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ESTATE PLANNING

VOLUME I

WILLS PROBATE

JOINT TENANCY LIVING WILLS

POWERS OF ATTORNEY

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ESTATE PLANNING

VOLUME I

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ESTATE PLANNING

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INTRODUCTION

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The ultimate in estate planning is cryogenics. Cryogenics is freezing the body of a dead person so it can be brought back to life sometime in the future when the technology to do so is developed. In fact, it is possible to do a lay-away plan where a person has his head cut off and frozen. This is done with the hope that in the future an entire new body can be cloned and the head attached to it. The person first has to be declared dead. The question becomes: What will happen to the body? Whether we believe we come back in another form or pass to a higher plane of existence, we will nevertheless travel to a realm where no one ever returns. We cannot take it with us. That is not to say that people have not tried to do so. The Pharaohs of Ancient Egypt, the Mayans in Central America and the Celtic tribes in Europe all attempted and failed to take their worldly goods with them.

So what then is left for us to do? Lacking a philosophical bent, we can only offer practical and pragmatic answers for the living. The only answer that makes sense is that if a person cannot take the estate with him, it should be given to those for whom the person cared. For most people that means simply giving the estate to family members and loved ones. If the estate is going to be given away, it makes sense to give it to loved ones rather than to the government in the form of avoidable taxes.

The purpose of estate planning is to help a person build a large estate during life and to pass as much of it as possible to the loved ones upon death. This book attempts to present the various types of available estate planning for the average estate.

An estate plan is the procedure by which a person attempts to preserve the assets of his estate during life and distribute them after death. The main considerations in estate planning are avoiding probate, reducing estate and inheritance taxes and quickly distributing the estate to the designated heirs.

A complete estate plan will consider methods for preservation of the estate during life by maximizing income while reducing income taxes that must be paid. The costs of probating a will are large. An old joke: If the person was not already dead, the cost to probate his estate would kill him.

Probate costs include court fees, appraisal fees, attorney fees and executor fees. Court costs and appraisal fees are modest: a couple of hundred dollars for an average estate. The real costs are the attorney and executor fees. The maximum amounts of attorney and executor fees are set by statute and approved by the court. They are based upon the size of the estate (value of the property to be probated) and increase as the estate increases. In California, for example, attorney and executor fees are as follows:

1. 4% of the first $15,000; maximum $600.

2. 3% of the next $85,000; maximum $2,550.

3. 2% of the next $900,000; maximum $18,000.

4. 1% of the next $15,000,000 and .5% thereafter.

For example, a $100,000 estate probated in California the maximum attorney and executor fees would be $6,300: ($3,150 each). The attorney and executor can agree to take less or no fee at all.

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Avoidance of probate fees is a major inducement for implementing an estate plan. When a revocable trust is used, there are no probate fees. The estate passes immediately to the designated beneficiaries of the trust. No court proceeding is needed to transfer the property of a trust, so no attorney is needed. There are several means to avoid having to probate property. The most common probate avoidance vehicles are:

1. Summary probate proceedings in the decedent's state. A summary probate is an abbreviated procedure for small

estates or for transferring the entire estate to a surviving spouse. Many states have adopted special procedures to by-pass the expense and long delay in probating such estates.

2. Giving the estate away while alive.

3. Placing the property into joint tenancy with the proposed heirs. Upon death, title for the property passes

immediately without probate to the surviving joint tenants. Real property held in joint tenancy passes to the survivors without a probate by recording a notice of the death of a joint tenant.

4. Placing the estate into a revocable trust that passes the estate to the designated beneficiaries immediately upon the decedent's death. This is the most popular form of

estate planning. It is fast and bestows the maximum amount of control and property over the estate.

To determine the best type of estate plan, one needs to know the

size of his estate, how he wishes to distribute it and the amount of control he is willing to relinquish to create the estate plan.

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CHAPTER 1

COMMON PROBATE QUESTIONS

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This chapter is devoted to the questions most frequently asked concerning probate. Nearly everyone has a basic understanding

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as to what a probate is all about. Few people, however, really understand the mechanics of a probate unless they have been compelled to go through one.

A probate is overall name given to the judicial proceeding whereby a court distributes an estate of a deceased person who had not made arrangements for the passing of the estate without court supervision prior to death. In short, if a person dies with property in excess of $60,000 in value for which he had not made arrangements for its passage outside of probate after death (such as through a revocable trust or joint tenancy), then the property must be probated in order to have it distributed to the deceased person's heirs. All property that passes to heirs by virtue of a Will or by intestacy must be probated.

Probate law is the only field of law that is gradually fading out of existence. Summary Probates, Joint Tenancies and Revocable Trusts have been steadily reducing the number of probate filings each year. The reason for this reduction is that such probate avoidance alternatives avoid the need to need for a probate as they pass title to the heirs or beneficiaries in the subject property immediately upon death. Since the only real function of a probate court is to decide who gets a deceased person's estate, following death, if the decedent has already done that then there is nothing left for the court to do.

Probate law is one of the most technically precise and regulated areas of law. Nearly everything that is done in a probate is subject to judicial review. The acts of the personal representative are, themselves, strictly regulated and reviewed by the courts.

This chapter is designed to familiarize the reader with the problems and procedures faced in probating an estate. The questions contained herein cover most of the problems faced in an average sized probate.

Generally, everyone having an estate over $60,000 should consider some type of probate avoidance vehicle. The reason or this is that when an estate exceeds $60,000 it is almost always more expensive to probate the estate, given attorneys fees and the fees of the personal representative, than it would to create a revocable trust for estate planning purposes. However, in the event that a person elects to have his or her estate probated, for whatever reason, the questions in this chapter and their answers will help the user better understand the problems and procedures that await. This chapter will be very useful in helping the reader identify and focus on the areas of most concern in their decision to have their estate probated.

1. WHAT IS PROBATE? "Probate" is the name for the entire legal proceeding in a probate court to determine how to distribute the estate of a deceased. Probate is the legal mechanism whereby a court states who gets the estate. Probate of a deceased's estate is necessary when the decedent did not plan his final affairs beyond preparing a Will. Appropriate estate planning avoids probate altogether while providing for the immediate transfer of the estate to the designated heirs.

Probate proceedings are long, cumbersome and expensive. They are avoidable with proper estate planning. In recognition of the difficulties and expense of probate many states have enacted laws waiving probate or streamlining procedures for small estates (usually under $60,000). These summary probates usually involve nothing more than filing petitions with the court stating that the estate is too small to be managed effectively and that it should be distributed without administration to the heirs. Summary probate procedure is available only for small estates. Above a certain value, usually $60,000, a regular probate is required. A

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person whose estate exceeds $60,000 should develop a simple estate plan and avoid probate.

2. WHAT ARE THE FUNCTIONS OF A PROBATE COURT?

The probate of a deceased person's estate is handled through a probate court. It is a special department or court under a court of general jurisdiction. The probate court oversees the administration of the probate estate. The probate court is responsible for performing the following functions:

1. Appointing the legal representative of the estate.

2. Supervising the representative.

3. Receiving and evaluating the inventories, accountings and other reports of the representatives.

4. Assuring that all bills, taxes and claims against the estate are paid by the representative.

5. Overseeing the distribution to the heirs.

6. Closing the estate and releasing the representatives from further responsibility.

The estate remains under the control of the personal representative until the probate court issues the final order of distribution. It can take years for an estate to be closed and the assets distributed to the heirs.

3. WHAT IS A LAST WILL AND TESTAMENT?

A Will is the final testament a person makes to ensure his earthly possessions go to whom he wants them to go. A Will is totally revocable during one's life. A Will usually must be in writing and witnessed by two or more adult persons. The witnesses usually cannot be heirs mentioned in the Will.

In some states an oral Will made in immediate contemplation of death may be valid to distribution of the estate. The creator of the Will (testator) must be legally competent to make the Will and not be insane or otherwise mentally impaired.

Unless a clause of the testator's last Will specifically revokes all prior Wills, all of the Wills of the testator must be read together. The probate court then will determine how the estate will be distributed. Therefore, all Wills should have a simple clause revoking all of the testator's prior Wills.

A Will must be signed, dated and, unless typed, be written entirely in the handwriting of the testator or be an approved Statutory Will (a pre-printed Will authorized by statute in the testator's state of residence).

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4. WHAT IS A HOLOGRAPHIC WILL?

A Holographic Will is a Will that is written entirely in the handwriting of the testator. Some states, such as Colorado and California, do not require a Holographic Will to be witnessed. Most states require a Holographic Will to be witnessed. Many states will not accept a Holographic Will as valid if there are any pre-printed or typed portions of the Will. Some states will permit pre-printed language in the Will if the material provisions are entirely in the testator's own handwriting. To be safe a Holographic Will should have two or more witnesses. That means, however, that it is no longer a Holographic Will, but an ordinary Will. Generally, Holographic Wills should not be used because they raise the potential issue of forgery. A case in point was the alleged Holographic Will of HOWARD HUGHES. The distribution of his estate of several billion dollars hinged on a purported unwitnessed Holographic Will. After years of legal wrangling, the court ruled that the Will was a forgery, but there are still some experts who believe it wasn't. If it was real, however, the issue of competency then exists because most sane people would not give away millions to strangers.

5. WHAT IS A STATUTORY WILL?

Many states have created Statutory Wills. These Statutory Wills comply with all of the terms for a valid Will in the state. They are pre-printed blank Wills on which the testators simply fill the blanks, sign and have notarized. Nearly all states have approved Statutory Wills for their citizens which will be sold in stationery and office supply stores. A Statutory Will still has to be probated the same as any other Will.

It is important that whenever a pre-printed do-it-yourself Will is used that the person pay particular attention to detail. A telling example of this is an actual case where a woman used a pre-printed Will. She was unmarried and had lived for 30 years with a man. She had a child whom she had not seen for over 30 years. She left everything to her male companion in the Will. Unfortunately, the Will she had bought and used was titled "Single Without Children." Her son filed a claim as a pretermitted heir and was awarded her entire estate. The man who had been with the decedent for 30 years received nothing because the woman chose the wrong pre-printed Will.

6. WHAT HAPPENS IN A PROBATE IF A WILL IS LOST?

If a deceased person's Will cannot be found, the general presumption in law is that the person destroyed it. The estate will be distributed in accordance with the state's laws of intestacy. It is next to impossible to prove the existence of a missing Will and what it contained to the satisfaction of a court. If an heir can do so and also convince the court that the Will was inadvertently destroyed, the court might possibly distribute the estate as intended. Example: George made a Will and gave a copy to a friend and placed the original Will in his son's house, which was destroyed by fire. The court might distribute the estate according to the copy. The evidence needed to prove to the court that the deceased did not destroy a missing Will is overwhelming.

The better tactic is for the person to sign two duplicate Wills with a general provision stating, "I have executed this last Will and testament in duplicate with one copy being held by my attorney. On my death if the Will in my possession cannot be found, it is not

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to be presumed that I revoked it. The Will in the possession of my attorney can be admitted in probate and treated as though it was the Will in my possession."

Because a lost Will is presumed to have been revoked, a probate court will not accept a copy of a Will into probate unless it can be shown to its satisfaction that the original Will was not destroyed by the deceased. The general presumption is that the decedent revoked the Will if it is missing. Producing a copy of the Will proves the contents of what was in it but does not prove that the deceased did not revoke it. Example: A fire kills the testator and destroys the Will at the same time. It then falls upon the heirs to prove that the testator did not destroy the Will prior to the fire. Therefore, execute the Will in duplicate with a clause that if the Will is not found in the deceased person's possessions, it is not to be presumed to have been destroyed.

7. WHAT IS LEGAL COMPETENCY TO MAKE A WILL?

In order to create a Will that is valid, the testator must be legally competent to do so. The issue of competency is critical when determining the validity of a Will. Will contests based upon competency are the most difficult cases in the law to win. The creator of the Will is dead, and the intent of a deceased testator has to be proven by extraneous and parol evidence that:

1. The testator was an adult or emancipated minor.

2. The testator knew the nature and quality of his estate.

3. The testator knew those who were the natural objects of his bounty (must have known his or her family).

4. The testator was mentally competent and not suffering from any insane delusions as pertained to the members of his family.

5. The testator was not on mind-altering drugs or alcohol when the Will was executed.

6. The testator knew that he was making a Will.

If these elements are not met, the Will is invalid no matter how many witnesses were present when it was executed. Competency is interesting because it does not have to be permanent. A person can be insane, have a temporary return to sanity, sign the Will and relapse into insanity with the effect that the Last Will and Testament will be valid.

The issue of competency most commonly arises when an elderly person creates a Will close to the time of death or while under some type of medical treatment that might cloud judgment. Most Will contests arise by someone claiming the decedent was tricked into signing a Will.

8. WHAT IS INTESTACY?

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A person is said to have died intestate if that person died without having executed a valid Will. The estate of a decedent whose Will is declared invalid will be treated as if he died without a Will. An unemancipated deceased minor's estate will be treated as though the minor died intestate. Minors cannot write a valid Will. If a Will is declared invalid for any reason (failure to be witnessed, having improper witnesses, being under age, lacking mental capacity, etc.), the decedent's estate will be distributed as though he died without creating a Will.

9. HOW IS AN INTESTATE ESTATE DISTRIBUTED?

When a person dies intestate, the estate usually is divided among the immediate family as follows:

1. If there is a spouse and a child, the estate is divided evenly between the two.

2. If there is a spouse and more than one child, one third of the estate goes to the spouse, and the rest is divided among the children.

3. If there is a spouse and parents and no children, the estate is split between the spouse and parents.

4. If there are parents and no spouse or children, it goes to the parents.

5. If there are no parents, spouse or children, the estate goes to any brothers and sisters.

The probate court will keep searching for heirs until it finds someone to receive the estate. To find an heir to Howard Hughes' estate the court ultimately found a distant cousin by adoption several times removed.

10. WHEN IS A WILL DECLARED INVALID?

A probate court will declare a person's Last Will and Testament invalid when:

1. The testator was an unemancipated minor, usually under eighteen years of age.

2. The testator did not sign it or have enough witnesses, or the witnesses were heirs and thus disqualified, or the witnesses were minors. In most states people named in a Will as receiving property cannot be witnesses. Their signatures are invalid. If there are not two, and in some cases three, good witnesses, the Will is declared invalid.

3. The testator was mentally incompetent at the time the Will was executed.

4. The testator was forced to make the Will as a result of fraud, duress or undue influence of another.

5. The oral Will was found invalid because it exceeded the statutory amount that can be passed by an oral Will.

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6. A Holographic Will was not entirely in the handwriting of the testator or not signed or not dated.

When a Will is declared invalid, the last valid Will of the decedent will be admitted into probate. If there is no valid previous Will, the decedent's estate will be distributed in accordance with the decedent's state laws.

11. WHAT ARE THE CONSIDERATIONS IN MAKING A WILL?

A Will is a final statement of a person about how his estate is to be distributed. A probate court will not employ a Ouija board or seance to determine the testator's intent on issues not covered in the Will. The court will apply the state's law and general equitable principles. One should consider the following factors before making a Will:

1. What specific bequests (gifts) are to be made?

2. How should the remainder of the estate be distributed?

3. Who should be the executor of the estate?

4. Should a bond be required on the executor?

5. What powers should be given the executor? How much should the court supervise the executor?

6. Should adopted or step-children inherit from the estate?

7. Should a testamentary trust be established?

8. Who should be nominated as guardian for minor children?

9. Should any debts be canceled that are owed by heirs, or will they be deducted from the inheritances?

10. If assets are to be sold to pay debts, is there a priority as to how they will be sold?

It simply makes no sense to leave such important matters to be decided by a judge who has no understanding of the decedent or his wishes.

13. WHAT IS COMMUNITY PROPERTY?

A small minority of states (California, Arizona, Idaho, Louisiana, New Mexico, Texas, Nevada, Washington, Wisconsin and to an extent Oklahoma) have laws that state all property acquired by either spouse during a marriage (except by gift, devise or bequest) is jointly and equally owned by both spouses. Earnings by both spouses for their work during the marriage along with retirement benefits earned during the marriage also belong equally to both spouses. Upon death only one half of the community

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property is placed in the deceased spouse's estate. The other half of the community property remains the sole property of the surviving spouse and is not included in the decedent's probate.

When a spouse dies intestate in some community property states, such as California, the surviving spouse automatically acquires title in the community property without probate. Since community property is considered by law to be owned equally by both spouses, a spouse's estate consists of only one-half of the property. Either spouse can direct through a Will how his half of the community property will be distributed. A surviving spouse is not automatically entitled to the deceased spouse's share of the community property. Example: George and Ellen are married in a community property state. George gives his half of the community property and all of his separate property by Will to his children, not to his wife, Eileen.

If the deceased spouse does not have a Will, his half of the community property will be distributed by state laws. California has a special provision that requires all community property to pass automatically to the surviving spouse if a spouse dies intestate. In the example above, if George died without a Will, then Eileen would inherit automatically, with no probate, all of George's interest in the community property. A probate would still be needed for all of George's separate non-community property.

14. WHAT IS STEPPED-UP BASIS FOR PROPERTY RECEIVED FROM DECEDENT?"

The basis (value for tax purposes) of property received from a decedent through a trust or through probate is its fair market value on the date of the decedent's death. Example: A person bought a home for $10,000. On his death it was worth $40,000. The basis of the property when heirs receive it will be $40,000. If the heirs sell it for $40,000, there will be no capital gains taxes due. If the heirs sell the house for $60,000, they will have to pay capital gains taxes on $20,000 (selling price $60,000 minus stepped-up basis $40,000).

Community property is considered owned by both spouses and is given special tax treatment. Under federal law when one spouse dies, the basis of both halves of the community property will be increased to fair market value. This is a great tax advantage. Example: A couple bought a home for $20,000 that had increased to $500,000 upon the husband's death. The basis for the husband's share in the community property is increased to fair market value $250,000. Under the special treatment for community property, the wife's share is also increased to fair market value $250,000. The surviving wife can sell the house for $500,000 without having to pay any capital gains taxes. If, however, the spouses held the house as joint tenants, only the husband's half would have been increased to fair market value. The wife's basis for her half would have remained at $10,000. If the wife later sold the house for $500,000, she would have to pay capital gains tax on $240,000 ($500,000 - $260,000 total basis).

The stepped-up basis for community property is a great tax advantage over mere jointly-held property between spouses.

15. WHO ARE HEIRS?

An heir is someone who succeeds by operation of law to the estate of a person who died intestate. Each state identifies those persons that can be heirs under its laws. A living person has no heirs, only "heirs apparent." Heirs must survive a decedent.

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Generally, heirs are the spouse, parents, children, brothers and sisters (immediate family) of the decedent. If none survive the decedent, the laws will extend heirship to the next-of-kin closest in relationship to the decedent.

Generally step-children have no greater rights in a step-parent's estate than those of a total stranger. Unless the step-children were adopted, which legally makes them the same as biological children, step-children are viewed as strangers for inheritance purposes.

If an heir is to receive property from an estate but can't be found, the probate court will order the property of the heir to be delivered to the county treasurer, county administrator or other designated agent. The agent will hold the property for the missing heir until the heir or a person acting for the heir or his estate applies for release of the property. Payment to the designated agent relieves the personal representative of further responsibility to the heir.

When the property consists of real or personal property other than cash, the court may order the property to be sold, converted to cash and kept in an interest-bearing account. If the money in the bank account is not claimed within a fixed statutory period, it is transferred to the state as "escheated property."

16. WHO IS A PERSONAL REPRESENTATIVE?

The person appointed by the court to act for the estate of a deceased person is the personal representative. There are two types of personal representatives: (1) the executor or executrix and (2) the administrator. The executor (a man) or the executrix (a woman) is appointed by the court to represent the estate when the trustor (creator) of the will dies. A person nominates an executor or executrix in the Will, but it is the court that does the actual appointment. If the court is not satisfied with the decedent's chosen representative, it will appoint another. An administrator is a man (administratrix, if a woman) appointed by a court to administer the estate of a decedent who died intestate.

The personal representative is given statutory powers to handle the affairs of the estate in most transactions without court approval. Through his Will the decedent can give the executor more powers and authority to act than are normally contained in the statutory powers conferred by the court. Usually court approval must be sought before real estate can be sold. A testator, however, may require in his Will that the real property be sold. If he does, court approval is not necessary.

The personal representative, whether the executor or the administrator, is responsible for performing the following duties in the probate:

1. Marshals (assembles and inventories) the assets of the estate.

2. Establishes a checking account in the name of the estate.

3. Arranges for appraisal of the assets of the estate, both real and personal property.

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4. Seeks payment on any insurance policies owed on the life of the deceased person.

5. Substitutes as the representative of the deceased person in any litigation pending at the time of death.

6. Files any litigation needed to collect debts owed to the estate or to maintain and preserve the estate.

7. Pays all bills, including funeral bills and medical bills for the last illness.

8. Prepares tax returns and pays all federal and state taxes for the estate and the decedent.

9. Submits accounting to the court for review.

10. Petitions the court for authority to distribute to heirs.

11. Distributes to heirs.

12. Applies to the court for final discharge, terminating his authority to act and releasing him from liability.

It usually takes a minimum of six months for a personal representative to do all this. It can take significantly longer. Some estates have been open for years. This is the prime factor in favor of a revocable trust, which can transfer property immediately subject only to the payment of appropriate estate and income taxes.

The personal representative appointed by the court is responsible for the payment of all taxes owed by the estate from the assets in the estate. If the personal representative distributes the estate before payment of all taxes due and owing, the representative may become personally liable for the taxes to the extent of the property transferred. Example: The representative distributes $50,000 to the heirs, and the IRS then determines that an additional $60,000 is owed in taxes. The personal representative may be responsible for any portion of the $50,000 not recovered from the heirs.

17. WHAT IS AN ACCOUNTING?

The personal representative is required to file an inventory with the court when the estate is opened. An inventory is a complete listing of every asset in the estate and its value. While the estate is open, the representative is required to keep track of every penny received or spent by the estate.

Before the estate can be closed, the representative is required to account for every penny that entered and left the estate. There must be a complete accounting for the estate. All of the heirs can agree to waive an accounting. That might be done when the accounting is unnecessary because the heirs trust the executor, or when it will be too costly given the difficulty or expense in performing it. Unless the accounting is waived, the estate cannot be closed.

18.WHAT ARE LETTERS OF PROBATE?

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In a probate the court appoints a personal representative. The appointment of a representative is manifested by a court document. The court order appointing an executor in an estate where there is a Will is called "letters testamentary." The court order appointing an administrator in an estate where there is no will is called "letters of administration."

The letters are the official appointment of the personal representative to act for the estate. Once these letters have been issued, the personal representative is legally entitled and indeed obligated to undertake the management of the affairs of the probate estate. No one should ever deal with a person claiming to be the personal representative of an estate without first seeing the letters of appointment.

19. WHAT IS A WIFE'S DOWER'S RIGHT?

Some states still have the ancient common law right of "dower." Under the concept of dower the law gives an interest to the wife in the real property of the husband owned by him at any time during the marriage. The wife's right (dower) was contingent upon her surviving him, and it became an absolute right after she did so. The dower interest was a life estate in one-third of the real property that the husband owned during the marriage.

The wife's dower could not be defeated by the husband during his life or by his Will, and her interest was not subject to the claims of her husband's creditors. The dower terminates upon divorce. Many states have abolished dower and replaced it with statutory shares in the deceased husband's estate.

20. WHAT IS A HUSBAND'S CURTESY RIGHT?

Some states still have the ancient common law doctrine of "curtesy" governing the husband's statutory share of his wife's estate. Curtesy grants the husband an interest in the real property of the wife owned by her during the time of the marriage. The husband's curtesy was contingent upon him surviving her, and it became an absolute right when he did so, provided a child was born during the marriage.

Curtesy entitles the husband to a life estate in all of the wife's real property owned by her during the marriage. The husband's curtesy could not be defeated by the wife during her life or by her Will and was not subject to the claims of her creditors. Curtesy terminates upon a divorce. Most states have replaced the doctrine of curtesy with statutory shares for the surviving husband in the deceased wife's estate (between a third and a half).

21. WHAT ARE COMMON LAW STATES?

The following are the states that follow the common law marital property rules. In these states a person owns separately and apart from the spouse everything titled solely in his name and everything purchased by his own property, income, or salary. The titles to property actually control who owns. This is different from the law in community property states, which hold that all

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property acquired by gift, devise, or bequest belongs to both husband and wife. The common law states are:

ALABAMA ALASKA ARKANSAS COLORADO

CONNECTICUT DELAWARE FLORIDA GEORGIA

HAWAII ILLINOIS INDIANA IOWA

KANSAS KENTUCKY MAINE MARYLAND

MASSACHUSETTS MICHIGAN MINNESOTA MISSISSIPPI

MISSOURI MONTANA NEBRASKA NEW JERSEY

NEW HAMPSHIRE NEW YORK N. CAROLINA N. DAKOTA

OHIO OKLAHOMA OREGON S. CAROLINA

PENNSYLVANIA RHODE ISLAND S. DAKOTA UTAH

TENNESSEE VERMONT VIRGINIA W. VIRGINIA

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Every common law state has its own laws determining the statutory share that a surviving spouse receives from a deceased spouse's estate. In the following states the surviving spouse receives a one-third life estate. This is the right to use the property to obtain income but not the right to sell it: Connecticut Kentucky Rhode Island Vermont

In the following states, the surviving spouse's percentage varies, depending on whether the deceased spouse had children. The surviving spouse usually gets at least one-half of the estate, one-third if there are children.

Alabama one-third of the augmented estate.

Alaska one-third of the augmented estate.

Colorado one-half of the augmented estate.

Delaware one-third of the estate.

Dist. of Columbia one-half of the estate.

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Florida 30% of the estate.

Hawaii one-third of estate.

Iowa one-third of estate.

Maine one-third of the augmented estate.

Minnesota one-third of estate.

Montana one-third of augmented estate.

Nebraska one-third of augmented estate.

New Jersey one-third of augmented estate.

New York one-third of augmented estate.

North Dakota one-third of augmented estate.

Oregon one-fourth of the estate.

Pennsylvania one-third of the estate.

