LAW 258 ESTATES & TRUSTS
SYLLABUS

SPRING SEMESTER 2013

I'M MY OWN GRANDPA
(Lonzo & Oscar)

I'm my own grandpa.
I'm my own grandpa.
It sounds funny, I know,
But it really is so,
Oh, I'm my own grandpa.

Now many, many years ago, when I was twenty-three,
I was married to a widow who was pretty as could be.
This widow had a grown-up daughter who had hair of red.
My father fell in love with her, and soon they, too, were wed.

This made my dad my son-in-law and changed my very life,
My daughter was my mother, cause she was my father's wife.
To complicate the matter, even though it brought me joy,
I soon became the father of a bouncing baby boy.

My little baby then became a brother-in-law to Dad,
And so became my uncle, though it made me very sad.
For if he was my uncle, then that also made him brother
Of the widow's grown-up daughter, who, of course, was my stepmother.

Father's wife then had a son who kept him on the run,
And he became my grandchild, for he was my daughter's son.
My wife is now my mother's mother, and it makes me blue,
Because, although she is my wife, she's my grandmother, too.

Now if my wife is my grandmother, then I'm her grandchild,
And every time I think of it, it nearly drives me wild,
For now I have become the strangest case you ever saw
As husband of my grandmother, I am my own grandpa!

I'm my own grandpa.
I'm my own grandpa.
It sounds funny, I know, but it really is so,
Oh, I'm my own grandpa.

LAW 258 ESTATES & TRUSTS SYLLABUS
SPRING SEMESTER 2013
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Intestate Succession

Chapter Two: Section A. (pp 71-97) and **Cal. Probate Code** §§100, 101, 103, 240-47, 6400-11, 6413, 6800-05; **Family Code** §§125, 760-72, 1100-03, 2550-56, 2580-81, and 2640-41) (***included in following materials***). See also materials included in this Syllabus.

Community Property

Read Community Property materials included in this Syllabus. Read also **Chapter Seven:** Section A. subsections 1. (pp 469-471) and 4. and 5. (pp 508-515).

Unit Two: Family Protection/Disqualification for Misconduct (1-2 classes)

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Rule Against Perpetuities

Briefly(!!!) skim **Chapter Fourteen** (pp 885-930). Skim also: **Cal. Probate Code** §§21200-31

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Unit Three: Introduction to Wills and Trusts

Capacity and Contests

Chapter Three (pp 159-221). See also **Cal. Probate Code** §§810-12 (Legal Mental Capacity), §§8250-54 and §§21300-22.

Unit Four: Introduction to Estate Planning (4-5 classes)

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Chapter One: Section B. (pp 38-49). Also ***skim*** **Cal. Probate Code** §§7000-12252 and **Chapter Fifteen:** Sections A. - C. (pp 931-988). See also materials included in this Syllabus.

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Chapter Six: Sections A. - E. (pp 393-448). Read also **Cal. Probate Code** §5000 and ***skim*** **Cal. Probate Code** §§5002-5705.

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Skim **Cal. Probate Code** §§1500 et. seq. (Guardianships) and §§3900 et. seq. (California Uniform Transfers to Minors Act).

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Chapter Six: Section F. (pp 448-468). Also ***skim*** **Cal. Probate Code** §§1800 et. seq. (Conservatorships) and §§4000-4860 (Powers of Attorney)

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Chapter One: Section D. (pp 58-70). Also ***skim*** **Cal. Probate Code** §§21350 et. seq. See also materials included in this Syllabus.

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Introduction

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Intestate Succession

Chapter Two: Sections A. (pp 59-83) and **Cal. Probate Code** §§100, 101, 103, 240-47, 6400-11, 6413, 6800-05; **Family Code** §§125, 760-72, 1100-03, 2550-56, 2580-81, and 2640-41) (***attached***). See also materials included in this Syllabus.

Community Property

Read Community Property materials included in this Syllabus. Read also **Chapter Seven:** Section A. subsections 1. (pp 417-9) and 4. (pp 455-62).

Unit Two: Family Protection/Disqualification for Misconduct (1-2 classes)

Family Protection

Chapter Seven: Section A. subsections 2., 3. and 6.and (pp 419-55 and 462-66) and Section B. (pp 466-84); **Cal. Probate Code** §§100-103, 120, 6412, 6500-6545, 6600-13 and 21600-23; **Family Code** §§1500-1620 (***attached***) and **Cal. Probate Code** §§140-46.

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Chapter Eight: Sections A. and B. (pp 485-533). ***Skim*** also **Cal. Probate Code** §§ 15200-12, 15600 and 15660.

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Chapter Four: Section C. (pp 271-86). **Chapter Six** (pp 365-417). **Chapter Ten:** Section C. subsection 2. (pp 648-669). Also ***Skim*** **Chapter Ten:** Section B. (pp 624-630). Read also: **Cal. Probate Code** §§21117, 21102-21106, 21120-22; §§21109-11 and 21113-15; §§21131-39 and §§21400-05; §§6130-31, 6300 and **Cal. Code Civ. Proc.** §§1856, 1860-65, ***attached***

Rule Against Perpetuities

Briefly(!!!) skim most of **Chapter Eleven** (pp 671-723), Skim also: **Cal. Probate Code** §§21200-31

Revocation / Revival / Lost Wills / Will Contracts

Chapter Four: Sections B. (pp 251-71) and D. (pp 286-294). Read also:

Unit Three: Introduction to Wills and Trusts

Cal. Probate Code §§6120-24, 8223 and **Cal. Probate Code** §21700 and **Family Code** §§1500 and 1600 [esp. §1615] et. seq. (***attached***).

Capacity and Contests

Chapter Three (pp 141-197). See also **Cal. Probate Code** §§810-12 (Legal Mental Capacity), §§8250-54 and §§21300-22.

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Chapter Five: Sections A. - D. (pp 295-345). Read also **Cal. Probate Code** §5000 and ***skim*** **Cal. Probate Code** §§5002-5705.

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Chapter Five: Section E. (pp 345-363). Also ***skim*** **Cal. Probate Code** §§1800 et. seq. (Conservatorships) and §§4000-4860 (Powers of Attorney)

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Unit Five: Trusts and Fiduciary Administration

(2-3 classes)

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Unit Six: Dealing With Clients/Class Summary and Review

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Introduction

Chapter One: Read Section A. (pp 1-34) independently during the first week of class.

Intestate Succession

Chapter Two: Sections A. & B. (pp 71-140) and **Cal. Probate Code** §§100, 101, 103, 240-47, 6400-11, 6413, 6800-05; **Family Code** §§125, 760-72, 1100-03, and 2550-81 (***attached***). See also materials included in this Syllabus.

Community Property

Read Community Property materials included in this Syllabus. Read also **Chapter Seven:** Section A. subsections 1. (pp 471-3), 4. and 5. (pp 521-30)

Unit Two: Family Protection/Disqualification for Misconduct (1-2 classes)

Family Protection

Chapter Seven: Section A. subsections 2., 3. and 6. (pp 471-521 and 530-36) and Section B. (pp 536-51); **Cal. Probate Code** §§100-103, 120, 6412, 6500-6545, 6600-13 and 21600-23 (***cf.*** with repealed 6560-73); **Family Code** §§1500-1620 (***attached***) and **Cal. Probate Code** §§140-46.

Disqualification For Misconduct

Chapter Two: Section C. subsection 1. (pp 141-48) **Cal. Probate Code** §§250-259

Unit Three: Introduction to Wills and Trusts (4-5 classes)

Wills: Formalities and Forms

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Trusts: Creation

Chapter Eight: Sections A. and B. (pp 553-617). ***Skim*** also **Cal. Probate Code** §§ 15200-12, 15600 and 15660.

Powers of Appointment

Skim **Chapter Nine** (pp 665-707) and **Cal. Probate Code** §§600-695

Trusts: Purposes/Spendthrift Trusts

Read **Cal. Probate Code** §15203 and §§15300-15309. Read also **Chapter Eight:** Section D. (pp 631-51)

Interpretation of Wills and Other Instruments

Chapter Four: Section C. (pp 301-19). **Chapter Six** (pp 409-69). **Chapter Ten:** Section C. subsection 2. (pp 750-86). Also ***Skim*** **Chapter Ten:** Section B. (pp 710-18). Read also: **Cal. Probate Code** §§21117, 21102-21106, 21120-22; §§21109-11 and 21113-15; §§21131-39 and §§21400-05; §§6130-31, 6300 and **Cal. Code Civ. Proc.** §§1856, 1860-65, ***attached***

Rule Against Perpetuities

Briefly(!!!) skim **Chapter Eleven** (pp 787-858), Skim also: **Cal. Probate Code** §§21200-31

Revocation / Revival / Lost Wills / Will Contracts

Chapter Four: Sections B. (pp 276-300) and D. (pp 319-29). Read also: **Cal. Probate Code** §§6120-24, 8223 and **Cal. Probate Code** §21700 and **Family Code** §§1500 and 1600 et. seq. (***attached***).

Capacity and Contests

Chapter Three (pp 159-222). See also **Cal. Probate Code** §§810-12 (Legal Mental Capacity)§§8250-54 and §§21300-22.

Unit Four: Introduction to Estate Planning (4-5 classes)

Introduction to Probate(including Introduction to Taxes)

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Will Substitutes

Chapter Five: Sections A. - D. (pp 331-396). Read also **Cal. Probate Code** §5000 and ***skim*** **Cal. Probate Code** §§5002-5705.

Planning for Minors

Skim **Cal. Probate Code** §§1500 et. seq. (Guardianships) and §§3900 et.

Incapacity Planning

Chapter Five: Section E. (pp 396-408). Also ***skim*** **Cal. Probate Code** §§1800 et. seq. (Conservatorships) and §§4000-4860 (Powers of Attorney)

Postmortem Planning/Disclaimers

Chapter Two: Section C. subsection 2. (pp 148-57). Also ***skim*** **Cal. Probate Code** §§260-95)

Office Procedures

Professional Responsibility

Chapter One: Section C. subsection 4. (pp 59-70). Also ***skim*** **Cal. Probate Code** §§21350 et. seq. See also materials included in this Syllabus.
seq. (California Uniform Transfers to Minors Act).

Unit Five: Trusts and Fiduciary Administration

(2-3 classes)

Modification and Termination of Trusts

Chapter Eight: Section E. (pp 651-664). Read also **Cal. Probate Code** §§15400-15414.

Charitable Trusts

Skim **Chapter Twelve** (pp 859-901).

Fiduciary Administration

Skim **Chapter Thirteen** (pp 903-76) and **Cal. Probate Code** §§15600-15805, 16000 -16249 and §§16400-65.

Unit Six: Dealing With Clients/Class Summary and Review

(1-2 classes)

See materials included in this Syllabus.

LAW 258 WILLS & TRUST
COMMUNITY PROPERTY

LAW 258 WILLS & TRUST
COMMUNITY PROPERTY

I. COMMUNITY PROPERTY

A. Origins/Background

1. Spanish Law imported into California through Mexico
2. The system is ***more favorable to women*** then is the traditional common law system imported from England--and generally adopted in the U.S.
   a. It recognizes that earnings of either spouse during marriage were really the result of the efforts of both (again viewing and supporting the family as a primary economic unit)
   b. It permitted Spanish daughters greater control over their inheritance
3. California is one of eight states in the U.S. to have historically adopted a Community Property System
   a. Arizona
   b. California
   c. Idaho
   d. Louisiana
   e. Nevada
   f. New Mexico
   g. Texas; and
   h. Washington

i. In 1986 ***Wisconsin*** also adopted a "marital property" system very much like the comm. prop. system

4. ***N.B.*** Although these states all have "community property" laws, there are sufficient variances between the laws of the various states so that if you practice in one of these states outside California, you should check the law to make such you understand the local rule.

5. ***N.B.*** Over time the property laws (especially relating the division of marital property in divorce) have tended to soften and have become much more favorable to wives than was historically the case--in part (I think) due to the influence of community property laws.

B. **General Rules**

1. The ***general rules*** of Calif. Community Property Law are ***easily stated***

a. "Except as otherwise provided by statute, all property, real or personal, wherever situated, acquired by a married person during the marriage while domiciled in this state is community property." ***§760 Calif. Fam. C.***

b. The ***principal exceptions*** to this rule are contained in ***§770 Calif. Fam. C.*** which defines ***separate property*** as:

(i) All property owned by the person before marriage;

(ii) All property acquired by the person after marriage by gift, bequest, devise or descent; and

(iii) The rents, issues and profits of the [foregoing] separate property.

c. "***Quasi-Community Property***" is defined as all real or personal property, wherever situated, acquired . . . by either spouse while domiciled elsewhere which would have been community property if the spouse who acquired the property had been domiciled in this state at the time of its acquisition.

C. **Incidental Rights**

1. One has total control over the management and disposition of separate property (see ***§770 [b] Calif. Fam C.***)

2. Management and control over community property are generally shared equally between the spouses--who stand in a fiduciary relationship to one another with respect to the same (see ***§1100-3 Calif. Fam C.***) and who have present equal, undivided interests in the property.

3. One has the absolute right to dispose of one's separate property at death in any manner in which one wishes--and, absent a Will, the separate property will be split between the spouse and children (or other relatives) if one dies intestate

4. A decedent only has the right to dispose of his/her one-half share of the community property owned with the decedent's spouse in the event of death--and, absent a Will, one's interest in community property will pass in its entirety to the decedent's spouse in the event of death.

5. ***If*** the ***requisite formalities*** are met, spouses can modify their respective marital property rights by contract and own their assets and earnings in any manner they choose. See ***Calif. Fam C §§1500 ff*** and ***Calif. Pro C. §§140 ff.***
See also Estate of Gagnier (21 Cal.App.4th 124 1993) which says that independent representation per §142 P.C. is not required where the requirements of §144 P.C. (the Court "finds that the waiver made a fair and reasonable disposition of the rights of the surviving spouse, that the surviving spouse had adequate knowledge and there was no breach by the decedent of his or her duties under" the Family Code) are met

D. **Significant Contexts**

1. ***Death***
   a. Tax Consequences (stepped-up basis)
   b. Determines the decedent's rights of disposition
   c. Intestate Rights
2. ***Divorce***
3. ***Control during marriage***

4. ***The apparent advantages of a couples holding their property as community at death can easily be outweighed by the disadvantages of losing formerly separate property in the event of divorce (and by the sometime disadvantages of giving up management control during marriage)***

E. **Problems**

1. Although easily stated, the community property rules are often ***hard to apply***. Examples:

a. ***Van Kamp/Pereira*** Rules re: profits of a separately owned business

(i) ***Van Kamp*** (53 C.A. 17, 199 P. 885 [1921]) case held that a "reasonable salary" (which is community income) should be allocated to the owner and any other increase in the value of the business is separate

(ii) ***Pereira*** (156 C. 1, 103 P. 488 [1909]) case held that a reasonable return on the original "investment"--i.e., the value of the business at the time of marriage--(in ***Pereira*** : 7%) should be allocated to separate property and the balance of the increase is community

(iii) Both lines of cases are still followed--with some significant variations added over time

b. Allocating ***retirement benefits*** in a divorce where some

of the benefits accrued during marriage and some accrued before and after marriage--particularly difficult in situations in which benefits are based on years of service and highest average salary

c. Allocating ***stock options*** in a divorce where options granted during marriage but vested afterwards (and vice versa). See ***Marriage of Walker*** 216 C.A. 3rd 644, 265 C.R. 32 (1989).

d. Community contributions to ***Education and Training.*** See ***Fam C §2641*** (Wife helps husband through medical or law school and, after graduation, they get divorced--community reimbursed for expense/10 yrs.)

e. Separate property contributions to ***Property Acquisitions***. See ***Fam C §2640*** (Parent helps kids buy a house and then kids get divorced)

f. ***Personal Injury awards***--See ***Fam C §2603*** (Community until divorce and then can be made separate)

2. ***Unusual situations***

a. Surcharge for ***misappropriation of funds*** (husband puts girlfriend on community property business payroll [as in ***Marriage of Czapar*** 232 C.A. 3rd 1308, 284 C.R. 41 {1991}] ***or*** buys presents/takes trips with girlfriend using community funds--wife entitled to reimbursement for "her" half of squandered funds)

b. ***Criminal charges*** can be brought against a spouse for wrongful destruction of community assets--as in ***Kahanic*** case (196 C.A. 3rd 461, 241 C.R. 722 [1987] where wife was convicted for vandalizing a community property automobile when she threw a bottle of beer through the car's rear window when she found it parked in front of another woman's residence.

With this as background, we'll now go back to Wills and Trust and look at the impact of California's community property laws on intestate succession.

That impact is seen in ***two primary way***s:

1. Because surviving spouse's have community property rights (that, presumably include increased community assets in a longer marriage), there is ***not as much need*** in a community property state ***to provide "forced share" protection*** (like dower and curtesy) for the surviving spouse as there is in common law jurisdictions).
2. There can be tremendous tax advantages to owning property as community property in the event of the death of one spouse. Explain "***stepped-up basis***." See ***§1014 U.S. Internal Revenue Code***.

INTESTACY IN THE OLD TESTAMENT

<u>From Numbers 27:</u>

The daughters of Zelophehad, of Manassite family--son of Hepher son of Gilead son of Machir son of Manasseh son of Joseph--came forward. The names of the daughters were Mahlah, Noah, Hoglah, Milcah, and Tirzah. They stood before Moses, Eleazer the priest, the chieftains, and the whole assembly at the entrance of the Tent of Meeting and they said, "Our father died in the wilderness. He was not one of the faction, Korah's faction, which banded together against the LORD, but died for his own sin; and he has left no sons. Let not our father's name be lost to his clan just because he had no son! Give us a holding among our father's kinsmen!"

Moses brought their case before the LORD. And the LORD said to Moses, "The plea of Zelophehad's daughters is just: you should give them a hereditary holding among their father's kinsmen; transfer their father's share to them. "Further, speak to the Israelite people as follows: '***If a man dies without leaving a son, you shall transfer his property to his daughter. If he has no daughter, you shall assign his property to his brothers. If he has no brothers, you shall assign his property to his father's brothers. If his father had no brothers, you shall assign his property to his nearest relative in his own clan, and he shall inherit it.' This shall be the law of procedure for the Israelites, in accordance with the LORD's command to Moses.***"

<u>From Numbers 36:</u>

The family heads in the clan of the descendants of Gilead son of Machir son of Manasseh, one of the Josephite clans, came forward and appealed to Moses and the chieftains, family heads of the Israelites. They said, "The LORD commanded my lord to assign the land to the Israelites as shares by lot, and my lord was further commanded by the LORD to assign the share of our kinsman Zelophehad to his daughters. Now, if they marry persons from another Israelite tribe, their share will be cut off from our ancestral portion and be added to the portion of the tribe into which they marry; thus our allotted portion will be diminished. And even when the Israelites observe the jubilee, their share will be added to that of the tribe into which they marry, and their share will be cut off from the ancestral portion of our tribe."

So Moses, at the LORD's bidding, instructed the Israelites, saying: "The plea of the Josephite tribe is just. ***This is what the LORD has commanded concerning the daughters of Zelophehad: They may marry anyone they wish, provided they marry into a clan of their father's tribe. No inheritance of the Israelites may pass over from one tribe to another, but the Israelites must remain bound each to the ancestral portion of his tribe. Every daughter among the Israelite tribes who inherits a share must marry someone from a clan of her father's tribe, in order that every Israelite may keep his ancestral share. Thus no inheritance shall pass over from one tribe to another, but the Israelite tribes shall remain bound each to its portion."***

The daughters of Zelophehad did as the LORD had commanded Moses: Mahlah, Tirzah, Hoglah, Milcah, and Noah, Zelophehad's daughters, were married

to sons of their uncles, marrying into clans of descendants of Manasseh son of Joseph; and so their share remained in the tribe of their father's clan.

These are the commandments and regulations that the LORD enjoined upon the Israelites, through Moses, on the steppes of Moab, at the Jordan near Jericho.

The Laws of Inheritance in the Old Testament

Old practice dictated that land was inherited through the male line only. If a man died without sons, his brother was to marry the widow and her son would become the true heir. Still, there would be cases when such procedure could not apply, and the law promulgated for the daughters of Zelophehad covers one such exception: when there were no sons, nor sons who left offspring, the women could inherit, but with the stipulation that they married within their own tribes (See Num. 36).

Later Jewish law set down the order of inheritance in this manner:

Sons and their offspring;

Daughters and their offspring;

The father;

Brothers and offspring;

Sisters and their offspring;

The paternal grandfather;

Paternal uncles and their offspring;

Paternal sisters and their offspring;

The paternal great-grandfather, etc.

Furthermore, the husband was added as an heir, but the wife did not inherit from the husband. The first obligation incumbent on the estate was to provide for unmarried daughters. The principle was: they must be supported even if the sons are thereby reduced to beggary.

INTESTACY PROBLEM

The Hues are divided into three primary races: the Reds, Blues and Yellows. They live in a rigidly hierarchical society where class is determined by color. The Reds are the "upper" wealth holding class, the Yellows are the "middle" managerial class and the Blues are the "lower" working class.

Hues are family oriented and generally live as close-knit, extended families. The typical family consists of married opposite sex parents, their ancestors and descendants. Committed, nonmarital relationships (of all gender mixes) are common and well tolerated. Committed, nonmarital couples may legally adopt--regardless of gender mix.

Hue reproductive technology is advanced and very expensive. Because Reds consider pregnancy inconvenient and childbirth distasteful, their offspring are generally conceived in Petrie dishes and gestate in hired, surrogate mothers (usually Blue). Post-mortem conception is unusual, but not unknown.

Abortion is legal, but rare. Out-of-wedlock children are common.

Divorce and adoption are legal and common. Remarriage after divorce is common.

Interracial marriage is illegal. As is inevitable, however, persons of Orange, Green and Purple color exist. Such persons live in a legal limbo and are shunned by persons of "pure," primary color.

Land ownership is considered the hallmark of wealth and is extremely concentrated. Land generally passes along maternal lines.

Hue government is relatively unobtrusive and supported ***exclusively*** by taxes levied on the transmission of wealth at death.

Although Hue law permits its citizens to devise their estates as they wish ***if*** they execute appropriate testamentary documents, due to a scarcity of lawyers few Hues take advantage of this right. Most Hues therefore die without a Will.

The Ministers of Justice and Wealth are not happy with the Hue's current system of intestacy--which originated in feudal times and doesn't reflect the realities of Hue society as it now exists. They have, therefore, engaged you to develop a new system of intestate succession appropriate to modern Hue society.

Submit your recommendations for a new Hue system of intestate succession, keeping in mind that the revenues of the state are solely dependent upon escheats and death taxes.

DRAFTING WILLS AND TRUSTS-PT. I
INTRODUCTION TO DRAFTING

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As promised in the last issue of the California State Bar Estate Planning, Trust and Probate Law Section Quarterly, we here continue our examination of certain basic practice issues about which we may have become dangerously complacent. The next column or two will review some fundamentals of drafting--with particular emphasis in ***this*** column on drafting sources, preferences and styles.

The impetus for this examination lies in the recent experience of Jon Gallo and Anne Hilker in teaching a course entitled "What They Don't Teach You In Form Books." In preparation for that class, Jon and Anne surveyed 100 selected members of the California and New York Bars, seeking information about the solutions those practitioners had developed, and the forms they used, in dealing with a list of selected issues. Their reported findings were fascinating. First, a significant number of the lawyers surveyed flat out refused to divulge their forms! Second, of the lawyers responding to the survey, virtually all expressed anxiety about the forms they were using. Finally, Jon and Anne found that the variety of "acceptable" solutions submitted to even relatively common problems was astounding.

Drafting Sources

The "form anxiety" uncovered by the Gallo/Hilker survey raises the question of how we go about obtaining and developing forms. This process should be ongoing--starting passively in the forms used by our firm's predecessors (or in a form book) and spurred on by a combination of client feedback, direct experience with the forms and the need to solve new problems. Form development can also be facili-

tated by the periodic review of documents prepared by others and by an occasional review of our own documents by our peers.

Over time, most of us build up our own unique library of forms. This task has been made much easier of late by the availability of computers. Repetitive use of our "own" forms has the advantages of: (i) increasing our familiarity with the forms used and (ii) permitting (indeed, even necessitating) an ongoing review of the forms. If we recognize these advantages both consciously and conscientiously ***and*** attend to the dynamics of form development we can greatly increase both the quality of our forms and our level of comfort in using them.

Drafting Preferences

Thankfully, neither clients nor attorneys are stamped out a common mold. The variety of client needs and the ability of the attorneys called upon to handle those needs are almost infinite. The range of appropriate options available to "solve" a given client's problems is correspondingly great. It is, therefore, difficult to prescribe universal solutions to the drafting problems faced by an estate planning practitioner. Each practitioner must develop his or her own preferences over time. Thus:

(a) One practitioner may routinely have clients create Living Trusts to administer the client's assets (both during the client's lifetime and after death), while another may simply have clients execute Wills and never establish a Living Trust; ***or***

(b) One practitioner may have virtually all clients incorporate Generation Skipping Transfer provisions (with or without subsequent Powers of Appointment) in their estate plans while another may hardly ever utilize such provisions.

(c) Similarly, one practitioner may routinely have clients grant Durable Powers of Attorney to spouses and children, while another finds such a prospect horrifying, ***or***

(d) One practitioner may generally draft estate plans for his/her wealthy married clients so as to pay estate taxes upon the death of the first spouse, while another would never even suggest that "option" to such clients.

These differences in preference sometimes, at first glance, seem completely incompatible. Closer examination of the circumstances giving rise to a practitioner's preferences, however, frequently reveals that the preferences have developed in response to the particular needs of the practitioner's clientele (which client needs may vary radically form practitioner to practitioner).

Given the variety of trust and estate planning practices, and given the fact that each involves the use of some planning devices that are not appropriate to others, one can see both that: (a) careful attention must be paid to the particular needs of a given client--so that appropriate solutions are developed for that client's unique needs; and (b) great latitude should be given for differences in approach and preference in planning estates.

Drafting Styles

Just as practitioners' preferences vary, so do practitioners' styles. There are some distinctly different ways of drafting documents. This column will discuss four such styles, which for convenience sake can be described as: (i) Standard Drafting, (ii) Overdrafting, (iii) Minimal Drafting and (iv) Explicit Drafting.

The most common style is probably best described as "***Standard Drafting***."

This is the style we see in standard form books and the "style" that most of us use in the documents we prepare daily. It is a style that is generally conservative, thorough and "safe." Over time--at the urging of both the public and such clear-thinking academics as Ed Halbach--"Standard Drafting" has (slowly) gravitated toward the use of "plain English." As a consequence, Latin terms have been replaced by their supposedly more comprehensible English renditions (e.g. "per stirpes" is now most often rendered as "by right of representation") and elaborate legal formulae have been reduced in complexity. With luck, this plain English trend will continue.

The worst style is probably best described as "***Overdrafting***." This is a "kitchen-sink style" that tosses in a clause or section to deal with every problem the drafter thinks may arise with respect to any client, anywhere, ever. Although an "Exemption Equivalent Trust with a Reverse Q-TIP Generation-Skipping Transfer sub-Trust containing a Limited Power of Appointment Option and a contingent remainder Charitable Remainder Unitrust" can be a wonderful device, it is ***not*** appropriate for a young couple with little money and limited prospects. This "style" generally reflects either laziness (stemming from an unwillingness to fit the documents to the circumstances) or deep-seated insecurity on the part of the drafter.

