

Guide to Reviewing Your Estate Plan

The purpose of this guide is to help you, as a “Class member”, review estate planning documents purchased by you from We The People. This guide is for educational purposes only, and is not intended to be a substitute for actual personalized advice from a qualified estate planning attorney. No transaction, course of action, or inaction relating to your estate plan should be undertaken without consulting an attorney.

The content of this Guide is the sole responsibility of its author, Matthew O'Donnell, Esq., and the Court's approval of the sending of the Guide to you does not constitute a representation that it is an accurate statement of the law as to the subjects discussed.

This guide will help you review the following basic estate planning documents which you may have signed: Revocable Living Trust, Pour Over Will, Certificate of Trust, General Assignment, Trust Transfer Deed, Spousal Property Agreement, Uniform Statutory Form Power of Attorney, and Statutory Form Advance Health Care Directive.

This guide generally does not refer to specific sections of your trust because your trust appears to be a computer-generated document likely to vary from client to client. Your Uniform Statutory Form Power of Attorney and your Statutory Form Advance Health Care Directive, however, are both mandated by the California Probate Code, and the basic printed forms do not vary from client to client.

Basic estate planning documents should be designed to accomplish six essential goals:

- (1) Avoid court involvement if you become mentally incapacitated;
- (2) Minimize or eliminate estate taxes (“death taxes”);
- (3) Minimize or eliminate capital gains taxes;
- (4) Avoid property tax increases;
- (5) Name your beneficiaries and direct how and when your beneficiaries will receive your estate; and
- (6) Avoid probate.

Note: This guide will not introduce or review advanced estate planning documents designed to help people with large estates (those estates exceeding the 2011 estate tax exemption) minimize death taxes or preserve assets through the use of irrevocable trusts, discounted gifting programs, charitable giving and/or life insurance.

Note: This guide assumes the reviewer is a United States citizen and California resident making either life or death transfers of domestically-owned property to other United States citizens. Estate planning and tax laws involving non-citizens and property owned outside the United States are complex and differ considerably from the rules and laws described here. This guide also does not cover possible additional transfer taxes that may be assessed on transfers to out-of-State residents and transfers of out-of-State property.

NOTE: Currently, same-sex couples married in California and California Registered Domestic Partners enjoy all the rights of opposite-sex married couples *except those major rights and benefits relating to federal tax and entitlement law*. Consequently, the estate and income tax rules and strategies discussed below applicable to married couples still do not apply to same-sex couples married in California and California Registered Domestic Partners. *It is recommended that due to the volatility and conflict that exists between federal and California law, same-sex couples have their estate plans reviewed by a qualified attorney specializing in this area of law.*

NOTE: YOU SHOULD NOT ATTEMPT TO AMEND, REPAIR, OR REVOKE ANY OF YOUR EXISTING DOCUMENTS BY WRITING ON THEM OR ADDING PAGES TO THEM, AS SUCH WRITING OR ADDING OF PAGES MAY INVALIDATE YOUR DOCUMENTS. YOU SHOULD SEEK PERSONAL LEGAL COUNSEL BEFORE MAKING CHANGES TO YOUR DOCUMENTS.

Basic Concepts, Rules and Procedures in Estate Planning

Before you begin reviewing your estate planning documents, you need to have a general understanding of basic estate planning concepts, rules and procedures. The following overview presents basic estate planning concepts with illustrative examples; all calculations are approximations, particularly when tax issues are discussed.

Conservatorship

If you become mentally incapacitated and have no estate planning documents in place, court appointment of a conservator is required to complete financial transactions and health care decisions on your behalf. Conservatorships are time-consuming, costly and intrusive.

Probate Code 3100 Petition

If you become mentally incapacitated and have no estate planning documents in place, your spouse can petition the court in California for authority to complete certain financial transactions on your behalf without establishing a conservatorship. This procedure is also costly, time-consuming and intrusive, and may require the appointment of court-appointed independent counsel to represent you.

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Estate Taxes

If you are married, there is generally no estate tax (sometimes referred to in this guide as “death taxes”) on estates passing directly and unhindered from one spouse to the other.

Prior to 2010, an estate tax was assessed at your death against your taxable estate transferred to non-spouses. Your taxable estate (referred to in this guide as your “estate”) is everything you own at death including real property, savings and investment accounts, retirement accounts, annuities and life insurance, less debts and allowable deductions.

Over the past decade, only estates transferred at death to non-spouses and valued at more than a certain exempted amount (i.e. \$1,000,000 in 2003; \$1,500,000 in 2004 and 2005; \$2,000,000 in 2006, 2007 and 2008; and \$3,500,000 in 2009) were subject to an estate tax. In 2009 the top estate tax rate was 45%.

Congress repealed the estate tax for those dying in 2010, effectively eliminating the estate tax for one year only. However, the estate tax is scheduled to return beginning in 2011 with an exempted amount of \$1,000,000. This \$1,000,000 exemption amount will be referred to in this guide as your “exemption coupon” which can be used to shield some or all of your estate from exposure to death taxes imposed if you die in 2011 or later. In 2011, the top tax rate will be 55%

Example: Charles and Joan’s estate is valued at \$2,000,000. Charles died in 2008 leaving his portion of their estate to Joan. Joan dies in 2010 owning a \$2,000,000 estate. She leaves her estate to their children.

In this example there was no death tax on Charles’s death because his estate passed directly to Joan, his spouse. Joan’s estate (now including the portion inherited from Charles) will pass death tax-free to their children due to the repeal of the estate tax for those dying in 2010.

Example: Charles and Joan’s estate is valued at \$2,000,000. Charles died in 2008 leaving his portion of their estate to Joan. Joan dies in 2011 owning a \$2,000,000 estate. She leaves her estate to their children.

In this example there is no death tax on Charles’s death because his estate passed to Joan, his spouse. Joan’s estate (now including the portion inherited from Charles) uses her \$1,000,000 exemption coupon available in 2011 to shield the first \$1,000,000 of her estate from death tax. The remainder of Joan’s estate (\$1,000,000) will be exposed to an estate tax of approximately \$550,000 based on the 2011 tax rate of 55%.

Capital Gains Taxes

“Basis” is the purchase price of an asset (e.g., stock or real property). When you sell an appreciated asset, federal and California income tax (“capital gains tax”) of approximately 25% will be imposed on your gain over the basis.

If you are single and have lived in and owned your residence for two out of the last five years, you will not have to pay capital gains tax on \$250,000 of the gain at sale.

If you are married and have lived in and owned your residence for two out of the last five years, you will not have to pay capital gains tax on \$500,000 of the gain at sale.

Both married and single persons can use the cost of any improvements made to real property to increase its basis. Non-residences and other appreciated assets receive no exclusion from capital gains taxes.

Prior to 2010, assets owned by you at death received a new basis equal to the market value at the date of your death (“step up in basis”). This step up in basis practically eliminated capital gains tax on sales made immediately after your death. Assets gifted away prior to your death did not receive a step up in basis.

Example: Akiko purchased her residence in 1978 for \$100,000. She made no improvements to her residence during her life and died in 2009 leaving it to her only son Haruto. Haruto immediately sold the residence for \$900,000 to the next door neighbor in a private sale.

In this example Haruto owed no capital gains tax, having received a full step up in basis on his mother’s residence at her death.

Example: Akiko purchased her residence in 1978 for \$100,000. She made no improvements to her residence during her life. In 2008 she executed a quitclaim deed transferring her home to her only son Haruto. She died in 2009. Haruto immediately sold the residence for \$900,000 to the next door neighbor in a private sale.

In this example Akiko’s residence did not receive a step-up in basis because she did not own it at her death. Haruto owed a tax of nearly \$200,000 on a gain on sale of \$800,000.