South Dakota one-third of the augmented estate.

Tennessee one-third of the estate.

Utah one-third of the estate.

W. Virginia up to one-half of the augmented estate. In the following states, the surviving spouse's percentage varies depending on whether the deceased had children. If there are no children the surviving spouse usually gets one-half of the estate but only one-third if there are children.

Arkansas Illinois Indiana Kansas Maryland Massachusetts Michigan Missouri New Hampshire N. Carolina Ohio Oklahoma

S. Carolina Virginia Wyoming

Georgia is unique. Instead of a fixed share, Georgia requires the deceased spouse's estate to support the surviving spouse for one year. This might or might not exceed the one-third of the estate usually given in other states.

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Most states base the statutory share on the augmented estate of the deceased spouse. The augmented estate consists of everything owned by the decedent: joint-tenancy property, trust property, etc. The amount of the statutory share is calculated from the augmented estate. The probate court has the power to cancel joint tenancies and trusts created by the deceased spouse in order to give the surviving spouse a statutory share. The purpose of using the augmented estate is to ensure the deceased spouse passes a statutory share of the estate to the surviving spouse. Not all states, however, use the augmented estate. Instead, other states simply rely on the property actually undergoing probate.

22. WHAT IS THE ROLE OF AN ATTORNEY IN A PROBATE?

An attorney is not required to probate an estate. In a simple probate a representative with normal intelligence and no legal training can handle the probate procedures quite well. There are a number of do-it-yourself probate manuals on the market that can assist a non-lawyer in the probate. An attorney will be needed if there is any type of lawsuit against the estate by third parties, such as a creditor's claim or a will contest. Most states have laws stating that only attorneys can bring or defend a lawsuit in court for another. Therefore, the personal representative cannot act as an attorney in a court unless he is a licensed attorney.

23. WHAT ARE ESTATE AND INHERITANCE TAXES?

A common misconception is that probate exists as a means for the state or federal government to collect taxes. That is not the case. Estate and inheritance tax rates are based on the size of the estate and the relationship of the heirs to the deceased. It is irrelevant to the taxing entities whether or not a probate is conducted when determining the tax liability.

For example, assume that a person gives $800,000 at his death to his children. It makes no difference if the $800,000 comes to the children from probate or through a revocable trust. There is greater cost if the estate is probated rather than passing it through a trust, but the tax rates are the same. The tax is on the money and property distributed after death, not whether or not it comes from probate.

Some states will freeze jointly-held property (such as bank accounts, real estate and brokerage accounts) until the taxing entities have time to assess the value of the decedent's interest in the property. In particular, New Jersey and South Carolina require 10 day's written notice to taxing agencies before securities, deposits or assets of a decedent may be transferred outside of probate. In the states that freeze the assets pending a tax determination, a limited amount may none-the-less be transferred to a spouse or children without having to give the required notice. New Jersey permits $5,000 to be transferred to the surviving spouse without having to wait the required 10 days.

The purpose of permitting limited transfer for use by the family is to keep the spouse and family from destitution while the taxing authorities determine what amount of tax is owed. It is markedly unfair to seize the joint property of one person merely because the other joint tenant died. Consequently, the notice period is usually small.

There is a lifetime federal unified credit for gift and estate taxes of $1,000,000 through 2004. Then for estates it rises to an unlimited amount in 2010 and then reduces to $1,000,000. For gifts, the exemption remains at $1,000,000. This means that no

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federal estate taxes will be owed unless an estate exceeds the unused portion of the unified credit (the unified credit amount minus the value of lifetime gifts). Under the Internal Revenue Code, a personal representative can file a request with the IRS (and sometimes the state taxing agency) for a final assessment of the taxes owed by the estate. The IRS has three years in which to assess additional taxes. If the personal representative makes a request for a prompt assessment, the IRS has to complete the assessment within 18 months. After the assessment is done, the personal representative can pay the tax, distribute the remaining estate to the heirs and be discharged without any liability for future taxes.

24. SHOULD JOINT WILLS BE USED IN ESTATE PLANNING?

Joint Wills are trouble and should usually be avoided. The problems are obvious. A married couple makes a Joint Will; one spouse dies; the survivor wished to change the Will; the ultimate beneficiaries, usually the children, object. Whether the surviving spouse can alter a Joint Will depends both on the language of the Will and the state law where the Will is probated. If the Will states that after the death of one spouse the survivor cannot amend or revoke, most states would enforce that provision on contractual grounds. These states take the position that the deceased spouse would not have executed the Joint Will had he known that it could be changed after death.

If the Joint Will does not have the language making it irrevocable and unamendable, the court Will try to decide the intent of the parties when they drafted it and base its decision on that determination. There simply is not any real justification for running this type of risk. Individual Wills are relatively cheap, especially statutory Wills, so cost should not be the determinative factor in deciding upon use of a Joint Will.

25. HOW IS A WILL CHANGED?

A "codicil" is an amendment to a Will. It does not revoke the entire Will, but it does change certain provisions. The probate court will read the Will and all codicils together to determine the final intent of the deceased. A codicil is, in essence, a mini-Will. It is prepared, signed and witnessed in the same manner as an ordinary Will. Particular care must be taken in writing a codicil to define just what changes are to be made in a Will. If an heir is to be removed or added, it must be clearly stated. A codicil should be kept together with the Will to assure that it will not be overlooked when the estate is probated. A codicil is governed by the same rules as a Will. Therefore, if a codicil is missing, it will be presumed to have been previously revoked unless conclusively proven otherwise.

All changes to the Will must comply to the same formalities used in making a codicil or new Will. A person who simply deletes old provisions or inserts new clauses brings the validity of the Will into question. A person can revoke his Will at any time by another Will or simply by destroying the old Will. Some states would consider the writing of the new clauses an effective revocation of the old Will yet ineffectual in creating a new Will.

A person should never write a change on the face of a Will. All changes to a Will should be by a valid codicil or a new Will in accordance with the requirements of the state of domicile. Given the ease with which new Wills can be created, especially

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Statutory Wills, there is no reason to risk invalidation of an existing Will by writing on it. Just prepare a new Will or a codicil.

26. WHEN SHOULD A WILL BE CHANGED?

Unless changed, once a will is drafted, it is valid forever. As time passes, a person's needs and circumstances change. A will drafted years earlier may no longer fulfill the current needs and desires of the person. A will should be changed to reflect the true intent of the person.

The following changes in a person's life should immediately cause a review of the person's will:

1. A change in marital status. Marriage makes the new spouse a pretermitted heir. A divorce might not cut the ex-spouse out of the will.

2. Children are born or adopted. State laws allow unmentioned children to claim a portion of an estate as pretermitted heirs. These children, however, might not receive under state law what the decedent would have given them.

3. Step-children. In most states, step-children of a deceased have no rights to inherit under a step-parent's estate. Therefore, if a step-parent wishes to make dispositions to a step-child, that intent must be specifically stated in a Will.

4. The value of the estate changes and the earlier gifts were too much, too little or there is now enough to give to others as well.

5. The intended heirs, executors, guardians or trustees have died.

6. Changes in estate or inheritance tax laws that make changing the will advisable to save on taxes.

7. The necessity for testamentary trusts for surviving spouse and children no longer exists.

A Will should be reviewed every few years for possible changes. Tax laws change frequently, and wills should be reviewed to ascertain their effect on the estate.

27. CAN A CHILD BE DISINHERITED?

Most states permit a parent to disinherit a child: prevent the child from receiving anything from the parent's estate. While possible, the intent to specifically disinherit a child must be detailed in writing. The laws of all states presume that a parent does not intend to disinherit a child unless specifically stated in the will. If a child is simply not mentioned in the will, the court will presume it was an error and award the child his intestate share of the estate.

Louisiana has several probate laws different from the rest of the nation. While the rest of the nation derived its basic law from English Common Law, Louisiana derived its law from French Napoleonic Code. Louisiana permits the disinheriting of a child only on one of 12 different grounds. Therefore, in Louisiana a parent cannot disinherit a child, no matter how specifically the intent to do

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so is stated in the will, unless one of the 12 grounds are met. These grounds run from a minor marrying without consent to planning to murder a parent.

28. WHAT ARE PRETERMITTED HEIRS?

A probate court will presume that a parent did not intend to disinherit a child unless the intent is specifically stated in the will. This comes into play in the pretermitted heir situation. A pretermitted heir is an heir, usually a child, who is not mentioned in the will, but who would have inherited under a state law if there had been no will. When the court finds the existence of a pretermitted heir, the court will award that heir his intestate share of the estate. For example, assume that Mary wrote a will leaving her estate to her three children. Mary later had a child out of wedlock and died shortly thereafter. Mary's will did not mention the new baby. The court, however, will find the baby a pretermitted heir and award the baby her intestate share of the estate which is one-fourth.

A step-child is not a pretermitted heir and has no right of inheritance under the law. California has created a novel statutory provision that permits a person to claim a defacto adoption if certain elements are met. California requires there be a parent-child relationship between the people and that an adoption was not possible because of some legal impediment. If these elements are met, the court will treat the person the same as an adopted child and award him an intestate share of the estate.

As with a pretermitted heir, a court will presume that a deceased spouse did not intend to disinherit a surviving spouse unless it is specifically stated in the will. A pretermitted spouse is a surviving spouse who is not mentioned in the deceased spouse's will. In all states a surviving spouse will inherit from a deceased spouse's estate, under each state's laws. It matters not that the surviving spouse is pretermitted or disinherited by a clause in the will, the state law will provide for inheritance. When the court finds a pretermitted spouse, it will award that spouse the intestate share of the estate. Example: Mary wrote a will leaving her estate to her three children. Mary then remarried and died 20 years later. Mary's will did not mention the husband. The court will find the new husband a pretermitted spouse and award him his intestate share of the estate, usually a third.

29. WHAT IS THE EFFECT OF A DIVORCE ON A TESTATOR'S WILL?

A few states, like California, have enacted laws that specifically prevent an ex-spouse from inheriting under a deceased ex-spouse's will that had been drafted at the time of their marriage. In most states, however, an ex-spouse will be entitled to share in the estate where the decedent failed to rewrite the will after the divorce. Most states take the view that the decedent must have wanted to make gifts to the ex-spouse because the will was not changed. Those courts will honor that perceived intention.

No one should ever assume that a divorce removes the rights of the ex-spouse to inherit under a will. In cases of divorce, a new will or a codicil should be drafted to state that the ex-spouse is not inheriting under the will. A new will should be written as soon as the divorce papers are contemplated and should certainly be in place when the divorce is filed. Some die during a divorce (in fact its been the basis of many mystery movies). The marriage is still legal. Thus the surviving spouse receives property under the deceased spouse's old will even though granting the divorce would have invalidated the will. Example: An attorney defended a woman charged with the murder of her wealthy husband. The woman had shot her husband six times. He defended her successfully. Because it was not murder, she inherited his estate of $26 million.

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30. WHAT IS AN ANCILLARY PROBATE?

An ancillary probate is a proceeding conducted in a state other than the state that was the decedent's permanent residence. Every state is responsible for probating the real and personal property located within it. If a deceased owned property in more than one state, a probate may be required in each such state in addition to the state of the decedent's domicile. Example: Robert died with a home in Georgia and another in Alabama. Probates must be opened in both Georgia and Alabama for the house in each state. If a decedent owns oil and gas leases in six states, there will be ancillary probates in five of the states plus a probate of the majority of the decedent's estate in the state of domicile.

Additional problems arise if the states have differing requirements for a valid will. Example: The domicile state requires two witnesses, but the state with the ancillary probate requires three witnesses. The will may be invalid in the ancillary probate state, and the property located therein will be distributed by its law of intestacy.

31. WHAT IS A WILL CONTEST?

A Will contest is a legal proceeding whereby someone, usually an heir or beneficiary, attacks or contests the validity of a will or a distribution made under it. A will contest results in a trial before the court to determine if the will was validly executed and should be enforced. The main contentions for contesting a will are:

1. Improper execution.

2. Lack of competency.

3. Lack of intent to make a will.

4. Pretermitted spouse.

5. Pretermitted heir.

6. Fraud, duress or undue influence.

Generally, only two witnesses are needed for a will, but a few states have rather eccentric requirements. Vermont requires three witnesses; Louisiana follows the Napoleonic Code requiring three witnesses, one of whom must be a notary public. These factors are important if there is a possibility of an ancillary probate. If the will might be probated in another state, it must comply with that state's and the decedent's home state's requirements for a valid will. In the case of an ancillary probate, if the will does not comply with the ancillary state's requirements for a valid will, it will be declared invalid and the estate distributed by the laws of intestacy.

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All states require that proof be submitted that the decedent actually signed the will. Some states actually require some or all of the witnesses to come before the court and testify about the signing of the will. Other states, such as California, permit the witnesses to sign a declaration called a proof of subscribing witnesses in which the witness swears under penalty of perjury that he actually saw the testator sign the will.

A few states, like Louisiana, permit witnesses to sign the will before a notary public. When this is done, the will is said to be self-authenticating, and the witnesses need not appear in court to validate their signatures. When the witnesses are dead or unavailable and their signatures were not notarized, some states, California for instance, permit handwriting experts to testify that the decedent signed the will. This is a last resort and is difficult if the decedent had a long illness that affected his signature. It is a good idea to use witnesses who are younger and in better health than the testator.

If the will is successfully contested, the probate court may invalidate the entire will or only the challenged portion of it. If the entire will is invalidated, the last valid will is reinstated. If there is no such valid prior will, the estate will be distributed pursuant to the laws of intestacy.

32. WHAT ARE CREDITOR CLAIMS?

After a probate is opened a notice of the probate proceeding is published in a newspaper of general circulation in the area where the decedent lived. This publication informs creditors of the decedent that a death has occurred. The publication also informs the creditors that they have a fixed period of time ranging from four to six months to file claims with the probate court for the amounts they are owed.

If any creditor that was given valid notice, directly or by publication, fails to file a claim within the statutory period of time, he is barred from recovery. The reason for having a cut-off period is to close the estate on a certain date. Otherwise, the probate would be open forever while old unpaid claims were being submitted. Once filed, the executor must approve or reject the claim. If the claim is approved, it will be paid from the estate at the closing. If the claim is rejected, the creditor has a fixed time to file a lawsuit to collect the claim. After that time, collection is permanently barred.

This creditor period is the main reason for the delay in closing a probate and distributing the estate. The advantage of a revocable trust is that the property is transferred immediately. The disadvantage is that the creditor claims follow the estate. The claims will be paid. Still it makes better sense to pay them immediately through a trust rather than wait months for the action to work its way through the courts.

Funeral expenses are paid out of the estate. They are granted a priority over other bills. They are among the first bills paid once the estate has been marshaled (assembled). Many people today make their own funeral arrangements by paying for the service ahead of time. Many states, such as Ohio, Nevada, South Dakota and Washington require money paid under a pre-need plan to be placed in a trust fund. In the event the funeral home goes out of business, the money is returned to the client. Sometimes a person purchases a funeral policy to pay the funeral expenses, and the insurance company can pay insurance proceeds directly to the funeral home. Some states, such as Maryland and Tennessee, require all payments on funeral policies to be made to the

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estate and forbid funeral homes being named beneficiaries on such policies.

If the estate is not large enough to pay all of the creditors, the personal representative will sell the secured property. The representative will apply the proceeds from the sale of the secured property to the secured creditors: those holding loans secured by designated property. If the proceeds are not enough to cover the claims, the secured creditors will have an unsecured claim for the unpaid balance. Any amount received in the sale that exceeds the amount of the claims is paid to the estate.

After claims of the secured creditors are satisfied, all the unsecured creditors divide the remaining estate according to their percentage of claims against the estate. Example: Ed dies owing George $50,000 secured by a printing press. The executor of the estate sells the press for $30,000 and pays it to George. The remaining $20,000 becomes an unsecured debt of George against the estate. Ed's estate totals $100,000 with $200,000 in unsecured claims. George's $20,000 unsecured claim is 10% of the total unsecured claims. Therefore, George receives 10% of the unsecured estate, which is $10,000.

33. WHAT IS A FAMILY ALLOWANCE?

Many states, like California, permit a surviving spouse or minor children to claim a fixed amount from decedent spouse or decedent parent's estate free from all creditor claims. This family allowance can be in addition to anything bequeathed in the will. In some states if an heir elects to take a family allowance, the heir cannot take under the will.

The family allowance can also be taken despite the terms of the will. The will may specifically give the wife nothing, but the wife may still be entitled to the family allowance under state law. A family allowance was one of the means used by the states to replace dower and curtesy. In a small estate the family allowance is the only way that the family may receive anything from the decedent's estate.

34. WHAT HAPPENS WHEN BOTH SPOUSES DIE SIMULTANEOUSLY?

A simultaneous death occurs when both the husband and wife die together so close in time that it cannot be ascertained with certainty who died first. When there is simultaneous death, each spouse's estate is distributed as though the other spouse has died first. The husband's estate passes to his heirs in the manner it would have passed had the husband actually died first. Jointly held property is divided equally among the two estates. Every state except Alaska and Louisiana have adopted the Uniform Simultaneous Death Act, which covers this situation.

Many Wills avoid this problem altogether by simply containing clauses that require the spouse or other heir to survive the testator by a fixed period of time in order to inherit, usually 60 days.

35. HOW LONG DOES IT TAKE TO PROBATE AN ESTATE?

The time required to settle an estate varies from state to state. It depends on whether there is litigation or creditor claims. In California it takes a minimum of six months to close an estate. Four months is the statutory creditor claims period, and the other

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two are the general period of public notice for opening and closing an estate.

Some states require that an executor actually close the estate within a fixed period of time. In Kansas the mandatory time to close an estate is nine months. In Wyoming, one year is the time period. Where litigation is involved years may pass before an estate can be closed. If a revocable trust is used, there is no estate to close because the trust estate passes immediately upon death to those next entitled to receive it under the terms of the trust.

36. WHAT IF THE FINAL JUDGMENT OF DISTRIBUTION?

After the accounting has been performed and either accepted by the court or waived by the heirs, the court will order which creditor claims are to be paid and how the final distribution to the heirs is to be made. The final judgment acts as a deed for real property. Recording the final judgment is the same as having received a deed from the personal representative for the real property distributed under the final judgment.

37. HOW IS AFTER-DISCOVERED PROPERTY TREATED?

An estate can always be reopened if property not covered by the terms of the final judgments have what is called an omnibus clause that states how such after-discovered property is to be distributed, thereby avoiding reopening the estate. Generally such an omnibus clause states, "The remainder of the estate along with any undiscovered property shall be distributed as follows:..."

When an omnibus clause is used in the final judgment of the probate court, there is usually no reason to reopen the probate because of after-discovered property. Finding after-discovered property may result in additional estate or inheritance taxes. The taxes go with the property. If additional taxes are owed because of the existence of this newly discovered property, the heirs receiving the property will be responsible for the taxes to the extent of the value of the assets received from the estate.

TABLE OF CONSANGUINITY

FIGURES INDICATE THE DEGREE OF RELATIONSHIP TO THE DECEASED PERSON.

The estate normally goes to children, grandchildren or great-children

under a state's law of intestacy before the Table of Consanguinity

is utilized.

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DECEASED ---->PARENTS ---->GRANDPARENTS ----->GREAT GRANDPARENTS ----->GREAT GREAT

PERSON GRANDPARENTS

1 2 3 4

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CHILDREN BROTHERS UNCLES GREAT AUNTS GREAT GRAND

SISTERS AUNTS UNCLES UNCLES AND AUNTS

2 3 4 5

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GRAND NIECES FIRST FIRST COUSIN FIRST COUSIN

CHILDREN NEPHEWS COUSINS ONCE REMOVED TWICE REMOVED

3 4 5 6

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GREAT GRAND GRAND NIECES FIRST COUSIN SECOND COUSINS SECOND COUSIN

CHILDREN NEPHEWS ONCE REMOVED ONCE REMOVED

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4 5 6 7

GREAT GRAND FIRST COUSIN SECOND COUSINS THIRD COUSINS

NIECES AND TWICE REMOVED ONCE REMOVED

NEPHEWS

5 6 7 8

FIRST COUSIN SECOND COUSINS THIRD COUSINS

THRICE REMOVED TWICE REMOVED TWICE REMOVED

7 8 9

SECOND COUSINS THIRD COUSINS

THRICE REMOVED TWICE REMOVED

9 10

THIRD COUSINS

THRICE REMOVED

11

CHAPTER 2

COMMON ESTATE PLANNING QUESTIONS

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Death is the great equalizer. The only other thing that cannot be avoided is taxes. Even the Ancient Egyptians were unable to conquer the "hereafter." Since we cannot avoid taxation, we must live with it and hopefully die in a manner that will minimize the taxation following our deaths.

There are few people who believe that the government should take all of a decedent's property upon death. Unfortunately, the government does not always feel that way. Not so many years ago, a Democrat representative stated on the floor of the House of Representatives that the people were only entitled to keep that money and property that the government says that they can keep. In that vein, the Democrats have proposed in 1992 House Resolution 4848 which called for taxing all estates over $200,000 in value. If HR 4848 had passed, a $600,000 estate would have had to pay nearly $60,000 in additional taxes. Fortunately, HR 4848 never became law and in the 2001 Tax Act, the unified credit was actually increased to $1,000,000 through 2004 and increases to unlimited in 2010 before dropping back to $1,000,000 in 2011.

Estate planning is a legal term of art. It covers anything that a person deliberately does to manage his estate while living and which oversees its distribution after death. Wills, trusts, joint tenancies, gifts and summary probates are the main instruments used in estate planning. The questions in this chapter serve to educate and guide the reader to the form of estate planning that is most useful to his given circumstance.

In order to present as full a discussion as possible, questions regarding revocable trusts as estate planning tools are discussed even though this volume does not address revocable trusts. The second volume on estate planning specifically deals with the use of revocable trusts for estate planning. In the second volume are the following full, complete and easy-to-use revocable trusts along with all of their necessary supporting documents:

(a) Individual trusts.

(b) Joint trusts for married couples.

(c) A-B By-pass trusts.

(d) QTIP trusts.

The ESTATE PLANNING II is designed to be the most complete and user-friendly self-help revocable trust book on the market. Any person with an estate of $60,000 or more should consider the use of a revocable trust for estate planning purposes.

This chapter deals with the most common questions asked by people when contemplating whether they need to implement an estate plan. The questions, herein, cover the general field of estate planning and help inform the reader of the various options available.

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1. WHAT IS AN ESTATE PLAN?

An estate plan is a general term for the procedure by which a person intends to preserve the assets of his estate during life and distribute them after death.

The main considerations in estate planning are the avoidance of probate, reduction of estate and inheritance taxes and the quick distribution of the estate to the designated heirs.

A complete estate plan considers the various methods for the preservation of the estate during life by maximizing income while reducing to the extent possible, given the circumstances of the individual, the amount of income taxes that must be paid.

2. WHAT ARE THE COSTS OF PROBATING A WILL?

The costs incurred in probating a will are large. A probate is usually one of the most expensive expenditures made by a person. An old joke which is wryly true is that if the person weren't already dead, the cost to probate his estate would kill him. Probate costs include court fees, appraisal fees, attorney fees and executor fees. Court costs and appraisal fees are modest: usually a couple of hundred dollars for an average estate. The real cost is for the attorney and executor fees.

The maximum amount of attorney and executor fees are set by statute and approved by the court. They are based upon the size of the estate (value of the property to be probated) and increase as the estate increases.

In California, for example, attorney and executor fees are calculated as follows:

(1) Four per cent (4%) of the first $15,000; maximum $600.00,

(2) Three per cent (3%) of the next $85,000; maximum $2,550.00,

(3) Two per cent (2%) of the next $900,000; maximum $18,000.00, and

(4) One per cent (1%) of the next $15,000,000, and one-half per cent (.5%) thereafter.

An estate of $100,000 probated in California would pay maximum attorney and executor fees of $6,300.00: $3,150 each to the executor and attorney. This is a maximum fee. The attorney and executor can agree to take less or no fee at all.

The avoidance of probate fees is a major inducement for implementing an estate plan. With a revocable trust there are no probate fees because the estate passes immediately to the designated beneficiaries in the trust. No court proceeding is needed to transfer the property of a trust so as such no attorney s needed.

3. HOW CAN PROBATE BE AVOIDED?

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There are several means available for a person to utilize in order to avoid having to probate an estate. These probate avoidance vehicles are:

(1) Summary probate proceedings, if available in the decedent's state. A summary probate is an abbreviated procedure for clearing and transferring small estates or entire estates to a surviving spouse. Many states have adopted special procedures to by-pass the expense and long delay in probating such estates.

(2) Giving the estate away while alive.

(3) Placing the property in joint tenancy with the proposed heirs. Upon death, title for the property passes immediately without probate to the surviving joint tenants. Real property held in joint tenancy passes to the survivors without a probate by the recordation of a notice of the death of a joint tenant.

(4) Placing the estate into a revocable trust that passes the estate to the designated beneficiaries immediately upon the decedent's death. This is the most popular form of estate planning because it is fast and bestows the maximum amount of control over the estate in the hands of the present owner.

In order to determine the best type of estate plan best suited to an individual's circumstances, the person must understand the size of the estate, how he wishes to distribute it and the amount of control he wishes to relinquish in order to create the estate plan.

4. WHAT ARE THE DISADVANTAGES OF USING JOINT TENANCIES FOR AVOIDING PROBATE?

There are three main disadvantages in forming a joint tenancy:

(1) Putting the property into joint tenancy is an immediate gift of half or more of the property. This means that property placed into joint tenancy becomes attachable to satisfy the debts of the other joint tenants upon the creation of the joint tenancy. For example, assume a house was placed in joint tenancy with a child. A creditor of the child gets a judgment. The creditor can seize and sell the child's half interest in the house.

(2) There may be gift taxes due on the gift if the value of the gift exceeds $10,000 and the unified credit has been used by previous gifts. By the way, there is no federal gift tax on gifts to a spouse if the spouse is an American citizen.

(3) There is no stepped-up basis for property placed in joint tenancy. The basis of the property for the donee is the same as for the person who made the gift. On the other hand, property obtained through a probate or a revocable trust has its basis raised to fair market value and can be immediately sold with no income gain and thus no capital gain tax.

