally deliver new signature cards to financial institution, prepare letter of instructions [*see form in § 73.300*].
5. Instruct settlors to review future statements to confirm transfer to trust.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Banking LawBank ActivitiesBank AccountsGeneral OverviewEstate, Gift & Trust LawTrustsGeneral OverviewEstate, Gift & Trust LawTrustsAdministrationEstate, Gift & Trust LawTrustsRevocable Living Trusts



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*26-73 California Legal Forms--Transaction Guide § 73.150*

**AUTHOR:** Margaret Johnson Hazel Lange Reviewed by James V. Quillinan

**§ 73.150 Automobiles, Vehicles and Vessels Registered with Department of Motor Vehicles**

1. Comply with State Board of Equalization procedures to obtain use tax clearance and thereby avoid a transfer tax.

a. Contact nearest State Board of Equalization office and obtain Vehicle/Vessel Use Tax Information, Form BT-106 [*see form in § 73.320*].

b. Complete Form BT-106.

c. Assemble following documentation required by State Board of Equalization to issue use tax clearance:

(1) Certificate of ownership ("pink slip").

**NOTE:**

The original is preferred, but a copy may suffice.

(2) Current registration, if available.

**NOTE:**

The original is preferred, but a copy may suffice.

(3) Trustee Certificate with pertinent articles of revocable trust; i.e., face page, trust powers, signature, and notary pages.

(4) Provide name of lien holder, if any.

d. Arrange to have documents delivered to nearest State Board of Equalization office (see locations below):

250 South Second Street  
San Jose, CA 95113-2706  
(408) 277-1231

455 Golden Gate Ave., Suite 7500  
San Francisco, CA 94102-3625  
(415) 703-5400

450 N Street  
Sacramento, CA 95814  
(916) 445-9524

5901 Green Valley Circle  
Culver City, CA 90231  
(310) 342-1000

**NOTE:**

The State Board of Equalization maintains an 800 number at 1-800-400-7115. The mailing addresses of the local offices sometimes differs from the physical location of an office. Call ahead of time to check.

The Board will review the forms and pertinent articles of the revocable trust, and determine whether the transfer is exempt. If the clerk finds that the transfer is exempt, the clerk will approve the application and issue the appropriate tax clearance for the client's vehicle or vessel.

2. Check to determine that Board of Equalization has returned copy of Form BT-106 [*see P 1, above*] along with a Use Tax Clearance; either Form BT-111 (internal form) for gasoline vehicles and diesel vehicles under 7,000 lbs, or Form BT-1138 (internal form) for diesel vehicles over 7,000 lbs.

3. Have settlors present in person or mail Form BT-106 and Form BT-111 or Form BT-1138 (whichever is appropriate [*see P 2, above*]) to nearest office of Department of Motor Vehicles.

4. Arrange for registered owner(s) to sign off on line 1 on face of Certificate of Ownership as follows:

- a. For sole ownership, only signature of sole owner is required.
- b. For joint ownership (when "or" appears between the names), only one signature is required.
- c. If "and" appears between names, both signatures are required.

5. Complete new registered owner information, with settlors' current address, on reverse side of Certificate of Ownership ("pink slip") to transfer title to trustee; form of title should read as follows:

\_\_\_\_\_ [*name(s) of trustee(s), e.g., VERNAL LANGJON and MARZEL LANGJON*], Trustee[s], or successor(s) of the \_\_\_\_\_ [*name of trust, e.g., LANGJON FAMILY REVOCABLE TRUST*], DATED \_\_\_\_\_.

6. Submit check for transfer fee made payable to Department of Motor Vehicles.

**NOTE:**

The attorney should check with the Department of Motor Vehicles to determine the current amount of the fee.

7. Mark calendar four to six weeks ahead to ascertain whether settlors received new certificate.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsGeneral OverviewEstate, Gift & Trust LawTrustsAdministrationEstate, Gift & Trust LawTrustsRevocable Living Trusts



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*26-73 California Legal Forms--Transaction Guide § 73.151*

**AUTHOR:** Margaret Johnson Hazel Lange Reviewed by James V. Quillinan

**§ 73.151 Manufactured Homes, Mobilehomes, Commercial Coaches, Truck Campers, Camp Trailers, Floating Homes, and Other Property Registered with Department of Housing and Community Development**

1. Have settlors locate and provide Certificate of Title issued by Department of Housing and Community Development (HCD), or the Certificate of Ownership ("pink slip") issued by Department of Motor Vehicles (DMV) before July 1, 1981.
2. Have all registered owners sign Certificate of Title.
3. Have settlors locate and provide current registration, if possible.
4. Prepare Statement of Facts--Designation of Trustee [*see* form in § 73.321].
5. Prepare Statement of Facts--Use Tax Exemption [*see* form in § 73.322] and write "NO EXCHANGE, TRANSFER TO TRUST" at top of form.
6. Prepare Statement of Facts--Smoke Detector [*see* form in § 73.323].
7. Prepare and submit Application for Registration [*see* form in § 73.324] if settlors' Certificate of Ownership for mobilehome was issued by Department of Motor Vehicles before July 1, 1981.
8. Submit check for transfer fee.

**NOTE:**

Counsel should check with the DMV or HCD, as the case may be, for the current amount of the fee.

9. Instruct HCD to reissue Certificate of Title showing title in following form:

"Vernal Langjon and Marzel Langjon, Trustees,"

**NOTE:**

HCD will not re-issue the Certificate of Title in the trust name. Title must be shown in the name of the trustees [*see Health & Safety Code § 18080.1(b)*].

10. Arrange for settlors to take documentation directly to HCD or mail documents.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsGeneral OverviewEstate, Gift & Trust LawTrustsAdministrationEstate, Gift & Trust LawTrustsRevocable Living Trusts



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C. Procedural Guide to Transferring Specific Assets to Trust

*26-73 California Legal Forms--Transaction Guide § 73.152*

**AUTHOR:** Margaret Johnson Hazel Lange Reviewed by James V. Quillinan

**§ 73.152 Vessels Registered Through Coast Guard**

1. Comply with State Board of Equalization procedures to obtain use tax clearance and thereby avoid a transfer tax [ *see* § 73.150, P 1, for a guide to the necessary steps].

2. If there is a lienholder on vessel:

**NOTE:**

The State Board of Equalization will require the lienholder's approval of the transfer to trust. The procedure described in a-d, *below*, is the method for obtaining that approval.

a. Contact Coast Guard and obtain Application, Consent, and Approval for Withdrawal of Application for Documentation or Exchange of Certificate of Documentation (Form CG-4593) [ *see* § 73.332[2]].

b. Complete Form CG-4593 and submit to lienholder for approval and return.

**NOTE:**

For a sample letter to a sailboat mortgage holder for approval and return of the Form CG-4593, *see* § 73.333[2].

c. Submit a *copy* of the signed Application Form CG-4593 and Vehicle/Vessel Use Tax Information (Form BT-106) to the State Board of Equalization to obtain the use tax clearance.

d. Retain original Form CG-4593 to send to Coast Guard with executed Coast Guard forms.

3. Check to determine that Board of Equalization has returned copy of Form BT-106 [*see* P 1, *above*] along with a Use Tax Clearance; either Form BT-111 or Form BT-1138.

4. Telephone Coast Guard Marine Safety Office in Falling Waters, West Virginia, to obtain following forms, and complete forms:

a. Application for Initial Issue, Exchange, or Replacement of Certificate of Documentation; Redocumentation (Form CG-1258) [*see* form in § 73.330].

b. Bill of Sale (Form CG-1340) [*see* form in § 73.331].

**NOTE:**

The vessel must be properly marked with number, name, and hailing port. The hailing port is generally the owner's residential address, but can be any city and state in the United States.

5. Instruct Coast Guard Marine Safety Office to re-title vessel in name of trust, using following form of title:

VERNAL LANGJON and MARZEL LANGJON, Trustees

6. Forward State Board of Equalization Forms BT-106 and BT-111, and executed Coast Guard forms to Coast Guard Marine Safety Office for registration in name of revocable trust.

7. Include check for transfer fee.

**NOTE:**

For a documented vessel (recreational), the fee is \$51. For an undocumented vessel (new certificate), the fee is \$100.

8. Mark calendar to expect to receive new registration in trust name within four to six weeks.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsGeneral OverviewEstate, Gift & Trust LawTrustsAdministrationEstate, Gift & Trust LawTrustsRevocable Living Trusts



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*26-73 California Legal Forms--Transaction Guide § 73.153*

**AUTHOR:** Margaret Johnson Hazel Lange Reviewed by James V. Quillinan

**§ 73.153 Aircraft**

**NOTE:**

Additional information regarding aircraft registration requirements are contained in the Federal Aviation Regulations, Part 47, "Aircraft Registration." A copy of these regulations may be obtained by writing to the Superintendent of Documents, U.S. Government Printing Office, Washington, D.C.

1. Contact FAA Aircraft Registry at (405) 954-3116 and obtain following forms:
  - a. Aircraft Registration Application, Form 8050-1 [*see form in § 73.340*].
  - b. Aircraft Bill of Sale, Form 8050-2 [*see form in § 73.341*].
2. Complete Application and Bill of Sale, making certain that:
  - a. Name are identical on each conveyance document.
  - b. Names are identical to name shown on evidence of ownership.
  - c. Type of registration block checked on Aircraft Registration Application and signer's name agrees.

**NOTE:**

Check either box 1 or box 4, depending whether title is being held as a sole trustee or as a cotrustee.

3. Obtain signatures of all owners on Aircraft Registration Application (Form 8050-1, 12/90) and Bill of Sale (Form 8050-2, 9/92) where required.

4. Submit following documentation to FAA:

- a. Aircraft Registration Application, Form 8050-1 (12/90), white and green copies.
- b. Aircraft Bill of Sale, Form 8050-2 (9/92), original.
- c. Evidence of ownership (i.e., conveyances reflecting chain of ownership from last owner to applicant):

**NOTE:**

Proof of ownership can be *any one* of the following documents by which the settlors(s) acquired all right, title and interest in the aircraft or which has been previously recorded with the FAA.

- (1) Bill of sale.
- (2) Contract of conditional sale.
- (3) Transfer of equitable interest.
- (4) Transfer of interest.
- (5) Repossession.
- (6) Foreclosure.
- (7) Judicial sale.
- (8) Foreclosure or mechanic's lien.
- (9) Certified court order.
- (10) Affidavit stating why evidence of ownership cannot be produced.

d. Provide Trustee's Certification of Trust with full copy of trust agreement [*see* form in § 73.200]; type or write "**TRUE COPY OF ORIGINAL**" across face of trust agreement.

5. Prepare affidavit stating that each beneficiary under the trust is either United States citizen or resident alien [*see* form in § 73.342].

6. Provide check payable to FAA for registration fee.

**NOTE:**

The attorney should check with the FAA for the current amount of the registration fee.

7. Instruct FAA to reissue new registration to single applicant as trustee or several trustees jointly as co-trustees.

a. For single person, title should read as follows:

VERNAL LANGJON, Trustee.

b. For married persons, title should read as follows:

VERNAL LANGJON and MARZEL LANGJON, Co-Trustees.

8. Forward documentation and fee to FAA at following address:

FAA Aircraft Registry  
P. O. Box 25504  
Oklahoma City, OKLA 73125  
(405) 954-3011

9. Mark calendar to expect receipt of new registration within six to eight weeks.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsGeneral OverviewEstate, Gift & Trust LawTrustsAdministrationEstate, Gift & Trust  
LawTrustsRevocable Living Trusts



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*26-73 California Legal Forms--Transaction Guide § 73.154*

**AUTHOR:** Margaret Johnson Hazel Lange Reviewed by James V. Quillinan

**§ 73.154 Safe Deposit Boxes**

1. Advise settlors to obtain new application card from institution where safe deposit box is located.
2. Instruct settlors to complete and execute new application card, showing title to box in following form:  

\_\_\_\_\_ [name(s) of trustee(s), e.g., VERNAL LANGJON and  
MARZEL LANGJON], Trustees under the terms of the \_\_\_\_\_ [name of  
trust, e.g., LANGJON FAMILY REVOCABLE TRUST], DATED  
\_\_\_\_\_.
3. Instruct settlors to provide attorney's office with written confirmation that safe deposit box has been assigned to revocable trust, listing location and box number.
4. Instruct settlors to prepare inventory of contents of safe deposit box.
5. Obtain copy of inventory from settlors and place inventory with settlors' original estate planning documents.

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Estate, Gift & Trust LawTrustsGeneral OverviewEstate, Gift & Trust LawTrustsAdministrationEstate, Gift & Trust  
LawTrustsRevocable Living Trusts



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*26-73 California Legal Forms--Transaction Guide § 73.155*

**AUTHOR:** Margaret Johnson Hazel Lange Reviewed by James V. Quillinan

**§ 73.155 Tangible Personal Property and Collectibles**

1. Complete declaration of trust ownership [*see* form in § 73.310].
2. Prepare and attach list of assets of intrinsic value to declaration of trust ownership if settlors' estate includes personal property such as coin collections, antiques, tools, equipment, art collections, stamps, etc.
3. Encourage settlors to attach photograph of asset(s) or expert appraisal to original declaration of trust ownership for assets of intrinsic value.
4. Contact insurance carrier and request that trustee be added as an additional insured on any policy covering tangible personal property.
5. Instruct settlors to attach insurance rider to original declaration of trust ownership.
6. Place original declaration of trust ownership with settlors' original estate plan documents.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsGeneral OverviewEstate, Gift & Trust LawTrustsAdministrationEstate, Gift & Trust LawTrustsRevocable Living Trusts



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*26-73 California Legal Forms--Transaction Guide § 73.156*

**AUTHOR:** Margaret Johnson Hazel Lange Reviewed by James V. Quillinan

**§ 73.156 Patents and Trademarks**

**NOTE:**

See Ch. 103B, *Trademarks*, for information on trademarks.

1. Review legal documents evidencing settlors' ownership to determine whether ownership terminates at death.
2. Prepare an assignment of patent [*see form in § 73.350*] or trademark [*see form in § 73.360*], as appropriate.
3. Have settlors execute the assignment before a Notary Public [*see form in § 73.201*].
4. Prepare one of following, as appropriate, to accompany assignment:

**NOTE:**

The Transmittal Cover Sheet must conform to certain Patents and Trademarks Office (PTO) requirements and must be accompanied by the recording fee.

- a. Recordation Form Cover Sheet Patents Only, Form PTO-1695 [*see form in § 73.351*];  
or
  - b. Recordation Form Cover Sheet Trademarks Only [*see form in § 73.361*].
5. Include stamped, self-addressed post card [*see form in § 73.352*] for use by PTO to confirm receipt of

assignment.

6. Make check for the appropriate recordation fee payable to "Commissioner of Patents and Trademarks"

a. Patents: \$40.00 for each patent.

b. Trademarks: \$40.00 for first trademark, and \$25.00 for each additional trademark.

7. Mail assignment, postcard and appropriate recordation fee for each patent and/or trademark being assigned to settlors' revocable trust to:

Patent and Trademark Office  
Box Assignments  
Washington, D.C. 20231

8. Mark calendar to expect receipt of original assignment within six to eight weeks.

**NOTE:**

The PTO clerk will notify the sender of receipt of the assignment by returning the postcard [*see P 5, above*]. The PTO clerk will review the assignment in conjunction with the patent number originally assigned to the patent or registration number assigned to the trademark to verify the date and signatures. The clerk then prepares a Notice of Recordation and stamps the assignment with a reel and frame number. After the assignment is recorded, the clerk mails the assignment and the Notice of Recordation to the address shown.

Recordation of the assignment is of public record and gives constructive notice of a claim of ownership.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsGeneral OverviewEstate, Gift & Trust LawTrustsAdministrationEstate, Gift & Trust LawTrustsRevocable Living TrustsPatent LawOwnershipPatents as PropertyTrademark LawConveyancesGeneral Overview



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*26-73 California Legal Forms--Transaction Guide § 73.157*

**AUTHOR:** Margaret Johnson Hazel Lange Reviewed by James V. Quillinan

**§ 73.157 Copyrights**

1. Prepare assignment of copyright to trust [*see form in § 73.370*]
2. Have settlors execute assignment of copyright to trust before a notary public [*see form in § 73.201*].
3. Prepare letter of instructions [*see form in § 73.371*] to accompany each assignment submitted, instructing Copyright Office to re-register title of copyright in name of settlors' revocable trust.
4. Mail assignment and letter of instructions, together with appropriate fee, to:

Copyright Office  
Library of Congress  
Washington, D.C. 20559  
Attn: Document Unit

**NOTE:**

The recordation fee is \$20.00 for each copyright.

The clerk will record the assignment and return a Certification of Recordation transferring title to the revocable trust. Recordation of the assignment is of public record and gives constructive notice of a claim of ownership.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Copyright Law  
Conveyances  
Formalities  
General Overview  
Estate, Gift & Trust Law  
Trusts  
General Overview  
Estate, Gift & Trust Law  
Trusts  
Administration  
Estate, Gift & Trust Law  
Trusts  
Revocable Living Trusts



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**AUTHOR:** Margaret Johnson Hazel Lange Reviewed by James V. Quillinan

**[Reserved]**

§§ 73.158[Reserved]



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DIVISION IV: WILLS AND TRUSTS  
CHAPTER 73 FUNDING A REVOCABLE TRUST  
PART IV. FORMS  
A. General Forms

*26-73 California Legal Forms--Transaction Guide § 73.200*

**AUTHOR:** Margaret Johnson Hazel Lange Reviewed by James V. Quillinan

**§ 73.200 Trustee's Certification of Trust**

**[1] Comment**

**[a] Use of Form**

This form is a certification of trust that meets the requirements of *Prob. Code § 18100.5*. It contains all of the information that third parties typically will need to know before they deal with the trust or cooperate with the trustee in carrying out a transaction that affects the trust or trust property. The form does not contain any of the dispositive provisions of the trust, which the settlor, beneficiaries, and trustee ordinarily will wish to keep private and confidential.

After a trust has been established, the trustee may be required from time to time to prove his or her authority to act with respect to the trust assets. Third parties such as banks, title companies, brokers, and transfer agents will require evidence of the trustee's authority and powers before they will deal with the trustee. This evidence can be provided by supplying a copy of the trust instrument, but providing a complete copy of the trust instrument may compromise portions of the trust, such as its dispositive provisions, that the settlor and beneficiaries would prefer to keep confidential. Trustees traditionally have attempted to preserve the privacy of trusts while still satisfying third parties as to their authority and powers by supplying an abstract of the trust instrument or selected pages from the instrument.

This form offers another solution to this problem. While it contains all of the information set forth in a typical abstract of trust, it also confers on third parties dealing with the trustee a measure of protection against liability claims that might otherwise be asserted against them. When a third party relies in good faith on a certification of trust that meets the requirements of *Prob. Code § 18100.5*, the third party will be protected from claims that may be asserted by beneficiaries or other parties who are damaged by the third party's acts [*see Prob. Code § 18100.5(f)*]. This may provide a valuable inducement for third parties who might otherwise be reluctant to deal with the trustee or the trust property.

**[b] Features of Form--In General**

This form includes space for providing all of information that is permitted to be included in a certification of trust under *Prob. Code § 18100.5(b)*. It also includes all of the information required to be included in the certification under that section [see *Prob. Code § 18100.5(c)*]. However, the form may be adapted to include other information that is required or seems appropriate under the circumstances.

### **[c] Trustee Powers**

The list of trustee powers set forth in this form should be derived from the list of trustee powers in the trust instrument. In most cases, it will be possible simply to copy the list from the instrument to this form. In the alternative, the relevant pages of the trust document may be copied and appended to the certification. Which of these two approaches is used may be simply a matter of the attorney's convenience. The statute permits third parties to require the trustee offering the certification to provide "copies" of excerpts from the original trust documents, any amendments to these documents, and any other documents that designate, evidence, or pertain to the succession of the trustee or confer on the trustee the power to act in the pending transaction, or both [see *Prob. Code § 18100.5(e)*], so it may be advisable to include the actual copies of those portions of the instrument in lieu of merely restating them in the instrument itself, to foreclose potential objections from nitpicking third parties. Under no circumstances, however, should the certification contain the trust's dispositive provisions [see *Prob. Code § 18100.5(d)*], nor may a third party require the submission of the entire instrument in lieu of the certification [*Prob. Code § 18100.5(e), (h)*; see [f], below.]

### **[d] Description of Real Property**

The space provided in this form for identifying the trust property may be used to include a legal description of real property held by the trust. It may be useful to include a legal description if it is contemplated that the certification will be recorded. A legal description may help to convince the recorder that the certification is an instrument that "affects" the title to or possession of real property and that is entitled to recordation under *Gov. Code § 27280(a)*.

### **[e] Signature and Attestation**

This form must be signed by the trustee [see *Prob. Code § 18100.5(a), (c)*]. If there are co-trustees, it must be signed by all of the currently acting co-trustees. All of the signatures on the form must be acknowledged [see *Prob. Code § 18100.5(c)*]. This form also includes an optional declaration under penalty of perjury. While this declaration is not required, it has the same force and effect as an affidavit, and makes the certification of trust admissible as evidence in any subsequent litigation.

### **[f] Reliance by Third Parties; Copies of Relevant Statutes**

This form includes a statement that third parties are entitled to rely on the certification in dealing with the trust. This statement paraphrases the contents of *Prob. Code § 18100.5(f)*. The statement also contains a warning to third parties regarding *Prob. Code § 18100.5(h)*, which imposes liability on third parties for bad faith refusal to accept a certification in lieu of the trust documents (except as permitted by law; see [c], above). These statements are not specifically required or authorized by *Prob. Code § 18100.5*; however, they merely restate the legal effects of a certification under that section. They are included to provide trustees and attorneys with a measure of leverage against third parties who may be unfamiliar with the law governing trust certifications and/or insisting on rigidly adhering to institutional requirements that are inconsistent with *Prob. Code § 18100.5*. To bolster that leverage and as an aid to all concerned, a copy of *Prob. Code § 18100.5* is also included at the end of the form.

### **[g] Recording Certification of Trust**

The certification of trust signed by the currently acting trustee may be recorded in the office of the county recorder in the county where all or a portion of the real property held in the trust is located [*Prob. Code § 18100.5(c)*]. Any person may record a certification of trust that relates to an interest in real property in the office of the county recorder in the

county where all or a portion of the property is located. The recorded certification is a public record of the real property. A certification of trust need not be recorded in conjunction with the recordation of a transfer of title of real property involving a trust [*Prob. Code § 18100.5(i)*].

### **[h] Recording Affidavit of Change of Trustee**

When title to an interest in real property is affected by a change of trustee, the successor trustee may execute and record in the county where the property is located an affidavit of change of trustee. The affidavit must include the legal description of the property, the name of the former trustee(s), and the name of the successor trustee(s). It may also include excerpts from the original trust documents, any amendments to these documents, and any other documents that evidence or pertain to the succession of the successor trustee(s) [*Prob. Code § 18105*]. The affidavit is subject to all statutory requirements for recorded documents [*Prob. Code § 18106(a)*].

The recorded affidavit must be indexed in the index of grantors and grantees. For purposes of the index entry, the person who has been succeeded as trustee is deemed the grantor [*Prob. Code § 18106(b)*]. The recorded affidavit is prima facie evidence of the change of trustee insofar as it identifies an interest in real property located in the county, title to which is affected by the change. This presumption is a presumption affecting the burden of producing evidence [*Prob. Code § 18107*].

Any person whose interest is, or may be, affected by the recordation of an affidavit of change of trustee may require the successor trustee to provide copies of excerpts from the original trust documents, any amendments to these documents, and any other documents that evidence or pertain to the succession of the successor trustee(s). The entire trust, any amendments to the trust, or the dispositive provisions of the trust need not be provided [*Prob. Code § 18108*].

## **[2] FORM**

### **Trustee's Certification of Trust**

CERTIFICATION OF TRUST OF THE \_\_\_\_\_ [*name of trust, e.g., LANGJON FAMILY TRUST*]

TO: ALL BANKS, SAVINGS AND LOAN  
ASSOCIATIONS, MUTUAL FUNDS BROKERS,  
TITLE INSURERS, TRANSFER AGENTS,  
AND OTHER PERSONS AND INSTITUTIONS

[I or We or The undersigned], [*name(s), e.g., Vernal Langjon and Marzel Langjon or First National Fidelity & Trust Company of San Francisco*], as trustee[s] of the [*name of trust, e.g., Langjon Family Trust*], [*certify or certifies*] as follows:

1. **Creation of Trust.** The trust was created on \_\_\_\_\_ [*date*], by [*names of settlor(s), e.g., Vernal Langjon and Marzel Langjon*], as settlor[s], under a [*declaration of trust or trust agreement*] executed on that date.

2. **Name of Trust.** The name of the trust is the [*name of trust, e.g., Langjon Family Trust*].

3. **Trustee[s].** The currently acting trustee[s] of the trust [*is or are*] [*name(s), e.g., Vernal Langjon and Marzel Langjon or First National Fidelity & Trust Company of San Francisco*].

4. **Trust Property.** The trustee[s] [*is or are*] now holding as trustee[s] of the trust one or more items of property, which constitute the trust property [*if certification is to be recorded, add legal description of real property, e.g., including the*

following real property located in the County of Marin, State of California, and more particularly described as Lot 2, Block 12, as shown on the Map of Scenic Tract No. 2, on record in the Office of the Recorder of Marin County in Reel 250 at page 135].

5. **[Ir]revocability of Trust.** The trust is [ir]revocable. [*Add, if trust is revocable:* The person(s) holding the power to revoke the trust \_\_\_\_\_ (is or are)(if appropriate, add: the settlors,) \_\_\_\_\_ (name(s), e.g., Vernal Langjon and Marzel Langjon)].

[EITHER]

6. **Powers of Trustee.** The attached copies of pages \_\_\_\_\_ of the trust [agreement or declaration] are true and correct copies of those pages, and state the identity of the Trustee[s], define the signature authority of the Trustee[s], and list relevant powers of the Trustee[s].

[OR]

6. **Powers of Trustee.** The trustee[s] [has or have] the following powers for managing the trust and the trust property:

[Insert list of powers copied from trust instrument]

[Continue with following:]

[If trust has its own taxpayer identification number, use:]

7. **Taxpayer Identification Number.** The Taxpayer Identification Number of this trust is \_\_\_\_\_.

[Or, if trust is a revocable trust that does not need to obtain a taxpayer identification number, give social security number of one settlor, e.g.:]

7. **Taxpayer Identification Number.** United States *Treasury Regulations Sections 1.671-4, 1.6012-3(a)(9)* and *301.6109-1(a)(2)* provide that [the or either] Settlor's Social Security Number may be used in lieu of a separate taxpayer identification number for the trust. This trust uses the Social Security number of [e.g., Vernal Langjon] as its Taxpayer Identification Number. That number is \_\_\_\_\_.

[Continue with following:]

8. **Manner in Which Title To Assets Should Be Taken.** Title to trust assets should be taken in the following form: [*specify, e.g., "VERNAL LANGJON and MARZEL LANGJON, TRUSTEES, or their successors in interest under the terms of the LANGJON FAMILY REVOCABLE TRUST"*].

9. **Legal Description of Real Property.** The legal description of real property held in the trust is as follows: [*set forth legal description(s)*].

10. **No Revocations, Modifications, or Amendments.** The trust has not been revoked, modified, or amended in any manner that would cause the representations contained in this certification of trust to be incorrect.

11. **Signed by All Currently Acting Trustees.** This certification is being signed by all of the currently acting trustees of the trust.

12. **Accuracy.** This certification of trust is a true and accurate statement of the matters referred to herein.

*[Include the following only if there are two or more co-trustees:]*

13. **Signature Authority.** *[Include appropriate statement as to signature authority of trustees, e.g., All of the trustees are required to sign in order to exercise the powers of the trustee under the trust or The signature of only one trustee is required to exercise the powers of the trustee under the trust or other specification of signature authority, as appropriate].*

*[Continue with following:]*

14. **Reliance on This Certification.** This certification is made in accordance with *California Probate Code Section 18100.5* a copy of which is attached to this instrument. Any transaction entered into by a person acting in reliance on this certification shall be enforceable against the trust assets. **PROBATE CODE SECTION 18100.5(h) PROVIDES THAT ANY PERSON WHO REFUSES TO ACCEPT THIS CERTIFICATION IN LIEU OF THE ORIGINAL TRUST DOCUMENTS WILL BE LIABLE FOR DAMAGES, INCLUDING ATTORNEYS' FEES, INCURRED AS A RESULT OF THAT REFUSAL, IF THE COURT DETERMINES HAT THE PERSON ACTED IN BAD FAITH IN REQUESTING THE TRUST DOCUMENTS.**

*[Optional declaration under penalty of perjury: I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.]*

Date: \_\_\_\_\_.

\_\_\_\_\_ *[signature of trustee]*  
 \_\_\_\_\_ *[typed name]*

*[If there are co-trustees, add lines for additional signatures]*

\_\_\_\_\_ *[signature of co-trustee]*  
 \_\_\_\_\_ *[typed name]*  
 \_\_\_\_\_ *[signature of co-trustee]*  
 \_\_\_\_\_ *[typed name]*

## **ACKNOWLEDGMENT**

*[Add acknowledgment; see § 73.201 ]*

*[Attach copies of text of Prob. Code § 18100.5, as follows:]*

**TEXT OF CALIFORNIA PROBATE CODE SECTION 18100.5**

§ 18100.5. (a) The trustee may present a certification of trust to any person in lieu of providing a copy of the trust instrument to establish the existence or terms of the trust. A certification of trust may be executed by the trustee voluntarily or at the request of the person with whom the trustee is dealing.

(b) The certification of trust may confirm the following facts or contain the following information:

- (1) The existence of the trust and date of execution of the trust instrument.
- (2) The identity of the settlor or settlors and the currently acting trustee or trustees of the trust.
- (3) The powers of the trustee.
- (4) The revocability or irrevocability of the trust and the identity of any person holding any power to revoke the trust.
- (5) When there are multiple trustees, the signature authority of the trustees, indicating whether all or less than all of the currently acting trustees are required to sign in order to exercise various powers of the trustee.
- (6) The trust identification number, whether a social security number or an employer identification number.
- (7) The manner in which title to trust assets should be taken.
- (8) The legal description of any interest in real property held in the trust.

(c) The certification shall contain a statement that the trust has not been revoked, modified, or amended in any manner which would cause the representations contained in the certification of trust to be incorrect and shall contain a statement that it is being signed by all of the currently acting trustees of the trust. The certification shall be in the form of an acknowledged declaration signed by all currently acting trustees of the trust. The certification signed by the currently acting trustee may be recorded in the office of the county recorder in the county where all or a portion of the real property is located.

(d) The certification of trust may, but is not required to, include excerpts from the original trust documents, any amendments thereto, and any other documents evidencing or pertaining to the succession or successor trustees. The certification of trust shall not be required to contain the dispositive provisions of the trust which set forth the distribution of the trust estate.

(e) A person whose interest is, or may be, affected by the certification of trust may require that the trustee offering or recording the certification of trust provide copies of those excerpts from the original trust documents, any amendments thereto, and any other documents which designate, evidence, or pertain to the succession of the trustee or confer upon the trustee the power to act in the pending transaction, or both. Nothing in this section is intended to require or imply an obligation to provide the dispositive provisions of the trust or the entire trust and amendments thereto.

(f) A person who acts in reliance upon a certification of trust without actual knowledge that the representations contained therein are incorrect is not liable to any person for so acting. A person who does not have actual knowledge

that the facts contained in the certification of trust are incorrect may assume without inquiry the existence of the facts contained in the certification of trust. Actual knowledge shall not be inferred solely from the fact that a copy of all or part of the trust instrument is held by the person relying upon the trust certification. Any transaction, and any lien created thereby, entered into by the trustee and a person acting in reliance upon a certification of trust shall be enforceable against the trust assets. However, if the person has actual knowledge that the trustee is acting outside the scope of the trust, then the transaction is not enforceable against the trust assets. Nothing contained herein shall limit the rights of the beneficiaries of the trust against the trustee.

(g) A person's failure to demand a certification of trust does not affect the protection provided that person by Section 18100, and no inference as to whether that person has acted in good faith may be drawn from the failure to demand a certification of trust. Nothing in this section is intended to create an implication that a person is liable for acting in reliance upon a certification of trust under circumstances where the requirements of this section are not satisfied.

(h) Except when requested by a beneficiary or in the context of litigation concerning a trust and subject to the provisions of subdivision (e), any person making a demand for the trust documents in addition to a certification of trust to prove facts set forth in the certification of trust acceptable to the third party shall be liable for damages, including attorney's fees, incurred as a result of the refusal to accept the certification of trust in lieu of the requested documents if the court determines that the person acted in bad faith in requesting the trust documents.

(i) Any person may record a certification of trust that relates to an interest in real property in the office of the county recorder in any county in which all or a portion of the real property is located. The county recorder shall impose any fee prescribed by law for recording that document sufficient to cover all costs incurred by the county in recording the document. The recorded certification of trust shall be a public record of the real property involved. This subdivision does not create a requirement to record a certification of trust in conjunction with the recordation of a transfer of title of real property involving a trust.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsGeneral OverviewEstate, Gift & Trust LawTrustsAdministrationEstate, Gift & Trust LawTrustsRevocable Living Trusts



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*26-73 California Legal Forms--Transaction Guide § 73.201*

**AUTHOR:** Margaret Johnson Hazel Lange Reviewed by James V. Quillinan

**§ 73.201 Notary Acknowledgment**

**[1] Comment--Use of Form**

This form is the general certificate of acknowledgment prescribed by *Civ. Code § 1189*. It must be completed by the notary public when proof or acknowledgment of an instrument must be made. This form is needed in conjunction with a number of the other forms in this chapter, and should be incorporated into or appended to those forms, as appropriate.

**[2] FORM**

**Notary Acknowledgment**

**ACKNOWLEDGMENT**

State of California

County of \_\_\_\_\_)

On \_\_\_\_\_, before me, \_\_\_\_\_ (*insert name and title of the officer*), personally appeared \_\_\_\_\_, who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

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

WITNESS my hand and official seal.

Signature \_\_\_\_\_ (SEAL)

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsGeneral OverviewEstate, Gift & Trust LawTrustsAdministrationEstate, Gift & Trust  
LawTrustsRevocable Living Trusts



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*26-73 California Legal Forms--Transaction Guide §§ 73.202-73.209*

**AUTHOR:** Margaret Johnson Hazel Lange Reviewed by James V. Quillinan

**[Reserved]**

§§ 73.202[Reserved]



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*26-73 California Legal Forms--Transaction Guide § 73.210*

**AUTHOR:** Margaret Johnson Hazel Lange Reviewed by James V. Quillinan

**§ 73.210 Letter to Residential Mortgage Holder**

**[1] Comment**

**[a] Use of Form**

This form is a letter that can be used to inform a mortgage holder that the settlors have established a revocable inter vivos grantor trust and that there has been no sale or change in occupancy of the property. This letter can also be used to apprise the lender of the settlors' rights under the Garn-St. Germain Depository Institutions Act of 1982, which prohibits lenders from enforcing due-on-sale clauses upon a transfer into an inter vivos trust in which the borrower is and remains the beneficiary and occupant, unless the borrower refuses to provide the lender with reasonable means acceptable to the lender by which the lender will be assured of timely notice of any subsequent transfer of the beneficial interest or change in occupancy [*12 U.S.C. § 1701j-3(d)*].

**[b] Lender's Consent**

Generally, the lender's consent is not required to transfer real property into a inter vivos trust [*see 12 U.S.C. § 1701j-3(d)*] and discussion in [a], *above*]. However, settlors may want to obtain the lender's approval of the change of title and verify that the settlors' agreement under the existing loan agreement will remain the same.

**[2] FORM**

**Letter to Residential Mortgage Holder**

To: \_\_\_\_\_ [*name and address of mortgage holder*]

Re: Proposed transfer of title to revocable inter vivos grantor trust

[*settlor(s)*], Settlor[s]  
 [*trustee(s)*], Trustee[s]

Property address: \_\_\_\_\_

Loan Number: \_\_\_\_\_

Dear Mortgage Holder:

This office represents \_\_\_\_\_ [*name(s) of settlor(s)*] who [is or are] the borrower[s] on the above loan.

Our client[s] would like to transfer title of the real property covered by that loan to \_\_\_\_\_ [his or her or their] inter vivos grantor trust in order to avoid probate at the time of \_\_\_\_\_ [his or her or their] death[s]. This trust can be amended or revoked by our client[s] at any time. Please advise this office if you require a copy of the trust instrument.

The proposed transfer does not result in any change of beneficial ownership of the property but merely a change in the manner in which our client[s] hold[s] title. The transfer is only a change in title to gain the maximum deduction for federal estate tax purposes. We do not believe that your consent is necessary, pursuant to Section 541(d)(8) of the Garn-St. Germain Depository Institutions Act of 1982, which states that lenders may not exercise their option on a due-on-sale clause upon a transfer to an inter vivos grantor trust in which the borrowers are and remain the beneficiaries. Furthermore, the Federal Home Loan Bank Board, at *12 C.F.R. Section 591.5(b)(1)(vi)*, prohibits lenders from enforcing due-on-sale clauses upon "a transfer into an inter vivos trust in which the borrower is and remains the beneficiary and continues to occupy the subject real property."

On behalf of our client[s], we request that you approve this transfer in title without fee. Please sign the enclosed copy of this letter to indicate your approval of the change of title and your agreement that this change will not in anyway affect the terms of the above-stated loan. Please return the enclosed copy of this letter in the stamped self-addressed envelope provided.

Thank you for your cooperation.

Sincerely,

\_\_\_\_\_ [*signature of attorney*]  
 [typed name]

Agreed by [*signature of lender's representative*]

Title: \_\_\_\_\_, on behalf of \_\_\_\_\_ [*name of lender*]

Dated: \_\_\_\_\_.

### Legal Topics:

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsAdministrationEstate, Gift & Trust LawTrustsRevocable Living Trusts



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*26-73 California Legal Forms--Transaction Guide § 73.211*

**AUTHOR:** Margaret Johnson Hazel Lange Reviewed by James V. Quillinan

**§ 73.211 Letter to Commercial Mortgage Holder**

**[1] Comment--Use of Form**

This form is a letter informing a commercial mortgage holder that the mortgagee has established a revocable inter vivos grantor trust, and that there has been no sale or change in occupancy of the property. This form letter requests the lender's consent to transfer the commercial property to the inter vivos grantor trust, or a waiver of any rights the lender may have if, by virtue of the property conveyance, the lender would claim acceleration of the due-on-sale clause. For discussion of due-on-sale clauses, see § 73.13[7][a].

**[2] FORM**

**Letter to Commercial Mortgage Holder**

[Lender's name and address]

Re: Loan No. \_\_\_\_\_

Dear \_\_\_\_\_ [name of lender] :

\_\_\_\_\_ [name (s)], [an individual *or* individuals] residing in California, [is *or* are] the borrower[s] on the loan noted above, maker[s] of the note evidencing the loan, and settlor[s] under the deed of trust securing the note against the real property located at \_\_\_\_\_ [street address], Assessor Parcel Number \_\_\_\_\_.

\_\_\_\_\_ [name(s)] [has *or* have] retained this law firm to transfer assets into \_\_\_\_\_ [his *or* her *or* their] revocable living trust. As part of that asset transfer, we would like to cause transfer of the fee title to the property noted above by execution and recordation of a trust transfer deed from our client[s] individually to the

revocable trust.

Our client[s] hereby requests that \_\_\_\_\_ [name of lender] (1) give its written consent to the property conveyance, and (2) waive any right it may have or claim, if and by virtue of the intended property conveyance, to accelerate the loan under Section \_\_\_\_\_ of the Note and/or Section \_\_\_\_\_ of the Trust Deed.

Lender's accommodation, early response, and attention to the above will be appreciated.

Sincerely,

\_\_\_\_\_ [signature of attorney]  
[typed name and firm name]

**AS REQUESTED ABOVE, \_\_\_\_\_ [name of lender] HEREBY GIVES ITS CONSENTS AND WAIVER WITH RESPECT TO THE MATTERS NOTED IN THE PRECEDING LETTER.**

Dated: \_\_\_\_\_.  
\_\_\_\_\_ [name of lender]

By: \_\_\_\_\_

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsAdministrationEstate, Gift & Trust LawTrustsRevocable Living Trusts



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*26-73 California Legal Forms--Transaction Guide § 73.212*

**AUTHOR:** Margaret Johnson Hazel Lange Reviewed by James V. Quillinan

**§ 73.212 Trust Transfer Deed (Grant Deed)**

**[1] Comment--Use of Form**

This form is a trust transfer deed. It has the same effect as a grant deed [ *see § 73.13[4]*] and is used to transfer title from the settlors' names as individuals to a revocable inter vivos trust, or to make other trust-related conveyances. A recorded deed is evidence of the transfer of title to the revocable trust.

**[2] FORM**

**Trust Transfer Deed (Grant Deed)**

**RECORDING REQUESTED BY**

\_\_\_\_\_  
**[*name of attorney*] AND WHEN  
RECORDED MAIL TO**

\_\_\_\_\_  
**[*name(s) and address of attorney  
or transferor*]**

APN: [*Number*]

Space above line for Recorder's Use  
NO TAX DUE.

GRANT DEED

Documentary transfer tax is NONE.

\_\_\_\_\_ Unincorporated area

\_\_\_\_\_ City of \_\_\_\_\_

Mail tax statements to: \_\_\_\_\_ [address of transferor(s); if address of transferor(s) appears above, use same address here]

**FOR A VALUABLE CONSIDERATION**, receipt of which is hereby acknowledged,  
 \_\_\_\_\_ [names(s) of settlor(s)] [if applicable: husband and wife, as Community Property,] hereby  
**GRANT[S] to** \_\_\_\_\_ [name(s) of trustee(s)], **trustee[s] of the** [name of trust, e.g.: **John Q. Smith and Mary Jones Smith Revocable Trust**] [optional: **dated** \_\_\_\_\_ (month, day, and year)], **all that real property situated in the** [if property is in incorporated area: **City of** \_\_\_\_\_,] **County of** \_\_\_\_\_, **State of California, described in Exhibit A attached hereto and incorporated herein.**

Dated: \_\_\_\_\_.

\_\_\_\_\_ [signature of (first) settlor]  
 [typed name]

[If there is more than one settlor, add:]

\_\_\_\_\_ [signature of second settlor]  
 [typed name]

[Add acknowledgment; see § 73.201 ]

### Legal Topics:

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsAdministrationEstate, Gift & Trust LawTrustsRevocable Living TrustsReal Property LawDeedsTypesGeneral Overview



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*26-73 California Legal Forms--Transaction Guide § 73.213*

**AUTHOR:** Margaret Johnson Hazel Lange Reviewed by James V. Quillinan

**§ 73.213 Preliminary Change of Ownership Report**

**[1] Comment**

**[a] Use of Form**

This form is a printed form for a Preliminary Change of Ownership Report. It may be obtained from any county assessor or county recorder in California, and must be used to satisfy county assessor and county recorder requirements on certain real property transfers that are exempt by law from reassessment [*Rev. & Tax Code § 63.1*]. Filing the preliminary change of ownership report provides the information to substantiate that the conveyance is to a revocable trust, does not constitute a "change in ownership," and is not subject to reassessment of real property taxes under *Rev. and Tax. Code § 62(d)(2)*. For more detailed discussion of the preliminary change of ownership report, see § 23.203.

The original Preliminary Change of Ownership Report must be submitted with the original document of conveyance to the county recorder's office. The county recorder is responsible for sending the Preliminary Change of Ownership Report form to the county assessor's office.

**[b] Failure to File**

Failure to submit the Preliminary Change of Ownership Report to the recorder's office with the document of conveyance will result in the county recorder returning the document unrecorded and imposing an additional \$20.00 fee.

**[2] FORM**

**Preliminary Change of Ownership Report**

Click here to view image.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsAdministrationEstate, Gift & Trust LawTrustsRevocable Living Trusts



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*26-73 California Legal Forms--Transaction Guide §§ 73.214-73.219*

**AUTHOR:** Margaret Johnson Hazel Lange Reviewed by James V. Quillinan

**[Reserved]**

§§ 73.214[Reserved]



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*26-73 California Legal Forms--Transaction Guide § 73.220*

**AUTHOR:** Margaret Johnson Hazel Lange Reviewed by James V. Quillinan

**§ 73.220 Assignment of Time-Share Interest (Outside California)**

**[1] Comment--Use of Form**

This form identifies the settlor's interest in a time-share outside of California and assigns it to the settlor's revocable inter vivos grantor trust. For discussion, see §§ 73.125, 73.126.

**[2] FORM**

**Assignment of Time-Share Interest (Outside California)**

THIS ASSIGNMENT is made by [*name(s), e.g., VERNAL LANGJON and MARZEL LANGJON*], hereafter referred to as "Assignor[s]," to [*name(s), e.g., VERNAL LANGJON and MARZEL LANGJON*], Trustees (or any successor in interest) of the [*name of trust, e.g., LANGJON FAMILY REVOCABLE TRUST*], dated \_\_\_\_\_, hereafter referred to as "Assignee[s]."

**RECITALS**

1. Assignor[s] own[s] a [*e.g., 4/51*] interest in that time-share project known as [*name of project, e.g., "PACIFIC GROVE INN"*], hereafter referred to as "TIME-SHARE USE" or "TIME-SHARE ESTATE," located in \_\_\_\_\_ [*location, e.g, the City of Kailua-Kona, County of Kona, State of Hawaii*], more particularly described as follows:

[*Insert legal description*]

2. Assignor[s] created a revocable inter vivos trust, and, under the terms of that trust, assignor[s] retained all beneficial interest in any real or personal property thereafter transferred to that trust.

3. Assignor[s] now wish[es] to assign that interest in the "Time-Share Use" or "Time-Share Estate" to Assignee[s], and Assignee[s] wish[es] to accept that assignment on the terms and conditions of this Assignment.

NOW, therefore, the parties agree as follows:

1. Assignor[s] hereby assign[s] all of \_\_\_\_\_ [his or her or their] interest in that "Time-Share Use" or "Time-Share Estate" to Assignee[s] as Trustee[s] of [*name of trust, e.g., the LANGJON FAMILY REVOCABLE TRUST*], dated \_\_\_\_\_.

2. Assignee[s] accept[s] the foregoing assignment and adopt[s] the terms and provisions of the Time-Share Agreement for the "Time-Share Use" or "Time-Share Estate."

3. This Assignment may be executed in several counterparts each of which shall be deemed an original, and those counterparts shall constitute but one instrument, which may be sufficiently evidenced by any one counterpart.

IN WITNESS WHEREOF, the parties have executed this Assignment on \_\_\_\_\_ [date].

ASSIGNORS:

\_\_\_\_\_ [signature]  
 \_\_\_\_\_ [signature]

ASSIGNEES:

\_\_\_\_\_ [signature]  
 \_\_\_\_\_ [signature]

[Add acknowledgment; see § 73.201 ]

### Legal Topics:

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsAdministrationEstate, Gift & Trust LawTrustsRevocable Living TrustsReal Property LawCommon Interest CommunitiesTimesharesReal Property LawOwnership & TransferGeneral Overview



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2. Time-Share and Similar Interests

*26-73 California Legal Forms--Transaction Guide § 73.221*

**AUTHOR:** Margaret Johnson Hazel Lange Reviewed by James V. Quillinan

**§ 73.221 Exemption From Conveyance Tax, Form P-64B (Hawaii)**

**[1] Comment**

**[a] Use of Form**

This form is used to report the conveyance of a real property interest that is specifically exempted from the Hawaii Conveyance Tax Law. It is the Hawaii equivalent to the Preliminary Change of Ownership Report [ *see* § 73.213], which is used in California to satisfy county assessors and county recorders. This form is included in this publication because many California residents have time-share or other interests in Hawaii. Form P-64B should be clipped to the document that is being recorded and mailed to the Bureau of Conveyances or Land Court in Hawaii.

**[b] When to File**

Form P-64B should be filed within 90 days after the transaction date. The transaction date is the date the document was executed, or the date of the last acknowledgment, whichever is later.

**[2] FORM**

**Exemption From Conveyance Tax, Form P-64B (Hawaii)**

[Click here to view image.](#)

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsAdministrationEstate, Gift & Trust LawTrustsRevocable Living TrustsReal Property LawOwnership & TransferGeneral OverviewReal Property LawPriorities & RecordingGeneral Overview



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*26-73 California Legal Forms--Transaction Guide § 73.222*

**AUTHOR:** Margaret Johnson Hazel Lange Reviewed by James V. Quillinan

**§ 73.222 Assignment of Foreign Time-Share Interest (Outside United States)**

**[1] Comment--Use of Form**

If the settlor owns a time-share interest outside the United States and that interest is not of record title, this form can be used to assign the interest to the revocable trust. The time-share interest should be listed on the appropriate trust schedule, and this assignment should be placed with the settlor's original estate planning documents.

**[2] FORM**

**Assignment of Foreign Time-Share Interest (Outside United States)**

THIS ASSIGNMENT is made by [*names, e.g., VERNAL LANGJON and MARZEL LANGJON*], hereafter referred to as "Assignor[s]," to [*names, e.g., VERNAL LANGJON and MARZEL LANGJON*], Trustees (or any successor in interest) of the [*name of trust, e.g., LANGJON FAMILY REVOCABLE TRUST*], dated \_\_\_\_\_, hereafter referred to as "Assignee[s]."

**RECITALS**

1. Assignor[s] [have *or* has] a [*e.g., 1/51*] interest in that time-share project known as [*name of project, e.g., "PACIFIC SHORES NATURE INN"*], hereafter referred to as "TIME-SHARE USE" or "TIME-SHARE ESTATE," located in the City of \_\_\_\_\_, [*S tate, district, or province, e.g., Province of British Columbia*], Country of \_\_\_\_\_, more particularly described as follows:

[*insert legal description*]

2. Assignor[s] created a revocable inter vivos trust, and, under the terms of that trust, assignor[s] retained all beneficial interest in any real or personal property thereafter transferred to that trust.

3. Assignor[s] now wish[es] to assign that interest in the "Time-Share Use" or "Time-Share Estate" to Assignee[s], and Assignee[s] wish[es] to accept that assignment on the terms and conditions of this Assignment.

NOW, therefore, the parties agree as follows:

1. Assignor[s] hereby assign[s] all of \_\_\_\_\_ [his or her or their] interest in that "Time-Share Use" or "Time-Share Estate" to Assignee[s] as Trustee[s] of the [name of trust, e.g., LANGJON FAMILY REVOCABLE TRUST], dated \_\_\_\_\_.

2. Assignee[s] accept[s] the foregoing assignment and adopt[s] the terms and provisions of the Time-Share Agreement for the "Time-Share Use" or "Time-Share Estate."

3. This Assignment may be executed in several counterparts each of which shall be deemed an original, and those counterparts shall constitute but one instrument, which may be sufficiently evidenced by any one counterpart.

IN WITNESS WHEREOF, the parties have executed this Assignment on \_\_\_\_\_ [date].

ASSIGNORS:

\_\_\_\_\_ [signature]  
\_\_\_\_\_ [signature]

ASSIGNEES:

\_\_\_\_\_ [signature]  
\_\_\_\_\_ [signature]

[Add acknowledgment; see § 73.201 ]

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Estate, Gift & Trust LawTrustsAdministrationEstate, Gift & Trust LawTrustsRevocable Living TrustsReal Property  
LawCommon Interest CommunitiesTimesharesReal Property LawOwnership & TransferGeneral Overview



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*26-73 California Legal Forms--Transaction Guide §§ 73.223-73.229*

**AUTHOR:** Margaret Johnson Hazel Lange Reviewed by James V. Quillinan

**[Reserved]**

§§ 73.223[Reserved]



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 3. Oil, Gas, and Mineral Interests

*26-73 California Legal Forms--Transaction Guide § 73.230*

**AUTHOR:** Margaret Johnson Hazel Lange Reviewed by James V. Quillinan

**§ 73.230 Grant Deed (Mineral Interest)**

**[1] Comment--Use of Form**

This form is a grant deed [*see Civ. Code § 1092*]. It may be used to convey title to a mineral interest located in California [*see discussion in § 73.14[1][b]*].

In a grant deed, the term "grant" is the operative word of transfer [*see Klamath Land & Cattle Co. v. Roemer (1970) 12 Cal. App. 3d 613, 618, 91 Cal. Rptr. 112*]. Although a grant deed may convey any type of estate in real property [*Klamath Land & Cattle Co. v. Roemer (1970) 12 Cal. App. 3d 613, 618, 91 Cal. Rptr. 112*], it is presumed to transfer a fee simple title unless it appears from the deed that a lesser estate was intended [*Civ. Code § 1105; see American Enterprise, Inc. v. Van Winkle (1952) 39 Cal. 2d 210, 220, 246 P.2d 935*]. A grant deed that passes a fee simple title also transfers any interest in the property acquired by the grantor after the date of the deed [*Civ. Code § 1106; Schwenn v. Kaye (1984) 155 Cal. App. 3d 949, 952, 202 Cal. Rptr. 374*].

The effect of this deed will be identical to the mineral deed in § 73.231. That deed is a printed form and may be easier to use when available. Mineral deeds can be obtained through some local stationery stores, or ordered from Burkhart's Bank and Legal Supply, Tulsa, Oklahoma (telephone 800-736-0146).

**[2] FORM**

**Grant Deed (Mineral Interest)**

**RECORDING REQUESTED BY**

\_\_\_\_\_  
 [*name of Attorney*] **AND WHEN  
 RECORDED MAIL TO**

\_\_\_\_\_  
 [name of Attorney]

APN: [Number]

Space above line for Recorder's Use  
 NO CONSIDERATION. NO TAX DUE.  
 Conveyance without consideration to change the manner in  
 which the interest of the parties is held.

## INDIVIDUAL GRANT DEED

The undersigned grantor(s) declare(s):

Documentary transfer tax is NONE.

(\_\_\_\_) computed on full value of property conveyed, or

(\_\_\_\_) computed on full value less value of liens and encumbrances remaining at time of sale.

(\_\_\_\_) Unincorporated area

(\_\_\_\_) City of \_\_\_\_\_, and

FOR VALUABLE CONSIDERATION, receipt of which is hereby acknowledged, \_\_\_\_\_ [name(s) of grantor(s)], as [capacity of grantors, or character of property held, e.g., joint tenants or community property], hereby grant(s) to \_\_\_\_\_ [name(s) of trustee(s)], as Trustee(s) or their successors in interest under the terms of the \_\_\_\_\_ [name of trust], dated \_\_\_\_\_, the following described real property located in the [City of \_\_\_\_\_,] County of \_\_\_\_\_, State of \_\_\_\_\_. LEGAL DESCRIPTION attached hereto as Exhibit A and incorporated herein.

Dated: \_\_\_\_\_.

\_\_\_\_\_ [Signature of first grantor]

[Typed name]

\_\_\_\_\_ [Signature of second grantor]

[Typed name]

[Add notary acknowledgment, Form § 73.201 ]

### Legal Topics:

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Trusts Administration Estate, Gift & Trust Law Trusts Revocable Living Trusts Real Property Law Deeds Types Mineral Deeds Real Property Law Oil & Gas Real Property Law Ownership & Transfer General Overview



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*26-73 California Legal Forms--Transaction Guide § 73.231*

**AUTHOR:** Margaret Johnson Hazel Lange Reviewed by James V. Quillinan

**§ 73.231 Mineral Deed**

**[1] Comment--Use of Form**

This form is a mineral deed that may be used to transfer the oil, gas, and other minerals under described real property to the trustee of a revocable trust. Since the operative words in the deed are "grant, bargain, sell, convey, transfer, assign and deliver," this deed qualifies as a grant deed [*see Klamath Land & Cattle Co. v. Roemer (1970) 12 Cal. App. 3d 613, 618, 91 Cal. Rptr. 112* and discussion in § 73.230[1]]. Printed forms for mineral deeds may be purchased in some stationery stores, or ordered from Burkhart's Bank and Legal Supply, Tulsa, Oklahoma (800-736-0146). It may also be possible to obtain a printed form of mineral deed from the managing company for oil and gas interest.

**[2] FORM**

**Mineral Deed**

Click here to view image.

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
 Estate, Gift & Trust LawTrustsAdministrationEstate, Gift & Trust LawTrustsRevocable Living TrustsReal Property  
 LawDeedsTypesMineral Deeds



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*26-73 California Legal Forms--Transaction Guide § 73.232*

**AUTHOR:** Margaret Johnson Hazel Lange Reviewed by James V. Quillinan

**§ 73.232 Oil and Gas Lease**

**[1] Comment--Use of Form**

This is a printed form of oil and gas lease. It may be used to grant a leasehold interest in described real property for the purpose of exploring, mining, and operating for oil and gas. If the settlor has already acquired a leasehold interest in oil and gas property, the interest may be transferred to the trustee through an assignment of the lease [ *see* § 73.234].

Printed forms of oil and gas leases may be purchased at some stationery stores, or ordered from Burkhart's Bank and Legal Supply, Tulsa, Oklahoma (telephone 800-736-0146).

**[2] FORM**

**Oil and Gas Lease**

Click here to view image.

*[Add acknowledgment; see § 73.201 ]*

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Energy & Utilities LawFederal Oil & Gas LeasesAssignments & TransfersEnergy & Utilities LawLeases &  
LicensesAssignment, Release & Surrender ClausesAssignmentsEstate, Gift & Trust LawTrustsAdministrationEstate,  
Gift & Trust LawTrustsRevocable Living TrustsReal Property LawOil & Gas



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*26-73 California Legal Forms--Transaction Guide § 73.233*

**AUTHOR:** Margaret Johnson Hazel Lange Reviewed by James V. Quillinan

**§ 73.233 Assignment of Overriding Royalty**

**[1] Comment--Use of Form**

This is a printed form for an assignment of an overriding royalty. It can be used to assign an overriding royalty in specified oil and gas property to the trustee of the revocable trust. The form defines the royalty as a specified fractional interest in all of the oil, gas, and other minerals that may be produced from the property. For discussion of overriding royalties, see § 73.14[1][d].

Printed forms for various oil and gas transactions may be purchased at some stationery stores, or ordered from Burkhart's Bank and Legal Supply, Tulsa, Oklahoma (telephone 800-736-0146).

**[2] FORM**

**Assignment of Overriding Royalty**

[Click here to view image.](#)

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Energy & Utilities LawRoyaltiesGeneral OverviewEnergy & Utilities LawRoyaltiesTrustsEstate, Gift & Trust LawTrustsAdministrationEstate, Gift & Trust LawTrustsRevocable Living TrustsReal Property LawOil & Gas



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*26-73 California Legal Forms--Transaction Guide § 73.234*

**AUTHOR:** Margaret Johnson Hazel Lange Reviewed by James V. Quillinan

**§ 73.234 Assignment of Oil and Gas Lease**

**[1] Comment--Use of Form**

This is a printed form of Assignment of Oil and Gas Lease. It may be used to transfer an oil and gas lease (or a fractional interest in such a lease) to the trustee of the revocable trust.

Printed forms for various oil and gas transactions may be purchased at some stationery stores, or ordered from Burkhart's Bank and Legal Supply, Tulsa, Oklahoma (telephone 800-736-0146).

**[2] FORM**

**Assignment of Oil and Gas Lease**

[Click here to view image.](#)

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Energy & Utilities Law  
Federal Oil & Gas Leases  
Assignments & Transfers  
Estate, Gift & Trust Law  
Trusts  
Administration  
Estate, Gift & Trust Law  
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*26-73 California Legal Forms--Transaction Guide § 73.235*

**AUTHOR:** Margaret Johnson Hazel Lange Reviewed by James V. Quillinan

**§ 73.235 Ratification of Oil and Gas Lease**

**[1] Comment--Use of Form**

This is a printed form of Ratification of Oil and Gas Lease. It may be used to ratify an existing lease after one of the parties to the lease has died.