The stepped-up-basis rules described above will not apply to those who die in 2010, but will again apply to those who die after 2010. During 2010 (and only during 2010), assets inherited from a decedent take a beginning tax basis of the lesser of (1) the basis the decedent had accumulated for the assets or (2) the market value of the assets at the date of the decedent’s death. To this beginning basis, the decedent’s executor may generally apply up to \$1,300,000 of additional basis (but no asset may ever receive a basis increase in excess of the asset’s fair market value). Additionally under the 2010 rules, assets transferred to a surviving spouse may receive an additional basis increase of up to \$3,000,000, resulting in an overall basis increase of up to \$4,300,000. At the time of this writing, the

application of these new basis rules is extremely uncertain. It is also uncertain if these new basis rules will be cancelled retroactively by Congress.

Example: Akiko purchased her residence in 1978 for \$100,000. She made no improvements to her residence during her life. She died in early 2010. Haruto immediately sold the residence for \$900,000 to the next door neighbor in a private sale.

In this example Akiko's residence did not receive a step-up in basis because she died in 2010. However, Haruto was allowed to add \$800,000 of additional basis to the property's beginning basis (\$100,000) from the allowable \$1,300,000 available to bring the basis up to the date of death market value (\$900,000) to avoid capital gains tax.

Property Taxes

California annually taxes real property based on assessed value at a rate of approximately 1.2%. When a "change of ownership" occurs, the property will be reappraised to its market value as of the date of the ownership change. In many instances this reappraisal will cause a significant increase in annual property taxes.

Transfers of residences between spouses and transfers of residences between parents and children generally will not be considered a "change of ownership" for the purpose of assessing California real property taxes.

Transfers of non-residences between spouses will not be considered a "change of ownership" for the purpose of assessing California real property taxes. Transfers of up to \$1,000,000 of assessed value non-residential property between parents and children will not be considered a "change of ownership". Assessed value is the value appearing on the property tax statement (as opposed to the market value).

Intestate Succession

The intestate succession law in California substitutes a Will for you if you don't have one (i.e., you die intestate). The law chooses your closest relatives to inherit your estate at your death and prescribes the proportion of your estate each of those relatives will receive.

Probate

At your death, if you own assets or property in your individual name, the court must appoint an executor or administrator to sign documents on your behalf to transfer your estate to your beneficiaries. The probate process can be time-consuming and expensive (usually between 3 to 6 percent of the gross estate value if both the executor and attorney charge their fees as defined by the California Probate Code).

Alternatives to Probate

- **Joint Tenancy:** If you own property as a joint tenant with other joint tenants, the surviving joint tenant(s) inherit the property without probate. Joint tenancy controls over the terms of your Will or Trust, which may result in frustrating your testamentary desires at your death.

Example: Bill and Jane have been married for 40 years and have three adult children. They own a home and bank accounts as joint tenants. Jane dies and Bill inherits the estate as the surviving joint tenant. Bill executes a Will leaving his entire estate to his three children. Two years later, Bill marries Ethel and they decide to buy a home together as joint tenants. They later decide to combine their bank accounts as joint tenants. Bill dies two years later. Ethel, as the surviving joint tenant, then adds her own children as joint tenants to the title of the home and bank accounts. Ethel dies.

In this example, Bill probably mistakenly believed his Will would control the disposition of his estate at his death. Instead, Ethel inherited Bill's estate by operation of joint tenancy law. Ethel's children thereafter inherited her estate (which now includes Bill's estate) by operation of that law. Sadly, despite the terms of his Will, Bill's three children take nothing from his estate.

Joint tenancy has the disadvantage of receiving a step up in capital gains basis only as to the interest of the deceased joint tenant. This may leave the surviving joint tenant with a potential capital gains tax at sale.

- **Community Property with Rights of Survivorship:** This form of ownership is similar to joint tenancy but doesn't carry the capital gains tax disadvantages. The surviving spouse will receive a full step up in capital gains basis on the entire property held as community property. However, you should be very careful in using this form of ownership when adding your spouse to an asset you have owned as your separate property. Transfer to this form of ownership may be considered a transmutation (gift) of your separate property to community property for divorce purposes.
- **Pay on Death Accounts:** A "pay on death" (POD) or "transfer on death" (TOD) account is set up with a financial institution directing that the account be paid to designated beneficiaries at your death. Upon presentation of your death certificate, your designated beneficiaries will receive the proceeds in the account without probate.
- **Beneficiary Designations:** Similar to "pay on death" accounts, your life insurance, retirement accounts and annuities all have beneficiary forms that direct payment at your death to your designated beneficiaries.

- **Small Estate:** If your estate or a portion of your estate is held in your individual name and does not exceed \$100,000 in total value, your estate can be probated by means of a “Small Probate Estate” affidavit executed no less than 40 days after your death.
- **Spousal Estates:** Estates passing from you to your spouse can be probated through the use of a summary court proceeding.
- **Revocable Trusts:** A revocable trust is a document signed by you as the grantor (or settlor, trustor, or trustmaker) appointing a trustee (usually you) to control or manage property held in trust. If your estate is held in a revocable trust, it will not be subject to probate. Usually you are both the grantor (maker) and the trustee (property manager) when you create a revocable trust. You will always be the grantor, but if you resign as trustee or become incapable of managing the trust assets as trustee, the trust document usually provides that a successor trustee will replace you.

Now you are ready to review your estate planning documents.

Revocable Living Trust

Trust Name

Does your trust document identify the formal and abbreviated names of the trust at the beginning of the document? This provision avoids confusion and provides clarity on how to appropriately title assets owned by the trust.

Your Name

Does your trust document identify you and list all your aliases and formerly-known-as names? Does your name listed in your trust match your photo identification (driver license or passport)? Financial institutions are becoming increasingly suspicious when names do not match identifications when re-titling your assets into your trust.

Names of Family Members, Beneficiaries and Successor Trustees

Does your trust document clearly identify your family members, the trust beneficiaries and the successor trustees? These identifications should include enough information to eliminate confusion for a successor trustee. If your successor trustees or beneficiaries are not also your relatives, their addresses should be included to eliminate confusion and avoid misidentification. In addition, the names of disinherited family members should be clearly identified to eliminate a contest.

Specific Revocation Provisions

Does your trust document clearly address the circumstances under which the trust (or part of it) would become irrevocable? This issue is particularly important for estate tax planning and for protecting the inheritance by children from the original marriage.

You should also consider including provisions to permit the withdrawal of trust property by your agent under a Durable Power of Attorney for the purpose of making gifts. This authority is vital if gifts or transfers are ever required to avoid estate taxes or qualify for public benefits. The lack of such a provision could cause an expensive court proceeding to gain such authority in the event of your mental incapacity.

Retention of Power to Act Alone

Does your trust document confirm to third parties that a married trustor/trustee has authority to act when his/her spouse cannot (if so desired)? Your trust document should also make clear that if neither you nor your spouse is acting as trustee but you have appointed successor co-trustees, (1) either successor co-trustee may act alone or (2) both successor co-trustees must act together. Failure to state whether successor co-trustees may act independently or must act in unison can create confusion and non-cooperation among the fiduciaries, financial institutions, and beneficiaries.

Procedure to Remove a Trustee

Does your trust document include a procedure for removing a trustee? In some cases, the surviving spouse and beneficiaries may want to remove a trustee they don't like or who is acting irresponsibly. In many cases, this power must be drafted in such a way that it does not cause adverse estate tax or creditor protection consequences for the beneficiaries. Regardless, it is important that a trust have a detailed procedure for removing a successor trustee to preclude the need to petition the court for instructions or intervention.

Procedure to Appoint New Trustee

Does the trust document include a procedure for appointing a new successor trustee if the position becomes vacant? In certain cases, this provision must be drafted specifically to avoid eliminating estate-tax protection and/or creditor protection for the beneficiaries. This issue is especially important for multi-generational trusts.

Determination of Incapacity

Does your trust document include a detailed procedure for determining your incapacity? This type of provision is necessary to avoid court involvement and should be customized to meet your objectives. You may want to consider use of a Disability Panel to avoid the inconvenience and delay of obtaining a physician's declaration. Members of your disability panel should consist of your most trusted relatives and friends to determine your mental capacity.