The main disadvantage in creating a joint tenancy is that half or more of the property is relinquished immediately. Example: A

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parent puts a house in joint tenancy with a married son. The son gets a divorce. The wife might, in some states, be awarded the son's interest in the house which was something the parent never intended to do.

5. WHAT IS A DURABLE POWER OF ATTORNEY?

A general power of attorney is a written document that gives a person (called the attorney in fact) the authority to act on the principal's behalf. A general power of attorney lapses (becomes invalid) when the principal becomes incompetent or dies. At the time it is needed most, when the principal is no longer able to act for himself, a general power of attorney lapses, and the right of the attorney in fact to act for the principal ceases.

To address this situation, most states have adopted the Uniform Durable Power of Attorney Act. Under the Act, a durable power of attorney will continue in full force and effect even though the principal subsequently becomes incompetent. A durable power of attorney must contain specific language stating the intent of the principal for the power of attorney to continue during the period of incompetency and incapacity.

A durable power of attorney has the effect of eliminating and replacing the necessity of a voluntary conservatorship. A durable power of attorney can also give the attorney in fact the power to make all decisions or just specific health care decisions for the principal in the event the principal becomes unable to do so.

Because of their importance to estate planning, durable powers of attorney have been given their own chapter in this book.

6. WHAT IS A LIVING WILL?

A living will is not a Will for probate purposes. Rather, it is a document that serves as a directive to a treating physician and the world at large that the person executing it does or does not want to be kept alive using extraordinary means. A living will is used to ascertain the intent of the person when he is unable to make the health care decisions at the time it is necessary to do so. Living Wills, including samples, are discussed in the durable power of attorney chapter.

Without the existence of a living will stating a contrary intent, a court will presume a person wanted extraordinary means used to be kept alive. The court will order extraordinary means to be used to keep the person alive, even over family objections.

Living Wills should be used in addition to durable powers of attorney for health care in order to assure that a person's wishes are most likely fulfilled in this most dire of situations.

7. WHAT IS A POUR-OVER WILL?

A pour-over will is a special will used in conjunction with a revocable trust. After the trustor dies, the pour-over will places all

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property into the trust that the decedent forgot or failed to place while alive. Unfortunately, property not placed into the trust prior to the trustor's death may require a probate if the size of the assets is large enough that summary procedures cannot be used.

In a real case, the trustor forgot to place a piece of property which he owned in Hawaii into a California trust which the trustor had created. The executor of the Pour-Over Will was required to open a Hawaiian probate in order to get permission to put the property into the trust. Having to probate the non-trust property needlessly cost the estate $11,000. The trustor could have done it during his life for the cost of recording a deed into the trust usually about $10.

A simple example of the need of a Pour-Over Will would be if a person hits a lottery for $50,000,000 and drops dead in the excitement. The Pour-Over Will operates to place the money into the trust after it has been probated. Once placed in the trust, the money will be managed in accordance with the trust terms.

8. WHAT IS A MARITAL DEDUCTION?

Under federal law, there is no federal gift or estate taxes on property transferred between spouses. This is an unlimited credit that has only two exceptions:

(1) It must be an actual gift. If the gift is in trust, then all of the income must go to the spouse.

(2) The spouse receiving the gift must be an American citizen.

Gifts to a non-citizen spouse are not eligible for the unlimited deduction but are eligible for a $110,000 annual exclusion under Section 2523 of the Internal Revenue Code. Property passing from an American spouse to an alien spouse, after death, does not qualify for an unlimited marital deduction either. Special tax rules apply for such transfers, and a tax consultant should be consulted if the estate of the American spouse exceeds $675,000.

Therefore, a person can generally pass his entire estate to a surviving spouse without incurring any federal estate taxes. This may not ultimately be the best estate planning. If the property given to the surviving spouse boosts the surviving spouse's estate over the unified credit amount, the surviving spouse's estate will have to pay estate taxes. No gift to a surviving spouse that boosts his estate over the available unified credit should be made until the decedent's unified credit is depleted as discussed below.

9. WHAT IS THE UNIFIED CREDIT?

Every person is permitted to transfer assets totaling $1,000,000, which gradually rises to an unlimited amount in 2010 and back to $1,000,000 in 2011 under the Tax Relief and Reconciliation Act of 2001 by death without incurring an estate tax under federal law. There is imposed a gift tax through 2010 equal to the estate tax for gifts made during that period.

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Under the Tax Act of 2001, Congress imposes a gift tax to restrict the transfer of income producing property from high income to low income taxpayers after the estate tax is eliminated. The gift tax exemption beginning in 2010 is $1,000,000. So even though transfers of property after death can be made tax free in 2010 for at least one year, unless made the estate tax elimination is made permanent by Congress, a gift tax on the transfer of property while alive will remain. The gift tax rate imposed in 2010 under the 2001 Tax Act is equal to the top individual tax rate at the time of the gift.

About half of the states impose their own estate and inheritance taxes. These taxes should also be considered in estate planning. The Internal Revenue Code permits a small credit for state death taxes to be applied against the federal estate.

The significance of the unified credit is that it permits a husband and wife to give to their children a total combined estate of $2,000,000 trhough 2003 before incurring any estate taxes. A person giving his entire estate to a surviving spouse is not taking advantage of the unified credit. Not using the unified credit is ill-advised when making the gift to the surviving spouse pushes the value of that estate over the unified credit amount and subjects it to the payment of federal estate taxes on the surviving spouse's death.

10. WHAT IS THE ANNUAL EXCLUSION?

Under federal tax law, every individual may make an annual gift of $11,000 per year per person without incurring a gift tax or having the gift applied towards the available unified credit. A parent having four children could give each of them $11,000 for a total of $44,000 free of gift taxes. The advantage of making these gifts is that they provide a means to reduce the size of the estate to below the unified credit thereby reducing or eliminating federal estate taxes.

An alien spouse does not qualify for the unlimited marital deduction. In place of the unlimited marital deduction, an alien spouse is permitted to receive, as a gift from the other spouse, $110,000 per year tax free.

END OF CHAPTER PREVIEW

CHAPTER 3

DURABLE POWERS OF ATTORNEY AND

LIVING WILL DECLARATIONS

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I. DURABLE POWERS OF ATTORNEY

A general power of attorney is a written document wherein a person, called the principal, gives to another person, called the attorney in fact, the authority to act on the principal's behalf. A general power of attorney lapses and becomes invalid at the moment that the principal becomes incompetent or dies. At the time it is needed most, a general power of attorney becomes invalid, and the right of the attorney in fact to act for the principal ceases, lapses and terminates at the moment that it is most needed.

To address this situation, the Uniform Durable Power of Attorney Act was drafted and adopted in some form by most states. In addition, Section Five of the Uniform Probate Code reads as follows:

POWERS OF ATTORNEYSection 5-501. When Power of Attorney Not Affected by Disability.

Whenever a principal designates another his attorney in fact or agent by a power of attorney in writing and the writing contains the words "This power of attorney shall not be affected by disability of the principal," or "This power of attorney shall become effective upon the disability of the principal," or similar words showing the intent of the principal that the authority conferred shall be exercisable by him as provided in the power on behalf of the principal notwithstanding later disability or incapacity of the principal at law or later uncertainty as to whether the principal is dead or alive. All acts done by the attorney in fact or agent pursuant to the power during any period of disability or incompetence or uncertainty as to whether the principal is dead or alive have the same effect and inure to the benefit of and bind the principal or his heirs, devisees and personal representative as if the principal were alive, competent and not disabled. If a conservator thereafter is appointed for the principal, the attorney in fact or agent, during the continuance of the appointment, shall account to the conservator rather than the principal. The conservator has the same power the principal would have had if he were not disabled or incompetent to revoke, suspend, or terminate all or any part of the powers of attorney or agency.

Section 5-502. Other Powers of Attorney Not Revoked Until Notice of Death or Disability.

(a) The death, disability, or incompetence of any principal who has executed a power of attorney in writing other than power described in Section 5-501, does not revoke or terminate the agency as to the attorney in fact, agent or other person who, without actual knowledge of the death, disability, or incompetence of the principal, acts in good faith under the power of attorney or agency. Any action so taken, unless otherwise invalid or unenforceable, binds the principal and his heirs, devisees and personal representatives.

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(b) An affidavit, executed by the attorney in fact or agent stating that he did not have, at the time of doing an act pursuant to the power of attorney, actual knowledge of the revocation or termination of the power of attorney by death, disability or incompetence, is, in the absence of fraud, conclusive proof of the nonrevocation or nontermination of the power at that time. If the exercise of the power requires execution and delivery of any instrument which is recordable, the affidavit when authenticated for record is likewise recordable.

(c) This section shall not be construed to alter or affect any provision for revocation or termination contained in the power of attorney.

The Uniform Durable Power of Attorney Act is set forth in this chapter in its entirety. A durable power of attorney is a special power of attorney which contains specific language stating the intent of the principal that the power of attorney is deliberately intended to continue in full force and effect during the period of incompetency and incapacity.

A durable power of attorney has the effect of eliminating and replacing the necessity of a voluntary conservatorship. A durable power of attorney can also give the attorney in fact the power to make all or just specific health care decisions if the principal becomes unable to do so.

Many states have approved a statutory form for durable powers of attorney. Following this chapter is the statutory form in California for a durable power of attorney for health care and the statutory form in California for business affairs. Also following this chapter is a combined durable power of attorney for both health and business affairs for use in most of the states that have adopted the Uniform Durable Power of Attorney Act. This form should only be used after verifying that it complies with the user's particular state law. Forms of those states that have approved statutory durable power of attorney forms will usually be sold in stationery and office supply stores for about $2.00 each.

II. LIVING WILLS

A living will is not a will for probate purposes. Instead, a living will is a declaration by a person that serves as a directive to a treating physician, hospital and the world at large that the person executing it wants or does not want to be kept alive through the use of extraordinary means. A living will declaration is the only way to ascertain the intent of the person in the event that the person is or becomes unable to make a decision at the time it is necessary to do so.

Most states presume a person wants extraordinary means used to be kept alive and will order it employed unless the person has made a living will stating the opposite intent.

A few states will not recognize a living will unless it is executed close in time to the incompetency and with informed consent. In such states, the living will would have to be executed in a hospital or with a doctor shortly before the surgery or treatment that subsequently rendered the person incompetent. The fact that some states will not recognize a living will executed some time before the incompetency does not mean that it should not be executed. If it is later ruled invalid under state law, there is no harm.

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In such an instance, the Living Will Declaration will be treated as though it had never been executed. It is the recommendation of most estate planners that everyone create a living will specifying their wishes and directives to their physicians and that the living will should be restated and redone, if possible, before any surgery or major treatment is undertaken. A living will declaration follows this chapter.

Most states require a living will declaration to have at least two witnesses over the age of 21 years. A few states accept witnesses of 18 years of age. Some states require the living will declaration to be notarized. The living will declaration included in this book calls for two witnesses and a notary acknowledgment. Having a living will declaration notarized is a good idea even if it might not be required in most states. The notary is an impartial licensed official of a state. Testimony as to capacity and intent from such a person carries more weight with a court in the event of a dispute over a person's intent or capacity when creating a living will declaration. It is suggested that both witnesses be over the age of 21 years of age but not so elderly or in poor health that they might predecease the person utilizing the living will declaration.

Furthermore, most states require that the witnesses not be blood relatives or anyone who would share in the estate of the person utilizing a living will declaration. In other words, anyone who would benefit from a person's death should not be a witness. Using such a person as a witness will usually invalidate the declaration. The reason behind this exclusion: the states do not want to give a witness an incentive, however improbable, to have the person creating the living will declaration put to death.

Some states do not permit doctors, medical personnel or nursing home personnel to be witnesses because of the concern that they may exert an undue influence on the person using the living will declaration. To avoid raising this issue, none of the above persons should be used as a witness, even if permitted under state law.

After a living will declaration is executed, a copy should be given to the person's physician. In fact, several states have laws that require the declaration to be delivered to such physicians before the patient becomes incompetent if the order is to be effective. The rationale for this is so that physician can consult with the patient and verify that the declaration truly expresses the person's intent. It really does not do any good to have the declaration tucked away in a safety deposit box when it is most needed. The existence of the living will declaration should be widely publicized so that if something happens, such as an auto accident, someone will know to tell the treating physicians and hospital that a living will declaration is in existence. In fact, copies of the living will declaration should be given to those persons named as agents in it. If the need arises, they will be able to produce the living will declaration to assure that the creator's intent is fulfilled.

A very sad example for the need of such a living will declaration recently received national attention. An unmarried woman who was pregnant suffered brain death. Her partner, who was the father of the child, wanted the child and would raise it. The woman's parents, however, did not want the child, their grandchild, born. Since the woman did not have a living will declaration in effect, the decision on whether or not to stop the life support machine rested with the parents. The father of the child and partner of the woman filed a lawsuit seeking to prevent the parents from stopping the life support machine and killing his child, which his former partner was carrying. Various women's rights groups sided with the parents arguing that no man should force a woman to have a child, even if she was brain dead. The matter was settled out of court with the parents relenting and agreeing for the child to be born provided the father would raise it.

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In the living will declaration used in this book, a woman is called upon to state whether she wants or does not want life support to be withdrawn if doing so would cause an abortion. Even with a woman's stated intention on this matter, there is no guarantee that a court would follow it if an abortion would result. In such a situation a court will look at her intention and apply it against appropriate state and federal law. If such intention is not violative of either, then it will be given effect.

A woman might also attempt to define the circumstances under which she would permit a child to be born. For example, if the child was seriously deformed or handicapped, she might state in the section for other instructions, that, under those circumstances, she would want the life support removed with the knowledge that an abortion would occur. In this situation, there is no guarantee that a court would approve the removal of life support, but, at least, the intention was made clear for the court and all concerned to consider.

UNIFORM DURABLE POWER OF ATTORNEY ACT OF CALIFORNIA

(The form of the California Act is very similar to the uniform acts adopted in other states. All references are to the Civil Code of California.)

SECTION 2400. DURABLE POWER OF ATTORNEY DEFINED.

A durable power of attorney is a power of attorney by which a principal designates another attorney in fact in writing, and the writing contains the words "This power of attorney shall not be affected by subsequent incapacity of the principal," or "This power of attorney shall become effective upon the incapacity of the principal," or similar words showing the intent of the principal that the authority conferred shall be exercisable notwithstanding the principal's subsequent incapacity.

SECTION 2400.5 PROXY BY ATTORNEY IN FACT IS NOT A DURABLE POWER OF ATTORNEY.

Where a durable power of attorney gives an attorney in fact the power to exercise voting rights, a proxy given by the attorney in fact to another to exercise the voting rights is subject to all the provisions of law applicable to such proxy and is not a durable power of attorney subject to this Article.

SECTION 2401. ACTS OF ATTORNEY IN FACT BINDING ON PRINCIPAL AND SUCCESSORS IN INTEREST.

All acts done by the attorney in fact pursuant to a durable power of attorney during any period of incapacity of the principal have the same effect and inure to the benefit of and bind the principal and his or her successors in interest as if the principal were competent.

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SECTION 2402. PRIOR NOMINATION OR SUBSEQUENT APPOINTMENT OF GUARDIAN, CONSERVATOR, OR OTHER FIDUCIARIES.

(a) If, following execution of a durable power of attorney, a court of the principal's domicile appoints a conservator of the estate, or other fiduciary charged with the management of all of the principal's property or all of his or her property except specified exclusions, the attorney in fact is

accountable to the fiduciary as well as the principal. The fiduciary has the same power to revoke or amend the power of attorney that the principal would have had if he or she were not incapacitated; but if a conservator is appointed by a court of this state, the conservator can revoke or amend the power of attorney only if the court in which the

conservatorship is pending has first made an order authorizing or requiring the fiduciary to revoke or amend the durable power of attorney and the revocation or amendment is in accord with the other. This subdivision does not apply to a durable power of attorney to the extent that the durable power of attorney authorizes the attorney in fact to make health care decisions, as defined in Section 2430 for the principal.

(b) A principal may nominate, by a durable power of attorney, a conservator of the person or the estate or both, or a guardian of the person or estate or both, for consideration by the court if protective proceedings for the principal's person or estate are thereafter commenced. If the protective proceedings are conservatorship proceedings in this state, the nomination shall have the effect provided in Section 1810 of the Probate Code, and the court shall give effect to the most recent writing executed in accordance with Section 1810 of the Probate Code, whether or not such writing is a durable power of attorney.

SECTION 2403. EFFECT OF DEATH OR INCAPACITY OF PRINCIPAL -- ALL POWERS OF ATTORNEY, DURABLE OR OTHERWISE.

(a) The death of a principal who has executed a written power of attorney, durable or otherwise, does not revoke or terminate the agency as to the attorney in fact or other person who, without actual knowledge of the death of the principal, acts in good faith under the power. Any action so taken, unless otherwise invalid or unenforceable, binds successors in interest of the principal.

(b) The incapacity of a principal who has previously executed a written power of attorney that is not a durable power of attorney does not revoke or terminate the agency as to the attorney in fact or other person who, without actual knowledge of the incapacity of the principal, acts in good faith under the power. Any action so taken, unless otherwise invalid or unenforceable, binds the principal and his or her successors in interest.

SECTION 2404. ACTS OF ATTORNEY IN FACT IN GOOD FAITH RELIANCE OF POWER-AFFIDAVIT SHOWING LACK OF ACTUAL

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KNOWLEDGE AS CONCLUSIVE PROOF OF NONREVOCATION OR NONTERMINATION.

As to acts undertaken in good faith reliance thereon, an affidavit executed by the attorney in fact under a power of attorney, durable or otherwise, stating that he or she did not have at the time of the exercise of the power actual knowledge of the termination of the power by revocation or by the principal's death or incapacity is conclusive proof of the nonrevocation or nontermination of the power at that time. If the exercise of the power of attorney requires execution and delivery of any instrument that is recordable, the affidavit when authenticated for record is likewise recordable. This section does not affect any provision in a power of attorney for its termination by expiration of time or occurrence of an event other than express revocation or a change in the principal's capacity.

SECTION 2405. APPLICATION AND CONSTRUCTION OF ACT TO EFFECTUATE UNIFORMITY.

This Article shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of this Article among states enacting it.

SECTION 2406. TITLE.

This Article may be cited as the UNIFORM DURABLE POWER OF ATTORNEY ACT.

SECTION 2407. PROVISIONS SEVERABLE ON INVALIDITY.

If any provision of this Article or its application to any person or circumstances is held invalid, the invalidity does not affect other provisions or applications of the Article which can be given effect without the invalid provisions or application, and to this end the provisions of this Article are severable.

The following Durable Power of Attorney is a combined form for both Health Care and Financial Affairs which can be used in the following states and territory which have not adopted a statutory Durable Power of Attorney form for Health Care or do not require use of their form (New Mexico, New York and Virginia have adopted a statute but do not require use of their form):

Alabama Arkansas Arizona Colorado

Delaware Florida Hawaii Iowa

Indiana Louisiana Maryland Maine

Michigan Missouri Mississippi Montana

Nebraska New Jersey New Mexico New York

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Oklahoma Pennsylvania South Dakota Virginia

Washington Wyoming Virgin Islands

The states not mentioned and the District of Columbia have adopted a statutory durable power of attorney form for health care. The forms for these states are sold in most office and stationery stores. The forms are also available in the book Powers of Attorney for Everyone by Michael Lynn Gabriel.

To illustrate the use of Durable Power of Attorney and Living Will Declarations, completed samples for the following forms succeeded by the blank pull-out forms are set forth:

1. Durable Power of Attorney for Health Care and Financial Affairs.

2. California Statutory Durable Power of Attorney for Health Care.

3. California Uniform Statutory Power of Attorney.

4. Living Will Declaration.

DURABLE POWER OF ATTORNEY

FOR BOTH HEALTH CARE AND FINANCIAL AFFAIRS

KNOW ALL PEOPLE BY THESE PRESENTS, that I, MICHAEL LYNN GABRIEL residing at 504 C LOW GAP ROAD, UKIAH, MENDOCINO COUNTY, STATE OF CALIFORNIA, phone number (707) 468-0268 do declare this to be a Durable Power of Attorney.

This Durable Power of Attorney shall not be affected by subsequent incapacity of the principal.

This Durable Power of Attorney shall become effective:

(X) Immediately upon the execution of this Durable Power of Attorney.

( ) Only after certification by two licensed physicians that I have been determined to lack the capacity to make health care and financial decisions for myself.

I hereby revoke all prior powers of attorney regardless of the type or to whom they may have been given.

I hereby nominate, constitute and appoint LYDIA ANN STINEMEYER GABRIEL , whose address and telephone number are: 504 C

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LOW GAP ROAD, UKIAH, CALIFORNIA (707) 468-0268 , as my true and lawful Attorney in Fact, for me and in my name, place and stead, and for my use and benefit, to exercise the following powers:

(1) To make health care decisions on my behalf. Health care decisions means decisions on my care, treatment, or procedures to be utilized in order to maintain, diagnose or treat my physical condition. This Durable Power of Attorney, as it relates to health care decisions, does not carry with it the power to authorize any of the following acts:

(A) Any commitment or placement in a mental health facility,

(B) Any convulsive treatment, or

© Any psychosurgery.

Furthermore, I hereby expressly authorize any physician, hospital, and any other person or organization, to release and disclose to my agent any information any of them may have concerning my physical condition and any health care, counsel, treatment, or assistance provided to me either before or after the execution of this power of attorney, any privilege hereby being expressly waived to such disclosures. This waiver shall extend to communications to my agent only and shall not be deemed a general waiver of the privilege. My agent may, however, authorize release of such information to such third persons as my agent deems to be reasonable or necessary in the exercise of the powers granted in this instrument.

(2) Subject to any limitations in this document, my agent has the power and authority to do all of the following:

(A) Authorize an autopsy,

(B) Make a disposition of a part or parts of my body under the Uniform Anatomical Gift Act, and

(C) Direct disposition of my remains in accordance with state law.

(3) Subject to any limitations in this document, I hereby grant to my agent full power and authority to act for me in my name, in any way which I myself could act, with respect to the following matters as each of them to the extent that I am permitted to act through an agent:

(A) Real estate transactions,

(B) Tangible personal property transactions,

(C) Bond, share and commodity transactions,

(D) Financial institution transactions,

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(E) Business operating transactions,

(F) Insurance transactions,

(G) Retirement plan transactions,

(H) Estate transactions,

(I) Claims and litigation,

(J) Tax matters,

(K) Personal relationships and affairs,

(L) Benefits from military service,

(M) Records, reports and statements,

(N) Full and unqualified authority to my agent to delegate any and all of the foregoing powers to any person or persons whom my agent shall delegate.

(4) To ask, demand, sue for, recover, collect, and receive such sums of money, debts, dues accounts, legacies, bequests, interest, dividends, annuities, and demands whatsoever as are now or shall hereafter become due, owing payable or belonging to me and have, use and take all lawful ways and means in my name or otherwise, and to compromise and agree for the acquittance or other sufficient discharge of the same.

(5) For me in my name, to make, seal, and deliver, to bargain, contract, agree for, purchase, receive, and take lands, tenements, hereditaments and accept the possession of all lands, and deeds of assurances, in the law therefor, and to lease, let, demise, bargain, sell, remise, release, convey, mortgage, and hypothecate lands, tenements and hereditaments upon such covenants as they shall think fit.

(6) To sign, endorse, execute, acknowledge, deliver, receive, and possess such applications, contracts, agreements, options, covenants, deeds, conveyances, trust deeds, security agreements, bills of sale, leases, mortgages, assignments, insurance policies, bills of lading, warehouse receipts, documents of title, bills, bonds, debentures, checks, drafts, bills of exchange, notes, stock certificates, proxies, warrants, commercial paper, receipts, withdrawal receipts and deposit instruments relating to accounts or deposits in or certificates of deposits of banks, savings and loans or other such institutions or associations, proof of loss, evidences of debts, releases and satisfaction of mortgages, judgments, liens, security agreements, and other debts and obligations, and such other instruments in writing of whatever kind and nature as may be necessary or proper in the exercise of the rights and powers herein granted.

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(7) Also to bargain and agree for, buy, sell, mortgage, hypothecate, and in any and every way and manner deal in and with goods, wares and merchandise, choices in action, and to make, do and transact all business of whatever nature and kind.

(8) Also for me and in my name, and as my act and deed, to sign, seal, execute, deliver, and acknowledge such deeds, leases, mortgages, hypothecations, bottomries, charter parties, bills of lading, bills, notes, receipts, evidences of debt, releases and satisfaction of mortgages, judgments and other debts, and other such instruments in writing of whatever kind and nature as may be necessary and proper.

(9) To have access at any time or times to any safe deposit box rented by me, wheresoever located and to remove all or any part of the contents thereof, and to surrender or relinquish said safe deposit box, and any institution in which such safe deposit box is located shall not incur any liability to me or to my estate as a result of permitting my agent to exercise this power.

(10) I hereby expressly authorize any attorney of mine, past or present, to release and disclose to my agent any information any of them may have concerning my legal affairs or other facts, which they may have concerning my personal affairs and any legal service, counsel or assistance provided to me either before or after the execution of this power of attorney, any privilege hereby being expressly waived as to such disclosures. This waiver shall extend to communications to my agent only and shall not be deemed to authorize a release of information to third parties and shall not be deemed a general waiver of the privilege. My agent may, however, authorize release of such information to such third persons as my agent deems to be reasonable or necessary in the exercise of the powers granted in this instrument.

(11) Giving and granting unto said attorney in fact full power and authority to do and perform every act necessary, requisite or proper to be done in and about my property as fully as I might or could do if personally present, with full power of substitution and revocation, hereby ratifying and confirming that my said attorney shall lawfully do or cause to be done by virtue hereof.

The attorney in fact under this durable power of attorney is specifically not given and does not have the authority or power to revoke, amend or alter any revocable or irrevocable trust that I have created or may create in the future.

The Attorney in Fact (x) is ( ) is not granted reasonable compensation for services rendered under this Power of Attorney.

