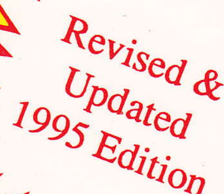
Estate Planning for the 1990s

A Practical Guide To Wills, Trusts, Probate And Death Taxes For Everyone



By Vijay Fadia

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A Practical Guide To Wills, Trusts, Probate And Death Taxes For Everyone

Homestead Publishing Company, Inc.
Torrance, Ca

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27 Tips to Planning an Estate 1

Many people put off estate planning because thinking of death (especially your own) is not very pleasant. In addition, most people have only the minimal knowledge about estate planning. Few are aware of various methods and strategies available which may bring tax and non-tax benefits to the estate owner and his family. To most people estate planning may represent making a will. A will may be one of the most important elements of an estate plan, but it's not everything. A good estate plan must consider taxes, probate, insurance, investing, charitable giving, and family wealth distribution. Estate planning is more than avoiding taxes; it also is determining how you want the property distributed and how that can be done with a minimum of administration and legal expenses. A good estate plan will achieve all these objectives in an optimum manner.

BASIC ESTATE PLANNING STRATEGIES

There are various methods of transferring an estate. After careful consideration, you may want to use a combination of these methods.

1. You own your property in joint tenancy with right of survivorship with your spouse. Upon the death of one spouse, the other spouse inherits the property tax-free and without probate and the surviving spouse then transfers it by will to the children.

2. You set up a trust in your will which provides for income to the spouse for life, and upon her death, the principal is transferred to the children. This is known as testamentary trust.

3. This is a variation of alternative (2). Some assets are left outright to the spouse and remainder to the children.

4. Upon the death of the trustor spouse, the trust estate is divided into two trusts, often referred to as Trust A, or the marital trust, and Trust B, or the by-pass trust. Trust B property passes to the children without being taxed in the surviving spouse's estate. The surviving spouse will receive income for life from Trust A and will retain the power of appointment over the principal.

5. Same as (4) except that income of the second trust is accumulated for the children during their minority, or distributed to them. To compensate the survivor for the loss of income from the second trust, the trustee can be given the power to invade principal if the survivor needs it.

6. A revocable trust, which achieves the objectives of any of the five methods listed above while retaining for the estate owner full flexibility to change his or her mind and utilize property during the remainder of his or her life.

7. You can set up an irrevocable trust with distributive provisions tailored to your personal situation.

8. A lifetime gift giving program is a favored estate planning method. Such gifts can take the gift property out of the taxable estate and any gift which does not exceed the gift tax annual exclusion amount ($10,000 per donee for an individual or $20,000 per donee for a husband and wife) will incur no gift tax.

9. Life insurance and annuity contracts could be one of the most powerful estate planning methods available to you. It can create an instant estate for the surviving family.

ESTATE PLANNING TOOLS

The tools listed below may be used to implement many of the methods described above. We'll discuss in detail with emphasis on practical implementation many of these tools and techniques throughout the Manual.

(1) Outright gifts during lifetime

(2) Inter vivos trusts (irrevocable or revocable)

(3) Testamentary trusts created in a will

(4) Annuities

(5) Charitable remainder or lead trusts

(6) Insurance

(7) Pension and other employee benefit plans

(8) Powers of appointment trusts

(9) Gift- or sale- leasebacks

(10) Family partnerships

(11) Close corporations (C- or S- corporations)

(12) Joint ownerships

(13) Creation of present and future interests

WHAT IS AN "ESTATE"?

Estate as referred to in estate planning generally means all of a person's property - real, personal, tangible and intangible. But the word may include different assets when used in different contexts. The following is a brief description of various meanings as applied to an estate.

Probate Estate

The "probate estate" consists of those assets that will be transferred under the terms of the estate owner's will, or under the state intestacy laws if there is no will. The best way to define probate estate is by listing all the property that is not part of it:

(a) Life insurance proceeds payable to a designated beneficiary other than the estate;

(b) Assets such as real estate, bank accounts, securities, etc., held in joint tenancy with right of survivorship where the joint tenant does in fact survive the decedent;

(c) Bank accounts held "in trust for" (so-called Totten trusts) someone who survives the decedent;

(d) Retirement plan or annuity contract benefits payable to a designated and surviving beneficiary;

(e) Any property that the decedent gave away during his life either outright or in trust; and,

(f) Trusts created by others in which the decedent had an interest which is terminated by his death, unless he had a general power of appointment which he in fact exercised in favor of his estate.

It should be remembered that only the probate estate is controlled through the terms of the will or a revocable living trust. Therefore, if you attempt to pass a jointly held asset such as a residence through a will, you'll be unsuccessful.

Gross Estate for Tax Purposes

The estate subject to death taxes is generally broader than the probate estate. It includes all the property owned by the decedent at the time of his death, plus: (a) the value of property given away by the decedent during his lifetime but as to which he retained certain powers or rights; (b) property held in joint tenancy with the decedent if he paid for it; (c) life insurance on the decedent's life if he retained incidents of ownership; and, (d) bank accounts held "in trust for."

If the decedent owned property jointly with his surviving spouse, only one-half of the value of the property is includible in his gross estate, regardless of which spouse paid for the property. It is also important to not retain any incidents of ownership with regards to any life insurance even though you've taken care to designate a different beneficiary and do not own the policy.

Adjusted Gross Estate

The "adjusted gross estate" is the gross estate minus deductible funeral and administration expenses, claims against the estate, mortgages or indebtedness on property the full value of which is included in the gross estate, and losses incurred during the settlement of the estate from fire, storms, other casualties or theft, to the extent not compensated for by insurance.

Taxable Estate

The "taxable estate" is the adjusted gross estate minus any charitable, marital, and qualified sale of employer securities to an ESOP or EWOC deductions available to the estate.

With the advent of the unified estate and gift tax concept and rate schedule, which applies to post-1976 decedents' estates, the value of the taxable estate alone determines the estate tax due only if the decedent made no taxable gifts after 1976. If such gifts were, in fact, made, the amount of such gifts must be added to the amount of the taxable estate, and a tentative tax must be computed on such total under the unified estate and gift tax rate schedule. This tentative tax is then reduced by gift taxes payable on the post-1976 gifts to obtain the estate tax before the unified gift and estate tax credit, local and foreign death tax credits, and credit for tax on prior transfers. When these credits are subtracted, the result is the net estate tax payable.

27 ESTATE PLANNING TIPS

1

An accurate valuation of your assets is the first step in the estate planning process. Most people under or overestimate the value of their estates. Many people do not realize that inflation has made them "rich" by substantially increasing the value of their assets. An estate worth over $600,000 isn't unusual when you consider a home, pension benefits, insurance, investments, and possibly a business in addition to usual personal assets. Knowing the worth of your estate will be extremely helpful in planning the payment of estate taxes upon your death and may prompt you on a programmed disposition of your estate to your loved ones during your lifetime. We've provided estate planning worksheets in this Manual to enable you to estimate your net worth and compute estimated tax liability.

2

The assets which compose most estates fall roughly into six categories: (1) your residence; (2) tangible personal property such as furniture, jewelry, paintings, cars, boats, and so forth; (3) investment real estate (houses or buildings not occupied by their owners but rented to tenants); (4) your closely held business, whether it's a sole proprietorship, an interest in a partnership, or an interest in a controlled corporation; (5) checking accounts, savings, certificates of deposit, stocks and bonds - the sum of your liquid assets, except for life insurance proceeds; and (6) proceeds of life insurance.

3

In evaluating their gross estates, many people lose sight of the fine distinction between ownership of a property and controlling interest in it. For estate tax purposes, any property in which you have a controlling interest will be included in your gross estate. An example of such an interest would be a revocable living trust through which you have relinquished the ownership of the property. But since you have retained the right to amend or revoke the trust, the assets will be included in your estate.

4

Here's a trap you should watch for when estimating your estate: You may have assets that you're not even aware of. For instance, you may have been given a "power of appointment" over property in someone's will. In other words, you have the power to determine who gets the particular property after your death. This could cause the property to be included in your estate even if you do not exercise the power. Another example would be a property you've given away but retained some powers as to its ultimate disposition. You may also have received a contingent interest in someone else's estate. All such retained strings or contingent interests may cause the entire property to be included in your estate.

5

The easiest and least expensive way to reduce your gross estate is to set up a lifetime giving program. The law allows you to give up to $10,000 of property per year to every person without incurring any gift taxes. When a gift is given jointly with your spouse, $20,000 per beneficiary can be given tax free each year. There is no limit on the amount that can be given to your spouse. When your gifts to one beneficiary exceeds $10,000 in a year, you get to use a gift tax credit before being assessed a tax. The catch to this is that the gift and estate tax systems are "unified." This means that any gift tax credits used during your lifetime reduce the credit your estate eventually gets to use. The lifetime gift tax credit has the same limit as the estate tax credit. So usually you will want to stay below the $10,000 limit.

You can give away any kind of property. When you own a large stock portfolio, you can give away $10,000 of shares each year. Even real estate can be divided into $10,000 pieces each year, though the legal and title expenses involved could be prohibitive. With real estate, one technique is to sell the property and take back a mortgage. Then, forgive $10,000 worth of the principal each year, protected by the annual exclusion.

6

1981 Tax Reform Act has ensured that upon the death of the first spouse there will be no estate tax due. You can leave your entire estate to your spouse and avoid taxes entirely. The estate tax provides an unlimited marital deduction, which means the value of any property that is willed to your spouse can be deducted from your gross estate. In addition, the money and property do not have to be put in your spouse's control to qualify for the deduction. This is useful if you are concerned that the spouse will be unable to manage the property. The assets can be put in a marital deduction trust. When your spouse dies the assets are included in his or her estate, and the spouse determines who ultimately inherits them.

7

It's not always good to rely on the marital deduction. It's true that the deduction does allow you to completely avoid estate taxes, but your spouse then must find a way to get all the assets out of his or her estate without incurring large gift and estate taxes. Otherwise there will be few assets left for your heirs. You might be better off doing some estate planning yourself instead of putting the burden on your spouse. In addition, your spouse might be unable to manage the property you leave.

Another possibility is that the spouse could remarry and decide to leave all the assets to the new spouse instead of the children as you expected. You can pay a heavy price for using the marital deduction exclusively.

8

A way to use the marital deduction while avoiding some of its problems is the qualified terminable interest property trust. On your death, the property goes into a trust. The trust pays income to your spouse for the remainder of his or her life. When the spouse dies, the property goes to whomever you designated in your will. All the assets in the trust qualify for the marital deduction when you die, but none goes in the spouse's estate. This trust not only enables you to reduce estate taxes, but it also allows you to determine who ultimately gets the assets. There is no risk that your spouse could remarry and direct the property elsewhere. In addition, the property will be managed by a trustee, which should comfort those who are concerned about a spouse's ability to handle the property.

9

Joint ownership is a very misunderstood estate planning technique. It often creates more problems than solves. Joint ownership avoids probate because the property passes automatically from the decedent spouse to the surviving spouse. But it does not escape estate taxes. When a couple owns property jointly, one half of the total value of the property is included in the estate of the decedent spouse. Marital deduction will eliminate any tax at this time, but upon the death of the second spouse, the entire property will be taxed. Before you use joint tenancy as an estate planning tool, you should examine all the consequences. See the chapter on **The Ownership of Property.**

10

At times it pays big dividends not to own property jointly. Take the case of a $200,000 apartment house held jointly by a married couple. The house was purchased many years ago and has been depreciated down to a $20,000 basis. The husband is in bad health and the wife is expected to outlive him. If ownership of the building is left untouched, one-half of the building's value will be included in the husband's taxable estate. This is true though it will pass to the wife without a will because they own it jointly. The basis in the husband's half of the building will be stepped up to its fair market value when the wife inherits it. So if the wife were to immediately sell the building she would have a capital gain of $90,000 (the $200,000 value minus the new basis of $110,000).

Suppose the couple decides to put the building in the husband's name and have him will it to the wife after his death. The building avoids any estate taxes because of the marital deduction. Then the building has a basis in the wife's hands equal to its full fair market value of $200,000. The only requirement is that the husband live at least one year after the deal is arranged. The wife could then sell the building for $200,000 without having to pay any taxes, or could keep the building and depreciate it at its full fair market value.

11

A revocable living trust is still the best way to avoid probate. Such trusts are relatively simple and inexpensive to set up. You retain full control over your assets including the right to change beneficiaries or revoke the trust. Any income earned by the trust is taxed to you and reported on your personal tax return. Upon your death, the beneficiaries inherit the assets without the delays and costs of probate.

12

With the advent of unlimited marital deduction and virtual elimination of estate tax on the death of the first spouse, the focus of most estate planners has now shifted to avoiding the second tax, i.e., the tax upon the death of the surviving spouse. To this end, most estate planning strategies involve the use of a bypass trust which allows the beneficiary to receive the benefit of the inheritance and yet the inherited assets escape death taxation upon the death of the beneficiary. Generally there are three types of bypass trusts that are useful in such a situation and the chapter on **Avoiding the Second Tax** discusses in detail this strategy.

13

Many couples prefer to have joint or mutual wills, but there are drawbacks to this strategy. A joint will is a single will that covers the estate of each spouse, even if they die at different times. A mutual will is a separate will, but each spouse joins in an agreement to dispose of his or her property in a particular way. The problem with these wills is that they cannot be changed once the first spouse dies. From estate planning point of view, joint or mutual wills are a bad idea. They may result in a loss of marital deduction and much higher estate taxes. A joint or mutual will also takes the flexibility out of the estate plan since the surviving spouse cannot adapt the estate to changes in the personal situation or changes in the tax law.

14

Farmers and real estate owners should check out the special use valuation. When a farm or real estate compose a family business, those assets often do not have to be valued at fair market value. They get to use the "special use valuation." This is a complicated provision but it roughly means that the property will be valued at what it is worth for its current use, instead of being valued at what it would be worth if it were converted to some other use. If a farmer's estate had to value the property at what it would be worth to a developer, the estate might not be able to pay the taxes. The special use valuation prevents the estate from having to sell the asset to pay taxes. Consult a tax professional to determine if you qualify.

15

While planning an estate, many estate owners concentrate on federal estate taxes but lose sight of state inheritance taxes. But state inheritance taxes can take a big chunk out of the inherited estate. One trap that frequently catches real estate owners is that the state in which the property is located is the one that imposes the inheritance tax. If you own property in a high tax state such as New York, the property will be hit with a stiff inheritance tax even if you are not a resident of New York. One

way to avoid inheritance tax on a real property is to incorporate the property. Then instead of owning a real property you own stock in a corporation that owns the real property. Personal assets such as corporate stock is taxed in the state of your domicile. So if you live in a low tax state, you may be able to avoid the inheritance taxes of another state.

16

One of the easiest and popular ways to reduce your estate is by donating a portion of your assets to a charity. Money your estate gives to a charity is deductible from the gross estate without any limit. You can just designate in your will that certain charities will receive gifts of cash or property, but there are some more creative ways to use the charitable deduction that may allow you to reap additional benefits during your lifetime.

17

Don't give away property that shows an unrealized loss. When the donee receives the property, his or her basis will be the lower of the property's fair market value or your basis at the time of the gift. So if you give the property away, no one gets to take the unrealized loss as a deduction. But if you sell the property first, you get to deduct a loss. Then you can give the cash proceeds away, and there will be money left over because of the tax savings from deducting the loss.

18

Your estate can take the charitable deduction and still pay income to a spouse or child. The device that makes this possible is the charitable remainder annuity trust. The estate puts property in the trust, and the trust pays income to the spouse or child for life or for 20 years, whichever is less. Then the property goes to the charity. The tax rules require that the beneficiary be paid an annual income of not less than 5% of the initial fair market value of the trust. When the trust is created, the estate gets a deduction of the present value of the remainder interest as determined by IRS tables. If the income beneficiary is your spouse, the present value of that qualifies for the marital deduction. A risk of this trust is that the income will fall so that principal must be used to pay the annual income. In addition, you should be aware that the income beneficiary will have no inflation protection.

A version of this is the charitable remainder unitrust. The main difference is that annual income payments fluctuate with the value of trust assets. The annual payments must be no less than 5% of the trust's asset value for the year. Payments are made for the same period of time. A more complicated version is the charitable lead trust, in which the charity receives the annual income from the trust for a period of at least 10 years, and your beneficiary then gets the remainder interest. Your estate's deduction is the present value of the income stream it will receive, as determined by IRS tables. For the deduction to equal the market value of the property, the charity should be paid income for 16 years. For detailed discussion of various trust arrangements and their benefits, see the chapter on **Charitable Trusts** in this Manual.

19

Life insurance is a significant part of your wealth, but it can be kept out of the estate. Life insurance proceeds are kept out of the estate if you did not own the policy or have the powers of ownership. A simple way to keep a policy out of your estate is to have your spouse own the policy and make the premium payments. You can give the spouse the money used to make the payments, as long as the money is deposited unconditionally in your spouse's separate checking account and your spouse writes separate checks for each premium payment. You can do the same thing with a child. An alternative is to create an irrevocable life insurance trust, sometimes known as a supertrust. The trust owns the policy, but you can make a gift to it each year that is used to make the premium payments. When you die, the proceeds are paid to the trust, which in turn pays them to the beneficiaries according to the instructions given when you created the trust. Irrevocable life insurance trusts are very flexible, but they also are very complicated. You definitely need an experienced estate planner to set one up. We've discussed in detail elsewhere in this Manual use of life insurance and life insurance trusts in your estate planning process.

20

Here's another very effective technique used to reduce your gross estate and still receive a steady stream of income during your lifetime. A private annuity can give you the needed cash flow and get the property out of your estate. In a private annuity, you sell property to someone who ordinarily would have inherited it, such as your children. The buyers take legal title to the property and promise to make payments to you and your spouse for the rest of your lives. The amount of the annuity payments is determined by consulting life expectancy tables prepared by the IRS . Part of each payment you receive will be tax-free return of investment, part will be capital gain, and part will be interest income. All payments will be ordinary income once you outlive your life expectancy. Each payment the children make to you will be added to their basis in the property.

The chapter on **Annuities** describes in detail various kinds of commercial and private annuities and provides a sample form for structuring a simple private annuity agreement.

21

Trusts can be a very powerful and flexible estate planning tool. They allow you to give property to the beneficiaries in a manner dictated by you. Property can be put into an irrevocable trust if you believe the beneficiary is not able to handle the property now. A trustee can be appointed to manage the property until the beneficiary is ready. But to get the property out of your estate there must be no possibility that the property will be returned to you, and you cannot be a trustee. The trustee should be independent of you. When creating the trust, you can direct the trustees to handle the property in whatever way you desire. The trustee can be given complete discretion, or you can precisely describe the actions to be taken. You can order that the income from the property is to be accumulated until the trust terminates or that the beneficiary is to be paid a specific amount each year.

22

An alternative to the irrevocable trust is a custodial account under the Uniform Gift to Minors Act. A responsible adult can control the money until the child reaches the age of majority (age 18 or 21, depending on your state). Under the new tax law, if your child is under age 14, the income will be taxed to you. Otherwise it will be taxed to your child. You can act as the custodian of the funds, but if you do, the account will be included in your estate should you die before the child reaches the age of majority. It is better to have someone other than you or your spouse act as custodian.

Money given to minor children under a gifting program should not be used for necessaries such as food, clothing, shelter and medical care. You are legally obligated to provide these items and they therefore do not qualify for the annual gift exclusion.

23

Unmarried individuals need an estate plan as much, if not more than, married couples do. Most discussions of estate planning focus on traditional married couples and ignore the special problems of single, divorced, and widowed individuals. That is unfortunate. If you are unmarried, you should at least arrange your affairs so that someone will be in charge of your assets should you die or become incapacitated. This is very important if you run a business or have substantial assets that need attention. With a married couple, a spouse can usually take control or quickly get a court order allowing him or her to manage the property. But unmarried individuals need to make other plans for this unhappy contingency. In most states you can draft a durable power of attorney that names the person who will direct your estate should you become incapacitated or incompetent. The designated attorney in fact will step into your shoes and act in your behalf for your financial and physical welfare.

24

There's another alternative: You can set up a revocable living trust and fund it with your major assets. You can be the trustee now, and the person you want to take over in an emergency can be a co-trustee or a substitute trustee. Unmarried individuals must take one of these steps because the courts are unlikely to know who you would like to manage your assets and will appoint your nearest relative.

25

When it comes to estate planning, unmarried individuals are at a distinct disadvantage compared to their married counterparts. Single people generally do not own property in joint tenancy with anyone and therefore do not have the benefit of an "automatic" will. For many single people, true objects of their affection are not easily identifiable. The biggest disadvantage comes in estate taxation: If you're unmarried, you will not get the benefit of the marital deduction to reduce estate taxes.

More thought and planning needs to go in estate planning for single individuals to ensure that their estate is not dissipated among unintended beneficiaries, or subjected to unnecessary taxation.

26

Unmarried individuals generally need to carry more life insurance than married counterparts because it is more difficult to reduce estate taxes. To get the bulk of your estate to your beneficiaries, life insurance, usually in an irrevocable trust, will be a major part of your estate plan.

27

Small business owners get a special tax break in paying their estate taxes. When a closely held business or farm makes up 35% or more of the value of your gross estate, your estate is allowed to pay the taxes over a period of up to 14 years. For the first five years, the estate makes interest-only payments, then it makes annual payments for the remaining 10 years. Best of all, for the first million dollars of the value of the farm or business, the interest rate charged is only 4%. This provision means that your family can keep the business and pay the estate taxes out of the future income. Some advisors recommend using the installment payment rule simply because of the low interest rate.

But before you decide upon this strategy you must examine the pros and cons of installment payment approach to paying estate taxes. Be sure to read the chapter on **Installment Payment of Estate Taxes.**

Estate Planning Worksheets 2

One of the first tasks facing an estate owner is compiling all necessary information that will allow him to formulate and then implement an estate plan. On the following pages, we have compiled estate planning worksheets that will make your task immensely easy. These worksheets should form the basis of your estate plan. The worksheets are organized in the following categories:

- **Documents checklist**
- **Personal information**
- **Location of assets and documents**
- **Advisers**
- **Inventory of assets and gifts**
- **Liabilities**
- **Estimating the estate tax**
- **Estate planning questionnaire**

____
Estate Owner

____
Date

DOCUMENTS CHECKLIST

1. Last wills of both spouses ______
2. Trust instruments ______
3. Life insurance policies ______
4. Income tax returns (past five years) ______
5. Gift tax returns for lifetime ______
6. IRA and Keogh plans ______
7. Pension, profit-sharing, stock option and deferred compensation plans ______
8. Evidences of ownership in sole proprietorships, partnerships and corporations ______
9. Business agreements ______
10. Buy/sell or stock redemption agreements ______
11. Real estate deeds and mortgages ______
12. Real estate purchase agreements to show cost basis ______
13. Instruments creating spouses' joint tenancies or tenancies by the entireties or separate property in community property states ______
14. Separation and divorce agreements ______
15. Pre- or postnuptial agreements ______
16. Financial statements - income and balance sheet ______
17. Powers of appointment ______
18. Powers of attorney ______

FAMILY INFORMATION

1. Personal

	Estate Owner	Spouse
a. Name	________	________
b. Home Address	________	________
c. Phone	________	________
d. Employer & Business Address	________	________
e. Birth Date	________	________
f. Place of Birth	________	________
g. Social Security No.	________	________
h. Date & Place of Marriage	________	________
i. Date & Place of Divorce	________	________

2. Children

	Name and Address	Birth Date
a.	________	________
b.	________	________
c.	________	________
d.	________	________

3. Grandchildren

Their Parents		Names of Grandchildren	Birth Date
a. ______________	(1)	______________	______________
______________	(2)	______________	______________
	(3)	______________	______________
b. ______________	(1)	______________	______________
______________	(2)	______________	______________
	(3)	______________	______________

4. Parents

	Husband		Wife	
Father:	______________		______________	
	Name	*Birth Date*	*Name*	*Birth Date*
	______________		______________	
	Address		*Address*	
Mother:	______________		______________	
	Name	*Birth Date*	*Name*	*Birth Date*
	______________		______________	
	Address		*Address*	

5. Other Dependents

	Name	Address	Relationship
(1)	______________	______________	______________
(2)	______________	______________	______________
(3)	______________	______________	______________
(4)	______________	______________	______________

LOCATION OF ASSETS AND DOCUMENTS

1. Safe deposit box (location of box, owners, who has access, who has keys):_____

____

____

2. Checking accounts (name of bank, location, owner): _______________

____

____

3. Savings accounts (name of bank, location, owner): _______________

____

____

4. Pass books (location): _______________________________

____

5. Securities: _______________________________________

____

6. Custodial and other managed accounts: ___________________

____

7. Real estate I:

   a. Location and how owned: ___________________________

   b. Deed and title policy: _____________________________

   c. Leases: ______________________________________

Real estate II:

a. **Location and how owned:** ______________________________

b. **Deed and title policy:** ______________________________

c. **Leases:** ______________________________

Real estate III:

a. **Location and how owned:** ______________________________

b. **Deed and title policy:** ______________________________

c. **Leases:** ______________________________

8. **Jewelry and other valuables:** ______________________________

____

9. **Current will:** ______________________________

10. **Powers of attorney - durable or otherwise (copies of the powers, attorney-in-fact's identity):** ______________________________

11. **Income tax returns (past five years):** ______________________________

____

12. **Life, health, and accident insurance policies:** ______________________________

____

____

13. **Business and other insurance policies:** ______________________________

____

14. **Business agreements:** ______________________________

____

15. **Trust agreements:** ______________________________

____

16. **Cemetery plot deed:** ______________________________________

____

17. **Funeral directions:** ______________________________________

____

18. **Birth certificate:** ______________________________________

19. **Marriage certificate:** ______________________________________

20. **Divorce decree:** ______________________________________

21. **Separation agreement:** ______________________________________

22. **Employee benefit statements:**______________________________________

23. **Employee benefit plan copies:** ______________________________________

24. **Military discharge papers:** ______________________________________

25. **Naturalization papers:** ______________________________________

26. **Passports:** ______________________________________

27. **Adoption papers:** ______________________________________

ADVISERS

Names, addresses and telephone numbers:

1. Attorney: ____

   ____

2. Accountant: ____

   ____

3. Life insurance broker: ____

   ____

4. Stockbroker: ____

   ____

5. Investment adviser: ____

   ____

6. Banker and trust officer: ____

   ____

7. Physician: ____

   ____

8. Executor: ____

   ____

9. Trustee: ____

   ____

10. Guardian of the minor children: ____

    ____

11. Clergyman: ____

    ____

INVENTORY OF ASSETS

Bank Accounts and Savings Accounts

Bank	Form of Ownership and with Whom	Amount
____________	____________________	____________
____________	____________________	____________
____________	____________________	____________
____________	____________________	____________

Tangible Personal Property

	Fair Market Value
Automobiles, boats, aircraft	____________
Household furnishings	____________
Jewelry	____________
Collections (art, stamps, coins, etc.)	____________
Leaseholds	____________
Partnership or unincorporated business interests	____________
Insurance owned on life of another	____________
Copyrights or patents	____________
Interests in estates or trusts	____________
Other ____________	____________
________________	____________
________________	____________

Total $____________

Stocks and Bonds

No. of Shares or Amount	Name of Company	Description	Date of Purchase or Acquisition	FairMarket Value	Cost Basis
			Total	$______	$______

Real Estate

1. Residence Address ______

Legal Description ______

Owned in Names of ______

Form of Ownership ______ Fair Market Value ______

Date of Acquisition ______ Cost Basis ______

Mortgage Amount ______ Mortgages ______

Date of Improvements ______ Costs ______

2. Address ______________________________

Legal Description ______________________________

Owned in Names of ______________________________

Form of Ownership ______________________ Fair Market Value __________

Date of Acquisition ______________________ Cost Basis __________

Mortgage Amount ______________________ Mortgagee __________

Date of Improvements ______________________ Costs __________

3. Address ______________________________

Legal Description ______________________________

Owned in Names of ______________________________

Form of Ownership ______________________ Fair Market Value __________

Date of Acquisition ______________________ Cost Basis __________

Mortgage Amount ______________________ Mortgagee __________

Date of Improvements ______________________ Costs __________

Closely Held Business Interests

Name of Business ______________________________ Per Cent Owned __________

Type of Entity: Corporation __________ Partnership __________ Sole Partnership ______

Other Owners: Spouse ______________________ Per Cent __________

Children ______________________ Per Cent __________

Others ______________________ Per Cent __________

Fair Market Value of Business $______________

Buy/Sell or Stock Redemption Agreement: Yes ______ No ______

Particulars: ____

Brief Description on Desired
Disposition of Interest: ____

____

Key-Man Insurance

Employee	Face Value	Cash Value

Life and Accidental Insurance

	Policy #1	Policy #2	Policy #3
Face Amount			
Type			
Policy No.			
Company			
Insured			
Owner			
Beneficiary			
Contingent Beneficiary			
Amount of Loan on Policy			
Cash Value			
Annual Premium			

Jointly Owned Property *(Other Than With Spouse)*

Description	Name of Joint owner	How Acquired	% of Consideration Furnished	Method of Proving Co-Owner' Contribution	Current Value

Property Owned Jointly With Spouse

Description	Original Cost Plus Improvements	Current Value

General Powers of Appointment

Instrument Conferring Power	Date Power Created	Value of Property Subject to Power
____________	____________	____________
____________	____________	____________
____________	____________	____________
____________	____________	____________

Note: Obtain copies of instruments creating power.

Retirement, Disability and Death Benefits

Information about pension, profit-sharing, stock bonus, Keogh, IRA or deferred compensation plan:

Company	Type of Plan	Benefits	Beneficiary

Annuities

Type of Plan	Annuity or Lump Sum Payout	Designated Beneficiary	Estate Owner's Contribution	Approx. Value

Gift Information

1. Trusts created (grantor, beneficiaries, powers and rights retained, value of gift, trustee, term, reversion, present value):

____

____

2. Totten trusts created (donor, owner, beneficiary, date of deposit, value of deposit, present value):

____

____

3. Existing custodial accounts created (donor, date, custodian, minor, minor's age, value of gift, present value):

____

____

4. Other Gifts:

	Owner	Spouse
(a) Contribution to joint property:		
(b) Nominal transfers:		
(c) Other gifts over $10,000:		
(d) Gift tax returns filed; indicate what years:		
(e) Unified credit used:		
(f) Regular non-charitable gifts:		
(g) Regular tithing:		
(h) Other regular charitable gifts:		
(i) Gifts within past 3 years:		

5. Foundations created (name, state purpose, motive for creating; obtain charter by-laws and exemption letter):

____

____

6. Foundation activities (foundation name, position, compensation, pension information, if any):

____

____

SUMMARY OF ASSETS

Use current market values; insert brief description as appropriate; if joint assets are substantial, indicate source of funds; indicate which assets, if any, are held by either spouse for the other; indicate each spouse's community property assets under appropriate column.

	Owner	Spouse	Joint
1. Cash funds:	$__________	$__________	$__________
2. Checking accounts:	$__________	$__________	$__________
3. Savings accounts:	$__________	$__________	$__________
a. Own name:	$__________	$__________	$__________
b. In trust for others:	$__________	$__________	$__________
4. Time deposits:	$__________	$__________	$__________
5. Marketable securities:			
a. Stocks:	$__________	$__________	$__________
b. Bonds:			
(i) Tax exempt:	$__________	$__________	$__________
(ii) U.S. bonds eligible for estate tax payment:	$__________	$__________	$__________
(iii) Savings:	$__________	$__________	$__________
(iv) Other:	$__________	$__________	$__________
c. Mutual fund shares:	$__________	$__________	$__________
d. Investment club interest:	$__________	$__________	$__________
e. Money market funds:	$__________	$__________	$__________

6. Mortgages, leases, copyrights, trademarks, patents, franchises: $________ $________ $________

7. Oil and gas interests: $________ $________ $________

8. Foreign assets: $________ $________ $________

9. Business interests: $________ $________ $________

10. Employee benefits:

    a. Deferred compensation: $________ $________

    b. Group life insurance: $________ $________

    c. Post-death salary compensation: $________ $________

    d. Stock options: $________ $________

    e. Restricted stock: $________ $________

    f. Pension plan contribution: $________ $________

    g. Vested employer's contribution: $________ $________

    h. Profit-sharing plan contribution: $________ $________

    i. Vested employer's contribution: $________ $________

    j. Savings plan contribution: $________ $________

    k. Vested employer's contribution: $________ $________

    l. Other benefit plans: $________ $________

11. Tangibles:

a. Cars, trailers, and other motor vechicle: $________ $________ $________

b. Boats and aircrafts: $________ $________ $________

c. Personal effects, jewelry, furs: $________ $________ $________

d. Collections, works of art: $________ $________ $________

e. Household effects: $________ $________ $________

f. Office Contents: $________ $________ $________

g. Guns, pets, and other hobby equipment: $________ $________ $________

h. Farm machinery and livestock: $________ $________ $________

12. Real estate (obtain title papers; show value less mortgage): $________ $________ $________

13. Co-op or condominium (obtain papers; show value less mortgage): $________ $________ $________

14. Real estate syndicate investments (obtain papers): $________ $________ $________

15. Life insurance: $________ $________ $________

a. Estate tax value of policies on self, excluding group: $________ $________ $________

b. Cash value of policies on others: $________ $________ $________

c. Face amount of policies on others:	$	$	$
16. Union or other death benefits:	$	$	$
17. Literary and theatrical properties:	$	$	$
18. Taxable beneficial interests in estates and trusts created by others (obtain instruments):	$	$	$
19. Taxable interests in self-created trusts:	$	$	$
20. Powers of appointments (obtain instruments):	$	$	$
21. Expectancies (describe):	$	$	$
22. Taxable custodianships (under gifts to minor acts):	$	$	$
23. Cemetery plot:	$	$	$
24. Social Club bond:	$	$	$
25. Property held as nominee for others:	$	$	$
26. Other assets (e.g., annuities, insurance settlement proceeds, private annuities, charitable annuities, installment sale contracts, crops, receivables, claims, etc.):	$	$	$
TOTAL ASSETS:	$	$	$

LIABILITIES

Indicate amount, creditors, and repayment provisions where appropriate.

	Owner	Spouse	Joint
1. Fixed liabilities:			
a. Taxes accrued:	$__________	$__________	$__________
b. Margin accounts:	$__________	$__________	$__________
c. Bank loans:	$__________	$__________	$__________
d. Installment contracts:	$__________	$__________	$__________
e. Other secured (indicate desired source of payment of insurance loans):	$__________	$__________	$__________
f. Accounts payable:	$__________	$__________	$__________
g. Other unsecured:	$__________	$__________	$__________
h. Leases:	$__________	$__________	$__________
i. Charitable pledges:	$__________	$__________	$__________
j. Notes endorsed:	$__________	$__________	$__________
k. Lawsuits:	$__________	$__________	$__________
l. Guarantees:	$__________	$__________	$__________
m. Judgments against:	$__________	$__________	$__________
Total liabilities:	$__________	$__________	$__________
2. Contingent liabilities:	$__________	$__________	$__________

3. Present fiduciary positions that may impose liability or accountability (obtain documents): $__________ $__________ $__________

ESTIMATING THE TAX BURDEN

The following worksheets can now be used to estimate the potential tax liability upon the death of each spouse.

Balance Sheet Summary

Estimated Gross Assets

	Estimated Fair Market Value	
	Husband's Assets	Wife's Assets
Bank Accounts & Savings Accounts	$__________	$__________
Stocks and Bonds	__________	__________
Real Estate	__________	__________
Life Insurance (face amount)	__________	__________
Business Interests	__________	__________
Other Assets	__________	__________
Total Gross Estate	$__________	$__________

Note: Allocate joint property with rights of survivorship based on actual contribution of each or in such accounts in the names of husband and wife, one-half to each.

Estimated Liabilities

Unsecured Notes	$__________	$__________
Notes Secured by Mortgages	__________	__________
Notes Secured by Life Insurance	__________	__________
Taxes Outstanding	__________	__________
Other Liabilities	__________	__________
Total Liabilities	$__________	$__________
Net Worth	$__________	$__________

FEDERAL ESTATE TAX ESTIMATE ON THE DEATH OF THE FIRST TO DIE

	Husband	Wife
Total Estimated Gross Assets	$__________	$__________
Less: Estimated Liabilities	$__________	$__________
Adjusted Gross Estate	$__________	$__________
Less: Marital Deduction	$__________	$__________
Taxable Estate	$__________	$__________
Plus: Adjusted Taxable Gifts (made after 12/31/76)	$__________	$__________
Tentative Tax Base	$__________	$__________
Estate Tax on Tentative Tax Base	$__________	$__________
Less: Credit for Gift Taxes Paid on Adjusted Taxable Gifts	$__________	$__________
Estate Tax Before Unified Credit	$__________	$__________
Less: Unified Credit (reduced by 20% of Gift Tax Specific Exemption claimed for gifts between 9/9/76 and 12/31/76)	$__________	$__________
Federal Estate Tax	$__________	$__________
Less: State Death Tax Credit	$__________	$__________
Federal Estate Tax Due	$__________	$__________

FEDERAL ESTATE TAX ESTIMATE ON THE DEATH OF THE SECOND TO DIE

	Husband	Wife
Total Estimated Gross Assets	$__________	$__________
Add Assets from Deceased Spouse	$__________	$__________
Total Gross Estate	$__________	$__________
Less: Estimated Liabilities	$__________	$__________
Taxable Estate	$__________	$__________
Plus: Adjusted Taxable Gifts (made after 12/31/76)	$__________	$__________
Tentative Tax Base	$__________	$__________
Estate Tax on Tentative Tax Base	$__________	$__________
Less: Credit for Gift Taxes Paid on Adjusted Taxable Gifts	$__________	$__________
Estate Tax Before Unified Credit	$__________	$__________
Less: Unified Credit (reduced by 20% of Gift Tax Specific Exemption claimed for gifts between 9/9/76 and 12/31/76)	$__________	$__________
Federal Estate Tax	$__________	$__________
Less: State Death Tax Credit	$__________	$__________
Federal Estate Tax Due	$__________	$__________

SUMMARY OF TOTAL TAXES

If husband dies first:

Federal estate tax due on his death	$________
State tax on his death	$________
Total	$________
Federal estate tax due on wife's subsequent death	$________
State tax on wife's subsequent death	$________
Total	$________
Total taxes on both deaths	$________

SUMMARY OF TOTAL TAXES

If wife dies first:

Federal estate tax due on her death	$________
State tax on her death	$________
Total	$________
Federal estate tax due on husband's subsequent death	$________
State tax on husband's subsequent death	$________
Total	$________
Total taxes on both deaths	$________

ESTATE PLANNING QUESTIONNAIRE

Questions you should ask yourself:

1. Do you want to make a specific bequest of personal effects?

Describe Item	Primary Beneficiary	Contingent Beneficiary
________	________	________
________	________	________

2. Do you want to leave any specific bequests of money or property to friends, relatives or others?

Amount	Primary Beneficiary	Contingent Beneficiary
________	________	________
________	________	________

3. List any charitable bequest you wish to make:

Charity	Item/Amount
________	________
________	________

4. Do you want to leave any real property to any person? Subject to mortgage? ________.

Description of Property	Primary Beneficiary	Contingent Beneficiary
________	________	________
________	________	________

5. If you and your spouse were to die prematurely, should the children receive their inheritance at the age of majority or should they wait till they are older? Should the property be kept in a trust to provide professional management?

____

____

6. Do any of your children have any special educational, medical or financial needs?

____

7. Have you made any substantial gifts in the past or placed property in joint names? Do you contemplate making future lifetime gifts?

---

8. Do you want to leave your body or organs to science or to be used for transplant purposes?

---

9. Do you own any insurance on the lives of others? Who should be the beneficiaries of this insurance?

---

10. Who do you want to serve as your executor?

---

11. Do you want to name a guardian of your minor children if your wife is not alive?

---

12. Is taking an unlimited marital deduction a desirable option for you? Have you computed your taxes taking into consideration unified credit against federal estate and gift taxes?

---

13. Do you want to leave the marital deduction share in trust or outright?

---

14. If it is to be left in trust, what portion of it will be allocated to Trust A (i.e., marital deduction trust)?

What portion of it will be allocated to Trust C (i.e., "QTIP" trust)?

