
Estate Planning

2010 EDITION

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This Guide is designed to provide you with a summary background in the law and related issues involved in estate planning.

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USING THIS GUIDE

As a part of the Estate Plan package you have requested, I am pleased to offer to you the following documents, each of which is explained briefly here and more fully elsewhere in this Guide. You are under no obligation to use all of the documents. Select only those that make sense for your particular circumstances.

These documents are designed for estates of any size, but for those with larger estates, there may be a need to have tax planning advice. If you have a question as to whether you are within this category or not, you should speak with me.

I discuss each of the estate planning documents offered for your use. I have given you some forms that gather the information I will need from you to prepare drafts of your documents. These same forms are available online and if you are comfortable in that environment, I urge you to use them.

Revocable Trust

A Revocable Trust is a special kind of arrangement by which all or part of your property is transferred to an entity called a trust. You retain control over all property transferred to the trust. The terms of the trust determine your respective rights and duties with respect to it. It is primarily a means of avoiding probate and can be a valid part of a financial and legal plan.

Your Will

If you are selecting a Revocable Trust, your Will is called a

“pour-over” Will. If you choose not to use a trust, I will design your Will as the primary document for handling your estate upon death.

Advanced Health Care Directive

This document is designed to give someone of your choice the power to make health care decisions if you are unable to do so yourself. You can specify limits and terms of your health treatment and determine who can make decisions on your behalf when you are incapacitated.

Durable Power of Attorney for Financial Matters

The Durable Power of Attorney would allow someone to act on your behalf regarding your affairs. You may state either that this power is available only if you are incapacitated or it can be made operative immediately, depending upon your needs.

PLEASE READ THE GUIDE AND ASK ME QUESTIONS

This Guide is designed to provide you with information about the law and related issues that will enable you to take care of yourself and your loved ones. It should be used in conjunction with our services on your behalf. Whenever you have a question about anything you read here or do not find an answer for here, please call me and let me know what is unclear.

USING THE GUIDE

Please read the entire Guide. I encourage you to make notes about issues that are of special interest to you or that may not be entirely clear to you. Please contact me by e-mail (phlaw@sbcglobal.net), telephone (310-209-8080) or in person to discuss such issues with me.

I have given you information forms that I ask you to complete either (1) send to our office by mail or (2) fax (310) 208-8582) or (3) **by using the online forms available at www.estateprobatelawyer.com (client services)** or (4) by scheduling an office visit so that I can then produce draft documents for your review.

ESTATE TAXATION

WARNING: Congress is likely to make changes to the estate and gift tax provisions during 2010 and California probably will as well.

Exemption Amount Changed

As part of the 2001 tax act, Congress increased the amount persons were permitted to give away tax-free at death (the "Exemption Amount"), with the increases phased in over a ten year period. The Exemption Amount increased over the years, reaching \$3,500,000 in 2009 and ultimately became unlimited this year. However, because the votes of 60 Senators could not be obtained back in 2001, the tax law changes were limited to a duration of 10 years, meaning that in 2011, the estate tax will be reinstated with an Exemption Amount of only \$1,000,000 and a rate of tax equal to 55%, the exemption and rate of tax that were in effect before the 2001 tax act was passed. Certain larger estates will be subject to an extra 5% surtax that was repealed altogether in 2001, but which will also be reinstated in 2011.

Other Changes

There are other changes that have taken place for the 2010 tax year.

First, under the now-repealed estate tax laws, property passing from a decedent used to receive a step-up in cost basis equal to the property's fair market value as of the decedent's date of death. That tax benefit has been eliminated for persons who die in 2010, and instead, the basis of property acquired from a decedent will be the lesser of the decedent's adjusted basis or the property's fair market value on the decedent's date of death.

Under this rule, it is possible that the cost basis of property will be stepped down. These new carryover basis rules will not only cause the imposition of capital gains taxes that previously were avoided following a person's death, but the beneficiaries who inherit an estate now need to know what the decedent's cost basis was in the properties they receive. For many people who inherit property in 2010, records will not exist or will be incomplete, thus making it difficult or impossible for them to determine a particular property's cost basis. There are two important exceptions, though, to the carryover basis rules. A decedent's executor or personal representative is allowed to allocate up to \$1,300,000 to various assets owned by a decedent, thereby increasing the cost basis of those assets.

Also, an additional \$3,000,000 of basis increase can be allocated to properties passing to a spouse or to a special "qualified terminable interest property" trust for the spouse (often called a "QTIP" trust or a "marital" trust). Under the tax laws in 2010, just like the laws which existed prior to estate tax repeal, any person may give an unlimited amount of property to his or her spouse or to a QTIP trust (the "Marital Deduction") without generating any gift or estate taxes.

Second, the Federal gift tax, while not repealed, now has a lower 35% rate of tax, down from the 45% rate in 2009. Under current law, each person may give away during lifetime as much as \$1 million in cash or other property without generating any gift taxes. Any gifts which exceed this amount will be taxed at 35%. The annual exclusion remains at \$13,000.

Third, the Federal generation skipping transfer tax has been repealed as well for the 2010 tax year. Under the old law which existed prior to repeal, each person could give away during lifetime or at death up to \$3.5 million (the "GST exemption") without imposition of the generation skipping transfer tax. Any gifts to

grandchildren or great-grandchildren (and to certain other persons two or more generations younger than the person making the gift) in excess of the GST exemption would have been subject to the GST tax which was equal to the highest marginal estate tax bracket (45% in 2009). Although the GST tax has been eliminated for 2010, it will be reinstated in 2011, and the available GST exemption will be reduced to its former level of only \$1,000,000 (although this amount will be indexed for inflation) and with a 55% rate of tax.

It is unknown what will happen to the estate, gift and generation skipping tax laws in 2010. It is possible that Congress will reinstate these taxes and make them retroactive back to January 1, 2010. (It is not clear, though, if retroactive reinstatement of the estate, gift and generation skipping tax laws is constitutional, and this is an issue that may one day be decided by the United States Supreme Court.) It is also possible that Congress will do nothing in 2010, and let the laws revert to how they were prior to the 2001 tax act. It is possible as well that Congress will pass new legislation creating new exemptions and rates of tax.

WHAT IS PROBATE? SHOULD I AVOID IT?

You may have noticed that there are a number of attorneys advertising ways to avoid probate. If you don't know what that is about, consider the following:

WHAT IS PROBATE?

Probate refers to a court proceeding which requires the filing of numerous forms and documents and is meticulously supervised by the courts. The probate of an estate will usually last more than six months and may take years. During that time, property you owned together will be tied up and you may have restricted or no access to important funds and accounts. The sale of property may be complicated by the need for court approval of the terms of sale.

PROBATE CAN BE EXPENSIVE

Both the executor and the attorney for the estate are entitled to be paid fees for their work during a probate. While their fees are regulated by the state, they can be considerable and unnecessary.

The table on the next page sets forth the statutory fee schedule for the Executor of the estate *and* the attorney for the estate. A fairly modest estate of a home, automobile, furniture and IRA or pension, can easily reach \$200,000 in value. The probate fees for each the executor and the attorney will be \$5,150 if there are no complications, for a total cost to the estate (*i.e.* the heirs) of at least \$10,300.00!

GROSS VALUE OF ESTATE	PROBATE FEES
Up to \$100,000	4% of value
Next \$100,000	3% of value
Next \$800,000	2% of value
Next \$15 million	1% of value

SHOULD I AVOID PROBATE?

The answer to that question in many situations is probably yes. Exceptions would be where there would be some value in having a court oversee the process of distribution of your estate, such as where there is a question of competence or whether your wishes will be carried out. If you have questions about this decision, discuss it with me.

Some of the effective ways of avoiding probate of an estate are discussed below. If your property fits in any of the following categories, you may be able to avoid probate in these specific situations under California law:

ESTATES OF LESS THAN \$100,000

If your estate is below \$100,000 and there is no real estate, there is a simplified procedure for handling the estate after death. Automobiles do not count in the \$100,000 limit and there are several other exclusions that make this a useful approach for many people. There is an affidavit (California Probate Code §13100) to complete and much of your property can be transferred in this way.