The Attorney in Fact ( ) is ( ) is not permitted to engage in self-dealing with my estate.

Special instructions or authority:

If LYDIA ANN STINEMEYER GABRIEL is not available or becomes ineligible or unable for any reason to act as my agent and to make decisions for me, or if I revoke appointment or authority to act as my agent, then I designate and appoint PAUL THOMAS GABRIEL , address: 3336 LOVELAND ROAD, YOUNGSTOWN, OHIO 44502 , phone: (213) 445-7846 as my alternative, true and lawful attorney in fact with all of the powers enumerated above, including the power to make health care decisions on my behalf.

IN WITNESS WHEREOF, I have hereunto signed my name on this day of , 2000, at . MICHAEL LYNN GABRIEL

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I am aware that I have the following rights regarding this Durable Power of Attorney.

1. This document gives to the person whom I designate as my attorney in fact the power to make health care decisions for me subject to the limitations and statement of my desires that I have included in this Document. The power to make health care decisions for me may exclude consent, refusal of consent, or withdrawal of consent to any treatment, service or procedure to maintain, diagnose or treat physical or mental condition. I may state in this document any type of treatment or placements that I do not desire.

2. The person whom I designated in this document has a duty to act consistent with my desires as stated in this document or otherwise made known or, if my desires are unknown, to act in my best interests.

3. Except as I have otherwise specified in this document, the power of the person whom I have designated to make health care decisions for me may include the power to consent to my doctor not to give treatment or to stop treatment which could keep me alive.

4. Unless I specify a shorter period in this document, this power will exist for seven (7) years from the date I execute this document, and if I am unable to make health care decisions for myself at the time the seven (7) year period ends, this power will continue to exist until the time I become able to make health care decisions for myself.

5. Notwithstanding this document, I have the right to make medical and other health care decisions for myself so long as I give informed medical consent with respect to the particular decision. In addition, no treatment may be given to me over my objection, and health care to keep me alive may not be stopped if I object.

6. I have the right to revoke the appointment of the person designated in this document by notifying that person of the revocation in writing.

7. I have the right to revoke the authority granted to the person designated in this document to make health care decisions for me by notifying the treating physician, hospital, or other health care provider orally or in writing.

8. The person designated in this document to make health care decisions for me has the right to examine my medical records and to consent to their disclosures unless I limit this right in this document.

Dated: MICHAEL LYNN GABRIEL

ATTESTATIONI declare under penalty of perjury under the laws of the State of CALIFORNIA that MICHAEL LYNN GABRIEL, the person who signed this document is personally known to me or proven to me on the basis of convincing evidence to be the Principal, that the Principal signed or acknowledged to this Durable Power of Attorney in my presence, that the Principal appears to be of sound mind and under no duress, fraud, or undue influence; that I am not the person appointed as attorney in fact by this

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document, and that I am not a health care provider, the operator of a community care facility, nor an employee of an operator of a community care facility, nor the operator of a residential care facility for the elderly, nor an employee of an operator of a residential care facility for the elderly.

I further declare under penalty of perjury under the laws of the State of CALIFORNIA that I am not related to the Principal by blood, marriage, or adoption, and to the best of my knowledge I am not entitled to any part of the estate of the Principal upon the death of the Principal under a will now existing or by operation of law.

DATED:_____

_____ _____

_____

_____ _____

_____

_____

CERTIFICATE OF ACKNOWLEDGMENT OF NOTARY PUBLICSTATE OF _____

COUNTY OF _____

On _____ before me, _____

personally appeared _____personally known to me (or proved to me on the basis of satisfactory evidence) to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

WITNESS MY HAND AND OFFICIAL SEAL.

_____

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DURABLE POWER OF ATTORNEY

FOR BOTH HEALTH CARE AND FINANCIAL AFFAIRS

KNOW ALL PEOPLE BY THESE PRESENTS, that I, residing at , phone number do declare this to be a Durable Power of Attorney.

This Durable Power of Attorney shall not be affected by subsequent incapacity of the principal.

This Durable Power of Attorney shall become effective:

( ) Immediately upon the execution of this Durable Power of Attorney.

( ) Only after certification by two licensed physicians that I have been determined to lack the capacity to make health care and financial decisions for myself.

I hereby revoke all prior powers of attorney regardless of the type or to whom they may have been given.

I hereby nominate, constitute and appoint , whose address and telephone number are: , as my true and lawful Attorney in Fact, for me and in my name, place and stead, and for my use and benefit, to exercise the following powers:

(1) To make health care decisions on my behalf. Health care decisions means decisions on my care, treatment, or procedures to be utilized in order to maintain, diagnose or treat my physical condition. This Durable Power of Attorney, as it relates to health care decisions, does not carry with it the power to authorize any of the following acts:

(A) Any commitment or placement in a mental health facility,

(B) Any convulsive treatment, or

(C) Any psychosurgery.

Furthermore, I hereby expressly authorize any physician, hospital, and any other person or organization, to release and disclose to my agent any information any of them may have concerning my physical condition and any health care, counsel, treatment, or assistance provided to me either before or after the execution of this power of attorney, any privilege hereby being expressly waived to such disclosures. This waiver shall extend to communications to my agent only and shall not be deemed a general waiver of the privilege. My agent may, however, authorize release of such information to such third persons as my agent deems to be reasonable or necessary in the exercise of the powers granted in this instrument.

(2) Subject to any limitations in this document, my agent has the power and authority to do all of the following:

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(A) Authorize an autopsy,

(B) Make a disposition of a part or parts of my body under the Uniform Anatomical Gift Act, and

© Direct disposition of my remains in accordance with state law.

(3) Subject to any limitations in this document, I hereby grant to my agent full power and authority to act for me in my name, in any way which I myself could act, with respect to the following matters as each of them to the extent that I am permitted to act through an agent:

(A) Real estate transactions,

(B) Tangible personal property transactions,

(C) Bond, share and commodity transactions,

(D) Financial institution transactions,

(E) Business operating transactions,

(F) Insurance transactions,

(G) Retirement plan transactions,

(H) Estate transactions,

(I) Claims and litigation,

(J) Tax matters,

(K) Personal relationships and affairs,

(L) Benefits from military service,

(M) Records, reports and statements,

(N) Full and unqualified authority to my agent to delegate any and all of the foregoing powers to any person or persons whom my agent shall delegate.

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(4) To ask, demand, sue for, recover, collect, and receive such sums of money, debts, dues accounts, legacies, bequests, interest, dividends, annuities, and demands whatsoever as are now or shall hereafter become due, owing payable or belonging to me and have, use and take all lawful ways and means in my name or otherwise, and to compromise and agree for the acquittance or other sufficient discharge of the same.

(5) For me in my name, to make, seal, and deliver, to bargain, contract, agree for, purchase, receive, and take lands, tenements, hereditaments and accept the possession of all lands, and deeds of assurances, in the law therefor, and to lease, let, demise, bargain, sell, remise, release, convey, mortgage, and hypothecate lands, tenements and hereditaments upon such covenants as they shall think fit.

(6) To sign, endorse, execute, acknowledge, deliver, receive, and possess such applications, contracts, agreements, options, covenants, deeds, conveyances, trust deeds, security agreements, bills of sale, leases, mortgages, assignments, insurance policies, bills of lading, warehouse receipts, documents of title, bills, bonds, debentures, checks, drafts, bills of exchange, notes, stock certificates, proxies, warrants, commercial paper, receipts, withdrawal receipts and deposit instruments relating to accounts or deposits in or certificates of deposits of banks, savings and loans or other such institutions or associations, proof of loss, evidences of debts, releases and satisfaction of mortgages, judgments, liens, security agreements, and other debts and obligations, and such other instruments in writing of whatever kind and nature as may be necessary or proper in the exercise of the rights and powers herein granted.

(7) Also to bargain and agree for, buy, sell, mortgage, hypothecate, and in any and every way and manner deal in and with goods, wares and merchandise, choices in action, and to make, do and transact all business of whatever nature and kind.

(8) Also for me and in my name, and as my act and deed, to sign, seal, execute, deliver, and acknowledge such deeds, leases, mortgages, hypothecations, bottomries, charter parties, bills of lading, bills, notes, receipts, evidences of debt, releases and satisfaction of mortgages, judgments and other debts, and other such instruments in writing of whatever kind and nature as may be necessary and proper.

(9) To have access at any time or times to any safe deposit box rented by me, wheresoever located and to remove all or any part of the contents thereof, and to surrender or relinquish said safe deposit box, and any institution in which such safe deposit box is located shall not incur any liability to me or to my estate as a result of permitting my agent to exercise this power.

(10) I hereby expressly authorize any attorney of mine, past or present, to release and disclose to my agent any information any of them may have concerning my legal affairs or other facts, which they may have concerning my personal affairs and any legal service, counsel or assistance provided to me either before or after the execution of this power of attorney, any privilege hereby being expressly waived as to such disclosures. This waiver shall extend to communications to my agent only and shall not be deemed to authorize a release of information to third parties and shall not be deemed a general waiver of the privilege. My agent may, however, authorize release of such information to such third persons as my agent deems to be reasonable or necessary in the exercise of the powers granted in this instrument.

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(11) Giving and granting unto said attorney in fact full power and authority to do and perform every act necessary, requisite or proper to be done in and about my property as fully as I might or could do if personally present, with full power of substitution and revocation, hereby ratifying and confirming that my said attorney shall lawfully do or cause to be done by virtue hereof.

The attorney in fact under this durable power of attorney is specifically not given and does not have the authority or power to revoke, amend or alter any revocable or irrevocable trust that I have created or may create in the future.

The Attorney in Fact ( ) is ( ) is not granted reasonable compensation for services rendered under this Power of Attorney.

The Attorney in Fact ( ) is ( ) is not permitted to engage in self-dealing with my estate.

Special instructions or authority:

If is not available or becomes ineligible or unable for any reason to act as my agent and to make decisions for me, or if I revoke appointment or authority to act as my agent, then I designate and appoint , address: , phone: as my alternative, true and lawful attorney in fact with all of the powers enumerated above, including the power to make health care decisions on my behalf.

IN WITNESS WHEREOF, I have hereunto signed my name on this day of , 200_, at .

I am aware that I have the following rights regarding this Durable Power of Attorney.

1. This document gives to the person whom I designate as my attorney in fact the power to make health care decisions for me subject to the limitations and statement of my desires that I have included in this Document. The power to make health care decisions for me may exclude consent, refusal of consent, or withdrawal of consent to any treatment, service or procedure to maintain, diagnose or treat physical or mental condition. I may state in this document any type of treatment or placements that I do not desire.

2. The person whom I designated in this document has a duty to act consistent with my desires as stated in this document or otherwise made known or, if my desires are unknown, to act in my best interests.

3. Except as I have otherwise specified in this document, the power of the person whom I have designated to make health care decisions for me may include the power to consent to my doctor not to give treatment or to stop treatment which could keep me alive.

4. Unless I specify a shorter period in this document, this power will exist for seven (7) years from the date I execute this document, and if I am unable to make health care decisions for myself at the time the seven (7) year period ends, this power will continue to exist until the time I become able to make health care decisions for myself.

5. Notwithstanding this document, I have the right to make medical and other health care decisions for myself so long as I give informed medical consent with respect to the particular decision. In addition, no treatment may be given to me over my objection,

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and health care to keep me alive may not be stopped if I object.

6. I have the right to revoke the appointment of the person designated in this document by notifying that person of the revocation in writing.

7. I have the right to revoke the authority granted to the person designated in this document to make health care decisions for me by notifying the treating physician, hospital, or other health care provider orally or in writing.

8. The person designated in this document to make health care decisions for me has the right to examine my medical records and to consent to their disclosures unless I limit this right in this document.

Dated:

ATTESTATION

I declare under penalty of perjury under the laws of the State of that , the person who signed this document is personally known to me or proven to me on the basis of convincing evidence to be the Principal, that the Principal signed or acknowledged to this Durable Power of Attorney in my presence, that the Principal appears to be of sound mind and under no duress, fraud, or undue influence; that I am not the person appointed as attorney in fact by this document, and that I am not a health care provider, the operator of a community care facility, nor an employee of an operator of a community care facility, nor the operator of a residential care facility for the elderly, nor an employee of an operator of a residential care facility for the elderly.

I further declare under penalty of perjury under the laws of the State of that I am not related to the Principal by blood, marriage, or adoption, and to the best of my knowledge I am not entitled to any part of the estate of the Principal upon the death of the Principal under a will now existing or by operation of law.

DATED:

CERTIFICATE OF ACKNOWLEDGMENT OF NOTARY PUBLIC

STATE OF

COUNTY OF

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On before me

personally appeared

personally known to me (or proved to me on the basis of satisfactory evidence) to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

WITNESS MY HAND AND OFFICIAL SEAL.

STATUTORY FORM DURABLE POWER OF ATTORNEY

FOR HEALTH CARE

(California Civil Code Section 2500)

WARNING TO PERSON EXECUTING THIS DOCUMENTThis is an important document which is authorized by the Keene Health Care Agent Act. Before executing this document, you should know these facts:

This document gives the person you designate as your agent (the attorney in fact) the power to make health care decisions for you. Your agent must act consistently with your desires as stated in this document or otherwise made known.

Except as you otherwise specify in this document, this document gives your agent the power to consent to your doctor not giving treatment or stopping treatment necessary to keep you alive.

Notwithstanding this document, you have the right to make medical and other health care decisions for yourself as long as you can give informed consent with respect to the particular decision. In addition, no treatment may be given to you over your objection at any time, and health care necessary to keep you alive may not be stopped or withheld if you object any time.

This document gives your agent authority to consent, to refuse to consent, or to withdraw consent to any care, treatment, service, or procedure to maintain, diagnose, or treat a physical or mental condition. This power is subject to any statement of your desires and any limitations that you include in this document. You may state in this document any types of treatment that you do not desire. In addition, a court can take away the power of your agent to make health care decisions for you if the agent (1) authorizes anything that is illegal, (2) acts contrary to your known desires, or (3) where your desires are not known, does anything that is clearly contrary to your best interests.

The powers given by this document will exist for an indefinite period of time unless you limit the duration in this document.

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You have the right to revoke the authority of your agent by notifying your agent or your treating doctor, hospital, or other health care provider orally or in writing of the revocation.

Your agent has the right to examine your medical records and to consent to their disclosure unless you limit this right in this document.

Unless you otherwise specify in this document, this document gives your agent the power to (1) authorize an autopsy, (2) donate your body or parts thereof for transplant or therapeutic or educational or scientific purposes, and (3) direct the disposition of your remains.

This document revokes any prior durable power of attorney for health care.

You should carefully read and follow the witnessing procedure described at the end of this form. The document will not be valid unless you comply with the witnessing procedure.

If there is anything in this document that you do not understand, you should ask a lawyer to explain it to you.

Your agent may need this document immediately in the case of an emergency that requires a decision concerning your health care. Either keep this document where it is immediately available to your agent and alternate agents or give each of them an executed copy of this document. You may also want to give your doctor an executed copy of this document.

Do not use this form if you are a conservatee under the Lanterman-Petris-Short Act and you want to appoint your conservator as your agent. You can only do that if the appointment document includes a certificate of your attorney.

1. Designation of Health Care Agent. I,

do hereby designate and appoint (Insert name, address, and telephone number of one individual only as your agent to make health care decisions for you. None of the following may be designated as your agent: [1] your treating health care provider, [2] a nonrelative employee of your treating health care provider, [3] an operator of a community care facility, [4] a nonrelative employee of an operator of a community care facility, [5] an operator of a residential care facility for the elderly or [6] a nonrelative employee of an operator of a residential care facility for the elderly.)

as my attorney in fact (agent) to make health care decisions for me as authorized in this document. For the purposes of this document "health care decision" means consent, refusal to consent, or withdrawal of consent to any care, treatment, service or procedure to maintain, diagnose or treat any of the individual's physical or mental condition.

2. Creation of Durable Power of Attorney for Health Care. By this document, I intend to create a durable power of attorney for health care under Sections 2430 to 2443 inclusive of the California Civil Code. This power of attorney is authorized by the Keene Health Care Agent Act and shall be construed in accordance with the provisions of Section 2500 to 2506 inclusive of the California

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Civil Code. This power of attorney shall not be affected by my subsequent incapacity.

3. General Statement of Authority Granted. Subject to any limitations in this document, I hereby grant to my agent full power and authority to make health care decisions for me to the same extent that I could make such decisions for myself if I had the capacity to do so. In exercising this authority, my agent shall make health care decisions that are consistent with my desires as stated in this document or otherwise made known to my agent, including but not limited to, my desires concerning obtaining or refusing or withdrawing life-prolonging care, treatment, services or procedures. (If you want to limit the authority of your agent to make health care decisions for you, you can state the limitations in paragraph 4, "Statement of Desires, Special Provisions, and Limitations," below. You can indicate your desires by including a statement of your desires in the same paragraph.)

4. Statement of Desires, Special Provisions and Limitations. (Your agent must make health care decisions that are consistent with your known desires. You can, but are not required to, state your desires in the space provided below. You should consider whether you want to include a statement of your desires concerning life-prolonging care, treatment, services or procedures. You can also include a statement of your desires concerning other matters relating to your health care. You can also make your desires known to your agent by discussing your desires with your agent or by some other means. If there are any types of treatment that you do not want to be used, you should state them in the space below. If you want to limit in any way the authority given your agent by this document, you should state the limits in the space below. If you do not want any limits, your agent will have broad powers to make health care decisions for you except to the extent that there are limits provided by law.)

In exercising the authority under this durable power of attorney for health care, my agent shall act consistently with my desires as stated below and is subject to the special provisions and limitations stated below:

(a) Statement of desires concerning life-prolonging care, treatment, services and procedures:

(b) Additional statement of desires and special provisions, and limitations: (You may attach additional pages if you need more space to complete your statement. If you attach additional pages, you must date and sign EACH of the additional pages at the same time you date and sign this document.)

5. Inspection and Disclosure of Information Relating to My Physical and Mental Health. Subject to any limitations in this document, my agent has the power and authority to do all of the following:

(a) Request, review, and receive any information, verbal or written, regarding my physical or mental health, including but not limited to medical and hospital records.

(b) Execute on my behalf any releases or other documents that may be required in order to obtain this information.

© Consent to the disclosure of this information.

(If you want to limit the authority of your agent to receive and disclose information relating to your health, you must state the limitations in paragraph 4, "Statement of Desires, Special Provisions, and Limitations," above.)

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6. Signing Documents, Waivers and Releases. Where necessary to implement the health care decisions that my agent is authorized by this document to make, my agent has the power and authority to execute on my behalf all of the following:

(a) Documents titled or purporting to be a "Refusal to Permit Treatment" and "Leaving Hospital Against Medical Advice."

(b) Any necessary waiver or release from liability required by a hospital or physician.

7. Autopsy: Anatomical Gifts: Disposition of Remains. Subject to any limitations in this document, my agent has the power and authority to do all of the following:

(a) Authorize an autopsy under Section 7113 of the Health and Safety Code.

(b) Make a disposition of a part or parts of my body under the Uniform Anatomical Gift Act (Chapter 3.5 [commencing Section 7150] of Part 1 of Division 7 of the Health and Safety Code).

(c) Direct the disposition of my remains under Section 7100 of the Health and Safety Code. (If you want to limit the authority of your agent to consent to an autopsy, make an anatomical gift or direct the disposition of your remains, you must state the limitations in paragraph 4, "Statement of Desires, Special Provisions, and Limitations," above.)

8. Duration. (Unless you specify otherwise in the space below, this power of attorney will exist for an indefinite period of time.)

This durable power of attorney for health care expires on .

(Fill in this space ONLY if you want to limit the duration of this power of attorney.)

9. Designation of Alternate Agents. (You are not required to designate any alternate agents, but you may do so. Any alternate agent you designate will be able to make the same health care decisions for you as the agent you designated in paragraph 1 above in the event that agent is unable or ineligible to act as your agent. If the agent you designated is your spouse, he becomes ineligible to act as your agent if your marriage is dissolved.)

If the person designated as my agent in paragraph 1 is not available or becomes ineligible to act as my agent to make health care decisions for me or loses the mental capacity to make health care decisions for me, or if I revoke that person's appointment or authority to act as my agent, I designate and appoint the following persons to serve as my agent to make health care decisions for me as authorized in this document, such persons to serve in the order listed below:

A. First Alternate Agent:

(Insert name, address, and telephone number of First Alternate Agent.)

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B. Second Alternate Agent:

(Insert name, address, and telephone number of Second Alternate Agent.)

10. Nomination of Conservator of Person. (A conservator of the person may be appointed for you if a court decides that one should be appointed. The conservator is responsible for your physical care, which under some circumstances includes making health care decisions for you. You are not required to nominate a conservator, but you may do so. The court will appoint the person you nominate unless that would be contrary to your best interests. You may, but are not required to, nominate as your conservator the same person you named in paragraph 1 as your health care agent. You can nominate an individual as your conservator by completing the space below.)

If a conservator of the person is to be appointed for me, I nominate the following individual to serve as conservator of the person

(Insert the name, address and telephone number of person nominated as conservator of the person.)

11. Prior Designations Revoked. I revoke any prior durable power of attorney for health care.

DATE AND SIGNATURE OF PRINCIPAL

(You must Date and Sign this Power of Attorney)I sign my name to this Statutory Form Durable Power of Attorney for Health Care on the day of ,_,at .

(This power of attorney will not be valid unless it is signed by two qualified witnesses who are present when you sign or acknowledge your signature. If you have attached any additional pages to this form, you must date and sign each of the additional pages at the same time you date and sign this power of attorney.)

(This document must be witnessed by two qualified adult witnesses. None of the following may be used as a witness: [1] a person you designate as your agent or alternate agent, [2] a health care provider, [3] an employee of a health care provider, [4] the operator of a community care facility, [5] an employee of an operator of a community care facility, [6] the operator of a residential care facility for the elderly, or [7] an employee of an operator of a residential care facility for the elderly. At least one of the witnesses must make the additional declaration set out following the place where the witnesses sign.)

(Read Carefully Before Signing. You can sign as a witness only if you personally know the principal or the identity of the principal is proved to you by convincing evidence.)

(To have convincing evidence of the identity of the principal, you must be presented with and reasonably rely on any of the following:

1. An identification card or driver's license issued by the California Department of Motor Vehicles that is current or has been

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issued within five years.

2. A passport issued by the Department of State of the United States that is current or has been issued within five years.

3. Any of the following documents if the document is current or has been issued within five years and contains a photograph and description of the person named on it, is signed by the person, and bears a serial or other identifying number:

a. A Passport issued by a federal government that has been stamped by the United States Immigration and Naturalization Service.

b. A driver's license issued by a state other than California or issued by a Canadian or Mexican public agency authorized to issue drivers' licenses.

c. An identification card issued by a state other than

California.

d. An identification card issued by any branch of the armed forces of the United States.

4. If the principal is a patient in a skilled nursing facility, a witness who is a patient advocate or ombudsman may rely upon the representations of the administrator or staff of the skilled nursing facility, or family members, as convincing evidence of the identity of the principal if the patient advocate or ombudsman believes that the representations provide a reasonable

basis for determining the identity of the principal. Other kinds of

proof of identity are not allowed.)

I declare under penalty of perjury under the laws of California that the person who signed or acknowledged this document is personally known to me (or proved to me on the basis of convincing evidence) to be the principal, that the principal signed or acknowledged this durable power of attorney in my presence, that the principal appears to be of sound mind and under no duress, fraud, or undue influence, that I am not the person appointed as attorney in fact by this document, and that I am not a health care provider, an employee of a health care provider, the operator of a community care facility, the employee of an operator of a community care facility, the operator of a residential care facility for the elderly, nor an employee of an operator of a residential care facility for the elderly.

Signature: _____

Print Name:_____Date:_____

Residence Address: _____

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_____

Signature: _____

Print Name:_____Date:_____

Residence Address: _____

_____

(AT LEAST ONE OF THE ABOVE WITNESSES MUST ALSO SIGN THE FOLLOWING DECLARATION)

I further declare under the penalty of perjury under the laws of California that I am not related to the principal by blood, marriage, or adoption, and to the best of my knowledge I am not entitled to any part of the estate of the principal upon the death of the principal under the will now existing or by operation of law.

Signature:_____

Signature:_____

STATEMENT OF PATIENT ADVOCATE OR OMBUDSMAN

(If you are a patient in a skilled nursing facility, one of the witnesses must be a patient advocate or ombudsman. The following statement is required only if you are a patient in a skilled nursing facility, a health facility that provides the following basic services: skilled nursing care and supportive care to patients whose primary need is for availability of skilled nursing care on an extended basis. The patient advocate or ombudsman must sign both parts of the "Statement of Witnesses" above AND must also sign the following statement.)

I further declare under penalty of perjury under the laws of California that I am a patient advocate or ombudsman as designated by the State Department of Aging and that I am serving as required by subdivision (f) of Section 2432 of the Civil Code.

Signature: _____

(Include if warning statement at the beginning of form was omitted.)

CERTIFICATE OF PRINCIPAL'S LAWYER

I am a lawyer authorized to practice in the state where this power of attorney was executed, and the principal was my client at the time this power of attorney was executed. I have advised my client of his rights in connection with this power of attorney and the applicable law and the consequences of signing or not signing this power of attorney, and my client, after being so advised, has

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executed this power of attorney. _____

(Signature of Attorney)

_____

Typed/Printed name of attorney

CALIFORNIA'S HEALTH CARE DIRECTIVE

In an attempt to further clarify California's health care directives, the legislature attempted to put all law regulating them in one division of the California Probate Code.

Effective as of July 2000, California added a *Uniform Health Care Decisions Act*, beginning in Section 4660 of the California Probate Court. The California legislature enacted a statutory Advance Care Directive which is quite similar to the statutory power of attorney of health Care.

The best explanation of what the legislature was attempting to do is set forth in Section 4665 of the California Probate Code wherein it explains the Division of the Probate Code dealing with Health Care Directives.