There is also a style afoot that can best be described as "***Minimal Drafting.***" This style requires a bit of courage (unless it results from simple ignorance--in which case it is dangerous). Minimal Drafting cuts documents to their very essence, and usually involves the sacrifice of clauses covering "standard," but remote, contingencies. Minimal Drafting can be greatly aided by incorporating appropriate statutes by reference. Thus, while a Trust document prepared with Standard Drafting might require 5 to 10 single-spaced pages to set forth Trustee pow-

ers, a Trust document prepared with Minimal Drafting might seek to shorten the enumeration of such powers by reference to the appropriate statutes as follows:

> "A. The Trustee shall have such powers as may now or hereafter be conferred upon the Trustee by law--specifically including (but not necessarily limited to) the powers conferred by Sections 16220 et. seq. of the California Probate Code. The Trustee shall also have such further powers as may be necessary to enable the Trustee to administer this Trust in a reasonable business-like manner in accordance with the provisions and intentions of this Trust Agreement as a whole.
>
> "B. The Trustee may also, by written delegation, delegate any or all of the Trustee's management and/or investment duties under this Trust Agreement (but not any of the Trustee's powers to distribute property to, or for the benefit of, persons other than the Trustor) to any of the Trustor's issue for such period and upon such terms, as the Trustee may stipulate."

The last drafting style to be discussed is best be described as "***Explicit Drafting***" (or "Savings Clauses"). This "style" is probably better described as a technique than as a style. It's compatible with all of the foregoing "styles" and can be an effective adjunct to any of them. "Explicit Drafting" is appropriate in those instances in which the drafter's objectives are clear, but for some reason the precise means of achieving the objective is not clear. Such situations can arise in cases in which there is some uncertainty about applicable law (as cases in which the Internal Revenue Code is changed effective 5 years before promulgation of the regulations interpreting the change!). In such cases, some margin of safety can be obtained by drafting a clause that explicitly recites the objective ***combined*** with "severance language" invalidating those portions of the document subsequently held to be incompatible with the objective sought.

The following are examples of "Explicit Drafting" clauses:

A. A clause designed to support broad Spendthrift Provisions in a Trust might read:

> ***NOTWITHSTANDING ANYTHING CONTAINED HEREIN TO THE CONTRARY, THE TRUSTEES SHALL NOT HAVE ANY POWERS OR AUTHORITY HEREUNDER THAT WILL CAUSE THE FOREGOING SPENDTHRIFT PROVISION TO LOSE THEIR STATUS AS SUCH WITHIN THE MEANING OF SECTIONS 15300 ET SEQ. OF THE CALIFORNIA PROBATE CODE AND SECTION 541 (c)(2) OF THE U.S. BANKRUPTCY ACT.***

or

B. A clause designed to support the tax advantages of a Qualified Domestic Trust might read:

> ***NOTWITHSTANDING ANYTHING CONTAINED HEREIN TO THE CONTRARY, THE TRUSTEES SHALL NOT HAVE ANY POWERS OR AUTHORITY HEREUNDER THAT WILL CAUSE ANY PROPERTY PASSING TO THE TRUSTEE FOR INCLUSION IN THE QUALIFIED DOMESTIC TRUST TO LOSE ITS ABILITY TO QUALIFY FOR A MARITAL DEDUCTION IN ACCORDANCE WITH THE TERMS OF SECTION 2056 OF THE U.S. INTERNAL REVENUE CODE AND/OR ANY REGULATIONS PROMULGATED THEREUNDER--NOTWITHSTANDING THE FACT THAT THE SURVIVING TRUSTOR MAY NOT BE A UNITED STATES CITIZEN AT THE TIME OF DEATH OF THE FIRST TRUSTOR TO DIE.***

In sum, by focusing both consciously and conscientiously on the manner in which we draft, we can increase both the quality of our forms and our level of comfort in using them.

DRAFTING WILLS AND TRUSTS-PT. II
"BOILERPLATE"

DRAFTING WILLS AND TRUSTS-PT. II
"BOILERPLATE"

--"Boil*er*plate" (noun), First appeared 1897: (i) standardized text; (ii) formulaic or hackneyed language <bureaucratic >

--"Term of art:" a word or expression that has a precise meaning in some uses or is peculiar to a science, art, profession, or subject <legal>

--(From American On Line's on-line version of the Miriam Webster Collegiate Dictionary)

This is the second of two articles reviewing some fundamentals of drafting--with particular emphasis in ***this*** column on "***boilerplate***."

I. General Introduction

A compelling argument can be made that there is "no such thing as boilerplate language" in an estate planning document. Every clause, indeed every phrase, ***should*** have substantive meaning that furthers in some way the manner in which a client's estate plan is implemented.

Right!!! Tell that to the client who has just waded through 25 to 30 pages of legalese searching for the one clause that identifies her children by name and tells in plain English exactly what each beneficiary will receive. Like it or not, we do use "boilerplate" in preparing our documents--much of it containing terms of art (like "issue," "by right of representation" and "hypothecate") that have little or no meaning to the layman. ***We*** know that "children" and "issue" are very different terms. ***We*** know that a Trustee's power to invade trust principal for his own "health, education, maintenance and/or support" is safe, while a power to invade

for "health, education, ***comfort***, maintenance and/or support" can have disastrous tax consequences. ***We*** know that brokerage house multi-purpose accounts (such as a Schwab One account, a Merrill, Lynch CMA account or a Dean Witter AAA account) must usually be established as margin accounts--requiring appropriate enabling language in our Trust documents. ***But clients*** don't generally understand these subtleties and must, ***if they are willing***, be educated about the meaning and importance of such clauses.

Through our use of "boilerplate," we tend (consciously or unconsciously) to impose our will on clients. Thus the very real differences in the "standard" language we use in directing trust distributions, defining Trustee discretion and establishing Trusts for minors--to name but a few--can make Trusts established by one practitioner perform substantially differently than those established by another.

There are, in fact, myriad ways to put together an estate plan--all of which involve some "boilerplate." There is nothing inherently wrong with this reality. Client's pay for the exercise of our judgment. We ascertain their needs and desires and help them achieve their objectives as best we can. We must, however, make sure that our judgment is informed and that it remains ***professional*** and responsive to client needs. As a consequence, we need to periodically reexamine our "boilerplate" to make sure that it accomplishes our (and, ultimately, our client's) objectives. "Good" boilerplate follows from the ongoing exercise of good judgment and should be appropriate to each client's unique circumstance. "Bad" boilerplate results from the rote incorporation in our documents of clauses that may or may not be appropriate under the circumstances. It often creeps in from habit.

What follows is an examination of the drafting of a ***few*** of those important clauses we (and clients) typically think of as "boilerplate."

II. Incorporation By Reference: *Wills*

We often try to shorten Wills by incorporating into them other, external documents. Thus, we may include Will clauses: (i) permitting client's to write Letters disposing of personal effects, (ii) making bequests to extrinsic Trusts [such as bequests in "Pour-over Wills" to Living Trusts] or (iii) incorporating statutory Trusts [such as the Uniform Transfers to Minors Act] by reference.

Although such incorporation avoids repetition (and tends to reduce costs), care must be taken lest the incorporation inadvertently fail.

The ***General Rule*** (reflected in ***§6130 California Probate Code***) precludes incorporation of extrinsic documents in a Will ***unless*** the document in question is: (i) in ***existence*** when the Will is executed (ii) the ***Will*** refers to the document with sufficient ***particularity*** to be clearly identified and (iii) the Will reflects an ***intention*** to incorporate the document by reference will fail.

1. *Letters disposing of personal effects*

Drafting clauses disposing of a client's personal effects can be among the estate planner's most aggravating tasks. Such clauses can be lengthy, time consuming and subject to frequent change. Most of the aggravation involved in the drafting of such clauses could be easily short circuited by simply permitting the client to write a letter instructing his Personal Representative regarding the disposition of such property.

§ 2-513 of the Uniform Probate Code deals realistically with this knotty problem by permitting the disposition of Personal Effects through the use of an ex-

trinsic writing.

> ***§2-513*** provides: ***Separate Writing Identifying Devise of Certain Types of Tangible Personal Property***. Whether or not the provisions relating to holographic Wills apply, a Will may refer to a written statement or list to dispose of items of tangible personal property not otherwise specifically disposed of by the Will, other than money. To be admissible under this section as evidence of the intended disposition, the writing must be signed by the Testator and must describe the items and the devisees with reasonable certainty. The writing may be referred to as one to be in existence at the time of the Testator's death; it may be prepared before of after the execution of the Will; it may be altered by the Testator after its preparation; and it may be a writing that has no significance apart from its effect on the dispositions made by the Will.

Unfortunately this provision has not yet been adopted in California. As a consequence, a Letter of Instructions governing the disposition of personal effects will not be effective in California unless the Letter is both written ***before*** the Will is executed and properly incorporated in the Will in accordance with the standards of ***California Probate Code §6130***. If the Letter is written (or modified) ***after*** the Will is executed, it cannot be a document "in existence" at time of Will and cannot be found to have been properly incorporated in the Will by reference.

Accordingly, special care must be paid to clauses dealing with the disposition of a Testator's personal effects until that happy day when the legislature sees fit to adopt ***§ 2-513 of the Uniform Probate Code***.

2. ***"Pour-over" Wills funding Subsequently Amended Trusts***)

Attorneys customarily prepare "Pour-over" Wills when establishing Living Trust for clients. Such Wills act as safety nets, directing the distribution of any assets a client may own outside the Trust to the client's Living Trust at death. Such clauses could raise incorporation by reference problems under ***California Probate Code §6130*** if the Trust is amended ***after*** execution of the Will ***unless*** the Will itself is also redone.

Fortunately, there is a statutory solution to this problem. The ***Uniform Testamentary Additions to Trust Act*** [***§6300 California Probate Code §§6300 et seq.***] creates an exception to ***§6130's*** general incorporation by reference rule. ***§ 6300*** provides in pertinent part that if the Will properly identifies the Trust:

> "Unless the Testator's Will provides otherwise, the property so devised . . . (2) shall be administered and disposed of in accordance with the provisions of the instrument . . . setting forth the terms of the trust ***including any amendments thereto made . . . after the execution of the Testator's Will***."

Although ***§6300*** saves Pour-over Wills that might otherwise violate ***§6130***, attorneys must still exercise ***caution*** in drafting the pour-over clause to make sure the clause incorporates the Trust "as written at the time of the client's demise." Many "standard" Form Books have Pour-over Wills incorporating the Trust "as it presently is written"--which clause would require that all Trust amendments adopted after execution of the client's Last Will be ignored (and preclude the flexibility permitted by the Uniform Testamentary Additions to Trust Act).

3. Statutory Trusts.

a. Uniform Transfer to Minor's Act

Convenience and economy can be achieved in gifts to children through incorporation of the Uniform Transfer to Minors Act to govern administration of such bequests. Such gifts are, of course, permissible under ***California Probate Code §§ 6130 and 6300 et seq.*** so long as the statute is properly referenced, as in the following sample clause:

> "Should any beneficiary of my Will be under the age of ***twenty-five (25)*** at the time of my death, then such beneficiary's share shall be paid over (pursuant to Sections 3900 et seq. of the California Probate Code) to my Personal Representative (or to said Representative's nominee) to be held, administered, and distributed in ***FURTHER TRUST*** by said person (who shall serve without bond) for said beneficiary's benefit in

accordance with the terms and provisions of the **California Uniform Transfers to Minors Act (CUTMA)** as the same may then and from time to time thereafter be in effect; ***provided*** that final distribution under the **CUTMA Trusts** shall be postponed for each such beneficiary until his/her ***twenty-fifth (25th)*** birthday."

b. Uniform Custodial Trust Act

The Uniform Code Commissioners have promulgated another Uniform Custodial Act, similar to the Uniform Transfers to Minors Act, permitting the establishment of a statutory trust for an ***adult***. Unfortunately, that act has not been as widely adopted as the Uniform Transfers to Minors Act, but is available in a few states. If and when the Act is adopted in California, it can be another excellent tool to use in drafting concise, economical documents.

III. Incorporation By Reference: *Trusts*

Although the issue is by no means settled, it appears that the stringent rules governing the incorporation of extrinsic documents by reference in Wills do ***not*** apply to the incorporation of such documents in Trusts. ***Cf. § 6130*** (which by its terms only applies to "Wills.")

While facilitating Trust drafting, the relaxation of the "Incorporation By Reference Rule" in the interpretation of Trusts poses yet another threat to the sanctity of "Testamentary Formality," and further eases the burden on those who wish to contest a dispositive document. See, e.g. ***California Probate Code §§ 5000 et seq.*** While beyond the scope of this article, the subtle, cumulative impact of this relaxation in Testamentary Formality is worth noting--especially in light of our ongoing switch from testamentary to non-testamentary documents as the favored means of transmitting wealth at death.

IV. Trust Distributions

Since all Trusts must ultimately be distributed, a major focus in the creation

of Trusts must be the drafting of clauses dealing with Trust distributions. Because the uses and purposes of Trusts seems limited only by the imagination of the client and her attorney, it is virtually impossible to catalog all of the permutations available in drafting clauses concerning Trust distributions. All we can really hope to accomplish is the identification of the primary issues involved and the proposal of some solutions to the more common situations encountered.

Here, then, in outline form is a catalog of some of the more common issues to be faced in drafting the distributive provisions of a Trust. It is in the drafting of the "boilerplate" provisions designed to resolve these issue that the attorney is called upon to exercise his/her most profound professional judgment.

1. ***Identifying Trust beneficiaries***
    a. ***Split Interests***
        i. Multiple Beneficiary situations
            (aa) Sprinkling Trusts--where Trustee has power to "sprinkle" trust assets among a designated group of beneficiaries
            (bb) Life Tenancies--where one beneficiary receives income for life and another receives the remainder
        ii. Single Beneficiary situations--where distribution of some or all of the corpus is deferred
    b. ***Class gifts***
        i. Define Class
        ii. Specify when class closes
    c. ***Contingent beneficiaries*** must, of course, always be identified

2. ***Identifying Trust purposes***

3. Definition and distribution of ***income and principal***

4. ***Mandatory v. discretionary distributions***

5. ***Standards*** for discretionary distributions

    a. Standards ***governing Trustee discretion***

        i. "Reasonable" Discretion

        ii. "Free, absolute and uncontrolled" discretion.

            Cf. statutes like ***§§16080 et seq. of the California Probate Code.***(requiring that holders of such broad discretion must still "act in accordance with fiduciary principals and shall not act in bad faith or in disregard of the purposes of the trust.")

        iii. "Good Faith" (with supplemental clauses exonerating the Trustee for all acts except those involving "gross negligence" and/or "willful misconduct")

    b. Standards ***guiding the exercise of the Trustee's discretion***

        i. "Health, education, maintenance and support"

        ii. "Comfort and welfare"

        iii. "Necessary"

        iv. "Desirable"

        v. Limitations

            aa. "After taking into consideration all other resources then know by the Trustee to be available to the beneficiary"

bb. "In the station in life to which the beneficiary has theretofore become accustomed"

vi. Definitions: Trust documents can provide guidance to the Trustee and the Courts by specifically defining the terms (such as "education," "start in life" and even "health") used to guide the exercise of the Trustee's discretion with respect to Trust distributions.

6. ***Trustee selection***

7. ***Taxes***

a. Allocable to trust beneficiaries

b. Allocable to the Trust

All of the foregoing factors are interrelated. The "solution" to any given issue will impact the "solution" to others. Thus the Trustor's desire to favor one beneficiary over another may influence the extent of the Trustee's discretion; and the extent of the Trustee's discretion may, in turn, impact the selection of the Trustee. None of these factors can be determined in isolation. All must be considered together in order to create a workable Trust, reflective of the client's wishes and needs.

V. Spendthrift Clauses

Spendthrift clauses are designed to both protect beneficiaries from their creditors (See ***Scott v. Bank One Trust Co.***, 62 Ohio St. 3d 39, 577 N.E. 2d 1077 [1991]) and to preclude beneficiaries from anticipating their interests. Such clauses are generally upheld, on the theory that since the Trustor need not leave anything to any given beneficiary, ***if*** the Trustor does make a bequest the Trustor may limit the bequest in any way s/he chooses. (See ***Broadway Bank v. Adams***,

133 Mass. 170 [1882]).

Spendthrift clauses are specifically condoned by statute in most jurisdictions, including California (see ***§§15300 et seq. California Probate Code***). Such clauses are also condoned under the ***U.S. Bankruptcy Act (***see ***11 U.S.C. §541[c][2])*** which provides in pertinent part that:

> "A restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under applicable nonbankruptcy law is enforceable in a case under this title."

Although generally condoned, there may be some public policy limitations placed on the use of spendthrift trusts. Thus: (i) a Trustor may ***not*** use a spendthrift trust to protect the Trustor's own assets from the Trustor's own creditors (***Cf. California Probate Code §15304***) and (ii) under certain circumstances a Court may direct that payment of future discretionary distributions due a spendthrift trust beneficiary be used to satisfy that beneficiary's obligations. (***Cf. California Probate Code §§15305 -7***).

A sample "boilerplate" spendthrift clause follows:

> "A. No beneficiary of this Trust shall have any right to alienate, encumber, or hypothecate his or her interest in the principal or income of the Trust in any manner; ***provided, however***, that such transactions shall be permissible with the written consent of the Trustee, which consent may be given if the Trustee (in the exercise of the Trustee's free and absolute discretion) determines that such a transaction would be beneficial to the respective beneficiary and not have a serious adverse effect on the interest of any other beneficiary of the Trust. The Trustee shall not be under any obligation whatsoever to consent to any such transaction and need not justify any refusal to do so.
>
> "The interest of any beneficiary in principal or income of the Trust shall not in any manner be subject to the claims of his or her creditors, liable to attachment, or execution, or to any other such processes of law, including bankruptcy proceedings; and, in the event that any creditor shall threaten or attempt to attach, garnishee or sequestrate any such interest, the Trustee--so long as said threat or effort on the part of such creditor continues--shall, instead of paying the principal or income due hereunder to said beneficiary, apply the same for his or her health, support, maintenance and/or education.

"B. If, during the period when any beneficiary is entitled to receive any payment hereunder, such beneficiary is--in the uncontrolled judgment of the Trustees--mentally or physically incapacitated (irrespective of whether legally so adjudicated), incarcerated, incompetent, placed under Conservatorship or in bankruptcy, the Trustees may apply any such payments for the benefit of such beneficiary rather than distributing the same to him/her directly; and, in the event that such condition shall (in the reasonable judgment of the Trustee) continue, the Trustee may, instead of paying the principal or income due hereunder to said beneficiary, apply the same for his/her health, support, maintenance and/or education until such time as such condition shall cease (if ever). If the trust share held for such beneficiary has not yet been distributed, then upon the death of the given beneficiary, the Trustee shall distribute the then remaining balance of the trust share then held for the benefit of such beneficiary to such person(s) as would have received the given trust share had the Trustor survived the given beneficiary and died on the date of the given beneficiary's death.

"***NOTWITHSTANDING ANYTHING CONTAINED HEREIN TO THE CONTRARY, THE TRUSTEES SHALL NOT HAVE ANY POWERS OR AUTHORITY HEREUNDER THAT WILL CAUSE THE FOREGOING SPENDTHRIFT PROVISION TO LOSE THEIR STATUS AS SUCH WITHIN THE MEANING OF SECTIONS 15300 ET SEQ. OF THE CALIFORNIA PROBATE CODE AND SECTION 541 (c)(2) OF THE U.S. BANKRUPTCY ACT.***"

VI. "End of the World Provisions"

Although clients don't like to think about it, the beneficiaries of their estates can die in unexpected order. Thus it is important to provide for alternate and contingent beneficiaries--to take in unusual circumstances. In extreme cases, ***all*** of an given client's principal beneficiaries could predecease the client. In such case, the client's estate would pass by intestacy (and could, depending upon the jurisdiction, end up escheating to the State). Careful draftsmanship thus requires an "End of the World" provision, designed to direct the distribution of a client's estate in the event of such a catastrophe.

The response of clients to questions about such provisions vary widely. One client (a psychiatrist no less!) broke down in tears when asked what she wished done with her estate in the event that her only daughter predeceased her--and flat out re-

fused to even contemplate the situation. Another became so enthralled with the prospect that he ended up adding 10 pages to what would otherwise have been a simple 4 page Will detailing the distribution of his modest estate to more than 100 charities in the virtually impossible event that all of his numerous issue predeceased him!

Humor, rather than dread, is more apt to elicit a response to this "ultimate beneficiary" question. Thus, following the lead of perceptive colleague, I broach this painful subject with clients by asking them who they would like to take their estates in the unlikely event that their ***Thanksgiving Turkey*** explodes and wipes out all of their nearest and dearest in a single swoop. Once that information is obtained, it can then be incorporated in "boilerplate" clauses like these:

Sample End of the World Provision: Explicit Alternate Beneficiaries

"If all of the Trustor's issue die at any time during the pendency of this trust, then upon the death of the Trustor, the Trustor's spouse or the death of the Trustor's last surviving issue (whichever event shall ***last*** occur) the then remaining assets of the trust estate (including any property passing to the Trust as a result of the Trustor's demise) shall be distributed as follows: ***[Followed by the names of appropriate family, friends and/or charity--again, with sufficient alternate and contingent beneficiaries so that the "ultimate beneficiary" is either an immortal institution or a group so large and diverse as to make it virtually impossible for all to predecease the Trustor].***"

Sample End of the World Provision: Intestacy

"If all of the Trustors' issue die at any time during the pendency of this Trust then upon the death of the surviving Trustor or the death of the Trustors' last surviving issue (whichever event shall ***last*** occur) the then remaining assets of the trust estate (including any property passing to the Trust as a result of the surviving Trustor's demise) shall be distributed as follows:

"1. ***One-half (1/2)*** thereof to the persons who would have been Trustor **JOHN DOE's** heirs-at-law, determined in accordance with the California laws then in effect with respect to the intestate succession of the property of a person who had never been married, had he died on the date this provision becomes effective; and

"2. ***One-half (1/2)*** thereof to the persons who would have been Trustor **JANE DOE's** heirs-at-law, determined in accordance with the California laws then in ef-

fect with respect to the intestate succession of the property of a person who had never been married, had she died on the date this provision becomes effective."

Note on use of this Clause: This clause is appropriate only when: (i) the client understands and accepts to provisions of the specified intestacy statutes and (ii) has a large enough family so as to assure that some will survive--even if the turkey explodes!

VII. Termination of Trusts

A well drafted Trust should itself govern termination of the Trust. But when should the Trust terminate? The drafter has number of alternatives:

1. ***At the end of a fixed term*** (measured by: a date certain ["this trust will terminate on December 31, 2011"] or the occurrence of a predetermined event ["the twenty-fifth birthday of the first of my grandchildren to reach that age"])?

2. ***At the discretion of the Trustee***, as in the following clause:

> "If at any time the Trustee determines that the Trustors' son **JOHN DOE, Jr.** has straightened out his life to the point that he is both: (i) no longer either dependent upon, or abusing, drugs and/or alcohol and (ii) economically self-sufficient, ***and*** further determines that he has maintained that state for a period of not less than two consecutive years, the Trustee may--in the exercise of the Trustee's free and absolute discretion--(but need not) terminate this Trust for **JOHN DOE, Jr.'s** benefit and distribute the same, outright and free of trust, to the Trustors' said son."

3. ***At the discretion of the Trustor*** if the Trust is revocable.

In addition, a Trust may be terminated by ***statute***: (i) ***California Probate Code §15403*** permits termination of a Trust by all beneficiaries so long as such termination does not violate a "material purpose" of the Trust;" (ii) ***California Probate Code §15404*** permits termination of a Trust by the Trustor and all beneficiaries under all circumstances; (iii) ***California Probate Code §15408*** permits the Court to terminate a Trust with "uneconomically low" principal; (iv) ***California Probate***

Code §15409 permits the Court to terminate a Trust "if, owing to circumstances not known to the settlor . . ., the continuation of the trust . . . would defeat or substantially impair the accomplishment of the purposes of the trust . . .;" and (v) ***California Probate Code §§21200 et seq.*** require termination of a Trust at the end of the Period of Perpetuities.

Not only should the Trust specify when it terminates, a well drafted Trust should also specify how the Trust is to be distributed upon termination. Again, the drafter has options. The Trust may be distributed: (i) in accordance with the explicit terms of the Trust; (ii) at the discretion of the holder of a Power of Appointment; or (iii) if the Trust is vague on the subject, "in a manner directed by the Court that conforms as nearly as possible to the intention of the settlor as expressed in the trust instrument." ***California Probate Code §15410***.

VIII. Conclusion

In examining ***some*** of the drafting issues raised by the ***Incorporation By Reference*** doctrine and the need to deal with such issues as ***Trust Distributions***, ***Spendthrift Clauses***, ***End of the World Provisions*** and ***Trusts Terminations*** we have seen that there are numerous "acceptable" solutions to each such problem. Examination of every clause "typically" found in a Will or Trust would undoubtedly reveal the same multitude of "acceptable" solutions to the problems addressed by those other clauses as well.

Because the universe of available drafting options is so vast, we must make life easier on ourselves (and more economical for our clients) by preselecting from among these options those with which we feel the most comfortable and believe most likely to accomplish the stated objectives of our clients. The options we se-

lect become “our” boilerplate and tend to be repeated over time. There is nothing inherently wrong with this practice--so long as our judgment in making these selections remains professional, informed and appropriate to our specific clients.

What the Hell are *ETHICS*?

(And why should we worry about them?)

A first approximation by: **MICHAEL C. FERGUSON**

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(And why should we worry about them?)

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A few years back the graduate school of business at which I teach decided that it should include a unit on Ethics in its MBA curriculum. After lengthy consideration the faculty opted to incorporate the unit in my Business Law class. This "solution" (reached in part, I think, because I was unable to attend the meeting!) allowed the school to conform to the fashions of the day while at the same time avoiding having to sacrifice any "important" (i.e., marketing, finance, strategic planning, etc.) parts of the program. Most of the faculty was pleased to avoid teaching Ethics--although one member vehemently protested that entrusting the unit to the Program's only Lawyer was "like sending a fox to guard the hen house," and another wondered aloud "What the hell *are* ethics, and why should we worry about them?"

Having been anointed the School's resident ethicist, I endeavored to gain enough information about the subject to communicate some notion of Ethics to our students. Realizing that far greater minds than mine had struggled with the issue for centuries, I naturally turned my attention to the many treatises written on the subject. After immersion in the writings of the likes of Aristotle, Kant, St. Thomas Aquinas, Mill and Thoreau; and after struggling with various deontological, teleological, utilitarian, relativistic and myriad other theories of Ethics, I ended up more confused than ever. It seems that in the vast literature available on the subject,

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many have prescribed systems of ethical behavior but few have explained "Ethics" themselves. The only thing these thinkers seemed to share was a common notion that Ethics in some way pertains to the ascertainment of rules of "correct" behavior.

I left the literature survey and turned to beseeching friends and colleagues to shed some light on the nature of Ethics. Interestingly, it was one of my most pigheaded colleagues who inadvertently provoked the in-sight that proved pivotal in my understanding of Ethics. During the course of our discussion this unwitting benefactor stated categorically that:

> ***"Ethics and Law are the same. By definition, behavior that is legal is also ethical and behavior that is illegal is unethical."***

Stunned by this bold assertion, I observed that slavery had been legal in the United States until outlawed by the XIIIth Amendment in 1865 and asked innocently if my colleague believed that this meant that the ownership of slaves in our country was also ethical prior to that date.