---

15. Will the executor be directed to elect the Trust C assets as "QTIP" property?

---

16. If a portion is to be left in Trust C, who will receive the assets of this trust on the wife's subsequent death?

17. If a portion is to be left in Trust A, what type power of withdrawal do you want your wife to have?

$_______________ or _______________ per cent.

18. Do you want your wife's right in Trust B (i.e., equivalent exemption trust) to terminate on remarriage?

____

19. Do you want the income of Trust B sprinkled among your wife and children or paid only to your wife?

____

20. After your wife's interest in Trust B terminates, how should its assets be distributed?

____

21. Do you or your wife own any substantial separate property acquired prior to marriage?

____

22. Have you or your wife received any substantial gifts or inheritances?

____

23. Have you lived or owned any property in any community property state (California, Texas, New Mexico, Arizona, Washington, Louisiana, Nevada and Idaho)? List assets brought into this state.

____

24. Are you or your wife the beneficiary under any trust? Do you or your wife have any powers of appointment?

____

Will - An Essential Step in Estate Planning 3

WHY YOU SHOULD HAVE A WILL

Regardless of the size of your estate, a will should be an integral part of your estate plan. There are many reasons why one puts off making a will. Among these reasons: Procrastination; superstitious belief that preparing the will will hasten one's demise; an erroneous belief that without a will one may be able to avoid probate or avoid death taxes; the general reluctance to face the legal realities of the inevitable death. No matter what the reason, a will may be one of the most important documents you'll execute during your lifetime. In this chapter, we'll examine some of the benefits of making a will and discuss various clauses that make up the will.

BENEFITS OF MAKING A WILL

Choose Your Beneficiaries

When an estate owner dies without a will (intestate) or with an ineffective or invalid will, he loses the right to name the beneficiaries who'll inherit his estate. The property is distributed according to the state's intestate laws. The result might be far from what you had in mind and may prove costly not only to the estate but also to your loved ones. Contrary to what many people believe, a spouse does not automatically inherit the estate. In most states the law provides that children or relatives are entitled to up to two-thirds of the property. So the relations whom the decedent didn't even know or didn't desire to have as beneficiaries may well inherit a portion of the decedent's estate.

Illustration: In New York state, if a person dies without a will, and has no children, the wife will inherit only $25,000 plus one-half of the estate; the balance goes to the parents of the decedent, if they're living. If the decedent had one child, the wife will receive $4,000 plus one-third of the estate and the balance to the children. If the decedent had no spouse but was survived by children, they'll inherit his property. If he had neither spouse nor children, his estate will be distributed to his parents, if they're living. If they are not living, the decedent's brothers and sisters or their children will inherit the estate. If none of the above relatives are living, then the property will go to the grandparents and, if none, to the next of kin.

Illustration: Tom and Mary, a childless couple, had $250,000 in assets - including stocks, bonds, savings accounts, a home in Pennsylvania, and a small business. As the result of a fatal car accident Tom died instantly, and Mary survived him by a few hours. Since neither had wills, all of their assets passed according to the intestate laws of Pennsylvania. Since Mary survived Tom, all jointly held property passed to Mary's sole heir - her brother - who never got along with Tom. Although Tom's brother-in-law was the last person in the world that he wanted as beneficiary of his assets, the real tragedy was that neither of Tom's two children from a previous marriage was able to obtain any of Tom's jointly held assets. All they were entitled to was a portion of his personal belongings.

Provide for Particular Needs of Family Members

As we've seen above, the state's intestate laws are very inflexible and do not take into account differing needs of the family members. With a will, one can provide for particular needs of individual members of the family. For example, rather than treating all children equally, you can give greater financial security to a mentally or physically disabled child. By the same token, a child that is independently wealthy does not need to be taken care of so well. A will can provide for a personalized, flexible plan of distribution that a court applying the intestate laws of the state cannot provide.

Appointment of Executor and Trustee

In your will, you can nominate a person you trust to be executor of your estate. This may be your wife, an adult child or a close friend. The court will generally confirm such a nomination unless the executor is unable or unwilling to serve. The executor you have chosen will be intimately familiar with your family situation and will be responsive to their specific needs. In the absence of a will, a court will be asked to appoint an administrator who may not have the best interests of the family at heart. Similar to the appointment of an executor, a person may be appointed to serve as trustee to manage the principal of a trust established by the decedent.

More important, in your will you can grant the executor sufficient powers that will make the administration of the estate efficient and smooth. A court appointed administrator is restricted by law as to what he can and can't do without specific court approval. But your executor can be empowered with wide ranging powers to suit your particular circumstances without undue court intervention.

Waiver of Bond Requirement

A significant benefit of making a will lies in the fact that it not only allows you to appoint a person of your choice to serve as executor but it also allows you to waive any bonding requirement. A court appointed administrator is required to post a bond cost of which comes out of your estate. The bond must be renewed annually until the estate is settled which may take several years.

Appointment of Guardian for Minor Children

A will enables you to nominate a person who would be guardian of your minor children. Without a will, you have no say in who would be their guardian. A guardian may be of the minor's person as well as property. The same individual may serve in both capacities or two different individuals may be appointed. If a guardian is appointed by court, he will be subject to judicial supervision, will be required to post a bond and make periodic accountings to the court. The guardian, and ultimately the court, will have to approve any major expenditures or disposition of the minor's assets. Each child has a right to demand and receive a complete accounting from the guardian of all financial transactions involving his assets as soon as he reaches the age of majority. All this costs money and creates legal nightmares.

Avoid Unnecessary Taxation

Without a will the distribution of property is done according to the intestate laws of the state -without any regard to minimizing the death taxes. For example, without a will only a portion of the husband's property may go to his wife which would mean a loss of marital deduction. If a part of the property goes to elderly parents, the result often is double estate taxation on the same property. The property is first taxed in the estate of the decedent, then it may be taxed in the estate of the parents as heirs under intestate succession and then on to their heirs. A proper planning will avoid such double taxation and allow you to pass a larger portion of the estate to your loved ones.

DRAFTING THE WILL

1. Heading

Each will should have a heading with the Testator's name shown at the top.

> **LAST WILL AND TESTAMENT**
> **OF**
>
> ____
> ***Testator's Name***

2. Introductory Clause

This clause names the testator, the place of his residence and domicile and revokes all prior wills. If you've used a variation of your name at times, place after your name, "...also known as ____________________________,".

> **I,** ____,
> ***Testator's Name***
>
> **a resident of and domiciled in the** ______________________________
> ***City/Town***
>
> **of** ____________________________, **County of** ____________________________,
> ***Name of City/Town***
>
> **and State of** ____,
>
> **do hereby make, publish and declare this to be my Last Will and Testament, hereby revoking all wills and codicils at any time heretofore made by me.**

3. Identification of Spouse and Children

This clause establishes your marital status and your intention to include later-born and adopted children in your will. Unmarried persons can omit the first part of this clause or modify it appropriately.

I am married to ______________________________________,
Name of Spouse

and all references to ______________________________________
My Husband/My Wife

shall be to ____________________ .
him/her.

At the time of the execution of this will, I have the following children:

____
Names of Children

____

____

____

As used in this will, the words "my children" shall mean the above-named, and any others hereafter born to me, and in addition to my natural children, any child legally adopted by me.

4. Direction to Pay Debts

As we've discussed elsewhere, the direction to pay debts is unnecessary, but is often included in a will.

I direct that all my just debts, secured and unsecured, be paid as soon as practicable after my death, but my executor shall not be required to pay in advance of maturity any obligation of mine.

5. Direction to Pay All Taxes From Residuary Estate

Your will should specify who is to bear the burden of estate and death taxes. Generally, for tax reasons, the residuary estate is the best source for tax payment. Without a specific provision, the state laws often require that all estate assets share the tax burden proportionately. This may be disastrous for certain beneficiaries who may be forced to sell the assets to raise their share of taxes.

> **I direct that all estate, inheritance, succession, death or similar taxes (except generation-skipping transfer taxes), regardless of whether the assets in respect of which such taxes have been imposed pass under this will or otherwise, shall be paid out of my residuary estate passing under will, without apportionment.**

6. Specific Bequest of Personal Property

Often a person wishes to leave a specific item of personal effect to a designated person. Such a bequest should be stated unambiguously. You should also know the difference between a demonstrative bequest and a specific bequest. A demonstrative bequest gives the beneficiary a dollar amount equivalent of a specific property, or the gift of a specific property that is highly negotiable, such as stocks and bonds. For example, a bequest to someone of $10,000 worth of ABC Corporation common stock would be a demonstrative bequest. But a bequest of "all of my ABC Corporation common stock" would be a specific bequest.

Each of these bequests has a different implication. If the decedent does not own any ABC Corporation common stock at the time of his death, a demonstrative bequest of $10,000 in ABC Corporation common stock would require the executor to purchase the stock in order to satisfy the bequest. However, if the bequest was specific, since the decedent did not own any ABC Corporation common stock at the time of his death, the bequest would simply be adeemed and the beneficiary would take nothing.

There is also a third kind of legacy called general legacy. A general legacy is not a legacy of any particular item or money that can be specifically identified. It is satisfied out of the general assets of the testator's estate. An example of general legacy would be "I give and bequeath the sum of $1,000."

You may use the following clause to bequeath a specific item of personal effect to a specific person. You may bequeath as many different personal items to as many different persons as you wish.

> **I give and bequeath to ____________________________,**
> ***Name***
>
> **if he shall survive me, ____________________________.**
> ***e.g., my diamond ring***
>
> **If he shall not survive me, then I give and bequeath said ________________**
> ***e.g., my diamond ring***
>
> **to ____________________________ if he shall survive me.**
> ***Alternate Beneficiary***
>
> **If he shall not survive me, such property shall be added to and disposed of as my residuary estate.**

7. Specific Bequest of Stock

If you want to leave all or part of your stock portfolio to a person, you should use the following clause.

> **I give and bequeath to ____,**
> ***Name***
> **if he shall survive me, the stocks listed below:**
>
> | ***Shares*** | ***Stock*** |
> | --- | --- |
> | ____________ | ______________________________ |
> | ____________ | ______________________________ |
> | ____________ | ______________________________ |
>
> **If he shall not survive me, then this legacy shall lapse and become a part of the residue of my estate.**

8. Cash Legacy

Gifts of cash are quite common in wills, and you can include such provisions in your will with a clause shown below.

> **I give and bequeath to ____,**
> ***Name***
>
> **if he shall survive me, the sum of ____.**
> ***Dollars***
>
> **If he shall not survive me, then I give and bequeath said sum to ______________**
> ***Name***
>
> **________________________________, if he shall survive me. If he shall not**
>
> **survive me, then this legacy shall lapse and become a part of the residue of my estate.**

9. Forgiveness of a Debt

It's also somewhat common for debts to be forgiven in a will. Use the following clause.

> **I hereby forgive any and all debts owed to me at the time of my death**
>
> **by ____**
>
> ***Name***
>
> **including interest thereon, and I direct my executor to cancel any promissory notes or other evidences of his indebtedness to me.**

10. General Bequest of Personal and Household Effects

A general bequest of personal effects as shown below is routinely included in every will regardless of the other provisions of the will. The following clause bequeaths to the spouse all items of personal effects and alternately divides them among the children equally with the executor having the final determination of the appropriateness of the division. If you're an unmarried person or have no children, you should make suitable changes in the clause with regards to the beneficiary designation.

> **I give and bequeath all of my personal and household effects of every kind including but not limited to furniture, appliances, furnishings, pictures, silverware, china, glass, books, jewelry, wearing apparel, boats, automobiles, and other vehicles, and all policies of fire, burglary, property damage, and other insurance on or in connection with the use of this property, to**
>
> **____**
>
> ***Name of Spouse***
>
> **if he shall survive me. If my said husband shall not survive me, I give and bequeath all of said property to my children surviving me, in approximately equal share, provided however, the issue of a deceased child surviving me shall take per stirpes the share their parent would have taken had he or she survived me. If my issue do not agree to the division of the said property among themselves, my executor shall make such division among them, the decision of my executor to be in all respects binding upon my issue. If any beneficiary hereunder is a minor, my executor may distribute such minor's share to such minor or for such minor's use to any person with whom such minor is residing or who has the care or control of such minor without further responsibility and the receipt of the person to whom it is distributed shall be a complete discharge of my executor.**

11. Specific Devise of Real Property

Generally, a family's principal dwelling is held in joint tenancy with a survivorship provision. The joint ownership is usually considered the best way of passing the principal residence to the surviving spouse or the family at death. The provisions of joint tenancy will take precedence over your will.

Aside from the principal dwelling, you may also own other real property, such as a vacation or second home, undeveloped land, or an income-producing property. The following clause allows you to pass such real property to a beneficiary subject to any mortgage on it. Care should be taken to describe the property with particulars, such as the street address and, if necessary, by the legal description available on the county assessor or tax collector's records.

You should always specify in your will whether you wish to pass the property subject to any mortgage that may exist at the time of death. In the absence of any direction in your will, the distribution of real property, with or without mortgage, will be governed by applicable state laws. Laws on this matter vary from state to state. In some states, the devisee is entitled to have the mortgage paid off from the general estate; in others, real property passes subject to any existing mortgages. It is important that you make clear your intentions. In the following clause, the devise is made subject to any mortgage.

> **I give and devise to ____,**
>
> **if he shall survive me, any interest which I own at the time of my death in the**
>
> **house and lot located at____.**
>
> **If this property at the time of my death is subject to any mortgage, then this devise shall be subject thereto and the devisee shall not be entitled to have the obligation secured by such mortgage paid out of my general estate.**

12. Residuary Estate

This is the portion of the testator's estate remaining after the payment of all debts, taxes, funeral and administrative expenses, bequests and devises. Your will should include a clause to dispose of this residuary estate. It's normal for a person to provide for his relatives and friends through specific bequests and legacies, and then to leave the residuary estate to the primary beneficiaries, such as spouse and children.

> **All the rest, residue and remainder of my estate, of whatsoever kind and nature, and wheresoever situated, of which I may be seized or possessed or to which I may be entitled at the time of my death, not hereby otherwise effectually disposed of (including any property over which I have power of appointment) I give, devise and bequeath to**
>
> **____,**
> ***Name of Spouse***
>
> **if he shall survive me. If he shall not survive me, then I give, devise and bequeath the said residuary estate to ______________________**
>
> **______________________ equally.**
> ***Names (e.g., Children)***

13. Naming an Executor

Selection of an executor for the estate is the most important decision you'll be making in your estate planning process at this stage. Most people choose their spouse or an adult son or daughter to serve as executor. Often, it may be a close friend or a relative who'll be asked to serve as executor. Whoever you may choose to serve, you should waive the requirement of a bond of your executor. This will result in considerable saving for the estate. Equally important is the necessity of naming an alternate executor in the event the first executor cannot serve, or is disqualified from serving.

> **I hereby nominate, constitute and appoint ______________________**
> ***Name***
>
> **______________________ to be executor of this will and to serve without**
>
> **bond. If for any reason, he shall fail to qualify or cease to act as executor, then I nominate, constitute and appoint as executor**
>
> **______________________________________ to serve without bond.**
> ***Name***

14. Powers for Executor

It makes good sense to grant your executor wide powers to manage your estate. This would be easy to do if you have exercised good judgment in your choice of executor. By allowing your executor sufficient discretion, you'll free him from having to seek court approval at every turn. Many states, by statute, grant an executor certain authority and powers. The powers defined below would be in addition to the statutory powers.

In addition to, and not in limitation of all authority, power and discretion granted under applicable law, I authorize my executor

(a) to retain any assets which shall come into their possession as a part of my estate;

(b) to sell or exchange any property contained in my estate, whether real or personal, and in case of sale, to sell at public auction or privately, for cash or credit, and upon such terms and conditions as they may deem best;

(c) to invest and reinvest in such notes, bonds, debentures, shares of stock (common or preferred) or other securities or property as they, in their sole discretion shall deem best without being confined to such investments as are usual for the investment of trust funds;

(d) to register and take title to any securities or other property held in my estate in the name of any nominee selected by them, without disclosing this trust;

(e) to make division or distribution of my estate in kind, money or partly in both, without regard to the income tax basis of any such property, and their valuation of property for such purposes shall be final and binding on all parties interested therein;

(f) to compromise and adjust any claims against or in favor of my estate upon such terms and conditions as they deem proper;

(g) to borrow money and renew obligations for my estate without any personal liability on my executors in doing so, and for such purposes to pledge, mortgage, and encumber all or any portion of my estate.

15. Simultaneous Death

Every will should carry some provision for common disaster or simultaneous death. Most states have adopted the Uniform Simultaneous Death Act and this statute contains a presumption that the beneficiary predeceased the testator for purposes of the testator's own property. Many states have anti-lapse statutes that allow the issue or descendants of the beneficiary under the will some rights. If your will does not include a simultaneous death clause, the share of the beneficiary who perished in the common disaster may pass to his or her heirs under the law. Simultaneous death also causes other problems with regard to increased estate taxes, higher administrative expenses, and generally, does not result in disposition of property according to the testator's wishes. By including a clause in your will, you'll be overriding the effect of any state statutes.

If any beneficiary and I should die under such circumstances as would render it doubtful whether the beneficiary or I died first, then it shall be conclusively presumed for the purposes of my will that said beneficiary predeceased me.

The following states have adopted the Uniform Simultaneous Death Act. Even the states that have not specifically adopted this Act may have similar statutes on their books. Almost all the statutes, however, stipulate that the provisions contained in a will shall supercede the law.

Alabama, Arkansas, California, Connecticut, District of Columbia, Florida, Georgia, Iowa, Kentucky, Massachusetts, Maryland, Minnesota, Montana, New Jersey, North Carolina, New Mexico, New York, Oklahoma, Oregon, Pennsylvania, South Carolina, Tennessee, Texas, Utah, Washington, Wisconsin, Virginia.

16. Appointment of Guardian

If you have any minor children or expect to have any in the future, your will should provide for the appointment of a guardian. A guardian will be necessary for the minor's person as well as the minor's property. Same individual can serve in both capacities, but often it's advisable to name two separate individuals as guardians. Of course, you must discuss the situation with the possible guardians and obtain their consent to serve as such otherwise the courts may still be required to appoint a guardian.

If I have a minor child or children who survive me, then I hereby nominate, constitute and appoint ______________________________

Name

as testamentary guardian of the person and the property of such minor child or children and, to the extent allowed by law, direct that such guardian shall serve without bond. If the aforementioned guardian dies, resigns, refuses or is otherwise unable to act, then I appoint

____

Name

as testamentary guardian of the person and property of such minor child or children and direct that he shall also serve without bond.

17. Minor's Share Under Will

In case if you're survived by minor children, it is generally a good practice to include a clause in your will directing the executor to deliver the minor's share of property to the person under whose care the child is living. This may alleviate the involvement of a court-appointed guardian. Of course, in a large majority of cases, the minor children will be living with the surviving spouse.

> **Whenever in this will, payment is to be made to a minor, or property is to be delivered to such minor, I authorize my executor to pay or deliver the same, in his discretion, to the parent, or to the person having the care, custody or control of such minor, and the receipt of such payee shall be full acquittance to my executor.**

18. Against Will Contest

We've discussed in detail elsewhere in this Manual the possible usefulness of a clause that may discourage will contests. Even though such a clause may not absolutely prevent a will contest from a disinherited person, the presence of in terrorem clause (against will contest) in a will is well accepted and recommended by most estate planners.

> **If any beneficiary under this will in any manner, directly or indirectly, contests or attacks this will or any of its provisions, any share or interest in my estate given to the contesting beneficiary under this will is revoked and shall be disposed of in the same manner provided herein as if that contesting beneficiary had predeceased me without issue.**

19. Specific Bequest of Body or Organs

As we've noted elsewhere, donation of your body or specific organs should not be a part of your will for the simple reason that it's often too late to honor your wishes in the event your will is not discovered in time by appropriate authorities. You may, however, use the following clause in your will if you can be certain that your executor will be able to act swiftly to enforce your wishes.

> **I, desiring that my body or part thereof be made available upon my death for transplant or for storage until it can be used for transplanting, do hereby give and donate my body to**
>
> ______________________________
> *Name*
>
> ______________________, ______________________.
> *Address* *Telephone No.*
>
> **I hereby authorize any medical physician, surgeon or hospital to remove such parts of my body or to hold my body for such purpose.**

20. Specific Bequest to Cemetery for Perpetual Care

This clause allows the testator to provide for perpetual care of his cemetery lot. It is usually better to make these arrangements during lifetime.

> **I give and bequeath to** ______________________
> *Name of Cemetery*
>
> **the sum of** ______________________ **for perpetual care of my cemetery**
> *Dollars*
> **lot located therein.**

21. Testimonium Clause

The text of your will should immediately be followed by the testimonium clause which provides for the date of execution of the will and the testator's signature.

> **IN WITNESS WHEREOF, I have hereunto set my hand and affixed**
>
> **my seal this** __________ **day of** __________________, **19**_______ .
>
> ______________________
> *Testator*

22. Attestation Clause

As we've discussed elsewhere in connection with execution of a will, your will must be witnessed by at least two individuals (three in some states) and the strict formality of execution must be observed. The attestation clause below meets the statutory requirements.

The foregoing will consisting of ___________ typewritten pages, this
Number
included, was this ______________ day of ______________ 19 _____ signed,

sealed, published and declared by the said testator as and for his Last Will and Testament in our presence, and we, at his request and in his presence, and in the presence of each other, have hereunto subscribed our names and witnesses on the above date.

__________________________ **of** ________________________________
Name *Address*

__________________________ **of** ________________________________
Name *Address*

__________________________ **of** ________________________________
Name *Address*

23. Proof of Will

It is recommended that you make your will "self-proving." In many states, a notarized will may be entered for probate without the affidavits of the witnesses or the appearance of any witness. Such a procedure is highly recommended since the witnesses in many cases may be hard to find or they themselves be dead by the time the will is offered for probate. Even in states where there is no provision for self-proving wills, it's a good practice to use the notary. The procedure of notarizing a will is simple enough at the time of execution, and will help avoid any future problems.

The following states permit the use of a self-proving affidavit.

Alabama, Alaska, Arizona, Arkansas, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Indiana, Iowa, Kansas, Kentucky, Maine, Minnesota, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, North Dakota, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Texas, Utah, Virginia, Washington, West Virginia, and Wyoming.

A will may be made "self-proving" either at the time it is executed by acknowledgment before a notary public or, as some states permit, at any time after its execution by acknowledgment by the testator and witnesses before a notary public. The following two sample forms are often used for the purpose.

A will may be simultaneously executed, attested, and made self-proved, by acknowledgment thereof by the testator and affidavits of the witnesses, each made before an officer authorized to

administer oaths under the laws of the state in which execution occurs and evidenced by the officer's certificate, under official seal, attached or annexed to the will in substantially the following form:

State of ____________________

County of __________________

I, ______________________________, the testator, sign my name

to this instrument this ____________ day of ______________, 19_____,

and being first sworn, declare to the undersigned authority that I sign and execute this instrument as my last will, that I sign it willingly or willingly direct another to sign for me, that I execute it as my free and voluntary act for the purposes therein expressed, and that I am eighteen years of age or older, of sound mind, and under no constraint or undue influence.

____
Testator

We, _____________________________, _________________

____________________, _________________________________,

the witnesses, sign our names to this instrument, and being first sworn, declare to the undersigned authority that the testator signed and executed this instrument as his last will, that he signed it willingly or willingly directed another to sign for him, that each of us, in the presence and hearing of the testator, signs this will as a witness to the testator's signing, and that to the best of our knowledge the testator is eighteen years of age or older, of sound mind, and under no constraint or undue influence.

____
Witness

____
Witness

____
Witness

Subscribed, sworn to, and acknowledged before me by_____________

_________________, the testator, and subscribed and sworn to before me

by ____________________________________, _______________

______________________and________________________,

witnesses, this _________ day of ___________, 19_____.

(SEAL)

Signed______________________

____

(Official capacity of officer)

In some states, an attested will may at any time after its execution be made self-proved, by the acknowledgment thereof by the testator and the affidavits of the witnesses, each made before an officer authorized to administer oaths under the laws of the state in which the acknowledgment occurs and evidenced by the officer's certificate, under official seal, attached or annexed to the will in substantially the following form:

State of __________________

County of ________________

We, _____________________________________, _____

________________________, _________________________,

and ______________________________, the testator and the

witnesses, respectively, whose names are signed to the attached or foregoing instrument, being first duly sworn, do hereby declare to the undersigned authority that the testator signed and executed the instrument as his last will and that he had signed willingly or directed another to sign for him, and that he executed it as his free and voluntary act for the purposes therein expressed; and that each of the witnesses, in the presence and hearing of the testator, signed the will as witness and that to the best of our knowledge the testator was at that time eighteen or more years of age, of sound mind, and under no constraint or undue influence.

____

Testator

____

Witness

____
Witness

____
Witness

Subscribed, sworn to and acknowledged before me by ____________ ______________, the testator, and subscribed and sworn to before me by ______________________________________, __________________ ______________________, and __________________________________, witnesses, this ______________ day ______________, 19______.

____

Signed______________________________
(SEAL) *(Official capacity of officer)*

Testimonium Clause

I, ________________________________, the testator, sign my name to this instrument this ___________ day of ____________, 19 _____, and being first duly sworn, do hereby declare to the undersigned authority that I sign it willingly, that I execute it as my free and voluntary act for the purposes therein expressed, and that I am eighteen years of age or older, of sound mind, and under no constraint or undue influence.

Attestation Clause

We, ______________________________, and ______________

______________________________, the witnesses, sign our names to this instrument, being first duly sworn and do hereby declare to the undersigned authority that the testator signs and executes this instrument as (his) (her) last will and that (he) (she) signs it willingly, and that each of us, in the presence and hearing of the testator, hereby signs this will as a witness to the testator's signing, and that to the best of our knowledge the testator is eighteen years of age or older, of sound mind, and under no constraint or undue influence.

________________________ of __________________________
Name *Address*

________________________ of __________________________
Name *Address*

Notarial Clause

State of ______________________

County of ____________________

Subscribed, sworn to and acknowledged before me by _____

________________________, the testator, and ________________

______________, ______________________________, the witnesses,

this __________ day of __________, 19_____.

(Seal) *(signed)* ______________________

____
(Official capacity of officer)

Miscellaneous Clauses and Execution of Your Will

4

MISCELLANEOUS CLAUSES IN YOUR WILL

Debts and Funeral Expenses

In nearly all jurisdictions, the executor of the estate is required to pay all debts and funeral expenses of the decedent as a matter of law. A typical clause to provide for the payment of debts and funeral expenses may be as follows:

> **I direct that all my just debts and funeral expenses be paid as soon after my death as may be practicable.**

Such clauses, however, serve no useful purpose and may even create problems and confusion. Since the law in most jurisdictions requires that such payments be made, your saying it in the will make no difference. Many estate planners discourage the use of this clause on the grounds that it may actually be construed as a directive to pay debts that are barred by the statute of limitations, or even debts that are not legally enforceable. Such a clause may even be interpreted as to create an implied trust in the creditors. In addition, it creates an ambiguity as to whether certain debts should be paid out of the estate or be borne by legatees of specific assets which carry these obligations.

Therefore, a directive to pay debts may be surplusage in that it may not diminish the statutory rights of a creditor, but may not be surplusage to the extent it enhances the statutory rights of a creditor, affects a gift to a devisee, or modifies the duties of the executor. Many well-written wills omit any reference to debts and funeral expenses. This should not, however, prevent you from directing your executor to pay certain specific obligations. A will may ask the executor to pay a debt owed to a friend or a pledge made to charity. Such directions may also benefit the estate by qualifying the payments as tax deductions.

Funeral Instructions

Many people include in their wills the specific instructions about the manner, time and place of burial and the disposition of their remains. Some people prefer cremation or desire to donate their organs or body for scientific use or for transplant purposes. A will is not considered a good place for such instructions. Too often a testator is buried before his will is discovered.

There are a couple of other ways to leave burial instructions. One is to include them in a codicil to the will, and give a copy of the codicil to the responsible members of the family or to the designated executor. Another way is to put burial instructions in a separate written letter. Remember, your instructions concerning the burial or the disposition of your body are not considered testamentary dispositions since there are no property rights involved. Nonetheless, most states require that the

written burial instructions of a deceased person "shall be faithfully and promptly performed." You should leave such instructions in a safe and readily accessible place or give them to your spouse or next of kin.

You may want to use something similar to the following:

> **I direct that my funeral be conducted by Little Company of Mary Chapels according to the rites of the Roman Catholic Church, and that my remains be interred in the plot I have purchased in Evergreen Cemetery in Lincoln, Nebraska.**

Disinheritance

Many people harbor a misconception that, in order to disinherit a person, the person has to be given a nominal amount of $1. This certainly is not true. The law does not force you to leave a certain share of your estate to your children or other members of your family. You may have a moral obligation to provide for your children, but this does not turn into a legal duty. There is, however, an exception with regard to the rights of the surviving spouse. Most states dictate that your surviving spouse share in your estate at least as much as he or she would have received if you had died intestate.

Nevertheless, it is recommended that if you wish to disinherit a particular member of your family, you should make specific mention in your will of the individual and your desire to disinherit him or her. This would lessen the chances of a will contest on the grounds of testamentary capacity. If you have disinherited your child by name in your will, the state law cannot grant the child a share equal to his or her intestate share. This would apply even to some other assets that you may not have disposed of in your will. By making a mention in the will, you would remove any ambiguity as to your true intentions.

> **Insofar as I have failed to provide in this Will for any of my issue, whether born before or after the date of this will or before or after my death, such failure is intentional and not occasioned by accident or mistake.**

No Contest

Many wills contain a provision that anyone who challenges the validity of the will shall automatically lose his share under the will. This is usually done to discourage a disgruntled heir from starting a legal battle over the terms of the will. Most wills contain such a clause and it is recommended that your will should contain some such admonishment, but you should keep in mind that a no contest clause may not always avoid a contest.

A person who has been disinherited in the will has nothing to lose by contesting the will. If he wins the contest the entire will including the no contest clause will be considered invalid, and he could not be punished for starting the contest. If he loses, he hasn't lost anything. A will contest helps only someone who would inherit a larger share under the state intestacy laws. If a will is set aside, the

state will distribute the estate as if the decedent had left no will.

> **If any beneficiary under this will in any manner, directly or indirectly, contests or attacks this will or any of its provisions, any share or interest in my estate given to the contesting beneficiary under this will is revoked and shall be disposed of in the same manner provided herein as if that contesting beneficiary had predeceased me without issue.**

Anatomical Gifts

Many states have adopted the Uniform Anatomical Gift Act which deals with the donation of all or part of the human body. Presently there is a great need for specific body organs for transplantation purposes. You can also donate your body to a medical school for research. Many people are not aware that there exists a very simple procedure in almost all the states to accomplish such a humanitarian act. If you want to leave your body or organs to help humanity, you must take actual steps, otherwise it won't happen.

Under the Uniform Anatomical Gift Act, a gift of a whole body or certain organs can be made either by executing a Uniform Donor Card or by a will. If made by a will, the gift becomes effective upon the testator's death without waiting for probate. Also, the donation is effective regardless of the validity of the will. You can deliver your Donor Card or your instructions in the will to any hospital or medical facility or an organ bank or a specific individual needing the transplant. In many states, specific bequest of body or an organ may be noted on the person's driver's license.

You can revoke your donation by delivering to the same facility or the individual a signed statement of revocation. If the donation was included in your will, you can revoke it by preparing a codicil.

> **The following states have adopted the Uniform Anatomical Gift Act: Alabama, Arkansas, California, Colorado, District of Columbia, Florida, Illinois, Indiana, Massachusetts, Maryland, Minnesota, Missouri, North Carolina, North Dakota, New Mexico, New York, Ohio, Oregon, Pennsylvania, Tennessee, Texas, Utah, Virginia, Washington, and Wisconsin.**

Spouse's Elective Share

Often a question arises whether you can disinherit anyone in your will. You can disinherit your children, parents or anyone else but you cannot disinherit your spouse. Most jurisdictions allow a spouse to elect against the will and receive a proportion of the estate that he or she would have received if the testator had died intestate rather than with a will that provides for less than his or her elective share. Such is the law in all common-law states (i.e., non-community states) except Georgia, Missouri and Rhode Island. The elective share is not necessary in a community property state because the surviving spouse inherits one-half of the community property outside the will. In determining the

elective share, courts will look beyond the will, such as insurance policies of which the surviving spouse is the beneficiary, transfer of any separate property, or the testator's share of joint property to the spouse.

A number of states (Alabama, Alaska, Arizona, California, Colorado, Connecticut, Delaware, Florida, Idaho, Maine, Michigan, Mississippi, Missouri, Montana, Nebraska, New Mexico, North Dakota, Pennsylvania, Utah, Virginia, Washington) make provision for the pretermitted spouse - that is, they permit a spouse who is not mentioned in the will to take an intestate share of the estate. This situation is slightly different from that of the spouse who is mentioned in the will, but who is supposed to inherit less than his or her statutory elective share.

Illustration: Harry Carlson , married to Alice Marie, leaves a will executed in 1986. They have no children. The will does not mention Alice Marie, leaving all his property to his brother, two nieces and a charity. If the Carlsons live in one of the states having a pretermitted-spouse statute, Alice Marie will be entitled to an intestate share of the estate. If they live in one of the other states, she may be entitled to elect against the will.

CONTINGENCY PROVISIONS IN A WILL

Often a person wishes to leave bulk of his estate to his wife provided she will be around to enjoy it. But there's always a possibility that both husband and wife will die in a common disaster and there would be no way to determine with any certainty who died first. There are important tax and non-tax considerations in such an eventuality. Do you want your estate to pass to your wife even though she survives you by only a few days? If there are no children, do you want your wife's relatives to inherit the estate? What about the tax consequences?

Some of these questions can be answered by the use of one or more of the following clauses in a will:

- **Simultaneous Death Clause**
- **Common Disaster Clause**
- **Conditional Survivorship Clause**

Simultaneous Death Clause

When it cannot be determined with any degree of certainty who died first, either the provisions of the Uniform Simultaneous Death Act or a simultaneous death provision incorporated in the will, will govern. Under the Uniform Probate Code, unless the spouse survives by at least 120 hours, both spouses are deemed to have died simultaneously.

Under the Uniform Simultaneous Death Act, unless there's evidence to the contrary, the estate of each person passes as if he had survived the other. In other words, if a husband and wife appear to have died simultaneously, the husband's property passes as if he had survived his wife and the wife's as if she had survived the husband.

Generally, if the husband's and wife's estates are approximately equal in value, it's a good idea to let the statutory presumption stand, i.e., each spouse is deemed to have survived the other. However if, for instance, husband's estate is considerably larger than wife's, it may make more sense to dictate that the wife be presumed to have survived him. This would equalize the estate of husband and wife and thus save estate taxes.

Common Disaster Clause

Jones and his wife are in a car accident. Jones dies immediately but his wife doesn't die until two weeks later. The spouses didn't die simultaneously but they did die in a common disaster. Most estate planners, as a rule, do not recommend a common disaster clause in a will. A common disaster clause brings uncertainty to the immediate resolution of the estate. It makes it difficult to decide whether the beneficiary is or isn't entitled to his share. As a result, the estate may be in limbo for some time.

Conditional Survivorship Clause

A conditional survivorship clause is an answer to the problems raised by a common disaster clause. Such a clause might read: "If my wife dies within six months after my death, my property shall pass under this will as if she had predeceased me." Such a clause has the advantage of preserving the marital deduction if she survives beyond six months. If she does die within six months, she doesn't get the property and naturally there's no marital deduction. But the cost of probating two estates and the possibility of extra taxes as a result of property passing through two estates instead of one within a short time is avoided.

If a will contains a clause making the bequest contingent upon the spouse "surviving the probate," there's a good chance that the marital deduction will be lost. Probate in most circumstances takes longer than six months which is the outside limit for preserving the marital deduction.

A Tax Saving Suggestion: If their estates are unequal, it might be wise to have a conditional survivorship clause in the estate of the poorer spouse and no clause presuming the survivorship of the richer spouse. A reverse presumption presuming the survivorship of the poorer spouse and no conditional survivorship clause might be the wiser course in the estate of the richer spouse.

EXECUTION OF THE WILL

A carefully drafted will serves no useful purpose if it's not properly executed. Each state has its own statutory requirements for the valid execution of a will. They differ in detail, but they all follow a certain basic pattern. We have summarized the general requirements and formalities that must be observed in the execution of your will. To some, these formalities may seem too onerous or ritualistic but you can't afford to overlook them. Remember, if questions are later raised regarding the validity of your will, you won't be around to furnish any proof.

1. Your will should be either a printed or typed document. Only a few states permit a handwritten will, known as holographic will, and several of them place stringent restrictions on its use.

2. Except for the signatures, everything on the will forms should be typed. The testator should sign the will. If he or she is unable to do so, another person can sign for him in his presence at his request. Of course, this signing should be observed by the witnesses.

3. The signature must follow the text of the will immediately and there should not be any blank space in between.

4. The will should be dated at the time of signing.

5. There must be at least two disinterested witnesses. Some states require three.

6. Your witnesses should not be beneficiaries, executors or trustees under the will, nor should they be spouses of beneficiaries, executors or trustees. Ideally, the witnesses should be acquainted with the testator.

7. Execution and Attestation. The testator and all of the witnesses should be together and remain together throughout the ceremony in one room, in sight and hearing of one another. The testator declares to the witnesses that the document in his hand is his last will and testament, and he asks them to attest "the execution of this will." The witnesses should observe the testator sign his will. The signature should be the customary signature of the testator, and should conform to the name as set forth in the will. Each witness then should sign his name and write his address on the will document in the testator's presence and in each other's presence.

8. Self-Proving Affidavit. More than 30 states permit "self-proving" wills which essentially means that the will will be presumed to have been executed according to the law and it will be admitted to probate without further proof or testimony of the witnesses. The states are: Alabama, Alaska, Arizona, Arkansas, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Indiana, Iowa, Kansas, Kentucky, Maine, Minnesota, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, North Dakota, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Texas, Utah, Virginia, Washington, West Virginia, and Wyoming. Even though your state may not be one of these states, it is advisable to follow the procedure to make the will self-proving; the process takes only a few minutes and may eliminate any future problems. Of course, a self-proving will is not immune from attacks due to lack of mental capacity, undue influence, fraud, forgery, etc.

It is important to realize that the proper execution of a will consists of two separate steps. In the first step, labeled above as Execution and Attestation, the testator and the witnesses sign the will in each other's presence. In the second step, the Self-Proving Affidavit is again signed by the testator and the witnesses in the presence of a notary public or some other officer authorized to administer oaths under the laws of the state who in turn sign and affix his official seal.

9. It is a good practice but certainly not necessary that the testator sign or initial each page of the will. All the pages should be fastened together securely.

10. Only the original will should be executed. Other copies may be conformed but no will should be executed in duplicate. Here's the danger: If after the testator dies, all of the executed copies can't be found, this may raise the presumption that he destroyed the lost copy or copies with the intent of revoking the will. This may provide a fertile ground to those disgruntled heirs who wish to contest

the will. The proponent of the will has the burden of proving that the will was not revoked.

11. Safekeeping. After execution, the will should be placed in a safe place. This could be the safe deposit box rented in the name of the spouse or executor of the will. This eliminates the possibilty that a court order would be necessary to open the safe doposit box of the testator to get to the will after his death. The testator should keep a conformed copy of the will in an easily accessible place. To facilitate the administration of the estate, he should attach an inventory of all property and where it can be found to the conformed copy. This inventory should be kept up to date and a copy should be sent to the executor of the will.

12. Should you destroy your prior wills? There's no clean cut answer to this question. If a prior will is not too different from the one you've just executed, it may be a good idea to hold on to it. If for some reason, your last will isn't admitted to probate, the prior will may be offered for probate. In most jurisdictions an invalid will doesn't revoke an earlier valid will and this may be more desirable than intestacy. Inasmuch as the two wills have consistent provisions - for instance, a particular heir has been disinherited in both wills - he will have little ground to contest the will. On the other hand, if there are substantial differences between the two wills, retaining the prior will may give the disgruntled heir ammunition to contest the most recent will.