Printed forms for various oil and gas transactions may be purchased at some stationery stores, or ordered from Burkhart's Bank and Legal Supply, Tulsa, Oklahoma (telephone 800-736-0146).

**[2] FORM**

**Ratification of Oil and Gas Lease**

[Click here to view image.](#)

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Energy & Utilities Law  
Federal Oil & Gas Leases  
Assignments & Transfers  
Energy & Utilities Law  
Leases & Licenses  
Assignment, Release & Surrender Clauses  
General Overview  
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*26-73 California Legal Forms--Transaction Guide §§ 73.236-73.249*

**AUTHOR:** Margaret Johnson Hazel Lange Reviewed by James V. Quillinan

**[Reserved]**

§§ 73.236[Reserved]



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*26-73 California Legal Forms--Transaction Guide § 73.250*

**AUTHOR:** Margaret Johnson Hazel Lange Reviewed by James V. Quillinan

**§ 73.250 Stock or Bond Assignment Separate from Certificate**

**[1] Comment**

**[a] Use of Form**

This form is an assignment of stock or bonds separate from the stock or bond certificate. This form duplicates the language on the reverse side of the stock certificate, assigns ownership of the stock to a revocable trust, and gives the stockbroker power as attorney-in-fact to complete the transfer.

**[b] Signature Requirements**

The signatures on this assignment must correspond with the names on the face of the certificate in every particular, without alteration, enlargement, or any change. A separate assignment is required for each issue. A separate assignment is also required for each certificate on a sale order.

The signatures must be guaranteed on the assignment. Signature or medallion guarantee should be made by a member or member organization of the New York Stock Exchange, members of other exchanges having signatures on file with transfer agents, or by a commercial bank or trust company having its principal office or correspondence in the City of New York.

**[2] FORM**

**Stock or Bond Assignment Separate from Certificate**

ASSIGNMENT OF \_\_\_\_\_ [STOCK *or* BONDS]

For no consideration, the undersigned do hereby sell, assign, and transfer to [name(s) of trustee(s), e.g., VERNAL LANGJON and MARZEL LANGJON], Trustee(s) Under the Terms of the [name of trust, e.g., LANGJON FAMILY REVOCABLE TRUST], dated \_\_\_\_\_, Social Security No[s]. \_\_\_\_\_,

[For shares of stock, use following:]

[number] shares of the [class of stock, e.g., common or Class B preferred] stock of \_\_\_\_\_ [name of company], represented by Certificate[s] number[s] \_\_\_\_\_, standing in the name of the undersigned on the books of that company.

[For bonds, use following:]

[number] bond[s] of \_\_\_\_\_ [name of company] in the principal amount of \$ \_\_\_\_\_, no[s]. [inclusive], standing in the name of the undersigned on the books of that company.

[Continue with following:]

The undersigned do hereby irrevocably appoint \_\_\_\_\_ [name of stockbroker] as \_\_\_\_\_ [his or her or their] attorney in fact, to transfer the above [stock or bond(s)] on the books of the company, with full power of substitution in the premises.

Dated: \_\_\_\_\_.

\_\_\_\_\_ [signature of owner/settlor]

\_\_\_\_\_ [signature of owner/settlor]

#### IMPORTANT-READ CAREFULLY

The signature(s) on this assignment must correspond with the name(s) on the face of the certificate in every particular, without alteration or enlargement or any change. A separate assignment is required for each issue.

A separate assignment is also required for each certificate on a sale order. The signature(s) of the signor(s) must be guaranteed hereon. Signature or medallion should be made by a member or member organization of the New York Stock Exchange, members of other Exchanges having signatures on file with transfer agents or by a commercial bank or trust company having its principal office or correspondence in the City of New York.

#### SIGNATURE GUARANTEE OR MEDALLION SIGNATURE GUARANTEE

#### Legal Topics:

For related research and practice materials, see the following legal topics:

Business & Corporate Law Corporations Shareholders Transfers of Shares Estate, Gift & Trust Law Trusts Administration Estate, Gift & Trust Law Trusts Revocable Living Trusts



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*26-73 California Legal Forms--Transaction Guide § 73.251*

**AUTHOR:** Margaret Johnson Hazel Lange Reviewed by James V. Quillinan

**§ 73.251 Letter of Instructions to Brokerage Firm and/or Transfer Agent**

**[1] Comment--Use of Form**

This form is a settlor's letter of instructions to authorize a brokerage firm and/or transfer agent to transfer title of shares of stock held in an account or certificate form to the settlor's revocable trust.

**[2] FORM**

**Letter of Instructions to Brokerage Firm and/or Transfer Agent**

[*date*]

[*settlor's name, address and telephone number*]

To: \_\_\_\_\_ [*name of brokerage firm or transfer agent*]

Re: [*name of trust, e.g., Langjon Family Revocable Trust*], dated \_\_\_\_\_

Account No. \_\_\_\_\_

Dear \_\_\_\_\_:

We have retained \_\_\_\_\_ [*name(s), address, and telephone number of attorney and/or law firm*], to assist us in establishing a revocable trust. In order to fund our revocable trust, we are in the process of transferring title of all assets to ourselves as trustees.

This letter serves as our authorization to transfer [all of the shares held in the above-listed account *or* the following listed stock certificates] to our revocable trust. Title should read:

" \_\_\_\_\_ [name(s) of trustee(s), e.g., VERNAL LANGJON and MARZEL LANGJON], Trustee[s]  
 Under the Terms of the \_\_\_\_\_ [name of trust, e.g., LANGJON FAMILY REVOCABLE TRUST],  
 dated \_\_\_\_\_."

[If only listed securities are to be transferred, add:]

The following securities are to be transferred to the trust in the manner indicated in this letter:

Name and Class of Stock	Number of Shares	Certificate Number	CUSIP Number
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____

[continue with following:]

Enclosed please find the following documentation to facilitate the transfer to our revocable trust:

1. \_\_\_\_\_ [if transfer agent is being used: Original stock certificate or, if stockbroker is being used: New account application];
2. Irrevocable \_\_\_\_\_ [Stock Power and/or Bond Power or Stock Assignment Separate From Certificate (signature or medallion guaranteed)];
3. Request for Taxpayer Identification W-9 Form;

Please confirm that the transfer has been completed by signing the extra copy of this letter and returning it to my attorney[s] at the above-listed address. A stamped self-addressed envelope is provided for your use.

Thank you for your prompt attention to this matter.

Sincerely,

\_\_\_\_\_ [signature of first settlor]  
 [typed name]

\_\_\_\_\_ [signature of first settlor]  
 [typed name]

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
 Business & Corporate Law Corporations Shareholders Transfers of Shares Estate, Gift & Trust  
 Law Trusts Administration Estate, Gift & Trust Law Trusts Revocable Living Trusts



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*26-73 California Legal Forms--Transaction Guide § 73.252*

**AUTHOR:** Margaret Johnson Hazel Lange Reviewed by James V. Quillinan

**§ 73.252 Assignment of Bearer Bonds to Trust**

**[1] Comment--Use of Form**

This form can be used to transfer and assign all right, title, and interest in bearer bonds to the client's revocable trust.

**[2] FORM**

**Assignment of Bearer Bonds to Trust**

ASSIGNMENT OF BEARER BONDS

[*name(s) and capacity, e.g., VERNAL LANGJON and MARZEL LANGJON, husband and wife*], in order to change formal title only and without consideration, transfer and assign to [*name(s) of trustee(s), e.g., VERNAL LANGJON and MARZEL LANGJON*], Trustee[s] of the [*name of trust, e.g., LANGJON FAMILY REVOCABLE TRUST*] dated \_\_\_\_\_, all of their right, title and interest in and to bearer bonds as listed below:

Name of Entity	Certificate Number	Amount
_____	_____	\$ _____
_____	_____	\$ _____
_____	_____	\$ _____

[I or We] declare under penalty of perjury under the laws of the State of California that the foregoing and all information herein, including any accompanying statements or documents, is true, correct and complete to the best of my knowledge and belief.

Dated: \_\_\_\_\_

\_\_\_\_\_ [*signature of first settlor*]  
[*typed name*]

Dated: \_\_\_\_\_

\_\_\_\_\_ [*signature of second settlor*]  
[*typed name*]

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsAdministrationEstate, Gift & Trust LawTrustsRevocable Living Trusts



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*26-73 California Legal Forms--Transaction Guide § 73.253*

**AUTHOR:** Margaret Johnson Hazel Lange Reviewed by James V. Quillinan

**§ 73.253 Assignment of Right to Exercise Stock Option Plan After Death of Settlor**

**[1] Comment--Use of Form**

This form gives the successor trustee the right to exercise an employee stock option plan held by a settlor after the employee settlor's death. The form assumes that the employee settlor is also serving as a trustee of the trust. It should be signed by the employee settlor.

**[2] FORM**

**Assignment of Right to Exercise Stock Option Plan After Death of Settlor**

ASSIGNMENT

THIS ASSIGNMENT is made by [*name of settlor holding right to exercise plan, e.g., VERNAL LANGJON*], hereafter referred to as "Assignor."

1. Assignor currently holds the right to exercise an option to purchase the stock of [*name of company, e.g., ABC Industries, Inc.*], under the terms of an employee stock option plan \_\_\_\_\_ [*name or description of plan, e.g., known as the ABC Industries Employee Stock Option Plan dated July 3, 1996*]. [A copy of that option is attached to this instrument.]

2. Assignor currently is serving as a [co-]trustee of the [*name of trust, e.g., LANGJON FAMILY REVOCABLE TRUST*], dated \_\_\_\_\_, which was created by Assignor [*for a two-settlor spouse, add: and \_\_\_\_\_ (name of spouse, e.g., Marzel Langjon)*] on \_\_\_\_\_ [*date*]. Under the terms of that trust, Assignor [and \_\_\_\_\_ (*name of spouse, e.g., Marzel Langjon*)] retained all beneficial interest in any real or personal property thereafter transferred to that trust.

3. Assignor hereby assigns to the successor trustee or co-trustees of the [*name of trust, e.g., LANGJON FAMILY REVOCABLE TRUST*], dated \_\_\_\_\_, the right to exercise the above-described stock option plan after Assignor's death. This assignment is effective immediately.

4. This assignment is accepted by [*name(s) of settlor(s)/trustee(s), e.g., Vernal Langjon and Marzel Langjon*] as trustee[s] of the [*name of trust, e.g., LANGJON FAMILY REVOCABLE TRUST*], dated \_\_\_\_\_, on behalf of all successor trustees or cotrustees of that trust, and shall be exercisable by any trustee of co-trustee then serving.

IN WITNESS WHEREOF, the parties have executed this Assignment on \_\_\_\_\_[*date*].

ASSIGNOR:

\_\_\_\_\_ [*signature of employee/settlor*]  
[*typed name*]

ASSIGNEE[S]:

\_\_\_\_\_ [*signature of assignee/trustee*]  
[*typed name*], Trustee

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsAdministrationEstate, Gift & Trust LawTrustsRevocable Living Trusts



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*26-73 California Legal Forms--Transaction Guide §§ 73.254-73.259*

**AUTHOR:** Margaret Johnson Hazel Lange Reviewed by James V. Quillinan

**[Reserved]**

§§ 73.254[Reserved]



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*26-73 California Legal Forms--Transaction Guide § 73.260*

**AUTHOR:** Margaret Johnson Hazel Lange Reviewed by James V. Quillinan

**§ 73.260 Amendment of Limited Partnership Agreement and Transfer, Assumption and Consent**

**[1] Comment**

**[a] Use of Form**

This form may be used to transfer the settlor's interest in a limited partnership to the revocable trust. It is drafted so that the general partner, or both the general and limited partners, will consent. If the partnership agreement does not expressly authorize the transfer of partnership interests, transferee may become a limited partner only if all general partners and a majority in interest of the limited partners consent [*see Corp. Code § 15907.02(h)* (ULPA '08); *Corp. Code § 15674(a)* (CRLPA)].

In most situations, all general partners are required to consent to the transfer of limited partnership interests. In some partnerships, however, the partnership agreement may give the general partner sole authority to consent. When that is the case, only the signature of the general partner will be required.

**[b] Consent**

Transferee of a limited partnership interest may become a limited partner if the partnership agreement so provides, or if all of the general partners and a majority in interest of the limited partners consent [*Corp. Code § 15907.02(h)* (ULPA '08); *Corp. Code §§ 15631(a)(2), 15674(a)* (CRLPA)]. If the limited partnership is large and has many limited partners, it will often be impractical to obtain the written consent of all of the partners. In this situation, the limited partnership agreement should provide some other mechanism for expressing consent. The agreement may, for example, authorize transfers to be made without the necessity of first obtaining consent, or authorize the general partner acting alone to consent to assignments. Alternatively, it may require the consent of a specified percentage in interest of the limited partners and permit the general partner to sign on the limited partners' behalf when such a percentage has been obtained.

If the limited partnership agreement has no provisions of this kind, however, the consent of all of the general partners and a majority in interest of the limited partners must be obtained. In the absence of such consent, the trustee will not become a member of the partnership, but will merely acquire the right to receive the distributions to which the settlor would have been entitled [*Corp. Code § 15907.02(b)* (ULPA '08); *Corp. Code § 15672(a)* (CRLPA)]. Note, however, that only that the "consent" of partners be obtained. The Corporations Code does not explicitly require that this "consent" be written. If the limited partners express their consent orally, the general partner could presumably sign this form in their behalf, even if the partnership agreement did not specifically authorize such a procedure. Obviously, however, good practice requires that consent should be in writing whenever possible.

## [2] FORM

### Amendment of Limited Partnership Agreement and Assignment, Assumption and Consent

#### TRANSFER OF LIMITED PARTNERSHIP INTEREST

The parties to this Transfer of Limited Partnership Interest are \_\_\_\_\_ [*name(s) of limited partner(s)/settlor(s)*] ("Transferor[s]") and \_\_\_\_\_ [*name(s) of trustee(s)*], as trustee[s] of the \_\_\_\_\_ [*name of trust*], dated \_\_\_\_\_, ("Transferee").

#### Recitals

1. \_\_\_\_\_ [*name of limited partnership*] ("Partnership") is a \_\_\_\_\_ [*name of state, e.g., California*] limited partnership formed pursuant to that certain Certificate and Agreement of Limited Partnership [dated \_\_\_\_\_], which was recorded on \_\_\_\_\_ [*date*] in the official records of \_\_\_\_\_ [*county and state, e.g., Orange County, California*], as document number \_\_\_\_\_ [*number stamped by recorder on certificate and agreement*].

2. As of the date of this instrument, Transferor[s] \_\_\_\_\_ [is one of the *or* are] limited partners of the Partnership.

3. Transferor[s] wish[es] to assign to Transferee[s], and Transferee[s] wish[es] to accept, all of the right, title, and interest of the Assignor[s] in and to the Partnership and any and all appurtenances thereto, including, without limitation, all rights of Transferor[s] to the capital, profits, losses, and distributions of the Partnership, on the terms and conditions set forth in this instrument.

[*If general partner will sign consent:* ]

4. \_\_\_\_\_ [*name of general partner*] is \_\_\_\_\_ [a *or* the] general partner of the Partnership and is authorized to approve the admission of Transferee to the Partnership as a limited partner \_\_\_\_\_ [*specify, e.g.: under the terms of the partnership agreement or by virtue of the fact that a majority in interest of the limited partners have consented to this assignment as required by the partnership agreement*].

[*OR, if both general and limited partners will sign consent:* ]

4. \_\_\_\_\_ [*name(s) of general partner(s)*] \_\_\_\_\_ [is a *or* are the] General Partner[s] of the Partnership. \_\_\_\_\_ [*names of limited partners or Those persons identified below as limited partners*] are \_\_\_\_\_ [all *or* a majority in interest] of the limited partners of the Partnership.

[CONTINUE ]

### Assignment

5. Subject to the consent of the [General] Partner[s] below, Transferor[s] hereby assign[s] to Transferee[s] all of the right, title, and interest of the Assignor[s] in and to the Partnership and any and all appurtenances thereto, including, without limitation, all rights of Transferor[s] to the capital, profits, losses, and distributions of the Partnership.

### Acceptance, Assumption and Substitution

6. Subject to the consent of the [General] Partner[s] below, Transferee[s] hereby accept[s] the foregoing assignment, agree[s] to be bound by and assume[s] each and all of the terms and provisions of the Partnership Agreement, and all obligations, duties, and liabilities, past, present, and future, of the Transferor[s] thereunder. On consent of the [General] Partner[s] below, Transferee[s] agree[s] to be [a] substituted limited partner[s] of the Partnership in the place and stead of Transferor[s], and Transferor[s] shall cease to be [a] limited partner[s] of the Partnership.

### Effective Date

7. This assignment shall be effective on the date set forth below.

Dated \_\_\_\_\_, at \_\_\_\_\_ [place, e.g., Newport Beach, California].

Transferor[s]:

\_\_\_\_\_ [signature of first transferor]

[typed name]

\_\_\_\_\_ [signature of second transferor]

[typed name]

Transferee[s]:

\_\_\_\_\_ [signature of first transferee]

[typed name]

\_\_\_\_\_ [signature of second transferee]

[typed name]

### Consent

GENERAL PARTNER[S]:

\_\_\_\_\_ [signature of first general partner]

[typed name]

\_\_\_\_\_ [signature of second general partner]

[typed name]

[If limited partners will also sign, add: ]

LIMITED PARTNER[S]:

\_\_\_\_\_ [*signature of first limited partner*]

[*typed name*]

\_\_\_\_\_ [*signature of second limited partner*]

[*typed name*]

[*Continue as necessary*]

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Business & Corporate Law Limited Partnerships General Overview Business & Corporate Law Limited Partnerships Formation Estate, Gift & Trust Law Trusts Administration Estate, Gift & Trust Law Trusts Revocable Living Trusts



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*26-73 California Legal Forms--Transaction Guide § 73.261*

**AUTHOR:** Margaret Johnson Hazel Lange Reviewed by James V. Quillinan

**§ 73.261 Assignment of Sole Proprietorship**

**[1] Comment--Use of Form**

This form can be used to transfer and identify a sole proprietorship as a separate and distinct asset of the trust. In a two-settlor trust, if the business is held as community property, both settlors should sign.

**[2] FORM**

**Assignment of Sole Proprietorship**

**ASSIGNMENT OF SOLE PROPRIETORSHIP**

\_\_\_\_\_ [name(s) of owner(s), e.g., VERNAL LANGJON and MARZEL LANGJON ], in order to change formal title only and without consideration, hereby transfer[s] and assign[s] to \_\_\_\_\_ [name(s) of trustee(s), e.g., VERNAL LANGJON and MARZEL LANGJON ], as Trustee[s] of the \_\_\_\_\_ [name of trust, e.g., LANGJON FAMILY REVOCABLE TRUST ], dated \_\_\_\_\_, all of \_\_\_\_\_ [name(s) of owner(s), e.g., VERNAL LANGJON'S and MARZEL LANGJON'S ] right, title and interest in and to that certain sole proprietorship commonly known as \_\_\_\_\_ [name of business, e.g., Langjon Shoe Repair Shop].

This assignment includes all of the interest of the undersigned in the assets and properties of the sole proprietorship, of whatsoever kind and character, whether tangible, real, personal or mixed, and wherever located including without limitation all cash, cash equivalents, bank accounts, accounts receivable stocks, bonds, notes, cash surrender value of insurance policies, inventories, deposits, goodwill, and all other supplies, materials, work in process, finished goods, equipment, machinery, furniture, fixtures, motor vehicles, claims and rights under leases, contracts, notes, evidences of indebtedness, purchase and sales orders, copyrights, service marks, trademarks, trade names, trade secrets, patents,

patent applications, licenses, royalty rights, deposits, and rights and claims to refunds and adjustments of any kind, together with all policies of insurance thereon but subject to any liens thereon.

Dated \_\_\_\_\_, at \_\_\_\_\_ [*place, e.g., Santa Clara, California*].

\_\_\_\_\_ [*signature of first owner/settlor*]

[*typed name*]

\_\_\_\_\_ [*signature of second owner/settlor*]

[*typed name*]

[*Add acknowledgment; see § 73.201* ]

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Business & Corporate Law  
Sole Proprietorships  
Estate, Gift & Trust Law  
Trusts Administration  
Estate, Gift & Trust Law  
Trusts Revocable Living Trusts



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C. Personal Property  
2. Partnership and Sole Proprietorship Interests

*26-73 California Legal Forms--Transaction Guide §§ 73.262-73.269*

**AUTHOR:** Margaret Johnson Hazel Lange Reviewed by James V. Quillinan

**[Reserved]**

§§ 73.262[Reserved]



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C. Personal Property  
3. United States Savings Bonds and Treasury Bonds

*26-73 California Legal Forms--Transaction Guide § 73.270*

**AUTHOR:** Margaret Johnson Hazel Lange Reviewed by James V. Quillinan

**§ 73.270 Request for Reissue of United States Savings Bonds/Notes in Name of Trustee of Personal Trust Estate**

**[1] Comment--Use of Form**

This form is the official Request for Reissue of United States Savings Bonds/Notes in Name of Trustee of Personal Trust Estate, issued by the Department of the Treasury, Bureau of the Public Debt (Form PDF 1851, rev. 2/95). Copies of this form may be obtained from the Federal Reserve Bank. When completed, the form should be submitted to the same bank.

**[2] FORM**

**Request for Reissue of United States Savings Bonds/Notes in Name of Trustee of Personal Trust Estate**

[Click here to view image.](#)

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Estate, Gift & Trust LawTrustsAdministrationEstate, Gift & Trust LawTrustsRevocable Living Trusts



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3. United States Savings Bonds and Treasury Bonds

*26-73 California Legal Forms--Transaction Guide § 73.271*

**AUTHOR:** Margaret Johnson Hazel Lange Reviewed by James V. Quillinan

**§ 73.271 Treasury Direct Transaction Request**

**[1] Comment--Use of Form**

This form is the official form (Form 5178, revised 8/95) that must be used to notify the U.S. Treasury (Federal Reserve Bank) to re-title the name on the client's treasury account to the revocable trust. The form also provides space for the client to state the financial institution in which future interest payments can be deposited directly into the client's account. When completed, it should be submitted to the Federal Reserve Bank.

**[2] FORM**

**Treasury Direct Transaction Request**

[Click here to view image.](#)

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsAdministrationEstate, Gift & Trust LawTrustsRevocable Living Trusts



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3. United States Savings Bonds and Treasury Bonds

*26-73 California Legal Forms--Transaction Guide §§ 73.272-73.279*

**AUTHOR:** Margaret Johnson Hazel Lange Reviewed by James V. Quillinan

**[Reserved]**

§§ 73.272[Reserved]



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4. Insurance Benefits

*26-73 California Legal Forms--Transaction Guide § 73.280*

**AUTHOR:** Margaret Johnson Hazel Lange Reviewed by James V. Quillinan

**§ 73.280 Letter of Instructions Regarding Beneficiary Designation**

**[1] Comment--Use of Form**

This form can be used to authorize an insurance company to change the beneficiary designation on an insurance policy to the trust and to name a contingent beneficiary.

**[2] FORM**

**Letter of Instructions Regarding Beneficiary Designation**

[*name of insurance company*]

[*address*]

Re: Policy Owner [*name, e.g., VERNAL LANGJON*]

Policy No. \_\_\_\_\_

Dear Sir/Madam:

This letter directs you to change the beneficiary designation of the above-identified policy as follows:

PRIMARY BENEFICIARY: THE TRUSTEE THEN IN OFFICE UNDER THE  
TERMS OF THE \_\_\_\_\_ [*name of*  
*trust, e.g., LANGJON FAMILY REVOCABLE*  
TRUST] \_\_\_\_\_  
[DECLARATION *or* AGREEMENT], DATED  
\_\_\_\_\_.

CONTINGENT BENEFICIARY: NONE.

Enclosed please find a completed new Designation of Beneficiary form to effect the above change.

If you have any questions or require further information, please contact my attorney[s], \_\_\_\_\_[*name, address, and phone number of attorney or law firm*].

Please confirm that the transfer has been made on your records by signing the enclosed copy of this letter and returning it to my attorney[s] in the stamped self-addressed envelope provided. Thank you for your prompt attention to this matter.

Sincerely,

\_\_\_\_\_ [*signature of policy owner*]  
[*typed name*]

Transaction completed:

\_\_\_\_\_ [*date*]

\_\_\_\_\_ [*name of insurance company*]

by: [*signature*], \_\_\_\_\_ Title

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsAdministrationEstate, Gift & Trust LawTrustsRevocable Living TrustsInsurance  
LawLife InsuranceBeneficiariesChanges



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*26-73 California Legal Forms--Transaction Guide §§ 73.281-73.289*

**AUTHOR:** Margaret Johnson Hazel Lange Reviewed by James V. Quillinan

**[Reserved]**

§§ 73.281[Reserved]



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 5. Notes and Obligations

*26-73 California Legal Forms--Transaction Guide § 73.290*

**AUTHOR:** Margaret Johnson Hazel Lange Reviewed by James V. Quillinan

**§ 73.290 Assignment of Promissory Note With Acknowledgment of Assignment**

**[1] Comment--Use of Form**

This form is an assignment of a promissory note to a revocable inter vivos trust. It can also be used to notify a debtor that a settlor/lender wishes to assign a promissory note to the settlor's revocable trust. In addition, it may be used to obtain the debtor's acknowledgment and consent to the trust as substitute holder of the promissory note.

**[2] FORM**

**Assignment of Promissory Note With Acknowledgment of Assignment**

NOTICE OF ASSIGNMENT OF PROMISSORY NOTE

[*name(s) and capacity of settlor(s)/lender(s), e.g., VERNAL LANGJON and MARZEL LANGJON, husband and wife*], without consideration and in order to change formal title only, transfer and assign to [*name(s) of trustee(s), e.g., VERNAL LANGJON and MARZEL LANGJON*], Trustee[s] of the [*name of trust, e.g., LANGJON FAMILY REVOCABLE TRUST*], dated \_\_\_\_\_, all of their right, title, and interest in a Promissory Note dated \_\_\_\_\_ and made by \_\_\_\_\_ [*name(s) of debtor(s)*] in the original amount of \$\_\_\_\_\_, a copy of which is attached hereto. This assignment is effective immediately.

Dated: \_\_\_\_\_

\_\_\_\_\_ [*signature of first settlor*]

[*typed name*]

\_\_\_\_\_ [*signature of second settlor*]

[*typed name*]

[Add acknowledgment; see § 73.201 ]

### DEBTOR'S ACKNOWLEDGMENT OF ASSIGNMENT

[I or We] acknowledge, recognize, and consent to the foregoing assignment and approve admission of [*name(s) of trustee(s), e.g., VERNAL LANGJON and MARZEL LANGJON*], Trustee[s] of the [*name of trust, e.g., LANGJON FAMILY REVOCABLE TRUST*], dated \_\_\_\_\_, as [a] substitute holder[s] of the promissory note identified above. Hereafter payments will be made to [*name(s) of trustee(s), e.g., VERNAL LANGJON and MARZEL LANGJON*], Trustee[s] of the [*name of trust, e.g., LANGJON FAMILY REVOCABLE TRUST*], dated

\_\_\_\_\_.

Dated: \_\_\_\_\_.

\_\_\_\_\_ [*signature of first debtor*]

[*typed name*]

\_\_\_\_\_ [*signature of second debtor*]

[*typed name*]

#### Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawNegotiable InstrumentsTransfersContracts LawNegotiable InstrumentsTypesPromissory NotesEstate, Gift & Trust LawTrustsAdministrationEstate, Gift & Trust LawTrustsRevocable Living Trusts



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*26-73 California Legal Forms--Transaction Guide § 73.291*

**AUTHOR:** Margaret Johnson Hazel Lange Reviewed by James V. Quillinan

**§ 73.291 Assignment of Deed of Trust**

**[1] Comment--Use of Form**

This form is an assignment of a promissory note (mortgage interest) held by the settlors in a particular piece of real property to the settlors' revocable trust. This form describes the property, the settlors' interest in the property, and contains the necessary language for conveyance to the revocable trust. It should be recorded to provide formal notice that the note has been transferred to the trust. For a guide to the procedural steps, see § 73.148.

**[2] FORM**

**Assignment of Deed of Trust**

**RECORDING REQUESTED BY**

\_\_\_\_\_  
**[name of Attorney] AND WHEN  
 RECORDED MAIL TO**

\_\_\_\_\_  
**[name of Attorney]**

APN: [Number]

Space above line for Recorder's Use  
 NO CONSIDERATION. NO TAX DUE.  
 Conveyance without consideration to change the manner in  
 which the interest of the parties is held.

**ASSIGNMENT OF DEED OF TRUST**

(For legal description, see Exhibit "A" attached to and made a part of this instrument)

FOR VALUE RECEIVED, the undersigned hereby grant[s], assign[s] and transfer[s] to [*name(s) of trustees, e.g., VERNAL LANGJON and MARZEL LANGJON*], Trustees, or \_\_\_\_\_ [*his or her or their*] successors in interest under the terms of the [*name of trust, e.g., LANGJON FAMILY REVOCABLE TRUST*], dated \_\_\_\_\_, all beneficial interest under that certain Deed of Trust dated \_\_\_\_\_, executed by [*name(s) of debtor(s), e.g., OWEN PLENTY and JOANNE PLENTY*] to [*trustee under deed of trust, e.g., Santa Clara Land Title*], Trustee, and recorded as Instrument No. \_\_\_\_\_ on \_\_\_\_\_ [*date*], in Book \_\_\_\_\_, page \_\_\_\_\_, of Official Records in the County Recorder's Office of \_\_\_\_\_ County, California, describing land therein as together with the note, or notes therein described or referred to, the money due, and to become due thereon with interest, and all rights accrued or to accrue under that Deed of Trust.

Dated: \_\_\_\_\_.

\_\_\_\_\_ [*signature of first settlor*]

[*typed name*]

\_\_\_\_\_ [*signature of second settlor*]

[*typed name*]

[*Add acknowledgment; see § 73.201* ]

### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Contracts LawSecured TransactionsThird Party RightsAssignmentsEstate, Gift & Trust

LawTrustsAdministrationEstate, Gift & Trust LawTrustsRevocable Living TrustsReal Property

LawFinancingMortgages & Other Security InstrumentsGeneral Overview



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*26-73 California Legal Forms--Transaction Guide §§ 73.292-73.299*

**AUTHOR:** Margaret Johnson Hazel Lange Reviewed by James V. Quillinan

**[Reserved]**

§§ 73.292[Reserved]



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6. Bank and Savings Accounts

*26-73 California Legal Forms--Transaction Guide § 73.300*

**AUTHOR:** Margaret Johnson Hazel Lange Reviewed by James V. Quillinan

**§ 73.300 Letter of Instructions to Financial Institution**

**[1] Comment--Use of Form**

This form is a letter authorizing a financial institution to transfer all funds from the settlors' individual account to a trust bank account with a designated trustee as account holder.

**[2] FORM**

**Letter of Instructions to Financial Institution**

[I or We] wish to formally transfer all funds in [checking or savings] account[s] number[s] \_\_\_\_\_ to a trust bank account which [I or we] will continue to maintain as trustee[s] of a trust that [I or we] have created.

Please use the enclosed self-addressed envelope to provide [my or our] attorney[s], \_\_\_\_\_ [name and address of attorney and/or law firm] with the necessary documentation to assign our [checking or savings] account[s] number[s] \_\_\_\_\_ to the following title:

\_\_\_\_\_ [name(s) or trustee(s), e.g., VERNAL LANGJON and MARZEL LANGJON ], Trustee[s], or \_\_\_\_\_ [his or her or their] Successors in Interest under the terms of the \_\_\_\_\_ [name of trust, e.g., LANGJON FAMILY REVOCABLE TRUST ], dated \_\_\_\_\_.

Thank you in advance for your help and cooperation in this matter.

Sincerely,

\_\_\_\_\_ [*signature of first settlor*]  
[*typed name*]

\_\_\_\_\_ [*signature of second settlor*]  
[*typed name*]

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Banking LawBank ActivitiesBank AccountsGeneral OverviewEstate, Gift & Trust LawTrustsAdministrationEstate,  
Gift & Trust LawTrustsRevocable Living Trusts



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*26-73 California Legal Forms--Transaction Guide §§ 73.301-73.309*

**AUTHOR:** Margaret Johnson Hazel Lange Reviewed by James V. Quillinan

**[Reserved]**

§§ 73.301[Reserved]



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7. Personal Effects and Other Tangible Personal Property

*26-73 California Legal Forms--Transaction Guide § 73.310*

**AUTHOR:** Margaret Johnson Hazel Lange Reviewed by James V. Quillinan

**§ 73.310 Declaration of Trust Ownership--Tangible Personal Property**

**[1] Comment--Use of Form**

This form is a declaration of trust ownership. It is used to transfer household furniture, furnishings, tangible personal property, and other items that have no record of ownership. Using this form will substantiate the settlors' intent, confirm trust ownership on later sale, and may help eliminate the necessity of a court supervised administration following the death of a settlor.

**[2] FORM**

**Declaration of Trust Ownership--Tangible Personal Property**

DECLARATION OF TRUST OWNERSHIP

The undersigned hereby declare[s] that, as Trustee[s] of the [*name of trust, e.g., LANGJON FAMILY REVOCABLE TRUST*], dated \_\_\_\_\_ ("the Trust"), and pursuant to Section \_\_\_\_\_ of the [*Declaration of Trust or Trust Agreement*] that created the Trust, the undersigned [*is or are*] now holding and will continue to hold, solely and exclusively for and on behalf of the Trust, the following:

All jewelry, clothing, household furniture and furnishings, personal automobiles, country club memberships, and other tangible articles of a personal nature belonging to the Settlor[s] of the Trust, or the \_\_\_\_\_ [*Settlor's or Settlor's*] interest in any such property which now or at any time after the date of this instrument is normally kept at the \_\_\_\_\_ [*Settlor's or Settlor's*] place of residence.

The undersigned hereby further affirm[s] and declare[s] that, from and after the date of this declaration:

1. All properties described above will be held by the undersigned solely and exclusively for and on behalf of the Trust as true owner.
2. Except to the extent of beneficial interests provided to the undersigned under the terms and provisions of the \_\_\_\_\_ [Declaration of Trust *or* Trust Agreement] that created the Trust (as now written or as amended in the future), the undersigned \_\_\_\_\_ [has *or* have] and shall have no personal interest in any of the properties described above.
3. All liabilities that relate in any way to the acquisition of, or that are a lien upon, any of the properties governed by this declaration shall be borne by the Trust which, pursuant to this declaration, owns those properties.

This declaration of exclusive trust ownership and waiver of interest is intended to be and shall be binding on the heirs, administrators, executors, and assigns of the undersigned, and shall be revocable only by a written instrument executed by one or more of the Trustees of the Trust then serving, with all of the same formalities that accompanied the execution of this instrument.

This declaration revokes all previous declarations of ownership, if any, with respect to any and all properties governed by this declaration, heretofore executed by the undersigned.

[*I or We*] declare under penalty of perjury under the laws of the State of California that the foregoing and all information herein, including any accompanying statements or documents, are true, correct, and complete to the best of [*my or our*] knowledge and belief.

Dated: \_\_\_\_\_.

\_\_\_\_\_ [signature of trustee]

[typed name]

\_\_\_\_\_ [signature of cotrustee]

[typed name]

[Add acknowledgment; see § 73.201 ]

### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsAdministrationEstate, Gift & Trust LawTrustsRevocable Living Trusts



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7. Personal Effects and Other Tangible Personal Property

*26-73 California Legal Forms--Transaction Guide §§ 73.311-73.319*

**AUTHOR:** Margaret Johnson Hazel Lange Reviewed by James V. Quillinan

**[Reserved]**

§§ 73.311[Reserved]



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*26-73 California Legal Forms--Transaction Guide § 73.320*

**AUTHOR:** Margaret Johnson Hazel Lange Reviewed by James V. Quillinan

**§ 73.320 Vehicle/Vessel Use Tax Information**

**[1] Comment--Use of Form**

This form is the official form for Vehicle/Vessel Use Tax Information [Cal. State Board of Equalization, Form BT-106, revised 10/92]. The form can be used to obtain a tax clearance from the Board of Equalization when the client wishes to transfer a vehicle or vessel to the revocable trust. It must be presented to the Department of Motor Vehicle or Department of Housing, whichever is appropriate, to avoid a transfer tax.

**[2] FORM**

**Vehicle/Vessel Use Tax Information**

[Click here to view image.](#)

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Estate, Gift & Trust LawTrustsAdministrationEstate, Gift & Trust LawTrustsRevocable Living Trusts



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*26-73 California Legal Forms--Transaction Guide § 73.321*

**AUTHOR:** Margaret Johnson Hazel Lange Reviewed by James V. Quillinan

**§ 73.321 Statement of Facts--Designation of Trustee(s)**

**[1] Comment--Use of Form**

This form is an official form entitled Statement of Facts--Designation of Trustee(s) [Form HCD 476.6b, revised 10/86] issued by the California State Department of Housing and Community Development. The form must be completed and furnished to the Department of Housing if the client wishes to transfer a mobilehome, commercial coach, floating home, or truck camper to the revocable trust.

**[2] FORM**

**Statement of Facts--Designation of Trustee(s)**

[Click here to view image.](#)

[Click here to view image.](#)

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Estate, Gift & Trust LawTrustsAdministrationEstate, Gift & Trust LawTrustsRevocable Living TrustsEstate, Gift & Trust LawTrustsTrusteesAppointment



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*26-73 California Legal Forms--Transaction Guide § 73.322*

**AUTHOR:** Margaret Johnson Hazel Lange Reviewed by James V. Quillinan

**§ 73.322 Statement of Facts--Use Tax Exemption**

**[1] Comment--Use of Form**

This form is an official form entitled Statement of Facts--Use Tax Exemption [Form HCD 476.7, rev. 7/97] issued by the California State Department of Housing and Community Development. The form must be completed and furnished to the Department of Housing if the client wishes to transfer a mobilehome, commercial coach, floating home, or truck camper to the revocable trust. It will shows the relationship between the transferor and transferor and whether the transfer results from an inheritance, gift, or court order. Properly completed, it will establish the facts necessary to exempt the transfer to the trust from the use tax.

**[2] FORM**

**Statement of Facts--Use Tax Exemption**

[Click here to view image.](#)

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Estate, Gift & Trust LawTrustsAdministrationEstate, Gift & Trust LawTrustsRevocable Living TrustsTax LawState & Local TaxesUse TaxGeneral Overview



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*26-73 California Legal Forms--Transaction Guide § 73.323*

**AUTHOR:** Margaret Johnson Hazel Lange Reviewed by James V. Quillinan

**§ 73.323 Statement of Facts--Smoke Detector**

**[1] Comment--Use of Form**

This form is an official form entitled Statement of Facts--Smoke Detector [Form HCD 476.6a, rev. 7/97] issued by the California State Department of Housing and Community Development. The form must be completed and furnished to the Department of Housing if the client wishes to transfer a mobilehome to the revocable trust. Properly completed, it will inform the Department of Housing that, at the date of transfer to the trust, the mobilehome unit is equipped with an approved smoke detector that is in proper working order.

**[2] FORM**

**Statement of Facts--Smoke Detector**

[Click here to view image.](#)

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsAdministrationEstate, Gift & Trust LawTrustsRevocable Living TrustsReal Property LawMobilehomes & Mobilehome ParksGeneral OverviewReal Property LawMobilehomes & Mobilehome ParksLicensing, Registration & TitlingReal Property LawMobilehomes & Mobilehome ParksPurchase & Sale



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*26-73 California Legal Forms--Transaction Guide § 73.324*

**AUTHOR:** Margaret Johnson Hazel Lange Reviewed by James V. Quillinan

**§ 73.324 Application for Registration**

**[1] Comment--Use of Form**

This form is the official Application for Registration [Form HCD 480.5, rev. 7/97] issued by the California State Department of Housing and Community Development. The form must be completed and furnished to the Department of Housing if the client wishes to transfer a mobilehome, commercial coach, floating home, or truck camper to the revocable trust. Properly completed, it will furnish all titling information required by the Department of Housing before it will register the mobilehome, commercial coach, floating home, or truck camper in the name of the trustee(s) of the trust.

**[2] FORM**

**Application for Registration**

[Click here to view image.](#)

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Estate, Gift & Trust LawTrustsAdministrationEstate, Gift & Trust LawTrustsRevocable Living TrustsReal Property  
LawMobilehomes & Mobilehome ParksLicensing, Registration & Titling



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*26-73 California Legal Forms--Transaction Guide §§ 73.325-73.329*

**AUTHOR:** Margaret Johnson Hazel Lange Reviewed by James V. Quillinan

**[Reserved]**

§§ 73.325[Reserved]



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DIVISION IV: WILLS AND TRUSTS  
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PART IV. FORMS  
D. Motor Vehicles, Mobilehomes, Boats, and Aircraft  
2. Boats

*26-73 California Legal Forms--Transaction Guide § 73.330*

**AUTHOR:** Margaret Johnson Hazel Lange Reviewed by James V. Quillinan

**§ 73.330 Application for Initial Issue, Exchange, or Replacement of Certificate of Documentation; Redocumentation**

**[1] Comment--Use of Form**

This form is an official United States Coast Guard form entitled Application for Initial Issue, Exchange, or Replacement of Certificate of Documentation; Redocumentation [Form CG-1258, rev. 9/97]. The form must be completed and furnished to the Coast Guard if the client wishes to transfer a vessel subject to registration with the Coast Guard to the revocable trust. Properly completed, it will furnish all of the information required to properly register the vessel in the name of the trustee(s).

**[2] FORM**

**Application for Initial Issue, Exchange, or Replacement of Certificate of Documentation; Redocumentation**

[Click here to view image.](#)

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Estate, Gift & Trust LawTrustsAdministrationEstate, Gift & Trust LawTrustsRevocable Living TrustsTransportation LawWater TransportationLicensing & Registration



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*26-73 California Legal Forms--Transaction Guide § 73.331*

**AUTHOR:** Margaret Johnson Hazel Lange Reviewed by James V. Quillinan

**§ 73.331 Bill of Sale**

**[1] Comment--Use of Form**

This form is an official United States Coast Guard form for a bill of sale [Form CG-1340, rev. 9/92]. This form must accompany the Application for Initial Issue, Exchange, or Replacement of Certificate of Documentation; Redocumentation [*see* § 63,330] when re-titling a vessel that is being transferred to a revocable trust.

**[2] FORM**

**Bill of Sale**

[Click here to view image.](#)

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Estate, Gift & Trust LawTrustsAdministrationEstate, Gift & Trust LawTrustsRevocable Living TrustsTransportation  
LawWater TransportationLicensing & Registration



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*26-73 California Legal Forms--Transaction Guide § 73.332*

**AUTHOR:** Margaret Johnson Hazel Lange Reviewed by James V. Quillinan

**§ 73.332 Application, Consent, and Approval for Withdrawal of Application for Documentation or Exchange of Certification of Documentation [Form CG-4593 (Rev. 9/92)]**

**[1] Comment--Use of Form**

This form is the official United States Coast Guard's form for "application, consent, and approval for withdrawal of application for document or exchange of certificate of documentation" [Form CG-4593, rev. 9/92]. If there is a lien on a vessel, this form must be used to obtain the lienholder's consent to transfer the vessel from the individual's name to the name of the trust.

**[2] FORM**

**Application, Consent, and Approval for Withdrawal of Application for Documentation or Exchange of Certification of Documentation [Form CG-4593 (Rev. 9/92)]**

[Click here to view image.](#)

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Estate, Gift & Trust LawTrustsAdministrationEstate, Gift & Trust LawTrustsRevocable Living TrustsTransportation LawWater TransportationLicensing & Registration



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*26-73 California Legal Forms--Transaction Guide § 73.333*

**AUTHOR:** Margaret Johnson Hazel Lange Reviewed by James V. Quillinan

**§ 73.333 Letter to Sailboat Mortgage Holder**

**[1] Comment--Use of Form**

This form is a letter informing the holder of a mortgage on a sailboat that the settlor has established a revocable trust and that the mortgage holder's approval is required by the State Board of Equalization to facilitate the issuance of a use tax clearance. It should be accompanied by a copy of the form in § 73.332[2].

After the mortgagee consents and returns the original application, the attorneys should retain the original to send to the Coast Guard and provide the State Board of Equalization with a copy, along with the Form BT-106 [ *see* § 73.320].

**[2] FORM**

**Letter to Sailboat Mortgage Holder**

To [ *name and address of mortgage holder* ] :

Re: Proposed transfer of title to revocable inter vivos trust \_\_\_\_\_ [ *name(s) of settlor(s)* ], Settlor[s]  
 \_\_\_\_\_ [ *name(s) of trustee(s)* ], Trustees

Re: Name of Boat: \_\_\_\_\_

Official No.: \_\_\_\_\_

Loan No.: \_\_\_\_\_

Dear Mortgage Holder:

This office represents \_\_\_\_\_ [ *name(s) of settlor(s)* ] who [ *is or are* ] the borrower(s) on the above-named loan.

My clients desire to transfer title to the above-referenced sailboat from to \_\_\_\_\_ [his or her or their] name[s] as [an] individual[s] to \_\_\_\_\_ [his or her or their] revocable trust.

Title will read: \_\_\_\_\_ [specify, e.g., "VERNAL LANGJON and MARZEL LANGJON, TRUSTEES OR THEIR SUCCESSOR IN INTEREST UNDER THE TERMS OF THE VERNAL LANGJON AND MARZEL LANGJON FAMILY TRUST, DATED \_\_\_\_\_"].

Please note that title to all of my [client's or clients'] other assets, including those assets to which you would look for payment in the event of default on the loan, are being transferred into \_\_\_\_\_ [his or her or their] revocable trust. Under the terms of the trust, the trustee[s] [is or are] authorized to maintain and pay the loan, and the trustee[s] hereby agree[s] to pay the loan.

Before the State Board of Equalization will issue a tax clearance, your approval of the transfer is required.

Enclosed is a form from the Coast Guard entitled "Application, Consent, and Approval for Withdrawal of Application for Documentation or Exchange of Certificate of Documentation," CG 4593, which has been signed by my clients. After you have reviewed your file, please consent to the transfer in the space designated at the bottom of the form and return the original form to this office in the stamped self-addressed envelope provided.

Thank you for your prompt attention to this matter. If I can provide you with any additional information to facilitate your approval, please do not hesitate to call.

Sincerely, \_\_\_\_\_ [signature of attorney]  
[typed name]

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsAdministrationEstate, Gift & Trust LawTrustsRevocable Living TrustsTransportation LawWater TransportationGeneral Overview



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*26-73 California Legal Forms--Transaction Guide §§ 73.334-73.339*

**AUTHOR:** Margaret Johnson Hazel Lange Reviewed by James V. Quillinan

**[Reserved]**

§§ 73.334[Reserved]



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3. Aircraft

*26-73 California Legal Forms--Transaction Guide § 73.340*

**AUTHOR:** Margaret Johnson Hazel Lange Reviewed by James V. Quillinan

**§ 73.340 Aircraft Registration Application**

**[1] Comment--Use of Form**

This form is the Federal Aviation Administration's official Aircraft Registration Application [FAA Form 8050-1, rev. 12/90]. This form must be completed and furnished to the FAA if the client wishes to transfer an aircraft to the revocable trust. Properly completed, it will furnish all of the information required to properly re-title the aircraft in the name of the trustee(s).

**[2] FORM**

**Aircraft Registration Application**

[Click here to view image.](#)

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Estate, Gift & Trust LawTrustsAdministrationEstate, Gift & Trust LawTrustsRevocable Living TrustsTransportation  
LawAir TransportationRegistration



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*26-73 California Legal Forms--Transaction Guide § 73.341*

**AUTHOR:** Margaret Johnson Hazel Lange Reviewed by James V. Quillinan

**§ 73.341 Aircraft Bill of Sale**

**[1] Comment--Use of Form**

This form is the Federal Aviation Administration's official Aircraft Bill of Sale [FAA Form 8050-2, revised 9/92]. This form must accompany the Aircraft Registration Application [ *see* § 73.340] when re-titling an aircraft that is being transferred to a revocable trust.

**[2] FORM**

**Aircraft Bill of Sale**

[Click here to view image.](#)

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Estate, Gift & Trust LawTrustsAdministrationEstate, Gift & Trust LawTrustsRevocable Living TrustsTransportation  
LawAir TransportationGeneral OverviewTransportation LawAir TransportationRegistration



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*26-73 California Legal Forms--Transaction Guide § 73.342*

**AUTHOR:** Margaret Johnson Hazel Lange Reviewed by James V. Quillinan

**§ 73.342 Affidavit Stating Each Beneficiary Under the Trust is a U.S. Citizen or a Resident Alien (Aircraft)**

**[1] Comment--Use of Form**

This form is an affidavit that may be used to provide the names and citizenship status of each beneficiary of the revocable trust. It may be used when an aircraft subject to registration with the Federal Aviation Administration is transferred to the revocable trust. The affidavit is prepared for the signature of the trustee or, if there are co-trustees, one of them. The signature of one person will be adequate to provide the required information.

**[2] FORM**

**Affidavit Stating Each Beneficiary Under the Trust is a U.S. Citizen or a Resident Alien (Aircraft)**

AFFIDAVIT

\_\_\_\_\_ [*name of trustee*], being first duly sworn, deposes and says:

1. I am [the trustee *or* one of the trustees] of the [*name and date of trust*].
2. The person[s] named below [is *or* are] the only [beneficiary *or* beneficiares] of the trust:

[*Full legal name of first beneficiary*], who is a \_\_\_\_\_ [citizen of *or* resident alien (i.e., person admitted lawfully for residence in) the United States.

[*Full legal name of second beneficiary*], who is a \_\_\_\_\_ [citizen of *or* resident alien (i.e., person admitted lawfully for residence in) the United States.

[Continue as necessary]

Dated: \_\_\_\_\_.

\_\_\_\_\_ [Signature]

[Typed name]

[Add notary acknowledgment, Form § 73.201 ]

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsAdministrationEstate, Gift & Trust LawTrustsRevocable Living TrustsTransportation  
LawAir TransportationRegistration



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*26-73 California Legal Forms--Transaction Guide §§ 73.343-73.349*

**AUTHOR:** Margaret Johnson Hazel Lange Reviewed by James V. Quillinan

**[Reserved]**

§§ 73.343[Reserved]



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DIVISION IV: WILLS AND TRUSTS  
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E. Intellectual Property  
1. Patents

*26-73 California Legal Forms--Transaction Guide § 73.350*

**AUTHOR:** Margaret Johnson Hazel Lange Reviewed by James V. Quillinan

**§ 73.350 Assignment of Patent**

**[1] Comment--Use of Form**

This form is an Assignment of Patent. It may be used to transfer all of the rights of the settlor(s) in and to a patent (whether pending or issued) to the revocable trust. This form should accompany the Recordation Form Cover Sheet, Patents Only [ *see § 73.351* ] when that form is submitted to the Commissioner of Patents and Trademarks.

**[2] FORM**

**Assignment of Patent**

ASSIGNMENT OF PATENT

**Recitals**

1. \_\_\_\_\_ [name(s) of settlor(s)] [has or have] invented certain new and useful improvements in [name of patent] for which [an Application or a United States Letters Patent] was granted on \_\_\_\_\_ [date], with [Serial or Patent] Number [number].
2. \_\_\_\_\_ [name(s) of settlor(s)], without consideration and for the purpose of changing formal title only, \_\_\_\_\_ [wish or wishes] to transfer and assign to the \_\_\_\_\_ [name and date of trust], its successors and assigns, all of \_\_\_\_\_ [his or her or their] right, title, and interest in and to [that Application or those United States Letters Patent].
3. The name and post office address of \_\_\_\_\_ [name(s) of settlor(s)] [is or are] as follows:

\_\_\_\_\_ [name of (first) settlor]  
 \_\_\_\_\_ [street address]  
 \_\_\_\_\_ [city, state, zip code]

\_\_\_\_\_ [name of (second) settlor]  
 \_\_\_\_\_ [street address]  
 \_\_\_\_\_ [city, state, zip code]

### Assignment

4. \_\_\_\_\_ [name(s) of settlor(s)], without consideration and for the purpose of changing formal title only, [does or do] hereby transfer and assign to the \_\_\_\_\_ [name and date of trust], its successors and assigns, all of \_\_\_\_\_ [his or her or their] right, title, and interest in and to [that Application or those United States Letters Patent].

5. This assignment is effective immediately.

Date: \_\_\_\_\_.

\_\_\_\_\_ [signature of first settlor]  
 [Typed name]

\_\_\_\_\_ [signature of second settlor]  
 [Typed name]

[ Add acknowledgment, Form § 73.201 ]

### Legal Topics:

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsAdministrationEstate, Gift & Trust LawTrustsRevocable Living TrustsPatent  
 LawOwnershipConveyancesAssignments



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DIVISION IV: WILLS AND TRUSTS  
CHAPTER 73 FUNDING A REVOCABLE TRUST  
PART IV. FORMS  
E. Intellectual Property  
1. Patents

*26-73 California Legal Forms--Transaction Guide § 73.351*

**AUTHOR:** Margaret Johnson Hazel Lange Reviewed by James V. Quillinan

**§ 73.351 Recordation Form Cover Sheet, Patents Only**

**[1] Comment--Use of Form**

This form is the official Recordation Cover Sheet, Patents Only [Form PTO-1695, revised 1/92] issued by the United States Patent and Trademarks Office. This form must be used as a cover page when the Assignment of Patent [ *see* § 73.350] is submitted to the Patent and Trademarks Office. The form lists the pertinent information and provides space for the signatures needed to complete an assignment of a patent to the revocable trust.

**[2] FORM**

**Recordation Form Cover Sheet, Patents Only**

[Click here to view image.](#)

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Patent LawOwnershipConveyancesRecordation



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DIVISION IV: WILLS AND TRUSTS  
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E. Intellectual Property  
1. Patents

*26-73 California Legal Forms--Transaction Guide § 73.352*

**AUTHOR:** Margaret Johnson Hazel Lange Reviewed by James V. Quillinan

**§ 73.352 Post Card Confirming PTO Receipt of Assignment**

**[1] Comment--Use of Form**

This is a post card designed to be submitted to the United States Patent and Trademarks Office when an Assignment of Patent [ *see § 73.350*] is submitted to that office. A clerk in the Patent and Trademarks Office will fill out the blanks in the post card and return it to the attorney, thereby confirming receipt of the Assignment.

**[2] FORM**

**Post Card Confirming PTO Receipt of Assignment**

*[font of post card:]*

\_\_\_\_\_ *[name and address of attorney(s)]*

*[reverse side of post card:]*

Attorney Docket: \_\_\_\_\_

Attorney's file No or Ref. No.: \_\_\_\_\_

Inventor/Applicant: \_\_\_\_\_

Name of settlor: \_\_\_\_\_

Ser./Pat No. [*patent number of issued patent or serial number of pending patent*]

Filing/Issue Date: [*Issue date of issued patent or date the pending patent was filed*]

Paper(s) enclosed: Assignment of Patent

Fees: [*Note: contact Patent and Trademarks Office for current amount of fee*]

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsAdministrationEstate, Gift & Trust LawTrustsRevocable Living TrustsPatent  
LawOwnershipConveyancesAssignmentsPatent LawOwnershipConveyancesRecordation



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1. Patents

*26-73 California Legal Forms--Transaction Guide §§ 73.353-73.359*

**AUTHOR:** Margaret Johnson Hazel Lange Reviewed by James V. Quillinan

**[Reserved]**

§§ 73.353[Reserved]



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 2. Trademarks

*26-73 California Legal Forms--Transaction Guide § 73.360*

**AUTHOR:** Margaret Johnson Hazel Lange Reviewed by James V. Quillinan

**§ 73.360 Assignment of Trademark**

**[1] Comment--Use of Form**

This form is an Assignment of Trademark. It may be used to transfer all of the rights of the settlor(s) in and to a trademark (whether pending or issued) to the revocable trust. This form should accompany the Recordation Form Cover Sheet, Trademarks Only [ *see § 73.361*] when that form is submitted to the Commissioner of Patents and Trademarks.

**[2] FORM**

**Assignment of Trademark**

ASSIGNMENT OF TRADEMARK

**Recitals**

1. \_\_\_\_\_ [name(s) of settlor(s)] [has or have] adopted, used, and [is or are] now using a trademark entitled \_\_\_\_\_ [name of trademark], which is registered Number [number], dated \_\_\_\_\_ [date].
2. \_\_\_\_\_ [name(s) of settlor(s)], without consideration and for the purpose of changing formal title only, wish[es] to transfer and assign to the \_\_\_\_\_ [name and date of trust], its successors and assigns, all of \_\_\_\_\_ [his or her or their] right, title, and interest in and to \_\_\_\_\_ that trademark.
3. The name and post office address of \_\_\_\_\_ [name(s) of settlor(s)] [is or are] as follows:

\_\_\_\_\_ [name of (first) settlor]  
 \_\_\_\_\_ [street address]  
 \_\_\_\_\_ [city, state, zip code]

\_\_\_\_\_ [name of (second) settlor]  
 \_\_\_\_\_ [street address]  
 \_\_\_\_\_ [city, state, zip code]

### Assignment

4. \_\_\_\_\_ [name(s) of settlor(s)], without consideration and for the purpose of changing formal title only, do[es] hereby transfer and assign to the \_\_\_\_\_ [name and date of trust], its successors and assigns, all of \_\_\_\_\_ [his or her or their] right, title, and interest in and to the aforementioned trademark.

5. This assignment is effective immediately.

Date: \_\_\_\_\_.

\_\_\_\_\_ [signature of first settlor]  
 [Typed name]

\_\_\_\_\_ [signature of second settlor]  
 [Typed name]

[Add acknowledgment; see Form § 73.201]

### Legal Topics:

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsAdministrationEstate, Gift & Trust LawTrustsRevocable Living TrustsTrademark  
 LawConveyancesAssignments



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DIVISION IV: WILLS AND TRUSTS  
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PART IV. FORMS  
E. Intellectual Property  
2. Trademarks

*26-73 California Legal Forms--Transaction Guide § 73.361*

**AUTHOR:** Margaret Johnson Hazel Lange Reviewed by James V. Quillinan

**§ 73.361 Recordation Form Cover Sheet, Trademarks Only**

**[1] Comment--Use of Form**

This form is an official form entitled Recordation Cover Sheet, Trademarks Only [Form PTO-1594, revised 6/93] issued by the United States Patent and Trademarks Office. This form must be used as a cover page when the Assignment of Trademark [ *see* § 73.360] is submitted to the Patent and Trademarks Office. The form lists the pertinent information and provides space for the signatures needed to complete an assignment of a trademark to the revocable trust.

**[2] FORM**

**Recordation Form Cover Sheet Trademarks Only**

[Click here to view image.](#)

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsAdministrationEstate, Gift & Trust LawTrustsRevocable Living TrustsTrademark  
LawConveyancesAssignments



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DIVISION IV: WILLS AND TRUSTS  
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2. Trademarks

*26-73 California Legal Forms--Transaction Guide §§ 73.362-73.369*

**AUTHOR:** Margaret Johnson Hazel Lange Reviewed by James V. Quillinan

**[Reserved]**

§§ 73.362[Reserved]



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DIVISION IV: WILLS AND TRUSTS  
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 3. Copyrights

*26-73 California Legal Forms--Transaction Guide § 73.370*

**AUTHOR:** Margaret Johnson Hazel Lange Reviewed by James V. Quillinan

**§ 73.370 Assignment of Copyright**

**[1] Comment--Use of Form**

This form is an assignment of copyright. It may be used to transfer all of the rights of the settlor(s) in and to a copyright. The form should be submitted to the Copyright Office at the Library of Congress in Washington, D.C., together with the Letter of Instructions in § 73.371.