REAL PROPERTY LESS THAN \$10,000

If your real property is worth less than \$10,000, it may avoid

probate and can be transferred by a "Affidavit Re Real Property of Small Value" (California Probate Code §13200) (This is NOT a state printed form).

MOTOR VEHICLES

A simple, non-probate procedure is available to transfer title to automobiles and registered boats in California, but there can be a 40 day delay.

Where there is no other property that needs to be probated, a person named in a Will or an heir of a deceased person can complete a declaration and submit it to the Department of Motor Vehicles in order to transfer title to a registered motor vehicle from the deceased to themselves.

This same method is used when the vehicle was transferred to a Revocable trust. A form for this purpose is available from the DMV. You will have to present the registration form as well.

FORMS OF OWNERSHIP AND LEGAL PRINCIPLES

Following are some basic legal principles for your review and background information. While some of this information may have no application to you now, please at least skim through to see if any topic grabs your attention. I urge you to keep this Guide in your library for handy reference in the future, when you may need some of the information that does not apply today.

SOLE OWNERSHIP

When title to property is in one person's name, the law regards that person as the sole owner. Any other person claiming rights to that property has a steep uphill battle to establish such a claim.

The named owner has the exclusive rights to sell or transfer the property. Upon the death of the named owner, it will pass to the people named in the owner's Will or, in the absence of a Will, to the owner's heirs. Any tax deductions related to the property will be limited to the named owner.

Where the two of you pool your income and purchase an item with money from that common fund, you should make certain that any document relating to the item of property reflects your dual ownership. It is unwise to depend upon private assurances between the two of you that are different from the written statements of ownership. Don't rely on verbal statements or your "understanding" or assumptions.

JOINT OWNERSHIP (JOINT TENANCY)

When you own items of property jointly, it is called a joint tenancy. This is a unique form of ownership and can be a useful tool of financial planning, but must be approached with caution.

A sample phrase that is used in joint tenancy situations is:

"Mary Brown and Christopher Hodges, as joint tenants with right of survival."

RIGHTS OF JOINT TENANTS

Each joint tenant enjoys complete and full rights of ownership. Either can sell the entire property without the permission of the other (although you will find few buyers willing to take the risk), even though you would both be entitled to share equally in the proceeds of the sale.

You own what is known as an "undivided joint interest" which gives you extensive rights to occupancy and decision-making regarding the property. Either one of you could occupy the property to the exclusion of the other.

You cannot pass your joint ownership interest by Will. Since this is even more extensive than the rights married couples have in their community property, joint tenancy is to be entered into only after considering all its ramifications.

OBLIGATIONS OF JOINT TENANTS

Each joint tenant is fully liable for any debts secured by or connected to jointly owned property, whether he or she had anything to do with the creation of the liability or not. Each joint tenant is responsible for the maintenance of the item of property, whether the other one contributes or not. As far as the law is concerned, joint tenants are considered to be one person and completely interchangeable for most purposes regarding liability to the outside world.

INHERITANCE FOR JOINT OWNERS

On the death of one joint tenant, her or his interest immediately ceases to exist. Therefore, the surviving joint tenant is the only owner. That means that one joint tenant cannot will his or her interest to someone. There is nothing to pass by Will.

This is one of the major features of joint tenancy from an estate planning perspective. Since title to the interest of the deceased joint owner passes by law to the surviving joint owner, there is no need to put the property through probate. This will save you probate fees and possibly attorneys' fees as well.

Upon the death of one joint tenant in real property, the survivor merely needs to file a declaration and record it to transfer title in most states. If you have a joint bank account, the survivor is entitled to immediate and uninterrupted use of the account, although banks will require you to complete a form when one joint tenant dies.

TAXES WITH JOINT OWNERSHIP

Upon the sale of jointly owned property, each of you will be responsible for income taxes on any resulting net income. Each of you is fully obligated for any property taxes connected with the property. If you are subject to inheritance taxes (if the gross value of your estate is in excess of the exclusion amount), you should seek the advice of a tax professional regarding the taxation of jointly owned property.

Upon the death of a joint tenant, the IRS will assume that the entire value of the jointly owned property should be included in the taxable estate of the decedent. This assumption can be rebutted by showing that the survivor paid for part or all of the property.

- ✓ Furthermore, the survivor will not get a step up in basis

for the part of the property they gain. For example, if both joint tenants put in \$100 to buy something, that is their tax "basis." If the property is worth \$1,000 on the death of the first to die, the basis of the entire property to the survivor is not \$100 (their one half the original price) plus \$500 (one half the value at the death of the first to die), but instead is only \$200.

By way of contrast, if property is inherited, the person receiving it has a new basis at the market value of the property on the date of death of the person giving it to them. In some cases, this can be a significant issue. I suggest you discuss this with an attorney. **NOTE: During 2010 or until Congress acts, there is no step-up in basis upon death.**

OTHER SPECIAL ISSUES WITH JOINT OWNERSHIP

One of the features of joint ownership is that either joint owner can end it. A joint owner can convert title to the property to tenancy in common by recording a deed transferring title from oneself as a joint tenant to oneself as a tenant in common under the law in California and some other states. You should seek legal advice in this regard if the need arises.

The advantage of this is that if the two of you wish to end your relationship but retain ownership in the property, either of you can protect your rights by recording a deed. Each of you would then be equal co-tenants and could, for practical purposes, control the sale of the property as well as limit your liability with respect to the property.

TENANTS IN COMMON

Where the two of you want to establish shared property rights, tenancy in common is probably your best bet. When you own property as tenants in common, you can establish your

respective rights as either equal or unequal. For example, if one of you earns twice as much as the other, you may want to reflect this fact in how you own your assets.

You can place title to real or personal property items in both names to result in equal ownership rights as follows:

“John Jones and Bruce Williams as tenants in common”

Or, you can specify ownership shares, as follows:

“John Jones as to an undivided $\frac{3}{4}$ interest and Bruce Williams as to an undivided $\frac{1}{4}$ interest, as tenants in common”

Such flexibility is often important as a way of expressing your financial relationship. Marriage laws of states such as California, by contrast, automatically provide for equal ownership between spouses.

RIGHTS OF TENANTS IN COMMON

Each owner can dispose of his or her ownership interest in the property by Will.

Each owner of a tenancy in common has the right to occupy and use the item of property. This right does not permit the exclusion of the other tenant in common, however. Neither owner can force the other to sell the property except through a court order. However, either owner can sell his or her rights in the property without the approval of the other.

Absent a Will, an owner's interest will pass by law to their heirs under the law, which usually does not include the co-owner (a good reason why you will want to complete your own Will and/or Living Trust).

OBLIGATIONS OF TENANTS IN COMMON

Each tenant in common is responsible for liabilities connected

with the property to the extent of their ownership interest. For example, where you buy a house or condo and take title as tenants in common, a $\frac{3}{4}$ interest to one and a $\frac{1}{4}$ interest to the other, claims against you, as owner of the property will reflect the same ratio. Of course, if you sign for a debt related to the property, whatever terms are specified in that document prevail.

For practical purposes, however, remember that if one of you defaults on a secured debt, the other is going to have to find a way to pay both shares if she or he wants to maintain ownership of the property that secures the debt. As a result of paying more than your share, there may be rights of repayment between you, but as far as your lender is concerned, they just want the payments.

Should there be a loss connected with the item of property, such as an injury for which the property owners are liable, both of you will be liable for the loss to the same extent that you hold ownership rights.

Personal liability is different, as, for example, where you drive a car owned by both of you—you are personally liable for the full amount of damages caused by your accidents. Both of you also may have liability in that case as owners of the car, to the extent of your ownership interest.

INHERITANCE BY CO-TENANTS

As indicated above, one tenant in common has no rights of inheritance in the interest of the other tenant in common (co-tenant). Where you own an item of property as co-tenants and you want your interest to go to your partner upon your death, you will need to take care of that in your Will or Living Trust.