Sample Wills 5

HOW TO WRITE YOUR OWN "CUSTOMIZED" WILL

The checklist and the instructions shown below can be used to create your own "customized" will. A sample will is also included in this chapter for your guidance.

Will Checklist

Note: The numbered clauses below refer to the clauses described in Chapter 3, Will - An Essential Step in Estate Planning.

X-Customarily used
O-Optional
XO-Customarily used option
R-Recommended

No.	Clause	
1.	Heading	X
2.	Introductory Clause	X
3.	Identification of Spouse and Children	R
4.	Direction to Pay Debts	O
5.	Direction to Pay All Taxes From Residuary Estate	R
6.	Specific Bequest of Personal Property	XO
7.	Specific Bequest of Stock	XO
8.	Cash Legacy	XO
9.	Forgiveness of a Debt	XO
10.	General Bequest of Personal and Household Effects	X

11.	Specific Devise of Real Property	XO
12.	Residuary Estate	X
13.	Naming an Executor	X
14.	Powers for Executor	X
15.	Simultaneous Death	X
16.	Appointment of Guardian	X
17.	Minor's Share under Will	O
18.	Against Will Contest	R
19.	Specific Bequest of Body or Organs	O
20.	Specific Bequest to Cemetery for Perpetual Care	O
21.	Testimonium	X
22.	Attestation	X
23.	Proof of Will	X

How to Use the Checklist

1. Each will clause is identified as customarily used (X), optional (O), customarily used option (XO), or recommended (R). The use of customarily used optional clauses would depend upon your individual situation or desires. For example, if you wish to leave a certain amount of cash to a relative or a friend in your will, you would use Clause 8 - Cash Legacy. On the other hand, if you wish to leave your body or organs to humanity, you would use Clause 19, which is an optional clause, and often is not included in a will. But customarily used clauses should be included in every will. These clauses constitute the principal body of the will and are necessary to establish the validity of the will. Recommended clauses will enhance the quality of your will and are generally used by estate planners.

2. The will clauses included in this chapter assume that the person referred to is a male. You should, however, change "he" to "she", and "his" to "her" as appropriate.

3. Once you have determined who the beneficiaries of your will are and what you wish to leave them, select the appropriate clause.

4. Type on a blank sheet of paper all the selected clauses in the order shown in the checklist. The typewritten will should be neat and error-free. Except for the signatures, everything should be

typed. You may follow the format shown in the sample will.

5. Once you've prepared the will, sign it in the presence of witnesses. Follow meticulously the procedure for proper execution of your will as explained in Chapter 4.

6. Now place the will in a safe place.

Writing of a will, like any legal instrument, requires professional skill and experience. If you need any assistance or have any questions regarding applicability to your particular situation, you should retain the services of a competent professional.

Sample Will

LAST WILL AND TESTAMENT

OF

____
Testator's Name

1. I, ____, a resident of and
Testator's Name

domiciled in the _______________________ of _______________________,
City/Town *Name of City/Town*

County of ____________________, and State of __________________, do hereby

make, publish and declare this to be my LAST WILL AND TESTAMENT, hereby revoking all wills and codicils at any time heretofore made by me.

2. I am married to ________________________________ and all references to
Name of Spouse

____________________________ shall be to __________________________.
My Husband/Wife *Him/Her*

At the time of execution of this will, I have the following children:

____
Name of Children

____

____

____

As used in this will, the words "my children" shall mean the above-named, and any others hereafter born to me, and in addition to my natural children, any child legally adopted by me.

3. I direct that all my just debts, secured and unsecured, be paid as soon as practicable after my death, but my executor shall not be required to pay in advance of maturity any obligation of mine.

4. I direct that all estate, inheritance, succession, death or similar taxes (except generation-skipping transfer taxes), regardless of whether the assets in respect of which such taxes have been

imposed pass under this will or otherwise, shall be paid out of my residuary estate passing under will, without apportionment.

5. I give and bequeath to ______________________________, if he shall survive me,
Name

the following property : ______________________________. If he shall not survive me,
Property

then I give and bequeath said ______________________ to ____________________
e.g., diamond ring

______________________, if he shall survive me. If he shall not survive me, such property
Alternate Beneficiary

shall be added to and disposed of as my residuary estate.

6. I give and bequeath to ______________________________, if he shall survive
Name
me, the stocks listed below:

______________________ ______________________________
Shares *Stocks*

______________________ ______________________________

If he shall not survive me, then this legacy shall lapse and become a part of the residue of my estate.

7. I give and bequeath to ______________________________, if he shall survive
Name

me, the sum of ______________________________. If he shall not survive me, then I
Dollars

give and bequeath said sum to ______________________________, if he shall survive
Name

me. If he shall not survive me, then this legacy shall lapse and become a part of the residue of my estate.

8. I hereby forgive any and all debts owed to me at the time of my death by ____________

______________________ including interest thereon, and I direct my executor to cancel
Name of Person

any promissory notes or other evidences of his indebtedness to me.

9. I give and bequeath all of my personal and household effects of every kind including but not limited to furniture, appliances, furnishings, pictures, silverware, china, glass, books, jewelry,

wearing apparel, boats, automobiles, and other vehicles, and all policies of fire, burglary, property damage, and other insurance on or in connection with the use of this property to ______________

________________________________, if he shall survive me. If my said husband shall not
Name of Spouse

survive me, I give and bequeath all of said property to my children surviving me, in approximately equal share, provided however, the issue of a deceased child surviving me shall take per stirpes the share their parent would have taken had he or she survived me. If my issue do not agree to the division of the said property among themselves, my executor shall make division among them, the decision of my executor to be in all respects binding upon my issue. If any beneficiary hereunder is a minor, my executor may distribute such minor's share to such minor or for such minor's use to any person with whom such minor is residing or who has the care or control of such minor without further responsibility and the receipt of the person to whom it is distributed shall be a complete discharge of my executor.

10. I give and devise to ________________________________, if he shall survive
Name

me, any interest which I own at the time of my death in the house and lot located at ______________

________________________________. If this property at the time of my death is subject to
Address

any mortgage, then this devise shall be subject thereto and the devisee shall not be entitled to have the obligation secured by such mortgage paid out of my general estate.

11. All the rest, residue and remainder of my estate, of whatsoever kind and nature, and wheresoever situated, of which I may be seized or possessed or to which I may be entitled to at the time of my death, not hereby otherwise effectually disposed of (including any property over which

I have power of appointment), I give, devise and bequeath to ________________________________,
Name (e.g., Spouse)

if he shall survive me. If he shall not survive me, then I give, devise and bequeath the residuary

estate to ____ equally.
Names (e.g., Children)

12. I hereby nominate, constitute and appoint ________________________________
Name

to be executor of this will and to serve without bond. If, for any reason, he shall fail to qualify or

cease to act as executor, then I nominate, constitute and appoint as executor ______________
Name

________________________________ to serve without bond.

13. In addition to, and not in limitation of all authority, power and discretion granted under applicable law, I authorize my executor:

(a) to retain any assets which shall come into his possession as a part of my estate;

(b) to sell or exchange any property contained in my estate, whether real or personal, and in case of sale, to sell at public auction or privately, for cash or credit, and upon such terms and conditions as he may deem best;

(c) to invest and reinvest in such notes, bonds, debentures, shares of stock (common or preferred) or other securities or property as he, in his sole discretion shall deem best without being confined to such investments as are usual for the investment of trust funds;

(d) to register and take title to any securities or other property held in my estate in the name of any nominee selected by him, without disclosing this trust;

(e) to make division or distribution of my estate in kind, money or partly in both, without regard to the income tax basis of any property, and his valuation of property for such purposes shall be final and binding on all parties interested therein;

(f) to compromise and adjust any claims against or in favor of my estate upon such terms and conditions as he may deem proper;

(g) to borrow money and renew obligations for my estate without any personal liability on my executor in doing so, and for such purposes to pledge, mortgage, and encumber all or any portion of my estate.

14. If any beneficiary and I should die under such circumstances as would render it doubtful whether the beneficiary or I died first, then it shall be conclusively presumed for the purposes of my will that said beneficiary predeceased me.

15. If I have a minor child or children who survive me, then I hereby nominate,

constitute and appoint ______________________________ as testamentary guardian
Name

of the person and the property of such minor child or children and, to the extent allowed by law, direct that such guardian shall serve without bond. If the aforementioned guardian dies, resigns, refuses

or is otherwise unable to act, then I appoint ______________________________
Name

as testamentary guardian of the person and property of such minor child or children and direct that he shall also serve without bond.

16. Whenever in this will, payment is to be made to a minor, or property is to be delivered to such minor, I authorize my executor to pay or deliver the same, in his discretion, to the parent, or to

the person having the care, custody or control of such minor, and the receipt of such payee shall be full acquittance to my executor.

17. If any beneficiary under this will in any manner, directly or indirectly, contests or attacks this will or any of its provisions, any share or interest in my estate given to the contesting beneficiary under this will is revoked and shall be disposed of in the same manner provided herein as if that contesting beneficiary had predeceased me without issue.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my seal this ________

day of ____________________, 19 ______.

____
Testator

The foregoing will consisting of ____________ typewritten pages, this included, was this
Number

_______________ day of _____________________, 19_______, signed, sealed, published and

declared by the said testator as and for her Last Will and Testament in our presence, and we, at her request and in her presence, and in the presence of each other, have hereunto subscribed our names as witnesses on the above date.

____________________________________ of ______________________________________
Name *Address*

____________________________________ of ______________________________________
Name *Address*

____________________________________ of ______________________________________
Name *Address*

AFFIDAVIT

STATE OF ______________________________ CITY
or
COUNTY OF ____________________________ TOWN ___________________________

Personally appeared (1) ____

(2) ____ and (3) _______________________________

who being duly sworn, depose and say that they attested the said will and they subscribed the same at the request and in the presence of the said testator and in the presence of each other, and the said testator signed said will in their presence and acknowledged that she had signed said will and declared the same to be her LAST WILL AND TESTAMENT, and deponents further state that at the time of the execution of said will the said testator appeared to be of lawful age and sound mind and memory and there was no evidence of undue influence. The deponents make this affidavit at the request of the testator.

(1) ___________________________________

(2) ___________________________________

(3) ___________________________________

Subscribed and sworn to before me this __________________ day of _____________, 19______.

(Notary Seal)

____
Notary Public

SAMPLE FORM

WILL OF SINGLE PERSON

The following sample will may be applicable to a single or unmarried person with a small to moderate estate. It contains specific clauses for cash bequests to Custodian under Uniform Gifts to Minors Act if beneficiaries are under twenty-one. Residuary estate is disposed of to specific individuals, if surviving; if not, to their issue.

I, ______________________________ [name], of ______________________ ________________[address], State of ________________________, declare this to be my last will and testament.

FIRST

(Prior Wills Revoked)

I revoke all my prior wills and codicils.

SECOND

(Tangible Personal Property)

I give all my tangible personal property in equal shares to ______________________ ________ [name of beneficiary], and ______________________________ [name of beneficiary], if they both survive me, or if only one of them survives me, all to the survivor.

THIRD

(Cash Bequests)

I make following cash bequests: [name individual beneficiaries and cash amount of bequest]

______________________________ $________________

______________________________ $________________

______________________________ $________________

If any such person has not attained the age of twenty-one years at the time of my death, such gift shall be held by his or her parent as Custodian for such person under the Uniform Gifts to Minors Act.

FOURTH

(Residuary Estate)

I direct that all the rest of my property, hereinafter referred to as "my residuary estate," be divided into two equal shares, and I dispose of such shares as follows:

(a) I give one such share to ____________________________________ [name of beneficiary], if she survives me, and if not, to her issue surviving me, per stirpes; if she has no such issue, this share shall be disposed of as provided in subarticle (b) of this article FOURTH.

(b) I give one such share to ____________________________________ [name of beneficiary], if he survives me, and if not, to his issue surviving me, per stirpes; if he has no such issue, this share shall be disposed of as provided in subarticle (a) of this article FOURTH.

FIFTH

(Minor Beneficiaries)

If any person has not attained the age of twenty-one years when he or she becomes entitled to a share of my residuary estate, title to the property constituting such share shall vest in such person but my executors shall retain possession of such property. My executors shall pay to, or apply for the benefit of, such person so much or all of the income and principal as my executors, in their sole discretion, determine to be necessary or desirable for the support, maintenance, education, health or other benefit of such person. Any income not so paid to or for the benefit of such person may be accumulated for his or her benefit and paid to him or her at any time or added to principal. All principal not previously paid and any accumulated income shall be paid to such person when he or she attains the age of twenty-one years, or to his or her estate upon his or her death prior to attaining such age.

In making payments of income or principal to or for the benefit of such person, my executors are also authorized, in their sole discretion, to make such payments to a parent or guardian of such person or to an adult person with whom he or she resides. The receipt for such payment executed by the parent, guardian or other person to whom the income or principal payment is made shall be a complete discharge of my executors from liability with respect to such payment.

SIXTH

(Death Taxes)

I direct that all estate, inheritance and other death taxes (including any interest thereon and penalties with respect thereto), federal, state and other, imposed by reason of my death, in respect of property passing under this will or otherwise, shall be paid out of my residuary estate.

SEVENTH

(Appointment of Executor)

I appoint ________________________________ [designate executor], as executor of this will. If such named executor, for any reason, fail to qualify or at any time cease to act as executor, I appoint ________________________________ [name substitute executor], as executor in his or her place.

No one acting as executor shall be required to furnish bond or security of any kind for the faithful performance of his or her duties as executor.

Any reference in this will to my executors shall be deemed to refer to survivors and successors.

EIGHTH

(Powers of Executor)

In addition to the powers conferred upon my executors by law or by other provisions of this will, I direct that they shall have full discretionary power to retain any property which I may own at the time of my death or which may at any time be in their hands for as long a period of time as they deem advisable; to sell, exchange or otherwise dispose of any such property, real or personal, at public or private sale, without application to court, on any terms they deem advisable; to acquire any property, real or personal, without regard to any principles of diversification, including but not limited to common and preferred stocks, bonds, mutual funds, common trust funds, secured and unsecured obligations, and mortgages; to borrow money from any source and for any purpose, including but not limited to the payment of taxes, and to pledge or mortgage any assets of my estate as security for money borrowed; to pay any gift and to make distributions of my estate in cash or in kind, or partly in each, and to allocate property to any gift or share other than ratably. My executors shall continue to have all the rights, powers and duties herein vested in them until the complete distribution of all property held by them.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this __________ day of ___________, 19_____.

____

Testator

WE, the undersigned witnesses, do hereby certify and attest that the foregoing instrument was subscribed by the above-named testator, ________________________________, in our presence, and that the said testator, at the time of making such subscription, declared the said instrument to be his last will and testament, and we thereupon, and the request of said testator, and in his presence and in the presence of each other, have signed our names hereto as attesting witnesses.

______________________________ residing at ______________________________

____

______________________________ residing at ______________________________

____

______________________________ residing at ______________________________

____

AFFIDAVIT

STATE OF ______________________ CITY
or
COUNTY OF ______________________ TOWN ______________________

Personally appeared (1) ____

(2) ______________________________ and (3) ______________________

who being duly sworn, depose and say that they attested the said will and they subscribed the same at the request and in the presence of the said testator and in the presence of each other, and the said testator signed said will in their presence and acknowledged that he had signed said will and declared the same to be his LAST WILL AND TESTAMENT, and deponents further state that at the time of the execution of said will the said testator appeared to be of lawful age and sound mind and memory and there was no evidence of undue influence. The deponents make this affidavit at the request of the testator.

(1) ______________________________

(2) ______________________________

(3) ______________________________

Subscribed and sworn to before me this ______________ day of __________, 19_____.

(Notary Seal)

____
Notary Public

SAMPLE FORM

WILL OF MARRIED PERSON WITH MINOR CHILDREN

The following sample will may be applicable to a married person with minor children who has a moderate estate. The will provides for the entire estate to pass to the spouse if surviving. If the spouse doesn't survive, the will contains separate share trusts for surviving children, and gifts to issue of predeceased children; if neither spouse nor children survive, the residuary estate is divided between families of both spouses. As a special feature, the will creates a trust for the benefit of minor children and provides for gradual distribution of their share of estate until they reach the age of 35. Such a plan may be attractive to those who fear that their children may not be mature enough to handle their inheritance.

I, ______________________________ [name of testator], of ____________________ ____________ [address], State of ____________________, declare this to be my last will and testament.

FIRST

(Prior Wills Revoked)

I revoke all my prior wills and codicils.

SECOND

(Tangible Personal Property)

I give all my tangible personal property to my wife, ____________________________, if she survives me, together with all insurance policies thereon, if any. If my wife does not survive me, I give such property to those of my children who survive me, in approximately equal shares, as my executors in their exclusive discretion shall determine.

THIRD

(Residuary Estate)

I give all the rest of my property, hereinafter referred to as "my residuary estate," to my wife, ________________________________, if she survives me. If my wife does not survive me, my residuary estate shall be disposed of as proved in article FOURTH if I have issue surviving me, or as provided in article FIFTH if I have no such issue.

FOURTH

(Trusts for Children)

If my wife does not survive me, but I have issue surviving me, my executors shall divide my residuary estate into as many equal shares as will permit them to set apart one such share for each child of mine who survives me and one such share for the issue surviving me of each child of mine who fails to survive me but leaves such issue, and I dispose of such shares as follows:

(a) I give one such share to the issue surviving me of each child of mine who fails to survive me but leaves such issue.

(b) I give one such share to each child of mine who survives me and has attained the age of thirty-five years at the time of my death.

(c) I give each share which is set apart for a child of mine who survives me but has not attained the age of thirty-five years at the time of my death ("the beneficiary") to my Trustees, IN TRUST, during the life of the beneficiary or until the earlier termination of the trust, for the following purposes:

(1) During the minority of the beneficiary, in the sole discretion of my Trustees, to pay any part or all of the income to, or to accumulate any part or all of the income for the benefit of, the beneficiary. Any income not so paid or accumulated shall be added to the principal of the trust.

(2) After the beneficiary has attained the age of twenty-one years, to pay the income to him or her in convenient installments at least quarter-annually.

(3) To pay to the beneficiary at any time or times prior to the termination of the trust, such sums from or any part or all of the principal as my Trustees may, in their sole discretion, determine to be reasonably necessary to permit the beneficiary to maintain his or her usual standard of living, including the costs of his or her education, and the expenses of any illness or accident which may affect him or her.

(4) To pay to the beneficiary, upon his or her attaining the age of twenty-five years, a sum from or part of the property which then constitutes the principal of the trust equivalent in value to one-third of such principal; to pay to the beneficiary, upon his or her attaining the age of thirty years, a sum from or part of the property which then constitutes the principal of the trust equivalent in value to one-half of such principal; and to pay to the beneficiary upon his or her attaining the age of thirty-five years, the entire principal, if any, remaining at that time.

If the beneficiary has attained the age of twenty-five or thirty years prior to his or her share being set apart, then when such share is set apart for his or her benefit, my Trustees shall distribute to him or her one-third or two-thirds of the value thereof, as the case may be.

(5) Upon the death of the beneficiary prior to his or her thirty-fifth birthday, to pay the then remaining principal, if any, to his or her then living issue, or if he or she has no such issue, to my then

living issue, except that any share which would be payable to a child of mine who is then under the age of thirty-five years shall instead be added to the principal of the trust created under this subarticle (c) of article FOURTH for the primary benefit of such child. If I have no issue then living, such principal shall be disposed of as provided in article FIFTH.

FIFTH

(Contingent Beneficiaries)

Any property which I have directed to be disposed of as provided in this article shall be divided into two equal parts, which I dispose of as follows:

(a) I give one such part to my mother, ______________________________, if she is then living. If my mother is not then living, or if she disclaims all or a portion of her part, then I give this part, or the disclaimed portion thereof, to the then living issue of my parents, __________ ________________________, in equal shares.

(b) I give the other such part, in equal shares, to my mother-in-law, ________________ __________________, and my father-in-law, ______________________________, if they are both then living, or if only one of them is then living, all to the survivor. If neither my mother-in-law nor my father-in-law is then living, or if one or both of them disclaim all or a portion of their shares, then I give this part, or the disclaimed portion thereof, to the then living issue of my mother-in-law and my father-in-law in equal shares.

SIXTH

(Minor Beneficiaries)

If, under the terms of other provisions of this will, any money or other property is required to be distributed to a person who is a minor or who is otherwise under a disability (such as incompetency), I direct that such money or other property not be so distributed, but that instead it be held by my Trustees, IN TRUST, for the following purposes:

(a) During the period of minority or other disability, the Trustees shall pay to the minor or other person under a disability any part or all of the income or principal as the Trustees may, in their discretion, determine to be reasonably necessary for such person's support, maintenance, education, or health or to meet the costs of any illness or accident affecting such person.

(b) During the period of minority or other disability, the Trustees may accumulate any part of the income not disposed of pursuant to subarticle (a) of this article, or they may add such income to principal.

(c) Upon the termination of minority or other disability, the Trustees shall pay all remaining

property to the person whose minority or disability has terminated, or in the event such person has died before attaining majority or without termination of the disability, the Trustees shall distribute such property to such person's estate.

SEVENTH

(Payments to Guardian)

Any property which my Trustees are authorized to pay to a person who is a minor or otherwise under a disability, may, in the discretion of my Trustees, be paid for the benefit of such person to a guardian or to another individual who is not under a disability with whom the minor or otherwise disabled person resides. If my Trustees, obtain a receipt for any payment made in accordance with this provision, such receipt shall fully discharge them from liability with respect to such payment and from further accountability therefore.

EIGHTH

(Application of Funds)

Whenever my Trustees are directed or authorized to make payments to a person, my Trustees are authorized, in their discretion, to apply such payments to or for the use of such person.

NINTH

(Accumulation of Income)

Any income which has been accumulated by my Trustees for the benefit of a specified person may be paid to such person at any time prior to the termination of the trust which earned the income and shall be paid to such person upon such termination. In the event that such person dies prior to the termination of such trust, any such accumulated income shall be paid to his or her estate.

TENTH

(Definitions)

The word "issue" as used in this will shall mean issue per stirpes, and shall include those born after my death. The word "minor" as used in this will shall mean a person who has not attained the age of twenty-one years. The use of the masculine shall include the feminine, the feminine shall include the masculine, and the use of the singular and the plural shall be interchangeable.

ELEVENTH

(Death Taxes)

I direct that all estate, inheritance and other death taxes (including any interest thereon and

penalties with respect thereto), federal, state and other, imposed by reason of my death, in respect of property passing under this will or otherwise, shall be paid out of my residuary estate.

TWELFTH

(Simultaneous Death)

If my wife, ________________________________, and I should die under such circumstances that it cannot be determined which of us died first, my wife shall be deemed to have survived me.

THIRTEENTH

(Guardian of Minors)

If my wife, ________________________________, does not survive me, I appoint ________________________________ as guardian of the person and property of each of my children during his or her minority. If the said guardian for any reason fails to qualify or ceases to act as guardian, I appoint ________________________________, as guardian in his or her place. No one acting as guardian shall be required to furnish any bond or security of any kind for the faithful performance of his or her duties as guardian.

FOURTEENTH

(Appointment of Executor)

I appoint my wife, ________________________________, as executrix of this will. If she, for any reason, fails to qualify or at any time ceases to act as executrix, I appoint ________ ____________________________ as executor is her place.

I appoint ____________________________, and ________________________ ______________, as Trustees of the trusts created herein.

If the number of Trustees acting hereunder is at any time reduced to one, I authorize such last acting Trustee to appoint either a co-Trustee or a successor Trustee. Any such appointment shall be made by a written instrument filed with the court in which my will is admitted to probate.

Any reference in this will to my executrix or Trustees shall be deemed to refer to successors, survivors and co-Trustees appointed as above authorized.

No one acting as executrix or Trustee shall be required to furnish any bond or security of any kind for the faithful performance of his or her duties as executrix or Trustee.

FIFTEENTH

(Powers of Executor)

In addition to the powers conferred by law or by other provisions of this will upon my executrix and my Trustees, I direct that they shall have the following discretionary powers:

(1) To retain any property which I may own at the time of my death or which may at any time be in their hands, or to sell, exchange or otherwise dispose of any such property, at public or private sale, without application to court, on any terms, including the extension of credit, which they deem advisable.

(2) To acquire, by purchase or otherwise, any property, real or personal, without being limited by any provision of law which restricts investments by fiduciaries and without regard to any principles of diversification, including but not limited to common and preferred stocks, bonds, mutual funds, common trust funds, secured and unsecured obligations and mortgages.

(3) To acquire and pay for, exercise, or sell any options or subscription rights in connection with securities or any other property.

(4) To hold securities in the names of nominees or in bearer form.

(5) To operate, repair, alter, improve, insure, grant options upon, mortgage, partition, or lease for any period of time any real property or interest in real property which at any time forms part of my estate or of any trust herein created.

(6) To retain and pay, as an expense of administration, accountants, attorneys, bookkeepers, investment advisors, stenographers, and other assistants.

(7) To borrow money from any source and for any purpose, including but not limited to the payment of taxes, and to pledge or mortgage any assets of my estate or of any trust created hereunder as security for money borrowed.

(8) To pay any gift and to make distributions of my estate or from any trust created hereunder in cash or in kind, or partly in each, and to allocate property to any gift or trust other than ratably.

(9) To hold property of separate trusts in common investments for convenience of investment or administration.

(10) To determine whether to claim deductions available to me or to my estate on estate tax or on income tax returns, and to determine whether to use date of death or alternate valuation date values for estate tax purposes, in such manner as they consider advisable and with or without making any adjustment between income and principal or among beneficiaries due to any such determination, as they, in their discretion, decide.

(11) To determine whether or not to consent to an election by any corporation to be taxed under Subchapter S of the Internal Revenue Code of 1954, as amended.

(12) To continue any business in which I have an interest for any period of time which they consider advisable, or to sell or otherwise dispose of any such business.

(13) Whenever more than one executor or Trustee has been appointed and is acting as such, to delegate to any one of my executors or Trustees any nondiscretionary power, including but not limited to the power to sign checks and bank withdrawal slips and the power to have access to safe deposit boxes in which property belonging to my estate or to any trust created hereunder is being held.

My Trustees shall continue to have all the rights, powers and duties herein vested in them after the termination of any trust created hereunder and until the complete distribution of all property held by them.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this ____________ day of

____________, 19 ______.

____
Testator

WE, the undersigned witnesses, do hereby certify and attest that the foregoing instrument was subscribed by the above-named testator, ____,
in our presence, and that the said testator, at the time of making such subscription, declared the said instrument to be his last will and testament, and we thereupon, at the request of said testator, and in his presence and in the presence of each other, have signed our names hereto as attesting witnesses.

____________________________________ residing at _______________________________________

____

____________________________________ residing at _______________________________________

____

____________________________________ residing at _______________________________________

____

AFFIDAVIT

STATE OF ______________________________ CITY
or
COUNTY OF ____________________________ TOWN ____________________________

Personally appeared (1) ____

(2) _______________________________________ and (3) _______________________________

who being duly sworn, depose and say that they attested the said will and they subscribed the same at the request and in the presence of the said testator and in the presence of each other, and the said testator signed said will in their presence and acknowledged that he had signed said will and declared the same to be his LAST WILL AND TESTAMENT, and deponents further state that at the time of the execution of said will the said testator appeared to be of lawful age and sound mind and memory and there was no evidence of undue influence. The deponents make this affidavit at the request of the testator.

(1) ___________________________________

(2) ___________________________________

(3) ___________________________________

Subscribed and sworn to before me this __________________ day of _____________, 19______.

(Notary Seal)

____
Notary Public

The Ownership of Property 6

The manner in which you own a property may have the most significant impact on your estate planning process. It will determine the disposition of the property upon your death, it may affect the creditors' claims, and it definitely will have federal estate, income and gift tax implications. This chapter discusses various forms of property ownership and numerous estate planning factors involved.

JOINT TENANCY

A joint tenancy is a joint interest owned by two or more persons in equal shares with the express declaration that the title is held in joint tenancy. A joint tenancy may be created by the owner's conveying to two or more persons, as joint tenants, or by one of the owners conveying to himself and one or more persons as joint tenants. A joint tenancy in most jurisdictions must, however, be created by a written instrument and not by oral agreement. In the event of simultaneous deaths the joint tenancy is severed and the undivided interest of each tenant is divided as if he or she had survived the other.

Illustration: A and B who own an asset as joint tenants die simultaneously. The right of survivorship is inoperative. One half of the asset will be distributed in the estate of A as if A were the surviving joint tenant and the other half will be distributed similarly in the estate of B.

Joint tenancy conveys to each tenant equal and undivided interest in the property. However, if any one joint tenant conveys his interest, the joint tenancy is severed and the parties become tenants in common as to the conveyed interest.

Joint tenancy has one feature that distinguishes it from all other forms of ownership: Upon the death of one of the joint tenants, the surviving tenant or tenants become the sole owners of the entire property by operation of law. The decedent's will has no effect on the disposition of a jointly-held property.

In some states, a joint tenancy between a husband and wife is presumed to be tenancy by the entirety. This form of ownership is similar to joint tenancy with a right of survivorship except neither spouse may sever the tenancy without the other's consent.

The principal disadvantage of joint tenancy lies in its general inflexibility and the inability of the tenants to dispose of the property by will except upon the death of the survivor. In addition, since the entire interest in the property passes to the surviving tenant outright, all of it is subject to inclusion in the survivor's estate. Joint tenancy form of ownership is not a will substitute and should not be used as such. It is almost invariably necessary for the joint tenants to have wills to dispose of other assets and the joint tenancy asset if the testator is the survivor. A will is also necessary to appoint guardians for minor children. Many individuals with small estates may own all of their assets in joint tenancy, and often many individuals own their residences and checking accounts in joint tenancy with their spouses.

The loss of power to dispose of the property by will can be serious in large estates. Where an estate is substantial, the estate owner may want to make provisions for his children separate and apart from the provisions he wishes to make for his spouse. He can do this by will but he can't do this where substantially all of his property is held in joint tenancy with his spouse. He also may not have enough assets in his own name alone to fund a tax-saving "credit shelter" trust.

If the bulk of the family assets are held in joint ownership, they will pass to the survivor outright. The survivor, as absolute owner of the property, may dissipate it, reinvest it unwisely, or make injudicious gifts. If the surviving spouse later remarries, some or all of the property may pass to his or her second spouse to the exclusion of the children of the first marriage. It's possible, for example, that the surviving spouse may put all the property received as surviving co-owner into a new co-ownership with the spouse of the second marriage, or may leave all the property by will to such spouse.

On the other hand, where the property is owned solely by one individual, that individual can create trusts during his or her lifetime or create trusts by will. A trust, whether of the inter vivos type or the testamentary type, can not only protect the beneficiary through spendthrift provisions and trustees' powers to use principal, but can also save estate and gift taxes through the use of qualified terminable interest property ("Q/TIP") gifts and bequests and limited powers of appointment in the beneficiaries.

If a spouse transfers property into joint ownership with his spouse, children, etc., or takes title to property in such form, he can normally continue to manage and care for the property during his lifetime. But on his death, his spouse or other co-owner will obtain the property outright. This can present problems of management, including conservation of the property, if the spouse or other surviving co-owner has little or no experience in managing real estate, handling investments, etc.

Also with advancing years, even a person with experience in handling property may dissipate or lose control over the property through bad judgment, incompetency, etc.

Another disadvantage is that on the death of the first tenant, there may be insufficient liquid assets in his "probate" estate to pay debts, expenses, cash legacies, and taxes because much of the property was held in joint tenancy. The joint tenancy property may be called upon to provide for the death taxes attributable to it where state law so provides.

In the final analysis, a judicious use of joint tenancy as an estate planning tool is the only course to follow.

Estate and Death Taxes

Rule of Contribution. IRS Section 2040(a) states that the full value of jointly held property is includible in the estate of the first joint tenant to die unless it is shown that some part of the property belonged to the survivor before the joint tenancy was created or that the survivor contributed to the acquisition of the property or its improvement. For example, a property is acquired for $30,000 with A contributing $20,000 and B contributing $10,000. Years later, if A dies and the property is worth $90,000, only $60,000 would be included in his estate. As explained below, this rule of contribution does not apply in the case of joint tenancy created between spouses. There's also another exception to the "full value" rule if the property was acquired by gift, legacy or inheritance. If, upon the creation

of the joint tenancy, a taxable gift resulted and if, because of the rule of contribution, the assets were nevertheless included in the taxable estate of the donor, a gift tax credit will be allowed in computing the estate tax. I.R.C. 2012.

This is a major drawback of joint tenancy since it may be difficult, if not impossible, years later to establish each co-owner's contribution toward the property.

Husband and Wife Joint Tenancy. Where husband and wife hold the property in joint tenancy, only one-half of the value of the property, regardless of which spouse furnished the consideration, will be included in the estate of the first spouse to die. I.R.C. 2040(b). For example, assume the husband purchases an asset for $100,000 out of his own funds and makes his wife a joint tenant with him. On the death of the first spouse to die, the asset is worth $180,000. Only one-half of the asset value, i.e., $90,000, is included in the decedent spouse's estate. The one-half which is included will, however, not be taxed because it will be deductible under the unlimited estate tax marital deduction. Where the property is held in joint tenancy by the husband and wife with a third party, the general rule of contribution, and not the husband and wife equality rule, will apply. I.R.C. 2040(b) (2)(B).

Gift Taxes

Creation of a joint tenancy generally gives rise to a taxable gift unless the interest acquired by each joint tenant is equal to his contribution to the joint interest. There are, however, three exceptions to this general rule.

Creation of a joint tenancy between husband and wife has no gift tax consequences. The above rule also does not apply to purchases of U.S. savings bonds, joint bank accounts and joint brokerage accounts registered in a "street" account. In these cases, a taxable gift occurs when the noncontributing or lesser contributing tenant makes a withdrawal of more than his portion of the contribution. The third exception to the general gift tax rule applies to joint tenancies created "for convenience only." Often, such arrangements are made to avoid probate on death or for mere convenience without any intent to transfer beneficial ownership or part with any dominion and control.

Income Taxes

Since each joint tenant owns an equal share of a joint tenancy asset, each must report an equal share of the taxable income. Joint ownership can permit a splitting of income, each joint tenant reporting his share of the income or gain on sale on his own separate tax return. This can produce overall tax savings.

For income tax basis, the surviving joint tenant, to the extent the asset is included in the estate of the deceased joint tenant, will receive a new basis equal to the federal estate tax value of the asset. I.R.C. 1014(a) and (b) (9). The portion of the asset which is not included in the decedent's estate will retain the survivor's adjusted basis.

For example, A buys an asset for $100,000 with his own funds, but holds the property in joint tenancy with B. Upon A's death, the asset is worth $180,000. B's basis will be $180,000. However, if B dies first, A's basis remains unchanged at $100,000. To change the example a little, let's assume A contributed $75,000 and B, $25,000 toward the purchase of the asset. On A's death, B's basis will

be $25,000 plus 75% of $180,000, or $160,000. If B dies first, A's basis will be $75,000 plus 25% of $180,000, or $120,000.

In the case of joint tenancy between husband and wife, only one-half of the asset included in the decedent's estate will receive a new basis equal to the federal estate tax value on the decedent's death; the other one-half will retain the survivor's adjusted basis.

From a planning point of view, it may be advantageous for the spouse who is the sole owner of an appreciated asset to place it in joint tenancy with the other spouse if it is anticipated that the donee-spouse will die first. Provided the donee-spouse survives for at least one year after the transfer into joint tenancy, one-half of the asset will receive a stepped-up basis when the donee dies. If the transfer had not been made, both halves would have retained the old basis. Where, however, the donee-spouse dies within one year of the transfer, the surviving spouse will not receive a new basis on the donee-spouse's death. I.R.C. 1014(e).

If the above couple lived in a community property state, and held title as community property a different result would be achieved. Upon the death of either spouse, both halves are deemed to be acquired from the decedent and receive a new basis equal to the federal estate value of the asset. I.R.C. 1014 (b) (6). However, if the property is held in joint tenancy and either spouse dies, only one-half is deemed to be acquired from the decedent and receives a new basis. Hence, where community property source assets exceed their adjusted basis, it's normally advisable for such assets to be owned in community property form, rather than in joint tenancy.

ILLUSTRATIONS

Illustration: Mr. and Mrs. Smith bought their home as tenants by the entirety. Although they are co-owners while both are alive, the moment one dies the survivor owns the whole house. The house is not subject to the terms of deceased spouse's will at all. It belongs to the surviving spouse directly because of being the surviving co-tenant by the entirety.

It is important to check local law on joint ownership since a few states have laws which attempt to abolish or restrict survivorship rights.

Illustration: Mary and John own a parcel of real estate as tenants in common. When Mary dies, her share of the property will pass under her will to her devisees if she leaves a valid will disposing of the property, or, in the absence of such a will, to her heirs under the laws of intestacy. The interest will be included in her gross estate. When John dies, his share will similarly pass under his will or under the laws of intestacy, and will be included in his gross estate. It doesn't matter who dies first, whether the tenants in common are married, whether they are related, or whether there are several tenants in common in the property. Only the co-tenant's share of the property is included in his estate.

Illustration: A father and his three sons decide to buy land as equal joint tenants for $80,000. The father puts up $65,000 and the sons each put up $5,000. The father has made a $15,000 gift to each son, a total of $45,000 ($65,000 contribution reduced by $20,000 value of his one-fourth interest.)

A husband may split his gifts with his wife so as to treat each gift as though one-half were made

by him and one-half by her. In the illustration above, if the husband chose to split his gifts, he would be considered as having made a gift of $7,500 to each son and his wife would be considered as having made a $7,500 gift to each. Since an annual exclusion of $10,000 is allowed for gifts by each donor to each donee, each $7,500 gift to the sons would be free of gift tax. If the gifts were not split by the husband and wife, the total taxable gifts would be $15,000 ($45,000 minus $30,000.)

Illustration: Mother buys property and registers it as joint tenants with right of survivorship with her daughter. One half the value of the property is a gift, and to the extent it exceeds the annual exclusion it will either use up part of mother's unified credit or result in payment of gift tax. At mother's death the entire value of the property will be included in her estate since she furnished all of the consideration.

Illustration: Five years ago, brother and sister bought a residence for $50,000, taking title as joint tenants. The brother put up $40,000 and the sister put up $10,000 in payment of the purchase price. Thus, brother made a gift to sister of $15,000 at the time the property was purchased. This year, they sell the property for $60,000, out of which the brother keeps $40,000 and his sister keeps $20,000. The sister has made a gift to her brother of $10,000.

Illustration: Brother and sister enter into the usual type of agreement with a broker to establish a joint brokerage account under which securities are to be held in street name and each sibling can deal with the account as though he or she were the sole owner. The brother contributes $40,000 to the account. At some later time when the value of the account is $60,000, the sister withdraws $35,000 for her own benefit. There was no gift by the brother or sister by reason of his $40,000 contribution to the account when it was originally set up. There is, however, a gift of $35,000 by the brother to his sister when she withdraws that amount for her own benefit.

Illustration: Brother and sister have a joint savings account which shows a balance of $19,500. This account is of the "revocable" type which permits either to withdraw all or part of the funds for personal use.

The brother's deposits with interest total $19,000; his sister's total $500. She withdraws $15,000 to cover purchase of a car. This withdrawal represents a gift for tax purposes by the brother to his sister of $14,500 ($15,000 - $500.)

Illustration: Father decides to give his Son a piece of land valued at $40,000, $30,000 of which would be subject to gift tax. If Mother joins in the gift, only $20,000 would be subject to gift tax. If the gift is made to Son and his wife by Father and Mother jointly, the entire gift would be exempt from gift tax.

TENANCY IN COMMON

In a tenancy in common, each tenant owns an undivided interest in the property which he may sell, give away, or dispose of by will.

For tax purposes, each co-tenant's share of the property and income is generally treated as though it were owned by him separately. There will be a gift on the creation or termination of a tenancy in common to the extent that tenants who have contributed nothing or less receive more than their share. When a co-tenant dies, the fair market value of his interest will be includible in his estate.