**[2] FORM**

**Assignment of Copyright**

ASSIGNMENT OF COPYRIGHT

**Recitals**

1. \_\_\_\_\_ [name(s) of settlor(s)] [is or are] the author[s] and copyright owner[s] of a[n] [describe, e.g., literary work or musical work or dramatic work or graphic work or pictorial work or architectural work or audiovisual work or motion picture or sound recording] bearing the title of \_\_\_\_\_ and described as \_\_\_\_\_ [describe work in reasonable detail, including, if appropriate, date of creation or copyright] (hereinafter "the work").

2. \_\_\_\_\_ [name(s) of settlor(s)], without consideration and for the purpose of changing formal title only, wish[es] to transfer and assign to the \_\_\_\_\_ [name and date of trust], its successors and assigns, all of \_\_\_\_\_ [his or her or their] right, title, and interest in and to "the work" and the copyright thereto.

**Assignment**

3. \_\_\_\_\_ [*name(s) of settlor(s)*], without consideration and for the purpose of changing formal title only, do[es] hereby transfer and assign to the \_\_\_\_\_ [*name and date of trust*], its successors and assigns, all of \_\_\_\_\_ [*his or her or their*] right, title, and interest in and to "the work" and the copyright thereto, in the United States and throughout the world.

4. This assignment is effective immediately.

Date: \_\_\_\_\_.

\_\_\_\_\_ [*signature of first settlor*]

[*Typed name*]

\_\_\_\_\_ [*signature of second settlor*]

[*Typed name*]

[*Add acknowledgment; see § 73.201* ]

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Copyright Law  
 Conveyances  
 General Overview  
 Estate, Gift & Trust Law  
 Trusts  
 Administration  
 Estate, Gift & Trust  
 Law  
 Trusts  
 Revocable Living Trusts



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DIVISION IV: WILLS AND TRUSTS  
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PART IV. FORMS  
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3. Copyrights

*26-73 California Legal Forms--Transaction Guide § 73.371*

**AUTHOR:** Margaret Johnson Hazel Lange Reviewed by James V. Quillinan

**§ 73.371 Letter of Instructions to Copyright Office**

**[1] Comment--Use of Form**

This form is a Letter of Instructions addressed to the Copyright Office at the Library of Congress in Washington, D.C. It is a cover letter and should be used by the attorney to transmit an original Assignment of Copyright [ *see § 73.370*] to the Copyright Office. It requests that the Copyright Office microfilm the assignment, make it a public record, and return the original after the microfilming has been completed.

**[2] FORM**

**Letter of Instructions to Copyright Office**

Copyright Office  
Library of Congress  
Washington, D.C. 20559  
Attention: Document Unit

Re: Copyright No. \_\_\_\_\_  
\_\_\_\_\_ [name and date of trust]

Dear Sir/Madam:

Enclosed please find an original Assignment of Copyright dated \_\_\_\_\_ and executed by \_\_\_\_\_ . This represents an assignment to the trustee(s) of a revocable inter vivos trust.

Please microfilm the Assignment and, after the microfilming has been completed, return the original to this office in the stamped, self-addressed envelope enclosed.

For our immediate reference, please acknowledge receipt of the Assignment at the place indicated below.

Thank you for your prompt attention to this matter.

Sincerely,

\_\_\_\_\_ [*signature of attorney*]  
[*typed name*]

The Assignment of Copyright described above was received by the Copyright Office on \_\_\_\_\_.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Copyright Law  
Conveyances  
General Overview  
Estate, Gift & Trust Law  
Trusts  
Administration  
Estate, Gift & Trust Law  
Trusts  
Revocable Living Trusts



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DIVISION IV: WILLS AND TRUSTS  
CHAPTER 74 SPLIT-INTEREST CHARITABLE TRUSTS

*26-74 California Legal Forms--Transaction Guide 74.syn*

**AUTHOR:** Reviewed by Albert G. Handelman

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Instrument Transferring Property to Pooled Income Fund--Two Lives, Concurrent and Consecutive Interests

Reviewed by Albert G. Handelmann\*

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CHAPTER 74 SPLIT-INTEREST CHARITABLE TRUSTS

*26-74 California Legal Forms--Transaction Guide Scope*

**AUTHOR:** Reviewed by Albert G. Handelman

**Scope**

Reviewed by Albert G. Handelman\* Scope

This chapter covers split-interest charitable trusts. The drafting of these trusts is controlled primarily by federal tax law. The federal income, estate, and gift tax laws and regulations set forth specific requirements for gifts in trust to charitable organizations. This chapter explains the requirements that must be satisfied in order to obtain full tax benefits, and illustrates different types of trust instruments that qualify under the federal tax laws and regulations.

In drafting any charitable trust for a client, the overall estate planning ramifications must be considered. For general estate planning coverage, see Ch. 60, *Estate Planning*. Charitable contributions in general are covered in Ch. 69, *Charitable Dispositions*. Ch. 69 contains a detailed discussion of the federal income, gift, and estate tax charitable deductions, which are discussed in this chapter only insofar as they directly relate to the content of split-interest charitable trusts.

**FOOTNOTES:**

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**§ 74.01 Related Forms With Tax Analysis**

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**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsCharitable TrustsTax LawFederal Estate & Gift TaxesDeductionsCharitable Deductions (IRC secs. 2055, 2522, 2524)General OverviewTax LawFederal Taxpayer GroupsIncome Taxation of Estates, Trusts & BeneficiariesCredits & Deductions (IRC secs. 641-668, 671, 681, 685)Deductions



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**§ 74.02 Related California Forms**

California Legal Forms (Matthew Bender).

Ch. 13, *Nonprofit Corporations* .

Ch. 60, *Estate Planning* .

Ch. 60A, *Gifts* .

Ch. 61, *Will Drafting and Complete Will Forms* .

Ch. 62, *Codicils* .

Ch. 63, *Will Provisions*.

Ch. 64, *Testamentary Trusts: Payment and Distribution Provisions*.

Ch. 64A, *Testamentary Trusts: Trustee Provisions*.

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**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Trusts Charitable Trusts Tax Law Federal Estate & Gift Taxes Deductions Charitable Deductions (IRC secs. 2055, 2522, 2524) General Overview Tax Law Federal Taxpayer Groups Income Taxation of Estates, Trusts & Beneficiaries Credits & Deductions (IRC secs. 641-668, 671, 681, 685) Deductions Tax Law State & Local Taxes Estate & Gift Tax Estate Tax Deductions Tax Law State & Local Taxes Income Tax Individuals, Estates & Trusts Deductions



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**§ 74.03 California Statutes**

Uniform Supervision of Trustees for Charitable Purposes Act. *Gov. Code § 12580 et seq.*

Filing copy of article of incorporation or other governing instrument. *Gov. Code § 12585.*

Filing periodic reports containing financial information. *Gov. Code § 12586.*

Duties of trustees of private foundations, charitable trusts, and split-interest trusts. *Prob. Code § 16100 et seq.*

Construction of charitable remainder unitrusts and charitable remainder annuity trusts to comply with Internal Revenue Code requirements. *Prob. Code § 21540.*

Deductions under California Personal Income Tax Law allowed in accordance with applicable federal law. *Rev. & Tax. Code § 17201.*

Taxation of estates, trusts, beneficiaries, and decedents. *Rev. & Tax. Code § 17731 et seq.*

Unrelated business taxable income. *Rev. & Tax. Code § 23732.*

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Unrelated debt-financed income. *Rev. & Tax. Code § 23735.*

Charitable deduction allowable to corporations. *Rev. & Tax. Code §§ 24357-24359.1.*

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsConstructive TrustsEstate, Gift & Trust LawTrustsTrusteesGeneral Overview



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**§ 74.04 Federal Sources**

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Allowance of deduction. *I.R.C. § 170(a).*

Percentage limitations. *I.R.C. § 170(b).*

Definition of "charitable contribution." *I.R.C. § 170(c).*

Treatment of certain amounts paid to or for benefit of educational institutions. *I.R.C. § 170(l).*

Treatment of income from intellectual property contribution. *I.R.C. § 170(m).*

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Governing instruments for private foundations. *I.R.C. § 508(e).*

Private foundations. *I.R.C. § 509.*

Definition of "private foundation." *I.R.C. § 509(a).*

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Charitable remainder trusts. *I.R.C. § 664.*

Federal estate tax charitable deduction. *I.R.C. § 2055.*

Allowance of deduction. *I.R.C. § 2055(a).*

Death taxes payable out of bequests. *I.R.C. § 2055(c).*

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Disallowance of deduction in certain cases. *I.R.C. § 2055(e).*

Federal gift tax charitable deduction. *I.R.C. § 2522.*

Allowance of deduction to citizens or residents. *I.R.C. § 2522(a).*

Allowance of deduction to nonresidents. *I.R.C. § 2522(b).*

Disallowance of deduction in certain cases. *I.R.C. § 2522(c).*

Deduction allowable for charitable remainder in trust. *I.R.C. § 2522(c)(2)(A).*

Deduction allowable for income interest in trust for charity. *I.R.C. § 2522(c)(2)(B).*

Denial of deduction for gifts or bequests to foreign organizations. *I.R.C. § 4948(c)(4).*

## **[2] Regulations**

Allowance of income tax charitable deduction. *Treas. Reg. § 1.170A-1.*

Amounts paid to maintain certain students as members of taxpayer's household. *Treas. Reg. § 1.170A-2.*

Reduction of deduction for interest on certain indebtedness. *Treas. Reg. § 1.170A-3.*

Reduction of deduction for contributions of certain appreciated property. *Treas. Reg. § 1.170A-4.*

Charitable contributions in trust. *Treas. Reg. § 1.170A-6.*

Limitation on deductions by individuals. *Treas. Reg. § 1.170A-8.*

Definition of *I.R.C. § 170(b)(1)(A)* organizations. *Treas. Reg. § 1.170A-9.*

Record-keeping requirements. *Treas. Reg. § 1.170A-13.*

Charitable remainder trusts. *Treas. Reg. § 1.664-1.*

Charitable remainder annuity trusts. *Treas. Reg. § 1.664-2.*

Charitable remainder unitrusts. *Treas. Reg. § 1.664-3.*

Calculation of fair market value of remainder interest in charitable remainder unitrust. *Treas. Reg. § 1.664-4.*

Estate tax charitable deduction. *Treas. Reg. § 20.2055-1.*

Transfers not exclusively for charitable purposes. *Treas. Reg. § 20.2055-2.*

Death taxes payable out of charitable transfers. *Treas. Reg. § 20.2055-3.*

### **[3] Revenue Rulings and Revenue Procedures**

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**Legal Topics:**

For related research and practice materials, see the following legal topics:

Tax LawFederal Estate & Gift TaxesDeductionsCharitable Deductions (IRC secs. 2055, 2522, 2524)General  
OverviewTax LawFederal Taxpayer GroupsIncome Taxation of Estates, Trusts & BeneficiariesCredits & Deductions  
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**AUTHOR:** Reviewed by Albert G. Handelman

**§ 74.07 Law Reviews**

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Estate, Gift & Trust Law Trusts Charitable Trusts Tax Law Federal Estate & Gift Taxes Deductions Charitable Deductions (IRC secs. 2055, 2522, 2524) General Overview Tax Law Federal Taxpayer Groups Income Taxation of Estates, Trusts & Beneficiaries Credits & Deductions (IRC secs. 641-668, 671, 681, 685) Deductions



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**AUTHOR:** Reviewed by Albert G. Handelman

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Ch. 30, *Charitable Devises*.

Ch. 116, *Charitable Remainder Trusts*.

Ch. 117, *Charitable Lead Trusts*.

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Nossaman & Wyatt, Trust Administration & Taxation, Ch. 3, *Validity--Charitable Trusts* (Matthew Bender).

**[2] Additional Text References**

Witkin, Summary of California Law, vol. 11, *Community Property*, §§ 151-157; vol. 13, *Trusts*, §§ 194-198 (10th ed. 2005).

Weinstock, Planning an Estate: A Guidebook of Principles and Techniques (4th ed. 1995), Ch. 14, *Making Gifts to Charity* (Shepard's/McGraw-Hill).

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law  
Trusts  
Charitable Trusts  
Tax Law  
Federal Estate & Gift Taxes  
Deductions  
Charitable Deductions  
(IRC secs. 2055, 2522, 2524)  
General Overview  
Tax Law  
Federal Taxpayer Groups  
Income Taxation of Estates, Trusts &  
Beneficiaries  
Credits & Deductions (IRC secs. 641-668, 671, 681, 685)  
Deductions



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DIVISION IV: WILLS AND TRUSTS  
CHAPTER 74 SPLIT-INTEREST CHARITABLE TRUSTS  
PART I. RESEARCH GUIDE  
B. Secondary Sources

*26-74 California Legal Forms--Transaction Guide § 74.09*

**AUTHOR:** Reviewed by Albert G. Handelman

**[Reserved]**

§ 74.09[Reserved]



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DIVISION IV: WILLS AND TRUSTS  
CHAPTER 74 SPLIT-INTEREST CHARITABLE TRUSTS  
PART II. LEGAL BACKGROUND

*26-74 California Legal Forms--Transaction Guide § 74.10*

**AUTHOR:** Reviewed by Albert G. Handelman

**§ 74.10 Nature and Purpose of Split-Interest Charitable Trusts**

**[1] Nature and Types**

A split-interest charitable trust is essentially a trust containing an income interest and a remainder interest, one of which is held by one or more noncharitable beneficiaries and the other of which is held by one or more charitable organizations, and conforming to the charitable deduction requirements of the federal tax laws [*see* [2], *below*]. There are two basic types of split-interest charitable trusts:

- The "charitable remainder trust," in which one or more individuals have life income interests and, on the death of the last income beneficiary, the remainder passes to one or more charitable organizations.
- The "charitable lead trust," in which one or more charitable organizations are given an income interest in the trust property for a specified period and, on termination of that period, the remainder or reversionary interest passes to one or more noncharitable remainder beneficiaries.

Each of these basic types of split-interest charitable trusts is further divided into subcategories. The various subtypes and their distinguishing features are discussed elsewhere in this chapter.

**[2] Tax Purpose**

Split-interest charitable trusts, as used in modern estate planning, are essentially driven by federal tax law. The primary purpose of all split-interest charitable trusts is to allow the donor to make a charitable contribution of property that will qualify for the various federal tax deductions for charitable contributions, while at the same time retaining either the current or future use of the trust property for the donor or another non-charitable beneficiary. However, to qualify for a charitable deduction for the contribution of a trust interest to a charity, the trust must be in a specifically defined form that meets the requirements of the Internal Revenue Code and the applicable regulations for these types of trusts.

The federal requirements are detailed, specific, and limiting. Prior to 1969, the value of the interest given to the charity

was computed and an income, estate, or gift tax charitable deduction, as appropriate, was allowed for that value. Since the Tax Reform Act of 1969, split-interest trusts have had to meet stringent requirements to obtain a charitable deduction for the interest given to the charity. For example, if a split-interest trust provides that the income of the trust is payable to the settlor for life and the remainder is given to a qualified charitable organization, there is a gift to the charitable organization of the present value of the remainder interest. The value of the remainder transferred to the qualified charitable beneficiary will qualify for an income tax charitable deduction [*see I.R.C. § 170*]. However, if the trust is not in the prescribed form, neither an income nor a gift tax charitable deduction is available [*see I.R.C. §§ 170(f)(2), 2522(c)(2)*].

The federal income, gift, and estate tax charitable deductions are discussed in detail in Ch. 69, *Charitable Deductions*. The basic features of the deductions are not repeated in this chapter, which instead focusses on the requirements of the deduction specifically applicable to split-interest charitable trusts. Readers should consult Ch. 69 for information on qualifying organizations, the maximum amount of the deductions, and similar general issues.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsCharitable Trusts



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DIVISION IV: WILLS AND TRUSTS  
CHAPTER 74 SPLIT-INTEREST CHARITABLE TRUSTS  
PART II. LEGAL BACKGROUND

*26-74 California Legal Forms--Transaction Guide § 74.11*

**AUTHOR:** Reviewed by Albert G. Handelman

**§ 74.11 Charitable Remainder Trusts**

**[1] Basic Features and Requirements**

Although the Internal Revenue Code does not provide a general definition of a charitable remainder trust, the Treasury Regulations define a charitable remainder trust as "a trust which provides for a specified distribution, at least annually, to one or more beneficiaries, at least one of which is not a charity, for life or for a term of years, with an irrevocable remainder interest to be held for the benefit of, or paid over to, charity" [*Treas. Reg. § 1.664-1(a)(1)(i)*]. If there is only one income beneficiary, that beneficiary must not be a qualified charitable beneficiary; if there are two or more income beneficiaries, at least one of the beneficiaries must not be a qualified charitable beneficiary [*I.R.C. § 664(d)(1)(A), (2)(A)*]. If the income interest is for a term of years, it must not be more than 20 years [*I.R.C. § 664(d)(1)(A), (2)(A)*].

**[2] Types**

To qualify for charitable deductions, contributions of remainder interests in trust to a charity must be to one of the following [*see I.R.C. §§ 170(f)(2), 2055(e)(2), 2522(c)(2)*]:

- A "charitable remainder annuity trust." A charitable remainder annuity trust basically pays a fixed annual sum (e.g., \$50,000 a year, subject to applicable percentage limitations) to the income beneficiary for life or for a specified term of years. Both the amount of the annuity and the term are subject to specific limitations. The distribution must be a "sum certain" which is not less than 5 or more than 50 percent of the initial net fair market value of the trust assets [*I.R.C. § 664(d)(1)(A); Treas. Reg. §§ 1.664-1(a)(1)(i), 1.664-2(a)(1)(i), (a)(2)(i)*]. Charitable remainder annuity trusts are discussed in § 74.12.
- A "charitable remainder unitrust." A charitable remainder unitrust basically pays fixed a percentage of the value of the trust assets (e.g., 10 percent) to the income beneficiary annually for life or for a specified term of years. Both the percentage and the term are subject to specific limitations. The fixed percentage must be not less than 5 or more than 50 percent of the net fair market value of the trust assets, determined annually [*I.R.C. § 664(d)(2)(A); Treas. Reg. §§ 1.664-1(a)(1)(i), 1.664-3(a)(1)(i), (a)(2)(i)*].

Charitable remainder unitrusts are discussed in § 74.13.

- A "pooled income fund." A pooled income fund differs significantly in structure and function from the other two types of charitable remainder trusts discussed above. Pooled income funds are basically trusts created by charitable organizations to allow individual donors to "pool" contributions in a single fund administered by a common trustee. Pooled income funds are discussed in § 74.14.

For transfers in trust made after July 28, 1997, the Internal Revenue Code requires that the value of the remainder interest in a charitable remainder trust, whether an annuity trust or a unitrust, be at least 10 percent of the initial net fair market value of all property placed in the trust as determined under *I.R.C. § 7520* [*I.R.C. § 664(d)(1)(D), (2)(D)*], as added by Pub. L. No. 105-34, § 1089(b)(1); *see* Pub. L. No. 105-34, § 1089(b)(6)(B)].

To qualify as a charitable remainder trust, a trust must be either a charitable remainder annuity trust "in every respect" or a charitable remainder unitrust "in every respect" [*Treas. Reg. § 1.664-1(a)(2)*]. Thus, a hybrid trust that incorporates features of both types of remainder trusts will not qualify for the charitable deduction [*Treas. Reg. § 1.664-1(a)(2); see I.R.C. § 170*].

### [3] Valuation of Charitable Remainder Interests

#### [a] Ten-Percent Rule

For transfers in trust made after July 28, 1997, the Internal Revenue Code requires that the value of the remainder interest in a charitable remainder trust, whether an annuity trust or a unitrust, be at least 10 percent of the initial net fair market value of all property placed in the trust as determined under *I.R.C. § 7520* [*I.R.C. § 664(d)(1)(D), (2)(D)*], as added by Pub. L. No. 105-34, § 1089(b)(1); *see* Pub. L. No. 105-34, § 1089(b)(6)(B)]. *I.R.C. § 7520* provides that the value of any annuity, any interest for life or a term of years, or any remainder or reversionary interest, must be determined under the IRS valuation tables [*see I.R.C. § 7520(a)(1)*], and by using an interest rate (rounded to the nearest two-tenths of one percent) equal to 120 percent of the Federal midterm rate in effect under *I.R.C. § 1274(d)(1)* for the month in which the valuation date falls [*I.R.C. § 7520(a)(2)*]. In other words, the determination of the value of the charitable remainder is based on the *actuarial values* produced by considering the payout rate chosen and the value of the trust assets and prevailing market interest rates at the beginning of the trust term. Although obvious, it is worth repeating that the actual length of time that the trust ultimately endures, or the amounts actually paid out to the beneficiaries over the term of the trust, are irrelevant to this determination.

#### **PRACTICE TIP:**

While it may seem that this 10 percent remainder test will be easy to satisfy, the drafter should bear in mind that it presents a very tangible trap for the unwary. If the annuity or unitrust amount is relatively high, if the noncharitable beneficiary or beneficiaries are relatively young, or if there is some seemingly innocuous combination of these two factors, it can be quite easy to create a charitable remainder trust worth less than 10 percent of the initial value of the trust property. Great care must be taken to accurately determine the value of the charitable remainder during the process of designing the trust. *Commentary by Albert G. Handelman.*

To illustrate an extreme example of the problem raised in the practice tip above, consider the result if a young married couple with a long life expectancy were to establish a charitable remainder trust for the benefit of themselves and their minor child for their consecutive lives, and provide for an annual payout amounting to, say, 20 percent of the value of the trust assets at the inception of the trust. It is clear in this situation that from an actuarial point of view, there is unlikely to be anything left over for the charity, and the trust therefore would fail to qualify under the 10 percent rule. However, the problem can arise in circumstances that are considerably less obvious than this example. If the actual annual payout, computed on a percentage basis, exceeds the interest rate determined under *I.R.C. § 7520(a)(2)*, the

actuarial calculations will treat the trust assets as depleting annually. If the trust continues long enough, or the payout percentage is high enough, the value of the remainder interest may fall below 10 percent. Because of this danger, it is absolutely essential that the attorney, after determining from the client(s) what kind of annual payout is desired, calculate the value of the resulting charitable interest before the trust becomes effective.

#### **[b] Charitable Remainder Annuity Trust**

The value of a remainder interest in a charitable remainder annuity trust for the purpose of income, gift, and estate tax charitable deductions is determined under *Treas. Reg. § 1.664-2* [see *Treas. Reg. §§ 1.170A-6(b)(2)*, 20.2055-2(f)(2), 25.2522(c)-3(d)(2)]. Under this regulation, the value of the remainder interest is determined by subtracting the present value of the annuity income interest of the noncharitable beneficiary from the net fair market value of the property placed in trust [*Treas. Reg. § 1.664-2(c)*]. The value of the annuity interest is calculated under *Treas. Reg. § 20.2031-7T(d)* (valuation dates after April 30, 1999) or *Treas. Reg. § 20.2031-7A(a)-(f)* (valuation dates before May 1, 2009).

#### **[c] Charitable Remainder Unitrust**

The value of a remainder interest in a charitable remainder unitrust for the purpose of income, gift, and estate tax charitable deductions is determined under *Treas. Reg. § 1.664-4* [see *Treas. Reg. §§ 1.170A-6(b)(2)*, 20.2055-2(f)(2), 25.2522(c)-3(d)(2)]. The procedure for calculating the present value of a remainder interest in a charitable remainder unitrust is set forth in *Treas. Reg. § 1.664-4*. This regulation provides detailed instructions and tables for this calculation.

#### **[d] Pooled Income Fund**

The value of a remainder interest in a pooled income fund for the purpose of income, gift, and estate charitable deductions is determined under *Treas. Reg. § 1.642(c)-6* [see *Treas. Reg. §§ 1.170A-6(b)(2)*, 20.2055-2(f)(2)(i), 25.2522(c)-3(d)(2)]. The present value of the remainder interest is calculated under *Treas. Reg. § 1.642(c)-6A(f)* (valuation dates after April 30, 1999) or *Treas. Reg. § 1.642(c)-6A(a)-(e)* (valuation dates before May 1, 1999). The present value of the remainder interest is calculated based on the life contingencies contained in *Treas. Reg. § 20.2031-7A(f)(4)*, 20.2031-7T or 20.2031-7A and discounted at the highest yearly rate of return of the pooled income fund for the previous three years [*Treas. Reg. § 1.642(c)-6A(f)*, 1.642(c)-6T(d), 1.642(c)-6T(e)].

#### **[4] Who May Be A Grantor**

Because neither the Internal Revenue Code nor the regulations contain any limitations or restrictions on the transferor, the grantor can presumably be any person or persons. The Internal Revenue Code defines "person" to include an individual, trust, estate, partnership, association, company, or corporation [*I.R.C. § 7701(a)(1)*]. However, the appropriate source of a transfer to a charitable trust may depend on the availability and value of the applicable charitable deductions [ see Ch. 69, *Charitable Dispositions* ].

#### **[5] Trust Property**

Any money or other property may be transferred to a charitable remainder trust. However, with respect to tangible personal property, there is no income tax deduction if the grantor or related parties (as defined in *I.R.C. § 267(b)* or 707(b)) are named as income beneficiaries [*I.R.C. § 170(a)(3)*; *Treas. Reg. § 1.664-2(d)*]. In addition, mortgaged property may cause unrelated business income to the trust under *I.R.C. § 511* or 514, realization of gain to the donor under *I.R.C. § 1011*, and penalties for self-dealing under *I.R.C. § 4941*. The transfer of mortgaged property, when the donor is liable for the indebtedness and when the charitable remainder trust may make payments on the indebtedness, will cause the trust to fail to qualify due to treatment as a grantor trust [see *Priv. Ltr. Rul. 9015049* ].

### **[6] Who May Be A Trustee**

Generally, the trustee can be any person, including the donor, who often prefers to retain the power to administer the trust assets in himself or herself or in a relative. Although retention of certain powers as trustee normally would cause the trust assets to be included with the donor's own assets for tax purposes [ *see Ch. 72, Irrevocable Trusts, § 72.12[2]* ], there is nothing in the Internal Revenue Code or regulations prohibiting the donor from acting as the trustee of a charitable remainder trust [ *see Priv. Ltr. Rul. 7730015* ]. For example, a trust in which the donor retained the right to remove the trustee and name himself trustee qualified as a charitable remainder trust [ *Rev. Rul. 77-285, 1977-2 C.B. 213* ]. However, in a trust in which the donor had the power to affect the beneficial enjoyment of the income distributions, the donor was considered the owner of the trust [ *Rev. Rul. 77-285, 1977-2 C.B. 213* ]. In such a case, or when the trust includes hard-to-value property such as closely held stock and real estate, an independent trustee is needed [ *Priv. Ltr. Rul. 8648048* ]. In any event, administration of a charitable trust can become complex, so use of a professional trustee's services is always worthy of consideration.

### **[7] Permissible Income Beneficiaries**

Charitable remainder trust income must be paid to "one or more persons" [ *see I.R.C. § 7701(a)(1)* ("person" defined)], at least one of which is not a charitable organization described in *I.R.C. § 170(c)*, for a term of years not exceeding 20 years, or in the case of individuals, for a term of years not exceeding 20 years or for the life or lives of that individual or those individuals [ *I.R.C. § 664(d)(1)(A), (2)(A)* ]. To qualify for payments for life, the individual recipient must be living at the time the trust is created [ *I.R.C. § 664(d)(1)(A), (2)(A)* ].

A "person" may be an individual, a trust, an estate, a partnership, an association, a company, or a corporation [ *I.R.C. § 7701(a)(1)* ]. However, a charitable remainder trust is not a proper vehicle to provide for the maintenance of a pet after the owner has died, because the pet is not a "person" for tax law purposes [ *Rev. Rul. 78-105, 1978-1 C.B. 295* ].

Because the Internal Revenue Code requires individual recipients of unitrust and annuity amounts to be living at the date of trust creation, a qualified charitable remainder trust cannot provide for payments of amounts to a named class of individuals unless all the individuals in the class are alive and ascertainable at the time the trust is created [ *Treas. Reg. §§ 1.664-2(a)(3)(i), 1.664-3(a)(3)(i)* ]. However, all individuals in a class need not be alive and ascertainable at the time a trust is created when the period for which the annuity or unitrust amount is payable to the class consists solely of a term of years [ *Treas. Reg. §§ 1.664-2(a)(3)(i), 1.664-3(a)(3)(i)* ].

### **[8] Permissible Remainder Beneficiaries**

Upon termination of the required payments to the income beneficiaries of a charitable remainder annuity trust or unitrust, the remainder interest in the trust must be transferred to or for the use of one or more qualified charitable organizations as described in *I.R.C. § 170(c)* [ *I.R.C. § 664(d)(1)(C), (2)(C)* ]. However, the donor should be cautioned that some *I.R.C. § 170(c)* organizations do not qualify for the 50 percent income tax charitable deduction, the gift tax charitable deduction, or the estate tax charitable deduction [ *see Rev. Rul. 77-385, 1977-2 C.B. 331* ; for discussion, *see Ch. 69, Charitable Dispositions* ]. With respect to income taxes, the drafter of a charitable remainder trust should use good judgment in preparing the trust instrument. Trust forms commonly require the trustee to distribute assets to an organization described in *I.R.C. § 170(c)* if the designated charity named by the donor fails to qualify at time of distribution. However, to assure the higher income tax percentage limitation when the donor intends the remainder to be received by a public charity, the drafter should consider requiring that the organization selected as alternate remainder beneficiary also qualify under *I.R.C. § 170(b)(1)(A)*.

### **[9] Trust Investments**

Under the regulations, the governing instrument of a charitable remainder trust cannot contain a provision restricting the

trustee from "investing the trust assets in a manner which could result in the annual realization of a reasonable amount of income or gain from the sale or disposition of trust assets" [*Treas. Reg. § 1.664-1(a)(3)*]. Thus, when there are "trust provisions" allowing the donor to dictate the trust's investment policies, no charitable deduction for income, gift, or estate tax purposes will be allowed. The Internal Revenue Service has hinted that "trust provisions" may include language other than that in the trust document itself [*see Rev. Rul. 60-370, 1960-2 C.B. 203*].

### **[10] Trust Creation Date**

The trust must meet the definition of, and function exclusively as, a charitable remainder trust from its creation [*Treas. Reg. § 1.664-1(a)(4)*]. For the purposes of *I.R.C. § 664* and accompanying regulations, a trust is considered to be created at the earliest time that neither the grantor of the trust nor any other person is treated as the owner of the entire trust under the tax rules that normally determine whether grantors or others are treated as owners of a trust [*see I.R.C. §§ 671-679* (grantors treated as owners)], but is not considered to be created before the time property is first transferred to the trust [*Treas. Reg. § 1.664-1(a)(4)*].

Under an exception to the general rule, a testamentary charitable remainder trust is deemed created at the date of the decedent's death, even though the trust will not be funded until the end of a reasonable period of administration and settlement [*Treas. Reg. § 1.664-1(a)(5)(i)*]. To qualify under the exception, a trust must be obligated to pay the annuity or unitrust amount as of the date of the decedent's death, but actual payment may be deferred or estimated payments may be made to the beneficiaries [*Treas. Reg. § 1.664-1(a)(5)(i); see Rev. Rul. 92-57, 1992-2 C.B. 123* (method of computing deferred payment)]. The rules set forth in *Treas. Reg. § 1.664-1(a)(5)* should be followed closely when deferring or estimating payments. Interest, calculated in accordance with that regulation and *I.R.C. § 7520*, must be applied.

To create an effective testamentary charitable remainder trust, the governing instrument of the trust must contain mandatory language providing that the obligation to pay the annuity or unitrust amount begins at the date of the decedent's death [*Rev. Rul. 80-123, 1980-1 C.B. 205; see Treas. Reg. § 1.664-1(a)(5)(i); see also Rev. Rul. 92-57, 1992-2 C.B. 123* (alternate method for computing deferred payments for testamentary charitable remainder unitrusts)]. The governing instrument should also provide for corrective payments should there be underpayment or overpayment of the annuity or unitrust amount [*Treas. Reg. §§ 1.664-2(a)(1)(iii), 1.664-3(a)(1)(iii)*].

### **[11] Power to Alter Amount of Payments**

An individual's power to alter the amounts paid to beneficiaries of a trust could cause that individual to be deemed the owner of a trust or part of a trust, even though the individual is not directly a beneficiary of the trust [*see I.R.C. § 674(a)*]. Consequently, if any person has the power to alter the amount paid to any named person other than a charitable organization listed in *I.R.C. § 170(c)*, the trust will not qualify as a charitable remainder annuity trust or charitable remainder unitrust if the power to alter causes the person to be treated as the owner of the trust or any portion of it [*Treas. Reg. §§ 1.664-2(a)(3)(ii), 1.664-3(a)(1)(ii)*].

However, a trustee of a trust may be given the power to apportion or "sprinkle" trust income among beneficiaries or within a class of beneficiaries. A sprinkling power that is solely exercisable by an independent trustee or trustees, none of whom is the grantor and no more than half of whom are related or subordinate parties who are subservient to the wishes of the grantor, does not disqualify a charitable remainder annuity trust or unitrust [*I.R.C. § 674(c)*]. Nonetheless, disqualification can result from a grantor's power to replace an independent trustee who has sprinkling powers with anyone including himself or herself [*Rev. Rul. 77-285, 1977-2 C.B. 213*].

Unique to the charitable remainder annuity trust is the inability to provide for a fixed percentage payout that is to be increased on the happening of some event. For example, a trust cannot provide for one percentage payout during the donor's life and an increased percentage payout subsequent to the donor's death. Nor can a trust provide for one

percentage payout to the first beneficiary for life and then an increased percentage payout to a successor beneficiary for life [ *Rev. Rul. 80-104, 1980-1 C.B. 135* ].

Proposed regulations would permit a so-called "flip" unitrust (or "FLIP-CRUT") that would begin as "net income with makeup" unitrust and later "flip" to a standard unitrust. [Prop. *Treas. Reg. § 1.664-3(a)(1)(i)(c)*]. If adopted, these regulations would provide some additional planning flexibility in cases in which the trust assets consist primarily of unmarketable assets that might otherwise have to be sold in order to meet the trust's payout requirements. For discussion, see § 74.13[2][c].

### **[12] Trust Payments Only to Beneficiaries**

No amount other than the annuity or unitrust amount or payments to an organization described in *I.R.C. § 170(c)* may be paid from the trust, unless the amount is transferred for full and adequate consideration. The trust may not be invaded, altered, amended, or revoked for the beneficial use of a person other than an organization described in *I.R.C. § 170(c)*. However, two exceptions apply. First, the grantor may retain the power exercisable only by will to revoke or terminate the interest of any recipient other than an organization described in *I.R.C. § 170(c)*. Second, the governing instrument may provide that any amount (other than the annuity or unitrust amount) must, or may in the discretion of the trustee, be paid to an organization described in *I.R.C. § 170(c)* [*Treas. Reg. §§ 1.664-2(a)(4), 1.664-3(a)(4)*].

### **[13] Certain Contingencies Permitted**

The governing instrument may contain a "qualified contingency," which is any trust provision requiring that, on the happening of a contingency, the annuity or unitrust payments will terminate earlier than those payments would otherwise terminate under the trust [*I.R.C. § 664(f)(3)*]. For purposes of determining the amount of the charitable contribution, the qualified contingency is disregarded [*I.R.C. § 664(f)(2)*].

### **[14] Spouse's Elective Share**

In general, no amount other than the sum certain (for an annuity trust) or the fixed percentage (for a unitrust) may be paid from the trust to or for the use of any person other than a qualified charitable organization [*I.R.C. § 664(d)(1)(B), (2)(B)*; see *I.R.C. § 664(d)(3)*]. Thus, a trust cannot qualify as a charitable remainder annuity trust under *I.R.C. § 664(d)(1)(B)* or as a charitable remainder unitrust under *I.R.C. § 664(d)(2)(B)* if the trust's assets may be used to satisfy a spouse's right of election to take against the settlor's will. However, a safe harbor provision is available for CRATs and CRUTs, created on or after June 28, 2005, that are subject to a spouse's right of election. Without the safe harbor provision, the mere possibility that the trust assets could be used to satisfy the spouse's elective share would disqualify the trust from its inception. The safe harbor provision prevents a trust from being disqualified by treating it as qualified from its creation if the spouse irrevocably waives the right of election with respect to the assets of the trust [see *Rev. Proc. 2005-24, 2005-16 I.R.B.* ].

The waiver must be valid under state law, in writing and signed and dated by the spouse, and effected within six months after the due date of the Split Interest Trust Information Return. If the spouse is named in the trust as a recipient of the annuity or unitrust payments from the trust, he or she is not required to waive the right to those payments. The trustee must be given a copy of the waiver and must keep the copy in the official records of the trust [ *Rev. Proc. 2005-24, 2005-16 I.R.B.* ].

### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Trusts Charitable Trusts Tax Law Federal Estate & Gift Taxes Deductions Charitable Deductions (IRC secs. 2055, 2522, 2524) General Overview Tax Law Federal Taxpayer Groups Income Taxation of Estates, Trusts & Beneficiaries Credits & Deductions (IRC secs. 641-668, 671, 681, 685) Deductions



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DIVISION IV: WILLS AND TRUSTS  
CHAPTER 74 SPLIT-INTEREST CHARITABLE TRUSTS  
PART II. LEGAL BACKGROUND

*26-74 California Legal Forms--Transaction Guide § 74.12*

**AUTHOR:** Reviewed by Albert G. Handelman

**§ 74.12 Special Features of Charitable Remainder Annuity Trusts**

**[1] Definition and General Requirements**

The technical definition of a charitable remainder annuity trust is a trust in which a stated amount (which must be at least 5 percent but not more than 50 percent of the initial net fair market value of the trust assets) is paid to the income beneficiary, not less often than annually, for the life or lives of the beneficiaries or a term of years not in excess of 20 years, and the remainder is transferred to a charitable organization described in *I.R.C. § 170(c)* [*I.R.C. § 664(d)(1)*]. For example, a trust with assets valued at \$100,000 must pay to the income beneficiary at least \$5,000 per year for the life of the beneficiary or a term of years, and then transfer the remainder to a qualified charity. A complete charitable remainder annuity trust is illustrated in § 74.200[2]. By using a charitable remainder annuity trust, a donor can transfer property to a trust, provide an annuity for a term of years or for the life or lives of an individual or individuals, and deduct as a charitable contribution the present value of the remainder interest that will eventually pass to a qualified charitable organization.

The basic requirements and considerations applicable to charitable remainder trusts in general, which are discussed in § 74.11, apply to charitable remainder annuity trusts. The remainder of this section discusses characteristics and issues specifically applicable only to charitable remainder trusts.

**[2] Payment of "Sum Certain"**

**[a] Basic Requirements**

A feature peculiar to the charitable remainder annuity trust is that it must pay a "sum certain," which is not less than 5 or more than 50 percent of the initial net fair market value of the property placed in the trust, to at least one noncharitable beneficiary [*I.R.C. § 664(d)(1)(A)*; *Treas. Reg. § 1.664-2(a)(1), (a)(2)*]. The regulations define a "sum certain" as "a stated dollar amount which is the same either as to each recipient or as to the total amount payable for each year" [*Treas. Reg. § 1.664-2(a)(1)(ii)*]. For example, a charitable remainder annuity trust could provide for an amount that is the same each year to recipient A until A's death, and concurrently for an amount that is the same each year to recipient

B until B's death (the amount to A may be different from the amount to B). Or a trust could provide for an amount to recipient A and recipient B for their joint lives and then to the survivor for life [*Treas. Reg. § 1.664-2(a)(1)(ii)*]. However, the minimum 5 percent payout requirement must be met throughout the terms of the trust [*Treas. Reg. § 1.664-2(a)(5)(ii)*].

The annuity or annuities paid by a charitable remainder annuity trust need not be expressed as a stated dollar amount to qualify as a sum certain. The amounts may be expressed as a fraction or percentage of the initial net fair market value of the property passing in trust as that value is finally determined for federal tax purposes. Thus, if H's will provides for a transfer of one half of H's residuary estate to a charitable remainder annuity trust that is required to pay W for life an annuity equal to 5 percent (or any other fixed percentage between 5 and 50 percent) of the initial net fair market value of the interest passing in trust as finally determined for federal tax purposes, the sum certain requirement is met [*Treas. Reg. § 1.664-2(a)(1)(iii)*].

#### **[b] Dollar-Amount Annuities**

When the annual payment to a recipient is expressed as a dollar amount [*see Treas. Reg. § 1.664-2(a)(1)(ii)* (definition of sum certain)], that amount ultimately may prove to be less than 5 percent of the initial net fair market value of the property transferred to the trust [*see I.R.C. § 664(d)(1)(A)* (sum certain must be at least 5 and not more than 50 percent of fair market value of initial trust property)], such as when the value of the property as finally determined for federal tax purposes is greater than the initial fair market value of the assets transferred to the trust. The failure to meet the 5 percent payout requirement could defeat the income and gift tax charitable deduction or the estate tax charitable deduction.

The regulations, however, provide a limited exception to the 5 percent payout requirement that can save the charitable deduction in certain cases. This exception applies only to an inter vivos trust that fails to provide for payment of the minimum 5 percent annuity amount [*Treas. Reg. § 1.664-2(a)(2)(iii)*]. To qualify for the exception, the grantor of the trust must have underestimated in good faith the initial net fair market value of the trust property [*Treas. Reg. § 1.664-2(a)(2)(iii)*]. In such a case, the 5 percent payout requirement is deemed to have been met if the grantor consents to accept an amount equal to 20 times the annuity as the fair market value of the trust property in determining the charitable deduction [*Treas. Reg. § 1.664-2(a)(2)(iii)*]. However, the regulations are silent on relief for any testamentary trust that fails to meet the 5 percent requirement.

#### **[c] Fraction or Percentage Annuities**

In contrast to dollar-amount annuities, when annuities are expressed as a fraction or percentage of the initial net fair market value of the property transferred in trust, the trust cannot fail to meet the 5 percent minimum payout requirement, unless the specified fraction or percentage is less than 5 percent. Thus, fraction or percentage annuities, in contrast to the dollar-amount annuity arrangement, cannot result in disqualification of a trust due to a subsequent redetermination of the initial fair market value of trust property.

On the other hand, redetermination of property value could cause another problem in those cases in which the annual payment of a trust is determined by a fraction or percentage of the initial net fair market value of trust property. If that value is later changed, payments made to beneficiaries before the change will be more or less than the amount that should have been paid. Such overpayments or underpayments would violate the requirement that the payments be a sum certain, resulting in the disqualification of the trust as a charitable remainder annuity trust. Therefore, the governing instrument of the trust must provide for corrective payments in the case of underpayments or overpayments caused by an incorrect valuation of the initial net fair market value of the trust property to avoid the possibility of disqualification [*Treas. Reg. § 1.664-2(a)(1)(iii)*].

Such a provision must require that the trust pay to the recipient (in the case of an undervaluation of property), or be

repaid by the recipient (in the case of an overvaluation of property), an amount equal to the difference between the amount that the trust should have paid, based on the correct value, and the amount that was actually paid [*Treas. Reg. § 1.664-2(a)(1)(iii)*]. Under the regulations, these corrective payments must be made within a reasonable time after the final determination of the initial net fair market value of the property [*Treas. Reg. § 1.664-2(a)(1)(iii)*].

It is advisable, therefore, to express the required sum certain as a fraction or percentage and not as a dollar amount, especially when the property transferred is difficult to value. An alternative solution for the grantor who wishes to guarantee a minimum dollar amount to the beneficiary is to express the annuity as the greater of the dollar amount or a percentage not less than 5 and not more than 50 percent of the initial net fair market value of the property [*see Rev. Rul. 72-395, 1972-2 C.B. 340*].

### **[3] Period of Payment**

The period during which a charitable remainder annuity trust must pay the sum certain annuity begins with the first tax year of the annuity trust and continues either for the life of a named individual (or lives of named individuals) or for a term that does not exceed 20 years [*Treas. Reg. § 1.664-2(a)(5)(i)*]. A lifetime annuity payable to an individual must be based solely on that individual's life and not measured by the life of another individual [*Treas. Reg. § 1.664-2(a)(5)(i)*].

However, the donor should not attempt to define the payment period of an annuity by combining an individual's life (or individuals' lives) with a term of years, unless it is not possible for the payment period to extend beyond the lives of the recipients in being at the time the trust was created or 20 years [*Treas. Reg. § 1.664-2(a)(5)(i)*]. Otherwise, this will result in an impermissible period causing disqualification as a charitable remainder annuity trust [*Treas. Reg. § 1.664-2(a)(5)(i)*]. For example, payment of an annuity to recipient A for A's life and then to recipient B for a term of years will disqualify a trust, because it is theoretically possible for the payment period to exceed either the lives of the recipients living at the creation of the trust or a term not in excess of 20 years [*Treas. Reg. § 1.664-2(a)(5)(i)*]. On the other hand, it is permissible to provide for the payment of an annuity to recipient A for A's life and then to recipient B for the shorter of either B's life or a term not exceeding 20 years, if both recipients are living at the time the trust is created [*Treas. Reg. § 1.664-2(a)(5)(i)*].

The regulations also provide that the following annuity arrangements will satisfy the requirements of both the 5 percent minimum/50 percent maximum payout [*see I.R.C. § 664(d)(1)(A)* (sum certain must be at least 5 and not more than 50 percent of fair market value of initial trust property)] and the period of payment [*Treas. Reg. § 1.664-2(a)(5)(ii)*]:

- An amount equal to at least 5 percent, but not more than 50 percent, of the initial net fair market value of the property placed in trust to A and B for their joint lives and then to the survivor for his or her life;
- An amount equal to at least 5 percent, but not more than 50 percent, of the initial net fair market value of the property placed in trust to A for life or for a term of years not longer than 20 years, whichever is longer (or shorter);
- An amount equal to at least 5 percent, but not more than 50 percent, of the initial net fair market value of the property placed in trust to A for a term of years not longer than 20 years and then to B for life, provided B was living at the date the trust was created;
- An amount to A for his or her life and concurrently an amount to B for his or her life (the amount to each recipient to terminate at death) if the amount given to each individual is not less than 5 percent, but not more than 50 percent, of the initial net fair market value of the property placed in trust; or
- An amount to A for his or her life and concurrently an equal amount to B for his or her life, and at

the death of the first to die, the trust to distribute one half of the current value of its assets to an organization described in *I.R.C. § 170(c)*, if the total of the amounts given to A and B is not less than 5 percent, but not more than 50 percent, of the initial net fair market value of the property placed in trust.

#### **[4] Additional Contributions**

The regulations provide that a trust is not a charitable remainder annuity trust unless its governing instrument prohibits any additional contributions to the trust after the initial contribution [*Treas. Reg. § 1.664-2(b)*]. However, since it is not always possible to fund a testamentary charitable remainder annuity trust with one payment, the regulations also provide that all property passing to such a trust by reason of the death of the grantor will be considered one contribution [*Treas. Reg. § 1.664-2(b)*].

#### **[5] Short Tax Year**

All charitable remainder annuity trusts must report on a calendar-year basis for taxable years beginning after December 31, 1986 [*I.R.C. § 644*]. Thus, most trusts will have an initial tax year of less than 12 months. The regulations require the governing instrument of the trust to provide a proration formula for determining the amount of the annuity payable to the recipient for the short year, based on the number of days in the taxable year of the trust [*Treas. Reg. § 1.664-2(a)(1)(iv)(a)*].

#### **[6] Final Tax Year**

The governing instrument of a charitable remainder annuity trust must provide for prorating the annuity amount for the final tax return of the trust. Unlike the proration for a short tax year, however, the annuity amount for the final tax year is based not on the number of days in the tax year, but rather on the number of days that the recipient of the annuity had lived during the final tax year, although the trust's final tax year typically extends beyond the date of the recipient's death [*Treas. Reg. § 1.664-2(a)(1)(iv)(b)*]. Alternatively, the governing instrument can provide that annuity payments are to terminate with the regular payment next preceding the recipient's death [*Treas. Reg. § 1.664-2(a)(5)(i)*]. In any case, failure to provide for proration of the annuity amount during the final tax year will result in disqualification of the trust [ *Rev. Rul. 79-428, 1979-2 C.B. 253* ].

#### **[7] Payment of Annuity**

A qualified charitable remainder annuity trust must pay a sum certain annuity at least annually [*Treas. Reg. § 1.664-2(a)(1)(i)*]. The regulations provide that, under the circumstances described below, the annuity can be paid after the close of the taxable year provided it is paid within a reasonable time, typically not beyond the time for filing the trust's tax return for the year (including extensions) [*Treas. Reg. § 1.664-2(a)(1)(i)*]. Otherwise, by implication from *Treas. Reg. § 1.664-2(a)(1)(i)*, failure to pay the annuity by the end of the trust's taxable year may cause the trust to be engaged in self-dealing [*see I.R.C. § 4941*], to have unrelated debt-financed income subject to tax [*see I.R.C. § 514*], to have received an additional contribution [*see Treas. Reg. § 1.664-2(b)*], or to have failed to exclusively function as a charitable remainder trust [*see Treas. Reg. § 1.664-1(a)(4)*].

A trust will not be deemed to have engaged in self-dealing [*see I.R.C. § 4941*], to have unrelated debt-financed income [*see I.R.C. § 514*], to have received an additional contribution [*see Treas. Reg. § 1.664-3(a)(1)(i)(f)*], or to have ceased to function exclusively as a charitable remainder trust [*see Treas. Reg. § 1.664-1(a)(4)*] merely because the annuity amount is paid after the close of the taxable year, if the payment is made within a reasonable time and if the entire annuity amount in the recipient's hands is characterized only as ordinary income, capital gain, or other income, except to the extent it is characterized as corpus because the trust pays the annuity amount by distributing any of the following [*Treas. Reg. § 1.664-2(a)(1)(i)(a)*]:

- Property that it owned at the end of the taxable year to pay the annuity amount, if the trustee elected

to treat any income generated by the distribution as occurring on the last day of the taxable year in which the annuity amount was due;

- Cash that was contributed to the trust (with respect to which a charitable deduction was allowable); or
- Cash received as a return of basis in any asset that was contributed to the trust (with respect to which a charitable deduction was allowable) and that was sold by the trust during the year for which the annuity amount is due.

These rules apply to taxable years ending after April 18, 1997, except that the second and third items immediately above apply only to distributions made after January 4, 2001 [*Treas. Reg. § 1.664-2(a)(1)(i)(e)*]. However, a trust created before December 10, 1998 will not be deemed to have engaged in self-dealing [*see I.R.C. § 4941*] to have unrelated debt-financed income [*see I.R.C. § 514*], to have received an additional contribution [*see Treas. Reg. § 1.664-3(a)(1)(i)(f)*], or to have ceased to function exclusively as a charitable remainder trust [*see Treas. Reg. § 1.664-1(a)(4)*] merely because the annuity amount is paid after the close of the taxable year, if the payment is made within a reasonable time and if the annuity amount is 15 percent or less of the initial net fair market value of the trust property [*Treas. Reg. § 1.664-2(a)(1)(i)(b)*].

*Treas. Reg. § 1.664-2(a)(1)(i)* was motivated by the belief that some trustees of charitable remainder trusts attempted to abuse prior regulations permitting payment within a reasonable time after the close of the taxable year under all circumstances. Since the charitable remainder annuity trust form in this publication requires that the annuity amount be paid at the end of each quarter [*see § 74.200[2]*, Section 4.01], it will meet the requirement of the regulation.

#### **[8] Safe Harbor for Trusts Subject to Spouse's Right of Election**

A safe harbor procedure is available for charitable remainder annuity trusts that are created during the grantor's life and are subject to a right of election by the grantor's spouse to take against the grantor's will. The mere possibility that the trust assets could be used to satisfy the spouse's right of election may disqualify the trust from its inception. However, the safe harbor prevents the trust from being disqualified by treating it as qualified from its creation if the spouse irrevocably waives the right of election with respect to the assets of the trust [*Rev. Proc. 2005-24, 2005-16 I.R.B. 909*].

The spouse must irrevocably waive the right of election to the extent necessary to ensure that no part of the trust (other than the annuity interest of which the spouse is the named recipient under the trust) may be used to satisfy the elective share. The spouse must execute a written waiver that is valid under applicable state law, date and sign the waiver, and deliver a copy to the trustee of the charitable remainder annuity trust. If the trust was created on or after June 28, 2005, the waiver must be executed on or before the date that is six months after the due date of Form 5227 (Split-Interest Trust Information Return) for the year in which the last of the following occurs [*Rev. Proc. 2005-24, 2005-16 I.R.B. 909*, § 3]:

- The creation of the trust.
- The date of the grantor's marriage to the surviving spouse.
- The date the grantor first becomes domiciled or resident in a jurisdiction that provides a right of election.
- The effective date of the applicable state law that creates such a right.

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
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California Legal Forms--Transaction Guide

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DIVISION IV: WILLS AND TRUSTS  
CHAPTER 74 SPLIT-INTEREST CHARITABLE TRUSTS  
PART II. LEGAL BACKGROUND

*26-74 California Legal Forms--Transaction Guide § 74.13*

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**§ 74.13 Special Features of Charitable Remainder Unitrusts**

**[1] Definition and General Requirements**

The technical definition of a charitable remainder unitrust is a trust in which the income interest paid to the income beneficiary is a fixed percentage (which must be at least 5 percent but not more than 50 percent) of the net fair market value of the trust assets, valued annually, and paid at least on an annual basis either for the life of the beneficiary or a term of years not exceeding 20 [*I.R.C. § 664(d)(2)*]. For example, a trust with assets initially valued at \$100,000 can provide that 5 percent of the value of the trust assets, valued annually, will be paid to the income beneficiary for life, with the remainder transferred to a qualified charitable organization. In the second year if the value of the trust assets appreciates to \$150,000, then the amount paid to the income beneficiary will be \$7,500, an increase from the \$5,000 which was required for the first year.

Like the charitable remainder annuity trust, the charitable remainder unitrust is an important deferred giving tool. The use of a unitrust allows a donor to provide a variable annuity payable for a term of years or for the life or lives of an individual or individuals, and to obtain a deduction for the present value of the remainder interest that ultimately will pass to a qualified charitable organization [*see I.R.C. § 664(d)(2)*].

In contrast to the charitable remainder annuity trust, a charitable remainder unitrust must pay a fixed percentage, which is not less than 5 or more than 50 percent, of the net fair market value of its assets to one or more beneficiaries, at least one of which is not a charitable organization described in *I.R.C. § 170(c)* and, in the case of an individual beneficiary, who is living at the time the unitrust is created [*I.R.C. § 664(d)(2)(A)*]. Payment of the fixed percentage amount must be made at least annually, and thus the unitrust assets must be valued at least annually [*I.R.C. § 664(d)(2)(A)*]. Payment of the fixed percentage amount must be made either for a term of years not to exceed 20 years, or in the case of an individual, for the life or lives of those beneficiaries [*I.R.C. § 664(d)(2)(A)*]. When payments of the fixed percentage amounts terminate, the remainder of the unitrust either must be transferred to or for the use of a qualified charitable organization described in *I.R.C. § 170(c)*, or must be retained by the unitrust for a charitable use [*I.R.C. § 664(d)(2)(C)*].

**[2] Fixed Percentage**

**[a] In General**

The unitrust amount paid by a charitable remainder unitrust, with respect to all beneficiaries taken together, ordinarily must be a fixed percentage, which is not less than 5 or more than 50 percent, of the net fair market value of the trust's assets, valued annually [I.R.C. § 664(d)(2)(A); *Treas. Reg. § 1.664-3(a)(1)(i)(a)*; *Treas. Reg. § 1.664-3(a)(2)(i)*]. Thus, a unitrust pays a variable amount to the income beneficiaries, rather than the "sum certain" paid by an annuity trust.

**[b] Definition of Fixed Percentage**

The fixed percentage that a unitrust must distribute each year to the income beneficiaries may be expressed either as a fraction or as a percentage, and must be payable each year in the period of payment [I.R.C. § 664(d)(2)(A); *Treas. Reg. § 1.664-3(a)(1)(ii)*]. A percentage is fixed if the percentage is the same either as to each recipient or as to the total percentage payable each year of that period [I.R.C. § 664(d)(2)(A); *Treas. Reg. § 1.664-3(a)(1)(ii)*]. For example, a provision for a fixed percentage that is the same every year to A until A's death and a concurrent fixed percentage that is the same every year to B until B's death, the fixed percentage to each recipient terminating at death, would satisfy this rule [I.R.C. § 664(d)(2)(A); *Treas. Reg. § 1.664-3(a)(1)(ii)*]. Additionally, a provision for a fixed percentage to A and B for their joint lives and then to the survivor would satisfy the rule [I.R.C. § 664(d)(2)(A); *Treas. Reg. § 1.664-3(a)(1)(ii)*].

**[c] Income Exception**

I.R.C. § 664(d)(3) provides for an exception to the payment of the unitrust amount. To qualify under this exception, the trust instrument must require that income be paid in one of two ways [I.R.C. § 664(d)(3); *Treas. Reg. § 1.664-3(a)(1)(i)(b)*; see I.R.C. § 664(d)(3)]. The trust may provide that the trustee must pay trust income to the recipient, if that amount is smaller than the unitrust amount in any taxable year. Alternatively, the trust may provide that the trustee must pay to the recipient the trust income, if that is smaller than the percentage payment, and must also pay income in excess of the unitrust amount if prior years' aggregate trust income payments were less than the amount that would have resulted from the fixed percentage payments [I.R.C. § 664(d)(3); *Treas. Reg. § 1.664-3(a)(1)(i)(b)*]. The difference between the two amounts is often called the "deficiency amount."

Under prior regulations, once the income-exception method of calculating the unitrust amount was elected, those payments became mandatory. However, under the current regulations, applicable to trusts created on or after December 10, 1998, an income-exception charitable remainder unitrust may include a conversion provision that permits a one-time conversion to a fixed-percentage unitrust, provided the event triggering the conversion is outside the control of the trustee or any person [I.R.C. § 664(d)(3); *Treas. Reg. § 1.664-3(a)(1)(i)(c)*]. (A triggering event based on the sale of unmarketable assets, or on a marriage, divorce, death or birth will not be considered within the control of the trustee or any person [I.R.C. § 664(d)(3); *Treas. Reg. § 1.664-3(a)(1)(i)(d)*]). Such a trust is sometimes referred to as a "flip-unitrust" or a "FLIP-NIMCRUT." If a charitable remainder unitrust created before December 10, 1998, allows a conversion from one method of calculating the unitrust amount to another but does not comply with the new regulations, it may be reformed to use the initial method of computing the unitrust amount throughout the term of the trust [I.R.C. § 664(d)(3); *Treas. Reg. § 1.664-3(a)(1)(i)(f)(2)*]. If the legal proceeding to reform the trust is commenced prior by June 8, 1999, an income-exception unitrust can be reformed to add a conversion provisions that complies with the new regulations [I.R.C. § 664(d)(3); *Treas. Reg. § 1.664-3(a)(1)(i)(f)(3)*], or a unitrust which allows a conversion from one method of calculating the unitrust amount to another can retain that conversion provision if the trust is reformed to comply with the new regulations [I.R.C. § 664(d)(3); *Treas. Reg. § 1.664-3(a)(1)(i)(f)(3)*].

**[d] Reduction of the Unitrust Amount**

Although a charitable remainder unitrust must continue to meet the 5 percent minimum payout requirement [see I.R.C. § 664(d)(2)(A) (sum certain must be at least 5 and not more than 50 percent of fair market value of initial trust property)] to qualify as a unitrust, the trust will not fail when it provides for a reduction of the fixed percentage payable upon the death of a recipient or the expiration of a term of years, as long as the following conditions are met [I.R.C. § 664(d)(2)(A); *Treas. Reg. § 1.664-3(a)(1)(i)(f)(3)*].