TAXES AMONG CO-TENANTS

Any income earned in connection with property owned by co-tenants, such as on the sale of the property, will be subject to income tax in proportion to the respective ownership interests. Income generated as a result of personal effort, however, will be taxed entirely to the person expending the effort. If you are in doubt about any of this or wonder how it might apply to you, your best bet is to see a tax or legal professional.

Property taxes are apportioned in the same ratio as the ownership interest, although once again, both will want to make sure the full taxes are paid to protect your interest.

JOINT TENANCY VS. TENANCY IN COMMON

JOINT TENANCY

- Immediate transfer upon death
- IRS presumes survivor paid for it all, difficult to challenge
- Then no "basis" increase on first death
- If couple owns jointly and separates, property may pass to wrong person

TENANCY IN COMMON

- Each owns their share

- Each can give their share on death as they desire
- Tax basis increase on death for portion owned by deceased owner
- If couple separates, each has legal right to pass their share to who they wish

WHAT HAPPENS WHEN JOINT PROPERTY IS THEN SOLD?

- Property was purchased in 1990 for \$500,000
- For tax purposes, this is known as the "basis"
- Property is sold after the death of the first joint tenant this year.
- The tax on the sale of the property is the "gain", or difference between the basis and the sale price

TAX TREATMENT OF SALE AFTER DISTRIBUTION

JOINT TENANCY

- Basis - \$500,000
- Sale = \$800,000
- No increase in basis on portion of first to die, so entire gain will be taxable to survivor
- Taxable Gain is \$300,000 to survivor

TENANCY IN COMMON

- Basis - \$500,000
- Sale = \$800,000
- Basis step up to \$400,000 (1/2 sale price) for portion of

first to die

- Gain is for the survivor is only \$150,000 for portion held by survivor

REVOCABLE (LIVING) TRUST

The Revocable Trust is a basic tool for modern estate planning. By using one, you can manage your assets during your life and pass them on at death without need of a court supervised, lengthy and expensive probate proceeding. Since Revocable Trusts can be complicated, you will probably not want to use this tool unless the nature of your assets makes it worthwhile. If your estate will be growing, it may be wise to create a Revocable Trust even when you have a small estate at the moment.

HOW DOES IT WORK?

The participants in a trust are:

1. a *settlor* or *trustor*, who is the person who creates the trust and transfers property to it,
2. a *trustee*, or the person who receives the things and acts on behalf of the settlor, and
3. a *beneficiary*, who is the person who benefits from the terms of the trust.

California state law imposes many terms and conditions under which the trustee must act with regard to the trust property. Others are provided by the document that creates the trust. The trustee is bound to follow both the conditions imposed by law and those in the trust document.

Foremost among the terms provided by law is that a trustee is a fiduciary, or a person who has a high standard of conduct and must act only for the benefit of the intentions of the settlor. This is also the standard with which married people must treat each

other under some state laws, such as California.

The title “Revocable Trust” is used to refer to a trust that is set up to circumvent the problems inherent in probate proceedings and allow for estate planning and tax saving.

Revocable Trusts usually contain instructions for managing the property placed in the trust during the lives of the trustees and also provides for what will happen when each dies. In this sense, it replaces most of the function of a Will (I suggest, however, that you have a Will in addition to a Revocable Trust).

The settlor, or person who creates the trust, place some or all of their property into the trust. That means you transfer title to those items to a trustee to manage the property according to the instructions in the trust document.

In the case of a Revocable Trust, the settlor(s) are almost always also the trustee(s) and the primary beneficiaries. The law, in its almost mystical wisdom, allows you to split yourself up in this way—you can be a settlor, trustee and beneficiary all at the same time.

SHOULD YOU USE A REVOCABLE TRUST?

As you may know, there are differing points of view about whether the Revocable Trust mechanism is for the average person. In part this discussion involves the cost of preparing a Revocable Trust. Since private attorneys often charge \$1,500 or more to prepare a Revocable Trust, the decision of whether to have one in part depends upon whether that cost is justified.

Another common concern is the sometimes-complex steps necessary to transfer assets to the Revocable Trust and transfer them back out if you decide to terminate the trust. This is a valid concern and only you can make that determination.

There are some situations in which it is not wise to avoid the supervision over the distribution of assets that is available in a probate proceeding. The estate might be more complex than your alternate trustee is capable of handling without assistance, for example.

In general, I am of the view that a Revocable Trust is appropriate for any situation where there is a desire to avoid probate **and** there is a person or institution upon which you can rely to carry out your instructions. The reason that use of a Revocable Trust is a way to avoid probate is that for purposes of probate law, any property owned by the trust is not in your estate. Therefore, it is not subject to the probate laws.

REVOCABLE TRUSTS

Your Guide includes a sample revocable trust. "Revocable" means that your Revocable Trust can be changed, amended or ended at any time during your life.

You may want to add a provision making the trust irrevocable if you become incapacitated. In this way, your alternate trustee will not be able to change the terms of the trust when you are no longer able to overrule them. Almost always a trust becomes irrevocable upon your death.

Making a trust irrevocable from the start or at a later date other than death has consequences that may be unexpected and undesirable. It may appear today to be a good idea, but later in life circumstances may change dramatically and the inability to alter the terms of the trust may then be a big problem.

Please discuss this with me if you have any questions.

TRANSFERRING ASSETS

You will need to transfer title of assets you presently

own to the trust in the same way that you would transfer title in a sale.

For real property that means a deed; for a car a pink slip, etc. For many assets, such as furnishings, artwork, etc., you do not need to do anything more than list the items on the appropriate pages of your Revocable Trust document and they are considered transferred when you sign the Revocable Trust.

Since most people have a mortgage on their real property, your home for example, transferring title from you as individuals to a trust will affect your lender since the person who borrowed the money secured by your property (you) will no longer own it (your trustee will). You should contact your lender to determine their attitude toward transfers to your Revocable Trust. Almost all now will permit such a transfer without charging points or requiring a new loan. The normal procedure is for you to create your trust, transfer the property by deed and *then* submit a request to transfer the mortgage to the trust as well on forms they provide.

If your mortgage lender gives you any resistance, please contact me.

The same goes for things like a pink slip if you have a loan against the car. The transfer to the trust is legally effective when you sign the document of title in most cases, allowing you to record it at a later time. There are some situations, however, where this is not the case and I urge you to discuss this matter with me if this situation confronts you.

Of course, if you apply for a new loan against the property, you should disclose the existence of the trust and the transfer of title to it. Please discuss any anticipated issues and problems with me.

At the end of the Revocable Trust I produce for you, there will be a page or pages listing the assets that are transferred to your Revocable Trust. **First, be aware that this statement does not replace the need for a separate document transferring any asset that has a document of title connected with it.**

In addition, unless you state otherwise, I will prepare for you a simple document that transfers your personal property, which typically has not document of title, to the trust.

WHAT ABOUT NEW ASSETS PURCHASED AFTER THE TRUST IS FORMED?

After you have established your Revocable Trust, you will need to take title to newly acquired assets in a very special way. You will no longer take title to a house or other real property as "John Jones", but you should always take title to any property or asset that has a document of title as:

"John Jones, Trustee of the John Jones Revocable Trust"

All assets you acquire that have a document that shows you are the owner must reflect this new form of title. For example, when you buy a new car, open a new bank account or purchase stocks, all the documents should show your ownership in the above form.

Occasionally the lender will require that you first take title in your individual name and then transfer the property to your trust. This is an extra step that requires diligence on your part.

DEBTS AND REVOCABLE TRUSTS

A Revocable Trust **does not** protect your assets from the reach of creditors. Anyone to whom you owe money is entitled under California law to enforce that debt against assets you hold in a Revocable Trust to the same extent as though there was no

Revocable Trust.