COMMUNITY PROPERTY

Eight states - Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, and Washington - have a form of co-ownership of property known as community property. While the laws vary somewhat from state to state, they all treat husband and wife as partners with respect to property acquired during marriage. Of course, the marital community ceases to exist upon the death of a spouse or dissolution of the marriage. For definitional purposes, community property is all property acquired by either spouse during marriage while domiciled in a community property state, except property received by inheritance or gift. The earnings and reinvestments of community property are also community property. Each spouse owns an equal, undivided one-half interest in all community property. Likewise each spouse has the power of testamentary disposition over only one-half of the community property - the other one-half belongs to the other spouse. California, Idaho and Washington prohibit one spouse from making a gift of community property without the consent of the other spouse.

Community property form of ownership does not preclude other forms of ownership, such as separate property ownership, joint tenancy or tenancy in common. The character of property as separate or community generally persists through sales, changes in form and reinvestments. Thus, the proceeds from the sale of a separate property and any property purchased with the proceeds would be characterized as separate property. In some states, the earnings of separate property retain their separate characteristics while, in some other states, such earnings become community property. If separate funds are commingled with community funds so that their source cannot be traced, they are regarded as community funds.

If a couple has acquired community property while domiciled in such state and then moves to one of the common law states, the community property will continue to retain its character as such. Similarly, if a couple moves from a non-community property state to a community property state, their property will retain its nature as separate or joint or tenancy-in-common property. In some states, the spouses may adjust their respective property rights by agreement and transfer separate property into community or vice versa. An agreement could be used to fix the character of a commingled property or to establish the separate or community character of property that is nominally joint tenancy. It should be stressed that such changes may have important tax consequences.

The community property form of ownership is so important to the residents of those states, and it differs from other forms of ownership in such major ways that the next chapter is devoted in entirety to this subject.

Community Property 7

INTRODUCTION

Community property system now exists in nine states: Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas and Wisconsin. There's no single community property "system" in the United States. The community property system finds its roots in the civil law of marital property developed in Spain and brought to North America by Spanish colonists. But the community property laws as they exist now are enacted by each state, and there are differences among them. What is community property in one state may not be considered community property in another state.

Community property is a civil law system of marital property under which each spouse owns a one-half interest in property acquired during marriage. It can exist only between a husband and wife. It generally includes all property acquired by either spouse during the marriage and while domiciled in a community property state, except property acquired by gift or inheritance. Upon dissolution of the marriage, either by death or dissolution, the community ceases to exist and the property is divided between the spouses or between the decedent's estate or heirs and the surviving spouse.

WHAT IS COMMUNITY PROPERTY?

The community property states all define separate property as the property owned by a spouse prior to marriage and all property acquired after marriage by gift, inheritance, devise or bequest. All other property acquired by husband or wife during marriage is their community property. This "negative" definition of community property is easy to understand and explains many questions. Separate property owned by the parties prior to marriage does not lose its separate character simply because the parties are married now. However, it may lose its separate character by agreement or conduct of the parties.

The character of property as separate or community generally persists through sales, changes in form, and reinvestments. Thus, the proceeds from the sale of an item of separate property and any property purchased with the proceeds would be separate property. In all states the income derived from community property is community. Likewise, in most states the income from separate property is separate. However, in Idaho, Louisiana, Texas, and perhaps Arizona, the income from separate property is community property.

If the separate and community properties are commingled in such manner that the separate property cannot be traced to its origin, the commingled property would be presumed to be community property.

Each spouse owns an equal, undivided one-half interest in all community property. Therefore, each spouse has the power of testamentary disposition over only one-half of the community property; the other one-half belongs to the other spouse. California, Idaho, and Washington prohibit one spouse

from making a gift of the community property without the consent of the other spouse.

Certain types of property present difficult problems of characterization. Take for instance a closely held business owned prior to marriage that has appreciated during the marriage. Most community property laws will first attempt to determine if the community has been fairly compensated for the community efforts, by way of salary or other compensation. If such is the case, the entire appreciation will be awarded to the owner-spouse's separate estate. Here's another sticky situation: Where an asset is purchased with separate and community funds, proportionate interests in the asset are held as separate and community respectively. By way of an illustration, for the purchase of a parcel of land for $10,000, husband contributed $3,000 of his separate funds and the balance came from the community funds. Husband would own a 30% separate interest in the property, the remainder being community interest.

Another complication may arise in a situation where one spouse buys an asset prior to marriage with his or her separate funds, but then uses community funds during the marriage to make continuing payments against the asset. In some states the asset would be considered separate since the spouse first acquired an interest in it with separate funds (the so-called "inception of title" rule.) However, the community is entitled to be reimbursed for the funds expended without interest. In contrast, some other states apply the proportionate ownership rule with regard to a property acquired with mixed deferred payments, just as in the case of lump sum payments.Thus, if community funds are used to make one-third of the payments on property that was originally acquired as the separate property of one spouse, a one-third interest in the property is held as community property.

State of Domicile

Before any community property laws can be applied, it is necessary to determine the state of domicile for husband and wife. This generally would be the state where they currently reside. However, two ingredients are necessary to establish the domicile. First, they must intend to make the particular state their permanent place of abode. Second, they must have some physical contact with the state. One without the other is not sufficient.

The rights of a husband and wife in personal property (stock, household goods, etc.) are determined by the laws of the matrimonial domicile (state where the husband and wife reside) at the time the property is acquired, regardless of the place of acquisition. Thus if a husband and wife domiciled in a community property state deposit community funds in a bank account in a common law state, the community status of the funds won't be affected.

The rights of a husband and wife in real property are usually governed by the laws of the state where the property is located, irrespective of the domicile of the spouses. But if real property is acquired in a community property state by a nondomiciliary spouse with funds that are the separate property of the spouse, or in exchange for separate property of the spouse, the acquired real property remains separate property.

If a husband domiciled in a community property state, as manager and business agent of the community, purchases real property in a common law state with community funds and takes title in his own name, the general rule is that he holds a one-half interest in the property as trustee for his wife. But in the case of spouses domiciled in California, real property purchased by them in another state

with community funds is regarded as community property by California courts.

Quasi-Community Property

The concept of quasi-community property was developed to protect a wife moving from a common law state to a community property state. In a common law state she would have a dower or similar right in her husband's separate property. But she would lose this right upon moving to a community property state and would not have yet acquired any right in the community property. Under the concept of quasi-community property, a property brought into a community property state is treated as community property if it would have been community property had it been acquired while domiciled in the community property state. California, and to a lesser extent other states, have adopted the rule of quasi-community property.

Under the California statute, quasi-community property includes (a) all personal property, wherever situated, and all real property situated in California, acquired by either spouse while domiciled in another state, which would have been community property if the spouse who acquired the property had been domiciled in California at the time of its acquisition; and (b) all personal property, wherever situated, and all real property situated in California, acquired in exchange for real or personal property, wherever situated, which would have been community property if the spouse who acquired the property had been domiciled in California when the property exchanged was acquired.

Upon the acquiring spouse's death, one-half of the quasi-community property passes to the surviving spouse and the other half is subject to testamentary disposition by the acquiring spouse. The nonacquiring spouse does not have the right of testamentary disposition over the property. California also applies the quasi-community concept in the event of divorce.

Income and Gains from Property

In all community property states, income and gains from community property are also considered to be community property. States differ, however, on classification of income from separate property.

In Arizona, California, Nevada, New Mexico, and Washington, income and gains from separate property ordinarily remain the separate property of the spouse who owns the property.

On the other hand, in Idaho, Louisiana and Texas, income from separate property is ordinarily community property. Thus property purchased by a spouse with income from separate property is community property. But gains on the sale of separate property remain separate property even though the increase in value occurred during marriage. Stock dividends on separately owned stock are also classified as separate property. And in Texas, oil royalties and other mineral income derived from separate property are treated the same as gains on the sale of property and thus retain their separate character.

However, the status of income from real property is determined by the situs of the property. Thus rent received by a Texas couple from California real estate, which is the husband's separate property, is considered to be separate income of the husband even though under Texas law it would be considered community income.

If property is acquired during marriage partly with community funds and partly with separate funds, the income from that property is prorated. Income allocable to the part of the property acquired with community funds is always community income. Income allocable to the part acquired with separate funds is community income or separate income, depending on the applicable law of the state where the spouses are domiciled.

How to Preserve Character of Community and Separate Property

An important step in planning the estate of a couple which resides in one of the community property states is to ensure that there are no unintended conversions of property from separate to community, or vice versa. A couple can take several steps to avoid such undesirable consequences.

1. Maintain separate bank accounts. Separate bank accounts should be maintained for the husband's separate funds, wife's separate funds, and for the community funds.

2. Keep community and separate incomes separate. The wages of either spouse and income from community property should be deposited in community accounts. Keep in mind that in California income from separate property retains its separate character, but in Texas income from separate property acquires community character.

3. Keep the proceeds from the sale of community or separate property separate. This will help you ensure that newly acquired property is funded with appropriate funds and will pass the character of the funds on to the property.

4. Keep the gifts and inheritances separate. Remember that gifts and inheritances received by a spouse are that spouse's separate property.

5. Pay for improvements and debts on community or separate property with like-kind funds.

6. Maintain separate brokerage accounts. In Texas, you should deposit the interest or dividends from separately owned securities into a community account. Leaving them in the separate account will result in the commingling of the funds making the entire account a community property.

7. Do not use mixed funds to buy property.

8. Use revocable trusts to keep property in traceable form.

AGREEMENTS REGARDING CHARACTER OF PROPERTY

The community property states generally allow a husband and wife to enter into written agreements that would fix the character of their property. Some of the states, including California, permit oral agreements concerning the ownership of personal property. Spouses may agree to convert character of a property from separate to community or vice versa. Such agreements are useful to fix the character of a commingled property or where the separate or community character of a property

is uncertain.

Included at the end of this chapter are several sample agreements that allow conversion of one form of property ownership to another between the spouses.

GIFT AND ESTATE TAX CONSIDERATIONS

Where one spouse transfers separate property into community property, the transferor makes a gift to the other spouse of an amount equal to one-half of the value of the transferred property. That results because each spouse owns a one-half interest in the property after the transfer. Where both spouses transfer separate property into community property, "a single gift will take place with respect to the conversion of the separately owned properties and the value of the single gift will be the net difference between the value of the husband's (or the wife's) separate property before its conversion into community property and the value of the husband's (or the wife's) interest in the community property resulting from the conversion." Such a gift should also qualify for the gift tax annual exclusion and marital deduction.

Illustration: W transferred $100,000 of her separate property cash into a community property form of ownership with her husband, H. The transfer involved a gift from W to H of one-half of the amount transferred (i.e., $50,000.) Such a transfer qualifies for the gift tax annual exclusion and marital deduction. If H had also transferred $50,000 of his separate property into a community property form of ownership with W, the transfers by W and H would be aggregated for purposes of determining the gift tax consequences. After the transfers were made each spouse would own a community property interest worth $75,000 (1/2 x ($100,000 + $50,000)). H would not have made a gift since he transferred property worth $50,000 and received an interest worth $75,000. W would have made a gift of $25,000, since she transferred property wroth $100,000 and received an interest worth only $75,000.

The partition of community property into equal shares of separate property does not involve a gift because each spouse continues to own an interest of equivalent value.

Taxable gifts may result from transfers of community property to third parties. For federal and state gift tax purposes, a gift of community property to a person outside the community is generally treated as two gifts - one by each spouse and each for one-half of the total value of the property transferred.

Illustration: Husband and wife give $20,000 of community property cash to the daughter. For gift tax purposes each spouse is considered to have made a gift of $10,000 to the daughter. Under the $10,000 annual exclusion per donee, no federal gift tax return is due.

For income, gift and estate tax purposes, community property is treated as owned one-half by each spouse. Upon the death of one spouse, only one-half of the community property is included in the deceased spouse's estate and the surviving spouse's one-half is excluded. Deductions are allowable for expenses of administration, funeral expenses and debts, to the extent they are chargeable to the decedent's share of the community property under the local law. Due to unlimited marital deduction, there are no tax consequences when property is transferred between the spouses.

COST BASIS FOLLOWING DEATH OF A SPOUSE

Whether a property is held in community or as a separate property of one of the spouses plays an important part in determining the basis of property following the death of a spouse. Under IRS regulations, the surviving spouse's share of the community property acquires a basis equal to its fair market value on the valuation date applicable to the deceased spouse's estate for federal estate tax purposes (i.e., either on the date of the decedent's death or on the alternate valuation date.) Thus, the survivor's share of the community property benefits from a free "step up" in basis where the community property has appreciated in value. On the other hand, the survivor's share suffers a decrease in basis ("step down") if the value of the community property has declined. In contrast, the basis of a survivor's separate property is not changed by reason of the decedent's death. Obviously, it is advantageous to hold an appreciated asset in community property form which allows the basis in both halves of it to be stepped up.

Illustration: H and W own 100 shares of stock bought at $10 per share with their community property funds. H leaves his interest in the stock to W who survives him. The stock had appreciated in value to $100 per share on the estate tax valuation date applicable to H's estate. Accordingly, H's estate included a value of $5,000 attributable to the stock (1/2 of $100 x 100.) W's one-half interest in the stock also receives a stepped up basis to $5,000. W's estate will now have a basis of $10,000 in 100 shares. By way of illustration, had the stock been held in a true joint tenancy, W would have had a basis of only $5,500 in the stock following H's death. She would have retained her original cost basis of $500 while H's one-half share would have received the stepped up basis of $5,000.

Illustration: W owns appreciated stock that is her separate property and that has a basis of $100. W converts the stock into community property of W and H. On W's death, five years later, the stock is worth $800. H's basis in his interest in the stock is $400 (one-half the estate tax value of the community property) and the basis of the stock in W's estate is also $400 for a total of $800.

In the above illustration, the result would have been the same if H had died first. In contrast, if W had not converted the stock into community property, there would be a complete basis step-up when W dies but no step-up if H dies first.

The basis step-up will not occur for the donee's half of the property if the donee of the appreciated property dies within a year of the gift and the gift property interest passes to the donor. But the basis of the donor's interest in such property will still be stepped-up.

Illustration: W owns property that has a basis of $100. After the property has appreciated in value W converts the property into community property. Within a year of the conversion, H, the donee spouse, dies at which time the property is worth $800. W's basis in her interest in the property is $400 (one-half the estate tax value of the community property) and if she inherits H's interest in the property, her basis in that interest would be $50 (H's basis in the community property), for a total of $450.

The basis of both interests in the property in the above illustration would have been stepped up if H's interest had passed to anyone other than his wife, for example the couple's child.

Thus, a spouse in a community property state can convert separately owned property to community property just prior to the death of his or her spouse and still receive a stepped-up basis with

respect to his or her interest in the community property. This is an advantage that couples in community property states have over their counterparts in common law states. A conversion of separate property to joint property in a common law state or in a community property state just prior to the death of the donee-spouse, will not result in any basis step-up if the donee spouse's interest passes to the donor-spouse.

SCHEDULE OF PROPERTY HELD BY HUSBAND AND WIFE

State of ______________________
County of ____________________

NOTICE IS HEREBY GIVEN that ____________________________ [*name of husband*] and ____________________________ [*name of wife*], husband and wife, both of ______________________________________ ______________, City of ________________________, County of ______________________, State of ______________________, and each of them, claim ownership of real and personal property as follows:

(a) Husband's Separate Personal Property. The following described personal property is the separate property of husband:

Description	Location	Value
___________	___________	$ _________
___________	___________	$ _________

(b) Husband's Separate Real Property. The following described real property is the separate property of husband:

Description	Location	Value
___________	___________	$ _________
___________	___________	$ _________

(c) Wife's Separate Personal Property. The following described personal property is the separate property of wife:

Description	Location	Value
___________	___________	$ _________
___________	___________	$ _________

(d) Wife's Separate Real Property. The following described real property is the separate property of wife:

Description	Location	Value
____________	____________	$ __________
____________	____________	$ __________

(e) Community Personal Property. The following described personal property is the community property of husband and wife:

Description	Location	Value
____________	____________	$ __________
____________	____________	$ __________

(f) Community Real Property. The following described real property is the community property of husband and wife:

Description	Location	Value
____________	____________	$ __________
____________	____________	$ __________

(g) Tenancy in Common. The following described property is owned by husband and wife as tenants in common:

Description	Location	Value
____________	____________	$ __________
____________	____________	$ __________

(h) Joint Tenancy. The following described property is owned by husband and wife as joint tenants:

Description	Location	Value
____________	____________	$ __________
____________	____________	$ __________

Dated ________________, 19_____.

____
Husband

____
Wife

[Acknowledgment] ***[Signatures]***

AGREEMENT CONVERTING SEPARATE PROPERTY INTO COMMUNITY PROPERTY

AGREEMENT MADE ______________, 19_____ between ________
____________________ [*name of husband*] and ________________
__________ [*name of wife*], husband and wife, both of ______________
____________________ [*address*], City of __________________,
County of ____________________, State of __________________.

RECITALS

(a) Status and Property of Parties. The parties hereto intermarried on ______________, 19______ at ______________________________
[*marriage domicil*], and since the above date have been and now are living together as husband and wife. The parties during their marriage have acquired certain property which, by virtue of the laws of the State of ______________ [*if appropriate, add:* and by virtue of a written agreement between the parties dated ______________, 19______], is the community property of the parties, and which property is listed and described in Schedule "______," which schedule is annexed to this agreement and incorporated herein by reference.

(b) Intent of Parties. The parties desire that their respective rights and interest in and to all their community property be expressly set forth herein and established in accordance with the terms and provisions hereof, and in consideration of the mutual covenants contained hereinafter, agree as follows:

SECTION ONE
SEPARATE PROPERTY TRANSMUTED TO COMMUNITY PROPERTY

All property now owned as separate property by ____________________
[*name of husband*] and by ______________________________ [*name of wife*], respectively, which separate property is listed and described in Schedule "______," is hereby declared by the parties to be, and it hereby is, their community property.

SECTION TWO
AFTER-ACQUIRED PROPERTY

All property hereafter acquired by the parties, or either of them, whether earned by capital or by personal efforts or otherwise acquired, and regardless of whether it is real, personal, or mixed, shall be deemed to be, and is hereby declared to be, the community property of the parties.

SECTION THREE
FULL DISCLOSURE MADE BY PARTIES

Each of the parties has made a full disclosure to the other party of all property owned or otherwise held by each respective party, as is shown in Schedule "_____" attached hereunto.

SECTION FOUR
EXECUTION OF NECESSARY INSTRUMENTS

Each party shall cooperate fully with the other party in preparing, executing, and delivering all instruments necessary to carry into effect the provisions of this agreement.

SECTION FIVE
PARTIES REPRESENTED BY COUNSEL

The parties hereby acknowledge that they, and each of them, have been represented by counsel of their choice in preparation of this agreement, that their rights in the property described in this agreement and in Schedule "_____" have been fully explained to them, that the legal effect of this agreement has been fully explained to them, and that they understand the terms, provisions, and legal effect of this agreement.

Dated _______________, 19_____.

IN WITNESS WHEREOF, we have executed this agreement at _________ ___________________________________ the day and year first above written.

____
Husband

____
Wife

[Acknowledgment] *[Signatures]*

AGREEMENT CONVERTING COMMUNITY PROPERTY INTO TENANCY IN COMMON-UNDIVIDED EQUAL SHARES

AGREEMENT MADE ____________, 19____, between ____________ ____________ [*name of husband*] and ____________ ____________ [*name of wife*], husband and wife, both of ____________ ____________ [*address*], City of ____________, County of ____________, State of ____________.

SECTION ONE
DESCRIPTION OF COMMUNITY PROPERTY

The parties hereto accumulated and acquired certain real and personal property subsequent to their marriage, which marriage was solemnized on ____________, 19____, at ____________ ____________ [*address*], City of ____________, County of ____________, State of ____________. All of such property has been and is community property ____________ [under the laws of the State of ____________ *or* pursuant to written agreement of the parties hereto], as set forth and described as follows:

Real Property	Personal Property	Value
____________	____________	$ ____________
____________	____________	$ ____________
____________	____________	$ ____________

SECTION TWO
INTENT OF PARTIES

The parties have from ____________, 19_____ to the present held title to all of the above-described property as community property, and now intend and desire to divide and separate the property and hold the same as tenants in common with equal undivided interest therein.

SECTION THREE
CONVEYANCE

The parties agree to convey all of the above property, which they have heretofore held as community property, and to convey to each of them an undivided one-half interest to themselves to be held as tenants in common within ______ days from the date of this agreement.

SECTION FOUR
DOCUMENTS OF TITLE

Each party covenants to execute and deliver to the other such bills of sale, deeds, and other documents and instruments necessary to convey the title to the above property to each of them as tenants in common.

SECTION FIVE
SEPARATE PROPERTY

The parties expressly declare that the purpose and intent of this agreement is that each party may acquire and own half of all the property above referred to, in his or her individual right and as his or her sole and separate property, including the rents, issues, and profits therefrom, and so that each may convey, transfer, assign, or otherwise transfer to his or her heirs at law, devisees, assignees, or legatees without the interference or necessity of the other party consenting or signing any instruments in connection therewith.

SECTION SIX
WAIVER OF RIGHTS

Each of the parties hereto agrees to waive all and every right whatsoever he or she might have or acquire by law in the community property of the marriage, whether now owned or hereafter to be acquired, and each party shall have sole control and management of, and the right to sell, convey, or transfer any and all of their properties transferred pursuant to this agreement without signature or joining in by the other, to the extent permitted by the laws of the State of __________________ respecting tenancy in common.

IN WITNESS WHEREOF, we have executed this agreement at __________ ______________________ the day and year first above written.

____
Husband

____
Wife

[Acknowledgment] *[Signatures]*

AGREEMENT CONVERTING COMMUNITY PROPERTY INTO SEPARATE PROPERTY-EQUAL DIVISION IN KIND

AGREEMENT MADE ____________, 19______ between ____________ ________________ [*name of husband*]and ________________________ [*name of wife*], husband and wife, both of ________________________ ____________________ [*address*], City of ________________, County of ________________, State of ________________.

There now stand in the name of the husband ________ shares of ______________ [common *or* preferred] stock of ____________________ *[corporation]*, a ________________*[name of state]* corporation, evidenced by ______[certificates of stock Nos. ______ through ______ *or as the case may be]*.

The corporate stock above referred to is community property of the parties, and the parties desire and intend that such stock shall be equally divided between them so that each shall hold one-half of such stock as his or her separate property.

(a) ____________________________ *[Name of husband]* hereby assigns, transfers, and conveys to ____________________________ *[name of wife]* ______ shares of such stock, to be held by her as her separate property.

(b) ____________________________ *[Name of wife]* hereby assigns, transfers, and releases to ____________________________ *[name of husband]* all of her community interest in the remaining ______ shares of such stock, to be held by him as his separate property.

IN WITNESS WHEREOF, we have executed this agreement at ________ __________________________ the day and year first above written.

____
Husband

____
Wife

[Acknowledgment] *[Signatures]*

AGREEMENT THAT EARNINGS OF HUSBAND AND WIFE SHALL BE SEPARATE PROPERTY

AGREEMENT MADE ____________, 19_____ between ____________ ________________________ *[name of husband]* and ________________________ ____________________ *[name of wife]*, husband and wife, both of __________ ________________________ *[address]*, City of ____________________, County of __________________, State of __________________.

(a) The parties hereto intermarried on ________________, 19________ at ____ *[marriage domicil]*, and since the above date have been and now are living together as husband and wife.

(b) The parties desire that earnings from personal activities shall hereafter be the separate property of the party so earning such income.

(c) The parties therefore agree that all earnings of either party earned on or after the date of execution of this agreement and arising from any and all sources, contingent or otherwise, and all income and profits from the investment or use of such earnings from the personal activities, ability or capacity of either party, and regardless of which party controls and manages such earnings, shall be the separate property of the party so earning or investing such income and shall not be community property.

Dated __________________, 19______.

IN WITNESS WHEREOF, we have executed this agreement at __________ ________________________________.

____
Husband

____
Wife

[Acknowledgment] *[Signatures]*

The Probate System 8

For most people, probate is a highly misunderstood and dreaded word. However, it does have a purpose. Under the probate court proceeding, title to the property left by the decedent passes to the persons named in the will or, in the absence of a will, to those entitled to inherit under the state intestacy laws. By going through the process of probate, heirs can be assured that the property they have received will be free of creditors' claims and taxes. In our society, this is one way of transferring property from one generation to the next generation.

ASSETS NOT SUBJECT TO PROBATE

Normally, all assets in which the decedent had any ownership interest will be subject to probate. Following are the typical arrangements which make an asset probate-exempt:

(a) Assets held in joint tenancy with right of survivorship. This is a popular form of ownership of property, especially between husband and wife. Upon the death of one joint tenant, the asset passes to the surviving joint tenant without probate. An asset owned by two or more persons as tenants in common will be subject to probate only as to the decedent's interest. The interests of the survivors already belong to them and are not included in the probate estate of the decedent. The interests of the surviving co-tenants will remain undistrubed. If an asset is owned by a husband and wife as community property, the surviving spouse's one-half interest may or may not be subject to probate depending upon the law of the particular state. In California, for instance, the one-half interest left to the spouse is not subject to probate. The surviving spouse may, however, find it to his or her advantage to subject his or her one-half to probate in order to limit the surviving spouse's personal liability for the debts of the decedent chargeable to the community property.

(b) Totten trust bank account. Here the bank account is transferred to the designated beneficiary upon the death of the account holder.

(c) Life insurance. When the policy is assigned to someone else, it will pass to the beneficiary out of probate.

(d) Funded living trust. Such a trust is set up during the lifetime of the grantor with the assets transferred to the trust. Since the assets are no longer in the decedent's name, upon his death, the designated beneficiaries become the owners of the assets without having to go through probate.

Avoiding probate does not necessarily mean avoiding taxes. Assets held in joint tenancy, in a bank account trust or in a funded revocable living trust will all be included in the decedent's estate for tax purposes. If the decedent retained any of the incidents of ownership in a life insurance policy on his life, or transferred such ownership within three years of his death, the proceeds will be included in his taxable estate. Same thing applies to uncompleted gifts or gifts in which the donor has retained too many strings.

ADVANTAGES OF PROBATE

Since the probate proceedings are conducted under the supervision of a court, the beneficiaries are protected in the sense that the estate is distributed according to the terms of the will or according to the state law. The probate procedure in most jurisdictions dictates that the court enter a decree of distribution before final distribution takes place. The beneficiaries execute receipts for the assets and the receipts are filed with the court before the executor is discharged.

The second major advantage of probate lies in its ability to pass the assets on to the beneficiaries free of creditors' claims. During the probate of an estate, the creditors are notified that a claim must be filed in order for the creditor to collect on a debt owed by the decedent or his estate. Such claims have to be filed in accordance with statutory procedures within the specified time. Failure to file a claim within the time period allowed by law will work as a statute of limitations in precluding the creditor from ever collecting on the debt after the statutory time has expired.

As we'll see below, the advantages of probate are far outweighed by the disadvantages it presents.

DISADVANTAGES OF PROBATE

Now let's look at the reasons why so many people find probate so distasteful that they'll go to extraordinary lengths to avoid it.

Cost of Probate

Probate costs include commissions paid to the executor or administrator, fees paid to the attorney representing the executor or administrator and court-related costs such as filing fees. Needless to say, the executor's commissions and attorney's fees constitute a lion's share of the total cost of probate. In many states, the commissions and fees are set by statute and are called statutory fees. In addition, a court may award compensation for extraordinary services performed, such as filing tax returns, litigation, sales of assets, etc.

To give you an idea as to what probate would cost in your state, we'll take California as an example. California's statutory rates are among the lowest in the nation. So it would be safe to assume that probate costs elsewhere would be at least what they are in California, probably a lot higher. Look at these figures:

California Statutory Fees and Commissions
For Executors and Attorneys

Value of Estate	Executor's Commission	+	Attorney's Fees
$ 15,000	$ 600		$ 600
50,000	1,650		1,650
100,000	3,150		3,150
150,000	4,150		4,150
200,000	5,150		5,150
300,000	7,150		7,150
400,000	9,150		9,150
500,000	11,150		11,150
600,000	13,150		13,150
700,000	15,150		15,150
800,000	17,150		17,150
900,000	19,150		19,150
1,000,000	21,150		21,150
1,250,000	23,650		23,650
1,500,000	26,150		26,150
2,000,000	31,150		31,150
3,000,000	41,150		41,150
4,000,000	51,150		51,150

Delay of Probate

Another major drawback to probate is that it is immensely time consuming compared to alternate methods of transferring the decedent's estate. The minimum period for a probate is about eight months, but if there are federal taxes to be paid, the usual time is close to two years or longer, sometimes much longer.

Why does probate take so long?

First, the law requires an estate to be kept open for six months after the required notice to creditors has been published in legal newspapers. Another reason is the nature of probate, which requires that each petition and procedure must have the approval of the court, and this always takes time.

Estates are often kept open longer as a matter of choice by the executor because federal estate taxes can be computed on the value of the estate either as of the date of death or six months later.

If you've left behind a business, the delays of probate can be devastating. Often, important business decisions have to be put off until after the probate is completed. Many other decisions require a court approval and supervision. As you can imagine, a business that emerges from probate is often a crippled business.

In reality, no matter how simple an estate appears to be, it's almost impossible to close an estate through the probate system in less than one year. With the slightest degree of complication, an estate

may not emerge from probate administration for two, three or more years.

Publicity of Probate

The third thing wrong with probate is the publicity that surrounds it. All information about the estate becomes a matter of public record. Promoters of dubious investment schemes flock to probate court to learn the identity of widows and children that are about to inherit family fortune. Again, a business fares considerably worse through probate. Assets and liabilities of business, income, expenses, inventory, customers, creditors, business plans, employee salaries - everything about the business is a matter of public record. Probate is often a source of valuable information for competitors.

COMPLEXITY OF PROBATE

The probate process is inherently complex. A minimum of five basic steps are necessary before the final distribution of assets can be made.

(a) **Filing Petition for Probate.** As a preliminary step, the executor will have to ascertain the identities of all beneficiaries, their addresses and their relationship to the decedent. A petition has to be filed with the court and a notice of the petition has to be sent to all beneficiaries and all heirs-at-law. A notice of death has to be published in a newspaper of general circulation for a statutory period of time.

(b) **Notice to Creditors.** All creditors to the decedent have to be notified of the death by publication in a newspaper. A creditor has to file a claim against the estate within a statutory time limit or he will be barred forever from collecting on the debt owed by the decedent.

(c) **Preparing Inventory and Appraisals.** This laborious step requires locating all assets of the estate and obtaining an appraisal from the court-appointed individual. This step is undoubtedly the most time-consuming and almost always holds up distribution of assets to needy beneficiaries.

(d) **Accounting and Petition for Distribution.** Once all the assets have been accounted for, a petition has to be filed with the court for discharge of debts and distribution of assets to the appropriate individuals. All tax returns have to be filed and taxes due paid at this time.

(e) **Final Petition.** When all of the above has been accomplished, the court may be asked to discharge the executor and close the estate.

In addition to the above described steps, some estates that own real property in more than one state face simultaneous probates in both the state of domicile of the decedent and in any other state where the real property is located. This is referred to as ancillary proceeding. It's not unusual for an ancillary probate to be a full court probate governed by the laws of the state where it is administered. The beneficiaries must endure the cost and delay of two probates.

The Use of Trusts in Estate Planning

9

The proper use of trusts is the cornerstone of any estate planning strategy. The trusts offer an estate owner flexibility and freedom to accomplish his objectives that no other mechanism can offer. The principal use and advantage of a trust arises from the fact that trust creates an entity wholly separate from that of the grantor. As a result, the principal or income that originally belonged to the grantor will now be attributed to the trust. This is exactly why a trust can be effectively used to reduce or eliminate taxes, avoid probate or to put the assets beyond the reach of the creditors. In this chapter, we'll examine various uses of trusts, tax and nontax advantages and forms of a trust instrument.

TRUSTS IN GENERAL - Basic Terms

Grantor, also known as settlor, is the person who sets up the trust. A trust is set up for the benefit of one or more beneficiaries. The property transferred to the trust makes up the corpus or the principal of the trust. The trustee could be one or more persons. Not all trustees are natural persons; oftentimes, a bank or trust company may act as corporate trustee. A trust could be either revocable or irrevocable. If a settlor reserves unto himself the power to amend or terminate the trust, the trust is considered a revocable trust. If he lacks this power, the trust is irrevocable. If the settlor provides in the trust instrument that, under certain conditions or after a certain period of time, the principal of the trust returns to the settlor, then the trust is considered a reversionary trust. If the settlor creates the trust during his or her lifetime, the trust is called inter vivos or living trust. If it is created under the terms of a will, it is called testamentary trust. A trust may sometimes provide for its beneficiaries some or all of its income. In this case, the beneficiaries are called income beneficiaries. After the trust is terminated, the remaining assets of the trust, known as remainderman, may either revert to the grantor or may go to his estate or to some other beneficiaries. In a simple trust, the trustee has no discretion when it comes to distributing all the income of the trust. In a complex trust, on the other hand, the trustee has the power to accumulate income or sprinkle it among the beneficiaries.

Elements of a Trust

A valid trust has five essential elements:

1. **Trustor or settlor setting up the trust;**

2. **Trustee holding legal title to the trust estate;**

3. **Beneficiaries who will eventually receive the trust estate;**

4. **Trust estate comprising of the property transferred to it;**

5. **Fiduciary relationship between trustor, trustee, and beneficiaries.**

Many times the same individual may act in more than one capacity. For instance, a settlor may also be the trustee of the trust.

Primary Uses of Trusts

1. Save income taxes;

2. Save estate taxes;

3. Provide management for assets of incapacitated individuals;

4. Relieve the settlor of management of assets, when not desired, even if he or she is capable of management;

5. Protect the beneficiaries from their own mismangement;

6. Avoid guardianship in the case of handicapped individuals or minors;

7. Reduce probate costs;

8. Reduce probate delays;

9. Avoid publicity attendant in probate;

10. Keep assets from rights of second spouse of surviving spouse;

11. Protect beneficiaries from their creditors;

12. Permit selection of situs for management of multi-state properties; and

13. Permit selection of manager for multi-state assets.

How You Can Use Trusts Advantageously

1. Often a person has children who are either minor or lack the maturity and experience to handle a large amount of property on their own. A trust is a very viable alternative in such a situation. It can provide that the trust assets are to be distributed when the children reach the age of maturity or at a more advanced age when they would be less likely to fritter the wealth away.

2. The trustee may be given discretionary powers to distribute income among certain beneficiaries or a class of beneficiaries according to their needs. The so-called "sprinkling" trust has the benefit of adding flexibility to the grantor's dispositive scheme.

3. A very popular use of a trust centers on its ability to avoid probate administration of the trust assets subsequent to the grantor's death. Such a trust is generally set up as a revocable living trust although irrevocable trusts can also be used that combines various other benefits with probate avoidance. The estate owner transfers the assets to the trust and the trust instrument provides for

ultimate distribution of assets to the designated beneficiaries. Since the property is not part of the decedent's estate, it escapes probate and its attendant legal costs, delays and publicity.

4. A major benefit of a trust is to provide professional, continuous management of the trust assets. Often a person feels that his wife may not have the expertise, background or temperament to manage income-producing assets or an on-going business. A corporate trustee would be an ideal solution. The wife may retain all the income benefits and the power to invade the principal for her use, but will no longer have the headaches of managing an on-going business.

5. A trust is often a useful device to provide support to an aged or handicapped dependent. The assets transferred to the trust will create a steady source of income for the dependent while removing these assets from the grantor's taxable income and gross estate.

6. A trust may also be used to fulfill a grantor's legal obligations. For example, a trust may be funded to make spousal support payments under a divorce decree with the provision that the trust principal is to return to the grantor in the event the spouse remarries or dies.

7. The use of a trust as a vehicle to carry insurance policies is quite common. By transferring the insurance to a trust and relieving himself of all incidents of ownership, an owner can remove its proceeds from his gross estate. A trust may provide greater flexibility than insurance settlement options.

8. Just as a trust can be set up to provide security to others, it can also be used by the grantor to protect himself from others, or from his own faulty judgment, or his old age. Similarly, a trust gives grantor an opportunity to see his own will in action. It gives him a chance to see how his dispositive scheme would work or evaluate the performance of the trustee. A revocable trust also allows him to make changes if the scheme does not work to his satisfaction.

9. The use of a trust to benefit a charity is another popular strategy that accomplishes several objectives simultaneously. A charitable remainder trust, for instance, may provide income from the trust assets to the beneficiaries for a set period of time after which the assets are transferred to the charity. The grantor fulfills his social or religious obligations of helping a charity while receiving an income tax deduction on the assets transferred to the trust and reducing the gross estate for tax purposes.

10. One use of a trust is to make money available for the use of dependents without having the corpus subject to the claims of a dependent's creditors (the so-called "spendthrift" trust.) Not all jurisdictions recognize the use of spendthrift trusts for this purpose. Even where a trust mechanism can be used to shield against the claims of creditors, it's not immune from federal taxes.

DRAFTING OF THE TRUST INSTRUMENT

A trust like any other legal instrument is only as good as the drafting behind it, and each clause of the trust must be precise and comprehensive so as to carry out the settlor's desires. In most cases, you'll need the help of a professional to prepare your trust instrument. However, many revocable trusts, set up for the sole purpose of avoiding probate, are fairly simple to draft. We've given you here a compendium of sample clauses that may actually help you in writing your trust instrument or increase your understanding of the process involved. Some clauses are necessary in each trust instrument, some others are optional depending on your objectives. Then there are some alternate clauses out of which you may select the one that best suits your needs.

Heading and Introductory Clause

The settlor's intent to establish the trust is one of the requisites for a valid instrument, and it should be evidenced by a clear introductory statement contained in the introductory clause. This clause names the settlor, the trustee and the date of the instrument. If the trust is a two party agreement, the following clause may be used:

> **This Agreement made and executed this ____________________**
>
> **day of ______________________________, 19______, by and between**
>
> **______________________________ hereinafter referred to as the settlor**
> ***Name***
> **and ______________________________ hereinafter referred to as the Trustee.**
> ***Name***

If the trust were to be set up as a one-party declaration (more commonly used where the settlor also acts as trustee of the trust,) the following clause may be used:

> **WHEREAS, I, ____,**
> ***Name***
> **of ______________________________, ______________________________,**
> ***Address*** ***City***
>
> **County of____________________, State of________________________,**
>
> **referred to hereinafter as Settlor and/or Trustee, declare that I am the owner of certain property referred to in this instrument as the trust estate and more fully set forth in Schedule A attached hereto and made a part hereof;**

Establishment of Trust Principal

The trust can be either a funded or an unfunded revocable trust. You can transfer certain assets to the trust now and still reserve the right to add to the trust principal in the future without amending the trust instrument. In order for the trust to be recognized as such, you must transfer title to the property to the trustee.

> **The Settlor, hereby assigns, transfers, sets over and delivers to the trustee, the property set forth in Schedule A, attached hereto, and has caused or will cause the Trustee to be designated as beneficiary of those life insurance policies described in Schedule B attached hereto and made a part hereof, to be held, administered, and disposed of as hereafter set forth in this Agreement.**
>
> **The Settlor reserves to (himself) (herself) and any other person the right to deposit with the Trustee, or make payable to the Trustee, other policies of insurance, and also to assign, transfer, convey, devise, bequeath and deliver to the Trustee such other personal property and real estate to be held, administered, and disposed of as hereafter set forth in this Agreement.**

Revocability of the Trust

Under many state laws, a trust is deemed to be revocable unless there is a specific provision regarding its irrevocability. Nonetheless, as a general rule, every revocable trust instrument should have a clause that gives the settlor the right to revoke, amend or otherwise change the trust. No trust should be made irrevocable without professional advice concerning its practical and tax consequences.

> **The Settlor reserves and shall have the exclusive right at any time and from time to time during (his) (her) lifetime by instrument in writing signed by the Settlor and delivered to the Trustee to modify or alter this Agreement, in whole or in part, without the consent of the Trustee or any beneficiary provided that the duties, powers and liabilities of the Trustee shall not be changed without (his) (her) consent; and the Settlor reserves and shall have the right during (his) (her) lifetime, by instrument in writing, signed by the Settlor and delivered to the Trustee, to cancel and annul this Agreement without the consent of the Trustee or any beneficiary hereof.**

Irrevocability of the Trust

As said before, careful consideration should be given to all consequences before making a trust irrevocable.