The query ended our discussion, but left me pondering the broader question of the relationship between Law and Ethics--amused by the fact that *slavery* might turn out to be the key to unlocking my understanding of both. How could something legal (such as slavery in the pre-Civil War U.S.) be unethical? Similarly, how could something ethical (such as I would consider abortion to have been in most states prior to the era of ***Roe v. Wade***) be illegal? As a result of that discussion I gained absolute confidence that Law and Ethics were ***not*** synonymous. I hadn't a clue, however, as to difference between the two.

This line of thought quickly proved disquieting as I realized that--notwithstanding three years of Law school and another twenty years of practice--I had no

clear idea as to what **LAW** was. So, starting with what seemed like the relatively straightforward task of defining and understanding "Ethics," my problem had now compounded to include an attempt at understanding and defining "Law" as well.

The only solution seemed to lie in a return to basics. It was time to garner what little of these slippery subjects I knew *for sure*. In thinking about the issues it seemed obvious that:

1. ***"Ethics" and "Law" both involve rules of "correct" behavior;***
2. ***Different communities have different rules of "correct" behavior; and***
3. ***A rule of behavior accepted as "correct" within one community may be the antithesis of one accepted as "correct" in another.***

Given these basic tenets (which I accepted on ***faith*** as the principles upon which my understanding of Law and Ethics would have to rest), my attention shifted to trying to gain some understanding of the concept of "community." This led to a realization that "communities" are amorphous things. A "community" can consist of as few as one (Socrates, Beckett, Sir Thomas More) or as many as all, depending simply on how one wishes to define the community. Further, communities are not mutually exclusive--they overlap. Thus, one is a member of several communities at the same time; some through formal consent and identification and others through accidents of geography, birth and happenstance. Each community has its own rules of "correct" behavior, which influence the actions of its members (at least insofar as they operate within the particular community). Numerous examples abound. All of us, for instance, are simultaneously members of one or more of the

following communities--to name but a few:

A. Our ***families***--both nuclear and procreative;
B. Our ***religious sect***s;
C. The ***geopolitical entities*** within which we reside (towns, cities, counties, states, nations);
D. The ***business entities*** for which we work;
E. Various circles of ***friends*** and acquaintances;
F. ***Voluntary associations*** to which we belong (fraternal, social professional, charitable, etc.);
G. ***Academic communities***; and,
H. Various ***ad hoc communities*** we may join for brief periods from time to time (such as tour groups, ad hoc athletic teams, etc.).

Each of these communities has rules of "correct" behavior--some explicit some implicit, but rules nevertheless. Each of these communities also have means of enforcing some (but not all!) of its rules and will mete out punishment for the violation of its more important rules.

While all communities seem to share the foregoing characteristics, that's where similarities end. Specific rules of "correct" behavior vary greatly from one community to another. A rule of behavior deemed fundamental within one community (such as the Catholic church's dictate that one should not remarry after divorce) can be more or less irrelevant in another (such as Hollywood). Similarly, the means of enforcing the rules of behavior may vary tremendously from community to community. I tend, for example, to yell at my kids for violation of family rules, whereas my partner grounds his; one of our associates fines her children; and another associate spanks his. The State of California imprisons felons; the Catholic Church excommunicates sinners; and businesses fire offending employees.

In trying to understand which rules of "correct" behavior are Law and which

are Ethics, a clear distinction can be made between rules that a community chooses to coercively enforce (by *punishing* violations) and those that the community does not so enforce. The former rules, which compel or prohibit (under penalty), are **LAW**; the latter, which encourage or dissuade (with or without penalty), are **ETHICS**.

Assuming one accepts this distinction it quickly becomes apparent that:

A. ***Law is a subset of Ethics*** (being that set of its Ethics that a community chooses to coercively enforce);

B. Rules which are **LAW** in one community may be "merely" **ETHICS** in another; and

C. Rules which may be Ethics in a given community at one time and place, may become Law in that community at another time and place.

The relationship between Law and Ethics is like the relationship between squares and rectangles. Just like all squares are rectangles (but not all rectangles are squares), all Laws are Ethics, but not all Ethics are Laws. The notion of Ethics embodies a continuum on which various points have various names, depending on the view of the narrator. Thus Lawyers concern themselves with Law, Priests talk of sin, Freudians discuss superego, Anthropologists study taboo, Philosophers worry about morality and Sociologists measure values.

All of these subjects are, fundamentally, aspects of the broader topic of Ethics. Although fascinating, an in-depth look at the relationship between these interconnected fields is beyond the scope of this essay. We are concerned here only with the connection between Law and Ethics.

Example of the differences between Law and Ethics are easily found. The

Catholic church will punish its adherents for remarrying after divorce while the secular State of California couldn't care less if its citizens' divorce and remarry. Consequently, the issue of divorce and remarriage may be seen as a matter of Law within the Catholic community while it is an issue of Ethics within the secular community of California. Similarly, a rule that embodies a community's ethics at one time and place may become that community's Law at another time and place. Thus, prior to the adoption of the XIIIth Amendment to the U.S. Constitution the question of slavery (from a national perspective) was an ethical issue whereas after slavery was abolished the right to own another person became an issue of Law. And, prior to the Supreme Court's decision in ***Roe v. Wade***, a woman who had an abortion in a state that prohibited such procedures engaged in an act that was clearly illegal; whereas the question of abortion in such states became (at least temporarily) one of Ethics subsequent to that decision. Rules can thus pop in and out of the Law subset of Ethics (i.e., that subset that a community chooses to coercively enforce) over time and depending on circumstance.

If one accepts this distinction between Law and Ethics, it becomes apparent that conflicts must arise between the rules of one community and those of another. The task of resolving these conflicts is no easy matter, although there are rough (and varying) hierarchies that provide in specific cases that the rules of one community will supersede those of another. To illustrate this point, families (a pervasive *type* of community) vary greatly in the means employed in punishing children. Although the state allows a wide latitude in family enforcement mechanisms (tolerating--I hope--my yelling, my partner's grounding, our associate's fining, and our other associate's spanking), there are limits beyond which a family cannot go.

Burning errant children with cigarettes, beating them to the point of injury or (perhaps) publicly humiliating them--as recently happened with a six year old whose mother draped him with a pig snout and made him sit on the family's front porch with a sign proclaiming him "A Pig"--all go beyond our State's limits and will likely subject the perpetrator to criminal sanctions for child abuse.

Generally the more "powerful" (i.e., larger, wealthier, more vigilant) community will force its *Laws* on its "weaker" cohorts when the Laws/Ethics of the weaker community conflict. There are, however, clear instances in which (as a matter of *Ethics*) a powerful community will renounce its "right" to legislate (impose "Law") in certain areas--as did the United States in adopting most of the Bill of Rights; and others in which (as a matter of disinterest* and/or economics) a powerful community will simply ignore those "rights."

When I first went into practice, for example, I overheard a wonderful--but at the time puzzling--conversation at the Courthouse between a Deputy D.A. representing the rural County of Tehama and one representing the urban City of Berkeley. The D.A. from Tehama inquired as to the nature of the Berkeley D.A.'s business at the Courthouse, and was amazed to learn that he was there prosecuting a kid for shooting a Stop sign. He allowed as how "all kids" shot road signs in Tehama County ("It's a normal part of growing up!") and wondered aloud why the Berkeley D.A. was wasting his time on the case. Whereupon the D.A. from Berkeley inquired as to the nature of the Tehama D.A.'s business at the Courthouse, and was

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* which may be a form of ethics

amazed to learn that he was there to retrieve a kid who had been arrested for smoking pot. He allowed as how "all kids" smoked pot in Berkeley ("It's a normal part of growing up!") and wondered aloud why the Tehama D.A. was wasting his time on the case.

The State of California prohibits ***statewide*** both the shooting of Stop signs and the possession of marijuana. It seems that the laws prohibiting the shooting of Stop signs are, however, rarely enforced in rural Tehama County--although routinely enforced in the urban City of Berkeley; while the laws prohibiting the possession of marijuana tend to be enforced more rigorously in Tehama than in Berkeley. The differences in enforcement reflect the ethics of the two communities, the disinterest of the State (a larger community of which the communities of Berkeley and Tehama are parts) and economic decisions by both the Tehama and Berkeley D.A.'s as to how they wish to allocate their limited law enforcement resources. Should the State ever become seriously interested in the shooting of road signs in Tehama or the smoking of pot in Berkeley, there is little doubt that it could enforce its Laws in both locales.

Since the more powerful community may <u>coercively</u> enforce its laws on subservient communities, the resolution of such conflicts is (given the definitions above) a matter of LAW--just as our Conflicts professors told us in Law School!!

Having come this far, I was finally ready to define "***Law***" as:

> **The set of rules governing behavior within communities (including the means of enforcing those rule) <u>and</u> the rules governing the interrelationship of the rules within the set.**

The broader definition of "Ethics" followed:

Rules suggesting correct behavior within a community--which the community may or may not enforce on its own members (and others). Those rules which a community enforces are Law.

Lest this all seem circular, let us remember that the task at hand is definitional--trying to understand what ethics are. The task is not substantive--no effort here is being made to understand what is ethical. By developing an understanding of the concept of Ethics, we may gain a *tool* for helping understand what is ethical, but will have no formula for doing so by rote.

As noted earlier with regard to slavery, abortion and divorce, ***in a given context*** a particular rule--while always an Ethic--might or might not be a Law. Change the context (as occurs with a change of community) and the characterization of the rule may change as well. Although at first glance this might seem to render ethics meaningless--by allowing a change in ethics with a "simple" change in community, on further examination this proves not to be the case. "Real life," like the real world (as physicist have long known), involves friction. Although theoretically possible, it is not so easy to leave one community to found or join another. Several years ago, for example, my son protested that he wasn't allowed to watch a particular television show that a friend of his could watch. After listening to his complaint as long I could stand, I suggested he pack his bags and move in with his friend. That way, I explained, he could watch the program to his heart's content. After several thoughtful minutes my son declined the invitation. It turned out that his friend's family required the friend to finish any food he left at dinner--**cold**--the next morning before the friend was allowed his hot breakfast. My son decided that cold dinner before breakfast was worse than missing the program he had formerly coveted.

The point of all this is that communities have ethical *systems*, which the members of the community must generally adopt in whole--they cannot pick and chose from the rules of the community those they wish to ignore and those to which they will adhere. It's an all or nothing proposition. My son could have hot breakfasts (and, one hopes, a bit more!) regardless of what he ate at dinner, but at the cost of the disputed TV program. I've also read of wives returning to polygamous Mormon marriages--after having fled in rebellion against the institution of polygamy--because their yearning for the other values of their abandoned community (family, friends, pace of life) eventually overcame their distaste (strong 'tho it may be) for that aspect of the community that at first drove them away.

So, having traveled the path to this point, where are we? Hopefully some light has been shed on the first question posed--"What the hell are ethics?" The second question--"Why should we worry about them?"--is still pending. The answer follows, however, from: (i) a recognition that communities are dynamic and (ii) an understanding of the relationship between Law and Ethics. Since Law--at least as here defined--is a subset of Ethics (being those ethics that a community chooses to coercively enforce), and since time and changes in circumstance can change those Ethics a community enforces as Law, an understanding of the relationship between Law and Ethics will help explain when and why the violation of some rules will be punished while the violation of others will not.

By way of example, a case can be made that the Law of Torts is the active area (in our legal system at least) in which Law and Ethics interact in a manner such as affects all of us on a daily basis. In this field Ethics cross over the line into Law (in the guise of findings of "duty") according to the changing whims and

prejudices of the Courts and Juries. Lawyers in particular need be concerned about this juncture between Law and Ethics as Bar Association "Rules of Conduct" proliferate. Although the Rules themselves are most often described as "Cannons of Ethics" (implying, somehow, rules lawyers should follow), the Courts in malpractice actions are increasingly finding these to be rules lawyers must follow. Care must thus be exercised in codifying professional "ethics," lest the normative values suggested become the legal values compelled.

That in itself should be a sufficient reason to "worry" about Ethics.

ETHICAL ISSUES AND CONFLICTS IN ESTATE PLANNING

ETHICAL ISSUES AND CONFLICTS IN ESTATE PLANNING

I. Introduction

A. The "ethical" issues and conflicts faced by legal practitioners vary greatly from practice to practice. Thus the nature of the ethical dilemmas commonly encountered in the real world practice of law differ according to such variables as:

1. One's age and experience;

2. The location and nature of one's practice;

3. The size of the community in which one practices;

4. The size and nature of the firm in which one practices.

--paradoxically, the longer one has been in practice, the greater tends to be his/her anxiety--probably as a result of seeing over time the myriad variety of ways things can go wrong

--Also, there has been a sea change in the practice of law over the past 40 years--not all of it good. Almost every lawyer I know think things were better in the "kinder, gentler" days of the '50's and '60's.

5. Thus, estate planners in large, full service law firms have different worries about ***conflict issues*** than small firm practitioners. (E.g., must you disclose that your firm represents in some way one or more ***corporate fiduciaries*** whose services your client might wish to utilize in connection with the client's estate plan?)

6. Similarly, large firm planners tend to face more complex dilemmas about such issues as the present status of a "***client***" being

currently represented by their firm (but with whom the planner may have had no contact for years) than do small firm practitioners.

C. I will try to address a common issues in this unit, but you must keep in mind that I am a "small firm" practitioner--having for the past twenty years conducted what amounts to a sole practice in association with several other lawyers in what many politely describe as the "***exotic***" locate of Berkeley. I therefore have more personal experience with "small firm" issues than with "large firm" issues, which experience will undoubtedly skew this presentation.

D. This unit will, ***very*** briefly:

1. Attempt to provide some ***understanding of the concept of Ethics***--See Article handed out

2. Explore the ***relationship between Law and Ethics*** (particularly the relationship between malpractice and Ethics)--See Article handed out

3. Look at the concept of "***community standards***" as applied in legal malpractice cases; and

4. Examine the current Rules of Professional Conduct relating to ***Conflicts of Interest***

II. What are "Ethics"?

A. See article immediately preceding

B. Briefly distinguish between "ethics" and Rules of Professional Responsibility

C. Briefly discuss and critique the bias of the current Rules of Professional Responsibility in California ("zealous advocate" v. "counselor" orientation of Rules)

Overall Critique of the Rules--they seemed to have been influenced heavily by the litigation bar and tend to define the lawyer's role of that of a "***zealous advocate***" rather than that of a "***counselor.***" Thus the Rules tend to compel the ***zealous assertion*** of the client's perceived position (almost no matter how inappropriate) rather than acting in the client's ***best interests*** (even if those interests appear to be antithetical to the stated wishes of the client)

D. Many of the so-called rules of "Ethics" are really ***rules <u>regulating</u> practice***--designed to accomplish ends far different than the "fair dealing" usually assumed to be a primary goal of ethical standards.

1. Thus it has been argued, that some of the first Rules of "Professional Ethics" (adopted in Philadelphia at the turn of the century) were designed as much to "***keep the bar clean and pure (at least by white, male, Protestant, upper class standards)***" and "***to keep to a minimum the admission of...'Russian Jew boys' who had come 'up out of the gutter . . . following the methods their fathers had been using selling shoe strings***,'" as to assure fairness in dealing with clients. (Margaret Anderson, Alameda County Bar Assn. Newsletter Ethics column).

2. And it has also been argued that "the Rules are as much political (serving to ***protect lawyers from governmental regulation***) as they are ethical (serving to protect the public)."

3. Arguably similar economic motivations underlie the "***zealous advocate***" orientation of the present Rules of Professional

Conduct (which, after all, tend to increase costs and the number of lawyers employed on a given case)

III. Determining What Is "Ethical"/General

A. Intuition/Do What's "Right" ("Smell" Test/"Gut Check")

1. There are probably a thousand ways to practice law "ethically" and "correctly"--just as anyone who has children must have come to realize that there are thousand of ways to raise children "correctly."

2. State my belief that the most deeply held values/ ethics are so deeply ingrained as to be almost unconscious--you just ***know*** that a particular action is right or wrong (this may be superego!)

   a. I could not, for example, imagine having to think much about whether or not it was proper to sleep with clients--it just seems ***absolutely*** wrong to me. ***BUT*** the State Bar Comm. on Prof. Responsibility & Conduct just last year (1992) adopted a Rule of Professional Responsibility that seems, by implication, to permit such relationships under certain circumstances! See Cal. St. Bar Rule of Prof. Responsibility # 3-120.

3. When you finish examining the subject of ethical behavior, you may well be able to find a rationalization for almost any type of behavior. This shouldn't give you the idea that ethics are relative--they are not. ***There is generally a "right" thing to do in a given context and community almost all of the time***.--See article immediately preceding

a. This follows from the fact that communities (of which the member of the State Bar form one) have ***systems of ethics***, which individual members of the community must accept ***in toto***--they cannot pick and choose

(i) Example: Mormon woman who first fled from polygamous marriage and then returned

(ii) Example: My son who rejected move out of house (to watch TV with friend) to avoid cold dinner before breakfast at friend's house

IV. Determining What is "Ethical?" / "Legal Ethics"

A. Some think that the concept of "legal ethics" (like the ideas of "military intelligence" and "jumbo shrimp") is an oxymoron--a self-canceling phrase

B. It has been observed that "***legal ethics***" have in the past been grounded on three general principals:

1. Fairness to the ***public and clients***

2. Fairness to ***fellow attorneys***

3. Courtesy to the ***Courts***

4. This observation is underscored by the Black's Law Dictionary (Revised 4th Ed. 1968) definition of "legal ethics": "Usages and customs among members of the legal profession, involving their moral and professional duties toward one another, and toward clients, and toward the courts . . . . Kraushaar v. La Vin 42 N.Y.S. 2d 857, 859, 181 Misc. 508."

a. Unfortunately the second of these bases of legal ethics (Fairness to fellow attorneys) has eroded over the past several years. Cf. the way the various lawyers treated one another in the Simpson case and the recent MCLE offering entitled "***Hardball Deposition Tactics***"

b. The Courts, however, have been fairly diligent about enforcing those rules relating to courtesy to the Courts

AND

c. Consumers (and others) have been fairly aggressive of late in asserting and codifying those legal ethics that are grounded on the principal of fairness to Clients and the General Public

(i) The Courts, for example, have successively:

(aa) Abolished minimum fee schedules. Goldfarb v. Va. State Bar 421 U.S. 773 (1975)

(bb) Abolished prohibitions on advertising Bates v. State Bar 433 U.S. 350 (1977) and Peel case

(cc) Relaxed barriers to malpractice actions

(ii) The State Bar seems to have abandoned its vigilance in policing the unauthorized practice of law, and prosecutors don't seem to have the inclination or resources to pursue such cases either

(iii) The explosion in the lawyer population has increased competition and (theoretically) provided better options for clients and the public

V. Specific Ethical Rules *for Estate Planners*

A. Relevant Legal Ethics are ***codified*** in a number of places, most significantly for California practitioners in:

1. California Rules of Professional Conduct--in handouts

2. The California Business & Professions Code at §§ 6000 ***ff*** --particularly § 6068 B. & . Code

3. Model Rules of Professional Responsibility, published by the American Bar Association

4. ACTEC's Guidelines For Estate Planners and Commentaries on the Model Rules of Prof. Responsibility (from an estate planning/administration viewpoint)

5. The American Law Institutes upcoming Restatement of Laws Governing Lawyers

6. Although of interest, these Codes of Conduct are not particularly helpful to estate planners *per se*--they tend to focus on general rules of practice and contain few rules relating specifically to our field

7. Other Sources of Information:

a. The Committee on Professional Responsibility and Conduct of the California State Bar (which publishes the **CALIFORNIA COMPENDIUM ON**

PROFESSIONAL RESPONSIBILITY)

b. State and Local Bar Assn. Ethics Committees

B. ***Obvious*** "No-No's"

1. Don't steal

2. Don't co-mingle assets

3. Don't represent clearly adverse parties

4. Don't abandon clients

5. Don't reveal client confidences

6. Don't take a case if you can't or won't do the work

7. Don't knowingly suborn perjury or tolerate fraud

8. Don't self-deal

9. Make all required Court appearances

10. ***Return your phone calls***

C. The California Rules of Professional Conduct are (of course) of particular interest to us because they are ***the*** **California** rules that govern our practice.

1. The Rules were substantially revised effective May, 1989, (and last "updated" in September, 1992)

2. Overall Critique of the Rules (again)--they tend to define the Lawyer's role of that of a "***zealous advocate***" rather

than that of a "***counselor.***"

The Rules have placed far too much emphasis on advocacy and, happily, are beginning to come under fire. Office practitioners (estate planners and business lawyers) have criticized the Rules almost from the beginning. Now ***Family Lawyers*** are upset with them too (because of the gunslingers who won't mediate); as are ***Entertainment Lawyers*** (because their practices are based on dealmaking between those with conflicting interests

3. ***Dangers of the Rules***--the Rules of conduct may well be interpreted as Rules of **LAW**, compelling (rather than suggesting) the described conduct. See **Mirabito v. Liccardo** 4 Cal. App. 4th 41 (1992), and its antecedents (cited in the case). This, notwithstanding, the Rules' disclaimers that:

   a. "These rules are not intended to create new civil causes of action. Nothing in these rules shall be deemed to create, augment, diminish, or eliminate any substantive legal duty of lawyers or the non-disciplinary consequences of violating such a duty." (Rule 1-100 [A])

   AND

   b. "The fact that a member has engaged in conduct that may be contrary to these rules does not automatically give rise to a civil cause of action." (Discussion to rule 1-100)

4. Of particular relevance to estate planners is the Rule relating to: ***Conflicts of Interest*** . See Rule 3-310 (especially subsection [C] [1] and the discussion of the Rule), which provides in pertinent part that:

"A member shall not, without the informed ***written*** consent of each client:

> "(C) (1) Accept representation of more than one client in a matter in which the interests of the clients ***potentially*** conflict . . ." (Emphasis added).

(b) Note that the requirement of ***written*** consent is new as of the September, 1992, amendments to the Rules.

(c) In the Discussion of the Rule, the Committee states that it is a conflict of interest for an attorney to represent multiple parties in a single transaction. It then goes on to give as an example of such representation "***the preparation of. . .joint or reciprocal wills for a husband and wife. . . .***"

(d) "Potential" Conflicts come up frequently in an estate in an estate planning practice. The most common conflict situations include providing representation:

(i) To a Husband and Wife

(ii) In Multigenerational ("Dynastic") estate planning situations

(iii) Estate planning for co-owners of closely held business enterprises

(iv) Estate/Incompetency planning for elderly and/or mentally disabled clients

(v) Planning for the benefit of the referrer

(vi) Planning for the benefit of other clients (such as preparing estate plans naming corporate fiduciaries who are also clients of the firm)

(vii) Representing interests adverse (or potentially adverse) to a present or former client (such as continuing to represent one or both former spouses after a divorce)

(viii) Representing a fiduciary--especially (as is often the case) when the fiduciary is acting for the benefit of a family whose member you have represented in the past

(e) Note that ***H/W rep turns out to be relatively easy*** and accepted by clients.

(f) The H/W Joint Representation issues are:

(i) ***Confidentiality***--a really tough issue if one spouse later contacts you to: (i) unilaterally change a common plan or (ii) reveal hidden information [like the existence of an illegitimate child, a lover, etc.] or (iii) seek protection of community assets while simultaneously seeking public benefits for the other spouse

--See § 6068 (e) B & P Code ("To maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client.")

(ii) Disparate ***Property Rights***

(iii) Different ***distributive desires***

(iv) Possibility of ***Divorce***--but see §§6122 and 6226 Cal. Prob Code

(v) Possibility of Remarriage after Death (and the ***"Ms. Slick"*** problem)

(vi) Possibility that one spouse may become mentally disabled in the future (Alzheimer's disease)

Conflicts Waivers can be especially helpful re: confidentiality issues and possible conflicts in the event of disability.

(g) The ***tougher conflicts cases*** come up in the context of dealing with (i) ***multigenerational representation*** (ii) representing ***elderly (and potentially incompetent) clients*** and (iii) representing ***fiduciaries***

--Cite the results of my unscientific surveys on the subject: only 10%-15% of the estate planners I polled seemed to be complying with the rule as a related to the representation of a married couple in ***1990***--although it appears from my equally unscientific surveys this year that figure has now gone up considerably. However, there seems to be almost no compliance with the Rule as it relates to Multigenerational planning.

(i) Re: ***elderly clients***: Of fundamental importance is the identification of one's conception of his/her role in the representation:

--Do you conceive of yourself as the "***zealous advocate***" of the clients expressed interests--whatever the client may articulate them to be,

or

--Do you conceive of yourself as needed to work in the "***best interests***" of your client-even 'tho those interests may conflict with the client's articulated goals

--The ***mechanistic approach*** (practically dictated by the current Rules of Professional Con duct) requires the lawyer to be the ***zealous advocate*** of his/her elderly client's articulated (or projected!) wishes. Unfortunately, this approach is probably the safest given the current Rules of Professional Conduct--although it is not always the "best" (for emotional, economic and just plain "fairness" reasons)

--A more ***humanistic approach***, however, would seem to allow the attorney more latitude in seeking to obtain results in the ***best interests*** of the client. The classic examples of the differences between these approaches are found in the area of Conservatorships--where conflict and confidentiality issues abound. The ABA's Model Rules tend to support this approach. See ***Model Rule 1.14*** which allows a lawyer to "take protective

action with respect to a client . . . when [but ***only*** when] the lawyer believes that the client cannot adequately act in the client's own interest."

--This issue raises the whole question of the propriety of ***paternalism*** in a lawyer's approach to client problems. I (and I think many older attorneys) approve.

(ii) Re: ***Multigenerational (or Dynastic***) estate planning:

--what to do with: (i) the dad who tells you to draw a Will for his daughter that excludes her "worthless" husband ***or*** (ii) the parent who wants to make an exempt "gift" to an adult child conditioned upon the child's immediately putting the money into a long-term trust for the parent's own benefit on terms to be set by the parent ***or*** (iii) the child who wants a Will for an aged parent cutting out issue of a pre- deceased sibling--who "lived with the family after the sibling's demise" or (iv) the child who wants you to prepare a Will disposing of a future inheritance in a manner inconsistent with the expressed expectation of the parent (also your client!) who is going to leave the inheritance to the child

--Give example of our former baby-sitter who inherited $500,000 at age 21 and whose mom sent her in to do estate planning

(iii) Re: ***representing fiduciaries***: Discussed later in section on "Who is the client?"

(h) The easiest solution in all of these conflicts cases is to obtain a written waiver from all parties involved. It is, however, ***hard to know what kind of a waiver will do***. The waiver must be obtained after "informed consent." It's not clear how far you must go to make sure you are getting such consent. From an extreme point of view you either shouldn't represent both a husband and wife or should tell them to obtain independent representation regarding the waiver! How far must this go? I doubt a boilerplate waiver, routinely signed by married clients at or before the initial interview, without any in-depth explanation or discussion will hold up. It is probably best to send out a customized letter to clients after the initial interview.