Guidelines for Distributions During Incapacity

Does your trust document include detailed guidelines for trust administration during your extended incapacity? In general, a poorly-drafted trust will not provide sufficient detail regarding incapacity planning. This can be extremely problematical in blended family situations. Does your trust document clearly set out your priorities? Is support of your spouse a major goal or should your spouse be required to use his/her own assets for support if your health needs are a priority? If you become incapacitated and your spouse requires care, can your separate property be used to pay for your spouse's care?

Ability to Distribute Funds to Dependents During Incapacity

Does your trust document specifically permit distributions of trust property to your spouse and/or dependents during your extended incapacity?

Guidelines for Distributions to the Guardians of a Deceased Trustor's Minor Children

If your estate plan designates a guardian for minor children, does your trust document include guidelines for distribution of trust funds to or for the benefit of the guardian? In some cases the guardian for your children may also be the trustee of your children. In some cases, an independent Special Trustee should be appointed to oversee such distributions to guard against a conflict of interest.

Disposition of Tangible Personal Property

Does your trust document include provisions for the distribution of your tangible personal property? Inclusion of an overly-detailed listing of specific gifts of tangible personal property to various individuals may result in an expensive and time-consuming distributive process following your death. Squabbles over distribution of personal items can also cause undue delay and/or animosity among your beneficiaries. If you suspect that your beneficiaries may not get along after your death, you may want to leave your personal items to one beneficiary with a non-binding suggestion as to a division. This will help prevent disgruntled beneficiaries from delaying the close of an estate by demanding appraisals and a mathematically precise division of personal property.

Provision to Offset Encumbrances on Gifts of Tangible Personal Property

Does your trust document clarify whether the beneficiary of a gift of tangible personal property must accept the gift subject to its accompanying debt? Without this clarification, an unfair result is likely when some beneficiaries must pay off the debt for an asset that someone else receives.

Split Trust Arrangement

If you are married, does your trust document split into separate spousal trusts (if so desired) on the first death? Most blended family couples (and many couples with the same children) split their estates on the first death into two or more separate trusts for the benefit of the surviving spouse.

The goals of split trust arrangements creating a deceased spouse's trust(s) and a surviving spouse's trust include:

- 1) Setting up support, management and creditor protection for the surviving spouse;
- 2) Utilizing the exemption coupon of the deceased spouse; and
- 3) Preventing the surviving spouse from leaving the deceased spouse's estate to someone other than the intended beneficiaries of the deceased spouse.

Trusts holding the deceased spouse's property are commonly referred to as the "B Trust", "Bypass Trust", "Credit Shelter Trust", "Family Trust", "Exemption Trust", "QTIP Trust" or "Marital Trust". There will usually be either one or two deceased spouse's trusts depending on the size of the estate and the value of the deceased spouse's exemption coupon on the first death.

The trust holding the surviving spouse's property is commonly referred to as the "A Trust", "Power of Appointment Trust", "Survivor's Trust" or "Survivor's Trust".

At the surviving spouse's death, the deceased spouse's trust(s) pass to the deceased spouse's children or beneficiaries, and the surviving spouse's trust passes to the surviving spouse's children or beneficiaries.

Community Property Issues

If you are married, does your trust document clearly articulate the treatment of property in a joint trust as community or separate? This is extremely important if you have chosen to split the estate between the deceased spouse's trust(s) and a surviving spouse's trust on the first death, particularly if either you or your spouse have children by prior marriages.

The assets funded on the first death into the deceased spouse's trust(s) and surviving spouse's trust are determined by the character of joint property as separate or community property. The deceased spouse's separate property, along with the deceased spouse's one-half interest in the community property, is usually funded at the first death into the deceased spouse's trust(s). The surviving spouse's separate property, along with the surviving spouse's one-half interest in the community property, is usually funded at the first death into the surviving spouse's trust.

Explosive conflicts between the beneficiaries of blended family spouses may ensue if the separate and community character of property is not clearly referenced in your trust.

Example: Bud and Patricia marry in their 60s after losing their respective spouses. Each has three children by a prior marriage and each brings \$1,000,000 in separate property into the marriage. They continue to work in highly-paid executive jobs. Within a few years of marriage they have combined their assets into joint accounts and a new residence. They sign a Joint Revocable Trust calling for a split on the first death into an Exemption Trust (the deceased spouse's trust) and a Survivor's Trust (the surviving spouse's trust), both for the benefit of the surviving spouse during the life of the surviving spouse. When the surviving spouse dies, the Exemption Trust will pass to the children of the deceased spouse and the Survivor's Trust will pass to the children of the surviving spouse. However, Bud and Patricia do not reference the character of their property as community property or separate property in either the Joint Revocable Trust or in a Spousal Property Agreement. Bud dies.

Patricia, as the surviving trustee, is required to transfer Bud's separate property and one-half of the couple's community property into the Bud's "Exemption Trust". Absent a clear agreement as to the character of property, Patricia's actions in dividing the trusts may be called into question by Bud's children on the second death.

Deceased Spouse's Trust(s) Tax Provisions

If you are married, does your trust document include valid deceased spouse's trust provisions when estate tax is an issue? As discussed above, spouses often use split trusts to make sure each spouse's beneficiaries will receive their parent's share of the estate on the death of the surviving spouse.

Even if you and your spouse have only joint children and no children by prior marriages, your trust may still provide for a split on the first death into deceased spouse's trust(s) and a Survivor's Trust in order to utilize the exemption coupon of the deceased spouse.

Example: Aldo and Elizabeth have three children of their marriage. They have an estate of \$2,000,000. Aldo dies in 2006. The terms of their joint trust provide that the entire estate passes to Elizabeth. Elizabeth dies in 2011.

There is no estate tax when Aldo dies. However, Elizabeth's estate will pay an estate tax of approximately \$550,000 (55%) on the value of her estate exceeding her death coupon (\$1,000,000). The terms of Aldo and Elizabeth's joint trust caused the loss of Aldo's exemption coupon because the entire estate was left to the surviving spouse. Aldo's exemption coupon can only be used by beneficiaries other than his spouse.

Example: Aldo and Elizabeth have three children of their marriage. They have an estate of \$2,000,000. Aldo dies in 2006. The terms of their joint trust provide that Aldo's share of the estate passes to his "Exemption Trust" and Elizabeth's share of the estate passes to her "Survivor's Trust". Elizabeth is the trustee and beneficiary of both trusts for her life. On Elizabeth's death, Aldo's Exemption Trust (which cannot be changed by Elizabeth) will pass to their three children. The terms of Elizabeth's Survivor's Trust (which can be changed by Elizabeth) also names their three children as beneficiaries. Elizabeth dies in 2011 with \$1,000,000 of assets in her Survivor's Trust.

No estate tax is owed on Aldo's death. His exemption coupon was used to transfer his estate tax-free into his Exemption Trust. Likewise, there will be no estate tax on Elizabeth's death because her 2011 \$1,000,000 exemption coupon is sufficient to cover the \$1,000,000 left to her children from her Survivor's Trust. There will also be no estate tax on the transfer of the Exemption Trust assets to the children since it was originally funded using Aldo's exemption coupon.

This form of split-trust planning effectively utilized Aldo's exemption coupon. However, the terms of the Exemption Trust must use "magic language" from the Internal Revenue Code that limits Elizabeth's access to the Exemption Trust; otherwise, Aldo's exemption coupon will not be allowed to shelter his estate from estate tax. Elizabeth may receive all income from the exemption trust but cannot have access to the principal of the Exemption Trust beyond use for her "health, education, support and maintenance". If the word "care" is added to her access rights, or if she is given broad powers to amend or change the Exemption Trust, she will be deemed to own the Exemption Trust, causing the loss of Aldo's exemption coupon.