Section 4665 APPLICATION OF DIVISION

Except as otherwise provided buy statute:

(a) On and after July 1, 2000, this division applies to all advance health care directives, including, but not limited to, durable powers of attorney for health care and declarations under the Natural Death Act (former Chapter 3.9 (commencing with Section 7185) of Part 1 of Division 7 of the Health and Safety Code), regardless of whether they were given or executed before or after July 1, 2000

(b) This division applies to all proceedings concerning health care directives commenced on or after July 1, 2000

(c) This division applies to all proceedings concerning written advance health care directives commenced before July 1, 2000,

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unless the court determines that application of a particular provision of this division would substantially interfere with the effective conduct of the proceedings or the rights of the parties and other interested persons, in which case the particular provision of this division does not apply and prior law applies.

(d) Nothing in this division affects the validity of an advance health care directive executed before July 1, 2000, that was effective under prior law.

(e) Nothing in this division affects the validity of a durable power of attorney for health care executed on a printed form that was valid under prior law, regardless of whether execution occurred before, or after July 1, 2000.

Now the law on Health Care Directives is contained in one Probate division rather than spread among various California Codes such as Health and Safety, Civil procedure and Probate.

All the statutes regulating health care directives is now concentrated in one area, it really has not changed. Pursuant to the subsection (e) of section 4665, statutory powers of attorney for health care executed under the old law still remain valid and the old statutory forms can still be used.

In addition as with statutory forms for *Durable Powers of Attorney For Health Care* , the statutory form for California Advance Health Care Directive, which follows is also voluntary and can be edited to fit the needs and desires of the person executing it.

To summarize, a person wishing to execute a health care directive has several valid ways ro do so and with a great deal of flexibility in the drafting the documents. A person in California can still use the California Statutory Form for Durable Power of Attorneys for Health Care, that form is still approved under subsection (e) of section 4665 or the person can use the *Statutory Advance Health Care Directive* which is set forth below, or the person may use the *Uniform Form for Durable Power of Attorney for Health and Financial Affairs* contained in the book. The use of any form is voluntary and can be modified to fit the needs of the principal.

From the position of a legal challenge, to a health care directive, the closer the form is to the statutory form the harder it becomes for a third person to claim the principal did not intend the specific authority set forth in the form to given to the agent. The principal still must still have been legally competent to execute a health care directive so the only real issue is what authority the principal intended to bestow on the agent. Starting from a statutory form carries with it the presumption that the principal intended to bestow the authority contained therein, As such, a third person would be virtually estopped from arguing another intent. When using a nonstatutory form the principal's intent is more open to challenge but as long as it is set forth in a clear fashion, it should prevail. So no trepidation should exist is editing a statutory form or using the uniform forms in the book as long as the principal's intent is clearly set forth.

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ADVANCE HEALTH CARE DIRECTIVE

(California Probate Code Section 4701)

Explanation

You have the right to give instructions about your own health care. You also have the right to name someone else to make health care decisions for you. This form lets you do either or both of these things. It also lets you express your wishes regarding donation of organs and the designation of your primary physician. If you use this form, you may complete or modify all or any part of it. You are free to use a different form.

Part I of this form is a power of attorney for health care. Part I lets you name another individual as agent to make health care decisions for you if you become incapable of making your own decisions or if you want someone else to make those decisions for you now even though you are still capable. You may also name an alternate agent to act for you if your first choice is not willing, able, or reasonably available to make decisions for you. (Your agent may not be an operator or employee of a community care facility or a residential care facility where you are receiving care, or your supervising health care provider or employee of the health care institution where you are receiving care, unless your agent is related to you or is a coworker.)

Unless the form you sign limits the authority of your agent, your agent may make all health care decisions for you. This form has a place for you to limit the authority of your agent. You need not limit the authority of your agent if you wish to rely on your agent for all health care decisions that may have to be made. If you choose not to limit the authority of your agent, your agent will have the right to:

(a) Consent or refuse consent to any care, treatment, service, or procedure to maintain, diagnose, or otherwise affect a physical or mental condition.

(b) Select or discharge health care providers and institutions.

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(c) Approve or disapprove diagnostic tests, surgical procedures, and programs of medication.

(d) Direct the provision, withholding, or withdrawal of artificial nutrition and hydration and all other forms of health care, including cardiopulmonary resuscitation.

(e) Make anatomical gifts, authorize an autopsy, and direct disposition of remains.

Part 2 of this form lets you give specific instructions about any aspect of your health care, whether or not you appoint an agent. Choices are provided for you to express your wishes regarding the provision, withholding, or withdrawal of treatment to keep you alive, as well as the provision of pain relief. Space is also provided for you to add to the choices you have made or for you to write out any additional wishes. If you are satisfied to allow your agent to determine what is best for you in making end-of-life decisions, you need not fill out Part 2 of this form.

Part 3 of this form lets you express an intention to donate your bodily organs and tissues following your death.

Part 4 of this form lets you designate a physician to have primary responsibility for your health care.

After completing this form, sign and date the form at the end. The form must be signed by two qualified witnesses or acknowledged before a notary public. Give a copy of the signed and completed form to your physician, to any other health care providers you may have, to any health care institution at which you are receiving care, and to any health care agents you have named. You should talk to the person you have named as agent to make sure that he or she understands your wishes and is willing to take the responsibility.

You have the right to revoke this advance health care directive or replace this

form at any time.

PART 1

POWER OF ATTORNEY FOR HEALTH CARE

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(1.1) DESIGNATION OF AGENT: I designate the following individual as my agent to make health care decisions for me

[insert name, address, and telephone number of one individual as your agent to make health care decisions for you].

OPTIONAL: If I revoke my agent's authority or if my agent is not willing, able, or reasonably available to make a health care decision for me, I designate as my first alternate agent

[insert name, address, and telephone number of one individual as your first alternate agent] .

OPTIONAL: If I revoke the authority of my agent and first alternate agent or if neither is willing, able, or reasonably available to make a health care decision for me, I designate as my second alternate agent

[insert name, address, and telephone number of one individual as your second alternate agent] .

(1.2) AGENT'S AUTHORITY: My agent is authorized to make all health care decisions for me, including decisions to provide, withhold, or withdraw artificial nutrition and hydration and all other forms of health care to keep me alive, except as I state here:

[You can indicate your desires by including a statement here.]

(1.3) WHEN AGENT'S AUTHORITY BECOMES EFFECTIVE: My agent's authority becomes effective when my primary physician determines that I am unable to make my own health care decisions unless I mark the following box. If I mark this box , my agent's authority to make health care decisions for me takes effect immediately.

(1.4) AGENT'S OBLIGATION: My agent shall make health care decisions for me in accordance with this power of attorney for health care, any instructions I give in Part 2 of this form, and my other wishes to the extent known to my agent. To the extent my wishes are unknown, my agent shall make health care decisions for me in accordance with what my agent determines to be in my best interest. In determining my best interest, my agent shall consider my personal values to the extent known to my agent.

(1.5) AGENT'S POSTDEATH AUTHORITY: My agent is authorized to make anatomical gifts, authorize an autopsy, and direct disposition of my remains, except as I state here or in Part 3 of this form:

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[if you want to limit the authority of your agent to consent to an autopsy, make an anatomical gift, or direct the disposition of your remains, you must state the limitations here.]

(1.6) NOMINATION OF CONSERVATOR: If a conservator of my person needs to be appointed for me by a court, I nominate the agent designated in this form. If that agent is not willing, able, or reasonably available to act as conservator, I nominate the alternate agents whom I have named, in the order designated.

PART 2

INSTRUCTIONS FOR HEALTH CARE

[If you fill out this part of the form, you may strike any wording you do not want.]

(2.1) END-OF-LIFE DECISIONS' I direct that my health care providers and others involved in my care provide, withhold, or withdraw treatment in accordance with the choice I have marked below:

(a) Choice Not To Prolong Life.

I do not want my life to be prolonged if (1) I have an incurable and irreversible condition that will result in my death within a relatively short time, (2) I become unconscious and, to a reasonable degree of medical certainty, I will not regain consciousness, or (3) the likely risks and burdens of treatment would outweigh the expected benefits, OR

(b) Choice To Prolong Life

I want my life to be prolonged as long as possible within the limits of generally accepted health care standards.

(2.2) RELIEF FROM PAIN: Except as I state in the following space, I direct that treatment for alleviation of pain or discomfort be provided at all times, even if it hastens my death:

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[Add additional sheets if needed.]

(2.3) OTHER WISHES: I direct that: [If you do not agree with any of the optional choices above and wish to write your own, or if you wish to add to the instructions you have given above, you may do so here.]

[Add additional sheets if needed.]

PART 3

DONATION OF ORGANS AT DEATH (OPTIONAL)

(3.1) Upon my death (mark applicable box):

(a) I give any needed organs, tissues, or parts, OR

(b) I give the following organs, tissues, or parts only:

(c) My gift is for the following purposes: *[strike any of the following you do not want]*

(1) Transplant

(2) Therapy

(3) Research

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(4) Education

PART 4

PRIMARY PHYSICIAN (OPTIONAL)

(4.1) I designate the following physician as my primary physician:

[insert name, address, and telephone number of physician] .

OPTIONAL- If the physician I have designated above is not willing, able, or reasonably available to act as my primary physician, I designate the following physician as my primary physician. [insert name, address, and telephone number of alternate physician]

PART 5

(5.1) EFFECT OF COPY: A copy of this form has the same effect as the original.

(5.2) SIGNATURE.[Sign and date the form here]

Date:

Signature

Typed Name

(5.3) STATEMENT OF WITNESSES. I declare under penalty of perjury under the laws of California that (1) the individual who signed or acknowledged this advance health care directive is personally known to me, or that the individual's identity was proven to me

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by convincing evidence, (2) the individual signed or acknowledged this advance directive in my presence, (3) the individual appears to be of sound mind and under no duress, fraud, or undue influence, (4) I am not a person appointed as agent by this advance directive, and (5) I am not the individual's health care provider, an employee of the individual's health care provider, the operator of a community care facility, an employee of an operator of a of a community care facility, the operator of a residential care facility for the elderly, or an employee of an operator of a residential care facility for the elderly.

[Typed name] [Typed name]

[Address] [Address]

[Signature] [Signature]

[Date] [Date]

First witness Second witness

(5.4) ADDITIONAL STATEMENT OF WITNESSES: At least one of the above witnesses must also sign the following declaration.

I further declare under penalty of perjury under the laws of California that I am not related to the individual executing this advance health care directive by blood, marriage, or adoption, and to the best of my knowledge, I am not entitled to any part of the individual's estate upon his or her death under a will now existing or by operation of law.

[Signature of witness] [Signature of witness]

PART 6

SPECIAL WITNESS REQUIREMENT

(6.1) The following statement is required only if you are a patient in a skilled nursing facility - a health care facility that provides the following basic services: skilled nursing care and supportive care to patients whose primary need is for availability of skilled nursing care on an extended basis. The patient advocate or ombudsman must sign the following statement:

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STATEMENT OF PATIENT ADVOCATE OR OMBUDSMAN

I declare under penalty of perjury under the laws of California that I am a patient advocate or ombudsman as designated by the State Department of Aging and that I am serving as a witness as required by Section 4675 of the Probate Code.

Date:

[Signature]

[Typed name]

RECORDING REQUESTED)

BY)

)

)

)

AND WHEN RECORDED)

MAIL TO)

)

)

)

Space above this line for recorder's use

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UNIFORM STATUTORY FORM POWER OF ATTORNEY

(California Civil Code Section 2475)

NOTICE: The powers granted by this document are broad and sweeping. They are explained in the Uniform Statutory Form Power of Attorney Act (California Civil Code Sections 2475-2499.5, inclusive). If you have any questions about these powers, obtain competent legal advice. This document does not authorize anyone to make medical and other health care decisions for you. You may revoke this power of attorney if you later wish to do so.

I, QUINCY HARKIN MYERS appoint

(your name and address)

MARTIN LIERBAG of 3336 LOVELAND ROAD, YOUNGSTOWN, OHIO 44502

(name and address of the person appointed, or of each

person appointed if you want to designate more than one)

as my agent (attorney in fact) to act for me in any lawful way with respect to the following initialed subjects:

To Grant All of the Following Powers, initial the line in front of (N) and ignore the lines in front of the other powers.

To Grant One or More, but Fewer than All, of the following powers, initial the line in front of each power you are granting.

To Withhold a Power, do not initial the line in front of it. You may, but need not, cross out each power withheld.

INITIAL

_____ (A) Real property transactions.

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_____ (B) Tangible personal property transactions.

_____ (C) Stock and bond transactions.

_____ (D) Commodity and option transactions.

_____ (E) Banking and other financial institution transactions.

_____ (F) Business operating transactions.

_____ (G) Insurance and annuity transactions.

_____ (H) Estate, trust, and other beneficiary transactions.

_____ (I) Claims and litigation.

_____ (J) Personal and family maintenance.

_____ (K) Benefits from social security, Medicare, Medicaid, or other governmental programs, or civil or military service.

_____ (L) Retirement plan transactions.

_____ (M) Tax matters.

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QLM (N) ALL OF THE POWERS LISTED ABOVE.

You need not initial any other lines if you initial line (N).

SPECIAL INSTRUCTIONS:

On the following lines you may give special instructions limiting or extending the powers granted to your agent.

None.

UNLESS YOU DIRECT OTHERWISE ABOVE, THIS POWER OF ATTORNEY IS EFFECTIVE IMMEDIATELY AND WILL CONTINUE UNTIL IT IS REVOKED.

This power of attorney will continue to be effective even though I become incapacitated.

STRIKE THE PRECEDING SENTENCE IF YOU DO NOT WANT THIS POWER OF ATTORNEY TO CONTINUE IF YOU BECOME INCAPACITATED.

EXERCISE OF POWER OF ATTORNEY WHERE

MORE THAN ONE AGENT DESIGNATED

If I have designated more than one agent, the agents are to act Jointly

IF YOU APPOINTED MORE THAN ONE AGENT, AND YOU WANT EACH AGENT TO BE ABLE TO ACT ALONE WITHOUT THE OTHER AGENT JOINING, WRITE THE WORD "SEPARATELY" IN THE BLANK SPACE ABOVE. IF YOU DO NOT INSERT ANY WORD IN THE BLANK SPACE, OR IF YOU INSERT THE WORD "JOINTLY," ALL OF YOUR AGENTS MUST ACT OR SIGN TOGETHER.

I agree that any third party who receives a copy of this document may act under it. Revocation of the power of attorney is not effective as to a third party until the third party has actual knowledge of the revocation. I agree to indemnify the third party for any claims that arise against the third party because of reliance on this power of attorney.

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Signed this day of , 200_.

QUINCY HARKIN MYERS

(your signature) 291-52-7868

(your social security number)

CERTIFICATE OF ACKNOWLEDGMENT OF NOTARY PUBLIC

STATE OF

COUNTY OF

On_before me,

personally appeared

personally known to me (or proved to me on the basis of satisfactory evidence) to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

WITNESS MY HAND AND OFFICIAL SEAL.

BY ACCEPTING OR ACTING UNDER THIS APPOINTMENT, THE AGENT ASSUMES THE FIDUCIARY AND OTHER LEGAL RESPONSIBILITIES OF AN AGENT.

RECORDING REQUESTED BY)

)

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AND WHEN RECORDED MAIL TO)

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_____)_____

UNIFORM STATUTORY FORM POWER OF ATTORNEY

(California Civil Code Section 2475)

NOTICE: The powers granted by this document are broad and sweeping. They are explained in the Uniform Statutory Form Power of Attorney Act (California Civil Code Sections 2475-2499.5, inclusive). If you have any questions about these powers, obtain competent legal advice. This document does not authorize anyone to make medical and other health care decisions for you. You may revoke this power of attorney if you later wish to do so.

I, appoint

(your name and address)

(name and address of the person appointed, or of each

person appointed if you want to designate more than one)

as my agent (attorney in fact) to act for me in any lawful way with respect to the following initialed subjects:

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To Grant All of the Following Powers, initial the line in front of (N) and ignore the lines in front of the other powers.

To Grant One or More, but Fewer than All, of the following powers, initial the line in front of each power you are granting.

To Withhold a Power, do not initial the line in front of it. You may, but need not, cross out each power withheld.

INITIAL

_____ (A) Real property transactions.

_____ (B) Tangible personal property transactions.

_____ (C) Stock and bond transactions.

_____ (D) Commodity and option transactions.

_____ (E) Banking and other financial institution transactions.

_____ (F) Business operating transactions.

_____ (G) Insurance and annuity transactions.

_____ (H) Estate, trust, and other beneficiary transactions.

_____ (I) Claims and litigation.

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_____ (J) Personal and family maintenance.

_____ (K) Benefits from social security, Medicare, Medicaid, or other governmental programs, or civil or military service.

_____ (L) Retirement plan transactions.

_____ (M) Tax matters.

_____ (N) ALL OF THE POWERS LISTED ABOVE.

You need not initial any other lines if you initial line (N).

SPECIAL INSTRUCTIONS:

On the following lines you may give special instructions limiting or extending the powers granted to your agent.

UNLESS YOU DIRECT OTHERWISE ABOVE, THIS POWER OF ATTORNEY IS EFFECTIVE IMMEDIATELY AND WILL CONTINUE UNTIL IT IS REVOKED.

This power of attorney will continue to be effective even though I become incapacitated.

STRIKE THE PRECEDING SENTENCE IF YOU DO NOT WANT THIS POWER OF ATTORNEY TO CONTINUE IF YOU BECOME INCAPACITATED.

EXERCISE OF POWER OF ATTORNEY WHERE

MORE THAN ONE AGENT DESIGNATED

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If I have designated more than one agent, the agents are to act

IF YOU APPOINTED MORE THAN ONE AGENT, AND YOU WANT EACH AGENT TO BE ABLE TO ACT ALONE WITHOUT THE OTHER AGENT JOINING, WRITE THE WORD "SEPARATELY" IN THE BLANK SPACE ABOVE. IF YOU DO NOT INSERT ANY WORD IN THE BLANK SPACE, OR IF YOU INSERT THE WORD "JOINTLY," ALL OF YOUR AGENTS MUST ACT OR SIGN TOGETHER.

I agree that any third party who receives a copy of this document may act under it. Revocation of the power of attorney is not effective as to a third party until the third party has actual knowledge of the revocation. I agree to indemnify the third party for any claims that arise against the third party because of reliance on this power of attorney.

Signed this day of , 200_.

(your signature)

(your social security number)

CERTIFICATE OF ACKNOWLEDGMENT OF NOTARY PUBLIC

STATE OF

COUNTY OF

On before me,

personally appeared

personally known to me (or proved to me on the basis of satisfactory evidence) to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

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WITNESS MY HAND AND OFFICIAL SEAL.

BY ACCEPTING OR ACTING UNDER THIS APPOINTMENT, THE AGENT ASSUMES THE FIDUCIARY AND OTHER LEGAL RESPONSIBILITIES OF AN AGENT.

LIVING WILL DECLARATION

To My Family, Doctors and All Those concerned with my care:

I, MATILDA ALLEN WATKINS , being of sound mind, make this statement as a directive to be followed if I become unable to participate in decisions regarding my medical care.

If I should be in an incurable or irreversible mental or physical condition with no reasonable expectation of recovery, I direct my attending physician to withhold or withdraw treatment that merely prolongs my dying. I further direct that treatment be limited to measures to keep me comfortable and relieve pain.

In the event that at the time this declaration is being considered I am pregnant, then I specifically state that I

1. Want the treatment withheld even though it may result in

an abortion.

2. Do not want such treatment withheld if it will result in an abortion. MATILDA ALLEN WATKINS (Cross out inapplicable language and sign on the appropriate line.)

These directions express my legal right to refuse treatment. Therefore, I expect my family, doctors and everyone concerned with my care to regard themselves as legally and morally bound to act in accord with my wishes, and in so doing to be free of any legal liability for having followed my directives.

I DO (x) DO NOT ( ) desire that nutrition and hydration (food and water) be withheld or withdrawn when the application of such

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procedures would serve only to artificially prolong the process of dying.

I especially do not want: TO BE KEPT ALIVE THROUGH A HEART LUNG MACHINE IF I AM COMATOSE OR TO BE KEPT ALIVE IN AN UNCONSCIOUS BUT PAINFUL STATE

Other instructions or comments: None

Proxy Designation Clause: Should I become unable to communicate my instructions as stated above, I designate the following person to act in my behalf:

Name: KIMBERLY WALLACE COWER

Address: 57 HEINZ STREET, FAIRFLAX, OHIO

Phone: (213) 783-4568

If the person I have named above is unable to act in my behalf, I authorize the following person to do so:

Name: TIMOTHY ALLEN HOWARD

Address: 57 HEINZ STREET, FAIRFLAX, OHIO

Phone: (213) 783-4568

Dated: DECEMBER 23, 1995 MATILDA ALLEN WATKINS

Signature

STATE OF

COUNTY OF

On the 23RD day of December , 199 5 , before me personally appeared MATILDA ALLEN WATKINS personally known to me or proved to me on the basis of satisfactory evidence to be the person whose name is subscribed to the within instrument and acknowledged to me that he/she executed the same in his/her authorized capacity and that by his/her signature on the instrument the person or the entity upon behalf of which the person acted, executed the within instrument.

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WITNESS MY HAND AND OFFICIAL SEAL.

STATEMENT OF WITNESS

I declare under penalty of perjury that the person who signed or acknowledged this document is personally known to me or proved to me on the basis of convincing evidence to be the principal, that the principal signed or acknowledged this Living Will Declaration in my presence, that the principal appears to be of sound mind and under no duress, fraud, or undue influence, that I am not the principal's attorney in fact, and that I am not a health care provider, an employee of a health care provider, the operator of a community care facility, the employee of an operator of a community care facility, the operator of a residential care facility for the elderly, nor an employee of an operator of a residential care facility for the elderly.

I further declare that I am not related to the principal by blood, marriage, or adoption, and to the best of my knowledge I am not entitled to any part of the estate of the principal upon the death of the principal under the will now existing or by operation of law.

Signature: _____

Print Name:_____Date:_____

Residence Address: _____

_____

Signature: _____

Print Name:_____Date:_____

Residence Address: _____

LIVING WILL DECLARATION

To My Family, Doctors and All Those concerned with my care:

I, , being of sound mind, make this statement as a directive to be followed if I become unable to participate in decisions regarding my medical care.

If I should be in an incurable or irreversible mental or physical condition with no reasonable expectation of recovery, I direct my attending physician to withhold or withdraw treatment that merely prolongs my dying. I further direct that treatment be limited to measures to keep me comfortable and relieve pain.

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In the event that at the time this declaration is being considered I am pregnant, then I specifically state that I

1. Want the treatment withheld even though it may result in

an abortion.

2. Do not want such treatment withheld if it will result in an abortion. (Cross out inapplicable language and sign on the appropriate line.)

These directions express my legal right to refuse treatment. Therefore, I expect my family, doctors and everyone concerned with my care to regard themselves as legally and morally bound to act in accord with my wishes, and in so doing to be free of any legal liability for having followed my directives.

I DO ( ) DO NOT ( ) desire that nutrition and hydration (food and water) be withheld or withdrawn when the application of such procedures would serve only to artificially prolong the process of dying.

I especially do not want:

Other instructions or comments:

Proxy Designation Clause: Should I become unable to communicate my instructions as stated above, I designate the following person to act in my behalf:

Name:

Address:

Phone:

If the person I have named above is unable to act in my behalf, I authorize the following person to do so:

Name:

Address:

Phone:

Dated:

Signature

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STATE OF

COUNTY OF

On the day of , 200_, before me personally

appeared personally known to me or proved to me on the basis of satisfactory evidence to be the person whose name is subscribed to the within instrument and acknowledged to me that he/she executed the same in his/her authorized capacity and that by his/her signature on the instrument the person or the entity upon behalf of which the person acted, executed the within instrument.

WITNESS MY HAND AND OFFICIAL SEAL.

STATEMENT OF WITNESS

I declare under penalty of perjury that the person who signed

or acknowledged this document is personally known to me or proved to me on the basis of convincing evidence to be the principal, that the principal signed or acknowledged this Living Will Declaration in my presence, that the principal appears to be of sound mind and under no duress, fraud, or undue influence, that I am not the principal's attorney in fact, and that I am not a health care provider, an employee of a health care provider, the operator of a community care facility, the employee of an operator of a community care facility, the operator of a residential care facility for the elderly, nor an employee of an operator of a residential care facility for the elderly.

I further declare that I am not related to the principal by blood, marriage, or adoption, and to the best of my knowledge I am not entitled to any part of the estate of the principal upon the death of the principal under the will now existing or by operation of law.

Signature: _____

Print Name:_____Date:_____

Residence Address: _____

_____

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Signature: _____

Print Name:_____Date:_____

Residence Address: _____

END OF CHAPTER PREVIEW

CHAPTER 4

PROBATE AVOIDANCE VEHICLES

This chapter will discuss some of the most common means available to a person desiring to avoid having an estate probated. The advantages and disadvantages of each method will be compared and evaluated.

The most popular means of estate planning, the use of joint tenancies and revocable living trusts, will each be discussed in full detail in succeeding chapters. Some discussion, however, will be given here, and the reader can compare their use with that of the other probate avoidance vehicles.

I. SUMMARY PROBATESMany states have adopted the Uniform Probate Code which provides for summary probate procedures in place of having to formally probate an estate. Below is Part 12 of the Uniform Probate Code which governs the summary administration of small estates.

PART 12

COLLECTION OF PERSONAL PROPERTY BY AFFIDAVIT AND SUMMARY ADMINISTRATION PROCEDURES FOR SMALL ESTATES

SECTION 3-1201. COLLECTION OF PERSONAL PROPERTY BY AFFIDAVIT.

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(a) Thirty days after the death of the decedent, any person indebted to the decedent or having possession of tangible personal property or an instrument evidencing a debt, obligation, stock or chose in action belonging to the decedent shall make payment on the indebtedness or deliver the tangible personal property or an instrument evidencing a debt, obligation, stock or chose of action to a person claiming to be the successor of the decedent upon being presented an affidavit made by or on behalf of the successor stating that:

(1) The value of the entire estate, wherever located, less liens and encumbrances does not exceed $5,000,

(2) 30 days have elapsed since the death of the decedent,

(3) No application or petition for the appointment of a personal representative is pending or has been granted in any jurisdiction, and

(4) The claiming successor is entitled to payment or delivery of the property.