6. Other Rules of relevance to estate planners/administrators

a. ***Competence*** Rule 3-110 (Cf. Model Rule 1.1)

(i) Must know, or be willing to learn, the law in the area of relevance to the client

(ii) Could ***cross-cultural differences*** disqualify you. Cite my experience with older Asian clients--many of whom (much to the distress of their younger children) wish to distribute their estates by primogeniture

b. ***Diligence*** Rule 3-110 (B) (Cf. Model Rule 1.3: "A lawyer shall act with reasonable diligence and promptness when representing a client")

c. ***Communication*** Rule 3-500 (Cf. Model Rule 1.4)

d. ***Fees*** Rule 4-200

e. ***Advertising*** Rule 1-400

(i) ***Communications*** seeking professional employment primarily for pecuniary gain transmitted by mail or equivalent means must be clearly marked on the ***outside*** of the envelope as an "'***Advertisement***,' 'Newsletter' or similar identification"--Standard 5 following Rule 1-400

(ii) The rules governing the advertisement of oneself as a "***certified specialist***" are complex and in a state of flux. It will probably soon be required that any advertisement holding one out as a "certified specialist" must: (i) identify the organization that has certified the person as a specialist and (ii) reflect certification by an organization that has itself been certified by the State Bar to certify specialists.

f. ***Abandonment/Termination of Employment***. Rule3-700.

--One can face nasty questions relating to Abandonment ***vs.*** the right to say "No" ***vs.*** the right to terminate a client

g. ***Self-dealing*** in dealings with clients (e.g., business dealings with clients, Testamentary gifts left the lawyer drafting the Will). Rule 3-300, as recently "enhanced" by the enactment of A.B. 21 (Cf. Model Rule 1.8)

--Note: these Rules have been greatly expanded by the recently enacted AB 21 (which was passed as a result of the publicity given the astounding acts of self-dealing by a single Orange County probate attorney in 1992).

h. ***Practical Impact of AB 21 (Cal. Prob Code §§21350 et seq./Quick and Dirty Overview***

(with no attention to fine details)--

(i) A.B. 21 was a political response to a specific, but well publicized, problem. Although the tone of the legislation is somewhat offensive (with a large dollop of lawyer bashing underlying the act), the actual legislation really isn't all that bad once understood.

(ii) A.B. 21 does four things

1. Defines the ***relationships of Guardian/ Ward and Conservator/Conservatee*** as fiduciary relationships "governed by the law of trusts" (amended §2101 P.C.)

2. Prohibits ***dual compensation*** for both fiduciary ***and*** legal services to attorney/ fiduciary and certain specified related persons --with certain exceptions (new §2645 P.C. re: Guard/Cons.; amended §10804 P.C. re: Pers. Reps; new §15687 P.C. re: Trustees)

3. Voids ***donative transfers*** to a person who ***drafts, transcribes or causes to be drafted or transcribed*** an instrument making a donative transfer to disqualified persons--with certain exceptions (new Part 3.5 commencing with §21350 P.C.)

4. Creates rebuttable presumption that ***sole Trustee*** who is a "disqualified person" (new §21350 P.C.) shall be removed (new §15642 [b][6] P.C.)

(iii) A.B. 21 is additive to prior law, and does not replace it. So gifts that pass A.B. 21 requirements, my still be found invalid on old grounds, including

fraud, duress and undue influence

(iv) Most Significantly: A.B. 21 codifies in extreme and extended form the rule that "Disqualified Persons" may not receive donative transfers and broadly defines "Disqualified Persons" as persons who "draft, transcribe, or ***cause*** to be drafted or transcribed 'instruments' making prohibited transfers" as well as persons "related by blood or marriage to, or who ***cohabit*** with, or are employees of" the foregoing disqualified persons

--Voyeurs can have a field day inquiring into the relationship of their colleagues and their staffs in the interest of identifying unanticipated disqualifying relationships!

--Voyeurs can also have a field day defining "cohabitation"

(v) There is ***now de minimis exception*** to this rule--permitting transfer of up to $3,000 worth of items to the disqualified person

(vi) ***BUT*** rule is not absolute, there are two major outs

--Relationship exemptions (which allow Disqualified Persons to revive donative transfers from cohabitants or those within 3 degrees of kinship)

--Independent Attorney Certificate (per §21351 [b] P.C.)

(vii) Sole Trustee Rule: entirely new ***BUT*** allows Disqualified Person to act a sole Trustee with Court

Approval

--***N.B.:*** The new rule may provide a convenient excuse for attorneys reluctant to take on Trustee responsibilities

(viii)There is really no significant change in the rules regarding an attorney's serving as Personal Representative under a Will drafted by the Attorney

--A.B. 21 specifically prohibits clauses in such Wills authorizing the attorney to receive both an Executor and an Attorney's fee--***but*** there were strong arguments that such clauses violated public policy anyway

--Attorney/P.R. may still hire the Attorney's firm to perform legal services for the estate--so long as the standard "No fee sharing" Agreement is filed with the Court (<u>Parker Estate</u>)

(ix) The rules codified in A.B. 21 re: dual compensation in Guardianship/Conservatorship/ Trust situations are new--but ***not*** particularly offensive.

--Probate Code and Local Rules generally require Court approval of fees for both Fiduciary and Attorney in Guardianship and Conservatorship situations

(x) Rules re: compensation in Trust situations are tolerable

--Can pay with 30 day prior notice to beneficiaries if no objections

--Can pay with Court Order

--Make sense in light of fact that Trusts (unlike Estates/Guardianships/Conservatorships) are not necessarily subject to Court supervision--and therefore more subject to abuse

D. Hot topic in related field of Estate Administration: ***Who is the client?***

1. **<u>In estates</u>:** The Fiduciary? The beneficiaries? The estate?

a. Louis Brandeis once purportedly responded to a query from the Bench as to whom he represented in some litigation: "Your Honor, I represent the situation."

b. I agree--I would prefer, if possible, to identify myself as the attorney for the "Decedent's Estate," and in fact did so for a while--then if conflicts arose I could direct the contending parties to other, independent counsel and continue to represent the ***neutral*** estate.

--As L.A. County's former Probate Commissioner John Goddard notes, however, in 1 <u>California Probate Practice</u> 3rd Ed. § 3: "There is no such officer as 'attorney for the estate,' he is simply the attorney for the representative." [Citing <u>Est. of Kruger</u>, 143 C. 141, 145 (1904)].

c. The law, alas seems to reject this position saying that the attorney for an estate must represent the Personal Representative in his/her ***Representative capacity*** and apparently must refer the person out if he/she has problems with the estate (or any beneficiary of the same) in his/her capacity as a ***beneficiary*** of the estate

--Thus two siblings who are Co-Executors and sole beneficiaries of a parent's estate could--if they have conflict--conceivably, need ***six*** attorneys to represent them. One each to represent them as Executors for the "routine" administration of the estate; one each to represent them as beneficiaries of the estate; and one each as special litigation counsel to represent them with respect to the resolution of conflict they may have with respect to the administration of the estate.

d. This position (that the attorney must necessarily represent the fiduciary) raises difficult and vexing questions--questions that are among the most controversial facing attorneys engaged in estate administration today

At a recent ACTEC meeting (in N.Y. last 8/93) the Professional Standards Committee discussed the question of the obligations (if any) that the attorney for a fiduciary has to the beneficiaries of the estate. Excerpts from the minutes of that meeting follow:

> ***The issues all revolved around the questions of: (i) whether the lawyer for the fiduciary owes any duties to the beneficiaries of the estate and, if so, (ii) what those duties might be.***

<u>Duty to Communicate with Beneficiaries</u>

There is much debate regarding the "duties," if any, the attorney owes the beneficiaries. Some hold that:

> ***... the lawyer for the fiduciary should inform the beneficiaries that the lawyer has been retained by the fiduciary . . . and that the fiduciary is the lawyer's client; that while the fiduciary and the lawyer will, from time-to-time provide information to the beneficiaries regarding the fiduciary estate, the lawyer does not represent them; and that the beneficiaries may wish to retain in***

dependent counsel to represent their interests.

This view holds that the lawyer for the fiduciary has few (if any) affirmative duties to estate beneficiaries and assumes both that: (i) the fiduciary is responsible for communicating with beneficiaries and (ii) that the lawyer's duty is to advise the fiduciary--not the beneficiaries.

Critics of this position observe that the duty to advise the fiduciary probably creates a ***derivative duty*** to beneficiaries.

Other argue in favor of finding greater lawyer duties to beneficiaries--noting that estates are intended to benefit beneficiaries (rather than fiduciaries) and suggesting that the beneficiaries (rather than the fiduciary) were the lawyer's "real" clients. They observe that the fiduciary's lawyer has often represented the family of the beneficiaries for a long time prior to the establishment of the estate and oft times "inherits" the fiduciary with the estate. In such cases the lawyer's loyalty tends to lie more with the beneficiaries than the fiduciary and, as a practical matter, the lawyer tends to continue to represent the beneficiaries--especially where there is a corporate fiduciary not normally represented by the attorney.

This position raises the difficult ***conflicts question*** of whether a lawyer can/should represent a fiduciary in cases where the lawyer has formerly represented the beneficiaries (or their family).

In considering a lawyers "duty" to beneficiaries, **MALCOLM MOORE** distinguished between a lawyer's duty to provide ***unsolicited information*** to beneficiaries and the lawyer's duty to respond to specific questions from beneficiaries. Examples of "unsolicited information" a lawyer might provide a beneficiary include: (i) informing beneficiary's of their right to disclaim and (ii) informing beneficiaries of any discretionary (with the fiduciary) rights they might have in the estate. He opined that when asked a ***direct question***, the lawyer has an obligation to respond fully to the question ***or*** advise the beneficiary to obtain indepen-

dent counsel on the question. He noted that the lawyer's "duty" to provide unsolicited information was more complicated.

One of the toughest current issue facing estate administration attorneys relates to the Attorney's Duty to Advise Beneficiaries of Fiduciary Malfeasance

MALCOLM MOORE noted that the ABA Special Committee on Professional Responsibility is taking the position that the lawyer for the fiduciary ***may*** if he/she so chooses report fiduciary malfeasance to beneficiaries. ***Although this position is consistent with that taken in many states, other jurisdictions (notably California) currently prohibit such disclosures (on the theory that the lawyer represents the fiduciary alone and the lawyer's "duty of loyalty" to the fiduciary/client precludes such disclosure)***. In jurisdictions prohibiting disclosure, the fiduciary's lawyer has the delicate (if not impossible) task of extricating him/herself from the situation without either: (i) participating in the malfeasance or (ii) violating the lawyer's confidentiality obligations to the fiduciary client.

Summary

ED BENJAMIN observed that in the "real world" of malpractice settlements, fiduciary's lawyers have affirmative duties to estate beneficiaries--particularly in cases where the lawyer "represents" a corporate fiduciary who is administering assets for beneficiaries who have been clients of the lawyer in the past (or for whose benefit another of the lawyer's clients put the assets in trust).

MALCOLM MOORE noted that the cases dealing with the duty of a fiduciary's lawyer to estate beneficiaries are "very loose" and inconsistent. This law is evolving as lawyers and Court's struggle to define appropriate standards of practice. This process requires the identification and articulation of the duties--both "affirmative" [e.g., disclose fiduciary malfeasance to beneficiaries] and "negative" [e.g., don't engage in

self-dealing with an estate managed by a fiduciary you represent]--owed by a fiduciary's lawyer to estate beneficiaries; a process Malcolm hopes can be accomplished outside the arena of malpractice suits.

JOHN PRICE (the principal author of the ***ACTEC Commentaries***) observed that issues concerning the duties of the fiduciary's lawyer to beneficiaries are very difficult and require a balancing of competing considerations in each specific instance. He noted that the Commentaries were intended to reflect the general sense of the Committee on the issues and were not intended to posit absolute standards of practice.

JACKSON BRUCE concurred--noting that the ***purpose of the Commentaries is*** more to ***raise consciousness*** than it is to dictate specific rules of conduct.

Although the solutions to these troubling issues is not at all clear, it is important to be aware that the issues exist.

E. California Business & Professions Code

1. Authorizes the adoption of Rules of Professional Conduct by the State Bars Board Of Governors, subject to the approval of the State Supreme Court--§ 6076 B &P Code

2. Authorizes the ***members*** of the State Bar to formulate Rules of Professional Conduct for themselves by ***initiative***, subject to the approval of the State Supreme Court--§ 6076.5 B & P Code

3. Sets forth at some length the Duties of attorneys--in § 6068 B & P Code, the most interesting (to estate planners) of which are contained in:

    a. Subsection (e): "To maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client."

b. Subsection (h): "Never to reject, for any consideration personal to himself or herself, the cause of the defenseless or oppressed."

c. Subsection (m): "To respond promptly to reasonable status inquiries of clients and to keep clients reasonably informed of significant developments in matters with regard to which the attorney has agreed to provide legal services"

VI. Reprise: Why Worry about Ethics?

A. Because ethical violations ***may*** lead to liability, even 'tho no clear rule ***yet*** exists to make an ethical violation a prima facie case of malpractice or tort liability

B. Understanding ethics may thus help avoid malpractice liability

A ***BRIEF*** PRIMER ON TAX ESSENTIALS

KEY POINTS TO REMEMBER RE: TAXATION OF ESTATES AND TRUSTS

(BUT KEEP IN MIND THAT IT'S FAR MORE COMPLICATED THAN THIS!!!!)

I. Five types of taxes may apply

A. Estate Taxes (imposed on a decedent's entire estate)

B. Inheritance Taxes (imposed on the transfer to a specific beneficiary--rates vary depending upon amount inherited and relationship between decedent and beneficiary)

C. Gift Taxes

D. Income Taxes

E. Real Property Taxes

II. Significant Points to Remember re: foregoing taxes

A. **Estate Taxes**

1. Imposed by Federal Government on "Taxable Estate"

a. "Taxable Estate" is all property in which decedent had an ownership interest at death

b. A decedent's "Taxable Estate" is not synonymous with the decedent's "Probate Estate" (and is generally much larger--since not all assets that pass at death must pass through probate)

2. ***Present Exemption: $5,000,000***

a. Granted in the form of a Credit

b. Federal Estate and Gift taxes are now "integrated," so taxable lifetime gifts will reduce the amount of the available exemption at death

3. Principal ***Deductions***

    a. ***Marital Deduction***--for property passing to a surviving spouse. This deduction is not available to a non-citizen spouse unless the property passing to the non-citizen spouse is placed in a "Qualified Domestic Trust"

    b. ***Charitable Deduction***

    c. ***Debts*** (especially including mortgages)

    d. ***Costs of Administration***

4. Until the end of 2004 Federal Tax Law granted a ***credit*** for ***State Death Taxes*** paid (up to a specified, ***but diminishing [!!]*** maximum amount). Thus, through 2004, most States had a ***"pick-up" estate tax*** designed to capture the credit allowed by the Federal Estate Tax laws. Starting on 1/1/05, the ***credit*** for State Death Taxes ceased, and been replaced with a ***deduction*** for State Death Taxes paid. This has resulted in significant changes in State Death Tax laws: States with only a "pick-up" Estate Tax no longer receive any death tax at all. Many states have adopted new Death Tax laws to recapture the death tax revenues lost as a result of the repeal of the Federal credit for State Death Taxes paid.

5. Filing requirements

    a. All estates with gross assets (before deductions for debts and costs of administration) in excess of the exempt amount

    b. File on ***Form 706*** (Federal Estate Tax Return)

    c. As of 2009, there were only 6,141 taxable estates (larger than the $3.5mil exempt from Estate Tax that year) in the entire US--of which just under 20% were from CA

[http://www.irs.gov/taxstats/indtaxstats/article/0,,id=210648,00.html]

B. **<u>Inheritance Taxes</u>**

1. Imposed on the transfer to a specific beneficiary

2. Rates vary depending upon

    a. The amount inherited (the rates are generally "graduated")

    b. The relationship between decedent and beneficiary (the rates are generally higher the more distant the kinship relationship)

3. Many States still impose Inheritance Taxes. California no longer has an Inheritance Tax

C. **<u>Gift Taxes</u>**

1. The Federal Estate and Gift taxes are--at present--"integrated," so taxable lifetime gifts will reduce the amount of the available exemption at death.

2. Permits ***$13,000/year/donee*** "exclusion" from gift tax for gifts of a "present interest" by a given donor (subject to annual cost of living increase). ***The Maximum lifetime Gift Tax Exclusion presently equals the amount exempt from Estate Tax, to-wit: $5,000,000***

    a. Gifts may be "split" with donor's spouse.

    b. Gifts valued at fair market value at the time of the gift for Gift Tax purposes.

3. Deductions from tax: generally the same as for estate tax.

4. Filing requirements.

    a. File on ***Form 709*** (Federal Gift Tax Return).

    b. Must file form if gift(s) to a given beneficiary in any given year exceed $13,000 (plus COL adjustment).

5. Judicious gift-giving programs can significantly reduce Estate Taxes at death.

6. As of 2011, the exemption is "portable," meaning that a surviving spouse can "use" the unused portion of the exemption available to his/her predecease spouse. This "***portability***" is new, so the exact manner through which it will be recognized must still be worked out.

D. **<u>Income Taxes</u>**

1. Estates and Trusts are ***separate taxpaying entities***.
2. Estates may file taxes on a "***fiscal year***" basis. Trusts must generally file on a "calendar year" basis.
3. Estates and Trust may claim a ***deduction*** on their income tax returns ***for distributions made to beneficiaries***.
4. The ***income*** distributed to beneficiaries is, however, taxed to the beneficiaries.
5. Inheritances are not generally subject to income tax--only the income generated on the inheritance after death is subject to tax.
    a. Exception: "***Income with respect to a decedent*** (IRD)" is subject to income tax.
    b. When income (such as IRD) is subject to both estate and income tax, a credit is generally allowed against income taxes due for estate taxes paid.
6. ***<u>"Basis" considerations</u>***
    a. **<u>Until 2009</u>**, ***inherited property*** received a ***"stepped-up basis"*** equal to the fair market value of the property at death--thus wiping out accumulated capital gains. That rule has been reinstituted for 2011. Because there is a dual tax system in place for 2010, the ***"basis" rules relating to inherited property in 2010 are very complicated***

N.B. Property held at death can also receive a "stepped-***down***" basis if the value has fallen since it was acquired. In an inflationary economy this tends not to happen.

b. Donee's "basis" (for income tax purposes) of ***gifted property*** for purposes of calculating "capital loss" equals the lower of the donor's basis for the property or the fair market value of the property at the time of the gift. For purposes of calculating "capital gain" the donee's basis equals the donor's basis.

7. Filing requirements.

a. File on Form 1041 (Fiduciary Income Tax Return).

b. Must file form if income to a given in any given year exceeds certain minimal amounts ($600 for an estate and $100 or $300 for a Trust)

c. Distributions to beneficiaries are reported to the beneficiaries on a Schedule K-1

E. **Real Property Taxes**

1. "Proposition XIII" froze real property taxes at 1976 levels, but permitted a "reassessment" for property tax purposes upon the "transfer" of property after that date

2. Certain "transfers" are exempt from reassessment, ***including***

a. Transfers between spouses

b. Transfers to a revocable trust (including most "Living Trusts")

c. Transfers between parents and children

(i) Limited to transfer of "principal residence" ***and*** up to $1,000,000 (of ***assessed*** value, in the aggregate) of "other real property"

(ii) "Children" include children adopted during minority (but not "children" adopted after majority)

(iii) Does not include transfers between grandparents and grandchildren

3. Real Property tax increases can be very significant at death and must be considered in estate planning.

4. The "problem" is significant in California. Most states use other systems, so the issue is not as apt to arise in the same manner in other jurisdictions.

SAMPLE ESTATE PLANNING DOCUMENTS

March 15, 2013

Mr. and Mrs. John Doe
1234 Main Street
Berkeley, California 94700

Dear Jane and John:

In furtherance of our recent meeting, enclosed please find draft copies of the following documents (establishing a Living Trust for your benefit):

1. A "Conflicts Letter" (required by the State Bar Association)--explaining certain potential conflicts of interest I could have in representing both of you in connection with the preparation of your new estate plan.
2. **THE JOHN AND JANE DOE LIVING TRUST**;
3. New Wills for each of you naming guardians for your children and reflecting the adopting of your Living Trust; and
4. A Grant Deed transferring title of your house into the name of your new Trust.

I will send you another letter--after we have completed the enclosed documents--telling you how to transfer title to your other assets into the name of the Trust.

Would you please review the enclosed documents and let me know of any changes you would like. Thereafter, I will make the necessary modifications and we can make an appointment for you to come in to sign the originals.

Please review the enclosed "Conflicts Letter" and, if it meets with your satisfaction, date and sign the same and return it to me as quickly as possible in the enclosed return envelope. In reviewing this Letter, please note that it recites that all of your property is community property (having either been accumulated as a result of

your labors during marriage--and not as the result of gift or inheritance--***or so commingled as to make it impossible to now determine the origin of the property***).

Although the issue of community versus separate property can be complex, in general the characterization of property as community assumes that you each own half of the same (and that you can each control the disposition of your half of the property in the event of death or divorce). On the other hand, characterization of property as separate assumes that the property belongs exclusively to the person who owns the property (and that s/he will retain exclusive control over the disposition of the same in the event of death or divorce).

In reviewing the enclosed documents, please pay particular attention to the provisions of Clauses **FIRST**, **SECOND**, **THIRD** and **FIFTH** of your respective **Wills** and the provisions of **Article II and III of the Trust Agreement**, particularly:

--**Article II subparagraph D.** [starting on page ___], concerning division of the Trust estate upon the death of the first of you];
--**Article II subparagraphs E.1. 1.2 and 1.3.** [starting on page ___] and **E.2. 2.4.** [on page ___], concerning distribution of the Trust upon the death of the survivor of the two of you--***assuming*** the survivor does not change the distribution of his/her share of your assets after the death of the first of you;
--**Article II subparagraph E.2. 2.5.** [starting on page ___], establishing further trusts for trust beneficiaries who are under the age of ***30***;
--**Article II subparagraph F.** [starting at the bottom of page ___], designating "ultimate beneficiaries" to take your estate in the very unlikely event that all of your descendants predecease you; and
--**Article III subparagraph A.** [starting on page ___], dealing with the succession of Trustees of the Trust.

These sections reflect your particular family situation and distributive de-

sires and are most uniquely drafted with you in mind. The rest of the language in the enclosed documents is, although ***very*** important, pretty much standard "boilerplate" language worked out by lawyers over the last 900 years to deal with problems that typically arise with the administration of estates and trusts.

In going through the Trust, you will also note the phrase "***issue by right of representation***" is used in Article II subparagraph E.2. 2.4.--on page ___. That crucial phrase has the following meaning: (i) the word "issue" refers to all of your descendants (children, grandchildren, etc.)--including as yet unborn descendants, and (ii) "by right of representation" means that your estate is divided equally between your children if they both survive. If a child predeceases then his/her share will in turn be equally divided between his/her children (or the "issue" of any child who is also deceased), if any. If a deceased child has no "issue," then the deceased child's share will pass to your other child--or to his/her "issue" if s/he is also deceased with issue surviving. In the unlikely event that both of your children predecease then the estate is divided at the oldest generation with a surviving member.

Also, in going over the enclosed documents please note that:

A. The estate plan is set up with a "Living Trust" into which I anticipate that you will transfer <u>most</u> of your assets during your lifetime. Thus, upon the death of either or both of you, the assets can pass immediately to your designated beneficiaries (named in Article II of the Trust) ***without*** the necessity of ***probate***.

This does not mean, however, that the transfer of your estates will be without cost. There may still be a considerable amount of legal work required to terminate and distribute the Trust on the deaths of each of you (and to file any estate tax returns that may be due in connection with your estates). Legal fees should, however, be considerably less than would be the case if probate proceedings were required to accomplish the same ends.

B. In light of the foregoing, the Wills should be irrelevant. The Wills are designed simply to assure that if you miss transferring any of your assets into the Trust, the assets will, in fact, be transferred to the Trust at your death under the terms of the Will. If all of the assets have already been transferred to the Trust, however, there will be nothing left outside the Trust for the Wills to transfer.

C. Please note that upon the death of the first of you (Article II sub-paragraph D.--starting on page ___ of the Trust) the Trust ***may*** be divided into two component parts for the benefit of the survivor of the two of you (and your successors). The first of these (the **DISCLAIMER TRUST**) will receive that portion of your property (not to exceed $5,000,000 under current law) belonging to the first of you to pass away ***if*** the survivor "disclaims" his/her right to receive some portion of the property belonging to the first of you to pass away. The survivor would likely make this election to minimize estate taxes on the death of the survivor in the event that your assets exceed the amount that is exempt from Estate Tax at the time the first of you pass away. This portion of the Trust will become ***irrevocable*** upon the death of the first of you--thus assuring that: (i) the property transferred to this portion of the Trust will not be subject to death taxes on the demise of the survivor of the two of you and (ii) the property in this portion of the Trust will pass to the beneficiaries you have named therein upon the death of the survivor, regardless of any changes the survivor may wish to make (as might be the case, for example, in the event of remarriage).

The balance of your property (comprising at least the property belonging to the surviving spouse--if not all of the property [as would be the case ***if*** the survivor does not elect to pass some of the property to the **DISCLAIMER TRUST**]) will go into the **SURVIVOR's TRUST.** The surviving spouse retains complete control over the **SURVIVOR's TRUST** and could (in theory) change the ultimate distribution of that Trust after the death of the first of you. If you would like to put additional constraints on the survivor, please let me know and we can

discuss the techniques for doing so.

D. Distribution of your personal effects (jewelry, etc.) is governed by Article II subparagraphs C. (on page ___ of the Trust) and E.1. 1.3. (b) (starting at the bottom of page ___), which state that you will write ***Letters of Instructions*** to the Trustee of the Trust telling the Trustee how you wish those items to be distributed. In this manner, if you change your mind about the distribution of any given item, you can simply revised your "Letter of Instructions" and need not go to the trouble of revising your Will (or Trust).

E. Finally, a note about terminology. At inception, each of you will wear three different hats with respect to the Trust. You are variously described in the Trust at the "***Trustors***" (the people who establish the Trust), the "***Trustees***" (the people who administer the Trust) and the "***beneficiaries***" of the Trust. While you will always be the Trustors, you will not always be Trustees or beneficiaries of the Trust. You lose your status as Trustees in the event of death, resignation or incapacity. You will, however, always be the beneficiaries of the Trust (even if you are not longer Trustees) so long as you are alive. You will lose your status as beneficiaries only in the event of death. Thus, even though you are initially called by all three of the foregoing names, it is (unfortunately) necessary to differentiate between your various roles under the trust because of the varying durations of the same. I hope you don't get too confused on this complex bit of legalese!

After you have had a chance to review the enclosed documents you will undoubtedly have questions. Thus, you should feel free to call me whenever you are ready so that we can discuss the enclosed documents at greater length.

Warmest regards,

MCF:mf/Encl. **Ichabod Crane, Esq.**

P.S. Also enclosed please find California Medical Association **DURABLE POWER OF ATTORNEY FOR HEALTH** forms. These forms are designed both to allow you: (i) to designate one or more persons (presumably one another and one or more appropriate alternates) to make health care decisions for you in the event that you are unable to do so, and (ii) to make known your wishes with respect to various decisions that may have to be made in the event of either terminal illness or death.

I think you might find it both comforting and helpful to have such a Power in effect. If so, please complete the enclosed forms and bring them in when you next come to the office so that we can notarize your signatures on the same.

March 15, 2013

Mr. and Mrs. John Doe
1234 Main Street
Berkeley, California 94700

Dear Jane and John:

As we discussed during our meeting, the Rules of Professional Conduct of the State Bar of California (the "Rules") limit an attorney's ability to represent "multiple clients" (including married persons). Thus, according to the Rules, I may not represent "multiple" clients who have conflicting or ***potentially*** conflicting interests without their informed written consent. Although the two of you do not appear to have conflicting interests at this time, the Rules require me to advise you of any reasonably foreseeable adverse effects that may arise as a result of my representing both of you and obtain your consent to such representation.