Detailed Instructions for Allocation of Deceased Trustor's One-Half of Community Property

If you are married, does your trust document include detailed instructions on the method and manner by which trust assets should be allocated upon the first death? Many complex issues are present, including how to allocate the taxable income earned by the Trust following the deceased spouse death but prior to distribution of the assets into shares.

Marital Deduction Planning Method

If you are married, does your trust document provide an appropriate marital deduction planning method? Older trust documents must be reviewed regularly in light of changes in the estate tax law and the value of your taxable estate. Your trust document should select a suitable funding/allocation formula based on projections about your net worth and asset allocation.

Deceased Spouse's Trust(s) Support Provisions

If you are married, does your trust document have adequate provisions for the support of the surviving spouse? When there is a split trust arrangement, some trusts provide that the assets, accounts and property belonging to the Survivor's Trust must be exhausted before the surviving spouse can have access to the assets belonging to the deceased spouse's Exemption Trust. This may cause hardship for the surviving spouse and could result in adverse capital gains tax consequences.

Deceased Spouse's Trust(s) Remarriage Provisions

If you are married, does your trust document have remarriage provisions that reduce the surviving spouse's rights in the event of remarriage (if desired)? When there is a split trust arrangement, some deceased spouse's trusts provide that the surviving spouse's benefits are reduced when the surviving spouse remarries unless the surviving spouse enters into an appropriate pre-nuptial agreement. When this provision is included, it must be reviewed to prevent accidental inclusion of restricted assets in the surviving spouse's taxable estate.

Deceased Spouse's Trust(s) Creditor Provisions

If you are married, does your trust document include language in the deceased spouse's trust(s) allowing for appointment of an independent co-trustee to strengthen insulation from creditors?

Deceased Spouse's Trust(s) Property Tax Provisions

If you are married, does your trust document include language in the deceased spouse's trust(s) preventing reappraisal for property tax purposes? Some deceased spouse's trusts include provisions giving the surviving spouse and "the decedent's issue" rights to principal in the deceased spouse's trust. If real property is allocated to the deceased spouse's trust, this language may cause a "change of ownership" in California as a Parent-Grandchild transfer. The deceased spouse's trust should clearly limit principal rights to surviving spouse and, if desired, "children" of the deceased spouse.

Optional Split Trust Arrangement

If you are married, does your trust document allow you to avoid a split trust arrangement? Some couples do not want to be forced into splitting the estate into a deceased spouse's trust(s) and a surviving spouse's trust on the first death, but instead want to leave this decision up to the surviving spouse. If this is the case, your trust could include optional split trust provisions that allow the surviving spouse to elect (or not elect) to make the split on the first death. This is extremely useful to couples who want to avoid having to carry an irrevocable deceased spouse's trust(s) the rest of the survivor's life. This optional split trust arrangement preserves the option of making the split if utilization of the deceased spouse's exemption coupon is needed to minimize estate taxes but offers no guarantee that the deceased spouse's intended beneficiaries will receive the deceased spouse's share of the estate.

Unambiguous Identification of Beneficiaries Upon Death

Does your trust document clearly identify the primary and contingent beneficiaries? In general, a poorly-drafted trust document will have ambiguous provisions in the event a primary beneficiary predeceases or disclaims inheritance. Proper time limits on survivorship will also prevent confusion and litigation. Estate and trust law precedent requires the use of specific language.

Definitions of Children and Issue

Does your trust document include comprehensive definitions of important legal terms? Does your trust document clearly define your relatives? Clear definitions will eliminate litigation. Does the definition of your children include adopted children or after-born children? Does the definition of your children include your spouse's children from a prior marriage? The use of the term "issue" may create confusion. "Issue" may be deemed to mean all your living descendants (children and grandchildren) when your intention was to only include your children. A specific definition of the term "issue" is important to clarify whether adopted children, stepchildren, and/or grandchildren should be included as beneficiaries of your trust.

Common Trust for Younger Beneficiaries

When the trust provides for younger beneficiaries, does the trust document include a Common Trust provision (if desired)? This option permits the successor trustee to make distributions from a common fund until a specific triggering event occurs (e.g., the youngest child reaches a particular age, or the youngest child graduates from college). A common trust provision guarantees that funds will be available to pay for the education of your children before the trust estate is divided and distributed among your children.

Flexibility to Use Different Methods of Distribution should Unforeseen Events Arise

Does your trust document give the successor trustee an appropriate amount of flexibility or allow the successor trustee to use his/her own discretion if, for example, a beneficiary becomes incapacitated or addicted to drugs? When unique circumstances exist, the successor trustee should be permitted to use his/her own fiduciary discretion regarding the method of asset distribution.

Expressions of Intent to Guide Trustees on Making Distributions

Whenever a successor trustee is permitted to make discretionary distributions, does the trust document include guidelines regarding how and when to distribute assets to the beneficiaries? In general, a comprehensive trust document will include statements to help the trustee interpret your intent.

Lifetime Inheritance Protection Provisions

Does your trust document establish lifetime inheritance trusts for one or more of your beneficiaries instead of leaving the estate to the beneficiary outright? You may want to include this option, even for responsible adult children or beneficiaries. When properly drafted, an "inheritance protection trust" can provide excellent asset protection from lawsuits, divorce, negligence, immaturity and failure of the beneficiary to establish his/her own estate plan.

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The following examples help illustrate situations in which lifetime trusts might be employed to protect the trust beneficiary's inheritance.

Example: William dies and leaves his entire estate to his daughter Gwen. Gwen has always enjoyed gambling and hires Bernie from High-Risk Financial Advisors to manage her money. One day Gwen when asks Bernie for a withdrawal to fund another of her trips to Las Vegas, Bernie tells her the account lost 75% in value over the last quarter.

In this example, William could have considered appointing a trust company, private fiduciary or a seasoned individual or relative as trustee to manage Gwen's inheritance for the rest of her life. The trust could provide that the trustee pay out income and principal as Gwen needs it for her health, education, support and maintenance -- at the discretion of the trustee. William's trust could also include provisions specifically to deal with Gwen's self-destructive tendencies and set up incentives to help her change her ways.

Example: Michael dies and leaves his entire estate to his only son Ben, a physician. Ben is presently defending a lawsuit for misdiagnosing an illness which may have caused the death of a prominent businessman.

Example: June dies and leaves her entire estate to her only daughter Vickie. Vickie marries Peter and uses her inheritance to buy a home with him just before Peter files for divorce from Vickie.

Example: Leroy dies and leaves his entire estate to his only daughter Matilda. Matilda is involved in a car accident in which the other driver sustains a spinal injury. Matilda is carrying auto insurance with policy limits of \$100,000.

Example: Todd dies and leaves his entire estate to his only son Cameron. Cameron marries Jill and they use Cameron's inheritance from Todd to purchase a home as joint tenants. Cameron and Jill are happily raising their three young boys when Cameron dies in a work accident. Jill inherits the home as a surviving joint tenant. A few years later, Jill marries Frank to provide a father figure for her three boys (Todd's grandsons). She decides to sell the home she and Cameron had owned and purchase a new home as a joint tenant with Frank. Frank has two children by a prior marriage. Jill dies. Frank inherits the home as a surviving Joint Tenant. Frank has a Will leaving his entire estate to his two children.

Each of the examples above involves a child who appears to be responsible and whose inheritance is exposed to significant loss or entirely wiped out by circumstances. The parent of each of these children could avoid this threat by setting up a lifetime protection trust for that child.

In all of the examples above, the inheritance received would have been protected if the parent had created a lifetime inheritance protection trust for the child. In all of the examples above, flexibility could be provided to allow the child to invest the funds of the trust, or buy a home with funds, as long as whatever he/she buys continues to be held in his/her name as trustee of his/her trust. He/she could also take distributions for his/her health, education, support and maintenance. If the parent is concerned that the child trustee might need some controls on distributions, the parent could provide for appointment of a "Distribution Trustee" to consent to distributions while the child continues to be the managing trustee.