(b) A transfer agent of any security shall charge the registered ownership on the books of a corporation from the decedent to the successor or successors upon the presentation of an affidavit as provided in subsection (a).

SECTION 3-1202. EFFECT OF AFFIDAVIT.

The person paying, delivering, transferring, or issuing personal property or the evidence thereof pursuant to affidavit is discharged and released to the same extent as if he dealt with a personal representative of the decedent. He is not required to see to the application of the personal property or evidence thereof or to inquire into the truth of any statement in the affidavit. If any person to whom an affidavit is delivered refuses to pay, deliver, transfer or issue any personal property or evidence thereof, it may be recovered or its payment, delivery, transfer or issuance compelled upon proof of their right in a proceeding brought for the purpose by or on behalf of the persons entitled thereto. Any person to whom payment, delivery, transfer or issuance is made is answerable and accountable therefor to any personal representative of the estate or to any other person having a superior right.

SECTION 3-1203. SMALL ESTATES: SUMMARY ADMINISTRATIVE PROCEDURES.

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If it appears from the inventory and appraisal that the value of the entire estate, less liens and encumbrances, does not exceed homestead allowance, exempt property, family allowance, costs and expenses of administration, reasonable funeral expenses, and reasonable and necessary medical and hospital expenses of the last illness of the decedent, the personal representative, without giving notice to creditors, may immediately disburse and distribute the estate to the persons entitled thereto and file a closing statement as provided in Section 3-1204.

SECTION 3-1204. SMALL ESTATES: CLOSING BY SWORN

STATEMENT OF PERSONAL

REPRESENTATIVE.

(a) Unless prohibited by order of the court and except for estates being administered by supervised personal representatives, a personal representative may close an estate administered under the summary procedure of Section 3-1203 by filing with the court, at any time after disbursement and distribution of the estate, a verified statement stating that:

(1) To the best knowledge of the personal representative, the value of the entire estate, less liens and encumbrances, did not exceed homestead allowance, exempt property, family allowance, costs and expenses of administration, reasonable funeral expenses, and reasonable, necessary medical and hospital expenses of the last illness of the decedent,

(2) The personal representative has fully administered the estate by disbursing and distributing it to the persons entitled thereto, and

(3) The personal representative has sent a copy of the closing statement to all distributees of the estate and to all creditors or other claimants of whom he is aware whose claims are neither paid nor barred and has furnished a full account in writing of his administration to the distributees whose interests are affected.

(b) If no actions or proceedings involving the personal representative are pending in the court one year after the closing statement is filed, the appointment of the personal representative terminates.

© A closing statement filed under this section has the same affect as one filed under Section 3-1003.

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In those states which have adopted the Uniform Probate Code, estates worth less than $5,000 will not have to go through a full and complete probate. The property contained in such small estates can be passed by the use of affidavits. An affidavit is a sworn statement, made under penalty or perjury, that the estate is worth less than $5,000 and that the affiant (the person making the affidavit) is the only person entitled to receive the property. Upon presentation of the affidavit to anyone holding the decedent's property requires him to deliver the ownership of the property to the affiant, and no liability will incur or attach to the person delivering such property in the event the affiant did not have the right to receive the property.

When the decedent's estate is worth over $5,000, the affidavit method for avoiding probate is no longer available. In its stead the Uniform Probate Code permits an abbreviated - summary probate procedure for small estates. The Uniform Probate Code permits an estate whose value does not exceed the total of the state's homestead exemption (which may in some states exceed $60,000) and the state's family allowance (which may be as much as another $40,000) to be passed to the heirs without having to institute a full probate. The personal representative, after the estate's inventory is prepared, simply files a statement with the court stating that the estate is a small estate under the state's probate code and that distribution should occur immediately to the entitled persons. If no one files any objections within a fixed time, usually ten days, the estate is closed, and the property distributed in accordance with the terms of the decedent's Will or, if there is no Will, then in accordance with the state's intestacy laws.

Most states have adopted versions of the Uniform Probate Code as it relates to small estates. California, for instance, defines a small estate as being less than $60,000 and basically permits it to be passed by petition. In addition, California permits an estate less than $10,000, which does not include interest in land, to be passed by affidavit.

An estate consists of that property that must be probated. Property that does not need to be probated, such as joint tenancy property, insurance proceeds payable to named beneficiaries rather than the insured's estate and assets in a revocable trust are not considered in determining the size of the probate estate. For example, if George dies with $500,000 in joint tenancy with his wife, a $2,000,000 revocable trust and a bank account of $25,000. Only the bank account needs to be probated and it would, in most states, qualify for a small estate summary probate.

II. BANK ACCOUNTSA common method of avoiding probate is for a person to entitle a bank account as a trust account for someone else. This is known in the trade as a Totten Trust.

A Totten Trust works as follows. The creator signs a bank card stating that the assets in the account are trust assets for the benefit of a certain individual. Upon death of the creator, the beneficiary of the trust obtains the right to take and keep the proceeds of the account. Up until that time, the beneficiary has no right to take or draw funds from the account. The bank account can be attached to pay the debts of the trust creator but cannot be attached to pay the debts of the beneficiary until after the death of the trust creator.

A Totten Trust is viewed as a revocable trust for all purposes. Since the creator retains the right to withdraw all or any part of the funds at any time, the account is treated tax-wise as a grantor trust. The interest on the account is solely attributed to the creator.

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Because the creator retains such complete control over the bank account, all of the funds in the bank account will be included in the creator's estate for federal and state inheritance and estate taxes.

A Totten Trust is different from a joint tenancy bank account. In a joint tenancy account each of the joint tenants owns an equal amount of the account. They also have equal management and control over the account. In a joint tenancy account a creditor of any joint tenant can attach the account to the extent of the debtor's joint tenancy interest. For example, if a mother established a joint account with her daughter for $15,000. The IRS can attach the bank account for $7,500 or less to pay the daughter's tax bill; even though the daughter may not have contributed any of the money to the bank account.

A Totten Trust is limited to bank accounts only. Totten Trusts are easy to create and cost no more than ordinary bank accounts. In addition, no fiduciary tax returns have to be filed as long as the creator is alive and on the account.

III. PENSION PLANS AND IRASPension plans, IRAs, annuities and the like can be passed without a probate if the owner designates the person to whom it is to be distributed after death. If a beneficiary is not designated, the proceeds from the pension plan, IRA, annuity, etc. will be paid to the estate of the owner, and that will require a probate to distribute it to the decedent's heirs.

It should not be assumed that all pensions, retirement plans or annuities permit the designation of a beneficiary. The avoidance of probate in this area is not based upon probate law but contract law. For that reason the contract between the owner and the provider of the pension plan, IRA plan, annuity, etc. determines the right of the owner to designate payment to someone other than the owner's estate.

Generally, there are no prohibitions to naming beneficiaries other than the owner's relatives. Sometimes, however, such restrictions do exist. In such an event the proceeds will be paid into the estate. If the estate should not qualify for a small-estate summary probate, then a full probate will have to be instituted to pass the proceeds to the owner's heirs.

Regardless of whether the pension plan proceeds need to be probated, they will still be included in the owner's estate for federal and state inheritance and estate purposes.

IV. LIFE INSURANCE TRUSTSProceeds from a life insurance policy on the owner's life are included in the owner's estate for federal and inheritance tax purposes. As with pension plan proceeds, insurance proceeds can be paid to designated beneficiaries without having to go through a probate.

It is possible, however, to structure an insurance trust in such a way that proceeds pass without a probate and also will not be included in the estate of the decedent. This can result in a significant tax savings to the heirs.

A life insurance trust is relatively easy to create. To ensure the proceeds will not be included in the insured's estate, the requirements are:

1. The life insurance trust must be irrevocable. The creator, the person whose life is insured, must not have the right to alter, amend or revoke the trust. If the insured retains any of these powers, the value of the insurance proceeds will be attributed to the

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insured's estate upon death: there would be no reason to have the policy held in an irrevocable trust.

2. An independent person, not the insured, must be the trustee. If the insured was the trustee, the trust would be a grantor trust as defined in the Internal Revenue Code and includable in the insured's estate on death.

3. The trust must be established and the insurance policy must be placed at least three years before the death of the insured.

An example of how this works is as follows: George, a widower, buys an insurance policy for $2,000,000 payable to his only child, a daughter. George's estate is valued at $1,000,000. George dies four years later. Under federal law, George's estate for tax purposes consists of $3,000,000. For probate purposes, the estate consists of only $1,000,000 because the insurance proceeds pass outside the probate. The federal estate taxes are based upon $2,400,000 ($3,000,000 minus the unified credit, $600,000 at that time). The federal taxes will be $735,800.

END OF CHAPTER PREVIEW

CHAPTER 5

JOINT TENANCY

I. DEFINITION

Joint tenancy is a statutorily created form of property ownership which permits co-ownership by two or more persons with the right of survivorship. Upon the death of one of the owners, called a joint tenant, his interest passes automatically to the surviving joint tenants without the need of any probate or judicial proceeding. This automatic passage of property outside of probate is the reason joint tenancies have become a popular tool of estate planning.

A joint tenancy in real property must be expressly created by a written instrument: the title or deed for the property. The instrument must contain language which reads substantially "To A and B as Joint Tenants with the Right of Survivorship."

Anyone can be a joint tenant with any other person. Usually spouses or parents and their children are joint tenants to avoid a probate of the property when one spouse or parent dies. Assume a father has a piece of property. The father executes a joint tenancy deed that places his four children on the deed with him as joint tenants. Upon the father's death the father's remaining share of the property is divided automatically, without probate, among the four children. Upon the father's death each of the children would own an undivided one-fourth of the property.

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A joint tenant owns an equal and undivided interest in the property regardless of whether that interest was purchased or acquired by a gift. Each joint tenant's interest can be attached by the creditors of that joint tenant. A young woman visited an estate planning attorney and stated that her mother had placed the maternal home in joint tenancy with her. The young woman subsequently had an auto accident and did not have insurance. She was sued for damages and had a judgment taken against her. The creditor was executing against the mother's house to sell it and get the sale value of the daughter's half interest. The woman was desperate to save her mother from losing her house. A payment plan was arranged, and her mother was allowed to remain in her home until her death. Then it would be sold, and the balance of the judgment paid off. This is the main drawback of a joint tenancy: the passing of the interest to each joint tenant is a legally completed gift.

Not all states permit property to be held in joint tenancy. Other states have laws that severely restrict its use. The following states have implemented laws regulating the use of joint tenancy property:

ALASKA does not permit the use of joint tenancies except between husbands and wives.

NORTH CAROLINA permits joint tenancies only on bank accounts. It is not permitted otherwise even between spouses.

PENNSYLVANIA has a series of court decisions that question whether there can be joint tenancy in real property. Personal property joint tenancy still appears to be valid.

TENNESSEE does not permit the use of joint tenancies for any property except between husbands and wives.

TEXAS does not permit the use of joint tenancies for any property except between husbands and wives.

II. TERMINATION

A joint tenancy can be terminated and turned into a tenancy in common (a co-ownership of the property without a right of survivorship) by any of the following acts:

1. Conveyance by one joint tenant of part or all of his interest. Any conveyance will terminate the joint tenancy because the other joint tenants did not initially agree to the new co-tenant participating with the right of survivorship in their interest in the property. In most states, such as California, a joint tenancy can be terminated by a joint tenant executing a deed covering his interest in the property to himself as a tenant in common. For example, George is a joint tenant with Ed. George can terminate the joint tenancy by executing a deed from himself to himself with the language "From George to George as tenant in common." In such an event, George and Ed will then become tenants in common. When George dies his interest in the property will not pass automatically to Ed under any right of survivorship.

2. Mortgaging by one joint tenant of his share of the joint tenancy property without the consent of the other joint tenants: if George takes a loan on his share of the property, the joint tenancy terminates.

3. Leasing by one joint tenant of the joint tenancy property without the consent of the other joint tenants.

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4. A few states permit the termination of a joint tenancy by a statement to that effect in a will. This, however, is a minority view not followed by the majority of states.

Once a joint tenancy is terminated, the right of survivorship also terminates. After the owner's death the property must undergo a probate in order to be passed to deceased owner's heirs.

About 20 states recognize a special form of joint tenancy between a husband and wife called "tenancy by the entirety." When property is held as tenants by the entirety, neither spouse may obtain a partition of the property or do anything that will defeat the right of survivorship of the other. A tenancy by the entirety cannot be terminated unilaterally by the act of just one spouse. A tenancy by the entirety can only be terminated by the following:

1. A divorce, which changes the ownership of the property into that of tenants in common.

2. A mutual agreement in writing where the spouses agree to terminate the tenancy by the entirety.

3. An execution against the property by a joint creditor of both spouses. A creditor of just one spouse cannot execute against property held in tenancy by the entirety.

The main advantage of a tenancy by the entirety over that of a joint tenancy is that creditors of just one spouse cannot take and execute against the property. In contrast, creditors can take and execute against ordinary joint tenancy property when they have a judgment against only one spouse.

Some community property states permit community property to be held in joint tenancy. In such a case, title is taken with the words "community property with the right of survivorship." The significance of these words is not to be ignored. By stating that the property remains community property even though it is held in joint tenancy means the property will still retain its community property status for tax purposes for those community property states which permit community property to be held with a right of survivorship (in joint tenancy).

III. TAX BASIS CONSIDERATIONSJoint tenancy property is treated differently for tax purposes based upon whether the joint tenants are married. Under federal tax law, it is presumed, except for married joint tenants, that all of the joint tenancy property was purchased by the decedent. Thus, all of the joint tenancy property is placed into the deceased joint tenant's estate for estate tax purposes; unless it can be proven that the surviving joint tenant provided some of the purchase price. To the extent that the surviving joint tenant proves a contribution, the value of the joint tenancy property attributed to the deceased joint tenant's estate is reduced proportionally. When the property is held in joint tenancy by a married couple, only one-half of the value of the joint tenancy property is placed in the deceased spouse's estate regardless of who actually paid for the property.

The basis (value for tax purposes) of the property received from a decedent through a trust or probate is its fair market value as of the date of death. For example, a person bought a home for $10,000, and upon death it was worth $40,000. The basis of the property when the heirs receive it will be $40,000. If the heirs sell it for $40,000, there will be no capital gains taxes due. If the heirs

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subsequently sell the home for $50,000, the heirs will have to pay capital gain on $10,000 ($50,000 minus the $40,000 stepped-up basis).

Community property, unlike separate property held in joint tenancy, is considered owned by both spouses and is given special tax treatment. Under federal tax law when one spouse dies, the basis of both halves of the community property will be stepped-up to fair market value. For example, a couple bought, as community property, a home for $20,000 that had increased to $500,000 at the time of the husband's death. The basis of the husband's share of the community property interest in the house is increased to $250,000. Under the special treatment rules for community property the surviving wife's share is also increased to fair market value of $250,000. The surviving spouse can thereafter sell the house for $500,000 without having to pay any capital gains taxes. If the spouses had held the property as joint tenants but not with language that it was community property, then only the husband's half would be increased to fair market value. The wife's basis for her half interest in the house would remain $10,000. If the wife later sold the house for $500,000, she would have to pay capital gains taxes on $240,000 ($500,000 selling price minus $250,000 husband's basis minus $10,000 wife's basis).

The stepped-up basis for community property is a great tax advantage over merely holding joint tenancy property between spouses. If the joint tenancy property deed does not state that the property is community property, then upon either spouse's death, the IRS will not treat the property as community property but rather as separate property owned equally by each spouse. As such, the IRS will not permit the surviving spouse's half of the basis in the property to be stepped-up to its fair market value. It is not uncommon for married couples to take community property as joint tenants but not to include language in the deed that it was community property merely being held in joint tenancy. Only upon death of one of the spouses is it discovered for the first time that the surviving spouse will not get a stepped-up basis solely because of how the title was taken.

IV. GIFT TAX CONSIDERATIONSAs a rule, when a person changes title to property so as to create a joint tenancy in order to avoid probate, a taxable gift is created. The major exception to this rule is the use of joint tenancies between spouses. There is an unlimited marital credit for all transfers between married spouses if the recipient spouse is an American citizen. One spouse may give any amount of property to the other if the recipient is an American citizen without incurring a federal gift tax.

The creation of a joint tenancy is a gift of one-half of the property placed into the joint tenancy. The interest transferred to someone other than a spouse may be subject to a gift tax if the other joint tenant has the power to sever the joint tenancy (cancel it): I.R.S. Reg. Section 25.2511(h)(5). Therefore, unless the property is worth less than $11,000 (the annual gift exclusion amount per recipient), a gift tax probably would have to be paid, or the value of the gift will be used to reduce the donor's unified credit. Then the property will pass free of gift or estate taxes.

V. DANGERSBesides the tax considerations, there are significant dangers in creating joint tenancies. A person should be aware of these considerations before creating a joint tenancy. When someone is creating a joint tenancy in order to avoid probate, that person is making a complete transfer of that interest to the other joint tenant. The interest transferred to the other joint tenant is a full and completed gift. The person creating the joint tenancy has forever divested all control and ownership of the property interest transferred to the other joint tenant.

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Once property is placed into joint tenancy, creditors of the other joint tenant can take and attach that joint tenant's share of the property to pay judgments. For example, a mother places her home worth $200,000 into joint tenancy with her son. The son subsequently has a judgment taken against him for $80,000 for business losses. The son, by virtue of his mother's joint tenancy gift, owns one-half of the home, which is an interest worth $100,000. The son's creditors can force the sale of the mother's home and attach $80,000 of the son's share of the sale proceeds to apply to their judgment. The mother will get $100,000 of the proceeds, but she will be forced out of her home and be $100,000 poorer as well.

Another problem that might arise with the use of joint tenancies could be where the son gets a divorce. In many states a divorce court will divide all of the property owned by the spouses, even that property acquired by gifts or bequests, in order to make an equitable settlement. In such an event the joint tenancy property may be ordered sold so the son's $100,000 share can be divided in the manner the court ordered. The property may also be sold to satisfy the son's obligations for alimony or child support. In any event, the mother will lose $100,000 of assets during her life and be forced from her home.

It usually does not make good sense for a person, particularly a parent, to place property into joint tenancy with someone other than a spouse. The risks and potential liability for the debts and obligations of the joint tenant to whom the property is being given usually outweigh the small advantage of avoiding probate. A revocable trust is usually a better solution.

VI. CREATION

A. REAL PROPERTY The creation of a joint tenancy in real property is relatively simple and painless. The deed for the real property must state that the owners are taking title as joint tenants. The person transferring the property, usually the seller, states in the deed that the property will be received by the new owners as joint tenants. For example, George Smith in a sale may transfer the property to the buyers Adam Quick and William Hauser as joint tenants. Likewise, George Smith may change the title of real property which he owns so as to place his daughter Alice Smith on it as a joint tenant. Thereafter, upon his death, the interest held by George Smith will pass to his daughter Alice Smith without a probate.

It makes no difference what type of deed is used to create a joint tenancy. A quitclaim deed, warranty deed, grant deed or even an installment sales contract can all be used to create joint tenancies as long as the operative language is included in them. A joint tenancy is created by specific language to the effect that the recipients are receiving the property "As joint tenants with right of survivorship." Example: George Smith would create a joint tenancy with Alice Smith with the language, "From George Smith to George Smith and Alice Smith as Joint Tenants with right of survivorship." The effect of such language is to give Alice Smith one-half of the property plus a right of survivorship in George Smith's remaining share in the property.

Both sample Grant and Joint Tenancy deeds are included at the end of this chapter for reference purposes.

B. PERSONAL PROPERTY Personal property, having no title, needs a written document that states it is intended to be joint tenancy property in order to be so treated. Common sense dictates that without such a document it is impossible to prove that the property was intended to be held in joint tenancy. For example, a person dies with a valuable ring worth hundreds of thousands of dollars. As personal property, the ring does not have a title. If the decedent had not previously executed a joint tenancy

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document placing the ring into joint tenancy with his children, the ring would have to be probated (assuming the ring was not put into a revocable trust).

A joint tenancy document for personal property is included at chapter's end for reference.

SAMPLE DEED FOR SELLER CREATING

JOINT TENANCY AMONG BUYERS

RECORDING REQUESTED BY)

)

)

)

)

WHEN RECORDED MAIL TO)

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)

)

_____)_____

(Space above for Recorder's use)

INDIVIDUAL GRANT DEED

Documentary Transfer Tax $_____

___ Computed on Full Value of Property, or

___ Computed on Full Value less Liens and

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Encumbrances Remaining Thereon at

Time of Sale

___ Unincorporated Area ___ City of_____

_____

Tax Parcel Number_____

For valuable consideration, the receipt of which is hereby acknowledged:

GEORGE SMITH hereby GRANTS to ADAM QUICK

and WILLIAM HAUSER as Joint Tenants with the Right of

Survivorship the real property in the County of

Mendocino, State of California described as:

1245 Skyplace Drive, Willits, California as described in Book 1, Page 1487 of the County Recorder's Office, Assessor's Parcel Number 1-14-782.

Dated:_____ _____

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George Smith

RECORDING REQUESTED BY)

)

)

)

)

WHEN RECORDED MAIL TO)

)

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)

_____)_____

(Space above for Recorder's use)

INDIVIDUAL GRANT DEED

Documentary Transfer Tax $_____

___ Computed on Full Value of Property, or

___ Computed on Full Value less Liens and

Encumbrances Remaining Thereon at

Time of Sale

___ Unincorporated Area ___ City of_____

_____

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Tax Parcel Number_____

For valuable consideration, the receipt of which is hereby acknowledged:

hereby GRANTS to

as joint tenants with right of survivorship.

the real property in the County of_State of

described as:

END OF CHAPTER PREVIEW

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CHAPTER 6

WILLS

I. NEED

Everyone should have a will regardless of the type of estate plan for which they ultimately opt. Parents with minor children especially have need of a Will to nominate the guardians of the children in the event both parents die early. In addition a Last Will guarantees that any property not included in the estate plan will ultimately pass to the person that the decedent wants to get it. If a Last Will is not created and there is property not otherwise disposed by the decedent, that property will be distributed under the probate laws of the state where the property is located. The property may be distributed in a manner that would not have been approved by the decedent.

A Last Will is the final testament of a person stating how he wishes his assets to be distributed after death. A Last Will is totally revocable during the person's life.

A Last Will usually must be in writing and witnessed by two or more persons. The witnesses usually cannot be heirs under the Last Will. An exception to this rule is that in some states an oral Will made in immediate contemplation of death before competent witnesses may be valid. In addition, some states permit a holographic Will, one written entirely by the testator, dated and signed to be valid.

To be valid, the testator (creator) of the Last Will must be

legally competent to make a Last Will. Unless the last will specifically revokes all prior wills, all of the wills of the testator will be read together by the probate court to determine how the estate will be distributed. To avoid this problem, all Last Wills should have a simple clause revoking all prior wills.

A Last Will must be signed, dated and typed or written entirely in the handwriting of the testator. A general fill-in-the-blank will for individuals follows this chapter. If a person needs greater detail in a Last Will than this one, this will should not be used, and the person should consult an attorney. Should a more sophisticated will be needed, the cost is well worth it. An attorney usually

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charges $50 to $100 to prepare a will.

II. STATUTORY WILLSIn order to aid its citizens, many states have created statutory wills. These statutory wills comply with all of the terms for a valid will in the particular state authorizing their use. Each state has its own requirements for a statutory will. Such statutory wills are preprinted blank forms in which the testators simply fill in the blanks, sign and have them witnessed or notarized.

Following this chapter is a copy of the Statutory Will used in California. If a state has a statutory will, it can usually be obtained in stationary or office supply stores for between two dollars and ten dollars.

III. POUR-OVER WILLSA Pour-Over Will is a special Will used in conjunction with a revocable trust. It places all property into the trust that the decedent forgot to place into the trust while alive. Unfortunately, property not placed into the trust prior to the trustor's death may require a probate if the size of the assets is so large that summary procedures cannot be used. For example, if the trustor forgot to place a piece of property in Hawaii into the California Trust, the executor of the pour-over will must open a Hawaiian probate in order to get permission to put it into the trust. Having to probate the non-trust property would needlessly cost thousands of dollars when the trustor could have done it during his life for just the cost of recording a deed into the trust, usually about ten dollars.

Another example of the use of the pour-over will. A person hits a lottery for $50,000,000 and drops dead in the excitement. The pour-over will places the money into the trust after it has been probated. Once placed in the trust, the money will be managed in accordance with the trust terms.

A Pour-Over Will is basically an insurance policy to insure that any forgotten property is placed into the trust after death. Following this chapter are several pour-over wills. There are pour-over wills for spouses who create a joint revocable trust. There is also a pour-over will for an individual who might be married but has executed a separate, revocable trust. The pour-over will simply puts in the trust any property not previously placed in the trust following the trustor's death. The will also nominates a guardian for existing minor children of the testator.

IV. NOTARIZING A WILLA few states, such as Louisiana, require a Last Will to be notarized. By requiring a notary the state makes it easier to authenticate (prove) that the Last Will was actually signed by the decedent. A person can determine very easily if a state requires a Last Will to be notarized by simply calling an attorney and asking. Most attorneys will state over the phone whether a Last Will must be notarized. The Last Wills in this book contain a notary acknowledgment for use in any state where it is required.

In states that do not require a notary the heirs under the will must obtain from a witness an affidavit, called "Proof of Subscribing Witness," declaring that the deceased executed the will.

Most states do not require a notary's acknowledgment and thus will not accept a notary's acknowledgment in place of a signed witness statement by the two to three legally competent witnesses required under state law.

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If all the witnesses are dead or unavailable to authenticate the Last Will, handwriting analysis must be undertaken to get that proof.

There are situations where notarizing a Last Will is a good idea even though the acknowledgment cannot be used in place of a witness statement. A notary is an officially licensed and independent person. If a decedent's Last Will is contested, a notary's testimony to the effect that the creator of the will appeared competent would carry a great deal of weight.