There are special provisions that can provide limited protection of assets in Revocable Trusts, such as “spendthrift” provisions and “special needs trust”. You should discuss this with me in this regard if appropriate.

ESTATE TAXES AND REVOCABLE TRUSTS

The use of a Revocable Trust does not, by itself, alter the liability for estate and gift taxes. Even though for purposes of probate any property held by your trust is not in your estate and is therefore not subject to the requirement of probate law, for purposes of tax laws, it is still your property. Therefore, the value of any property held in a Revocable Trust is included in the taxable estate, both for gift and death tax purposes.

There are a number of techniques that can be utilized to minimize or even eliminate estate tax liability, and if this is of concern to you, I ask that you discuss it further with me.

TAX RETURNS

Ordinarily, there is no need to file a separate tax return for your Revocable Trust. Of course, if property transferred to the trust earns income, you must report that income on someone’s return. In most situations, this will be the tax return of the person who owned the property prior to transferring it to the trust. If you have questions about this, please consult your tax advisor.

REVOCABLE TRUST ISSUES

You can either use your name or any other designation as the name of your Revocable Trust. In order to make it easy to avoid transfer taxes and encourage banks and other institutions to honor your instructions transferring assets to your trust, you may

want to include your name in the trust title.

Where you give a specific piece of property, unless you provide otherwise, any debts connected with that item of property will have to be paid by the person receiving that property. For example, if you give someone a car that is not yet paid for, they would have to make the remaining payments. If you want to have the estate to pay off the debt, you must say so in your Revocable Trust.

In making a distribution of the remainder, you can name one person or organization or several in shares. If you name one person or organization as the primary beneficiary, it is important to also name an alternate. If you have named several people or organizations as the primary beneficiaries of the remainder, you can omit naming an alternate.

SHOULD YOU USE A MARITAL TRUST OR INDIVIDUAL TRUSTS?

Marital Revocable Trusts are designed for legally married stable couples. I do **NOT** recommend the use of a marital trust for registered Domestic partners. There may be quite a bit involved in transferring property into the Revocable Trust and it is only recommended if you have reason to believe that the effort will be worth it.

If your relationship ends, you will probably want to terminate the trust and that will involve sorting out title to all the things you put into the trust. On the other hand, there is no substitute for the ease with which property can be handled upon the death of one of you using a Revocable Trust. For married couples, I recommend a Marital Trust in part because such a trust will provide for the use of the marital deduction for estate tax purposes.

Whether married or in an unmarried relationship, there are

some situations in which you will be better served by having separate Revocable Trusts, or it may be that only one of you needs one.

For example, if you are maintaining separate financial accounts you will probably want separate Revocable Trusts. There are other situations where an individual Revocable Trust is warranted.

Since the issue will depend upon your specific circumstances, I recommend that you discuss this with me. Some factors that would indicate single person Revocable Trusts:

1. If you are just getting together, or have been a couple less than two years.
2. Where a couple has separate finances. While you can use a Marital trust, since the one used by Estate Document Set maintains the identity of property in the trust, it is often preferable to keep them separate. This is especially true to protect against problems if you ever separate.
3. Where one of you has debt problems. While strictly speaking combining both sets of assets into a Marital trust does not expose the non-debtor's assets to the creditors of the one with debt problems, there is a risk that a creditor will try to combine all assets in collecting the debt. This is a risk that may warrant using separate trusts.

MARITAL REVOCABLE TRUSTS

In addition to the individual Revocable Trust that I have just discussed, which is specifically designed for couples whose net estate is not going to exceed the exclusion amount at the time of their death, I can also provide you with a marital Trust.

The difference is that the Marital Trust takes advantage of Estate Tax laws that provide that married couples may transfer *any amount* between themselves *tax-free*. All transfers between a married couple are tax-free during your lifetime. In addition, all such transfers at death are tax-free.

These are known as A-B or A-B-C trusts and involve provisions designed to maximize the impact of these tax laws. However, even if your present estate is far below this amount, I provide the Marital Trust format that permits you to grow your estate and not have to change your trust at a later date. If your estate never grows beyond the excludable amount tax threshold in the future the use of the marital trust will not be a problem.

MARITAL REVOCABLE TRUST ISSUES

In naming your Marital Revocable Trust, you can either use your names, as in

“The John Jones and Kim Brown Family Trust”

or you can give it a special name of your own. In some cases it may be important to keep the identity of the trustees private, as in cases where there may be discrimination against you by an employer or other entity.

The Marital Revocable Trust allows for the distribution of trust assets on two occasions:

1. When the first person dies, you can provide for the distribution of specific trust assets to anyone you would like. This distribution is made immediately upon your death. Where you give a specific piece of property, unless you provide otherwise, any debts connected with that item of property will have to be paid by the person receiving that property. For example, if you give someone a car that is not

yet paid for, they would have to make the remaining payments. If you want to have the estate to pay off the debt, you must say so in your Revocable Trust.

2. The remainder of the trust assets will remain in the trust during the life of the survivor of the two of you and then will be distributed upon his or her death of the other of you. You can again provide for the gift of specific items. In making a distribution of the remainder, you can name one or more persons or organizations. If you name more than one, indicate what share each is to receive. If you name one person or organization as the primary beneficiary, it is important to also name an alternate in case the primary beneficiary does not outlive you by 30 days. In that event, your gift would go to the person you name as an alternate. If you have named several people or organizations as the primary beneficiaries of the remainder, you can omit naming an alternate.
3. As an alternative, you can set up a Children's trust upon the death of the survivor of the two of you. This provides a means to distribute your trust estate to your children and can include distributing the assets in stages at certain ages, such as 25 and 35.

Often, you will want to make the Marital Revocable Trust fixed and unchangeable when the first of you dies. This may be true where you want to make certain that the survivor is able to use the trust assets during his or her lifetime but also want to make certain that the assets will be distributed in the manner you agreed to when you wrote the Revocable Trust and that these provisions cannot later be changed.

Sample text for this purpose:

“The A and B Revocable Trust shall become irrevocable and cannot be modified or amended upon the death of the first of us.”

This is an issue with many ramifications and I urge you to discuss this with me.

TRANSFERRING ASSETS TO YOUR TRUST



WARNING REGARDING TRANSFERRING ASSETS TO YOUR TRUST.

YOUR TRUST IS ONLY AS EFFECTIVE AS THE STEPS TAKEN TO TRANSFER ASSETS TO IT. IF AN ASSET IS NOT TRANSFERRED TO YOUR TRUST THE PROVISIONS OF YOUR TRUST DO NOT APPLY TO THAT ASSET AND IT MAY BE SUBJECT TO PROBATE.

Please take this warning seriously. Many a person has taken the trouble and expense to create a Revocable Trust but then forgot to transfer their assets to it. With this additional step, the trust is of no value.

Remember, if there is a piece of paper that says who owns a particular asset, there has to be a new piece of paper saying that the trust owns it after the trust is created. Actually, the title is in the name of the trustee of the trust. For example:

John Jones, trustee of the John Jones Revocable Trust

Once the property is transferred to the trust, you do not need to create a new document simply because the trustee changes. Once transferred, the successor trustee will have ownership for the trust.

DEALING WITH LIFE INSURANCE, PENSION PLANS

The trustee of the Revocable Trust may be named either as the owner of the life insurance policy or as its beneficiary. Forms for this purpose can be obtained from the insurance company.

Remember that transferring an insurance policy to your Revocable Trust does not alter its status for purposes of estate

tax computation. The payoff value of your policy is included in your estate in calculating its size under federal estate tax laws. You can remove it from your estate by transferring all incidents of ownership to a person not under your control. I urge you to discuss this with your insurance agent or a trained professional.

✓ **You do not need to include your pension plan in your trust. In fact, you definitely should not include any existing IRA, 401K or other plan in your trust because of tax consequences. Again, consult a tax professional in this regard.**

You do not want to name the trust as beneficiary of such a plan. Instead, name the beneficiaries in the plan itself because they may have more options as to how to take such benefits. Consult your plan administrator in this regard.