Accordingly, I write you now to advise you that I believe it possible (although unlikely) that the following adverse effects could arise from my representation of both of you in the preparation of your new estate plan:

1. Since I will be representing both of you, each of you are considered to be my client. As a result, matters which either of you discuss with me will ***not*** be protected by the attorney/client privilege from disclosure to the other. The Rules prohibit me from agreeing with either of you to withhold information from the other. Anything either of you may discuss with me is, however, privileged from disclosure to ***third*** parties.

2. If the two of you have differences of opinion concerning your estate plan, I can point out the pros and cons of such differing opinions. The Rules prohibit me, however (as the lawyer for both of you), from advocating one of your positions over the other.

3. Although I doubt it will happen, if conflicts do arise between you of such a nature that it is impossible in my judgment to perform my obligations to each of you in accordance with this letter, I will have to withdraw as your joint attorney and to advise you both to obtain separate, independent counsel. I would not, and could not, continue to represent either one of you under those circumstances.

In the event, however, that either of you should become mentally incompetent in the future, this Letter will constitute your consent for me to continue representing both of you (with the advice and consent of the one of you who is not so incapacitated) to the extent that I deem that your interests are not in conflict.

4. I understand from our meeting that virtually all of your current assets are community in origin (having either been accumulated as a result of your labors during marriage--and not as the result of gift or inheritance--or so commingled as to make it impossible to now determine the origin of the property). I have planned your estate accordingly.

Although the issue of community versus separate property can be complex, in general the characterization of property as community assumes that you each own half of the same (and that you can each control the disposition of your half of the property in the event of death or divorce). On the other hand, characterization of property as separate assumes that the property belongs exclusively to the person who owns the property (and that he/she will retain exclusive control over the disposition of the same in the event of death or divorce).

If you have any questions concerning ***any*** of the foregoing, please don't hesitate to call and I will answer them as best I can.

After you have had a chance to review this letter, I would appreciate it if you would sign and return the enclosed copy of the same to me in the enclosed return

envelope. By signing and returning the enclosed copy of this letter you acknowledge that you have read and understood the same and wish me to proceed representing both of you in connection with the preparation of your new estate plan.

I look forward both to receiving the signed copy of this letter back in the not too distant future and to working with both of you in connection with the preparation of your new estate plan.

Warmest regards,

MCF:mf/Encl. **Ichabod Crane**

WE HAVE READ THE FOREGOING LETTER AND UNDERSTAND ITS CONTENTS. WE CONSENT TO HAVING YOU REPRESENT BOTH OF US ON THE TERMS AND CONDITIONS SET FORTH HEREIN. WE UNDERSTAND THE DISCUSSION OF CONFLICTS SET FORTH ABOVE AND AGREE THAT BETWEEN THE TWO OF US (WITH RESPECT TO INFORMATION EITHER OF US PROVIDES YOU) THERE SHALL BE NO CONFIDENTIAL COMMUNICATIONS.

_____ _____
JOHN DOE **JANE DOE**

_____ _____
Date **Date**

LAST WILL AND TESTAMENT

OF

JANE DOE

I, **JANE DOE**, a resident of the City of Berkeley, County of Alameda, State of California, declare this to be my Last Will and Testament and revoke all other Wills and Codicils previously made by me.

FIRST: I am married to **JOHN DOE**, and all references in this Will to my "spouse" are to him.

I have two children born of my marriage to **JOHN DOE**, whose names and dates of birth are: **JOHN DOE, Jr.**, born January 1, 1987; and **BABY JANE DOE**, born December 31, 1992.

The terms "issue," "child," and "children" as used in this Will shall include children and issue legally adopted during minority, but not "children" adopted after the "child" has reached majority.

All references in this Will to my "Personal Representative" shall refer to the person named as Executor/Executrix hereof.

SECOND: I give my entire estate to the Trustees of the **JOHN AND JANE DOE LIVING TRUST** (created earlier this day by and between my spouse and myself as both Trustors and Trustees)--which Trust is sometimes referred to as the "Trust" hereinafter--to be held, administered and distributed by said Trustees in accordance with the terms and provisions then governing said Trust.

THIRD: Should my spouse predecease me and any child of ours still be a

minor at the time of my death, I appoint my parents **RONALD** and **ROSANNE McDONALD** (currently of El Cerrito, California), or the survivor of them, as guardian(s) of the person and estate of my said minor child--to serve without bond; and should both of them be or become unable or unwilling to serve, then I appoint my spouse's parents **BIG JOHN** and **MARIANNE DOE** (currently of San Francisco, California), or the survivor of them as such guardian(s)--to serve without bond.

FOURTH: A) Except as otherwise provided in the Trust, I have intentionally omitted to provide for any of my heirs-at-law living at the time of my death and/or for any other person.

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

FIFTH: I appoint my spouse **JOHN DOE** as Executor of this Will; and should he be or become unable or unwilling to serve, then I appoint my mother **ROSANNE McDONALD** (currently of El Cerrito, California) as Executrix hereof; and should she also be or become unable or unwilling to serve, then I appoint my father **RONALD McDONALD** (currently of El Cerrito, California) as Executor.

No bond or other security shall be required of any person nominated as my Personal Representative herein.

I authorize my Personal Representative to sell at either public or private sale (and to encumber or lease) any property belonging to my estate--either with or without notice, subject only to such confirmation by Court Order as may be required by law.

This **WILL** was signed by me at Sleepy Hollow, California, on March 15, 2013.

_____

JANE DOE

The foregoing Will, consisting of four (4) pages--including this page signed by us as witnesses--was at the date hereof, by **JANE DOE** signed as and declared to be her Will in the presence of us who, at her request and in her presence, and in the presence of each other, have subscribed our names as witnesses hereto. Each of us is now more than 18 years of age, a competent witness and resident at the address set forth after his/her name.

We are acquainted with **JANE DOE**. She is over the age of 18 years; and to the best of our knowledge, she is of sound mind and is not acting under duress, menace, fraud, misrepresentation, or undue influence.

We declare under penalty of perjury (under the laws of the State of California) that the foregoing is true and correct.

Executed on March 15, 2013, at Sleepy Hollow, California.

_____

ICHABOD CRANE

Residing at: 5678 Headless Court, Sleepy Hollow, California 91011.

_____

WHOOPING CRANE

Residing at: 5678 Headless Court, Sleepy Hollow, California 91011.

TRUST AGREEMENT

This **TRUST AGREEMENT** is entered into by and between **JOHN DOE** and **JANE DOE**, husband and wife (currently of Berkeley, California) as both Trustors and Trustees.

WHEREAS, the Trustors are desirous of creating a Trust to be known as the

JOHN AND JANE DOE LIVING TRUST

the provisions of which are hereinafter stated;

NOW, THEREFORE, this Trust Agreement made and entered into by the aforementioned parties,

WITNESSETH:

Article I

The Trustors hereby deliver and transfer to the Trustees all of the property listed on Schedule "A," attached hereto and by this reference made a part hereof (receipt of which is acknowledged by the Trustees) which property, together with any property which hereafter may become subject to the trust, shall constitute the Trust property and is hereinafter referred to as the trust estate.

The Trustees may at any time during the existence of this Trust receive other property from any person. The Trustees may particularly receive such property under the Will of either of the Trustors. Any property so received shall be held, administered, and distributed by the Trustees, subject to the terms which govern this Trust.

Nothing in this Trust Agreement shall be construed to change the character of any community property transferred to this Trust by the Trustors. Said property

is simply being transferred to the Trust to facilitate the administration of the same and to avoid probate, and said property shall retain its community character for all purposes.

Nor shall anything in this Trust Agreement be construed to change the character of any separate property transferred to this Trust by either of the Trustors. Said property is simply being transferred to the Trust to facilitate the administration of the same and to avoid probate, and said property shall retain its separate character for all purposes.

To facilitate the identification of separate and community property within the Trust, the Trustors shall specifically identify in writing any separate property in the Trust in the following manner:

With respect to Trustor **JOHN DOE's** separate assets, title should read:

"JOHN AND JANE DOE LIVING TRUST U/A dtd 3/___/13 *fbo JOHN DOE* (John Doe and Jane Doe, Trustees)"

With respect to **JANE DOE's** separate assets, title should read:

"JOHN AND JANE DOE LIVING TRUST U/A dtd 3/___/13 *fbo JANE DOE* (John Doe and Jane Doe, Trustees)"

In the event of any reasonable doubt concerning the origins and nature of any given Trust asset (as between separate and community), said assets shall be

Article II

The Trustees shall apply and distribute the trust estate and the income therefrom in the following manner:

A. 1. During the joint lifetime of the Trustors, the Trustees shall in annual or more frequent installments pay to, or apply for the benefit of, the Trustors

(or either of them) the entire net income from ***community*** property assets included in the trust estate and so much of the principal of the community property assets included in the trust estate, up to the whole thereof, as either: (i) the Trustees determine the Trustors (or either of them) needs for his/her health, comfort, welfare, maintenance, education and/or support or (ii) the Trustors (or either of them) may request.

2. During the joint lifetime of the Trustors, the Trustees shall in annual or more frequent installments pay to, or apply for the benefit of, the Trustor to whom the property belongs the entire net income from any ***separate*** property assets included in the trust estate and so much of the principal of said separate property assets included in the trust estate, up to the whole thereof, as either: (i) the Trustees determine the Trustor to whom the property belongs needs for his/her health, comfort, welfare, maintenance, education and/or support or (ii) the Trustor to whom the property belongs may request.

3. If at any time during the existence of this Trust any of the Trustors' issue should be in need of funds for his or her health, maintenance, education, support and/or start in life then the Trustee may (but need not) pay to, or apply for the benefit of, such issue so much of the trust estate as the Trustee (in the exercise of his/her free and absolute discretion) deems necessary or desirable for such purposes.

The Trustees ***may*** (but need not) keep records of any such payment to any of the Trustors' various issue and charge any such payments as an advance against the benefited issue's (or his/her successor's, as the case may be) ultimate distributive share of the trust estate so long as the Trustees advises the benefited issue in writing of the Trustees' intent to so charge the payment at the time the

payment is made.

4. In exercising the discretion herein granted the Trustees with respect to payments of Trust principal hereunder, the Trustees should keep in mind that the health, maintenance, comfort, and support of the Trustors is more important to the Trustors than any other purposes of this trust.

B. Upon the death of one of the Trustors, the Trustee (for at that point the Trust need be administered by only one Trustee--see Article III, below) shall pay any local, federal or state taxes that may be due as a result of the Trustor's death--including death, income, property or other taxes due; the Trustor's last illness and funeral expenses; and the expenses of administering the deceased Trustor's estate. In addition, the Trustee may--but need not (unless legally compelled to do so)--pay all of the deceased Trustor's just debts (not legally barred).

C. Upon the death of one of the Trustors, the Trustee shall distribute the deceased Trustor's personal effects in accordance with the directives contained in a ***Letter of Instructions*** which the Trustor may address to the Trustee. Said letter may be written either before or after this Trust Agreement is executed and may be changed from time to time in the future. The Trustee should follow the directives contained in the last such letter written prior to the Trustor's death.

As to any personal effects remaining in the trust estate after the Trustee makes the distributions requested, the Trustors direct the Trustee to dispose of such items in such manner as the Trustee deems best (including keeping such of the same as the Trustee may wish for himself/herself).

To the extent that the Trustor's aforesaid letter directs the Trustee to distribute personal effects to persons residing outside the immediate area of the

Trustor's final residence, the Trustee shall arrange for the shipping of such items to such persons and pay all reasonable charges incurred in connection therewith as an expense of administration.

D. Upon the death of one of the Trustors, the Trustee shall allocate the then remaining balance of the trust estate--after making the distributions and payments required under Article II subparagraphs B. and C., above, and including any property received by the Trust as a result of the Trustor's death--as follows:

1. First, ***if--but only if***--the surviving Trustor (or his/her representative) disclaims ***within the appropriate statutory period [currently 9 months following the date of the first Trustor's demise]*** his/her right to receive--through the Survivor's Trust--any portion of the trust estate not considered as belonging to the surviving Trustor, the Trustor shall allocate property (to be selected by the Trustee) having a value equal to the amount of property disclaimed to the **DISCLAIMER TRUST** portion of this Trust.

The Trustors strongly recommend, but do not require, that the surviving Trustor consider disclaiming a portion of the trust estate if the value of the trust estate at the time of the first deceased Trustor's death exceeds the amount that is then exempt from Federal and/or State Estate Tax. As of this date, this amount is: $5,000,000, less the value (for federal estate tax purposes) of any property passing to persons other than the deceased Trustor's surviving spouse (or to the **SURVIVOR's TRUST** portion of this Trust) or to a U. S. Internal Revenue Code qualified charitable organization, either as a result of post-1976 taxable gifts or as a result of the deceased Trustor's death--whether under the deceased Trustor's Will, this Trust, as insurance payments taxable in the deceased Trustor's estate, or other-

wise--not to exceed the whole of the deceased Trustor's taxable estate.

2. Next, the balance of the trust estate shall be allocated to the **SURVIVOR's TRUST** portion of this Trust.

3. In making the allocations required above, the Trustee may divide the Trustors' community property in a non pro rata manner and shall take into account any property the Trustors' may own (specifically including IRAs, Keoghs, tax deferred benefit plans and/or other retirement/ pension plans) which pass outside of the Trust.

The **SURVIVOR's** and **DISCLAIMER TRUST** portions of the trust estate shall thereafter be held, administered, and distributed in accordance with the terms and provisions of Article II subparagraph E., below.

E. 1. <u>WITH RESPECT TO THE SURVIVOR's TRUST</u>:

1.1. (a) The Trustee shall--in annual or more frequent installments --pay to, or apply for the benefit of, the surviving Trustor the entire net income from the **SURVIVOR's TRUST** portion of the trust estate and so much of the principal thereof, up to the whole thereof, as either: (i) the Trustee determines the surviving Trustor needs for his/her health, comfort, welfare, maintenance, education and/or support or (ii) the surviving Trustor may request.

(b) If at any time during the existence of this Trust any of the Trustors' issue should be in need of funds for his or her health, maintenance, education, support and/or start in life then the Trustee may (but need not) pay to, or apply for the benefit of, such issue so much of the trust estate as the Trustee (in the exercise of his/her free and absolute discretion) deems necessary or desirable for such purposes.

The Trustee ***may*** (but need not) keep records of any such payment to any of the Trustors' various issue and charge any such payments as an advance against the benefited issue's (or his/her successor's, as the case may be) ultimate distributive share of the trust estate so long as the Trustee advises the benefited issue in writing of the Trustee's intent to so charge the payment at the time the payment is made.

(c) In exercising the discretion herein granted the Trustees with respect to payments of Trust principal hereunder, the Trustees should keep in mind that the health, maintenance, comfort, and support of the surviving Trustor is more important to the Trustors than any other purposes of this **SURVIVOR's TRUST**.

1.2. Upon the death of the surviving Trustor, the then remaining balance of the **SURVIVOR's TRUST** portion of the trust estate shall be distributed in such manner and such proportions as the surviving Trustor may have determined (exercising the power to amend the **SURVIVOR's TRUST** portion of the Trust reserved to the surviving Trustor hereinafter).

1.3. In the event that the surviving Trustor does not amend the distributive provisions of this **SURVIVOR's TRUST**, then, upon the death of the surviving Trustor, the then remaining balance of the same shall be distributed as follows:

(a) The Trustee shall pay any local, federal or state taxes that may be due as a result of the surviving Trustor's death--including death, income, property or other taxes due; the surviving Trustor's last illness and funeral expenses; and the expenses of administering the surviving Trustor's estate. In addition, the Trustee may--but need not (unless legally compelled to do so)--pay all of the surviving Trustor's just debts (not legally barred).

(b) The Trustee shall distribute the surviving Trustor's personal effects in accordance with the directives contained in a ***Letter of Instructions*** which the surviving Trustor may address to the Trustee. Said letter may be written either before or after this Trust Agreement is executed and may be changed from time to time in the future. The Trustee should follow the directives contained in the last such letter written prior to the surviving Trustor's death.

As to any personal effects remaining in the trust estate after the Trustee makes the distributions requested, the Trustors direct the Trustee to dispose of such items in such manner as the Trustee deems best (including keeping such of the same as the Trustee may wish for himself/herself).

To the extent that the surviving Trustor's aforesaid letter directs the Trustee to distribute personal effects to persons residing outside the immediate area of the surviving Trustor's final residence, the Trustee shall arrange for the shipping of such items to such persons and pay all reasonable charges incurred in connection therewith as an expense of administration of the surviving Trustor's estate.

(c) The Trustee shall thereafter add the balance of the **SURVIVOR's TRUST** portion of the trust estate (including failed and lapsed gifts) to the **DISCLAIMER TRUST** hereunder, to thereafter be held, administered and distributed as a part of the same.

E. 2. <u>WITH RESPECT TO THE DISCLAIMER TRUST</u>:

2.1. The Trustee shall in annual or more frequent installments pay to, or apply for the benefit of, the surviving Trustor so much of the income and principal of the **DISCLAIMER TRUST** estate--up to the whole thereof--as the Trustee (in the exercise of the Trustee's reasonable discretion) deems necessary or desir-

able for the surviving Trustor's health, maintenance, education and/or support.

2.2. If at any time during the existence of this Trust any of the Trustors' issue should be in need of funds for his or her health, maintenance, education, support and/or start in life then the Trustee may (but need not) pay to, or apply for the benefit of, such issue so much of the trust estate as the Trustee (in the exercise of his/her free and absolute discretion) deems necessary or desirable for such purposes.

The Trustee ***may*** (but need not) keep records of any such payment to any of the Trustors various issue and charge any such payments as an advance against the benefited issue's (or his/her successor's, as the case may be) ultimate distributive share of the trust estate so long as the Trustee advises the benefited issue in writing of the Trustee's intent to so charge the payment at the time the payment is made.

2.3. In exercising the discretion herein granted the Trustee with respect to payments of **DISCLAIMER TRUST** principal hereunder, the Trustee should keep in mind that the health, maintenance, and support of the surviving Trustor are more important to the Trustors than any other purposes of this Trust.

2.4. Upon the death of the surviving Trustor, the Trustee shall distribute the then remaining balance of the **DISCLAIMER TRUST** (including any property passing to the Trust as a result of the surviving Trustor's demise) to the Trustors' then living issue, by right of representation--***subject to*** the ***FURTHER TRUST*** provisions set forth in Article II subparagraph E.2. 2.5., below, with respect to any share thus allocated to a benefited issue who is then still under the age of ***thirty (30)*** years.

The Trustors' presently living issue are their two children: **JOHN**

DOE, Jr., born January 1, 1987; and **BABY JANE DOE**, born December 31, 1992.

2.5. Any gift or devise hereunder to any beneficiary who is under the age of ***thirty (30)*** years at the time the gift/devise to said beneficiary vests shall thereafter be held, administered, and distributed as follows:

(a) The Trustee shall pay to, or apply for the benefit of, the beneficiary of each such share so much of the net income and/or principal of the beneficiary's share of the trust estate (up to the whole thereof) as the Trustee--in the exercise of the Trustee's free and absolute discretion--deems necessary or desirable for the health, education, comfort, maintenance, support and/or start in life of such beneficiary.

(b) Upon the ***thirtieth (30th)*** birthday of each beneficiary (or as soon thereafter as is reasonably possible), the Trustee shall distribute--outright and free of trust--the entire then remaining balance of the Trust share then held by the Trustee for such beneficiary.

(c) Should any beneficiary of any such share die during the existence of the Trust for his or her benefit leaving issue surviving, then the share of such beneficiary shall be distributed to the beneficiary's then living issue, by right of representation--***subject to*** the ***FURTHER TRUST*** provisions set forth in this Article II subparagraph E.2. 2.5. with respect to any share thus allocated to a benefited issue who is then still under the age of ***thirty (30)*** years.

(d) Should any beneficiary of such a share die during the existence of the Trust for his or her benefit without leaving issue surviving, then the share of such beneficiary shall be added to the shares of his/her siblings hereunder (or of their issue, or the survivor[s] of them--as the case may be), if any, in the

same proportions which said shares or subshares bore to each other at the time they were initially created; and should there be no such siblings (or siblings' issue), then the share of such beneficiary shall be divided among the Trustors' then living issue, by right of representation--and continue to be held for their benefit, or distributed to them (as the case may be) in accordance with the provisions of this Trust Agreement.

The Trustee is empowered to resolve (in the exercise of the Trustee's reasonable discretion) any dispute that may arise with regard to any division pursuant to this provision.

Should any of the contingent shares hereunder be distributed, then the distribution hereunder shall be made directly to the distributee of such share (or to his or her guardian or successors, as the case may be).

(e) Notwithstanding any of the foregoing provisions, if at any time any share of this Trust shall be worth $75,000 or less, the Trustee may, but need not (in the exercise of the Trustee's free and absolute discretion) elect to distribute such share to the beneficiary of the same (or to the guardian of such beneficiary, if at the time the beneficiary is either a minor or incompetent) outright and free of trust.

F. If all of the Trustors' issue die at any time during the existence of this trust, then upon the death of the surviving Trustor or the death of the Trustors' last surviving issue (whichever event shall ***last*** occur) the then remaining assets of the trust estate (including any property passing to the Trust as a result of the surviving Trustor's demise) shall be distributed as follows:

1. ***One-half (1/2)*** thereof in equal shares to Trustor **JOHN DOE's** par-

ents **BIG JOHN** and **MARIANNE DOE** (currently of San Francisco, California), or the whole thereof to the survivor of them, and should both of them also be then deceased, then to their then living issue by right of representation--***subject to*** the ***FURTHER TRUST*** provisions set forth in Article II subparagraph E.2. 2.5., above, with respect to the share of any such benefited issue who is then under the age of ***thirty (30)*** years; and should there be no such issue, then to the persons (in the order, manner and proportions) set forth in Article II subparagraph F. 2., below; and

2. ***One-half (1/2)*** thereof to the then living issue of Trustor **JANE DOE's** parents **RONALD** and **ROSANNE McDONALD** (currently of El Cerrito, California), by right of representation--***subject to*** the ***FURTHER TRUST*** provisions set forth in Article II subparagraph E.2. 2.5., above, with respect to the share of any such benefited issue who is then under the age of ***thirty (30)*** years; and should there be no such issue, then to the persons (in the order, manner and proportions) set forth in Article II subparagraph F. 1., above.

G. Any beneficiary hereof who is entitled to receive a distribution from the trust estate upon the death of another must actually survive the designated individual by ***sixty (60)*** days--***otherwise***, said beneficiary shall be deemed to have predeceased said individual for purposes of distribution hereunder.

H. Anything contained herein to the contrary notwithstanding, at the time appointed hereunder for distribution of any property of the Trust, the Trustee may withhold from distribution--without the payment of interest--any part, or all, of such property, as long as the Trustee shall determine (in the exercise of the Trustee's reasonable discretion) that such property may be subject to conflicting claims, to tax deficiencies or tax liabilities--contingent or otherwise--properly incurred in

the administration of the trust estate.

I. Each of the trusts (and shares thereof) created by or pursuant to the terms of this Agreement shall for all purposes be considered as separate trusts. The Trustee is authorized, however, to hold and administer assets of the Trust herein created as a single unit for purposes of convenience.

If by the terms of this Trust Agreement any beneficiary shall become beneficially interested in more than one share of this trust, then and in that event all such shares of the Trust shall (to the extent of his/her interest therein) be combined and administered as a single share of the trust.

Article III

A. In the event that either of the initial Trustees named herein shall be or become unable or unwilling to serve, then the other of them shall become sole Trustee hereunder, and the Trust need thereafter be administered only by a single Trustee. Should both of the initial Trustees hereunder be or become unable or unwilling to serve, then the Trustor **JANE DOE's** mother **ROSANNE McDONALD** (currently of San Francisco, California) shall become the successor Trustee hereof; and should she also be or become unable or unwilling to serve, then Trustor **JANE DOE's** father **RONALD McDONALD** (currently of El Cerrito, California) shall become the successor Trustee hereof; and should he also be or become unable or unwilling to serve, then his successor shall be selected as follows:

Upon qualifying as Trustee, the initial Trustees (and any successor Trustees) shall appoint in writing one or more successor Trustees who, upon the death, resignation, or inability to serve of both the appointing Trustee[s] and any successor Trustee[s] specifically designated herein, shall become Trustee in the

appointing Trustee's stead--to serve without bond. The Trustee may appoint several persons who shall serve in the order designated by the Trustee. The same power to appoint successor Trustees is hereby granted successor Trustees. As soon as a successor Trustee has started to serve, the appointments made by said Trustee's predecessor, except said Trustee's own appointment, shall become void, and it shall be up to the successor Trustee to make new appointments of further successor Trustees--all of whom may serve without bond. Any Trustee having designated the Trustee's successor in writing shall have the power to revoke any such designation in writing at any time before the appointing Trustee's office as Trustee has terminated and make other appointments if the Trustee desires to do so.

In the event that there shall be a vacancy in the Trusteeship of this Trust that has not been filled in the foregoing manner, then a majority of the adult beneficiaries of the Trust may appoint a successor and should said adult beneficiaries be unable to do so, then any beneficiary of this Trust shall be authorized to apply to a Court of competent jurisdiction for the appointment of a successor to the Trusteeship which has been terminated.

No person (other than the Trustors) who is both a Trustee and a beneficiary of the Trust shall have any power to make any distribution hereunder to (or for the benefit of) him/herself during the lifetime of either Trustor unless such distribution is made exclusively for the recipient's necessary health, support, education or maintenance and further provided that no person who is a Trustee of this Trust shall have any power to make any distribution for the support of any person whom that Trustee has a legal obligation to support.

B. Any successor Trustee shall succeed without further act or deed to full and complete title to the property of the trust estate and to all powers, rights, discretions, obligations and immunities of the initial Trustee(s) hereunder with the

same effect as though such successor had been originally named as Trustee.

C. No successor Trustee shall be liable for any act, omission, or default of a predecessor Trustee. Unless requested in writing within ninety (90) days of appointment by an adult beneficiary of this Trust, no successor Trustee shall have any duty to investigate or review any action of a predecessor Trustee and may accept the accounting records of the predecessor Trustee showing assets on hand without further investigation and without incurring any liability to any person claiming or having an interest in this Trust.

D. Any person dealing with any Trustee may rely on a written statement by the Trustee that said Trustee is a present acting Trustee of the Trust.

E. 1. If a Trustee wishes to resign, the resigning Trustee shall deliver a written statement, acknowledged before a notary, of intent to resign to the Successor Trustee(s). The resignation shall become effective upon the written acceptance of the Trusteeship by the designated Successor Trustee(s).

2. If a Trustee dies, the deceased Trustee's successor shall prepare a Trustee's Certification [per ***§18100.5 of the California Probate Code***, or its successor], with a true copy of the deceased Trustee's death certificate attached, and provide the Certification to interested parties. Said Certification shall attest to both the death of the Trustee and the assumption of office of the Trustee's successor.

3. If a Trustee cannot administer the Trust because of physical or mental incapacity, such incapacity shall be conclusively established by a certification, acknowledged before a notary, by a physician who has attended the incapacitated Trustee for a period of not less than one year preceding the incapacity attesting to the Trustee's incapacity, accompanied by a Statement from the Successor Trustee

declaring the successor's incumbency as Successor Trustee of the Trust. Otherwise the Successor Trustee shall obtain an order from a Court of competent jurisdiction declaring the Trustee's incapacity and the successor's assumption of office.