Whenever Wills are changed within a year of death, the question often arises that the deceased person may have been incompetent or that undue influence was employed to get the new will executed. This, unfortunately, is a somewhat common scenario. For that reason, having a notary sign a will, when there is a marked change in distribution of the estate, can certainly be of value.

V. VIDEOTAPING A WILLVideotaping a Will is an excellent idea, but it does not replace the need to have the will written. If the Will is not written, the intent of the decedent regarding the disposition will not be given effect, even with the videotaping. The exception is that some states do permit nuncupative wills (oral wills) to pass a small amount of property. For a large estate, oral wills should not be used because there are usually limitations on the amount that could be passed by such a Will.

The real value of videotaping a Will is that it proves the testator to be competent, sane and not under any undue influence. An elderly or sick person making a new Will that greatly changes the disposition of the estate can result in a will contest. There is case law in California wherein a marriage was set aside because the court found that the man had been incompetent and unable to understand that he was getting married. As a result, the woman, whose marriage had been annulled, received nothing from the estate.

The most common will contest comes from the situation wherein an heir ignored a relative for years until shortly before that relative's death. Then the heir suddenly became the relative's best friend. The relative, shortly before death, rewrites the will to replace other heirs and friends who have cared for the person during all the years that the new heir was absent. The issue is whether the new heir played upon the decedent's fear of impending death to get a larger share of the estate.

Videotaping is an excellent means of preventing a will contest from greedy relatives. The testator can read the will to the camera, state his intent to create a new will and answer questions that show a detailed understanding of that intent. If any heir thereafter seeks to set aside the will, the tape would be excellent proof of the testator's competence. Most Wills contain a clause that disinherits heirs who try to break a Will and fail. The videotape would give the heirs something to consider before starting a Will contest.

CALIFORNIA STATUTORY WILL

NOTICE TO THE PERSON WHO SIGNS THIS WILL:

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1. It may be in your best interests to consult with a California lawyer because this statutory will has serious legal effects on your family and property.

2. This will does not dispose of property which passes on your death to any person by operation of law or by any contract. For example, the will does not dispose of joint tenancy assets or your spouse's share of community property, and it will not normally apply to proceeds of life insurance on your life or your retirement plan benefits.

3. This will is not designed to reduce death taxes or any other taxes. You should discuss the tax results of your decisions with a competent tax advisor.

4. You cannot change, delete, or add words to the face of this California statutory will. If you do, the change or the deleted or added words will be disregarded, and this will may be given effect as if the change, deletion, or addition had not been made. You may revoke this California Statutory Will, and you may amend it by codicil.

5. If there is anything in this will that you do not understand, you should ask a lawyer to explain it to you.

6. The full text of this California statutory will, the definitions and rules of construction, the property disposition clauses, and the mandatory clauses following the end of this will are contained in the probate code of California.

7. The witnesses to this will should not be people who may receive property under the will. You should carefully read and Follow the witnessing procedure described at the end of this will. All of the witnesses must watch you sign the will.

8. You should keep this will in your safe deposit box or other safe place.

9. This will treats most adopted children as if they are natural children.

10. If you marry or divorce after you sign this will, you should make and sign a new will.

11. If you have children under 21 years of age, you may wish to use the California Statutory Will with trust or another type of will.

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12. Refer to the information sheet which contains additional information regarding the California probate code relating to wills.

CALIFORNIA STATUTORY WILL

_____

(Insert your name here)

CALIFORNIA STATUTORY WILL OFSHERRIL JOHNSON

(Print your full name here)

ARTICLE 1

Declaration

This is my will, and I revoke all prior wills and codicils.

ARTICLE 2

Disposition of My Property

2.1 PERSONAL AND HOUSEHOLD ITEMS. I give all my furniture, furnishings, household items, and personal items to my spouse, if living; otherwise, they shall be divided equally among my children who survive me.

2.2 CASH GIFT TO A PERSON OR CHARITY. I make the following cash gift to the person or charity in the amount stated in words and figures in the box which I have completed and signed. If I fail to sign in the box, no gift is made. No death tax shall be paid from this gift.

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FULL NAME OF PERSON OR CHARITY AMOUNT OF GIFT $100,000

TO RECEIVE CASH GIFT (Name

only one. Please print). AMOUNT WRITTEN OUT

UNITED WAY OF LOS ANGELES ONE HUNDRED THOUSAND DOLLARS

SHERRIL JOHNSON

Signature of Testator

2.3 ALL OTHER ASSETS (MY "RESIDUARY ESTATE"). I adopt only one Property Disposition Clause in this paragraph 2.3 by writing my signature in the box next to the title of the Property Disposition Clause I wish to adopt. I sign in only one box. I write the words "not used" in the remaining boxes. If I sign in more than one box, the property will be distributed as if I did not make a will.

PROPERTY DISPOSITION CLAUSES (Select one.)

(a) TO MY SPOUSE IF LIVING:

IF NOT LIVING, THEN TO HARROLD JOHNSON

MY CHILDREN AND THE

DESCENDANTS OF ANY

DECEASED CHILD.

(b) TO MY CHILDREN AND THE

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DESCENDANT OF ANY DECEASED CHILD. I LEAVE NOTHING TO

MY SPOUSE, IF LIVING.

(c) TO BE DISTRIBUTED AS

IF I DID NOT HAVE A WILL.

ARTICLE 3

Nominations of Executor and Guardian

3.1 EXECUTOR (Name at least one.)I nominate the person or institution named in the first box of this paragraph 3.1 to serve as executor of this will. If that person or institution does not serve, then I nominate the others to serve in the order I list them in the other boxes.

FIRST EXECUTOR HOWARD CLINTON

SECOND EXECUTOR MELISSA JOHNSON

THIRD EXECUTOR MANDY JOHNSON

3.2 GUARDIAN. (If you have a child under 18 years of age, you should name at least one guardian of the child's person and at least

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one guardian of the child's property. The guardian of the child's person and the guardian of the child's property may, but need not, be the same. An individual can serve as guardian of either the person or the property, or as guardian of both. An institution can only serve as guardian of the property.)

If the guardian is needed for a child of mine, then I nominate the individual named in the first box of this paragraph 3.2 to serve as guardian of the person of that child, and I nominate the individual or institution named in the second box of this paragraph 3.2 to serve as guardian of the property of that child. If that person or institution does not serve, then the others shall serve in the order I list them in the other boxes.

FIRST GUARDIAN

OF THE PERSON DANIEL GLEASON

FIRST GUARDIAN

OF THE PROPERTY DANIEL GLEASON

SECOND GUARDIAN

OF THE PERSON JEROLD CLINTON

SECOND GUARDIAN

OF THE PROPERTY JEROLD CLINTON

THIRD GUARDIAN

OF THE PERSON MEARA TYLER

THIRD GUARDIAN

OF THE PROPERTY MEARA TYLER

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3.3 BOND.

My signature in this box means that a bond is not required for any individual named in this will as executor or guardian. If I do not sign in this box, then a bond is required for each of these persons as set forth in the Probate Code. (The bond provides a fund to pay those who do not receive the share of your estate to which they are entitled, including your creditors, because of improper performance of duties of the executor or guardian. Bond premiums are paid out of your estate.)

I sign my name to this California Statutory Will on at , ,

Date City State

SHERRILL JOHNSON

Signature of Testator

STATEMENT OF WITNESSES

(You must use two adult witnesses and three would be preferable.)

Each of us declare under penalty of perjury under the laws of the State of California that the testator signed this California Statutory Will in our presence, all of us being present at the same time, and we now at the testator's request in the testator's presence and in the presence of each other sign below as witnesses, declaring that the testator appears to be of sound mind and under no duress, fraud, or undue influence.

Signature

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Residence

address:_____

Print Name

Here:_____

Signature

Residence

address:_____

Print Name

Here:_____

Signature

Residence

address:_____

Print Name

Here:_____

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CALIFORNIA STATUTORY WILL

NOTICE TO THE PERSON WHO SIGNS THIS WILL:

1. It may be in your best interests to consult with a California lawyer because this statutory will has serious legal effects on your family and property.

2. This will does not dispose of property which passes on your death to any person by operation of law or by any contract. For example, the will does not dispose of joint tenancy assets or your spouse's share of community property, and it will not normally apply to proceeds of life insurance on your life or your retirement plan benefits.

3. This will is not designed to reduce death taxes or any other taxes. You should discuss the tax results of your decisions with a competent tax advisor.

4. You cannot change, delete, or add words to the face of this California statutory will. If you do, the change or the deleted or added words will be disregarded, and this will may be given effect as if the change, deletion, or addition had not been made. You may revoke this California Statutory Will, and you may amend it by codicil.

5. If there is anything in this will that you do not understand, you should ask a lawyer to explain it to you.

6. The full text of this California statutory will, the definitions and rules of construction, the property disposition clauses, and the

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mandatory clauses following the end of this will are contained in the probate code of California.

7. The witnesses to this will should not be people who may receive property under the will. You should carefully read and Follow the witnessing procedure described at the end of this will. All of the witnesses must watch you sign the will.

8. You should keep this will in your safe deposit box or other safe place.

9. This will treats most adopted children as if they are natural children.

10. If you marry or divorce after you sign this will, you should make and sign a new will.

11. If you have children under 21 years of age, you may wish to use the California Statutory Will with trust or another type of Will.

12. Refer to the information sheet which contains additional information regarding the California probate code relating to Wills

CALIFORNIA STATUTORY WILL

_____

(Insert your name here)

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CALIFORNIA STATUTORY WILL OF

(Print your full name here)

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ARTICLE 1

Declaration

This is my will, and I revoke all prior wills and codicils.

ARTICLE 2

Disposition of My Property

2.1 PERSONAL AND HOUSEHOLD ITEMS. I give all my furniture, furnishings, household items, and personal items to my spouse, if living; otherwise, they shall be divided equally among my children who survive me.

2.2 CASH GIFT TO A PERSON OR CHARITY. I make the following cash gift to the person or charity in the amount stated in words and figures in the box which I have completed and signed. If I fail to sign in the box, no gift is made. No death tax shall be paid from this gift.

FULL NAME OF PERSON OR CHARITY AMOUNT OF GIFT $

TO RECEIVE CASH GIFT

(Name only one. Please print). AMOUNT WRITTEN OUT

DOLLARS

Signature of Testator

Signature of Testator

2.3 ALL OTHER ASSETS (MY "RESIDUARY ESTATE"). I adopt only one Property Disposition Clause in this paragraph 2.3 by writing my signature in the box next to the title of the Property Disposition Clause I wish to adopt. I sign in only one box. I write the words "not used" in the remaining boxes.

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If I sign in more than one box, the property will be distributed as if I did not make a will.

PROPERTY DISPOSITION CLAUSES (Select one.)

(a) TO MY SPOUSE IF LIVING:

IF NOT LIVING, THEN TO

MY CHILDREN AND THE

DESCENDANTS OF ANY

DECEASED CHILD.

(b) TO MY CHILDREN AND

THE DESCENDANTS OF

ANY DECEASED CHILD.

I LEAVE NOTHING TO MY

SPOUSE, IF LIVING.

(c) TO BE DISTRIBUTED AS

IF I DID NOT HAVE A WILL.

ARTICLE 3

Nominations of Executor and Guardian

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3.1 EXECUTOR (Name at least one.)

I nominate the person or institution named in the first box of this paragraph 3.1 to serve as executor of this will. If that person or institution does not serve, then I nominate the others to serve in the order I list them in the other boxes.

FIRST EXECUTOR

SECOND EXECUTOR

THIRD EXECUTOR

3.2 GUARDIAN. (If you have a child under 18 years of age, you should name at least one guardian of the child's person and at least one guardian of the child's property. The guardian of the child's person and the guardian of the child's property may, but need not, be the same. An individual can serve as guardian of either the person or the property, or as guardian of both. An institution can only serve as guardian of the property.)

If the guardian is needed for a child of mine, then I nominate the individual named in the first box of this paragraph 3.2 to serve as guardian of the person of that child, and I nominate the individual or institution named in the second box of this paragraph 3.2 to serve as guardian of the property of that child. If that person or institution does not serve, then the others shall serve in the order I list them in the other boxes.

FIRST GUARDIAN

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OF THE PERSON

FIRST GUARDIAN

OF THE PROPERTY

SECOND GUARDIAN

OF THE PERSON

SECOND GUARDIAN

OF THE PROPERTY

THIRD GUARDIAN

OF THE PROPERTY

THIRD GUARDIAN

OF THE PERSON

3.3 BOND.

My signature in this box means that a bond is not required for any individual named in this will as executor or guardian. If I do not sign in this box, then a bond is required for each of these persons as set forth in the Probate Code. (The bond provides a fund to pay those who do not receive the share of your estate to which they are entitled, including your creditors, because of improper performance of duties of the executor or guardian. Bond premiums are paid out of your estate.)

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I sign my name to this California Statutory Will on

_____ at_____, _____,

Date City State

Signature of the Testator

STATEMENT OF WITNESSES

(You must use two adult witnesses and three would be preferable.)

Each of us declare under penalty of perjury under the laws of the State of California that the testator signed this California Statutory Will in our presence, all of us being present at the same time, and we now at the testator's request in the testator's presence and in the presence of each other sign below as witnesses, declaring that the testator appears to be of sound mind and under no duress, fraud, or undue influence.

Signature

Residence

address:_____

Print Name

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Here:_____

Signature

Residence

address:_____

Print Name

Here:_____

Signature

Residence

address:_____

Print Name

Here:_____

SAMPLE POUR-OVER WILL FOR SPOUSE PUTTING INTO

A REVOCABLE TRUST ANY PROPERTY NOT IN IT

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LAST WILL AND TESTAMENT

(POUR-OVER WILL)

OF

AGNES MILICENT HOWARD

I, AGNES MILICENT HOWARD , a resident of MENDOCINO

County, CALIFORNIA , declare this to be my LAST WILL AND TESTAMENT.

Paragraph One: I revoke all wills and codicils that I have previously made.

Paragraph Two: I am married to JASON HOWARD and all references in this will to my spouse are to JASON HOWARD . I have the following children: FELICITY HOWARD, ALLEN HOWARD and ALICE HOWARD. The terms "my child" and "my children" as used in this will shall include any other children born to or adopted by me.

Paragraph Three: I confirm to my spouse full interest in our community and marital property.

Paragraph Four: I give my entire estate, including all of my real and personal property to the trustee then in office under the trust designated as the HOWARD REVOCABLE TRUST of which AGNES MILICENT HOWARD AND JASON HOWARD are grantors and AGNES MILICENT HOWARD AND JASON HOWARD were designated as trustees. I direct that my entire estate shall be added to, administered, and distributed as part of that trust, according to the terms of the trust and any amendment made to it before my death. To the extent permitted by law it is not my intention to create a separate trust by this will or to subject the trust or the property added to it to the jurisdiction of the probate court.

Paragraph Five: If the disposition in Paragraph Four is inoperative or is invalid for any reason, or if the trust referred to in Paragraph Four fails or is revoked, I incorporate here by reference the terms of the trust, as originally executed without giving effect to any amendments made subsequently, and I bequeath and devise my entire estate to the trustee named in the trust as trustee to be held, administered and distributed as provided in this instrument.

Paragraph Six: Except as provided in this will, I have intentionally omitted to provide herein for any of my heirs living at the date of my death.

Paragraph Seven: 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 that contesting beneficiary under this will is revoked and shall be disposed in the same manner provided herein as if that contesting beneficiary had predeceased me without issue.

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Paragraph Eight: I nominate JASON HOWARD

as executor of my estate to serve without bond. If for any reason,

JASON HOWARD

shall fail to qualify or cease to act as my executor, then I nominate FELICITY HOWARD

as alternate executor of my estate to serve without bond. The term "executor" as used in this will shall include any personal representative of my estate.

Paragraph Nine: I direct that all inheritance, estate, or other death taxes that may by reason of my death be attributable to my probate estate or any portion of it, including any property received by any person as a family allowance or homestead, shall be paid by my executor from the residue of my estate disposed by this will, without adjustment among the residuary beneficiaries, and shall not be charged against or collected from any beneficiary of my probate estate.

Paragraph Ten: I grant my executor the following powers under the terms of this will:

1. To retain any such property without regard to the proportion such property or similarly held property may bear to the entire amount held and whether or not the same is of the class in which fiduciaries are authorized by law or any rule of court to invest funds.

2. To sell any such property upon such terms and conditions as may be deemed proper at either public or private sale, either for credit for such period of time as may be deemed proper or for cash and with or without security, and the purchaser of such property shall have no obligation to see to the use or application of the proceeds of sale. To exchange, lease, sublease, mortgage, pledge or otherwise encumber any such property upon such terms and conditions as may be deemed advisable. To grant options for any of the foregoing and to make any lease or sublease, including any oil, gas or mineral lease, for such period of time and to include therein any covenants or options for renewal as may be deemed proper without regard to the duration of any trust, subject only to such confirmation of court as may be required by law.

3. To invest and reinvest and to acquire by exchange property of any character, foreign or domestic, or interests or participations therein, including by way of illustration but not of limitation, real property, mortgages, bonds, notes, debentures, certificates of deposit, capital, common and preferred stocks, and shares or interests in investment trusts, mutual funds or common trust funds, without regard to the proportion any such property or similar property held may bear to the entire amount held and whether or not the same is of the class in which fiduciaries are authorized by law or any rule of court to invest funds.

4. To hold any personal property in any state; to register and hold any property of any kind, whether real or personal, at any time held hereunder in the name of a nominee or nominees; and to take and keep any stocks, bonds or other security unregistered or in such condition as to pass by delivery.

5. To employ in the exercise of absolute discretion investment counsel, accountants, depositaries, custodians, brokers, attorneys and agents, irrespective of whether any person so employed shall be a fiduciary hereunder or a firm or corporation in which a fiduciary hereunder shall have an interest and to pay them the usual compensation for their services out of the principal or income of the property held hereunder in addition to and without diminution of or charging the same against the commissions or compensation of any fiduciary hereunder, and any fiduciary who shall be a partner in any such firm shall nevertheless be entitled to receive his share as part of the compensation paid to such firm.

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6. To continue the operation of any business belonging to my estate for such time and in such manner as my executor may deem advisable and for the best interests of my estate, or to sell and liquidate the business at such time and on such terms as my executor may deem advisable and for the best interests of my estate. Any such operation, sale, or liquidation by my executor, in good faith, shall be at the risk of my estate and without liability on the part of my executor for the resulting losses.

Paragraph Eleven: This Last Will and Testament shall be construed, regulated, and governed in all respects not only as to administration but also as to its validity and effect by the laws of the State of CALIFORNIA .

Paragraph Twelve: As used in this will, the term "issue" shall refer to lineal descendants of all degrees, and the terms "child," "children," and "issue" shall include adopted persons.

Paragraph Thirteen: This Last Will and Testament has been executed in duplicate. Upon my death, either duplicate original will may be offered for probate. If upon my death the will in my possession cannot be found, it is not to be presumed that I destroyed or revoked the will.

Paragraph Fourteen: If at my death any of my children is a minor, I nominate my brother, HAROLD LYDON CRIER as guardian of both the person and estate of my minor child to serve without bond. If for any reason HAROLD LYDON CRIER shall fail to qualify or cease to act as such guardian, then I nominate my sister, HELEN FAYE MASON as alternate guardian to serve without bond.

I subscribe my name to this will on this date January 15, 2002 at Ukiah, California .

_____

AGNES MILICENT HOWARD

On the date last written above, AGNES MILICENT HOWARD declared to us the undersigned that the foregoing instrument consisting of six (6) pages including the page signed by us as witnesses, was the testator's LAST WILL AND TESTAMENT and requested us to act as witnesses to it. The testator thereupon signed the will in our presence, all of us being present at the same time. We now at the testator's request in the testator's presence and in the presence of each other subscribe our names as witnesses.

_____

Residing at _____

_____

Residing at _____

_____

Residing at _____

STATE OF _____

COUNTY OF _____

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On _____, before me,_____

personally appeared _____

_____ (Name(s) of Signer(s)) personally known to me or proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

WITNESS MY HAND AND OFFICIAL SEAL.

_____

LAST WILL AND TESTAMENT

(POUR-OVER WILL)

OF

I, , a resident of

County, , declare this to be my LAST WILL AND TESTAMENT.

Paragraph One: I revoke all wills and codicils that I have previously made.

Paragraph Two: I am married to and all references in this will to my spouse are to . I have the following children: . The terms "my child" and "my children" as used in this will shall include any other children born to or adopted by me.

Paragraph Three: I confirm to my spouse full interest in our community and marital property.

Paragraph Four: I give my entire estate, including all of my real and personal property to the trustee then in office under the trust designated as the of which are grantors and were designated as trustees. I direct that my entire estate shall be added to, administered, and distributed as part of that trust, according to the terms of the trust and any amendment made to it before my death. To the extent permitted by law it is not my intention

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to create a separate trust by this will or to subject the trust or the property added to it to the jurisdiction of the probate court.

Paragraph Five: If the disposition in Paragraph Four is inoperative or is invalid for any reason, or if the trust referred to in Paragraph Four fails or is revoked, I incorporate here by reference the terms of the trust, as originally executed without giving effect to any amendments made subsequently, and I bequeath and devise my entire estate to the trustee named in the trust as trustee to be held, administered and distributed as provided in this instrument.

Paragraph Six: Except as provided in this will, I have intentionally omitted to provide herein for any of my heirs living at the date of my death.

Paragraph Seven: 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 that contesting beneficiary under this will is revoked and shall be disposed in the same manner provided herein as if that contesting beneficiary had predeceased me without issue.

Paragraph Eight: I nominate

as executor of my estate to serve without bond. If for any reason,

shall fail to qualify or cease to act as my executor, then I nominate

as alternate executor of my estate to serve without bond. The term "executor" as used in this will shall include any personal representative of my estate.

Paragraph Nine: I direct that all inheritance, estate, or other death taxes that may by reason of my death be attributable to my probate estate or any portion of it, including any property received by any person as a family allowance or homestead, shall be paid by my executor from the residue of my estate disposed by this will, without adjustment among the residuary beneficiaries, and shall not be charged against or collected from any beneficiary of my probate estate.

END OF CHAPTER PREVIEW

CHAPTER 7

ESTATE PLANNING QUESTIONNAIRE

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Before anyone starts on the creation of an estate plan it is important, indeed it is critical, that the person be aware of both the size of the estate and how it ultimately is to be distributed. There are a variety of available ways to accomplish the desired result, but they should all begin with the person knowing what the desired result. The purpose of this questionnaire is to assist the reader in marshalling (assembling) the assets for the twin purposes of evaluating the size of the estate and also to avoid missing or overlooking assets. Assets left out of an estate plan, regardless of the reason, will have to be probated unless they fall into a state's exemptions from probate such as being in joint tenancy or in a trust of some type.

The use of such an estate planning questionnaire cannot be over-stressed. It is not uncommon for a person to forget a piece of property inherited years earlier from old Uncle Bill in Tulsa or Aunt Emily in Maine. Then after death, the person's heirs discover the existence of the forgotten property. Thereafter, the heirs are forced to spend thousands of dollars needlessly to probate the property to place the title in their names.

Unless a person knows the size of his estate, it is difficult to make an accurate estate plan. If gifts figure in the estate plan, the person must know how much to give to reduce the estate's value below the value of the unified credit.

This questionnaire is structured to help recall to mind any forgotten assets and serves as a guide to the executor, trustee or heirs as to where property is located. This questionnaire is needed even if the person knows the extent of his property, and where it is going. In any event, this form does make decisions easier for the heirs when they use it. Use of the questionnaire also tends to prove the competency of the person to make an estate plan. In any Will or trust contest, use of this schedule would be evidence demonstrating that the person used deliberate care in drafting the estate plan. Such evidence, in any competency challenge, would be beneficial.

ESTATE PLANNING QUESTIONNAIRE

A. BACKGROUND INFORMATION

1. Name (include all other names once used, i.e. maiden) _____

2. Address and phone number (home and business)
_____

3. Employer's name, address and phone number:
_____

4. Spouse's employer's name, address and phone number: _____

_____

5. Occupation:_____

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6. Spouse's occupation:_____

7. Social security number:_____

8. Spouse's social security number:_____

9. Former military service (branch and dates of service): _____

_____

_____

10. Date and place of birth:_____

11. Name of spouse:_____

12. Date and place of spouse's birth: _____

_____

13. Date and place of marriage: _____

_____

14. Length of residency in the state: _____

_____

15. Previous marriages for each spouse: _____

_____

_____

_____

16. Children:_____

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_____

_____

17. Children of spouse (step-children):_____

_____ _____

18. Deceased children: _____

_____

19. Grandchildren:_____

_____

20. Grandchildren of spouse: _____

_____

21. Parents and address: _____

_____

_____

_____

22. Parents of spouse and address: _____

_____

_____

_____

23. Last will:

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a. Date executed:_____

b . Location of original: _____ _____

c. Attorney who prepared will, address, phone: _____

_____

_____

B. PROPERTY

1. Real property (for each piece of real property state):

a. (1) Type of property: _____

_____

(2) Location of property: _____

_____

(3) Holder and amount of liens on the property:_____

_____

(4) Fair market value of the property not deducting for the liens: _____

(5) Date of purchase and original amount: _____

_____

(6) How is title to the property taken? (What does it say on the deed? separate property, joint tenancy, tenancy in the entirety, tenancy in common):
_____

b. (1) Type of property: _____

(2) Location of property: _____

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_____

_____

(3) Holder and amount of liens on the property:

_____

(4) Fair market value of the property not deducting for the liens: _____

_____

(5) Date of purchase and original amount:_____

_____

(6) How is title to the property taken? (What does it say on the deed? separate property, joint tenancy, tenancy by the entirety, tenancy in common):
_____

_____

c. (1) Type of property: _____

(2) Location of property:_____

_____

(3) Holder and amount of liens on the property: _____

_____

(4) Fair market value of the property not deducting for the liens: _____

END OF CHAPTER PREVIEW

CHAPTER 8

ESTATE AND INHERITANCE TAXES

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One of the main reasons for doing estate planning is to eliminate or minimize estate and inheritance taxes, both on the state and federal side. To effectively plan an estate, a person must know how the Internal Revenue Code and his own state's tax laws affect the property in the estate.