*1.664-3(a)(2)(ii)*]:

- A distribution is made to an organization described in *I.R.C. § 170(c)* at the death of the recipient or the expiration of the term of years, and
- The total of the percentage payable after distribution to the qualified charitable organization is not less than 5 percent.

### **[3] Period of Payment**

The period during which the fixed percentage unitrust amount must be paid by a charitable remainder unitrust begins with the first tax year of the unitrust and continues either for the life of a named individual (or lives of named individuals) or for a term that does not exceed 20 years [*Treas. Reg. § 1.664-3(a)(5)(i)*]. A lifetime unitrust amount payable to an individual must be based solely on that individual's life and not measured by the life of another individual [*Treas. Reg. § 1.664-3(a)(5)(i)*].

However, the donor should not attempt to define the payment period of a unitrust amount by combining an individual's life (or individuals' lives) with a term of years, unless it is not possible for the payment period to extend beyond the lives of the recipients in being at the time the trust was created [*Treas. Reg. § 1.664-3(a)(5)(i)*]. Otherwise, this will result in an impermissible period causing disqualification as a charitable remainder unitrust [*Treas. Reg. § 1.664-3(a)(5)(i)*].

The regulations also provide that the following unitrust arrangements will satisfy the requirements of both the 5 percent minimum/50 percent maximum payout [*see I.R.C. § 664(d)(2)(A)*] (sum certain must be at least 5 and not more than 50 percent of fair market value of initial trust property) and the period of payment [*Treas. Reg. § 1.664-3(a)(5)(ii)*]:

- A fixed percentage of at least 5 percent, but not more than 50 percent, to A and B for their joint lives and then to the survivor for his or her life;
- A fixed percentage of at least 5 percent, but not more than 50 percent, to A for life or for a term of years not longer than 20 years, whichever is longer (or shorter);
- A fixed percentage of at least 5 percent, but not more than 50 percent, to A for a term of years not longer than 20 years and then to B for life, provided B was living at the date of creation of the trust;
- A fixed percentage to A for his or her life and concurrently a fixed percentage to B for his or her life (the amount to each recipient to terminate at death) if the amount given to each individual is not less than 5 percent, but not more than 50 percent; or
- A fixed percentage to A for his or her life and concurrently an equal percentage to B for his or her life, and at the death of the first to die, the trust to distribute one half of the value of its assets at that time to an organization described in *I.R.C. § 170(c)*, if the total of the percentages is not less than 5 percent, but not more than 50 percent, for the entire relevant period.

### **[4] Additional Contributions**

Additional contributions to a charitable remainder unitrust are permitted only if the trust instrument provides for them and provides for both valuation of the property at the time of contribution and determination of the prorated unitrust amount based on the values. Otherwise, the trust instrument must prohibit additional contributions [*Treas. Reg. § 1.664-3(b)*].

### [5] Short Tax Year

All charitable remainder unitrusts must report on a calendar year basis [*I.R.C. § 644*]. Thus, most trusts will have an initial tax year of less than 12 months. The regulations require that the governing instruments of the trust provide a proration formula for determining the unitrust amount payable to the recipient for the short year [*Treas. Reg. § 1.664-3(a)(1)(v)(a)(1)*]. Additionally, the governing instrument of a unitrust must also provide that if no valuation date occurs before the end of the short tax year, the unitrust assets are to be valued as of the last day of the short tax year [*Treas. Reg. § 1.664-3(a)(1)(v)(a)(3)*].

### [6] Determining Amount of Payment

An annual valuation of all trust assets is required in order to determine the unitrust amount [*I.R.C. § 664(d)(2)(A)*]. All assets and liabilities are taken into account, without regard to whether particular items are taken into account in determining the income of the trust [*Treas. Reg. § 1.664-3(a)(1)(iv)*]. The net fair market value may be determined by one valuation date or by taking an average of the values on more than one date, provided the same dates and methods are used each year. If a unitrust's governing instrument fails to specify the date or dates on which the trust assets are to be valued each year, the trustee must select the valuation date or dates and disclose the selection on the unitrust's first tax return [*Treas. Reg. § 1.664-3(a)(1)(iv)*].

If a charitable remainder trust holds "unmarketable assets" (i.e., assets that are not cash, cash equivalents, or other assets that can be readily sold or exchanged for cash or cash equivalents) and the trustee is the settlor, a noncharitable beneficiary, the settlor's spouse or a party who is related or subordinate to the settlor or the noncharitable beneficiary [*see I.R.C. § 672(c)* ("related or subordinate party" defined)], the trustee must use a current qualified appraisal to value those assets [*Treas. Reg. § 1.664-1(a)(7)*]. However, this requirement does not apply to a trustee who is not the settlor, a noncharitable beneficiary, or a related or subordinate party. The settlor, a noncharitable beneficiary, or a related or subordinate party may properly serve as the sole trustee of the trust if the trustee uses a current qualified appraisal from a qualified appraiser to compute the fair market value of the trust's "unmarketable assets" [*Treas. Reg. § 1.664-1(a)(7)*].

When the net fair market value is incorrectly determined, the governing instrument must provide that the unitrust is to pay to the recipient, in the case of an undervaluation of assets, or to receive from the recipient, in the case of an overvaluation of assets, the difference between the correct amount and the amount paid [*Treas. Reg. § 1.664-3(a)(1)(iii)*]. In addition, corrective payments must be made within a reasonable period after the final determination of the correct values [*Treas. Reg. § 1.664-3(a)(1)(iii)*].

### [7] Time of Payment

The issues discussed in § 74.12[7] regarding payments from a charitable remainder annuity trust after the trust's year-end also apply to payments after year-end from a fixed percentage charitable remainder unitrust. A fixed percentage charitable remainder unitrust will not be deemed to have engaged in self-dealing [*see I.R.C. § 4941*], to have unrelated debt-financed income [*see I.R.C. § 514*], to have received an additional contribution [*see Treas. Reg. § 1.664-3(a)(1)(i)(f)*], or to have ceased to function exclusively as a charitable remainder trust [*see Treas. Reg. § 1.664-1(a)(4)*] merely because the unitrust amount is paid after the close of the taxable year if the payment is made within a reasonable time and if the entire annuity amount in the recipient's hands is characterized only as ordinary income, capital gain, or other income, except to the extent it is characterized as corpus because the trust pays the annuity amount by distributing any of the following [*Treas. Reg. § 1.664-2(a)(1)(i)(a)*]:

- Property that it owned at the end of the taxable year to pay the annuity amount, if the trustee elected to treat any income generated by the distribution as occurring on the last day of the taxable year in which the annuity amount was due;

- Cash that was contributed to the trust (with respect to which a charitable deduction was allowable);  
or
- Cash received as a return of basis in any asset that was contributed to the trust (with respect to which a charitable deduction was allowable) and that was sold by the trust during the year for which the annuity amount is due.

These rules apply to taxable years ending after April 18, 1997, except that the second and third items immediately above apply only to distributions made after January 4, 2001 [*Treas. Reg. § 1.664-2(a)(1)(i)(e)*]. However, a trust created before December 10, 1998 will not be deemed to have engaged in self-dealing [*see I.R.C. § 4941*] to have unrelated debt-financed income [*see I.R.C. § 514*], to have received an additional contribution [*see Treas. Reg. § 1.664-3(a)(1)(i)(f)*], or to have ceased to function exclusively as a charitable remainder trust [*see Treas. Reg. § 1.664-1(a)(4)*] merely because the annuity amount is paid after the close of the taxable year, if the payment is made within a reasonable time and if the annuity amount is 15 percent or less of the initial net fair market value of the trust property [*Treas. Reg. § 1.664-2(a)(1)(i)(b)*].

#### **[8] Safe Harbor for Trusts Subject to Spouse's Right of Election**

A safe harbor procedure is available for charitable remainder unitrusts that are created during the grantor's life and are subject to a right of election by the grantor's spouse to take against the grantor's will. The mere possibility that the trust assets could be used to satisfy the spouse's right of election may disqualify the trust from its inception. However, the safe harbor prevents the trust from being disqualified by treating it as qualified from its creation if the spouse irrevocably waives the right of election with respect to the assets of the trust [ *Rev. Proc. 2005-24, 2005-16 I.R.B. 909* ].

The spouse must irrevocably waive the right of election to the extent necessary to ensure that no part of the trust (other than the unitrust interest of which the spouse is the named recipient under the trust) may be used to satisfy the elective share. The spouse must execute a waiver, in writing that is valid under applicable state law, date and sign the waiver, and deliver a copy to the trustee of the charitable remainder unitrust. If the trust was created on or after June 28, 2005, the waiver must be executed on or before the date that is six months after the due date of Form 5227 (Split-Interest Trust Information Return) for the year in which the last of the following occurs [ *Rev. Proc. 2005-24, 2005-16 I.R.B. 909* , § 3]:

- The creation of the trust.
- The date of the grantor's marriage to the surviving spouse.
- The date the grantor first becomes domiciled or resident in a jurisdiction that provides a right of election.
- The effective date of the applicable state law that creates such a right.

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:  
Estate, Gift & Trust LawTrustsCharitable Trusts



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California Legal Forms--Transaction Guide

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DIVISION IV: WILLS AND TRUSTS  
CHAPTER 74 SPLIT-INTEREST CHARITABLE TRUSTS  
PART II. LEGAL BACKGROUND

*26-74 California Legal Forms--Transaction Guide § 74.14*

**AUTHOR:** Reviewed by Albert G. Handelman

**§ 74.14 Pooled Income Funds**

**[1] Nature and Description**

A pooled income fund is a split-interest trust established by a qualified charitable organization, rather than by an individual donor. Individual private donors contribute property to the trust, retain a lifetime income interest in the contributed property, and obtain a charitable deduction based on the value of the remainder interest in the contributed property, which will pass to the charity on the individual donor's or life beneficiary's death. [*I.R.C. § 642(c)(5)*]. Gifts to a pooled income fund generally qualify for the charitable deductions for income-tax [*see I.R.C. § 170*], gift-tax [*see I.R.C. § 2522*], and estate-tax [*see I.R.C. § 2055*] purposes.

Thus, a pooled income fund basically is a common trust fund operated by a qualified charitable organization. The property transferred by each donor to a pooled income fund is commingled with property transferred by other donors to the pooled income fund and managed, as trustee, by the charitable organization operating the fund [*I.R.C. § 642(c)(5)(B)*].

The principal distinction between a pooled income fund and an ordinary common trust fund operated by a community chest corporation or a corporation sole [*see Corp. Code §§ 10000-10015*] is that the remainder interest in all property transferred to a pooled income fund must be irrevocably given to the charitable organization operating the fund [*see I.R.C. § 642(c)(5)(A)*]. The distinction between property donated in fee to a charitable organization and property donated to a pooled income fund is that the donor of property to a pooled income fund retains an income interest in the property transferred to the fund for the life of one or more beneficiaries living at the time of the transfer [*see I.R.C. § 642(c)(5)(A)*].

**[2] Planning Considerations**

Pooled income funds offer several advantages. First, they offer investment diversification without the necessity of first converting assets and thereby incurring potential liability for capital gains [*see I.R.C. § 642(c)(3),(5)(B)*; *Treas. Reg. § 1.642(c)-5(a)(3), (b)(3)*]. A donor who transfers assets to a pooled income fund is in effect exchanging those assets for a

share of the pool's diversified assets without thereby realizing any capital gain. Second, a pooled income fund offers professional management at a relatively modest cost, an advantage that may be particularly attractive when the assets transferred to the fund by the donor are not large and the costs of establishing a separate trust would be prohibitive. Third, pooled income funds permit donors to safeguard their principal against erosion during the lifetime of the income beneficiary, since such a fund can only distribute income and cannot invade principal for the benefit of the lifetime income beneficiary [see *I.R.C. § 642(c)(5)(A)*, (F); *Treas. Reg. § 1.642(c)-5(b)(1)*, (2)].

On the other hand, pooled income funds are limited in securing tax-exempt income for the beneficiary, since they can neither receive nor invest in tax-exempt securities [*I.R.C. § 642(c)(5)(C)*; see [6], *below*]. Additionally, the beneficiary cannot receive realized capital gain, since any such gain must be set aside for the charitable remainder beneficiary [*Treas. Reg. § 1.642(c)-5(a)(3)*]. Further, the income interest must be a lifetime interest and not merely an interest for a term of years [*I.R.C. § 642(c)(5)(A)*]. Finally, the remainder interest must be paid to or for the use of a charitable organization to which contributions qualifying for the 50 percent income tax deduction may be made (and only if the organization is qualified under *I.R.C. § 509(a)(1)* [*I.R.C. § 642(c)(5)(A)*]; for organizations to which contributions qualifying for the 50 percent income tax deduction may be made, see *I.R.C. § 170(b)(1)(A)*; see also in Ch. 69, *Charitable Dispositions* ].

### **[3] Income Interest**

#### **[a] General Requirements**

Pooled income funds are the recipients of remainder interests in property in which other persons have lifetime income interests. The donor can retain or create an income interest in the property for the donor's own life, or for the life or lives of another person or persons [*I.R.C. § 642(c)(5)(A)*; *Treas. Reg. § 1.642(c)-5(b)(1)*, (2)]. However, the term of any income beneficiary's interest must be measured by the beneficiary's own life. It cannot be measured in years [*I.R.C. § 642(c)(5)(A)*], and it cannot be measured by the life of another person [ *Rev. Rul. 79-61, 1979-1 C.B. 220* ].

Although the donor need not be an individual [see [c], *below*], a donor who is not an individual cannot retain an income interest in its own favor [ *Rev. Rul. 85-69* ]. A pet cannot be the income beneficiary of a pooled income fund [ *Rev. Rul. 78-105* ].

#### **[b] Income Interest in Favor of Class**

The beneficiaries may be the members of a class [*Treas. Reg. § 1.642(c)-5(b)(2)*]. However, all of the members of the class must be alive and ascertainable at the time the property is transferred to the fund [*Treas. Reg. § 1.642(c)-5(b)(2)*].

#### **[c] Income Interest in Favor of Private Trust or Pooled Income Fund Itself**

A private trust in which an individual has a lifetime income interest may be named as the income beneficiary of a pooled income fund [ *Priv. Ltr. Rul. 8020025* ; see *Priv. Ltr. Ruls. 8727056* , *8727057* ]. Similarly, the pooled income fund itself may be one of the income beneficiaries. However, the donor will not get a charitable deduction for the present value of the income interest when the fund is one of the income beneficiaries [*Treas. Reg. § 1.642(c)-5(b)(2)*]. If the donor does not wish to retain the full income interest from the donated property, he or she may give a portion of the property to the charity outright, and then transfer a remainder interest in the rest of the property to the fund, thereby realizing the maximum tax benefits.

#### **[d] Concurrent and Consecutive Income Interests**

When there are two or more income beneficiaries, the beneficiaries may receive the income concurrently, consecutively, or both concurrently and consecutively [*Treas. Reg. § 1.642(c)-5(b)(2)*]. However, each beneficiary must receive income for each year for which the beneficiary is entitled to receive income measured by the rate of return earned by the

trust for the year [*I.R.C. § 642(c)(5)(F)*; *Treas. Reg. § 1.642(c)-5(b)(7)*]. The governing instrument of the fund must direct the trustee to distribute income currently or within the first 65 days following the close of the taxable year [*Treas. Reg. § 1.642(c)-5(b)(7)*]. It must also provide that the income interest of any income beneficiary will either terminate with the last regular payment made before death or be prorated to the date of death [*Treas. Reg. § 1.642(c)-5(b)(7)*].

#### **[4] Remainder Interest**

The remainder interest must be irrevocably transferred to the fund [*I.R.C. § 642(c)(5)(A)*]. It cannot be a contingent remainder [*Treas. Reg. § 1.642(c)-5(b)(1)*].

Once the income interest terminates, the fund's trustee must sever from the fund an amount equal to the value of the remainder interest in the property upon which the income interest is based [*Treas. Reg. § 1.642(c)-5(b)(8)*]. The value of the remainder interest may be either (1) its value as of the determination date next succeeding the termination of the income interest, or (2) its value as of the date on which the last regular payment was made before the death of the beneficiary, if the income interest is terminated on that payment date [*Treas. Reg. § 1.642(c)-5(b)(8)*]. The governing instrument must provide whether the severed amount will be either paid to, or retained for the use of, the charity [*Treas. Reg. § 1.642(c)-5(b)(8)*].

#### **[5] Commingling of Property**

The property that a donor transfers to the pooled income fund must be commingled, and invested or reinvested, with property transferred to the trust by other donors. Further, the governing instrument must require this kind of commingling [*I.R.C. § 642(c)(5)(B)*; *Treas. Reg. § 1.642(c)-5(b)(3)*; *see § 74.230[2]*].

Other property held by the charity cannot be commingled with the fund's property [*Treas. Reg. § 1.642(c)-5(b)(3)*]. However, a public charity can maintain more than one pooled income fund as long as the maintenance of multiple funds does not allow a group to manipulate the fund [*Treas. Reg. § 1.642(c)-5(b)(3)*]. In addition, a pooled income fund may invest a portion of its properties jointly with other properties that are held by the charity but that are not part of the fund, as long as records are maintained that identify the portion of the investment owned by the fund and the income attributable to that portion [*Treas. Reg. § 1.642(c)-5(b)(3)*].

#### **[6] Prohibition Against Holding Exempt Securities**

Property transferred to the pooled income fund cannot include any securities that are exempt from income tax, and the fund may not invest in any such securities [*I.R.C. § 642(c)(5)(C)*; *Treas. Reg. § 1.642(c)-5(b)(4)*]. The governing instrument of the fund must contain specific prohibitions against accepting or investing in exempt securities [*Treas. Reg. § 1.642(c)-5(b)(4)*].

#### **[7] Exclusivity of Fund**

Pooled income funds are subject to a requirement of exclusivity. That is, a pooled income fund can only include amounts from transfers that meet the requirements for pooled income funds [*I.R.C. § 642(c)(5)(D)*]. Conversely, a pooled income fund cannot include amounts from transfers that do not meet those requirements [*see I.R.C. § 642(c)(5)(D)*].

#### **[8] Maintenance of Fund**

A pooled income fund must be maintained by the organization to which the remainder interest is contributed, and neither a donor nor an income beneficiary of the fund can serve as the trustee [*I.R.C. § 642(c)(5)(E)*; *Treas. Reg. § 1.642(c)-5(b)(5)*]. The requirement of maintenance will be satisfied if the public charity exercises control directly or indirectly [*Treas. Reg. § 1.642(c)-5(b)(5)*]. For example, the requirement of control ordinarily will be met if the public

charity has the power to remove the trustee or trustees of the fund and to designate a new trustee or trustees [*Treas. Reg. § 1.642(c)-5(b)(5)*]. Further, a national organization may maintain a pooled income fund in which one or more local organizations are recipients of the remainder interests [*Treas. Reg. § 1.642(c)-5(b)(5)*; *see also Rev. Rul. 92-107, 1992-2 C.B. 120*; *Rev. Rul. 92-108, 1992-2 C.B. 127*]. Although a donor or income beneficiary is prohibited from serving as a trustee of the fund, a donor or income beneficiary may serve as a trustee, officer, or director of the public charity without jeopardizing the fund [*Treas. Reg. § 1.642(c)-5(b)(6)*].

## **[9] Tax Treatment for Donor**

### **[a] Income Tax**

Generally, the amount of the deduction resulting from the transfer of property to a pooled income fund is the fair market value of the transferred property less the present value of the income interest retained by the donor [*Treas. Reg. § 1.642(c)-6(a)(1), (2)*]. The present value of the life income interest is computed on the basis of the life expectancy or expectancies of the income beneficiary or beneficiaries as well as the rate of return earned by the fund [*Treas. Reg. § 1.642(c)-6(b)*]. The rate of return is equal to the highest yearly rate of return of the fund for the three taxable years immediately preceding the taxable year in which the transfer of property is made [*Treas. Reg. § 1.642(c)-6(b)*; *see also Treas. Reg. § 1.642(c)-6(b)* (determining present value if fund has been in existence less than three years)].

The income tax regulations provide actuarial tables of valuation factors to determine the present value of the remainder interest of the transferred property to a fund [*Treas. Reg. § 1.642(c)-6A; 1.642(c)-6T(d); 1.642(c)-6T(e)* (for valuation dates after April 30, 1999); *Treas. Reg. § 1.642(c)-6A(a)-(e)* (for valuation dates before May 1, 1999)].

### **[b] Gift Tax**

The gift tax consequences of a transfer of property to a pooled income fund are determined by a number of factors, such as whether the income interest is to be measured by the life of just one beneficiary, or more than one, whether the donor, the donor's spouse, or some other person is the income beneficiary, and whether the donor will hold a power to revoke the income interest of another income beneficiary.

If the donor retains a lifetime income interest, and there are no other income beneficiaries, the gift of the remainder interest qualifies for the gift tax charitable deduction [*I.R.C. § 2522(c)(2)(A)*].

If the donor's spouse is the sole income beneficiary, the gift of the charitable remainder interest also qualifies for the gift tax charitable deduction [*see I.R.C. § 2522(c)(2)(A)*]. However, to avoid gift tax on the transfer of the income interest to the spouse, an election must be made to have the entire property transferred to the fund treated as qualified terminable interest property (QTIP) [*I.R.C. § 2523(f)(1)*].

If the donor transfers an income interest to someone other than the spouse, the gift of the remainder interest qualifies for the gift tax charitable deduction [*I.R.C. § 2522(c)(2)(A)*], and the transfer of the income interest to the income beneficiary is a taxable gift [*I.R.C. § 2511(a)*] qualifying for the annual gift tax exclusion [*see I.R.C. § 2503(b)*]; for discussion of the annual exclusion and the applicable exclusion amounts, which are adjusted annually for inflation, *see Ch. 60A, Gifts, § 60A.32[4]*.

If the income interest is created for successive lives, the gift tax consequences may differ. For example, if the donor and spouse are respectively the primary and survivor beneficiaries of the income interest in a charitable remainder trust, the gift of the remainder interest and the donor's retained life income interest have no gift tax consequences. However, a spouse's income interest can qualify for the gift tax marital deduction only through election to treat the property transferred to the fund as qualified terminable interest property [*I.R.C. § 2523(f)(1)*], and only if the spouse is the only income beneficiary of the fund [*I.R.C. § 2523(f)(2)(B)*]. That is, if the spouse's income interest is preceded or succeeded

by another's interest, the property cannot qualify for the election, and no gift tax marital deduction is available. Further, the annual gift tax exclusion is not available, since the spouse's survivor interest is a future interest rather than a present interest [*see I.R.C. § 2503(b)*].

If the donor is the primary beneficiary of the income interest and a person other than the donor's spouse is the survivor beneficiary, the survivor beneficiary's interest constitutes a taxable gift if it is irrevocable [*I.R.C. § 2511(a); Treas. Reg. § 25.2511-2(b)*].

If the donor's spouse is the primary beneficiary and another person is the survivor beneficiary, both gifts to the noncharitable beneficiaries are taxable gifts [*I.R.C. § 2511(a)*], and the gift to the spouse qualifies for the annual exclusion [*I.R.C. § 2503(b)*] but does not qualify for the marital deduction because the spouse is not the sole beneficiary [*I.R.C. § 2523(f)(2)(B)*]. Finally, if individuals other than the donor and spouse are named as both the primary and surviving beneficiaries of the income interest, both gifts to the noncharitable beneficiaries are taxable gifts [*I.R.C. § 2511(a)*]. The gift to the primary beneficiary is a gift of a present interest against which the annual exclusion may be used, but the exclusion does not apply to the gift to the survivor beneficiary since it is a gift of a future interest [*see I.R.C. § 2503(b)*]. For gifts made after 2009, except as provided in regulations, a transfer to a trust will be treated as a taxable gift, unless the trust is treated as wholly owned by the donor or the donor's spouse under the grantor trust provisions of the Internal Revenue Code [*I.R.C. § 2511(c); see I.R.C. §§ 671-679* (grantor trust provisions)].

However, it cannot always be assumed that the gifts are irrevocable. If the donor reserves the right to revoke a beneficiary's interest, the gift will be incomplete [*Treas. Reg. §§ 1.664-2(a)(4), 1.664-3(a)(4)*]. However, the right to revoke can be exercised only by will since, if the right to revoke is exercisable other than by will, the pooled income fund will be disqualified [*Treas. Reg. § 1.642(c)-5(b)(2)*].

### [c] Estate Tax

#### NOTE

**REGARDING ESTATE TAX REPEAL:** The federal estate tax has been repealed, effective for decedents dying after 2009 [*I.R.C. § 2210(a)*]. Until then, however, it remains in effect. Furthermore, under a sunset provision of the 2001 legislation that enacted the repeal, the repeal of the estate tax does not apply to estates of decedents dying after December 31, 2010 [Pub. Law 107-16, § 901]. Thus, unless the current provision repealing the estate tax is re-enacted before 2010, the estate tax law in effect before enactment of the 2001 legislation (including the 55 percent maximum estate tax rate) will once again apply after 2010 [*see Pub. Law 107-16, § 901; I.R.C. § 2001*, before amendment by Pub. Law 107-16]. Most commentators feel that significant changes will be made to the estate tax law before 2010. For additional discussion, see § 60.12A.

The estate tax treatment of a transfer of property to a pooled income fund also depends on several factors, such as whether the income interest is to be measured by the life of just one beneficiary, or more than one, and whether the donor, the donor's spouse, or some other person is the income beneficiary [*see Treas. Reg. § 1.642(c)-5(b)(2)*].

If the donor is the lifetime income beneficiary, all or a part of the value of the trust assets must be included in the donor's gross estate [*I.R.C. § 2036(a)*]. If the donor's spouse is irrevocably named as the lifetime income beneficiary, no part of the trust's assets is includable in the donor's estate, and the lifetime gift to the spouse qualifies for the marital deduction and is not considered in determining the estate tax due on the donor's estate [*I.R.C. § 2523(f)(1)*]. If the lifetime income beneficiary is someone other than the donor or the donor's spouse, no part of the trust's assets is ever includable in the donor's gross estate, but the amount of the lifetime gift is considered in determining the estate tax [*I.R.C. § 2001(b)(1)*], reduced by any previous gift tax paid [*I.R.C. § 2001(b)(2); see also I.R.C. § 2001(d)*].

In all cases, if the donor dies within three years of the date of the transfer to the pooled income fund, the value of the

estate is increased by the amount of the gift tax paid on the lifetime noncharitable transfer [*I.R.C.* § 2035(b)]. This tax, with other gift taxes paid, is allowed as a credit against the estate tax due under the unified transfer tax system.

If the donor is the primary beneficiary of a two-life arrangement and possesses at death the power to revoke the survivor beneficiary's interest, the full value of the trust's assets will be includable in the donor's gross estate [*I.R.C.* § 2036(a)]. However, if the donor's will revokes the rights of the survivor beneficiary, the estate will receive a charitable deduction for the full value of the assets that pass outright to the charitable beneficiary [*I.R.C.* § 2055(a)]. Otherwise, the estate is entitled to a charitable deduction only for the value of the remainder interest that passes to the charitable remainder beneficiary upon the death of the survivor beneficiary [*I.R.C.* § 2055(e)(2)(A)]. If the survivor is the donor's spouse, the estate is allowed a marital deduction by electing to have the fund property treated as qualified terminable interest property (QTIP) [*see I.R.C.* § 2056(b)(7)(A); *see also* discussion in Ch. 71, *Marital Deduction Trust Provisions* ]. In that case, there is no charitable deduction, since the entire value of the pooled income fund units is removed from the donor's taxable estate through the marital deduction [ *see* § 30.03[3][c]].

In any case, if the survivor beneficiary predeceases the donor, the value of the trust's assets must be included in the estate of the donor [*I.R.C.* § 2036(a)], but the same amount is allowed as an estate tax charitable deduction [*I.R.C.* § 2055(a)].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsCharitable TrustsTax LawFederal Estate & Gift TaxesDeductionsCharitable Deductions (IRC secs. 2055, 2522, 2524)General OverviewTax LawFederal Taxpayer GroupsIncome Taxation of Estates, Trusts & BeneficiariesCredits & Deductions (IRC secs. 641-668, 671, 681, 685)Deductions



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DIVISION IV: WILLS AND TRUSTS  
CHAPTER 74 SPLIT-INTEREST CHARITABLE TRUSTS  
PART II. LEGAL BACKGROUND

*26-74 California Legal Forms--Transaction Guide § 74.15*

**AUTHOR:** Reviewed by Albert G. Handelman

**§ 74.15 Charitable Lead Trusts**

**[1] General Characteristics**

A charitable lead trust is an irrevocable trust that provides for an income interest in favor of a qualifying charitable organization and a succeeding interest (which may be either a reversion or a remainder) in favor of the settlor or other designated beneficiaries. Like charitable remainder trusts and pooled income funds, charitable lead trusts are used to give property to charity and to obtain tax benefits in the form of an income tax [*see I.R.C. § 170(f)(2)(B)*], estate tax [*see I.R.C. § 2055(e)(2)(B)*], or gift tax [*see I.R.C. § 2522(c)(2)(B)*] charitable deduction. Because the noncharitable interest created under a charitable lead trust cannot be enjoyed until some time in the future, a charitable lead trust is best suited for a donor who has substantial assets and can afford to forgo income from or use of the trust assets, either permanently or for a period of years (or, in the case of a nongrantor trust [*see [2], below*], a donor who will leave substantial interests in other assets to family members or other noncharitable beneficiaries, who can therefore afford to wait for the charitable interest to terminate).

While the concept of the charitable lead trust is simple on the surface, the statutory requirements to qualify a charitable lead trust for the charitable deduction are quite complex, and failure to satisfy all of the requirements may result in loss of the deduction. Rules governing charitable lead trusts are found in three sets of treasury regulations, one relating to the income tax charitable deduction [*see Treas. Reg. § 1.170A-6(c)(2)(i), (ii)*], a second relating to the estate tax charitable deduction [*see Treas. Reg. § 20.2055-2(e)(2)(vi), (vii)*], and a third relating to the gift tax charitable deduction [*see Treas. Reg. § 25.2522(c)-3(c)(2)(vi), (vii)*]. With certain exceptions, these sets of regulations are identical.

In order for a charitable deduction to be allowed, the income interest must be either [*see I.R.C. §§ 170(f)(2)(B), 2055(e)(2)(B), 2522(c)(2)(B)*]:

- A guaranteed annuity [*see [3], below*]; or
- A fixed percentage of the fair market value of the trust assets, determined yearly and paid annually,

also known as a unitrust interest [*see* [4], *below*].

## [2] Grantor and Nongrantor Trusts

Charitable lead trusts can be either "grantor" or "nongrantor" trusts. In a grantor charitable lead trust, the donor retains the right to receive the trust assets after the termination of the charitable income interest. In the law of future interests, this interest is classified as a reversion [*see Civ. Code* § 768]. Under the grantor income tax rules [*see I.R.C.* §§ 671-679], a donor who retains a reversionary interest in a trust that, at inception, is worth more than five percent of the value of the whole trust is treated as the owner of the trust for income tax purposes [*I.R.C.* § 673(a)]. When the donor is treated as the owner of the trust for income tax purposes, the income of the trust is included in the donor's income for income tax purposes [*I.R.C.* § 671]. Since the income is to be paid to a charitable beneficiary, however, the donor obtains an initial income tax charitable deduction equal to the present value of the income interest passing to charity [*I.R.C.* § 170(f)(2)(B)].

In a nongrantor charitable lead trust, the donor irrevocably transfers the entire property to the trust, specifying that the income interest is to be paid to a charity and, upon termination of the income interest, the trust property is to be distributed to family members or others. The property is not distributed to the donor upon termination of the income interest. In the law of future interests, the interests of the family members or others are remainders [*Civ. Code* § 769]. Since the donor is not treated as the owner of the trust property for income tax purposes, no lifetime income tax charitable deduction is available to the donor for the income interest payable to charity [*I.R.C.* § 170(f)(2)(B)]. However, a gift tax charitable deduction is available for the present value of the income interest transferred to charity [*I.R.C.* § 2522]. Although the transfer of the remainder interest to family members or others would potentially be subject to gift tax, the value of the deductible income interest would reduce the value of the taxable remainder interest and thus reduce the overall gift tax cost of the transfer. If the trust is testamentary and the transfer is made on the donor's death, the overall estate tax costs of the transfer will be reduced by the value of the deductible income interest passing to charity [*see I.R.C.* § 2055 (estate tax charitable deduction)].

## [3] Charitable Lead Annuity Trust

A charitable lead annuity trust is a trust in which a "determinable amount" [*see Treas. Reg.* § 1.170A-6(c)(2)(i)(A) (definition of "determinable amount")] will be paid to a qualified charitable beneficiary for a term of years, or for the life or lives of one or more persons living at the time the trust is created [*I.R.C.* §§ 170(f)(2)(B), 2055(e)(2)(B), 2522(c)(2)(B); *Treas. Reg.* § 1.170A-6(c)(2)(i)(A)]. For this purpose, only one or more of the following individuals may be used as measuring lives: the donor, the donor's spouse, and an individual who, with regard to all remainder beneficiaries (other than qualifying charitable organizations), is either a lineal ancestor or the spouse of a lineal ancestor of those beneficiaries. A trust satisfies this requirement if there is less than a 15 percent probability that individuals who are not lineal descendants will receive any trust corpus. This probability must be computed, based on the applicable table in *Treas. Reg.* § 20.2031-7, at the time property is transferred to the trust, taking into account the interests of all primary and contingent remainder beneficiaries who are living at that time. An interest payable for a specified term of years can qualify as a guaranteed annuity interest even if the governing instrument contains a savings clause intended to ensure compliance with a rule against perpetuities. The savings clause must utilize a period for vesting of 21 years after the deaths of measuring lives who are selected to maximize, rather than limit, the term of the trust [*Treas. Reg.* §§ 1.170A-6(c)(2)(i)(A), 20.2055-2(e)(2)(vi)(a), 25.2522(c)-3(c)(2)(vi)(a)]. If a transfer is made on or after April 4, 2000, that uses an individual other than one permitted, the interest may be reformed to satisfy the rule [*Treas. Reg.* § 1.170A-6(e)]. On termination of the income interest, the trust property can be distributed to the grantor in the form of a reversion, or to another designated beneficiary in the form of a remainder.

There is no requirement that any minimum amount be paid, but to obtain a charitable income tax deduction, the donor must be taxable on the trust income during the term that the trust distributes assets to the charity [*see I.R.C.* § 170(f)(2)(B)]. For example, a trust that has assets valued at \$100,000 and which pays \$2,000 per year to a qualified

charitable organization for a period of eight years with the remainder reverting to the settlor will qualify for a charitable income and gift tax deduction for the value of the income interest given to the charity [ *see* §§ 74.210, 74.211].

#### **[4] Charitable Lead Unitrust**

A charitable lead trust with a unitrust income interest is a trust in which a fixed percentage of the value of the trust's assets, determined annually, is paid at least on an annual basis to a qualified charitable beneficiary for a term of years, or for the life or lives of an individual or individuals living at the time the trust is created [*Treas. Reg.* § 1.170A-6(c)(2)(ii)(A)]. For this purpose, only one or more of the following individuals may be used as measuring lives: the donor, the donor's spouse, and an individual who, with respect to all remainder beneficiaries (other than qualifying charitable organizations), is either a lineal ancestor or the spouse of a lineal ancestor of those beneficiaries. A trust satisfies this requirement if there is less than a 15 percent probability that individuals who are not lineal descendants will receive any trust corpus. This probability must be computed, based on the applicable table in *Treas. Reg.* § 20.2031-7, at the time property is transferred to the trust, taking into account the interests of all primary and contingent remainder beneficiaries who are living at that time. An interest payable for a specified term of years can qualify as a guaranteed annuity interest even if the governing instrument contains a savings clause intended to ensure compliance with a rule against perpetuities. The savings clause must utilize a period for vesting of 21 years after the deaths of measuring lives who are selected to maximize, rather than limit, the term of the trust [*Treas. Reg.* §§ 1.170A-6(c)(2)(i)(A), 20.2055-2(e)(2)(vi)(a), 25.2522(c)-3(c)(2)(vi)(a)]. If a transfer is made on or after April 4, 2000, that uses an individual other than one permitted, the interest may be reformed to satisfy the rule [*Treas. Reg.* § 1.170A-6(e)]. After the termination of the unitrust interest, the property can return to the grantor or be distributed to remainder beneficiaries [*see I.R.C.* §§ 170(f)(2)(B), 2055(e)(2)(B), 2522(c)(2)(B)].

Like the guaranteed annuity income interest, there is no minimum amount that must be paid, but the donor must be taxable on the trust income during the term that the trust distributes assets to the charity in order to obtain an income tax charitable deduction [*see I.R.C.* § 170(f)(2)(B)]. For example, a trust that requires that six percent of the value of its assets, valued annually, be paid to a qualified charitable organization for a period of eight years with the remainder reverting to the settlor will qualify for a charitable income and gift tax deduction for the value of the income interest given to the charity [ *see* § 74.220]. Unlike the annuity trust, however, the unitrust does not guarantee that a fixed amount will be paid to the charity each year.

When a unitrust is created during the donor's lifetime, additional contributions can be made to the trust and additional gift tax deductions (and, possibly, additional income tax deductions) will be allowed. However, the annual valuation of the trust property required for a unitrust can be burdensome.

#### **[5] Trust Property**

##### **[a] In General**

Property contributed to a charitable lead trust should yield sufficient income to meet the income requirements of the trust instrument, whether they be an annual guaranteed annuity or a unitrust amount. There is no provision permitting the trustee of a charitable lead unitrust to pay the lesser of the stated payment amount or the actual trust net income, as there is in the case of a charitable remainder unitrust [*see I.R.C.* § 664(d)(3)(A)]. If the property contributed to a charitable lead trust does not yield enough income to meet the income distribution requirements of the trust, the trustee may be forced to borrow funds, sell assets, or distribute a portion of the principal.

##### **[b] Tax-Exempt Securities**

Tax-exempt securities may be transferred to a charitable lead trust, and the trust may invest in tax-exempt securities. Holding tax-exempt securities in a grantor charitable lead trust may be advantageous from a tax standpoint, since the donor receives an immediate income tax deduction for the present value of the income interest contributed to charity [

*I.R.C. § 170(f)(2)(B)*] while the income generated by the trust (and reportable by the donor) is tax- exempt [*see Priv. Ltr. Rul. 8427022* ].

However, the value of fixed income securities (including tax-exempt securities) varies as interest rates fluctuate. If prevailing rates rise, the value of the securities will fall, and if rates decline, the value of the securities will rise. If tax-exempt securities are contributed to a unitrust (as opposed to an annuity trust), the annual unitrust amount that must be paid to the charitable beneficiary will increase or decrease as interest rates change. However, the securities will continue to generate only a fixed amount of income. If interest rates fall, the trust may not have enough income to make the unitrust payments; and if rates rise the trust may have excessive income for that purpose.

### **[c] Appreciated Property**

A significant tax advantage may be gained by transferring appreciated property to a trust that is exempt from income tax. After the property has been transferred to the trust, the trustee can sell it and reinvest the proceeds without incurring a capital gain tax. A charitable remainder trust is a tax-exempt trust for this purpose [*see I.R.C. § 664(c)*]. However, a charitable lead trust is not exempt from income tax. If appreciated property is contributed to a charitable lead trust, any gain on the subsequent sale of the property will be taxed to the grantor (if the trust is a grantor trust) or to the trust (if the trust is a nongrantor trust). For this reason, it is generally inappropriate to fund a charitable lead trust with appreciated property that the settlor wishes to be sold. However, a charitable lead trust may be funded with appreciated property that the donor does not wish to be sold. Property of this kind may be particularly appropriate if it generates enough income to meet the annuity or unitrust payments and it is expected that the property will continue to appreciate in the future.

The income tax effects of such a transfer on the remainder beneficiaries should be considered. If the remainder beneficiaries sell appreciated property after it has been contributed to the trust, the beneficiaries will realize capital gains to the extent that the adjusted sales price exceeds the donor's basis in the property [*see I.R.C. § 1015* (basis of property acquired by gift same in hands of donee as in hands of donor)]. If, on the other hand, the property is devised to the beneficiaries by will or otherwise transferred on the donor's death, the beneficiaries will receive a stepped-up basis in the property [*see I.R.C. § 1014* (basis of property acquired from decedent is fair market value at date of death)]; for decedents dying after 2009, a modified carryover basis rule generally applies, so a step-up basis does not apply (*I.R.C. § 1022*); *see* Ch. 60, *Estate Planning* , for a more detailed discussion] and the capital gains tax will be proportionately lower.

### **[6] Trustee**

#### **[a] Basic Considerations**

Any person or corporation that has the capacity to enter into contracts and hold title to property generally may act as a trustee. The choice is usually made among an individual (such as the grantor or a remainder beneficiary), a corporate trustee (such as a bank or trust company), or the charitable beneficiary. Careful selection of the trustee is crucial, because poor trusteeship can seriously affect the financial benefits of the trust for both the charitable beneficiary and any remainder beneficiaries.

Many factors should be considered when a trustee is selected. If the value of the trust property is modest, it may not be practical to pay a substantial corporate trustee fee. If the trust is complex, however, a corporate trustee may be preferable to an individual, because of its greater administrative capabilities, investment experience, and continuity. In some cases, the trust may be best served by the use of multiple trustees. This may be the case, for example, if the trust instrument gives the trustee discretion to allocate income among two or more charitable beneficiaries.

#### **[b] Settlor**

There are no rules prohibiting the settlor (or grantor) from serving as the trustee of a charitable lead trust. If the trust is to be a nongrantor trust, however, the trustee should not be given powers that would render the trustee the owner of the trust for income tax purposes under the grantor trust tax rules [*see I.R.C. §§ 671-679* (grantor trust rules); *see also Ch. 72, Irrevocable Trusts § 72.11[2]*]. The settlor can safely act as the trustee of a nongrantor trust if the trustee possesses only routine administrative powers over the trust property. If the trustee has the power to make discretionary distributions of trust property or income, however, or to designate the income or remainder beneficiaries of the trust, the settlor cannot safely act as the trustee without adverse income and estate tax consequences [*see I.R.C. §§ 674* (grantor deemed owner of trust for income tax purposes if grantor retains power to control beneficial enjoyment of trust), 2036(a)(2) (trust property included in grantor's estate when grantor retains power to designate persons who will possess or enjoy property or income from property), 2038(a)(1) (trust property included in grantor's estate if grantor retains power of revocation over trust)].

### **[c] Beneficiary**

There are no rules prohibiting an individual beneficiary from serving as trustee or cotrustee of a charitable lead trust. In appropriate cases, a beneficiary's interest in the trust or familiarity with the trust assets may make the beneficiary a good choice for trustee. However, a beneficiary should be selected as trustee only if the beneficiary is reliable, has good business judgment, and will not be subject to conflicts of interest. If there are two or more beneficiaries, selecting one of the beneficiaries to serve as trustee may be inadvisable, since such a trustee would be subject to conflicts of interest in the discharge of his or her duties. In circumstances of this kind, it will often be preferable to select a disinterested individual or a corporate fiduciary to serve as trustee, or as cotrustee with a beneficiary.

### **[7] Income Beneficiaries**

#### **[a] Charitable Organizations**

A charitable lead trust must have at least one income beneficiary that qualifies as a charitable organization. The charitable organization must be one of the organizations described in *I.R.C. §§ 170(c)* (income tax charitable deduction), *2055(a)* (estate tax charitable deduction), and *2522(a)* (gift tax charitable deduction). Although there is a slight difference in the wording of *I.R.C. §§ 170(c)*, *2055(a)*, and *2522(a)*, an organization that qualifies under one of these sections ordinarily will qualify under the other sections as well. IRS Publication No. 78 is a *Cumulative List of Organizations Described in I.R.C. § 170(c)*. To determine whether a particular organization qualifies as a charitable organization, an attorney may consult Publication No. 78, or directly contact the organization in question and request a copy of its tax-exempt determination letter.

The trust instrument should make some provision for the possibility that the named organization may lose its tax-exempt status. This may be done by providing that if, during the term of the trust, the designated charitable organization is not an organization of the type described in *I.R.C. §§ 170(c)*, *2055(a)* and *2522(a)*, the trustee will have discretion to pay the amount to another organization or organizations of that type. Giving the trustee authority to pay the amount to another organization or organizations when the designated charitable organization loses its tax-exempt status will not result in adverse income or estate tax consequences, even when the settlor is the trustee, although it will preserve the charitable deduction. The retention by the settlor of a power to determine the beneficial enjoyment of the income will not cause the settlor to be treated as the owner of the trust for income tax purposes if the income is irrevocably payable for a purpose specified in *I.R.C. § 170(c)* [*I.R.C. § 674(b)(4)*]. The income is still irrevocably payable for a purpose specified in *I.R.C. § 170(c)* when the trustee has the power to designate an alternative beneficiary to receive payments if and when the designated charitable beneficiary loses its tax-exempt status. Although the estate tax provisions of the Internal Revenue Code do not address this issue, it is doubtful that the retention by the settlor of a power of this kind would result in the inclusion of the trust corpus in the settlor's gross estate for estate tax purposes under either *I.R.C. § 2036* or *I.R.C. § 2038*.

There is no authority addressing whether the trust instrument may list several charitable beneficiaries and grant the trustee the power to "sprinkle" the annuity or unitrust amount among them. If the settlor (grantor) is trustee, however, that power would cause the trust to be includible in the settlor's estate for estate tax purposes [see *I.R.C. § 2036(a)(2)*], although it would not render the trust a grantor trust [see *I.R.C. § 674(b)(4)*].

### **[b] Private Individuals**

An income interest generally will not qualify as a guaranteed annuity or unitrust interest if an amount may be paid by the trust for a private purpose before the expiration of all charitable interests [*Treas. Reg. §§ 1.170A-6(c)(2)(i)(E), (ii)(D), 20.2055-2(e)(2)(vi)(f), 25.2522(c)-3(c)(2)(vi)(f)*]. For purposes of this rule, amounts paid for full and adequate consideration, such as trustee fees, are not considered to be paid for private purposes [*Treas. Reg. §§ 1.170A-6(c)(2)(i)(E), 20.2055-2(e)(2)(vi)(f), 25.2522(c)-3(c)(2)(vi)(f)*].

There are two exceptions to this general rule. First, an amount may be paid for private purposes from a segregated group of assets devoted solely to the private purpose [*Treas. Reg. §§ 1.170A-6(c)(2)(i)(E), 20.2055-2(e)(2)(vi)(f), 25.2522(c)-3(c)(2)(vi)(f)*]. This exception applies only if (1) the obligation to pay the charitable interest begins on the date the trust is created; (2) the private interest does not precede the charitable interest; and (3) the trust does not provide any preference or priority with respect to the private interest [*Treas. Reg. §§ 1.170A-6(c)(2)(i)(E), 20.2055-2(e)(2)(vi)(f), 25.2522(c)-3(c)(2)(vi)(f)*]. A trust that provides for payments of this kind is essentially treated as two trusts, a charitable lead trust and a noncharitable trust.

Second, an amount may be paid for a private purpose if the trust instrument provides that a guaranteed annuity or unitrust interest will be paid for both the private purpose and the charitable purpose [ *Estate of Boeshore v. Commissioner (1982) 78 T.C. 523, 531-532, acq., 1987-1 C.B. 1* ]. This exception was addressed by the Tax Court in *Estate of Boeshore v. Commissioner* [ *Estate of Boeshore v. Commissioner (1982) 78 T.C. 523, acq., 1987-1 C.B. 1* ]. The trust in question (a testamentary trust) provided for a unitrust interest payable first to an individual, then to both individuals and charities. Because a private interest was payable simultaneously with the charitable interest, both being stated as percentages of the whole fund, the IRS denied an estate tax charitable deduction. The court noted that such a payout sequence was not necessarily abusive, and held the applicable regulation [*Treas. Reg. § 20.2055-2(e)(2)(vii)(e)*] invalid [ *Estate of Boeshore v. Commissioner (1982) 78 T.C. 523, acq., 1987-1 C.B. 1* ]. Presumably, the court's reasoning should apply to income and gift tax deductions as well as estate tax deductions.

### **[8] Income Interest**

#### **[a] General Requirements**

The charitable beneficiary's right to receive the annuity or unitrust interest under a charitable lead trust must be irrevocable, and the payments to that beneficiary must be made at least annually [*Treas. Reg. § 1.170A-6(c)(2)(i)(A), (ii)(A)*]. An income interest will qualify as a guaranteed annuity interest only if it is such an interest "in every respect" [*Treas. Reg. § 1.170A-6(c)(2)(i)(B)*]. Conversely, an income interest will qualify as a unitrust interest only if it is a unitrust interest "in every respect" [*Treas. Reg. § 1.170A-6(c)(2)(ii)(B)*]. An interest will not qualify if it combines characteristics of these two types of interests. If, for example, the income interest is the right to receive an annual payment equal to the lesser of a sum certain or a fixed percentage of the net fair market value of the trust assets, the interest will not qualify as either a guaranteed annuity interest or a unitrust interest, since it does not fully satisfy the requirements of either type of interest [*Treas. Reg. § 1.170A-6(c)(2)(i)(B), (ii)(B)*].

#### **[b] Term**

A trust will qualify as a charitable lead trust if the guaranteed annuity or unitrust interest is payable (1) for a specified term, (2) for the life or lives of an individual or individuals, each of whom is living and ascertainable at the date of transfer, or (3) for the life of a specified individual living at the date of the transfer plus a term of years [*Treas. Reg. §*

*1.170A-6(c)(2)(i)(A), (ii)(A)*]. The IRS has also ruled that the term may be the lesser of a term of years or the lives of individuals plus a term of years [ *Rev. Rul. 85-49, 1985-1 C.B. 330* (guaranteed annuity interest)]. Unlike charitable remainder trusts, which are restricted to terms not exceeding 20 years [*see Treas. Reg. §§ 1.664-2(a)(5)(i), 1.664-3(a)(5)(i)*], there is no rule limiting the number of years for which a charitable lead trust can be established. Thus, a charitable lead trust that is established for a term of years can be established for any period the donor chooses, as long as the term does not violate the applicable rule against perpetuities [*see Prob. Code §§ 21200-21231* (Uniform Statutory Rule Against Perpetuities)].

### **[c] Valuation**

The present value of the annuity or unitrust interest in a charitable lead trust qualifies for a gift [*see I.R.C. § 2522(a)*] or estate [*see I.R.C. § 2055(a)*] tax charitable deduction, and in the case of a grantor lead trust, an income tax charitable deduction [*see I.R.C. § 170(f)(2)(B), (3)*]. The present value of a unitrust interest is an amount equal to the fair market value of the transferred property less the present value of all interests in the transferred property other than the unitrust interest [*Treas. Reg. §§ 1.170A-6(c)(3)(ii), 20.2055-2(f)(2)(v), 25.2522(c)-3(d)(2)(v)*]. The present value of a guaranteed annuity interest is the present value at the date of contribution of the annuity payments payable to the charitable recipient [*Treas. Reg. §§ 1.170A-6(c)(3)(i), 20.2055-2(f)(2)(iv), 25.2522(c)-3(d)(2)(iv)*].

For transfers made after April 30, 1989, the valuation of the annuity or unitrust interest is governed by *I.R.C. § 7520*, which requires that the value be determined using tables provided by the IRS and an interest rate based upon the "Applicable Federal Rate." The Applicable Federal Rate is an interest rate determined by the IRS and published on a monthly basis in accordance with authority conferred by *I.R.C. § 1274(d)*. It has three components, denominated the Federal short-term rate, the Federal mid-term rate, and the Federal long-term rate [*see I.R.C. § 1274(d)(1)*]. These rates are published in monthly IRS notices. Guidance in determining values is provided by *IRS 1989-1 C.B. 660, Notice 89-24*; *see Treas. Reg. § 20.7520-4* (transitional rule permitting transferors to rely on *Notice 89-24* in valuing interests having valuation date after April 30, 1989, and before June 10, 1994)]. Regulations provide additional valuation guidelines for interests transferred after April 30, 1989 [*Treas. Reg. §§ 1.7520-1, 20.7520-1-20.7520-4*]. Computer software products designed to facilitate the valuation are also used by many practitioners.

If the value of an interest as determined under the IRS tables exceeds the amount that the charity will actually receive, the deductible amount will be limited to the amount the charity will actually receive [*Treas. Reg. §§ 1.170A-6(c)(3)(iii), 20.2055-2(f)(2)(v), 25.2522(c)-3(d)(2)(v)*].

Before the income interest can be valued, the property transferred to the trust must be valued. The degree to which this valuation is troublesome depends upon the type of property transferred. Publicly-traded stock is relatively simple to value, while partnership interests are generally quite difficult to value. If the trustee of a lead unitrust intends to retain transferred assets, the transfer of a "hard-to-value" asset may prove troublesome, as the trust assets must be valued annually.

### **[9] Payout**

Unlike charitable remainder trusts, charitable lead trusts are not subject to minimum payout requirements. Instead, the donor may choose any guaranteed annuity or fixed payout percentage [*I.R.C. §§ 170(f)(2)(B), 2055(e)(2)(B), 2522(c)(2)(B)*]. Of course, it is necessary to consider what payout the trust investments can actually support in order to preserve trust principal for distribution after the termination of the annuity interest to the donor or the designated remainder beneficiaries.

### **[10] Remainder or Reversionary Interest**

After the termination of the annuity or unitrust interest, the trust principal may be distributed to the settlor (grantor) in

the form of a reversion, or to family members or others in the form of a remainder, in accordance with the trust terms [see *I.R.C.* §§ 170(f)(2)(B), 2055(e)(2)(B), 2522(c)(2)(B)]. There is no limit on the number of remainder beneficiaries that may be designated. However, all remainder beneficiaries must be living and ascertainable on the date the trust is created [*Treas. Reg.* § 1.170A-6(c)(2)(i)(A), (ii)(A)].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Trusts Charitable Trusts Tax Law Federal Estate & Gift Taxes Deductions Charitable Deductions (IRC secs. 2055, 2522, 2524) Disallowance of Deductions Tax Law Federal Taxpayer Groups Income Taxation of Estates, Trusts & Beneficiaries Credits & Deductions (IRC secs. 641-668, 671, 681, 685) Deductions Tax Law State & Local Taxes Income Tax Individuals, Estates & Trusts Deductions



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DIVISION IV: WILLS AND TRUSTS  
CHAPTER 74 SPLIT-INTEREST CHARITABLE TRUSTS  
PART II. LEGAL BACKGROUND

*26-74 California Legal Forms--Transaction Guide § 74.16*

**AUTHOR:** Reviewed by Albert G. Handelman

**§ 74.16 Special Features of Charitable Lead Annuity Trusts**

**[1] Determinable Amount**

A charitable lead annuity trust must pay a "determinable amount" periodically, but not less often than annually [*Treas. Reg. § 1.170A-6(c)(2)(i)(A)*]. An amount is determinable if the exact amount that must be paid under the conditions specified in the trust instrument can be ascertained as of the date of the transfer [*Treas. Reg. § 1.170A-6(c)(2)(i)(A)*]. The exact amount may be a specified sum or a fixed percentage of the fair market value of the trust assets ascertained as of the date of transfer [*Treas. Reg. § 1.170A-6(c)(2)(i)(A)*]. There is no requirement that any minimum amount be paid.

The annuity amount must be paid regardless of the value of the trust property or the amount of income generated by the trust. The amount may be changed by a specific amount at the end of a term or the life of an individual, but it may not be redetermined by reference to a fluctuating index such as the cost of living index [*Treas. Reg. § 1.170A-6(c)(2)(i)(A)*]. For example, the trust could provide for the payment of \$10,000 per year for 10 years, followed by \$15,000 per year for the next 10 years.

**[2] Excess Income**

Income earned by the trust in excess of the guaranteed annuity payment may be either retained by the trust for eventual distribution to the grantor or remainder beneficiaries, or distributed currently to the charitable beneficiary. In either case, the amount of the initial income, gift, or estate tax charitable deduction is limited to the fair market value of the guaranteed annuity interest computed with respect to the sum certain or the stated percentage of the trust's assets [*Treas. Reg. §§ 1.170A-6(c)(2)(i)(C)*, (3), 20.2055-2(e)(2)(vi)(d), 25.2522(c)-3(c)(2)(vi)(d)]. If the trust is a grantor trust [ *see § 74.15[2]*; *see also Ch. 72, Irrevocable Trusts § 72.11[2]*], however, the grantor is permitted an annual income tax charitable deduction for amounts paid by the trust to a charitable organization in excess of the guaranteed annuity amount [*Treas. Reg. § 1.170A-6(d)(2)(ii)*]

**[3] Additional Contributions**

There are no rules prohibiting additional contributions to charitable lead trusts, as there are in the case of charitable remainder trusts [*see Treas. Reg. §§ 1.664-2(b), 1.664-3(b)*]. However, it is unclear whether additional contributions to a charitable lead annuity trust will generate additional income, gift, or estate tax charitable deductions, since the annuity payment must be "determinable" at the "date of transfer" [*Treas. Reg. § 1.170A-6(c)(2)(i)(A)*]. Neither the Code nor the Regulations address the question of whether the "date of transfer" for this purpose is the initial transfer date, or date of the creation of the trust, or the later date of an additional contribution. Additional contributions may be helpful when the income of the trust would otherwise be insufficient to pay the guaranteed annuity amount.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Trusts Charitable Trusts



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DIVISION IV: WILLS AND TRUSTS  
CHAPTER 74 SPLIT-INTEREST CHARITABLE TRUSTS  
PART II. LEGAL BACKGROUND

*26-74 California Legal Forms--Transaction Guide § 74.17*

**AUTHOR:** Reviewed by Albert G. Handelman

**§ 74.17 Special Features of Charitable Lead Unitrusts**

**[1] Fixed Percentage**

A charitable lead unitrust must pay, at least annually, a fixed percentage of the net fair market value of the trust assets, determined annually [*Treas. Reg. § 1.170A-6(c)(2)(ii)(A)*]. In determining the net fair market value of the trust property, all assets and liabilities of the trust must be taken into account, regardless of whether they are also taken into account in determining the income of the trust [*Treas. Reg. § 1.170A-6(c)(2)(ii)(A)*]. The net fair market value may be determined on any one date during the trust's taxable year, or by taking the average of valuations made on more than one date during the year, providing that the same valuation date or dates and valuation methods are used each year [*Treas. Reg. § 1.170A-6(c)(2)(ii)(A)*]. If the trust instrument does not specify the valuation date or dates, the trustee must select the date or dates on the first fiduciary income tax return (Form 1041) that the trust is required to file [*Treas. Reg. § 1.170A-6(c)(2)(ii)(A)*].

**[2] Excess Income**

Income earned by the trust in excess of the unitrust amount may be retained by the trust for eventual distribution to the grantor or the remainder beneficiaries, or may be distributed to the charitable beneficiary on a current basis. In either case, the amount of the initial income, gift, or estate tax charitable deduction is limited to the fair market value of the guaranteed unitrust interest computed with respect to the fixed percentage of the fair market value of the trust's assets [*Treas. Reg. §§ 1.170A-6(c)(2)(ii)(C), (3), 20.2055-2(e)(2)(vii)(d), 25.2522(c)-3(c)(2)(vii)(d)*]. If the trust is a grantor trust [ *see § 74.15[2]; see also Ch. 72, Irrevocable Trusts § 72.11[2]*], however, the grantor is permitted an annual income tax charitable deduction for amounts paid by the trust to a charitable organization in excess of the unitrust amount [*Treas. Reg. § 1.170A-6(d)(2)(ii)*]. Note that if the trust pays excess income to a charity, the charitable deduction will be less than if the excess income were accumulated since, when income is accumulated, the value of the trust principal increases and the present value of the unitrust amount determined with reference to the principal also increases [ *Rev. Rul. 78-183, 1978-1 C.B. 302* ].