Article IV

A. The term "***education***," as used in this Agreement, shall be construed to include art, music and trade school study and apprenticeship programs--as well as college, graduate and postgraduate study (not necessarily limited to the United States) so long as pursued to advantage by the beneficiary at an institution of the beneficiary's choice; and any other means of education (including travel) which seems reasonable to the Trustees. In determining payments to be made for such education, the Trustees shall take into consideration the beneficiary's related travel and living expenses to the extent that they are reasonable.

B. The words "***issue***," "***child***," and "***children***" as used herein shall include children and issue legally adopted during minority, but not "children" adopted after the "child" has reached majority.

C. The phrase "***right of representation***" as used herein shall require distribution in the manner provided in ***Section 240 of the California Probate Code***.

D. The term "***start in life***" as used in this Trust Agreement shall mean the purchase of a house, commencement of a career, family, occupation or other endeavor substantially related to, or having the potential of becoming, a beneficiary's life's work. The Trustors are aware that under certain circumstances, some or all of the Trustors' issue may reasonably have more than one "start in life" and request that the Trustees sympathetically consider the Trustors' issue's needs accordingly.

E. The term "***health***" as used in this Trust Agreement shall include elective

as well as required treatment.

F. As used in this Trust Agreement, the masculine, feminine, and neuter ***genders and*** the singular and plural ***numbers*** shall each be deemed to include the others whenever the context and/or circumstances indicate or require.

Article V

The rights, powers, and duties of the Trustees with respect to the management of the trust estate shall be as follows:

A. The Trustees are authorized to retain in the Trust for such time as they may deem advisable any of the property received by them during the existence of this Trust, whether or not of the character permitted by law for the investment of Trust funds.

B. The Trustees shall have the power, with respect to the property of the trust estate or any part thereof, and upon such terms and in such manner as the Trustees may deem advisable, to: sell, convey, exchange, convert, improve, repair, manage, and control the same; to participate in foreclosures; to lease Trust property on terms within or beyond the Trust, and for any purpose; to borrow money for any Trust purpose and to encumber Trust property or hypothecate the same by mortgage, deed of trust, pledge, or otherwise; to carry insurance, at the expense of the Trust, of such kinds and in such amounts as the Trustees may deem advisable; to lend Trust assets to such one or more persons, at such times and on such terms as the Trustee may deem advisable; to commence, defend, settle, or compromise such litigation with respect to the Trust, or any property of the trust estate, at the expense of the Trust, as the Trustees may deem advisable; to invest and reinvest the Trust funds in such properties as the Trustees may deem advisable (including non income-producing properties and/or common trust funds managed and/or administered by the Trustees), whether or not of the character permitted by law for the investment of Trust funds; and, with respect to securities, partnership interests, joint ventures and other assets held in the Trust: to vote, give proxies, and pay assessments or other charges; to participate in reorganizations, consolidations, mergers, and liquidations, and, incident thereto, to deposit securities with (and transfer title to) any protective or other committee upon such terms as the Trustees may deem

advisable, and to exercise or sell stock subscriptions or conversion rights; to operate any business or other enterprise that is held in the Trust; and to abandon any property or interest in property belonging to any Trust created pursuant to this Trust Agreement when in the Trustees' discretion, such abandonment is in the best interest of the Trusts created hereunder and of the beneficiaries of the same.

In addition, the Trustees shall be authorized to: (i) purchase assets from, (ii) sell assets at net fair market value to, (iii) borrow money from, or (iv) loan money (with adequate security and interest) to: (a) the estate of the Trustors (or either of them), (b) the issue of the Trustors (or either of them) (c) any other Trust established by the Trustors (or either of them) and/or (d) the Trustees as individuals and, in addition, to engage in such transaction between the separate trusts established hereunder. The terms of any such transaction shall be solely within the reasonable discretion of the Trustees--and the Trustees shall incur no liability with regard thereto ***except that*** any such transaction between the Trust and an individual Trustee shall be a bona fide transaction for adequate and full consideration in money or money's worth.

In addition to the foregoing powers listed, the Trustees shall have such further powers as may now or hereafter be conferred upon the Trustees by law (specifically including those contained in Calif. Probate Code Sections 16220 et seq.) and such additional powers as may be necessary to enable the Trustees to administer this Trust in a reasonable business-like manner in accordance with the provisions and intentions of this Trust Agreement as a whole.

C. The Trustees may hold securities or other property of the trust estate in the name of the Trust, in their names as Trustees hereunder or in the name of the Trustees' nominee (or the nominee of a custodian selected by the Trustees); or, with regard to real property, by means of any holding agreement which may be executed by and between the Trustees and a title insurance company, bank, Trust company, or other appropriate corporation or person of the Trustees' choice. The Trustees may hold securities as above stated or unregistered in such condition that ownership will pass by delivery.

D. All taxes, assessments, fees, charges, and other expenses incurred by the

Trustees in the administration or protection of this Trust, including any compensation of the Trustees, the Trustees' attorney, the Trustees' accountant, or other agents employed by the Trustees, shall be paid by the Trustees in full out of the principal or in full out of the income of the trust estate, or partially out of each of them, in such manner and proportions as the Trustees, in their free and absolute discretion, may determine to be advisable prior to the final distribution of the trust estate.

E. The Trustees may employ such brokers, banks, custodians, investment counsel, attorneys, accountants, real property managers and/or other agents (and delegate to them such of the duties, rights and powers of the Trustee, for such periods, as the Trustees think fit) and may pay such agents such reasonable compensation out of either income or principal of the trust estate as the Trustees deem appropriate for all services performed by such parties. The Trustees shall not be liable in any way for any neglect, omission, misconduct, or default of any broker, bank, custodian, investment counsel, attorney, accountant, real property manager and/or other agent employed by the Trustees.

F. Except as provided in Article V subparagraphs D. and N. hereof, all matters relating to principal and income shall be governed by the provisions of the California **Uniform Principal and Income Act** (***§§16320 et seq. of the California Probate Code***)--and its successors--as the same shall from time to time be in effect, except that the Trustees shall always have the power to:

1. credit to principal distributions by mutual funds and similar entities all gains from the sale or the disposition of property;

2. charge to income from time to time a reasonable amortization reserve for all intangible property having a limited economic life (including, but not limited to, patents and copyrights); and

3. amortize all premiums paid and discounts received in connection with the purchase of any bond or any other obligation by making an appropriate charge or credit to income as the case may be.

G. Upon any division of the property of the trust estate, or partial or final distribution thereof as herein provided, the Trustees may divide or distribute such property in kind (including undivided interests therein) or, in the Trustees' free and absolute discretion, the Trustees may sell all or any part of such property to make

such division or distribution partly in cash and partly in kind; and the decision of the Trustees as to what constitutes a proper division of the trust estate, either prior to or upon any distribution thereof, shall be binding upon all persons interested in this Trust.

H. In the event that this Trust is ever administered by more than one Trustee, the Trustees may, by mutual agreement, designate any one or more of themselves to exercise any or all of the powers granted them hereunder and to otherwise act on behalf of, and in the name of, the Trust without requiring the specific concurrence of the other Trustee in the exercise of such designated powers or the undertaking of the designated act(s). The initial Trustees may, in particular, delegate such authority to one another--and may do so (in appropriate cases--as in dealing with banks, stockbrokers and other like financial institutions) by simply opening Trust accounts in their names as joint owners and designating on the documents establishing the account that either Trustee may act alone with respect to the account in question.

In the event that this Trust is ever administered by more than one Trustee, decisions of the Trustees need not be unanimous but shall be made by a majority of the Trustees.

In the event of any dispute between the Trustees of this Trust, said dispute shall be resolved by binding arbitration by a full-time arbitrator with expertise in the field to be selected by the parties to the dispute or, failing such agreement, by a Court of competent jurisdiction.

I. The Trustees may hire professional investment counsel (such as a bank, stock brokerage house, a reputable financial planner or other like financial advisor or institution) to consult with respect to the management and investment of the trust estate and/or to act as custodian of any or all Trust assets, and the Trustees may further delegate the Trustees' management and/or investment duties under this Trust Agreement to any such reasonable investment counsel or financial institution.

In addition the Trustee may, by written delegation (or through a Power of Attorney from the Trustee to the delegate--which Power of Attorney is hereby

authorized as a proper delegation of the Trustee's powers), delegate any or all of the Trustees powers to such one or more of the following persons, for such period and upon such terms, as the Trustee may stipulate:: Trustor **JANE DOE's** mother **ROSANNE McDONALD** (currently of El Cerrito, California), Trustor **JANE DOE's** father **RONALD McDONALD** (currently of El Cerrito, California) and/or such one or more of the Trustors' issue who is then past the age of ***thirty (30)*** as the Trustee may designate.

J. The Trustees may release or restrict the scope of any power granted the Trustees, whether such power is expressly granted or implied by law. The Trustees shall exercise this power in a written instrument executed by the Trustees and delivered to the then income beneficiaries of the Trust (or, if there are none, then to the beneficiaries then entitled to distributions from the Trust in the discretion of the Trustees) specifying the powers to be released or restricted and the nature of the restriction.

K. The Trustees are authorized to carry insurance of such kinds and in such amounts as the Trustees, in the exercise of their free and absolute discretion, consider advisable (at the expense of the Trust) to protect the trust estate, the Trustees or any beneficiary of the trust estate against any hazard reasonably expected. The Trustees may, for example, use Trust funds to purchase health insurance for the benefit of any beneficiary for whose health Trust funds may properly be expended.

L. The Trustees are vested with the power to open, operate, and maintain a securities brokerage account wherein any securities may be bought and/or sold on margin; and to hypothecate, borrow upon, purchase, and/or sell existing securities in such account as the Trustees may deem appropriate or useful.

M. The Trustees are also vested with the power and authority to write, buy, and/or sell options (whether covered or not) on any security held by the Trust and/or regularly traded on a recognized securities exchange.

N. The Trustees are further authorized to invest in partnerships and joint ventures and to comply with all the terms and provisions of every partnership and joint venture agreement which is or may become a part of the principal of any

Trust herein created. The Trustees may treat as income all distributions actually received from any partnership or joint venture which is part of the principal of any Trust hereunder, and derived from rent or receipts from operations, even though a portion of any such distribution may be regarded as a return of capital for accounting purposes. The Trustees may maintain reasonable reserves for depreciation and amortization, but such reserves shall not prevent the distribution as Trust income of the amounts described in the preceding sentence.

Article VI

A. No beneficiary of this Trust shall have any right to alienate, encumber, or hypothecate his or her interest in the principal or income of the Trust in any manner--***provided, however***, that such transactions shall be permissible with the written consent of the Trustee, which consent may be given if the Trustee (in the exercise of the Trustee's free and absolute discretion) determines that such a transaction would be beneficial to the respective beneficiary and not have a serious adverse effect on the interest of any other beneficiary of the Trust. The Trustee shall not be under any obligation whatsoever to consent to any such transaction and need not justify any refusal to do so.

The interest of any beneficiary in principal or income of the Trust shall not in any manner be subject to claims of his or her creditors, liable to attachment, or execution, or to any other such processes of law, including bankruptcy proceedings; and, in the event that any creditor shall threaten or attempt to attach, garnishee or sequestrate any such interest, the Trustee--so long as said threat or effort on the part of such creditor continues--shall, instead of paying the principal or income due hereunder to said beneficiary, apply the same for his or her health, support, maintenance and/or education.

B. If, during the period when any beneficiary is entitled to receive any pay-

ment hereunder, such beneficiary is--in the uncontrolled judgment of the Trustees--mentally or physically incapacitated (irrespective of whether legally so adjudicated), incarcerated, incompetent, placed under conservatorship, in financial trouble or in bankruptcy, the Trustees may apply any such payments for the benefit of such beneficiary rather than distributing the same to him/her directly; and, in the event that such condition shall (in the reasonable judgment of the Trustee) continue, the Trustee may, instead of paying the principal or income due hereunder to said beneficiary, apply the same for his/her health, support, maintenance and/or education until such time as such condition shall cease (if ever). If the Trust share held for such beneficiary has not yet been distributed, then upon the death of the given beneficiary, the Trustee shall distribute the then remaining balance of the Trust share then held for the benefit of such beneficiary to such person(s) as would have received the given Trust share had the Trustor survived the given beneficiary and died on the date of the given beneficiary's death.

NOTWITHSTANDING ANYTHING CONTAINED HEREIN TO THE CONTRARY, TRUSTEES SHALL NOT HAVE ANY POWERS OR AUTHORITY HEREUNDER THAT WILL CAUSE THE FOREGOING SPENDTHRIFT PROVISIONS TO LOSE THEIR STATUS AS SUCH WITHIN THE MEANING OF SECTIONS 15300 ET SEQ. OF THE CALIFORNIA PROBATE CODE AND SECTION 541 (c)(2) OF THE U.S. BANKRUPTCY ACT.

Article VII

A. The Trustees shall from time to time, but no less often than annually, account to the then principal income beneficiary(ies) of the Trust--***provided,*** that during the lifetime of the Trustors (or either of them): (i) the Trustees need not account at all if the Trustors and the Trustees are one and the same persons and (ii)

the Trustees need account only to the Trustors if the Trustors and Trustees are different persons (in which event the Trustors' written approval shall be final and conclusive in respect to transactions disclosed in the account as to all beneficiaries of this Trust--including unborn and contingent beneficiaries). The sending of regular bank and/or stockbroker's statements shall be considered an accounting within the meaning of this provision.

B. Trustees shall be entitled to reasonable compensation for services.

C. No bond shall be required of any person named as a Trustee herein.

D. No Trustee designated herein shall be liable to any beneficiary or any heir of either Trustor for the Trustee's acts or failure to act, except for willful misconduct or gross negligence.

E. Until the Trustee shall have received written notice of any birth, death or other event upon which the right to receive payment from the trust estate may depend, the Trustee shall incur no liability for disbursements or distributions theretofore made in good faith.

F. No Trustee shall be liable or responsible for any act, omission, or default of any predecessor or Co-Trustee so long as the Trustee has no actual knowledge of facts that might reasonably be expected to put the Trustee on notice of the offending act, omission, or default of the predecessor or Co-Trustee.

Article VIII

Should any Trust beneficiary (other than the Trustors) or any other legal heir of the Trustors, or any person claiming under any of them--no matter how remote or contingent such beneficiary's interest may appear:

A. Contest the provisions of this Trust Agreement, or attack or seek

to impair or invalidate any of its provisions, or conspire with or voluntarily assist anyone attempting to do any of those things; and/or

B. Without the consent of the Trustee: Petition to terminate the Trust created for such beneficiary for any reason whatsoever prior to the prescribed termination date of said person's Trust (if any) as set forth in this Trust Agreement--other than to terminate said Trust for the reason(s) set forth in California Probate Code Section 15408; and/or

C. Commence any proceeding in law, equity or arbitration to claim a right to support (whether or not said claim is based upon contract, equity and/or a filed creditors' claim) by reason of said claimant's relationship with the Trustor--unless the claimant has been explicitly granted a right to support hereunder; and/or

D. Commence any proceeding to challenge the legality of this Trust Agreement, or any amendment thereto or any Trust created hereunder for any reason whatsoever (including, without limitation, any allegations that said Trust Agreement or any Trust created hereunder violates or could violate the "Rule Against Perpetuities" and/or that the Trustor was incompetent or acting under undue influence at the time that this Trust Agreement--or any amendment thereto--was executed);

--then and in such event such person shall not be entitled to any interest in any Trust created hereunder; and all benefits, if any, provided for such person under this Trust Agreement shall be forfeited and shall augment proportionately the shares of such of the other Trust beneficiaries hereunder as shall not have participated in such acts or proceedings; and all benefits theretofore paid to the beneficiary shall be forfeited and shall be paid back to the Trust and shall aug-

ment proportionately the shares of such of the other Trust beneficiaries hereunder as shall not have participated in such acts or proceedings.

Article IX

Unless sooner terminated in accordance with other provisions of this Agreement, each Trust created under this Agreement shall terminate twenty-one (21) years after the death of the last survivor of the following persons: the Trustors, all of the Trustors' issue living at the time any portion of this Trust becomes irrevocable and all other persons specifically named as beneficiaries of this Trust (and their issue) who are living at the time this Trust becomes irrevocable.

All principal and undistributed income of any Trust so terminated shall be distributed to the then income beneficiary of that Trust. If there are several persons entitled to receive the income, then the remaining principal and undistributed income shall be distributed to such income beneficiaries in the proportions in which they are, at the time of termination, entitled to receive the income. If the rights to income are not then fixed by the terms of this Trust Agreement, distribution under this Article shall be made--by right of representation--to such of the Trustors' issue as are then entitled to receive income payments. If there are no such issue, then distribution hereunder shall be made in equal shares to such persons as are then entitled to receive income payments.

Article X

A. All questions relating to the validity and construction of this Agreement and to the administration of any Trust created herein shall be determined in accordance with the laws of the State of California.

B. If any provision of this Trust Agreement, or any amendment thereof,

should be invalid, the remaining provisions shall remain in effect and be so construed as to effectuate the intents and purposes of this Trust Agreement and any amendments thereto.

Article XI

A. This Trust Agreement shall be revocable and subject to amendment as long as the Trustors are alive. Revocation shall be effected by delivering an instrument in writing to that effect from the Trustors to the Trustees. Amendments shall be effected during the joint lifetime of the Trustors by an agreement in writing executed by the Trustors and delivered to the Trustees.

B. Upon the death of one of the Trustors, this Trust Agreement, as then amended, shall become irrevocable and shall not be subject to further amendments--***provided, however,*** that the surviving Trustor shall have the power to: (i) amend the **SURVIVOR's TRUST** portion of this Trust by an agreement in writing executed by the surviving Trustor and delivered to the then incumbent Trustee and (ii) amend the **DISCLAIMER TRUST** portion of this Trust to change the Trustee of the same. Upon the death of the surviving Trustor, the **SURVIVOR's TRUST** (as then amended) shall become irrevocable and shall not be subject to further amendments.

Article XII

In the event that any Trustee (or any other interested party) hereunder shall at any time wish to submit this Trust to the jurisdiction of an appropriate State of California Superior Court for supervision--pursuant to the terms and provisions of Sections 17000 et. seq. of the California Probate Code (or any of them, or their successors)--the Trustee, or interested party, may do so forthwith.

This **TRUST AGREEMENT** has been executed in triplicate. The original copies hereof have been designated as the "First Original," "Second Original," and "Third Original" and delivered to the Trustors, the Trustees, and the Trustors' attorney **ICHABOD CRANE** (currently of Berkeley, California), respectively.

IN WITNESS WHEREOF, we have executed this instrument at Berkeley, California, on March 15, 2013.

_____ _____

JANE DOE,
Trustor/Trustee

JOHN DOE,
Trustor/Trustee

STATE OF CALIFORNIA)
) ss.
COUNTY OF ALAMEDA)

On March 15, 2013, before me, **ICHABOD CRANE**, a Notary Public in and for the State of California, personally appeared **JOHN DOE** and **JANE DOE**, who proved to me on the basis of satisfactory evidence to be the persons whose names are subscribed to the within instrument and acknowledged to me that they executed the same in their authorized capacities, and that by their signatures on the instrument the persons, or the entity upon behalf of which the persons 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.

_____

ICHABOD CRANE, Notary Public
My Commission Expires: 12/15/08

SCHEDULE "A"
(TRANSFER OF ASSETS)

We hereby grant, transfer and convey to the Trustees of the **JOHN AND JANE DOE LIVING TRUST**, all of our right, title and interest in and to all jewelry, objets d'art, clothing, household furniture and furnishings, automobiles and all other personal effects, and all other real and personal property that we own now or acquire later during our lifetimes--including our interest in our residence commonly known as ***1234 Main Street, Berkeley, California 94700***, together with all of our cash, bank accounts, stocks and bonds, general and limited partnership interests, business interests, promissory notes and trust deeds payable to us--or either of us--(or our interest in any such property), together with any insurance on such property.

This transfer of assets shall be binding and effective as to our heirs and assigns.

We agree to sign such documents and take such actions as are necessary to effectuate the aforesaid transfer as a matter of public record (e.g., the recording of real estate deeds in the County Recorder's Office).

Executed this March 15, 2013, at Berkeley, California.

_____ _____

JANE DOE, Trustor **JOHN DOE**, Trustor

In our capacity as Trustees of the **JOHN AND JANE DOE LIVING TRUST**, we accept transfer and delivery of the above-stated assets.

Executed this March 15, 2013, at Berkeley, California.

_____ _____

JANE DOE, Trustee **JOHN DOE**, Trustee

March 15, 2013

Mr. and Mrs. John Doe
1234 Main Street
Berkeley, California 94707

Dear Jane and John:

It was good see you both again today when we met to execute all of the documents necessary to establish your new estate plan (centered on a Living Trust). Now that you have the Trust set up, you must effectuate the same by transferring title to all of your assets into the name of the Trust. To that end you should take the following steps:

1. Transfer title to your house into the name of the Trust. Among the papers you signed were those necessary to accomplish that transfer. I will now complete the same and send the Deed in to the Recorder's Office. The house will then be officially transferred into the name of the Trust. You should receive the new Deed back within the next four to eight weeks.

2. In addition, you need to transfer title to your other assets into the name of your new Trust in substantially the following form:

With respect to <u>community</u> assets, title should read:

"JOHN AND JANE DOE LIVING TRUST U/A dtd 3/15/13 (John Doe and Jane Doe, Trustees)"

With respect to <u>John's separate</u> assets (if any), title should read:

"JOHN AND JANE DOE LIVING TRUST U/A dtd 3/15/13 *fbo JOHN DOE* (John Doe and Jane Doe, Trustees)"

With respect to Jane's separate assets (if any), title should read:

"JOHN AND JANE DOE LIVING TRUST U/A dtd 3/15/13 *fbo JANE DOE* (John Doe and Jane Doe, Trustees)"

Title to any assets you acquire in the future should be taken in the manner noted above as well.

The assets you should change particularly include your bank accounts and any other assets ***(except retirement plans and life insurance)*** which are registered in the names of either or both of you. Enclosed please find a suggested form letter that you might use to ask the parties holding your various ***community*** assets to change title to your accounts. Notwithstanding that you should change title to your bank accounts so that they are held in the name of the Trust (as indicated above), you may still have your checks printed up any way you wish.

You need not do anything about ***title*** to your ***insurance policies or retirement accounts***--as ownership of those assets should remain individual. You should, however, check the beneficiaries you have designated for each and, if necessary, change them as follows:

A. The Trust (designated as above) should probably be made the beneficiary of your ***life insurance policies***--unless there is compelling reason to have another beneficiary. If you have any questions about this point, please let me know and I will help you sort them out.

B. You should (for tax reasons) generally each be the primary beneficiary of any ***IRAs, Keoghs, tax deferred benefit plans and/or other retirement/ pensions plans*** you have. The Trust, however, should be the secondary beneficiary on each such account.

You should also get in touch with the company that insures your house and advise it that you have transferred title to the same into the name of your Trust. The Company should then add the Trust as an "additional insured" party on your homeowner's insurance policy--probably without additional charge.

When you try to transfer your assets into the name of the Trust, the institutions holding the assets may ask you to send them a copy of some portion (or all) of the Trust. If you need additional copies of the Trust for this purpose, please let me know and I will be happy to send you the requisite number of copies--or send you copies from time to time as you need them.

This will also confirm, once again, the importance of transferring title to ***all*** of your assets into the name of your new Living Trust. Failure to transfer title to some of your assets could result in having to probate that portion of your estate that does not get changed into the name of the Trust--thus defeating one of the principal objectives of the Trust. Again, if you need any help with these transfers, please don't hesitate to call.

You should also remember to write the Letter of Instructions to your Trustee directing the disposition of your personal effects--per Article II subparagraphs C. [starting on page ___] and 1. 1.3. (b) [starting on page ___] of the Trust.

Finally, this will reiterate that your new estate plan has been based on present applicable laws. If the laws change, it is imperative that the plan be reviewed and (if necessary) changed.

Although I attempt to keep my clients advised of significant changes in the law, I do not undertake this responsibility. Therefore, should it come to your attention through the news media or other sources that there has been a change in the

tax laws, I recommend that you call for an appointment.

Further, I believe that it is essential that you personally review your estate plan at every few years, to make certain that it still expresses your exact desires concerning the disposition of property. If any changes are desired, please do not attempt to make the changes yourselves. Simply advise me of the changes desired and we will prepare appropriate amendments to your estate plan. Even if you do not desire to make changes in your estate plan, I suggest that the plan be reviewed every three to five years. At the time of any future appointment, you should remember to bring in a current financial statement and copies of the current deeds to any real property you may then own.

If you have any questions, or if I can be of assistance in transferring title to your various assets, please let me know.

Warmest regards, as always,

MCF:mf **Michael C. Ferguson**

_____, 20____

TO WHOM IT MAY CONCERN:

Re: _____
Account #: _____
Currently in the Name of: _____

Please be advised that we have recently established a Living Trust--designed to receive all of our assets as a way of avoiding probate and facilitating the administration of our financial affairs.

In order to effectuate the trust, it is necessary to transfer title to our assets into the name of our new Trust. Accordingly, we write to request that you change title to our above-captioned account from our names individually into the name of our new Trust, as follows:

"JOHN AND JANE DOE LIVING TRUST U/A dtd 3/15/13 (John Doe and Jane Doe, Trustees)"

Since our Trust is a revocable (grantor type) Living Trust, the taxpayer identification number for the Trust will remain as is, to-wit: _____
[Insert Either of Your Social Security Numbers Here]

If you need any further information or documentation in order to comply with this request, please don't hesitate to get in touch either with us or with our attorney (**Ichabod Crane**, 5678 Headless Court, Sleepy Hollow, California 91011; Phone: [666] 765-4321) with your additional requirements.

Cordially,

_____ _____
JOHN DOE **JANE DOE**

_____, 20____

TO WHOM IT MAY CONCERN:

Re: _____
Account #: _____
Currently in the Name of: _____

Please be advised that my spouse and I have recently established a Living Trust--designed to receive all of our assets as a way of avoiding probate and facilitating the administration of our financial affairs.

In order to effectuate the trust, it is necessary to transfer title to our various assets into the name of our new Trust. Accordingly, I write to request that you change title to my above-captioned account from my name individually into the name of our new Trust (***preserving the nature of the assets as my separate property***), as follows:

"JOHN AND JANE DOE LIVING TRUST U/A dtd 3/15/13 *fbo JOHN DOE* (John Doe and Jane Doe, Trustees)"

Since our Trust is a revocable (grantor type) Living Trust, the taxpayer identification number for the Trust will remain as is, to-wit: _____
[Insert John's Social Security Number Here]

If you need any further information or documentation in order to comply with this request, please don't hesitate to get in touch either with us or with our attorney (**Ichabod Crane**, 5678 Headless Court, Sleepy Hollow, California 91011; Phone: [666] 765-4321) with your additional requirements.

Cordially,

_____
JOHN DOE

_____, 20____

TO WHOM IT MAY CONCERN:

Re: _____
Account #: _____
Currently in the Name of: _____

Please be advised that my spouse and I have recently established a Living Trust--designed to receive all of our assets as a way of avoiding probate and facilitating the administration of our financial affairs.