Special Needs Trust Options

Does your trust document include a Special Needs Trust option for inheritance given to a disabled beneficiary? A special needs trust will prevent the beneficiary's inheritance from making the disabled beneficiary ineligible for government assistance such as SSI or Medi-Cal benefits. In general, a comprehensive special needs trust document will include detailed provisions for a Care Manager to supervise the care of the disabled beneficiary.

Testamentary Powers of Appointment

Does your trust document include either limited or general powers of appointment for continuing trusts after your death? In most cases, powers of appointment are preferred because they enable greater flexibility in distribution of trust assets. However, careful drafting is required when you seek to restrict the beneficiary from appointing assets to specific persons.

Default Distribution of Inheritance if Beneficiary Fails to Exercise Power of Appointment

When testamentary powers of appointment are included, does the trust document identify a default distribution plan if a trust beneficiary fails to exercise a power of appointment?

Estate Transfer

Does your trust document transfer your trust, "death tax" free, to your grandchildren upon your child's death? A large portion of the estate can be transferred estate-tax-free from your deceased child's trust to your other child, children or grandchildren, if the trust document is properly written. This is a little used but very powerful asset transfer technique.

Remote Contingent Distribution

Does your trust document include a contingent distribution plan if all of the named beneficiaries are deceased and the trust has remaining funds? You may prefer to designate a favorite charity in this provision.

Guidance to Trustee on Determination of Income and Principal Distributions

Does the trust document provide guidance to the successor trustee regarding allocation of income and principal after your death? State law sets forth general rules, but often fails to articulate how these determinations are made.

Trust Accounting Guidelines

Does your trust document include a provision that establishes accounting guidelines and reporting requirements? The trust document should include a provision that provides guidance and consistency to this process.

Trust Protector Provisions

Does your trust document have provisions to appoint a Trust Protector? You may want to include these provisions in order to protect the long-term integrity of your trust. A trust protector may modify the terms and conditions of the trust in order to comport with your original intent.

Authorization for Delegation of Trustee Duties

Does your trust document permit the successor trustee to delegate authority to various agents? Successor trustees are often unable by themselves to carry out all of the necessary and/or specialized tasks associated with the administration and ultimate termination of the trust.

Authorization for Merger and Severance of Continuing Trusts

Does your trust document permit the successor trustee to combine or sever trusts for greater flexibility and asset management?

Non Prorata Distribution

Does your trust document allow your trustee to distribute your trust estate to your beneficiaries without dividing every single asset among the beneficiaries? This provision will allow your trustee to award certain assets to some beneficiaries with offsetting distributions of other assets to other beneficiaries. This provision may also help your beneficiaries avoid a “change of ownership” for property tax purposes.

Example: Sam has two children. He owns a residence worth \$300,000 and a second home next door worth \$300,000. He bought both properties thirty years ago and only pays property tax of \$300 a year on each property. Sam’s son Travis lives with him while Sam’s other son Taylor lives next door. Sam executes a revocable trust leaving his estate equally to his children. His trust includes non-prorata provisions. Sam dies.

In this example the non-prorata provision allows Sam’s trustee to distribute the residence to Travis and the second home to Taylor as an equal distribution, as opposed to distributing half of each home to each child. Each distribution will be a parent-child transfer exempt from property tax reappraisal as a “change of ownership”. This will permit each child to own his own home without having to buy his sibling out (which would be considered a “change of ownership” as a sibling-sibling transfer).

Authorization for Common Investments

Does your trust document enable the trustee to invest the funds of various sub-trusts in common investments where such investment would be beneficial to affected trust beneficiaries?

Authorization for Termination of Continuing Trusts

Does your trust document enable the trustee to terminate trusts early under appropriate circumstances? Events may transpire to make it no longer economically feasible for the trust to continue.

Authorization for Payment of Beneficiary’s Funeral Expenses

Does your trust document include a provision enabling the successor trustee to pay the funeral expenses, burial or cremation expenses upon the death of a beneficiary?

Expanded Closely-Held Business Operations Authority to Trustee

If you own a closely-held business, does your trust document include expanded trustee power authority? The trustee should be authorized to serve as an officer, director, manager, or in any other capacity, of any proprietorship, partnership, joint venture, corporation or other enterprise in which the trust has an interest.

Special S-Corp Stock Provisions

Does your trust document include special provisions to enable the trust to hold S-Corp stock after your death? The successor Trustee must have discretion to hold S-Corp stock as a separate “electing small business trust” or as a separate “qualified subchapter S trust.”

Coordination with Buy-Sell Agreement

Does your trust document include provisions to coordinate trustee authority with a separate buy-sell agreement of a closely-held business? Specific trust provisions are needed to ensure that the trustee is bound by, and follows, the terms of any buy-sell agreement entered into by you.

Professional Practice Provisions

Does your trust document include provisions to enable the trust to appropriately comply with laws that regulate “professional practices”? These provisions are appropriate when you own a medical, dental or certain other professional practices.

Coordinated Retirement Account Beneficiary Designations

Retirement account beneficiary designations should be reviewed periodically to make sure the beneficiaries receive the maximum deferral of income taxes and to coordinate those beneficiary designations with estate tax issues. Generally speaking, retirement accounts should not name the trust as beneficiary. However, retirement account planning is complex and should be reviewed periodically to confirm that the proper beneficiary designation has been made.

Complete Funding of Trust

Is there evidence that the trust is properly funded? An unfunded or partially funded trust does not avoid probate. Regular review is required to ensure that all assets otherwise subject to probate have been re-titled in the trust name. In addition, life insurance policies should designate the trust as a primary or contingent beneficiary, depending upon one’s estate planning goals and objectives.

Catch-All Funding List

Does your trust document include a general list (commonly referred to as “Schedule A”) of your assets that you intend to fund into your trust? The list should include your real property, bank accounts, brokerage accounts, and tangible personal property, and should make reference to property you own now or may acquire in the future. If necessary, your spouse or beneficiaries may need the court to confirm the listed assets as assets held in your revocable trust should you fail to fully fund them into the trust during your lifetime.

Pour Over Will

A “Pour Over” Will is a Will that names the trustee of your trust as the beneficiary of your estate. This document “sweeps” assets that you still hold in your individual name into your trust at your death. Often the total value of assets left out of trust (and still titled in an individual’s name at death) is less than \$100,000. If that is the case for you, those assets can be probated into your trust by affidavit. If you hold more than \$100,000 of separate property outside your trust at your death, a formal probate of that property will be required.

Certificate of Trust

A Certificate of Trust eliminates the need to produce the entire trust document when dealing with financial institutions and title companies. It is usually attached to instruction letters requesting that financial institutions change the title to certain of your accounts to the name of the trustee of your trust.

General Assignment

General assignments or bills of sale transfer your tangible personal property to the trustee of your trust (and therefore place that property under the purview of your trustee). General assignments can also be used to indicate your intention to fund your accounts and other assets into your trust. This may help you to avoid probate by permitting the use of a summary court petition to confirm any property you inadvertently left out of your trust was trust property at your death.

Trust Transfer Deeds

Properly-drawn Trust Transfer Deeds should be recorded to fund your real property into your trust. A fairly common mistake is to re-title your real property in the name your trust rather than in the name of the trustee of your trust. It is also critical that the name of the trustee(s) and the name of the trust both appear correctly on the deed. Finally, you should make sure your homeowner’s insurance policy names the trustee of your trust as an “additional insured”.

Spousal Property Agreement

A Spousal Property Agreement characterizes marital property as either community property or separate property. If you have a trust that splits on the first death, the characterization of property determines the proper allocation of property between the deceased spouse’s trust(s) and the surviving spouse’s trust. The character of the property will also determine whether a step up in capital gains basis will occur on the first death. Assets owned as community property will receive a step up in basis on the first death. Assets owned as separate property will receive a step up only on the death of the spouse that owns the separate property. Finally, Spousal Property Agreements can include “aggregate community property” provisions which may permit your retirement accounts to be included when an allocation is made between the deceased spouse’s trust(s) and the survivor’s trust. This will help fully utilize the estate tax coupon of the deceased spouse.