SPECIFIC GIFTS

Example specific gift:

“I give my collection of Joni Mitchell records to Joan Brindell, my library of art books to the Los Angeles County Library, and \$5,000 to Aids Healthcare Foundation.”

Here you can provide for giving a specific item or an amount of money to a specific person or organization upon your death. For each gift:

- ✓ **Name the item with sufficient specificity that it can be identified by someone who isn't familiar with the item; and**
- ✓ **Indicate to whom that item will go.**

Note that if the item you name is not in existence at the time of your death, no substitution will be made of another item unless you so specify. If the person you name to receive a specific gift does not outlive you, the gift lapses and is distributed as part of the Residue unless you specify an alternative person.

Where you give a specific piece of property, unless you

provide otherwise, any debts connected with that item of property will have to be paid by the person receiving that property. For example, if you give someone a car that is not yet paid for, they would have to make the remaining payments. If you want to have the estate to pay off the debt, you must say so in your Revocable Trust.

TRUST RESIDUE

Whether you have made provision for specific items or not, you need to provide for the remaining part of your estate. The *Residue* refers to everything in your estate that has not otherwise been distributed as a Specific Gift.

✓ **You can name one person or organization to receive all of the remainder of your estate. You should then name an alternate person/organization in case the first one you named is not alive or is not willing to take your bequest.**

✓ **You may name more than one person/organization (or combination) and if so, specify the percentage each is to receive, making sure that the total is 100%. You should then name an alternate person/organization in case the first one you named is not alive or is not willing to take your bequest.**

You can also distribute the Residue of your estate to more than one person and/or organization in percentage shares. If one of the named recipients does not survive you, their share goes to the other named recipient(s), or, you can provide for an alternative beneficiary.

THE “NO CONTEST” CLAUSE

I recommend and will include in your trust (unless you tell

me not to do so) a provision that disinherits anyone who contests your Will or Trust, especially if you expect any significant opposition to your plan for disbursing your estate after your death, this provision may not be sufficient, alone, to meet such a challenge. You need to take special care to document your mental health, your independence in decision making and that your trust is, in fact yours and not the subject of any undue influence.

If you expect a significant challenge, I urge you to discuss this with me. I will add a no contest clause unless you instruct me, after a discussion, that you do not want one.

GIVING SOMEONE THE POWER TO CHANGE YOUR TRUST IN A POWER OF ATTORNEY

One of the choices you will be asked to make is whether you want to give someone the power to make changes to your trust during a period in which you are unable to do so yourself. An example would be if you are incapacitated temporarily or permanently.

If you are choosing to create a durable power of attorney as a part of this package of documents, you can give this power to amend you trust in that document.

THE WILL

I will prepare for you a Last Will whether you use a Revocable Trust or not. If you use a trust, the type of Will is known as a “pour over” and is designed to capture any assets you have inadvertently not transferred before death to your trust. The Will does so upon your death, but will not avoid probate if the amount of assets not owned by your trust exceeds \$100,000.

If you are using a trust, and if all of your assets are transferred to the trust, skip go directly to “Disposing of Property if you also have a Revocable Trust” in this section below.

If you either are not using a Revocable Trust or if you have not transferred all of your assets to your trust, please read the following topics which will then apply *only* to the assets not transferred to your trust. If there are specific assets that will not be transferred to your trust and you wish to distribute through your Will, please tell me about them.

SPECIFIC GIFTS

In your Will, as in your trust, you can make a gift of a specific item or amount of money. Example specific gift:

“I give my collection of Joni Mitchell records to Joan Brindell, my library of art books to the Los Angeles County Library, and \$5,000 to Aids Healthcare Foundation.”

For each gift:

- ✓ Name the item with sufficient specificity that it can be identified by someone who isn't familiar with the item; and
- ✓ Indicate to whom that item will go.

Note that if the item you name is not in existence at the time of your death, no substitution will be made of another item unless you so specify. If the person you name to receive a specific gift does not outlive you, the gift lapses and is distributed as part of the Residue unless you name an alternative.

Where you give a specific piece of property, unless you provide otherwise, any debts connected with that item of property will have to be paid by the person receiving that property. For example, if you give someone a car that is not yet paid for, they would have to make the remaining payments. If you want to have the estate to pay off the debt, you must say so in your Will (or Revocable Trust).

WILL RESIDUE

Whether you have made provision for specific items or not, you need to provide for the remaining part of your estate. The *Residue* refers to everything in your estate that has not otherwise been distributed as a Specific Gift.

- ✓ **You can name one person or organization to receive all of the remainder of your estate. You should then name an alternate person/organization in case the first one you named is not alive or is not willing to take your bequest.**
- ✓ **You may name more than one person/organization (or combination) and if so, specify the percentage each is to receive, making sure that the total is 100%. You should then name an alternate person/organization in case the first one you named is not alive or is not willing to take your bequest.**

✓ **You can also distribute the Residue of your estate to more than one person and/or organization in percentage shares. If one of the named recipients does not survive you, their share goes to the other named recipient(s), or, you can provide for an alternative beneficiary.**

DISPOSING OF PROPERTY IF YOU ALSO HAVE A REVOCABLE TRUST

If you are also creating a Revocable Trust, I recommend that you not provide separately for the disposition of your assets in your Will except to include the following language in the portion of the Will dealing with your estate:

“I give my estate to the John Jones Revocable Trust. If for any reason any dispositive provision of said Revocable Trust is found to be invalid, I hereby incorporate each and every dispositive provision thereof as though fully set forth herein.”

This is known as a "pour over" Will. That way, all assets you own will be distributed through your Revocable Trust and not your Will. It is important to have this kind of a Will if you establish a Revocable Trust because sometimes people fail to transfer title to existing assets or acquire new assets in the name of the trust.

Of course, if there is a reason you would rather subject the item to probate, leave it in your Will and exclude it from your Revocable Trust.

THE EXECUTOR OF YOUR WILL

The Executor is the person who is charged with carrying out the terms of your Will and wrapping up your estate. If you are establishing a Revocable Trust, the person you have named as a successor trustee will ordinarily also be named as executor.

Depending upon the nature of your estate, your Executor may need to file a petition with the Probate Court for this purpose. If so, the Court is not bound to appoint the person you nominate, although it ordinarily will do so. The Court will require your Executor to post a bond equal to the value of your estate as security for her/his actions unless you provide in your Will that such a bond is waived.

Ordinarily, if you think the person you nominate as Executor is trustworthy beyond reproach, waiving the bond is sensible. It is a cost that will be taken from the value of your estate if required. If you have any doubts, however, the cost of the bond is minimal in comparison with the possible loss of valuable assets.

I recommend that you name an alternate Executor in case the person you name as your primary Executor is unwilling or unable to serve in that capacity. The same considerations as mentioned above apply to the issue of a bond.

OUT OF STATE PROPERTY

If you own property in another state that has not been transferred to a Revocable Trust, that property will have to be probated under the laws of that state and *in that state*.

I urge you to let me know about any such property and to name in your Will an executor for that property who lives in that state. This would be in addition to the executor named under the provision described above.

THE “NO CONTEST” CLAUSE

The Estate Planning Guide Sample Will includes a provision that disinherits anyone who contests your Will.

If you expect any significant opposition to your plan for disbursing your estate after your death, this provision may not be

sufficient, alone, to meet such a challenge. You need to take special care to document your mental health, your independence in decision making and that your Will is, in fact yours and not the subject of any undue influence.

If you expect a significant challenge, I urge you to discuss this with me.

BURIAL INSTRUCTIONS

I recommend that you state in a separate writing your burial instructions. You can address it either to someone who you will entrust with carrying them out or to your executor. This can be in the form of a simple letter signed by you and giving clear instructions to someone who you can trust to implement your instructions. A sample of such a letter is at the end of this section.

Typical instructions relate to whether or not you want your remains cremated, where you would like to be buried, and whether there are specific instructions regarding your funeral ceremony.