The Settlor hereby declares that this agreement and all trusts and beneficial interests, whether vested or contingent, herein created shall be irrevocable and that the Settlor hereafter shall stand without power at any time to revoke, change, alter, or annul any of the provisions herein contained or any of the vested or contingent beneficial interest affected thereby whether pursuant to a statute or decision of court or otherwise.

Payment of Estate Taxes by the Trust

With testamentary trusts or pour-over trusts, the trustee may be directed to pay the share of estate taxes attributable to the funds passing to this entity. In a marital deduction estate, the taxes are usually apportioned to the so-called "B" trust (the trust which contains property not qualifying for the marital deduction) to avoid reduction of the portion of the estate qualifying for the marital deduction. Therefore, this type of clause would be particularly significant with respect to that trust.

In the event that any of the assets of this trust fund in the hands of the Trustee immediately after the death of the Settlor are taxable in (his) (her) estate, the Trustee shall, upon the Settlor's death, pay from the trust the sum which equals the total death and succession taxes (except for any tax imposed under Section 2601 of the Internal Revenue Code of 1954, as amended) assessable in respect to the taxable estate.

Alternate clause that obligates the beneficiaries for estate taxes in proportion to their share of the estate:

Each beneficiary hereunder shall be liable for his/her proportionate share of any taxes levied upon the Settlor's total taxable estate upon the death of the settlor or the death of the survivor of two joint Settlors.

Provisions for Settlor During Settlor's Lifetime

In a revocable funded trust, the settlor would want to provide for the application and withdrawal of principal and income of the trust estate for his or her own lifetime benefit.

The Trustee shall hold, manage, invest and reinvest the trust estate (if any requires such management and investment) and shall collect the income, if any, therefrom and shall dispose of the net income and principal as follows:

(1) During the lifetime of the Settlor, the Trustee shall pay to or apply for the benefit of the Settlor all the net income from this trust.

(2) During the lifetime of the Settlor, the Trustee may pay to or apply for

the benefit of the Settlor such sums from the principal of this trust as in its sole discretion shall be necessary or advisable from time to time for the medical care, comfortable maintenance and welfare of the Settlor, taking into consideration to the extent the Trustee deems advisable, any other income or resources of the Settlor known to the Trustee.

(3) The Settlor may at any time during his lifetime and from time to time, withdraw all or any part of the principal of this trust, free of trust, by delivering an instrument in writing duly signed by him to the Trustee, describing the property or portion thereof desired to be withdrawn. Upon receipt of such instrument, the Trustee shall thereupon convey and deliver to the Settlor, free of trust, the property described in such instrument.

Simultaneous Death Clause

As we have discussed elsewhere in this Manual, simultaneous death of the husband and wife can cause significant tax and nontax problems for the estate. While many states have adopted the Uniform Simultaneous Death Act, some have not, and generally, it's advisable to formulate your own estate disposition plan than to rely upon the state law provisions. In order to maximize the marital deduction value, the wealthier spouse should be presumed to predecease the other, whereever possible.

If the Settlor and (his wife) (her husband) shall die simultaneously or under circumstances in which there is insufficient evidence to establish who predeceased the other, the Settlor shall be presumed conclusively to have predeceased (his wife) (her husband) for the purpose of this trust.

Rule Against Perpetuities Savings Clause

Under the rule against perpetuities, in effect in almost every state, a trust interest will fail unless it must vest within twenty-one years after the end of a life in being at the time the trust is created (the death of the settlor in the case of a testamentary or revocable inter vivos trust; the date of execution in the case of an irrevocable inter vivos trust.) If it is at all possible, no matter how absurd or remote, that an interest will not vest within the period of the rule, that interest is invalid. An example of such an interest would be a life estate to the settlor's child, with a remainder to the first grandchild of the settlor to attain 25-years of age, assuming that the settlor had no grandchildren at the effective date of the trust. The settlor's child could die at the birth of the grandchild, leaving a period in excess of twenty-one years between the death of the life in being and the vesting of the grandchild's interest. To prevent the trust interests from being eliminated by the rule against perpetuities, the instrument usually contains a savings clause providing that it will terminate within the period of the rule, as currently in effect or later amended.

If it shall be determined that any provision of the trust created herein violates any rule against perpetuities or remoteness of vesting now or hereafter in effect in a governing jurisdiction, that portion of the trust herein created shall be administered as herein provided until the termination of the maximum period allowed by law at which time and forthwith such part of the trust shall be distributed in fee simple to the beneficiaries then entitled to receive income therefrom, and for the purpose, it shall be presumed that any beneficiary entitled to receive support or education from the income or principal of any particular fund is entitled to receive the income therefrom.

Minor Beneficiary's Savings Clause

In certain instances, the beneficiary of a trust at its termination will be a minor. While it is imperative, for purposes of the rule against perpetuities, that the interest of such a beneficiary vest immediately, since it is quite possible that the rule would otherwise be violated, you may not wish for an immediate distribution of the corpus or accumulated income. It is quite likely that this may occur when the taker of the trust interest is the settlor's grandchild or similarly removed beneficiary. A specific savings clause should be used in this case.

> **Anything herein contained to the contrary notwithstanding, if at the termination of any trust established under this Agreement, all or any portion of the principal of the trust shall vest in absolute ownership of any beneficiary under the age of eighteen (18), the Settlor authorizes and empowers the Trustee in (his) (her) discretion to hold the property so vested in such a beneficiary in a separate fund for the benefit of such beneficiary and to invest and reinvest the same, collect the income therefrom and, until such beneficiary shall attain the age of eighteen (18) years, to apply all or so much of the net income, accumulated net income, or principal for the health, support, maintenance, and education of said beneficiary as the Trustee shall deem necessary. The Trustee is hereby authorized to make any such payments of income, accumulated income, or principal to a parent, guardian, or person with whom such beneficiary resides without obligation by the Trustee to look to the proper application or use of any payments so made, or the Trustee may expend such sums of income or principal in such manner in (his) (her) discretion as (he) (she) believes will benefit such beneficiary and may also pay to the beneficiary directly such sums as the Trustee approves as an allowance. The Trustee shall accumulate the balance of said income, if any, until such beneficiary shall attain the age of eighteen years (18), after which time the income and principal shall be paid over to said beneficiary at his or her own discretion until he or she shall terminate the trust. If such beneficiary shall die before attaining the age of eighteen (18) years, then the principal, together with any accumulated and unexpended income, shall be paid to such person or persons as he or she may appoint by his or her last will and testament, and if he or she fails effectively to make an appointment, then over to his or her estate. The authority conferred upon the Trustee shall be construed as a power only and shall not operate to suspend or prevent absolute vesting of any property in such beneficiary.**

Spendthrift Clause

A common restriction on the bequest of gift of an interest in trust is that the beneficiary be unable to pledge or assign the interest for the benefit of his or her creditors, and that the beneficiary be unable to deal with the corpus of the trust. These provisions are designed to protect the beneficiary from his or her own weakness or financial inabilities, while providing a steady income flow from the trust. The income may be subject to the payment of debts and expenses under state law, but the corpus is normally protected by a spendthrift clause.

It should be noted that not all states do recognize the validity of a spendthrift clause against the claims of creditors; those that do often place restrictions on them. If the trust is for the benefit of the settlor, in particular, this clause may be disregarded as part of a transfer in defraud of creditors. However, since most states do give some effect to these provisions, they are useful and most estate practitioners insert such clauses in all trusts as a matter of course, feeling that if it protects the corpus from the claims of creditors of the beneficiary, no one but the creditors is hurt. Furthermore, the interest of a beneficiary who is not the settlor.

Except as otherwise provided herein, all payments of principal and income payable, or to become payable, to the beneficiary of any trust created hereunder shall not be subject to anticipation, assignment, pledge, sale or transfer in any manner, nor shall any said beneficiary have the power to anticipate or encumber such interest, nor shall such interest, while in the possession of the Trustee , be liable for, or subject to, the debts, contracts obligations, liabilities or torts of any beneficiary.

Sprinkling Trust Clause

The trustee may be given the discretion to allocate the income of the trust in the manner he or she finds appropriate. This power will enable the trustee to consider facts and circumstances arising after the creation of the trust, such as the financial success of one child or the lack of success of another. It also provides a mechanism for the settlor to provide for a handicapped child, since the trustee could sprinkle enough income for support but not so much as would disqualify the beneficiary for available federal or state aid. As noted earlier, however, contributions to a sprinkling trust are not eligible for the $10,000 annual per-donee exclusion from the gift tax.

The Trustee shall pay such portion of the income and principal of the trust for the benefit of____________________, ____________________, and ____________________, as the Trustees in their discretion shall deem advisable for the health, maintenance, support and education, and, shall add to principal any income not so paid or used. In making distributions of income and principal, the Trustees may, in their discretion, pay more income and principal to or for the benefit of any one or more of said beneficiaries than it does for others and may omit paying income and principal to or for the benefit of any one or more of said beneficiaries.

Accumulation of Income Clause

Sometimes a settlor may find it more advantageous to have the trust accumulate income for distribution in a later year. This offers the trustee and beneficiary flexibility which can result in a reduction of the total income taxes paid on trust income. In the case of a minor beneficiary, such a clause would allow the trustee to accumulate income until he or she reaches the age of majority, at which time the accumulations can be distributed. It should be remembered that the contributions to an accumulation trust other than a qualifying minor's trust will not qualify for the annual $10,000 per-donee exclusion from gift tax.

Until such a time as the beneficiary of each trust created hereunder shall attain the age of eighteen (18) years, the Trustees shall collect the income of such trust, and after paying therefrom all expenses and taxes, shall accumulate the net income and add it to the principal. Upon the attainment by such beneficiary of the age of eighteen (18) years, the Trustees may pay over to or for the benefit of such beneficiary so much of the current income of his or her trust as the Trustees in their sole discretion shall deem advisable for his or her health, support, maintenance and education. Any amounts of income not so paid or used shall be added to and become a part of the principal of such trust.

Powers of the Trustee

The powers of the trustee are often stated in the statutory law of the applicable jurisdiction, but they should be explicitly delineated in the trust instrument because, unlike a will, a trust need not be rewritten when the settlor moves from one state to another. The law of the state in which the settlor later resides, and in whose courts the trust may be construed, may vary from that of the law of the state in which the instrument was drawn and executed.

Generally, the trustee should have the powers to make investments for the trust, though this may be broadly or narrowly drawn. In some states, the trustee, in the absence of specific direction, is limited to a legal list of conservative portfolio investments. If the settlor desires a more open or speculative type of investment, it should be stated in the instrument. Another major power which is often ignored is the power of the trustee to terminate the trust when it becomes too small to be economically handled. Such powers often apply when the assets drop below $5,000 or $10,000. If the trust is a testamentary trust, the trustee should also be able to borrow from and lend money to the executor of the settlor's estate.

In addition to any powers granted under applicable law or otherwise, and not in limitation of such powers, but subject to any rights and powers which may be reserved expressly by the Settlor(s) in this Agreement, the Trustee of each trust established hereunder are authorized and empowered to exercise the following powers in their sole and absolute discretion:

a. To hold and retain any or all property, real, personal, or mixed, received from the Settlor's estate, or from any other source, regardless of any law or rule of court relating to diversification, or non-productivity, for such time as the Trustee shall deem best, and to dispose of such property by sale, exchange, or otherwise, as and when they shall deem advisable; notwithstanding this provision or any other contained herein, the Trustees shall stand without power to sell or otherwise dispose of any interest in a closely-held business unless they shall have consulted with all of the adult beneficiaries and the legal representatives of all the minor beneficiaries of this trust, and they shall have agreed to such sale or other disposition by an affirmative vote of a majority of such beneficiaries and representatives.

b. To sell, assign, exchange, transfer, partition and convey, or otherwise dispose of, any property, real, personal or mixed, which may be included in or may at any time become part of the trust estate, upon such terms and conditions as deemed advisable, at either public or private sale, including options and sales on credit and for the purpose of selling, assigning, exchanging, transferring, partitioning, or conveying the same, to make, execute, acknowledge, and deliver any and all instruments of conveyance, deeds of trust, and assignments in such form and with such warranties and covenants as they may deem expedient and proper; and in the event of any sale, conveyance or other disposition of any of the trust estate, the purchaser shall not be obligated in any way to see the application of the purchase money or other consideration passing in connection therewith.

c. To invest and reinvest or leave temporarily uninvested any or all of the funds of the trust estate as said Trustees in their sole discretion may deem best, including investments in stocks, common and preferred, and common trust fund, without being restricted to those investments expressly approved by statute for investment by fiduciaries, and to change investments from realty to personality, and vice versa.

d. To lease any or all of the real estate, which may be included in or at any time become a part of the trust estate, upon such terms and conditions deemed advisable, irrespective of whether the term of the lease shall exceed the period permitted by law or the probable period of any trust created hereby, and to review and modify such leases; and for the purpose of leasing said real estate, to make, execute, acknowledge and deliver any and all instruments in such form and with such covenants and warranties as they may deem expedient and proper; and to make any repairs, replacements, and improvements, structural and otherwise, of any property, and to charge the expense thereof in an equitable manner to principal or income, as deemed proper.

e. To vote any stock, bonds, or other securities held by the trust at any meetings of stockholders, bondholders, or other security holders and to delegate the power so to vote to attorneys-in-fact or proxies under power of attorney, restricted or unrestricted, and to join in or become a party to any organization, readjustment, voting trust, consideration or exchange, and to deposit securities with any persons, and to pay any fees incurred in connection therewith, and to charge the same to principal or income, as deemed proper, and to exercise all of the rights with regard to such securities as could be done by the absolute owner.

f. To borrow money for any purpose in connection with the administration of any trust created hereby, and to execute promissory notes or other obligation for amounts so borrowed, and to secure the payment of any such amounts by mortgage or pledge or any real or personal property, and to renew or extend the time of payment of any obligation, secured or unsecured, payable to or by any trust created hereby, for such periods of time as deemed advisable.

g. To compromise, adjust, arbitrate, sue or defend, abandon, or otherwise deal with and settle claims, in favor of or against the trust estate as the Trustees shall deem best and their decision shall be conclusive. The Trustees, however, shall not be required to take any action until indemnified to their satisfaction.

h. To make distributions in cash or in kind, or partly in each, at valuations to be determined by the Trustee, whose decision as to values shall be conclusive.

i. To determine in a fair and reasonable manner whether any part of the trust estate, or any addition or increment thereto be income or principal, or whether any cost, charge, expense, tax, or assessment shall be charged against income or principal, or partially against income and partially against principal.

j. To engage and compensate, out of principal or income or both, as equitably determined, agents, accountants, brokers, attorneys-in-fact, attorneys-at-law, tax specialists, realtors, clerks, custodians, investment counsel, and other assistants and advisors, to delegate to such persons any discretion deemed proper, and to do so without liability for any neglect, omission, misconduct, or default of any such agent or professional representative, provided he or she was selected and retained with reasonable care.

k. To apportion extraordinary stock and liquidating dividends between the income and principal in such manner as shall fairly take into account the relative interests of the beneficiaries and to determine what constitutes such dividends.

l. To hold and administer the trusts created hereby in one or more consolidated funds, in whole or in part, in which the separate trusts shall have undivided interests.

m. To rely upon any affidavit, certificate, letter, note, telegraph or other paper, or on any telephone conversation, believed by them to be sufficient and to be protected and held harmless in all payments or distributions required to be made hereunder, if made in good faith and without actual notice or knowledge of the changed condition or status of any person receiving payments or other distributions upon a condition.

n. To purchase securities, real estate, or other property from the executor or other personal representative of the Settlor's estate, the executor or other personal representative of the Settlor's husband's/wife's estate, and the Trustees of any agreement or declaration executed by the Settlor during his/her lifetime under his/her last will in case his/her executors or Trustees are in need of cash, liquid assets, or income-producing assets with which to pay taxes, claims, or other estate or trust indebtedness, or in case such executors or

Trustees are in need of such property to properly exercise and discharge their discretion with respect to distributions to beneficiaries as provided for under such bills, declarations, or agreements. Such purchase may be in cash or may be in exchange for other property of this trust, and the Trustees shall not be liable in any way for any loss resulting to the trust estate by reason of the exercise of the authority.

o. To make loans or advancements to the executor or other personal representative of the Settlor's estate, the executor or other personal representative of the Settlor's husband's/wife's estate, and the Trustees of any agreement or declaration executed by the Settlor during his/her lifetime or under his/her last will in case such executors or Trustees are in need of cash for any reason. Such loans or advancements may be secured or unsecured, and the Trustees shall not be liable in any way for any loss resulting to the trust estate by reason of the exercise of this authority.

p. To do all other acts and things not inconsistent with the provisions of this instrument which they may deem necessary or desirable for the proper management of the trusts herein created, in the same manner and to the same extent as an individual might or could do with respect to his or her own property.

Waiver of Bond

The trustee may be required, under the law of the applicable state, to post bond or security, particularly if the trust is testamentary in character. The bond can usually be waived in the trust instrument and this may be advisable for personal trustees since it poses a financial burden that they may not be willing to bear. Institutional or corporate trustees, however, are often relieved of the requirement that they post a bond by state statute.

To the extent that any such requirements can legally be waived, no Trustee shall ever be required to give any bond as Trustee or qualify before, be appointed by, or in the absence of breach of trust, account to any court, or obtain the order or approval of any court in the exercise of any power or discretion herein given. No person paying money or delivering any property to any Trustee shall be required to see to its application.

Definition of Trustee

A general definitional provision concerning the trustee identification should be included in a trust instrument.

> **Whenever the word "Trustee" or any modifying or substituted pronoun therefor is used in this trust, such words and respective pronouns shall be held and taken to include both the singular and the plural, the masculine, feminine and neuter gender thereof, and shall apply equally to the Trustee named herein and to any successor or substitute Trustee acting hereunder, and such successor or substitute Trustee shall possess all the rights, powers and duties, authority and responsibility conferred upon the Trustee originally named herein.**

Governing Law

Normally the trust instrument will be interpreted under the laws of the state which is the state of domicile of the settlor unless the settlor has made a specific statement that the laws of another state should govern. Your trust instrument should express your intent regarding the governing state law.

> **This Agreement shall be governed and construed at all times according to the laws of the State of ______________________________.**

Signature and Notarization

The signature of the settlor and trustee should be provided at the end of the instrument. Although acknowledgment before a notary public is not a requirement, it's commonly used and establishes the validity of the signatures should they ever be called into question.

> **I certify that I have read the foregoing Agreement and that it correctly states the terms and conditions under which the trust estate is to be held, managed, and disposed of by the Trustee. I approve the Agreement in all particulars and request that the Trustee execute it.**
>
> **Dated:_________________________ ______________________________**
> ***Settlor/Trustee***
>
> **______________________________**
> ***Trustee***
>
> **STATE OF ____________________________**
>
> **COUNTY OF __________________________**

I, a Notary Public, within and for the State and County aforesaid do hereby certify that the foregoing instrument of writing was this day produced to me in said State and County by

____,

Settlor, party hereto and was executed and acknowledged by said Settlor to be his/her free act and voluntary deed.

WITNESS my signature this __________________ day of ________________, 19 _________.

(Notary seal) ________________________________

Notary Public

Revocable Living Trust 10

There are, in general, two forms of revocable living trusts, "funded" and "unfunded." The funded living trust contains assets contributed during the lifetime of the trustor and such assets escape probate upon the death of the trustor. The unfunded living trust receives its assets only after the death of the trustor and, typically, such assets have been probated prior to their transfer to the trust. It, nevertheless, is an advantageous estate planning device.

ELEMENTS OF A FUNDED REVOCABLE LIVING TRUST

The basic characteristic of such a trust is that it permits the trustor complete control and flexibility over his assets during his lifetime and, upon his death, allow them to be transferred to the designated beneficiaries without the rigors of a probate. Upon setting up the trust, the legal title to the grantor's assets is transferred to the trust although the grantor continues to exercise full control over such transferred assets. He also reserves unto himself the right to amend or revoke the trust at any time. Since the legal title to the assets is held by the trust, they are not subject to probate, and would be distributed by the successor trustee according to the provisions of the trust instrument.

ADVANTAGES OF A REVOCABLE LIVING TRUST

The advantages provided by a revocable living trust are quite numerous. The following is a brief discussion of these advantages:

Avoid Costs and Delays of Probate

As we've emphasized over and over, the principal benefit and purpose of a living trust is to avoid probate. The assets that are placed in a living trust can pass to the beneficiaries without any probate proceedings. With a living trust, upon the death of the trustor, the successor trustee, who in most cases is also the beneficiary of the trust, turns the assets over to himself and terminates the trust. He does not have to wait for a year or two or more for the probate court to certify that he now is the legal owner of the assets. In the case of a savings account, he simply walks into the bank with a copy of the declaration of trust and the death certificate and walks out with the money left to him. He sends the same papers to the securities broker and has the securities transferred to his name. If there is any real estate involved, the successor trustee files with the county recorder's office a quitclaim deed transferring property from the successor trustee to the beneficiary.

With the avoidance of probate, you also have avoided attorneys, executors, guardians, court proceedings and all their fees. We've seen what probate costs, anywhere from 2% to 10% of the gross estate. Savings provided by the living trust will now go directly to the beneficiaries.

Avoid Publicity of Probate

Probate has another drawback. It invites publicity. When an estate goes through probate, all estate records become public knowledge. Details about the assets and liabilities, the value of each item and who is to inherit what - all these are available to anyone who asks to see the probate file at the county clerk's office. Widows and inexperienced heirs become inviting targets for unscrupulous investors.

If a business was involved in probate proceedings, there's even a greater potential for damage. All the inside information about the business - its value, its assets and liabilities, partners' interests, its products and its income and future plans - is available to the competitors to glean and profit from. Probate is often known to deal a mortal blow to a business.

However, when you've placed your assets in a living trust, it's an entirely private matter. The trust instrument is not recorded anywhere, and no one is privy to its contents. When the trustor dies, the assets of the trust are immediately transferred to the beneficiary without any court proceedings. Living trust is a boon to those who seek privacy.

Avoid Contests

Wills are often successfully contested by disgruntled heirs, and estates do not always go to those whom the testator has named to receive them. The very fact that a will has to be probated, and is a matter of public record invites the attention and interest of people however remotely connected. All that a contestant needs to do is to put in a formal pleading alleging lack of mental capacity or undue influence. Often, an executor facing an expensive, time-consuming full-scale public trial and the legitimate heirs who're desperately in need of money choose to pay off the contestant.

A living trust, on the other hand, is a completely private matter. No one needs to know disposition of your assets in the living trust nor does it become a matter of public record. Immediately upon your death, your named beneficiaries inherit the assets, transfer them to their individual names, and terminate the trust. As a result, a living trust is almost never successfully contested.

Avoid Guardianship Proceedings

A major benefit of a revocable living trust is that it allows you to protect yourself or other family members against unforeseen contingencies such as incompetency, incapacity, physical disability or similar misfortune. In such a contingency, the living trust would provide for the successor trustee to take over the management of the trust and provide sufficient income for the comfort and welfare of the trustor. This would avoid the need, embarrassment and publicity of a court-appointed guardian or conservator. Since the successor trustee in your living trust is someone hand-picked by you and not by a court, he's more likely to look after your affairs and welfare. You can also grant him broad fiduciary powers that a court-appointed guardian could not have.

Avoid Ancillary Probate

Normally, when a person dies, his estate is probated according to the laws of the state where he died. If he happens to own some real estate in another state, additional probate, called ancillary

proceedings, will be necessary in the other state. If he had created a testamentary trust in his will, a trustee will be appointed in each of the states where real property is located. All of this creates additional drain of money and time on your family.

However, if you had placed all of your property, wherever located, in a living trust, there would be no probate in any state. The successor trustee named in the living trust can look after the assets in each of the states affected without any court proceedings.

Choice of State Law

This same feature allows you to select the law of one state over another to govern the validity, administration and disposition of your assets. Sometimes you may find that the laws of a state other than the one where you live are more favorable. In such a case, your living trust can stipulate that the laws of that particular state would govern the trust.

See Your Will in Action

A living trust offers you the benefit of seeing your trust in action - while you're around to make corrections and adjustments. The revocable living trust gives you the opportunity to test out a trustee. Rather than just placing your property in a testamentary trust and hoping that the trustee will perform up to your expectations, you can install the trustee now, through your living trust. This way, you'll be able to supervise, correct, and perhaps even replace the trustee if he does not measure up to your expectations. This potential benefit is often described as a way to "see your will in action."

Professional Management

There is one other overriding reason for setting up a revocable living trust, and that is to obtain professional management of the assets. For instance, a person may have inherited a large sum of money, and is too inexperienced to handle it; or, a person has reached an age where he simply does not want to get involved in the day-to-day operation of his assets and business; or, he feels that a professional manager can look after his affairs better. A revocable living trust would be an answer in such a situation. You can delegate the responsibility to a professional manager and still retain the power to revoke the arrangement, if you so desire later.

Protection for Inexperienced Heirs

Thinking along the same lines, a living trust is often an answer if one feels that his wife or children are inexperienced in business matters or there is a fear that they may make imprudent expenditures or gifts or may live beyond their means. You may also use the vehicle of living trust to put your assets beyond the reach of creditors or of a divorced spouse.

Continuous, Smooth Operation

When you set up a living trust, you're setting up a separate, on-going entity. It keeps on operating even after you die, without any disruption from the probate process. Smooth, continuous management of trust properties is thus assured. This is vitally important in the case of an on-going

business; employees, customers, or creditors of the business need not feel the slightest impact of the death of the owner.

Comprehensive Disposition of Your Estate

By making your living trust the ultimate receptacle of all of your assets - real, personal, life insurance, pension and death benefits - you'll greatly simplify the management and disposition of your assets under the terms of one single instrument and thereby reduce the possibility of conflicting or duplicative arrangements under two or more instruments.

Flexibilty

Living trust gives you the ultimate flexibility in your estate planning with regard to the disposition of trust income and principal. Various members of your family may have differing needs for support, education, and comfort; often these needs change. You can set up your living trust to meet and adapt to these needs by giving the trustee discretionary powers over distribution of income and principal.

Funding the Trust for a Specific Purpose

In some situations, you can use the trust to set aside particular assets, proceeds, or payments for administration and distribution pursuant to a court decree or by agreement of the parties. For example, a living trust can be set up with an insurance policy on the husband's life for the benefit of his children pursuant to a divorce decree or by agreement with his wife.

Creditors

A living trust offers another important "bonus" advantage - exemption from attachment. At least in some states, when you hold property in trust for someone, it's not subject to attachment by persons having a claim against the settlor. This, however, should not be done in fraud of creditors.

You should know that in at least ten states, there are statutes which provide that a settlor who retains an unlimited power of revocation is to be deemed the absolute owner of the trust property insofar as creditors are concerned.

In Summary

In the final analysis, the use of a revocable living trust to achieve many of the above-enumerated objectives should be analyzed under individual circumstances. Often, it would be a combination of several estate planning techniques that would bring the optimum benefit to you.

TAX CONSEQUENCES

In creating the trust, there are normally no adverse tax consequences to the grantor. The grantor, for most tax purposes, is still considered the owner of the assets transferred to the revocable trust. Accordingly, during his lifetime he is taxed on the income earned by the trust; he is deemed to have made no taxable gift; and upon his death the assets will be included in his gross estate. For tax reporting purposes, if an individual is both the grantor and trustee of a revocable living trust, there is no requirement to file a separate trust income tax return. Until the trust becomes irrevocable, the grantor may include on his personal income tax return all the gains and losses attributable to the trust estate.

Trustees' fees and other expenses of administering a revocable lifetime trust incurred before the grantor's death are deductible by the estate owner (grantor) on his personal income tax return to the extent that they qualify as deductible nonbusiness or business expenses. Administration expenses incurred by the trusts after death of the grantor continue to be deductible by the trust for income tax purposes except to the extent that they are allowed as estate tax deductions. In this respect, the trust is allowed deductions on the same basis as an estate during estate administration. However, the trust's income tax deductions for administration expenses continue beyond the period of administration of the estate; they continue for the life of the trust.

The living trust arrangement can also provide an opportunity to eliminate the estate tax on the death of the first spouse and also to minimize such tax on the death of the surviving spouse. To achieve this objective, the trust will typically provide that upon the death of the first spouse, it becomes irrevocable and is divided into two separate trusts, Trust "A" and Trust "B". That portion of the couple's total estate, consisting of the surviving spouse's interest in the assets plus that portion of the decedent's estate which equals the optimum marital deduction will go into Trust "A". The balance of the estate (i.e., the non-marital deduction portion of the decedent's estate which will be approximate to the amount of equivalent exemption) will go into Trust "B". Upon the survivor's death the balance of Trust "A" will be taxed, but will not be subject to probate; the balance in Trust "B" will not be subject to either death taxation or probate. Achieving this dual objective requires the use of a funded revocable living trust.

TRANSFER OF ASSETS

In order to have the funded revocable living trust effectively avoid probate, it's necessary not only to prepare and execute a declaration of trust but also to actually transfer the legal title to the assets to the trust. It's absolutely imperative that you as a grantor keep your personal assets separate from those belonging to the trust. If the asset transferred is a real property, the deed transferring the property from the grantor to the trust must be recorded in the office where such land records are maintained. The trust instrument must carry the full legal description of the real property. In transferring publicly held stocks and bonds, it'll be necessary to contact the brokerage firm handling the securities to effectuate the transfer. Where a transfer of partnership interest is involved, partnership agreement must be examined for any prohibition against transfer, even to a revocable living trust. Often, the agreement calls for obtaining consent of the other partners. Where there are assets without any formal documentation involved in the transfer, the assets must be described with full particulars, sometimes attaching a photograph of the item.

CREDITORS' CLAIMS

Are the assets contained in a funded revocable living trust at the time of the grantor's death subject to the claims of his general creditors for debts incurred during the grantor's life?

The answer to this question is far from clear. In the absence of statute, most courts have concluded that the grantor's creditors cannot reach the assets of a revocable trust established for others at a time when the grantor was solvent. e.g., Guthrie v. Canty, 53 N.E.2d 1009 (Mass. 1944); Van Stewart v. Townsend, 28 P.2d 999 (Wash. 1934). Of course, the creditors can reach the assets if the grantor revokes the trust and takes possession of them. Several important states have statutes that allow the grantor's creditors to reach the assets of a revocable trust. They include Florida (Fla. Stat. Ann. 726.08 (West 1969), Indiana (Ind. Code Ann. 30-1-9-14 (Burns 1972)), Kansas (Kan. Stat. Ann 58-2414 (1976)), and Michigan (Mich. Stat. Ann. 26.155(118) (1974)).

If the transfer is made in fraud of the creditors, it stands to reason that the creditors may assert their claims against the trust. In *Estate of Heighs v Heighs* 186 CaAp2d 360, 9 Cal 196 (1960), it was held that if the transfer renders the grantor insolvent, the trust assets may be subjected to the decedent's creditors. This may, however, be difficult to establish since the grantor retained the power to revoke the trust and reclaim the trust assets. On the other hand, the *Estate of Camm v Brooks* 76 CaAp2d 104, 172 P2d 547 (1946) holds that where the grantor reserves the lifetime benefits from a trust, such as income, the grantor's creditors may collect their debts after the grantor's death out of the assets which were payable to the grantor, even in the absence of the grantor's fraud or insolvency.

If, under state law, the trust assets are not subject to the decedent's creditors, the payment by the trust to such creditors is not deductible for federal estate tax purposes unless payment is made prior to the time for filing the federal estate tax return (including extensions). I.R.C. 2053(c).

General Power of Appointment

In some states creditors are allowed to reach property of a trust over which the grantor retained a general power of appointment. Others limit their reach to trusts in which the grantor also reserved a life interest. Where the grantor reserved an inter vivos power exercisable in his or her own favor, creditors should be able to reach the assets of the trust a la the Bankruptcy Code.

Other Creditors of a Deceased Grantor

The extent to which the grantor's creditors can reach the assets of a revocable trust following the grantor's death is uncertain in most jurisdictions. Unless the grantor retained a beneficial interest in the trust the creditors may be unable to reach the assets. In State Street Bank & Trust Co. v. Reiser, 389 N.E.2d 768 (Mass. App. 1979), the court held that "where a person places property in trust and reserves the right to amend and revoke, or to direct disposition of principal and income, the settlor's creditors may, following the death of the settlor, reach in satisfaction of the settlor's debts to them, to the extent not satisfied by the settlor's estate, those assets owned by the trust over which the settlor had such control at the time of his death as would have enabled the settlor to use the trust assets for his own benefit."

Also, a relatively recent New York decision held that the assets of a revocable trust are subject to claims of the deceased grantor's creditors. In re Matter of Granwell, 228 N.E.2d 779 (N.Y. 1967). The decision was based on New York law, under which the grantor of a revocable trust is considered to have retained ownership of the trust assets until death insofar as creditors are concerned. The possibility that the assets of a revocable trust cannot be reached by the grantor's creditors following the grantor's death is cited by some planners as an additional advantage of establishing a revocable trust. The advantage may be illusory, and costly if the trustee is required to engage in litigation after the grantor's death.

POUR-OVER WILL AND UNFUNDED REVOCABLE LIVING TRUST

Sometimes a person may not wish to establish a funded revocable living trust for the primary purpose of avoiding probate. He may find the transfer of assets to the living trust rather cumbersome for the time being. He may, however, wish to have his estate go into a trust after his death for purposes of tax saving and management of assets for his beneficiaries. In such a case, he would set up an unfunded revocable living trust and his will will provide for his estate to pour over into the trust upon his death. Of course, such an arrangement will not avoid probate of the estate.

The unfunded revocable living trust serves as a standby vehicle and, in the event the estate owner so decides, could be later funded with his assets, in which case he would avoid probate of these assets. An unfunded revocable living trust may also be used by someone who wishes to control and manage his assets during his lifetime, but wants to have a corporate fiduciary assume the role of trustee upon his death. A corporate fiduciary would be less reluctant to take over an unfunded living trust than a funded living trust.

In connection with the creation of an unfunded revocable living trust and a pour-over will, the following points must be kept in mind:

(a) The trust instrument must be identified in the testator's will and it must be executed before or concurrently with the will.

(b) Since some states do not recognize an unfunded living trust, it's recommended that it be nominally funded.

(c) The pour-over will should provide that if the trust is invalid or has been revoked, its provisions are to be incorporated into the will by reference.

(d) It is also a common practice to make the trust the beneficiary of life insurance proceeds and death benefits under qualified retirement plans and thus streamline the decedent's estate plan.

A living trust as described above differs from a testamentary trust in many respects. A testamentary trust is subject to the continuing jurisdiction of the probate court. As a result, the cost of administering a testamentary trust, due to higher trustee's and attorneys' fees, is considerably significant. A testamentary trust is a matter of public record and could become a target of publicity hounds.

In conclusion, the use of an unfunded revocable living trust together with a pour-over will may be a preferable choice over a testamentary trust in that it contains all the advantages of the latter and the flexibility of a living trust. It leaves the estate owner with a viable option of funding the trust anytime prior to his death and avoid probate.

Sample Revocable Trust Agreement

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A sample revocable trust agreement has been put together below to provide a relatively flexible estate plan for a married man whose wife and children are living.

In the following form, all of the net income is payable to the grantor during his life. On his death, trusts are established for his wife and descendants. The grantor retains the right to revoke the trust at any time. The corpus is divided into two trusts, Trust "A" designed to qualify for the marital deduction in the grantor's estate (Marital Deduction Trust), and Trust "B" designed to escape taxation in the wife's estate (Residuary Credit Shelter Trust). This pattern is frequently employed to achieve maximum estate tax economy. All the income from Trust "A" is payable to the wife for her life, and she is given a general testamentary power of appointment over the remainder. The income of Trust "B" may be paid to the grantor's wife in the trustee's discretion, and the wife is given a limited power of appointment over the remainder. Since the trust may own the bulk of the grantor's assets so that there are insufficient assets in his probate estate to pay taxes, debts, and funeral and administration expenses, the trustee is directed to pay the grantor's executor the amount of any deficiency.

Also shown separately in this chapter are forms dealing with Trust C- Qualified Terminable Interest Trust. You must seek professional advice before implementing any of these trusts in your situation.

(Heading)

This Agreement made and executed this ____________________ day of

____, 19_____, by and between

__________________________________ hereinafter referred to as the Settor
Name

and ______________________________ hereinafter referred to as the Trustee.
Name

(Introductory Clause)

The Settlor desires to create a trust of the property described in Schedule A hereto annexed, together with such monies, securities and other assets as the Trustee may hereafter at any time hold or acquire hereunder (such property, monies, securities and other assets, including cash or other property received by the Trustee pursuant to its designation as beneficiary of any insurance policies or of any employee benefit plan, being hereinafter referred to collectively as the "trust estate"), for the purposes hereinafter set forth.

NOW, THEREFORE, in consideration of the premises and of the mutual covenants herein contained, the Settlor agrees to execute such further instruments as shall be necessary to vest the Trustee with full title to the property described in Schedule A, and the Trustee agrees to hold the trust estate, IN TRUST, NEVERTHELESS, for the following uses and purposes and subject to the terms and conditions hereinafter set forth:

(Provision for Settlor During Settlor's Lifetime)

The Trustee shall hold, manage, invest and reinvest the trust estate (if any requires such management and investment) and shall collect the income, if any, therefrom and shall dispose of the net income and principal as follows:

(1) During the lifetime of the Settlor, the Trustee shall pay to or apply for the benefit of the Settlor all the net income from this trust.

(2) During the lifetime of the Settlor, the Trustee may pay to or apply for the benefit of the Settlor such sums from the principal of this trust as in its sole discretion shall be necessary or advisable from time to time for the medical care, comfortable maintenance and welfare of the Settlor, taking into consideration to the extent the Trustee deems advisable, any other income or resources of the Settlor known to the Trustee.

(3) The Settlor may at any time during his lifetime and from time to time, withdraw all or any part of the principal of this trust, free of trust, by delivering an instrument in writing duly signed by him to the Trustee, describing the property or portion thereof desired to be withdrawn. Upon receipt of such instrument, the Trustee shall thereupon convey and deliver to the Settlor, free of trust, the property described in such instrument.

(4) In the event that the Settlor is adjudicated to be incompetent or in the event that the Settlor is not adjudicated incompetent, but by reason of illness or mental or physical disability is, in the opinion of the Trustee, unable to properly handle his own affairs, then and in that event the Trustee may during the Settlor's lifetime, in addition to the payments of income and principal for the benefit of the Settlor, pay to or apply for the benefit of any one or more of the Settlor's wife, ____________________ (Name) ________________, and the Settlor's children such sums from the net income and from the principal of this Trust in such shares and proportions as in its sole discretion it shall determine to be necessary or advisable from time to time for the medical care, comfortable maintenance and welfare of the Settlor's said wife and children taking into consideration to the extent the Trustee deems advisable, any other income or resources of the Settlor's said wife and children known to the Trustee.

(Right to Amend or Revoke the Trust)

The Settlor reserves and shall have the exclusive right at any time and from time to time during (his) (her) lifetime by instrument in writing signed by the Settlor and delivered to the Trustee to modify or alter this Agreement, in whole or in part, without the consent of the Trustee or any beneficiary provided that the duties, powers and liabilities of the Trustee shall not be changed without (his) (her) consent; and the Settlor reserves and shall have the right during (his) (her) lifetime, by instrument in writing, signed by the Settlor and delivered to the Trustee, to cancel and annul this Agreement without the consent of the Trustee or any beneficiary hereof.