**[3] Additional Contributions**

Additional contributions to a charitable lead unitrust appear to be permissible as long as the governing instrument so provides. In *Private Letter Ruling 8043077*, the IRS approved a lead unitrust that permitted additional contributions and ruled that additional gift tax deductions would be available.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Trusts Charitable Trusts



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DIVISION IV: WILLS AND TRUSTS  
CHAPTER 74 SPLIT-INTEREST CHARITABLE TRUSTS  
PART II. LEGAL BACKGROUND

*26-74 California Legal Forms--Transaction Guide § 74.18*

**AUTHOR:** Reviewed by Albert G. Handelman

**§ 74.18 Private Foundation Rules Applicable to Split-Interest Trusts**

**[1] Applicability of Requirements**

Charitable remainder trusts and charitable lead trusts are split-interest trusts within the meaning of the Internal Revenue Code if they have noncharitable and charitable interests and either an income, estate, or gift charitable deduction is granted for the charitable interests [*I.R.C. § 4947(a)(2)*]. As split-interest trusts, they are subject to certain taxes and requirements applicable to private foundations [*I.R.C. § 4947(a)(2)*].

Under *I.R.C. § 4947(a)(2)*, split-interest trusts are generally subject to the following statutory provisions applicable to private foundations:

- *I.R.C. § 507* relating to termination of private foundation status [*see Treas. Reg. § 53.4947-1(e)*] (applicable only in limited situations).
- *I.R.C. § 4941*, which imposes a tax on acts of self-dealing by private foundations [*see discussion in [3], below*].
- *I.R.C. § 4943*, which imposes a tax on excess business holdings by private foundations [*see discussion in [4], below*].
- *I.R.C. § 4944*, which imposes a tax on jeopardy investments by private foundations [*see discussion in [5], below*].
- *I.R.C. § 4945*, which imposes a tax on taxable expenditures by private foundations [*see discussion in [6], below*].
- *I.R.C. § 508(e)*, which requires that the governing trust instrument prohibit the activities noted in

Items 2 through 5, above, which are subject to tax [*see* discussion in [2], *below*].

## **[2] Governing Instrument Requirements**

### **[a] Required Provisions**

Charitable deductions (whether income tax deductions, gift tax deductions, or estate tax deductions) are not allowed for gifts to charitable trusts that fail to meet the "governing instrument" requirements of *I.R.C. § 508(e)(1)* [*I.R.C. § 508(d)(2)*]. Generally, the governing instrument must include provisions requiring the trust to distribute income in accordance with *I.R.C. § 4942* and prohibiting the trust from engaging in acts of self-dealing [*I.R.C. § 4941(d)*; *see* [3], *below*], from retaining excess business holdings [*I.R.C. § 4943(c)*; *see* [4], *below*], from making investments in a manner subjecting the foundation to tax [*I.R.C. § 4944*; *see* [5], *below*], and from making taxable expenditures [*I.R.C. § 4945(d)*; *see* [6], *below*]. However, as noted in [4], and [5], *below*, *I.R.C. § 4947(b)(3)* provides that the excess business holdings rules of *I.R.C. § 4943* and the investment rules of *I.R.C. § 4944* are inapplicable to trusts described in [1], above.

### **[b] State Statutes Satisfying Requirements**

The requirements of *I.R.C. § 508(e)* relating to provisions of the trust instrument are deemed satisfied if state statutes prohibit the trusts from engaging in the activities forbidden by that section [*Treas. Reg. § 1.508-3(d)*]. In California, the trustees of charitable trusts, private foundations, and split-interest trusts are subject to *Prob. Code §§ 16100-16105*, which generally require the trustee to distribute trust income in a time and manner that will not subject the trust property to tax under *I.R.C. § 4942* [*Prob. Code § 16101*] and forbid the trustee from engaging in any acts that would violate the private foundation rules [*Prob. Code §§ 16102, 16103*]. The California statutory provisions are deemed to be contained in the governing instrument of charitable trusts, private foundations, and split-interest trusts subject to California law [*Prob. Code § 16104*]. Many other states have enacted similar statutes [*see Rev. Rul. 75-38, 1975-1 C.B. 161* for a list of states that have enacted similar statutory provisions]. Even when the state law automatically makes the private foundation rules applicable to charitable trusts, however, it is good practice to include provisions in the trust explicitly requiring the trustee to abide by the rules. This will clearly apprise the trustee and all other persons interested in the trust that the private foundation rules apply to the trust and must be complied with.

### **[3] Self-Dealing**

Subject to certain exceptions, the following self-dealing transactions are prohibited between a "disqualified person" and a split-interest charitable trust [*I.R.C. § 4941(d)*; for definition of "disqualified person," *see I.R.C. § 4946(a)* and discussion in *Ch. 61, Will Drafting & Complete Will Forms § 61.15[3]*]:

- The sale, exchange, or lease of property, including the assumption of a mortgage by the trust.
- The lending of money or other extension of credit, excluding a loan to the trust that is interest-free and used exclusively for exempt purposes.
- The furnishing of goods, services, or facilities, unless they are furnished to the trust without charge and are used exclusively for exempt purposes, or are not made available to the trustee on a more favorable basis than to the general public.
- The payment of compensation, unless the payment is necessary to carry out the exempt purpose of the trust and is not excessive.
- The transfer to, or use by or for the benefit of, a disqualified person of the income or assets of the trust.

- The payment of money or property to a government official.

A disqualified person who participates in any of these acts of self-dealing may be liable for initial (and possibly additional) taxes [*see I.R.C. § 4941(a), (b)*]. A participating trustee may also be liable [*see I.R.C. § 4941(a), (b)*].

#### **[4] Excess Business Holdings**

The excess business holdings rules are complex. These rules generally provide that a split-interest charitable trust cannot hold more than 20 percent of the voting stock in any business enterprise, less the percentage of the voting stock owned by all disqualified persons [*I.R.C. § 4943(c)(2)(A)*]; for definition of "disqualified person," *see I.R.C. § 4946(a)*]. This 20-percent limit is increased to 35 percent if effective control of the corporation is held by outside third parties [*I.R.C. § 4943(c)(2)(B)*].

If a trust has excess business holdings as a result of a gift or devise, there is a five-year grace period during which the trust or disqualified person may dispose of the property without violating the excess business holdings rules [*I.R.C. § 4943(c)(6)(A)*]. If there is an unusually large or complex gift or devise, an additional five-year period may be granted to dispose of the excess business holdings [*I.R.C. § 4943(c)(7)*].

Charitable remainder trusts for which an income, estate, or gift charitable deduction is granted and that have solely noncharitable income beneficiaries are not subject to the taxes on excess business holdings and need not include prohibitions against those activities in the trust instrument [*I.R.C. § 4947(b)(3)(B)*; *Treas. Reg. § 1.508-3(e)(2)*]. Charitable lead trusts whose income beneficiaries are solely charitable and whose aggregate income, estate, or gift charitable deductions do not exceed 60 percent of the fair market value of all assets in the trust also are not subject to the taxes on excess business holdings, and need not include prohibitions against such activities in the trust instrument [*I.R.C. § 4947(b)(3)(A)*; *Treas. Reg. § 1.508-3(e)(2)*].

The excess business holding rules can be troublesome for charitable lead trusts, since these trusts are often used to pass valuable assets (such as closely held stock) to family members. Structuring a charitable lead trust so that the actuarial value of the charitable interest in the lead trust is less than 60 percent of the value of all the interests in the trust will limit the charitable deduction. The requirement that all of the income interest must be paid to a charitable organization is presumably satisfied via the guaranteed annuity or unitrust interest.

#### **[5] Investments Jeopardizing Charitable Purpose**

If a split-interest charitable trust makes an investment that jeopardizes any of the trust's exempt purposes, a tax equal to 5 percent of the amount invested in the taxable period will be imposed on the trust, and possibly also on the trustee [*I.R.C. § 4944(a)*]. Investments that may jeopardize the trust's exempt purposes include such things as trading in securities on margin, trading in commodity futures, investing in working interests in oil and gas wells, purchasing "puts," "calls," and "straddles," purchasing warrants, and short-selling [*see Treas. Reg. § 53.4944-1(a)(2)*]. If the investment is not corrected, additional taxes may be imposed [*I.R.C. § 4944(b)*].

The same exceptions that apply to the excess business holding rules [*see [4], above*] also applies to the jeopardy investment rules. Charitable remainder trusts for which an income, estate, or gift charitable deduction is granted and that have solely noncharitable income beneficiaries are not subject to the taxes on jeopardy investments and need not include prohibitions against those activities in the trust instrument [*I.R.C. § 4947(b)(3)(B)*; *Treas. Reg. § 1.508-3(e)(2)*]. Charitable lead trusts whose income beneficiaries are solely charitable and whose aggregate income, estate, or gift charitable deductions do not exceed 60 percent of the fair market value of all assets in the trust also are not subject to the taxes on jeopardy investments, and need not include prohibitions against such activities in the trust instrument [*I.R.C. § 4947(b)(3)(A)*; *Treas. Reg. § 1.508-3(e)(2)*].

**[6] Taxable Expenditures**

A penalty tax will be imposed on a split-interest charitable trust (and possibly on the trustee) if the trustee makes certain "taxable expenditures" [I.R.C. § 4945(a)]. For this purpose, the term "taxable expenditures" generally includes the following:

- Any amount paid or incurred by the trust to influence legislation, to influence the outcome of a specific public election, or to carry on a voter registration drive [I.R.C. § 4945(d)(1), (2)].
- Any amount paid or incurred as a grant to an individual for travel or study, or as a grant to any organization that is not a "public charity" organization or exempt operating foundation [I.R.C. § 4945(d)(3), (4); see I.R.C. §§ 509(a), 4940(d)(2)].
- Any other amount paid or incurred for any purpose other than a religious, charitable, scientific, literary, or educational purpose, or to foster amateur sports competition or to prevent cruelty to children or animals [I.R.C. § 4945(d)(5); see I.R.C. § [0-9]70(c)(2)(B)].

If a taxable expenditure has been made and it is not corrected within the taxable period, additional taxes may be imposed [I.R.C. § 4945(b)].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsCharitable TrustsTax LawFederal Estate & Gift TaxesDeductionsCharitable Deductions (IRC secs. 2055, 2522, 2524)General OverviewTax LawFederal Estate & Gift TaxesDeductionsCharitable Deductions (IRC secs. 2055, 2522, 2524)Disallowance of DeductionsTax LawFederal Income Tax ComputationDeductions for Nonbusiness ExpensesCharitable Contributions (IRC sec. 170)Disallowance of DeductionTax LawFederal Taxpayer GroupsIncome Taxation of Estates, Trusts & BeneficiariesCredits & Deductions (IRC secs. 641-668, 671, 681, 685)Deductions



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*26-74 California Legal Forms--Transaction Guide § 74.19*

**AUTHOR:** Reviewed by Albert G. Handelman**§ 74.19 Generation-Skipping Transfer Tax Consequences of Split-Interest Trusts****[1] Charitable Remainder Trusts and Pooled Income Funds**

The gift of the income interest of a charitable remainder annuity or unitrust may have generation-skipping transfer tax implications [*I.R.C. § 2601 et seq.*; *see I.R.C. § 664(d)(1), (2)*]. Similarly, if the settlor makes a gift of the income interest when transferring the remainder to a pooled income fund, that gift may have generation-skipping transfer tax consequences [*I.R.C. § 2601 et seq.*; *see I.R.C. § 642(c)(5)*]. The generation-skipping transfer tax applies to both income and principal distributions. In general, whenever a trust distribution of income or principal is made to a beneficiary who is assigned to a generation that is two or more below that of the settlor [*see I.R.C. § 2651*], the distribution is subject to the tax [*see I.R.C. §§ 2601, 2611, 2612(a), (b)*]. For example, if the settlor creates a charitable remainder annuity trust, providing that his or her children and grandchildren receive 5 percent of the initial net fair market value of the trust assets for 12 years and that a designated charity receive the remainder interest, distributions of income or principal passing directly to the grandchildren constitute taxable distributions [*see I.R.C. §§ 2601, 2611, 2612(b)*]. For further discussion of the generation-skipping transfer tax, see the Legal Background to Ch. 60, *Estate Planning*. For a detailed discussion of the tax, see California Wills & Trusts, Ch. 113, *Generation-Skipping Transfers and Trust Strategies* (Matthew Bender).

**[2] Charitable Lead Trusts**

The gift of a remainder interest in a charitable lead trust may have generation-skipping transfer tax consequences [*see I.R.C. § 170(f)(2)(B)*; *see also I.R.C. § 2601 et seq.*]. If the remainder interest is in trust, trust distributions of either income or principal to beneficiaries who are assigned to generations that are two or more below that of the settlor [*see I.R.C. § 2651*] are subject to the tax [*see I.R.C. §§ 2601, 2611, 2612(a), (b)*]. If all the remainder beneficiaries are skip persons (two or more generations below the settlor's generation [*see I.R.C. § 2613(a)*]), the expiration of the charitable interest constitutes a taxable termination [*see I.R.C. § 2612(a)*]. However, if a least one of the remainder beneficiaries is not a skip person, the expiration of the charitable interest is not a taxable termination, but subsequent distributions to skip persons are taxable distributions [*see I.R.C. § 2612(b)*]. If the remainder passes outright, transfers to beneficiaries assigned to generations that are two or more below that of the settlor are taxable distributions [*see I.R.C. § 2612(b)*].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Trusts Charitable Trusts Tax Law Federal Estate & Gift Taxes Generation-Skipping Transfer Taxes (IRC secs. 2601-2663)



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*26-74 California Legal Forms--Transaction Guide § 74.20*

**AUTHOR:** Reviewed by Albert G. Handelman

**§ 74.20 Federal Income Taxation of Charitable Trusts and Beneficiaries**

**[1] Remainder Trusts**

Charitable remainder trusts that qualify under *I.R.C. § 664* are specifically exempted from income tax liability [*I.R.C. § 664(c)*]. However, if a charitable remainder trust has unrelated business taxable income within the meaning of *I.R.C. § 512* during the year, then all of its income during that year is subject to income tax [*Treas. Reg. § 1.664-1(c)*].

The donor of appreciated property to a charitable remainder trust does not recognize gain or loss on the transfer, and the trust takes the donor's basis [*see Rev. Rul. 55-275, 1955-1 C.B. 295 ; Rev. Rul. 60-370, 1960-2 C.B. 203*].

The income beneficiaries of charitable remainder trusts are taxable according to the characteristics of the trust distribution [*see Treas. Reg. § 1.664-1(a)(5)(iii)*]. Distributions are treated first as ordinary income to the extent of the trust's ordinary income for the year and prior undistributed ordinary income; second, as capital gain to the extent of capital gain for the year and prior undistributed capital gain; third, as other income to the extent of such other income for the year and prior undistributed other income; and fourth, as a distribution of trust corpus [*I.R.C. § 664(b)*]. Within the ordinary income and capital gains categories, income is treated as distributed from the classes of income in that category beginning with the class that is subject to the highest income tax rate and ending with the class that is subject to the lowest income tax rate [*Treas. Reg. § 1.664-1(d)(1)(ii)*]. The determination of the character of amount distributed (or deemed distributed) at any time during the trust's tax year is made as of the end of that tax year. The tax rates to be used in computing the tax on the distribution are those that apply in the year in which the distribution is required to be made to the classes of income deemed to make up the distribution, not the tax rates that apply to those classes of income in the year the trust receives the income [*Treas. Reg. § 1.664-1(d)(1)(ii)(a)*]. A loss in one of the categories of distribution may offset prior undistributed amounts in that category, but it cannot be used to offset gains in other categories [*Treas. Reg. § 1.664-1(d)(1)(ii)*]. For each tax year that current and undistributed gains and losses within each class are netted to determine the net gain or loss for that class, the classes of capital gains and losses may then be netted against each other in a specified order [*Treas. Reg. § 1.664-1(d)(1)(iv)*]. Notice that these rules may result in deferral, but not elimination of tax on a capital gain if the trust sells low-basis, high-value assets, contrary to popular notions that

contributions of such assets to charitable remainder trusts prevent complete avoidance of the tax.

### **[2] Pooled Income Funds**

A qualifying pooled income fund and its beneficiaries are taxable under Part I of Subchapter J of the Internal Revenue Code, relating to the taxation of trusts and beneficiaries [*Treas. Reg. § 1.642(c)-5(a)(2)*]. The pooled income fund is subject to taxation to the extent that its income is not distributed to its beneficiaries. Like charitable remainder trusts, donors do not recognize gain or loss on property transferred to the fund, and *I.R.C. § 644* is inapplicable [*see I.R.C. § 644(b)*]; *Treas. Reg. § 1.642(c)-5(a)(3)*].

### **[3] Lead Trusts**

A charitable lead trust, like a pooled income fund, is taxable under Part I of Subchapter J of the Internal Revenue Code. The income beneficiary is a charitable organization that will not be subject to income tax on the trust distributions. If the donor receives an income tax charitable deduction for the lead interest, the donor will be taxable on the trust income throughout the trust term [*see I.R.C. § 170(f)(2)(B)*]. If the donor does not retain a reversionary interest in the trust property, the trust is taxable on income that is not distributed [*see I.R.C. §§ 641, 642(c), 675*]. Payments to the charitable income beneficiary must be treated as charitable deductions under *I.R.C. § 642(c)*, rather than as distribution deductions under *I.R.C. § 661* [*Treas. Reg. § 1.663(a)-2*].

### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Tax Law Federal Taxpayer Groups Income Taxation of Estates, Trusts & Beneficiaries Credits & Deductions (IRC secs. 641-668, 671, 681, 685) General Overview Tax Law Federal Taxpayer Groups Income Taxation of Estates, Trusts & Beneficiaries Credits & Deductions (IRC secs. 641-668, 671, 681, 685) Deductions Tax Law Federal Taxpayer Groups Income Taxation of Estates, Trusts & Beneficiaries Taxation of Beneficiaries (IRC secs. 661-668, 691-692)



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*26-74 California Legal Forms--Transaction Guide § 74.21*

**AUTHOR:** Reviewed by Albert G. Handelman

**§ 74.21 Coordination of Marital Deduction and Charitable Deduction**

**[1] Eligibility of Income Interest for Marital Deduction**

It is not uncommon for a settlor to create a charitable remainder trust with the settlor's spouse as an income beneficiary. In this situation, the income interest to the surviving spouse will qualify for the federal estate and gift tax marital deductions, notwithstanding the fact that the interests are terminable interests, for which the marital deduction generally is unavailable [*I.R.C. §§ 2056(b)(8)* (estate tax), 2523(g) (gift tax); *see I.R.C. §§ 2056(b), 2523(b)* (general disallowance of deduction for terminable interests)]. In order for the income interest to qualify for the federal estate tax marital deduction, however, the surviving spouse must be the *only* beneficiary of a qualified charitable remainder trust who is not a charitable beneficiary or an employee stock ownership plan (ESOP) [*I.R.C. §§ 2056(b)(8)* (estate tax), 2523(g) (gift tax)].

The IRS regulations provide that the interest held by a sole noncharitable beneficiary of a qualified charitable remainder trust is ineligible for the QTIP election [*Treas. Reg. § 20.2056(b)-8(a)(1)*]. The surviving spouse's interest need not be an interest for life, but under the rules applicable to charitable remainder trusts an interest payable for a specified term cannot be payable for a term in excess of 20 years [*Treas. Reg. § 20.2056(b)-8(a)(2); I.R.C. § 664(d)(1)(A), (2)(A)*].

**[2] QTIP Trust As Alternative to Charitable Remainder Trust**

As an alternative to qualified charitable remainder trust, the drafter may simply prepare a standard QTIP trust with a remainder to charity. When this is done, the entire value of the QTIP property is eligible for the QTIP election, as with any other QTIP trust, and may pass to the trust tax free if the executor so elects [*see I.R.C. § 2056(b)(7); Treas. Reg. § 20.2056(b)-7*]. When the surviving spouse dies, any remaining assets of the QTIP trust are included in his or her taxable estate [*I.R.C. § 2044(a),(b)(1)(A)*]. However, the trust assets are treated as property passing from the deceased spouse to the charity [*I.R.C. § 2044(c)*], and therefore qualify for the charitable deduction, assuming all other applicable requirements have been met [*Treas. Reg. § 20.2044-1(b); see I.R.C. § 2055(a)* (charitable deduction available for all qualifying transfers made by decedent)]. Some attorneys prefer this drafting alternative to the creation of a qualifying charitable remainder trust, simply because they are familiar with the QTIP requirements and would prefer to deal with

them rather than the more detailed and less frequently encountered regulations dealing with charitable remainder trusts. A second (and better) reason for this preference is greater flexibility in the administration of the QTIP trust for the survivor's benefit: unlike a charitable remainder trust [*see I.R.C. § 664(d)(1)(B), (2)(B)* (no amount other than annuity or unitrust amount may be payable to life beneficiary)], the survivor may invade the principal of a QTIP trust if the trust instrument permits such invasions.

For detailed discussion of the federal estate tax marital deduction and QTIP trusts, see Ch. 71, *Marital Deduction Trust Provisions*. For illustrative QTIP trusts (for noncharitable remainder beneficiaries), see Ch. 70, *Complete Revocable Trust Forms*, §§ 70.202[2], 70.203[2].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Tax Law Federal Estate & Gift Taxes Deductions Charitable Deductions (IRC secs. 2055, 2522, 2524) General Overview  
Tax Law Federal Estate & Gift Taxes Deductions Marital Deduction (IRC secs. 2056, 2523) General Overview  
Tax Law Federal Taxpayer Groups Income Taxation of Estates, Trusts & Beneficiaries Credits & Deductions (IRC secs. 641-668, 671, 681, 685) Deductions



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*26-74 California Legal Forms--Transaction Guide § 74.22*

**AUTHOR:** Reviewed by Albert G. Handelman

**§ 74.22 California Law Governing Interpretation of Charitable Remainder Annuity Trusts, Unitrusts, and Charitable Lead Trusts**

**[1] Purpose and Application**

*Prob. Code §§ 21540 and 21541* are designed to reduce the possibility that the estate tax charitable deduction will be lost by inadvertent inclusion of inappropriate provisions in instruments creating charitable remainder unitrusts, charitable remainder annuity trusts, or charitable lead trusts. These sections apply broadly to wills, trusts, deeds, and other writings that designate beneficiaries or make donative transfers of property [*see Prob. Code § 21540* (rules applicable to "instrument"); *see also Prob. Code § 45* ("instrument" means will, trust, deed, or other writing that designates beneficiary or makes donative transfer)].

**[2] Construction of Instruments in Conformity With Internal Revenue Code**

*Prob. Code § 21540* provides that if an instrument indicates the transferor's intention to comply with the Internal Revenue Code requirements for a charitable remainder unitrust or annuity trust (as defined in *I.R.C. § 664*), the provisions of the instrument (including any power, duty, or discretionary authority given to a fiduciary in the instrument) must be construed to comply with the charitable deduction provisions of *I.R.C. § 2055* or *I.R.C. § 2522* and the charitable remainder trust provisions of *I.R.C. § 664* in order to conform to that intent [*Prob. Code § 21540*]. *Prob. Code § 21541* makes the same provision for instruments that indicate the transferor's intention to comply with the requirements for a charitable lead trust as described in *I.R.C. § 170(f)(2)(B)* and *I.R.C. § 2522(c)(2)*.

**[3] Other Requirements**

Under both *Prob. Code §§ 21540 and 21541*, the trustee is forbidden to take any action or have any power that impairs the charitable deduction [*Prob. Code §§ 21540, 21541*]. *Prob. Code § 21540* states that the provisions of the instrument may be augmented in any manner consistent with *I.R.C. §§ 2055(e)* or *2522(c)* on a petition provided for in *Prob. Code § 17200*. *Prob. Code § 21541* provides that the provisions of the instrument may be augmented in any manner consistent with the intent to comply with the requirements for a charitable lead trust on a petition provided for in *Prob.*

*Code § 17200* [see *Prob. Code § 17200(b)(15)* (petition to amend or conform instrument to qualify for charitable estate tax deduction)]. If a petition under *Prob. Code § 17200* relates to a charitable trust subject to the jurisdiction of the Attorney General, notice of the time and place of the hearing on the petition must be given to that officer, unless the Attorney General has waived notice [*Prob. Code § 17203(a)(3)*]. In one case, the amendment of the provisions of a charitable trust regarding appointment of successor trustees was found to be improper under the *Fourteenth Amendment to the U.S. Constitution* because potential successor trustees under the trust as written were not notified of the proceeding to amend the trust [ *Estate of Sigourney v. American Psychoanalytic Ass'n* (2001) 93 Cal. App. 4th 593, 603-604, 113 Cal. Rptr. 2d 274] .

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsCharitable TrustsEstate, Gift & Trust LawTrustsInterpretation



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*26-74 California Legal Forms--Transaction Guide § 74.23*

**AUTHOR:** Reviewed by Albert G. Handelman

**§ 74.23 Drafting Split-Interest Charitable Trusts**

**[1] Charitable Remainder Trusts**

**[a] Sample IRS Forms**

The IRS has promulgated sample forms that incorporate the statutory and regulatory requirements applicable to charitable remainder trusts. *Revenue Procedures 2005-52* through *2005-59* [ *Rev. Proc. 2005-52, 2005-34 I.R.B. 326* ; *Rev. Proc. 2005-53, 2005-34 I.R.B. 339* ; *Rev. Proc. 2005-54, 2005-34 I.R.B. 353* ; *Rev. Proc. 2005-55, 2005-34 I.R.B. 367* ; *Rev. Proc. 2005-56, 2005-34 I.R.B. 383* ; *Rev. Proc. 2005-57, 2005-34 I.R.B. 292* ; *2005-58, 2005-34 I.R.B. 402* ; *Rev. Proc. 2005-59, 2005-34 I.R.B. 412* ] contain sample forms for charitable remainder unitrusts. *Revenue Procedures 2003-53* through *2003-60* [ *Rev. Proc. 2003-54, 2003-31 I.R.B. 236* ; *Rev. Proc. 2003-55, 2003-31 I.R.B. 242* ; *Rev. Proc. 2003-56, 2003-31 I.R.B. 249* ; *Rev. Proc. 2003-57, 2003-31 I.R.B. 257* ; *Rev. Proc. 2003-58, 2003-31 I.R.B. 262* ; *Rev. Proc. 2003-59, 2003-31 I.R.B. 268* ] contain sample forms for charitable remainder annuity trusts. The sample forms include both testamentary and inter vivos trusts. If the trust provisions in a charitable remainder trust are "substantially similar" to those in the sample forms, the IRS will recognize the trust as satisfying the applicable requirements for split interest charitable trusts. Documents will be considered "substantially similar" if the wording is varied to "comport with local law and practice as necessary to create trusts, define legal relationships, pass property by bequest, provide for the appointment of alternative and successor trustees, or designate alternative charitable remaindermen." A trust that contains additional substantive provisions, or that omits any of the provisions in the sample forms, will not necessarily be disqualified, but neither will it be assured of qualification under these Revenue Procedures.

**[b] Effect on Drafting Practices**

To assure that split-interest charitable trusts will qualify for their intended purpose, the standard drafting practice among estate planners ordinarily is to deviate as little as possible from the standard language of the sample trusts, consistent with state law and the needs of the client. This means that the provisions in the sample agreements are usually incorporated essentially verbatim. However, since the sample agreements do not contain other provisions that are

commonly incorporated into trust agreements in California, such as standard trustee powers, spendthrift clauses, and definitional provisions, it is common practice to incorporate these provisions into the trust agreement to the extent they are not inconsistent with the IRS-mandated requirements.

### **[2] Pooled Income Funds**

The Internal Revenue Service has also published sample forms for declarations of trust creating pooled income funds, and instruments transferring property to pooled income funds [*see Rev. Proc. 88-53, 1988-2 C.B. 712 ; see also Rev. Rul. 82-38, 1982-1 C.B. 96 ; Rev. Rul. 85-57, 1985-1 C.B. 182 ; Rev. Rul. 90-103, 1990-2 C.B. 159*]. According to the IRS, these sample declarations of trust and instruments of transfer meet all of the applicable requirements for a pooled income fund under *I.R.C. § 642(c)(5)*, and if the charity responsible for the creation and maintenance of the pooled income fund makes reference in the trust instrument of the fund to *Rev. Proc. 88-53*, and adopts substantially similar documents, the IRS will recognize the trust documents as satisfying all of the applicable requirements of *I.R.C. § 642(c)(5)* and the applicable regulations. As a practical matter, therefore, pooled income funds usually track the IRS forms with as few deviations as possible, consistent with the structure and purpose of the trust. The IRS sample forms and requirements for pooled income fund trust declarations and transfer instruments, are discussed in greater detail in §§ 74.230 and 74.231, respectively. The pooled income fund forms in this chapter closely track the sample IRS forms [*see §§ 74.230-74.233*].

Pooled income fund transfer instruments frequently are prepared by the charitable institution associated with the fund.

### **[3] Charitable Lead Trusts**

The IRS has not issued prototype forms for charitable lead trusts as it has for charitable remainder trusts and pooled income funds [*see [1], [2], above*]. Thus, the attorney must draft his or her own forms to create charitable lead trusts. However, many of the provisions that are used in charitable remainder trusts are also suitable for inclusion in charitable lead trusts. The complete charitable lead trust forms in this publication make use of those provisions, while providing specially drafted provisions to accommodate the particular needs of the charitable lead trust format [*see §§ 74.210, 74.211*]. For additional discussion, see the comments to those forms [*see §§ 74.210[1]* (charitable lead annuity trust), *74.211[1]* (charitable lead unitrust)].

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsGeneral OverviewEstate, Gift & Trust LawTrustsCharitable TrustsEstate, Gift & Trust LawTrustsCreation



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*26-74 California Legal Forms--Transaction Guide §§ 74.24-74.99*

**AUTHOR:** Reviewed by Albert G. Handelman

**[Reserved]**

§§ 74.24[Reserved]



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DIVISION IV: WILLS AND TRUSTS  
CHAPTER 74 SPLIT-INTEREST CHARITABLE TRUSTS  
PART III. TRANSACTION GUIDE  
A. Client Interview--Facts and Documents

*26-74 California Legal Forms--Transaction Guide*

**AUTHOR:** Reviewed by Albert G. Handelman

**NOTE:**

For a client interview checklist containing basic information that needs to be obtained from the client before an attorney prepares any estate planning documents, see § 60.200[2].



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PART III. TRANSACTION GUIDE  
B. Preliminary Determinations

*26-74 California Legal Forms--Transaction Guide § 74.100*

**AUTHOR:** Reviewed by Albert G. Handelman

**§ 74.100 Suitability of Split-Interest Trust**

1. Determine client's purpose in creating trust.
  - a. Make charitable gift of property, but retain its use for client's lifetime.
  - b. Make charitable gift of property now, but retain property for future use.
  - c. Reduce estate or gift tax on transfers of property to family.
  - d. Make charitable gift of property after surviving spouse's death.
2. Determine if trust is most appropriate vehicle for carrying out client's wishes.

**NOTE:**

In many cases an outright charitable gift may better serve the client's purpose [ *see* Ch. 69, *Charitable Dispositions* ].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsGeneral OverviewEstate, Gift & Trust LawTrustsCharitable TrustsEstate, Gift & Trust LawTrustsCreation



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PART III. TRANSACTION GUIDE  
B. Preliminary Determinations

*26-74 California Legal Forms--Transaction Guide § 74.101*

**AUTHOR:** Reviewed by Albert G. Handelman

**§ 74.101 Type of Trust**

1. Determine which type of split-interest charitable trust is most appropriate to accomplish client's personal, charitable, and tax purposes:

- a. If client wishes to retain use of property for client's life or life of another beneficiary, and give remainder interest to charity, use charitable remainder trust.
- b. If client wants to make contribution of remainder interest, but value of property to be contributed is not large, consider contribution to existing pooled income fund, if charity has one.
- c. If client wishes to make charitable contribution but retain property for future use, use charitable lead trust.
- d. If client wishes to make gift of property to family members but defer their enjoyment of property for a period of time and save gift tax on transfer, consider use of charitable lead trust.

2. If client wants to create split-interest charitable trust, determine whether trust should be inter vivos trust or testamentary trust.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsGeneral OverviewEstate, Gift & Trust LawTrustsCharitable TrustsEstate, Gift & Trust

LawTrustsCreation



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B. Preliminary Determinations

*26-74 California Legal Forms--Transaction Guide § 74.102*

**AUTHOR:** Reviewed by Albert G. Handelman

**§ 74.102 Basic Features of Trust Arrangement**

1. Determine whether charitable organization to which client wishes to make gift qualifies for desired tax deductions.

**NOTE:**

Definitions of charitable organizations that qualify for estate, gift, and income tax charitable deductions are not identical [*compare I.R.C. §§ 170(b)(1)(A), 2055(a), 2522(a)*]. For detailed discussion, see Ch. 69, *Charitable Dispositions* .

2. Determine type and value of property client wishes to contribute.

3. Ascertain whether any of that property is encumbered.

4. Determine how income payments will be determined, either:

a. Payment of fixed annual sum ("sum certain") to income beneficiary (an "annuity trust") [ *see §§ 74.200* (charitable remainder annuity trust) *74.210* (charitable lead annuity trust)];  
or

b. Payment of fixed annual percentage of trust assets to income beneficiary (a "unitrust") [ *see §§ 74.201* (charitable remainder unitrust) *74.211* (charitable lead unitrust)].

5. Determine whether client is willing to have corporate trustee or wishes to act as trustee.

a. If grantor wishes to name himself or herself trustee, do not give grantor any power that

would cause trustee to be treated as owner of trust [ *Rev. Rul. 77-285, 1977-2 C.B. 213* ].

**NOTE:**

For discussion of the "grantor trust" rules, see *Ch. 72, Irrevocable Trusts, § 72.11[2]*.

b. If trustee is granted power to sprinkle guaranteed annuity or unitrust amount among several beneficiaries, name independent trustee and do not give grantor power to name himself or herself trustee [ *Rev. Rul. 77-73, 1977-1 C.B. 175* ].

6. Determine management and investment powers that should be given to trustee.

**NOTE:**

A trust is not a charitable remainder trust if the provisions of the trust instrument restrict the trustee from investing the trust assets in a manner that could result in the annual realization of a reasonable amount of income or gain from the sale or disposition of trust assets [*Treas. Reg. § 1.664-1(a)(3); see Rev. Rul. 73-610, 1973-2 C.B. 213* ].

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsGeneral OverviewEstate, Gift & Trust LawTrustsAdministrationEstate, Gift & Trust LawTrustsConstructive Trusts



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*26-74 California Legal Forms--Transaction Guide §§ 74.103-74.109*

**AUTHOR:** Reviewed by Albert G. Handelman

**[Reserved]**

§§ 74.103[Reserved]



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C. Procedural Guide

*26-74 California Legal Forms--Transaction Guide § 74.110*

**AUTHOR:** Reviewed by Albert G. Handelman

**§ 74.110 Drafting, Executing, and Funding Charitable Trusts**

**NOTE:**

For additional information on the procedural steps involved in creating trusts, see Ch. 70, *Complete Revocable Trust Forms*, and Ch. 72, *Irrevocable Trusts*.

1. Draft trust instrument, using appropriate model form and modifying instrument for particular client desires or needs:

**NOTE:**

The IRS has promulgated sample forms for charitable remainder annuity trusts and charitable remainder unitrusts. As discussed in greater detail in §§ 74.23[1], 74.200[1], and 74.201[1], the usual practice among attorneys drafting these trusts is to make as few changes as possible in the sample IRS forms, consistent with the nature and goals of the trust.

a. For a charitable remainder trust:

(1) For a charitable remainder annuity trust with a fractional or percentage annuity, use *form in § 74.200[2]*.

(2) For a charitable remainder unitrust with a fractional or percentage annuity, use *form in § 74.201[2]*.

b. For a charitable lead trust:

**NOTE:**

The IRS has not promulgated sample forms for charitable lead trusts.

(1) For a charitable lead annuity trust, use *form in § 74.210[2]*.

(2) For a charitable lead unitrust, use *form in § 74.211[2]*.

c. For a contribution to a pooled income fund:

(1) Examine fund's governing instrument and verify that it complies with applicable IRS requirements [ *see § 74.230[2]*].

**NOTE:**

The trust instrument for a pooled income fund is usually drafted by or on behalf of the charitable institution associated with the fund. Before advising a prospective donor to make a contribution to the fund, the donor's attorney should verify that the fund is operating in accordance with applicable IRS requirements, to ensure that the donor's contribution will actually qualify for the desired charitable deduction. The IRS has promulgated a sample declaration of trust for pooled income funds. The *form in § 74.230* illustrates the sample IRS form. That form and the accompanying discussion may be used as a guide in reviewing pooled income fund instruments.

(2) Prepare or complete instrument of transfer [ *see § 74.230[2]*].

**NOTE:**

Pooled income funds may provide their own standard forms for transfer instruments. Before completing such a form, the attorney should verify that it meets the applicable IRS requirements. The IRS has promulgated sample forms for transfer instruments [ *see §§ 74.231[2]-74.233[2]*], which are illustrated in this chapter and may be used as a guide in reviewing transfer instruments. If the fund does not provide its own transfer instrument forms, the attorney should prepare one, using the appropriate form below.

(a) For an income interest for one life, use *form in § 74.231[2]*

(b) For an income interest spanning two lives, with the interests running consecutively, use *form in § 74.232[2]*.

(c) For an income interest spanning two lives, with the interests running both concurrently and consecutively, see *§ 74.233[2]*.

2. Prepare other documents necessary to transfer trust property into trust.

**NOTE:**

For discussion and forms relating to trust funding, see Ch. 73, *Funding a Revocable Trust* . Although charitable trusts are irrevocable, the asset transfer process is essentially identical to that described in Ch. 73.

3. Have client execute necessary documents.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsGeneral OverviewEstate, Gift & Trust LawTrustsAdministrationEstate, Gift & Trust  
LawTrustsConstructive Trusts



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*26-74 California Legal Forms--Transaction Guide §§ 74.111-74.199*

**AUTHOR:** Reviewed by Albert G. Handelman

**[Reserved]**

§§ 74.111[Reserved]



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DIVISION IV: WILLS AND TRUSTS  
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PART IV. FORMS  
A. Charitable Remainder Trusts

*26-74 California Legal Forms--Transaction Guide § 74.200*

**AUTHOR:** Reviewed by Albert G. Handelman

**§ 74.200 Charitable Remainder Annuity Trust**

**[1] Comment**

**[a] Use of Form**

This form is a charitable remainder annuity trust (CRAT). The form may be used to create either an inter vivos or a testamentary trust. It is based on the following sample forms for CRATs, which have been issued by the Internal Revenue Service:

- An inter vivos charitable remainder annuity trust providing for annuity payments for one measuring life [ *Rev. Proc. 2003-53, 2003-31 I.R.B. 230* ].
- An inter vivos charitable remainder annuity trust providing for annuity payments for term of years [ *Rev. Proc. 2003-54, 2003-31 I.R.B. 236* ].
- An inter vivos charitable remainder annuity trust providing for annuity payments payable consecutively for two measuring lives [ *Rev. Proc. 2003-55, 2003-31 I.R.B. 242* ].
- An inter vivos charitable remainder annuity trust providing for annuity payments payable concurrently and consecutively for two measuring lives [ *Rev. Proc. 2003-56, 2003-31 I.R.B. 249* ].
- A testamentary charitable remainder annuity trust providing for annuity payments for one measuring life [ *Rev. Proc. 2003-57, 2003-31 I.R.B. 257* ].
- A testamentary charitable remainder annuity trust providing for annuity payments for term of years [ *Rev. Proc. 2003-58, 2003-31 I.R.B. 262* ].

- A testamentary charitable remainder annuity trust providing for annuity payments payable consecutively for two measuring lives. *Rev. Proc. 2003-59, 2003-31 I.R.B. 268*.
- A testamentary charitable remainder annuity trust providing for annuity payments payable concurrently and consecutively for two measuring lives. *Rev. Proc. 2003-60, 2003-31 I.R.B. 274*.

The sample forms satisfy all of the requirements for a CRAT under *I.R.C. § 664(d)(1)* and *Treas. Reg. § 1.664-2*. They supersede previous sample forms issued by the IRS [*see Rev. Proc. 89-21, 1989-1 C.B. 842*; *Rev. Proc. 90-32, 1990-1 C.B. 546*].

The IRS will recognize that a trust meets all of the requirements for a CRAT if (1) the trust instrument is substantially similar to the appropriate sample declaration of trust or properly integrates one or more of the alternate provisions [*see [b], below*] into a document that is substantially similar to the sample declaration, and (2) the trust operates in a manner that is consistent with the terms of the trust instrument and is a valid trust under applicable local law. A trust instrument that contains substantive provisions in addition to those provided in the sample declaration (other than properly integrated alternate provisions or provisions necessary to establish a valid trust under applicable local law that are not inconsistent with applicable federal tax requirements), or that omits any of the provisions in the sample declaration, will not necessarily be disqualified, but the trust will not be assured of automatic qualification under these Revenue Procedures [*see Rev. Proc. 2003-53, 2003-31 I.R.B. 230*, § 3]. This form follows the language of the sample forms almost exactly, with minor nonsubstantive deviations to conform to the style and format of the other forms in this publication.

To assure that split-interest charitable trusts will qualify for their intended purpose, the standard drafting practice among estate planners ordinarily is to deviate as little as possible from the standard language of the sample trusts, consistent with state law and the needs of the client. This means that the provisions in the sample agreements are usually incorporated essentially verbatim. However, since the sample agreements do not contain other provisions that are commonly incorporated into trust agreements in California, such as standard trustee powers, spendthrift clauses, definitional provisions, and the like, it is common practice to incorporate these provisions into the trust agreement to the extent they are not inconsistent with the IRS-mandated requirements.

### **[b] Alternate Provisions**

The Revenue Procedures also set forth alternate provisions that may be integrated into the sample declaration of trust. These alternate provisions relate to [*see Rev. Proc. 2003-53, 2003-31 I.R.B. 230*, § 6]:

- The statement of the annuity amount as a specific dollar amount.
- Payment of a portion of the annuity amount to an *I.R.C. § 170(c)* charitable organization.
- An *I.R.C. § 664(f)(3)* "qualified contingency."
- Restriction of the charitable remainder beneficiary to a "public charity."
- The donor's retained right to substitute the designated charitable remainder beneficiary.
- A power of appointment to designate the charitable remainder beneficiary.

### **[c] Trustee Provisions**

The trust instrument may designate alternate or successor trustees. It may also contain other administrative provisions

relating to the trustee's duties and powers, as long as the provisions do not conflict with the rules governing CRATs under *I.R.C. § 664* and the regulations under that statute [*see Rev. Proc. 2003-53, 2003-31 I.R.B. 230*, § 5.01(4)].

Any qualified and suitable person, natural or corporate, may serve as the trustee. In appropriate circumstances, either the donor or the annuity recipient may serve as the trustee. If, however, it is desirable to remove the trust assets from the donor's estate for federal estate tax purposes, the donor should not serve as the trustee, or the trust instrument should be carefully examined for any power that might cause the trust assets to be included in the donor's gross estate for federal estate tax purposes.

A donor who wishes to nominate co-trustees may do so.

#### **[d] Donor Provisions**

The donor of an inter vivos trust may be an individual or a husband and wife. Appropriate adjustments should be made to the introductory paragraph of the trust instrument if a husband and wife are the donors. Terms such as "grantor" or "settlor" may be substituted in the trust instrument for "donor" [*see Rev. Proc. 2003-53, 2003-31 I.R.B. 230*, § 5.01(5)].

#### **[e] Payment of Annuity Amount**

##### **[i] Permissible Recipients**

For a CRAT with an annuity period based on the life of one individual, the annuity amount must generally be paid to that individual who must be living at the time the trust is created [ *Rev. Proc. 2003-53, 2003-31 I.R.B. 230*, § 5.02(1) (inter vivos trusts); *Rev. Proc. 2003-57, 2003-31 I.R.B. 257*, § 5.02(1) (testamentary trusts)].

For a CRAT having an annuity period consisting of a term of years, the annuity amount generally must be paid to a named person or persons, and if the annuity amount is to be paid to an individual or individuals, all must be living at the time the trust is created. The annuity amount be payable to the estate or heirs of a named recipient who dies before the expiration of the term of years. It may also be payable to members of a named class and all members of the class need not be living or ascertainable when the trust is created [ *Rev. Proc. 2003-54, 2003-31 I.R.B. 236*, § 5.02(2) (inter vivos trusts); *Rev. Proc. 2003-58, 2003-31 I.R.B. 262*, § 5.02(2) (testamentary trusts)]. If the annuity amount is payable to more than one person, the trust instrument should describe each person's interest [ *Rev. Proc. 2003-54, 2003-31 I.R.B. 236*, § 5.02(3) (inter vivos trusts); *Rev. Proc. 2003-58, 2003-31 I.R.B. 262*, § 5.02(3) (testamentary trusts)]. For a provision apportioning the annuity amount among members of a named class in the trustee's discretion, see *Rev. Proc. 2003-54, 2003-31 I.R.B. 236*, § 6.03.

For a CRAT with an annuity period based on the lives of two individuals, the annuity amount must generally be paid to those individuals and both must be living at the time the trust is created [ *Rev. Proc. 2003-55, 2003-31 I.R.B. 242*, § 5.02(1); *Rev. Proc. 2003-56, 2003-31 I.R.B. 249*, § 5.02(1); *Rev. Proc. 2003-59, 2003-31 I.R.B. 268*, § 5.02(1); *Rev. Proc. 2003-60, 2003-31 I.R.B. 274*, § 5.02(10)].

An organization described in *I.R.C. § 170(c)* may receive part, but not all, of the annuity amount [*I.R.C. § 664(d)(1)(A)*; *Treas. Reg. § 1.664-2(a)(3)(i)*]. If a gift tax charitable deduction and an estate tax charitable deduction are sought for the present value of the annuity interest passing to a charitable organization, the trust instrument must specify the portion of each annuity payment that is payable to the noncharitable recipient and to the charitable organization. The trust instrument must also contain a means for selecting an alternative qualified charitable organization if the designated organization is not a qualified organization at the time any annuity amount is to be paid to it. Finally, the trust instrument must contain prohibitions against investments that jeopardize the exempt purpose of the trust for purposes of *I.R.C. § 4944*, and against retaining any excess business holdings for purposes of *I.R.C. § 4943* [*see Rev. Proc.*

2003-53, 2003-31 I.R.B. 230 , § 6.02(1)]. For alternate provisions that may be used in such a case, see 2003-31 I.R.B. 230, Rev. Proc. 2003-53 , § 6.02(2).

### **[ii] Percentage Requirements**

The sum certain annuity amount must be at least 5 percent and not more than 50 percent of the initial net fair market value of the trust assets [*I.R.C. § 664(d)(1)(A)*]. In addition, the value of the charitable remainder interest must be at least 10 percent of the initial net fair market value of all property placed in the trust [*I.R.C. § 664(d)(1)(D)*].

As an alternative to stating the annuity amount as a fraction or percentage of the initial net fair market value of the trust assets, the annuity amount may be stated as a specific dollar amount, within the percentage limitations [*Treas. Reg. § 1.664-2(a)(1)(ii), (iii)*]. In such event, the second alternative version of the first sentence of the paragraph in the trust instrument entitled "Payment of Annuity Amount" should be used, and the last sentence of that paragraph should be deleted [*see Rev. Proc. 2003-53, 2003-31 I.R.B. 230 , § 6.01(2)*].

### **[iii] Payment of Annuity Amount in Installments**

The paragraph the trust instrument entitled "Payment of Annuity Amount" specifies that the annuity amount is to be paid in equal quarterly installments at the end of each quarter. However, the trust instrument may specify that the annuity amount is to be paid to the recipient annually, or in equal or unequal installments throughout the year [*see Treas. Reg. § 1.664-2(a)(1)(i)*]. The amount of the charitable deduction is affected by the frequency of payment, by whether the installments are equal or unequal, and by whether each installment is payable at the beginning or at the end of the period [*see Treas. Reg. §§ 1.664-2(c), 20.2031-7(d)(2)(iv)*].

### **[iv] Payment of Annuity Amount by Close of Taxable Year**

Generally, the annuity amount for any taxable year must be paid before the close of the taxable year for which the amount is due, but under specified circumstances the amount may be paid within a reasonable time after the close of the taxable year [*see Treas. Reg. § 1.664-2(a)(1)(i)(a)*].

A CRAT created by a testamentary transfer may defer payment of the annuity amount until the end of the taxable year in which it is completely funded [*see Treas. Reg. § 1.664-1(a)(5)(i)*]. Paragraph 2 of the trust instrument provides for such a deferral.

### **[v] Early Distributions to Charity**

The trust instrument may provide that an amount other than the annuity must be paid (or may be paid in the trustee's discretion) to a charitable organization described in *I.R.C. § 170(c)*. If such a distribution is made in kind, the adjusted basis of the distributed property must be fairly representative of the adjusted basis of the property available for distribution on the distribution date [*Treas. Reg. § 1.664-2(a)(4)*].

### **[vi] Qualified Contingency**

Payment of the annuity amount may terminate on the earlier of the occurrence of a qualified contingency or the recipient's death [*I.R.C. § 664(f)(3)*]. The amount of the charitable deduction is determined without regard to a qualified contingency [*I.R.C. § 664(f)(2)*].

### **[f] Proration of Annuity Amount**

As an alternative to prorating the annuity amount in the taxable year of the recipient's death, payment of the annuity amount may terminate with the last regular payment preceding the recipient's death, but the fact that the recipient may

not receive the last payment may not be taken into account in determining the present value of the remainder interest [*Treas. Reg. § 1.664-2(a)(5)(i)*]. When this treatment is desired, the second alternative version of the second sentence of Paragraph 3 in the trust instrument should be used [*see Rev. Proc. 2003-53, 2003-31 I.R.B. 230*, § 6.04(2)].

The fact that the recipient may not receive the last payment may not be taken into account when determining the present value of the remainder interest [*Treas. Reg. § 1.664-2(a)(5)(i)*].

### **[g] Distribution to Charity**

Any named charitable remainder beneficiary must be an organization described in *I.R.C. § 170(c)* at the time of the transfer to the CRAT [*see I.R.C. § 664(d)(1)(C)*]. It must also be an organization described in *I.R.C. § 2522(a)* to qualify for the gift tax charitable deduction, and an organization described in *I.R.C. § 2055(a)* to qualify for the estate tax charitable deduction [*see Rev. Rul. 77-385, 1977-2 C.B. 331*]. The trust instrument may restrict the charitable remainder beneficiary to an organization described in *I.R.C. §§ 170(c), 2055(a), and 2522(a)*, but grant to the trustee or other person the power to designate the actual charitable remainder beneficiary [*see Rev. Rul. 76-7*]. For an alternate provision that may be used in such a case, see *2003-31 I.R.B. 230, Rev. Proc. 2003-53*, § 6.07(2).

The trust instrument must provide a means for selecting an alternative charitable remainder beneficiary in the event the designated organization is not qualified at the time any payments are to be made to it from the trust [*Treas. Reg. § 1.664-2(a)(6)(iv)*]. The remainder interest may pass to more than one charitable organization, as long as each organization is described in *I.R.C. §§ 170(c), 2055(a), and 2522(a)* [*Treas. Reg. § 1.664-2(a)(6)(i)*].

The donor may retain the right to substitute another charitable remainder beneficiary for the charitable remainder beneficiary named in the trust instrument [*see Rev. Rul. 76-8, 1976-1 C.B. 179*]. However, the retention of this right will cause the gift of the remainder interest to be incomplete for gift tax purposes [*see Treas. Reg. § 25.2511-2(c); Rev. Rul. 77-275*]. To retain the right to substitute the charitable remainder beneficiary, the optional language illustrated in the text should be added to Paragraph 4 of the trust instrument after the first sentence [*see 2003-31 I.R.B. 230, Rev. Proc. 2003-53*, § 6.06(2)].

### **[h] Restricting Charitable Remainder Beneficiary to Public Charity**

The amount of the donor's income tax charitable deduction is more limited for gifts to certain private foundations than for gifts to other charitable organizations. To avoid these more restrictive limitations, a donor of an inter vivos CRAT may wish to restrict the charitable remainder beneficiary to an organization that is described in *I.R.C. § 170(b)(1)(A)*, as well as *I.R.C. §§ 170(c), 2055(a), and 2522(a)*. To restrict the charitable remainder beneficiary to a public charity, the phrase "an organization described in §§ 170(c), 2055(a), and 2522(a) of the Code" in the trust instrument should be replaced with the phrase "an organization described in §§ 170(b)(1)(A), 170(c), 2055(a), and 2522(a) of the Code" [*see Rev. Proc. 2003-53, 2003-31 I.R.B. 230*, § 6.05].

### **[i] Prohibited Transactions**

Payment of the annuity amount to the recipient is not considered an act of self-dealing or a taxable expenditure within the meaning of *I.R.C. §§ 4941(d) and 4945(d)*, as modified by *I.R.C. § 4947(a)(2)(A)*. Prohibitions against investments that jeopardize the exempt purpose of the trust for purposes of *I.R.C. § 4944*, and against retaining any excess business holdings for purposes of *I.R.C. § 4943*, are required if the trust provides for payment of part of an annuity amount to an organization described in *I.R.C. § 170(c)*, and gift and estate tax charitable deductions are sought for this interest [*see I.R.C. § 4947(b)(3)*].

### **[j] Payment of Federal Estate Taxes and State Death Taxes**

An inter vivos CRAT providing for annuity payments payable consecutively (or concurrently and consecutively) for

two measuring lives must contain a special provision regarding payment of estate and state death taxes [ *Rev. Proc. 2003-55, 2003-31 I.R.B. 242* , §§ 4, 5.03; *Rev. Proc. 2003-56, 2003-31 I.R.B. 249* , §§ 4, 5.03]. This provision, which appears as an optional provision in this form, should be included in the trust instrument as Paragraph 3, and the subsequent paragraphs renumbered accordingly.

### **[k] Right to Revoke Interest of Successor Recipient**

In an inter vivos CRAT providing for annuity payments payable consecutively (or concurrently and consecutively) for two measuring lives, the donor may retain the right to revoke or terminate the interest of the noncharitable recipient. This right is exercisable only by the donor's will [*Treas. Reg. § 1.664-2(a)(4)*]. The retention of this right may have gift and estate tax consequences, and affects the value of the transferred annuity interests. It may also cause a portion of the trust to be included in the donor's gross estate for federal estate tax purposes [ *Rev. Proc. 2003-55, 2003-31 I.R.B. 242* , § 6.04(1); *Rev. Proc. 2003-56, 2003-31 I.R.B. 249* , § 6.04(1)].

To retain the right to revoke the noncharitable recipient's interest by the donor's will, the donor should be designated as a recipient in the paragraph in the trust instrument entitled "Payment of Annuity Amount," and the second alternative version of the second sentence of that paragraph in this should be used [ *Rev. Proc. 2003-55, 2003-31 I.R.B. 242* , § 6.04(2); *Rev. Proc. 2003-56, I.R.C. 2003-31, 249* , § 6.04(2)].

## **[2] FORM**

### **Charitable Remainder Annuity Trust**

[*Name of trust, if desired; e.g., JOHN Q. SMITH CHARITABLE REMAINDER ANNUITY TRUST*]  
TRUST AGREEMENT

[*If the trust is an inter vivos trust:*]

On this \_\_\_\_\_ day of \_\_\_\_\_, I, \_\_\_\_\_ (hereinafter "the Donor"), desiring to establish a charitable remainder annuity trust, within the meaning of [*specify appropriate Revenue Procedure, e.g., Revenue Procedure 2003-53* ] and *I.R.C. § 664(d)(1)*, hereby enter into this trust agreement with \_\_\_\_\_ as the initial trustee (hereinafter "the Trustee"). This trust shall be known as the \_\_\_\_\_ Charitable Remainder Annuity Trust.

**1. Funding of Trust.** The Donor hereby transfers and irrevocably assigns, on the above date, to the Trustee, the property described in Schedule A, and the Trustee accepts the property and agrees to hold, manage, and distribute the property under the terms set forth in this trust instrument.

**2. Payment of Annuity Amount.** In each taxable year of the trust during the annuity period, the Trustee shall pay to [*specify recipient*], \_\_\_\_\_ [(hereinafter "the Recipient" *or* (hereinafter "the Initial Recipient")) until the Initial Recipient's death, and thereafter to \_\_\_\_\_ (hereinafter "the Successor Recipient") (subject to any proration in paragraph 3) *or* and to \_\_\_\_\_ (hereinafter "the Recipients") in equal shares during their lifetimes], an annuity amount equal to [*number no less than 5 and no more than 50*] percent of the initial net fair market value of all property transferred to the trust, valued as of the above date (that is, the date of the transfer) [*Add if annuity payments are payable concurrently and consecutively for two measuring lives:*, and upon the death of one (hereinafter "the Predeceasing Recipient"), the Trustee shall pay the entire annuity amount (subject to any proration in paragraph 3) to the survivor (hereinafter "the Survivor Recipient")]. [*Add if annuity payments are payable for a term of years:* The annuity period is a term of \_\_\_\_\_ (*a number not more than 20, as provided by Treas. Reg. § 1.664-2(a)(5)(i)*) years.]

[Either:]

The first day of the annuity period shall be the date the property is transferred to the trust and the last day of the annuity period shall be \_\_\_\_\_ [the date of the Recipient's death *or* the day preceding the \_\_\_\_\_ anniversary of that date *or* the date of death of the survivor of the Initial Recipient and the Successor Recipient *or* the date of the Survivor Recipient's death].

[*Or, to retain right to revoke noncharitable recipient's interest by the donor's will, designate donor as a recipient above, and include the following (see [1][g], above):*]

The Donor hereby expressly reserves the power, exercisable only by the Donor's last will and testament, to revoke and terminate the interest of [*noncharitable recipient*] under this trust. The first day of the annuity period shall be the date the property is transferred to the trust and the last day of the annuity period shall be the date of the death of the Survivor Recipient, or on the earlier death of the Donor if the power to revoke the interest of [*noncharitable recipient*] is exercised.

[Continue with the following:]

The annuity amount shall be paid in equal quarterly installments at the end of each calendar quarter from income, and to the extent income is not sufficient, from principal. Any income of the trust for a taxable year in excess of the annuity amount shall be added to principal. If the initial net fair market value of the trust assets is incorrectly determined, then within a reasonable period after the value is finally determined for federal tax purposes, the Trustee shall pay to the [Recipient *or* Initial Recipient and/or Successor Recipient *or* Recipients] (in the case of an undervaluation) or receive from the [Recipient *or* Initial Recipient and/or Successor Recipient *or* Recipients] (in the case of an overvaluation) an amount equal to the difference between the annuity amount(s) properly payable and the annuity amount(s) actually paid.

[Include the following provision only in an *inter vivos* CRAT providing for annuity payments payable consecutively (or consecutively and concurrently), and renumber remainder of provisions in trust accordingly:]

**3. Payment of Federal Estate Taxes and State Death Taxes.** The lifetime annuity interest of the [Successor *or* Survivor] Recipient will [take *or* continue in] effect upon the death of the [Initial *or* Predeceasing] Recipient only if the [Successor *or* Survivor] Recipient furnishes the funds for payment of any federal estate taxes and state death taxes for which the Trustee may be liable upon the death of the [Initial *or* Predeceasing] Recipient. If the funds are not furnished by the [Successor *or* Survivor] Recipient, the annuity period shall terminate on the death of the [Initial *or* Predeceasing] Recipient, notwithstanding any other provision in this instrument to the contrary.