SAMPLE BURIAL INSTRUCTIONS

Dear John:

As my trusted friend, I am giving to you instructions for the treatment of my body and for my funeral after I die.

First of all, I want you and only you to make all the decisions regarding these matters. I have designated _____ as my agent under a Durable Power of Attorney for Health. They have the authority to take my body upon my death.

What I want done is that I want my body cremated and the ashes strewn at sea at sunrise. I want you to invite my close friends and family except for _____ to gather before hand for a brief ceremony. I have written out a short statement that I would like you to read to them. I specifically do not want _____.

Thank you for taking care of this for me.

[Your signature]

PROVIDING FOR A GUARDIAN OF A MINOR CHILD

If you are a parent of a minor child, you may wish to provide in your Will for who will take care of the minor child if you die during their minority. To do this, you include in your Will a provision naming a guardian of the minor child.

LIMITATIONS

The law provides, in general, that if one parent dies, the other parent is the legal custodian of any minor children of the couple, whether they were married or not. There are exceptions to this general principle.

For example, if the mother has custody of a child and she dies when the child is 8 years old, the father will be presumed to have custody. If the mother names a third person as guardian of the child in her Will, that will not take precedence over the normal rule about custody.

However, naming such a third person in a Will does give that person legal standing to challenge the father regarding custody, based upon the best interests of the child.

NAMING A GUARDIAN

In selecting a person to serve as the minor child's guardian after your death, you should select someone who is capable of taking care of the child, is familiar with any possible conflicts with other family members, and who is familiar with the child. If you are naming someone other than a biological parent and you foresee a possible argument regarding who should have custody of the child, consider the background and characteristics of the person you name in the light of a challenge being made to their capacity to serve.

ADVANCE HEALTH CARE DIRECTIVE

A power of attorney for health care is a written instrument designating an agent to make health care decisions for the principal and is known as the Advance Health Care Directive in this Guide.

SCOPE OF POWERS

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. The directive provided by me lets you do either or both of these things. It also lets you express your wishes regarding your personal care, donation of organs, and the designation of your primary physician.

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 co-worker).

Unless the form you sign limits the authority of your agent, your agent may make all health care decisions for you and all decisions regarding your personal care. You do not need to limit

the authority of your agent if you wish to rely on your agent for all health care decisions and personal 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 disapprove 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.

(f) Make personal care decisions, including determining where you will live, providing meals, hiring household employees, providing transportation, handling mail, and arranging recreation and entertainment for you.

GENERAL SCOPE OF AUTHORITY GRANTED

The statement of the Health Care Directive regarding the scope of authority you would be giving is as follows:

GENERAL STATEMENT OF AUTHORITY GRANTED. Subject to any limitations in this document, I hereby grant to my agent full power and authority (a) to make health care decisions for me to the same extent that I could make such decisions for myself if I had the capacity to do so, including, without limitation, decisions to provide, withhold or withdraw artificial nutrition and hydration

and all other forms of health care to keep me alive; and (b) to make personal care decisions for me to the same extent that I could make those decisions for myself if I had the capacity to do so, including, without limitation, determining where I will live, providing me meals, hiring household employees, providing transportation, handling mail, and arranging recreation and entertainment for me.

WHEN DOES THE HEALTH DIRECTIVE TAKE EFFECT?

You can provide either that your health directive will take effect immediately or only after your primary physician has determined that you are unable to make these decisions for yourself.

Ordinarily I recommend the latter choice as a precaution to preserve your power to make your own decisions. There may be situations where the immediate grant of power makes more sense. For example, if you are in an accident far from home, your primary physician may not be able to make the needed determination and this could delay the ability of your health surrogate to make decisions for you.

ANATOMICAL GIFTS, AUTOPSIES, DISPOSAL OF REMAINS

In your Health Care Directive you can provide for what happens to your body after your death. This includes an option giving your health care surrogate the power to make gifts of your body parts (all, none, or specific parts); the power to authorize an autopsy; and the power to dispose of your remains, including giving funeral directions.

NOMINATION OF CONSERVATOR OF PERSON

The use of a Health Care Directive is a means of avoiding the necessity for someone to go to court on your behalf to gain the

authority to make health care decisions for you. If no health care directive existed, such a person would ask the court to appoint them as conservator of your person.

Even when you have a health care directive, it sometimes happens that a well-meaning person may ask the court for appointment as your conservator if they feel the health care surrogate you named in your health care directive is either not following your instructions or is not acting on your behalf in some way. In such an event, I recommend that you nominate someone to be your conservator if the court is going to appoint one. While the court does not have to follow your nomination, it often does.

Usually you would nominate the same person that you selected as your health surrogate, but you may wish to nominate someone else. You can also name anyone who you do not wish to be able to apply to the court for appointment as your conservator or to petition the court regarding your health care directive.

HEALTH CARE INSTRUCTIONS

There are two primary choices of health care instructions used by most people. You can select one of them for inclusion in your health care directive:

(a) Choice Not To Prolong Life

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

(b) Choice To Prolong Life

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

OTHER TYPES OF INSTRUCTIONS

Another commonly used instruction is:

RELIEF FROM PAIN: I direct that treatment for alleviation of pain or discomfort be provided at all times, even if it hastens my death.

Other instructions may be added to reflect your specific wishes.

PRIMARY PHYSICIAN

You will be asked to provide the name, address and telephone number of your primary physician and, if you choose, an alternate primary physician. Select the physician who is most familiar with you and your health needs.

You do not need to name a primary physician. The advantage to doing so is that it gives you the ability to name the physician who has the power for purposes of the health directive to determine whether you can make your own decisions or not. If you do not designate your primary physician, that decision may be left to a physician who is unknown to you. The disadvantage is that if you do designate the primary physician (and alternate), you would have to change your health directive if you change physicians. Those using HMO's without a primary physician may not even be able to make this designation.

ADVANCE HEALTH CARE DIRECTIVE REGISTRY

The Secretary of State maintains the Advance Health Care Directive Registry as required by Probate Code section 4800

which allows a person who has executed an advance health care directive to register information regarding the directive with the Secretary of State. This information is made available upon request to the registrant's health care provider, public guardian, or legal representative. A request for information must state the need for the information.

An advance health care directive can be made a part of the Secretary of State's registry by attaching it to the Registration of Written Advance Health Care Directive filed with the Secretary of State. As an alternative to providing the written directive to the Secretary of State, its location can be indicated on the registration form.

An advance health care directive lets your physician, family, and friends know your health care preferences, including the types of special treatment you want or don't want at the end of life, your desire for diagnostic testing, surgical procedures, cardiopulmonary resuscitation and organ donation.

Once the advance health care directive has been prepared and executed, information regarding the advance health care directive may be registered with the Secretary of State by completing the Registration of Written Advance Health Care Directive. The Registration of Written Advance Health Care Directive is a voluntary filing. The registration form is provided at <http://www.ss.ca.gov/business/sf/forms/sfl-461.pdf>. It is to be mailed to:

Secretary of State
Advance Health Care Directive Registry
P.O. Box 942877, Sacramento, CA 94277-0001.

There is a \$10 fee for filing a new registration form or a revocation of prior directive and new registration.

The same form can be used to amend information on a previously filed registration form or revoke the registration by checking the applicable box on the form. There is no fee for filing an amendment or revocation.

The advance health care directive, or the location of the directive, can be made a part of the Secretary of State registry by attaching the advance health care directive to the Registration of Written Advance Health Care Directive filed with the Secretary of State.

A registrant must re-register upon execution of a subsequent advance directive.

TAKE A COPY OF THE DIRECTIVE WITH YOU

I urge you to make a copy of your Health Care Directive and take it with you when you travel in case you need it then. Having the directive at home when you are unconscious a thousand miles away is not helpful.

I also urge you to give a copy to your primary physician and certainly to give it to your hospital admissions if you undergo surgery.

DURABLE POWER OF ATTORNEY FOR PROPERTY MATTERS

The Individual's Durable Power of Attorney for Financial and Property matters is based on forms commonly used throughout California. It is, therefore, a form that most people can use and one that banks and other institutions are by law obligated to honor.