In order to effectuate the trust, it is necessary to transfer title to our various assets into the name of our new Trust. Accordingly, I write to request that you change title to my above-captioned account from my name individually into the name of our new Trust (***preserving the nature of the assets as my separate property***), as follows:

"JOHN AND JANE DOE LIVING TRUST U/A dtd 3/15/13 *fbo JANE DOE* (John Doe and Jane Doe, Trustees)"

Since our Trust is a revocable (grantor type) Living Trust, the taxpayer identification number for the Trust will remain as is, to-wit: _____
[Insert Jane's Social Security Number Here]

If you need any further information or documentation in order to comply with this request, please don't hesitate to get in touch either with us or with our attorney (**Ichabod Crane**, 5678 Headless Court, Sleepy Hollow, California 91011; Phone: [666] 765-4321) with your additional requirements.

Cordially,

_____
JANE DOE

When recorded mail to:
ICHABOD CRANE
5678 Headless Court
Sleepy Hollow, California 91011

MAIL TAX STATEMENTS TO:
JOHN DOE, TRUSTEE
JANE DOE, Trustee
1234 Main Street
Berkeley, California 94700

DOCUMENTARY TRANSFER TAX $ NONE
EXEMPT PER §11930 REV & TAX CODE
NOT PURSUANT TO SALE

_____
Ichabod Crane, Esq.

Transfer By Grantors to Revocable Trust for Benefit of Themselves

GRANT DEED

FOR A VALUABLE CONSIDERATION, receipt of which is hereby acknowledged,

JOHN DOE and JANE DOE, husband and wife

do hereby GRANT to

JOHN DOE and JANE DOE (and their successors in interest), as Trustees of the JOHN AND JANE DOE LIVING TRUST U/A dtd 3/15/13

the real property in the City of Berkeley, County of Alameda, State of California, described as:

SEE LEGAL DESCRIPTION ON EXHIBIT "A," ATTACHED

Commonly known as: **1234 Main Street Berkeley, California 94700.**

Assessor's Parcel Number: ***123-456-778910***

Dated: March 15, 2013

_____ _____

JOHN DOE **JANE DOE**

MAIL TAX STATEMENTS AS DIRECTED ABOVE

STATE OF CALIFORNIA)
) ss.
COUNTY OF ALAMEDA)

On March 15, 2013, before me, **ICHABOD CRANE**, a Notary Public in and for the State of California, personally appeared **JOHN DOE** and **JANE DOE**, who proved to me on the basis of satisfactory evidence to be the persons whose names are subscribed to the within instrument and acknowledged to me that they executed the same in their authorized capacities, and that by their signatures on the instrument the persons, or the entity upon behalf of which the persons acted, executed the instrument.

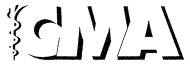
I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

_____

ICHABOD CRANE, Notary Public
My Commission Expires: 12/15/16

CALIFORNIA MEDICAL ASSOCIATION
DURABLE POWER OF
ATTORNEY FO HEALTH



California Medical Association
Physicians dedicated to the health of Californians

ADVANCE HEALTH CARE DIRECTIVE

Including Power of Attorney for Health Care Decisions
California Probate Code Sections 4600-4805

MY HEALTH CARE WISHES

This form lets you give instructions about your future health care. It also lets you name someone to make decisions for you if you can't make your own decisions. It's best if you fill out the whole form, but, as long as it is signed, dated and witnessed or notarized properly, you may choose only to appoint an agent (section 1) or provide health care instructions (section 5). If there is anything in this form you do not understand, read the booklet that comes with this form and the italicized instructions on the form, or ask your physician, other health care professional or an attorney for help. You may also review additional information and instructions concerning advance health care directives on the California Medical Association's website, ***www.cmanet.org****. Internet access is available at your local public library.*

1. APPOINTMENT OF HEALTH CARE AGENT

❑ **Option A.** I, _____, wish to appoint a health care agent.

(Print your full name and date of birth)

Fill in below the name and contact information of the person(s) (your agent and alternate agent(s)) you wish to make health care decisions for you if you are unable to make them for yourself. You may appoint alternate agents in case your first appointed agent is not willing, able or reasonably available to make these decisions when asked to do so.

Your agent may ***not*** *be:*

A. Your primary treating health care provider.

B. An operator of a community care or residential care facility where you receive care.

C. An employee of the health care institution or community or residential care facility where you receive care, unless your agent is related to you or is one of your co-workers.

If you choose to name an agent, you should discuss your wishes with that person and give that person a copy of this form. You should make sure that this person understands your wishes and this responsibility and is willing to accept it.

OR

❑ **Option B.** I, _____, do not wish to appoint an agent at this time.

(Print your full name and date of birth)

If you choose not to name an agent, initial the box above, print your name on the line in the Option B above, draw a line through the next page (page 2), then continue to Section 3.

I hereby appoint as my agent to make health care decisions for me:

Name _____
(agent's name)

Address _____
(street address, city, state, zip code)

Home Phone (_____)_____ Work Phone (_____) _____

Cell phone/Pager (_____)_____ Fax (_____)_____ e-mail _____

I understand this appointment will continue unless I revoke it as explained in Section 3.
If I revoke my agent's authority or if my agent is not reasonably available, able or willing to make health care decisions for me, I appoint the following person(s) to do so, listed in the order they should be asked:

OPTIONAL: 1st alternate agent: Name _____ e-mail _____

Address _____ Home phone (_____)_____
(street address, city, state, zip code)

Work Phone (_____)_____ Cell phone/Pager (_____)_____ Fax (_____)_____

OPTIONAL: 2nd alternate agent: Name_____ e-mail _____

Address_____ Home phone (_____)_____
(street address, city, state, zip code)

Work Phone (_____)_____ Cell phone/Pager (_____)_____ Fax (_____)_____

2. AUTHORITY OF AGENT

Your agent must make health care decisions that are consistent with the instructions in this document and your known desires. ***It is important that you discuss your health care desires with the person(s) you appoint as your health care agent, and with your doctor(s).*** *If your wishes are not known, your agent must make health care decisions that your agent believes to be in your best interest, considering your personal values to the extent they are known.*

If my primary physician finds that I cannot make my own health care decisions, I grant my agent full power and authority to make those decisions for me, subject to any health care instructions set forth below. My agent will have the right to:

A. Consent, refuse consent, or withdraw consent to any medical care or services, such as tests, drugs, surgery, or consultations for any physical or mental condition. This includes the provision, withholding or withdrawal of artificial nutrition and hydration (feeding by tube or vein) and all other forms of health care, including cardiopulmonary resuscitation (CPR).

B. Choose or reject my physician, other health care professionals or health care facilities.

C. Receive and consent to the release of medical information.

D. Donate organs or tissues, authorize an autopsy and dispose of my body, unless I have said something different in a contract with a funeral home, in my will, or by some other written method.

I understand that, by law, my agent may not consent to committing me to or placing me in a mental health treatment facility, or to convulsive treatment, psychosurgery, sterilization or abortion.

OPTIONAL: I want my agent's authority to make health care decisions for me to start now, **even though I am still able to make them for myself.** I understand and authorize this statement as proved by my

signature_____.

3. PRIOR DIRECTIVES REVOKED

I revoke any prior Power of Attorney for Health Care or Natural Death Act Declaration.

You may revoke any part of or this entire Advance Health Care Directive at any time. To revoke the appointment of an agent, you must inform your treating health care provider personally or in writing. Completing a new California Medical Association Advance Health Care Directive will revoke all previous directives. If you revoke a prior directive, notify every person, physician, hospital, clinic, or care facility that has a copy of your prior directive and give them a copy of your new directive, if you execute one.

4. COPIES

My agent and others may use copies of this document as though they were originals.

Your agent may need this document immediately in case of an emergency. You should keep the completed original and give copies of the completed original to (1) your agent and alternate agents, (2) your physician(s), (3) members of your family and others who might be called in the event of a medical emergency, and (4) any hospital or other health facility where you receive treatment. Instruct your agent(s), family, and friends to provide a copy of your directive to your physician(s) or emergency medical personnel on request.

5. HEALTH CARE INSTRUCTIONS

You may, but are not required to, state your desires about the goals and types of medical care you do or do not want, including your desires concerning life support if you are seriously ill. If your wishes are not known, your agent must make health care decisions for you that your agent believes to be in your best interest, considering your personal values. ***If you do not wish to provide specific, written health care instructions, draw a line through this Section.***

The following are statements about the use of life-support treatments. Life-support or life-sustaining treatments are any medical procedures, devices or medications used to keep you alive. Life-support treatments may include: medical devices put in you to help you breathe; food and fluid supplied artificially by medical device (feeding tube); cardiopulmonary resuscitation (CPR); major surgery; blood transfusions; kidney dialysis; and antibiotics.

Sign either of the following general statements about life-support treatments if one accurately reflects your desires. If you wish to modify or add to either statement or to write your own statement instead, you may do so in the space provided or on a separate sheet(s) of paper which you must date and sign and attach to this form.

OPTIONAL: The statement I have signed below is to apply if I am suffering from a terminal condition from which death is expected in a matter of months, or if I am suffering from an irreversible condition that renders me unable to make decisions for myself, and life-support treatments are needed to keep me alive.

A. I request that all treatments other than those needed to keep me comfortable be discontinued or withheld and my physician(s) allows me to die as gently as possible. I understand and authorize this statement as proved by my

signature_____

OR

B. I want my life to be prolonged as long as possible within the limits of generally accepted health care standards. I understand and authorize this statement as proved by my

signature_____

OPTIONAL: Other or additional statements of medical treatment desires and limitations: _____

_____

_____

_____

For additional Advance Health Care Directive options, go to the California Medical Association's website at ***www.cmanet.org.***

OPTIONAL: I have added _____ page(s) of specific health care instructions to this directive, each of which is signed and dated on the same day I signed this directive.

6. ORGAN AND TISSUE DONATION

I wish to be an organ donor. I understand and authorize this statement as proved by my

signature_____.

I have indicated this on ❑ my driver's license and/or ❑ optional section below.

*If you **do not** wish to be an organ donor, please check this box:* ❑

*Organ and tissue donation represent one of the greatest gifts that an individual can make. **A clear statement of your intent, such as the information that follows, will help to make sure that your intentions regarding organ and tissue donations are honored.** Be sure to communicate these intentions to your family members, loved ones, and physician(s).*

For more information on organ and tissue donation in Northern California, contact the California Transplant Donor Network at www.ctdn.org or telephone 888-570-9400; in Central California, contact One Legacy, Los Angeles, CA, at www.onelegacy.com or telephone (213) 413-6219; in Eastern California, contact Golden State Donor Services, Sacramento, CA, at www.gsds.org or telephone (916) 567-1600; in Southern California, contact Lifeshare, Southern California, San Diego, CA, at www.lifesharing.org or telephone (619) 521-1983.

OPTIONAL: Other or additional statements of organ and tissue donation desires and limitations.

I, _____, make this anatomical gift to take effect upon my death:

I give

- ❑ my body
- ❑ any needed organ (e.g., kidneys, liver, heart. lungs, pancreas, spleen), tissue (corneas, heart valves, skin, bone) or parts
- ❑ only the following organs, tissues, or parts: _____

_____

to

- ❑ the regional organ procurement agency or eye or tissue bank for transplantation or other therapy
- ❑ the following university, hospital, storage bank, or other medical institution:

_____

for

- ❑ transplantation or treatment of any person who can medically benefit
- ❑ medical education
- ❑ medical research
- ❑ any purpose authorized by law

I understand and authorize this statement as proved by my

signature_____.

7. DATE AND SIGNATURE OF PRINCIPAL

I sign my name to and acknowledge this Advance Health Care Directive:

_____ _____ _____

(signature of principal) *(date of birth)* *(date of signing)*

8. STATEMENT OF WITNESSES

This Advance Health Care Directive will not be valid unless it is either (1) signed by two qualified adult witnesses who are present when you sign or acknowledge your signature or (2) acknowledged before a notary public in California. If you use witnesses rather than a notary public, the law ***prohibits using the following as witnesses:*** *(1) the persons you have appointed as your agent or alternate agent(s); (2) your health care provider or an employee of your health care provider; or (3) an operator or employee of an operator of a community care facility or residential care facility for the elderly. Additionally, at least one of the witnesses* ***cannot*** *be related to you by blood, marriage or adoption, or be named in your will, or by operation of law be entitled to any portion of your estate upon your death.*

Special Rules for Skilled Nursing Facility Residents

If you are a patient in a skilled nursing facility, you must have a patient advocate or ombudsman sign as a witness and sign the Statement of Patient Advocate or Ombudsman. (See Following Pages) You must also have a second qualified witness sign below or have this document acknowledged before a notary public.

FOR SKILLED NURSING FACILITIES: STATEMENT OF PATIENT ADVOCATE OR OMBUDSMAN

If you are a patient in a skilled nursing facility, a patient advocate or ombudsman must sign the Statement of Witnesses (See Following Pages), and must also sign the following declaration.

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

Name/Title Printed _____ Signature _____

Date _____ Address _____

STATEMENT OF WITNESSES (continued)

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 (*see next page), (2) that the individual signed or acknowledged this Advance Health Care 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 Health Care Directive, and (5) I am not the individual's health care provider nor an employee of that health care provider, nor an operator or employee of an operator of a community care facility or a residential care facility for the elderly.

First Witness: _____ _____

(date) *(name printed)* *(signature)*

Residence Address: _____

Second Witness: _____ _____

(date) *(name printed)* *(signature)*

Residence Address: _____

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 _____ Date _____

9. CERTIFICATE OF ACKNOWLEDGMENT OF NOTARY PUBLIC

*Acknowledgment before a notary public is **not** required if two qualified witnesses have signed on page 7. If you are a patient in a skilled nursing facility, you must have a patient advocate or ombudsman sign the Statement of Witnesses on page 6 and the Statement of Patient Advocate or Ombudsman above, even if you also have this form notarized.*

State of California
County of _____ } ss.

On this _____ (*date*), before me, _____ (*name and title of officer*),

personally appeared _____ (*name(s) of signer(s)*),

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

WITNESS my hand and official seal.

_____
(*signature of notary public*)

Notary Seal

Additional forms can be purchased from:
CMA Publications, 1201 J Street, Suite 375, Sacramento, CA 95814-2906
Phone: 1-800-882-1262 • Fax: 916-551-2035 • Internet: www.cmanet.org

***EVIDENCE OF IDENTITY:** The following forms of identification are satisfactory evidence of identity: a California driver's license or identification card or U.S. passport that is current or has been issued within five years, or any of the following if the document is current or has been issued within 5 years, contains a photograph and description of the person named on it, is signed by the person, and bears a serial or other identifying number: a foreign passport that has been stamped by the U.S. Immigration and Naturalization Service; a driver's license issued by another state or by an authorized Canadian or Mexican agency; an identification card issued by another state or by any branch of the U.S. armed forces, or for an inmate in custody, an inmate identification card issued by the Department of Corrections. If the principal is a patient in a skilled nursing facility, a patient advocate or ombudsman may rely on the representations of family members or the administrator or staff of the facility as convincing evidence of identity if the patient advocate or ombudsman believes that the representations provide a reasonable basis for determining the identity of the principal.

LAST WILL AND TESTAMENT

OF

JOHN DOE

I, **JOHN DOE**, a resident of the City Berkeley, County of Alameda, State of California, declare this to be my Last Will and revoke all other Wills and Codicils previously made by me.

FIRST: I am married to **JANE DOE**, and all references in this Will to my "spouse" are to her.

I have two children born of my marriage to **JANE DOE**, whose names and dates of birth are: **JOHN DOE, Jr.**, born January 1, 1987; and **BABY JANE DOE**, born December 31, 1992.

The terms "issue," "child," and "children" as used in this Will shall include children and issue legally adopted during minority, but not "children" adopted after the "child" has reached majority.

All references in this Will to my "Personal Representative" shall refer to the person named as Executrix hereof.

SECOND: A) I give all of my estate to my spouse **JANE DOE**; and should she predecease me, then to my surviving issue, by right of representation --***provided, however,*** that should any such benefited issue then be under the age of ***twenty-five (25)***, then such issue's share shall be paid (pursuant to Sections 3900 et seq. of the California Probate Code) to my Personal Representative (or

to said Representative's nominee) to be held in ***FURTHER TRUST*** by said person (who shall serve without bond) for said issue's benefit in accordance with the terms of the **California Uniform Transfers to Minors Act (CUTMA)**; ***provided*** that final distribution under the **CUTMA Trusts** shall be postponed for each such issue until his/her ***twenty-fifth (25th)*** birthday.

C) Should my spouse and all of my issue predecease me, then I give the residue of my estate as in two equal shares to: (i) my sister **FRANCES DOE** (currently of New York, New York) and (ii) my spouse's sister **FAWN SMITH** (currently of Napa Valley, California); and should either of them also predecease me, then her share shall go instead to her then living issue, by right of representation--***subject, however,*** to the **CUTMA Trust** provisions set forth above for any such benefited issue who is then under the age of ***twenty-five (25)*** years; and should there be no such issue, then to the surviving sister (or to her then living issue, by right of representation, if she is also then deceased--***subject to*** the **CUTMA Trust** provisions set forth above for any such benefited issue who is then under the age of ***twenty-five (25)*** years).

THIRD: Should my spouse predecease me and any child of ours still be a minor at the time of my death, I appoint my sister **FRANCES DOE** (currently of New York, New York) as guardian of the person and estate of my said minor child--to serve without bond; and should she be or become unable or unwilling to serve, then I appoint my spouse's sister **FAWN SMITH** (currently of Napa Valley, California) as such guardian--to serve without bond.

FOURTH: A) Except as otherwise provided herein, I have intentionally omitted to provide for any of my heirs-at-law living at the time of my death and/or

for any other person.

B) If any beneficiary under this Will in any manner, directly or indirectly, contests or attacks this Will or any of its provisions in any way, any share or interest in my estate given to that contesting beneficiary is revoked and shall be disposed hereunder as if that contesting beneficiary had predeceased me without issue.

FIFTH: If any beneficiary under this Will should die from any cause not surviving me more than One Hundred Fifty (150) days, or disclaim any interest passing to him/her by reason of my death, then my property (or such of it as may have been disclaimed) shall be distributed as if such person had predeceased me.

SIXTH: All death taxes due as a result of my death (whether relating to my probate estate or to any property or transfers of property outside my probate estate) shall be paid by my Personal Representative out of the residue of my probate estate, without adjustment among the several beneficiaries of the same and without contribution from any transferee or beneficiary of any property outside my probate estate.

SEVENTH: I appoint my spouse **JANE DOE** as Executrix of this Will; and should she be or become unable or unwilling to serve, then I appoint my sister **FRANCES DOE** (currently of New York, New York) as Executrix hereof; and should she also be or become unable or unwilling to serve, then I appoint my spouse's sister **FAWN SMITH** (currently of Napa Valley, California) as Executrix hereof.

No bond or other security shall be required of my Personal Representative.

I authorize my Personal Representative to sell at either public or private sale (and to encumber or lease) any property belonging to my estate--either with or

without notice, subject only to such confirmation by Court Order as may be required by law.

I further authorize my Personal Representative to hold, manage, and operate any such property.

I authorize my Personal Representative to distribute my residuary estate among the several beneficiaries of the same in the manner said Representative deems best; and to make up the shares of different beneficiaries of property or cash (or partly of each), without being under a duty to distribute the same kind of property to each beneficiary and with the power to keep together units of property to such extent as my Representative deems best.

This **WILL** was signed by me at Sleepy Hollow, California, on March 15, 2013.

_____

JOHN DOE

The foregoing instrument, consisting of five (5) pages, including the page signed by us as witnesses, was at the date hereof, by **JOHN DOE** signed as and declared to be his Will in the presence of us who, at his request and in his presence, and in the presence of each other, have subscribed our names as witnesses thereto. Each of us is now more than 18 years of age and a competent witness and resides at the address set forth after his/her name.

We are acquainted with **JOHN DOE**. He is over the age of 18 years; and to the best of our knowledge, he is of sound mind and is not acting under duress, menace, fraud, misrepresentation, or undue influence.

We declare under penalty of perjury (under the laws of the State of California) that the foregoing is true and correct.

Executed on March 15, 2013, at Sleepy Hollow, California.

_____

ICHABOD CRANE

Residing at: 5678 Headless Court, Sleepy Hollow, California 91011.

_____

WHOOPING CRANE

Residing at: 5678 Headless Court, Sleepy Hollow, California 91011.

DEALING WITH CLIENTS

LAW 258/DEALING WITH CLIENTS

I. Initial Interview

A. Purposes

1. Establish Relationship With Client
2. Determine Client Competency and Independence
3. Gather Information
4. Answer Questions
5. Educate Clients

B. Gathering Information

1. Methodology/Questionnaire or Freehand
2. Family and Personal Situation
3. Assets
   - (a) Getting information from the reluctant client
   - (b) Types of Assets
     - (i) Real Property
     - (ii) Cash
     - (iii) Securities
     - (iv) Business Interests (Proprietorships, Partnerships--Ltd. and Gen., Corps.)
     - (v) Life Insurance
     - (vi) Retirement Benefits
     - (vii) Miscellaneous assets (Debts due, copyrights, etc.)
     - (viii) Personal Effects

(c) Value of Assets

(d) Title to assets

(e) Determination of Origins of Property Belonging to Spouses

4. Dispositive Wishes of Client

(a) Discussion of Disposition with Client

(b) How to Structure Bequests

(c) Alternative and Ultimate Beneficiaries

5. Planning for Children--form of bequests

(a) Uniform Transfers to Minors Act

(b) Guardianships

(c) Formal Trusts

6. Fiduciary Function

(a) General Issues

(i) Purposes

(ii) With or without bond

(iii) Court Supervision/IAEA

(b) Executor

(c) Trustee

(d) Guardian

(i) Person/Estate

(ii) Need/Frequency of occurrence

(iii) Nomination

(iv) Bond

(e) Custodian

(f) Attorney-in-fact (lifetime incapacity planning)

(i) For Asset Management/Health

--Limitations on Powers (Durable or not)

(ii) For Health

--Directive to Physicians

--"Directive for Life"

II. Lawyer Thought Processes

A. Ethical Considerations

1. Dual Representation/Conflicts of Interest
2. Retaining a Specialist
3. Unusual Dispositions
   (a) Disinheriting a Spouse or Child
   (b) Unnatural Dispositions
4. File Keeping and Malpractice Considerations

B. Typical tax Considerations

1. Federal Estate Taxes
   (a) Marital Deduction
   (b) Unified Credit Amount
   (c) Non-citizen spouse
   (d) Charitable bequests
2. Generation Skipping Transfer Taxes
3. California Estate Taxes
4. Income Taxes

(a) Basis issues

(b) Estates/Trusts as Separate Taxpaying entities

5. Real Property Taxes

6. Gift-giving Programs

C. Common Dispositive Patterns

1. Couple with Children and Nontaxable Estate

(a) Minor child

(b) Adult child

(c) Disabled child

2. Married Couple with Taxable Estate

(a) Children: Minors or adults

(b) Disabled child

(c) Common distributive scheme? or spousal differences?

3. Special Problems with Blended Families

(a) Consider Q-TIP Trusts

4. Special Problems with Non-citizen spouses

(a) Consider QDOT Trusts

5. Childless Single Testator

(a) Cohabiting or not

(b) Young/old

6. Planning for Nontraditional Individuals (gays & lesbians)

(a) Main problem: familial hostility--note recent case involving Raymond Burr (who left his estate to his "life-

time companion" [a male] with his will challenged by his niece)

(b) Planning is really no different than would be done for an unmarried heterosexual client

D. General Observations re: tax considerations and Property Agreements (community property v. separate property)

E. Legal Costs and Fees

1. Fees for Estate Planning (loss leaders for probate?)

2. How I learned to be comfortable with my fees (story of the grad student who wanted form book so he could do it himself)

3. Probate Costs and Fees

4. Costs for administering Non-probate estates--hourly or fixed fees

F. Living Trusts v. Wills (with expectation of Probate)

III. Office Procedures

A. Drafting Methods/Use of Computers (Tailored Formats: Gothic/ Large Print Plans)

B. Development of Forms (tend to develop as a result of:)

1. Use of form books (in house/standard texts)

2. Client feedback

(a) English/Math Department concerns

(b) Client insistence on $1.00 disinheritance clause (later challenged by Math Prof. who was concerned about 1,000,000 claimants each receiving $1 and bankrupting his estate)

3. Periodic review of accumulated forms of others

4. Occasional review of my forms by others

5. Direct experience with forms:

   (i) seeing how they work when clients die

   (ii) seeing how the forms stand up in IRS audit

6. Developing solutions to "new" problems presented by clients--(e.g., my Delegation of Authority enabling language and the accompanying form)

7. Lawyers tend to develop standard Formats with which they are familiar

C. Communicating Estate Plan to Client

D. File-Keeping and Malpractice Considerations

E. Client Databases

SAMPLE EXAM QUESTIONS

SAMPLE QUESTION No.: ONE*

John and Helen were divorced in late 1972--partly as a result of strain brought about by the wayward behavior of their then 17 year old daughter Lola. At the time John and Helen were both 47 years old. In 1974, John wrote a will leaving a life estate in his valuable Piedmont residence to Helen and the residue of his estate (including the remainder interest in his Piedmont residence) to Lola. The will nominated Lola as Executrix.

Lola's behavior worsened. She developed drug and alcohol dependencies, had two illegitimate children and was arrested several times on drug and prostitution charges. As a result of these problems, in 1984 the County found Lola to be an unfit mother and awarded custody of her children to John and his longtime girlfriend Betty. In 1986, John and Betty married. Betty was 42. John, Betty and the children lived in John's Piedmont house.

John died in 1988 without ever changing his 1974 Will--although after their marriage John named Betty as beneficiary of his $300,000 IRA and $150,000 life insurance policy. Apart from the IRA and life insurance, Betty has but $10,000 worth of property of her own.

One month after John's death, Betty discovered that she was pregnant--the result of an "Embryo Lavage and Transfer" (of a test tube embryo that was the product of John's sperm and Betty's ova) last attempted the day before John died. Distraught over John's death, Betty miscarried the day after discovering she was pregnant.

Betty has come to you in hopes of salvaging something from John's estate. During the course of your interview, Betty informs you that she wants to keep Lola's children and that, as best she can tell, John's assets consisted of the house (which is unencumbered and worth $400,000), the IRA, his insurance policy and the contents of his desk drawer--which contained $200,000 worth of unregistered bearer bonds and a plastic bag filled with a half pound of a powdery white substance.

Assume for purposes of this question: (i) that all of the property mentioned was John's separate property and that (ii) Helen has no claims to any of John's property except those she may have under John's Will. Ignore all tax issues. ***What can/should you do to help Betty?***

**** Substantially the same Question--based on an actual case--was asked on the Estate Planning, Trust Law and Probate Specialization Exam in October, 1989.***

SAMPLE QUESTION No.: TWO

Part One:

Hank and Wilma Jones are married and have one child, Cindy, who is now 3 years of age. They tell you they hope to have more children. They own a house, a joint tenancy bank account with a balance of about $2,500, a car and some furniture. All of their assets are community property in origin.

Hank and Wilma each wish to leave their estates to the other in the event one dies. If the Joneses both die they want to leave their estate to Cindy (and any future children they may have) and they want Wilma's sister Sara to both raise Cindy and take care of her money until she reaches "some appropriate age."

Mindful of the Jones' finances you suggest they prepare holographic Wills, which you will dictate to them. Write out the ***simplest*** complete holographic Will you think will accomplish the Jones' testamentary objectives.

Part Two:

Two days after your meeting with the Joneses, Wilma calls to tell you Hank has been abusing her for years and that she plans to leave him. In the meantime she wants to redo her Will to cut Hank out and to make sure he never gets custody of Cindy. Wilma asks you how she can accomplish these objectives.

Can you help Wilma change her Will? Explain your answer.