[*Or, if the trust is a testamentary trust, omit all the preceding provisions and begin as follows:*]

I give [*specify property*] to my Trustee in trust to be administered under this provision. I intend this gift to establish a charitable remainder annuity trust, within the meaning of [*specify appropriate Revenue Procedure (see [1](a), above); e.g., Revenue Procedure 2003-57*] and I.R.C. § 664(d)(1). The trust shall be known as the \_\_\_\_\_ Charitable Remainder Annuity Trust and I hereby designate \_\_\_\_\_ as the initial trustee (hereinafter "the Trustee").

#### 1. Payment of Annuity Amount.

[If annuity amount is to be a fractional or percentage share, use:]

In each taxable year of the trust during the annuity period, the Trustee shall pay to [specify recipient], \_\_\_\_\_ [hereinafter "the Recipient"] or (hereinafter "the Initial Recipient") until the Initial Recipient's death, and thereafter to \_\_\_\_\_ (hereinafter "the Successor Recipient") (subject to any proration in Paragraph 3) or and to \_\_\_\_\_ (hereinafter "the Recipients") in equal shares during their lifetimes], an annuity amount equal to [a number no less than 5 and no more than 50] percent of the initial net fair market value of all property passing to this trust as finally determined for federal estate tax purposes [Add if annuity payments are payable concurrently and consecutively for two measuring lives: and upon the death of one (hereinafter "the Predeceasing Recipient"), the Trustee shall pay the entire annuity amount (subject to any proration in paragraph 3) to the survivor (hereinafter "the Survivor Recipient")]. [Add if annuity payments are payable for a term of years: The annuity period is a term of \_\_\_\_\_ (number not more than 20, as provided by Treas. Reg. § 1.664-2(a)(5)(i) ) years.]

[Or, if annuity is to be stated as a specific dollar amount, use:]

In each taxable year of the trust during the annuity period, the Trustee shall pay to [specify recipient] (hereinafter "the Recipient") an annuity amount equal to \_\_\_\_\_ [stated dollar amount].

[Continue with the following:]

The first day of the annuity period shall be the date of my death and the last day of the annuity period shall be \_\_\_\_\_ [the date of the Recipient's death or the day preceding the \_\_\_\_\_ anniversary of that date or the date of the death of the survivor of the Initial Recipient and the Successor Recipient or the date of the Survivor Recipient's death]. The annuity amount shall be paid in equal quarterly installments at the end of each calendar quarter from income, and to the extent income is not sufficient, from principal. Any income of the trust for a taxable year in excess of the annuity amount shall be added to principal. [If annuity amount is to be a fractional or percentage share (see above), add: If the initial net fair market value of the trust assets is incorrectly determined, then within a reasonable period after the value is finally determined for federal estate tax purposes, the Trustee shall pay to the \_\_\_\_\_ (Recipient or Initial Recipient and/or Successor Recipient or Recipients) (in the case of an undervaluation) or receive from the \_\_\_\_\_ (Recipient or Initial Recipient and/or Successor Recipient or Recipients) (in the case of an overvaluation) an amount equal to the difference between the annuity amount(s) properly payable and the annuity amount(s) actually paid.]

**2. Deferral Provision.** The obligation to pay the annuity amount shall commence with the date of my death, but payment of the annuity amount may be deferred from this date until the end of the taxable year in which the trust is completely funded. Within a reasonable time after the end of the taxable year in which the trust is completely funded, the Trustee must pay to the [Recipient or Initial Recipient and/or the Successor Recipient or Recipients] (in the case of an underpayment) or receive from the [Recipient or Initial Recipient and/or the Successor Recipient or Recipients] (in the case of an overpayment) the difference between any annuity amounts actually paid, plus interest, and the annuity amounts actually paid, plus interest. The interest shall be computed for any period at the rate of interest, compounded annually, that the federal income tax regulations under § 664 of the Code prescribe for this computation.

[Continue with the following for both inter vivos and testamentary trusts:]

**3. Proration of Annuity Amount.** The Trustee shall prorate the annuity amount on a daily basis for any short taxable

year. *[Add if annuity payments are payable consecutively for two measuring lives: If the Successor Recipient survives the Initial Recipient, the Trustee shall prorate on a daily basis the next regular annuity payment due after the death of the Initial Recipient between the estate of the Initial Recipient and the Successor Recipient.] [Add if annuity payments are payable concurrently and consecutively for two measuring lives: Upon the death of the Predeceasing Recipient, the Trustee shall prorate on a daily basis the Predeceasing Recipient's share of the next regular annuity payment between the estate of the Predeceasing Recipient and the Survivor Recipient.]*

*[If annuity amount will be prorated in the taxable year of the recipient's death, add the following:]*

In the taxable year of the trust during which the annuity period ends, the Trustee shall prorate the annuity amount on a daily basis for the number of days of the annuity period in that taxable year.

*[Or, if payment of the amount will terminate with the last regular payment preceding the recipient's death, add the following:]*

In the taxable year of the trust during which the annuity period ends, the obligation of the Trustee to pay the annuity amount shall terminate with the regular quarterly installment next preceding the death of the Recipient.

*[Continue with the following:]*

**4. Distribution to Charity.** At the termination of the annuity period, the Trustee shall distribute all of the then principal and income of the trust (other than any amount due the [Recipient *or* Recipients] or \_\_\_\_\_ [the Recipient's estate *or* their estates] under the provisions above) to [*specify designated remainder beneficiary*] (hereinafter "the Charitable Organization").

*[If donor will retain the right to substitute another charitable remainder beneficiary for the one named in the trust, add:]*

The Donor reserves the right to designate, at any time and from time to time, in lieu of the Charitable Organization identified above, one or more organizations described in *Internal Revenue Code* §§ 170(c), 2055(a), and 2522(a) as the charitable remainderman and shall make any such designation by giving written notice to the Trustee.

*[Continue with the following:]*

If the Charitable Organization is not an organization described in *Internal Revenue Code* §§ [*for an inter vivos CRAT: 170(c), 2055(a), and 2522(a) or, for a testamentary CRAT: 107(c) and 2055(a)*] at the time when any principal or income of the trust is to be distributed to it, then the Trustee shall distribute the then principal and income to one or more organizations described in *Internal Revenue Code* §§ [*for an inter vivos CRAT: 170(c), 2055(a), and 2522(a) or, for a testamentary CRAT: 107(c) and 2055(a)*] as the Trustee shall select, and in the proportions as the Trustee shall decide, in the Trustee's sole discretion.

**5. Additional Contributions.** No additional contributions shall be made to the trust after the initial contribution. *[Add for testamentary CRAT: The initial contribution, however, shall be deemed to consist of all property passing to the trust by reason of my death.]*

**6. Prohibited Transactions.** The Trustee shall not engage in any act of self-dealing within the meaning of *Internal Revenue Code § 4941(d)*, as modified by *Internal Revenue Code § 4947(a)(2)(A)*, and shall not made any taxable expenditures within the meaning of *Internal Revenue Code § 4945(d)*, as modified by *Internal Revenue Code § 4947(a)(2)(A)*.

**7. Spendthrift Clause.** The interests of the beneficiaries under this instrument are not transferable by voluntary or involuntary assignment, or by operation of law. These interests are free from the claims of creditors and from attachment, execution, bankruptcy, and other legal process, to the maximum extent permitted by law.

**8. Successor Trustees.** If the office of Trustee becomes vacant by reason of death, incapacity, or any other reason, the following, in order of priority indicated, shall be Trustee: [*indicate name and address of each successor trustee, e.g., first, Alexander W. Smeed, who resides at 123 First Avenue, Smalltown, California; then Bank of Berkeley, West Oakland Branch*].

**9. Definition of "Trustee."** Reference in this instrument to "the Trustee" is deemed a reference to whoever is serving as Trustee, and includes alternate or successor trustees or co-trustees, unless the context requires otherwise.

**10. Waiver of Bond.** No bond or undertaking may be required of any individual who serves as Trustee under this instrument.

**11. Resignation of Trustee.** Any Trustee may resign at any time, without giving a reason for the resignation, by giving written notice, as least [*specify number of days, e.g., 30 days*] before the time the resignation is to take effect, to the Donor, if living, to any other Trustee then acting, to all living trust beneficiaries known to the Trustee (or, in the case of a minor beneficiary, to the parent or guardian of that beneficiary), and to the successor Trustee. A resignation is effective on written acceptance of the trust by the successor Trustee.

**12. Trustee's Good Faith Actions Binding.** Every action taken in good faith by the Trustee is conclusive and binding on all persons interested in the property of the trust.

**13. Duty to Account.** The Trustee must render accounts at least annually, at the termination of the trust, and on a change of trustees, to the persons and in the manner required by law.

**14. Taxable Year.** The taxable year of the trust shall be the calendar year.

**15. Governing Law.** The operation of the trust shall be governed by the laws of the State of California. However, the Trustee is prohibited from exercising any power or discretion granted under said laws that would be inconsistent with the qualification of the trust as a charitable remainder annuity trust under *Internal Revenue Code § 664(d)(1)* and the corresponding regulations.

**16. Limited Power of Amendment.** This trust is irrevocable. However, the Trustee shall have the power, acting alone, to amend the trust from time to time in any manner required for the sole purpose of ensuring that the trust qualifies and continues to qualify as a charitable remainder annuity trust within the meaning of *Internal Revenue Code § 664(d)(1)*.

**17. Investment of Trust Assets.** Nothing in this trust instrument shall be construed to restrict the Trustee from investing the trust assets in a manner that could result in the annual realization of a reasonable amount of income or gain from the sale or disposition of trust assets.

Executed on [*month, day*], [*year*], at [*city or town, and state, in which trust agreement is signed, e.g., Smalltown, California*].

DONOR

\_\_\_\_\_ [signature of donor]

[typed name]

TRUSTEE[S]

[For individual trustee:]

\_\_\_\_\_ [signature]

[typed name]

[For corporate trustee:]

[typed name of corporate trustee]

By: \_\_\_\_\_ [signature of

first authorized employee]

[typed name]

\_\_\_\_\_ [signature of

second authorized employee]

[typed name]

ACKNOWLEDGMENT

[Acknowledgements taken in California must be in the following form (Civ. Code § 1189(a))]:

State of California )  
County of \_\_\_\_\_ ) ss

On \_\_\_\_\_ [date], before me, \_\_\_\_\_ [name of notary], personally appeared \_\_\_\_\_ [name(s)], who proved to me on the basis of satisfactory evidence to be the person[s] whose name[s] [is or are] subscribed to the within instrument, and acknowledged to me that \_\_\_\_\_ [he or she or it or they] executed the same in \_\_\_\_\_ [his or her or its or their] authorized \_\_\_\_\_ [capacity or capacities], and that by \_\_\_\_\_ [his or her or its or their] signature[s] on the instrument the person[s], or the entity on behalf of which the person[s] acted, executed the instrument.

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

WITNESS my hand and official seal.

\_\_\_\_\_ [signature of notary]  
[typed name]

SCHEDULE A SCHEDULE OF TRUST ASSETS

Description of Asset	Character of Asset [e.g., separate property]
_____	_____
_____	_____

_____	_____
_____	_____
_____	_____
_____	_____
_____	_____

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Estate, Gift & Trust LawTrustsCharitable Trusts



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California Legal Forms--Transaction Guide

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DIVISION IV: WILLS AND TRUSTS  
CHAPTER 74 SPLIT-INTEREST CHARITABLE TRUSTS  
PART IV. FORMS  
A. Charitable Remainder Trusts

*26-74 California Legal Forms--Transaction Guide § 74.201*

**AUTHOR:** Reviewed by Albert G. Handelman

**§ 74.201 Charitable Remainder Unitrust; One Non-Charitable Recipient**

**[1] Comment**

**[a] Use of Form**

This form is an inter vivos charitable remainder unitrust (CRUT) providing for unitrust payments to one individual. The unitrust amount is a fixed percentage of the annual value of the trust assets. This form is derived from the 2005 sample IRS form that appears in *Rev. Proc. 2005-52, 2005-34 I.R.B. 326*, with the addition of administrative provisions as discussed in [c], *below*.

**[b] Sample IRS Forms**

The Internal Revenue Service has promulgated a number of sample forms for charitable remainder unitrusts. In addition to the IRS sample on which this form is based, the IRS also has promulgated the following sample CRUT forms, which due to space limitations are not reproduced in this publication:

- An inter vivos charitable remainder unitrust for a term of years [ *Rev. Proc. 2005-53, 2005-34 I.R.B. 339* ].
- An inter vivos charitable remainder unitrust with consecutive interests for two measuring lives [ *Rev. Proc. 2005-54, 2005-34 I.R.B. 353* ].
- An inter vivos charitable remainder unitrust with concurrent and consecutive interests for two measuring lives [ *Rev. Proc. 2005-55, 2005-34 I.R.B. 367* ].
- A testamentary charitable remainder unitrust for one measuring life [ *Rev. Proc. 2005-56, 2005-34 I.R.B. 383* ].

- A testamentary charitable remainder unitrust for a term of years [ *Rev. Proc. 2005-57, 2005-34 I.R.B. 392* ].
- A testamentary charitable remainder unitrust with consecutive interests for two measuring lives [ *Rev. Proc. 2005-58, 2005-34 I.R.B. 402* ].
- A testamentary charitable remainder unitrust with concurrent and consecutive interests for two measuring lives [ *Rev. Proc. 2005-59, 2005-34 I.R.B. 412* ].

These sample forms satisfy all of the requirements for a CRUT under *I.R.C. § 664(d)(2), (3)* and *Treas. Reg. § 1.664-3*. The 2005 versions supersede previous sample forms issued by the IRS [see *Rev. Proc. 89-20, 1989-1 C.B. 841*; *Rev. Proc. 90-30, 1990-1 C.B. 534*; *Rev. Proc. 90-31, 1990-1 C.B. 539*].

The IRS will recognize that a trust meets all of the requirements for a CRUT if [see *Rev. Proc. 2005-52, 2005-34 I.R.B. 326*, § 3]:

- The trust instrument is substantially similar to the appropriate sample declaration of trust or properly integrates one or more of the alternate provisions [see [b], *below*] into a document that is substantially similar to the sample declaration; and
- The trust operates in a manner that is consistent with the terms of the trust instrument and is a valid trust under applicable local law.

A trust instrument that contains substantive provisions in addition to those provided in the sample declaration (other than properly integrated alternate provisions or provisions necessary to establish a valid trust under applicable local law that are not inconsistent with applicable federal tax requirements), or that omits any of the provisions in the sample declaration, will not necessarily be disqualified, but the trust will not be assured of automatic qualification under these revenue procedures [see *Rev. Proc. 2005-52, 2005-34 I.R.B. 326*, § 3]. The relevant provisions in this form follow the language of the sample forms almost exactly, with minor nonsubstantive deviations to conform to the style and format of the other forms in this publication.

### **[c] Drafting Practices**

To assure that split-interest charitable trusts will qualify for their intended purpose, the standard drafting practice among estate planners ordinarily is to deviate as little as possible from the standard language of the sample trusts, consistent with state law and the needs of the client. This means that the provisions in the sample agreements usually are incorporated essentially verbatim. However, since the sample agreements do not contain other provisions that are commonly incorporated into trust agreements in California, such as standard trustee powers, spendthrift clauses, definitional provisions, and the like, it is common practice to incorporate these provisions into the trust agreement to the extent they are not inconsistent with the IRS-mandated requirements.

*Rev. Proc. 2005-52* specifically states that alternate or successor trustees may be designated in the trust instrument. In addition, the revenue procedure states that the trust may contain other administrative provisions relating to the trustee's duties and powers, as long as those provisions do not conflict with the rules governing charitable trusts under *I.R.C. § 664* and its implementing regulations [ *Rev. Proc. 2005-52*, § 5.01, Paragraph 4]. Accordingly, this form contains additional provisions for the nomination of alternate and successor trustees [ see Sections 5.01, 5.02 of form], trustee powers [ see Section 5.06 of form], and other administrative provisions that are commonly found in California trusts. The revenue ruling also clarifies that terms such as "grantor" or "settlor" may be substituted for "donor," and this has been done in this form in accordance with the publisher's general format. In addition, the numbering scheme used in the

IRS provisions has been changed to reflect the publisher's general format for trust forms, and to provide a complete, fully integrated trust document. These latter changes are cosmetic rather than substantive and have no effect on the content of the provisions derived from the IRS sample form.

**PRACTICE TIP:**

To assist users of this form in identifying the source of the provisions in this form, each provision and alternative is preceded by bracketed language identifying the source of that provision. IRS sample provisions are identified to the original section and paragraph numbers in *Rev. Proc. 2005-52* in which they appear. When more than one section of the revenue procedure sets out language for a particular provision, the first reference is to the section of the revenue procedure that sets out the basic text of the provision, followed by references to any other secondary sections that provide alternative or additional language. Administrative and other provisions added by the publisher are labeled as "additional provisions." This method of identification enables the user to reference the source of every provision in this form, and to modify the form without inadvertently eliminating any of the IRS provisions.

**[d] Alternate Provisions**

The revenue procedures containing the IRS sample forms also contain various alternate provisions that may be integrated into the basic trust form. These alternate provisions relate to the following [*see Rev. Proc. 2005-52, 2005-34 I.R.B. 326*, § 6]:

- Payment of a portion of the unitrust amount to an *I.R.C. § 170(c)* charitable organization [*see Rev. Proc. § 2005-52*, § 6.01].
- Provisions under which payment of the unitrust amount may terminate upon the earlier of the occurrence of a "qualified contingency" or the death of the recipient [*see Rev. Proc. § 2005-52*, § 6.02; *I.R.C. § 664(f)(3)*].
- Termination of the obligation to pay the unitrust amount with the last regular payment preceding the recipient's death, as an alternative to prorating the unitrust amount in the year of the recipient's death [*see Rev. Proc. § 2005-52*, § 6.03].
- Restriction of the charitable remainder beneficiary to a "public charity"[*see Rev. Proc. § 2005-52*, § 6.04].
- Reservation of a retained right in the donor to substitute the designated charitable remainder beneficiary [*see Rev. Proc. § 2005-52*, § 6.05]. Note, however, that the retention of this right will cause the gift to be incomplete for gift tax purposes [*see Treas. Reg. § 25.2511-2(c)*; *Rev. Rul. 77-275, 1977-2 C.B. 346*].
- Inclusion of a power of appointment allowing the recipient to designate the charitable remainder beneficiary [*see Rev. Proc. § 2005-52*, § 6.06].
- Use of the net income method or the net income with make-up method for calculating the unitrust amount, or combining one of these methods with the fixed percentage method for calculating the unitrust amount [*see Rev. Proc. § 2005-52*, §§ 6.06, 6.07, 6.08].

**PRACTICE TIP:**

All of the alternative language noted above is illustrated in this form, with notations as to the IRS source provision and directions as to when the alternate language should be used.

When a series of alternate versions of a particular type of provision appears in the text, the first alternative is the basic version that appears in the IRS sample form, and the subsequent variations are alternative versions that may be substituted in appropriate cases. Care must be taken to ensure that the proper combination of alternatives is used, so to avoid inadvertent inclusion of inconsistent versions of different provisions. Therefore, particular attention should be paid to the italicized directions explaining when each alternative version should be used.

#### **[e] Trustee**

Any qualified and suitable person, natural or corporate, may serve as the trustee. In appropriate circumstances, either the settlor or the unitrust recipient may serve as trustee. If, however, it is desirable to remove the trust assets from the settlor's estate for federal estate tax purposes, the settlor should not serve as trustee, or the trust instrument should be carefully examined for any power that might cause the trust assets to be included in the settlor's gross estate for federal estate tax purposes. See Ch. 60, *Estate Planning*, for a general overview of tax laws affecting the disposition of estates; see also Ch. 72, *Irrevocable Trusts*, for a general discussion of the estate tax ramifications of irrevocable inter vivos trusts.

#### **[f] Donor Provisions**

The donor of an inter vivos trust may be an individual or a husband and wife. Appropriate adjustments should be made to the introductory paragraph of the trust instrument if a husband and wife are the donors. Terms such as "grantor" or "settlor" may be substituted in the trust instrument for "donor" [*see Rev. Proc. 2005-52, 2005-34 I.R.B. 326*, § 5.01(5)]. This form uses "settlor" in accordance with the publisher's general format.

Only a donor or a donor's estate may make an additional contribution to the trust [*see Rev. Proc. 2005-52, 2005-34 I.R.B. 326*, § 5.05(1)].

#### **[g] Payment of Unitrust Amount**

##### **[i] Permissible Recipients**

For a CRUT with a unitrust period based on the life of one individual, the unitrust amount generally must be paid to that individual, who must be living at the time the trust is created [ *Rev. Proc. 2005-52, 2005-34 I.R.B. 326*, § 5.02(1) (inter vivos trusts)]. The unitrust amount may be paid to a trust for the benefit of an individual who is financially disabled under some circumstances [*see Rev. Rul. 2002-20, 2002-1 C.B. 794*].

For a CRUT having a term-of-years unitrust period, the unitrust amount generally must be paid to a named person or persons, and if the unitrust amount is to be paid to an individual or individuals, all must be living at the time the trust is created. The unitrust amount may be payable to the estate or heirs of a named recipient who dies before the expiration of the term of years. It also may be payable to members of a named class and all members of the class need not be living or ascertainable when the trust is created [ *Rev. Proc. 2005-53, 2005-34 I.R.B. 339*, § 5.02(2)]. If the unitrust amount is payable to more than one person, the trust instrument should describe each person's interest [ *Rev. Proc. 2005-53, 2005-34 I.R.B. 339*, § 5.02(3) (inter vivos trusts)]. For a provision apportioning the unitrust amount among members of a named class in the trustee's discretion, see  *Rev. Proc. 2005-53, 2005-34 I.R.B. 339*, § 6.02. Note that this form is designed for a charitable remainder unitrust providing payments to only one individual. For other fact contexts, the appropriate sample IRS forms listed in [b], *above*, should be used as drafting models.

For a CRUT with a unitrust period based on the lives of two individuals, the unitrust amount generally must be paid to those individuals and both must be living when the trust is created [ *Rev. Proc. 2005-54, 2005-34 I.R.B. 353*, § 5.02(1);  *Rev. Proc. 2005-55, 2005-34 I.R.B. 367*, § 5.02(1);  *Rev. Proc. 2005-58, 2005-34 I.R.B. 402*, § 5.02(1);  *Rev.*

*Proc. 2005-59, 2005-34 I.R.C. 412, § 5.02(1)*].

An organization described in *I.R.C. § 170(c)* (qualified charitable and nonprofit organizations) may receive part, but not all, of any unitrust amount [*I.R.C. § 664(d)(2)(A)*; *Treas. Reg. § 1.664-3(a)(3)(i)*]. If a gift tax charitable deduction and an estate tax charitable deduction are sought for the present value of the unitrust interest passing to a charitable organization, the trust instrument must specify the portion of each unitrust payment that is payable to the noncharitable recipient and to the charitable organization. The trust instrument also must contain a means for selecting an alternative qualified charitable organization if the designated organization is not a qualified organization at the time any unitrust amount is to be paid to it [ *see Section 4.01* (second alternative provision) of form]. Finally, the trust instrument must contain prohibitions against investments that jeopardize the exempt purpose of the trust for purposes of *I.R.C. § 4944*, and against retaining any excess business holdings for purposes of *I.R.C. § 4943* [*see Rev. Proc. 2005-52, 2005-34 I.R.B. 326*, § 6.01(1); *see also* optional language in Section 5.11 of form].

If payment of part of the unitrust amount to a charitable organization is desired, Section 4.01 of this form should be replaced with the alternative provision *set forth in § 6.01(2)(a)* of *Rev. Proc. 2005-52, 2005-34 I.R.B. 326* [ *see Section 4.01* (second alternative provision) of form]. Language changes also should be made to the first alternative version of Section 4.03, as indicated in the form, and Section 5.11 of the form also should be modified as indicated in that provision.

#### **[ii] Percentage Requirements**

The fixed percentage unitrust amount must be at least 5 percent and not more than 50 percent of the annual net fair market value of the trust assets [*I.R.C. § 664(d)(2)(A)*]. In addition, with respect to each contribution of property to the trust, the value of the charitable remainder interest must be at least 10 percent of the net fair market value of the contributed property as of the date of its contribution to the trust [*I.R.C. § 664(d)(2)(D)*]. An additional contribution to an existing CRUT that does not satisfy the 10 percent test is treated as a transfer to a separate trust [*I.R.C. § 664(d)(4)*].

The first alternative and second alternative versions of Section 4.01 calculate the unitrust amount under the fixed percentage method, which bases the calculation on a fixed percentage of the net fair market value of the trust assets valued annually. The revenue procedures specify alternate provisions that may be substituted to use the net income method for calculating the unitrust amount [ *see Section 4.01* (third alternative)], the net income with make-up method for calculating the unitrust amount [ *see Section 4.01* (fourth alternative)], or a combination of methods for calculating the unitrust amount [ *see Section 4.01* (fifth and sixth alternatives); *Rev. Proc. 2005-52, 2005-34 I.R.B. 326*, §§ 6.07-6.09]. When any of these alternative provisions are used, the corresponding alternate versions of Sections 4.02 and 4.04 must also be included.

#### **[iii] Payment of Unitrust Amount in Installments**

This trust instrument specifies that the unitrust amount is to be paid in equal quarterly installments at the end of each quarter. However, the trust instrument also may specify that the unitrust amount is to be paid to the recipient annually, or in equal or unequal installments throughout the year [*see Treas. Reg. § 1.664-3(a)(1)(i)*]. The amount of the charitable deduction is affected by the frequency of payment, by whether the installments are equal or unequal, and by whether each installment is payable at the beginning or end of the period [*see Treas. Reg. §§ 1.664-3(c), 1.664-4*].

#### **[iv] Payment of Unitrust Amount by Close of Taxable Year**

Generally, the unitrust amount for any taxable year, if computed under the fixed percentage method, must be paid before the close of the taxable year for which the amount is due, but under specified circumstances the amount may be paid within a reasonable time after the close of the taxable year [*see Treas. Reg. § 1.664-3(a)(1)(i)(g), (k)*].

#### **[v] Early Distributions to Charity**

The trust instrument may provide that an amount other than the unitrust amount must be paid (or may be paid in the trustee's discretion) to a charitable organization described in *I.R.C. § 170(c)*. If such a distribution is made in kind, the adjusted basis of the distributed property must be fairly representative of the adjusted basis of the property available for distribution on the distribution date [*Treas. Reg. § 1.664-3(a)(4)*].

#### **[vi] Qualified Contingency**

Payment of the unitrust amount may terminate on the earlier of the occurrence of a qualified contingency or the recipient's death (or the expiration of the term of years unitrust period) [*I.R.C. § 664(f)(3)*]. The amount of the charitable deduction, however, is determined without regard to the qualified contingency [*I.R.C. § 664(f)(2)*]. An optional provision for termination on the occurrence of a qualified contingency is included in the first and second alternatives in Section 4.01 of this form.

#### **[h] Proration of Unitrust Amount**

The first alternative of Section 4.02 of the form specifies that the unitrust amount must be prorated on a daily basis. As an alternative to prorating the unitrust amount in the taxable year of the recipient's death, payment of the unitrust amount may terminate with the last regular payment preceding the recipient's death, but the fact that the recipient may not receive the last payment may not be taken into account in determining the present value of the remainder interest [ *see Section 4.02* (second alternative provision); *Treas. Reg. § 1.664-3(a)(5)(i)*; *see Rev. Proc. 2005-52, 2005-34 I.R.B. 326* , § 6.03(2)].

Section 4.04 of this form provides a formula for determining the unitrust amount in each year in which an additional contribution is made to the CRUT. If an additional contribution is made in a short taxable year or in the taxable year of the recipient's death, the unitrust amount computed under Section 4.04 must be prorated under Section 4.02.

#### **[i] Distribution to Charity**

Any named charitable remainder beneficiary must be an organization described in *I.R.C. § 170(c)* at the time of the transfer to the CRUT [*see I.R.C. § 664(d)(2)(C)*]. It must also be an organization described in *I.R.C. § 2522(a)* to qualify for the gift tax charitable deduction, and an organization described in *I.R.C. § 2055(a)* to qualify for the estate tax charitable deduction [*see Rev. Rul. 77-385, 1977-2 C.B. 331* ]. If it is determined that an estate tax charitable deduction will not be necessary, all references to *I.R.C. § 2055(a)* in the trust instrument may be deleted. The trust instrument may restrict the charitable remainder beneficiary to an organization described in *I.R.C. §§ 170(c), 2055(a), and 2522(a)*, but grant to the trustee or other person the power to designate the actual charitable remainder beneficiary [*see Rev. Rul. 76-7, 1976-1 C.B. 179* ]. The second alternative version of Section 4.03 of this form may be used to grant such a power of appointment.

The trust instrument must provide a means for selecting an alternative charitable remainder beneficiary in the event the designated organization is not qualified at the time any payments are to be made to it from the trust [*Treas. Reg. § 1.664-3(a)(6)(iv)*]. This requirement is satisfied in Section 4.03 of the trust instrument by conferring the power on the trustee to designate an alternative charitable remainder beneficiary. The remainder interest may pass to more than one charitable organization, as long as each organization is described in *I.R.C. §§ 170(c), 2055(a), and 2522(a)* [*Treas. Reg. § 1.664-3(a)(6)(i)*].

The donor may retain the right to substitute another charitable remainder beneficiary for the charitable remainder beneficiary named in the trust instrument [*see Rev. Rul. 76-8, 1976-1 C.B. 179* ]. However, the retention of this right will cause the gift of the remainder interest to be incomplete for gift tax purposes [*see Treas. Reg. § 25.2511-2(c)*; *Rev. Rul. 77-275* ]. To retain the right to substitute the charitable remainder beneficiary, the optional language illustrated in

the text should be added to the first version of Section 4.03 of this form [*see* 2005-34 I.R.B. 326, *Rev. Proc.* 2005-52 , § 6.05(2)].

#### **[j] Restricting Charitable Remainder Beneficiary to Public Charity**

The amount of the donor's income tax charitable deduction is more limited for gifts to certain private foundations than for gifts to other charitable organizations. To avoid these more restrictive limitations, a donor of an inter vivos CRUT may wish to restrict the charitable remainder beneficiary to an organization that is described in *I.R.C.* § 170(b)(1)(A), as well as *I.R.C.* §§ 170(c), 2055(a), and 2522(a). To restrict the charitable remainder beneficiary to a public charity, the phrase "an organization described in §§ 170(c), 2055(a), and 2522(a) of the Code" in the trust instrument should be replaced with the phrase "an organization described in §§ 170(b)(1)(A), 170(c), 2055(a), and 2522(a) of the Code" [*see Rev. Proc.* 2005-52, 2005-34 I.R.B. 326 , § 6.04(2)]. The appropriate optional references to *I.R.C.* § 170(b)(1)(A) have been included throughout the form.

#### **[k] Valuation of Assets**

The trust instrument specifies that the net fair market value of the trust assets is to be determined as of the first day of each taxable year of the trust. However, the value may be determined on any date during the trust's taxable year, or by taking the average of valuations made on more than one date during the taxable year, as long as the same valuation date and methods are used each year. If the trust instrument does not specify a valuation date, the trustee must select a date and indicate the selection on the first Form 5227 (Split-Interest Trust Information Return) that the trust must file [*Treas. Reg.* § 1.664-3(a)(1)(iv)].

If the valuation date is a date other than the first day of each taxable year of the trust, it may be necessary to modify the provisions of the trust instrument regarding the following [*see* *Treas. Reg.* § 1.664-3(a)(1)(v), (b); *see also* *Rev. Proc.* 2005-52, 2005-34 I.R.B. 326 , § 5.05(4)]:

- The timing of the payment of the unitrust amount.
- The proration of the unitrust amount in a short taxable year and the last taxable year of the unitrust period.
- Additional contributions.

If the CRUT is funded with unmarketable assets, the net fair market value of the assets must be determined by an independent trustee [*Treas. Reg.* § 1.664-1(a)(7)(iii)], or by a current "qualified appraisal" from a "qualified appraiser" [*Treas. Reg.* §§ 1.170A-13(c)(3), (5), 1.664-1(a)(7)]. If there are multiple trustees, any co-trustee may value the trust's unmarketable assets. An unmarketable asset that is valued in one year by an independent trustee may be valued in a successive year by a qualified appraiser; and, within a single year, some unmarketable assets may be valued by a qualified appraiser, while others are valued by an independent trustee [*see* *Rev. Proc.* 2005-52, 2005-34 I.R.B. 326 , § 5.07].

#### **[l] Prohibiting Additional Contributions**

Section 4.04 of the form provides rules for determining the unitrust amount that is payable in a year in which an additional contribution is made to the trust. The trust instrument instead may prohibit contributions to the trust after the initial contribution [*see* *Treas. Reg.* § 1.664-3(b)]. If additional contributions are not permitted, Section 2.02 should be deleted, all references to the unitrust amount computed under Section 4.04 must be removed, and Section 4.05 also should be deleted.

#### **[m] Prohibited Transactions**

Payment of the unitrust amount to the recipient is not considered an act of self-dealing or a taxable expenditure within the meaning of *I.R.C. §§ 4941(d) and 4945(d)*, as modified by *I.R.C. § 4947(a)(2)(A)*. Prohibitions against investments that jeopardize the exempt purpose of the trust for purposes of *I.R.C. § 4944*, and against retaining any excess business holdings for purposes of *I.R.C. § 4943*, are required if the trust provides for payment of part of a unitrust amount to an organization described in *I.R.C. § 170(c)*, and gift and estate tax charitable deductions are sought for this interest [*see I.R.C. § 4947(b)(3)*].

#### **[n] Payment of Federal Estate Taxes and State Death Taxes**

An inter vivos CRUT providing for unitrust payments payable consecutively (or concurrently and consecutively) for two measuring lives must contain a special provision regarding payment of estate and state death taxes [*see Rev. Proc. 2005-54, 2005-34 I.R.B. 353*, § 5.03; *Rev. Proc. 2005-55, 2005-34 I.R.B. 367*, § 5.03]. Because this form is based on only one measuring life, this alternative has not been included in this form.

#### **[o] Right to Revoke Interest of Successor Recipient**

In an inter vivos CRUT providing for annuity payments payable consecutively (or concurrently and consecutively) for two measuring lives, the donor may retain the right to revoke or terminate the interest of the noncharitable recipient. This right is exercisable only by the donor's will [*Treas. Reg. § 1.664-3(a)(4)*]. The retention of this right may have gift and estate tax consequences, and affects the value of the transferred unitrust interests. It may also cause a portion of the trust to be included in the donor's gross estate for federal estate tax purposes [ *Rev. Proc. 2005-54, 2005-34 I.R.B. 353*, § 6.03(1); *Rev. Proc. 2005-55, 2005-34 I.R.B. 367*, § 6.03(1)]. Because this form is based on only one measuring life, this option has not been included in this form.

### **[2] FORM**

#### **Charitable Remainder Unitrust; One Non-Charitable Recipient**

[*Name of trust, if desired, e.g.,*

MARY S. BARNES CHARITABLE REMAINDER UNITRUST]  
TRUST AGREEMENT

#### Article 1: Creation of Trust

[*Source: Rev. Proc. 2005-52*, § 4, *Introductory Paragraph*; § 6.07(3)(a); § 6.08(2)(a); § 6.09(2)(a), 3(a)] **Section 1.01. Creation of Trust.** On this \_\_\_\_\_ day of \_\_\_\_\_, I, [*name, e.g., Mary S. Barnes, of Ventura, California*] (hereinafter "the Settlor"), desiring to establish a charitable remainder unitrust within the meaning of *Revenue Procedure 2005-52* and *Internal Revenue Code Section 664(d)(2)* [*if unitrust income is to be calculated using the net income method, the net income with make-up method, or a combination of either of those methods with the fixed income method, add: and (d)(3)*], hereby enter into this trust agreement with \_\_\_\_\_ as the initial trustee (hereinafter "the Trustee"). This trust shall be known as the \_\_\_\_\_ [*name of trust*] Charitable Remainder Unitrust.

[*Source: additional provision*] **Section 1.02. Marital Status.** The Settlor is married to [*name of spouse, e.g., Horace E. Barnes*], and all references in this trust instrument to the Settlor's "[*husband or wife*]" are to [*him or her*].

[*Source: additional provision*] **Section 1.03. No Children.** The Settlor has never had any children.

#### Article 2: Trust Estate

[Source: Rev. Proc. 2005-52 , § 4, Paragraph 1] **Section 2.01. Funding of Trust.** The Settlor hereby transfers and irrevocably assigns, on the above date, to the Trustee the property described in Schedule A, and the Trustee accepts the property and agrees to hold, manage, and distribute the property, and any property subsequently transferred, under the terms set forth in this trust instrument.

[Source: additional provision] **Section 2.02. Additions to Trust.** From time to time, the Trustee may accept additions to the trust, but only from the Settlor or a duly authorized agent or agents of the Settlor. All such additions shall become a part of the trust estate and shall be held, administered, and distributed in accordance with the terms of this instrument.

#### Article 3: Rights and Powers of Settlor

[Source: Rev. Proc. 2005-52 , § 4, Paragraph 11; § 6.07(3)(a); § 6.08(2)(a), § 6.09(2)(a), 3(a)] **Section 3.01. Irrevocability; Limited Power of Amendment.** This trust is irrevocable. However, the Trustee shall have the power, acting alone, to amend the trust from time to time in any manner required for the sole purpose of ensuring that the trust qualifies and continues to qualify as a charitable remainder unitrust within the meaning of *Internal Revenue Code Section 664(d)(2)* [if unitrust income is to be calculated using the net income method, the net income with make-up method, or a combination of either of those methods with the fixed income method, add: and (d)(3)].

[Source: additional provision] **Section 3.02. Removal of Trustee.** The settlor reserves the right to dismiss the trustee and to appoint a successor trustee. To remove the trustee pursuant to this provision, the settlor shall give the trustee 30 days' written notice. To appoint a successor trustee pursuant to this provision, the settlor shall give the successor trustee written notice of the appointment.

#### Article 4: Payments and Distributions

[EITHER]

[Source: Rev. Proc. 2005-52 , § 4, Paragraph 2 , § 6.02(2)] **Section 4.01. Payment of Unitrust Amount.** In each taxable year of the trust during the unitrust period, the Trustee shall pay to [permissible recipient] (hereinafter "the Recipient") a unitrust amount equal to [a number no less than 5 and no more than 50] percent of the net fair market value of the assets of the trust valued as of the first day of each taxable year of the trust (hereinafter "the valuation date"). The first day of the unitrust period shall be the date property is first transferred to the trust and the last day of the unitrust period shall be the date of the Recipient's death [if payment of unitrust amount is to terminate on the earlier of the recipient's death or the occurrence of a qualified contingency, add: or, if earlier, the date on which occurs the \_\_\_\_\_ (specify qualified contingency)]. The unitrust amount shall be paid in equal quarterly installments at the end of each calendar quarter from income and, to the extent income is not sufficient, from principal. Any income of the trust for a taxable year in excess of the unitrust amount shall be added to principal. If, for any year, the net fair market value of the trust assets is incorrectly determined, then within a reasonable period after the correct value is finally determined, the Trustee shall pay to the Recipient (in the case of an undervaluation) or receive from the Recipient (in the case of an overvaluation) an amount equal to the difference between the unitrust amount(s) properly payable and the unitrust amount(s) actually paid.

[OR, if charitable organization is to receive part, but not all, of any unitrust amount:]

[Source: Rev. Proc. 2005-52 , § 6.01(2)(a), § 6.02(2); § 6.04(2)] **Section 4.01. Payment of Unitrust Amount.** The unitrust amount is equal to [a number no less than 5 and no more than 50] percent of the net fair market value of the assets of the trust valued as of the first day of each taxable year of the trust (hereinafter "the valuation date"). In each taxable year of the trust during the unitrust period, the Trustee shall pay [the percentage of the unitrust amount payable

to the noncharitable recipient] percent of the unitrust amount to [permissible recipient] (hereinafter "the Recipient") and [percentage of unitrust amount payable to charitable recipient] percent of the unitrust amount to [organization described in Internal Revenue Code Sections 170(b)(1)(A) (if recipient must be a public charity), 170(c), 2055(a), and 2522(a)] (hereinafter "the Charitable Recipient"). The first day of the unitrust period shall be the date property is first transferred to the trust and the last day of the unitrust period shall be the date of the Recipient's death [if payment of unitrust amount is to terminate on the earlier of the recipient's death or the occurrence of a qualified contingency, add: or, if earlier, the date on which occurs the \_\_\_\_\_ (specify qualified contingency)]. If the Charitable Recipient is not an organization described in Internal Revenue Code Sections 170(c), 2055(a), and 2522(a) at the time when any unitrust payment is to be distributed to it, then the Trustee shall distribute that unitrust payment to one or more organizations described in Internal Revenue Code Sections [if recipient must be a public charity, add: 170(b)(1)(A),] 170(c), 2055(a), and 2522(a) as the Trustee shall select, and in the proportions as the Trustee shall decide, in the Trustee's sole discretion. The unitrust amount shall be paid in equal quarterly installments at the end of each calendar quarter from income and, to the extent income is not sufficient, from principal. Any income of the trust for a taxable year in excess of the unitrust amount shall be added to principal. If, for any year, the net fair market value of the trust assets is incorrectly determined, then within a reasonable period after the correct value is finally determined, the Trustee shall pay to the Recipient and the Charitable Recipient (in the case of an undervaluation) or receive from the Recipient and the Charitable Recipient (in the case of an overvaluation) an amount equal to the difference between the unitrust amount(s) properly payable and the unitrust amount(s) actually paid.

[OR, if unitrust income is to be calculated using the net income method rather than the fixed income method:]

[Source: Rev. Proc. 2005-52, § 6.07(3)(b)] **Section 4.01. Payment of Unitrust Amount.** In each taxable year of the trust during the unitrust period, the Trustee shall pay to [permissible recipient] (hereinafter "the Recipient") a unitrust amount equal to the lesser of (a) a fixed percentage amount equal to [a number no less than 5 and no more than 50] percent of the net fair market value of the assets of the trust valued as of the valuation date (hereinafter "the fixed percentage amount described in (a) of Section 4.01") or (b) the trust income for the taxable year as defined in Internal Revenue Code Section 643(b) and the applicable regulations. The valuation date is the first day of each taxable year of the trust. The first day of the unitrust period shall be the date property is first transferred to the trust and the last day of the unitrust period shall be the date of the Recipient's death. The unitrust amount shall be paid in equal quarterly installments at the end of each calendar quarter from income. Any income of the trust for a taxable year in excess of the unitrust amount shall be added to principal. If, for any year, the net fair market value of the trust assets is incorrectly determined, then within a reasonable period after the correct value is finally determined, the Trustee shall pay to the Recipient (in the case of an undervaluation) or receive from the Recipient (in the case of an overvaluation) an amount equal to the difference between the unitrust amount(s) properly payable and the unitrust amount(s) actually paid.

[OR, if unitrust income is to be calculated using the net income with make up method rather than the fixed income method:]

[Source: Rev. Proc. 2005-52, § 6.08(2)(b)] **Section 4.01. Payment of Unitrust Amount.** In each taxable year of the trust during the unitrust period, the Trustee shall pay to [permissible recipient] (hereinafter "the Recipient") a unitrust amount equal to the lesser of (a) a fixed percentage amount equal to [number no less than 5 and no more than 50] percent of the net fair market value of the assets of the trust valued as of the valuation date (hereinafter "the fixed percentage amount described in (a) of Section 4.01") or (b) the trust income for the taxable year as defined in Internal Revenue Code Section 643(b) and the applicable regulations. The unitrust amount for a taxable year shall also include any amount of trust income for the year that is in excess of \_\_\_\_\_ [restate fixed percentage amount determined under (a) of this section for the year], but only to the extent that the aggregate of the amounts paid to the Recipient in prior years was less than the aggregate of the amounts determined for all prior years under (a) of this section and (a) of Section 4.04. The valuation date is the first day of each taxable year of the trust. The first day of the

unitrust period shall be the date property is first transferred to the trust and the last day of the unitrust period shall be the date of the Recipient's death. The unitrust amount shall be paid in equal quarterly installments at the end of each calendar quarter from income. Any income of the trust for a taxable year in excess of the unitrust amount shall be added to principal. If, for any year, the net fair market value of the trust assets is incorrectly determined, then within a reasonable period after the correct value is finally determined, the Trustee shall pay to the Recipient (in the case of an undervaluation) or receive from the Recipient (in the case of an overvaluation) an amount equal to the difference between the unitrust amount(s) properly payable and the unitrust amount(s) actually paid.

*[OR, if unitrust income is to be calculated using a combination of the fixed income method with the net income method:]*

*[Source: Rev. Proc. 2005-52 , § 6.09(2)(b)]* **Section 4.01. Payment of Unitrust Amount.**

**(1) Unitrust amount determined by net income method.** In each taxable year of the trust during the unitrust period, the Trustee shall pay to *[permissible recipient]* (hereinafter "the Recipient") a unitrust amount equal to the lesser of (a) a fixed percentage amount equal to *[number no less than 5 and no more than 50]* percent of the net fair market value of the assets of the trust valued as of the valuation date (hereinafter "the fixed percentage amount described in (a) of Section 4.01(1)") or (b) the trust income for the taxable year as defined in *Internal Revenue Code Section 643(b)* and the applicable regulations. The unitrust amount shall be paid in equal quarterly installments at the end of each calendar quarter from income. Any income of the trust for a taxable year in excess of the unitrust amount shall be added to principal.

**(2) Conversion to fixed percentage method of determining unitrust amount.** Notwithstanding Section 4.01(1), upon the occurrence of *[permissible triggering event as described in Treas. Reg. § 1.664-3(a)(1)(i)(c) and (d)]* (hereinafter "the triggering event") and effective as of the first day of the taxable year that immediately follows the triggering event (hereinafter "the effective date of the triggering event"), the Trustee shall pay to the Recipient in each remaining taxable year of the trust during the unitrust period a unitrust amount equal to *[same percentage used in Section 401(1)(a)]* percent of the net fair market value of the trust assets as of the valuation date. Beginning on the effective date of the triggering event, the Trustee shall no longer pay the amount equal to the lesser of (a) or (b) in Section 4.01(1). The unitrust amount shall be paid in equal quarterly installments at the end of each calendar quarter from income and, to the extent income is not sufficient, from principal. Any income of the trust for a taxable year in excess of the unitrust amount shall be added to principal.

**(3) In general.** The first day of the unitrust period shall be the date property is first transferred to the trust and the last day of the unitrust period shall be the date of the Recipient's death. The valuation date is the first day of each taxable year of the trust. If, for any year, the net fair market value of the trust assets is incorrectly determined, then within a reasonable period after the correct value is finally determined, the Trustee shall pay to the Recipient (in the case of an undervaluation) or receive from the Recipient (in the case of an overvaluation) an amount equal to the difference between the unitrust amount(s) properly payable and the unitrust amount(s) actually paid.

*[OR, if unitrust income is to be calculated using a combination of the fixed income method with the net income with make up method:]*

*[Source: Rev. Proc. 2005-52 , § 6.09(3)(b)]* **Section 4.01. Payment of Unitrust Amount.**

**(1) Unitrust amount determined by net income with make-up method.** In each taxable year of the trust during the unitrust period, the Trustee shall pay to *[permissible recipient]* (hereinafter "the Recipient") a unitrust amount equal to the lesser of (a) a fixed percentage amount equal to *[number no less than 5 and no more than 50]* percent of the net fair

market value of the assets of the trust valued as of the valuation date (hereinafter "the fixed percentage amount described in (a) of Section 4.01(1)") or (b) the trust income for the taxable year as defined in *Internal Revenue Code Section 643(b)* and the applicable regulations. The unitrust amount for a taxable year shall also include any amount of trust income for the year that is in excess of [same percentage used in Section 401(1)(a)], but only to the extent that the aggregate of the amounts paid to the Recipient in prior years was less than the aggregate of the amounts determined for all prior years under (a) of Section 4.01(1) and (a) of Section 4.04(1). The unitrust amount shall be paid in equal quarterly installments at the end of each calendar quarter from income. Any income of the trust for a taxable year in excess of the unitrust amount shall be added to principal.

**(2) Conversion to fixed percentage method of determining unitrust amount.** Notwithstanding Section 401(1), upon the occurrence of [permissible triggering event as described in *Treas. Reg. § 1.664-3(a)(1)(i)(c) and (d)*] (hereinafter "the triggering event") and effective as of the first day of the taxable year that immediately follows the triggering event (hereinafter "the effective date of the triggering event"), the Trustee shall pay to the Recipient in each remaining taxable year of the trust during the unitrust period a unitrust amount equal to [same percentage used in Section 401(1)(a)] percent of the net fair market value of the trust assets as of the valuation date. Beginning on the effective date of the triggering event, the Trustee shall no longer pay the amount equal to the lesser of (a) or (b) in Section 4.01(1) and shall not pay any amount of trust income described in the second sentence of Section 4.01(1). The unitrust amount shall be paid in equal quarterly installments at the end of each calendar quarter from income and, to the extent income is not sufficient, from principal. Any income of the trust for a taxable year in excess of the unitrust amount shall be added to principal.

**(3) In general.** The first day of the unitrust period shall be the date property is first transferred to the trust and the last day of the unitrust period shall be the date of the Recipient's death. The valuation date is the first day of each taxable year of the trust. If, for any year, the net fair market value of the trust assets is incorrectly determined, then within a reasonable period after the correct value is finally determined, the Trustee shall pay to the Recipient (in the case of an undervaluation) or receive from the Recipient (in the case of an overvaluation) an amount equal to the difference between the unitrust amount(s) properly payable and the unitrust amount(s) actually paid.

[CONTINUE]

[EITHER]

[Source: *Rev. Proc. 2005-52*, § 4, Paragraph 3] **Section 4.02. Proration of Unitrust Amount.** For a short taxable year and for the taxable year during which the unitrust period ends, the Trustee shall prorate on a daily basis the unitrust amount described in Section 4.01, or, if an additional contribution is made to the trust, the unitrust amount described in Section 4.04.

[OR, if obligation to pay the unitrust amount will terminate with the last regular payment preceding the recipient's death:]

[Source: *Rev. Proc. 2005-52*, § 6.03(2)] **Section 4.02. Proration of Unitrust Amount.** For a short taxable year, the Trustee shall prorate on a daily basis the unitrust amount described in Section 4.01, or, if an additional contribution is made to the trust, the unitrust amount described in Section 4.04. In the taxable year of the trust during which the unitrust period ends, however, the obligation of the Trustee to pay the unitrust amount shall terminate with the last regular quarterly installment preceding the death of the Recipient.

[OR, if unitrust income is to be calculated using the net income method rather than the fixed income method:]

[Source: Rev. Proc. 2005-52 , § 6.07(3)(c)] **Section 4.02. Proration of Unitrust Amount.** For a short taxable year and for the taxable year during which the unitrust period ends, the Trustee shall prorate on a daily basis the fixed percentage amount described in (a) of Section 4.01, or, if an additional contribution is made to the trust, the fixed percentage amount described in (a) of Section 4.04. In such a year, this prorated fixed percentage amount shall be used in place of the fixed percentage amount described in (a) of Section 4.01 or in (a) of Section 4.04 to determine the unitrust amount payable for that year.

*[OR, if unitrust income is to be calculated using the net income with make up method rather than the fixed income method:]*

[Source: Rev. Proc. 2005-52 , § 6.08(2)(c)] **Section 4.02. Proration of Unitrust Amount.** For a short taxable year and for the taxable year during which the unitrust period ends, the Trustee shall prorate on a daily basis the fixed percentage amount described in (a) of Section 4.01, or, if an additional contribution is made to the trust, the fixed percentage amount described in (a) of Section 4.04. In such a year, this prorated fixed percentage amount shall be used in place of the fixed percentage amount described in (a) of Section 4.01 or in (a) of Section 4.04 to determine the unitrust amount payable for that year.

*[OR, if unitrust income is to be calculated using a combination of the fixed income method with the net income method:]*

[Source: Rev. Proc. 2005-52 , § 6.09(2)(c)] **Section 4.02. Proration of Unitrust Amount.**

**(1) Proration in years preceding the effective date of triggering event.** For a short taxable year before the effective date of the triggering event, which may include the taxable year during which the unitrust period ends, the Trustee shall prorate on a daily basis the fixed percentage amount described in (a) of Section 4.01(1) or, if an additional contribution is made to the trust, the fixed percentage amount described in (a) of Section 4.04(1). In such a year, this prorated fixed percentage amount shall be used in place of the fixed percentage amount described in (a) of Section 4.01(1) or in (a) of Section 4.04(1) to determine the unitrust amount payable for that year.

**(2) Proration on and after effective date of triggering event.** For a short taxable year beginning on or after the effective date of the triggering event, which may include the taxable year during which the unitrust period ends, the Trustee shall prorate on a daily basis the unitrust amount described in Section 4.01(2) or, if an additional contribution is made to the trust, the unitrust amount described in Section 4.04(2).

*[OR, if unitrust income is to be calculated using a combination of the fixed income method with the net income with make up method:]*

[Source: Rev. Proc. 2005-52 , § 6.09(3)(c)] **Section 4.02. Proration of Unitrust Amount.**

**(1) Proration in years preceding the effective date of triggering event.** For a short taxable year before the effective date of the triggering event, which may include the taxable year during which the unitrust period ends, the Trustee shall prorate on a daily basis the fixed percentage amount described in (a) of Section 4.01(1) or, if an additional contribution is made to the trust, the fixed percentage amount described in (a) of Section 4.04(1). In such a year, this prorated fixed percentage amount shall be used in place of the fixed percentage amount described in (a) of Section 4.01(1) or in (a) of Section 4.04(1) to determine the unitrust amount payable for that year.

**(2) Proration on and after effective date of triggering event.** For a short taxable year beginning on or after the effective date of the triggering event, which may include the taxable year during which the unitrust period ends, the Trustee shall prorate on a daily basis the unitrust amount described in Section 4.01(2) or, if an additional contribution is made to the trust, the unitrust amount described in Section 4.04(2).

[CONTINUE]

[EITHER]

[Source: Rev. Proc. 2005-52, § 4, Paragraph 4, § 6.01(2)(b); § 6.04(2); § 6.05(2)] **Section 4.03. Distribution to Charity.** At the termination of the unitrust period, the Trustee shall distribute all of the then principal and income of the trust (other than any amount due the Recipient [*if charitable organization is to receive part, but not all, or any unitrust amount, add:* and the Charitable Recipient] under the terms of this trust) to [*charitable remainder beneficiary*] (hereinafter "the Charitable Organization"). [*If settlor retains right to substitute another charitable remainder beneficiary for the charitable remainder beneficiary man named in the trust instrument, add:* The Settlor reserves the right to designate, at any time and from time to time, in lieu of the Charitable Organization identified above, one or more organizations described in Internal Revenue Code Sections (*if recipient must be a public charity, add:* 170(b)(1)(A),) 170(c), 2055(a), and 2522(a) as the charitable remainderman and shall make any such designation by giving written notice to the Trustee.] If the Charitable Organization is not an organization described in Internal Revenue Code Sections [*if recipient must be a public charity, add:* 170(b)(1)(A),] 170(c), 2055(a), and 2522(a) at the time when any principal or income of the trust is to be distributed to it, then the Trustee shall distribute the then principal and income to one or more organizations described in Internal Revenue Code Sections [*if recipient must be a public charity, add:* 170(b)(1)(A),] 170(c), 2055(a), and 2522(a) as the Trustee shall select, and in the proportions as the Trustee shall decide, in the Trustee's sole discretion.

[OR, to grant recipient a power of appointment to designate charitable remainder beneficiary:]

[Source: Rev. Proc. 2005-52, § 6.06(2); § 6.04(2)] **Section 4.03. Distribution to Charity.** At the termination of the unitrust period, the Trustee shall distribute all of the then principal and income of the trust (other than any amount due the Recipient under the terms of this trust) to one or more charitable organizations described in Internal Revenue Code Section [*if recipient must be a public charity, add:* 170(b)(1)(A),] 170(c), 2055(a), and 2522(a) as the Recipient shall appoint and direct by specific reference to this power of appointment by inter vivos or testamentary instrument. To the extent the Recipient fails to effectively exercise the power of appointment, the principal and income not effectively appointed shall be distributed to one or more organizations described in Internal Revenue Code Sections [*if recipient must be a public charity, add:* 170(b)(1)(A),] 170(c), 2055(a), and 2522(a) as the Trustee shall select, and in the proportions as the Trustee shall decide, in the Trustee's sole discretion. If an organization fails to qualify as an organization described in Internal Revenue Code Sections [*if recipient must be a public charity, add:* 170(b)(1)(A),] 170(c), 2055(a), and 2522(a) at the time when any principal or income of the trust is to be distributed to it, then the Trustee shall distribute the then principal and income to one or more organizations described in Internal Revenue Code Sections [*if recipient must be a public charity, add:* 170(b)(1)(A),] 170(c), 2055(a), and 2522(a) as the Trustee shall select, and in the proportions as the Trustee shall decide, in the Trustee's sole discretion.

[CONTINUE]

[EITHER]

[Source: Rev. Proc. 2005-52 , § 4, Paragraph 5] **Section 4.04. Additional Contributions.** If any additional contributions are made to the trust after the initial contribution, the unitrust amount for the year in which any additional contribution is made shall be [*same percentage used in Section 4.01*] percent of the sum of (a) the net fair market value of the trust assets as of the valuation date (excluding the assets so added and any post-contribution income from, and appreciation on, such assets during that year) and (b) for each additional contribution during the year, the fair market value of the assets so added as of the valuation date (including any post-contribution income from, and appreciation on, such assets through the valuation date) multiplied by a fraction the numerator of which is the number of days in the period that begins with the date of contribution and ends with the earlier of the last day of the taxable year or the last day of the unitrust period and the denominator of which is the number of days in the period that begins with the first day of such taxable year and ends with the earlier of the last day in that taxable year or the last day of the unitrust period. In a taxable year in which an additional contribution is made on or after the valuation date, the assets so added shall be valued as of the date of contribution, without regard to any post-contribution income or appreciation, rather than as of the valuation date.

[OR, if unitrust income is to be calculated using the net income method rather than the fixed income method:]

[Source: Rev. Proc. 2005-52 , § 6.07(3)(d)] **Section 4.04. Additional Contributions.** Notwithstanding Section 4.01, if any additional contributions are made to the trust after the initial contribution, the unitrust amount for the year in which any additional contribution is made shall be equal to the lesser of (a) a fixed percentage amount equal to [*same percentage used in Section 4.01(a)*] percent of the sum of (1) the net fair market value of the trust assets as of the valuation date (excluding the assets so added and any post-contribution income from, and appreciation on, such assets during that year) and (2) for each additional contribution during the year, the fair market value of the assets so added as of the valuation date (including any post-contribution income from, and appreciation on, such assets through the valuation date) multiplied by a fraction the numerator of which is the number of days in the period that begins with the date of contribution and ends with the earlier of the last day of the taxable year or the last day of the unitrust period and the denominator of which is the number of days in the period that begins with the first day of such taxable year and ends with the earlier of the last day in such taxable year or the last day of the unitrust period (hereinafter "the fixed percentage amount described in Section 4.04(a)") or (b) the trust income for the taxable year as defined in *Internal Revenue Code Section 643(b)* and the applicable regulations. In a taxable year in which an additional contribution is made on or after the valuation date, the assets so added shall be valued as of the date of contribution, without regard to any post-contribution income or appreciation, rather than as of the valuation date.