(Creation of Trust A and Trust B)

Upon the death of the Settlor, the Trustee shall divide the Trust Estate (which shall include any property which may be added from the Settlor's general estate) as follows:

(1) If the Settlor is survived by his wife, ____________________(Name) ______________________the Trustee shall divide the Trust Estate into Two (2) separate shares, hereinafter designated as Trust "A" and Trust "B." Trust A shall be composed of cash, securities or other property of the Trust Estate (undiminished by any estate, inheritance, succession, death or similar taxes) having a value equal to the maximum marital deduction as finally determined in the Settlor's federal estate tax proceedings, less the aggregate amount of marital deductions, if any, allowed for such estate tax purposes by reason of property or interests in property passing or which have passed to the Settlor's said wife otherwise than pursuant to the provisions of this Article; provided however, the amount for Trust A hereunder shall be reduced by the amount, if any, needed to increase the Settlor's taxable estate (for federal estate tax purposes) to the largest amount that, after allowing for the unified credit against the federal estate tax and the state death tax credit against such tax (but only to the extent that the use of such state death tax credit does not increase the death tax payable to any state), will not result in a federal estate tax credit being imposed on the Settlor's estate. The term "maximum marital deduction" shall not be construed as a direction by the Settlor to exercise any election respecting the deduction of estate administration expenses, the determination of the estate tax valuation date, or any other tax election which may be available under any tax laws, only in such manner as will result in a larger allowable estate tax marital deduction than if the contrary election had been made. The Trustee shall have the sole discretion to select the assets which shall constitute Trust A. In no event, however, shall there be included in this Trust A any asset or the proceeds of any asset which will not qualify for the federal estate tax marital deduction, and this Trust A shall be reduced to the extent that it cannot be created with such qualifying assets. The Trustee shall value any asset selected by the Trustee for distribution of such asset. Trust A shall be paid over and distributed to the Settlor's said wife free of

trust. Trust B shall be the balance of the Trust Estate after the assets have been selected for Trust A.

(2) If the Settlor's wife, ______________________________

(Name)______________________________, shall not survive him, Trust B shall be the entire Trust Estate.

Trust B shall be administered as hereinafter set forth.

(Trust A - Marital Deduction Trust)

Trust A shall be held, administered and distributed as follows:

(Payment of Income to Wife)

(1) Commencing with the date of the Settlor's death, the Trustee shall pay to or apply for the benefit of the Settlor's said wife during her lifetime all the net income from Trust A in convenient installments but no less frequently than quarter-annually.

(Principal Invasion by Trustee)

(2) In addition, the Trustee may pay to or apply for the benefit of the Settlor's said wife such sums from the principal of Trust A as in its sole discretion shall be necessary or advisable from time to time for the medical care, comfortable maintenance, and welfare of the Settlor's said wife, taking into consideration to the extent the Trustee deems advisable any other income or resources of the Settlor's said wife known to the Trustee.

(Withdrawal of Principal by Wife)

(3) The Settlor's said wife may at any time during her lifetime and from time to time, withdraw all or any part of the principal of Trust A, free of trust, by delivering an instrument in writing duly signed by her to the Trustee, describing the property or portion thereof desired to be withdrawn. Upon receipt of such instrument, the Trustee shall thereupon convey and deliver to the Settlor's said wife, free of trust, the property described in such instrument.

(Power to Require Trustee to Make Property Productive)

(4) The Settlor's said wife may at any time by written notice, require the Trustee either to make any nonproductive property of this trust productive or to convert such nonproductive property to productive property within a reasonable time.

(General Power of Appointment)

(5) Upon the death of the Settlor's said wife, the entire remaining principal of Trust A, together with any accrued and undistributed income therefrom, shall be paid over, conveyed and distributed to or in trust for such appointee or appointees (including the estate of the Settlor's wife), in such manner and in such proportions as the Settlor's said wife may appoint in and by the Last Will of the Settlor's said wife, making specific reference to the power of appointment herein conferred upon her. In disposing of Trust A, the Trustee shall be protected in relying upon an instrument admitted to probate in any jurisdiction as the Last Will of Settlor's said wife or in acting upon the assumption that the Settlor's wife died intestate in case the trustee has no notice of the existence of a Will of the Settlor's said wife within six (6) months after the death of the Settlor's said wife.

(Trust B - Credit Shelter Trust)

Trust B shall be held, administered and distributed as follows:

(Income Provisions)

(1) Commencing with the date of the Settlor's death, the Trustee shall pay to or apply for the benefit of any one or more of the Settlor's said wife and the Settlor's children, until division into shares pursuant to Paragraph (3) all of the net income from Trust B in convenient installments in such shares and proportions as the Trustee in its sole discretion shall determine primarily for the medical care, comfortable maintenance, welfare and education of the Settlor's said wife and children, taking into consideration to the extent the Trustee deems advisable, any other income or resources of the Settlor's said wife and children known to the Trustee.

(Invasion of Principal)

(2) Prior to division into shares pursuant to Paragraph (3), the Trustee may pay to or apply for the benefit of any one or more of the Settlor's said wife and children such sums from the principal of Trust B in such shares and proportions as in its sole discretion shall be necessary or advisable from time to time for the medical care, education, support and maintenance in reasonable comfort of the Settlor's said wife and children, taking into consideration to the extent the Trustee deems advisable, any other income or resources of the Settlor's said wife and children known to the Trustee. Any payment or application of benefits for a child of the Settlor pursuant to this Paragraph shall be charged against this Trust as a whole rather than against the ultimate distributive share of a beneficiary to whom or for whose benefit the payment is made.

(Division into Shares for Children)

(3) Upon or after the death of the survivor of the Settlor's said wife and the Settlor or upon or after the remarriage of the Settlor's said wife, when no child of the Settlor is living who is under the age of ____________ years, the Trustee shall divide this Trust as then constituted into equal separate shares so as to provide one (1) share for each then living child of the Settlor and one (1) share for each deceased child of the Settlor who shall leave issue then living. Each share provided for a living child of the Settlor shall be distributed to such child. Each share provided for a deceased child of the Settlor who shall leave issue then living, shall be distributed per stirpes to such issue.

(Powers of the Trustee)

In addition to any powers granted under applicable law or otherwise, and not in limitation of such powers, but subject to any rights and powers which may be reserved expressly by the Settlor(s) in this Agreement, the Trustee of each trust established hereunder are authorized and empowered to exercise the following powers in their sole and absolute discretion:

a. To hold and retain any or all property, real, personal, or mixed, received from the Settlor's estate, or from any other source, regardless of any law or rule of court relating to diversification, or non-productivity, for such time as the Trustee shall deem best, and to dispose of such property by sale, exchange, or otherwise, as and when they shall deem advisable; notwithstanding this provision or any other contained herein, the Trustees shall stand without power to sell or otherwise dispose of any interest in a closely-held business unless they shall have consulted with all of the adult beneficiaries and the legal representatives of all the minor beneficiaries of this trust, and they shall have agreed to such sale or other disposition by an affirmative vote of a majority of such beneficiaries and representatives.

b. To sell, assign, exchange, transfer, partition and convey, or otherwise dispose of, any property, real, personal or mixed, which may be included in or may at any time become part of the trust estate, upon such terms and conditions as deemed advisable, at either public or private sale, including options and sales on credit and for the purpose of selling, assigning, exchanging, transferring, partitioning, or conveying the same, to make, execute, acknowledge, and deliver any and all instruments of conveyance, deeds of trust, and assignments in such form and with such warranties and covenants as they may deem expedient and proper; and in the event of any sale, conveyance or other disposition of any of the trust estate, the purchaser shall not be obligated in any way to see the application of the purchase money or other consideration passing in connection therewith.

c. To invest and reinvest or leave temporarily uninvested any or all of

the funds of the trust estate as said Trustees in their sole discretion may deem best, including investments in stocks, common and preferred, and common trust fund, without being restricted to those investments expressly approved by statute for investment by fiduciaries, and to change investments from realty to personality, and vice versa.

d. To lease any or all of the real estate, which may be included in or at any time become a part of the trust estate, upon such terms and conditions deemed advisable, irrespective of whether the term of the lease shall exceed the period permitted by law or the probable period of any trust created hereby, and to review and modify such leases; and for the purpose of leasing said real estate, to make, execute, acknowledge and deliver any and all instruments in such form and with such covenants and warranties as they may deem expedient and proper; and to make any repairs, replacements, and improvements, structural and otherwise, of any property, and to charge the expense thereof in an equitable manner to principal or income, as deemed proper.

e. To vote any stock, bonds, or other securities held by the trust at any meetings of stockholders, bondholders, or other security holders and to delegate the power so to vote to attorneys-in-fact or proxies under power of attorney, restricted or unrestricted, and to join in or become a party to any organization, readjustment, voting trust, consideration or exchange, and to deposit securities with any persons, and to pay any fees incurred in connection therewith, and to charge the same to principal or income, as deemed proper, and to exercise all of the rights with regard to such securities as could be done by the absolute owner.

f. To borrow money for any purpose in connection with the administration of any trust created hereby, and to execute promissory notes or other obligation for amounts so borrowed, and to secure the payment of any such amounts by mortgage or pledge or any real or personal property, and to renew or extend the time of payment of any obligation, secured or unsecured, payable to or by any trust created hereby, for such periods of time as deemed advisable.

g. To compromise, adjust, arbitrate, sue or defend, abandon, or otherwise deal with and settle claims, in favor of or against the trust estate as the Trustees shall deem best and their decision shall be conclusive. The Trustees, however, shall not be required to take any action until indemnified to their satisfaction.

h. To make distributions in cash or in kind, or partly in each, at valuations to be determined by the Trustee, whose decision as to values shall be conclusive.

i. To determine in a fair and reasonable manner whether any part

of the trust estate, or any addition or increment thereto be income or principal, or whether any cost, charge, expense, tax, or assessment shall be charged against income or principal, or partially against income and partially against principal.

j. To engage and compensate, out of principal or income or both, as equitably determined, agents, accountants, brokers, attorneys-in-fact, attorneys-at-law, tax specialists, realtors, clerks, custodians, investment counsel, and other assistants and advisors, to delegate to such persons any discretion deemed proper, and to do so without liability for any neglect, omission, misconduct, or default of any such agent or such agent or professional representative, provided he or she was selected and retained with reasonable care.

k. To apportion extraordinary stock and liquidating dividends between the income and principal in such manner as shall fairly take into account the relative interests of the beneficiaries and to determine what constitutes such dividends.

l. To hold and administer the trusts created hereby in one or more consolidated funds, in whole or in part, in which the separate trusts shall have undivided interests.

m. To rely upon any affidavit, certificate, letter, note, telegraph or other paper, or on any telephone conversation, believed by them to be sufficient and to be protected and held harmless in all payments or distributions required to be made hereunder, if made in good faith and without actual notice or knowledge of the changed condition or status of any person receiving payments or other distributions upon a condition.

n. To purchase securities, real estate, or other property from the executor or other personal representative of the Settlor's estate, the executor or other personal representative of the Settlor's husband's/wife's estate, and the Trustees of any agreement or declaration executed by the Settlor during his/her lifetime under his/her last will in case his/her executors or Trustees are in need of cash, liquid assets, or income-producing assets with which to pay taxes, claims, or other estate or trust indebtedness, or in case such executors or Trustees are in need of such property to properly exercise and discharge their discretion with respect to distributions to beneficiaries as provided for under such bills, declarations, or agreements. Such purchase may be in cash or may be in exchange for other property of this trust, and the Trustees shall not be liable in any way for any loss resulting to the trust estate by reason of the exercise of the authority.

o. To make loans or advancements to the executor or other personal representative of the Settlor's estate, the executor or other personal representative of the Settlor's husband's/wife's estate, and the Trustees of any

agreement or declaration executed by the Settlor during his/her lifetime or under his/her last will in case such executors or Trustees are in need of cash for any reason. Such loans or advancements may be secured or unsecured, and the Trustees shall not be liable in any way for any loss resulting to the trust estate by reason of the exercise of this authority.

p. To do all other acts and things not inconsistent with the provisions of this instrument which they may deem necessary or desirable for the proper management of the trusts herein created, in the same manner and to the same extent as an individual might or could do with respect to his or her own property.

(Direction to Pay Executor if Residuary Estate is Insufficient for Taxes, Debts, Funeral and Administration Expenses)

The Trustee shall pay over to the Executor of the Settlor's Last Will and Testament, out of Trust B, or, if the Settlor's wife, does not survive the Settlor, out of the trust estate, such amount as the Executor shall certify to the Trustee as the amount by which the residuary estate passing pursuant to the Settlor's Last Will and Testament shall be insufficient for the payment of all the taxes imposed on the Settlor's estate and all the expenses of the administration of the Settlor's estate and all debts and funeral expenses payable by the Settlor's estate, provided, however, that no asset of the trust estate shall be paid over to the executor if such asset is not includible in the Settlor's gross estate for federal estate tax purposes. The Trustee shall have no duty or obligation to inquire as to the correctness of any amount so certified by the Executor, and the payment of such amount to the Executor shall be a full and complete discharge to the Trustee with respect to such payment. The Trustee may, but shall have no duty to, take part in the preparation of any death tax return or in any negotiation or proceeding to determine the amount of any death taxes.

(Common Disaster Provision)

If any beneficiary and the Settlor should die under such circumstances as would render it doubtful whether the beneficiary or the Settlor died first, then it shall be conclusively presumed for the purposes of this Trust that said beneficiary predeceased the Settlor.

(Perpetuities Savings Clause)

If it shall be determined that any provision of the trust created herein violates any rule against perpetuities or remoteness of vesting now or hereafter in effect in a governing jurisdiction, that portion of the trust herein created shall be administered as herein provided until the termination of the maximum period allowed by law at which time and forthwith such part of the trust shall be distributed in fee simple to the beneficiaries then entitled

to receive income therefrom, and for the purpose, it shall be presumed that any beneficiary entitled to receive support or education from the income or principal of any particular fund is entitled to receive the income therefrom.

(Spendthrift Provision)

Except as otherwise provided herein, all payments of principal and income payable, or to become payable, to the beneficiary of any trust created hereunder shall not be subject to anticipation, assignment, pledge, sale or transfer in any manner, nor shall any said beneficiary have the power to anticipate or encumber such interest, nor shall such interest, while in the possession of the Trustee, be liable for, or subject to, the debts, contracts obligations, liabilities or torts of any beneficiary.

(Governing State Law)

This Trust Agreement and the trusts created hereby shall be construed, regulated and governed by and in accordance with the laws of the

State of________________________.

(Signature & Notarization)

I certify that I have read the foregoing Agreement and that it correctly states the terms and conditions under which the trust estate is to be held, managed, and disposed of by the Trustee. I approve the Agreement in all particulars and request that the Trustee execute it.

Dated:____________________ ________________________________

Settlor/Trustee

____

Trustee

STATE OF ___________________________

COUNTY OF _________________________

I, a Notary Public, within and for the State and County aforesaid do hereby certify that the foregoing instrument of writing was this day produced to me in said State and County by

____,

Settlor, party hereto and was executed and acknowledged by said Settlor to be his/her free act and voluntary deed.

WITNESS my signature this __________ day of ________________,

19 ______.

(Notary Seal) ________________________________

Notary Public

SCHEDULE "A"

Under Trust Agreement Dated:

APPROVED:

____

Settlor

____

Trustee

SCHEDULE "B"

Under Trust Agreement Dated:

APPROVED:

____

Settlor

____

Trustee

SCHEDULE "C"

Under Trust Agreement Dated:

APPROVED:

____

Settlor

____

Trustee

(TRUST C - QUALIFIED TERMINABLE INTEREST TRUST)

Trust C shall be held, administered and distributed as follows:

(Payment of Income to Wife)

(1) Commencing with the date of the Settlor's death, the Trustee shall pay to or apply for the benefit of the Settlor's said wife during her lifetime all the net income from Trust C in convenient installments but no less frequently than quarter-annually. Any accrued and undistributed income at the death of the Settlor's wife shall be paid to her executors and administrators.

(Principal Invasion by Trustee)

(2) In addition, the Trustee may pay to or apply for the benefit of the Settlor's said wife such sums from the principal of Trust C as in its sole discretion shall be necessary or advisable from time to time for the medical care, education, support and maintenance in reasonable comfort of the Settlor's said wife, taking into consideration to the extent the Trustee deems advisable, any other income or resources of the Settlor's said wife known to the Trustee.

(Power to Require Trustee to Make Property Productive)

(3) The Settlor's said wife may at any time by written notice, require the Trustee either to make any nonproductive property of this trust productive or to convert such nonproductive property to productive property within a reasonable time.

(Disposition Upon Death of Wife)

(4) Upon the death of the Settlor's said wife, the entire remaining principal of Trust C shall be added to and become a part of Trust B and shall be held and administered or distributed in whole or in part, as if it had been an original part of Trust B.

Unlimited Marital Deduction 12

The marital deduction is undoubtedly the single most important element of any estate plan that attempts to reduce estate taxes. With the enactment of the unlimited marital deduction in the 1981 Economic Recovery Tax Act, the idea of leaving everything to the decedent's spouse has become very attractive. After all, no federal estate tax will have to be paid on the death of the decedent if everything was left to the surviving spouse. Such a strategy, however, does not always produce the best results. Very often an unnecessarily large amount of tax becomes payable upon the death of the surviving spouse. In this chapter, we'll examine the impact and the optimum use of the unlimited marital deduction in your estate planning process.

IMPACT OF THE 1981 ECONOMIC RECOVERY TAX ACT (ERTA)

ERTA made certain profound changes in the way estate planning is approached. These changes include:

- **Unlimited marital deduction**
- **Qualified terminable interest property ("QTIP") rules**
- **Increases in the unified transfer tax credit**
- **Reduction in the highest marginal federal estate tax**
- **Liberalization of the treatment of joint property**
- **Exclusion of most gifts of present interest within three years of death**

UNLIMITED MARITAL DEDUCTION

Prior to the Economic Recovery Tax Act of 1981, the maximum marital deduction for property passing to a surviving spouse had been limited to an amount equal to one-half of the adjusted gross estate or $250,000, whichever was greater. ERTA completely eliminated any limitation on the amount of the marital deduction. Hence, a married person, regardless of whether his estate consists of separate or community property, can now avoid paying any federal estate tax on his death. ERTA also expanded the marital deduction qualitatively. Under Section 2056(b) (7), the decedent's executor can elect to treat what is otherwise a terminable interest transfer (e.g., a life estate to the surviving spouse, remainder to children or others designated by the decedent) as qualifying for marital deduction. Such transfers known as "QTIP" transfers are discussed separately in this Manual. Parallel to the unlimited marital deduction allowed under the ERTA, interspousal gifts of present interests can also be made without any limitation, including those made within three years of death.

Not all property included in the gross estate and passing from a decedent to the surviving spouse will qualify for the marital deduction. Here are some limitations and exceptions:

Terminable Interests

The purpose of the terminable interests rule is to ensure that property escaping estate tax on the death of the decedent spouse will be subject to tax on the subsequent death of the surviving spouse. If the interest passing from the decedent to the surviving spouse will terminate or fail because of a lapse of time or the occurrence of an event or the failure of an event to occur and then pass to some other person, no marital deduction will generally be allowed with respect to such interest. I.R.C. 2056(b). Thus, if the surviving spouse's interest will terminate upon his or her death or remarriage, the interest is terminable and does not qualify for the marital deduction.

Here are some examples of terminable interests. Husband's will provides that his property will pass to his wife upon his death, to be used or disposed of by her as she wishes. However, any property remaining in her possession at her death is to go to their children or other beneficiaries. This represents a terminable interest ineligible for the marital deduction because her interest in the property ceases at her death. Sometimes a husband's will will stipulate that the wife will lose her rights to the property if she remarries. Such a will defeats the marital deduction. One person left his assets to his wife subject to her executing a valid will. If she failed to do it, the property would go to the children upon her death. Again, there was no marital deduction, for her interest in the property was only contingent.

A terminable interest is said to exist if a will stipulates that the surviving spouse is not entitled to the bequest until the decedent's will is probated. If the surviving spouse dies before the will is probated, a process that may take several months, the surviving spouse will not get the property. An interest in property terminable upon the happening of a contingency (the probating of the will) does not qualify for marital deduction, whether or not the contingency does in fact occur. In this case, if she died before the will was probated, the property would escape the estate tax again; in other words, both spouses would have avoided the estate tax which is not permissible under the terminable interest rule.

Six-Month Survivorship Condition

However, I.R.C. 2056 (b) (3) provides an exception to the terminable interest rule:

An interest passing to the surviving spouse is not considered an interest that will terminate or fail on the death of the surviving spouse if (1) the death will cause a termination or failure of an interest to pass only if it occurs within a period of not more than six months after the first decedent's death, or only if it occurs as a result of a common disaster resulting in the death of both spouses, or only if it occurs in the case of either such event; and (2) such termination or failure does not in fact occur. For example, a husband's will could provide that the property will go to his widow unless she fails to survive him by more than six months. This is not regarded as a terminable interest if she does survive him by that time.

In some instances, it is better planning for the bequest not to fail even if the recipient spouse does not survive either a common disaster or a longer period up to six months. This would be the case where one spouse has a much larger estate and the overall estate tax liability on both deaths is smaller

when the maximum marital deduction is obtained on the wealthier spouse's death. In that situation, the will of the wealthier spouse should provide that in the event of a common disaster the other spouse is deemed to be the survivor.

Power of Appointment Trust

Another exception to the terminable interest rule is a bequest to a power of appointment type trust. I.R.C. 2056 (b) (5). For instance, a husband may have set up a trust providing that his wife is to get the income as long as she lives. Although she's entitled only to a life income, generally a terminable interest, the bequest to the trust will qualify for marital deduction if the following conditions are met:

(1) The surviving spouse must be entitled to receive all of the income for life, payable at least annually.

(2) If the surviving spouse is to receive income only from a specific portion of the trust, only the specific portion will qualify for marital deduction. For example, a surviving spouse may be entitled to $2,000 per month for life payable out of the principal, to the extent that the trust income may be insufficient, and have a testamentary power to appoint the entire interest to herself or her estate. The marital deduction is allowable in an amount equal to the value the of property, which at a prevailing rate of return, would produce the $2,000 per month annuity.

(3) To qualify for the marital deduction, the power of appointment trust must give to the surviving spouse the power to appoint the entire principal of the trust either to herself or to her estate, or to both. I.R.C. 2056 (b) (5). If the surviving spouse has the power to appoint in favor of his or her estate, such power, if exercisable during life, must be fully exercisable at any time and, if exercisable by will, must be fully exercisable irrespective of the time of such survivor's death.

Where the trust provides that the surviving spouse has an unlimited power to invade principal for herself, this will constitute a power to appoint fully exercisable to herself. A wife was deemed not to have the power over the entire trust principal where her husband's will specified that she was to use the trust principal for the education of the children. If the right to make use of the principal is limited, there is no general power of appointment.

(4) To qualify for the marital deduction, the power of appointment must be exercisable by the surviving spouse alone and in all events. The "all events" test was not met when a wife was entitled to trust income for her support, maintenance, welfare, and comfort, but had no right to further income once these requirements had been met. On the other hand, "alone and in all events" test was met where the trustees could expend the principal for persons other than the surviving spouse, but only with her consent.

(5) Finally, the power of appointment may be either an inter vivos power or a testamentary power. Where the objective in setting up an appointment trust is primarily to avoid probate on the surviving spouse's death, the surviving spouse may be empowered as trustee with an unlimited right to invade principal during her lifetime and a general testamentary power of appointment on her death. On the other hand, if the objective is to bring professional management of trust assets, a third party or an institution may be named as trustee and limit the surviving spouse's power to either a power to

withdraw or a testamentary power, but not both. Sometimes, a combination of a special power to make gifts, limited, for example, to the children and grandchildren, and a general testamentary power to satisfy the marital deduction may be desirable.

MARITAL DEDUCTION AND THE SIZE OF THE ESTATE

The 1981 Economic Recovery Tax Act provided for unlimited marital deduction for the estate of the first spouse to die. However, the size of the estate and the estate owner's objectives and requirements may dictate reducing the size of the marital deduction.

If the estate of the taxpayer is small, say $600,000 - which is the exemption equivalent after 1986 -outright bequest to the surviving spouse will take the form of marital deduction. Trusts may be used in such estates for non-tax reasons, but the cost of setting one up and administering it may be relatively high. As long as the estate is under $600,000, there will be no estate tax payable upon the death of either spouse.

For estates between $600,000 and $1.2 million, the unified credit exemption equivalent coupled with the marital deduction can eliminate federal estate taxes from the estates of both spouses. A trust arrangement would often be attractive in such a situation; a by-pass trust, for example, may allow one spouse to retain control over the ultimate disposition of the estate.

For estates over $1.2 million, trusts will generally be used for tax and non-tax reasons. In such estates, it will be important to plan the amount and form of marital deduction to reduce the overall tax bite on the estates of both spouses.

Illustration: W's estate is worth $2,000,000 and H's is worth $275,000. If H dies before W there will be no estate tax due on his death, but any property that he leaves to W will be subject to a marginal estate tax rate of 49% upon her death. In the absence of any estate planning, H has wasted his unified credit by letting the W's estate to be taxed unnecessarily. A good estate plan would not only minimize the overall tax but also take into account the possibility that either spouse may die first or that they may both die simultaneously.

The general objectives of marital deduction tax planning can be summarized as follows:

1. To equalize the sizes of the spouses' estates and to pay the least total amount of estate tax;

2. To defer the payment of any estate tax until the death of the surviving spouse; and

3. To insure that the estates of both spouses will take full advantage of the unified credit.

Determining the Amount of the Marital Deduction

As we have pointed out before, although the law permits unlimited marital deduction, such a choice will not always produce the best results. If all of the decedent's estate was simply left to the

surviving spouse, there would be no tax due on the estate of the first spouse to die. However, the estate tax on the death of the surviving spouse will be unnecessarily large.

Example: Assume that John Williams, a resident of a common law state, died in 1987 leaving a total estate of $2.6 million. The estate has $100,000 of deductible funeral and administrative expenses. Assume that John's will makes a bequest of his net estate to his wife, Mary. Let's also assume, for simplicity reasons, that the estate has remained unchanged in value by the time of her death. In other words, she has lived off the income and appreciation of assets till her death. The following analysis shows the estate tax liability on the successive deaths of each spouse.

Exhibit I
Federal Estate Taxes Payable if All Property Left to the Surviving Spouse

	Husband	Wife
Gross Estate	$2,600,000	$2,500,000
Debts, Funeral and Administration Expenses	(100,000)	-0-
Marital Deduction	(2,500,000)	-0-
Taxable Estate	-0-	2,500,000
Adjusted Taxable Gifts	-0-	-0-
Total Taxable Transfers	-0-	2,500,000
Tentative Tax	-0-	1,025,800
Unified Credit	-0-	(192,800)
Estate Tax Payable	-0-	$833,000

Maximum Defferal Option

In the above example, the wife's estate paid more tax than necessary. This was a direct result of the husband's failure to take advantage of the exemption equivalent of the unified credit ($600,000 in 1987 and thereafter) in his estate planning. Instead of passing his entire net estate to his wife the husband had left an amount equal to the exemption equivalent to persons other than his wife, the combined estate tax on both estates would have been reduced by $290,000.

Exhibit II
Federal Estate Taxes Payable if Exemption Equivalent Not Left to the Surviving Spouse

	Husband	Wife
Gross Estate	$2,600,000	$1,900,000
Debts, Funeral and Administration Expenses	(100,000)	-0-
Marital Deduction	(1,900,000)	-0-
Taxable Estate	600,000	1,900,000
Adjusted Taxable Gifts	-0-	735,800
Total Taxable Transfers	600,000	1,900,000
Tentative Tax	192,800	735,800
Unified Credit	(192,800)	(192,800)
Estate Tax Payable	-0-	$543,000

As shown in Exhibit II, it isn't always wise to leave everything outright to the surviving spouse. A strategy that utilizes the exemption equivalent amount left to other beneficiaries will generally produce the lowest estate tax. This strategy is often referred to as the "maximum deferral option."

Equalization of Estates Option

The federal estate tax ranges from 37% to a maximum of 55%. This progressive tax structure gives you an opportunity to optimize tax between the two spouses. The optimum tax result is achieved when both estates are subject to the same marginal tax rate. If one spouse's estate is considerably greater than the other spouse's estate, the total tax on both estates will be higher. The solution would be to equalize the two estates.

The marital deduction is the tool you would use to transfer assets from one spouse to the other and achieve equalization of two estates. In the example below, Husband transfers $1,250,000 from his estate to Wife using the marital deduction. The result is two equal estates.

Exhibit III
Federal Estate Taxes Payable if the Equalization Option were Chosen

	Husband	Wife
Gross Estate	$2,600,000	$1,250,000
Debts, Funeral and Administration Expenses	(100,000)	-0-
Marital Deduction	(1,250,000)	-0-
Taxable Estate	1,250,000	1,250,000
Adjusted Taxable Gifts	-0-	-0-
Total Taxable Transfers	1,250,000	1,250,000
Tentative Tax	448,300	448,300
Unified Credit	(192,800)	(192,800)
Estate Tax Payable	$255,500	$255,500

The equalization of both estates would produce a tax saving of $32,000 over the use of maximum deferral option. This, however, ignores the effect of interest earned on the amount of deferred taxes after the death of the first spouse. In this example, upon the death of one spouse, estate tax in the amount of $255,500 would be payable, causing the surviving spouse to lose the use and time-value of this money. It is, therefore, important to compute the time necessary to earn enough interest on the deferred taxes that would offset the estate tax savings available under the equalization option. If the surviving spouse was likely to survive longer than this time, the maximum deferral option should be selected.

The following is a brief analysis of factors that may favor the use of one method over the other.

Factors Favoring Maximum Deferral

Liquidity. Generally speaking, taxes should be deferred whenever possible. This method allows the surviving spouse full benefit of the entire estate, without being depleted by estate taxes. If the estate consists of largely illiquid assets, the choice of maximum deferral method would be almost mandatory.

Consumption of the Principal by the Surviving Spouse. If the surviving spouse possibly would need the principal of the estate to survive or for other reasons, the deferral of taxes would be a wise choice. Possibly, the estate would be consumed sufficiently so that there would be no tax payable.

Inter Vivos Gifts by the Surviving Spouse. The surviving spouse could make lifetime gifts and take advantage of $10,000 annual exclusion per donee to reduce her taxable estate.

Tax Basis. When the property is transferred to the surviving spouse and included in his or her gross estate, it acquires a stepped-up cost basis. This may produce significant income tax savings to the ultimate recipients of the property.

General Considerations. Common sense dictates that taxes should generally be deferred, if at all possible. It's for this reason, if none other, that most people would adopt the maximum deferral strategy.

Factors Favoring Equalization

Short Life Expectancy. Surviving spouse may not survive long. If the surviving spouse were to die within a very short time, the earned interest on the deferred taxes would not be sufficient to offset the lower tax liability produced under the equalization option.

Income Tax Savings. In many cases, income tax may play a greater part than estate tax in your choice of option. Use of a non-marital trust that permits sprinkling of income among several beneficiaries that are in a lower income tax bracket than the surviving spouse would produce larger overall savings.

If the Beneficiaries Need More Than $600,000. In a maximum deferral option, only $600,000 which is the exemption equivalent is transferred to the beneficiaries; the balance of the estate passes under marital deduction to the surviving spouse. If the beneficiaries need more than $600,000 and couldn't possibly wait till the death of the surviving spouse, you may not be able to use maximum deferral option.

Potential for Higher Asset Appreciation. If some of the decedent spouse's assets are likely to appreciate significantly in value after his or her death, it may be wise to transfer such assets to a bypass trust, even though such transfer would result in less than the maximum deferral of estate tax. If the estate's value were to increase, the tax savings from equalization would likewise increase. Transferring assets with high appreciation potential to persons other than the surviving spouse would keep the surviving spouse's estate from becoming inordinately large.

Likelihood that the Surviving Spouse Won't Consume All the Income or Principal. If the spouse has other independent and continuing means of support, she may not need the income or the principal from the decedent's estate. In other words, she may not have a chance to reduce the estate during her lifetime and achieve a lower tax rate. In such a case, equalization of estates may be a preferable option to maximum deferral.

In the final analysis, an estate planner needs to balance the impact of various factors and select an optimal marital deduction. Some situations may require the maximum deferral option and some others estate equalization option, while in some others the course may be somewhere in the middle.

Estate Trust 13

The 1981 Economic Recovery Tax Act has made possible for a decedent to leave unlimited amount of property to his or her surviving spouse and escape estate taxes altogether on the estate of the first spouse to die. Most estate planners have concentrated their efforts on determining how much of the available deduction should be used, and what types of formula clauses should be used to separate the assets into the marital and nonmarital shares. Relatively little attention has been paid to an alternative marital deduction vehicle that can produce income-splitting benefits, especially in a moderate to large size estates. The estate trust is just such a vehicle.

DEFINITION

If a decedent transfers property to a trust under which all beneficial interest is in the surviving spouse, this "estate" trust qualifies for the marital deduction as an outright bequest since no interest in the trust property passes to anyone other than the surviving spouse or such spouse's estate. I.R.C. 2056 (b) (1).

The estate trust differs from the power of appointment trust in two major ways. First, income need not be paid at least annually, but may be accumulated solely for the surviving spouse or her estate. Second, the principal and any accumulated income must be distributed to the surviving spouse's probate estate on her death.

Illustration: John and Mary are each independently wealthy. Mary leaves her estate in trust for the benefit of John for life with remainder to John's estate. The trustee is directed to distribute the income to John or to accumulate it as the trustee may decide in his own discretion with the remainder passing to John's estate. The amount placed in trust qualifies for marital deduction. There is one additional benefit. The income retained in the trust will be taxed to the trust, and if the trust qualifies to be in a lower tax bracket, some income tax savings can be achieved.

ADVANTAGES OF THE ESTATE TRUST

Income Tax Benefits

Where the surviving spouse's income from all sources is large and she will therefore be in a high income tax bracket, such a trust may be more advantageous than a power of appointment trust or a "QTIP" trust. The trustee of estate trust can be given the discretionary right to accumulate or distribute income as the case may be to meet the needs of the surviving spouse consistent with the desire to reduce taxes.

Let's further illustrate the income tax benefits of the estate trust. If property is given outright

to a surviving spouse, all income earned by the assets is taxed in the individual return of the spouse. If the decedent left a moderate or large size estate, the income earned off the marital assets could be substantial with resultant high taxes. Under the terms of the estate trust, the trustee could be given the discretion to pay income to the surviving spouse or to accumulate it for later distribution. Any income distributed to the spouse would, of course, be taxed to him or her; income retained in the trust would be taxed to it as a separate entity. By splitting the income between these two taxpayers, significant tax savings could be achieved. On the surviving spouse's death, any accumulated income in the trust will be distributed to his or her estate and taxed as if the surviving spouse had received the income in the year it was earned under the throwback rules generally applicable to all trusts.

Stepped-up Basis

Another advantage of the estate trust is that it can distribute income in the form of appreciated assets. The distributee will receive a new income tax basis for the distributed asset equal to its fair market value at the time of distribution.

Right of Termination

Under marital deduction vehicles other than the estate trust, the spouse must be given an income interest for life. No contingency that might terminate that interest is permitted. In the estate trust, however, there is no such requirement. Accordingly, the trust could contain a provision terminating the current income interest of the surviving spouse in the event of his or her remarriage. Of course, the principal and any accumulated income will be paid to the spouse's estate on death and thus be subject to disposition under the will. However, the creator of the trust is given the privilege of requiring the new spouse to support his or her partner without benefit of the trust income.

DISADVANTAGES OF THE ESTATE TRUST

Subject to Probate

There is, however, one major disadvantage in the use of an estate type trust. Upon the death of the surviving spouse, the trust assets will pass under the terms of the surviving spouse's will and must go through probate with its attendant costs, delay and publicity. A power of appointment trust or a "QTIP" trust has the advantage of avoiding probate.

Subject to the Claims of the Spouse's Creditors

As part of the probate estate, the assets of the estate trust will be subject to the claims of the spouse's creditors. The most important of these creditors may be his or her new spouse, who would be entitled to elect against the will and receive his or her statutory share of the augmented probate assets.

Use of a "QTIP" or power of appointment trust as the marital deduction vehicle would have none of these disadvantages. Both of these trusts prevent trust assets from becoming assets of the spouse's estate, except to the extent the income is distributed currently and not consumed by the spouse.

DRAFTING THE ESTATE TRUST

The traditional or classic estate trust is fairly simple to draft. The key provisions of such a trust may be as follows:

> **A. My trustee shall pay amounts of principal and income to or for the benefit of my spouse in such manner and at such intervals as my trustee in his or her absolute discretion shall determine.**
>
> **B. Upon the death of my spouse, the then principal of this trust and any accumulated income shall be paid over, free of trust, to the estate of my spouse.**

OTHER STRATEGIES INVOLVING ESTATE TRUST

There is another variation of the classic estate trust that may accomplish the dual goals of achieving income tax benefits and reducing the gross estate and taxes upon the death of the surviving spouse. Since the value of the trust is includible in the estate of the surviving spouse, one way to reduce this estate would be to give the trustee the power to invade the principal of the trust and distribute the principal to the surviving spouse for the purpose of funding inter vivos gifts. Such gifts would be subject to the annual exclusion limits and unified transfer tax credit. This will result in the reduction of the gross estate and will retain the income tax benefits of the estate trust.

Another popular strategy combines the estate trust with a "QTIP" trust. For instance, in an estate that wishes to qualify for $1 million in marital deduction, the will could provide that $400,000 would pass into a "QTIP" trust and the balance, $600,000, pass into an estate trust. The "QTIP" trust could contain a right of withdrawal in the spouse and the assets so withdrawn could be given to the issue of the spouse or to others. No adverse income tax consequences would result, for all income of the trust is required to be paid over to the surviving spouse in any event. At the same time, the income of the estate trust could be accumulated if not needed by the beneficiary, causing it to be taxed to the trust as a separate taxpayer. If it's needed later, the trustee would have the power to invade the accumulated income or the principal for the benefit of the surviving spouse.

In summary, the estate trust is a dependable marital deduction vehicle and should be given appropriate consideration in estate planning, especially when the amount of the marital share is large and the surviving spouse has significant separate assets. The ability of the estate trust to accumulate income permits income splitting and the resulting reduction of the income tax liability. The use of the estate trust, particularly in combination with the "QTIP" or power of appointment trust, can bring needed income tax benefits to the estate plan of the surviving spouse.

"QTIP" Trust 14

The Economic Recovery Tax Act of 1981 created an important exception to the terminal interest rule under certain conditions. This new vehicle is a bequest to a qualified terminable interest property ("QTIP") trust. I.R.C. 2056(b)(7). The entire property subject to this interest is treated as passing to the surviving spouse, and no interest in this property is treated as passing to any person other than the surviving spouse. Accordingly, the entire interest qualifies for the marital deduction.

A "QTIP" trust may be more attractive to many estate owners who wish to provide income from the estate to the surviving spouse during her lifetime and the remainder, on her death, to the children. Under a "QTIP" trust arrangement, the surviving spouse need not be given the ultimate power of disposition over the trust assets and thus may be preferable to an outright bequest to the spouse or a bequest to a power of appointment trust or an estate trust.

REQUIREMENTS

(1) The most important requirement of a "QTIP" trust is that the surviving spouse be entitled to receive all the income from the trust, payable at least annually, for life. I.R.C. 2056(b)(7)(B)(ii). Thus, income interests granted subject to termination upon remarriage or the occurrence of a specified event, other than the surviving spouse's death, will not qualify. To avoid possible disqualification, the trust instrument should specify that any undistributed income, on the surviving spouse's death, must be paid to such spouse's estate, or be subject to a general power of appointment in such spouse.

(2) The second requirement of a "QTIP" trust is that no person (including the surviving spouse) can have any power to appoint the property to any third person during the surviving spouse's lifetime. I.R.C. 2056(b)(7)(B)(ii). For example, the trustee cannot be given the power to use trust property for the support of the children, but may be given the power to distribute principal for any purpose to, or for the benefit of, the spouse. The spouse may be given the power to assign her income interest to other persons during her lifetime, without disqualifying the trust. The Code also permits the trust to provide that the spouse, or even a third person, may designate which of the decedent's children or grandchildren are to receive the trust principal upon the spouse's death. Essentially, the rule ensures that the property not required for use by the surviving spouse is subject to tax upon her death or earlier disposition of the property.

Executor's Election

There's no automatic marital deduction in the case of a qualified terminal transfer. To obtain the marital deduction, the decedent's executor must elect to take it on the federal estate tax return. Once made, the election is irrevocable. I.R.C. 2056(b)(7)(B)(v). It may not always be beneficial to make the election, because the assets in the "QTIP" trust will be includible in the surviving spouse's estate.

The requirement of having to make an election is, in fact, another advantage of a "QTIP"

bequest: It affords a great deal of post-mortem estate planning flexibility. If circumstances change or plans change, the executor can make a partial "QTIP" election which would cover only a portion of the trust assets.