The purpose of this chapter is to appraise the reader of the federal and state inheritance and estate taxes to which estates are subject. Given that each state's taxing provisions are different, the most that can be done here is to give the taxing schedule for the state. Hopefully, the reader will be able to employ it in calculating taxes under whatever estate planning scheme is adopted.

I. ANNUAL EXCLUSION

Under federal law every person can give $11,000 per year to an unlimited number of individuals without incurring a federal gift tax or having his unified credit reduced for the gifts. For example, assume a man has two children and five grandchildren. As such, he can give each child and grandchild $11,000 each every year. This means that the man can give $77,000 or less per year tax-free: without having to pay any gift taxes.

By making such gifts it is possible to reduce an estate substantially over a period of years. Such gifts are not included in the estate of the donor after his death. For this reason, gifts are an excellent means of reducing the size of the estate for federal estate tax purposes provided the donor lives long enough to give away enough property.

II. UNLIMITED MARITAL CREDIT

The Internal Revenue Code authorizes an unlimited marital credit for all transfers of property between spouses if they are American citizens. If the recipient of the transfer is not an American citizen (Internal Revenue Code Section 2523), there is no unlimited marital credit for gifts. Instead, the marital credit for gifts from an American citizen to an alien spouse is only $110,000 per year. This means that an American citizen can only give $110,000 per year or less to an alien spouse without having to pay federal gift taxes. If the spouse were an American citizen, any amount of property could be given away each year tax-free.

The unlimited marital deduction is also not available for a trust established by an American citizen for an alien spouse. Section 2056 of the Internal Revenue Code requires that such gifts are immediately taxable to the estate of the American spouse, unless it was placed in a qualified domestic trust. In such case the tax is delayed until distribution to the alien spouse. The tax is delayed: it is not forgiven as it would be if the receiving spouse was an American citizen. Therefore, if a couple wishes to use a joint trust, they should both be American citizens or consult a tax attorney or other tax professional to determine how the reduced marital credit will affect them. This problem can be cured by the non-citizen spouse becoming a citizen.

If a husband gives $1,000,000 to his wife, an American citizen, the unlimited marital credit ensures there will be no federal estate gift taxes on the transfer.

III. UNIFIED CREDIT

Under federal law, everyone can pass upon death a total of $1,000,000 of property, which gradually rises to an unlimited amount in 2009 and then reduces again to $1,000,000 under the Tax Relief Act Reconciliation Act of 2001. As bizarre as it may seem, Congress did not make the elimination of the estate tax permanent. It is eliminated for only one year and is reinstated at the top rate of 55% with a $1,000,000 unified credit unless Congress by another tax act makes the elimination of the estate tax permanent.

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Under the Tax Act of 2001, Congress imposes a gift tax to restrict the transfer of income producing property from high income to low income taxpayers. The gift tax exemption beginning in 2010 is $1,000,000. So even though transfers of property after death can be made tax free in 2010 for at least one year, unless made the estate tax elimination is made permanent by Congress, a gift tax on the transfer of property while alive will remain. The gift tax under the 2001 Tax Act is equal to the top individual tax rate at the time of the gift.

The Tax Act of 2001 changed the annual exclusion of $11,000 per year per person (up from $10,000) for gifts made during life. So taxpayers can still give $11,000 per year per person away without having it reduction the unified credit amount of the donor.

V. STATE ESTATE AND INHERITANCE TAXES

A. PICKUP TAXES

Most states do not impose a direct estate or inheritance tax on an estate. Instead, many states employ what is called a "pickup tax." Under federal law, a decedent is permitted to take a statutory credit for a fixed amount of state death taxes. These states having pickup taxes require the estate of the decedent, that must file and pay federal estate taxes, to deduct the maximum allowable state credit for death taxes and pay it to the state. Prior to the Tax Act of 2001, the ultimate tax was still the same of the decedent's estate for tax purposes. The total tax owed and paid remained the same it was just split between the IRS and the state taxing agency. If the estate did not pay the pickup tax, it would remain liable for the taxes along with interest. A claim for a refund on the overpayment of any estate tax could be sought from the IRS, along with interest, if it is filed within three years of the overpayment of the estate tax.

The 2001 Tax Act made the area much murkier. The Act instituted of the State death tax credit. Under the Act the credit will be phased out by 2005 and replaced by a deduction for death taxes actually paid.

Year	REDUCTION IN TAX CREDIT
2002	25%
2003	50%
2004	75%
2005	Credit eliminated replaced with deduction for taxes actually paid

For example, if a decedent in one of the following states died with an estate of less than $1,000,000, there would be no federal or state estate taxes. Assume however that the decedent died in one of those states and he had a large estate which generated a federal estate tax of $23,000. If the state death credit in effect then is $5,000, the state gets $5,000 and the IRS gets the remaining $18,800.

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The states with the pickup tax are:

ALABAMA ALASKA ARIZONA ARKANSAS CALIFORNIA

COLORADO DIST. OF COLUMBIA FLORIDA GEORGIA

HAWAII ILLINOIS MAINE MINNESOTA NEVADA

NEW MEXICO NORTH DAKOTA OREGON PUERTO RICO

RHODE ISLAND SOUTH CAROLINA TEXAS UTAH

VERMONT VIRGINIA WASHINGTON W. VIRGINIA WISCONSIN WYOMING

B. STATE TAX SCHEDULES

Below are the state estate and inheritance tax rate schedules. These rates are applied to estates in probate in that state. In these states the inheritance taxes usually apply to the recipient of decedent's property. In most states property distributed to spouses and children is taxed at lower rates than property distributed to others. For this reason each state's tax rate is different. The reader must calculate his taxes using the particular state schedule where probate and any ancillary probate is conducted.

The reader should also be aware that tax laws frequently change. In the last few years several states have repealed their inheritance and estate taxes. In the future such taxes may again be reimposed or raised.

CONNECTICUT

CLASS AA Surviving spouse

CLASS A Parent, grandparent, adoptive parent or natural or

adopted descendant

CLASS B Son or daughter-in-law of child (both natural or adopted) who has not remarried. Step-child, brother or sister (full, half or adopted). Brother's or sister's children or descendants (both natural and adopted)

CLASS C All other heirs

TAXABLE AMOUNT TAX RATE

CLASS AA -0- -0-

CLASS A 50,000 to 150,000 3%

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150,000 to 250,000 4%

250,000 to 400,000 5%

400,000 to 600,000 6%

600,000 to 1,000,000 7%

1,000,000 and over 8%

CLASS B 6,000 to 25,000 4%

25,000 to 150,000 5%

150,000 to 250,000 6%

250,000 to 400,000 7%

400,000 to 600,000 8%

600,000 to 1,000,000 9%

1,000,000 and over 10%

CLASS C 1,000 to 25,000 8%

25,000 to 150,000 9%

150,000 to 250,000 10%

250,000 to 400,000 11%

400,000 to 600,000 12%

600,000 to 1,000,000 13%

1,000,000 and over 14%

EXEMPTIONS:

1. Class AA All property is exempt

2. Class A First $50,000 is exempt

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3. Class B First $6,000 is exempt

4. Class C First $1,000 is exempt

The state has an estate tax equal to the federal state death tax credit.

DELAWARE

CLASS A Spouse

CLASS B Parent, grandchild (both natural and adoptive), son-in-law and daughter-in-law, lineal descendant or step-child

CLASS C Brother, sister, their descendants, aunts and uncles and their descendants

CLASS D All others

TAXABLE AMOUNT TAX RATE

CLASS A 70,000 to 100,000 2%

100,000 to 200,000 3%

200,000 and over 4%

CLASS B 25,000 to 50,000 2%

50,000 to 75,000 3%

75,000 to 100,000 4%

100,000 to 200,000 5%

200,000 and over 6%

CLASS C 5,000 to 25,000 5%

25,000 to 50,000 6%

50,000 to 100,000 7%

100,000 to 150,000 8%

150,000 to 200,000 9%

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200,000 and over 10%

CLASS D 1,000 to 25,000 10%

25,000 to 50,000 12%

50,000 to 100,000 14%

100,000 and over 16%

EXEMPTIONS:

1. Class A First $70,000 is exempt

2. Class B First $25,000 is exempt

3. Class C First $5,000 is exempt

4. Class D First $1,000 is exempt

The state has an estate tax equal to the federal state death tax credit.

END OF CHAPTER PREVIEW

CHAPTER 9

CONSIDERATIONS IN DECIDING WHETHER TO USE A

WILL OR REVOCABLE TRUST FOR ESTATE PLANNING

Deciding upon a type of estate plan that a person or a couple will employ is one of the most important personal decisions will ever be made. Use of a trust or Will in an estate plan should only be done after careful deliberation. In most instances, a revocable trust will be superior to probate of a will.

Probate actions are the only legal proceedings in which fewer number each year are being instituted. Revocable trusts were designed to replace probates and they do it very well. A probate action exists solely to determine who gets a person's estate when no provision had been made by the decedent to provide for its immediate passing upon death. More people are turning to revocable trusts to avoid probate and time-consuming hassles, hearings and delays which it entails. Some of the prime advocates for revocable trusts are judges themselves. Most judges, handling probate matters, view the basic exercise of probate jurisdiction as unnecessary in view that revocable trusts can do the job faster and cheaper.

Although revocable trusts are, however, generally superior to probate, there are estate situations where probate may be advantageous. A general rule is good but with every rule there is an exception. Before deciding on a trust, each person should review his personal situation to determine if it is an exception to the rule and that therefore a probate should be used.

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This chapter deals with the major disadvantages commonly cited by estate planners as grounds for not using a revocable trust. They are presented here for the reader to apply them to his own fact pattern to determine if a trust is warranted.

This book is written for the average person with an average estate equal to no more than the unified credit which is $1,000,000 individually or $2,000,000 per couple through 2004 and rises to unlimited in 2010 and then reduces down again to $1,000,000 each under the 2001 Tax Act.

Persons with estates significantly over these amounts should go to a tax advisor and spend a few dollars for the expert estate planning needed by virtue of having a larger estate. Someone with assets significantly above these limits should consider charitable contributions, charitable trusts, life insurance trusts and a myriad of other estate devices that are far beyond the scope of this book. The trusts contained in Estate Planning II are for people who have already made up their minds to use a revocable trust or are considering it and have assets close to the limits stated above. According to IRS estimates, those trusts apply to 90% of the American people.

It is impossible to address every tax consideration that could arise from the use of a trust. Bearing that in mind, here presented are the most important ones. Nonetheless, the reader should be able to make a knowledgeable and informed decision as to whether to execute a will or use a revocable trust as his main estate planning tool after reading this book and the second volume, Estate Planning II.

I. EFFECTS OF DIVORCE ON PROBATE AND REVOCABLE TRUSTS

In many states a divorce automatically revokes all gifts made to a former spouse in a will. In some states the validity of the gifts still remains in effect until the will is changed.

A revocable trust is a nonprobate transfer, and the property contained therein passes by contract. Therefore, a divorce will not affect a divorcee's right to receive a distribution from the ex-spouse's revocable trust unless the divorce decree specifically terminates that right. Thus, unless a revocable trust is amended after a divorce to remove the former spouse as a beneficiary, that former spouse will still receive the original share of the trust even though now divorced from the deceased ex-spouse.

A difficult situation exists when an incompetent trustor (creator of the trust) is divorced. An incompetent trustor cannot revoke or amend a trust that was validly created during a time when the trustor was competent. The conservator or guardian of the incompetent trustor must seek court permission to revoke the trust in the divorce proceeding or in a separate petition.

While divorce is always a consideration in any relationship, amending a revocable trust is extremely easy. All the trustor must do is deliver a written statement to the trustee, who is usually himself, stating that the former spouse is not to receive anything under the trust. The trustor notifies the trustee that the trust is either terminated or that the former spouse's share goes to someone else. It is that simple. Although the revocation does not need to be witnessed, it should be to avoid having its execution challenged by the former spouse.

II. CREDITOR CLAIMS AGAINST THE ESTATE

Under probate law, the decedent's creditors are given a statutory period of time, usually four months, after the probate is opened to present their claims against the estate (debts owed by the decedent) for payment. Claims filed after that period normally are disallowed and cannot be paid no matter how meritorious. This can be quite an advantage to an estate. Should large creditors happen to be late in presenting their claims, they won't be paid. As such, the heirs will receive the estate free of any potential creditor claims not presented during the statutory period.

In addition, a probate also permits a certain amount of property to pass to the family as a family allowance. This property is exempt from all creditor claims. The amount of the family allowance varies from state to state, but it can exceed $40,000.

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On the other hand, a revocable trust does not cut off any creditor claims. A creditor can sue the trust or the beneficiary receiving the trust property for a period of four years (depending on the state's statute of limitations) for debts owed by the decedent. The beneficiaries of the estate are responsible to pay any judgment awarded that is within the value of the trust property they received.

A decedent cannot avoid his debts by transferring property into a trust for the trustor's benefit. All states have laws which prevent transfers designed strictly to avoid or defraud creditors. So a revocable trust established by a trustor would be liable for the trustor's debts.

Generally, if use of a trust will pass more to the beneficiaries after all the creditors have been paid than if a Will had been used, then the trust should be the estate planning vehicle employed. Usually this is the case because once an estate exceeds the state limits for a summary probate, it will cost more to probate the estate than it would to create the trust and thereby avoid the probate.

III. STATUTORY SHARE OF SURVIVING SPOUSE

A revocable trust cannot deprive a surviving spouse of a statutory share of the deceased spouse's estate. If state law gives a spouse a mandatory one-third share of the other spouse's estate, the surviving spouse can insist on that one-third share regardless of the amount the trust document purports to give the surviving spouse.

In community property states there usually are no statutory shares in a spouse's estate because the community property interest replaces the need for a statutory share. Most states, however, do have mandatory statutory shares. Therefore, in order for the trust to work the surviving spouse must elect to take the share given under the trust and waive the statutory share.

As a practical matter, this is usually not a problem. A husband and wife usually create a joint trust which establishes how they want the property distributed upon both of their deaths. The most common joint trust gives everything to the surviving spouse with the remainder, if any, going to their children. In the usual joint trust, the surviving spouse is receiving far more property than the statutory share. The bottom line is that if one spouse feels that the other spouse will challenge the trust, don't bother with it.

IV. WILL OR TRUST CONTESTS

Both wills and trusts can be challenged by heirs, beneficiaries or disinherited family members. The challenges are the same for each: lack of capacity, mistake, fraud, duress, insane delusion, pretermitted heirs, etc.

There is no difference as to how a court will treat a will contest or a trust contest. The probate court has the same jurisdiction to determine trust contests as it does will contests.

All wills and trusts should have a protective clause to limit challenges. The no-contest clause states that should any heir or beneficiary challenge a trust and lose, the challenger also loses all right to receive property under the will or trust. For example, a beneficiary due to inherit $1,000,000 seeks to inherit $2,000,000 by overturning the will or trust. If he loses the challenge, the beneficiary also loses the $1,000,000 that was to pass under the Will or trust. It is amazing to contemplate the amount of litigation avoided by the No-Contest Clause in Wills and Trusts.

V. TIME IT TAKES TO PROBATE A WILL OR TRANSFER PROPERTY IN TRUST

Assets in probate can be held for quite a while before final distribution to the heirs. Partial distributions based on need can be made under court approval prior to the close of the estate. Generally, a normal probate (assets over $60,000 that are not going to a surviving spouse) takes a minimum of six months.

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Under the Uniform Probate Code, adopted by many states including Colorado, the personal representative may take possession of the decedent's assets within five days of death. In addition, there are special provisions for summary probates when the estate is small or going primarily to the surviving spouse. Such summary proceedings are fast, usually no more than two months.

Revocable trusts are the fastest way to transfer assets following the trustor's death. Upon the trustor's death, the trustee or successor-trustee immediately transfers the property in accordance with the terms of the trust, subject only to whatever delays exist in paying required federal and inheritance taxes. Since the same delay for payment of taxes exists for probates, trusts clearly have the advantage of speed.

VI. EFFECT OF REVOCABLE TRUST ON MEDICAID ELIGIBILITY

A revocable trust has an unfair effect on the beneficiary spouse's ability to claim Medicaid benefits if institutionalized. For this reason elderly couples with small estates should give particular attention to this matter if they feel that they might one day have to seek institutionalized Medicaid assistance.

Under 42 U.S.C. Section 1396(a)(k), assets and income from a revocable trust for a surviving spouse institutionalized as a Medicaid recipient will be counted as available for the surviving spouse's use in determining eligibility for Medicaid assistance. The assets and income will be attributed to the surviving spouse even though the trust has placed an independent trustee in control. This is not the case when the trust was created for the surviving spouse in the deceased spouse's will. The assets and income of a testamentary trust (trust created by a will) will not be counted toward the institutionalized spouse in determining Medicaid eligibility.

This is an important consideration and should be reviewed with the Social Security Administration if Medicare is an important consideration for a person. Democrats in Congress have proposed changing the law to include assets from a testamentary trust into a surviving spouse's estate as well as those of a revocable trust created by a deceased spouse.

VII. GIFTS WITHIN THREE YEARS OF DEATH

Nowadays gifts made by an individual within three years of death are no longer brought back into the estate for tax purposes. There are exceptions: those transfers involving life insurance or those transfers in which the decedent retained control over the property. Therefore, a parent, for example, could give $10,000 to a child within three years of death without having the money return to the parent's estate for estate tax purposes.

A different situation exists when the parent makes the gift directly from a revocable trust. The IRS holds that gifts made directly from a revocable trust within three years of the trustor's death are included in the trustor's estate for tax purposes. In other words, if the parent's revocable trust makes a $10,000 gift to the child, the gift will be brought back into the estate for tax purposes (Revenue Ruling 75-553, 1975-2 C.B. 477).

This is a result of incompetent tax writing by Congress. The problem, however, is easily avoided if the trustor first takes the $10,000 out of the trust in the parent's own name before making the gift. In other words, the transaction goes through two steps rather than one to avoid having the money brought back into the estate.

VIII. TAX I.D. NUMBERS

Everyone fears the IRS. No one wants to have anything to do with the IRS any more than the average person looks forward to going to a dentist for a root canal. The thought of having to get a Federal Identification Number scares most people. Getting an I.D. number means that the person has become a cipher in the IRS machine, and secrecy and privacy have been lost to the taxing behemoth.

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Once a probate is opened and a tax return due, the personal representative is required to file for a Federal Identification Number. This I.D. number must be placed on all income tax and estate tax returns for the estate.

In a revocable trust, no federal tax identification number is required and no separate tax return for the trust need be filed as long as the grantor is the trustee. The trust, however, will need a federal identification number and must start filing annual federal fiduciary tax returns (Form 1041) if the grantor is replaced as trustee.

IX. EFFECT OF TRUST ON HOMESTEADS

A potential drawback in a trust is that homestead exemptions are not available in some states for homes placed into a revocable trust. A homestead exemption is an exemption from attachment on the equity of a person's home by a creditor's judgment. For example, if a state's homestead exemption is $45,000 and the equity in a debtor's home is $46,000, a judgment creditor can only keep $1,000 if the home is taken and sold to pay off a judgment. The remaining $45,000 in equity is returned to the debtor to start over.

If the home is placed into a trust, the homestead exemption will not apply, and the creditor can take the entire $46,000 of equity to reduce the trustor's debts.

The loss of the homestead exemption can be a significant concern in deciding to create a trust. If a person is in a business with a potential for a great deal of liability or lawsuits, it might be advisable not to form a trust. The average person will, however, have enough insurance to guard against judgments for normal negligence, and thus the loss of the homestead is not that important. Hopefully all states will eventually extend homestead protection to homes placed into a trust.

X. TRANSFER TAXES

Some states or territories, such as the District of Columbia, impose transfer taxes for property placed in a revocable trust. Most states do not impose a transfer tax as long as the grantor is a beneficiary in the trust. The rationale for not applying the tax is obvious: there really is no change of ownership until the grantor dies. Until the death of the grantor, the grantor has the power and ability to terminate the trust and receive the property back. As such, the transfer is at best tentative. Neither Colorado or California charge a transfer tax for property placed into a revocable trust if the grantor is a beneficiary.

In any event the transfer taxes are a small amount compared to the savings in probate fees.

XI. REAPPRAISAL OF REAL PROPERTY PLACED INTO TRUST

Some states reappraise real property to determine tax value when the property is placed in a revocable trust. Most states will not reappraise real property placed into a revocable trust as long as the grantor is a beneficiary in the trust. The rationale for not reappraising the real property is obvious: there really is no change of ownership until the grantor dies. Until the death of the grantor, the grantor has the power and ability to terminate the trust and receive the property back. The transfer is at best tentative. Neither Colorado nor California will reappraise real property placed into a revocable trust where the grantor is a beneficiary.

In any event, the additional taxes in those states where reappraisal occurs usually is a small amount when compared to the savings in probate fees. If not, then the transfer of the property into the trust might be delayed, or the trust may not be formed at all.

XII. TAX EXEMPTIONS

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There is a slight difference in the tax exemptions available for trusts and those tax exemptions available for estates. A revocable trust has a personal exemption of $300 while an estate has a personal exemption of $600. This means that an income tax return need not be filed for a probate until its income exceeds $600 while a trust must file the return when its income exceeds $300.

There are expensive probate fees involved a the probate of a Will transfers large income-producing property as opposed to the use of a trust. Although a trust only has an exemption of $300, as compared to a probate, use of the trust avoids having to probate a large estate and thereby offers significant savings by avoiding having to pay the large probate fees.

XIII. S CORPORATION STOCK

One area where a probate has a distinct advantage over a revocable trust is where the decedent owned stock in an S Corporation (a corporation treated as a partnership). A trust may hold the stock for two years following the grantor's death. At the end of the two-year period the stock loses its S Corporation status, and the corporation is then taxed as a normal corporation. In contrast, the probate estate may hold the stock until completion of the probate, and the stock will always remain S Corporation stock. This means that the estate can hold the S Corporation stock for years and receive the tax benefits of the S status for the corporation.

An estate may be kept open for as long as 15 years if an installment payment election under Code 6166 was made. It might prove worthwhile to keep the estate open for that long just to keep the S Corporation status.

XIV. DEPRECIATION DEDUCTIONS

There is a tax difference as to how losses for the distribution of depreciated property made to satisfy bequests in a probate and those made by a trust are handled. A probate may deduct such losses whereas a trust may not deduct the losses.

XV. STOCK OPTIONS

END OF PREVIEW

CHAPTER 10

ASSET PRESERVATION THROUGH THE USE OF SELF-SETTLED

SPENDTHRIFT TRUSTS

Probably the most interesting and controversial changes to estate planning to occur within the last 50 years have been the adoption in a minority of states of spendthrift trusts for the asset protection of the trust grantor and not just the beneficiaries' interests in the trust. This is such a major departure from the asset protection law of the majority of states that it may have, in the future, a profound effect as to how people hold title to their property in the United States.

A spendthrift trust has always been a special type of trust, the assets of which, by its own terms, could not be attached by creditors of the trust beneficiary. The history behind the spendthrift trust extends far back into English common law under which assets, primarily land, were kept intact for passage down through a family line.

By definition under the RESTATEMENT (SECOND) OF TRUST SECTION152(2) (1959), a spendthrift trust is "a trust in which by the terms of the trust or by statute a valid restraint on the voluntary and involuntary transfer of the interest of the beneficiary is imposed." This has been taken to mean

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by all state courts that beneficiaries of a spendthrift trust cannot in any way transfer, sell or alienate their interest in the trust. Likewise, creditors of a beneficiary of a spendthrift trust, which in the past did not include a grantor if also a trust beneficiary, could not force the trustee to pay the debts of a beneficiary from the beneficiary's interest in the trust.

HISTORY OF SPENDTHRIFT TRUSTSThe validity of a spendthrift trust as a shield from a beneficiary's creditors was recognized by the United Supreme Court in its decision *NICHOLS VS. EATON* 91 U.S. 716 (1875). The case involved a trust provision calling for the termination of a trust beneficiary's right to require the trustee to pay income to the beneficiary upon the beneficiary's bankruptcy followed by the beneficiary's income interest being replaced by a purely discretionary trust. Under the terms of the newly created discretionary trust, the trustee would not be under any requirement to make any payments to or for the benefit of the beneficiary. Such payments would be at the sole unfettered discretion of the beneficiary. Since such payments were discretionary and not mandatory, the Court held that the creditors of the beneficiary could not attach the assets of the trust or compel the trustee to make a distribution of the trust assets to the beneficiary so they, the creditors, could attach them. In rendering its holding the Supreme Court made clear its reasoning that a creator of trust can make arrangements to assure that the property transferred to a trust would be used for the benefit of a beneficiary and not be taken first by the creditors of the beneficiary. The Court stated:

"[T]he doctrine that the owner of property cannot dispose of

[that property], but that [the beneficiaries sought to be benefitted by the gifts in trust]....must hold [the property given into the trust for their benefit] subject to the debts due his creditors...is one which we are not prepared to announce as a doctrine of this court."

Following the United State Supreme Court's decision all of the states subsequently adopted the rationale set forth in *Nichols* and have held that spendthrift trusts are valid and protect the trust assets from attachment by the creditors of the trust beneficiary.

So complete has been this judicially created bar from a spendthrift trust's attachment by the creditors of a trust beneficiary, that when attachment has been permitted, it has only been by legislative act. The most important and pervasive exception to rule that creditors of a spendthrift trust may not attach the trust is for claims of child or spousal support against a debtor parent or spouse who is the beneficiary of a spendthrift trust. Virtually all states have by legislation enacted laws permitting such creditor claims against a spendthrift trust for which the debtor parent or spouse is a beneficiary. Also both the states and federal government are usually able to attach a beneficiary's interest in a spendthrift trust to satisfy that beneficiary's tax obligations. California has gone even farther and permitted a spendthrift trust to be attached to pay the damage award of a beneficiary convicted of sexual assault. These are all limited exceptions to the general rule which remains firmly entrenched that absent a legislative acts stating otherwise, the assets of a spendthrift trust are not attachable by the creditors of a trust beneficiary.

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