[OR, if unitrust income is to be calculated using the net income with make up method rather than the fixed income method:]

[Source: Rev. Proc. 2005-52 , § 6.08(2)(d)] **Section 4.04. Additional Contributions.** Notwithstanding Section 4.01, if any additional contributions are made to the trust after the initial contribution, the unitrust amount for the year in which any additional contribution is made shall be equal to the lesser of (a) a fixed percentage amount equal to [*same percentage used in Section 4.01(a)*] percent of the sum of (1) the net fair market value of the trust assets as of the valuation date (excluding the assets so added and any post-contribution income from, and appreciation on, such assets during that year) and (2) for each additional contribution during the year, the fair market value of the assets so added as of the valuation date (including any post-contribution income from, and appreciation on, such assets through the valuation date) multiplied by a fraction the numerator of which is the number of days in the period that begins with the date of contribution and ends with the earlier of the last day of the taxable year or the last day of the unitrust period and the denominator of which is the number of days in the period that begins with the first day of such taxable year and ends with the earlier of the last day in such taxable year or the last day of the unitrust period (hereinafter "the fixed percentage amount described in (a) of Section 4.04") or (b) the trust income for the taxable year as defined in *Internal Revenue Code Section 643(b)* and the applicable regulations. The unitrust amount for that year shall also include any

amount of trust income for the year that is in excess of \_\_\_\_\_ [fixed percentage amount determined under (a) of this section for the year], but only to the extent that the aggregate of the amounts paid to the Recipient in prior years was less than the aggregate of the amounts determined for all prior years under (a) of Section 4.01 and (a) of this section. In a taxable year in which an additional contribution is made on or after the valuation date, the assets so added shall be valued as of the date of contribution, without regard to any post-contribution income or appreciation, rather than as of the valuation date.

[OR, if unitrust income is to be calculated using a combination of the fixed income method with the net income method:]

[Source: Rev. Proc. 2005-52, § 6.09(2)(d)] **Section 4.04. Additional Contributions.**

**(1) Additional contributions made before effective date of triggering event.** Notwithstanding Section 4.01(1), if any additional contributions are made to the trust after the initial contribution and before the effective date of the triggering event, the unitrust amount for the year in which the additional contribution is made shall be equal to the lesser of:

(a) A fixed percentage amount equal to [same percentage used in Section 4.01(1)(a)] percent of the sum of:

- (1) The net fair market value of the trust assets as of the valuation date (excluding the assets so added and any post-contribution income from, and appreciation on, such assets during that year); and
- (2) For each additional contribution during the year, the fair market value of the assets so added as of the valuation date (including any post-contribution income from, and appreciation on, such assets through the valuation date) multiplied by a fraction the numerator of which is the number of days in the period that begins with the date of contribution and ends with the earlier of the last day of the taxable year or the last day of the unitrust period and the denominator of which is the number of days in the period that begins with the first day of such taxable year and ends with the earlier of the last day in such taxable year or the last day of the unitrust period (hereinafter "the fixed percentage amount described in (a) of Section 4.04(1)"); or

(b) the trust income for the taxable year as defined in *Internal Revenue Code Section 643(b)* and the applicable regulations.

In a taxable year in which an additional contribution is made on or after the valuation date, the assets so added shall be valued as of the date of contribution, without regard to any post-contribution income or appreciation, rather than as of the valuation date.

**(2) Additional contributions made on or after effective date of triggering event.** Notwithstanding Section 4.01(2), if any additional contributions are made to the trust after the initial contribution and on or after the effective date of the triggering event, the unitrust amount described in Section 4.01(2) for the year in which the additional contribution is made shall be [same percentage used in Section 4.01(1)(a)] percent of the sum of:

(a) The net fair market value of the trust assets as of the valuation date (excluding the assets so added and any post-contribution income from, and appreciation on, such assets during that year); and

(b) For each additional contribution during the year, the fair market value of the assets so added as of the valuation date (including any post-contribution income from, and appreciation on, such assets through the valuation date) multiplied by a fraction the numerator of which is the number of days in the period that begins with the date of contribution and

ends with the earlier of the last day of the taxable year or the last day of the unitrust period and the denominator of which is the number of days in the period that begins with the first day of such taxable year and ends with the earlier of the last day in such taxable year or the last day of the unitrust period.

In a taxable year in which an additional contribution is made on or after the valuation date, the assets so added shall be valued as of the date of contribution, without regard to any post-contribution income or appreciation, rather than as of the valuation date. Beginning on the effective date of the triggering event, the trustee shall no longer pay the amount equal to the lesser of (a) or (b) in Section 4.04(1).

[OR, if unitrust income is to be calculated using a combination of the fixed income method with the net income with make up method:]

[Source: Rev. Proc. 2005-52, § 6.09 (3)(d)] **Section 4.04. Additional Contributions.**

**(1) Additional contributions made before effective date of triggering event.** Notwithstanding Section 4.01(1), if any additional contributions are made to the trust after the initial contribution and before the effective date of the triggering event, the unitrust amount for the year in which the additional contribution is made shall be equal to the lesser of:

(a) A fixed percentage amount equal to [same percentage used in Section 4.01(1)(a)] percent of the sum of:

- (1) The net fair market value of the trust assets as of the valuation date (excluding the assets so added and any post-contribution income from, and appreciation on, such assets during that year); and
- (2) For each additional contribution during the year, the fair market value of the assets so added as of the valuation date (including any post-contribution income from, and appreciation on, such assets through the valuation date) multiplied by a fraction the numerator of which is the number of days in the period that begins with the date of contribution and ends with the earlier of the last day of the taxable year or the last day of the unitrust period and the denominator of which is the number of days in the period that begins with the first day of such taxable year and ends with the earlier of the last day in such taxable year or the last day of the unitrust period (hereinafter "the fixed percentage amount described in (a) of Section 4.04(1)"); or

(b) The trust income for the taxable year as defined in *Internal Revenue Code Section 643(b)* and the applicable regulations.

The unitrust amount for that year shall also include any amount of trust income for the year that is in excess of [the fixed percentage amount determined under (a) of Section 4.04(1) for the year], but only to the extent that the aggregate of the amounts paid to the Recipient in prior years was less than the aggregate of the amounts determined for all prior years under (a) of Section 4.01(1) and (a) of this section. In a taxable year in which an additional contribution is made on or after the valuation date, the assets so added shall be valued as of the date of contribution, without regard to any post-contribution income or appreciation, rather than as of the valuation date.

**(2) Additional contributions made on or after effective date of triggering event.** Notwithstanding Section 4.01(2), if any additional contributions are made to the trust after the initial contribution and on or after the effective date of the triggering event, the unitrust amount described in Section 4.01(2) for the year in which the additional contribution is made shall be [same percentage used in Section 4.01(1)(a)] percent of the sum of:

- (1) The net fair market value of the trust assets as of the valuation date (excluding the assets so added

and any post-contribution income from, and appreciation on, those assets during that year); and

(2) For each additional contribution during the year, the fair market value of the assets so added as of the valuation date (including any post-contribution income from, and appreciation on, such assets through the valuation date) multiplied by a fraction the numerator of which is the number of days in the period that begins with the date of contribution and ends with the earlier of the last day of the taxable year or the last day of the unitrust period and the denominator of which is the number of days in the period that begins with the first day of such taxable year and ends with the earlier of the last day in such taxable year or the last day of the unitrust period.

In a taxable year in which an additional contribution is made on or after the valuation date, the assets so added shall be valued as of the date of contribution, without regard to any post-contribution income or appreciation, rather than as of the valuation date. Beginning on the effective date of the triggering event, the Trustee shall no longer pay the amount equal to the lesser of (a) or (b) in Section 4.04(1) and shall not pay any amount of income described in the second sentence of Section 4.04(1).

[CONTINUE]

[Source: Rev. Proc. 2005-52, § 4, Paragraph 6; § 6.01(2)(c)] **Section 4.05. Deferral of the Unitrust Payment Allocable to Testamentary Transfer.** All property passing to the trust by reason of the death of the Settlor (hereinafter "the testamentary transfer") shall be considered to be a single contribution that is made on the date of the Settlor's death. Notwithstanding the provisions of Sections 4.01 and 4.04, above, the obligation to pay the unitrust amount with respect to the testamentary transfer shall commence with the date of the Settlor's death. Nevertheless, payment of the unitrust amount with respect to the testamentary transfer may be deferred from the date of the Settlor's death until the end of the taxable year in which the funding of the testamentary transfer is completed. Within a reasonable time after the end of the taxable year in which the testamentary transfer is completed, the Trustee must pay to the Recipient [if charitable organization is to receive part, but not all, or any unitrust amount, add: and the Charitable Recipient] (in the case of an underpayment) or receive from the Recipient [if charitable organization is to receive part, but not all, or any unitrust amount, add: and the Charitable Recipient] (in the case of an overpayment) the difference between any unitrust amounts allocable to the testamentary transfer that were actually paid, plus interest, and the unitrust amounts allocable to the testamentary transfer that were payable, plus interest. The interest shall be computed for any period at the rate of interest, compounded annually, that the federal income tax regulations under *Internal Revenue Code Section 664* prescribe for this computation.

[Source: Rev. Proc. 2005-52, § 4, Paragraph 7] **Section 4.06. Unmarketable Assets.** Whenever the value of a trust asset must be determined, the Trustee shall determine the value of any assets that are not cash, cash equivalents, or other assets that can be readily sold or exchanged for cash or cash equivalents (hereinafter "unmarketable assets"), by either (a) obtaining a current "qualified appraisal" from a "qualified appraiser," as defined in Sections 1.170A-13(c)(3) and 1.170A-13(c)(5) of the *Income Tax Regulations*, respectively, or (b) ensuring the valuation of these unmarketable assets is performed exclusively by an "independent trustee," within the meaning of Section 1.664-1(a)(7)(iii) of the *Income Tax Regulations*.

[Source: additional provision] **Section 4.07. Spendthrift Clause.** The interests of the beneficiaries under this instrument are not transferable by voluntary or involuntary assignment or by operation of law, and shall be free from the claims of creditors and from attachment, execution, bankruptcy, and other legal process, to the maximum extent permitted by law.

Article 5: Trustee

[Source: additional provision] **Section 5.01. Successor Trustees.** If the office of trustee becomes vacant by reason of death, incapacity, or any other reason, and no successor trustee or cotrustees have been designated under any other provision of this trust instrument, the following, in the order of priority indicated, shall be trustee:

First, \_\_\_\_\_ [name and description, e.g., (for cotrustees) Norma S. Jones, who resides at \_\_\_\_\_ (address); Frank P. Smith, who resides at \_\_\_\_\_ (address), and Olivia C. Hackman, who resides at \_\_\_\_\_ (address), or any one or more of them, as cotrustees];

Second, \_\_\_\_\_ [name and description, e.g. (for individual trustee) Douglas R. Young, who resides at \_\_\_\_\_ (address)];

Third, \_\_\_\_\_ [name and description, e.g. (for corporate trustee) Double Eagle Bank, Fresno, California].

[Continue as necessary for each other individual or entity being designated as a successor trustee, and then add the following:]

If all those named above are unwilling or unable to serve as successor trustee, a new trustee or cotrustees shall be appointed by the court. [To limit class of permissible individual trustees, add appropriate limitation, e.g., Any individual trustee or cotrustee not specifically named in this section who is appointed under this section shall be appointed from among the issue of the settlor, unless no issue of the settlor is able and willing to serve.]

[Source: additional provision] **Section 5.02. Replacement of Co-trustee.** If, at any time when two or more persons or entities are serving as cotrustees, any one or more (but less than all) of them are unable or unwilling for any reason to continue to serve as cotrustees, and no successor co-trustee has been designated under any other applicable provision of this trust instrument, a new cotrustee may be appointed by the court. If no new cotrustee is appointed, the remaining cotrustee or cotrustees shall have full power to act as trustee or cotrustees and to continue the trust administration.

[Source: additional provision] **Section 5.03. Definition of "Trustee."** Reference in this instrument to "the trustee" shall be deemed a reference to whoever is serving as trustee or cotrustees, and shall include alternate or successor trustees or cotrustees, unless the context requires otherwise.

[Source: additional provision] **Section 5.04. Waiver of Bond.** No bond or undertaking shall be required of any trustee named in this instrument.

[Source: additional provision] **Section 5.05. Compensation of Trustee.** The trustee shall be entitled to reasonable compensation for services rendered, payable without court order. [Optional: The settlor believes that a fee of \$\_\_\_\_\_ is a reasonable annual amount to compensate the trustee for all of the ordinary services that will be required of the trustee during an annual period. Additional compensation in a reasonable amount may be proper to compensate the trustee for any extraordinary services rendered by the trustee, all without court order.] [Optional: If a trustee serves for only part of a calendar year, the annual compensation shall be prorated according to the number of days during that year that the trustee was acting as trustee during that year.]

[Source: additional provision] **Section 5.06. General Powers of Trustee.** To carry out the purposes of the trust created under this instrument, and subject to any limitations stated elsewhere in this instrument, the trustee shall have the power to do all of the following, in addition to being entitled to exercise all of the powers now or hereafter conferred on trustees by law:

(a) Retain property received into the trust at its inception, or later added to the trust, as long as the trustee considers that retention in the best interests of the trust or in furtherance of the goals of the settlor in creating the trust, as determined from this trust instrument, but subject to the standards of the prudent investor rule as set forth in the California Uniform Prudent Investor Act, as amended from time to time.

(b) Invest and manage the trust assets as a prudent investor would, by considering the purposes, terms, distribution requirements, and other circumstances of the trust. In satisfying this standard, the trustee shall exercise reasonable care, skill, and caution. The trustee's investment and management decisions respecting individual assets and courses of action must be evaluated not in isolation, but in the context of the trust portfolio as a whole and as a part of an overall investment strategy having risk and return objectives reasonably suited to the trust. Among circumstances that are appropriate to consider in investing and managing trust assets are the following, to the extent relevant to the trust or its beneficiaries:

- (1) General economic conditions.
- (2) The possible effect of inflation or deflation.
- (3) The expected tax consequences of investment decisions or strategies.
- (4) The role that each investment or course of action plays within the overall trust portfolio.
- (5) The expected total return from income and the appreciation of capital.
- (6) Other resources of the beneficiaries known to the trustee as determined from information provided by the beneficiaries.
- (7) Needs for liquidity, regularity of income, and preservation or appreciation of capital.
- (8) An asset's special relationship or special value, if any, to the purposes of the trust or to one or more of the beneficiaries.

The trustee may invest in any kind of property or type of investment or engage in any course of action or investment strategy consistent with the standards set forth in the Uniform Prudent Investor Act, as set forth in *Probate Code Sections 16045-16054*, or any successor sections.

(c) In the trustee's discretion, invest or reinvest in mutual funds, money market funds, investment trusts, regulated investment companies, market funds, and index funds, and in the shares or securities of any such funds or companies, that persons of prudence, discretion, and intelligence acquire for their own account.

(d) With or without court authorization, sell (for cash or on deferred payments, and with or without security), convey, exchange, partition, and divide trust property; grant options for the sale or exchange of trust property for any purpose, whether the contract is to be performed or the option is to be exercised within or beyond the term of the trust; and lease trust property for any purpose, for terms within or extending beyond the expiration of the trust, regardless of whether the leased property is commercial or residential and regardless of the number of units leased.

(e) Manage, control, improve, and maintain all real and personal trust property.

(f) Subdivide or develop land; make or obtain the vacation of plats and adjust boundaries, or adjust differences in valuation on exchange or partition by giving or receiving consideration; and dedicate land or easements to public use

with or without consideration.

(g) Make ordinary or extraordinary repairs or alterations in buildings or other trust property, demolish any improvements, raze existing party walls or buildings, and erect new party walls or buildings, as the trustee deems advisable.

(h) Enter into oil, gas, and other mineral leases, on terms deemed advisable by the trustee; enter into any pooling, unitization, repressurization, community, or other types of agreements relating to the exploration, development, operation, and conservation of mineral properties; drill, mine, and otherwise operate for the development of oil, gas, and other minerals; contract for the installation and operation of absorption and repressuring plants; and install and maintain pipelines. Any such leases or agreements may be for a term within or extending beyond the term of the trust.

(i) In the trustee's discretion, abandon any [unproductive or wasted] trust asset or interest therein.

(j) Employ and discharge agents and employees, including but not limited to attorneys, accountants, investment and other advisers, custodians of assets, property managers, real estate agents and brokers, and appraisers, to advise and assist the trustees in the management of any trusts created under this trust instrument, and compensate them from the trust property. [*Optional:* The agents and employees may be associated or affiliated with the trustee, or may be descendants or other persons related to the trustee or to the settlor, or a company associated with any such persons.] [*Optional:* The trustee is entitled to rely on the advice of any professional advisers employed under this provision. Reasonable compensation paid to any such agents or employees shall not diminish the compensation to which the trustee is otherwise entitled.]

(k) With respect to securities held in trust, exercise all the rights, powers, and privileges of an owner, including, but not limited to, the power to vote, give proxies, and pay assessments and other sums deemed by the trustee necessary for the protection of the trust property; participate in voting trusts, pooling agreements, foreclosures, reorganizations, consolidations, mergers, and liquidations, and, in connection therewith, deposit securities with and transfer title to any protective or other committee under such terms as the trustee deems advisable; exercise or sell stock subscription or conversion rights; and accept and retain as investments of the trust any securities or other property received through the exercise of any of the foregoing powers.

(l) Hold securities or other trust property in the trustee's own name or in the name of a nominee, without disclosure of the trust, or in unregistered form, so that title may pass by delivery.

(m) Deposit securities in a securities depository that is either licensed or exempt from licensing.

(n) Borrow money for any trust purpose from any person or entity, on such terms and conditions as the trustee deems advisable, and obligate the trust for repayment; encumber any trust property by mortgage, deed of trust, pledge, or otherwise, whether for terms within or extending beyond the term of the trust, as the trustee deems advisable, to secure repayment of any such loan; replace, renew, and extend any such loan or encumbrance; and pay loans or other obligations of the trust deemed advisable by the trustee.

(o) Procure and carry, at the expense of the trust, insurance in such forms and in such amounts as the trustee deems advisable to protect the trust property against damage or loss, and to protect the trustee against liability with respect to third persons.

(p) Enforce any obligation owing to the trust, including any obligation secured by a deed of trust, mortgage, or pledge held as trust property, and purchase any property subject to a security instrument held as trust property at any sale under that instrument.

(q) Extend the time for payment of any note or other obligation held as an asset of, and owing to, the trust, including accrued or future interest, and extend the time for repayment beyond the term of the trust.

(r) Pay or contest any claim against the trust; release or prosecute any claim in favor of the trust; or, in lieu of payment, contest, release, or prosecution, adjust, compromise, or settle any such claim, in whole or in part, and with or without consideration.

(s) At trust expense, prosecute or defend actions, claims, or proceedings of whatever kind for the protection of the trust property and of the trustee in the performance of the trustee's duties, and employ and compensate attorneys, advisers, and other agents as the trustee deems advisable.

[Source: *additional provision*] **Section 5.07. Division or Distribution in Cash or in Kind.** In order to satisfy a pecuniary gift or to distribute or divide trust assets into shares or partial shares, the trustee may distribute or divide those assets in kind, or divide undivided interests in those assets, or sell all or any part of those assets and distribute or divide the property in cash, in kind, or partly in cash and partly in kind. Property distributed to satisfy a pecuniary gift under this trust instrument shall be valued at its fair market value at the time of distribution.

[Source: *additional provision*] **Section 5.08. Payments to Legally Incapacitated Persons.** If at any time any trust beneficiary is a minor, or it appears to the trustee that any trust beneficiary is incapacitated, incompetent, or for any other reason not able to receive payments or make intelligent or responsible use of the payments, then the trustee, in lieu of making direct payments to the trust beneficiary, may make payments to the beneficiary's conservator or guardian; to the beneficiary's custodian under the Uniform Gifts to Minors Acts or Uniform Transfers to Minors Act of any state; to one or more suitable persons as the trustee deems proper, such as a relative of or a person residing with the beneficiary, to be used for the beneficiary's benefit; to any other person, firm, or agency for services rendered or to be rendered for the beneficiary's assistance or benefit; or to accounts in the beneficiary's name with financial institutions. The receipt of payments by any of the foregoing shall constitute a sufficient acquittance of the trustee for all purposes.

[Source: *additional provision*] **Section 5.09. Grant of Specific Powers Not to Limit Exercise of General Powers.** The enumeration of specific powers under this trust instrument shall not limit the trustee from exercising any other power with respect to any trusts created by this trust instrument that may be necessary or appropriate for the trustee to have and exercise in order to carry out the purposes of the trusts or to permit the trustee to fulfill the trustee's responsibilities and duties with respect to the trust.

[Source: *additional provision*] **Section 5.10. Trust Distributions Shall Not Discharge Obligations of Support.** Notwithstanding any other provision of this trust instrument, no income or principal of the trust shall be used to discharge, in whole or in part, the legal obligation of any person to support or educate any beneficiary of this trust. In determining the legal obligation of any person to support and educate a beneficiary of this trust, the existence of this trust and the funds made available under it shall not be taken into account.

[Source: *Rev. Proc. 2005-52*, § 4, Paragraph 8, § 6.01(2)(d)] **Section 5.11 Prohibited Transactions.** The Trustee shall not engage in any act of self-dealing within the meaning of *Internal Revenue Code Section 4941(d)*, as modified by *Internal Revenue Code Section 4947(a)(2)(A)*, and shall not make any taxable expenditures within the meaning of *Internal Revenue Code Section 4945(d)*, as modified by *Internal Revenue Code Section 4947(a)(2)(A)*. [If charitable organization is to receive part, but not all, or any unitrust amount, add: The Trustee shall not make any investments that jeopardize the exempt purpose of the trust within the meaning of *Internal Revenue Code Section 4944*, as modified by *Internal Revenue Code Section 4947(a)(2)(A)*, or retain any excess business holdings within the meaning of *Internal Revenue Code Section 4943*, as modified by *Internal Revenue Code Section 4947(a)(2)(A)*.]

[Source: *Rev. Proc. 2005-52*, § 4, Paragraph 12] **Section 5.12. Investment of Trust Assets.** Nothing in this trust instrument shall be construed to restrict the Trustee from investing the trust assets in a manner that could result in the

annual realization of a reasonable amount of income or gain from the sale or disposition of trust assets.

[Source: *additional provision*] **Section 5.13. Limitation on Trustee's Powers.** Notwithstanding any other provision of this instrument, the trustee shall not hold or exercise any power or discretion which is in conflict with the provisions of *Internal Revenue Code Section 664* or the regulations thereunder, or with any specific provision of this instrument.

[Source: *additional provision*] **Section 5.14. Power to Disclaim or Release Powers.** The trustee may disclaim, release, or restrict the scope of any power or discretion that the trustee may hold in connection with any trust created under this instrument, whether the power or discretion is expressly granted in this instrument or is implied by law. The trustee shall disclaim a power in the manner required by applicable federal or California law. The trustee shall release or restrict any power or discretion by giving written notice to the beneficiary or beneficiaries then entitled to current distribution of income from the trust, specifying the power or discretion to be released or restricted, the nature of the restriction, and, if appropriate, the person or persons to whom the released or restricted power shall pass and be exercisable. If a power is disclaimed, the power shall be available to and exercisable by [*if trust nominates cotrustees: the other trustee or trustees or, if trust nominates a successor trustee: the successor trustee*].

[Source: *additional provision*] **Section 5.15. Duty to Account.** The trustee shall render accounts at least annually, at the termination of a trust, and upon a change of trustees, to the persons and in the manner required by law.

#### Article 6: Concluding Provisions

[Source: *Rev. Proc. 2005-52, § 4, Paragraph 13*] **Section 6.02 Definition of Recipient.** References to the Recipient in this trust instrument shall be deemed to include the estate of the Recipient with regard to all provisions in this trust instrument that describe amounts payable to and/or due from the Recipient. The prior sentence shall not apply to the determination of the last day of the unitrust period.

[Source: *additional provision*] **Section 6.03. Definition of Issue.** As used in this instrument, the term "issue" refers to all persons referred to in *California Probate Code Section 50*, as in effect at the time of execution of this instrument.

[Source: *additional provision*] **Section 6.04. Definition of Incapacity.** For purposes of this instrument, a person shall be deemed "incapacitated" if and for so long as a court of competent jurisdiction has made a finding to that effect, or a guardian or conservator of that person's estate or person duly appointed by a court of competent jurisdiction is serving, or upon certification by two physicians (licensed to practice under the laws of the state where the person is domiciled at the time of the certification) that the person is unable properly to care for himself or herself or for his or her property. The latter certification shall be made by each physician in a written declaration under penalty of perjury.

[Source: *additional provision*] **Section 6.05. Number and Gender.** As used in this instrument, references in the masculine gender shall be deemed to include the feminine and neuter gender, and vice versa, and references to the singular shall be deemed to include the plural, and vice versa, wherever the context so permits.

[Source: *additional provision*] **Section 6.06. Captions.** The captions appearing in this instrument are for convenience of reference only, and shall be disregarded in determining the meaning and effect of the provisions of this instrument.

[Source: *additional provision*] **Section 6.07. Severability Clause.** If any provision of this instrument is invalid, that provision shall be disregarded, and the remainder of this instrument shall be construed as if the invalid provision had not been included.

[Source: *Rev. Proc. 2005-52, § 4, Paragraph 9*] **Section 6.08. Taxable Year.** The taxable year of the trust shall be the calendar year.

[Source: Rev. Proc. 2005-52 , § 4, Paragraph10; § 6.07(3)(a); § 6.08(2)(a); § 6.0(2)(a), 3(a)] **Section 6.09.**

**Governing Law and Limitation.** The operation of the trust shall be governed by the laws of the State of \_\_\_\_\_ . However, the Trustee is prohibited from exercising any power or discretion granted under said laws that would be inconsistent with the qualification of the trust as a charitable remainder unitrust under *Internal Revenue Code Section 664(d)(2)* [if unitrust income is to be calculated using the net income method, the net income with make-up method, or a combination of either of those methods with the fixed income method, add: and (d)(3)] and the corresponding regulations.

Article 7: Execution

[Source: additional provision] **Section 7.01. Execution.** We certify that we have read the foregoing trust agreement and that it correctly states the terms and conditions under which the trust estate is to be held, administered, and distributed. The settlor approves this trust agreement in all particulars. The trustee[s] approve[s] and accept[s] the trust provided for in this trust agreement.

Executed on [month, day], [year], at [city or town, and state, in which trust agreement is signed, e.g., Ventura, California].

SETTLOR

\_\_\_\_\_ [signature of settlor]  
[typed name]

TRUSTEE[S]

[For individual trustee:]

\_\_\_\_\_ [signature]  
[typed name]

[For corporate trustee:]

[typed name of corporate trustee]

By: \_\_\_\_\_ [signature of  
first authorized employee]

[typed name]

\_\_\_\_\_ [signature of  
second authorized employee]

[typed name]

ACKNOWLEDGMENT

[Acknowledgements taken in California must be in the following form (Civ. Code § 1189(a))]:

State of California )  
County of \_\_\_\_\_ ) ss  
\_\_\_\_\_ )

On \_\_\_\_\_ [date], before me, \_\_\_\_\_ [name of notary], personally appeared \_\_\_\_\_ [name(s)], who proved to me on the basis of satisfactory evidence to be the person[s] whose name[s] [is or are] subscribed to the within instrument, and acknowledged to me that \_\_\_\_\_ [he or she or they] executed the same in \_\_\_\_\_ [his or her or their] authorized \_\_\_\_\_ [capacity or capacities], and that by \_\_\_\_\_ [his or her or their] signature[s] on the instrument the person[s], or the entity upon behalf of which the person[s] acted, executed the instrument.

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

WITNESS my hand and official seal.

\_\_\_\_\_ [signature of notary]  
[typed name]

**SCHEDULE A SCHEDULE OF TRUST ASSETS**

Description of Asset	Character of Asset [e.g., <i>separate property, community property, or quasi-community property</i> ]
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Estate, Gift & Trust Law Trusts Charitable Trusts



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California Legal Forms--Transaction Guide

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DIVISION IV: WILLS AND TRUSTS  
CHAPTER 74 SPLIT-INTEREST CHARITABLE TRUSTS  
PART IV. FORMS  
A. Charitable Remainder Trusts

*26-74 California Legal Forms--Transaction Guide §§ 74.202-74.209*

**AUTHOR:** Reviewed by Albert G. Handelman

**[Reserved]**

§§ 74.202[Reserved]



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California Legal Forms--Transaction Guide

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DIVISION IV: WILLS AND TRUSTS  
CHAPTER 74 SPLIT-INTEREST CHARITABLE TRUSTS  
PART IV. FORMS  
B. Charitable Lead Trusts

*26-74 California Legal Forms--Transaction Guide § 74.210*

**AUTHOR:** Reviewed by Albert G. Handelman

**§ 74.210 Charitable Lead Annuity Trust**

**[1] Comment**

**[a] Use of Form**

This form is a charitable lead annuity trust. It can be used to create an annuity interest in favor of a qualified charitable organization for a period of years. On termination of the annuity interest, the trust property will be distributed to the settlor or to a designated remainder beneficiary or beneficiaries.

The IRS has not issued prototype forms for charitable lead trusts, as it has for charitable remainder trusts [*see Rev. Proc. 2005-52, 2005-34 I.R.B. 326-2005-59, 2005-34 I.R.B. 412* (charitable remainder unitrusts); *Rev. Proc. 2003-53, 2003-31 I.R.B. 230-2003-60, 2003-31 I.R.B. 274* ; (charitable remainder annuity trusts) *see also* discussion in §§ 74.200[1][a] and 74.201[1][a] regarding the IRS sample provisions and drafting practices for charitable remainder trusts]. Thus, it is up to the attorney to draft appropriate forms to create charitable lead trusts. However, many of the provisions that are used in charitable remainder trusts are also suitable for inclusion in charitable lead trusts. This form makes use of those provisions, in addition to specially drafted provisions to accommodate the particular needs of the charitable lead trust format. Various standard provisions, for example the marital status/children and issue declaration [ *see* Sections 1.04, 1.05 of Form], the provision requiring a periodic accounting [ *see* Section 5.13 of Form], and the method for determining incapacity [ *see* Section 6.03 of Form], may be modified as necessary to suit the individual fact situation.

For discussion of the distinction between grantor and nongrantor trusts, see § 74.15[2]; *see also* Ch. 72, *Irrevocable Trusts* § 72.11[2]. For additional coverage of charitable contributions and the charitable deduction, see Ch. 69, *Charitable Dispositions* . For general coverage of charitable lead trusts, see California Wills & Trusts, Ch. 117, *Charitable Lead Trusts* (Matthew Bender).

**[b] Annuity Payment to Charitable Organization**

This trust provides for the payment of an "annuity amount" to a qualified charitable organization for a period of years. The annuity amount is stated as a fixed percentage of the net fair market value of the trust assets, valued as of the date of transfer to the trustee. The stated percentage may be any percentage selected by the settlor, and the term of the annuity payments may be any number of years selected by the settlor. On termination of the annuity payments, the principal and any undistributed income of the trust will be distributed to the settlor in the form of a reversion, or to designated third parties in the form of a remainder.

### **[c] Measuring Lives**

In order to prohibit the abusive scheme of using non-related ill persons as measuring lives for the purpose of accelerating the termination of the charitable lead interest, the IRS has issued regulations providing that only the following individuals may be used as measuring lives [*see* Treas. Reg. § 25.2522(c)-(c)(2)(vi)(a)]:

- The donor.
- The donor's spouse.
- An individual who, with respect to all remainder beneficiaries (other than charitable organizations described in *Internal Revenue Code Section 170, 2055, or 2522*), is either a lineal ancestor or the spouse of a lineal ancestor of those beneficiaries.

### **[d] Irrevocability**

This trust is irrevocable. However, the trustee is given the power to amend the trust for the sole purpose of ensuring that the trust qualifies as a charitable lead annuity trust under the applicable statutes and regulations.

### **[e] Trustee**

Any qualified and suitable person, natural or corporate, may serve as the trustee of this trust. In appropriate circumstances, either the settlor or a remainder beneficiary may serve as the trustee. If, however, it is desirable to remove the trust assets from the settlor's estate for federal estate tax purposes, the settlor should not serve as the trustee, or the trust instrument should be carefully examined for any power that might cause the trust assets to be included in the settlor's gross estate for federal estate tax purposes. See *Ch. 64A, Testamentary Trusts: Trustee Provisions, § 64A.30 et seq.*, for a general discussion of trustee powers and the tax consequences of the retention by the settlor of particular powers. If, for example, the settlor has the power to make discretionary distributions of trust property or income, or to designate the income or remainder beneficiaries of the trust, the settlor cannot safely act as the trustee without adverse estate tax consequences. In such a case, an independent trustee may be needed.

A settlor who wishes to nominate cotrustees may do so. For a discussion of the nomination of cotrustees, see *Ch. 64A, Testamentary Trusts: Trustee Provisions, § 64A.31*. For a discussion of the appropriateness of designating the settlor as the trustee of a charitable lead trust, see § 74.15[6][b].

### **[f] Trust Agreement Format**

This form uses the trust agreement format.

## **[2] FORM**

### **Charitable Lead Annuity Trust**

[Name of trust, if desired; e.g.,  
WILLIAM J. HUNT CHARITABLE LEAD ANNUITY TRUST]

## TRUST AGREEMENT

### Article 1: Creation of Trust

Section 1.01. Parties. This trust agreement is made by [identify settlor, e.g., William T. Hunt of Los Angeles, California] (the "settlor"), as settlor, and [identify trustee(s), e.g., Daniel W. Green of Los Angeles, California] (the "trustee"), as trustee. The settlor hereby transfers and assigns to the trustee certain property (the "trust estate"), in trust, to be held, administered, and distributed as provided in this instrument.

Section 1.02. Purpose of Trust. The settlor desires by this instrument to establish a charitable lead annuity trust within the meaning of *Internal Revenue Code Sections 2055(e)(2)(B) and 2522(c)(2)(B)*.

Section 1.03. Name of Trust. The name of the trust created by this instrument shall be the [settlor's name followed by words "Charitable Lead Annuity Trust," e.g., William T. Hunt Charitable Lead Annuity Trust].

Section 1.04. Marital Status. The settlor is married to [name of spouse, e.g., Betty W. Hunt], and all references in this trust instrument to the settlor's "[husband or wife]" are to [him or her].

Section 1.05. No Children. The settlor has never had any children.

### Article 2: Trust Estate

Section 2.01. Definition of Trust Estate. All property subject to this instrument from time to time is referred to as the "trust estate" and shall be held, administered, and distributed as provided in this instrument. The trustee shall hold, administer, and distribute the property described in Schedule A, any other property that may be hereafter subject to this trust, and the income and proceeds attributable to all such property, in accordance with the provisions of this instrument.

Section 2.02. Additions to Trust Prohibited. The Trustee shall not accept any additions to the trust.

### Article 3: Rights and Powers of Settlor

Section 3.01. Trust Irrevocable; Limited Power of Amendment by Trustee. The trust is irrevocable. However, the trustee shall have the power, acting alone, to amend the trust in any manner required for the sole purpose of ensuring that the trust qualifies and continues to qualify as a charitable lead annuity trust within the meaning of *Internal Revenue Code Sections 2055(e)(2)(B) and 2522(c)(2)(B)* and the Regulations thereunder.

Section 3.02. Removal of Trustee. The settlor reserves the right to dismiss the trustee and to appoint a successor trustee. To remove the trustee pursuant to this provision, the settlor shall give the trustee 30 days written notice. To appoint a successor trustee pursuant to this provision, the settlor shall give the successor trustee written notice of the appointment.

### Article 4: Payments and Distributions

Section 4.01. Payment of Annuity Amount. In each taxable year, the trustee shall pay to \_\_\_\_\_ [correct legal name of charitable organization] (the "charitable organization"), \_\_\_\_\_ [specify duration of payments, either: during the lifetime of \_\_\_\_\_ (name of person) and/or, to specify terms of years: (and) a period of \_\_\_\_\_ (specify number) years] beginning with the first date the trustee accepts property under this instrument, an annuity amount equal to [specify either dollar amount: \$ \_\_\_\_\_ or

\_\_\_\_\_ percent of the net fair market value of the trust assets valued as of the date of transfer of those assets to the trustee, as indicated on Schedule A]. The charitable interest in this trust shall terminate at the end of the trust term provided for in this section.

Section 4.02. Installments. The annuity amount shall be paid in equal installments [*specify frequency of payment, e.g., at the end of each quarter*] from income and, to the extent that income is not sufficient, from principal. Any income of the trust for a taxable year in excess of the annuity amount shall be added to principal.

Section 4.03. Proration. In determining the amount to be paid under Section 4.01, the trustee shall prorate the same on a daily basis for a short taxable year and for the taxable year in which the charitable interests terminate.

Section 4.04. Purpose. The annuity amount shall be used for [*describe general or special purpose, e.g., the general charitable purposes of the charitable organization or medical and scientific research for the purpose of finding a cure for cancer*]. [*Add, if purpose is restricted: If at any time in the judgment of the trustee it is impossible or impractical to carry out this purpose exactly in the manner specified, a purpose and manner as near as is practicable to the above purpose and manner shall be determined by the trustee.*]

Section 4.05. Qualification of Charitable Organization. In the event that the charitable organization is not, during the term of this trust, an organization of the type described in *Internal Revenue Code Sections 170(b)(1)(A), 170(c), 2055(a) and 2522(a)*, the amount that would have been paid to the charitable organization had it been an organization of that type shall instead be paid to one or more organizations of that type in the sole discretion of the trustee, or any successor trustee then acting.

Section 4.06. Valuation. In computing the net fair market value of the trust assets, all of the trust's assets and liabilities as of the date of the computation shall be taken into account without regard to whether particular items are taken into account in determining the income or the principal of the trust. All determinations of net fair market value shall be made exclusively by the trustee, and the trustee's decision, reached in good faith, shall be final and binding upon all persons interested in the trust. If the net fair market value of the trust assets is incorrectly determined, the trustee shall, in the case of an undervaluation, pay to the charitable organization and, in the case of an overvaluation, collect from the charitable organization, an amount equal to the difference between the amount that the trustee would have paid if the correct value had been used and the amount that the trustee actually paid. Each adjustment is to be made within a reasonable period after final determination of the value.

Section 4.07. Distribution on Termination of Charitable Interest. On the termination of all charitable interests, this trust shall terminate and the trustee shall distribute the remaining trust assets outright to \_\_\_\_\_ [*designate beneficiary or beneficiaries, all of whom must be living and ascertainable on the date the trust is created, e.g., the settlor or the settlor's issue who are living on the date that the trust is created or Mildred Harper*] [*if beneficiaries are members of a class, specify pattern of distribution, e.g., in the manner provided in California Probate Code Section \_\_\_\_\_ (specify either 240, 246, or 247) or in equal shares, regardless of whether or not all such issue are members of the same generation or, if assets are to be poured over to another trust, add: to be held, administered, and distributed in accordance with the terms of that \_\_\_\_\_ (trust agreement or declaration of trust)*]. If, upon termination of all charitable interests, there is no one who is entitled to receive the trust assets under this section, any remaining trust assets shall be distributed outright to [*alternative disposition, e.g., the Marin County chapter of The Anonymous Artists of America or the heirs of the settlor*].

Section 4.08. Prohibition Against Certain Payments. Except for the distribution on termination of the charitable interest as provided in Section 4.07, or an amount transferred for full and adequate consideration, no amount may be paid to or for the use of any person other than an organization described in *Internal Revenue Code Sections 170(b)(1)(A), 170(c), 2055(a), and 2522(a)*. No gift, legacy, succession, inheritance, estate, or generation-skipping transfer taxes that may be assessed against the trust assets by reason of the settlor's transfer to the trust or the settlor's death shall be paid out of

any property held in trust under this instrument. The settlor agrees on behalf of [himself *or* herself], \_\_\_\_\_ [his *or* her] heirs, legal representatives, successors and assigns, to provide for payment of any such taxes from sources other than property held by this trust and to indemnify and hold the trustee harmless from any and all liability for any such taxes.

#### Article 5: Trustee

Section 5.01. Successor Trustees. If the office of trustee becomes vacant by reason of death, incapacity, or any other reason, and no successor trustee or cotrustees have been designated under any other provision of this trust instrument, the following, in the order of priority indicated, shall be trustee:

First, \_\_\_\_\_ [name and description, e.g. (for cotrustees) Norma S. Jones, who resides at \_\_\_\_\_ (address); Frank P. Smith, who resides at \_\_\_\_\_ (address), and Olivia C. Hackman, who resides at \_\_\_\_\_ (address), or any one or more of them, as cotrustees];

Second, \_\_\_\_\_ [name and description, e.g. (for individual trustee) Arthur H. Wilson, who resides at \_\_\_\_\_ (address)];

Third, \_\_\_\_\_ [name and description, e.g. (for corporate trustee) First Fidelity Bank, Main Office, Los Angeles, California].

[Continue as necessary for each other individual or entity being designated as a successor trustee, and then add the following:]

If all those named above are unwilling or unable to serve as successor trustee, a new trustee or co-trustees shall be appointed by the court. [To limit class of permissible individual trustees, add appropriate limitation, e.g., Any individual trustee or cotrustee not specifically named in this section who is appointed under this section shall be appointed from among the issue of the settlor, unless no issue of the settlor is able and willing to serve.]

Section 5.02. Replacement of Co-trustee. If, at any time when two or more persons or entities are serving as cotrustees, any one or more (but less than all) of them are unable or unwilling for any reason to continue to serve as cotrustees, and no successor co-trustee has been designated under any other applicable provision of this trust instrument, a new cotrustee may be appointed by the court. If no new cotrustee is appointed, the remaining cotrustee or cotrustees shall have full power to act as trustee or cotrustees and to continue the trust administration.

Section 5.03. Definition of "Trustee." Reference in this instrument to "the trustee" shall be deemed a reference to whoever is serving as trustee or cotrustees, and shall include alternate or successor trustees or cotrustees, unless the context requires otherwise.

Section 5.04. Waiver of Bond. No bond or undertaking shall be required of any trustee named in this instrument.

Section 5.05. Compensation of Trustee. The trustee shall be entitled to reasonable compensation for services rendered, payable without court order. [Optional: The settlor believes that a fee of \$\_\_\_\_\_ is a reasonable annual amount to compensate the trustee for all of the ordinary services that will be required of the trustee during an annual period. Additional compensation in a reasonable amount may be proper to compensate the trustee for any extraordinary services rendered by the trustee, all without court order.] [Optional: If a trustee serves for only part of a calendar year, the annual compensation shall be prorated according to the number of days during that year that the trustee was acting as trustee during that year.]

Section 5.06. General Powers of Trustee. To carry out the purposes of the trust created under this instrument, and subject to any limitations stated elsewhere in this instrument, the trustee shall have the power to do all of the following, in addition to being entitled to exercise all of the powers now or hereafter conferred on trustees by law:

- (a) Retain property received into the trust at its inception, as long as the trustee considers that retention in the best interests of the trust or in furtherance of the goals of the settlor in creating the trust, as determined from this trust instrument, but subject to the standards of the prudent investor rule as set forth in the California Uniform Prudent Investor Act, as amended from time to time.
- (b) Invest and manage the trust assets as a prudent investor would, by considering the purposes, terms, distribution requirements, and other circumstances of the trust. In satisfying this standard, the trustee shall exercise reasonable care, skill, and caution. The trustee's investment and management decisions respecting individual assets and courses of action must be evaluated not in isolation, but in the context of the trust portfolio as a whole and as a part of an overall investment strategy having risk and return objectives reasonably suited to the trust. Among circumstances that are appropriate to consider in investing and managing trust assets are the following, to the extent relevant to the trust or its beneficiaries:
  - (1) General economic conditions.
  - (2) The possible effect of inflation or deflation.
  - (3) The expected tax consequences of investment decisions or strategies.
  - (4) The role that each investment or course of action plays within the overall trust portfolio.
  - (5) The expected total return from income and the appreciation of capital.
  - (6) Other resources of the beneficiaries known to the trustee as determined from information provided by the beneficiaries.
  - (7) Needs for liquidity, regularity of income, and preservation or appreciation of capital.
  - (8) An asset's special relationship or special value, if any, to the purposes of the trust or to one or more of the beneficiaries.

The trustee may invest in any kind of property or type of investment or engage in any course of action or investment strategy consistent with the standards set forth in the Uniform Prudent Investor Act, as set forth in *Probate Code Sections 16045-16054*, or any successor sections.

- (c) In the trustee's discretion, invest or reinvest in mutual funds, money market funds, investment trusts, regulated investment companies, market funds, and index funds, and in the shares or securities of any such funds or companies, that persons of prudence, discretion, and intelligence acquire for their own account.
- (d) With or without court authorization, sell (for cash or on deferred payments, and with or without security), convey, exchange, partition, and divide trust property; grant options for the sale or exchange of trust property for any purpose, whether the contract is to be performed or the option is to be exercised within or beyond the term of the trust; and lease trust property for any purpose, for terms within or extending beyond the expiration of the trust, regardless of whether the leased property is commercial or residential and regardless of the number of units leased.

- (e) Manage, control, improve, and maintain all real and personal trust property.
- (f) Subdivide or develop land; make or obtain the vacation of plats and adjust boundaries, or adjust differences in valuation on exchange or partition by giving or receiving consideration; and dedicate land or easements to public use with or without consideration.
- (g) Make ordinary or extraordinary repairs or alterations in buildings or other trust property, demolish any improvements, raze existing party walls or buildings, and erect new party walls or buildings, as the trustee deems advisable.
- (h) Enter into oil, gas, and other mineral leases, on terms deemed advisable by the trustee; enter into any pooling, unitization, repressurization, community, or other types of agreements relating to the exploration, development, operation, and conservation of mineral properties; drill, mine, and otherwise operate for the development of oil, gas, and other minerals; contract for the installation and operation of absorption and repressuring plants; and install and maintain pipelines. Any such leases or agreements may be for a term within or extending beyond the term of the trust.
- (i) In the trustee's discretion, abandon any [unproductive or wasted] trust asset or interest therein.
- (j) Employ and discharge agents and employees, including but not limited to attorneys, accountants, investment and other advisers, custodians of assets, property managers, real estate agents and brokers, and appraisers, to advise and assist the trustees in the management of any trusts created under this trust instrument, and compensate them from the trust property. [*Optional:* The agents and employees may be associated or affiliated with the trustee, or may be descendants or other persons related to the trustee or to the settlor, or a company associated with any such persons.] [*Optional:* The trustee is entitled to rely on the advice of any professional advisers employed under this provision. Reasonable compensation paid to any such agents or employees shall not diminish the compensation to which the trustee is otherwise entitled.]
- (k) With respect to securities held in trust, exercise all the rights, powers, and privileges of an owner, including, but not limited to, the power to vote, give proxies, and pay assessments and other sums deemed by the trustee necessary for the protection of the trust property; participate in voting trusts, pooling agreements, foreclosures, reorganizations, consolidations, mergers, and liquidations, and, in connection therewith, deposit securities with and transfer title to any protective or other committee under such terms as the trustee deems advisable; exercise or sell stock subscription or conversion rights; and accept and retain as investments of the trust any securities or other property received through the exercise of any of the foregoing powers.
- (l) Hold securities or other trust property in the trustee's own name or in the name of a nominee, without disclosure of the trust, or in unregistered form, so that title may pass by delivery.
- (m) Deposit securities in a securities depository that is either licensed or exempt from licensing.
- (n) Borrow money for any trust purpose from any person or entity, including one acting as trustee hereunder, on such terms and conditions as the trustee deems advisable, and obligate the trust for repayment; encumber any trust property by mortgage, deed of trust, pledge, or otherwise, whether for terms within or extending beyond the term of the trust, as the trustee deems advisable, to secure repayment of any such loan; replace, renew, and extend any such loan or encumbrance; and pay loans or other obligations of the trust deemed advisable by the trustee.
- (o) Procure and carry, at the expense of the trust, insurance in such forms and in such amounts as the trustee deems advisable to protect the trust property against damage or loss, and to protect the trustee against liability with respect to third persons.

(p) Enforce any obligation owing to the trust, including any obligation secured by a deed of trust, mortgage, or pledge held as trust property, and purchase any property subject to a security instrument held as trust property at any sale under that instrument.

(q) Extend the time for payment of any note or other obligation held as an asset of, and owing to, the trust, including accrued or future interest, and extend the time for repayment beyond the term of the trust.

(r) Pay or contest any claim against the trust; release or prosecute any claim in favor of the trust; or, in lieu of payment, contest, release, or prosecution, adjust, compromise, or settle any such claim, in whole or in part, and with or without consideration.

(s) At trust expense, prosecute or defend actions, claims, or proceedings of whatever kind for the protection of the trust property and of the trustee in the performance of the trustee's duties, and employ and compensate attorneys, advisers, and other agents as the trustee deems advisable.

**Section 5.07. Division or Distribution in Cash or in Kind.** In order to satisfy a pecuniary gift or to distribute or divide trust assets into shares or partial shares, the trustee may distribute or divide those assets in kind, or divide undivided interests in those assets, or sell all or any part of those assets and distribute or divide the property in cash, in kind, or partly in cash and partly in kind. Property distributed to satisfy a pecuniary gift under this trust instrument shall be valued at its fair market value at the time of distribution.

**Section 5.08. Payments to Legally Incapacitated Persons.** If at any time any trust beneficiary is a minor, or it appears to the trustee that any trust beneficiary is incapacitated, incompetent, or for any other reason not able to receive payments or make intelligent or responsible use of the payments, then the trustee, in lieu of making direct payments to the trust beneficiary, may make payments to the beneficiary's conservator or guardian; to the beneficiary's custodian under the Uniform Gifts to Minors Acts or Uniform Transfers to Minors Act of any state; to one or more suitable persons as the trustee deems proper, such as a relative of or a person residing with the beneficiary, to be used for the beneficiary's benefit; to any other person, firm, or agency for services rendered or to be rendered for the beneficiary's assistance or benefit; or to accounts in the beneficiary's name with financial institutions. The receipt of payments by any of the foregoing shall constitute a sufficient acquittance of the trustee for all purposes.

**Section 5.09. Grant of Specific Powers Not to Limit Exercise of General Powers.** The enumeration of specific powers under this trust instrument shall not limit the trustee from exercising any other power with respect to any trusts created by this trust instrument that may be necessary or appropriate for the trustee to have and exercise in order to carry out the purposes of the trusts or to permit the trustee to fulfill the trustee's responsibilities and duties with respect to the trust.

**Section 5.10. Limitations on Trustee's Powers.** Notwithstanding any other provision of this instrument, the trustee shall not:

(a) Engage in any act of self-dealing as defined in *Internal Revenue Code Section 4941(d)* or make any taxable expenditure as defined in *Internal Revenue Code Section 4945(d)*, except for the payment of the annuity amount;

(b) Make any investments that jeopardize the charitable purpose of the trust, within the meaning of *Internal Revenue Code Section 4944*, or retain any excess business holdings, within the meaning of *Internal Revenue Code Section 4943*;

(c) Hold or exercise any power or discretion that is in conflict with the provisions of *Internal Revenue Code Section 170* or the regulations thereunder, or with any specific provision of this instrument.

After the termination of all noncharitable interests, there shall be distributed amounts at least sufficient to avoid liability for the tax imposed by *Internal Revenue Code Section 4942(a)*.

Section 5.11. Realization of Reasonable Income and Gain. Nothing in this trust instrument shall be construed to restrict the trustee from investing the trust assets in a manner that could result in the annual realization of a reasonable amount of income or gain from the sale or disposition of trust assets.

Section 5.12. Power to Disclaim or Release Powers. The trustee may disclaim, release, or restrict the scope of any power or discretion that the trustee may hold in connection with any trust created under this instrument, whether the power or discretion is expressly granted in this instrument or is implied by law. The trustee shall disclaim a power in the manner required by applicable federal or California law. The trustee shall release or restrict any power or discretion by giving written notice to the beneficiary or beneficiaries then entitled to current distribution of income from the trust, specifying the power or discretion to be released or restricted, the nature of the restriction, and, if appropriate, the person or persons to whom the released or restricted power shall pass and be exercisable. If a power is disclaimed, the power shall be available to and exercisable by [*if trust nominates cotrustees*: the other trustee or trustees *or, if trust nominates a successor trustee*: the successor trustee].

Section 5.13. Duty to Account. The trustee shall render accounts at least annually, at the termination of a trust, and upon a change of trustees, to the persons and in the manner required by law.

#### Article 6: Concluding Provisions

Section 6.01. Definitions of Child and Children. As used in this instrument, the terms "child" and "children" refer to natural children and to children who have been legally adopted by the parent or parents from or through whom their right to inherit or to take is determined or derived.

Section 6.02. Definition of Issue. As used in this instrument, the term "issue" refers to all lineal descendants of all generations, with the relationship of parent and child at each generation being determined by the definitions of "child" and "children" set forth in this instrument.

Section 6.03. Definition of Incapacity. For purposes of this instrument, a person shall be deemed "incapacitated" if and for so long as a court of competent jurisdiction has made a finding to that effect, or a guardian or conservator of that person's estate or person duly appointed by a court of competent jurisdiction is serving, or upon certification by two physicians (licensed to practice under the laws of the state where the person is domiciled at the time of the certification) that the person is unable properly to care for himself or herself or for his or her property. The latter certification shall be made by each physician in a written declaration under penalty of perjury.

Section 6.04. Number and Gender. As used in this instrument, references in the masculine gender shall be deemed to include the feminine and neuter gender, and vice versa, and references to the singular shall be deemed to include the plural, and vice versa, wherever the context so permits.

Section 6.05. Captions. The captions appearing in this instrument are for convenience of reference only, and shall be disregarded in determining the meaning and effect of the provisions of this instrument.

Section 6.06. Severability Clause. If any provision of this instrument is invalid, that provision shall be disregarded, and the remainder of this instrument shall be construed as if the invalid provision had not been included.

Section 6.07. California Law to Apply. All questions concerning the validity, interpretation, and administration of this instrument, including any trusts created under this instrument, shall be governed by the laws of the State of California, regardless of the domicile of any trustee or beneficiary.

Section 6.08. Taxable Year. The taxable year of the trust shall be the calendar year.

Article 7: Execution

Section 7.01. Execution. We certify that we have read the foregoing trust agreement and that it correctly states the terms and conditions under which the trust estate is to be held, administered, and distributed. The settlor approves this trust agreement in all particulars. The trustee[s] approve[s] and accept[s] the trust provided for in this trust agreement.

Executed on [month, day] [year] at [city or town, and state, in which trust agreement is signed, e.g., Los Angeles, California].

SETTLOR

\_\_\_\_\_ [signature of settlor]  
[typed name]

TRUSTEE[S]

[For individual trustee:]

\_\_\_\_\_ [signature]  
[typed name]

[For corporate trustee:]

[typed name of corporate trustee]

By: \_\_\_\_\_ [signature of  
first authorized employee]  
[typed name]

\_\_\_\_\_ [signature of second authorized employee]  
[typed name]

ACKNOWLEDGMENT

[Acknowledgements taken in California must be in the following form (Civ. Code § 1189(a))]:

State of California )  
County of \_\_\_\_\_ ) ss

On \_\_\_\_\_ [date], before me, \_\_\_\_\_ [name of notary], personally appeared \_\_\_\_\_ [name(s)], who proved to me on the basis of satisfactory evidence to be the person[s] whose name[s] [is or are] subscribed to the within instrument, and acknowledged to me that \_\_\_\_\_ [he or she or they] executed the same in \_\_\_\_\_ [his or her or their] authorized \_\_\_\_\_ [capacity or capacities], and that by \_\_\_\_\_ [his or her or their] signature[s] on the instrument the person[s], or the entity upon behalf of which the person[s] acted, executed the instrument.

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

WITNESS my hand and official seal.

\_\_\_\_\_ [signature of notary]  
[typed name]

SCHEDULE A SCHEDULE OF TRUST ASSETS

Description of Asset	Character of Asset [e.g., separate property, community property, or quasi-community property]
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**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Estate, Gift & Trust Law Trusts Charitable Trusts



182 of 187 DOCUMENTS

California Legal Forms--Transaction Guide

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DIVISION IV: WILLS AND TRUSTS  
CHAPTER 74 SPLIT-INTEREST CHARITABLE TRUSTS  
PART IV. FORMS  
B. Charitable Lead Trusts

*26-74 California Legal Forms--Transaction Guide § 74.211*

**AUTHOR:** Reviewed by Albert G. Handelman

**§ 74.211 Charitable Lead Trust Unitrust**

**[1] Comment**

**[a] Use of Form**

This form is a charitable lead unitrust. It can be used to require the trustee to pay a fixed percentage of the trust's assets, valued annually, to a qualified charitable organization for a period of years. Upon termination of the required payments, the trust property will be distributed to the settlor or to a designated remainder beneficiary or beneficiaries.

The IRS has not issued prototype forms for charitable lead trusts, as it has for charitable remainder trusts [*see Rev. Proc. 2005-52, 2005-34 I.R.B. 326-2005-59, 2005-34 I.R.B. 412* (charitable remainder unitrusts); *Rev. Proc. 2003-53, 2003-31 I.R.B. 230-2003-60, 2003-31 I.R.B. 274* (charitable remainder annuity trusts); *see also* discussion in §§ 74.200[1][a] and 74.201[1][a] regarding the IRS sample provisions and drafting practices for charitable remainder trusts]. Thus, it is up to the attorney to draft appropriate forms to create charitable lead trusts. However, many of the provisions that are used in charitable remainder trusts are also suitable for inclusion in charitable lead trusts. This form therefore makes use of those provisions, in addition to specially drafted provisions to accommodate the particular needs of the charitable lead trust format. Various standard provisions, for example the marital status/children and issue declaration [*see* Sections 1.04, 1.05 of Form], the provision requiring a periodic accounting [*see Section 5.13* of Form], and the method for determining incapacity [*see Section 6.03* of Form], may be modified as necessary to suit the individual fact situation.

For discussion of the distinction between grantor and nongrantor trusts, see § 74.15[2]; *see also Ch. 72, Irrevocable Trusts* § 72.11[2]. For additional coverage of charitable contributions and the charitable deduction, see Ch. 69, *Charitable Dispositions* . For general coverage of charitable lead trusts, see *California Wills & Trusts, Ch. 117, Charitable Lead Trusts* (Matthew Bender).

**[b] Unitrust Payment to Charitable Organization**

This trust provides for the payment of a "unitrust amount" to a qualified charitable organization for a period of years. The unitrust amount is stated as a fixed percentage of the net fair market value of the trust assets, valued as of the first day of each taxable year. The stated percentage may be any percentage selected by the settlor, and the term of the unitrust payments may be any number of years selected by the settlor. Upon termination of the unitrust payments, the principal and any undistributed income of the trust will be distributed to the settlor in the form of a reversion, or to designated third parties in the form of a remainder.

**[c] Irrevocability**

This trust is irrevocable. However, the trustee is given the power to amend the trust for the sole purpose of ensuring that the trust qualifies as a charitable lead unitrust under the applicable statutes and regulations.

**[d] Trustee**

The trustee generally may be any person, natural or corporate, who would be qualified to serve as the trustee of a charitable lead annuity trust. See § 74.210[1][d] for important discussion of the qualifications of such a trustee.

**[e] Trust Agreement Format**

This form uses the trust agreement format.

**[2] FORM**

**Charitable Lead Trust Unitrust**

*[name of trust, if desired; e.g.,*  
DOUGLAS J. YOUNG CHARITABLE LEAD UNITRUST]

TRUST AGREEMENT

Article 1: Creation of Trust

Section 1.01. Parties. This trust agreement is made by *[identify settlor, e.g., Douglas J. Young of San Jose, California]* (the "settlor"), as settlor, and *[identify trustee(s), e.g., Thomas W. Brown of San Jose, California]* (the "trustee"), as trustee. The settlor hereby transfers and assigns to the trustee certain property (the "trust estate"), in trust, to be held, administered, and distributed as provided in this instrument.