Note: As discussed earlier in this guide, the amount of the step up in basis is subject to limitation for assets owned by persons dying in 2010 only. At the time of this writing, the application of new basis rules for 2010 is extremely uncertain. It is also uncertain whether these new basis rules will be cancelled retroactively by Congress.

Uniform Statutory Form Power of Attorney

Although your trust appoints a trustee (usually you to start) to manage assets held by your trust, there are many other financial transactions you regularly make that are unrelated to your trust assets. If your signature is needed to make one of these financial transactions, a Power of Attorney is needed. Many times a Power of Attorney is the only method of acting for an incapacitated person.

Unmodified, a Uniform Statutory Form Power of Attorney adopts a rather limited set of financial powers that are listed in Probate Code Sections 4400-4465. The Uniform Statutory Form Power of Attorney will be referred to below as a "POA". A copy of a blank Uniform Statutory Form Power of Attorney is attached hereto as Addendum A.

Your Name

The beginning of the POA refers to you as appointing an agent (or "attorney in fact") to act for you with regard to powers listed in the document. Does the POA name you by all of the names by which you are known? It is important that at least one of the listed names match the name on your driver license or passport, or financial institutions may refuse to recognize it.

Your Agent

Your agent is the person you empower to make financial transactions on your behalf. Does your POA name your agent by all of the names by which he/she is known? It is important that at least one of the listed names match the name on your agent's driver license or passport, or financial institutions may refuse to recognize it.

Powers

The next section of the POA allows you select (as you indicate by writing your initials) the specific powers you want your agent to be authorized to perform. The full text of these powers is included in the Probate Code. Failure to initial any powers may invalidate the POA. Initialing item "N" adopts all the powers included in the Probate Code Section.

Special Instructions

The next section of the POA gives you the opportunity to add any special instructions or additional powers. Most people, particularly those signing statutory forms, mistakenly believe that once they have signed a POA, their agent can perform almost any financial act. The California Probate Code requires that an agent can perform any of the following acts *only if they are specifically authorized in the power of attorney*:

- Creating, modifying, or revoking a trust;
- Funding with the principal's property a trust not created by the principal or by a person authorized to create a trust on behalf of the principal;
- Making or revoking a gift of the principal's property in trust or otherwise;
- Exercising the right to make a disclaimer on behalf of the principal;
- Creating or changing survivorship interests in the principal's property or in property in which the principal may have an interest;
- Designating or changing the designation of beneficiaries to receive any property, benefit, or contract right on the principal's death; and
- Making a loan to the agent.

The above powers are extremely important when needed for estate planning, tax planning and public benefits planning. Gifting programs can save death taxes, facilitate your qualification for SSI and Medi-Cal, and protect your assets from Medi-Cal estate claims for reimbursement at death. If you are authorizing these powers, and especially if your agent is one of your children, you may also want to specifically allow your agent to "self deal" and temporarily "breach their fiduciary duty" to you if you intend that the agent be the recipient of any gift made with your authorization. It is also extremely important that your agent be authorized to request removal of an asset from your trust for the purpose of making gifts.

When granting these specific powers to your agent, the authority granted must not be so broad as to cause tax liability for your agent. For example, if certain limits or conditions are not placed on your agent's authority to make gifts to himself/herself, your estate may be deemed to be owned by your agent for death tax purposes if your agent dies before you.

You may also want to consider adding other powers that are not adequately covered in the limited powers included in the Probate Code.

Immediate vs Springing Powers of Attorney

The powers granted in the POA are effective immediately upon signing. You may want to add provisions to the Special Instructions Section to make the powers “springing”. As the principal, you have the authority to make the POA powers effective only after a “springing event” (such as the determination of your mental incapacity by a doctor’s declaration) occurs. If you decide to make the POA powers springing, the POA should provide for the revocation of your agent’s power when the springing event is reversed (e.g., you regain your capacity). The POA should set forth the required proof of the event or reversal of the event (e.g., notarized declarations). It is also recommended that a Release of protected health care information under the Health Insurance Portability and Accountability Act of 1996 (HIPAA) be executed if a doctor declaration verifying your incapacity is required as an event necessary to spring the agents powers.

Joint or Successor Agents

The next section the POA allows you to specify whether you want joint agents. If you name joint agents, the POA allows you to specify whether you want your agents to act “jointly” or “separately”. Despite these provisions, it is recommended that detailed instructions be included in the special instructions section to clearly set out rules by which your agents act together. What happens if your agents disagree? What happens when one of the joint agents is unavailable? Failure to set forth clear rules will create confusion with financial institutions (and make them less likely to cooperate with your agent). You should also include provisions designating successor agents in the event that your first-named agent is unavailable or unwilling to serve. Finally, you may want to include provisions allowing your agent to appoint successor agents if the list of successor agents is exhausted. These provisions will prevent a permanent vacancy in the office of “agent”.

Revocation

The last part of the POA gives you the right to revoke the document. You may want to include provisions in the special instructions section to establish a procedure for you to terminate your agent’s authority without terminating the entire POA. You may want to terminate a particular agent’s authority but keep the POA in force. Revocation of the entire POA may give rise to the need for a conservatorship of your estate. You should ask yourself: Do you want the POA you are signing to revoke all prior POA’s signed by you, or do you want it to recognize the other POAs you have signed? If you do install provisions revoking all prior POAs, the revoking language should exempt your health care power from revocation. Ask yourself: Do you want your POA terminated upon the appointment of a conservator of your person or estate?

Execution Requirements

A Uniform Statutory Form Power of Attorney requires acknowledgment of your signature by a notary public (witnesses are not permitted).

Statutory Form Advance Health Care Directive

You may have signed a Statutory Form Advance Health Care Directive. A Statutory Form Advance Health Care Directive is authorized in Probate Code Section 4701. Unlike a Uniform Statutory Power of Attorney form that gives your agent a set of financial powers, the Statutory Form Advance Health Care Directive gives your agent the authority to make medical decisions on your behalf. The Statutory Form Advance Health Care Directive is referred to below as an “AHCD”. A copy of a blank Statutory Form Advance Health Care Directive is attached hereto as Addendum B.

Immediate Vs Springing Powers of Attorney

The powers granted in the statutory form AHCD are “springing” upon your incapacity unless you mark the box in paragraph 1.3 to give your agent authority to make health care decisions for you immediately.

Multiple Agents

The statutory form AHCD does not provide for appointment of Co-Agents, perhaps anticipating potential problems and confusion when co-agents disagree or are unavailable. If, for example, you would like two of your children to work together to make your medical decisions, the provisions to appoint them as co-agents would have to be added to the form, although it is unclear whether adding these provisions would invalidate the form as a whole. If you do appoint co-agents, it is recommended that you provide detailed instructions to clearly set out rules by which your agents act together. Consider what should happen if your agents disagree, or if one of the joint agents is unavailable. Failure to set forth clear rules will create confusion with health care providers (and make them less likely to cooperate with your agent).

Access to Medical Records

The statutory form AHCD does not give your agent a right to access your medical records. Therefore, it is recommended that a separate Release of Protected Health Care Information under the Health Insurance Portability and Accountability Act of 1996 (HIPAA) be executed, particularly if the statutory form provision is unmodified. If you do not mark the appropriate box, the unmodified statutory form AHCD requires proof of your incapacity to “spring” your agent’s powers, and the medical records needed to confirm your incapacity might not be made available to your agent in the absence of the HIPAA release.

Revocation

The statutory form AHCD does not include detailed procedures and additional options for the replacement of the agent and/or revocation of the agent's powers. The statutory form AHCD also lacks specificity regarding how to determine whether an agent is "not willing, able, or reasonably available" to make your health care decisions. The lack of clear transition of authority from one agent to the next may create confusion with health care providers (and make them less likely to cooperate with your agent). Finally, the statutory AHCD does not revoke previously-executed AHCDs, making the status of your previously-identified agents and health care decisions uncertain.