DO I NEED ONE OF THESE?

Being appointed by the court can be time consuming and costly.

The purpose of a durable power of attorney for financial, non-health related matters is to give someone the authority to act on your behalf regarding financial matters, either immediately or if you become incapacitated or disabled. Without such a document, there may be no one with the necessary legal authority to manage your financial affairs in your absence (immediate power) or, during your incapacity (springing power), unless a court appoints a conservator of your estate.

Family members are not always available or committed to carrying out your desires. The durable power of attorney provides an economical, effective tool so that someone you trust can handle your property and finances.

CONSERVATORS

As an alternative to the Durable Power of Attorney, there is a procedure called a "Conservator of the Estate" that provides another method by which someone else could gain authority to

make decisions for you regarding financial and property matters. A Conservator of the Estate could be appointed by the court to administer your financial affairs if needed. The same or a different person could also be appointed to serve as "Conservator of the Person". That conservator would handle all personal and health matters.

This power of attorney is designed to avoid that situation. Virtually anyone may petition the court to be appointed your conservator, although ordinarily the person appointed would be someone familiar with you.

A Conservatorship tends to be expensive and time intensive. Most major events need court approval and your affairs become public record. Where someone can be trusted to carry out your instructions, I feel that a Durable power of Attorney for Property Matters is a better alternative. I suggest that you also name a conservator nominee, however. Usually this is the same person as your agent. It is unlikely you will need a conservator, but this is a precaution so that if one is called for, your wishes in who that should be are on record.

WHAT IS A "DURABLE" POWER OF ATTORNEY?

A power of attorney can be used in a variety of circumstances, such as when you would be out of town and want to authorize someone to sign a document on your behalf in your absence. A normal power of attorney is valid and gives the agent you appoint power to act on your behalf until you are incapacitated or die. Because there are many situations in which you may want your agent to act on your behalf during a period of incapacity, the legislature created something called a *durable* power of attorney.

The durable power of attorney is valid even when the person

who grants it is not capable of acting himself or herself. This is, therefore, an important tool in designing a plan for the orderly management of your affairs.

WHAT IF I ALSO HAVE A REVOCABLE TRUST AND/OR HEALTH CARE DIRECTIVE?

Even if you create a Revocable Trust and a Health Care Directive (or Durable Power Of Attorney for Health Care), I recommend that you also consider one of these standard durable powers of attorney. If you have a joint Revocable Trust, all assets are owned jointly and have been transferred to the trust, and either trustee can act alone, your need for the Durable Power for Financial Matters is minimized.

In any other circumstance, however, there may be a need to grant to someone the legal authority to act on your behalf with regard to a wide range of financial matters.

With regard to your Health Care Directive, if you create one, by California law you cannot combine in one instrument the power over health matters *and* power over financial matters. Therefore I have included both kinds of documents in this Guide and as part of the Estate Document Set.

SELECTING AN AGENT

You may have a trusted friend to whom you feel you can entrust these decisions. Remember that without such a power, there may be no one who can act on your behalf in an emergency with regard to your accounts, property, receiving checks and depositing them, etc., except for an immediate family member. Even such a family member is likely to encounter resistance and delays in handling your affairs.

You should make certain that the person you choose is likely to be available and will follow your instructions faithfully. If you

have a question about the person, it is not wise to appoint that person.

When you have decided who the agent will be, talk over your intentions with them. Let them know what financial and property matters they may have to take over if you need them. Make certain they understand that this may be a significant imposition on them and check to see that they are willing to take it on.

WHEN SHOULD MY DURABLE POWER BEGIN?

It depends upon whether you want the power to begin immediately (immediate power) or whether you prefer to wait for the power to take effect only if you are unable to act yourself (the so-called "springing power").

An immediate power is one that goes into effect when you sign it. This is could be appropriate where there is a need to give another person the to act on your behalf right away.

WHEN IS AN "IMMEDIATE" POWER EFFECTIVE?

An immediate power of attorney is effective as soon as you sign it. This can be helpful in situation where you are frequently out of the country or otherwise not available to take action with regard to your property interests. You may want to give the power to take those actions to another, trusted person acting on your behalf.

WHEN DOES A SPRINGING POWER TAKE EFFECT?

A springing power simply means that it has no effect until either a court or two physicians determine you to be unable to act. The springing power is very advantageous because it is effective only when you need it. That determination must be placed in writing and attached to your durable power of attorney.

The powers described are extensive. Please be certain that you understand each statement of power before you give that power to anyone.

HOW DO I GIVE MY AGENT POWER?

The Power of Attorney that I offer is based upon the statutory form developed by the state and is, therefore, universally accepted. Among the powers that you may wish to grant your agent are:

_____ **(A) Real property transactions.** To lease, sell, mortgage, purchase, exchange, and acquire, and to agree, bargain, and contract for the lease, sale, purchase, exchange, and acquisition of, and to accept, take, receive, and possess any interest in real property whatsoever, on such terms and conditions, and under such covenants, as my Agent shall deem proper; and to maintain, repair, tear down, alter, rebuild, improve manage, insure, move, rent, lease, sell, convey, subject to liens, mortgages, and security deeds, and in any way or manner deal with all or any part of any interest in real property whatsoever, including specifically, but without limitation, real property lying and being situated in the State of California, under such terms and conditions, and under such covenants, as my Agent shall deem proper and may for all deferred payments accept purchase money notes payable to me and secured by mortgages or deeds to secure debt, and may from time to time collect and cancel any of said notes, mortgages, security interests, or deeds to secure debt.

_____ **(B) Tangible personal property transactions.** To lease, sell, mortgage, purchase, exchange, and acquire, and to agree, bargain, and contract for the lease, sale, purchase, exchange, and acquisition of, and to accept, take, receive, and

possess any personal property whatsoever, tangible or intangible, or interest thereto, on such terms and conditions, and under such covenants, as my Agent shall deem proper; and to maintain, repair, improve, manage, insure, rent, lease, sell, convey, subject to liens or mortgages, or to take any other security interests in said property which are recognized under the Uniform Commercial Code as adopted at that time under the laws of the State of California or any applicable state, or otherwise hypothecate (pledge), and in any way or manner deal with all or any part of any real or personal property whatsoever, tangible or intangible, or any interest therein, that I own at the time of execution or may thereafter acquire, under such terms and conditions, and under such covenants, as my Agent shall deem proper.

_____ **(C) Stock and bond transactions.** To purchase, sell, exchange, surrender, assign, redeem, vote at any meeting, or otherwise transfer any and all shares of stock, bonds, or other securities in any business, association, corporation, partnership, or other legal entity, whether private or public, now or hereafter belonging to me.

_____ **(D) Commodity and option transactions.** To buy, sell, exchange, assign, convey, settle and exercise commodities futures contracts and call and put options on stocks and stock indices traded on a regulated options exchange and collect and receipt for all proceeds of any such transactions; establish or continue option accounts for the principal with any securities or futures broker; and, in general, exercise all powers with respect to commodities and options which the principal could if present and under no disability.

_____ **(E) Banking and other financial institution**

transactions. To make, receive, sign, endorse, execute, acknowledge, deliver and possess checks, drafts, bills of exchange, letters of credit, notes, stock certificates, withdrawal receipts and deposit instruments relating to accounts or deposits in, or certificates of deposit of banks, savings and loans, credit unions, or other institutions or associations. To pay all sums of money, at any time or times, that may hereafter be owing by me upon any account, bill of exchange, check, draft, purchase, contract, note, or trade acceptance made, executed, endorsed, accepted, and delivered by me or for me in my name, by my Agent. To borrow from time to time such sums of money as my Agent may deem proper and execute promissory notes, security deeds or agreements, financing statements, or other security instruments in such form as the lender may request and renew said notes and security instruments from time to time in whole or in part. To have free access at any time or times to any safe deposit box or vault to which I might have access.