For planning purposes, therefore, the" QTIP" trust gives the testator's executor a choice after the testator's death of (1) electing the marital deduction for the entire trust property (not just the spouse's income interest) and therefore deferring estate tax until the surviving spouse's death (unless she makes a prior gift in which case a gift tax will be payable), or (2) not electing the marital deduction for the trust property and causing it to be subject to estate tax in the testator's estate but not subject to gift or estate tax on subsequent disposition by the surviving spouse during her life, or on her death.

This - whether to qualify the "QTIP" trust property for the marital deduction and defer the estate tax or to not qualify it for the marital deduction and expose it to the tax at the testator's death - is the unique advantage of a "QTIP" trust. Below is a brief summary of salient advantages of a "QTIP" trust.

ADVANTAGES OF "QTIP" TRUST

1. Eliminate Control by Surviving Spouse Over Ultimate Disposition of Property

A "QTIP" trust is very useful in situations where a person wishes to provide income for his spouse during her lifetime but does not want her to have rights over the principal or its ultimate disposal, for example, in the event if she should remarry. Or it can be used by an estate owner who has children from his previous marriage and wants to pass all or part of the trust property to such children and, at the same time, provide income to his wife as long as she lives. A "QTIP" trust permits an estate owner to designate the beneficiaries who are to receive the trust property after the surviving spouse's death without jeopardizing the marital deduction for property placed in the trust. The surviving spouse has the benefit of income during her lifetime but does not control disposition of the trust property.

2. Power to Invade Trust Principal for Spouse's Benefit May Be Given to Trustee or Others

In addition to giving the surviving spouse the income from the "QTIP" trust, a limited or unlimited power to invade trust principal for the spouse's benefit may be given to a trustee other than the spouse or to persons other than the trustee.

3. Limited Power to Appoint Trust Principal After Spouse's Death May Be Given to Spouse

In many family situations it is not possible or desirable to deprive the surviving spouse of all control over the trust property or its ultimate disposition. A "QTIP" trust arrangement has the flexibility of providing the surviving spouse with a limited testamentary power to appoint trust principal by limiting the possible recipients of the property (appointees) to a specified class of persons,

such as children, grandchildren, nephews, nieces, etc. If the spouse is given a general (unlimited) testamentary power of appointment over trust principal, the trust would qualify for the marital deduction as life estate - power of appointment trust.

POWERS THAT MAY DISQUALIFY A "QTIP" TRUST

If a "QTIP" trust is desired, care should be taken to avoid granting powers over the trust income or principal which will disqualify the trust as a "QTIP" trust eligible for the marital deduction at the executor's election.

Powers over income which will disqualify the trust for "QTIP" status include any power which would prevent the surviving spouse from being entitled to receive all the income from the trust property (or a specific portion of the property) annually or at more frequent intervals. Consequently any of the following powers will disqualify the trust from "QTIP" trust status:

- power of the trustee to sprinkle trust income among beneficiaries including the surviving spouse;

- power of the trustee to accumulate all or part of the trust income even though all income will be payable to the surviving spouse prior to death;

- power of the trustee to withhold income from the spouse in the event of remarriage.

Powers over principal which will disqualify the trust as a "QTIP" trust include any power under which any part of the trust property (or of a specific portion of the trust property) could be appointed during the surviving spouse's life to any person other than the surviving spouse. Powers to appoint principal which are exercisable only after the surviving spouse's death are permissible.

Either of the following powers will disqualify the trust as a "QTIP" trust:

- power of the surviving spouse during her lifetime to appoint principal to her children, issue, descendants, etc.

- power of the trustee to invade principal during the spouse's lifetime for benefit of persons other than the surviving spouse.

Apparently a power vested in the surviving spouse to appoint principal to herself (including a power to invade principal solely for her own benefit) will not disqualify the trust as a "QTIP" trust, even though such a power would permit the surviving spouse to make tax-free gifts (within the $10,000 annual exclusion) of principal withdrawn from the trust to other persons and avoid estate tax in her estate on the amounts given away.

SUMMARY

In general, many estate planners find a "QTIP" trust attractive, for it allows a decedent to defer the estate tax until the death of the surviving spouse, provide for income during the lifetime of the spouse, and still retain the control over the ultimate disposition of the estate after the surviving spouse's death.

In certain estates it may be desirable to vary the powers or rights of the surviving spouse over different portions of the estate. For example, in a relatively large estate it might be appropriate to provide the surviving spouse with (1) complete ownership of part of the estate through an outright marital bequest, (2) a right to income from part of the estate property with a general power to appoint the property during her life or after her death, (3) a right to income from part of the estate property with only limited rights of access to, or disposition over, the property, (4) a right to income from the property with no rights or powers over the property or its disposition.

For example, a life estate-power-of-appointment trust could be used in conjunction with a "QTIP" trust. Both trust properties would qualify for the marital deduction, but the life estate-power of-appointment trust would give the surviving spouse broad powers over the disposition of the trust property whereas the "QTIP" trust may give none or restricted testamentary powers.

Or it may be desirable to qualify only part of the estate for the marital deduction and have the remainder of the estate pass at the surviving spouse's death to other beneficiaries free of estate tax in the surviving spouse's estate. In this situation, a life estate-power-of-appointment trust, estate trust, or "QTIP" trust could be used for the marital deduction portion and a "by-pass" type trust not qualifying as a "QTIP" trust could be used for the credit shelter portion to be excluded from the surviving spouse's estate.

The assets transferred to a "QTIP" trust generally acquire a new income tax basis upon the death of the surviving spouse. This would be advantageous where the assets have appreciated in value.

One note of caution: The death tax laws of many states do not conform to the federal estate tax. In such states, a "QTIP" trust bequest may not qualify for the full marital deduction, where an outright bequest or a bequest to a power of appointment trust or an estate trust would qualify. As a result, the "QTIP" trust would increase the state death tax on the death of the first spouse (but may reduce the death tax on the surviving spouse's death.)

Avoiding the Second Tax 15

One of the basic estate planning techniques centers around "avoiding the second tax." Here are a couple of illustrations:

Illustration: Assume that husband has an adjusted gross estate of $1,200,000; he has made no lifetime gifts and he dies in 1987. His wife has no estate in her own right. Due to the unlimited marital deduction, there will be no federal estate tax on the husband's death. On the wife's subsequent death, the estate tax (after the unified credit but ignoring the state death tax credit) will be $235,000. The total taxes paid on the estates of both spouses will be $235,000.

Illustration: Assume that A, an unmarried person, leaves B his entire estate of $900,000. The federal estate tax on A's death will be approximately $114,000 leaving B a net inheritance of $786,000, disregarding state death taxes and other costs. If B has an estate of his own of $250,000, B's total estate after the inheritance will be $1,036,000 on which he will be taxed $167,760 upon his death. If a way could be found so that the beneficiary receives the benefit of the inheritance and yet the inherited assets bypass his estate for death tax purposes, the beneficiary would pay no tax at all.

In both of the above cases, the use of a bypass trust would avoid the second tax. In the case of a married couple with an estate exceeding $600,000, a bypass trust, used in conjunction with an optimum marital deduction bequest, would be the standard estate planning tool. A bypass trust can also be used effectively by an estate owner wishing to leave his estate to relatives other than a surviving spouse, such as his parents and brothers and sisters. However, if the estate owner creates such a trust for his children or for other persons of a younger generation than he is, and on their death, for their children, the effect of the generation-skipping transfer tax must be considered. This tax is discussed elsewhere in this Manual.

Basically there are three kinds of bypass trusts that can be created in order to avoid the second tax on the death of the surviving spouse.

- **Maximum Benefit Trust**
- **Discretionary Trust**
- **Widow's Election Trust**

MAXIMUM BENEFIT TRUST

The maximum benefit bypass trust is very widely used by estate planners. It gives the estate owner's spouse the maximum benefit of the assets left behind and still minimize the death taxes on the second estate. Such estate planning technique is generally referred to as "maximizing the unified credit and minimizing the marital deduction."

Assume that the husband has a larger estate and he dies first. Almost all of the same principles will apply if the wife has the larger estate and the order of death was reversed. The trust arrangement may be called "A-B" trust. Upon the death of the husband, a portion of the husband's estate which equals the optimum marital deduction will go into Trust A, and the balance of the estate (i.e., the nonmarital deduction portion of the husband's estate) will go into Trust B. Trust A qualifies for marital deduction and thus escapes the estate tax. The wife will have the lifetime benefit of Trust B assets including the power of appointment but they will not be included in her estate on her death.

Optimum Marital Deduction Bequest

Let's examine the tax benefits of A-B trust. If the husband with an estate of $1,350,000 were to use the unlimited marital deduction and leave the entire estate to his wife, the estate tax on the wife's subsequent death will be $298,500. In an estate like this, the use of the unlimited marital deduction does not yield the best results. As an alternative, the husband can use the optimum marital deduction bequest which is the amount necessary to eliminate the estate tax on his death. This is the amount that will go to Trust A; the balance of the estate will go to Trust B. In the above example, using the optimum marital deduction formula, Trust B will be funded with the "equivalent exemption" of $600,000 (assuming death after 1986) and the balance $750,000 ($1,350,000 minus $600,000) will be allocated to Trust A. Under this estate plan, there will be no estate tax on the husband's death and a tax of only $55,500 on the wife's subsequent death.

Equalization of Estates

Now let us introduce another factor in the funding of Trust B. It's not always most advantageous to fund Trust B with the "equivalent exemption" amount. The effect of the marginal tax rate also should be considered. Assume that the husband's estate is $2,000,000, and the optimum marital deduction bequest amount of $1,400,000 is left to Trust A and $600,000 to Trust B. There would, of course, be no tax on the husband's death, but a tax of $320,000 (with a marginal rate of 43 per cent) on the wife's subsequent death. If, however, the estate were divided equally, $1,000,000 to Trust A and $1,000,000 to Trust B, there would be a tax of $153,000 (with a marginal rate of 39 per cent) on each death, or a total of $306,000, producing a tax saving of $14,000.

In other words, where the marginal tax rate is expected to be higher on the death of the second spouse, it may be more beneficial to pay some estate tax on the first death so as to reduce the marginal rate, and in turn pay less tax on the second death.

Pros and Cons

The decision of whether to use the optimum marital deduction bequest or to pay some tax now in order to reduce the marginal rate on the second estate is a difficult one. There are several factors which must be considered carefully. Here are some of the reasons why you might want to consider optimum marital deduction bequest over equalization of estates option.

(a) By deferring the tax completely, the surviving spouse has the use and benefit of the deferred tax amount during her lifetime. If she survives by any length of time, the income earned on the deferred tax may more than offset the cost of deferral. In the above example, the wife has the use and income from $153,000 in deferred taxes. A set of hypothetical calculations would reveal which

option is preferable, whether to defer the estate tax or to equalize the estate.

(b) If a larger estate is left to the surviving spouse, she still may reduce her estate during her lifetime either by consumption or by a planned lifetime giving program. The end result may be lower overall tax.

(c) To pay tax on the first estate, it may be necessary to raise cash which often may not be available.

(d) When the surviving spouse dies her assets will receive a new and possibly higher income tax basis.

On the other hand, equalizing of estates might be a more desirable option in some situations.

(a) Under the equalization of estates concept, the portion of the estate going to Trust A is usually smaller than if the optimum marital deduction bequest was made. This may be desirable from the estate tax point of view especially if the assets in Trust A are expected to grow considerably. Using the example cited above with an estate of $2,000,000, if the optimum marital deduction bequest is made and if the assets in Trust A were to double to $2,800,000 after the husband's death, an estate tax of $983,000 would be levied upon the wife's subsequent death. On the other hand, if the estates had been equalized with $1,000,000 in each of the two trusts, only $2,000,000 would be taxed in the wife's estate, resulting in a tax of $588,000. The benefit of equalization in this situation is a tax saving of $395,000 ($983,000 minus $588,000) which substantially exceeds the additional tax of $153,000 on the first death.

(b) Trust A is generally designed for wife's benefit, but in some cases the entire income from this trust may not be required by the wife. In fact, this additional, unneeded income would only raise her taxable income. By equalizing the estates, the size of Trust B can be made larger and the trustee can be given discretionary powers to distribute a larger share of income to beneficiaries other than the surviving spouse.

(c) When an estate owner wishes to leave an amount greater than the equivalent exemption to beneficiaries other than his spouse, such as the children, he would equalize the estates and fund Trust B with a greater share of his estate.

STRUCTURING OF TRUST B

In a bypass trust arrangement, the assets of Trust B pass to the ultimate beneficiaries without being taxed in the estate of the surviving spouse. In a qualifying bypass trust, the wife may be given substantial benefits and rights and yet not have Trust B included in her estate.

1. She can receive all the income during her lifetime.

2. The trustee can spend any amount of principal necessary for her reasonable support, medical care and maintenance.

3. She can withdraw on a noncumulative, annual basis, the greater of $5,000 or 5 per cent of the trust.

4. She can be given a special power of appointment which will allow her to leave the trust property to anyone except herself, her estate, her creditors or the creditors of her estate.

The following discussion will amplify these rights.

Power to Invade Under an Ascertainable Standard

The wife may have a right to invade principal, limited by an ascertainable standard relating to her support, maintenance, health or education. Such a power is considered a special or limited power of appointment which does not cause taxation in the wife's estate. I.R.C. 2041 (b)(1)(A). Precise language should be used in the drafting of the power so as to avoid it being construed as a general power of appointment. Here are some suggestions:

- "My wife shall have the right to invade, for the purposes of her health, education, support and maintenance in her accustomed manner of living" is okay.

- "My wife shall have the right to invade for her comfort, welfare or happiness" is not okay.

- A power to invade for the holder's "accustomed manner of living" is not okay, but a power to invade for the holder's "support in his accustomed manner of living" is okay.

- The power to invade "in cases of emergency" will not pass the test.

$5,000 or Five Per Cent Power

The wife may also be given the power to invade principal for any purpose (without being limited to an ascertainable standard) so long as the right is limited to the greater of $5,000 or 5 per cent of the principal per calender year, on a noncumulative basis.

Under the "five and five" power, the most that will be included in the wife's estate will be the value of the unexercised right in the year of her death. All the amounts which had lapsed in the preceding years will not be included in her estate.

Special Power to Appoint to Third Parties

In addition to her other powers, the wife may be given a special power of appointment allowing her to dispose of the assets in Trust B to anyone except herself, her creditors or the creditors of her estate either during her life or upon her death. The estate owner may limit the permissible donees by the provisions of the trust to a class of beneficiaries, such as the couple's children or he may give the wife broad powers to appoint the property to anyone she chooses.

DISCRETIONARY TRUST

A discretionary bypass trust differs from a maximum benefits type of trust described above in that the trustee of a discretionary trust has discretion to accumulate income and to distribute (or "sprinkle") the income and principal to the surviving spouse or the designated beneficiaries. This provides for a flexible pattern of distribution. The trust, by either accumulating or distributing the income, can affect the taxable income of the beneficiaries, often quite favorably. Generally, the wife or a beneficiary should not be the trustee of a discretionary trust. If the wife has the sole power to vest the income to herself, she will be taxed on the income of the trust for income tax purposes. Also, for estate tax purposes, the wife acting as trustee of the sprinkling trust will have her estate taxed on the assets of Trust B because she's deemed to have a general power of appointment with respect to the trust assets. Also, where the wife-trustee distributes the income or principal of the trust to third parties whom she's not obligated to support, she will be considered to have made a taxable gift. Similar tax consequences will arise even where the wife is not a trustee and appoint herself as a successor. Therefore, it's generally recommended that an independent trustee be appointed in a discretionary trust.

WIDOW'S ELECTION TRUST

This type of bypass trust is more commonly used in community property states where each spouse is deemed to be half owner of all community property. It has similar application in common law states too where the wealthier spouse will make unlimited tax-free lifetime gifts to the poorer spouse and equalize the two estates. This kind of a trust is conditional on the surviving spouse relinquishing certain rights in assets which belong to such spouse in return for certain benefits out of the other spouse's estate.

Let's take an example of a married couple with substantial assets living in a community property state. The husband desires to leave the entire estate consisting of all community property assets for the benefit of their children while providing for lifetime benefit to the surviving spouse. This means that the wife will have no power to dispose of her half of the community estate subsequent to her death except as provided for in the trust. The husband transfers his half of the community property to a trust with the provision that wife is to receive lifetime income from it and the children shall inherit the assets subsequent to her death. In return for this lifetime income from the husband's estate, the wife is to transfer her half of the community property at the time of the husband's death to the same or similar trust.

It should be noted that under a widow's election trust the husband attempts to dispose of both halves of the community property even though he only has the power to dispose his half of the community. He, in fact, forces the widow to make the election between receiving lifetime benefits from her husband's assets in return for giving up disposition powers over her half of the community estate, or claiming her share of the community property outright but forfeit any benefits from her husband's one-half.

There are basically two variations to the widow's election trust.

- In the "traditional" type widow's trust, the widow is given income from both halves of the

community property but nothing of the principal. Upon her subsequent death, the entire estate passes to the beneficiaries.

- In the "new" type widow's election trust, the widow is given both the income and principal from the husband's one-half of the community property and only the income from her half of the community property which she is required to place in the trust.

Each of the above two variations may result in different estate and income tax consequences. A detailed discussion of these tax consequences is beyond the scope of this Manual, but the results in a "traditional" widow's election trust can be explained by way of a simple illustration as discussed below.

Tax Consequences

Normally, the husband's one-half of the community property will qualify as "QTIP" trust because the wife is to receive income for life - had it not been for the fact that, in order to receive this lifetime income, the widow has to give up the remainder interest in her one-half of the community property. As a result, the marital deduction will be reduced by the value of the remainder interest in her one-half of the community property.

Assume that the husband dies leaving a community property of $2,000,000, half of which will be allocated to the widow. The value of the widow's remainder interest can be computed from the IRS tables at $441,970 (assuming widow's age at 65.) The amount of marital deduction would be reduced from $1,000,000 to $558,030. If the amount of the decrease in the marital deduction does not exceed the amount of the equivalent exemption (which for years after 1986 is $600,000,) the reduction will have no effect. There will be no estate tax payable on the husband's death. However, if the wife were older at the time of the husband's death, or the estate were larger in value, the value of the wife's remainder interest and thereby the reduction in the amount of the husband's marital deduction would also be greater. If the wife were 80 at the time of the husband's death, in the above example, the value of the widow's remainder interest in her one-half of the community property would be $698,830, which incidentally, is higher than the amount of equivalent exemption available. This would trigger estate tax on the husband's death.

Conclusion - Use of Widow's Election Trust

(a) Widow's election trust is an extremely useful device to eliminate or reduce the second estate tax on the death of the second spouse.

(b) Creation of a trust that holds the entire community property has the advantage of providing professional management for the widow during her lifetime.

(c) Since the widow's one-half of the community property goes into a trust for the beneficiaries, probate will be avoided upon her death.

(d) Widow's election trust allows the husband (or the first spouse to die) to ensure the ultimate disposition of the entire community property as set out in the trust instrument. The power to dispose of her half of the estate is effectively taken away from the widow.

(e) The above benefits must be weighed against the tax consequences of reduced marital deduction on the husband's death.

ILLUSTRATIONS - HOW TO PLAN AN ESTATE

Here are a few illustrations on how to plan an estate that takes into account marital deduction planning with a view to reducing the overall tax. Even though the law allows a married testator to transfer unlimited amounts of property to his surviving spouse free of federal estate tax such a course is not necessarily the wisest alternative. Unless the bequest is in the form of a qualified terminable interest property (the so-called "QTIP") trust, the surviving spouse gains full control over the transferred property with the result that this spouse will determine the ultimate disposition of the entire estate. This may cause problems in the event the surviving spouse remarries and comes under the influence of the new spouse. The children of the decedent may have to share the original estate with the children of the new spouse or his or her relatives. The surviving spouse may also be lacking in sophistication or business judgment to manage the estate, especially if she has had no previous experience.

As a practical matter, however, most couples in their 30s or 40s have to plan their estates in such a manner that will leave the entire estate to the surviving spouse in the event one of them dies prematurely. The surviving spouse of necessity needs the resources of the entire estate to provide for the family and support and education of the children. Even where a couple is older and has no children to support, the surviving spouse who may not have a great deal of property of her own will need the estate of the decedent spouse to support her for the rest of her life. Only where the estate of one spouse exceeds what the surviving spouse will need to live on, either because the couple owns a large estate or the survivor has a substantial property of her own, is it possible to engage in marital deduction planning to avoid or reduce the estate tax.

A final consideration in marital deduction planning involves the unified credit against gift and estate tax available to each spouse. This credit, which is in the amount of $192,800 for decedents dying in 1987 and thereafter, protects an estate of $600,000 from federal estate tax. Thus, marital deduction planning is not necessary for estates that do not exceed this exemption equivalent amount of $600,000. Where a spouse does not need complete control of the other spouse's property and the "poorer" spouse's estate does not exceed $600,000, it would make no sense to transfer any property under marital deduction planning. Even if an estate exceeds the exemption equivalent of the unified credit, whenever the other spouse does not need total ownership of the entire estate, the amount protected from the estate tax should be transferred in a manner that will avoid its exposure to estate tax in the surviving spouse's estate.

Illustration: Say husband has an estate of $2,000,000 and wife has no estate of her own. If the estates are equalized between the spouses by marital deduction planning, the estate tax on each estate of $1,000,000 will be $153,000, or a total tax on both estates of $306,000. If a credit shelter trust for $600,000 is used in conjunction with an unlimited marital deduction of $1,400,000 on the husband's prior death, there will be no tax due on his estate. Upon the wife's later death, her estate of $1,400,000 will be subject to tax of $320,000. The unlimited marital deduction planning approach increased the estate tax by $14,000 over the equalization of estates approach. If a credit shelter trust is not used and the entire estate of $2,000,000 is transferred to the wife upon the husband's death, under unlimited

marital deduction there will be no tax due on the husband's estate, but the estate tax on the wife's $2,000,000 estate upon her death will be $588,000. This is an increase of $282,000 over the equalization of estates approach.

The estate planner would have to weigh the economic advantage of postponing tax of $153,000 on the husband's estate for the duration of the wife's remaining years against the $14,000 additional tax cost by taking the full marital deduction. Assuming an interest rate of 6%, the postponed tax of $153,000 would generate $18,360 in two years - an amount that more than offsets the additional tax of $14,000. So if the wife is expected to survive more than two years, the full marital deduction approach would seem preferable to the equalization of estates approach. It should be borne in mind that the property retained by the wife may appreciate in value during the course of her life causing additional estate taxation on the appreciation. An additional consideration: The income earned on the tax saved will be subject to income tax, and if accumulated and retained by the wife, subject to further estate tax.

Illustration: Let's take another similar example with a larger estate. Husband has an estate of $5,000,000 whereas wife has no estate of her own. Under the equalization of estates approach, husband transfers $2,500,000 to his wife, and $2,500,000 is left to nonmarital beneficiaries or transferred to a trust which will not be included in the surviving spouse's estate. Each estate will be taxed $833,000 upon the respective deaths of husband and wife bringing the total tax to $1,666,000.

Using the unlimited marital deduction in conjunction with $600,000 credit shelter trust, $4,400,000 of the husband's estate will be qualified for the marital deduction and will escape federal estate tax upon the husband's prior death. On his wife's subsequent death, her estate of $4,400,000 will be subject to estate tax of $1,783,000. This is $117,000 more than the amount payable if the estates were equalized.

If the credit shelter trust were not utilized and the entire estate of $5,000,000 were to be transferred to the wife under the unlimited marital deduction approach, there will, of course, be no tax upon the husband's prior death, but the wife's estate would be taxed $2,083,000. This is $417,000 more than the tax payable under the equalization of estates approach.

Life Insurance 16

Life insurance is one of the most important estate planning tools. It creates an instant estate where one does not exist or supplements one that's too small to support a surviving family. Proceeds of life insurance provide badly needed liquidity to an estate to pay death taxes, administration expenses and provide living expenses to the family. In a closely held business, life insurance is routinely used to fund buy-sell agreements to provide for the purchase of a decedent's interest in the business upon his death. Similarly, it's used to provide tax-favored employee fringe benefits, such as group life insurance, split-dollar life insurance and benefits under qualified pension and profit sharing plans.

MAJOR TYPES OF LIFE INSURANCE POLICIES

It's beyond the scope of this Manual to provide a thorough discussion of all types of life insurance policies available. Generally, however, there are two major types of life insurance policies - "whole life" and "term" insurance, and a few important variations within each of these two types.

Whole Life Insurance

A whole life insurance policy pays a designated beneficiary a stated amount upon the death of the insured. Such a policy is, however, also an investment vehicle because a portion of each premium payment is used to build a cash reserve. Such cash reserve is available for use as collateral for loans, for paying a portion of the future premiums, or simply as cash value. For the same reason, the premiums for whole life are usually higher than for the same amount of term insurance, but the cost of whole life insurance does not increase as dramatically as the insured becomes older.

Whole life insurance policy has three basic variations: Single premium life policy, the limited pay life policy, and the split-dollar policy.

A single premium policy is one offering a stated payment at death in exchange for a single premium payment. This type of policy is often used by individuals with high income, because they can immediately remove from their taxable income the earnings on their single premium payment, since policy owners are not normally taxed currently on the earnings of their life insurance policies. Also, as with most life insurance, the proceeds of the policy, even if included in the insured's taxable estate, are usually excluded from the deceased's probate estate, thereby reducing probate costs.

A limited payment life insurance policy requires the insured to pay premiums over a limited peirod, after which the policy will remain in force until the insured's death. A limited payment life policy is useful for the insured who has a few high income years (such as an athlete or entertainer), since it builds an estate when the individual has income, but requires no payments when the individual has his or her later, low-income years.

A third type of whole life insurance is so-called "split-dollar" life insurance, in which an employer and employee share the cost of the employee's life insurance protection. The employer

agrees to fund the amount of the premium on a whole life policy equal to the increase in the cash surrender value, in exchange for the right to receive the cash value out of the proceeds upon the insured's death. The employer's payments are deductible to the employer and are not taxable income to the employee. The employee pays the balance of the premium, in exchange for the right to designate the beneficiary of the proceeds (in excess of the cash value). In reality, the employer usually pays the entire premium and the employee treats the employer's premium payments in excess of the cash value as taxable compensation income. The general advantage of a split-dollar life insurance plan is that the employee receives a relatively large amount of life insurance at a relatively low cost. However, the proceeds above the cash value of the policy are included in the employee's gross estate for estate tax purposes.

Term Life Insurance

Term life insurance provides a simpler form of insurance pretection, promising to pay a stated dollar amount to the designated beneficiary upon the death of the insured. Term is "pure" insurance, as distinguished from other types of life insurance, because it has no cash or investment value. It is also, therefore, the lowest priced life insurance, although its premiums tend to increase as the insured gets older or the insured's health deteriorates. One common variation, known as "decreasing term" tries to offset this increase in rates with a decrease in coverage, resulting in a more level premium. Generally, the real advantage of term life insurance over whole life is its lower cost, which may be a major concern to younger clients who are only beginning to build an estate of their own.

LIFE INSURANCE SETTLEMENT OPTIONS

While most beneficiaries receive their life insurance in a single, lump-sum payment, there are most often a number of settlement options available among which the insured or the beneficiary may choose. Below is a brief explanation of four major settlement options and their tax consequences.

Life Annuity Option

Under the life annuity option, the insurer agrees to pay the beneficiary a stated annual sum for the remainder of the beneficiary's lifetime. This gives the beneficiary a secure source of income for the rest of his or her life and is particularly advantageous when the beneficiary has no other significant sources of income. A portion of each payment will be a return of the proceeds (not subject to income taxes) and a portion will be treated as interest (taxable). The taxable portion of each payment is determined by the difference between the present value of the annuity and the amount of the proceeds, determined under a formula much like that used for private annuities. This payment form is also often recommended for the surviving spouse since, if the insured selected this settlement option, it may qualify for the estate tax marital deduction.

Fixed Period Option

The fixed period option requires the insurer to pay the proceeds to the beneficiary over a specific number of years, with interest at a fixed rate. The proceeds are not normally subject to income taxes, but the interest payments are fully taxable. This settlement option may be especially useful

where the beneficiary anticipates future income but at the present time requires a supplement to his or her income, such as where the beneficiary is a college student.

Fixed Income Option

The fixed income option permits the insurer to pay the proceeds and interest in a number of installments of a fixed amount, rather than over a fixed time period. This amount is paid until the proceeds and interest thereon have run out. Again, the portion of each payment attributable to proceeds is not normally subject to income taxes and the portion attributable to interest is fully taxable.

Interest-Only Option

An interest-only option allows the insurer to retain the proceeds and pay the beneficiary only the interest on this amount for a specified period. At the end of that period, the beneficiary may select another payment option. The interest payments under this option are fully taxable, though the eventual proceeds distribution is normally tax-free. This would be useful where the beneficiary has another source of income for a limited period only, such as nonqualified death benefits paid by the deceased insured's business. When the beneficiary's other source of income ends, the rest of the insurance proceeds may be drawn out.

Prior to the Tax Reform Act of 1986, where the beneficiary was the surviving spouse of the insured, the IRS regulations allowed such beneficiary to exclude from the gross income each year the first $1,000 of the interest portion of the payments received during such year. The new law has eliminated this exclusion of interest.

Settlement Options vs. Trusts

In general, the use of a trust provides more flexibility than a settlement option. The trustee may be given broad discretion to distribute principal or income to the beneficiaries, and the trust can be tailored to suit the needs of a broad range of beneficiaries. However, if the insured simply wants to make sure that a beneficiary will receive a fixed schedule of payments, the settlement option route is less expensive and easier to administer. Note that while the option provides a guaranteed rate of return, a trust may be expected to earn much more (particularly on tax-free bonds).

ESTATE TAX AND LIFE INSURANCE PROCEEDS

Life insurance proceeds are generally includible in the insured's estate for death tax purposes. I.R.C. 2042. Inclusion is required regardless of whether the estate is specifically named as the beneficiary under the policy. Thus, if the insurance proceeds are received by another beneficiary, such as a trustee, but the beneficiary is legally obligated to pay taxes, claims or administration expenses of the decedent's estate, the proceeds are included in the decedent's estate to the extent they are used for such purposes. To avoid estate tax on such proceeds, the beneficiary should be merely authorized, rather than legally obligated, to make such payments.

Proceeds Payable to Other Beneficiaries

If proceeds of insurance on a decedent's life are payable to a beneficiary other than his estate, such proceeds usually are not included in the gross estate of the decedent unless the decedent possessed an 'incident of ownership" in the policy at the time of his death. By "incident of ownership," the law means the broad, nontechnical spectrum of economic benefits from the policy. It should be noted that inclusion is required regardless of whether the incident of ownership could be exercised by the decedent alone, or only by him in conjunction with another person. Moreover, the Supreme Court has held that the proceeds are includible if the decedent legally possessed any incidents of ownership, even though the policy is not in his possession and he is temporarily unable to exercise ownership rights.

The I.R.S. regulations provide examples of several types of powers that are considered incidents of ownership. Below is a non-exhaustive list of powers that may be deemed incidents of ownership:

1. Power to change the beneficiary;

2. Power to surrender or cancel the policy;

3. Power to assign the policy;

4. Power to revoke an assignment of the policy;

5. Power to pledge the policy for a loan;

6. Power to obtain from the insurer a loan against the surrender value of the policy;

7. A reversionary interest in the policy which, immediately before the insured's death, exceeds 5 per cent of the value of the entire policy;

8. Power to control or alter beneficial enjoyment of the life insurance policy exercisable only as a trustee (such as where the first spouse to die held the incidents of ownership in a life insurance policy on the life of the surviving spouse and left the policy in a testamentary trust with the surviving spouse as trustee);

9. Power to control or alter beneficial enjoyment of the life insurance policy exercisable only in conjunction with another person or persons;

10. Power to require some other person who owns the policy to exercise incidents of ownership over it;

11. Incidents of ownership held by a corporation controlled or owned solely by the deceased-insured, if the insurance is not payable to the corporation or payable to a third person in satisfaction of a valid business need of the corporation.

An owner of insurance policies generally may avoid estate tax on the proceeds by assigning all incidents of ownership in the policies to another. This is a popular and generally effective tax saving

technique. However, care must be exercised to ensure that all incidents of ownership are transferred.

The following is a list, again by no means complete, of interests and rights in a life insurance policy which may not constitute incidents of ownership:

1. The right only to receive dividends paid by the policy;

2. Incidents maintained under divorce decree requiring the deceased to maintain the policy for the exclusive benefit of the former spouse or children;

3. Right to cease employment and thereby terminate a group life insurance policy coverage;

4. Right of non-trustee insured to veto a transfer of the policy by a trustee, though not amounting to co-trusteeship;

5. Power to control only the time when the proceeds will be paid over to the beneficiary.

Gifts Made Within Three Years of Death

Under I.R.C. 2035, even where the insured does not possess at the time of his death any of the incidents of ownership, the policy proceeds may nevertheless be included in his estate as a gift made within three years of the decedent's death. If the decedent has made a gratuitous transfer of the life insurance policy within three years of his death, the full amount of the death proceeds would be included in his gross estate. In addition, provision regarding exclusion from the gross estate of gifts not in excess of the $10,000 annual exclusion is not applicable to a gift of a life insurance policy. For instance, the insured makes a gift of a $100,000 life insurance policy with a gift value of $8,000 to a child. The insured dies within three years of the gift. The entire $100,000 death proceeds would be included in the insured's estate.

Where the policy is includible as a gift made within three years of the decedent's death and the donee paid premiums after the transfer, only a portion of the proceeds will be taxable in the insured's estate. For example, a father transfers a $50,000 life insurance policy on his life to his son within three years of death. Before the transfer the father had paid $9,000 of premiums and the son paid $1,000 after the transfer. In this case, 90% of the insurance proceeds ($45,000) will be included in the father's estate. While the payment by the insured of the premiums on a policy he or she has transferred is not an incident of ownership, the payments do constitute separate taxable gifts. If the policy is transferred within three years of the insured's death and the donee pays some of the premiums, the insured's estate will not include the portion of the proceeds attributable to the donee's premium payments.

More on Includibility of Insurance

Although the insured may have never owned the policy, the proceeds may still be included in his or her gross estate. Where the insured had a life insurance policy issued directly to the beneficiary as owner and the insured paid for it out of his or her own funds, the IRS has held that the proceeds of the policy are includible in the insured's estate where he or she dies within three years of the policy's issuance.

The proceeds of a life insurance policy can also be included in the estate of the insured in less ordinary ways. For example, if the insured possesses a general power of appointment over either the policy or a trust containing the insurance policy, its proceeds will be included in his or her gross estate.

Where the proceeds of a life insurance policy are included in the insured's gross estate, the amount included depends upon the payment mode available. If the beneficiary has the right to elect (whether or not he or she does so elect) to take a lump sum payment, the entire proceeds are included in the gross estate. If, however, the policy offers only an annuity, and no lump sum option, the annuity valuation is determined actuarially under appropriate table.

For various reasons, the value of a life insurance policy or its proceeds may be included in the gross estate of someone other than the insured. Perhaps the most common situation in which this occurs is where the insured gives the policy to the beneficiary who predeceases the insured. In this instance, the estate of the beneficiary would include the value of the policy, set at its replacement value.

It is more unusual for the proceeds of a life insurance policy to be found in the estate of one other than the insured. However, in certain situations the proceeds may be included in the gross estate of another. For example, this might occur if the insured transfers the policy to the beneficiary, who elects to receive only the interest on the proceeds for his or her life, and to have the proceeds paid to another beneficiary at his or her death. Upon the death of the first beneficiary and owner of the policy, the proceeds would be included in his or her gross estate because he or she has retained a life estate in them. Generally speaking, however, when life insurance is included in the gross estate of someone other than the insured, it is normally as a policy, valued at its replacement cost, rather than as proceeds.

A reversionary interest in the policy or its proceeds is deemed to be an incident of ownership if its value exceeds 5% of the value of the policy immediately before the decedent's death. The term "reversionary interest" includes a possibility that the policy or its proceeds may return to the decedent or his estate, or become subject to a power of disposition by him. A reversionary interest does not result from the possibility that the decedent might receive the policy or its proceeds by inheritance through the estate of another person, or as a surviving spouse under a statutory right of election or any other similar right.

Marital Deduction

The marital deduction generally is allowed for insurance proceeds included in the decedent's gross estate which pass to the surviving spouse. This rule applies regardless of whether the proceeds go directly under the policy to the widow in a lump sum, or are paid to the estate and are then transferred to the widow as a bequest.

The marital deduction may be lost if the proceeds are payable to the spouse other than in a lump sum. If the proceeds are payable in installments, or are held by the insurer subject to an agreement to pay interest, special statutory requirements must be met to qualify the proceeds for deduction.

GIFT TAXATION

Obviously, one of the most common ways to remove the proceeds of a life insurance policy from the insured's gross estate is to give the policy away, usually to a beneficiary or to a trust. This transfer is a taxable gift and the value of the gift is the replacement cost of the policy. Moreover, if the donor continues to pay the premiums on the policy after he has given it away, the amount of premiums paid will also constitute a gift to the new owner. In computing the gift tax, the donor is permitted to exclude from his taxable gifts up to $10,000 given to each donee in each calendar year. However, the gifts must be gifts of a "present interest" to qualify for the annual exclusion. Hence, if the policy is transferred by the insured to his child and the insured pays the premium directly to the insurance company, the premium payments will constitute gifts of a future interest. However, if the insured makes outright gift of cash to his child and he voluntarily pays the premiums on the insurance policy, the gift will constitute gift of a present interest. Such an arrangement can make the best utilization of the per-donee annual exclusion.

Because of the significant difference between the gift tax valuation of a life insurance policy (replacement cost) and the estate tax valuation (normally insurance proceeds), it's usually a good idea to remove the life insurance policy from the insured's gross estate by gift. Such gifts are usually made either to the insured's spouse or to an irrevocable life insurance trust. Gifts of life insurance to the insured's spouse would not be advisable if the estates are otherwise equal, if the spouse was not likely to survive the insured.

A sample form of assignment of the ownership of a life insurance policy is shown at the end of this chapter.

INCOME TAXATION

The proceeds of a life insurance policy payable by reason of the insured's death are generally not subject to income tax. I.R.C. 101(a). An exception arises, however, if the owner acquired the policy in a "transfer for valuable consideration." The amount includible will be the net proceeds of the policy less (1) the amount of valuable consideration paid by the transferee and (2) the premiums paid by the transferee. For example, A purchases $50,000 policy on B's life from B for $4,000. A then pays $6,000 in premiums. When B dies, the amount includible in A's income will be $40,000.

ESTATE PLANNING CONSIDERATIONS

The following is a summary of estate planning techniques and considerations while dealing with insurance:

- **Transferring Ownership.** The insured should irrevocably transfer all incidents of ownership in the policy. All relevant documents (the policy, assignment forms, etc.) should reflect the fact that the insured is no longer the owner.

- **Beneficiary Designation.** The insured should irrevocably designate both the primary and

contingent beneficiaries. This will avoid the incident-of-ownership test, as well as the reversionary - interest provisions of IRC 2042. The choice of the beneficiary depends on the individual's requirements and goals. However, if the value of the estate is relatively high, serious consideration should be given to creating an irrevocable insurance trust. In most cases the beneficiary should also own the policy; otherwise, if the insured predeceases the owner, the payment of the proceeds will be treated as a gift.

- **Trustees.** The insured should not be named trustee of any trust that contains insurance policies on his or her life. If naming the insured cannot be avoided, the policy and trust instrument should expressly prohibit the insured from exercising any incidents of ownership except in a fiduciary capacity.

- **Premium Payments.** The insured should have a third party pay the premiums for three years after the policy is transferred.

- **Coordination With Estate Plan.** All wills, trusts, buy-sell agreements, etc., should be coordinated with the transfer of the insurance policy. For example, the trustee of an irrevocable insurance trust should be given the authority (but should not be required) to purchase estate assets or lend funds to the estate. If the proceeds are to be included in the insured's gross estate, a marital deduction provision for the proceeds or an estate tax apportionment clause (having the residuary estate pay the taxes) may be appropriate.

- **Minimizing Transfer Taxes.** The estate tax on insurance proceeds receivable by a beneficiary may be excluded from the beneficiary's estate if he or she is given only a life interest in the proceeds. Gift taxes on the transfer of a life insurance policy can be minimized by assigning the policy so as to qualify for the annual exclusion.