Agent's Authority to Make Treatment Decisions

Although the statutory form AHCD "lets you give specific instructions about any aspect of your health care, whether or not you appoint an agent", the major weakness of a statutory form AHCD is that it sets out broadly-described preferences for a rather limited number of health care decisions. The form allows you to limit the authority of your agent if you provide the specifics. If you choose not to limit the authority of your agent, your agent will have the right to:

- Consent or refuse to consent to any care, treatment, service, or procedure to maintain, diagnose, or otherwise affect a physical or mental condition
- Select or discharge health care providers and institutions
- Approve or disapprove diagnostic tests, surgical procedures, and programs of medication
- Direct the provision, withholding, or withdrawal of artificial nutrition and hydration and all other forms of health care, including cardiopulmonary resuscitation
- Make anatomical gifts, authorize an autopsy, and direct disposition of remains

You may wish to add provisions to your statutory form AHCD to give your agent authority to do additional specific things; or, you may wish to add language to ensure that your agent does not have the authority to do specific things. Clearly, countless numbers of customized instructions are theoretically possible. A few examples of customized instructions and guidance you may wish to include in your own statutory form AHCD are:

Agent's Authority to Hire and Consult with a Care Manager

Do you require that your agent make all decisions independently? If you prefer that your agent seek advice and guidance from experienced professionals, you must add a provision to authorize your agent to hire a case manager and caregivers, as needed, in order to ensure that a proper care plan is created and followed along with instructions, if desired, that the person creating a care plan created for you consult with your spouse and children (if any are reasonably available) prior to implementation of the plan.

Agent's Authority to Inspect and Disclose Medical Information

Do you wish to make your medical information readily available to your agent? Should your agent be permitted to share your medical information with medical care providers? If so, you should add a provision authorizing your agent to review and disclose any and all information in your medical and hospital records as your agent may deem appropriate, including verbal and written information. To avoid delays, you should consider adding a provision to authorize your agent to execute on your behalf any releases or documents that may be required to obtain your medical information, and consent to disclosure of your medical information.

Agent's Authority to Make Personal Care Decisions

Who will ensure that your wishes regarding your personal care are carried out? You should consider adding a provision specifically to give your agent the authority to make decisions relating to your personal care, including but not limited to determining where you will live, providing your meals, hiring and supervising your household employees and other service providers, providing and/or arranging your transportation, handling your mail, and arranging for your recreation and entertainment.

Agent's Authority to Receive Personal Effects

Who will have authority to receive or recover your personal property if you are not well enough to receive it yourself? If desired, you must add a provision to give your agent the authority to receive into your agent's sole possession any and all items of your personal property and effects that may be recovered by any hospital, police agency, or any other person at the time of your illness, injury, disability, or death. To avoid confusion and potential family squabbles, you should also consider authorizing your agent to receive your remains.

Agent's Authority to Make or Withhold Payments

Who will "mind the bank" when the medical bills come in? To ensure that there is no break in your ongoing care due to lack of coordination among your financial managers, you must add a provision to give your agent the authority to expend or withhold your funds for any treatment, and determine to the same extent that you could what claims for benefits may be submitted to any insurer or agency that may be liable for the costs of your care. You should also authorize your agent to request that your trustee, conservator or agent acting under another power of attorney, pay for any expense authorized under your AHCD.

Agent's Authority to Execute Consents and Waivers

Who can sign for you? If desired, you should confirm to your agent the authority to do anything whatsoever that you could do with respect to your medical care, including (but not limited to) signing consents or waivers of liability for injury or wrongful death.

Added Specific Instructions for Your Health Care

Does the statutory form AHCD exactly reflect your own thoughts and desires about your medical care preferences? You may want to add detailed treatment and end-of life instructions, although the limited space provided on the form itself may discourage you. If your additions and modifications are lengthy, consider attaching additional pages to your AHCD. The provisions you add, of course, need not be limited to those listed below; the following list is illustrational and the language is given as an example only.

- **Desire to be Involved in Decision-Making**

Do you want every effort made to include you in your care planning and decision making? If so, you might consider adding the following language to the "Other Wishes" section of your statutory form AHCD: "As long as I am living, I desire that every effort be made to inform me and to consult with me in order to obtain my directions concerning my care, even if I am unable to communicate with words, but can only indicate my desires with non-verbal powers of communication, including, but not limited to hand gestures or blinking my eyes."

- **Desire for Loving and Dignified Care**

Are you apprehensive about being left alone for long periods of time when you are gravely ill or dying? If so, you might consider adding language like this to the "Other Wishes" section of your AHCD: "If I should suffer a serious disease, injury, or illness, I desire that those who love and care for me touch me and tell me so, demonstrating that I am precious to them. I ask that those involved in my medical care conduct themselves so that it is apparent that I am included in their respect and care for all humanity, trying to make me aware of that respect through any of my senses, regardless of my condition. I particularly ask that I not be left alone or isolated with silence when dying."

- **Directive for Medical Treatment**

Do you want maximum or aggressive medical treatment to sustain your life (something more than the rather vague "limits of generally accepted health care standards" written in the statutory form AHCD)? If so, you should consider providing additional specific instructions for your agent and health care providers in the "Other Wishes" section of your AHCD: "If I am living, I desire that all possible medical life-sustaining treatments be given me to maintain and sustain my life. With respect to all medical treatments or procedures, I include both existing technology and any methods or techniques that may be hereafter developed. This definition specifically includes (but is not limited to) maintenance of respiration or heartbeat, renal dialysis, administration of blood products, transplants."

Do you feel strongly that you do not want "heroic measures" to sustain your life in certain situations? If so, you should (1) identify the persons, if any, who will consult with your agent to determine that the decision to continue or not continue sustaining your life is timely, and (2) define the specific criteria for their decision. If you feel strongly that you want "the plug pulled" if your condition is deemed "hopeless", you might help minimize shock among your loved ones if you add the following instructions in the "Other Wishes" section of your AHCD: "I do not regard the withdrawing of treatment as being quantitatively different from withholding treatment, and I do not want any such distinction made in my treatment".

- **Do Not Resuscitate (DNR) Order**

Have you executed a Do Not Resuscitate (DNR) Order? If not, you may add your consent to a DNR in the "Other Wishes" section of your statutory form AHCD and direct that your DNR be placed in your medical record immediately upon receipt of your statutory form AHCD by any of your health care providers.

- **Artificial Nutrition and Hydration**

Do you wish to receive artificial nutrition and hydration in all circumstances? In the "Other Wishes" section of your statutory form AHCD you may specify that if you are determined to be in an incurable state as described in Part 2.1(a) of your AHCD, you may indicate your preference to receive (or not receive) artificial means of nutrition and hydration, even though you might suffer temporary discomfort from the withholding of such treatment.

- **Antibiotics**

Do you wish to be treated with antibiotics for a reversible secondary condition if you are determined to be in an incurable state as described in Part 2.1(a) of your AHCD? In the "Other Wishes" section of your statutory form AHCD, you may indicate your preference to receive (or not receive) treatment for any reversible secondary condition, including pneumonia or other serious infection, unless needed to prevent the spread of contagious infection.

- **Treatment for Preexisting Conditions**

Do you have a “pre-existing condition” for which you are receiving continuing treatment? In the “Other Wishes” section of your AHCD you may specify that if you are determined to be in an incurable state as described in Part 2.1(a) of your AHCD, it is your preference to be treated (or not be treated) with the medication(s) you are receiving for your pre-existing medical condition. You should identify both the pre-existing condition and the medication in this provision of your AHCD.

- **Blood Transfusions**

Are you reluctant to receive a blood transfusion from a donor unknown to you? Do you have religious objection to blood transfusions? In the “Other Wishes” section of your statutory form AHCD you may specify that if you need blood transfusions, it is your desire, if it is at all possible, to receive transfusions from blood donated for this purpose by your family and friends. You may also specify that if for any reason you cannot use blood donated by your family and friends, you authorize the use donated blood from an FDA licensed blood donor facility.