Assuming that you can help Wilma, what advice would you give her?

SAMPLE QUESTION No.: THREE

U.S. Nat'l Bank v. Snodgrass says:

> While one may personally and loudly condemn a species of 'intolerance' as socially outrageous, a court on the other hand must guard against being judicially intolerant of such 'intolerance,' unless the court can say the act of intolerance is in a form not sanctioned by the law. We are mindful that there are many places where a bigot may safely express himself and manifest his intolerance of the viewpoint of others without fear of legal restraints or punishment. With certain limitations, one of those areas with a wide latitude of sufferance is found in the construction of. . . one's last will and testament. It is a field wherein neither this court nor any other court will question the correctness of a testator's religious views or prejudices.

Do you agree with this statement? Why? ***Give examples to illustrate and support your answer.***

SAMPLE QUESTION No.: FOUR

(THIS WAS THE WILL AND TRUST QUESTION ON THE JULY, 2002, CALIFORNIA STATE BAR EXAM--IF YOU CAN HANDLE THIS, IT SHOULD GIVE YOU A GOOD FEELING FOR THAT EXAM!!!)

Theresa and Henry were married and had one child, Craig. In 1990, Theresa executed a valid will leaving Henry all of her property except for a favorite painting, which she left to her sister, Sis. Theresa believed the painting was worth less than $500.

On February 14, 1992, Theresa typed, dated, and signed a note, stating that Henry was to get the painting instead of Sis. Theresa never showed the note to anyone.

In 1994, Theresa hand-wrote a codicil to her will, stating: "The note I typed, signed, and dated on 2/14/92 is to become a part of my will." The codicil was properly signed and witnessed.

In 1995, Theresa's and Henry's second child, Molly, was born. Shortly thereafter, Henry, unable to cope any longer with fatherhood, left and joined a nearby commune. Henry and Theresa never divorced.

In 1999, Theresa fell in love with Larry and, with her separate property, purchased a $200,000 term life insurance policy on her own life and named Larry as the sole beneficiary.

In 2000, Theresa died. She was survived by Henry, Craig, Molly, Sis, and Larry.

At the time of her death, Theresa's half of the community property was worth $50,000, and the painting was her separate property. When appraised, the painting turned out to be worth $1 million.

What rights, if any, do Henry, Craig, Molly, Sis, and Larry have to:

1. Theresa's half of the community property? Discuss.

2. The life insurance proceeds? Discuss.

3. The painting? Discuss.

Answer according to California law.

For sample answers see:

http://calbar.ca.gov/state/calbar/calbar_generic.jsp?sImagePath=Examination_Results_Statistics.gif&sCategoryPath=/Home/About%20the%20Bar/Bar%20Exam&sHeading=Examination%20Results/Statistics&sFileType=HTML&sCatHtmlPath=html/Admissions_Old-Statistics.html#ESQASA

SAMPLE QUESTION No.: FIVE

(THIS WAS THE WILL AND TRUST QUESTION ON THE February, 2008, CALIFORNIA STATE BAR EXAM--IF YOU CAN HANDLE THIS, IT SHOULD GIVE YOU A GOOD FEELING FOR THAT EXAM!!!)

In 2001, Wilma, an elderly widow with full mental capacity, put $1,000,000 into a trust (Trust). The Trust instrument named Wilma's church (Church) as the beneficiary. Although the Trust instrument did not name a trustee, its terms recited that the trustee has broad powers of administration for the benefit of the beneficiary.

In 2002, Wilma's sister, Sis, began paying a great deal of attention to Wilma, preventing any other friends or relatives from visiting Wilma. In 2003, Wilma reluctantly executed a properly witnessed will leaving her entire estate to Sis. Following the execution of the will, Wilma and Sis began to develop a genuine fondness for each other, engaging in social events frequently and becoming close friends. In 2005 Wilma wrote a note to herself: "Am glad Sis will benefit from my estate."

In 2007, Wilma named Sis as trustee of the Trust, which was when Sis found out for the first time about the $1,000,000 in the Trust. Without telling Wilma, Sis wrote across the Trust instrument, "This Trust is revoked," signing her name as trustee.

Shortly thereafter, Wilma died, survived by her daughter, Dora, who had not spoken to Wilma for twenty years, and by Sis.

Church claims that the Trust is valid and remains in effect. Sis and Dora each claim that each is entitled to Wilma's entire estate.

1. What arguments should Church make in support of its claim, and what is the likely result? Discuss.

2. What arguments should Sis and Dora make in support of their respective claims, and what is the likely result? Discuss.

Answer question number 2 according to California law.

For a model answer see:

http://www.writingedge.com/california_bar_exam_q4.html

LAW 258

VOCABULARY, CONCEPTS

&

OUTLINE

General

Decedent
Inheritance
Primogeniture
Probate
Will
Testator
Personal Representative
Hotchpot
Trust
Settlor/Trustor/Grantor
Mandatory Language
Precatory Language
Disclaimer
Formalism

Family

Descendant
Issue
Ascendant
Ancestor
Spouse
Collateral Relative
Sibling
Stepsibling
Halfblood
Wholeblood
Posthumous Heir
Marriage
--Common Law
--***Marvin/Carey*** Relationship
--Abandoned spouse
--Effect of Divorce on Estate Plan
Co-Habitant
--Opposite Sex Co-habitant
--Same Sex Co-habitant
In-Laws
Child
--Non-marital Child
--Illegitimate Child
•Acknowledged
•Unacknowledged
--Husband's Wife's child
--Adopted Child
•Agency Adoption
•Independent Adoption
•Intercountry Adoption
•Stepparent Adoption
•Adult Adoption
•Equitable Adoption
--Stepchild
--Afterborn child
--Foster child
--Technotots
•Sperm Donor Dads
•Cryopreservation of Sperm/Ova
•Egg Donor Moms
•Surrogate Moms
•Genetic v. Gestational Moms
•Artificial Insemination
•Test tube babies

State Interest

Revenue
Family Protection
Limit Accumulations

Intestacy

Intestacy
Partial Intestacy
Intestate succession
Heir
Domicile
Choice of Law
Escheat

Property

Real Property
Personal Property
Personal Effects
Separate Property
Community Property
Quasi-Community Property

Representation

Per Capita
Per Stirpes
Conventional Right of Representation
Conventional Per Capita with Representation (Modern Representation)
Per Capita at Each Generation
Effect of Disclaimer

Kindred

Kin
Next of Kin
Counting Kin
--Civil Law System
--Modified Civil Law System

Status

Halfblood relatives
Wholeblood relatives
Aliens
Posthumous Heirs
--Conceived during decedent's life
--Post-mortem conception
Simultaneous Death

Disqualification

Homicide
--Felonious
--Intentional
--Standard of Proof
•Effect of Criminal Acquittal
•Effect of Criminal Conviction
--Euthanasia/Mercy Killing
--Killing by Minor
--Killing by Incompetent
Adultery
Abandonment
--By spouse
--By parent

Family Protection

Scope of Protection

--Spouse
--Minor Child
--Dependent Child
--Parent
--Others?
Temporary Possession of Residence
Probate Homestead
Family Allowance
Small Estate Set Aside

Pretermitted Heirs

Spouse
Child
Others?
Defeating Pretermission
--Specific Mention
--General mention?
--Alternate Provisions
--Extrinsic Evidence?
--Most of estate left to parent

Minimum Rights of Spouse

Dower
Curtesy
Community Property
E.R.I.S.A.
Election by Surviving Spouse
--Election against Will
--In lieu of other rights
--In addition to other rights
Forced Share
Abatement Issues
Effect of Premarital Contract
Requirements of Premarital Contract
--Fair and Equitable
--Full Disclosure
--Independent Counsel

Anticipation of Inheritance

Advancement
--Intent
--Acknowledgment
--Valuation Date
--Hotchpotch
--Advance in excess of share
Release
Assignment
--Consideration/Fairness
--Scope
--Heir Hunters

Restrictions on Testation

Family Protection
Charitable Dispositions
Public Policy
--Discrimination
•Racial
•Religious
•National Origin
--Restraints on Marriage
--Bequests encouraging divorce
--Adulterous Relationships
--Illegal Conditions
--Rule Against Perpetuities
--Incompetency

Restrictions on Testation (cont'd)

--Lack of Capacity
--Creditors' Rights
--Taxes

Wills

Types of Wills

Witnessed
Holographic
Statutory Wills
Oral Wills

Execution Formalities

Advantages/Benefits
--Testator Deceased
--Ritual Function
--Evidentiary Function
--Protective Function
Disadvantages
--Favors Form over Substance
--Can yield Unjust Results
Of Attested/Witnessed Wills
--In Writing
--Signed
--Testamentary Capacity of Testator
--Testamentary Intent
--Acknowledged as Will/Publication
--Witnessed:
•Two or more
••Competent
••Past Majority
••Disinterest
••Effect of Interest?
•Present at same time
••Physical Presence?
••Conscious Presence?
•Hear Acknowledgment
•See Testator Act
•See one another act
Of Unattested/Holographic Wills
--Testator's Own Handwriting
•All?
•Material Provisions only?
--Dated
--Declared to be a Will
--Signed (at end)
--Common Problems
•No Residuary Clause
•No Executor Nomination

General

Codicil
Integration
Ambulatory Nature of Wills
--Speak as of execution
--Effective as of death
Republication by Codicil
--Effective date
--Revival
Incorporation by Reference
--Documents in existence
--Described with particularity

General (cont'd)

--Intent to incorporate
--Disposition of Personal Effects
--Pour-over Wills
Facts of Independent Significance

Extrinsic Evidence

Should such evidence ever be allowed?
Tension between administrative ease and fairness
Standard of Proof
--Preponderance of the Evidence
--Clear and Convincing
--Beyond a Reasonable Doubt
Burden of Proof
Rectify Mistakes
--Of Material Fact
--Misdescription
--Drafting Errors
--Omissions
--Ambiguity
•Latent/Patent
Reformation
Overlap with Contract Law
Overlap with Procedural Law

Revocation

By physical act
--Burning
--Tearing
--Canceling
--Obliterating
--Destroying
--With intent
Effect of Interlineations
By subsequent instrument
By operation of law
--Divorce
--Homicide
--Family Protection
By subsequent inconsistent act
--Advance
--Ademption by extinction
--Ademption by satisfaction
Misplacement
--Lost or destroyed?
--Lost Will may be proved
•Prove content
•Overcome presumption of destruction

Revival

Does revocation of subsequent Will revive earlier revoked Will?
--Old English rule: yes
--Modern rule: no
Effect of Partial Revocation
Dependent Relative Revocation

Will Contracts

Purposes
--Reward promise of lifetime care
--Control disposition of estate on death of surviving beneficiary
Includes Promise to Make a Will
Statute of Frauds
Statutory Requirements
--Material Provisions in Will
--Will contains express reference to Contract
--Writing signed by Decedent

Often oral
--Enforced through Promissory Estopple
--Validity governed by Contract Law not Law of Wills
Burden of Proof
Standard of Proof
Remedies
--Money Damages
--Specific Performance
--Quantum Meruit

Joint and Mutual Wills

Are they Will Contracts?
Joint Will: Single Document
Mutual Wills: Two reciprocal Documents

Rules of Construction

Why needed:
--Ambiguities in Will
--Changes in Circumstance
•Births and Deaths
•Transactions between Testator and Beneficiary
•Changes in Assets
••Voluntary
••Involuntary
••Known to Testator
••Unknown to Testator
Terminology
--Bequest
•Specific
•General
•Pecuniary
•Residuary
--Devise
Ademption
--By extinction
--By satisfaction
--By Testator
•Sale
•Conversion into another asset
•Sale with retained or traceable proceeds
--By another
•Destruction
•By Conservator
•Condemnation
--Effect of Insurance

Rules of Construction (cont'd)

--Relevance of Extrinsic Evidence
•Irrelevant in Formal Jurisdictions

Satisfaction
--Analogous to Advancement
--Same Proof Requirements as Advancement
--Only specific bequests?
--Special rules re: children?

Abatement
--Order of abatement (absent contrary intent)
•Intestate property first
•Residuary Bequests next
•General Bequests next
•Specific last
•Often governed by statute
--Preference for Relatives?

Exoneration

Set-off

Determination of Beneficiaries
--Class Gifts
•When does class close?
--Lapse
--Antilapse statutes
•Protected persons
•Apply to class gifts?
•Not applied if intent to lapse clear
•Applicability to residuary bequests?

Estate Administration

Probate

Purposes
--Wrap up financial affairs at death
--Settle Creditors' claims
--Enforce Family Protection
--Interpret Will
--Permit challenge to Will
--Resolve Conflicting claims
--Collect and distribute assets

Disadvantages
--Time consuming
--Costly
•Personal Representative's Fee
•Attorney's Fee
•Court Costs
•Publication Fees
•Appraisal Fees
--Public

Will Substitutes

Mostly contract devices

Need not comply with testamentary formality

Avoid Probate

Joint Tenancy
--May be for convenience/intent
--May have several tenants
•Issues of "ownership"
--Severance Issues
•By whom?

Will Substitutes (cont'd)

•How?

--Special Problems with Safe Deposit Boxes

Tenancy by the Entirety

Pay on Death (POD) accounts

Life Insurance

Retirement/Annuity accounts

Gifts

--Inter vivos

--General Proof problems

•Intent

•Delivery

•Acceptance

--*Causa mortis*

•Requires Fear of imminent death

--To Minors

•On oral Trust

•Through formal Guardianship

•Uniform Transfer to Minor's Act

•On formal Trust

•Consider Income Taxes

••"Kiddie" Tax

••High Trust Tax rates

Creditor's Claims

Living Trusts

--Advantages

•Significant estate tax savings for couples with more than $1,000,000

•Avoid Probate

•Facilitate Administration in event of incapacity

•Privacy

--Disadvantages

•Initial Cost

•Hassle of asset transfer into trust

•Loss of probate "protections"

Other contract provisions

Taxes

Concepts for Tax purposes often differ from those for general Estate Planning purposes

--E.g., Powers of Appointment

•Limited

•General

--E.g., Definition of "charity"

Taxes applicable to Estates/Trusts

--Estate Taxes

--Inheritance Taxes

--Gift Taxes

--Income Taxes

--Real Property Taxes

Federal Estate Taxes

--Broadly inclusive

•All property "owned" by decedent

•Decedent's share of Jt. Tens.

•Life insurance proceeds if "incident of ownership"

•*General* Powers of Appointment

•Annuities

Federal Estate Taxes (cont'd)

•Interests retained for life

--Now "unified" with Gift Tax
--Apply to gross estate/regardless of beneficiaries
--Allows for unified credit (equal to exemption to be determined)
was $5,100,000 in 2012
•Married couple should combine credits with good planning to double exemptions
--Gives "stepped-up basis" (except on Income With Respect to a Decedent ["IRD"] items)
--Principal Deductions
•Unlimited Marital Deduction
••Interest must *not* be "terminable"
••Requires special trust for non-Citizen spouse
•Charitable Deductions
•Decedent's Debts
•Costs of Administration
--<u>Generation Skipping Transfer Tax</u>
•$2,000,000/donor exclusion (?)
•Enormously complex tax
--Payment of Estate Taxes
•Allocation among beneficiaries
--Many states also have estate taxes
•Often "pick-up" taxes to obtain the state death tax credit allowed against federal estate tax

Federal Gift Taxes

--Now "unified" with Gift Tax
--Principal Exclusions
•$14,000/donee annual exclusion as of 1/1/13--subject to COL adjustments
•Unlimited Marital Deduction
••Requires special trust for non-Citizen spouse
•Limited Charitable Deductions
--May split gifts with spouse
--Complex Basis rules

Federal Income Taxes

--Estates/Trusts are taxpaying entities
--Current rates are high
--Estates may elect "fiscal years"
--Deduction for income distributions to beneficiaries
--Special rules for figuring Distributable Net Income ("DNI")
--Special "basis" rules may apply

Federal Estate Taxes (cont'd)

--Special treatment for Income With Respect to a Decedent (IRD)

--Most states also tax estate/trust income

Inheritance Taxes

--Tax on transfer to given beneficiary
--Tax rate varies according to relationship between decedent and beneficiary
--Many states impose

Real Property Taxes

--Post Prop. XIII problem in Cal.
--Real Property reassessed on transfer
--Important reassessment exclusions
•Interspousal Transfer
•Limited Parent-Child exclusion
••Transfer of Principal residence
••Transfer of $1 million other property
••Must file timely application for exclusion

•Transfer to Revocable Trust for benefit of Grantor or Grantor's spouse
•Transfer into Joint Tenancy if Grantor remains a Joint Tenant
--Significant, but often over looked tax
--States other than California may have similar tax

Planning for Children

Custody of Child's Person
--Appoint guardian of persons
--Parental Nomination generally followed, but not controlling
•Best interest of child control
--Single toughest issue for young couples
--Hard to exclude surviving parent
Management of Child's Estate
--Formal Trust
--Nomination of Donor al most always controls
--Formal Guardianship
--Uniform Transfer to Minor's Act

Professional Responsibility and Estate Planning

•Relationship between law and ethics
•Community Standards
•Relationship between legal ethics and Rules of Professional Responsibility
•Counselor v. Zealous Advocate
•Individual or Community as Client
•Big firm v. Small Firm Problems
•Governing Rules
--ABA Model Rules of Prof. Conduct
--California Rules of Prof. Responsibility
--Calif. Bus. & Prof. Code
--ACTEC Commentaries on ABA Model Rules
--Various State Rules of Prof. Conduct
Conflicts of Interest
--Includes "potential" conflicts
--Must obtain waiver
•In writing in California
•When and How obtained
--Husband/Wife Planning
•Confidentiality Issues
•Issues re: Separate Property
•Different Distributive Desires (e.g. both spouses have children from prior marriages)
•Future Incapacity Issues
•Possibility of Remarriage after death of first spouse
•Potential Divorce
•Actual conflict in future
--Dynastic/Multigenerational Planning
--Planning for Business Associates
--Incompetency Situations
•Who is the client?
•Acting on client's instructions or in client's best interest?
--Planning for the Benefit of Others
•Referral Source
•Other clients (such as corporate fiduciaries)

Trusts

Nature

Uniquely Anglo-American device
Considered "jural persons"
Have only such power as is granted by governing instrument or by law

Basic Requirements

Intent to create trust
Corpus
Trustee
Definite Beneficiary (except with re: Charitable Trusts)
--Relationship to Power of Appointment

Classification

Express Trusts
Implied Trusts
--Constructive Trusts
--Resulting Trusts
Statutory Trusts
--Uniform Transfer to Minor's Act (for children)
--Uniform Custodial Trust Act (for adults)
Testamentary v. Inter Vivos Trusts
Active v. Passive Trusts
Revocable v. Irrevocable Trusts

Advantages

Continuity of Management
Consolidation of interests

Common Purposes

May seek any purpose not prohibited
--Limited only by imagination of Settlor, Settlor's attorney and law
Asset Management
--For Minors
--For Incompetents
--For Persons Disinterested
Tax Avoidance
--*Bypass/Exemption Equivalent Trusts*
--*Generation Skipping Transfer Trusts*
--*Qualified Terminable Interest Property Trusts*
--*Qualified Domestic Trusts*
--*Irrevocable Insurance Trusts*
--*Minor's Trusts (Gift Tax Issues)*
--*"Crummey" Trusts*
Avoidance of Probate
--*Living Trusts*
--*Totten Trusts*
Avoidance of Laws re: Estates
--Family Protection Schemes
--Rules re: Incorporation by Reference
--Court Supervision
Postponement of Benefits
Avoidance of Conservatorship/ Guardianship

Common Purposes (cont'd)

Providing for Successive/Concurrent and/or Limited Enjoyment
Protecting Public Assistance Benefits ("Special Needs Trusts")
Illegal Purposes
--Public Policy (varies over time/from jurisdiction to jurisdiction)
•Discriminatory
••Racial
••Religious
••National Origin
•Restraints on Marriage
•Bequests encouraging divorce
--Requires/Encourages Illegal Activity
--Violates Rule Against Perpetuities

Nature of Beneficiaries' Interest

Beneficiaries have enforceable rights
--As a direct, present, equitable interest?
--As a personal claim against Trustee?
Judicial Interpretations
--Will require reasonable exercise of administrative powers (e.g. frequency of payments to benes)
--Greater difficulty in interpreting/enforcing discretionary powers
•Powers personal to fiduciary
•Powers with "clear" standard
Extent of Trustee Discretion
--Absent manifestation of Settlor's contrary intent, must act reasonably
--Manifestation of "contrary" intent
•"Absolute" discretion
•"Uncontrolled" discretion
•"Sole" discretion
--Determination of "Support"/"Need"
•Consider Beneficiary's other assets?
•Can beneficiary create need by divesting assets?
•Include Dependent's needs?
•Living Standard (the "manner to which the beneficiary has become accustomed")?
•Include cost of public facility?
Beneficiary's Right to Transfer
--Absent spendthrift provisions
•Beneficiary may transfer
•Transferee receives only beneficiary's interest
•Creditors can reach interest
•Beneficiary may disclaim interest
--Spendthrift Provisions
•English Rule: Void as restraint on alienation
•Generally O.K. in U.S.
•Fraud on Creditors?
••Can't establish spendthrift trust for self
•Disadvantage: Prevents beneficiary's use of trust as collateral
•Cf. "Protective Trust"

Modification/Termination

Governing Instrument controls
Power to terminate includes power to modify
Presumption of Irrevocability
--General Rule: Trusts presumed Irrevocable
--Calif. Rule: Trusts presumed Revocable
Absent express provision, who can modify/terminate
--Settlor
•Can if trust revocable
•If Settlor can terminate, so can Settlor's creditors
•May rescind irrevocable trust if grounds to do so
--Trustee
•Must have explicit power
•May effectively terminate through use of power to invade
--Beneficiaries
•All beneficiaries acting together may terminate ***if*** termination doesn't violate material purpose of Trust
•All beneficiaries acting together with Settlor may terminate any trust, regardless of purpose
•Holder of <u>Present</u> General Power of Appointment may act alone (but Testamentary Power is insufficient)
•Consent of uborn/unascertained/ incompetent beneficiaries?
••English Rule: can't obtain, therefore no termination/modification
••U.S. Rule: Use Guardian ad litem
--Court
•Acts in response to request by others
•Circumstances justifying modification
••Unforeseen change in circumstance
••Emergency
••Trust uneconomically small
•Difference in willingness to modify "administrative," "discretionary" and "distributive provisions

Charitable Trusts

Differences from other Trusts
--Must be for indefinite beneficiaries
•Trust invalid if too restrictive
•Lots of litigation over issue
--May be established in perpetuity
--Must be for "charitable" purpose
Charitable Purposes
--Relief of Poverty
--Advancement of Education
--Advancement of Science
--Advancement of Religion
--Promotion of Health
--Governmental purposes
--Other purposes of benefit to the community
--Cannot be for illegal purpose

Charitable Trusts (cont'd)

Court's Favor Charitable Bequests
--Allow Extrinsic Evidence
--May grant Limited Power of Appointment to direct to charity
Effect of Failure or Fulfillment of Trust
--Could have Resulting Trust
--Could apply *Cy Pres* Doctrine
Alternatives
--Gift to established charity (with directives)
Enforcement
--By Settlor
--By Attorney General
•Statutes often require notice
•Statutes often require registration
•Statutes often require periodic reports
--By any interested party

Future Interests

Remainders
Powers of Appointment
Survivorship
Future Class Gifts
Contingent Remainders
Rule Against Perpetuities

The Fiduciary Office

Examples of Fiduciaries
--Partners
--Corporate Officers
--Spouses (re: Community Property)
--Guardians/Conservators
--Personal Representatives
--Trustee
Same general rules apply to all ('tho there are slight variations with respect to each type of fiduciary)
Selection of Fiduciary
--By statute
•Where none named (as in intestacy)
--By Testator/Settlor
•Must be competent to serve
•May be a corporate Fiduciary (Bank, Trust Co.)
••Advantages: continuity, reliability, no bond, impartiality, specialized expertise, sophistication, deep pockets
••Disadvantages: costly, cold, conservative
•May be an individual
••Advantages and Disadvantages: pretty much to opposite of those with re: corporate Trustee, above
--Fiduciary who is also beneficiary may have special tax problems
Co-fiduciaries
--Advantages
•May avoid diplomatic problems
•Allows combination of special skills
--Disadvantages
•Possibility of Deadlock
•Increased Costs

The Fiduciary Office (cont'd)

Alternate and Successor Fiduciaries
--Governing instrument should provide
--Court may appoint

Removal
--Governing instrument controls
--May remove for Cause
•Lack of Capacity
•Breach of Trust
•Refusal to give Bond
•Commission of a crime
•Unfitness
••Old Age
••Habitual Drunkenness
••Lack of Ability
•Long-term absence
•Favoritism
•Failure to co-operate with Co-Fiduciary
•Insolvency
--"Mere" friction with beneficiary is ***not*** a ground for removal

Compensation
--Reasonable compensation implied
--Many states govern compensation of Personal Representatives by statute
--Special Problems where attorney is also fiduciary
--Fiduciary who is also beneficiary may have special tax problems

Right to Indemnity (from estate)

Standard of Care
--"*Prudent Person*" Rule
•Managing *own* property
•Managing property *of another*
--Fiduciary must utilize special skills if advertised
--Trustee's duty to make assets *productive*
--Personal Representative's duty to *conserve* assets for distribution

Duty of Loyalty
--Don't self-deal
--Don't Invest with Estate
--Strict liability

Delegation of Duties
--General Rule: Don't Delegate
--Many exceptions
•Governing instrument may authorize
•Prudent Person rule may require
•Co-Fiduciaries can usually delegate to one another
•Statutes increasingly permit delegation
--Distinguish between delegation of administrative and distributive duties and discretionary powers

Duty to segregate assets
--Old rule: strict liability for any violation
--General rule: liable only for loss caused by failure to segregate (as with foreclosure or attachment by Fiduciary's creditor)

The Fiduciary Office (cont'd)

Duty to take control and render accounts
--Governing instrument controls
--Starting Point for accounting
•Schedule of initial assets in Trust
•Inventory & Appraisement in Estate
--Beneficiaries may compel accounting
--Formal v. Informal Accounting

Fiduciary Liability
--To Beneficiaries
•For Unauthorized Distributions (even in good faith)
--To Co-Fiduciaries
--To Successor Fiduciaries
--To Creditors
--***Not*** generally liable for acts of others
--Within public policy limits liability may be waived by governing instrument

Management Functions
--Governing instrument controls
--Fiduciary exercises the management powers with respect to the Estate/Trust
--Fiduciary has only such powers as are granted by the governing instrument or implied by law
--Investment Powers may be limited
•New York Rule: limited investments
•Massachusetts Rule: Prudent Person Rule
•Legal List Investment
•Many states have now broadened rights
•Governing instrument should generally provide broad powers (but with increased risk of abuse)
•Subject to Prudent Person Rule
•Duty to Diversify
•Follow "Modern Portfolio Theory"?
--Power to continue a business
•Power to add capital to business?
--Powers of Successor Fiduciary
•Generally the same as original
•May not always have discretionary powers/rights of original fiduciary

Accounting
--Principal and income allocations
--Principal and Income Acts
--Overproductive and Underproductive Assets
•Bond Premiums and Discounts
--Unproductive Assets
--Depreciable Assets
--Wasting Assets
--Allocation of Expenses
•Fiduciary Fees
•Estate Expenses
--Allocation of Income During Transitional Periods
--Fiduciary's Discretionary Powers