_____ **(F) Business operating transactions.** To conduct, engage in, and otherwise transact the affairs of any and all lawful business ventures of whatever nature or kind that I may now or hereafter be involved in. To organize or continue and conduct any business which term includes, without limitation, any farming, manufacturing, service, mining, retailing or other type of business operation in any form, whether as a proprietorship, joint venture, partnership, corporation, trust or other legal entity; operate, buy, sell, expand, contract, terminate or liquidate any business; direct, control, supervise, manage or participate in the operation of any business and engage, compensate and discharge business managers, employees, agents, attorneys, accountants and consultants; and, in general, exercise all powers with respect to business interests

and operations which the principal could if present and under no disability.

_____ **(G) Insurance and annuity transactions.** To exercise or perform any act, power, duty, right, or obligation, in regard to any contract of life, accident, health, disability, liability, or other type of insurance or any combination of insurance; and to procure new or additional contracts of insurance for me and to designate the beneficiary of same; provided, however, that my Agent cannot designate himself or herself as beneficiary of any such insurance contracts.

_____ **(H) Estate, trust, and other beneficiary transactions.** To accept, receipt for, exercise, release, reject, renounce, assign, disclaim, demand, sue for, claim and recover any legacy, bequest, devise, gift or other property interest or payment due or payable to or for the principal; assert any interest in and exercise any power over any trust, estate or property subject to fiduciary control; establish a revocable trust solely for the benefit of the principal that terminates at the death of the principal and is then distributable to the legal representative of the estate of the principal; and, in general, exercise all powers with respect to estates and trusts which the principal could exercise if present and under no disability; provided, however, that the Agent may not make or change a will and may not revoke or amend a trust revocable or amendable by the principal or require the trustee of any trust for the benefit of the principal to pay income or principal to the Agent unless specific authority to that end is given.

_____ **(I) Claims and litigation.** To commence, prosecute, discontinue, or defend all actions or other legal proceedings touching my property, real or personal, or any part thereof, or

touching any matter in which I or my property, real or personal, may be in any way concerned. To defend, settle, adjust, make allowances, compound, submit to arbitration, and compromise all accounts, reckonings, claims, and demands whatsoever that now are, or hereafter shall be, pending between me and any person, firm, corporation, or other legal entity, in such manner and in all respects as my Agent shall deem proper.

_____ **(J) Personal and family maintenance.** To hire accountants, attorneys at law, consultants, clerks, physicians, nurses, agents, servants, workmen, and others and to remove them, and to appoint others in their place, and to pay and allow the persons so employed such salaries, wages, or other remunerations, as my Agent shall deem proper.

_____ **(K) Benefits from Social Security, Medicare, Medicaid, or other governmental programs, or military service.** To prepare, sign and file any claim or application for Social Security, unemployment or military service benefits; sue for, settle or abandon any claims to any benefit or assistance under any federal, state, local or foreign statute or regulation; control, deposit to any account, collect, receipt for, and take title to and hold all benefits under any Social Security, unemployment, military service or other state, federal, local or foreign statute or regulation; and, in general, exercise all powers with respect to Social Security, unemployment, military service, and governmental benefits, including but not limited to Medicare and Medicaid, which the principal could exercise if present and under no disability.

_____ **(L) Retirement plan transactions.** To contribute to, withdraw from and deposit funds in any type of retirement plan (which term includes, without limitation, any tax qualified or

nonqualified pension, profit sharing, stock bonus, employee savings and other retirement plan, individual retirement account, deferred compensation plan and any other type of employee benefit plan); select and change payment options for the principal under any retirement plan; make rollover contributions from any retirement plan to other retirement plans or individual retirement accounts; exercise all investment powers available under any type of self-directed retirement plan; and, in general, exercise all powers with respect to retirement plans and retirement plan account balances which the principal could if present and under no disability.

_____ **(M) Tax matters.** To prepare, to make elections, to execute and to file all tax, social security, unemployment insurance, and informational returns required by the laws of the United States, or of any state or subdivision thereof, or of any foreign government; to prepare, to execute, and to file all other papers and instruments which the Agent shall think to be desirable or necessary for safeguarding of me against excess or illegal taxation or against penalties imposed for claimed violation of any law or other governmental regulation; and to pay, to compromise, or to contest or to apply for refunds in connection with any taxes or assessments for which I am or may be liable.

If you are uncertain about whether you want to grant a specific power on the form, I recommend that you do not do so. Discuss any questions with me. When you have read the powers in the Sample form, check off the ones you want to include in your document on the Information forms that follow this Chapter.

DURATION OF A DURABLE POWER

A Durable Power of Attorney is effective from the date

designated in the document for it to begin until the date your terminate it in writing. You can, however, provide that the power will terminate as of a designated date in the future, such as three years from the date of creation.

SPECIAL INSTRUCTIONS

You can place your own special instructions or limitations on the powers you grant or the methods and occasions on which your agent exercises those powers. Such as:

“My agent has authority to make charitable contributions on my behalf only to organizations that support human rights. I prefer that he make such contributions to the following organizations: [list them]”

ALTERNATE AGENTS

You may provide for up to two alternate agents. These are people who could take over in the event that the previously named agent was not able or willing to serve as your agent. This can be very important especially where your Durable Power has been in existence for a period of years. It can also be useful when situations arise that your primary named agent is for one reason or another unwilling or unable to deal with a particular situation.

CHECK WITH THE PERSON YOU SELECT BEFORE NAMING THEM

Before you name someone in your Durable Power, it is very important that you discuss the appointment with him or her. Discuss with them what you want done in case you need their help and make certain that they are willing to carry out your instructions.

Also, discuss with them whether they are likely to be available when needed, whether they are willing to take on the substantial

responsibility involved in the appointment, and whether they understand how the power of attorney works.

SIGNING YOUR DURABLE POWER

Your Durable Power for financial matters needs to be signed and dated by you **and notarized**. The power does not need to be recorded but that may be necessary as a part of a real estate transaction undertaken on your behalf by your agent.

Your agent will also be asked to sign your Power of Attorney confirming their acceptance.

COPIES OF YOUR POWER OF ATTORNEY

I recommend that you keep the original of the durable power of attorney but that you give a copy to your agent and anyone who is likely to interact with your agent. This might include your bank, creditors, mortgage company or others that you would expect your agent will have to deal with.

TERMINATING YOUR POWER OF ATTORNEY

You can terminate a durable power of attorney by any writing which cancels it. You can use any written statement, similar to that found in this Guide. Problems could arise, however, if it is claimed that you do not have the mental capacity to cancel your durable power of attorney. If this occurs, you will need an attorney.

The other problem that could arise is where there are copies of your durable power of attorney in the hands of people you do not know about. An agent who has evil intentions might be able to act on your behalf with such people even after you have terminated the power. Again, consult with me if this seems to be the case.

SAMPLE REVOCATION OF POWER

I, Henry Adams, of Los Angeles, California, executed a durable power of attorney dated January 1, 1992, appointing Brian Jones, my true and lawful attorney with such powers as are described therein.

I hereby revoke that durable power of attorney and all power and authority contained in it effective immediately.

Dated: _____

Henry Adams

[NOTARY STATEMENT]

AFTER DEATH

Upon your death, certain steps must be taken to distribute your assets and pay your last debts according to the plan you have created here. Those steps will vary depending upon what your plan has been.

If you use a Revocable Trust, your successor trustee will have the responsibility for handling these affairs for you. They will have to gather your debts and arrange for their payment, gather your assets and distribute them according to your plan.

There are a number of requirements of your successor trustee that the law imposes. I urge your successor trustee to consult legal counsel to make certain your wishes are followed and your plan is implemented.

If you do not use a trust I also suggest that your executor (named in your will) consult legal counsel.

In order to facilitate the work of the successor trustee or executor, I urge you to keep a of the names, addresses and telephone numbers of all people and/or organizations that will receive property from you or who may be important in carrying out your plan. I urge you to update this page as needed.