Alternatively, if you do not want to receive blood transfusions in any circumstances, you may use the “Other Wishes” section of your AHCD to specifically refuse to give your agent any authority to authorize blood transfusions.

- **Chemotherapy**

Are you concerned that you may be prescribed chemotherapy and receive it against your wishes? In the “Other Wishes” section of your AHCD, you may state limitations to your consent to receive chemotherapy (or any other therapy). For example, you might state that in the event that you are diagnosed with cancer and chemotherapy is proposed, you specifically direct that if your death is imminent within six months, your agent shall not authorize or consent to chemotherapy if it is unlikely to improve your condition or reduce your pain.

- **Desire for Home Care**

If you are given the choice of living out your last days at home with appropriate medical and support care or in a fully-staffed medical facility, which would you prefer? You may express your wishes in the “Other Wishes” section of your AHCD in language substantially similar to the following: “If at all possible, and if doing so does not impose an undue cost or other burden on my family, I would like to live out my last days at home with appropriate medical, nursing, social, and emotional support and any necessary medical or other equipment needed to keep me comfortable. My agent may contact either community or commercial social services organizations in order to facilitate my care at home. Alternatively, my agent may choose hospice care, or care in a facility that my agent deems appropriate. If I am deemed to be in an incurable state as described in Part 2.1(a) of my AHCD, I refuse permission to be transferred to a hospital if the sole purpose is to prolong my life”.

- **Alzheimers or Other Dementia**

Do you have strong feelings about the medical care you wish to receive and your living situation if you develop Alzheimers or other dementia during your lifetime? If so, you should make your preferences known in the “Other Wishes” section of your AHCD. For example, you might authorize noninvasive life-prolonging treatments such as artificial nutrition, fluids, and antibiotics as long as you have the ability to meaningfully interact with family and friends, but refuse to authorize intrusive treatments such as CPR, mechanical ventilation, or kidney dialysis. You might also state that if you lose the capacity for meaningful interaction and physical independence, then only treatments that would make you more comfortable and free from pain would be authorized.

- **Pregnancy**

Are you now or could you become pregnant? If so, you may wish to consider the life of your unborn child despite your own physical condition and “suspend” most of the Instructions for Health Care (section 2 of your AHCD) during your term of pregnancy. You might add the following provision to the “Other Wishes” section of your AHCD: “If I have been diagnosed as pregnant and that diagnosis is known to my physician, these Instructions for Health Care (with the sole exception of this section) shall have no force or effect during the course of my pregnancy. During my pregnancy it is my desire to be kept alive by all means, so I can have a healthy baby. Once I am no longer pregnant, these Instructions for Health Care shall have full force and effect.”

Added Specific Post-Death Instructions for Your Agent

- **Organ Donation**

What are your wishes regarding organ donation at your death? Do you object to having your body used for cadaver research? If you do not mark any of the boxes in Part 3 of your AHCD, your agent will not have authority to donate any of your organs for any reason. Alternatively, and if you wish, you may authorize your agent to donate any needed organs, tissues or parts or certain organs, tissues or parts that you specify in Part 3(b), and for one or more purposes.

- **Disposition of Remains**

Do you have specific wishes about the disposition of your remains, or do you trust your agent to make arrangements at his/her own discretion? If you want to limit the authority of your agent to direct the disposition of your remains, you must state the limitations (and your specific directions regarding cremation, burial, etc.) in section 1.5 of your AHCD.

Designation of Primary Physician

Who will have authority to select a primary care physician for you if the physician(s) you have designated in your AHCD are unwilling, unable or not reasonably available to act as your primary physician? You can add a provision in the “Other Wishes” section of your AHCD to give your agent the authority to select any attending physician as your primary physician in the event that the physician(s) you named cannot serve.

Execution Requirements

A Statutory Form Advance Health Care Directive must be signed before two witnesses or acknowledged before a notary public. If you are a patient in a skilled nursing facility, the patient advocate or ombudsman must also sign your AHCD.

This is a general discussion of some of the most critical estate planning issues. Due to periodic changes in the law and the complexities and peculiarities of each situation, no course of action or inaction should be taken without first consulting a lawyer.

Decisions on the signing of documents and transfer of property must be viewed in the context of respecting the wishes of the persons involved. No document should ever be signed without court approval unless the maker is competent and fully understands and approves the contents and effect of the document.

Circular 230 Disclosure: Pursuant to recently-enacted U.S. Treasury Department regulations, we are now required to advise you that, unless otherwise expressly indicated, any federal tax advice contained in this communication, including attachments and enclosures, is not intended or written to be used, and may not be used, for the purpose of (i) avoiding tax-related penalties under the Internal Revenue Code or (ii) promoting, marketing or recommending to another party any tax-related matters addressed herein.

Uniform Statutory Power of Attorney Form
Probate Code Sections 4400-4465

Addendum A - Coversheet

UNIFORM STATUTORY FORM POWER OF ATTORNEY (California Probate Code Section 4401)

NOTICE: THE POWERS GRANTED BY THIS DOCUMENT ARE BROAD AND SWEEPING. THEY ARE EXPLAINED IN THE UNIFORM STATUTORY FORM POWER OF ATTORNEY ACT (CALIFORNIA PROBATE CODE SECTIONS 4400-4465). IF YOU HAVE ANY QUESTIONS ABOUT THESE POWERS, OBTAIN COMPETENT LEGAL ADVICE. THIS DOCUMENT DOES NOT AUTHORIZE ANYONE TO MAKE MEDICAL AND OTHER HEALTH-CARE DECISIONS FOR YOU. YOU MAY REVOKE THIS POWER OF ATTORNEY IF YOU LATER WISH TO DO SO.

I, _____ [your name and address], appoint
_____ [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.
- (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.
- (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

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," THEN ALL OF YOUR AGENTS MUST ACT OR SIGN TOGETHER.

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

Signed this _____ day of _____ [date], _____ [year].

Signature: _____

State of _____ [e.g., California], County of _____ [name of county].

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

CERTIFICATE OF ACKNOWLEDGMENT OF NOTARY PUBLIC

State of California)
)
County of _____)
 [name of county])

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

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal:

_____ [Signature of officer]

[Officer's seal]

Statutory Form Advance Health Care Directive
Probate Code Section 4701 et seq.

Addendum B - Coversheet

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 1 of this form is a power of attorney for health care. Part 1 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.
- (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

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

(name of individual you choose as agent)

(address) (city) (state) (zip code)

(home phone) (work phone)

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:

(name of individual you choose as first alternate agent)

(address) (city) (state) (zip code)

(home phone) (work phone)

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:

(name of individual you choose as second alternate agent)

(address) (city) (state) (zip code)

(home phone) (work phone)

(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:

(Add additional sheets if needed.)

(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:

(Add additional sheets if needed.)

(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

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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:

(Add additional sheets if needed.)

(2.3) OTHER WISHES: (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.) I direct that:

(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
- (4) Education

PART 4: PRIMARY PHYSICIAN (OPTIONAL)

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

(name of physician)

(address) (city) (state) (zip code)

(phone)

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:

(name of physician)

(address) (city) (state) (zip code)

(phone)

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)

(sign your name)

(address)

(print your name)

(city) (state) (zip code)

(5.3) STATEMENT OF WITNESSES: I declare under penalty of perjury under the laws of California (1) that 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 by convincing evidence, (2) that the individual signed or acknowledged this advance directive in my presence, (3) that the individual appears to be of sound mind and under no duress, fraud, or undue influence, (4) that I am not a person appointed as agent by this advance directive, and (5) that 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 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.

First witness

Second witness

(print name)

(print name)

(address)

(address)

(city) (state) (Zip Code)

(city) (state) (zip code)

(signature of witness)

(signature of witness)

(date)

(date)

(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:

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)

(sign your name)

(address)

(print your name)

(city) (state) (zip code)