Section 1.02. Purpose of Trust The settlor desires by this instrument to establish a charitable lead unitrust within the meaning of *Internal Revenue Code Sections 2055(e)(2)(B) and 2522(c)(2)(B)*.

Section 1.03. Name of Trust. The name of the trust created by this instrument shall be the *[settlor's name followed by words "Charitable Lead Unitrust," e.g., Douglas J. Young Charitable Lead Unitrust]*.

Section 1.04. Marital Status. The settlor is married to *[name of spouse, e.g., Barbara W. Young]*, and all references in this trust instrument to the settlor's *"[husband or wife]"* are to *[him or her]*.

Section 1.05. No Children. The settlor has never had any children.

Article 2: Trust Estate

Section 2.01. Definition of Trust Estate. All property subject to this instrument from time to time is referred to as the "trust estate" and shall be held, administered, and distributed as provided in this instrument. The trustee shall hold, administer, and distribute the property described in Schedule A, any other property that may be hereafter subject to this trust, and the income and proceeds attributable to all such property, in accordance with the provisions of this instrument.

Section 2.02. Additions to Trust. From time to time, the Trustee may accept additions to the trust, but only from the Settlor or a duly authorized agent or agents of the Settlor. All such additions shall become a part of the trust estate and shall be held, administered, and distributed in accordance with the terms of this instrument.

#### Article 3: Rights and Powers of Settlor

Section 3.01. Trust Irrevocable; Limited Power of Amendment by Trustee. The trust is irrevocable. However, the trustee shall have the power, acting alone, to amend the trust in any manner required for the sole purpose of ensuring that the trust qualifies and continues to qualify as a charitable lead unitrust within the meaning of *Internal Revenue Code Sections 2055(e)(2)(B)* and *2522(c)(2)(B)* and the Regulations thereunder.

Section 3.02. Removal of Trustee. The settlor reserves the right to dismiss the trustee and to appoint a successor trustee. To remove the trustee pursuant to this provision, the settlor shall give the trustee 30 days written notice. To appoint a successor trustee pursuant to this provision, the settlor shall give the successor trustee written notice of the appointment.

#### Article 4: Payments and Distributions

Section 4.01. Payment of Unitrust Amount. In each taxable year, the trustee shall pay to \_\_\_\_\_ [*correct legal name of charitable organization*] (the "charitable organization"), for a period of \_\_\_\_\_ years beginning with the first date the trustee accepts property under this instrument, an amount (the "unitrust amount") equal to \_\_\_\_\_ percent of the net fair market value of the trust assets valued as of the first day of each taxable year of the trust (the "valuation date"); except that when no valuation date occurs in a taxable year of the trust which is a short taxable year or which is the taxable year in which the charitable interest terminates, the trust assets shall be valued as of the earlier of the last day of that short taxable year or as of the date on which the charitable interest terminates. The charitable interest in this trust shall terminate at the end of the trust term provided for in this section.

Section 4.02. Payments When Additional Contributions Have Been Made. In any taxable year in which additional property is contributed to the trust, the unitrust amount shall be \_\_\_\_\_ percent of the sum of (i) the net fair market value of the trust assets (excluding the added assets and any income from or appreciation on the added assets), and (ii) that proportion of the value of the added assets that was excluded under (i) which the number of days in the period that begins with the date of contribution and ends with the earlier of the last day of the taxable year or the last day of the trust term bears to the number of days in the period that begins on the first day of that taxable year and ends with the earlier of the last day in that taxable year or the last day of the trust term. All added assets shall be valued at the time of contribution. If any additional contribution is made by will, by revocable living trust, or by any other means at the settlor's death, the obligation to pay the unitrust amount specified in Section 4.01 with respect to the additional contribution shall commence with the date of death of the person by whom or under whose will or trust the additional contribution is made, but payment of that amount may be deferred from the date of death until the end of the taxable year of the trust in which the complete funding of the additional contribution occurs. Within a reasonable period after that time, the trustee must pay to the charitable organization in the case of an underpayment, or must receive from the charitable organization, in the case of an overpayment, the difference between (a) any amounts specified in Section 4.01 actually paid, plus interest, compounded annually, computed for any period at the rate of interest that the Treasury Regulations under *Internal Revenue Code Section 7520* prescribe for the trust for such a computation for that period, and (b) the amounts payable as specified in Section 4.01 determined under the method similar to that described in *Treasury Regulation Section 1.664-1(a)(5)(ii)* for charitable remainder trusts, plus interest compounded annually, computed for any period at the rate of interest that the Treasury Regulations under *Internal Revenue Code Section 7520*

prescribe for the trust for such a computation for that period.

Section 4.03. Installments. The unitrust amount shall be paid in equal installments at the end of each quarter from income and, to the extent that income is not sufficient, from principal. Any income of the trust for a taxable year in excess of the unitrust amount shall be added to principal.

Section 4.04. Proration. In determining the amount to be paid under Section 4.01, the trustee shall prorate the same on a daily basis for a short taxable year and for the taxable year in which the charitable interest terminates.

Section 4.05. Purpose. The unitrust amount shall be used for [*describe general or special purpose, e.g., the general charitable purposes of the charitable organization or medical and scientific research for the purpose of finding a cure for cancer*]. [*Add, if purpose is restricted: If at any time in the judgment of the trustee it is impossible or impractical to carry out this purpose exactly in the manner specified, a purpose and manner as near as is practicable to the above purpose and manner shall be determined by the trustee.*]

Section 4.06. Qualification of Charitable Organization. In the event that the charitable organization is not, during the term of this trust, an organization of the type described in *Internal Revenue Code Sections 170(b)(1)(A), 170(c), 2055(a) and 2522(a)*, the amount that would have been paid to the charitable organization had it been an organization of that type shall instead be paid to one or more organizations of that type in the sole discretion of the trustee, or any successor trustee then acting.

Section 4.07. Valuation. In computing the net fair market value of the trust assets, all of the trust's assets and liabilities as of the date of the computation shall be taken into account without regard to whether particular items are taken into account in determining the income or the principal of the trust. All determinations of net fair market value shall be made exclusively by the trustee, and the trustee's decision, reached in good faith, shall be final and binding upon all persons interested in the trust. If the net fair market value of the trust assets is incorrectly determined, the trustee shall, in the case of an undervaluation, pay to the charitable organization and, in the case of an overvaluation, collect from the charitable organization, an amount equal to the difference between the amount that the trustee would have paid if the correct value had been used and the amount that the trustee actually paid. Each adjustment is to be made within a reasonable period after final determination of the value.

Section 4.08. Distribution Upon Termination of Charitable Interest. Upon the termination of all charitable interests, this trust shall terminate and the trustee shall distribute the remaining trust assets outright to \_\_\_\_\_ [*designate beneficiary or beneficiaries, all of whom must be living and ascertainable on the date the trust is created, e.g., the settlor or the settlor's issue who are living on the date that the trust is created or Janice B. Dalton*] [*if beneficiaries are members of a class, specify pattern of distribution, e.g., in the manner provided in California Probate Code Section \_\_\_\_\_ (specify either 240, 246, or 247) or in equal shares, regardless of whether or not all such issue are members of the same generation or, if assets are to be poured over to another trust, add: to be held, administered, and distributed in accordance with the terms of that \_\_\_\_\_ (trust agreement or declaration of trust)*]. If, upon termination of all charitable interests, there is no one who is entitled to receive the trust assets under this section, any remaining trust assets shall be distributed outright to [*alternative disposition, e.g., the Marin County chapter of The Anonymous Artists of America or the heirs of the settlor*].

Section 4.09. Prohibition Against Certain Payments. Except for the distribution upon termination of the charitable interest as provided in Section 4.08, or an amount transferred for full and adequate consideration, no amount may be paid to or for the use of any person other than an organization described in *Internal Revenue Code Sections 170(b)(1)(A), 170(c), 2055(a), and 2522(a)*. No gift, legacy, succession, inheritance, estate, or generation-skipping transfer taxes that may be assessed against the trust assets by reason of the settlor's transfer to the trust or the settlor's death shall be paid out of any property held in trust under this instrument. The settlor agrees on behalf of [*himself or*

herself], \_\_\_\_\_ [his or her] heirs, legal representatives, successors and assigns, to provide for payment of any such taxes from sources other than property held by this trust and to indemnify and hold the trustee harmless from any and all liability for any such taxes.

#### Article 5: Trustee

Section 5.01. Successor Trustees. If the office of trustee becomes vacant by reason of death, incapacity, or any other reason, and no successor trustee or cotrustees have been designated under any other provision of this trust instrument, the following, in the order of priority indicated, shall be trustee:

First, \_\_\_\_\_ [name and description, e.g. (for cotrustees) James Smith, who resides at \_\_\_\_\_ (address); Edna Smith, who resides at \_\_\_\_\_ (address), and Roberta Fleegle, who resides at \_\_\_\_\_ (address), or any one or more of them, as cotrustees];

Second, \_\_\_\_\_ [name and description, e.g. (for individual trustee) Paul Fleegle, who resides at \_\_\_\_\_ (address)];

Third, \_\_\_\_\_ [name and description, e.g. (for corporate trustee) Viking Savings Bank, Main Office, San Jose, California].

[Continue as necessary for each other individual or entity being designated as a successor trustee, and then add the following:]

If all those named above are unwilling or unable to serve as successor trustee, a new trustee or cotrustees shall be appointed by the court. [To limit class of permissible individual trustees, add appropriate limitation, e.g., Any individual trustee or cotrustee not specifically named in this section who is appointed under this section shall be appointed from among the issue of the settlor, unless no issue of the settlor is able and willing to serve.]

Section 5.02. Replacement of Co-trustee. If, at any time when two or more persons or entities are serving as cotrustees, any one or more (but less than all) of them are unable or unwilling for any reason to continue to serve as cotrustees, and no successor co-trustee has been designated under any other applicable provision of this trust instrument, a new cotrustee may be appointed by the court. If no new cotrustee is appointed, the remaining cotrustee or cotrustees shall have full power to act as trustee or cotrustees and to continue the trust administration.

Section 5.03. Definition of "Trustee." Reference in this instrument to "the trustee" shall be deemed a reference to whoever is serving as trustee or cotrustees, and shall include alternate or successor trustees or cotrustees, unless the context requires otherwise.

Section 5.04. Waiver of Bond. No bond or undertaking shall be required of any trustee named in this instrument.

Section 5.05. Compensation of Trustee. The trustee shall be entitled to reasonable compensation for services rendered, payable without court order. [Optional: The settlor believes that a fee of \$\_\_\_\_\_ is a reasonable annual amount to compensate the trustee for all of the ordinary services that will be required of the trustee during an annual period. Additional compensation in a reasonable amount may be proper to compensate the trustee for any extraordinary services rendered by the trustee, all without court order.] [Optional: If a trustee serves for only part of a calendar year, the annual compensation shall be prorated according to the number of days during that year that the trustee was acting as trustee during that year.]

Section 5.06. General Powers of Trustee. To carry out the purposes of the trust created under this instrument, and

subject to any limitations stated elsewhere in this instrument, the trustee shall have the power to do all of the following, in addition to being entitled to exercise all of the powers now or hereafter conferred on trustees by law:

(a) Retain property received into the trust at its inception, or later added to the trust, as long as the trustee considers that retention in the best interests of the trust or in furtherance of the goals of the settlor in creating the trust, as determined from this trust instrument, but subject to the standards of the prudent investor rule as set forth in the California Uniform Prudent Investor Act, as amended from time to time.

(b) Invest and manage the trust assets as a prudent investor would, by considering the purposes, terms, distribution requirements, and other circumstances of the trust. In satisfying this standard, the trustee shall exercise reasonable care, skill, and caution. The trustee's investment and management decisions respecting individual assets and courses of action must be evaluated not in isolation, but in the context of the trust portfolio as a whole and as a part of an overall investment strategy having risk and return objectives reasonably suited to the trust. Among circumstances that are appropriate to consider in investing and managing trust assets are the following, to the extent relevant to the trust or its beneficiaries:

- (1) General economic conditions.
- (2) The possible effect of inflation or deflation.
- (3) The expected tax consequences of investment decisions or strategies.
- (4) The role that each investment or course of action plays within the overall trust portfolio.
- (5) The expected total return from income and the appreciation of capital.
- (6) Other resources of the beneficiaries known to the trustee as determined from information provided by the beneficiaries.
- (7) Needs for liquidity, regularity of income, and preservation or appreciation of capital.
- (8) An asset's special relationship or special value, if any, to the purposes of the trust or to one or more of the beneficiaries.

The trustee may invest in any kind of property or type of investment or engage in any course of action or investment strategy consistent with the standards set forth in the Uniform Prudent Investor Act, as set forth in *Probate Code Sections 16045-16054*, or any successor sections.

(c) In the trustee's discretion, invest or reinvest in mutual funds, money market funds, investment trusts, regulated investment companies, market funds, and index funds, and in the shares or securities of any such funds or companies, that persons of prudence, discretion, and intelligence acquire for their own account.

(d) With or without court authorization, sell (for cash or on deferred payments, and with or without security), convey, exchange, partition, and divide trust property; grant options for the sale or exchange of trust property for any purpose, whether the contract is to be performed or the option is to be exercised within or beyond the term of the trust; and lease trust property for any purpose, for terms within or extending beyond the expiration of the trust, regardless of whether the leased property is commercial or residential and regardless of the number of units leased.

(e) Manage, control, improve, and maintain all real and personal trust property.

- (f) Subdivide or develop land; make or obtain the vacation of plats and adjust boundaries, or adjust differences in valuation on exchange or partition by giving or receiving consideration; and dedicate land or easements to public use with or without consideration.
- (g) Make ordinary or extraordinary repairs or alterations in buildings or other trust property, demolish any improvements, raze existing party walls or buildings, and erect new party walls or buildings, as the trustee deems advisable.
- (h) Enter into oil, gas, and other mineral leases, on terms deemed advisable by the trustee; enter into any pooling, unitization, repressurization, community, or other types of agreements relating to the exploration, development, operation, and conservation of mineral properties; drill, mine, and otherwise operate for the development of oil, gas, and other minerals; contract for the installation and operation of absorption and repressuring plants; and install and maintain pipelines. Any such leases or agreements may be for a term within or extending beyond the term of the trust.
- (i) In the trustee's discretion, abandon any [unproductive or wasted] trust asset or interest therein.
- (j) Employ and discharge agents and employees, including but not limited to attorneys, accountants, investment and other advisers, custodians of assets, property managers, real estate agents and brokers, and appraisers, to advise and assist the trustees in the management of any trusts created under this trust instrument, and compensate them from the trust property. [*Optional*: The agents and employees may be associated or affiliated with the trustee, or may be descendants or other persons related to the trustee or to the settlor, or a company associated with any such persons.] [*Optional*: The trustee is entitled to rely on the advice of any professional advisers employed under this provision. Reasonable compensation paid to any such agents or employees shall not diminish the compensation to which the trustee is otherwise entitled.]
- (k) With respect to securities held in trust, exercise all the rights, powers, and privileges of an owner, including, but not limited to, the power to vote, give proxies, and pay assessments and other sums deemed by the trustee necessary for the protection of the trust property; participate in voting trusts, pooling agreements, foreclosures, reorganizations, consolidations, mergers, and liquidations, and, in connection therewith, deposit securities with and transfer title to any protective or other committee under such terms as the trustee deems advisable; exercise or sell stock subscription or conversion rights; and accept and retain as investments of the trust any securities or other property received through the exercise of any of the foregoing powers.
- (l) Hold securities or other trust property in the trustee's own name or in the name of a nominee, without disclosure of the trust, or in unregistered form, so that title may pass by delivery.
- (m) Deposit securities in a securities depository that is either licensed or exempt from licensing.
- (n) Borrow money for any trust purpose from any person or entity, including one acting as trustee hereunder, on such terms and conditions as the trustee deems advisable, and obligate the trust for repayment; encumber any trust property by mortgage, deed of trust, pledge, or otherwise, whether for terms within or extending beyond the term of the trust, as the trustee deems advisable, to secure repayment of any such loan; replace, renew, and extend any such loan or encumbrance; and pay loans or other obligations of the trust deemed advisable by the trustee.
- (o) Procure and carry, at the expense of the trust, insurance in such forms and in such amounts as the trustee deems advisable to protect the trust property against damage or loss, and to protect the trustee against liability with respect to third persons.
- (p) Enforce any obligation owing to the trust, including any obligation secured by a deed of trust, mortgage, or pledge

held as trust property, and purchase any property subject to a security instrument held as trust property at any sale under that instrument.

(q) Extend the time for payment of any note or other obligation held as an asset of, and owing to, the trust, including accrued or future interest, and extend the time for repayment beyond the term of the trust.

(r) Pay or contest any claim against the trust; release or to prosecute any claim in favor of the trust; or, in lieu of payment, contest, release, or prosecution, adjust, compromise, or settle any such claim, in whole or in part, and with or without consideration.

(s) At trust expense, prosecute or defend actions, claims, or proceedings of whatever kind for the protection of the trust property and of the trustee in the performance of the trustee's duties, and employ and compensate attorneys, advisers, and other agents as the trustee deems advisable.

**Section 5.07. Division or Distribution in Cash or in Kind.** In order to satisfy a pecuniary gift or to distribute or divide trust assets into shares or partial shares, the trustee may distribute or divide those assets in kind, or divide undivided interests in those assets, or sell all or any part of those assets and distribute or divide the property in cash, in kind, or partly in cash and partly in kind. Property distributed to satisfy a pecuniary gift under this trust instrument shall be valued at its fair market value at the time of distribution.

**Section 5.08. Payments to Legally Incapacitated Persons.** If at any time any trust beneficiary is a minor, or it appears to the trustee that any trust beneficiary is incapacitated, incompetent, or for any other reason not able to receive payments or make intelligent or responsible use of the payments, then the trustee, in lieu of making direct payments to the trust beneficiary, may make payments to the beneficiary's conservator or guardian; to the beneficiary's custodian under the Uniform Gifts to Minors Acts or Uniform Transfers to Minors Act of any state; to one or more suitable persons as the trustee deems proper, such as a relative of or a person residing with the beneficiary, to be used for the beneficiary's benefit; to any other person, firm, or agency for services rendered or to be rendered for the beneficiary's assistance or benefit; or to accounts in the beneficiary's name with financial institutions. The receipt of payments by any of the foregoing shall constitute a sufficient acquittance of the trustee for all purposes.

**Section 5.09. Grant of Specific Powers Not to Limit Exercise of General Powers.** The enumeration of specific powers under this trust instrument shall not limit the trustee from exercising any other power with respect to any trusts created by this trust instrument that may be necessary or appropriate for the trustee to have and exercise in order to carry out the purposes of the trusts or to permit the trustee to fulfill the trustee's responsibilities and duties with respect to the trust.

**Section 5.10. Limitations on Trustee's Powers.** Notwithstanding any other provision of this instrument, the trustee shall not:

(a) Engage in any act of self-dealing as defined in *Internal Revenue Code Section 4941(d)* or make any taxable expenditure as defined in *Internal Revenue Code Section 4945(d)*, except for the payment of the unitrust amount;

(b) Make any investments that jeopardize the charitable purpose of the trust, within the meaning of *Internal Revenue Code Section 4944*, or retain any excess business holdings, within the meaning of *Internal Revenue Code Section 4943*;

(c) Hold or exercise any power or discretion that is in conflict with the provisions of *Internal Revenue Code Section 170* or the regulations thereunder, or with any specific provision of this instrument.

After the termination of all noncharitable interests, there shall be distributed amounts at least sufficient to avoid liability for the tax imposed by *Internal Revenue Code Section 4942(a)*.

Section 5.11. Realization of Reasonable Income and Gain. Nothing in this trust instrument shall be construed to restrict the trustee from investing the trust assets in a manner that could result in the annual realization of a reasonable amount of income or gain from the sale or disposition of trust assets.

Section 5.12. Power to Disclaim or Release Powers. The trustee may disclaim, release, or restrict the scope of any power or discretion that the trustee may hold in connection with any trust created under this instrument, whether the power or discretion is expressly granted in this instrument or is implied by law. The trustee shall disclaim a power in the manner required by applicable federal or California law. The trustee shall release or restrict any power or discretion by giving written notice to the beneficiary or beneficiaries then entitled to current distribution of income from the trust, specifying the power or discretion to be released or restricted, the nature of the restriction, and, if appropriate, the person or persons to whom the released or restricted power shall pass and be exercisable. If a power is disclaimed, the power shall be available to and exercisable by [*if trust nominates cotrustees: the other trustee or trustees or, if trust nominates a successor trustee: the successor trustee*].

Section 5.13. Duty to Account. The trustee shall render accounts at least annually, at the termination of a trust, and upon a change of trustees, to the persons and in the manner required by law.

#### Article 6: Concluding Provisions

Section 6.01. Definitions of Child and Children. As used in this instrument, the terms "child" and "children" refer to natural children and to children who have been legally adopted by the parent or parents from or through whom their right to inherit or to take is determined or derived.

Section 6.02. Definition of Issue. As used in this instrument, the term "issue" refers to all lineal descendants of all generations, with the relationship of parent and child at each generation being determined by the definitions of "child" and "children" set forth in this instrument.

Section 6.03. Definition of Incapacity. For purposes of this instrument, a person shall be deemed "incapacitated" if and for so long as a court of competent jurisdiction has made a finding to that effect, or a guardian or conservator of that person's estate or person duly appointed by a court of competent jurisdiction is serving, or upon certification by two physicians (licensed to practice under the laws of the state where the person is domiciled at the time of the certification) that the person is unable properly to care for himself or herself or for his or her property. The latter certification shall be made by each physician in a written declaration under penalty of perjury.

Section 6.04. Number and Gender. As used in this instrument, references in the masculine gender shall be deemed to include the feminine and neuter gender, and vice versa, and references to the singular shall be deemed to include the plural, and vice versa, wherever the context so permits.

Section 6.05. Captions. The captions appearing in this instrument are for convenience of reference only, and shall be disregarded in determining the meaning and effect of the provisions of this instrument.

Section 6.06. Severability Clause. If any provision of this instrument is invalid, that provision shall be disregarded, and the remainder of this instrument shall be construed as if the invalid provision had not been included.

Section 6.07. California Law to Apply. All questions concerning the validity, interpretation, and administration of this instrument, including any trusts created under this instrument, shall be governed by the laws of the State of California, regardless of the domicile of any trustee or beneficiary.

Section 6.08. Taxable Year. The taxable year of the trust shall be the calendar year.

Article 7: Execution

Section 7.01. Execution. We certify that we have read the foregoing trust agreement and that it correctly states the terms and conditions under which the trust estate is to be held, administered, and distributed. The settlor approves this trust agreement in all particulars. The trustee[s] approve[s] and accept[s] the trust provided for in this trust agreement.

Executed on [month, day], [year], at [city or town, and state, in which trust agreement is signed, e.g., San Jose, California].

SETTLOR

\_\_\_\_\_ [signature of settlor]
[typed name]

TRUSTEE[S]

[For individual trustee:]

\_\_\_\_\_ [signature]
[typed name]

[For corporate trustee:]

[typed name of corporate trustee]

By: \_\_\_\_\_ [signature of
first authorized employee]
[typed name]

\_\_\_\_\_ [signature of second authorized employee]
[typed name]

ACKNOWLEDGMENT

[Acknowledgements taken in California must be in the following form (Civ. Code § 1189(a))]:

State of California )
County of \_\_\_\_\_ ) ss

On \_\_\_\_\_ [date], before me, \_\_\_\_\_ [name of notary], personally appeared
\_\_\_\_\_ [name(s)], who proved to me on the basis of satisfactory evidence to be the person[s] whose
name[s] [is or are] subscribed to the within instrument, and acknowledged to me that \_\_\_\_\_ [he or she
or they] executed the same in \_\_\_\_\_ [his or her or their] authorized \_\_\_\_\_ [capacity
or capacities], and that by \_\_\_\_\_ [his or her or their] signature[s] on the instrument the person[s], or
the entity upon behalf of which the person[s] acted, executed the instrument.

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

WITNESS my hand and official seal.

\_\_\_\_\_ [signature of notary]
[typed name]

SCHEDULE A SCHEDULE OF TRUST ASSETS

Description of Asset Character of Asset [e.g., separate property, com-
munity property, or quasi-community property]

_____	_____
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Estate, Gift & Trust Law Trusts Charitable Trusts



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California Legal Forms--Transaction Guide

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DIVISION IV: WILLS AND TRUSTS  
CHAPTER 74 SPLIT-INTEREST CHARITABLE TRUSTS  
PART IV. FORMS  
B. Charitable Lead Trusts

*26-74 California Legal Forms--Transaction Guide §§ 74.212-74.229*

**AUTHOR:** Reviewed by Albert G. Handelman

**[Reserved]**

§§ 74.212[Reserved]



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DIVISION IV: WILLS AND TRUSTS  
CHAPTER 74 SPLIT-INTEREST CHARITABLE TRUSTS  
PART IV. FORMS  
C. Pooled Income Funds

*26-74 California Legal Forms--Transaction Guide § 74.230*

**AUTHOR:** Reviewed by Albert G. Handelman

**§ 74.230 Declaration of Trust for Pooled Income Fund**

**[1] Comment**

**[a] Use of Form**

This form is a sample declaration of trust creating a pooled income fund. This document typically is prepared by legal counsel for a charitable organization that wishes to create a pooled income fund to which individual donors may contribute. Property contributed by individual donors is commingled with the other property in the fund and thereafter managed by a trustee as a single fund. The individual donors retain life income interests in the contributed property, in the form of "units of participation," and must receive income payments on their contributions at least annually, based on the fund's overall rate of return. This form provides for quarterly income payments until otherwise determined by the trustee. On the donor's death, the value of the remainder interest in the property contributed by the donor is severed from the fund and paid to the charitable organization.

Individual donees who wish to contribute funds to a pooled income fund do so by completing an instrument of transfer. For sample instruments of transfer conforming to the applicable IRS requirements for such instruments, see §§ 74.231-74.233.

**[b] Sample IRS Form**

The content of this form follows the sample IRS form set forth in *Revenue Procedure 88-53* [ *Rev. Proc. 88-53*, § 4]. The IRS has stated that taxpayers who make contributions to a trust that substantially follows this model "can be assured that the Service will recognize the trust as meeting all of the requirements of a qualified pooled income fund, provided the trust operates in a manner consistent with the terms of the trust instrument and provided it is a valid trust under applicable local law" [ *Rev. Proc. 88-53*, § 2]. According to the IRS, the sample declaration of trust and instruments of transfer made available by this revenue procedure meet all of the applicable requirements for a pooled income fund under *I.R.C. § 642(c)(5)*, and if the public charity responsible for the creation and maintenance of the

pooled income fund makes reference in the trust instrument of the fund to *Rev. Proc. 88-53*, and adopts substantially similar documents, the IRS will recognize the trust documents as satisfying all of the applicable requirements of *I.R.C. § 642(c)(5)* and the applicable regulations. In addition, remainder interests in property transferred to such a fund will be deductible under *I.R.C. §§ 170(f)(2)(A), 2055(e)(2)(A), and 2522(c)(2)(A)* for income, estate, and gift tax purposes, respectively [ *Rev. Proc. 88-53, 1988-2 C.B. 712*, § 3].

A trust that contains substantive provisions in addition to those provided by *Rev. Proc. 88-53*, other than provisions necessary to establish a valid trust under applicable local law, or that omits any of those provisions, will not necessarily be disqualified, but neither will it automatically qualify under the provisions of this revenue procedure [ *Rev. Proc. 88-53, 1988-2 C.B. 712*, § 8]. Prudence therefore obviously dictates that deviations from the standard form be made only if absolutely necessary. The only changes to the sample IRS form made below are minor format and style changes to conform to the general style of the other forms in this publication. The language of the form itself is reproduced verbatim. The sample IRS form states that acknowledgments and signatures of witnesses may be added at the end of the form, but since witnesses are not required under California law, this form provides only for the addition of an optional acknowledgment.

Other sample provisions for pooled income funds are set forth in *Revenue Ruling 82-38* [*Rev. Rul. 82-38, 1982-1 C.B. 96*], as amplified by *Revenue Ruling 85-57* [*Rev. Rul. 85-57, 1985-1 C.B. 182*] and *Revenue Ruling 90-103* [*Rev. Rul. 90-103, 1990-2 C.B. 159*], which set forth the terms that must be included in the governing instrument of a qualified pooled income fund. The requirements of these revenue rulings are discussed in greater detail in [c], below. The IRS has specified that the sample provisions contained in these three revenue rulings in no way preclude the use of other provisions conforming to the requirements of *I.R.C. § 642(c)(5)* and the applicable Treasury Regulations [ *Rev. Rul. 82-38, 1982-1 C.B. 96*, § 11.01]. Although the provisions that appear in these revenue rulings are apparently still good, it appears to make more sense for the drafter to work from the complete form provided in *Rev. Proc. 88-53, 1988-2 C.B. 712*], since automatic IRS approval of the entire instrument is thereby assured.

### **[c] Pooled Income Fund Requirements**

#### **[i] In General**

The requirements for qualification of a pooled income fund are set forth in *I.R.C. § 642(c)(5)* and *Treas. Reg. § 1.642(c)-5(b)*. *Revenue Ruling 82-38* [*Rev. Rul. 82-38, 1982-1 C.B. 96*] serves as a guide in developing governing instruments for funds that meet these requirements. *Revenue Ruling 82-38* has been amplified by *Revenue Ruling 85-57* [*Rev. Rul. 85-57, 1985-1 C.B. 182*] and *Revenue Ruling 90-103* [*Rev. Rul. 90-103, 1990-2 C.B. 159*], which set forth additional terms that must be included in the governing instrument of a qualified pooled income fund. The provisions that are required by these revenue rulings are discussed in the subheadings below.

#### **[ii] Transfer of Irrevocable Remainder Interest**

Each donor must transfer property to a pooled income fund and contribute an irrevocable remainder interest in such property to or for the use of a public charity [*Treas. Reg. § 1.642(c)-5(b)(1)*]. A contingent remainder is not treated as an irrevocable remainder interest [see *Rev. Rul. 82-38, 1982-1 C.B. 96*].

#### **[iii] Creation of Income Interest for Life**

The donor of property to a pooled income fund must either retain for himself or herself a life income interest in the property, or create an income interest therein for the life of one or more beneficiaries, each of whom must be living at the time of the transfer. The donor may retain the power, exercisable only by will, to revoke or terminate the income interest of any designated beneficiary other than the charity. No charitable contribution deduction is allowed to the donor for the value of an income interest given to a public charity, or for the amount of any income paid by the fund to such an organization [*Treas. Reg. § 1.642(c)-5(b)(2)*].

**[iv] Commingling and Investment of Donated Property**

The property transferred to a pooled income fund must be commingled with, and invested or reinvested with other property transferred to the fund by other donors. The governing instrument of the pooled income fund must contain a provision requiring compliance with this requirement. However, the fund may invest its property jointly with properties not a part of the fund, i.e., properties held by or for the use of the public charity that maintains the fund [*Treas. Reg. § 1.642(c)-5(b)(3)*]. If a bank is the trustee of more than one pooled income fund, it may maintain a common trust fund for collective investment and reinvestment of assets from the pooled income funds [*Treas. Reg. § 1.642(c)(5)-(b)(3)*; see *I.R.C. § 584* (common trust funds)].

**[v] Exempt Securities Precluded**

A pooled income fund may not accept from a donor, or invest in, any securities the income from which is exempt from federal income tax [*Treas. Reg. §§ 1.642(c)-5(b)(4)*]. The governing instrument of the fund must contain specific prohibitions against accepting or investing in such securities.

**[vi] Control of Fund by Charitable Organization**

The pooled income fund must always be maintained by the charity to or for the use of which the remainder was contributed. This requirement is satisfied if the charity exercises control either directly or indirectly [*Treas. Reg. § 1.642(c)-5(b)(5)*].

**[vii] Prohibition Against Donor or Noncharitable Beneficiary as Trustee**

Neither a donor nor a beneficiary other than the charity to or for the use of which the remainder is given may be a trustee of a pooled income fund. The declaration of trust must contain such a prohibition [ *Rev. Rul. 82-38, 1982-1 C.B. 96* ]. The fact that the donor, or a beneficiary, is a trustee, officer, or other official of the donee charity will not prevent the fund from complying with this prohibition [*Treas. Reg. § 1.642(c)-5(b)(6)*].

**[viii] Income Beneficiary Requirements**

Each beneficiary entitled to income (as defined in *I.R.C. § 643(b)*) in any taxable year of the fund must receive that income in an amount determined by the rate of return earned by the fund for that year with respect to his or her income interest.

On each transfer of property to the fund by a donor, one or more units of participation in the fund must be assigned to the beneficiary or beneficiaries of the income interest in the property, determined by dividing the fair market value of the property by the fair market value of a unit of participation at the time of the transfer. The fair market value of a unit of participation is to be determined by dividing the fair market value of all property in the fund by the number of units of participation in the fund at the time of the transfer [*Treas. Reg. § 1.642(c)-5(c)(2)*].

If a transfer of property to a fund occurs on other than a determination date, the number of units of participation assigned to the income interest in that property may be determined by using the fair market value of the property in the fund on the determination date immediately preceding the date of transfer, with appropriate adjustments on the next succeeding determination date. A determination date is each day of the taxable year of the fund on which there is a valuation of property in the fund, being the first day of that year and at least three other days, with no more than three calendar months between two consecutive determination dates. The share of income allocated to each unit of participation is to be determined by dividing the income of the fund for the taxable year by the outstanding number of units in the fund at the end of that year, with appropriate adjustment for units outstanding during only a part of that year [*Treas. Reg. § 1.642(c)-5(c)(2)*].

The governing instrument of the fund must direct the trustee to distribute income currently or within the first 65 days following the close of the taxable year in which the income is earned. The governing instrument must provide that the income interest of any designated beneficiary must either terminate with the last regular payment that was made before the death of the beneficiary, or be prorated to the date of his or her death [*Treas. Reg. § 1.642(c)-5(b)(7)*].

**[ix] Severance of Remainder From Fund on Termination of the Income Interest**

On termination of the income interest retained or created by a donor, the trustee of the pooled income fund must sever from the fund an amount equal to the value at that time of the remainder interest in the property upon which the income interest is based. The value of the remainder interest must be either its value as of the determination date next succeeding the termination of the income interest or its value as of the date on which the last regular payment was made before the death of the beneficiary if the income interest is terminated on the payment date [*Treas. Reg. § 1.642(c)-5(b)(8)*].

**[x] Alternative Remainder Beneficiary**

The governing instrument of a pooled income fund should provide for the selection of an alternate charitable remainder beneficiary in the event that the designated charity goes out of existence or loses its charitable qualification. The instrument should authorize the trustee of the pooled income fund to select another organization within 60 days after the designated charity ceases to exist or within 60 days after expiration of the time specified in *I.R.C. § 7428(b)(3)* in which a pleading may be filed under *I.R.C. § 7428(a)* to contest such a loss of qualification. The alternative remainder beneficiary must meet the same requirements as the designated charity [ *Rev. Rul. 85-57, 1985-1 C.B. 182* ].

**[xi] Depreciable or Depletable Assets**

When property is transferred to a pooled income fund, a charity is designated to receive the remainder interest after termination of the lifetime income interests. If the trustee invests in depreciable or depletable property, the value of the remainder interest will shrink during the lifetimes of the income beneficiaries. The remainder interest can be protected against loss due to this kind of shrinkage either by forbidding the trustee to make this kind of investment or by permitting the trustee to make the investments but requiring the trustee to establish a reserve for depreciation or depletion in accordance with Generally Accepted Accounting Principles (GAAP) [ *Rev. Rul. 90-103, 1990-2 C.B. 159* ]. Accordingly, the Internal Revenue Service has ruled that the governing instrument must either forbid the trustee from accepting or investing in any depreciable or depletable assets or require the trustee to establish a depreciation or depletion reserve in accordance with GAAP for any such investments [ *Rev. Rul. 90-103, 1990-2 C.B. 159* ].

**[xii] Incorporation of Declaration of Trust by Reference in Other Documents**

A will, trust agreement, or other instrument may function as an instrument of transfer if it incorporates the declaration of trust by reference and is consistent with the provisions of the trust and of *I.R.C. § 642(c)(5)*. Paragraph 11 of this form contains a sample IRS provision that may be inserted into the declaration of trust to meet this requirement [see *Rev. Rul. 82-38, 1982-1 C.B. 96* ; *Rev. Proc. 88-53, 1988-2 C.B. 712* ].

**[2] FORM**

**Declaration of Trust for Pooled Income Fund**

DECLARATION OF TRUST

On this \_\_\_\_\_ day of \_\_\_\_\_, [year], the Board of Trustees of the \_\_\_\_\_ [name] Public Charity (hereinafter referred to as "Public Charity") desiring to establish a pooled income fund within the meaning of *Rev. Proc. 88-53* and *section 642(c)(5) of the Internal Revenue Code* (hereinafter

referred to as "the Code"), hereby creates the \_\_\_\_\_[*name*] Public Charity Pooled Income Fund (hereinafter referred to as "the Fund") and designates \_\_\_\_\_[*name*] as the initial trustee to hold, manage, and distribute such property hereinafter transferred to and accepted by it as part of the Fund under the following terms and conditions.

1. **Gift of Remainder Interest.** Each donor transferring property to the Fund shall contribute an irrevocable remainder interest in such property to Public Charity.

2. **Retention of Life Income Interest.** Each donor transferring property to the Fund shall retain for himself or herself an income interest in the property transferred, or create an income interest in such property for the life of one or more named beneficiaries, provided that each income beneficiary must be a living person at the time of the transfer of property to the Fund by the donor. If more than one beneficiary of the income interest is named, such beneficiaries may enjoy their shares concurrently and/or consecutively. Public Charity may also be designated as one of the beneficiaries of the income interest. The donor need not retain or create a life interest in all of the income from the property transferred to the Fund and any income not payable to an income beneficiary shall be contributed to, and within the taxable year of the Fund in which it is received paid to, Public Charity.

3. **Commingling of Property.** The property transferred to the Fund by each donor shall be commingled with, and invested or reinvested with, other property transferred to the Fund by other donors satisfying the requirements of this instrument and of section 642(c)(5) of the Code or corresponding provision of any subsequent federal tax law. The Fund shall not include property transferred under arrangements other than those specified in this instrument and satisfying the said provisions of the Code.

All or any portion of the assets of the Fund may, however, be invested or reinvested jointly with other properties not a part of the Fund that are held by, or for the use of, Public Charity. When joint investment or reinvestment occurs, detailed accounting records shall be maintained by the Trustee specifically identifying the portion of the jointly invested property owned by the Fund and the income earned by, and attributable to such portion.

4. **Prohibition Against Exempt Securities.** The property transferred to the Fund by any donor shall not include any securities whose income is exempt from taxation under subtitle A of the Code or the corresponding provisions of any subsequent federal tax law. The Trustee of the Fund shall not accept or invest in such securities as part of the assets of the Fund.

5. **Maintenance by Public Charity.** Public Charity shall always maintain the Fund or exercise control, directly or indirectly, over the Fund. Public Charity shall always have the power to remove any Trustee or Trustees and to designate a new Trustee or Trustees.

6. **Prohibition Against Donor or Beneficiary Serving as Trustee.** The Fund shall not have as a Trustee a donor to the Fund or a beneficiary (other than Public Charity) of an income interest in any property transferred to the Fund. No donor or beneficiary (other than Public Charity) shall have, directly or indirectly, general responsibilities with respect to the Fund that are ordinarily exercised by a Trustee.

7. **Income of Beneficiary to be Based on Rate of Return of Fund.** The taxable year of the Fund shall be the calendar year. The Trustee shall pay income to each beneficiary entitled thereto in any taxable year of the Fund in the amount determined by the rate of return earned by the Fund for the year with respect to the beneficiary's income interest. Payments must be made at least once in the year in which the income is earned. Until the Trustee determines that payments shall be made more or less frequently or at other times, the Trustee shall make income payments to the beneficiary or beneficiaries entitled to them in four quarterly payments on or about March 31, June 30, September 30, and December 31 of each year. An adjusting payment, if necessary, will be made during the taxable year or within the first 65 days following its close to bring the total payment to the actual income to which the beneficiary or beneficiaries

are entitled for that year.

On each transfer of property by a donor to the Fund, there shall be assigned to the beneficiary or beneficiaries of the income interest retained or created in the property the number of units of participation equal to the number obtained by dividing the fair market value of the property transferred by the fair market value of a unit in the Fund immediately before the transfer. The fair market value of a unit in the Fund immediately before the transfer shall be determined by dividing the fair market value of all property in the Fund at that time by the number of units then in the Fund. The initial fair market value of a unit in the Fund shall be the fair market value of the property transferred to the Fund divided by the number of units assigned to the beneficiaries of the income interest in that property. All units in the Fund shall always have equal value.

If a transfer of property to the Fund by a donor occurs on other than a determination date, the number of units of participation assigned to the beneficiary or beneficiaries of the income interest in the property shall be determined by using the average fair market value of the property in the Fund immediately before the transfer, which shall be deemed to be the average of the fair market values of the property in the Fund on the determination dates immediately preceding and succeeding the date of transfer. For the purpose of determining the average fair market value, the property transferred by the donor and any other property transferred to the Fund between the preceding and succeeding dates, or on such succeeding date, shall be excluded. The fair market value of a unit in the Fund immediately before the transfer shall be determined by dividing the average fair market value of the property in the Fund at that time by the number of units then in the Fund. Units of participation assigned with respect to property transferred on other than a determination date shall be deemed to be assigned as of the date of the transfer.

A determination date means each day within a taxable year of the Fund on which a valuation is made of the property in the Fund. The property of the Fund shall be valued on January 1, April 1, July 1, and October 1 of each year; provided, however, that where such date falls on a Saturday, Sunday or legal holiday (as defined in section 7503 of the Code and the regulations thereunder), the valuation shall be made on the next succeeding day which is not a Saturday, Sunday or legal holiday.

The amount of income allocated to each unit of participation in the Fund shall be determined by dividing the income of the Fund for the taxable year by the outstanding number of units in the Fund at the end of the year, except that income shall be allocated to units outstanding during only part of the year by taking into consideration the period of time the units are outstanding during the year.

For purposes of this instrument, the term "income" has the same meaning as it does under section 643(b) of the Code or corresponding provision of any subsequent federal tax law and the regulations thereunder.

The income interest of any beneficiary of the Fund shall terminate with the last regular payment of income that was made before the death of the beneficiary. The Trustee of the Fund shall not be required to prorate any income payment to the date of the beneficiary's death.

**8. Termination of Life Income Interest.** Upon the termination of the income interest of the designated beneficiary (or, in the case of successive income interests, the survivor of the designated beneficiaries) entitled to receive income pursuant to the terms of a transfer to the Fund, the Trustee shall sever from the Fund an amount equal to the value of the remainder interest in the property upon which the income interest is based. The value of the remainder interest for severance purposes shall be its value as of the date on which the last regular payment was made before the death of the beneficiary. The amount so severed from the Fund shall be paid to Public Charity. If at the time of severance of the remainder interest Public Charity has ceased to exist or is not a public charity (an organization described in clauses (i) through (vi) of section 170(b)(1)(A) of the Code), the amount severed shall be paid to an organization selected by the Trustee that is a public charity.

**9. Prohibited Activities.** The income of the Fund for each taxable year shall be distributed at such time and in such manner as not to subject the Fund to tax under section 4942 of the Code. Except for making the required payments to the life income beneficiaries, the Trustee shall not engage in any act of self-dealing as defined in section 4941(d) and shall not make any taxable expenditures as defined in section 4945(d). The Trustee shall not make any investments that jeopardize the charitable purpose of the Fund within the meaning of section 4944 or retain any excess business holdings within the meaning of section 4943.

**10. Depreciable or Depletable Assets.** The Trustee shall not accept or invest in any depreciable or depletable assets.

**11. Incorporation by Reference.** The provisions of this document may be, and are intended to be, incorporated by reference in any will, trust, or other instrument by means of which property is transferred to the Fund. Any property transferred to the Fund whereby an income interest is retained or created for the life of one or more named beneficiaries, where this document is not incorporated by reference, shall become a part of the Fund and shall be held and managed under the terms and conditions of this document, unless the instrument of transfer is inconsistent with such terms and conditions, in which case the Trustee shall not accept the property.

**12. Governing Law.** The operation of the Fund shall be governed by the laws of the State of \_\_\_\_\_. However, the Trustee is prohibited from exercising any power or discretion granted under said laws that would be inconsistent with the qualification of the Fund under section 642(c)(5) of the Code and the corresponding regulations.

**13. Power of Amendment.** The Fund is irrevocable. However, Public Charity shall have the power, acting alone, to amend this document and the associated instruments of transfer in any manner required for the sole purpose of ensuring that the Fund qualifies and continues to qualify as a pooled income fund within the meaning of section 642(c)(5).

IN WITNESS WHEREOF \_\_\_\_\_ [name of public charity] and \_\_\_\_\_ [name of trustee] by their duly authorized officers have signed this agreement the day and year first above written.

[name of public charity]

By \_\_\_\_\_

[name of trustee]

By \_\_\_\_\_

[Add acknowledgment if desired; see § 74.200[2] .]

### Legal Topics:

For related research and practice materials, see the following legal topics:  
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DIVISION IV: WILLS AND TRUSTS  
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PART IV. FORMS  
C. Pooled Income Funds

*26-74 California Legal Forms--Transaction Guide § 74.231*

**AUTHOR:** Reviewed by Albert G. Handelman

**§ 74.231 Instrument Transferring Property to Pooled Income Fund--One Life**

**[1] Comment**

**[a] Use of Form**

This form is an instrument by which a donor transfers property to an existing pooled income fund, with a retained income interest for one life. For an instrument transferring property to a pooled income fund for two lives, with consecutive interests, see § 74.232[2]. For an instrument transferring property to a pooled income fund for two lives, with concurrent and consecutive interests, see § 74.233[2].

Many pooled income funds may be expected to supply their own transfer instruments to persons who wish to contribute property to the fund. If a pooled income fund does not supply its own form instrument, counsel for the individual donor may need to prepare one.

**[b] Sample IRS Form**

The content of this form follows the sample IRS form set forth in *Revenue Procedure 88-53* [Rev. Proc. 88-53, 1988-2 C.B. 712, § 5]. According to the IRS, the sample declaration of trust and instruments of transfer made available by this revenue procedure meet all of the applicable requirements for a pooled income fund under *I.R.C. § 642(c)(5)*. For additional discussion of the effect of using the IRS documents illustrated in *Revenue Procedure 88-53*, see § 72.230[1][b]. As indicated in that discussion, prudence dictates that deviations from the IRS standard forms be made only if absolutely necessary. The only changes to the sample IRS form made below are minor format and style changes to conform to the general style of the other forms in this publication. The language of the form itself is reproduced verbatim. The sample IRS form states that acknowledgments and signatures of witnesses may be added at the end of the form, but since witnesses are not required under California law, this form provides only for the addition of an optional acknowledgment.

Other sample provisions for pooled income funds are set forth in *Revenue Ruling 82-38* [*Rev. Rul. 82-38, 1982-1 C.B. 96*], as amplified by *Revenue Ruling 85-57* [*Rev. Rul. 85-57, 1985-1 C.B. 182*] and *Revenue Ruling 90-103* [*Rev. Rul. 90-103, 1990-2 C.B. 159*], which set forth various terms that must be included in the instrument of transfer to a qualified pooled income fund. Although the provisions that appear in these revenue rulings are apparently still good, it would appear to make more sense for the drafter to work from the complete form provided in *Rev. Proc. 88-53, 1988-2 C.B. 712*], since automatic IRS approval of the entire instrument is thereby assured.

### **[c] Transfer Instrument Requirements**

#### **[i] In General**

The requirements for pooled income funds are set forth in *I.R.C. § 642(c)(5)* and *Treas. Regs. § 1.642(c)-5(b)*. *Revenue Ruling 82-38* [*Rev. Rul. 82-38, 1982-1 C.B. 96*] serves as a guide in developing governing instruments and instruments transferring property to funds that meet those requirements. *Revenue Ruling 82-38* has been amplified by *Revenue Ruling 85-57* [*Rev. Rul. 85-57, 1985-1 C.B. 182*], which sets forth additional terms that must be included in instruments transferring property to pooled income funds. These requirements are discussed in [ii] and [iii], below.

#### **[ii] Irrevocable Remainder Interest**

Each donor must transfer property to a pooled income fund and contribute an irrevocable remainder interest in that property to or for the use of a public charity. A contingent remainder interest will not qualify as an irrevocable remainder interest for this purpose [*Treas. Reg. § 1.642(c)-5(b)(1)*; *Rev. Rul. 82-38, 1982-1 C.B. 96*].

If the donor wishes to designate a particular charitable purpose for which the remainder interest is to be used, care should be exercised to make sure that the statement of purpose does not make the remainder interest contingent.

#### **[iii] Alternate Charitable Remainder Beneficiary**

The governing instrument of a pooled income fund should provide for the selection of an alternate charitable remainder beneficiary in the event that the designated charity goes out of existence or loses its charitable qualification. The instrument should authorize the trustee of the pooled income fund to select another organization within 60 days after the designated charity ceases to exist or within 60 days after expiration of the time specified in *I.R.C. § 7428(b)(3)* in which a pleading may be filed under *I.R.C. § 7428(a)* to contest such a loss of qualification. The alternative remainder beneficiary must meet the same requirements as the designated charity [*Rev. Rul. 85-57, 1985-1 C.B. 182*].

*Revenue Ruling 85-57* states that an instrument transferring property to a pooled income fund should include a provision recognizing the possibility that the trustee may select an alternate charitable remainder beneficiary and clearly stating that references in the instrument of transfer to the designated public charity shall in that event be construed to refer to the replacement organization so selected [*Rev. Rul. 85-57, 1985-1 C.B. 182*], and provides suggested language for such a provision. However, the sample IRS forms illustrated in *Rev. Proc. 88-53, 1988-2 C.B. 712*], and illustrated in this chapter in §§ 74.231[2]-74.233[2] do not contain such express language. They do, however, incorporate the terms and conditions of the fund's declaration of trust, and the standard IRS form for the latter instrument, which is illustrated in § 74.230[2], does provide that if at the time of severance of the remainder interest, the charity has ceased to exist or is not a public charity as described in *I.R.C. § 170(b)(1)(A)(i) through (vi)*, the amount severed be paid to an organization selected by the trustee that is a public charity [*see § 74.230[2]*, § 8].

## **[2] FORM**

### **Instrument Transferring Property to Pooled Income Fund--One Life**

Instrument of Transfer

On this \_\_\_\_\_ day of \_\_\_\_\_, [year], I hereby transfer to the \_\_\_\_\_ [name of public charity] Pooled Income Fund, under the terms and conditions set forth in its Declaration of Trust, the following property: [description of property]

The income interest attributable to the property transferred shall be paid as follows:

\_\_\_\_\_ A. To me during my lifetime.

\_\_\_\_\_ B. To \_\_\_\_\_ [name] during \_\_\_\_\_ [his or her] life. However, I reserve the right to revoke, solely by will, this income interest.

Upon the termination of the income interest, the Trustee of the Fund will sever from the Fund an amount equal to the value of the remainder interest in the transferred property and transfer it to \_\_\_\_\_ [name of public charity]:

\_\_\_\_\_ A. For its general uses and purposes.

\_\_\_\_\_ B. For the following charitable purpose(s): \_\_\_\_\_.

However, if it is not possible for \_\_\_\_\_ [name of public charity] in its sole discretion to use the severed amount for the specified purpose(s), then it may be used for the general purposes of \_\_\_\_\_ [name of public charity].

This instrument and the transfer of property made pursuant thereto shall be effective after acceptance by both the Donor and the Trustee.

IN WITNESS WHEREOF \_\_\_\_\_ [name of donor] and \_\_\_\_\_ [name of trustee], by its duly authorized officer have signed this agreement the day and year first above written.

\_\_\_\_\_  
[signature of donor]

\_\_\_\_\_  
[name of trustee]

By \_\_\_\_\_

[Add acknowledgment if desired; see § 74.200[2] .]

### Legal Topics:

For related research and practice materials, see the following legal topics:  
Estate, Gift & Trust Law Trusts Charitable Trusts



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California Legal Forms--Transaction Guide

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DIVISION IV: WILLS AND TRUSTS  
CHAPTER 74 SPLIT-INTEREST CHARITABLE TRUSTS  
PART IV. FORMS  
C. Pooled Income Funds

*26-74 California Legal Forms--Transaction Guide § 74.232*

**AUTHOR:** Reviewed by Albert G. Handelman

**§ 74.232 Instrument Transferring Property to Pooled Income Fund--Two Lives, Consecutive Interests**

**[1] Comment**

**[a] Use of Form**

This form is an instrument by which a donor transfers property to an existing pooled income fund, with retained income interests for two consecutive lives. For an instrument transferring property to a pooled income fund for one life, see § 74.231[2]. For an instrument transferring property to a pooled income fund for two lives, with concurrent and consecutive interests, see § 74.233[2].

**[b] Sample IRS Form**

The content of this form follows the sample IRS form set forth in *Revenue Procedure 88-53* [ *Rev. Proc. 88-53, 1988-2 C.B. 712* , § 6]. According to the IRS, the sample declaration of trust and instruments of transfer made available by this revenue procedure meet all of the applicable requirements for a pooled income fund under *I.R.C. § 642(c)(5)*. For additional discussion of the effect of using the IRS documents illustrated in *Revenue Procedure 88-53* , see §§ 72.230[1][b] and 72.231[1][b]. As indicated in those discussions, prudence dictates that deviations from the IRS standard forms be made only if absolutely necessary. The only changes to the sample IRS form made below are minor format and style changes to conform to the general style of the other forms in this publication. The language of the form itself is reproduced verbatim. The sample IRS form states that acknowledgments and signatures of witnesses may be added at the end of the form, but since witnesses are not required under California law, this form provides only for the addition of an optional acknowledgment.

**[2] FORM**

**Instrument Transferring Property to Pooled Income Fund--Two Lives, Consecutive Interests**

## Instrument of Transfer

On this \_\_\_\_\_ day of \_\_\_\_\_, [year], I hereby transfer to the \_\_\_\_\_ [name of public charity] Pooled Income Fund, under the terms and conditions set forth in its Declaration of Trust, the following property: [description of property]

The income interest attributable to the property transferred shall be paid as follows:

\_\_\_\_\_ A. To me during my lifetime, and after my death to \_\_\_\_\_ [name] during \_\_\_\_\_ [his or her] lifetime. However, I reserve the right to revoke, solely by will, \_\_\_\_\_ [his or her] income interest.

\_\_\_\_\_ B. To \_\_\_\_\_ [name] during \_\_\_\_\_ [his or her] lifetime, and after \_\_\_\_\_ [his or her] death to \_\_\_\_\_ [name] during \_\_\_\_\_ [his or her] lifetime. However, I reserve the right to revoke, solely by will, the income interest of either or both beneficiaries.

Upon the termination of the income interest, the Trustee of the Fund will sever from the Fund an amount equal to the value of the remainder interest in the transferred property and transfer it to \_\_\_\_\_ [name of public charity]:

\_\_\_\_\_ A. For its general uses and purposes.

\_\_\_\_\_ B. For the following charitable purpose(s): \_\_\_\_\_.

However, if it is not possible for \_\_\_\_\_ [name of public charity] in its sole discretion to use the severed amount for the specified purpose(s), then it may be used for the general purposes of \_\_\_\_\_ [name of public charity].

This instrument and the transfer of property made pursuant thereto shall be effective after acceptance by both the Donor and the Trustee.

IN WITNESS WHEREOF \_\_\_\_\_ [name of donor] and \_\_\_\_\_ [name of trustee], by its duly authorized officer have signed this agreement the day and year first above written.

\_\_\_\_\_  
[signature of donor]

\_\_\_\_\_  
[name of trustee]

By \_\_\_\_\_

[Add acknowledgment if desired; see § 74.200[2] .]

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Estate, Gift & Trust Law Trusts Charitable Trusts



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*26-74 California Legal Forms--Transaction Guide § 74.233*

**AUTHOR:** Reviewed by Albert G. Handelman

**§ 74.233 Instrument Transferring Property to Pooled Income Fund--Two Lives, Concurrent and Consecutive Interests**

**[1] Comment**

**[a] Use of Form**

This form is an instrument by which a donor transfers property to an existing pooled income fund, with retained income interests for two lives. The interests are to run both consecutively and concurrently. For an instrument transferring property to a pooled income fund for one life, see § 74.231[2]. For an instrument transferring property to a pooled income fund for two lives, with consecutive interests, see § 74.232[2].

**[b] Sample IRS Form**

The content of this form follows the sample IRS form set forth in *Revenue Procedure 88-53* [ *Rev. Proc. 88-53, 1988-2 C.B. 712*, § 7]. According to the IRS, the sample declaration of trust and instruments of transfer made available by this revenue procedure meet all of the applicable requirements for a pooled income fund under *I.R.C. § 642(c)(5)*. For additional discussion of the effect of using the IRS documents illustrated in *Revenue Procedure 88-53*, see §§ 72.230[1][b] and 72.231[1][b]. As indicated in those discussions, prudence dictates that deviations from the IRS standard forms be made only if absolutely necessary. The only changes to the sample IRS form made below are minor format and style changes to conform to the general style of the other forms in this publication. The language of the form itself is reproduced verbatim. The sample IRS form states that acknowledgments and signatures of witnesses may be added at the end of the form, but since witnesses are not required under California law, this form provides only for the addition of an optional acknowledgment.

**[2] FORM**

**Instrument Transferring Property to Pooled Income Fund--Two Lives, Concurrent and Consecutive**

**Interests**

## Instrument of Transfer

On this \_\_\_\_\_ day of \_\_\_\_\_, [year], I hereby transfer to the \_\_\_\_\_ [name of public charity] Pooled Income Fund, under the terms and conditions set forth in its Declaration of Trust, the following property: [description of property]

The income interest attributable to the property transferred shall be paid as follows:

\_\_\_\_\_ A. \_\_\_\_\_% to me during my lifetime, and \_\_\_\_\_% to \_\_\_\_\_ [name] during \_\_\_\_\_ [his or her] lifetime. After the death of the first income beneficiary to die, the survivor shall be entitled to the entire income. However, I reserve the right to revoke, solely by will, \_\_\_\_\_ [name]'s income interest.

\_\_\_\_\_ B. \_\_\_\_\_% to \_\_\_\_\_ [name] during \_\_\_\_\_ [his or her] lifetime and \_\_\_\_\_% to \_\_\_\_\_ [name] during \_\_\_\_\_ [his or her] lifetime. Upon the death of the first income beneficiary to die, the survivor shall be entitled to receive the entire income. However, I reserve the right to revoke, solely by will, the income interest of either or both beneficiaries. Upon the termination of the income interest, the Trustee of the Fund will sever from the Fund an amount equal to the value of the remainder interest in the transferred property and transfer it to \_\_\_\_\_ [name of public charity]:

\_\_\_\_\_ A. For its general uses and purposes.

\_\_\_\_\_ B. For the following charitable purpose(s): \_\_\_\_\_.

However, if it is not possible for \_\_\_\_\_ [name of public charity] in its sole discretion to use the severed amount for the specified purpose(s), then it may be used for the general purposes of \_\_\_\_\_ [name of public charity].

This instrument and the transfer of property made pursuant thereto shall be effective after acceptance by both the Donor and the Trustee.

IN WITNESS WHEREOF \_\_\_\_\_ [name of donor] and \_\_\_\_\_ [name of trustee], by its duly authorized officer have signed this agreement the day and year first above written.

\_\_\_\_\_  
[signature of donor]

\_\_\_\_\_  
[name of trustee]

By \_\_\_\_\_

[Add acknowledgment if desired; see § 74.200[2].]

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Trusts Charitable Trusts