- **Corporate Owners.** Proceeds of insurance owned by a corporation on a stockholder's life should be applied for a valid business purpose.

- **Transferee of Policy.** If the transferee of an insurance policy is not the beneficiary, and he or she predeceases the insured, the value of the policy is includible in the transferee's estate. Note that creditors of the transferee may be able to attach the policy or its proceeds.

ASSIGNMENT OF LIFE INSURANCE

Insured:__________________________ Policy No. ____________________

The undersigned Owner of Policy hereby assigns without any exception, reservation or limitation, the above policy to:

Name of Assignee Address of Assignee

__________________________ __________________________

This assignment (is) (is not) for a valuable consideration.

This assignment cancels and rescinds any reversionary provision in favor of the assignor and (his) (her) estate, whether contained in the policy or in any provision pertaining to the policy.

The assignment does not affect or alter the designation of beneficiary now in effect. Any and all proceeds payable upon the death of the insured will be paid in accordance with such designation unless the designation of beneficiary shall be hereafter changed by the assignee or any subsequent owner of the policy.

This assignment is made subject to all liens, if any, which the Insurer may have against the policy.

It is hereby declared that no proceedings in bankruptcy or insolvency have been filed or are pending against the assignor.

Executed this_________________ day of________________, 19____,

at _________________________, ___________________________________.

______________________________ ______________________________

Witness *Owner of Policy-Assignor*

The Role of Life Insurance Trusts in Estate Planning 17

We examined the role of life insurance as a substantial factor in a person's estate planning process. Being an integral part of anybody's estate, life insurance does raise several additional issues:

- Upon the death of the estate owner, large amounts of cash may be turned over to the spouse or minor children who may be ill-equipped to handle it.

- Merely providing for life insurance will not ensure that the beneficiaries will receive its proceeds in proportion to their needs.

- Steps should be taken to provide the estate with liquid assets to pay its expenses, debts and taxes.
- Keep the life insurance proceeds out of the decedent's taxable estate.

- Furthermore, keep the proceeds out of the beneficiaries' taxable estate as well.

A life insurance trust may be an answer to most of these problems. A life insurance trust may be created as an inter vivos trust which can be revocable or irrevocable, funded or unfunded. The insurance may be permanent or term. Such a trust may also be testamentary in nature, established in a will, and designed to receive, invest, or distribute life insurance proceeds.

PROS AND CONS OF LIFE INSURANCE TRUSTS

Here are some of the advantages of creating a life insurance trust as opposed to simply providing for an outright gift of insurance proceeds.

1. A trust agreement can provide for professional management and investment of the proceeds. This solves the problem of having a substantial sum of money come into the hands of an inexperienced beneficiary.

2. A trust provides the flexibility of distributing the proceeds according to a beneficiary's particular needs. A trustee can be empowered to "sprinkle" the income among the beneficiaries.

3. When the beneficiary of an insurance trust dies, the trust instrument can be designed to have the proceeds not included in the beneficiary's estate and thus escape probate again.

4. A properly drafted trust gives the grantor the flexibility of providing for future contingencies, such as death of one or another beneficiary. This may not be possible if the insurance proceeds were left as outright gift.

5. A special power of appointment can save additional taxes by keeping the proceeds out of the taxable estate of the insured and beneficiary as well. The trust can provide that the beneficiary shall have merely a special power of appointment over the trust proceeds, e.g., a power to appoint to anyone but his own estate, and the proceeds will thus escape being taxed twice.

6. Say, out of a desire keep the insurance proceeds out of his estate, husband names wife as the owner and beneficiary of the policy. If wife were to predecease husband, husband may find himself inheriting his own policy. This possibility is, however, foreclosed if an independent trustee is named the owner and beneficiary of the policy in the first place.

REVOCABLE LIFE INSURANCE TRUST

Unlike the irrevocable trust, the revocable trust provides no estate tax savings since its revocability causes the insurance proceeds to be included in the donor's estate. Nevertheless, it may be useful as an administrative device during life, and avoids the expense and delay of probate on death. If the trust is funded with income producing property, the grantor will be taxed on such income under the "grantor trust" rules. If the trust is unfunded and the policy is not paid up, the grantor must continue to make insurance premium payments out of his after-tax income. Generally, the grantor has no tax incentive to fund his revocable insurance trust.

IRREVOCABLE LIFE INSURANCE TRUST

An irrevocable insurance trust is a trust created to acquire and own one or more life insurance policies. The irrevocable trust, unlike the revocable trust, can provide significant income and estate tax benefits. In addition, an irrevocable trust avoids probate, provides flexibility, protects inexperienced heirs from mismanaging the proceeds and provides for orderly administration and disposition of the grantor's estate. To obtain these benefits, the grantor relinquishes all control over the property and trust. In addition to the life insurance policies, the trust may be funded with other assets, to provide a source of funds to pay the life insurance premiums, or it may be unfunded in which case the grantor or another person will have to pay the premiums to keep the policies in force.

Gift Tax Consequences

The assignment of an insurance policy and transferring additional property to an irrevocable trust constitutes a taxable gift. In computing the gift tax, the $10,000 present interest exclusion will generally not be allowed. If the trust is unfunded, the payment of premiums will constitute additional gifts of a future interest. The value of the funding property subject to the gift tax will be the fair market value at the time of transfer. The value of the life insurance policy will generally be based upon the replacement cost.

Income Tax Consequences

If the income of a trust is or may be used to pay the premiums on a policy of life insurance on the life of the grantor or his spouse, the grantor is taxable to the extent of the premium payments. I.R.C.

677. On the other hand, if the grantor of the trust is the owner of a life insurance policy on the life of someone other than himself or his spouse, he may transfer it to an irrevocable insurance trust, and the income of the trust will not be taxable to him.

Estate Tax Consequences

Unless the transfers to the trust have been made within three years of the grantor's death, the life insurance policies will ordinarily be kept out of his estate. Also, the insured should not act as trustee of the irrevocable life insurance trust. If the trustee is required to pay any death taxes or other obligations of the insured's estate, the insurance proceeds will be included in the decedent's estate. However, if the trustee has only discretionary power to loan the proceeds to or purchase assets from the insured's estate, the proceeds will escape inclusion in the decedent's estate.

Marital Deduction. Generally, if the proceeds of the insurance policy are to pass to the decedent's spouse and the transferor dies within three years, the unlimited marital deduction would still be available. However, if the trust contains certain sprinkling provisions for the transferor's spouse and children, the marital deduction may not be available. The result would be the inclusion of the proceeds in the gross estate of the decedent with no corresponding marital deduction. Therefore, a properly drawn insurance trust should contain an "escape clause" whereby the policy proceeds will pass directly to the surviving spouse or a separate trust (e.g., a "QTIP" or general power of appointment trust) that will qualify for the marital deduction in case the decedent dies within three years.

ESTATE PLANNING IDEA

Many planning devices have been suggested which involve a funded irrevocable insurance trust. One familiar planning device is the so-called grandfather trust in which a grandparent purchases an insurance policy on his life and transfers the policy, often along with income-producing property, to an irrevocable trust, designating his children or grandchildren as beneficiaries. A gift tax is payable, but assuming that the proceeds are not includible in the grandparent's gross estate, the property avoids his highest marginal rates and the income generated by the trust is taxable to either the trust or to the beneficiaries, at presumably lower marginal rates. The trust can be structured to keep the insurance proceeds out of the gross estates of both the grandfather and his children. If the grandfather's children, in addition to his grandchildren, are beneficiaries of the trust, then care must be taken regarding the generation-skipping transfer tax provisions. However, transfers to an individual's grandchildren will not be subject to the generation-skipping transfer tax to the extent that all distributions or terminations through any deemed transferor (the grandparent's children) do not exceed $250,000.

CRUMMEY DEMAND PROVISIONS

In the landmark case of *Crummey v Commissioner*, it was held that the annual exclusion was available for transfers made to a trust when a trust beneficiary had an immediate right to demand withdrawal of additions to trust corpus. The beneficiary's withdrawal rights sufficed to classify the beneficiary's interest as a present interest in property, at least to the extent of the withdrawal rights. In *Crummey*, this result was reached even though the beneficiary with the demand right was a minor child of the grantor for whom no guardian had been appointed and who was unable to exercise his demand

rights under local law. Although the *Crummey* case did not involve irrevocable life insurance trusts, the *Crummey* type "demand" provisions are most commonly found in such trusts. The Internal Revenue Service has accepted the *Crummey* decision and will allow the annual exclusion for a gift in trust even when the withdrawal power is held by a minor for whom no guardian has been appointed, as long as neither the terms of the trust nor local law provide any impediment to the appointment of a guardian.

In planning to obtain the benefits of the annual exclusion for transfers to a trust over which the beneficiary has a limited power of withdrawal, care must be taken to ensure that a present interest is actually created. For instance, failure to notify an adult beneficiary of his power to demand withdrawal of trust corpus renders the interest transferred a future interest in property, which does not qualify for the annual exclusion. The donee's right to compel distributions is deemed contingent on his awareness of his power prior to the expiration of the demand period.

Through the use of a *Crummey* demand power, it should be possible to secure the annual gift tax present interest exclusion for premiums paid by an irrevocable trust on an insurance policy. This assumes, of course, that the beneficiaries do not actually exercise their withdrawal rights. The donor should be advised to make cash gifts to the trust and then to have the trust pay the premiums directly to the insurance company, rather than having the donor pay the premiums on behalf of the trust. A cash gift makes it clear that the cash is available for withdrawal by the beneficiaries under the "demand" provision of the agreement. Otherwise, the Internal Revenue Service could argue that the present interest portion of the gift would be limited to the amount of the cash value increase created by the premium payment, rather than the full amount of the premium.

The tax ramifications of a *Crummey* withdrawal power are briefly summarized as follows:

1. The existence of a beneficiary who is theoretically capable of exercising his withdrawal rights provides the grantor of the trust with a present interest annual exclusion which would otherwise be unavailable;

2. If the beneficiary with the *Crummey* power should predecease the grantor, the beneficiary's gross estate shall include the value of the trust assets subject to his withdrawal rights;

3. The annual lapse of the beneficiary's withdrawal rights creates no adverse gift or estate tax consequences, so long as the value of the assets subject to that power do not exceed $5,000 during any calendar year; and

4. To the extent of the beneficiary's withdrawal rights, the beneficiary is considered to be the "owner" of the trust for federal income tax purposes and may be taxed on a portion of the trust income. In an unfunded insurance trust, however, there is no trust income and, consequently, no income tax ramifications.

Drafting of a life insurance trust, whether revocable or irrevocable, involves considerable financial and tax planning and requires legal expertise. Use the information and sample form provided here as a starting point. If you find it necessary to use life insurance trusts in your estate planning, follow up with competent professional advice.

SAMPLE UNFUNDED, IRREVOCABLE LIFE INSURANCE TRUST FOR THE BENEFIT OF WIFE AND CHILDREN

TRUST AGREEMENT, made ____________________________, by and between JOHN WILLIAMS, of ________________________________, State of New York, (hereinafter called the "Donor") and MARY WILLIAMS, THEODORE WILLIAMS, and CITY TRUST COMPANY, a body corporate of the State of New York, (hereinafter called the "Trustees").

WITNESSETH:

WHEREAS, the Donor desires to establish a trust of certain policies of insurance on his life and of the proceeds thereof;

NOW THEREFORE, in consideration of the premises and of the mutual covenants herein contained, the Donor has delivered herewith to the Trustees the insurance policies described in Schedule "A" attached hereto and made a part hereof, receipt of which is hereby acknowledged by the Trustees. The Donor hereby covenants and agrees forthwith to assign and cause to be made payable to the Trustees the insurance policies so as to vest immediately and irrevocably in the Trustees, all title to and all incidents of ownership in the policies. The Trustees shall hold the policies, and the proceeds thereof, for the following purposes and subject to the following terms and conditions:

(Payment of premiums)

FIRST: The Trustees shall be under no duty or obligation to pay premiums or any other charges which may become due and payable on the policies, or any of them, to see that such payments are made by the Donor or otherwise, to notify the Donor that such payments are or will become due, or to forward premium notices to the Donor. The Trustees shall not be liable or accountable to anyone in case such premiums or other charges are not paid, or for any result of failure to make such payments. Current dividends on any policy (and interest on dividends, if any, accumulated prior to delivery of any policy hereunder) shall be applied by the insurance company in the reduction of premiums hereafter payable on such policy.

(Assignment of additional policies)

SECOND: The Donor hereby reserves the privilege of depositing with and assigning to the Trustees additional insurance policies on his life, provided that such additional policies shall be acceptable by the Trustees.

(Collection of proceeds)

THIRD: Immediately upon the death of the Donor, the Trustees shall make claim for the proceeds of the policies held by them hereunder and shall receive and hold the proceeds for the purposes herein set forth. The Trustees are authorized to compromise and adjust claims arising out of the insurance policies, or any of them, upon such terms and conditions as they may deem proper, and the decision of the Trustees shall be binding and conclusive upon all persons and corporations interested therein.

(Dispositive provisions)

FOURTH: The Trustees shall hold, manage, invest and reinvest the proceeds of the policies received by them and, after deducting such expenses as are properly payable, including Trustees' commissions, shall apply the trust fund as follows:

A. If Mary Williams shall survive the Donor, the Trustees shall pay the entire net income therefrom, at such intervals as the Trustees shall determine, to Mary Williams during her life. The Trustees may, nevertheless, during the life of Mary Williams, in their sole discretion, use or pay over any or all of the principal of the trust for the maintenance and support of Mary Williams and/or children of the Donor and/or their surviving descendants, taking into consideration in the exercise of such discretion other income and resources of the persons for or to whom such payments from principal are to be made. Any such payments to the children of the Donor, or their surviving descendants, however, shall constitute advancements against and shall be deductible from, the share such child or the descendants of such child is to receive from the principal of this trust when the same shall become payable, as hereinafter provided.

In the event Mary Williams shall, at the death of the Donor, testate, renounce and refuse to accept the devises and bequests to her under the will of the Donor, then, and in that event, the Trustees shall hold and/or distribute this trust fund, as hereinafter provided, as if Mary Williams had predeceased the Donor.

B. Upon the death of Mary Williams, or upon the death of the Donor if she does not survive him, the Trustees shall divide and set apart the remaining principal of this trust or the entire trust, as the case may be, into equal shares, one share for each child of the Donor who shall be living upon the death of the survivor of Mary Williams and the Donor. When such child shall reach 30 years of age, or if, at the time of the death of the survivor of the Donor and Mary Williams such child shall have attained such age, the Trustees shall distribute such share to such child, free and discharged of this trust.

(Powers in trust)

FIFTH: If any beneficiary is under the age of twenty-one (21) years when he shall become entitled to a share of the principal of this trust, such share shall vest absolutely in such beneficiary notwithstanding minority. During minority such share shall remain in the custody of the Trustees, as Donees under a power in trust, until such beneficiary attains the age of twenty-one (21) years. The Donees shall apply so much of the income, and if that be insufficient, so much of the principal thereof, for the benefit of such beneficiary as they deem necessary or desirable, regardless of any other source of support which the beneficiary may have. The Donees shall have all the investment and administrative powers conferred upon the Trustees hereunder.

(Powers of trustees)

SIXTH: The Trustees shall have the following powers and discretions, in addition to any conferred by law:

A. To sell or exchange any property comprising the trust fund and, without being restricted to property authorized by the laws of the State of New York or of any other jurisdiction for trust investment, to invest in any kind of property whatsoever, real or personal, whether or not productive of income, and without regard to the proportion that such property, or property of a similar character held, may bear to the entire trust fund, and specifically to invest in any Common Trust Fund maintained by the Corporate Trustee.

B. To sell, exchange, lease, mortgage, partition or improve any real estate comprising the trust fund, upon such terms as they may deem proper, and to execute and deliver deeds, leases, mortgages or other instruments relating thereto. Any lease may be made for such period of time as they may deem proper without regard to the duration of the trust or any statutory restrictions on leasing, and without the approval of any Court.

C. To vote in person or by proxy upon securities held by them and in such connection as to delegate their discretionary powers.

D. To exercise options, conversion privileges or rights to subscribe for additional securities and to make payments therefor.

E. To Consent to or participate in dissolutions, reorganizations, consolidations, mergers, sales, leases, mortgages, transfers or other changes affecting securities held by them and in such connection as to delegate their discretionary powers and to pay assessments, subscriptions and other charges.

F. To extend or modify the terms of any bond and mortgage; to foreclose any mortgage or take title by deed in lieu of foreclosure or otherwise;

to protect or redeem any property from forfeiture for non-payment of taxes or other liens; and generally to exercise as to such bond and mortgage or such property all powers that an absolute owner might exercise.

G. To retain any property acquired in connection with the foregoing provisions whether or not such property shall be authorized by the laws of the State of New York or of any other jurisdiction for trust investment.

H. To register any property in the name of their nominee or in their own name or to hold it unregistered or in such other form that title shall pass by delivery, but without thereby increasing or decreasing their liability as Trustees.

I. To make any division or distribution required by this Agreement in cash or in other property, real or personal, or undivided interests therein, or partly in cash and partly in property.

J. To hold separate parts or shares of this trust wholly or partially *in solido* for convenience of investment and administration.

The provisions of this Article shall also apply to any income that the Trustees may be authorized or required to accumulate as well as to property constituting investments of accumulated income.

(Persons dealing with trustees)

SEVENTH: No person or corporation dealing with the Trustees shall be required to investigate the Trustees' authority for entering into any transaction, or to see to the application of the proceeds of any transaction.

(Trustees' commissions)

EIGHTH: Except for Mary Williams, who shall serve as Trustee hereunder without compensation, the Trustees hereunder shall be entitled to receive as compensation for their services, commissions as follows:

A. Corporate Trustee: Full commissions allowed on principal and interest income by the laws of the State of New York to a sole testamentary Trustee; and

B. Individual Trustee: Commissions equal to one-half of those allowed to a sole testamentary Trustee. Commissions shall be computed in the manner and at the rates in effect at the time such compensation shall be payable.

(Irrevocability)

NINTH: The Donor hereby declares that this Agreement and the Trust herein created shall be irrevocable and not subject to amendment or modification.

(Successor trustees)

TENTH: The Trustee may resign at any time but such resignation shall not be effective until thirty days after written notice has been given to the Donor if he is living, or , in the event of his death before the end of such thirty-day period until thirty days after notice to Mary Williams. Upon such resignation a successor trustee may be appointed by the Donor during his lifetime, or after his death by the Donor's surviving spouse, or after her death by any court having jurisdiction over the trust. The Donor may not be a successor trustee, nor may his spouse. No successor trustee may be related by blood or marriage to the Donor or be in his employ or be a person or corporation subordinate to the Donor or a corporation in which the Donor is an executive or in which the Donor has significant stockholdings. Any successor trustee thus appointed, or, if the Trustee shall merge with or be consolidated with another corporate fiduciary, then such corporate fiduciary shall succeed to all the duties and to all the powers, including discretionary powers, herein granted to the Trustee.

(Governing law)

ELEVENTH: This trust has been accepted by the Trustees in the State of New York, and all questions pertaining to its validity, construction and administration shall be determined in accordance with the laws of that State.

(Duration of powers)

TWELFTH: The title, powers, duties, immunities and discretions herein conferred upon the Trustees shall continue after the termination of the trust, until final distribution.

IN WITNESS WHEREOF JOHN WILLIAMS, Donor, and Mary Williams and Theodore Williams, Trustees, have executed this Agreement, and the City Trust Company of New York, Trustee, has caused this Agreement to be signed and its corporate seal affixed by its authorized officers, all as of the day and year first above written.

____
John Williams

DONOR

____
Mary Williams

____
Theodore Williams

CITY TRUST COMPANY

Attest:

______________________ By: ______________________
Assistant Trust Officer *Vice-President*

TRUSTEES

(Acknowledgments)

SCHEDULE "A"

Policy No.	*Insurance Company*	*Insured*	*Face Amount*
______	______________	______________	______
______	______________	______________	______
______	______________	______________	______
______	______________	______________	______
______	______________	______________	______

Split Dollar Life Insurance 18

An increasingly popular form of estate planning technique using life insurance is a so-called "split-dollar" insurance program. Unlike another common employee benefit, group-term insurance, split dollar plans don't have to be offered to a broad range of employees. Many corporations reward key executives by including split dollar insurance plans in their executive compensation packages.

WHAT A SPLIT DOLLAR PLAN IS

Split dollar life insurance is ordinary life insurance purchased by either the employer or the employee whereby the two parties agree to share the cost of insurance premiums and correspondingly agree to share in the death proceeds. Generally, the employer pays that portion of the premium equal to the annual increase in the cash value, and the employee pays the balance of the premium. On the death of the employee, an amount equal to the cash value will be payable to the employer and the balance (which consists of the "term" portion of the proceeds) to the employee. Since the cash value of the policy increases every year, the employee's portion of both the premiums and the proceeds will decrease with each succeeding year. There are several variations to this basic plan that can be adapted to a particular situation:

(a) The employer pays all the premiums and the employee's beneficiary receives that portion of the policy proceeds in excess of the cash value. Such a plan will subject the employee to income tax each year on the excess of the total premium paid by the employer over the annual increase in cash value.

(b) The employee's annual contribution to the plan would be an amount equal to the P.S. 58 cost of insurance (cost of one-year term insurance at the present age of the insured as determined by an IRS table) and the employer would contribute the difference between that amount and the gross annual premium. Here there should be no taxable income to the insured employee because his premium contribution would be exactly equal to his cost of insurance in any given year.

(c) The premium on the policy can be leveled over the life of the policy and split equally between the employer and employee with a continually decreasing death benefit to the employee over the period of the policy.

Advantages of Split Dollar Plan

A split dollar plan offers two basic advantages. First, it usually enables the employee to achieve a lower after-tax cost for insurance protection than he could have if he had purchased the insurance on his own. Second, it enables the employer to reward a key employee and, at the same time, build up a fund in the form of the cash value of the insurance policy which can be used for corporate purposes when needed.

Types of Split Dollar Policy Forms

Split dollar plans take two basic forms - endorsement or collateral assignment. Under the "endorsement" format, the employer is the owner of the insurance and, pursuant to an agreement with the employee-insured, authorizes the employee to name the beneficiary of that portion of the insurance proceeds in excess of the employer's reimbursement for premiums advanced. Alternatively, if the "collateral assignment" format is established, the employee-insured owns the policy and makes a collateral assignment to the employer only of that portion of the insurance proceeds (approximately the cash surrender value) equivalent to the premiums advanced by the employer, as security for repayment of such advances, and the balance is payable to the employee's beneficiary.

ESTATE TAXATION

The estate tax implications of split dollar insurance plans are generally the same as those of other life insurance arrangements. If the employee has any incidents of ownership in a split dollar plan, the part of the proceeds payable to his beneficiary is included in the employee's gross estate. A special problem exists where the employee is a controlling shareholder owning at least 50 per cent of the stock in the employer-corporation. In such a case, if the corporation has any of the incidents of ownership in the policy and the policy is payable for a noncorporate purpose, the policy proceeds may be included in the stockholder-employee's estate.

Example: If decedent is the controlling stockholder in a corporation, and the corporation owns a life insurance policy on his life, the proceeds of which are payable to the decedent's spouse, the incidents of ownership held by the corporation will be attributed to the decedent through his stock ownership. So the proceeds will be included in his gross estate under Section 2042. But if the policy proceeds had been payable 40 per cent to the decedent's spouse and 60 per cent to the corporation, only 40 per cent would be included in his estate.

In situations where the corporation is not the owner of the policy, but merely a secured arrangement, the employer-corporation is not considered to have possessed any incidents of ownership in the "death benefit" portion of the proceeds that would be required to be attributed to the employee. From an estate planning standpoint, a collateral assignment form would be a preferred arrangement between a controlling shareholder-employee and his corporation in that the employee may assign his incidents of ownership in the policy with less risk of attribution by virtue of his controlling ownership.

CERTIFICATE OF RESOLUTIONS

WHEREAS, John Williams in his official capacity as President has stimulated the business activities of this Corporation so that its gross profits have doubled in the last ten years; and

WHEREAS, without Mr. Williams' personal contacts this increase in gross profits never could have been realized; and

WHEREAS, the loss of Mr. Williams' as an officer of this Corporation would seriously impair the Corporation's operations, profits and financial stability; and

WHEREAS, in order to retain the services of Mr. Williams the Corporation is willing to enter into a split dollar insurance plan with Mr. Williams' wife, Mary in order that she may carry insurance on his life;

NOW THEREFORE, it is resolved that:

1. The officers of this Corporation are authorized to enter into a split dollar life insurance agreement with Mary Williams with respect to a policy of insurance on the life of John Williams, President of the Corporation, provided that the death benefits of the policy are collaterally assigned to the Corporation as security for the repayment of the amounts which the Corporation will contribute toward payment of the premiums due on the policy pursuant to the terms of the split dollar insurance agreement.

2. Mary Williams shall be the owner of the policy and shall have the right to name the beneficiary of the proceeds payable on the insured's death in excess of the cash value of the policy as of the end of the policy year in which the insured's death occurs but the cash value of the policy shall be payable to the Corporation.

3. The Treasurer is hereby authorized, until otherwise directed, to contribute an amount toward payment of each annual premium due on the policy. This amount shall be paid to Mary Williams and shall be the sum required to pay the annual premium on the policy less the "P.S. 58" cost of such policy which shall be paid by Mary Williams.

4. The officers of the Corporation or any of them, and in the discretion of the one or more of them acting in the matter, are fully authorized, empowered and instructed, in the name and on behalf of the Corporation, to take all action, do all things and execute all writings as shall be necessary to carry out the foregoing.

____
Secretary

I hereby certify that this is a true copy of the minutes of the meeting of the Board of Directors of the ABC Corporation held on the ___________ day of ___________, 19______.

____
Secretary

SPLIT DOLLAR INSURANCE AGREEMENT

AGREEMENT made as of ________________________, 19____, by and between Mary Williams (the "Owner") and ABC CORPORATION (the "Company"), a New York corporation.

RECITALS

The Company, in recognition of the unique and essential services of John Williams (the "Employee") to the company and his contributions to the Company, has determined that its best interests would be served by entering into a split dollar life insurance arrangement with the Owner, who is the Employee's wife, whereby the Company will assist the Owner in maintaining certain life insurance for the benefit and protection of the Owner's and Employee's family by contributing from time to time toward payment of premiums due on the policy of the Owner on the Employee's life, subjec t to the condition that such policy be assigned to the Company as security for repayment of any amounts which the Company may contribute toward payment of any premiums due on such policy.

NOW, THEREFORE, THIS AGREEMENT WITNESSETH:

That for and in consideration of the premises and other valuable considerations between the parties it is agreed as follows:

ARTICLE I

(Application for Insurance)

1.1 Owner has applied to Massachusetts Mutual Life Insurance Company for convertible life policy (the "policy") on the life of her husband, John Williams in the face amount of $100,000, which policy has been issued to and is owned by the owner. The policy number, face amount and plan of insurance with respect to such policy is designated on Schedule "A" attached hereto, and uch policy, is subject to the terms of this Agreement.

ARTICLE II

(Ownership of Insurance)

2.1. The Owner shall retain and may exercise all rights of ownership with respect to the policy except as otherwise hereinafter provided.

2.2. The Company shall have no rights of ownership with respect to the

policy, but the policy is subject to the terms of this Agreement and the provisions of the collateral assignment of the policy by the Owner securing Owner's obligation to the Company under this Agreement.

ARTICLE III

(Election of Dividend Option)

3.1. (Reduction of Premiums.) All dividends declared by Massachusetts Mutual Life Insurance Company on the policy on the Employee's life acquired pursuant to the terms of this Agreement shall be applied to reduce the premiums payable on the policy.

ARTICLE IV

(Payment of Premiums on Policy)

4.1. On or before the due date of each annual premium on the policy, the Company will advance to the Owner an amount equal to that portion of the annual premium which exceeds the cost of the portion of such insurance which the beneficiary or beneficiaries named by the Owner and designated in the policy would be entitled to receive if the Employee died during the policy year for which such annual premium is paid. The foregoing cost shall be determined pursuant to Rev. Rul. 64-328, C.B., 1964-2, 11 and Rev. Rul. 55-747, C.B. 1955-2, 228, as amplified by Rev. Rul. 66-110, C.B. 1966-1, 12 and Rev. Rul. 67-154, C.B. 1967-1, 11.

4.2. Upon receipt of the amount which the Company shall contribute under paragraph 4.1. of this ARTICLE IV toward payment of the premiums due on the policy, the Owner will pay the full amount of the premiums due on the policy to Massachusetts Mutual Life Insurance Company. The payment of the premium shall be made by the Owner on the date the premium is due and within the grace period allowed by the policy for the payment of the premium.

ARTICLE V

(Owner's Obligation to Company)

5.1. The Owner shall be obligated and hereby agrees to repay to the Company the aggregate amount which the Company advances to the Owner pursuant to paragraph 4.1. of ARTICLE IV of this Agreement. This obligation of the Owner to the Company shall be payable as provided in ARTICLE VIII and ARTICLE X of this Agreement.

ARTICLE VI

(Assignment or Termination of Policy)

6.1. The Owner will collaterally assign the policy to the Company as security for the repayment of the amounts which the Company advances to the Owner under paragraph 4.1. of ARTICLE IV of this Agreement. The Collateral Assignment will be in the form attached hereto as Schedule "B" and will not be altered or changed without the consent of the Company.

6.2. While this Agreement is in force and effect, the Owner will neither sell, surrender nor otherwise terminate the policy without first giving sixty (60) days advance written notice to the Company. In the event the Company determines that such sale, surrender or termination of the policy adversely affects the security interest of the Company hereunder or under the Collateral Assignment, this Agreement may be terminated by the Company upon thirty (30) days advance written notice to the Owner, in which event the provisions of ARTICLE IX and ARTICLE X hereinafter set forth shall become effective and operative. In the event the Company determines that such sale, surrender or termination does not affect its security interest hereunder or under the Collateral Assignment, a conforming amendment shall be made to this Agreement to reflect such sale, surrender or termination.

ARTICLE VII

(Additional Policy Benefits and Riders)

7.1. The Owner may apply for and secure such additions and riders to the policy as are provided by Massachusetts Mutual Life Insurance Company for the benefit of the Owner.

7.2. Upon written request by the Company, the Owner will apply for and secure such additions and riders to the policy as are provided by Massachusetts Mutual Life Insurance Company for the benefit of the Company.

7.3. The cost or additional premium attributable to any such addition or rider shall be paid by the party which will benefit from or be entitled to receive the proceeds of such addition or rider.

ARTICLE VIII

(Death Claims)

8.1. When the Employee dies, the Company shall be entitled to receive a portion of the death benefits payable under the policy. The amount which the Company will be entitled to receive shall be the aggregate amount of its contributions, pursuant to paragraph 4.1. of ARTICLE IV of this Agreement, toward the payment of premiums due on such policy. The receipt of this amount by the Company shall constitute satisfaction of the Owner's obligation under ARTICLE V of this Agreement.

8.2. When the Employee dies, the beneficiary or beneficiaries named by the Owner and designated in the policy shall be entitled to receive the amount of the death benefits provided under the policy in excess of the amount payable to the Company under paragraph 8.1. of this ARTICLE VIII. This amount shall be paid under the settlement option in the policy elected by the Owner.

ARTICLE IX

(Termination of Agreement)

9.1. This Agreement shall terminate on the occurrence of any of the following events:

9.1. (a) Cessation of the Company's business.

9.1. (b) Written notice given by either party to the other.

9.1. (c) Termination of employment of the Employee.

9.1. (d) Bankruptcy, receivership or dissolution of the Company.

9.1. (e) Upon the election of the aggrieved party if either the Company or the Owner fails for any reason to make the contribution required by ARTICLE IV of this Agreement toward payment of any premiums due on the policy, provided that any election to terminate this Agreement under this clause must be made within 90 days after the failure to make the required contribution occurs.

9.1. (f) Repayment in full by the Owner of the contributions made by the Company under paragraph 4.1. of AR-

TICLE IV of this Agreement toward payment of the premiums due on this policy. The Company agrees that upon receipt of such repayment the Company will release the Collateral Assignment of the policy made by the Owner pursuant to ARTICLE VI of this Agreement.

ARTICLE X

(Disposition of Policy on Termination of Agreement)

10.1. In the event this Agreement is terminated pursuant to subparagraphs 9.1. (a), 9.1. (b), 9.1. (c), 9.1. (d) or 9.1. (e) of ARTICLE IX of this Agreement, the Owner shall have 90 days in which to repay the Company the aggregate amount which it has contributed toward payment of the premiums due on the policy under paragraph 4.1. of ARTICLE IV of this Agreement. Upon receipt of this amount, the Company shall release the Collateral Assignment of the policy. In the event the Owner does not repay the amount which the Company has contributed within this 90 day period, the Company may enforce any rights which it has under the Collateral Assignment of the policy and may take whatever other action it deems appropriate, at law or in equity, to collect, or to cause the Owner to repay to the Company, the amount due the Company by the Owner under ARTICLE V of this Agreement. The Owner agrees, promptly upon any such termination, to surrender the policy to Massachusetts Mutual Life Insurance Company for cancellation and to direct Massachusetts Mutual Life Insurance Company to apply the proceeds of such cancellation to the repayment of the amount due by the Owner to the Company pursuant to this Agreement.

ARTICLE XI

(Death of Owner)

11.1. In the event of the death of the Owner during the continuance of this Agreement, this Agreement shall not terminate and the Company shall continue to perform according to the Agreement with the Owner's successor in interest in the policy, if such successor in interest executes a new or supplemental agreement by which such successor in interest will be bound by the terms and provisions of this Agreement and, provided, further, that such successor in interest executes a collateral assignment with respect to such policy. The Owner's personal representative and, following administration of the Owner's estate, the distributee of the Owner's estate who acquires the Owner's interest in and ownership of the policy shall, respectively, within 15 days from the date of the Owner's death or from the date of distribution of the policy to such distributee, as the case may be, promptly notify the Company of such event and within 10 days following the date of postmark of such notice execute such new or supplemental agreement and collateral assignment.

11.2. In the event the Owner's successor in interest to the policy does not enter into such a new or supplemental agreement and collateral assignment with the Company as provided in paragraph 11.1. of this ARTICLE XI, then this Agreement shall terminate as of the death of the Owner and the provisions of ARTICLE X of this Agreement shall become fully effective and operative.

ARTICLE XII

(Insurance Company Not A Party)

12.1. The Massachusetts Mutual Life Insurance Company

(a) shall not be deemed to be a party to this Agreement for any purpose nor in any way responsible for its validity;

(b) shall not be obligated to inquire as to the distribution of any monies payable or paid by it under the policy on the Employee's life acquired pursuant to the terms of this Agreement; and (c) shall be fully discharged from any and all liability under the terms of any policy issued by it, which is subject to the terms of this Agreement, upon payment or other performance of its obligations in accordance with the terms of such policy.

ARTICLE XIII

(Amendment of Agreement)

13.1. This Agreement shall not be modified or amended except by a writing signed by the Company and the Owner. This Agreement shall inure to the benefit of and shall be binding upon the heirs, personal representatives, successors and assigns of each party to this Agreement.

ARTICLE XIV

(Agreement of Further Performance)

14.1. Each of the parties, for itself and its heirs, personal representatives, successors and assigns, agrees to take such further action, do such other things, and execute such other writings as shall be necessary and proper to carry out the terms and provisions of this Agreement.

ARTICLE XV

(State Law)

15.1. This Agreement shall be subject to and shall be construed under the laws of the State of New York.

IN TESTIMONY WHEREOF, the Company, pursuant to the proper corporate authority, has caused this Agreement to be signed on its behalf and its seal to be affixed and attested by its proper officers and the Owner has hereunto subscribed her name and seal, all as of the day and year first above set forth.

____________________________________(SEAL)
Mary Williams

ABC CORPORATION

By:______________________________

Its: ____________________________

(SEAL)

ATTEST:

By:______________________________

Its: ____________________________

SCHEDULE "A"

Policy Number	Type of Policy	Face Amount
____________	Convertible Life	$100,000

SCHEDULE "B"

ASSIGNMENT OF LIFE INSURANCE POLICY AS COLLATERAL

KNOW ALL MEN BY THESE PRESENTS THAT:

(A) For value received, the undersigned hereby assigns, transfers and sets over to ABC CORPORATION, its successors and assigns, (herein called the "Assignee") the death benefit under Policy No. ____________ issued by Massachusetts Mutual Life Insurance Company (herein called the "Insurer") and any supplementary contracts issued in connection therewith (said policy and contracts being herein called the "Policy"), upon the life of JOHN WILLIAMS, subject to all of the terms and conditions of the Policy and to all superior liens, if any, which the insurer may have against the Policy. The undersigned by this instrument agrees, and the Assignee by the acceptance of this assignment agrees, to the conditions and provisions herein set forth.

(B) It is understood and agreed that the Assignee shall have the sole right to collect from the Insurer the net proceeds of the Policy when it becomes a claim by death or maturity and that all other rights under the policy, including, by way of illustration and not limitation, the right to surrender the policy, the right to make policy loans, the right to designate and change the beneficiary, and the right to elect and to receive dividends are reserved exclusively to the Owner of the policy and are excluded from this assignment and do not pass by virtue hereof and may be exercised by the Owner on the sole signature of the Owner. Nothing herein shall affect funds, if any, now or hereafter held by the Insurer for the purpose of paying future premiums under the policy.

(C) The Assignee covenants and agrees with the undersigned as follows:

1. That any balance of sums received hereunder from the Insurer remaining after payment of the then existing Liabilities, matured or unmatured, shall be paid by the Assignee to the persons entitled thereto under the terms of the Policy had this Assignment not been executed;

2. That the Assignee, not having any right to obtain policy loans from the Insurer, will not take any steps to borrow against the Policy, except that the Owner of the Policy may direct the Insurer to pay the proceeds of any policy loan to the Assignee, in which event the Assignee shall reduce the amount of existing Liabilities by the amount of such policy loan and interest accrued to the date such policy loans are repaid by the Assignee.

3. That the Assignee will upon request forward without unreasonable delay to the Insurer the Policy for endorsement of any designation or change of beneficiary or any election of an optional mode of settlement; provided, however, that any such designation, change or election shall be made subject to this assignment and to the rights of the Assignee hereunder.

(D) This assignment of the life insurance death benefit under the Policy is made a collateral security for all liabilities of the undersigned, or any of them, to the Assignee, either now existing or that may hereafter arise with respect to premiums advanced for or paid on the Policy by the Assignee (all of which liabilities secured or to become secured are herein called "Liabilities").

(E) The Insurer is hereby authorized to recognize the Assignee's claims hereunder without investigating the validity or the amount of the Liabilities, or the application to be made by the Assignee of any amount to be paid to the Assignee. The sole receipt of the Assignee for any sum received shall be a full discharge and release therefor to the Insurer. A check for all or any part of the insurance death benefit payable under the Policy and assigned herein shall be drawn to the exclusive order of the Assignee in such amount as may be requested by the Assignee.

(F) Except as otherwise provided in any other document evidencing Liabilities owing to the Assignee from the undersigned, her successors and assigns, if any, the Assignee shall be under no obligation to pay any premium on the Policy. The principal of or interest on any loans or advances on the Policy, or any other charges on the Policy shall be an obligation of the undersigned, and not an obligation of the Assignee, except as otherwise specifically provided herein under Paragraph (C) 2.

(G) The Assignee may take or release other security, may release any party primarily or secondarily liable for any of the Liabilities, may grant extensions, renewals or indulgences with respect to the Liabilities, or may apply to the Liabilities in such order as the Assignee shall determine, the insurance death benefit payable under the Policy hereby assigned without resorting or regard to other security.

(H) In the event of any conflict between the provisions of this assignment and provisions of the note or other evidence of any Liability, with respect to the Policy or rights of collateral security therein, the provisions of this assignment shall prevail.

(I) The undersigned declares that no proceedings in bankruptcy are pending against her and that her property is not subject to any assignment for the benefit of creditors.

Signed and sealed this ________________ day of ______________,

19____.

____
Owner

____
Address

The foregoing Assignment is hereby accepted this ____________

day of ____________________, 19______.

ABC CORPORATION

By: ___________________________________

Its__________________________________

(Notary Acknowledgements)